BREATHING NEW LIFE INTO AN OLD STATUTE: THE REVIVAL OF SEDITIOUS CONSPIRACY PROSECUTIONS IN 21ST CENTURY AMERICA

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INTRODUCTION

Throughout its more than 150 years of existence, the federal crime of seditious conspiracy has fallen into virtual nonuse by prosecutors for extended periods of time. Given the sinister nature of the behavior it criminalizes—agreements to, by force, overthrow the federal government, seize its property, oppose its authority, prevent its execution of the law, or levy war against it—seditious conspiracy charges have, when historically used, attracted national attention.[1] Convictions for the headline-grabbing charge, though, have not always followed.

On more than one occasion in recent history, the government has received negative publicity in the wake of high-profile acquittals. As the calendar turned to 2021, more than a quarter century had passed since a jury had convicted anyone of seditious conspiracy. Critics argued that the statute was not only ineffective but also unconstitutional. Seditious conspiracy, for all intents and purposes, appeared to be on life support.

The events of January 6, 2021, flipped the script.[2] To date, federal prosecutors have charged 18 individuals with seditious conspiracy due to their involvement in the events that occurred in Washington, D.C., on that fateful day. By securing ten convictions via jury verdict in three separate trials, in addition to four guilty pleas, the government has revived this Civil War-era criminal statute.[3] Given the prevalence of anti-government sentiment and the increasing threat of domestic terrorism, the seditious conspiracy statute will continue to be a valuable tool for federal prosecutors in the 21st century.

Part I of this article will discuss the statute itself: its history, text, and historical use by federal prosecutors. Part II will analyze four noteworthy seditious conspiracy trials, which resulted in two convictions and two acquittals, to demonstrate what has worked to the

[1] *See* 18 U.S.C. § 2384; *see also infra* note 48.
[2] This article uses the shorthand "January 6th" interchangeably with the full date of the incident.
[3] *See infra* Part IV.

government's benefit and to its detriment in seditious conspiracy prosecutions. Part III will assess challenges that defendants-appellants have raised regarding the constitutionality of the statute. A discussion of the January 6th seditious conspiracy litigation in Part IV will provide recent practical application of the otherwise dated practice of prosecuting seditious conspiracy.

Considering recent history and peering into the future, Part V will argue that, given the government's repeated success in defeating constitutional challenges to the seditious conspiracy statute, pursuing indictments and convictions for the crime of seditious conspiracy statute remains a viable option for federal prosecutors in the 21st Century. Challenges grounded on the First Amendment, the Treason Clause, and the statute's purported overbreadth and vagueness have been consistently rejected.[4] Although seditious conspiracy prosecutions have not been universally successful, these failures are better attributed to weaknesses in the underlying indictments and cases as presented, rather than an inherent flaw with the statute itself.[5]

I. HISTORY

The crime of sedition has a history dating back to the time of Socrates.[6] Many Western nations, including Great Britain, have criminalized seditious behavior in various ways in the intervening centuries.[7] Following the American Revolution, the Thirteen Colonies recognized seditious conspiracy as a crime; the federal government, however, did not for its first 85 years of existence, except for a two-year period at the end of the 18th Century.[8] Congressional efforts to pass a seditious conspiracy statute before the Civil War proved

[4] *See* discussion *infra* Part III.
[5] *See* discussion *infra* Part II.B.
[6] *See* Bradley T. Winter, *Invidious Prosecution: The History of Seditious Conspiracy – Foreshadowing the Recent Convictions of Sheik Omar Abdel-Rahman and His Immigrant Followers*, 10 GEO. IMMIGR. L.J. 185, 186 (1996).
[7] *See* Joshua T. Carback, *Charging Riots and Insurrections at the Seat of Government*, 49 AM. J. CRIM. L. 1, 17–19 (2021).
[8] *See id.* at 20.

unsuccessful.[9] Senator Stephen Douglas, believing that the Constitution's command "to provide for the domestic tranquility" allowed Congress to take preventive action, advocated for a federal criminal statute allowing the government to "suppress [an uprising] in advance."[10] However, Senator Douglas's resolution was barely debated and did not gain adequate support before the Southern secession.[11]

After the Southern states opened fire on Fort Sumter, Congress recognized the need for statutes defining crimes less than treason, and therefore enacted such statutes in its first session thereafter. The first of these statutes was the predecessor of the current seditious conspiracy statute—codified at Title 18, U.S. Code, Section 2384 ("Section 2384").[12] The text of the statute itself does not include, and has never included, the term "sedition" or any derivative thereof:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.[13]

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[9] Catherine M. Tarrant, *To "Insure Domestic Tranquility": Congress and the Law of Seditious Conspiracy, 1859-1861*, 15 AM. J. OF LEGAL HIST. 107, 112 (1971).

[10] *Id.* at 114.

[11] *See id.* at 115–18.

[12] *Id.* at 118–19. Interestingly, the absence of existing statutes authorizing the detention of individuals suspected of disloyalty was a factor behind President Lincoln's decision to suspend the writ of habeas corpus. *Id.* at 118.

[13] Seditious Conspiracy, 18 U.S.C. § 2384. Each of the five prongs has, at times, been utilized by prosecutors, but the "by force to prevent, hinder, or delay the execution of any law of the United States" prong is most commonly cited in appellate opinions. *See* Reeder v. United States, 262 F. 36, 37 (8th Cir. 1919) (charging defendants under conspiring to prevent, hinder, or delay execution of the law prong); Orear v. United States,

The "Seditious Conspiracy" heading was added when the then-existing federal statutes were assembled into the U.S. Code in 1926.[14] The only subsequent amendments to the statute related to an increase in the maximum punishment, which had previously been capped at six years of imprisonment.[15]

Throughout its existence, the statute has endured long periods of infrequent use. Despite being enacted at the outset of the Civil War, there is no record that the statute was used to secure any criminal convictions during the war.[16] The first significant wave of prosecutions did not come until the World War I era, spurred in part by criminal anarchy concerns—particularly those related to the enactment of the Selective Service Act.[17] Several cases that made their way to the appellate courts had a similar fact pattern: a group of individuals distributed anti-war propaganda, procured weapons and ammunition, and attempted to influence others to resist their legal obligation to enter military service.[18] Whether the defendants were ultimately convicted was factually dependent, and consistently turned on the nature of the action undertaken and whether the action was

261 F. 257, 257 (5th Cir. 1919) (same); Haywood v. United States, 268 F. 795, 798 (7th Cir. 1920) (same); Anderson v. United States, 273 F. 20, 22 (8th Cir. 1921) (same); *see also* Phipps v. United States, 251 F. 879, 879 (4th Cir. 1918) (charging defendants under conspiring to seize property prong); Bryant v. United States, 257 F. 378, 380 (5th Cir. 1919) (charging defendants under conspiring to levy war and overthrow the government prongs); United States v. Rodriguez, 803 F.2d 318, 319 (7th Cir. 1986) (charging defendant under conspiring to oppose authority prong).

[14] Carback, *supra* note 7, at 25.

[15] *See* An Act to amend title 18 of the United States Code, so as to increase the penalties applicable to seditious conspiracy, advocating overthrow of Government, and conspiracy to advocate overthrow of Government, 70 Stat. 623 (July 24, 1956); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2148 (Sept. 13, 1994).

[16] Tarrant, *supra* note 9, at 121–22.

[17] The Selective Service Act authorized the federal government to raise an army by conscription, thereby subjecting males between the ages of 21 and 30 to the possibility of mandatory military service. *See* 65 Pub. L. 12, 39 Stat. 76 (1917).

[18] *See, e.g., Bryant*, 257 F. at 385; *Orear*, 261 F. at 257.

directed at the U.S. Government or a non-governmental entity.[19] In the century following the wave of World War I-era cases, federal prosecutors rarely charged "the uncommon crime of seditious conspiracy."[20]

II. TRIAL LITIGATION

Although seditious conspiracy litigation has been intermittent, the existing trial and appellate records provide insight into both what has happened in past cases and what can be expected in future cases. The following case studies of notable past prosecutions—two convictions and two acquittals—will lay the groundwork for an analysis regarding the future of seditious conspiracy prosecutions.

A. *Seditious Conspiracy Convictions*

Following a wave of successful seditious conspiracy prosecutions in the World War I era,[21] federal prosecutors significantly reduced their usage of Section 2384. Two cases that were tried and resulted in convictions demonstrate the merit of seditious conspiracy as a criminal offense and hold some commonalities that exemplify how Section 2384 can be effectively applied.

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[19] *Compare Bryant*, 257 F. at 385 (affirming convictions of defendants who procured high-powered guns, departed their homes, and took positions in a canyon to forcibly resist conscription officers) *with Haywood*, 268 F. at 799–800 (reversing convictions of defendants whose plan included attempting to persuade workers to go on strike and resist replacement workers because such actions were directed against commercial interests rather than persons executing laws on behalf of the U.S. Government).

[20] *See* Winter, *supra* note 6, at 185, 186. One commentator's purportedly thorough review of case law and secondary sources revealed that, as of 1996, the federal government prosecuted "only six groups of people [fragmented into at least ten cases] for alleged violations of the modern seditious conspiracy statute." *Id.* at 188. This count excludes the World War I era cases, presumably because they were prosecuted before the statute existed as Section 2384. *See* Carback, *supra* note 7, at 25.

[21] *See, e.g.*, *Bryant*, 257 F. at 385; *Reeder*, 262 F. at 37; *Orear*, 261 F. at 257.

