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IMPEACHMENT OF DONALD JOHN TRUMP

THE EVIDENTIARY RECORD PURSUANT TO S. RES. 47

VOLUME IV



FEBRUARY 9, 2021.—Ordered to be printed

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FEBRUARY 9, 2021.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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HOUSE OF REPRESENTATIVES

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IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP

THE EVIDENTIARY RECORD

VOLUME IV

Supplemental Materials

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PRODUCED BY THE HOUSE COMMITTEE ON THE JUDICIARY
PURSUANT TO H. RES. 40 AND SUBMITTED BY:

JAMIE RASKIN (D–MD), *Lead House Impeachment Manager*
DIANA DEGETTE (D–CO), *House Impeachment Manager*
DAVID CICILLINE (D–RI), *House Impeachment Manager*
JOAQUIN CASTRO (D–TX), *House Impeachment Manager*
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ANTHONY VALDEZ, *Legislative Aide*
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Supplemental Materials

Evan Perez et al., New charges allege Proud Boys prepped for Capitol insurrection, CNN (Feb. 3, 2021)

Joshua Goodman, Voting company sues Fox, Giuliani over election fraud claims, Associated Press (Feb. 3, 2021)

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New charges allege Proud Boys prepped for Capitol insurrection

cnn.com/2021/02/03/politics/proud-boys-indicted-capitol-riot/index.html

February 3, 2021



*(CNN)*Two prominent affiliates of the Proud Boys face new conspiracy charges related to the US Capitol riot, and another was arrested Wednesday, as the Justice Department laid out a planning and funding effort within the far-right extremist group in a major court development.

The Justice Department unveiled the new conspiracy charge in a federal grand jury indictment of Nicholas Ochs and Nicholas DeCarlo.

The indictment alleges the two conspired to block Congress' certification of the electoral votes on January 6. Prosecutors say they planned and fundraised for the effort, then came to Washington, DC, and stormed past police and into the Capitol building as part of the violent crowd, according to a copy of the indictment.

Wednesday's indictment came shortly after the Justice Department made clear it had taken more investigative steps against Proud Boys affiliates related to the insurrection. The Proud Boys are a far-right group known for their clashes with Antifa and general support of former President Donald Trump, who even mentioned them in a presidential debate, telling them to "stand back and stand by."

Also on Wednesday, the so-called Sergeant at arms of the Proud Boys in Seattle, Ethan Nordean, aka "Rufio Panman," was arrested, then appeared in federal court for his role in the

riot. Federal prosecutors wrote they believed Nordean asked on social media for help to buy "protective gear" and "communications equipment," with the intention of organizing people before the January 6 siege, his charging document said. He is charged with three counts related to entering the Capitol, and the allegations he faces name several other Proud Boys affiliates among the crowd.

Read More

At least 11 people with ties to the Proud Boys have been charged in connection with the Capitol insurrection, according to a CNN analysis of court documents and Justice Department statements.

A flight, flex-cuffs and etching the Memorial Door

Prosecutors outlined that Ochs and DeCarlo, as part of the conspiracy, allegedly raised money online so they could fly from their home states of Texas and Hawaii to DC for the January 6 pro-Trump event. They also "publicized" their plans, the indictment said.

The pair is alleged to have inscribed the words "murder the media" on a notable entrance to the Capitol, the Memorial Door. In previous court records, investigators showed a photo of Ochs and DeCarlo standing beside the etching with their thumbs up. The damage to the door was less than $1,000, the indictment said.

In all, the indictment on Wednesday charges them with seven counts, including conspiracy, obstruction of an official proceeding and theft and destruction of government property.

One charge now accuses them of stealing from Capitol Police a pair of flex handcuffs -- the same types of zip-tie-like restraints that the Justice Department has focused on in other cases as rioters potentially intended to take lawmakers hostage.

Investigators began building the case in court against Ochs and DeCarlo in the days after the Capitol riot. To arrest them each, the FBI had described how both were believed to be inside the Capitol building and could be identified in photos and videos taken during the insurrection.

Five people, including a Capitol Police officer, were killed in the riot. Members of Congress and then-Vice President Mike Pence were evacuated to safety, temporarily shutting down debate over the Electoral College results.

During the riot, Ochs -- the founder of the Hawaii chapter of the Proud Boys -- tweeted a selfie of himself smoking a cigarette in the building.

"We didn't have to break in, I just walked in and filmed," Ochs told CNN in an interview. "There were thousands of people in there -- they had no control of the situation. I didn't get stopped or questioned."

Ochs ran an unsuccessful campaign for the state legislature last year, winning an endorsement from Trump confidant Roger Stone, who recorded a video with him. He claimed in the interview with CNN that he was working as a professional journalist when he entered the Capitol, and that he didn't go into any congressional offices or the chambers.

DeCarlo also claimed he was a journalist, in an interview he gave to the Los Angeles Times after January 6, according to court records. But he is not credentialed as a journalist by Congress, investigators said, and he operates a YouTube channel with Ochs and "purports to

be an employee" of a group called "MT Media News," standing for "murder the media news," an affidavit supporting his arrest said.

Arrest in Seattle

Nordean, a 30-year-old Washington state resident, is charged in the DC District Court with four counts in total, all related to his actions on January 6.

Investigators say he was marching at the front of the crowd near the Capitol, next to another prominent Proud Boys affiliate, Joseph Biggs, who has also been charged in recent weeks.

Investigators also say Nordean interacted with another person previously charged, Robert Gieswein, during their push into the Capitol. Gieswein went into a window in the Capitol that was first broken by another Proud Boys affiliate, Dominic Pezzola, who has also been charged related to the riot.

"Assembled close behind Nordean in the crowd in front of the Capitol were a group of individuals that I have identified as many of the same people who had been seen marching behind Nordean, Biggs, and other Proud Boys earlier in the day," investigators wrote, recreating the group effort of parts of the crowd to force their way inside the building.

Investigators said they don't have evidence Nordean was part of his acquaintances' effort to break in through a window. They used extensive photos and videos to place him among the riot outside and inside the Capitol building, court records say.

Investigators also described his social media activity before January 6, including a video on Parler two days earlier in which Nordean said the Proud Boys should protect the community and respond to voter fraud beliefs with "that original spirit of 1776."

"We're coming back. We're coming to DC and were going to take this country back. Your gifts, and your thoughts, and your financial contributions will not go for nothing," another person said in the January 5 Parler video, investigators wrote to the court in an affidavit supporting Nordean's arrest.

Nordean made his initial appearance in federal court in Washington state Wednesday afternoon through video conference. He will be held in detention until another court hearing on February 8.

Building conspiracy cases, charging others

Federal officials have said repeatedly in recent weeks they are looking into groups -- and to charge possible seditious conspiracies -- that indicate coordination before the Capitol riot. But cases are still moving slowly and in the early stages. No sedition cases have been brought. Still, several other Proud Boys members are already in federal court and faces criminal charges following the riot.

Two other Proud Boys affiliates, Pezzola and William Pepe, both of New York, are accused of working together during the attack of the Capitol, according to their indictment last week.

A fixture and organizer in Proud Boys mass gatherings, Biggs, of Florida, is facing charges in an initial complaint related to him entering the Capitol grounds.

in addition to members of the Proud Boys, a separate group of alleged right-wing extremists was previously indicted on a conspiracy charge.

In that case, which is also in an early stage, Thomas Caldwell of Virginia and Jessica Watkins and Donovan Crowl of Ohio are alleged to have coordinated before the January 6 attack, and to have discussed or attended paramilitary training camps.

Prosecutors say the three are affiliated with right-wing paramilitary organizations in Ohio and with the national paramilitary group the Oath Keepers.

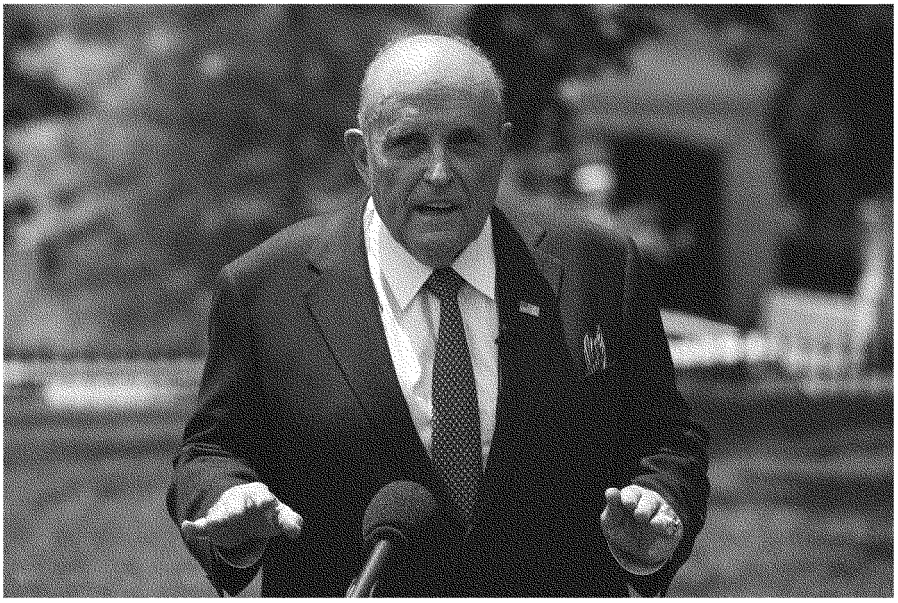
This story has been updated with additional reporting and background.

Kay Jones, Paul Murphy, Marshall Cohen, Hannah Rabinowitz and Anna-Maja Rappard contributed to this report.

Voting company sues Fox, Giuliani over election fraud claims

AP apnews.com/article/smartmatic-sues-fox-news-giuliani-2a8d83df2e6d73b750dd85f92f4fd7ef

February 4, 2021



ADVERTISEMENT

By JOSHUA GOODMANFebruary 5, 2021 GMT

1 of 2

FILE - Rudy Giuliani, a personal attorney for President Donald Trump, talks with reporters outside the White House, Wednesday, July 1, 2020, in Washington. A voting technology company is suing Fox News, three of its top hosts, Giuliani and Sidney Powell for $2.7 billion, charging that the defendants conspired to spread false claims that the company helped steal the U.S. presidential election away from former President Donald Trump. (AP Photo/Evan Vucci, File)

1 of 2

FILE - Rudy Giuliani, a personal attorney for President Donald Trump, talks with reporters outside the White House, Wednesday, July 1, 2020, in Washington. A voting technology company is suing Fox News, three of its top hosts, Giuliani and Sidney Powell for $2.7 billion, charging that the defendants conspired to spread false claims that the company helped steal the U.S. presidential election away from former President Donald Trump. (AP Photo/Evan Vucci, File)

MIAMI (AP) — A voting technology company is suing Fox News, three of its hosts and two former lawyers for former President Donald Trump — Rudy Giuliani and Sidney Powell — for $2.7 billion, charging that the defendants conspired to spread false claims that the company helped "steal" the U.S. presidential election.

The 285-page complaint filed Thursday in New York state court by Florida-based Smartmatic USA is one of the largest libel suits ever undertaken. On Jan. 25, a rival election-technology company — Dominion Voting Systems, which was also ensnared in Trump's baseless effort to overturn the election — sued Guiliani and Powell for $1.3 billion.

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Unlike Dominion, whose technology was used in 24 states, Smartmatic's participation in the 2020 election was restricted to Los Angeles County, which votes heavily Democratic.

Smartmatic's limited role notwithstanding, Fox aired at least 13 reports falsely stating or implying the company had stolen the 2020 vote in cahoots with Venezuela's socialist government, according to the complaint. This alleged "disinformation campaign" continued even after then-Attorney General William Barr said the Department of Justice could find no evidence of widespread voter fraud.

For instance, a Dec. 10 segment by Lou Dobbs accused Smartmatic and its CEO, Antonio Mugica, of working to flip votes through a non-existent backdoor in its voting software to carry out a "massive cyber Pearl Harbor," the complaint alleged.

"Defendants' story was a lie," the complaint stated. "But, it was a story that sold."

The complaint also alleges that Fox hosts Dobbs, Maria Bartiromo and Jeanine Pirro also directly benefitted from their involvement in the conspiracy. The lawsuit alleges that Fox went along with the "well-orchestrated dance" due to pressure from newcomer outlets such as Newsmax and One America News, which were stealing away conservative, pro-Trump viewers.

Roy Gutterman, a media law professor at Syracuse University, said the lawsuit is compelling and based on specific examples and facts, not frivolous claims.

"This is a perfect example of why we have the law of defamation in first place," said Gutterman, a former reporter.

Fox News Media, in a statement on behalf of the network and its hosts, rejected the accusations. It said it is proud of its election coverage and would defend itself against the "meritless" lawsuit in court.

Fox "is committed to providing the full context of every story with in-depth reporting and clear opinion," the company said in a written statement.

Giuliani and Powell did not immediately respond to requests for comment.

For Smartmatic, the effects of the negative publicity were swift and devastating, the complaint alleges. Death threats, including against an executive's 14-year-old son, poured in as Internet searches for the company surged, Smartmatic claims.

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With several client contracts in jeopardy, the company estimates that it will lose as much as $690 million in profits over the next five years. It also expects it will have to boost spending by $4.7 million to fend off what it called a "meteoric rise" in cyberattacks.

"For us, this is an existential crisis," Mugica said in an interview. He said the false statements against Smartmatic have already led one foreign bank to close its accounts and deterred Taiwan, a prospective client, from adopting e-voting technology.

Like many conspiracy theories, the alleged campaign against Smartmatic was built on a grain of truth. Mugica is Venezuelan and Smartmatic's initial success is partly attributable to major contracts from Hugo Chávez's government, an early devotee of electronic voting.

No evidence has emerged that the company rigged votes in favor of the anti-American firebrand, and for a while the Carter Center and other observers held out Venezuela as a model of electronic voting. Meanwhile, the company has expanded globally.

Full Coverage: Politics
Smartmatic is represented by J. Erik Connolly, who previously won what's believed to be the largest settlement in American media defamation, at least $177 million, for a report on ABC News describing a company's beef product as "pink slime."

"Very rarely do you see a news organization go day after day after day against the same targets," Connolly said in an interview. "We couldn't possibly have rigged this election because we just weren't even in the contested states to do the rigging."

Fox, after receiving a demand for retraction from Smartmatic's lawyers in December, aired what it called a "fact-checking segment" with an election technology expert. In the segment, the expert said there was no evidence of tampering — something the defendants knew from the start and reported elsewhere on the network, the complaint alleges.

Far from making the company whole, Mugica said he saw the segment — in which an unidentified voice asks questions referenced in the retraction letter — as an admission of guilt.

Gutterman said that any after-the-fact correction can be a mitigating factor but doesn't get of the defendants entirely off the hook if they are found to have previously been propagating false claims. With the line between fact and opinion increasingly blurred in the current media landscape, he said he expects the lawsuit to force news outlets trying to capitalize on support for Trump to reconsider how far to stretch the limits.

"This is certainly a wake-up call that, just because you're dealing in opinion and not straight news, you can't openly put anything on the air," he said. "Facts are still facts."

Follow Goodman on Twitter: @APJoshGoodman

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Arrested in Capitol Riot: Organized Militants and a Horde of Radicals

nytimes.com/interactive/2021/02/04/us/capitol-arrests.html



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are charged with conspiracy crimes or assault

Daniel Page Adams

Goodrich, Texas

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Wilmar Jeovanny Montano Alvarado

Houston

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Thomas Edward Caldwell

Berryville, Va.

Conspiracy

Property crimes

Trespassing or disrupting Congress

Mathew Capsel

Illinois

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Donovan Ray Crowl

Woodstock, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Nicholas DeCarlo

Fort Worth

Conspiracy

Property crimes

Trespassing or disrupting Congress

Lisa Marie Eisenhart

Woodstock, Ga.

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Scott Kevin Fairlamb

Stockholm, N.J.

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Michael Joseph Foy

Wixom, Mich.

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Robert Gieswein

Woodland Park, Colo.

Assault

Weapons crimes

Property crimes

Trespassing or disrupting Congress

Alex Kirk Harkrider

Carthage, Texas

Conspiracy

Weapons crimes

Trespassing or disrupting Congress

Emanuel Jackson

Assault

Weapons crimes

Trespassing or disrupting Congress

Douglas Austin Jensen

Des Moines

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Chad Barrett Jones

Coxs Creek, Ky.

Assault

Interference with law enforcement

Weapons crimes

Property crimes

Trespassing or disrupting Congress

Edward Jacob Lang

New York

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Mark Jefferson Leffingwell

Seattle

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Patrick Edward McCaughey III

Ridgefield, Conn.

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Eric Gavelek Munchel

Nashville

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Ryan Taylor Nichols

Longview, Texas

Conspiracy

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Nicholas R. Ochs

Honolulu

Conspiracy

Property crimes

Trespassing or disrupting Congress

William Pepe

Beacon, N.Y.

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Dominic Pezzola

Rochester, N.Y.

Conspiracy

Assault

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Ryan Stephen Samsel

Bristol, Pa.

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Robert Sanford

Boothwyn, Pa.

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Barton Wade Shively

Mechanicsburg, Pa.

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Jessica Marie Watkins

Champaign County, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

43

are charged with interference with law enforcement, weapons crimes, threats or property crimes but not conspiracy or assault

Christopher Michael Alberts

Pylesville, Md.

Weapons crimes

Trespassing or disrupting Congress

Tommy Frederick Allan

Rocklin, Calif.

Property crimes

Trespassing or disrupting Congress

Richard Barnett

Gravette, Ark.

Weapons crimes

Property crimes

Trespassing or disrupting Congress

Craig Michael Bingert

Slatington, Pa.

Interference with law enforcement

Gina Michelle Bisignano

Beverly Hills, Calif.

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Samuel Camargo

Florida

Interference with law enforcement

Trespassing or disrupting Congress

Jacob Anthony Chansley

Phoenix

Interference with law enforcement

Trespassing or disrupting Congress

Lonnie Leroy Coffman

Falkville, Ala.

Weapons crimes

Nolan B. Cooke

Savoy, Texas

Interference with law enforcement

Trespassing or disrupting Congress

Gracyn Dawn Courtright

Hurricane, W.Va.

Property crimes

Trespassing or disrupting Congress

Nathaniel J. DeGrave

Las Vegas

Interference with law enforcement

Trespassing or disrupting Congress

Hunter Allen Ehmke

Glendora, Calif.

Property crimes

Trespassing or disrupting Congress

Troy Elbert Faulkner

Columbus, Ohio

Property crimes

Trespassing or disrupting Congress

Gabriel Augustin Garcia

Miami

Interference with law enforcement

Trespassing or disrupting Congress

Vitali GossJankowski

Naples, Fla.

Weapons crimes

Trespassing or disrupting Congress

Christopher Ray Grider

Texas

Property crimes

Trespassing or disrupting Congress

Timothy Louis Hale-Cusanelli

Colts Neck, N.J.

Interference with law enforcement

Trespassing or disrupting Congress

Stephanie Hazelton

Medford, N.J.

Interference with law enforcement

Trespassing or disrupting Congress

Emily Hernandez

Sullivan, Mo.

Property crimes

Trespassing or disrupting Congress

Jerod Wade Hughes

East Helena, Mont.

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Joshua Calvin Hughes

East Helena, Mont.

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Adam Johnson

Parrish, Fla.

Property crimes

Trespassing or disrupting Congress

Klete Derik Keller

Colorado Springs

Interference with law enforcement

Trespassing or disrupting Congress

Joshua R. Lollar

Spring, Texas

Interference with law enforcement

Trespassing or disrupting Congress

Cleveland Grover Meredith Jr.

Colorado

Threats

Garret Miller

Richardson, Texas

Interference with law enforcement

Threats

Trespassing or disrupting Congress

Matthew Ryan Miller

Cooksville, Md.

Weapons crimes

Trespassing or disrupting Congress

Jorden Robert Mink

Oakdale, Pa.

Weapons crimes

Property crimes

Trespassing or disrupting Congress

Aaron Mostofsky

Brooklyn

Property crimes

Trespassing or disrupting Congress

Joshua Pruitt

Silver Spring, Md.

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Guy Wesley Reffitt

Wylie, Texas

Threats

Trespassing or disrupting Congress

Jeffrey P. Sabol

Interference with law enforcement

Ronald L. Sandlin

Long Beach, Calif.

Interference with law enforcement

Trespassing or disrupting Congress

Hunter Seefried

Laurel, Del.

Property crimes

Trespassing or disrupting Congress

Troy Anthony Smocks

Dallas

Threats

Michael Sparks

Elizabethtown, Ky.

Interference with law enforcement

Trespassing or disrupting Congress

Peter Francis Stager

Conway, Ark.

Interference with law enforcement

Justin Stoll

Wilmington, Ohio

Threats

Brandon Straka

New York

Interference with law enforcement

Trespassing or disrupting Congress

John Earle Sullivan

Salt Lake City

Interference with law enforcement

Trespassing or disrupting Congress

Dustin Byron Thompson

Columbus, Ohio

Property crimes

Trespassing or disrupting Congress

William Wright Watson

Auburn, Ala.

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Riley June Williams

Harrisburg, Pa.

Property crimes

Trespassing or disrupting Congress

107

are charged with trespassing or disrupting Congress only

Rasha N. Abual-Ragheb

Fairfield, N.J.

Trespassing or disrupting Congress

Stephen Michael Ayres

Ohio

Trespassing or disrupting Congress

Dawn Bancroft

Doylestown, Pa.

Trespassing or disrupting Congress

Thomas Baranyi

Ewing, N.J.

Trespassing or disrupting Congress

Robert L. Bauer

Cave City, Ky.

Trespassing or disrupting Congress

Damon Michael Beckley

Cub Run, Ky.

Trespassing or disrupting Congress

Andrew Ryan Bennett

Columbia, Md.

Trespassing or disrupting Congress

Bryan Betancur

Silver Spring, Md.

Trespassing or disrupting Congress

Joseph Randall Biggs

Ormond Beach, Fla.

Trespassing or disrupting Congress

Joshua Matthew Black

Leeds, Ala.

Trespassing or disrupting Congress

Matthew Bledsoe

Memphis

Trespassing or disrupting Congress

James Bonet

Glen Falls, N.Y.

Trespassing or disrupting Congress

Larry Rendall Brock Jr.

Grapevine, Texas

Trespassing or disrupting Congress

Terry Brown

Myerstown, Pa.

Trespassing or disrupting Congress

William McCall Calhoun Jr.

Americus, Ga.

Trespassing or disrupting Congress

Albert A. Ciarpelli

Syracuse, N.Y.

Trespassing or disrupting Congress

Josiah Colt

Meridian, Idaho

Trespassing or disrupting Congress

Cody Page Carter Connell

Vivian, La.

Trespassing or disrupting Congress

Matthew Ross Council

Riverview, Fla.

Trespassing or disrupting Congress

Jenny Louise Cudd

Midland, Texas

Trespassing or disrupting Congress

Michael Curzio

Summerfield, Fla.

Trespassing or disrupting Congress

Michael Shane Daughtry

Newton, Ga.

Trespassing or disrupting Congress

Karl Friedrich-Johannes Dresch

Calumet, Mich.

Trespassing or disrupting Congress

Valerie Elaine Ehrke

Arbuckle, Calif.

Trespassing or disrupting Congress

Andrew C. Ericson

Muskogee, Okla.

Trespassing or disrupting Congress

Derrick Evans

Prichard, W.Va.

Trespassing or disrupting Congress

Thomas Fee

Freeport, N.Y.

Trespassing or disrupting Congress

Brandon Fellows

Schenectady, N.Y.

Trespassing or disrupting Congress

Samuel J. Fisher

New York

Trespassing or disrupting Congress

Cindy Fitchett

Cobbs Creek, Va.

Trespassing or disrupting Congress

Jacob Fracker

Rocky Mount, Va.

Trespassing or disrupting Congress

Thomas Gallagher

Bristol, N.H.

Trespassing or disrupting Congress

Christina Gerding

Quincy, Ill.

Trespassing or disrupting Congress

Jason Gerding

Quincy, Ill.

Trespassing or disrupting Congress

Anthime Joseph Gionet

Burbank, Calif.

Trespassing or disrupting Congress

Simone Melissa Gold

Los Angeles

Trespassing or disrupting Congress

Daniel Goodwyn

San Francisco

Trespassing or disrupting Congress

Vaughn Gordon

Lafayette, La.

Trespassing or disrupting Congress

Couy Griffin

Tularosa, N.M.

Trespassing or disrupting Congress

Jack Jesse Griffith

Tennessee

Trespassing or disrupting Congress

Brian Gundersen

Armonk, N.Y.

Trespassing or disrupting Congress

Peter J. Harding

Buffalo

Trespassing or disrupting Congress

Andrew Hatley

South Carolina

Trespassing or disrupting Congress

Edward E. Hemenway II

Winchester, Va.

Trespassing or disrupting Congress

Jacob Hiles

Virginia Beach

Trespassing or disrupting Congress

Suzanne Ianni

Natick, Mass.

Trespassing or disrupting Congress

Kash Lee Kelly

Hammond, Ind.

Trespassing or disrupting Congress

Leo Christopher Kelly

Cedar Rapids, Iowa

Trespassing or disrupting Congress

Christopher M. Kelly

New City, N.Y.

Trespassing or disrupting Congress

Jacob Lewis

Victorville, Calif.

Trespassing or disrupting Congress

Kevin Loftus

Chippewa Falls, Wis.

Trespassing or disrupting Congress

John Lolos

Trespassing or disrupting Congress

Robert Anthony Lyon

Columbus, Ohio

Trespassing or disrupting Congress

Kevin James Lyons

Chicago

Trespassing or disrupting Congress

Dominick Madden

New York

Trespassing or disrupting Congress

Anthony R. Mariotto

Fort Pierce, Fla.

Trespassing or disrupting Congress

Felipe Marquez

Coral Springs, Fla.

Trespassing or disrupting Congress

Zachary Hayes Martin

Rogersville, Mo.

Trespassing or disrupting Congress

Matthew Carl Mazzocco

San Antonio

Trespassing or disrupting Congress

Justin McAuliffe

Bellmore, N.Y.

Trespassing or disrupting Congress

David Charles Mish Jr.

Milwaukee

Trespassing or disrupting Congress

Nicolas Anthony Moncada

Staten Island

Trespassing or disrupting Congress

Patrick Montgomery

Littleton, Colo.

Trespassing or disrupting Congress

Henry Phillip Muntzer

Dillon, Mont.

Trespassing or disrupting Congress

Christopher W. Ortiz

Huntington, N.Y.

Trespassing or disrupting Congress

Robert Keith Packer

Newport News, Va.

Trespassing or disrupting Congress

Matthew Perna

Sharon, Pa.

Trespassing or disrupting Congress

Rachael Lynn Pert

Middleburg, Fla.

Trespassing or disrupting Congress

Tam Dinh Pham

Richmond, Texas

Trespassing or disrupting Congress

Daniel Dink Phipps

Garland, Texas

Trespassing or disrupting Congress

Christine Priola

Willoughby, Ohio

Trespassing or disrupting Congress

Blake A. Reed

Nashville

Trespassing or disrupting Congress

Jordan T. Revlett

Island, Ky.

Trespassing or disrupting Congress

Jorge A. Riley

Sacramento

Trespassing or disrupting Congress

Jesus Rivera

Pensacola, Fla.

Trespassing or disrupting Congress

Thomas Robertson

Ferrum, Va.

Trespassing or disrupting Congress

Nicholas Rodean

Frederick, Md.

Trespassing or disrupting Congress

Eliel Rosa

Midland, Texas

Trespassing or disrupting Congress

Bradley Rukstales

Inverness, Ill.

Trespassing or disrupting Congress

Jennifer Leigh Ryan

Frisco, Texas

Trespassing or disrupting Congress

Mark Sahady

Malden, Mass.

Trespassing or disrupting Congress

Diana Santos-Smith

Bucks County, Pa.

Trespassing or disrupting Congress

Jon Ryan Schaffer

Columbus, Ind.

Trespassing or disrupting Congress

Kevin Seefried

Laurel, Del.

Trespassing or disrupting Congress

Dennis Sidorski

Ashburn, Va.

Trespassing or disrupting Congress

Mark Simon

Huntington Beach, Calif.

Trespassing or disrupting Congress

Jeffrey Alexander Smith

San Diego

Trespassing or disrupting Congress

Christopher Raphael Spencer

North Carolina

Trespassing or disrupting Congress

Patrick Alonzo Stedman

Haddonfield, N.J.

Trespassing or disrupting Congress

Melody Steele-Smith

Gloucester, Va.

Trespassing or disrupting Congress

Michael Stepakoff

Palm Harbor, Fla.

Trespassing or disrupting Congress

John Herbert Strand

Beverly Hills, Calif.

Trespassing or disrupting Congress

Kevin Strong

Beaumont, Calif.

Trespassing or disrupting Congress

Marissa A. Suarez

Union Beach, N.J.

Trespassing or disrupting Congress

Douglas Sweet

Hudgins, Va.

Trespassing or disrupting Congress

Patricia Todisco

Staten Island

Trespassing or disrupting Congress

Eric Chase Torrens

Gallatin, Tenn.

Trespassing or disrupting Congress

Israel Tutrow

Greenfield, Ind.

Trespassing or disrupting Congress

Chance Anthony Uptmore

San Antonio

Trespassing or disrupting Congress

James Herman Uptmore

San Antonio

Trespassing or disrupting Congress

Hector Emmanuel Vargas Santos

Jersey City, N.J.

Trespassing or disrupting Congress

William Vogel

Pawling, N.Y.

Trespassing or disrupting Congress

Joshua Wagner

Greenwood, Ind.

Trespassing or disrupting Congress

Bradley Weeks

Macclenny, Fla.

Trespassing or disrupting Congress

Andrew Williams

Orlando, Fla.

Trespassing or disrupting Congress

Dana Joe Winn

Middleburg, Fla.

Trespassing or disrupting Congress

Andrew Wrigley

Jim Thorpe, Pa.

Trespassing or disrupting Congress

Notes: The people shown here had federal charges that were filed and unsealed through Jan. 31. Trespassing and disrupting Congress includes illegal entry, disorderly conduct and obstructing official proceedings.

In the weeks since the Jan. 6 attack on the U.S. Capitol, federal prosecutors have announced criminal charges against more than 175 people — less than a quarter of those involved in the melee, but enough to provide a rough portrait of the mob and the sprawling investigation into its actions.

At least 21 of those charged so far had ties to militant groups and militias, according to court documents and other records. At least 22 said they were current or former members of the military. More than a dozen were clear supporters of the conspiracy theory QAnon. But a majority expressed few organizing principles, outside a fervent belief in the false assertion that President Donald J. Trump had won re-election.

The accused came from at least 39 states, as far away as Hawaii. At least three were state or local officials, and three were police officers. Some were business owners; others were unemployed or made their living as conservative social media personalities. Many made comments alluding to revolution and violence, while others said the protests had been largely peaceful.

A New York Times review of federal cases through the end of January suggests that many of those in the horde were likely disorganized, but some groups and individuals came to the events of Jan. 6 trained and prepared for battle. The early charges set the stage for those to come as the Justice Department promises to prosecute even those accused of misdemeanor trespass and also devotes resources to more serious crimes, like conspiracy and homicide.

11 have been charged with conspiracy so far.

Thomas Edward Caldwell, 66

From Berryville, Va.

Charges:

Conspiracy

Property crimes

Trespassing or disrupting Congress

Donovan Ray Crowl, 50

From Woodstock, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Nicholas DeCarlo, 30

Far-right media personality from Fort Worth

Conspiracy

Property crimes

Trespassing or disrupting Congress

Lisa Marie Eisenhart, 56

Nurse from Woodstock, Ga.

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Alex Kirk Harkrider, 32

From Carthage, Texas

Conspiracy

Weapons crimes

Trespassing or disrupting Congress

Eric Gavelek Munchel, 30

Bartender from Nashville

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Ryan Taylor Nichols, 30

Business owner from Longview, Texas

Conspiracy

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Nicholas R. Ochs, 34

Far-right media personality from Honolulu

Conspiracy

Property crimes

Trespassing or disrupting Congress

William Pepe, 31

M.T.A. worker from Beacon, N.Y.

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Dominic Pezzola, 43

From Rochester, N.Y.

Conspiracy

Assault

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Jessica Marie Watkins, 38

Bartender from Champaign County, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Prosecutors have said some of the people involved in the riot could face charges of seditious conspiracy, which requires proof that rioters planned to use force to oppose the authority of the United States government or to hinder the execution of its laws. Such cases are complex because they require evidence not only of planning but also intent, and no such charges have yet been filed.

The few conspiracy charges that the government has already brought provide clues to how these investigations might grow.

Two cases with conspiracy charges appear limited in scope, including one involving two friends from Texas who posted pictures of themselves on Facebook at the Capitol with the caption "You want to steal our election, and not hear us in court? Good! Now you'll hear our civil unrest!" and a mother and son recognized from photographs with the son, Eric Gavelek Munchel, 30, carrying zip-tie handcuffs.

But other more prominent cases involving conspiracy charges cite the involvement of major right-wing groups, the Oath Keepers militia and the Proud Boys, a nationalist organization. In both of those matters, prosecutors have already referenced other unnamed participants who they say were involved, hinting that the universe of accused conspirators is likely to grow.

"As with a traditional criminal case, you build up through the organization," said Anne Milgram, an ex-prosecutor and former attorney general of New Jersey who has been a frequent critic of Mr. Trump.

At least 21 have possible ties to militant groups.

More than 10 percent of those now facing federal charges have expressed allegiance to or affinity for militant groups, according to the court records or other documentation like video footage of group events. Some hold leadership roles, while others are described by prosecutors as wearing their group's paraphernalia or discussing plans to travel to the Jan. 6 protests with members.

Four members of the Proud Boys were recently charged with conspiracy. Seven other people with possible ties to the group were arrested and publicly charged in January, including one of the group's leaders, Joseph Randall Biggs.

At least 11 of them have possible ties to the Proud Boys.

Nicholas DeCarlo, 30

Far-right media personality from Fort Worth

Charges:

Conspiracy

Property crimes

Trespassing or disrupting Congress

Nicholas R. Ochs, 34

Far-right media personality from Honolulu

Conspiracy

Property crimes

Trespassing or disrupting Congress

William Pepe, 31

M.T.A. worker from Beacon, N.Y.

Conspiracy

Interference with law enforcement

Trespassing or disrupting Congress

Dominic Pezzola, 43

From Rochester, N.Y.

Conspiracy

Assault

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Gabriel Augustin Garcia, 40

Construction business owner from Miami

Interference with law enforcement

Trespassing or disrupting Congress

Joshua Pruitt, 39

Bartender from Silver Spring, Md.

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Andrew Ryan Bennett, 36

From Columbia, Md.

Trespassing or disrupting Congress

Bryan Betancur

From Silver Spring, Md.

Trespassing or disrupting Congress

Joseph Randall Biggs, 37

From Ormond Beach, Fla.

Trespassing or disrupting Congress

Daniel Goodwyn, 32

Web developer from San Francisco

Trespassing or disrupting Congress

Christopher M. Kelly, 44

From New City, N.Y.

Trespassing or disrupting Congress

On Wednesday, the Justice Department charged an additional Proud Boys leader, Ethan Nordean, and still others are known to have been near the Capitol during the riot. The Times based its analysis on charges made public through Jan. 31, so these people were not included.

Three people affiliated with the Oath Keepers militia have been charged with conspiracy to interfere with law enforcement officers and obstruct a proceeding of Congress. Two others who demonstrated affinity for the group are facing other federal charges. Several more people wearing insignia of the group or moving in concert with them appear in videos of the mob but have not been charged.

At least 5 have possible ties to the Oath Keepers.

Thomas Edward Caldwell, 66

From Berryville, Va.

Charges:

Conspiracy

Property crimes

Trespassing or disrupting Congress

Donovan Ray Crowl, 50

From Woodstock, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Jessica Marie Watkins, 38

Bartender from Champaign County, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Larry Rendall Brock Jr., 53

Former pilot from Grapevine, Texas

Trespassing or disrupting Congress

Jon Ryan Schaffer, 52

Musician from Columbus, Ind.

Trespassing or disrupting Congress

At least 5 have possible ties to other militant groups.

Robert Gieswein

Runs a paramilitary training program, from Woodland Park, Colo.

Charges:

Assault

Weapons crimes

Property crimes

Trespassing or disrupting Congress

Barton Wade Shively, 53

From Mechanicsburg, Pa.

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Guy Wesley Reffitt, 48

Drilling rig worker from Wylie, Texas

Threats

Trespassing or disrupting Congress

Rasha N. Abual-Ragheb, 40

Licensed cosmetologist from Fairfield, N.J.

Trespassing or disrupting Congress

Douglas Sweet, 58

From Hudgins, Va.

Trespassing or disrupting Congress

Followers of other groups, such as the Three Percenters, were also present on Jan. 6, as were people who publicly aligned themselves with white supremacist organizations like Patriot Front. While the vast majority of those who stormed the Capitol may not have pledged membership in such groups, some did adopt related language and imagery, by showing a "white power" hand sign in photos or wearing clothing with battle insignia or mockery of the Holocaust.

Although organized groups may have played an important role in the attack, most people identified so far were more loosely affiliated. In part, this reflects the slower development of cases with conspiracy charges, but it is also consistent with patterns of radicalization on the far right in recent years, said Cynthia Miller-Idriss, director of the Polarization and Extremism Research and Innovation Lab at American University.

"The majority appear to be individuals who are not card-carrying members of particular groups," she said. "There is nothing they are identifying with other than an overarching set of ideologies and misinformation."

At least 22 are current or former military members.

Veterans and service members appear to have been overrepresented in the crowds that stormed the Capitol: Of the 176 people charged in federal court, at least 22 claim some sort of military experience.

At least 2 are currently in the military.

Timothy Louis Hale-Cusanelli, 30

Government contractor from Colts Neck, N.J.

Charges:

Interference with law enforcement

Trespassing or disrupting Congress

Jacob Fracker, 29

Police officer from Rocky Mount, Va.

Trespassing or disrupting Congress

At least 20 are said to be military veterans.

Thomas Edward Caldwell, 66*

From Berryville, Va.

Charges:

Conspiracy

Property crimes

Trespassing or disrupting Congress

Donovan Ray Crowl, 50

From Woodstock, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Michael Joseph Foy

From Wixom, Mich.

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Alex Kirk Harkrider, 32

From Carthage, Texas

Conspiracy

Weapons crimes

Trespassing or disrupting Congress

Mark Jefferson Leffingwell, 51*

From Seattle

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Ryan Taylor Nichols, 30

Business owner from Longview, Texas

Conspiracy

Assault

Interference with law enforcement

Weapons crimes

Trespassing or disrupting Congress

Nicholas R. Ochs, 34

Far-right media personality from Honolulu

Conspiracy

Property crimes

Trespassing or disrupting Congress

Dominic Pezzola, 43*

From Rochester, N.Y.

Conspiracy

Assault

Interference with law enforcement

Property crimes

Trespassing or disrupting Congress

Barton Wade Shively, 53

From Mechanicsburg, Pa.

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Jessica Marie Watkins, 38

Bartender from Champaign County, Ohio

Conspiracy

Property crimes

Trespassing or disrupting Congress

Gabriel Augustin Garcia, 40

Construction business owner from Miami

Interference with law enforcement

Trespassing or disrupting Congress

Joshua R. Lollar, 39*

From Spring, Texas

Interference with law enforcement

Trespassing or disrupting Congress

Joseph Randall Biggs, 37

From Ormond Beach, Fla.

Trespassing or disrupting Congress

Larry Rendall Brock Jr., 53

Former pilot from Grapevine, Texas

Trespassing or disrupting Congress

Kevin Loftus, 52*

From Chippewa Falls, Wis.

Trespassing or disrupting Congress

Jesus Rivera*

Conservative social media influencer from Pensacola, Fla.

Trespassing or disrupting Congress

Thomas Robertson, 47

Police officer from Ferrum, Va.

Trespassing or disrupting Congress

Mark Sahady, 46*

From Malden, Mass.

Trespassing or disrupting Congress

Jeffrey Alexander Smith*

From San Diego

Trespassing or disrupting Congress

Hector Emmanuel Vargas Santos*

From Jersey City, N.J.

Trespassing or disrupting Congress

Note: Those marked with an asterisk have made public claims of military service, but The Times has not confirmed their service.

Militant and militia groups such as the Proud Boys and Oath Keepers are known to recruit and attract military members, who often lean conservative in their views.

"You see people on the videos of the riots who are clearly making use of tactical training, and that is relevant to some potential charges, if you made a plan and treated this as if it were a military operation," said Emily Berman, a law professor at the University of Houston who focuses on domestic laws related to national security. "But I think it's also potentially problematic if you have people who are charged with serving the country or upholding the law who have these views and act on them."

At least 13 voiced QAnon beliefs.

A majority of people arrested so far espoused some belief in disinformation, at minimum the idea that the election had been stolen from Mr. Trump, or that Vice President Mike Pence could change the outcome of the vote certification on Jan. 6.

At least 13 of those who were federally charged have voiced a clear affiliation with QAnon, according to court documents and confirmed social media accounts.

Douglas Austin Jensen, 41

From Des Moines

Charges:

Assault

Interference with law enforcement

Trespassing or disrupting Congress

Jacob Anthony Chansley, 33

From Phoenix

Interference with law enforcement

Trespassing or disrupting Congress

Cleveland Grover Meredith Jr., 52

From Colorado

Threats

Valerie Elaine Ehrke

Architectural designer from Arbuckle, Calif.

Trespassing or disrupting Congress

Samuel J. Fisher

Dating coach from New York

Trespassing or disrupting Congress

Jason Gerding, 50

From Quincy, Ill.

Trespassing or disrupting Congress

Kevin Loftus, 52

From Chippewa Falls, Wis.

Trespassing or disrupting Congress

Dominick Madden, 43

Sanitation worker from New York

Trespassing or disrupting Congress

Henry Phillip Muntzer, 52

Appliance store owner from Dillon, Mont.

Trespassing or disrupting Congress

Christine Priola, 49

Occupational therapist from Willoughby, Ohio

Trespassing or disrupting Congress

Patrick Alonzo Stedman, 32

Dating coach from Haddonfield, N.J.

Trespassing or disrupting Congress

Kevin Strong, 44

F.A.A. employee from Beaumont, Calif.

Trespassing or disrupting Congress

Douglas Sweet, 58

From Hudgins, Va.

Trespassing or disrupting Congress

The sweeping conspiracy theory holds, among other things, that Democrats are part of a cabal of Satan-worshipping pedophiles, and that Mr. Trump is secretly fighting to bring them to justice.

Because of the sprawling, amorphous nature of the QAnon theories, the number of obvious adherents is almost certainly an undercount of those in the group who held at least some of the views, which have become entangled with more mainstream conservative rhetoric.

QAnon supporters were some of the most prominent figures in the mob, wearing clothing and carrying signs to highlight their beliefs. Christine Priola, a school occupational therapist from Ohio, brought a sign to the Senate floor that said "The Children Cry Out for Justice." Legal experts said even a sincere belief in the conspiracy theories about the election would not likely be a successful strategy for the defense.

"I don't care what you believe, you know you're not supposed to break into the Capitol," Ms. Berman said.

How the federal charges break down

A majority of charges so far are for violations like trespassing or disorderly conduct, or for obstruction of a congressional proceeding. Many of these are misdemeanors.

"We try to look for the most easily provable case" to quickly file a criminal complaint, said Michael Sherwin, the acting U.S. attorney for the District of Columbia.

Total number of people charged for each type of crime

169 charged with trespassing or disrupting Congress

40 charged with interference with law enforcement

25 charged with property crimes

17 charged with assault

17 charged with weapons crimes

11 charged with conspiracy

5 charged with threats

Note: Some of the arrested have been charged with more than one type of crime.

The authorities moved quickly to arrest those who had brazenly posted internet videos of themselves committing crimes, or whose images had become iconic symbols of the riot: a man carrying a Confederate flag through the halls of Congress; another who propped his feet on a desk in the offices of House Speaker Nancy Pelosi; a third who stood on the floor of the Senate shirtless, wearing a painted face, headdress and horns. But slowly, more complex allegations have also trickled in.

More than 40 people are facing more serious charges like obstruction of a law enforcement officer, weapons violations or theft of government property. These include people arrested outside the Capitol grounds with weapons like guns and Molotov cocktails, and others charged with making threats against their own family members and against congressional officials.

One man was charged with a federal crime over threats to kill Ms. Pelosi and with local violations in Washington, D.C., after federal agents said they found a Glock pistol, a Tavor X95 assault rifle and hundreds of rounds of ammunition in his trailer.

More than two dozen defendants are accused of the most severe crimes so far — assaulting an officer or conspiring with others in the attack on the Capitol. These cases include a Marine Corps veteran who brought a hockey stick to the protest and is accused of using it to beat a

police officer on the Capitol steps, as well as a Connecticut man seen on video pinning a bleeding officer to a door with a riot shield.

Such cases are certain to increase, as investigators put pressure on people already in custody, and as they determine who killed Brian Sicknick, a Capitol Police officer, and who placed pipe bombs at nearby buildings.

Since Jan. 31, federal prosecutors have revealed charges against about a half dozen more people, who were not included in the Times analysis. Justice Department officials have said they expect the number of people charged to increase geometrically in the days and weeks to come.



POLITICS 02/04/2021 09:23 pm ET

Democratic Lawmakers Give Emotional Testimony On Experiences Of Capitol Attack

Democrats in Congress spoke passionately on the House floor, some in tears, about Jan. 6, the day of the armed insurrection by pro-Trump rioters.



By Sarah Ruiz-Grossman

Democratic lawmakers spoke on the House floor on Thursday, delivering emotional testimonies of their experiences on Jan. 6, the day that armed, pro-Trump insurrectionists stormed the U.S. Capitol.

Rep. Alexandria Ocasio-Cortez (D-N.Y.), who earlier this week gave a play-by-play of the moments she thought she was going to die during the attack, organized a "special order" hour for nearly a dozen lawmakers to speak to their own trauma after surviving the riots.

Rep. Sheila Jackson Lee (D-Texas) recounted how she had to flee the same Capitol two decades earlier on Sept. 11, 2001, and saw the smoke from the plane that hit the Pentagon.

"We heard the words 'hurry up, get out,'" Jackson Lee said of the Jan. 6 attack at the Capitol. As she and other colleagues heard shooting, "we crouched and some of my good colleagues and I began to pray."

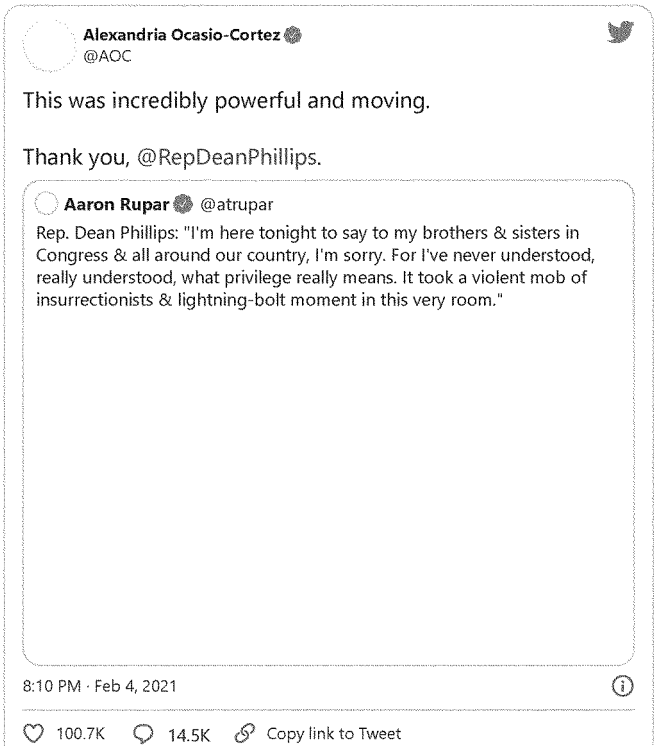
"White supremacy, insurrectionists and domestic terrorism will not prevail," Jackson Lee said of the rioters, some of whom carried Confederate flags, hung nooses and wore racist symbols.

On Jan. 6, Rep. Dean Phillips (D-Minn.) described how lawmakers "had to take cover behind our seats" and "struggled to activate our gas masks."

"We know the sound of the breaking glass, of the screams, of the furniture being moved in front of the doors," Phillips said. "We know what it feels like searching for something, anything to defend ourselves and realizing a pencil is about all we had ... thinking that it's a real possibility that we would not see our families and loved ones again."

Phillips, who is white, then choked up as he recounted how he had urged Democratic colleagues to mix with Republicans so they might be safe from the right-wing mob.

"I realized blending in was not an option for my colleagues of color," Phillips said. "I'm sorry. For I had never understood, really understood, what privilege really means."



Other Democratic lawmakers were moved to tears as they described an armed mob descending on lawmakers as they were certifying the U.S. election results. Five people died in the mayhem, including a Capitol Police officer.

Rep. Rashida Tlaib of Michigan, one of the first Muslim women elected to Congress, broke into tears as she recounted how she's repeatedly received death threats since being in office, including on her first day as a congresswoman.

"I didn't even get sworn in yet and someone wanted me dead," the Democrat said, adding how more threats came over the years, including one mentioning her son by name. "The trauma from just being here, existing as a Muslim, is so hard."

While Tlaib was not at the Capitol during the Jan. 6 attack, she spoke of how she worries "every day" for the lives of her staff, some of whom are queer or Black and one of whom wears a hijab. "I urge my colleagues to please take what happened on Jan. 6 seriously," she said.

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Rep. Cori Bush (D-Mo.) — who is a longtime activist for Black liberation and who wore a mask printed with the name of Breonna Taylor, a Black woman killed at home by police in Kentucky last year — condemned the "white supremacist attack on our nation's capital."

Bush said she was in the House gallery on Jan. 6 when she left to see what was happening outside and saw a crowd approaching. She fled to her office, where she watched on television as the insurrectionists breached the doors.

Bush used her time on the House floor on Thursday to send a message to her Republican colleagues:

did you run for office?" Bush asked. "How can we trust that you will address the suffering that white supremacy causes on a day-to-day basis in the shadows if you can't address the white supremacy that happened right in front of you in your house?"



Rep. Mary Gay Scanlon (D-Penn.) read a letter signed by nearly 400 congressional staff members "because they don't often have a voice on this floor."

"Our workplace was attacked by a violent mob trying to stop the election vote count. That mob was incited by former President Donald Trump and his allies, some of whom we pass in the hallways," the staffers wrote. "As the mob smashed through barricades, broke doors and windows and charged into the Capitol ... many of us hid behind chairs, under desks, or barricaded ourselves inside offices."

Rep. Adriano Espaillat (D-N.Y.), who locked himself in his office with his team during the insurrection, spoke of the "traumatic experience" of leaving the building that night and seeing bloodstains where someone had been shot.

condemned those who "are already demanding that we move on, or worse, attempting to minimize, discredit or belittle the accounts of survivors."

"They send a tremendously damaging message to survivors of trauma across the country," Ocasio-Cortez said, "that what they experienced wasn't bad enough."

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Sarah Ruiz-Grossman
Reporter, HuffPost

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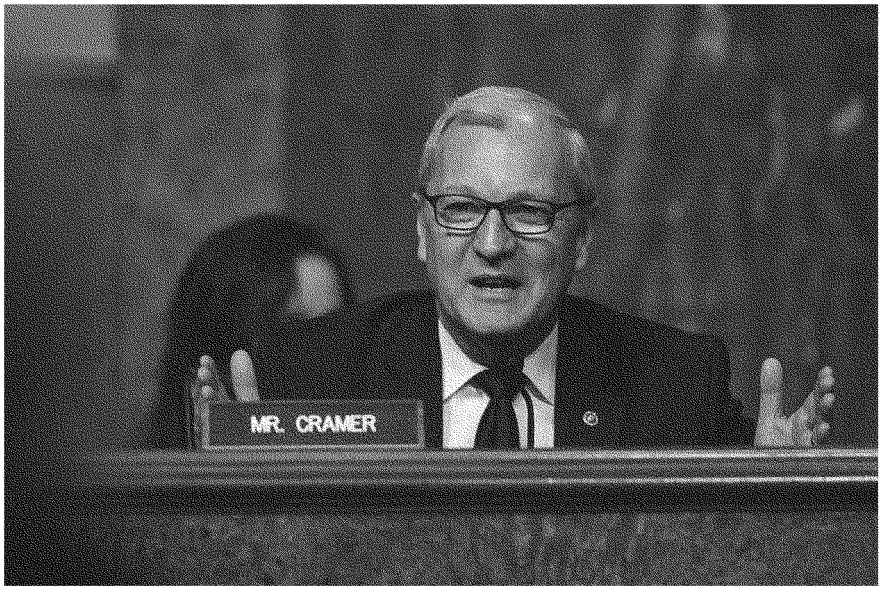
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IMPEACHMENT

GOP senators wary of Trump impeachment defense

"It's not a great moment for trying to score political points," said Sen. Kevin Cramer.



Sen. Kevin Cramer has criticized the House's case for convicting former President Donald Trump. | Carolyn Kaster/AP Photo

By **ANDREW DESIDERIO**
02/03/2021 11:21 AM EST
Updated: 02/03/2021 04:13 PM EST

Republican senators are discouraging Donald Trump's lawyers from raising discredited election fraud claims to defend the former president during the Senate's upcoming trial, a day after Trump's defense team advanced those arguments in its first official response to the House's impeachment charge.

GOP senators warned Trump's lawyers on Wednesday that relitigating the false claims would backfire, urging them to instead focus squarely on the procedural objections that have already united Republicans.

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"The point here is to avoid conviction. It's not a great moment for trying to score political points," said Sen. Kevin Cramer (R-N.D.), who has criticized the House's case for convicting Trump. "And I don't think litigating the election is a winning strategy. I think it's got lower percentage of success than a Hail Mary in the Super Bowl."

Last week, 45 out of 50 GOP senators voted in favor of a procedural motion arguing that it was unconstitutional for the Senate to hold an impeachment trial for a former president because that individual is already out of office. Cramer said Trump's lawyers should treat that vote as a victory, noting that "you already have a winning score on the constitutional message."

"I'd take the cue from what worked with the first vote in the Senate: it's unconstitutional," added Sen. Mike Braun (R-Ind.), who said the procedural arguments are the most potent defense and are already working, as Trump is on a glide path to an acquittal.

The overwhelming sentiment from Republican senators, who will serve as jurors in the trial when it begins next week, reflects their near-unity on the question of whether putting a former president on trial for impeachment charges is unconstitutional. It also allows them to avoid scrutinizing Trump's conduct leading up to the Jan. 6 insurrection at the Capitol, which the House's impeachment article alleges he incited.

Trump's lead defense attorney Bruce Castor said earlier Wednesday that he has not been pressured to reprise the unsubstantiated claim that the election was "stolen" from Trump, and insisted that his defense of the ex-president will focus strictly on the "technical" arguments. But just a day earlier, in his team's first official response to the impeachment charge, they explicitly doubled down on the false allegations about widespread fraud in the 2020 election.

Appearing on KYW Newsradio Philadelphia, Castor maintained that the fraud claims will not be a part of his defense of Trump on the Senate floor and said the Senate has no jurisdiction over a private citizen because "it would be almost the equivalent of the president having died — they can't remove him from office because he simply is unable to be removed because he's not there."

"There are plenty of questions about how the election was conducted throughout the country, but that's for a different forum, and I don't believe that's important to litigate in the Senate trial because you don't need it," Castor said. "President Trump has plenty to win with what he has."

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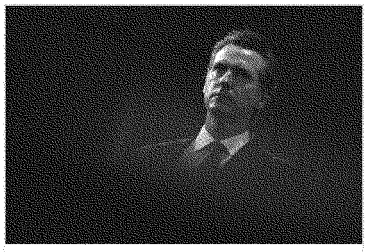
Trump cut ties with his initial legal team over the weekend in part because they refused to advance the fraud claims, but Castor insisted he was not pressured to adopt that strategy ahead of the trial, which begins next Tuesday.

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"I don't know where people got that notion that was some sort of litmus test to get to defend the president, because as you saw from the document I filed, which had to be approved by the president personally, there isn't anything in there about the election being stolen," Castor said.

Indeed, Tuesday's filing, written by Castor and his co-counsel David Schoen, does not argue that the election was "stolen" from Trump. But it does state that Trump "denies" the House managers' assertion that it was false for the former president to say he won the election in a "landslide."

The filing also maintains that Trump has a First Amendment right to express his opinion that the election results were inaccurate or disputed. The House impeachment managers argued in a separate filing Tuesday that Trump's

continued advancement of that false claim backs up their charge that he incited the Jan. 6 insurrection at the Capitol, which left five people dead.

Upon learning of those passages in Castor's filing, Trump ally Sen. Lindsey Graham (R-S.C.) said: "If they start trying to prove that Georgia and Pennsylvania and Wisconsin were stolen, that's when you're going to lose everybody."

At least one Senate Republican, though, disagrees. Sen. Tommy Tuberville (R-Ala.), who voted against certifying some Electoral College results on Jan. 6, said Trump's lawyers should "throw the barn door at them."

"How else are you going to defend yourself?" Tuberville asked, noting that the House managers' case relies on Trump's conduct in the months leading up to Jan. 6, not just the events of that day. "There's no other way."

Questions about Trump's second impeachment trial?
Our reporters will answer a selection of your questions in a live chat when the trial begins on Tuesday, Feb. 9.

While Republicans have coalesced around the idea that the trial itself is unconstitutional, Democrats unanimously oppose that view, and they've been joined by legal scholars from across the political spectrum. They note that the Constitution gives the Senate the "sole power to try all impeachments," and that one of the potential punishments for conviction is barring that former president from holding federal office again. Moreover, they say, under Trump's standard an official subject to impeachment could simply resign before the trial begins in order to evade accountability.

Based on last week's vote, it is highly unlikely that the Senate will reach the two-thirds threshold required to convict Trump on the House's charge that he incited the Jan. 6 attack. If all 50 Democratic senators vote in favor of conviction, at least 17 Republicans would need to join them in order for Trump to face punishments including a ban on holding office in the future.

In his radio interview Wednesday, Castor outlined the procedural arguments against a conviction, after the House impeachment managers wrote on Tuesday that Trump bears "unmistakable" responsibility for the attack on the Capitol.

"Just because somebody gave a speech and people got excited, it doesn't mean it's the speechmaker's fault — it's the people who got excited and did what they know is wrong," Castor said, referring to Trump's remarks to the crowd the just hours before it stormed the Capitol.

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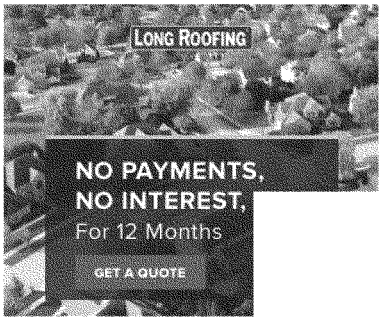


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How McConnell is navigating Trump's trial: Quietly

politico.com/news/2021/02/03/mitch-mcconnell-impeachment-trump-trial-465188

Senate Minority Leader Mitch McConnell — who is approaching a tough Senate map in 2022 — hasn't talked to Donald Trump since late last year, when McConnell recognized Joe Biden as the election winner. | Samuel Corum/Getty Images

Kevin McCarthy is hugging former President Donald Trump as tightly as he can. Liz Cheney voted to impeach him. But Mitch McConnell isn't making any sudden movements as House Republicans tear each other apart in Trump's wake.

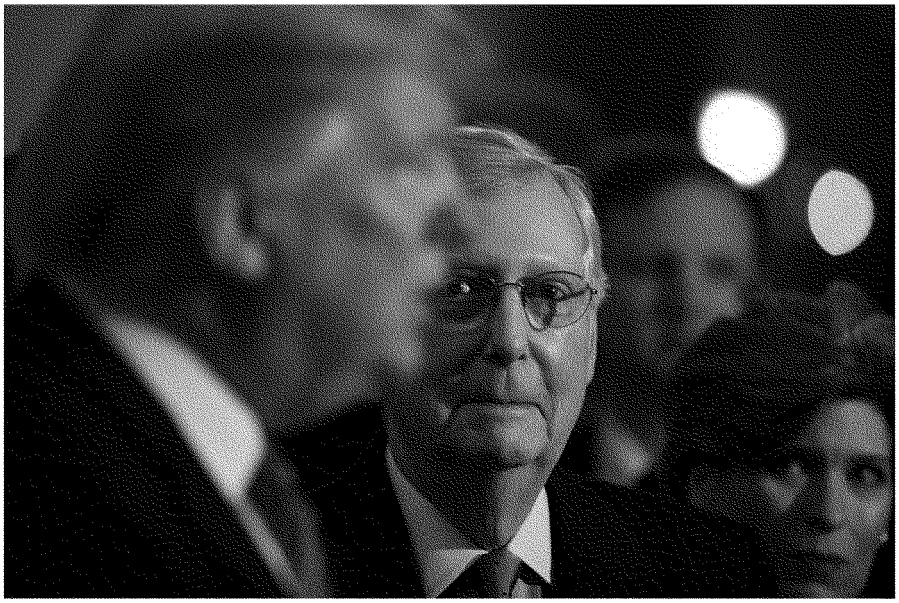
The Senate minority leader is deferring a final verdict on Trump, even with the opportunity to do so via the president's forthcoming impeachment trial. McConnell's strategy reflects the consensus of his fellow Senate Republicans, who have watched uneasily as the House minority leader and conference chair staked out polarizing positions on Trump's conduct.

Two weeks ago, McConnell publicly castigated Trump by blaming him, in part, for feeding "lies" to the mob that invaded the Capitol, while privately signaling to associates that he was open to conviction. But then he sided with Sen. Rand Paul (R-Ky.) to find Trump's impeachment trial unconstitutional — indicating that while he might criticize Trump at the conclusion of the process, he likely won't vote to convict.

McConnell has done little to hide his annoyance with the president, but allies say he is extremely unlikely to make a further break with Trump now. In fact, since his speech assigning blame to Trump, he's said nothing to his colleagues about Trump other than referring to his contacts with the former president's legal team, said one senator who attends meetings with McConnell.

"What we do talk about is that he's spoken to the president's attorneys. So he's not in direct conversations with the president," the senator said. The Jan. 19 speech "was his one outlet ... he was very frustrated, that was why he did that one floor speech."

Those comments, coming from a man who spent four years avoiding direct criticism of Trump, were remarkable in part because they were so uncharacteristically passionate and blunt.



Mitch McConnell has done little to hide his annoyance with the president, but allies say he is extremely unlikely to make a further break with Trump now. | Olivier Douliery-Pool/Getty Images

Then on Monday, in a rare intervention in House business, McConnell labeled Rep. Marjorie Taylor Greene (R-Ga.) a "cancer" on the party for spreading conspiracy theories and defended Cheney even as pro-Trump Republicans seek to oust her from her leadership position. But asked Tuesday about whether he should have condemned Trump's conspiracy theories earlier, McConnell reverted to type, saying only, "We're going to an impeachment trial next week, and we're going to listen to what the lawyers have to say."

"I'm going to listen to the arguments. I think that's what we ought to do. That's what I said before it started. That's still my view. The issue on which we already voted is an interesting constitutional question. I think we ought to listen to the lawyers argue the question," McConnell said about whether he was still keeping an open mind.

Though McConnell's criticisms of Trump two weeks ago will always be viewed by Trump's supporters as a betrayal, it's become increasingly clear he will not attempt to lead his party into barring Trump from seeking future office. His position that Trump's trial is not constitutional is as good an indicator as any.

"He probably has frustration — we all have at times — with people's behavior," said Sen. Richard Shelby (R-Ala.). "But I think he studied and read the Constitution on that vote, like 45 of us did. I wish the other five had, but they didn't."

"What he said is one thing, but then you come to reality and gather more evidence and information," Shelby said, reconciling McConnell's searing criticisms of Trump with his vote against the trial's constitutionality.

Notably, McConnell declined to hold the trial in the immediate aftermath of the House's impeachment vote. He believed doing so would short-circuit Trump's due process for the trial. But in delaying the trial until after Trump left office, he also helped steer the GOP toward its dominant argument.

A Republican leadership aide described a "palpable sense of relief" within the party that the GOP had coalesced around the constitutionality question. That allows members to acquit Trump on a process argument rather than judge the merits of whether Trump incited an insurrection.

Two weeks ago in a party conference call shortly after McConnell's speech, multiple senators raised the prospect that Trump's trial and conviction could be unconstitutional. That call became a turning point — it showed that few Republicans are comfortable even weighing the possible conviction of Trump.

Then McConnell invited constitutional scholar Jonathan Turley, who is currently arguing against the constitutionality of the trial, to a Senate GOP lunch last week. A few minutes later, just five GOP senators voted against Paul's motion. McConnell was not one of them.

McConnell "basically told our members that this is an issue where they're going to be able to vote their conscience. It's the best you can hope to do under circumstances like this," said Senate Minority Whip John Thune (R-S.D.), who earlier had raised Trump's ire by downplaying the chances of his election challenge's success in Congress. "That's where I think most of our members would like to have him land."

Cheney's increasingly tenuous position in the GOP is a good indicator for what would come next if McConnell were to convict Trump. And he's close to getting his old job back, needing to pick up just one seat to become majority leader again. Further friction with Trump is unlikely to help him achieve that goal.

"Senator McConnell has been very emphatic about his views about what happened that day. That doesn't extend to the other issues we've talked about, like the constitutionality and the wisdom of setting a new precedent" of convicting a former president, said Sen. John Cornyn (R-Texas), a McConnell ally. "The president got 70 million-plus votes. Those people are going to vote in 2022 hopefully, so people are trying to navigate an honorable approach."

McConnell and the GOP largely allowed Trump to make his baseless election fraud claims for weeks in an effort to hold the party together ahead of Georgia's special elections — an effort that was devastatingly unsuccessful.

Still, even if he doesn't vote to convict, McConnell is sending unmistakable signs about where he thinks the GOP should head in the post-Trump era: exorcising the far-right extremists from the party and embracing mainstream Republicans.

And whether intentional or not, McConnell's rare decision to wade into internal House GOP politics painted a sharp contrast with McCarthy, who has only expressed tepid support for Cheney and has yet to formally reprimand Greene. McCarthy may meet with Greene Tuesday evening, while House Republicans will determine Cheney's fate Wednesday afternoon.

McConnell said Tuesday that he enjoys a "good working relationship" with McCarthy but felt the need to express himself about "that particular new member of the House" — he did not use her name — and Democrats' efforts to paint the GOP as Greene's party.

The two minority leaders have also split in their approach to Trump, a reflection of their differing conferences. McCarthy, whom Trump has fondly called "My Kevin," trekked to Mar-a-Lago last week to make amends with the disgraced ex-president and emerged from that meeting making clear that Trump would be integral to the GOP's efforts to win back the House.



Mitch McConnell and Kevin McCarthy have also split in their approach to Trump, a reflection of their differing conferences. | Erin Schaff-Pool/Getty Images

Meanwhile, McConnell — who is approaching a tough Senate map in 2022 — hasn't talked to Trump since late last year, when McConnell recognized Biden as the election winner. And while McCarthy still challenged the election results even after the deadly Capitol riots, McConnell delivered a withering floor speech on Jan. 6, warning that voting to overturn the election results would send the U.S. political system into a "death spiral."

McCarthy and McConnell's offices both declined to answer questions about whether McCarthy was given a heads up about the Kentucky Republican's statement defending Cheney. Cheney's office, however, was in the loop about McConnell's remarks, according to sources.

McConnell's current posture is in some ways a return to form for a GOP leader that tried to stay as far away from clashing with Trump as possible for four years. His inscrutable facial expressions and public and private comments are a feature for him — not a bug.

"I don't know what to make of him. Honestly," said Sen. John Kennedy (R-La.) of McConnell's stance on impeachment. "Mitch is a person of few words anyway and he hasn't really talked about his position extensively — at all, that I remember."

Marianne LeVine contributed to this report.

In Rare Public Statement, Congressional Aides Call for Trump's Conviction

nytimes.com/2021/02/03/us/politics/congress-trump-impeachment.html

February 3, 2021



WASHINGTON — More than 370 Democratic congressional aides issued an unusual public appeal on Wednesday, imploring senators — in some cases their own bosses — to convict former President Donald J. Trump for inciting a violent "attack on our workplace" that threatened the peaceful transition of power.

In a starkly personal letter, the staff members describe ducking under office desks, barricading themselves in offices or watching as they witnessed marauding bands of rioters who "smashed" their way through the Capitol on Jan. 6. Responsibility, they argue, lies squarely with Mr. Trump and his "baseless, monthslong effort to reject votes lawfully cast by the American people."

"As congressional employees, we don't have a vote on whether to convict Donald J. Trump for his role in inciting the violent attack at the Capitol, but our senators do," they wrote. "And for our sake, and the sake of the country, we ask that they vote to convict the former president and bar him from ever holding office again."

A copy of the letter, including the names of the signatories, was shared with The New York Times before its release on Wednesday, four weeks after the attack and days before the Senate's impeachment trial.

The letter, while in no way binding, underscored the remarkable dynamic surrounding Mr. Trump's trial, in which many of the witnesses to and victims of the "incitement of insurrection" he is charged with are among the closest advisers to lawmakers who will decide his political fate. Congressional aides often provide counsel behind closed doors to the elected officials they serve, and many are authorized to speak on those officials' behalf. But exceedingly rarely do they publicly express their own views — much less push for so stark a political and constitutional remedy as conviction in an impeachment trial.

Among the signatories were press secretaries, schedulers, committee staff members and advisers from the House and Senate, though relatively few were from the upper echelon of chiefs of staff or committee staff directors. They included Drew Hammill, a deputy chief of staff for Speaker Nancy Pelosi, as well as communications aides closely associated with lawmakers who have been involved with Mr. Trump's impeachments, such as Shadawn Reddick-Smith, communications director for the House Judiciary Committee; Gabby Richards, communications director for Representative Mary Gay Scanlon of Pennsylvania; Anne Feldman, communications director for Representative Jason Crow of Colorado; and Daniel Gleick, communications director for Representative Val Demings of Florida.

The letter's organizers solicited support from Republican aides, offering to include language to assuage their concerns about retribution from bosses or harassment on social media. But despite tentative interest from some, people familiar with the effort said, no Republican aides ultimately signed on.

As public attention has zeroed in on the stories of their more recognizable bosses, congressional aides who were at the Capitol on Jan. 6 have privately struggled for weeks to make sense of what they saw in the usually staid halls of the building. Unlike their bosses, they typically have few outlets to publicly share those experiences.

In the letter to senators, the aides refer to Brian D. Sicknick, a Capitol Police officer who died after his encounter with the mob as "one of our co-workers who guards and greets us every day." The letter also says that many of the signers had come of age in the era of mass school shootings "post-Columbine" and had been trained in how to respond.

"As the mob smashed through Capitol Police barricades, broke doors and windows, and charged into the Capitol with body armor and weapons, many of us hid behind chairs and under desks or barricaded ourselves in offices," they wrote. "Others watched on TV and frantically tried to reach bosses and colleagues as they fled for their lives."



POLITICS 02/01/2021 09:49 pm ET

Trump Supporter's Delusions About A Stolen Election Make Him More Dangerous: Judge

Couy Griffin's belief in conspiracy theories hurt his case to be released ahead of his trial linked to the Capitol insurrection.



By Ryan J. Reilly

A federal magistrate judge ordered a defendant charged in connection with the Capitol insurrection to be held until trial, in part by finding that the man's delusional beliefs about a stolen U.S. election make him unlikely to recognize the government's authority.

Federal Magistrate Judge Zia Faruqui ordered on Monday that Couy Griffin — a New Mexico commissioner and founder of an organization called "Cowboys for Trump" — be held until trial.

Faruqui found that Griffin's lack of belief in the United States government "as it sits today," along with his rhetoric endorsing violence against Democrats, indicated that there was no way to release him and still assure the safety of the American public and his future appearances in court.



BRENT STIRTON VIA GETTY IMAGES

Trump supporters gather outside the Capitol during an insurrectionist attack on the U.S. Capitol on Jan. 6.

