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## Prosecuting an Existential Threat to Democracy: Domestic Terrorism and the January 6 Insurrection

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**Prosecuting an Existential Threat to Democracy: Domestic Terrorism and the January 6  
Insurrection**  
**Nathan D. Verrilli\***

I. INTRODUCTION

Despite four years of insurrection and bloodshed, the stars and bars of the Confederacy never flew over Washington D.C. during America’s Civil War. But one hundred and fifty-six years later, that same flag flew in the halls of the United States Capitol. The effort that failed on the field of battle was accomplished in a matter of hours on January 6, 2021. This was a violent attack, not only on the men and women who placed themselves in harm’s way to protect the legislators in the Capitol that day, but also on the very fabric of our democracy. The insurrection at the U.S. Capitol presented a severe and unprecedented break from the traditional peaceful transfer of power that has historically characterized U.S. elections and inaugurations.

As lawmakers and legislators grapple with the effects of the insurrection through hearings and the House Select Committee investigation, federal prosecutors turn to the courts to hold accountable those responsible. Through these prosecutions, the dual challenges of accurately memorializing this attack for history and preventing its repetition in the future become paramount. Prosecutors pursuing sentences consistent with the gravity of the attack are sending a message to the public emphasizing commitment to the rule of law and future deterrence. Should these prosecutions fail, and the attempted attack be allowed to recede into history without a commensurate Department of Justice (“DOJ”) response, they may expose the need for a legislative response: the codification of a federal domestic terrorism statute. In the same way that the criminal

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penalties under The U.S.A. Patriot Act, 18 U.S.C. § 2331, pivoted the country's focus towards international terrorism as a response to the terror attacks of September 11, 2001, codifying criminal penalties for domestic terrorist events like January 6 could provide an effective tool for criminal accountability. This pursuit, however, might also enable dangerous violations of the civil liberties of U.S. citizens and provide a future federal government with additional tools that have a potential for misuse.

This Comment will explore the implications of criminalizing domestic terrorism within the U.S. Code in the same way that international terrorism is currently codified. Viewed specifically through the lens of the January 6 insurrection and the subsequent prosecutions, it will examine the potential benefits to arming federal prosecutors with a more particularized tool with which to charge defendants. Such legislation could confer additional investigatory capabilities and reframe the focus of the federal government in its escalating battle with domestic violent extremists. Part II of this Comment will review the factual record of the events preceding and during the assault on the Capitol complex as currently documented. It will also analyze the status of the resulting prosecutions and sentencings that followed the event. Part III defines and classifies domestic terrorism under federal law and then argues that the definition inescapably applies to the events of January 6. Part IV assesses the advantages of a new domestic terrorism statute in combatting anti-government or racially motivated violent extremists, while Part V performs a balancing test, weighing the constitutional concerns about threats to civil liberties and potential for misuse or abuse against the statute's potential advantages. Finally, Part VI concludes by arguing that the U.S. can adequately respond to the domestic extremist threat and prevent a future insurrection using the tools and resources at its current disposal without adding additional criminal penalties or changing the federal statute. Ultimately, this Comment will argue that the challenge facing the

DOJ, federal agencies, and the country as a whole is not a lack of remedies or applicable criminal statutes but a lack of will.

## II. THE JANUARY 6, 2021, INSURRECTION AT THE U.S. CAPITOL<sup>1</sup>

The events of January 6, 2021, were a shocking break from the long tradition of the peaceful transfer of power in the U.S., and will live in infamy in the historical record. The violence that day was appalling, both symbolically as an attack on democracy, and literally, as thousands watched vastly outnumbered uniformed police bear the brunt of the melee while lawmakers huddled in fear. This insurrection was unprecedented in scope and without historical analogue, but it was not at all unexpected or a departure from the escalating rhetoric following the 2020 election.<sup>2</sup> In the short- and long-term aftermath of the death and destruction of that day, Articles of Impeachment were filed,<sup>3</sup> a House Select Committee Investigation was launched,<sup>4</sup> civil suits were filed,<sup>5</sup> and criminal prosecutions began.<sup>6</sup> Despite this reaction and DOJ's visible commitment to accountability under law, the forces behind the insurrection were not only undeterred, but emboldened.<sup>7</sup> Just as chilling, the mendacious claims surrounding election fraud

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<sup>1</sup> The factual record established in Part II is limited in two ways: first, spatially, to provide the full breadth of the preparation, violence, and aftermath that characterized January 6, 2021, would be too lengthy for this comment to tackle. For a full breakdown of the events surrounding the attack, *see* Jacqueline Alemany Et AL., *The Attack: Before, During, After*, WASH.POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/>; *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html>. Second, this Comment is limited temporally, written in fall 2021 with news continuing to break on a weekly basis as Congressional testimony and other events shed additional light on that day. For a more complete picture, *see* (the yet to be released) H.R. Select Comm., 117<sup>th</sup> Cong., Nat'l Comm'n to Investigate the January 6<sup>th</sup> Attack on the U.S. Capitol Complex Act (Comm. Print 2021).

<sup>2</sup> Jacqueline Alemany et al., *The Attack: Before, During, After*, WASH.POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/>.

<sup>3</sup> *Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors*, H.R. Res. 24, 117<sup>th</sup> Cong. (2021).

<sup>4</sup> H.R. Select Comm., 117<sup>th</sup> Cong., Nat'l Comm'n to Investigate the January 6<sup>th</sup> Attack on the U.S. Capitol Complex Act (Comm. Print 2021).

<sup>5</sup> Maya King, *NAACP Sues Trump and Giuliani after Jan. 6 Riots*, POLITICO (Feb. 16, 2021), <https://www.politico.com/news/2021/02/16/naACP-trump-giuliani-capitol-riots-469077>.

<sup>6</sup> *Capitol Breach Cases*, UNITED STATES DEP'T OF JUST., <https://www.justice.gov/usao-dc/capitol-breach-cases>.

<sup>7</sup> *E.g.*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 2 (Mar. 1, 2021), <https://int.nyt.com/data/documenttools/biden-administration-domestic-extremist->

that helped incite the violence that day have only increased in volume and frequency, becoming a tenet of the mainstream Republican Party Platform.<sup>8</sup>

*A. In Preparation: Electoral Defeat, The Big Lie, and a Coalition of Hate*

During the 2020 Presidential campaign, cries of election fraud from incumbent President Trump and his supporters ramped up to a fever pitch in the twenty-four to forty-eight hours following the polls closing on November 3, 2020.<sup>9</sup> While initially leading in several key battleground states on the night of the election, President Donald Trump saw his lead and the election slip away as the total number of ballots were counted and registered.<sup>10</sup> Once news outlets declared victory for then President-Elect Joseph Biden, President Trump took to Twitter and friendly news networks to decry the election as fraudulent and illegitimate, subsuming his unfounded grievances under the mantra “Stop the Steal.”<sup>11</sup> His supporters, including Paul Hodgkins of Tampa, Florida and Jacob Chansley of Phoenix, Arizona, heeded the call and began researching the alleged electoral theft using fringe sources, attending local protests, and traveling to Washington D.C. for protests organized by supporters of the President and the Trump Campaign.<sup>12</sup>

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report-march-2021/ab0bbdf0a8034aea/full.pdf; NAT’L SEC. COUNCIL, NAT’L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 10 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>8</sup> See Amy Gardner & Rosalind S. Helderman et al., *The Attack: Before, During, After: After—Contagion*, WASH. POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/interactive/2021/fallout-jan-6-insurrection/> (citing ten Republicans running for Secretary of State who have disputed Biden’s victory and downplayed the events of January 6); Ryan Goodman, Mari Dugas & Nicholas Tonckens, *Incitement Timeline: Year of Trump’s Actions Leading to the Attack on the Capitol*, JUST SECURITY (Jan. 11, 2021), <https://www.justsecurity.org/74138/incitement-timeline-year-of-trumps-actions-leading-to-the-attack-on-the-capitol/> (documenting the Arizona Republican Party official Twitter account asking supporters whether they are willing to die for the fight to retain President Trump).

<sup>9</sup> Aaron C. Davis et al., *The Attack: Before, During, After: Before—Red Flags*, WASH. POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; Goodman, *supra* note 8.

<sup>12</sup> Davis et al., *supra* note 9.

Beyond individual supporters, the President also carried strong support from organized militias and extremist groups, often with white supremacist or anti-Semitic ideologies.<sup>13</sup> Groups like the Proud Boys, Three Percenters, Oath Keepers, and other semi-organized militias that had been active throughout 2020 in counterprotesting Black Lives Matter gatherings, protesting COVID-19 shutdowns, or attending Trump Campaign events,<sup>14</sup> now turned their attention to Washington D.C. following what they believed was a call to action from their President.<sup>15</sup> Providing further evidence that the events of January 6 were foreseeable, the Proud Boys organized multiple previous protest marches in the nation's capital, all of which ended in violence and arrests.<sup>16</sup> The Million MAGA March of November 14, 2020, featured a marauding group of Proud Boys in the streets, searching for and eventually clashing with counter-protestors for hours.<sup>17</sup> By the end of the night, the march ended with one person stabbed, four police officers injured, eight firearms confiscated by law enforcement, and twenty people arrested.<sup>18</sup> In another macabre foreshadowing of January 6, the Proud Boys again organized a D.C.-based march on December 12, 2020, which was once again marred by violence and clashes with the police and counter-protestors.<sup>19</sup> This time, when the smoke cleared, four people were stabbed, eight were hospitalized, including two police officers, and dozens were arrested.<sup>20</sup>

Considering the clear and obvious trend established by the previous two rallies, the lack of preparation by federal agencies is difficult to fathom. In monitoring these groups, federal agencies

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<sup>13</sup> NAT'L SEC. COUNCIL, NAT'L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 8, 27 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>14</sup> Darrin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059, 1074, 1078 (Spring 2021).

<sup>15</sup> Davis et al., *supra* note 9.

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

were surprised to note the sinister development of previously unseen alliances forming between the groups.<sup>21</sup> For example, the “boogaloo boys,” militia members who federal prosecutors charged with helping to plot the attempted kidnapping of Michigan Governor Gretchen Whitmer,<sup>22</sup> allied themselves with neo-Nazi groups, Oath Keepers, and Three Percenters, collaborating on rendezvous points around Washington D.C. to stash weapons and stage the deployment of additional militia members to the Capitol on January 6.<sup>23</sup> This coordination between what were formerly disparate militia groups and terrorist organizations evidenced the heightened threat brewing before January 6, and was indicative of the shared motivations and ideologies between these various groups.<sup>24</sup> These shared motivations included general anti-government or anti-authority sentiment,<sup>25</sup> fictitious narratives of voter fraud,<sup>26</sup> and fidelity to former President Trump.<sup>27</sup> As noted by the Combatting Terrorism Center at West Point, “[i]n the wake of the [January 6] attack, there have been indications that despite the fissiparous nature of the extreme far-right, many of these groups, emboldened by the violence, were, online at least, increasingly cohering around the objective of overthrowing the prevailing political order.”<sup>28</sup> While federal

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<sup>21</sup> Davis et al., *supra* note 9.

<sup>22</sup> Graham Macklin, *The Conspiracy to Kidnap Governor Gretchen Whitmer*, COMBATING TERRORISM CTR. AT WEST POINT, 14 CTC SENTINEL 1, 4 (Jul.-Aug. 2021), <https://ctc.usma.edu/the-conspiracy-to-kidnap-governor-gretchen-whitmer/>; Federal Grand Jury Charges Six With Conspiracy To Kidnap The Governor Of Michigan, UNITED STATES DEP’T OF JUST., [https://www.justice.gov/usao-wdmi/pr/2020\\_1217\\_fox\\_et\\_al](https://www.justice.gov/usao-wdmi/pr/2020_1217_fox_et_al).

<sup>23</sup> *Id.*; Davis et al., *supra* note 9; Note that of those charged in this plot, two men were acquitted of the charges, two are awaiting re-trial after the judge declared a mistrial, and two pled guilty. Mitch Smith, *Two Men Acquitted of Plotting to Kidnap Michigan Governor in High Profile Trial*, N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/08/us/verdict-whitmer-kidnapping-case.html>.

<sup>24</sup> NAT’L SEC. COUNCIL, NAT’L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 8 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 10.

<sup>27</sup> Macklin, *supra* note 22, at 12 (noting that for far-right militia groups like the Oath Keepers, Trump was an “inflection point,” and the first evidence in their eyes of government as a “force for good”).

