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### January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule

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# January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule

Alan Z. Rozenshtein & Jed Handelsman Shugerman\*

37 CONSTITUTIONAL COMMENTARY (forthcoming 2023)

*A prosecution of Donald Trump for his role in the January 6 attack on the Capitol would have to address whether the First Amendment protects the inflammatory remarks he made at the “Stop the Steal” rally. A prosecution based solely on the content of Trump’s speech—whether for incitement, insurrection, or obstruction—would face serious constitutional difficulties under Brandenburg v. Ohio’s dual requirements of intent and likely imminence. But a prosecution need not rely solely on the content of Trump’s speech. It can also look to Trump’s actions: his order to the remove the magnetometers from the entrances to the rally and his repeated attempts to join the crowd at the Capitol.*

*This Article proposes a requirement of overt acts for the prosecution of ambiguously inciting speech. Trump’s overt acts offer a principled basis for criminal liability for Trump’s speech, while preserving Brandenburg’s prophylactic approach to protecting against the overcriminalization of speech. The prosecutorial use of overt acts also accords with historical practice going back to the Founding, when the Framers, influenced by prerevolutionary English practice, required evidence of overt acts for the most serious of crimes: treason. In an age of increasing political polarization and violence, drawing a line between permitted and prohibited by our political officials is of the utmost importance. This essay is an attempt to make that line clearer.*

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**Introduction**

The January 6 attack on the Capitol was the most serious attack on American democracy since the Civil War. At his “Stop the Steal” rally before the armed crowd stormed the Capitol, Donald Trump gave a speech urging the crowd to “fight like hell” against a stolen election and march to the Capitol, where Congress was preparing to certify the electoral college vote. In an unprecedented step, the House Select Committee to Investigate the January 6th Attack on the United States Capitol (January 6 Committee) officially referred Donald Trump to the Department of Justice for criminal prosecution on obstruction of an official proceeding, conspiracy to defraud the United States, conspiracy to make a false statement, and, most seriously, incitement of insurrection.<sup>1</sup> Even among Trump’s many potential avenues of legal exposure stemming from his campaign to overturn the 2020 election,<sup>2</sup> his conduct at the rally properly is and will continue to be a main focus for the American people, as well as the Department of Justice.

However, a prosecution of Donald Trump for his conduct on January 6 raises difficult legal and policy issues, even beyond those that would attend any prosecution of the former president and the highest-profile 2024 Republican presidential candidate. For all of the inflammatory falsehoods that Trump’s speech contained, it was also ambiguous enough to plausibly

<sup>1</sup> H.R. REP. NO. 117-663, at 103–12 (2022) [hereinafter JANUARY 6 REPORT].

<sup>2</sup> Such conduct would include Trump’s pressure campaign against Vice President Mike Pence to reject pro-Biden electoral votes, the scheme to get state legislatures to overturn their election results, and Trump’s request to the Georgia Secretary of State to “find” votes.

be protected as core political speech by the First Amendment. A prosecution of heated metaphors and inflammatory rhetoric would set a dangerous precedent, especially with the risk of partisan and hindsight bias. Trump's speech exemplifies, with the highest stakes imaginable, the tension at the heart of a liberal society's commitment to free expression: how to protect the maximum amount of speech while still defending against attempts to use that speech to subvert the very liberal democratic order that defends it.

There is a small but growing legal literature evaluating Trump's speech under the First Amendment, and different scholars have come to different conclusions.<sup>3</sup> Federal District Judge Ahmed Mehta, the only judge to have squarely addressed the issue, concluded that Trump's speech itself was "plausibly words of incitement not protected by the First Amendment."<sup>4</sup> In its criminal referral, the January 6 Committee Report approvingly cited Judge Mehta's conclusion<sup>5</sup> and argued that Trump's speech, along with his later inflammatory tweets and refusal to speak out against the violence, were a sufficient basis for criminal prosecution.<sup>6</sup>

In our view, all of these analyses are incomplete, because they focus only on what Trump said, not what he also *did*. Those omissions are understandable, because it was not until the House January 6 Committee

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<sup>3</sup> Compare Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 WAKE FOREST L. REV. 971 (2022) (finding the *Brandenburg* test satisfied); Joshua Azriel & Jeff DeWitt, "We Fight like Hell": Applying the *Brandenburg* Test to Trump's Speech Surrounding the Siege at the U.S. Capital, 12 CRIM. L. PRAC. 23 (2022) (same); Jay Sterling Silver, *Thompson v. Trump: Lost in the Funhouse of Brandenburg*, 107 IOWA L. REV. Online 151 (2022) (same), and Brief of Amici Curiae Floyd Abrams, Erwin Chemerinsky, Martha Minow, and Lawrence H. Tribe in Support of the Plaintiffs at 4, *Thompson v. Trump*, 590 F. Supp. 3d 46 (D.D.C. 2022) (No. 31-1) (same), with Michael Conklin, *Capitol Offense: Is Donald Trump Guilty of Inciting a Riot at the Capitol?*, 15 U. ST. THOMAS J.L. & PUB. POL'Y 483 (2022) (finding the *Brandenburg* test not satisfied).

<sup>4</sup> *Thompson v. Trump*, 590 F. Supp. 3d 46 (D.D.C. 2022). Trump has appealed the ruling with respect to the denial of presidential immunity but not with respect to the First Amendment holding. His appeal is pending as of the publication of this Article, but the oral argument suggests that the D.C. Circuit is prepared to rule against him on the narrow grounds that his conduct constituted "arguable incitement" and was outside the scope of official immunity. Alan Z. Rozenshtein, *Extreme Facts Make Easy Law: D.C. Circuit Appears Ready to Issue a Narrow Ruling Against Civil Immunity for Donald Trump*, LAWFARE (Dec. 9, 2022).

<sup>5</sup> JANUARY 6 REPORT, *supra* note 1, at 109 & n.633.

<sup>6</sup> See *id.* at 109–11.

held public hearings did we learn about Trump's most troubling actions: Trump's order to remove the magnetometers that were preventing his armed supporters from joining the rally crowd; and Trump's attempts, as evidenced by Secret Service emails, to personally lead the mob at the Capitol. These actions were overt acts, separate but related to the speech itself and relevant to intent and imminence. Where the inciting nature of a political speech is ambiguous and implicit, evidence from additional overt acts can provide a principled basis for a prosecution, while protecting the First Amendment.

Recognizing that an overt act can be the key fact for establishing liability for speech that plausibly, though not definitively, incites lawlessness or violence not only clarifies an important doctrinal point, but it also surfaces a key historical continuity. For centuries English and American law has struggled with two overlapping concerns: how to criminalize concrete conspiracies but not mere loose talk; and how to criminalize treason, insurrection, and politically aimed incitement but not merely heated but protected political speech. For hundreds of years—and across the crimes of treason, conspiracy, and incitement—the law has rediscovered the same solution: requiring overt acts. For example, even before there was a Bill of Rights and a First Amendment, the Framers required two witnesses of the same overt act, as a matter of both process and substance, to limit politically motivated treason prosecutions.<sup>7</sup>

Similarly, we propose a rule requiring overt acts for the prosecution of ambiguously inciting speech. Specifically, we argue that in any prosecution—whether on a charge of incitement, insurrection, obstruction, seditious conspiracy, or the like—for which the underlying inculpatory act (*actus reus*) is political speech whose inciting character is ambiguous rather than definite, the government must demonstrate that the speaker took overt acts to further the offense. These overt acts must be probative of the speaker's intent to cause lawlessness and violence and designed to increase the imminent risk of such lawlessness and violence.

Although our formulation of this rule is novel, it is not a departure from the caselaw. Rather, it is an extension of the already prophylactic nature of *Brandenburg's* intent and imminent likelihood requirements, which provide more protections than are strictly required by the First Amendment so as to guard against the hindsight and confirmation bias that can lead to the overcriminalization of political speech, especially in politically charged domains where subjective biases pose a particular danger. While an overt-act requirement cannot fully address the “I know it

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<sup>7</sup> U.S. CONST. art. III, § 3, cl. 1.

when I see it” nature of incitement prosecutions, it provides meaningful additional protections against prosecutorial overreach.

Part I of this essay provides the factual background to the January 6 attack on the Capitol, as well as an overview of the main criminal charges that could apply to Trump’s incitement of the crowd. Part II outlines the First Amendment framework for when the government can punish public speech on the basis that it causes lawlessness and violence, and applies this framework to Trump’s “Stop the Steal” speech; it concludes that, under traditional First Amendment principles, Trump’s speech was ambiguous and that a prosecution of Trump on the basis of the speech in itself would raise both legal difficulties as well as set a concern precedent for the criminalization of political speech. Part III argues that additional evidence of overt acts can resolve the problem of criminalizing ambiguously inciting speech. It shows how overt act requirements were used in pre-revolutionary and Founding-era law to avoid over-criminalizing political speech, and that the “overt act” requirements are also a feature of modern criminal statutes, including the conspiracy and incitement statutes. It then demonstrates how Trump’s overt acts can allow for a prosecution that both satisfies constitutional requirements and offers a principled basis for distinguishing Trump’s conduct from “ordinary” inflammatory political speech.

Trump remains an active politician, and even once he leaves the political scene, copycats are likely to follow. In an age of increasing political polarization and violence, drawing a line between permitted and prohibited by our political officials is of the utmost importance. This essay is an attempt to make that line clearer.

## I. Background

### A. The Road to January 6

Donald Trump’s election denialism is longstanding.<sup>8</sup> As a political candidate, it goes as far back as 2016, when he accused Ted Cruz of “fraud” for

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<sup>8</sup> After the 2012 election, in which Barack Obama beat Mitt Romney, Trump argued that the election was a “total sham” and a “travesty” and that America was “not a democracy.” Terrance Smith, *Trump Has Longstanding History of Calling Elections “Rigged” If He Doesn’t Like the Results*, ABC News (Nov. 11, 2020). Trump has even argued that the Emmy Awards have “no credibility” because his show, “The Apprentice,” did not win. Daniel White, *Yes, Donald Trump Thought the Emmys Were Rigged Against Him*, YAHOO! NEWS (Oct. 19, 2016).

