

**IN THE SENATE OF THE UNITED STATES**  
**Sitting as a Court of Impeachment**

In re

**IMPEACHMENT OF  
PRESIDENT DONALD J. TRUMP**

**TRIAL MEMORANDUM  
OF THE UNITED STATES HOUSE OF REPRESENTATIVES  
IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP**

United States House of Representatives

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## INTRODUCTION

This trial arises from President Donald J. Trump’s incitement of insurrection against the Republic he swore to protect. The House of Representatives has impeached him for that constitutional offense. To protect our democracy and national security—and to deter any future President who would consider provoking violence in pursuit of power—the Senate should convict President Trump and disqualify him from future federal officeholding.

On January 6, 2021, with Vice President Michael Pence presiding, Congress assembled to perform one of its most solemn constitutional responsibilities: the counting of electoral votes for President of the United States. This ritual has marked the peaceful transfer of power in the United States for centuries. Since the dawn of the Republic, no enemy—foreign or domestic—had ever obstructed Congress’s counting of the votes. No President had ever refused to accept an election result or defied the lawful processes for resolving electoral disputes. Until President Trump.

In a grievous betrayal of his Oath of Office, President Trump incited a violent mob to attack the United States Capitol during the Joint Session, thus impeding Congress’s confirmation of Joseph R. Biden, Jr. as the winner of the presidential election. As it stormed the Capitol, the mob yelled out “President Trump Sent Us,” “Hang Mike Pence,” and “Traitor Traitor Traitor.” The insurrectionists assaulted police officers with weapons and chemical agents. They seized control of the Senate chamber floor, the Office of the Speaker of the House, and major sections of the Capitol complex. Members and their staffs were trapped and terrorized. Many officials (including the Vice President himself) barely escaped the rioters. The line of succession to the Presidency was endangered. Our seat of government was violated, vandalized, and desecrated. Congress’s counting of electoral votes was delayed until nightfall and not completed until 4 AM. Hundreds of people were injured in the assault. Five people—including a Capitol Police officer—died.

President Trump's responsibility for the events of January 6 is unmistakable. After losing the 2020 election, President Trump refused to accept the will of the American people. He spent months asserting, without evidence, that he won in a "landslide" and that the election was "stolen." He amplified these lies at every turn, seeking to convince supporters that they were victims of a massive electoral conspiracy that threatened the Nation's continued existence. But every single court to consider the President's attacks on the outcome of the election rejected them. And state and federal officials from both parties refused President Trump's increasingly desperate demands that they break the law to keep him in power. With his options running out, President Trump announced a "Save America Rally" on January 6. He promised it would be "wild."

By the day of the rally, President Trump had spent months using his bully pulpit to insist that the Joint Session of Congress was the final act of a vast plot to destroy America. As a result—and as had been widely reported—the crowd was armed, angry, and dangerous. Before President Trump took the stage, his lawyer called for "trial by combat." His son warned Republican legislators against finalizing the election results: "We're coming for you." Finally, President Trump appeared behind a podium bearing the presidential seal. Surveying the tense crowd before him, President Trump whipped it into a frenzy, exhorting followers to "fight like hell [or] you're not going to have a country anymore." Then he aimed them straight at the Capitol, declaring: "You'll never take back our country with weakness. You have to show strength, and you have to be strong."

Incited by President Trump, his mob attacked the Capitol. This assault unfolded live on television before a horrified nation. But President Trump did not take swift action to stop the violence. Instead, while Vice President Pence and Congress fled, and while Capitol Police officers battled insurrectionists, President Trump was reportedly "delighted" by the mayhem he had unleashed, because it was preventing Congress from affirming his election loss. This dereliction of

duty—this failure to take charge of a decisive security response and to quell the riotous mob—persisted late into the day. In fact, when Congressional leaders begged President Trump to send help, or to urge his supporters to stand down, he instead renewed his attacks on the Vice President and focused on lobbying Senators to challenge the election results. Only *hours* after his mob first breached the Capitol did President Trump release a video statement calling for peace—and even then, he told the insurrectionists (who were at that very moment rampaging through the Capitol) “we love you” and “you’re very special.” President Trump then doubled down at 6:01pm, issuing a tweet that blamed Congress for not surrendering to his demand that the election results be overturned: “These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!”

The Nation will indeed remember January 6, 2021—and President Trump’s singular responsibility for that tragedy. It is impossible to imagine the events of January 6 occurring without President Trump creating a powder keg, striking a match, and then seeking personal advantage from the ensuing havoc. In the words of Representative Liz Cheney, the House Republican Conference Chair: “The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President. The President could have immediately and forcefully intervened to stop the violence. He did not. There has never been a greater betrayal by a President of the United States of

his office and his oath to the Constitution.”<sup>1</sup> Senate Minority Leader Mitch McConnell recently affirmed that “[t]he mob was fed lies” and “provoked by the president.”<sup>2</sup>

President Trump committed this high crime and misdemeanor amid his final days in office. Given the clarity of the evidence and the egregiousness of his wrongdoing, the House approved an article of impeachment for incitement of insurrection. Now, merely weeks later, President Trump will argue that it serves no purpose to subject him to a trial and that the Senate lacks jurisdiction to do so. He is mistaken. As we explain at length below—and as scholars from diverse viewpoints have long recognized—the text and structure of the Constitution, as well as its original meaning and prior interpretations by Congress, overwhelmingly demonstrate that a former official remains subject to trial and conviction for abuses committed in office. Any other rule would make little sense. The Constitution governs the first day of the President’s term, the last day, and every moment in between. Presidents do not get a free pass to commit high crimes and misdemeanors near the end of their term. The Framers of our Constitution feared more than anything a President who would abuse power to remain in office against the will of the electorate. Allowing Presidents to subvert elections without consequence would encourage the most dangerous of abuses.

For that reason, President Trump’s conduct must be declared unacceptable in the clearest and most unequivocal terms. This is not a partisan matter. His actions directly threatened the very foundation on which all other political debates and disagreements unfold. They also threatened the constitutional system that protects the fundamental freedoms we cherish. It is one thing for an official to pursue legal processes for contesting election results. It is something else entirely for that

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<sup>1</sup> Liz Cheney, *I Will Vote To Impeach The President* (Jan. 12, 2021).

<sup>2</sup> Mike DeBonis & Paul Kane, *Uncertainty Reigns in Senate as Schumer Pushes Fast Agenda and McConnell Calls Out Trump*, Wash. Post (Jan. 19, 2021).

official to incite violence against the government, and to obstruct the finalization of election results, after judges and election officials conclude that his challenges lack proof and legal merit.

To reaffirm our core constitutional principles—and to deter future Presidents from attempting to subvert our Nation’s elections—the Senate should convict President Trump and disqualify him from holding or enjoying “any Office or honor, Trust, or Profit under the United States.”<sup>3</sup> That outcome is not only supported by the facts and the law; it is also the right thing to do. President Trump has demonstrated beyond doubt that he will resort to any method to maintain or reassert his grip on power. A President who violently attacks the democratic process has no right to participate in it. Only after President Trump is held to account for his actions can the Nation move forward with unity of purpose and commitment to the Constitution. And only then will future Presidents know that Congress stands vigilant in its defense of our democracy.

## STATEMENT OF FACTS

### A. President Trump Refuses to Accept the Results of the 2020 Election

Before a single voter cast a ballot in the 2020 presidential election, President Trump made it clear that he had no intention of abiding by the verdict of the American people.<sup>4</sup> In a July 2020 interview, he pointedly refused to agree that he would accept the election results.<sup>5</sup> Pressed in September 2020 on whether he would “commit to making sure that there is a peaceful transferal [sic] of power after the election,” he responded: “We’re going to have to see what happens.”<sup>6</sup> Throughout this period, he insisted at rallies and through social media that if he appeared to lose the

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<sup>3</sup> U.S. Const., Art. I, § 3, cl. 7.

<sup>4</sup> Nick Niedzwiadek, *The 9 Most Notable Comments Trump Has Made About Accepting the Election Results*, Politico (Sept. 24, 2020).

<sup>5</sup> Ryan Goodman et al., *Incitement Timeline: Year of Trump’s Actions Leading to the Attack on the Capitol*, Just Security (Jan. 11, 2021).

<sup>6</sup> *Id.*



election, the only possible explanation was a conspiracy to defraud him and those who supported him. On August 17, for instance, he asserted that “the only way we’re going to lose this election is if this election is rigged.”<sup>7</sup> One week later, he declared that “[t]he only way they can take this election away from us is if this is a rigged election.”<sup>8</sup> He echoed these points at every opportunity, laying the groundwork for a refusal to accept any outcome other than his own continued grip on power.

This was not mere rhetoric, as became apparent immediately after Election Day. Based on incomplete early returns, and despite warnings from virtually every expert and election official in the country, President Trump claimed victory and tried to stop states from counting millions of lawful ballots. On November 4, for example, he tweeted: “We are up BIG, but they are trying to STEAL the Election. We will never let them do it.”<sup>9</sup> Over the following days, many media outlets (including Fox News) reported that Joseph R. Biden, Jr. had won the election. President Trump responded by asserting—on November 8—that “this was a stolen election.”<sup>10</sup> He repeated that same theme many times over the following months, urging his supporters to “Stop the Steal!”<sup>11</sup>

It was never clear who President Trump blamed for this asserted fraud—which, according to him, was vast enough to affect the outcome in many different states. At various points throughout

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<sup>7</sup> *Donald Trump Speech Transcript Wisconsin August 17*, Rev (Aug. 17, 2020).

<sup>8</sup> *Donald Trump 2020 RNC Speech Transcript August 24*, Rev (Aug. 24, 2020).

<sup>9</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49 AM).

<sup>10</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 8, 2020, 9:17 AM).

<sup>11</sup> See e.g., Donald J. Trump (@realDonaldTrump), Twitter (Nov. 21, 2020 3:34 PM) (Watch: Hundreds of Activists Gather for ‘Stop the Steal’ Rally in Georgia <https://t.co/vUG1bqG9yg> via BreitbartNews Big Rallies all over the Country. The proof pouring in is undeniable. Many more votes than needed. This was a LANDSLIDE!); Donald J. Trump (@realDonaldTrump), Twitter (Nov. 24, 2020 10:45 PM) (“Poll: 79 Percent of Trump Voters Believe ‘Election Was Stolen’ <https://t.co/PmMBmt05AI> via @BreitbartNews They are 100% correct, but we are fighting hard. Our big lawsuit, which spells out in great detail all of the ballot fraud and more, will soon be filed. RIGGED ELECTION!”); *Donald Trump Speech on Election Fraud Claims Transcript, December 2*, Rev (Dec. 2, 2020) (But no matter when it happens, when they see fraud, when they see false votes and when those votes number far more than is necessary, you can’t let another person steal that election from you. All over the country, people are together in holding up signs, “Stop the steal.”); Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2020 9:41 AM) (He didn’t win the Election. He lost all 6 Swing States, by a lot. They then dumped hundreds of thousands of votes in each one, and got caught. Now Republican politicians have to fight so that their great victory is not stolen. Don’t be weak fools!).

late 2020, President Trump accused some combination of corrupt state election officials, fraudulent voters, doctored voting machines, and unspecified shadowy actors. In a speech on December 2, for example, he alleged “tremendous voter fraud and irregularities” resulting from a suspicious late-night “massive dump” of votes; he added in this speech that certain votes were “counted in foreign countries,” that “[m]illions of votes were cast illegally in the swing states alone,” and that “[i]t is statistically impossible” that he lost.<sup>12</sup> “This election was rigged,” he insisted.<sup>13</sup>

Our legal system affords many ways in which a candidate can contest the outcome of an election. President Trump took full advantage of those opportunities, focusing on the states in which he claimed President Biden had been improperly recognized as the winner: Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. President Trump and his allies ultimately filed 62 lawsuits in state and federal courts contesting every aspect of those elections.<sup>14</sup> But all of these suits were dismissed, save for one marginal Pennsylvania suit that did not affect the outcome there.<sup>15</sup> In dismissing these suits, judges at all levels—including several of President Trump’s own judicial appointees—found that his claims were “not credible,” “without merit,” and “flat out wrong.”<sup>16</sup> Courts warned that some of his suits improperly aimed to “breed confusion,” “undermine the public’s trust in the election,” and “ignore the will of millions of voters.”<sup>17</sup> As Judge Stephanos Bibas (a Trump appointee) observed in one characteristic opinion: “Free, fair elections are the lifeblood of

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<sup>12</sup> *Donald Trump Speech on Election Fraud Claims Transcript, December 2*, Rev (Dec. 2, 2020).

<sup>13</sup> *Id.*; see also, e.g., Donald J. Trump (@realDonaldTrump), Twitter (Dec. 30, 2020 2:48 PM) (“United States had more votes than it had people voting, by a lot. This travesty cannot be allowed to stand. It was a Rigged Election, one not even fit for third world countries!”).

<sup>14</sup> William Cummings et al., *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Allison Durkee, *Trump Election Lawsuit Against Brad Raffensperger, Brian Kemp Fails in Georgia*, Forbes (Jan. 5, 2021).

our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”<sup>18</sup> The U.S. Supreme Court itself denied numerous emergency applications aimed at overturning the election results; in response, President Trump tweeted that our highest court is “totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election.”<sup>19</sup>

President Trump had the right to seek redress through the legal system. But he turned to improper and abusive means of staying in power when it became clear that the courts were unconvinced by his claims. Specifically, he launched a pressure campaign initially aimed at state election officials that soon expanded to the Department of Justice and Members of Congress.

Starting in mid-November, President Trump brought the full power of his office to bear on state officials, pushing them to overturn and block certification of the election results by any means necessary. He pursued this agenda through tweets, phone calls, and meetings with officials, seeking at every opportunity to reverse the election so that he could remain in office.<sup>20</sup> For example, despite clear evidence of President Biden’s victory in Michigan, President Trump issued false accusations that “[t]he Democrats cheated big time and got caught.”<sup>21</sup> He personally lobbied two members of the Board of Canvassers for Wayne County to rescind their prior votes in favor of certifying the election results.<sup>22</sup> He also (unsuccessfully) tried to induce Michigan’s top Republican legislative

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<sup>18</sup> *Donald J. Trump For President v. Boockvar*, No. 20-3371 (3d Cir. Nov. 27, 2020).

<sup>19</sup> Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020 8:51 AM).

<sup>20</sup> Maggie Haberman et al., *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. Times (Nov. 19, 2020); Amy Gardner et al., *Trump asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, Wash. Post (Dec. 8, 2020); Ryan Randazzo et al., *Arizona Legislature ‘Cannot and Will Not’ Overturn Election, Republican House Speaker Says*, Arizona Republic (Dec. 4, 2020).

<sup>21</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 18, 2020) (“The Great State of Michigan, with votes being far greater than the number of people who voted, cannot certify the election. The Democrats cheated big time, and got caught. A Republican WIN!”).

<sup>22</sup> Kendall Karson et al., *Republican Canvassers Ask To ‘Rescind’ Their Votes Certifying Michigan Election Results*, ABC News (Nov. 19, 2020).

officials to violate Michigan law by rejecting the popular vote and selecting a Trump slate of electors; in furtherance of this effort, he had them fly to Washington, D.C., for a White House meeting.<sup>23</sup>

Trump applied particularly intense pressure to Georgia officials. On November 11, while Georgia’s vote count was in progress, Republican Secretary of State Brad Raffensperger publicly stated that there was no evidence of widespread voter fraud and that ballots were being accurately counted.<sup>24</sup> President Trump then tweeted about Raffensperger seventeen times between November 11 and the date on which Georgia finally certified its election results. On Thanksgiving Day, he declared Raffensperger an “enemy of the people” for insisting upon the integrity of Georgia’s election.<sup>25</sup> Reflecting an ominous pattern that would recur many times over the weeks that followed, President Trump’s attacks on Raffensperger sparked threats of death and violence; one such message warned that “the Raffenspergers should be put on trial for treason and face execution.”<sup>26</sup> Nonetheless, President Trump continued his assault on Raffensperger. President Trump’s attacks were so concerning that Gabriel Sterling, another Republican election official in Georgia, publicly warned: “Mr. President ... Stop inspiring people to commit potential acts of violence. Someone’s going to get hurt, someone’s going to get shot, someone’s going to get killed.”<sup>27</sup>

President Trump’s campaign to reverse the election results—and to keep himself in the White House—lasted through the days immediately preceding the assault on the Capitol. On

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<sup>23</sup> Tom Hamburger et al., *Trump Invites Michigan Republican Leaders To Meet Him At White House As He Escalates Attempts To Overturn Election Results*, Wash. Post (Nov. 19, 2020).

<sup>24</sup> Tim Reid & Lisa Lambert, *Republican Georgia Secretary of State Says No Sign of Widespread Fraud in Vote Count*, Reuters (Nov. 11, 2020).

<sup>25</sup> Tim Kephart, *Trump Calls Ga. Secretary of State “Enemy of the People”*, CBS46 (Nov. 27, 2020).

<sup>26</sup> Jake Lahut, *Georgia’s Republican Secretary Of State And His Wife Received Texts Telling Them They Deserve ‘To Face A Firing Squad’ As Trump Escalated His Attacks On Election Results*, Business Insider (Nov. 19, 2020); Donald J. Trump (@realDonaldTrump), Twitter (Dec. 7, 2020, 7:50 PM).

<sup>27</sup> Stephen Fowler, *‘Someone’s Going To Get Killed’: Ga. Official Blasts GOP Silence On Election Threats*, NPR (Dec. 1, 2020).

December 23, for instance, President Trump reportedly called one of Georgia’s lead election investigators, urging him to “find the fraud” and claiming that the official would be a “national hero” if he did so.<sup>28</sup> On January 2, President Trump called Raffensperger to push him to somehow “find” enough votes to overturn the state’s results: “I just want to find 11,780 votes, which is one more than we have because we won the state.”<sup>29</sup> President Trump also made a clear and chilling threat to Georgia’s highest election official: Failing to “find” enough votes to overturn the results of the Georgia election would be “a criminal offense” and “a big risk to you.”<sup>30</sup> By this point, it was evident that President Trump would resort to any means necessary to reverse the election outcome.