1. 1950s: Puerto Rican Nationalists

In 1954, seventeen members of the Puerto Rican Nationalists Party were indicted for seditious conspiracy in connection with a plot that spanned more than three years and culminated in a shooting at the U.S. Capitol.[22] The evidence admitted at trial in *United States v. Lebron* demonstrated that the group sought to secure Puerto Rican independence via a series of acts aimed at forcefully and violently overthrowing U.S. Government authority in the island territory.[23] The conspirators utilized clandestine tactics, underwent military training, and committed "spectacular acts of violence" resulting in numerous deaths and injuries.[24]

In addition to staging armed uprisings in Puerto Rico, the conspiracy included the attempted assassination of President Harry S. Truman in Washington, D.C., in which two men "stormed the President's [temporary residence] with guns blazing," resulting in the death of one of the assailants and a security officer.[25] Several years later, four fellow Puerto Rican conspirators committed the groups' most infamous act of violence from the public gallery overlooking the floor of the House of Representatives.[26] After one of the conspirators shouted "Free Puerto Rico" and waved a Puerto Rican flag, each fired shots onto the House floor.[27] Fortunately, bystanders subdued the shooters before they could spend the majority of their ammunition; unfortunately, five Representatives were wounded before the shooters could be disarmed.[28] Four of the defendants pleaded guilty to seditious conspiracy, and the remaining thirteen defendants were convicted by a jury.[29]

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[22] United States v. Lebron, 222 F.2d 531, 533 (2d Cir. 1955).
[23] *Id.*
[24] *Id.*
[25] Winter, *supra* note 6, at 190.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 190–91.
[29] *Lebron*, 222 F.2d at 532–33. The government later charged an additional 12 Puerto Rican Nationalist Party members with seditious conspiracy for their alleged participation in a broad conspiracy to overthrow the

2. 1990s: Terrorism Plots in New York City

In 1995, federal prosecutors brought seditious conspiracy charges against a group of Islamic extremists, including Sheikh Omar Abdel-Rahman, also known as the "Blind Sheikh."[30] The defendants in *United States v. Rahman* were charged under three Section 2384 prongs: levying a war of urban terrorism against the United States; opposing by force the authority of the United States; and by force preventing, hindering, or delaying the execution of the laws of the United States.[31] The extensive evidence presented at trial detailed a years-long terrorist plot that encompassed the 1993 World Trade Center bombing, plans to bomb bridges and tunnels in New York City, and plans to murder various public figures.[32] Law enforcement surveillance and the testimony of government informants who infiltrated the conspirators' inner circle played a significant role at trial.[33]

The evidence put on by the prosecution was extensive. An informant testified about frequent conversations amongst some of the defendants about explosives and detonators.[34] Another informant testified that a defendant attempted to purchase explosives and weapons from him.[35] Law enforcement searches uncovered recorded messages urging jihad at one of the defendant's houses[36] and sketches of bombing plans at a safehouse.[37] One of the informants also testified about surveillance of bombing targets undertaken by some of the defendants, as well as efforts to procure supplies to construct the

U.S. Government; all but two of the defendants were convicted. Winter, *supra* note 6, at 191, 205.

[30] Malcolm Gladwell, *Sheik, 9 Others Convicted in N.Y. Bomb*, WASH. POST (OCT. 1, 1995, 8:00 PM), https://www.washingtonpost.com/archive/politics/1995/10/02/sheik-9-others-convicted-in-ny-bomb/5bd7099a-f960-4d32-b02d-8165302dd594/.

[31] United States v. Rahman, 854 F. Supp. 254, 258 (S.D.N.Y. 1994).

[32] United States v. Rahman, 189 F.3d 88, 104–11 (2d Cir. 1999).

[33] *See id.* at 104–05.

[34] *See id.* at 106.

[35] *See id.* at 107.

[36] *See id.* at 108.

[37] *See id.* at 109.

explosives and execute the planned bombings.[38] Based on their surveillance and input from their informants, federal agents arrested the defendants before they were able to execute the planned bombings of bridges and tunnels.[39]

Although the Blind Sheikh did not directly participate in the execution of any of the plots, he served as a leader and encouraged his co-conspirators to engage in violent acts against the United States.[40] The court observed that, "as a cleric and the group's leader, [the Blind Sheikh] was entitled to dispense 'fatwas,' religious opinions on the holiness of an act to members of the group sanctioning proposed courses of conduct and advising them whether the acts would be in furtherance of jihad."[41]

Prosecutors presented evidence of numerous specific comments the Sheikh made to his co-defendants endorsing the assassination of certain public figures and approving attacks against numerous targets.[42] For example, when consulted by a co-defendant about the potential bombing of the United Nations Headquarters, he referred to the prospective operation as "a must" and "a duty."[43] On another occasion, he advised a co-defendant to "find a plan to destroy or to bomb or to . . . inflict damage to the American Army."[44] He also counseled a co-defendant to "make up with God . . . by turning his rifle's barrel to [Egyptian] President Mubarak's chest, and killing him."[45] Evidence was also presented that the Blind Sheikh participated in discussions with his co-defendants regarding their paramilitary training and "made numerous phone calls overseas" to numbers associated with known terrorists, including the perpetrator of the 1993 World Trade Center bombing.[46]

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[38] *See Rahman*, 189 F.3d at 109–11.
[39] *See id.* at 111.
[40] *See id.* at 123–24.
[41] *Id.* at 104.
[42] *Id.* at 117.
[43] *Id.*
[44] *Rahman*, 189 F. 3d at 117.
[45] *Id.*
[46] *Id.* at 124.

Following a nine-month trial, a jury found each of the ten defendants guilty of seditious conspiracy.[47] The guilty verdicts resulting from what was deemed the "biggest terrorism trial in the nation's history" garnered nationwide headlines.[48]

B. *Seditious Conspiracy Acquittals*

Despite the successful prosecutions of the Puerto Rican Nationalists in 1954 and the Blind Sheikh and his co-conspirators in 1995, federal prosecutors have not always fared so well in seditious conspiracy cases. In fact, some observers questioned the wisdom of pursuing seditious conspiracy charges in the modern era following acquittals in two highly publicized trials.[49] A review of those cases, though, reveals that they should be read narrowly: the prosecutions' failure is more appropriately attributed to evidentiary deficiencies rather than seditious conspiracy prosecutions' inherent nonviability.

1. 1980s: The Order

The 1988 prosecution of a group of reputed White nationalists in Fort Smith, Arkansas—who referred to themselves as "The Order"—generated widespread skepticism.[50] Ten defendants, including members of the Ku Klux Klan and the Aryan Nation, were charged with seditious conspiracy related to a "plot to overthrow the [federal] government and establish a White nation in the Pacific Northwest."[51] Specifically, the government alleged that the defendants

[47] *Id.* at 103. The government disposed of the seditious conspiracy charges against five of the fifteen defendants indicted for the crime before the case went to the jury. Winter, *supra* note 6, at 185 n.3.

[48] Joseph P. Fried, *The Terror Conspiracy: The Overview; Sheik and 9 Followers Guilty of a Conspiracy of Terrorism*, N.Y. TIMES, Oct. 2, 1995, at A1; *see also* Lisa Anderson, *Sheik, 9 Others Found Guilty in N.Y. Bomb Plot; U.S. Hails Verdict; Security Tightened Around Airports*, CHI. TRIB., Oct. 2, 1995, at A1.

[49] *See, e.g.*, Carback, *supra* note 7, at 16–17.

[50] *See* Winter, *supra* note 6, at 202.

[51] *Security Tight for Trial of White Supremacists*, UNITED PRESS INT'L (Feb. 15, 1988),

planned to execute bombings, destroy public utilities, poison the public water supply, and murder public officials and minorities.[52] The funding for these operations was allegedly derived from counterfeiting currency and committing a series of robberies, which yielded an estimated $4.1 million.[53] This case "marked the first time" in American history that "sedition charges [were] used against members of [an] extreme right-wing group[]."[54] From the outset, the defendants claimed that the prosecution was a "witch hunt" and an abridgement on their First Amendment rights to freedom of speech and freedom of religion.[55] Given the publicity garnered by the charges and the widespread public protests by the defendants' supporters, the stakes for prosecutors were unquestionably high.[56]

At trial, the defendants argued that the prosecution mischaracterized their statements and purpose.[57] The prosecution's case relied heavily on the testimony of one of the defendants' former associates—an individual who, according to the defendants, fabricated a conspiracy theory that served as the foundation for the unwarranted charges against them.[58] The defense successfully attacked this witness' credibility by revealing that he was not only serving a 20-year prison sentence (reduced in exchange for his testimony against the

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https://www.upi.com/Archives/1988/02/15/Security-tight-for-trial-of-white-supremacists/4011571899600/.

[52] *Id.*

[53] *See* Bill Simmons, *Defendants All Acquitted in Sedition Trial*, ASSOCIATED PRESS (Apr. 8, 1988); Winter, *supra* note 6, at 203.

[54] *Security Tight for Trial of White Supremacists*, *supra* note 51.

[55] *Id.*

[56] *See* Simmons, *supra* note 53 (providing that the Ku Klux Klan held at least 15 rallies across Arkansas in the weeks preceding the trial).

[57] *Supremacists Argue There Was No Government Conspiracy*, UNITED PRESS INT'L (Apr. 2,1988), https://www.upi.com/Archives/1988/04/02/Supremacists-argue-there-was-no-government-conspiracy/5510575960400/.

[58] Bill Simmons, *13 White Supremacists Acquitted in Arkansas Murder and Sedition Trial*, WASH. POST (Apr. 8, 1988), https://www.washingtonpost.com/archive/politics/1988/04/08/13-white-supremacists-acquitted-in-arkansas-murder-and-sedition-trial/21c30cbe-c120-40ac-8fec-33420d1b0d2e/.

defendants) but also married to two women, believed he received messages from God, and had crowned himself "King of the Ozarks."[59] After receiving testimony from 192 witnesses over nearly two months, and deliberating for four days, an all-White jury acquitted the defendants of all charges.[60]

The defendants touted the verdict as a vindication of their First Amendment rights and claimed that the outcome "sent a message to the government."[61] Prosecutors conceded that the acquittal was disappointing but defended their decision to bring the charges.[62] Although the acquittal generated negative publicity and raised concerns that extreme causes would be emboldened,[63] the outcome of this case must be viewed narrowly. There is no indication that the indictment itself was deficient. Ultimately, the prosecution's demise was its witnesses' lack of credibility. Additionally, according to the Assistant United States Attorney who prosecuted the case, at least some members of the jury seemed to agree with the defendants' goals based on their subsequent conduct.[64] Thus, any big-picture criticism of seditious conspiracy as a criminal offense based on this case is misguided.

