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# HUMAN RIGHTS

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# Two Years On, Why Hasn't Anyone Been Prosecuted for Domestic Terrorism for the January 6, 2021 Capitol Attack?

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## **Recognizing the Capitol Attack as 'Domestic Terrorism' is of Capital Importance**

The January 6, 2021 Capitol attack was not random people committing felonies and misdemeanors nor as former President Donald J. Trump claimed 'a simple protest that got out of hand'. It was a premeditated, planned, organized, concerted and intensely violent onslaught that succeeded in interrupting the peaceful transfer of presidential power - among the most important of American constitutional democratic processes - and many called it a 'domestic terrorist attack'.

But not everyone considers the January 6 attack to have been 'domestic terrorism', or for that matter, even a bad thing. Despite considerable bipartisan outrage in the immediate aftermath of the attack, much of the Republican establishment soon engaged in a campaign of denial, deception, deflection, and dissimulation. A December 2021 CBS poll discovered that 47% of Republicans considered the attack 'patriotism' and 56% about 'defending freedom'. A substantial part of the American electorate continues to lap up Trump's election lies, rampant right-wing disinformation and oddball conspiracies spun and promoted by white supremacists and far-right ideologues.

The Capitol attack seems easily to fit U.S. legal definitions of 'domestic terrorism', yet more than two years on, nobody has been charged with that. In contrast, Barry Croft Jr. and Adam Fox were sentenced to 19 years and 16 years imprisonment respectively in federal court on December 28, 2022 on domestic terrorism charges for plotting to kidnap Michigan Governor Gretchen Whitmer. In connection with the same plot, Michigan Jackson County Circuit Court sentenced Pete Musico, Joseph

Morrison and Paul Bellar to 12, 10 and 7 years imprisonment respectively for providing material support to terrorism.

The Final Report of the House Select Committee to Investigate the January 6th Attack on the United States Capitol barely mentions 'domestic terrorism'. It focuses almost entirely on President Donald J. Trump's role, instead of analyzing how American white supremacist ideology, and its cousin, violent right-wing extremism, were direct and proximate causes for the assault on American democracy.

Unless the Capitol attack is understood clearly as domestic terrorism rooted in enduring right-wing white supremacist subculture and the activities of violent hate groups and criminally prosecuted as such, America's democratic governance, rule of law and equal protection of the laws will remain more vulnerable to similar assault in future.

## **Republicans Equivocate on the Question of the Capitol Attack as 'Domestic Terrorism'**

Despite in-plain-sight warnings piling up for several of the preceding months, the January 6, 2021 Capitol attack instantly shocked people for its brazen violence and miserably weak law enforcement response. Right away, many said it looked like a domestic terrorist attack. As violence broke out, former Trump communications director Hope Hicks messaged Ivanka Trump's chief of staff Julie Radford: "We all look like domestic terrorists now". Congressman Jim McGovern tweeted that evening: "This is not a protest. It is a terrorist attack on our democracy." Many other politicians chimed in with similar comments. Others however, went immediately into overdrive to deflect blame onto supposed left-wing

agitators. Republican Matt Gaetz and dozens of other Trump supporters spread falsehoods that the rioters “were members of the violent terrorist group antifa”, a conspiracy theory Fox News’s Laura Ingraham and Sarah Palin picked up and repeated to millions of viewers and followers on the evening of January 6. In a January 12 private conversation with then-House Minority Leader Kevin McCarthy, Trump said Antifa was responsible for the violence, a debunked claim he kept repeating for months afterwards. Two months after the attack, a Suffolk University / USA Today poll found that around half of Trump voters believed that it was “mostly an antifa-inspired attack” in spite of definitive evidence to the contrary, including from many of the rioters themselves.

In the days after the attack, many Democrats and Republicans alike denounced the violence as ‘domestic terrorism’, including President Joe Biden, then-House Speaker Nancy Pelosi, and Republicans Senate Minority Leader Mitch McConnell and then-House Minority Leader Kevin McCarthy. Republican Senator Lindsey Graham exclaimed: “Yesterday they could have blown the building up. They could have killed us all”. Graham referred to those who had occupied the House floor as “terrorists, not patriots”. Leading intelligence figures and experts, including FBI Director Chris Wray and former CIA Deputy Director Mike Morell, labelled it ‘domestic terrorism’.

