

**CRACKS IN THE “THIN BLUE LINE”:  
POLICING, DEMOCRACY, AND INSURRECTION**

*Josephine Ross* \*

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\* Professor of Law, Howard University School of Law. This article grew out of a presentation I gave at a NKU Chase College of Law symposium about democracy and policing, and I appreciate Michael Mannheimer for inviting me to speak on this timely topic. I appreciate Vida Johnson’s helpful comments on a late draft. Alejandro Beutel, with his vast knowledge of the groups that organized the January 6 insurrection, shared interesting insights that I incorporated. Howard research assistants Tytiana Reid and Kiana Stallworth earned my gratitude as they pinned down facts within the evolving record of January 6 and its aftermath, and a shout-out to Hannah Bruns and Bisi Ogumefun for researching specific topics. My thanks to editor-in-chief Marie Ceske, Indira Rajkumar, and the dedicated editing team at the University of Virginia.

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INTRODUCTION

On the morning of January 6, 2021, police officers observed a group of men sporting Glock-style pistols in their waistbands on the Capitol Mall in the District of Columbia.<sup>1</sup> The Park Police, in charge of policing the Mall, were too overwhelmed to arrest these men.<sup>2</sup> The group with pistols were part of the crowd attending the “Save America” rally that President Donald Trump had called, also known as the “Stop the Steal” rally. President Trump planned the rally for the day that Congress was due to certify the 2020 election results, a last-ditch effort to stay in power after Trump’s legal team failed to convince any court that he, rather than Joe Biden, had won the 2020 election. These men were not alone. Many members of the crowd were armed with guns, pepper spray and an array of other weapons.<sup>3</sup> After the rally, over two thousand people walked to the U.S. Capitol Building where white nationalists and other Trump supporters led an “angry mob”<sup>4</sup> in a violent insurrection that injured more than 150 police officers.<sup>5</sup> If their plan had succeeded in coercing the Vice

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<sup>1</sup> Claudia Grisales, *Trump said he knew Jan. 6 crowd members had weapons, ex-White House aide testified*, NPR (June 28, 2022, 5:46 PM), Transcribed Interview of Cassidy Hutchinson, (Feb. 23, 2022), also available at <https://www.npr.org/2022/06/28/1108387054/trump-said-he-knew-jan-6-crowd-members-had-weapons-ex-white-house-aide-testified>.

<sup>2</sup> See Jordan Libowitz and Lauren White, “*We’re not going to be able to hold that base*”: Park Police overwhelmed hours before Capitol breach on Jan 6<sup>th</sup>”, CREW (Sept. 30, 2021), <https://www.citizensforethics.org/reports-investigations/crew-investigations/park-police-overwhelmed-hours-before-capitol-breach-on-jan-6th/>.

<sup>3</sup> See *infra*, Section I. Many of the facts describing January 6 come from the public record assembled by the House January 6th Committee. See SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>4</sup> *Fischer v. United States*, 144 S. Ct. 2176, 2190 (2024) (Jackson J. concurring), and *id.* at 2194 (Justice Barrett, concurring) (“The Court does not dispute that Congress’s joint session qualifies as an ‘official proceeding’; that rioters delayed the proceeding; . . . [and that these were] part of a successful effort to forcibly halt the certification of the election results.”); Alexander Tsisis, *Incitement to Insurrection and the First Amendment*, 57 WAKE FOREST L. REV. 971, 984 (2022) (Four Trump supporters died.).

<sup>5</sup> Luke Broadwater et al., “The Story So Far” in THE JANUARY 6 REPORT: FINDINGS FROM THE SELECT COMMITTEE TO INVESTIGATE THE ATTACK ON THE UNITED STATES CAPITOL 11-30 (2022) (“. . . injuring more than 150 police officers”); see also Chris Cameron, *These are the People who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022),

President to announce that Donald Trump was reelected, President Trump was apparently considering quelling any ensuing revolt by citizens by using the military and/or non-government alt-right militias.<sup>6</sup>

In the six hours leading up to the storming of the U.S. Capitol, the United States Park Police arrested only one person for carrying a weapon.<sup>7</sup> While journalists and scholars have written about the violence at the Capitol, no one has analyzed the under-enforcement of laws on the National

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<https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html>; see also Hannah Rabinowitz et al., *US attorney says untold of police officers injured while protecting Capitol on January 6*, CNN (Jan. 4, 2024, 7:32 PM), <https://www.cnn.com/2024/01/04/politics/january-6-prosecutions-justice-department/index.html>.

<sup>6</sup> *Id.* at 7 (“The Select Committee recognizes that some at the Department had genuine concerns, counseling caution, that President Trump might give an illegal order to use the military in support of his efforts to overturn the election.”); see also Tom Nichols, *The Patriot*, THE ATLANTIC (March 20, 2024), <https://www.theatlantic.com/newsletters/archive/2024/03/trumps-dangerous-january-6-pardon-promise/677823/> (General Mark Milley has been given credit for refusing to allow Trump to use the military to stay in power.); Tom Nichols, *Trump’s Dangerous January 6-Pardon Promise*, THE ATLANTIC (Nov. 2023), (hereinafter *Pardon Promise*), <https://www.theatlantic.com/magazine/archive/2023/11/general-mark-milley-trump-coup/675375/> (“Shortly after Esper was fired, Milley told both Patel and Ezra Cohen-Watnick, another Trump loyalist sent to the Pentagon, that he would make sure they would see the world ‘from behind bars’ if they did anything illegal to prevent Joe Biden from taking the oath of office on January 20.”); see also Mark Denbeaux & Donna Crawley, *The January 6 Insurrectionists: Who They Are and What They Did*, SETON HALL LAW SCHOOL LEGAL STUDIES RESEARCH (2023), <https://ssrn.com/abstract=4512381> (The Seton Hall researchers explain the plot this way: “[T]wo means that were considered to stop the certification by the conspirators: either by harming the Vice President before the ballots could be counted (‘Hang Mike Pence’) or by destroying the Electoral College ballots before Pence could count them.”); see also *Trump v. U.S.*, 144 S. Ct. 2312, 2356 (2024) (Sotomayor, dissenting, explains the allegations thus: “When this crowd then ‘violently attacked the Capitol and halted the proceeding,’ Trump allegedly delayed in taking any step to rein in the chaos he had unleashed. Instead, in a last desperate ploy to hold onto power, he allegedly ‘attempted to exploit the violence and chaos at the Capitol’ by pressuring lawmakers to delay the certification of the election and ultimately declare him the winner.”).

<sup>7</sup> See *A Timeline of the Government’s Response on Jan. 6, 2021*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/timeline-jan6#12PM>. (The Park Police arrested an individual with a rifle near the Capitol grounds on the afternoon of January 6, 2021, before the riot began, and helped make a second arrest at the Washington monument at approximately 9AM for a non-weapons offense. Park Police also detained a second person for a rifle at 12:33 on 17th Street, near the WWII Memorial. It appears that D.C.’s Metropolitan Police Department also did not arrest these men.); see also *infra* Part I).

Mall during the hours that preceded the storming.<sup>8</sup> This omission allows a misleading narrative to persist. Focusing only on the embattled officers on the steps of the Capitol creates the false impression that police could have done nothing more to prevent the violence that day. By widening the lens to include the policing on the National Mall during the morning before the attack, a second, more complete narrative emerges of the police response that day. This picture will help develop a fuller understanding of the current relationship between policing and American democracy. This is not merely theoretical, but essential for defending against the next attack on an election.

There is a phrase, the “thin blue line,” that signifies that police are essential to keeping a society safe.<sup>9</sup> Violent individuals and powerful gangs would rule society if not for our armed civil servants. Under this view, the rule of law depends upon the police, an entity entrusted with a monopoly on the use of force and violence to ensure that people follow the laws established by a democratically elected government. Many police officers embrace the phrase “thin blue line,” while critics see a danger in this casting of the police role, for it invites officers to see themselves as outsiders, not subject to the laws themselves.<sup>10</sup> Whatever one believed before January 6, the term gains cogency and new meaning in the video footage and photographs depicting a line of officers guarding the Capitol from the insurrectionist mob. There is a literal line of dark blue uniforms, the officers’ backs towards the camera as they try to hold the bike racks against a surging mob.<sup>11</sup> This article adopts the “thin blue line” metaphor to the need for armed police to protect assaults on democracy, whether it be from vigilantes showing up at voting booths, or an insurrection aimed at preventing the transfer of power from a Republican president to a duly elected Democrat. This metaphor shows the way police lived up to that symbol on January 6 and the ways some police departments failed.

The thin blue line came alive on January 6, 2021 as Capitol police fought off white nationalist Trump supporters intent on overthrowing the

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<sup>8</sup> See Scott MacFarlane, *Jan. 6 timeline: key moments from the attack on the Capitol*, CBS NEWS, (Jan. 6, 2023), <https://www.cbsnews.com/live-updates/jan-6-capitol-riot-timeline-key-moments/>.

<sup>9</sup> Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 635 (2016) (“Policing is viewed as being critically important; it is thought of as the last bastion of a free society. In the absence of Warriors who stand to defend it, civilization itself would crumble. That dramatic view is depicted in the context of policing by the ‘Thin Blue Line,’ the well-known symbol of a blue line lying horizontally between two black lines.”).

<sup>10</sup> Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1191-92 (2017).

<sup>11</sup> See Photograph of Capitol Police Officers in Katelyn Polantz & Hannah Rabinowitz, *January 6 trial’s witness testimony opens with searing Capitol Police audio and emotional testimony*, CNN (Mar. 2, 2022), <https://www.cnn.com/2022/03/02/politics/reffitt-january-6-trial-capitol-police-testimony/index.html>.

election results.<sup>12</sup> One Capitol Police officer described the scene as a battle: “There were officers on the ground. They were bleeding, they were throwing up. I saw friends with blood all over their faces. I was slipping in people’s blood . . . It was carnage. It was chaos.”<sup>13</sup> These images speak to the brutality of the anti-government forces, and their success in turning their protest into a war zone. “That day it was just hours of hand-to-hand combat.”<sup>14</sup> Capitol Police like Caroline Edwards became heroes as the Country learned about their efforts to repel the attack, and when unsuccessful, divert rioters from the Senate floor and protect elected officials from both parties. So were the MPD officers who ran to help the Capitol Police propel the insurrectionists. Officer Brian Sicknick suffered multiple strokes and died within one day of the attack.<sup>15</sup> As many as four other officers who were subjected to a barrage of violence that day later killed themselves.<sup>16</sup> While it may be tempting to believe that the insurrectionists were doomed to fail, the testimonies remind us that the thin blue line here meant enormous personal sacrifice by the Capitol Police and MPD officers who were out-numbered and overrun.

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<sup>12</sup> “White nationalists/supremacists believe that ‘white’ people are genetically, morally, and/or culturally superior to all other races. They also tend to be overwhelmingly antisemitic. White nationalists/supremacists also express intense hatred toward sexual and gender minorities as well as individuals they deem as ‘parasites’ upon society, such as homeless people.” See Daryl Johnson & Alejandro Beutel, *Protecting the U.S. Government from Far-Right Insider Threats*, NEW LINES INSTITUTE 7 (Sept. 2022), <https://newlinesinstitute.org/wp-content/uploads/20220928-Protect-US-from-Far-Right-NLISAP.pdf>; see also James Risen, *In the Shadow of the Jan. 6 Hearings, Right-Wing Militancy is on the Rise*, THE INTERCEPT (Jan. 17, 2022), <https://theintercept.com/2022/06/17/jan-6-hearings-right-wing-white-nationalists/> (noting how the House committee “highlighted the roles played on January 6 by [some] pro-Trump white nationalist groups” while “other white nationalist groups are starting to rise to prominence.”).

<sup>13</sup> See Watch: ‘It was carnage. It was chaos,’ Capitol Police Officer Caroline Edwards says of Jan. 6 attack, PBS (June 9, 2022), <https://www.pbs.org/news-hour/politics/watch-capitol-police-officer-caroline-edwards-testifies-during-jan-6-committee-hearing>.

<sup>14</sup> See Farnoush Amiri, *Capitol officer recounts Jan. 6 ‘war scene’ in her testimony*, AP NEWS, (June 10, 2022), <https://apnews.com/article/capitol-siege-government-and-politics-riots-d690e70ac850d8652b82c0c3e2fba5bf> (testimony on June 9, 2022) (Officers are seen in the footage being pummeled with flagpoles, trash cans and bike racks.).

<sup>15</sup> Alana Wise, *Capitol Police Officer Brian Sicknick Died of Natural Causes, Medical Examiner Rules*, NPR (Apr. 19, 2021), <https://www.npr.org/2021/04/19/988876722/capitol-police-officer-brian-sicknick-died-of-natural-causes-medical-examiner-ru>.

<sup>16</sup> Chris Cameron, *These are the People who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html>.

Not all law enforcement protected democracy. While the “thin blue line” aptly describes the officers who fought the mob, more than one hundred individuals with a background in law enforcement or the military have been prosecuted for participating in the insurrection and storming of the Capitol.<sup>17</sup> There were other cracks in the thin blue line beyond officer participation in the riot. These fault lines are more difficult to detect because they involve under-policing. The thin blue line was absent or deactivated when Park Police leadership failed to organize an effective police response to suspects carrying weapons, a failure that allowed armed suspects to walk from the Mall to the Capitol. Thus, January 6 revealed ominous cracks in the thin blue line.

Many police officers were convicted of their roles in the riot, but this should not end the inquiry. If the Park Police had done their job on the National Mall that morning, Capitol police officers might not have faced an armed attack. At the very least, arrests on the Mall would have depleted the number of weapons and marchers. It is hard to over-emphasize the importance that day for all police departments, local and federal, to have employed their vast resources to quash an anti-democratic rebellion. Yale history professor Timothy Snyder put it succinctly: “Had that coup succeeded, our constitutional system would be no more.”<sup>18</sup>

There is danger of further political violence now that Trump secured a second term. -In June of 2024, the Supreme Court in *Trump v. United States*, immunized the defendant and future presidents for many, if not most, felonies and misdemeanors, thereby removing the criminal deterrent for future presidents to refuse to relinquish power. For Trump himself, now assured more generally of solicitude and protection by six Republican members of the High Court, the decision may encourage him to use violence again.<sup>19</sup> In fact, fewer than four weeks after the Court’s immunity ruling, Trump signaled (in his jocular way) that he would not relinquish power if he wins the 2024 election, telling his supporters that in four more

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<sup>17</sup> Denbeaux, *supra* note 6 (Among the 716 individuals who were charged in the first year after the insurrection, 132 individuals — or 18.5% — had a background in law enforcement or the military.) Others were investigated for attending the rally. See Eric Westerbelt, *Off-Duty Police Officers Investigated, Charged with Participating in Capitol Riot*, NPR (Jan. 15, 2021), <https://www.npr.org/2021/01/15/956896923/police-officers-across-nation-face-federal-charges-for-involvement-in-capitol-ri> (“30 sworn police officers from a dozen departments attended the pro-Trump rally at the U.S. Capitol last week, and several stormed the building with rioters and are facing federal criminal charges as well as possible expulsion or other discipline.”).

<sup>18</sup> Timothy Snyder, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY*, 43 (Kindle Edition 2021) (originally published in 2017, but the paragraph from which this was taken was added after January 6, 2021).

<sup>19</sup> *Trump v. United States*, 144 S.Ct. 2312 (2024). (This does not turn a President’s crimes into innocent acts. Rather the Supreme Court decided to take away accountability on the rationale that fear of prosecution would hamper a President’s ability to govern well.) For more on this case, see *infra*.

years, “[i]t’ll be fixed, it’ll be fine. You won’t have to vote anymore . . .”<sup>20</sup> Months before the 2024 election, Donald Trump, to accept the 2024 election results if he lost.<sup>21</sup> And Trump’s jokes about a third term should unsettle supporters of the ballot box, for he need not run a third time to refuse to give up power in 2029.<sup>22</sup>

Meanwhile, the Christian Nationalist movement is growing. The “rhetoric of violence among movement leaders appears to have increased significantly from the already alarming levels,” explains author Katherine Stewart, an expert on religious extremism.<sup>23</sup> In place of a pluralistic democracy, Christian Nationalists believe “that right-thinking Christians have a biblically derived mandate to take control of all aspects of government and society.”<sup>24</sup> If people believe that rights are God-given, instead of established by the people, then we can see how they can jump quickly to “and I can use violence to protect those rights.”<sup>25</sup>

Overall, this article builds on work by Vida Johnson, who warned of the danger of racist and extremist views within the police forces that harm Black communities and explain the failure of Capitol Police leadership on

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<sup>20</sup> See Maegan Vazquez and Sarah Ellison, *Trump faces backlash for ‘in four years, you don’t have to vote again’ remark*, WASH. POST, (July 27, 2024), <https://www.washingtonpost.com/politics/2024/07/27/trump-faces-backlash-four-years-you-dont-have-vote-again-remark/> (“Christians, get out and vote, just this time,” he urged. “You won’t have to do it anymore . . . You got to get out and vote. In four years, you don’t have to vote again. We’ll have it fixed so good you’re not going to have to vote.”). A spokesperson for the Trump campaign responded that the statements did not mean an end to voting, but instead that Trump “was talking about uniting this country.” *Id.* Constitutional law professor Laurence Tribe posted that Trump “said it out loud” and “it’s much worse” than Trump having “authoritarian reflexes.” See Lawrence Tribe (@TribeLaw), , <https://x.com/tribelaw/status/1817144515435569230>; <https://x.com/tribelaw/status/1817654678701613434>.

<sup>21</sup> Erin Doherty, *Trump unwilling to say whether he will support results of an election*, AXIOS (June 28, 2024), <https://www.axios.com/2024/06/28/trump-2024-election-results>.

<sup>22</sup> Eric Lutz, *There’s Nothing Funny About Trump’s Third-Term “Joke”*, ER, VANITY FAIR, (Nov. 14, 2024), <https://www.usatoday.com/story/news/politics/elections/2024/11/13/trump-2028-third-term-joke/75962254007/>.

<sup>23</sup> Diana Ravitch, *Dahlia Lithwick: How Religious Zealots Gained Control of the Courts and the GOP*, BLOG POST, (June 12, 2024), <https://dianeravitch.net/2024/06/12/dahlia-lithwick-how-the-religious-zealots-gained-control-of-the-courts-and-the-gop/> (Interview with Katherine Stewart and Rachel Laser). The two-year rise followed the Supreme Court’s abortion decision in 2022, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

<sup>24</sup> *Id.* (quoting Katherine Stewart, *THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM* (2020)).

<sup>25</sup> *Id.* (Rachel Laser speaking. She is the President and CEO at Americans United for Separation of Church and State.)

January 6.<sup>26</sup> Widening the lens, this article urges the reader to think about the Park Police leaders who may not have wished to help overthrow the government, but who nevertheless failed to use their extensive powers to prevent the coup. The January 6 Hearings in Congress were instrumental in educating the public about the conspiracy to overthrow the election and the armed insurrection at the Capitol.<sup>27</sup> In addition, the Department of Justice has prosecuted over 1,500 offenders who took part on the January 6 assault on the Capitol, including retired and off-duty police officers who traveled to the District to attend at former President Trump's behest.<sup>28</sup> These prosecutions are essential for deterring future violence, one reason why Trump has promised pardons if he reassumes the presidency. Still, nothing has been done to examine or address police inaction that occurred that morning on the Mall. When the Park Police become too overwhelmed by an armed and angry crowd, what is the protocol for reigning in threats to the Capitol city and to American democratic institutions such as Congress? If Park Police had requested backup from the National Guard and other policing agencies when they realized they could not control the crowd, the move would have saved lives.

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<sup>26</sup> Vida B. Johnson, *White Supremacy's Police Siege on the United States Capitol*, 87 BROOK. L. REV. 557 (2022).