Many defendants charged in connection with the U.S. Capitol insurrection will undoubtedly argue, whether at trial or during sentencing, that they were sucked into a false conspiracy about mass voter fraud. Monday's detention hearing showed how a defendant's belief in such delusional conspiracies — combined with rhetoric endorsing violence — can harm their chances at securing pretrial release.

The federal government argued for Griffin's pretrial detention in part by pointing to his statements endorsing violence against Democrats.

"The defendant has taken 'nothing off the table' in pursuit of his aims to ensure 'Biden will never be president.' The defendant's inflammatory conduct, repeated threats, delusional worldview, and access to firearms makes him a danger to the community," the government argued in a court filing. "In order to protect the community and assure his appearance at future court proceedings, the defendant should be held without bond pending trial."

Faruqui agreed with the government's arguments, finding that the nature of Griffin's offense was tied to the "horrific" attempt to "stop the lawful administration of the democratic process."

forward because people were unhappy about the results of the election," Faruqui said.

Faruqui noted how widespread the delusional belief that President Joe Biden benefited from a stolen election had become, and suggested that, in normal circumstances, a defendant who spouted rambling, nonsensical beliefs after being charged with unlawfully occupying protected areas like the White House would receive a mental health evaluation.

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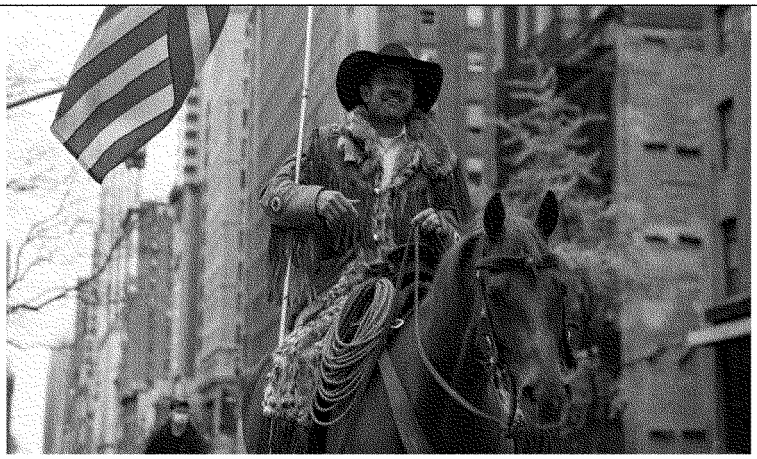
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"He makes statements about the election being stolen by Chinese entities. I don't know what that means," Faruqui said. He then referenced other cases in which defendants with mental health issues hopped a White House fence.

"I know that on my White House Ellipse cases, when someone makes statements like this that are demonstrably false and are in no way accurate, what happens is that we consider whether the person requires a mental health evaluation," Faruqui said.

"It's no different than people not believing facts or science," he said. "Unfortunately, this is a prevailing, apparently, idea — although false."



JEENAH MOON VIA GETTY IMAGES

Couy Griffin, who was later charged in connection with the insurrectionist attack on the U.S. Capitol, rides his horse on 5th Avenue on May 1, 2020, in New York City.

Faruqui said he worried that Griffin wouldn't obey his authority if he were released because of his belief in nonsensical conspiracy theories.

"I don't believe that he will believe that those orders are to be respected or followed," Faruqui said. "I don't think that the defendant will follow my conditions if he believes I am part of this machine of the democratic process, or for whatever reason, I don't know, I can't fathom what it is because these are not logical thoughts based in fact."

While Griffin had not specifically expressed his lack of faith or distrust in the judicial branch, Faruqui said that it's impossible to belief that Griffin's belief about a mass conspiracy to steal the election would not extend to the judicial branch, which over and over and over again, rejected Trump's attempts to overthrow the results of the 2020 election based on nonsense conspiracy theories.

"I think a logical inference is that when someone tries to participate in what the government describes as an insurrection, that he does not believe in the legitimacy of a government," Faruqui said. "It's hard to believe how parts of the government can be quarantined from that ... how the defendant cannot just believe that we, the courts, are

mind does.

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Ryan J. Reilly
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Trump doubles down on false election claim in impeachment response

politico.com/news/2021/02/02/house-impeachment-brief-trump-responsible-capitol-attack-464930

The legal battle over Donald Trump's impeachment trial kicked off Tuesday, with the House managers arguing the former president bears "unmistakable" responsibility for the deadly Jan. 6 attack on the Capitol, and Trump's team advancing his false claims about the election.

A week before the Senate is slated to put the former president on trial for a second time, the House's first legal brief outlines a weekslong campaign by Trump to overturn President Joe Biden's Electoral College victory based on unsubstantiated claims of election fraud — culminating in the insurrection at the Capitol while lawmakers were certifying Biden's win.

"President Trump's pursuit of power at all costs is a betrayal of historic proportions," the House wrote in its opening brief. "It requires his conviction."

Trump's legal team filed its first official response to the House's impeachment charge later Tuesday, denying that the former president sought to subvert the election results and incited the violence at the Capitol. The submission foreshadowed Trump's legal strategy for the trial, which begins next Tuesday but is not expected to last as long as last year's three-week trial.

Trump's lawyers, Bruce Castor and David Schoen, also advanced the former president's false claims that the election results were "suspect," asserting that Trump has a First Amendment right to express that view.

"Insufficient evidence exists upon which a reasonable jurist could conclude that the 45th president's statements were accurate or not, and he therefore denies they were false," Castor and Schoen wrote, adding that Trump "denies" it is false to say he won the election "in a landslide."

Castor and Schoen only joined Trump's legal team in the last few days, after the initial defense attorneys pulled out over disagreements about whether to buttress Trump's false claims about the election. Even some of Trump's allies are warning the legal team against leaning into Trump's unsubstantiated allegations as part of the defense strategy.

"If they start trying to prove that Georgia and Pennsylvania and Wisconsin were stolen, that's when you're going to lose everybody," Sen. Lindsey Graham (R-S.C.) said. "That's when most of us will be ready to move on."

The House's 80-page brief is the most the public has heard from the nine impeachment managers — a team that includes several of the most TV-friendly lawmakers in Congress — since they were tapped by Speaker Nancy Pelosi in mid-January.

The group of managers, led by Rep. Jamie Raskin (D-Md.), has been meeting for weeks both formally and informally with each other and top staffers from the speaker's office and House Judiciary Committee to prepare. But many of the lawmakers' personal office staffers have been kept in the dark about the intense preparations and the members have been instructed not to do media interviews in the meantime, according to multiple Democrats.

Democratic leadership's cone of silence strategy is twofold: both to ensure they clamp down on potential leaks ahead of the trial and also to avoid distracting any more than possible from Biden's new administration and its efforts to tackle the coronavirus pandemic.

The House impeached Trump a week after the Jan. 6 attack, charging him with inciting the insurrection and writing in Tuesday's brief that he did so using "incendiary and violent language" that put at grave risk the lives of the same senators now serving as jurors in the case against Trump.

"It is one thing for an official to pursue legal processes for contesting election results," the House managers wrote. "It is something else entirely for that official to incite violence against the government, and to obstruct the finalization of election results, after judges and election officials conclude that his challenges lack proof and legal merit."

Pelosi is still enraged by the events of Jan. 6 and what she believes is Trump's direct role in inciting the violence, according to multiple people who have heard her express those sentiments both publicly and privately. And while the speaker was quick to call for removing Trump from office just one day after the deadly riots, Democrats are under no illusion that the trial will result in a conviction.

While there is a "deference being given to the future" in terms of focusing on the Biden administration, there is also a "visceral" feeling within the House Democratic Caucus that Trump — and the majority of Republicans who continue to support him — must be held accountable in some way, according to senior Democratic aides.

For Democrats, that meant moving quickly to impeach Trump even as he was on his way out of office and then put Senate Republicans on the record by making them vote on whether to convict in a trial that otherwise likely wouldn't have consequences for the former president.

The House's legal brief directly addresses the arguments from Trump's allies that the Senate has no constitutional right to put a former president on trial because the penalty of removal from office does not apply. Indeed, 45 out of 50 Republican senators voted last week that trying an ex-president on impeachment charges is unconstitutional, creating a significant hurdle for the House as it seeks to convince at least 17 GOP senators that Trump should be convicted of the charge against him. Conviction requires the support of two-thirds of the chamber, or 67 senators.

The argument was a central theme of Trump's response to the impeachment article on Tuesday, with Castor and Schoen writing that because Trump is a private citizen, "the Senate has no jurisdiction over his ability to hold office" and "the present proceedings are moot."

Pushing back against this claim, the House managers noted that the Constitution gives the Senate the "sole power to try all impeachments," and said refusing to put a former president on trial gives future presidents a license to commit impeachable offenses in his or her final days in office and then simply resign in order to evade accountability.

"It is unthinkable that those same Framers left us virtually defenseless against a president's treachery in his final days, allowing him to misuse power, violate his Oath, and incite insurrection against Congress and our electoral institutions simply because he is a lame duck," the House managers wrote.

The former president's allies have also asserted that Trump's First Amendment rights to free speech shield him from responsibility for his elevated rhetoric leading up to Jan. 6. The House's brief pushes back on that argument, asserting that "the First Amendment does not apply at all to an impeachment proceeding" because the Senate "must decide whether to safeguard the nation's constitutional order by disqualifying an official who committed egregious misconduct."

Only a handful of GOP senators are in the mix to vote in favor of Trump's conviction, especially after a majority of the Senate GOP conference declared that the trial itself was unconstitutional. That group includes Sens. Mitt Romney, Lisa Murkowski, Susan Collins, Ben Sasse and Pat Toomey.

Senate Minority Leader Mitch McConnell voted alongside the GOP senators who oppose the trial on procedural grounds, but he has criticized Trump directly for his conduct, saying at one point that Trump "provoked" the rioters on Jan. 6. McConnell said last week that he has not spoken with Trump since mid-December.

Central to the House's argument is that Trump's public statements and actions threatened American democracy at its core in a way that the U.S. has never seen in modern times. The brief implicitly pushes back against the argument — advanced by some Democrats — that the Senate should not be spending so much of its time on an impeachment trial that appears likely to be headed toward an acquittal.

"Since the dawn of the republic, no enemy — foreign or domestic — had ever obstructed Congress's counting of the votes," the brief states. "No president had ever refused to accept an election result or defied the lawful processes for resolving electoral disputes. Until President Trump."

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A message from Axios

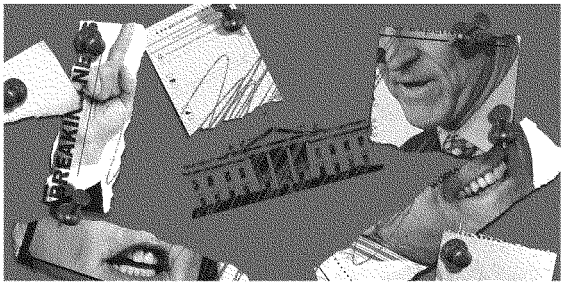
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Feb 2, 2021 - Politics & Policy

Off the Rails

Bonus episode: Inside the craziest meeting of the Trump presidency

Jonathan Swan, Zachary Basu



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Last month, Axios published "Off the rails," a series taking you inside the end of Donald Trump's presidency, from his election loss to the deadly Jan. 6 Capitol insurrection that triggered his second impeachment — and a Senate trial set to begin next week.

In this bonus edition, we take you back into those final weeks — to one long, unhinged night a week before Christmas, when an epic, profanity-soaked standoff played out with profound implications for the nation.

Four conspiracy theorists marched into the Oval Office. It was early evening on Friday, Dec. 18 — more than a month after the election had been declared for Joe Biden, and four days after the Electoral College met in every state to make it official.

"How the hell did Sidney get in the building?" White House senior adviser Eric Herschmann grumbled from the outer Oval Office as Sidney Powell and her entourage strutted by to visit the president.

President Trump's private schedule hadn't included appointments for Powell or the others: former national security adviser Michael Flynn, former Overstock.com CEO Patrick Byrne, and a little-known former Trump administration official, Emily Newman. But they'd come to convince Trump that he had the power to take extreme measures to keep fighting.

As Powell and the others entered the Oval Office that evening, Herschmann — a wealthy business executive and former partner at Kasowitz Benson & Torres

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The hours to come would pit the insurgent conspiracists against a handful of White House lawyers and advisers determined to keep the president from giving in to temptation to invoke emergency national security powers, seize voting machines and disable the primary levers of American democracy.

Herschmann took a seat in a yellow chair close to the doorway. Powell, Flynn, Newman and Byrne sat in a row before the Resolute Desk, facing the president.

For weeks now, ever since Rudy Giuliani had commandeered Trump's floundering campaign to overturn the election, outsiders had been coming out of the woodwork to feed the president wild allegations of voter fraud based on highly dubious sources.

Trump was no longer focused on any semblance of a governing agenda, instead spending his days taking phone calls and meetings from anyone armed with conspiracy theories about the election. For the White House staff, it was an unending sea of garbage churned up by the bottom feeders.

Powell began this meeting with the same baseless claim that now has her facing a $1.3 billion defamation

lawsuit: She told the president that Dominion Voting Systems had rigged their machines to flip votes from Trump to Biden and that it was part of an international communist plot to steal the election for the Democrats.

[Note: In response to a request for comment, Powell said in

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confidential under executive privilege and under rules of the legal profession. I would caution the readers to view mainstream media reports of any such conversations with a high degree of discernment and a healthy dose of skepticism."]

Powell waved an affidavit from the pile of papers in her lap, claiming it contained testimony from someone involved in the development of rigged voting machines in Venezuela.

She proposed declaring a national security emergency, granting her and her cabal top-secret security clearances and using the U.S. government to seize Dominion's voting machines.

"Hold on a minute, Sidney," Herschmann interrupted from the back of the Oval. "You're part of the Rudy team, right? Is your theory that the Democrats got together and changed the rules, or is it that there was foreign interference in our election?"

Giuliani's legal efforts, while replete with debunked claims about voter fraud, had largely focused on allegations of misconduct by corrupt Democrats and election officials.

"It's foreign interference," Powell insisted, then added: "Rudy hasn't understood what this case is about until just now."

In disbelief, Herschmann yelled out to an aide in the outer Oval Office. "Get Pat down here immediately!"

Several minutes later White House counsel Pat

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The meeting was already getting heated.

White House staff had spent weeks poring over the evidence underlying hundreds of affidavits and other claims of fraud promoted by Trump allies like Powell. The team had done the due diligence and knew the specific details of what was being alleged better than anybody. Time and time again, they found, Powell's allegations fell apart under basic scrutiny.

But Powell, fixing on Trump, continued to elaborate on a fantastical election narrative involving Venezuela, Iran, China and others. She named a county in Georgia where she claimed she could prove that Dominion had illegally flipped the vote.

Herschmann interrupted to point out that Trump had actually won the Georgia county in question: "So your theory is that Dominion intentionally flipped the votes so we could *win* that county?"

As for Powell's larger claims, he demanded she provide evidence for what — if true — would amount to the greatest national security breach in American history. They needed to dial in one of the campaign's lawyers,

Herschmann said, and Trump campaign lawyer Matt Morgan was patched in via speakerphone.

By now, people were yelling and cursing.

The room was starting to fill up. Trump's personal assistant summoned White House staff secretary

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group kept citing as the key to victory. Lyons agreed with Cipollone and the other officials that Powell's theories were nonsensical.

It was now four against four.

Flynn went berserk. The former three-star general, whom Trump had fired as his first national security adviser after he was caught lying to the FBI (and later pardoned), stood up and turned from the Resolute Desk to face Herschmann.

"You're quitting! You're a quitter! You're not fighting!" he exploded at the senior adviser. Flynn then turned to the president, and implored: "Sir, we need fighters."

Herschmann ignored Flynn at first and continued to probe Powell's pitch with questions about the underlying evidence. "All you do is promise, but never deliver," he said to her sharply.

Flynn was ranting, seemingly infuriated about anyone challenging Powell, who had represented him in his recent legal battles.

Finally Herschmann had enough. "Why the fuck do you keep standing up and screaming at me?" he shot back at Flynn. "If you want to come over here, come over here. If not, sit your ass down." Flynn sat back down.

The meeting had come entirely off the rails.

Byrne, backing up Flynn, told Trump the White House lawyers didn't care about him and were being

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Trump. "We know that there are times you have to be creative and take different steps."

This was a remarkable level of personal familiarity, given it was the first time Byrne had met the president. All the stanchions and buffers between the White House and the outside world had crumbled.

Byrne kept attacking the senior White House staff in front of Trump. "They've already abandoned you," he told the president aggressively. Periodically during the meeting Flynn or Byrne challenged Trump's top staff — portraying them as disloyal: *So do you think the president won or not?*

At one point, with Flynn shouting, Byrne raised his hand to talk. He stood up and turned around to face Herschmann. "You're a quitter," he said. "You've been interfering with everything. You've been cutting us off."

"Do you even know who the fuck I am, you idiot?" Herschmann snapped back.

"Yeah, you're Patrick Cipollone," Byrne said.

"Wrong! Wrong, you idiot!"

The staff were now on their feet, standing behind one of the couches and facing the Powell crew at the Resolute Desk. Cipollone stood to Herschmann's left. Lyons, on his last day on the job, stood to Herschmann's right.

Trump was behind the desk, watching the chaos. He

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The usually mild-mannered Lyons blasted the Powell set: "You've brought 60 cases. And you've lost every case you've had!"

Trump came back into the Oval Office from the dining room to rejoin the meeting. Lyons pointed out to Powell that their incompetence went beyond their lawsuits being thrown out for standing. "You somehow managed to misspell the word 'District' three different ways in your suits," he said pointedly.

In a Georgia case, the Powell team had misidentified the court on the first page of their filing as "THE UNITED STATES DISTRICCT COURT, NORTHERN DISTRCOICT OF GEORGIA." And they had identified the Michigan court as the "EASTERN DISTRCT OF MICHIGAN."

These were sloppy spelling errors. But given that these lawsuits aimed to overturn a presidential election, the court nomenclature should have been pristine.

Powell, Flynn and Byrne began attacking Lyons as they renewed their argument to Trump: *There they go again, they want to focus on the insignificant details instead of fighting for you.*

Trump replied, "No, no, he's right. That was very embarrassing. That shouldn't have happened."

The Powell team needed to regroup. They shifted to a

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hadn't lost the 60-odd court cases, since the cases were mostly dismissed for lack of standing and they had never had the chance to present their evidence.

Every judge is corrupt, she claimed. *We can't rely on them.* The White House lawyers couldn't believe what they were hearing. "That's your argument?" a stunned Herschmann said. "Even the judges *we* appointed? Are you out of your fucking mind?"

Powell had more to say. She and Flynn began trashing the FBI as well, and the Justice Department under Attorney General Bill Barr, telling Trump that neither could be trusted. Both institutions, they said, were corrupt, and Trump needed to fire the leadership and get in new people he could trust.

Cipollone, standing his ground amidst this mishmash of conspiracies, said they were totally wrong. He aggressively defended the DOJ and the FBI, saying they had looked into every major claim of fraud that had been reported.

Flynn and Powell had long nursed their antipathy to the FBI and Justice. Flynn had pleaded guilty in 2017 to lying to the FBI during the Russia investigation but withdrew the plea after hiring Powell as his lawyer in June 2019.

The two alleged the FBI had entrapped Flynn and failed to disclose exculpatory evidence, known as Brady material, as required by law. They had found an ally in Barr, a fierce critic of the Russia investigation

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Herschmann, known inside the White House as a defender of Barr and the DOJ, went off on Flynn again: "Listen, the same people that you're trashing, if they didn't produce the Brady material to Sidney, your ass would still be in jail!"

It was no longer technically true that Flynn would be in jail, as he had received a post-election pardon from Trump. But Flynn was furious. "Don't mention my case," he roared. Herschmann responded, "Where do you think Sidney got this information? Where do you think it came from? From the exact same people in the Department of Justice that you're now saying are corrupt."

Byrne, wearing jeans, a hoodie and a neck gaiter, piped up with his own conspiracy: "I know how this works. I bribed Hillary Clinton $18 million on behalf of the FBI for a sting operation."

Herschmann stared at the eccentric millionaire. "What the hell are you talking about? Why would you say something like that?" Byrne brought up the bizarre Clinton bribery claim several more times during the meeting to the astonishment of White House lawyers.

Trump, for his part, also seemed perplexed by Byrne. But he was not entirely convinced the ideas Powell was presenting were insane.

He asked: *You guys are offering me nothing. These guys are at least offering me a chance. They're saying they have the evidence. Why not try this?* The president seemed

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The words "martial law" were never spoken during the meeting, despite Flynn having raised the idea in an appearance the previous day on Newsmax, a right-wing hive for election conspiracies.

But this was a distinction without much of a difference. What Flynn and Powell were proposing amounted to suspending normal laws and mobilizing the U.S. government to seize Dominion voting machines around the country.

Powell was arguing that they couldn't get a judge to enforce any subpoena to hand over the voting machines because all the judges were corrupt. She and her group repeatedly referred to the National Emergencies Act and a Trump executive order from 2018 that was designed to clear the way for the government to sanction foreign actors interfering in U.S. elections.

These laws were, in the view of Powell, Flynn and the others, the key to unlocking extraordinary powers for Trump to stay in office beyond Jan. 20.

Their theory was that because foreign enemies had stolen the election, all bets were off and Trump could

use the full force of the United States government to go after Dominion.

It was remarkable that the presidency had deteriorated to such an extent that this fight in the Oval Office between senior White House officials and radical conspiracists was even taking place.

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exasperated Herschmann asked again, later in the conversation. Newman again cited the 2018 executive order, which prompted Herschmann to question out loud whether she was even a lawyer.

Then Byrne chimed in: "There are guys with big guns and badges who can get these things." Herschmann couldn't believe it. "What are you, three years old?" he asked.

Lyons, the staff secretary, told the president that the executive order Powell and Flynn were citing did not give him the authority they claimed it did to seize voting machines. Morgan, the campaign lawyer, also expressed skepticism about their idea of invoking national security emergency powers.

To help adjudicate, Trump then patched in the national security adviser, Robert O'Brien, on speakerphone. Trump's personal assistant brought O'Brien into the call with no explanation of what madness would await him.

O'Brien said very little in the short time he was on the call but intervened at one point to say he saw no evidence to support Powell's notion of declaring a national security emergency to seize voting machines.

There was so much fiery crosstalk it was hard for anyone on the telephone to follow the conversation.

Trump expressed skepticism at various points about Powell's theories, but he said, "At least she's out there fighting."

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as a special counsel inside the government to investigate voter fraud. She wanted a top secret security clearance and access to confidential voter information.

Lyons told Trump he couldn't appoint Powell as a special counsel at the Justice Department because this was an attorney general appointment. Lyons, Cipollone and Herschmann — in fact the entire senior White House staff who were aware of this idea — were all vehemently opposed to Powell becoming a special counsel anywhere in the government.

By this point Trump had also patched into the call his personal lawyer Giuliani and White House chief of staff Mark Meadows. Meadows indicated that he was trying to wrap his mind around what exactly Powell's role would entail. He told Powell she would have to fill out the SF-86 questionnaire before starting as special counsel.

This was seen as a delaying tactic. The sense in the room was that Trump might actually greenlight this extraordinary proposal.

At its essence, the Powell crew's argument to the president was this: *We have the real information. These people — your White House staff — don't believe in the truth. They're liars and quitters. They're not willing to fight for you because they don't want to get their hands dirty. Put us in charge. Let us take control of everything. We'll prove to you that what we're saying is right. We won't quit, we'll fight. We're willing to fight for the presidency.*

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only people willing to tell him what he wanted to hear — that a path to stay in power in the White House remained.

The Oval Office portion of the meeting had dragged on for nearly three hours, creeping beyond 9 p.m. The arguments became so heated that even Giuliani — still on the phone — at one point told everyone to calm down. One participant later recalled: "When Rudy's the voice of reason, you know the meeting's not going well."

Giuliani told Trump he was going to come over to the White House. The president, having forgotten about the others on the line, hung up and cut multiple people off the call.

Herschmann, Cipollone and Lyons left the Oval Office, but soon discovered that the Powell entourage had made their way to the president's residence. They followed them upstairs, to the Yellow Oval Room, Trump's living room, where they were joined by Giuliani and Meadows.

Trump sat beside Powell in armchairs facing the door, separated by a round, wooden antique table. Giuliani sat in an armchair to the right of them, while Byrne

and Meadows sat on a couch. Byrne wolfed down pigs in a blanket and little meatballs on toothpicks that staff had set on the coffee table.

Herschmann was primed to brawl and ready to dump on Powell. It had been a long day.

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fuck you're doing. Right, Sidney?" He turned to Powell. "Why don't you tell Rudy to his face?"

"Eric, really it's not appropriate," Trump replied curtly.

"What's not appropriate?" Herschmann shot back. Turning to Powell, he said, "Why don't you repeat to Rudy what you just told the president in the Oval Office — that he has no idea about the case and that he only just began to understand it a few hours ago."

Three days later, Giuliani would publicly distance himself from Powell, telling Newsmax that Powell did not represent the president, and that "whatever she's talking about, it's her own opinions."

It didn't take long for the yelling to start up again. They were now in hour four of a meeting unprecedented even by the deranged standards of the final days of the Trump presidency.

Now it was Meadows' turn, blasting Flynn for trashing him and accusing him of being a quitter. "Don't you dare challenge me about whether I'm being supportive of the president and working hard," Meadows shouted, reminding Flynn that he'd defended him during his legal troubles.

Trump and Cipollone, who frequently butted heads, went at it too, over whether the administration had the authority to do what Powell was proposing.

Powell kept asserting throughout the night that she had — or would soon produce — the evidence needed to prove foreign interference. She kept insisting that

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Powell at one point turned to Lyons and demanded, "Why are you speaking? Are you still employed here?" The staff secretary, who had already resigned, laughed and joked, "Well I guess I'm here until midnight."

It was after midnight by the time the White House officials had finally said their piece. They left that night fully prepared for the mad possibility Trump might still name Sidney Powell special counsel. *You have our advice,* they told the president before walking out. *You decide who to listen to.*

🎧 **Listen to Jonathan Swan** on Axios' new investigative podcast series, called "How it happened: Trump's last stand."

Read the rest of the "Off the Rails" episodes here.

About this series: Our reporting is based on multiple interviews with current and former White House, campaign, government and congressional officials as well as direct eyewitnesses and people close to the president. Sources have been granted anonymity to share sensitive observations or details they would not be formally authorized to disclose. President Trump and other officials to whom quotes and actions have been attributed by

others were provided the opportunity to confirm, deny or respond to reporting elements prior to publication.

"Off the rails" is reported by White House reporter Jonathan Swan, with writing, reporting and research assistance by Zach Basu. It was edited by Margaret Talev and Mike Allen and copy edited by Eileen O'Reilly.



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Go deeper

Axios
Updated Feb 2, 2021 - Politics & Policy

Off the rails: Episode library

Photo illustration: Sarah Grillo/Axios. Photo: Chip Somodevilla/Getty Images

The first line of the Axios Manifesto is "Audience First." That's why we created our unique Smart Brevity style to get you smarter, faster, on topics that matter. But it also means we won't shy away from important stories that are worthy of more detail and more of your time, like our Deep Dives, Axios Investigates and now this deeply reported series, "Off the rails."

If you're in a hurry, check out the highlights:

- Episode 1: A premeditated lie lit the fire
- Episode 2: Barbarians at the Oval
- Episode 3: Descent into madness

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- Episode 5: The secret CIA plan
- Episode 6: Last stand in Georgia
- Episode 7: Trump turns on Pence
- Episode 8: The siege
- Bonus episode: The craziest meeting of the Trump presidency

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Alayna Treene, author of Sneak Peek
Feb 2, 2021 - Politics & Policy

Scoop: Fees — not just strategy — blew up Trump's legal team

President Trump boards Air Force One for the final time. Photo: Pete Marovich - Pool/Getty Images

Disagreements over legal strategy weren't the only reason Donald Trump's defense team collapsed just days before his second impeachment trial, Axios has learned.

What we're hearing: The notoriously stingy former president and his lead lawyer, Butch Bowers, wrangled over compensation during a series of tense phone calls, sources familiar with their conversations said.

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Axios
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Both chambers pass budget resolution, paving the way for Biden's relief plan

The House voted 219-209 on Friday afternoon to approve a budget plan after the Senate's 5:34 a.m. vote that will be used to facilitate passage of President Biden's $1.9 trillion coronavirus relief proposal.

Why it matters: Passing the stimulus package via the budget reconciliation process allows Democrats to sidestep the 60-vote threshold needed to approve most major legislation.

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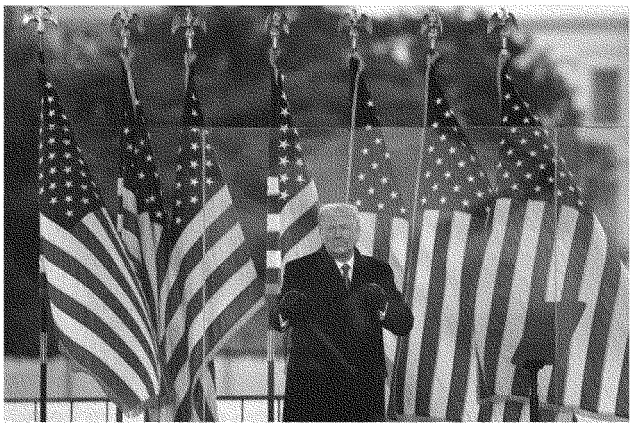
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buzzfeednews.com/article/zoetillman/trump-impeachment-capitol-rioters-fight-like-hell



Brendan Smialowski / Getty Images
Former president Donald Trump gives a speech to supporters before the insurrection at the US Capitol on Jan. 6, in which he tells them to "fight like hell."

WASHINGTON — Former president Donald Trump formally responded Tuesday to the charges filed by House Democrats in his second impeachment, denying that he incited a mob to violently descend on the Capitol building to stop Congress from certifying President Joe Biden's win.

But court records in the 175-plus criminal cases filed so far in connection with the Jan. 6 insurrection reveal that's exactly what at least some of Trump's supporters thought he was directing them to do.

"[T]oday President Trump told Us to 'fight like hell,'" Troy Smocks, a Texas man charged with making threats, posted on Jan. 6 on Parler, quoting Trump's speech to supporters before the insurrection, according to the government's court filings. Smocks appeared to admit to participating in the attack on the Capitol in his posts, although he isn't charged with that; he urged his followers to get weapons and prepare to "hunt" Democrats, tech executives, and others he considered "enemies of Our constitution," writing, "We now have the green light."

"[Trump] said that Our cause was a matter of national security, and that these people behind the massive fraud must be arrested and brought to justice. And that task, falls on the shoulders of We The People.... the American Patriots," Smocks wrote, court documents say. A judge ordered him to be held in jail pending trial, citing his posts on Parler.

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Trump's lawyers are contesting the constitutionality of impeaching a former president, as well as disputing whether he really meant it when he had repeatedly told his supporters to "fight."

"It is denied that the phrase 'if you don't fight like hell you're not going to have a country anymore' had anything to do with the action at the Capitol as it was clearly about the need to fight for election security in general, as evidenced by the recording of the speech," Trump's lawyers wrote in his official response papers.

But court filings in many cases showed that the former president's supporters came to Washington spoiling for a fight and that they broadly took calls from Trump and his allies to "stop the steal" — a reference to baseless claims of widespread voter fraud — to be an appeal for violence. Social media posts, FBI interview summaries, and publicly available interviews that prosecutors included in charging papers also lay out the extent to which Trump's supporters were waiting to take orders from him and understood his words as a direction to act.

Robert Bauer, charged with unlawfully entering a restricted area (the US Capitol) and violent entry and disorderly conduct on Capitol grounds, spoke with two FBI agents on Jan. 8. He "reiterated that he marched to the U.S. Capitol because President Trump said to do so," according to his charging papers. The FBI affidavit includes a screenshot of a selfie found on Bauer's phone that shows him and his cousin (and codefendant) Edward Hemenway II, both wearing "Trump 2020" hats, smiling and posing with their middle fingers up inside the Capitol building.

"According to BAUER, after President Trump told the crowd, 'We are going down Pennsylvania Avenue to the Capitol,' the crowd began moving towards the Capitol," an FBI agent wrote in the affidavit.

Robert Sanford, a Pennsylvania man charged with throwing a fire extinguisher at police officers at the Capitol, similarly told the FBI when he was interviewed on Jan. 12 that he was part of a group that "had gone to the White House and listened to President Donald J. Trump's speech and then had followed the President's instructions and gone to the Capitol."

> "IF TRUMP TELLS US TO STORM THE FUKIN CAPITAL IMA DO THAT THEN!"

In charging papers for Kenneth Grayson of Pennsylvania, the FBI quoted a private message that he allegedly sent to an unidentified person on Dec. 23 about his plans to go to DC on Jan. 6 and take direction from Trump. Grayson, who allegedly livestreamed video on Facebook of himself going into the Capitol and who prosecutors believe is a follower of the QAnon mass delusion, is charged with being a restricted area, disorderly and disruptive conduct, and obstructing an official proceeding.

"I'm there for the greatest celebration of all time after Pence leads the Senate flip!! OR IM THERE IF TRUMP TELLS US TO STORM THE FUKIN CAPITAL IMA DO THAT THEN! We don't want any trouble but they are not going to steal this election that I guarantee bro!!" Grayson allegedly wrote.

Samuel Fisher, a New York man charged with illegally going into the Capitol and disorderly conduct, wrote in a lengthy post on his personal website dated Jan. 6, apparently before the attack, "Trump just needs to fire the bat signal... deputize patriots... and then the pain comes."

If you have a news tip, we'd like to hear from you. Reach out to us via one of our tip line channels.

It's too early in most cases for people charged with participating in the insurrection to have had a chance to offer a defense — but in a few court fights over whether defendants should be kept in jail or allowed to go home pending trial, their lawyers have highlighted the connection between Trump's words and the violence at the Capitol. In opposing pretrial detention for Emanuel Jackson, who is charged with assaulting police officers as well as illegally going into the Capitol, his lawyer wrote that "the nature and circumstances of this offense must be viewed through the lens of an event inspired by the President of the United States." A judge ordered Jackson kept in custody.

A judge is scheduled to hear arguments on Feb. 3 on whether to order pretrial detention for Dominic Pezzola, a New York man and member of the Proud Boys identified in videos breaking a window at the Capitol and who the government alleged had instructions at his home to make guns and bombs. In a recent interview, Pezzola's lawyer told Reuters that the "logical thinking" to Trump's supporters was that the president had "invited" them to Washington.

Reuters also noted that during a Jan. 21 court hearing, a lawyer for Riley Williams of Pennsylvania told the judge that her client "took the president's bait and went inside the Capitol." Williams is charged with illegally going into the Capitol as well as stealing or helping to steal a laptop from House Speaker Nancy Pelosi's office; Williams, through her lawyer, has denied any involvement in the theft.

The House voted to impeach Trump for a historic second time on Jan. 13 for inciting the insurrection at the Capitol. A trial in the Senate is expected to begin next week. The Senate voted last week against a Republican attempt to reject the impeachment effort as unconstitutional, which means a trial will take place, but enough Republican members supported the measure that it's unlikely Democrats can win the two-thirds majority needed to convict Trump of high crimes and misdemeanors.

Proud Boys, a fixture at Portland protests, labeled 'extremist group' by FBI

oregonlive.com/portland/2018/11/proud_boys_a_fixture_at_portla.html

November 20, 2018



Members of the Proud Boys attend a Patriot Prayer rally at the Portland Waterfront on June 30, 2017. The FBI now considers them an

By Shane Dixon Kavanaugh | The Oregonian/OregonLive
Update 4:06 p.m.

The Proud Boys, a band of street fighters whose members routinely appear at right-wing rallies in Portland, have been designated "an extremist group with ties to white nationalism" by the FBI.

The group is "actively recruiting in the Pacific Northwest" and "[has] contributed to the recent escalation of violence at political rallies," including those in Portland, the FBI told Clark County authorities this summer.

The FBI provided its assessment of the Proud Boys as part of an internal affairs investigation by the Clark County Sheriff's Office. The Guardian revealed the documents, first obtained by transparency group Property of the People, Monday in a story on its website.

It's the first time that an FBI evaluation of the group has become public.

[Read the documents here.]

Sgt. Chris Burley, a Portland Police Bureau spokesman, told The Oregonian/OregonLive on Monday afternoon that "at this time" he was unaware of any similar briefings between the FBI and the members of the bureau.

Started in 2016 by conservative writer and political commentator Gavin McInnes, the Proud Boys have billed themselves as "pro-Western fraternal organization" and have vigorously fought accusations by critics that members are associated with white nationalists or other bigoted groups.

The Southern Poverty Law Center, for example, lists them as a hate group, citing their supporters' documented history of promoting misogyny, Islamophobia and violence.

Members have made appearances alongside Vancouver's Joey Gibson at his Patriot Prayer rallies in the Portland area over the last 18 months.

A number of them, outfitted in yellow and black Fred Perry polo shirts and red "Make America Great Again" baseball caps, have tangled with counter-protesters, throwing punches and drawing blood.

The FBI provided its assessment of the Proud Boys to the Clark County Sheriff's Office on Aug. 2 as the agency investigated a former female deputy's alleged ties to the group, Cmdr. Michael McCabe told The Guardian.

Two days later, on Aug. 4, hundreds of Proud Boys from around the country joined Gibson in downtown Portland for a so-called "freedom march" where some participants brought guns and other weapons.

That event ended when police used riot control weapons on the hundreds of counter-demonstrators who came to protest Gibson's rally.

The group's public image began to take a hit later that summer.

Twitter started suspending accounts affiliated with the Proud Boys a week after the Aug. 4 event in Portland and Facebook and Instagram followed suit last month, citing policies against organized hate groups, hate speech and promoting violence.

In October, members of the Proud Boys in New York City were arrested after they were caught on video brutally beating two or three protesters after an event at Manhattan's Republican Party headquarters.

-- Shane Dixon Kavanaugh

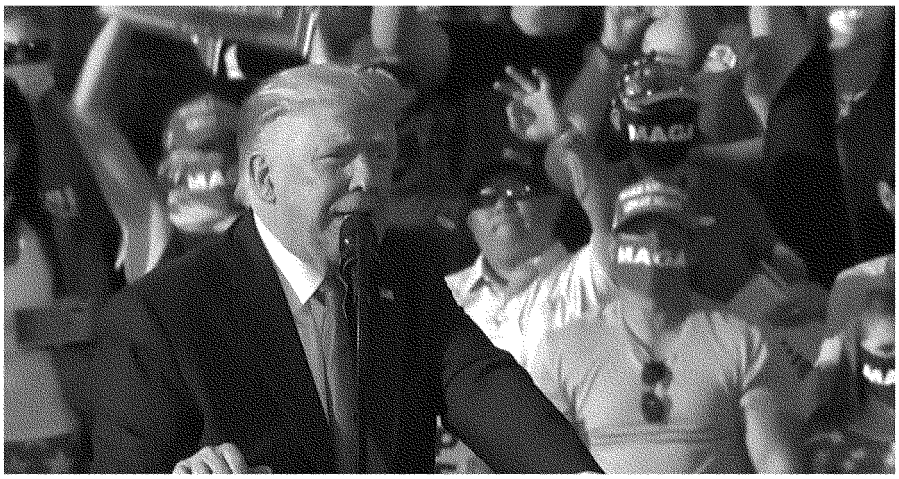
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Donald Trump supporter wearing 'Proud Boys' hat makes 'white power' gesture behind President at rally

mirror.co.uk/news/politics/donald-trump-supporter-wearing-proud-22897773

October 23, 2020



News

A man standing directly behind the president at a retirement community in Florida repeatedly held up the 'OK' hand gesture - which has been adopted by white supremacist groups



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A Donald Trump supporter repeatedly made an 'OK' hand gesture - which has been adopted by white supremacist groups, during a speech in Florida.

The man also appeared to wear a hat sporting the logo of the 'Proud Boys' a far-right group which supports President Trump.

He was standing directly behind the President as he gave a nearly 90 minute address at The Village retirement community in Florida.

And he made the gesture prominently when President Trump said in his speech: "We have made America proud again."

Trump drew criticism last month when he was asked to disavow the Proud Boys during the first TV Presidential debate.

Instead, the President's message to the group was "stand back and stand by."

Within minutes, members of the Proud Boys - founded by Brit Gavin McInnes - embraced his comments posting calling his words “historic.”



On the right-wing social media site Parler, the group’s leader Joe Biggs said he took Trump to be issuing a rallying cry.

“Proud Boys shout out at Presidential debate,” he wrote before adding, “President Trump told the Proud Boys to stand by because someone needs to deal with Antifa. Well, sir. We’re ready.”

The 'OK' gesture was originally linked to racism as part of a prank by users of the message board 4Chan.

Instead of standing for "OK", it stands for "WP" - for 'white power' or 'white pride'.

But, according to the Anti-Defamation league it has grown into a "sincere expression of white supremacy", and adopted by far-right groups.



(Image: Getty Images)

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Who are the Proud Boys? Far-right group celebrate as Donald Trump tells them to 'stand by'

Earlier in the rally, President Trump attacked Joe Biden's running mate Kamala Harris for both her views and for being a woman.

He said: "We're not going to have a socialist president. Especially a female socialist president.

"We're not going to have it. We're not going to put up with it. It's not going to happen."

The President said: "Kamala will not be your first female President.

She will not be your first female president.

"It's not the way it's supposed to be. We're not supposed to have a socialist."

Trump has repeatedly complained at his rallies that he struggles to get support from "suburban women."

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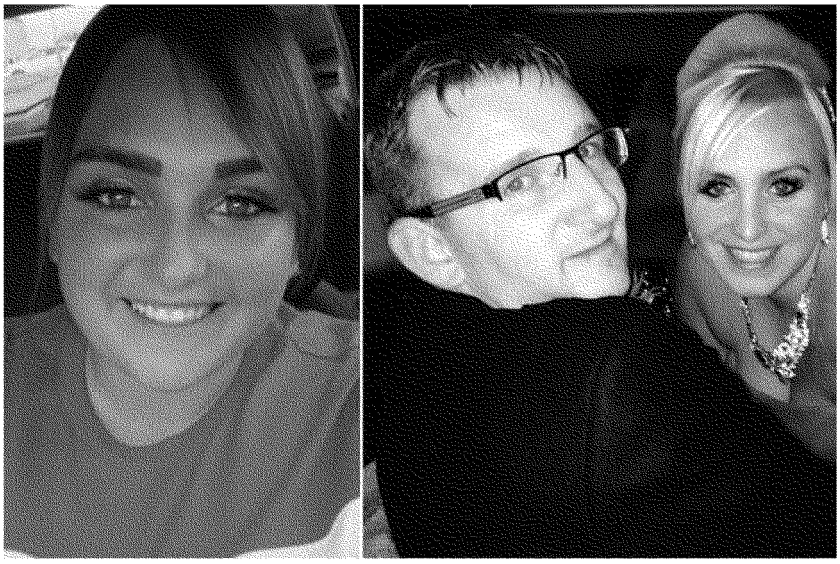
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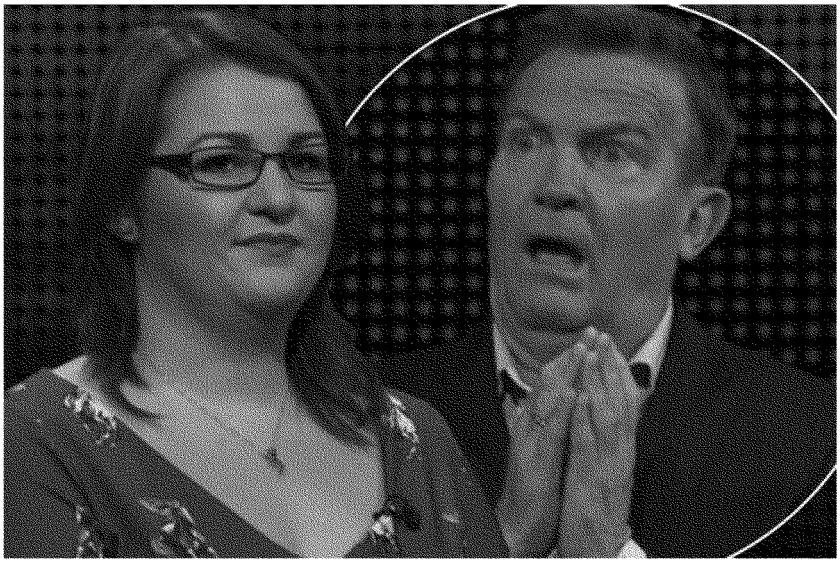


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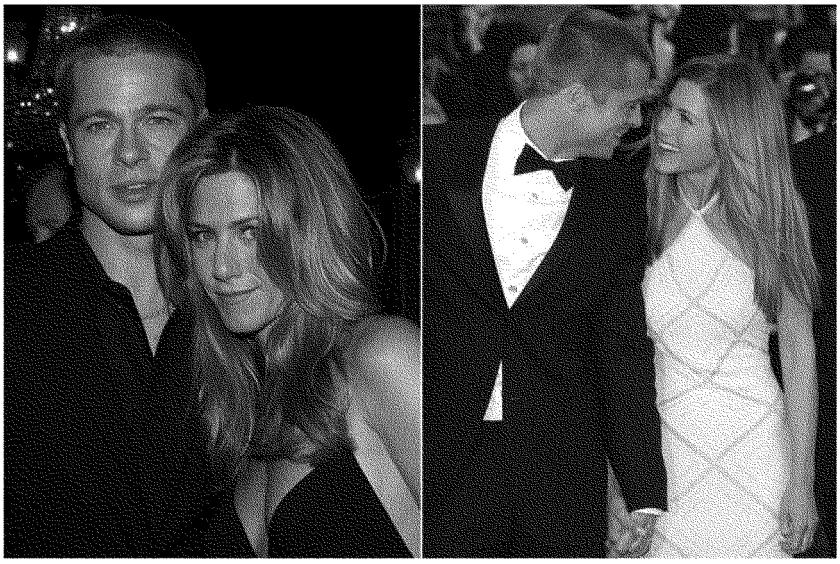


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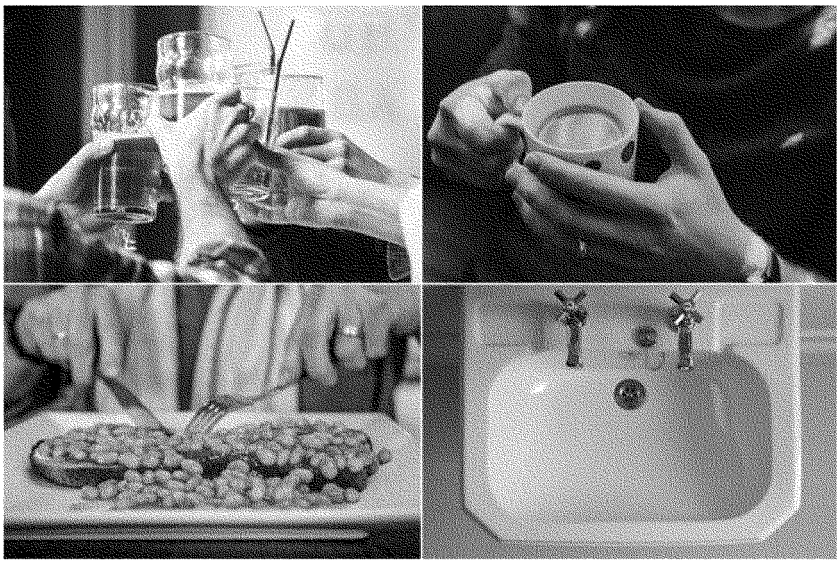
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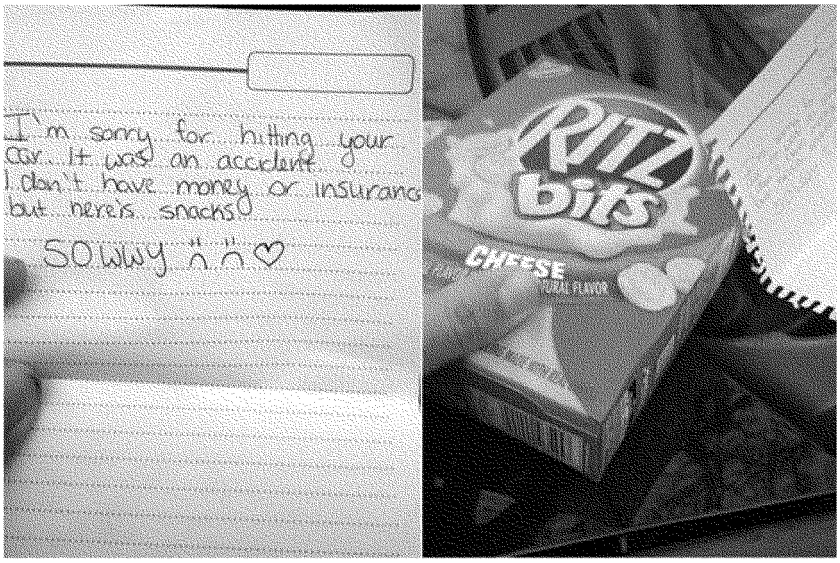
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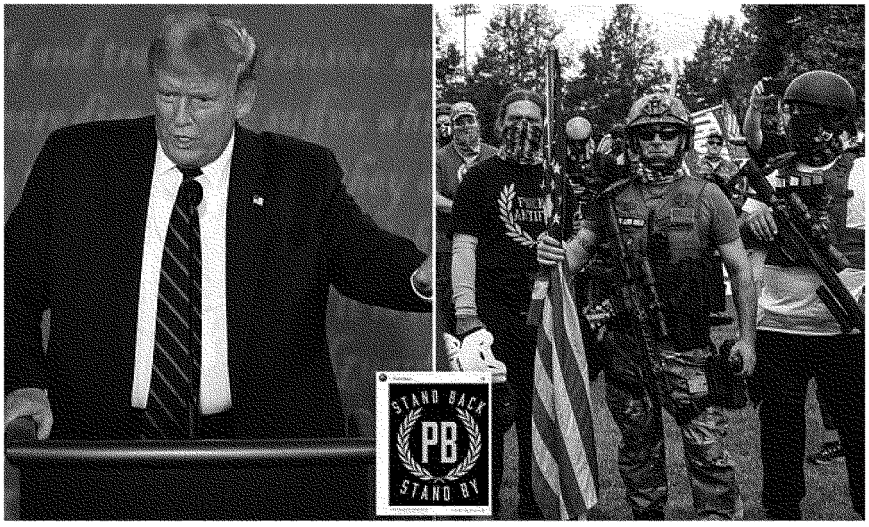


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Proud Boys celebrate online after Trump told the far right group to 'stand back and stand by'

dailymail.co.uk/news/article-8788187/Proud-Boys-celebrate-online-Trump-told-far-right-group-stand-stand-by.html

September 30, 2020



- **Members of the far-right group immediately posted about the shout out Tuesday**
- **Their account on Telegram posted: 'Standing down and standing by sir'**
- **Following the call out the group appeared to pledge their allegiance to Trump**
- **One online account made 'Stand back. Stand by' part of a new logo for the group**
- **Proud Boys organizer Joe Biggs wrote: 'President Trump told the proud boys to stand by because someone needs to deal with ANTIFA... well sir! we're ready!'**
- **'Trump basically said to go f*** them up! this makes me so happy', he added**
- **Joe Biden retweeted a post which looked to show a number of their posts in the wake of Trump's comments; he wrote: 'This. This is Donald Trump's America'**
- **Proud Boys is a far-right organization that admits only men as members**

The Proud Boys were celebrating online Wednesday after Donald Trump told them to 'stand back and stand by' during the first presidential debate - while president was attacked by members of his own party for refusing to condemn white supremacy before delivering his message to the far-right group.

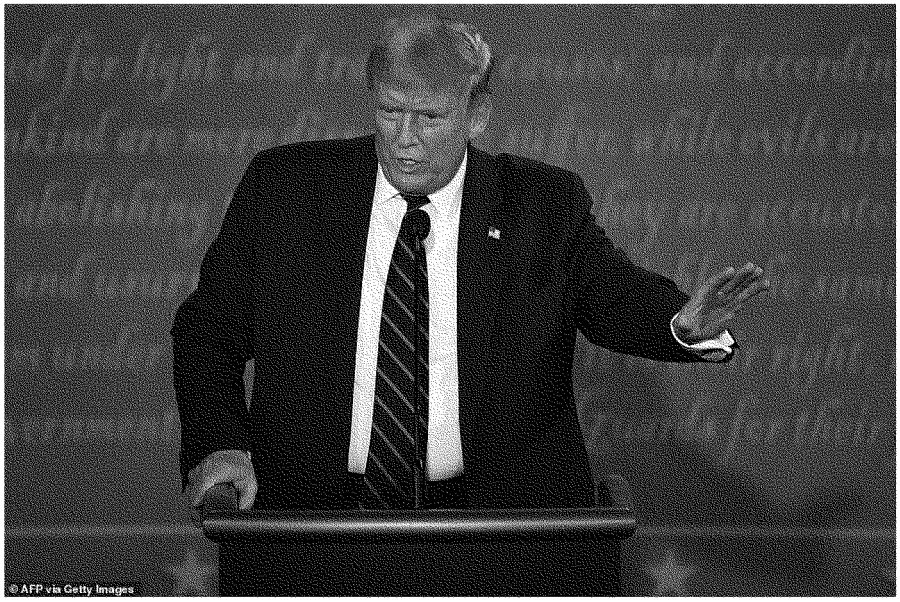
Members of the group posted about the shout out, telling the president: 'We're ready.' Their account on the social media app Telegram posted: 'Standing down and standing by sir.'

Proud Boys is a far-right organization that admits only men as members and promotes and engages in political violence. The group believes white men and western culture are under siege and one of its co-founders recorded a video titled '10 things I hate about the Jews.'

'Proud boys, stand back and stand by, but I tell you what, somebody has got to do something about antifa and the left because this is not a right wing problem, this is a left-wing problem,' Trump said when he was challenged to condemn white supremacists during Tuesday's presidential debate.

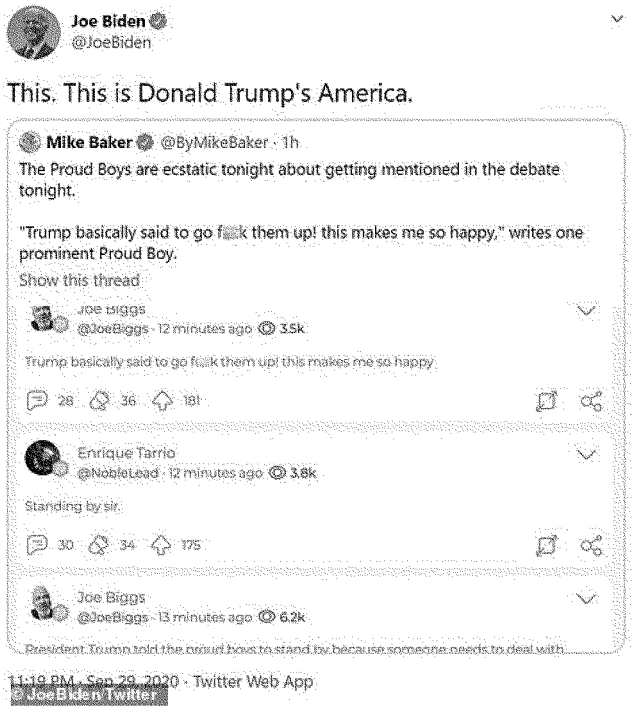
He claimed the protests in the country on race relations were a left-wing problem.

The Southern Poverty Law Center, a liberal advocacy organization, has designated the all-male Proud Boys as a hate group. The group is known for its violent clashes at political rallies.



The Proud Boys were celebrating online Tuesday night after Donald Trump told them to 'stand back and stand by' during the first presidential debate


Proud Boys
STAND BACK
PB
STAND BY
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Following the shout out several members of the group appeared to pledge their allegiance to the president. One social media account connected to the organization even appeared to made 'Stand back. Stand by' part of a new logo

READ THE FULL 'PROUD BOYS' EXCHANGE

CHRIS WALLACE: You have repeatedly criticized the vice president for not specifically calling out Antifa and other left wing extremist groups. But are you willing tonight to condemn white supremacists and militia group and to say that they need to stand down and not add to the violence in a number of these cities as we saw in Kenosha and as we've seen in Portland.

DONALD TRUMP: Sure, I'm willing to do that.

CHRIS WALLACE: Are you prepared specifically to do it.

DONALD TRUMP: I would say almost everything I see is from the left wing not from the right wing.

CHRIS WALLACE: But what are you saying?

DONALD TRUMP: I'm willing to do anything. I want to see peace.

CHRIS WALLACE: Well, do it, sir.

JOE BIDEN: Say it, do it say it.

DONALD TRUMP: What do you want to call them? Give me a name, give me a name, go ahead who do you want me to condemn.

CHRIS WALLACE: White supremacist and white militia.

JOE BIDEN: Proud boys. Proud boys.

DONALD TRUMP: Okay. Proud Boys - stand back and stand by. But I'll tell you what somebody's got to do something about Antifa and the left because this is not a right wing problem this is a left wing.

JOE BIDEN: His own FBI Director said unlike white supremacist, Antifa is an idea not an organization-

DONALD TRUMP: Oh you got to be kidding me.

JOE BIDEN: ... not a militia. That's what his FBI Director said.

DONALD TRUMP: Well, then you know what, he's wrong.

CHRIS WALLACE: We're done, sir. Moving onto the next... [crosstalk]

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Following the shout out several members of the group pledged their allegiance to the president.

One social media account connected to the organization even appeared to made 'Stand back. Stand by' part of a new logo.

Proud Boys organizer Joe Biggs wrote: 'President Trump told the proud boys to stand by because someone needs to deal with ANTIFA... well sir! we're ready!

'Trump basically said to go f*** them up! this makes me so happy.'

Joe Biden retweeted a post which looked to show a number of their posts in the wake of Trump's comments.

He wrote: 'This. This is Donald Trump's America.'

Republican Senator Mitt Romney said 'of course' President Donald Trump should have condemned white supremacists during the presidential debate Tuesday night.

'Of course, of course,' Romney, who's openly criticized Trump when he disagrees with the president, told reporters on Capitol Hill Wednesday morning.

'It was not a Lincoln Douglas debate, that's for sure,' he added of the clash between Trump and Democratic nominee Joe Biden that pundits dubbed a 's*** show' and 'dumpster fire.'

Other Republicans said they would give the president a chance to explain, including Republican Senator Tim Scott of South Carolina, the only black GOP senator.

'I think he misspoke in response to Chris Wllace's comment,' Scott said on Capitol Hill Wednesday. 'He was asking Chris what he wanted to say. I think he misspoke. I think he should correct it. If he doesn't correct it I guess he didn't misspeak.'

And Republican Senator Todd Young of Indiana said the president should have been clear that extremist groups from both the left and right should be condemned.

'He should have been very clear, and he should have made it very clear that there's no room for people on the far left or the far more far right. When it comes to either an antifa or these white supremacist groups should have been very clear,' Young said.

And Hogan Gidley, the spokesman for the Trump campaign, said the president condemned them three times during the debate.

'He did call them out. He has condemned them,' Gidley said on CNN. 'He said sure three times.'

Some of the president's other supporters also said he missed out on the chance to condemn such hate groups, including Brian Kilmeade, one of the co-hosts of Trump's favorite morning show 'Fox & Friends.'

'Donald Trump ruined the biggest layup in the history of debates by not condemning white supremacists,' Kilmeade said on the cable news morning show Wednesday.

'I don't know if he didn't hear it, but he's gotta clarify that right away,' he added. 'Why the president didn't just knock it out of the park, I'm not sure.'

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The Proud Boys hold a rally in Portland, Oregon on Saturday. Governor Kate Brown declared a state of emergency prior to Saturdays rally as fears of political violence between Proud Boys and Black Lives Matter protesters grew.

Anti-Defamation League CEO Jonathan Greenblatt tweeted: 'It's astonishing that, when asked a simple question, will you condemn white supremacists, @POTUS responded - 'The Proud Boys should stand back and stand by.'

'Trying to determine if this was an answer or an admission. @POTUS owes America an apology or an explanation. Now.'

Proud Boys describes itself as a fraternal organization that 'venerates the housewife' and is 'anti-political correctness.' It has been suspended from both Twitter and Facebook.

Computer science professor Megan Squire told NBC News: 'To say Proud Boys are energized by this is an understatement.

'They were pro-Trump before this shoutout, and they are absolutely over the moon now. Their fantasy is to fight antifa in his defense, and he apparently just asked them to do just that.'

Jason Miller, a senior adviser to the president's campaign, said Trump's call to 'stand by' was 'very clear he wants them to knock it off'.



A Proud Boy wearing a Proud Boys yamaka is seen during a Proud Boys Rally at Delta Park Vanport. The Oregon governor declared an emergency in advance of the event hosted by a right-wing group with a history of violence at protests



nikki mccann ramírez
@NikkiMcR

Trump told the Proud Boys to "stand by" and it looks like they were watching



10:19 PM · Sep 29, 2020 · Twitter Web App

Members of the far-right group posted about the shout out, telling the president: 'We're ready.' Their account on the social media app Telegram posted: 'Standing down and standing by sir'

The Trump campaign tweeted afterward: 'President Trump has repeatedly condemned white supremacists. What a ridiculous question from Chris Wallace.'

Vice Media co-founder Gavin McInnes started the Proud Boys in 2016.

McInnes and the Proud Boys have described the group as a politically incorrect men's club for 'Western chauvinists' and deny affiliations with far-right extremist groups that overtly espouse racist and anti-Semitic views.

In February last year, McInnes sued the Alabama-based Southern Poverty Law Center for labeling the Proud Boys as a hate group.

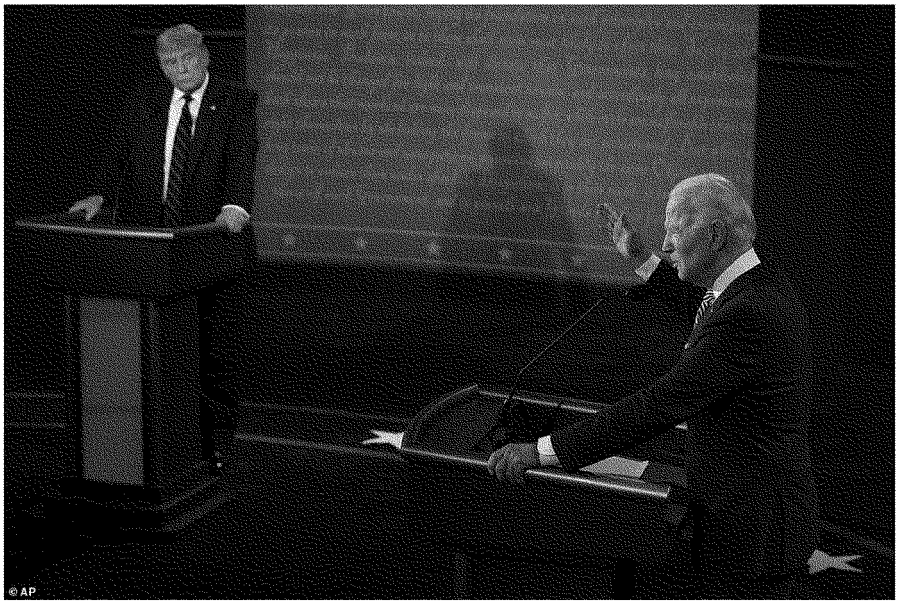
In response to the lawsuit, the law center said Proud Boys members often spread 'outright bigotry' over the internet and have posted social media pictures of themselves with prominent Holocaust deniers, white nationalists and 'known neo-Nazis.'

In New York City in October 2018, police arrested several Proud Boys members who brawled with anti-fascist protesters following a speech by McInnes at a Manhattan Republican club.

Proud Boys members also have frequently clashed with counterprotesters at rallies in California and Oregon.

About 1,000 people gathered at the Proud Boys rally in Delta Park on Saturday, while a group of 500 left-wing counter-protesters massed at nearby Peninsula Park, leading to fears of clashes.

Ahead of the right-wing rally, which organizers said was to support President Donald Trump and 'to end domestic terrorism', Oregon Governor Kate Brown declared a state of emergency and Mayor Ted Wheeler said it poses the 'greatest threat we've faced so far' amid fears of clashes with left-wing protesters.



President Donald Trump listens to Democratic presidential candidate former Vice President Joe Biden during the first presidential debate Tuesday

Debate moderator Chris Wallace asked the president if he would condemn white supremacists and militia groups.

'I would say almost everything I see is from the left wing, not from the right wing,' Trump said.

Wallace asked him to clarify what he meant.

'I'm willing to do anything, I want to see peace,' Trump said.

'Then do it, sir,' Wallace challenged.

'What do you want to call them? Give me a name, give me a name,' Trump said.

'White supremacist and right wing militias,' Wallace said.

Instead, Trump turned to attack antifa, an unorganized group opposed to extreme right-wing political groups like fascists.

'Proud boys, stand back and stand by, but I tell you what, somebody has got to do something about antifa and the left because this is not a right wing problem, this is a left-wing problem,' he said.

But antifa is not an organization - it's a political idea that many different groups support. And law enforcement has found no evidence these groups were working with the Black Lives Matter protesters in cities across the United States.

Trump has declined to call out the citizen militias that have sprung up during the protests as he declined to do Tuesday night.

'Antifa is an idea not an organization. His FBI director said,' Biden said.

'Antifa is a dangerous, radical,' Trump started saying as Wallace interrupted him to say they were moving on to another topic.

But the president got in one last zinger on antifa: 'They'll overthrow you.'

Race relations, like other debate topics, resulted in a furious back-and-forth, shouting over each other conversation between the presidential contenders.

At one point in the night, Biden called Trump a 'racist' when the two men debated race relations in the country.

Trump was defending his decision to end racial sensitivity training for federal workers when his Democratic rival hit him with the 'racist' label.

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Who are the Proud Boys? Inside the far-right group who describe themselves as 'Western chauvinist' men and are classified as extremists by the FBI - and have a chummy relationship with Donald Trump

The Proud Boys is a far-right fraternal organization that was founded on the idea that white men and western culture are under siege and champions being 'anti-political correctness' and 'venerating the housewife'.

The group has been known to promote and engage in political violence as they push their pro-gun, anti-feminist, anti-immigration and anti-welfare. The group maintains that it is not racist despite incorporating elements of the 'white genocide' conspiracy theory into its core tenets.

The Proud Boys were classified as an extremist group with ties to white nationalism by the FBI, while the Southern Poverty Law Center (SPLC) lists them as a hate group and the Anti-Defamation League describes them as misogynistic, Islamophobic, transphobic and anti-immigration.

Twitter, Facebook, Instagram and YouTube suspended official Proud Boys social media accounts from their platforms for promoting 'hateful content' after the SPLC made its designation in 2018.

The group has a history of street violence targeting left-wing and anti-fascist activists and protest movements. In the past few months Proud Boys have repeatedly dropped in on Black Lives Matter demonstrations taking place across the country, sparking violent clashes on several occasions.

Proud Boys founder Gavin McInnes is quoted as saying in 2015: 'I want violence, I want punching in the face. I'm disappointed in Trump supporters for not punching enough.'

The organization made headlines this week after Donald Trump refused to condemn their associations with white supremacy during his first 2020 presidential debate against Joe Biden on Tuesday night.



The Proud Boys is a far-right fraternal organization that was founded on the idea that white men and western culture are under siege and champions being 'anti-political correctness' and 'venerating the housewife'. Members of the group are seen marching across the Hawthorne Bridge during a rally in Portland, Oregon, on August 17, 2019

FOUNDING:

British-Canadian activist and Vice Media co-founder Gavin McInnes founded the Proud Boys in the months leading up to Donald Trump's election to the presidency in 2016. McInnes started the group as a joke in the far-right Taki's Magazine, adopting its name from the Aladdin song Proud Of Your Boy.

McInnes and the Proud Boys have described the group as a politically incorrect men's club for 'Western chauvinists' and deny affiliations with far-right extremist groups that overtly espouse racist and anti-Semitic views.

In February last year, McInnes sued the Alabama-based SPLC, claiming he was banned from social media platforms and saw his livelihood suffer after the organization branded the Proud Boys as a hate group.

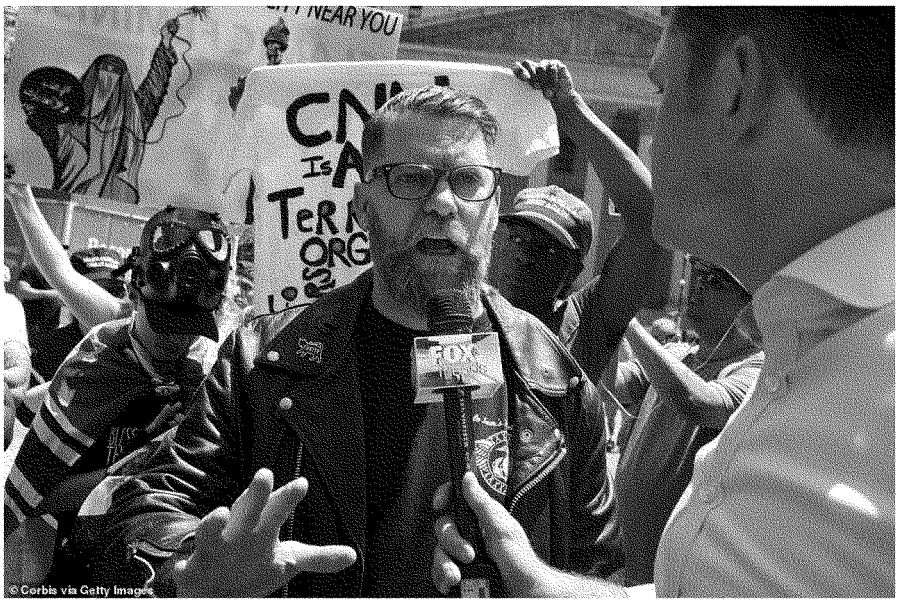
'What they [the SPLC] do is they cast this wide net of 'everyone's a Nazi' and they start destroying lives,' McInnes said at a news conference announcing his lawsuit. 'This is a free speech nation, and this is not a free speech organization.'

However McInnes recorded a video titled ' 10 things I hate about the Jews,' and said Jews have a 'whiny paranoid fear of Nazis' and that Israelis don't support President Donald Trump because they're 'scared of Christians and Trump, who are their biggest allies.'

Richard Cohen, president of the Southern Poverty Law Center, responded to the suit by saying: 'Gavin McInnes has a history of making inflammatory statements about Muslims, women and the transgender community. The fact that he's upset with SPLC tells us that we're doing our job exposing hate and extremism.'

McInnes has since worked to distance the group from the alt-right, describing members as 'Western chauvinists' and denying affiliations with far-right extremist groups that overtly espouse racist and anti-Semitic views.

Enrique Tarrio is currently serving in the role of chairman for the Proud Boys.



British-Canadian activist and Vice Media co-founder Gavin McInnes (pictured) founded the Proud Boys in the months leading up to Donald Trump's election to the presidency in 2016



Enrique Tarrio is currently serving in the role of chairman for the Proud Boys. Tarrio is pictured during an Oregon rally this month

JOINING THE GROUP:

The Proud Boys only admits men into its ranks, as the name suggests. Members share a number of ideologies that include being pro-gun rights, anti-feminism and anti-immigration.

To join, members must make the following pledge: 'I am a proud western chauvinist, I refuse to apologize for creating the modern world.'

Members can be identified by an unofficial uniform of red Make America Great Again caps from the Trump campaign and black and yellow Fred Perry polo shirts. The clothing brand withdrew that specific design from sale in North America this week because it said it does not want to be associated with the Proud Boys.



Proud Boys members can be identified by an unofficial uniform of red Make America Great Again caps from the Trump campaign and black and yellow Fred Perry polo shirts (seen above during a protest in Oregon on September 26). The clothing brand withdrew that design from sale in North America this week because it said it does not want to be associated with the Proud Boys

NOTABLE INCIDENTS:

February 2, 2017: McInnes gives a speech at New York University, after which minor brawls break out between Proud Boys members and anti-facist activists, resulting in charges against 11 people.

April 15, 2017: Proud Boys attend an alt-right rally in Berkeley, California, that was organized by the Liberty Revival Alliance and attended by members of neo-Nazi group Identity Evropa and the Oath Keepers, another right-wing anti-government group. Twenty-one people were arrested after violence broke out between attendees and counter-protesters.

