

Federal Criminal Law: January 6, 2021, Unrest at the Capitol

January 12, 2021

On January 6, 2021, a crowd gathered on the U.S. Capitol grounds, breached police barriers, entered the Capitol building, occupied portions of the building for an extended period of time, and [clashed](#) with law enforcement, resulting in at least [five](#) deaths, dozens of injuries, and damage to federal property. Multiple participants in the unrest allegedly carried [firearms](#) and used flag poles and other objects as weapons, and explosive devices were [discovered](#) on or near the Capitol complex. Members of Congress and the Vice President, who were in the process of fulfilling their [constitutional](#) duty of counting the 2020 presidential election electoral votes, were forced to [evacuate](#) in response to the unrest. In its wake, observers have speculated [about](#) the nature and scope of criminal charges that might be brought against a number of the individuals involved. Indeed, the first charges have already been [filed](#) in federal and D.C. Superior Court. That said, investigations are [ongoing](#) and additional charges are expected. An array of federal, District, and [state](#) criminal statutes could have been violated during the unrest, although identifying every potentially applicable statute would be difficult given the [breadth](#) and diversity of the activity and the resultant [complexity](#) of the investigations.

For example, some authorities have [signaled](#) civil disorder and explosives statutes, as well as the Anti-Riot Act, which are discussed in a prior [Legal Sidebar](#), could be applicable. In addition, another CRS product analyzes the [Computer Fraud and Abuse Act](#), a federal cybercrime statute that could be relevant assuming initial [reports](#) are correct that some individuals involved in the unrest at the Capitol [accessed](#) government computers or email accounts. Additional products discuss issues related to [domestic terrorism](#), incitement [and](#) threats, and some potentially relevant [constitutional](#) limitations under the First Amendment, all of which are beyond the scope of this Sidebar. So too are the laws of the [District of Columbia](#), under which numerous charges have already been announced.

This Sidebar focuses, instead, on three specific categories of federal criminal statutes that may have been violated by some of the participants in the unrest at the Capitol: (1) crimes involving federal property; (2) crimes against persons; and (3) crimes against government authority. (Additionally, though not discussed further in this Sidebar, inchoate crimes like [attempt](#) or [conspiracy](#) to commit the substantive crimes described below or other crimes, as well as [accomplice](#) liability, may be relevant).

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Crimes Involving Federal Property

Unlawful Activities on Capitol Grounds and in Capitol Buildings: 40 U.S.C. § 5104

[40 U.S.C. § 5104](#), the federal law perhaps most applicable to the unrest at the Capitol on January 6, 2021, and that [appears](#) to have been used most often in the charges filed so far, prohibits a variety of conduct and activities on Capitol Grounds or in Capitol Buildings. The Capitol Grounds are specifically [defined](#) by separate statute to include certain streets, roadways, and other areas surrounding the Capitol itself, and Capitol Buildings are defined to include the U.S. Capitol building and also House and Senate office buildings, among other things. A non-comprehensive list of conduct proscribed by Section 5104 includes:

- occupation of Capitol Grounds roads in a manner that obstructs or hinders their proper use;
- injury of Capitol Grounds statues, seats, walls, fountains, or other erections or architectural features, or any tree, shrub, plant, or turf;
- knowingly, with force and violence, entering or remaining on the floor of either House of Congress;
- willfully and knowingly remaining unauthorized on the floor of either House of Congress or any adjacent cloakroom or lobby;
- willfully and knowingly entering or remaining in either House's gallery in violation of rules or authorization for admission;
- willfully and knowingly entering or remaining in any room in any Capitol Building set aside or designated for use of Congress or the Library of Congress with intent to disrupt the orderly conduct of official business;
- willfully and knowingly uttering loud, threatening, or abusive language, or engaging in disorderly or disruptive conduct, anywhere on the Capitol Grounds or in Capitol Buildings, with intent to impede, disrupt, or disturb the orderly conduct of Congress;
- willfully and knowingly obstructing or impeding passage through or within the Capitol Grounds or Buildings;
- willfully and knowingly engaging in an act of physical violence (defined as an act involving assault, other infliction or threat of infliction of death or bodily harm to an individual, or damage or destruction of real or personal property) on Capitol Grounds or in Capitol Buildings;
- willfully and knowingly parading, demonstrating, or picketing in any Capitol Buildings;
- except as authorized by Capitol Police Board regulations, carrying or having readily accessible a firearm, a dangerous weapon (including a dagger or knife with a blade over three inches), an explosive, or an incendiary device, or using or discharging any of the preceding items. (A separate statute, [18 U.S.C. § 930](#), also prohibits, with exceptions, knowing possession of a firearm or other dangerous weapon in a "federal facility," the definition of which would appear to include the Capitol Buildings because they are "owned or leased by the federal government" and have federal employees regularly present for the purpose of performing official duties).