<sup>27</sup> See Erin Sheley, *Self-Defense and Political Rage*, 11 TEX. A&M L. REV. 591, 619-20 (2024) ("According to a CNN poll taken on the last day of the Congressional hearings on the January 6 attack on the U.S. Capitol, a full 79% of Americans generally believed that former President Trump acted unethically, with 45% also believing he acted illegally. While those numbers remained steady relative to another poll given earlier in 2022, polling respondents who identified as political partisans did appear to be changing positions — in opposite directions."); *From 'an attempted coup' to chaos, searing moments of Jan. 6*, THE ASSOCIATED PRESS (July 23, 2022), <https://apnews.com/article/Jan-6-hearings-key-moments-b374e48ab5a1a0a597fd5b6ec69048c2> (describing key moments from the January 6 hearings in Congress, which investigated factual details of the attempted coup at the United States Capitol on January 6, 2021).

<sup>28</sup> See Andrew Goudsward, *Capitol riot defendants face upheld trespassing charges in US court*, REUTERS (Oct 22, 2024, 5:30 PM), <https://www.reuters.com/legal/capitol-riot-defendants-face-upheld-trespassing-charges-us-court-2024-10-22/>; Tom Joscelyn, *Proud Boys Threat Assessment: From the Planning of January 6th to Future Scenarios*, JUST SECURITY (Oct 17, 2024), <https://www.justsecurity.org/103956/proud-boys-threat-assessment/>; Olivia Ruben, *Number of Capitol riot arrests of military, law enforcement and government personnel rises to 52*, ABC NEWS, <https://abcnews.go.com/US/number-capitol-riot-arrests-military-law-enforcement-government/story?id=77246717> (April 23, 2021, 4:14 AM); Bart Jansen, "'Elephant in the room': Police grapple with charges against officers in Jan. 6 Capitol attack", USA TODAY (May 3, 2022, 5:03 AM), <https://www.usatoday.com/story/news/politics/2022/05/03/police-charged-jan-6-assault-obstructing-congress/7355516001/?gnt-cfr=1&gca-cat=p>. For information on individual police officers charged, see *Capitol Breach Cases*, UNITED STATES ATT'Y OFF. DC., <https://www.justice.gov/usao-dc/capitol-breach-cases>.



A properly armed police force must be ready, prepared, and willing to defeat the next assault on American democracy by white nationalists and their allies. With American democracy in peril in the 2024 election and beyond, it is essential to understand how an armed mob was permitted free reign for hours on the National Mall and then allowed to proceed to the U.S. Capitol to try to stop Congress from announcing that President Biden won the election.

Part I begins with a discussion of the failures of the police on the Mall that day. Park Police leadership responded to violations of D.C. weapons laws and the growing threat to the Nation by directing the rank-and-patrol to “monitor only.” Throughout the six-hour time-period in question, leadership never provided their officers the backup they needed to search bags and make arrests. Part II explores the theory of democracy and policing, including the idea of the thin blue line, while Part III examines the far-right groups that led the insurrection and the officers who took part, highlighting the connection between racism and officer participation. Finally, Part IV brings the camera back to under-policing on the Mall and the necessity of recognizing the dangers that under-enforcement poses to future efforts to prevent an authoritarian figure from taking power.

## I. PARK POLICE FAILURES ON THE MALL

### A. *D.C. Law Gave Police the Power to Stop, Search, and Arrest*

As this section will show, the police failures on the Mall began four or five hours before the mob started surrounding the Capitol. To understand the magnitude of the failure on the Mall, this section begins with the extensive legal powers held, but not used, by police.

The District of Columbia retains some of the most stringent gun laws in the country.<sup>29</sup> As every officer knows, it is a felony to carry a pistol or any deadly or dangerous weapon without a license outside a person’s dwelling place or business.<sup>30</sup> Visitors may not bring firearms into the District even if they are registered in their states. That includes the federal Mall. This Article focuses primarily on the U.S. Park Police, the federal agency that bears responsibility for policing on the National Mall where the rally was held.<sup>31</sup>

Unlike some jurisdictions, police may arrest anyone they observe carrying a weapon openly or concealed. Police also have “super powers,” rules such as stop and frisk that allow them to detain and search for

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<sup>29</sup> Everytown for Gun Safety, *At a glance: Washington D.C.*, <https://www.everytown.org/state/washington-dc/> (“The District of Columbia has some of the strongest gun laws in the country”); *see also*, *Gun Laws 50-State Survey*, JUSTIA, <https://www.justia.com/constitutional-law/gun-laws-50-state-survey/>.

<sup>30</sup> *See* D.C. CODE § 22-4504(a)(1); D.C. CODE § 22-4504.01.

<sup>31</sup> *Policing Capitol Cites*, U.S. DEP’T OF THE INTERIOR (July 21, 2006), <https://www.doi.gov/ocl/policing-capital-sites>.

weapons on nothing more than a reasonable belief that the person might be carrying an illegal weapon.<sup>32</sup> Police can even pat down and disarm someone they suspect might be carrying a lawful weapon such as pepper spray and planning to use it in an unlawful way. If questioning reveals a person's improper intent, police have the power to arrest.

Answering Trump's infamous "will be wild" tweet, supporters began assembling on the Mall early on January 6, 2021.<sup>33</sup> Crowds gathered at the Ellipse, the large grassy area behind the White House where the stage was set for the rally, and at the nearby Washington Monument. Many of those attending the Save America rally arrived prepared for battle. One member of the far-right extremist group, the Three Percenters, attended the rally at the Ellipse with a loaded firearm before carrying it onto Capitol grounds.<sup>34</sup> Another far right extremist carried a gun "from the Ellipse in a 'We the People' holster" to the Capitol grounds where he fought with Capitol Police.<sup>35</sup> Mark Andre Mazza loaded his .45-caliber weapon with a combination of hollow-point and shotgun rounds before assaulting a police officer on the steps of the Capitol.<sup>36</sup> These men were not stopped or arrested until long after they departed Washington.<sup>37</sup> Several different departments police the District of Columbia, making it more complicated to assess fault: "[t]he MPD has jurisdiction on city streets; the Park Police on the Ellipse, where Trump's rally took place; the Secret Service in the

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<sup>32</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN*, 56-61, 81-83 (2017) ("Because of Super Powers, New York City police officers were able to arrest Eric Garner in Staten Island . . . [for a] minor infraction . . ."). *Id.* at 60.; *see also* Terry v. Ohio, 392 U.S. 1, 10 (1968).

<sup>33</sup> Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html> ("'Big protest in D.C. on January 6th,' Mr. Trump tweeted on Dec. 19, just one of several of his tweets promoting the day. 'Be there, will be wild!'").

<sup>34</sup> *Id.* ("Far-right extremists brought guns into Washington or the surrounding area."); Guy Reffitt and Jerod Thomas Bargar are the two armed individuals described in SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 641 (2022).

<sup>35</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 641 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> BARGAR, *Jerod Thomas*, UNITED STATES ATT'Y OFF. DC., <https://www.justice.gov/usao-dc/defendants/bargar-jerod-thomas> (Aug 3, 2022); *see generally* *Capitol Breach Cases*, UNITED STATES ATT'Y OFF. DC., <https://www.justice.gov/usao-dc/capitol-breach-cases> (lists the date and place of arrest for every person charged in relation to January 6 insurrection); *see also* Judy L. Thomas, *Missouri man who carried loaded gun onto Capitol grounds on Jan. 6 gets probation*, THE KANSAS CITY STAR (Jan. 9, 2024, 3:03 PM), <https://www.kansascity.com/news/politics-government/article283982538.html> (arrested on Wednesday August 23 in Osage Beach, Missouri).

vicinity of the White House; and the Capitol Police on the Capitol complex.”<sup>38</sup>

The best time to eliminate the threat would have been on the National Mall, before the crowd surrounded the Capitol or scaled its walls. Donald Trump began speaking at the Ellipse midday on January 6, but the rally began at least three hours earlier and people began assembling as early as 7 a.m. that morning.<sup>39</sup> Twelve people spoke to the crowd before the President.<sup>40</sup> Thus, the Park Police were given more than four hours to nullify the threat or call in another police entity that could. As Vida Johnson notes, given mutual aid agreements between the many departments within the District’s boundaries, “had Capitol Police asked for their assistance,” “thousands of additional police officers . . . could have been activated.”<sup>41</sup> This is doubly true of Park Police, who maintain a smaller force than the Capitol Police. By watching the threat grow instead of bringing in outside units, such as the National Guard, Park Police missed the opportunity to disarm members of the crowd before rioters advanced towards the Capitol grounds.<sup>42</sup>

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<sup>38</sup> Greg Myre, *Where Was Security When a Pro-Trump Mob Stormed the Capitol?*, NPR (Jan. 27, 2021, 10:33 AM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954349992/where-was-the-security-when-a-mob-stormed-the-capitol>.

<sup>39</sup> Joshua Kaplan & Joaquin Sapien, *New Details Suggest Senior Trump Aides Knew Jan. 6 Rally Could Get Chaotic*, PROPUBLICA (June 25, 2021, 5:00 AM) <https://www.propublica.org/article/new-details-suggest-senior-trump-aides-knew-jan-6-rally-could-get-chaotic> (“By 9 a.m., Trump supporters had arrived in droves . . . Kylie Kremer greeted them gleefully. ‘What’s up, deplorables!’ she said from the stage.”); see SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 640 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> (At 7:25 a.m., the National Park Service reported that a significant number of attendees ditched their bags in trees, rather than have them inspected); SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663 at 585 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> (“By noon, President Trump took to the stage at the Ellipse.”). See also Atlantic Council’s DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SEC. (Feb. 10, 2021), <https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/> (this timeline includes a January 2, 2021 Tweet from Rally organizer Amy Kremer announcing that “the site of our Jan 6th event will be at the Ellipse” and “doors will open at 7am.”).

<sup>40</sup> Matthew Choi, *Trump is on trial for inciting an insurrection. What about the 12 people who spoke before him?*, POLITICO (Feb. 10, 2021, 4:30 AM), <https://www.politico.com/news/2021/02/10/trump-impeachment-stop-the-steal-speakers-467554>.

<sup>41</sup> Johnson, *supra* note 26, at 576-77.

<sup>42</sup> See Section 1C, *infra*.

Over the course of the morning rally, Park Police detained only two people on the Mall.<sup>43</sup> MPD was not much better. Before the storming of the Capitol began, MPD had arrested only fifteen protesters, and that number includes those arrested on January 5.<sup>44</sup> Even after the crowd began to leave the Ellipse for the Capitol, law enforcement had ample opportunity to protect the city. The Save America rally was held directly behind the White House with the stage at the Ellipse, close to the Washington Monument. Meanwhile, the U.S. Capitol building is over one and a half miles away. It takes thirty minutes for most people to walk that distance and, as the crowd fanned out, it became easier for a police force, or multi-department teams, to question and detain those carrying weapons. We will never know how many gun-toting individuals were never caught.

The President lacks the power to declare D.C. law null and void for a day, or even an hour. Even though the Park Police is federal, it has its own leadership. In the United States, police departments do not answer to the U.S. President, and there is a danger if they start taking orders from a leader with authoritarian aims. Thus, if police intentionally failed to use their significant powers to stop, search and arrest to defer to a president's wishes, that would constitute undue deference.

### *B. What Police Knew and When They Knew It*

As this subsection will reveal, police knew that Trump supporters were armed in violation of D.C. law, but did nothing to prevent an armed mob from walking to the Capitol.

There were plenty of warning signs leading up to January 6, and they grew more alarming throughout the morning. An “overwhelming amount of evidence” proves that the FBI and Secret Service knew there would be violence at the Capitol on January 6, and they “apparently dismissed

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<sup>43</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 640-41 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>; Libowitz, *supra* note 2 (After the first arrest of the day when a hostile crowd threatened the officers, Park Police were soon given specific instructions to monitor rather than arrest.). See Section 1C, *infra*.

<sup>44</sup> Kristen Schneider, *Dozens of curfew-related arrests made in DC as police reinforcements flood into city*, WJLA (Jan. 6, 2021, 11:50 PM), <https://wjla.com/news/local/police-arrests-wednesday-protests-capitol-breach-dc-police> (DC police made fifteen arrests related to “first Amendment activities” over a two-day span leading up to the storming of the Capitol. Later, on the night the Capitol was overrun, D.C. police made fifty-two arrests, forty-seven of which were curfew-related.); Tom Jackman et al., *Evidence of Firearms in Jan. 6 Crowd Grows as Arrests and Trials Mount*, WASH. POST (July 8, 2022), <https://www.washingtonpost.com/dc-md-va/2022/07/08/jan6-defendants-guns/> (“[A]ccounts from police officers and rioters indicate that many firearms were spotted on Jan. 6 but were not seized as law enforcement focused more on defending the Capitol than on arresting gun-law violators.”).

warning signs of violence.”<sup>45</sup> Weeks before the attack, the U.S. Postal Service’s covert program analysts issued an accurate threat warning for January 6.<sup>46</sup> Capitol Police intelligence unit provided specific warnings three days before the attack which should have been shared with Park Police leadership.<sup>47</sup> The FBI field office in Norfolk, Virginia issued an alert to

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<sup>45</sup> CREW investigating law enforcement agents sympathetic towards insurrectionists, CREW (Feb. 21, 2023), <https://www.citizensforethics.org/reports-investigations/foia-requests/crew-investigating-law-enforcement-agents-sympathetic-towards-insurrectionists/> (CREW stands for Citizens for Responsibility and Ethics in Washington, an investigative journalism entity.). The United States Senate Committee on Homeland Security and Government Affairs issued a report that blamed “the intelligence community’s struggle to adapt to the new reality that the primary threat to homeland security (as identified by these same agencies) is now domestic terrorism driven largely by anti-government and white supremacist ideologies.” Chairman Gary Peters, *Planned in Plain Sight: A Review of the Intelligence Failures in Advance of January 2021*, HSGAC MAJORITY STAFF REPORT 104 (2023), [https://www.hsgac.senate.gov/wp-content/uploads/230627\\_HSGAC-Majority-Report\\_Jan-6-Intel.pdf](https://www.hsgac.senate.gov/wp-content/uploads/230627_HSGAC-Majority-Report_Jan-6-Intel.pdf). The HSGAC report states:

That was not a failure to see the warning signs — on the contrary, this investigation demonstrated the sheer volume of intelligence FBI and I&A [Office of Intelligence and Analysis within Homeland Security] received that indicated the potential for violence on January 6th. Rather, these agencies failed to properly assess that intelligence and adequately communicate the severity of the threat to USCP and other agencies to better prepare them to respond to a violent attack on the Capitol, protect our democratic process, and ensure the peaceful transfer of power.

*Id.* at 103. *See also* Johnson, *supra* note 26, at 570 (“ In the days leading up to the attack, 80 percent of the most popular posts on” the online forum the-Donald.win “called for violence.”); Mark Follman, *Fight Trump Like He’s a Terrorist Leader*, *National Security Experts Say*, MOTHER JONES (Jan. 13, 2021), <https://www.motherjones.com/politics/2021/01/trump-attack-on-congress-terrorism-law-enforcement/> (“‘Either [police] were complicit or willingly ignorant of what they needed to do to prepare,’ says Marisa Randazzo, a leading threat assessment professional and former chief research psychologist for the US Secret Service.” “For several weeks before the siege, the national security community was ‘swimming in threat intel.’” In the month leading up to the Save America rally, “[v]iolent far-right extremist groups exchanged ideas about concealing weapons and using guerilla tactics to target political enemies,” and the “phrase ‘Storm the Capitol’ was mentioned 100,000 times across various platforms.”)

<sup>46</sup> Meghan Faulkner & Lauren White, *USPS law enforcement arm warned of violence on January 6*, CREW (Mar. 18, 2022), <https://www.citizensforethics.org/reports-investigations/crew-investigations/usps-law-enforcement-arm-warned-of-violence-on-january-6/>.

<sup>47</sup> Alex Moe et al., *Capitol Police ignored intelligence warnings ahead of Jan. 6 riots, watchdog report finds*, NBC NEWS (Apr. 14, 2021, 4:57 PM),

law enforcement agencies titled, “Potential for Violence in Washington, D.C. Area in Connection with Planned ‘StopTheSteal’ Protest” the following day.<sup>48</sup> A Senate investigation found that “multiple warnings of violence” were “poorly circulated and largely went unheeded by top leaders in several agencies.” It is unclear which briefing Park Police leaders attended, but the agency was woefully unprepared when the day came, lacking staff, supplies and most importantly, a plan.<sup>49</sup>

There is no excuse for the lack of preparation. Park Police leadership would have remembered the violence inflicted by the Proud Boys, which included stabbings, during the group’s earlier visits to the District.<sup>50</sup> Park Police leadership should have heard from their own officers about the Trump rally at Freedom Plaza the day before. At this precursor rally, where Park Police officers arrested an attendee for carrying a firearm, they would have heard Alex Jones tell an agitated crowd, “I don’t know how this is all going to end, but if they want to fight, they better believe they’ve got one.”<sup>51</sup> More ominous still, Ali Alexander had led the Freedom Plaza crowd in a chant of “victory or death.”<sup>52</sup>

In contrast to Park Police, the MPD prepared for mob violence. Remembering how Trump supporters behaved during prior rallies, Acting MPD Police Chief Robert Contee ordered “all hands on deck,” requiring all 3,800 MPD officers to be on duty on January 6.<sup>53</sup> And D.C. Mayor Muriel Bowser called in the National Guard in advance of the rally date to take over some standard duties and thereby free up MPD officers to

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<https://www.nbcnews.com/politics/congress/capitol-police-ignored-intelligence-warnings-ahead-jan-6-riots-watchdog-n1264054>.

<sup>48</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 62 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>49</sup> Libowitz, *supra* note 2.

<sup>50</sup> “On December 12, 2020, the Proud Boys descended into Washington, D.C. for a ‘Stop the Steal’ campaign event . . . . As was typical, the Proud Boys provoked fights with counter-protestors. At least four people were stabbed near Harry’s, a dive bar where the Proud Boys gathered during the march. Although several eyewitness and video reports showed Proud Boys members involved in the stabbings, no arrests were made.” *Proud Boys*, MAPPING MILITANTS PROJECT (Sept. 28, 2023), [https://cisac.fsi.stanford.edu/mappingmilitants/profiles/proud-boys#highlight\\_text\\_32640](https://cisac.fsi.stanford.edu/mappingmilitants/profiles/proud-boys#highlight_text_32640).

<sup>51</sup> *What Conspiracy Theorist Alex Jones Said in the Lead Up to the Capitol Riot*, PBS: FRONTLINE (Jan. 12, 2021), <https://www.pbs.org/wgbh/frontline/article/what-conspiracy-theorist-alex-jones-said-in-the-lead-up-to-the-capitol-riot/>.

<sup>52</sup> Kaplan, *supra* note 39; see also Mark Follman, *Trump Incited the Terrorism of January 6, Investigations Further Show*, MOTHER JONES (July 21, 2022), <https://www.motherjones.com/politics/2022/07/january-6-trump-domestic-terrorism/>.

<sup>53</sup> Peter Hermann, *We got to hold this door. How battered D.C. police made a stand against the Capitol mob*, THE WASH. POST, (Jan. 14, 2021) <https://www.washingtonpost.com/dc-md-va/2021/01/14/dc-police-capitol-riot/>.

control the Stop the Steal crowd if they caused mayhem in the city streets.<sup>54</sup> The violence from this crowd should not have surprised any of the police leaders. Oddly, despite the MPD preparation for the city streets, they seemed to lack a backup support plan if the crowd on the Mall became too difficult for Park Police to control.

During the January 6 rally, Park Police confirmed that many members of the crowd were armed. The officers learned this information in several ways that gave police the legal authority to frisk and search thousands of suspects on the Mall. As this section will detail, police saw people refuse to walk through metal detectors so their weapons would not be confiscated, observed others who ditched their bags to avoid the screenings, and even spotted members of the crowd holding guns.