August 11-12, 2017: Proud Boys member Jason Kessler helped organize the Unite the Right rally in Charlottesville, Virginia, where counter-protester Heather Heyer was mowed down and killed by white supremacist James Alex Fields Jr. McInnes later said that he'd kicked Kessler out of the Proud Boys for his involvement in the rally attended by other members.

February 2018: Longtime Trump ally Roger Stone allegedly hired the Proud Boys to serve as his security detail at the annual Republican Dorchester Conference in Salem, Oregon. After the event the Proud Boys posted a video claiming that Stone was undergoing 'low-level initiation' into the group.

October 12, 2019: A group of Proud Boys were filmed beating up anti-facists staging a protest against a speech by McInnes in New York City. Two members - Maxwell Hare, 27, and John Kinsman, 40 - were convicted and sentenced to four years in prison for their involvement in that incident.

June 2020: Proud Boys face off with Black Lives Matter protesters by the Capitol Hill Autonomous Zone in Seattle, Washington.

September 29, 2020: Donald Trump brings up the Proud Boys during his first presidential debate against Joe Biden after moderator Chris Wallace repeatedly asked him to condemn violence by white supremacists and right-wing groups. 'Proud Boys, stand back and stand by!' Trump said. 'But I'll tell you what, somebody's got to do something about Antifa and the left.' The Proud Boys reacted with joy over the shout out, even adding the phrase 'Stand Back, Stand By' to their logo. Proud Boys leader Enrique Tarrio posted on social media: 'Standing by sir.'



The group has a history of street violence targeting left-wing and anti-fascist activists and protest movements. In the past few months Proud Boys have repeatedly dropped in on Black Lives Matter demonstrations taking place across the country, sparking violent clashes on several occasions. Pictured: A Proud Boy confronts a counter-protester during a rally in Oregon this month

Reporting by Megan Sheets for DailyMail.com

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- Before getting upset about the Proud boys, conside...

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Proud Boys' West Palm leader: Trump bump 'awesome;' we're not a hate group

P palmbeachpost.com/story/news/2020/10/21/west-palm-beach-proud-boys-leader-trump-bump-awesome/5880793002/



Christine Stapleton | Palm Beach Post
Bobby Pickles — whose real name is not Bobby Pickles — is a college graduate, owner of a screen printing business and head of the West Palm Beach chapter of the Proud Boys.

In the wake of the uproar over President Donald Trump's call for the Proud Boys to "stand back and stand by" during the first presidential debate Sept. 29, Pickles wants to make one thing clear: The Proud Boys are in Palm Beach County and they are not a hate group or white supremacist organization.

"I am a textbook example of someone who is not a white supremacist," said Pickles, 40, adding that he "surrounds" himself "with non-white people."

Pickles said his girlfriend is from Costa Rica. He also said he hires minorities, including an Asian man born in South Korea who is also a member of the Proud Boys, and a Black man, who is not a member of the Proud Boys.

"It's just a fraternal organization," said Pickles, who calls himself a "liberal" Proud Boy. "We like to get together, we like to drink beer and we all support Trump and that's it."

Not so, say two of the largest non-profit organizations that monitor hate groups: The Anti-Defamation League and the Southern Poverty Law Center.

The ADL describes the group on its website as "alt lite."

"A loosely connected movement of right-wing activists who reject the overtly white supremacist ideology of the alt right, but whose hateful impact is more significant than their 'lite' name suggests," according to the ADL website. "The alt lite embraces misogyny and xenophobia, and abhors 'political correctness' and the left."

The SPLC goes even further, accusing Proud Boys founder, Vice Media co-founder Gavin McInnes, of crafting the "Western chauvinism" concept as a ruse to gain mainstream acceptance. Individual Proud Boys are guilty by association, participating alongside white supremacists at events like the "Unite the Right" rally in Charlottesville, Va., in August 2017 that brought together Klansmen, anti-Semites, Southern racists and militias, according to the SPLC.

"They should absolutely be taken seriously as should all extremists — as should all people who espouse hate and bigotry of any kind," said Sheri Zvi, the Florida regional director for the ADL. "They should be called out and denounced by everyone who comes in contact with them, especially the president of the United States."

More: Trump tells Proud Boys to 'stand back and stand by.' Who are the Proud Boys?

Because of the stimga, local leader says Proud Boys use aliases

Pickles blames the SPLC forthe Proud Boys' bad reputation. The advocacy center has branded the Proud Boys white supremacists and labeled them a hate group for financial reasons, Pickles said.

Both groups are widely despised by the Proud Boys.

"They need hate to exist in order for them to make money," Pickles said. "They need to perpetuate this false idea there are all of these hate groups all around the country."

Because of the "stigma" against the group, Proud Boys often use aliases, Pickles said, adding that he adopted his "nom de plume" long before before he became a Proud Boy after a co-worker dubbed him Bobble Pickles.

"The reason why many other Proud Boys don't give their real names is because the media have libeled us so they fear getting doxed and losing their job," said Pickles.

Pickles said he graduated with an English degree from the University of Florida after two years at a community college, and that he always wanted to be in a fraternity. The Proud Boys fills that void, he said.

"There's just something about being in a group of men and doing stuff together," said Pickles. "It's, like, very awesome."

More: Trump opened door for Proud Boys, far right group enters election fray

Being a Proud Boy has not only provided Pickles with male camaraderie and drinking buddies, it's also has been a boon to his business. It has attracted big, high-profile accounts to his company, Fat Enzo T-ShIrts on North Dixie Highway in West Palm Beach.

He says his T-shirt shop makes merchandise for the campaign of Laura Loomer and for Roger Stone

While Pickles says that neither he nor the Proud Boys endorse or condone racism, xenophobia or violence, his T-shirts say otherwise. "SPEAK ENGLISH" is emblazoned on one shirt in the storefront window.

Two other shirts celebrate Kyle Rittenhouse, the 17-year-old facing murder charges in the fatal shootings of two protesters and wounding another during demonstrations in Kenosha, Wis. Those protests followed the police shooting of a Black man, Jacob Blake, by a white officer in August.

Rittenhouse has become ahero to conservatives who claim he acted in self-defense. Far-right social media posts have depicted those shot by Rittenhouse as "commies."

In Pickles' shop, a black T-shirt in the front window proclaims "KYLE RITTENHOUSE DID NOTHING WRONG!" in white letters. Another shirt displays an image of a smiling Rittenhouse holding a semi-automatic weapon across his chest with his finger on the trigger superimposed over a tree.

"THE TREE OF LIBERTY MUST BE REFRESHED FROM TIME TO TIME WITH THE BLOOD OF COMMIES," the shirt reads. The saying is a play on a quote by Thomas Jefferson: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."

The quote has previously been used to justify violence and was displayed, along with a tree dripping blood, on the back of the T-shirt worn by Timothy McVeigh, the domestic terrorist who carried out the Oklahoma City bombing in 1995 that killed 168 people.

Phrases on other shirts include "SPEAK ENGLISH" and "CAUC ASIAN" below an image of the Proud Boys' emblem, a rooster or cock, and a politically incorrect depiction of an Asian man wearing a cone shaped hat and Fu Manchu mustache.

Pickles said the company produces nearly all the "merch" for the Proud Boys, the congressional campaign of self-proclaimed Islamaphobe Laura Loomer and political operative Roger Stone. Pickles proudly claims Stone was wearing one of his T-shirts when he

was arrested.

Proud Boys chapter in South Florida is called Vice City, local leader says

Although a diehard Trump fan and defender of "Western values," Pickles said he works both sides of the political aisle. As proof, one anti-Trump shirt hangs in his window featuring a drag queen flushing a toilet. "Flush the turd on November 3rd," the shirt reads.

"We provide the bullets and the bandages," Pickles said.

The Proud Boys have chapters throughout the U.S., Europe and Australia.There are also has chapters in China and Japan. Florida is divided into six zones, each with different names. The regions are divided into chapters and sub-chapters, Pickles said.

More: Proud Boys at Trump LGBTQ counter-rally in Orlando, June 18, 2019

The region that covers South Florida, from West Palm Beach to Key West, is called Vice City and has about 150 members, said Pickles, who heads the West Palm Beach chapter.

The Vice City website asks prospective members to answer four questions, including political leanings and thoughts on race-based politics. It also advises: "Meeting up with the boys for a couple of brews is essential to being a Proud Boy. How often can you join us?"

All that's required to be a Proud Boy is for a man to declare that he is "a Western chauvinist who refuses to apologize for creating the modern world," according to the group's website.

There is also a vetting process, Pickles said. If you are a prospective Proud Boy in South Florida, the vetting will be done by Genghis Khan, a Korean-born employee at Pickles' T-shirt business, whose real name is not Genghis Khan.

"I'm going to put it this way," Khan said. "The Proud Boys isn't for everyone and sometimes it really is not for someone."

The vetting process includes interviews, background checks and scouring social media, looking not only for racist comments but also religious bigotry.

"The organization, as a whole, we are not anti-Islam or anti any religion," Khan said. "Now, individual wise, I can't speak for everybody. I'm sure there are some out there who are like that but within every group you have the good and there are some that are not going to be good."

Says his group is not racist and 'I don't know why it's on us to prove it'

As proof that that the Proud Boys are not white supremacists, Pickles and Khan point to Proud Boys leader Enrique Tarrio, an Afro-Cuban Miami businessman. Pickles said he met with Tarrio in West Palm Beach when he was considering joining the group in 2017.

"First thing I said was, 'Are you guys racist in any way? Because if you guys are, I don't want to be a part of this because I keep on hearing that and I don't want to be a part of it,' " Pickles said. "Enrique was like, I'm Cuban."

"I don't know why it's on us to prove it," Pickles said. "It should be on the people trying to libel us."

As Pickles discussed the Proud Boys, Jermain Wilson, a Black man who is a member of the West Palm Beach chapter, walked into Pickles' cavernous warehouse-like storefront.

Wilson, who once worked for Pickles, said he "grew up mostly Democratic but my way of thinking has always been Republican." He said he was raised by his mother and grandmother, who "never got government assistance, never got food stamps."

"I was raised on values of working for what you get — all that is all Republican," said Wilson. "Democrats believe in abusing and using the system — getting checks from government."

Wilson doesn't hide his membership in the Proud Boys. He posts pictures on his social media accounts and wears Proud Boys swag.

"Sorry to say but the majority of white people look at me, like, 'You're a Proud Boy?' " Wilson said. "They are more shocked about it than African Americans."

Proud Boys members must also subscribe to the group's tenets: "Minimal government, maximum freedom, anti-political correctness, anti-drug war, closed borders, anti-racial guilt, anti-racism, pro-free speech, pro-gun rights, glorifying the entrepreneur, venerating the housewife, and reinstating the spirit of Western chauvinism."

Western chauvinism is a sort of a Mad Men-esque type of America where political correctness is reviled, housewives are venerated and Trump is revered.

Making the commitment to Western chauvinism is the first of four degrees in the group's hierarchy. A second-degree wannabe must recite the names of five breakfast cereals while being playfully slugged by other members.

To become a third degree Proud Boy, a member must get a Proud Boy tattoo. To achieve the fourth and highest degree, a Proud Boy must endure a hardship, such as being kicked off social media — more of a badge of honor than hardship for far right agitators like Pickles and his clients Loomer and Stone.

Pickles achieved that status when he was kicked off Facebook and Instagram earlier this year. He was given no reason for his banishment but — as a point of pride — said it coincided with Loomer and Stone getting kicked off both platforms.

Trump's call-out during presidential debate drove attention ... and backlash

While Trump's shout-out gave the Proud Boys an avalanche of free publicity and drove up interest in the group, the backlash was swift.

Color of Change, the nation's largest online racial justice organization, succeeded in its years-long efforts to convince Google to ask a Cloud Services customer to stop hosting the Proud Boys website and online store. Within a day, the Proud Boys site was back online with a new web hosting service.

Amazon, eBay, Etsy and Teespring, an e-commerce platform that allows people to create and sell custom apparel, also stopped selling Proud Boys products. Twitter and Facebook de-platformed the group in 2018, and the payment processor PayPal cut its ties with the group in 2019.

The LGBTQ community also fired back by hijacking the #ProudBoys hashtag. Star Trek star and activist George Takei launched the prank two days after the debate when he tweeted: "What if gay guys took pictures of themselves making out with each other or doing very gay things, then tagged themselves with #ProudBoys. I bet it would mess them up real bad. #ReclaimingMyShine."



Proud Boys at Trump LGBTQ counter-rally in Orlando, June 18, 2019

Members of the Proud Boys jeered LGBTQ counter-protestors several blocks from rally where Trump announced re-election bid in Orlando, June 18, 2019.

Christine Stapleton, Palm Beach Post

The movement went viral and searches for the hashtag #ProudBoys on Twitter returned countless photos of gay couples kissing.

Still, the Trump bump was "awesome," Pickles said. The topic came up as a trick question and it would have been better if the president had said the Proud Boys are not white supremacists, Pickles said.

Proud Boys, meanwhile, are showing up at more mainstream conservative events without their megaphones and weapons. Gavin McInnis made a podium appearance at Loomer's victory party after the August primary, and Tarrio was a featured speaker at AMPFest, the annual convention for young conservatives held at Trump Doral.

"People are getting woken up by this whole thing," Pickles said. "People you would never expect or suspect of being even remotely right wing are going, what is the Proud Boys?"

cstapleton@pbpost.com

@ChristineStaple

Proud Boys surround man with knife at violent DC Trump rally

nypost.com/2020/12/13/one-person-stabbed-during-massive-proud-boys-brawl-in-dc/

By Elizabeth Elizalde December 13, 2020

December 13, 2020 | 12:47am | Updated December 13, 2020 | 8:20am

Violence erupted in Washington, D.C., on Saturday night as Proud Boys and Antifa clashed after a day of pro-Trump demonstrations, leaving a female cop injured and at least four people stabbed — including in this dramatic, caught-on-video knife-fight.

The video shows a lone African American counter-protester, dressed all in black, as he is surrounded outside Harry's Bar at 11th and F streets NW by a group of shouting white men.

Many in the crowd are wearing "America Strong" hats and the gold, laurel wreath insignia associated with the far-right, white nationalist Proud Boys.

At first, the surrounding group just taunts the black-clad counter-protester, telling him to leave.

He indeed begins to walk off, glaring at the taunting group over his shoulder.

"Get out! Get the f— outta here!" they shout at him. "Go that way!"

But when he's shoved from behind, the lone counter-protester pulls what appears to be a gravity knife from his right coat pocket.

He flicks it open and holds it down at his side as he continues trying to walk off — and the group surrounding him bursts into screams and shouts, some among them moving still closer to him.

"He's got a knife!" they shout. Others in the crowd shout, "Get back! Get back!"

Women can be heard shrieking. One woman is seen in the video grabbing and pulling at the counter-protester's balaclava-style ski hat, which covers most of his head and face.

The counter-protester appears to be swinging his knife and running away as some in the crowd then give chase and tackle him.

"Get his ass!" someone in the crowd yells.

"Stop guys stop — please stop" police can then be heard shouting as they break up the scrum, into which the knife-wielding counter-protester has disappeared.

The clip ends with the crowd clearing the way for multiple D.C. police officers who have rushed quickly to the scene, breaking up the scrum and taking control of the now cowering counter-protester, who has curled up into a ball on the sidewalk.

A separate video of the same incident, tweeted by @mauricioxgomez, shows others in the crowd surrounding and trying to help a male victim with a bleeding stab wound to his stomach.

"He got stabbed!" someone shouts. "Medic! Medic! Medic!"

"There was a lot of alcohol — it was a charged atmosphere," videographer James Keivom told The Post of the scene outside Harry's.

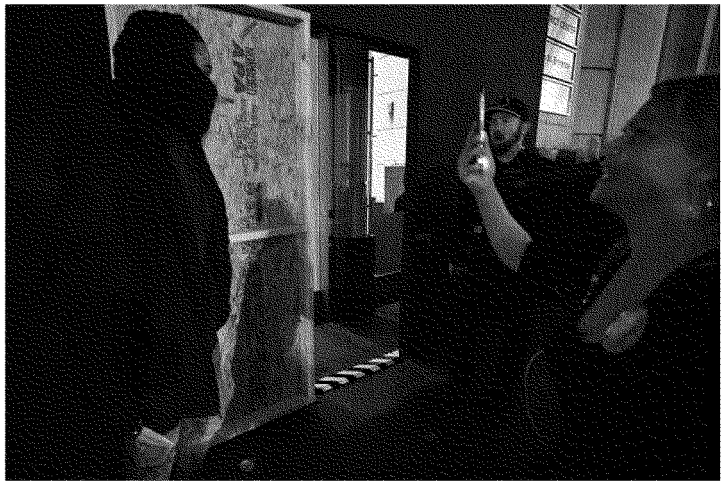
At least four stabbing victims were hospitalized, and some suffered life-threatening injuries, D.C. fire spokesman Doug Buchanan told the Washington Post.

One police officer was also injured, the paper said.

ABC 7 tweeted footage of the injured cop as she limped away from the scene, supported on both sides by her fellow officers.

"The officer appeared to have tears in her eyes," the tweet noted.

The Metropolitan Police Department told WRC-TV that 23 people were arrested.



Members of the Proud Boys confront a man with a knife in DC Saturday night.
James Keivom



Members of the Proud Boys confront a man with a knife in DC Saturday night
James Keivom



A police officer stands over a man who was attacked by members of the Proud Boys.
James Keivom



Paramedics take a man to the hospital after the stabbing.
James Keivom for New York Post

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Trump Supporters Gather As Votes Are Counted in Atlanta

gpb.org/news/2020/11/05/trump-supporters-gather-votes-are-counted-in-atlanta



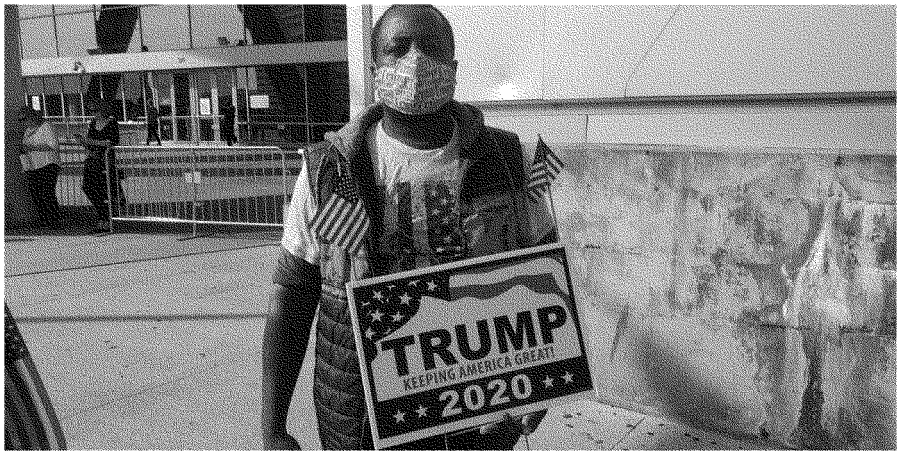
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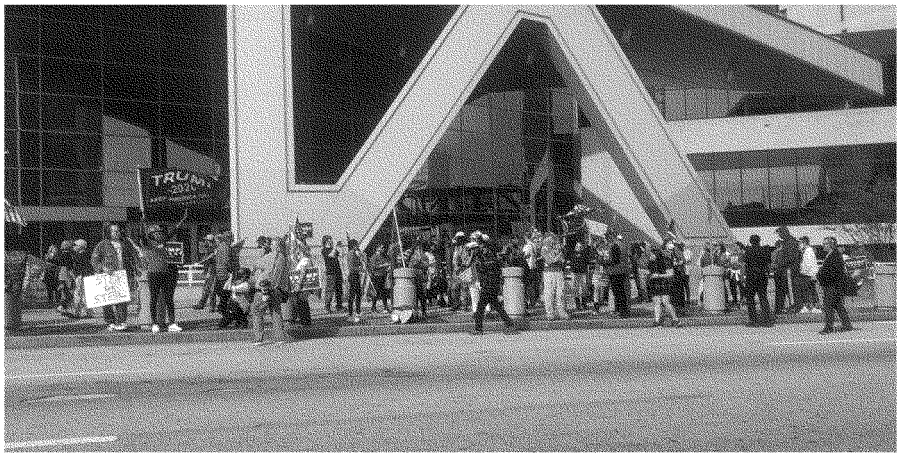
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Credit: Sarah Rose



Credit: Sarah Rose

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Nearly a hundred Trump supporters rallied outside of the State Farm Arena in downtown Atlanta, where ballot counting was in process, alleging that voter fraud was taking place in the state's presidential vote tally.



"I've been seeing and hearing a lot of things that are not being broadcast," said Kimberly Aikland of Dacula. "I think this election is in jeopardy of being tampered with."



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Caption

Trump supporter Gladys K. protests outside of State Farm Arena in Atlanta as votes are counted in the 2020 election.
Credit: Sarah Rose/GPB News

Gladys K. escaped Cuba when she was 24 and said she's supporting Trump because she doesn't want Americans to experience what she did under Castro communism.

"I left Cuba because there was no freedom of religion, freedom of education, freedom of commerce," she said. "If the American people think that the shenanigans with this election is just about Republicans or Democrats, they better wake up — because it's going to happen to you also."

Secondary Content

About the author

Author



Sarah Rose
REPORTER

Sarah Rose (*they/them*) is a reporter for GPB News covering public policy issues throughout the state.

Detroit Elections Center Employee On 'Stop The Count' Protest: 'It Said A Lot'05:52 Download Copy the code below to embed the WBUR audio player on your site

wbur.org/hereandnow/2020/11/05/detroit-stop-the-vote-protest



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Here & Now's 2020 Election Coverage



Election challengers demand to enter to observe the absentee ballots counting but were denied after the room reached capacity during the 2020 general election in Detroit, Michigan on Wednesday, Nov. 4, 2020. (Salwan Georges/The Washington Post via Getty Images)

Soon after the Associated Press called the state of Michigan for Joe Biden, a chaotic scene erupted inside the Detroit convention center.

Police barred Republicans and Democratic poll challengers from entering a room where Detroit ballots were being counted. A group identified as Republicans chanted "stop the count" as they were met by police, who shielded the doors of the city's TCF Center.

Authorities were able to quickly disperse the crowd but a photo in The New York Times captured one worker fearlessly staving off the protesters. Exterior logistics coordinator Sommer Woods says she stepped outside to explain the process to the crowd.

"For me, it was just a matter of making sure that we were being fair," she says, "but obviously also the workers that were on the inside, for their safety as well."

A long-time logistics coordinator, Woods says she was called in to help with an election for the first time — and the experience "forever changed" her. People talk about the importance of voting but don't put enough emphasis on taking part in the process, she says.

"Even though it was my first time being that entrenched in the process, I will forever be a part of it going forward and never take that for granted," she says. "So I feel very fortunate and I feel very blessed that I was able to play a small role."

Despite that Detroit is a majority Black city, videos from the scene show the protesters were white. For Woods, the altercation "said a lot" about the state of the country.

Election workers stayed in the room all night and counted ballots while the white people outside banged on the windows and yelled at them, she says. And the protesters were "irate" as they yelled at Woods when she came out to talk to them, she says.

Even in this hostile space, Black workers continued doing their job with grace, she says.

"Those people that sat at those tables, that had to listen to people beating on the walls to try to throw them off, through it all, they still maintained to count every single vote," she says. "That said a lot for me — especially being a Black woman from Detroit — that we showed up. We represented. We did what needed to be done."

This situation shows that the country has more work to do around racial healing and building respect, she says. In Detroit, Woods says people sometimes take for granted that the racial dynamics in the city vastly differ from Michigan at large.

"There's Detroit," she says, "and then there is Michigan."

To start the healing process, Woods says people need to take an honest, introspective look at themselves and the U.S. As people continue to find ways to dismantle systemic racism, communities also need to be rebuilt, she says.

The election workers who kept counting through the protest can aid in this healing by telling their stories, she says.

"I want them to share those moments, because the more that we're able to share to make this a more human experience, then I think that we can be able to do some work in order to heal," she says. "That's just to start."

Cristina Kim and Ciku Theuri produced this story and edited it for broadcast with Tinku Ray. Allison Hagan adapted it for the web.

Stop the Steal Protest at Central Vote Site

urbanmilwaukee.com/2020/11/05/stop-the-steal-protest-at-central-vote-site/

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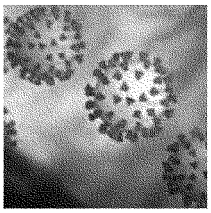
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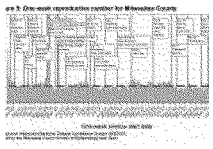


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Trump, Biden backers launch protests at vote center in North Las Vegas

lasvegassun.com/news/2020/nov/05/trump-biden-backers-converge-vote-center-nlv/

November 5, 2020



Steve Marcus

Mike and Wetonia Houlihan listen to speakers during a protest at the Clark County Election Center in North Las Vegas Wednesday, Nov. 4, 2020.

By *Ricardo Torres-Cortez* (contact)

Thursday, Nov. 5, 2020 | 2 a.m.

Competing protests gathered in front of a Clark County Election Department center, with one side proclaiming its candidate the winner and the other wanting the vote count to proceed.

Several dozen flag-waving President Donald Trump supporters huddled peacefully Wednesday night in front of the North Las Vegas warehouse, where workers continue to tally votes that will help determine if their candidate will remain in the White House for another term.

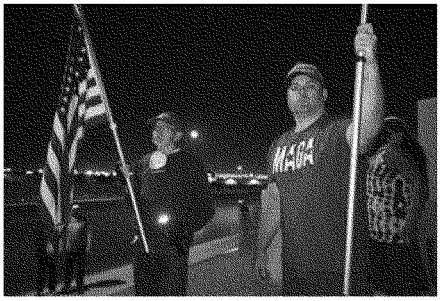
As one of the handful of states that hasn't yet turned red or blue on U.S. Electoral College maps, Nevada's six votes could hand Joe Biden the highest office in the land.

Ballots continue to be counted here as the former vice president's razor-thin lead in Nevada stood at fewer than 8,000 votes Wednesday.

The Make America Great Again crowd was part of a multistate movement named #stopthesteal in which organizers and followers suggest that Trump has won reelection, alleging unproven conspiracies about widespread voter fraud by Democrats, polling station workers and the "fake news" media.

'Stop the Steal' Protest at Election Center

Launch slideshow »



Early Wednesday morning, hours after the polls closed across the country, Trump called for vote counting to stop in several states, proclaiming himself the winner and alleging that if he loses, it would be because of fraud.

He's offered no evidence for the alleged intrigue. But as Biden's path to 270 electoral votes became clearer Wednesday, Trump supporters have also converged on vote-counting centers in Michigan and Arizona. Republicans have filed suit in various states over the election.

The pro-Trump group grew from about a dozen to 50 with sympathizers in MAGA gear waving Trump campaign flags. North Las Vegas Police had blocked the parking lot, and the supporters gathered on a public sidewalk overlooking the warehouse.

"President Trump has won," said Rebecca Gandara, who stood with her friend Lisa Maims, whom she befriended last presidential election season. "He won Nevada. President Trump four more years."

Gandara said she didn't believe votes were being counted. "I would bet my life there's no people in there," she said about the warehouse.

Maims said she heard from a friend who told her about "illegals" brought in to vote on Tuesday and some evidence that they were sending to Rudy Giuliani, Trump's personal attorney. Voter fraud in the U.S. is very rare, according to the Brennan Center for Justice.

Gandara railed against Gov. Steve Sisolak and the COVID-19 restrictions, but also spoke about being eager to vote when she awoke at 5:30 a.m. to vote red across the board on Tuesday. "I'm American and I love President Trump," she said. Democrats, she added, are "the party of rioters, looters and hate. We don't hate, we love everybody."

They went on peacefully to listen to event organizers Courtney Holland and conservative activist Michael Coudrey, who gave examples of what he called voter fraud and spoke about taking the country back.

They said Wednesday's event was to "plant a seed" and to prepare for more such demonstrations.

After hearing about the pro-Trump protest, a liberal group organized its own demonstration, with participants chanting, "count every vote!"

Both sides kept a substantial distance between each other and didn't direct their attention at each other.

Valeria Villaseñor, 20, voted in her first presidential election this year.

"I feel like every vote matters," she said, adding that she'd voted for Biden. "No one should be mad just because the other is losing."

Meanwhile, from New York City to Seattle, thousands of demonstrators turned out to demand that every vote be tallied.

In Portland, Oregon, which has been a scene of regular protests for months, Gov. Kate Brown called out the National Guard as demonstrators engaged in what authorities said was widespread violence downtown, including smashing windows. Protesters in Portland were demonstrating about a range of issues, including police brutality and the counting of the vote.

In New York, hundreds of people paraded past boarded-up luxury stores on Manhattan's Fifth Avenue, and in Chicago, demonstrators marched through downtown and along a street across the river from Trump Tower.

Similar protests — sometimes about the election, sometimes about racial inequality — took place in at least a half-dozen cities, including Los Angeles, Houston, Pittsburgh, Minneapolis and San Diego.

Trump Supporters' Own Explanations For Assaulting The Capitol Are Undercutting His Impeachment Defense

buzzfeednews.com/article/zoetillman/trump-impeachment-capitol-rioters-fight-like-hell



Brendan Smialowski / Getty Images
Former president Donald Trump gives a speech to supporters before the insurrection at the US Capitol on Jan. 6, in which he tells them to "fight like hell."

WASHINGTON — Former president Donald Trump formally responded Tuesday to the charges filed by House Democrats in his second impeachment, denying that he incited a mob to violently descend on the Capitol building to stop Congress from certifying President Joe Biden's win.

But court records in the 175-plus criminal cases filed so far in connection with the Jan. 6 insurrection reveal that's exactly what at least some of Trump's supporters thought he was directing them to do.

"[T]oday President Trump told Us to 'fight like hell,'" Troy Smocks, a Texas man charged with making threats, posted on Jan. 6 on Parler, quoting Trump's speech to supporters before the insurrection, according to the government's court filings. Smocks appeared to admit to participating in the attack on the Capitol in his posts, although he isn't charged with that; he urged his followers to get weapons and prepare to "hunt" Democrats, tech executives, and others he considered "enemies of Our constitution," writing, "We now have the green light."

"[Trump] said that Our cause was a matter of national security, and that these people behind the massive fraud must be arrested and brought to justice. And that task, falls on the shoulders of We The People.... the American Patriots," Smocks wrote, court documents say. A judge ordered him to be held in jail pending trial, citing his posts on Parler.

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Trump's lawyers are contesting the constitutionality of impeaching a former president, as well as disputing whether he really meant it when he had repeatedly told his supporters to "fight."

"It is denied that the phrase 'if you don't fight like hell you're not going to have a country anymore' had anything to do with the action at the Capitol as it was clearly about the need to fight for election security in general, as evidenced by the recording of the speech," Trump's lawyers wrote in his official response papers.

But court filings in many cases showed that the former president's supporters came to Washington spoiling for a fight and that they broadly took calls from Trump and his allies to "stop the steal" — a reference to baseless claims of widespread voter fraud — to be an appeal for violence. Social media posts, FBI interview summaries, and publicly available interviews that prosecutors included in charging papers also lay out the extent to which Trump's supporters were waiting to take orders from him and understood his words as a direction to act.

Robert Bauer, charged with unlawfully entering a restricted area (the US Capitol) and violent entry and disorderly conduct on Capitol grounds, spoke with two FBI agents on Jan. 8. He "reiterated that he marched to the U.S. Capitol because President Trump said to do so," according to his charging papers. The FBI affidavit includes a screenshot of a selfie found on Bauer's phone that shows him and his cousin (and codefendant) Edward Hemenway II, both wearing "Trump 2020" hats, smiling and posing with their middle fingers up inside the Capitol building.

"According to BAUER, after President Trump told the crowd, 'We are going down Pennsylvania Avenue to the Capitol,' the crowd began moving towards the Capitol," an FBI agent wrote in the affidavit.

Robert Sanford, a Pennsylvania man charged with throwing a fire extinguisher at police officers at the Capitol, similarly told the FBI when he was interviewed on Jan. 12 that he was part of a group that "had gone to the White House and listened to President Donald J. Trump's speech and then had followed the President's instructions and gone to the Capitol."

> "IF TRUMP TELLS US TO STORM THE FUKIN CAPITAL IMA DO THAT THEN!"

In charging papers for Kenneth Grayson of Pennsylvania, the FBI quoted a private message that he allegedly sent to an unidentified person on Dec. 23 about his plans to go to DC on Jan. 6 and take direction from Trump. Grayson, who allegedly livestreamed video on Facebook of himself going into the Capitol and who prosecutors believe is a follower of the QAnon mass delusion, is charged with being a restricted area, disorderly and disruptive conduct, and obstructing an official proceeding.

"I'm there for the greatest celebration of all time after Pence leads the Senate flip!! OR IM THERE IF TRUMP TELLS US TO STORM THE FUKIN CAPITAL IMA DO THAT THEN! We don't want any trouble but they are not going to steal this election that I guarantee bro!!" Grayson allegedly wrote.

Samuel Fisher, a New York man charged with illegally going into the Capitol and disorderly conduct, wrote in a lengthy post on his personal website dated Jan. 6, apparently before the attack, "Trump just needs to fire the bat signal... deputize patriots... and then the pain comes."

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It's too early in most cases for people charged with participating in the insurrection to have had a chance to offer a defense — but in a few court fights over whether defendants should be kept in jail or allowed to go home pending trial, their lawyers have highlighted the connection between Trump's words and the violence at the Capitol. In opposing pretrial detention for Emanuel Jackson, who is charged with assaulting police officers as well as illegally going into the Capitol, his lawyer wrote that "the nature and circumstances of this offense must be viewed through the lens of an event inspired by the President of the United States." A judge ordered Jackson kept in custody.

A judge is scheduled to hear arguments on Feb. 3 on whether to order pretrial detention for Dominic Pezzola, a New York man and member of the Proud Boys identified in videos breaking a window at the Capitol and who the government alleged had instructions at his home to make guns and bombs. In a recent interview, Pezzola's lawyer told Reuters that the "logical thinking" to Trump's supporters was that the president had "invited" them to Washington.

Reuters also noted that during a Jan. 21 court hearing, a lawyer for Riley Williams of Pennsylvania told the judge that her client "took the president's bait and went inside the Capitol." Williams is charged with illegally going into the Capitol as well as stealing or helping to steal a laptop from House Speaker Nancy Pelosi's office; Williams, through her lawyer, has denied any involvement in the theft.

The House voted to impeach Trump for a historic second time on Jan. 13 for inciting the insurrection at the Capitol. A trial in the Senate is expected to begin next week. The Senate voted last week against a Republican attempt to reject the impeachment effort as unconstitutional, which means a trial will take place, but enough Republican members supported the measure that it's unlikely Democrats can win the two-thirds majority needed to convict Trump of high crimes and misdemeanors.

REUTERS

U.S. LEGAL NEWS

FEBRUARY 2, 2021 / 6:12 AM / UPDATED 3 DAYS AGO

'He invited us': Accused Capitol rioters blame Trump in novel legal defense

By Jan Wolfe

(Reuters) - Emanuel Jackson, a 20-year-old Washington area man, was caught on video using a metal bat to strike the protective shields wielded by police officers as they tried to fend off rioters storming the U.S. Capitol on Jan. 6.

U.S. President Donald Trump speaks during a rally to contest the certification of the 2020 U.S. presidential election results by the U.S. Congress, in Washington, U.S, January 6, 2021. REUTERS/Jim Bourg

Jackson, awaiting trial in federal court on assault charges, is now adopting a novel legal defense: seeking to pin the blame on Donald Trump, citing the former president's remarks at a "Stop the Steal" rally shortly before the Capitol siege.

Trump told the crowd to "fight like hell," said "we will not take it anymore" and repeated his false claims that the election was stolen from him through widespread voting fraud. Trump exhorted his followers to go to the Capitol. The ensuing rampage interrupted the congressional certification of President Joe Biden's election victory, sent lawmakers into hiding and left five people dead including a police officer.

Jackson's lawyer, Brandi Harden, wrote in a Jan. 22 court filing that "the nature and circumstances of this offense must be viewed through the lens of an event inspired by the President of the United States."

The Capitol siege, Harden added, "appears to have been spontaneous and sparked by the statements made during the 'Stop the Steal' rally." Harden argued that Jackson should be released while awaiting trial. A judge on Jan. 22 denied the request.

At least six of the 170 people charged in connection with the Capitol siege have tried to shift at least some of the blame onto Trump as they defend themselves in court or in the court of public opinion.

Other defendants to take this route include Jacob Chansley, who donned a horned headdress and face paint during the attack, and Dominic Pezzola, a member of the Proud Boys right-wing extremist group who is accused of shattering a window in the Capitol with a stolen police shield so rioters could enter.

"The boss of the country said, 'People of the country, come on down, let people know what you think,'" Pezzola's defense lawyer, Michael Scibetta, told Reuters. "The logical thinking was, 'He invited us down.'"

Lawyers have not yet sought dismissal of charges or acquittal during a trial based on the idea that Trump incited their clients, instead making the claim as part of efforts to spare them from pretrial detention.

No defendant will be able to avoid criminal culpability by saying they were incited by Trump, said Jay Town, who served as the top federal prosecutor in Birmingham, Alabama, during the Trump administration.

"If anything, it is an admission to criminal conduct," said Town, now the general counsel of cybersecurity firm Gray Analytics. "While this ineffective tactic may help with headlines, it will not help the fate of any defendant."

Trump took to a stage near the White House and exhorted supporters to "fight" - using the word more than 20 times. Trump told the crowd that "everyone here will soon be marching over to the Capitol." About 50 minutes into the speech, many of them did.

Trump adviser Jason Miller did not immediately respond to a request for comment on the legal strategy of blaming the former president. Trump has called his speech "totally appropriate."

IMPEACHMENT TRIAL

The Democratic-led House of Representatives voted to impeach Trump on a charge of "incitement of insurrection" stemming from his Jan. 6 speech. He faces an impeachment trial next week in the Senate.

Enough of his fellow Republicans in the Senate have signaled opposition to impeachment to indicate that the chamber almost certainly will fall short of the two-thirds majority needed to convict him. Democrats hope to use the trial to disqualify him from future public office.

Lori Ulrich, a defense lawyer in Pennsylvania, said that her client Riley June Williams was motivated by Trump's remarks. Williams, 22, is accused of stealing a laptop from House Speaker Nancy Pelosi's office during the siege.

Slideshow (4 images)

It is "regrettable that Ms. Williams took the president's bait and went inside the Capitol," Ulrich told a judge at a Jan. 21 court hearing as she argued against Williams being detained while her case proceeds. The judge released Williams to home confinement.

Some legal experts said the "blame Trump" defense could complicate matters for defendants if they eventually plead guilty in hopes of getting a lesser sentence. Town noted that federal judges require defendants who plead guilty to accept full responsibility for their conduct.

Scibetta acknowledged the limits of the effectiveness of blaming Trump.

"It would be reckless to put all your eggs in that basket," Scibetta said.

But Scibetta said Trump's speech helps explain how people got swept away in the riot.

"These were people acting in a way they have never acted before," Scibetta said, "and it begs the question, 'Who lit the fuse?"

Reporting by Jan Wolfe; Additional reporting by Sarah N. Lynch; Editing by Will Dunham and Noeleen Walder

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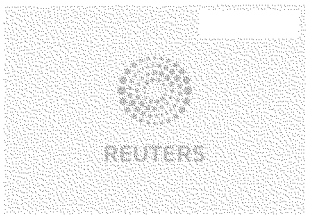


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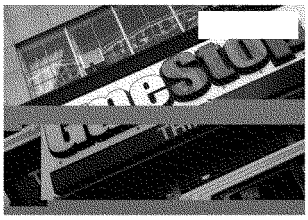


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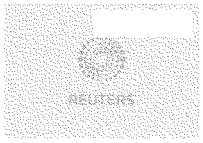
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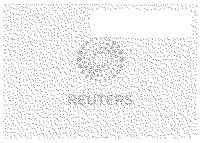
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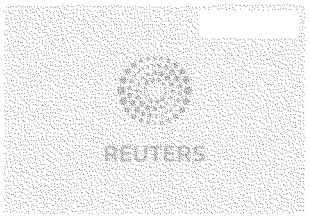


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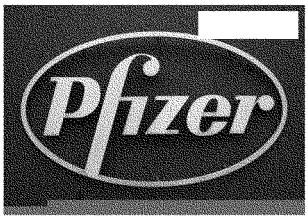


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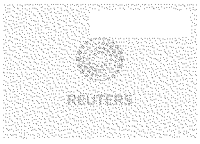
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What the Founders Would Have Done with Trump

An originalist case for trying, convicting and disqualifying a president after he or she leaves office.

by Frank O. Bowman, III (https://washingtonmonthly.com/people/frank-o-bowman-iii/)

January 18, 2021

LAW AND JUSTICE (https://washingtonmonthly.com/law-and-justice/)

Donald Trump has now been impeached by the House of Representatives for the second time but will not stand trial before the Senate until after he has left office. Senate backers of the president seem to be coalescing around the argument that at that point their body will no longer have jurisdiction over the by-then ex-president.

The majority of impeachment scholars maintain that the impending trial is perfectly proper. An insistent minority urge the opposite. The arguments so far focus primarily on the text of the constitution and on three prior impeachments: Senator William Blount who, in 1797-98, was impeached while in office and tried afterward; Secretary of War William Belknap, who in 1876 was both impeached and tried after leaving office; and Judge West Humphreys, who in 1862 was impeached, tried, convicted, and disqualified a year after he abandoned his office to join the Confederacy. Although these impeachments provide persuasive precedent for post-term Senate impeachment jurisdiction, obsessing over them can mislead us because none involved a president. Even though Article II, §4, renders all "civil officers" (a phrase we now read to include judges and executive branch appointees) impeachable, the president was the nearly exclusive focus of all the impeachment debates at the Constitutional Convention.

The delegates supported the ouster of a president for personal corruption, egregious incompetence, and betrayal of the nation to foreign powers. But a singular concern of the Framers, not merely when debating impeachment but throughout the process of designing the constitutional system, was the danger of a demagogue rising to the highest office and overthrowing republican government.

When composing our Constitution, the Framers drew on their educations and studied every historical model they could find. When crafting the impeachment clauses of the Constitution, they focused particularly on the constitutional history of Great Britain and the history of the limited number of prior republics, especially those of ancient Greece and Rome.

The unwritten British constitution was the Framers' patrimony. In the wrenching process of resisting and then freeing themselves from British rule, they had studied and debated its every nuance. Likewise, the ancient history of Rome and Greece was the core of the "classical education" almost all the Framers possessed to one degree or another, and the educated members of the founding generation drew on their knowledge of it for inspiration and example. Their public and private papers are full of classical allusions. They commonly wrote under pseudonyms of Roman political personalities — Cato, Caesar, Brutus, Agrippa, Cincinnatus, and most famously, Publius, the pen name used by Alexander Hamilton, James Madison, and John Jay as authors of *The Federalist Papers*.

The impeachment mechanism written into the American Constitution owes its structure to a set of very specific lessons the Framers drew from British and classical history.

Impeachment was well known to the Framers as an invention of the British Parliament, crafted as a legislative tool for resisting royal oppression. Impeachment could not remove the monarch, but it could hobble a ruler's aspirations by removing the ministers who were active agents of royal absolutism. For Parliament, the men most to be feared, who thus became the targets of the great political impeachments, were the hereditary aristocrats and landed gentry who were favorites of the Crown. But such figures could not be entirely defanged merely by removing them from office — even out of office, they retained title, land, wealth, and royal favor and might rise again to threaten constitutional order and, in the violent politics of the times, the very lives of the parliamentarians.

Therefore, the consequences of conviction following a British impeachment included the full range of penalties we would consider criminal – imprisonment, forfeiture of property and title, even death. These stern remedies were not merely retribution for wrongdoing, or even deterrent warnings to future officeholders, but prophylactic measures to ensure that the convicted officer could never again threaten constitutional governance.

The American Framers rejected monarchy, and they chose not to create an American aristocracy. Thus, the dangers against which the American rules of impeachment were directed were different. The Framers did not have to worry that an impeached and expelled officer would retain a hereditary title or landed fiefdom from which he could plot a violent resurgence. Nor did they have to worry that such a person would climb back into power by the grace of a hereditary monarch.

Moreover, they did not want the national legislature to act as a court, imposing personal punishments on either private citizens or erring officeholders. But they were every bit as conscious as the British that merely removing an officeholder from power would not necessarily neuter the threat such a person

could pose to the Republic. The particular threat that haunted the founding generation was the demagogue.

The founders cautioned against demagogues constantly. The word appears 187 times in the National Archives' database of the founders' writings. Eighteenth-century American writers often used "demagogue" simply as an epithet to suggest that a political opponent was a person of little civic virtue who used the baser arts of flattery and inflammatory rhetoric to secure popular favor. In 1778, in the midst of the Revolution, George Washington wrote to Edward Rutledge complaining that, "that Spirit of Cabal, & destructive Ambition, which has elevated the Factious Demagogue, in every Republic of Antiquity, is making great Head in the Centre of these States."

But the idea at the bottom of the insult was the Framers' conclusion, based on the study of history ancient and modern, that republics were peculiarly vulnerable to demagogues – men who craved power for its own sake, and who gained and kept it by dishonest appeals to popular passions.

The Framers had ancient historical examples constantly in mind, particularly Cataline, who sought to overturn the Roman Republic by ingratiating himself with the Roman mob and raising an army to make him a dictator. His name was a synonym for anti-republican villainy in the minds of the Revolutionary generation, just as the famous Romans who thwarted him, Cicero and Cato, were the universally admired symbols of steadfast republican virtue.

Alexander Hamilton summed up the Founders' view in Federalist No. 1:

> History will teach us, that ... of those men who have overturned the liberties of republics the greatest number have begun their carreer [sic], by paying an obsequious court to the people, commencing Demagogues and ending Tyrants.

The worry about demagogues influenced every aspect of the constitutional debate. For example, in proposing large, populous districts for members of the House of Representatives, Madison argued they would be less likely to elect demagogues.

The Framers' fear of a demagogue was doubly acute because the new American chief executive would be chosen, not by hereditary succession, but the people. The much-maligned electoral college was devised, not only as a means of giving states a special mediating role in picking the president, but also with the idea that the state legislatures tasked with devising processes for picking electors, and the electors themselves, would be sensible statesmen immune to the popular intrigues of a demagogue.

However, the Framers expressly rejected the idea that periodic elections alone, even elections by the imagined body of discerning electors, would be sufficient proof against a president either corrupt or with aspirations to tyranny. Accordingly, they adopted impeachment, but with two major innovations from British practice.

The first was making the president, America's head of state and chief executive, subject to impeachment at all. If a demagogue rose to the presidency, he could, upon displaying dangerous behavior redolent of autocratic ambitions, be removed. But Article I, Section 3, does not limit the consequences of conviction to removal. It goes on to permit "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."

This provision serves a critical function. Unlike British impeachments of old, impeachment under the federal constitution is not punitive. It is purely political. It seeks to protect the constitutional order in part by removing bad actors from federal service now, *but also*, where appropriate, *by preventing them from rising to power again*. Because the United States has neither a hereditary monarch nor a hereditary landed aristocracy, the officer removed need not be imprisoned or killed to prevent a return to national power. Permanent disqualification suffices. If personal punishments are deserved, those are reserved to the ordinary criminal courts.

How is all this relevant to the apparently technical question of whether a president may be tried after he leaves office?

The key to the Founders' fear of the demagogue was not merely that he might secure high office, but that the means by which he would attain it – appeal to the mob – would allow him to corrupt or overthrow the Republic in order to transform himself into a dictator. The source of the demagogue's power does not expire if he is expelled from office; so long as he retains the loyalty of the mob, he may return to power.

As concerned as the Framers were about the dangers of the demagogue, they imagined that they were protecting their new Republic in a variety of ways – including a presidential electoral system managed by state political elites and large House districts – that would defeat the wiles of such a person in an age when communication was limited to voice, letters, and newspapers of limited local circulation. Imagine their terror if told of today's technology that allows the demagogue to appeal directly to millions through Facebook, Twitter, Instagram, and YouTube.

Donald Trump is the living embodiment of the Framers' fears, amplified many-fold by the reach of modern media technology. If there were any doubt that his departure from the White House will not alone end his threat to the national government, consider that, even now, after the failure of the January 6 as-

sault on the Capitol and the chastisement of a second impeachment, Washington, D.C., has become a vast armed camp fortified, not against foreign invaders, but against Trump supporters *still* seeking to overturn the results of a free and fair election.

Trump was the man against whom the founding generation armed the constitution with the disqualification clause. They would surely think anyone quite mad for suggesting that a president who actively sought the overthrow of democracy could not be disqualified from trying again because the failed plot reached its crescendo too close to the expiration of his term.

The Senate trial of Donald Trump for inciting insurrection is entirely consistent with the founders' original intent.

Frank O. Bowman, III (https://washingtonmonthly.com/people/frank-o-bowman-iii/)

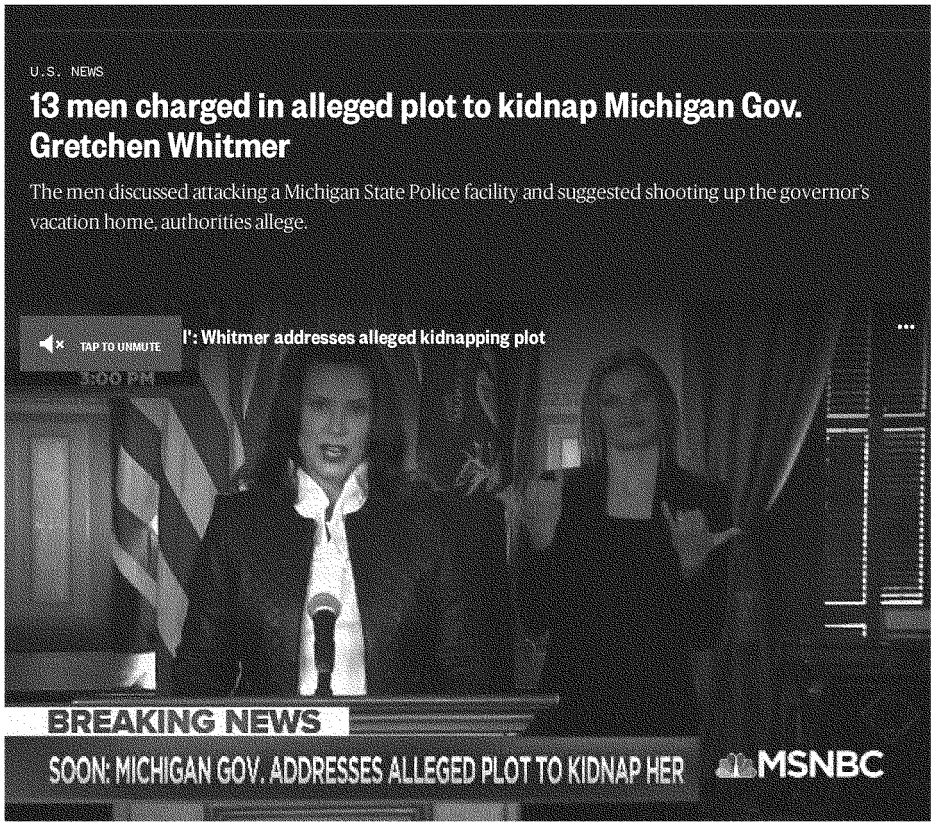
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Frank O. Bowman, III is Curators' Distinguished Professor at the University of Missouri School of Law; and the author of

High Crimes & Misdemeanors: A History of Impeachment for the Age of Trump (https://www.amazon.com/high-crimes-misdemeanors-history-impeachment/dp/1108481051)

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Oct. 8, 2020, 12:15 PM EDT / Updated Oct. 9, 2020, 12:17 AM EDT

By Tom Winter, Michael Kosnar and David K. Li

More than a dozen men were arrested on federal and state charges in connection with an alleged foiled plot to kidnap Michigan's Democratic governor, Gretchen Whitmer, authorities said Thursday.

Six were apprehended and charged with federal crimes, while another seven were picked up on state charges, officials in Michigan said.

All are members of two militia groups "who were preparing to kidnap and possibly kill me," Whitmer said in an address from Lansing late Thursday afternoon following the arrests.

"When I put my hand on the Bible and took the oath of office 22 months ago, I knew this job would be hard," Whitmer continued. "But I'll be honest, I never could have imagined anything like this."

She thanked federal and state law enforcement for bringing criminal charges that "hopefully will lead to convictions, bringing these sick and depraved men to justice."

The arrests grew out of an FBI-led inquiry that began in March and focused on militia groups' discussing the "violent overthrow" of certain government and law enforcement officials.

Each of the federally charged men faces up to life in prison if convicted on all charges, authorities said.

Those six suspects facing federal charges in the alleged kidnapping plot used encrypted messaging to communicate about the plot, conducted coordinated surveillance on the governor's vacation home and detonated an improvised explosive device wrapped with shrapnel, officials said.

Based on court documents, the FBI was well aware of the activities of the six men charged and there does not seem to have been an imminent threat posed to Whitmer.

The documents identify the defendants as Adam Fox, Barry Croft, Ty Garbin, Kaleb Franks, Daniel Harris and Brandon Caserta.

At a meeting in July, allegedly attended and recorded by one of the informants, the men "discussed attacking a Michigan State Police facility, and in a separate conversation after the meeting, Garbin suggested shooting up the governor's vacation home," authorities said.

Then at a July 27 meeting, Fox and an informant discussed a possible kidnapping of Whitmer, with the defendant allegedly saying: "Snatch and grab, man. Grab the f---ing governor. Just grab the b----. Because at that point, we do that, dude – it's over."

"Fox said that after kidnapping the governor, the group would remove her to a secure location in Wisconsin for 'trial'," according to the criminal complaint.



The alleged conspirators used code words and encrypted platforms to shield their discussions from authorities, according to U.S. Attorney Andrew Birge for the Western District of Michigan.

They used terms such as "cake" or "cupcakes" for bombs, a "chemistry set" for components of an improvised explosive device and "baker" for an explosives manufacturer, according to the complaint.

"Fox and Croft in particular ... discussed detonating explosive devices to divert police from the area of the (governor's vacation) home," Birge said.

The federal investigation involved at least one member of a Michigan militia group who was involved in a Second Amendment rally at the Michigan Statehouse in June.

That member allegedly told the FBI that the group was considering killing police officers and agreed to become an informant.

But the involvement of that militia in the plot to kidnap the governor appears to be minimal as the group that was charged Thursday allegedly discussed keeping the broader militia out of their actual plan.

In a YouTube video from May, Caserta claimed in a 30-minute diatribe that “the enemy is government.” He shot the video in front of an anarchist’s flag and a map of Michigan.

Caserta did not post on YouTube again until three weeks ago. In that video, Caserta does not speak, and simply loads and poses with a long gun off camera while wearing a shirt that says "F--- The Government."

The seven suspects facing state charges were identified as Paul Bellar, 21, Shawn Fix, 38, Eric Molitor, 36, Michael Null, 38, William Null, 38, Pete Musico, 42, and Joseph Morrison, 26.

They've all been charged with "providing material support for terrorist acts" and "carrying or possessing a firearm during the commission of a felony," according to state prosecutors.

The seven are linked to the Wolverine Watchmen militia, sought to "instigate a civil war" and had "engaged in planning and training for an operation to attack the Capitol building of Michigan and to kidnap government officials, including the governor of Michigan," Michigan Attorney General Dana Nessel said.

A senior federal law enforcement official said authorities believe the "Wolverine Watchmen" ideology differs from a conventional militia group. The official says this group believes in the "boogaloo" movement, a term that refers to an impending civil war.

The boogaloo movement is also described as an anti-government movement that advocates for a violent uprising targeting liberal political opponents and law enforcement.

There have been a number of arrests involving people linked to the boogaloo or self-described as being in the movement, including in the killing of a federal security officer and a California sheriff's deputy in May and June.

For months, Whitmer has drawn the ire of militia groups and others opposed to her restrictions aimed at curbing the spread of the coronavirus.

Armed protesters took to the streets of Lansing, the state capital, during the early days of Whitmer's coronavirus lockdown orders. And President Donald Trump famously tweeted "LIBERATE MICHIGAN!" in April.

"The Governor of Michigan should give a little, and put out the fire," Trump tweeted May 1. "These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal."

U.S. Attorney Matthew Schneider, who heads federal prosecutions in the Eastern District of Michigan, acknowledged the fraught political climate in which these arrests were made.

"All of us in Michigan can disagree about politics," he said. "But those disagreements should never, ever amount to violence."

Whitmer on Thursday said Trump was "complicit" through his rhetoric. She specifically linked the alleged actions of the suspects in her case to Trump's refusal, at a debate last week, to forcibly denounce white supremacist groups.

"Just last week the president of the United States stood before the American people and refused to condemn white supremacists and hate groups like these two Michigan militia groups," she said.

"'Stand back and stand by,' he told them ... hate groups heard the president's words not as a rebuke but as a rallying cry, as a call to action."

Trump on Thursday night attacked Whitmer, tweeting that the governor "has done a terrible job" and "locked down" her state, referring to coronavirus restrictions. "My Justice Department and Federal Law Enforcement" announced the foiling of a dangerous plot, he tweeted.

"Rather than say thank you, she calls me a White Supremacist," Trump wrote.

"I do not tolerate ANY extreme violence. Defending ALL Americans, even those who oppose and attack me, is what I will always do as your President!" he added in another tweet.

"Mr. President, I thought you weren't interested in a virtual debate?" Whitmer responded on Twitter, referint to Trump's stated refusal to participate in the next presidential debate after the Commission on Presidential Debates announced it would take place virtually "in order to protect the health and safety of all involved."

Trump is being treated for Covid-19.

Whitmer also encouraged Trump to watch her earlier speech, saying the president clearly had not done so. "If you're as tired of this divisive rhetoric as I am, there's something we can do about it," Whitmer said in another tweet, with a link related to voting.

Trump's rival, Joe Biden, criticized Trump's past remarks on Whitmer, saying the "words of a president matter."

"I just think it's got to stop. The president's got to realize the words he utter matter," the Democratic nominee said. "Why can't the president just say stop? Stop. Stop. Stop. And we will pursue you if you don't, so stop."

"There is a throughline from President Trump's dog whistles and tolerance of hate, vengeance, and lawlessness to plots such as this one. He is giving oxygen to the bigotry and hate we see on the march in our country," Biden said in a statement. "We have to stop it."

Whitmer was elected as the state's 49th governor in 2018, defeating Republican Bill Schuette by nearly 10 percentage points.

The governor on Thursday continued to defend her actions during the pandemic.

Michigan residents are now testing positive at about a 3-percent rate, one of the lowest in the nation, according to a rolling count kept by Johns Hopkins University.

"It's not over yet, but here's what I know: We're Michiganders. We have grit. We have heart and we are tough as hell," Whitmer said.

An attorney for Harris said in an email that he would speak to Harris on Friday and had no comment "except to say that he, like all Americans, are presumed innocent until adjudicated otherwise." Emailed requests for comment for attorneys listed as representing the other five people federally charged were not immediately returned Thursday evening.



Tom Winter

Tom Winter is a New York-based correspondent covering crime, courts, terrorism and financial fraud on the East Coast for the NBC News Investigative Unit.



Michael Kosnar

Michael Kosnar is a Justice Department producer for the NBC News Washington Bureau.



David K. Li

David K. Li is a breaking news reporter for NBC News.

Ben Collins, Brandy Zadrozny, Shamar Walters, Mohammed Syed, Matthew Mulligan and Phil Helsel contributed.

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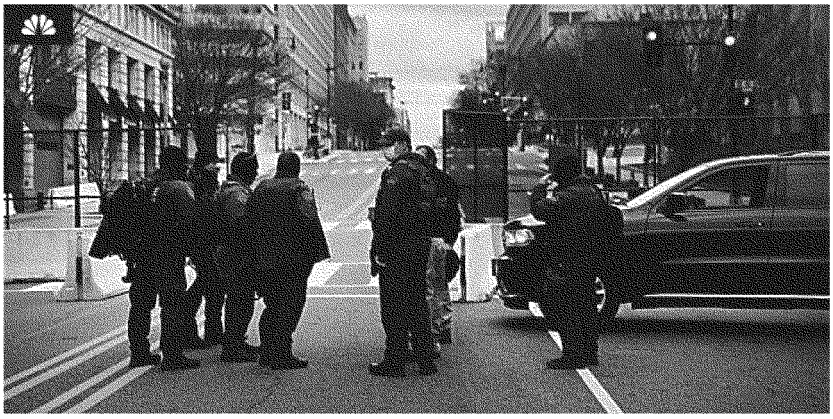
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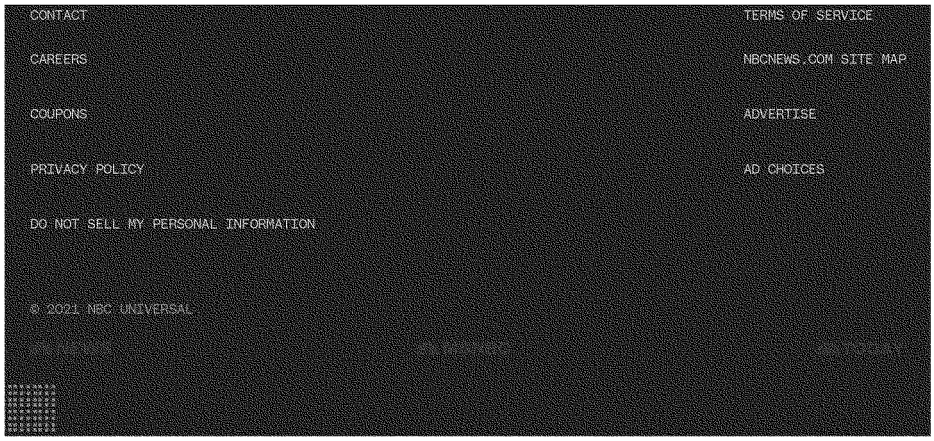
Woman arrested at inauguration checkpoint in D.C. said

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Trump plans big farewell ceremony as Pence does all the work

theworldnews.net/au-news/trump-plans-big-farewell-ceremony-as-pence-does-all-the-work

By Eli Stokols

January 16, 2021 — 12.53pm

Washington: Frustrated by the loss of his Twitter account and forced to accept that he soon must leave office, President Donald Trump has effectively stopped doing his job, delegating daily responsibilities to Vice-President Mike Pence while hunkering down with a shrinking group of acquiescent aides and contemplating additional presidential pardons.

Trump had considered leaving the White House before his final day in office, even as early as this weekend, but he has opted to depart on the morning of President-elect Joe Biden's Inauguration Day, according to two people familiar with discussions who cautioned that, with Trump, plans are always subject to change.



President Donald Trump has asked for an elaborate send-off on the morning of Inauguration Day. Credit:Bloomberg

The President has requested a major send-off on the morning of inauguration. It would begin with a throng of cheering, flag-waving staffers and supporters to see him off on the White House's South Lawn, according to a person familiar with the planning, and continue to a more formal ceremony at Joint Base Andrews, featuring a red carpet, military band, colour guard and 21-gun salute. He'll make his final Air Force One flight to Florida, to take up residence at Mar-a-Lago, his West Palm Beach, Florida, estate.

While Trump is still unwilling to formally concede to Biden directly, or to participate in the traditional show of the peaceful transfer of power by attending his successor's swearing-in, Pence called Vice President-elect Kamala Harris and "congratulated her and offered assistance ahead of inauguration," according to a person familiar with the call.

Pence, his relationship with Trump all but severed now because he refused to abet the President's efforts to overturn the election result, confirmed earlier in the week that he plans to attend Biden's inauguration. Trump, in one of his final tweets last week, made it clear he would not be going.

Previously, Trump had floated the idea of leaving town early to avoid having to host Biden at the White House before the inauguration ceremonies at the Capitol, as has long been traditional - to provide the time-honoured photo of the outgoing and incoming presidents that gives visual definition to America's peaceful transfer of power. Though he now might stay until Inauguration Day, Trump still has no plans to meet with the President-elect.

Finally forced to acknowledge the "new administration" - if not his defeat - Trump has withdrawn almost completely from the duties of the job he fought so hard to keep. Aides and friends who have spoken with him this week say he's been sobered somewhat by warnings from his lawyers about his potential legal liability for inciting last week's deadly riot.

Since the moment the pro-Trump mob smashed through the Capitol doors and into the House and Senate chambers to stop Congress' count of the electoral votes, Pence has effectively taken over the responsibilities of the Presidency. With Trump mesmerised by live television coverage of his supporters fighting for him, it fell to Pence - who'd been presiding over the count, and had to be rushed into hiding - to authorise the deployment of the National Guard in the District of Columbia to quell the mob.

The President is confident the Senate will again fail to convict him, according to one person who speaks with him regularly, and last Wednesday focused his ire on the 10 House Republicans who voted in favour of impeachment, peppering aides with questions about who some of the lawmakers were and what he could do to exact revenge.

Trump has instructed aides to knock down reports of his frustration with Rudolph Giuliani, one of the few lawyers still willing to defend him. That afternoon, while Trump took farewell photos with staffers, Pence visited the headquarters of the Federal Emergency Management Agency for a briefing about security preparations for the inauguration ceremony.

After the meeting, Pence told reporters that the government would "ensure that we have a safe inauguration, that President-elect Joe Biden and Vice President-elect Kamala Harris are sworn in ... in a manner consistent with our history and traditions".



Vice President Mike Pence elbow bumps with a member of the National Guard as he speaks to troops outside the Capitol on Thursday evening.Credit:AP

On his way home, Pence stopped to greet some of the 20,000 National Guards posted outside the Capitol, thanking them for their service.

By Friday (Saturday AEDT), Trump still had not addressed the nation about reports from the FBI and other law

enforcement agencies that domestic terrorists, emboldened by the breach of the Capitol that left at least five dead, threatened not only the inauguration but all 50 state capitals.

My Pillow Chief Executive Mike Lindell, one of Trump's staunchest defenders in arguing that fraud cost the President reelection, was spotted around an otherwise quiet White House. As Lindell left the West Wing, a photographer captured an image showing that the notes he was holding referred to "martial law" and the "Insurrection Act".

Pence is also scheduled to deliver an address Saturday, local time, on the administration's "foreign policy accomplishments" at California's Naval Air Station Lemoore, and then to the 10th Mountain Division, in Fort Drum, New York.

Typically, outgoing Presidents take part in an official farewell ceremony with members of the armed forces. Trump, however, isn't bothering. The White House emailed a brief statement to reporters from Trump that could mark a final, 67-word valedictory.

"United States military troops in Afghanistan are at a 19-year low. Likewise, Iraq and Syria are also at the lowest point in many years," the President said. "I will always be committed to stopping the endless wars. It has been a great honour to rebuild our military and support our brave men and women in uniform. $2.5 trillion invested, including in beautiful new equipment - all made in the USA."

Loading

Spending his final days almost entirely out of view, Trump is said to be readying a number of pardons and weighing whether to give one to himself. A self-pardon would be an act of untested and dubious constitutionality.

Those who have been in contact with the President are loath to predict whether he will go through with the brazen move. His calculations now must be weighed against the unsettled matter of his impeachment trial in the Senate; a conviction could bar him from ever seeking office again.

Los Angeles Times

Trump Biden 2020

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Extremists intensify calls for violence ahead of Inauguration Day

cnn.com/2021/01/08/us/online-extremism-inauguration-capitol-invs/index.html

January 9, 2021



(CNN)"Trump or war. Today. That simple."

"If you don't know how to shoot: You need to learn. NOW."
"we will storm the government buildings, kill cops, kill security guards, kill federal employees and agents, and demand a recount."
In the weeks, days and hours ahead of Wednesday's siege on the Capitol by President Donald Trump's zealous supporters, the warning signs were clear: online posts from hate groups and right-wing provocateurs agitating for civil war, the deaths of top lawmakers and attacks on law enforcement.
And now, as the dust settles and the country struggles to make sense of the violence that left five dead -- including an officer with the US Capitol Police -- experts warn that the calls for violence have only intensified ahead of Inauguration Day, when President-elect Joe Biden will be sworn in as commander in chief.
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"We are seeing ... chatter from these white supremacists, from these far-right extremists -- they feel emboldened in this moment," said Jonathan Greenblatt, the CEO of the Anti-Defamation League, which tracks and counters hate. "We fully expect that this violence could actually get worse before it gets better."

Supporters of President Donald Trump break into the US Capitol on January 6, 2021 in Washington, DC.

Wednesday's chaos -- which erupted during a protest to dissuade Congress from certifying the results of Biden's unambiguous win -- showed a loss of control and sudden breaking of the bond that for four years had held Trump, his supporters and the Republican leadership together in lockstep.

After rioters charged through a barricade, assaulted police officers, shattered windows and stormed into the hallowed building that was torched by the invading British military in 1814, Trump made a tepid plea for them to go home -- although he repeated the falsehood that the election had been stolen. Republican leaders that night -- including Vice President Mike Pence and Senate Majority Leader Mitch McConnell -- condemned the rioters in the strongest terms.

But it all appeared to have little effect on the radicalized right.

"Trump WILL be sworn in for a second term on January 20th!!," said a commenter on thedonald.win, a pro-Trump online forum, on Thursday, the day after the siege. "We must not let the communists win. Even if we have to burn DC to the ground. Tomorrow we take back DC and take back our country!!"

Security concerns ahead of Biden's inauguration

John Scott-Railton, a senior researcher at the Citizen Lab -- a group at the University of Toronto that monitors cybersecurity -- said he is "terribly concerned" about the inauguration. "While the broader public was aghast at what happened (Wednesday) at the Capitol, in certain corners of the sort of right wing conversation, what happened ... is viewed as a success," he told CNN.

In the days and weeks before the attack on the Capitol, signs that the protest could spiral into violence were in abundance.

Pro-Trump supporters storm the US Capitol following a rally with President Donald Trump on January 6.

Advance Democracy, Inc., a nonpartisan governance watchdog, highlighted red flags on social media. In the six days leading up to the event, for instance, there were 1,480 posts from QAnon-related accounts that referenced the event and contained terms of violence. On Parler, the report said, multiple posts referenced war, including statements like "the war begins today."

Ali Alexander, a political activist who has organized pro-Trump rallies, including one of the demonstrations that converged on the Capitol lawn Wednesday, accused the left of "trying to push us to war." In late December, Alexander told followers on Periscope that he and three GOP congressman -- Reps. Paul Gosar and Andy Biggs of Arizona and Rep. Mo Brooks of Alabama -- were planning something big.

Insurrection fueled by conspiracy groups, extremists and fringe movements

"It was to build momentum and pressure and then on the day change hearts and minds of Congress peoples who weren't yet decided or who saw everyone outside and said, 'I can't be

on the other side of that mob,'" Ali said, though he did not call for violence.
CNN reached out to the offices of all three congressman, but only Biggs responded, with a statement from a spokesperson denying that he worked in any way with Alexander or any protestors.
"Congressman Biggs is not aware of hearing of or meeting Mr. Alexander at any point -- let alone working with him to organize some part of a planned protest," the spokesperson said. "He did not have any contact with protestors or rioters, nor did he ever encourage or foster the rally or protests. He was focused on his research and arguments to work within the confines of the law and established precedent to restore integrity to our elections, and to ensure that all Americans -- regardless of party affiliation -- can again have complete trust in our elections systems."

Watchdogs issued warnings ahead of Capitol siege

Several organizations that monitor extremism online issued warnings beforehand.
On January 4, the ADL published a lengthy blog post detailing threats of violence pertaining to the upcoming rally.
"In response to a user who wondered what happens if Congress ignores 'evidence' that President Trump won the election, a user wrote, 'Storm the capitol,'" the ADL's blog post says.

