

A BESIEGED CAPITOL: THE NEED TO OBJECTIVELY ASSESS THE NATURE OF THE VIOLENCE

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As the world watched, in real time, a mob descended upon the U.S. Capitol on January 6, and, spurred on by the words of the then President of the United States, engaged in destructive and deadly acts of violence. Pundits, politicians, present and former government officials, and, yes, any number of attorneys, have since referred to the actions involved, alternatively, as a “riot”, “mob violence”, “domestic terrorism”, “sedition”, “a coup”, “rebellion” and “insurrection”. The headline in *The Washington Post* on the morning of January 7 declared that the President had incited his supporters to commit “acts of insurrection [and] violence”. And, on January 11, the House of Representatives, in apparent confirmation of the *Post*’s conclusion, impeached President Trump on the charge of “incitement of insurrection”. Here’s the question, however. While the President, individually, has been charged with inciting “insurrection”, did the collective acts engaged in by those who stormed the Capitol actually rise to the level of what can objectively be viewed as such? With this in mind, it would perhaps be prudent for the National Security Law community to take a step back, draw a deep breath, and undertake an analysis as to what the actions of those who descended upon the Capitol should most accurately and realistically be termed-bearing in mind that, as the saying goes, words actually do matter. The brief thoughts that follow are intended to engender this assessment.

The reasoning behind the decision by the House of Representatives to base its impeachment of the President, for high crimes and misdemeanors, on a determination that he had “incited insurrection”, is relatively transparent. Rather than achieving any realistic goal of removing him from the presidency, in the time that he had remaining in office, this charge appears to have been designed, instead, to ensure that, should he be convicted after departing the White House, he would never again be eligible to hold any elected position. The House Resolution specifically references section 3 of the 14th Amendment to the Constitution, which prohibits any person who “has engaged in insurrection or rebellion against” the United States from “hold[ing] any office...under the United States.” 18 United States Code, section 2383, requires that, in order to be barred from holding any future office, the President be found only to have “incited” insurrection. “Whoever incites... any rebellion or insurrection against the authority of the United States or the laws thereof...shall be incapable of holding any office under the United States.”

Given the above norms, the issue arises as to whether a conviction of the President for “incitement to insurrection” depends not only upon his being found to have actually “incited” insurrection, a charge in itself difficult to prove, but that, as a result of his incitement, “insurrection” actually occurred. Assuming, validly I think, that conviction by the Senate does not mandate a finding that the breach of the Capitol did, in fact, rise to the level of “insurrection”, the question thus posed is whether it truly serves the best interests of the United States, both domestically and internationally, to deem the events of January 6 as such. Or, might the actions of the individuals involved perhaps be more prudently and realistically otherwise characterized, bearing in mind the ultimate aim of successfully dispensing justice for the crimes committed.

Let's briefly discuss which of the various descriptive terms used to describe the actions of those who marched on Capitol Hill might best capture the nature of this event.

(1) "Insurrection": "A rising or rebellion of citizens or subjects of a country against their government."

Did the few thousand Trump supporters who made their way to the Capitol represent an "American citizenry" engaged in a knowing intent to forcefully enter, gain control of the building, and overthrow the government of the United States?

In this regard, I would suggest that possibly the only ones more surprised than the Capitol Police as to how easily the "security" surrounding the Capitol was breached was the disparate collection of individuals who managed to do so. If even the most basic of preventive measures had been in place, given the available threat assessment, we would not be having this discussion. This having been said, while it would appear that a very small cadre of the right wing, extremist group, the Oath Keepers, attempted to conduct some form of coordinated, yet ultimately futile, actions, once inside the Capitol, the overwhelming majority of those involved seem to have simply been swept along in the frenzy that characterizes any mob. This is evidenced by the fact that, though some individuals indisputably engaged in violent, criminal acts to secure entry to the building, as well as to various chambers within, most who gained access appeared to be content to simply aimlessly wander the halls, pan for selfies in the Senate Chamber, and pilfer items to commemorate their unlawful acts. Too, while some few were found to have carried concealed weapons, once again, the vast majority of those who swept into the halls of the Capitol were armed only with their ignorance. As a colleague from Latin America noted in an email, "Your so-called 'insurgency' was like no other with which I'm familiar."