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[59] *Id.* (providing that the jury discounted the testimony of multiple witnesses due to the reduced sentences they received in exchange for their testimony).

[60] Simmons, *supra* note 58 (providing that the prosecution called 113 witnesses and the defense called 79 witnesses). The judge had previously dismissed the seditious conspiracy charge against one of the defendants due to insufficient evidence. *Security Tight for Trial of White Supremacists*, *supra* note 51.

[61] *Id.*

[62] *Id.*

[63] Bill Simmons, *White Supremacists' Acquittal Wins Both Praise and Criticism*, ST. PETERSBURG TIMES, Apr. 9, 1988, at 4A.

[64] The prosecutor told the American Bar Association Journal that "one juror later married a defendant, another wrote a defendant to say there was nothing wrong with killing [a Jewish talk show host, a charged offense in the case], and a third was quoted in a newspaper as saying he supported [W]hite supremacy." Winter, *supra* note 6, at 212 (quoting Jeff Barge, *Sedition Prosecutions Rarely Successful*, A.B.A. JOURNAL (Oct. 1994) at 16).

2. 2010s: Hutaree Militia

Prior to 2021, the most recent seditious conspiracy charges were brought in 2010, and directed against a Michigan group known as the Hutaree Militia.[65] According to the indictment, the group established a multi-step plan whereby its members would initiate a shootout with law enforcement, retreat to designated rally points, defend those positions via acts of violence against government officials, and cause a larger uprising against the U.S. Government.[66] The U.S. Department of Justice characterized these schemes as an "insidious plan by anti-government extremists."[67] Again, the evidence did not materialize at trial, and the judge therefore entered a judgment of acquittal before the case reached the jury.[68]

The judge concluded that the alleged plan had no connection to the use of force in opposition to the U.S. Government as required by Section 2384 and that, more importantly, there was no evidence of an agreement amongst the defendants to do anything.[69] The judge instead characterized the defendants as having engaged in speech that, although vile, was protected by the First Amendment.[70] The case that prosecutors presented to the jury differed markedly from the allegations set forth in the indictment, and the judge criticized the government for improperly attempting to substantially alter its theory of the case post-indictment.[71] Because a finding of guilty would have required an impermissible piling of inferences, the judge entered judgment for the defendants without submitting the case to the jury.[72]

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[65] Press Release, U.S. Dep't of Just., Nine Members of a Militia Group Charged with Seditious Conspiracy and Related Charges (Mar. 29, 2010), https://www.justice.gov/opa/pr/nine-members-militia-group-charged-seditious-conspiracy-and-related-charges.
[66] United States v. Stone, No. 10-20123, 2012 U.S. Dist. LEXIS 41434, at *15 (E.D. Mich. Mar. 27, 2012).
[67] Press Release, U.S. Dep't of Just., *supra* note 65.
[68] *Stone*, 2012 U.S. Dist. LEXIS 41434, at *2.
[69] *Id.* at *21–23.
[70] *Id.* at *21–22.
[71] *Id.* at *18–20, 34.
[72] *Id.*

Due to the expansive attention the case received,[73] including public comments from the Attorney General,[74] the acquittals were widely deemed an "extraordinary defeat for federal authorities."[75] Commentators correctly noted that the case illustrated the inherent difficulties in prosecuting a case involving political speech.[76] Setting this challenge aside, though, it is evident from the judge's ruling that the government failed to introduce evidence to support the most basic element of any conspiracy: an agreement.[77] Additionally, despite their anti-government rhetoric, the defendants never developed a concrete plan[78] and generally appeared to be disorganized and unsophisticated.[79] From a legal perspective, nothing more should be taken away from this case than the basic proposition that, regardless of the charge, insufficient evidence will not lead to a conviction.

III. APPELLATE LITIGATION: CONSTITUTIONAL CHALLENGES TO SECTION 2384

Defendants and appellants have raised numerous challenges to the constitutionality of Section 2384 at the trial and appellate levels, respectively. The First Amendment is the most common defense to seditious conspiracy charges. Appellate courts have also addressed arguments based on vagueness, overbreadth, and contravention of the Treason Clause of the Constitution. Decades of constitutional

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[73] Robert Snell & Christine Ferretti, *Key Charges Dropped Against Hutaree Militia*, THE DETROIT NEWS, Mar. 28, 2012, at A1; *see also* Corey Williams & Devlin Barrett, *Christian Militia Group Charged with Plotting to Kill Police, Spark Revolt Against Government*, ASSOCIATED PRESS, Mar. 29, 2010.

[74] Ed White, *Michigan Militia Members Cleared of Conspiracy*, ASSOCIATED PRESS Mar. 27, 2012, (quoting Attorney General Eric Holder as referring to the Hutaree Militia as a "dangerous organization"); Time Wire Services, *Militia Members Acquitted of Plotting to Overthrow Government*, L.A. TIMES, Mar. 28, 2012, at 2.

[75] *See, e.g.*, White, *supra* note 74.

[76] Nick Bunkley, *U.S. Judge in Michigan Acquits Militia Members of Sedition*, N.Y. TIMES, Mar. 27, 2012, at A13.

[77] *See Stone*, 2012 U.S. Dist. LEXIS 41434 at *21–22.

[78] *Id.* at *37–38.

[79] Andrea Billups, *Lawyers Find Flaws in Militia Case*, WASH. TIMES, Apr. 12, 2012, at 6.

challenges to Section 2384 on each of these grounds have proven unsuccessful.

A. *First Amendement*

There are perhaps no protections as sacred to our democracy as those enshrined in the First Amendment. Any restraint imposed by the government on an individual's ability to exercise their freedoms of speech and religion are viewed with skepticism by the courts.[80] Except in very limited circumstances, even speech critical of the government is protected.[81] This is commonly where Section 2384 and the First Amendment intersect. Given the extensive protection afforded by the First Amendment, it is no surprise that defendants facing seditious conspiracy charges based, at least in part, on their allegedly anti-government statements commonly make the First Amendment their first line of defense. Commentators have observed that "almost invariably, the defense invokes the First Amendment" when facing seditious conspiracy charges.[82] The case law shows, however, that even the First Amendment has its limits and is not a per se prohibition to successful seditious conspiracy prosecutions.

The Second Circuit addressed an argument from several of the conspirators in the aforementioned Puerto Rican Nationalists case, including an editor and publisher who previously served as the party's "Minister of Propaganda," that their actions constituted political

[80] *See, e.g., Colorado Republican Fed. Campaign Committee v. Fed. Elec. Comm'n*, 518 U.S. 604, 640 (1996) (Thomas, J., dissenting) ("Curbs on protected speech, we have repeatedly said, must be strictly scrutinized."); *Sindi v. El-Moslimany*, 896 F.3d 1, 29 (1st Cir. 2018); *Wiegand v. Seaver*, 504 F.2d 303, 306 (5th Cir. 1974).

[81] *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the government may proscribe speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that the government may proscribe speech that constitutes a "true threat").

[82] Winter, *supra* note 6, at 186; John Alan Cohan, *Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government*, 17 ST. JOHN'S J.L. COMM. 199, 209 (2003).

expression protected by the First Amendment.[83] The Second Circuit affirmed their convictions after summarily rejecting this First Amendment argument as untenable under Supreme Court precedent.[84]

In *Rahman*, the appellant argued that Section 2384 was facially invalid because it criminalized expression protected by the First Amendment.[85] Drawing support from its decision four decades earlier in the Puerto Rican Nationalists case, the Second Circuit rejected this argument because the statute only prohibits speech that "constitutes an agreement to use force against the United States," and such speech is not afforded First Amendment protection.[86] The appellant also contended that Section 2384 violated his First Amendment rights as applied to the facts of the case.[87] In particular, he argued that his speeches and writings as a religious leader, even though delivered in a fiery and emotional manner, were constitutionally protected.[88] The court rejected this argument, concluding that "one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching," and further expounded that "freedom of speech and of religion do not extend so

[83] *Lebron*, 222 F.2d at 536.
[84] *Id.* (citing Dennis v. United States, 341 U.S. 494 (1951)). In *Dennis*, the Supreme Court upheld convictions under the Smith Act for conspiring to advocate the overthrow of the U.S. Government. *Id.* at 517. The Court held that the statute did not violate the defendants' First Amendment rights because their conduct presented a clear and present danger of attempting to commit a crime that Congress was authorized to punish, i.e., attempting to overthrow the government by force and violence. *Id.* at 514–17. The Court also held that the First Amendment was not violated where the defendants' advocacy exceeded peaceful study and discussion because they planned to overthrow the government posthaste. *Id.* at 516–17.
[85] *Rahman*, 189 F.3d at 114 (citing *Lebron*, 222 F.2d at 536).
[86] *Id.*
[87] *Id.* at 116.
[88] *Id.*

far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes."[89]

Evidence admitted at the *Rahman* trial revealed several specific comments made to co-conspirators by the appellant—who had assumed a leadership role amongst the conspirators—that extended well beyond fiery religious sermons and instead encouraged, endorsed, and approved terrorism and assassination plots.[90] The evidence sufficiently established that the appellant conspired with others to violate the law and, in fact, encouraged others to commit overt acts of violence against the United States.[91] Thus, the appellant's as-applied challenge to Section 2384 failed.