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The post went on to say while it wasn't aware of any credible threats violence planned for January 6, "if the past is any indication, the combination of an extremist presence at the rallies and the heated nature of the rhetoric suggests that violence is a possibility."
Also on January 4, a risk analysis by the security firm G4S stated that "current rhetoric suggests that there will be attendees who have violent intent, including armed militia groups" between January 6 and Inauguration Day.
The analysis cited numerous posts in recent weeks advocating violence on the right-wing site thedonald.win, including one from late December that said, "We will have to achieve an actual tactical victory like storming and occupying Congress, to have the intended effect." Another said, "Patriots who STILL, AT THIS POINT IN TIME, are too cowardly to condone violence, are part of the problem."
Security experts said they were puzzled by the flat-footed response of law enforcement.
"The surprising part of it is why it was so much less aggressively policed," said Jonathan Wood, director of global risk analysis for London-based Control Risks. "Many security analysts were surprised by the lack of security, and by the lack of a robust security response."

Law enforcement caught by surprise

Federal and local law enforcement officials insist they had no idea the siege would happen.
"There was no intelligence that suggested there would be a breach of the US Capitol," said DC Police Chief Robert Contee at a press conference Thursday.
Steven A. Sund, who is resigning as chief of the US Capitol Police amid criticism over the apparent lack of preparedness to deal with the violent mob, said in a statement that the department had a robust plan to address "anticipated First Amendment activities."

Trump supporters clash with police as they storm the US Capitol on January 6, 2021.
"But make no mistake -- these mass riots were not First Amendment activities; they were criminal riotous behavior," he said Thursday.
As for security on Inauguration Day, the Secret Service issued a statement saying its plans for the event have been long in the making.
"The inauguration of the President of the United States is a foundational element of our democracy," the agency said in a statement. "The safety and security of all those participating in the 59th Presidential Inauguration is of the utmost importance."

Law enforcement missed key signs ahead of riot on US Capitol
Robert Dodge, president of corporate risk services at G4S -- which issued the January 4 warning -- said in the months leading up to January 6, he saw "a lot of concerning and hostile rhetoric, which in our world we call a threat indicator."
He added that the US Capitol building seemed to lack the proper fortification.
"Did people approaching the Capitol see a proper level of physical barriers, of psychological barriers such as signs saying do not cross this line or you will be arrested?" he said. "You saw the glass windows being broken in. Why weren't some of those reinforced? It looks like there were some serious physical security challenges that got left to the Capitol police to mitigate."

Americans swept up in disinformation

Trump supporters try to break through a police barrier on January 6 at the Capitol.
It isn't just the fringe elements who have gotten swept up in the current fervor. Mingling with the crowd of militia groups, white nationalists and high-profile conspiracy theorists on the Capitol lawn on Wednesday were other citizens who made the trip to challenge the certification.
One was Texas resident and former mayoral candidate Jenny Cudd, whose campaign slogan was "Jenny for Mayor."
After railing against what she described as voter fraud and a stolen election, she called for the death of those who have committed treason.
"All we need is one public hanging, and then people will start acting right -- kind of like it would be useful if we still had the firing squad for the death penalty," Cudd said. "We shall see if there will be a public hanging in our future because it is still considered a valid form of death for treason."
Cudd posted a video the night before the protests, where she talked about how the next day was going to be a "ruckus."

"I don't know what y'all think about a revolution, but I'm all for it," she said. "Nobody actually wants war, nobody wants bloodshed, but the government works for us and unfortunately it appears that they have forgotten that, quite a lot, so if a revolution is what it takes then so be it."



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Right-wing news network OANN posted a photo of Cudd on Twitter Wednesday afternoon showing her inside the Capitol, wearing a Trump flag around her as a cape. And that evening, she posted a video from her hotel, where she drank a beer and choked back tears as she took her followers through what had happened that day.

"When Pence betrayed us is when we decided to storm the Capitol," she said.

On Friday, Cudd told a local TV news outlet that she did nothing illegal.

"I pretty well walked up the steps and then there was an open door to the Capitol," she said. "I personally did not tear down anything, destroy anything."

In response to a CNN request for comment Friday, Cudd texted a link to a video of herself repeating a version of the statement she made to the local outlet, saying, "cancel culture is in full force," and that she has "received several death threats, along with thousands of one-star reviews" for her business.

Joel Finkelstein, director of the Network Contagion Research Institute at Rutgers University, said conspiracies on the web have mushroomed from smaller, obscure sites like 8kun frequented by adherents of QAnon to more mainstream sites like Facebook, Twitter and Instagram. The result, he said, is that many of the people drawn to the protests Wednesday

were not extremists but rather ordinary Americans who did not understand that they had been lied to.

"These are our neighbors -- these are these are our neighbors and friends," he said. "They are people we all know. They were doing it on Facebook. They were doing it on Twitter. The threats to our democracy aren't coming just from 8chan. And they're not coming just from QAnon."

Some of the more disturbingly violent chatter on social media reflects what appears to be a growing hostility toward Republican leaders on the part of Trump supporters.

"I'm fairly certain seeing Pelosis and Mitch the Bitch swinging bodies from a rope will get more attention from sheeple who normally don't follow or care about politics," said a commenter Wednesday on thedonald.win.

And as law enforcement has begun to take a heavier hand with right-wing extremist groups -- Proud Boys leader Henry "Enrique" Tarrio was arrested by DC police ahead of the January 6 protest -- experts are noticing a growing antipathy for police in these circles, which have tended to consider themselves allies of men and women in uniform.

"That creates a pretty dangerous situation," said Southern Poverty Law Center senior research analyst Cassie Miller. "Because not only might there be violent encounters with leftists but it kind of increases the potential that there's going to be a violent confrontation with cops as well."

CNN's Yahya Abou-Ghazala, Nelli Black, Blake Ellis, Drew Griffin, Melanie Hicken and Benjamin Naughton contributed to this report.

Opinion: The far-right Trump insurgency just scored a huge propaganda coup

washingtonpost.com/opinions/2021/01/08/capitol-mob-far-right-trump-propaganda/

Opinion by Greg Sargent Columnist January 8, 2021



As we seek to absorb the meaning of a violent insurrectionist mob storming the seat of government on President Trump's behalf, a kind of split screen is emerging.

On one screen, Trump is shriveling into a buffoonish, pathetic figure. His violent and destructive fantasies remain unchecked and dangerous, but news accounts are depicting an increasingly isolated figure whose advisers are deserting him, even as he rages ineffectually over his inability to reverse his election loss.

On the other screen, a different picture is emerging: For the loose network of groups and lone actors that carried out Trump's calls for violent disruption of the lawful conclusion of the election, it's becoming clear that the siege was a huge and momentous success, a propaganda coup that will energize them for a long time to come.

"Make no mistake: Wednesday was a watershed moment for the far-right extremist movement in this country," Jonathan Greenblatt, CEO of the Anti-Defamation League, told me.

"By all measurable effects, this was for far-right extremists one of the most successful attacks that they've ever launched," Jared Holt, who tracks far-right groups for the Atlantic Council, added. "This will be lionized and propagandized on likely for the next decade."

Trump came as close as he ever will to conceding defeat in a video released Thursday night. This came after aides alarmed by his erratic behavior pressured him to project calm as imagery of the chaos and destruction at the Capitol sank in across the country and around the world.

Trump also released the video after growing convinced that he could face legal trouble for inciting mob violence. So Trump appears somewhat chastened, if not by the violence and destruction he has wrought, then at least by his newfound legal vulnerability.

But we shouldn't view this as a wind-down or a defeat for this loose movement of groups. That misconstrues both his relationship to this movement, such as it is, as well as its understanding of the real meaning of this moment.

The siege of the Capitol

It's not easy to say who exactly stormed the Capitol. The ADL, tracking far-right live streams and scouring as many pictures and videos as possible, tells me the groups include extremist and alt-right organizations such as the Proud Boys, the Oath Keepers, the Groyper Army and the Three Percenters, as well as various militia organizations.

Holt, who employs similar techniques and tracked online planning of the siege for months, concurs, telling me that many of the participants were "militia movement groups" and "white supremacist and white nationalist groups" and known individual "conspiracy extremists."

The connecting thread is the "Stop the Steal" movement, which brought all these groups together in various state capitals in the months-long struggle over the election results, Holt says.

The driving ideology here is more complicated than just, "Democrats stole the election." As Holt notes, it's bigger: The idea is that the "election was somehow compromised by nefarious forces," including everyone from state officials in both parties to the courts and the media, all devoted to denying Trump a win.

Trump spoke directly to these impulses when he told Fox News last fall that Joe Biden was being controlled by "people in dark shadows." And, as Holt told me, the notion of a compromised election has been "echoed at the highest levels of Republican power."

But both Holt and the ADL agree that for these groups, what happened on Wednesday was a major, resounding victory.

A propaganda coup

As Holt notes, the Internet chat rooms and message boards and other platforms he tracks have been absolutely lighting up with such chatter. Their understanding of this moment is that they successfully placed the U.S. government under siege.

"These communities are discussing the attack as some sort of validation that it actually is possible for them to exert their power like this and achieve results," Holt tells me. "They're talking about this as the first stab in a greater revolution."

Think of it like this: The attack on the Capitol captured the news cycle and riveted the country's attention for a full day, projecting imagery of a country seeming to teeter on the edge of civil collapse.

They succeeded in disrupting the lawful conclusion of the presidential election, even if temporarily. This imagery (and remember that far-right groups have gone international) was broadcast all around the world.

Meanwhile, it's now emerging that there were major security breakdowns. The FBI and Homeland Security didn't do a threat assessment, calls to bring in the Maryland National Guard were rebuffed amid chaotic cross-signaling, and the Capitol Police allowed the rioters to capture the seat of government.

This, too, will likely be held up as a propaganda victory, another sign that the ruling elites and their decrepit security forces are collapsing under the weight of their own corruption.

"A lot of these extremist groups have explicitly discussed what the attack on the Capitol represents for their ability to overwhelm law enforcement," Holt told me, adding that the security failures are seen as "validation of a broader narrative about the government buckling" that will awaken others to its "corruption."

In a terrific segment, Rachel Maddow looked at Wednesday's events and concluded that the loosely knit movement that showed up on Trump's behalf will see all this as a "big success."

"His supporters pulled off a violent, armed insurrection attacking the U.S. Capitol," Maddow noted. "And then they all just walked away to tell their war stories about it."

Or, as Greenblatt put it to me, these groups "are certainly not going anywhere."

It's hard to say what will happen to this movement once Trump exits the scene. But it's hard to be optimistic.

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Catherine Rampell: RIP, the GOP of 'Personal Responsibility'

Randall D. Eliason: Trump should be criminally investigated

Karen Attiah: How Western media would have covered the storming of the U.S. Capitol if it had happened in another country

David Ignatius: What went wrong with the protection of the U.S. Capitol

What I Saw at the White House on Trump's Last Day

theatlantic.com/politics/archive/2021/01/trump-leaves-white-house/617758/

January 20, 2021



Anna Moneymaker / New York Times / Redux

At dawn this morning, workers loaded couches and tables into a moving truck parked outside the West Wing. Men wearing white coveralls and carrying roller brushes and paint cans walked across the north driveway. Inside the White House, pictures of the 45th president had been removed from the walls. Only the hooks remained, ready for a new set of portraits of the 46th.

A lone Donald Trump press deputy, Judd Deere, sat in his small office, writing a note on a piece of stationery to whoever would be taking over his desk in a few hours. Deere was attempting to describe what it's like to work in the building. When I looked in at noon, after the Trump presidency had officially ended, he was gone, his desk cleared. Even the magazine racks hanging on the wall had been emptied.

Trump also left a letter for his successor, perhaps the only traditional gesture he'd made in what has been an utterly graceless departure. Breaking one final norm, Trump refused to grant the simple courtesy of attending the inauguration ceremony and greeting the Bidens at the White House to show them their new home, as the Obamas had greeted him four years earlier. It's not that Trump is merely a sore loser; Trump was even a sore winner, weaving conspiracy theories about how he was robbed of the popular vote in 2016.

Read: Among the guardsmen

Trump left the White House with his wife, Melania, at about 8:20 a.m., refusing to take questions from the press. He walked to Marine One with an ominous send-off: "I just want to say goodbye, but hopefully it's not a long-term goodbye. We'll see each other again." Later, in a brief departure ceremony at Joint Base Andrews before flying to Florida, he gave a familiar and repetitive summation of what he views as his accomplishments in office. He of course neglected to mention the incident that will come to overshadow everything else that happened over the past four years: a lethal insurrection carried out by his supporters after a rally in which he'd again falsely claimed that the election was stolen. Trump may have no interest in revisiting the riot at the Capitol on January 6 that delayed the congressional certification of Joe Biden's victory and took five lives, but history won't forget it.

"This is the only president in American history who incited an insurrection against Congress that could have resulted in assassinations and hostage-taking and, conceivably, the cancellation of a free presidential election and the fracturing of a democracy," Michael Beschloss, the presidential historian, told me. "That's a fact, and it won't change in 50 years. It's very hard to think of a scenario under which someone might imagine some wonderful thing that Donald Trump did that will outshine that. He did, literally, the worst thing that an American president could ever do."

By early afternoon, the new Biden aides had arrived in the White House, fresh from the inaugural ceremony. There were predictable hiccups: The incoming deputy press secretary, Karine Jean-Pierre, came through the press room with a thick binder under her arm and discovered that the door to the West Wing staff section was locked. Jean-Pierre, it turns out, inherited the office that Deere had just vacated. I later asked her if she had gotten his note. She said she hadn't read it yet, but appreciated that he wrote it.

Adam Serwer: An incompetent authoritarian is still a catastrophe

Shortly after noon today, the main @POTUS, @WhiteHouse, and @VP Twitter accounts had changed hands. Twitter even created an account for Vice President Kamala Harris's husband, Douglas Emhoff, called @SecondGentleman. Unlike Trump, Biden is not a Twitter obsessive. A Biden transition adviser told me that the new president would not use social media as an "abusive, psychotic mechanism to display insecurity and grievances."

There was no mistaking the new administration for the old. Biden's press secretary, Jen Psaki, sat behind the desk in her office wearing a mask. Others walked through the offices wearing masks as well. During my visits to the White House last year, I observed staff members walking through hallways and talking to one another without masks. The explanation they'd give was that they were routinely tested for COVID-19. Still, the coronavirus sickened a slew of White House officials from Trump on down.

The Biden White House will limit the number of journalists allowed on the grounds at any one time to reduce the risk of infection during the pandemic. Reporters are required to get tested for the virus before coming into the building. By comparison, visitors to the Trump White House might have looked around and concluded that the pandemic didn't exist.

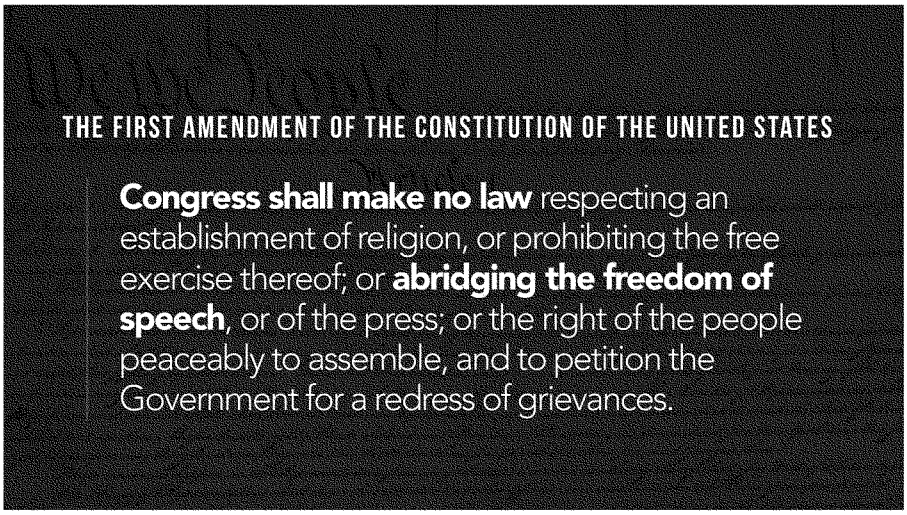
After Trump boarded Marine One for his departure from the White House, tree branches bent and swayed as the blades whipped the air. The helicopter rose slowly from the South Lawn and arced behind the Washington Monument. Had Trump looked out his passenger window, he might have seen the thousands of National Guard troops and razor-topped fences aimed at repelling his supporters should they attempt another insurrection. He might have glimpsed the lights placed near the Lincoln Memorial honoring those who have died from COVID-19, even as he made his empty assurances that the nation had "rounded the turn."

A small group of reporters and TV camera people gathered outside the White House on the north driveway watched quietly. A voice behind me eventually piped up: "Good riddance."

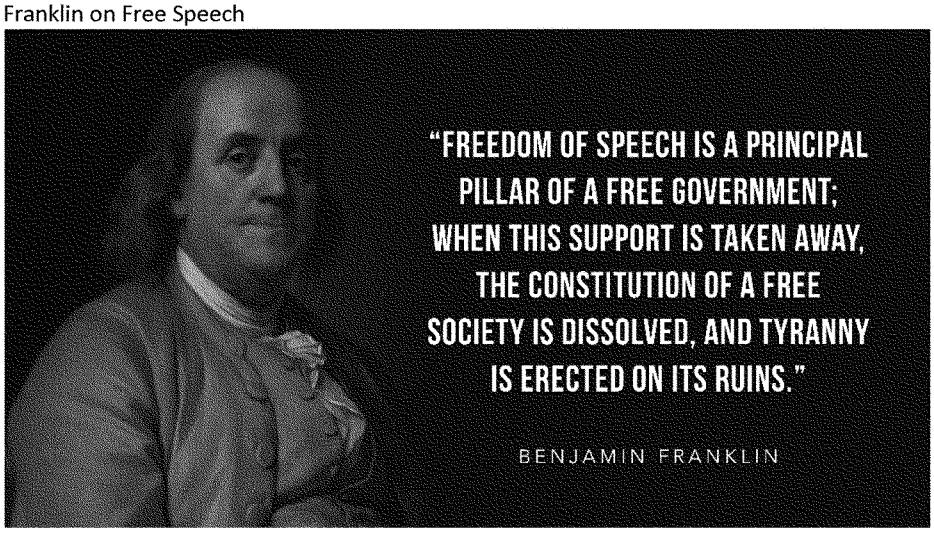
MATERIALS SUBMITTED ON BEHALF OF THE 45TH PRESIDENT

Record 2.zip

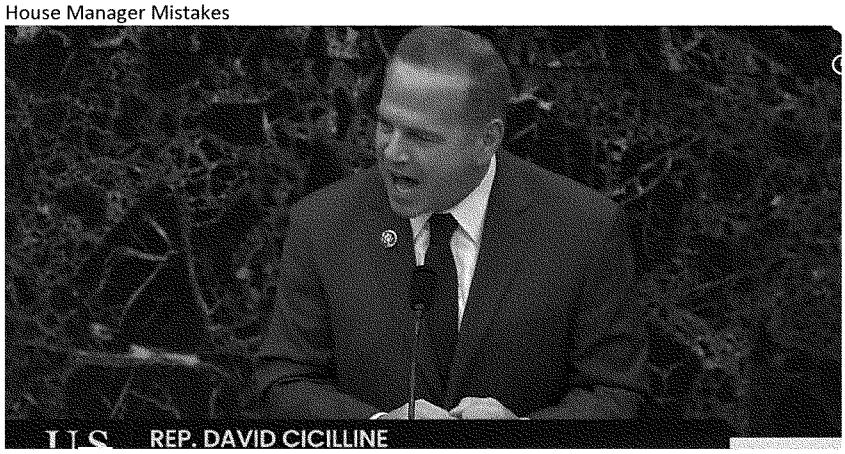
First Amendment



Franklin on Free Speech



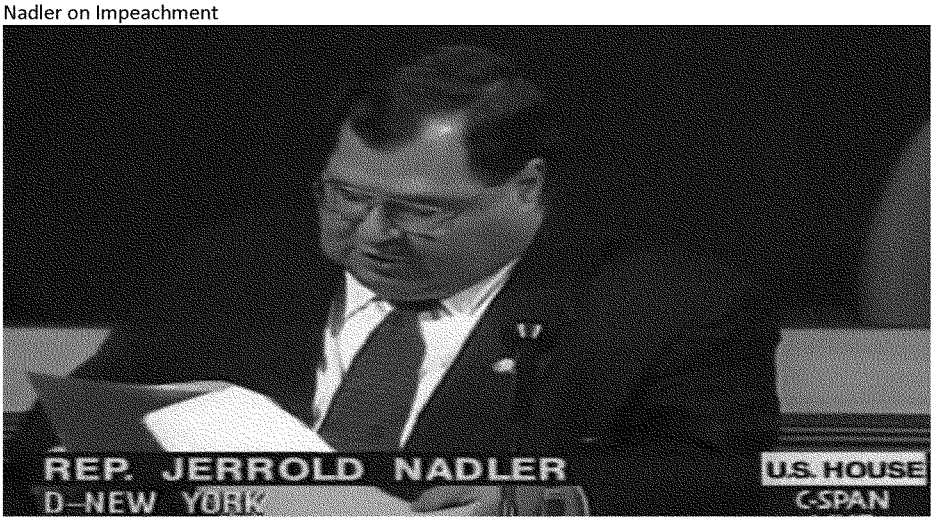
House Manager Mistakes



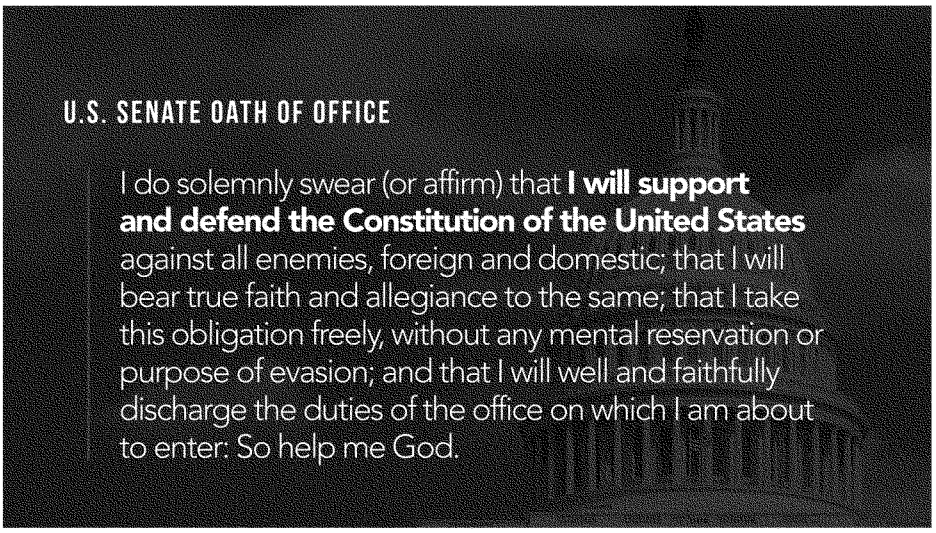
Lofgren on Impeachment



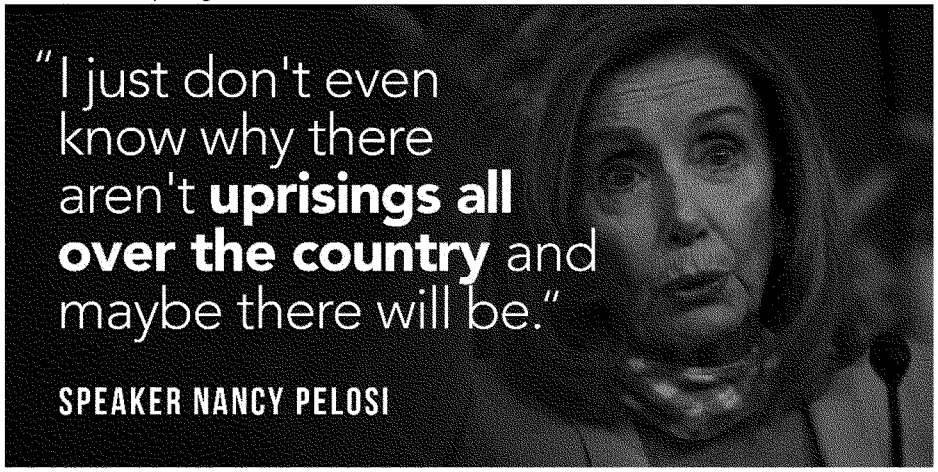
Nadler on Impeachment



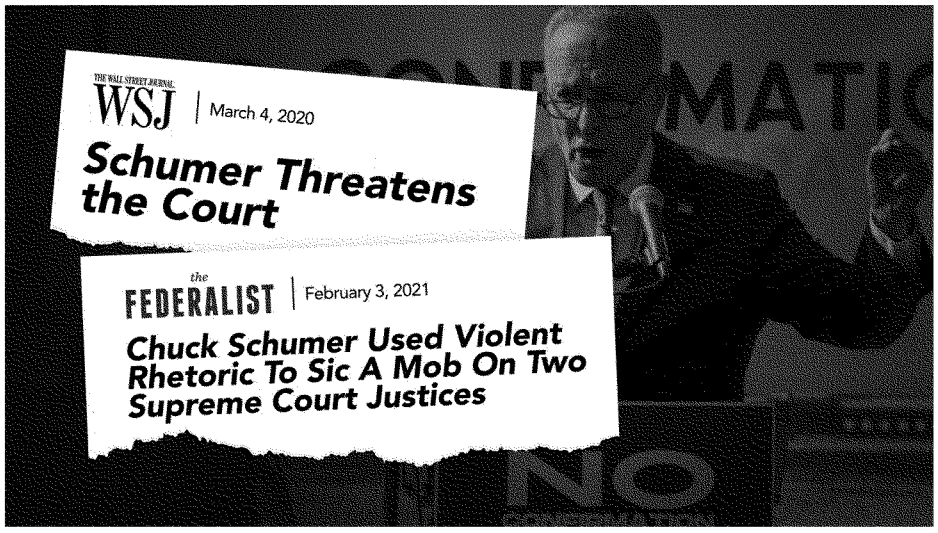
Oath of Office



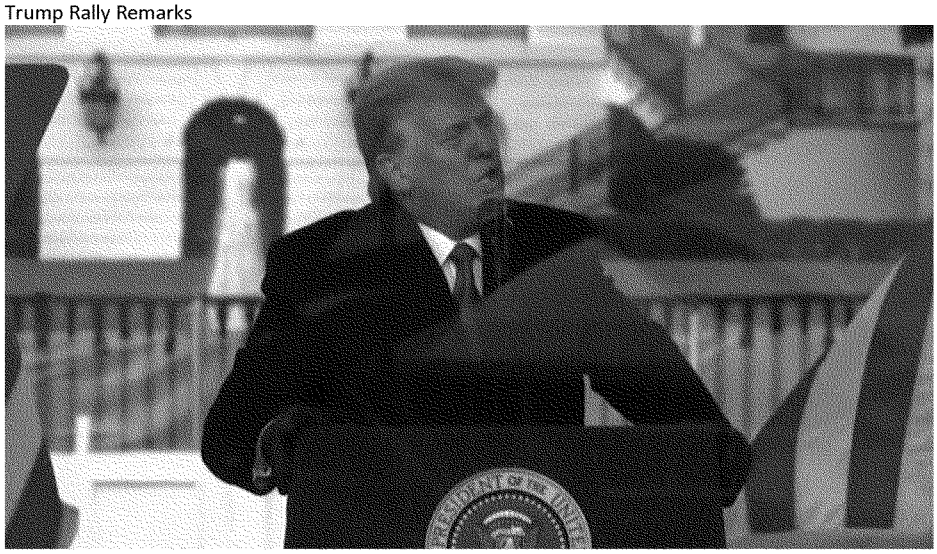
Pelosi Calls for Uprisings



Schumer Calls for Violence



Trump Rally Remarks



Trump White House Remarks



IN THE SENATE
OF THE UNITED STATES OF AMERICA

ANSWER OF PRESIDENT DONALD JOHN TRUMP, 45TH PRESIDENT OF THE UNITED STATES, TO ARTICLE I: INCITEMENT OF INSURRECTION

To: The Honorable, the Members of the Unites States Senate:

The 45th President of the United States, Donald John Trump, through his counsel Bruce L. Castor, Jr., and David Schoen hereby responds to the Article of Impeachment lodged against him by the United States House of Representatives by breaking the allegations out into 8 Averments and,

Respectfully Represents:

1. The Constitution provides that the House of Representatives 'shall have the sole Power of Impeachment' and that the President 'shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.'"

Answer 1:

Admitted in part, denied in part as not relevant to any matter properly before the Senate. It is admitted that the Constitutional provision at Averment 1 is accurately reproduced. It is denied that the quoted provision currently applies to the 45th President of the United States since he is no longer "President." The constitutional provision requires that a person actually hold office to be impeached. Since the 45th President is no longer "President," the clause 'shall be removed from Office on Impeachment for...' is impossible for

the Senate to accomplish, and thus the current proceeding before the Senate is *void ab initio* as a legal nullity that runs patently contrary to the plain language of the Constitution. Article I, Section 3 of the Constitution states "[j]udgment in cases of impeachment shall not extend further than to removal from office, *and* disqualification to hold and enjoy an office of honor..." (emphasis added). Since removal from office by the Senate of the President is *a condition precedent which must occur before*, and jointly with, "disqualification" to hold future office, the fact that the Senate presently is unable to remove from office the 45th President whose term has expired, means that Averment 1 is therefore irrelevant to any matter before the Senate.

2. Further, section 3 of the 14th Amendment to the Constitution prohibits any person who has 'engaged in insurrection or rebellion against' the United States from 'hold[ing] any office...under the United States'.

Answer 2:

Admitted in part, denied in part, and denied as not relevant to any matter properly before the Senate. It is admitted that phrases from Section 3 of the 14th Amendment to the Constitution are correctly replicated in Averment 2. It is denied that the 45th President engaged in insurrection or rebellion against the United States. The 45th President believes and therefore avers that as a private citizen, the Senate has no jurisdiction over his ability to hold office and for the Senate to take action on this averment would constitute a Bill of Attainder in violation of Art. I, Sec. 9. Cl. 3 of the United States Constitution.

The 45th President asks the Senate to dismiss Averment 2 relating to the 14th Amendment as moot.

3. In his conduct while President of the United States – and in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed.

Answer 3:

Denied, and irrelevant to any matter properly before the Senate. It is denied that the 45th President of the United States ever engaged in a violation of his oath of office. To the contrary, at all times, Donald J. Trump fully and faithfully executed his duties as President of the United States, and at all times acted to the best of his ability to preserve, protect and defend the Constitution of the United States, while never engaging in any high Crimes or Misdemeanors. Since the 45th President is no longer "President," the clause 'shall be removed from Office on Impeachment for...' referenced at Averment 1 above is impossible, and the current proceeding before the Senate is *void ab initio* as a legal nullity patently contrary to the plain language of the Constitution. As the present proceedings are moot and thus a nullity since the 45th President cannot be removed from an office he no longer occupies, Averment 3 is irrelevant to any matter properly before the Senate.

4. Donald John Trump engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States, in that:

On January 6, 2021, pursuant to the 12th Amendment to the Constitution of the United States, the Vice President of the United States, the House of Representatives, and the Senate met at the United States Capitol for a joint session of Congress to count the votes of the Electoral College. In the months preceding the Joint Session, President Trump repeatedly issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials.

Answer 4:

Admitted in part, denied in part, and denied as irrelevant to any matter properly before the Senate. It is admitted that on January 6, 2021 a joint session of Congress met with the Vice President, the House and the Senate, to count the votes of the Electoral College. It is admitted that after the November election, the 45th President exercised his First Amendment right under the Constitution to express his belief that the election results were suspect, since with very few exceptions, under the convenient guise of Covid-19 pandemic "safeguards" states election laws and procedures were changed by local politicians or judges without the necessary approvals from state legislatures. Insufficient evidence exists upon which a reasonable jurist could conclude that the 45th President's statements were accurate or not, and he therefore denies they were false. Like all Americans, the 45th President is protected by the First

Amendment. Indeed, he believes, and therefore avers, that the United States is unique on Earth in that its governing documents, the Constitution and Bill of Rights, specifically and intentionally protect unpopular speech from government retaliation. If the First Amendment protected only speech the government deemed popular in current American culture, it would be no protection at all. Since the 45th President is no longer "President," the Constitutional clause at Averment 1 above 'shall be removed from Office on Impeachment for…' is impossible since the 45th President does not hold office and the current proceeding before the Senate is *void ab initio* as a legal nullity rendering Averment 4 irrelevant to any matter properly before the Senate.

5. Shortly before the Joint Session commenced, President Trump, addressed a crowd at the Capitol ellipse in Washington DC. There, he re-iterated false claims that "we won this election, and we won it by a landslide."

Answer 5:

Admitted in part, denied in part. It is admitted that President Trump addressed a crowd at the Capitol ellipse on January 6, 2021 as is his right under the First Amendment to the Constitution and expressed his opinion that the election results were suspect, as is contained in the full recording of the speech. To the extent Averment 5 alleges his opinion is factually in error, the 45th President denies this allegation.

6. He also willfully made statements that, in context, encouraged – and foreseeably resulted in – lawless action at then Capitol, such as: "if you don't fight like hell you're not going to have a country anymore." Thus, incited by President Trump, members of the crowd he had addressed, in an attempt to, among other objectives, interfere with the Joint Session's solemn constitutional duty to certify the results of the 2020 Presidential election, unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious act.

Answer 6:

Admitted in Part, denied in part. It is admitted that persons unlawfully breached and vandalized the Capitol, that people were injured and killed, and that law enforcement is currently investigating and prosecuting those who were responsible. "Seditious acts" is a term of art with a legal meaning and the use of that phrase in the article of impeachment is thus denied in the context in which it was used. It is denied that President Trump incited the crowd to engage in destructive behavior. It is denied that the phrase "if you don't fight like hell you're not going to have a country anymore" had anything to do with the action at the Capitol as it was clearly about the need to fight for election security in general, as evidenced by the recording of the speech. It is denied that President Trump intended to interfere with the counting of Electoral votes. As is customary, Members of Congress challenged electoral vote submissions by state under a process written into Congressional rules allowing for the

respective Houses of Congress to debate whether a state's submitted electoral votes should be counted. In 2017, Democratic Members of Congress repeatedly challenged the electoral votes submitted from states where President Trump prevailed. In 2021, Republican Members of Congress challenged the electoral votes submitted from states where President Biden prevailed. The purpose of the Joint Sessions of Congress in 2017 and on January 6, 2021 was for Members of Congress to fulfill their duty to be certain the Electoral College votes were properly submitted, and any challenges thereto properly addressed under Congressional rules. Congress' duty, therefore, was *not* just to certify the presidential election. Its duty was to first determine whether certification of the presidential election vote was warranted and permissible under its rules.

7. "President Trump's conduct on January 6, 2021, followed his prior efforts to subvert the certification of the results of the 2020 Presidential Election. Those prior efforts, included a phone call on January 2, 2021, during which President Trump urged the secretary of state Georgia, Brad Raffensperger, to "find" enough votes to overturn the Georgia Presidential election results and threatened Secretary Raffensperger if he failed to do so.

Answer 7:

Admitted in part. Denied in part. Denied as irrelevant to any matter properly before the Senate. It is admitted that President Trump spoke on the telephone with Secretary Raffensperger and multiple other parties, including several attorneys for both parties, on January 2, 2021. Secretary Raffensperger

or someone at his direction surreptitiously recorded the call and subsequently made it public. The recording accurately reflects the content of the conversation. It is denied President Trump made any effort to subvert the certification of the results of the 2020 Presidential election. It is denied that the word "find" was inappropriate in context, as President Trump was expressing his opinion that if the evidence was carefully examined one would "find that you have many that aren't even signed and you have many that are forgeries." It is denied that President Trump threatened Secretary Raffensperger. It is denied that President Trump acted improperly in that telephone call in any way. Since the 45th President is no longer "President," the Constitutional clause from Averment 1 above 'shall be removed from Office on Impeachment for...' is impossible since the 45th President does not hold office rendering the current proceeding before the Senate is *void ab initio* as a legal nullity making Averment 7 irrelevant to any matter properly before the Senate.

8. "In all this, President Trump gravely endangered the security of the United States and its institutions of Government. He threatened the integrity of the democratic system, interfered with the peaceful transition of power, and imperiled a coequal branch Government. He thereby betrayed his trust as President, to the manifest injury of the people of the United States.

Answer 8:

Denied, and denied as irrelevant to any matter properly before the Senate. It is denied that President Trump ever endangered the security of the United States and its institutions of Government. It is denied he threatened the

integrity of the democratic system, interfered with the peaceful transition of power, and imperiled a coequal branch Government. It is denied he betrayed his trust as President, to the manifest injury of the people of the United States. Rather, the 45th President of the United States performed admirably in his role as president, at all times doing what he thought was in the best interests of the American people. The 45th President believes and therefore avers that in the United States, the people choose their President, and that he was properly chosen in 2016 and sworn into office in 2017, serving his term to the best of his ability in comportment with his oath of office. Since the 45th President is no longer "President," the Constitutional clause at Averment 1 above 'shall be removed from Office on Impeachment for...' is impossible for the Senate to accomplish since the 45th President does not hold office, meaning the current proceeding before the Senate is *void ab initio* as a legal nullity rendering Averment 8 irrelevant to any matter properly before the Senate.

To the extent there are factual allegations made against the 45th President of the United States contained in Article I that are not specifically addressed above, said allegations are **denied** and strict proof at time of hearing is demanded.

Legal Defenses

To: The Honorable, the Members of the Unites States Senate:

The 45th President of the United States, Donald John Trump, through his counsel Bruce L. Castor, Jr., and David Schoen hereby avers that the Article of Impeachment lodged against him by the United States House of

Representatives is facially and substantively flawed, and otherwise unconstitutional, and must be dismissed with prejudice. In support thereof, the 45th President,

Respectfully Represents:

1. The Senate of the United States lacks jurisdiction over the 45th President because he holds no public office from which he can be removed, and the Constitution limits the authority of the Senate in cases of impeachment to removal from office as the prerequisite active remedy allowed the Senate under our Constitution.

2. The Senate of the United States lacks jurisdiction over the 45th President because he holds no public office from which he can be removed rendering the Article of Impeachment moot and a non-justiciable question.

3. Should the Senate act on the Article of Impeachment initiated in the House of Representatives, it will have passed a Bill of Attainder in violation of Article 1, Sec. 9. Cl. 3 of the United States Constitution.

4. The Article of Impeachment misconstrues protected speech and fails to meet the constitutional standard for any impeachable offense.

5. The House of Representatives deprived the 45th President of due process of law in rushing to issue the Article of Impeachment by ignoring it own procedures and precedents going back to the mid-19th century. The lack of due process included, but was not limited to, its failure to conduct any meaningful committee review or other investigation, engage in any full and fair

consideration of evidence in support of the Article, as well as the failure to conduct any full and fair discussion by allowing the 45th President's positions to be heard in the House Chamber. No exigent circumstances under the law were present excusing the House of Representatives' rush to judgment. The House of Representatives' action, in depriving the 45th President of due process of law, created a special category of citizenship for a single individual: the 45th President of the United States. Should this body not act in favor of the 45th President, the precedent set by the House of Representatives would become that such persons as the 45th President similarly situated no longer enjoy the rights of all American citizens guaranteed by the Bill of Rights. The actions by the House make clear that in their opinion the 45th President does not enjoy the protections of liberty upon which this great Nation was founded, where free speech, and indeed, free *political* speech form the backbone of all American liberties. None of the traditional reasons permitting the government to act in such haste (i.e exigent circumstances) were present. The House had no reason to rush its proceedings, disregard its own precedents and procedures, engage in zero committee or other investigation, and fail to grant the accused his "opportunity to be heard" in person or through counsel – all basic tenets of due process of law. There was no exigency, as evidenced by the fact that the House waited until after the end of the President's term to even send the articles over and there was thus no legal or moral reason for the House to act as it did. Political hatred has no place in the administration of justice anywhere in America, especially in the Congress of the United States.

6. The Article of Impeachment violates the 45th President's right to free speech and thought guaranteed under the First Amendment to the United States Constitution.

7. The Article is constitutionally flawed in that it charges multiple instances of allegedly impeachable conduct in a single article. By charging multiple alleged wrongs in one article, the House of Representatives has made it impossible to guarantee compliance with the Constitutional mandate in Article 1, Sec. 3, Cl. 6 that permits a conviction only by at least two-thirds of the members. The House charge fails by interweaving differing allegations rather than breaking them out into counts of alleged individual instances of misconduct. Rule XXIII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* provides, in pertinent part, that an article of impeachment shall not be divisible thereon. Because the Article at issue here alleges multiple wrongs in the single article, it would be impossible to know if two-thirds of the members agreed on the entire article, or just on parts, as the basis for vote to convict. The House failed to adhere to strict Senate rules and, instead, chose to make the Article as broad as possible intentionally in the hope that some Senators might agree with parts, and other Senators agree with other parts, but that when these groups of senators were added together, the House might achieve the appearance of two thirds in agreement, when those two thirds of members, in reality, did not concur on the *same* allegations interwoven into an over-broad article designed for just such a

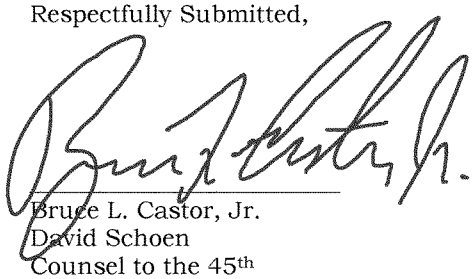
purpose. Such behavior on the part of the House of Representatives may have a less nefarious reason, in the alternative, and simply be a by-product of the haste in which the House unnecessarily acted while depriving the 45th President of the United States of his American right to due process of law. The 45th President of the United States believes and therefore avers that the defect in the drafting of the Article requires that Senators be instructed that if two thirds of them fail to find *any* portion of the Article lacking in evidence sufficient for conviction, then the *entire* Article fails and should be dismissed.

8. The Chief Justice of the United States is not set to preside over the proceedings contemplated by the Senate, as he would be constitutionally required to do if the House was seeking to have the president removed from office under Art. I, Sec 3, Cl. 6 of the United States Constitution. Once the 45th President's term expired, and the House chose to allow jurisdiction to lapse on the Article of Impeachment, the constitutional mandate for the Chief Justice to preside at all impeachments involving the President evidently disappeared, and he was replaced by a partisan Senator who will purportedly also act as a juror while ruling on certain issues. The House actions thus were designed to ensure that Chief Justice John Roberts would not preside over the proceedings, which effectively creates the additional appearance of bias with the proceedings now being supervised by a partisan member of the Senate with a long history of public remarks adverse to the 45th President. The 45th President believes and therefore avers that this action of the House of Representatives, additionally,

violated his right to due process of law because the House, effectively, maneuvered an ally in the Senate into the judge's chair.

WHEREFORE, Donald John Trump, 45th President of the United States respectfully requests the Honorable Members of the Senate of the United States dismiss Article I: Incitement of Insurrection against him as moot, and thus in violation of the Constitution, because the Senate lacks jurisdiction to remove from office a man who does not hold office. In the alternative, the 45th President respectfully requests the Senate acquit him on the merits of the allegations raised in the article of impeachment.

Respectfully Submitted,



Bruce L. Castor, Jr.
David Schoen
Counsel to the 45th
President of the United States

Date: February 2, 2021

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re **IMPEACHMENT OF** **PRESIDENT DONALD J. TRUMP**

TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP

United States House of Representatives

Jamie Raskin
Diana DeGette
David Cicilline
Joaquin Castro
Eric Swalwell
Ted Lieu
Stacey Plaskett
Madeleine Dean
Joe Neguse

U.S. House of Representatives Managers

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INTRODUCTION

This trial arises from President Donald J. Trump's incitement of insurrection against the Republic he swore to protect. The House of Representatives has impeached him for that constitutional offense. To protect our democracy and national security—and to deter any future President who would consider provoking violence in pursuit of power—the Senate should convict President Trump and disqualify him from future federal officeholding.

On January 6, 2021, with Vice President Michael Pence presiding, Congress assembled to perform one of its most solemn constitutional responsibilities: the counting of electoral votes for President of the United States. This ritual has marked the peaceful transfer of power in the United States for centuries. Since the dawn of the Republic, no enemy—foreign or domestic—had ever obstructed Congress's counting of the votes. No President had ever refused to accept an election result or defied the lawful processes for resolving electoral disputes. Until President Trump.

In a grievous betrayal of his Oath of Office, President Trump incited a violent mob to attack the United States Capitol during the Joint Session, thus impeding Congress's confirmation of Joseph R. Biden, Jr. as the winner of the presidential election. As it stormed the Capitol, the mob yelled out "President Trump Sent Us," "Hang Mike Pence," and "Traitor Traitor Traitor." The insurrectionists assaulted police officers with weapons and chemical agents. They seized control of the Senate chamber floor, the Office of the Speaker of the House, and major sections of the Capitol complex. Members and their staffs were trapped and terrorized. Many officials (including the Vice President himself) barely escaped the rioters. The line of succession to the Presidency was endangered. Our seat of government was violated, vandalized, and desecrated. Congress's counting of electoral votes was delayed until nightfall and not completed until 4 AM. Hundreds of people were injured in the assault. Five people—including a Capitol Police officer—died.

President Trump's responsibility for the events of January 6 is unmistakable. After losing the 2020 election, President Trump refused to accept the will of the American people. He spent months asserting, without evidence, that he won in a "landslide" and that the election was "stolen." He amplified these lies at every turn, seeking to convince supporters that they were victims of a massive electoral conspiracy that threatened the Nation's continued existence. But every single court to consider the President's attacks on the outcome of the election rejected them. And state and federal officials from both parties refused President Trump's increasingly desperate demands that they break the law to keep him in power. With his options running out, President Trump announced a "Save America Rally" on January 6. He promised it would be "wild."

By the day of the rally, President Trump had spent months using his bully pulpit to insist that the Joint Session of Congress was the final act of a vast plot to destroy America. As a result—and as had been widely reported—the crowd was armed, angry, and dangerous. Before President Trump took the stage, his lawyer called for "trial by combat." His son warned Republican legislators against finalizing the election results: "We're coming for you." Finally, President Trump appeared behind a podium bearing the presidential seal. Surveying the tense crowd before him, President Trump whipped it into a frenzy, exhorting followers to "fight like hell [or] you're not going to have a country anymore." Then he aimed them straight at the Capitol, declaring: "You'll never take back our country with weakness. You have to show strength, and you have to be strong."

Incited by President Trump, his mob attacked the Capitol. This assault unfolded live on television before a horrified nation. But President Trump did not take swift action to stop the violence. Instead, while Vice President Pence and Congress fled, and while Capitol Police officers battled insurrectionists, President Trump was reportedly "delighted" by the mayhem he had unleashed, because it was preventing Congress from affirming his election loss. This dereliction of

duty—this failure to take charge of a decisive security response and to quell the riotous mob—persisted late into the day. In fact, when Congressional leaders begged President Trump to send help, or to urge his supporters to stand down, he instead renewed his attacks on the Vice President and focused on lobbying Senators to challenge the election results. Only *hours* after his mob first breached the Capitol did President Trump release a video statement calling for peace—and even then, he told the insurrectionists (who were at that very moment rampaging through the Capitol) "we love you" and "you're very special." President Trump then doubled down at 6:01pm, issuing a tweet that blamed Congress for not surrendering to his demand that the election results be overturned: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!"

The Nation will indeed remember January 6, 2021—and President Trump's singular responsibility for that tragedy. It is impossible to imagine the events of January 6 occurring without President Trump creating a powder keg, striking a match, and then seeking personal advantage from the ensuing havoc. In the words of Representative Liz Cheney, the House Republican Conference Chair: "The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President. The President could have immediately and forcefully intervened to stop the violence. He did not. There has never been a greater betrayal by a President of the United States of

his office and his oath to the Constitution."[1] Senate Minority Leader Mitch McConnell recently affirmed that "[t]he mob was fed lies" and "provoked by the president."[2]

President Trump committed this high crime and misdemeanor amid his final days in office. Given the clarity of the evidence and the egregiousness of his wrongdoing, the House approved an article of impeachment for incitement of insurrection. Now, merely weeks later, President Trump will argue that it serves no purpose to subject him to a trial and that the Senate lacks jurisdiction to do so. He is mistaken. As we explain at length below—and as scholars from diverse viewpoints have long recognized—the text and structure of the Constitution, as well as its original meaning and prior interpretations by Congress, overwhelmingly demonstrate that a former official remains subject to trial and conviction for abuses committed in office. Any other rule would make little sense. The Constitution governs the first day of the President's term, the last day, and every moment in between. Presidents do not get a free pass to commit high crimes and misdemeanors near the end of their term. The Framers of our Constitution feared more than anything a President who would abuse power to remain in office against the will of the electorate. Allowing Presidents to subvert elections without consequence would encourage the most dangerous of abuses.

For that reason, President Trump's conduct must be declared unacceptable in the clearest and most unequivocal terms. This is not a partisan matter. His actions directly threatened the very foundation on which all other political debates and disagreements unfold. They also threatened the constitutional system that protects the fundamental freedoms we cherish. It is one thing for an official to pursue legal processes for contesting election results. It is something else entirely for that

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[1] Liz Cheney, *I Will Vote To Impeach The President* (Jan. 12, 2021).

[2] Mike DeBonis & Paul Kane, *Uncertainty Reigns in Senate as Schumer Pushes Fast Agenda and McConnell Calls Out Trump*, Wash. Post (Jan. 19, 2021).

official to incite violence against the government, and to obstruct the finalization of election results, after judges and election officials conclude that his challenges lack proof and legal merit.

To reaffirm our core constitutional principles—and to deter future Presidents from attempting to subvert our Nation's elections—the Senate should convict President Trump and disqualify him from holding or enjoying "any Office or honor, Trust, or Profit under the United States."[3] That outcome is not only supported by the facts and the law; it is also the right thing to do. President Trump has demonstrated beyond doubt that he will resort to any method to maintain or reassert his grip on power. A President who violently attacks the democratic process has no right to participate in it. Only after President Trump is held to account for his actions can the Nation move forward with unity of purpose and commitment to the Constitution. And only then will future Presidents know that Congress stands vigilant in its defense of our democracy.

STATEMENT OF FACTS

A. President Trump Refuses to Accept the Results of the 2020 Election

Before a single voter cast a ballot in the 2020 presidential election, President Trump made it clear that he had no intention of abiding by the verdict of the American people.[4] In a July 2020 interview, he pointedly refused to agree that he would accept the election results.[5] Pressed in September 2020 on whether he would "commit to making sure that there is a peaceful transferal [sic] of power after the election," he responded: "We're going to have to see what happens."[6] Throughout this period, he insisted at rallies and through social media that if he appeared to lose the

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[3] U.S. Const., Art. I, § 3, cl. 7.

[4] Nick Niedzwiadek, *The 9 Most Notable Comments Trump Has Made About Accepting the Election Results*, Politico (Sept. 24, 2020).

[5] Ryan Goodman et al., *Incitement Timeline: Year of Trump's Actions Leading to the Attack on the Capitol*, Just Security (Jan. 11, 2021).

[6] *Id.*

election, the only possible explanation was a conspiracy to defraud him and those who supported him. On August 17, for instance, he asserted that "the only way we're going to lose this election is if this election is rigged."[7] One week later, he declared that "[t]he only way they can take this election away from us is if this is a rigged election."[8] He echoed these points at every opportunity, laying the groundwork for a refusal to accept any outcome other than his own continued grip on power.

This was not mere rhetoric, as became apparent immediately after Election Day. Based on incomplete early returns, and despite warnings from virtually every expert and election official in the country, President Trump claimed victory and tried to stop states from counting millions of lawful ballots. On November 4, for example, he tweeted: "We are up BIG, but they are trying to STEAL the Election. We will never let them do it."[9] Over the following days, many media outlets (including Fox News) reported that Joseph R. Biden, Jr. had won the election. President Trump responded by asserting—on November 8—that "this was a stolen election."[10] He repeated that same theme many times over the following months, urging his supporters to "Stop the Steal!"[11]

It was never clear who President Trump blamed for this asserted fraud—which, according to him, was vast enough to affect the outcome in many different states. At various points throughout

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[7] *Donald Trump Speech Transcript Wisconsin August 17*, Rev (Aug. 17, 2020).
[8] *Donald Trump 2020 RNC Speech Transcript August 24*, Rev (Aug. 24, 2020).
[9] Donald J. Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49 AM).
[10] Donald J. Trump (@realDonaldTrump), Twitter (Nov. 8, 2020, 9:17 AM).
[11] *See e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 21, 2020 3:34 PM) (Watch: Hundreds of Activists Gather for 'Stop the Steal' Rally in Georgia https://t.co/vUG1bqG9yg via BreitbartNews Big Rallies all over the Country. The proof pouring in is undeniable. Many more votes than needed. This was a LANDSLIDE!"); Donald J. Trump (@realDonaldTrump), Twitter (Nov. 24, 2020 10:45 PM) ("Poll: 79 Percent of Trump Voters Believe 'Election Was Stolen' https://t.co/PmMBmt05AI via @BreitbartNews They are 100% correct, but we are fighting hard. Our big lawsuit, which spells out in great detail all of the ballot fraud and more, will soon be filled. RIGGED ELECTION!"); *Donald Trump Speech on Election Fraud Claims Transcript, December 2*, Rev (Dec. 2, 2020) (But no matter when it happens, when they see fraud, when they see false votes and when those votes number far more than is necessary, you can't let another person steal that election from you. All over the country, people are together in holding up signs, "Stop the steal."); Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2020 9:41 AM) (He didn't win the Election. He lost all 6 Swing States, by a lot. They then dumped hundreds of thousands of votes in each one, and got caught. Now Republican politicians have to fight so that their great victory is not stolen. Don't be weak fools!).

late 2020, President Trump accused some combination of corrupt state election officials, fraudulent voters, doctored voting machines, and unspecified shadowy actors. In a speech on December 2, for example, he alleged "tremendous voter fraud and irregularities" resulting from a suspicious late-night "massive dump" of votes; he added in this speech that certain votes were "counted in foreign countries," that "[m]illions of votes were cast illegally in the swing states alone," and that "[i]t is statistically impossible" that he lost.[12] "This election was rigged," he insisted.[13]

Our legal system affords many ways in which a candidate can contest the outcome of an election. President Trump took full advantage of those opportunities, focusing on the states in which he claimed President Biden had been improperly recognized as the winner: Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. President Trump and his allies ultimately filed 62 lawsuits in state and federal courts contesting every aspect of those elections.[14] But all of these suits were dismissed, save for one marginal Pennsylvania suit that did not affect the outcome there.[15] In dismissing these suits, judges at all levels—including several of President Trump's own judicial appointees—found that his claims were "not credible," "without merit," and "flat out wrong."[16] Courts warned that some of his suits improperly aimed to "breed confusion," "undermine the public's trust in the election," and "ignore the will of millions of voters."[17] As Judge Stephanos Bibas (a Trump appointee) observed in one characteristic opinion: "Free, fair elections are the lifeblood of

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[12] *Donald Trump Speech on Election Fraud Claims Transcript, December 2*, Rev (Dec. 2, 2020).

[13] *Id.*; *see also, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Dec. 30, 2020 2:48 PM) ("United States had more votes than it had people voting, by a lot. This travesty cannot be allowed to stand. It was a Rigged Election, one not even fit for third world countries!").

[14] William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021).

[15] *Id.*

[16] *Id.*

[17] Allison Durkee, *Trump Election Lawsuit Against Brad Raffensperger, Brian Kemp Fails in Georgia*, Forbes (Jan. 5, 2021).

our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[18] The U.S. Supreme Court itself denied numerous emergency applications aimed at overturning the election results; in response, President Trump tweeted that our highest court is "totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election."[19]

President Trump had the right to seek redress through the legal system. But he turned to improper and abusive means of staying in power when it became clear that the courts were unconvinced by his claims. Specifically, he launched a pressure campaign initially aimed at state election officials that soon expanded to the Department of Justice and Members of Congress.

Starting in mid-November, President Trump brought the full power of his office to bear on state officials, pushing them to overturn and block certification of the election results by any means necessary. He pursued this agenda through tweets, phone calls, and meetings with officials, seeking at every opportunity to reverse the election so that he could remain in office.[20] For example, despite clear evidence of President Biden's victory in Michigan, President Trump issued false accusations that "[t]he Democrats cheated big time and got caught."[21] He personally lobbied two members of the Board of Canvassers for Wayne County to rescind their prior votes in favor of certifying the election results.[22] He also (unsuccessfully) tried to induce Michigan's top Republican legislative

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[18] *Donald J. Trump For President v. Boockvar*, No. 20-3371 (3d Cir. Nov. 27, 2020).

[19] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020 8:51 AM).

[20] Maggie Haberman et al., *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. Times (Nov. 19, 2020); Amy Gardner et al., *Trump asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, Wash. Post (Dec. 8, 2020); Ryan Randazzo et al., *Arizona Legislature 'Cannot and Will Not' Overturn Election, Republican House Speaker Says*, Arizona Republic (Dec. 4, 2020).

[21] Donald J. Trump (@realDonaldTrump), Twitter (Nov. 18, 2020) ("The Great State of Michigan, with votes being far greater than the number of people who voted, cannot certify the election. The Democrats cheated big time, and got caught. A Republican WIN!").

[22] Kendall Karson et al., *Republican Canvassers Ask To 'Rescind' Their Votes Certifying Michigan Election Results*, ABC News (Nov. 19, 2020).

officials to violate Michigan law by rejecting the popular vote and selecting a Trump slate of electors; in furtherance of this effort, he had them fly to Washington, D.C., for a White House meeting.[23]

Trump applied particularly intense pressure to Georgia officials. On November 11, while Georgia's vote count was in progress, Republican Secretary of State Brad Raffensperger publicly stated that there was no evidence of widespread voter fraud and that ballots were being accurately counted.[24] President Trump then tweeted about Raffensperger seventeen times between November 11 and the date on which Georgia finally certified its election results. On Thanksgiving Day, he declared Raffensperger an "enemy of the people" for insisting upon the integrity of Georgia's election.[25] Reflecting an ominous pattern that would recur many times over the weeks that followed, President Trump's attacks on Raffensperger sparked threats of death and violence; one such message warned that "the Raffenspergers should be put on trial for treason and face execution."[26] Nonetheless, President Trump continued his assault on Raffensperger. President Trump's attacks were so concerning that Gabriel Sterling, another Republican election official in Georgia, publicly warned: "Mr. President … Stop inspiring people to commit potential acts of violence. Someone's going to get hurt, someone's going to get shot, someone's going to get killed."[27]

President Trump's campaign to reverse the election results—and to keep himself in the White House—lasted through the days immediately preceding the assault on the Capitol. On

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[23] Tom Hamburger et al., *Trump Invites Michigan Republican Leaders To Meet Him At White House As He Escalates Attempts To Overturn Election Results*, Wash. Post (Nov. 19, 2020).

[24] Tim Reid & Lisa Lambert, *Republican Georgia Secretary of State Says No Sign of Widespread Fraud in Vote Count*, Reuters (Nov. 11, 2020).

[25] Tim Kephart, *Trump Calls Ga. Secretary of State "Enemy of the People"*, CBS46 (Nov. 27, 2020).

[26] Jake Lahut, *Georgia's Republican Secretary Of State And His Wife Received Texts Telling Them They Deserve 'To Face A Firing Squad' As Trump Escalated His Attacks On Election Results*, Business Insider (Nov. 19, 2020); Donald J. Trump (@realDonaldTrump), Twitter (Dec. 7, 2020, 7:50 PM).

[27] Stephen Fowler, *'Someone's Going To Get Killed': Ga. Official Blasts GOP Silence On Election Threats*, NPR (Dec. 1, 2020).

December 23, for instance, President Trump reportedly called one of Georgia's lead election investigators, urging him to "find the fraud" and claiming that the official would be a "national hero" if he did so.[28] On January 2, President Trump called Raffensperger to push him to somehow "find" enough votes to overturn the state's results: "I just want to find 11,780 votes, which is one more than we have because we won the state."[29] President Trump also made a clear and chilling threat to Georgia's highest election official: Failing to "find" enough votes to overturn the results of the Georgia election would be "a criminal offense" and "a big risk to you."[30] By this point, it was evident that President Trump would resort to any means necessary to reverse the election outcome.

That is confirmed by his persistent (and increasingly extreme) efforts to transform DOJ into an arm of his assault on state election results. At President Trump's direction, then-Attorney General William Barr authorized federal prosecutors "to pursue substantial allegations of voting and vote tabulation irregularities prior to the certification of elections."[31] That prompted sixteen Assistant United States Attorneys in fifteen districts to urge Barr to cease the investigation because there was no evidence of such substantial voting irregularities. DOJ's own investigation ultimately confirmed as much: Barr announced on December 1 that DOJ had "uncovered no evidence of widespread voter fraud that could change the outcome of the 2020 election."[32] Barr reportedly told President Trump at the time that his claims of election stealing were "bullshit."[33]

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[28] Amy Gardner, *'Find the Fraud': Trump Pressured a Georgia Elections Investigator in a Separate Call Legal Experts Say Could Amount to Obstruction*, Wash. Post (Jan. 9, 2021).

[29] Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Wash. Post (Jan. 5, 2021).

[30] *Id.*

[31] Katie Benner & Michael S. Schmidt, *Barr Hands Prosecutors the Authority to Investigate Voter Fraud Claims*, N.Y. Times (Nov. 9, 2020); Memorandum from the Attorney General, Post-Voting Election Irregularity Inquiries (Nov. 9, 2020).

[32] Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, Associated Press (Dec. 1, 2020).

[33] Jesse Byrnes, *Barr Told Trump that Theories About Stolen Election Were "Bulls---": Report*, The Hill (Jan. 18, 2021).

President Trump then apparently pressured Barr's successor, Acting Attorney General Jeffrey Rosen, to appoint special counsels and file briefs aimed at overturning the election results.[34] When Rosen refused, President Trump reportedly hatched a scheme to fire Rosen and replace him with a different official who would be willing to deploy DOJ's resources in support of President Trump's efforts to keep himself in office.[35] President Trump backed down only after he learned that most of DOJ's political leadership would resign in protest if he fired Rosen.[36]

As this timeline indicates, President Trump's rejection of the election results—and his steadily more extreme efforts to overturn them—persisted from Election Day through January 6. He did not cease his campaign even after the Electoral College met on December 14, with presidential electors casting 306 Biden votes and only 232 Trump votes. Nor did he cease after Senate Majority Leader McConnell recognized Mr. Biden's victory: "Many millions of us hoped that the presidential election would yield a different result, but our system of government has processes to determine who will be sworn in on January the 20th. The Electoral College has spoken."[37] Instead, President Trump responded to these developments by escalating and refocusing his attacks on Members of Congress, pushing them to reject the Electoral College vote and then engineer his retention in office. On December 18, for instance, he tweeted that "@senatemajldr and Republican

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[34] Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021); Matt Zapotosky et al., *Trump Entertained Plan to Install an Attorney General Who Would Help Him Pursue Baseless Election Fraud Claims*, Wash. Post (Jan. 22, 2021); Jess Bravin & Sadie Gurman, *Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results*, Wall Street J. (Jan. 23, 2021).

[35] *Id.*

[36] Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021).

[37] Niels Lesniewski, *McConnell Recognizes Biden Win: 'The Electoral College Has Spoken*, Roll Call (Dec. 15, 2020); Nicholas Fandos, *Defying Trump, McConnell Seeks to Squelch Bid to Overturn the Election*, N.Y. Times (Dec. 15, 2020).

Senators have to get tougher, or you won't have a Republican Party anymore. We won the Presidential Election, by a lot. FIGHT FOR IT. Don't let them take it away!"[38]

B. President Trump Encourages His Followers to Come to Washington on January 6, 2021 and "Fight" to Overturn the Election Results

Following the Electoral College vote, President Trump fixated on January 6, 2021—the date of the Joint Session of Congress—as presenting his last, best hope to reverse the election results and remain in power. Even as he continued improperly pressuring state officials, DOJ, and Members of Congress to overturn the electoral outcome, he sharply escalated his public statements, using more incendiary and violent language to urge supporters to "stop the steal" on January 6. He insisted that the election had been "rigged" and "stolen," and that his followers had to "fight like hell" and "fight to the death" against this "act of war," since they "can't let it happen" and "won't take it anymore!" These statements turned his "wild" rally on January 6 into a powder keg waiting to blow. Indeed, it was obvious and entirely foreseeable that the furious crowd assembled before President Trump at the "Save America Rally" on January 6 was primed (and prepared) for violence if he lit a spark.

By mid-December 2020, President Trump had spent months insisting to his base that the only way he could lose the election was a dangerous, wide-ranging conspiracy against them that threatened America itself. After the Electoral College vote, he channeled that fury toward January 6, which he presented as the final firewall against a historic fraud that "stole" their democracy. On December 19, he tweeted: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. **Be there, will be wild!**"[39] On December 26, he tweeted: "If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen

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[38] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 18, 2020, 9:14 AM).
[39] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2020, 1:42 AM).

before, the Democrat Senators would consider it an **act of war, and fight to the death.** Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!" (emphasis added).[40] Fourteen minutes later, he tweeted again: "The 'Justice' Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, **the biggest SCAM in our nation's history**, despite overwhelming evidence. They should be ashamed. History will remember. **Never give up. See everyone in D.C. on January 6th**."[41] And on January 1, he tweeted: "The BIG Protest Rally in Washington, D.C., will take place at 11.00 AM on January 6th . . . **StopTheSteal!"**[42] That same day, Kylie Jane Kremer, the head of Women For America First—a group that had helped organize the Second Million MAGA March on December 12 (which ended in 4 stabbings and 33 arrests)[43]—tweeted a link to the website "Trumpmarch.com." At the top of the post she added, "the cavalry is coming Mr. President!" President Trump retweeted her post, responding, "A great honor!"[44]

As January 6 approached, and President Trump's other attempts to overturn the election failed (including his schemes at DOJ), he further escalated his call to arms. On January 4, he gave an angry speech in Dalton, Georgia, warning that "**Democrats are trying to steal the White House … [y]ou can't let it happen. You can't let it happen,**" and "**they're not taking this White House. We're going to fight like hell, I'll tell you right now**."[45] The next day, on January 5, he tweeted: "Washington is being inundated with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, **they won't take it**

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[40] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 8:00 AM).
[41] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 8:14 AM).
[42] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 2:53 PM).
[43] NBC Washington Staff, *4 Stabbed, 33 Arrested as Trump Supporters, Counterprotesters Clash in Downtown DC*, NBC Washington (Dec. 12, 2020).
[44] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 12:52 PM); Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 3:34 PM).
[45] Donald Trump Rally Speech Transcript Dalton, Georgia: Senate Runoff Election, Rev (Jan. 4, 2021).

anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!"[46] Trump made it clear that his goal was to prevent the election results from being certified: "**I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking** at the thousands of people pouring into D.C. They won't stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune"[47]

Through these and other statements, President Trump spent the weeks preceding his rally doing everything in his power to persuade attendees that their votes—and the election itself—were going to be stolen away in the Joint Session of Congress. That is, unless they somehow stopped it by making plans to "fight like hell" and "fight to the death" against this "act of war" by "Radical Left Democrats" and the "weak and ineffective RINO section of the Republican Party."

By this point, it was clear that President Trump was comfortable urging, approving, and even celebrating violence. During a debate on September 29, for instance, he told the Proud Boys—a violent extremist group with ties to white nationalism—to "stand back and stand by."[48] On October 30, when a caravan of his supporters in Texas attacked a bus full of Biden campaign workers, nearly running it off the road, President Trump tweeted a stylized video of the caravan and captioned it, "I LOVE TEXAS!"[49] Days later, he declared that "these patriots"—who could easily have killed a busload of innocent campaign staff—"did nothing wrong."[50]

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[46] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 5, 2021, 5:05 PM).

[47] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 5, 2021, 5:12 PM).

[48] Sheera Frenkel & Annie Karni, *Proud Boys Celebrate Trump's 'Stand By' Remark About Them At The Debate*, New York Times (Sept. 29, 2020).

[49] Donald J. Trump (@realDonaldTrump), Twitter (Oct. 31, 2020 8:14 PM).

[50] Donald J. Trump (@realDonaldTrump), Twitter (Nov. 1, 2020, 8:18 AM); Katie Shepherd, *Trump Cheers Supporters Who Swarmed A Biden Bus In Texas: 'These Patriots Did Nothing Wrong'*, Wash. Post (Nov. 2, 2020).

Throughout this period, it was widely reported and well known that President Trump's attacks on election officials had sparked threats, intimidation, and actual violence.[51] Following President Trump's attacks on Michigan's election process, armed supporters surrounded the home of the Michigan Secretary of State; after President Trump's attacks on the election in Arizona, his supporters surrounded the home of the Arizona Secretary of State and chanted, "We are watching you!"; after President Trump targeted the election outcome in Georgia, state election officials received a wave of death threats.[52] On December 1, as described above, Gabriel Sterling (who voted for Trump) warned President Trump that his incendiary rhetoric could mean that "someone's going to get killed." Yet President Trump not only refused to condemn any of this dangerous and threatening conduct; as detailed above, he also escalated his inflammatory and militaristic demands. That trend was matched by escalating violence. On December 12, for instance, clashes between Trump supporters and law enforcement and counter protestors at the "Second Million MAGA March" resulted in dozens of arrests and several stabbings, and at least one leader of the Proud Boys was later arrested for vandalizing a church.[53]

Given all that, the crowd which assembled on January 6 unsurprisingly included many who were armed, angry, and dangerous—and poised on a hair trigger for President Trump to confirm that they indeed had to "fight" to save America from an imagined conspiracy. Answering to the President's call to mobilize, thousands arrived in Washington for the purpose (aggressively

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[51] Michael Wines, *Here Are the Threats Terrorizing Election Workers*, N.Y. Times (Dec. 3, 2020).

[52] Nick Corasaniti et al., *As Trump Rails Against Loss, His Supporters Become More Threatening*, N.Y. Times (updated Jan. 7, 2021); *Video: Group Chants 'We Are Watching You' outside Arizona Secretary of State Katie Hobbs' Home*, KPNX-TV 12 News (Nov. 18, 2020).

[53] Peter Hermann & Keith Alexander, *Proud Boys Leader Barred From District By Judge Following His Arrest*, Wash. Post (Jan. 5, 2021); Jason Slotkin et al., *4 Stabbed, 33 Arrested After Trump Supporters, Counterprotesters Clash in D.C.*, NPR (Dec. 12, 2020).

championed by the President) of doing anything necessary to stop the Joint Session of Congress from finalizing the election results. Many who arrived brought weapons, plans of the Capitol building, and even tactical gear, including ropes, military helmets, ladders, and zip tie restraints.[54]

This mobilization was not hidden away in the dead of night. It was widely discussed on websites—such as TheDonald.win—that, as confirmed by a former White House staff member, were "closely monitored" by President Trump's social media operation.[55] These sites hosted hundreds of posts about plans for the attack on the Capitol, with detailed discussions of weaponry and directions to "find the tunnels" and "arrest the worst traitors."[56] At TheDonald.win, one poster stated: "If Congress illegally certifies Biden, … Trump would have absolutely no choice but to demand us to storm Congress and kill/beat them up for it."[57] Another poster wrote: "[Trump] can order the NAT guard to stand down if needed. unfortunately he has no control over the Capitol Police... but there are only around 2k of them and a lot are useless fat asses or girls."[58] In their posts, extremists made it clear that they were prepared to fight at President Trump's direction.

These calls for violence at the Capitol were widely covered. On January 2, for example, Fox News reported on a social media declaration by Proud Boys Leader Enrique Tarrio that the Proud Boys would come to the January 6 rally prepared for violence.[59] Another Proud Boys organizer said,

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[54] *See, e.g.*, Evan Hill et al., *They Got a Officer!': How a Mob Dragged and Beat Police at the Capitol*, N.Y. Times (Jan. 11, 2021); Peter Hermann, *'We Got to Hold This Door'*, Wash. Post (Jan. 14, 2021); Rich Schapiro, *Stun Guns, 'Stinger Whips' and a Crossbow: What Police Found on the Capitol Protesters*, NBC News (Jan. 13, 2021).

[55] Andrew Feinberg, White House Insiders Say Trump Knew What Was About To Happen At The Capitol—Because of His Social Media Guru Dan Scavino, Independent (Jan. 12, 2021).

[56] Adam Rawnsley and Justin Rohrlich, *'Ready to Die': Two Months of MAGA Mob Warning Signs*, The Daily Beast (Jan. 7, 2021).

