

# Democracy at Risk: Domestic Terrorism and Attack on the U.S. Capitol

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## ABSTRACT

The year 2022 begins with democracy hanging in the balance. On February 13, 2021, Donald John Trump becomes the only American president to be impeached and acquitted twice. His acquittal for the second time follows a violent mob, having been incited by the lame-duck president, into marching down Pennsylvania Avenue to break into and vandalize the Capitol Building. It is now known that at least 138 law enforcement officers suffered from or received burns, concussions, rib fractures, heart attack—and at least five deaths are attributed to this insurrection. More than 725 individuals are subsequently charged for their role in this violent crime. Here is an account of the events leading up to impeachment and the constitutional duties and responsibilities that follow.

America is at a crossroads. Encouraged by foreign powers, the rise of domestic terrorism in the United States has now become a major threat to the fragile American experiment. Preservation of this precious republic will require a diligent and thoughtful daily commitment to preserving the sanctity and efficient functioning of each of the three independent branches of government.

## CONTENTS

I. OVERVIEW .....	1155
II. JANUARY 6, 2021 .....	1157
<i>A. Capitol Under Siege</i> .....	1158

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<i>B. Rage, Chaos, and Destruction</i> .....	1159
<i>C. Presidential Incitement</i> .....	1161
<i>D. Systemic Racism</i> .....	1163
III. FOUR YEARS OF DONALD TRUMP AND HIS ENABLERS .....	1164
<i>A. The First Impeachment</i> .....	1165
<i>B. Continued Schemes at Overturning Election Results</i> .....	1166
<i>C. Pressure on Justice Department</i> .....	1167
<i>D. President Trump's Enablers</i> .....	1168
<i>E. The Big Lie</i> .....	1168
<i>F. Investigations and Arrests Begin</i> .....	1174
<i>G. Role of Rep. Scott Perry</i> .....	1175
IV. IMPEACHMENT, THE HOUSE, AND A SINGLE ARTICLE .....	1176
<i>A. Impeachment</i> .....	1176
<i>B. Vice President Mike Pence and the 25th Amendment</i> .....	1178
<i>C. The Impeachment Resolution</i> .....	1181
<i>D. Debate</i> .....	1183
<i>E. The Vote</i> .....	1183
V. TRIAL IN THE SENATE .....	1183
<i>A. Republicans Argue Procedural Unconstitutionality</i> .....	1184
<i>B. Debate</i> .....	1187
<i>C. The Vote</i> .....	1188
VI. IMPACT OF MILITIAS & OTHER PARTICIPANTS.....	1189
<i>A. Focus on Domestic Terrorism</i> .....	1190
<i>B. Domestic Terrorism Defined</i> .....	1192
<i>C. Domestic Terrorism Prevention Act (DTPA)</i> .....	1193
<i>D. Charlottesville, White Supremacy Groups &amp; Proud Boys</i> .....	1194
<i>E. Proud Boys</i> .....	1194
<i>F. Militias and Plot to Kidnap Michigan Governor</i> .....	1196
<i>G. Boogaloo Bois</i> .....	1197
<i>H. QAnon</i> .....	1199
<i>I. Oath Keepers</i> .....	1201
<i>J. Pipe Bombs Planted</i> .....	1203
<i>K. White House Connections</i> .....	1203
VII. ROLE OF SOCIAL MEDIA IN RADICALIZATION .....	1204
<i>A. Facebook</i> .....	1207
<i>B. Twitter</i> .....	1209
<i>C. Parler &amp; AWS</i> .....	1211
<i>D. Telegram and Signal</i> .....	1212

2022]	<i>Democracy at Risk</i>	1155
VIII. THE FOURTEENTH AMENDMENT.....		1213
IX. POST-CAPITOL ATTACK DEVELOPMENTS .....		1214
<i>A. Hon. Bennie G. Thompson v. Trump, Giuliani, Proud Boys</i>		
<i>&amp; Oath Keepers .....</i>		1217
<i>B. Rep. Eric Swalwell v. Donald J. Trump, et al. ....</i>		1217
<i>C. Investigations Continue.....</i>		1219
<i>D. Select Committee to Investigate the January 6th Attack.....</i>		1225
<i>E. A Country Deeply Divided.....</i>		1225
CONCLUSION .....		1226

## I. OVERVIEW

I know the forces that divide us are deep and they are real. But I also know they are not new. Our history has been a constant struggle between the American ideal that we are all created equal and the harsh, ugly reality that racism, nativism, fear, and demonization have long torn us apart. The battle is perennial. Victory is never assured.

Joseph R. Biden  
46th President of the United States  
Inauguration Speech,  
January 20, 2021<sup>1</sup>

The year 2022 began with democracy hanging in the balance. On January 6, 2021, after incitement by lame-duck<sup>2</sup> President Donald J. Trump, a violent mob broke into and vandalized the Capitol building and proceeded to commit numerous instances of violence. A little over a month later, we learned “about 140 officers . . . were injured,” resulting in injuries ranging from “concussions, rib fractures, burns and even a mild heart attack.”<sup>3</sup> Capitol Police Officer Brian D. Sicknick was killed during the riots and two other officers later died by suicide. Just a week later, five

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1. Joseph R. Biden, President of the United States, Inaugural Address by President Joseph R. Biden, Jr., (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr> [<https://perma.cc/S87B-XGPH>]; see also Aaron Blake & Eugene Scott, *Joe Biden’s Inauguration Speech Transcript, Annotated*, WASH. POST (Jan. 20, 2021), <https://www.washingtonpost.com/politics/interactive/2021/01/20/biden-inauguration-speech/> [<https://perma.cc/2SWK-DVVR>].

2. The term “lame duck” is defined by Merriam-Webster as “an elected official or group continuing to hold office during a period between the election and the inauguration of a successor.” *Lame Duck*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/lame%20duck> [<https://perma.cc/R78J-JKN7>].

3. Michael S. Schmidt & Luke Broadwater, *Officers’ Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [<https://perma.cc/QM99-R6NK>].

deaths have been attributed to the riot.<sup>4</sup> In addition, David Cicilline, a House impeachment manager, noted that “[a]t least [thirty-eight] Capitol Police officers have tested positive for the coronavirus or were exposed to it . . . [and] [n]early 200 National Guard personnel who were deployed to protect the Capitol in the weeks after the siege also tested positive.”<sup>5</sup> On Wednesday, January 13, 2021, Donald J. Trump is impeached for the second time by the U.S. House of Representatives—the only president to attain this distinction.<sup>6</sup> Just one month later on February 13, 2021, the Senate, by a vote of 5743, failed to reach the necessary two-thirds majority required for conviction of high crimes and misdemeanors.<sup>7</sup>

The movement toward impeachment results in part because President Trump proceeded for months with numerous “efforts to subvert and obstruct the certification . . . of the 2020 Presidential election . . . includ[ing] a phone call . . . during which [he] urged the secretary of state of Georgia, Brad Raffensperger, to ‘find’ enough votes to overturn the Georgia Presidential election results and threatened Secretary Raffensperger if he failed.”<sup>8</sup> The Impeachment Resolution states, in relevant part:

In the months preceding the Joint Session [January 6, 2021], President Trump repeatedly issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials. Shortly before the Joint Session commenced, President Trump [] addressed a crowd at the Ellipse in Washington, DC. There, he reiterated false claims that ‘we won this election, and we won it by a landslide[.]’ He also willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol, such as: ‘if you don’t fight like hell you’re not going to have a country anymore[.]’ Thus incited by President Trump, members of the crowd he had addressed, in an attempt to, among other objectives, interfere with the Joint Session’s solemn constitutional duty to certify the results of the 2020 Presidential election, unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress,

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4. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> [<https://perma.cc/EC24-EHBX>].

5. Schmidt & Broadwater, *supra* note 3.

6. Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, GUARDIAN (Feb. 13, 2021), <https://www.theguardian.com/us-news/2021/feb/13/donald-trump-acquitted-impeachment-trial> [<https://perma.cc/8U4A-NMVQ>].

7. *Id.*

8. H.R. Res. 24, 117th Cong. (2021).

the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious acts. . . .

In all this, President Trump gravely endangered the security of the United States and its institutions of Government. He threatened the integrity of the democratic system, interfered with the peaceful transition of power, and imperiled a coequal branch of Government. He thereby betrayed his trust as President, to the manifest injury of the people of the United States.<sup>9</sup>

This article proceeds in nine parts. First, it is a discussion about the tragic events of the January 6, 2021 violent insurrection and storming of the U.S. Capitol Building. Second, for context and perspective, this article briefly looks at the first impeachment of President Trump, his four years as president, and provides an inquiry into his enablers. Third, this article discusses impeachment and the relevant single article. Fourth, it is a discussion of trial in the Senate. Fifth, it is an inquiry into the growing threat and participation of militias and domestic terrorist organizations in the chronology of relevant events. Sixth, it is a look at the role of social media in radicalization. Seventh, this article discusses the fourteenth Amendment to the Constitution. Eighth, it is an inquiry into post-Capitol attack developments. And last, this article concludes by observing that America is at a crossroads.

Encouraged by foreign powers, the rise of domestic terrorism in the United States is now a major threat to the American democratic experiment. Preservation of this precious republic will require a diligent and thoughtful commitment to preserving the sanctity and efficient functioning of each of the three independent branches of government.

## II. JANUARY 6, 2021

In the early afternoon of January 6th [2021]— as the United States Senate and House of Representatives were meeting to certify the vote count of the Electoral College — a large crowd gather outside the Capitol building. Shortly after 2 p.m., individuals in the crowd began to force entry into the Capitol, by smashing windows and assaulting U.S. Capitol police, who were stationed there to protect the members of Congress as they took part in one of the most solemn proceedings of our democracy. Others in the crowd encouraged and assisted those who attacked the police. Over the course of several hours, outnumbered law enforcement officers sustained a barrage of repeated, violent attacks. About [eighty] Capitol Police and [sixty] D.C. Metropolitan Police were assaulted. . . . Perpetrators punched dozens of law enforcement officers, knocking some officers

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9. *Id.*

unconscious; some perpetrators tackled and dragged law enforcement officers. Among the many examples of such violence: One officer was crushed in a door. Another was dragged down a set of stairs, face down, repeatedly tased and beaten, and suffered a heart attack; some perpetrators attacked law enforcement officers with chemical agents that burned their eyes and skin; and some assaulted officers with pipes, poles, and other dangerous or deadly weapons; [and] [p]erpetrators also targeted, assaulted, tackled and harassed journalists and destroyed their equipment. With increasing numbers of individuals having breached the Capitol . . . proceedings in both chambers were disrupted for hours—interfering with a fundamental element of American democracy: the peaceful transfer of power from one administration to the next. Those involved must be held accountable, and there is no higher priority for us at the Department of Justice.

Merrick B. Garland  
Attorney General  
January 5, 2022<sup>10</sup>

#### *A. Capitol Under Siege*

January 6, 2021 will long be remembered as the day of “a violent mob storming the Capitol at the instigation of a defeated leader trying to hang onto power as if America was just another authoritarian nation.”<sup>11</sup> At the behest of President Trump, his supporters attacked the Capitol in an attempt to halt Congress from confirming President-elect Joseph R. Biden Jr.’s presidential victory, which prompted Capitol police to evacuate lawmakers amidst a scene of violence.<sup>12</sup> In the final days of President Trump’s four-year term, rioters “acting in the president’s name vandaliz[ed] Speaker Nancy Pelosi’s office, smash[ed] windows, loot[ed] art and briefly [took] control of the Senate chamber.”<sup>13</sup> Outside the Capitol, rioters “erected a gallows, punctured the tires of a police SUV,

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10. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just., Remarks on the First Anniversary of the Attack on the Capitol (Jan. 5, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol> [<https://perma.cc/7CMH-YA2C>].

11. Peter Baker, *Americans at the Gates: The Trump Era’s Inevitable Denouement*, N.Y. TIMES, Jan. 7, 2021, at A1.

12. See Nicholas Fandos & Emily Cochrane, *Trump Incites Mob: Rampage in Capitol Leads to Evacuations; Democrats Win in Georgia to Take the Senate: Count to Confirm Biden’s Victory is Delayed*, N.Y. TIMES, Jan. 7, 2021, at A1.

13. Nicholas Fandos & Emily Cochrane, *After a Day of Chaos, Congress Certifies Joe Biden’s Election Victory*, in *Mob Attack, Incited by Trump, Delays Election Certification*, N.Y. TIMES (Feb. 17, 2022), <https://www.nytimes.com/live/2021/01/06/us/electoral-vote> [<https://perma.cc/6ATA-WDVP>].

and left a note on its windshield saying, ‘PELOSI IS SATAN.’”<sup>14</sup> Republican Senator Mitt Romney yelled at his Republican colleagues on the floor: “‘This is what the president has caused today, this insurrection’”<sup>15</sup> Describing the event for the Wall Street Journal, Gerald Seib writes, “Never in recent memory have the events of a single [twenty-four] hour period so shaken two presidencies, the very capitol of the United States and the nation itself.”<sup>16</sup> Journalist Seib continues, “The remarkable scenes of political violence that broke out amid what was to be a peaceful confirmation of the transfer of power are testing America’s democratic institutions, and it’s far from clear how they will respond.”<sup>17</sup>

A week later, on Wednesday, January 13, 2020, Donald J. Trump, forty-fifth President of the United States, is impeached for the second time during his single term, the only president to have achieved this distinction.<sup>18</sup>

### *B. Rage, Chaos, and Destruction*

Resulting in five deaths and injuring numerous police officers, “[t]he extraordinary invasion of the Capitol was a last-ditch act of desperation from a camp facing political eviction.”<sup>19</sup> Journalist Peter Baker writes:

The scenes in Washington would have once been unimaginable: A rampage through the citadel of American democracy. Police officers brandishing guns in an armed standoff to defend the House chamber. Tear gas deployed in the Rotunda. Lawmakers in hiding. Extremists standing in the vice president’s spot on the Senate dais and sitting at the desk of the speaker of the House.

The words used to describe it were equally alarming: Coup. Insurrection. Seditious. Suddenly the United States was being compared to a ‘banana republic’ and receiving messages of concern from other capitals. ‘American carnage,’ it turned out, was not what President Trump would stop, as he promised upon taking office, but

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14. Nicholas Fandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden’s Win*, N.Y. Times (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html> [<https://perma.cc/4EVM-JWWJ>].

15. Jonathan Martin, *Mitt Romney, on His Way to Secure Location, Says, ‘This is What the President Caused’ in Today’s Rampage at the Capitol, as It Happened*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/live/2021/01/06/us/washington-dc-protests> [<https://perma.cc/AP6B-QDMB>].

16. Gerald F. Seib, *Political Violence Shakes Country*, WALL ST. J., Jan. 7, 2021, at A1.

17. *Id.*

18. Natalie Andrews, Kristina Peterson & Rebecca Ballhaus, *Trump Impeached Again*, WALL ST. J. (Jan. 13, 2021) <https://www.wsj.com/articles/trump-to-face-impeachment-vote-over-capitol-riot-11610543781> [<https://perma.cc/J2EU-ZLYP>].

19. Baker, *supra* note 11.

what he wound up delivering four years later to the very building where he took the oath.

The convulsion in Washington capped 1,448 days of Twitter storms, provocations, race-baiting, busted norms, shock-jock governance and truth-bending prevarication from the Oval Office that have left the country more polarized than in generations. Those who warned of worse-case scenarios only to be dismissed as alarmists found some of their darkest fears realized. By day's end, some Republicans discussed removing Mr. Trump under the [twenty-fifth] Amendment . . . .<sup>20</sup>

Colorado Representative Jackson Crow, a Democrat, "and former Army Ranger in Iraq, who found himself captive in the House chamber . . . [said,] 'I thought we'd have to fight our way out.'"<sup>21</sup> It is now clear "[w]hat unfolded at that point . . . was a tableau of violence and mayhem that shocked the nation . . . the most severe intrusions of the Capitol since the British invaded during the War of 1812 and burned it down."<sup>22</sup> *The New York Times* reported:

The crowd was peppered with far-right nationalists, military veterans and militia members, and adherents of a dangerous conspiracy. Rioters hurled invectives at police officers and called them traitors, threatening to kill former Vice President Mike Pence, Speaker Nancy Pelosi and Representative Alexandria Ocasio-Cortez. . . .

'You could hear people shouting outside the door of the chambers and pounding on the door,' said Representative Zoe Lofgren, Democrat of California. . . . Since the breach began, rioters had wielded bear spray, batons, pipes and fire extinguishers against officers. When the lieutenant thought he heard on the radio that shots had been fired, according to his account, he positioned himself in a doorway off to one side of the corridor, with a view of anyone trying to get through the glass doors. . . .

As [rioters] moved in, they got a clear view of the lieutenant on the other side, who was raising his .40-caliber Glock handgun. 'There's a gun!' 'He's got a gun!' people shouted. In the thick of the action, a man wielding the helmet broke out the windowpane in front of Ms. Babbitt. A few seconds later, someone tried to boost her through. She wore a Trump flag around her neck like a cape, and a backpack over it.

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20. *Id.*

21. Zolan Kanno-Youngs, Sabrina Tavernise & Emily Cochrane, *As House Was Breached, a Fear 'We'd Have to Fight' to Get Out*, N.Y. TIMES, Jan. 7, 2021, at A1.

22. *Id.*



As Ms. Babbitt was hoisted up, the lieutenant fired a single shot. She plummeted backward, striking the hard floor. There was no evidence that she had been armed. Since Ms. Babbitt's death, far-right extremists and white supremacists have claimed her as a martyr and a 'freedom fighter,' even reproducing her image on flags and with anti-Semitic imagery.<sup>23</sup>

### C. Presidential Incitement

As reported by the *Wall Street Journal*, "Hundreds of people echoing Mr. Trump's false claims that Democrats stole the 2020 election had gathered Wednesday [January 6th] ahead of a last-ditch effort from his congressional allies to contest the results in Congress."<sup>24</sup> The post-November 2020 election was not the first time that Donald Trump wallowed in the fiction of widespread voter fraud. During 2016, this was a popular ploy that Mr. Trump parroted despite facts to the contrary, "insist[ing] that the election was fraudulent—that millions of false votes were cast for his opponent."<sup>25</sup> Yale University historian Timothy Snyder writes:

In 2020, in the knowledge that he was trailing Joseph R. Biden in the polls, [Donald Trump] spent months claiming that the presidential election would be rigged and signaling that he would not accept the results if they did not favor him. He wrongly claimed on Election Day that he had won and then steadily hardened his rhetoric: With time, his victory became a historic landslide and the various conspiracies that denied it ever more sophisticated and implausible.<sup>26</sup>

Just minutes before the mob marched to the Capitol building, Donald Trump, Jr. and other Trump supporters conspired to work the crowd into a frenzy. Rudolph Giuliani said, "Let's have trial by combat,"<sup>27</sup> and Alabama Representative Mo Brooks yelled, "Today is the day American patriots start taking down names and kicking ass."<sup>28</sup> Then, when his turn to address the gathering of supporters came, President Trump:

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23. Adam Goldman & Shaila Dewan, *Shouting, Smashed Glass, a Lunge, Then a Gunshot*, N.Y. TIMES, Jan. 24, 2021, at A1–A18.

24. Lindsay Wise & Andrew Duehren, *Mob Storms Capitol — Woman Is Killed By Police; Members Evacuated*, WALL ST. J., Jan. 7, 2021, at A1–A2.

25. Timothy Snyder, *The American Abyss*, N.Y. TIMES MAG. (Dec. 28, 2021), <https://www.nytimes.com/2021/01/09/magazine/trump-coup.html> [<https://perma.cc/K7V9-D9SP>].

26. *Id.*

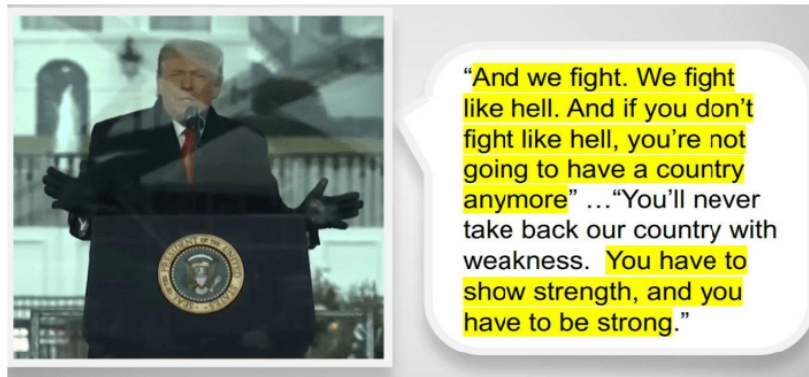
27. Michael R. Sisak, *Bar Association Seeks Giuliani Ban over 'Combat' Remarks*, BOS. HERALD (Jan. 11, 2021), <https://www.bostonherald.com/2021/01/11/bar-association-seeks-giuliani-ban-over-combat-remarks> [<https://perma.cc/3YYM-CY4U>].