First, the screening mechanism set up to protect Donald Trump and the other speakers revealed a multitude of weapons. The Secret Service had set up metal detectors or magnetrons that rally-goers had to walk through to get to the area nearest the stage:

The Secret Service confiscated a significant number of prohibited items from these people, including: 269 knives or blades, 242 canisters of pepper spray, 18 brass knuckles, 18 tasers, 6 pieces of body armor, 3 gas masks, 30 batons or blunt instruments, and 17 miscellaneous items like scissors, needles, or screwdrivers.<sup>55</sup>

This information provided police all the evidence they needed to act. Although no guns were retrieved during these screenings, some of the weapons seized were illegal. For example, possessing brass knuckles carries a one-year prison sentence or up to ten years for an individual with a prior felony conviction.<sup>56</sup> D.C. law prohibits carrying many types of knives as well.<sup>57</sup> Nevertheless, no one was arrested or detained who entered the staging area.

Among the people that entered the stage, many of them “ditched their bags in trees” to avoid being inspected.<sup>58</sup> It is unclear if police looked in any of those bags, but it appears that officers failed to stop, question and

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<sup>54</sup> *Id.*; see also Mike Lillis, *DC police chief stunned by reluctance to deploy Guard during Jan. 6 attack*, THE HILL, (Feb. 23, 2021, 12:11 PM) <https://thehill.com/homenews/house/540070-dc-police-chief-stunned-by-reluctance-to-deploy-national-guard-during-jan-6/>.

<sup>55</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 640 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>56</sup> D.C. CODE § 22-4514(a), (c)(3) (2024); D.C. CODE § 22-4515 (2013).

<sup>57</sup> D.C. Code § 22-4514 (2024).

<sup>58</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 640 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

search people as they left their bags behind.<sup>59</sup> Police had the right to lawfully search these bags, because it was reasonable for officers to infer that protesters ditched their bags because they had stashed weapons and other illegal protest paraphernalia that the screenings would have uncovered.

Second, to make the threat more obvious still, half the members of the crowd avoided the magnetometers. That's an alarming number — perhaps 25,000 protesters who refused to be screened.<sup>60</sup> The logical implication is that these participants were armed and wanted to keep their weapons. Donald Trump knew it. He stated, “I don't [f\*\*\*ing] care that they have weapons. They're not here to hurt *me*. Take the [f\*\*\*ing] mags away. Let my people in. They can march to the Capitol from here. Take the [f\*\*\*ing] mags away.”<sup>61</sup> The Secret Service did not heed Trump's pleas, and the mags stayed in place, keeping savvy armed protesters outside the staging area. Based on the fact that people who came to hear the President speak were not entering the area arranged for the audience to see and hear the speakers, let alone all the weapons seized from members of the crowd who braved the metal detectors, police were empowered to search anyone who came to hear Trump speak but refused to walk through the mags. But police did not so much as frisk them for weapons.

Thus, by noon on January 6, one hour before a wave of Trump supporters began to storm the Capitol and over two hours before the leaders of the mob broke a window at the Capitol, the Secret Service, the MPD, and Park Police all understood that members of the crowd were armed and posed a danger to others. This is precisely the purpose of the power to stop, frisk, search and arrest: to eliminate an inchoate threat. Had police disarmed the people avoiding the metal detectors, many violent members of the crowd would never have made it to the Capitol. Had police arrested the people carrying weapons, the planned insurrection would have been cut off at the knees.

Third, FBI reports also show how the Bureau intentionally downplayed known threats. By 10AM, the FBI knew that there were approximately 20,000 people in the crowd and that some members appeared dressed for battle. But even as the “FBI's real-time reports escalated from

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<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 585 (“President Trump looked out at the crowd of approximately 53,000 supporters and became enraged. Just under half of those gathered — a sizeable stretch of about 25,000 people — refused to walk through the magnetometers and be screened for weapons, leaving the venue looking half-empty to the television audience at home.”); *see also* Hermann, *supra* note 53 (that afternoon, at the Capitol, police “were battling 15,000 people. It looked like a medieval battle scene.”)

<sup>61</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 70, 585 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> (The Deputy Chief of Staff for Operations told the President that the onlookers “don't want to come in right now. They have weapons that they don't want confiscated by the Secret Service.”).



detailed and unconcerned to urgent and distressed” the Bureau continued to declare: “No credible threats at this time.”<sup>62</sup>

Radio communications add further proof that police bungled multiple opportunities to respond to threats before the assault on the Capitol. Well before President Trump climbed onto the rally stage, Park Police began gathering direct evidence of people carrying weapons. Shortly after 8AM, Secret Service agents described how “members of the crowd [were] wearing ballistic helmets, body armor and carrying radio equipment and military grade backpacks.”<sup>63</sup> Listening to some of the police radio conversations played during the January 6 hearings, one can hear the officers discuss armed individuals who were in the process of violating D.C. gun laws. “MPD advised over the radio” that someone was “possibly armed with a ‘Glock’ at Fourteenth and Constitution Avenue,” a corner that borders the Mall.<sup>64</sup> Officers also reported another suspect “possibly armed with a ‘rifle’” on the next corner.<sup>65</sup> At 11:48AM, before Trump spoke, MPD arrested a man in a tree who was armed.<sup>66</sup> Despite numerous sightings of criminal activity near the National Mall, MPD made few arrests that morning.<sup>67</sup>

Even scarier were reports of assault weapons. NPR reported that police officers spotted a man carrying an assault rifle on the Capitol Mall.<sup>68</sup> This may or may not have been the same suspect described in this radio interchange: “The chatter included reports of a man with an AR-15 [an assault weapon] in a tree on Constitution Avenue [a street that borders the Mall] who was accompanied by two men with pistols on their hips.”<sup>69</sup> Another officer radioed about another grouping of men with assault rifles: “I’ve got three men walking down the street in fatigues carrying AR-15s, copy, at 14th and Independence,” a corner that borders the Mall.”<sup>70</sup> In what might be the report of a sixth man carrying an AR-15, an officer radioed that two officers “both saw a stock of an AR-15” protruding from a man’s

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<sup>62</sup> Sara Wiatrak, *Internal briefing reveal FBI’s real-time reaction to Jan. 6*, CREW (May 14, 2024), <https://www.citizensforethics.org/reports-investigations/crew-investigations/internal-briefings-reveal-fbis-real-time-reaction-to-jan-6/>.

<sup>63</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 640 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>64</sup> *Id.* at 641.

<sup>65</sup> *Id.*

<sup>66</sup> Libowitz, *supra* note 2.

<sup>67</sup> Schneider, *supra* note 44.

<sup>68</sup> Grisales, *supra* note 1.

<sup>69</sup> Jackman, *supra* note 44; *see also* SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 68 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>70</sup> Jackman, *supra* note 44.

hooded jacket, and he met up “with a group of individuals, about 5'8", 5'9", skinny white males, brown cowboy boots.”<sup>71</sup> The skinny white males were also armed. These sightings occurred near the Ellipse on the morning of January 6, while the speakers were riling up the crowd at the Ellipse and before Donald Trump took the stage.<sup>72</sup> In the face of all the evidence of the looming threat to the city and the government, police had an unconditional duty to arrest all suspects for committing a felony in their presence.

### C. “Monitor Only”

Despite the growing threat, this section will show that Park Police were ordered not to detain or arrest Stop the Steal protesters with perilous ramifications for the Capitol Police officers who faced an army of protesters that afternoon. Park Police started to recognize that they were unprepared as early as 7 AM on the morning of January 6. According to Citizens for Responsibility and Ethics in Washington, Park Police saw so many piles of bags thrown on the ground and into trees around the Ellipse that it was “impossible for them to check all the unattended bags for threats.”<sup>73</sup>

Two hours later, leadership must have recognized that their officers were unable to control the crowds. Just before 9 AM, a Park Police officer began to clear an area near the Washington Monument when approximately twenty protesters began yelling at the officer. After one man refused to leave and resisted arrest, the officer handcuffed him and summoned additional Park Police.<sup>74</sup> The crowd grew, eventually to 300 people, and “approximately 100 people started to form around” the officers. Police retreated into the Washington Monument Visitor Center with the man they arrested. “The crowd was hostile, threatening officers, and punching the glass windows of the Washington Monument Visitor

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<sup>71</sup> Grisales, *supra* note 1.

<sup>72</sup> “Transcript: All In with Chris Hayes, 6/28/22” NBC (June 28, 2022, 8:00 PM), <https://www.msnbc.com/transcripts/all-in/transcript-all-chris-hayes-6-28-22-n1296751> (Explaining the sequence that before President Trump took the stage, he knew about the weapons seen by officers and described in the radio reports. “He wanted the crowd to keep its weapons, and then march armed to the Capitol,” said Rachel Maddow.) While these are only the sightings of firearms that we know about, there may have been many more that were not part of the radio frequency released to the January 6 Committee and then made public. As Vida Johnson notes about those involved in the siege itself, “law enforcement’s failure to take the individuals responsible for the attack into custody immediately [means that] valuable evidence evaded detection.” Johnson, *supra* note 26, at 560.

<sup>73</sup> Libowitz, *supra* note 2 (“At 7 AM, as District residents were waking to start their day, Park Police officers were already fretting about the day ahead of them, confronted with piles of bags around the Ellipse, on the ground and thrown into trees and bushes, making it impossible for them to check all the unattended bags for threats.”)

<sup>74</sup> U.S. Park Police Incident Report “PP21001153 Miscellaneous CFR Violations [90Z] @01/06/2021 09:46” (on file with the author).

Center.”<sup>75</sup> Multiple Park Police units came to assist, and eventually units on horseback came to bring the arrestee to the police cruiser, waiting outside the Mall.

After this experience, Park Police leadership started telling officers to “monitor only.”<sup>76</sup> When there was an escalating problem at Lincoln memorial, the units were told: “monitor only. Please do not take any type of enforcement action. Let it happen.” And while backup police squads were on the way, the officers were advised even then not to make any arrests. “Let it happen unless we have major, major issues.”<sup>77</sup>

The danger of violence blazed brightly on the morning of January 6, when officers hid from a violent mob. The danger grew when Rudolph Giuliani took the stage at the Ellipse on January 6 and infamously called for “trial by combat.”<sup>78</sup> Even after President Trump told the armed crowd that, “[we] fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore,” police did nothing.<sup>79</sup> Inexcusably, Park Police and MPD officers made no attempt to disarm the angry protesters who walked almost two miles to reach the Capitol. The Secret Service knew that the Park Police were “overwhelmed” that morning but “downplayed” this fact and the signs of violence.<sup>80</sup>

What does it signify when those responsible for policing the National Mall “monitor only,” relinquishing control to paramilitary groups and anti-government activists the first time that these groups attempt a national insurrection? How do we square this with the notion of police as the “thin blue line” that allows our democracy to function?

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<sup>75</sup> *Id.* (Approximately 300 people refused to leave the Flag Circle); Libowitz, *supra* note 2; See also SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 640 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>76</sup> OFF. OF INSPECTOR GEN., U.S. DEP’T. OF THE INTERIOR: REVIEW OF U.S. DEPARTMENT OF THE INTERIOR’S ACTIONS RELATED TO JANUARY 6, 2021 (Dec 18, 2023), [https://www.doioig.gov/sites/default/files/2021-migration/SpecialReview\\_Review%20of%20the%20U.S.%20Department%20of%20the%20Interior%20Actions%20Related%20to%20January%206%2C%202021.pdf](https://www.doioig.gov/sites/default/files/2021-migration/SpecialReview_Review%20of%20the%20U.S.%20Department%20of%20the%20Interior%20Actions%20Related%20to%20January%206%2C%202021.pdf) (a deputy operation chief of the Park Police explains why he gave the order “not to take any law enforcement actions”); Libowitz, *supra* note 2.

<sup>77</sup> Libowitz, *supra* note 2.

<sup>78</sup> Katelyn Polantz, *Giuliani, who urged Trump supporters to have ‘trial by combat,’ says he wasn’t literally calling for insurrection*, CNN (May 18, 2021), <https://edition.cnn.com/2021/05/18/politics/rudy-giuliani-january-6-insurrection-lawsuit/index.html>.

<sup>79</sup> 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>.

<sup>80</sup> Faulkner, *supra* note 46.

## II. THE THIN BLUE LINE AND POLICE SOVEREIGNTY

This Part looks at current scholarship on the term “thin blue line” to show how pro-democracy advocates might reclaim a term that is often negatively associated with anti-democratic impulses and behaviors.

The “thin blue line is the figurative boundary separating basic order from a kind of primal chaos” that envisions police as “a fundamental prerequisite for legislatures, courts, and civil society to function,” according to Nirej Sekhon.<sup>81</sup> Alice Ristoph explains that the “thin blue line” expression signifies that police create a line of defense between civil order and violent anarchy.<sup>82</sup> Without police, the argument goes, violent individuals and powerful gangs would rule society rather than the rule of law. Inherent within the “thin blue line” metaphor is a boast that police are foundational to American society and therefore to continued democracy.

Capitol police officers Eugene Goodman, Harry Dunn, Caroline Edwards, Michael Fanone, Sergeant Aquilino Gonell and Brian Sicknick epitomize the expression “thin blue line” in this sense of protecting democracy. They became heroes in the eyes of most Americans who learned about their efforts to repel the January 6 attack, how they tried to prevent the angry mob from entering the Capitol and, when unsuccessful, diverted rioters from the Senate floor to protect elected officials from both parties. With American democracy in greater peril than on September 11, 2001, these officers represented a “thin blue line,” the last line of protection against an armed mob or gang rule, a defense against totalitarianism. Not only were 150 law enforcement officers injured, but many suffered PTSD symptoms, and five officers who defended the Capitol died in the days that followed the attack.<sup>83</sup> The defense of the Capitol and Congress brought the blue line metaphor to life, for protecting Congress was foundational to protecting democracy.

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<sup>81</sup> Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1748-1749 (2019) (citing VICTOR E. KAPPELER ET AL., *FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING* 95) (2d ed. 1998) (characterizing the “police worldview” as one anchored in notions of a “thin blue line”).

<sup>82</sup> Alice Ristoph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305 (2018).

<sup>83</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 711 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>; see also Luke Barr, *‘It broke me’: Capitol officer describes recurring trauma of Jan. 6 attack*, ABC NEWS (Jan. 8, 2023, 12:02 PM), <https://abcnews.go.com/Politics/2-years-capitol-police-officer-dealing-trauma-jan/story?id=96253008>; Hannah Rabinowitz & Holmes Lybrand, *‘I wasn’t sure if I was going home’: US Capitol Police officers continue to relive January 6 trauma in court*, CNN (Aug. 29, 2023, 1:52 PM), <https://www.cnn.com/2023/08/29/politics/capitol-police-january-6-trauma-proud-boys/index.html>.

Criticisms of the thin blue line metaphor abound and may explain the failures on the morning of January 6 that accompanied this heroism. One thread of scholarship on democracy and policing describes law enforcement as antithetical to the democratic ideal of checks and balances and the rule of law. Although the thin blue line metaphor promises protection from violence, Alice Ristroph reasons that the concept also “suggests that police do not themselves operate wholly within democratic society.” If police are “understood as a necessary barrier separating safe, organized society from violent chaos,”<sup>84</sup> then they are not part of society and not governed by the same rules. Most importantly, police are not constrained by the usual rules on force, because officers are given a monopoly on force and violence to protect society. Rather the officer, “like . . . anyone else whose livelihood involves wielding physical force on behalf of the state, always stands at the periphery of civilized, law-bound society, and on that periphery, keeps one foot in a world of violence.”<sup>85</sup> Although police figuratively stand outside of the body politic, democracies place more constraints on police violence than authoritarian regimes.

In theory, police operate differently in authoritarian governments than in democracies. Scholars distinguish police who operate under an authoritarian rule from the ideal American model by whether officers must also obey the general laws or whether police answer to a single ruler. One succinct definition of a democracy comes from New York University law professor William Nelson:

Government . . . must obey the law . . . [and] must give all societal interest groups a fair opportunity to participate in the lawmaking process. In an authoritarian police state, in contrast, government compels those in its power to obey the laws it enacts to achieve its objectives, but government is bound by no law.<sup>86</sup>

Similarly, Justice Robert H. Jackson explained in a 1948 Supreme Court opinion, that “one of the most fundamental distinctions between our form of government” and an authoritarian police-state is that in the U.S., “officers are under the law,” while in a police-state, the police “are the law.”<sup>87</sup> Thus, to allow police to behave as sovereign decisionmakers is at odds with the foundation of democracy.

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<sup>84</sup> Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. Rev. 1182, 1191 (2017).

<sup>85</sup> *Id.* at 1191-1992.

<sup>86</sup> William E. Nelson, *The Emerging American Police State: The Problem Is Not with the Police, but Higher Up*, 33 TOURO L. REV. 709, 734 (2017).

<sup>87</sup> *Johnson v. U.S.*, 333 U.S. 10, 17 (1948)(prosecuting someone based on evidence seized by police in a warrantless, illegal search “would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”); *see also* *Brinegar v. U.S.*, 338 U.S. 160, 180 (1949) (Jackson, J. dissenting)

In an authoritarian police state, a leader needs the loyalty of a domestic army, the police, to enforce his or her orders.<sup>88</sup> Police do not have to answer to general laws, such as a constitution that requires search warrants and rules on excessive force. In fact, the lure of some police officers towards an authoritarian figure like Trump may be because authoritarian systems promise police freedom to use violence without restraint. In fascist Italy in the 1920's, one historian found that the police's attraction to fascism was a rebellion from liberal rules. The "policy of post-war liberal governments, [had] on many occasions angered the police by ordering them to show restraint in dealing with strikes and demonstrations."<sup>89</sup>

Most scholars studying police and democracy focus on the relationship between law enforcement and the communities they serve. A "democratic approach to policing" does not coerce the public through the application of force but instead respects rights, uses force proportionately, and is accountable to the public.<sup>90</sup> The most policed segments of society are often the ones with the least power to influence how they are policed. Current communities where officers act unconstrained by law represent authoritarian or totalitarian systems within the larger democratic structure of the U.S.

In a recent article about democracy and policing, Sekhon argues that police are not part of our democratic system of checks and balances. Instead, police operate as "sovereign" in the field with review only after the fact, and then only sometimes. Even when courts review conduct, there is little that judges can do to mandate that officers follow constitutional boundaries.<sup>91</sup> Sadly, this failure in our legal regime now applies to presidents as well. Unfortunately, after the Supreme Court's shocking rewrite of the Constitution in *Trump v. United States*, presidents will operate as "sovereigns" with little that judges can do to mandate that presidents follow constitutional boundaries or obey criminal laws.<sup>92</sup>

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("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.")

<sup>88</sup> *Police State*, MIRIAM-WEBSTER DICTIONARY.COM, [https://www.merriam-webster.com/dictionary/police state](https://www.merriam-webster.com/dictionary/police%20state) (last visited Dec. 15, 2024).

<sup>89</sup> Jonathan Dunnage, *Policing Right-Wing Dictatorships: Some Preliminary Comparisons of Fascist Italy, Nazi Germany and Franco's Spain*, 10 CRIME, HISTOIRE & SOCIÉTÉS / CRIME, HISTORY & SOCIETIES 93, 94 (2006), <https://journals.openedition.org/chs/200>.

<sup>90</sup> See, e.g., Rick Trinkner, Tom R. Tyler & Phillip Atiba Goff, *Justice from Within: The Relations Between A Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement of Democratic Policing, and Officer Well-Being*, 22 PSYCH. PUB. POL'Y & L. 158, 160 (2016) ("Because of its links to public trust, there has been increasing interest in identifying strategies that encourage officers to adopt a democratic style of policing.")

<sup>91</sup> Sekhon, *supra* note 81, at 1723 ("But what compels the police to listen?")