[57] Greg Miller et al., *A Mob Insurrection Stoked by False Claims Of Election Fraud And Promises Of Violent Restoration*, Wash. Post (Jan. 9, 2021).

[58] House Judiciary Committee Majority Staff Report: Materials in Support of H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, 117th Cong, at 20 (Jan. 12, 2021).

[59] Caitlin McFall, *Proud Boys Flock to Washington 'Incognito' for Jan. 6 Protests*, Fox News (Jan. 2, 2021).

"We are going to smell like you, move like you, and look like you. The only thing we'll do that's us is think like us! Jan 6th is gonna be epic."[60] On January 5, the *Washington Post* warned that "[f]ar-right online forums are seething with references to potential violence and urging supporters of President Trump to bring guns to Wednesday's protests in Washington."[61] These calls to action, the *Washington Post* explained, were "direct responses to Trump's demands that his supporters pack the nation's capital in support of his bogus claims that November's national vote for Biden resulted from election fraud."[62] Other outlets reported threats to the Joint Session, with headlines such as "Violent threats ripple through far-right internet forums ahead of protest," and "MAGA Geniuses Plot Takeover of US Capitol."[63]

City officials, such as D.C. Mayor Muriel Bowser, also warned that the rally posed a high risk of violence. Mayor Bowser announced that all D.C. police officers would report on January 6, and asked residents to avoid the downtown area and "not to engage with demonstrators who come to our city seeking confrontation."[64] Law enforcement activity in the days leading up to January 6 confirmed that the gathering was dangerous. On January 3, a Capitol Police intelligence report warned of increased risk of violence targeted against Congress "as the last opportunity to overturn the results of the presidential election."[65] On January 5, an FBI office in Virginia also issued an

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[60] Joshua Zitser, *Far-Right Group Proud Boys Claim They Will Attend January 6 Rally 'Incognito' and Wear All-Black to Blend In With Antifa Protestors*, Business Insider (Jan. 3, 2021).

[61] Craig Timberg & Drew Harwell, *Pro-Trump Forums Erupt with Violent Threats Ahead of Wednesday's Rally Against the 2020 Election*, Wash. Post (Jan. 5, 2021).

[62] *Id.*.

[63] Brandy Zadrozny & Ben Collins, *Violent Threats Ripple Through Far-Right Internet Forums Ahead of Protest*, NBC News (Jan. 5, 2021); Andrew Beaujon, *MAGA Geniuses Plot Takeover of US Capitol*, Washingtonian (Jan. 5, 2021); Luke Barr, *Law Enforcement Braces For Protests As Trump Supporters Gather In Captial*, ABC News (Jan. 5, 2021).

[64] Press Release, Office of the Mayor of the District of Columbia, Mayor Bowser Continues Preparation for Upcoming First Amendment Demonstrations (Jan 3, 2021).

[65] Carol D. Leonnig, Capitol Police Intelligence Report Warned Three Days Before Attack That 'Congress Itself' Could Be Targeted, Washington Post (Jan. 15, 2021).

explicit warning that extremists were preparing to travel to Washington to commit violence and start a "war."[66] District of Columbia police made several protest-related arrests on January 4 and 5, including for weapons charges and assaulting a police officer. The arrests were widely publicized and included the leader of the Proud Boys, who was arrested with high capacity firearms magazines, which he claimed were meant to be supplied to another rally attendant.[67]

In all these ways—and more, as we will show at trial—President Trump created a powder keg on January 6. Hundreds were prepared for violence at his direction. They were prepared to do whatever it took to keep him in power. All they needed to hear was that their President needed them to "fight like hell." All they needed was for President Trump to strike a match.

C. Vice President Pence Refuses to Overturn the Election Results

By the time the rally began, President Trump had nearly run out of options. He had only one card left to play: his Vice President. But in an act that President Trump saw as an unforgivable betrayal, Vice President Pence refused to violate his oath and constitutional duty—and, just hours later, had to be rushed from the Senate chamber to escape an armed mob seeking vengeance.

In the weeks leading up to the rally, President Trump had furiously lobbied Vice President Pence to refuse to count electoral votes for President Biden from any of the swing states.[68] These demands ignored the reality that the Vice President has no constitutional or statutory authority to take that step. Over and over again, President Trump publicly declared that if Vice President Pence refused to block the Joint Session from finalizing President Biden's victory, then the election, the

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[66] Devlin Barrett and Matt Zapotosky, *FBI Report Warned Of 'War' At Capitol, Contradicting Claims There Was No Indication Of Looming Violence,* Washington Post (Jan. 12, 2021).

[67] Jennifer Steinhauer et al., *Leader of Proud Boys, a Far-Right Group, Is Arrested as D.C. Braces for Protests*, N.Y. Times (Jan. 4, 2021); Peter Hermann & Keith Alexander, *Proud Boys Leader Barred From District By Judge Following His Arrest*, Wash. Post (Jan. 5, 2021).

[68] Jonathan Swan, Zachary Basu, *Off the Rails Episode 7: Trump Turns on* Pence, Axios (Jan. 20, 2021).

party, and the country would be lost. "I hope Mike Pence comes through for us, I have to tell you," President Trump said in Georgia on January 4.[69] The next day, he tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency."[70] President Trump reiterated this demand just hours before the rally: "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"[71] On the morning of January 6, President Trump reportedly told Vice President Pence, "You can either go down in history as a patriot, or you can go down in history as a pussy."[72]

Later that day, while President Trump was speaking at his rally, Vice President Pence issued a public letter rejecting President Trump's threats. "It is my considered judgment," he wrote, "that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not."[73]

This letter sounded the death knell to any peaceful methods of overturning the election outcome. It was well known that the House and Senate were going to count the lawfully certified electoral votes they had received. President Trump's efforts to coerce election officials, state legislatures, the DOJ, Members of Congress, and his own Vice President had all failed. But he had long made it clear that he would *never* accept defeat. He would fight until the bitter end. And all that remained for President Trump was the seething crowd before him—known to be poised for

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[69] Donald Trump Rally Speech Transcript Dalton, Georgia: Senate Runoff Election, Rev (Jan. 4, 2021).
[70] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:00 AM).
[71] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 8:17 AM).
[72] Peter Baker et al., *Pence Reached His Limit With Trump. It Wasn't Pretty.*, N.Y. Times (Jan. 12, 2021).
[73] Mike Pence (@Mike_Pence), Twitter (Jan. 6, 2021, 1:02 PM).

violence at his instigation—and the Capitol building just a short march away, where Vice President Pence presided over the final, definitive accounting of President Trump's electoral loss.

D. President Trump Incites Insurrectionists to Attack the Capitol

Shortly before noon on January 6, President Trump took the stage at his "Save America Rally" and spoke from a podium bearing the Seal of the President of the United States.[74] By the time he addressed the angry crowd, Rudy Giuliani (his lawyer) had called for "trial by combat."[75] President Trump praised Giuliani, saying "he's got guts, he fights."

Over the following hour, President Trump repeatedly reiterated his claim that Democrats had "stolen" the election. He described vote tranches that favored President Biden as "explosions of bullshit."[76] He exhorted the crowd to "**fight much harder**" to "**stop the steal**" and "**take back our country**."[77] He also demanded again that Vice President Pence illegally interfere with the work of the Joint Session—a position that the Vice President rejected even as President Trump spoke. Time and again, President Trump declared that the future of the country was on the line and that only the crowd assembled before him could stop the massive fraud taking place at the Capitol.

At numerous points during the rally, President Trump urged the crowd toward the Capitol, where the Joint Session was about to start.[78] In response, an early wave surged toward the building and started to pull down barricades around its perimeter. Twenty minutes into the rally, President Trump said that those marching toward the Capitol should do so "peacefully." But then he spoke

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[74] *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

[75] *Id.*; *see also Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat'*, Rev (Jan. 6, 2021).

[76] *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

[77] *Id.*; *see also* Maggie Haberman, *Trump Told Crowd 'You Will Never Take Back Our Country with Weakness'*, N.Y. Times (Jan. 6, 2021).

[78] *Watch LIVE:* Save *America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

for another 50 minutes, using highly inflammatory rhetoric—exactly the kind of language calculated to incite violence given what had been reported about the crowd. He declared, "**we fight, we fight like hell**," because "**if you don't fight like hell you're not going to have a country anymore**."[79]

Videos of the crowd eliminate any doubt that President Trump's words *in fact* incited the crowd to commit violence. Immediately after President Trump told the crowd that "**you'll never take back our country with weakness**," and that "**[y]ou have to show strength**," supporters can be heard loudly shouting "take the Capitol right now!" and "invade the Capitol building!"[80] At another point, the crowd interrupted him with chants of "Fight for Trump!" The President did not try to soothe their aggression, but instead smiled and responded, "Thank you."[81] As many in the crowd instantly recognized, the tenor of his speech (and his repeated demand that they "fight like hell" and "show strength" to save their country) belied any desire for a peaceful demonstration.[82] Those who had come to the rally looking for a signal from their President found it in his remarks. Rather than quell the crowd, urge peaceful demonstration, or promise to carry on the fight over the years to come, the overwhelming thrust of President Trump's remarks—delivered to an armed, angry crowd widely known to be prepared for violence on his behalf—was a militaristic demand that they must fight to stop what was occurring in the Capitol at that very moment.

President Trump ended his speech by again imploring supporters to march to the Capitol, shouting, "So let's walk down Pennsylvania Avenue!"[83] Although President Trump ducked out and

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[79] *Id.*

[80] Ryan Goodman & Justin Hendrix, *"Fight for Trump": Video Evidence of Incitement at the Capitol*, Just Security (Jan. 25, 2021).

[81] *Watch LIVE:* Save *America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

[82] Julia Jacobo, *This Is What Trump Told Supporters before Many Stormed Capitol Hill*, ABC News (Jan. 7, 2021).

[83] *Id.*

returned to the White House to watch the day's events on television—and to lobby allies to stall the Joint Session—thousands of people, many of them armed, marched on the Capitol as he instructed.

E. Insurrectionists Incited by President Trump Attack the Capitol

Provoked and incited by President Trump, who told them to "fight like hell," hundreds of insurrectionists arrived at the Capitol and launched an assault on the building—a seditious, deadly attack against the Legislative Branch and the Vice President without parallel in American history.

In short order, President Trump's mob crashed through security barriers that had been set up around the Capitol perimeter, tore down scaffolding, and bludgeoned law enforcement personnel guarding the building.[84] Rioters wearing Trump paraphernalia shoved and punched Capitol Police officers, gouged their eyes, assaulted them with pepper spray and projectiles, and denounced them as "cowards" and "traitors."[85] Rioters attacked law enforcement personnel with weapons they had brought with them or stolen from the police: sledgehammers, baseball bats, hockey sticks, crutches, flagpoles, police shields, and fire extinguishers.[86] They tore off officers' helmets, beat them with batons, and deployed chemical irritants including bear spray, a chemical irritant similar to tear gas, designed to be used by hunters to fend off bear attacks.[87] Some attackers wore gas masks and bulletproof vests; many carried firearms—indeed, at least six handguns were recovered after the

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[84] Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021).

[85] Marc Fisher et al., *The Four-Hour Insurrection*, Wash. Post (Jan. 7, 2021).

[86] Evan Hill et al., *They Got a Officer!': How a Mob Dragged and Beat Police at the Capitol*, N.Y. Times (Jan. 11, 2021); Peter Hermann, *'We Got to Hold This Door'*, Wash. Post (Jan. 14, 2021).

[87] *Id.*; Peter Hermann, *'We Got to Hold This Door'*, Wash. Post (Jan. 14, 2021); Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021); Rich Schapiro, *Stun Guns, 'Stinger Whips' and a Crossbow: What Police Found on the Capitol Protesters*, NBC News (Jan. 13, 2021).

insurrection[88]—while others carried knives, brass knuckles, a noose, and other deadly weapons.[89] One officer attempting to guard the Capitol described the attack as a "medieval battle scene."[90]

After storming through the barricades surrounding the building, rioters laid siege to the Capitol itself. One rioter screamed, "What are we waiting for? We already voted and what have they done? They stole it! We want our fucking country back! Let's take it!"[91] Some in the mob scaled walls to reach the Capitol, while others climbed makeshift ladders and still others clambered over one another to get inside.[92] The mob physically overwhelmed law enforcement personnel guarding the entrances to the building and smashed through windows to gain access.[93] Police put their own lives at risk to defend the Capitol, but they were overcome by a crush of insurrectionists.

The mob breached the Capitol on the Senate side first, after the Joint Session had separated for each Chamber to consider an objection to Arizona's Electoral College votes.[94] Senators were in the midst of debate when rioters stormed into the building.[95] Secret Service agents swiftly rushed Vice President Pence out of the Senate and evacuated him and his family to elsewhere in the Capitol complex, avoiding a potentially deadly encounter.[96] A Capitol Police officer shrewdly and heroically led a violent crowd away from the entrance to the Senate Chamber, narrowly preventing a swarm of

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[88] *See, e.g.*, Officer Dallan Haynes Statement of Facts, at 2 (Jan. 7, 2021); DC Police Department (@DCPoliceDept), Twitter (Jan. 7, 2021, 1:52 PM).

[89] Officer Christopher Frank Affidavit, at 1 (Jan. 6, 2021), https://perma.cc/YN87-BDKH; Officer Alexandria Sims Affidavit, at 1 (Jan. 7, 2021), https://perma.cc/392C-CGPC; Special Agent Lawrence Anyaso Affidavit, at 1 (Jan. 7, 2021), https://perma.cc/M3GZ-WSVM; Luke Mogelson, *Among the Insurrectionists*, The New Yorker (Jan. 15, 2021).

[90] Peter Hermann, *'We Got to Hold This Door'*, Wash. Post (Jan. 14, 2021).

[91] Ryan Goodman & Justin Hendrix, *"Fight for Trump": Video Evidence of Incitement at the Capitol*, Just Security (Jan. 25, 2021).

[92] Marc Fisher et al., *The Four-Hour Insurrection*, Wash. Post (Jan. 7, 2021).

[93] *Id.*

[94] Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, N.Y. Times (Jan. 15, 2021).

[95] Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021).

[96] Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021).

insurrectionists from overcoming Senators who remained just feet away.[97] After that, the violent mob inside the Capitol embarked on a deadly mission.

Videos of the events show that dozens of the insurrectionists specifically hunted Vice President Pence and House Speaker Nancy Pelosi—the first and second in the line of Presidential succession, respectively. "Once we found out Pence turned on us and that they had stolen the election, like, officially, the crowd went crazy," said one rioter. "I mean, it became a mob."[98] Rioters chanted, "**Hang Mike Pence!**"[99] Another shouted, "Mike Pence, we're coming for you … fucking traitor!"[100] Others shouted, "**Tell Pelosi we're coming for that bitch.**"[101] One rioter said that he and other rioters "kicked in Nancy Pelosi's office door" and that "Crazy Nancy probably would have been torn into little pieces but she was nowhere to be seen."[102]

The insurrectionists also menaced Members of Congress, their staffs, their families, and Capitol personnel. Senators were evacuated from their Chamber, scrambling quickly just as the mob massed nearby.[103] Rioters ultimately overpowered Capitol Police throughout the complex, forcing them to retreat closer and closer to where Members had sought safety. In the House, terrified Members were trapped in the Chamber; they prayed and tried to build makeshift defenses while

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[97] *Id.*; Rebecca Tan, *A Black Officer Faced Down a Mostly White Mob at the Capitol. Meet Eugene Goodman*, Wash. Post (Jan. 14, 2021).

[98] Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021).

[99] Peter Baker et al., *Pence Reached His Limit with Trump. It Wasn't Pretty*, N.Y. Times (Jan. 12, 2021).

[100] Ryan Goodman & Justin Hendrix, *"Fight for Trump": Video Evidence of Incitement at the Capitol*, Just Security (Jan. 25, 2021).

[101] Matthew S. Schwartz, *As Inauguration Nears, Concern Of More Violence Grows*, NPR (Jan. 9, 2021).

[102] David K. Li & Ali Gostanian, *Georgia Lawyer Said He Kicked in Pelosi's Door, She Could've Been 'Torn into Little Pieces'*, NBC News (Jan. 19, 2021).

[103] Marc Fisher et al., *The Four-Hour Insurrection*, Wash. Post (Jan. 7, 2021).

rioters smashed the entryway.[104] Capitol Police dragged furniture to barricade the House Chamber doors against the mob attempting to break in; they then drew their guns to guard the doors.[105] Instructed to put on gas masks to protect against chemical agents, some Members called loved ones for fear that they would not survive the assault by President Trump's insurrectionist mob.[106]

As Members on the House floor evacuated through the Speaker's Lobby, rioters saw them and attempted to break through the barricaded glass door, which Capitol Police protected with their guns drawn. The officer at the door shot one woman attempting to break through, merely ten yards from the path where Members were being evacuated to safety from the House floor. Meanwhile, Members of Congress, press, and staff remained trapped in the Gallery, one floor up and fearing for their lives. When gunshots were heard outside the House Chamber, police screamed, "Get down! Get down!" and Members in the Gallery crawled to shelter behind chairs.[107]

Members and staff who were not on the House floor at the time of the siege were also in danger. Many barricaded themselves in their offices. Speaker Pelosi's staff hid under a table with the lights turned off for hours while they could hear rioters outside in the Speaker's office.[108] One Member asked his chief of staff to protect his visiting daughter and son-in-law "with her life"—which she did by standing guard at the door clutching a fire iron while his family hid under a table.[109]

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[104] Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021); CBS News, *Video Shows Members of Congress Taking Cover in House Gallery* (Jan. 6, 2021); Haley Britzky, *This Army Ranger-Turned-Congressman Was Last Out of the House Chamber During the Capitol Riots*, Task and Purpose (Jan. 7, 2021).

[105] CNN, *Lawmaker Describes Moment Captured in Dramatic Photo*, YouTube (Jan. 6, 2021).

[106] Rep. Dan Killdee (@RepDanKildee), Twitter, (Jan. 6, 2021, 2:52 PM); Rose Minutaglio, *Rep. Susan Wild On The 'Sheer Panic' She Felt In That Viral Photo*, Elle (Jan. 7, 2021).

[107] Rose Minutaglio, *Rep. Susan Wild On The 'Sheer Panic' She Felt In That Viral Photo*, Elle (Jan. 7, 2021).

[108] Christina Zhao, *Pelosi Gets Emotional Talking About Her Staffers Hiding Under Desks Amid Capitol Riot*, Newsweek (Jan. 10, 2021).

[109] John Hendrickson, *Jamie Raskin Lost His Son. Then He Fled a Mob*, The Atlantic (Jan. 8, 2021).

Once inside, insurrectionists desecrated and vandalized the Capitol. They ransacked Congressional Leadership offices—breaking windows and furniture, and stealing electronics and other sensitive material.[110] They left bullet marks in the walls, looted art, smeared feces in hallways, and destroyed monuments, including a commemorative display honoring the late Representative John Lewis.[111] Many rioters carried Trump flags and signs, while others wore the insignia of fringe militias and extremists such as the Proud Boys and neo-Nazis, including a shirt emblazoned with the slogan, "Camp Auschwitz."[112] One insurrectionist paraded the Confederate battle flag through the Capitol halls—an act that thousands of troops gave their lives to prevent during the Civil War.[113]

Shortly after Senators had been evacuated from the Senate Chamber, insurrectionists entered it and rummaged through Senators' desks, taking photos of private notes and letters.[114] One of them shouted "Trump won that election!" on the Senate dais where Vice President Pence had presided.[115] Another rioter climbed onto the dais, announcing that "I'm gonna take a seat in this chair, because Mike Pence is a fucking traitor."[116] He left a note on the Vice President's desk stating, "ITS ONLY

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[110] Natasha Bertrand, *Justice Department Warns of National Security Fallout from Capitol Hill Insurrection*, Politico (Jan. 7, 2021); Wilson Wong, *Shattered Glass, Ransacked Offices: Images of Damage at U.S. Capitol Left by Pro-Trump Mob*, NBC News (Jan. 7, 2021).

[111] *See* Chris Sommerfeldt, *Pro-Trump Rioters Smeared Poop in U.S. Capitol Hallways During Belligerent Attack*, N.Y. Daily News (Jan. 7, 2021); The Hill (@thehill), Twitter (Jan. 7, 2021, 1:16 PM); Sarah Bahr, *Curators Scour Capitol for Damage to the Building or Its Art*, N.Y. Times (Jan. 7, 2021); Lauren Egan, *Capitol Reels from Damage and Destruction Left by Violent Rioters*, NBC News (Jan. 7, 2021).

[112] *Here Are Some of the People Charged since a Mob Breached the Capitol*, Wash. Post (Jan. 15, 2021); Elana Schor, *Anti-Semitism Seen in Capitol Insurrection Raises Alarms*, Associated Press (Jan. 13, 2021); Special Agent Affidavit, at 13 (Jan. 15, 2021), https://www.justice.gov/opa/page/file/1355921/download.

[113] *Id.*; Julia Jacobo, *A Visual Timeline on How the Attack on Capitol Hill Unfolded*, ABC News (Jan. 10, 2021).

[114] *Id.*; Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, N.Y. Times (Jan. 15, 2021); Luke Mogelson, *Among the Insurrectionists*, The New Yorker (Jan. 15, 2021).

[115] Igor Bobic (@igorbobic), Twitter (Jan. 6, 2021, 2:47 PM).

[116] Luke Mogelson, *Among the Insurrectionists*, The New Yorker (Jan 15. 2021).

A MATTER OF TIME / JUSTICE IS COMING."[117] Some insurrectionists carried zip ties that could be used as handcuffs—apparently in anticipation of taking hostages.[118]

Meanwhile, the mob outside the building continued to attack the police and wreak havoc. Some erected a gallows directly outside of the Capitol.[119] Others disabled police vehicles, and still others left threatening messages for Members of Congress.[120] In a nearby pickup truck belonging to a Trump supporter who had driven to Washington for the day's events, police discovered materials for making napalm-like explosives, a rifle, a shotgun, three pistols, five types of ammunition, a crossbow, several machetes, a stun gun, and smoke devices.[121] Police found two other explosive devices near the Capitol, outside the offices of the Republican National Committee and the Democratic National Committee.[122] Law enforcement is currently seeking more information on a hooded figure captured on camera transporting the suspected pipe bombs.[123]

Provoked by President Trump's statements at the rally, many insurrectionists who assaulted the Capitol proudly proclaimed that they were doing President Trump's bidding. One told police officers that he came as part of a group of "patriots" "at the request of the President."[124] In a livestreamed video from inside the Capitol, another declared that "**[o]ur president wants us here.**

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[117] *Id.*

[118] Alexander Mallin & Ivan Pereira, *Capitol Riot Suspects Who Allegedly Brought Zip Ties, Wore Tactical Gear Arrested*, ABC News (Jan. 11, 2021).

[119] Azi Paybarah & Brent Lewis, *Stunning Images as a Mob Storms the U.S. Capitol*, N.Y. Times (Jan. 6, 2021).

[120] *Id.*

[121] *Here Are Some of the People Charged Since a Mob Breached the Capitol*, Wash. Post (Jan. 15, 2021).

[122] Michael Balsamo, *Discovery of Pipe Bombs in DC Obscured by Riot at Capitol*, Associated Press (Jan. 11, 2021).

[123] *See* DC Police Department (@DCPoliceDept), Twitter (Jan. 8, 2021, 10:52 AM).

[124] Special Agent James Soltes Affidavit, at 3 (Jan. 8, 2021).

… We wait and take orders from our president."[125] Yet another rioter yelled at police officers, "**[w]e were invited here … by the President of the United States**!"[126]

After the insurrection, one participant who broke into the Capitol wearing combat gear and carrying zip ties stated that he acted because "[t]he President asked for his supporters to be there to attend, and I felt like it was important, because of how much I love this country, to actually be there."[127] Another asserted, "I thought I was following my President. … He asked us to fly there, he asked us to be there, so **I was doing what he asked us to do**."[128] She explained that she believed that she had "**answered the call of [her] president**," echoing the views of other participants.[129] Subsequent reporting revealed that far-right groups had rallied members to attend the event based upon "the green light from the President."[130]

The insurrectionists killed a Capitol Police officer by striking him in the head with a fire extinguisher.[131] They injured over 140 police officers, including at least 81 U.S. Capitol Police officers and 65 members of the Metropolitan Police Department, with many requiring hospitalization and significant medical treatment.[132] One suffered an apparent heart attack after he was hit six times with a stun gun; another lost part of a finger.[133] To cite just a few of the many

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[125] Dan Barry et al., *'Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. Times (Jan. 9, 2021).

[126] *See* Philip Bump, *A House Republican Wanted Proof of Incitement. Here Are Four Rioters Who Came to D.C. Because of Trump*, Wash. Post (Jan. 13, 2021).

[127] *Here Are Some of the People Charged since a Mob Breached the Capitol*, Wash. Post (Jan. 15, 2021).

[128] David Begnaud (@DavidBegnaud), Twitter (Jan. 15, 2021, 8:30 PM).

[129] Alan Feurer & Nicole Hong, *'I Answered the Call of My President': Rioters Say Trump Urged Them On*, N.Y. Times (Jan. 17, 2021).

[130] Georgia Wells et al., *Proud Boys, Seizing Trump's Call to Washington, Helped Lead Capitol Attack*, Wall Street J. (Jan. 17, 2021); Aruna Viswanatha & Sadie Gurman, *Far-Right Affiliations Seen among Those Recently Charged in Capitol Riot*, Wall Street J. (Jan. 17, 2021).

[131] Marc Santora et al., *Capitol Police Officer Dies from Injuries in Pro-Trump Rampage*, N.Y. Times (Jan. 8, 2021).

[132] Peter Hermann & Julie Zauzmer, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers during Assault on U.S. Capitol*, Wash. Post (Jan. 11, 2021); Special Agent Michael Palian Affidavit, at 5 (Jan. 19, 2021); Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, Wash. Post (Jan. 27, 2021).

[133] Peter Hermann & Julie Zauzmer, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers during Assault on U.S. Capitol*, Wash. Post (Jan. 11, 2021).

incidents of violence captured on video: multiple officers were dragged down a flight of stairs and beaten with metal pipes and an American flag pole; another was bludgeoned with a hockey stick; another was crushed as he attempted to guard a door to the Capitol.[134] Rioters shouted as they surrounded one fallen officer: "We got one!" Others urged, "Kill him with his own gun!"[135] Four rioters died during the attack.[136]

It took more than three hours to secure the Capitol after the insurrectionists invaded the building.[137] Another three hours passed before the Joint Session could resume.[138] The rioters tried but—as Majority Leader McConnell noted—ultimately failed to prevent Vice President Pence and Congress from carrying out their constitutional responsibility to count the Electoral College votes.[139] At approximately 4 AM, President Biden was confirmed as the winner of the 2020 election.[140]

F. President Trump's Dereliction of Duty During the Attack

As armed insurrectionists breached the Capitol—and as Vice President Pence, the Congress, and the Capitol Police feared for their lives—President Trump was described by those around him as "borderline enthusiastic because it meant the certification was being derailed."[141] Senior administration officials described President Trump as "delighted" and reported that he was "walking around the White House confused about why other people on his team weren't as excited as he was

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[134] *Id.*; Evan Hill et al., *They Got a Officer!': How a Mob Dragged and Beat Police at the Capitol*, N.Y. Times (Jan. 11, 2021); Katie Shepherd, *Video Shows Capitol Mob Dragging Police Officer Down Stairs. One Rioter Beat the Officer with a Pole Flying the U.S. Flag*, Wash. Post (Jan. 11, 2021); Peter Hermann, *'We Got to Hold This Door'*, Wash. Post (Jan. 14, 2021); Pierre Thomas et al., *"Like a Medieval Battle Scene": Officers Recount Being Attacked by Capitol Mob*, ABC News (Jan. 15, 2021).

[135] Peter Hermann, *'We Got to Hold This Door'*, Wash. Post (Jan. 14, 2021).

[136] Jack Healy, *These Are the Five People Who Died in the Capitol Riot*, New York Times (Jan. 11, 2021).

[137] Shelly Tan et al., *How One of America's Ugliest Days Unraveled Inside and Outside the Capitol*, Wash. Post (Jan. 9, 2021).

[138] *Id.*

[139] Matthew Choi, *"They Failed": McConnell Condemns Rioters Who Stormed the Capitol*, Politico (Jan. 6, 2021).

[140] Shelly Tan et al., *How One of America's Ugliest Days Unraveled Inside and Outside the Capitol*, Wash. Post (Jan. 9, 2021).

[141] Kaitlan Collins (@kaitlancollins), Twitter (Jan. 6, 2021, 10:34 PM).

as you had rioters pushing against Capitol Police trying to get into the building."[142] These feelings were reflected in President Trump's actions (and inactions) over the following hours, which reveal an extraordinary, unprecedented repudiation of the President's duties to protect the government.

At 1:49 PM, after insurrectionists had overcome the Capitol perimeter—and after reports of pipe bombs had been confirmed—President Trump retweeted a video of his speech at the rally, which included his message that "Our country has had enough, we will not take it anymore, and that's what this is all about. … You have to be strong."[143] Just over thirty minutes later, at 2:24 PM, while rioters were still attacking police and after Vice President Pence had been evacuated from the Senate floor, President Trump again tweeted to excoriate the Vice President for refusing to obstruct the Joint Session: "**Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution**."[144] President Trump thus singled out Vice President Pence for direct criticism *at the very same time* the Vice President and his family were hiding from a violent mob provoked by President Trump. As one rioter explained, the mob "went crazy" after learning that "Pence turned on us and that they had stolen the election."[145]

As the assault continued, President Trump continued his efforts to prevent the Joint Session from affirming the election results. After Senators had been evacuated from the Senate Chamber, President Trump called Senator Mike Lee—apparently trying to reach Senator Tommy Tuberville—not to check on his safety, or assess the security threat, but to try to persuade him to delay and

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[142] Andrew Prokop, *Republican Senator: White House Aides Say Trump Was "Delighted" as Capitol Was Stormed*, Vox (Jan. 8, 2021).

[143] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:49:54 PM).

[144] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 2:24 PM).

[145] Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021).

further obstruct the Electoral College vote count.[146] In fact, there is no evidence that President Trump called Vice President Pence, Speaker Pelosi or Senator Chuck Grassley—the first three in the line of succession—or anyone else in the Capitol to check on their safety during the attack.

Recognizing President Trump's singular responsibility for the assault, as well as his unique ability to both provoke and quell the riotous mob, Members of the House and Senate from both parties urged the President to intervene.[147] This occurred both publicly and privately. House Minority Leader Kevin McCarthy confirmed that he had "talked to the President" on the telephone and said: "I think we need to make a statement. Make sure that we can calm individuals down."[148] Republican Representative Mike Gallagher tweeted, "Mr. President. You have got to stop this. You are the only person who can call this off."[149] Mick Mulvaney, the President's former Acting Chief of Staff, tweeted that President Trump "can stop this now and needs to do exactly that. Tell these folks to go home."[150] Even the President's own Chief of Staff, Mark Meadows, was prompted to speak to him after aides bluntly insisted on it: "They are going to kill people."[151]

But the President did not take any action at all in response to the attack until 2:38 PM, when he issued his first tweet, and 3:13 PM, when he issued a second. These tweets told his followers to "support our Capitol Police and Law Enforcement … Stay peaceful!"[152] and "ask[ed] everyone at the

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[146] Sunlen Serfaty et al., *As Riot Raged at Capitol, Trump Tried to Call Senators to Overturn Election*, CNN (Jan. 8, 2021).

[147] *See e.g.,* Ashley Parker et al., *Six Hours of Paralysis: Inside Trump's Failure to Act after a Mob Stormed the Capitol*, Wash. Post (Jan. 11, 2021); Nancy Pelosi (@SpeakerPelosi), Twitter (Jan. 6, 2021, 3:55 PM).

[148] Associated Press, *Trump Doesn't Ask Backers to Disperse after Storming Capitol*, PBS (Jan. 6, 2021); *see also Chris Christie says Trump Should Tell Protesters to Leave Capitol*, ABC News (Jan. 6, 2021).

[149] Editorial, *Mike Gallagher Is Right: 'Call It Off, Mr. President'*, Wisconsin State Journal (Jan. 6, 2021).

[150] Mick Mulvaney (@MickMulvaney), Twitter (Jan. 6, 2021, 3:01 PM).

[151] Ashley Parker et al., *Six Hours of Paralysis: Inside Trump's Failure to Act after a Mob Stormed the Capitol*, Wash. Post (Jan. 11, 2021).

[152] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 2:38 PM).

U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order."[153] These tweets were, obviously, totally ineffectual at stopping the violence. And they did not reflect any substantial effort on the part of the President of the United States to protect the Congress.

During this time, not only did President Trump fail to issue unequivocal statements ordering the insurrectionists to leave the Capitol; he also failed in his duties as Commander in Chief by not immediately taking action to protect Congress and the Capitol. This failure occurred despite multiple members of Congress, from both parties, including on national television, vehemently urging President Trump to take immediate action.

The next action that President Trump took—while the violence persisted and escalated—occurred more **than three hours** from the start of the siege. At this point, he released a scripted video that included a call for "peace" and "law and order," and instructed his followers, "you have to go home now."[154] But even in that video, President Trump continued to provoke violence, telling his supporters—who were *at that very moment* committing violence inside the Capitol and terrorizing Members of Congress—that the election was "stolen from us."[155] He added that "[i]t was a landslide election and everyone knows it, especially the other side." He concluded by telling the violent insurrectionists: "**We love you, you're very special. … I know how you feel.** But go home and go home in peace."[156]

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[153] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 3:13 PM).

[154] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 4:17 PM); *President Trump Video Statement on Capitol Protestors*, C-SPAN (Jan. 6, 2021).

[155] *Id.*

[156] *Id.*; *see also* Tony Keith, *Twitter 'Locks' President Trump for 12 Hours Wednesday Evening*, KKTV (Jan. 6, 2021).

The violence he had provoked unsurprisingly continued after President Trump released this video.[157] In the early evening, after the Capitol had finally been secured and the scope of the devastation was clear, President Trump sent another tweet. But rather than forcefully denounce the violence and express concern for the safety of law enforcement personnel and Members of Congress, he again validated the insurrection, reiterated his falsehoods about the election, and lionized the rioters as patriots: "**These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!**"[158]

Like his predecessors, President Trump swore an oath to "preserve, protect, and defend the Constitution of the United States." But on January 6, after inciting violence against the Congress to block certification of the election results, President Trump failed to honor that oath. And he concluded the day not by apologizing, or by repudiating the insurrectionists, but instead by embracing them and lending the imprimatur of the Presidency to their acts of domestic violence.

Since the events of January 6, President Trump has shown no remorse for his role in provoking an attack on our seat of government. To the contrary, he insisted to reporters days later that his speech prior to the insurrection had been "totally appropriate."[159] Despite repeated

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[157] Evan Hill & Arielle Ray, *Body Camera Footage Shows Capitol Rioters Trampling Over Woman*, N.Y. Times (Jan. 28, 2021).

[158] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 6:01 PM).

[159] Kevin Liptak & Betsy Klein, *Defiant Trump Denounces Violence but Takes No Responsibility for Inciting Deadly Riot*, CNN (Jan. 12, 2021).

entreaties, it took him three days to order the flag of the United States to be flown at half-staff to commemorate the death of a Capitol Police Officer who had been killed by insurrectionists.[160]

President Trump's conduct on and after January 6 exacerbated the continuing threat of violence following the assault on the Capitol. As a result, the federal and state governments had to take unprecedented measures to ensure security in Washington. The states sent 25,000 National Guard troops to protect the inauguration of an incoming President from potential violence incited by the outgoing President.[161] In addition, state capitols across the Nation shut their doors and took extreme security measures during the days leading up to the inauguration for fear of further violence in support of President Trump.[162] As the Director of the FBI stated, there was a major "potential for violence at multiple protests and rallies" both in Washington and at state capitols around the country "that could bring armed individuals within close proximity to government buildings and officials."[163] Ultimately, President Trump announced he would not attend the inauguration of President Biden.[164] He never issued any statement condemning threatened attacks on the inauguration or repudiating violence against the lawful government of the United States of America

G. The House Approves An Article of Impeachment with Bipartisan Support

In light of the crisis that President Trump created and the overwhelming public evidence of his guilt, the House acted quickly to impeach him.[165] Five days after the assault on the Capitol, an article of impeachment for incitement of insurrection was introduced in the House and referred to

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[160] David Choi, *Trump Lowers the White House Flag after Pressure from Both Republicans and Democrats*, Business Insider (Jan. 10, 2021).

[161] Emily Davies et al., *With Mall, Bridges and Streets Closed in D.C., the Nation Prepares for a Celebration of Democracy Mostly Devoid of its Citizens*, Wash. Post (Jan. 15, 2021), https://perma.cc/FR4Y-6G7N.

[162] Associated Press, *State Capitols Boarded Up, Fenced Off, Patrolled by Troops*, KNAU (Jan. 18, 2021).

[163] Press Release, FBI, *FBI Director Christopher Wray's Remarks at Briefing on Inauguration Security* (Jan. 15, 2021).

[164] Kaitlin Collins & Kevin Liptak, *Trump Tweets He is Skipping Biden's Inauguration*, CNN (Jan. 8, 2021).

[165] H. Res. 24, 117th Cong. (Jan. 11, 2021).

the House Committee on the Judiciary. The following day, the House Committee on Rules convened a hearing to take testimony on the impeachment resolution.[166] During this hearing, the Chairman of the Judiciary Committee submitted a 50-page report documenting the Committee's findings in support of impeachment.[167] At the conclusion of this hearing, the Rules Committee adopted by a recorded vote a special rule providing for House debate on the resolution.[168]

One day later—January 13, 2021—the House voted to impeach President Trump with bipartisan support on charges that he incited an insurrection. The article of impeachment was adopted with the support of 232 House Members, including every Democrat and ten Republicans.[169] The House acted with urgency because President Trump's rhetoric and conduct before, during, and after the riot made clear that he was a menace to the Nation's security and democratic system. Moreover, President Trump never disputed the facts that gave rise to his impeachment, which were captured on recordings. Instead he merely stated publicly that what he did was appropriate.

Several Republican Members of the House issued statements explaining their decision to vote for impeachment. For example, Representative John Katko explained:

> It cannot be ignored that President Trump encouraged this insurrection—both on social media ahead of January 6th, and in his speech that day. By deliberately promoting baseless theories suggesting the election was somehow stolen, the president created a combustible environment of misinformation, disenfranchisement, and division. When this manifested in violent acts on January 6th, he refused to promptly and forcefully call it off, putting countless lives in danger.[170]

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[166] *House Rules Committee Debate on Resolution to Remove President Trump From Office*, C-SPAN (Jan. 12, 2021).

[167] *House Judiciary Committee Majority Staff Report: Materials in Support of H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, 117th Cong (Jan. 12, 2021).

[168] U.S. House Committee on Rules, *Report on Providing for Consideration of the Resolution (H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors)*, H. Rept. 117-2, 117th Cong. (Jan. 12, 2021).

[169] Clerk of the U.S. House of Representatives, Roll Call 17, H. Res. 24 (Jan. 13, 2021.

[170] Press Release, Representative John Katko, Statement from Rep. Katko on Articles of Impeachment (Jan. 12, 2021).

Representative Tom Rice stated:

> It has been a week since so many were injured, the United States Capitol was ransacked, and six people were killed, including two police officers. Yet, the President has not addressed the nation to ask for calm. He has not visited the injured and grieving. He has not offered condolences. Yesterday in a press briefing at the border, he said his comments were "perfectly appropriate."[171]

Representative Adam Kinzinger similarly explained: "There is no doubt in my mind that the President of the United States broke his oath of office and incited this insurrection. He used his position in the Executive to attack the Legislative."[172] Representative Liz Cheney put the point simply when she recognized that "[t]here has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution."[173]

ARGUMENT

I. President Trump Committed High Crimes and Misdemeanors

A President is subject to impeachment, conviction, and disqualification from future federal officeholding if he commits high crimes and misdemeanors. President Trump's incitement of insurrection meets that standard.[174] His conduct endangered the foundation of our government.

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[171] Press Release, Representative Tom Rice, Rep. Tom Rice Votes to Impeach President Trump (Jan. 13, 2021).

[172] Press Release, Representative Adam Kinzinger, Congressman Kinzinger Statement on Impeachment (Jan. 12, 2012).

[173] Press Release, Representative Liz Cheney, I Will Vote To Impeach The President (Jan. 12, 2021).

[174] *See* Dan McLaughlin, *Convict and Disqualify Trump*, National Review (Jan. 15, 2021); David Post, *A Senatorial Impeachment Two-Step?*, The Volokh Conspiracy (Jan. 13, 2021); Gene Healy, *Only Impeachment is Censure Enough*, CATO Institute (Jan 13. 2021); Eric Posner, *The Effort to Disqualify Trump is Worth It*, Project Syndicate (Jan. 12, 2021); *ACLU Again Calls for Impeachment of President Trump*, ACLU Press Release (Jan. 10, 2021); Frank O. Bowman, III, *The Constitutional Case for Impeaching Donald Trump (Again)*, Just Security (Jan. 9, 2021); Jeannie Suk Gerson, *The Case For Removing Donald Trump*, New Yorker (Jan. 9, 2021); Michael Stokes Paulsen, *The Constitutional and Moral Imperative of Immediate Impeachment*, The Bulwark (Jan. 8, 2021); Jonathan H. Adler, *Yes, Congress May Impeach and Remove President Trump for Inciting Lawless Behavior at the Capitol*, The Volokh Conspiracy (Jan. 8, 2021); Noah Feldman, *I Testified at Trump's Last Impeachment. Impeach Him Again.*, Bloomberg (Jan. 7, 2021); Steven G. Calabresi & Norman Eisen, *We Disagree on a Lot. But We Both Think Trump Should Be Convicted*, N.Y. Times (Jan. 13, 2021); David Landau and Rosalind Dixon, *The 25th Amendment Can Remove Trump, but We Shouldn't Stop There*, N. Y. Times (Jan. 7, 2021); *Stanford Law's Michael McConnell on the 25th Amendment and Trump*,

A. President Trump Violated His Oath of Office

Every President swears an oath to "faithfully execute the Office of the President of the United States"[175] and assumes the constitutional duty to "take Care that the laws be faithfully executed."[176] Impeachment is a safeguard against Presidents who violate that oath (and betray that duty) by using the powers of their office to advance their own personal political interests at the expense of the Nation. In particular, the Framers of the Constitution feared a President who would corrupt his office by sparing "no efforts or means whatever to get himself re-elected."[177]

President Trump's effort to extend his grip on power by fomenting violence against Congress was a profound violation of the oath he swore. If provoking an insurrectionary riot against a Joint Session of Congress after losing an election is not an impeachable offense, it is hard to imagine what would be. The Framers themselves would not have hesitated to convict on these facts. Their worldview was shaped by a study of classical history, as well as a lived experience of resistance and revolution. They were well aware of the danger posed by opportunists who incited mobs to violence for political gain. They drafted the Constitution to avoid such thuggery, which they associated with "the threat of civil disorder and the early assumption of power by a dictator."[178] James Madison thus worked "to avoid the fate of those 'ancient and modern confederacies,' which he believed had succumbed to rule by demagogues and mobs."[179] The *Federalist Papers*, too, strongly

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Stanford Law School (Jan. 7, 2021); Keith E. Whittington, *The Conservative Case For Impeaching Trump Now*, Wash. Post (Jan. 7, 2021); David Priess & Jack Goldsmith, *Can Trump Be Stopped?*, Lawfare (Jan. 7, 2021); Cass Sunstein, *Does the 25th Amendment Apply to Trump? Quite Possibly*, Bloomberg (Jan. 7, 2021); John Podhoretz, *Donald Trump Should Be Impeached and Removed from Office Tomorrow*, Commentary Magazine (Jan. 6, 2021); Melissa De Witte and Sharon Driscoll, *Stanford Scholars React to Capitol Hill Takeover*, Stanford News (Jan. 6, 2021); Ilya Somin, *A Qualified Defense of Impeaching Trump Again*, Reason (Jan. 6, 2021); Will Baude, Samuel Bray & Stephen Sachs, *Impeach and Remove*, The Volokh Conspiracy (Jan. 6, 2021).

[175] U.S. Const., Art. II, § 1, cl. 8.

[176] U.S. Const., Art. II, §§ 1, 3.

[177] 2 *The Records of the Federal Convention of 1787*, at 64 (Max Farrand ed., 1911) (Farrand).

[178] Bernard Bailyn, *The Ideological Origins of the American Revolution* 282 (1967).

[179] Jeffrey Rosen, *American is Living James Madison's Nightmare*, The Atlantic (October 2018).

warned against aspiring tyrants who would aggrandize themselves—and threaten the Republic—by stirring popular fury to advance personal ambition.[180] The founding generation was familiar with leaders who provoked mobs for their personal gain and threatened the political order. They would have immediately recognized President Trump's conduct on January 6 as an impeachable offense.

B. President Trump Attacked the Democratic Process

The gravity of President Trump's offense is magnified by the fact that it arose from a course of conduct aimed at subverting and obstructing the election results. Since President George Washington willingly relinquished his office after serving two terms, our Nation has seen an unbroken chain of peaceful transitions from one presidential administration to the next—that is, until January 6, 2021. President Trump's incitement of insurrection disrupted the Joint Session of Congress as it performed its duty under the Twelfth Amendment to count the Electoral College votes.[181] Although this assault was put down after several hours, and the Joint Session fulfilled its responsibility later that night, President Trump's abuse of office threatened and injured our democratic order. Under absolutely no circumstance may a candidate for any position, at any level of government, respond to electoral defeat by provoking armed violence.

As evidenced by the statements of William Davie, George Mason, and Gouverneur Morris at the Constitutional Convention, the Framers "anticipated impeachment if a President placed his own interest in retaining power above the national interest in free and fair elections."[182] At a time when "democratic self-government existed almost nowhere on earth,"[183] the Framers imagined a society "where the true principles of representation are understood and practised, and where all authority

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[180] Alexander Hamilton, *The Federalist Papers*: No. 1.
[181] U.S. Const. Amend. XII.; Electoral Count Act of 1887, Pub. L. 49-90, 24 Stat. 373.
[182] *See* H. Rep. 116-346 at 52.
[183] Akhil Amar, *America's Constitution: A Biography* 8 (2006)

flows from, and returns at stated periods to, the people."[184] That would be possible only if "those entrusted with [power] should be kept in dependence on the people."[185] Thus, "[w]hen the President concludes that elections threaten his continued grasp on power, and therefore seeks to corrupt or interfere with them, he denies the very premise of our constitutional system."[186] President Trump placed his own political ambition above our Nation's commitment to democracy and the rule of law—and for that reason his actions plainly rank as high crimes and misdemeanors.

C. President Trump Imperiled Congress

President Trump's conduct not only harmed democracy, but also jeopardized the safety of the Vice President and nearly the entire Legislative Branch, as well as the police officers protecting the Capitol. Members of Congress and their staffs were forced to improvise barricades and hiding places while they awaited rescue by law enforcement. Others were trapped in the House Chamber, where they seized gas masks and ducked behind furniture to avoid insurrectionists. Many feared for their lives as armed attackers battered doors and Capitol Police drew weapons. The duration and severity of this threat were amplified by President Trump's dereliction of duty during the attack.

The Framers understood that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, … may justly be pronounced the very definition of tyranny."[187] They wrote a Constitution that creates a system of checks and balances within the federal government. A President may be impeached for conduct that severely undermines this structural separation of powers.[188] Our constitutional system simply cannot function if the President, acting to extend his

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[184] *See* 4 Elliot, *Debates in the Several State Conventions* at 331.
[185] James Madison, Federalist No. 37.
[186] *See* H. Rep. 116-346 at 53.
[187] James Madison, *The Federalist Papers*: No. 47.
[188] *See* H. Rept. 116-346 at 45-46, 145-148.

own grasp on power against the expressed will of the people, prompts an armed attack against a co-equal branch that prevents it from performing its core constitutional responsibilities.

President Trump's conduct will have other lasting effects on Congress. Before January 6, the Capitol was a place that the people of the United States could freely visit to see their democratic system at work. Since January 6, the Capitol complex has more closely resembled a fortress, ringed by fences with barbed wire and heavily guarded by the Capitol Police and the National Guard. The American people cannot now get anywhere near their Capitol. That is a sorry state of affairs for our Nation, one that no President should have played a role in bringing about.

D. President Trump Undermined National Security

A final consideration requiring President Trump's conviction is the harm he inflicted on the national security of the United States. Most immediately, the insurrectionist mob had access to, and stole, sensitive materials and electronics—including a laptop from the office of the Speaker of the House.[189] The U.S. Attorney for the District of Columbia has stated that "electronic items" and other "[d]ocuments [and] materials" were "stolen from [S]enators' offices."[190] These devices could be used to infiltrate federal networks.[191] It has therefore been necessary to undertake a thorough review to determine the extent of the security breach and implement appropriate remedial measures.

The attack that President Trump provoked has also emboldened other violent extremists.[192] As government officials and outside experts have warned, it may come to be seen as a rallying point for further insurrection—and as a "significant driver of violence" that inspires extremists "to engage

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[189] Raphael Satter, *Laptop Stolen from Pelosi's Office during Storming of U.S. Capitol, Says Aide*, Reuters (Jan. 8, 2021).
[190] Brian Fung, *Capitol Riots Raise Urgent Concerns about Congress's Information Security*, CNN (Jan. 8, 2021).
[191] Samantha Masunaga, *The Attack on the Capitol May Pose a Cybersecurity Risk. Here's How*, L.A. Times (Jan. 8, 2021).
[192] Molly Hennessy-Fiske, *'Second Revolution Begins': Armed Right-Wing Groups Celebrate Capitol Attack*, L.A. Times (Jan. 6, 2021).

in more sporadic, lone-actor or small-cell violence" against targets including "racial, ethnic, or religious minorities and institutions, law enforcement, and government officials and buildings."[193] President Trump's conduct on January 6 brought distinct extremist groups into ad hoc coalition with one another, which might strengthen their "willingness, capability, and motivation to attack and undermine" the government.[194] Further, the armed insurrection has been nothing short of a "propaganda coup … in fueling recruitment and violence for years to come."[195] President Trump only made matters worse when he tweeted, in the evening, "Remember this day forever!"—a statement that armed extremists will indeed remember. (Sadly, it will be remembered too by the Members of Congress, their staffs, and the law enforcement officials who were attacked by the insurrectionist mob.) In all of these respects, President Trump made Americans less safe, particularly Americans who belong to communities targeted by right-wing extremist groups.

Finally, President Trump's conduct tarnished the reputation of the United States abroad. Images of insurrectionists sacking the seat of American democracy—stirred to action by a President who said "we love you" during the assault—have been a propaganda bonanza for America's adversaries, for whom "the sight of the U.S. Capitol shrouded in smoke and besieged by a mob whipped up by their unwillingly outgoing president" is "proof of the fallibility of Western democracy."[196] This country's reputation as a stable democracy has sustained a heavy blow. For

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[193] Zolan Kanno-Youngs, *Federal Authorities Warn That the Capitol Breach Will Be a 'Significant Driver of Violence'*, N.Y. Times (Jan. 13, 2021).

[194] *Id.*

[195] Neil MacFarquhar et al., *Capitol Attack Could Fuel Extremist Recruitment for Years, Experts Warn*, N.Y. Times (Jan. 16, 2021).

[196] Alexander Smith & Saphora Smith, *U.S. Foes like China and Iran See Opportunity in the Chaos of Trump-Stoked Riot at Capitol*, NBC News (Jan. 8, 2021).

years to come, the insurrectionist attack that President Trump incited may gravely undermine American efforts to promote democracy, even as it emboldens authoritarian regimes.

Since our Nation was founded, it has been well recognized that impeachment is warranted for "betrayal of the Nation's interest—and especially for betrayal of national security."[197] President Trump's pursuit of power at all costs is a betrayal of historic proportions. It requires his conviction.

II. THERE IS NO DEFENSE FOR PRESIDENT TRUMP'S CONDUCT

Every argument that may be raised in President Trump's defense further demonstrates that he is a danger to our democratic system of government.

A. Fair Impeachment Process

President Trump incited a mob that attacked Congress during the Joint Session. The House's expeditious response to this attack was both necessary and appropriate. There must be no doubt that Congress will act decisively in the fact of such extraordinary abuse—which threatened not only the peaceful transfer of power, but also the very lives of senior government officials.

Any claim that the House moved too quickly in responding to a violent insurrection that President Trump incited is mistaken. The House serves as a grand jury and prosecutor under the Constitution. The events that form the basis for President Trump's impeachment occurred in plain view. They are well known to the American people. Many Members of Congress were themselves witnesses to his conduct and its consequences. There is no basis on which President Trump could assert that what a horrified Nation saw with its own eyes, and heard with its own ears, is somehow "fake news." Accordingly, in this unprecedented circumstance, the House acted squarely within its constitutional responsibilities in swiftly and emphatically approving an article of impeachment.

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[197] H. Rept. 116-346 at 49.

Here, in the Senate, is where the Constitution calls for a trial and where President Trump will have ample opportunity to make his case through procedures that the Senate adopts.

For that reason, any process-based objections to this impeachment are wrong. This case does not involve secretive conduct, or a hidden conspiracy, requiring months or years of investigation. It does not raise complicated legal questions about the definition of a high crime and misdemeanor. And the gravity of the President's abuse—as well as the continuing nature of the threat it poses to our democracy if left unanswered—demand the clearest of responses from the Legislative Branch. Indeed, hundreds of people have already been arrested and charged for their role in the events of January 6. There is no reason for Congress to delay in holding accountable the President who incited the violent attack, inflamed the mob even as it ransacked the Capitol, and failed to take charge of a swift law enforcement response because he believed such dereliction of duty might advance his political interest in overturning the results of an election that he lost.

B. Criminality

The Constitution authorizes impeachment and conviction for "high Crimes and Misdemeanors." As Alexander Hamilton explained in the *Federalist Papers*, impeachable offenses "are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[198] Therefore, whether President Trump's conduct violated the criminal law is a question for prosecutors and courts; "offenses against the Constitution are different than offenses against the criminal code."[199] The only question here is

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[198] Alexander Hamilton, *The Federalist Papers*: No. 65; *see* H. Rept. 116-346 at 58.

[199] *See* Constitutional Grounds for Presidential Impeachment, Report by the Majority Staff of the House Committee on the Judiciary, at 5 (Dec. 2019).

whether President Trump committed offenses justifying conviction and disqualification from future officeholding. For the reasons given above, the answer to that question is indisputably "yes."

C. Election Results

President Trump may persist in asserting that he actually won the 2020 presidential election, despite the overwhelming evidence to the contrary—and despite the rejection of this claim by every court and election official to consider it. President Trump may also suggest that his abuse of office is somehow justified or excused by his belief that the election was "rigged." Any such argument would rest upon demonstrable falsehoods about the legitimacy of the election results.

Moreover, we live in a Nation governed by the rule of law, not mob violence incited by candidates who cannot accept their own defeat. President Trump was not the first Presidential candidate who declared himself cheated out of victory.[200] Andrew Jackson, for instance, strongly believed that the 1824 election had been stolen from him because powerful forces refused to accept his candidacy on behalf of the common man. Richard Nixon believed in 1960 that he had been cheated out of the Presidency by widespread voter fraud in Illinois, which he thought secured John F. Kennedy's victory. And in 2000, Vice President Al Gore and many of his political supporters thought he would have won the Presidency had all of Florida's votes been properly counted. Yet despite their feelings of grievance, all of these Presidential candidates accepted the election results and acquiesced to the peaceful transfer of power required by the Constitution. President Trump, alone in our Nation's history, did not. His belief that he won the election—regardless of its truth or falsity (though it is assuredly false)—is no defense at all for his abuse of office.

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[200] For the discussion in this paragraph, see generally Robert Mitchell, *A Presidential Election History Lesson: Americans Often Waited Days Or Weeks For The Outcome*, Wash. Post (Nov. 4, 2020).

D. Free Speech

The First Amendment exists to protect our democratic system. It supports the right to vote and ensures robust public debate. But rights of speech and political participation mean little if the President can provoke lawless action if he loses at the polls. President Trump's incitement of deadly violence to interfere with the peaceful transfer of power, and to overturn the results of the election, was therefore a direct assault on core First Amendment principles. Holding him accountable through conviction on the article of impeachment would *vindicate* First Amendment freedoms—which certainly offer no excuse or defense for President Trump's destructive conduct.

Most fundamentally, the First Amendment protects private citizens from the government; it does not protect government officials from accountability for their own abuses in office. Therefore, as scholars from across the political spectrum have recognized, the First Amendment does not apply *at all* to an impeachment proceeding.[201] The question in this case is not whether to inflict liability or punishment on a private citizen; instead, the Senate must decide whether to safeguard the Nation's constitutional order by disqualifying an official who committed egregious misconduct. As one scholar writes, "the First Amendment does not shrink the scope of the impeachment power or alter what conduct would fall within the terms of high and misdemeanors."[202]

Indeed, the notion that a President can attack our democracy, provoke violence, and interfere with the Electoral College so long as he does so through statements advocating such lawlessness would have astonished the Framers. They wrote the impeachment provisions of the

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[201] *See* Michael C. Dorf, *Free Speech, Due Process, and Other Constitutional Limits in Senate Impeachment Trials*, Dorf on Law (Jan. 20, 2021, 7:00 AM); Keith E. Whittington, *Is There A Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021, 4:18 PM); Jonathan H. Adler, *Yes, Congress May Impeach and Remove President Trump for Inciting Lawless Behavior at the Capitol*, The Volokh Conspiracy (Jan. 8, 2021, 3:21 PM); Ilya Somin, *The First Amendment Doesn't Protect Trump Against Impeachment for his Role in Inciting the Assault on the Capitol*, The Volokh Conspiracy (Jan. 8, 2021, 4:17 PM);

[202] *See* Keith E. Whittington, *Is There A Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021, 4:18 PM).

Constitution to guard against *any* presidential conduct that constitutes a great and dangerous offense against the Nation—no matter the means for carrying out that malfeasance. And here, the House approved an article of impeachment that concerns not solely the President's incitement, but also his conduct preceding and following his provocation of an armed assault on the Capitol.

Regardless, even if the First Amendment were applicable here, private citizens and government officials stand on *very* different footing when it comes to being held responsible for their statements. As the leader of the Nation, the President occupies a position of unique power. And the Supreme Court has made clear that the First Amendment does not shield public officials who occupy sensitive policymaking positions from adverse actions when their speech undermines important government interests.[203] Thus, just as a President may legitimately demand the resignation of a Cabinet Secretary who publicly disagrees with him on a matter of policy (which President Trump did repeatedly), the public's elected representatives may disqualify the President from federal office when they recognize that his public statements constitute a violation of his oath of office and a high crime against the constitutional order. No one would seriously suggest that a President should be immunized from impeachment if he publicly championed the adoption of totalitarian government, swore an oath of eternal loyalty to a foreign power, or advocated that states secede from and overthrow the Union—even though private citizens could be protected by the First Amendment for such speech.[204] By its own terms, and in light of its fundamentally democratic

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[203] *See Branti v. Finkel*, 445 U.S. 507, 517-518 (1980); *Elrod v. Burns*, 427 U.S. 347, 366-367 (1976) (plurality).

[204] *See* Keith E. Whittington, *Is There A Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021, 4:18 PM) (listing additional examples).

purposes, the First Amendment does not constrain Congress from removing an official whose expression makes him unfit to hold or ever again occupy federal office.[205]

Yet even if President Trump's acts while occupying our highest office were treated like the acts of a private citizen, and even if the First Amendment somehow limited Congress's power to respond to presidential abuses, a First Amendment defense would *still* fail. Speech is not protected where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[206] Given the tense, angry, and armed mob before him, President Trump's speech—in which he stated "you'll never take back our country with weakness," proclaimed that "[y]ou have to show strength," and exhorted his supporters to "go to the Capitol" and "fight like Hell" immediately before they stormed the Capitol—plainly satisfies that standard.

Separate from these legal points, President Trump may assert that this impeachment reflects "cancel culture" or some supposed intolerance of his right to voice objections to the election results. That would be a red herring. President Trump endangered the very constitutional system that protects all other rights, including freedom of expression. It would be perverse to suggest that our shared commitment to free speech requires the Senate to ignore the obvious: that President Trump is singularly responsible for the violence and destruction that unfolded in our seat of government on January 6. "It can't be that the solemn price for protecting our civil liberties against current and future abuses is that the president can incite a mob bearing huge flags with his name on them to storm the Capitol, kill a police officer, and further, not immediately tell them to stop or, as

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[205] *Branti*, 445 U.S. at 517, 519. Indeed, impeachment is fundamentally an employment action against a public official, and thus the First Amendment would not insulate the President's statements from discipline even if it applied, because the government's interest in orderly operation would outweigh the President's speech interests. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Meyers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[206] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

commander-in-chief, to refuse to send help . . . . [T]hat would be a sure way to make a mockery of the civil liberties . . . contemplated and secured by the Constitution and Bill of Rights."[207]

III. THE SENATE HAS JURISDICTION TO TRY THIS IMPEACHMENT

Given the overwhelming strength of the case against him, we expect President Trump will seek to escape any reckoning for his constitutional offenses by asserting that the Senate lacks jurisdiction over him as a former official. That argument is wrong. It is also dangerous. The period in which we hold elections and accomplish the peaceful transfer of power is a source of great pride in our nation. But the transition between administrations is also a precarious, fragile time for any democracy—ours' included. The Framers anticipated these risks and emphasized that presidential abuse aimed at our democratic process itself was the single most urgent basis for impeachment. It is unthinkable that those same Framers left us virtually defenseless against a president's treachery in his final days, allowing him to misuse power, violate his Oath, and incite insurrection against Congress and our electoral institutions simply because he is a lame duck. There is no "January Exception" to impeachment or any other provision of the Constitution. A president must answer comprehensively for his conduct in office from his first day in office through his last. Former President John Quincy Adams thus declared, "I hold myself, so long as I have the breath of life in my body, amenable to impeachment by [the] House for everything I did during the time I held any public office."[208]

As the Senate itself concluded in the trial of Secretary of War William Belknap, and as nearly every legal expert has affirmed, President Adams had the right idea. The Constitution does not allow officials to escape responsibility for committing impeachable offenses by resigning when

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[207] Jonathan Zittrain, *Impeachment Defense, the Constitution, and Bill of Rights*, Just Security (Jan. 13, 2021).
[208] Cong. Globe, 29th Cong., 1st Sess. 641 (1846) (statement of Rep. Adams).

caught, or by waiting until the end of their term to abuse power, or by concealing misconduct until their service concludes. Experts from across the ideological spectrum, including a co-founder of the Federalist Society and Ronald Reagan's Solicitor General, agree that "[t]he Constitution's text and structure, history, and precedent make clear that Congress's impeachment power permits it to impeach, try, convict, and disqualify former officers, including former presidents."[209] Even Professor Jonathan Turley (who seems to have changed his long-held views on the subject less than a month ago) previously argued that impeaching former presidents for abuses in office is authorized by the Constitution and can serve as "a reaffirmation of the principle that, within this system, 'no man in no circumstance, can escape the account, which he owes to the laws of his country.'"[210]

It is particularly obvious that the Senate has jurisdiction here because President Trump was in office at the time he was impeached. There can be no doubt that the House had authority to impeach him at that point. So the question is not whether a former official can ever be impeached by the House—though, as we will explain, this is indeed authorized. The only issue actually presented is whether the Senate has jurisdiction to conduct a trial of *this* impeachment. And Article I, Section 3, Clause 6 provides a straightforward answer to that question: "The Senate shall have the sole Power to try *all* Impeachments" (emphasis added). As Professor Michael McConnell, a former Court of Appeals judge appointed by President George W. Bush, explains: "The key word is 'all.' This clause contains no reservation or limitation. It does not say 'the Senate has power to try

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[209] *See* Constitutional Law Scholars on Impeaching Former Officers (Jan. 21, 2021), available at https://www.politico.com/f/?id=00000177-2646-de27-a5f7-3fe714ac0000; *see also* Congressional Research Service, *The Impeachment and Trial of a Former President* 1-2 (Jan. 15, 2021) ("[I]t appears that most scholars who have closely examined the question have concluded that Congress has authority to extend the impeachment process to officials who are no longer in office.").

[210] Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment As A Madisonian Device*, 49 Duke L.J. 1, 96 (1999); *see also* Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. Rev. 1791, 1827 (1999).

impeachments against sitting officers.' Given that the impeachment of Mr. Trump was legitimate, the text makes clear that the Senate has power to try that impeachment."[211]

Accordingly, the Senate should not turn aside from centuries of its own practice and understanding. President Trump is personally responsible for inciting an armed attack on our seat of government that imperiled the lives of the Vice President, Members of Congress and our families, and those who staff and serve the Legislative Branch. The Nation cannot simply "move on" from presidential incitement of insurrection. If the Senate does not try President Trump (and convict him) it risks declaring to all future Presidents that there will be no consequences, no accountability, indeed no Congressional response at all if they violate their Oath to "preserve, protect and defend the Constitution" in their final weeks—and instead provoke lethal violence in a lawless effort to retain power. That precedent would horrify the Framers, who wrote the Presidential Oath of Office into the Constitution and attached no January Exception to it. President Trump must therefore stand trial for his high crimes and misdemeanors against the American people.

A. Former Officials in England and the Early American States Were Subject to Impeachment and Disqualification for Abuses Committed in Office

As revolutionaries who overthrew a king, the Framers obsessed over protecting their young Republic from the abuse of power. Based on the history of impeachment in England and the early American states, they would have considered it self-evident that a former official like President Trump could be impeached and tried for high crimes and demeanors he had committed in office.

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[211] Quoted in Eugene Volokh, *Impeaching Officials While They're in Office, but Trying Them After They Leave*, The Volokh Conspiracy (Jan. 28, 2021), https://reason.com/volokh/2021/01/28/impeaching-officials-while-theyre-in-office-but-trying-them-after-they-leave/

When the Framers gathered in Philadelphia in 1787, they did not invent the impeachment power from scratch. As Alexander Hamilton explained in Federalist No. 65, they looked to English history, which provided "the model from which the idea of this institution has been borrowed."[212] The Framers were also influenced by "several of the State constitutions."[213] *Id.* And it was firmly established in both England and the early states that former officials were subject to impeachment for abuses in office. This was not a remotely controversial view. It was widely accepted. By vesting Congress with the power of "impeachment," the Framers incorporated that history and meaning.

Looking to the unwritten British constitution confirms that former officials were subject to impeachment. In fact, "Parliament impeached only two men during the 18th century, both former officers."[214] In 1725, former Lord Chancellor Macclesfield was impeached and convicted for acts of bribery committed during his tenure in office.[215] And while the Framers deliberated in Philadelphia in 1787, they knew that Warren Hastings faced charges in Parliament arising from abuses he had committed as the former Governor General of Bengal.[216] Those charges were championed by no less a figure than Edmund Burke, a great and founding figure of conservative political theory.

Early American states followed English practice in this respect. The impeachment of former officials was thus "known and accepted" under early state constitutions.[217] Five states—including Virginia and Pennsylvania—specifically authorized such impeachments.[218] In some states, *only* former officials (not current officials) could be impeached, which confirms the centrality of the

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[212] *The Federalist No. 65*, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[213] *Id.*
[214] Keith Whittington, *Yes, the Senate Can Try Trump*, Wall Street Journal (Jan. 22, 2021).
[215] *See* Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13, 26 (2001) (hereinafter, *Former Officials*).
[216] *See id.* at 26-27.
[217] *Id.* at 27.
[218] *Id.* at 29-31.

disqualification remedy to early American thinking about impeachment and the oddity of any suggestion that former officials can never be impeached.[219] Looking to the state constitutions that allowed impeachment but did not expressly address former officials confirms that impeaching former officials was indeed consistent with American legal traditions.[220] And no state constitution expressly prohibited such impeachments.[221] Moreover, the precept that former officials could be impeached was acted upon: in 1781, for instance, the Virginia General Assembly subjected Thomas Jefferson to an impeachment inquiry after he completed his term as governor.[222]

As defined by British and early American practice, the phrase "impeachment" was thus understood as covering former officials. That was the rule on both sides of the Atlantic. Prohibiting former official impeachments would have been a marked departure from common legal usage and tradition—the kind of departure that we might expect to trigger heated debates and considerable writing. But as explained below, there were no such debates and there were no such writings. If anything, the Framers' deliberations confirm adherence to the tradition they inherited.

Throughout this early period, disqualification was recognized as essential to achieving the core purposes of impeachment. "Especially in an age of long, varied careers, it was very significant that an impeachment conviction said not only 'get out!' but added an emphatic and irreversible 'and stay out!'"[223] Removal alone was not enough to protect the public from corrupt and abusive officials, who might later seek reelection or reappointment—and whose misconduct could create dangerous precedents if not decisively repudiated. Disqualification gave teeth to impeachment. The

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[219] *See id.*
[220] *See id.* at 34-35.
[221] *See id.*
[222] *See id.* at 29.
[223] *Id.* at 73-74.

threat of disqualification deterred officials from abusing their power by reminding them that "their political existence depends upon their good behavior."[224] It allowed legislatures to convene inquests—and to hold public trials—that "served as a vehicle for exposing and formally condemning official wrongdoing, or for a former officeholder to clear his name."[225] Finally, it protected society from those who dishonored their offices and might do so again, whenever their abuse of power may have occurred or been discovered. These purposes defined the impeachment power as it was known to the Framers, who wrote it into the Constitution as a safeguard against presidential abuse.

B. The Framers Adhered to the Tradition That Former Officials Were Subject to Impeachment, Conviction, and Disqualification for Misconduct in Office

The records of the Constitutional Convention and a close study of the Constitution's text confirm that a former official like President Trump remains subject to impeachment and trial for high crimes and misdemeanors. History, originalism, and textualism thus leave no doubt that the Senate has jurisdiction—and a constitutional duty—to decide this case on the merits.

As Justice Robert Jackson wisely observed, "the purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."[226] Nowhere is that truer than with regard to the presidency. As Edmund Randolph warned, "the Executive will have great opportunitys of abusing his power."[227] Impeachment was the Framers' final answer to this threat. Their goal was not to criminally punish presidents for abuse or corruption; that they left to prosecutors and courts. The Framers had a much greater purpose in mind: the preservation of the Republic itself.

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[224] *See* Whittington, *Yes, the Senate Can Try Trump.*
[225] *Id.*
[226] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (Jackson, J., concurring).
[227] 2 Max Farrand, ed., *The Records of the Federal Convention of 1787*, 67 (1911)

To achieve that purpose, the Framers vested Congress with the power to investigate, impeach, and convict officials for constitutional offenses. The Framers then provided two separate remedies, both focused on an offender's ability to seek and exercise government power: removal from office and disqualification from future officeholding. As confirmed by their deliberations at the Constitutional Convention, as well as the text and structure of the Constitution, the Framers adhered to British and early state practice in authorizing impeachment for *any* high crimes and misdemeanors against the American people—whenever committed and whenever discovered.

That is not surprising. The Framers were too savvy to make up a new rule, at odds with centuries of historical practice, that would allow officials to escape accountability by resigning at the last minute, or by waiting until near the end of their tenure in office to commit abuses, or by concealing misconduct until after they left public service. This would create extremely dangerous and perverse incentives, especially for Presidents who sought to retain power by subverting election results in their final days. In designing the Constitution, the Framers aimed to ensure that the President could never become a King; they did not leave the Nation unprotected against abuse surrounding the transfer of power from one administration to the next.

To that end, the Constitution establishes a clear framework. The House has the sole power to impeach. The Senate has the sole power to try impeachments. These grants of jurisdiction over impeachment are categorical and include no statute of limitations. Any person who commits an extraordinary abuse of power in office may face impeachment for high crimes and misdemeanors. If they are currently a civil officer and are convicted, they must at least be removed from office. And in all events, the Senate's judgment in an impeachment case cannot extend further than disqualification from holding any office of honor, trust, or profit under the United States. These rules arise directly from the history, text, and structure of the Constitution.

1. The Constitutional Convention

The Framers were familiar with the history of impeachment. They understood that the Constitution's references to "impeachment" incorporated centuries of prior practice. In certain very specific respects, they decided to vary from that history—for instance, by requiring a two-thirds supermajority in the Senate to convict. But *nobody* at the Constitutional Convention suggested departing from the existing practice that former officials could be impeached (and disqualified from future officeholding) for their abuses while in office. If anything, the opposite is true. Four aspects of the Framers' deliberations signal their intent to follow historical practice.