28. Rachel Sharp, *Congressman Mo Brooks Refuses to Apologize For Encouraging 'American Patriots' to 'Take Down Names and Kick Ass' in Trump's Rally Before MAGA Mob Stormed US Capitol and Says He Was Talking About a Donkey*, DAILY MAIL (Jan. 12, 2021),

Calling the outcome of the election “this egregious assault on our democracy,” he said his supporters should “walk down to the Capitol. We are going to cheer on our brave senators and congressmen and women,” he continued, “and we are probably not going to be cheering so much for some of them—because you will never take back our country with weakness.”<sup>29</sup>

Reading from Representative Swalwell’s complaint, “Trump continued to incite the crowd. . . . He told the crowd to ‘walk down Pennsylvania Avenue. . . . And we’re going to the Capitol. . . . We’re going to try and give them [the Republicans] the kind of pride and boldness that they need to take back our country.’ The crowd cheered in response.”<sup>30</sup> Exhibit 1 shows a quote from President Trump’s remarks just minutes before the crowd proceeded toward attacking the Capitol.

Exhibit 1 <sup>31</sup>



Brookings scholar Darrell M. West writes, “After a highly incendiary speech from Trump, they marched to the Capitol, smashed windows and doors, stormed the building, assaulted police officers, stole federal property, and temporarily stopped members of Congress from certifying Biden’s victory.”<sup>32</sup> During the two weeks immediately following the

<https://www.dailymail.co.uk/news/article-9130413/Mo-Brooks-REFUSES-apologize-urging-patriots-names-kick-ass-riot.html> [<https://perma.cc/S4EH-56N2>].

29. Maggie Haberman, *Trump Told Crowd “You Will Never Take Back Our Country with Weakness”*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html> [<https://perma.cc/86RB-BKZE>].

30. Complaint at 34, *Swalwell v. Trump*, No. 1:21-cv-00586 (D.C. Dist. Mar. 5, 2021).

31. *Id.* at 35.

32. Darrell M. West, *The Role of Misinformation in Trump’s Insurrection*, BROOKINGS (Jan. 11, 2021), <https://www.brookings.edu/blog/techtank/2021/01/11/the-role-of-misinformation-in-trumps-insurrection/> [<https://perma.cc/6ADL-GE4U>].

mob's storming of the Capitol, a group of people came forward and directly implicated President Trump.<sup>33</sup> As investigations continue:

In court papers and interviews, at least four pro-Trump rioters have said they joined the march that spiraled into violence in part because the president encouraged them to do so. In the last few days, a retired firefighter charged with assaulting members of the Capitol Police force told a friend he went to the building following 'the president's instructions,' according to a criminal complaint, and a Texas real estate agent accused of breaching the building told a reporter that by protesting in Washington, she had "answered the call of my president."<sup>34</sup>

#### D. Systemic Racism

Thoughtful observers of American civil protests during recent years will inevitably ask how it is possible for such a large mob to break into the Capitol building and take control. Brookings scholar Rashawn Ray writes, "Make no mistake, the Capitol insurgency was about making America great for white people. In erecting a hangman's noose, waving the Confederate flag, and wearing white nationalist paraphernalia, including an Auschwitz Concentration Camp shirt, the domestic terrorists showed America they fundamentally believe in maintaining and enacting white supremacy."<sup>35</sup> Despite the FBI and other national security officials' repeated warnings of a credible threat on January 6, the Capitol Police were grossly unprepared, which showed "negligence at the least and conspiracy at the most."<sup>36</sup> Law journal space limitations preclude coverage deserved by the topic of systemic racism. However, the following remarks from Rashawn Ray during January 2021 are noteworthy:

These domestic terrorists also had a blueprint for what might happen when they stormed the Capitol. During COVID-19 anti-lockdown protests, people similar to these domestic terrorists stormed state capitals and little happened. They pushed the boundaries on law enforcement and our democratic ideals and nothing happened. So, they not only felt emboldened by Trump and other politicians complicit in the Capitol coup, but they were shown directly from previous interactions with law enforcement at government buildings

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33. Alan Feuer & Nicole Hong, *We Just Followed Trump's Cue, Several Accused in Rioting Say*, N.Y. TIMES, Jan. 18, 2021, at A1.

34. *Id.*

35. Rashawn Ray, *What the Capitol Insurgency Reveals About White Supremacy and Law Enforcement*, BROOKINGS (Jan. 12, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/01/12/what-the-capitol-insurgency-reveals-about-white-supremacy-and-law-enforcement/> [<https://perma.cc/W9PY-L6S3>].

36. *Id.*

that nothing would happen. After all, [seventeen]-year-old Kyle Rittenhouse drove from Illinois and killed Black Lives Matter protesters in Wisconsin. He walked straight past law enforcement with the loaded AR-15 rifle he used to kill them and police simply told him to go home. People like Rittenhouse were [] able to drive to Washington, DC, park a vehicle with bombs and guns on residential streets, and walk to the Capitol and take it over.

But, the domestic terrorists' boldness with law enforcement is much deeper than just recent incidents. Their experiences with law enforcement throughout their lifetimes show them how police often privilege whiteness over blackness. They are accustomed to police officers being deferential with them. They are accustomed to being entitled to spew white nationalist rhetoric in settings where police are present. And, I am not talking about only during protests. I am talking about at dinner tables, at restaurants, and other places where police officers are present. It is important to comprehend that the people who stormed the Capitol are our co-workers, lawyers, CEOs, military veterans, police officers, neighbors, and family members. This is America and we must admit it.<sup>37</sup>

### III. FOUR YEARS OF DONALD TRUMP AND HIS ENABLERS

Whatever our ex-President claims he thought might happen that day . . . whatever reaction he says he meant to produce . . . by that afternoon, he was watching the same live television as the rest of the world. A mob was assaulting the Capitol in his name. These criminals were carrying his banners, hanging his flags, and screaming their loyalty to him. It was obvious that only President Trump could end this. Former aides publicly begged him to do so. Loyal allies frantically called the Administration. But the President did not act swiftly. He did not do his job. He didn't take steps so federal law could be faithfully executed, and order restored.

Instead, according to public reports, he watched television happily as the chaos unfolded. He kept pressing his scheme to overturn the election! Even after it was clear to any reasonable observer that Vice President Pence was in danger . . . even as the mob carrying Trump banners was beating cops and breaching perimeters . . . the President sent a further tweet attacking his Vice President. Predictably and foreseeably under the circumstances, members of the mob seemed to interpret this as further inspiration to lawlessness and violence.

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37. *Id.*

Mitch McConnell  
Senate Minority Leader  
February 13, 2021<sup>38</sup>

Many Americans found aspects of Donald Trump's first few years as president particularly disturbing, for instance: the Muslim Ban;<sup>39</sup> tolerance and instigation of white supremacists as evidenced by the Charlottesville rally;<sup>40</sup> the separation and orphaning of hundreds of children fleeing oppression in their countries of origin;<sup>41</sup> lack of a coherent foreign policy,<sup>42</sup> combined with an apparent coziness with autocrats such as Vladimir Putin<sup>43</sup> and others; and failure to manage the U.S. pandemic crisis.<sup>44</sup> Even before the first impeachment in 2019, widespread dissatisfaction with President Trump was noted.<sup>45</sup> For example, Tom Steyer's Need to Impeach group listed the following reasons to impeach as of November 11, 2018: obstructing justice; Emoluments Clause violations; conspiring to commit crimes against the United States, and concealment of the same; advocating violence and undermining equal protection; abuse of the pardon power; engaging in dangerous conduct to U.S. peace and security; improper use of law enforcement; undermining freedom of the press; and cruel and unconstitutional imprisonment of children and their families.<sup>46</sup>

### A. *The First Impeachment*

Law journal space limitations preclude a full recital of the many events, charges and investigations surrounding the first successful impeachment of President Donald Trump. Coverage of the events known

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38. See Read McConnell's Remarks on the Senate Floor Following Trump's Acquittal, CNN (Feb. 13, 2021), <https://www.cnn.com/2021/02/13/politics/mcconnell-remarks-trump-acquittal/index.html> [<https://perma.cc/NV57-ALUE>].

39. See Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 634–36 (2017).

40. See Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 564 (2019).

41. *Id.* at 579.

42. See Lawrence J. Trautman, *Impeachment, Donald Trump and the Attempted Extortion of Ukraine*, 40 PACE L. REV. 141, 170 (2020) (discussing open letter to Wash. Post by forty-four former U.S. Senators stating, in relevant part, "it is our shared view that we are entering a dangerous period, and we feel an obligation to speak up about serious challenges to the rule of law, the Constitution, our governing institutions and our national security . . . . We are at an inflection point in which the foundational principles of our democracy and our national security interests are at stake, and the rule of law and the ability of our institutions to function freely and independently must be upheld.").

43. See Lawrence J. Trautman, *Grab 'Em By The Emoluments: The Crumbling Ethical Foundation of Donald Trump's Presidency*, 17 CONN. PUB. INTEREST L.J. 169, 204 (2018).

44. See Eddie Bernice Johnson, *The Demographics of Death: An Early Look at Covid-19, Cultural and Racial Bias in America*, 48 HASTINGS CONST. L.Q. 357, 417 (2021).

45. See Trautman, *supra* note 40, at 550.

46. Trautman, *supra* note 42, at 168.

up until the vote is offered elsewhere.<sup>47</sup> However, the continued role played by Russian disinformation distributed over social media platforms to U.S. citizens remains of particular relevance to understanding the events influencing and leading up to the November 2020 U.S. presidential election. This happened at the same time as the pervasive cybersecurity threat to all American institutions<sup>48</sup> and, in particular, the cyberattack on U.S. governmental agencies and businesses for at least ten months during 2020, and likely continuing as this article goes to press.<sup>49</sup> Almost ten months after the hack is believed to have started, the *Wall Street Journal* reported: “Investigators continue to try to understand the full extent of the hack, so far linked to using a malicious update to widely used software provided by a Texas-based network-management company called SolarWinds Corp. to compromise U.S. government agencies and scores of private businesses across the globe.”<sup>50</sup>

### B. Continued Schemes at Overturning Election Results

Just a day following the Senate impeachment vote, it was reported that Fulton County, Georgia District Attorney Fani T. Willis was deciding “whether to bring criminal charges over Mr. Trump’s phone call to Georgia’s secretary of state, Brad Raffensperger, asking him to ‘find’ votes to erase the former president’s loss there, and other efforts by Trump allies to overturn the election results.”<sup>51</sup> While it is not possible at this time to determine the extent of Mr. Trump’s legal exposure, “Ms. Willis has started laying out some details about the inquiry . . . [and] is also open to considering not just conspiracy but racketeering charges . . . [which] tend to make people think of mob bosses, who have often been targets of the federal Racketeer Influenced and Corrupt Organizations Act . . . (RICO).”<sup>52</sup> The *New York Times* reported:

The pressure campaign to overturn the Georgia election results began on Nov. 13, when Mr. Graham, a Trump ally from South Carolina, made a phone call to Mr. Raffensperger, Georgia’s secretary of state. Mr. Raffensperger, a Republican, later said that Mr. Graham had asked him if he had the authority to throw out all mail-in votes from

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47. See Trautman, *supra* note 40, at 529.

48. See ANDREW WEISSMAN, WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION (2020).

49. See Dustin Volz & Robert McMillan, *Solar Winds Hack Breach Justice Department System*, WALL ST. J. (Jan. 6, 2021), <https://www.wsj.com/articles/solarwinds-hack-breached-justice-department-systems-11609958761> [<https://perma.cc/6GC3-7N37>].

50. *Id.*

51. Danny Hakim & Richard Fausset, *In Georgia, a New District Attorney Starts Circling Trump and His Allies*, N.Y. TIMES (Feb. 13, 2021) <https://www.nytimes.com/2021/02/13/us/politics/fani-willis-trump.html> [<https://perma.cc/Y97U-JJVF>].

52. *Id.*

particular counties, a suggestion the secretary of state rebuffed. Mr. Graham disputed Mr. Raffensperger's account. . . .

On Dec. 3, Mr. Giuliani, Mr. Trump's personal lawyer, made an appearance before a Georgia State Senate committee, saying that 'there's more than ample evidence to conclude this election was a sham,' and laid out a number of false claims. Two days later, Mr. Trump called Brian Kemp, Georgia's Republican Governor, to press him to call a special session of the legislature to overturn the election. Mr. Trump then called Georgia's Republican attorney general, Chris Carr, and pressured him not to oppose a legal attempt to challenge the election results in Georgia and other swing states. Because of the flurry of Trump calls, Ms. Willis said she believes that she is the only official with jurisdiction who does not have a conflict of interest.<sup>53</sup>

### C. Pressure on Justice Department

Then, on January 23, 2021, *The New York Times* reported that a Justice Department official "devised a plan with President Donald J. Trump to oust Jeffrey A. Rosen as acting attorney general and wield the department's power to force Georgia state lawmakers to overturn its presidential election results."<sup>54</sup> Furthermore:

Because Mr. Rosen had refused the president's entreaties to carry out those plans, Mr. Trump was about to decide whether to fire Mr. Rosen and replace him with Mr. Clark.

The department officials, convened on a conference call, then asked each other: What will you do if Mr. Rosen is dismissed? The answer was unanimous. They would resign.

Their informal pact ultimately helped persuade Mr. Trump to keep Mr. Rosen in place, calculating that a furor over mass resignations at the top of the Justice Department would eclipse any attention on his baseless accusations of voter fraud. . . .

The previously unknown chapter was the culmination of the president's long-running effort to batter the Justice Department into advancing his personal agenda. He also pressed Mr. Rosen to appoint special councils, including one who would look into Dominion Voting Systems, a maker of election equipment that Mr. Trump's allies had falsely said was working with Venezuela to flip votes from Mr. Trump to Joseph R. Biden Jr.<sup>55</sup>

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53. *Id.*

54. Katie Benner, *Mutiny Halted Trump Scheme in Justice Dept.*, N.Y. TIMES, Jan. 23, 2021, at A1.

55. *Id.* This account was "based on interviews with four former Trump Administration officials who asked not to be named because of fear of retaliation." *Id.*

*D. President Trump's Enablers*

Following the assault and attack on the Capitol, prominent Republican politicians and right-leaning media channels attempted to downplay the events of January 6th.<sup>56</sup> Consider:

In one of the ultimate don't-believe-your-eyes moments of the Trump era, these Republicans have retreated to the ranks of misinformation, claiming it was Black Lives Matter protesters and far-left groups like antifa who stormed the Capitol—in spite of the pro-Trump flags and QAnon symbology in the crowd. Others have argued that the attack was no worse than the rioting and looting in cities during the Black Lives Matter movement, often exaggerating the unrest last summer while minimizing a mob's attempt to overturn an election.<sup>57</sup>

By January 19, 2021, a significant rebuke of President Trump from his own party had begun. Most significant was Senate Majority Leader Mitch McConnell's remarks to the Senate floor: “The mob was fed lies. They were provoked by the president and other powerful people and they tried to use fear and violence to stop a specific proceeding of the first branch of the federal government which they did not like.”<sup>58</sup>

*E. The Big Lie*

*The Washington Post* described the “Big Lie” as “shorthand for Trump's baseless and overwhelmingly debunked effort to call the results of the 2020 election into question—a set of claims that led his supporters to take drastic action in storming the U.S. Capitol.”<sup>59</sup> Barton Gellman, writing for *The Atlantic* in September 2020, sketches out a disturbing future for American democracy: “in this election year of plague and recession and catastrophized politics, the mechanisms of decision are at meaningful risk of breaking down. Close students of election law and procedure are warning that conditions are ripe for constitutional

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56. Astead W. Herndon, *Some Republicans Have Turned to Conspiracy Theories and Misinformation to Explain the Capitol Attack*, N.Y. TIMES (Jan. 18, 2021) <https://www.nytimes.com/2021/01/18/us/some-republicans-have-turned-to-conspiracy-theories-and-misinformation-to-explain-the-capitol-attack.html> [<https://perma.cc/2LM6-AHYM>].

57. *Id.*

58. Lindsay Wise, Siobhan Hughes & Andrew Duehren, *McConnell Says Trump Provoked Mob That Attacked Capitol*, WALL ST. J. (Jan. 20, 2021) <https://www.wsj.com/articles/mcconnell-says-trump-provoked-mob-that-attacked-capitol-11611079825?mod=flipboard> [<https://perma.cc/S3YZ-SLHB>].

59. Aaron Blake, *Trump's 'Big Lie' Was Bigger than Just a Stolen Election*, WASH. POST (Feb. 12, 2021), <https://www.washingtonpost.com/politics/2021/02/12/trumps-big-lie-was-bigger-than-just-stolen-election> [<https://perma.cc/QY3T-3V67>].



crisis . . . .”<sup>60</sup> In many ways, the 2020 presidential election was a “perfect storm” given “[t]he coronavirus pandemic, a reckless incumbent, a deluge of mail-in ballots, a vandalized Postal Service, a resurgent effort to suppress votes, and a trainload of lawsuits [] bearing down on the nation’s creaky electoral machinery.”<sup>61</sup> Mr. Gellman observe, “Donald Trump may win or lose, but he will never concede. Not under any circumstance. Not during the Interregnum and not afterward. If compelled in the end to vacate his office, Trump will insist from exile, as long as he draws breath, that the contest was rigged.”<sup>62</sup> It is now clear that months before the election, President Trump’s attorneys were “already laying the groundwork for postelection maneuvers that would circumvent the results of the vote count in battleground states. Ambiguities in the Constitution and logic bombs in the Electoral Count Act” made it possible to extend litigation to Inauguration Day, “bring[ing] the nation to a precipice.”<sup>63</sup>

By November 12, 2020, President Trump’s election lawyers concluded that Trump’s perception of reality and the actual situation were polar opposites.<sup>64</sup> “There was no substantial evidence of election fraud, and . . . nowhere near enough ‘irregularities’ to reverse the outcome in the courts. Mr. Trump did not, could not, win the election, not by ‘a lot’ or even a little.”<sup>65</sup>

However, Trump’s “‘Big Lie’ wasn’t just about a stolen election; it was also about how it might be taken back.”<sup>66</sup> Consider that:

Over and over again, Trump and his allies pushed far-flung, doomed and legally specious efforts to overturn the election they claimed had been stolen. They said GOP state legislatures could change the results, including by designating their own competing electors. They claimed judges hadn’t actually ruled on the merits of their claims, when in fact they had. They assured not only that the Supreme Court had the power to tell states how run their elections, but suggested that it would soon intervene. And toward the end, they advanced a desperate, last-ditch attempt to get Vice President Mike Pence to unilaterally throw the election to Trump. None of it bore any

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60. Barton Gellman, *The Election That Could Break America*, ATLANTIC (Sept. 23, 2020), <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424> [<https://perma.cc/XA3K-RYZS>].

61. *Id.*

62. *Id.*

63. *Id.*

64. Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html> [<https://perma.cc/L4YF-MJMM>].

65. *Id.*

66. Blake, *supra* note 59.

resemblance to the legal realities of the situation, but all of it injected fuel and false hope . . . .

The first big claim was about what GOP state legislatures could do. Even before the election and as the result was still uncertain in the hours and days afterward, some floated the idea that the legislatures could unilaterally designate their own electors. By late November, Trump lawyer Rudolph W. Giuliani was telling Pennsylvania's legislators that they should attempt to appoint pro-Trump electors, despite the results in their states. He did the same with Michigan . . . .

When it became clear state legislatures weren't going to do this and as the Trump team's court losses mounted, attention turned to the possibility that the Supreme Court might overrule them all. "We're waiting for the United States Supreme Court, of which the president has nominated three justices, to step in and do something," one Trump campaign surrogate said. "And hopefully [Trump-appointed Justice] Amy Coney Barrett will come through and pick it up." Trump called a dubious case spearheaded by Texas Attorney General Ken Paxton (R) — and joined in by most state GOP attorneys general — "the Big One."

