



JUDICIAL UNCERTAINTY AND DOMESTIC TERRORISM: REFORMING THE SENTENCING GUIDELINES AFTER JANUARY 6

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INTRODUCTION

On January 6, 2021, the U.S. Capitol was attacked.¹ Approximately 10,000 of President Trump's supporters gathered on the grounds of the Capitol to unlawfully challenge the results of the 2020 presidential election.² The violence and chaos that ensued from the rioters' attempted interference with the certification of the electoral count not only made a mark on our Nation's history, but highlight the continuing threat of domestic terrorism.³ Left in the aftermath were broken glass, the stench of tear gas, and a Justice Department with more January 6 cases than lawyers to handle them.⁴

In the weeks between election night and the January 6 riots, *The Associated Press* and all other major networks called the Presidential race in favor of former Vice President Joseph Biden.⁵ By the ordinary process, once the electoral count was confirmed by Congress, Biden would be inaugurated as the United States' 46th President.⁶ Nonetheless, then-President Trump baselessly claimed the election had been stolen from him and refused to concede.⁷ Among

¹ See *The January 6 Attack on the Capitol*, AM. OVERSIGHT (Sept. 26, 2023), <https://www.americanoversight.org/investigation/the-january-6-attack-on-the-u-s-capitol>.

² Olivia Rubin, Alexander Mallin, & Will Steakin, *7 hours, 700 Arrests, 1 year Later: The Jan. 6 Capitol Attack, by the Numbers*, ABC NEWS (Jan. 6, 2022), <https://abc7.com/jan-6-insurrection-us-capitol-riot/11428976/>.

³ See generally *Examining the Domestic Terrorism Threat in the Wake of the Attack on the U.S. Capitol: Hearing Before the H. Comm. on Homeland Security*, 117th Cong. (2023).

⁴ Lauren Egan, *Capitol Reels from Damage and Destruction left by Violent Rioters*, NBC NEWS, (Jan. 7, 2021), <https://www.nbcnews.com/politics/congress/capitol-reels-damage-destruction-left-violent-rioters-n1253383>. See also Ryan J. Reilly, *FBI has Names of Hundreds More Jan. 6 Rioters. DOJ Needs More Lawyers to Prosecute Them*, NBC NEWS (Apr. 6, 2022), <https://www.nbcnews.com/politics/justice-department/fbi-names-hundreds-jan-6-rioters-doj-needs-lawyers-prosecute-rcna22384>.

⁵ See Jonathan Lemire, Zeke Miller & Will Weissert, *Biden Defeats Trump for White House, Says 'Time to Heal'*, AP NEWS (Nov. 7, 2020), <https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9>.

⁶ *President Election Results: Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> (last visited Apr. 18, 2024).

⁷ See Lemire et al., *supra* note 5.

other things, Trump claimed that widespread voter fraud corrupted the vote tally.⁸ What was supposed to be a peaceful transfer of power turned into an unprecedented assault on American democracy.⁹ At the Capitol, more than 140 police officers were injured, and five people were killed. Congress fled, temporarily forced to abandon their duty to certify the election of President-elect Joe Biden.¹⁰

The riots were precipitated in part by President Trump himself, who communicated to his supporters through Twitter and a 70-minute speech on January 6. He claimed that the 2020 election results were fraudulent and should not be accepted by Americans.¹¹ President Trump's speech included incendiary rhetoric that urged his supports to march to the Capitol.¹² Some of President Trump's most extreme supporters, groups like the Proud Boys, "3 per cent," "11 per cent," Boogaloo Boys, the Nationalist Social Club ("NSC-131"), the Oath Keepers, and QAnon, were in attendance.¹³ Members of these groups were among those that ultimately breached and attacked the Capitol.¹⁴

⁸ See Hope Yen, *AP Fact Check: Yes, Trump Lost Election Despite What he Says*, AP NEWS (May 6, 2021), <https://apnews.com/article/donald-trump-michael-pence-electoral-college-elections-health-2d9bd47a8bd3561682ac46c6b3873a10>.

⁹ See Melissa Morgan, *The Legacy of January 6*, STANFORD FREEMAN SPOGLI INSTITUTE FOR INTERNATIONAL STUDIES (Jan. 5, 2022), <https://fsi.stanford.edu/news/legacies-january-6>.

¹⁰ See Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, N.Y. TIMES (Feb. 13, 2024), <https://www.nytimes.com/interactive/2021/01/15/us/trump-capitol-riot-timeline.html>.

¹¹ See *Capitol Riots: Did Trump's Words at Rally Incite Violence?*, BBC NEWS (Feb. 13, 2021), <https://www.bbc.com/news/world-us-canada-55640437>.

¹² *Id.*

¹³ Masood Farivar, *Researchers: More Than a Dozen Extremist Groups Took Part in Capitol Riots*, VOA NEWS (Jan. 16, 2021), https://www.voanews.com/a/2020-usa-votes_researchers-more-dozen-extremist-groups-took-part-capitol-riots/6200832.html; Christy Somos, *These Are Some of the Extremist Groups Responsible for the Violence on Capitol Hill*, CTV NEWS (Jan. 8, 2021), <https://www.ctvnews.ca/world/these-are-some-of-the-extremist-groups-responsible-for-the-violence-on-capitol-hill-1.5259142?cache=>.

¹⁴ See Seth G. Jones, Catrina Doxsee, Grace Hwang & Jared Thompson, *The Military, Police, and the Rise of Terrorism in the United States*, CSIS (Apr. 12, 2021), <https://www.csis.org/analysis/military-police-and-rise-terrorism-united-states>.

The Capitol riots became one of the biggest criminal investigations that our country has ever seen.¹⁵ The White House, Federal Bureau of Investigation (“FBI”), and the U.S. Department of Justice (“DOJ”) called the January 6 riots an “act of domestic terrorism.”¹⁶ As a result, January 6 prosecutors have asked judges to apply the so-called “terrorism enhancement.”¹⁷ In short, the terrorism enhancement is a set of guidelines that judges use during the sentencing process of defendants who were “involved” in a crime of terrorism or “intended to promote” a crime of terrorism.¹⁸

Section 3A 1.4 of the Sentencing Guidelines can be applied to a broad set of federal offenses, including offenses intended to influence “the conduct of government by intimidation or coercion, or to retaliate against the government.” In addition, *United States v. Booker* established that the Guidelines are advisory, rather than mandatory, giving courts discretion in applying sentencing enhancement.¹⁹ Judges have been reluctant to apply the terrorism enhancement due to its controversial nature.²⁰ For instance, the terrorism enhancement can be applied to a broad range of federal crimes including violent acts such as murder to nonviolent offenses like providing information to terrorist organizations.²¹ As a result, the terrorism enhancement has the potential to be applied indiscriminately. Additionally, the severity of punishment is a concern as the application of the terrorism enhancement can have a substantial impact on a defendant’s total sentence.

¹⁵ *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Apr. 5, 2024), <https://www.npr.org/2021/02/09/1965472049/the-capitol-siege-the-arrested-and-their-stories>.

¹⁶ Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022), <https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407>.

¹⁷ See Lucien Bruggeman, *Who Should be Labeled a Terrorist? Jan. 6 Sentencing Fuels the Debate*, ABC NEWS (Aug. 1, 2022), <https://abcnews.go.com/US/labeled-terrorist-jan-sentencing-fuels-debate/story?id=87769985>.

¹⁸ U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2018).

¹⁹ *United States v. Booker*, 543 U.S. 220, 245 (2005).

²⁰ Gerstein, *supra* note 16.

²¹ See Acts of Terrorism Transcending National Boundaries, 18 U.S.C. § 2332b(g)(5)(B)(i).

