

## THE ATTACK ON THE CAPITOL CALLS FOR A MEASURED RESPONSE

EMILY BERMAN\*

There are many indisputable facts about violent and deadly incursion into the Capitol building on January 6th. It is beyond debate that the fiasco included multiple criminal acts. Nor is there any question that it represents a colossal security failure on the part of those whose mission is to safeguard the premises and the people inside. Finally, as many observers have noted, the differential treatment afforded to the largely White crowd of President Donald Trump's supporters compared to the Black Lives Matter protestors who took to the streets this summer to protest acts of police violence against Black individuals was, to say the least, stark. Each of these facts—the criminal acts, the security failure, and the differential treatment afforded to those protesting—demand thorough investigation and a vigorous response. But that response need not—indeed *must* not—include measures that ultimately repress peaceful protest and restrict the right to assembly for Americans of all political stripes.

Take first the criminal activity. The crimes that were committed in and around the Capitol Building on Jan. 6 should be investigated and prosecuted. Fortunately, federal prosecutors have no lack of tools at their disposal to address the lawless activity. [As others have documented](#), the list of offenses depicted in images and videos from both inside and outside the Capitol is extensive. They range from the relatively minor offense of trespassing to the possibility of seditious conspiracy. Rather than focusing on the existing laws that were broken, however, much commentary has sought to use the incident as [justification for enacting a new law against domestic terrorism](#). While such a law might be intended to deter white supremacist terrorism, it will inevitably be used against those communities that most frequently cross paths with law enforcement. To be sure, anyone who [planted a bomb](#) likely committed a terrorist act. But such actions already are subject to [significant penalties](#), and to depict the entire crowd as “terrorists,” or even “rioters,” (though surely some individuals present were guilty of that offense as well) is simply to paint with too broad a brush. Assigning collective guilt to an entire crowd due to the actions of a (perhaps significant) minority of those present simply criminalizes the First Amendment protected right to express dissent. By all means, prosecute the criminals, demonstrate that violence is not a valid tool of political dissent. But don't [place non-violent protestors on the “No Fly” list](#) or allow righteous outrage at the sacking of the Capitol become a weapon to be employed against the very democratic values that building represents.

This risk is not limited to the federal level. In recent years, many local and state governments have introduced or enacted new laws to deter lawful protests against, for example, [petrochemical](#) companies or [oil pipelines](#). These measures impose enhanced penalties for already prohibited activity, such as trespassing or obstructing traffic, when they occur in the context of a peaceful demonstration. The result is criminalization of protest itself. [Analogous measures proposed](#) in the wake of the events of Jan. 6<sup>th</sup> are similarly problematic. Understanding the government's incentives to suppress the voices of its critics, the Constitution builds a buffer around free speech rights, limiting criminal liability for expressing ideas to actual acts of violence or incitement to violence. Any efforts to encroach on this buffer in response to expression we might find odious or ideas we might deem illegitimate renders more fragile the right to expression in all its forms.

Second, the Capitol Police's failure to preserve the security of the Capitol Building [and those within it](#) should be studied, and appropriate reforms put in place. What happened was an avoidable and dangerous failure to adequately prepare for or respond to [exceptionally predictable](#) behavior. But this failure also risks prompting a significant overreaction. The tableau of Americans coming to petition for redress of their grievances at the seat of government is a fundamental symbol of American democracy. Yet for President Biden's inauguration Washington D.C. was transformed into a fortress guarded by tens of thousands of armed individuals, and the [new fence erected](#) around the Capitol grounds—similar to the one that recently turned Lafayette Square “[from a public square to a fortress](#)”—is set to remain there until at least the end of January. As a temporary matter, these measure may be justified by the reported plans for additional, potentially violent gatherings [cited by Twitter as justification for its permanent suspension of President Trump's account](#) and the need to secure the city for Presidential inauguration. But to turn Capitol Hill into a fortified bunker from which the American people are excluded would not only send an anti-democratic message both domestically and to the rest of the world, but would itself serve to significantly undermine First Amendment values. As soon as it is safe to do so, the extra fortification of the Capitol, already a highly securitized space, should come down.

Finally, the contrast between law enforcement's use of kid gloves on crowds who stormed the Capitol and the deployment of [tear gas](#), [excessive force](#), and [helicopter overflights](#) on social justice demonstrators this summer certainly justifies the outrage it has prompted. The solution, however, is not to insist that Trump supporters be subject to the same heavy-handed response. Rather, it is to insist that law enforcement strike the admittedly difficult balance between permitting valid acts of protest and preventing violence and destruction of property. It does not seem too much to ask that law enforcement protect law-abiding Trump supporters' right to express their views—note that armed protesters might not meet that description, given Washington D.C.'s strict firearms regulations—while simultaneously denying those supporters access to the floor of the Senate or House Speaker Nancy Pelosi's office. Just as it seems reasonable to allow protestors to take to the streets without having to fear being swept up in [unmarked vehicles](#) by individuals purporting to be law enforcement but refusing to identify themselves.

It is no wonder that Americans have responded to the events of Jan. 6 with rage, shock, and profound sadness. American democracy is currently in a state of seeming fragility that demands nurturing rather than the assault to which it was subject that day. The desecration of what [many](#) have [described](#) as the [temple](#) of that democracy should not go unanswered. That answer must not, however, further weaken the foundations of that temple by undermining the most American of rights: the right to engage in peaceful protest against our government.

*\* Emily Berman is an Associate Professor at University of Houston Law Center. An earlier version of this piece appeared at Just Security on January 12, 2021.*