Then, many Republicans began to minimize the gravity of the attack and downplayed its danger to American democracy. Some spread outright lies or tragic-comically contradicted themselves. Georgia Republican Congressman Andrew Clyde blatantly lied to a May 13, 2021 House Oversight Committee hearing that: “the House floor was not breached”, “it was not an insurrection and calling it an ‘insurrection’ is a boldfaced lie” and that the Capitol riot actually resembled a ‘normal tourist visit’ - despite Clyde himself having helped physically barricade the House door against rampaging rioters trying to smash their way in.

Senator Ted Cruz, who led an effort to delay the election certification process for 10 days, displayed stunning self-contradiction that stands in a class of its own. Starting from the day after the attack, Cruz consistently called the riot ‘a terrorist attack’ in a series of media interviews. On February 13, 2021, he released a written statement: “As I’ve said repeatedly, what we saw on January 6 was a despicable terrorist attack

on the United States Capitol and those who carried it out should be prosecuted to the fullest extent of the law.” To a January 5, 2022 Senate Rules Committee Hearing, Cruz reiterated that it was “a violent terrorist attack on the Capitol”. Then the very next day - first anniversary of the attack - in an attempt to mollify irate conservatives, Cruz stooped to calling his own characterization of the attack ‘sloppy’ and ‘frankly dumb’ in a cringeworthy exchange with Fox’s Tucker Carlson who had angrily challenged the ‘domestic terrorism’ label. Other Republicans tried hard to whitewash January 6, despite hundreds of cell phone and helmet cam clips taken by the rioters themselves showing the violence and destruction up close. E-mails that Dominion Voting’s 1.5 billion defamation lawsuit against Fox News brought to light in mid-February 2023 show that Rupert Murdoch, Tucker Carlson, Laura Ingraham, Sean Hannity, Maria Bartiromo, Lou Dobbs and other top Fox personalities, privately ridiculed Trump’s election lies during and after January 6 while they propagated the very same lies in their public broadcasts – a galling display of Fox’s apparently purposeful and dishonest role as amplifier of false right-wing conspiracy theories.

No wonder that a year after the attack, so much of the American public remained utterly confused about whether or not the Capitol attack was domestic terrorism as an Angus Reid poll found: “While one-quarter (24%) of those who voted for Trump in 2020 agree that the storming of the Capitol was domestic terrorism, still seven-in-ten (68%) disagree” - “a significant difference from the near unanimity voiced by President Joe Biden’s voters (92%) in believing that term is appropriate”.

### **The House Select Committee Did Not Refer Trump to be Prosecuted Criminally for ‘Domestic Terrorism’**

On June 30, 2021, the House of Representatives adopted Resolution 503 with 222 votes in favor (all Democrats except for Republicans Liz Cheney and Adam Kinziger) and 190 against (all Republicans) that established a bipartisan Select Committee to “investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021 domestic terrorist attack upon the United States Capitol Complex”. The Committee’s 845-page Final Report of December 22, 2022, said the totality of the evidence “led to an overriding and straight forward conclusion: the central cause of January 6th was one man, former

President Donald Trump, whom many others followed” to implement a multi-part plan to subvert the peaceful transfer of presidential power from Trump to Biden. In its report, the Committee details the execution of this plan which comprised: Trump’s Big Lie that the election vote-counting process was fraudulent and that he had in fact won the election; Trump’s attempt to corruptly persuade Vice President Mike Pence not to perform his ministerial function to certify the slate of electors in favor of Joe Biden; Trump’s efforts to pressure 7 states to change the election outcome from Democrat to Republican by creating and transmitting fake election certificates; Trump’s attempts to corrupt the Department of Justice; Trump’s summoning of a mob to Washington DC knowing they were angry and armed and then instructing them to march to the Capitol; Trump’s dereliction of duty for remaining silent for 187 minutes during the attack itself; and following January 6, Trump’s unwavering insistence he had won the election when he had actually lost.