Given the concerns with the current Guidelines, some January 6 prosecutors have decided “to pull back on tougher sentences,” while others have continued to seek enforcement of the terrorism enhancement but found little success.²² As the January 6 riots displayed, terroristic violence within the U.S. is a significant threat, and greater accountability is needed in the fight against domestic terrorism. As many January 6 defendants still await sentencing, there are certain cases and facts that arguably warrant the application of the terrorism enhancement.

Surprisingly there is currently no federal statute that prohibits domestic “acts of terrorism,” so prosecutors are forced to use other federal statutes that are not specifically related to, or designed to address, domestic terrorism.²³ Rather than addressing terrorism as a class, federal “law prohibits certain, very specific, activities” and as a result, activities like January 6 must be fit into those narrow categories to be prosecuted.²⁴ Considering the growing and evolving threat of domestic terrorism, the January 6 riots provide a unique opportunity to analyze the structure of the U.S. Sentencing Guidelines and evaluate the need for reform.²⁵

Amending the U.S. Sentencing Guidelines could be the vehicle for change to decrease the incidence of domestic terrorism. Although the actions of January 6 defendants can fit under existing criminal statutes, an amended sentencing guideline could have a more substantial impact on defendants’ punishment and actions that threaten our system of government.

This comment discusses the inadequacies of § 3A 1.4 of the U.S. Sentencing Guidelines, highlights flaws exposed by the January 6 prosecutions. It then goes on to make recommendations to ensure so that similar acts will qualify under the terrorism enhancement

²² Gerstein, *supra* note 16.

²³ Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 Nw. U. L. REV. 1061, 1066 (2020).

²⁴ *Id.*

²⁵ See generally U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2018).

provision. Unlike this framework, future offenders would not be able to evade the enhancement as easily as the January 6 rioters.

Part I of this comment gives a brief overview of the January 6 U.S. Capitol riots. Part II gives an overview of §3A 1.4 of the Sentencing Guidelines and uses the January 6 riots as the foundation to make the necessary revisions to the Guidelines. Part III discusses the 2005 Supreme Court's landmark decision in *United States v. Booker* as it has shaped the legal landscape regarding the application of Sentencing Guidelines, the evolution of the terrorism enhancement, and how existing federal statutes can be used to implicitly criminal domestic terrorism will be discussed. Part IV will discuss the most recent January 6 prosecutions, and whether the terrorism enhancement was applied or not.

Finally, the comment will analyze the inadequacies of § 3A 1.4 and also suggest two reforms: (1) reducing the criminal history category from Category V to Category IV; and (2) creating a domestic terrorism statute that formally charges actions that meet § 3A 1.4. These changes will be essential in efforts to deter and punish future domestic terror events.

According to the Center for Strategic and International Studies ("CSIS"), "[t]here has been a significant rise in the number of domestic terrorist attacks and plots at demonstrations in the United States."²⁶ Additionally, the CSIS data indicates that "the most frequent targets of attacks were government, military, and law enforcement agencies, who are increasingly at the center of domestic terrorism by extremists of all ideologies."²⁷ The January 6 riots fueled a much-needed debate regarding the terrorism enhancement.²⁸ A close examination of some of the January 6 participants' actions demonstrates why the Guidelines require amendment.

²⁶ See Catrina Doxsee, Seth G. Jones, Jared Thompson, Grace Hwang, & Kateryna Halstead, *Pushed to Extremes: Domestic Terrorism amid Polarization and Protest*, CSIS (May 17, 2022), <https://www.csis.org/analysis/pushed-extremes-domestic-terrorism-amid-polarization-and-protest>.

²⁷ *Id.*

²⁸ See Bruggeman, *supra* note 17.

I. JANUARY 6 OVERVIEW

Prior to the attack on the Capitol, President Trump hosted a “Stop the Steal” rally.²⁹ Some have argued that the President’s speech incited those at the rally to march to the Capitol and protest the counting of the electoral votes.³⁰ President Trump’s speech included many incendiary statements and exhortations. Among them: “[w]e will stop the steal;” “if you don’t fight like hell you’re not going to have a country anymore;” and, most relevantly to what followed, “[w]e are going to the Capitol.”³¹ President Trump ended his speech by saying “[w]e fight. We fight like hell and if you don’t fight like hell, you’re not going to have a country anymore So, let’s walk down Pennsylvania Avenue.”³² As a result, a march to the Capitol ensued, with Trump supporters chanting “[f]ight for Trump” and “[h]ang Mike Pence.”³³

Thousands of Trump’s supporters marched towards the Capitol; they bore flags, weapons, and even makeshift gallows with a noose attached.³⁴ Some were armed with “guns, stun guns, knives, batons, baseball bats, axes, and chemical sprays.”³⁵ Additionally, some

²⁹ Richard J. Smith and Anna Maria Santiago, *The Storming of Washington, D.C.: the City of Love against the City of White Supremacy*, 29 JOURNAL OF COMMUNITY PRACTICE 1 (2021).

³⁰ Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

³¹ *Id.*

³² *Id.*

³³ *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC NEWS (Aug. 2, 2023), <https://www.bbc.com/news/world-us-canada-56004916>. See also, Maggie Haberman and Luke Broadwater, *Trump Said to Have Reacted Approvingly to Jan. 6 Chants About Hanging Pence*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/us/politics/trump-pence-jan-6.html>.

³⁴ See *Capitol riots timeline: What happened on 6 January 2021?*, BBC NEWS (Aug. 2, 2023), <https://www.bbc.com/news/world-us-canada-56004916>.

³⁵ Daniel Dale & Marshall Cohen, *Fact Check: Five Enduring Lies about the Capitol Insurrection*, CNN POLITICS (Jan. 5, 2022), <https://www.cnn.com/2022/01/04/politics/fact-check-capitol-insurrection-january-6-lies/index.html>.

protesters came prepared with riot gear including protective helmets and gas masks.³⁶

During a House January 6 committee hearing, Caroline Edwards, a Capitol Police officer, shared testimony about the events that transpired.³⁷ Ms. Edwards suffered a traumatic brain injury from the violence and described the attack as “just hours of hand-to-hand combat, hours of dealing with things that were way beyond any law enforcement officer has ever trained for.”³⁸ This account is supported by body camera footage.³⁹ Edwards also added that she “was slipping in other people’s blood. It was carnage, it was chaos.”⁴⁰ Eventually, rioters “stormed past barricades” and into the Capitol.⁴¹ Some rioters smashed windows, climbed scaffolding, and overpowered police to enter the Capitol.⁴²

As the Senate recessed and the Senators proceeded to seek shelter, the rioters were, at one point, “within 100 feet” of Vice President Pence and a foot away from a door leading into the Senate chamber.⁴³ As lawmakers were taken to a secure location, rioters spread throughout the building, and some eventually made it into Speaker of the House Nancy Pelosi’s office, looking “to shoot her in the frickin’ brain.”⁴⁴ The mayhem continued as rioters ransacked

³⁶ See Alexis Moran, *How did Pro-Donald Trump Protesters get into Washington DC’s Heavily Guarded Capitol Building?* ABC NEWS (Jan 7, 2021), <https://www.abc.net.au/news/2021-01-07/how-did-pro-trump-protesters-get-into-capitol-hill-washington/13038568>.

³⁷ See Kevin Breuninger, *Jan. 6 hearing highlights ‘carnage’ of Capitol riot in new video footage, Trump officials concede he lost election*, CNBC (last updated Jun. 10, 2022), <https://www.cnn.com/2022/06/09/trump-capitol-riot-hearing-jan-6-investigators-release-new-findings.html>.

³⁸ *Id.*

³⁹ See Dale & Cohen, *supra* note 36.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Moran, *supra* note 37.

⁴³ Barbara Starr & Caroline Kelly, *Military officials were unaware of potential danger to Pence’s ‘nuclear football’ during Capitol riot*, CNN POLITICS (Feb. 1, 2021), <https://www.cnn.com/2021/02/11/politics/military-officials-were-unaware-pence-nuclear-football-riot/index.html>.