“stealing” the Iowa Republican caucus<sup>9</sup> and when, after he won the presidential election but lost the popular vote, he claimed that millions of people had illegally voted for Hillary Clinton.<sup>10</sup>

He continued to cast doubt on election integrity throughout his presidency, and he began his campaign to discredit the 2020 election as early as April 2020, when, after the start of the COVID-19 pandemic drew attention to mail-in ballots, Trump claimed that there was pervasive mail-in ballot fraud.<sup>11</sup> He refused to commit to accepting the election results<sup>12</sup> and suggested delaying the election.<sup>13</sup> At no point did he accept the possibility that he might lose in a free and fair election, at one point saying, “[G]et rid of the ballots . . . we’ll have a very peaceful—there won’t be a transfer, frankly; there’ll be a continuation.”<sup>14</sup> Indeed, according to Trump campaign manager Brad Parscale, Trump intended, as early as July, to declare victory on election night no matter the actual outcome.<sup>15</sup>

Trump has a history of publicly defending rightwing violence.<sup>16</sup> In the aftermath of the violent “Unite the Right Rally” in Charlottesville, in which one person was killed, Trump argued that “there is blame on both sides” and that there were “very fine people on both sides.”<sup>17</sup> During the protests

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<sup>9</sup> Maggie Haberman & Matt Flegenheimer, *Donald Trump Says Ted Cruz Stole Victory in Iowa Caucuses*, N.Y. TIMES (Feb. 3, 2016).

<sup>10</sup> Michael D. Shear & Maggie Haberman, *Trump Claims, With No Evidence, That “Millions of People” Voted Illegally*, N.Y. TIMES (Nov. 27, 2016).

<sup>11</sup> JANUARY 6 REPORT, *supra* note 1, at 201. Where possible, we cite to the January 6 Committee report, which we consider to be the most authoritative factual record available.

<sup>12</sup> *Id.* at 202.

<sup>13</sup> *Trump Defends “Delay the Election” Tweet, Even Though He Can’t Do It*, N.Y. TIMES (July 30, 2020).

<sup>14</sup> JANUARY 6 REPORT, *supra* note 1, at 202.

<sup>15</sup> Select Committee to Investigate the January 6th Attack on the United States Capitol, Oct. 13, 2022 (statement of Rep. Lofgren) [hereinafter January 6 Committee Hearing], *transcript available at* <https://perma.cc/Z79Z-CZYL>.

<sup>16</sup> *See* Katherine Shaw, *Impeachable Speech*, 70 EMORY L. J. 1, 58–59 (2020).

<sup>17</sup> Glenn Thrush & Maggie Haberman, *Trump Gives White Supremacists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017).

following George Floyd's murder, Trump tweeted a threat, "when the looting starts, the shooting starts."<sup>18</sup>

During the 2020 presidential debates, Trump, asked whether he condemned white supremacist groups including the Proud Boys, said "stand back and stand by," a comment that was taken by the Proud Boys, who later played a major role in the attack on the Capitol, as a high-profile show of support.<sup>19</sup>

On election night Trump declared victory despite being urged by numerous members of his campaign, including his daughter Ivanka, that it was too early to do so.<sup>20</sup> Later that night he accused the Biden campaign of voter fraud, tweeting "We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Polls are closed!"<sup>21</sup> At a press briefing two days after the election, he repeated his claims of a stolen election: "If you count the legal votes, I easily win. If you count the illegal votes, they can try to steal the election from us."<sup>22</sup>

After the major news organizations announced that Joe Biden had won the 2020 election, Trump refused to concede, despite being repeatedly informed by his aides that he had in fact lost. He publicly accused the Biden campaign of relying on "fraudulent."<sup>23</sup> In private, he told his aides, "I'm just not going to leave. We're never leaving. How can you leave when you won an election."<sup>24</sup>

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<sup>18</sup> Donald Trump (@realDonaldTrump), Twitter (May 28, 2020, 11:53 PM). Trump was repeating a phrase from a Miami police chief in the 1960s who, describing crackdowns on "hoodlums" in black neighborhoods who had "taken advantage of the civil rights campaign," threatened, "We don't mind being accused of police brutality." Maggie Haberman & Alexander Burns, *Trump's Looting and 'Shooting' Remarks Escalate Crisis in Minneapolis*, N.Y. TIMES (May 29, 2020).

<sup>19</sup> JANUARY 6 REPORT, *supra* note 1, at 507; Natalie Reneau, Stella Cooper, Alan Feuer & Aaron Byrd, *Proud Boys Led Major Breaches of Capitol on Jan. 6, Video Investigation Finds*, N.Y. TIMES (June 17, 2022).

<sup>20</sup> JANUARY 6 REPORT, *supra* note 1, at 195–96; Michael D. Shear & Maggie Haberman, *The Fractious Night That Began Trump's Bid to Overturn the Election*, N.Y. TIMES (June 13, 2022).

<sup>21</sup> Donald Trump (@realDonaldTrump), TWITTER (Nov. 4, 2020, 12:49 AM).

<sup>22</sup> Jill Colvin & Zeke Miller, *Trump Steps to Podium, Baselessly Attacks Election*, AP (Nov. 5, 2020).

<sup>23</sup> JANUARY 6 REPORT, *supra* note 1, at 226.

<sup>24</sup> MAGGIE HABERMAN, *CONFIDENCE MAN: THE MAKING OF DONALD TRUMP AND THE BREAKING OF AMERICA 196* (2022).



Before the election and throughout the transition period, numerous Trump administration and campaign officials declared publicly and told Trump privately that there was no evidence of systematic election fraud. Christopher Krebs, the director of the Cybersecurity and Infrastructure Security Agency, called the election “the most secure in American history,” a statement for which Trump later fired him.<sup>25</sup> FBI Director Christopher Wray testified before Congress that the FBI had “not seen, historically, any kind of coordinated national voter fraud effort in a major election, whether it’s by mail or otherwise.”<sup>26</sup> Attorney General Bill Barr not only stated publicly that there was no evidence of widespread fraud,<sup>27</sup> but he even told Trump privately that such claims were “bullshit.”<sup>28</sup> At times, Trump appeared to privately concede that he had in fact lost the election, one time telling White House aide Alyssa Farah Griffin, “Can you believe I lost to this [f-ing] guy?”<sup>29</sup> And after the Supreme Court rejected legal challenges to the election, Trump told Mark Meadows, his chief of staff, that his election loss was “embarrassing” and that “I don’t want people to know that we lost.”<sup>30</sup>

As January 6 neared, Trump pursued multiple avenues to reverse the election result. Some of these were through the courts, where his attorneys, including Rudy Giuliani and Sidney Powell pursued increasingly outlandish theories that were uniformly rejected. Others involved radical extra-judicial options. For example, in one White House meeting, Trump raised an idea, earlier floated by former National Security Advisor Michael Flynn on the conservative Newsmax channel, about imposing martial law and having the military rerun the election.<sup>31</sup> (The month before, Trump

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<sup>25</sup> David E. Sanger & Nicole Perlroth, *Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims*, N.Y. TIMES (Nov. 17, 2020).

<sup>26</sup> Devlin Barrett, *FBI Director Says Widespread Mail Ballot Interference Would Be a “Major Challenge” for Foreign Agents*, WASH. POST (Sept. 24, 2020).

<sup>27</sup> Matt Zapotosky, Devlin Barrett & Josh Dawsey, *Barr Says He Hasn’t Seen Fraud That Could Affect the Election Outcome*, WASH. POST (Dec. 1, 2020).

<sup>28</sup> JANUARY 6 REPORT, *supra* note 1, at 220.

<sup>29</sup> January 6 Committee Hearing, *supra* note 15 (statement of Rep. Kinzinger).

<sup>30</sup> JANUARY 6 REPORT, *supra* note 1, at 20.

<sup>31</sup> Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. TIMES (Dec. 19, 2020); *see also* JANUARY 6 REPORT, *supra* note 1, at 730.

had fired Defense Secretary Mike Esper, who had publicly opposed Trump's idea to use active-duty troops to quell protests.)<sup>32</sup>

Some of the schemes to reverse the election have become the basis for criminal investigations at the federal and state level. For example, in a phone call to Georgia Secretary of State Brad Raffensperger, Trump asked Raffensperger to "find" the 11,780 votes he would need to win Georgia.<sup>33</sup> Trump also supported a plan developed by legal scholar and informal Trump advisor John Eastman for Vice President Mike Pence to reject electoral college votes.<sup>34</sup> And he plotted with Jeffrey Clark, the head of the Department of Justice's Environmental and Natural Resources Division, to install Clark as acting Attorney General, at which point Clark would work to overturn Georgia's election results.<sup>35</sup>

On December 19, Trump first told his supporters to come to Washington on January 6, the day that Congress was due to certify the electoral college vote and officially declare Joe Biden the winner of the 2020 presidential election. He tweeted, "Big protest in D.C. on January 6th. Be there, will be wild!"<sup>36</sup> At this point, multiple protests against the 2020 election had occurred around the country, including two "Million MAGA Marches" in November and December in Washington, D.C. that turned violent.<sup>37</sup> Trump repeatedly tweeted his support for these rallies.<sup>38</sup>

As January 6 approached, the White House received intelligence about the danger of the crowd. For example, according to General Mark Milley, Chairman of the Joint Chiefs of Staff, in early January Deputy Secretary of Defense David Norquist told staff on the National Security Council that "the greatest threat [from the protest was] a direct assault on the Capitol."<sup>39</sup> The Secret Service in particular had multiple sources of intelligence

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<sup>32</sup> Helene Cooper, Eric Schmitt & Maggie Haberman, *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. TIMES (Nov. 9, 2020).

<sup>33</sup> JANUARY 6 REPORT, *supra* note 1, at 44.

<sup>34</sup> *Id.* at 428.

<sup>35</sup> *Id.* at 104.

<sup>36</sup> *Id.* at 499.

<sup>37</sup> *Id.* at 505–06.

<sup>38</sup> *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Nov. 14, 2020, 3:07 PM); Donald Trump (@realDonaldTrump), TWITTER (Dec. 12, 8:47 AM).