The Select Committee, itself without enforcement power, issued referrals recommending that the Department of Justice criminally prosecute Trump for: obstruction of an official proceeding (for trying to derail the certification process); conspiracy to defraud the United States on the election result; conspiracy to make a false statement (for the fake electors scheme); and inciting, assisting or providing aid and comfort to an insurrection using speech not protected by the First Amendment. The referral on incitement relates to Trump’s one-hour-and-14-minute rant begun at 11:57 a.m. at the Ellipse just 2 miles from the Capitol Building where he declared he had won the election ‘by a landslide’, that ‘big tech’ had ‘rigged it like they’ve never rigged an election before’ and that ‘our election victory [was] stolen by emboldened radical-left Democrats’ and ‘the fake news media’. For the cherry on top, Trump added that: “All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people”. He told the crowd that “you’ll never take back our country with weakness”, “You have to show strength and you have to be strong”, “We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated” and that ‘we’re going to walk down to the Capitol’, ‘to peacefully and patriotically make your voices heard’.

The Committee’s report sheds light on the symbiotic relationship between President Trump and Proud Boys, Oath Keepers, Three Percenters,

Qanon, Groyppers, and other violent right-wing extremist groups and their sympathizers as well as apparent Trump-right-wing-militia coordination that was orchestrated through Trump surrogates Roger Stone (convicted of 7 felony offenses and whom President Trump then granted a full and unconditional pardon) and former General Mike Flynn (who pled guilty to lying to the FBI, then was pardoned for it by President Trump). In concentrating mainly on Trump as the central cause of the Capitol attack itself and in omitting to analyze in any serious way the domestic terrorist threat posed by right-wing extremism as a clear and present danger to American democracy, the rule of law and equal protection of the laws, the Committee exhibited grievous misjudgment.

Bottom line? Although the Select Committee was mandated to investigate the “domestic terrorist attack upon the United States Capitol Complex”, it did not refer Trump, or for that matter anyone else, to the Justice Department for domestic terrorism prosecution. The Committee at least referred Trump for inciting an insurrection, but whether the Department of Justice decides to proceed on that basis remains to be seen.

### **Instead of Domestic Terrorism Prosecutions, Lenient Treatment**

The day after the attack, former Acting U.S. Attorney for the District of Columbia Michael Sherwin said: “Charges such as seditious conspiracy, rioting and insurrection will be considered if warranted”. The Capitol ‘riot’ was the product of ‘seditious conspiracy’ which is defined as conspiring to overthrow, put down, destroy or use ‘force to prevent, hinder, or delay the execution of any law of the United States’. Several rioters already have been charged and convicted for that offense. As for ‘insurrection’, case-law establishes that no intention to overthrow the government is necessary. Insurrection only has to involve the use of force or intimidation to resist or nullify a particular law for a public purpose, such as trying to redress a real or imagined grievance or injustice rather than for some private motive. The Capitol attack is commonly referred to as an ‘insurrection’, but two years on, no one has been charged for ‘insurrection’.

In fact, by February 2023, the majority of Capitol attack offenders had received no jail time whatsoever. Those who did, received relatively short sentences. Capitol rioters have been not charged with domestic terrorism

offences, but for more run-of-the-mill misdemeanors and felonies.

Consider a few of the more serious cases tried thus far. Texan Guy Reffitt - the first rioter to be prosecuted - was a member of the Three Percenters Militia and a recruiter for the violent extremist group. Equipped with body armor, handguns, flexi-cuffs, communication radios, megaphone, and camera-equipped helmet, he stormed the Capitol on January 6. The prosecution proved Reffitt was on a mission to disrupt Congress and to physically attack House Speaker Nancy Pelosi and Senate Majority Leader Mitch McConnell. On March 8, 2022, a jury found Reffitt guilty on all counts. On July 15, the prosecutor requested the judge to apply a sentence of 15 years, citing federal terrorism sentencing enhancement guidelines, but U.S. District Court Judge Dabney Friedrich refused this request and he declined to call Reffitt a 'domestic terrorist'. On August 1, 2022, Reffitt was sentenced to 7 years and 3 months imprisonment, not for domestic terrorism, but for the relatively mundane offenses of transporting a rifle and semi-automatic handgun for the purpose of 'civil disorder', 'obstruction of an official proceeding', 'entering or remaining in a restricted building or grounds with a deadly or dangerous weapon', 'interference with a law enforcement officer during a civil disorder' and 'obstruction of justice by hindering communication through force or threat of physical force'.