But then the Supreme Court unceremoniously dismissed the case without hearing it — along with another seeking a Supreme Court intervention in Pennsylvania. . . .

The final dose of false hope for Trump supporters came in the form of Pence. The Trump team argued that he could, as the man tasked with overseeing Congress accepting the results of the electoral college, unilaterally object to any given state. Again, though, legal scholars rejected this out of hand. So too did Pence, who fought a lawsuit arguing he had such power. As Congress was taking up the electoral college on Jan. 6, Pence reaffirmed that he had no intent to attempt this end-run on the Constitution — a situation which led some Capitol riots to chant, "Hang Mike Pence." Even after the insurrection began and as Pence was evacuated, Trump tweeted attacking Pence for this decision.<sup>67</sup>

The complaint filed on March 5, 2021 by Representative Eric Swalwell, demonstrates the "Big Lie" claims by President Trump "of widespread fraud and election-rigging."<sup>68</sup> Trump lashed out at agencies that rebuked his claims of fraud and election-rigging, including the FBI, the Department of Justice, and the Department of Homeland security, claiming this to be "the biggest SCAM in our nation's history."<sup>69</sup> An

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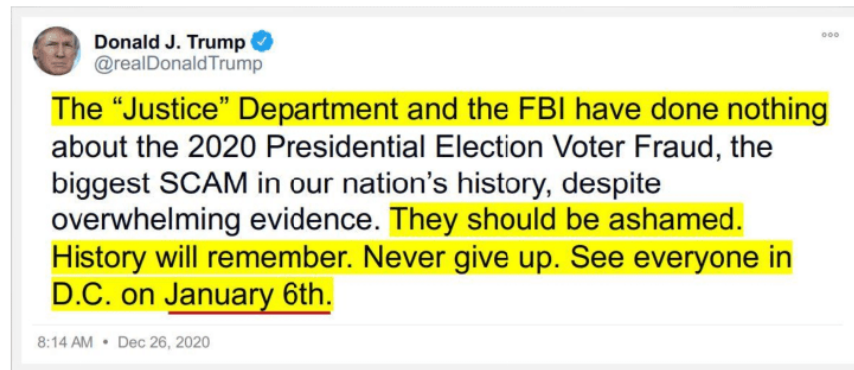
67. *Id.*

68. Complaint at 15, *Swalwell v. Trump*, No. 1:21-cv-00586 (D.C. Dist. Mar. 5, 2021).

69. *Id.*

example of the continued “Big Lie” is found in Mr. Trump’s Tweet of December 26, 2020 as shown in Exhibit 2 below.

Exhibit 2<sup>70</sup>



On January 5th, the night before the rally, “Trump tweeted about the thousands of people flooding D.C. who did not want to see the country ‘stolen’ by ‘Radical Left Democrats,’” as shown in Exhibit 3 below.

Exhibit 3<sup>71</sup>



Senators Ted Cruz and Josh Hawley<sup>72</sup>

In a letter to the Senate Committee on Ethics dated January 21, 2021, six U.S. Senators called for disciplinary action for those politicians involved in aiding and abetting the insurrection.<sup>73</sup> Requesting an

<sup>70</sup>. *Id.*

<sup>71</sup>. *Id.*

<sup>72</sup>. *Id.*

<sup>73</sup>. See Letter from U.S. Senators Richard Blumenthal, Sherrod Brown, Mazie Hirono, Tim Kaine, Tina Smith, Sheldon Whitehouse & Ron Wyden to Senate Committee on Ethics (Jan. 21, 2021), [https://www.whitehouse.senate.gov/imo/media/doc/1.21.21%20Ethics%20Complaint%](https://www.whitehouse.senate.gov/imo/media/doc/1.21.21%20Ethics%20Complaint%20)

investigation of Senators Ted Cruz and Josh Hawley, the letter further states:

When Senators Ted Cruz and Josh Hawley announced they would object to the counting of state-certified electors on January 6, 2021, they amplified claims of election fraud that had resulted in threats of violence against state and local officials around the country. While Congress was debating Senator Cruz's objection, a violent mob stormed the Capitol. These insurrectionists ransacked the building, stole property, and openly threatened Members of Congress and the Vice President. Dozens of police officers were injured; five people died, including U.S. Capitol Police Officer Brian Sicknick. By proceeding with their objections to the electors after the violent attack, Senators Cruz and Hawley lent legitimacy to the mob's cause and made future violence more likely.

Senators Hawley and Cruz's actions have been denounced by individuals across the political spectrum. The Senate has the exclusive power to determine whether these actions violated its ethics rules, to investigate further conduct of which we may not be aware that may have violated these rules, and to consider appropriate discipline. The question the Senate must answer is not whether Senators Hawley and Cruz had the right to object to the electors, but whether the senators failed to "[p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department" or engaged in "improper conduct reflecting on the Senate" in connection with the violence on January 6. The Senate Ethics Committee should investigate their conduct to fully understand their role. The actions of which we know demand an investigation and a determination whether disciplinary action is warranted. Until then, a cloud of uncertainty will hang over them and over this body.<sup>74</sup>

Representatives Andy Biggs, Paul Gosar, and Mo Brooks

Seven U.S. Senators also called for an investigation of Senators Josh Hawley and Ted Cruz, writing, "Three members of the House of Representatives who coordinated with Senators Hawley and Cruz to object to the electors, Reps. Andy Biggs, Paul Gosar, and Mo Brooks, have been identified as alleged co-architects of the rally."<sup>75</sup>

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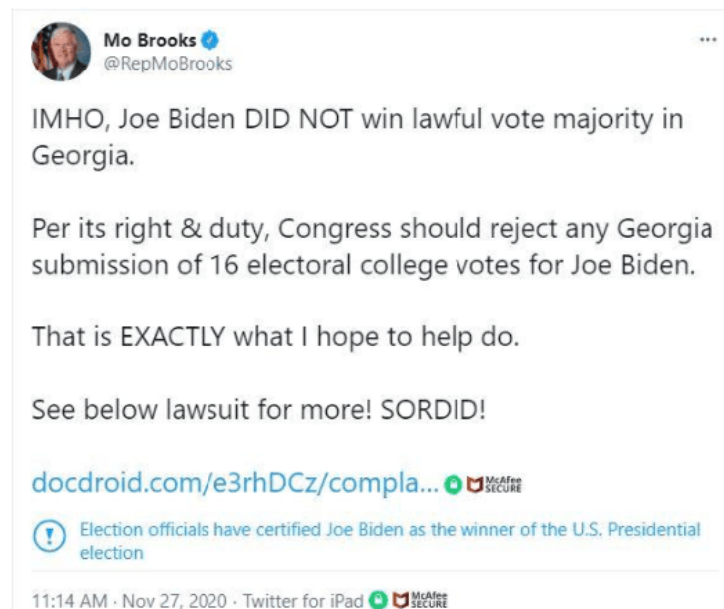
20Against%20Cruz%20and%20Hawley%20Final.pdf [https://perma.cc/4HLX-9EDT].

74. *Id.* at 1–2 (internal citations omitted).

75. *Id.* at 4.

## The House Supporters

Several recent law review articles are available for those who want to learn more about Trump's Big Lie.<sup>76</sup> In addition, the complaint filed by Representative Swalwell includes many examples of the concerted efforts by Representative Mo Brooks to advance this false narrative. For example, as early as November 5, 2020, President Trump addressed the nation about alleged election fraud. On that same day, Brooks tweeted that he “‘lack[ed] faith that this was an honest election.’”<sup>77</sup> Exhibit 4 shows that Brooks tweeting that “‘Joe Biden DID NOT win lawful vote majority in Georgia’ and that Congress should also reject its electoral votes.”<sup>78</sup>

Exhibit 4<sup>79</sup>

Before the rally, Trump invited Brooks to the “Stop the Steal” rally to speak on how “Socialist Democrats” had managed to “steal this election” (Brooks identified Trump by tagging Trump’s personal Twitter account), see Exhibit 5 below.

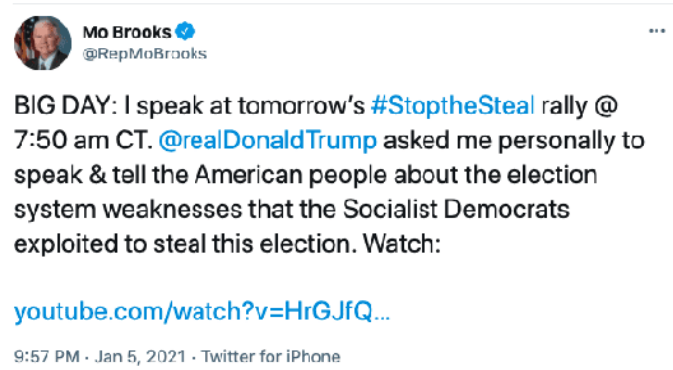
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76. See, e.g., William Baude, *The Real Enemies of Democracy*, 109 CAL. L. REV. 2407 (2021); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. FORUM (2022); Margaret Tarkington, *The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL’Y (2022).

77. Complaint at 20, *Swalwell v. Trump*, No. 1:21-cv-00586 (D.C. Dist. Mar. 5, 2021).

78. *Id.* at 22.

79. *Id.*

Exhibit 5<sup>80</sup>

### F. Investigations and Arrests Begin

By January 22, 2021, just two days into the Biden-presidency, *The New York Times* reported that evidence for those involved in the Capitol attack was flooding in. Family members would turn in their loved ones, while others were discovered through social media and local newspapers.<sup>81</sup> Involving individuals from all parts of the United States, the investigation involved members in various degrees of law enforcement, including state agents and prosecutors. The federal investigation would continue to expand its search for those involved with investigators having search warrants to investigate email accounts and online chat rooms.<sup>82</sup> As investigations began, consider:

But the inquiry into the Capitol assault, a huge effort that has focused its attention on as many as 400 people, took an important turn this week as prosecutors filed their first serious conspiracy charges, accusing three members of the right-wing militia group the Oath Keepers of plotting the insurrection in advance. If, as they have promised, investigators are hoping to narrow their gaze on organized extremists who may have preplanned the attack, they are going to have [to] use a difficult and more difficult-to-master set of skills. The FBI's most challenging work, legal scholars say, may have only just begun. "It's a lot harder to charge a conspiracy, especially compared to the first wave of cases where you basically had people confessing on video to federal crimes," said Aitan Goelman, a former federal prosecutor who helped try Timothy McVeigh, the

80. *Id.*

81. Alan Feuer & Nicole Hong, *The First Capitol Riot Arrests Were Easy. The Next Ones Will Be Tougher*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/21/nyregion/capitol-riot-conspiracy-fbi.html> [<https://perma.cc/85H6-4SA5>]. See also *Infra* Parts VI and VII.

82. Feuer & Hong, *supra* note 81; see also *infra* Parts VI and IX.

Oklahoma City bomber. . . . The Oath Keeper case could be a model moving forward for more complicated cases.”<sup>83</sup>

*G. Role of Rep. Scott Perry*

On January 24, 2021, news broke that Republican Scott Perry of Pennsylvania “played a significant role in the crisis that played out at the top of the Justice Department this month, when Mr. Trump considered firing the acting attorney general and backed down only after top department officials threatened to resign en masse.”<sup>84</sup> *The New York Times* reported:

When Representative Scott Perry joined his colleagues in a months long campaign to undermine the results of the presidential election, promoting ‘Stop the Steal’ events and supporting an attempt to overturn millions of legally cast votes, he often took a back seat to higher-profile loyalists in President Donald J. Trump’s orbit . . . .

It was Mr. Perry, a member of the hardline Freedom Caucus, who first made Mr. Trump aware that a relatively obscure Justice Department official, Jeffrey Clark, the acting chief of the civil division, was sympathetic to Mr. Trump’s view that the election had been stolen, according to former administration officials who spoke with Mr. Clark and Mr. Trump.

Mr. Perry introduced the president to Mr. Clark, whose openness to conspiracy theories about election fraud presented Mr. Trump with a welcome change from the acting attorney general, Jeffrey A. Rosen, who stood by the results of the election and had repeatedly resisted the president’s efforts to undo them.

Mr. Perry’s previously unreported role, and the quiet discussions between Mr. Trump and Mr. Clark that followed, underlined how much the former president was willing to use the government to subvert the election, turning to more junior and relatively unknown figures for help as ranking Republicans and cabinet members rebuffed him.<sup>85</sup>

Our attention now turns to a discussion of the House impeachment process, the twenty-fifth Amendment, debate, and the vote.

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83. *Id.*

84. Katie Benner & Catie Edmondson, *Pennsylvania Lawmaker Played Key Role in Trump’s Plot to Oust Acting Attorney General*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2021/01/23/us/politics/scott-perry-trump-justice-department-election.html>; see also *infra* Part V.

85. Benner & Edmondson, *supra* note 84.

## IV. IMPEACHMENT, THE HOUSE, AND A SINGLE ARTICLE

He must go. He is a clear and present danger to the nation that we all love. Since the presidential election in November—an election the President lost—he has repeatedly held about—lied about the outcome, sowed self-serving doubt about democracy and unconstitutionally sought to influence state officials to repeal reality. And, then, came that day of fire we all experienced.

The President must be impeached, and, I believe, the President must be convicted by the Senate, a constitutional remedy that will ensure that the republic will be safe from this man who is so resolutely determined to tear down the things that we hold dear and that hold us together.

Nancy Pelosi, Speaker  
U.S. House of Representatives  
January 13, 2021<sup>86</sup>

On Monday, January 12, 2021, an article of impeachment was introduced by House Democrats against President Donald J. Trump for his role and influence on the Capitol attacks on January 6th. This prompted a vote in the House to charge the President with “inciting violence against the government.”<sup>87</sup> Speaker Pelosi managed to get this article of impeachment through the House in a matter of seven days,<sup>88</sup> a stark contrast from a year ago when she led a three-month battle of President Trump’s first impeachment.<sup>89</sup>

*A. Impeachment*

It is the Constitution of the United States that provides for impeachment. Chief Justice William Rehnquist states, “those who wrote the Constitution realized there could also be malfeasance by high officials of the government, and so they borrowed from England the concept of impeachment and removal of such officials.”<sup>90</sup> Article II Section IV of the U.S. Constitution provides for presidential impeachment: “The President, Vice President and all civil Officers of the United States, shall be removed

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86. Press Release, Speaker of the House Nancy Pelosi, Floor Speech on H.Res 24, Impeaching Donald John Trump, President of the United States, for Incitement of Insurrection (Jan. 13, 2021), <https://www.speaker.gov/newsroom/11321> [<https://perma.cc/FAE5-DSLFL>].

87. Nicholas Fandos, *House Sets a Vote to Impeach Trump Unless Pence Acts*, N.Y. TIMES, Jan. 12, 2021, at A1.

88. Nicholas Fandos, *Trump, After Inciting Rampage in Capitol is First President to Face 2nd Senate Trial*, N.Y. TIMES, Jan. 14, 2021, at A1.

89. *Id.*

90. See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORICAL IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 9 (1992).



from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>91</sup> The U.S. House of Representatives has the sole authority to initiate impeachment proceedings<sup>92</sup> conducted by the Senate.<sup>93</sup> The Chief Justice of the United States will preside over trial in the Senate with conviction requiring two-thirds of the senators present.<sup>94</sup> Elsewhere, the author of this Article has discussed the meaning of the terms “Treason, Bribery, and other high Crimes and Misdemeanors”:<sup>95</sup>

#### Treason

The term “treason” is defined briefly and succinctly in Article III of the Constitution, as “Treason against the United States[] shall consist only in levying War against them, or in adhering to their Enemies, giving the Aid and Comfort.”<sup>96</sup> Yale Law school professor Charles L. Black writes, “There is, in short, no reason to think the word means anything other than this in the impeachment passage. This makes irrelevant a great deal of learning . . . about treasons under English law.”<sup>97</sup>

#### Bribery

Professor Black observes that, “bribery may mean the *taking* as well as the *giving* of a bribe. At the Constitutional Convention, Gouverneur Morris gave the instance of Charles II, who ‘was bribed by Louis XIV.’”<sup>98</sup> Professor Michael J. Gerhardt has written an excellent discussion of matters surrounding removing impeachable officials, including the Bribery Act of 1790, which provides additional color about the concern at the time regarding matters surrounding the bribery of federal judges and executive officers.<sup>99</sup>

#### Other High Crimes and Misdemeanors

Now for the broadest aspect of impeachable offenses that has proven a most difficult term for interpretation due to its vagueness, the phrase, “[o]ther high Crimes and Misdemeanors.”<sup>100</sup> Professor Black observes, “The phrase ‘high Crimes and Misdemeanors’ comes to us out of English law and practice, starting . . . [we believe] in 1386. It

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91. U.S. CONST. art. II, § 4.

92. U.S. CONST. art. I, § 2, cl. 5.

93. U.S. CONST. art. I, § 3, cl. 6.

94. *Id.*

95. Trautman, *supra* note 40, at 532.

96. *Id.* (citing U.S. CONST. art. III, § 3, cl. 1).

97. *Id.* (citing CHARLES L. BLACK, IMPEACHMENT: A HANDBOOK 25 (1974)).

98. *Id.* (citing BLACK, *supra* note 97, at 26).

99. *Id.* (citing MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 82 (2000)).

100. *Id.* (citing BLACK, *supra* note 97, at 27).

frequently figured in impeachment of officers. The English . . . saw it as including serious misconduct in office, whether or not punishable as crime in the ordinary courts.”<sup>101</sup> Professor Black writes that during the very brief discussion at the Constitutional Convention, “Mason’s ready substitution of ‘high Crimes and Misdemeanors’ indicates that *he* thought (and no voice was raised in doubt) that this new phrase would satisfactorily cover ‘many great and dangerous offenses’ not reached by the words ‘treason’ and ‘bribery’; its coverage was understood to be broad.”<sup>102</sup>

However, before the first impeachment of Donald Trump, most contemporary accounts focused on President Andrew Jackson, President Bill Clinton, and, most famously, President Richard Nixon.<sup>103</sup>

### *B. Vice President Mike Pence and the 25th Amendment*

The Twenty-Fifth Amendment to the U.S. Constitution provides a mechanism for the vice president’s assumption of the presidency when it is determined that the president “is unable to discharge the powers and duties of his office . . . .”<sup>104</sup> It is the ambiguity of Article II, Section I, Clause 5, of the Constitution that creates the need for the Twenty-Fifth Amendment:

In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.<sup>105</sup>

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101. *Id.* (citing BLACK, *supra* note 97, at 49).

102. *Id.* (citing BLACK, *supra* note 97, at 29); see also Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 CONN. L. REV. 413 (2019).

103. *Id.* at 532 (citing LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT xviii (1st ed. 2018)) (“Although not resulting in impeachment, Richard Nixon’s presidency included: the resignation of Vice President Spiro Agnew and the break-in of the Democratic National Headquarters, known as the Watergate burglary. President Richard Nixon’s subsequent resignation remains in the memory of many America’s baby-boomer generation. These modern events have influenced the meaning in contemporary impeachment jurisprudence and of what constitutes ‘high Crimes and Misdemeanors.’ . . . Modernly, professors Tribe and Matz write, ‘Under George W. Bush, Barack Obama, and Trump, impeachment talk has become a far more significant aspect of US political discourse and strategy.’”) *Id.* at 535 (citing TRIBE & MATZ, *supra* note 103, at xviii).

104. U.S. CONST. amend. XXV, § 3.

105. U.S. CONST. art. II, § 1, cl. 5.

Consider the 1988 Report of the Commission on Presidential Disability and The Twenty-Fifth Amendment. At the time of this report, eight out of thirty-five U.S. Presidents died in office.<sup>106</sup> Four deaths were the result of assassinations while the other deaths were the result of serious illnesses.<sup>107</sup> Having gained ratification on February 10, 1967, Exhibit 6 provides language of the twenty-fifth Amendment to the U.S. Constitution:

### Exhibit 6

#### The Twenty-Fifth Amendment to the U.S. Constitution

**Section 1.** In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

**Section 2.** Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

**Section 3.** Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

**Section 4.** Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department, or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of

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106. See HERBERT BOWNELL, BITCH E. BAYH JR., KENNETH W. THOMPSON & CHALMERS M. ROBERTS, MILLER CTR. COMM'N NO. 4, FINAL REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 5 (1988).