As [described](#) in news [reports](#), on January 6, 2021, a large number of people forced their way into Capitol buildings and offices, damaging or destroying property, disrupting the conduct of official business, in some cases resorting to physical violence, and in several instances carrying weapons or explosive devices. As noted above, multiple [charges](#) have already been filed under Section 5104 as a result of some of this activity, often referencing the provisions regarding violent entry and disorderly conduct and, at least in

one case, carrying a firearm and ammunition. Violations of most of the provisions of Section 5104 are [punishable](#) by fines and up to six months in prison. The provision regarding firearms, dangerous weapons, explosives, and incendiary devices, however, [carries](#) a higher maximum punishment of up to five years in prison.

Vandalism of Government Property: 18 U.S.C. § 1361

[18 U.S.C. § 1361](#) prohibits willful injury of federal property. Ordinarily, violations of the statute are subject to fines and a maximum prison term of one year. However, if the damage to federal property [exceeds](#) \$1,000, the statute authorizes increased fines and up to ten years of imprisonment.

Theft of Government Property: 18 U.S.C. § 641

[18 U.S.C. § 641](#) makes it a crime to steal “any record, voucher, money, or thing of value of the United States or of any department or agency thereof.” If the property stolen is worth less than \$1,000, the statute [authorizes](#) fines and a maximum prison term of one year. Offenses involving property of greater value may be [punished](#) by fines and up to ten years of imprisonment. Depending on the circumstances, additional [federal robbery statutes](#)—prohibiting theft of government property from another person by [assault](#), [violence](#), or putting that person in fear—could also be relevant to conduct that occurred during the unrest at the Capitol. The [DOJ](#) has, as of the date of this Sidebar, [charged](#) at least one individual under § 641 in connection with the unrest, [alleging](#) that he took official materials from the Office of the Speaker of the House of Representatives.

Restricted Buildings or Grounds: 18 U.S.C. § 1752

[18 U.S.C. § 1752](#) prohibits certain conduct at “restricted building or grounds,” which are [defined](#) to include, among others, locations where a “person protected by the Secret Service,” such as the [Vice President](#), “is or will be temporarily visiting.” [Conduct](#) prohibited at restricted buildings or grounds includes: (1) knowingly entering or remaining without lawful authority; (2) knowingly engaging in disruptive conduct, or impeding ingress or egress, “with intent to impede or disrupt the orderly conduct of Government Business or official functions;” and (3) knowingly engaging in “any act of physical violence against any person or property.” [Violations](#) of § 1752 may be punished by fines and up to one year of imprisonment, but a maximum sentence of up to ten years is authorized if the offense involved a deadly or dangerous weapon or firearm, or resulted in significant bodily injury. DOJ has [charged several individuals](#) under § 1752 in connection with the unrest at the Capitol.

Crimes Against Persons

Assaulting, Resisting, or Impeding Federal Officers or Employees: 18 U.S.C. § 111

Among other things, 18 U.S.C. § 111 [prohibits](#) forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering [with](#) “any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services)” while “engaged in or on account of” the person’s “performance of official duties.” Acts under the statute that qualify as only “simple assault” are punishable by up to one year in prison, while acts that “involve physical contact with the victim of that assault or the intent to commit another felony” are punishable by imprisonment for up to eight years. Finally, use of a deadly or dangerous weapon or infliction of bodily injury enhances the applicable penalty to up to twenty years in prison.

On its face, the statute appears to cover not only forcible *assault*—*i.e.*, “an attempt or threat to injure”—but broader categories of conduct such as forcibly *opposing* or *impeding* a federal officer. However, as

described above, the least severe statutory penalties apply to conduct that “constitute[s] only simple assault,” while conduct that “involve[s] physical contact with the victim of that assault or the intent to commit another felony” carries a heightened penalty. Based on this language, some courts have [concluded](#) that any violation of the statute must “necessarily involve[]—at a minimum—simple assault,” meaning an attempt or threat to injure that does not involve actual physical contact, a weapon, bodily injury, or intent to commit certain felonies. Thus, under this view, merely [refusing](#) to obey commands or “tens[ing] up” in response to an officer’s use of physical force, for instance, would not qualify as an offense under Section 111 even if technically considered resistance or opposition. However, other courts have [disagreed](#) that a violation of Section 111 necessarily requires an assault, asserting that such a reading “makes a great deal of what § 111 does say entirely meaningless.” Under this latter view, resistance could be a violation of the statute even if not coupled with an attempt or threat to injure.