Similarly, on September 1, 2022, former marine and retired NYPD officer Thomas Webster was sentenced for having brutally tackled Capitol Police Officer Noah Rathbun on January 6, choking him and forcing him to the ground, which allowed others in the mob to kick Rathbun while he was down. Webster was sentenced to 10 years imprisonment for the felonies of "assaulting, resisting, or impeding officers with a dangerous weapon; obstructing officers during a civil disorder; entering and remaining in a restricted building or grounds while carrying a dangerous weapon; engaging in disorderly or disruptive conduct in a restricted building or grounds, while carrying a dangerous weapon, and engaging in physical violence in a restricted building or grounds, while carrying a dangerous weapon" and for one misdemeanor. In another case, co-defendants Julian Elie Khater and George Pierre Tanios pled guilty to spraying Officer Brian Sicknick with a chemical substance. Each faced a maximum of 20 years imprisonment and at the time of writing, sentencing was pending. Sicknick collapsed 8 hours after the attack and died the next

day. The D.C. Medical Examiner's Office determined that Sicknick's death occurred not from any injury, but from several strokes, and therefore from 'natural causes', which precluded homicide charges.

Although Reffitt, Webster, Khater and Tanios were sentenced to serious jail time, their sentences likely would have been much more commensurate with the seriousness of their crimes if federal sentencing guidelines for terrorism had been applied. Compare their treatment to persons convicted of terrorism in relation to ISIS or Al Qaeda or in relation to domestic terrorism in some other contexts. Cesar Sayoc got 20 years imprisonment for mailing pipe bombs to President Barack Obama, President Bill Clinton, Vice President Joe Biden, Secretary of State Hillary Clinton, CNN and others. Even climate change activist Jessica Reznicek was sentenced as a domestic terrorist to 8 years in prison and ordered to retribute \$3.2 million for "damaging and attempting to damage the pipeline using an oxy-acetylene cutting torch and fires near pipeline instrumentation and equipment in Mahaska, Boone, and Wapello Counties within the Southern District of Iowa". Upon Reznicek's sentencing, FBI Special Agent Kowel declared that: "Protecting the American people from terrorism – both international and domestic – remains the FBI's number one priority. We will continue to work with our law enforcement partners to bring domestic terrorists like Jessica Reznicek to justice. Her sentence today should be a deterrent to anyone who intends to commit violence through an act of domestic terrorism." How a seriously misguided climate change activist could be prosecuted as a domestic terrorist while no Capitol attackers were even charged with terrorism offenses, remains mystifying.

Two years on, Capitol rioters have received remarkably lenient sentences despite the gravity of their attack against the heart of American democracy and the rule of law. The Washington Post reported that by January 2, 2023, 357 out of 932 individuals had been charged federally for the Capitol attack, and only 5 were convicted of seditious conspiracy. It noted that of "more than 460 people charged with felonies, only 69 have been convicted and sentenced so far, mostly for assaulting police or obstructing Congress; all but four have received jail or prison time" and that the average prison sentence for a felony conviction so far is 33 months". The Post contrasted the D.C. District Court Judges' strong verbal condemnation for convicted defendants at trial with their actual



sentencing which averaged only 48 days and in the great majority of cases, below that recommended by federal prosecutors and sentencing guidelines. Intriguingly, the Post found that judges appointed by Democratic presidents ordered jail or prison sentences in 61 percent of Capitol attack cases and probation in 18 percent of cases, whereas Republican-appointed judges sentenced people to jail in only 48 percent of cases, and opted for probation twice as often as Democratic-appointed judges did.

Politico noted that: “In court filings, prosecutors have been exceedingly vague about their decisions not to seek terrorism-level punishment in the handful of Jan. 6 felony cases that have gone to sentencing” and that “Sentencing memorandums filed by prosecutors in at least five such cases use the same boilerplate language, stating that the government is not pursuing the enhancement ‘based on the facts and circumstances of the case.’”