B. *Treason Clause*

Two circuit courts of appeals have addressed a constitutional challenge to Section 2384 on the ground that it violates the Treason Clause, which states:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.[92]

In *United States v. Rodriguez*, the appellant argued that Section 2384 constitutes "constructive treason" because it criminalizes behavior akin to treason while dispensing of two constitutional requirements for the crime of treason: an overt act and in-court testimony of witnesses regarding the same overt act.[93]

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[89] *Id.* at 116–17.
[90] *Id.*; *see also* discussion *supra* Part II.A.2.
[91] *Rahman*, 189 F.3d at 116–17.
[92] U.S. CONST. art. III, § 3, cl. 1.
[93] *Rodriguez*, 803 F.3d at 320. The appellant was a member of a clandestine terrorist organization known as the FALN that desired an independent Puerto Rico. *Id.* at 319. Evidence gathered via court-authorized electronic surveillance demonstrated that the appellant and others planned to bomb a U.S. Marine Corps facility in Chicago. *Id.*

The Seventh Circuit rejected the argument, instead concluding that "Section 2384 protects a different governmental interest and proscribes a different crime" than the Treason Clause.[94] The court characterized treason as a more limited offense than seditious conspiracy for two reasons: (1) treason can only be committed by a person owing allegiance to the United States; and (2) treason can only be accomplished by levying war against the United States or giving aid and comfort to its enemies.[95] Seditious conspiracy, in contrast, has no requirement for a duty of allegiance to the United States, does not extend beyond the jurisdictional boundaries of the United States, does not contemplate the presence of an enemy foreign state, and cannot be completed by one person acting alone.[96] The *Rodriguez* court concluded its analysis by noting that Section 2384 has a different purpose than treason—to help the government cope with and fend off urban terrorism—and provides the government with a means of making arrests before a conspiracy materializes into an act of violence.[97]

The same Treason Clause argument was raised to the Second Circuit more than a decade later in *Rahman*.[98] Drawing from and expanding upon the Seventh Circuit's analysis in *Rodriguez*, the Second Circuit similarly concluded that seditious conspiracy under Section 2384 "differs from treason not only in name and associated stigma, but also in its essential elements and punishment."[99] After noting that treason was punishable by an "exceptionally cruel method of execution" at the time of the Constitution's drafting, the *Rahman* court surmised that the Treason Clause may have been a means of limiting the application of such a severe penalty to only those situations where a person levied war against, or adhered to the enemies of, the United States.[100] The court was not persuaded by the argument

[94] *Id.* at 320.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Rahman*, 189 F.3d at 111–12.
[99] *Id.* at 112.
[100] *Id.* The *Rahman* court also noted that the Supreme Court had previously "identified but not resolved the question whether the [Treason Clause] applies to offenses that include all the elements of treason but are not

that the Framers intended to prohibit the prosecution of any seditious behavior other than treason.[101]

C. Overbreadth

In *Rahman*, the appellant argued that Section 2384 was unconstitutionally overbroad.[102] The fundamental inquiry in an overbreadth challenge is "whether the [statute in question] sweeps within its prohibitions what may not be punished" under the First Amendment.[103] Recognizing this well-established doctrine of constitutional jurisprudence, the *Rahman* court noted that laws cannot be so broad as to prohibit activities that constitute protected free speech.[104] The court further recognized the need to scrutinize laws that target sedition to ensure that the expression of unpopular viewpoints will not be suppressed or deterred.[105] The court concluded, however, that the narrow scope of Section 2384—criminalizing only conspiratorial agreement and not unpopular speech—passed constitutional muster.[106] As adroitly articulated by the *Rahman* court, any ambiguity regarding the term "sedition" in this context is therefore inconsequential.

D. Vagueness

The appellant in *Rahman* also argued that Section 2384 was unconstitutionally vague.[107] The U.S. Supreme Court has summarized the vagueness doctrine as follows:

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branded as such." *Id.* at 113 (citing *Ex Parte* Quirin, 317 U.S. 1, 38 (1942) and Cramer v. United States, 325 U.S. 1, 45 (1945)). The court nevertheless deemed it inconsequential because seditious conspiracy and treason differ in name, punishment, and definition. *Id.*

[101] *Rahman*, 189 F.3d at 113–14. The historical record supports the *Rahman* court's conclusion. *See* discussion *infra* Part V.

[102] *Id.* at 115.

[103] Grayned v. City of Rockford, 408 U.S. 104, 114–15 (1972).

[104] *Rahman*, 189 F.3d at 115.

[105] *Id.*

[106] *Id.* at 116.

[107] *Id.* at 115.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[108]

The appellant in *Rahman* relied on the murky definition of the term "seditious" to argue that Section 2384 is void for vagueness because the term did not provide "fair notice" regarding what behavior the statute criminalized.[109] The *Rahman* court quickly discarded this argument because only the heading of Section 2384—not the text of the statute that actually proscribes conduct—uses the term.[110] The court concluded that text of Section 2384 does not include vague terminology and "unquestionably specif[ies] that agreement to use force is an essential element of the crime."[111] Because Section 2384 does not present the concerns that underlie the vagueness doctrine, the statute passes constitutional muster.

IV. SEDITIOUS CONSPIRACY POST-JANUARY 6, 2021

The events of January 6th led to the first seditious conspiracy indictments in more than a decade. Given the degree of public condemnation of the events of that day and the growing public concern about threats to democracy, it is perhaps not surprising that

[108] *Grayned*, 408 U.S. at 108–09 (internal citations omitted).
[109] *Id.* at 112.
[110] *Rahman*, 189 F.3d at 116.
[111] *Id.* (internal emphasis omitted).

prosecutors dusted off Section 2384 for these cases.[112] The recent successful prosecution of members of two right-wing extremist groups—the Oath Keepers and the Proud Boys—demonstrates that Section 2384 remains an important tool for federal prosecutors.

A. *The Oath Keepers (Part I)*

On January 6, 2021, several hundred individuals unlawfully and, in some cases, through the use of force breached law enforcement barriers to enter the U.S. Capitol in an effort to interrupt a joint session of Congress and thereby prevent certification of the 2020 Presidential election results.[113] A vigorous investigation in the months that followed yielded significant evidence regarding not only the events of that day but also the planning and preparation that occurred in the preceding months. Federal indictments became a regular news story, though the initial wave of indictments largely consisted of lower-level offenses.[114]

The game changed on January 12, 2022, when the founder and leader of the Oath Keepers, Elmer Stewart Rhodes III, and ten other individuals were indicted on various charges, including seditious conspiracy, in connection with their involvement in the events of January 6th.[115] The indictment alleged that, for the purpose of opposing the lawful transfer of presidential power, the defendants

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[112] Cohan, *supra* note 82, at 206 (providing that seditious conspiracy prosecutions are more likely in a climate of heightened societal apprehension about plots against the nation); Alanna Durkin Richer & Lindsay Whitehurst, *Rare Sedition Charge at Center of Jan. 6 Trial*, ASSOCIATED PRESS (Sept. 28, 2022) https://apnews.com/article/what-does-sedition-charge-mean-3aa820dda5f501dd874c4dd6d60ca1ce (providing that threats to democracy are among Americans' top concerns).

[113] *See generally* H.R. REP. NO. 117-663, at 465 (2022).

[114] *See* Alanna Durkin Richer & Jacques Billeaud, *Feds Back Away From Claim of Assassination Plot at Capitol*, ASSOCIATED PRESS (Jan. 15, 2021) ("The federal charges brought so far are primarily for crimes such as illegal entry, but prosecutors have said they are weighing more serious charges against at least some of the rioters.").

[115] Indictment at 1, United States v. Rhodes, et al., No. 22-cr-15 (D.D.C. Jan. 12, 2022), ECF No. 1.

conspired to prevent, hinder, or delay the execution of the laws governing the transfer of power, including the Twelfth and Twentieth Amendments of the Constitution and Title 3, Section 15 of the U.S. Code.[116]

According to the indictment, the defendants undertook a number of acts in furtherance of the conspiracy beginning in November 2020, including preparing to use force to stop the lawful transfer of power, organizing into teams prepared and willing to use such force, recruiting members to participate in the conspiracy, organizing paramilitary training, procuring and transporting firearms and paramilitary gear, breaching and attempting to take control of the Capitol, and using force against law enforcement officers at the Capitol.[117] A much more detailed account of the overt acts allegedly committed by the defendants was set forth over the span of 23 pages, including numerous messages sent amongst the defendants and other co-conspirators that evinced their intent to prepare for the potential use of force on January 6th.[118]

The defendants filed several motions to dismiss the seditious conspiracy charges raising a variety of arguments. The defendants first argued that, because laws do not "execute" themselves, a particular person must be the object of the conspiracy.[119] Moreover, they claimed, because members of Congress cannot execute laws, a function reserved for the Executive Branch, they cannot be the object of a seditious conspiracy.[120] The district court judge examined the statutory history and appellate case law and determined that, so long as the federal government writ large is identified as the object of the

[116] *See id.* at 2. The Twelfth Amendment establishes the procedure by which Electors vote for the President and Vice-President. The Twentieth Amendment describes when the terms of the President and Vice-President begin and end. Title 3, U.S. Code, Section 15, sets forth the specific procedure for counting electoral votes.
[117] *See id.* at 2, 5, 6.
[118] *See id.* at 2–28.
[119] Memorandum Opinion and Order at 7, United States v. Rhodes, No. 22-cr-15, June 28, 2022, ECF No. 176 [hereinafter June Order].
[120] *See id.*

conspiracy, a particular individual need not be identified.[121] Additionally, the indictment described both the Vice President and members of Congress as executing the election laws on January 6th.[122]

The defendants also argued that the First Amendment protected their political speech and right to assembly, and that the indictment violated these rights.[123] The judge noted that the defendants were indicted for seditious conspiracy, not "purely for their speech or assembly,"[124] and concluded that "seditious conduct can always be punished."[125] The defendants further argued that Section 2384 is unconstitutionally vague.[126] The judge swiftly concluded that "[t]he conduct alleged when applied to the plain statutory text . . . presents no vagueness problem."[127]

At trial, the prosecution's case relied heavily on messages sent by the defendants before, during, and after the events of January 6th, many of which were extremely graphic. For instance, an exchange between Mr. Rhodes and co-defendant Kelly Meggs said "there is going to be blood in the street no matter what."[128] Mr. Meggs had previously sent a message on Election Day that he was ready to go on a "killing spree" and that "[House Speaker Nancy] Pelosi would be first."[129] Prosecutors played the jury an audio recording in which

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[121] *See id.* at 37–38.
[122] *See id.* at 37.
[123] *Id.* at 47–48; Memorandum Opinion and Order at 5–6, United States v. Rhodes, et al., No. 22-cr-15, Aug. 2, 2022, ECF No. 238 [hereinafter August Order].
[124] August Order, *supra* note 123, at 6.
[125] June Order, *supra* note 119, at 24.
[126] August Order, *supra* note 123, at 5.
[127] *Id.*
[128] Quinn Owen, *Oath Keepers Discussed Possibility of "Blood in the Streets" on Jan. 6, FBI Agent Testifies*, ABC NEWS (Oct. 13, 2022), https://abcnews.go.com/Politics/oath-keepers-discussed-possibility-blood-streets-jan-fbi/story?id=91460102.
[129] Spencer S. Hsu & Rachel Weiner, *U.S. in Oath Keepers Trial Outlines Alleged Plotting Before Capitol Attack*, WASH. POST (Oct. 3, 2022), https://www.washingtonpost.com/dc-md-va/2022/10/03/oath-keepers-trial-live-updates/.