<sup>28</sup> *Id.* at 10.

agencies noted these trends and the coalescing of these extremists around the rally planned for January 6, their preparation for a law enforcement response remained muted and inadequate.<sup>29</sup>

Beyond just failing to adequately prepare, two days before the insurrection, the National Park Service approved the requested increase for the permit to protest at Trump's planned January 6 Stop the Steal speech at the Ellipse from 5,000 to 30,000.<sup>30</sup> In a notable break from the attitudes of other law enforcement agency members, Chairman Mark Milley of the Joint Chiefs of Staff presciently questioned why permits to the Capitol grounds were being granted at all to protestors that had repeatedly indicated their propensity for violence.<sup>31</sup> Chairman Milley's concerns were rebutted with the argument that silencing the protestors would be a violation of their free speech and that the permits had been properly applied for and registered.<sup>32</sup> As a result, the protests and rally scheduled for January 6th went off as planned by the organizers.

### *B. A Day of Death and Destruction*

At the Ellipse, President Trump and his allies goaded the crowd with both veiled and explicit calls to arms, before sending them to the Capitol to interrupt the certification of the electoral vote.<sup>33</sup> Donald Trump Jr. opened with the threat of "we're coming for you." Representative Lauren Boebert (R-CO) tweeted "[t]oday is 1776" along with a video of her purporting to enter the Capitol with a firearm. Representative Marjorie Taylor-Greene (R-GA) tweeted "FIGHT.FOR.TRUMP." Representative Mo Brooks (R-AL) enflamed the crowd with "[t]oday is the day American patriots start taking down names and kicking ass." Rudolph Giuliani called for "trial by combat."<sup>34</sup> Finally, the President himself took the stage, exhorting "[s]omething

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<sup>29</sup> Davis et al., *supra* note 9.

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Philip Rucker et al., *The Attack: Before, During, After: During—Bloodshed*, WASH. POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/interactive/2021/what-happened-trump-jan-6-insurrection/>.

<sup>34</sup> Goodman, *supra* note 8.



is wrong here, something is really wrong, can't have happened and we fight, we fight like hell, and if you don't fight like hell, you're not going to have a country anymore [sic].” He then directed his supporters gathered at the Ellipse to head down Pennsylvania Avenue to the Capitol.<sup>35</sup> This was not regarded as a suggestion by those gathered at the Ellipse: “when he [President Trump] urged demonstrators to descend on the Capitol . . . [i]t was received as a command among the Proud Boys, who were openly radioing with each other over the walkie-talkie app Zello.”<sup>36</sup>

During the morning's speeches and the gathering of the crowd outside the Capitol, Metropolitan police stopped two men openly carrying rifles, one with a pitchfork, and discovered at least three abandoned vehicles with long guns, handguns, ammunition, and the materiel to make eleven Molotov cocktails inside.<sup>37</sup> Outnumbered, out-armed, and instructed not to engage, Capitol police and Metropolitan police officers continuously reduced the perimeter they had formed around the Capitol, until 2:11 p.m., when the first insurrectionists breached the building.<sup>38</sup>

At 2:12 p.m., Senator Mitt Romney left the Senate Floor to head for his office, but he fortunately encountered Capitol Police Officer Eugene Goodman, who directed him immediately back to the Senate Chambers to prevent him from walking into the mob heading in his direction.<sup>39</sup> Moments later, at 2:13 p.m., Vice President Mike Pence and his family were evacuated from the rostrum by the Secret Service and moved to a secure office.<sup>40</sup> At 2:14 p.m., rioters chanting his name reached the same second floor landing where he had been less than sixty seconds earlier.<sup>41</sup> This anecdote underscores just how close the Vice President came to a dangerous mob that had constructed a makeshift gallows on the property, called him a traitor, and chanted “hang Mike

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

<sup>36</sup> Rucker et al., *supra* note 33.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Pence” as they stormed through the hallways.<sup>42</sup> Despite this close call, President Trump continued to tweet threateningly at Vice President Pence<sup>43</sup> and attorney John Eastman, architect of the legal plan to overthrow the electoral results,<sup>44</sup> emailed Pence’s counsel and aides that the blame for the siege lay on the Vice President for his supposed cowardice.<sup>45</sup> But for good fortune and the quick actions of law enforcement, the day could’ve ended with even more bloodshed and destabilization than it did.

While the Senators, House leadership, and Vice President were evacuated, the Congressmen and women sheltered in place in the House Chamber.<sup>46</sup> These moments of captivity while the violent mob attempted to force entry by breaking the windows and doors of the chamber, including the fatal shooting of Ashli Babbitt as she attempted to forcibly enter the Speaker’s Lobby, caused acute feelings of lasting trauma for the officers and lawmakers who lived through the harrowing minutes from 2:26 p.m. until 3:00 p.m.<sup>47</sup> Emphasizing the gravity of the situation in the House chamber, Representatives Terri Sewell (D-AL), Susan Wild (D-PA), and Daniel Kildee (D-MI) all called family members with Kildee specifically saying goodbye as he recognized there was a chance he might not make it out alive.<sup>48</sup> This was not a misplaced fear; Representative Jason Crow (D-CO), a former Army Ranger,<sup>49</sup> instructed lawmakers in the chamber to remove

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<sup>42</sup> Ashley Parker, Carol D. Leonnig, Paul Kane, & Emma Brown, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021, 9:56 AM), [https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html).

<sup>43</sup> Goodman, *supra* note 8 (tweeting during the insurrection “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution”).

<sup>44</sup> Jamelle Bouie, Opinion, *Trump Had a Mob. He Also Had a Plan*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/09/24/opinion/jan-6-eastman-memo.html>.

<sup>45</sup> Rucker et al., *supra* note 33.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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

<sup>49</sup> JASON CROW CONGRESSMAN FOR COLORADO’S 6TH DISTRICT, <https://crow.house.gov/about> (last visited Nov. 6, 2021).

their Congressional pins so that the insurrectionists would have a harder time identifying who to kill.<sup>50</sup> In response, Representative Pramila Jayapal (D-WA) later told reporters:

For many of us, we can't hide what we look like . . . [w]e can't run over and hide in a group of Republicans, and we can't take off a jacket to blend into a White crowd, which was a very, very real dynamic as we were watching Confederate flags being raised with horrible racist messages.<sup>51</sup>

These eyewitness accounts underscore the gravity of the violence and very real threat those inside the building faced during the insurrection.

The Congressional testimony of Capitol Police Officer Harry Dunn supports Representative Jayapal's concerns, as he documented for the House Select Committee more than twenty insurrectionists hurling racial epithets at him as he guarded the entrance to the Speaker's Lobby adjacent to the chamber where the House members were sheltering.<sup>52</sup> Officer Dunn's testimony also included discussions he had with multiple other officers of color from that day who also faced a torrent of racial abuse, all for the first time as uniformed officers and some for the first time in their lives.<sup>53</sup> This hateful and racially-motivated speech revealed the motivations and propensity for violence simmering among the insurrectionists as they roamed the People's House looking for lawmakers to exact their revenge on.

Ultimately, after several hours of chaos, violence, and hand-to-hand combat inside and outside the Capitol, the Capitol Police were able to secure the building.<sup>54</sup> Reinforcements arrived in the form of FBI and ATF teams as well as National Guardsmen dispatched by the Governors of

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<sup>50</sup> Rucker et al., *supra* note 33.

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

<sup>52</sup> *Hearing Before the Select Comm. to Investigate the January 6<sup>th</sup> Attack on the United States Capitol*, 117th Cong. 3 (Jan. 27, 2021) (written statement of Harry A. Dunn, Private First Class, U.S. Capitol Police).

<sup>53</sup> *Id.*

<sup>54</sup> Rucker et al., *supra* note 33.

Virginia and Maryland and lastly, by the Defense Department after hours of delay.<sup>55</sup> By 8:06 p.m., the House of Representatives, Senate, and Vice President were able to reconvene and renew their certification process.<sup>56</sup> While the political process and the transfer of power was ultimately successful, it was not without great cost and sacrifice.

### *C. Documenting the Human Costs of the Insurrection*

The events of January 6 ultimately led to the deaths of five people, 140 police officers assaulted and injured,<sup>57</sup> and the cost of repairing the damage to historical artifacts and the Capitol itself at over \$30 million.<sup>58</sup> The day marked “the worst desecration of the complex since British forces burned it in 1814.”<sup>59</sup> Beyond the physical damage to the complex, multiple law enforcement personnel gave their lives as a result of the lasting physical and emotional injuries sustained in defending the Capitol that day.<sup>60</sup> Capitol Police Officer Brian Sicknick was sprayed with bear mace outside the Capitol and suffered two strokes, dying in George Washington University Hospital that night.<sup>61</sup> The medical examiner found that he had died of natural causes but “all that transpired played a role in his condition.”<sup>62</sup> Two other police officers who fought against the insurrectionists on January 6 took their own lives nine days after the attack.<sup>63</sup>

For the first responders who faced the brunt of the insurrectionists’ violence that day, grappling with the aftereffects is still a daily struggle, as many still suffer from intense trauma,

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<sup>55</sup> *Id.*

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

<sup>57</sup> Jacqueline Alemany et al., *The Attack: Before, During, After*, WASH. POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/>.

<sup>58</sup> Bill Chappell, *Architect of the Capitol Outlines \$30 Million in Damages From Pro-Trump Riot*, NAT’L PUBLIC RADIO (Feb. 24, 2021), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/02/24/970977612/architect-of-the-capitol-outlines-30-million-in-damages-from-pro-trump-riot>.

<sup>59</sup> Alemany et al., *supra* note 57.

<sup>60</sup> Daniel L. Byman, *Assessing the Right-Wing Terror Threat in the United States a Year After the January 6 Insurrection*, BROOKINGS (Jan. 5, 2022) <https://www.brookings.edu/blog/order-from-chaos/2022/01/05/assessing-the-right-wing-terror-threat-in-the-united-states-a-year-after-the-january-6-insurrection/>.

<sup>61</sup> Gardner & Helderman et al., *supra* note 8.

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

<sup>63</sup> *Id.*

including serious physical injuries, nightmares, and anxiety.<sup>64</sup> Physically, the officers suffered crushed spinal discs, broken kneecaps, and traumatic brain injuries and the Police Labor Union Chairman predicted “some of these officers may never return to duty.”<sup>65</sup> Captain Carneysha Mendoza of the Capitol Police documented to a fellow officer that she continued to suffer from painful skin burns for many months following the attack, and dealt with even more lingering emotional injuries stemming from January 6, from recurring nightmares to stress-induced PTSD.<sup>66</sup> Additionally, Capitol Police Officer Harry Dunn testified to Congress about the lasting emotional trauma he and his colleagues still suffer from their time in combat the insurrectionist assault.<sup>67</sup> Dunn specifically mentioned that since his exposure to the attack, he has required counseling from the force’s Employee Assistance Program, private counseling, peer support program outreach, and therapy.<sup>68</sup>

#### *D. Accountability: Investigation, Prosecution, and Sentencing*

In addition to these lingering scars for those who sacrificed their own personal safety on January 6, the country is far from a resolution and has only just begun to reckon with the larger symbolic and political consequences of the attack. Questions remain about some of the more sinister acts of violence that marred that day: Particularly who placed the makeshift gallows and noose on the Capitol lawn, as well as who built and planted the makeshift pipe bombs discovered at the Democratic National Committee and Republican National Committee Headquarters?<sup>69</sup> Furthermore, how did the rioters know to run past fifteen reinforced windows at the front of the

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

<sup>65</sup> Goodman, *supra* note 8.

<sup>66</sup> Gardner & Helderman et al., *supra* note 8.

<sup>67</sup> *Hearing Before the Select Comm. to Investigate the January 6<sup>th</sup> Attack on the United States Capitol*, *supra* note 52, at 4.

<sup>68</sup> *Id.*

<sup>69</sup> *Here are Some Unanswered Questions About the Jan. 6 Attack*, WASH. POST (Nov. 3, 2021, 10:18 AM), <https://www.washingtonpost.com/politics/2021/11/03/unanswered-questions-trump-jan-6-insurrection/>.

Capitol before attempting their break-in at a recessed area on the far Senate side of the complex where four of the unreinforced windows of the building were located?<sup>70</sup> Out of the 658 Capitol windows, only twelve weren't upgraded during the 2017-2019 secret renovations, yet those seeking to break in seemed to know exactly where to launch their attack.<sup>71</sup> It is imperative that these acts and their serious national security implications are investigated fully by the House Select Committee to Investigate January 6, the DOJ, and the FBI.

Prosecuting those who stormed the Capitol on January 6 is vital to providing accountability and deterring future attacks. The DOJ faces a herculean task before it, as officials estimate that between 2,000 and 2,500 people unlawfully entered the Capitol on January 6.<sup>72</sup> While there were clearly different tiers of conduct and differing levels of violence amongst the suspected perpetrators of the insurrection, as an Assistant United States Attorney ("AUSA") for the District of Columbia noted, "[a] riot cannot occur without rioters, and each rioter's actions – from the most mundane to the most violent – contributed, directly and indirectly, to the violence and destruction that day."<sup>73</sup>

As of October 31, 2021, the DOJ had arrested 650 insurrection suspects<sup>74</sup> and of those, DOJ prosecutors charged forty suspects with conspiracy, sixty with use of a dangerous weapon, seventy with destruction or theft of government property, 190 with felony assault on a law enforcement officer, 235 with obstruction or impeding an official procedure, and 495 with entering

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<sup>70</sup> *E.g., id.*; Sarah D. Wire, *Jan. 6 Rioters Exploited Little-Known Capitol Weak Spots: A Handful of Unreinforced Windows*, L.A. TIMES (Oct. 4, 2021, 2:00 AM), <https://www.latimes.com/politics/story/2021-10-04/jan-6-rioters-exploited-little-known-capitol-weak-spots-a-handful-of-unreinforced-windows>.