Compare sentences of Muslims for plotting, attempting or providing material support to ISIS (“Islamic State in Iraq and al-Sham”), a foreign terrorist organization. In December 2022, 27 year-old Queens resident Parveg Ahmed was sentenced to more than 12 years imprisonment for having “attempted to travel to Syria to join ISIS”. Mustafa Mousab Alowemer, 24, of Pittsburgh, received 17 years in prison for providing material support to ISIS to attack a church. Uzbekistan national and resident of Chicago Dilshod Khusanov was sentenced to 11 years imprisonment for raising money for ISIS, and Abdurasul Juraboev, Akhror Saidakhmetov, and Dilkhayot Kasimov got 15 years imprisonment for conspiring to provide material support to foreign terrorists. U.S. national Bernard Raymond Augustine and lawful permanent resident Yemeni Mohamed Rafik Naji were each sentenced to 20 years imprisonment for attempting to provide material support to ISIS. Ali Saleh, an American from Queens, New York, got 30 years’ imprisonment for having “made numerous attempts to travel overseas to join ISIS, and when those efforts failed, attempted to assist others in joining the terrorist organization”. Former U.S. Air Force mechanic Tairod Pugh received a sentence of 35 years imprisonment for attempting to join ISIS.

Thus, to date, no Capitol attack offenders have been prosecuted for

domestic terrorism or even insurrection. U.S. District Court in Washington sentences have been surprisingly lenient, in stark contrast to sentencing of Muslims for ‘foreign terrorism’ offenses.

### **Legally Speaking, Was the Capitol Attack Really ‘Domestic Terrorism’?**

If prosecutors had faithfully applied the definitions of ‘domestic terrorism’ in the United States Code (‘Code’) or that of the Department of Homeland Security Act (‘DHS Act’) without fear or favor, they could probably have convicted and sentenced Capitol attack organizers, participants, and perhaps even Trump too, for domestic terrorism offenses. The Code defines ‘domestic terrorism’ as activities that “involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State” and that ‘appear to be intended’ to do one of the following: (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) affect the conduct of a government by mass destruction, assassination, or kidnapping. The Code says ‘domestic terrorism’ has to involve activities that have occurred “primarily within the territorial jurisdiction of the United States”, so that excludes the Capitol attack from being considered international terrorism, but ‘domestic terrorism’ definitions still apply. The DHS Act definition of ‘domestic terrorism’ is broader than that of the Code because it adds in any act that is ‘potentially destructive of critical infrastructure or key resources’.

Evidence from hundreds of Capitol riot criminal prosecutions to date suggests that many of the actions committed by the rioters, and perhaps by Trump himself, fit easily within Code and DHS Act legal definitions of ‘domestic terrorism’. It is worth underlining that an act of domestic terrorism requires only one of the acts enumerated above, not all three elements. Many of the acts perpetrated by at least some of the Capitol riots seem clearly to fulfill one or more of these conditions. The words ‘apparent intention’ direct the court to apply an objective test, i.e. to consider how an act looks to a reasonable observer, rather than a subjective test of exactly what Trump or anyone else actually may have been thinking at any given moment.

So, legally speaking, was the January 6, really 'domestic terrorism'? The correct answer is 'Yes'. First, many individuals committed acts that endangered human life and which violated U.S. and State criminal law, such as violently attacking Capitol Police Officers. Several people have been convicted already of such felonies. Second, Trump supporters and Trump himself tried to overturn the election results by intending to intimidate or coerce illegally the American civilian population into accepting a false electoral result, as the House Select Committee's Final Report documents. Third, some Capitol rioters tried to affect the conduct of government by trying to kidnap and / or assassinate Vice President Mike Pence and House Speaker Nancy Pelosi. Finally, the rioters were actually successful in interrupting the lawful transition of presidential power. All these factual elements together seem to exceed the statutory requirements for 'domestic terrorism' that 'involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State' and which 'appear to be intended to affect' the conduct of government, most obviously in the mob's declared attempt to kidnap and assassinate certain politicians and office holders.