Mr. Rhodes, reflecting on the events of January 6th, said "we should have brought rifles" and that he would "hang Pelosi from a lamppost."[130] Perhaps most relevant to the seditious conspiracy charge, though, was Mr. Rhodes's message in December 2020 that "we will have to rise up in insurrection (rebellion)" if President Trump did not act to prevent President-elect Biden from taking office.[131] Mr. Rhodes published an open letter later in December urging President Trump to invoke the Insurrection Act,[132] adding that "[t]ens of thousands of patriotic Americans . . . will already be in Washington . . . [ready] to take arms in defense of our God given liberty."[133]

Prosecutors also presented evidence from several previous supporters of Mr. Rhodes. One fellow Oath Keeper testified that he felt "disturbed" by Mr. Rhodes's messages about taking action to prevent President-elect Biden from taking office.[134] Another testified that Mr. Rhodes was "unchained" in his insistence that the Oath Keepers would need to take action themselves if President Trump did

[130] Lindsay Whitehurst, *Witness: Oath Keepers Head Tried to Reach Trump After Jan. 6*, ASSOCIATED PRESS (Nov. 2, 2022), https://apnews.com/article/capitol-siege-texas-donald-trump-veterans-conspiracy-d159e7b101fd7fc63f7821a0bc7daa9d.

[131] Spencer S. Hsu, Tom Jackman, & Rachel Weiner, *Oath Keepers Founder Stewart Rhodes Guilty of Jan. 6 Seditious Conspiracy*, WASH. POST (Nov. 29, 2022) [hereinafter Hsu et al. (Nov. 29, 2022)].

[132] The Insurrection Act authorizes the President, under certain circumstances, to use the armed forces or the militia, or both, to suppress an insurrection. *See* 10 U.S.C. §§ 251–55. In response to the defendants' reliance on the Insurrection Act, prosecutors argued that the defendants were simply using the Insurrection Act as "legal cover" for their actions. Rachel Weiner, Spencer S. Hsu, & Tom Jackman, *Oath Keepers Sedition Trial Could Reveal New Info About Jan. 6 Plotting*, WASH. POST (Sept. 24, 2022) [hereinafter Hsu et al. (Sept. 24, 2022)]. Regardless, prosecutors argued, President Trump never invoked the Insurrection Act and "lacked the authority to authorize a conspiracy to attack Congress or the presidential transition." *Id.*

[133] *See* Hsu et al. (Sept. 24, 2022), *supra* note 132.

[134] Spencer S. Hsu & Rachel Weiner, *Prosecutors Draw Links Between Oath Keepers Founder, Stone*, WASH. POST (Oct. 8, 2022).

not invoke the Insurrection Act.[135] These two witnesses also testified that, although they were not aware of a specific plan to enter the Capitol, there was an implicit agreement that the Oath Keepers were going to take action.[136] Another Oath Keeper testified that, if President Trump did not take action to prevent Congress from certifying the election results, the defendants were prepared to do so "by any means necessary," including armed combat.[137] Prosecutors also presented evidence that the group stockpiled weapons at a hotel in nearby Arlington, Virginia, where a "quick reaction force" was on standby to respond to the Capitol, if necessary.[138] Prosecutors used these messages to argue that the defendants attempted to "use force and violence to change the outcome" of the 2020 Presidential election and that the defendants' actions were "deadly serious."[139]

The defense contended that the Oath Keepers, including the defendants, were present in Washington, D.C., to provide security[140] and furnish support in the event that President Trump invoked the Insurrection Act.[141] The defense countered the prosecution's case by emphasizing two points: (1) the defendants' messages constituted speech protected by the First Amendment; and (2) there was no agreement amongst the defendants sufficient to support a seditious conspiracy conviction.[142] Defense attorneys characterized the defendants' messages as "horribly heated rhetoric and bombast" that was nevertheless constitutionally protected.[143] Attacking the charged conspiracy directly, throughout the trial the defense emphasized the

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[135] *Id.*
[136] Rachel Weiner, Spencer S. Hsu, & Tom Jackman, *What We've Learned From the Jan. 6 Oath Keepers Trial So Far*, WASH. POST (Nov. 4, 2022).
[137] Spencer S. Hsu, *Key Oath Keepers Witness Testifies Jan. 6 Plans Potentially "Treasonous,"* WASH. POST (Oct. 18, 2022).
[138] Owen, *supra* note 128.
[139] Spencer S. Hsu, Rachel Weiner, & Tom Jackman, *"Democracy Is Fragile," Prosecutor Says at Close of Oath Keepers Trial*, WASH. POST (Nov. 18, 2022) [hereinafter Hsu et al. (Nov. 18, 2022)].
[140] Owen, *supra* note 128.
[141] *See* Hsu et al. (Sept. 24, 2022), *supra* note 132.
[142] *See* Hsu et al. (Nov. 18, 2022), *supra* note 139.
[143] *See* Hsu et al. (Nov. 29, 2022), *supra* note 131.

lack of evidence regarding a specific plan to attack the Capitol.[144] Mr. Rhodes testified that no such plan existed and that entering the Capitol was not part of the Oath Keepers' mission.[145] Similarly, the Oath Keepers' "operations leader," indicted on other charges, testified that there was no explicit or implicit plan to enter the Capitol.[146]

After a nearly two-month trial that included hundreds of exhibits and testimony from 46 witnesses, the case was submitted to the jury.[147] On November 29, 2022, following three days of deliberations, the jury convicted Mr. Rhodes and Mr. Meggs of seditious conspiracy; the remaining three co-defendants were acquitted of the seditious conspiracy charge.[148] According to press reports, the evidence presented at trial demonstrated that Mr. Rhodes was the leader of the conspiracy and Mr. Meggs served as a "top deputy."[149] Prosecutors described Mr. Rhodes as acting like a "general surveying his troops on the battlefield" while standing outside the

[144] *See, e.g.*, Spencer S. Hsu, *Second Oath Keepers Cooperator Says He Saw Jan. 6 as "Bastille-Type" Moment*, WASH. POST (Oct. 31, 2022) (discussing cross-examination of prosecution witness regarding lack of specific plan to breach the Capitol); Lindsay Whitehurst & Alanna Durkin Richer, *Prosecution Rests, Oath Keepers 1/6 Case Turns to Defense*, ASSOCIATED PRESS (Nov. 3, 2022) (discussing cross-examination of law enforcement agent regarding absence of evidence that Mr. Rhodes ordered anyone to breach the Capitol), https://apnews.com/article/capitol-siege-riots-donald-trump-conspiracy-government-and-politics-822b87cf763331b547dc515d8aba7033.

[145] Spencer S. Hsu & Tom Jackman, *Oath Keepers' Leader Rhodes Denies Conspiracy to Enter Capitol on Jan. 6*, WASH. POST (Nov. 7, 2022).

[146] Alanna Durkin Richer, *Defense Rests in Capitol Riot Trial of Oath Keepers Leader*, ASSOCIATED PRESS (Nov. 9, 2022), https://apnews.com/article/capitol-seige-conspiracy-government-and-politics-302b986f102f4aca3955967c4f623861.

[147] Tom Jackman & Spencer S. Hsu, *Defendants Attack U.S. "Manipulation" of Evidence in Oath Keepers Trial*, WASH. POST (Nov. 21, 2022).

[148] *See* Hsu et al. (Nov. 29, 2022), *supra* note 131. All five defendants were convicted of an array of other charges. *See id.*

[149] *Id.*

Capitol on January 6th.[150] Phone records presented at trial showed a phone call between Mr. Rhodes and Mr. Meggs immediately before Mr. Meggs led a group of Oath Keepers into the Capitol.[151] Considering that the evidence showed the other three co-defendants played a less prominent role in the strategic planning and execution phases, it is not surprising that the jury drew a distinction between their conduct and the conduct of Mr. Rhodes and Mr. Meggs.[152] The three acquittals demonstrate that the jury was not inflamed by the extreme nature of the events of January 6th but instead analyzed the evidence presented against each individual defendant, as every criminal jury is charged to do. Mr. Rhodes and Mr. Meggs were subsequently sentenced to 18 years and 12 years in prison, respectively.[153]

The seditious conspiracy convictions were portrayed as a "major victory" for the Department of Justice and a "bellwether" for two upcoming seditious conspiracy trials, one involving several other Oath Keepers and the other involving members of another right-wing group, the Proud Boys.[154]

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[150] Lindsay Whitehurst, Alanna Durkin Richer, & Michael Kunzelman, *Oath Keepers' Rhodes Guilty of Jan. 6 Seditious Conspiracy*, ASSOCIATED PRESS (Nov. 29, 2022), https://apnews.com/article/oath-keepers-founder-guilty-of-seditious-conspiracy-42affe1614425c6820f7cbe8fd18ba96.