⁴⁴ Phil Helsel, *Jan. 6 Rioter who Talked of Shooting Nancy Pelosi is Sentenced to 60 Days*, NBC NEWS (July 21, 2022), <https://www.nbcnews.com/news/us-news/jan-6-rioter-talked-shooting-nancy-pelosi-was-sentenced-60-days-rcna39484>.

Speaker Pelosi's office, stormed inside the Senate chamber, and vandalized statues.⁴⁵

The riots left five dead, over 140 officers injured, and a divided America.⁴⁶ It took approximately twelve hours for the Capitol to be secured and for Congress to certify President Joe Biden's victory.⁴⁷ The attack resulted in damages totaling \$2,881,360.20 and presented an unprecedented challenge for the U.S Attorney's Office, which had to prosecute over one thousand defendants.⁴⁸

II. SECTION 3A 1.4 OF THE SENTENCING GUIDELINES

The U.S. Sentencing Guidelines Manual § 3A1.4 was adopted in the mid-1990s to enable district courts to increase the penalty for an act that qualified as a federal crime of terrorism.⁴⁹ Within § 3A 1.4, Congress addresses this "terror enhancement."⁵⁰ Some federal criminal offenses that fit under the legal definition of domestic terrorism are subject to statutory maximum penalties.⁵¹ The U.S Sentencing Guidelines influence a defendant's actual sentence as judges refer to the guidelines to impose sentences at or below the

⁴⁵ See Catie Dull & Virginia Lozano, *Photos: A Look Back at the Jan. 6 Insurrection*, NPR (Jan. 6, 2022), <https://www.npr.org/sections/pictureshow/2022/01/06/1070610129/photos-one-year-later-a-look-back-on-the-jan-6-insurrection>.

⁴⁶ Alana Wise, *'Unconscionable': Capitol Police Union Says Leadership Failed Officers In Riot*, NPR (Jan. 27, 2021), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/27/961268306/unconscionable-capitol-police-union-says-leadership-failed-officers-in-riot>.

⁴⁷ See Dylan Stableford, *Congress Certifies Biden's Win after Trump Supporter Storm U.S. Capitol*, YAHOO NEWS (Jan. 6, 2021), <https://www.yahoo.com/video/live-congress-counts-electoral-votes-georgia-senate-runoffs-trump-pence-134705945.html>.

⁴⁸ *Three Years Since the Jan. 6 Attack on the Capitol*, U.S. DEP'T OF JUST. (Jan. 5, 2024), <https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0#:~:text=Approximately%20749%20federal%20defendants%20have,sentenced%20o%20periods%20of%20incarceration>.

⁴⁹ See Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO STATE L.J. 477, 480 (2014).

⁵⁰ See U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2018).

⁵¹ See PETER G. BERRIS, MICHAEL A. FOSTER, & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., R46829, DOMESTIC TERRORISM: OVERVIEW OF FED. CRIM. L. AND CONST. ISSUES 47 (2021).

maximum penalties.⁵² The purpose of the Sentencing Guidelines is to provide courts with a “starting point” when they consider imposing a terrorism enhancement.⁵³ Although the Sentencing Guidelines are not binding, federal judges are mandated to review the guidelines while sentencing a defendant.⁵⁴

The sentencing guidelines are based on both the seriousness of the offense and a defendant’s criminal history.⁵⁵ The guidelines set forth forty-three levels of offense seriousness and assign each crime a base level offense.⁵⁶ The more serious the crime, the higher the base level offense. For instance, “if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism . . .” the guidelines mandate an upward adjustment of the base level to at least a level thirty-two.⁵⁷ This is substantial, considering that the maximum offense level is forty-three.⁵⁸ Under the guidelines, an offender with a level thirty-two offense and no prior criminal history will at a minimum be sentenced to an additional 121-151 months (10.08-12.58 years) of imprisonment.⁵⁹ The terrorism enhancement, U.S.S.G. § 3A1.4, provides as follows:

- (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than 12 level 32, increase to level 32.
- (b) In each such case, the defendant’s criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.⁶⁰

⁵² *See id.*

⁵³ *See* David B. Savitz & Todd J. Thompson, *Avoiding the Terrorism Enhancement*, 43 CHAMPION 24, 3 (2019).

⁵⁴ *See* Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, LAWFARE (Feb. 16, 2021, 11:17 AM), <https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism>.

⁵⁵ *See* U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENT’G COMM’N 2018).

⁵⁶ *See id.*

⁵⁷ U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2018).

⁵⁸ U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENT’G COMM’N 2018).

⁵⁹ *Id.*

⁶⁰ U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2018).

For U.S.S.G. § 3A1.4 to apply, the defendant must have committed a crime that is an “offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”⁶¹ Additionally, the defendant must be in “violation of a specific federal criminal statute listed in 18 U.S.C. § 2332b(g)(5)(B).”⁶²

The Sentencing Guidelines can “dramatically increase sentences for felonies that involved, or [were] intended to promote . . . federal crime[s] of terrorism by automatically raising the offense level and criminal history category.”⁶³ The Appendix of the Guidelines indicates that “[a]ll federal crimes are grouped according to offense characteristics and assigned a base offense level.”⁶⁴ The base offense level can be found on the vertical axis of the Guidelines and the judge can consider any mitigating circumstances, such as possession of a firearm, to further adjust the defendant’s position on the vertical axis.⁶⁵ The Guidelines also allow the judge to make adjustments “based on such factors as the victim, the defendant’s role, and the defendant’s acceptance of responsibility.”⁶⁶

The horizontal axis of the Guidelines takes into account the defendant’s criminal history.⁶⁷ The Guidelines provide six categories, with Category I being the least serious and Category VI being the most serious. Category I includes first-time offenders, while Category VI includes defendants with a serious criminal record. If a judge decides to apply the terrorism enhancement, then the Guidelines

⁶¹ 18 U.S.C. § 2332b(g)(5)(A) (1996).

⁶² See 18 U.S.C. § 2332b(g)(5)(B) (1996) (setting forth a long list of offenses, including the criminal use of biological weapons, conspiracy to murder persons abroad, and aircraft piracy, among others).

⁶³ Stephen Floyd, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security*, 109 Geo. L.J. 142 (2021); U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2018).

⁶⁴ George D. Brown, *Punishing Terrorists: Congress, THE SENTENCING COMMISSION, THE GUIDELINES, AND THE COURTS*, 23 CORNELL J.L. & PUBLIC POLICY 517, 520 (2014).

⁶⁵ U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENT’G COMM’N 2018).

⁶⁶ See Brown, *supra* note 65, at 520.

⁶⁷ U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENT’G COMM’N 2018).

automatically place the defendant in Category VI, irrespective of their prior record.⁶⁸ In other words, even if the offender does not have a criminal record, they are treated as if they are amongst the greatest recidivists.⁶⁹

Because the terrorism enhancement imposes a base level of at least level thirty-two and the criminal history category is VI, a defendant will at a minimum be sentenced to 210-262 months (17.5-21.8 years) of imprisonment when the enhancement is applied.⁷⁰ The next section will discuss the evolution of the terrorism enhancement and how existing federal statutes could implicitly criminalize acts of domestic terrorism.

III. HISTORICAL LANDSCAPE UNDER BOOKER AND BEYOND

The 2005 Supreme Court's landmark decision in *United States v. Booker* shaped the legal landscape regarding the application of Sentencing Guidelines.⁷¹ Even before *Booker*, it was clear that congress intended the duty to sentence defendants to lie predominantly with judges.⁷² However, under the mandated Sentencing Guidelines and the facts presented in *Booker*, the defendant's sentence could have been as much as life imprisonment.⁷³

In *Booker*, the defendant was convicted by a jury of possession "based on evidence that he had 92.5 grams of [cocaine base] in his duffel bag."⁷⁴ Following the jury's findings, the judge additionally found that the defendant "had possessed an additional 566 grams of crack and that he was guilty of obstructing justice," which, per the guidelines, imposed a sentence approximately ten years longer than the jury conviction standing alone would have.⁷⁵ The central issue in

⁶⁸ U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2018).