<sup>39</sup> January 6 Committee Hearing, *supra* note 15 (statement of Rep. Schiff).

regarding the crowd's dangerousness and potential plans to attack the Capitol.<sup>40</sup>

Cassidy Hutchinson, a top former aide to Trump chief of staff Meadows, testified that, on the morning of January 6, Anthony Ornato, who had been the head of Trump's security detail and was then serving as deputy chief of staff, told her and Meadows that he told Trump that the crowd was armed with knives, guns, and other weapons, and was "fastening spears to the end of flagpoles."<sup>41</sup> In a letter responding to the January 6 Committee's subpoena, Trump (unwittingly) conceded that he had foreseen danger on the day, claiming that he had "recommended and authorized thousands of troops to be deployed to ensure that there was peace, safety, and security at the Capitol and throughout Washington, D.C. on January 6th."<sup>42</sup>

When he began his speech, Trump expressed displeasure that the crowd was kept back from the stage where he was speaking: "And I'd love to have, if those tens of thousands of people would be allowed, the military, the Secret Service—and we want to thank you, and the police, law enforcement, great. You're doing a great job. But I'd love it if they could be allowed to come up here with us. Is that possible? Can you just let them come up, please?"<sup>43</sup> Indeed, before he went on stage, he expressed the same sentiments, but this time in the form of an order. Hutchinson testified that Trump, angry that the magnetometers were keeping armed members of the crowd at a distance from the stage, said, "I don't [fucking] care that they have weapons. They're not here to hurt me. Take the [fucking] mags away. Let my people in. They can march to the Capitol from here. Let the people in. Take that [fucking] mags away."<sup>44</sup>

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<sup>40</sup> JANUARY 6 REPORT, *supra* note 1, at 61.

<sup>41</sup> Catie Edmondson, *A Timeline of the Key Scenes in Cassidy Hutchinson's Jan. 6 Testimony*, N.Y. TIMES (June 28, 2022); *see also* JANUARY 6 REPORT, *supra* note 1, at 67.

<sup>42</sup> Trump's explanation was that he "knew, based on instinct and what I was hearing, that the crowd coming to listen to my speech, and various others, would be a very big one, far bigger than anyone thought possible." The letter did not specify that he knew the crowd would be armed and violent, but he nevertheless conceded that he had foreseen a dangerous situation. Letter from Donald J. Trump to the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol (Oct. 13, 2022) [hereinafter Trump Letter], available at <https://www.lawfareblog.com/trump-responds-jan-6-committee-subpoena>.

<sup>43</sup> *See Transcript of Trump's Speech at Rally Before US Capitol Riot*, AP (Jan. 13, 2021).

<sup>44</sup> JANUARY 6 REPORT, *supra* note 1, at 585.

Trump spoke for 75 minutes, focusing on his allegations that the election was stolen. He claimed that Vice President Pence could reverse the election results.<sup>45</sup> Near the beginning of the speech he remarked approvingly of the crowd's plan to "march[] over to the Capitol building to peacefully and patriotically make your voices heard." Later in the speech his rhetoric took a more confrontational turn. He told the crowd, "The Republicans have to get tougher," and, "When you catch somebody in a fraud, you're allowed to go by very different rules." He used the word "fight" nearly two dozen times, the final time saying, "And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."

After Trump finished the speech, thousands of members of the audience marched from the Ellipse to the Capitol, where some of Trump's supporters, including members of the Proud Boys, had begun to breach the Capitol's outer perimeter. As the crowd grew, it overwhelmed the Capitol police and ultimately breached the building itself, sending the assembled officials into hiding and delaying the certification by several hours. The crowd vandalized the Capitol, smearing feces on the wall and chanting "Hang Mike Pence." At least seven people died in connection with the attack.<sup>46</sup>

According to the testimony of Hutchinson and others, as Trump's motorcade drove from the Ellipse back to the White House, he demanded it reroute to the Capitol. When the Secret Service refused, Trump got angry and, according to some accounts, lunged at the steering wheel and had to be restrained. Even after he returned to the White House, Trump apparently still wanted to go the Capitol and Secret Service agents were initially directed to don their protective gear and prepare for an "off the record movement to the Capitol." Press Secretary Kayleigh McEnany testified that she heard Trump "saying that he wanted to physically walk and be a part of the march, and then saying that he would ride the Beast if he needed to, ride in the Presidential limo."<sup>47</sup>

Once at the White House, Trump watched news reports of the riots, ignoring entreaties from aids and family members to make a public statement telling the rioters to leave. Hutchinson testified that Meadows said that Trump, when told of the crowd's chants to kill the Vice President,

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<sup>45</sup> "All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people."

<sup>46</sup> Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022).

<sup>47</sup> JANUARY 6 REPORT, *supra* note 1, at 75.

“thinks Mike deserves it. He doesn’t think they’re doing anything wrong.”<sup>48</sup> Further feeding the mob’s anger against Pence, Trump tweeted during the attack, “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution.”

In the following hour he sent two tweets urging “no violence” and for the crowd to “stay peaceful.”<sup>49</sup> Trump later tweeted an unscripted video to his supporters, in which he repeated his claims of a “stolen” election but that “you have to go home now. We have to have peace.” He added, “We love you. You’re very special.”<sup>50</sup> Later that evening he tweeted, “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!”<sup>51</sup>

## **B. Applicable Statutes**

At least three categories of crimes could plausibly apply to Donald Trump’s conduct regarding the January 6 attack: incitement to riot, fraud and obstruction of justice, and insurrection and seditious conspiracy. In this section, we describe the applicable law and suggest how the facts of January 6 might map on to them.<sup>52</sup> It is important to establish a *prima facie* case that Trump’s alleged conduct falls within the statute; otherwise there would be no opportunity to address his First Amendment defense.

The first applicable charge, incitement to riot, is criminalized in 18 U.S.C. § 2101, which applies to anyone who, with intent to “incite a riot” or “organize, promote, [or] encourage . . . a riot . . . performs or attempts to perform any other overt act” to incite, organize, etc., a riot. The definition of “riot” includes “a public disturbance involving . . . an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or

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<sup>48</sup> *Id.* at 89.

<sup>49</sup> *Id.* at 90

<sup>50</sup> *Id.* at 606.

<sup>51</sup> *Id.* at 93.

<sup>52</sup> Because we limit our analysis to the attack on the Capitol, we do not address other bases for criminal liability stemming from the 2020 election, including based on Trump’s pressuring Vice President Mike Pence to reject electoral college votes or Trump’s pressuring of Georgia Secretary of State Brad Raffensperger to “find 11,780 votes.” Other ongoing criminal investigations of the former president, notably the investigation into Trump’s retention of documents at his Mar-a-Lago residence, are similarly out of scope for our analysis.

shall result in, damage or injury to the property of any other person or to the person of any other individual.”<sup>53</sup> The statute covers “urging or instigating other persons to riot” but does not apply to “mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.”<sup>54</sup>

Several courts have found parts of the incitement-to-riot statute to violate the First Amendment. For example, the Fourth Circuit struck down those parts of the statute that criminalize encouraging, promoting, and urging a riot.<sup>55</sup> The Ninth Circuit went one step further, also striking down the organization prong.<sup>56</sup> But both Circuits upheld those parts of the statute that punish incitement to riot, thus bringing the statute in line with the First Amendment protections articulated in *Brandenburg v. Ohio*<sup>57</sup> and its progeny. (We address in detail below how Trump’s conduct would satisfy the *Brandenburg* test.)

The second category of offenses address attempts to interfere with government function, whether or not by force. The obstruction statute, 18 U.S.C. § 1512(c)(2), applies to anyone who “corruptly obstructs, influences, or impedes any official proceeding, or attempts to do so.”<sup>58</sup> The mens rea requirement of corrupt intent could be established by evidence that Trump knew that he had actually lost the 2020 election and that the crowd that gathered on January 6 was armed and potentially dangerous. And courts have uniformly recognized that the electoral college certification is an “official proceeding.”<sup>59</sup>

The fraud-on-the-government statute, 18 U.S.C. § 371, applies if “two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the

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<sup>53</sup> 18 U.S.C. § 2102(a).

<sup>54</sup> *Id.* at 2102(b).

<sup>55</sup> *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020).

<sup>56</sup> *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021).

<sup>57</sup> 395 U.S. 444 (1969) (per curiam).

<sup>58</sup> Subsection (c)(2) is preceded by (c)(1), which addresses “records” and “documents.” An appeal is pending before the D.C. Circuit as to whether (c)(2) should similarly be limited to offenses regarding document availability. *United States v. Fischer*, No. 22-3038 (D.C. Cir. argued Dec. 12, 2022).

<sup>59</sup> Teri Kanefield, *Jan. 6 Defendants Are Raising a Creative Defense. It Isn’t Working*, WASH. POST (Feb. 15, 2022).

conspiracy”<sup>60</sup> Sometimes called a *Klein* conspiracy after an important case that interpreted the statute,<sup>61</sup> the “very broad provision” punishes conspiracies to “obstruct[] the operation of any government agency by any deceit, craft or trickery, or at least by means that are dishonest.”<sup>62</sup> With respect to the substantive provision of the statute, prosecutors could allege that Trump’s repeated falsehoods about the 2020 election, which were the centerpiece of his speech, were the dishonest means to obstruct the certification of the electoral college vote. And with respect to the conspiracy requirement, they could point to Trump’s coordination with others, including fellow rally speakers and 2020-deniers Rudy Giuliani and John Eastman, to whip up the crowd and put pressure on Vice President Mike Pence.

The third category of crimes address anti-government uses of force. The insurrection statute, 18 U.S.C. § 2383, applies to “[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto.” The seditious-conspiracy statute, 18 U.S.C. § 2384, punishes conspiracies “to [1] overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to [2] oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof.”

Section 2383 was enacted as part of the Second Confiscation Act, which was aimed at the Civil War secessionists. Section 2384 was enacted as part of the Enforcement Act of 1871, also known as the Ku Klux Klan Act, which was meant to combat violent southern resistance to postwar reconstruction. As Mark Graber has explained, the Congress that criminalized these anti-government offenses drew on the English common law crime of treason, which was broadly defined as encompassing “any organized resistance to governmental authority” where such resistance was undertaken for a “for a public purpose”—i.e., not primarily for personal advantage, but out of a belief that the law was “oppressive or unconstitutional.”<sup>63</sup>

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<sup>60</sup> See generally Gretchen C. F. Shappert & Christopher J. Costantini, *Klein Conspiracy: Conspiracy to Defraud the United States*, U.S. ATT’YS BULL., July 2013, at 1.