[151] *See* Hsu et al. (Nov. 29, 2022), *supra* note 131.

[152] For instance, the defense presented evidence that Defendant Thomas Caldwell was not a member of the Oath Keepers, had no communications with Mr. Rhodes after mid-November 2020, and did not enter the Capitol on January 6th. *See* Jackman & Hsu, *supra* note 147. Prosecutors presented no communications from Defendant Kenneth Harrelson which, his attorney argued, showed that Mr. Harrelson did not participate in planning and was a mere follower, not a leader. *See id.*

[153] *See* Press Release, U.S. Dep't of Justice, Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach (May 25, 2023).

[154] Hsu et al. (Nov. 29, 2022), *supra* note 131; Whitehurst, Richer, & Kunzelman, *supra* note 150.

B. *The Oath Keepers (Part II)*

Due to space limitations in the courtroom, four of the nine Oath Keepers defendants were tried separately from Mr. Rhodes.[155] Prosecutors deemed the four defendants tried in the second Oath Keepers trial less culpable than Mr. Rhodes and his four co-defendants.[156] The case thus presented a "tougher challenge," albeit with "lower stakes," than the first Oath Keepers trial.[157]

At trial, prosecutors depicted the defendants as foot soldiers lower in the Oath Keepers' hierarchy than the defendants in the first Oath Keepers trial.[158] A key evidentiary distinction in the second trial was testimony from a former Oath Keeper that Mr. Meggs explicitly directed the group to stop the electoral vote count.[159] The defense argued that the defendants' actions were unplanned and constituted "mere bluster" rather than seditious conspiracy.[160]

After deliberations spanning three days, the jury convicted each of the four defendants of seditious conspiracy, constituting "another major victory for the Justice Department."[161] The defendants were subsequently sentenced to prison terms ranging from 36 to 54 months.[162]

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[155] Zach Montague, *Four More Members of Oath Keepers Convicted of Sedition in Second Trial*, N.Y. TIMES, Jan. 24, 2023, at A20.
[156] Rachel Weiner, *Four Other Oath Keepers Found Guilty of Jan. 6 Seditious Conspiracy*, WASH. POST (Jan. 23, 2023).
[157] Spencer S. Hsu & Rachel Weiner, *In 2nd Oath Keepers Sedition Trial, U.S. Ties 4 More to Rhodes*, WASH. POST (Dec. 12, 2022).
[158] *See* Montague, *supra* note 155.
[159] *See* Weiner, *supra* note 156.
[160] *See id.*; Michael Kunzelman & Alanna Durkin Richer, *Four Oath Keepers Convicted of Jan. 6 Seditious Conspiracy*, ASSOCIATED PRESS (Jan. 24, 2023), https://apnews.com/article/oath-keepers-seditious-conspiracy-conviction-2b9fb724c9839524d00ee389959e0e62.
[161] Kunzelman, *supra* note 160.
[162] Press Release, U.S. Dep't of Justice, Four Additional Oath Keepers Sentenced for Seditious Conspiracy Related to U.S. Capitol Breach (June 2, 2023).

C. *The Proud Boys*

On June 6, 2022, the leader of the Proud Boys, Enrique Tarrio, and four additional members of the organization were charged with seditious conspiracy and other crimes in connection with their involvement in the events of January 6th.[163] According to the indictment, the defendants conspired to prevent, hinder, or delay the execution of the laws governing the transfer of power, including the Twelfth Amendment and Title 3, U.S. Code Section 15, for the purpose of opposing the lawful transfer of presidential power.[164]

While the indictment shared many similarities with the Oath Keepers indictment in terms of recruiting, purchasing supplies, and general preparatory steps, it differed in two notable respects: (1) it alleged much more aggressive behavior by the Proud Boys defendants on January 6th;[165] and (2) it alleged a much more detailed planning phase.[166] Of particular note, the indictment quoted messages allegedly sent by the defendants that referenced occupying government buildings and "storming" the Capitol.[167] Perhaps more importantly, it quoted messages referring to a specific "plan" to be executed on January 6th.[168]

Despite the differences in the indictments, the Proud Boys defendants deployed a pretrial litigation strategy similar to that of the

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[163] *See generally* Third Superseding Indictment, United States v. Nordean, No. 21-cr-175 (D.D.C. June 6, 2022) [hereinafter Proud Boys Indictment].
[164] *Id.* at 8.
[165] Proud Boys Indictment, *supra* note 163, at 17–23 (alleging numerous forcible breaches of the Capitol and assaults on law enforcement officers). This accords with Mr. Rhodes's (perhaps self-serving) testimony that, whereas the Oath Keepers prefer to "stay calm," the Proud Boys "want to go out and street fight." Tom Jackman & Rachel Weiner, *Stewart Rhodes Testifies in His Own Defense at Seditious Conspiracy Trial*, WASH. POST (Nov. 4, 2022).
[166] Proud Boys Indictment, *supra* note 163, at 10–17. Of note, the Proud Boys Indictment did not allege that the defendants stockpiled weapons as had been alleged in the Oath Keepers Indictment. *See generally id.*
[167] *Id.* at 12, 13.
[168] *Id.* at 15, 17.

Oath Keepers defendants by moving to dismiss the seditious conspiracy charges on familiar grounds. The Proud Boys defendants argued that Section 2384 requires targeting a specific U.S. Government official.[169] The trial judge rejected the defendants' argument, noting that Congress knew how to impose such a statutory requirement but did not do so in Section 2384.[170] The judge also noted that while proof of a seditious conspiracy must include the use of force or planned use of force against people or property, the indictment need not identify specific persons targeted by the conspiracy.[171]

The defendants also argued that Congress was not "executing" any laws on January 6th and was instead merely complying with the applicable laws when certifying the election results.[172] The defendants went a step further by arguing that "execution" of laws is outside the constitutional authority of Congress.[173] The judge concluded that Congress executes the Twelfth Amendment and the Electoral Count Act by carrying into effect their ultimate objects: certifying the vote and the transition of power.[174] Drawing support from The Federalist Papers, the judge noted that the Framers understood the separation of powers as "entirely compatible with a partial intermixture of [the Executive and Legislative] departments for special purposes."[175] The judge thus concluded that Congress may execute the Twelfth Amendment and the Electoral Count Act for the "special purpose" of certifying Presidential elections.[176]

The Proud Boys defendants also argued that the "force" element of seditious conspiracy renders the statute unconstitutionally vague.[177] In rejecting this argument, the judge posited that the

[169] United States v. Nordean, 2022 U.S. Dist. LEXIS 222712, at *14 (D.D.C. 2022).
[170] *Id.* at *15.
[171] *Id.* at *17.
[172] *Id.* at *19–20.
[173] *Id.*
[174] *Id.* at *20.
[175] *Nordean*, 2022 U.S. Dist. LEXIS 222712, at *22 (quoting THE FEDERALIST NO. 66, at 401 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
[176] *Id.* at *23.
[177] *Id.* at *28–29.

susceptibility of the term "force" to several meanings is not itself sufficient to void a statute on vagueness grounds.[178] Stated otherwise, "difficult questions at the margins do not render a statute unconstitutionally vague."[179] The judge cited other criminal statutes that are routinely applied without vagueness issues.[180] Ultimately, none of the Proud Boys defendants' challenges to Section 2384 carried the day.

The evidence supporting the charges against the Proud Boys defendants led to a different prosecutorial framing of the case as compared to the Oath Keepers trial. Prosecutors portrayed the defendants as having "handpicked and mobilized a loyal group of foot soldiers—or 'tools'—to supply the force necessary to carry out their plot to stop the transfer of power."[181] Those "tools," in turn, helped advance the defendants' objectives of overwhelming law enforcement, breaching barricades, and forcing the cessation of the electoral count.[182] The defense immediately characterized this prosecutorial theory as a "novel, flawed concept with no legal foundation."[183] The judge ruled that the prosecution's painstaking efforts in a days-long motions hearing resulted in sufficient evidence to draw a nexus between the defendants and 22 other individuals, which rendered the prosecution's theory presentable to the jury.[184]

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[178] *Id.*
[179] *Id.* at *29.
[180] *Id.*
[181] Michael Kunzelman, *Proud Boys Deployed Foot Soldiers in Sedition Plot, Feds Say*, ASSOCIATED PRESS (Mar. 10, 2023), https://apnews.com/article/proud-boys-capitol-riot-tarrio-jan-6-09f5e86dd62580eaaef0f5413206c63e.
[182] *Id.*
[183] *Id.*
[184] United States v. Nordean, 2023 U.S. Dist. LEXIS 77588, at *5 (D.D.C. 2023). In particular, the prosecution presented video evidence depicting these 22 individuals interacting with the defendants on January 6th. *Id.* at *5–6. The judge observed that "sometimes the best evidence of a conspiracy is the concerted action that in fact results from one." *Id.* at *8.

