THE RELATIVE SEVERITY OF CRIMINAL SENTENCES IN THE JANUARY 6, 2021, CAPITOL BREACH CASES

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ABSTRACT

Many observers claim that judges are imposing disproportionately lenient sentences on January 6, 2021, "Capitol Breach" offenders. Some have even suggested a racial or political motivation for lighter sentences. Comparative data on these sentences and offenders, presented here for the first time, refute this narrative. Individuals convicted of felonies related to the Capitol Breach appear to actually receive longer sentences than individuals convicted of the same crimes outside of the Capitol Breach context.

But sentences in Capitol Breach cases may indeed be "lenient" for a deeper, more structural reason—the current Federal Sentencing Guidelines do not adequately account for the severity of the conduct that occurred on January 6, 2021. There is a qualitative difference between federal offenses and the same offenses committed in the context of the "treason spectrum." English and American legal traditions have historically viewed treason, rebellion, and subversive activities as "the worst crimes of all" because they are crimes against all citizens and threaten the constitutional order. Yet no sentencing

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enhancement addresses the increased severity of conduct involving offenses on the treason spectrum.

Recognizing the increased seriousness of other conduct, Congress and the Sentencing Commission have enacted an array of enhancements to punish, incapacitate, and deter offenders whose conduct involves a dangerous weapon, body armor, or even the use of a fake website during an offense. This Article proposes a new sentencing enhancement in the Federal Sentencing Guidelines that properly accounts for the relative severity of conduct involving offenses on the treason spectrum. To reaffirm a commitment to democratic values, deter future subversive conduct, and ensure that the legal system is equipped to respond to subversive conduct, policymakers and judges should send clear signals that subversive activities are indeed among "the worst crimes of all."

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INTRODUCTION

On January 6, 2021, thousands of supporters of Donald J. Trump heeded his call to descend upon the Nation's Capitol.[1] January 6 was the day that the United States Congress convened in a joint session to declare the winner of the 2020 presidential election after certifying the Electoral College vote. Thousands of people committed an array of crimes for a variety of reasons in the process of trying to thwart, influence, or delay the certification of the 2020 election.[2]

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1. *See* Trump v. Thompson, 573 F. Supp. 3d 1, 8–9 (D.D.C.), *aff'd*, 20 F.4th 10 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022), quoting Donald Trump:

- "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!" Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2020, 6:42 AM), https://www.presidency.ucsb.edu/documents/tweets-december-19-2020 [https://perma.cc/P5FB-DJJU].
- "Democrats are trying to steal the White House . . . you can't let that happen. You can't let it happen, . . . [w]e're going to fight like hell, I'll tell you right now." *President Trump Remarks at Georgia U.S. Senate Campaign Event*, (C-SPAN television broadcast Jan. 4, 2021) at 8:40, 14:19, https://www.c-span.org/video/?507634-1/president-trump-campaigns-republican-senate-candidates-georgia [https://perma.cc/M7HR-L47P].
- "[W]alk down to the Capitol" to "give them the kind of pride and boldness that they need to take back our country," "we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore," and "you'll never take back our country with weakness." *Trump's Jan. 6 Rally Speech*, (C-SPAN television broadcast Jan. 6, 2021) at 3:33:04, 3:33:36, 3:37:20, 3:47:02, 3:47:22, 4:42:26, 4:41:27, https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification [https://perma.cc/PXH5-WDYT].

See also United States v. Little, 78 F.4th 453, 454 (D.C. Cir. 2023) (offender sought to take over the Capitol because "'[s]tealing elections is treason.'"); Tom Dreisbach, *How Trump's 'Will be Wild' Tweet Drew Rioters to the Capitol on Jan. 6*, NPR (July 13, 2022, 3:42 PM), https://www.npr.org/2022/07/13/1111341161/how-trumps-will-be-wild-tweet-drew-rioters-to-the-capitol-on-jan-6 [https://perma.cc/CXZ3-TA9V]; Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial,* NPR (Feb. 10, 2021, 2:43 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/UE66-E6JH]; Anderson v. Griswold, 543 P.3d 283, 335–36 (Colo. 2023) (determining that "[u]nsurprisingly, the crowd at the Ellipse reacted to President Trump's words with calls for violence" and that "President Trump engaged in insurrection"), *rev'd sub nom*, Trump v. Anderson, 601 U.S. 100 (2024).

2. *See, e.g.*, *Little*, 78 F.4th at 454 (offender sought to take over the Capitol proclaiming "'[s]tealing elections is treason.'"); United States v. Robertson, 86 F.4th 355, 360 (D.C. Cir. 2023), (offender sought to commit "'civil disobedience (here now) and then open armed rebellion. I've

As of November 18, 2024 , in what Attorney General Merrick Garland called the largest and "most important investigation that the Justice Department has ever entered into,"[3] the Department of Justice has charged approximately 1,561 defendants in nearly all fifty states and the District of Columbia.[4] As of the same date, approximately 1,028 offenders have been sentenced, with approximately 645 receiving a sentence of incarceration.[5] Prosecutors have obtained convictions for at least the following federal offenses:[6]

- Principals' Liability[7]
- Assaulting, resisting, or impeding certain officers or employees[8]
- Civil disorder[9]
- Conspiracy to commit offense or to defraud United States[10]

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spent the last 10 years fighting an insurgency in Iraq and then Afghanistan. [I'm] prepared to start one here. . . .'"); United States v. DeGrave, 539 F. Supp. 3d 184, 209 (D.D.C. 2021) (finding that the offender held "a misguided belief that he should take matters into his own hands to defend the country against perceived corruption in democratic institutions."); United States v. Sabol, 534 F. Supp. 3d 58, 70 (D.D.C. 2021) (offender argued that he got "caught up" and "made 'some really bad decisions'" after being convinced by the rhetoric from "'Roger Stone and Rudy Giuliani and the President himself.'").

3. Associated Press, *Jan. 6 Probe Is Most Important in DOJ History, Garland Says*, PBS NEWS (July 20, 2022, 7:37 PM), https://www.pbs.org/newshour/politics/watch-jan-6-probe-is-most-important-in-doj-history-garland-says [https://perma.cc/X9MV-GLAL].

4. *46 Months Since the Jan. 6 Attack on U.S. Capitol*, U.S. DEP'T OF JUST. [hereinafter *46 Months Since*], https://www.justice.gov/usao-dc/46-months-jan-6-attack-us-capitol [https://perma.cc/9XRL-GXNS] (Nov. 18, 2024); *see The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR, https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories [https://perma.cc/N36E-YC3V] (Nov. 1, 2024, 6:25 PM) (providing similar statistics).

5. *46 Months Since*, *supra* note 4.

6. *See, e.g.*, *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, *supra* note 4.

7. 18 U.S.C. § 2.

8. *Id.* § 111(a)(1), (b).

9. *Id.* § 231(a)(2)–(3).

10. *Id.* § 371.

- Conspiracy to impede or injure officer[11]
- Embezzlement and Theft of Public money, property, or records[12]
- Interstate communications - Extortion and Threats[13]
- Malicious Mischief related to government property or contracts[14]
- Malicious Mischief related to buildings or property within special maritime and territorial jurisdiction[15]
- Obstruction of an Official Proceeding/Witness Tampering[16]
- Presidential and Presidential Staff Assassination, Kidnapping and Assault; Restricted building or grounds[17]
- Robbery and Burglary[18]
- Robbery and Burglary of Personal Property of United States[19]
- Seditious Conspiracy[20]
- Unlawful activities on United States Capitol Buildings and Grounds[21]

11. *Id.* § 372.
12. *Id.* § 641.
13. *Id.* § 875(b)–(d).
14. *Id.* § 1361.
15. *Id.* § 1363.
16. *Id.* § 1512.
17. *Id.* § 1752.
18. *Id.* § 2111.
19. *Id.* § 2112.
20. *Id.* § 2384.
21. 40 U.S.C. § 5104(b)–(e).

- Unregistered Firearm - Machine Guns, Destructive Devices, and Certain Other Firearms[22]

In a handful of cases, prosecutors also assimilated District of Columbia offenses under the Assimilative Crimes Act.[23]

Some observers assert that Capitol Breach sentencing judges' "harsh lectures" do not match their "lighter sentences" in these cases.[24] They contend that judges are handing down disproportionately lenient sentences for January 6 offenders,[25] with some implying a racial connection[26] or mentioning the fact

22. 26 U.S.C. § 5861.

23. D.C. CODE §§ 22-3211, 22-4504 (2024) (assimilated under 18 U.S.C. § 13 (Assimilative Crimes Act)). Under the Assimilative Crimes Act, if criminal conduct is not punishable by federal law, the federal prosecutor can assimilate state law and charge the elements of that offense in federal court. If there is not a "substantial difference" between the kind of behavior covered by a federal law and a state law, the prosecutor should generally charge the federal offenses—not the state offense. *See* Lewis v. United States, 523 U.S. 155, 165 (1998).

24. *See* Tom Jackman & Spencer S. Hsu, *Review of Jan. 6 Cases Finds Judges Give Harsh Lectures, Lighter Sentences*, WASH. POST [hereinafter Jackman & Hsu, *Review of Jan. 6 Cases*], https://www.washingtonpost.com/dc-md-va/2023/01/06/jan6-capitol-riot-sentencings/ [https://perma.cc/LR3V-4VF9] (Jan. 6, 2023, 9:31 AM); *see also* Tom Jackman & Spencer S. Hsu, *Most Jan. 6 Defendants Get Time Behind Bars, but Less Than U.S. Seeks*, WASH. POST (Jan. 5, 2024, 10:00 AM) [hereinafter Jackman & Hsu, *Less Time*], https://www.washingtonpost.com/dc-md-va/2024/01/05/january-6-riot-sentences/ [https://perma.cc/9UWK-9XRE]; Ryan J. Reilly, *Trump-Appointed Judge Gives a "Break" to Jan. 6 Rioter Who Wants to be a Police Officer*, NBC NEWS (July 7, 2023, 9:27 PM), https://www.nbcnews.com/politics/justice-department/trump-appointed-judge-gives-break-jan-6-rioter-sentencing-rcna93170 [https://perma.cc/3F7K-T457]; Jeremy Stahl, *The Jan. 6 Defendants Are Getting Off Easy*, SLATE (Jan. 6, 2022, 2:40 PM), https://slate.com/news-and-politics/2022/01/jan-6-capitol-riot-criminal-prosecutions-status.html [https://perma.cc/WR5E-ASZD]. *But see* Jason Linkins, *Most January 6 Defendants Are Getting Light Sentences—and That's OK*, THE NEW REPUBLIC (Jan. 8, 2022), https://newrepublic.com/article/164966/january-6-defendants-sentences-light [https://perma.cc/B6NW-7M9L] ("Judges exist to temper [public] emotions and restore balance in the pursuit of justice. It's important to remember that even people whom we disagree with, or don't like, deserve fair treatment under the law.").

25. *See, e.g.*, Jackman & Hsu, *Review of Jan. 6 Cases*, *supra* note 24 (discussing how federal judges have been imposing sentences below the federal prosecutors' guidelines in more than 75% of cases); Stahl, *supra* note 24 (stating that January 6 defendants are "twice as likely to be released from jail pre-detention as ordinary defendants and more than four times less likely to be held on charges").

26. Todd J. Clark, Caleb Gregory Conrad, André Douglas Pond Cummings & Amy Dunn Johnson, *Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience*, 90 U. CIN. L. REV. 857, 897 (2022) ("[I]f one seeks to concisely illustrate the American legal system's passivism, sympathy, and ultimate protection of white actors in a

that Donald Trump nominated the sentencing judge.[27] But criticisms about lenient sentences tend to compare Capitol Breach sentences with the sentences that *prosecutors recommended* to judges before sentencing.[28]

Measuring disparity based on prosecutor recommendations is a poor comparator for assessing unwarranted disparity for several reasons. Prosecutors and the Department of Justice have their own interests and strategies when recommending a sentence—interests which are not necessarily uniform across the country, and the government might make different recommendations in Capitol Breach cases than in other cases.[29] The prosecutors' interests do not always align with judges' considerations of the purposes of sentencing under 18 U.S.C. § 3553.[30] The critics have also not shown how often judges sentence in accordance with prosecutors' recommendations in non-Capitol Breach cases. Finally, the most common federal

white system, there is no better example than how those who participated in the attempted insurrection of the U.S. Capitol Building on January 6, 2021, were treated in courtrooms across the country.").