⁶⁹ Roger Parloff, *Should Nine Oath Keepers Receive Terror-Enhanced Sentences?*, LAWFARE (May 22, 2023, 8:30 AM), <https://www.lawfaremedia.org/article/should-nine-oath-keepers-receive-terror-enhanced-sentences>.

⁷⁰ U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2018).

⁷¹ See Brown, *supra* note 65, at 518.

⁷² See *United States v. Booker*, 543 U.S. 220, 245–47 (2005).

⁷³ See Brown, *supra* note 65, at 525.

⁷⁴ See *Booker*, 543 U.S. at 226–28.

⁷⁵ *Id.* at 227.

Booker was whether imposing a sentence enhancement under the Guidelines, based on judicial findings, violates the Sixth Amendment.⁷⁶

The Court established two important principles in *Booker*. The more relevant holding to the January 6 sentencing hearings is that the Sentencing Guidelines are now advisory, rather than binding on trial judges.⁷⁷ The court reasoned that making the Guidelines advisory maintained a “strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”⁷⁸

Like the changes to the Guidelines at issue in *Booker*, the terrorism enhancement has changed significantly over the years. This history stretches back well before *Booker*. In 1993, foreign Islamist terrorists exploded a bomb in the basement of the World Trade Center, leaving a crater several stories deep and six people dead.⁷⁹ Following this incident, Congress enacted the sentencing enhancement for terrorism.⁸⁰ This enhancement was originally applied only to cases involving *international*, rather than domestic terrorism.⁸¹

In 1995, however, American perpetrators Timothy McVeigh and Terry Nichols, both veterans of the Gulf War, set off a 4,800 pound ammonium nitrate–fuel oil bomb at the north entrance of the Alfred P. Murrah Federal Building in downtown Oklahoma City.⁸² The bombing killed 168 people and injured approximately 850 more.⁸³ At

⁷⁶ *Id.* at 226.

⁷⁷ *Id.* at 245.

⁷⁸ *Id.* at 246.

⁷⁹ Sarah Pruitt, *7 Facts About the 1993 World Trade Center Bombing*, HISTORY (Aug. 24, 2021), <https://www.history.com/news/world-trade-center-bombing-1993-facts>.

⁸⁰ Gerstein, *supra* note 16.

⁸¹ *Id.*

⁸² Edward Tabor Linenthal, *Oklahoma City Bombing*, OKLAHOMA HISTORICAL SOCIETY: THE ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE (Jan. 15, 2010), <https://www.okhistory.org/publications/enc/entry.php?entry=OK026>.

⁸³ *Id.*

the time, some considered the tragedy to be “the worst act of homegrown terrorism in the nation’s history.”⁸⁴

As a result, Congress moved to expand the terrorism enhancement to cover terrorism inspired by domestic causes.⁸⁵ Codified in § 3A1.4 of the Federal Sentencing Guidelines, Congress imposed tougher penalties to deter acts of “intimidation or coercion” aimed at the government or civilian population.⁸⁶ It is important to note there is no current, specific crime of domestic terrorism.⁸⁷ However, Congress did create a statutory definition of domestic terrorism in another statute—18 U.S.C. § 2331(5):

[A]cts within the U.S. that are dangerous to human life, violate the laws of the U.S. or a state, and “appear to be intended—(1) to intimidate or coerce a civilian population; (2) to influence the policy of a government by intimidation or coercion; or (3) to affect the conduct of a government by mass destruction, assassination, or kidnapping[.]”⁸⁸

Although a definition of domestic terrorism is therefore provided by federal law, no “federal provision expressly prohibits” it.⁸⁹ Therefore, domestic terrorism has operated in a gray area “between international terrorism and non-terrorist criminal offenses.”⁹⁰

As the January 6 insurrection has displayed, “[c]onduct consistent with the definition of domestic terrorism may still be a federal crime” under other statutes.⁹¹ Chapter 113B of Title 18 of the U.S. Code encompasses federal criminal offenses that fall under “terrorism.”⁹² In 18 U.S.C. § 2332(b)(g) there are over 50 federal offenses that are “federal crime[s] of terrorism” if “calculated to

⁸⁴ *Oklahoma City Bombing*, FBI: FAMOUS CASES AND CRIMINALS, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited Apr. 16, 2024).

⁸⁵ Gerstein, *supra* note 16.

⁸⁶ See Halliday, *supra* note 55.

⁸⁷ *Id.*

⁸⁸ 18 U.S.C. § 2331.

⁸⁹ BERRIS ET AL., *supra* note 52.

⁹⁰ See Halliday, *supra* note 55.

⁹¹ BERRIS ET AL., *supra* note 52, at 1.

⁹² 18 U.S.C. § 2332a.

influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”⁹³ Although some federal criminal laws that explicitly address terrorism can be applied to domestic terrorism, others cannot.⁹⁴ There are, however, other federal criminal laws that are applicable in a domestic terrorism case.⁹⁵

Acts that fit within the legal definition of domestic terrorism can range from hate crimes to damaging government property.⁹⁶ Although there are a great number of federal offenses that could be applied under the definition of domestic terrorism, the following list contains a few categories where federal statutes could “implicitly criminalize acts of domestic terrorism.”⁹⁷

- crimes of violent unrest;
- crimes against government authority;
- crimes against persons;
- crimes involving infrastructure or federal property;
- hate crimes;
- crimes involving specific weapons;
- crimes involving threats; and
- crimes involving computers.⁹⁸

Depending on the conduct, a federal prosecutor’s choice of which statute to prosecute under will turn on “the weapon used by the defendant, the target selected, or the defendant’s motive.”⁹⁹ Federal statutes criminalizing violent unrest include the Anti-Riot Act, and one charge that can be brought is Civil Disorder.¹⁰⁰ These federal crimes address “violent unrest,” “rioting,” and “other destructive mob behavior.”¹⁰¹

⁹³ BERRIS ET AL., *supra* note 52, at 11.

⁹⁴ 18 U.S.C § 2339C(b)(5) (1990); *See also* Berris, *supra* note 52, at 14.

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ BERRIS ET AL., *supra* note 52, at 15.

⁹⁸ *Id.*

⁹⁹ *See id.* at 16.

¹⁰⁰ 18 U.S.C. §§ 2101, 231.

¹⁰¹ BERRIS ET AL., *supra* note 52, at 16.

Another federal crime, which prosecutors have used against January 6 insurrectionists, is the category of “crimes against government authority.”¹⁰² The most relevant to January 6 defendants is 18 U.S.C. § 2383, which “authorizes fines and up to ten years of imprisonment for anyone” who “incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto.”¹⁰³ Additionally, under 18 U.S.C. § 2384, the seditious conspiracy code provides that:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, 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 contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.¹⁰⁴

A more complete list would include federal statutes against assaulting, resisting, or impeding federal officers or employees under 18 U.S.C. § 111 and unlawful activities at U.S. Capitol Buildings and Grounds under 40 U.S.C. § 5104.¹⁰⁵ Section 5104 is especially relevant to January 6, as the DOJ has filed multiple charges against defendants involved in the riots under this statute.¹⁰⁶ Furthermore, § 5104 prohibits:

- knowingly, with force and violence, entering or remaining on the floor of either house of Congress;
- willfully and knowingly obstructing or impeding passage through or within the Capitol grounds or buildings;
- willfully and knowingly engaging in an act of physical violence (defined as an act involving assault, other infliction or threat of infliction of death or bodily harm to an individual, or damage or

¹⁰² See generally *id.* at 19.