First, in debating the standard for impeachable offenses, George Mason explicitly raised the ongoing case of Warren Hastings—and did so to describe when impeachment *should* occur. Were anybody present at the Convention opposed to authorizing the impeachment of former officials, this would have been an obvious opportunity to speak up. "If Mason and the Framers knew anything about the Hastings case," it was that he faced an impeachment proceeding in Parliament *after* he had left his position as Governor General of Bengal.[228] Yet nobody objected. "Given the prominence of the Hastings's impeachment to the framers, the absence of debate on the question at the federal or state ratifying conventions . . . speaks volumes."[229]

Second, and highly relevant here, many Framers described efforts to overturn or corrupt elections as the paradigm case for impeachment. Gouverneur Morris explained that "the Executive ought [] to be impeachable for … Corrupting his electors."[230] William Davie favored impeachment

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[228] Kalt, *Former Officials*, at 47.

[229] Laurence H. Tribe, *The Senate Can Constitutionally Hold An Impeachment Trial After Trump Leaves Office*, New York Times (Jan. 13, 2021).

[230] 2 Farrand, Records of the Federal Convention, at 69.

for a President who spared "no efforts or means whatever to get himself re-elected."[231] And Mason intended impeachment for a President "who has practiced corruption & by that means procured his appointment in the first instance."[232] By necessity, this kind of misconduct would usually occur near the end of a President's term in office.[233] Given their intense focus on danger to elections and the peaceful transfer of power, it is inconceivable that the Framers designed impeachment to be virtually useless in a President's final days, when opportunities to interfere with the peaceful transfer of power would be most tempting and dangerous. Moreover, it would have made no sense for the Framers to allow impeachment if a President succeeded in winning re-election through corrupt means, but to prohibit *any* Congressional response if his efforts to corrupt the election fell short. A President who tried and narrowly failed to retain power improperly could easily try again. He would still warrant disqualification, both to protect the nation from his future wrongdoing and as a deterrent to anybody else contemplating last-ditch attacks on the electoral process.

Indeed, "a singular concern of the Framers in devising our constitutional system was the danger of a power-seeking populist of the type they referred to as a 'demagogue.'"[234] Madison and Hamilton repeatedly warned against this ancient threat to the young Republic.[235] Yet "the Framers further understood that the source of such a person's power does not expire if he or she is expelled from office; so long as such a person retains the loyalty of his or her supporters, he or she might return to power."[236] Accordingly, "the Framers devised the disqualification power to guard against

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[231] *Id.* at 64.

[232] *Id.* at 65.

[233] *See* Jed Shugerman, *An Originalist Case for Impeaching Ex-Presidents: Mason, Randolph, and Gouverneur Morris*, Shugerblog (Jan. 16, 2021) ("[T]he Framers supported a broad impeachment process for presidential misconduct at the end of their terms, especially with respect to re-election abuses [and] corrupting or contesting electors . . .").

[234] *Letter from Constitutional Law Scholars on Impeaching Former Officers.*

[235] *See* Jeffrey Rosen, *American is Living James Madison's Nightmare*, The Atlantic (October 2018).

[236] *Letter from Constitutional Law Scholars on Impeaching Former Officers.*

that possibility, and would surely disagree that a person who sought to overthrow our democracy could not be disqualified from holding a future office of the United States because the plot reached its crescendo too close to the end of his or her term."[237]

Third, those who wrote and ratified the Constitution saw that impeachment was meant to deter abuse of office—which it could not achieve if wrongdoers knew they could easily escape any inquiry or trial. At the Convention, Davie described impeachment as "an essential security for the good behaviour of the Executive."[238] In Massachusetts, Reverend Samuel Stillman warned, "With such a prospect [of impeachment], who will dare to abuse the powers vested in him by the people."[239] In North Carolina, future Justice James Iredell stated, "[Impeachment] will be not only the means of punishing misconduct, but it will prevent misconduct."[240] And in Federalist No. 64, future Chief Justice John Jay wrote, "so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments."[241]

If all it took to evade impeachment were quitting—or delaying misconduct until the end of a term—then Davie, Stillman, Iredell, and Jay badly misjudged its deterrent effect. The Framers did not commit such a glaring blunder. To protect the Republic, they designed the impeachment power to cover *anyone* who engaged in abuse or corruption while entrusted with public office—thereby ensuring that any wrongdoer's "infamy might be rendered conspicuous, historic, eternal, in order to prevent the occurrence of likely offenses in the future."[242]

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[237] *Id.*
[238] 2 Farrand, *Records of the Federal Convention*, at 64.
[239] 2 Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 169 (1861)
[240] 4 *id.* at 32.
[241] Federalist 64
[242] *Belknap Proceedings* at 203 (Mr. Manager Knott)

Fourth, and finally, the Framers saw themselves not as restricting the impeachment power in comparison to the states, but rather as broadening it. Federalist No. 39 illustrates the point. There, Madison compared the state and federal governments. Turning to impeachment, he first remarked that "several of the States" did not allow impeachment of "the chief magistrate," adding that "in Delaware and Virginia he is not impeachable till out of office."[243] In contrast, he noted, "the President of the United States is impeachable at any time during his continuance in office."[244] Read in isolation, this may suggest that only a current official can be impeached, but in context it reflects Madison's pride that the President is subject to a *broader* impeachment power than in states that confined impeachment only to former officials. Hamilton confirmed this point in Federalist No. 69. While discussing impeachment, he wrote: "[T]he President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware."[245] Here, too, the upshot is that the President is even *more* accountable than state officials—including in states, like Delaware, that provided for the impeachment of former governors. Neither Hamilton nor Madison suggests any departure from the rule that a former official can be impeached for their abuses in office; instead, they celebrate the extension of the impeachment power to also encompass (and permit the removal of) current officeholders.

All these sources confirm that the Framers intended the impeachment power to reach both current and former officials who engaged in gross abuse of their office. The text and structure of the Constitution that emerged from their debates reflect—in fact, *require*—that conclusion.

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[243] Federalist No. 39
[244] *Id.*
[245] Federalist No. 69.

2. Constitutional Text and Structure

The Constitution contains several provisions addressing impeachment. A careful review of the Constitution's text and structure permits only a single conclusion: that the Senate has jurisdiction to hear this trial against President Trump for the constitutional offenses that he committed against the American people while he was entrusted with our highest political office.

The Constitution's impeachment provisions are properly understood by reference to the overarching constitutional plan. Senator John H. Mitchell of Oregon thus explained during the Belknap trial that each provision's "particular location in the Constitution" must "receive consideration in giving construction to its purpose."[246] So that is how we will approach them.

Article I of the Constitution defines the powers of the Legislative Branch. Here, the Constitution uses unqualified language to vest the House and Senate with jurisdiction over all impeachments. That grant of authority does not contain any statute of limitations or any other language limiting Congress's impeachment jurisdiction over people who committed high crimes and misdemeanors while in office. Article I also provides for two separate possible judgments in any impeachment case: removal and disqualification. Nowhere does the Constitution suggest that an impeachment is permitted only when both judgments can be imposed. Instead, it treats them as distinct penalties, mandating only that the Senate not exceed them in rendering judgment. The separate availability of disqualification—without any suggestion that it must necessarily follow removal—confirms that former officials like President Trump can be tried by the Senate. Finally, Article I refers to a "Person" and a "Party" (but not a "civil Officer") in describing the accused in an impeachment. This broader word choice plainly encompasses former officials.

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[246] *Belknap Proceedings* at 347 (Senator Mitchell).

Whereas Article I addresses the Legislative Branch, Article II concerns the Executive Branch. It refers to impeachment only twice—and on both occasions it *restrains* the Executive's power to resist an impeachment: first by confirming that the President's pardon power cannot defeat impeachments; and second by requiring at least the removal of any current officer convicted of an impeachable offense. Neither of these provisions limits the jurisdiction of the Senate over President Trump or makes the possibility of removal a requirement of impeachment.

a. Article I of the Constitution

Article I sets up the Legislative Branch of the federal government. In Section 2, it vests the House with the "sole Power of Impeachment." This is an "express, distinct, positive, absolute and unqualified grant of jurisdictional power to the House of Representatives to impeach."[247] And as explained above, the phrase "Power of Impeachment" had a well-defined, well-developed meaning in the 1780s that the Framers understood to encompass former officers. Whenever the House exercises its "sole Power of Impeachment," the Senate has comprehensive, exclusive jurisdiction under Article I, Section 3, which vests it with "the sole Power to try all Impeachments."

These are the *only* provisions anywhere in the Constitution that affirmatively vest and define the jurisdiction of the House and Senate in matters of impeachment. Both of them provide broad authority, with no statute of limitations, no restriction based on whether a person is still in office, and no other caveats based on *when* the accused committed their high crimes and misdemeanors. By its plain and categorical language, the Constitution vests the Senate with full jurisdiction to hear any valid impeachment case brought by the House for high crimes and misdemeanors. And it makes

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[247] *Id.* at 338 (Senator Mitchell).

perfectly clear that the Senate is empowered to "try all Impeachments," which at bare minimum must include jurisdiction where the House impeached an official while he was still in office.

As a result, any claim that Congress lacks authority to impeach and convict a former official must arise not from jurisdictional language in the text itself, but from supposed implications of the text. Yet a careful study of the Constitution instead confirms that the Framers intended impeachment to reach anyone who abused power while in office.

This is clear from Article I, Section 3, Clause 7: "Judgment in Cases of Impeachment *shall not extend further* than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States" (emphasis added). In interpreting this language, we must assign meaning to every word. Following that rule, this provision can only be read as "fixing a minimum and maximum penalty."[248] As Professor McConnell explains, "the clause does not say that both sanctions are required; it says that the judgment may not go beyond imposition of both sanctions."[249] Therefore, "the clause does not require removal; it just precludes the Senate from imposing penalties like fines, imprisonment or death."[250] This language limits the possible remedies as compared to British impeachment, "in which the full range of criminal penalties was available." [251]

Under Clause 7, when the Senate convicts, it (1) may remove the accused if they are in office and (2) separately, it may impose disqualification. What it may not do is impose judgments that "extend further" than those options. Critically, "these 'judgments'—removal and disqualification—

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[248] C.S. Potts, *Impeachment As A Remedy*, 12 St. Louis L. Rev. 15, 23 (1926).

[249] Quoted in Eugene Volokh, *Impeaching Officials While They're in Office, but Trying Them After They Leave,* The Volokh Conspiracy (Jan. 28, 2021), https://reason.com/volokh/2021/01/28/impeaching-officials-while-theyre-in-office-but-trying-them-after-they-leave/

[250] Brian Kalt, *The Constitutional Case for Allowing Late Impeachment Trials*, The Hill (Jan. 29, 2021), https://thehill.com/opinion/judiciary/536487-the-constitutional-case-for-allowing-late-impeachment-trials

[251] *Id.*

are analytically distinct and linguistically divisible."[252] The text does not say "removal from Office, and *then* disqualification" or "removal from Office, *followed by* disqualification." It simply identifies two separate possible sentences and provides that the Senate cannot exceed them. "[T]he inclusion of both present removal and future disqualification as penalties for impeachment suggests that they are two separate penalties that may be separately applied."[253]

In fact, given how the Senate has historically structured its proceedings, it is *impossible* for the Senate to impose disqualification on a current official: it can disqualify only a former official. If the accused is currently in office, and is convicted by the Senate, they are removed upon conviction. By the time Senators separately vote on disqualification, they are considering what penalty to inflict on someone who is at that point a former officer. In this respect, removal and disqualification must be separate penalties—and disqualification must be available for former officials—because disqualification "is itself necessarily a vote about a former (as opposed to current) officer."[254]

Impeachment thus has "two aspects"—and the Constitution "must be read so as to give full effect to both aspects of this power."[255] It provides for removal from office, and it separately provides for disqualification from future officeholding. Consistent with that understanding, "of the eight officers the Senate has ever voted to remove, it subsequently voted to disqualify only three of them—reinforcing that removal and disqualification are separate inquiries."[256]

Ultimately, neither removal nor disqualification is itself the purpose of impeachment. They both serve the deeper purpose of protecting public against officials who have proven themselves a

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[252] Tribe, *The Senate Can Constitutionally Hold An Impeachment Trial After Trump Leaves Office.*
[253] Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 79-80 (1996).
[254] Stephen I. Vladeck, *Why Trump Can Be Convicted Even as an Ex-President*, New York Times (Jan. 14, 2020).
[255] *Letter from Constitutional Law Scholars on Impeaching Former Officers.*
[256] Vladeck, *Why Trump Can Be Convicted Even as an Ex-President.*

threat to our Constitution. And that purpose would be obstructed if Clause 7 were distorted by an interpretation that precluded the impeachment of former officials. This would create incentives for a President "to behave only early in his term, to conceal his wrongdoing long enough to run out the clock, and to skip out of office if congressional action becomes a serious issue."[257] To ensure that the impeachment power promotes integrity in office, the Constitution must be given its natural reading—one that treats the judgment of disqualification as a distinct remedy that can be imposed on both current and former officials following conviction by the Senate.

Although President Trump may argue that Clause 7 limits impeachment only to cases where removal can occur, that view is mistaken. As explained, it clashes with the text of the Constitution. Further, it rests on a logical fallacy. Clause 7 bars the Senate from imposing any sentence *beyond* removal or disqualification. But "a prohibition against doing more than two things cannot be turned into a command to do both or neither."[258] "It certainly will not be seriously maintained that, when a statute prescribes two punishments, one of which has become impossible, the offender is thereby exempted from the other."[259] Such analysis collapses upon scrutiny: in authorizing two possible penalties upon conviction, and saying the Senate may not exceed them, the Constitution did not confer a right on the accused to escape trial entirely because one of the penalties is unavailable. If a defendant made that contention in court, her argument would be rejected out of hand.

That position is especially untenable because it would give abusive officials total control over their own impeachment proceedings. Any official "who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate's final

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[257] Kalt, *Former Officials*, at 71-72.
[258] Belknap Proceedings at 277 (Senator Edmunds).
[259] Id. at 193 (Mr. Manager Hoar).

conviction vote."[260] Needless to say, there is an overwhelming presumption against "a proposition that makes the jurisdiction of the Senate depend upon the will of the accused," and that "would practically annihilate the power of impeachment in all cases of guilt clearly provable."[261] The Framers did not design the Constitution's mightiest safeguards to be so easily undermined. As House Manager James Proctor Knott of Kentucky explained to the Senate during the trial of Secretary Belknap, the ultimate question is simply stated: "Whether you exercise the functions devolved upon you today as the highest court known to our Government by virtue of a constitutional power, or merely at the will and pleasure of the accused."[262]

To ask that question is to answer it. The Framers authorized disqualification for a reason. They knew that in especially grievous cases, a failure to impeach and disqualify could imperil the nation—both by setting a dangerous precedent and by allowing an official to repeat his misconduct. It is implausible that the Framers structured impeachment to allow abusive officials, at their own discretion, to readily escape trial, judgment, and disqualification. Instead, the Framers adhered to established English and state practice. And they used language in Article I, Section 3, Clause 7 that very clearly treats removal and disqualification as separate possible judgments upon conviction. It is therefore wrong to assert that "removal from office is the sole object of impeachment," since "the Constitution authorizes a sentence of disqualification that may be as properly pronounced against the man who has left office as against him who clings to it."[263]

That conclusion is confirmed (and independently required) by the language used in the impeachment provisions of Article I, Section 3, Clauses 6 and 7:

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[260] *Letter from Constitutional Law Scholars on Impeaching Former Officers.*
[261] *Id.* at 247 (Senator Thurman).
[262] *Id.* at 144 (Mr. Manager Knott).
[263] *Id.* at 250 (Senator Thurman).

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no **Person** shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the **Party** convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

(emphasis added).

The word choice here is significant, especially in contrast to Article II, Section 4 of the Constitution, which provides that "all civil Officers of the United States" must be removed from office upon conviction for impeachable offenses. Unlike that provision, Article I—which creates the impeachment power and vests Congress with jurisdiction—does not refer to "civil Officers." Instead, in describing who may be subject to impeachment, it uses broader language: "Person" and "Party." The Framers chose their words carefully. They could have written "civil Officers" in Article I to describe who can be impeached, yet they did not do so. It follows that there must be a "Person" or "Party" subject to impeachment who is not a "civil Officer[]." But in order to face impeachment, a person must commit high crimes and misdemeanors, which by definition only a government official can do. That leaves only a single possible explanation for why the Framers used "Person" and "Party" rather than "civil Officers" in Article I, Section 3: they wanted to ensure that the text of the Constitution covered the impeachment, conviction, and disqualification of *former* officials for high crimes and misdemeanors committed while they were in office.[264]

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[264] *Id.* at 403-404 (Senator Bayard).

b. Article II of the Constitution

Article II defines and limits the authority of the Executive Branch. As a review of its plain text confirms, Article II "contains no grant of power" to any branch of government on the subject of impeachment.[265] Instead, it addresses impeachment only twice and, significantly, only to *constrain* the Executive Branch. Although President Trump may attempt to rely on language in Article II to contest the Senate's jurisdiction over him, any such reliance would be misplaced.

First consider Article II, Section 2, which provides that the President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, *except in Cases of Impeachment*" (emphasis added). This rule reflects a critical feature of the Constitution's design: because impeachment "is a great check upon misconduct in the executive branch . . . the power of impeachment and conviction is placed as far as possible beyond the influence of or interference by the executive branch or any member therefore."[266] An impeachment proceeding is not subject to a Presidential veto. It does not depend upon support from federal prosecutors (who serve in the Executive Branch). It can override the President's ordinarily sweeping discretion to select his own officers. And a President cannot use his pardon power to prevent Congress from impeaching and convicting anyone who has committed a great and dangerous offense. These aspects of impeachment are essential to its role in the separation of powers. The jurisdiction and authority of Congress in matters of impeachment are not subject to control by the Executive Branch; after all, a major purpose of the impeachment power is to restrain the Executive Branch.

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[265] *Id.* at 299-300 (Senator Wright).
[266] *Id.* at 402 (Senator Bayard).

This principle confirms that former officials must be subject to impeachment for any and all abuses committed while in office. Under the Appointments Clause—which appears in Article II of the Constitution—the President enjoys a broad "removal power."[267] This allows him to fire many officials within the Executive Branch. If only current officials could be impeached for high crimes and misdemeanors, the President could easily stop impeachments by firing officials accused (or suspected) of high crimes and misdemeanors. That would prevent Congress from getting to the bottom of what happened. It would also weaken the deterrent effect of impeachment, and allow the President to block the Senate from convicting and disqualifying officials who deserve it.

Again, the Framers were not foolish. The Constitution does not enable the President to accomplish through his removal power the very same interference with impeachment that it forbids by expressly limiting his pardon power. As explained above, it allows the impeachment of former officials for abuses committed in office, thus ensuring that the President's power to fire officials cannot halt an impeachment. This rule also avoids another awkward result: if only current officials could be impeached, a President might face a choice between leaving a scofflaw in office (so that an impeachment process could unfold) or immediately firing him to protect the public (which would also stop the impeachment and make it impossible for the Senate to impose disqualification, even if fully warranted).[268] As a matter of constitutional text and structure—not to mention common sense—Article II, Section 2 strongly supports the conclusion that former officials remain subject to impeachment and trial for grievous abuses committed during their tenure in office.

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[267] *Seila Law LLC v. C.F.P.B.*, 140 S. Ct. 2183, 2197 (2020)
[268] *See* Kalt, *Former Officials*, at 78.

So does Article II, Section 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." President Trump may cite this provision to argue that only current officials can be impeached, but that argument has no basis in the text.

Article II, Section 4 states a straightforward rule: whenever a civil officer is impeached and convicted for high crimes and misdemeanors, they "shall be removed." Absolutely nothing about this rule implies, let alone requires, that former officials—who can still face disqualification—are immune from impeachment and conviction. That is unsurprising, since this provision is contained in a part of the Constitution addressed only to current officers, whereas the impeachment provisions set forth in Article I use broader language and emerge from a tradition that covers former officials. Indeed; it would be strange for a provision concerning what happens when a civil officer is convicted to somehow indirectly control the Senate's power under Article I to try all impeachments. As Professor McConnell observes, Article II, Section 4 "does not limit the power of the Senate to try, which comes from Article I, Section 3, Clause 6. It merely states that removal from office is mandatory upon conviction of any sitting officer. No lesser sanction will suffice."[269]

It is therefore a mistake to read Article II, Section 4 as somehow providing protection to officials who abuse their power but escape impeachment while in office (*e.g.*, by committing abuse in their final days, or by concealing wrongdoing, or by resigning at the last minute). Like the rule that pardons cannot defeat an impeachment, the rule set forth in Section 4 is meant to *restrain* the Executive Branch—and it does so by establishing a baseline requirement that officials at least be removed if convicted of impeachable offenses. Thus, whereas the first half of Section 4 concerns

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[269] Quoted in Volokh, *Impeaching Officials While They're In Office But Trying Them After They Leave.*

itself generally with the requirements for conviction (high crimes and misdemeanors), the second half speaks only about the consequences of convicting a current officer (removal from office).

President Trump may argue that Article II, Section 4 makes removal the primary purpose of *any* impeachment, and that it is strange to imagine an impeachment trial that cannot result in removal. Yet that misreads both Section 4 and Article I. "The fact that the Constitution empowers the Senate to disqualify, as well as remove from office, would, it seems, be a perfect answer to the assumption that the sole purpose of impeachment is the removal from office."[270] The Senate's own practice reflects this: "Senators vote 'guilty' or 'not guilty.' Their formal verdict is not 'remove' or 'don't remove.'"[271] Further, the purpose of impeachment is to protect the nation by deterring official misconduct and ensuring accountability for those who abuse power. Removal and disqualification are each methods of achieving that purpose, which would be hindered rather than furthered if officials knew they could escape any reckoning through resignation or by waiting until their last days in office. "It certainly makes no sense for presidents who commit misconduct late in their terms . . . to be immune from the one process the Constitution allows for barring them from serving in any other federal office or from receiving any federal pensions."[272]

In the alternative, President Trump might contend that the reference to "civil Officers" in Article II means that only government officials—and not private citizens—can ever be subject to impeachment. The flaw in this argument is obvious: "[P]residents and the other officials who are subject to impeachment are not like the rest of us. Once they leave office and return to their private lives, they are still ex-presidents and former officials who may have committed impeachable offenses

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[270] Id. at 350 (Senator Mitchell).
[271] Brian Kalt, *The Constitutional Case For Allowing Late Impeachment Trials.*
[272] Michael J. Gerhardt, *The Constitution's Option for Impeachment After a President Leaves Office*, Just Security (Jan. 8, 2021).

in office."[273] In other words, impeaching a former official for their official acts while they were a "civil Officer[]" is not the same as impeaching a private citizen. The Constitution "demands of all its officials purity, honesty, and fidelity, and it is plain enough and strong enough to enforce its demands at all times and upon every class of those who enjoy its high places."[274] There is thus no basis for President Trump to object to the Senate's jurisdiction over him (or to raise related Bill of Attainder Clause concerns). The trial of a former official for abuses he committed as an official—arising from an impeachment that also occurred while he was in office—poses no risk of subjecting private parties to punitive legislative action targeting their private conduct.

Next, President Trump may argue that it somehow matters that Chief Justice Roberts is not presiding over this trial. It does not. Under Article I, Section 3, "When the President of the United States is tried, the Chief Justice shall preside." But under Article II, there is only ever a single person at a time who is "the President of the United States." That person is now Joseph R. Biden, Jr. As a former official, President Trump does not trigger the requirement that the Chief Justice preside. Moreover, the reason the Chief Justice is summoned is to ensure the Vice President does not preside over a trial where conviction would result in her becoming the President; obviously, that concern is not implicated in the trial of a *former* president. The normal rules for a Senate trial therefore apply—including those governing who presides (which allow the President *pro tempore* to do so).[275]

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[273] *Id.*

[274] *Belknap Proceedings* at 255 (Senator Wallace).

[275] President Trump may separately contend that the Constitution does not permit a person to be disqualified from seeking the Presidency. But as the DOJ Office of Legal Counsel concluded under President Obama, "The President surely 'hold[s] an[] Office of Profit or Trust.'" *See* David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009). Indeed, this is the only conclusion consistent with the text of the Constitution, which repeatedly refers to the President as holding an "Office"—including in the Natural Born Citizen Clause, the Presidential Oath Clause, and the Twelfth, Twenty-Second, and Twenty-Fifth Amendments. *See* Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol'y Sidebar 143 (2009).

Finally, President Trump may assert that finding jurisdiction here will invite the House to undertake a slew of other impeachments, dusting off old issues and pursuing tired grudges. But history disproves such slippery slope concerns. For centuries, the prevailing view—bolstered by the Blount and then Belknap precedents—has been that former officials are subject to impeachment. Yet only in Belknap's case did the House take that step. In the vast majority of cases, including that of President Richard Nixon, the House has properly recognized that an official's resignation or departure abated any need for the extraordinary remedy of impeachment. That remains true today: "There is no likelihood that we shall ever unlimber this clumsy and bulky monster piece of ordinance to take aim at an object from which all danger has gone by."[276] But President Trump's case is exceptional. The danger has not "gone by." The threat to our democracy makes Watergate pale in comparison—and remains with us to this day. Here is the rare case in which love of the Constitution, and commitment to our democracy, required the House to impeach President Trump. And for the same reasons, the Senate can and must take jurisdiction.

C. Congressional Precedent Supports Jurisdiction over President Trump

Prior practice of the House and Senate point the same way as a careful study of the Constitution. Indeed, the case for exercising jurisdiction over President Trump—and convicting him of high crimes and misdemeanors—is even stronger than in any of these precedents.

1. Senator William Blount

The Nation's very first impeachment trial concerned an ex-official: Senator William Blount, who had plotted to give the British control over parts of Florida and Louisiana (which were then

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[276] *Belknap Proceedings* at 198 (Mr. Manager Hoar).

controlled by Spain and France, respectively).[277] After President Adams provided the House with evidence of this betrayal, the House impeached Blount on July 7, 1797. One day later, by a vote of 25 to 1, the Senate expelled him from its ranks. This was not the end of the matter, however. The House concluded that Blount should also be disqualified from future officeholding, so it proceeded with its investigation and adopted five articles of impeachment on January 29, 1798.[278] Despite Blount's refusal to appear in person, the Senate commenced an impeachment trial with Thomas Jefferson presiding. Ultimately, it dismissed the case on the ground that Members of Congress are not subject to the impeachment power at all. But notably, Blount had also asserted that the Senate lacked jurisdiction over him as a former official—and the Senate did not dismiss on that basis.[279]

2. Secretary of War William Belknap

Nearly eighty years later, in 1876, the House Committee on Expenditures discovered that Secretary of War William Belknap was involved in an elaborate kickback scheme.[280] Hours before the committee released its report, Belknap "rushed to the White House in an unholy panic to tender his resignation," which President Ulysses Grant accepted on the spot.[281] Two hours later, fully aware that Belknap had resigned, the House voted unanimously to impeach him.[282]

The ensuing Senate trial is "the single most important precedent" on the question whether a former official is subject to impeachment.[283] Belknap strenuously argued that the Senate lacked jurisdiction because he had resigned before the House impeached him. The Senate heard "[m]ore

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[277] *See* Bowman & Kalt, *Congress Can Impeach Trump Now And Convict Him When He's Gone.*
[278] Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* 30 (1992).
[279] *See id.* at 32-41.
[280] *See* Kalt, *Former Officials*, at 94.
[281] Ron Chernow, *Grant* 821 (2017).
[282] Kalt, *Former Officials*, at 95.
[283] *Id.* at 94.

than two weeks of wide-ranging arguments on the question . . . followed by two weeks of [S]enators' reciting their own conclusions."[284] After this exhaustive presentation—which covered virtually all of the points likely to be raised here—the Senate voted 37 to 29 that it had jurisdiction over the case. It proceeded to a full presentation of argument and evidence over a two-month period and ultimately acquitted Belknap, though only after plenary consideration of the merits of the case.

3. Judges Robert Archbald & George English

Two cases from the early 1900s further support the Senate's jurisdiction here. The first involved Circuit Judge Robert Archbald, who was impeached in 1912. Of the thirteen articles of impeachment that the House approved, six addressed conduct in his former role as a district judge. In the end, Judge Archbald was convicted on five articles relating to his tenure as a circuit judge; on that basis, he was removed from office and disqualified from future officeholding. The Senate acquitted him of two articles relating to his circuit judgeship, as well as the articles concerning his conduct as a district judge. It is clear from the public record, however, that the case against Judge Archbald relating to his earlier role failed on the merits—and that "a majority of the [S]enators voting saw no problem" with impeaching Judge Archbald for conduct in his former office.[285] Once again, the arguments for jurisdiction over former officials commanded a clear majority in the Senate.

Fourteen years later, the House impeached District Judge George English for corrupt conduct on the bench. Six days before his Senate trial, Judge English resigned. In light of that decision—and given his advanced age—the House resolved that it did "not desire further to urge the articles of impeachment."[286] In a filing with the Senate, however, the House Managers pointedly

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[284] *Id.* at 96.
[285] *Id.* at 103.
[286] Quoted in *id.* at 104.

stated that "the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine [the case]."[287] Further, "No [S]enator suggested that it would have been impossible or unconstitutional to proceed if the House had not 'desired' to do otherwise."[288] To the contrary, several Senators stated that the Senate in fact retained jurisdiction. Senator William C. Bruce of Maryland remarked, "I deeply regret the conclusion that the House of Representatives has reached."[289] And Senator Duncan Fletcher of Florida wanted it "distinctly understood" that the case was not precedent for the idea that resignation terminates a trial.[290] Thus, the proceeding against Judge English supports the Senate's jurisdiction over former officials, since "the House and the Senate felt that they could have proceeded with [that] case."[291]

In fact, as noted above, the case for jurisdiction here is stronger than in *any* of the precedents just mentioned. Unlike Senator Blount, who was held accountable through expulsion, President Trump will escape responsibility for his betrayal of the Constitution unless this body tries and convicts him. Unlike Secretary Belknap, who resigned before the House could act, President Trump was impeached by the House while he was still in office. Moreover, whereas Secretary Belknap and Judge English left office in disgrace, President Trump insists that his constitutional offenses were perfectly acceptable—and so the precedent set by a failure to try him would pose an astronomically greater threat to the Republic. Finally, unlike in the case of Judge Archbold, the evidence against President Trump is overwhelming. His is personally responsible for an attack that unleashed death and mayhem at the Capitol amid the transfer of power. For Congress to stand aside in the face of

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[287] Quoted in *id.*
[288] *Id.* at 105.
[289] Quoted in *id.*
[290] Quoted in *id.*
[291] *Id.* at 106.

such conduct would be a grave abdication of its constitutional duty, and an invitation for future Presidents to act without fear of constraint during their final months in office.

* * * * *

Constitutional history, text, and structure, as well as prior Congressional practice, all confirm that the Senate has jurisdiction to try President Trump. So does common sense. While sworn to faithfully execute the laws—and to preserve, protect, and defend the Constitution—President Trump incited insurrection against the United States government. His conduct endangered the life of every single Member of Congress, jeopardized the peaceful transition of power and line of succession, and compromised our national security. This is *precisely* the sort of constitutional offense that warrants disqualification from federal office. President Trump has proven his willingness to break and brutalize the law in his quest for power. The Senate must establish beyond doubt, for all time, and for officials of all political parties that President Trump's behavior was intolerable.

CONCLUSION

President Trump falsely asserted that he won the 2020 election and then sought to overturn its results. He and his supporters filed dozens of lawsuits nationwide—including before judges he had appointed—but their claims uniformly failed to persuade. He also tried to convince state and federal election officials and law enforcement personnel to attempt to reverse the election outcome. These attempts failed, too. The only honorable path at that point was for President Trump to accept the results and concede his electoral defeat. Instead, he summoned a mob to Washington, exhorted them into a frenzy, and aimed them like a loaded cannon down Pennsylvania Avenue. As the Capitol was overrun, President Trump was reportedly "delighted." And rather than take immediate steps to quell the violence and protect lives, President Trump left his Vice President and Congress to fend for themselves while he lobbied allies to continue challenging election results.

As will be shown at trial, President Trump endangered our Republic and inflicted deep and lasting wounds on our Nation. His conduct resulted in more than five deaths and many more injuries. The Capitol was defiled. The line of succession was imperiled. America's global reputation was damaged. For the first time in history, the transfer of presidential power was interrupted. And the threat of violence remains with us: as President Biden was inaugurated and even now, the Capitol more closely resembles an armed camp than the seat of American democracy.

President Trump's incitement of insurrection requires his conviction and disqualification from future federal officeholding. This is not a case where elections alone are a sufficient safeguard against future abuse; it is the electoral process itself that President Trump attacked and that must be protected from him and anyone else who would seek to mimic his behavior. Indeed, it is difficult to imagine a case that more clearly evokes the reasons why the Framers wrote a disqualification power into the Constitution. The need for conviction and disqualification is further supported by Section 3 of the Fourteenth Amendment, which bars from government service those who "having previously taken an oath … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."[292] President Trump's conduct offends everything that the Constitution stands for. The Senate must make clear to him and all who follow that a President who provokes armed violence against the government of the United States in an effort to overturn the results of an election will face trial and judgment.

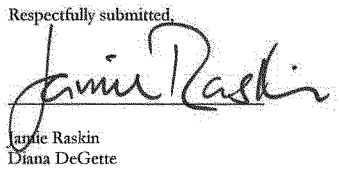
Many have suggested that we should turn the page on the tragic events of January 6, 2021. But to heal the wounds he inflicted on the Nation, we must hold President Trump accountable for his conduct and, in so doing, reaffirm our core principles. Failure to convict would embolden future

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[292] U.S. Const. Amend. XIV § 3.

leaders to attempt to retain power by any and all means—and would suggest that there is no line a President cannot cross. The Senate should make clear to the American people that it stands ready to protect them against a President who provokes violence to subvert our democracy.[293]

Respectfully submitted,



Jamie Raskin
Diana DeGette
David Cicilline
Joaquin Castro
Eric Swalwell
Ted Lieu
Stacey Plaskett
Madeleine Dean
Joe Neguse

February 2, 2021

U.S. House of Representatives Managers

[293] The House Managers wish to recognize the invaluable assistance of the following individuals in preparing this trial memorandum: Barry H. Berke, Joshua Matz, and Sarah Istel of the House Committee on the Judiciary; Susanne Sachsman Grooms, Krista Boyd, Candyce Phoenix, Cassie Fields, and Jacob Glick of the House Committee on Oversight and Reform; and Douglas Letter, Megan Barbero, Eric Columbus, Will Havemann, Lisa Helvin, and Jonathan Schwartz of the House Office of General Counsel.

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re **IMPEACHMENT OF** **PRESIDENT DONALD J. TRUMP**

REPLICATION OF THE UNITED STATES HOUSE OF REPRESENTATIVES TO THE ANSWER OF PRESIDENT DONALD J. TRUMP TO THE ARTICLE OF IMPEACHMENT

United States House of Representatives

Jamie Raskin
Diana DeGette
David Cicilline
Joaquin Castro
Eric Swalwell
Ted Lieu
Stacey Plaskett
Madeleine Dean
Joe Neguse

U.S. House of Representatives Managers

The House of Representatives, through its Managers and counsel, replies to the Answer of President Donald J. Trump as follows:

The House denies each and every allegation in the Answer that denies the acts, knowledge, intent, or wrongful conduct charged against President Trump. The House states that each and every allegation in the Article of Impeachment is true, and that any affirmative defenses and legal defenses set forth in the Answer are wholly without merit. The House further states that the Article of Impeachment properly alleges an impeachable offense under the Constitution, is not subject to a motion to dismiss, is within the jurisdiction of the Senate sitting as a Court of Impeachment, and should be considered and adjudicated by the Senate sitting as a Court of Impeachment.

Jurisdiction: For the reasons stated in the Trial Memorandum of the United States House of Representatives ("Trial Memo"), the Senate has jurisdiction to try this case. *See* Trial Memo at 48-75. The Framers' intent, the text of the Constitution, and prior Congressional practice all confirm that President Trump must stand trial for his constitutional crimes committed in office. Presidents swear a sacred oath that binds them from their first day in office through their very last. There is no "January Exception" to the Constitution that allows Presidents to abuse power in their final days without accountability. As former President John Quincy Adams declared, "I hold myself, so long as I have the breath of life in my body, amenable to impeachment by [the] House for everything I did during the time I held any public office." Cong. Globe, 29th Cong., 1st Sess. 641 (1846).

First Amendment: President Trump's incitement of insurrection was itself a frontal assault on the First Amendment. As a matter of law and logic—not to mention simple common sense—his attempted reliance on free speech principles is utterly baseless. *See* Trial Memo at 45-48.

The Answer claims that the Article of Impeachment "misconstrues protected speech." Answer at 10. For instance, it contends that there is "insufficient evidence" to decide whether any of

President Trump's statements at the January 6 rally were "accurate or not." *Id.* at 4. It further asserts that one of President Trump's statements—"if you don't fight like hell you're not going to have a country anymore"—was "clearly about the need for fight for election security in general." *Id.* at 6. Finally, it declares that President Trump never "threatened Secretary Raffensperger." *Id.* at 8.

To call these responses implausible would be an act of charity. President Trump's repeated claims about a "rigged" and "stolen" election were *false*, no matter how many contortions his lawyers undertake to avoid saying so. When President Trump demanded that the armed, angry crowd at his Save America Rally "fight like hell" or "you're not going to have a country anymore," he wasn't urging them to form political action committees about "election security in general." And when the President of the United States demanded that Georgia Secretary of State Raffensperger "find" enough votes to overturn the election—or else face "a big risk to you" and "a criminal offense"—that was obviously a threat, one which reveals his state of mind (and his desperation to try to retain power by any means necessary). The House looks forward to proving each of these points at trial.

Also, to be clear, this is not a case about "protected speech." The House did not impeach President Trump because he expressed an unpopular political opinion. It impeached him because he willfully incited violent insurrection against the government. We live in a Nation governed by the rule of law, not mob violence incited by Presidents who cannot accept their own electoral defeat.

Dereliction of Duty: The Answer declares that "[t]he 45th President of the United States performed admirably in his role as president, at all times doing what he thought was in the best interests of the American people." *Id.* at 9. Yet that is plainly inconsistent with the public record of President's Trump conduct on January 6, which reveals a President concerned almost exclusively with overturning his electoral defeat, rather than quelling the violence or defending the U.S. Capitol. Indeed, even after he incited insurrection, President Trump took numerous steps on January 6 that

further incited the insurgents to escalate their violence and siege of the Capitol. For example, he issued a tweet attacking the Vice President while insurrectionists sought to assassinate him.

Due Process of Law: For the reasons given in the House Trial Memo, President Trump's objections to the procedures by which the House impeached him—and by which the Senate plans to try him—lack merit. *See* Trial Memo at 42-43. Moreover, the House has invited President Trump to voluntarily testify under oath, yet President Trump immediately rejected that opportunity to tell his story. The House will establish at trial that this decision to avoid testifying supports a strong adverse inference regarding President Trump's actions (and inaction) on January 6.

Multiplicity: President Trump objects that the Article of Impeachment "[c]harges multiple instances of allegedly impeachable conduct in a single article." Answer at 12. Not so. The Article of Impeachment charges that President Trump "engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States." It then describes a single course of conduct constituting that incitement of insurrection. While the article describes the consequences of that conduct—as well as "prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election"—it charges President Trump only with a single impeachable offense.

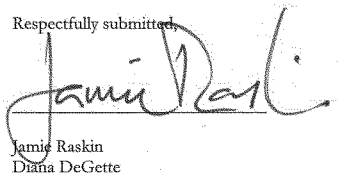
This objection is also legally flawed. In President Clinton's case, the articles of impeachment *specifically* charged that he had engaged in "one or more" improper acts. *See* H. Res. 611, 105th Cong. (1998). Even so, the Senate rejected President Clinton's motion to dismiss on the ground that the articles were multiplicitous. That precedent forecloses President Trump's position here.

Conclusion: The evidence of President Trump's conduct is overwhelming. He has no valid excuse or defense for his actions. And his efforts to escape accountability are entirely unavailing.

As charged in the Article of Impeachment, President Trump violated his Oath of Office and betrayed the American people. His incitement of insurrection against the United States

government—which disrupted the peaceful transfer of power—is the most grievous constitutional crime ever committed by a President. There must be no doubt that such conduct is categorically unacceptable. The House will establish at trial that President Trump merits conviction and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Respectfully submitted,



Jamie Raskin
Diana DeGette
David Cicilline
Joaquin Castro
Eric Swalwell
Ted Lieu
Stacey Plaskett
Madeleine Dean
Joe Neguse

February 8, 2021

U.S. House of Representatives Managers

IN PROCEEDINGS BEFORE
THE UNITED STATES SENATE

In re:	
IMPEACHMENT OF FORMER PRESIDENT DONALD J. TRUMP	

TRIAL MEMORANDUM
OF DONALD J. TRUMP, 45TH PRESIDENT OF THE UNITED STATES OF AMERICA

Bruce L. Castor, Jr., Esquire
David Schoen, Esquire
Michael T. van der Veen, Esquire
Counsel to the 45th President of the United States

February 8, 2021

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I. INTRODUCTION

During the past four years, Democrat members of the United States House of Representatives have filed at least nine (9) resolutions to impeach Donald J. Trump, the 45th President of the United States,[1] each containing charges more outlandish than the next.[2] One might have been excused for thinking that the Democrats' fevered hatred for Citizen Trump and their "Trump Derangement Syndrome" would have broken by now, seeing as *he is no longer the President*, and yet for the second time in just over a year the United States Senate is preparing to sit as a Court of Impeachment, but this time over a private citizen who is a former President.[3] In this Country, the Constitution – not a political party and not politicians – reigns supreme. But through this latest Article of Impeachment now before the Senate, Democrat politicians seek to carve out a mechanism by which they can silence a political opponent and a minority party. The Senate must summarily reject this brazen political act

This rushed, single article of impeachment ignores the very Constitution from which its power comes and is itself defectively drafted.. In bringing this impeachment at all, the Members of the House leadership have debased the grave power of impeachment and disdained the solemn

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[1] Andrew Kaczynski, Christopher Massie, *A running list of Democrats who have discussed impeachment*, CNN (Mar. 12, 2017), https://www.cnn.com/2017/05/12/politics/kfile-democrats-impeach-trump/index.html

[2] Some of the allegations that they thought were grounds for impeachment: national security decisions that were upheld by the Supreme Court, *see Trump v. Hawaii*, 138 S. Ct. 2392 (2018); publishing disparaging tweets about Democratic House members in response to their own attacks on the President, H.R. Res. 498, 116th Cong. (2019); and failing to nominate persons to fill vacancies and insulting the press, H.R. Res. 396, 116th Cong. (2019).

[3] The charge itself is not even original: One of the articles of impeachment introduced by Representative Al Green back in December 2017 accused President Trump of "inciting hate and hostility" by "sowing discord among the people of the United States." *Impeaching Donald John Trump, President of the United States, of High Misdemeanors*, H.R. 646, 115th Cong. § 1 (2017).

responsibility that this awesome power entails. In bringing this impeachment in the manner in which they did, namely *via* a process that violated every precedent and every principle of fairness followed in impeachment inquiries for more than 150 years, they offered the public a master's class in the art of political opportunism.

The intellectual dishonesty and factual vacuity put forth by the House Managers in their trial memorandum only serve to further punctuate the point that this impeachment proceeding was never about seeking justice.[4] Instead, this was only ever a selfish attempt by Democratic leadership in the House to prey upon the feelings of horror and confusion that fell upon *all* Americans across the entire political spectrum upon seeing the destruction at the Capitol on January 6 by a few hundred people. Instead of acting to heal the nation, or at the very least focusing on prosecuting the lawbreakers who stormed the Capitol, the Speaker of the House and her allies have tried to callously harness the chaos of the moment for their own political gain.

II. STATEMENT OF FACTS RELEVANT TO THE ARTICLE OF IMPEACHMENT

On January 6, 2021, rioters entered the Capitol building and wrought unprecedented havoc, mayhem, and death. In a brazen attempt to further glorify violence, the House Managers took several pages of their Memorandum to restate over 50 sensationalized media reports detailing the horrific incidents and shocking violence of those hours. Counsel for the 45th President hereby stipulate that what happened at the Capitol by those criminals was horrible and horrific in every sense of those words. Their actions were utterly inexcusable and deserve robust and swift investigation and prosecution. As President Trump said in a video statement of condemnation, "I want to be very clear, I unequivocally condemn the violence that we saw last week. Violence and

[4] Hugh Hewitt, *A fast-track impeachment would not be justice*, Washington Post (Jun. 8, 2021), https://www.washingtonpost.com/opinions/2021/01/08/fast-track-trump-impeachment-pointless-revenge/

vandalism have absolutely no place in our country and no place in our movement."[5] Mr. Trump's comments echoed his sentiments expressed the day of the rally, as he repeatedly urged protesters to stay peaceful,[6] and told rioters to go home.[7] [8]

The House Managers' compulsion to obfuscate the truth is borne out of an absence of evidence relied upon in their "Statement of Facts." As the body vested with the sole power to impeach, the House serves as the investigator and prosecutor. There was no investigation. The House abdicated that responsibility to the media. Of the 170 footnotes in the House Manager's Trial Memorandum, there were only three citations to affidavits of four law enforcement officers and they were merely referenced to support descriptions of what rioters were wearing and weapons that were found. The rest of the purported "facts" relied upon by these Constitutionally-charged prosecutors came from hearsay through the media.

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[5] Reuters, *Trump condemns Capitol Hill violence*, Reuters (Jan. 13, 2021).https://www.reuters.com/article/us-usa-trump-remarks/trump-condemns-capitol-hill-violence-in-video-that-does-not-mention-impeachment-idUSKBN29I37G

[6] Rev.com, *Donald Trump Speech "Save America" Rally Transcript January 6*, Jan. 6, 2021, beginning at approximately 18:16 (emphasis added), available at https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6. ("Transcript of January 6, 2021 Speech").

[7] Kevin Breuninger, *Trump tells Capitol rioters to 'go home' but repeatedly pushes false claim that election was stolen,* CNBC (Jan. 6, 2021), https://www.cnbc.com/2021/01/06/trump-tells-capitol-rioters-to-go-home-now-but-still-calls-the-election-stolen.html

[8] The House Managers' suggestion that President Trump did not act swiftly enough to quell the violence is absolutely not true. Upon hearing of the reports of violence, he tweeted, pleading with the crowd to be "peaceful," followed by a tweeted video urging people to "go home" and to do so in "peace." He and the White House further took immediate steps to coordinate with authorities to provide whatever was necessary to counteract the rioters. The fact is there are complex procedural elements involved in quelling a riot at the Capitol and on the mall – DC police, Capitol Police, National Guard, etc., There was a flurry of activity inside the White House working to mobilize assets. There is no legitimate proof, nor can there ever be, that President Trump was "delighted" by the events at the Capitol. He, like the rest of the Country, was horrified at the violence.

A. The Single Article Of Impeachment Is Belied By An Analysis Of Mr. Trump's Spoken Words To A Crowd Gathered At The Ellipse Four On January 6, 2021.

At the demand of the Speaker of the House, certain members of the House drafted and introduced Resolution 24 impeaching Mr. Trump, in his capacity as President of the United States. The single Article titled "Incitement of Insurrection" charged Mr. Trump with engaging in "high Crimes and Misdemeanors by inciting violence against the Government of the United States." Incitement is the act of encouraging someone to do or feel something unpleasant or violent.[9] An insurrection – unlike a riot – is an organized movement acting for the express purpose to overthrow and take possession of a government's powers.[10] President's Trump speech on January 6, 2021 was not an act encouraging an organized movement to overthrow the Unites States government.

On January 6, 2021, Mr. Trump addressed a crowd of people who had gathered on the Ellipse, public land that is part of the President's Park next to the White House. Mr. Trump spoke for approximately one hour and fifteen minutes. Of the over 10,000 words spoken, Mr. Trump used the word "fight" a little more than a handful of times and each time in the figurative sense that has long been accepted in public discourse when urging people to stand and use their voices to be heard on matters important to them; it was not and could not be construed to encourage acts of violence Notably absent from his speech was any reference to or encouragement of an insurrection, a riot, criminal action, or any acts of physical violence whatsoever. The only reference to force was in taking pride in his administration's creation of the Space Force. Mr. Trump never made any express or implied mention of weapons, the need for weapons, or anything

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[9] https://dictionary.cambridge.org/us/dictionary/english/incitement

[10] Younis Bros. & Co. v. Cigna Worldwide Ins. Co., 899 F. Supp. 1385, 1392-1393 (E.D. Pa. 1995) (*citing Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1017 (2d Cir. 1974) *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1487 (S.D.N.Y. 1983); and *Home Ins. Co. of New York v. Davila*, 212 F.2d 731, 736 (1st Cir.1954)).

of the sort. Instead, he simply called on those gathered to ***peacefully and patriotically use their voices***.

Mr. Trump greeting the crowd by remarking on the honor he felt looking out at the many "American patriots who are committed to the honesty of our elections and integrity of our glorious Republic." He went on to thank the crowd for their "extraordinary love" noting "that's what it is. There's never been a movement like this ever, ever for the extraordinary love for this amazing country and this amazing movement. Thank you." Mr. Trump told those gathered that "we're gathering in the heart of our Nation's Capital for one very, very basic and simple reason, to save our democracy."

Nearly twenty minutes into his speech, Mr. Trump said "I know that everyone here will soon be marching over to the Capitol building to ***peacefully and patriotically*** make your voices heard." Mr. Trump then spent approximately thirty to forty (30 – 40) minutes recapping some of his accomplishments as President and his beliefs on the outcome of the election, including the voting irregularities he attributed to the changes made in various states purportedly in response to the pandemic, and his conversation with Georgia's secretary of state.

As Mr. Trump was winding down his speech, he again looked out at all those gathered saying "looking out at all the amazing patriots here today, I have never been more confident in our nation's future." Although expressing some caution, Mr. Trump added "we are the greatest country on earth and we are headed, were headed, in the right direction." With great hope, Mr. Trump went on to state:

> As this enormous crowd shows, we have truth and justice on our side. We have a deep and enduring love for America in our hearts. We love our country. We have overwhelming pride in this great country, and we have it deep in our souls. Together we are determined to defend and preserve government of the people, by the people and for the people.

> Our brightest days are before us, our greatest achievements still wait. I think one of our great achievements will be election security because nobody until I came along, had any idea how corrupt our elections were. And again, most people would stand there at 9:00 in the evening and say, "I want to thank you very much," and they go off to some other life, but I said, "Something's wrong here. Something's really wrong. Can't have happened." And we fight. We fight like Hell and if you don't fight like Hell, you're not going to have a country anymore.
>
> Our exciting adventures and boldest endeavors have not yet begun. My fellow Americans for our movement, for our children and for our beloved country and I say this, despite all that's happened, the best is yet to come.

Mr. Trump concluded his speech at the Ellipse stating "[s]o let's walk down Pennsylvania Avenue. I want to thank you all. God bless you and God Bless America. Thank you all for being here, this is incredible. Thank you very much. Thank you." Despite the House Managers' charges against Mr. Trump, his statements cannot and could not reasonably be interpreted as a call to immediate violence or a call for a violent overthrown of the United States' government.

B. Democrat Members Of The House Drafted The Article Of Impeachment Before Any Investigation Into The Riot Had Even Started.

Democrat members of the House Judiciary Committee publically admitted that they began drafting the Article of Impeachment moments after angry extremists breached the doors of the Capitol.[11] The very next day, Speaker Nancy Pelosi and Senate Democratic Leader Chuck Schumer called on Vice-President Pence to invoke the 25th Amendment concluding – without any investigation – that Mr. Trump incited the insurrection and continued to pose an imminent danger

[11] Jennifer Haberkorn, *Sheltering in a Capitol Office: a California Lawmaker's Frantic Text Got the Impeachment Ball Rolling,* L.A. Times (Jan. 13, 2021), https://www.latimes.com/politics/story/2021-01-13/sheltering-in-a-capitol-office-a-california-lawmakers-frantic-text-got-the-impeachment-ball-rolling

if he remained in office as President.[12] Five days later, on January 11, 2020, House Democrats formally introduced House Resolution 24. On January 12th, Speaker Pelosi announced the nine representatives who would serve as the impeachment managers. One day later, on January 13th, House Democrats completed the fastest presidential impeachment inquiry in history and adopted the Article of Impeachment over strong opposition and with zero due process afforded to Mr. Trump, against Constitutional requirements and centuries of practice.[13]

C. The House Managers' "Statement Of Facts" Outlines A Narrative Irrelevant To The Facts Alleged In Support Of The Single Article Of Impeachment.

The House Managers spent nearly thirty-five (35) of their seventy-seven (77) page Trial Memorandum rehashing stories written by the media of mischaracterized statements attributed to Mr. Trump many months *before* Mr. Trump addressed the crowd at the Ellipse in Washington, D.C. on January 6, 2021. Media reports and reporters' opinions are not facts and most assuredly are not facts that should form the basis for instituting the grave power of impeachment. More significantly, however, Mr. Trump was never charged in the Article of Impeachment with the claims made in these various reports.

1. Law Enforcement Had Reports Of A Potential Attack On The Capitol Several Days Before President Trump's Speech.

Despite going to great lengths to include irrelevant information regarding Mr. Trump's comments dating back to August 2020 and various postings on social media, the House Managers are silent on one very chilling fact. The Federal Bureau of Investigation has confirmed that the

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[12] *Pelosi, Schumer Joint Statement on Call to Vice President Pence on Invoking 25th Amendment*, (Jan. 7, 2021), https://www.speaker.gov/newsroom/1721-0

[13] H.Res.24 – Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-resolution/24/actions

breach at the Capitol was planned *several days* in advance of the rally, and therefore had nothing to do with the President's speech on January 6th at the Ellipse. According to investigative reports all released after January 6, 2021, "the Capitol Police, the NYPD and the FBI all had prior warning there was going to be an attack on the Capitol..."[14] Embarrassingly enough, even members of the Democratic leadership themselves have admitted on the record, albeit subsequent to January 6, 2021, that they believed the riots were pre-planned, with some, including Representative James C. Clyburn, the House Democratic Whip, going so far as to accuse fellow House Members of coordinating and planning the attack in advance as co-conspirators.[15] The problem with that claim of course is that while the House Managers are clearly eager to make the most of this tragedy for their own purely personal political gain, House Leadership simply cannot have it both ways. Either the *President* incited the riots, like the Article claims, or the riots were pre-planned by a small group of criminals who deserve punishment to the fullest extent of the law. 33 Representatives are only now calling for investigations into Members across the aisle.[16]

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[14] Ian Schwartz, *John Solomon: Capitol Riot Was A "planned Attack," Can't Blame Trump; What Did Pelosi and McConnell Know?*, Real Clear Politics (Jan. 13, 2021), https://www.realclearpolitics.com/video/2021/01/13/john_solomon_capitol_riot_was_a_planned_attack_cant_blame_trump_what_did_pelosi_mcconnell_know.html

[15] Geoff Earle, *Republican congressman's top aid admits to being with mob*, Daily Mail (Jan. 14, 2021),https://www.dailymail.co.uk/news/article-9147863/Democratic-whip-Jim-Clyburn-says-Democrats-convinced-MAGA-rioters-inside-help.html

[16] Siladitya Ray, *Lawmakers Led "Reconnaissance' Tours of the Capitol,* Forbes (Jan. 13, 2021), https://www.forbes.com/sites/siladityaray/2021/01/13/lawmakers-led-reconnaissance-tours-of-the-capitol-ahead-of-last-weeks-riots-democratic-congresswoman-alleges/?sh=32ec8fe81c7e

The real truth is that the people who criminally breached the Capitol did so of their own accord[17] and for their own reasons, and they are being criminally prosecuted.[18] While never willing to allow a "good crisis" to go to waste, the Democratic leadership is incapable of understanding that not *everything* can always be blamed on their political adversaries, no matter how very badly they may wish to exploit any moment of uncertainty on the part of the American people.[19] Even a cursory investigation would have disproved the House's theory of incitement; however, Speaker Pelosi did not grant the President any of his Constitutionally mandated due process rights.

A simple timeline of events demonstrates conclusively that the riots were not inspired by the President's speech at the Ellipse. "The Capitol is 1.6 miles away from Ellipse Park which is near the White House. This is approximately a 30-33 minute walk. Trump began addressing the crowd at 11:58 AM and made his final remarks at 1:12 PM… Protesters, activists and rioters had

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[17] Some anti-Trump, some ani-government. *See, e.g.,* Alicia Powe, *Exclusive: "Boogaloo Boi" Leader Who Aligns with Black Lives Matter*, Gateway Pundit, (Jan. 17, 2021), https://www.thegatewaypundit.com/2021/01/boogaloo-boi-leader-aligns-black-lives-matter-boasted-organizing-armed-insurrection-us-capitol/. "The goal of swarming the home of the U.S. House of Representatives and Senate is **"to revel in the breach of security while mocking the defenses that protect tyrants…whether that be Trump or others."** *See also* Robert Mackey, *John Sullivan, Who Filmed Shooting of Ashli Babbitt*, The Intercept (Jan. 14, 2021), https://theintercept.com/2021/01/14/capitol-riot-john-sullivan-ashli-babbitt/ ("The rapper, who later retweeted a brief video clip of himself and Sullivan inside the Rotunda that was broadcast live on CNN, told me in an Instagram message … "I'm far from a Trump supporter…I really don't even get into politics at all. It was an experience for me and that's really the only reason I was there.")

[18] *See, e.g.*, Tom Jackman, Marissa J. Lank, Jon Swaine, *Man who shot video of fatal Capitol shooting is arrested, remains focus of political storm,* Washington Post (Jan. 16, 2021), https://www.washingtonpost.com/nation/2021/01/16/sullivan-video-arrested/.

[19] Over the last four years Donald J. Trump has been blamed for every manner of evil thing, and every crisis or news cycle that left people unsure of what to do was another opportunity to point a finger at the President. For one example, when a celebrity claimed that he was the victim of a violent hate crime, Donald Trump was blamed; and when it turned out that the claim was fraudulent the then-Mayor of Chicago quickly pivoted and *still* blamed President Trump for creating a 'toxic environment.' Howie Carr, *Trump is blamed for everything*, Boston Herald (Mar. 30, 2019), https://www.bostonherald.com/2019/03/30/fault-line-trump-is-blamed-for-everything/.

already breached Capitol Grounds a mile away 19 minutes prior to the end of President Trump's speech."[20]

2. The House Managers False Narrative Rests Entirely On Biased And Mischaracterized Reports By The Media And Cherry-Picked, Non-Contextual Parsing Of Mr. Trump's January 6 Speech.

Contrary to the false narrative set forth by the House Managers, Mr. Trump's speech was never directed to inciting or producing any imminent lawless action. It is important to read the speech in its entirety, because the House Managers played shamefully fast and loose with the truth as they cherry-picked its content along with content from other speeches made to other audiences for their Trial Memorandum, desperately searching for incitement and desperate to deflect attention away from the glaring inability to show an insurrection. And this is no small matter, because their demonstrably false claims go right to the heart of their main allegation.

Democrats cannot pretend that they were confused by the word 'fight' in the context President Trump used it in his speech; Speaker Pelosi has used this word multiple times herself in the context of election security,[21] and the well-known nonprofit started by rising Democratic darling Stacey Abrams and endorsed by none other than Speaker Pelosi[22] is literally called 'Fair Fight,' and it asks people to join the "fight for free and fair elections." And yet in her comments during the impeachment debate Speaker Pelosi adjusted the truth by conflating the parts of the

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[20] Tayler Hansen, *Independent Journalist Tayler Hansen: A Riot that Turned Deadly, What I Witnessed*, Gateway Pundit (Jan. 28, 2021), https://www.thegatewaypundit.com/2021/01/exclusive-independent-journalist-tayler-hansen-riot-turned-deadly-witnessed-us-capitol-riot/

[21] Press Release, *Pelosi Remarks at Election Security Week of Action Press Conference*, Speaker.gov (Jul. 9, 2019), https://www.speaker.gov/newsroom/7819-2.

[22] Press Release, *Pelosi, Schumer Announce Stacey Abrams To Deliver Democratic Response to President Trump's State of the Union*, Speaker.gov (Jan. 29, 2019), https://www.speaker.gov/newsroom/12919-3.

President's speech in which he talked about marching peacefully to the Capitol and the part of the speech addressing the need to fight for election security. She lied to the American people saying: "They were sent here, sent here by the president, with words such as a cry to fight like hell." Incredibly enough, her very next words were "Words matter. Truth matters. Accountability matters."

Words do matter and the words of President Trump's January 6th speech speak for themselves. President Trump did not direct anyone to commit lawless actions, and the claim that he could be responsible if a small group of criminals (who had come to the capital of their own accord armed and ready for a fight) completely misunderstood him, were so enamored with him and inspired by his words that they *left his speech early*, and then walked a mile and a half away to "imminently" do the opposite of what he had just asked for, is simply absurd. The attack on the Capitol was horrific. Period. But as constitutional professors[23] and experienced practitioners[24] agree, "The president didn't mention violence on Wednesday, much less provoke or incite it.[25] The fact that the House Managers found sheer deceptiveness necessary in the exercise of selectively parsing the words of the former President and quoting him out of context underscores the utter weakness of the House Managers' factual and legal claims. This tact is reminiscent of

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[23] Such as Andrew Koppelman, a Constitutional Law professor from Northwestern University, who explained "It seems to me the Brandenburg standard requires intention," and noted "It's like the word fight. It's often used as a metaphor. 'Senator X is a fighter. He will fight for you." Mark Sherman, Zeke Miller, *Can Trump be charged with inciting a riot? Legal bar is high*, Associated Press (Jan. 8, 2021), https://apnews.com/article/can-donald-trump-be-charged-incite-riot-3f27e4393e83d2967cf25bd18db5b268

[24] Like Jefrey Scott Shapiro, a former District of Columbia assistant attorney general who has experience successfully – and unsuccessfully – convicting protesters for incitement. Jeffrey Scott Shapiro, *No, Trump Isn't Guilty of Incitement*, Wall Street Journal (Jan. 10, 2021), https://www.wsj.com/articles/no-trump-isnt-guilty-of-incitement-11610303966

[25] *Id.*

Congressman Schiff's manufacturing of a fake conversation between President Trump and Ukrainian President Zelensky.[26]

Truth also matters very much. But Speaker Pelosi and her allies perverted the truth. The day after the riot, sensing a political opportunity, House Leadership decided to forego focusing on the business of the nation and unifying a bitterly divided country to once again endeavor to score political points against Mr. Trump. First, in an attempt to usurp Constitutional power that is not in any way hers, the Speaker demanded that Vice-President Michael Pence or the White House Cabinet invoke the 25th Amendment, threatening to launch an impeachment proceeding if they refused. Four days later, on January 11, 2021, an Article of Impeachment was introduced, which charged President Trump with "incitement of insurrection" against the United States government and "lawless action at the Capitol." See H. Res. 24 (117th Congress (2021-2022). The Speaker made good on her extortionate threat.

Accountability does matter, according to the House Managers, unless you are a Democrat. While fixating on words and sentences taken out of context, the House Managers ignore the many reckless statements made by their Democrat colleagues in the House and Senate. Merely by way of example, one need only search media reports to be reminded of Speaker Pelosi's 2018 hopeful comment when disagreeing with a policy: "I just don't even know why there aren't uprisings all over the country. Maybe there will be."[27] And just last summer, when sustained violent riots were

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[26] Morgan Chalfant, Trump demands Schiff resign, The Hill (Sept. 17, 2019), https://thehill.com/homenews/administration/463344-trump-demands-schiff-resign.

[27] Douglas Ernst, *Nancy Pelosi wonders why there 'aren't uprisings' across nation: 'Maybe there will be,'* Washington Times (Jan. 14, 2018), https://www.washingtontimes.com/news/2018/jun/14/nancy-pelosi-wonders-why-there-arent-uprisings-acr/

decimating our cities and local businesses, Representative Ayana Pressley went on national TV and said that "there needs to be unrest in the streets."[28]

They also ignore the sheer hypocrisy of their House leader's 4-plus year quest to remove President Trump from office. After the Article was introduced, Speaker Pelosi again gave Vice-President Pence an ultimatum: either he invokes the 25th Amendment within twenty-four hours or the impeachment proceedings would proceed. Vice-President Pence responded in a letter to Speaker Pelosi the following day stating that he would not allow her to usurp constitutional authority that is not hers and extort him (and by extension the Nation) to invoke the 25th Amendment because he believed to do so would not "be in the best interest of our Nation or consistent with our Constitution."[29] Vice-President Pence also noted that Speaker Pelosi was being hypocritical, as she had previously stated that in utilizing the 25th Amendment, "we must be '[v]ery respectful of not making a judgment on the basis of a comment or behavior that we don't like, but [rather must base such a decision] on a medical decision."[30]

III. ARGUMENT

A. The Senate Lacks The Constitutional Jurisdiction To Conduct An Impeachment Trial Of A Former President.

The Constitution of the United States bifurcates the power of impeachment and addresses the issue in four places:

Article I, Section 2, Clause 5:

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[28] Am Joy, *Post office cuts are wa against American people Pressley says*, MSNBC (Aug. 15, 2020), https://www.msnbc.com/am-joy/watch/post-office-cuts-are-war-against-american-people-pressley-says-90125893871

[29] See Mike Pence's Letter to Nancy Pelosi https://www.cnn.com/2021/01/12/politics/pence-letter/index.html.

[30] *Id.*

> The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment;[31]
>
> Article I, Section 3, Clauses 6 and 7:
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law;[32]
>
> Article II, Section 2:
> [The President] ... shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment;[33] and
>
> Article II, Section 4:
> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.[34]

1. The Text And Structure Of The Articles Discussing Impeachment Do Not Grant To the Senate the Authority Over A Former President.

As is evident from our Constitution's plain text, Article II limits impeachment to current officials: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." As Alexis de Tocqueville wrote, impeachment was designed to

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31 U.S. Const, art.1, § 2, cl. 5.

32 U.S. Const. art. 1, §3, cl. 6 and 7.

33 U.S. Const. art 2, § 2.

34 U.S. Const. art 2, § 4.

deprive a political actor "of the authority he has used to amiss."[35] In this instance, however, the Senate is being asked to do something patently ridiculous: try a private citizen in a process that is designed to remove him from an office *that he no longer holds*.

(a) The Impeachment of a Former President, A Private Citizen, Constitutes An Illegal Bill Of Attainder.

An impeachment trial of Mr. Trump held before the Senate would be nothing more nor less than the trial of a private citizen by a legislative body. An impeachment trial by the Senate of a private citizen violates Article I, Section 9 of the U.S. Constitution, which states that "[n]o bill of attainder . . . shall be passed."[36]

The Bill of Attainder, as this clause is known, prohibits Congress from enacting "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[37] Simply put, "[a] bill of attainder is a legislative act which inflicts punishment without a judicial trial."[38] "The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence."[39]

"[The Bill of Attainder Clause], and the separation of powers doctrine generally, reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of

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35 Katherine Shaw, *Impeachable Speech*, 70 Emory L.J. 1, 10 (2020), citing to ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 101 (1838).

36 U.S. Const. art. I, § 9.

37 *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

38 *Cummings v. State of Missouri*, 71 U.S. 277, 323 (1866).

39 *United States v. Lovett*, 328 U.S. 303, 321-22 (1946) (Frankfurter, J., and Reed, J., concurring).

power."[40] As the Supreme Court explained in *United States v. Brown,*[41] "[t]he best available evidence, the writings of the architects of our constitutional system, indicate that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[42] The Bill of Attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries. . . " [43]

When the Senate undertakes an impeachment trial of a private citizen, it is acting as a judge and jury rather than a legislative body. And this is exactly the type of situation that the Bill of Attainder was meant to preclude. It is clear that disqualification from holding future office is a kind of punishment that is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included; in *Cummings, Ex parte Garland*, and *Brown*, the Supreme Court thrice struck down provisions that precluded support of the South or support of Communism from holding certain jobs as being in violation of this prohibition.[44] Thus the impeachment of a private citizen in order to disqualify them from holding office is an unconstitutional act constituting a Bill of Attainder.

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40 *I.N.S. v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring opinion).

41 *United States v. Brown*, 381 U.S. 437, 442 (1965).

42 381 U.S. 437, 442 (1965).

43 *Id.* at 445.

44 *Cummings v. Missouri*, 71 U.S. 277 (1867)(noting that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment."); *Ex parte Garland*, 71 U.S. 333 (1866)(explaining that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."); *see also Brown v. U.S.*, 381 U.S. 437, 458 (1965).

Moreover, this is the exact type of situation in which the fear would be great that some members of the Senate might be susceptible to acting in the haste the House did when it rushed through the Article of Impeachment in less than 48 hours, *i.e.*, acting hastily simply to appease the popular clamor of their political base.[45] As Chief Justice Marshall warned in *Fletcher v. Peck*,

> [I]t is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state. No state shall pass any bill of attainder. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained.[46]

2. The Constitution only gives the Senate Jurisdiction over the President, not the *former* President, of the United States.

One legal scholar described the simplicity of Article II's limitation, which House Managers try in vain to make seem inscrutable, in this way: "A half-grown boy reads in a newspaper that the President occupies the White House; if he would understand from that that all Ex-Presidents are in it together he would be considered a very unpromising lad."[47] That is the first reason why a former President cannot be impeached: he is not the President anymore.

As Professor Phillip Bobbit, one of the leading scholars on the impeachment process, and author of *Impeachment: A Handbook* (with Black, New Edition) (2018), recently argued:

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45 *United States v. Brown*, 381 U.S. 437, 442 - 445 (1965).

46 *Fletcher v. Peck*, 10 U.S. 87, 137–38, 3 L. Ed. 162 (1810).

47 Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13, 20 (2001).

> There is no authority granted to Congress to impeach and convict persons who are not "civil officers of the United States." It's as simple as that. But simplicity doesn't mean unimportance. Limiting Congress to its specified powers is a crucial element in the central idea of the U.S. Constitution: putting the state under law.[48]

Further textual support on this issue is evidenced by the Founders use of "shall" when identifying the penalty to be imposed, i.e. "…**shall** be removed from Office…." Justice Scalia once wrote, when the word "shall" can reasonably be understood as mandatory, it ought to be taken that way.[49] In 2007 the Supreme Court confirmed that

> The word `shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes ... this word is generally imperative or mandatory").[50]

The text then is very clear: Conviction at an impeachment trial requires the possibility of a removal from office. Without that possibility, there cannot be a trial. In the civil law analogue, this case would be summarily dismissed under Federal Rules of Civil Procedure 12(b)(6), for "failure to state a claim upon which relief can be granted."[51]

The second reason a former President cannot be impeached follows logically from the first. The purpose of impeachment is to remove someone from office, and unequivocally, this impeachment trial is *not* about removing someone from office, as Mr. Trump left office on January 20, 2021. He is now, both factually and legally, a private citizen.

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[48] Bobbit, *Why the Senate Shouldn't Hold a Late Impeachment Trial,* Law Fare Blog (Jan. 27, 2021), https://www.lawfareblog.com/why-senate-shouldnt-hold-late-impeachment-trial#.

[49] Scalia, Antonin; Garner, Bryan A. (2012). "11. Mandatory/Permissive Canon". *Reading Law: The Interpretation of Legal Texts* (Kindle ed.). St. Paul, MN: Thomson West. ISBN 978-0-314-27555-4.

[50] *National Ass'n v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007).

[51] Fed. R. Civ. P. 12

House Managers have no authority to legally redefine "former Presidents" as "Presidents" for some constitutional provisions and not others. Would they accept a former President conducting foreign policy on behalf of the United States? Would they be content to have a "former President" nominate a Justice for a vacant seat on the Supreme Court? Of course not. That is why the term 'former President' is actually a term of art with legal ramifications, as evidenced by the Former Presidents Act (3 U.S.C. § 102 note), which states that:

> "(f)As used in this section, the term 'former President' means a person—
> "(1) who shall have held the office of President of the United States of America;
> "(2) whose service in such office shall have terminated other than by removal pursuant to section 4 of article II of the Constitution of the United States of America; and
> "(3) who does not then currently hold such office.