107. *Id.*

the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.<sup>108</sup>

On January 12, 2021, by a vote of 223 to 205, the House approved a resolution to call on Vice President Pence to invoke the Twenty-Fifth Amendment.<sup>109</sup> Lawmakers warned Pence that they would seek impeachment of the president for using his presidential powers to incite an attack on the Capitol if he did not act to invoke the Twenty-Fifth Amendment.<sup>110</sup> Resolution author Democratic Representative Jamie Raskin of Maryland also urged Pence that “the time of a [Twenty-Fifth] Amendment emergency has arrived.”<sup>111</sup> Following the House passage of the resolution, Mr. Pence declined to take action.

This proves to not be the first discussion about invoking the Twenty-Fifth Amendment to defend the country against the threat of President Trump. For example, elsewhere, Trautman observes,

On Saturday morning, September 22, 2018, readers of *The New York Times* awoke to read a page-one story about how the deputy attorney general, Rod J. Rosenstein, had previously advocated the secret White House recording of President Trump, “to expose the chaos consuming the administration, and he discussed recruiting cabinet members to invoke the [Twenty-Fifth] Amendment to remove Mr. Trump from office for being unfit.”<sup>112</sup>

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108. U.S. CONST. amend. XXV.

109. See Press Release, *supra* note 86

110. Nicholas Fandos, *The House Formally Called on Pence to Invoke the 25th Amendment to Strip Trump of Power. He Declined.*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/the-house-formally-called-on-pence-to-invoke-the-25th-amendment-to-strip-trump-of-power-he-declined.html> [https://perma.cc/7DZL-RDTS].

111. *Id.*

112. Lawrence J. Trautman, *The Twenty-Fifth Amendment: Incapacity and Ability to Discharge the Powers and Duties of Office?*, 67 CLEV. ST. L. REV. 373, 375 (2019) (citing Adam Goldman & Michael S. Schmidt, *Rosenstein Raised Idea of Recording Talks with Trump*, N.Y. TIMES, Sept. 22, 2018, at A1); see also Katie Benner & Maggie Haberman, *White House Was Prepared to Put a Trump Loyalist in Rosenstein’s Place*, N.Y. TIMES, Sept. 27, 2018, at A16; Katie Benner, *President Would Prefer Not to Fire Rosenstein*, N.Y. TIMES, Sept. 27, 2018, at A16; Katie Benner, *Rosenstein Still Has His Job, Trump Says*, N.Y. TIMES, Oct. 9, 2018, at A13; Sadie Gurman, *Trump Vouches For Rosenstein As The Two Meet*, WALL ST. J., Oct. 9, 2018, at A4.

*C. The Impeachment Resolution*

Reproduced as Exhibit 7 is the full text of the House resolution for impeaching President Trump for high crimes and misdemeanors as introduced by Representatives Mr. Ted Lieu, Mr. Raskin, Mr. Nadler, and numerous other co-sponsors.

## Exhibit 7

Impeaching Donald John Trump,  
President of the United States,  
For High Crimes and Misdemeanors

H. Res. 24

*In the House of Representatives, U. S.,**January 13, 2021*

*Resolved*, That Donald John Trump, President of the United States, is impeached for high crimes and misdemeanors and that the following article of impeachment be exhibited to the United States Senate:

Article of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and of the people of the United States of America, against Donald John Trump, President of the United States of America, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

## ARTICLE I: INCITEMENT OF INSURRECTION

The Constitution provides that the House of Representatives “shall have the sole Power of Impeachment” and that the President “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”. Further, section 3 of the 14th Amendment to the Constitution prohibits any person who has “engaged in insurrection or rebellion against” the United States from “hold[ing] any office . . . under the United States”. In his conduct while President of the United States—and in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed—Donald John Trump engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States, in that:

On January 6, 2021, pursuant to the 12th Amendment to the Constitution of the United States, the Vice President of the United States, the House of Representatives, and the Senate met at the United States Capitol for a Joint Session of Congress to count the votes of the Electoral College. In the months preceding the Joint Session, President Trump repeatedly issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials. Shortly before the Joint Session commenced, President Trump, addressed a crowd at the Ellipse in Washington, DC. There, he reiterated false claims that “we won this election, and we won it by a landslide”. He also willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol, such as: “if you don’t fight like hell you’re not going to have a country anymore”. Thus incited by President Trump, members of the crowd he had addressed, in an attempt to, among other objectives, interfere with the Joint Session’s solemn constitutional duty to certify the results of the 2020 Presidential election, unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious acts.

President Trump’s conduct on January 6, 2021, followed his prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election. Those prior efforts included a phone call on January 2, 2021, during which President Trump urged the secretary of state of Georgia, Brad Raffensperger, to “find” enough votes to overturn the Georgia Presidential election results and threatened Secretary Raffensperger if he failed to do so.

In all this, President Trump gravely endangered the security of the United States and its institutions of Government. He threatened the integrity of the democratic system, interfered with the peaceful transition of power, and imperiled a coequal branch of Government. He thereby betrayed his trust as President, to the manifest injury of the people of the United States.

Wherefore, Donald John Trump, by such conduct, has demonstrated that he will remain a threat to national security, democracy, and the Constitution if allowed to remain in office, and has acted in a manner grossly incompatible with self-governance and the rule of law. Donald John Trump thus warrants impeachment and trial, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Attest:<sup>113</sup>

*Speaker of the House of Representatives*

*D. Debate*

Because members of the House were witnesses to the Capitol rampage, the debate held on January 13, 2021, was minimal. Wyoming Congresswoman and House Republican Conference Chair Liz Cheney released this statement before the impeachment vote:

On January 6, 2021[,] a violent mob attacked the United States Capitol to obstruct the process of our democracy and stop the counting of presidential electoral votes. This insurrection caused injury, death[,] and destruction in the most sacred space in our Republic.

Much more will become clear in coming days and weeks, but what we know now is enough. The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President. The President could have immediately and forcefully intervened to stop the violence. He did not. There has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution.

I will vote to impeach the President.<sup>114</sup>

*E. The Vote*

By a vote of 232 to 197, consisting of all House Democrats, plus ten Republicans voting in favor, the impeachment of Donald J. Trump for the second time took place “in a House chamber secured by National Guard troops stationed throughout the Capitol and its grounds.”<sup>115</sup>

V. TRIAL IN THE SENATE

I believe it is constitutionally dangerous not to proceed. We just had a president of the United States try to undermine the peaceful transition of power, tried to challenge a fair and free and election. And [he] and his agents from the moments before, from his son, to his lawyer, whipping up a crowd to go attack the Capitol. So I believe fundamentally the Senate has an obligation to act.

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113. H.R. Res. 24, 117th Cong. § 1 (2021) (enacted).

114. Press Release, Liz Cheney, Congresswoman, *Cheney: I Will Vote to Impeach the President* (Jan. 12, 2021), <https://cheney.house.gov/2021/01/12/cheney-i-will-vote-to-impeach-the-president> [<https://perma.cc/R6HA-FBV2>].

115. Andrews, Peterson & Ballhaus, *supra* note 18.

Corey Booker  
U.S. Senator  
Appearing on Meet the Press  
January 17, 2021<sup>116</sup>

By January 22, 2021, it is reported that Mr. Trump has retained South Carolina attorney Butch Bowers to represent him.<sup>117</sup> Shortly thereafter, Mr. Trump hires new representation: Bruce L. Castor Jr., a Philadelphia, Pennsylvania-area former district attorney; and Alabama-based criminal defense and civil rights lawyer, David I. Schoen, “as his first defense team was falling apart.”<sup>118</sup> The House Managers are led by Congressman Jamie Raskin, and “joined by Congresswoman Diana DeGette, Congressman David Cicilline, Congressman Joaquin Castro, Congressman Eric Swalwell, Congressman Ted Lieu, Congresswoman Stacey Plaskett, Congresswoman Madeleine Dean, and Congressman Joe Neguse.”<sup>119</sup>

#### *A. Republicans Argue Procedural Unconstitutionality*

Seeking to ignore the merits of the case, the Republicans instead “argue that the Senate lacks constitutional jurisdiction to try former officials (even though it has done so before) . . . .”<sup>120</sup> This argument is refuted by “leading conservative constitutional lawyer, Charles J. Cooper—who has been a close ally and adviser to Republican senators like Ted Cruz of Texas—[who] argued . . . their claims about the constitutionality of the proceeding were unfounded.”<sup>121</sup> Then, 170 constitutional law scholars signed a letter writing, “[D]espite our differences, our carefully considered views of the law lead all of us to agree that the Constitution permits the impeachment, conviction, and

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116. Chuck Todd, *Meet the Press—January 17, 2021*, NBC NEWS (Jan. 17, 2021), <https://www.nbcnews.com/meet-the-press/meet-press-january-17-2021-n1254547> [<https://perma.cc/VE75-W7J2>].

117. Rebecca Ballhaus, *McConnell Floats Trial in February—GOP Leader Says this Gives Democrats and Trump Time to Prepare; Schumer Reviews Offer*, WALL ST. J., Jan. 22, 2021, at A6.

118. Charles Savage, *Trump’s Defense Team: A Civil Rights Lawyer and a Former Prosecutor*, N.Y. TIMES, Feb. 9, 2021, at A16.

119. Press Release, Jamie Raskin, Congressman, *U.S. House of Representatives Files Replication to Former President Trump’s Answer to the Article of Impeachment* (Feb. 8, 2021), <https://raskin.house.gov/media/press-releases/us-house-representatives-files-replication-former-president-trumps-answer> [<https://perma.cc/7C76-QSEL>].

120. Savage, *supra* note 118; see also Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13 (2001).

121. Michael S. Schmidt, *Senate to Debate Constitutionality of Impeachment*, N.Y. TIMES, Feb. 9, 2021, at A16.



disqualification of former officers, including presidents.”<sup>122</sup> These scholars state, in relevant part:

the Constitution’s impeachment power has two aspects. The first is removal from office, which occurs automatically upon the conviction of a current officer. The second is disqualification from holding future office, which occurs in those cases where the Senate deems disqualification appropriate in light of the conduct for which the impeached person was convicted. The impeachment power must be read so as to give full effect to both aspects of this power.

Impeachment is the exclusive constitutional means for removing a president (or other officer) before his or her term expires. But nothing in the provision authorizing impeachment-for-removal limits impeachment to situations where it accomplishes removal from office. Indeed, such a reading would thwart and potentially nullify a vital aspect of the impeachment power: the power of the Senate to impose disqualification from future office as a penalty for conviction. In order to give full effect to both Article I’s and Article II’s language with respect to impeachment, therefore, the correct conclusion is that former officers remain subject to the impeachment power after leaving office, for purposes of permitting imposition of the punishment of disqualification.

If impeachment were only a device for removing officials from office, then perhaps only current officers could be impeached. But disqualification is a consequence that might need to be imposed on prior officeholders as well as current ones. In keeping with that rationale, nothing in the text of the Constitution bars Congress from impeaching, convicting, and disqualifying *former* officials from holding future office. Indeed, the ability to try, convict, and disqualify former officials is an important deterrent against future misconduct. If an official could only be disqualified while he or she still held office, then an official who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate’s final conviction vote. The Framers did not design the Constitution’s checks and balances to be so easily undermined.

History supports a reading of the Constitution that allows Congress to impeach, try, convict, and disqualify former officers. . . . More broadly, a singular concern of the Framers in devising our constitutional system was the danger of a power-seeking populist of the type they referred to as a “demagogue” rising to the highest office

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122. Letter from Constitutional Law Scholars on Impeaching Former Officers 1 (Jan. 21, 2021), <https://www.politico.com/f/?id=00000177-2646-de27-a5f7-3fe714ac0000> [<https://perma.cc/3F7G-UAHF>].

and overthrowing republican government. The Framers further understood that the source of such a person's power does not expire if he or she is expelled from office; so long as such a person retains the loyalty of his or her supporters, he or she might return to power. The Framers devised the disqualification power to guard against that possibility, and would surely disagree that a person who sought to overthrow our democracy could not be disqualified from holding a future office of the United States because the plot reached its crescendo too close to the end of his or her term.

Precedent also buttresses our conclusion that Congress may try, convict, and disqualify former officers: Congress has done it in the past. In 1876, Secretary of War William Belknap tried to avoid impeachment and its consequences by resigning minutes before the House voted on his impeachment. The House impeached him anyway, and the Senate concluded that it had the power to try, convict, and disqualify former officers. Even in cases when impeachment proceedings were dismissed after the subject resigned, Congress has indicated that it was choosing to drop the case rather than being compelled to do so by the Constitution. Belknap was not a president, but there is no reason why the same rule would not apply to presidents—after all, the Constitution's impeachment provisions apply to presidents, vice presidents, and civil officers alike.

In sum, the Constitution's text and structure, history, and precedent make clear that Congress's impeachment power permits it to impeach, try, convict, and disqualify former officers, including former presidents. The Senate may take up the House's article of impeachment against former President Donald J. Trump, conduct a trial, convict him, and disqualify him from holding a future office of the United States.<sup>123</sup>

They however did not take a "position on whether the Senate *should* convict President Trump on the article of impeachment."<sup>124</sup>

On February 9, 2021, "A divided Senate voted . . . to proceed with Donald J. Trump's second impeachment trial, narrowly rejecting constitutional objections after House prosecutors opened their case with a harrowing [thirteen]-minute video capturing the deadly Capitol riot he stands accused of inciting."<sup>125</sup> However, following the presentation depicting violence and a very real threat to those in the Senate chamber on

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123. *Id.* at 1–3.

124. *Id.* at 1.

125. Nicholas Fandos, *Senate Agrees Trial Is Constitutional, as Trump Consolidates Votes for an Acquittal Violence*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/us/politics/trump-impeachment-trial-senate.html> [<https://perma.cc/XY6D-N9QB>].

January 6th, “only six Republicans joined Democrats in clearing the way for the case to be heard.”<sup>126</sup>

### B. Debate

The Senate debate begun on February 9, 2021<sup>127</sup> and is presented by House Manager Representative Jamie Raskin and the House Managers Diana DeGette; David Cicilline; Joaquin Castro; Eric Swalwell; Ted Lieu; Stacey Plaskett; Madeleine Dean; and Joe Neguse.<sup>128</sup> The House Managers’ Memorandum warns, “To protect our democracy and national security—and to deter any future President who would consider provoking violence in pursuit of power—the Senate should convict President Trump and disqualify him from future federal officeholding.”<sup>129</sup> The presentation by the House Managers closely mirrors the trial memorandum and contends, “After losing the 2020 election, President Trump refused to accept the will of the American people. He spent months asserting, without evidence, that he won in a ‘landslide’ and that the election was ‘stolen.’”<sup>130</sup> In addition, they asserted President Trump “amplified these lies at every turn, seeking to convince supporters that they were victims of a massive electoral conspiracy that threatened the Nation’s continued existence. But every single court to consider the President’s attacks on the outcome of the election rejected them.”<sup>131</sup>

Following a recitation of the facts, the House Managers argued that high Crimes and Misdemeanors were committed by President Trump when he: “Violated his Oath of Office”<sup>132</sup>; “Attacked the Democratic Process”<sup>133</sup>; “Imperiled Congress”<sup>134</sup>; and “Undermined National Security.”<sup>135</sup> The House Managers concluded the following:

[After failing to overturn the outcome of the election, t]he only honorable path at that point was for President Trump to accept the

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126. *Id.*

127. Felicia Sonmez, Amy B. Wang, Colby Itkowitz & John Wagner, *Divided Senate Votes to Proceed with Impeachment Trial of Trump*, WASH. POST (Feb. 9, 2021), <https://www.washingtonpost.com/politics/2021/02/09/trump-impeachment-live-updates> [<https://perma.cc/KSB8-GXDZ>].

128. See Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump, *In re Impeachment of President Donald J. Trump*, U.S. Senate (Feb. 2, 2021), [https://judiciary.house.gov/uploadedfiles/house\\_trial\\_brief\\_final.pdf](https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf) [<https://perma.cc/9QNC-KXG8>] [hereinafter Senate Trial Memorandum].

129. *Id.* at 1.

130. *Id.* at 2.

131. *Id.*

132. See *id.* at 37.

133. See *id.* at 38.

134. See *id.* at 39.

135. See *id.* at 40.

results and concede his electoral defeat. Instead, he summoned a mob to Washington, exhorted them into a frenzy, and aimed them like a loaded cannon down Pennsylvania Avenue. As the Capitol was overrun, President Trump was reportedly “delighted.” And rather than take immediate steps to quell the violence and protect lives, President Trump left his Vice President and Congress to fend for themselves while he lobbied allies to continue challenging election results.

As will be shown at trial, President Trump endangered our Republic and inflicted deep and lasting wounds on our Nation. His conduct resulted in more than five deaths and many more injuries. The Capitol was defiled. The line of succession was imperiled. America’s global reputation was damaged. For the first time in history, the transfer of presidential power was interrupted. And the threat of violence remains with us: as President Biden was inaugurated and even now, the Capitol more closely resembles an armed camp than the seat of American democracy.

. . . The need for conviction and disqualification is further supported by Section 3 of the Fourteenth Amendment, which bars from government service those who “having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.”

. . . Failure to convict would embolden future leaders to attempt to retain power by any and all means—and would suggest that there is no line a President cannot cross. The Senate should make clear to the American people that it stands ready to protect them against a President who provokes violence to subvert our democracy.<sup>136</sup>

### C. The Vote

Because conviction in the United States Senate requires a two-thirds vote, or sixty-seven total votes if all 100 Senators are present, the February 13, 2021 Senate vote of fifty-seven guilty and forty-three not guilty resulted in an acquittal for former President Donald Trump. “Seven Republicans broke with Mr. Trump and voted ‘guilty.’”<sup>137</sup> The seven Republican Senators who voted guilty are: Collins (Maine); Murkowski (Alaska); Romney (Utah); Burr (North Carolina); Cassidy (Louisiana);

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136. *Id.* at 75–77.

137. Weiyi Cai, Annie Daniel, Jon Huang, Jasmine C. Lee & Alicia Parlapiano, *Trump’s Second Impeachment: How the Senate Voted*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/13/us/politics/senate-impeachment-live-vote.html> [<https://perma.cc/N7MU-SE8H>].

Toomey (Pennsylvania); and Sasse (Nebraska).<sup>138</sup> *The New York Times* describes this as “the most bipartisan vote for a presidential impeachment conviction in United States history. Most [Republican senators] were facing intense backlash . . . from Republicans in their states livid about the vote, as have the [ten] House Republicans who supported the impeachment . . . .”<sup>139</sup>

#### VI. IMPACT OF MILITIAS & OTHER PARTICIPANTS

We can see each other not as adversaries but as neighbors. We can treat each other with dignity and respect. We can join forces, stop the shouting, and lower the temperature. For without unity, there is no peace, only bitterness and fury. No progress, only exhausting outrage. No nation, only a state of chaos. . . . And so today, at this time in this place, let us start afresh. All of us. Let us begin to listen to one another. Hear one another. See one another. Show respect to one another. Politics need not be a raging fire destroying everything in its path. Every disagreement doesn't have to be a cause for total war. And we must reject the culture in which facts themselves are manipulated and even manufactured.

Joseph R. Biden  
46th President of the United States  
Inauguration Speech  
January 20, 2021<sup>140</sup>

The car caravans of pro-Trump supporters from around the country assembling in Washington, DC on January 6, 2021, included those advocating,

Overthrowing the government. Igniting a second Civil War. Banishing racial minorities, immigrants and Jews. Or simply sowing chaos in the streets. The ragged camps of far-right groups and white nationalists emboldened under President Trump have long nursed an overlapping list of hatreds and goals.<sup>141</sup>

By January 2021, *The New York Times* reports that these groups “have been galvanized by the outgoing president’s false claims that the election was stolen from him—and by the violent attack on the nation’s Capitol

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138. *Id.*

139. Catie Edmondson, *Dare by 7 Republican Senators: Voting Guilty and Taking the Hits*, N.Y. TIMES, Feb. 15, 2021, at A1.

140. See Biden, Inauguration Speech, *supra* note 1; see also Joe Biden’s Inauguration Speech Transcript Annotated, *supra* note 1.