<sup>92</sup> *Trump v. United States*, 144 S.Ct. 2312, 2372 (2024) (Jackson, J., dissenting) ("It is a core tenet of our democracy that the People are the sovereign, and the Rule of Law is our first and final security.") Jackson explains that the majority

As Sekhon describes this sovereign power, “police wield a form of extreme discretion that cannot be readily checked by other government actors. That discretion includes the power to suspend legal rights and protections for those seized — a situation akin to a hyper localized, street declaration of martial law.”<sup>93</sup> When police behave as lawless gangs themselves, this brings a totalitarian legal structure to neighborhoods. Those stopped by police possess rights only on paper. In practice, exercising one’s rights might lead to retaliatory force or arrest. Democracy might exist in many parts of society, but where police prevent people from gathering on the sidewalks or throw young men against the wall as they walk home, those communities are virtual “police states.” This paradox has led Jocelyn Simonson to seek insubordination principles within the push for democratic policing.<sup>94</sup>

While reigning in police abuse counts for a large portion of civil rights advocacy against the police, the push to expand democratic influence over police institutions assumes that the United States continues to function as a democracy. This is why the thin blue line is a useful concept for understanding how to protect democracy against efforts of a losing candidate to seize power. January 6 took the “thin blue line” metaphor from the generality that police are essential for a safe and orderly society to a recognition that a functioning democracy needs a police force that will stand up to anti-government militias and white nationalist attempts to overthrow the government and install an authoritarian strong-man. The question of how police use their sovereign powers looms large as one considers whether the thin blue line will hold during the next election or whether officers or the leadership will actively or passively support an authoritarian challenger. Thus, it may be useful to consider the psychological make-up of a majority of those who enter the law enforcement profession. Many social scientists refer to an “authoritarian personality” or the “fundamentally

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has wrought a “profound change.” “Conferring immunity ‘create[s] a privileged class free from liability for wrongs inflicted.’” *Id.*

<sup>93</sup> Sekhon, *supra* note 81 at 1749, nn.313-14. As Sekhon explains, police are sovereign when it comes to violence. Officers decide when to employ violence during their shift, a power that is supposed to be tethered to the officer’s need to fight crime in a particular encounter, but this violence may not serve any legal enforcement purpose. In her article, Sekhon separates out police violence that is based on the psychological make-up of individual officers, such as letting off steam after a frustrating or embarrassing encounter, from violence in service of crime prevention, even if the force used was excessive. *Id.* at 1743-44. Summing up the literature, Sekhon concludes that officers use a variety of force and violence to control certain populations and most police violence is probably unconstitutional. *Id.* at 1747-48.

<sup>94</sup> Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 786 (2021); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J. 798, 799 (2021).

authoritarian character” of rank-and-file officers.<sup>95</sup> “The notion that the police have a distinctive mentality — rigid, insecure, inclined toward violence, hostile to anyone ‘different’ — became widespread by the late 1960s . . .”<sup>96</sup> This connects with how police wield their powers during stop-and-frisk. As I have written in my book about stops, frisks, and consent, police control all the power during encounters and will punish any perceived disrespect with force, including with improper arrests.<sup>97</sup> This stop-and-frisk power was notably absent on the National Mall during the Save America rally despite police having cause to detain and search many members in the crowd.

There are connections between the police failure to prevent an armed mob from walking to the Capitol on January 6 and police sovereignty. To the extent police officers operate as sovereigns, their powers include both over-policing and under-policing, too much violence or too little protection. Police maintain the sovereign power to decline to enforce laws. Officers need not punish every crime they see. Even though police argue that the power to stop and frisk on mere suspicion is necessary to their arsenal, they are not required to frisk whenever they see someone who is armed and potentially dangerous. Rather, as sovereigns, they decide when and where to exercise their powers. And most importantly, police decide against whom to exercise their vast power.

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<sup>95</sup> Jerome Skolnick and James Q. Wilson “believed that the psychology of the police [including their ‘fundamentally authoritarian character’] was shaped not just by occupational role and outcast status, but also by a cluster of dispositions that officers brought with them to the job.” David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1732-33. One group of scholars described police officers as possessing an “authoritarian personality,” meaning a character that included preoccupation with power and toughness, and “uncritical attitude toward idealized moral authorities of the ingroup.” *Id.* at 1725, citing THEODORE W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950) and ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 50 (1956).

<sup>96</sup> See Sklansky, *supra* note 95, at 1733, citing to CHRISTOPHER LASCH, *THE AGONY OF THE AMERICAN LEFT* 171 (1969), and Thomas R. Brooks, *New York’s Finest*, 2 COMMENTARY 29, 31 (Aug. 1965).

<sup>97</sup> JOSEPHINE ROSS, *A FEMINIST CRITIQUE OF POLICE STOPS* 78-99 (2021); Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 724 (2016) (“Moreover, police view disrespect for their authority as a transgression that should be punished even if a citizen has engaged in no rule-breaking.”). “Coercing respect,” while not necessarily part of the written job description of police departments, has long been ingrained in police culture. Frank Rudy Cooper has described the majority of interactions between police and young black and brown men as “masculinity contests” which straddle the line between satisfying the psychological needs of certain officers while also satisfying the controversial law enforcement goal of exerting control in “high crime neighborhoods.” Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 674-76 (2009).



## III. CROSSING THE BLUE LINE INTO THE ENEMY CAMP

## A. Race and Insurrection

If the primary purpose of police is to control dangerous groups, why did police fail so miserably on January 6? To understand why Stop the Steal protesters were not policed with the same vigor as Black Lives Matter protesters, this section begins by revealing the organizations at the forefront of Stop the Steal.

The January 6 insurrection represented a war against a racially diverse egalitarian republic along with an attempt to keep one man in power. For example, when Trump falsely claimed a “suspicious ballot dump” in Detroit, he sought to discard votes in a city where a high percentage of Black people live and vote.<sup>98</sup> As Professor Lucius Outlaw phrased it, the insurrectionists shared a “collective goal . . . to disenfranchise, after the fact, millions of black voters who had exercised their constitutional voting rights to tip the election away from former President Trump” and “to further deny black Americans full citizenship and from experiencing the American promise of life, liberty, and the pursuit of happiness.”<sup>99</sup> Unsurprisingly then, many of the groups who came to D.C. to commit violence professed anti-Black as well as Christian Nationalist ideologies.

As the January 6 Committee made explicit, “far-right extremists and conspiracy theorists prepared for violence after President Trump summoned them to Washington for a ‘wild’ protest.”<sup>100</sup> The organizers who planned and executed the insurrection included a veritable who’s who of domestic extremists, in some ways, the modern-day descendants of the Klu Klux Klan. Two of the most important organizations involved in the planning and execution were the Proud Boys and the Oath Keepers, “far-right militias that espouse anti-government, white supremacist, and neo-fascist ideologies.”<sup>101</sup>

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<sup>98</sup> Emily Towns et. al., *Trump falsely claims suspicious ballot dump in Detroit, indictment reveals*, NEWS CHANNEL 3 (Aug. 2, 2023, 9:13 AM), <https://wwmt.com/news/local/donald-trump-false-claims-suspicious-ballot-dump-detroit-indictment-lee-chatfield-mike-shirkey> (discussing indictment in DC federal court charging Mr. Trump with conspiracy to defraud the United States and other crimes.); see also Jane Timm, *Fact check: Trump's bogus claim of more votes in Detroit than people*, NBC NEWS (Nov. 18, 2020), <https://www.nbcnews.com/politics/2020-election/fact-check-trump-s-bogus-claim-more-votes-detroit-people-n1248121>.

<sup>99</sup> Lucius T. Outlaw III, *The Line That I Did Not Know I Had: Why I Would Not Represent a January 6 Defendant As A Public Defender*, 27 BERKELEY J. CRIM. L. 1, 2-3 (2022).

<sup>100</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 638 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>101</sup> Denbeaux, *supra* note 6, at 9.

The Proud Boys are an “all-male, far-right extremist organization” that “advocates violence in readiness for civil war in the United States,”<sup>102</sup> according to The Center for International Security and Cooperation (CISAC) at Stanford University, which tracks militant organizations around the world.<sup>103</sup> The Proud Boys “group is Islamophobic, anti-Semitic, homophobic, transphobic, misogynistic, and xenophobic” and seeks to defend itself “from a perceived war on whites.”<sup>104</sup> The group gained national attention in 2017 when many of its members attended the “Unite the Right” rally held in Charlottesville, Virginia, where hundreds of armed marchers fought counter-protesters and chanted “Jews will not replace us” and other Nazi-style slogans.<sup>105</sup> Calling its members to Washington for the January 6 insurrection, the Proud Boys “deliberately harnessed the mob’s anger to overrun the Capitol.”<sup>106</sup>

A jury convicted four of the group’s leaders of seditious conspiracy for conspiring “before, during, and after the siege of the Capitol to use force against their own government to prevent the peaceful transfer of power.”<sup>107</sup> For his role in the conspiracy, Enrique Tarrío, the organization’s “former national chairman,” was sentenced to twenty-two years in prison.<sup>108</sup>

The Oath Keepers, “a far-right, anti-government militia movement,” was founded by Stewart Rhodes.<sup>109</sup> It is “one of the largest and most

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<sup>102</sup> *Proud Boys*, MAPPING MILITANTS PROJECT, *supra* note 50.

<sup>103</sup> See MAPPING MILITANTS PROJECT, <https://mappingmilitants.org/about> (last visited Dec. 15, 2024); *Global Right-Wing Extremism*, MAPPING MILITANTS PROJECT, <https://mappingmilitants.org/map/global-right-wing-extremism> (last visited Dec. 15, 2024).

<sup>104</sup> *Proud Boys*, MAPPING MILITANTS PROJECT, *supra* note 50.

<sup>105</sup> *Id.* For chants, see Debbie Elliott, *The Charlottesville rally 5 years later: It’s what you’re still trying to forget*, NPR (Aug. 12, 2022), <https://www.npr.org/2022/08/12/1116942725/the-charlottesville-rally-5-years-later-its-what-youre-still-trying-to-forget>.

<sup>106</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 639 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>; Jurist Staff, *The January 6th Committee Report: Bearing Witness to an Event That Has Changed Our Lives*, (Jan. 6, 2023, 1:00 PM), <https://www.jurist.org/features/2023/01/06/the-january-6th-committee-report-bearing-witness-to-an-event-that-has-changed-our-lives/>.

<sup>107</sup> *Proud Boys Leader Sentenced to 22 Years in Prison for Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, DEP’T. OF JUST. OFF. OF PUB. AFFS. (Sept. 5, 2023), <https://www.justice.gov/opa/pr/proud-boys-leader-sentenced-22-years-prison-seditious-conspiracy-and-other-charges-related>.

<sup>108</sup> *Id.*

<sup>109</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 58 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>; see also *Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, DEP’T. OF JUST.

prominent organizations of the militia/patriot movement with chapters across the United States.”<sup>110</sup>

Heavily armed members of the group came to Black Lives Matter (BLM) protests, including in Ferguson, Missouri where they were “seen on rooftops in what they said was an effort to protect businesses from rioters.”<sup>111</sup> In keeping with Rhodes’ racialized approach to vigilante justice, he called Kyle Rittenhouse a “patriot” for killing two BLM protesters in Kenosha, Wisconsin in August 2020.<sup>112</sup> “Rhodes amassed an arsenal of military-grade assault weapons and equipment in the days leading up to January 6<sup>th</sup>.”<sup>113</sup> Videos of the attack on the Capitol reveal how the Oath Keepers “formed two military ‘stacks’ and marched up the steps of the U.S. Capitol on January 6th.”<sup>114</sup>

After an eight-week jury trial, Rhodes was convicted of seditious conspiracy and other charges for his role in the insurrection and sentenced to 18 years in prison. Kelly Meggs, who led the Florida Chapter of the Oath Keepers, received twelve years in prison.<sup>115</sup> The DOJ described some of their crimes as “organizing into teams that were prepared and willing to use force and to transport firearms and ammunition into Washington, D.C.; recruiting members and affiliates; organizing trainings to teach and

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OFF. OF PUB. AFFS., <https://www.justice.gov/opa/pr/court-sentences-two-oath-keepers-leaders-seditious-conspiracy-and-other-charges-related-us> (May 25, 2023) (“According to the government’s evidence, the Oath Keepers are a large but loosely organized collection of individuals, some of whom are associated with militias.”).

<sup>110</sup> *Oath Keepers*, MAPPING MILITANTS PROJECT, *supra* note 102; *see also The Oath Keepers Data Leak: Unmasking Extremism in Public Life*, ANTI-DEFAMATION LEAGUE (Sept 06, 2022), <https://www.adl.org/resources/report/oath-keepers-data-leak-unmasking-extremism-public-life> (the group “identified 373 individuals in the Oath Keepers database who we believe are currently serving in law enforcement agencies across the country . . . including at least ten chiefs of police and eleven sheriffs.”).

<sup>111</sup> *Oath Keepers*, S. POVERTY L. CTR, <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers> (last visited Dec. 15, 2024).

<sup>112</sup> *Oath Keepers*, MAPPING MILITANTS PROJECT, *supra* note 102.

<sup>113</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 515 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>114</sup> *Id.* at 500-01; Ryan Lucas, *Prosecutors Allege ‘Substantial Evidence’ Of Oath Keepers Conspiracy To Storm Capitol* (Mar. 25, 2021, 1:28 PM), <https://www.npr.org/2021/03/25/981210089/prosecutors-allege-substantial-evidence-of-oath-keeper-conspiracy-to-storm-capitol>.

<sup>115</sup> Michael Kunzelman, Alanna Durkin Richer & Lindsay Whitehurst, *Oath Keeper leaders get jail time for Jan. 6 Capitol riot*, OCALA STARBANNER (May 26, 2023), <https://www.ocala.com/story/news/2023/05/26/oath-keeper-florida-chapter-leader-gets-12-years-for-jan-6-role-kelly-meggs-ocala/70261856007/>.

learn paramilitary combat tactics; bringing and contributing paramilitary gear, weapons, and supplies.”<sup>116</sup>

Central to the group’s mission, “Oath Keepers have directed their recruiting effort toward members of the military, law enforcement and other public-safety positions.”<sup>117</sup> Many of their members are veterans and some were active military when they came to the Capitol. This is especially troubling given the need for a thin blue line to prevent a coup on January 6 and the need for a strong police force to repel a future insurrection. Oath Keepers used “military tactics (such as stack formation), encrypted message planning (using apps such as Telegram and Signal), and wore sophisticated tactical gear (vests, goggles, Kevlar clothing).”<sup>118</sup> Some consider it a contradiction that “the police and military organizations from which their members come are some of the same organizations the group likely would have to attack in order to carry out its self-proclaimed mission against the government.”<sup>119</sup> As the attack on the Capitol illustrated, Rhodes has a good strategy, for the training will make the Oath Keepers organized, more violent, and effective fighters.

Other hate groups were also represented at the insurrection: Three Percenters, QAnon adherents, members of the America First movement, known as “Groyppers,” America’s Frontline Doctors, and various Patriot militias.<sup>120</sup> “Proud Boys, Three Percenters, Oath Keepers, and Patriots 45 account for 83.3% (50 of 60) of” those charged with conspiracy to obstruct a proceeding.<sup>121</sup> Some of these extremist organizations worked together with the Oath Keepers or Proud Boys in the planning, but not all. The FBI has a secret Terrorist Screening Database that reportedly contained the names of dozens of participants in the riot, many of whom were suspected white supremacists.<sup>122</sup>

Within the concept of the thin blue line, containing “dangerous groups” represents a primary goal of policing. However, the Proud Boys

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<sup>116</sup> *Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, *supra* note 109.

<sup>117</sup> *Oath Keepers*, S. POVERTY L. CTR., *supra* note 111.

<sup>118</sup> Denbeaux, *supra* note 6, at 23.

<sup>119</sup> *Oath Keepers*, S. POVERTY L. CTR., *supra* note 109 (discussing a book that predates the siege, SAM JACKSON, OATH KEEPERS: PATRIOTISM AND THE EDGE OF VIOLENCE IN A RIGHT-WING ANTIGOVERNMENT GROUP (2020)).

<sup>120</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 500-01 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>; Denbeaux, *supra* note 6, at 34 (based on data from Jan. 2021 through Jan. 2022).

<sup>121</sup> Denbeaux, *supra* note 6, at 34.

<sup>122</sup> Devlin Barrett, Spencer S. Hsu & Marissa J. Lang, *Dozens of people on FBI terrorist watch list came to D.C. the day of Capitol riot*, WASH. POST (Jan. 14, 2021), [https://www.washingtonpost.com/national-security/terror-watchlist-capitol-riot-fbi/2021/01/14/07412814-55f7-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/national-security/terror-watchlist-capitol-riot-fbi/2021/01/14/07412814-55f7-11eb-a931-5b162d0d033d_story.html).

and Oath Keepers and other white nationalist leaders were not treated as dangerous by Park Police. Vida Johnson points to racism as the cause for Capitol Police’s failure to properly prepare for an attack by violent White Supremacists despite specific warnings from the FBI and NYPD:<sup>123</sup>

A conclusion must be drawn that the attack on the Capitol was enabled by white supremacy and other forms of racism in the very core of law enforcement. Whether those at the top of the Capitol Police Department were blind to the threat posed by Trump supporters because of their race, or were so sympathetic to Trump supporters’ ideology and goals that they actively aided them, their response was at odds with their goal of public safety and national security.<sup>124</sup>

Indeed, given the racist core of the groups that organized and led the assault, one cannot separate out the anti-democratic nature of the insurrection from its racist underpinnings. One scholar summarized the January 6 organizers thus: “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>125</sup>

Initially, the failure to properly police one of “the most significant terrorism-related threats to the United States” might seem contradictory with the definition of police sovereignty, whose purpose is to control dangerous groups, but it fits precisely with Sekhon’s critique of police sovereignty. What police view as dangerous groups is filtered through a distorting race lens that has been deeply embedded within police culture. Again, Alice Ristroph’s analysis was prescient, for she noted that as “agent[s] of violence,” police will “always stand at the periphery of civilized, law-bound society,” a status that makes them particularly susceptible to racist and violent views and attract members with racist and violent views.<sup>126</sup>

In fact, many current and former military and law enforcement members participated in the attack at the Capitol.<sup>127</sup>

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<sup>123</sup> Johnson, *supra* note 26, at 577-79.

<sup>124</sup> *Id.* at 560.

<sup>125</sup> Lawrence J. Trautman, *Democracy at Risk: Domestic Terrorism and Attack on the U.S. Capitol*, 45 SEATTLE U.L. REV. 1153, 1189 (2022)(citing Neal MacFarquhar, Jack Healy, Mike Baker & Serge F. Kovaleski, *Assault Spawns New Rally Cry for Extremists*, N.Y. TIMES (Jan. 17, 2021), at A1.).

<sup>126</sup> Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1191-92 (2017).

<sup>127</sup> *The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history*, NPR STAFF, (first published Feb 9, 2021, updating daily) <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> (last visited Dec. 15, 2024).