<sup>71</sup> Wire, *supra* note 70.

<sup>72</sup> Gardner & Helderman et al., *supra* note 8.

<sup>73</sup> Pete Williams, *Virginia Couple Sentenced to Probation on Capitol Riot Charge*, NBC NEWS (Aug. 4, 2021), <https://www.nbcnews.com/politics/justice-department/virginia-couple-sentenced-probation-capitol-riot-charge-n1275948>.

<sup>74</sup> Note all of those charged but not yet convicted are presumed innocent until proven guilty.

a restricted federal building.<sup>75</sup> Roughly half of the 650 defendants face felony charges.<sup>76</sup> Nineteen of these defendants have been sentenced: eleven have received sentences of incarceration, one received time served, and the remaining have received sentences of either supervised release or probation.<sup>77</sup>

While sentencings have not yet occurred for any of the defendants charged with violent offenses or the most serious felonies, the majority of the cases that reached the sentencing stage present troubling trends and light sentences – potentially exposing the prosecutions of the January 6 insurrections as ineffective and lacking in the requisite severity in light of the severity of the attack. The sentencings of Paul Hodgkins and Jacob Chansley offer telling examples. After the doors to the Senate chamber were breached, Hodgkins entered and is pictured carrying protective goggles and gloves as well as a large Trump 2020 flag next to Jacob Chansley,<sup>78</sup> who was shirtless, wearing a horned, fur hat and face paint on the dais of the Senate chamber and carried a six-foot spear with an American flag attached.<sup>79</sup> Chansley also sat in the Vice President’s chair while on the Dais.<sup>80</sup> The two men then stood on the dais with others who were chanting and shouting through a bullhorn and saluted with their flags.<sup>81</sup>

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<sup>75</sup> Capitol Breach Cases, U.S. DEP’T OF JUST., <https://www.justice.gov/usao-dc/capitol-breach-cases>; Roger Parloff, *What Do—and Will—the Criminal Prosecutions of the Jan. 6 Capitol Rioters Tell Us?*, LAWFARE (Nov. 4, 2021, 10:41 AM), <https://www.lawfareblog.com/what-do%E2%80%94and-will%E2%80%94criminal-prosecutions-jan-6-capitol-rioters-tell-us>; see Sally Buzbee, *Letter From Washington Post Executive Editor Sally Buzbee About the Post’s Jan. 6 Investigation*, WASH. POST (Oct. 31, 2021, 11:45 AM), <https://www.washingtonpost.com/politics/2021/10/31/about-jan-6-insurrection-investigation/>.

<sup>76</sup> Parloff, *supra* note 75.

<sup>77</sup> Capitol Breach Cases, *supra* note 75; Hannah Rabinowitz & Holmes Lybrand, *Toughest Sentence Yet Handed Down in January 6-Related Case for Man Who Threatened Lawmakers and Tech Executives*, CNN (Oct. 21, 2021), <https://www.cnn.com/2021/10/21/politics/troy-anthony-smocks-january-6-sentence/index.html>.

<sup>78</sup> Indictment at 1–3, *United States v. Hodgkins*, No. 21-CR-188-RDM (D.D.C. Mar. 5, 2021), D.E. 11.

<sup>79</sup> Complaint at 1, *United States v. Chansley*, No. 21-CR-00003-RCL (D.D.C. Jan. 11, 2021), D.E. 1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; Indictment at 1–3, *United States v. Hodgkins*, No. 21-CR-188-RDM (D.D.C. Mar. 5, 2021), D.E. 11.

Following DOJ’s investigation, Hodgkins faced a five-count indictment for corruptly obstructing an official proceeding;<sup>82</sup> entering and remaining in a restricted building;<sup>83</sup> disorderly and disruptive conduct in a restricted building;<sup>84</sup> violent entry and disorderly conduct in a Capitol Building;<sup>85</sup> and parading, demonstrating, or picketing in a Capitol Building.<sup>86</sup> Chansley faced the same five counts as Hodgkins,<sup>87</sup> plus an additional sixth charge of civil disorder.<sup>88</sup> Both men accepted plea bargains in which they pled guilty to only the single count of obstructing an official proceeding,<sup>89</sup> which carried a Sentencing Guideline Range of forty-one to fifty-one months incarceration.<sup>90</sup> As noted above, Hodgkins received a sentence of eight months incarceration followed by twenty-four months supervised release,<sup>91</sup> well below guideline range, while Chansley received forty-one months imprisonment, followed by 36 months supervised release,<sup>92</sup> again a sentence at the lowest possible end of the guidelines.

In the same vein as Hodgkins and Chansley, Michael Thomas Curzio and Anna Morgan-Lloyd both entered the Capitol in violation of specific police orders to halt and to leave the premises and were later arrested.<sup>93</sup> While neither Curzio nor Morgan-Lloyd were alleged to have committed acts of violence and were not charged with felonies, they were early instigators and

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<sup>82</sup> 18 U.S.C. § 1512(c)(2).

<sup>83</sup> 18 U.S.C. § 1752(a)(1).

<sup>84</sup> § 1752(a)(2).

<sup>85</sup> 40 U.S.C. § 5104(e)(2)(D).

<sup>86</sup> § 5104(e)(2)(G).

<sup>87</sup> Indictment at 2-3, *United States v. Chansley*, No. 21-CR-00003-RCL (D.D.C. Jan. 11, 2021), D.E. 3.

<sup>88</sup> 18 U.S.C. § 231(a)(3).

<sup>89</sup> 18 U.S.C. § 1512(c)(2). This has become the “go-to felony” in these cases. Parloff, *supra* note 75.

<sup>90</sup> *E.g.*, Judgment at 1–3, *United States v. Hodgkins*, No. 21-CR-188-RDM (D.D.C. July 20, 2021), D.E. 37; Plea Agreement at 3, *United States v. Chansley*, No. 21-CR-00003-RCL (D.D.C. Jan. 11, 2021), D.E. 69; Alan Feuer, *Capitol Rioter Known as QAnon Shaman Pleads Guilty*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/us/politics/qanon-shaman-capitol-guilty.html>.

<sup>91</sup> Judgment at 1–3, *United States v. Hodgkins*, No. 21-CR-188-RDM (D.D.C. July 20, 2021), D.E. 37.

<sup>92</sup> Capitol Breach Cases, Defendants, Chansley, Jacob Anthony (aka Jake Angeli), U.S. DEP’T OF JUST., <https://www.justice.gov/usao-dc/defendants/chansley-jacob-anthony>.

<sup>93</sup> Statement of Facts at 3–4, *United States v. Curzio*, No. 21-CR-00041-CJN (D.D.C. July 12, 2021), D.E. 71; Statement of Facts at 2, 6, *United States v. Morgan-Lloyd*, No. 21-CR-164-RCL (D.D.C. June 23, 2021), D.E. 1-1.



part of the movement that resulted in the death and destruction detailed above.<sup>94</sup> As was the case with Hodgkins and Chansley, despite facing four federal charges each, Curzio and Morgan-Lloyd were offered and accepted plea bargains, entering guilty pleas<sup>95</sup> to only a single count of parading, demonstrating, or picketing in a Capitol Building.<sup>96</sup> Both faced a guideline sentence of six months incarceration and a \$500 fine, which Curzio received,<sup>97</sup> but Morgan-Lloyd's sentence was reduced to thirty-six months' probation instead.<sup>98</sup>

It remains to be seen how federal judges will handle the most serious cases from January 6, featuring violence against law enforcement personnel and weapons possession charges. Only seven of the defendants facing felony charges have appeared for sentencing as of January 2022, with five of them receiving lighter sentences than those recommended by prosecutors.<sup>99</sup> Fourteen defendants charged with felonies have been allowed to plea down to misdemeanor charges.<sup>100</sup> In two of these felony sentencings, Hodgkins received eight months incarceration and Troy Smock received fourteen months incarceration for making threats on the messaging system, Parler.<sup>101</sup> There are currently thirteen defendants who have pled guilty to felonies, ten of whom face guideline sentences carrying greater than three years' incarceration.<sup>102</sup> In the end it will be those cases, the larger conspiracy cases against the leadership of the Oath Keepers, Proud Boys, and

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<sup>94</sup> Statement of Facts at 3–4, *United States v. Curzio*, No. 21-CR-00041-CJN (D.D.C. July 12, 2021), D.E. 71.; Statement of Facts at 2, 6, *United States v. Morgan-Lloyd*, No. 21-CR-164-RCL (D.D.C. June 23, 2021), D.E. 1-1 (by Morgan-Lloyd's own omissions "[w]e stormed the [C]apitol building . . . were in the first 50 people in" resulting in her "picking glass out of my purse.").

<sup>95</sup> Judgement at 1, *United States v. Curzio*, No. 21-CR-00041-CJN (D.D.C. July 14, 2021), D.E. 73; Plea Agreement at 1, *United States v. Morgan-Lloyd*, No. 21-CR-164-RCL (D.D.C. June 23, 2021), D.E. 24.

<sup>96</sup> 40 U.S.C. § 5104(e)(2)(G).

<sup>97</sup> Capitol Breach Cases, *supra* note 75.

<sup>98</sup> Plea Agreement at 1, *United States v. Morgan-Lloyd*, No. 21-CR-164-RCL (D.D.C. June 23, 2021), D.E. 24.

<sup>99</sup> Rachel Weiner, Tom Jackman, Spencer S. Hsu, *Judges Have Declined U.S.-proposed Sentences in Two-Thirds of Jan. 6 Cases So Far*, WASH. POST (Jan. 6, 2022, 10:08 AM), <https://www.washingtonpost.com/dc-md-va/2022/01/06/jan6-sentencings-judges/>.

<sup>100</sup> *Id.*

<sup>101</sup> Parloff, *supra* note 75; Rabinowitz & Lybrand, *supra* note 77 (noting Smock's lengthy sentence was more likely the result of his extensive criminal history than his actions on January 6).

<sup>102</sup> Parloff, *supra* note 75.

Three Percenters, plus any potential future charges filed against former President Trump or the other speakers at the rally at the Ellipse that will determine the adequacy of the January 6 prosecutions.<sup>103</sup>

But judges presiding over the prosecution of low-level defendants have already shared their views, condemning the actions and rhetoric of the January 6 defendants. At Paul Hodgkins' sentencing, Judge Randolph D. Moss stated that through Hodgkins' actions in carrying his Trump flag to the dais of the Senate Rotunda on January 6<sup>th</sup>, Hodgkins "declar[ed] his loyalty to a single individual over the nation."<sup>104</sup> Moss continued: "In that act, he captured the threat to democracy that we all witnessed that day."<sup>105</sup> U.S. District Judge Thomas Hogan denounced defendants Jessica and Joshua Bustle during their sentencing, stating "Patriots are not the ones who attack the operations of Congress . . . I seriously considered putting you in jail."<sup>106</sup> Judge Amy Berman Jackson, in declining defendant Cleveland Grover Meredith Jr.'s motion for release, wrote: "The steady drumbeat that inspired defendant to take up arms has not faded . . . that the election was stolen is being repeated daily on major news outlets and from the corridors of power in state and federal government, not to mention in the near daily fulminations of the former President."<sup>107</sup>

Judges have also criticized prosecutors for the charges they have agreed to in plea agreements. Chief Judge Beryl A. Howell of the District of Columbia Circuit articulated the difficulty in determining appropriate sentences for defendants like Glenn Wes Lee Croy, who pled guilty to unlawful picketing and parading and demonstrating, because January 6 was neither a

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<sup>103</sup> *See id.*

<sup>104</sup> Gardner & Helderman et al., *supra* note 8.

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

<sup>106</sup> Spencer S. Hsu, Tom Jackman, Ellie Silverman & Rachel Weiner, *Court Hearings, Guilty Pleas Belie Right-Wing Recasting of Jan. 6 Defendants as Persecuted Patriots*, WASH. POST (Sept. 17, 2021, 7:33 PM), [https://www.washingtonpost.com/local/legal-issues/j6-rally-capitol-riot-defendants/2021/09/17/b433ecb6-1657-11ec-a5e5-ceecb895922f\\_story.html](https://www.washingtonpost.com/local/legal-issues/j6-rally-capitol-riot-defendants/2021/09/17/b433ecb6-1657-11ec-a5e5-ceecb895922f_story.html).