<sup>61</sup> *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957).

<sup>62</sup> *United States v. Caldwell*, 989 F.2d 1056, 1058 (9th Cir. 1993) (cleaned up).

<sup>63</sup> Mark A. Graber, *Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021*, LAWFARE (Sept. 6, 2022).

This background understanding is important not only to define terms such as “rebellion,” “treason,” or “war” against the United States, but also to limit the open-ended nature of the second half of the seditious conspiracy statute, which, read literally, would otherwise extend to all conspiracies under federal law (to the extent that all criminal activity implicitly seeks to prevent, hinder, or delay the enforcement of the relevant criminal prohibition).

Thus, for example, the Supreme Court has interpreted the seditious conspiracy statute as requiring that force be used “against the government *as a government*” such that “force must be brought to resist some positive assertion of authority by the government.”<sup>64</sup> And later courts have held that “the purpose of the conspiracy was the exertion of force against those charged with the duty of executing the laws of the United States.”<sup>65</sup> The anti-governmental purpose is an important limit on the statute, because it excludes uses of force against the government whose primary purpose is the commission of the underlying offense; for example, a bank robber who shoots at federal agents to evade capture is guilty of many crimes, but not the crime of seditious conspiracy.

Trump might be tempted to seize on the public-purpose requirement, which is vital to put reasonable limits on sections 2383 and 2384, as a defense to prosecution, on the grounds that his actions were taken for a *private* purpose, *i.e.*, retaining political power. This argument should be rejected, however, for two reasons. First, it leads to the absurd result that, while those who support the coup would be liable for rebellion, insurrection, and seditious conspiracy, the leader of the coup could evade responsibility because the leader would personally benefit. And second, even if Trump’s motives were private, rather than public, regarding, his actions nonetheless helped others commit insurrection, rebellion, and seditious conspiracy.

## II. Trump’s Speech and The First Amendment

### A. The *Brandenburg* Framework

The First Amendment doctrine regarding incitement is articulated in three Supreme Court cases: *Brandenburg v. Ohio*,<sup>66</sup> *Hess v. Indiana*,<sup>67</sup>

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<sup>64</sup> *Baldwin v. Franks*, 120 U.S. 678, 693 (1887) (emphasis added).

<sup>65</sup> *Anderson v. United States*, 273 F. 20, 26 (8th Cir. 1921).

<sup>66</sup> 395 U.S. 444 (1969) (per curiam).

<sup>67</sup> 414 U.S. 105 (1973) (per curiam).



and, most relevant to the facts of January 6, *NAACP v. Claiborne Hardware Co.*<sup>68</sup>

In *Brandenburg*, the defendant, a leader of a KKK group, was convicted under a state “criminal syndicalism” statute, which punished “advocacy” or “justification” of using violence to accomplish social change. During a KKK rally held on a farm, in which the only outside participants were an invited TV report and cameraman, Brandenburg made derogatory statements about Jews and Black people, suggested that “revengeance” might need to be taken, and announced a planned march on Congress on the next Fourth of July. In striking down the statute, the Court held 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.”<sup>69</sup> It also articulated what has come to be known as the *Brandenburg* test: “the constitutional guarantees of free speech and free press do not permit a State 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.”<sup>70</sup>

In *Hess*, the Court applied *Brandenburg* to the case of a defendant convicted under a state disorderly conduct statute. Hess was a member of an antiwar demonstration that blocked a street. After police removed the demonstrators from the street, Hess said words to the effect of “We’ll take the fucking street later.” The Court noted that “Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.”<sup>71</sup> On this basis the Court, citing *Brandenburg*, held that Hess’s conduct could not be criminalized because “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.”<sup>72</sup>

In *Claiborne Hardware*, the decision that arguably bears the closest similarities to January 6, the Supreme Court addressed a civil suit stemming from a boycott organized by NAACP against white merchants in a Mississippi county. At several gathering, Charles Evers, the local NAACP leader, made threatening statements regarding Black boycott violators—in

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<sup>68</sup> 458 U.S. 886 (1982).

<sup>69</sup> *Brandenburg*, 395 U.S. at 448 (cleaned up).

<sup>70</sup> *Id.* at 447.

<sup>71</sup> *Hess*, 414 U.S. at 107.

<sup>72</sup> *Id.* at 108.

one speech saying that violators would be “disciplined’ by their own people and warn[ing] that the Sheriff could not sleep with boycott violators at night,” and in another speech saying, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”<sup>73</sup> The Court held that Evers could not be subject to civil liability for loss of business due to these statements even though, “in the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline.”<sup>74</sup>

The key lesson from these cases is that “mere abstract teaching” is different than “preparing a group for violent action.”<sup>75</sup> In other words, the likely imminence prong of *Brandenburg* is best understood as a spectrum between two poles. On one end are cases like *Brandenburg* itself, where the speech advocates for violence or lawlessness in some general, indefinite way. The Supreme Court has used different formulations for these types of cases<sup>76</sup>— including “theoretical advocacy”<sup>77</sup> and advocacy of “principled divorced from action”<sup>78</sup>—but the general idea is the same: the more general the discussion and exhortation to violence and illegality, the less likely the speech can be prosecuted.

On the other end of the spectrum are cases where the speech is closely tied to specific acts. In some cases this is because the speech provides detailed instruction and encouragement; thus courts have upheld convictions for individuals who provide “detailed instructions and techniques to avoid paying taxes,”<sup>79</sup> recipes for illegal drugs,<sup>80</sup> or manuals on how to assassinate people.<sup>81</sup> In other cases the courts have held that the speech is part of the lawlessness itself, as in the case of blackmail or extortion, in which case courts deny First Amendment protections on the grounds that the speech was “integral to crime.” Where courts have found that even crime-

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<sup>73</sup> *Claiborne Hardware*, 458 U.S. at 902.

<sup>74</sup> *Id.* at 927.

<sup>75</sup> *Brandenburg*, 395 U.S. at 448.

<sup>76</sup> *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 249 (4th Cir. 1997).

<sup>77</sup> *Scales v. United States.*, 367 U.S. 203, 235 (1961).

<sup>78</sup> *Yates v. United States*, 354 U.S. 298, 320 (1957).

<sup>79</sup> *United States v. Bell*, 414 F.3d 474, 483 (3d Cir. 2005).

<sup>80</sup> *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982).

<sup>81</sup> *Rice*, 128 F.3d at 249.

facilitating speech is protected under *Brandenburg*, it is generally because of the lack of imminence.<sup>82</sup>

Importantly, the limitations that the *Brandenburg* doctrine imposes on prosecuting incitement to riot applies to extensions from this core case. Incitement to insurrection is a very particular kind of inciting riot—both more serious and more plausibly political. And if political speech is the basis for an obstruction of justice charge, the same problems arise. Thus, any additional safeguards (like an overt act requirement) that apply to an incitement-to-riot charge should also be required for insurrection, sedition, and obstruction charges brought on the basis of speech.

*Brandenburg* and its progeny, although iconic, are extremely difficult to apply with certainty, even as compared to other constitutional tests, for several reasons.

First, *Brandenburg* and *Hess* were both brief *per curiam* decisions, and even *Claiborne Hardware*'s discussion of the First Amendment issue is sparse; none of the cases provide anything like a robust theoretical account of the *Brandenburg* doctrine.

Second, the Supreme Court has not squarely applied *Brandenburg* in the four decades since *Claiborne Hardware*, and litigants are thus left to parse the same small set of somewhat cryptic doctrinal formulations.

Third, the *Brandenburg* factors are highly fact-specific and subject to different interpretations,<sup>83</sup> leading some commentators to hold that the test is “totally contextual, giving little guidance to either the speaker or the official censor who must predict the impact of the expression.”<sup>84</sup>

Fourth, the *Brandenburg* requirements are a kind of constitutional prophylaxis, erring on the side of overprotecting speech that has no First Amendment value so as to lower the risk of criminalizing legitimate political speech. This prophylactic overprotection is justified, as Paul Horwitz has explained, because of the “standard and predictable cognitive illusions,” like hindsight and availability bias, “that are likely to distort the

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<sup>82</sup> See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1130 & n.141 (2005) (collecting cases and noting that “even intentionally crime-facilitating speech is protected if it isn’t intended to and likely to incite *imminent* crime”).

<sup>83</sup> For example, in *Hess*, three justices dissented on the grounds that “[s]urely the sentence ‘We’ll take the fucking street later (or again)’ is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd.” *Hess*, 414 U.S. at 111 (Rehnquist, J., dissenting).

<sup>84</sup> Marc Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 65 (2002) (quoting Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 19).

factfinder's analysis of the risk of illegal advocacy."<sup>85</sup> Prophylactic rules, although valuable, frequently magnify legal imprecision, because they add a standard—the level of necessary prophylaxis—to the already fuzzy contours of the substantive constitutional value at issue.

Fifth, and most fundamentally, despite occasional claims that *Brandenburg* is a categorical rule,<sup>86</sup> it is best understood as a balancing test between two clusters of values, both of which are of the highest order.<sup>87</sup> One cluster is the basic rule-of-law and public-safety interests in avoiding law-breaking and violence. The other cluster are the values of political speech, which lie at the very core of the First Amendment.<sup>88</sup> Strong protections for such speech serve not only to promote the free exchange of valuable political communication, but they also serve the anti-authoritarian aim of making it difficult for the government to suppress political opposition. *Brandenburg* cases are thus both high stakes and particularly subject to disagreement based on competing priors as to how to balance the values at

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<sup>85</sup> Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 *TEMPLE L. REV.* 1, 44 (2003); see also Anuj C. Desai, *Attacking Brandenburg With History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?*, 55 *FED. COMM. L.J.* 353, 385 (2003) (book review) (“*Brandenburg* can be seen as a prophylactic rule to prohibit government from using a long-term harm rationale to suppress speech based on the government’s view of truth.”).

<sup>86</sup> Jed Rubenfeld, *The First Amendment’s Purpose*, 53 *STAN. L. REV.* 767, 829 (2001) (“Despite appearances, the *Brandenburg* test cannot be understood as a balancing test.”).

<sup>87</sup> As Christina Wells argues, “[T]he *Brandenburg* standard is a balancing test requiring the Court to weigh the likelihood and magnitude of harm against the right to free expression,” albeit one that is “weighted” in that it “heavily favors speech in the absence of concrete evidence of intentional and likely imminent harm.” Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 *CASE WES. L. REV.* 1, 47–48 (2000).