27. *See, e.g.*, Reilly, *supra* note 24.

28. *See, e.g.*, Stahl, *supra* note 24 ("Critically, judges have been generally lenient with those who have pleaded guilty. Most notably, for several defendants, judges have offered a lower sentence than the prosecutor recommended."); Jackman & Hsu, *Review of Jan. 6 Cases*, *supra* note 24 ("[T]he judges in U.S. District Court in Washington, despite harsh words for the convicted defendants about the historic impact of their actions, have gone below federal prosecutors' sentencing recommendations in more than three-quarters of the cases so far, and below the advisory sentencing guidelines nearly 40 percent of the time.").

29. *See, e.g.*, *Attorney General Merrick Garland Remarks on January 6 Attack on the U.S. Capitol*, (C-SPAN television broadcast Jan. 5, 2022) at 10:34, https://www.c-span.org/video/?517045-1/attorney-general-merrick-garland-remarks-january-6-attack-us-capitol [https://perma.cc/QJ9Q-BJMD] (describing the "serious risks" these offenders' actions "pose[d] to our democratic institutions.").

30. 18 U.S.C. § 3553(a)(2) ("The court shall impose a sentence sufficient, but not greater than necessary. . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."). *See also* Roger Parloff, *Should Nine Oath Keepers Receive Terror-Enhanced Sentences?*, LAWFARE (May 22, 2023, 8:30 AM), https://www.lawfaremedia.org/article/should-nine-oath-keepers-receive-terror-enhanced-sentences [https://perma.cc/9Q6P-GNX2] (calling the government's sentencing recommendations in Oath Keepers cases "aggressive" and "in some instances . . . seem excessive").

sentence is at or below the bottom of the Sentencing Guideline range.[31] Unless the government recommends a sentence at or below the Sentencing Guideline minimum, the government's recommendation will regularly exceed the actual sentence.[32] The fact that January 6 prosecutors recommend sentences that far exceed the judges' ultimate sentences tells us little about whether there is unwarranted disparity in these cases.

A better approach when analyzing possible sentencing disparity is to compare Capitol Breach sentences with other sentences for the same offenses outside of the Capitol Breach context. Crucially, this comparison must account for the difference in criminal history between offenders, which existing analyses have ignored.[33] This Article provides a more complete analysis and finds that Capitol Breach offenders convicted of felonies tend to receive longer sentences than similar non-Capitol Breach offenders convicted for the same offenses because they (correctly) receive more enhancements under the

31. *See* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 22 (2023), [hereinafter U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf (calling the bottom end of the guidelines the "presumptive sentence"); *see generally* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS (2010) [hereinafter U.S. SENT'G COMM'N, AN UPDATE OF THE MULTIVARIATE REGRESSION ANALYSIS], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf (analyzing multiple factors such as age, race, and crime committed and their effect on federal sentencing). Most federal sentences are at or below the bottom end of the guideline range. For example, if an offender's guideline range is fifty-seven to seventy-one months, the most common federal sentence would be fifty-seven months or lower. *See id.*

32. Of course, there is the practical consideration: in an adversarial system each side might be cognizant of the "compromise effect" or "decoy effect" and propose a more extreme sentence in order to make the midpoint between the recommendations appear more reasonable. *See, e.g.*, Harry L. Munsinger & Donald R. Philbin, Jr., *Why Can't They Settle? The Psychology of Relational Disputes*, 18 CARDOZO J. CONFLICT RESOL. 311, 330 (2017) ("Because most individuals tend to avoid extreme choices, the middle options appear more attractive."); Alexander Lundberg, *Sentencing Discretion and Burdens of Proof*, 46 INT'L REV. L. & ECON. 34, 34 (2016) ("When people are given a choice between A and B, the introduction of a third choice, C, can lead people to the middle option through either the 'compromise effect' or the 'decoy effect.'").

33. *See, e.g.*, Jackson & Hsu, *Less Time*, *supra* note 24 (comparing assault offenses, but not accounting for criminal history of offenders); non-Capitol Breach offenders have over four times the criminal history as Capitol Breach offenders. *See infra* Section I.B.

Sentencing Guidelines based on the nature of the offense conduct. To address in advance any potential mischaracterizations of these findings, let me be crystal clear: the data do not suggest that judges are exercising their independent *discretion* to punish Capitol Breach offenders more harshly. Rather, Capitol Breach conduct simply implicates sentencing enhancements more often. This Article also describes how analyzing sentences alone does not rule out the possibility of more leniency in other stages of the criminal process.

I then argue that Capitol Breach cases reveal a troubling blind spot in the current sentencing model. Federal statutes and Sentencing Guidelines provide a seemingly endless number of sentencing enhancements to account for conduct that is perceived to be more severe than the heartland of cases. Capitol Breach offenders were more likely to engage in conduct that implicates these *existing* enhancements (e.g., they were more likely to make physical contact during their offenses due to the nature of the Capitol Breach events), resulting in longer sentences. But these enhancements would apply regardless of whether they were committed in the context of treason, insurrection, or rebellion. There are currently no enhancements directly addressing conduct associated with what has historically been considered the most severe of all—treason and subversive activities. The Capitol Breach requires us to reflect on our perception of the severity of all criminal conduct. I propose a new sentencing enhancement for conduct involving offenses on the "treason spectrum."[34] Viewed within this framework, Capital Breach offenders (and *any* offenders whose conduct involves an offense on the treason spectrum) are indeed receiving a "lenient" sentence—not based on judges' discretion, but because the Sentencing Guidelines do not currently account for the severity of their offenses.

34. The treason spectrum is Congress's tacit acknowledgment of the relative severity of offenses like treason, rebellion, insurrection, and other subversive activities. *See infra* Section II.A.3.

Part I provides an overview of the dataset and methodology and then compares Capitol Breach sentences with non-Capitol Breach sentences for the same offenses. Part II outlines a proposal for a new, tiered sentencing enhancement that would apply in cases involving treason, insurrection, rebellion, and other subversive activities.

I. JANUARY 6 OFFENDERS RECEIVED LONGER SENTENCES THAN NON-JANUARY 6 OFFENDERS CONVICTED UNDER THE SAME STATUTES AND SENTENCED UNDER THE SAME GUIDELINES

A. Dataset

The Department of Justice ("DOJ") maintains public databases of Capitol Breach cases with offender names, charges,[35] sentences,[36] and other case information. Cross-referencing this data with more detailed information from the United States Sentencing Commission ("Sentencing Commission" or "Commission"), the initial dataset included all Capitol Breach sentences up to October 16, 2023,[37] and sentences for the same offenses for all other offenders nationwide from FY2018 through FY2022.[38]

Demographically, 92% of Capitol Breach offenders were male, compared to 87% of non-Capitol Breach offenders.[39] Capitol Breach offenders were 89% White, compared to only

35. *Capitol Breach Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/capitol-breach-cases [https://perma.cc/T7LK-9AUM] (last visited Nov. 2, 2024).

36. *Sentences Imposed in Cases Arising Out of the Events of January 6, 2021*, U.S. DEP'T OF JUST. (Oct. 7, 2024), https://www.justice.gov/usao-dc/media/1331746/dl?inline [https://perma.cc/9ZDV-5RLQ].

37. The dataset therefore included the longest anticipated sentences in these cases—those related to seditious conspiracy, 18 U.S.C. § 2384. Average Sentence for All Selected Statutes SAS Report (Oct. 16, 2023) (on file with author).

38. The fiscal year begins October 1 and ends September 30. *See, e.g.*, U.S. SENT'G COMM'N, FISCAL YEAR 2021 OVERVIEW OF FEDERAL CRIMINAL CASES 24 n.2 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf.

39. SAS Output, Gender and Race FY18-22 Jan. 6th v. All Other Defenders (Oct. 16, 2023) (on file with author).

21% of non-Capitol Breach offenders.[40] Non-Capitol Breach offenders were 22% Black and 53% Hispanic.[41] Only 8% of Capitol Breach offenders were Hispanic and only 2% were Black.[42]

The purpose of this Article is to compare sentences for similar offenses committed by similar offenders.[43] Accordingly, the focus is on comparing "crossover" offenses, or sentences for the same offenses and applying the exact same guidelines in the Capitol Breach context ("J6") and in all other, non-Capitol Breach contexts ("non-J6"). Misdemeanor offenses were excluded because (1) many were sentenced without Sentencing Guidelines,[44] (2) data on misdemeanor offenses are often incomplete, and (3) the sentence for a single misdemeanor offense is under one year of imprisonment, meaning the range of any disparity is relatively narrow.

Many offenders in both the J6 and non-J6 categories had convictions for multiple offenses,[45] making a comparison between these ultimate sentences unreliable for several reasons. Consider an attempt to compare sentences for Obstruction of an Official Proceeding/Witness Tampering.[46] Witness tampering under 18 U.S.C. § 1512(a) or (b) are traditional witness-tampering offenses and are often committed in connection with

40. *Id.*

41. *Id.*

42. *Id.*

43. For guideline-calculation purposes, the Federal Sentencing Guidelines primarily view the similarity of offenders in terms of criminal history, not demographics. *See, e.g.*, 28 U.S.C. § 994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

44. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §1B1.9 (U.S. SENT'G COMM'N 2023) ("The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.").

45. Individual Datafiles FY18-22 (on file with the Sentencing Commission).

46. 18 U.S.C. § 1512(c). This broad statute criminalizes, among other things, intimidating or thwarting testimony from a witness or victim, destroying or preventing the production of evidence, and most importantly for the purposes of the Capitol Breach, "obstruct[ing], influenc[ing], or imped[ing] any official proceeding, or attempt[ing] to do so . . . ."

the prosecution of another offense.[47] In the Capitol Breach context, however, the 18 U.S.C. § 1512 convictions were primarily under subsection (c), which criminalizes the obstruction of an official proceeding.[48] Thus, a J6 § 1512 conviction would likely be related to obstructing the certification of the Electoral College vote, and in the non-J6 context, it might be threatening a witness before a murder trial. In the latter case, assuming convictions for murder and witness tampering, the U.S. Sentencing Guideline for murder (§2A1.1) would likely apply at sentencing.[49] In both the J6 and non-J6 scenarios, given the grouping[50] or other applicable guidelines, guidelines *unrelated* to witness tampering or obstruction might be applied in cases of convictions under 18 U.S.C. § 1512. Additionally, there is the potential for uncertainty regarding whether and how judges holistically factor multiple counts of conviction into the ultimate sentence.[51] These problems can be ameliorated by comparing sentences for only a single count of

47. *See, e.g.*, United States v. Wilder, 87 F.4th 816, 820 (6th Cir. 2023) (discussing how defendant, an alleged felon in possession of a firearm, attempted to bribe a witness to claim ownership of the firearm); United States v. Sherman, 81 F.4th 800, 804–05 (8th Cir. 2023) (discussing how a drug dealer killed confidential informant/witness to prevent her testimony at a revocation proceeding); United States v. Carson, 796 F. App'x 238, 240 (6th Cir. 2019) (discussing how a bank robber tried to influence a witness from jail before trial).

48. *See, e.g.*, United States v. Robertson, 86 F.4th 355, 361 (D.C. Cir. 2023) ("Robertson was charged with 'corruptly' obstructing Congress's certification of the Electoral College vote, in violation of 18 U.S.C. § 1512(c)(2)."). Congress added 18 U.S.C. § 1512(c) after the Enron scandal to address a gap in the obstruction-of-justice statute. *See* Yates v. United States, 574 U.S. 528, 541–42 (2015).

49. *See infra* note 74 (describing over 100 murders or other serious offenses leading to life or other long sentences in the context of non-J6 convictions under 18 U.S.C. § 1512).

50. *See* U.S. SENT'G GUIDELINES MANUAL ch. 3, pt. D, introductory cmt. (U.S. SENT'G COMM'N 2023). For example, although a J6 and a non-J6 offender might each have ten counts of conviction, including one or more counts of assaulting an officer (18 U.S.C. § 111(a)(1)), the conduct involved for the other counts of conviction can vary substantially and it is difficult to determine with any precision what conduct actually drove the sentence. By narrowing the dataset to a single count, the data is more likely to capture similar conduct for which the offender is being held accountable: assaulting an officer.