Is it reasonable to believe that Capitol rioters were unaware of the intention of some members of the mob to disrupt the certification process or to threaten the life and safety of Mike Pence and Nancy Pelosi? No, it is not reasonable to believe that. Trump himself sent messages that many, including rioter Stephen Ayres, took as encouragement to storm the Capitol, as Ayres himself testified at his criminal trial. Not only were these intentions widely discussed among many of the Capitol riot organizers for weeks leading up to January 6 and during the attack itself, and that were broadly shared via social media, but a gallows to hang Mike Pence was even erected on Capitol Hill grounds for everyone to see. Hundreds chanted: 'Hang Mike Pence'. The Select Committee discovered that when Trump was told of the 'Hang Mike Pence' chant, he commented that the Vice President perhaps deserved to be hanged (page 137 of the Final Report). At 2:11, rioters smashed and entered the Capitol's south front first-floor windows. Trump egged on rioters by tweeting at 2:24 that Pence had shown 'cowardice' by not refusing to certify the election. As Select Committee member Elaine Luria put it: "He put a target on his own vice president's back". That happened at almost the exact moment Secret Service were forced to move Pence from his

Domestic terrorism prosecutions can communicate clearly where the boundaries are that separate constitutionally protected free speech on the one hand, from incitement to hatred and violence and planning, preparation and instigation of terrorist acts on the other hand.

Senate office to a more secure location inside the Capitol.

Mark Follman pointed out in his March-April 2021 Mother Jones article on "How Trump Unleashed a Domestic Terrorism Movement - And What Experts Say Must Be Done to Defeat It" that many seasoned experts, including former DHS assistant secretary Juliette Kayyem and former FBI agent Michael German, concur that Trump incited domestic terrorism during the Capitol attack and that he should be prosecuted for it.

In short, some, perhaps many, Capitol rioters seem to have engaged in domestic terrorism, but to date, none have been charged for domestic terrorism, nor even for 'insurrection' nor to date has Trump been indicted for having incited domestic terrorism.

### **The Failure to Charge and Prosecute Capitol Attackers for Domestic Terrorism Shows that the United States Is Not Ready to Address Right-Wing Extremism Meaningfully**

Terrorism is no ordinary crime. It specifically targets democratic governance and institutions. If not addressed properly, terrorism corrodes the rule of law, threatens equal protection of the laws by unfairly privileging certain political claims over others, and it demeans democracy. Public trust in American democracy already has steadily declined over the last two decades. The widely respected Economist Intelligence Unit's 2022 Democracy Index ranked the United States 30th out of 167 countries, below Israel and just above Slovenia, and called the U.S. a 'flawed democracy'. The Economist noted that political and cultural polarization posed the greatest threat to U.S. democracy where "differences of opinion in the U.S. have hardened into political sectarianism and institutionalized deadlock". One year after the January

6, 2021 attack, an Axios-Momentive poll found that 40% of Americans did not believe Joe Biden had won the 2020 election fairly. In January 2022, NPR reported that: “64% of Americans believe U.S. democracy is ‘in crisis and at risk of failing’” and two-thirds of GOP respondents agreed “with the verifiably false claim that ‘voter fraud helped Joe Biden win the 2020 election’ - a key pillar of the ‘Big Lie’ that the election was stolen from former President Donald Trump”. By September 2022, a Monmouth University poll discovered that 61% of Republican voters believed Biden’s win was due to election fraud.

Failure to impose punishment commensurate with the gravity of the crime betrays a fundamental responsibility of U.S. law enforcement to educate the American public that violent extremism is wholly illegitimate, that domestic terrorism is not patriotism, and that intimidating or coercing government officials to change policy or refrain from executing law, are serious criminal offenses that will be punished accordingly.