<sup>107</sup> Gardner & Helderman et al., *supra* note 8.

picket, a parade, nor a demonstration.<sup>108</sup> Chief Judge Howell explicitly expressed her dissatisfaction with the charge used: “Let me make my view clear: The rioters were not mere protestors.”<sup>109</sup> Similarly, Judge Paul Friedman made his displeasure known to defendant Valerie Ehrke and prosecutors while sentencing her to three years’ probation for unlawful picketing or demonstrating: “What happened on January 6th was not a peaceful demonstration . . . every participant in [the Capitol breach], for no matter how many minutes, contributed to an assault on democracy and democratic norms that continues to resonate in unfortunate ways.”<sup>110</sup> Finally, Chief Judge Howell castigated DOJ prosecutors during Jack Griffith’s sentencing for a “muddled” and “baffling” approach to the January 6 defendants, arguing that it is “almost schizophrenic” to use “scorching” rhetoric in the government’s briefs to describe the severity of the insurrection, but then to simultaneously agree to low level plea bargains that do not recommend jail time.<sup>111</sup> She questioned the government’s motivation in offering low-level plea deals, asking “[i]s general deterrence going to be served by letting rioters who broke into the Capitol, overran the police . . . broke into the building through windows and doors . . . resolve their criminal liability through petty offense pleas?”<sup>112</sup>

For all this tough talk, the judges in question decided not to impose harsh sentences in most of these cases<sup>113</sup> and in no cases rejected the plea deals.<sup>114</sup> Chief Judge Howell sentenced Croy to

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<sup>108</sup> Samantha Hawkins, *Chief Judge Slams Comparison Between Capitol Riot and George Floyd Protests*, COURTHOUSE NEWS SERVICE (Nov. 5, 2021) <https://www.courthousenews.com/chief-judge-slams-comparison-between-capitol-riot-and-george-floyd-protests/>.

<sup>109</sup> Rachel Weiner, *Chief Federal Judge in D.C. Assails ‘Muddled’ Jan. 6 Prosecutions: ‘The Rioters Were Not Mere Protestors,’* WASH. POST (Oct. 28, 2021, 5:55 PM), [https://www.washingtonpost.com/local/legal-issues/judge-howell-capitol-riot-case/2021/10/28/8f6da2c2-3809-11ec-9bc4-86107e7b0ab1\\_story.html](https://www.washingtonpost.com/local/legal-issues/judge-howell-capitol-riot-case/2021/10/28/8f6da2c2-3809-11ec-9bc4-86107e7b0ab1_story.html).

<sup>110</sup> Hsu, Jackman, Silverman & Weiner, *supra* note 106.

<sup>111</sup> Zoe Tillman, *A Judge Blasted Prosecutor’s “Muddled” Approach in Rejecting Prison Time For a Capitol Rioter*, BUZZFEED NEWS (Oct. 28, 2021, 4:49 PM), <https://www.buzzfeednews.com/article/zoetillman/jan-6-judge-blame-prosecutors>; Parloff, *supra* note 75.

<sup>112</sup> Weiner, *supra* note 109.

<sup>113</sup> *Contra* Tillman, *supra* note 111 (noting the break in trend when Judge Tanya Chutkan sentenced Matthew Mazzocco to 45 days in jail as opposed to the government’s requested home confinement).

<sup>114</sup> Parloff, *supra* note 75.

three months home detention, despite prosecutors asking for incarceration.<sup>115</sup> Relatedly, Judge Hogan sentenced the Battles to twenty-four months supervised release, rather than the incarceration sought by prosecutors,<sup>116</sup> and Judge Moss reduced the jail time below the guideline recommendation for Hodgkins' sentence.<sup>117</sup> Despite the excoriation of the government in the Griffith sentencing,<sup>118</sup> Chief Judge Howell sentenced Griffith to three years' probation, citing "unwarranted" disparities between prosecutors' requested three months incarceration and sentences for other similarly situated defendants.<sup>119</sup>

There are several potential explanations for the actions of prosecutors and judges in requesting and handing down such light sentences to this first crop of Capitol insurrection defendants. First, it is important to note that the guilty pleas to date only make up roughly 15 percent of the cases brought by DOJ, and if the Department's prediction regarding the number of criminal defendants is accurate, it could be a much smaller percentage than that as well – making it difficult to draw strong conclusions at this point.<sup>120</sup> But, given the propensity for these plea deals for the defendants to date, it is possible that the Department prosecutors are pursuing a strategy of efficiency and attempting to clear their crowded docket of the lower-level cases as quickly and expediently as possible.<sup>121</sup> After all, this is the largest prosecution of a single event in U.S. history.<sup>122</sup> Supporting this theory is the fact that, with one exception, prosecutors have only offered

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<sup>115</sup> Hawkins, *supra* note 108.

<sup>116</sup> Hsu, Jackman, Silverman & Weiner, *supra* note 106.

<sup>117</sup> Judgment at 1–3, United States v. Hodgkins, No. 21-CR-188-RDM (D.D.C. July 20, 2021), D.E. 37.

<sup>118</sup> Tillman, *supra* note 111 (quoting Chief Judge Howell asking prosecutors about their lack of concern for deterrence, “does the government have any concern given the factual predicate at issue here, of the defendant joining a mob, breaking into the Capitol building through a broken door, wandering through the Capitol building and stopping a constitutionally mandated duty of the Congress and terrorizing members of Congress, the vice president, who had to be evacuated?”).

<sup>119</sup> Tillman, *supra* note 111.

<sup>120</sup> Parloff, *supra* note 75.

<sup>121</sup> *Id.*

<sup>122</sup> Devlin Barrett, Abigail Hauslohner, Spencer S. Hsu & Ashlyn Still, *A Sprawling Investigation: What We Know So Far About the Capitol Riot Suspects*, WASH. POST (May 13, 2021),

defendants the option to plead down from Class A misdemeanors to Class B misdemeanors, rather than from felonies to misdemeanors.<sup>123</sup> This would explain the government’s seeming willingness to let these types of defendants off easy so that they can focus energy and resources on the more complex conspiracy and felony cases.<sup>124</sup>

An additional possible explanation is that the mountains of evidence, mainly made up of video and picture footage of the insurrection, may present complexity and challenges for prosecutors because of the discovery and Speedy Trial obligations owed to defendants.<sup>125</sup> News reporting suggests that a March 11, 2021, DOJ meeting may have involved the implementation of a similar plan by senior Department officials in order to expedite the misdemeanor cases and ease the burden imposed by the daunting amount of evidence.<sup>126</sup>

Finally, and dishearteningly, is the possibility that judges are sentencing under the guidelines because they do not see the January 6 insurrection as the existential threat that the events of that day suggest it was. Judge Katsas of the D.C. Circuit Court of Appeals suggested as much in a dissenting opinion from a case upholding the pretrial detention of a January 6 defendant as a danger to the community, writing “[b]ut the [Biden Presidential] transition has come and gone, and that threat has long passed.”<sup>127</sup> Fortunately, the rhetoric of eleven of the District Court judges in the District of Columbia seems to indicate that the trial court judges handling these cases do not

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[https://www.washingtonpost.com/nation/interactive/2021/capitol-riot-arrests-investigation/?itid=lk\\_inline\\_manual\\_10](https://www.washingtonpost.com/nation/interactive/2021/capitol-riot-arrests-investigation/?itid=lk_inline_manual_10).

<sup>123</sup> Parloff, *supra* note 75.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g., id.*; Sarah N. Lynch, *Thousands of Hours of U.S. Capitol Riot Videos Swamp Attorneys*, REUTERS (Oct. 26, 2021, 6:06 AM) <https://www.reuters.com/world/us/thousands-hours-us-capitol-riot-videos-swamp-prosecutors-defense-attorneys-2021-10-26/>.

<sup>127</sup> *U.S. v. Munchel*, 991 F.3d 1273, 1288 (D.C. Cir. 2021) (Katsas, J., concurring in part and dissenting in part); *see* Parloff, *supra* note 75.

share this sentiment.<sup>128</sup> The most persuasive evidence that other judges disagree with Judge Katsas' suggestion comes from an opinion in the litigation surrounding the House Select Committee's subpoena requests to former President Trump for his presidential records. Judge Tanya Chutkan made explicit the potential legislation that might stem from the House Select subpoena requests:

Some examples include enacting or amending criminal laws to deter and punish violent conduct targeted at the institutions of democracy, enacting measures for future executive enforcement of Section 3 of the Fourteenth Amendment against any Member of Congress or Officer of the United States who engaged in "insurrection or rebellion," or gave "aid or comfort to the enemies thereof," imposing structural reforms on executive branch agencies to prevent their abuse for antidemocratic ends, amending the Electoral Count Act, and reallocating resources and modifying processes for intelligence sharing by federal agencies charged with detecting, and interdicting, foreign and domestic threats to the security and integrity of our electoral processes.<sup>129</sup>

This and the overall tone of these federal district court judges that preside over the January 6 cases highlights their understanding of the gravity of this event and the stakes of the subsequent prosecutions.

#### *E. The Language of Insurrection*

In the same way the presiding judges are documenting the record with strong language describing January 6, properly contextualizing the severity of the events will help the government to craft an appropriate response. Despite the initial public outcry and bipartisan consensus in condemning the violence and anti-democratic posturing that emerged in the immediate aftermath of the insurrection, that narrative has since split along the traditional political lines, such that there is no longer an agreed-upon public framing of the events of that day. Not only is there a divisive

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<sup>128</sup> Tillman, *supra* note 111; John Bellinger, *The D.C. District Court and the Jan. 6 Cases*, LAWFARE (Jan. 3, 2022, 10:23 AM) <https://www.lawfareblog.com/dc-district-court-and-jan-6-cases>.

<sup>129</sup> Trump v. Thompson No. 21-cv-2769 TSC, (D.D.C. Nov. 9, 2021) (memorandum opinion) (internal citations omitted).

battle over the narrative of the election and the motivations for the insurrection, but there is even disagreement over what exactly transpired on the grounds and in the halls of the Capitol that day. The Washington Post noted that the events of January 6 did not end with the retaking of the Capitol by law enforcement that evening, the Post wrote “[t]he insurrection was not a spontaneous act nor an isolated event. It was a battle in a broader war over the truth and over the future of American democracy . . . [s]ince then, the forces behind the attack remain potent and growing.”<sup>130</sup>

The way we discuss and remember January 6 has implications for national security and the prevention of domestic terrorism. These events are fairly classified as domestic terrorism by the statutory definition enshrined in the Patriot Act: “activities that—involve acts dangerous to human life that are a violation of the criminal laws of the United States . . . [and] appear to be intended—to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction.”<sup>131</sup> The rhetoric of those at the Ellipse and the actions of those who breached the Capitol and attacked law enforcement clearly meet this definition. In the weeks and months since, minimizing the January 6 insurrection has become common among the Republican Party’s platform, as nearly one-third of the 390 Republican candidates expressing interest in campaigning for statewide office have downplayed the attack on the Capitol and pushed baseless claims of voter fraud in the 2020 election.<sup>132</sup> Perhaps there is no stronger evidence of this than the infamous comment from Representative Andrew Clyde (R-GA), who ironically, helped to barricade the door to the House chamber during the 2:00 p.m. to 3:00 p.m. hour of the insurrection, when the members of Congress were most at risk: “If you didn’t know the TV footage was a video from January the sixth, you’d actually think it was a normal tourist visit.”<sup>133</sup> As the

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<sup>130</sup> Alemany et al., *supra* note 2.

<sup>131</sup> 18 U.S.C. § 2331 (5)(A)-(B)(ii-iii).

<sup>132</sup> Gardner & Helderman et al., *supra* note 8.

<sup>133</sup> Parloff, *supra* note 75.

timeline of events above establishes, this is so patently absurd and divorced from reality that it strains credulity.

Nonetheless, this type of sentiment has had concrete effects on the rule of law in the country. Since January 6, election officials in seventeen states have suffered threats of violence against their safety or their lives,<sup>134</sup> including 800 intimidating messages documented by Reuters, of which legal experts felt more than 100 could warrant prosecution.<sup>135</sup> The increased incidence of threats of violence issued against state and local lawmakers and elections officials, was explicitly tied to this type of rhetoric and the downplaying of the severity of January 6.<sup>136</sup> According to a formal warning issued in August 2021 by the Department of Homeland Security, this increase was “in response to the unsubstantiated claims of fraud related to the 2020 election fraud and the alleged ‘reinstatement’ of former President Trump.”<sup>137</sup> The U.S. government documented that the attack on January 6 and the subsequent revisionist history surrounding that day emboldened extremists, spurring an increase in violent extremist and militia activity in months since the attack.<sup>138</sup> At the Capitol itself, the Capitol Police have had to go on high alert more than thirty times since January 6 because of intelligence reporting that a threat from a group to break into the building again had been received.<sup>139</sup> Bruce Hoffman, former lead author of the 9/11 Independent Review Commission Report, warns that this toxic narrative downplaying the gravity of the insurrection undercuts the effectiveness of the government response as well.<sup>140</sup> He fears

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<sup>134</sup> Alemany et al., *supra* note 2; Byman, *supra* note 60.