141. Neal MacFarquhar, Jack Healy, Mike Baker & Serge F. Kovalski, *Assault Spawns New Rally Cry for Extremists*, N.Y. TIMES, Jan. 17, 2021, at A1.

that hundreds of them led in his name. . . . The Capitol riots served as a propaganda coup for the far right . . . .”<sup>142</sup>

Writing about the attack on the Capitol, journalists Matthew Rosenberg and Ainara Tiefenthäler reported: “Militiamen showed up proudly bearing the emblems of their groups—American flags with the stars replaced by the Roman numeral III, patches that read ‘Oath Keepers.’ Alt-right types wore Pepe the Frog masks, and QAnon adherents could be seen in T-shirts urging people to ‘Trust the Plan.’”<sup>143</sup> As several hundred million Americans watched the attack on the Capitol in horror and then attempted to decode what they had witnessed during the following days, consider that,

White supremacists brought their variant of the Crusader cross. . . . The dizzying array of symbols, slogans and images was, to many Americans, a striking aspect of the unrest, revealing an alternate political universe where violent extremists, outright racists and conspiracy theorists march side by side with evangelical Christians . . . .<sup>144</sup>

For all those who found themselves engaged in marching on the Capitol and sometimes taking violent action on January 6, 2021, “Uniting them is a loyalty to Mr. Trump and a firm belief in his false and discredited insistence that the election was stolen.”<sup>145</sup>

#### *A. Focus on Domestic Terrorism*

Within the first few days of the Biden Administration, the Director of National Intelligence was ordered “to work with the F.B.I. and the Department of Homeland Security to conduct a comprehensive assessment of the threat from domestic violent extremism, a sign of how seriously the new administration is taking the issue in the aftermath of the Jan. 6 riot at the Capitol.”<sup>146</sup> *The New York Times* observed

Domestic terrorism and violent groups are a thorny issue for intelligence agencies like the C.I.A., which are limited to tracking attempts by foreign governments or organizations to influence extremist groups in America. . . . Jen Psaki, the White House press secretary, said the assessment would help Mr. Biden hone his policies

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142. *Id.*

143. Matthew Rosenberg & Ainara Tiefenthäler, *Decoding Far-Right Symbols of the Capitol Mob*, N.Y. TIMES, Jan. 17, 2021, at A19.

144. *Id.*

145. *Id.*

146. Julian E. Barnes & Hailey Fuchs, *White House Orders Assessment on Violent Extremism in U.S.*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/capitol-riot-domestic-extremism.html> [<https://perma.cc/J2T7-NSFE>].

aimed at curbing violent extremism in the United States. ‘This assessment will draw on the analysis from across the government and, as appropriate, nongovernmental organizations . . . . The key point here is that we want fact-based analysis upon which we can shape policy.’”<sup>147</sup>

Consider the following:

In recent years, some parts of the intelligence community have been working to increase their focus on the threat of domestic terrorism, particularly by doing more to track growing foreign influence operations on domestic groups. The C.I.A. also has officers in its counterterrorism section who specialize in tracking racially-motivated violent extremists overseas.

. . .

“Far-right, violent extremism, nurtured on online platforms, has become one of the most dangerous threats to our nation,” said Representative Adam B. Schiff, Democrat of California and Chairman of the House Intelligence Committee.

The domestic terrorism order is the second assignment in two days for Ms. Haines, who was confirmed by the Senate [on January 20, 2021]. . . .<sup>148</sup>

During September 2020, reports emerged that former head of the Department of Homeland Security’s intelligence branch, Brian Murphy, “said in [a whistleblower] complaint that he was ordered [during] spring [2020] by Chad F. Wolf, the acting secretary of the department, to stop producing assessments on Russian interference and focus instead on Iran and China.”<sup>149</sup> About a month later, “The Department of Homeland Security warned . . . that violent white supremacy was the ‘most persistent and lethal threat in the homeland’ in an annual assessment that a former intelligence chief had accused the agency of withholding in deference to President Trump.”<sup>150</sup> *The New York Times* reported:

The delayed release of the report has been a point of scrutiny for a department that has faced consistent accusations of morphing into a tool for Mr. Trump’s re-election campaign. After the department

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147. *Id.*

148. *Id.*

149. Zolan Kanno-Youngs & Nicholas Fandos, *D.H.S. Downplayed Threats from Russia and White Supremacists, Whistle-Blower Says*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/us/politics/homeland-security-russia-trump.html> [<https://perma.cc/V55K-6M3D>].

150. Zolan Kanno-Youngs, *Delayed Homeland Security Report Warns of ‘Lethal’ White Supremacy*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/homeland-security-white-supremacists-russia.html> [<https://perma.cc/GC8E-RDRW>].

singled out domestic terrorists and specifically white supremacists in a terrorism framework in September 2019, the agency's leadership committed to releasing a follow-up assessment to the threat as well as a blueprint to confront it within months. It took far longer.<sup>151</sup>

Mississippi Democrat Representative Bennie Thompson, chairman of the House Homeland Security Committee, is quoted as saying, "This threat assessment confirms two things: that white supremacist extremists are the top domestic threat to the homeland, and they are often inspired by President Trump's rhetoric."<sup>152</sup> With the suppression of the DHS intelligence report, on October 2020, *The New York Times* reported that "The administration's treatment of white supremacy re-emerged as an issue last week, when Mr. Trump failed to condemn white racist violence during the presidential debate, even after Christopher A. Wray, the F.B.I. director, affirmed to Congress the lethal threat of the racist extremists."<sup>153</sup>

### *B. Domestic Terrorism Defined*

Soon after the mob attack of the Capitol building, discussion ensued advocating the need for strengthening the law to fight domestic terrorism. Existing law, relied upon by law enforcement agencies in dealing with these types of events, comes from two basic sources.<sup>154</sup>

First, the Code of Federal Regulations characterizes "terrorism" as including "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." Second, 18 U.S.C. § 2331(5) more narrowly defines "domestic terrorism." This definition comes from Section 802 of the USA PATRIOT Act (P.L. 107-56). According to 18 U.S.C. § 2331(5), domestic terrorism occurs primarily within U.S. territorial jurisdiction, and involves

(A) Acts dangerous to human life that are a violation of the criminal laws of the United States or of any state;

(B) Appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

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151. *Id.*

152. *Id.*

153. *Id.*

154. LISA N. SACCO, DOMESTIC TERRORISM AND THE ATTACK ON THE U.S. CAPITOL, CONG. RSCH. SERV., IN11573 (2021).



(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping . . .

The participants' actions seem to fit both definitions. Video evidence and media reports portray participants committing acts dangerous to human life and those actions appeared to be intended both to influence the policy of the U.S. government by intimidation and affect its conduct through possible assassination and/or kidnapping.<sup>155</sup>

However, under current law “domestic terrorism” is not a chargeable offense.<sup>156</sup> This absence of criminal statutes providing penalties solely for acts of “domestic terrorism” relegate this conduct to status as an “element of other federal crimes or provide [for] an enhanced sentence.”<sup>157</sup> As the Congressional Research Service writes, “[i]n other words, an individual may commit criminal acts that are widely considered domestic terrorism and be prosecuted for the criminal acts themselves, but an individual cannot be *charged* with committing an act of domestic terrorism under current federal law.”<sup>158</sup>

### *C. Domestic Terrorism Prevention Act (DTPA)*

On March 27, 2019, fourteen Senators introduced the Domestic Terrorism Prevention Act of 2019 following its passage in the House.<sup>159</sup> Among other provisions, this proposed legislation, “authorize[d] domestic terrorism offices within the Department of Homeland Security, the Department of Justice, and the Federal Bureau of Investigation to analyze and monitor domestic terrorist activity and require the Federal Government to take steps to prevent domestic terrorism.”<sup>160</sup> During the 116th Congress, “Senator Durbin brought the bill on the Senate floor, only to be blocked by Senator Ron Johnson.”<sup>161</sup> Within days of the storming of the Capitol, the Bill was reintroduced in the House.<sup>162</sup>

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155. *Id.* at 1–2 (citing 18 U.S.C. § 2331(5); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001)).

156. *Id.* at 2.

157. *Id.*

158. *Id.*

159. See Domestic Terrorism Prevention Act of 2019, S. 894, 116th Cong.

160. *Id.*

161. Press Release, Brad Schneider, Congressman, Domestic Terrorism Prevention Act (DTPA) of 2021 Introduced in House (Jan. 19, 2021), <https://schneider.house.gov/media/press-releases/domestic-terrorism-prevention-act-dtpa-2021-introduced-house> [<https://perma.cc/M8MW-4CSW>].

162. *Id.*

*D. Charlottesville, White Supremacy Groups & Proud Boys*

A noted symbol of white supremacy groups, the Confederate battle flag, signifying secession and slavery, was prominent among the mob riot during January 6, 2021.<sup>163</sup> For the entire life of the United States, “Hate groups have been a staple of American life no matter who is in the White House. They have had natural foes when Democrats have held the presidency. Under Mr. Trump, they have had an ally.”<sup>164</sup> *The New York Times* reports:

The president echoed their demonization of immigrants and fears of gun seizures and pushed white grievance into the American mainstream.

Far-right groups were buoyed after Mr. Trump spoke of “very fine people on both sides” of the 2017 “Unite the Right” rally in Charlottesville, Va., where a white supremacist fatally ran over a peaceful counterprotester with his car. They saw a signal of support when Mr. Trump, during a presidential debate, told the far-right Proud Boys to “stand back and stand by.”<sup>165</sup>

*E. Proud Boys*

The Proud Boys, a far-right group “w[as] founded in 2016 as a club for men by Gavin McInnes, who also was a founder of the online publication Vice. Describing themselves as ‘Western chauvinists,’ the group attracted people who appeared eager to engage in violence and who frequently espoused anti-Muslim and anti-Semitic views.”<sup>166</sup> According to *The Wall Street Journal*, “On Jan. 3, three days before the attack on the Capitol, Enrique Tarrío, the leader of the far-right organization known as the Proud Boys, shared a cryptic post on the messaging app Telegram: ‘What if we invade it?’”<sup>167</sup> To the Proud Boys, the President’s message was viewed “as a call to action,” “with the first reply reading: ‘January 6th is D day in America.’”<sup>168</sup> Following President Trump’s December tweets about the January 6 rally saying “‘be there, will be wild,’ the Long Island

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163. See Rosenberg & Tiefenthäler, *supra* note 143.

164. Neil MacFarquhar, Jack Healy, Mike Baker & Serge F. Kovalski, *Capitol Attack Could Fuel Extremist Recruitment for Years, Experts Warn*, N.Y. TIMES (Jan. 30, 2021), <https://www.nytimes.com/2021/01/16/us/capitol-attack-extremist-hate-groups.html> [<https://perma.cc/AL3Z-3UVF>].

165. *Id.*

166. Sheera Frenkel & Alan Feuer, *They Called Trump ‘Emperor.’ Now, He’s ‘Weak.’*, N.Y. TIMES, Jan. 21, 2021, at A29.

167. Georgia Wells, Rebecca Ballhaus & Keach Hagey, *Proud Boys Inspired by Trump: Messages Suggest the Far-Right Group Interpreted President’s Words as Call to Action*, WALL ST. J., Jan. 19, 2021, at A6.

168. *Id.*

chapter of the Proud Boys posted that Trump supporters have been ‘waiting for the green light from the President.’”<sup>169</sup> Many took it as a sign that he had done just that. The *Times* observed:

In a Nov. 8 post . . . the group urged its followers to attend protests against an election that it said had been fraudulently stolen from Mr. Trump. “Hail Emperor Trump,” the Proud Boys wrote.

But by [January 18, 2021], the group’s attitude toward Mr. Trump had changed. “Trump will go down as a total failure,” the Proud Boys said in the same Telegram channel on Monday.<sup>170</sup>

As investigations and arrests started to take place, it was reported that, “Prosecutors have come close to alleging a conspiracy against members of the far-right national group the Proud Boys, saying that some of its members wore earpieces and chest-clipped walkie-talkies in a possible effort to communicate with one another.”<sup>171</sup> A month following the attack on the Capitol, *The New York Times* reported: “In a flurry of court papers filed in recent days—in four separate cases against six individual Proud Boys—federal officials have painted scenes like this, assembling the first draft of a narrative that suggests the Proud Boys brought some coordination to the Capitol attack.”<sup>172</sup> In addition:

In a criminal complaint released on Wednesday night [February 3, 2021], for instance, prosecutors said that days before the Capitol attack, Mr. [Ethan] Nordean issued a call on social media asking for donations of “protective gear” and declared during his podcast, “We are in a war.”

In previous filings, the government has said that some group members went to the Capitol with communication equipment and that leaders ordered subordinates to show up undercover, not in their typical black-and-yellow shirts.

The Proud Boys, who have long been some of the former President Donald J. Trump’s most vocal and violent supporters, have been a chief focus of the F.B.I.’s inquiry into the Capitol assault—not the least because they were one of the extremist groups with a large and visible presence in Washington on Jan. 6.<sup>173</sup>

As investigations continued, by early March 2021, we learned that

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169. *Id.*

170. Frenkel & Feuer, *supra* note 166.

171. See Feuer & Hong, *supra* note 81.

172. Alan Feuer, *Proud Boys Attacked Capitol with a Plan, New Documents Hint*, N.Y. TIMES, Feb. 6, 2021, at A19.

173. *Id.*

A member of the far-right nationalist Proud Boys was in communication with a person associated with the White House in the days just before the Jan. 6 assault . . . . Location, cellular and call record data revealed a call tying a Proud Boys member to the Trump White House . . . .<sup>174</sup>

By March 15, 2021, *The New York Times* reported that a federal investigation now targeted Mr. Ethan Nordean, 30, and Mr. Joseph Biggs, 37, in perhaps “‘one of the largest in American history.’ They face some of the most serious charges stemming from the attack on the U.S. Capitol in January: leading a mob of about 100 Proud Boys in a coordinated plan to disrupt the certification of President Donald J. Trump’s electoral defeat.”<sup>175</sup> According to *The New York Times*, Nordean and Briggs escaped legal action despite the following:

A protester was burning an American flag outside the 2016 Republican convention in Cleveland when Joseph Biggs rushed to attack. Jumping a police line, he ripped the man’s shirt off and “‘started pounding,” he boasted that night in an online video.

But the local police charged the flag burner with assaulting Mr. Biggs. The city later paid \$225,000 to settle accusations that the police had falsified their reports out of sympathy with Mr. Biggs, who went on to become a leader of the far-right Proud Boys.

Two years later, in Portland, Ore., something similar occurred. A Proud Boy named Ethan Nordean was caught on video pushing his way through a crowd of counterprotesters, punching one of them, then slamming him to the ground, unconscious. Once again, the police charged only the other man in the skirmish, accusing him of swinging a baton at Mr. Nordean.<sup>176</sup>

#### *F. Militias and Plot to Kidnap Michigan Governor*

Highly visible at the Capitol building on January 6, 2021, “‘Out in force were right-wing militias like the Oath Keepers and the Three Percenters, whose symbol, the Roman numeral III, could be seen on patches and flags. Both groups are anti-government, pro-guns and, nowadays, devoted to Mr. Trump.”<sup>177</sup> Additional symbols witnessed among the Capitol mob included, “‘Others on the right who share the militia’s anti-government views [and] often signal their beliefs with the

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174. Katie Benner, Alan Feuer & Adam Goldman, *F.B.I. Links Proud Boy and White House Associate*, N.Y. TIMES, Mar. 6, 2021, at A16.

175. David D. Kirkpatrick & Alan Feuer, *Proud Boys Got Bigger as Police Looked Away*, N.Y. TIMES, Mar. 15, 2021, at A1.

176. *Id.*

177. See Rosenberg & Tiefenthäler, *supra* note 143.

Gadsden flag, a yellow banner dating to the American Revolution with a rattlesnake and the phrase ‘Don’t Tread on Me.’”<sup>178</sup>

Over many months, motivated by requests by President Trump such as, “to ‘liberate’ Democratic-run states locked down by the coronavirus pandemic, far-right groups and rifle-toting extremists forged common cause with some mainstream Republicans upset with government limits on business and public life.”<sup>179</sup> During 2020, just months before the “Stop the Steal” rally and assault on the Capitol, “[i]n Michigan, armed gunmen stormed the statehouse in Lansing, and prosecutors charged [fourteen] men, including some tied to an armed group called Wolverine Watchmen, with plotting to kidnap Gov. Gretchen Whitmer in response to lockdown measures she imposed.”<sup>180</sup>

### *G. Boogaloo Bois*

The Southern Poverty Law Center is credited for observing that “The Boogaloo meme began emerging in both white power and antigovernment spaces online in the early 2010s . . . . In both of these communities, ‘boogaloo’ was frequently associated with racist violence and, in many cases was an explicit call for race war . . . .”<sup>181</sup> Alex Newhouse of Middlebury Institute’s Center on Terrorism, Extremism, and Counterterrorism states:

There are mainly two wings of the boogaloo movement, but their objective of overthrowing the government and sparking societal collapse remains the same . . . . One side is made up of some neo-Nazis and white supremacists, whose plan for destroying the government is by starting a race war.<sup>182</sup>

The other component of the Boogaloos is:

characterized as radical libertarian, notably men carrying weapons and wearing Hawaiian shirts. Some have recently been spotted at Black Lives Matter protests, waving anti-police signs alongside protesters . . . . They believe in defending the rights of individuals against the government and have been known to incite violence against police.<sup>183</sup>

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178. *Id.*

179. MacFarquhar, Healy, Baker & Kovaleski, *supra* note 164.

180. *Id.*

181. Khrysgiana Pineda, *The Boogaloo Movement Is Gaining Momentum. Who Are the Boogaloo ‘Bois’ and What Do They Want?*, USA TODAY (June 19, 2020), <https://www.usatoday.com/story/news/nation/2020/06/19/what-is-boogaloo-movement/3204899001> [<https://perma.cc/T3FN-EBM2>].

182. *Id.*

183. *Id.*

Law professor G. Alex Sinha relates the story of “Ivan Harrison Hunter—a self-identified leader of the right-wing Boogaloo Bois—[who allegedly] traveled from Texas to Minnesota with the specific aim of participating violently in the protests.”<sup>184</sup> Hunter is accused by prosecutors of “fir[ing] an AK-47 at the Third Precinct thirteen times while other protesters were inside, [before] join[ing] in the looting and arson of the building.”<sup>185</sup> Professor Sinha observes:

After shooting at the building, Hunter walked toward a rolling camera, high-fived another protester, and shouted, “Justice for Floyd!”

Given the ideology of the Boogaloo Bois’s commitment to “exploit[ing] unrest in order to start a second civil war,” Hunter’s interest in the discord in Minneapolis was probably not driven by solidarity with the protesters so much as a commitment to sparking a broader conflict between authorities and the populace. Hunter appears to have seen an opportunity to sow chaos and to attribute that chaos to a social movement different from his own—to Black Lives Matter (“BLM”) rather than to the Boogaloo Bois. He sought to tell the world a lie about BLM’s propensity for violence, and, in doing so, to invite a harsher police response.<sup>186</sup>

Professor Sinha teaches that “Hunter’s message is interesting and important from a public policy standpoint because it was dishonest—not just calculated to mislead the public about his personal views, but, more powerfully, designed to obscure his identity to facilitate a lie about an entire social movement.”<sup>187</sup> As I discussed more fully elsewhere,<sup>188</sup>

The public’s perception of BLM carries substantial implications for police reform and race relations more generally. That is why Hunter is not the only Boogaloo Boi to attempt to incite violence at BLM protests, and why those efforts matter.

... Roughly put, manipulative communications are those that advance false factual propositions, or advance true propositions through certain logically defective means. Here, Hunter channeled consequential lies about BLM through the media, effectively reaching a broad audience as part of a multipronged effort by the Boogaloo Bois to attribute violence to BLM and generally spread discord. Hunter’s efforts thus amount to a creative and insidious form

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184. G. Alex Sinha, *False Flags and the First Amendment: Lying Through Symbolic Speech*, 89 GEO. WASH. L. REV. ARGUENDO 133, 134–35 (2021).

185. *Id.* at 135.

186. *Id.* (footnotes omitted).

187. *Id.* at 143.