<sup>88</sup> See, e.g., *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). Thus, Kent Greenawalt distinguishes between “public” speech that includes “ideological” exhortation, rather than “private” speech that encourages lawbreaking for only a “nonideological,” arguing that the former deserves *Brandenburg*’s stringent protections because it includes “serious reference to duty, right, overall welfare, or some historical, philosophical, political, or religious view that would make the crime appropriate.” KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 260–62 (1989).

stake and differing predictions as to long-run costs and benefits of any particular setting of the relevant legal thresholds.

## B. The Ambiguity of Trump's Speech

Trump's speech exemplifies all the difficulties of applying *Brandenburg*. Within the meandering 75-minute rant, it is easy to point to features of the speech on either side of the *Brandenburg* test.

For example, a threshold question is whether Trump's words advocated lawless action at all. One approach would be to consider his words outside the broader context of the speech, in which case Trump could argue that even his most inflammatory remarks—"Because you'll never take back our country with weakness. You have to show strength and you have to be strong . . . . And we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."—were simply exhortations for social and political mobilization, not violence and lawbreaking.<sup>89</sup>

Indeed, this sort of narrow approach was adopted by the Sixth Circuit in an earlier case alleging Trump of inciting violence. In *Nwanguma v. Trump*,<sup>90</sup> several protesters who were forcibly ejected from a Trump campaign rally after Trump told the crowd to "Get 'em out of here" brought suit against Trump, including for incitement to riot. In rejecting this claim, the Court argued that Trump's words "did not specifically advocate for listeners to take unlawful action" and thus were protected under the First Amendment, even if they had a "tendency to encourage unlawful use of force."<sup>91</sup>

However, other articulations of *Brandenburg* leave more room for context and speech that is, on its face, ambiguous as to its advocacy for immediate lawless action. David Crump has articulated a version of *Brandenburg* that can address "camouflaged incitement": The "borderland . . . in which clever speakers can hide, with form, the substance of what they say."<sup>92</sup> Crump would thus expressly consider "the context, including the medium,

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<sup>89</sup> Cf. Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 S. CT. REV. 209, 240 (characterizing *Brandenburg* as requiring "express advocacy of law violation").

<sup>90</sup> 903 F.3d 604 (6th Cir. 2018).

<sup>91</sup> *Id.* at 610.

<sup>92</sup> David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1 (1994). To illustrate, Crump offers the famous example of Marc Antony's disingenuous claim to "come to bury Caesar, not to praise him," *id.* at 1 (quoting William Shakespeare, *Julius Caesar* act 3, sc. 2.).

the audience, and the surrounding communications” to determine whether the speech at issue constituted camouflaged incitement and was thus not protected by the First Amendment.<sup>93</sup>

Even scholars who favor a speech-protective approach to *Brandenburg* recognize the possibility of indirect incitement. Thus, Martin Redish, one of the leading theorists of the First Amendment, observed:

Drawing a line between direct and indirect advocacy does not have the effect of totally preventing suppression of indirect advocacy. It is easy to imagine circumstances in which assertions of fact or opinion that do not advocate illegal conduct are sufficiently likely to cause immediate harm that society is justified in suppressing them in order to protect itself. To shout, “the man in that jail tortured and killed my mother” in front of an unruly mob outside a jail is a classic example.<sup>94</sup>

But Redish also cautions against over relying on context: “But only such truly exceptional circumstances, in which listeners’ reactions are easily predictable, should justify upholding suppression of a statement which does not on its face urge unlawful conduct.”<sup>95</sup> The question is whether urging a crowd to march on the Capitol to “fight” a “rigged” election is the sort of indirect advocacy that is unprotected by the First Amendment.

The only court to have directly addressed the question of whether Trump’s speech on January 6 was protected by the First Amendment adopted something like Crump’s approach, concluding that the speech was unprotected. After carefully parsing the language of the speech, Judge Amit Mehta of the District Court for the District of Columbia conceded that Trump “did not explicitly encourage the imminent use of violence or lawless action,” but he held that, given Trump’s long campaign of discrediting the 2020 election, the “import of the language” and the “rational inferences” from it could plausibly be intercepted as encouraging the attack on the Capitol.<sup>96</sup>

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<sup>93</sup> *Id.* at 56.

<sup>94</sup> MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 188 (1984). *Cf.* *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010) (“[T]hat a request for criminal action is coded or implicit does not change its characterization as a solicitation.”).

<sup>95</sup> *See* REDISH, *supra* note 94, at 188.

<sup>96</sup> *Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022). This point comes from *Hess*’s reference to “rational inference from the import of the language.” *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam).

Another difficulty with establishing the inciting nature of Trump's speech is that contained both highly inflammatory remarks as well as calls for the crowd to march to the Capitol "to peacefully and patriotically make your voices heard."<sup>97</sup> Thus, in *Nwanguma*, the Sixth Circuit emphasized that "the very *possibility*" of implied violence in Trump's calls to "get 'em [the protesters] out of here" was nemacsegated by Trump's "admonition, 'Don't hurt 'em.'"<sup>98</sup>

Whether a disclaimer should be dispositive or instead should be understood as "camouflaged incitement"<sup>99</sup> is another open question. Thus, the concurring judge in *Nwanguma* criticized the majority for "overemphasiz[ing] the legal significance of the "don't hurt 'em" statement."<sup>100</sup> Similarly, Judge Mehta in *Thompson* held that, "although Trump's scattered suggests of peaceful protest are clearly relevant," they do not "inoculate him against the conclusion that his exhortation, made nearly an hour later, to 'fight like hell' immediately before sending rally-goers to the Capitol, within the context of the larger Speech and circumstances, was not protected expression."<sup>101</sup>

Additional relevant factors in Trump's case can similarly be used both to argue for and against First Amendment protections for the speech. Unlike in *Hess*, where the call for action was for some indefinite point in the future, Trump directed his followers to "fight" and "march" on the Capitol immediately after the speech, which they did. Imminence is an important factor in satisfying the *Brandenburg* requirement because it is part of the substantive justification for criminalizing speech: "The standard justification for inchoate crimes is that they are crimes of prevention, designed for circumstances in which the offense is impending, and there is not sufficient time to expose 'falsehoods and fallacies' in the marketplace of ideas,

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<sup>97</sup> Indeed, in a response to the January 6 Committee's October 13, 2022 session, which ended with a unanimous vote to subpoena Trump's testimony, Trump pointedly included "PEACEFULLY AND PATRIOTICALLY" at the very top of the first page. Ironically, the same letter concedes (perhaps unwittingly) that Trump foresaw the danger presented from such a large crowd. See Trump Letter, *supra* note 42, and accompanying text.

<sup>98</sup> *Nwanguma v. Trump*, 903 F.3d 604, 608 (6th Cir. 2018).

<sup>99</sup> Crump, *supra* note 92, at 66.

<sup>100</sup> *Nwanguma*, 903 F.3d at 614 (White, J., concurring).

<sup>101</sup> *Thompson*, 590 F. Supp. 3d at 117.

or to allow deliberation on the part of the listener, or give police enough time to take appropriate measures.”<sup>102</sup>

In addition, the threat of violence was not hypothetical, but in fact occurred, a fact that the Supreme Court held to be relevant in *Claiborne Hardware*: “If [the] language had been followed by acts of violence, a substantial question would be presented whether [the speaker] could be held liable for the consequences of that unlawful conduct. . . . [But w]hen such appeals do not incite lawless action, they must be regarded as protected speech.”<sup>103</sup> Judge Mehta did not explicitly include the crowd’s response to Trump’s speech as a legally relevant fact, but his quotation of this portion of *Claiborne Hardware*,<sup>104</sup> along with his observation that “[Trump’s] words stoked an already inflamed crowd”<sup>105</sup> suggests that the consequences of the speech may have shaped his incitement analysis.

Whether lawlessness actually followed the speech should not be determinative, for two reasons. First, it is easy to fall subject to hindsight bias and commit the fallacy of *post hoc ergo propter hoc*: assuming that, because Y followed X, Y was caused by X. The audience at the rally may have attacked the Capitol irrespective of the the words Trump chose. Second, causation is neither necessary nor sufficient for criminal liability in general, nor incitement in particular. It is not sufficient because it must be directed at a concrete, imminent act; speech that causes “stochastic terror-

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<sup>102</sup> Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating Brandenburg After Charlottesville*, 5 U. PA. J.L. & PUB. AFF. 189, 209 (2020).

<sup>103</sup> NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). As the Seventh Circuit has explained,

Cases such as *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury. But we do not doubt that if, immediately after the Klan’s rally in *Brandenburg*, a mob had burned to the ground the house of a nearby black person, that person could have recovered damages from the speaker who whipped the crowd into a frenzy. All of the Justices assumed in *Claiborne Hardware* that if the threats in Charles Evers’s incendiary speech had been a little less veiled and had led directly to an assault against a person shopping in a store owned by a white merchant, the victim of the assault and even the merchant could have recovered damages from the speaker.

*Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985).

<sup>104</sup> *Thompson*, 590 F. Supp. 3d at 111.

<sup>105</sup> *Id.* at 116.



ism”—random-seeming attacks that are triggered by political demagoguery against a demonized group<sup>106</sup>—is generally protected by the First Amendment.<sup>107</sup> And it is not necessary because incitement is the speaker’s *at-tempt* to get the crowd to take some action; if the crowd in fact takes that action should cause us to update our estimate as to whether the speech was likely to cause imminent lawlessness, but it should not be a requirement.

The unique features of the speaker and the context can also be used to argue *Brandenburg* both ways. This was no ordinary day at the Capitol and Trump was no ordinary member of the crowd. The certification of the electoral college votes was the culmination of a bitterly contested election and was bound to provoke strong emotions. An attack on the Capitol, potentially devastating even under normal circumstances, was especially harmful on January 6, given that it interrupted a fundamental feature of the American democratic process.<sup>108</sup> It is notable that some of the strongest proponents of categorical First Amendment protections for political speech have also been those that justify the First Amendment on grounds of democratic self-government.<sup>109</sup> If there was ever a situation in which the

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<sup>106</sup> See Molly Amman & J. Reid, *Stochastic Terrorism: A Linguistic and Psychological Analysis*, 15 PERSPS. ON TERRORISM, no. 5, 2021, at 2, 3.