<sup>135</sup> Linda So & Jason Szep, *Reuters Unmasks Trump Supporters Who Terrified U.S. Election Officials*, REUTERS (Nov. 9, 2021 11:00 AM), <https://www.reuters.com/investigates/special-report/usa-election-threats/>.

<sup>136</sup> Gardner & Helderman et al., *supra* note 8.

<sup>137</sup> *Id.*

<sup>138</sup> OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 2 (Mar. 1, 2021), <https://int.nyt.com/data/documenttools/biden-administration-domestic-extremist-report-march-2021/ab0bbdf0a8034aea/full.pdf>.

<sup>139</sup> Gardner & Helderman et al., *supra* note 8.

<sup>140</sup> Bruce Hoffman, *How Has the Terrorism Threat Changed Twenty Years After 9/11?*, COUNCIL ON FOREIGN RELATIONS: IN-BRIEFS (Aug. 12, 2021), <https://www.cfr.org/in-brief/how-has-terrorism-threat-changed-twenty->



partisan divisions exacerbated by the whitewashing of January 6 by those on the right will prevent the unity and common purpose exhibited after the terror attacks of September 11, 2001.<sup>141</sup> “In contrast, the current climate of political polarization could effectively paralyze the government in preparing for the next generation of threats.”<sup>142</sup> These direct ties between January 6 and the rise in far-right extremist activity emphasize the need to properly document the events of that day as domestic terrorism—both for the historical record, and to aid the federal government in re-allocating law enforcement resources to appropriately prevent a similar attack in the future.

### III. DEFINING AND CLASSIFYING DOMESTIC TERRORISM

To combat the threat posed by domestic terrorism, it is important to define and classify it under law, so that the country and its national security apparatus might recognize the types of threats before they materialize and take steps to prevent them. The U.S. statutory approach to terrorism grew mainly out of international terrorism, as that approach has taken precedence over domestic terror over the course of U.S. history. The controlling statute today is the USA Patriot Act,<sup>143</sup> amending the U.S. Code following the September 11, 2001, terrorist attacks.<sup>144</sup> The Patriot Act includes a definition for domestic terrorism, but it lacks criminal penalties for it. Applying the statutory definition of domestic terrorism to the events of January 6 makes it clear that under the substantive elements of prohibited conduct and the motivation or intent elements, the insurrection fits squarely within the definitional terms of 18 U.S.C. § 2331(5). The difficulty in charging the insurrectionists and domestic terrorists more broadly under U.S. law is the limitation

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years-after-911?utm\_medium=email&utm\_campaign=911-resources&utm\_source=911-announcement&utm\_term=Announcement\_911Resources.

<sup>141</sup> *Id.*

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

<sup>143</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA Patriot Act” of 2001), 18 U.S.C. § 2331.

<sup>144</sup> Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. Legis. 249, 256 (2004).

established by the requirement that the conduct transcend national boundaries under the separate statute that lists the criminal penalties for terrorism.<sup>145</sup> This Part will analyze how the federal government and its agencies characterize the threat posed by domestic terrorism following the events of January 6 and how the lack of criminal penalties under the Patriot Act impacts the governmental response to threat.

*A. Historical Codification of the Definition of and Criminal Penalties for Terrorism in the U.S.*

*Focuses on International Terrorism*

The U.S. first attempted to codify a definition of terrorism with the Foreign Intelligence Surveillance Act (“FISA”) of 1978.<sup>146</sup> The FISA definition<sup>147</sup> of terrorism centered around international terrorism and contained three elements that cover a broad range of conduct, including: (1) a substantive element listing the prohibited or criminalized conduct, (2) a motivation or intent element, and (3) a jurisdictional element identifying the geographic location of the action or the nationality of the parties (either foreign or domestic).<sup>148</sup> The limitation requiring the act to “occur totally outside the United States or transcend national boundaries”<sup>149</sup> distinguishes FISA from later definitions.

In 2001, following the September 11 attacks on the World Trade Center,<sup>150</sup> the USA Patriot Act<sup>151</sup> adopted the FISA terrorism definition almost verbatim for both international and domestic

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<sup>145</sup> 18 U.S.C. § 2332b(a)(1).

<sup>146</sup> Perry, *supra* note 144, at 254.

<sup>147</sup> 50 U.S.C. § 1801(c) (“international terrorism means activities that (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended-(A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum”).

<sup>148</sup> Perry, *supra* note 144, at 255.

<sup>149</sup> 50 U.S.C. § 1801(c)(3).

<sup>150</sup> Deborah England, *What is the Patriot Act? How can it Affect a Criminal Case?*, NOLO: LEGAL ENCYCLOPEDIA (2021), <https://www.nolo.com/legal-encyclopedia/what-the-patriot-act-how-can-affect-criminal-case.html>.

<sup>151</sup> 18 U.S.C. § 2331.

terrorism, but changed the jurisdictional element to cover attacks that “occur primarily within the territorial jurisdiction of the United States.”<sup>152</sup> This broadened the prior jurisdictional limitation of the FISA statute under 50 U.S.C. § 1801(c)(3) that the incident must occur outside the U.S. or be international. The Patriot Act also expanded the intent element, formerly limited to just “assassination or kidnapping” under FISA,<sup>153</sup> to also include “mass destruction.”<sup>154</sup> Other than those two differences, the definitions of international and domestic terrorism are identical, but under 18 U.S.C. § 2331, they are purely definitional and are not the elements of a federal criminal offense themselves.<sup>155</sup> Instead, § 2331 establishes the classification of terrorist activity for other federal purposes—in order to charge defendants criminally, prosecutors must rely on 18 U.S.C. § 2332b(a)(1).<sup>156</sup> § 2332b(a)(1) lists enumerated crimes that become terrorism when the potential perpetrators intend to intimidate or influence a government<sup>157</sup> and prosecutors may then look to the corresponding criminal penalties listed under § 2332b(c)(1). Thus, it is § 2332b(a)(1) that criminalizes international terrorism by including penalties for activities that meet the international terror definition, without addressing those that meet the domestic terror definition. The trigger in § 2332b(a)(1) is the jurisdictional requirement “involving conduct transcending national boundaries” that completely omits conduct situated purely within the U.S.<sup>158</sup> This leaves prosecutors without a criminal statute with which to charge similar domestic terror activities, since § 2331(5)(C) offers only a definition and lacks criminal penalties.

*B. The Events of January 6, 2021, Unmistakably Fit Within the Definition of Domestic Terrorism*

*Under the USA Patriot Act*

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<sup>152</sup> 18 U.S.C. § 2331(5)(C).

<sup>153</sup> 50 U.S.C. § 1801(c)(2)(C).

<sup>154</sup> Perry, *supra* note 144, at 256–57; 18 U.S.C. § 2331(1)(B)(iii).

<sup>155</sup> Perry, *supra* note 144, at 257–58.

<sup>156</sup> *Id.* at 258.

<sup>157</sup> See intent elements listed under the definitional statute 18 U.S.C. § 2331(1)(B).

<sup>158</sup> Perry, *supra* note 144, at 258.

Under the plain language and intent of the domestic terrorism definition in the USA Patriot Act, the events of the January 6 qualify as a domestic terrorist attack. The substantive element of the domestic terrorism definition sets out the prohibited conduct under the statute: “activities that— (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State.”<sup>159</sup> With 650 suspects arrested, more than 190 charged with felony assault on a law enforcement officer, and sixty charged with the aggravating factor of using a dangerous or deadly weapon to cause bodily injury,<sup>160</sup> these charges provide clear evidence of violence that is dangerous to human life and in violation of the law. In addition, the intent element of the domestic terrorism definition establishes as the requisite motivation “ activities that appear to be intended— (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by . . . assassination, or kidnapping.”<sup>161</sup> The march on the Capitol following the rally at the Ellipse was intended to be a show of such force, or intimidation, that it would convince Republican lawmakers to disregard the law and prevent the certification of the electoral votes for then President-elect Joe Biden.<sup>162</sup> If that was unsuccessful, the makeshift gallows in the yard and the marauding insurrectionists roaming the hallways of the Capitol chanting “hang Mike Pence” were intended to influence the conduct of the then Vice President, who was charged with certifying the electoral votes.<sup>163</sup> Finally, the jurisdictional element of the statute requires that the conduct in the first two elements “occur primarily within the territorial jurisdiction of the United States,”<sup>164</sup> which is again, easily satisfied, as Washington D.C. and the

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<sup>159</sup> 18 U.S.C. § 2331(5)(A).

<sup>160</sup> Capitol Breach Cases, *supra* note 75; Parloff, *supra* note 75.

<sup>161</sup> 18 U.S.C. § 2331(5)(B)(ii–iii).

<sup>162</sup> Goodman, *supra* note 8 (President Trump encouraging the crowd at the Ellipse “we are going to try—give our Republicans, the weak ones because the strong ones don’t need any of our help, we’re try—going to try [sic] and give them the kind of pride and boldness that they need to take back our country. So let’s walk down Pennsylvania Avenue”).

<sup>163</sup> Parker, Leonnig, Kane & Brown, *supra* note 42.

<sup>164</sup> 18 U.S.C. § 2331(5)(C).

U.S. Capitol Complex are both within the United States. Barb McQuade, former U.S. Attorney for the Eastern District of Michigan who oversaw a number of counter-terrorism prosecutions, framed the attack on the Capitol as aligning with the elements of the domestic terrorism definition in the same way:

One of the most devastating of these domestic attacks came on January 6 at the U.S. Capitol, where lives were lost and Congress was forced to flee from one of its most important duties – certifying the results of the presidential election. Not only did we suffer fatal physical violence that day, but our institutions of democracy were also undermined when extremists overpowered police officers to enter the Capitol and disrupt the vote.<sup>165</sup>

### *C. Government Response to Domestic Terrorism*

While the events of January 6 clearly fit the definition of domestic terrorism set out in the USA Patriot Act,<sup>166</sup> because the enforcement provisions of § 2332b(a)(1) require cross-border, international conduct, the statute is not useful to prosecutors attempting to hold the insurrectionists accountable in court under these statutes. As such, the different executive branch agencies have attempted to address the rising threat of domestic terrorism since January 6 in their own ways.<sup>167</sup>

The Biden Administration’s National Strategy for Countering Domestic Terrorism, released in June 2021, explicitly cites the January 6 attack on the Capitol as an example of a domestic terror attack, calling it imperative to “ensur[e] that domestic terrorism threats are properly identified and categorized as such and addressed accordingly.”<sup>168</sup> The National Strategy detailed in this report was released as a response to January 6, calling it an “unprecedented attack against a core institution of our democracy: the U.S. Congress.”<sup>169</sup> But for the severity and near

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<sup>165</sup> CAFE Insider, *Note From Barb: Dangerous Rhetoric Fuels Domestic Terrorism*, CAFE STUDIOS, (Sept. 14, 2021), <https://cafe.com/notes-from-contributors/note-from-barb-dangerous-rhetoric-fuels-domestic-terrorism/>.

<sup>166</sup> 18 U.S.C. § 2331(5).

<sup>167</sup> NAT’L SEC. COUNCIL, NAT’L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 10 (2021).

<https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>168</sup> *Id.* at 5, 28.

<sup>169</sup> *Id.* at 5.

catastrophe of this event, the executive branch response would likely not have been so forceful and full-throated. The National Security Council Report further asserts that domestic terrorism which threatens the peaceful transfer of power is a foundational threat to this country: “A hallmark of this democracy is that political change must be pursued through nonviolent means grounded in the principles upon which the United States was founded.”<sup>170</sup> Another implicit reference to January 6 is contained in the conclusion, warning that dangerous conspiracy theories can lead to terrorist violence.<sup>171</sup> This reference subtly calls out the “Stop the Steal” movement for its role both in the rally immediately preceding the violence at the Capitol and in driving continued threats of violence against election officials post-January 6.<sup>172</sup>

Federal law enforcement also reframed its approach following the insurrection and the renewed focus of the federal government. Federal Bureau of Investigation (“FBI”) Director Christopher Wray outlined the impact January 6 had on domestic extremist activity: “Domestic terrorism took on new urgency after the Jan. 6<sup>th</sup> assault on the U.S. Capitol by supporters of then-President Donald Trump,” he testified before a Senate Committee.<sup>173</sup> Wray disclosed that the FBI has 2,700 active domestic terror investigations as of September 21, 2021, up from 1,000 in the spring of 2020, and that he has increased personnel by 260 percent to manage the increased caseload.<sup>174</sup>

Finally, local law enforcement officials have also increased their efforts to combat domestic violent extremist activity. District of Columbia Attorney General Karl Racine issued

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<sup>170</sup> *Id.* at 29.