That is confirmed by his persistent (and increasingly extreme) efforts to transform DOJ into an arm of his assault on state election results. At President Trump’s direction, then-Attorney General William Barr authorized federal prosecutors “to pursue substantial allegations of voting and vote tabulation irregularities prior to the certification of elections.”<sup>31</sup> That prompted sixteen Assistant United States Attorneys in fifteen districts to urge Barr to cease the investigation because there was no evidence of such substantial voting irregularities. DOJ’s own investigation ultimately confirmed as much: Barr announced on December 1 that DOJ had “uncovered no evidence of widespread voter fraud that could change the outcome of the 2020 election.”<sup>32</sup> Barr reportedly told President Trump at the time that his claims of election stealing were “bullshit.”<sup>33</sup>

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<sup>28</sup> Amy Gardner, *Find the Fraud: Trump Pressured a Georgia Elections Investigator in a Separate Call Legal Experts Say Could Amount to Obstruction*, Wash. Post (Jan. 9, 2021).

<sup>29</sup> Amy Gardner & Paulina Firozi, *Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Wash. Post (Jan. 5, 2021).

<sup>30</sup> *Id.*

<sup>31</sup> Katie Benner & Michael S. Schmidt, *Barr Hands Prosecutors the Authority to Investigate Voter Fraud Claims*, N.Y. Times (Nov. 9, 2020); Memorandum from the Attorney General, Post-Voting Election Irregularity Inquiries (Nov. 9, 2020).

<sup>32</sup> Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, Associated Press (Dec. 1, 2020).

<sup>33</sup> Jesse Byrnes, *Barr Told Trump that Theories About Stolen Election Were “Bulls---”*: Report, The Hill (Jan. 18, 2021).

President Trump then apparently pressured Barr’s successor, Acting Attorney General Jeffrey Rosen, to appoint special counsels and file briefs aimed at overturning the election results.<sup>34</sup> When Rosen refused, President Trump reportedly hatched a scheme to fire Rosen and replace him with a different official who would be willing to deploy DOJ’s resources in support of President Trump’s efforts to keep himself in office.<sup>35</sup> President Trump backed down only after he learned that most of DOJ’s political leadership would resign in protest if he fired Rosen.<sup>36</sup>

As this timeline indicates, President Trump’s rejection of the election results—and his steadily more extreme efforts to overturn them—persisted from Election Day through January 6. He did not cease his campaign even after the Electoral College met on December 14, with presidential electors casting 306 Biden votes and only 232 Trump votes. Nor did he cease after Senate Majority Leader McConnell recognized Mr. Biden’s victory: “Many millions of us hoped that the presidential election would yield a different result, but our system of government has processes to determine who will be sworn in on January the 20th. The Electoral College has spoken.”<sup>37</sup> Instead, President Trump responded to these developments by escalating and refocusing his attacks on Members of Congress, pushing them to reject the Electoral College vote and then engineer his retention in office. On December 18, for instance, he tweeted that “@senatemajldr and Republican

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<sup>34</sup> Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021); Matt Zapotosky et al., *Trump Entertained Plan to Install an Attorney General Who Would Help Him Pursue Baseless Election Fraud Claims*, Wash. Post (Jan. 22, 2021); Jess Bravin & Sadie Gurman, *Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results*, Wall Street J. (Jan. 23, 2021).

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

<sup>36</sup> Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. Times (Jan. 22, 2021).

<sup>37</sup> Niels Lesniewski, *McConnell Recognizes Biden Win: ‘The Electoral College Has Spoken*, Roll Call (Dec. 15, 2020); Nicholas Fandos, *Defying Trump, McConnell Seeks to Squelch Bid to Overturn the Election*, N.Y. Times (Dec. 15, 2020).

Senators have to get tougher, or you won't have a Republican Party anymore. We won the Presidential Election, by a lot. FIGHT FOR IT. Don't let them take it away!"<sup>38</sup>

**B. President Trump Encourages His Followers to Come to Washington on January 6, 2021 and "Fight" to Overturn the Election Results**

Following the Electoral College vote, President Trump fixated on January 6, 2021—the date of the Joint Session of Congress—as presenting his last, best hope to reverse the election results and remain in power. Even as he continued improperly pressuring state officials, DOJ, and Members of Congress to overturn the electoral outcome, he sharply escalated his public statements, using more incendiary and violent language to urge supporters to “stop the steal” on January 6. He insisted that the election had been “rigged” and “stolen,” and that his followers had to “fight like hell” and “fight to the death” against this “act of war,” since they “can’t let it happen” and “won’t take it anymore!” These statements turned his “wild” rally on January 6 into a powder keg waiting to blow. Indeed, it was obvious and entirely foreseeable that the furious crowd assembled before President Trump at the “Save America Rally” on January 6 was primed (and prepared) for violence if he lit a spark.

By mid-December 2020, President Trump had spent months insisting to his base that the only way he could lose the election was a dangerous, wide-ranging conspiracy against them that threatened America itself. After the Electoral College vote, he channeled that fury toward January 6, which he presented as the final firewall against a historic fraud that “stole” their democracy. On December 19, he tweeted: “Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. **Be there, will be wild!**”<sup>39</sup> On December 26, he tweeted: “If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen

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<sup>38</sup> Donald J. Trump (@realDonaldTrump), Twitter (Dec. 18, 2020, 9:14 AM).

<sup>39</sup> Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2020, 1:42 AM).

before, the Democrat Senators would consider it an **act of war, and fight to the death**. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!” (emphasis added).<sup>40</sup>

Fourteen minutes later, he tweeted again: “The ‘Justice’ Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, **the biggest SCAM in our nation’s history**, despite overwhelming evidence. They should be ashamed. History will remember. **Never give up. See everyone in D.C. on January 6th.**”<sup>41</sup> And on January 1, he tweeted: “The BIG Protest Rally in Washington, D.C., will take place at 11.00 AM on January 6<sup>th</sup> . . . **StopTheSteal!**”<sup>42</sup> That same day, Kylie Jane Kremer, the head of Women For America First—a group that had helped organize the Second Million MAGA March on December 12 (which ended in 4 stabbings and 33 arrests)<sup>43</sup>—tweeted a link to the website “Trumpmarch.com.” At the top of the post she added, “the cavalry is coming Mr. President!” President Trump retweeted her post, responding, “A great honor!”<sup>44</sup>

As January 6 approached, and President Trump’s other attempts to overturn the election failed (including his schemes at DOJ), he further escalated his call to arms. On January 4, he gave an angry speech in Dalton, Georgia, warning that “**Democrats are trying to steal the White House ... [y]ou can’t let it happen. You can’t let it happen,**” and “**they’re not taking this White House. We’re going to fight like hell, I’ll tell you right now.**”<sup>45</sup> The next day, on January 5, he tweeted: “Washington is being inundated with people who don’t want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, **they won’t take it**

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<sup>40</sup> Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 8:00 AM).

<sup>41</sup> Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 8:14 AM).

<sup>42</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 2:53 PM).

<sup>43</sup> NBC Washington Staff, *4 Stabbed, 33 Arrested as Trump Supporters, Counterprotesters Clash in Downtown DC*, NBC Washington (Dec. 12, 2020).

<sup>44</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 12:52 PM); Donald J. Trump (@realDonaldTrump), Twitter (Jan. 1, 2021, 3:34 PM).

<sup>45</sup> Donald Trump Rally Speech Transcript Dalton, Georgia: Senate Runoff Election, Rev (Jan. 4, 2021).



**anymore!** We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!”<sup>46</sup> Trump made it clear that his goal was to prevent the election results from being certified: **“I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking** at the thousands of people pouring into D.C. They won’t stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune”<sup>47</sup>

Through these and other statements, President Trump spent the weeks preceding his rally doing everything in his power to persuade attendees that their votes—and the election itself—were going to be stolen away in the Joint Session of Congress. That is, unless they somehow stopped it by making plans to “fight like hell” and “fight to the death” against this “act of war” by “Radical Left Democrats” and the “weak and ineffective RINO section of the Republican Party.”

By this point, it was clear that President Trump was comfortable urging, approving, and even celebrating violence. During a debate on September 29, for instance, he told the Proud Boys—a violent extremist group with ties to white nationalism—to “stand back and stand by.”<sup>48</sup> On October 30, when a caravan of his supporters in Texas attacked a bus full of Biden campaign workers, nearly running it off the road, President Trump tweeted a stylized video of the caravan and captioned it, “I LOVE TEXAS!”<sup>49</sup> Days later, he declared that “these patriots”—who could easily have killed a busload of innocent campaign staff—“did nothing wrong.”<sup>50</sup>

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<sup>46</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 5, 2021, 5:05 PM).

<sup>47</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 5, 2021, 5:12 PM).

<sup>48</sup> Sheera Frenkel & Annie Karni, *Proud Boys Celebrate Trump’s ‘Stand By’ Remark About Them At The Debate*, New York Times (Sept. 29, 2020).

<sup>49</sup> Donald J. Trump (@realDonaldTrump), Twitter (Oct. 31, 2020 8:14 PM).

<sup>50</sup> Donald J. Trump (@realDonaldTrump), Twitter (Nov. 1, 2020, 8:18 AM); Katie Shepherd, *Trump Cheers Supporters Who Swarmed A Biden Bus In Texas: ‘These Patriots Did Nothing Wrong’*, Wash. Post (Nov. 2, 2020).

Throughout this period, it was widely reported and well known that President Trump’s attacks on election officials had sparked threats, intimidation, and actual violence.<sup>51</sup> Following President Trump’s attacks on Michigan’s election process, armed supporters surrounded the home of the Michigan Secretary of State; after President Trump’s attacks on the election in Arizona, his supporters surrounded the home of the Arizona Secretary of State and chanted, “We are watching you!”; after President Trump targeted the election outcome in Georgia, state election officials received a wave of death threats.<sup>52</sup> On December 1, as described above, Gabriel Sterling (who voted for Trump) warned President Trump that his incendiary rhetoric could mean that “someone’s going to get killed.” Yet President Trump not only refused to condemn any of this dangerous and threatening conduct; as detailed above, he also escalated his inflammatory and militaristic demands. That trend was matched by escalating violence. On December 12, for instance, clashes between Trump supporters and law enforcement and counter protestors at the “Second Million MAGA March” resulted in dozens of arrests and several stabbings, and at least one leader of the Proud Boys was later arrested for vandalizing a church.<sup>53</sup>

Given all that, the crowd which assembled on January 6 unsurprisingly included many who were armed, angry, and dangerous—and poised on a hair trigger for President Trump to confirm that they indeed had to “fight” to save America from an imagined conspiracy. Answering to the President’s call to mobilize, thousands arrived in Washington for the purpose (aggressively

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<sup>51</sup> Michael Wines, *Here Are the Threats Terrorizing Election Workers*, N.Y. Times (Dec. 3, 2020).

<sup>52</sup> Nick Corasaniti et al., *As Trump Rails Against Loss, His Supporters Become More Threatening*, N.Y. Times (updated Jan. 7, 2021); *Video: Group Chants ‘We Are Watching You’ outside Arizona Secretary of State Katie Hobbs’ Home*, KPXX-TV 12 News (Nov. 18, 2020).

<sup>53</sup> Peter Hermann & Keith Alexander, *Proud Boys Leader Barred From District By Judge Following His Arrest*, Wash. Post (Jan. 5, 2021); Jason Slotkin et al., *4 Stabbed, 33 Arrested After Trump Supporters, Counterprotesters Clash in D.C.*, NPR (Dec. 12, 2020).

championed by the President) of doing anything necessary to stop the Joint Session of Congress from finalizing the election results. Many who arrived brought weapons, plans of the Capitol building, and even tactical gear, including ropes, military helmets, ladders, and zip tie restraints.<sup>54</sup>

This mobilization was not hidden away in the dead of night. It was widely discussed on websites—such as TheDonald.win—that, as confirmed by a former White House staff member, were “closely monitored” by President Trump’s social media operation.<sup>55</sup> These sites hosted hundreds of posts about plans for the attack on the Capitol, with detailed discussions of weaponry and directions to “find the tunnels” and “arrest the worst traitors.”<sup>56</sup> At TheDonald.win, one poster stated: “If Congress illegally certifies Biden, ... Trump would have absolutely no choice but to demand us to storm Congress and kill/beat them up for it.”<sup>57</sup> Another poster wrote: “[Trump] can order the NAT guard to stand down if needed. unfortunately he has no control over the Capitol Police... but there are only around 2k of them and a lot are useless fat asses or girls.”<sup>58</sup> In their posts, extremists made it clear that they were prepared to fight at President Trump’s direction.

These calls for violence at the Capitol were widely covered. On January 2, for example, Fox News reported on a social media declaration by Proud Boys Leader Enrique Tarrío that the Proud Boys would come to the January 6 rally prepared for violence.<sup>59</sup> Another Proud Boys organizer said,

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<sup>54</sup> See, e.g., Evan Hill et al., *They Got a Officer!': How a Mob Dragged and Beat Police at the Capitol*, N.Y. Times (Jan. 11, 2021); Peter Hermann, *We Got to Hold This Door*, Wash. Post (Jan. 14, 2021); Rich Schapiro, *Stun Guns, 'Stinger Whips' and a Crossbow: What Police Found on the Capitol Protesters*, NBC News (Jan. 13, 2021).

<sup>55</sup> Andrew Feinberg, *White House Insiders Say Trump Knew What Was About To Happen At The Capitol—Because of His Social Media Guru Dan Scavino*, Independent (Jan. 12, 2021).

<sup>56</sup> Adam Rawnsley and Justin Rohrlich, *'Ready to Die': Two Months of MAGA Mob Warning Signs*, The Daily Beast (Jan. 7, 2021).

<sup>57</sup> Greg Miller et al., *A Mob Insurrection Stoked by False Claims Of Election Fraud And Promises Of Violent Restoration*, Wash. Post (Jan. 9, 2021).

<sup>58</sup> House Judiciary Committee Majority Staff Report: *Materials in Support of H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, 117th Cong, at 20 (Jan. 12, 2021).

<sup>59</sup> Caitlin McFall, *Proud Boys Flock to Washington 'Incognito' for Jan. 6 Protests*, Fox News (Jan. 2, 2021).

“We are going to smell like you, move like you, and look like you. The only thing we’ll do that’s us is think like us! Jan 6th is gonna be epic.”<sup>60</sup> On January 5, the *Washington Post* warned that “[f]ar-right online forums are seething with references to potential violence and urging supporters of President Trump to bring guns to Wednesday’s protests in Washington.”<sup>61</sup> These calls to action, the *Washington Post* explained, were “direct responses to Trump’s demands that his supporters pack the nation’s capital in support of his bogus claims that November’s national vote for Biden resulted from election fraud.”<sup>62</sup> Other outlets reported threats to the Joint Session, with headlines such as “Violent threats ripple through far-right internet forums ahead of protest,” and “MAGA Geniuses Plot Takeover of US Capitol.”<sup>63</sup>

City officials, such as D.C. Mayor Muriel Bowser, also warned that the rally posed a high risk of violence. Mayor Bowser announced that all D.C. police officers would report on January 6, and asked residents to avoid the downtown area and “not to engage with demonstrators who come to our city seeking confrontation.”<sup>64</sup> Law enforcement activity in the days leading up to January 6 confirmed that the gathering was dangerous. On January 3, a Capitol Police intelligence report warned of increased risk of violence targeted against Congress “as the last opportunity to overturn the results of the presidential election.”<sup>65</sup> On January 5, an FBI office in Virginia also issued an

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<sup>60</sup> Joshua Zitser, *Far-Right Group Proud Boys Claim They Will Attend January 6 Rally ‘Incognito’ and Wear All-Black to Blend In With Antifa Protestors*, Business Insider (Jan. 3, 2021).

<sup>61</sup> Craig Timberg & Drew Harwell, *Pro-Trump Forums Erupt with Violent Threats Ahead of Wednesday’s Rally Against the 2020 Election*, Wash. Post (Jan. 5, 2021).

<sup>62</sup> *Id.*

<sup>63</sup> Brandy Zadrozny & Ben Collins, *Violent Threats Ripple Through Far-Right Internet Forums Ahead of Protest*, NBC News (Jan. 5, 2021); Andrew Beaujon, *MAGA Geniuses Plot Takeover of US Capitol*, Washingtonian (Jan. 5, 2021); Luke Barr, *Law Enforcement Braces For Protests As Trump Supporters Gather In Capital*, ABC News (Jan. 5, 2021).

<sup>64</sup> Press Release, Office of the Mayor of the District of Columbia, Mayor Bowser Continues Preparation for Upcoming First Amendment Demonstrations (Jan 3, 2021).

<sup>65</sup> Carol D. Leonnig, *Capitol Police Intelligence Report Warned Three Days Before Attack That ‘Congress Itself’ Could Be Targeted*, Washington Post (Jan. 15, 2021).

explicit warning that extremists were preparing to travel to Washington to commit violence and start a “war.”<sup>66</sup> District of Columbia police made several protest-related arrests on January 4 and 5, including for weapons charges and assaulting a police officer. The arrests were widely publicized and included the leader of the Proud Boys, who was arrested with high capacity firearms magazines, which he claimed were meant to be supplied to another rally attendant.<sup>67</sup>

In all these ways—and more, as we will show at trial—President Trump created a powder keg on January 6. Hundreds were prepared for violence at his direction. They were prepared to do whatever it took to keep him in power. All they needed to hear was that their President needed them to “fight like hell.” All they needed was for President Trump to strike a match.

### **C. Vice President Pence Refuses to Overturn the Election Results**

By the time the rally began, President Trump had nearly run out of options. He had only one card left to play: his Vice President. But in an act that President Trump saw as an unforgivable betrayal, Vice President Pence refused to violate his oath and constitutional duty—and, just hours later, had to be rushed from the Senate chamber to escape an armed mob seeking vengeance.

In the weeks leading up to the rally, President Trump had furiously lobbied Vice President Pence to refuse to count electoral votes for President Biden from any of the swing states.<sup>68</sup> These demands ignored the reality that the Vice President has no constitutional or statutory authority to take that step. Over and over again, President Trump publicly declared that if Vice President Pence refused to block the Joint Session from finalizing President Biden’s victory, then the election, the

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<sup>66</sup> Devlin Barrett and Matt Zapotosky, *FBI Report Warned Of ‘War’ At Capitol, Contradicting Claims There Was No Indication Of Looming Violence*, Washington Post (Jan. 12, 2021).

<sup>67</sup> Jennifer Steinhauer et al., *Leader of Proud Boys, a Far-Right Group, Is Arrested as D.C. Braces for Protests*, N.Y. Times (Jan. 4, 2021); Peter Hermann & Keith Alexander, *Proud Boys Leader Barred From District By Judge Following His Arrest*, Wash. Post (Jan. 5, 2021).