Regardless of the statutory term at issue, the conduct proscribed by Section 111 must be [forcible](#), which does not require physical contact but, in one formulation, requires at least some “display of physical aggression toward the officer.” Section 111 also requires that a person intend to engage in the proscribed conduct but does [not](#) require knowledge that the person subjected to the conduct is a federal officer or employee. Finally, the requirement that a protected federal officer or employee at least be “engaged in . . . performance of official duties” [calls](#) for a fact-specific analysis, and the officer or employee does not necessarily have to be “on duty” to meet the standard so long as he or she is carrying out a federal function.

The January 6, 2021, unrest at the Capitol [reportedly](#) involved clashes between participants and responding federal law enforcement officers, resulting in injuries and, in one case, death. Assuming forcible, intentional conduct beyond passive resistance on the part of some of the participants in the unrest, some of this conduct could be charged under Section 111 and, if coupled with physical contact, injury, or use of a weapon, could lead to federal [felony](#) convictions. (A separate statute, [18 U.S.C. § 351](#), proscribes assaults on Members of Congress, among other things, but there do not appear to be reports at this time of conduct that might qualify under this provision).

Unlawful Killing

Federal prosecutors are [reportedly](#) considering federal statutes prohibiting [murder](#) in connection with the unrest at the capitol. Although murder is ordinarily a matter of state law, federal statutes prohibit [murder](#) and [related](#) conduct where there is a federal jurisdictional nexus. In this vein, one potentially relevant statute is [18 U.S.C. § 1111](#), which prohibits the “unlawful killing of a human being” when committed in the [special territorial jurisdiction](#) of the United States, such as various federal [buildings and lands](#). Of possible relevance to the unrest at the Capitol, Section 1111 prohibits “[felony murder](#),” killings that occur from the actual or attempted perpetration of a variety of other [offenses](#), including [robbery](#) (discussed below). To establish felony murder, the government need not establish intent to kill on the part of the defendant—instead, his [mental state](#) may be [established](#) by “commission of the specified [underlying] felony.” Section 1111 also prohibits “[a]ny other murder” committed in special territorial jurisdiction, but that prohibition is subject to more stringent [intent](#) requirements.

In addition, depending on the circumstances, other [statutes](#) such as [18 U.S.C. § 1114](#) could be relevant. Section 1114 [imposes](#) a range of criminal penalties—depending on the circumstances and defendant’s state of mind—for the killing of federal officers or employees (murder or manslaughter) “in any branch of the United States Government.” As with assault of federal officers under [Section 111](#), the statute may also protect state and local officers acting in [cooperation](#) with, and under the [control of](#), federal officers, and sometimes even private citizens when they are [assisting](#) federal employees in their official duties.

Crimes Against Government Authority

Though the federal charges [filed](#) thus far appear largely to have been limited to crimes in the foregoing categories, some [observers](#) have noted that if the motive for at least some of the unrest at the Capitol was to undermine the functioning of the U.S. government, crimes such as treason, insurrection, seditious conspiracy, and advocating overthrow of the government could be relevant.

Treason: 18 U.S.C. § 2381

Due to limited case law, the exact contours of the federal crime of treason are [unclear](#), as is its potential applicability to the events of January 6, 2021. Treason has been [described](#) as the “most serious offense” that may be committed against the government. It is the only crime [defined](#) in the Constitution itself, which [specifies](#) that treason “consist[s] only” of “levying War against” the United States or “adhering to their Enemies, giving them Aid and Comfort.” That definition is codified in [18 U.S.C. § 2381](#), which imposes fines and a minimum sentence of five years of imprisonment for treason, and also authorizes the death penalty. Treason prosecutions are [rare](#)—particularly [since](#) the [1950s](#). That said, there are a number of significant limits on the application of the treason statute. First, the Constitution itself permits conviction for treason [only](#) where there is a “[c]onfession in open [c]ourt,” or “testimony of two [w]itnesses to the same overt [a]ct”—an [action](#) committed in furtherance of the treason. Second, the Supreme Court has held that treason requires [proof](#) that the defendant “intend[ed] to [betray](#) his country.” Third, treason may only be committed by those who owe [allegiance](#) to the United States—such as [citizens](#) or some temporary residents—and who [breach](#) that allegiance. Furthermore, the concept of “levying war” is a “[meticulously exclusive](#)” phrase, which the Supreme Court has held applies only to conduct involving “an actual [assemblage](#) of men for the purpose of executing a treasonable design.” It is unclear from the limited case law exactly what conduct would count within that definition, and the Supreme Court has cautioned that the “crime of treason should not be extended by construction to [doubtful](#) cases.” Conduct that falls outside the narrow definition of treason may still be [subject to](#) prosecution [under](#) other laws concerning crimes against the government—such as [seditious conspiracy](#) discussed below.