<sup>107</sup> For example, after a racist attack, one could question the attacker, and the attacker might say that he or she was triggered by a president’s racist rhetoric (“sending us their murderers and rapists,” “a complete and total shutdown of all Muslims coming into the United States,” etc.), and yet even if one could prove causation, that proof would not turn such immoral and dangerous rhetoric into criminal “incitement.”

<sup>108</sup> See, e.g., *People v. Rubin*, 158 Cal. Rptr. 488, 493 (Cal. App. 2d Dist. 1979) (“Additionally, the seriousness of the threatened crime, i.e. the nature of the lawless action solicited, bears some relationship to its imminence.”); Wells, *supra* note 87, at 47 (“[T]he *Brandenburg* standard is a balancing test requiring the Court to weigh the likelihood and *magnitude* of harm against the right to free expression”) (emphasis added); REDISH, *supra* note 94, at 189 (“Government should be allowed more latitude in suppressing advocacy of the serious crimes than in punishing those who incite lesser offenses.”); GREENAWALT, *supra* note 88, at 267–78 (arguing for “moderate[] flexib[ility] in relation to the seriousness of the crime” and thus “a more-probable-than-not standard would be too strict for a grave crime, though perhaps appropriate for a petty one”). This harm-sensitive interpretation of *Brandenburg* is, to be sure, not shared by all scholars. See, e.g., Rubinfeld, *supra* note 86, at 829.

<sup>109</sup> The most notable example is Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. CT. REV. 245.

First Amendment's categorical protections are inappropriate, then, it is where they are used to attack democratic self-government itself.

Trump, far from being an ordinary member of the crowd,<sup>110</sup> was its leader, having, over the past several months, worked to build the very crowd that he sent to the Capitol, one that was armed and radicalized.<sup>111</sup> Nor was January 6 the first time that Trump's words arguably led to violence. For example, during the 2016 election, Trump repeatedly used

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<sup>110</sup> Cf. *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (per curiam) (“[Hess’s] tone, although loud, was no louder than that of the other people in the area.”).

<sup>111</sup> See Lyrisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 162 (2011) (arguing that “the likely make-up of the target audience [and] whether there was a prior history of violence by members of that audience” is relevant to a determination of imminence under *Brandenburg*). Anthropologists Richard Wilson and Jordan Kiper have developed what they term an “incitement matrix” to analyze those gatherings that are more likely to lead to violence:

1. The speaker occupies an official position of authority within government or a political party or political movement
2. The speaker is perceived by supporters as credible or charismatic.
3. The speaker has regular access to means of mass communication, or the ability to control information, or to suppress alternative sources of information.
4. The message contains explicit or implicit calls for violent acts against members of an outgroup.
5. The message dehumanizes an outgroup, or expresses disgust for an outgroup, or calls for acts of revenge against an outgroup.
6. The message identifies a direct threat to the ingroup and identifies a clear and foreseeably violent course of action that can be taken by listeners imminently to remove the source of the threat.
7. There is a history of intergroup conflict between the ingroup and outgroup, and the number of instances of intergroup violence has increased overall in the previous twelve months.
8. There is a major national political election in the next twelve months or there was a major national political election in the last twelve months.
9. There is significant polarization of political parties along religious, ethnic, or racial lines.
10. The emotional state of the audience at the time of the message appears heightened and predisposed towards violent activity.

Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating Brandenburg After Charlottesville*, 5 U. PENN. J.L. & PUB. AFFAIRS 67 (2020). It is notable how many of these factors apply to Trump's speech on January 6.

phrases like “Get him out of here” when member of the audience heckled or protested him; such statements frequently resulted in violence.<sup>112</sup> There is ample evidence, from the many warnings he received that the crowd would be large and dangerous to his refusal for hours after the speech to quell the riot, regarding his intent. Finally, Trump, as president and commander in chief, had unique rhetorical power; indeed, many January 6 defendants who are raising public authority defenses,<sup>113</sup> a reflection of how seriously they took Trump’s commands on January 6.

At the same time, all of these factors can be used to argue in favor of First Amendment protections. After all, it is precisely because the electoral count certification is so important that political speech and protest about it should be granted the highest protections; had the election actually been stolen, a high-profile protest at the Capitol would have been appropriate, as would have been fairly extreme language used to encourage a loud and massive protest, perhaps even language that had previously led to violence.<sup>114</sup> A First Amendment that only protects harmless, fringe movements that have no political influence is hardly worth its reputation as a core safeguard of liberty and democracy.

Similarly, Trump’s status as president, although it magnified the danger of his speech, also counsels in favor of more, not less, First Amendment protection. As Judge Mehta conceded, First Amendment “protection must be particularly guarded when it comes to the President of the United States” because a “President could not function effectively if there were a risk that routine speech might hale him into court. Only in the most extra-

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<sup>112</sup> JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 *CAP. U.L. REV.* 585, 615 (2019); *see also id.* at 617 (“At the very least, Trump knew that the audience might read his words that way and that violence could occur in response to his commands because it had in the past. The fact that he kept using the same rhetoric despite past violence shows that there was no misunderstanding as to what his words meant. Accordingly, there is plenty of contextual evidence to show that Trump’s words were a call to violence and were properly understood by his audience as such.”); Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 *CONN. L. REV.* 117, 143–45 (2019).

<sup>113</sup> Teri Kanefield & Mark Reichel, “*Trump Said I Could*”: *One Possible Legal Defense for Accused Rioters*, *WASH. POST* (Jan. 11, 2021).

<sup>114</sup> For example, in *Claiborne Hardware*, previous boycott breakers had been harassed and attacked, but the Court found that Evers’s remarks were nevertheless protected under the First Amendment. At the same time, the violence occurred several years before Evers’s speech. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 904–06 (1982).

ordinary circumstances could a court not recognize that the First Amendment protects a President's speech."<sup>115</sup>

The same might be said for other high-profile politicians, who would risk the most from a successful prosecution of Trump for his speech. After all, inflammatory speech is (regrettably) common across the political spectrum. To take just two recent examples on the political left, consider Senate majority leader Chuck Schumer's warning to Supreme Court Justices Brett Kavanaugh and Neil Gorsuch that they would "release[] the whirlwind and . . . pay the price" if they rolled back abortion rights,<sup>116</sup> or Representative Maxine Water's call for protesters to "get more confrontational" if Derek Chauvin was not convicted for the murder of George Floyd.<sup>117</sup> To prosecute politicians on the basis of ambiguously inciting speech alone would not only sweep much speech that is not likely to cause imminent lawless action, but it would also punish individuals whose lawless intent was insufficiently established. Because prominent leaders on either side of the partisan divide are the most likely to be targeted by federal or state prosecutors, both presidents and their prominent opponents should receive equally robust protections for their political activism and political speech.

Ultimately, there are plausible arguments on both sides as to whether Trump's speech by itself satisfied the *Brandenburg* test. By itself, this lack of doctrinal clarity would counsel against a prosecution. Indicting a former president for political acts that he took while in office—especially when that president is the current president's former political rival and has declared his candidacy for the next presidential election—might well be the most controversial prosecution in American history. Even if justified, it would represent a profound break with longstanding norms and it would impose immense short-term costs on domestic political stability. Such a prosecution may well be justified as a kind of "constitutional anti-hard-

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<sup>115</sup> Thompson v. Trump, 590 F. Supp. 3d 46, 108 (D.D.C. 2022).

<sup>116</sup> Adam Liptak, *John Roberts Condemns Schumer for Saying Justices "Will Pay the Price" for "Awful Decisions"*, N.Y. TIMES (Mar. 4, 2020).

<sup>117</sup> Chandeliers Duster, *Waters Calls for Protesters to "Get More Confrontational" If No Guilty Verdict Is Reached in Derek Chauvin Trial*, CNN (Apr. 19, 2021).

<sup>118</sup> See David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949, 950 (2019) (defining "anti-hardball measures as those that reduce the likelihood of constitutional hardball being played by either side").

ball”<sup>118</sup> (or rather, *anti-beanball*,<sup>119</sup> a more apt analogy for violence on the political field) that deters future would-be authoritarians. Indeed, we have argued as much elsewhere.<sup>120</sup>

However, such a case must not be legally marginal; a prosecution with obvious legal deficiencies would rightly undermine the Department of Justice’s claims to the evenhanded administration of justice. And the more likely an acquittal or a reversal on appeal, the more likely that a prosecution of Trump would leave him *more* popular and emboldened, and thus a greater threat to American democracy.

### III. The Role of Trump’s Overt Acts

So far we have applied the First Amendment to the facts of January 6 as they were understood at the time, when the only information available was Trump’s public behavior leading up to and on January 6. In the intervening months, more evidence, much of it disclosed by the House Select Committee to Investigate the January 6th Attack on the United States Capitol, has become available. Key among this evidence are actions that Trump took on January 6 that go beyond his public statements—in particular, his order to remove the magnetometers that kept the armed crowd at a distance from the stage on which he spoke, and his attempt to personally lead the crowd at the Capitol itself. In this Part we show how these overt acts resolve the First Amendment deficiencies of a prosecution based solely on Trump’s speech. We also argue that the incorporation of these overt acts is in line with a legal tradition stemming back to English legal history and the Founding that required such acts for criminalizing political speech as insurrectionary.

#### A. An Overt-Act Requirement as a Historically Grounded Protection for Speech

The law has struggled to draw a line between loose talk and criminal acts—and between heated political rhetoric and criminal acts—for centuries. A vital solution again and again—from treason law to conspiracy law to incitement law—is to require overt acts: actions that go beyond

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<sup>119</sup> Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 COLUM. L. REV. ONLINE 85 (2019) (commenting on Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018)).

<sup>120</sup> See Jed Shugerman & Alan Z. Rozenshtein, *The Case for Prosecuting Donald Trump*, PERSUASION (Aug. 31, 2022).

mere agreement, planning, or talk that are in furtherance of a crime and that manifest the requisite criminal intent.