<sup>68</sup> Jonathan Swan, Zachary Basu, *Off the Rails Episode 7: Trump Turns on Pence*, Axios (Jan. 20, 2021).

party, and the country would be lost. “I hope Mike Pence comes through for us, I have to tell you,” President Trump said in Georgia on January 4.<sup>69</sup> The next day, he tweeted: “If Vice President @Mike\_Pence comes through for us, we will win the Presidency.”<sup>70</sup> President Trump reiterated this demand just hours before the rally: “States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!”<sup>71</sup> On the morning of January 6, President Trump reportedly told Vice President Pence, “You can either go down in history as a patriot, or you can go down in history as a pussy.”<sup>72</sup>

Later that day, while President Trump was speaking at his rally, Vice President Pence issued a public letter rejecting President Trump’s threats. “It is my considered judgment,” he wrote, “that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not.”<sup>73</sup>

This letter sounded the death knell to any peaceful methods of overturning the election outcome. It was well known that the House and Senate were going to count the lawfully certified electoral votes they had received. President Trump’s efforts to coerce election officials, state legislatures, the DOJ, Members of Congress, and his own Vice President had all failed. But he had long made it clear that he would *never* accept defeat. He would fight until the bitter end. And all that remained for President Trump was the seething crowd before him—known to be poised for

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<sup>69</sup> Donald Trump Rally Speech Transcript Dalton, Georgia: Senate Runoff Election, Rev (Jan. 4, 2021).

<sup>70</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:00 AM).

<sup>71</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 8:17 AM).

<sup>72</sup> Peter Baker et al., *Pence Reached His Limit With Trump. It Wasn't Pretty.*, N.Y. Times (Jan. 12, 2021).

<sup>73</sup> Mike Pence (@Mike\_Pence), Twitter (Jan. 6, 2021, 1:02 PM).

violence at his instigation—and the Capitol building just a short march away, where Vice President Pence presided over the final, definitive accounting of President Trump’s electoral loss.

#### **D. President Trump Incites Insurrectionists to Attack the Capitol**

Shortly before noon on January 6, President Trump took the stage at his “Save America Rally” and spoke from a podium bearing the Seal of the President of the United States.<sup>74</sup> By the time he addressed the angry crowd, Rudy Giuliani (his lawyer) had called for “trial by combat.”<sup>75</sup> President Trump praised Giuliani, saying “he’s got guts, he fights.”

Over the following hour, President Trump repeatedly reiterated his claim that Democrats had “stolen” the election. He described vote tranches that favored President Biden as “explosions of bullshit.”<sup>76</sup> He exhorted the crowd to “**fight much harder**” to “**stop the steal**” and “**take back our country**.”<sup>77</sup> He also demanded again that Vice President Pence illegally interfere with the work of the Joint Session—a position that the Vice President rejected even as President Trump spoke. Time and again, President Trump declared that the future of the country was on the line and that only the crowd assembled before him could stop the massive fraud taking place at the Capitol.

At numerous points during the rally, President Trump urged the crowd toward the Capitol, where the Joint Session was about to start.<sup>78</sup> In response, an early wave surged toward the building and started to pull down barricades around its perimeter. Twenty minutes into the rally, President Trump said that those marching toward the Capitol should do so “peacefully.” But then he spoke

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<sup>74</sup> *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

<sup>75</sup> *Id.*; see also Rudy Giuliani Speech Transcript at Trump’s Washington, D.C. Rally: Wants ‘Trial by Combat’, Rev (Jan. 6, 2021).

<sup>76</sup> *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

<sup>77</sup> *Id.*; see also Maggie Haberman, *Trump Told Crowd ‘You Will Never Take Back Our Country with Weakness’*, N.Y. Times (Jan. 6, 2021).

<sup>78</sup> *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump*, RSBN TV (Jan. 6, 2020).

for another 50 minutes, using highly inflammatory rhetoric—exactly the kind of language calculated to incite violence given what had been reported about the crowd. He declared, “**we fight, we fight like hell,**” because “**if you don’t fight like hell you’re not going to have a country anymore.**”<sup>79</sup>

Videos of the crowd eliminate any doubt that President Trump’s words *in fact* incited the crowd to commit violence. Immediately after President Trump told the crowd that “**you’ll never take back our country with weakness,**” and that “[y]ou have to show strength,” supporters can be heard loudly shouting “take the Capitol right now!” and “invade the Capitol building!”<sup>80</sup> At another point, the crowd interrupted him with chants of “Fight for Trump!” The President did not try to soothe their aggression, but instead smiled and responded, “Thank you.”<sup>81</sup> As many in the crowd instantly recognized, the tenor of his speech (and his repeated demand that they “fight like hell” and “show strength” to save their country) belied any desire for a peaceful demonstration.<sup>82</sup> Those who had come to the rally looking for a signal from their President found it in his remarks. Rather than quell the crowd, urge peaceful demonstration, or promise to carry on the fight over the years to come, the overwhelming thrust of President Trump’s remarks—delivered to an armed, angry crowd widely known to be prepared for violence on his behalf—was a militaristic demand that they must fight to stop what was occurring in the Capitol at that very moment.

President Trump ended his speech by again imploring supporters to march to the Capitol, shouting, “So let’s walk down Pennsylvania Avenue!”<sup>83</sup> Although President Trump ducked out and

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<sup>79</sup> *Id.*

<sup>80</sup> Ryan Goodman & Justin Hendrix, “*Fight for Trump*”: *Video Evidence of Incitement at the Capitol*, Just Security (Jan. 25, 2021).

<sup>81</sup> *Watch LIVE: Save America March at The Ellipse featuring President @realDonaldTrump*, RSN TV (Jan. 6, 2020).

<sup>82</sup> Julia Jacobo, *This Is What Trump Told Supporters before Many Stormed Capitol Hill*, ABC News (Jan. 7, 2021).

<sup>83</sup> *Id.*



returned to the White House to watch the day’s events on television—and to lobby allies to stall the Joint Session—thousands of people, many of them armed, marched on the Capitol as he instructed.

### **E. Insurrectionists Incited by President Trump Attack the Capitol**

Provoked and incited by President Trump, who told them to “fight like hell,” hundreds of insurrectionists arrived at the Capitol and launched an assault on the building—a seditious, deadly attack against the Legislative Branch and the Vice President without parallel in American history.

In short order, President Trump’s mob crashed through security barriers that had been set up around the Capitol perimeter, tore down scaffolding, and bludgeoned law enforcement personnel guarding the building.<sup>84</sup> Rioters wearing Trump paraphernalia shoved and punched Capitol Police officers, gouged their eyes, assaulted them with pepper spray and projectiles, and denounced them as “cowards” and “traitors.”<sup>85</sup> Rioters attacked law enforcement personnel with weapons they had brought with them or stolen from the police: sledgehammers, baseball bats, hockey sticks, crutches, flagpoles, police shields, and fire extinguishers.<sup>86</sup> They tore off officers’ helmets, beat them with batons, and deployed chemical irritants including bear spray, a chemical irritant similar to tear gas, designed to be used by hunters to fend off bear attacks.<sup>87</sup> Some attackers wore gas masks and bulletproof vests; many carried firearms—indeed, at least six handguns were recovered after the

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<sup>84</sup> Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021).

<sup>85</sup> Marc Fisher et al., *The Four-Hour Insurrection*, Wash. Post (Jan. 7, 2021).

<sup>86</sup> Evan Hill et al., *They Got a Officer!?: How a Mob Dragged and Beat Police at the Capitol*, N.Y. Times (Jan. 11, 2021); Peter Hermann, *We Got to Hold This Door*, Wash. Post (Jan. 14, 2021).

<sup>87</sup> *Id.*; Peter Hermann, *We Got to Hold This Door*, Wash. Post (Jan. 14, 2021); Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021); Rich Schapiro, *Stun Guns, ‘Stinger Whips’ and a Crossbow: What Police Found on the Capitol Protesters*, NBC News (Jan. 13, 2021).

insurrection<sup>88</sup>—while others carried knives, brass knuckles, a noose, and other deadly weapons.<sup>89</sup> One officer attempting to guard the Capitol described the attack as a “medieval battle scene.”<sup>90</sup>

After storming through the barricades surrounding the building, rioters laid siege to the Capitol itself. One rioter screamed, “What are we waiting for? We already voted and what have they done? They stole it! We want our fucking country back! Let’s take it!”<sup>91</sup> Some in the mob scaled walls to reach the Capitol, while others climbed makeshift ladders and still others clambered over one another to get inside.<sup>92</sup> The mob physically overwhelmed law enforcement personnel guarding the entrances to the building and smashed through windows to gain access.<sup>93</sup> Police put their own lives at risk to defend the Capitol, but they were overcome by a crush of insurrectionists.

The mob breached the Capitol on the Senate side first, after the Joint Session had separated for each Chamber to consider an objection to Arizona’s Electoral College votes.<sup>94</sup> Senators were in the midst of debate when rioters stormed into the building.<sup>95</sup> Secret Service agents swiftly rushed Vice President Pence out of the Senate and evacuated him and his family to elsewhere in the Capitol complex, avoiding a potentially deadly encounter.<sup>96</sup> A Capitol Police officer shrewdly and heroically led a violent crowd away from the entrance to the Senate Chamber, narrowly preventing a swarm of

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<sup>88</sup> See, e.g., Officer Dallan Haynes Statement of Facts, at 2 (Jan. 7, 2021); DC Police Department (@DCPoliceDept), Twitter (Jan. 7, 2021, 1:52 PM).

<sup>89</sup> Officer Christopher Frank Affidavit, at 1 (Jan. 6, 2021), <https://perma.cc/YN87-BDKH>; Officer Alexandria Sims Affidavit, at 1 (Jan. 7, 2021), <https://perma.cc/392C-CGPC>; Special Agent Lawrence Anyaso Affidavit, at 1 (Jan. 7, 2021), <https://perma.cc/M3GZ-WSVM>; Luke Mogelson, *Among the Insurrectionists*, *The New Yorker* (Jan. 15, 2021).

<sup>90</sup> Peter Hermann, *We Got to Hold This Door*, *Wash. Post* (Jan. 14, 2021).

<sup>91</sup> Ryan Goodman & Justin Hendrix, *“Fight for Trump”*: *Video Evidence of Incitement at the Capitol*, *Just Security* (Jan. 25, 2021).

<sup>92</sup> Marc Fisher et al., *The Four-Hour Insurrection*, *Wash. Post* (Jan. 7, 2021).

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

<sup>94</sup> Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, *N.Y. Times* (Jan. 15, 2021).

<sup>95</sup> Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, *N.Y. Times* (Jan. 12, 2021).

<sup>96</sup> Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, *Wash. Post* (Jan. 15, 2021).

insurrectionists from overcoming Senators who remained just feet away.<sup>97</sup> After that, the violent mob inside the Capitol embarked on a deadly mission.

Videos of the events show that dozens of the insurrectionists specifically hunted Vice President Pence and House Speaker Nancy Pelosi—the first and second in the line of Presidential succession, respectively. “Once we found out Pence turned on us and that they had stolen the election, like, officially, the crowd went crazy,” said one rioter. “I mean, it became a mob.”<sup>98</sup> Rioters chanted, “**Hang Mike Pence!**”<sup>99</sup> Another shouted, “Mike Pence, we’re coming for you ... fucking traitor!”<sup>100</sup> Others shouted, “**Tell Pelosi we’re coming for that bitch.**”<sup>101</sup> One rioter said that he and other rioters “kicked in Nancy Pelosi’s office door” and that “Crazy Nancy probably would have been torn into little pieces but she was nowhere to be seen.”<sup>102</sup>

The insurrectionists also menaced Members of Congress, their staffs, their families, and Capitol personnel. Senators were evacuated from their Chamber, scrambling quickly just as the mob massed nearby.<sup>103</sup> Rioters ultimately overpowered Capitol Police throughout the complex, forcing them to retreat closer and closer to where Members had sought safety. In the House, terrified Members were trapped in the Chamber; they prayed and tried to build makeshift defenses while

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<sup>97</sup> *Id.*; Rebecca Tan, *A Black Officer Faced Down a Mostly White Mob at the Capitol. Meet Eugene Goodman*, Wash. Post (Jan. 14, 2021).

<sup>98</sup> Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021).

<sup>99</sup> Peter Baker et al., *Pence Reached His Limit with Trump. It Wasn't Pretty*, N.Y. Times (Jan. 12, 2021).

<sup>100</sup> Ryan Goodman & Justin Hendrix, *“Fight for Trump”: Video Evidence of Incitement at the Capitol*, Just Security (Jan. 25, 2021).

<sup>101</sup> Matthew S. Schwartz, *As Inauguration Nears, Concern Of More Violence Grows*, NPR (Jan. 9, 2021).

<sup>102</sup> David K. Li & Ali Gostanian, *Georgia Lawyer Said He Kicked in Pelosi’s Door, She Could’ve Been ‘Torn into Little Pieces’*, NBC News (Jan. 19, 2021).

<sup>103</sup> Marc Fisher et al., *The Four-Hour Insurrection*, Wash. Post (Jan. 7, 2021).

rioters smashed the entryway.<sup>104</sup> Capitol Police dragged furniture to barricade the House Chamber doors against the mob attempting to break in; they then drew their guns to guard the doors.<sup>105</sup>

Instructed to put on gas masks to protect against chemical agents, some Members called loved ones for fear that they would not survive the assault by President Trump’s insurrectionist mob.<sup>106</sup>

As Members on the House floor evacuated through the Speaker’s Lobby, rioters saw them and attempted to break through the barricaded glass door, which Capitol Police protected with their guns drawn. The officer at the door shot one woman attempting to break through, merely ten yards from the path where Members were being evacuated to safety from the House floor. Meanwhile, Members of Congress, press, and staff remained trapped in the Gallery, one floor up and fearing for their lives. When gunshots were heard outside the House Chamber, police screamed, “Get down! Get down!” and Members in the Gallery crawled to shelter behind chairs.<sup>107</sup>

Members and staff who were not on the House floor at the time of the siege were also in danger. Many barricaded themselves in their offices. Speaker Pelosi’s staff hid under a table with the lights turned off for hours while they could hear rioters outside in the Speaker’s office.<sup>108</sup> One Member asked his chief of staff to protect his visiting daughter and son-in-law “with her life”—which she did by standing guard at the door clutching a fire iron while his family hid under a table.<sup>109</sup>

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<sup>104</sup> Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. Times (Jan. 12, 2021); CBS News, *Video Shows Members of Congress Taking Cover in House Gallery* (Jan. 6, 2021); Haley Britzky, *This Army Ranger-Turned-Congressman Was Last Out of the House Chamber During the Capitol Riots*, Task and Purpose (Jan. 7, 2021).

<sup>105</sup> CNN, *Lawmaker Describes Moment Captured in Dramatic Photo*, YouTube (Jan. 6, 2021).

<sup>106</sup> Rep. Dan Kildee (@RepDanKildee), Twitter, (Jan. 6, 2021, 2:52 PM); Rose Minutaglio, *Rep. Susan Wild On The ‘Sheer Panic’ She Felt In That Viral Photo*, Elle (Jan. 7, 2021).

<sup>107</sup> Rose Minutaglio, *Rep. Susan Wild On The ‘Sheer Panic’ She Felt In That Viral Photo*, Elle (Jan. 7, 2021).

<sup>108</sup> Christina Zhao, *Pelosi Gets Emotional Talking About Her Staffers Hiding Under Desks Amid Capitol Riot*, Newsweek (Jan. 10, 2021).

<sup>109</sup> John Hendrickson, *Jamie Raskin Lost His Son. Then He Fled a Mob*, The Atlantic (Jan. 8, 2021).

Once inside, insurrectionists desecrated and vandalized the Capitol. They ransacked Congressional Leadership offices—breaking windows and furniture, and stealing electronics and other sensitive material.<sup>110</sup> They left bullet marks in the walls, looted art, smeared feces in hallways, and destroyed monuments, including a commemorative display honoring the late Representative John Lewis.<sup>111</sup> Many rioters carried Trump flags and signs, while others wore the insignia of fringe militias and extremists such as the Proud Boys and neo-Nazis, including a shirt emblazoned with the slogan, “Camp Auschwitz.”<sup>112</sup> One insurrectionist paraded the Confederate battle flag through the Capitol halls—an act that thousands of troops gave their lives to prevent during the Civil War.<sup>113</sup>

Shortly after Senators had been evacuated from the Senate Chamber, insurrectionists entered it and rummaged through Senators’ desks, taking photos of private notes and letters.<sup>114</sup> One of them shouted “Trump won that election!” on the Senate dais where Vice President Pence had presided.<sup>115</sup> Another rioter climbed onto the dais, announcing that “I’m gonna take a seat in this chair, because Mike Pence is a fucking traitor.”<sup>116</sup> He left a note on the Vice President’s desk stating, “ITS ONLY

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<sup>110</sup> Natasha Bertrand, *Justice Department Warns of National Security Fallout from Capitol Hill Insurrection*, Politico (Jan. 7, 2021); Wilson Wong, *Shattered Glass, Ransacked Offices: Images of Damage at U.S. Capitol Left by Pro-Trump Mob*, NBC News (Jan. 7, 2021).

<sup>111</sup> See Chris Sommerfeldt, *Pro-Trump Rioters Smeared Poop in U.S. Capitol Hallways During Belligerent Attack*, N.Y. Daily News (Jan. 7, 2021); The Hill (@thehill), Twitter (Jan. 7, 2021, 1:16 PM); Sarah Bahr, *Curators Scour Capitol for Damage to the Building or Its Art*, N.Y. Times (Jan. 7, 2021); Lauren Egan, *Capitol Reels from Damage and Destruction Left by Violent Rioters*, NBC News (Jan. 7, 2021).

<sup>112</sup> *Here Are Some of the People Charged since a Mob Breached the Capitol*, Wash. Post (Jan. 15, 2021); Elana Schor, *Anti-Semitism Seen in Capitol Insurrection Raises Alarms*, Associated Press (Jan. 13, 2021); Special Agent Affidavit, at 13 (Jan. 15, 2021), <https://www.justice.gov/opa/page/file/1355921/download>.

<sup>113</sup> *Id.*; Julia Jacobo, *A Visual Timeline on How the Attack on Capitol Hill Unfolded*, ABC News (Jan. 10, 2021).

<sup>114</sup> *Id.*; Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, N.Y. Times (Jan. 15, 2021); Luke Mogelson, *Among the Insurrectionists*, The New Yorker (Jan. 15, 2021).

<sup>115</sup> Igor Bobic (@igorbobic), Twitter (Jan. 6, 2021, 2:47 PM).