B. *Officers Who Joined the Assault on Democracy*

There were officers on both sides of that thin blue line as Capitol Police engaged in combat to protect the lives of House and Senate members and the Vice President. Virginia police officer Jacob Fracker was “recruited to join the mob” by his commanding sergeant, Thomas Robertson.<sup>128</sup> The two officers “forced their way into the U.S. Capitol.”<sup>129</sup> Once inside, Robertson used “a large wooden stick to block police outside the Capitol,” and the officers photographed themselves celebrating.<sup>130</sup> Fracker pled guilty to conspiracy to obstruct a proceeding, receiving probation after he testified against his former boss and helped police investigate the sergeant’s “assembly of an arsenal of weapons after the Jan. 6 attack.”<sup>131</sup> A jury convicted Robertson of five felonies, including entering and remaining in a restricted building while carrying a dangerous weapon, and he received a prison sentence greater than seven years.<sup>132</sup>

One of the most infamous assaults was perpetrated by retired New York City Police Officer Thomas Webster. A twenty-year veteran of the NYPD, Webster began his service in the Marine Corps where he served four years. He came to the Capitol on January 6 wearing a bulletproof vest and carrying a large U.S. Marine Corps flag on a metal pole. The retired NYPD officer was caught on video attacking MPD officer Noah Rathbun on the steps of the Capitol. “The videos show Webster shoving a bike rack at Rathbun before swinging the flagpole at the officer in a downward chopping motion, striking a metal barricade in front of the officer.”<sup>133</sup>

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<sup>128</sup> Rachel Weiner, *On Jan. 6, he trusted a fellow cop based on lies. Now both are felons*, WASH. POST (Aug. 16, 2022), <https://www.washingtonpost.com/dc-md-va/2022/08/16/fracker-robertson-capitol-cop/>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*; see also Rachel Weiner, *Ex-Va. police officer gets more than 7 years for role in Jan. 6 riot*, WASH. POST (Aug. 11, 2022), <https://www.washingtonpost.com/dc-md-va/2022/08/11/robertson-jan6-sentence-rocky-mount-police/>; see also *Capitol Breach Cases*, U.S. ATT’Y’S OFF. D.C., <https://www.justice.gov/usao-dc/capitol-breach-cases?combine=fracker>; Press Release, U.S. ATT’Y’S OFF. D.C., *Two Off-Duty Virginia Police Officers Charged in Federal Court Following Events at the U.S. Capitol* (Jan. 13, 2021), <https://www.justice.gov/usao-dc/pr/two-duty-virginia-police-officers-charged-federal-court-following-events-us-capitol/>.

<sup>131</sup> Weiner, *supra* note 128; see also Ryan J. Reilly, *Ex-cop who breached Capitol pleads guilty to obstructing vote count on Jan. 6*, NBC NEWS (Mar. 18, 2022), <https://www.nbcnews.com/politics/justice-department/ex-cop-breached-capitol-pleads-guilty-obstructing-vote-count-jan-6-rca20595>.

<sup>132</sup> *Robertson, Thomas*, UNITED STATES ATT’Y OFF. D.C., (Aug. 12, 2022) <https://www.justice.gov/usao-dc/defendants/robertson-thomas> (Robertson was sentenced to eighty-seven months in prison, thirty-six months supervised release, and restitution of \$2,000 on August 11, 2022).

<sup>133</sup> Michael Kunzelman, *Officer describes fending off capitol rioter at man’s trial*, THE ASSOC. PRESS (Apr. 27, 2022), <https://apnews.com/article/capitol-siege-new-york-city-riots-15f9cb5b3004ff0340a792df6edc0e82>.

Officer Rathbun retreated and Webster then charged through a police barricade and tackled the officer to the ground.<sup>134</sup> Webster grabbed the officer's face mask and held it while the officer “struggled to breathe . . . because the strap was cutting off his oxygen.”<sup>135</sup> After a jury convicted him of multiple charges, Webster asked the judge for mercy, claiming he suffered from PTSD from his twenty years as a NYPD officer. He was sentenced to ten years in federal prison.<sup>136</sup>

Ronald Colton McAbee was convicted of assaulting two police officers inside the Capitol. McAbee was on a two-week medical leave from his job at a sheriff's office working in a rural Tennessee jail when he drove to Washington for Trump's “Save America” rally.<sup>137</sup> His previous job was Sheriff's Deputy in Cherokee County, Tennessee. For the occasion, McAbee wore a tactical vest with a fake “Sheriff's patch.”<sup>138</sup> Although he claims he is not a member of an extremist group, McAbee also wore a patch with “Three Percent,” a symbol worn by “a vanguard extremist movement that claims to be ready to carry out armed resistance” to overthrow a tyrannical government according to the Southern Poverty Law Center.<sup>139</sup> He purchased brass knuckle gloves, which he wore during the siege.

McAbee's violence took place in an interior tunnel of the Capitol building, where MPD officers were taking a stand against the mob. “Throughout the afternoon, members of the mob struck officers with weapons, shot them with [pepper] spray, and dragged officers from the tunnel into the crowd.”<sup>140</sup> McAbee was part of a group that dragged MPD officer Andrew Wayne to the ground, “stripped him of his baton” while

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<sup>134</sup> Complaint at 6, *United States v. Webster*, No. 1:21-mj-00244 (D.D.C. Feb. 19, 2021), <https://www.courtlistener.com/docket/59678994/1/1/united-states-v-webster/>.

<sup>135</sup> *Id.* at 7; Courtney Copenhagen, Jonathan Dienst & Ryan J. Reilly, *Ex-NYPD cop who attacked D.C. officer cites PTSD as he seeks to avoid longest Jan. 6 sentence yet*, NBC NEWS (Aug. 29, 2022), <https://www.nbcnews.com/politics/justice-department/ex-nypd-cop-attacked-dc-officer-cites-ptsd-seeks-avoid-longest-jan-6-s-rcna45368>; “*Webster, Thomas*,” U.S. ATT'Y'S OFF. D.C. (Sept. 1, 2022), <https://www.justice.gov/usao-dc/defendants/webster-thomas>.

<sup>136</sup> *Retired NYPD Officer Sentenced to 10 Years in Prison For Actions Related to Capitol Breach*, UNITED STATES ATT'Y OFF. D.C. (Sept. 1, 2022) <https://www.justice.gov/usao-dc/pr/retired-nypd-officer-sentenced-prison-actions-related-capitol-breach>.

<sup>137</sup> *United States v. McAbee*, 628 F.Supp.3d 140, 144 (D.D.C. 2022).

<sup>138</sup> *United States v. McAbee*, Crim. Action 21-35-7 (EGS), 6 (D.D.C. Dec. 21, 2021), <https://casetext.com/case/united-states-v-mcabee-5>.

<sup>139</sup> *Three Percenters*, SPLC, <https://www.splcenter.org/fighting-hate/extremist-files/group/three-percenters> (last visited Dec. 15, 2024).

<sup>140</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 662 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

“repeatedly striking him in the head and body.”<sup>141</sup> For his part, McAbee grabbed the MPD officer’s leg, pulled him towards the violent mob of rioters who punched, kicked, and hit the officer. At one point, “McAbee, whose body weighed about 300 pounds, was on top of Wayte while rioters barraged the officer on all sides.”<sup>142</sup> Officer Wayte was eventually transported to the hospital and treated for a head laceration, a concussion, and bodily abrasions.<sup>143</sup> When a second MPD officer, Carter Moore, stepped in “to assist the downed officer,” McAbee swung his arms and hands towards the second officer’s head and torso, still wearing the brass knuckles. After pleading guilty to felony assault on Officer Moore, McAbee exercised his right to trial on five more felonies, and the jury convicted him of all charges.<sup>144</sup>

Timothy Hale-Cusanelli, the rioter with a mustache like Hitler, bears mention here even though he was an army reservist rather than a police officer.<sup>145</sup> In addition to his army work, Hale-Cusanelli held a “secret” security clearance, worked as a security guard at Naval Weapons Station Earle, and lived on the base. He was one of the people moving bicycle rack barriers to allow the crowd to enter the Capitol grounds, and surveillance video showed Hale-Cusanelli climbing through a window on the Lower West Terrace moments after it was smashed. He harassed police officers, including a “profane taunt” shouted at a female Capitol Police officer. Before trial, his lawyer successfully excluded some of the racist, sexist, and antisemitic rants that Hale-Cusanelli made before and after the

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<sup>141</sup> Samatha Hawkins, *Cell doors nudge open for rioting sheriff’s deputy who assaulted police at Capitol*, COURTHOUSE NEWS SERV. (Sept. 22, 2021), <https://www.courthousenews.com/cell-doors-nudge-open-for-rioting-sheriffs-deputy-who-assaulted-police-at-capitol/>; see also Sierra Rains, *Former TN Sheriff’s deputy found guilty of 5 felony charges related to Jan. 6 riots*, WKRN (Oct. 11, 2023), <https://www.wkrn.com/news/tennessee-news/former-tn-sheriffs-deputy-found-guilty-of-5-felony-charges-related-to-jan-6-riots/>.

<sup>142</sup> Rachel Weiner, *He claimed he was helping police on Jan. 6. He was convicted of assault*, WASH. POST (Oct. 19, 2023), <https://www.washingtonpost.com/dc-md-va/2023/10/12/tennessee-deputy-convicted-jan-6-police-attack/>.

<sup>143</sup> *Tennessee Man Found Guilty of Five Felony Charges Related to Jan. 6 Capitol Breach*, UNITED STATES ATT’Y OFF. D.C. (Oct. 11, 2023), <https://www.justice.gov/usao-dc/pr/tennessee-man-found-guilty-felony-charges-related-jan-6-capitol-breach>.

<sup>144</sup> *Id.*; see also *Tennessee Man Sentenced to Prison on Multiple Felony Charges Related to Jan. 6 Capitol Breach*, UNITED STATES ATT’Y OFF., (Feb. 29, 2024), <https://www.justice.gov/usao-dc/pr/tennessee-man-sentenced-prison-multiple-felony-charges-related-jan-6-capitol-breach#:~:text=Ronald%20Colton%20McAbee%2C%2029%2C%20of,of%20five%20felonies%20on%20Oct>.

<sup>145</sup> *Coworkers: Man charged in Capitol riot had a Hitler mustache*, AP NEWS (March 14, 2021), <https://apnews.com/article/capitol-siege-race-and-ethnicity-ap-top-news-riots-4644edb6f3fa819628760251c846a408>.



riot. Nevertheless, the jury found him guilty of all five counts, and the judge sentenced him to forty-eight months in federal prison.

Although Hale-Cusanelli expressed remorse during his sentencing hearing, stating, “I disgraced my uniform and I disgraced the country,” he is now singing openly with Donald Trump in the “J6 Prison Choir” that portrays those who participated in the violent overthrow attempt as patriots.<sup>146</sup> This validates Judge Emmet Sullivan’s skepticism towards statements of remorse issued by police and military who joined the fight against the United States. During a hearing on pre-trial conditions of release for a different defendant, the judge pointed to the man’s career in law enforcement as the reason it was difficult to credit his promise that he would not reoffend. “He’s raised his right hand, probably put his left hand on the Bible, more than once and swore to administer justice,” said Judge Sullivan. If he violated his oath “on January 6, how can the court take any comfort in knowing that he will abide by the court’s directives to do certain things going forward?”<sup>147</sup>

This list is far from exhaustive. Hale-Cusanelli was just one of many former or active military members investigated for or charged with the Capitol attack.<sup>148</sup> Three years after the attack, over 200 of the defendants have known military or law enforcement ties.<sup>149</sup> The former police officers came from multiple states.<sup>150</sup> Researchers who studied the defendants

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<sup>146</sup> David Klepper, *Music to Trump’s ears: Whitewashing Jan. 6 riot with song*, THE ASSOC. PRESS, (Apr. 21, 2023), <https://apnews.com/article/j6-choir-trump-national-anthem-capitol-riot-79618f1f2a689c308dfdc34d54d327ea>.

<sup>147</sup> Ryan J. Reilly, ‘*Outrageous*’: Judge Lays Into Trump-Loving Deputy Who Wore ‘*Sheriff*’ Patch On Jan. 6, HUFF POST, (Sept. 22, 2021), [https://www.huffpost.com/entry/capitol-attack-three-percent-sheriff-colton-mcabee\\_n\\_614b7a14e4b0017183446e45](https://www.huffpost.com/entry/capitol-attack-three-percent-sheriff-colton-mcabee_n_614b7a14e4b0017183446e45); see also Samantha Hawkins, *Cell doors nudge open for rioting sheriff’s deputy who assaulted police at capitol*, COURTHOUSE NEWS SERV., (Sept. 22, 2021), <https://www.courthouse-news.com/cell-doors-nudge-open-for-rioting-sheriffs-deputy-who-assaulted-police-at-capitol/>.

<sup>148</sup> Denbeaux, *supra* note 6, at 7 (Of the 716 insurrectionists charged up to the time of the report, 105 had a military background.).

<sup>149</sup> *The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history*, NPR STAFF, (first published Feb 9, 2021, updating daily), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> (last visited Dec. 15, 2024) (1,434 individuals who have been arrested in affiliation with the Jan. 6 insurrection as of July 31, 2024).

<sup>150</sup> Jonathan Ben-Menachem, *The cops at the capitol*, THE APPEAL, (Jan. 13, 2021), <https://theappeal.org/the-cops-at-the-capitol/>. For an example of officers physically attacking police, take Joseph Robert Fisher of Massachusetts who worked for the Boston Police Department for twenty-two years. Before retiring in 2016, Fisher’s last position was in the K-9 unit. The retired police officer who plead guilty to eight charges including assaulting a Capitol police officer inside the building. See *The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history*, NPR STAFF, (first published Feb 9, 2021, updating daily) <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and->

charged in the first twelve months report that 28.6% of defendants with law enforcement or military backgrounds were part of far-right militias, such as the Proud Boys, Oath Keepers, or Three Percenters, groups that were central to organizing and leading the charge.<sup>151</sup> The numbers of charged former law enforcement and military keep growing.<sup>152</sup> Putting aside their badges, these men and women employed the training and tactics they learned in their police programs or military training against the Capitol Police and MPD officers that day. Their expertise helped the attackers breach the Capitol and their combat training made it more difficult for officers to protect the country. When those sworn to protect the United States use their military training to attack the country, the danger of bloodshed and overthrow increase. Arguably, it is even more dangerous when the enemy within shows up to work in uniform, as the next paragraph describes. Some officers who wore their Capitol Police uniforms that day demonstrated allegiance to the rioters and their goals. During the January 6 attacks, the public watched a few police officers intentionally let the mob in by moving the barriers that surrounded the Capitol.<sup>153</sup> This encouraged some defendants to argue at trial, albeit unsuccessfully, that they did

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their-stories (last visited Dec. 15, 2024); *Massachusetts Man Arrested on Felony Charges for Actions During Jan. 6 Capitol Breach*, U.S. ATT’Y’S OFF. D.C. (Mar. 30, 2023), <https://www.justice.gov/usao-dc/pr/massachusetts-man-pleads-guilty-felony-charges-actions-during-jan-6-capitol-breach>.

<sup>151</sup> Denbeaux, *supra* note 6, at 25. (basing its argument on the aggregation and analysis of the Department of Justice’s legal filings and arrests between January 6, 2021, and January 6, 2022).

The military insurrectionists were heavily armed with 30 weapons or pieces of offensive gear, including two firearms, three bats, and two knives. In contrast 20% of the law enforcement defendants were armed, only one with a gun).

<sup>152</sup> *The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history*, NPR STAFF, (first published Feb 9, 2021, updating daily), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories> (last visited Dec. 15, 2024) (“At the current pace of arrests, the government appears unlikely to charge all of those individuals before the statute of limitations lapses for many offenses on Jan. 5, 2026, according to an NPR analysis.”).

<sup>153</sup> Matt Stevens, *Police, under fire for their response, say they arrested at least 52 people in connection with Capitol mayhem*, N.Y. TIMES (Feb. 12, 2022), <https://www.nytimes.com/live/2021/01/06/us/electoral-vote#police-under-fire-for-their-response-say-they-arrested-at-least-52-people-in-connection-with-the-capitol-mayhem> (“One video, for instance, appeared to show Capitol Police officers moving aside barriers and retreating as the mob flooded through.”); *see also* video footage, <https://www.tiktok.com/@marcus.dipaola/video/6914723446496840965?lang=en>. (“Investigations have since been opened into the actions of 35 Capitol Police officers, a congressional official told ABC News.”); *See* Alexander Mallin, Alex Hosenball & Olivia Rubin, “*In new defense, dozens of Capitol rioters say law enforcement 'let us in' to building*,” ABC News (Feb. 19, 2021), <https://abcnews.go.com/US/defense-dozens-capitol-rioters-law-enforcement-us-building/story?id=75976466>.

not trespass because officers invited them in.<sup>154</sup> One twenty-five-year veteran of the Capitol Police was convicted of obstruction of justice. “I’m a Capitol police officer who agrees with your political stance,” Michael Riley privately messaged the rioter, before advising him how to evade the FBI.<sup>155</sup>

In the most visible display of the splintered blue line, several insurrectionists carried “Thin Blue Line Flags.” These flags are like American flags except with black and white stripes and one blue stripe, a pro-cop message.<sup>156</sup> The flags have been criticized for fostering an “‘us versus them’ mentality.”<sup>157</sup> While some officers view the flag as a sign of solidarity and deny racist associations, the flag was also flown during the Charlottesville Unite the Right Rally in 2017 alongside confederate flags.<sup>158</sup> Together, these flags portray the police as racist, antagonistic to a pluralistic society, the opposite of the thin blue line as conceived in this article as a force to protect democracy. “‘It’s unfortunate that extremist groups have hijacked the use of the ‘Thin Blue Line Flag’ to symbolize their undemocratic, racist, and bigoted views,’” said the Los Angeles Police Chief when he ordered his department to remove the flag from police station lobbies.<sup>159</sup>

The flag that some say symbolizes police as “a first line of defense against chaos in society” now appeared in the rioters’ hands with a more sinister meaning. In the hands of rioters, the flags warned viewers that Americans cannot count on police officers to hold the line and protect democracy, that members of our police forces might take arms against the

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<sup>154</sup> Alexander Mallin, Alex Hosenball & Olivia Rubin, *In New Defense, Dozens of Capitol Rioters Say Law Enforcement “Let Us In” to Building*, ABC NEWS (Feb. 19, 2021), <https://abcnews.go.com/US/defense-dozens-capitol-rioters-law-enforcement-us-building/story?id=75976466> (“At least 29 people arrested for their role in the Jan. 6 events have claimed they thought they were free to enter the Capitol because law enforcement authorities either didn’t stop them from coming in or never told them they were not allowed to be there, according to affidavits and court filings reviewed by ABC News.”)

<sup>155</sup> *Former U.S. Capitol Police Officer Found Guilty of Obstruction Charge Involving Investigation of Jan. 6 Capitol Breach*, UNITED STATES ATT’Y OFF., D.C., (Oct. 28, 2022), <https://www.justice.gov/usao-dc/pr/former-us-capitol-police-officer-found-guilty-obstruction-charge-involving-investigation>

<sup>156</sup> *The Thin Blue Line*, FLAGS OF VALOR, <https://www.flags-of-valor.com/blogs/news/the-thin-blue-line> (last visited Dec. 15, 2024).

<sup>157</sup> Maurice Chammah & Cary Aspinwall, *The Short, Fraught History of the Thin Blue Line American Flag*, POLITICO (June 9, 2020), <https://www.politico.com/news/magazine/2020/06/09/the-short-fraught-history-of-the-thin-blue-line-american-flag-309767>.

<sup>158</sup> *Id.*

<sup>159</sup> Libor Jany, *LAPD ban of ‘thin blue line’ flags is latest salvo in culture war*, LOS ANGELES TIMES (Jan. 21, 2023), <https://www.latimes.com/california/story/2023-01-21/lapd-ban-of-thin-blue-line-flags-latest-salvo-in-culture-war>.

country. Instead of protecting against chaos, the flag in that context symbolizes an armed force who believes in anti-democratic violence and chaos when perpetrated with the ultimate goal of creating an authoritarian system of oppression.

With police on both sides of the insurrection, there can be no solid blue line. Racism within police departments has always been dangerous to non-white Americans and their friends and families. The police participation during January 6 reveals the threat that racist officers pose to everyone who values free speech, freedom of the press, participatory democracy, and equal justice, to name a few democratic principles at stake. For the blue line to hold next time, we need officers who are not Christian nationalists and officers willing to fight white supremacists. Officers with authoritarian personalities or white supremacist tendencies represent a threat to the well-being of those policed in a violent or hostile manner. And these same officers are also more likely to be enticed to obey illegal orders by authoritarian-style leaders, join a mob, or passively help armed anti-government protesters.

In Nazi Germany, the police force was reorganized and reoriented toward Nazism, gradually freeing officers from constitutional constraints and firing those who stood in the way. Any authoritarian leader consolidating power in the U.S. is likely to follow this playbook. Racist and anti-government forces that embed within the law enforcement and military pose particular concerns for the country's safety. The problem needs to be addressed before Trump or another authoritarian leader attempts a coup.