A notable example is the Framers' inclusion of an overt-act requirement in the Constitution's Treason Clause, which defines the crime of treason and provides that "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 Treason Clause was patterned on prerevolutionary English practice, which balanced the goals of criminalizing treason against the dangers of criminalizing speech through partisan prosecutorial abuses of treason. This context helps clarify not only the meaning of the Treason Clause, but of statutes, like the insurrection prohibition, that were patterned on it.

The origin of substantive English treason law begins in 1351, but it did not yet include a requirement of overt acts.<sup>121</sup> In 1695–96, in the wake of the English Civil War, decades of unrest and loyalty controversies culminating in the Glorious Revolution, Parliament passed the Treason Trials Act, adding procedural protections later adopted by American law:

No person whatsoever shall be indicted, tried or attainted of High Treason . . . but by and upon Oaths and Testimony of Two lawful Witnesses, either both of them to the *same overt act or one of them to one and one to another act of the same Treason*, unless the party indicted or arraigned or tried shall willingly without force or violence in open Court confess the same.<sup>122</sup>

This statute followed years of Parliamentary rights protections, such as the English Bill of Rights, and the establishment of a limited constitutional monarchy.

The Continental Congress passed a treason bill on June 24, 1776, about two weeks before the Declaration of Independence, without an overt-act requirement.<sup>123</sup> But when the Constitutional Convention constitutionalized the definition of treason, it not only adopted the more protective Treason

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<sup>121</sup> See 25 Edw. 3, Stat. 5, c. 2; Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 869-70 (2006).

<sup>122</sup> Statute of Westminster, 1695, 7 & 8 William 3, c. 3 (emphasis added).

<sup>123</sup> 5 Journals of the Continental Congress 475 (Worthington Chauncey Ford ed., 1906); CARLTON F.W. LARSON, *THE TRIALS OF ALLEGIANCE: TREASON, JURIES, AND THE AMERICAN REVOLUTION* 42-45 (2019); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PENN. L. REV. 863, 878-79 (2006).

Trials Act language requiring an overt act,<sup>124</sup> but it also added an additional evidentiary requirement of two witnesses observing the same overt act, rather than each witness testifying about different overt acts.<sup>125</sup>

The Convention debates clarify the Framers' intention in requiring evidence of an overt act. According to James Madison's records, on August 20, as the Convention was finalizing the substance of the Constitution, Pennsylvania delegate John Dickerson said "proof of an overt-act ought to be expressed as essential in the case," and that Connecticut delegate William Samuel Johnson also argued "that something should be inserted in the definition concerning overt-acts."<sup>126</sup> Benjamin Franklin pressed for the Convention to require two witnesses to the same overt act as a procedural limit on treason, because "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence."<sup>127</sup> James Wilson noted the difficulties that this evidentiary requirement would pose to treason prosecutions, since "[t]reason may sometimes be practised in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy."<sup>128</sup>

The nature of the Treason Clause's overt-act requirement was clarified in the famous 1807 treason trial of Vice President Aaron Burr. After leaving the Jefferson administration, Burr ventured into the frontier and planned a privateers' expedition against Spain to claim land in the Mississippi and Mexico regions. Burr had assembled his own small army, but one of his "generals" exposed his plot, and Jefferson pressed for a treason prosecution. Chief Justice Marshall ruled against the prosecution's case. The government had argued that Burr's overt act was his amassing men with treasonous intent. However, Burr was not present where the men had gathered, and he had not gathered them himself. The prosecution tried to overcome this problem by arguing he was "constructively present" because

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<sup>124</sup> On August 20, as the Convention was finalizing the substance of the Constitution, Dickerson said "proof of an overt act ought to be expressed as essential in the case, and Johnson elaborated in favor of such a condition." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 346 (Max Farrand ed. 1911).

<sup>125</sup> Benjamin Franklin pressed for the Convention to require two witnesses to the same overt act as a procedural limit on treason, because "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." *Id.* at 348.

<sup>126</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 346 (Max Farrand ed. 1911).

<sup>127</sup> *Id.* at 348.

<sup>128</sup> *Id.*

he was legally responsible. Marshall rejected this argument, explaining that Burr would have had to have committed an overt act himself.

The key issue is what would constitute such an overt act. Marshall explained that an overt act “may be minute, it may not be the actual appearance in arms, and it may be remote from the scene of action.”<sup>129</sup> Presumably, had Burr written a letter explicitly commanding his supporters to take a treasonous act, that would have been sufficient. But writing letters that did not concretely advance the treasonous plot was insufficient. Absent clear evidence of treasonous intent on the part of the men who gathered in response, even “a secret, unarmed meeting,” Marshall wrote, would not constitute an overt act.<sup>130</sup> Nevertheless, an overt act “may be minute, it may not be the actual appearance in arms, and it may be remote from the scene of action.”<sup>131</sup>

The similarities between Marshall’s reasoning and that of the *Brandenburg* Court 150 years later are notable. In holding that Burr’s ambiguous letter to his supporters could not by itself count as an overt act for purposes of a treason prosecution, Marshall foreshadowed the modern Court’s emphasis on concreteness and imminence. We do not mean to suggest that Marshall was making the same kind of constitutional argument that the *Brandenburg* Court would later make—after all, he was interpreting the Treason Clause, which explicitly requires an overt act, not the First Amendment, which does not. Rather, our point is that contemporary doctrine’s protection for speech tending towards lawlessness has deep constitutional roots and one that the Framers believed could be satisfied by proof of overt acts on the part of the alleged wrongdoer.

Of course, Trump is not accused of treason, but Marshall’s discussion of treason and overt acts should inform the overt act analysis from the text of the incitement statute and an overt act distinction for other speech-related prosecutions. One difference between Burr and Trump is that Burr’s conduct was that of a private citizen making plans (mere private conspiring), whereas Trump was a public official allegedly giving direct orders: “speech-acts,”<sup>132</sup> i.e., speech that would count as action, just as direct orders given by the head of an organized crime organization or by a military officer to his troops counts as an “act.” Another key difference is that Trump not only helped organize the rally, but was indeed present and

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<sup>129</sup> United States v. Burr, 25 F.Cas. 55, 177 (C.C.D. Va. 1807).

<sup>130</sup> *Id.* at 168.

<sup>131</sup> *Id.* at 177.

<sup>132</sup> J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); JOHN R. SEARLE, SPEECH ACTS, AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1974).



spoke at the rally. In fact, Trump has admitted that he knew of the risk of violence before the rally began.<sup>133</sup>

Overt act requirements also appear throughout federal criminal law, where they serve as a bulwark against prosecutorial overreach.<sup>134</sup> This is true for several of the statutes that could apply to Trump's involvement in the January 6 attack on Capitol. Thus, the federal fraud-on-the-government conspiracy statute requires that one of the conspirators "do any act to effect the object of the conspiracy."<sup>135</sup> The Anti-Riot Act of 1968, which enacted the federal incitement-to-riot statute, requires not only that the defendant travel in or use a facility of interstate commerce with intent to incite or aid a riot, but that the defendant also "performs or attempts to perform any other overt act" in furtherance of the riot.<sup>136</sup> And while the insurrection statute does not explicitly require an overt act, it is clearly patterned on the Treason Clause,<sup>137</sup> suggesting that, as a matter of statutory interpretation of textual background as well as constitutional avoidance, an overt-act requirement might be appropriate there as well.

## **B. The Role of Overt Acts for Ambiguous Speech**

Given the important role that overt-act requirements have played in safeguarding political speech throughout American history, it is unsurprising that they play a similar role in modern First Amendment doctrine. In particular, they help police the central distinction, which runs throughout First Amendment law, between speech, which enjoys constitutional protections, and conduct, which does not. We are not suggesting that the First Amendment always requires an overt act beyond the allegedly inciting speech itself; an explicit call for violence is sufficient to establish liability. However, when the allegedly inciting speech is plausibly ambiguous, overt acts can serve to buttress liability by establishing intent or imminence.

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<sup>133</sup> See *supra* note 42 and accompanying text.

<sup>134</sup> Most federal conspiracy statutes do not require an over act, but a substantial number do. *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 361-362 (5th Cir. 2014).

<sup>135</sup> 18 U.S.C. § 371.

<sup>136</sup> 18 U.S.C. § 2101.

<sup>137</sup> Compare U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."), with 18 U.S.C. 2383 (punishing "[w]hoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto").

The question addressed by the *Brandenburg* cases is under what circumstances the criminal law can treat public speech as conduct. In other words, the *Brandenburg* cases can be understood as a special case of the broader inquiry of when speech can be punished because it is “integral” to the commission of a crime.<sup>138</sup> In particular, *Brandenburg*, *Hess*, and *Claiborne Hardware* limit when an instance of public speech, taken alone, can be considered conduct that impermissibly encourages lawbreaking. “Advocacy of the use of force or of law violation” is only punishable *by itself* when “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>139</sup>

However, the *Brandenburg* cases do not preclude a combination of speech and *other* conduct from collectively being the grounds for criminal or civil liability. Thus, in his concurring opinion in *Brandenburg*, Justice Douglas distinguished speech by itself from “speech brigaded with action”: “The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”<sup>140</sup>

In fact, *Claiborne Hardware*, although putting undue focus on whether the speech at issue actually led to lawlessness or violence, does correctly look to overt acts and conduct as evidence of intent, knowledge, and imminent danger: “If there were other evidence of [the defendant’s] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence.”<sup>141</sup> The Court used this overt act to limit liability for speech alone, even what the speech was in “a context of violence,” since “strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.” The Court thus approached the question of liability for “highly charged political rhetoric lying at the core of the First Amendment . . . with extreme care.”<sup>142</sup> This caution is a good reason to avoid prosecuting cases where the speech leaves any plausible room for doubt regarding the speaker’s intention and there is no additional overt act that confirms intent and likely imminence.

Properly understood, then, the *Brandenburg* line of cases, including *Claiborne Hardware*, set out different requirements for liability depend-

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<sup>138</sup> See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). See generally Eugene Volokh, *The Speech Integral to Conduct Exception*, 101 CORNELL L. REV. 981 (2016).

<sup>139</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>140</sup> *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring).

<sup>141</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982)

<sup>142</sup> *Id.* at 927.

ing on the nature of the speech. If the speech explicitly and unambiguously calls for imminent lawlessness, it itself can suffice to establish liability. If, on the other hand, the speech plausibly calls for lawlessness but can be also interpreted in a different way—i.e., if it is ambiguous as to lawlessness—then additional overt acts, such as “authorizations of wrongful conduct,” that would make imminent lawlessness likely, are required under the First Amendment.