51. For example, even when applying the grouping guidelines, judges might depart or vary for an "unusual" case in which the grouping guidelines result in an "inadequate" guideline range. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §3D1.4 cmt. background (U.S. SENT'G COMM'N 2023) (Determining the Combined Offense Level) ("Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines.").

conviction and applying the same guideline between J6 and non-J6 offenders.[52] Thus, the final dataset included (1) felony convictions, (2) for a *single* count of conviction, (3) where the court applied a direct guideline, and (4) each of (1)–(3) were the exact same between J6 and non-J6 offenders.

For example, the Guidelines' Statutory Index provides that for witness tampering/obstruction convictions (18 U.S.C. § 1512), the court should apply either U.S. Sentencing Guidelines §§ 2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, or 2J1.2, depending on the subsection and the offense conduct.[53] The dataset only includes convictions under 18 U.S.C. § 1512 if both J6 and non-J6 offenders were sentenced under the same guideline. In the dataset, only U.S. Sentencing Guideline §2J1.2 was common between both J6 and non-J6 offenders convicted of a single count of violating 18 U.S.C. § 1512. While some J6 offenders might have been convicted under 18 U.S.C. § 1512 and had a different guideline apply, unless single-count non-J6 offenders were also sentenced under the same guideline, the sentences were not compared in this section. Comparing sentences for the same statutory offense but applying different guidelines would not permit a reliable comparison of similar offenders and offense conduct. By matching the guideline that was applied (instead of merely comparing convictions under broad statutes), it is more likely that the offense conduct matched between J6 and non-J6 offenders.

The following met the above criteria (hence, were "crossovers"):

52. Some offenses, like civil disorder and seditious conspiracy, have no guidelines, and judges can therefore either apply an analogous guideline or sentence without guidelines. *See* U.S. SENT'G GUIDELINES MANUAL §2X5.1 (U.S. SENT'G COMM'N 2023) (Other Felony Offenses). Even though such an offense has no direct guideline, courts often apply the same one or two guidelines to these offenses. This was the case with civil disorder. *See infra* Section I.B.

53. *See* U.S. SENT'G GUIDELINES MANUAL app. A (U.S. SENT'G COMM'N 2023).

- 18 U.S.C. § 1512 (Obstructing an Official Proceeding), applying U.S. Sentencing Guideline §2J1.2 (Obstruction of Justice)[54];
- 18 U.S.C. § 1361 (Malicious Mischief related to government property or contracts), applying U.S. Sentencing Guideline §2B1.1 (Theft, Property Destruction, and Fraud);
- 18 U.S.C. § 111 (Assaulting or Impeding Officers), applying U.S. Sentencing Guideline §2A2.2 (Aggravated Assault);
- 18 U.S.C. § 231 (Civil Disorder), applying U.S. Sentencing Guideline §2A2.4 (Obstructing or Impeding Officers);
- 18 U.S.C. § 875(c) (Interstate Communications - Extortion and Threats), applying U.S. Sentencing Guideline §2A6.1 (Threatening Communications).

Put another way, these were instances of single-count convictions under the same statutes applying the same guidelines and existed in J6 and non-J6 cases.[55] There were 83 J6 cases and 637 non-J6 cases meeting these criteria.[56] In all except

54. After the drafting of this Article, the U.S. Supreme Court decided *Fischer v. United States*, 144 S. Ct. 2176, 2179 (2024), endorsing a narrow reading of one subsection of 18 U.S.C. § 1512 (subsection (c)(2), which authorizes felony penalties for a person who "corruptly . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so"). This ruling does not impact the cases analyzed in detail in this Article because there were no crossover cases that involved 18 U.S.C. § 1512(c)(2). *See also* Press Release, U.S. Dep't of Just., Fact Sheet: *Fischer v. United States* (June 28, 2024), https://www.justice.gov/usao-dc/pr/fact-sheet-fischer-v-united-states ("[T]here are zero cases where a defendant was charged only with 18 U.S.C. § 1512(c)(2)."") (emphasis omitted).

55. One type of crossover offense (18 U.S.C. § 231, applying U.S. SENT'G GUIDELINES MANUAL §2A2.2 (U.S. SENT'G COMM'N 2023) (Aggravated Assault)) was excluded for having so few sentences (N=3 J6 and N=2 non-J6). J6 v. NJ6 Datafile (on file with author).

56. There were 326 felony J6 sentences in the dataset, s*ee infra* Appendix A, meaning 243 sentences were excluded for either having multiple counts or not having commonality between the statute and guideline criteria. As explained in Section I.B and in Appendix A, J6 offenders received longer sentences for almost *all* offenses, not just the "crossover" offenses discussed granularly in Part I. J6 vs. NJ6 Datafile (on file with author).

one category, there were far more non-J6 sentences,[57] meaning we can use the non-J6 sentences to observe the "heartland" [58] of typical sentences *outside* of the Capitol Breach context to analyze the relative severity of J6 sentences.

B. January 6 Offenders Received Longer Sentences

As an important prelude to the sentence-length discussion, J6 offenders had less criminal history, and therefore lower criminal-history categories for every offense in the dataset.[59] Prior convictions are given between zero and three criminal-history points,[60] and the total number of criminal-history points leads to a "criminal-history score" that places federal offenders into a criminal-history category ("CHC") between one and six.[61] An overwhelming 81% of the J6 offenders in the dataset had a

57. This was anticipated, as non-J6 cases include several years of cases and include sentences from each district, not only the District of Columbia.

58. *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 4(b) (U.S. SENT'G COMM'N 2023) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes."); *cf*. Nancy Gertner, *Apprendi/Booker and Anemic Appellate Review*, 99 N.C. L. REV. 1369, 1372 (2021) (supporting a common law of sentencing, "a judge-made sentencing framework supplementing, and perhaps supplanting, the Guidelines.").

59. Some people familiar with the Capitol Breach cases already knew or suspected that J6 offenders had less criminal history than the average federal offender. *See* Robert A. Pape, *American Face of Insurrection: Analysis of Individuals Charged for Storming the US Capitol on January 6, 2021*, UNIV. CHI. PROJECT ON SEC. & THREATS 1, 13 (Jan. 5, 2022), https://d3qi0qp55mx5f5.cloudfront.net/cpost/i/docs/Pape_-_American_Face_of_Insurrection_(2022-01-05).pdf?mtime=1654548769 ("[O]nly 30% of the insurrectionists had some prior criminal record."). *See also* U.S. SENT'G COMM'N, THE CRIMINAL HISTORY OF FEDERAL OFFENDERS 3 (May 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf (finding in a pre-Capitol Breach study that, "[t]he average number of prior convictions among those offenders was 6.1, with a median of four convictions.").

60. U.S. SENT'G GUIDELINES MANUAL §4A1.1 (U.S. SENT'G COMM'N 2023).

61. Criminal-history category (incompletely, in my view) captures information about the *offender*. The total-offense level tries to capture characteristics about the *offense* that the offender committed. The judge uses the criminal-history category and the total-offense level to determine the sentencing guideline range, based on the Sentencing Table in the Sentencing Guidelines. *See* U.S. SENT'G GUIDELINES MANUAL, ch. 5, pt. A, app. n. 1 (U.S. SENT'G COMM'N 2023).

CHC of I, the lowest category.[62] Only 44% of non-J6 offenders were CHC I.[63]

Even with lower criminal-history categories, J6 offenders received longer sentences than non-J6 offenders for the most common crossover offenses. For convictions under 18 U.S.C. § 1512 (Obstructing an Official Proceeding) and applying U.S. Sentencing Guideline §2J1.2 (Obstruction of Justice), J6 offenders received sentences almost twice as long as non-J6 offenders (twenty-eight months imprisonment vs. fifteen months).[64] This was true even though these J6 offenders averaged only one criminal-history point and non-J6 offenders averaged three criminal-history points.[65] J6 offenders received around seven months more time in prison for convictions under 18 U.S.C. § 875(c) (Interstate Communications - Extortion and Threats), applying U.S. Sentencing Guideline §2A6.1 (Threatening Communications) (twenty-one months vs. fourteen months), and around one month longer for convictions under 18 U.S.C. § 231 (Civil Disorder) and sentenced under U.S. Sentencing Guideline §2A2.4 (Obstructing or Impeding Officers) (eight vs. seven months).[66] Where non-J6 sentences were longer on average (addressed below), the non-J6 offenders had substantially more criminal-history scores, meaning we would expect much longer sentences.[67] Data on these sentences are presented below and in Appendix A.

But what about non-J6 offenders with similar criminal history as the J6 offenders? Put another way: what sentence did an average offender receive for the offense *outside* of the Capitol Breach context if they had the same (lower) criminal history as the average J6 offenders? This more precisely compares similar offenders and better reveals whether there might be

62. J6 v. NJ6 Average Matched CH Points (on file with author).

63. *Id.*

64. Sentences in months are rounded to the nearest whole number, consistent with Commission practice.

65. J6 v. NJ6 Average Matched CH Points (on file with author).

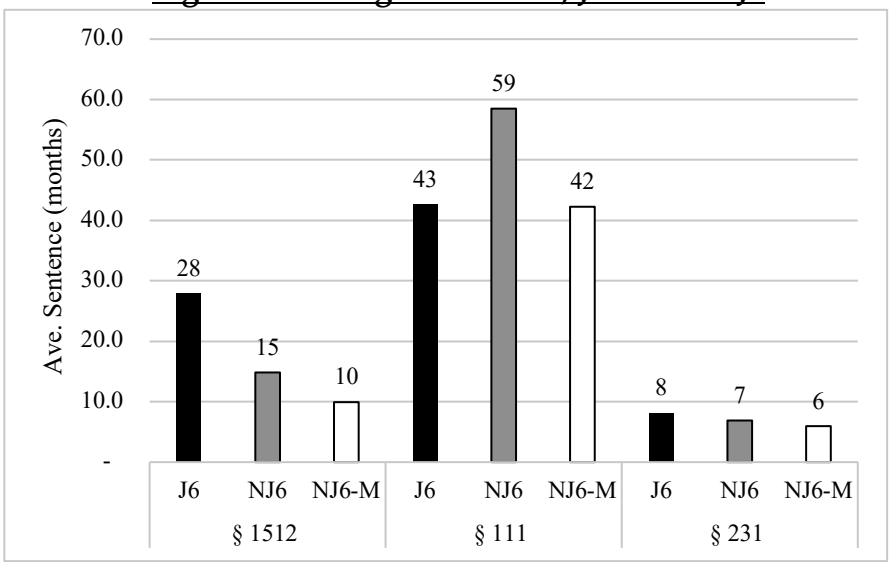
66. J6 v. NJ6 Datafile (on file with author).

67. *See also infra* Section I.C.

unwarranted disparities. To analyze this, one can match the average criminal-history scores between the non-J6 and the J6 offenders, excluding non-J6 offenders with the longest criminal histories until the average criminal-history score reaches parity.

The result is represented visually in the graph below for the three most common crossover offenses.[68] The white bars represent average non-J6 sentences after matching the criminal-history score of the J6 offenders ("NJ6-M"). As this chart shows, J6 offenders receive longer sentences for each studied offense after matching average criminal histories (though only slightly longer for assaulting an officer).

Figure 1: Average Sentences, J6 vs. Non-J6



68. 18 U.S.C. § 1512 (Tampering with a Witness, Victim, or an Informant), applying U.S. SENT'G GUIDELINES MANUAL §2J1.2 (U.S. SENT'G COMM'N 2023) (Obstruction of Justice) (N=19 J6, N=98 NJ6); 18 U.S.C. § 111 (Assaulting, Resisting, or Impeding Certain Officers or Employees), applying U.S. SENT'G GUIDELINES MANUAL §2A2.2 (U.S. SENT'G COMM'N 2023) (Aggravated Assault) (N=37 J6, N=90 NJ6); 18 U.S.C. § 231 (Civil Disorders), applying U.S. SENT'G GUIDELINES MANUAL §2A2.4 (U.S. SENT'G COMM'N 2023) (Obstructing or Impeding Officers) (N=23 J6, N=11 NJ6). There were only two J6 crossover sentences for convictions under 18 U.S.C. § 1361 and only two for convictions under 18 U.S.C. § 875; given the small number of sentences, the focus was on the other offenses. *See* J6 v. NJ6 Datafile (on file with author).