188. See *infra* Parts I, II, and VI.

of propaganda. . . . The incident in Minneapolis reveals that *stigmatizing acts*—in this case criminal acts of violence—can be undertaken as communicative, propagandistic acts.<sup>189</sup>

#### H. QAnon

The QAnon “conspiracy theory falsely claims that there is a cabal of Democrats, deep-state bureaucrats and international financiers who use their power to rape and kill children, and that Mr. Trump was elected to vanquish them. The canard is convoluted and confusing, but its iconography is clear and was plentiful . . . .”<sup>190</sup> Those identifying as QAnon at the Capitol wore “shirts with the letter ‘Q’ or slogans like ‘Trust the Plan’; signs saying ‘Save the Children’; and flags with the abbreviation ‘WWG1WGA,’ which stands for ‘Where We Go One, We Go All.’”<sup>191</sup>

It was Georgia Representative Marjorie Taylor Greene’s advocacy of these conspiracy theories attributed to the Qanon group that resulted in her being stripped of coveted House committee assignments.<sup>192</sup> In addition to embracing the Qanon notion that “a cabal of Satan-worshipping pedophiles was plotting against Mr. Trump,” other conspiracy theory media posts from Rep. Greene included “a space laser controlled by Jewish financiers started a California wildfire.”<sup>193</sup> Ms. Greene also posted that “endorsed executing top Democrats, including Nancy Pelosi; suggested a number of school shootings were secretly perpetrated by government actors; and repeatedly trafficked in anti-Semitic and Islamophobic conspiracy theories.”<sup>194</sup> *The New York Times* describe Qanon as a “right-wing movement convinced of the fiction that Donald Trump is a messiah sent to defeat a cabal of Satan-worshipping, child-abusing, deep-state villains.”<sup>195</sup> The list of “bizarre lies” offered in support of this proposition include that: “the Obama administration used its MS-13 ‘henchmen’ to murder a Democratic National Committee staff member and floating the idea that the Clintons had John F. Kennedy Jr. killed. She has dabbled in 9/11 Trutherism and contended that various school shootings were false-flag operations.”<sup>196</sup>

189. See Sinha, *supra* note 184, at 143–44.

190. See Rosenberg & Tiefenthäler, *supra* note 143.

191. *Id.*

192. Rick Rojas, ‘It’s Embarrassing’: In Georgia, Greens Tests the Limits of Some Voters, N.Y. TIMES, Feb. 5, 2021, at A18.

193. *Id.*

194. Catie Edmondson, *Vote by House Ejects Greene From 2 Panels*, N.Y. TIMES, Feb. 5, 2021, at A1.

195. *If Marjorie Taylor Greene Isn’t Beyond the Pale, Who Is?*, Opinion, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/opinion/marjorie-taylor-greene-gop.html> [<https://perma.cc/4A8S-VSSA>].

196. *Id.*

Another major figure in the Qanon movement appears to be Michael J. Flynn, described as “the former national security adviser . . . a discredited and dishonored ex-general, a once-esteemed military intelligence officer who went off the rails ideologically and then was fired a mere [twenty-four] days into the Trump administration for lying to the F.B.I. about contacts with the Russian ambassador.”<sup>197</sup> Reports emerged that:

Mr. Flynn’s dark view of Islam and eagerness to cultivate President Vladimir V. Putin of Russia have given way to an embrace of QAnon, the pro-Trump conspiracy theory, and a readiness to question the very fabric of American democracy. He has swapped a government job and an obsessive focus on “radical Islamic terrorism” for selling QAnon-branded T-shirts and a new media partnership with conspiracy theorists called Digital Soldiers.

. . . Call it the alt-truth movement, and if it is to coalesce into something more permanent, it may well be, at least in part, because figures like Mr. Flynn continue to push false claims of how a deep-state cabal stole the election.

. . .

In an interview with Newsmax, the conservative channel, [Flynn] suggested Mr. Trump could impose martial law in swing states he had lost and rerun the elections.

. . .

Then there is his new media venture, Digital Soldiers, which will publish reader-submitted stories. Mr. Flynn is building it with UncoverDC, a website that has pushed Qanon and conspiracy theories about the Covid-19 pandemic and President Biden.

. . .

. . . The supposed dishonesty of the mainstream media is central to Qanon, and Digital Soldiers—a phrase followers often use to describe themselves—represents Mr. Flynn’s fullest embrace of the movement to date.

. . .

This past summer, Mr. Flynn posted a video of himself taking QAnon’s “digital soldier” oath. To many of the movement’s followers, Mr. Flynn ranks just below Mr. Trump. Some have

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197. Matthew Rosenberg, *Pushing QAnon and Stolen Election Lies, Flynn Re-emerges*, N.Y. TIMES (Feb. 6, 2021), <https://www.nytimes.com/2021/02/06/us/politics/michael-flynn-qanon.html?searchResultPosition=1> [<https://perma.cc/S74B-9F56>].



speculated that he is the mysterious figure known as “Q,” the purported government insider with a high-level security clearance who began posting cryptic messages in 2017 about the deep state trying to destroy the president.<sup>198</sup>

### *I. Oath Keepers*

According to the F.B.I.,

Militia groups have a long history of taking part in anti-government events and right-wing political protests. The Oath Keepers are an anti-government, pro-gun militia composed largely of former law enforcement and military veterans “who believe that the federal government . . . is trying to strip American citizens of their rights.”<sup>199</sup>

The initial criminal complaint against certain members of The Oath Keepers showed that prosecutors charged defendants Thomas E. Caldwell, Donovan Crowl, and Jessica Watkins after investigators employed a variety of techniques to track down the defendants.<sup>200</sup> According to *The New York Times*:

Investigators also conducted an analysis of locational data from a cellphone registered to Mr. Caldwell’s wife, determining that it was near the Capitol at the time of the assault. Since Mr. Caldwell had no obvious connection to the others, agents followed up the lead with a more old-fashioned method.

While searching Ms. Watkins’s home in Ohio, they persuaded one of her friends to tell them that Ms. Watkins had provided a phone number for a fellow Oath Keeper with whom she had stayed after the attack. The F.B.I. was able to determine the number was connected to the cellphone registered to Mr. Caldwell’s wife.<sup>201</sup>

Weeks following the Capitol riot, reports emerged that the Oath Keepers “largely draw their membership from former law enforcement and military personnel [and] appear to have coordinated before the Capitol attack with other extremist groups, prosecutors say.”<sup>202</sup> As the Senate impeachment hearing was underway, Election Day activities were reported:

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198. *Id.*

199. Adam Goldman, Katie Benner & Alan Feuer, *Investigators Eye Right-Wing Militias at Capitol Riot*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/01/18/us/politics/capitol-riot-militias.html?searchResultPosition=1> [<https://perma.cc/Y78U-3Q56>].

200. See Feuer & Hong, *supra* note 81.

201. *Id.*

202. Alan Feuer, *Oath Keepers Plotting Before Capitol Riot Awaited ‘Direction’ from Trump, Prosecutors Say*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2021/02/11/us/politics/oath-keepers-trump-investigation.html?searchResultPosition=1> [<https://perma.cc/J45Z-TC4U>].

[c]hilling new details emerged . . . about the plot by the Oath Keepers militia group to attack the Capitol as prosecutors said that members discussed a brazen plan to ferry “heavy weapons” . . . across the Potomac River into Washington and began training sessions “for urban warfare, riot control and rescue operations. . . .”<sup>203</sup>

These new reports:

[I]ncluded allegations that a member of the [Oath Keepers] militia group was “awaiting direction” from Mr. Trump about how to handle the results of the vote in the days that followed the election. “POTUS has the right to activate units too,” the Oath Keepers member, Jessica M. Watkins, wrote in a text message to an associate on Nov. 9, according to court papers. “If Trump asks me to come, I will.”

. . . Prosecutors say that the three Oath Keepers, who are facing conspiracy charges, appear to have worked with other far-right extremist groups and “began plotting to undo” the results of the election only days after it occurred.

Shortly after the three militia members were arrested . . . prosecutors said that they were some of the first rioters to have planned their part in the attack on the Capitol instead of merely storming the building spontaneously.

. . .

In a pair of court papers filed on Thursday [February 11, 2021], prosecutors offered further evidence that the three Oath Keepers planned the attack, citing text messages reaching back to November. In one message from Nov. 16, prosecutors say, Mr. Crowl told Mr. Caldwell, “War is on the horizon.” One week later, court papers say, Mr. Caldwell wrote Ms. Watkins saying he was “worried about the future of our country,” adding, “I believe we will have to get violent to stop this.”

. . .

When federal agents searched Mr. Caldwell’s house in Virginia last month, they discovered a document titled “Death List” that contained the name of an unidentified election official from another state, prosecutors said. The agents also found a pistol that was “intentionally built to look like a cellphone,” prosecutors say.<sup>204</sup>

Stewart Rhodes,

founder of the Oath Keepers . . . appeared on the conspiracy theory media outlet Infowars shortly after the election, claiming that his

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203. *Id.*

204. *Id.*

group was ready to attack Washington in defense of Mr. Trump. “We’ll also be on the outside of D.C., armed, prepared to go in, if the president calls us up,” he said.<sup>205</sup>

*The New York Times* reported:

members of the Oath Keepers . . . have been working as security guards for Republicans and for Mr. Trump’s allies, such as Mr. [Roger] Stone . . . who was pardoned by Mr. Trump after refusing to cooperate with the investigation into the Trump campaign’s contacts with Russian intelligence . . . .<sup>206</sup>

It appears that Roger Stone’s use of “Oath Keepers as bodyguards [was extensive] before and on the day of the assault on the Capitol.”<sup>207</sup>

#### *J. Pipe Bombs Planted*

By Thursday, January 21, 2021, “the F.B.I. indicated that it was actively pursuing the most serious actors in the Capitol attack, announcing a reward of up to \$75,000 for information about anyone linked to devices believed to be pipe bombs that were planted at the headquarters of the Republican and Democrat National Committees.”<sup>208</sup> Containing a description of the person believed to be responsible, “[t]he bulletin showed a grainy photo of someone wearing a white mask, black gloves and a hooded sweatshirt, walking down a street and carrying a backpack.”<sup>209</sup>

#### *K. White House Connections*

As investigations continued, by early March 2021 reports surfaced that “Federico G. Klein . . . a low-level aide on Mr. Trump’s 2016 campaign . . . [was] a leader of the mob that stormed the Capitol on Jan. 6, according to a court document filed by the F.B.I., which arrested Mr. Klein.”<sup>210</sup> Granted a top-secret security clearance, the appointment of Mr. Klein to the Department of State position came as the result of “pressure from the White House in early 2017 [as] Mr. Klein, whose father was from Argentina and had worked at the Inter-American Development Bank before his death, was installed in the State Department’s Office of

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205. See Goldman, Benner & Feuer, *supra* note 199.

206. Katie Benner, Alan Feuer & Adam Goldman, *F.B.I. Finds Contact Between Proud Boys Member and Trump Associate Before Riot*, N.Y. TIMES (March 5, 2021), <https://www.nytimes.com/2021/03/05/us/politics/trump-proud-boys-capitol-riot.html> [<https://perma.cc/XE8F-MTYX>].

207. *Id.*

208. See Feuer & Hong, *supra* note 81.

209. *Id.*

210. Michael Crowley, *Trump Official Arrested in Storming of Capitol Left Little Mark Before Riot*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/us/politics/federico-klein-capitol-riot-trump.html?searchResultPosition=1> [<https://perma.cc/K3VW-JKDR>].

Brazilian and Southern Cone Affairs as a special assistant.”<sup>211</sup> With numerous investigations underway and discovery from several law suits yet to transpire, it is likely that much more will be learned about the involvement of the Trump White House in the support and planning for the events leading to mob violence on January 6th. *The New York Times* reported:

Several State Department officials and Trump political hands said that they had no memory of Mr. Klein, and that his role on the 2016 campaign—for which he reported just \$15,000 in income in a financial disclosure form—would have been marginal.

He served in the Marine Corps Reserves from early 2004 to late 2012 as a combat engineer, reaching the rank of corporal, according to records released by the Defense Department. . . .

He did serve a tour of duty in Iraq, in 2005, according to his mother, Cecilia Klein. She said he never fired his weapon there.<sup>212</sup>

#### VII. ROLE OF SOCIAL MEDIA IN RADICALIZATION

There is no question that President Trump is practically and morally responsible for provoking the events of that day. The people who stormed this building believed they were acting on the wishes and instructions of their President. And their having that belief was a foreseeable consequence of the growing crescendo of false statements, conspiracy theories, and reckless hyperbole which the defeated President kept shouting into the largest megaphone on planet Earth. The issue is not only the President’s intemperate language on January 6th. It is not just his endorsement of remarks in which an associate urged “trial by combat.” It was also the entire manufactured atmosphere of looming catastrophe; the increasingly wild myths about a reverse landslide election that was being stolen in some secret coup by our now-President.

Mitch McConnell  
Senate Minority Leader  
February 13, 2021<sup>213</sup>

In just a few short decades, social media platforms have played a major role in reshaping American society and shifting the manner and

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211. *Id.*

212. *Id.*

213. See Read McConnell’s Remarks on the Senate Floor Following Trump’s Acquittal, CNN (Feb. 13, 2021), <https://www.cnn.com/2021/02/13/politics/mcconnell-remarks-trump-acquittal/index.html>.

speed in which communications take place.<sup>214</sup> Harvard Berkman-Klein scholars Robert Faris, Justin Clark, Bruce Etling Jonas Kaiser, Hal Roberts, Carolyn Schmidt, Casey Tilton, and Yochai Benkler, even before the November 2020 presidential election, point to the heightened level “of disinformation in political discourse among partisan media and on social media.”<sup>215</sup> These Harvard professors warn that the “problem is far more acute on the right than the left and considerable attention on the far-right is tied to the growing QAnon conspiracy. This development is a troubling symptom of the state of political discourse in the United States and translates into real-world costs.”<sup>216</sup> Brookings scholar Darrell M. West writes about “the rising polarization in the United States over the past [forty] years and how dangerous the divisions were for our ability to function as a democracy and our ability to address important problems.”<sup>217</sup> Accordingly, he described the following:

Flash forward and it is shocking how the situation since then has deteriorated and the role misinformation has played in the intensification of the political divide. During the 2020 election, for example, there were false claims that mail ballots would generate massive election fraud and that wearing masks to protect people against COVID-19 would endanger individual freedom. In addition, President Donald Trump has proclaimed since the election that it was stolen from him, there was massive fraud, and the Joe Biden’s victory was illegitimate. Dozens of courts have dismissed these claims for lack of evidence, including cases presided over by Trump-appointed judges.<sup>218</sup>

*The New York Times* reported that “Keith Lee, an Air Force veteran and former police detective, spent the morning of Jan. 6 [2021] casing the entrances to the Capitol.”<sup>219</sup> We now know that social media has played an important role in the organizing of the many small groups and militias who assembled in Washington on the day of 2020 presidential election certification. *The New York Times* described Mr. Lee’s activities:

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214. See Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-Commerce, Political and Regulatory Compliance Risks*, 10 WM. & MARY BUS. L. REV. 1 (2018).

215. ROBERT FARIS, JUSTIN CLARK, BRUCE ETLING, JONAS KAISER, HAL ROBERTS, CAROLYN SCHMIDT, CASEY TILTON & YOCHAI BENKLER, POLARIZATION AND THE PANDEMIC: AMERICAN POLITICAL DISCOURSE 3 (2020).

216. *Id.*

217. West, *supra* note 32; see also DARRELL M. WEST, DIVIDED POLITICS, DIVIDED NATION: HYPERCONFLICT IN THE TRUMP ERA 1 (2020).

218. *Id.*

219. David D. Kirkpatrick, Mike McIntire & Christiaan Triebert, *Before Capitol Riot, Thousands Made Small Donations Online*, Jan 17, 2021, at A1.

In online videos, the 41-year-old Texan pointed out the flimsiness of the fencing. He cheered the arrival, long before President Trump's rally at the other end of the mall, of far-right militiamen encircling the building. Then, armed with a bullhorn, Mr. Lee called out for the mob to rush in, until his voice echoed from the dome of the Rotunda.

Yet even in the heat of the event, Mr. Lee paused for some impromptu fund-raising. 'If you couldn't make the trip, give five to ten bucks,' he told his viewers, seeking donations for the legal costs of two jailed 'patriots,' a leader of the far-right Proud Boys and an ally who had clashed with the police during an armed incursion at Oregon's statehouse.

Much is still unknown about the planning and financing of the storming of the Capitol, aiming to challenge Mr. Trump's electoral defeat. What is clear is that it was driven, in part, by a largely ad hoc network of low-budget agitators, including far-right militants, Christian conservatives and ardent adherents of the QAnon conspiracy theory. Mr. Lee is all three. And the sheer breadth of the movement he joined suggests it may be far more difficult to confront than a single organization . . . . To help pay for dozens of caravans to meet at the Jan. 6 rally, he had teamed up with an online fund-raiser in Tampa, Fla., who secured money from small donors and claimed to pass out tens of thousands of dollars.<sup>220</sup>

In describing the storming of the capitol building, Mr. West writes that, "It was the ultimate polarization of Americans turning against other Americans and engaging in violence that resulted in death and injury."<sup>221</sup> Consider the following:

[O]n social media, Trump supporters continue to spread outright lies. People I know argue that the violence was committed by ultra-liberal antifa supporters who infiltrated what they claimed was a peaceful Trump protest. Others are telling their friends to shut off the automatic update feature of their phones because the operators are going to remove Trump's access to the emergency broadcast system. Some even suggest that some of the more extreme actions were staged and did not take place in the way they are being depicted by the news media.

These are not innocent lies that have no consequences. These false narratives allow those who saw the Capitol invasion to believe Trump supporters refrained from violence and that progressive activists were

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220. David D. Kirkpatrick, Mike McIntire & Christiaan Triebert, *Before the Capitol Riot, Calls for Cash and Talk of Revolution*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/16/us/capitol-riot-funding.html>.

221. West, *supra* note 32.

the guilty ones. They help the president's side turn the violent attack into an argument on why Trump supporters are being unfairly framed.<sup>222</sup>

As investigations and arrests took place following the January 6 storming of the Capitol, *The New York Times* reported: “[o]f the 125 federal arrests made so far [by January 21, 2021] in connection with the riot at the Capitol earlier this month, most have been relatively simple: Agents and prosecutors have put together cases largely by scouring the news and social media for incriminating photographs and videos.”<sup>223</sup> A brief review of several prominent platforms are now presented: Facebook, Twitter, Parler & AWS, and Telegram. These platforms have been implicated in the growth of U.S. political polarization.

#### A. Facebook

Just like Congress has taken a keen interest during recent years about the role Facebook played in the 2016 U.S. presidential election,<sup>224</sup> there can be little doubt that Facebook leadership will incur demands from Congress to appear and provide testimony about the role played in events leading up to the January 6 riot.<sup>225</sup> *The Wall Street Journal* reported the following about the U.S. Capitol riot by Trump-supporters:

User reports of violent content jumped more than 10-fold from the morning, according to documents viewed by the Wall Street Journal. A tracker for user reports of false news surged to nearly 40,000 reports an hour, about four times recent daily peaks. On Instagram, the company's popular photo-sharing platform, views skyrocketed for content from authors in “zero trust” countries, reflecting potential efforts at platform manipulation from entities overseas. Facebook's platforms were aflame, the documents show. One Instagram presentation, circulated internally and seen by the Journal, was subtitled “Why business as usual isn't working.”<sup>226</sup>

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222. *Id.*

223. See Feuer & Hong, *supra* note 81.

224. See Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis*, 20 PITT. J. TECH. L. & POL'Y 41 (2020)

225. Elizabeth Dwoskin, *Facebook's Sandberg Deflected Blame for Capitol Riot, but New Evidence Shows How Platform Played Role*, WASH. POST (Jan. 13, 2021), <https://www.washingtonpost.com/technology/2021/01/13/facebook-role-in-capitol-protest/> [<https://perma.cc/8B65-UL8D>].

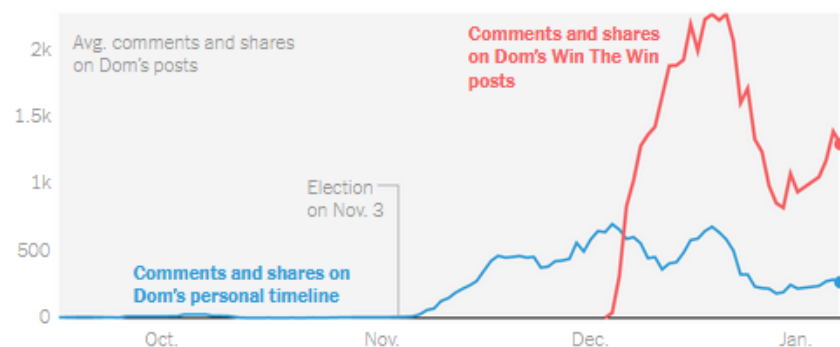
226. Jeff Horowitz & Deepa Seetharaman, *Facebook Turned on Trump After Warnings that 'Business as Usual Isn't Working'*, WALL ST. J. (Jan. 13, 2021), <https://www.wsj.com/articles/facebook-turned-on-trump-after-warnings-that-business-as-usual-isnt-working-11610578907> [<https://perma.cc/495M-X7DE>].