<sup>116</sup> Luke Mogelson, *Among the Insurrectionists*, The New Yorker (Jan 15, 2021).

A MATTER OF TIME / JUSTICE IS COMING.”<sup>117</sup> Some insurrectionists carried zip ties that could be used as handcuffs—apparently in anticipation of taking hostages.<sup>118</sup>

Meanwhile, the mob outside the building continued to attack the police and wreak havoc. Some erected a gallows directly outside of the Capitol.<sup>119</sup> Others disabled police vehicles, and still others left threatening messages for Members of Congress.<sup>120</sup> In a nearby pickup truck belonging to a Trump supporter who had driven to Washington for the day’s events, police discovered materials for making napalm-like explosives, a rifle, a shotgun, three pistols, five types of ammunition, a crossbow, several machetes, a stun gun, and smoke devices.<sup>121</sup> Police found two other explosive devices near the Capitol, outside the offices of the Republican National Committee and the Democratic National Committee.<sup>122</sup> Law enforcement is currently seeking more information on a hooded figure captured on camera transporting the suspected pipe bombs.<sup>123</sup>

Provoked by President Trump’s statements at the rally, many insurrectionists who assaulted the Capitol proudly proclaimed that they were doing President Trump’s bidding. One told police officers that he came as part of a group of “patriots” “at the request of the President.”<sup>124</sup> In a livestreamed video from inside the Capitol, another declared that “[o]ur president wants us here.

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<sup>117</sup> *Id.*

<sup>118</sup> Alexander Mallin & Ivan Pereira, *Capitol Riot Suspects Who Allegedly Brought Zip Ties, Wore Tactical Gear Arrested*, ABC News (Jan. 11, 2021).

<sup>119</sup> Azi Paybarah & Brent Lewis, *Stunning Images as a Mob Storms the U.S. Capitol*, N.Y. Times (Jan. 6, 2021).

<sup>120</sup> *Id.*

<sup>121</sup> *Here Are Some of the People Charged Since a Mob Breached the Capitol*, Wash. Post (Jan. 15, 2021).

<sup>122</sup> Michael Balsamo, *Discovery of Pipe Bombs in DC Obscured by Riot at Capitol*, Associated Press (Jan. 11, 2021).

<sup>123</sup> See DC Police Department (@DCPoliceDept), Twitter (Jan. 8, 2021, 10:52 AM).

<sup>124</sup> Special Agent James Soltes Affidavit, at 3 (Jan. 8, 2021).

... **We wait and take orders from our president.**<sup>125</sup> Yet another rioter yelled at police officers, “[w]e were invited here ... by the **President of the United States!**”<sup>126</sup>

After the insurrection, one participant who broke into the Capitol wearing combat gear and carrying zip ties stated that he acted because “[t]he President asked for his supporters to be there to attend, and I felt like it was important, because of how much I love this country, to actually be there.”<sup>127</sup> Another asserted, “I thought I was following my President. ... He asked us to fly there, he asked us to be there, so **I was doing what he asked us to do.**”<sup>128</sup> She explained that she believed that she had “**answered the call of [her] president,**” echoing the views of other participants.<sup>129</sup> Subsequent reporting revealed that far-right groups had rallied members to attend the event based upon “the green light from the President.”<sup>130</sup>

The insurrectionists killed a Capitol Police officer by striking him in the head with a fire extinguisher.<sup>131</sup> They injured over 140 police officers, including at least 81 U.S. Capitol Police officers and 65 members of the Metropolitan Police Department, with many requiring hospitalization and significant medical treatment.<sup>132</sup> One suffered an apparent heart attack after he was hit six times with a stun gun; another lost part of a finger.<sup>133</sup> To cite just a few of the many

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<sup>125</sup> Dan Barry et al., ‘Our President Wants Us Here’: *The Mob That Stormed the Capitol*, N.Y. Times (Jan. 9, 2021).

<sup>126</sup> See Philip Bump, *A House Republican Wanted Proof of Incitement. Here Are Four Rioters Who Came to D.C. Because of Trump*, Wash. Post (Jan. 13, 2021).

<sup>127</sup> *Here Are Some of the People Charged since a Mob Breached the Capitol*, Wash. Post (Jan. 15, 2021).

<sup>128</sup> David Begnaud (@DavidBegnaud), Twitter (Jan. 15, 2021, 8:30 PM).

<sup>129</sup> Alan Feurer & Nicole Hong, ‘I Answered the Call of My President’: *Rioters Say Trump Urged Them On*, N.Y. Times (Jan. 17, 2021).

<sup>130</sup> Georgia Wells et al., *Proud Boys, Seizing Trump’s Call to Washington, Helped Lead Capitol Attack*, Wall Street J. (Jan. 17, 2021); Aruna Viswanatha & Sadie Gurman, *Far-Right Affiliations Seen among Those Recently Charged in Capitol Riot*, Wall Street J. (Jan. 17, 2021).

<sup>131</sup> Marc Santora et al., *Capitol Police Officer Dies from Injuries in Pro-Trump Rampage*, N.Y. Times (Jan. 8, 2021).

<sup>132</sup> Peter Hermann & Julie Zauzmer, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers during Assault on U.S. Capitol*, Wash. Post (Jan. 11, 2021); Special Agent Michael Palian Affidavit, at 5 (Jan. 19, 2021); Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, Wash. Post (Jan. 27, 2021).

<sup>133</sup> Peter Hermann & Julie Zauzmer, *Beaten, Sprayed with Mace and Hit with Stun Guns: Police Describe Injuries to Dozens of Officers during Assault on U.S. Capitol*, Wash. Post (Jan. 11, 2021).

incidents of violence captured on video: multiple officers were dragged down a flight of stairs and beaten with metal pipes and an American flag pole; another was bludgeoned with a hockey stick; another was crushed as he attempted to guard a door to the Capitol.<sup>134</sup> Rioters shouted as they surrounded one fallen officer: “We got one!” Others urged, “Kill him with his own gun!”<sup>135</sup> Four rioters died during the attack.<sup>136</sup>

It took more than three hours to secure the Capitol after the insurrectionists invaded the building.<sup>137</sup> Another three hours passed before the Joint Session could resume.<sup>138</sup> The rioters tried but—as Majority Leader McConnell noted—ultimately failed to prevent Vice President Pence and Congress from carrying out their constitutional responsibility to count the Electoral College votes.<sup>139</sup> At approximately 4 AM, President Biden was confirmed as the winner of the 2020 election.<sup>140</sup>

#### **F. President Trump’s Dereliction of Duty During the Attack**

As armed insurrectionists breached the Capitol—and as Vice President Pence, the Congress, and the Capitol Police feared for their lives—President Trump was described by those around him as “borderline enthusiastic because it meant the certification was being derailed.”<sup>141</sup> Senior administration officials described President Trump as “delighted” and reported that he was “walking around the White House confused about why other people on his team weren’t as excited as he was

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<sup>134</sup> *Id.*; Evan Hill et al., *They Got a Officer!?: How a Mob Dragged and Beat Police at the Capitol*, N.Y. Times (Jan. 11, 2021); Katie Shepherd, *Video Shows Capitol Mob Dragging Police Officer Down Stairs. One Rioter Beat the Officer with a Pole Flying the U.S. Flag*, Wash. Post (Jan. 11, 2021); Peter Hermann, *We Got to Hold This Door*, Wash. Post (Jan. 14, 2021); Pierre Thomas et al., *“Like a Medieval Battle Scene”: Officers Recount Being Attacked by Capitol Mob*, ABC News (Jan. 15, 2021).

<sup>135</sup> Peter Hermann, *We Got to Hold This Door*, Wash. Post (Jan. 14, 2021).

<sup>136</sup> Jack Healy, *These Are the Five People Who Died in the Capitol Riot*, New York Times (Jan. 11, 2021).

<sup>137</sup> Shelly Tan et al., *How One of America’s Ugliest Days Unraveled Inside and Outside the Capitol*, Wash. Post (Jan. 9, 2021).

<sup>138</sup> *Id.*

<sup>139</sup> Matthew Choi, *“They Failed”: McConnell Condemns Rioters Who Stormed the Capitol*, Politico (Jan. 6, 2021).

<sup>140</sup> Shelly Tan et al., *How One of America’s Ugliest Days Unraveled Inside and Outside the Capitol*, Wash. Post (Jan. 9, 2021).

<sup>141</sup> Kaitlan Collins (@kaitlancollins), Twitter (Jan. 6, 2021, 10:34 PM).



as you had rioters pushing against Capitol Police trying to get into the building.”<sup>142</sup> These feelings were reflected in President Trump’s actions (and inactions) over the following hours, which reveal an extraordinary, unprecedented repudiation of the President’s duties to protect the government.

At 1:49 PM, after insurrectionists had overcome the Capitol perimeter—and after reports of pipe bombs had been confirmed—President Trump retweeted a video of his speech at the rally, which included his message that “Our country has had enough, we will not take it anymore, and that’s what this is all about. ... You have to be strong.”<sup>143</sup> Just over thirty minutes later, at 2:24 PM, while rioters were still attacking police and after Vice President Pence had been evacuated from the Senate floor, President Trump again tweeted to excoriate the Vice President for refusing to obstruct the Joint Session: “**Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution.**”<sup>144</sup> President Trump thus singled out Vice President Pence for direct criticism *at the very same time* the Vice President and his family were hiding from a violent mob provoked by President Trump. As one rioter explained, the mob “went crazy” after learning that “Pence turned on us and that they had stolen the election.”<sup>145</sup>

As the assault continued, President Trump continued his efforts to prevent the Joint Session from affirming the election results. After Senators had been evacuated from the Senate Chamber, President Trump called Senator Mike Lee—apparently trying to reach Senator Tommy Tuberville—not to check on his safety, or assess the security threat, but to try to persuade him to delay and

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<sup>142</sup> Andrew Prokop, *Republican Senator: White House Aides Say Trump Was “Delighted” as Capitol Was Stormed*, Vox (Jan. 8, 2021).

<sup>143</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:49:54 PM).

<sup>144</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 2:24 PM).

<sup>145</sup> Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021).

further obstruct the Electoral College vote count.<sup>146</sup> In fact, there is no evidence that President Trump called Vice President Pence, Speaker Pelosi or Senator Chuck Grassley—the first three in the line of succession—or anyone else in the Capitol to check on their safety during the attack.

Recognizing President Trump’s singular responsibility for the assault, as well as his unique ability to both provoke and quell the riotous mob, Members of the House and Senate from both parties urged the President to intervene.<sup>147</sup> This occurred both publicly and privately. House Minority Leader Kevin McCarthy confirmed that he had “talked to the President” on the telephone and said: “I think we need to make a statement. Make sure that we can calm individuals down.”<sup>148</sup> Republican Representative Mike Gallagher tweeted, “Mr. President. You have got to stop this. You are the only person who can call this off.”<sup>149</sup> Mick Mulvaney, the President’s former Acting Chief of Staff, tweeted that President Trump “can stop this now and needs to do exactly that. Tell these folks to go home.”<sup>150</sup> Even the President’s own Chief of Staff, Mark Meadows, was prompted to speak to him after aides bluntly insisted on it: “They are going to kill people.”<sup>151</sup>

But the President did not take any action at all in response to the attack until 2:38 PM, when he issued his first tweet, and 3:13 PM, when he issued a second. These tweets told his followers to “support our Capitol Police and Law Enforcement ... Stay peaceful!”<sup>152</sup> and “ask[ed] everyone at the

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<sup>146</sup> Sunlen Serfaty et al., *As Riot Raged at Capitol, Trump Tried to Call Senators to Overturn Election*, CNN (Jan. 8, 2021).

<sup>147</sup> See e.g., Ashley Parker et al., *Six Hours of Paralysis: Inside Trump’s Failure to Act after a Mob Stormed the Capitol*, Wash. Post (Jan. 11, 2021); Nancy Pelosi (@SpeakerPelosi), Twitter (Jan. 6, 2021, 3:55 PM).

<sup>148</sup> Associated Press, *Trump Doesn’t Ask Backers to Disperse after Storming Capitol*, PBS (Jan. 6, 2021); see also *Chris Christie says Trump Should Tell Protesters to Leave Capitol*, ABC News (Jan. 6, 2021).

<sup>149</sup> Editorial, *Mike Gallagher Is Right: ‘Call It Off, Mr. President’*, Wisconsin State Journal (Jan. 6, 2021).

<sup>150</sup> Mick Mulvaney (@MickMulvaney), Twitter (Jan. 6, 2021, 3:01 PM).

<sup>151</sup> Ashley Parker et al., *Six Hours of Paralysis: Inside Trump’s Failure to Act after a Mob Stormed the Capitol*, Wash. Post (Jan. 11, 2021).

<sup>152</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 2:38 PM).

U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order.”<sup>153</sup>

These tweets were, obviously, totally ineffectual at stopping the violence. And they did not reflect any substantial effort on the part of the President of the United States to protect the Congress.

During this time, not only did President Trump fail to issue unequivocal statements ordering the insurrectionists to leave the Capitol; he also failed in his duties as Commander in Chief by not immediately taking action to protect Congress and the Capitol. This failure occurred despite multiple members of Congress, from both parties, including on national television, vehemently urging President Trump to take immediate action.

The next action that President Trump took—while the violence persisted and escalated—occurred more **than three hours** from the start of the siege. At this point, he released a scripted video that included a call for “peace” and “law and order,” and instructed his followers, “you have to go home now.”<sup>154</sup> But even in that video, President Trump continued to provoke violence, telling his supporters—who were *at that very moment* committing violence inside the Capitol and terrorizing Members of Congress—that the election was “stolen from us.”<sup>155</sup> He added that “[i]t was a landslide election and everyone knows it, especially the other side.” He concluded by telling the violent insurrectionists: “**We love you, you’re very special. ... I know how you feel.** But go home and go home in peace.”<sup>156</sup>

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<sup>153</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 3:13 PM).

<sup>154</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 4:17 PM); *President Trump Video Statement on Capitol Protestors*, C-SPAN (Jan. 6, 2021).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*; see also Tony Keith, *Twitter Locks’ President Trump for 12 Hours Wednesday Evening*, KKTV (Jan. 6, 2021).

The violence he had provoked unsurprisingly continued after President Trump released this video.<sup>157</sup> In the early evening, after the Capitol had finally been secured and the scope of the devastation was clear, President Trump sent another tweet. But rather than forcefully denounce the violence and express concern for the safety of law enforcement personnel and Members of Congress, he again validated the insurrection, reiterated his falsehoods about the election, and lionized the rioters as patriots: **“These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!”**<sup>158</sup>

Like his predecessors, President Trump swore an oath to “preserve, protect, and defend the Constitution of the United States.” But on January 6, after inciting violence against the Congress to block certification of the election results, President Trump failed to honor that oath. And he concluded the day not by apologizing, or by repudiating the insurrectionists, but instead by embracing them and lending the imprimatur of the Presidency to their acts of domestic violence.

Since the events of January 6, President Trump has shown no remorse for his role in provoking an attack on our seat of government. To the contrary, he insisted to reporters days later that his speech prior to the insurrection had been “totally appropriate.”<sup>159</sup> Despite repeated

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<sup>157</sup> Evan Hill & Arielle Ray, *Body Camera Footage Shows Capitol Rioters Trampling Over Woman*, N.Y. Times (Jan. 28, 2021).

<sup>158</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 6:01 PM).

<sup>159</sup> Kevin Liptak & Betsy Klein, *Defiant Trump Denounces Violence but Takes No Responsibility for Inciting Deadly Riot*, CNN (Jan. 12, 2021).

entreaties, it took him three days to order the flag of the United States to be flown at half-staff to commemorate the death of a Capitol Police Officer who had been killed by insurrectionists.<sup>160</sup>

President Trump's conduct on and after January 6 exacerbated the continuing threat of violence following the assault on the Capitol. As a result, the federal and state governments had to take unprecedented measures to ensure security in Washington. The states sent 25,000 National Guard troops to protect the inauguration of an incoming President from potential violence incited by the outgoing President.<sup>161</sup> In addition, state capitols across the Nation shut their doors and took extreme security measures during the days leading up to the inauguration for fear of further violence in support of President Trump.<sup>162</sup> As the Director of the FBI stated, there was a major "potential for violence at multiple protests and rallies" both in Washington and at state capitols around the country "that could bring armed individuals within close proximity to government buildings and officials."<sup>163</sup> Ultimately, President Trump announced he would not attend the inauguration of President Biden.<sup>164</sup> He never issued any statement condemning threatened attacks on the inauguration or repudiating violence against the lawful government of the United States of America

### **G. The House Approves An Article of Impeachment with Bipartisan Support**

In light of the crisis that President Trump created and the overwhelming public evidence of his guilt, the House acted quickly to impeach him.<sup>165</sup> Five days after the assault on the Capitol, an article of impeachment for incitement of insurrection was introduced in the House and referred to

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<sup>160</sup> David Choi, *Trump Lowers the White House Flag after Pressure from Both Republicans and Democrats*, Business Insider (Jan. 10, 2021).

<sup>161</sup> Emily Davies et al., *With Mall, Bridges and Streets Closed in D.C., the Nation Prepares for a Celebration of Democracy Mostly Devoid of its Citizens*, Wash. Post (Jan. 15, 2021), <https://perma.cc/FR4Y-6G7N>.

<sup>162</sup> Associated Press, *State Capitols Boarded Up, Fenced Off, Patrolled by Troops*, KNAU (Jan. 18, 2021).

<sup>163</sup> Press Release, FBI, *FBI Director Christopher Wray's Remarks at Briefing on Inauguration Security* (Jan. 15, 2021).

<sup>164</sup> Kaitlin Collins & Kevin Liptak, *Trump Tweets He is Skipping Biden's Inauguration*, CNN (Jan. 8, 2021).

<sup>165</sup> H. Res. 24, 117th Cong. (Jan. 11, 2021).

the House Committee on the Judiciary. The following day, the House Committee on Rules convened a hearing to take testimony on the impeachment resolution.<sup>166</sup> During this hearing, the Chairman of the Judiciary Committee submitted a 50-page report documenting the Committee's findings in support of impeachment.<sup>167</sup> At the conclusion of this hearing, the Rules Committee adopted by a recorded vote a special rule providing for House debate on the resolution.<sup>168</sup>

One day later—January 13, 2021—the House voted to impeach President Trump with bipartisan support on charges that he incited an insurrection. The article of impeachment was adopted with the support of 232 House Members, including every Democrat and ten Republicans.<sup>169</sup> The House acted with urgency because President Trump's rhetoric and conduct before, during, and after the riot made clear that he was a menace to the Nation's security and democratic system. Moreover, President Trump never disputed the facts that gave rise to his impeachment, which were captured on recordings. Instead he merely stated publicly that what he did was appropriate.