<sup>171</sup> *Id.*

<sup>172</sup> Davis et al., *supra* note 9; Byman, *supra* note 60; So & Szep, *supra* note 135.

<sup>173</sup> Jan Wolfe, *U.S. Domestic Terrorism Investigations Have More Than Doubled-FBI Director*, REUTERS (Sept. 21, 2021), <https://www.reuters.com/legal/government/us-domestic-terrorism-investigations-have-more-than-doubled-fbi-director-2021-09-21/>.

<sup>174</sup> *Id.*

remarks on his own department and the rest of local government's pivot from focusing on international terrorism to domestic terrorism following the insurrection. "The domestic threat may be cloaked in different clothes, rituals, and names but is just as insidious and destructive," he stated. "And we have yet to unite around confronting hate at its source."<sup>175</sup> Just as Racine indicated in his statement, the Director of National Intelligence and the National Security Council both traced a strong ideological connection between domestic violent extremists and racially or ethnically motivated violence intended to intimidate minority groups.<sup>176</sup> The National Security Council created a collaborative working group with FBI investigators and DOJ prosecutors from both the counterterrorism and hate crimes divisions to better address this overlap.<sup>177</sup> Racine also documented the drastic increase in hate crimes in recent years, with 7,759 reported in 2020, the most since 2008.<sup>178</sup> But because most hate crimes go unreported, both by those who experience them and by law enforcement, incomplete reporting hinders law enforcement's ability to adequately respond to and understand the pervasive spread of the threat.<sup>179</sup> Racine leveraged his position as the president of the National Association of Attorneys General to work towards the robust implementation of his three part plan to combat domestic terrorism and extremism. His first step was to advocate with his fellow Attorneys General for the passage of the federal No Hate Act, authorizing additional resources to improve reporting of hate crimes and racially motivated

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<sup>175</sup> Karl A. Racine, *The Threat We Face is Unbridled Hate*, AMERICAN CONSTITUTION SOCIETY: EXPERT FORUM (Sept. 8, 2021), [https://www.acslaw.org/expertforum/the-threat-we-face-is-unbridled-hate/?utm\\_medium=email&utm\\_campaign=bulletin&utm\\_source=20210910\\_bulletin\\_share](https://www.acslaw.org/expertforum/the-threat-we-face-is-unbridled-hate/?utm_medium=email&utm_campaign=bulletin&utm_source=20210910_bulletin_share).

<sup>176</sup> OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 4 (Mar. 1, 2021), <https://int.nyt.com/data/documenttools/biden-administration-domestic-extremist-report-march-2021/ab0bbdf0a8034aea/full.pdf>; NAT'L SEC. COUNCIL, NAT'L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 13 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>177</sup> NAT'L SEC. COUNCIL, NAT'L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 24 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>178</sup> Racine, *supra* note 175.

<sup>179</sup> *Id.*

violence.<sup>180</sup> He also combined with other Attorneys General in opposing big tech's role in pushing targeted advertisements for military and tactical gear to extremists around the time of the Capitol attack.<sup>181</sup> Finally, the D.C. Attorney General's Office worked with local legislators to pass a law authorizing the office to bring civil charges against the perpetrators of bias crimes.<sup>182</sup>

These actions at different levels of government show current elected officials are recognizing and grappling with the surging threat of domestic terrorism in the months after the Capitol insurrection. While these actions are important and underscore the larger need for government to properly dedicate resources and effort to combatting domestic extremism, the question remains whether there is a link between the concerning trend of light sentencing and favorable plea bargains for January 6 defendants and the inability to use the domestic terrorism statute in pursuit of criminal penalties in federal prosecutions.

#### IV. ADVANTAGES TO LEGISLATIVELY ENACTING A NEW FEDERAL DOMESTIC TERRORISM STATUTE

While the issue of a domestic terrorism statute being codified under the U.S. Code was raised in the past,<sup>183</sup> the debate has taken on a renewed fervor following the January 6 storming of

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See generally Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> (arguing that the Tree of Life Synagogue shooting should provide the impetus for a domestic terrorism statute); Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019, 8:00 AM), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism> (suggesting that Congress should follow the example of 18 U.S.C. §2332b to assign criminal penalties for domestic terrorism the way the statute currently does for international terrorism); Amy C. Collins, *The Need for a Specific Law Against Domestic Terrorism*, THE GEORGE WASHINGTON UNIVERSITY PROGRAM ON EXTREMISM (Sept. 2020), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf> (advocating for the drafting of a domestic terrorism statute based on the definition of domestic terrorism in the USA Patriot Act to combat the rise in domestic terrorism and ensure consistency in prosecution between domestic and foreign terror threats).



the Capitol.<sup>184</sup> To be sure, a legislative solution might provide certain advantages to assuage the fear that there will be a lack of accountability in prosecuting the insurrectionists. Adding domestic terrorism to the section of the Patriot Act that criminalizes international terrorism<sup>185</sup> might provide more stringent criminal penalties than the current property and trespass crimes many of the January 6 rioters have been charged with. Modifying the statute might add a specifically tailored and effective tool to prosecutors' arsenals, rather than relying on novel or creative prosecutorial theories under little used criminal statutes like seditious conspiracy. Such a change could provide consistency with international counter-terrorism resources and prosecutions. This new legislation might also allow the federal government to choke off financial or material support for domestic extremist groups.

*A. A New Domestic Terrorism Law Would Provide a Much-Needed Replacement to the Current Charges*

As detailed in Part II above, there are concerns raised with the early stages of the prosecutions and sentencing for the January 6 defendants. The frequency of the government's plea bargaining with defendants—often securing guilty pleas only on one count of unlawful picketing, demonstrating, or parading, despite multiple count informations and indictments—has raised questions from the press and the ire of the judges.<sup>186</sup> While possible that this is a docket-clearing strategy rather than a trend, the warning signs are hard to ignore. This is especially true in cases like Paul Hodgkins and Scott Fairlamb where felony defendants were allowed to plea

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<sup>184</sup> See CAFE Insider, *Note From Barb: Cape Up Against Domestic Terrorism*, CAFE STUDIOS (June 22, 2021), <https://cafe.com/notes-from-contributors/note-from-barb-cape-up-against-domestic-terrorism/>. But See Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism More Seriously*, BRENNAN CENTER FOR JUSTICE (Dec. 14, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously>.

<sup>185</sup> 18 U.S.C. § 2332b.

<sup>186</sup> See Zoe Tillman, *A Judge Questioned if Capitol Rioters are Getting Off Too Easy for "Terrorizing Members of Congress"*, BUZZFEED NEWS (July 29, 2021, 12:22 PM), <https://www.buzzfeednews.com/article/zoetillman/capitol-riot-jan-6-defendants-plea-deals-too-lenient>; Tillman, *supra* note 111.

down for reduced sentences on the lower end or below the recommended sentence under the federal sentencing guidelines.<sup>187</sup> The concern stems from the constraints on federal prosecutors in these lower level cases where the defendants' conduct was not violent or destructive, but was severe in its sinister intent to assist in the overthrow of a democratic electoral process. Prosecutors cannot bring charges for the symbolic nature that the full threat of January 6 posed because the singular actions of many individuals amounted to little more than trespassing or property crimes. Similarly, judges' hands may be tied by the plea bargains, prosecutors' recommended sentences, or the judicial goal of issuing consistent sentences for like crimes.<sup>188</sup>

A domestic terrorism statute that is on point and codifies a sentence that is commensurate with the seriousness of the crime would help to resolve this difficulty. A compelling example lies in the prosecution of the Wolverine Watchmen militia group that plotted to kidnap Michigan Governor Gretchen Whitmer in 2020. Six of the fourteen militia members who plotted the attempted kidnapping faced federal conspiracy and weapons charges, while eight others who aided and abetted their efforts will instead be tried in state court under Michigan's anti-terrorism law.<sup>189</sup> Rather than needing to cobble together disparate charges related to conspiracy, complicity, or trespass in a similar vein to the DOJ prosecutors in the January 6 cases, the state's anti-terrorism law provides an effective workaround for Michigan Attorney General Dana Nessel's Office. The presence of the Michigan Anti-Terrorism Act<sup>190</sup> offered a catch-all criminal charge that was on point to charge the Wolverine Watchmen for their plotted violence to intimidate state government officials. The results of the federal trials for Brandon Caserta, Daniel Harris, Adam Fox, and Barry

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<sup>187</sup> Scott MacFarlane, *Ex-MMA Fighter Gets 41 Months in 1<sup>st</sup> Sentence for Capitol Riot Violence*, NBC WASHINGTON (Nov. 10, 2021, 6:30 PM), <https://www.nbcwashington.com/news/local/ex-mma-fighter-sentenced-for-jan-6-assault-on-officer-capitol-scott-fairlamb/2877728/>; Weiner *supra* note 99; Judgment at 1-3, United States v. Hodgkins, No. 21-CR-188-RDM (D.D.C. July 20, 2021), D.E. 37.

<sup>188</sup> Tillman, *supra* note 111.

<sup>189</sup> Macklin, *supra* note 22, at 1, 4.

<sup>190</sup> MCL 750.543a-z.

Croft indicate the difficulties federal prosecutors face without a federal domestic terrorism statute to charge with. Caserta and Harris were both acquitted by a jury in the Western District of Michigan of all charges against them and the jury deadlocked on the charges against Fox and Croft, resulting in a mistrial.<sup>191</sup> On the other hand, a state court judge allowed the charges of providing material support to terrorism and membership in a terrorist group to stand against the defendants charged in state court, who will proceed to trial in mid-2022.<sup>192</sup> A federal domestic terrorism criminal penalty modeled after the Michigan Anti-Terrorism Act could offer a similarly targeted statute for DOJ to utilize.

#### B. A New Domestic Terrorism Statute Would Add an Effective Tool to the Federal Prosecutors' Arsenal

A new domestic terrorism statute, modeled after the criminalization of international terrorism under 18 U.S.C. § 2332b, might offer prosecutors a more specifically tailored charge to levy against the very behavior that on January 6 and in subsequent prosecutions was difficult to quantify. Perhaps the best evidence of this is that the DOJ and executive branch agencies like the National Security Council are already considering potential legislative reforms as a result of the events of January 6.<sup>193</sup> In consultation with Congress, the agencies will consider the necessity of such reforms, balance them against the threat to civil rights and civil liberties, and make recommendations for implementation as needed.<sup>194</sup> Representative Brad Schneider (D-IL) re-

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<sup>191</sup> Smith, *supra* note 23.

<sup>192</sup> *Trial for 3 in Gov. Whitmer Kidnap Plot Will Proceed*, WILX NEWS 10, (Mar. 1, 2022, 12:30 PM), <https://www.wilx.com/2022/03/01/trial-3-gov-whitmer-kidnap-plot-will-proceed/>.

<sup>193</sup> NAT'L SEC. COUNCIL, NAT'L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 25–26 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

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

introduced a bill for the second time in the House that would accomplish similar goals in constructing stronger deterrent factors and investigation around domestic terrorism.<sup>195</sup>

Two additional ancillary benefits to this type of legislative solution include increased investigative resources and better record keeping. First, a federal domestic terrorism statute would allow Federal agents to work on cases that are traditionally the purview of the states like murder, mass shootings, or vehicular homicide, as was the case in the Charlottesville killing of Heather Heyer.<sup>196</sup> While federal law enforcement can already bring federal resources to bear with an interstate hook, the enactment of a new federal statute would broaden law enforcement's access to resources for crimes that are purely intrastate. The novel involvement of federal agents in these types of cases would help to supplement the scarce resources of state level law enforcement and would provide a justification for a more proactive prosecutorial approach in order to prevent tragedy before it occurs.<sup>197</sup> Second, this new statute could improve record-keeping and data collection for domestic terrorism prosecution the same way it did for international terrorism.<sup>198</sup> Because all international terrorism prosecutions are tracked and managed by DOJ's National Security Division, the DOJ maintains a robust database of past prosecutions, which far exceeds the under-reported and incomprehensive data the Department keeps on domestic terrorism prosecutions.<sup>199</sup> With the collection and maintenance of this improved data, prosecutors could bring stronger cases and the overall office efficiency would improve.

### *C. A Domestic Terrorism Statute Would Help Establish Consistency Between International and*

#### *Domestic Terrorism Cases*

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<sup>195</sup> Domestic Terrorism Prevention Act of 2021, H.R. 117<sup>th</sup> Cong. (2021), <https://schneider.house.gov/sites/schneider.house.gov/files/DTPA%20of%202021.pdf>.

<sup>196</sup> *Note From Barb: Cape Up Against Domestic Terrorism*, *supra* note 184.

<sup>197</sup> *Id.*

<sup>198</sup> Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime>.