For convictions under 18 U.S.C. § 1512 (Tampering with a Witness, Victim, or an Informant) and applying U.S. Sentencing Guideline §2J1.2 (Obstruction of Justice), J6 offenders on average received sentences almost three times as long as non-J6 offenders with the same average criminal-history score.[69] J6 sentences averaged two months longer for convictions under 18 U.S.C. § 231 (Civil Disorder) and sentenced under U.S. Sentencing Guideline §2A2.4 (Obstructing or Impeding Officers). While non-J6 sentences for the broad category of Assaulting or Impeding Officers (18 U.S.C. § 111) and applying U.S. Sentencing Guideline §2A2.2 (Aggravated Assault) were higher without matching the criminal-history score, the average total criminal-history score for those non-J6 offenders was around four times higher (7.3) than the J6 offenders (1.8) for that offense.[70] Matching the average criminal-history score reveals that J6 offenders are sentenced around the same as non-J6 offenders for that offense.[71]

C. January 6 Offenders Received Longer Sentences for Almost All Offenses, Not Just the Crossover Offenses

Although only crossover sentences were analyzed in detail, the findings appeared generally consistent among all other offenses. For virtually every statute of conviction, J6 offenders received longer sentences.[72] Again, these were not analyzed

69. For comparisons, *see supra* Figure 1.

70. J6 v. NJ6 Average Matched CH Points (on file with author). Not factoring in criminal history is where many prior analyses are incomplete. *See, e.g.*, Jackson & Hsu, *Less Time*, *supra* note 24 ("Commission data show that the D.C. court's sentences for Jan. 6 defendants who assaulted police is below the national average. Since Jan. 6 cases began, the average sentence imposed by D.C. federal judges in the Capitol attack under guidelines for serious assaults climbed to 46 months from 41 months but is still below the nationwide average of 51 months in 2022.").

71. In the non-J6 context, most of these offenses are related to inmates assaulting federal officials while the inmate was serving a sentence or was being transferred. J6 v. NJ6 Datafile (on file with author).

72. *See infra* Appendix A. The one significant exception is witness tampering/obstruction, where non-J6 sentences averaged longer than J6 sentences. *See id*. But this is because the non-J6 sentences included over 100 convictions for murder, substantial drug trafficking, and related

granularly for the reasons stated in Section I.A, *supra*. But the same conclusions for the studied offenses (that January 6 offenders receive longer sentences) appear to be reflected in all offenses.

D. January 6 Offenders Received More Sentencing Enhancements Than Non-January 6 Offenders

Another key question is why January 6 offenders appear to receive longer sentences. The answer is that in J6 cases, more sentencing enhancements applied based on the offenders' conduct. Among *all* felony sentences (i.e., not narrowed to crossover offenses), judges sentenced within the guideline range in 61% of J6 cases, but in only 46% of non-J6 cases (most often varying or departing *downward* when outside of the guideline range).[73] Upward departures are rare in federal sentencing, but judges were more likely to depart upward in J6 cases (3.3% J6 vs. 0.5% non-J6).[74] A similar trend existed with upward variances: while they were rare, judges varied upward slightly more often in J6 cases (3.3% J6 vs. 2% non-J6).[75]

Reviewing the standard, *unenhanced* guideline ranges for the crossover offenses helps reveal precisely how judges enhanced sentencing-guideline ranges.[76] The table below shows the hypothetical guideline range if *no enhancements apply* to increase the guideline range[77] and if the offender receives a two-point

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sentences that resulted in life in prison or other substantial sentences (and those harsher guidelines drove the sentence). There are no murder, substantial drug trafficking, or similar analogs in the J6 dataset, which explains the longer sentences in non-J6 cases. The other instances of shorter J6 sentences had very few J6 sentences.

73. Sentence Relative to the Guideline Range by Jan 6 Def Variable (Dec. 20, 2023) (on file with author). *Cf.* sources cited *supra* note 31 (most common federal sentence is at or below the guideline range). For the difference between a departure and a variance, *see infra* notes 248–51.

74. Sentence Relative to the Guideline Range by Jan 6 Def Variable (Dec. 20, 2023) (on file with author).

75. *Id.*

76. *Id.*

77. *See infra* Table 1. These ranges were derived by identifying the base offense level for these guidelines, applying no enhancements, subtracting two points for accepting responsibility (*see infra* note 78), and identifying the guideline range in the Sentencing Table based on CHC I and CHC II. *See* U.S. SENT'G GUIDELINES MANUAL, ch. 5, pt. A (U.S. SENT'G COMM'N 2023).

reduction for accepting responsibility,[78] and then compares that with the actual average guideline ranges for the most common J6 criminal-history categories (I and II). It also compares the non-J6 sentences for offenders who had the same average criminal-history score as the J6 offenders.

Table 1: Unenhanced vs. Actual Guideline Ranges

Offense	CHC I Unenhan. GL Range	CHC II Unenhan. GL Range	J6 Actual Average Sentence	J6 Actual Median Sentence	NJ6 Ave. Sent. (CH Ave. Match)	NJ6 Med. Sent. (CH Ave. Match)
18 U.S.C. § 1512; U.S.S.G. §2J1.2	10 to 16	12 to 18	28	21	10	6
18 U.S.C. § 111; U.S.S.G. §2A2.2	10 to 16	12 to 18	43	42	42	29

78. All federal offenders can receive up to a three-point reduction for accepting responsibility for their action and assisting the government with the investigation of the offense. *See* U.S. SENT'G GUIDELINES MANUAL §3E1.1 (U.S. SENT'G COMM'N 2023) (Acceptance of Responsibility). Most offenders receive this reduction. Among all federal sentences in 2022, offenders received at least a two-point reduction in 96% of sentences, and a three-point reduction in 68% of sentences. *See* U.S. SENT'G COMM'N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 73, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf. The analysis applies a two-level instead of a three-level reduction because these base offenses levels were below sixteen. *See* U.S. SENT'G GUIDELINES MANUAL §3E1.1(b) (U.S. SENT'G COMM'N 2023) (limiting the third addition point to offenses that are at level sixteen or above).

18 U.S.C. § 231; U.S.S.G. §2A2.4	0 to 6	4 to 10	8	8	6	4

As this table shows, average and median J6 sentences typically exceeded the maximum of the "unenhanced" guideline range even assuming the higher CHC II. Because upward departures and variances were rare,[79] this suggests that judges likely applied enhancements in J6 cases more often, and those enhancements increased the guideline ranges. The next step was to determine whether this was true, and if so, determine the specific enhancements that judges applied.

1. 18 U.S.C. § 1512 applying U.S. Sentencing Guideline §2J1.2

Regarding convictions for obstructing an official proceeding and applying §2J1.2 (Obstruction of Justice), the two most common J6 offender guideline ranges were fifteen to twenty-one and forty-one to fifty-one months.[80] Offenders with the lower guideline range (fifteen to twenty-one months) received a three-level enhancement under U.S. Sentencing Guideline §2J1.2(b)(2) for "substantial interference with the administration of justice"[81] and the latter received the same

79. Sentence Relative to the Guideline Range by Jan 6 Def Variable (Dec. 20, 2023) (on file with author). Courts only varied upward in around 3% of J6 cases and departed upward in around 3% of J6 cases. Additionally, for convictions under 18 U.S.C. § 111 (Assaulting, Resisting, or Impeding Certain Officers or Employees), there is often similar physical contact or bodily injury associated with that crime (increasing the guideline range), which helps explain why both J6 and non-J6 sentences exceeded the unenhanced guideline range.

80. The average guideline range for this offense was twenty-eight to thirty-six months, and the median was twenty-one to twenty-seven months. J6 v. NJ6 Datafile (on file with author).

81. "Substantial interference with the administration of justice" includes "the unnecessary expenditure of substantial governmental or court resources." U.S. SENT'G GUIDELINES MANUAL §2J1.2, app. n.1 (U.S. SENT'G COMM'N 2023) (Obstruction of Justice). In the Capitol Breach context, *see, e.g.*, United States v. Robertson, 86 F.4th 355, 380–81 (D.C. Cir. 2023) (under plain-error review, affirming application of both subsections (b)(1)(B) and (b)(2) to J6 offender); United States v. Wright, No. CR 21-341, 2023 WL 2387816, at *12 (D.D.C. Mar. 4, 2023) (defendant caused "millions of dollars of damage and divert[ed] police resources from

three-level enhancement plus an eight-level increase under U.S. Sentencing Guideline §2J1.2(b)(1)(B) for causing or threatening injury.[82]

Judges applied fewer enhancements to non-J6 sentences with the same average criminal-history scores, with the average non-J6 guideline range being seventeen to twenty-three months and the median twelve to eighteen months. In fact, 95% of J6 18 U.S.C. § 1512 offenders sentenced under §2J1.2 received a three-level enhancement under §2J1.2(b)(2), and 42% received an additional eight-level increase under §2J1.2(b)(1)(B).[83] Only 15% of non-J6 § 1512 offenders sentenced under §2J1.2 received the three additional levels, and only 18% received an eight-level increase.[84] This means that judges believed that while both J6 and non-J6 offenders obstructed justice, J6 offenders' conduct more often constituted a "substantial interference."[85] Because the conduct of J6 offenders implicated more enhancements that

numerous states, among other harms," including "impact[ing] the duration of the joint session").

82. "If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels." U.S. SENT'G GUIDELINES MANUAL §2J1.2(b)(1)(B) (U.S. SENT'G COMM'N 2023) (Obstruction of Justice).

83. J6 v. NJ6 Datafile (on file with author).

84. *See infra* Appendix A; J6 v. NJ6 Datafile (on file with author).

85. "Substantial interference" is discussed in more detail *infra* Section II.B.4. In United States v. Brock, 94 F.4th 39, 51 (D.C. Cir. 2024), the D.C. Circuit determined that this enhancement does not apply to 18 U.S.C. § 1512(c)(2) convictions because "administration of justice" in that statute refers to judicial and investigating proceedings, not the "unique congressional function of certifying electoral college votes." Defendants convicted under this statute who receive the "substantial interference" enhancement might be eligible for resentencing. In my experience, judges often state on the record at the sentencing hearing that they would have imposed the same sentence regardless of the advisory sentencing guidelines. *See, e.g.*, United States v. Orange, 21 F.4th 162, 167 (D.C. Cir. 2021) (affirming where court could "readily conclude that the court would have imposed the same sentence irrespective of the Guidelines"); United States v. Cole, No. 21-3006, 2023 WL 3563073, at *1 (D.C. Cir. May 19, 2023) (stating the court would have imposed the same sentence regardless of the sentencing enhancer). Given the anchoring effect of guidelines (discussed in Section II.B.4), I am somewhat dubious of such claims. *See* Sam J. Merchant, *A World Without Federal Sentencing Guidelines*, 102 WASH. U. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4811335 (finding that judges appear to sentence harsher without sentencing guidelines). However, because these sentences were already imposed, I predict that upon resentencing, most judges will impose the same or similar sentences in J6 18 U.S.C. § 1512(c)(2) cases.

increased the guideline range, J6 offenders received longer sentences than non-J6 offenders.[86]

2. 18 U.S.C. § 231 applying U.S. Sentencing Guideline §2A2.4

J6 convictions for civil disorder resulted in slightly longer sentences, and these appear attributable to an increased likelihood of the presence of physical contact or a dangerous weapon in the J6 context. For example, in the non-J6 context, one offender jumped on a police car with officers inside during a George Floyd protest but made no physical contact with officers, meaning he did not receive an enhancement under §2A2.4(b)(1).[87] In the J6 context, the government sought the enhancement for an offender who, while wearing tactical gear, "forcibly entered the Capitol Building as one of the first individuals in a group that pushed through, violently overwhelmed, and made physical contact with a line of uniformed officers during the second breach of the Senate Wing Door."[88]

The average J6 guideline range was seven to thirteen months (median eight to fourteen months), and the average non-J6 guideline range was five to eleven months (median six to twelve months).[89] Courts applied the enhancement under U.S. Sentencing Guideline §2A2.4(b)(1) (increase three levels if the

86. *See, e.g.*, United States v. Robertson, 86 F.4th 355, 380 (D.C. Cir. 2023) (affirming eleven-point enhancement under U.S. Sentencing Guidelines §§2J1.2(b)(1)(B) and (b)(2) (Obstruction of Justice), and rejecting offender's argument that "Congress's certification of the Electoral College vote does not implicate the 'administration of justice.'"); United States v. Wright, No. CR 21-341, 2023 WL 2387816, at *11–12 (D.D.C. Mar. 4, 2023) (applying same eleven-point enhancements, finding that the offender was an "active and willing participant in a mob of insurrectionists who stormed and breached United States Capitol, causing millions of dollars of damage and diverting police resources from numerous states, among other harms" and recounting voluminous evidence of conduct that threatened to cause physical injury to a person "'in order to obstruct the administration of justice.'").