"When the men with guns who have always claimed to be against the system start wearing uniforms and marching with torches and pictures of a leader, the end is nigh. When the pro-leader paramilitary and the official police and military intermingle, the end has come,"<sup>160</sup> warns Timothy Snyder. Fortunately, during Trump's first term in office, he was not able to turn the military into his personal soldiers. Writing approximately five months before the Stop the Steal rally, Snyder observed that Trump's attempts to mingle the police with thugs was not successful:

Even if some police officers do seem primed for the kind of racial war that the Nazis saw as their task, most find such an idea abhorrent, and the institution is highly decentralized and not under Trump's control.<sup>161</sup>

While the thin blue was threatened on January 6, it held, owing to Trump's inability to control the majority of police or to control the military. Nevertheless, the police failures are warning signs that need addressing.

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<sup>160</sup> SNYDER, *supra* note 18, at 42.

<sup>161</sup> Timothy Snyder, *In Portland, the Baby Fascists Have Shown Their Face*, FOREIGN POLICY (July 23, 2020), <https://foreignpolicy.com/2020/07/23/portland-fascism-trump-election/>.

## IV. UNDER-POLICING

While the last section focused on officers who actively participated in the insurrection, this section considers the role of police inaction, the failure to enforce the laws and nullify the threat as soon as it appeared on the Mall. Under-policing creates a particular problem for democracy, a vulnerability to insurrectionist violence. “D.C. is no stranger to protests. The city has averaged more than 800 permitted demonstrations annually in recent years and many more that gather without permits.”<sup>162</sup> By comparing the police response to World Bank and Black Lives Matter protests that both occurred less than one year before the Stop the Steal rally, Section A shows that Park Police has the capacity to coordinate with other law enforcement departments and ramp up enforcement on short notice when there is a will to do so. Over-policing of anti-racists and the left while under-policing right wing hate groups amount to two sides of the same coin.

*A. Black Lives Matter Protesters Receive Radically Different Treatment*

On the morning of January 6, violent crowds amassed on the Mall rather than prowling city streets, so law enforcement was crucial near the Ellipse. Thousands of Trump supporters attended the rally, and the police did not know exactly how many people, nor how many guns, there were.<sup>163</sup> Nevertheless, as soon as leadership realized this was too dangerous a crowd for Park Police to control, they should have demanded back-up rather than relying on their small response teams. The District has long been a magnet for large crowds and demonstrations. If the crowd needed containment, police with appropriate back-up officers could have surrounded the area, allowing police to remove identified individuals to areas

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<sup>162</sup> Marissa J. Lang, *D.C. is becoming a protest battleground. In a polarized nation, experts say that's unlikely to change*, WASH. POST (Jan. 1, 2001), [https://www.washingtonpost.com/local/washington-dc-protests/2021/01/01/da743c20-4a68-11eb-839a-cf4ba7b7c48c\\_story.html](https://www.washingtonpost.com/local/washington-dc-protests/2021/01/01/da743c20-4a68-11eb-839a-cf4ba7b7c48c_story.html).

<sup>163</sup> See Jie Jenny Zou & Erin B. Logan, *Key facts to know about the Jan. 6 insurrection*, LA TIMES (Jan. 5, 2022), <https://www.latimes.com/politics/story/2022-01-05/by-the-numbers-jan-6-anniversary> (Rally organizers told the National Park Service to expect 30,000 people, but law enforcement predicted as many as 80,000 people. In fact, at least 10,000 Trump supporters attended the rally); Jackman, *supra* note 44 (“The full picture of how many among the crowd were armed before the riot occurred is unclear, but . . . growing evidence [shows] that multiple people brought firearms to Washington for Jan. 6, 2021.”); Denbeaux, *supra* note 6 (Of those who were charged the first year, approximately one in four had weapons of some type.). In addition, the Oath Keepers stashed an “arsenal of firearms” in a Virginia hotel room “and were prepared to rush them into the hands of extremists in the capital if needed.” Lindsey Whitehurst, *Oath Keepers jury hears about massive weapon cache on Jan. 6*, ASSOC. PRESS (Oct. 12, 2022), <https://apnews.com/article/capitol-siege-florida-virginia-conspiracy-government-and-politics-6ac80882e8cf61af36be6c46252ac24c>.

with heavy police presence where they could be safely handcuffed and escorted to police vans. Such maneuvers would have prevented many of the armed insurrectionists from storming the capitol while sending the message of swift and certain justice.

Consider the protests in D.C. in April of 2000 against the International Monetary Fund and World Bank, where there may have been as many as 15,000 protesters over the course of several days. A Washington Post reporter observed that on April 15, 2000, “protesters were taken into custody [downtown] as a helicopter whirred overhead and police in riot gear formed double rows on both ends of the street, holding their batons across their chests.”<sup>164</sup> Police arrested 1,300 people over the course of a week.<sup>165</sup> While many of those arrests were probably illegal because the protest was overwhelmingly nonviolent, it demonstrates the ability of D.C. police to handle large crowds and make arrests when they wish to do so.

Two years later, at a similar protest, the D.C. police response was described as “[a] massive local and federal police force [that] outnumbered and overwhelmed anti-globalization protesters yesterday in downtown Washington and quickly stamped out sporadic acts of vandalism . . .”<sup>166</sup> Before January 6, the District had never been a place where police gave up, locked themselves into a box, and allowed vigilantes to roam wild.

There are several lessons to be gleaned from contrasting the police response to Trump supporters on January 6, 2021 with the police response to a peaceful Black Lives Matters protest just six months earlier on June 1, 2020. On that occasion, in the wake of George Floyd protests, law enforcement officers deployed tear gas and shot rubber bullets to forcefully disperse peaceful protestors from Lafayette Park to clear the way for

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<sup>164</sup> Brigid Schulte & Cindy Loose, *Demonstrations Grow Near World Bank, IMF*, WASH. POST (Apr. 15, 2000), <https://www.washingtonpost.com/archive/politics/2000/04/16/demonstrations-grow-near-world-bank-imf/23416c74-d783-4fa6-ab03-860469210f08/>.

<sup>165</sup> Ray Suarez, *Background: The IMF, Policy and Protest*, PBS NEWS (Sept. 27, 2002), <https://www.pbs.org/newshour/show/background-the-imf-policy-and-protest> (“20,000 demonstrators flooded the streets of the nation’s capital to protest the spring gathering of World Bank and IMF officials. Police arrested some 1,300 people. The IMF and World Bank were targets again during a September 2000 meeting in the Czech capital of Prague.”); see also *Jailed World Bank/IMF Protestors Charge D.C. Police and Federal Marshals with Homophobic Abuse, Sexual Harassment*, ACT UP (April 22, 2000), <https://actupny.org/reports/IMF.html>.

<sup>166</sup> Manny Fernandez et. al., *Police Arrest Hundreds in Protests*, WASH. POST (Sept. 27, 2002), <https://www.washingtonpost.com/archive/politics/2002/09/28/police-arrest-hundreds-in-protests/7dc6c9d0-3f88-462a-8800-ad1581b9fd61/>.

President Trump to take a photo in front of St. John’s Church.<sup>167</sup> They did this on President Trump’s order.<sup>168</sup>

First, the inter-agency coordination before the Black Lives Matter protest stands in stark contrast with the lack of coordination exhibited on January 6, 2021. In advance of the BLM protest, the Park Police and the U.S. Secret Service coordinated to establish a unified command to direct law enforcement.<sup>169</sup> Six other law enforcement agencies assisted the Park Police and the Secret Service in the operation to clear and secure Lafayette Park, including the D.C. National Guard, Federal Protective Service, U.S. Marshals Service, MPD, the Bureau of Prisons (BOP), and the Arlington County Police.<sup>170</sup> While Arlington County Police “provided personnel trained in advanced civil disturbance tactics and equipped with specialized personal protective gear,” the Federal Protective Service, BOP, and the U.S. Marshals Service provided tactical support.<sup>171</sup> Both the Park Police incident commander and Secret Service deputy chief jointly coordinated and directed law enforcement agencies. This meant that the various police units were prepared in the event the crowd became agitated or the protest turned violent. Contrast with January 6.

Second, in 2020, the police shifted gears quickly in response to President Trump. It was not until mid-to-late afternoon that the Secret Service informed the Park Police of the President’s potential interest in visiting Lafayette Park.<sup>172</sup> Within approximately two hours, all departments were briefed on the attack plan, positioned throughout Lafayette Park, and “ready to go.”<sup>173</sup> Before the assault on Black Lives Matter marchers, the Park Police dispersed three sound warnings, as a tactic to clear the crowd, stating: “Attention. This is [the incident commander] with the United States Park Police. For safety and security reasons, Lafayette Park and H Street are closed to pedestrians. You are ordered to depart the area

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<sup>167</sup> Elizabeth M. Iglesias, *Trump's Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee*, 11 U. MIA RACE & SOC. JUST. L. REV. 7, 11 (2021).

<sup>168</sup> *Id.* at 24.

<sup>169</sup> OFF. OF INSPECTOR GEN.: U.S. DEP’T. OF THE INTERIOR, REVIEW OF U.S. PARK POLICE ACTIONS AT LAFAYETTE PARK (June 8, 2021) (hereinafter LAFAYETTE PARK INSPECTOR GEN. REPORT), <https://www.oversight.gov/sites/default/files/oi-ports/DOI/SpecialReviewUSPPActionsAtLafayetteParkPublic.pdf>.

<sup>170</sup> *Id.* Increasingly, Park Police must coordinate with other agencies because since 2001, their ranks shrunk to just 508 sworn officers. See Brianna Sacks & Rosalind Adams, *Park Police Officers Worried That Chronic Understaffing Could Endanger The Public. Then The Capitol Riot Happened*, BUZZFEED (Jan. 19, 2021, 1:07 PM), <https://www.buzzfeednews.com/article/briannasacks/us-park-police-capitol-riot-understaffed>.

<sup>171</sup> LAFAYETTE PARK INSPECTOR GEN. REPORT, *supra* note 169, at 5-6.

<sup>172</sup> *Id.* at 10.

<sup>173</sup> *Id.* at 14.

immediately.”<sup>174</sup> In a cohesive move, personnel from the Park Police, the D.C. National Guard, the BOP, the Federal Protective Service, and the U.S. Marshals Service descended on the protestors by firing pepper balls, charging protestors, knocking them to the ground, using tear gas, and shooting rubber bullets.<sup>175</sup> Thus, the 2020 history shows that police agencies are designed to respond and capable of responding quickly to changing events, that the federal and local forces maintain the knowledge and tools to quell rebellions if they so choose.

Third, the reckless use of force during the BLM protest and the January 6 decision that Park Police made to “hold their fire” represent two sides of the same coin. Both were forms of undue deference to the President’s illegal wishes. At President Trump’s request, Park Police were “used as political pawns by former Attorney General Bill Barr to clear [Lafayette Park] quickly,” without proper warning to Black Lives Matter demonstrators.<sup>176</sup> At 6:23 PM on June 1, 2020, what was once a peaceful protest turned into senseless violence. Kishon McDonald, a Navy veteran who was present at the protest, testified before Members of Congress that the crowd was peaceful and did not want any trouble.<sup>177</sup> MSNBC correspondent Garrett Haake echoed this sentiment. He reported that this particular day was “by far the most peaceful day of protest that we’ve had in D.C. . . .” until police moved in.<sup>178</sup> After police violently cleared protestors from the park, President Donald Trump slowly walked from the White House through Lafayette Park to St. John’s Church, the so-called Church of the Presidents, to pose for a photo.<sup>179</sup> President Trump, who has criticized Black Lives Matter protests on numerous occasions, posed for his photo holding a Bible. That photo caused pain to hundreds of individuals.

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<sup>174</sup> *Id.* at 16.

<sup>175</sup> See *The Park Police Attack on Peaceful Protesters at Lafayette Square — Part 1, Unanswered Questions About the U.S. Park Police’s June 1 Attack on Peaceful Protesters at Lafayette Square — Part 2: Oversight Hearing Before the H. Comm. on Natural Resources*, 116th Cong. (2020).

<sup>176</sup> Ben Lefebvre, *Park Police failed to warn BLM demonstrators before clearing Lafayette Park, watchdog says*, POLITICO (June 9, 2021), <https://www.politico.com/news/2021/06/09/dc-police-tear-gas-trump-photo-op-492630> (quote is from Sen. Ron Wyden (D-Or.)).

<sup>177</sup> Barbara Sprunt, ‘Scared, Confused And Angry’: Protestor Testifies About Lafayette Park Removal, NPR (June 29, 2020), <https://www.npr.org/2020/06/29/884609432/scared-confused-and-angry-protester-testifies-about-lafayette-park-removal/>.

<sup>178</sup> Ken Dilanian, *Police did not clear D.C.’s Lafayette Square of protestors so Trump could hold a photo op, new report says*, NBC NEWS (June 9, 2021), <https://www.nbcnews.com/politics/donald-trump/police-did-not-clear-d-c-s-lafayette-park-protestors-n1270126>.

<sup>179</sup> Tom Gjelten, *Peaceful Protesters Tear-Gassed to Clear Way for Trump Church Photo-Op*, NPR (June 1, 2020), <https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visits-angers-church-officials>.



As he stood for the photo, Trump stated ironically, “‘We have the greatest country in the world’ . . . ‘Keep it nice and safe.’”<sup>180</sup>

Vida Johnson argues that the failures leading up to January 6 and the delay in bringing the National Guard to the Capitol during the violent attack may have been intentional; police leaders sought to aid the President’s plot to disrupt the peaceful transition of power away from him.<sup>181</sup> Certainly, bringing in riot police to arrest all the armed members of the crowd attending the Save America rally on January 6 would have embarrassed and thwarted President Trump. Intentional or not, the decision to not enforce the law against armed Trump supporters and to monitor only amounted to a form of undue deference as much as police violently ejecting protesters from Lafayette Park seven months before.

Fourth, over-policing of Black Lives Matter and under-policing on January 6 both contained a racial component in conjunction with an undue deference to President Trump’s wishes. The Black Lives Matter protests were about police violence against Black people and Donald Trump’s open disapproval of the Black Lives Matter movement is one way in which he appeals to a segment of voters. Excessive policing was not simply about the protesters’ race, as Black Lives Matter demonstrations were notably interracial,<sup>182</sup> but also about political goals, for in Trump’s presentations, White people who demonstrate for equality are his opponents, whom he referred to at least once as “‘radical left thugs that live like vermin.’”<sup>183</sup> In the wake of George Floyd (BLM) protests in June of 2020, police in D.C. arrested 289 people per day.<sup>184</sup> In contrast, all the police departments together on January 6, 2021 made only 52 arrests,

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<sup>180</sup> *Id.*

<sup>181</sup> Johnson, *supra* note 26, at 560–61.

<sup>182</sup> See Ahtra Elnashar, *Researchers: White people make up largest portion of protestors*, ABC 7 NEWS (July 29, 2020), <https://wjla.com/news/nation-world/researchers-white-people-make-up-large-portion-of-protestors>; see also Marissa Lang, *D.C. protests over the death of George Floyd have grown bigger and more diverse. That’s not an accident, experts say*, WASH. POST (June 4, 2020), [https://www.washingtonpost.com/local/dc-protests-over-the-death-of-george-floyd-have-grown-bigger-and-more-diverse-thats-not-an-accident-experts-say/2020/06/04/92806226-a677-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/local/dc-protests-over-the-death-of-george-floyd-have-grown-bigger-and-more-diverse-thats-not-an-accident-experts-say/2020/06/04/92806226-a677-11ea-b473-04905b1af82b_story.html).

<sup>183</sup> Bret Samuels, *Trump’s incendiary vermin remarks prompt backlash*, HILL (Nov. 14, 2023), <https://thehill.com/homenews/campaign/4307719-trump-vermin-remark-draws-comparisons-dictators-criticism/>. To understand the anti-Jewish implication of “radical left thugs,” see, e.g., *Fact Check: False claims about George Soros*, REUTERS (June 18, 2020), <https://www.reuters.com/article/world/fact-checkfalseclaims-about-george-soros-idUSKBN23P2X7/> (George Soros, the rich liberal philanthropist who serves as the dog whistle for antisemitic conspiracy theories, “does not ‘own’ ANTIFA or Black Lives Matter.”)

<sup>184</sup> Natasha Lennard, *To See Police Priorities, Contrast Capitol Mob with J20 and Black Lives Matter Protests*, THE INTERCEPT (Jan. 7, 2021), <https://theintercept.com/2021/01/07/capitol-mob-police-j20-black-lives-matter/> (736 people were arrested during the week of BLM protests).

including after the riot ended at the Capitol.<sup>185</sup> Police agreed to act unconstitutionally during the Black Lives Matter protest and stood down on January 6, both to please the President who lacked legal authority to control these departments.

### B. Inaction Cost Lives

In many ways, the rank-and-file Park Police officers on duty on January 6 were in a similar position to Capitol Police officers. Both were set up for failure, with a lack of supplies and a lack of preparation. Both faced emergencies which their upper management ignored. One of the biggest differences between their two experiences was timing. Capitol Police officers recognized the emergency at approximately 1 p.m. when the rioters pushed past protective barriers around the Capitol.<sup>186</sup> Meanwhile, Park Police officers knew they had an emergency at approximately 7 AM, and certainly by 9 AM, that morning.<sup>187</sup> Those four to six hours were crucial.

One of the alarming facts about the January 6 attack was the length of time it took Capitol Police and the D.C. Mayor to mobilize the National Guard. The Capitol Police Chief requested National Guard troops shortly after 1 p.m. on January 6, 2021, less than one hour before insurrectionists breached the Capitol.<sup>188</sup> By the time the first D.C. National Guard troops arrived at the Capitol, it was 5:40 PM, after “most of the violence had ended.”<sup>189</sup> Much of the delay was bureaucratic, causing Jill Goldenziel, a professor at National Defense University-College of Information and Cyberspace, to blame the law. Where a governor can summon the National Guard without waiting for approval from the Pentagon, the mayor of D.C. cannot.<sup>190</sup> Nor can the Capitol Police Chief. Waiting for approval took four hours, hours that were crucial for guarding the Capitol.

This is another instance where responsible actions by Park Police leaders could have averted bloodshed. What if the Guard had been

<sup>185</sup> *Id.*

<sup>186</sup> Kat Lonsdorf et al., *A timeline of the Jan. 6 Capitol attack — including when and how Trump responded*, NPR (Jan 5, 2024), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>.

<sup>187</sup> *See supra*, at Section I.C and note 39.

<sup>188</sup> Robert Farley, *Timeline of National Guard Deployment to Capitol*, FACTCHECK.ORG, <https://www.factcheck.org/2021/01/timeline-of-national-guard-deployment-to-capitol/> (May 24, 2021). Others have put the time frame as 1:49 when the Capitol Police Chief Steven Sund requested the D.C. National Guard. *See Fact Sheet and Timeline: Delayed Response to January 6 Insurrection*, COMMITTEE OVERSIGHT AND REFORM, <https://www.justsecurity.org/wp-content/uploads/2021/06/Jan6-Clearinghouse-House-Oversight-Committee-and-Reform-Fact-Sheet-and-Timeline-Delayed-National-Guard-Response-to-January-6.pdf>. The mayor of DC also put in an urgent request at 1:34 PM. *Id.*

<sup>189</sup> Farley, *supra* note 188.

<sup>190</sup> Jill I. Goldenziel, “*Revolution*” at the Capitol: How Law Hindered the Response to the Events of January 6, 2021, 81 MD. L. REV. 336, 345-46 (2021).

summoned at 7 AM by Park Police leaders as soon as they realized they were short-staffed? Even with a four-hour lag time, that still brings a full National Guard to the Mall at 11 AM. Even if Park Police had waited to call until 9 AM, when multiple response units to the Washington Monument were unable to control the crowd, this would have added four crucial hours to the timeline. This is time that the Guard troops could have used to help arrest people toting assault rifles and other weapons near the Rally, check all abandoned bags for weapons, frisk those who refused to enter through the metal scanners, and establish control of the crowd.