¹⁰³ 18 U.S.C. § 2383.

¹⁰⁴ 18 U.S.C. § 2384.

¹⁰⁵ 18 U.S.C. § 111; 40 U.S.C. § 5104.

¹⁰⁶ MICHAEL FOSTER & PETER BERRIS, CONG. RSCH. SERV., LSB10564, FED. CRIM. LAW: JAN. 6, 2021, UNREST AT THE CAPITOL 2 (2021).

destruction of real or personal property) on Capitol grounds or in Capitol buildings; and

- except as authorized by Capitol Police Board regulations, carrying or having readily accessible a firearm, a dangerous weapon (including a dagger or knife with a blade over three inches), an explosive, or an incendiary device, or using or discharging any of the preceding items.¹⁰⁷

Although prosecutors can apply the federal crimes listed above, acts of domestic terrorism by the January 6 insurrectionists should carry extra weight when courts are determining the sentencing for such acts.

IV. DEPARTMENT OF JUSTICE CONVICTIONS OF JANUARY 6 INSURRECTIONISTS

It has been more than three years since the Capitol riots, and as of January 5, 2024, more than 1,265 defendants from nearly all 50 states have been charged with crimes connected to their participation in the January 6 attack on the Capitol.¹⁰⁸ Of these, “332 defendants have been charged with corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so.”¹⁰⁹ In addition, “57 defendants have been charged with conspiracy, either: (a) conspiracy to obstruct a congressional proceeding, (b) conspiracy to obstruct law enforcement during a civil disorder, (c) conspiracy to injure an officer, or (d) some combination of the three.”¹¹⁰ More importantly, approximately 749 federal defendants have received sentences for their actions on January 6.¹¹¹ Of these, 467 defendants have been sentenced to periods of incarceration, while 154 defendants have been sentenced to periods of home detention.¹¹²

To date, only three January 6 defendants had the “terrorism enhancement” added to their sentence under § 3A1.4.¹¹³ Numerous

¹⁰⁷ BERRIS ET AL., *supra* note 52, at 27. See 40 U.S.C. § 5104.

¹⁰⁸ U.S. Dep’t of Just., *supra* note 49.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Press Release, U.S. Dep’t of Just., Leaders of the Proud Boys Sentenced to 17 & 15 Years in Prison on Seditious Conspiracy & Other Charges Related to U.S. Capitol

prosecutors, however, have advocated for the application of the terrorism enhancements to the sentence of several of the January 6 defendants.¹¹⁴ Although prosecutors have pushed for sentencing enhancement, there are several reasons why judges have only applied the terrorism enhancement to a few January 6 offenders. Judges are not sure whether actions taken on January 6 qualify as “crimes of terrorism.”¹¹⁵ Moreover, judges are reluctant to label the January 6 rioters that come before them “domestic terrorists” when other January 6 defendants did not receive similar sentencing enhancement.¹¹⁶ In some cases, prosecutors also did not ask judges to impose the enhancement, citing unspecified “facts and circumstances.”¹¹⁷ The next section will discuss several January 6 convictions where the sentencing enhancement was requested by prosecutors, but not applied by judges. Following that, there will be a review of the convictions where prosecutors were successful in persuading the judge to apply the sentence enhancement.

A. *Terrorism Enhancement Not Requested or Denied*

Capitol rioter Guy Reffitt was sentenced to 87 months in prison for his involvement in the January 6 riots.¹¹⁸ However, U.S. District Judge Dabney Friedrich denied prosecutors’ request for applying the terrorism enhancement.¹¹⁹ Reffitt, a recruiter for the Three Percenters, a right-wing militia group, drove to the capitol on January 6 with several firearms to participate in the riot.¹²⁰ At Reffitt’s

Breach (Aug. 31, 2023), <https://www.justice.gov/opa/pr/two-leaders-proud-boys-sentenced-17-and-15-years-prison-seditious-conspiracy-and-other>.

¹¹⁴ Parloff, *supra* note 70.

¹¹⁵ Gerstein, *supra* note 16.

¹¹⁶ See Bruggeman, *supra* note 17.

¹¹⁷ Gerstein, *supra* note 16.

¹¹⁸ Sam Cabral & Tara McKelvey, *Guy Reffitt: Capitol rioter turned in by son gets 87 months in prison*, BBC (Aug. 1, 2022), <https://www.bbc.com/news/world-us-canada-62382492>.

¹¹⁹ Eric Neugeboren, *Texan who prosecutors say ‘lit the match’ of Jan. 6 riot sentenced to more than 7 years in prison*, TEX. TRIB. (Aug. 1, 2022), <https://www.kut.org/crime-justice/2022-08-01/texan-who-prosecutors-say-lit-the-match-of-jan-6-riot-sentenced-to-more-than-7-years-in-prison>.

¹²⁰ Hannah Rabinowitz, *Jan. 6 rioter who carried gun to US Capitol and threatened Nancy Pelosi gets more than 7 years in prison*, CNN (Aug. 1, 2022), <https://www.cnn.com/2022/08/01/politics/guy-reffitt-sentencing/index.html>.

trial, the jury were played a recording in which Reffitt says he “wanted to drag lawmakers outside of the Capitol ‘kicking and screaming’” and “wanted to see House Speaker Nancy Pelosi’s head hit every stair on the way down.”¹²¹ During the rior, Reffitt was armed with a handgun, body armor, a helmet, and flex cuffs.¹²² A former Capitol police officer who confronted Reffitt during the riots testified at Reffitt’s sentencing hearing: “I witnessed him lead an angry, motivated mob of armed individuals whose sole intent was to push past officers.”¹²³

The Reffitt prosecutors’ sentencing memo explained that Mr. “Reffitt sought not just to stop Congress, but also to physically attack, remove, and replace the legislators who were serving in Congress.”¹²⁴ Prosecutors used video evidence of Reffitt bragging about his involvement in the riots.¹²⁵ Prosecutors explained that “This is a quintessential example of an intent to both influence and retaliate against government conduct through intimidation or coercion.”¹²⁶

Prosecutors urged the judge to sentence Reffitt to 15 years’ imprisonment, in part by applying the terrorism enhancement.¹²⁷ Reffitt’s actions, they said, could violate the laws of the U.S. and “appear to be intended—(1) to intimidate or coerce a civilian population; (2) to influence the policy of a government by intimidation or coercion; and (3) to affect the conduct of a government by mass destruction, assassination, or kidnapping” and still not be considered domestic terrorism under federal law.¹²⁸ The federal sentencing Guidelines in Mr. Reffitt’s case called for a prison sentence between nine and eleven years.¹²⁹

¹²¹ *Id.*

¹²² *See id.*

¹²³ *Id.*

¹²⁴ Neugeboren, *supra* note 123.

¹²⁵ Tom Jackman & Spencer S. Hsu, *Hundreds of people stormed the Capitol. Most won’t face hefty prison terms, legal experts say*, WASH. POST (May 13, 2021), <https://www.washingtonpost.com/nation/2021/05/13/capitol-rioters-sentencing/>.

¹²⁶ Neugeboren, *supra* note 123.

¹²⁷ *Id.*

¹²⁸ 18 U.S.C. § 2331.

¹²⁹ *See* Bruggeman, *supra* note 17.

In Judge Friedrich's denial of the terrorism enhancement, she reasoned that applying the terrorism enhancement would cause "an unwanted sentencing disparity" between Reffitt and other January 6 cases in which prosecutors did not request an increase in sentencing.¹³⁰ Judge Friedrich also noted that "[t]here are a lot of cases where defendants possessed weapons or committed very violent assaults."¹³¹ Since the U.S. district court did not characterize Mr. Reffitt as a domestic terrorist, Mr. Reffitt joined the many defendants who evaded the terrorism enhancement.