Several Republican Members of the House issued statements explaining their decision to vote for impeachment. For example, Representative John Katko explained:

It cannot be ignored that President Trump encouraged this insurrection—both on social media ahead of January 6th, and in his speech that day. By deliberately promoting baseless theories suggesting the election was somehow stolen, the president created a combustible environment of misinformation, disenfranchisement, and division. When this manifested in violent acts on January 6th, he refused to promptly and forcefully call it off, putting countless lives in danger.<sup>170</sup>

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<sup>166</sup> *House Rules Committee Debate on Resolution to Remove President Trump From Office*, C-SPAN (Jan. 12, 2021).

<sup>167</sup> *House Judiciary Committee Majority Staff Report: Materials in Support of H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, 117th Cong (Jan. 12, 2021).

<sup>168</sup> U.S. House Committee on Rules, *Report on Providing for Consideration of the Resolution (H. Res. 24, Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors)*, H. Rept. 117-2, 117th Cong. (Jan. 12, 2021).

<sup>169</sup> Clerk of the U.S. House of Representatives, Roll Call 17, H. Res. 24 (Jan. 13, 2021).

<sup>170</sup> Press Release, Representative John Katko, Statement from Rep. Katko on Articles of Impeachment (Jan. 12, 2021).

Representative Tom Rice stated:

It has been a week since so many were injured, the United States Capitol was ransacked, and six people were killed, including two police officers. Yet, the President has not addressed the nation to ask for calm. He has not visited the injured and grieving. He has not offered condolences. Yesterday in a press briefing at the border, he said his comments were “perfectly appropriate.”<sup>171</sup>

Representative Adam Kinzinger similarly explained: “There is no doubt in my mind that the President of the United States broke his oath of office and incited this insurrection. He used his position in the Executive to attack the Legislative.”<sup>172</sup> Representative Liz Cheney put the point simply when she recognized that “[t]here has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution.”<sup>173</sup>

## ARGUMENT

### I. President Trump Committed High Crimes and Misdemeanors

A President is subject to impeachment, conviction, and disqualification from future federal officeholding if he commits high crimes and misdemeanors. President Trump’s incitement of insurrection meets that standard.<sup>174</sup> His conduct endangered the foundation of our government.

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<sup>171</sup> Press Release, Representative Tom Rice, Rep. Tom Rice Votes to Impeach President Trump (Jan. 13, 2021).

<sup>172</sup> Press Release, Representative Adam Kinzinger, Congressman Kinzinger Statement on Impeachment (Jan. 12, 2021).

<sup>173</sup> Press Release, Representative Liz Cheney, I Will Vote To Impeach The President (Jan. 12, 2021).

<sup>174</sup> See Dan McLaughlin, *Convict and Disqualify Trump*, National Review (Jan. 15, 2021); David Post, *A Senatorial Impeachment Two-Step?*, The Volokh Conspiracy (Jan. 13, 2021); Gene Healy, *Only Impeachment is Censure Enough*, CATO Institute (Jan. 13, 2021); Eric Posner, *The Effort to Disqualify Trump is Worth It*, Project Syndicate (Jan. 12, 2021); ACLU *Again Calls for Impeachment of President Trump*, ACLU Press Release (Jan. 10, 2021); Frank O. Bowman, III, *The Constitutional Case for Impeaching Donald Trump (Again)*, Just Security (Jan. 9, 2021); Jeannie Suk Gerson, *The Case For Removing Donald Trump*, New Yorker (Jan. 9, 2021); Michael Stokes Paulsen, *The Constitutional and Moral Imperative of Immediate Impeachment*, The Bulwark (Jan. 8, 2021); Jonathan H. Adler, *Yes, Congress May Impeach and Remove President Trump for Inciting Lawless Behavior at the Capitol*, The Volokh Conspiracy (Jan. 8, 2021); Noah Feldman, *I Testified at Trump’s Last Impeachment. Impeach Him Again.*, Bloomberg (Jan. 7, 2021); Steven G. Calabresi & Norman Eisen, *We Disagree on a Lot. But We Both Think Trump Should Be Convicted*, N.Y. Times (Jan. 13, 2021); David Landau and Rosalind Dixon, *The 25th Amendment Can Remove Trump, but We Shouldn’t Stop There*, N. Y. Times (Jan. 7, 2021); *Stanford Law’s Michael McConnell on the 25th Amendment and Trump*,

## A. President Trump Violated His Oath of Office

Every President swears an oath to “faithfully execute the Office of the President of the United States”<sup>175</sup> and assumes the constitutional duty to “take Care that the laws be faithfully executed.”<sup>176</sup> Impeachment is a safeguard against Presidents who violate that oath (and betray that duty) by using the powers of their office to advance their own personal political interests at the expense of the Nation. In particular, the Framers of the Constitution feared a President who would corrupt his office by sparing “no efforts or means whatever to get himself re-elected.”<sup>177</sup>

President Trump’s effort to extend his grip on power by fomenting violence against Congress was a profound violation of the oath he swore. If provoking an insurrectionary riot against a Joint Session of Congress after losing an election is not an impeachable offense, it is hard to imagine what would be. The Framers themselves would not have hesitated to convict on these facts. Their worldview was shaped by a study of classical history, as well as a lived experience of resistance and revolution. They were well aware of the danger posed by opportunists who incited mobs to violence for political gain. They drafted the Constitution to avoid such thuggery, which they associated with “the threat of civil disorder and the early assumption of power by a dictator.”<sup>178</sup> James Madison thus worked “to avoid the fate of those ‘ancient and modern confederacies,’ which he believed had succumbed to rule by demagogues and mobs.”<sup>179</sup> The *Federalist Papers*, too, strongly

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Stanford Law School (Jan. 7, 2021); Keith E. Whittington, *The Conservative Case For Impeaching Trump Now*, Wash. Post (Jan. 7, 2021); David Priess & Jack Goldsmith, *Can Trump Be Stopped?*, Lawfare (Jan. 7, 2021); Cass Sunstein, *Does the 25th Amendment Apply to Trump? Quite Possibly*, Bloomberg (Jan. 7, 2021); John Podhoretz, *Donald Trump Should Be Impeached and Removed from Office Tomorrow*, Commentary Magazine (Jan. 6, 2021); Melissa De Witte and Sharon Driscoll, *Stanford Scholars React to Capitol Hill Takeover*, Stanford News (Jan. 6, 2021); Ilya Somin, *A Qualified Defense of Impeaching Trump Again*, Reason (Jan. 6, 2021); Will Baude, Samuel Bray & Stephen Sachs, *Impeach and Remove*, The Volokh Conspiracy (Jan. 6, 2021).

<sup>175</sup> U.S. Const., Art. II, § 1, cl. 8.

<sup>176</sup> U.S. Const., Art. II, §§ 1, 3.

<sup>177</sup> 2 *The Records of the Federal Convention of 1787*, at 64 (Max Farrand ed., 1911) (Farrand).

<sup>178</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* 282 (1967).

<sup>179</sup> Jeffrey Rosen, *American is Living James Madison’s Nightmare*, The Atlantic (October 2018).



warned against aspiring tyrants who would aggrandize themselves—and threaten the Republic—by stirring popular fury to advance personal ambition.<sup>180</sup> The founding generation was familiar with leaders who provoked mobs for their personal gain and threatened the political order. They would have immediately recognized President Trump’s conduct on January 6 as an impeachable offense.

## **B. President Trump Attacked the Democratic Process**

The gravity of President Trump’s offense is magnified by the fact that it arose from a course of conduct aimed at subverting and obstructing the election results. Since President George Washington willingly relinquished his office after serving two terms, our Nation has seen an unbroken chain of peaceful transitions from one presidential administration to the next—that is, until January 6, 2021. President Trump’s incitement of insurrection disrupted the Joint Session of Congress as it performed its duty under the Twelfth Amendment to count the Electoral College votes.<sup>181</sup> Although this assault was put down after several hours, and the Joint Session fulfilled its responsibility later that night, President Trump’s abuse of office threatened and injured our democratic order. Under absolutely no circumstance may a candidate for any position, at any level of government, respond to electoral defeat by provoking armed violence.

As evidenced by the statements of William Davie, George Mason, and Gouverneur Morris at the Constitutional Convention, the Framers “anticipated impeachment if a President placed his own interest in retaining power above the national interest in free and fair elections.”<sup>182</sup> At a time when “democratic self-government existed almost nowhere on earth,”<sup>183</sup> the Framers imagined a society “where the true principles of representation are understood and practised, and where all authority

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<sup>180</sup> Alexander Hamilton, *The Federalist Papers*: No. 1.

<sup>181</sup> U.S. Const. Amend. XII.; Electoral Count Act of 1887, Pub. L. 49-90, 24 Stat. 373.

<sup>182</sup> See H. Rep. 116-346 at 52.

<sup>183</sup> Akhil Amar, *America’s Constitution: A Biography* 8 (2006)

flows from, and returns at stated periods to, the people.”<sup>184</sup> That would be possible only if “those entrusted with [power] should be kept in dependence on the people.”<sup>185</sup> Thus, “[w]hen the President concludes that elections threaten his continued grasp on power, and therefore seeks to corrupt or interfere with them, he denies the very premise of our constitutional system.”<sup>186</sup>

President Trump placed his own political ambition above our Nation’s commitment to democracy and the rule of law—and for that reason his actions plainly rank as high crimes and misdemeanors.

### **C. President Trump Imperiled Congress**

President Trump’s conduct not only harmed democracy, but also jeopardized the safety of the Vice President and nearly the entire Legislative Branch, as well as the police officers protecting the Capitol. Members of Congress and their staffs were forced to improvise barricades and hiding places while they awaited rescue by law enforcement. Others were trapped in the House Chamber, where they seized gas masks and ducked behind furniture to avoid insurrectionists. Many feared for their lives as armed attackers battered doors and Capitol Police drew weapons. The duration and severity of this threat were amplified by President Trump’s dereliction of duty during the attack.

The Framers understood that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.”<sup>187</sup> They wrote a Constitution that creates a system of checks and balances within the federal government. A President may be impeached for conduct that severely undermines this structural separation of powers.<sup>188</sup> Our constitutional system simply cannot function if the President, acting to extend his

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<sup>184</sup> See 4 Elliot, *Debates in the Several State Conventions* at 331.

<sup>185</sup> James Madison, *Federalist* No. 37.

<sup>186</sup> See H. Rep. 116-346 at 53.

<sup>187</sup> James Madison, *The Federalist Papers*: No. 47.

<sup>188</sup> See H. Rept. 116-346 at 45-46, 145-148.

own grasp on power against the expressed will of the people, prompts an armed attack against a co-equal branch that prevents it from performing its core constitutional responsibilities.

President Trump’s conduct will have other lasting effects on Congress. Before January 6, the Capitol was a place that the people of the United States could freely visit to see their democratic system at work. Since January 6, the Capitol complex has more closely resembled a fortress, ringed by fences with barbed wire and heavily guarded by the Capitol Police and the National Guard. The American people cannot now get anywhere near their Capitol. That is a sorry state of affairs for our Nation, one that no President should have played a role in bringing about.

#### **D. President Trump Undermined National Security**

A final consideration requiring President Trump’s conviction is the harm he inflicted on the national security of the United States. Most immediately, the insurrectionist mob had access to, and stole, sensitive materials and electronics—including a laptop from the office of the Speaker of the House.<sup>189</sup> The U.S. Attorney for the District of Columbia has stated that “electronic items” and other “[d]ocuments [and] materials” were “stolen from [S]enators’ offices.”<sup>190</sup> These devices could be used to infiltrate federal networks.<sup>191</sup> It has therefore been necessary to undertake a thorough review to determine the extent of the security breach and implement appropriate remedial measures.

The attack that President Trump provoked has also emboldened other violent extremists.<sup>192</sup> As government officials and outside experts have warned, it may come to be seen as a rallying point for further insurrection—and as a “significant driver of violence” that inspires extremists “to engage

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<sup>189</sup> Raphael Satter, *Laptop Stolen from Pelosi’s Office during Storming of U.S. Capitol, Says Aide*, Reuters (Jan. 8, 2021).

<sup>190</sup> Brian Fung, *Capitol Riots Raise Urgent Concerns about Congress’s Information Security*, CNN (Jan. 8, 2021).

<sup>191</sup> Samantha Masunaga, *The Attack on the Capitol May Pose a Cybersecurity Risk. Here’s How*, L.A. Times (Jan. 8, 2021).

<sup>192</sup> Molly Hennessy-Fiske, *‘Second Revolution Begins’: Armed Right-Wing Groups Celebrate Capitol Attack*, L.A. Times (Jan. 6, 2021).

in more sporadic, lone-actor or small-cell violence” against targets including “racial, ethnic, or religious minorities and institutions, law enforcement, and government officials and buildings.”<sup>193</sup> President Trump’s conduct on January 6 brought distinct extremist groups into ad hoc coalition with one another, which might strengthen their “willingness, capability, and motivation to attack and undermine” the government.<sup>194</sup> Further, the armed insurrection has been nothing short of a “propaganda coup ... in fueling recruitment and violence for years to come.”<sup>195</sup> President Trump only made matters worse when he tweeted, in the evening, “Remember this day forever!”—a statement that armed extremists will indeed remember. (Sadly, it will be remembered too by the Members of Congress, their staffs, and the law enforcement officials who were attacked by the insurrectionist mob.) In all of these respects, President Trump made Americans less safe, particularly Americans who belong to communities targeted by right-wing extremist groups.

Finally, President Trump’s conduct tarnished the reputation of the United States abroad. Images of insurrectionists sacking the seat of American democracy—stirred to action by a President who said “we love you” during the assault—have been a propaganda bonanza for America’s adversaries, for whom “the sight of the U.S. Capitol shrouded in smoke and besieged by a mob whipped up by their unwillingly outgoing president” is “proof of the fallibility of Western democracy.”<sup>196</sup> This country’s reputation as a stable democracy has sustained a heavy blow. For

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<sup>193</sup> Zolan Kanno-Youngs, *Federal Authorities Warn That the Capitol Breach Will Be a ‘Significant Driver of Violence’*, N.Y. Times (Jan. 13, 2021).

<sup>194</sup> *Id.*

<sup>195</sup> Neil MacFarquhar et al., *Capitol Attack Could Fuel Extremist Recruitment for Years, Experts Warn*, N.Y. Times (Jan. 16, 2021).

<sup>196</sup> Alexander Smith & Saphora Smith, *U.S. Foes like China and Iran See Opportunity in the Chaos of Trump-Stoked Riot at Capitol*, NBC News (Jan. 8, 2021).

years to come, the insurrectionist attack that President Trump incited may gravely undermine American efforts to promote democracy, even as it emboldens authoritarian regimes.

Since our Nation was founded, it has been well recognized that impeachment is warranted for “betrayal of the Nation’s interest—and especially for betrayal of national security.”<sup>197</sup> President Trump’s pursuit of power at all costs is a betrayal of historic proportions. It requires his conviction.

## **II. THERE IS NO DEFENSE FOR PRESIDENT TRUMP’S CONDUCT**

Every argument that may be raised in President Trump’s defense further demonstrates that he is a danger to our democratic system of government.

### **A. Fair Impeachment Process**

President Trump incited a mob that attacked Congress during the Joint Session. The House’s expeditious response to this attack was both necessary and appropriate. There must be no doubt that Congress will act decisively in the face of such extraordinary abuse—which threatened not only the peaceful transfer of power, but also the very lives of senior government officials.

Any claim that the House moved too quickly in responding to a violent insurrection that President Trump incited is mistaken. The House serves as a grand jury and prosecutor under the Constitution. The events that form the basis for President Trump’s impeachment occurred in plain view. They are well known to the American people. Many Members of Congress were themselves witnesses to his conduct and its consequences. There is no basis on which President Trump could assert that what a horrified Nation saw with its own eyes, and heard with its own ears, is somehow “fake news.” Accordingly, in this unprecedented circumstance, the House acted squarely within its constitutional responsibilities in swiftly and emphatically approving an article of impeachment.

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<sup>197</sup> H. Rept. 116-346 at 49.

Here, in the Senate, is where the Constitution calls for a trial and where President Trump will have ample opportunity to make his case through procedures that the Senate adopts.

For that reason, any process-based objections to this impeachment are wrong. This case does not involve secretive conduct, or a hidden conspiracy, requiring months or years of investigation. It does not raise complicated legal questions about the definition of a high crime and misdemeanor. And the gravity of the President’s abuse—as well as the continuing nature of the threat it poses to our democracy if left unanswered—demand the clearest of responses from the Legislative Branch. Indeed, hundreds of people have already been arrested and charged for their role in the events of January 6. There is no reason for Congress to delay in holding accountable the President who incited the violent attack, inflamed the mob even as it ransacked the Capitol, and failed to take charge of a swift law enforcement response because he believed such dereliction of duty might advance his political interest in overturning the results of an election that he lost.

## **B. Criminality**

The Constitution authorizes impeachment and conviction for “high Crimes and Misdemeanors.” As Alexander Hamilton explained in the *Federalist Papers*, impeachable offenses “are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”<sup>198</sup> Therefore, whether President Trump’s conduct violated the criminal law is a question for prosecutors and courts; “offenses against the Constitution are different than offenses against the criminal code.”<sup>199</sup> The only question here is

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<sup>198</sup> Alexander Hamilton, *The Federalist Papers*: No. 65; see H. Rept. 116-346 at 58.

<sup>199</sup> See Constitutional Grounds for Presidential Impeachment, Report by the Majority Staff of the House Committee on the Judiciary, at 5 (Dec. 2019).

whether President Trump committed offenses justifying conviction and disqualification from future officeholding. For the reasons given above, the answer to that question is indisputably “yes.”

### **C. Election Results**

President Trump may persist in asserting that he actually won the 2020 presidential election, despite the overwhelming evidence to the contrary—and despite the rejection of this claim by every court and election official to consider it. President Trump may also suggest that his abuse of office is somehow justified or excused by his belief that the election was “rigged.” Any such argument would rest upon demonstrable falsehoods about the legitimacy of the election results.