Imagine the difference if these arrests and weapon seizures were accomplished before Trump urged the crowd to go to the Capitol “to fight like hell or you won’t have a country anymore.” Instead, Park Police leadership told their officers to monitor only, allowing the President’s supporters to violate the law with impunity.

There is wide agreement that the Capitol Police chief was derelict in his responsibility to protect the Capitol. One day after the building was stormed, Capitol Police Chief Steven Sund submitted his resignation. Only one month later, the National Park Service also replaced “embattled acting Chief Gregory Monahan” of the Park Police.<sup>191</sup> However, the Park Police Chief was not dismissed for his dereliction of duty on January 6. Unlike Chief Sund who was forced out because of his failure to prepare the Capitol Police for the January 6 threat, the Park Police leader was forced out for his role in clearing Lafayette square of Black Lives Matter protesters.<sup>192</sup> Chief Monahan was blamed for using smoke canisters to clear peaceful protesters from Lafayette Square in June of 2020 so that President Trump could walk to a church for a photo. While both departments failed to properly prepare for the Stop the Steal mob, only Sund was

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<sup>191</sup> Rob Hotakainen, *NPS picks first African American woman as Park Police chief*, E&E NEWS PM (Feb. 25, 2021, 4:20 PM), <https://subscriber.politicopro.com/article/eenews/1063726061>.

<sup>192</sup> See Michael Doyle, *Park Police chief’s abrupt retirement comes amid complaints*, POLITICO E&ENEWS (April 11, 2022), <https://www.eenews.net/articles/park-police-chiefs-abrupt-retirement-comes-amid-complaints/> (In February of 2021, Chief Pamela Smith “rose to the top job after Monahan, who had overseen the agency in an acting capacity since 2019, drew Capitol Hill criticism over his handling of the June 1, 2020, protest at Lafayette Square near the White House that erupted into violence. House Democrats and other critics said the Park Police used excessive force in chasing away protesters before then-President Donald Trump crossed the street to pose for photographs in front of St. John’s Episcopal Church.”) Monahan showed loyalty to President Trump when he testified to a House Committee about Lafayette Park, claiming that “the removal of demonstrators . . . was not ordered by the White House or the Justice Department.” Tom Jackman, *Park Police chief says he knew Trump was coming, but Lafayette Square clearing was unrelated*, WASH. POST (July 28, 2020), <https://www.washingtonpost.com/dc-md-va/2020/07/28/park-police-chief-says-he-knew-trump-was-coming-lafayette-square-clearing-was-unrelated/>.

asked to resign by Nancy Pelosi. The role of Park Police leadership in failing to protect the public has mostly avoided public scrutiny.

### C. *The Unpoliced*

Under-policing is less visible than over-policing. Perhaps that explains why journalists and scholars have not written about the decision by Park Police to turn a blind eye towards crime on the Mall. But that does not mean that under-policing is harmless. Randall Kennedy famously argued in the 1990s that under-enforcement of violent crime in African American neighborhoods was worse than over-enforcement.<sup>193</sup> More recently, Shima Baradaran Baughman noted a general “lack of recognition about the harms of under-policing and structural marginalization of poor communities of color . . . harms caused by not solving murders of loved ones, rapes of daughters and sons, and burglaries . . .”<sup>194</sup> Some departments also ignore hate crimes and unlawful police violence against civilians in Black communities.<sup>195</sup> Women bear the brunt of under-policing in jurisdictions where police departments fail to investigate rape complaints.<sup>196</sup> The refusal to arrest and prosecute perpetrators for crimes that primarily affect women is what Deborah Tuerkheimer calls “gender-based underenforcement.”<sup>197</sup>

Failing to protect certain groups serves to immunize others. Mary Anne Franks argues that white men are “essentially unpoliced” when it comes to crimes against women. Among the entitled, “so many are never stopped, frisked, investigated, or questioned when they have been credibly accused of or even proven to have committed wrongdoing.”<sup>198</sup> The unpoliced also creates a problem for democracy. “Our society is in the grip not

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<sup>193</sup> RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19 (1997); Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 878 (2020); see also JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 35 (2017). Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1744-45 (2023) (“Randall Kennedy is the most important late twentieth-century scholar of the African American security interest, taking the torch from Du Bois.”).

<sup>194</sup> Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 129-30 (2021).

<sup>195</sup> Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1290 & nn.11-13 (2016).

<sup>196</sup> See *id.* at 1294 & n.35.

<sup>197</sup> *Id.* at 1327-28 & n.239 (citing THOMAS E. PEREZ & MICHAEL W. COTTER, U.S. DEP’T OF JUSTICE, RE: THE UNITED STATES’ INVESTIGATION OF THE MISSOULA POLICE DEPARTMENT 7 (2013), [https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind\\_5-15-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf)).

<sup>198</sup> Mary Anne Franks, *Unpoliced*, 53 NEW ENG. L. REV. 217, 220 (2019) (reviewing Barry Friedman, *Unwarranted: Policing Without Permission* (2017)).

only of undemocratic *over*-policing, but undemocratic *under*-policing,” wrote Franks.<sup>199</sup>

The uncharged weapon offenses of January 6 established a particular unpoliced group, namely violent Trump supporters. The “entitled” suspects who attended the Trump rally were “never stopped, frisked, investigated, or questioned” even when police saw them committing crimes. Certainly, those immunized by police inaction on January 6 were almost all White men, men who supported a world view that was hostile to feminism and civil rights. But this moment was also different from everyday immunity based on race, class, and gender. The January 6 harms were political harms with the perpetrators advocating political and treasonous violence. The intended victims of the uncharged weapon offenses of January 6 were voters and the government.

Under-enforcement can embolden perpetrators and future perpetrators. In the context of race, at least one court recognized that lack of accountability often leads to future criminality. “Would-be criminals will act with a greater impunity if they believe they have a get out of jail free card if they commit crimes against the disfavored group,” the Ninth Circuit wrote in the context of police refusing to investigate or arrest a drunk driver.<sup>200</sup>

There has been a measure of accountability for the January 6 rioters. Although the Park Police failed to prevent the attack by making arrests on the Mall, and officers at the Capitol were too overpowered to arrest the rioters there, in the months and years following the breach the Justice Department tracked down hundreds of insurrectionists. While many of those who brought weapons to the Capitol may never be charged, the prosecutions discourage future violence. With over 1,400 defendants charged, hundreds of guilty pleas, and at least 186 guilty trial verdicts, the Justice Department removed the veneer of invincibility or impunity that the Park Police initially bestowed on rioters on January 6.<sup>201</sup>

Unfortunately, accountability for the insurrectionists may prove vulnerable to appeals and pardons. The Republican-appointed justices on the Supreme Court created some barriers to accountability for both rioters and the former president. On June 28, 2024, the Supreme Court overturned federal charges for “obstructing, influencing or impeding official proceeding” by people who “joined a mob of rioters that breached the Capitol”

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<sup>199</sup> *Id.* at 220.

<sup>200</sup> *Elliot-Park v. Manglona*, 592 F.3d 1003, 1006-7 (9th Cir. 2010) (allegedly “because of racial animus against her as a Korean and in favor of” a Micronesian driver who was the same race and ethnicity as the police. This occurred in Saipan, part of the United States Territory of CNMI in the Pacific Ocean, known as the Mariana Islands).

<sup>201</sup> *43 Months Since the Jan. 6 Attack on the Capitol*, U.S. ATT’Y. OFF. D.C., <https://www.justice.gov/usao-dc/42-months-jan-6-attack-capitol> (last visited Dec. 15, 2024).

and “forced Congress to suspend the proceeding.”<sup>202</sup> This ruling in *Fischer v. United States* forced the Justice Department to dismiss felony indictments against some of the Oath Keepers and Proud Boys and others within the “small core group” of defendants who allegedly acted with the intent to block lawmakers from certifying the election.<sup>203</sup> Donald Trump also faces two counts of obstructing an official proceeding in relation to the certification process, although his alleged acts likely fit within the new Court framework.

While the Court’s *Fischer* decision made Special Counsel Jack Smith’s job of prosecuting Trump more difficult, the Supreme Court’s July 1, 2024 immunity decision delivered a serious blow to prosecuting the ex-president for his role on January 6. In *Trump v. United States*, the Court decided to give presidents immunity for crimes the Court categorized as “official actions.”<sup>204</sup> The Court bestowed absolute immunity on Trump for crimes committed during his presidency for actions that would be considered part of a president’s “core constitutional powers” if they were not felonious. As Justice Sotomayor wrote in dissent: “Orders the Navy’s Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.”<sup>205</sup> Addressing presidential crimes committed during non-core official actions, the Court also granted Trump immunity, either “presumptive immunity” or absolute immunity, to be decided at another time. For any remaining crimes to which these new immunity rules did not apply, the Court added yet another hurdle to encumber prosecutions. Under the usual rules of evidence, prosecutors will often introduce uncharged misconduct or other evidence that reveals a defendant’s motive and helps prove the defendant’s intent. However, the Court

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<sup>202</sup> *Fischer v. United States*, 144 S. Ct. 2176 (2024) (narrowly interpreting a felony statute used against one of the January 6 defendants, while only the dissent acknowledged that January 6 involved a “mob of rioters” who breached the Capitol, forcing Congress to suspend the proceeding.) *Id.* at 2194 (Barrett, J., dissenting). On remand, Joseph Fischer will face six other charges. Hannah Rabinowitz & Katelyn Polantz, *January 6 rioter no longer faces obstruction charge after Supreme Court ruling, will face trial on other charges*, CNN (Aug. 29, 2024), <https://www.cnn.com/2024/08/29/politics/joseph-fischer-january-6/index.html>. (Fischer is a former Pennsylvania police officer who allegedly yelled “Charge!” and ran into the US Capitol on January 6, 2021, and texted that that protesters should drag Democrats “into the street and have a mob trial.”).

<sup>203</sup> Spencer Hsu, *U.S. begins dropping Jan. 6 obstruction charges for some Proud Boys, others*, WASH. POST (July 16, 2024), <https://www.washingtonpost.com/dc-md-va/2024/07/16/jan-6-defendants-obstruction-charges-drop/> (“As many as 259 Jan. 6 defendants who were convicted or awaiting trial on the count may seek to vacate their convictions, sentences or plea deals,” although most were convicted of other felonies as well.).

<sup>204</sup> *Trump v. United States*, 144 S.Ct. 2312, 2327 (2024) (Sotomayor, J., dissenting).

<sup>205</sup> *Id.* at 2356.

now forbids Jack Smith from using any of the immune criminal acts to prove the defendant’s criminal motive at trial for whatever charges survive the new immunity rule.

Shortly after the Supreme Court’s ruling, the Florida District Court judge in Trump’s classified document case dismissed all the charges against him and his cohorts for stealing and concealing documents including national defense information, a felony under the Espionage Act.<sup>206</sup> Florida District Court Judge Aileen Cannon based her ruling on the dubious theory that the Attorney General could not appoint Jack Smith as a special prosecutor because he came from outside of government, violating the separation-of-powers principle.<sup>207</sup> Even if the ruling is overturned on appeal, the delay might permit Donald Trump to regain the presidency and appoint an attorney general who will remove the special prosecutor. As president, Trump can appoint an Attorney General who will dismiss all the pending federal cases against him.

With these recent decisions, Donald Trump becomes the most unpoliced criminal suspect in the country. Many people will hear the news of the Supreme Court decision as an exoneration, a confirmation that Donald Trump did not commit any crimes when he organized a coup to stay in power.<sup>208</sup> Given that Trump was the person who summoned his supporters to the Capitol and who directed them to the Capitol, his immunity clashes with the convictions of his supporters. People who view the Court’s decision as an exoneration will no longer view the guilty verdicts of the rioters as fair and just. One goal of prosecuting the January 6 defendants was to demarcate the line between lawful protest and illegal acts, but an exoneration of the leader of the conspiracy blurs this distinction. Moreover, if Trump becomes President again, he now has impunity to commit crimes and issue illegal orders. How then can the government prosecute military or civilians for following the illegal orders of an immune President?

The pardon power represents another vulnerability in the finality of convictions for insurrectionists. The whitewashing of the crimes began with denials of wrongdoing, that the people who stormed the Capitol were

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<sup>206</sup> Charlie Savage, *Cannon’s Dismissal of Trump Case Rejects Precedents of Higher Courts*, N.Y. TIMES (July 15, 2024), <https://www.nytimes.com/2024/07/15/us/politics/cannons-dismissal-of-trump-case-rejects-precedents-of-higher-courts.html>.

<sup>207</sup> *Id.*; United States v. Donald Trump, No. 23-80101-CR-CANNON, 2024 U.S. Dist. LEXIS 123552 \*, at \*4-\*5 (S.D. Fl. 2024) (order granting motion to dismiss).

<sup>208</sup> Trump posted “TOTAL EXONERATION!” on his Truth Social platform. “It is clear that the Supreme Court’s Brilliantly Written and Historic Decision ENDS all of Crooked Joe Biden’s Witch Hunts against me, including the WHITE HOUSE AND DOJ INSPIRED CIVIL HOAXES in New York.” Melissa Goldin, *FACT FOCUS: Trump wasn’t exonerated by the presidential immunity ruling, even though he says he says he was*, AP NEWS, (Jul 3, 2024, 4:52 PM), <https://apnews.com/article/trump-fact-check-immunity-supreme-court-exoneration-f5ee8ff71d2153da3efbf7bb0818d249>.

patriots and peaceful protesters, invited into the building by police officers.<sup>209</sup> Trump has told his supporters that it was “a beautiful day.”<sup>210</sup> By January of 2024, only eighteen percent of Republicans believed the attack was violent.<sup>211</sup> Two years after the assault on the Capitol, Trump began playing a jailhouse rendition of the National anthem during some campaign events, sung by the prisoners he calls “patriots.” As the rhetoric of innocence increased, Trump began referring to the insurrections as “political prisoners” and then “hostages.”<sup>212</sup> On March 12, three years after the attack, Trump promised pardons, posting on social media that one of his “first acts” as President will be to “[f]ree the January 6 Hostages.”<sup>213</sup> Thus, underenforcement is a problem from under-policing through conviction. If the January 6 convictions appear vulnerable to full pardons, it is more likely that Trump supporters will use violence in the future to try to overturn an election or intimidate voters or election workers.

#### D. How Democracies End

The cost of under-policing, for allowing Trump’s armed supporters to roam free, unconstrained by law, extends beyond January 6. This section will show that deference, under-enforcement, or professional courtesy by any name poses an existential threat to American democracy.

Some histories that describe the rise of European fascism point to the role of under-policing. For example, Italian police began with “passive acceptance” of the fascist movement’s illegal activities along with active participation in fighting the left.<sup>214</sup> As early as 1922, Italian police refused to stop the violence perpetrated by fascist sympathizers. “Fascists continued their attacks on the workers’ movement, often without the police intervening to stop them,” wrote historian Jonathan Dunnage.<sup>215</sup>

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<sup>209</sup> Daniel Dale & Marshall Cohen, *Fact check: Five enduring lies about the Capitol insurrection*, CNN, <https://www.cnn.com/2022/01/04/politics/fact-check-capitol-insurrection-january-6-lies/index.html> (Jan 5, 2022, 12:37 AM); see also Liz Skalka, *Trump Called Jan. 6 A ‘Beautiful Day.’ His Lawyer Calls It A ‘Riot.’*, HUFFPOST (Feb. 8, 2024), [https://www.huffpost.com/entry/donald-trump-jan-6-supreme-court\\_n\\_65c517b8e4b093b2e782cf06](https://www.huffpost.com/entry/donald-trump-jan-6-supreme-court_n_65c517b8e4b093b2e782cf06).

<sup>210</sup> Skalka, *supra* note 209.

<sup>211</sup> Kayla Epstein, *January 6: The day that still divides America, three years on*, BBC (Jan. 5, 2024), <https://www.bbc.com/news/world-us-canada-67889403>.

<sup>212</sup> See *Id.*; Nichols, *Pardon Promise*, *supra* note 6; Doc Louallen et al., *Jan. 6 rioters, supports work to rewrite history of the attack on the capitol*, ABC NEWS (July 22, 2024), <https://abcnews.go.com/Politics/jan-6-rioters-supporters-work-rewrite-history-attack/story?id=111986051>.

<sup>213</sup> Nichols, *Pardon Promise*, *supra* note 6 (emphasis added) (“My first acts as your next President will be to Close the Border, DRILL, BABY, DRILL, and Free the January 6 Hostages being wrongfully imprisoned!”).

<sup>214</sup> Dunnage, *supra* note 89, at 94-96.

<sup>215</sup> JONATHAN DUNNAGE, *THE ITALIAN POLICE AND THE RISE OF FASCISM: A CASE STUDY OF THE PROVINCE OF BOLOGNA, 1897-1925* 117 (1997).



Timothy Snyder, a Professor of History at Yale University who specializes in European nations that evolved from democracies into fascist or totalitarian regimes during the 20th century, explains that it is “impossible to carry out democratic elections, try cases at court, design and enforce laws, or indeed manage any of the other quiet business of government when agencies beyond the state also have access to violence.”<sup>216</sup> Once police lose their monopoly on violence and defer to armed hate groups and paramilitaries that support the insurgent leader, democracies will fall: “Armed groups first degrade a political order, and then transform it.”<sup>217</sup>

In his book *On Tyranny*, Snyder explains the demise of a democracy, how violence moves from fascist-type rallies to the streets, from rhetoric to action, and from the streets to police and the armed services:

For violence to transform not just the atmosphere but also the system, the emotions of rallies and the ideology of exclusion have to be incorporated into the training of armed guards. These first challenge the police and military, then penetrate the police and military, and finally transform the police and military.<sup>218</sup>

Snyder stresses the importance of democracies retaining police and armies that follow the law. “If only the government can legitimately use force, and this use is constrained by law, then the forms of politics that we take for granted become possible.”<sup>219</sup> While Snyder does not use the term “thin blue line,” it is time to claim that term to reference the importance of police departments across this country that prevent violence from members of fascist or anti-government organizations and other Trump supporters.

The threat of future insurrectionist violence is not merely theoretical. One can trace the violence and threats of violence to the 2016 campaign, where supporters chanted “Lock her up” at rallies, referring to Trump’s opponent, Hillary Clinton, and at a 2015 rally, where members of the crowd kicked and punched a man who shouted, “Black lives matter!” when Trump told the crowd, “Throw him out!”<sup>220</sup> That’s the ideology of

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<sup>216</sup> Snyder, *supra* note 18, at 43.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 45.

<sup>219</sup> *Id.* at 43.

<sup>220</sup> Peter W. Stevenson, *A brief history of the ‘Lock her up!’ chant by Trump supporters against Clinton*, WASH. POST (Nov. 22, 2016 at 4:56 p.m), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/> (Lock her up became “the most popular chant of Donald Trump’s campaign,” beginning in the summer of 2016, “a go-to refrain, punctuating every mention of Clinton’s name.”); For the rough treatment of a protester, see Jenna Johnson & Mary Jordan, *Trump on rally protester: ‘Maybe he should have been roughed up’*, WASH. POST (Nov. 22, 2015, 3:29 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/22/black-activist-punched-at-donald-trump-rally-in->

exclusion, suggesting that America belongs to only Trump's team. Next, Trump actively courted police and military to vote for him, promising that they would not be governed by constitutional constraints if he was elected.<sup>221</sup> As President, Trump urged the military leaders to intervene in civil rights protests around the country, saying "beat the f-k out" of the protesters and "just shoot them."<sup>222</sup>

In March of 2024, Trump declared that there would be a "bloodbath" if he is not re-elected.<sup>223</sup> Then in the months leading up to the 2024 election, Trump continues to claim that the 2020 election was rigged or stolen and refuses to unconditionally accept the 2024 results.<sup>224</sup> These conditions are reflected in a July 2024 filing by the Justice Department on whether a court should release a convicted January 6 defendant pending appeal. "If the defendant is released, the Court would be releasing him into the same volatile political climate & unrest that led him to commit his crimes in the 1st place . . . an unacceptable risk to the safety of the community."<sup>225</sup>

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birmingham/ (Trump had said "Throw him out!" at the rally and then the next morning, Trump told a TV audience, "Maybe he should have been roughed up.").