Thomas Webster, an ex-NYPD officer and Marine Corps veteran, was sentenced to ten years in prison for his actions in the Capitol riots.¹³² Mr. Webster was equipped with a bulletproof vest and a large metal flagpole that he "forcefully swung towards" an officer during the riots.¹³³ It is reported that Mr. Webster tackled that officer to the ground and "tried to remove his helmet and gas mask, choking him."¹³⁴

As a result of Mr. Webster and others in the mob "kicking the officer," the officer sustained several injuries.¹³⁵ Although prosecutors did not seek the terrorism enhancement in this case, Mr. Webster was found guilty of:

five felonies: assaulting, resisting, or impeding officers with a dangerous weapon; obstructing officers during a civil disorder; entering and remaining in a restricted building or grounds, while carrying a dangerous weapon; engaging in disorderly or disruptive conduct in a restricted building or grounds, while carrying a dangerous weapon, and engaging in physical violence

¹³⁰ Neugeboren, *supra* note 123.

¹³¹ See Josh Gerstein, *Texas militia member gets most serious Jan. 6 sentence yet: Just over 7 years*, POLITICO (Aug. 1, 2022), <https://www.politico.com/news/2022/08/01/jan-6-terrorism-sentencing-penalty-00048922>.

¹³² Press Release, U.S. Dep't of Just., *Retired NYPD Officer Sentenced to 10 Years in Prison For Actions Related to Capitol Breach* (Sept. 1, 2022), <https://www.justice.gov/usao-dc/pr/retired-nypd-officer-sentenced-prison-actions-related-capitol-breach>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

in a restricted building or grounds, while carrying a dangerous weapon.¹³⁶

There have been many other January 6 convictions. For example, Devlyn Thompson was sentenced to 46 months in prison for assaulting a police officer with a metal baton.¹³⁷ In addition, Lonnie Leroy Coffman pleaded guilty to possession of unregistered weapons.¹³⁸ Mr. Coffman drove his truck to the Capitol with a “small arsenal of 282 molotov cocktails, a 9mm handgun, a rifle, a shotgun, hundreds of rounds of ammunition, large-capacity ammunition feeding devices, a crossbow with bolts, machetes, camouflage smoke detectors and gas-filled Mason jars used to make napalm (a kind of homemade bomb).”¹³⁹ He was sentenced to 46 months in prison.¹⁴⁰

Robert Scott Palmer, age 54, pleaded guilty to assaulting law enforcement officers with a dangerous weapon and was sentenced to 63 months in prison.¹⁴¹ Palmer “hurled wooden boards and a fire extinguisher at police” during the riot.¹⁴² Thomas Robertson, age 49, was sentenced to 87 months’ imprisonment for “obstruction of an official proceeding, civil disorder, and carrying a weapon in a restricted building.”¹⁴³ Qanon follower Nicholas Languerand, age 26, was sentenced to 44 months in prison for assaulting law enforcement with a dangerous weapon.¹⁴⁴ Languerand threw items at U.S. Capitol Police that were “capable of inflicting serious bodily injury.”¹⁴⁵ The

¹³⁶ *Id.*

¹³⁷ See Nik Popli & Julia Zorthian, *What Happened to the Jan. 6 Insurrectionists Arrested Since the Capitol Riot*, TIME (last updated May 26, 2023), <https://time.com/6133336/jan-6-capitol-riot-arrests-sentences/>.

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Vimal Patel, *Ex-Police Officer Gets 7 Years in Prison for Role in Jan. 6 Attack*, N.Y. TIMES (Aug. 11, 2022), <https://www.nytimes.com/2022/08/11/us/thomas-roberston-jan-6-sentenced.html>.

¹⁴⁴ Press Release, U.S. Dep’t of Just., South Carolina Man Sentenced to 44 Months in Prison for Assaulting Law Enforcement During Capitol Breach, (Jan. 26, 2022), <https://www.justice.gov/usao-dc/pr/south-carolina-man-sentenced-44-months-prison-assaulting-law-enforcement-during-capitol>.

¹⁴⁵ *Id.*

presiding Judge, John Bates, noted that “[t]he defendant engaged in, and plead[ed] guilty to an, extremely dangerous offense” and “[i]t strikes at the very heart of the democratic rule of law.”¹⁴⁶ None of the defendants listed above, however, had the terrorism enhancement attached to their sentences, even though their actions certainly (1) intimidated or coerced a civilian population; (2) influenced the policy of a government by intimidation or coercion; or (3) affected the conduct of a government by mass destruction, assassination, or kidnapping.¹⁴⁷

B. *Terrorism Enhancement Successfully Applied to Defendants’ Sentences*

Three defendants, however, did not escape the application of the terrorism enhancement. Enrique Tarrío, Joseph Biggs, and Zachary Rehl, all former leaders of the Proud Boys organization, received a terrorism enhancement at sentencing.¹⁴⁸ The appropriateness of the penalty is obvious from a summary of their actions. Biggs, Rehl, and Tarrío hand-selected “rally boys” to take to the Capitol.¹⁴⁹ The three men “established a chain of command, chose a time and place for their attack, and intentionally recruited others who would follow their top-down leadership and who were prepared to engage in physical violence if necessary.”¹⁵⁰

U.S. District Judge Timothy Kelly applied the terrorism enhancement to Zachary Rehl’s sentence, boosting it to a total of 15

¹⁴⁶ Robert Legare & Jacob Rosen, *QAnon follower from South Carolina who admitted he assaulted officers on January 6 sentenced to 44 months in prison*, CBS NEWS (Jan. 27, 2022), <https://www.cbsnews.com/news/january-6-nicolas-languerand-qanon-assault-sentence-44-months/>.

¹⁴⁷ 18 U.S.C. § 2331.

¹⁴⁸ Alanna Durkin Richer, *Justice Department seeks 33 years in prison for ex-Proud Boys leader Enrique Tarrío in Jan. 6 case*, PBS (Aug. 18, 2023), <https://www.pbs.org/newshour/politics/justice-department-seeks-33-years-in-prison-for-ex-proud-boys-leader-enrique-tarrio-in-jan-6-case>; *Two Leaders of the Proud Boys*, *supra* note 114.

¹⁴⁹ U.S. Dep’t of Just., *supra* note 117.

¹⁵⁰ *Id.*

years in prison.¹⁵¹ Prosecutors in Rehl's case requested a 33-year sentence, partially because he advocated for "firing squads" to be used against "the traitors that are trying to steal the election."¹⁵² Prosecutors also presented evidence at trial of Rehl using a chemical spray on law enforcement during the riot.¹⁵³ On May 4, 2023, Rehl was convicted of several felonies including seditious conspiracy and conspiracy to obstruct an official proceeding.¹⁵⁴ Though not matching the prosecutors' request.

Enrique Tarrío was also convicted of several felonies, including seditious conspiracy and conspiracy to obstruct an official proceeding.¹⁵⁵ As with Rehl, Judge Kelly applied the terrorism enhancement to his sentence.¹⁵⁶ Tarrío was sentenced to a total of 22 years in prison for his involvement in the Capitol attack.¹⁵⁷ Though Tarrío was not even in Washington, D.C. during the riot, prosecutors argued that he organized and encouraged his followers from afar.¹⁵⁸ Prosecutors also presented evidence of online messages that Tarrío wrote, including "Do what must be done" and "Do it again."¹⁵⁹

Joseph Biggs was convicted, inter alia, of seditious conspiracy, obstruction of an official proceeding, conspiracy to use force, and

¹⁵¹ *Id.* Because the enhancement applied, this sentence was 15 years below the guideline recommendation. Ella Lee, *Proud Boy Zachary Rehl receives 15 years in prison, half of government request*, THE HILL (Aug. 31, 2023), <https://thehill.com/regulation/court-battles/4181859-proud-boy-zachary-rehl-receives-15-years-in-prison-half-of-government-request/>.