In an op-ed published in *The New York Times*, Stuart A. Thompson and Charlie Warzel contend that “Facebook’s algorithms have coaxed many people into sharing more extreme views on the platform—rewarding them with likes and shares for posts on subjects like election fraud conspiracies, Covid-19 denialism and anti-vaccination rhetoric.”<sup>227</sup> Exhibit 8 illustrates an example of how one Facebook user dramatically increased subsequent comments and shares to his pro-election conspiracy posts.

Exhibit 8<sup>228</sup>

### A Turn to Partisanship

After Mr. McGee started posting more about President Trump and the election, he was rewarded with surging likes and shares. Those rewards multiplied after starting his Win the Win group.



### Increased Facebook Audience Due to Pro-election Conspiracy Posts

By January 22, 2021, *The Wall Street Journal* reported, “Facebook Inc. has referred its decision to indefinitely suspend the accounts of former President Donald Trump to its outside oversight board, as the company grapples with how to treat one of its highest-profile users after his exit from public office.”<sup>229</sup> Consider the following:

Earlier this month the social-media giant moved to disable Mr. Trump’s Facebook and Instagram accounts for at least two weeks, after he encouraged protests of the election results and his supporters stormed the U.S. Capitol in a Jan. 6 attack that left five dead. Chief

227. Stuart A. Thompson & Charlie Warzel, *They Used to Post Selfies. Now They’re Trying to Reverse the Election*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/14/opinion/facebook-far-right.html?searchResultPosition=1> [<https://perma.cc/8DAR-U6HD>].

228. *Id.* (chart displays a seven-day moving average).

229. Sarah E. Needleman, *Facebook Refers Trump Account Suspension to Oversight Board*, WALL ST. J. (Jan. 21, 2021), <https://www.wsj.com/articles/facebook-refers-trump-account-suspension-to-oversight-board-11611251506> [<https://perma.cc/CY74-KNR5>].



Executive Mark Zuckerberg said at the time that the risks of Mr. Trump’s use of the platforms through Inauguration Day were too great.

...

Facebook said the former president’s accounts would remain suspended while five members of the 20-person oversight board determine whether certain posts he made before the riot had violated the company’s community standards and values.

They will also determine whether Facebook’s removal of those posts respected international human-rights standards. The board—which has been likened to a Supreme Court for content decisions—is an independent group of academics, lawyers and human-rights advocates from around the world.

...

A majority of the board must sign off on the final decision, which is expected to be delivered within the next three months. World leaders, members of Congress and Facebook’s social-media peers will pay close attention to the board’s verdict, said Avery Gardiner, general counsel at the nonprofit Center for Democracy & Technology.<sup>230</sup>

Public research and data initiative The Tech Transparency Project is credited by news reports as having “identified roughly 125 Facebook groups related to the [Boogaloo] movement, more than half of which were created between February and April [2020] and had recently attracted tens of thousands of members.”<sup>231</sup> To its credit, it appears that Facebook took action during May 2020, “to limit the [Boogaloo] groups . . . the social media company banned the use of the term boogaloo and related words when they accompany pictures of weapons and calls to action. Later, Facebook said it would no longer recommend such groups to members of similar associations.”<sup>232</sup>

### *B. Twitter*

The day following the attack on the capitol, “one group, known for pushing the worst anti-Semitic tropes, commented on Twitter . . . , ‘The politicians who have lied, betrayed and sold out the American people for decades were forced to cower in fear and scatter like rats.’”<sup>233</sup> Twitter banned President Trump from using its platform because of further

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230. *Id.*

231. Pineda, *supra* note 181.

232. *Id.*

233. Neal MacFarquhar, Jack Healy, Mike Baker & Serge F. Kovalski, *Assault Spawns New Rally Cry for Extremists*, N.Y. TIMES, Jan. 17, 2021, at A1.

incitement of violence risk following the deadly January 6th insurrection at the U.S. Capitol.<sup>234</sup> The Guardian reported, “[a]s of 12 January, [Twitter] had also suspended more than 70,000 accounts associated with QAnon as it attempted to rein in harmful activity ahead of the presidential inauguration.”<sup>235</sup> Among those accounts suspended included a member of U.S. Congress. Consider:

Twitter has temporarily suspended the account of the Georgia congresswoman Marjorie Taylor Greene, who has gained a large following on social media, in part by posting incendiary videos and comments.

Greene, a Republican businesswoman, is the first candidate who expressed support for the baseless, far-right QAnon conspiracy theory to win a US House seat. Greene in November won the race for Georgia’s 14th congressional district after her Democratic opponent had dropped out.

On Sunday [January 17, 2021], she posted a clip from an interview with a local news outlet in which she condemned Georgia election officials and expressed support for debunked theories claiming that voting machines, absentee ballots and other issues led to widespread fraud in the state during the presidential election.

Twitter responded to the tweet, and others, with a message that called the election fraud claim “disputed[,]” and saying it posed “a risk of violence”.

A statement from Greene’s team on Sunday included screenshots from Twitter that appeared to show the company informing the congresswoman she had violated its rules and would be prohibited from interacting with content on the site for [twelve] hours.

Greene said in a statement her account had been suspended “without explanation.”

Greene has faced national scrutiny for racist and bigoted statements and posts supporting QAnon, the baseless conspiracy theory rooted in antisemitic tropes whose followers believe Donald Trump is secretly fighting against a cabal of Democrats, billionaires and celebrities engaged in child trafficking.

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234. See Poppy Noor, *Should We Celebrate Trump’s Twitter Ban? Five Free Speech Experts Weigh In*, GUARDIAN (Jan. 17, 2021), <https://www.theguardian.com/us-news/2021/jan/17/trump-twitter-ban-five-free-speech-experts-weigh-in>.

235. *Twitter Suspends Marjorie Taylor Greene, QAnon-Backing Republican*, GUARDIAN (Jan. 18, 2021), <https://www.theguardian.com/technology/2021/jan/18/twitter-suspends-marjorie-taylor-green-qanon-backing-republican>.

The FBI has identified the movement as a potential domestic terrorism threat, and it has repeatedly inspired vigilante violence.<sup>236</sup>

### C. Parler & AWS

On January 11, 2021, *The Washington Post* reported that “Amazon suspended the pro-Trump social network Parler from its Web-hosting service over the weekend, a move that threatens to darken the site indefinitely after its users glorified the recent riot at the U.S. Capitol.”<sup>237</sup> As an example of Parler usage by Oath Keeper insurrectionists, the FBI did the following:

Agents . . . pored through video footage at the Capitol looking for badges or insignia suggesting that the three accused militia members were part of the same group. They trolled through social media accounts on platforms like Parler for any indications that the three were not only at the building [] but had planned in advance to be there. And they obtained audio recordings of Ms. Watkins talking with others who are suspected of being Oath Keepers on Zello, a push-to-talk cellphone app that operates like a walkie-talkie.”<sup>238</sup>

*The Wall Street Journal* reported that the official Proud Boys account on Parler, “had more than 340,000 followers before the platform went offline . . . [Proud Boys leader] Mr. Tarrío said on Dec. 29 that the Proud Boys would be able to put a thousand ‘boots on the ground’ and ‘turn out in record numbers on Jan. 6.”<sup>239</sup> Consider:

The Proud Boys escalated their social-media activity and appeared emboldened after the Sept. 29 presidential debate, the [Wall Street] Journal’s review shows. In that debate, moderator Chris Wallace asked Mr. Trump if he would condemn white supremacists and militia groups. As part of his reply, the president said, “Proud Boys, stand back and stand by.”

The response within the group, whose members describe themselves as “Western Chauvinists” and advocate misogynistic, racist and anti-Semitic views, was euphoric. On Parler, members shared designs for a T-shirt inspired by Mr. Trump’s comments. It read: “Proud Boys standing by.”<sup>240</sup>

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236. *Id.*

237. Tony Romm & Rachel Lerman, *Amazon Suspends Parler, Taking Pro-Trump Site Offline Indefinitely*, WASH POST (Jan. 11, 2021), <https://www.washingtonpost.com/technology/2021/01/09/amazon-parler-suspension/> [https://perma.cc/5FER-BBND].

238. See Feuer & Hong, *supra* note 81.

239. Wells, Ballhaus & Hagey, *supra* note 167.

240. *Id.*

On February 16, 2021, we learned that “Parler, the social network popular with conservatives, has come back online after going dark when some tech companies withdrew their services in the wake of the deadly attack on the U.S. Capitol.”<sup>241</sup> The Wall Street Journal reported: “Amazon.com Inc. removed Parler from its cloud-computing service . . . over a month ago, effectively knocking the network offline. Apple Inc. and Alphabet Inc.’s Google removed it from their respective app stores. The tech companies said Parler had violated terms-of-service agreements . . . .”<sup>242</sup>

#### *D. Telegram and Signal*

In the days leading up to and following the Trump rally and assault on the U.S. Capitol, news media started to report on the usage of encryption apps by militia groups and others to escape easy detection by law enforcement.<sup>243</sup> *The New York Times* observed:

Over the past week, tens of millions of people have downloaded Signal and Telegram, making them the two hottest apps in the world. Signal allows messages to be sent with ‘end-to-end encryption, meaning no one but the sender and receiver can read its contents. Telegram offers some encrypted messaging options, but is largely popular for its group-based chat rooms where people can discuss a variety of subjects.

Their sudden jump in popularity was spurred by a series of events last week that stoked growing anxiety over some of the big tech companies and their communication apps, like WhatsApp, which Facebook owns. Tech companies including Facebook and Twitter removed thousands of far-right accounts—including President Trump’s —after the storming of the Capitol. Amazon, Apple and Google also cut off support for Parler, a social network popular with Mr. Trump’s fans. In response, conservatives sought out new apps where they could communicate.

At the same time, privacy worries rose over WhatsApp, which last week reminded users in a pop-up notification that it shares some of their data with its parent company. The notification set off a wave of

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241. Jeff Horwitz & Robert McMillan, *Parler Resurfaces Online After Monthlong Service Disruption*, WALL ST. J. (Feb. 15, 2021), <https://www.wsj.com/articles/parler-resurfaces-online-after-monthlong-service-disruption-11613422725> [<https://perma.cc/J522-RTQF>].

242. *Id.*

243. Jack Nicas, Mike Isaac & Sheera Frenkel, *Millions Flock to Telegram, Signal as Fears Grow Over Big Tech*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/technology/telegram-signal-apps-big-tech.html>

anxiety, fueled by viral chain messages that falsely claimed that Facebook could read WhatsApp messages.

The result was a mass migration that, if it lasts, could weaken the power of Facebook and other big tech companies. On Tuesday [January 12, 2021] Telegram said it added more than 25 million users over the previous three days, pushing it to over 500 million users. Signal added nearly 1.3 million users on Monday alone, after averaging just 50,000 downloads a day last year, according to estimates from Apptopia, an app-data firm.<sup>244</sup>

#### VIII. THE FOURTEENTH AMENDMENT

“Donald Trump needs to be held accountable for deliberately inciting and colluding with white supremacists to stage a coup, in his continuing efforts to disenfranchise African-American voters. The insurrection was the culmination of a carefully orchestrated, months-long plan to destroy democracy, to block the results of a fair and democratic election, and to disenfranchise hundreds of thousands of African-American voters who cast valid ballots. Since our founding, the NAACP has gone to the courthouse to put an end to actions that discriminate against African-American voters. We are now bringing this case to continue our work to protect our democracy and make sure nothing like what happened on January 6th ever happens again.”

Derrick Johnson  
President and CEO  
NAACP<sup>245</sup>

Two former Republican legislators from Missouri, Tom Coleman, a former congressman, and former Senator John C. Danforth, wrote, “[s]uch anti-democratic conduct should disqualify Trump from ever holding future public office. While conviction by the Senate would have been the best and quickest route to disqualification, because that failed, Congress can—and must—pursue an alternative path to protecting our Republic from a future Trump presidency.”<sup>246</sup> Coleman and Danforth argued that the fourteenth Amendment, Section 3:

bars from public office those officials who engage in ‘insurrection or rebellion’ against the United States. Passed in the wake of the Civil

244. *Id.*; see also Shira Ovide, *The Alternate Reality of Fringe Apps*, N.Y. TIMES, Jan. 14, 2021.

245. Press Release, NAACP Files Federal Lawsuit Accusing Trump and Giuliani of Inciting U.S. Capitol Riot, NAACP (Feb. 16, 2021), <https://naacp.org/latest/naacp-files-federal-lawsuit-accusing-trump-and-giuliani-of-inciting-u-s-capitol-riot/> [<https://perma.cc/ZN5A-T3DP>].

246. Tom Coleman & John C. Danforth, *Opinion, Congress Must Invoke the 14th Amendment to Stop Trump from Running Again*, WALL ST. J. (Feb. 16, 2021), <https://www.washingtonpost.com/opinions/2021/02/16/14th-amendment-disqualify-trump-congress/> [<https://perma.cc/K77Y-U52Q>].

War, Section 3 sought to ensure that those who have violated their oaths to defend the Constitution by threatening our democracy cannot hold public office in the future. Importantly, Congress did not limit Section 3 to disqualifying only members of the former Confederacy, but instead deliberately drafted language to encompass any future acts of insurrection or rebellion — such as those of Jan. 6.

There can be no serious dispute that Trump engaged in insurrection within the meaning of Section 3. While Trump did not himself storm the Capitol on Jan. 6, his actions leading up to and during that day's events were central to the insurrection.

...

These actions amount to a historic attack on our democracy, an astonishing abuse of power and a violation of his oath of office—and they rise to the level of “insurrection or rebellion.”

Because the Senate failed to convict Trump in the impeachment trial, Congress should immediately take action to ensure that Trump is held accountable under Section 3—an action endorsed by legal scholars. Ideally, Congress would enact legislation that both establishes judicial procedures to enforce Section 3 and expresses Congress's conclusion—based on factual findings—that Trump engaged in insurrection within the meaning of Section 3. But even a resolution that only does the latter would cast serious doubt on Trump's eligibility to run for president in 2024.

In addition to not being subject to a two-thirds majority vote, such legislation has numerous advantages. First, it would provide a strong basis for state election officials or political opponents to challenge his candidacy based on Congress's finding that Section 3 disqualifies him from holding office. This would create a cloud of illegitimacy over a potential Trump candidacy, deterring supporters and donors. Second, while it is most important to prevent any future Trump campaign, any judicial procedures created by Congress could also be used to disqualify others involved in the Jan. 6 insurrection from holding future office.<sup>247</sup>

## IX. POST-CAPITOL ATTACK DEVELOPMENTS

In the aftermath of the attack, the Justice Department began its work on what has become one of the largest, most complex, and most resource-intensive investigations in our history.

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<sup>247</sup> *Id.*; see also Phillip Zelikow, *A Practical Path to Condemn and Disqualify Donald Trump*, LAW FARE (Jan. 22, 2021), <https://www.lawfareblog.com/practical-path-condemn-and-disqualify-donald-trump> [<https://perma.cc/6AJJ-KQUU>].

Only a small number of perpetrators were arrested in the tumult of January 6th itself. Every day since, we have worked to identify, investigate, and apprehend defendants from across the country. And we have done so at record speed and scale—in the midst of a pandemic during which some grand juries and courtrooms were not able to operate.

Led by the U.S. Attorney’s Office for the District of Columbia and the FBI’s Washington Field Office, DOJ personnel across the department — in nearly all [fifty-six] field offices, in nearly all [ninety-four] United States Attorneys’ Offices, and in many Main Justice components — have worked countless hours to investigate the attack. Approximately [seventy] prosecutors from the District of Columbia and another [seventy] from other U.S. Attorney’s Offices and DOJ divisions have participated in this investigation.

So far, we have issued over 5,000 subpoenas and search warrants, seized approximately 2,000 devices, pored through over 20,000 hours of video footage, and searched through an estimated 15 terabytes of data.”

Merrick B. Garland  
Attorney General  
January 5, 2022<sup>248</sup>

Reports emerged that “[i]n recently issued intelligence bulletins, federal authorities have said the deadly attack on Congress is expected to be a ‘significant driver of violence’ for armed militia groups and racist extremists in the days ahead.”<sup>249</sup> Experts studying hate groups warn that

[t]he storming of the Capitol is expected to serve as powerful propaganda that fuels the far right and its violent tactics for years to come . . . . Racist extremists and antigovernment militias like those seen at the Capitol attack “likely pose the greatest domestic terrorism threats in 2021.”<sup>250</sup>

On February 12, 2021, the Capitol Police announce opening of

an investigation into whether members of Congress inappropriately gave visitors access to the Capitol ahead of the storming of the building . . . after several lawmakers raised concerns that their own

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248. Garland, *supra* note 10.

249. *See* Goldman, Benner & Feuer, *supra* note 199.

250. *Id.*

colleagues might have allowed members of a pro-Trump mob inside in the days leading up to the assault.<sup>251</sup>

Speaker Pelosi also announced the appointment of retired Army Lieutenant General Russel L. Honoré,

“to lead a security review of the Capitol in the wake of the riot . . . [I]ed by Representative Mikie Sherrill, a New Jersey Democrat and former Navy pilot, more than [thirty] lawmakers called . . . for an investigation into visitors’ access to the Capitol on the day before the riot.”<sup>252</sup>

Then, on February 15, 2021, Speaker Nancy Pelosi announced that a September 11th-style commission will be established by Congress to examine “the deadly insurrection that took place at the U.S. Capitol.”<sup>253</sup>

Following the January 6th assault on the Capitol, concern about violent U.S. extremist groups has resulted in heightened interest about the quality and effectiveness of intelligence gathered in the weeks and months prior to the riot. As a result,

both Democrats and Republicans on the House Homeland Security Committee expressed support for new domestic terrorism laws intended to stop violence similar to the attack on the Capitol. . . . Senator Mark Warner . . . the new chairman of the Senate Intelligence Committee, said . . . that he had bipartisan support . . . to investigate the matter.<sup>254</sup>

It is possible that:

[T]he bulk of the intelligence review would fall to the intelligence arms of the F.B.I. and Department of Homeland Security, but it is the role of the director of national intelligence to coordinate assessments that involve multiple departments.

However, an element of the review will look at potential links between domestic groups and foreign networks and organizations . . . . That part of the review will involve intelligence agencies, including the C.I.A. and National Security Agency, which are restricted in their collection of intelligence on Americans.

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251. Luke Broadwater & Nicholas Fandos, *Police Investigating Whether Lawmakers Gave Rioters Tour of Capitol Before Siege*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/live/2021/01/15/us/impeachment-trump> [<https://perma.cc/X9UX-A22C>].

252. *Id.*

253. *Pelosi Says Independent Commission Will Examine Capitol Riot*, BOSTON HERALD (Feb. 15, 2021), <https://www.bostonherald.com/2021/02/15/pelosi-says-independent-commission-will-examine-capitol-riot-2/> [<https://perma.cc/ZBE8-3UNT>].

254. Julian E. Barnes & Zolan Kanno-Youngs, *F.B.I. Ability to Counter Extremists Scrutinized*, N.Y. TIMES, Feb. 7, 2021, at 14.



...

[A]nother part of the review would look at whether the Bureau’s Joint Terrorism Task Forces were structured to address the threat of American extremist groups and anti-governmental organizations. The review will look at whether the task forces are capable of reporting episodes of domestic violent extremism and track the groups that are involved, the official said.

