

THE JANUARY 6, 2021 CAPITOL RIOTS: RESISTING CALLS FOR MORE TERRORISM LAWS

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On January 6, 2021, a group overwhelmingly comprised of white supporters of President Trump engaged in extraordinary violence against people and property at the U.S. Capitol. In the weeks since those attacks, many terms have been deployed by politicians, the media, legal commentators, and legal academics to describe the events: riots, insurrection, sedition, coup, and terrorism, just to name a few.

Many have expressed hope of seeing the alleged perpetrators legally [labeled as “terrorists.”](#) Intuitively the label fits because they caused mass terror at the U.S. Capitol with the stated desire of disrupting democratic processes and effectuating government change, but for some the label rightly derives from schadenfreude for right-wing extremists who have long been perceived as being treated leniently by policy and law, and in political discourse. Muslim, Arab, and South Asian communities in the United States have for nearly 20 years borne the brunt of suspicions that they harbored terrorist sympathies. These groups have been disproportionately subjected to unwarranted surveillance, detention, harassment, financial harm, and other unconstitutional violations of civil rights pursuant to the “war on terror.” In context, the desire for reciprocal treatment of the perpetrators by some among these disadvantaged groups is understandable. The juxtaposition of the images of January 6—of a group of violent trespassers entering and looting the U.S. Capitol with few visible immediate repercussions—with the lived experience of being hyper-visible to and over-policed by law enforcement and intelligence agencies was understandably [difficult to reconcile](#).

Yet U.S. law is structured deliberately such that it is likely that nobody will be charged with domestic terrorism, despite many of the acts of January 6 fitting squarely within the relevant definitions under federal [terrorism-related statutes](#). Those laws define terrorism as any act “dangerous to human life” that violates the criminal laws of a state or the United States, if the act appears to be intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping. Limitations on the use of this definition to charge those within the United States who are not affiliated with a foreign terrorist organization are meant to safeguard people in the United States against government overreach and the potential trampling of free expression and other constitutional rights.

Under those limitations, the FBI continues investigating those involved in the January 6 attacks and seeking to charge them criminally for various federal crimes that [deal with the specific underlying conduct at issue](#). Thus far, well over 100 people have been charged with federal crimes, including: making interstate threats; knowingly entering or remaining in any restricted building or grounds without lawful entry; violent entry and disorderly conduct on Capitol grounds; theft of public money, property, or records; possession of an unregistered firearm (destructive device) and carrying a pistol without a license; assault on a federal law enforcement officer; carrying or having readily accessible, on the grounds of the United States Capitol Building, a firearm and ammunition; conspiracy; and illegal possession of ammunition.

The FBI promises that its investigation will continue for some indefinite period, and the list of crimes may broaden.

In the second half of 2020, the United States reckoned publicly with the disparate treatment of communities of color by law enforcement and the criminal justice system across the country. In response, many people, including President Biden and Vice-President Harris, vowed to press for significant reform to make the laws and their application more equitable. In the context of criminal justice and the January 6 attacks, does equitable justice require criminalizing not just underlying acts, but creating by statute the [crime of domestic terrorism](#) so that it could be used in similar situations in the future? Advocates have [suggested](#) that right-wing white supremacist extremism poses so severe a threat that strengthening and [expanding federal criminal law](#) to make it more like the counterterrorism law and policy geared toward foreign and international threats is [the only way](#) to combat the problem. Such an approach is tempting, but carries significant red flags that warrant caution, as it may simply result in further endangering protections of those already treated as suspect in the U.S. justice system.

There is no doubt that the January 6 perpetrators should be held accountable criminally. Federal criminal law is robust, and, as the FBI's ongoing investigation into the January 6 attacks illustrates, there is no shortage of opportunities to indict perpetrators for their actions. Historically, the challenge has not been a lack of legal authority to prosecute or lack of [actual knowledge](#) about the threat of white supremacist violence. Instead, federal and state prosecutors have sometimes lacked the [political](#) and prosecutorial will to acknowledge, investigate, and prosecute fully the serious threat of right-wing extremism. Challenging that mindset and approach would be far more effective than codifying more terrorism-related crimes to apply to acts already criminalized with significant accompanying punishment elsewhere in our federal and state laws.

At the same time, the federal laws and policies related to foreign and international terrorism are far from perfect. Before working to import those legal structures to apply to domestic terrorism, we should recognize that for a long time advocates for civil liberties have fought to curtail the application of foreign terrorism laws for the ways in which they denigrate the rights of foreign nationals and Americans, particularly as they [disparately impact](#) Muslims, Arabs, South Asians, and people [who are perceived](#) as such by others.

We also know that dozens of states crafted domestic terrorism laws after the September 11 attacks, many with definitions that mirror federal law. Many of those laws have been deployed in questionable and unconstitutional ways against defendants, raising the question of whether state prosecutors would be better off simply pursuing charges related to the underlying acts of a case instead of a terrorism charge. In the notable 2012 case of [People v. Morales](#), the New York antiterrorism statute was used to convict a gang member who had no known ties to any terrorist organization for shooting and killing a girl on a street under the specious theory that he was trying to intimidate the "civilian population" of the entire Mexican-American community in the area. On appeal that conviction was vacated, leading to Morales being tried and convicted for the underlying non-terrorism crimes. His prison sentence after the second trial was longer than the one imposed after the first trial.

In fact, history shows that when counterterrorism laws have been expanded, even as a reaction to right-wing extremism, the ways in which those policies are implemented and applied will often apply to other, historically marginalized groups. The Antiterrorism and Effective Death Penalty Act of 1996 ([AEDPA](#)) is a prime example. The AEDPA was enacted in the wake of the 1995 bombing of the Alfred P. Murrah Federal Building, in which 168 people were killed in an explosion set by white, right-wing, anti-government citizen extremists. The AEDPA ramped up counterterrorism authorities, primarily against foreign actors, and shrunk the array of [post-conviction rights](#), such as habeas corpus, resulting in the increased wrongful imprisonment and execution of those who are poor and/or people of color.

Laws are only as just as they are applied. Our history of criminal justice—on both the federal and state level—suggests that additional domestic terrorism laws would not be limited to combatting the type of violence and lawlessness on display on January 6, but would likely result in [further harming populations](#) who have long been subject to unfair treatment by the criminal justice system. An honest reckoning at the federal level as to the seriousness of right-wing extremist violence, and a concomitant [refocusing of priorities](#) and resources, would likely be a more fruitful approach. Racially motivated extremist violence is a [serious problem](#), but expanding authorities under a domestic terrorism law is not the solution.

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