Moreover, we live in a Nation governed by the rule of law, not mob violence incited by candidates who cannot accept their own defeat. President Trump was not the first Presidential candidate who declared himself cheated out of victory.<sup>200</sup> Andrew Jackson, for instance, strongly believed that the 1824 election had been stolen from him because powerful forces refused to accept his candidacy on behalf of the common man. Richard Nixon believed in 1960 that he had been cheated out of the Presidency by widespread voter fraud in Illinois, which he thought secured John F. Kennedy’s victory. And in 2000, Vice President Al Gore and many of his political supporters thought he would have won the Presidency had all of Florida’s votes been properly counted. Yet despite their feelings of grievance, all of these Presidential candidates accepted the election results and acquiesced to the peaceful transfer of power required by the Constitution. President Trump, alone in our Nation’s history, did not. His belief that he won the election—regardless of its truth or falsity (though it is assuredly false)—is no defense at all for his abuse of office.

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<sup>200</sup> For the discussion in this paragraph, see generally Robert Mitchell, *A Presidential Election History Lesson: Americans Often Waited Days Or Weeks For The Outcome*, Wash. Post (Nov. 4, 2020).

## D. Free Speech

The First Amendment exists to protect our democratic system. It supports the right to vote and ensures robust public debate. But rights of speech and political participation mean little if the President can provoke lawless action if he loses at the polls. President Trump’s incitement of deadly violence to interfere with the peaceful transfer of power, and to overturn the results of the election, was therefore a direct assault on core First Amendment principles. Holding him accountable through conviction on the article of impeachment would *vindicate* First Amendment freedoms—which certainly offer no excuse or defense for President Trump’s destructive conduct.

Most fundamentally, the First Amendment protects private citizens from the government; it does not protect government officials from accountability for their own abuses in office. Therefore, as scholars from across the political spectrum have recognized, the First Amendment does not apply *at all* to an impeachment proceeding.<sup>201</sup> The question in this case is not whether to inflict liability or punishment on a private citizen; instead, the Senate must decide whether to safeguard the Nation’s constitutional order by disqualifying an official who committed egregious misconduct. As one scholar writes, “the First Amendment does not shrink the scope of the impeachment power or alter what conduct would fall within the terms of high and misdemeanors.”<sup>202</sup>

Indeed, the notion that a President can attack our democracy, provoke violence, and interfere with the Electoral College so long as he does so through statements advocating such lawlessness would have astonished the Framers. They wrote the impeachment provisions of the

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<sup>201</sup> See Michael C. Dorf, *Free Speech, Due Process, and Other Constitutional Limits in Senate Impeachment Trials*, Dorf on Law (Jan. 20, 2021, 7:00 AM); Keith E. Whittington, *Is There A Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021, 4:18 PM); Jonathan H. Adler, *Yes, Congress May Impeach and Remove President Trump for Inciting Lawless Behavior at the Capitol*, The Volokh Conspiracy (Jan. 8, 2021, 3:21 PM); Ilya Somin, *The First Amendment Doesn't Protect Trump Against Impeachment for his Role in Inciting the Assault on the Capitol*, The Volokh Conspiracy (Jan. 8, 2021, 4:17 PM);

<sup>202</sup> See Keith E. Whittington, *Is There A Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021, 4:18 PM).



Constitution to guard against *any* presidential conduct that constitutes a great and dangerous offense against the Nation—no matter the means for carrying out that malfeasance. And here, the House approved an article of impeachment that concerns not solely the President’s incitement, but also his conduct preceding and following his provocation of an armed assault on the Capitol.

Regardless, even if the First Amendment were applicable here, private citizens and government officials stand on *very* different footing when it comes to being held responsible for their statements. As the leader of the Nation, the President occupies a position of unique power. And the Supreme Court has made clear that the First Amendment does not shield public officials who occupy sensitive policymaking positions from adverse actions when their speech undermines important government interests.<sup>203</sup> Thus, just as a President may legitimately demand the resignation of a Cabinet Secretary who publicly disagrees with him on a matter of policy (which President Trump did repeatedly), the public’s elected representatives may disqualify the President from federal office when they recognize that his public statements constitute a violation of his oath of office and a high crime against the constitutional order. No one would seriously suggest that a President should be immunized from impeachment if he publicly championed the adoption of totalitarian government, swore an oath of eternal loyalty to a foreign power, or advocated that states secede from and overthrow the Union—even though private citizens could be protected by the First Amendment for such speech.<sup>204</sup> By its own terms, and in light of its fundamentally democratic

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<sup>203</sup> See *Branti v. Finkel*, 445 U.S. 507, 517-518 (1980); *Elrod v. Burns*, 427 U.S. 347, 366-367 (1976) (plurality).

<sup>204</sup> See Keith E. Whittington, *Is There A Free Speech Defense to an Impeachment?*, Lawfare (Jan. 19, 2021, 4:18 PM) (listing additional examples).

purposes, the First Amendment does not constrain Congress from removing an official whose expression makes him unfit to hold or ever again occupy federal office.<sup>205</sup>

Yet even if President Trump’s acts while occupying our highest office were treated like the acts of a private citizen, and even if the First Amendment somehow limited Congress’s power to respond to presidential abuses, a First Amendment defense would *still* fail. Speech is not protected where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>206</sup> Given the tense, angry, and armed mob before him, President Trump’s speech—in which he stated “you’ll never take back our country with weakness,” proclaimed that “[y]ou have to show strength,” and exhorted his supporters to “go to the Capitol” and “fight like Hell” immediately before they stormed the Capitol—plainly satisfies that standard.

Separate from these legal points, President Trump may assert that this impeachment reflects “cancel culture” or some supposed intolerance of his right to voice objections to the election results. That would be a red herring. President Trump endangered the very constitutional system that protects all other rights, including freedom of expression. It would be perverse to suggest that our shared commitment to free speech requires the Senate to ignore the obvious: that President Trump is singularly responsible for the violence and destruction that unfolded in our seat of government on January 6. “It can’t be that the solemn price for protecting our civil liberties against current and future abuses is that the president can incite a mob bearing huge flags with his name on them to storm the Capitol, kill a police officer, and further, not immediately tell them to stop or, as

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<sup>205</sup> *Branti*, 445 U.S. at 517, 519. Indeed, impeachment is fundamentally an employment action against a public official, and thus the First Amendment would not insulate the President’s statements from discipline even if it applied, because the government’s interest in orderly operation would outweigh the President’s speech interests. See *Garvetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Meyers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>206</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

commander-in-chief, to refuse to send help . . . . [I]hat would be a sure way to make a mockery of the civil liberties . . . contemplated and secured by the Constitution and Bill of Rights.”<sup>207</sup>

### III. THE SENATE HAS JURISDICTION TO TRY THIS IMPEACHMENT

Given the overwhelming strength of the case against him, we expect President Trump will seek to escape any reckoning for his constitutional offenses by asserting that the Senate lacks jurisdiction over him as a former official. That argument is wrong. It is also dangerous. The period in which we hold elections and accomplish the peaceful transfer of power is a source of great pride in our nation. But the transition between administrations is also a precarious, fragile time for any democracy—ours’ included. The Framers anticipated these risks and emphasized that presidential abuse aimed at our democratic process itself was the single most urgent basis for impeachment. It is unthinkable that those same Framers left us virtually defenseless against a president’s treachery in his final days, allowing him to misuse power, violate his Oath, and incite insurrection against Congress and our electoral institutions simply because he is a lame duck. There is no “January Exception” to impeachment or any other provision of the Constitution. A president must answer comprehensively for his conduct in office from his first day in office through his last. Former President John Quincy Adams thus declared, “I hold myself, so long as I have the breath of life in my body, amenable to impeachment by [the] House for everything I did during the time I held any public office.”<sup>208</sup>

As the Senate itself concluded in the trial of Secretary of War William Belknap, and as nearly every legal expert has affirmed, President Adams had the right idea. The Constitution does not allow officials to escape responsibility for committing impeachable offenses by resigning when

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<sup>207</sup> Jonathan Zittrain, *Impeachment Defense, the Constitution, and Bill of Rights*, Just Security (Jan. 13, 2021).

<sup>208</sup> Cong. Globe, 29th Cong., 1st Sess. 641 (1846) (statement of Rep. Adams).

caught, or by waiting until the end of their term to abuse power, or by concealing misconduct until their service concludes. Experts from across the ideological spectrum, including a co-founder of the Federalist Society and Ronald Reagan’s Solicitor General, agree that “[t]he Constitution’s text and structure, history, and precedent make clear that Congress’s impeachment power permits it to impeach, try, convict, and disqualify former officers, including former presidents.”<sup>209</sup> Even Professor Jonathan Turley (who seems to have changed his long-held views on the subject less than a month ago) previously argued that impeaching former presidents for abuses in office is authorized by the Constitution and can serve as “a reaffirmation of the principle that, within this system, ‘no man in no circumstance, can escape the account, which he owes to the laws of his country.’”<sup>210</sup>

It is particularly obvious that the Senate has jurisdiction here because President Trump was in office at the time he was impeached. There can be no doubt that the House had authority to impeach him at that point. So the question is not whether a former official can ever be impeached by the House—though, as we will explain, this is indeed authorized. The only issue actually presented is whether the Senate has jurisdiction to conduct a trial of *this* impeachment. And Article I, Section 3, Clause 6 provides a straightforward answer to that question: “The Senate shall have the sole Power to try *all* Impeachments” (emphasis added). As Professor Michael McConnell, a former Court of Appeals judge appointed by President George W. Bush, explains: “The key word is ‘all.’ This clause contains no reservation or limitation. It does not say ‘the Senate has power to try

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<sup>209</sup> See Constitutional Law Scholars on Impeaching Former Officers (Jan. 21, 2021), available at <https://www.politico.com/f/?id=00000177-2646-de27-a5f7-3fe714ac0000>; see also Congressional Research Service, *The Impeachment and Trial of a Former President* 1-2 (Jan. 15, 2021) (“[I]t appears that most scholars who have closely examined the question have concluded that Congress has authority to extend the impeachment process to officials who are no longer in office.”).

<sup>210</sup> Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment As A Madisonian Device*, 49 Duke L.J. 1, 96 (1999); see also Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. Rev. 1791, 1827 (1999).

impeachments against sitting officers.’ Given that the impeachment of Mr. Trump was legitimate, the text makes clear that the Senate has power to try that impeachment.”<sup>211</sup>

Accordingly, the Senate should not turn aside from centuries of its own practice and understanding. President Trump is personally responsible for inciting an armed attack on our seat of government that imperiled the lives of the Vice President, Members of Congress and our families, and those who staff and serve the Legislative Branch. The Nation cannot simply “move on” from presidential incitement of insurrection. If the Senate does not try President Trump (and convict him) it risks declaring to all future Presidents that there will be no consequences, no accountability, indeed no Congressional response at all if they violate their Oath to “preserve, protect and defend the Constitution” in their final weeks—and instead provoke lethal violence in a lawless effort to retain power. That precedent would horrify the Framers, who wrote the Presidential Oath of Office into the Constitution and attached no January Exception to it. President Trump must therefore stand trial for his high crimes and misdemeanors against the American people.

**A. Former Officials in England and the Early American States Were Subject to Impeachment and Disqualification for Abuses Committed in Office**

As revolutionaries who overthrew a king, the Framers obsessed over protecting their young Republic from the abuse of power. Based on the history of impeachment in England and the early American states, they would have considered it self-evident that a former official like President Trump could be impeached and tried for high crimes and misdemeanors he had committed in office.

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<sup>211</sup> Quoted in Eugene Volokh, *Impeaching Officials While They're in Office, but Trying Them After They Leave*, The Volokh Conspiracy (Jan. 28, 2021), <https://reason.com/volokh/2021/01/28/impeaching-officials-while-theyre-in-office-but-trying-them-after-they-leave/>

When the Framers gathered in Philadelphia in 1787, they did not invent the impeachment power from scratch. As Alexander Hamilton explained in Federalist No. 65, they looked to English history, which provided “the model from which the idea of this institution has been borrowed.”<sup>212</sup> The Framers were also influenced by “several of the State constitutions.”<sup>213</sup> *Id.* And it was firmly established in both England and the early states that former officials were subject to impeachment for abuses in office. This was not a remotely controversial view. It was widely accepted. By vesting Congress with the power of “impeachment,” the Framers incorporated that history and meaning.

Looking to the unwritten British constitution confirms that former officials were subject to impeachment. In fact, “Parliament impeached only two men during the 18th century, both former officers.”<sup>214</sup> In 1725, former Lord Chancellor Macclesfield was impeached and convicted for acts of bribery committed during his tenure in office.<sup>215</sup> And while the Framers deliberated in Philadelphia in 1787, they knew that Warren Hastings faced charges in Parliament arising from abuses he had committed as the former Governor General of Bengal.<sup>216</sup> Those charges were championed by no less a figure than Edmund Burke, a great and founding figure of conservative political theory.

Early American states followed English practice in this respect. The impeachment of former officials was thus “known and accepted” under early state constitutions.<sup>217</sup> Five states—including Virginia and Pennsylvania—specifically authorized such impeachments.<sup>218</sup> In some states, *only* former officials (not current officials) could be impeached, which confirms the centrality of the

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<sup>212</sup> *The Federalist No. 65*, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>213</sup> *Id.*

<sup>214</sup> Keith Whittington, *Yes, the Senate Can Try Trump*, Wall Street Journal (Jan. 22, 2021).

<sup>215</sup> See Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13, 26 (2001) (hereinafter, *Former Officials*).

<sup>216</sup> See *id.* at 26-27.

<sup>217</sup> *Id.* at 27.

<sup>218</sup> *Id.* at 29-31.

disqualification remedy to early American thinking about impeachment and the oddity of any suggestion that former officials can never be impeached.<sup>219</sup> Looking to the state constitutions that allowed impeachment but did not expressly address former officials confirms that impeaching former officials was indeed consistent with American legal traditions.<sup>220</sup> And no state constitution expressly prohibited such impeachments.<sup>221</sup> Moreover, the precept that former officials could be impeached was acted upon: in 1781, for instance, the Virginia General Assembly subjected Thomas Jefferson to an impeachment inquiry after he completed his term as governor.<sup>222</sup>

As defined by British and early American practice, the phrase “impeachment” was thus understood as covering former officials. That was the rule on both sides of the Atlantic. Prohibiting former official impeachments would have been a marked departure from common legal usage and tradition—the kind of departure that we might expect to trigger heated debates and considerable writing. But as explained below, there were no such debates and there were no such writings. If anything, the Framers’ deliberations confirm adherence to the tradition they inherited.

Throughout this early period, disqualification was recognized as essential to achieving the core purposes of impeachment. “Especially in an age of long, varied careers, it was very significant that an impeachment conviction said not only ‘get out!’ but added an emphatic and irreversible ‘and stay out!’”<sup>223</sup> Removal alone was not enough to protect the public from corrupt and abusive officials, who might later seek reelection or reappointment—and whose misconduct could create dangerous precedents if not decisively repudiated. Disqualification gave teeth to impeachment. The

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<sup>219</sup> *See id.*

<sup>220</sup> *See id.* at 34-35.

<sup>221</sup> *See id.*

<sup>222</sup> *See id.* at 29.

<sup>223</sup> *Id.* at 73-74.

threat of disqualification deterred officials from abusing their power by reminding them that “their political existence depends upon their good behavior.”<sup>224</sup> It allowed legislatures to convene inquests—and to hold public trials—that “served as a vehicle for exposing and formally condemning official wrongdoing, or for a former officeholder to clear his name.”<sup>225</sup> Finally, it protected society from those who dishonored their offices and might do so again, whenever their abuse of power may have occurred or been discovered. These purposes defined the impeachment power as it was known to the Framers, who wrote it into the Constitution as a safeguard against presidential abuse.

**B. The Framers Adhered to the Tradition That Former Officials Were Subject to Impeachment, Conviction, and Disqualification for Misconduct in Office**

The records of the Constitutional Convention and a close study of the Constitution’s text confirm that a former official like President Trump remains subject to impeachment and trial for high crimes and misdemeanors. History, originalism, and textualism thus leave no doubt that the Senate has jurisdiction—and a constitutional duty—to decide this case on the merits.

As Justice Robert Jackson wisely observed, “the purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”<sup>226</sup> Nowhere is that truer than with regard to the presidency. As Edmund Randolph warned, “the Executive will have great opportunities of abusing his power.”<sup>227</sup> Impeachment was the Framers’ final answer to this threat. Their goal was not to criminally punish presidents for abuse or corruption; that they left to prosecutors and courts. The Framers had a much greater purpose in mind: the preservation of the Republic itself.

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<sup>224</sup> See Whittington, *Yes, the Senate Can Try Trump*.

<sup>225</sup> *Id.*

<sup>226</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (Jackson, J., concurring).

<sup>227</sup> 2 Max Farrand, ed., *The Records of the Federal Convention of 1787*, 67 (1911)



To achieve that purpose, the Framers vested Congress with the power to investigate, impeach, and convict officials for constitutional offenses. The Framers then provided two separate remedies, both focused on an offender's ability to seek and exercise government power: removal from office and disqualification from future officeholding. As confirmed by their deliberations at the Constitutional Convention, as well as the text and structure of the Constitution, the Framers adhered to British and early state practice in authorizing impeachment for *any* high crimes and misdemeanors against the American people—whenever committed and whenever discovered.

That is not surprising. The Framers were too savvy to make up a new rule, at odds with centuries of historical practice, that would allow officials to escape accountability by resigning at the last minute, or by waiting until near the end of their tenure in office to commit abuses, or by concealing misconduct until after they left public service. This would create extremely dangerous and perverse incentives, especially for Presidents who sought to retain power by subverting election results in their final days. In designing the Constitution, the Framers aimed to ensure that the President could never become a King; they did not leave the Nation unprotected against abuse surrounding the transfer of power from one administration to the next.

To that end, the Constitution establishes a clear framework. The House has the sole power to impeach. The Senate has the sole power to try impeachments. These grants of jurisdiction over impeachment are categorical and include no statute of limitations. Any person who commits an extraordinary abuse of power in office may face impeachment for high crimes and misdemeanors. If they are currently a civil officer and are convicted, they must at least be removed from office. And in all events, the Senate's judgment in an impeachment case cannot extend further than disqualification from holding any office of honor, trust, or profit under the United States. These rules arise directly from the history, text, and structure of the Constitution.

## 1. The Constitutional Convention

The Framers were familiar with the history of impeachment. They understood that the Constitution’s references to “impeachment” incorporated centuries of prior practice. In certain very specific respects, they decided to vary from that history—for instance, by requiring a two-thirds supermajority in the Senate to convict. But *nobody* at the Constitutional Convention suggested departing from the existing practice that former officials could be impeached (and disqualified from future officeholding) for their abuses while in office. If anything, the opposite is true. Four aspects of the Framers’ deliberations signal their intent to follow historical practice.