¹⁵² Lee, *supra* note 157.

¹⁵³ *Id.*

¹⁵⁴ Press Release, Court Applied Enhancement for a Federal Crime of Terrorism, DOJ (Aug. 31, 2023), <https://www.justice.gov/opa/pr/two-leaders-proud-boys-sentenced-17-and-15-years-prison-seditious-conspiracy-and-other>.

¹⁵⁵ U.S. Dep't of Just., *supra* note 150.

¹⁵⁶ *Id.*

¹⁵⁷ *Proud Boys Leader Sentenced to 22 Years in Prison on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, U.S. ATT'YS' OFF., D.C. (Sept. 5, 2023), <https://www.justice.gov/opa/pr/proud-boys-leader-sentenced-22-years-prison-seditious-conspiracy-and-other-charges-related>.

¹⁵⁸ *Id.*

¹⁵⁹ Michael Kunzleman et al., *Proud Boys' Enrique Tarrío gets record 22 years in prison for Jan. 6 seditious conspiracy*, AP (Sept. 6, 2023), <https://apnews.com/article/enrique-tarrío-capitol-riot-seditious-conspiracy-sentencing-da60222b3e1e54902db2bbbb219dc3fb>.

destruction of government property.¹⁶⁰ The government sought 33 years in federal prison for Biggs, since he served as an instigator and leader.¹⁶¹ Moreover, prosecutors argued that he “led a revolt against the government in an effort to stop the peaceful transfer of power.”¹⁶² Judge Kelly sentenced Biggs to seventeen years in prison and thirty-six months of supervised release.¹⁶³ As with Rehl and Tario, Kelly applied the enhancement, citing Mr. Biggs’ role in the destruction of a fence that surrounded the Capitol.¹⁶⁴ Judge Kelly reasoned that the destruction was a “deliberate, meaningful step” that contributed to the disruption of the electoral vote count taking place in the Capitol.¹⁶⁵ Comparing Biggs, Tarrío, and Rehl’s actions to other January 6 defendants, it is apparent that others exhibited similar behaviors and held similar intentions, yet judges did not apply the enhancement in many of these cases.¹⁶⁶ Like Rehl, who sprayed chemicals at law enforcement, QAnon follower Nicholas Languerand also assaulted law enforcement by throwing a can of pepper spray at officers.¹⁶⁷ Yet, Rehl and not Languerand received the terrorism enhancement. Unlike Tarrío, Thomas Webster was actually present at the riot, physically attacked an officer, and “tried to remove his helmet and gas mask, choking him.”¹⁶⁸ Even violent conduct such as Webster’s didn’t warrant an enhancement. Although there are only three cases where a judge held that a January 6 defendant qualified for a sentencing enhancement, it is difficult to find consistency in the application of the enhancement. To varying degrees, all the defendants seem to meet the statutory definition of domestic terrorism as their actions “appear[ed] to be intended—(1) to intimidate or coerce a civilian population; (2)

¹⁶⁰ Ryan J. Reilly and Daniel Barnes, *Proud Boy Joe Biggs sentenced to 17 years in Jan. 6 seditious conspiracy case*, NAT’L BROAD. CO. NEWS (Aug. 31, 2023), <https://www.nbcnews.com/politics/justice-department/proud-boy-joe-biggs-faces-decades-prison-jan-6-seditious-conspiracy-ca-rcna102597>.

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ U.S. DEP’T OF JUST., *supra* note 114.

¹⁶⁴ Jaclyn Diaz, *Proud Boys leaders sentenced to a combined 32 years for Jan. 6 riot*, NPR, Aug. 31, 2023, <https://www.npr.org/2023/08/31/1196972258/proud-boys-sentence-jan-6-joseph-biggs>.

¹⁶⁵ Reilly and Barnes, *supra* note 166.

¹⁶⁶ *See* U.S. DEP’T OF JUST., *supra* note 114.

¹⁶⁷ Lee, *supra* note 157; U.S. DEP’T OF JUST., *supra* note 136.

¹⁶⁸ U.S. DEP’T OF JUST., *supra* note 133.

to influence the policy of a government by intimidation or coercion; and (3) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”¹⁶⁹

Section 3A 1.4 of the Sentencing Guidelines, known as the “terrorism enhancement” is controversial in nature as it is broadly and inconsistently applied, and results in harsh punishment. Although prosecutors have pushed for the sentencing enhancement, there are several reasons why judges have not applied the terrorism enhancement to the January 6 offenders. For instance, judges are not sure whether actions taken on January 6 qualify as “crimes of terrorism.”¹⁷⁰ Moreover, judges are reluctant to label January 6 rioters tried in their courtrooms “domestic terrorists” if other January 6 related defendants before other judges did not receive similar sentencing enhancements.¹⁷¹ Prosecutors have also raised the issue of unspecified “facts and circumstances” to explain why, in some cases, they did not ask judges to impose harsher sentencing.¹⁷²

V. TERRORISM ENCHANTMENT AND ITS LEGAL INEQUALITIES

Section 3A 1.4 of the Sentencing Guidelines is satisfied if the offense is felonious conduct that: (1) “involved” a crime of terrorism; or (2) was “intended to promote” a crime of terrorism.¹⁷³ A federal crime of terrorism is defined as “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”¹⁷⁴ The January 6 riots can be classified as a “federal crime of terrorism” given the rioters’ intent to disrupt Congress’s ratification of the 2020 presidential election.¹⁷⁵ The January 6 rioters’ actions could also be seen as calculated to influence or affect the conduct of government, which would also fall under the definition of crimes of terrorism.

¹⁶⁹ 18 U.S.C. § 2331.

¹⁷⁰ Gerstein, *supra* note 16.

¹⁷¹ See Bruggeman, *supra* note 17.

¹⁷² Gerstein, *supra* note 16.

¹⁷³ See Savitz, *supra* note 54, at 8.

¹⁷⁴ 18 U.S.C. § 2332b(g)(5) (2002).

¹⁷⁵ Breuninger, *supra* note 28.

The controversies surrounding the Guidelines stem from the legal structure of the provision.¹⁷⁶ Given the deficiencies of the Guidelines, prosecutors and/or judges have declined to apply the terrorism enhancement to the majority of the January 6 rioters. The next section seeks to argue that the Guidelines have not been successfully applied due to the substantial increase in prison time, overly broad application, and historically inconsistent application of the enhancement.

A. *Harsh Sentences under Terrorism Enhancement Guidelines*

Under the current structure, the length of an individual's prison sentence could be exponentially increased if the terrorism enhancement is applied.¹⁷⁷ Ohio State law professor Doug Berman describes the enhancement as potentially "tak[ing] you from a couple of years [in prison] in the Guidelines range all the way up to, like, [twenty]."¹⁷⁸ Given the circumstances of the January 6 riots, and in some cases the actions of the accused unspecified, judges are apprehensive about labeling defendants as domestic terrorists and sentencing them to such a harsh extension.¹⁷⁹ Furthermore, the January 6 defendants have evaded the enhancement given the courts' reluctance to add a harsh sentence to acts such as "breaking a window."¹⁸⁰

B. *The Terrorism Enhancement Lacks Specificity and is Overly Broad*

The broad application of terrorism sentencing enhancement has sparked controversy.¹⁸¹ The terrorism enhancement provision is

¹⁷⁶ See Floyd, *supra* note 64, at 157.

¹⁷⁷ Gerstein, *supra* note 16.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ See Press Release, *Kentucky Man Pleads Guilty to Felony Charge for Actions During Jan. 6 Capitol Breach*, U.S. DEP'T OF JUST. (Sept. 21, 2022), <https://www.justice.gov/usao-dc/pr/kentucky-man-pleads-guilty-felony-charge-actions-during-jan-6-capitol-breach>.