Prosecutors again relied heavily on messages exchanged between the defendants before, during, and after the events of January 6th.[185] On January 1, 2021, Mr. Tarrio sent a message reading: "Let's bring this new year with one word in mind: revolt."[186] Another defendant, Joseph Biggs, sent a message that read: "It's time for . . . War if they steal this . . . ."[187] Co-defendant Zachary Rehl sent a message referencing the use of a firing squad for the "traitors that are trying to steal the election from the American people."[188] In response to receiving a document detailing a plan to occupy federal buildings, Mr. Tarrio responded: "I'm not playing games."[189] Prosecutors also presented video footage from January 6th showing defendant Ethan Nordean organizing Proud Boys members into leadership and general membership groups at the Washington Monument and declaring "[w]e have a plan and . . . can adjust" as they marched toward the Capitol.[190]

Prosecutors called two former Proud Boys as witnesses in their case-in-chief. While neither testified to having knowledge of a specific plan to enter the Capitol on January 6th, their testimony was nevertheless revealing about the objectives and outlook of the Proud

[185] Michael Kunzelman, Alanna Durkin Richer, & Lindsay Whitehurst, *Proud Boys Leaders' Jan. 6 Sedition Trial Inches to a Close*, ASSOCIATED PRESS (Apr. 10, 2023), https://apnews.com/article/proud-boys-seditious-conspiracy-trial-enrique-tarrio-43f54932920c1fb38ac96c4aae737a1e.
[186] Ella Lee, '*New Years Revolution': What the Proud Boys Said on Parler Ahead of the Jan. 6 Capitol Riot*, USA TODAY ONLINE (Jan. 31, 2023), https://www.usatoday.com/story/news/politics/2023/01/31/proud-boys-trial-parler-messages-path-jan-6/11153687002.
[187] *Id.*
[188] *Id.*
[189] Kyle Cheney, *Proud Boys Sedition Trial Shows Group Keying Off Trump Comments*, POLITICO (Feb. 9, 2023), https://www.politico.com/news/2023/02/09/proud-boys-sedition-trial-trump-00082067.
[190] Kyle Cheney, *Anger at Police, and Hints of a Plan, as Proud Boys Marched Toward Capitol*, POLITICO (Mar. 7, 2023), https://www.politico.com/news/2023/03/07/proud-boys-march-toward-capitol-00085975.

Boys organization.[191] The first witness testified that the group celebrated the use of force and was "ready and willing for anything that was going to happen."[192] The second witness testified that the Proud Boys believed they had to lead a new American revolution and agreed that they "had to do anything that was necessary to save the country."[193] He further testified that the Proud Boys were prepared for an "all-out revolution" leading up to January 6th.[194]

From the outset, the defense attempted to downplay the defendants' role in the events of January 6th and shift blame in a manner unseen in the Oath Keepers trial. During opening statements, defense attorneys posited that the defendants were scapegoats for an unplanned riot instigated by President Trump and could not have been involved in a plot to use force because they did not bring any weapons.[195] The defense also emphasized that Mr. Tarrio was in regular contact with a police lieutenant for 15 months preceding

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[191] *See* Alan Feuer & Zach Montague, *Proud Boys' Views on Violence Take Center Stage at Jan. 6 Trial of Five Members*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2023/01/25/us/politics/proud-boys-violence-jan-6.html; *see also* Michael Kunzelman, *Ex-Member: Proud Boys Failed to Carry Out 'Revolution',* ASSOCIATED PRESS (Feb. 22, 2023, 5:36 PM), https://apnews.com/article/biden-politics-district-of-columbia-united-states-government-proud-boys-6ab48b3de424c00a6b4595fcac63b5cd.

[192] Lindsay Whitehurst, *Proud Boys Expecting "Civil War" Before Jan. 6, Witness Says*, ASSOCIATED PRESS (Jan. 24, 2023, 4:57 PM), https://apnews.com/article/politics-united-states-government-district-of-columbia-proud-boys-donald-trump-a7e5b9f263868239c06c3826b49bf0c0.

[193] Spencer S. Hsu & Tom Jackman, *Star U.S. Witness Says Proud Boys Took 'Reins,' Led Jan. 6 Riot By Example*, WASH. POST (Feb. 22, 2023, 4:09 PM), https://www.washingtonpost.com/dc-md-va/2023/02/22/proudboys-bertino-testimony-jan6-trial-tarrio.

[194] C. Ryan Barber, *Ex-Proud Boy Testifies Group Sought an 'All-Out Revolution,'* WALL ST. J. (Feb. 23, 2023, 5:44 PM), https://www.wsj.com/articles/ex-proud-boy-testifies-group-sought-all-out-revolution-in-capitol-riot-9c9ca696.

[195] *See* Spencer S. Hsu, Rachel Weiner, & Tom Jackman, *Proud Boys Led Jan. 6 Riot to Keep Trump in Office, U.S. Says at Trial*, WASH. POST (Jan.12, 2023, 7:29 PM), https://washingtonpost.com/dc-md-va/2023/01/12/proud-boys-trial-openings.

January 6th regarding plans for Proud Boys events in the area.[196] Such communications, the defense argued, served as evidence that there was no conspiracy to oppose federal authority or disrupt confirmation of the election results.[197]

In an interesting strategic move, two of the defendants chose to testify.[198] In their testimony, both Mr. Rehl and Mr. Pezzola denied knowledge of any plan to storm the Capitol on January 6th.[199] Prosecutors were, however, able to make Mr. Rehl and Mr. Pezzola appear "evasive and unreliable" on cross-examination and were permitted to introduce otherwise inadmissible video footage based on Mr. Rehl's testimony on direct examination.[200]

In closing arguments, the prosecution referred to the defendants as "Donald Trump's army, fighting to keep their preferred leader in power no matter what the law or the courts had to say about it."[201] Acknowledging the lack of a smoking gun, the prosecutor boldly argued that conspiracy could result from an unspoken and implicit

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[196] *See* Spencer S. Hsu, *Texts Between D.C. Police and Proud Boys Head Shown at Jan. 6 Trial*, WASH. POST (Apr. 7, 2023, 5:33 PM), https://www.washingtonpost.com/dc-md-va/2023/04/07/proud-boys-lamond-texts-jan6-trial.

[197] *Id.*

[198] *See* Rachel Weiner & Spencer S. Hsu, *Proud Boys Defendant Calls Jan. 6 Violence 'Disgrace' at Trial*, WASH. POST (Apr. 13, 2023, 6:21 AM), https://www.washingtonpost.com/dc-md-va/2023/04/13/proud-boys-trial-rehl-testify; *see also* Lindsay Whitehurst & Michael Kunzelman, *Proud Boy Who Smashed Capitol Window at Riot Denies Any Plot*, ASSOCIATED PRESS (Apr. 19, 2023, 5:46 PM), https://apnews.com/article/proud-boys-jan-6-testimony-6aed3489f86af1b3ed0c4b8e876768c4.

[199] Weiner, *supra* note 198; Whitehurst, *supra* note 198.

[200] Rachel Weiner & Spencer S. Hsu, *Proud Boys' Defense Wobbles in Sedition Trial after Two Take the Stand*, WASH. POST (Apr. 20, 2023, 5:25 PM), https://www.washingtonpost.com/dc-md-va/2023/04/20/proud-boys-defendants-testify/. One of these videos appeared to show Mr. Rehl using pepper spray on police officers on January 6th. *Id.*

[201] Alan Feuer, *Closing Arguments Underway in Sedition Trial*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/24/us/politics/proud-boys-jan-6-sedition-trial.html.

"mutual understanding, reached with a wink and a nod."[202] In response to the defense's constant refrain to protected speech, the prosecutor provided the following retort: "These men aren't here because of what they said. They're here because of what they did."[203] Closing arguments from defense counsel emphasized the spontaneity of the events of January 6th and criticized the prosecution's case as relying on "misdirection and innuendo."[204] All told, the trial included 50 days of testimony and spanned more than four months before the case went to the jury.[205]

Following seven days of deliberations, the jury convicted four of the defendants of seditious conspiracy.[206] Only Mr. Pezzola was acquitted of that charge.[207] The jury may have been swayed by the fact that Mr. Pezzola did not know any of his co-defendants before

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[202] Michael Kunzelman & Lindsay Whitehurst, *Prosecutor: Proud Boys Viewed Themselves as "Trump's Army,"* ASSOCIATED PRESS (Apr. 24, 2023, 8:31 PM), https://apnews.com/article/proud-boys-enrique-tarrio-capitol-riot-trial-4dc5d0d36bc4c39ea924412dbb51780b.

[203] Michael Kunzelman, *Jury to Deliberate in Major Jan. 6 Case Against Proud Boys*, ASSOCIATED PRESS (Apr. 25, 2023, 5:49 PM), https://apnews.com/article/capitol-riot-proud-boys-enrique-tarrio-5dd9377b31c90d2cc87bc6b4d01013af.

[204] Alan Feuer, *Prosecution and Defense Sum Up at Proud Boys Jan. 6 Sedition Trial*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/24/us/politics/proud-boys-jan-6-sedition-trial.html.

[205] *See* Michael Kunzelman & Lindsay Whitehurst, *Defense Rests at Sedition Trial for Proud Boys Leaders*, ASSOCIATED PRESS (Apr. 20, 2023, 6:25 PM), https://apnews.com/article/proud-boys-trial-capitol-riot-pezzola-tarrio-385c396b3264fccff463c65624951463.

[206] *See* Spencer S. Hsu, Tom Jackman, Rachel Weiner, & Hannah Allam, *Proud Boys Enrique Tarrio, 3 Others Guilty of Jan. 6 Seditious Conspiracy*, WASH. POST (May 4, 2023, 11:02 AM), https://www.washingtonpost.com/dc-md-va/2023/05/04/proud-boys-verdict-jan6-seditious-conspiracy.

[207] *Id.*

January 6th and his testimony that he acted alone.[208] Similar to the acquittal of three Oath Keepers defendants, the acquittal of Mr. Pezzola demonstrates that the jury did not rush to convict but instead carefully reviewed the evidence and applied the facts and the law to each individual defendant.

Mr. Tarrio was ultimately sentenced to 22 years in prison while Mr. Nordean, Mr. Biggs, and Mr. Rehl were sentenced to 18, 17, and 15 years, respectively.[209]

D. *The Future of Seditious Conspiracy Prosecutions*

To be sure, the crime of seditious conspiracy has drawn public criticism and, in some instances, rightfully so. The cases against The Order and the Hutaree Militia, subject to national media coverage from indictment through trial, ultimately resulted in embarrassment when the evidence did not support a conviction.[210] But the same results-oriented criticism can be said at one time or another about virtually every criminal statute. Sometimes prosecutors simply do not have the evidence, or do not present it convincingly enough, to obtain a conviction. That disappointing result, unless compounded *ad infinitum*, does not constitute reasonable grounds to repeal, or discontinue the use of, the underlying criminal statute. Instead, prosecutors should simply assess what went wrong between the indictment and the verdict and apply any lessons learned to future charging decisions and litigation strategy.