The equivocal political, judicial, intelligence and law enforcement responses do not bode well for the future resilience of American democracy, rule of law and equal protection of the laws from the threat of right-wing domestic terror. In this regard, the intelligence and law enforcement response leading up to and during January 6, 2021, speaks volumes about America’s enduring cultural blind spots towards white supremacist ideology and associated right-wing domestic terrorism. From August 2020, the Federal Bureau of Investigation, Department of Homeland Security Office of Intelligence and Analysis, Secret Service and other U.S. intelligence agencies had developed 38 ‘threat products’ (i.e. briefing notes, reports and memoranda) that assessed the risk of extremist political violence connected to the impending election process which the General Accountability Office (GAO) chronicled in its May 2022 report “Capitol Attack: Federal Agencies’ Use of Open Source Data and Related Threat Products Prior to January 6, 2021”. Discounting the warning signals of Trump’s escalating rhetoric before, during and after the 3 November 2020 election and the growing mass of publicly accessible online messages threatening violence in the lead-up to January 6, culminated in a gigantic intelligence failure. Internal Secret Service messages on the morning of January 6 reiterated time and time again: “There is no indication of civil disobedience.” Few rioters were security screened for weapons. The very few who were arrested were

found to be carrying guns and ammunition. Many other rioters were armed with pepper spray, stun guns, baseball bats and flagpoles. At least 2000 people actually entered the Capitol Building and at around 2:10 pm, rioters started smashing Senate doors and windows.

Weak, disorganized and uncoordinated agency reaction failed to prevent rioters from threatening the lives and safety of lawmakers. Rioters roamed the Capitol complex for hours and even smeared the House floor and hallways with their own urine and feces. Rioters threatened to hang Mike Pence and shoot House Speaker Nancy Pelosi. Pelosi’s office was vandalized. Seven persons died as a result of the Capitol attack, hundreds more were injured including 140 police officers, and officials eventually estimated damage at \$30 million. Rioters forced lawmakers to suspend election certification proceedings and to hide and flee the building. Capitol Hill Police took 7 hours from the time protesters first stormed crowd control barriers to declare the Capitol secure enough at 8:00 pm on January 6 for resumption of the certification process. Instead of mass arrests on the spot, undermanned and overwhelmed police arrested only 14 of the thousands of attackers on January 6, 2021. Compare that with Brazil’s Federal Police immediately detaining 1,843 persons for the January 8, 2023 attack on Brazil’s Supreme Court, Planalto and Congress.

The response to the January 6 debacle fits a long and well established pattern of American law enforcement agencies turning a blind eye to right-wing extremism ‘in an atmosphere of willful indifference’ - as the New York Times phrased it when referring to the legal response to the August 2017 Charlottesville Unite the Right Rally. There, white supremacist James Fields Jr. rammed a crowd of counter-protesters, killing Heather Heyer and injuring 35 others. The white supremacist perpetrator was prosecuted for a ‘hate crime’ rather than for domestic terrorism. Meanwhile, Muslims have been routinely prosecuted for international or domestic terrorism for similar crimes, as Professor Caroline Mala Corbin contends in an article titled “Terrorists Are Always Muslim but Never White”.

## Can American Intelligence and Law Enforcement Agencies Address Right-Wing Domestic Terrorism More Responsibly and Consistently Than They Have So Far?

Professor Shirin Sinnar cautions it may be “unrealistic to expect that a national security establishment accustomed to limited transparency and oversight - for institutional, cultural, and legal reasons - will respond to White supremacist violence in an open or accountable fashion, or with significant engagement with the minority communities most targeted by the threat”. One only has to recall how ruthlessly the FBI harassed Martin Luther King Jr. for at least 5 years with an intense campaign of surveillance, wiretapping, intimidation, and blackmail while the Ku Klux Klan terrorized African Americans across the US, but this is not just history. In the wake of protests in Minneapolis over the police killing of George Floyd, President Trump declared on May 31, 2020 that: “The United States of America will be designating ANTIFA as a Terrorist Organization”, and Trump’s Attorney General William Barr said: “The violence instigated and carried out by antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly”.

Selective focus on some groups for domestic terrorism while systematically ignoring others offends the equal protection of the laws and it debases rule of law institutions across the United States. ‘White Replacement Theory’ or ‘Great Replacement’ theory’ - which contends that the U.S. white majority population is being deliberately replaced by non-white immigrants - forms a pillar of white supremacist grievance. Alarming, it has been mainstreamed in the Republican party thanks in large part to President Trump’s overt racism and his white supremacist dog whistles. It has also severely distorted American domestic intelligence and police action on terrorism by systematically focusing law enforcement attention and resources on left-wing groups that in fact were not a violent threat all the while ignoring real right-wing danger.