First, in debating the standard for impeachable offenses, George Mason explicitly raised the ongoing case of Warren Hastings—and did so to describe when impeachment *should* occur. Were anybody present at the Convention opposed to authorizing the impeachment of former officials, this would have been an obvious opportunity to speak up. “If Mason and the Framers knew anything about the Hastings case,” it was that he faced an impeachment proceeding in Parliament *after* he had left his position as Governor General of Bengal.<sup>228</sup> Yet nobody objected. “Given the prominence of the Hastings’s impeachment to the framers, the absence of debate on the question at the federal or state ratifying conventions . . . speaks volumes.”<sup>229</sup>

Second, and highly relevant here, many Framers described efforts to overturn or corrupt elections as the paradigm case for impeachment. Gouverneur Morris explained that “the Executive ought [] to be impeachable for . . . Corrupting his electors.”<sup>230</sup> William Davie favored impeachment

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<sup>228</sup> Kalt, *Former Officials*, at 47.

<sup>229</sup> Laurence H. Tribe, *The Senate Can Constitutionally Hold An Impeachment Trial After Trump Leaves Office*, New York Times (Jan. 13, 2021).

<sup>230</sup> 2 Farrand, Records of the Federal Convention, at 69.

for a President who spared “no efforts or means whatever to get himself re-elected.”<sup>231</sup> And Mason intended impeachment for a President “who has practiced corruption & by that means procured his appointment in the first instance.”<sup>232</sup> By necessity, this kind of misconduct would usually occur near the end of a President’s term in office.<sup>233</sup> Given their intense focus on danger to elections and the peaceful transfer of power, it is inconceivable that the Framers designed impeachment to be virtually useless in a President’s final days, when opportunities to interfere with the peaceful transfer of power would be most tempting and dangerous. Moreover, it would have made no sense for the Framers to allow impeachment if a President succeeded in winning re-election through corrupt means, but to prohibit *any* Congressional response if his efforts to corrupt the election fell short. A President who tried and narrowly failed to retain power improperly could easily try again. He would still warrant disqualification, both to protect the nation from his future wrongdoing and as a deterrent to anybody else contemplating last-ditch attacks on the electoral process.

Indeed, “a singular concern of the Framers in devising our constitutional system was the danger of a power-seeking populist of the type they referred to as a ‘demagogue.’”<sup>234</sup> Madison and Hamilton repeatedly warned against this ancient threat to the young Republic.<sup>235</sup> Yet “the Framers further understood that the source of such a person’s power does not expire if he or she is expelled from office; so long as such a person retains the loyalty of his or her supporters, he or she might return to power.”<sup>236</sup> Accordingly, “the Framers devised the disqualification power to guard against

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<sup>231</sup> *Id.* at 64.

<sup>232</sup> *Id.* at 65.

<sup>233</sup> See Jed Shugerman, *An Originalist Case for Impeaching Ex-Presidents: Mason, Randolph, and Gouverneur Morris*, Shugerblog (Jan. 16, 2021) (“[T]he Framers supported a broad impeachment process for presidential misconduct at the end of their terms, especially with respect to re-election abuses [and] corrupting or contesting electors . . .”).

<sup>234</sup> *Letter from Constitutional Law Scholars on Impeaching Former Officers*.

<sup>235</sup> See Jeffrey Rosen, *American is Living James Madison’s Nightmare*, *The Atlantic* (October 2018).

<sup>236</sup> *Letter from Constitutional Law Scholars on Impeaching Former Officers*.

that possibility, and would surely disagree that a person who sought to overthrow our democracy could not be disqualified from holding a future office of the United States because the plot reached its crescendo too close to the end of his or her term.”<sup>237</sup>

Third, those who wrote and ratified the Constitution saw that impeachment was meant to deter abuse of office—which it could not achieve if wrongdoers knew they could easily escape any inquiry or trial. At the Convention, Davie described impeachment as “an essential security for the good behaviour of the Executive.”<sup>238</sup> In Massachusetts, Reverend Samuel Stillman warned, “With such a prospect [of impeachment], who will dare to abuse the powers vested in him by the people.”<sup>239</sup> In North Carolina, future Justice James Iredell stated, “[Impeachment] will be not only the means of punishing misconduct, but it will prevent misconduct.”<sup>240</sup> And in Federalist No. 64, future Chief Justice John Jay wrote, “so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.”<sup>241</sup>

If all it took to evade impeachment were quitting—or delaying misconduct until the end of a term—then Davie, Stillman, Iredell, and Jay badly misjudged its deterrent effect. The Framers did not commit such a glaring blunder. To protect the Republic, they designed the impeachment power to cover *anyone* who engaged in abuse or corruption while entrusted with public office—thereby ensuring that any wrongdoer’s “infamy might be rendered conspicuous, historic, eternal, in order to prevent the occurrence of likely offenses in the future.”<sup>242</sup>

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<sup>237</sup> *Id.*

<sup>238</sup> 2 Farrand, *Records of the Federal Convention*, at 64.

<sup>239</sup> 2 Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 169 (1861)

<sup>240</sup> 4 *id.* at 32.

<sup>241</sup> Federalist 64

<sup>242</sup> *Belknap Proceedings* at 203 (Mr. Manager Knott)

Fourth, and finally, the Framers saw themselves not as restricting the impeachment power in comparison to the states, but rather as broadening it. Federalist No. 39 illustrates the point. There, Madison compared the state and federal governments. Turning to impeachment, he first remarked that “several of the States” did not allow impeachment of “the chief magistrate,” adding that “in Delaware and Virginia he is not impeachable till out of office.”<sup>243</sup> In contrast, he noted, “the President of the United States is impeachable at any time during his continuance in office.”<sup>244</sup> Read in isolation, this may suggest that only a current official can be impeached, but in context it reflects Madison’s pride that the President is subject to a *broader* impeachment power than in states that confined impeachment only to former officials. Hamilton confirmed this point in Federalist No. 69. While discussing impeachment, he wrote: “[T]he President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.”<sup>245</sup> Here, too, the upshot is that the President is even *more* accountable than state officials—including in states, like Delaware, that provided for the impeachment of former governors. Neither Hamilton nor Madison suggests any departure from the rule that a former official can be impeached for their abuses in office; instead, they celebrate the extension of the impeachment power to also encompass (and permit the removal of) current officeholders.

All these sources confirm that the Framers intended the impeachment power to reach both current and former officials who engaged in gross abuse of their office. The text and structure of the Constitution that emerged from their debates reflect—in fact, *require*—that conclusion.

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<sup>243</sup> Federalist No. 39

<sup>244</sup> *Id.*

<sup>245</sup> Federalist No. 69.

## 2. Constitutional Text and Structure

The Constitution contains several provisions addressing impeachment. A careful review of the Constitution’s text and structure permits only a single conclusion: that the Senate has jurisdiction to hear this trial against President Trump for the constitutional offenses that he committed against the American people while he was entrusted with our highest political office.

The Constitution’s impeachment provisions are properly understood by reference to the overarching constitutional plan. Senator John H. Mitchell of Oregon thus explained during the Belknap trial that each provision’s “particular location in the Constitution” must “receive consideration in giving construction to its purpose.”<sup>246</sup> So that is how we will approach them.

Article I of the Constitution defines the powers of the Legislative Branch. Here, the Constitution uses unqualified language to vest the House and Senate with jurisdiction over all impeachments. That grant of authority does not contain any statute of limitations or any other language limiting Congress’s impeachment jurisdiction over people who committed high crimes and misdemeanors while in office. Article I also provides for two separate possible judgments in any impeachment case: removal and disqualification. Nowhere does the Constitution suggest that an impeachment is permitted only when both judgments can be imposed. Instead, it treats them as distinct penalties, mandating only that the Senate not exceed them in rendering judgment. The separate availability of disqualification—without any suggestion that it must necessarily follow removal—confirms that former officials like President Trump can be tried by the Senate. Finally, Article I refers to a “Person” and a “Party” (but not a “civil Officer”) in describing the accused in an impeachment. This broader word choice plainly encompasses former officials.

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<sup>246</sup> *Belknap Proceedings* at 347 (Senator Mitchell).

Whereas Article I addresses the Legislative Branch, Article II concerns the Executive Branch. It refers to impeachment only twice—and on both occasions it *restrains* the Executive’s power to resist an impeachment: first by confirming that the President’s pardon power cannot defeat impeachments; and second by requiring at least the removal of any current officer convicted of an impeachable offense. Neither of these provisions limits the jurisdiction of the Senate over President Trump or makes the possibility of removal a requirement of impeachment.

**a. Article I of the Constitution**

Article I sets up the Legislative Branch of the federal government. In Section 2, it vests the House with the “sole Power of Impeachment.” This is an “express, distinct, positive, absolute and unqualified grant of jurisdictional power to the House of Representatives to impeach.”<sup>247</sup> And as explained above, the phrase “Power of Impeachment” had a well-defined, well-developed meaning in the 1780s that the Framers understood to encompass former officers. Whenever the House exercises its “sole Power of Impeachment,” the Senate has comprehensive, exclusive jurisdiction under Article I, Section 3, which vests it with “the sole Power to try all Impeachments.”

These are the *only* provisions anywhere in the Constitution that affirmatively vest and define the jurisdiction of the House and Senate in matters of impeachment. Both of them provide broad authority, with no statute of limitations, no restriction based on whether a person is still in office, and no other caveats based on *when* the accused committed their high crimes and misdemeanors. By its plain and categorical language, the Constitution vests the Senate with full jurisdiction to hear any valid impeachment case brought by the House for high crimes and misdemeanors. And it makes

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<sup>247</sup> *Id.* at 338 (Senator Mitchell).

perfectly clear that the Senate is empowered to “try all Impeachments,” which at bare minimum must include jurisdiction where the House impeached an official while he was still in office.

As a result, any claim that Congress lacks authority to impeach and convict a former official must arise not from jurisdictional language in the text itself, but from supposed implications of the text. Yet a careful study of the Constitution instead confirms that the Framers intended impeachment to reach anyone who abused power while in office.

This is clear from Article I, Section 3, Clause 7: “Judgment in Cases of Impeachment *shall not extend further* than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States” (emphasis added). In interpreting this language, we must assign meaning to every word. Following that rule, this provision can only be read as “fixing a minimum and maximum penalty.”<sup>248</sup> As Professor McConnell explains, “the clause does not say that both sanctions are required; it says that the judgment may not go beyond imposition of both sanctions.”<sup>249</sup> Therefore, “the clause does not require removal; it just precludes the Senate from imposing penalties like fines, imprisonment or death.”<sup>250</sup> This language limits the possible remedies as compared to British impeachment, “in which the full range of criminal penalties was available.”<sup>251</sup>

Under Clause 7, when the Senate convicts, it (1) may remove the accused if they are in office and (2) separately, it may impose disqualification. What it may not do is impose judgments that “extend further” than those options. Critically, “these ‘judgments’—removal and disqualification—

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<sup>248</sup> C.S. Potts, *Impeachment As A Remedy*, 12 St. Louis L. Rev. 15, 23 (1926).

<sup>249</sup> Quoted in Eugene Volokh, *Impeaching Officials While They're in Office, but Trying Them After They Leave*, The Volokh Conspiracy (Jan. 28, 2021), <https://reason.com/volokh/2021/01/28/impeaching-officials-while-theyre-in-office-but-trying-them-after-they-leave/>

<sup>250</sup> Brian Kalt, *The Constitutional Case for Allowing Late Impeachment Trials*, The Hill (Jan. 29, 2021), <https://thehill.com/opinion/judiciary/536487-the-constitutional-case-for-allowing-late-impeachment-trials>

<sup>251</sup> *Id.*



are analytically distinct and linguistically divisible.”<sup>252</sup> The text does not say “removal from Office, and *then* disqualification” or “removal from Office, *followed by* disqualification.” It simply identifies two separate possible sentences and provides that the Senate cannot exceed them. “[T]he inclusion of both present removal and future disqualification as penalties for impeachment suggests that they are two separate penalties that may be separately applied.”<sup>253</sup>

In fact, given how the Senate has historically structured its proceedings, it is *impossible* for the Senate to impose disqualification on a current official: it can disqualify only a former official. If the accused is currently in office, and is convicted by the Senate, they are removed upon conviction. By the time Senators separately vote on disqualification, they are considering what penalty to inflict on someone who is at that point a former officer. In this respect, removal and disqualification must be separate penalties—and disqualification must be available for former officials—because disqualification “is itself necessarily a vote about a former (as opposed to current) officer.”<sup>254</sup>

Impeachment thus has “two aspects”—and the Constitution “must be read so as to give full effect to both aspects of this power.”<sup>255</sup> It provides for removal from office, and it separately provides for disqualification from future officeholding. Consistent with that understanding, “of the eight officers the Senate has ever voted to remove, it subsequently voted to disqualify only three of them—reinforcing that removal and disqualification are separate inquiries.”<sup>256</sup>

Ultimately, neither removal nor disqualification is itself the purpose of impeachment. They both serve the deeper purpose of protecting public against officials who have proven themselves a

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<sup>252</sup> Tribe, *The Senate Can Constitutionally Hold An Impeachment Trial After Trump Leaves Office*.

<sup>253</sup> Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 79-80 (1996).

<sup>254</sup> Stephen I. Vladeck, *Why Trump Can Be Convicted Even as an Ex-President*, New York Times (Jan. 14, 2020).

<sup>255</sup> *Letter from Constitutional Law Scholars on Impeaching Former Officers*.

<sup>256</sup> Vladeck, *Why Trump Can Be Convicted Even as an Ex-President*.

threat to our Constitution. And that purpose would be obstructed if Clause 7 were distorted by an interpretation that precluded the impeachment of former officials. This would create incentives for a President “to behave only early in his term, to conceal his wrongdoing long enough to run out the clock, and to skip out of office if congressional action becomes a serious issue.”<sup>257</sup> To ensure that the impeachment power promotes integrity in office, the Constitution must be given its natural reading—one that treats the judgment of disqualification as a distinct remedy that can be imposed on both current and former officials following conviction by the Senate.

Although President Trump may argue that Clause 7 limits impeachment only to cases where removal can occur, that view is mistaken. As explained, it clashes with the text of the Constitution. Further, it rests on a logical fallacy. Clause 7 bars the Senate from imposing any sentence *beyond* removal or disqualification. But “a prohibition against doing more than two things cannot be turned into a command to do both or neither.”<sup>258</sup> “It certainly will not be seriously maintained that, when a statute prescribes two punishments, one of which has become impossible, the offender is thereby exempted from the other.”<sup>259</sup> Such analysis collapses upon scrutiny: in authorizing two possible penalties upon conviction, and saying the Senate may not exceed them, the Constitution did not confer a right on the accused to escape trial entirely because one of the penalties is unavailable. If a defendant made that contention in court, her argument would be rejected out of hand.

That position is especially untenable because it would give abusive officials total control over their own impeachment proceedings. Any official “who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate’s final

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<sup>257</sup> Kalt, *Former Officials*, at 71-72.

<sup>258</sup> Belknap Proceedings at 277 (Senator Edmunds).

<sup>259</sup> *Id.* at 193 (Mr. Manager Hoar).

conviction vote.”<sup>260</sup> Needless to say, there is an overwhelming presumption against “a proposition that makes the jurisdiction of the Senate depend upon the will of the accused,” and that “would practically annihilate the power of impeachment in all cases of guilt clearly provable.”<sup>261</sup> The Framers did not design the Constitution’s mightiest safeguards to be so easily undermined. As House Manager James Proctor Knott of Kentucky explained to the Senate during the trial of Secretary Belknap, the ultimate question is simply stated: “Whether you exercise the functions devolved upon you today as the highest court known to our Government by virtue of a constitutional power, or merely at the will and pleasure of the accused.”<sup>262</sup>

To ask that question is to answer it. The Framers authorized disqualification for a reason. They knew that in especially grievous cases, a failure to impeach and disqualify could imperil the nation—both by setting a dangerous precedent and by allowing an official to repeat his misconduct. It is implausible that the Framers structured impeachment to allow abusive officials, at their own discretion, to readily escape trial, judgment, and disqualification. Instead, the Framers adhered to established English and state practice. And they used language in Article I, Section 3, Clause 7 that very clearly treats removal and disqualification as separate possible judgments upon conviction. It is therefore wrong to assert that “removal from office is the sole object of impeachment,” since “the Constitution authorizes a sentence of disqualification that may be as properly pronounced against the man who has left office as against him who clings to it.”<sup>263</sup>

That conclusion is confirmed (and independently required) by the language used in the impeachment provisions of Article I, Section 3, Clauses 6 and 7:

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<sup>260</sup> *Letter from Constitutional Law Scholars on Impeaching Former Officers.*

<sup>261</sup> *Id.* at 247 (Senator Thurman).

<sup>262</sup> *Id.* at 144 (Mr. Manager Knott).

<sup>263</sup> *Id.* at 250 (Senator Thurman).

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no **Person** shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the **Party** convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

(emphasis added).

The word choice here is significant, especially in contrast to Article II, Section 4 of the Constitution, which provides that “all civil Officers of the United States” must be removed from office upon conviction for impeachable offenses. Unlike that provision, Article I—which creates the impeachment power and vests Congress with jurisdiction—does not refer to “civil Officers.” Instead, in describing who may be subject to impeachment, it uses broader language: “Person” and “Party.” The Framers chose their words carefully. They could have written “civil Officers” in Article I to describe who can be impeached, yet they did not do so. It follows that there must be a “Person” or “Party” subject to impeachment who is not a “civil Officer[.]” But in order to face impeachment, a person must commit high crimes and misdemeanors, which by definition only a government official can do. That leaves only a single possible explanation for why the Framers used “Person” and “Party” rather than “civil Officers” in Article I, Section 3: they wanted to ensure that the text of the Constitution covered the impeachment, conviction, and disqualification of *former* officials for high crimes and misdemeanors committed while they were in office.<sup>264</sup>

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<sup>264</sup> *Id.* at 403-404 (Senator Bayard).

**b. Article II of the Constitution**

Article II defines and limits the authority of the Executive Branch. As a review of its plain text confirms, Article II “contains no grant of power” to any branch of government on the subject of impeachment.<sup>265</sup> Instead, it addresses impeachment only twice and, significantly, only to *constrain* the Executive Branch. Although President Trump may attempt to rely on language in Article II to contest the Senate’s jurisdiction over him, any such reliance would be misplaced.