The absence of seditious conspiracy charges in the past decade suggests that federal prosecutors have taken this exact approach to reduce the risk of undesirable results. Given the complexity of explaining these cases to a jury and the politically charged nature of

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[208] *See* Matthew Impelli, *Proud Boys Trial Is a Set of Catastrophes*, NEWSWEEK (Apr. 18, 2023, 5:00 AM), https://www.newsweek.com/proud-boys-trial-series-catastrophes-1794900.

[209] Tom Jackman & Spencer S. Hsu, *Ex-Proud Boys Leader Enrique Tarrio Sentenced to 22 Years for Jan. 6*, WASH. POST (Sept. 5, 2023, 5:52 PM), https://washingtonpost.com/dc-md-va/2023/09/05/proud-boys-sentencing-enrique-tarrio-jan-6-seditious-conspiracy.

[210] *See* discussion *supra* Part II.B.

their prosecution,[211] the evidence needs to be solid, the necessary inferences need to be minimal, and the witnesses need to be credible. This same formula applies to virtually every criminal offense. Thus, there is nothing peculiar about Section 2384 that warrants cessation of its usage.

Critics have suggested that Section 2384 allows the government to convict a person merely based on their thoughts.[212] That is simply not true. The most basic element of any conspiracy is an agreement which, by definition, necessitates communication in some form or fashion between two or more parties.[213] Thoughts communicated are no longer just thoughts; they are words or actions that are subject to punishment if they constitute a criminal offense.

The First Amendment will continue to be the primary defense to seditious conspiracy charges both because it so frequently overlaps with the type of behavior common to seditious conspiracy charges and because it provides such broad protection to individuals' exercise of their freedoms of speech, religion, and association. Without question, there is a fine line between speech that is protected and speech that is not. But the First Amendment protection fades when there is evidence of an agreement by two or more parties to pursue unlawful action.[214] It is well-established that speech that crosses the line into conspiracy is no longer protected.[215]

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[211] Kunzelman, Richer, & Whitehurst, *supra* note 185; Nick Robins-Early, *Seditious Conspiracy is Rarely Proven. The Oath Keepers Trial is a Litmus Test*, THE GUARDIAN (Jan. 28, 2022, 6:00 AM), https://www.theguardian.com/us-news/2022/jan/28/seditious-conspiracy-charges-trial-oath-keepers-us-court.

[212] Cohan, *supra* note 82, at 200 (citing Kevin Fedarko, *The Imaginary Apocalypse: A U.S. Court Finds a Blind Muslim Cleric and Nine of His Followers Guilty of "Seditious Conspiracy" to Conduct a Bombing Spree Throughout New York City*, TIME (Oct. 16, 1995)).

[213] *See* The Law Dictionary, https://thelawdictionary.org/conspiracy (defining "conspiracy" as "a consultation or agreement between two or more persons" to engage in unlawful conduct).

[214] *Rahman*, 189 F.3d at 114.

[215] *Id.* at 117.

A critical role for investigators and prosecutors, then, is to obtain and present evidence of such an agreement to the factfinder. As demonstrated by the Hutaree Militia case, direct evidence of an agreement is far more desirable than circumstantial evidence, and relying on inferences to prove seditious conspiracy is a risky proposition.[216] Notwithstanding the protections afforded by the First Amendment, there is still plenty of space to successfully prosecute seditious conspiracy cases.

Despite being rejected by the only two circuit courts of appeal to have addressed it, the Treason Clause argument continues to be championed by some legal commentators.[217] Similar to the litigants whose efforts to advance this argument have proven unsuccessful, the commentators fail to make a convincing argument that the Framers intended to prohibit prosecution of any seditious behavior other than treason. Congress debated this very issue prior to the enactment of the statute in 1861.[218] In his defense of the legislation, Senator Lyman Trumbull argued that "the object of this bill is not under another name to punish traitors, but it is to punish persons who conspire together to commit offenses against the United States not analogous to treason."[219]

The Framers had concerns about the potential leveling of treason charges as a political weapon.[220] As a result, they defined treason in the Constitution "specifically in order to prohibit constructive definitions of the crime which in England had been used to eliminate the political enemies of the King."[221] There is, however, no convincing evidence that they intended to handcuff Congress by prohibiting the criminalization of conduct falling short of treason.[222] Instead, the Framers' restrictive concept of the crime of treason stemmed, at least in part, from the capital nature of the offense, as made clear by "[d]ebate in the Constitutional Convention, remarks in

[216] *See* discussion *supra* Part II.B.2.
[217] *See* Carback, *supra* note 7, at 28 (referring to seditious conspiracy as a "statutory bypass" of the Treason Clause).
[218] Tarrant, *supra* note 9, at 119–21.
[219] *Id.* at 121.
[220] *See id.* at 109.
[221] *See id.*
[222] *See id.*

the ratifying conventions, and contemporaneous public comments."[223] The Federalist Papers—the foundational documents of American democracy—also support the notion that "conspiracies and plots against the government, which have not been matured into actual treason" are subject to punishment.[224] The words of former Chief Justice John Marshall demonstrate his belief that seditious behavior short of the constitutionally defined crime of treason may be proscribed by statute:

> Crimes so atrocious as those which have for their object the subversion by violence of the laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. . . . It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that *crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide*.[225]

Perhaps a telling sign: none of the Oath Keepers or Proud Boys defendants appear to have raised this argument in a pretrial motion to dismiss. There is no sign that this argument is likely to gain traction in future litigation.

Seditious conspiracy charges may, of course, come with political implications that warrant consideration before the charging decision. The case of Oscar Lopez Rivera serves as an historic example. Mr. Rivera was convicted of seditious conspiracy and other charges in connection with a series of bombings conducted by a group advocating for Puerto Rican independence.[226] Because no evidence implicated Mr. Rivera as a participant in any of the bombings, his

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[223]Cong. Rsch. Serv., *Historical Background on Treason*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S3-C1-1/ALDE_00013524/ (last visited Feb. 23, 2024).

[224] THE FEDERALIST NO. 69, at 447 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (discussing the potential that commission of such crimes could be subject to an executive pardon).

[225] *Ex parte Bollman*, 8 U.S. 75, 126–27 (1807) (emphasis added).

[226] Gregory Pratt, *Puerto Ricans Cheer Impending Release*, CHI. TRIB., Jan. 18, 2017, at C1.

conviction and 55-year sentence drew notable criticism, especially in the Puerto Rican community.[227] President Obama's commutation of Mr. Rivera's sentence in 2017 was scrutinized in other circles.[228] More recently, the seditious conspiracy indictments related to the events of January 6th serve as an example of the "politically charged" nature of seditious conspiracy prosecutions.[229]

Finally, the results obtained from the January 6th-related seditious conspiracy prosecutions demonstrate the continued viability of Section 2384. Three separate juries have determined that prosecutors presented sufficient evidence to prove beyond a reasonable doubt that ten defendants engaged in a seditious conspiracy.[230] Additionally, three Oath Keepers and one Proud Boy pleaded or agreed to plead guilty to seditious conspiracy.[231] Guilty pleas may not be as dramatic or draw as much media coverage as a fully litigated trial but, at the end of the day, the result is the same: a conviction.

Unsurprisingly, defense attorneys in the January 6th-related seditious conspiracy prosecutions have indicated appeals are forthcoming.[232] Based on pretrial motions practice and arguments raised at trial, the appeals will likely involve at least some of the issues

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[227] *Id.*

[228] *Id.*

[229] Hsu et al. (Nov. 29, 2022), *supra* note 131; *see also* Lindsay Whitehurst & Alanna Durkin Richer, *Jan. 6 Sedition Trial of Oath Keepers Founder Goes to Jury*, ASSOCIATED PRESS (Nov. 21, 2022), https://apnews.com/article/capitol-siege-biden-government-and-politics-d18cc28d78f0644c967551ba6b429f7c (providing that some conservatives portray the charges as politically motivated).

[230] *See* discussion *supra* Part IV.

[231] Richer & Whitehurst, *supra* note 112; Jan Wolfe, *Proud Boys Member Pleads Guilty to Seditious Conspiracy*, WALL ST. J. (Oct. 7, 2022), https://www.wsj.com/articles/proud-boys-member-pleads-guilty-to-seditious-conspiracy-11665094486.

[232] *See* Hsu et al. (Nov. 29, 2022), *supra* note 131; Spencer S. Hsu, Tom Jackman, Rachel Weiner, & Hannah Allam, *Proud Boys Enrique Tarrio, 3 Others Guilty of Jan. 6 Seditious Conspiracy*, WASH. POST (May 4, 2023, 11:02 AM), https://www.washingtonpost.com/dc-md-va/2023/05/04/proud-boys-verdict-jan6-seditious-conspiracy.

previously addressed by the Second and Seventh Circuits.[233] Despite the uncertainty regarding the precise nature of the arguments to be raised by the Oath Keepers and Proud Boys appellants, the body of appellate jurisprudence interpreting Section 2384 will undoubtedly be expanding for the first time in more than two decades.

CONCLUSION

Seditious conspiracy prosecutions in the United States have a long and inconsistent history. Despite the occasional disappointing acquittal and accompanying negative press coverage, the statute has generated a significant number of convictions and survived a variety of constitutional challenges in the federal courts. The most recent wave of seditious conspiracy prosecutions—related to the January 6th attack on the Capitol—were an overwhelming success for the government. Given the continued prominence of anti-government sentiment across the nation and individuals' apparent willingness to act on that sentiment, there exists a reasonable likelihood that future acts of criminal misconduct warranting consideration of seditious conspiracy charges are on the horizon. Although securing seditious conspiracy convictions under Section 2384 may be challenging, its continued presence in the criminal code is essential given the persistent threat of domestic terrorism in 21st Century America.

[233] *See supra* Part IV.