



How Courts Can Prevent Election Violence

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Around the world, democracies are witnessing a rise in election-related violence triggered by demagogues; that is, politicians who incite their followers to intimidate, harass, or attack opponents. The most obvious example is that of Donald Trump, who began encouraging violence at his rallies at the very beginning of his 2015 campaign. By now, **literal volumes** have been written about Trump's incitement. At the same time as Trump's rise to prominence, Brazil saw the ascendance of Jair Bolsonaro, whom one national congressman **described** as "encourag[ing] political violence with an intensity Brazil has never seen." And the phenomenon is not confined to the Americas; North Macedonian senior officials, including the former president of the parliament, **organized an invasion** of the capitol building during post-election riots in 2017, leading to serious injuries. Around that same time, former Alternativ für Deutschland leader Alexander Gauland **said** that the party would "hunt down" then-Chancellor Angela Merkel. Demagogues, once relegated to the political fringes, are now the political mainstream, and their tactics are rapidly gaining public acceptance worldwide.

Courts tend to wait until violence has occurred before acting, even though many possess the authority and procedural tools to intervene earlier. The question of whether courts can prevent election violence has scarcely been asked by legal scholars, but it may be a defining judicial challenge of this era.

Key Insights

Common-law systems routinely and effectively use civil orders such as domestic violence protection orders, peace bonds, and behavior control orders to prevent foreseeable harm. These ordinary devices have a demonstrated track record, supported by empirical evidence, of stopping violence before it flourishes. For example, in the U.S., a **2002 study** of 2691 women, which connected protective orders with an 80% reduction in reported physical violence over the following year. A **subsequent study** of 448 women compared those who obtained protective orders with those who did not, finding that the former were less likely to suffer further physical abuse. A **2006 study** concluded that restricting access to firearms by alleged abusers, pursuant to civil restraining orders, reduced intimate partner homicides by as much as ten percent. Another set of researchers **followed 210 women** for six months after obtaining a protective order, finding "significant reductions in abuse and violence" overall. Comparable studies have been conducted in the **UK, Australia, and Canada**, and tell similar success stories.

When demagogues use threatening or coercive language targeting their opponents, they activate predictable and preventable chains of violence. It is in this context that judicial actors may be effective at preventing significant harm. Just as civil courts can effectively restrain domestic abusers or gang members, they can issue narrowly tailored injunctions against candidates or organizations that use speech to incite imminent harm. These orders respect expressive rights while protecting the public's right to nonviolent elections.

When faced with the threat of incited political violence, courts are in an excellent position to assess the risk not only to the public, but to democracy itself, and employ a balancing test that weighs a demagogue's expressive rights against the state's interest in safeguarding peaceful elections. Courts already strike similar balances in domestic and public safety contexts.

However, the judiciary must be willing and able to act quickly. Research **shows** that as demagogues gain political power, the **independence of the judiciary declines**. Courts' preventive authority is strongest early, when violent rhetoric first appears. Furthermore, criminal prosecutions are generally slow, backward-looking, and often ineffective deterrents. **Decades of research** across disciplines and continents demonstrate that civil mechanisms, operating under lower evidentiary thresholds and backed by criminal penalties for contempt, are faster, more flexible, and more accessible.

Policy Recommendations

1. Courts should be receptive to jurisprudential approaches that treat demagogic speech as a serious, predictive indicator of violence and, with the guidance of legislatures if necessary, be prepared to adapt preventive devices to political contexts. For example, the presence of well-recognized risk factors for electoral violence may lead a court to implicate the interests of democracy or electoral integrity, thus potentially altering the way in which judges balance the rights of litigants in cases where demagogic speech is implicated.
2. Judges and lawyers should understand the basics of risk assessment and preventive justice, specifically with regard to election violence, thus avoiding formalist blind spots that may keep courts from acting on clear warning signs.
3. Non-judicial democratic institutions must ensure courts are empowered with sufficient autonomy and the proper tools, including the capacity to implement immediate preventive remedies, thereby preserving the range of reasonable choices judges can make to quell electoral violence.

Scholars agree that countries with weak institutions are prone to violence in general, and election violence specifically. But the way in which "strong" institutions exercise their strength is important. It is not enough for courts to be a silent symbol of democracy, as demonstrated by unmistakable democratic backsliding in the U.S. over the last decade. If, as evidence demonstrates, the courts are equipped to prevent various forms of episodic, interpersonal violence, there is simply no jurisprudential, philosophical, or practical reason why they cannot act to prevent election violence. To the contrary: elections are worthy of special protection, and should outrank any abstract concerns over the right of a political actor to engage in demagoguery. A strong judiciary must be wise enough to know the difference, and bold enough to craft its jurisprudence accordingly.