First consider Article II, Section 2, which provides that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, *except in Cases of Impeachment*” (emphasis added). This rule reflects a critical feature of the Constitution’s design: because impeachment “is a great check upon misconduct in the executive branch . . . the power of impeachment and conviction is placed as far as possible beyond the influence of or interference by the executive branch or any member thereof.”<sup>266</sup> An impeachment proceeding is not subject to a Presidential veto. It does not depend upon support from federal prosecutors (who serve in the Executive Branch). It can override the President’s ordinarily sweeping discretion to select his own officers. And a President cannot use his pardon power to prevent Congress from impeaching and convicting anyone who has committed a great and dangerous offense. These aspects of impeachment are essential to its role in the separation of powers. The jurisdiction and authority of Congress in matters of impeachment are not subject to control by the Executive Branch; after all, a major purpose of the impeachment power is to restrain the Executive Branch.

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<sup>265</sup> *Id.* at 299-300 (Senator Wright).

<sup>266</sup> *Id.* at 402 (Senator Bayard).

This principle confirms that former officials must be subject to impeachment for any and all abuses committed while in office. Under the Appointments Clause—which appears in Article II of the Constitution—the President enjoys a broad “removal power.”<sup>267</sup> This allows him to fire many officials within the Executive Branch. If only current officials could be impeached for high crimes and misdemeanors, the President could easily stop impeachments by firing officials accused (or suspected) of high crimes and misdemeanors. That would prevent Congress from getting to the bottom of what happened. It would also weaken the deterrent effect of impeachment, and allow the President to block the Senate from convicting and disqualifying officials who deserve it.

Again, the Framers were not foolish. The Constitution does not enable the President to accomplish through his removal power the very same interference with impeachment that it forbids by expressly limiting his pardon power. As explained above, it allows the impeachment of former officials for abuses committed in office, thus ensuring that the President’s power to fire officials cannot halt an impeachment. This rule also avoids another awkward result: if only current officials could be impeached, a President might face a choice between leaving a scofflaw in office (so that an impeachment process could unfold) or immediately firing him to protect the public (which would also stop the impeachment and make it impossible for the Senate to impose disqualification, even if fully warranted).<sup>268</sup> As a matter of constitutional text and structure—not to mention common sense—Article II, Section 2 strongly supports the conclusion that former officials remain subject to impeachment and trial for grievous abuses committed during their tenure in office.

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<sup>267</sup> *Seila Law LLC v. C.F.P.B.*, 140 S. Ct. 2183, 2197 (2020)

<sup>268</sup> See Kalt, *Former Officials*, at 78.

So does Article II, Section 4: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” President Trump may cite this provision to argue that only current officials can be impeached, but that argument has no basis in the text.

Article II, Section 4 states a straightforward rule: whenever a civil officer is impeached and convicted for high crimes and misdemeanors, they “shall be removed.” Absolutely nothing about this rule implies, let alone requires, that former officials—who can still face disqualification—are immune from impeachment and conviction. That is unsurprising, since this provision is contained in a part of the Constitution addressed only to current officers, whereas the impeachment provisions set forth in Article I use broader language and emerge from a tradition that covers former officials. Indeed; it would be strange for a provision concerning what happens when a civil officer is convicted to somehow indirectly control the Senate’s power under Article I to try all impeachments. As Professor McConnell observes, Article II, Section 4 “does not limit the power of the Senate to try, which comes from Article I, Section 3, Clause 6. It merely states that removal from office is mandatory upon conviction of any sitting officer. No lesser sanction will suffice.”<sup>269</sup>

It is therefore a mistake to read Article II, Section 4 as somehow providing protection to officials who abuse their power but escape impeachment while in office (*e.g.*, by committing abuse in their final days, or by concealing wrongdoing, or by resigning at the last minute). Like the rule that pardons cannot defeat an impeachment, the rule set forth in Section 4 is meant to *restrain* the Executive Branch—and it does so by establishing a baseline requirement that officials at least be removed if convicted of impeachable offenses. Thus, whereas the first half of Section 4 concerns

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<sup>269</sup> Quoted in Volokh, *Impeaching Officials While They’re In Office But Trying Them After They Leave*.

itself generally with the requirements for conviction (high crimes and misdemeanors), the second half speaks only about the consequences of convicting a current officer (removal from office).

President Trump may argue that Article II, Section 4 makes removal the primary purpose of *any* impeachment, and that it is strange to imagine an impeachment trial that cannot result in removal. Yet that misreads both Section 4 and Article I. “The fact that the Constitution empowers the Senate to disqualify, as well as remove from office, would, it seems, be a perfect answer to the assumption that the sole purpose of impeachment is the removal from office.”<sup>270</sup> The Senate’s own practice reflects this: “Senators vote ‘guilty’ or ‘not guilty.’ Their formal verdict is not ‘remove’ or ‘don’t remove.’”<sup>271</sup> Further, the purpose of impeachment is to protect the nation by deterring official misconduct and ensuring accountability for those who abuse power. Removal and disqualification are each methods of achieving that purpose, which would be hindered rather than furthered if officials knew they could escape any reckoning through resignation or by waiting until their last days in office. “It certainly makes no sense for presidents who commit misconduct late in their terms . . . to be immune from the one process the Constitution allows for barring them from serving in any other federal office or from receiving any federal pensions.”<sup>272</sup>

In the alternative, President Trump might contend that the reference to “civil Officers” in Article II means that only government officials—and not private citizens—can ever be subject to impeachment. The flaw in this argument is obvious: “[P]residents and the other officials who are subject to impeachment are not like the rest of us. Once they leave office and return to their private lives, they are still ex-presidents and former officials who may have committed impeachable offenses

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<sup>270</sup> Id. at 350 (Senator Mitchell).

<sup>271</sup> Brian Kalt, *The Constitutional Case For Allowing Late Impeachment Trials*.

<sup>272</sup> Michael J. Gerhardt, *The Constitution’s Option for Impeachment After a President Leaves Office*, Just Security (Jan. 8, 2021).



in office.”<sup>273</sup> In other words, impeaching a former official for their official acts while they were a “civil Officer[]” is not the same as impeaching a private citizen. The Constitution “demands of all its officials purity, honesty, and fidelity, and it is plain enough and strong enough to enforce its demands at all times and upon every class of those who enjoy its high places.”<sup>274</sup> There is thus no basis for President Trump to object to the Senate’s jurisdiction over him (or to raise related Bill of Attainder Clause concerns). The trial of a former official for abuses he committed as an official—arising from an impeachment that also occurred while he was in office—poses no risk of subjecting private parties to punitive legislative action targeting their private conduct.

Next, President Trump may argue that it somehow matters that Chief Justice Roberts is not presiding over this trial. It does not. Under Article I, Section 3, “When the President of the United States is tried, the Chief Justice shall preside.” But under Article II, there is only ever a single person at a time who is “the President of the United States.” That person is now Joseph R. Biden, Jr. As a former official, President Trump does not trigger the requirement that the Chief Justice preside. Moreover, the reason the Chief Justice is summoned is to ensure the Vice President does not preside over a trial where conviction would result in her becoming the President; obviously, that concern is not implicated in the trial of a *former* president. The normal rules for a Senate trial therefore apply—including those governing who presides (which allow the President *pro tempore* to do so).<sup>275</sup>

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<sup>273</sup> *Id.*

<sup>274</sup> *Belknap Proceedings* at 255 (Senator Wallace).

<sup>275</sup> President Trump may separately contend that the Constitution does not permit a person to be disqualified from seeking the Presidency. But as the DOJ Office of Legal Counsel concluded under President Obama, “The President surely ‘hold[s] an[] Office of Profit or Trust.’” See David J. Barron, *Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President’s Receipt of the Nobel Peace Prize*, 33 Op. O.L.C. 1, 4 (2009). Indeed, this is the only conclusion consistent with the text of the Constitution, which repeatedly refers to the President as holding an “Office”—including in the Natural Born Citizen Clause, the Presidential Oath Clause, and the Twelfth, Twenty-Second, and Twenty-Fifth Amendments. See Saikrishna Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol’y Sidebar 143 (2009).

Finally, President Trump may assert that finding jurisdiction here will invite the House to undertake a slew of other impeachments, dusting off old issues and pursuing tired grudges. But history disproves such slippery slope concerns. For centuries, the prevailing view—bolstered by the Blount and then Belknap precedents—has been that former officials are subject to impeachment. Yet only in Belknap’s case did the House take that step. In the vast majority of cases, including that of President Richard Nixon, the House has properly recognized that an official’s resignation or departure abated any need for the extraordinary remedy of impeachment. That remains true today: “There is no likelihood that we shall ever unlimber this clumsy and bulky monster piece of ordinance to take aim at an object from which all danger has gone by.”<sup>276</sup> But President Trump’s case is exceptional. The danger has not “gone by.” The threat to our democracy makes Watergate pale in comparison—and remains with us to this day. Here is the rare case in which love of the Constitution, and commitment to our democracy, required the House to impeach President Trump. And for the same reasons, the Senate can and must take jurisdiction.

### **C. Congressional Precedent Supports Jurisdiction over President Trump**

Prior practice of the House and Senate point the same way as a careful study of the Constitution. Indeed, the case for exercising jurisdiction over President Trump—and convicting him of high crimes and misdemeanors—is even stronger than in any of these precedents.

#### **1. Senator William Blount**

The Nation’s very first impeachment trial concerned an ex-official: Senator William Blount, who had plotted to give the British control over parts of Florida and Louisiana (which were then

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<sup>276</sup> *Belknap Proceedings* at 198 (Mr. Manager Hoar).

controlled by Spain and France, respectively).<sup>277</sup> After President Adams provided the House with evidence of this betrayal, the House impeached Blount on July 7, 1797. One day later, by a vote of 25 to 1, the Senate expelled him from its ranks. This was not the end of the matter, however. The House concluded that Blount should also be disqualified from future officeholding, so it proceeded with its investigation and adopted five articles of impeachment on January 29, 1798.<sup>278</sup> Despite Blount's refusal to appear in person, the Senate commenced an impeachment trial with Thomas Jefferson presiding. Ultimately, it dismissed the case on the ground that Members of Congress are not subject to the impeachment power at all. But notably, Blount had also asserted that the Senate lacked jurisdiction over him as a former official—and the Senate did not dismiss on that basis.<sup>279</sup>

## 2. Secretary of War William Belknap

Nearly eighty years later, in 1876, the House Committee on Expenditures discovered that Secretary of War William Belknap was involved in an elaborate kickback scheme.<sup>280</sup> Hours before the committee released its report, Belknap “rushed to the White House in an unholy panic to tender his resignation,” which President Ulysses Grant accepted on the spot.<sup>281</sup> Two hours later, fully aware that Belknap had resigned, the House voted unanimously to impeach him.<sup>282</sup>

The ensuing Senate trial is “the single most important precedent” on the question whether a former official is subject to impeachment.<sup>283</sup> Belknap strenuously argued that the Senate lacked jurisdiction because he had resigned before the House impeached him. The Senate heard “[m]ore

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<sup>277</sup> See Bowman & Kalt, *Congress Can Impeach Trump Now And Convict Him When He's Gone*.

<sup>278</sup> Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* 30 (1992).

<sup>279</sup> See *id.* at 32-41.

<sup>280</sup> See Kalt, *Former Officials*, at 94.

<sup>281</sup> Ron Chernow, *Grant* 821 (2017).

<sup>282</sup> Kalt, *Former Officials*, at 95.

<sup>283</sup> *Id.* at 94.

than two weeks of wide-ranging arguments on the question . . . followed by two weeks of [S]enators’ reciting their own conclusions.”<sup>284</sup> After this exhaustive presentation—which covered virtually all of the points likely to be raised here—the Senate voted 37 to 29 that it had jurisdiction over the case. It proceeded to a full presentation of argument and evidence over a two-month period and ultimately acquitted Belknap, though only after plenary consideration of the merits of the case.

### 3. Judges Robert Archbald & George English

Two cases from the early 1900s further support the Senate’s jurisdiction here. The first involved Circuit Judge Robert Archbald, who was impeached in 1912. Of the thirteen articles of impeachment that the House approved, six addressed conduct in his former role as a district judge. In the end, Judge Archbald was convicted on five articles relating to his tenure as a circuit judge; on that basis, he was removed from office and disqualified from future officeholding. The Senate acquitted him of two articles relating to his circuit judgeship, as well as the articles concerning his conduct as a district judge. It is clear from the public record, however, that the case against Judge Archbald relating to his earlier role failed on the merits—and that “a majority of the [S]enators voting saw no problem” with impeaching Judge Archbald for conduct in his former office.<sup>285</sup> Once again, the arguments for jurisdiction over former officials commanded a clear majority in the Senate.

Fourteen years later, the House impeached District Judge George English for corrupt conduct on the bench. Six days before his Senate trial, Judge English resigned. In light of that decision—and given his advanced age—the House resolved that it did “not desire further to urge the articles of impeachment.”<sup>286</sup> In a filing with the Senate, however, the House Managers pointedly

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<sup>284</sup> *Id.* at 96.

<sup>285</sup> *Id.* at 103.

<sup>286</sup> Quoted in *id.* at 104.

stated that “the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine [the case].”<sup>287</sup> Further, “No [S]enator suggested that it would have been impossible or unconstitutional to proceed if the House had not ‘desired’ to do otherwise.”<sup>288</sup> To the contrary, several Senators stated that the Senate in fact retained jurisdiction. Senator William C. Bruce of Maryland remarked, “I deeply regret the conclusion that the House of Representatives has reached.”<sup>289</sup> And Senator Duncan Fletcher of Florida wanted it “distinctly understood” that the case was not precedent for the idea that resignation terminates a trial.<sup>290</sup> Thus, the proceeding against Judge English supports the Senate’s jurisdiction over former officials, since “the House and the Senate felt that they could have proceeded with [that] case.”<sup>291</sup>

In fact, as noted above, the case for jurisdiction here is stronger than in *any* of the precedents just mentioned. Unlike Senator Blount, who was held accountable through expulsion, President Trump will escape responsibility for his betrayal of the Constitution unless this body tries and convicts him. Unlike Secretary Belknap, who resigned before the House could act, President Trump was impeached by the House while he was still in office. Moreover, whereas Secretary Belknap and Judge English left office in disgrace, President Trump insists that his constitutional offenses were perfectly acceptable—and so the precedent set by a failure to try him would pose an astronomically greater threat to the Republic. Finally, unlike in the case of Judge Archbold, the evidence against President Trump is overwhelming. He is personally responsible for an attack that unleashed death and mayhem at the Capitol amid the transfer of power. For Congress to stand aside in the face of

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<sup>287</sup> Quoted in *id.*

<sup>288</sup> *Id.* at 105.

<sup>289</sup> Quoted in *id.*

<sup>290</sup> Quoted in *id.*

<sup>291</sup> *Id.* at 106.

such conduct would be a grave abdication of its constitutional duty, and an invitation for future Presidents to act without fear of constraint during their final months in office.

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Constitutional history, text, and structure, as well as prior Congressional practice, all confirm that the Senate has jurisdiction to try President Trump. So does common sense. While sworn to faithfully execute the laws—and to preserve, protect, and defend the Constitution—President Trump incited insurrection against the United States government. His conduct endangered the life of every single Member of Congress, jeopardized the peaceful transition of power and line of succession, and compromised our national security. This is *precisely* the sort of constitutional offense that warrants disqualification from federal office. President Trump has proven his willingness to break and brutalize the law in his quest for power. The Senate must establish beyond doubt, for all time, and for officials of all political parties that President Trump’s behavior was intolerable.

### CONCLUSION

President Trump falsely asserted that he won the 2020 election and then sought to overturn its results. He and his supporters filed dozens of lawsuits nationwide—including before judges he had appointed—but their claims uniformly failed to persuade. He also tried to convince state and federal election officials and law enforcement personnel to attempt to reverse the election outcome. These attempts failed, too. The only honorable path at that point was for President Trump to accept the results and concede his electoral defeat. Instead, he summoned a mob to Washington, exhorted them into a frenzy, and aimed them like a loaded cannon down Pennsylvania Avenue. As the Capitol was overrun, President Trump was reportedly “delighted.” And rather than take immediate steps to quell the violence and protect lives, President Trump left his Vice President and Congress to fend for themselves while he lobbied allies to continue challenging election results.

As will be shown at trial, President Trump endangered our Republic and inflicted deep and lasting wounds on our Nation. His conduct resulted in more than five deaths and many more injuries. The Capitol was defiled. The line of succession was imperiled. America's global reputation was damaged. For the first time in history, the transfer of presidential power was interrupted. And the threat of violence remains with us: as President Biden was inaugurated and even now, the Capitol more closely resembles an armed camp than the seat of American democracy.

President Trump's incitement of insurrection requires his conviction and disqualification from future federal officeholding. This is not a case where elections alone are a sufficient safeguard against future abuse; it is the electoral process itself that President Trump attacked and that must be protected from him and anyone else who would seek to mimic his behavior. Indeed, it is difficult to imagine a case that more clearly evokes the reasons why the Framers wrote a disqualification power into the Constitution. The need for conviction and disqualification is further supported by Section 3 of the Fourteenth Amendment, which bars from government service those who "having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."<sup>292</sup> President Trump's conduct offends everything that the Constitution stands for. The Senate must make clear to him and all who follow that a President who provokes armed violence against the government of the United States in an effort to overturn the results of an election will face trial and judgment.

Many have suggested that we should turn the page on the tragic events of January 6, 2021. But to heal the wounds he inflicted on the Nation, we must hold President Trump accountable for his conduct and, in so doing, reaffirm our core principles. Failure to convict would embolden future

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<sup>292</sup> U.S. Const. Amend. XIV § 3.

leaders to attempt to retain power by any and all means—and would suggest that there is no line a President cannot cross. The Senate should make clear to the American people that it stands ready to protect them against a President who provokes violence to subvert our democracy.<sup>293</sup>

Respectfully submitted,



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February 2, 2021

*U.S. House of Representatives Managers*

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<sup>293</sup> The House Managers wish to recognize the invaluable assistance of the following individuals in preparing this trial memorandum: Barry H. Berke, Joshua Matz, and Sarah Istel of the House Committee on the Judiciary; Susanne Sachsman Grooms, Krista Boyd, Candyce Phoenix, Cassie Fields, and Jacob Glick of the House Committee on Oversight and Reform; and Douglas Letter, Megan Barbero, Eric Columbus, Will Havemann, Lisa Helvin, and Jonathan Schwartz of the House Office of General Counsel.