87. United States v. Montanez, 36 F.4th 824, 825 (8th Cir. 2022) (receiving an enhancement under U.S. Sentencing Guideline §2A2.4(a) (Offense Conduct) rather than §2A2.4(b)(1) (Obstruction or Impeding Officers)).

88. Gov't's Sent'g Memorandum at 2, United States v. Shough, No. 22-cr-197, 2022 WL 19266092, at *1 (D.D.C. Nov. 29, 2022) (seeking application of U.S. SENT'G GUIDELINES MANUAL §2A2.4(b)(1) (U.S. SENT'G COMM'N 2023) (Obstruction or Impeding Officers)).

89. J6 v. NJ6 Datafile (on file with author).

offense involved physical contact or involved a dangerous weapon) in 57% of these J6 sentences but only 31% of non-J6 sentences.[90] This helps explain why the average J6 sentences for civil disorder were around two months longer than non-J6 sentences.[91] The longer sentences were not rooted in an acknowledgment of the increased severity of trying to thwart the counting of the Electoral College vote; instead, they were based on simply making physical contact or involving a dangerous weapon.

3. 18 U.S.C. § 111 applying U.S. Sentencing Guideline §2A2.2

Sentences for assaulting an officer applied a variety of enhancements.[92] Sentences between the two groups averaged around the same (after matching criminal history).[93] For J6 offenders, both the average and median guideline range was forty-six to fifty-seven months, meaning judges on average enhanced by ten levels for CHC I offenders (for example, +4 for causing bodily injury, +6 for that injury being to a law-enforcement officer and motivated by the officer's status).[94]

As addressed above, non-J6 offenders convicted of assaulting officers had four times higher criminal-history scores, and appear to have caused bodily injuries more often,[95] explaining their longer average sentences (without adjusting for criminal history). For non-J6 offenders with the same average criminal-history scores as J6 cases, the average

90. *Id.*

91. *See supra* Table 1.

92. These commonly include: U.S. SENT'G GUIDELINES MANUAL §2A2.2(b)(2)(B) (U.S. SENT'G COMM'N 2023) (Dangerous Weapon, +4); *id.* §2A2.2(b)(3) (Degree of Bodily Injury, +3 to +7); *id.* §2A2.2(b)(7) (+2 if the offender is convicted under 18 U.S.C. § 111(b) (enhanced penalty for deadly or dangerous weapon, or for causing bodily injury)); and *id.* §§3A1.2(a), (b) (Official Victim, +6). J6 v. NJ6 Datafile (on file with author).

93. *See supra* Figure 1; *supra* Table 1.

94. U.S. SENT'G GUIDELINES MANUAL §2A2.2(b)(3) (U.S. SENT'G COMM'N 2023) (Degree of Bodily Injury, +3 to +7); *id.* §3A1.2(a), (b) (Official Victim, +6). *Infra* Table 3.

95. Non-J6 offenders received more enhancements under U.S. Sentencing Guideline §2A2.2(b)(3) (Assault Causing Bodily Injury). Sixty-two percent of non-J6 offenders received this enhancement compared to only twenty-seven percent of J6 offenders receiving this enhancement. J6 v. NJ6 Datafile (on file with author).

guideline range was roughly the same as J6 cases and the median was around five months lower.[96]

E. Other Potential Disparity

The prior sections were limited to felony *sentencing*,[97] and sentencing is necessarily post-conviction. Additional analyses may or may not reveal unwarranted disparities in other stages of these criminal proceedings.[98] Future inquiries could include comparing J6 and non-J6 (1) investigations and arrests, (2) charging practices, (3) plea bargaining,[99] (4) pretrial rulings—particularly on dispositive motions,[100] or (5) disparities in bench[101] or jury-trial outcomes. The following sections

96. Average: forty-seven to fifty-nine months, median: forty-one to fifty-one months. J6 v. NJ6 Datafile (on file with author).

97. This Article also does not rule out potential disparity among the misdemeanor sentences that were excluded for the reasons described *supra* Section I.A.

98. *See* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 6, 24 (2013) (studying arrest data, prosecution files, and court records in addition to sentencing information in disparity analysis because analyzing sentencing in insolation "gives an incomplete view of the scope and sources of sentencing disparity").

99. Changes to the interpretation of various laws while these cases are being processed can also impact charging decisions and plea negotiations. *See infra* Section I.E.2. *See also* United States v. Miller, 589 F. Supp. 3d 60, 78 (D.D.C. 2022), *reconsideration denied*, 605 F. Supp. 3d 63 (D.D.C. 2022), and *rev'd and remanded sub nom*, United States v. Fischer, 64 F.4th 329, 335–37 (D.C. Cir. 2023), *cert. granted*, 144 S. Ct. 537 (2023), and *vacated and remanded*, 603 U.S. 480 (2024), and *cert. granted, judgment vacated sub nom.* Miller v. United States, 144 S. Ct. 2706 (2024), and *cert. granted, judgment vacated sub nom.* Lang v. United States, 144 S. Ct. 2706 (2024) (analyzing different interpretations of 18 U.S.C. § 1512(c)); United States v. Little, 78 F.4th 453, 461–62 (D.C. Cir. 2023) (disallowing "split sentences" of both imprisonment and probation).

100. *See, e.g.*, *Miller*, 589 F. Supp. 3d at 78–79 (dismissing 18 U.S.C. § 1512(c) count because "[n]othing in Count Three (or the Indictment more generally) alleges, let alone implies, that Miller took some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence Congress's certification of the electoral vote."); *Fischer*, 64 F.4th at 350 (reversing dismissal of § 1512(c) charge because "Appellees' alleged conduct falls comfortably within the plain meaning of" the statute).

101. *See, e.g.*, Ryan J. Reilly, *Judge Acquits Federal Defense Contractor on Jan. 6 Charges*, NBC NEWS, https://www.nbcnews.com/politics/justice-department/judge-acquits-federal-defense-contractor-jan-6-charges-rcna23245 [https://perma.cc/X2LV-EN5D] (Apr. 6, 2022, 10:46 PM) ("Matthew Martin was acquitted by U.S. District Judge Trevor N. McFadden after a two-day bench trial."); Anna Skinner, *Capitol Rioter's Major Court Victory Is a Rare One*, NEWSWEEK, https://www.newsweek.com/capitol-rioter-major-victory-court-rare-1812591 [https://perma.cc/WQ7P-JEBP] (July 13, 2023, 9:59 AM) (describing acquittal of Oath Keepers member James Beeks, who represented himself at a bench trial, by U.S. District Judge Amit Mehta).

introduce areas of potential disparity that arose in developing Part I.

1. Triage

Based on what I refer to as "legal triage," prosecutors in D.C. might have been more likely to allow a January 6 offender to plead to charges that result in a lower sentence, compared to a prosecutor in a less burdened jurisdiction.[102] Sentencing data alone would not reveal this type of disparity. Attorney General Garland has called the Capitol Breach investigation "one of the largest, most complex, and most resource-intensive investigations in our history."[103] Some have claimed that the Capitol Breach "broke" the justice system.[104]

The unprecedented number of new criminal filings resulting from the investigation taxed the court system in the U.S. District

102. *See, e.g.*, U.S. Dep't of Just., Justice Manual § 9-27.400 (2023) [hereinafter DOJ Manual], https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution. The prosecutor can drop charges with approval if, for example, "the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office." *Id.* DOJ could contend that to the extent that there are disparities, they are *warranted* disparities, not unwarranted disparities. 18 U.S.C. § 3553(a)(6) (requiring that judges consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). There is an interest in prompt resolution of all cases. *See* 18 U.S.C. § 3161 (setting time limits for a speedy trial under the Speedy Trial Act); FED. R. CRIM. P. 2 (rules should be interpreted to secure the "just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."). Additionally, after his reelection in November 2024, Donald Trump is unlikely to pursue further convictions of Capitol Breach offenders. He has promised to pardon most of those already convicted and to issue an apology to them on behalf of the government. *See* Mariana Alfaro, *Trump Vows Pardons, Government Apology to Capitol Rioters if Elected*, WASH. POST, https://www.washingtonpost.com/national-security/2022/09/01/trump-jan-6-rioters-pardon/ [https://perma.cc/HW34-BBYM] (Sept. 1, 2022, 5:23 PM).

103. Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Statement on the Second Anniversary of the January 6 Attack on the Capitol (Jan. 4, 2023), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-second-anniversary-january-6-attack-capitol [https://perma.cc/7EJQ-HD5P].

104. *See* RYAN J. REILLY, SEDITION HUNTERS: HOW JANUARY 6TH BROKE THE JUSTICE SYSTEM 5–6 (2023) (cataloging how online cyber sleuths employed their skills and crowdsourcing as a critical supplement to the FBI's investigation to help identify Capitol Breach participants).

Court for the District of Columbia.[105] The Department of Justice has admitted that at least "[e]arly in the investigation" it extended plea offers of probation only and suggested that it does not constitute an unwarranted disparity to offer some defendants the benefit for participating in a "fast-track" program if the government also gains a benefit.[106] Practitioners also disclosed anecdotal instances of an offender accepting an early plea deal and the government later discovering more severe conduct.

2. Legal uncertainty

Legal uncertainty could also work in defendants' favor. The federal criminal code has been described as an "'incomprehensible,' 'random and incoherent,' 'duplicative, ambiguous, incomplete, and organizationally nonsensical mass of federal legislation.'"[107] Capitol Breach prosecutors struggled in some cases to identify statutes that clearly covered the insurrectionist[108] conduct that could secure and maintain a conviction.[109] Prosecutors might understandably hesitate to

105. Like the response to the judicial emergency in Oklahoma after the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), prosecutors, defense attorneys, and others from around the country have assisted with processing Capitol Breach cases. *See* E.D.O.K. General Order No. 21-10, *Special Sessions of Court Pursuant to 28 U.S.C. Section 141(b)(1)* (May 21, 2021), https://www.oked.uscourts.gov/sites/oked/files/general-ordes/GO_21-10.pdf (declaring state of emergency as a result of the "onslaught of criminal cases arising out of *McGirt*, and the logjam of cases created due to the COVID-19 pandemic.").

106. *See Sentences Imposed in Cases Arising Out of the Events of January 6, 2021*, *supra* note 36, at 1 n.1.

107. Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006).

108. *See, e.g.*, Anderson v. Griswold, 543 P.3d 283, 336 (Colo. 2023) (determining that the Capitol Breach constituted an insurrection under Section Three of the Fourteenth Amendment to the U.S. Constitution); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 731 (2024) ("[I]t seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three.").

109. *See* DOJ Manual, *supra* note 102, § 9-27.300 ("Ordinarily, . . . charges will include the most serious offense that is encompassed by the defendant's conduct and that is likely to result in a sustainable conviction."); Kurtis A. Kemper, Annotation, *January 6, 2021 Capitol Event: Criminal Consequences of Participation—Particular Federal Crimes and Penalties*, 74 A.L.R. Fed. 3d Art. 1 (2022) (collecting various legal challenges to Capitol Breach charges); *see* United States v.

charge more severe offenses that are untested in this context.[110] If a statute is ambiguous, defendants may benefit from the rule of lenity.[111]

3. Misdemeanor vs. felony

Whether based on triage, legal uncertainties, or for other reasons, permitting the defendant to plead to a misdemeanor only (which has occurred in 67.5% of J6 pleas[112]) dramatically impacts judges' sentencing options[113] and can also be used to "circumvent" harsher guideline ranges to incentivize a timely plea.[114] In such cases, even if the judge wanted to sentence an offender more harshly, the judge cannot bring charges against the offender.[115] Nor can the judge *sua sponte* exceed a statutory

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Miller, 589 F. Supp. 3d 60, 78 (D.D.C. 2022), *reconsideration denied*, 605 F. Supp. 3d 63 (D.D.C. 2022), and *rev'd and remanded sub nom.*, United States v. Fischer, 64 F.4th 329, 335–37 (D.C. Cir. 2023), *cert. granted*, 144 S. Ct. 537 (2023), and *vacated and remanded*, 603 U.S. 480 (2024), and *cert. granted, judgment vacated sub nom.* Miller v. United States, 144 S. Ct. 2706 (2024), and *cert. granted, judgment vacated sub nom.* Lang v. United States, 144 S. Ct. 2706 (2024) (analyzing different interpretations of 18 U.S.C. § 1512(c)).