<sup>199</sup> *Id.*

Not only would codifying a domestic terror statute align domestic terror prosecutions more closely with international cases, but it would also carry an important symbolic uniformity to highlight the gravity and threat domestic violent extremists pose to society. The word “terrorism” assigns a stringent moral condemnation and universally negative connotation to the act or actor branded with that label;<sup>200</sup> “[t]o some, this pejorative connotation is the defining quality of terrorism.”<sup>201</sup> This is important because it can help to reframe and address Americans longstanding reticence to label majority white, domestic, far-right extremists as terrorists in the same way those adhering to a radical form of Islam have been.<sup>202</sup> In practice, the moral equivalence between domestic and international terrorism matters because:

An important component of criminal law is deterrence, and words indicating societal condemnation like “terrorism” can help shape public opinion and behavior . . . . Violent acts committed in the name of white supremacy are just as evil as those committed in the name of Islamic extremism, and deserve the same damning label of terrorism.<sup>203</sup>

After two decades of orienting nearly all aspects of American society – from National Security to Foreign Policy to Military Intervention – to counter international terrorism, the country would be well-advised to take this opportunity and refocus on the threat posed by domestic terrorists in the present and near future.

*D. A Domestic Terrorism Statute Modeled After the Existing International Terrorism Framework  
Might Cut Off the Financing Activity of Domestic Extremist Groups*

If drafted successfully, a domestic terrorism statute criminalizing the funding of domestic extremists could effectively cut off their material, financial support and hinder their recruiting

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<sup>200</sup> Perry, *supra* note 144, at 252.

<sup>201</sup> *Id.* at 253.

<sup>202</sup> Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061, 1065–66 (2020).

<sup>203</sup> *Note From Barb: Cape Up Against Domestic Terrorism*, *supra* note 184.

abilities. In the international terrorism context, support for organizations that the U.S. government designates Foreign Terrorist Organizations<sup>204</sup> is a prosecutable crime under 18 U.S.C. § 2339B.<sup>205</sup> This criminal provision is very commonly used in international terror contexts, and in fact 66 percent of all ISIS defendants criminally prosecuted were charged under § 2339B.<sup>206</sup> If the domestic terrorism statute included criteria for a similar designation of domestic entities and then criminalized financial support for such groups, it could provide an invaluable tool in federal law enforcement efforts to prevent a future attack and disrupt domestic extremist operations.

It is important to note that this provision would need to be carefully drafted in order to avoid infringing on constitutionally protected rights like freedom of assembly and speech for those U.S. citizens simply joining a dissident group or engaging in anti-government speech, absent more concrete steps towards a criminal conspiracy. If the new statute could successfully criminalize the material support of Foreign Terrorist Organizations, and if federal law enforcement would consider naming far-right extremist groups as similarly designated terrorist organizations, the financial support and mobile training that some U.S. violent extremists have to networks at home and abroad could dry up.<sup>207</sup> The provision would likely need to follow the example set by the foreign Material Support for Terrorism statute that the Supreme Court upheld as constitutional in *Humanitarian Law Project v. Holder*.<sup>208</sup> This change could have a dramatic effect on U.S.-based groups trying

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<sup>204</sup> The U.S. State Department has the ability to officially designate certain entities as “Foreign Terrorist Organizations” under section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189, subjecting them to the criminal prohibitions of 18 U.S.C. § 2339B.

<sup>205</sup> Laguardia, *supra* note 202, at 1071.

<sup>206</sup> *Id.*

<sup>207</sup> NAT’L SEC. COUNCIL, NAT’L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 11 (2021) <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf> (emphasizing the frequent communication like-minded extremists have with each other, even transnationally and indicating that escalating support from abroad is a factor that could increase the lethality of future attacks on U.S. soil).

<sup>208</sup> *Humanitarian Law Project v. Holder*, 561 U.S. 1, 8 (2010) (Upholding 18 U.S.C. § 2339B as constitutional and rejecting a First Amendment freedom of speech and association challenge).

to use social media platforms to recruit or relying on institutional actors like banks in order to secure funding.<sup>209</sup>

V. DISADVANTAGES TO LEGISLATIVELY ENACTING A NEW FEDERAL DOMESTIC  
TERRORISM STATUTE

Any codification of a law giving the government additional surveillance and prosecutorial power should be viewed with a healthy skepticism and carefully analyzed against the potential to curb fundamental civil liberties. The risks of this new domestic terrorism law include the potential weaponization of prosecutorial power or investigatory power in unintended and unconstitutional ways. It might tempt prosecutors to eschew already viable alternatives in their pursuit of accountability for the attack on the country's democratic institutions. Any new statute would also carry the possibility that it is struck down in court or fails to secure jury convictions. Finally, this change could create inefficiencies by unnecessarily reallocating resources across the federal bureaucracy. This Part will explore each of these possible outcomes in turn, and will argue that, on balance, a new federal statute criminalizing domestic terrorism is not necessary and carries too great a risk of abuse to be justified.

A. *A New Domestic Terror Statute Would do Little to Ensure Accountability for January 6*

The codification of a new domestic terrorism statute would not help to resolve the issues of prosecution and sentencing for January 6 defendants. Even if Congress were to pass a law immediately criminalizing the exact conduct that transpired on January 6, not a single defendant from that day could be tried due to the prohibition on ex post facto laws. While this doesn't immediately render a new domestic terror statute completely impractical, as it could still provide

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<sup>209</sup> Johnson, *supra* note 14, at 1115–16.

a chilling effect on future insurrections, it certainly diminishes its utility because it could only apply to new defendants going forward.

*B. There are Pre-Existing Alternatives That Could be Used to Hold January 6 Defendants Accountable*

Beyond attempting the drastic step of writing a new statute into the Criminal Code, there are other charges already on the books prosecutors could bring to provide the deterrence needed to prevent future attacks. First, the National Security Council's National Strategy for Countering Domestic Terrorism Report repeatedly mentions that many of the militia activities that groups like the Oath Keepers, Three Percenters, and Proud Boys regularly engage in are already illegal under state law.<sup>210</sup> Some of the state constitutional provisions that might be applicable include requiring subordination of the military under civil authorities, statutes prohibiting organized militia activity without express authorization from the state government, and the criminalization of some forms of paramilitary activity and could be charged as such by state prosecutors.<sup>211</sup> To this point, the National Security Council is concerned first with "convening nonfederal partners to have 'open, robust exchange of ideas'" on this task, before it will consider attempting to draft legislation establishing a new law.<sup>212</sup> This same approach should be taken at the federal level for January 6 prosecution as well.

Prosecutors and the DOJ could look to leverage the extensive international counter-terrorism apparatus the country built over the last two decades to combat domestic terror. Some U.S.-based extremists have ties to violent extremists overseas, connect with each other online and

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<sup>210</sup> NAT'L SEC. COUNCIL, NAT'L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 6,13,25 (2021) <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>211</sup> Macklin, *supra* note 22, at 12.

<sup>212</sup> *Id.*



with foreign groups, and encourage international mobilization to violence.<sup>213</sup> Even those without specific ties share ideological similarities and are influenced or radicalized by overseas groups or actors.<sup>214</sup> Following the January 6 insurrection, the Canadian Parliament unanimously designated the Proud Boys an international terrorist organization, further underscoring the transnational nature of some of the insurrection’s groups. By turning to existing international terrorism statutes, the DOJ could look to prosecute domestic terrorist groups with sufficient international ties that transform their conduct into “conduct transcending national boundaries.”<sup>215</sup> Even though leveraging the international terrorism structure and resources remains a possibility, to date it has not been successful: “While the U.S. government has been consumed with heading off future terrorist plots since 9/11, its agencies failed to effectively harness the security and intelligence infrastructure built in the wake of that assault by Islamic extremists to look inward at domestic threats,” the Washington Post reported.<sup>216</sup> This is clearly not as simple as using a domestic terrorism statute could be, but it nonetheless might offer a potential workaround for the DOJ.

*C. Federal Prosecutors Could Charge Defendants with Violations of Federal Laws Currently on the Books*

Rather than call for a new domestic terrorism law that wouldn’t apply retroactively, prosecutors could attempt a creative charging decision using either the Rebellion or Insurrection statute<sup>217</sup> or the Seditious Conspiracy statute.<sup>218</sup> No Capitol insurrection defendant has been

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<sup>213</sup> Johnson, *supra* note 14, at 1076–77.

<sup>214</sup> *Id.*

<sup>215</sup> 18 U.S.C. § 2332b(a)(1).

<sup>216</sup> Davis Et Al., *supra* note 9.

<sup>217</sup> 18 U.S.C. § 2383 (stating “whoever incites ... assists, or engages in any rebellion or insurrection against the United States ... or gives aid or comfort thereto” and carries a 10 year prison sentence plus a mandatory bar from “any office under the United States”).

<sup>218</sup> 18 U.S.C. § 2384 (stating “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

charged with either of these,<sup>219</sup> though ironically, prosecutors used the word “insurrection” nine times in their brief in support of detention during the Chansley prosecution.<sup>220</sup> Perhaps part of the reason prosecutors have not filed any charges using the insurrection statute is because the felony charge prosecutors are pursuing most often, corruptly obstructing, influencing, or impeding an official proceeding,<sup>221</sup> carries a twenty year maximum sentence, rather than a ten year maximum like the insurrection statute does.<sup>222</sup> On the other hand, the “obstructing an official proceeding” statute<sup>223</sup> that prosecutors have chosen to use frequently is not without controversy among the federal bench. Some judges have registered their dislike of it because of its vagueness<sup>224</sup> and because it lacks a limiting principle<sup>225</sup> as well as its legislative history and purpose—it was originally enacted after the Enron financial scandal<sup>226</sup>—raise doubts among judges that it is not well-suited to the January 6 prosecutions as a result.<sup>227</sup>

Seditious Conspiracy, seems more applicable to the present situation. It’s language references conspiracies to “overthrow” the government but also conspiracies “to prevent, hinder, or delay [by force] the execution of any law of the United States.”<sup>228</sup> It seems entirely clear that for many of those who stormed the Capitol on January 6 that forcibly delaying the certification of

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contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both”).

<sup>219</sup> Parloff, *supra* note 75. No Capitol defendant has been charged with the Seditious Conspiracy or Rebellious Insurrection statutes as of Nov. 6, 2021, at the time of this writing.

<sup>220</sup> Government’s Brief in Support of Detention, *United States v. Chansley*, No. 21-CR-00003-RCL (D.D.C. Jan. 14, 2021), D.E. 5.

<sup>221</sup> 18 U.S.C. § 1512(c)(3).

<sup>222</sup> Parloff, *supra* note 75.

<sup>223</sup> 18 U.S.C. § 1512(c)(2).

<sup>224</sup> Spencer S. Hsu, *Lead Felony Charge Against Jan. 6 Defendants Could Be Unconstitutionally Vague*, *U.S. Judge Warns*, WASH. POST (Aug. 6, 2021, 2:17 PM), [https://www.washingtonpost.com/local/legal-issues/capitol-riot-charge-vague/2021/08/06/018b4cf8-f483-11eb-9068-bf463c8c74de\\_story.html](https://www.washingtonpost.com/local/legal-issues/capitol-riot-charge-vague/2021/08/06/018b4cf8-f483-11eb-9068-bf463c8c74de_story.html).

<sup>225</sup> Spencer S. Hsu, *Second U.S. Judge Questions Constitutionality of Lead Felony Charge Against Oath Keepers in Capitol Riot*, WASHINGTON POST (Sept. 8, 2021, 7:25 PM), [https://www.washingtonpost.com/local/legal-issues/oathkeepers-obstruction-charge-vague/2021/09/08/9a833eaa-10c3-11ec-bc8a-8d9a5b534194\\_story.html](https://www.washingtonpost.com/local/legal-issues/oathkeepers-obstruction-charge-vague/2021/09/08/9a833eaa-10c3-11ec-bc8a-8d9a5b534194_story.html).

<sup>226</sup> See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 533 (2005).

<sup>227</sup> Parloff, *supra* note 75.

<sup>228</sup> *Id.*

the electoral count under Electoral Count Act of 1887 was the main goal of their attack that day.<sup>229</sup> Beyond just its textual applicability, prosecutor’s past uses of the Seditious Conspiracy Act in similar domestic terrorism contexts highlight its potential utility to the DOJ in their post-January 6 work.

In a remarkable echo from history, the Seditious Conspiracy Act was used in 1954 to secure convictions from a group of four Puerto Rican nationalist terrorists and thirteen of their co-conspirators who planned and executed a storming of the Capitol and sprayed the room with bullets.<sup>230</sup> The resulting affirmation of their convictions by the Second Circuit Court of Appeals provided an expansive interpretation of the criminal statute in three important ways that link it to the facts of January 6.<sup>231</sup>

First, in a potentially telling example for prosecutors analyzing the chain of events leading up to and inciting the 2021 insurrection, the indictment and conviction of the thirteen assailants in the 1954 Capitol attack listed all of the planning activities undertaken by the Puerto Rican nationalists up to and including their actual shooting in the House Chamber as part of their conspiracy.<sup>232</sup> As the Second Circuit panel wrote in its opinion affirming the convictions, “[w]e think the evidence sufficient to permit the jury to find a single continuous conspiracy operating at least from September 1950 to May 1954.”<sup>233</sup> Given the planning and coordination that occurred leading up to January 6, this case could provide support for charging the event’s organizers and planners in addition to those on the ground of the Capitol.