These different requirements are closely related, in that each is an attempt to meet *Brandenburg*’s intent and likely imminence prongs. An explicit, ambiguous call for immediate violence is culpable because it would provide conclusive evidence of the speaker’s mens rea and because it is likely to cause lawless action rather than the conversation and debate that the First Amendment seeks to promote.

Similarly, ambiguous speech combined with overt acts would satisfy both of those prongs. With regard to intent, an overt act serves the evidentiary function of ensuring that society does not misconstrue speech that, while inflammatory, is not explicitly inciteful and that the speaker does not intend to cause lawlessness or violence. With regard to imminent likelihood, an overt act increasing the risk of violence is concrete evidence of imminence. It also serves as a bright-line rule limiting prosecutions. These aspects serve to ensure that society does not criminalize speech whose discursive benefit outweighs its potential to cause lawlessness. In this respect, our proposal—an overt act as an additional prosecutorial burden in the case of ambiguously inciting speech—extends *Brandenburg*’s prophylactic quality.<sup>143</sup>

Admittedly, what is serious enough to count as an overt act is often ambiguous and subjective in itself, at least at the margins. But all judgments as to criminal culpability have some uncertainty; eliminating uncertainty altogether would require giving up enforcing criminal law. The compromise has always been to look to the high burdens of proof at a criminal trial, along with the discretion granted the independent trier of fact, whether judge or jury, as the key safeguards against overzealous prosecution.

Applying this framework to January 6 leads to the same conclusion as in *Thompson v. Trump*—that the First Amendment does not protect Trump’s conduct on January 6—but for different, and we think better, reasons than those articulated by the district court. Rather than rely solely on the content of Trump’s speech, which contains sufficient ambiguities so as to raise serious First Amendment questions, the better case for Trump’s li-

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<sup>143</sup> See *supra* note 85 and accompanying text.

ability would focus on the content of the speech taken together with Trump's additional overt acts.

Perhaps the most damning evidence of an overt act presented by the January 6 committee is that Trump, even as he was repeatedly warned that the crowd was armed and dangerous, ordered that the magnetometers keeping the crowd farther away from him be removed and he sought to personally join the crowd and lead it to the Capitol. Trump demonstrated through an overt act that, at the very least, he was aware that the crowd was heavily armed; moreover, the act shows that he knew (and arguably approved) of potential violence and was willing to act in such a way that would make that violence more likely.<sup>144</sup> Even if those armed supporters could hear him from a distance when they were staying back from the "mags," Trump clearly wanted a larger and a more fired-up rally. His order would have increased the risk of violence, since it would have brought more armed people closer to him, and thus more likely to be motivated by his speech to march to the Capitol.

Trump might argue that his primary motivation likely was a better "photo op" of a larger rally, the optics and the audio for the media, and probably his own ego. However, criminal conduct can have multiple, sometimes even good, motives. For example, stealing from a bank in order to pay for life-saving health care is still a crime).

Even if his photo op was his overriding "motive," his willingness to act on it would demonstrate deliberate indifference and reckless disregard towards inciting riot and insurrection. Although *Brandenburg* used the language of intent, there is an argument that the intent requirement should be satisfied by a finding of deliberate or reckless indifference. After all, even public figures need only prove "reckless disregard of whether [the statement] was false or not" to satisfy the First Amendment's "actual malice" test.<sup>145</sup> And the criminal law similarly punishes treats willful blindness as culpable; as Daniel Richman has explained, Trump's willful blindness about the falsity of his election fraud claims would be sufficient for a crimi-

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<sup>144</sup> To be sure, Trump's statement—"They're not here to hurt me. . . . Let my people in. They can march to the Capitol from here."—can be interpreted more benignly, as expressing the view that the crowd wasn't there to hurt him *or anyone else*. Given the evidence of what Trump was told about the crowd, the danger he later admitted existed, and actions and statements after the attack on the Capitol had begun (for example, telling his aids that Pence "deserved" the call for his hanging by the mob), we believe that a trier of fact could properly reject, beyond a reasonable doubt, this benign interpretation.

<sup>145</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

nal conviction.<sup>146</sup> Thus, even if Trump's remarks and actions only support a finding of deliberate or reckless indifference, the First Amendment need not protect his speech on this basis.

Trump's order to remove the magnetometers, while perhaps the most damning, was not the only relevant overt act that he performed. According to Hutchinson, Meadows said when Trump heard that the mob was chanting for the death of Vice President Pence, Trump replied that "Mike deserves it" and that the mob was not "doing anything wrong"<sup>147</sup> And Trump's tweet, while Pence's life was actively in danger, that the vice president "didn't have the courage to do what should have been done to protect our Country and our Constitution" is additional evidence of knowledge and intent. But the tweet, like Trump's speech itself, was both political speech and thus *prima facie* protected under the First Amendment, and at worst only ambiguously inciting. Thus we do not believe that it satisfies the overt-act requirement.

By contrast, Trump attempted, on multiple occasions, to personally lead the mob at the Capitol, demanding that the Secret Service drive him from the White House to the Capitol and allegedly fighting with a Secret Service agent who was driving him from the speech back to the White House.<sup>148</sup> These orders and physical actions could, unlike ambiguous public speeches and tweets, count as overt acts. Had Trump personally led the crowd at the Capitol, that might well have inflamed them to even greater acts of violence. These acts went beyond mere speech and represent concrete steps to incite, insurrect, and obstruct; they thus can serve as a basis to establish both Trump's intent and the likely imminent danger that his words and actions together presented.

To summarize our doctrinal argument, here is a taxonomy of conduct that would be sufficient to establish criminal liability for incitement and related crimes:

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<sup>146</sup> Daniel Richman, *Actual Knowledge, Willful Blindness, and the Jan. 6 Hearings*, LAWFARE (June 21, 2022).

<sup>147</sup> Edmondson, *supra* note 41.

<sup>148</sup> Unlike most of the parts of Hutchinson's testimony that are relevant to the criminal case against Trump for his role in the attack on the Capitol, Hutchinson's recounting of being told about Trump's grabbing at the steering wheel would be hearsay if introduced directly in a trial. *See* FED. R. EVID. 801(c) (defining hearsay as an out-of-court statement introduced "to prove the truth of the matter asserted"). Such allegations might have direct witnesses, but thus far, they should be regarded with less weight as less likely to be admissible. However, other sources back up Hutchinson's account of Trump wanting to go the Capitol. *See supra* note 47 and accompanying text.

*First*, speech that is otherwise illegal in and of itself, such as criminal threats or speech integral to a criminal conspiracy.<sup>149</sup> For example, Trump could be prosecuted for conspiracy if he communicated in advance with leaders of far-right militias like the Oath Keepers or Proud Boys and encouraged them to come to and violently attack the Capitol.

*Second*, speech that explicitly and unambiguously calls for concrete, imminent acts of lawlessness or violence. For example, had Trump publicly called for the crowd to “march to and attack the Capitol,” his speech would be sufficient by itself for an incitement charge.

*Third*, speech that plausibly but not explicitly calls for lawlessness or violence, combined with overt acts that further likely imminent action and demonstrate intent. Such acts can include:

- a. Concrete physical action—e.g., Trump’s physical attempts to join the march might count as such overt acts.
- b. Speech whose purpose is action-oriented rather than expressive, and thus that counts as action (a “speech act”<sup>150</sup>)—e.g., Trump’s order to remove the magnetometers or his order to be driven to the Capitol so he could join the rioters.

By contrast, speech for which a substantial purpose is public political expression—e.g., Trump’s tweets during the riot about Vice President Pence—is insufficient to constitute an overt act for the purpose of establishing criminal liability. It can, however, be admissible as additional evidence of knowledge and intent.

## Conclusion

We have argued that Trump’s January 6 speech, by itself, is sufficiently ambiguous as to raise serious First Amendment questions. A prosecution based on Trump’s speech alone would risk both reversal and, if it were successful, setting a dangerous precedent that could be weaponized against future political speech. We thus disagree with those—scholars, judges, and

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<sup>149</sup> See, e.g., *Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948) (enumerating examples of speech that may constitute “overt act” under the Treason Clause, such as conveying military intelligence to the enemy).

<sup>150</sup> See generally J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1974).

the January 6 Committee alike—who have suggested that Trump’s speech at the rally would be sufficient by itself for criminal punishment.

But Trump’s speech was accompanied by several overt acts in furtherance of inciting an attack against the Capitol. These acts—Trump’s order to remove the magnetometers and his attempt to join the crowd as it marched to the Capitol—can serve, in combination with Trump’s speech, as a basis for criminal liability, without weakening the First Amendment’s protections for inflammatory political speech. Relying on the speaker’s overt acts is relevant to the *Brandenburg* elements of intent and imminence; this approach is also fairer and more relevant than looking to the audience’s reaction, as in *Claiborne Hardware*. And foregrounding Trump’s overt acts is also in line with historical practice, in particular the importance that the Founding era put on overt acts as helping to safeguard political speech.

The legal availability of a prosecution is not, of course, conclusive as to whether a prosecution should in fact be brought. *United States v. Donald Trump* would take place in a courtroom before a judge and jury and under the beyond-a-reasonable-doubt standard. The Department of Justice would not, as Jack Goldsmith has pointed out, be able to rely on the January 6 Committee’s “one-sided factual recitations,”<sup>151</sup> and would instead to have call witnesses, who would be subject to cross-examination, and convince the finder of fact as to Trump’s public and, most importantly, private conduct. The trial would raise a host of difficult issues, ranging from whether Trump could get an impartial jury in Washington, D.C. to the permissible application of criminal law to actions taken while president. And while a failure to hold Trump accountable would undermine both the reality and, for many Americans, the perception of the rule of law, a failed prosecution might simply embolden Trump and his supporters.

These are difficult considerations, and we do not pretend to offer definitive answers. But we are confident that the First Amendment neither prevents, nor would be undermined by, a prosecution of Donald Trump for inciting an armed attack on the United States Capitol.

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<sup>151</sup> Jack Goldsmith, *Prosecute Trump? Put Yourself in Merrick Garland’s Shoes.*, N.Y. TIMES (June 20, 2022).