110. *See* sources cited *infra* note 129 (describing the federal criminal code as inadequate to address insurrections and domestic terrorism); Kemper, *supra* note 109 (collecting various legal challenges to Capitol Breach charges); *Miller*, 589 F. Supp. 3d at 78.

111. *See, e.g.*, Shular v. United States, 589 U.S. 154, 165 (2020) (quoting United States v. Shabani, 513 U.S. 10, 17 (1994)) (finding that the rule of lenity "'applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute'").

112. *See 46 Months Since*, *supra* note 4 ("Approximately 979 individuals have pleaded guilty, which includes . . . 661 who have pleaded guilty only to misdemeanors."); *cf.* United States v. Cua, 657 F. Supp. 3d 106, 113 (D.D.C. 2023) (describing the complicated differences between charging 18 U.S.C. § 111(a) as a misdemeanor or felony, and associated penalties).

113. *See* Starr & Rehavi, *supra* note 98, at 7 ("[B]etween half and the entire [sentence-length gap between Black and White offenders] can be explained by the prosecutor's initial charging decision.").

114. *See* Stephen J. Schulhofer & Ilene H. Nagel, *The Federal Sentencing Guidelines: Ten Years Later: Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1290 (1997) (finding "unequivocal evidence that bargaining and charging practices undercut the Guidelines").

115. *See* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 799 (4th ed. 2022) ("As long as there is probable cause to support the charges, prosecutors can decide how many counts to bring, the severity of the crime to charge, and which suspects to use as witnesses and which to charge as defendants . . . . Because of separation of powers, if judges disagree with a prosecutor's charging decision, they can decide to dismiss charges, but they cannot order prosecutors to bring other charges.").

maximum,[116] which is one year in misdemeanor cases.[117] Pleading to a misdemeanor also guides the "in/out" decision[118] regarding whether the offender must serve a prison term or whether the judge has more options for alternatives to incarceration like probation, intermittent confinement, or home confinement.[119]

4. Disparity compared to other offenses

The Chair of the U.S. Sentencing Commission, Judge Carlton Reeves, identified a more fundamental source of potential disparity: an asymmetry between how the entire system views other common federal offenses (particularly, controlled-substance offenses) and the democracy-undermining conduct of the Capitol Breach offenders.[120] Chair Reeves compared several sentences (like an eighteen-year-sedition sentence for a "rioter who recruited, directed, and encouraged the assault who helped lead an attack that grievously wounded countless people" in an attempt to undermine democracy) with longer sentences for defendants who "get caught up in a 'stash house'

116. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 489 (2000) (finding that any fact other than that of a prior conviction that increases penalty for crime beyond prescribed statutory maximum must be proved beyond reasonable doubt).

117. *See* 18 U.S.C. § 3559(a) (maximum of one year per count for misdemeanor convictions); *see also* Ronald F. Wright & Rodney L. Engen, *Bargaining in the Shadow of the Law-the Relationship Between Plea Bargaining and Criminal Code Structure: Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 9 (2007) ("The reduction of felony charges to misdemeanors is especially consequential because it generally reduces the punishment and has much less impact on an offender's criminal history.").

118. Melissa Hamilton, *Prison-by-Default: Challenging the Federal Sentencing Policy's Presumption of Incarceration*, 51 HOUS. L. REV. 1271, 1274, 1290, 1334 (2014) (citing legislative history expressing the "in/out" decision as "'the most fundamental decision of sentencing'" and recommending an "in/out" guideline that corrects the "prison-by-default policies in its Sentencing Guidelines").

119. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §5C1.1 (U.S. SENT'G COMM'N 2023) (setting forth alternatives to incarceration depending on severity of sentence).

120. Carlton W. Reeves, *Alternatives to Incarceration and the Sentencing Commission: A Call for Progress Through Partnership*, 36 FED. SENT'G REP. 130, 131 (2024) ("[Many January 6 offenders] whose punishment for attempting to rip the heart out of our democracy was probation, home detention, or a fine."). *See also* Ctr. for Just. & Hum. Dignity, *US Sentencing Commission: A Look Ahead from the Chair*, YOUTUBE, at 19:50–20:36 (Dec. 1, 2023), https://youtu.be/osKaK3qWLq8?si=4D2FF_Y4Kq1q17Yw [https://perma.cc/9DC7-2X9B].

sting concocted by the government."[121] Judge Reeves was not necessarily advocating for longer sentences for J6 offenders, but instead for more empathy, grace, compassion, and alternatives to incarceration for other federal offenders.[122]

These remarks invite observers to think more broadly about relative severity of sentences. Is it really worse for a felon to have an unused firearm sitting in his girlfriend's closet (fifty-seven months in prison)[123] than to be convicted of seditious conspiracy after training and preparing for months "to teach and learn paramilitary combat tactics," "bringing and contributing paramilitary gear, weapons, and supplies—including knives, camouflaged combat uniforms, tactical vests with plates, helmets, eye protection and radio equipment—to the Capitol grounds," storming the Capitol building "in an effort to prevent, hinder and delay the certification of the electoral college vote," and "using force against law enforcement officers while inside the Capitol Building" (thirty-six to fifty-four months)?[124]

Another example is Carlos Diaz-Menera who was recruited to send a total of approximately $1.5 million from the U.S. to Mexico in small transactions over the course of seven to eight months, netting around $50 for himself on each transfer after expenses.[125] He knew that the money came from illegal activity but did not know or would not speculate about what type.[126] After pleading guilty to money laundering, he was unexpectedly held accountable for all drugs in a drug

121. Reeves, *supra* note 120, at 131.

122. *Id.* ("[The] disgraceful [problem] is our system's restriction of empathy, mercy, and non-prison sanctions to the few, rather than the many.").

123. *See, e.g.*, United States v. Jones, No. 21-30546, 2022 WL 1010687, at *1, *3 (5th Cir. Apr. 5, 2022) (affirming the application of enhancements for defendant's possession of three to seven firearms).

124. *Four Additional Oath Keepers Sentenced for Seditious Conspiracy Related to U.S. Capitol Breach*, U.S. DEP'T OF JUST., https://www.justice.gov/opa/pr/four-additional-oath-keepers-sentenced-seditious-conspiracy-related-us-capitol-breach [https://perma.cc/7R92-NMLN] (June 2, 2023).

125. United States v. Diaz-Menera, 60 F.4th 1289, 1292 (10th Cir. 2023).

126. *Id.*

conspiracy, which, after cross-referencing much harsher drug guidelines instead of money-laundering guidelines, resulted in a guideline range of 262 to 327 months.[127] He received a downward variance and ultimately a sentence of 168 months in prison.[128] Diaz-Menera's conduct was no doubt harmful and worthy of punishment, but is the conduct four times worse than the seditious conspiracy described above? Or if we refer to the Sentencing Guidelines, is the conduct seven to ten times worse? Put plainly, is it worse to launder money, possess firearms, or sell drugs than it is to violently take up arms against your country and its constitutional processes? The answer is probably "at a certain point, yes," but our current system does not appear responsive to this framing of the issue.[129] This Article addresses some questions about potential disparity, but other important questions remain.[130]

127. *Id.* at 1292–93 (analyzing U.S. SENT'G GUIDELINES MANUAL §2D1.1 (U.S. SENT'G COMM'N 2023)).

128. *Id.* at 1293.

129. Other commenters have argued that our current criminal code is ineffective at addressing domestic terrorism. *See, e.g.*, Note, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, 136 HARV. L. REV. 1914, 1915 (2023) ("[T]here is no federal charge of domestic terrorism."); Blake Pendleton, *The War Within: Is the Anti-Riot Act the Answer to the Growing Threat of Domestic Terrorism in the United States?*, 32 GEO. MASON U. CIV. RTS. L.J. 1, 11 (2021) ("The lack of a federal domestic terrorism statute has also forced federal prosecutors to rely on other federal charges or sentencing enhancements when prosecuting individuals committing domestic terrorism."); *see also* United States v. Seefried, 639 F. Supp. 3d 8, 20 (D.D.C. 2022) ("If the Sentencing Commission had foreseen the Capitol breach, it may well have included 'official proceeding' in the text of §2J1.2. But the Commission did not.").

130. A future inquiry could involve revisiting the National Crime Survey of Crime Severity, which gauged public sentiment on crime severity but was last conducted in the 1980s. *See* MARVIN E. WOLFGANG, ROBERT M. FIGLIO, PAUL E. TRACY & SIMON I. SINGER, U.S. DEP'T OF JUST., THE NATIONAL SURVEY OF CRIME SEVERITY vi (1985), https://bjs.ojp.gov/library/publications/national-survey-crime-severity-0 (asking sixty thousand adults to rank the severity of offenses ranging from playing hooky from school to planting a bomb that kills twenty people). The survey found that the public viewed planting a bomb that killed twenty people (terrorism) as the most severe offense, but the survey did not inquire into the perceived severity of treason, rebellion, and other subversive activities. *Id.* at vi–x.

II. JANUARY 6 OFFENDERS *SHOULD* RECEIVE LONGER SENTENCES THAN NON-JANUARY 6 OFFENDERS CONVICTED UNDER THE SAME STATUTES AND SENTENCED UNDER THE SAME GUIDELINES.

Part I suggested that January 6 offenders tended to receive longer sentences than non-January 6 offenders convicted under the same statutes and applying the same guidelines. Part II offers the normative claim that most of these types of offenders (importantly, whether inside or outside of the Capitol Breach context) *should* receive longer sentences than they would for similar conduct that is committed outside of the context of insurrection or rebellion. Part II suggests that the current statutory and guideline regime does not account for the increased severity of insurrectionists' conduct.

The longer sentences in January 6 cases are rooted in the fact that the offenders' conduct more often implicated *existing* sentencing enhancements, like physical contact or having a dangerous weapon.[131] Non-January 6 offenders who commit that enhancement-triggering conduct, however, would *also* be subject to those existing enhancements. The offenses committed during the Capitol Breach, or any insurrection or rebellion, are qualitatively different than offenses committed outside of those contexts. No existing enhancement adequately considers the fact that January 6 conduct involved offenses that are uniquely on the "treason spectrum"—treason, rebellion, sedition, insurrection, and other subversive acts described further in Section II.A.

I propose that the Sentencing Guidelines be amended to include a new Chapter 3 adjustment that accounts for conduct that involves offenses that are on the treason spectrum. This tiered adjustment would align with Congress's understanding of the severity of treason-spectrum offenses. Importantly, this Chapter 3 adjustment has *no political valence* and would apply outside of the Capitol Breach context. By way of prebuttal, upon

131. *See supra* Section I.D.

conviction the enhancement would apply equally to qualifying rebellious conduct by members of Antifa, BLM, or the Proud Boys.[132] The Capitol Breach simply revealed a flaw in the current sentencing regime—enhancements exist covering a wide array of conduct considered to be more severe, but none exist covering the increased severity of offenses involving the "worst crimes of all."[133]

A. The Treason Spectrum

1. Treason

Sir William Blackstone considered treason "the highest civil crime which (considered as a member of the community) any man can possibly commit."[134] Justice William O. Douglas called treason "the worst crime of all,"[135] and Justice Joseph P. Bradely proclaimed that "[n]o crime is greater than treason."[136] Crimes of betrayal like treason occupied the lowest level of Hell in Dante Alighieri's Inferno because unlike crimes of passion, weakness, or even violence, crimes of betrayal are "the most deliberate, the most calculated."[137] This medieval perception of severity seems to have continued into modernity, at least in part: the Sentencing Guidelines, enacted in 1987, set the

132. *Cf.* United States v. Rivera, 607 F. Supp. 3d 1, 7 (D.D.C. 2022) ("[The defendant] argued that if 'BLM [Black Lives Matter] and "Antifa" has been able to do it so long,' a violent assault on the seat of government was appropriate."), *aff'd*, No. 22-3088, 2023 WL 8594077 (D.C. Cir. Dec. 12, 2023).

133. *See infra* Section II.A.1.

134. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 42 (8th ed. 1916). For an overview of the evolution of treason across English and American law, *see* George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1613 (2004); JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 3–11 (1971).

135. Katz v. United States, 389 U.S. 347, 360 (1967) (Douglas, J., concurring). *See also* United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986) ("Treason . . . is the most serious national crime and is punishable by death."); Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943) ("Treason is the most serious offense that may be committed against the United States.").