As it relates to the above definitional requirements, Mr. Trump has held the Office of President of the United States of America; his service was *not* terminated by removal pursuant to section 4 of article II of the Constitution (and even if this sham late impeachment were to result in a conviction, he *still* would not have been thus removed); and he does not currently hold such office. He is therefore *legally* in the separate category of 'former President' and is statutorily *not* the President of the United States referred to in the Impeachment Clauses of the Constitution. The text of the Constitution that provides only "[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment," supports the conclusion that the impeachment process applies only to officials in office.[52] This provision does not state "a" President or "a former" President, it unequivocally states "the" President. And when one refers to

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[52] Harold J. Krent, *Can President Trump Be Impeached As Mr. Trump? Exploring the Temporal Dimension of Impeachments*, 95 Chi.-Kent L. Rev. 537, 540 (2020)(noting that RTILCE II "appears to limit impeachment of "officers" only when "removal" is possible, i.e., when the officer is still serving.")

"the" President, the reference is clearly to the current President. The text of the Constitution simply does not contain language allowing for the impeachment of a former President and does not address "late impeachments," i.e., an impeachment of a former officer.[53] Any inference from British practice about former officials is therefore a nullity because they *would* impeach private citizens, and our Framers decided *not* to do that. We chose not to remain British after all.

3. The Founders Knowingly Did Not Extend The Power Of Impeachment To Former Officials.

The Founders clearly decided to purposefully limit the power of impeachment in this way. The concept of a "late impeachment" was in use at the time the Constitution was written, with Great Britain specifically allowing impeachment of former officials.[54] In fact, the British Parliament could, and did, impeach private citizens. The Framers could have explicitly included a provision allowing for the impeachment of a former President, but they did not. Instead, the Constitution was written to restrict impeachment to specific public officials: "*the* President, Vice President, and other civil officers."[55]

"There is little discussion in the historical record surrounding the framing and ratification of the Constitution that treats the precise question of whether a person no longer a civil officer can

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[53] As stated in a recent report from the Congressional Research Service on "The Impeachment and Trial of a Former President": "The Constitution does not directly address whether Congress may impeach and try a former President for actions taken while in office," and "the text is open to debate." Congressional Research Service "The Impeachment and Trial of a Former President" https://crsreports.congress.gov/product/pdf/LSB/LSB10565 (Jan. 15, 2021).

[54] Kalt at 25-26 (discussing state constitutions which specifically provided for late impeachments and quoting several constitutions which specifically provided for impeachment of an official "when he is out of office" or "either when in office, or after his resignation, or removal").

[55] As argued by Jeremiah S. Black during Senator William Blount's impeachment: "A half-grown boy reads in a newspaper that *the* President occupies the White House; if he would understand from that that all Ex-Presidents are in it together he would be considered a very unpromising lad." 3 Hinds *Precedents of the House of Representatives*, § 2007 at 314 (1907). https://www.govinfo.gov/collection/precedents-of-the-house?path=/GPO/Precedents%20of%20the%20U.S.%20House%20of%20Representatives

be impeached—and in light of the clarity of the text, this is hardly surprising."[56] The text is also doubly clear given the clarity of available models in some of the United States themselves that *did* allow for late impeachments to take place.[57]

While the House Managers cite to some non-binding statements from John Quincy Adams about the possibility of late impeachment (in a case that did not even end with an impeachment) there is equal and perhaps even more on the scant record that would weigh against it. For example, as Professor Brian Kalt details, in multiple places Alexander "Hamilton seemed to believe that removal was a required component of the impeachment penalty, which suggests that he viewed

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[56] Bobbit, *supra.* https://www.lawfareblog.com/why-senate-shouldnt-hold-late-impeachment-trial

[57] For example, the state Constitution of Vermont (7/1777) provides "the General Assembly [sic] of the Representatives of the Freemen of Vermont . . . may . . . impeach State criminals. Every officer of State, whether judicial or executive, shall be liable to be impeached by the General Assembly, either when in office, **or after his resignation, or removal** for mal-administration . . . Vt. Const. of 1777, ch. 2, § 20; or Pennsylvania (9/1776): "The general assembly of the representatives of the freemen of Pennsylvania . . . may . . . impeach state criminals. Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation, or removal for mal-administration . . . .Pa. Const. of 1776, ch. II, §22.

As Brian Kalt explains, ideas like requiring a two-thirds majority to convict in the Senate are not self-evident, which is why the Framers took the time to spell them out. Late impeachment, so the argument goes, which is also not self-evident, would have also required specification if the Framers wished to include it as a possibility. Kalt at 37, see also *id* at fn. 441:

> See N.J. Const. of 1844, art. V, §11 ("The governor and all other officers under this State shall be liable to impeachment for misdemeanor in office, during their continuance in office, and for two years thereafter.") (emphasis added); Proceedings of the New Jersey State Constitutional Convention of 1844, at 600 (New Jersey Writers' Project ed., 1942) (chronicling last-minute addition of late impeachment provision); see also N.J. Const. art. VII, §3, cl. 1 ("The Governor and all other State officers, while in office and for two years thereafter, shall be liable to impeachment for misdemeanor committed during their respective continuance in office.").

Clearly late impeachment was something that people thought about, talked about, and wrote about, *if* they wanted to include it in their laws.

late impeachment as impossible."[58] In The Federalist No. 39, Madison wrote that the President of the United States is impeachable *at any time during his continuance in office*.[59] (Emphasis added).[60]

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[58] Kalt at 43.

[59] Kalt at 50, citing The Federalist No. 39, at 397 (James Madison) (Clinton Rossiter ed., 1961). Kalt also notes that the other discussions of impeachment in The Federalist concerned removability, which buttresses the argument that impeachment was intended for sitting officers. *Id.* at 51.

[60] Other states, like Georgia *had* late impeachment clauses up to a point and then and removed them. Kalt quotes the Georgia committee's discussion at length, noting that their consideration is very illuminating as an example of commonsense intuitions about the idea of a late impeachment:

> DR. PYLES: May I raise another question? What about this ". . . against all persons who shall have been . . . ." What's the point? . . This is highly confusing if you say ". . . shall have been in office . . . ." That's almost ex post facto or something.
> MR. CLARK: How can you impeach somebody who's not in office[?]
> DR. PYLES: Yeah. Or why. We've got criminal provisions, law, civil law.
> MR. CLARK: Any understandable background for that, that phraseology, "shall have been" ?
> CHAIRMAN SWEENEY: No.. . .
> MR. TIDWELL: If you look further into what you can do, the consequences are, he cannot hold office again. That might shed some light on that. . ..
> MR. HILL: . . . Now a person could leave office and two or three years later something is found out about that person that would be serious enough to warrant an impeachment trial so that he or she could never hold office again. . . . I don't think the language was happenstance, I think it was intended to cover both people in office and former officeholders.
> MR. CLARK: . . . [I]mpeachment is to put that person out of office, it seems to me, and the idea if he has committed some malfeasance or violation, that there would be criminal support, this falls into court action rather than the ponderous procedure of an impeachment. I just can't see it ever coming about . . . it clutters up again and adds questions to the Constitution that is just not necessary.
> MS. RYSTROM: I agree with you....
> DR. PYLES: I actually think the impeachment provision serves as a deterrent or maybe a threat against an officer, whether it will ever be carried out or not, the fact that it could be carried out is a pretty viable threat it would seem to me to an individual before he continued to persist in whatever it was that would be heinous enough to warrant impeachment.
> CHAIRMAN SWEENEY: Especially if he knows that it may come up after he leaves office.
> MR CLARK: . . . I don't think it's enough--it's not important enough to quibble about. I don't think it's likely to come up again, so I would be

Interestingly, where the Constitution refers to "the President" in Article 1, Section 3 and gives protocols for impeachment, such as "when the President of the United States is tried [in the Senate], the Chief Justice shall preside," the Senate reads this as applicable to the impeachment trial only of the current sitting President. Yet, under the House Managers' theory, they urge the Senate to read the constitutional provision that specifies "the President" is subject to impeachment to include a former President.[61]

4. **Historical Precedents**

(a) The Failed Attempts to Impeach Senator William Blount and Secretary of War William Belknap

The House Managers suggests there is "congressional precedent" for impeaching a former President in the impeachment cases of Senator William Blount and Secretary of War William Belknap. These two cases are actually inapposite and do not provide any binding precedential authority for impeaching a former President. .

In 1797, United States Senator William Blount of Tennessee faced allegations of conspiring to help Great Britain seize Spanish-controlled areas in Florida and what is now Louisiana as part of a scheme to pay off debts incurred from land speculation. Blount was expelled

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> opposed to leaving the wording in there, I don't think it serves any protective purpose at all.
> CHAIRMAN SWEENEY: Well, is there a motion to drop it?. . .
> DR. PYLES: I so move.. . .
> CHAIRMAN SWEENEY: All in favor?
> MS. RYSTROM: I was getting convinced on the other side as this discussion went on.
> CHAIRMAN SWEENEY: Four [out of seven committee members present] in favor of dropping the language.

Kalt at 109-11, quoting from 2 State of Georgia Select Committee on Constitutional Revision, Transcript of Meetings, 1977-1981, Committee to Revise Article III, Oct. 29, 1979, at 29-30 (stating subcommittee's understanding that leaving office "obviate[s] the need for an impeachment proceeding."). Virginia removed late impeachment in 1830. See Kalt at 114, citing to Va. Const. of 1830, art. III, §13.

[61] House Trial Memo. at 48-50.

by the Senate prior to his impeachment proceedings in 1798, he therefore argued that he was not subject to trial and refused to appear. Specifically, Blount argued that Senators or members of Congress could not be impeached, but only expelled by their respective chamber, and, even if Senators *could* be impeached, ex-Senators could not.

"In a close vote, the Senate defeated a resolution asserting Blount was an impeachable civil officer. But the debate around this vote, and the text of the resolution, do not make clear whether the resolution was rejected because it was felt that a senator was not "a civil officer" or whether, having been expelled, Blount ceased to be impeachable."[62] Therefore the case has little or no precedential value supporting a late impeachment.

In 1876, Belknap, Secretary of War under President Ulysses S. Grant, was investigated by the House for corruption. Belknap had accepted over $20,000 in kickbacks for the appointment of an associate to a lucrative military trading post at Fort Sill.[63] However, on March 2, 1876, after the House had taken up the issue but before the House voted on his impeachment, Grant accepted Belknap's resignation[64] – apparently just minutes before the House was set to vote.[65] Despite Belknap's resignation, the House voted to impeach him anyway. The issue of whether an officer who had resigned could be impeached was heavily debated from May15 to May 29th, but

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62 *Id.*

63 United State Senate.gov https://www.senate.gov/artandhistory/history/minute/War_Secretarys_Impeachment_Trial.htm).

64 Of course the Belknap case is arguably different than Mr. Trump's because Mr. Trump did *not* try and escape a trial by resignation; this entire constitutional problem was created by the Democratic leadership that chose to wait until after his term had naturally expired.

65 *Id.*

ultimately the Senate voted 37-29 that it had the power to hold an impeachment trial for a former officeholder and proceeded to have a trial.[66]

On August 1, 1876, Belknap was acquitted because less than 2/3 of the Senate voted for impeachment.[67] While historical accounts suggest that few senators believed Belknap was innocent, the majority of those voting to acquit him did so **because they did not think the Senate had jurisdiction to convict someone who was no longer in office.**[68]

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66 *Id.*

67 *Id.*

68 3 Hinds *Precedents of the House of Representatives*, § 2467 (1907):

> An analysis of the reasons given with the votes shows that of those voting "guilty," 2 believed that the Senate had no jurisdiction, but gave their verdict in good faith, since by vote jurisdiction had been assumed. Of those voting "not guilty,"3 announced that they did so on the evidence, while 22 announced that they voted not guilty because they believed the Senate had no jurisdiction. One Senator stated that he declined to vote because he believed they did not have jurisdiction.

As Alan Dershowitz framed this case and its relative import:

> No former official has ever been convicted by the Senate, and only one has been impeached. Secretary of War William W. Belknap was indisputably guilty of numerous impeachable offences, to which he confessed as he resigned his office hours before the House unanimously impeached him in 1876. The Senate voted in favor of a procedural motion affirming its jurisdiction to try Belknap's impeachment. But two dozen senators who believed he was guilty voted to acquit on jurisdictional grounds. A close vote nearly a century and a half ago doesn't establish a binding precedent.

Alan Dershowitz, *Senate Should Dismiss Article Impeachment Since Trump is Now Private Citizen,* The Hill (Jan. 21, 2021), https://thehill.com/homenews/media/535261-dershowitz-senate-should-dismiss-article-impeachment-since-trump-is-now.

There are also other recent precedents, in 1926 and 2009, in which judges resigned having been impeached, after which the House then petitioned the Senate to withdraw the indictment. See Bobbit, *supra.*, https://www.lawfareblog.com/why-senate-shouldnt-hold-late-impeachment-trial.

Significantly, neither Belknap nor Blount received the required two-thirds majority of the Senate and were acquitted so their proceedings provide no binding precedent establishing the Senate's jurisdiction to convict former officials of impeachment. "These cases cannot be read as foreclosing an argument that they never dealt with."[69] This is critically important because the burden of proof applies to both jurisdictional and substantive elements: "[T]he substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority. Both kinds of elements must be proved to a jury beyond a reasonable doubt; and because that is so, both may play a real role in a criminal case."[70] With impeachments, jurisdiction and guilt must be found by a two-thirds majority. Neither case established jurisdiction by the required two-thirds' majority. These two instances present, at best, an example of hypothetical jurisdiction.[71] It is also

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[69] *Waters v. Churchill*, 511 U.S. 661, 678, 114 S. Ct. 1878, 1889 (1994)(plurality). Furthermore, a court "is not bound by prior *sub silentio* holdings when a subsequent case finally brings the jurisdictional issue before us." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63, n.4 (1989)(Court's alterations omitted) quoting *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1977).

[70] *Torres v. Lynch,* 136 S. Ct. 1619, 1630 (2016) (citations omitted).

[71] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S. Ct. 1003, 1016 (1998). The *Steel* Court discussed the threshold inquiry into jurisdiction noting contested questions of law could not be resolved when jurisdiction was in doubt:

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment -- which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362, 55 L. Ed. 246, 31 S. Ct. 250 (1911); *Hayburn's Case*, 2 U.S. 409, 2 Dall. 409, 1 L. Ed. 436 (1792). Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. *See United States v. Richardson*, 418 U.S. 166, 179, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974). For a court to pronounce upon the meaning or the constitutionality of a state or federal

worth noting that neither of those cases dealt with a President, with his unique status in the Constitution, and with the clear definitional limits that apply to him and not to others.

(b) More Recent Impeachment Proceedings

In the past, Congress has acknowledged and exercised its duty to not impeach when an official is no longer in office. In the case involving the impeachment of President Richard M. Nixon, Congress decided not to impeach because he resigned from office. "[A]s a practical matter… the resignation of an official about to be impeached generally puts an end to impeachment proceedings because the primary objective—removal from office—has been accomplished." [72]

In May 1974, the House Judiciary Committee began formal impeachment hearings against President Nixon in regard to the Watergate scandal, and, on July 27, 1974, the House Judiciary Committee approved three articles of impeachment and reported them to the full House for consideration. Knowing that he was about to be impeached in the House and convicted in the Senate, Nixon resigned on August 8, 1974. The House officially ended the impeachment process against him on August 20, 1974, by accepting the committee's report, but deciding not to further advance impeachment proceedings.

As professor Bobbitt explained: "Why didn't they go ahead and impeach him when he resigned? The answer is they didn't believe that they had the authority to impeach someone who could not be removed, someone who was no longer, as the [constitutional] text requires, a 'civil officer' of the United States."[73] A memo from the Office of Legal Counsel at the time reached a

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> law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

[72] *House Practice: A Guide to the Rules, Precedents and Procedures of the House*, Chap. 27 Impeachment § 2 at 604-05.

[73] Interview with Columbia Law professor Philip Bobbitt, co-author of Impeachment: A Handbook (https://www.npr.org/2021/01/18/957866252/can-the-senate-try-an-ex-president).

very similar conclusion "[a]s a practical matter, if the President should resign, this would probably result in termination of impeachment proceedings."[74]

(c) State Courts Have Rejected Claims Similar To Those Made By The House Managers In Similar Late Impeachment Matters.

While the Supreme Court has not yet addressed the question of a late impeachment, some state courts have. In *State v. Hill*, the Supreme Court of Nebraska dealt with the exact same substantive question facing the Senate now, on almost identical Constitutional language. They addressed head on and dismissed the same claims that the House Managers now make. First, they started with the plain meaning of the word *officer* at issue:

> It is urged by counsel for the managers that ex–officers are liable to impeachment for official misdemeanors committed while in office; that jurisdiction attaches immediately upon the commission of an impeachable offense; and that the expiration of the official term does not deprive the legislature of the power to impeach, or the court to try. It cannot be said that there is any provision of the constitution which expressly confers the authority to impeach a person after he is out of office; while section 5, already quoted, designates the persons who may be impeached as "all civil officers of this state." This language is unambiguous. It means existing officers,—persons in office at the time they are impeached. Ex–officials are not civil officers within the meaning of the constitution. Jurisdiction to impeach attaches at the time the offense is committed, and continues during the time the offender remains in office, but no longer.[75]

Then the Court proceeded to address the question of disqualification as a separate remedial punishment:

> The necessary implication of the provisions in section 14, art. 3, of the constitution, that "judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold

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[74] U.S. Department of Justice, *Legal Aspects of Impeachment: An Overview, Volumes 1-5*, https://books.google.com/books?id=tHyQAAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[75] *State v. Hill*, 55 N.W. 794, 796 (Neb. 1893).

and enjoy any office of honor, profit, or trust in this state," is that the offending party must be in office at the time the impeachment proceedings are commenced. In case of impeachment, either one of two judgments can be pronounced, namely, removal from office, or removal and disqualification to hold office. It is obvious that there can be no judgment of removal where the party was not an officer when impeached. It is claimed by counsel for the managers, as we understand their argument, that a judgment of disqualification can be entered without a judgment of removal. All will concede that disqualification to hold office is a punishment much greater than removal; so that, if the construction contended for by counsel is the true one, then, in case the person impeached is out of office, he is liable to a more severe penalty than might have been inflicted upon him had he been impeached before he went out of office. We cannot believe that the members of the convention who framed the constitution so intended. Judge Story, in discussing the question whether a person can be impeached after he has ceased to hold office, at section 803 says: "As it is declared in one clause of the constitution that judgment in cases of impeachment shall not extend further than a removal from office, and disqualification to hold any office of honor, trust, or profit under the United States, and in another clause, that the 'president, vice president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors,' it would seem to follow that the senate, on the conviction, were bound in all cases to enter a judgment of removal from office, though it has a discretion as to inflicting the punishment of disqualification. If, then, there must be a judgment of removal from office, it would seem to follow that the constitution contemplated that the party was still in office at the time of impeachment. If he was not, his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued, with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offense, when the most important object for which the remedy was given was no longer necessary or attainable; and, although a judgment of disqualification might still be pronounced, the language of the constitution may create some doubt whether it can be pronounced without being coupled with a removal from office." [76]

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[76] *Id.* at 796-97. Next the Court "rejected the British cases of Hastings and Melville as irrelevant given the broader scope of English impeachment… [and] rejected the Belknap precedent because of the weakness of the Senate's majority and also because, unlike Belknap, Benton and Hill were out of office from the natural expiration of their terms." Kalt, at 117; see also *id.* at fn. 454: describing how "in a case decided the same day, the court dismissed another late impeachment on different grounds, while noting its argument in Hill. *State v. Leese*, 55 N.W. 798, 799 (Neb. 1893) (citing Hill and pointing out that the legislature had no power to impeach Leese because he had been out of office for two years)."

The most recent state court opinion on late impeachment is *Smith v. Brantley*,[77] a Florida case from 1981 that also declared late impeachment unacceptable. The Florida Supreme Court held that:

> officers are officers; ex-officers, who could not be suspended or removed from office, are not. The court thus was making the linguistic argument that "officer" meant "sitting officer" and the functional argument that "the primary and dominant purpose of impeachment in Florida is removal of an officeholder from office. Once an officer has resigned, this purpose is fulfilled, the court said, and the mere possibility of disqualification from future office does not change the fact that the main purpose of the process has been achieved. The court considered Blount, Belknap, and Ferguson, but argued that in each case the resignation did not occur until impeachment proceedings had begun.[78]

B. Congress' Power To Impose Penalties Upon Conviction Of Impeachment Is Limited to Removal, And (Not Or) Disqualification.

The Constitution grants Congress only the power to remove a person's right to run for office when it is part of the process of removal from office. Article II, Section 4, of the Constitution states that the only purpose of an impeachment is whether "the President, Vice president and all civil Officers of the United States, shall be removed from office." The only purpose of impeachment is to remove the President, Vice-President, and civil officers from office. When a President is no longer in office, the objective of an impeachment ceases.[79]

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77 *Smith v. Brantley*, 400 So. 2d 443 (Fla. 1981)

78 Kalt at 120-121.

79 Kalt at 66, *see also* fn. 112:

> *See, e.g.*, 14 Annals of Cong. 430-31 (1805) (speech of Luther Martin in impeachment trial of Justice Samuel Chase) ("The President, Vice President, and other civil officers can only be impeached.... In the first article, section the third, of the Constitution, it is declared that, judgment in all cases of impeachment, shall not extend further than removal from office, and disqualification to hold any office of honor, trust, or profit,

This impeachment trial is being pursued solely to preclude Mr. Trump, a private citizen, from holding any future office. However, the Constitution does not provide for the impeachment of a private citizen who is not in office. Further, the Constitution only grants the Senate the additional power to remove a person's right to run for office as *part* of the process of removal from office.[80] When a person ceases to hold an office, he immediately becomes a private citizen, impervious to removal, and therefore to impeachment and trial by the Senate.

As Professor Harold Krent has noted, "although the Impeachment Clause in Article I states that the penalty for impeachment shall not extend beyond removal and disqualification from office, that clause reads as a limit on what type of punishment can be meted rather than addressing "when." The Framers presumably were signaling the change from the British practice under which additional penalties were possible. There is no language in the Constitution suggesting that the impeachment authority is continuous."[81]

This idea was perhaps best expressed by Supreme Court Justice Joseph Story, in his influential three volume treatise *Commentaries on the Constitution of the United States*:

> **§ 801.** As it is declared in one clause of the constitution, that "judgment, in cases of impeachment, shall not extend further, than a removal from office, and disqualification to hold any office of honour, trust, or profit, under the United States;" and in another clause, that "the president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors;" it would seem to follow, that the senate, on the

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> under the United States. This clearly evinces, that no persons but those who hold offices are liable to impeachment.

[80] Dershowitz, *No, You can't try an Impeached Former President*, Wall Street Journal (Jan. 21, 2021),*https://www.wsj.com/articles/no-you-cant-try-an-impeached-former-president-11611167113?mod=article_inline* (contrasting the word "and" with the word "or.")

[81] Harold J. Krent, *Can President Trump Be Impeached As Mr. Trump? Exploring the Temporal Dimension of Impeachments*, 95 Chi.-Kent L. Rev. 537, 542 (2020).

> conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification. If, then, there must be a judgment of removal from office, it would seem to follow, that the constitution contemplated, that the party was still in office at the time of the impeachment. If he was not, his offence was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most important object, for which the remedy was given, was no longer necessary, or attainable. And although a judgment of disqualification might still be pronounced, the language of the constitution may create some doubt, whether it can be pronounced without being coupled with a removal from office.[82]

The House Managers' failure to grasp this concept is evident from their misplaced reliance on this language to try and create a work-around of a problem of their own making, i.e. Mr. Trump was no longer President at the time the House filed the Article of Impeachment in the Senate. Instead, their argument further demonstrates the point that Mr. Trump could not be removed from office (because his term ended), the condition precedent to any further penalty. As Professor Alan Dershowitz explained:

> The Constitution is clear: "The president . . . shall be removed from office on impeachment . . . and conviction"—not by the expiration of his term before the impeachment process is complete. It also mandates that "judgment in cases of impeachment shall not extend further than to removal and disqualification"—not *or* disqualification.[83]

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[82] Justice Joseph Story, *Commentaries on the Constitution of the United States* at § 801.

[83] Alan Dershowitz, *No, You can't try an Impeached Former President,* Wall Street Journal, (Jan. 21, 2021), *https://www.wsj.com/articles/no-you-cant-try-an-impeached-former-president-11611167113?mod=article_inline*

Other scholars have forcefully rejected the failed interpretation the House Managers try to advance in an effort to salvage this doomed impeachment by spelling out the unstated assumptions inherent in their position:

> by this logic a president could be disqualified from holding office without being removed, an obvious absurdity. This argument asserts that, because the Senate could, by a simple majority, disqualify a person impeached and convicted under Article II, it would thwart the operation of Article I, Clause 7's list of permissible punishments to let the convicted former officer go free. Were it otherwise, an officer could avoid removal and disqualification by simply resigning. This circular argument assumes the truth of the proposition that a person no longer in office can be impeached in the first place and then infers from this assumption that such a power should not be frustrated. It is not compatible with Article II, which provides the sole constitutional grounds for trial in the Senate on the basis of which impeachment penalties can be imposed: the commission of bribery, treason, or other high crimes and misdemeanors by a civil officer leading to his removal. It relies instead on a tortured inference from Article I, whose text says nothing about who can be impeached or on what grounds. In an effort to salvage the penalty of disqualification where an official has been impeached while in office but has resigned, advocates for this view would have the Senate convict a person no longer in office, inventing a new basis for conviction beyond that provided in Article II.[84]

The Constitution does not provide for an impeachment of someone who is not in office as a means to an end resulting in only disqualification – and for good reason. As Alexander Hamilton wrote:

> Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances

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[84] Bobbit, *supra.*, https://www.lawfareblog.com/why-senate-shouldnt-hold-late-impeachment-trial

> render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense.[85]

The House Managers put a lot of misplaced importance onto the fact that Article I Section 7 contains a clause reminding Congress of its own limitations, namely that after a conviction and removal, the only other penalty Congress can impose is disqualification. "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor," does *not* mean that disqualification is a separate or alternative form of punishment entirely. Disqualification from future office is simply an additional discretionary penalty that the Senate may impose once it has determined the original purpose of the impeachment, removal, is proper. Disqualification, however, is not the purpose of an impeachment proceeding, and it is not available simply to disqualify a former public officer from future officeholding.

But that is not all. The House Managers are not content to argue that an officer who is impeached while in office can then be tried after they leave office;[86] the House Managers dig in further and claim that a person can be impeached at any time after they leave office.[87] The absence of a statute of limitations suggests that process is confined to present office holders: "A federal

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[85] Hamilton, A., *A Letter from Phocion to the Considerate Citizens of New York* (January 27, 1784), https://founders.archives.gov/documents/Hamilton/01-03-02-0314#ARHN-01-03-02-0314-fn-0001 .

[86] Although the same textual inferences against such proceedings would apply, especially because there *were* states that *did* allow for just that: some states, there is an arguable textual and structural basis for drawing a distinction between the stages of impeachment. For instance, Nebraska state law provided: "An impeachment of any state officer shall be tried, notwithstanding such officer may have resigned his office, or his term of office has expired." This language more easily supports the notion that impeachment is limited to sitting officers but that trial is not. Kalt at 76 citing to *State v. Hill*, 55 N.W. at 798 (quoting Neb. Comp. Stat. ch. 19, § 8 (1891)).

[87] House Trial Memo at 2.

cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'"[88]

In addition, at any given moment in time "[t]he majority party could threaten to impeach former officeholders of the minority party unless support is forthcoming on a particular appropriations or other bill. In other words, the ongoing threat of impeachment might distort law-making… and, as a functional matter, might interfere with the balance of powers otherwise prescribed in the Constitution."[89]

This is a dangerous slippery slope that the Senate should be careful to avoid. Were it otherwise, a future House could impeach former Vice President Biden for his obstruction of justice in setting up the Russia hoax circa 2016. While he could not be removed from the Vice Presidency because his term ended in 2017, he could be barred from holding future office. The same flawed logic the House Managers advance could apply to former Secretary of State Clinton for her violations of 18 U.S.C § 793. Impeachment cannot and should not be allowed to devolve into a political weapon.

Setting aside the clear meaning of the text, the House Managers argument about the need for late impeachment with disqualification upon conviction to serve as a deterrence for Presidential wrongdoing is also unfounded. A President who left office is not in any way above the law; as the Constitution states he or she is like any other citizen and can be tried in a court of law. From a political standpoint as well, an officer who has left office and is seeking to return faces the *ultimate*

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[88] *Wilson v. Garcia*, 471 U.S. 261, 271, 105 S. Ct. 1938, 1944 (1985) (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)), abrogated in part on other grounds, Pub. L. No. 101-650, Title III, § 313(a), 104 Stat. 5089, 5114-5115 (1990).

[89] *Id. See also*, Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 Tex. L. Rev. 301, 315 (2009), noting that Congress "cannot impeach a former President."

political check even without disqualification- the electorate. It is almost laughable that the House Managers, who spent four years pretending that Mr. Trump was completely ineffective and illegitimate, are now so worried that he might win again that they seek to illegally impair him.

Accordingly, the Senate does not have the power to try a former President and should dismiss the Article of Impeachment. Any other outcome would do profound and lasting damage to the institution of the Presidency. In this political climate we have seen the statues and monuments of former Presidents attacked because the values of their times were not in line with supposed modern sensibilities; if this impeachment of a former President is allowed to go forward, we could expect dozens more to follow from potentially both sides of the aisle, depending on which party happens to be in the majority.

> Future Congresses would judge the conduct of Presidents and other civil officers from the perspective of a different political and social milieu. From the vantage point of subsequent Congresses, President Clinton may have had a #MeToo problem; President Lyndon Johnson evidently spoke disparagingly about race; President George W. Bush lied to the public about domestic surveillance, and so on. And, although historical judgment may, at times, be healthy, the power of impeachment comes with tangible penalties.[90]

It is also true that, even if the Senate were to convict him without jurisdiction, such a decision would not go unchallenged. If Mr. Trump decides to run again, any non-binding 'disqualification' from an unauthorized Senate vote could and would be challenged in a court of law.[91] As scholars across the spectrum have agreed, certain aspects of impeachment *are* justiciable.

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[90] Harold J. Krent, *Can President Trump Be Impeached As Mr. Trump? Exploring the Temporal Dimension of Impeachments*, 95 Chi.-Kent L. Rev. 537, 546 (2020).

[91] Christopher Silvester, *Beware the bill of attainder*, The Critic (Jan. 29, 2021), https://thecritic.co.uk/beware-the-bill-of-attainder/

For example, if, in a case like this, where "the President was tried by someone other than the Chief Justice,"[92] a Court would be likely to hear the matter on review.[93]

C. The Article of Impeachment Violates Mr. Trump's First Amendment Rights

Aside from the fact that it does not constitute a crime, let alone a high crime or misdemeanor, President Trump's speech at the January 6, 2021 event fell well within the norms of political speech that is protected by the First Amendment, and to try him for that would be to

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[92] Josh Blackman, *What happens if the Chief Justice cannot serve at the Presidential impeachment trial?*, The Volokh Conspiracy (Nov. 25, 2019), https://reason.com/volokh/2019/11/25/what-happens-if-the-chief-justice-cannot-serve-at-the-presidential-impeachment-trial/.

[93] As Adam Liptak described it in the NY Times;

> Still, the 1993 decision did appear to leave open a possible role for the court were the Senate to violate what Chief Justice Rehnquist wrote were "the three very specific requirements" in the constitutional text — "that the Senate's members must be under oath or affirmation, that a two-thirds vote is required to convict and that the chief justice presides when the president is tried."
> When the case was argued, he asked the government's lawyer, Solicitor General Ken Starr, whether violations of those provisions could be challenged in court. (Mr. Starr would go on to investigate Mr. Clinton as independent counsel and to prepare the report that led to his impeachment.)
> **For instance, Chief Justice Rehnquist asked, what would happen if the chief justice died and Congress "created the office of vice chief justice?"**
> "We're going to let him preside," the chief justice said, sketching out the Senate's reasoning, "because it would just be catastrophic to wait for the appointment of a chief justice while this impeachment is pending."
> "Can the Senate not do that because of the specific language 'the chief justice shall preside'?" Chief Justice Rehnquist asked. "Would that action by the Senate, followed by the presiding by the vice chief justice, be judicially reviewable?"
> "I have to admit," Mr. Starr said, with apparent reluctance, that the answer was yes.

Adam Liptak, *Can Trump Challenge His Impeachment in the Supreme Court*, New York Times (Dec. 17, 2019), https://www.nytimes.com/2019/11/25/us/trump-impeachment-supreme-court.html.

do a grave injustice to the freedom of speech in this country.[94] Perhaps in realization that Mr. Trump's speech was clearly within the bounds the protections afforded by the First Amendment, the House Managers attempt to erect artificial roadblocks to prevent the Senate from even considering First Amendment principles in these impeachment proceedings. These efforts – as fully discussed below – are complete sophistry that should be rejected by the Senators, who are duty bound to consider and apply the First Amendment.

1. The Senate Cannot Disregard the First Amendment and the Supreme Court's Long-Established Free Speech Jurisprudence

The House Managers' Trial Memorandum expressly advocates for the Senate to disregard First Amendment principles, stating "the First Amendment does not apply *at all* to an impeachment proceeding."[95] In doing so, the House Managers shockingly invite Senators to violate their own oaths to uphold the Constitution and the bedrock principle—established over two hundred years ago—that the Supreme Court is the final arbiter of whether Congressional acts are consistent with the Constitution.[96] There is no actual precedent for this confounding precept offered in the House Managers' Brief—the Managers astonishingly cite to a few recent internet *blogs*.[97]

The First Amendment is widely understood as prohibiting Congress from "abridging the freedom of speech; or the right of people peaceably to assemble" in all aspects of state action in

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[94] Miranda Devine, *Facebook's squad of though police: Devine,* https://nypost.com/2021/01/31/facebooks-squad-of-thought-police-devine/; *see also* Tammy Bruce, *The new thought police: Inside the left's assault on free speech and free minds* (Crown, 2010).

[95] House Trial Memo. at 45.

[96] *Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.")

[97] Mem. of U.S. House of Rep. at 45 n.201.

all three branches of government.[98] Congress may not take action that would "abridge the freedom of speech." Indeed, Senators take an Oath of Office, which includes an oath to "support and defend the Constitution of the United States . . . ."[99] The Constitution, of course, includes the Bill of Rights, including the First Amendment. This means, inevitably, that Senators cannot do what the House Managers urge: the Senate cannot blithely cast aside the First Amendment and the Supreme Court's long-established Free Speech jurisprudence when passing judgment on articles of impeachment.

The Constitution must, at a minimum, serve as a limitation on the ability of Congress to impeach for "high crimes and misdemeanors." As noted by a Constitutional scholar a few years ago, if that were not the case, there would be a host of internal contradictions within the Constitution that could not have been intended by the Framers:

> Additional *negative* restrictions would also extend from the panoply of protections in the Bill of Rights. For example, an officer could not be removed from office for refusing to self-incriminate (Fifth Amendment) or seeking the assistance of counsel in a criminal prosecution (Sixth Amendment). Whatever "high crimes and Misdemeanors" means, it cannot include conduct that is itself protected by the Constitution; such would be an internal contradiction. Or, to frame it in modern doctrine, it would amount

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[98] While the First Amendment explicitly states that "Congress shall make no laws" abridging freedom of speech or of the press, by settled tradition it "has been read to apply to the entire national government." U.S. Constitution, 1st Am.; Gerald Gunther, *Constitutional Law, Cases and Materials* 462 (10th ed. 1982); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 511 (1982) (Brennan, J. dissenting on other grounds) ("The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance."); *Richmond Newspapers*, 448 U.S. at 575 ("The First Amendment . . . prohibits governments from 'abridging the freedom of speech, or of the press."); *Smith v. California*, 361 U.S. 147, 157 (1960) (Black, J., concurring) ("The First Amendment . . . fixed its own value on freedom of speech and press by putting these freedoms wholly 'beyond the reach' of federal power to abridge.").

[99] U.S. Senate Website, *Oath of Office,* https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm

> to an unconstitutional condition: punishing a person for exercising a right protected by the Constitution.[100]

The position advanced by the House Managers is essentially an impeachment standard without Constitutional guardrails, unmoored to any specific legal test other than the unbridled whims of the House Managers. That distinctly was not what the Framers intended when they expressly limited impeachable offenses to "high crimes and misdemeanors." The Framers of the Constitution were keenly aware of the danger of any impeachment process that would make the President "the mere creature of the Legislature."[101] Such an arrangement would constitute nothing less than "a violation of the fundamental principle of good Government."[102]

Founding Father James Wilson, who was a renowned legal scholar, served as one of the six initial Supreme Court Justices (1789-1798), and was a major force in drafting the Constitution,[103] plainly stated in his law lectures that lawful and constitutional conduct may not be used as an impeachable offense:

> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No

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100 Josh Blackman, *Obstruction of Justice and the Presidency: Part II*, Lawfare (Dec. 12, 2017)(emphasis original), https://www.lawfareblog.com/obstruction-justice-and-presidency-part-i.

101 2 *Records of the Federal Convention of 1787*, at 86 (Max Farrand ed., rev. ed. 1937).

102 *Id.*

103 "James Wilson (September 14, 1742 – August 21, 1798) was an American statesmen, politician, legal scholar, and Founding Father who served as an Associate Justice of the United States Supreme Court from 1789 to 1798. He was elected twice to the Continental Congress, was a signatory of the United States Declaration of Independence, and was a major force in drafting the United States Constitution. A leading legal theorist, he was one of the six original justices appointed by George Washington to the Supreme Court of the United States. In his capacity as first Professor of Law at the University of Pennsylvania, he taught the first course on the new Constitution to President Washington and his cabinet in 1789 and 1790." https://en.wikipedia.org/wiki/James_Wilson_(founding_father)

> one should be secure while he violates the constitution and the laws:
> ***everyone should be secure while he observes them.***[104]

The House Managers' suggestion that the First Amendment does not apply to this impeachment process is untenable. It conflicts with common sense, the Senators' Oath of Office, well-settled Supreme Court precedent, and the intent of the Framers of the Constitution, such as James Wilson, who not only was a draftsman of the Constitution, but taught the first course on the new Constitution to President Washington and his cabinet in Philadelphia at the University of Pennsylvania in 1789. The Senate should soundly reject the Managers' invitation to disregard the Constitution.

2. Mr. Trump as an Elected Official Has First Amendment Rights to Freely Engage in Political Speech

Another roadblock the House Managers use is the legally unsupported idea that because Mr. Trump was an elected official, specifically the President, he has fewer rights under the First Amendment than everyone else in the United States. This, too, is sophistry. The opposite is true. The Supreme Court of the United States has long held that the First Amendment's right to freedom of speech protects elected officials such as Mr. Trump. The House Managers' argument to the contrary both ignores well-established precedent and erodes the constitutional principles guiding this august body. In fact, the argument of the House Managers so materially omits the relevant constitutional precepts that an extended discussion becomes both necessary and warranted, particularly in light of the public commentary relied upon in the House Trial Memorandum.

There can be no dispute that elected public officials engage in protected free speech when they speak out on investigations of voting regularity and fairness. The Supreme Court held that an elected sheriff who spoke out on an investigation of voting patterns, and even communicated

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[104] *Collected Works of James Wilson,* Vol. 2 at 861 (Hall Kermit ed., 2007).

with a sitting grand jury via open letter, was protected by the First Amendment from punitive action by another group of "elected officers" for "publishing views honestly held and contrary to those" advocated by his accusers in the other political party.[105] Justice Brennan, writing for the majority in *Wood v. Georgia*, went so far as to make the protection of an elected public official a core First Amendment principle because the voting controversy at issue directly affected the sheriff's political career:

> The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.[106]

To paraphrase *Wood*, if Mr. Trump could be silenced in this manner by Congress, the Constitutional problem becomes evident: [107] a difference of political opinion, expressed in speech, on an issue of voting irregularity cannot be punishable where all that was done was to encourage investigation of voting irregularities and peaceful political speech.[108]

If *Wood* alone was not dispositive of Mr. Trump's free speech rights as an elected official to address public controversies such as voting irregularities and the authority of officials certifying votes, the Supreme Court emphatically held shortly after *Wood* that a legislature cannot punish an elected official for protected political speech. *Bond v. Floyd* squarely addresses the question of an

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105 *Wood v. Georgia*, 370 U.S. 375, 390–91, 394-95 (1962).

106 *Wood*, 370 U.S. at 394-95 (citation and footnote omitted).

107 *Id.* at 390-91.

108 "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard." Transcript of January 6, 2021 Speech at approximately 18:16, available at https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

elected official's punishment by a legislature for statements alleged to have incited public violation of the law, unequivocally rejecting the idea that an elected official is entitled to lesser, or no, protection under the First Amendment. When the state argued "that even though such a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators[,]" the Supreme Court responded tersely, "We do not agree[,]" and held the action of the legislature against the elected official unconstitutional and in violation of his First Amendment rights.[109]

The *Bond* case is particularly instructive, because the petitioner opposed the Vietnam war draft, and was accused of endorsing the burning of draft cards—a position he subsequently clarified, noting that he possessed his own draft card and did not support burning draft cards.[110] As punishment for articulating this position in theoretical conflict with federal law, the Georgia House of Representatives to which he was elected refused to seat him—a purely legislative action, like impeachment.[111] Based in part upon Bond's subsequent clarification that he did not urge anyone to burn draft cards, the Supreme Court first concluded that Bond "could not have been constitutionally convicted under 50 U.S.C. App. s 462(a), which punishes any person who 'counsels, aids, or abets another to refuse or evade registration.'"[112]

Going further, the Supreme Court held that the Georgia House of Representatives was in fact forbidden by the First Amendment from punishing Bond for advocating against the policy of the United States. It began by once again rejecting outright the argument that an elected official

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109 *Bond v. Floyd*, 385 U.S. 116, 132–33 (1966).

110 *Bond*, 385 U.S. at 118-25 ("I have not counselled burning draft cards, nor have I burned mine.")

111 *Id.* at 125.

112 *Id.* at 133-34.

could be held to any "higher standard" or that the Georgia House could "limit[] its legislators' capacity to discuss their views of local or national policy."[113] Justice Brennan, once again writing for the majority, went on to reaffirm the Constitutional shield around the speech of elected officials, even extending it to statements deemed "erroneous:"

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964), is that 'debate on public issues should be uninhibited, robust, and wide-open.' We think the rationale of the *New York Times* case disposes of the claim that Bond's statements fell outside the range of constitutional protection. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that the *New York Times* principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the *New York Times* case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.[114]

Mr. Trump's statements and advocacy of his political opinions—abhorred by the opponents of freedom of speech in the House as they may be—is no less protected than Bond's speech. Mr. Trump, having been elected nationally, was elected to be the voice for his national

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113 *Id.* at 135.

114 *Id.* at 135-37.

constituency. It is undeniable that the First Amendment's protections flow to him as an elected official where he was, as Wood, addressing the electoral integrity issues essential to his career that he has consistently advocated, a position unpopular with his political opponents. Furthermore, as Mr. Trump expressly urged rally participants "to peacefully and patriotically make your voices heard"[115] on January 6, 2021, his political speech falls squarely within the protections of the First Amendment under clear Supreme Court precedent (as fully discussed below), and he thus cannot be convicted by a Senate sworn to uphold the Constitution.

Contrary to these express holdings of the Supreme Court, as announced more than fifty years ago, the House Managers assert in their memorandum that "the First Amendment does not shield public officials who occupy sensitive policymaking positions from adverse actions when their speech undermines important government interests."[116] In making this spurious claim, the Managers rely on two cases concerning *appointed* public employees,[117] having inexplicably failed to bring to the Senate's attention the squarely and obviously on-point Supreme Court authority concerning *elected* public officials (discussed at length *supra*).

The House Manager's two cases, however, address the wholly different situation of public defenders and sheriff's office employees suffering unconstitutional dismissals based on party affiliation. Those individuals were protected from employment termination—not impeachment—because they were not policy-makers or possessors of confidential information, and thus, their

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[115] Transcript of January 6, 2021 Speech at approximately 18:16, available at https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

[116] House Trial Memo. at 46.

[117] *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

"private political beliefs" could not interfere with their duties.[118] Such cases cannot serve as the basis for a First Amendment analysis of Mr. Trump, or in fact any president, because elected officials are different in kind from non-elected public employees under the First Amendment.

The Supreme Court, in fact, expressly rejected the House Managers' First Amendment argument when confronting the voting investigation speech at issue in *Wood*.[119] Justice Brennan examined the line of cases addressing termination of non-elected public employees and found it inapplicable to the case of the elected sheriff:

> Petitioner was not a civil servant, but an elected official, and hence this is not a case like *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754, in which this Court held that congress has the power to circumscribe the political activities of federal employees in the career public service.

As *Mitchell* was the case relied upon in *Elrod*[120] and *Branti*,[121] and its factual predicate was expressly rejected as a basis for evaluation of an elected public official's First Amendment rights in *Wood*, the House Managers have built their case against the First Amendment upon the proverbial foundation of sand, and have no support for their argument that Mr. Trump lacks protection under the First Amendment as all Supreme Court authority is directly contrary to their assertions.

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118 *Branti*, 445 U.S. at 517 (synthesizing rule in *Elrod*).

119 *Wood*, 370 U.S. at 395 n.21.

120 427 U.S. at 357, 362, 366-70.

121 445 U.S. at 515 n.10.

3. Mr. Trump's Speech Was Fully Protected by the First Amendment

Mr. Trump engaged in constitutionally protected political speech that the House has, improperly, characterized as "incitement of insurrection." The attempt of the House to transmute Mr. Trump's speech—core free speech under the First Amendment—into an impeachable offense cannot be supported, and convicting him would violate the very Constitution the Senate swears to uphold.

House Resolution 24 contains only one article of impeachment: incitement of insurrection.[122] The allegations made i that article are that Mr. Trump engaged in speech of various kinds concerning a public, political event: the Presidential election of November 2020. Specifically, House Resolution 24 focuses upon Mr. Trump's speech on January 6, 2021.[123] The article also discusses in passing other "statements" of Mr. Trump as well as a telephone call to the secretary of state of Georgia.[124]

The fatal flaw of the House's arguments is that it seeks to mete out governmental punishment – impeachment—based on political speech that falls squarely within broad protections of the First Amendment. Speech and association for political purposes is the kind of activity to which the First Amendment offers its strongest protection.[125] Restrictions placed on freedom of

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122 H. Res. 24 at 2, 117th Cong. (Jan. 11, 2021). The sole article of impeachment is framed under the "high Crimes and Misdemeanors" clause of Article II, and does not allege treason or bribery. U.S. CONST. art. II, § 4.

123 *Id.* at 2-3.

124 *Id.* at 2, 4.

125 *New York Times Co. v.* Sullivan, 376 U.S. 254, 269 (1964)(The First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)).

speech are evaluated "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[126] Thus, "[o]ur First Amendment decisions have created a rough hierarchy in the constitutional protection of speech" in which "[c]ore political speech occupies the highest, most protected position."[127]

The Supreme Court has further acknowledged that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact."[128] A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues and their superintendence would lead to "self-censorship" by all which would not be relieved by permitting a defense of truth. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule thus dampens the vigor and limits the variety of public debate."[129] In only a few well defined and

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126 *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

127 *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992(Stevens, J., concurring); *see also Hill v. Colorado*, 530 U.S. 703, 787 (2000)(Kennedy, J., dissenting)("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against."); *Citizens United v. Federal Election Comm'n*, 588 U.S. 310, 349 (2010)("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.")

128 *Watts*, 394 U.S. at 708 (distinguishing between "political hyperbole" and "true threats") (citing *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, (1966)).

129 *New York Times,* 376 U.S. at 279.

narrowly limited classes of speech may the government punish an individual for his or her words.[130]

Even political speech that *may* incite unlawful conduct is protected from the reach of governmental punishment. Indeed, "[e]very idea is an incitement,' and if speech may be suppressed whenever it *might* inspire someone to act unlawfully, then there is no limit to the State's censorial power."[131] The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time."[132] Rather, the government may *only* suppress speech for advocating the use of force or a violation of law if **"such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."**[133]

In *Brandenburg v. Ohio*, the Supreme Court formed a test that placed even speech inciting illegal conduct within the protection of the First Amendment.[134] In that case, a leader of the Ku Klux Klan was convicted under an Ohio criminal syndicalism law.[135] Evidence of his incitement was a film of the events at a Klan rally, which included racist and anti-Semitic speech, the burning of a large wooden cross, and several items that appeared in the film, including a number of

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130 *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972).

131 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580, 121 S.Ct. 2404, 2435, 150 L.Ed.2d 532 (2001)(emphasis added)(quoting *Gitlow v. New York*, 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138 (1925)(Holmes, J., dissenting)).

132 *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253–54 (2002)(quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)(*per curiam*)).

133 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added) (*per curiam*).

134 395 U.S. at 447.

135 *Id.* at 445.

firearms.[136] The leader of the protest proclaimed that "[w]e're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might be some revenge taken. We are marching on Congress July the Fourth, four hundred thousand strong."[137] The Court held that, "the constitutional guarantees of free speech and free press do not permit [the government] to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[138] The Court explained that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.[139]

Thus, under *Brandenburg* and its progeny, government actors may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[140] Absent an imminent threat, therefore, it is expressly within the First Amendment to advocate for the use of force; similarly, it is protected speech to advocate for violating the law; and as Mr. Trump did neither of these things, his speech at all times fell well within First Amendment protections. He thus cannot be subject to conviction by the Senate under well-established First Amendment jurisprudence.

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136 *Id.* at 445-46.

137 *Id.* at 446.

138 *Id.*

139 *Id.* at 448.

140 *Id.*

The article of impeachment cherry picks Mr. Trump's phrases from an hour-long speech, and indeed other speeches before other audiences, but even looked at through the lens of House Resolution 24, the incitement alleged is sterile and thin. The House's case for "incitement" simply fails to pass constitutional muster.

First, Mr. Trump unambiguously advocated to the crowd at the January 6, 2021 event that he expected peaceful behavior. He explicitly stated, "I know that everyone here will soon be marching over to the Capitol building to ***peacefully*** and patriotically make your voices heard."[141] Indeed, after reports of violence at the Capitol Mr. Trump issued a public video statement, urging the crowd at the Capitol to "go home" in "peace" and further pleading:

> we have to have peace, we have to have law and order, we have to respect our great people in law and order, we don't want anyone hurt. . .[142]

Mr. Trump's explicit disavowal of violence and calls for peace – both directly before and after the riot – and his urge to have the participants use their "voices" as opposed to other action cannot be ignored. Given these express statements, and the fact that the First Amendment protects elected public officials who disclaim violence or violations of the law,[143] the inquiry need go no further. Mr. Trump incited no insurrection, and his speech as a whole (despite all of the rhetoric

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[141] Transcript of January 6, 2021 Speech at approximately 18:16 (emphasis added), available at https://www.rev.com/blog/transcripts/donald-trump-speech-save-america-rally-transcript-january-6.

[142] Video Starting at :22, located at https://www.c-span.org/video/?507774-1/president-trump-claims-election-stolen-tells-protesters-leave-capitol.

[143] *Bond*, 385 U.S. at 125, 133-34 ("I have not counselled burning draft cards, nor have I burned mine.").

in House Resolution 24) cannot support a conviction because the First Amendment protected him at all times from government retribution.

Second, the House's heavy reliance on Mr. Trump's metaphorical "fighting" language is completely devoid of context, which, when considered as a whole, places Mr. Trump's speech entirely within the protection of the First Amendment. The thrust of the House's allegation against Mr. Trump is that he said, in the context of election security generally, that "if you don't ***fight*** like hell you're not going to have a country anymore."[144] To characterize this statement alone as "incitement to insurrection" is to ignore, wholesale, the remainder of Mr. Trump's speech that day, including his call for his supporters to "peacefully" making their "voices heard."

What is more, a closer examination of the text of Mr. Trump's speech reveals he makes references to "fighting" in a plainly figurative sense. For example, the metaphor of boxing permeated Mr. Trump's speech. He expressly referred to the sport in his speech, associating it with the word "fighting:" "Republicans are constantly ***fighting*** like a boxer with his hands tied behind his back. It's like a boxer[.]"[145] The House cannot seriously argue that Mr. Trump's use of the word "fighting" in this speech incited an insurrection, given this usage; it is not merely couched in the language of simile ("like") but it describes a position of physical disadvantage; it is far from a prescription for future violent action.

Mr. Trump used the word "fights" in the figurative sense of arguing, or putting forth an extreme effort, just as he did a short time later, speaking of Rep. Jordan:

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144 H. Res. 24 at 3, 117th Cong. (Jan. 11, 2021).

145 Transcript of January 6, 2021 Speech at approximately 16:25 (emphasis added).

> There's so many weak Republicans. We have great ones, Jim Jordan, and some of these guys. They're out there ***fighting*** the House. Guys are ***fighting***, but it's incredible.[146]

Mr. Trump again used the word "fighting," but Rep. Jordan was not punching any of his fellow representatives. Mr. Trump referred to Rep. Jordan's *advocacy* efforts. This is entirely consistent with yet another use of the word, in reference to action at the ballot box, not violence:

> Unbelievable, what we have to go through, what we have to go through and you have to get your people to ***fight***. If they don't ***fight***, we have to primary the hell out of the ones that don't ***fight***. You primary them. We're going to let you know who they are. I can already tell you, frankly.[147]

Again, Mr. Trump used the word "fight" in the sense of forceful argument, and combined it with a plainly nonviolent request: he sought a change in the occupants of Congress through future primary elections, not through violence.

None of this constituted anything from which a conviction may follow: Mr. Trump's speech on January 6, 2021 was protected political speech, that which receives the strongest protection under the First Amendment, when the protections of free speech are at their highest.[148] In fact, under *Brandenburg*, there is no doubt that the words upon which the article of impeachment issued could never support a conviction, as there was plainly no advocacy of "lawless action" and the words, as stated, can hardly be interpreted to be "likely" to "incite imminent" violence or lawless action.

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146 *Id.* at approximately 12:34 (emphasis added).

147 *Id.* at approximately 13:45 (emphasis added).

148 *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

Neither can the other allegations in the article of impeachment support a conviction given Mr. Trump's plain and clear First Amendment protection. The allegations of other "statements" alleged to contribute to an "incitement of insurrection"[149] are bereft of detail, and even as expanded upon in the House Managers' Trial Memorandum, amount to no more than Mr. Trump's advocating his position that he won the Presidential election in November 2020.

The allegation that Mr. Trump should be convicted for "incitement of insurrection" based upon the telephone call to the Georgia secretary of state rests on even shakier ground. The allegations of "threats of death and violence" come not from Mr. Trump at all; they come from other individuals from the internet, not identified (nor identifiable) in the House Trial Memorandum, who took it upon themselves to make inane internet threats, which were not urged or "incited" by Mr. Trump in any way shape or form.[150] Examining the discussion with the Georgia secretary of state under the standard of "incitement," leads to the same conclusion as the January 6, 2021 statements of Mr. Trump: there is nothing said by Mr. Trump that urges "use of force" or "law violation" directed to producing imminent lawless action.[151]

Even the House Managers' sinister and selective summary of Mr. Trumps' call cannot meet the standard for "incitement:" the analysis of the Supreme Court in *Hess v. Indiana* makes this apparent.[152] The question is not, as the House Managers seek to frame it, whether Mr. Trump's call offends the House's sensibilities; it is whether the call—which is plainly political speech in

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149 H. Res. 24 at 3, 117th Cong. (Jan. 11, 2021).

150 House Trial Memo. at 9-10.

151 *Brandenburg*, 395 U.S. at 447.

152 414 U.S. 105, 107-10 (1973).

the sense that *Woods* concerns political speech, no different than the sheriff's letter to the grand jurors[153]—is outside the First Amendment based on the limited classes of speech beyond its ambit.[154] Mr. Trump's call was not obscene, nor did it contain fighting words, nor incitement: it was a political call, and such political speech must receive the highest protection afforded under the First Amendment.

The events of January 6, 2021, at the Capitol were terrible. The loss of life of any citizen, let alone a member of the Capitol Police, is a tragedy, but impeaching a former President is not the answer. The Senate should vote to clear Mr. Trump of any wrongdoing: "the hostile reaction of a crowd does not transform protected speech into incitement."[155] What matters is the objective meaning of the words. Courts do not deem speech unprotected based on how it could possibly be contorted or misunderstood by an unreasonable listener. Rather, they engage in an objective inquiry to determine how a reasonable person would understand the words. Otherwise, speakers at public events would be put at the mercy of the unhinged reactions of their most unreasonable audience members. That is exactly what happened on January 6th, but the Senate, composed of reasonable and erudite members, can take a few minutes and read the speech themselves.

In *Brandenburg*, the Supreme Court erected an extremely high bar to proving incitement.[156] That test requires proof that "(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless

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153 *Wood*, 370 U.S. at 390–91, 394-95.

154 *Hess*, 414 U.S. at 107-08.

155 *Bible Believers v. Wayne Co.*, 805 F.3d 228, 246 (6th Cir. 2015).

156 *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (en banc).

action, and (3) the imminent use of violence or lawless action is the likely result of his speech."[157] The allegations against Mr. Trump unquestionably fail as a matter of law because "[a]dvocacy for the use of force or lawless behavior, intent, and imminence, are all absent." [158]Thus, "[t]he doctrine of incitement has absolutely no application" to this case. [159]

First, as evident from the transcript and the video of the speech in question, Mr. Trump's statements did not advocate—or even mention—the use of any force whatsoever. Because "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it,"[160] it is all the more true that a statement that "fails to specifically advocate" for the crowd "to take 'any action' cannot constitute incitement."[161] Indeed, Mr. Trump expressly made a specific demand in his speech that all members of the audience - all protestors - behave "peacefully."

As the Sixth Circuit has recognized, "[i]t is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot."[162] And unsurprisingly, "[t]here will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime."[163] Consider *Hess v. Indiana*, where a protester yelled, "We'll take the fucking street again," to a crowd that was already agitated and resisting police.[164] The Court held

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157 *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015).

158 *Id.* at 244.

159 *Id.*

160 *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

161 *Bible Believers*, 805 F.3d at 244 (quoting *Hess v. Indiana,* 414 U.S. 105, 109 (1973)).

162 *Id.*

163 Eugene Volokh, *Crime–Facilitating Speech*, 57 STAN. L. REV. 1095, 1190 (2005).

164 414 U.S. at 107.

that speech could not be punished.[165] Or take *NAACP v. Claiborne Hardware Co.*, where a speaker told a crowd that anyone who failed to boycott businesses would be "disciplined," and said, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[166] The Court held that this speech was not incitement.[167] If these incendiary statements, with express references to violence, do not rise to the level of incitement, then surely Mr. Trump's request to peacefully protest could never be incitement.

In *Bible Believers*, the Court held the speech did not amount to incitement to riot under the *Brandenburg* test, despite the obviously explosive context, because it did not include "a single word" that could be perceived as encouraging, explicitly or implicitly, violence or lawlessness.[168] The same can be said of Mr. Trump's speech in this case: not a single word encouraged violence or lawlessness, explicitly or implicitly, and again, he affirmatively exhorted the crowd to act "peacefully" when protesting. Moreover, the *Bible Believers* court observed that "[t]he hostile reaction of a crowd does not transform protected speech into incitement."[169] Even though the Bible Believers' speech actually triggered a predictably violent reaction, it was their speech that the court scrutinized. And their speech was held to be protected, despite its blatantly offensive and even provocative nature and despite the crowd's reaction. It follows that if Mr. Trump's speech is protected—because it, like that of the Bible Believers, did not include a single word encouraging violence—then the fact that audience members reacted by using force does not transform Mr.

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165 *Id.*

166 *NAACP v. Claiborne Hardware Co*, 458 U.S. 886, 902 (1982).

167 *Id.* at 928–29.

168 *Id.* at 246.

169 *Id.*

Trump's protected speech into unprotected speech. The reaction of listeners who may or may not be hostile does not alter the otherwise protected nature of speech.[170]

Nor is "the mere tendency of speech to encourage unlawful acts ... sufficient reason for banning it."[171] What is required, to forfeit constitutional protection, is incitement speech that "specifically advocate[s]" for listeners to take unlawful action.[172] Again, even assuming that then-President Trump's words may arguably have had a tendency to encourage unlawful use of force (which they did not), they certainly did not specifically advocate for listeners to take unlawful action and are therefore protected. As the *Bible Believers* court further observed, "[i]t is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot."[173] The words alleged in the current case, much less offensive than those of the Bible Believers, are not up to the high standard demanded by *Brandenburg*.

Because not a single word of the speech actually advocates violence either implicitly or explicitly, the first *Brandenburg* factor—specific advocacy of violence— is totally absent. The allegations in the Article seems to place heavy reliance on the latter two *Brandenburg* factors. That is, the allegations that Mr. Trump intended violence to occur and knew that his words were likely to result in violence. But this backwards approach was specifically rejected in *Hess v. Indiana*, where the Court reversed the judgment of the Indiana Supreme Court.[174] In *Hess*, the Court noted that the state court had placed primary reliance on evidence that the speaker's

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170 *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

171 *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

172 *Id.* (citing *Hess*, 414 U.S. at 109.

173 *Id.* at 244.

174 *Hess v. Indiana* 414 U.S. at 107–09.

statement was intended to incite further lawless action and was likely to produce such action. This was not enough. The *Hess* Court focused on the words, on the language, that comprised the subject speech, i.e., the first *Brandenburg* factor. "It hardly needs repeating," the Court repeated, "that the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within narrowly limited classes of speech."[175] And in applying this wisdom, the Court likewise tied its conclusion to the words of the subject speech: "And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence.'"[176]

In other words, *Hess* teaches that the speaker's intent to encourage violence (second factor) and the tendency of his statement to result in violence (third factor) are not enough to forfeit First Amendment protection unless the words used specifically advocated the use of violence, whether explicitly or implicitly (first factor).

In *Snyder v. Phelps*, the Court observed: "[T]he court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[177] So, yes, in addition to the content and form of the words, the Senate is obliged to consider the context, based on the whole record. (But not instead of it.)

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175 *Id.* at 107 (quoting Gooding v. Wilson, 405 U.S. 518, 521–22 (1972)) (internal quotation marks omitted; emphasis added).

176 *Id.* at 109 (quoting the Indiana court's rationale) (emphasis added).

177 *Snyder v. Phelps*, 562 U.S. 443, 453 – 54 (2011) (internal quotation marks and citations omitted).

Here, of course, the "whole record" consists of the charges in the Article. An article of impeachment is literally a "charge" of particular wrongdoing. Thus, under the division of responsibility in the Constitution, the Senate must conduct a trial solely on the charge specified in articles of impeachment approved by a vote of the House and presented to the Senate. The Senate cannot expand the scope of a trial to consider mere assertions appearing in biased media reports that the House did not include in the articles of impeachment submitted to a vote of that Chamber, nor even in the unsupported statements in the House Managers' Trial Memorandum. Similarly, House Managers trying the case in the Senate must be confined to the specific conduct alleged in the Articles approved by the House. These restrictions follow both from the plain terms of the Constitution limiting the Senate to trying an "impeachment" framed by the House and from elementary principles of due process. "[T]he senator's role is solely one of acting on the accusations (Articles of Impeachment) voted by the House of Representatives. The Senate cannot lawfully find the president guilty of something not charged by the House, any more than a trial jury can find a defendant guilty of something not charged in the indictment." "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused."[178]

As the Supreme Court has explained, it has been the rule for over 130 years that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."[179]

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178 *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

179 *Stirone v. United States*, 361 U.S. 212, 217 (1960).

Doing so is "fatal error."[180] Under the same principles of due process, the Senate must similarly refuse to consider any uncharged allegations as a basis for conviction.

In its examination of context, the *Snyder* Court held that because the speech was protected, its setting, or context, could not render it unprotected.[181] In fact, Mr. Trump's admonition not to harm is analogous to the circumstance considered in *Bible Believers* as neutralizing the inciting tendency of words that were even more offensive in nature and delivered in an even more volatile context.

Even taking every one of Mr. Trump's prior statements about the election in the most negative light, they were, at most, only abstract discussions that never advocated for physical force. And even if they had broached the idea of violence, "the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[182] Indeed there had never been violence before and so there was thus no reason to expect that Mr. Trump's statements would lead to any injury to the officers or protesters. Moreover, even, assuming *arguendo*, if one could posit that the likely response to that statement would have been "imminent lawless action,"[183] Mr. Trump corrected any such misunderstanding by immediately saying "Stay Peaceful!"

The fact that some small percentage of unlawful rioters who, as the FBI already knew in advance, had been planning to come and wage war, did so later that same day, does not in any way mean that they were acting at Mr. Trump's direction or through any "incitement" from Mr. Trump.

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180 *Id.*

181 *Snyder*, 562 U.S. at 454–55.

182 *Noto v. United States*, 367 U.S. 290, 298 (1961).

183 *Brandenburg*, 395 U.S. at 447.

In the context of ordinary civil litigation, such a "bald" allegation of agency "is by itself a mere legal conclusion and is therefore insufficient to withstand a motion to dismiss."[184] "A complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship. It is insufficient to merely plead the legal conclusion of agency."[185] "Neither a single incident nor sporadic incidents are sufficient to establish foreseeability."[186]

For First Amendment purposes, the meaning of words must be judged objectively. Unprotected speech is the exception to the rule of free speech, so it cannot be punished on the ground that it might be unprotected. The speech must objectively fall within the narrow exception for unprotected speech, lest protected speech be penalized based on a subjective or idiosyncratic interpretation.[187] Courts "weigh the circumstances in order to protect, not to destroy, freedom of speech."[188] "[I]f the freedoms of expression are to have the breathing space that they need to survive,"[189] courts must "err on the side of protecting political speech."[190] Here, the question is not even close. Mr. Trump's words are core speech protected under the First Amendment.

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184 *Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 798 F.Supp. 1427, 1433 (D. Neb. 1992).

185 *Bird v. Delacruz*, 2005 WL 1625303, at *4 (S.D. Ohio July 6, 2005); *see also Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP*, 2004 WL 112948, at *6 (S.D.N.Y. 2004).

186 *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp. 1054, 1058 (E.D. Ky. 1995), aff'd sub nom., 89 F.3d 833 (6th Cir. 1996).

187 *See Claiborne*, 458 U.S. at 915 n.50.

188 *Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J, concurring); *Bible Believers*, 805 F.3d at 234 ("We interpret the First Amendment broadly so as to favor allowing more speech.").

189 *New York Times Co.* ,376 U.S. at 271-72.

190 *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007).

4. Lastly, Mr. Trump's Figurative Use of the Words "Fight," "Fighting," Have Been Used By Many, None Are Impeachable

It is truly incredible that House Democratic leadership is feigning horror at the President's choices of words considering some of their own members recent public comments. For example, in 2018, Speaker Nancy Pelosi held her weekly press conference in the Capitol Visitor Center. In reference to a policy she disagreed with, the most powerful Democrat in the Country said: "I just don't even know why there aren't uprisings all over the country. Maybe there will be."[191] Was she advocating violence? Sending a silent dog whistle to radical protesters? Should she be held accountable for her extremist rhetoric and removed from office?

As political violence grew last summer, Representative Ayana Pressley went on national TV and said that "there needs to be unrest in the streets." Should we hold her liable to pay for all of the businesses that were destroyed when people heeded her call and removed from office ?[192]

In perhaps the most egregious call for physical confrontation, Rep Maxine Waters told a crowd at a rally that they should accost members of the government that they do not like.

> You think we're rallying now? You ain't seen nothing yet…Already you have members of your Cabinet that are being booed out of restaurants ... protesters taking up at their house saying 'no peace, no sleep…If you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get out and you create a crowd and you push back on them and you tell them they're not welcome anymore, anywhere… We want history to record that we stood up, that we pushed back, that we fought…

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[191] Douglas Ernst, *Nancy Pelosi wonders why there 'aren't uprisings' across nation: 'Maybe there will be,'* The Washington Times (Jun. 14, 2018), https://www.washingtontimes.com/news/2018/jun/14/nancy-pelosi-wonders-why-there-arent-uprisings-acr/

[192] Am Joy, *Post Office Cuts Are War Against American People Pressley Says*, MSNBC (Aug. 15, 2020), https://www.msnbc.com/am-joy/watch/post-office-cuts-are-war-against-american-people-pressley-says-90125893871

In another cable interview Waters was even more specific:

> I have no sympathy for these people that are in this administration … they won't be able to go to a restaurant, they won't be able to stop at a gas station, they're not going to be able to shop at a department store. The people are going to turn on them. They're going to protest. They're absolutely going to harass them…We've got to push back.

In that instance, even Speaker Pelosi called Representative Waters' remarks "unacceptable" but of course did nothing to remove her from office, just like she has done nothing to censure other Members who have tweeted calls for genocide[193] – because when it is her side of the aisle making their 'political speech' heard, Speaker Pelosi is nothing if not tolerant. Other Democratic leadership went so far as to defend Representative Waters by bending over backwards to read an inverted message of peacefulness into her violent statements – the *exact opposite* of what they did to former President Trump. Giving her far more than the benefit of the doubt, Representative Cedric Richmond claimed that "[i]n exercising her constitutional right to freedom of speech at a recent rally, Congresswoman Waters did not, as she has made clear, encourage violence . . . She instead, encouraged Americans to exercise their constitutional rights to freedom of speech and peaceful assembly…" For those who would say that those quotes must be understood in their greater context, *i.e.*, that they were clearly meant to be political speech- we say *exactly.* The truth is that both the Mr. Trump's speech and these comments are acceptable political free speech; it is the double standard at play here that is entirely unacceptable, and Mr. Trump ask that the Senate reject it in no uncertain terms.

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[193] Aaron Bandler, *Rashida Tlaib Retweets 'From the River to the Sea' Tweet,* Jewish Journal (Nov. 30, 2020), https://jewishjournal.com/news/325415/rashida-tlaib-retweets-from-the-river-to-the-sea-tweet/

This is not the first time that Congress has impeached and tried to convict a President for making a speech, and the last time did not work either. The tenth Article of Impeachment against Andrew Johnson read as follows:

> That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the government ought inviolably to preserve and maintain,) and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, ... make and deliver with a loud voice certain intemperate, inflammatory[,] and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries[,] jeers[,] and laughter of the multitudes ... Which said utterances, declarations, threats[,] and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States[.

While no vote was ever taken on the tenth Article, multiple Senators expressed their concern about trying to impeach for inflammatory rhetoric. James Patterson noted that "in view of the liberty of speech which our laws authorize, in view of the culpable license of speech which is practiced and allowed in other branches of the Government, I doubt if we can at present make low and scurrilous speeches a ground of impeachment."[194] Senator Sherman echoed this view;

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[194] CONG. GLOBE, 40th Cong., 2d Sess. 509 (Supp. 1868); *see also* Shaw, *Impeachable Speech*, 70 Emory L.J. 1, 21.

while indicating his support for conviction on a number of the other articles, he voiced concerns about the tenth article, arguing that "we must guard against making crimes out of mere political differences or the abuse of the freedom of speech."[195]

D. The House Afforded President Trump No Due Process of Law

On January 12th, Speaker Pelosi announced the nine representatives who would serve as the impeachment managers. On January 13, 2021, mere days after the press conference purportedly launching the inquiry, House Democrats completed the fastest presidential impeachment inquiry in history and adopted the Article of Impeachment over strong opposition and with zero due process of law afforded to the President, against Constitutional requirements and centuries of practice. The lack of due process is no small matter; due process of law is not a formality it is a

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[195] *Impeachable Speech*, 70 Emory L.J. at 62:

> There have also been recent suggestions that the invocation of presidential speech in a trial setting raises First Amendment concerns. Judge Kozinski made this claim in an opinion regarding one of the challenges to President Trump's first "travel ban" executive order. *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting). Dissenting from the denial of rehearing en banc, Judge Kozinski criticized the panel for citing "a trove of informal and unofficial statements from the President and his advisers." *Id.* This approach, Kozinski warned, threatened to "chill campaign speech, despite the fact that our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Id.* (citing *McCutcheon v. FEC*, 572 U.S. 185, 191-192 (2014)). Given the near-constant campaigning in which an incumbent president might engage, this argument could be extended to virtually every statement a president makes--including in the context of an impeachment inquiry.