Many white supremacist groups and violent right-wing extremist groups maintain active links with serving law enforcement personnel. A leaked cache of e-mails dating from May 2011 to December 2017 reveals that the D.C. Metropolitan Police Intelligence Bureau focused on monitoring anti-racist and anti-Fascist groups rather than right-wing groups. On

February 15, 2023, during the D.C. criminal trial of right-wing extremist Proud Boys national chairman Henry ‘Enrique’ Tarrío, the prosecutor introduced into evidence e-mails showing that Tarrío had received inside information for at least six months from Intelligence Bureau Lieutenant Shane Lemond leading up to January 6, and that Lemond even tipped off Tarrío that police might be seeking an arrest warrant against him. Tarrío was in fact arrested two days before the Capitol attack on a charge relating to the burning of a Black Lives Matter banner on December 12, 2020. Tarrío was charged in June 2022 with seditious conspiracy for plotting to use force to keep Trump in power and his criminal trial commenced on January 13, 2023.

Belatedly, parts of American officialdom seem to be in the process of recognizing the seriousness of right-wing domestic terrorism but only very tentatively. In November 2022, the U.S. Senate Committee on Homeland Security and Governmental Affairs concluded three years of hearings and research with the observation that since 2019, although the DHS and FBI frequently identified white supremacist violence as the main source of persistent and lethal domestic terrorism, “the federal government has continued to allocate resources disproportionately aligned to international terrorist threats over domestic terrorist threats”. The Committee further complained that the federal government failed even to “comprehensively track and report data on domestic terrorism despite a requirement from Congress to do so”. President Biden’s June 2021 National Strategy for Countering Domestic Terrorism represents a laudable step forward. However, prospects for the National Strategy’s success took a major hit with the appointment of far-right Republicans Paul Gosar and Marjorie Taylor Greene to the powerful House Oversight Committee - the Committee responsible for supervising the ‘efficiency, effectiveness, and accountability of the federal government and all its agencies’.

American political leaders and rule of law agencies and institutions need to separate radical far-right violence-prone individuals and groups from the less committed political middle and it is precisely here where vigorous prosecutions for domestic terrorism could have, and perhaps can still, help. Domestic terrorism prosecutions can communicate clearly where the boundaries are that separate constitutionally protected free speech on the one hand, from incitement to hatred and violence and planning, preparation and instigation of terrorist acts on the other hand.

The January 6, 2021 Capitol attack should have made crystal clear to all Americans that white supremacist ideology, xenophobia, antisemitism, Islamophobia and other forms of racism and religious intolerance cannot be allowed to run rampant throughout American political life, but this realization seems not to have been achieved. These antisocial, rather demented inclinations, further soured by rancid conspiracy theories born of ignorance, prejudice and hate, all militate strongly towards authoritarianism. They interfere in the functioning of democratic institutions, exacerbate steady corrosion of the rule of law and diminish social trust in American democracy.

One hopes that democracy in America is better than it looks right now. The rule of law remains sacred in the US, even if it is not always honored to the fullest. The deep and abiding respect most Americans seem to have for the rule of law could yet prove to be the saving grace of American democracy. Perhaps as fewer and fewer grow less enamored with Trump, Trump's family, and the authoritarianism Trump represents, prospects could improve for broader and more responsible civic engagement from the moderate political majority. This is by no means guaranteed however: on 17 February 2023, a Harvard-CAPS poll found that in hypothetical 2024 election match-ups, Trump would beat Republican challengers Ron DeSantis and Nikki Haley, as well as President Biden and Vice President Kamala Harris.

In any case, eventual disaffection with Trump and Trumpism will be far from sufficient to combat right-wing domestic terrorism in the United States. Americans will have to either reject or tire of right-wing boorishness, the vacuousness of political polarization, conspiracy-fueled cynicism and racial hatred. They will have to rediscover instead more constructive cooperation that better fosters respect for diversity, human rights, and equal protection of the laws all of which remain crucial for the sanctity of democracy and the rule of law in America.

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