136. Hanauer v. Doane, 79 U.S. 342, 347 (1870).

137. Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 L. & SOC. INQUIRY 787, 788 (2001).

guideline sentence for treason at the highest in the Sentencing Guidelines—life in prison.[138]

Blackstone also spoke of treason in terms of betrayal: it entails a betrayal or renunciation of allegiance to the king or his government, or at least a "criminal neglect" of that duty of allegiance.[139] George Fletcher distills its essence as "a crime committed by members of a nation against the nation itself."[140] It is therefore a "relational crime, committed only by persons who stand in a specific relationship to others."[141] Accordingly, treason is not a crime that anyone can commit against anyone else.[142] For example, a neighbor cannot commit treason against his individual neighbor; it depends upon a relationship. In this case, a member of "We the People" committing treason against the United States itself.[143]

As a consequence of the Enlightenment, the victim of betrayal shifted from the king to the nation.[144] John Locke, whose theories were immensely influential to the Founders, posited that people who consent with others to make a nation are then "'under an obligation to every one of that society to

138. *See* U.S. SENT'G GUIDELINES MANUAL §2M1.1 (U.S. SENT'G COMM'N 2023) (setting base offense level at forty-three). The sentencing guidelines do not include capital punishment as an option for any offense. *See also* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1213–14 (2017) (discussing deliberations of the initial sentencing commissioners on the issue of capital punishment). George Fletcher argues that people in the West are more "ambivalent" about treason today than in the past and instead focus more on immediate threats of personal harm. *See* Fletcher, *supra* note 134, at 1628 ("The decline of treason expresses a general shift in our culture away from symbolic struggles toward the systematic and scientific control of violence.").

139. BLACKSTONE, *supra* note 134, at 74.

140. Fletcher, *supra* note 134, at 1618.

141. *Id.* Blackstone agrees, stating that treason "happens only between allies." BLACKSTONE, *supra* note 134 at 75.

142. Fletcher, *supra* note 134, at 1618.

143. *Id.*

144. *See* B. Mitchell Simpson, III, *Treason and Terror: A Toxic Brew*, 23 ROGER WILLIAMS U. L. REV. 1, 1 (2018) (explaining that "[i]n our jurisprudence, its original purpose was to punish those who would kill or betray the king. Under the United States Constitution, the intention to punish betrayal remains" but is narrowed and applied to the state).

submit to the determination of the majority.'"[145] Treason is therefore a crime on the "grandest scale possible" because it is a crime not just against one person but "against all members of the state."[146]

Treason is one of only three offenses that the Framers considered important enough to expressly criminalize in the Constitution.[147] Treason is the only crime that the Constitution actually defines; it consists of (1) levying war against the United States or (2) adherence to the enemy and rendering him aid and comfort.[148] The Framers were inspired by the broader English treason statute of 25 Edward III (1351), which criminalized treason and included "'compass[ing] or imagin[ing] the death of our Lord the King,'" queen, or many of the king's other relatives.[149] The 1351 statute deemed treasonous murdering royal officials and counterfeiting royal documents or currency.[150] Importantly, it was also treason "if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere."[151] The scope of treason in England expanded after 1351 and was used to suppress political opposition or beliefs "distasteful to those in power."[152]

To prevent abuses they observed in England, the Framers narrowed the English conception of treason to only the most

145. *Id.* at 6 (quoting JOHN LOCKE, TWO TREATIES OF GOVERNMENT (Ernest Rhys ed., J.M. Dent & Sons, Ltd. last rprt. 1943) (1690)).

146. *Id.* at 5.

147. The others are piracy and counterfeiting. U.S. CONST. art. I, § 8, cl. 10, 6. Article I, Section 8 also grants Congress the authority to punish "offenses against the law of nations." In ancient common law, if piracy was committed by a subject of the king, it was considered treason; otherwise, it was a felony. BLACKSTONE, *supra* note 134, at 82.

148. U.S. CONST. art. III, § 3, cl. 1; *see also* Cramer v. United States, 325 U.S. 1, 22 (1945). "Levying war" means "actually" levying war (not just conspiring to do so). *See Ex parte* Bollman, 8 U.S. 75, 126 (1807).

149. Fletcher, *supra* note 134, at 1613 (quoting Treason Act 1351, 25 Edw. 3 c. 2 (Eng.)).

150. Treason Act 1351, 25 Edw. 3 c. 2 (Eng.).

151. *Id.*

152. HURST, *supra* note 134, at 5.

severe treasonous conduct,[153] conduct that subverts the established foundation of the state's authority and security.[154] Incorporating the English Treason Trials Act of 1688, the Framers constitutionalized the requirement that an "overt act" be proven by the testimony of at least two witnesses (or on confession in open court).[155] The First Congress also clarified that the offender must first owe an allegiance to the United States to be guilty of treason.[156] Treason prosecutions are rare, especially in modernity.[157] The punishment for treason at the country's founding was death,[158] but it now statutorily includes anything from five years in prison to death.[159] While many treason prosecutions commenced after conflicts like the Whiskey Rebellion and both World Wars, "after 1954 not a single American was charged with treason until . . . 2006."[160] This has been attributed to the 1945 Supreme Court case *Cramer v. United States*, 325 U.S. 1 (1945), making treason harder to prove, and to Congress creating new offenses that cover

153. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 2d § 6.14 ("[T]he English definition also included, among other things, compassing the death of the chief magistrate, counterfeit of the great seal or coin, and killing a judge when in the exercise of his office.").

154. *Id.*

155. *See* U.S. CONST. art. III, § 3, cl. 1. These additions were intended to limit future political abuses. *See* Alexander Gouzoules, *Dual Allegiance: Federal and State Treason Prosecutions, the Treason Clause, and the Fourteenth Amendment*, 53 IND. L. REV. 593, 594 (2020) (citing THE FEDERALIST NO. 43 (James Madison)).

156. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 1, 1 Stat. 112, 112 (1790) ("[I]f any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death."). The Treason Clause prevents Congress from redefining treason but allows Congress to establish the punishment for treason. *See* U.S. CONST. art. III, § 3, cl. 1.

157. Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing* Cramer v. United States *and Its Significance*, 36 FLA. STATE U. L. REV. 635, 639 (2009).

158. An Act for the Punishment of Certain Crimes Against the United States, *supra* note 156, at § 1.

159. 18 U.S.C. § 2381. The federal sentencing guidelines provide only one punishment—life in prison. *See* U.S. SENT'G GUIDELINES MANUAL §2M1.1 (U.S. SENT'G COMM'N 2023).

160. Crane, *supra* note 157, at 639.

subversive conduct.[161] Congress has authority to specify lesser treason-like crimes that are of a "subversive nature"[162] that do not require an overt act, two witnesses, and other requirements.[163]

2. Other subversive activities

Congress has created many treason-like offenses of a subversive nature that are on what we may call the "treason spectrum." Many of these are within Chapter 115 of Title 18—entitled "Treason, Sedition, and Subversive Activities"—including misprision of treason, rebellion or insurrection, seditious conspiracy, advocating overthrow of government, failure to register as a foreign agent, activities affecting the armed forces (during and outside of a war), recruiting for services against the United States, and enlistment to serve against the United States.[164] In *Cramer*, Justice Robert Jackson identified other historical instances of Congress criminalizing treasonous conduct that overlapped with or was short of actual treason, including unlawfully obtaining certain defense information, disloyal acts in wartime, and trading with the enemy.[165] Treason and treason-like offenses make up the treason spectrum.[166]

"Treason" is at one end of the spectrum and is defined in the Constitution.[167] It has historically applied to those who breach the duty of allegiance by levying war or "doing something to help an enemy."[168] Other offenses on the spectrum may have

161. *Id.* at 680–85.

162. ROTUNDA & NOWAK, *supra* note 153, § 6.14 n.2.

163. Crane, *supra* note 157, at 680–85.

164. 18 U.S.C. §§ 2381–90.

165. Cramer v. United States, 325 U.S. 1, 46 n.54 (1945).

166. *See infra* Table 2.

167. *See* U.S. CONST. art. III, § 3, cl. 1 (levying war against the United States or adherence to the enemy and rendering him aid and comfort).

168. Simpson, *supra* note 144, at 2.

definitions provided in statutes[169] or case law, but a few important offenses (namely, insurrection and rebellion) are more difficult to define. William Baude and Michael Stokes Paulson offer a working definition of "insurrection" in the context of Section 3 of the Fourteenth Amendment: beyond ordinary lawbreaking, protest, riot, or civil disobedience and involves "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect."[170] Relatedly, Baude and Paulson define "rebellion," which sometimes consists of conduct that overlaps with insurrection, as "an effort to overturn or displace lawful government authority by unlawful means" and involves a repudiation of existing governmental authority.[171] Working definitions are sufficient at this point as it is ultimately the government's burden to establish that an offense on the treason spectrum occurred.[172]

Baude and Paulson use the example of the Confederates' attack on Fort Sumter in 1861 to show conduct that constitutes insurrection might not constitute a rebellion, and vice-versa.[173] Had the Confederates attacked before declaring secession, the attack might constitute an insurrection but not a rebellion, because (in this hypothetical) there was no effort to replace or repudiate the lawful government.[174] Had Southern states seceded but not attacked, this might constitute rebellion but not

169. *See, e.g.*, 18 U.S.C. § 2384 (defining seditious conspiracy: "[When] two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof."); United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986) ("Section 2384 provides a vehicle for the government to make arrests before a conspiracy ripens into a violent situation.").

170. Baude & Paulsen, *supra* note 108, at 676.

171. *Id.*

172. *See infra* notes 192–93 and accompanying text.

173. *See* Baude & Paulsen, *supra* note 108, at 679.

174. *See id.*

insurrection because there was not yet any "forcible resistance."[175]

Treason, insurrection, and rebellion are related and are on the treason spectrum because, among other reasons,[176] they involve crimes "committed by members of a nation against the nation itself"[177] as a breach of duty of allegiance to the nation.[178] Far from some "vestige of a feudal past," allegiance is "[a]n essential element of [American] citizenship," and core to the crime of treason.[179] In the Capitol Breach context, judges found that many offenders' conduct also undermined democracy in that it showed a "flagrant disregard for the law and our constitutional order"[180] and "interfer[ed]with the peaceful transfer of power, one of our Nation's crown jewels."[181]

The existence of a treason spectrum is apparent in Congress's creation of treason-like offenses, like those in Chapter 115 of Title 18, with different ranges of punishments evidencing Congress's understanding of severity.[182] Blackstone also acknowledged a treason spectrum, stating that treason involves "in some *degree* a breach of this duty of allegiance" and

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175. *Id.*

176. *See* 18 U.S.C. §§ 2381–90.

177. Fletcher, *supra* note 134, at 1618.

178. BLACKSTONE, *supra* note 134, at 74.

179. Ashwini Vasanthakumar, *Treason, Expatriation and "So-Called" Americans: Recovering the Role of Allegiance in Citizenship*, 12 GEO. J.L. & PUB. POL'Y 187, 190, 203 (2014) ("American nationality, for example, is tautologically defined with reference to allegiance: an American national is statutorily defined as any 'person owing permanent allegiance to the United States.'").

180. *See* United States v. Pezzola, 531 F. Supp. 3d 139, 150 (D.D.C. 2021) (quoting United States v. Munchel, 521 F. Supp. 3d 54, 61 (D.D.C. 2021)) ("The gravity and boldness of his alleged offenses, which reflect a flagrant disregard for the law and our constitutional order, cannot be overstated. As one court observed, the conduct he is charged with 'threatens the republic itself.'").

181. United States v. Tarrio, 605 F. Supp. 3d 73, 78 (D.D.C. 2022); *see also* United States v. Chrestman, 525 F. Supp. 3d 14, 33 (D.D.C. 2021) ("Even more troubling than the implication that the President can waive statutory law is the suggestion that the President can sanction conduct that strikes at the very heart of the Constitution and thus immunize from criminal liability those who seek to destabilize or even topple the constitutional order."). As a limiting principle, policymakers may wish to restrict offenses on the treason spectrum to those that are democracy-undermining.

182. *See infra* Table 2.

identifying four different kinds of treason, each with different severity and ranges of punishment:

- Treason;
- Felonies injurious to the king's prerogative;
- Praemunire; and
- Other misprisions and contempts.[183]

Thus, although this Article provides new framing and a vocabulary with which to interpret the severity of these types of offenses, conceptually the treason spectrum has a long history in American and English traditions.