Given these facts, I would suggest that the evidence now available does not reflect any realistic, well-coordinated, and widely supported plan, on the part of those who made their way to the Capitol, to overthrow the government of the United States. While fully cognizant of the senseless and contemptible violence that occurred and the tragedy of the resulting deaths, characterizing the chaotic and somewhat cartoonish events of January 6 as an "insurrection" would, nevertheless, appear to be gratuitous hyperbole. It conveys a vastly overstated and overly alarmist message to both the American public and, very importantly, the international community, the latter of which views an "insurgency" as something much more than a single instance of mob violence, lasting only a few hours. Moreover, even an unintended designation of those who comprised the ragtag collective that descended upon the Capitol as "insurgents"- and their actions as an "insurrection"- affords these individuals and their criminal behavior a completely unwarranted degree of recognition, credibility, and purpose. Finally, is there really any reason to believe that any of those who violated the Capitol will actually be charged and prosecuted for the crime of "insurrection"?

(2) "Rebellion": See "Insurrection".

(3) “Coup”: “A sudden, violent overthrow of an existing government by a small group, a chief prerequisite of which is control of all or part of the armed forces, the police, and other military elements.”

The events of January 6th fall far short of meeting this definition.

(4) “Sedition”: “An act of inciting revolt or violence against a lawful authority, with the goal of overthrowing it, usually involving an actual conspiracy to disrupt the legal operation of the government that goes beyond the expression of an opinion of protest.”

“Seditious conspiracy”: “A crime that is committed when two or more persons conspire to forcibly: (a) destroy or overthrow the U.S. government; (b) create obstacles or prevent the execution of U.S. laws; (c) oppose the authority of the U.S. government; or (d) unlawfully possess or take property that belongs to the nation.”

18 United States Code, section 2384 (Seditious Conspiracy) states: “If two or more persons in any State or Territory...conspire to overthrow, put down, or to destroy by force the Government of the United States,...or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States....”

While the House Resolution of Impeachment notes that, as a result of President Trump’s incitement, those laying siege to the Capitol “engaged in violent, deadly, destructive, and ‘seditious’ acts”, the available evidence again fails to support a characterization of the collective actions of the vast majority of those involved as “sedition”, as this offense is defined. And, the great majority of resultant charges will undoubtedly reflect this conclusion. However, it is possible that a small number of the radicalized Oath Keepers, and, potentially others of this same ilk, may, largely through their own proven statements and actions, be appropriately charged, and successfully convicted, of “seditious conspiracy”.

(5) “Domestic terrorism”: “Acts dangerous to human life that are a violation of the criminal laws of the United States or of any state; appearing to be intended to intimidate or coerce a civilian population; influence the policy of government by intimidation or coercion; or affect the conduct of a government by mass destruction, assassination or kidnapping....”

Again, an argument might be made that a small number of Oath Keepers and, potentially, a few other persons, amongst the several thousand who besieged the Capitol, should be charged with engaging in “domestic terrorism”, in that it was their apparent intent “to influence government policy through intimidation or coercion”. To view these individuals as “terrorists”, however, would appear to be a misapplication of the term, as well as an unnecessary overreach. Moreover, it would be erroneous to characterize the Capitol Hill events of January 6, as a whole, as “domestic terrorism”, given the nature of the actions taken by the great majority of the event’s participants.

(6) “Riot”: “A wild, violent, public disturbance of the peace by a number of persons assembled together.”

“Mob”: “A disorderly and lawless crowd; rabble.”

“Riotous mob” is the term President Biden chose to use, in his inaugural address, to describe those who marched on the Capitol. In my view, it is the most accurate characterization of the events that occurred. What we witnessed on January 6 was a wild rabble that gained entry to the Capitol through the use of violence. Each of those who unlawfully entered the building should be prosecuted for doing so. Each who committed further offenses, upon gaining entry, must be charged with these crimes, as well. In so doing, however, it would appear to serve no prosecutorial, or practical, purpose to label and try these individuals as anything but what they truly were: a mob of common criminals engaged in the riotous desecration of our nation’s symbol of democracy.

I end with this brief reminder. The characterization of the events of January 6 as an “insurrection” is not/not an essential prerequisite for the Senate’s conviction of former President Trump for the crime of “inciting” insurrection.

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