Insurrection: 18 U.S.C. § 2383

Federal [prosecutors](#) are reportedly considering whether a federal statute prohibiting [insurrection](#) could apply to the unrest at the Capitol. That [statute](#) authorizes fines and up to ten years of imprisonment for anyone who “incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto.” The statute also bars anyone convicted of violating that provision from “holding any [office](#) under the United States.” The exact scope of the insurrection statute is unclear, in part because it does not define “rebellion” or “insurrection.” In addition, there is little interpretive case law, because prosecutions under the insurrection statute [are rare](#).

Seditious Conspiracy: 18 U.S.C. § 2384

18 U.S.C. § 2384 [provides](#):

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.

In a 2020 [memo](#) to U.S. Attorneys (hereinafter the “Rosen Memo”), Deputy Attorney General Jeffrey A. Rosen noted that the statute “does not require proof of a plot to overthrow the U.S. Government, despite what the name might suggest.” Rather, the statute applies to any conspiracy—i.e., an [agreement](#) with the

requisite intent—with the object of using force to (1) overthrow, put down, or destroy the U.S. government, (2) oppose the authority of the United States, (3) prevent, hinder, or delay the execution of any law of the United States, *or* (4) seize, take, or possess any property of the United States contrary to its authority, among other things. Though recent case law interpreting these phrases is limited, some authority suggests that at least some of the alleged conduct connected to the January 6, 2021, unrest at the Capitol might come within the purview of the statute. For instance, the Rosen Memo specifically noted [that](#) charges under Section 2384 could be “potentially available” “where a group has conspired to take a federal courthouse or other federal property by force,” presumably under the statutory prong proscribing forcibly seizing, taking, or possessing any property of the United States contrary to its authority.

Additionally, in an early twentieth century case, one federal court of appeals [indicated](#) that the prong addressing prevention, hindrance, or delay of the execution of federal law prohibits a conspiracy to use force “against some person who has authority to execute and who is immediately engaged in executing a law of the United States,” using forcible interference with a government printing office as a possible example. Thus, though the January 6, 2021, unrest at the Capitol disrupted the legislative, rather than executive, branch of the U.S. government, it might be argued that because Congress is charged by [law](#)—indeed, by the [Constitution](#)—with the electoral vote counting in which it was engaged, some forcible actions taken at the Capitol could have been intended to prevent or hinder execution of that law.

More broadly, the seditious conspiracy statute has been used in recent decades in [circumstances](#) involving plots to bomb government buildings, and as noted above, reports indicate that law enforcement discovered [explosive](#) devices in [multiple](#) locations near the Capitol on January 6, 2021. That said, one fairly recent district court case did identify some apparent limits to the seditious conspiracy statute’s “oppose by force” prong, recognizing [that](#) it implies “force against the government as a government.” In other words, there must be agreement [to](#) forcibly “resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority.” As such, whether charges would be warranted under the seditious conspiracy statute in connection with particular conduct at the Capitol on January 6, 2021, could ultimately depend not only on whether the conduct related to an agreement between two or more persons to take forcible action against government property, but also on whether (depending on the statutory prong at issue) the object of the agreement was actually in opposition to a positive assertion of government authority. (Another statute, [18 U.S.C. § 2385](#), separately proscribes knowingly or willfully advocating, abetting, advising or teaching “the duty, necessity, desirability, or propriety of overthrowing or destroying” the federal or a state or local government “by force or violence” or by assassination, as well as organization of or affiliation with groups that do the same and distribution of related printed matter. Depending on the circumstances, some conduct to which Section 2384 is relevant might also be considered under Section 2385, though the First Amendment implications of that statute place it beyond the scope of this Sidebar.)

Violations of 18 U.S.C. § 2384 are [punishable](#) by fines or up to twenty years in prison, or both.

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