¹⁸¹ See Pinky Wassenberg, *U.S. Circuit Courts & the Application of the Terrorism Enhancement Provision*, 42 S. ILL. U. L.J. 85, 87.

structured so that the enhancement can be imposed on individuals convicted of crimes ranging from donating money to terror groups to murders and hostage taking.¹⁸² Therefore, under the current Guidelines, no matter the severity of the acts committed by January 6 rioters, all could “result in similar sentences for dissimilar crimes.”¹⁸³ Moreover, the broadness of the enhancement represents a flaw in the statutory structure since sentencing is not uniform or proportionate.¹⁸⁴ For this reason, judges are reluctant to apply the enhancement provisions to the January 6 rioters.

1. Terrorism Enhancement Disproportionate to Defendant’s Criminal Histories

Under the current Guidelines, a person without a criminal background could have a base-level offense of ten if they obstruct a terrorism investigation.¹⁸⁵ Therefore, “first-time offenders who indirectly support a terrorist act may receive the same criminal history category as a violent offender with a lengthy record.”¹⁸⁶

Some of the January 6 rioters fall into the category of “first-time” offenders and must face the reality under the current structure that judges have the ability to treat these individuals the same as violent offenders with a lengthy record.¹⁸⁷ Under the current Sentencing Guidelines, this indiscriminate approach “automatically increases an offender[']s criminal history to the highest level.”¹⁸⁸ The goals of the Sentencing Guidelines are not individualized as intended.¹⁸⁹

¹⁸² *See id.*

¹⁸³ *See* Floyd, *supra* note 64, at 143.

¹⁸⁴ *See id.*

¹⁸⁵ *See* Wassenberg, *supra* note 187, at 87.

¹⁸⁶ Floyd, *supra* note 64, at 148.

¹⁸⁷ *See* Jackman & Hsu, *supra* note 129.

¹⁸⁸ Floyd, *supra* note 64, at 143.

¹⁸⁹ *Id.*

2. Inconsistent Application of the Terrorism Enhancement

Given the advisory nature of the Guidelines, judges have discretion to apply the enhancement or not. Compare the January 6 cases with that of Jessica Reznicek a climate activist who damaged pipeline infrastructures across the Midwest.¹⁹⁰ She admitted to “damaging and attempting to damage the pipeline using an oxy-acetylene cutting torch and fires near pipeline instrumentation and equipment in Mahaska, Boone, and Wapello Counties within the Southern District of Iowa.”¹⁹¹ In her case, prosecutors *were* able to secure the terrorism enhancement. Many January 6 rioters similarly used objects to damage and destroy property and obstructed the functioning of government.¹⁹²

By contrast with Reznicek, neither Dylann Roof nor James Fields was given the Terrorism Sentencing Enhancement.¹⁹³ Mr. Roof pleaded guilty to killing nine people at a Charleston bible study, and Mr. Fields killed a Charlottesville demonstrator with his car.¹⁹⁴ Similarly, Guy Riffitt did not receive the terrorism enhancement even though he threatened to “physically attack, remove, and replace” lawmakers.¹⁹⁵ It is clear from this short list of examples that courts are not uniformly applying the terrorism sentencing enhancement. The harshness, breadth and one size-fits all approach of the Guidelines, combined with judges’ discretion, has resulted in inconsistent application. This has proven to be a challenge both for judges, and for the popular legitimacy of the judicial system.

¹⁹⁰ See *Des Moines Woman Sentenced to Eight Years in Prison for Conspiracy to Damage the Dakota Access Pipeline*, U.S. DEP’T OF JUST. (Jun. 30 21, 2021), <https://www.justice.gov/usao-sdia/pr/des-moines-woman-sentenced-eight-years-prison-conspiracy-damage-dakota-access-pipeline>.

¹⁹¹ *Id.*

¹⁹² U.S. DEP’T OF JUST., *supra* note 49.

¹⁹³ See Bruggeman, *supra* note 17.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

VI. THE JANUARY 6 ATTACK DEMONSTRATES THE NEED TO REFORM THE GUIDELINES

Change is on the horizon to combat domestic terrorism following the January 6 riots. The legal structure of the Guidelines provides a flawed framework and should be modified so that judges are confident applying the terrorism enhancement in a uniform and consistent manner. The following recommended amendments would encourage judges to consider the enhancement, and by doing so, send a clear message that all actions have consequences.

A. *Lower the Mandatory Criminal Category to IV*

One of the reasons for the court's reluctance to impose the terrorism sentencing enhancement is the harshness of the sentences that result from doing so.¹⁹⁶ Under the current framework, a defendant with no criminal history, but who "intended to promote, a federal crime of terrorism . . ." is automatically placed into the highest category (VI).¹⁹⁷ By downgrading the criminal history mandate for terrorism offenders to a category IV, judges might be more willing to consider imposing the terrorism enhancement. This would reduce the minimum sentence from an additional 210-262 months (or 17.5-21.83 years) of imprisonment to 168-210 months (or 14-17.5 years). So far, judges have not imposed terrorism sentencing enhancement regularly even though some January 6 cases fall under the statutory definition of "domestic terrorism."¹⁹⁸ With a change in the criminal history category, more judges may feel comfortable assigning offenders to a lower category as they are no longer grouped with offenders with serious criminal records.

Holding more defendants accountable for acts that fit within the statutory definition of terrorism, may prove to be more impactful in combatting terrorism in America. If the January 6 rioters satisfy § 3A 1.4, but judges decline to apply the enhancement because of harshness, lowering the mandatory criminal category and decreasing

¹⁹⁶ See Wassenberg, *supra* note 187, at 89–91.

¹⁹⁷ See U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2018).

¹⁹⁸ See Popli & Zorthian, *supra* note 141.

the total number of years added to an offender's sentence may make a judge more inclined to apply the enhancement.

B. *Create a Domestic Terrorism Statute*

The broad scope of the Guidelines allows judges to impose the enhancement, or, in some cases, decline to apply it altogether.¹⁹⁹ However, if domestic terrorism charges could be brought and used under the Guidelines then judges may be more likely to apply the terrorism enhancement. Although the broad applicability of the current Guidelines provides an effective catch-all mechanism, it also leaves courts with powerful discretion.²⁰⁰ Without violating *Booker*, Congress should provide courts with a clearer statement of intent to formally criminalize domestic terrorism.

For example, under the advisement of Congress, the U.S. Sentencing Commission could amend the current Guidelines to include criminalizing specific acts that directly undermine or influence the government or population. Therefore, the actions of the January 6 defendants, or any future similar acts, would be explicitly covered under the Guidelines and judges may feel more confident in deeming whether a defendant's actions require the application of the terrorism enhancement.

CONCLUSION

The January 6 riot is the most recent example participants in a domestic terrorism attack avoiding having the terrorism enhancement tacked on their sentences. When such a tragic and destructive event undermines our government and interferes with our political process, significant change is warranted. Judges' reluctance to apply the terrorism enhancement to January 6 rioters stems from the inadequate legal structure of the Sentencing Guidelines. Thus, prosecutors are facing and will continue to face an uphill battle that seems impossible to climb without certain changes to the Sentencing Guidelines.

¹⁹⁹ See Floyd, *supra* note 64, at 143–45.

²⁰⁰ See *id.* at 154–56.

Under the recommended amendments to the legal structure of the Sentencing Guidelines, prosecutors would have more success in tacking on the terrorism enhancement to a defendant's sentence when terrorism is involved; judges would feel more comfortable utilizing the terrorism enhancement when considering a defendant's sentencing; and defendants would receive sentences that are warranted. They would be held accountable for acts that threaten our nation's national security.