See also Paul F. Campos, *A Constitution for the Age of Demagogues: Using the Twenty-Fifth Amendment to Remove an Unfit President*, 97 Denv. L. Rev. 85, 100 (2019), noting that "Impeachment, in practice, has become something intended solely to remove a corrupt president..."; and Bushnell, Eleanore. *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials*. University of Illinois Press, 1992, p. 6, noting that "The impeachment procedure was designed to provide a means for removing a deficient officer, not to punish for derelictions of duty or substitute for a court trial. Therefore, it might seem obvious that no action need be taken when a suspect occupant removed himself from his position."

key Constitutional right, and when it is lacking a case is tainted and the case should be dismissed. In the civil context, the law is clear that a case should be dismissed if the government wrongfully interfered with a defendant's due process rights, and that "[a]t the core of procedural due process jurisprudence is the right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard." *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir.1998).

As it relates to impeachment proceedings, the legal analog is clear:

> The gravity of the deprivation at stake in an impeachment—especially a presidential impeachment—buttresses the conclusion that some due process limitations must apply. It would be incompatible with the Framers' understanding of the "delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs"[196] to think that they envisioned a system in which the House was free to devise any arbitrary or unfair mechanism it wished for impeaching individuals. The Supreme Court has described due process as "the protection of the individual against arbitrary action."[197] There is no reason to think that protection was not intended to extend to impeachments.[198]

And in terms of longstanding historical practice when it comes to those proceedings, the precedent is also unambiguous:

> Although constitutional requirements governing House impeachment proceedings may have been unsettled when the Constitution was adopted, by the 1870s consistent practice in the House (unbroken since then) gave meaning to the Constitution and settled the minimum procedures that must be afforded for a fair impeachment inquiry. The Framers, who debated impeachment with reference to the contemporaneous English impeachment of Warren

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196 *The Federalist* No. 65, *supra* note at 397 (Alexander Hamilton).

197 *Ohio Bell Tel. Co. v. Pub. Serv. Comm'n*, 301 U.S. 292, 302 (1937).

198 Trial Memorandum of President Donald J. Trump (2020); *Hastings v. United States*, 802 F. Supp. 490, 504 (D.D.C. 1992), *vacated and remanded on other grounds by Hastings v. United States*, 988 F.2d 1280 (D.C. Cir. 1993) (per curiam).

> Hastings,[199] knew that "the House of Commons did hear the accused, and did permit him to produce testimony, before they voted an impeachment against him."[200] And practice in the United States rapidly established that the accused in an impeachment must be allowed fair process. Although a few early impeachment investigations were *ex parte*,[201] the House provided the accused with notice and an opportunity to be heard in the majority of cases starting as early as 1818.[202]

Democratic Members of the House have argued that then-President Trump's alleged offense was so grave and his power so immense that there was no time to wait for the actual facts to come to light. In a crocodile-tear-stained letter, Representative Ilhan Omar, herself no stranger to extremist rhetoric,[203] exhorted her colleagues by saying, "The urgency of this moment is real and we have to be courageous and unified in defense of our Republic…Every single hour that Donald Trump remains in office, our country, our democracy, and our national security remain in danger. Congress must take immediate action to keep the people of this country safe and set a precedent

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199 2 *Records of the Federal Convention of 1787*, at 550 (M. Farrand ed. 1966); *see, e.g.*, Richard M. Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 St. Louis L.J. 859, 872 (1999); *see also, e.g.*, *Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War, on the Articles of Impeachment Exhibited by the House of Representatives*, 44th Cong. 98 (1876) (statement of Sen. Timothy Howe); Scott S. Barker, *An Overview of Presidential Impeachment*, 47 Colo. Lawyer 30, 32 (Sept. 2018).

200 6 Reg. Deb. 737 (1830) (statement of Rep. James Buchanan).

201 *See* III Hinds' Precedents § 2319, at 681 (Judge Pickering); *id.* § 2343, at 716 (Justice Chase).

202 *See* 32 Annals of Cong. 1715, 1715–16 (1818); *see, e.g.*, III Hinds' Precedents § 2491, at 988 (Judge Thurston, 1825); *id.* § 1736, at 97–98 (Vice President Calhoun, 1826); *id.* §§ 2365–2366 (Judge Peck, 1830–1831); *id.* § 2491, at 989 (Judge Thurston, 1837); *id.* § 2495, at 994 & n.4 (Judge Watrous, 1852); Cong. Globe, 35th Cong., 1st Sess. 2167 (1858) (statement of Rep. Horace Clark) (Judge Watrous, 1858); III Hinds' Precedents § 2496, at 999 (Judge Watrous, 1858); *id.* § 2504, at 1008 (Judge Delahay, 1873).

203 Sarah Elbeshbishi, Nicholas Wu, *GOP targets Ihan Omar after Dems try to Oust Majorie Taylor Green,* USA Today (Feb. 4, 2021), https://www.usatoday.com/story/news/politics/2021/02/03/gop-targets-ilhan-omar-after-dems-try-oust-marjorie-taylor-green/4369715001/ and Rep Andy Biggs, Twitter (Feb. 3, 2021, 9:02 AM), https://twitter.com/RepAndyBiggsAZ/status/1356966391493111808.

that such behavior cannot be tolerated." Of course, President Trump's term came to an end without the apocalyptic predictions of the all-seeing Rep. Omar coming to pass.

As Speaker Pelosi told the country, she had to act *now* "so urgent was the matter." So urgent, of course, that instead of immediately sending it over to the Senate so that the President could have a trial and, if convicted, be removed, the Speaker once again decided to act in a purely political manner, pretending that she was rushing the impeachment to protect the country from an imminent danger, and then waiting until the President was no longer in the White House to prefer the charge. The House actually took longer t o transmit the Article of Impeachment to the Senate than it did to investigate and debate it in the first place.

Of course, this is not the first time that Speaker Pelosi has ignored the Constitutional protections in an impeachment proceeding. When they led the impeachment of then-President Trump the first time, the Democratic leadership also denied him due process (although not as brazenly and outrageously as this time) and the Speaker also refused to send the Articles of Impeachment to the Senate right away. That time, her machinations were focused on trying to influence the rules that the Senate would put in place for the trial, and she only sent the articles to the Senate when it became clear that she would not get her way. [204] But, just like this time, in withholding the articles the Speaker undercut one of her party's "primary arguments for impeachment in the first place: the need for urgency in removing Trump."[205] As Democratic

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[204] John Hulsman, *In the impeachment saga trump derangement syndrome is destroying the Democrats*, City A.M. (Jan. 20, 2020), https://www.cityam.com/in-the-impeachment-saga-trump-derangement-syndrome-is-destroying-the-democrats/ ("Republican Senate majority leader Mitch McConnell, as shrewd a tactician as Pelosi herself, had the speaker's number, and he has been grimly clear in response to the issue of Pelosi trying to leverage him: "We will not cede our (Senate) authority to try this impeachment. The House Democrats' turn is over.")

[205] *Id.*

senator and staunch Pelosi ally Dianne Feinstein put it: "'The longer it goes on, the less urgent it becomes. So if it's serious and urgent, send them over. If it isn't, don't send it over.'"[206]

This time the Speaker apparently held the Articles over so that she could effectively, maneuver an ally in the Senate into the judge's chair. Once the 45th President's term expired, and the House chose to allow jurisdiction to lapse on the Article of Impeachment, the constitutional mandate for the Chief Justice to preside at all impeachments involving the President disappears. Now, instead of the Chief Justice, the trial will be overseen by a biased and partisan Senator who will purportedly *also act as a juror* while ruling on issues that arise during trial.

The Senate, in reviewing the House actions, should immediately dismiss this case because the process was completely unfair and one-sided. The civil analog is clear: "Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it."[207]

Throughout this entire process Speaker Pelosi was never acting to apply her understanding of the laws of impeachment in any principled manner. The Speaker did *not* think it was necessary to call for an impeachment so long as she got her way, and twice told the Vice President, and the country, just that. She did *not* really believe that the process was "urgent" and it was *never* actually about whether President Donald Trump would stay in office, because once she brought the impeachment Article to a vote she decided to hold it until after he had finished the remainder of his term. If the Speaker really believed that the President was that much of a danger, then she was being criminally negligent by holding it back. Obviously, as demonstrated by her actions, there

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206 *Id.*

207 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 1013 (1998) (interior quotation omitted).

was only ever one urgency, to score political points quickly before the harried Members of even her own party could calm down and look at the facts. And there was only ever one motivation; to try and spin this incredibly sad moment in American history, and use it to embarrass the President. Unfortunately for House Democrats, the impeachment of a former United States President, a private citizen, is unconstitutional.

E. The Article Is Structurally Deficient and Can Only Result in Acquittal.

The hastily drafted Article is not only wrong on the facts and the law, it also suffers from a Constitutionally fatal structural defect that the Senate cannot remedy. This defect alone makes it worthy of dismissal:

> Put simply, the articles are impermissibly duplicitous—that is, each article charges multiple different acts as possible grounds for sustaining a conviction.[208] The problem with an article offering such a menu of options is that the Constitution requires two-thirds of Senators present to agree ***on the specific basis for conviction***. A vote on a duplicitous article, however, could never provide certainty that a two-thirds majority had actually agreed upon a ground for conviction. Instead, such a vote could be the product of an amalgamation of votes resting on several different theories, no single one of which would have garnered two-thirds support if it had been presented separately. Accordingly, duplicitous articles like those exhibited here are facially unconstitutional.[209]

As noted in our previously filed Answer to the Charges, by charging multiple alleged wrongs in one article, the House of Representatives has made it impossible to guarantee compliance with the Constitutional mandate in Article 1, Sec. 3, Cl. 6 that permits a conviction only by at least two-thirds of the members. The House charge fails by interweaving differing allegations rather than

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208 "'Duplicity' is the joining of two or more distinct and separate offenses in a single count"; "'[m]ultiplicity' is charging a single offense in several counts." 1A Charles Alan Wright et al., *Federal Practice and Procedure* § 142 (4th ed. 2019); *see, e.g.*, *United States v. Root*, 585 F.3d 145, 150 (3d Cir. 2009); *United States v. Chrane*, 529 F.2d 1236, 1237 n.3 (5th Cir. 1976).

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breaking them out into counts of alleged individual instances of misconduct. Rule XXIII of the *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* provides, in pertinent part, that an article of impeachment shall not be divisible thereon. Because the Article at issue here alleges multiple wrongs in the single article, it would be impossible to know if two-thirds of the members agreed on the entire article, or just on parts, as the basis for vote to convict. The House failed to adhere to strict Senate rules and, instead, chose to make the Article as broad as possible intentionally in the hope that some Senators might agree with parts, and other Senators agree with other parts, but that when these groups of senators were added together, the House might achieve the appearance of two thirds in agreement, when those two thirds of members, in reality, did not concur on the *same* allegations interwoven into an over-broad article designed for just such a purpose.

F. The Article Fails to State an Impeachable Offense as a Matter of Law.

The Articles of Impeachment also fail because, as former D.C. Assistant Attorney General Jeffrey Scott Shapiro explains, "**The president didn't commit incitement or any other crime.**" As it relates to the allegation in the Article:

> In the District of Columbia, it's a crime to "intentionally or recklessly act in such a manner to cause another person to be in reasonable fear" and to "incite or provoke violence where there is a likelihood that such violence will ensue… The president didn't mention violence on Wednesday, much less provoke or incite it. He said, "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard." District law defines a riot as "a public disturbance . . . which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons." When Mr. Trump spoke, there was no "public disturbance," only a rally. The "disturbance" came later at the Capitol by a small minority who entered the perimeter and broke the law. The president's critics want him charged for inflaming the emotions of angry Americans. That alone does not satisfy the elements of any criminal offense, and

> therefore his speech is protected by the Constitution that members of Congress are sworn to support and defend.[210]

It matters greatly that the President did not commit a crime, because the Constitutional requirement for action that is grounds for impeachment is a high crime or misdemeanor.

> By limiting impeachment to cases of "Treason, Bribery, or other high Crimes and Misdemeanors,"[211] the Framers restricted impeachment to specific offenses against "already known and established law."[212] That was a deliberate choice designed to constrain the impeachment power. In keeping with that restriction, every prior presidential impeachment in our history has been based on alleged violations of existing law—indeed, criminal law…[213] **The terminology of "high Crimes and Misdemeanors" makes clear that an impeachable offense must be a violation of established law.** The Impeachment Clause did not confer upon Congress a roving license to make up new standards of conduct for government officials and to permit removal from office merely on a conclusion that conduct was "bad" if there was not an existing law that it violated. [214]

House Democrats' theory on insurrection collapses at the threshold because it fails to describe any violation of law whatsoever. Aside from the decided lack of causation that the evidence *demonstrably* proves,[215] Mr. Trump's speech was well-within the long-understood protection of

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210 Jeffrey Scott Shapiro, *No, Trump Isn't Guilty of Incitement*, Wall Street Journal (Jan. 10, 2021), https://www.wsj.com/articles/no-trump-isnt-guilty-of-incitement-11610303966

211 U.S. Const., art. II, § 4.

212 4 William Blackstone, *Commentaries on the Laws of England* *256.

213 *See Impeachment Inquiry into President Donald J. Trump: Constitutional Grounds for Presidential Impeachment Before the H.R. Comm. on the Judiciary*, 116th Cong. (2019) (written statement of Professor Jonathan Turley, Geo. Wash. Univ. Law Sch., at 15, https://perma.cc/QU4H-FZC4); H.R. Res. 611, 106th Cong. (1998); H.R. Comm. on the Judiciary, *Impeachment of William Jefferson Clinton, President of the United States*, H.R. Rep. No. 105-830, 105th Cong. 143 (1998) (additional views of Rep. Bill McCollum); H.R. Comm. on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, 93d Cong. 1–3 (1974).

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215 See timeline above and see FBI reports.

the First Amendment. A person does not lose his fundamental right to speak his mind just because he is the President.

IV. CONCLUSION

The Article of Impeachment presented by the House is unconstitutional for a variety of reasons, any of which alone would be grounds for immediate dismissal. Taken together, they demonstrate conclusively that indulging House Democrats hunger for this political theater is a danger to our Republic democracy and the rights that we hold dear. Reasons for dismissal include:

1. The Senate of the United States lacks jurisdiction over the 45th President because he holds no public office from which he can be removed, and the Constitution limits the authority of the Senate in cases of impeachment to removal from office as the prerequisite active remedy allowed the Senate under our Constitution.

2. The Senate of the United States lacks jurisdiction over the 45th President because he holds no public office from which he can be removed rendering the Article of Impeachment moot and a non-justiciable question.

3. Should the Senate act on the Article of Impeachment initiated in the House of Representatives, it will have passed a Bill of Attainder in violation of Article 1, Sec. 9. Cl. 3 of the United States Constitution.

4. The allegations in the Article of Impeachment are self-evidently wrong, as demonstrated by the evidence including the transcript of the President's actual speech, and the allegations fail to meet the constitutional standard for any crime, let alone an impeachable offense.

5. The House of Representatives deprived the 45th President of due process of law in rushing to issue the Article of Impeachment and by ignoring its own procedures and precedents going back to the mid-19th century. The lack of due process included, but was not limited to, its failure to

conduct any meaningful committee review or other investigation, engage in any full and fair consideration of evidence in support of the Article, as well as the failure to conduct any full and fair discussion by allowing the 45th President's positions to be heard in the House Chamber. No exigent circumstances under the law were present excusing the House of Representatives' rush to judgment, as evidenced by the fact that they then held the Article for another 12 days.

6. The Article of Impeachment violates the 45th President's right to free speech and thought guaranteed under the First Amendment to the United States Constitution.

7. The Article is constitutionally flawed in that it charges multiple instances of allegedly impeachable conduct in a single article.

The Senate should dismiss these charges and acquit the President because this is clearly *not* what the Framers wanted or what the Constitution allows.

Respectfully submitted,

Bruce L. Castor, Jr.
David Schoen
Michael T. van der Veen
Counsel to the 45th President of the United States

February 8, 2021

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re **IMPEACHMENT OF** **PRESIDENT DONALD J. TRUMP**

REPLY MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP

United States House of Representatives

Jamie Raskin
Diana DeGette
David Cicilline
Joaquin Castro
Eric Swalwell
Ted Lieu
Stacey Plaskett
Madeleine Dean
Joe Neguse

U.S. House of Representatives Managers

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INTRODUCTION

President Trump's pre-trial brief confirms that he has no good defense of his incitement of an insurrection against the Nation he swore an oath to protect. Instead, he tries to shift the blame onto his supporters, and he invokes a set of flawed legal theories that would allow Presidents to incite violence and overturn the democratic process without fear of consequences. His brief—in which he refuses to accept responsibility for his actions—highlights the danger he continues to pose to the Nation he betrayed. To send a clear message to the Nation and to all future Presidents that efforts to undermine our democracy through violence will not be tolerated, the Senate should convict President Trump and disqualify him from ever holding office again.

President Trump's constitutional offense is a matter of public record that cannot be seriously disputed. After spending months propagating the lie that the 2020 election had been stolen from him, President Trump summoned his supporters to a rally in Washington on January 6. He seized on that date—when Congress and the Vice President were to hold a Joint Session to count the Electoral College votes—as his last chance to overturn the election and install himself in the White House for a second term against the will of the majority of Americans.

Against this backdrop, President Trump addressed a crowd that he knew was armed and primed for violence. He falsely raged to the crowd that the Joint Session was the culmination of a treasonous plot to destroy America. He exhorted his supporters to "fight like hell [or] you're not going to have a country anymore." And he urged the mob to march to the Capitol, telling them that "[y]ou'll never take back our country with weakness." He thus lit the match of insurrection and threw it into the powder keg he had spent months creating. President Trump now studiously

ignores all that preceded his speech and provided meaning and context to his statements, asking the Senate to do the same and focus only on a handful of his remarks in isolation.

There can be no doubt that President Trump is singularly responsible for inciting the violent insurrection that followed his speech. The mob he incited stormed the Capitol, bludgeoned the police with weapons, deployed chemical irritants, hunted Vice President Pence and Speaker Pelosi for their alleged "treason," and left threatening messages for Members of Congress—all the while proclaiming proudly that they were doing President Trump's bidding. By the end of the day, a police officer and four others were dead, dozens more were injured, and our Nation's Capitol was desecrated. As a direct result of President Trump's actions, the seat of our democracy has been transformed into a military camp. That is President Trump's legacy to the Nation.

Nor can there be any doubt that President Trump failed to act decisively to stop the violence as soon as it began. Instead, President Trump was "delighted" that the insurrection was delaying the counting of the Electoral College votes. In an astonishing act of further incitement and betrayal, President Trump denounced his own Vice President on Twitter *at the very time* the mob hunted him through the halls of the Capitol. When President Trump finally issued a statement after hours of delay, he blamed Congress for the attack on itself, and told the insurrectionists, "you're very special," and "we love you." Since then, he has described his conduct as "totally appropriate."

There can be no doubt that these facts amount to an impeachable offense. President Trump incited the insurrection while seeking to cheat in an election and remain in office for a second term against the will of America's voters. The Framers of our Constitution designed the impeachment power to protect against a President who would subvert our democracy to keep himself in power.

And the drafters of the Fourteenth Amendment further confirmed that an official who participates in an insurrection must be disqualified from future officeholding.[1] President Trump's conduct on January 6 was the paradigm of an impeachable offense.

Because President Trump's guilt is obvious, he seeks to evade responsibility for inciting the January 6 insurrection by arguing that the Senate lacks jurisdiction to convict officials after they leave office. This discredited argument has been rejected by scholars across the political spectrum, including many of the Nation's leading conservative constitutional lawyers, one of whom recently took to the pages of the Wall Street Journal to urge the Senate to accept jurisdiction over this trial. This argument has also been rejected by the very scholars on which President Trump principally relies, several of whom have taken *exactly the opposite position* as the position President Trump incorrectly ascribes to them in his trial memorandum. President Trump's jurisdictional argument is both wrong as a matter of constitutional law and dangerous as a matter of Senate practice. It would leave the Senate powerless to hold Presidents accountable for misconduct committed near the end of their terms. It would also create an obvious loophole in the Senate's disqualification power by allowing officials to resign immediately before their Senate trial. And it would encourage Presidents to commit abuses precisely when those abuses pose the greatest threat to our democracy—at election time. The Senate must reject this effort to eviscerate its impeachment power, just as it has rejected similar arguments in impeachments dating back more than 200 years.

President Trump's other defenses are equally weak. The First Amendment protects our democratic system—but it does not protect a President who incites his supporters to imperil that

[1] U.S. Const. amend. XIV, § 3.

system through violence. In the words of the Nation's leading First Amendment scholars, the argument that the First Amendment prevents the Senate from convicting the President is "legally frivolous."[2] Accepting President Trump's argument would mean that Congress could not impeach a President who burned an American flag on national television, or who spoke at a Ku Klux Klan rally in a white hood, or who wore a swastika while leading a march through a Jewish neighborhood—all of which is expression protected by the First Amendment but would obviously be grounds for impeachment. The First Amendment does not immunize President Trump from impeachment or limit the Senate's power to protect the Nation from an unfit leader. And even assuming the First Amendment applied, it would certainly not protect President Trump's speech on January 6, which incited lawless action.

President Trump's other purported defenses also fail. President Trump received all the process he was due. The House moved urgently to impeach him because he remained a danger after January 6. And President Trump's *trial* will occur in the Senate, which has provided for extensive pretrial briefing and an opportunity for him to present evidence before the Senate determines whether to convict. President Trump is also wrong to argue that he can only be impeached for a criminal violation. This argument has no support in history or precedent—and, once again, even the scholar on whom he relies has rejected it. Finally, President Trump's argument that the article of impeachment charges "multiple alleged wrongs" is simply false: the article charges a single course of impeachable conduct for inciting an insurrection.

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[2] *Constitutional Law Scholars on President Trump's First Amendment Defense* at 1-2 (Feb. 5, 2021).

The question whether President Trump should be convicted and disqualified is not close. As the House Republican Conference Chair recognized, "There has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution."[3] To deter future Presidents from attempting to subvert our Nation's elections, and to ensure that President Trump never again has an opportunity to endanger our democracy, the Senate should convict him and disqualify him from holding "any Office of honor, Trust or Profit under the United States."[4]

ARGUMENT

PRESIDENT TRUMP'S ATTEMPTED DEFENSES FAIL

Unable to defend his misconduct on January 6, President Trump devotes the majority of his brief to attempting to shift the blame to others, arguing that the Senate should not hold a trial at all, and trying to cloak his betrayal of the Nation in the First Amendment. All of his defenses fail.

A. President Trump Cannot Reasonably Deny Responsibility For Inciting The Insurrection

President Trump asserts that the insurrectionists stormed the Capitol "of their own accord and for their own reasons."[5] That argument defies belief. The factual record, as discussed in detail in our opening brief, demonstrates President Trump's singular responsibility for inciting the attack on the Capitol. That he does not like being held responsible by Congress does not allow him to rewrite history.

Before January 6, President Trump had tried and failed to overturn the election through every conceivable means at his disposal—flawed judicial challenges, threats against state officials,

[3] Liz Cheney, *I Will Vote To Impeach The President* (Jan. 12, 2021).
[4] U.S. Const., Art. I, § 3, cl. 7.
[5] Opp. at 9.

efforts to change state law, and even attempts to enlist his Attorney General to find proof of widespread fraud—all while he falsely insisted to his supporters that the election had been stolen from him.[6] After these methods failed, President Trump identified the Joint Session's electoral vote count as his final chance to retain his grip on the Presidency. He therefore planned a rally for the morning of January 6, just hours before Congress and the Vice President were to convene to affirm President Biden's election victory. He announced that he would personally appear at the rally, which he promoted constantly. The event "will be wild!"[7] he promised; a "historic day"[8] to "StopTheSteal!"[9]

By the morning of the rally, President Trump knew that many of his supporters, agitated by his barrage of lies about a stolen election, were prone to violence. An earlier pro-Trump rally in Washington, D.C. had ended in brawls, vandalism directed against churches, and numerous assaults on police officers.[10] One GOP election official even warned President Trump that his rhetoric

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[6] William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021); Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, Associated Press (Dec. 1, 2020); Jesse Byrnes, *Barr Told Trump that Theories About Stolen Election Were "Bulls---": Report*, The Hill (Jan. 18, 2021); Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Wash. Post (Jan. 5, 2021); Maggie Haberman et al., *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. Times (Nov. 19, 2020); Amy Gardner et al., *Trump Asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, Wash. Post (Dec. 8, 2020); Ryan Randazzo et al., *Arizona Legislature 'Cannot and Will Not' Overturn Election, Republican House Speaker Says*, Arizona Republic (Dec. 4, 2020).

[7] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2020, 1:42 AM).

[8] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2021, 10:27 AM).

[9] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 2:53 PM).

[10] Peter Hermann & Keith Alexander, *Proud Boys Leader Barred From District By Judge Following His Arrest*, Wash. Post (Jan. 5, 2021); Jason Slotkin et al., *4 Stabbed, 33 Arrested After Trump Supporters, Counterprotesters Clash in D.C.*, NPR (Dec. 12, 2020); NBC Washington Staff, *4 Stabbed, 33 Arrested as Trump Supporters, Counterprotesters Clash in Downtown DC*, NBC Washington (Dec. 12, 2020).

would cause someone "to get killed."[11] When he stood at the podium before thousands of his supporters, President Trump knew that they were armed and that they were angry.

President Trump then whipped his followers into a frenzy. He launched into an impassioned attack on a "stolen election"[12]—falsely telling the crowd that Congress's actions at the Joint Session would be the culmination of a vast conspiracy to destroy the country. And President Trump made clear what he wanted them to do: go to the Capitol and "fight like hell." He told the crowd to march to the Capitol, even falsely pledging to join them on the march. He told them that "if you don't fight like hell you're not going to have a country anymore."[13] He added: "you'll never take back our country with weakness."[14]

President Trump cannot credibly claim that he is not responsible for what followed. As Leader McConnell accurately put it, "[t]he mob was fed lies" and "provoked by the president."[15] The insurrectionists themselves made clear that they understood that they were following President Trump's commands—they proudly said so in videos taken as they ransacked the Capitol, in statements to reporters after the riot, and in court when attempting to explain their heinous actions.[16] The many American flags wielded by attackers demonstrated that they believed they were performing a patriotic act in the service of their President. The rioters attacked the Capitol because

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[11] Stephen Fowler, *'Someone's Going To Get Killed': Ga. Official Blasts GOP Silence On Election Threats*, NPR (Dec. 1, 2020).

[12] Donald J. Trump (@realDonaldTrump), Twitter (Nov. 8, 2020, 9:17 AM).

[13] *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump,* RSBN TV (Jan. 6, 2021); *Donald Trump Speech "Save America" Rally Transcript January 6*, Rev (Jan. 6, 2021).

[14] *Id.*

[15] Mike DeBonis & Paul Kane, *Uncertainty Reigns in Senate as Schumer Pushes Fast Agenda and McConnell Calls Out Trump*, Wash. Post (Jan. 19, 2021).

[16] Zoe Tillman, *Trump Supporters' Own Explanations For Assaulting The Capitol Are Undercutting His Impeachment Defense*, BuzzFeed News (Feb. 2, 2021); House Trial Mem. at 27-28.

President Trump plied them with false assertions that Congress and the Vice President were in the process of stealing their democracy.

President Trump argues that he "did not direct anyone to commit lawless actions,"[17] but as the crowd well knew, he had been urging Vice President Pence to do just that: by unilaterally and unconstitutionally overturning the election results at the Joint Session. President Trump's unsuccessful attempt to pressure Vice President Pence into acting unlawfully surely inspired the mob to believe that it needed to attack the Capitol—and to hunt down the Vice President himself when he refused.

If, as President Trump suggests, the mob "completely misunderstood him,"[18] and if he disapproved of the violence perpetrated by those who purported to act in his name, he could have acted swiftly to set them straight. But he refused. Instead, he was "delighted" by the riot at the Capitol because he believed it increased his chances of overturning the election. He even tweeted an attack on his own Vice President while the riot was underway.[19] Only after receiving public and private entreaties did he issue a pair of lukewarm tweets asking his supporters to "[s]tay peaceful" even as they committed horrific violence.[20] Finally, *three hours* after the siege began, he released a scripted video telling insurrectionists "We love you, you're very special. … I know how you feel."[21] Even then, he insisted that the election was "stolen from us"[22]—the same lie that had incited his

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[17] Opp. at 11.
[18] Opp. at 11.
[19] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 2:24 PM).
[20] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 2:38 PM).
[21] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 4:17 PM); *President Trump Video Statement on Capitol Protestors*, C-SPAN (Jan. 6, 2021).
[22] *Id.*

supporters to commit violence in the first place. And in the evening, after the insurrection was finally put down, he blamed it on Congress: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long."[23] President Trump barely attempts to justify his abject failure to stop the riot after it began, and confines his entire discussion of the point to a convoluted footnote that hardly offers any response or explanation at all.[24]

President Trump only *increases* his own responsibility by pointing to indications that some of the attackers planned the insurrection "*several days* in advance of the rally."[25] That fact underscores that President Trump knew exactly what he was doing in his campaign to overturn the election. Any plans hatched in advance were intended to support President Trump, who had inflamed his followers and invited them to converge in Washington, D.C., on January 6 to "StoptheSteal." His continued insistence that he was the rightful winner of the election was the oxygen that enabled their plans to flourish. And his incendiary remarks at the rally itself, delivered despite warnings that the crowd was poised and prepared for violence at his instigation, were the match that detonated everything. Had he accepted the verdict of the Electoral College—like *every* presidential candidate before him—there would have been no plans, no rally, no calls to "fight," and no insurrection.

Finally, President Trump does not help his case by arguing that his January 6 speech was intended to encourage his supporters to press for "election security generally."[26] To call this argument implausible would be an act of charity. The rally, set for the day when Congress was to

[23] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 6:01 PM).
[24] Opp. at 3 n.8.
[25] Opp. at 8.
[26] Opp. at 52.

count the electoral votes, was the culmination of President Trump's months-long campaign to overturn the results of a *specific* election he lost. In his speech, President Trump did not direct his supporters to go home and lobby their state legislatures, but instead directed them to march to the Capitol and fight. President Trump's speech did not promote election security—it exhorted a mob to attack Congress in order to overturn a free and fair election.

B. The Senate Has Jurisdiction To Try This Impeachment

President Trump is wrong to cast doubt on the Senate's jurisdiction over this trial. Scholars from across the political spectrum, including renowned conservative constitutional scholars, have recognized that the Constitution empowers the Senate to convict and disqualify officials who commit misconduct late in their terms and therefore can realistically only be tried after leaving office. We thus explained in our opening brief that there is no "January Exception."

As the former Reagan Administration official Chuck Cooper recently wrote in the Wall Street Journal, scholarship regarding the Senate's jurisdiction "has matured substantially" since this body voted on that question.[27] This scholarship "has exposed the serious weakness" in President Trump's claim that the Senate lacks jurisdiction.[28] For the reasons given by Cooper and others, Senators who previously voted to reject jurisdiction over this trial might wish to "reconsider their view and judge the former president's misconduct on the merits."[29]

Constitutional Text: President Trump's brief glaringly fails to address the constitutional text that establishes the Senate's jurisdiction over this trial. The language of the Constitution gives the

[27] Chuck Cooper, *The Constitution Doesn't Bar Trump's Impeachment Trial*, Wall Street Journal (Feb. 7, 2021).
[28] *Id.*
[29] *Id.*

Senate "the sole Power to try all Impeachments"[30]—not just impeachments involving sitting officials. As noted by Michael McConnell, a prominent scholar and former court of appeals judge appointed by President George W. Bush, the key word in the Constitutional text is "all."[31] "This clause contains no reservation or limitation" and it does not "say the Senate has power to try impeachments against sitting officers."[32] The constitutional text thus "makes clear that the Senate has power to try th[is] impeachment."[33]

The Senate's jurisdiction in this case is especially clear given that the House undisputedly had jurisdiction to impeach President Trump while he was still President. Regardless of whether the *House* would have the authority to commence an impeachment proceeding against an official after he left office, the *Senate* plainly has authority to try the impeachment of an official like President Trump who was still in office when he was impeached. Indeed, President Trump's attorneys attempt to support their jurisdictional argument by citing scholars who have said exactly the opposite of what President Trump ascribes to them; they have confirmed that the Senate possesses jurisdiction in these circumstances. For example, one article that President Trump relies on[34] concludes: "as long as an officer served in office at the time formal impeachment proceedings started, then the House and Senate retain jurisdiction to continue the process because the officer was 'in office' at the

[30] U.S. Const., Art. I, § 3, cl. 6.

[31] Eugene Volokh, *Impeaching Officials While They're in Office, but Trying Them After They Leave,* The Volokh Conspiracy (Jan. 28, 2021) (quoting Prof. Michael McConnell).

[32] *Id.*

[33] *Id.*

[34] Opp. at 19, 31, 36.

commencement of the proceedings."[35] Another scholar that President Trump repeatedly cites[36] recently opined: "Trump's defenders will surely contend that a president cannot be tried by the Senate after he has left office. They are wrong."[37] President Trump's brief's serious distortion of these scholars' views is deeply troubling.

Rather than tackle the Senate's unqualified power to try *all* impeachments or accurately represent the scholarship on this question, President Trump instead mistakenly invokes other constitutional provisions that he claims limit the Senate's power by implication. He cites the provision of Article I stating that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."[38] This provision means that the Senate may not impose judgments that "extend further" than (1) removal of the accused if he remains in office, and (2) disqualification of the accused regardless of whether he remains in office. But nothing in this provision confines the Senate's disqualification power to cases involving sitting officials.

President Trump argues that because only sitting officials are subject to the removal remedy, then *only* sitting officials should be subject to the separate disqualification remedy.[39] But this argument attempts to add a word to the Constitutional text—"only"—that the Framers omitted. It also defies logic. If a law sets out two possible penalties and one of them becomes unavailable, that

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[35] Harold J. Krent, *Can President Trump Be Impeached As Mr. Trump? Exploring the Temporal Dimension of Impeachments*, 95 Chi.-Kent L. Rev. 537, 548 (2021) (emphasis added).

[36] Opp. at 17, 20-21.

[37] Brian C. Kalt & Frank Bowman, *Congress Can Impeach Trump Now and Convict Him When He's Gone*, Wash. Post (Jan. 11, 2021). Professor Kalt has noted that, in several places, President Trump's brief contains "multiple . . . flat-out misrepresentations" of his scholarship. Brian Kalt (@ProfBrianKalt), Twitter (Feb. 8, 2021, 11:57 AM).

[38] U.S. Const., Art. I, § 3, cl. 7.

[39] Opp. at 30.

does not mean that the offender is exempt from the penalty that remains. Consider the example of a "con man" convicted under a statute that provides for both mandatory refund of the proceeds of his crime as well as a prison term. Even if the "con man" spends all the proceeds of his crime before his trial, thus making the refund penalty unavailable, he is obviously still subject to the penalty of imprisonment.[40]

President Trump also cites the provision of Article II stating that "The President, Vice President and all civil Officers of the United States, shall be removed from Office" upon impeachment and conviction.[41] This provision means that sitting officials who are impeached and convicted must be removed from office. But, as Cooper explains, this provision "cuts *against*" the theory that the Senate lacks jurisdiction over former officials.[42] Instead, this provision "simply establishes what is known in criminal law as a 'mandatory minimum' punishment: If an incumbent officeholder is convicted by a two-thirds vote of the Senate, he is removed from office as a matter of law."[43] It does not exempt former officials, and it certainly does not support the illogical leap that former officials are altogether immune from the Senate's power to try all impeachments.

The Constitution itself makes clear that the category of officials who can be tried in the Senate is broader than the category of "civil officers" who must be removed from office upon conviction. When the Constitution refers to the full category of individuals who can be tried by the Senate, it refers to "persons" and "parties"[44]—a broader category than the sitting "civil officers"

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[40] *See* Frank O. Bowman, III, *The Constitutionality of Trying a Former President Impeached While in Office*, Lawfare (Feb. 3, 2021).

[41] Opp. at 18; U.S. Const., Art. II, § 4.

[42] Chuck Cooper, *The Constitution Doesn't Bar Trump's Impeachment Trial*, Wall Street Journal (Feb. 7, 2021).

[43] *Id.*

[44] U.S. Const., Art. I, § 3, cl. 6, 7.

subject to mandatory removal. President Trump does not even attempt to answer this point. Notably, President Trump filed a lengthy brief, but failed to engage with key jurisdictional arguments grounded in the Constitution's actual text.

President Trump next cites the provision stating that "When the President of the United States is tried, the Chief Justice shall preside."[45] This provision requires the Chief Justice to preside over the impeachment trial of a sitting President. But Donald Trump is not a sitting President, which means that the Chief Justice need not preside at his trial—just as the Chief Justice does not preside over impeachment trials of other officials. The Framers required the Chief Justice to preside over the trial of a sitting President to ensure that the Vice President, as President of the Senate, does not oversee a trial where conviction would result in her ascending to the presidency. That concern is not implicated in a trial of a former President.

Finally, President Trump wrongly suggests that, because he is now a private citizen, convicting and disqualifying him would raise concerns under the Bill of Attainder Clause, which prohibits Congress from following the old English practice of passing laws that single out a specific individual for punishment.[46] But unlike in the Supreme Court cases cited by President Trump,[47] which involved legislative attempts to punish individuals for their private conduct, President Trump was impeached by the House while he was in office for abuses he committed as a sitting President. He does not even try to claim that the House lacked authority to impeach him for those abuses.

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[45] Opp. at 23; U.S. Const., Art. I, § 3, cl. 6.
[46] *See* Opp. at 15-17; *see also* U.S. Const., Art. I, § 9, cl. 3.
[47] Opp. at 16-17.

Trying, convicting, and disqualifying him in the Senate based on those same abuses poses no risk of subjecting a private party to punitive legislative action targeting his private conduct.

History: The "originalist" case for the Senate's jurisdiction here could hardly be stronger. President Trump does not dispute that the Framers looked to English practice as a model for the federal impeachment power. And President Trump concedes that, in the English system, officials could be impeached and disqualified after leaving office.[48] In fact, as we described in our opening brief (at 51), Warren Hastings, a former official, faced impeachment charges in England even as the Framers gathered in Philadelphia to draft our Constitution—and the Framers cited his case as one in which impeachment was appropriate. President Trump is therefore left to make the implausible argument that the Framers intended to depart from this settled English practice without saying so.

President Trump similarly concedes that numerous state constitutions during the founding era provided for the impeachment of former officials.[49] None prohibited such impeachments. Indeed, in some states, *only* former officials could be impeached, which confirms that the Framers surely understood that the impeachment power could also encompass former officials. Had they intended to depart from that understanding, they would have said so.

Precedent dating back more than 200 years makes the Senate's jurisdiction here even clearer—as noted by, among many others, Professor Steven Calabresi, Co-Chairman of the Federalist Society's Board of Directors.[50] After leaving office, President John Quincy Adams recognized that he was "amenable to impeachment by [the] House for everything I did during the

[48] Opp. at 20.
[49] Opp. at 21.
[50] Steven G. Calabresi and Norman Eisen, *We Disagree on a Lot. But We Both Think Trump Should Be Convicted*, N.Y. Times (Jan. 13, 2021).

time I held any public office."[51] And the Senate has several times affirmed that it has the power to try, convict, and disqualify officials after they leave office. When Senator Blount was expelled from the Senate after being impeached in 1798, he expressly disavowed at his Senate trial the radical claim (made here by President Trump) that former officials were categorically exempt from trial.[52]

When Secretary of War Belknap was impeached in 1876 shortly after resigning, the Senate squarely rejected his argument that there was no jurisdiction to try him as a former official.[53] President Trump asserts that the Senate's exercise of jurisdiction in the Belknap trial should not be treated as precedent because Belknap was ultimately acquitted. But before Belknap was acquitted, the Senate rejected the exact same jurisdictional claim that President Trump presses here.[54] President Trump relies at length on Joseph Story to support that now-rejected claim.[55] But Story's conclusions were equivocal—indeed, he recognized that impeachment of former officers could still serve a purpose because "a judgment of disqualification might still be pronounced."[56]

If there were any doubt on the question, when the House impeached Judge Archbald in 1912, based in part on his conduct in a prior judgeship, "a majority of the [S]enators voting saw no

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[51] Cong. Globe, 29th Cong., 1st Sess. 641 (1846).

[52] Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials*, at 30 (1992).

[53] Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13, 96 (2001).

[54] Opp. at 25-26. President Trump also points to opinions by Nebraska and Florida courts regarding their states' impeachment power. *See* Opp. at 28-30. But the Nebraska case involved an officer who had left office before the impeachment investigation even began, and the court found under state law that while a former officer could not be impeached and tried, a former officer could be tried if he had been in office at the time of his impeachment. *See State v. Hill*, 55 N.W. 794, 795, 798 (Neb. 1893); *see also* Opp. 34 n.86. In any event, the opinions of *state* courts interpreting *state* law in cases decided a century or two after the federal Constitution was drafted are not persuasive evidence of the scope of the federal impeachment power.

[55] Opp. at 31-32.

[56] Joseph Story, *Commentaries on the Constitution of the United States* § 801 (R. Rotunda & J. Nowak eds., 1987); *see also* Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13, 123 (2001).

problem" with impeaching him for misconduct in his former office.[57] In more than 200 years, the Senate has *never* accepted the self-defeating argument that it lacks the power to try the impeachment of a former official. The Senate should not do so for the first time now.

Purpose of Impeachment: Once again failing to engage with the Constitution's plain text, President Trump argues that "[t]he purpose of impeachment is to remove someone from office."[58] But removal is not the only purpose of impeachment. In crafting the impeachment power, the Framers included two separate remedies—removal from office *as well as* disqualification from future officeholding. Distinct from the removal power, the disqualification power was intended to ensure that officials who abused their power were never again permitted to attain office from which they could threaten the American people. This animating purpose of disqualification—to protect the Nation from the return of a dangerous official—applies just as forcefully when the official has left office by the time the Senate tries his impeachment. President Trump does not even attempt to explain why the Framers would have provided that a *sitting* President found to have endangered the Nation should be disqualified from returning to office, but a *former* President found to have done the exact same thing should be free to return.

Nor can President Trump defend the perverse consequences that would result from his theory. The Framers feared more than anything a President who spared "no efforts or means whatever to get himself re-elected."[59] Thus, they understood that the paradigm case for impeachment would arise from a President's efforts to overturn an election. But elections, by

[57] *Id.* at 104.
[58] Opp. at 18.
[59] 2 The Records of the Federal Convention of 1787, at 64 (Max Farrand, ed., 1911).

definition, occur at the end of a President's term. It is inconceivable that the Framers designed impeachment to be virtually useless in a President's final weeks or days, when opportunities to interfere with the peaceful transfer of power are most present. And it is equally inconceivable that the Framers intended to create a remedy that would make no sense: disqualify a President from future office if he tried and succeeded to overturn an election, thus remaining in office, but not if—like President Trump—he tried and failed.

The consequences of President Trump's jurisdictional argument get more dangerous still. President Trump does not dispute that, if his theory were correct, the Senate would be powerless to address abuse by officials that comes to light only after they leave office. Nor does President Trump dispute that, under his theory, a President "who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate's final conviction vote."[60] The President could thus evade the Senate's disqualification power by resigning, then could later return to office, where he would be free to betray the public trust all over again. This loophole would "practically annihilate the power of impeachment in all cases of guilt clearly provable."[61]

President Trump points out that Congress in the past has declined to impeach, convict, and disqualify officials after they leave office. President Trump asks why, for example, the House did not impeach President Nixon after he resigned.[62] The answer is that impeachment, conviction, and disqualification were unnecessary where President Nixon resigned in disgrace, acknowledged wrongdoing, and was already barred from running again for President by the Twenty-Second

[60] *Constitutional Law Scholars on Impeaching Former Officers* at 2 (Jan. 21, 2021).
[61] 4 Cong. Rec. at 79 (1876) (Opinion of Senator Thurman).
[62] Opp. at 27.

Amendment.[63] By contrast, President Trump has described his conduct as "totally appropriate,"[64] refused to accept responsibility for his abuses, and is eligible to seek the Presidency—and assault the democratic process—yet again.

That Congress has previously found it unnecessary to disqualify former officials despite its clear power to do so demonstrates that Congress does not take this step lightly. It also demonstrates that there is no merit to President Trump's spurious claim that disqualifying him here would open the floodgates and allow Congress to use impeachments to pursue old grudges or settle old scores—particularly given that President Trump was still in office when he was impeached.[65] And, above all else, it highlights the unprecedented danger created by President Trump's effort to cling to power by inciting an attack on Congress. The Senate must reject President Trump's invitation to eviscerate one of the Senate's most important tools for protecting the Nation against officials who attempt to subvert our democracy.

C. The First Amendment Provides No Defense to Conviction and Disqualification

President Trump's reliance on the First Amendment is an insult to the values that the First Amendment enshrines. In the words of nearly 150 First Amendment lawyers and constitutional scholars, President Trump's First Amendment defense is "legally frivolous."[66]

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[63] *See* President Nixon's Resignation Speech, August 8, 1974; *see also* U.S. Const. amend. XXII ("No person shall be elected to the office of the President more than twice …").

[64] Kevin Liptak & Betsy Klein, *Defiant Trump Denounces Violence but Takes No Responsibility for Inciting Deadly Riot,* CNN (Jan. 12, 2021).

[65] Opp. at 35.

[66] *Constitutional Law Scholars on President Trump's First Amendment Defense* at 1-2 (Feb. 5, 2021); *see also* Nicholas Fandos et al., *144 Constitutional Lawyers Call Trump's First Amendment Defense 'Legally Frivolous,'* N.Y. Times (Feb. 5, 2021).

President Trump argues that he is "protected by the First Amendment" "[l]ike all Americans."[67] He is wrong from the beginning: the President is not "[l]ike all Americans." The First Amendment has no application in an impeachment proceeding, which does not seek to punish unlawful speech, but instead to protect the Nation from a President who violated his oath of office and abused the public trust.

Under President Trump's view of the First Amendment, even a sitting President who strenuously urged States to secede from the Union and rebel against the federal government would be immune from impeachment. Likewise, a President could declare his loyalty to a foreign power or publicly renounce his oath "to preserve, protect, and defend the Constitution"—all without fear of impeachment.[68] The First Amendment provides no such immunity for a President who has committed "high Crimes and Misdemeanors."

In fact, the Senate has confirmed that the First Amendment does not limit its power to convict in an impeachment proceeding. In 1804, the Senate convicted Judge John Pickering in part for inflammatory and politically charged statements he made from the bench.[69] No precedent supports President Trump's contrary view. He cites the impeachment of President Johnson in 1868, contending that the Senate there established that a President cannot be convicted and disqualified

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[67] Answer at 4-5, 10; Opp. at 37-66.

[68] *See Constitutional Law Scholars on President Trump's First Amendment Defense* at 1; *see also* Peter D. Keisler & Richard D. Bernstein, *Freedom of Speech Doesn't Mean What Trump's Lawyers Want It to Mean*, The Atlantic (Feb. 2021) (arguing that President Trump's First Amendment argument is wrong and could produce the absurd result that a President could not be impeached if he or she "burned an American flag on national television to demonstrate contempt for the country he or she had been chosen to lead" or "wore a swastika while leading a Nazi march through a Jewish neighborhood").

[69] Keith E. Whittington, *Is There a Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021).

based on his speech.[70] But the Senate set no such precedent in President Johnson's impeachment. As President Trump notes, one of the articles of impeachment charged President Johnson with insulting and denouncing Congress by "mak[ing] and declar[ing] … certain intemperate, inflammatory, and scandalous harangues … [which] are peculiarly indecent and unbecoming in the Chief Magistrate of the United States."[71] While some Senators expressed concern that President Johnson's remarks were constitutionally protected,[72] others disagreed. Senator Jacob Howard, for example, stated that "[n]o question of the 'freedom of speech' arises here."[73] Ultimately the Senate never voted on the article and thus made no judgment about the relevance of the First Amendment. In any event, there is no comparison between President Johnson's "intemperate" broadsides and President Trump's incitement of an insurrection.

Indeed, even if—contrary to precedent and scholarship—the First Amendment were understood to restrict Congress's power over impeachments, it still would not protect President Trump's calls to violence.[74] In *Brandenburg v. Ohio*, the Supreme Court explained that, while the First Amendment prohibits states from punishing "mere advocacy," it does *not* preclude punishment for speech that is "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[75] President Trump's speech falls squarely within this exception for incitement. His statements on January 6, particularly in the context of his prior remarks, were

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[70] Opp. at 65-66.

[71] *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. Senate, www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7.

[72] 3 Trial of Andrew Johnson 206 (1868) (speech of Sen. Joseph Fowler).

[73] *Id.* at 49 (speech of Sen. Jacob Howard).

[74] *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

[75] *Id.* at 447.

"directed to" and "likely to incite or produce" imminent unlawful action.[76] President Trump incited a crowd to go to the Capitol and fight, immediately before they stormed the Capitol.

These statements would not be protected whether they were made by an elected official, a civil servant, or a private citizen—contrary to President Trump's lengthy argument that those distinctions should matter.[77] President Trump is not helped by his reliance on a case concerning punishment for statements made by an elected official "as a private citizen" that "did not present a danger to the administration of justice."[78] Nor does the Supreme Court's recognition that an elected legislator could not be excluded from state office for "criticizing public policy" advance President Trump's claim, where the Court distinguished that situation from one in which "a legislator swears to an oath pro forma while … manifesting his … indifference to the oath."[79] President Trump's speech was not a criticism of public policy—rather, it was a repudiation of his oath of office as he incited a violent insurrection and then manifested callous indifference to its deadly consequences.

President Trump attempts to equate his January 6 speech to statements by other politicians, arguing that convicting him will chill political speech.[80] But context matters under the First Amendment. While other political figures have used heated rhetoric, none of the speeches that President Trump cites bears any resemblance to President Trump's anti-democratic effort to prolong his presidency by exhorting a mob to attack the Congress. President Trump spoke to

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[76] *Constitutional Law Scholars on President Trump's First Amendment Defense* at 2-3 (concluding that President Trump's "words and conduct were not protected" under the First Amendment because they were "in the words of the *Brandenburg* case, 'directed to inciting or producing imminent lawless action and … likely to … produce such action'").

[77] Opp. at 41-46 (citing *Wood v. Georgia*, 370 U.S. 375 (1962), and *Bond v. Floyd*, 385 U.S. 116 (1966)).

[78] *See Wood*, 370 U.S. at 382, 393, 395.

[79] *Bond*, 385 U.S. at 132, 136.

[80] Opp. at 63-64.

supporters who were angry, prepared for violence, and intent on disrupting Congress's counting of the electoral votes. Knowing all that, he launched into an inflammatory speech that was bound to result in the violence that followed. And, of great significance, as his supporters overtook the Capitol, instead of acting to stop them, he watched delightedly on television, continued to disparage his Vice President, and lobbied Senators to overturn the election. That conduct is impeachable.

D. President Trump Has Received From Congress All The Process He Was Due

President Trump's claim that the House denied him due process by moving too quickly to impeach him has no grounding in law or fact. It also misunderstands the constitutional process for impeachments: his impeachment *trial* occurs in the Senate, not in the House.

The Constitution vests the House with the "sole Power of Impeachment"[81] and the power to "determine the Rules of its Proceedings."[82] Here, the House had to move quickly to address President Trump's dangerous misconduct, to discourage him from engaging in further abuse during the last days of his term, and to send an immediate signal that such an attack on our core democratic institutions will not be tolerated. And it was appropriate for the House to impeach without a lengthy investigation because the most relevant evidence against him is a matter of undisputed public record—the underlying events played out on live television and social media and were witnessed firsthand by Members of Congress.

President Trump ignores reality in arguing that there was no exigency that justified the House's urgent impeachment of him.[83] His actions after January 6 established that he posed a

[81] U.S. Const., Art. I, § 2, cl. 5.
[82] U.S. Const., Art. I, § 5, cl. 2.
[83] Opp. at 68-71.

continuing, immediate threat to our democracy. When the House impeached him one week after the insurrection, it was rightly concerned that "a President capable of fomenting a violent insurrection in the Capitol is capable of greater dangers still."[84] Importantly, President Trump had failed to show any remorse for the violence and instead continued to fan the flames.[85]

In light of this ongoing threat, five days after the assault on the Capitol, an article of impeachment was introduced in the House and referred to the House Committee on the Judiciary. During a hearing the following day, the Chairman of the Judiciary Committee submitted a 50-page report documenting the Committee's findings supporting impeachment, relying heavily on recorded speeches and actions.[86] One day later—on January 13, 2021—the House voted to impeach President Trump with bipartisan support on charges that he incited an insurrection. The article of impeachment was adopted with the support of 232 House Members, including every Democrat and ten Republicans.[87] This House impeachment provided President Trump with all the process he was due.

President Trump now argues that the House did not need to act expeditiously because his term ended without "apocalyptic predictions … coming to pass."[88] That ignores the fact that the impeachment itself limited the danger posed by President Trump. The House sent a clear message

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[84] *House Judiciary Committee Majority Staff Report: Materials in Support of H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, at 3, 117th Cong (Jan. 12, 2021).

[85] *See id.* at 40-43.

[86] *House Judiciary Committee Majority Staff Report: Materials in Support of H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, 117th Cong (Jan. 12, 2021).

[87] Clerk of the U.S. House of Representatives, Roll Call 17, H. Res. 24 (Jan. 13, 2021).

[88] Opp. at 69.

that the President's conduct would not be tolerated, and President Trump was undoubtedly chastened in the final days of his term, knowing that he would face a Senate impeachment trial.

For these reasons, there was no procedural flaw in the House's impeachment of President Trump. But even if there were, that would be irrelevant to the Senate's separate exercise of its "sole Power *to try* all Impeachments."[89] Any defect in the House's impeachment proceedings—which are not an impeachment trial—could be cured when the evidence is presented to the Senate at trial.

President Trump incorrectly suggests that the Senate is like an appellate court, reviewing the decision of a lower court.[90] But that is not how the Framers structured the impeachment power: the House has the sole power to impeach, and the Senate has the sole power to try the impeachment and convict. It is the constitutional duty of *the Senate* to consider the evidence and decide for itself whether President Trump is guilty of inciting an insurrection. And President Trump has been provided with every opportunity to defend himself in his Senate trial, including additional time to prepare, extensive pretrial briefing,[91] and the opportunity to testify, which he declined.[92]

President Trump mistakenly points to the timing of the Senate impeachment trial to insist that there was no exigency in the House's impeachment. But the timing of the Senate trial was negotiated by leaders from both parties. Indeed, "Senate Republicans had requested *more time* to

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[89] U.S. Const., Art. I, § 3, cl. 6 (emphasis added).
[90] Opp. at 70.
[91] S. Res. 16, 117th Cong. (2021).
[92] *See* Ltr. from Representative Raskin to President Trump (Feb. 4, 2021) (inviting President Trump to provide testimony); Ltr. from Bruce Castor to Representative Raskin (Feb. 4, 2021) (declining invitation).

allow Trump's lawyers to prepare."[93] The Senate then passed a resolution providing that the trial would begin on February 9, 2021.[94]

Finally, the allegation that Senator Leahy will be biased in presiding over the impeachment trial is both offensive and mistaken.[95] As Senator Leahy has explained: "I consider holding the office of the president pro tempore and the responsibilities that come with it to be one of the highest honors and most serious responsibilities of my career. When I preside over the impeachment trial of former President Donald Trump, I will not waver from my constitutional and sworn obligations to administer the trial with fairness, in accordance with the Constitution and the laws."[96]

E. The Senate Is Not Limited To The Standards Of Criminal Law

President Trump mistakenly contends that conviction by the Senate is only permitted where the House charges a violation of criminal law.[97] Under President Trump's view of the Senate's power to try impeachments, even if every Senator found that all of the allegations in the article were true, the Senate could not convict because the article does not specifically "describe any violation of law."[98] As Chuck Cooper recently put it, the argument that the alleged conduct does not rise to the level of an impeachable offense is "a hard argument to make with a straight face."[99] And as Steven

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[93] Dartunorro Clark, *House Managers Deliver Impeachment Article Against Trump, Kicking Off Trial Preparations*, NBC News (Jan. 25, 2021) (emphasis added); Mike DeBonis, *Senate Ends Standoff, Agrees to Start Trump's Impeachment Trial Feb. 9*, Wash. Post (Jan. 22, 2021).

[94] S. Res. 16, 117th Cong. (2021).

[95] *See* Opp. at 70.

[96] Senator Patrick Leahy, Comment on Presiding Over the Impeachment Trial of President Donald Trump (Jan. 25, 2021).

[97] Opp. at 26, 72-74.

[98] Opp. at 73.

[99] Chuck Cooper, *The Constitution Doesn't Bar Trump's Impeachment Trial*, Wall Street Journal (Feb. 7, 2021).

Calabresi explained, "Whether or not Trump's words were a violation of the criminal law, they fall squarely within the Framers' definition of 'a High Crime and Misdemeanor.'"[100] Although President Trump's conduct may separately violate the criminal code, impeachment is not limited to criminal offenses, nor is it governed by the standards of proof that may apply in a criminal trial.[101] Indeed, even the legal scholar on whom President Trump relies has previously acknowledged that impeachment has never been understood to require criminal conduct.[102] The House therefore was not required to charge—and the Senate need not find—that President Trump committed any criminal offense.

Impeachment was conceived in the English Parliament as a method to control the King's ministers. It was not limited to accusations of criminal wrongdoing, but instead included broader, non-criminal offenses including abuse of power, corruption, and neglect of duty.[103] The Framers were aware of this history and understood that impeachment and conviction must reach a broad array of conduct beyond criminal misconduct, including abuse of power, betrayal of the Nation, and

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[100] Steve Calabresi, *Trump Should Be Convicted By The Senate*, Daily Caller (Jan. 28, 2021).

[101] *See* H. Rep. No. 116-346 at 56-62.

[102] *See* Jonathan Turley, Written Statement, *The Impeachment Inquiry into President Donald J. Trump: The "Constitutional Basis" for Presidential Impeachment*, at 10-11 (Dec. 4, 2019) (acknowledging that, since the Founding, it has been understood that impeachable acts need not constitute criminal offenses); *see also Constitutional Law Scholars on President Trump's First Amendment Defense* at 1 (Feb. 5, 2021) (explaining that "Congress's power to impeach is not limited to *unlawful* acts" and that "violations of an officer's oath of office can constitute impeachable 'high Crimes or misdemeanors' under the Constitution even if no law has been violated"); Alan Dershowitz, *The Case Against Impeaching Trump*, at 26-27 (2018) (conceding that, if it were true that impeachment were warranted only for criminal law violations, it would lead to the absurd results that the President could not be impeached even if he allowed an enemy power to invade and conquer American territory). President Trump also mistakenly cites Professor Paul Campos, apparently to support his argument about what conduct is impeachable. Opp. at 66 n.195. But Professor Campos's article addressed a different subject—the standard for removing a sitting President under the Twenty-Fifth Amendment—and, in any event, he has since confirmed that it does not stand for the proposition for which President Trump cites it. Paul Campos, *That was a right pretty speech, sir. But I ask you, what is a contract?*, Lawyers, Guns & Money (Feb. 8, 2021).

[103] H. Rep. No. 116-346 at 57 (citing 2 J. Story, *Commentaries on the Constitution of the United States*, 268 (1833)).

corruption of the office and of elections.[104] As Alexander Hamilton explained in the *Federalist Papers*, impeachable offenses are defined by "the abuse or violation of some public trust"; they "are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[105] For these reasons, a "'requirement of criminality would be incompatible with the intent of the [F]ramers to provide a mechanism broad enough to maintain the integrity of constitutional government.'"[106]

History and precedent confirm that conduct need not be criminal to be impeachable. Judge Archbald, for instance, was removed in 1912 for non-criminal speculation in coal properties, and Judge Ritter was removed in 1936 for the non-criminal act of bringing his court into scandal and disrepute.[107] Likewise, the House Judiciary Committee's allegations against President Nixon contained claims encompassing non-criminal acts, although President Nixon resigned before the House itself could consider impeachment.[108] In accord with that precedent, the Senate has also

[104] *Id.* (citing Peter Charles Hoffer & N. E. H. Hull, *Impeachment in America, 1635–1805*, at 1-95 (1984), and Frank O. Bowman, III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump*, at 244 (2019)).

[105] Alexander Hamilton, Federalist No. 65; *see also* Joseph Story, *Commentaries on the Constitution of the United States* § 801 (R. Rotunda & J. Nowak eds., 1987) (explaining that impeachment is a political, not a criminal proceeding, intended "not … to punish an offender" by threatening deprivation of his life or liberty, but rather to "secure the state" by "divest[ing] him of his political capacity"); H. Rep. No. 116-346 at 62.

[106] Staff of H. Comm. on the Judiciary, *Constitutional Grounds for Presidential Impeachment 93d Cong.*, at 25 (Comm. Print 1974).

[107] H. Rep. No. 116-346 at 58 (citing *Report of the Committee on the Judiciary, Robert W. Archbald, Judge of the United States Commerce Court*, H. Rep. No. 62–946 (1912), and H. Res. 422, 74th Cong. (1936)).

[108] *Id.* (citing *Committee Report on Nixon Articles of Impeachment* (1974)).

consistently rejected suggestions that it adopt a standard of proof borrowed from the criminal law, choosing instead to allow each Senator to determine how best to judge the facts presented.[109]

While President Trump's efforts to overturn the results of the 2020 election, culminating in his incitement of the January 6 insurrection, very well may have violated the criminal law, that is beside the point here. The only question before the Senate is whether President Trump's violation of his oath and breach of the public trust warrant conviction and disqualification from future officeholding. Here, there is no doubt that it does. Indeed, it is difficult to imagine conduct more deserving of conviction and disqualification than that for which President Trump was impeached.

F. The Article Does Not Charge Multiple Instances Of Impeachable Conduct

President Trump finally errs in arguing that the article of impeachment impermissibly charges "multiple alleged wrongs" and that, as a result, it would be "impossible" for a conviction to comply with the Constitutional requirement that it rest on a two-thirds vote of the Senators present.[110] This argument misconstrues the text of the article and the relevant precedent.

The article does not, as President Trump claims, charge multiple impeachable offenses. Rather, it charges that President Trump engaged in a single course of impeachable conduct in inciting an insurrection on January 6. While the article explains that President Trump employed

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[109] *See, e.g.*, 132 Cong. Rec. S15489-S15490 (daily ed. Oct. 7, 1986) (in his 1986 impeachment proceedings, Judge Harry E. Claiborne moved to designate "beyond a reasonable doubt" as the standard of proof for his conviction; the Senate rejected that request, and one of the House managers explained that the Senate had historically allowed each Member to exercise his or her own personal judgment in impeachment cases); *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee Hastings: Hearings before the Senate Impeachment Trial Committee* (Part 1) 101st Cong., 1st Sess. 73-75 (when a question arose about the appropriate standard of proof during the 1989 impeachment of Judge Alcee Hastings, a Senator explained that there was no set standard; rather "[i]t is what is in the mind of every Senator.... it is what everybody decides for themselves").

[110] Opp. at 71-72; *see also* U.S. Const., Art. I § 3, cl. 6 (conviction requires "the Concurrence of two thirds of the Members present"); Rule XXIII, *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* (rev. Aug. 16, 1986) (providing that articles of impeachment may not be "divisible for the purpose of voting thereon").

various tactics, over the course of months, "to subvert and obstruct the certification of the results of the 2020 Presidential election," it also makes clear that these activities merely provided the kindling, which President Trump set aflame when he incited insurrection on January 6.[111] Of course, this prior course of conduct is also relevant in illuminating President Trump's state of mind on January 6 when he exhorted his followers to march to the Capitol and "fight like hell."

President Trump appears to borrow his argument from a similar one made (unsuccessfully) during the impeachment trial of President Clinton.[112] But any comparison to President Clinton's impeachment does not help President Trump here. The articles in President Clinton's impeachment charged that he engaged in "one or more" improper acts.[113] Thus, unlike this article, the Senate could have convicted President Clinton without a two-thirds agreement on which of the charged improper acts he committed. Even so, the Senate *rejected* President Clinton's effort to dismiss the articles on the ground that they charged multiple offenses.[114] As the House Managers explained, the Senate's Rules (which remain in effect today) "specifically contemplate that the House may draft articles of impeachment" containing multiple specifications, "and prior rulings of the Senate have

[111] H. Res. 24, 117th Cong. (2021).

[112] Opp. at 71 (quoting the 2020 Trial Memorandum of President Donald J. Trump (at 107-108), which in turn invoked the "duplicity" argument made during the Clinton impeachment trial).

[113] H. Res. 611, 105th Cong. (1998).

[114] 145 Cong. Rec. S961, S973-S974 (daily ed. Jan. 25, 1999).

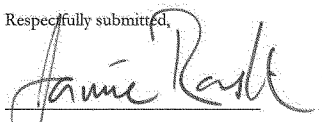
held that such drafting is not deficient."[115] If President Clinton's claim failed—where the articles in fact alleged multiple, distinct acts of impeachable conduct—then so too must President Trump's.

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[115] *Reply of United States House of Representatives to Trial Memorandum of President William Jefferson Clinton* (Jan. 14, 1999) [145 Cong. Rec. S215-21 (daily ed. Jan. 14, 1999)] at 25 (*reprinted in Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton*, S. Doc. 106-4, 106th Cong., 1st Sess. (Feb. 12, 1999)); *see also Amending the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, Report of the Comm. on Rules and Administration, S. Rep. No. 99-401, 99th Cong., 2nd Sess., at 8 (1986) (recognizing that "the most judicious and efficacious" approach to drafting articles of impeachment would be to present "broadly based charges" containing multiple enumerated specifications, and noting that the new rules would allow for conviction where a Senator found the accused guilty "of one or more of the enumerated specifications").

For the reasons stated in the opening Trial Memorandum for the House Impeachment Managers and in this Reply Memorandum, the Senate should convict President Trump on the impeachment article and disqualify him from future federal officeholding.

Respectfully submitted,



Jamie Raskin
Diana DeGette
David Cicilline
Joaquin Castro
Eric Swalwell
Ted Lieu
Stacey Plaskett
Madeleine Dean
Joe Neguse

February 9, 2021

U.S. House of Representatives Managers[*]

[*] The House Managers wish to recognize the invaluable assistance of the following individuals in preparing this trial memorandum: Barry H. Berke, Joshua Matz, and Sarah Istel of the House Committee on the Judiciary; Susanne Sachsman Grooms, Krista Boyd, Candyce Phoenix, Cassie Fields, and Jacob Glick of the House Committee on Oversight and Reform; and Douglas Letter, Megan Barbero, Eric Columbus, Will Havemann, Lisa Helvin, and Jonathan Schwartz of the House Office of General Counsel.



THE

CONSTITUTION OF THE UNITED STATES OF AMERICA

LITERAL PRINT

CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within

every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make tem-

porary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at

any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning

from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress

by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the

principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appel-

late Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by

Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

Attest WILLIAM JACKSON
Secretary

G°. WASHINGTON—Presidt.
and deputy from Virginia

New Hampshire	JOHN LANGDON NICHOLAS GILMAN
Massachusetts	NATHANIEL GORHAM RUFUS KING
Connecticut	WM SAML JOHNSON ROGER SHERMAN
New York	ALEXANDER HAMILTON
New Jersey	WIL: LIVINGSTON DAVID BREARLEY. WM PATTERSON. JONA: DAYTON
Pennsylvania	B FRANKLIN THOMAS MIFFLIN ROBT MORRIS GEO. CLYMER THOS FITZSIMONS JARED INGERSOL JAMES WILSON GOUV MORRIS

Delaware	GEO: READ GUNNING BEDFORD JUN JOHN DICKINSON RICHARD BASSETT JACO: BROOM
Maryland	JAMES MCHENRY DAN OF ST THOS JENIFER DANL CARROLL
Virginia	JOHN BLAIR— JAMES MADISON JR.
North Carolina	WM BLOUNT RICHD DOBBS SPAIGHT HU WILLIAMSON J. RUTLEDGE
South Carolina	CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER
Georgia	WILLIAM FEW ABR BALDWIN

In Convention Monday, September 17th 1787.
Present
The States of

New Hampshire, Massachusetts, Connecticut, MR Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

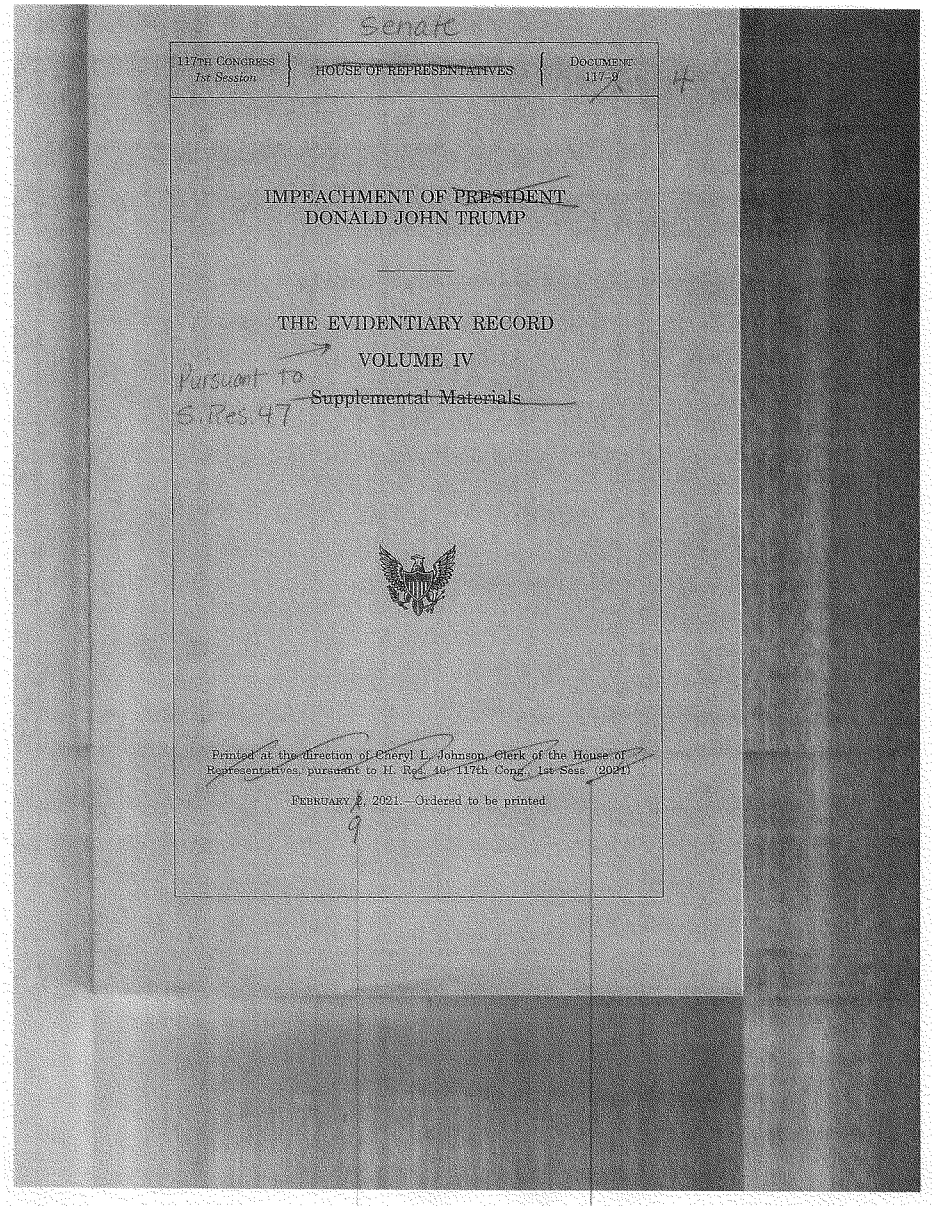
That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators

should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

Go: WASHINGTON—Presidt.

W. JACKSON Secretary.



Senate

117TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

DOCUMENT
117–9

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IMPEACHMENT OF PRESIDENT DONALD JOHN TRUMP

THE EVIDENTIARY RECORD

VOLUME IV

Supplemental Materials

Pursuant to S. Res. 47

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