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<sup>229</sup> *Id.*

<sup>230</sup> Jacob Schulz, *When Extremists Stormed the Capitol and Got Convicted of Seditious Conspiracy*, LAWFARE (Jan. 20, 2021, 8:01 AM), <https://www.lawfareblog.com/when-extremists-stormed-capitol-and-got-convicted-seditious-conspiracy>.

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

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

<sup>233</sup> *United States v. Lebron*, 222 F.2d 531, 533 (2d Cir. 1955).

Second, the Court ruled that the prosecution of those, including the Minister of Propaganda for the nationalist group, who had no role in the violence of the attack but were nonetheless linked to the group and participated in the discussions of acts of violence, was valid and did not infringe on protected speech under the First Amendment.<sup>234</sup>

Finally, and perhaps most relevant to the 2021 Capitol insurrection, the Second Circuit held that all of the defendants had been properly convicted of conspiracy, even those who did not participate in the actual act of the shooting and who were not in the House chamber that day, but who were nonetheless a part of the group.<sup>235</sup> “As noted earlier, we reject the theory that that attack was a separate conspiracy, and we agree with the trial judge that evidence of that attack was admissible against all of the defendants.”<sup>236</sup> This expansive interpretation of the statute provides a useful link for current prosecutors in that it allows the nonviolent misdemeanor defendants gathered at the Capitol to be linked to the violent offenders that engaged in hand-to-hand combat with police in the same conspiracy to “delay the execution of any law of the United States.”<sup>237</sup>

A second useful case that similarly applied the Seditious Conspiracy Act is the conviction of Sheik Omar Abdel Rahman after the 1993 World Trade Center bombing.<sup>238</sup> Rahman, a blind Islamic scholar and the group’s cleric, had the power to opine on fatwas<sup>239</sup> and whether an act constituted true Jihad or not, but his role in the conspiracy was more supervisory, acting as a director rather than being physically involved.<sup>240</sup> Rahman spoke at a conference in Brooklyn and voiced his support for violent jihad and embraced the label of terrorist.<sup>241</sup> The members of the

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<sup>234</sup> *Id.* at 536.

<sup>235</sup> *Id.* at 535.

<sup>236</sup> *Id.*

<sup>237</sup> 18 U.S.C. § 2384.

<sup>238</sup> *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999).

<sup>239</sup> A “fatwa” is a religious opinion adjudicating the holiness of an act. *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 107–09.

jihadi group pledged allegiance to Rahman, staying in close contact with him as they constructed the World Trade Center bombs and requiring approval from Rahman whenever the group undertook an action that was “basically unlawful.”<sup>242</sup> The Second Circuit, in upholding Rahman’s conviction, found his challenge to the Seditious Conspiracy statute unpersuasive because while the state may not criminalize the expression of views (even the view that the violent overthrow of the government is desirable), it may outlaw the encouragement, conspiracy, or inducement to violent action.<sup>243</sup> In order to win his appeal, Rahman’s teachings would’ve had to be purely theoretical, teaching the abstract principle of violent overthrow, not providing such encouragement that is directed towards and likely to result in lawless action.<sup>244</sup>

Like in the 1954 *Lebron* prosecution, the Second Circuit in *Rahman* found that § 2384 was neither overbroad nor void for vagueness because the statute prohibits only conspiratorial agreement, which is a sufficiently preparatory step towards the commission of a criminal crime.<sup>245</sup> The court wrote that “[w]e recognize that laws targeting ‘sedition’ must be scrutinized with care to assure that the threat of prosecution will not deter expression of unpopular viewpoints by persons ideologically opposed to the government. But Section 2384 is drawn sufficiently narrowly that we perceive no unacceptable risk of such abuse.”<sup>246</sup>

The combination of the Court’s interpretations of Seditious Conspiracy in both *Lebron* and *Rahman* position the statute as a close parallel to a domestic terrorism prosecution and leave the DOJ with the ability to build a strong case in their pursuit of accountability for the January 6 defendants.<sup>247</sup> Both examples further emphasize the potential application of the statute to

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<sup>242</sup> *Id.* at 110.

<sup>243</sup> *Id.* at 115.

<sup>244</sup> *United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999).

<sup>245</sup> *Id.* at 116.

<sup>246</sup> *Id.* at 115.

<sup>247</sup> *But see* Jacob Schulz, *The Last Time the Justice Department Prosecuted a Seditious Conspiracy Case*, LAWFARE (Feb. 24, 2021, 1:56 PM), <https://www.lawfareblog.com/last-time-justice-department-prosecuted-seditious->

criminalize the conduct of those who might not have been the most violent on January 6, as well as those who planned the day's events but were not present at the insurrection in person. In fact, the former Acting U.S. Attorney for the District of Columbia, Michael R. Sherwin, twice issued public statements indicating that his office is considering seditious conspiracy charges stemming from the Capitol insurrection.<sup>248</sup> Because the application of this statute fits the factual basis well for January 6, it weighs against the need for the codification of a new domestic terrorism statute.

#### D. Any Statute Criminalizing Domestic Terrorism Necessarily Faces Difficult Constitutional Challenges

By its very nature, a statute criminalizing domestic terrorism would likely run up against First Amendment roadblocks in that it could potentially be criminalizing protected civil liberties and constitutional rights like freedom of speech, freedom of assembly, and freedom of association. Both the White House and DOJ remain cognizant of the First Amendment and protected political speech in their strategies and press releases on countering domestic terrorism and political violence.<sup>249</sup> Shortly after taking office, Attorney General Merrick Garland outlined the parameters of DOJ's prosecutions and investigations, including those surrounding January 6. "We are focused on violence, not an ideology," he stated. "In America, espousing a hateful ideology is not unlawful. We do not investigate individuals for their First Amendment protected activities."<sup>250</sup>

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conspiracy-case (documenting the 2010 prosecution of the Hutaree, a Michigan anti-police militia group, under the Seditious Conspiracy statute and the eventual dismissal of charges by a federal judge).

<sup>248</sup> Spencer S. Hsu, *Evidence in Capitol Attack Investigation Trending Toward Seditious Charges, Departing Chief Says*, WASH. POST (Mar. 21, 2021, 9:17 PM), [https://www.washingtonpost.com/local/legal-issues/seditious-conspiracy-charges-capitol-riot/2021/03/21/406da056-8aa2-11eb-a730-1b4ed9656258\\_story.html](https://www.washingtonpost.com/local/legal-issues/seditious-conspiracy-charges-capitol-riot/2021/03/21/406da056-8aa2-11eb-a730-1b4ed9656258_story.html).

<sup>249</sup> NAT'L SEC. COUNCIL, NAT'L STRATEGY FOR COUNTERING DOMESTIC TERRORISM 2–3 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>250</sup> Jarrett Renshaw & Jan Wolfe, *U.S. Lays Out Plan to Confront White Supremacist Violence*, REUTERS (June 15, 2021), <https://www.reuters.com/world/us/biden-administration-unveils-plan-tackle-domestic-terrorism-2021-06-15/>.

Under the approach discussed above to enhance or assign criminal penalties to domestic terrorism via 18 U.S.C. § 2339B, constitutional protections present a nearly insurmountable hurdle for the drafters because of the freedom of speech and assembly protections afforded to U.S. citizens. In attempting to add the ability to classify domestic organizations as terrorist groups in the same way that 18 U.S.C. § 2331(6)(A) allows the State Department to identify international groups, the specter of government blacklisting disfavored political organization looms large. Even if well-intentioned and enacted in good faith, it is not hard to imagine a future administration abusing such a classification to harm its political opponents. Freedom of Association also restricts criminalizing membership in political groups,<sup>251</sup> and “[r]estriction of associational expression is likely to become, in practice, an effort to suppress a whole social or political movement.”<sup>252</sup>

Past examples of attempts to criminalize domestic terrorism preemptively before violence occurred resulted in criminal syndicalism laws that were often used to target political dissidents, like Communist Party members, and were upheld by the courts in the first half of the 20<sup>th</sup> Century.<sup>253</sup> The Court’s position on these criminal syndicalism laws changed with the 1969 *Brandenburg v. Ohio* decision.<sup>254</sup> In *Brandenburg*, the Court held that Ohio’s criminal syndicalism law violated the First Amendment because it criminalized “mere advocacy” of violence to achieve political reform and criminalized “assembly with others merely to advocate”

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<sup>251</sup> *Scales v. United States*, 357 U.S. 203, 209 (1961) (holding that membership alone in an organization that advocated the overthrow of the government was not enough to convict, the defendant’s membership must also be for the knowing purpose of achieving said overthrow). *But See* Humanitarian Law Project v. Holder, 561 U.S. 1, 29-30 (2010) (Holding the material support statute, 18 U.S.C. § 2339, constitutional and rejecting freedom of speech and association challenges because any material support to a group designated as a Foreign Terrorist Organization, whether for lawful or unlawful conduct, can further terrorist aims).

<sup>252</sup> Laguardia, *supra* note 202, at 1086 (quoting Thomas I. Emerson, Freedom of Association and Freedom of Expression, 74 YALE L.J. 1, 23 (1964)).

<sup>253</sup> *See* *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357, 370 (1927); *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>254</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

the same.<sup>255</sup> Without proving “incitement to imminent lawless action,” the government cannot punish protected speech through these laws.<sup>256</sup> This new test explained in *Brandenburg* moved the country away from the potentially prejudicial treatment of the politically disfavored under criminal syndicalism laws and seemed to broaden what could be considered First Amendment protected speech. While these constitutional restrictions do not render the drafting of a domestic terrorism statute impossible, they certainly make the task a difficult one, potentially forcing drafters to choose between a constitutionally sound criminal statute that criminalizes ex post facto actions in the way the international terrorism criminal penalty statute does, and one that lacks the power to enforce preemptive measures as domestic extremists form anti-government militia groups and coordinate their insurrectionist movements to interfere with the government’s certification of the Presidential elector ballots.

While the need to combat the growing domestic terrorism threat<sup>257</sup> and protect against future assaults on democracy is both crucially important and compelling, the need for protected speech is arguably more fundamental to the democratic process than pursuing adequate criminal penalties. Free speech is fundamental to democracy and self-government because it enables complete and unfettered access to information and subjects policy preferences to close scrutiny, allowing disparate political viewpoints to be aired and potentially erroneous policies to be challenged freely.<sup>258</sup> Both because these constitutional protections work as a countervailing force against the drafting of a statute criminalizing domestic terrorism, and because such a statute is largely unnecessary given the statutes already codified for prosecutorial use,<sup>259</sup> the best strategy

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<sup>255</sup> *Id.* at 448–49.

<sup>256</sup> *Id.* at 447, 449.

<sup>257</sup> DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 4 (2020).

<sup>258</sup> Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 683–84 (2009).

<sup>259</sup> *Cf.* German, *supra* note 184.



today is for the DOJ and its federal prosecutors to use the resources they currently possess, particularly the seditious conspiracy statute<sup>260</sup>, combined with a refocused prioritization and coordination by the entire executive branch on the threat posed by domestic terrorism and anti-government extremism in order to tackle this challenge.

## VI. CONCLUSION

What will ultimately serve as the greatest deterrent effect and prevent a repeat of the events of January 6 is not the codification of a new statute to give prosecutors even more power—or applying the harshest sentences possible to the low-level rioters who made up the mass of the violent mob that stormed the Capitol—but instead the use of the resources and criminal statutes at hand to initiate a serious and consequential public trial of the rioters, political fomenters, organizers, and leaders of the movement to overthrow the peaceful transfer of power. Lining up as the head of a movement against American democracy must be prosecuted with the same force that anti-democratic, historical movements (both domestic and international) have faced if we are to make such a position untenable and antithetical to all that we stand for. If a careful application of the facts and the existing laws like the seditious conspiracy statute warrants a decision to charge, federal prosecutors should avoid low-level plea bargains for those deemed most responsible and, if the facts support such charges, work to have the organizers and most violent participants stand in federal court as defendants against the United States. Our criminal justice system is built such that this accountability will prove to posterity that American democracy and a Constitution respectful of Due Process of Law and civil rights and liberties are compatible. We already have the tools necessary that prevented the violent overthrow of our system of government on January 6, 2021, and that will prevent the same from occurring on every future January 6 to come. Now it

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<sup>260</sup> 18 U.S.C. § 2384.

is up to Attorney General Merrick Garland, the Department of Justice, and the individual line prosecutors who swore an oath to defend the Constitution, to utilize them to their full effect.