<sup>221</sup> *Trump to police: 'please don't be too nice' to suspects*, ABC NEWS (July 28, 2017, 6:39 PM), <https://abcnews.go.com/Politics/trump-police-nice-suspects/story?id=48914504>; Jeffry Robinson, *Donald Trump's Talk to Police Officers Was Police-State Authoritarianism Distilled to Its Essence*, ACLU (July 31, 2017), <https://www.aclu.org/news/criminal-law-reform/donald-trumps-talk-police-officers-was-police>.

<sup>222</sup> Zachery Cohen, *Top US general rejected Trump suggestions military should 'crack skulls' during protests last year, new book claims*, CNN (June 24, 2021, 6:33 PM), <https://www.cnn.com/2021/06/24/politics/bender-book-trump-milley-protests/index.html> (According to General Michael Bender, Trump said "Just shoot them," on multiple occasions inside the Oval Office. When Joint Chiefs Chairman General Mark Milley and then Attorney General Bill Barr explained to Trump that they couldn't "just shoot" people, the president came up with an alternative suggestion. "Well, shoot them in the leg — or maybe the foot," Trump reportedly said. "But be hard on them!"). MICHAEL C. BENDER, FRANKLY, WE DID WIN THIS ELECTION (2021).

<sup>223</sup> Nichols, *Pardon Promise*, *supra* note 6.

<sup>224</sup> Rashard Rose & Kate Sullivan, *Trump says he will only accept 2024 election results 'if everything's honest'*, CNN (May 2, 2024, 11:52 AM), <https://www.cnn.com/2024/05/02/politics/donald-trump-accept-2024-election-results/index.html>. In fact, Trump switched his vice presidential candidate from Mike Pence, who certified the results of the Biden victory, to J.D. Vance, who "said he would have done what Vice president Mike Pence refused to do — ignore the Constitution and try to derail certification of Trump's election loss in 2020." Colby Itkowitz et al., *In Vance, Trump finds a kindred spirit on election denial and Jan. 6*, WASH. POST (July 17, 2024, 6:00 AM), <https://www.washingtonpost.com/politics/2024/07/17/vance-trump-january-6-election-denial/>.

<sup>225</sup> Laurence Hammack, *Ex-Rocky Mount police officer convicted in Jan. 6 case to remain in prison — for now*, ROANOKE TIMES (Jul 26, 2024), <https://roanoke.com/news/local/crime-courts/ex-rocky-mount-police-officer-convicted-in->

To retain a democracy, Snyder explains, police must be “constrained by law,” separate and uncompromised by the paramilitaries that answer only to one man, one insurgent. Authoritarian strong men will encourage private militias, such as the Oath Keepers who guarded Roger Stone, and all the organized groups that answered Trump’s call for a violent response at the Capitol. The last section focused on how Trump’s Make America Great Again (MAGA) movement penetrated various police forces, but the military was also not immune. QAnon is one example. This antisemitic hate-group that began during Trump’s first term believes that “an elite cabal of satanic pedophiles have corrupted every level of government” and that President Trump will fight them using the military.<sup>226</sup> QAnon adherents penetrated the armed services where they recruited other adherents into the armed forces. If Donald Trump regains power through an election or a coup, we can expect him to transform the police and military into his army.<sup>227</sup> He tried to do this in his first term, but Army General Mark Milley refused.<sup>228</sup> Next time, President Trump will seek to appoint a more compliant general as his Army chief of staff.

When Snyder wrote that the threats and violence would begin with a leader whose armed followers “first challenge the police and military,” he might have been imagining January 6. The violent followers literally challenged Capitol police officers, physically fighting them. But police officers faced another type of challenge as well. Officers on the Mall were challenged to follow the law and make arrests despite the lure of belonging to a new vision of America, an exclusive MAGA universe, where violence is accepted and restrictions do not apply to them. We must not wait. Once

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jan-6-case-to-remain-in-prison-/article\_4ddda186-4b75-11ef-ac0f-63c0ee39033e.html.

<sup>226</sup> Liz Yates, *Digital Soldiers*, HUM. RTS. FIRST 5 (Dec. 2022), [https://humanrightsfirst.org/wp-content/uploads/2022/12/Digital-Soldiers\\_QAnon-Report.pdf](https://humanrightsfirst.org/wp-content/uploads/2022/12/Digital-Soldiers_QAnon-Report.pdf); (“QAnon’s effort to create the perception that they are allied with the U.S. military has particularly alarming implications for our democracy.”) *Id.* at 4. Moreover, the “QAnon extremist movement presents a growing and direct threat to the military community, communities frequently targeted by extremists, democratic institutions and processes, and ultimately American democracy. *Id.*”

<sup>227</sup> See, e.g., Dan Lamothe, *Milley told Jan. 6 panel he’s become a political ‘lightning rod’*, WASH. POST, (Jan. 3, 2023, 7:33 PM), <https://www.washingtonpost.com/national-security/2023/01/03/mark-milley-january-6-interview/> (“Milley expressed frustration with a number of events he saw challenging the military’s nonpartisan nature.”)

<sup>228</sup> See Zachery Cohen, *Top US general rejected Trump suggestions military should ‘crack skulls’ during protests last year; new book claims*, CNN, (June 24, 2021, 6:33 PM), <https://www.cnn.com/2021/06/24/politics/bender-book-trump-milley-protests/index.html>; see also Lauren Sforza, *GOP’s Gosar suggest Milley Should be hung for Jan. 6 response*, HILL, (Sept. 25, 2023, 10:08 AM), <https://thehill.com/homenews/house/4221450-gosar-milley-hung/> (the extreme language hurled at General Milley for following the law).

an authoritarian leader transforms the police and military, it will be too late.

*E. How to Address Under-policing of White Nationalists*

Three months before the insurrection, the Department of Homeland Security warned that “violent white supremacy was the ‘most persistent and lethal threat in the homeland.’”<sup>229</sup> Nevertheless, the Capitol Police and the Park Police ignored specific warnings about these groups coming to D.C. for Trump’s rally. Despite the prosecution of insurrections, Homeland Security reports heightened risk, stating that “[d]omestic extremists ‘likely remain emboldened’” as the 2024 election approaches.<sup>230</sup> “We expect the 2024 election cycle will be a key event for possible violence,” according to a Homeland Security Department bulletin.<sup>231</sup>

Once we recognize the risk that police leadership will not protect the country against dangerous groups, even when it places their own officers in peril, the question becomes how to prevent this from occurring again. Police departments must change their protocols. The country can no longer rely on police leadership to call the National Guard or other reinforcement units when the threat comes from white nationalists and other pro-Trump groups. Instead, a special police force for democracy should be formed that is alert and ready to respond whenever there’s a large event, such as the Unite the Right riot in Charlottesville or Stop the Steal on January 6, any protest that is likely to attract groups that have been designated as a “lethal threat in the homeland.”

Vida Johnson recommends a variety of methods to weed out racist and compromised police officers.<sup>232</sup> Indeed, the push for anti-racist, antisubordination principles to guide the changes to police departments connects with the goal of protecting American democracy. It is a necessary and commendable goal to purge all police departments of openly racist officers, but it will take time, more time than the likely next challenge by armed white nationalists. While all police departments should prevent infiltration by Oath Keepers or hate group members or white nationalist sympathizers, this pro-democracy force can implement such screening quickly and

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<sup>229</sup> 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>].

<sup>230</sup> Sasha Pizenik & Josh Margolin, *The top threats facing the 2024 election*, ABC NEWS, (Feb. 2, 2024, 6:02 AM), <https://abcnews.go.com/Politics/2024-election-face-complicated-array-threats-dhs/story?id=106879560>.

<sup>231</sup> HOMELAND SECURITY OFF. OF INTEL. & ANALYSIS: HOMELAND THREAT ASSESSMENT v (2024).

<sup>232</sup> Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 234-241 (2019); see also Johnson & Beutel, *supra* note 12, at 13-15 (policy recommendations for how to eliminate insider threats from white nationalists).

efficiently and need not wait for the larger police departments around the country to reform. This pro-democracy force might be part of the National Guard or be independent — in either circumstance, it would not be subject to the four-hour wait for military backup that occurred on January 6.<sup>233</sup>

Imagine a scenario such as January 6 where Park Police officers call for back-up but only receive small “response teams” and an order to stop arresting people. In that instance, rank-and-file officers, including Park Police, Capitol Police, and MPD should be allowed to alert the pro-democracy response force who can then start to investigate the situation with drones and other surveillance tools to determine if the police are indeed unable to control an armed crowd. This pro-democracy force can then act without waiting for department leadership, who may be corrupted by sympathies to the mob and its leader.

There are dangers in creating a federal response to protesters. For example, a politicized Homeland Security might designate a non-violent group as a threat, the way the FBI coined the term “Black Identity extremists” in 2017 to refer to anyone who attacked law enforcement who happened to be Black, and even more troubling, inaccurately equating Black anti-police incidents as an equal threat to White supremacists.<sup>234</sup> On the other hand, it is not clear that a federal pro-democracy force will make the police response to civil rights protesters any worse than it would be without the new force. In fact, if members of the new force are properly vetted to prevent racists and white nationalists from joining as proposed, one would expect fairer policing than what BLM protesters experienced in 2020. Another difficulty is circumventing laws that prevent anyone but the

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<sup>233</sup> This article rejects the idea that Secret Service should serve as the democracy back-up team. *But see* Maria Sacchetti & Jacqueline Alemany, *Inspector general issues report on Secret Service’s handling of Jan. 6 attack*, WASH. POST (Aug. 1, 2024, 6:47 PM), <https://www.washingtonpost.com/national-security/2024/08/01/secret-service-january-6-attack-inspector-general/> (“The report also recommended that the Secret Service develop protocols so that it could more quickly dispatch agents to support local law enforcement in case of an emergency such as Jan. 6.”). The report was issued by Inspector General Joseph Cuffari who was appointed by President Trump. *Id.* The Secret Service could not be trusted as the thin blue line against a right-wing coup. As a 2015 report found, the Secret Service had “an insular culture that resisted change.” *Id.*; *see also* Olivia Beavers & Kyle Cheney, *DHS leaders clashed with watchdog ahead of report on Secret Service’s handling of Jan. 6*, POLITICO (July 31, 2024, 2:03 PM), <https://www.politico.com/news/2024/07/31/dhs-january-6-report-inspector-general-clash-00172084>.

<sup>234</sup> Jane Winter et al., *New terrorism guide shows FBI still classifying Black ‘extremists’ as domestic terrorism threat*, YAHOO NEWS (Dec. 30, 2020), [https://www.yahoo.com/news/new-terrorism-guide-shows-fbi-still-classifying-black-extremists-as-domestic-terrorism-threat-190650561.html?fr=sycsrp\\_catchall](https://www.yahoo.com/news/new-terrorism-guide-shows-fbi-still-classifying-black-extremists-as-domestic-terrorism-threat-190650561.html?fr=sycsrp_catchall).

President or the governor of a state from calling the National Guard.<sup>235</sup> These laws are designed to make it more difficult for a leader to use the military on American soil. While these concerns are valid, the thin blue line is at risk by under-policing, especially where violence threatens democracy. Given the current threat level, the American people cannot simply hope that brave, pro-democracy leaders happen to head up the various police departments that may be called upon to protect people from violent militias.

#### CONCLUSION

“Domestic violent extremism poses one of the most significant terrorism related threats to the United States” according to the U.S. Department of Homeland Security.<sup>236</sup> The threat did not end after January 2021. In fact, it has grown.<sup>237</sup> The Southern Poverty Law Center, which tracks hate groups, found that in the three years since January 6, 2021, the far-right have regrouped and “have meticulously prepared the groundwork for an authoritarian takeover and a more deeply divided nation.”<sup>238</sup> As one of the lead architects of Project 2025 stated, “we are in the process of the second American Revolution, which will remain bloodless if the left allows it to be.”<sup>239</sup>

With Donald Trump’s return to the White House, Americans face an increased threat of violence from alt-right and racist groups. Whether it be another “Unite the Right” march or a “Save America” rally like the one on January 6, 2021, when Trump summoned his supporters to Washington to use violence to achieve political ends, the question looms: Will the police protect us from these mobs?

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<sup>235</sup> See generally Jill I. Goldenziel, *“Revolution” at the Capitol: How Law Hindered the Response to the Events of January 6, 2021*, 81 MD. L. REV. 336, 336, 345-46 (2021) (“Together, Congress and the DoD have created a web of statutes, regulations, and policies that generate confusion about who bears responsibility for enforcing the law when extraordinary emergencies occur on U.S. soil.”); Christopher F. Melling, *Why the President Should Remain Commander in Chief of the D.C. National Guard*, 47 B.Y.U. L. REV. 711, 716 (2022).

<sup>236</sup> DHS Releases Report on Internal Review of Domestic Violent Extremism, HOMELAND SECURITY (March 11, 2022), <https://www.dhs.gov/news/2022/03/11/dhs-releases-report-internal-review-domestic-violent-extremism>.

<sup>237</sup> Will Carless, *Far-right extremist groups show surging growth, new annual study shows*, USA TODAY (June 7, 2024, 6:08 AM), <https://www.usatoday.com/story/news/investigations/2024/06/07/splc-annual-hate-group-report/74007339007/>.

<sup>238</sup> S. POVERTY L. CTR., THE YEAR IN HATE AND EXTREMISM 1 (2023), <https://www.splcenter.org/resources/year-hate-extremism-2023>.

<sup>239</sup> Ali Swenson, *A conservative leading the pro-Trump Project 2025 suggests there will be a new American Revolution*, AP NEWS (July 3, 2024), <https://apnews.com/article/project-2025-trump-american-revolution-6e02a297fb91b55de01ba7e86615bb08>

Some of Trump’s plans for a second term would thwart police efforts to control white nationalist violence. In his second term, Trump promises to sign legislation called the Concealed Carry Reciprocity Act that would overrule state and local gun restrictions.<sup>240</sup> As the Center for American Progress explains, if enacted into law, the proposed federal legislation would “enable tourists with criminal histories” and members of hate groups that arrive in D.C. for nefarious purposes “to carry loaded and hidden firearms in busy places such as . . . the National Mall in Washington, D.C., no questions asked.”<sup>241</sup> While this article faulted Park Police leaders for failing to use their powers of stop, frisk and arrest to prevent armed individuals from walking to the Capitol with guns, this campaign promise would make these tools obsolete against armed protesters. If it is no longer a crime for visitors who lives in an open carry states to carry guns in D.C., then law enforcement could not use their stop and arrest powers to control an armed and angry crowd. In 2021, the Oath Keepers stashed most of their firearms in Virginia during the insurrection for a “quick reaction force,” because they knew firearms were illegal in the District; next time they will bring them into the city next time they take part in a planned attack.<sup>242</sup> Imagine a future insurrection where the flag poles, batons and tasers of January 6 are exchanged for rifles and Glocks. The promised law “would thwart law enforcement’s ability to keep communities safe” and thwart its ability to stop an armed rebellion.<sup>243</sup>

Donald Trump has also threatened a federal takeover of the Washington D.C., including its police department. Calling Washington “a nightmare of murder and crime,” Trump promised to take over the capital to

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<sup>240</sup> Anna Kutz, *Trump has promised ‘concealed carry reciprocity.’ What would it do?*, YAHOO NEWS (Nov. 15, 2024), [https://www.yahoo.com/news/trump-promised-concealed-carry-reciprocity-024817610.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAIC-MnPhznrRtgaC5KdKZS5TXzX-rtKCc3-um91sOmcJVg-av0CGQj5R3bB2fX0v1bjZX8lynQRC\\_7Y1trM-2scns7VZhIX-0GRMjTgw2gutvmAVBNrfHdAGMeD6k4UaRcTqEucNrrgItb-6cZNscIs-sleUzwWV01\\_CRY4Ur8IRy](https://www.yahoo.com/news/trump-promised-concealed-carry-reciprocity-024817610.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAIC-MnPhznrRtgaC5KdKZS5TXzX-rtKCc3-um91sOmcJVg-av0CGQj5R3bB2fX0v1bjZX8lynQRC_7Y1trM-2scns7VZhIX-0GRMjTgw2gutvmAVBNrfHdAGMeD6k4UaRcTqEucNrrgItb-6cZNscIs-sleUzwWV01_CRY4Ur8IRy) (referring to Concealed Carry Reciprocity Act of 2017, H.R. 38, 117th Cong. (2021-2022)).

<sup>241</sup> Nick Wilson, *Project 2025 Would Increase Gun Violence, Reversing Historic Declines*, CTR. FOR AM. PROGRESS (July 23, 2024), <https://www.americanprogress.org/article/project-2025-would-increase-gun-violence-reversing-historic-declines/>

<sup>242</sup> SELECT COMM. TO INVESTIGATE THE JANUARY 6<sup>TH</sup> ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 515 (2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

<sup>243</sup> Nick Wilson, *Project 2025 Would Increase Gun Violence, Reversing Historic Declines*, CTR. FOR AM. PROGRESS (July 23, 2024), <https://www.americanprogress.org/article/project-2025-would-increase-gun-violence-reversing-historic-declines/>

make D.C. crime-free.<sup>244</sup> Of all the law enforcement divisions involved in protecting the country on January 6, including the Park Police, Capitol Police and the local MPD, only the leaders of the MPD called for all hands-on deck, and hundreds of MPD officers took part in repelling an assault on the unprepared Capitol.<sup>245</sup> If Trump follows through on his threat and federalizes D.C.'s Metropolitan Police, this could remove a thin blue line of protection against a future white nationalist insurgency.

Finally, if Trump tries to stay in power after his term ends, as he did in 2021, the country will once again need to rely on police and the military to follow the Constitution rather than an individual president.<sup>246</sup> This is why the thin blue line is a useful concept for understanding how to protect democracy against a losing candidate's efforts to seize power or against a president trying to stay in power. January 6 changed the "thin blue line" metaphor from the generality that police are essential for a safe and orderly society to a specific call for an incorruptible force that we can trust to protect democracy against armed insurrectionists. The U.S. needs a police force that will stand up to anti-government militias and white nationalists who attempt to overthrow the government and install an authoritarian strong-man.

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<sup>244</sup> Mark Segraves, *Trump threatened to 'take over' DC if reelected. Here's what city leaders say*, NBC NEWS (July 17, 2024, 8:49 AM), <https://www.nbcwashington.com/news/local/trump-has-threatened-to-take-over-dc-if-reelected-heres-what-that-might-change-for-the-district/3666385/>; see also D.C. Code §1-207.40, Emergency control of police, <https://code.dccouncil.gov/us/dc/council/code/sections/1-207.40>.

<sup>245</sup> See text, *supra*, at 14-15; see also Peter Hermann, *D.C. police sent 850 officers to the Capitol during insurrection, spent \$8.8 million during week of Jan. 6*, THE WASH. POST, (Jan. 26, 2021), [https://www.washingtonpost.com/local/public-safety/contee-dcpolice-capitol-riot-/2021/01/26/8f386d12-6020-11eb-9061-07abcc1f9229\\_story.html](https://www.washingtonpost.com/local/public-safety/contee-dcpolice-capitol-riot-/2021/01/26/8f386d12-6020-11eb-9061-07abcc1f9229_story.html)

<sup>246</sup> Lutz, *supra* note 22; Erin Mansfield, et al, *Donald Trump quips he can't run in 2028 unless Republican "do something,"* USA TODAY, (Nov. 21, 2024), <https://www.usatoday.com/story/news/politics/elections/2024/11/13/trump-2028-third-term-joke/75962254007/> ("Donald Trump has long joked about serving more than two terms as president.")