International terrorist groups, like Al Qaeda, are far more hierarchical. In contrast . . . domestic extremist groups are more loosely organized. Membership can shift, and different groups can come together, as they did during the Capitol attack, and then split apart.<sup>255</sup>

*A. Hon. Bennie G. Thompson v. Trump, Giuliani, Proud Boys & Oath Keepers*

On February 16, 2021, Congressman Bennie Thompson of Mississippi, in his personal capacity, brought a federal lawsuit alleging violation of the 1871 Ku Klux Klan Act,<sup>256</sup> accusing Donald J. Trump, Rudolph Giuliani, Proud Boys, and Oath Keepers of conspiring, contrary to the requirements and provisions of Article II, Section 1 of the U. S. Constitution, “to incite an assembled crowd to march upon and enter the Capitol of the United States for the common purpose of disrupting, by the use of force, intimidation and threat, the approval by Congress of the count of votes cast by members of the Electoral College. . . .”<sup>257</sup> According to allegations in the complaint, the actions of Trump et al., “In doing so, the Defendants each intended to prevent, and ultimately delayed, members of Congress from discharging their duty commanded by the United States Constitution to approve the results of the Electoral College in order to elect the next President and Vice President of the United States.”<sup>258</sup>

*B. Rep. Eric Swalwell v. Donald J. Trump, et al.*

On March 5, 2021, an action was brought in the United States District Court for the District of Columbia by fifth term Representative Eric Swalwell from California’s fifteenth Congressional District.<sup>259</sup> Defendants include the former U.S. President Donald J. Trump and “three close associates [Donald J. Trump, Jr., Rudolph Giuliani, and Representative Mo Brooks] who conspired with him and others, including the rioters who

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255. *Id.*

256. 42 U.S.C. § 1985(1).

257. Complaint at 2, *Thompson v. Trump*, No. 1:21-cv-00400 (D.C. Dist. Feb. 16, 2021).

258. *Id.*

259. Complaint, *Swalwell v. Trump*, No. 1:21-cv-00586 (D.C. Dist. Mar. 5, 2021).

breached the Capitol on January 6, to prevent Congress from certifying President Biden's victory in the 2020 presidential election."<sup>260</sup> From the complaint we learned:

1. The peaceful transfer of power is a sacrament of American democracy. Donald Trump, his son Donald Trump Jr., his advisor Rudy Giuliani, and Congressman Mo Brooks, together with many others, defiled that sacrament through a campaign of lies and incendiary rhetoric which led to the sacking of the United States Capitol on January 6, 2021.
2. Donald Trump lost the 2020 presidential election; he was unwilling to accept defeat. Trump lied to his followers, telling them that the certification of Joe Biden's election was a "coup" and that their country was being stolen from them. The Defendants filed frivolous lawsuits, all of which failed. The Defendants tried to intimidate state officials, none of whom caved to the pressure. Out of options and out of time, the Defendants called their supporters to Washington, D.C. on the day Congress met to certify Joe Biden's win, telling them to "Stop the Steal" and "be wild." Thousands came to the District in response. Some planned violence at the Capitol in advance; some were stirred to violence by the Defendants' words on that day.
3. Trump implored the crowd to "fight like hell" and "walk down Pennsylvania Avenue . . . to the Capitol." According to an analysis of cell phone location data, approximately 40% of the rally attendees did just that.
4. As a direct and foreseeable consequence of the Defendants' false and incendiary allegations of fraud and theft, and in direct response to the Defendants' express calls for violence at the rally, a violent mob attacked the U.S. Capitol. Many participants in the attack have since revealed that they were acting on what they believed to be former President Trump's orders in service of their country.
5. The mob disrupted the certification of the vote in the Electoral College. Rioters threatened to hang Mike Pence and kill the Speaker of the House, Nancy Pelosi, and the terrorized and injured scores of others, including the Plaintiff.
6. Many members of Congress, including the Plaintiff, were trapped in the House chamber as plainclothes officers barricaded doors and held off the mob at gunpoint. Fearing for their lives, the Plaintiff and others masked their identities as members of Congress, texted loved ones in case the worst happened, and took shelter throughout the Capitol complex.

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260. *Id.* at 4.

7. As the Plaintiff and hundreds of others—including police officers, other elected officials, and rank-and-file workers at the Capitol—were put in mortal danger, and as the seat of American Democracy was desecrated by the insurgent mob, the Defendants watched the events unfold on live television. Those with knowledge claimed that during this moment of national horror, Trump was “delighted” and was “confused about why other people on his team weren’t as excited as he was.” Others described Trump as “borderline enthusiastic” about the unfolding violence.

8. The horrific events of January 6 were a direct and foreseeable consequence of the Defendants’ unlawful actions. As such, the Defendants are responsible for the injury and destruction that followed.<sup>261</sup>

The Swalwell complaint states the January 6th rally “was organized and funded by Trump’s campaign organization, Donald J. Trump for President . . . [and] paid an entity called Event Strategies to obtain the permit for the rally. The permit for the rally listed the Campaign’s director of finance operations as the ‘VIP Lead’ for the rally.”<sup>262</sup> The following charges are alleged against all Defendants: Conspiracy to Violate Civil Rights (Interference with official Duties);<sup>263</sup> Neglect to Prevent Interference with Civil Rights;<sup>264</sup> Negligence *Per Se* (Incitement to Riot);<sup>265</sup> Negligence *Per Se* (Disorderly Conduct);<sup>266</sup> Bias-Related Crimes (Inciting Assault, Inciting to Riot, Disorderly Conduct and Terrorism);<sup>267</sup> Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Aiding and Abetting Common-Law Assault; and Negligence.<sup>268</sup>

### C. Investigations Continue

During the spring of 2021, nationwide investigations continued into discovering who was involved in the Capitol breach, why they did it—and what can be learned thus far from news accounts, public records, court documents, and analysis of social media. Reports indicate from these sources that over 300 individuals have been identified as suspects by

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261. *Id.* at 1–3.

262. *Id.* at 29.

263. 42 U.S.C. § 1985(1).

264. 42 U.S.C. § 1986.

265. D.C. Code § 22-1322(b).

266. D.C. Code § 22-1321(a)(2).

267. D.C. Code §§ 22-404, 22-1805, 22-1321, 22-1322(c), 22-3152, 22-3153, 22-3704.

268. See Nicholas Fandos, *Congressman Sues Trump Over Jan. 6 Attack*, N.Y. TIMES, Mar. 6, 2021, at A16.

March 2021.<sup>269</sup> Only three months after the riot, among the questions yet to be answered is whether guided tours were hosted for insurrectionists by congressional offices and staff just days before the attack. Broad generalizations about the characteristics of the January 6th mob are difficult to make. A database constructed by National Public Radio (NPR) of suspects charged so far indicates defendants “are predominantly white and male, though there were exceptions. Federal prosecutors say a former member of the Latin Kings gang joined the mob, as did two Virginia police officers.”<sup>270</sup> In addition, “A man in a ‘Camp Auschwitz’ sweatshirt took part, as did a Messianic Rabbi. Far-right militia members decked out in tactical gear rioted next to a county commissioner, a New York City sanitation worker, and a two-time Olympic gold medalist.”<sup>271</sup> Several months following the riot, NPR also reported:

There were those with connections to extremist groups or fringe ideas. At least [thirteen] defendants appear to have expressed support for QAnon, the pro-Trump conspiracy theory. At least [fifteen] of the defendants appear to have links to the Proud Boys, a far-right gang. The group was recently declared a terrorist group in Canada. Their values have been widely described as racist, misogynist, anti-immigrant and hateful against other minority groups. At least four of the defendants have alleged ties to the Oath Keepers, which the Anti-Defamation League calls an “anti-government right-wing fringe organization.” The group is known to target and recruit current and former law enforcement officers and military veterans. At least three of the defendants are allegedly affiliated with the Three Percenters, another anti-government extremist organization.<sup>272</sup>

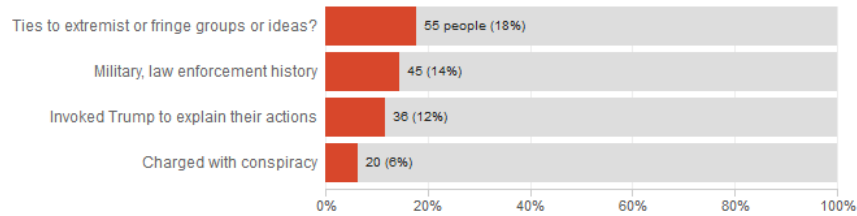
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269. See *The Capitol Siege: The Arrested and Their Stories*, NPR (Mar. 12, 2021), <https://www.mprnews.org/story/2021/02/12/npr-the-capitol-siege-the-arrested-and-their-stories>

270. *Id.*

271. *Id.*

272. *Id.*

Exhibit 9<sup>273</sup>

Credit: Sean McMinn/NPR

## Common Traits Among Capitol Insurrectionists

As shown in Exhibit 9, within months, a total of: fifty-five people (18%) were considered to have ties to extremist or fringe groups or ideas; forty-five individuals (14%) have a military or law enforcement background; thirty-six (12%) invoked Trump to explain their actions; and twenty were charged with conspiracy (6%).

In his March 17, 2021, remarks before the House Committee on Homeland Security, Chairman Representative Bennie G. Thompson observed, “Just as President Trump made DHS [the Department of Homeland Security] less able to carry out its mission, his failed policies also made the homeland less secure. . . . [H]e helped fuel the rise of domestic terrorism in America and incited right-wing violent extremists to attack the U.S. Capitol.”<sup>274</sup> At the same hearing, Alejandro N. Mayorkas, Secretary of Homeland Security, warned: “Currently, the most significant terrorist threat facing our Nation comes from lone offenders and small groups of individuals who commit acts of violence that are motivated by a broad range of extreme racial, political, religious, anti-government, societal, and personal ideological beliefs.”<sup>275</sup> To further illustrate this point, Secretary Mayorkas stated:

Domestic violent extremism is typically fueled by false narratives, conspiracy theories, and extremist rhetoric usually spread through social media and other online platforms. The lethality of this threat is evidenced by the attack on the U.S. Capitol on January 6, 2021, and other recent attacks across the United States, including against

273. *Id.*

274. *The Way Forward on Homeland Security: Hearing Before H. Comm. on Homeland Security*, 117th Cong. (2021) (statement of Rep. Bennie G. Thompson, Chairman, H. Comm. on Homeland Security), <https://homeland.house.gov/download/bgt-opening-statement-full-dhs-317> [<https://perma.cc/WE27-DNLM>].

275. *The Way Forward on Homeland Security: Hearing Before H. Comm. on Homeland Security*, 117th Cong. (2021) (statement of Alejandro N. Mayorkas, Secretary of Homeland Security), <https://homeland.house.gov/download/mayorkas-testimony-full-317> [<https://perma.cc/2398-TUL5>].

government buildings and personnel and minority groups. Combatting this violence requires a whole-of-government approach, which I have already initiated at DHS in collaboration with key partners, including DOJ, to help ensure the violence and assault on democracy that occurred on January 6th does not occur again.

This year, and for the first time, I designated “combating domestic violent extremism” as a National Priority Area for the FY 2021 State Homeland Security Program (SHSP) and Urban Area Security Initiative (UASI) grant programs. Recipients of these grants will be required to spend at least 7.5 percent of their awards on combating domestic violent extremism, resulting in at least \$77 million in grant funding being spent on building the capability to detect and protect against threats from domestic violent extremism. Additionally, the \$20 million Targeted Violence and Terrorism Prevention Grant Program supports the implementation and evaluation of innovative community-based prevention programs and identifies efforts that are demonstrably effective to replicate them across the country. The Department also continues to increase support for establishing and enhancing local prevention programs through the provision of financial, educational, and technical assistance services.

I have directed an expansion of our analytic focus, including to more comprehensively assess how extremist actors exploit and leverage social media and other online platforms, and how those online activities are linked to real-world violence. The Department will share related findings with SLTT government and law enforcement partners.

The Department will also expand its intelligence and information-sharing capabilities, particularly with SLTT and international partners, including to more comprehensively assess the transnational elements associated with certain domestic extremist movements.

Further, DHS will continue to disseminate intelligence to the broadest audience, at the lowest classification level possible, while protecting privacy, civil rights, and civil liberties. In January, the Department issued the first National Terrorism Advisory System (NTAS) Bulletin in more than a year. It warned the American public about the threat from ideologically-motivated violent extremists. The Department will continue to leverage the NTAS as a critical tool, among others, for communicating with the public.

Continued support from the public is essential to identifying and reporting suspicious activity and threats of violence, especially online. DHS is enhancing its public awareness campaigns and resilience to disinformation and other false narratives that inspire domestic extremist violence by updating its “If You See Something,

Say Something®” campaign and refreshing its Nationwide Suspicious Activity Reporting Initiative to facilitate our partners’ ability to identify, evaluate, and report tips related to terrorism, regardless of ideology. DHS is also working to support the efforts of technology companies and other private-sector partners to curb online recruitment and radicalization to violence.

To ensure the Department is able to adequately address the evolving threat in this area longer-term, I look forward to working with Congress to examine our current legal authorities to access, collect, integrate, and share information posted on social media and other online platforms and consider whether there may be opportunities to enhance DHS’s ability to take actions that would protect the public, consistent with privacy, civil rights, and civil liberties.<sup>276</sup>

On January 5th, 2022, Attorney General Merrick Garland stated: “As of today, we have arrested and charged more than 725 defendants, in nearly all [fifty] states and the District of Columbia . . . . In the first months of the investigation, approximately 145 defendants pled guilty to misdemeanors, mostly defendants who did not cause injury or damage.”<sup>277</sup> As 2022 begins, “[the Department of Justice has] charged over 325 defendants with felonies, many for assaulting officers and many for corruptly obstructing or attempting to obstruct an official proceeding. Twenty defendants charged with felonies have already pled guilty.”<sup>278</sup> In addition:

Approximately [forty] defendants have been charged with conspiracy to obstruct a congressional proceeding and/or to obstruct law enforcement. In the months ahead, [seventeen] defendants are already scheduled to go to trial for their role in felony conspiracies.

A necessary consequence of the prosecutorial approach of charging less serious offenses first is that courts impose shorter sentences before they impose longer ones.

In recent weeks, however, as judges have sentenced the first defendants convicted of assaults and related violent conduct against officers, we have seen significant sentences that reflect the seriousness of those offenses — both in terms of the injuries they caused and the serious risk they posed to our democratic institutions.

The actions we have taken thus far will not be our last.

The Justice Department remains committed to holding all January 6th perpetrators, at any level, accountable under law — whether they

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276. *Id.*

277. Garland, *supra* note 10.

278. *Id.*

were present that day or were otherwise criminally responsible for the assault on our democracy. We will follow the facts wherever they lead

... [W]e understand that there is broad public interest in our investigation. We understand that there are questions about how long the investigation will take, and about what exactly we are doing/

...

We build investigations by laying a foundation. We resolve more straightforward cases first because they provide the evidentiary foundation for more complex cases.

Investigating the more overt crimes generates linkages to less overt ones. Overt actors and the evidence they provide can lead us to others who may also have been involved. And that evidence can serve as the foundation for further investigative leads and techniques.

In circumstances like those of January 6th, a full accounting does not suddenly materialize. To ensure that all those criminally responsible are held accountable, we must collect the evidence.

We follow the physical evidence. We follow the digital evidence. We follow the money.

But most important, we follow the facts — not an agenda or an assumption. The facts tell us where to go next.

...

The central norm is that, in our criminal investigations, there cannot be different rules depending on one's political party or affiliation. There cannot be different rules for friends and foes. And there cannot be different rules for the powerful and the powerless.

There is only one rule: we follow the facts and enforce the law in a way that respects the Constitution and protects civil liberties.

We conduct every investigation guided by the same norms. And we adhere to those norms even when, and especially when, the circumstances we face are not normal.<sup>279</sup>

*The New York Times* wrote: "Dozens of defendants are facing charges that will give prosecutors the opportunity to ask for longer sentences by invoking the context of domestic terrorism."<sup>280</sup> As of this writing, "It is not yet clear how harsh prosecutors and judges will be when

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279. *Id.*; see also Sadie Gurman, *Riot Probe Could Charge Instigators*, WALL ST. J., Jan. 6, 2022, at A4; Alan Feuer, *A Year Later, Capitol Cases Keep Growing*, N.Y. TIMES, Jan. 5, 2022, at A1.

280. Charlie Savage, *Does Jan. 6 Qualify as a 'Terror Attack'?*, N.Y. TIMES, Jan. 8, 2022, at A14.



it comes time to sentence uncooperative defendants who insist on going to trial and then get convicted, rather than striking plea deals.”<sup>281</sup>

*D. Select Committee to Investigate the January 6th Attack*

At the beginning of 2022, the House Select Committee investigating the January 6th Attack on the Capitol conducted its work

by a team of [forty] investigators and staff members, including former federal prosecutors . . . [having] obtained more than 30,000 records . . . interviewed more than 300 witnesses . . . plans to hold televised hearings . . . to lay out for the public how the pro-Trump “Stop the Steal” movement helped lead to the Capitol riot.<sup>282</sup>

*The New York Times* wrote, “The questions of criminality go far beyond the contempt of Congress referrals that the House has sent to the Justice Department Mr. Trump’s former chief strategist, for Stephen K. Bannon, and his former chief of staff, Mark Meadows, for their refusal to cooperate with the investigation.”<sup>283</sup> As this article goes to press, the Select Committee continues its work.

Wyoming Republican Vice Chair Liz Cheney said,

As the violence was underway on the 6th . . . we know that for 187 minutes, President Trump refused to act . . . we know hours passed with no action by the President to defend the Congress of the United States from an assault while we were trying to count electoral votes . . . .<sup>284</sup>

*E. A Country Deeply Divided*

More than a year following the January 6th Capitol riot, *The New York Times* observed, “America has not come together to defend its democracy; it has only split further apart. Lies and disinformation spread by the former president have so permeated the political ecosphere that nearly universal outrage has reverted to separate blue and red realities.”<sup>285</sup> Consider the following:

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281. *Id.*

282. Michael S. Schmidt & Luke Broadwater, *Panel May Push for Criminal Charges Over Riot*, N.Y. TIMES, Dec. 21, 2021, at A1.

283. *Id.*

284. Thompson & Cheney Testimony at Rules Committee Meeting, Select Comm. to Investigate the January 6th Attack on the United States Capitol (Dec. 14, 2021), <https://january6th.house.gov/news/press-releases/thompson-cheney-testimony-rules-committee-meeting> [<https://perma.cc/9EYG-5BM8>].

285. Peter Baker, *Shock, Outrage, and a Deeper Political Divide*, N.Y. TIMES, Jan. 6, 2022, at A14.

Today, the Republican Party is very much still Mr. Trump's, transforming his lies about a stolen 2020 election into an article of faith, and even a litmus test that he is seeking to impose on the 2022 primaries with the candidates he backs. He is the party's most coveted endorser, its top fund-raiser and the polling front-runner for the 2024 presidential nomination.

Mr. Trump is also deeply divisive, unpopular among the broader electorate and under investigation for his business practices and his interference with election officials in Fulton County, Ga. He remains the same politician whose White House oversaw four years of devastating Republican losses, including of the House and Senate. . . .

Yet his unrivaled power inside the G.O.P., one year after inciting the sacking of the Capitol to forcibly forestall the certification of the election, is a testament to his unrelenting hold on the loyalty of the party base.<sup>286</sup>

As the Democratic Congressional members and President Biden observed the one-year anniversary of the Capitol attack, "Republicans were nowhere to be found . . . reflecting the Republican Party's reluctance to acknowledge the [January] 6 riot or confront its own role in stoking it."<sup>287</sup> Among Republicans, "[n]ot a single one of those senators appeared on the Senate floor to speak about how rioters laid siege to their workplace in the name of former President Donald J. Trump, sending them fleeing for their lives."<sup>288</sup>

#### CONCLUSION

America is at a crossroads. The January 6th investigations and Senate acquittal of Donald J. Trump, for the second time, follows a violent mob that was incited by the lame-duck president to march down Pennsylvania Avenue to break into and vandalize the Capitol Building. As investigations continue, more than 725 individuals were subsequently charged for their role in this violent crime. Encouraged by foreign powers, the rise of domestic terrorism in the United States has now become a major threat to the American democratic experiment. Preservation of this precious republic will require a diligent and thoughtful daily commitment to

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286. Shane Goldmacher & Maggie Haberman, *A Year After Capitol Riot, Trump's Hold on G.O.P. Is Unrivaled*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/trump-gop-jan-6.html> [<https://perma.cc/V6QU-2VU2>].

287. Catie Edmondson, *'A Reflection of Where Our Party Is': Republicans Avoid January 6 Observances*, N.Y. TIMES, Jan. 7, 2022, at A14.

288. *Id.*

preserving the sanctity and efficient functioning of each of the three independent branches of government.