3. Severity of offenses on the treason spectrum

Ranking the severity of offenses on the treason spectrum can be a subjective value judgment, but statutory ranges of punishment can serve as a guide. The following table ranks the offenses in Section 115 of Title 18 of the United States Code in order of severity based on statutory maximums, revealing Congress's treason spectrum:

Table 2: Treason Spectrum

Offense	Statute	Statutory Maximum Punishment
Treason	18 U.S.C. §	Death[184]

183. BLACKSTONE, *supra* note 134, at 74–100. *Praemunire* is a "criminal offense of obeying an authority other than the king." BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Heather R. Darsie, *Our English Legal Forebearers and Their Contributions to the Practice of Law and American Jurisprudence: Sir Thomas More, Sir Edward Coke, and Sir William Blackstone*, 40 N. ILL. U. L. REV. 227, 230 (2020) ("The original purpose of the Statute of Praemunire was to limit the powers of the Pope and the Holy Roman Emperor in matters involving England.").

184. 18 U.S.C. § 2381 (declaring that guilty offenders shall also incur a fine of at least $10,000 and "shall be incapable of holding any office under the United States"). *See also* Fletcher, *supra* note 134, at 1612 (noting that death as a punishment for treason "is of dubious constitutionality," citing Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (death penalty unconstitutional as imposed for rape)).

	2381	
Advocating overthrow of Government	18 U.S.C. § 2385	20 years[185]
Seditious conspiracy	18 U.S.C. § 2384	20 years
Activities affecting armed forces during war	18 U.S.C. § 2388(a)	20 years
Rebellion or insurrection	18 U.S.C. § 2383	10 years[186]
Activities affecting armed forces generally	18 U.S.C. § 2387	10 years[187]
Activities affecting armed forces during war (Harboring or Concealing)	18 U.S.C. § 2388(b)	10 years
Misprision of treason	18 U.S.C. § 2382	7 years
Foreign Agent Registration	18 U.S.C. § 2386	5 years
Recruiting for service against United States	18 U.S.C. § 2389	5 years
Enlistment to serve against United States	18 U.S.C. § 2390	3 years

According to Congress, enlisting to serve against the United States is not as severe as recruiting people to serve against the United States. Both of those are less severe than rebellion or insurrection, which are not as severe as treason. These are not

185. 18 U.S.C. § 2385 (declaring that guilty offenders shall also "be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction").

186. *Id.* § 2383 (declaring that guilty offenders shall also "be incapable of holding any office under the United States").

187. *Id.* § 2387 (declaring that guilty offenders shall also "be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction").

necessarily the only offenses on the treason spectrum,[188] but this is a conceptual starting framework for understanding the relative severity of offenses on this spectrum. This spectrum informs the extent of the associated sentencing enhancement.

B. A New Sentencing Enhancement for Conduct That Involves Offenses on the Treason Spectrum

If the offense of conviction is not on the treason spectrum (like most of the January 6 convictions) but *involved* an offense that is on the treason spectrum, offenders should incur a sentencing enhancement because the conduct is more severe than conduct committed outside of the context of offenses on the treason spectrum. Importantly, an offender committing a non-treason offense is not being sentenced *for* treason or *for* any offense on the treason spectrum. Unlike cross-references,[189] the more severe punishment is not replacing what would otherwise be a guideline range. The treason spectrum is merely a reference to ground the severity of enhancements.

For example, if an offender assaults a police officer in the context of a rebellion, the offender would receive a *greater enhancement* than if the assault involved recruiting to serve against the United States because rebellion is higher on the treason spectrum. If the assault was not in the context of any offense on the treason spectrum (or was not one analogous to those offenses),[190] the offender would receive no such enhancement. Like the statutes and guidelines discussed below, the proposed enhancement simply acknowledges that if an offender committed offense "A" and it involved a more serious

188. *See, e.g.*, Cramer v. United States, 325 U.S. 1, 46 n.54 (1945) (Jackson, J.) (identifying related statutes). For other potential examples, *see* §§ 2151–56 (Sabotage); §§ 792–799 (Espionage and Censorship).

189. *See infra* notes 198–202 and accompanying text (providing example of cross references).

190. To avoid attempting to identify every offense that is on the treason spectrum, policymakers can list the clearest or most common offenses and provide a catchall provision: "or any offense analogous to one of these offenses." *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §2X5.1 (U.S. SENT'G COMM'N 2023) (catchall provision in the Sentencing Guidelines addressing offenses that do not have direct guidelines).

offense "B," her conduct is simply more serious than if she had committed offense A and the conduct did not involve offense B.

Given the importance of determining whether the conduct "involved" offenses on the treason spectrum, some additional discussion is warranted. As a preliminary matter, the burden of proof for establishing the enhancement (i.e., whether an insurrection or rebellion existed and whether the conduct "involved" an offense that is on the treason spectrum) is on the government, which must establish this by a preponderance of the evidence.[191] Additionally, because this Article invokes the treason spectrum only in the context of federal *sentencing*, "involved" has the same meaning that it has in the federal-sentencing context. The Sentencing Guidelines do not define "involve,"[192] but a working definition is "to include within its scope or ramifications as a necessary accompaniment,"[193] for the reasons described below.

Federal statutes use "involve" regularly in the context of sentencing enhancements and mandatory minimum sentences.[194] Although the Supreme Court has not propounded a definition in the Sentencing Guidelines context, in the context

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191. *See, e.g.*, *id.* §6A1.3 ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."); *cf*. United States v. Booker, 543 U.S. 220, 236 (2005) ("The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.").

192. *See, e.g.*, United States v. Logsdon, 26 F.4th 854, 857 (10th Cir. 2022) ("[T]he Guidelines do not define the word 'involved,' so we turn to its plain meaning."); United States v. Quiroga, No. 22-10915, 2022 WL 4295414, at *5 (11th Cir. Sept. 19, 2022) ("[T]he Guidelines nowhere define 'involved,' and our case law has not squarely addressed the term's scope.").

193. *See, e.g.*, *Quiroga*, 2022 WL 4295414, at *5. "To 'involve' is to 'include within its folds or ramifications; to contain, imply.'" *Id.* (citing Oxford English Dictionary (online ed.) and finding "involve" in §2K2.1(a)(3) to have an unambiguous plain meaning).

194. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(ii) (stating that "violent felony" for purposes of enhancement under the Armed Career Criminal Act includes any felony that, among other things, "involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"); 28 U.S.C. § 994(i)(5) (mandating "a substantial term of imprisonment" if a drug offense "involved trafficking in a substantial quantity of a controlled substance").

of the Armed Career Criminal Act, the Court acknowledged the parties' agreement that "involve" means "necessarily require" and "to include as a necessary circumstance, condition, or consequence."[195] The Court has also unanimously held in a different case that district-court determinations about whether offenses are "related" are entitled to deference.[196] This is an issue for the government to establish and the sentencing court to decide, and the sentencing court's determination should be given due deference. The Sentencing Guidelines use "involve" abundantly,[197] and offenders regularly incur sentencing enhancements if conduct "involves" more serious conduct.

Cross-references. The Sentencing Guidelines often use "involve" when an offender commits one offense but is subject to a cross-reference to a more severe guideline because the offense of conviction "involved" the more severe offense. For example, Julieann Logsdon worked at Mail-Mart, a mail and shipping business.[198] Her location of Mail-Mart was set on fire, and she lied to federal agents who were investigating the cause of the fire.[199] She pleaded guilty to making a false statement in violation of 18 U.S.C. § 1001, and her guideline range for making a false statement likely would have been zero to six months in prison if the direct guideline had applied (§2B1.1 (Larceny, Embezzlement, Theft)), but the district court applied the cross-reference in U.S. Sentencing Guideline §2B1.1(c)(2)

195. Shular v. United States, 140 S. Ct. 779, 785 (2020); *see also* United States v. Fields, 53 F.4th 1027, 1056 (6th Cir. 2022) (noting competing views of "involve," such as a narrow "necessarily entails" or "necessarily requires" view, and a broader "related to" or "connected with" view).

196. *See* Buford v. United States, 532 U.S. 59, 59 (2001).

197. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §2B1.1(c)(2) (U.S. SENT'G COMM'N 2023) (Larceny, Embezzlement, Fraud) ("If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives)."); *id.* §2D1.1(b)(5) (increasing two levels if the offense "involved" illegally imported amphetamine or methamphetamine); *id.* §2A2.2(b)(4) (applying a three-level enhancement "[i]f the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner").

198. United States v. Logsdon, 26 F.4th 854, 855 (10th Cir. 2022).

199. *Id*.

because the lie "involved arson."[200] Even though there was no evidence that she had anything to do with causing the fire, the cross-reference applied because her "false statement can only be understood with reference to the ongoing arson investigation it obstructed. Without the arson, the statement would not have been made, let alone recorded, let alone prosecuted."[201] This was true even though Logsdon never even mentioned arson in her false statements, because "nothing in §2B1.1 requires that a false statement expressly reference arson."[202]

Specific-offense characteristics. In addition to frequently using "involve" in the context of cross-references, "involve" is used in many specific-offense characteristics to enhance a base offense level when one offense "involves" another, more severe offense. For example, a jury found Malek al-Maliki guilty of sexually abusing his two children in violation of 18 U.S.C. §§ 2423(c) and (e) (engaging in illicit sexual conduct in foreign places).[203] The applicable guideline is §2A3.1 (Criminal Sexual Abuse), and that guideline has a specific-offense characteristic which states that if "the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) [aggravated sexual abuse, a different statutory offense], increase by 4 levels."[204] Here, like the treason-spectrum enhancement, the guideline applicable to one statute enhances the offense level based on conduct described in a different, more serious statute. The Court of Appeals affirmed the application of the enhancement, agreeing with the trial judge that "al-Maliki did, in fact, use force against the victim."[205]

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200. *Id.* at 856; *see also* U.S. SENT'G GUIDELINES MANUAL §2B1.1(c)(2) (U.S. SENT'G COMM'N 2023) ("[I]f the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.").

201. *Logsdon*, 26 F.4th at 858 (citing United States v. Montgomery, 468 F.3d 715, 720 (10th Cir. 2006)).

202. *Id.* at 859–60; *see also* United States v. Johnson, 782 F. App'x 568, 570 (9th Cir. 2019) (affirming the same cross-reference in a false-statements case).

203. United States v. Al-Maliki, 787 F.3d 784, 789–90 (6th Cir. 2015).

204. *See id.* at 790; U.S. SENT'G GUIDELINES MANUAL §2A3.1(b)(1) (U.S. SENT'G COMM'N 2023).

205. *Al-Maliki*, 787 F.3d at 796 (quotations omitted).

These types of enhancements acknowledge that although the statutory elements involved in different convictions under the same statute may be identical, conduct can be more serious if it involves more severe behavior or context.[206]

But the current statutory and guideline regime wholly fails to account for the increased seriousness of Capitol Breach convictions that involve offenses that are on the treason spectrum. As the above and countless other cases demonstrate, Congress and the Sentencing Commission believe that the severity of offenses is context dependent. Both entities account for this reality by imposing an array of enhancements throughout the Federal Criminal Code and the Sentencing Guidelines. Under the Federal Criminal Code and the Sentencing Guidelines, an enhancement is appropriate if a lesser offense involves a more serious offense. This straightforward principle should apply to conduct involving offenses on the treason spectrum.

It might be understandable that the current penal system has overlooked the increased severity of conduct that involves offenses that are on the treason spectrum. The Capitol Breach was an unprecedented event that seemed unfathomable before it occurred. One indication of this blind spot is that among the variety of offenses in Chapter 115 of Title 18, only treason has a sentencing guideline.[207] The Sentencing Commission has never

206. There is no shortage of critics of the Sentencing Guidelines' use of "real offense sentencing" and the Sentencing Guidelines' rather heavy reliance on the consideration of facts beyond those that formed the basis of the offense of conviction. *See, e.g.*, Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1758 (1999) ("When I describe federal real offense sentencing to lawyers and judges outside the United States, the reaction is always a combination of incredulity and disapproval."); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real Offense Sentencing*, 91 NW. U. L. REV. 1434, 1437, 1440 (1997). But even if the use of acquitted and uncharged conduct is at some point limited, it seems unlikely that judges will (or should) ever be precluded from considering the full context of a criminal offense. Additionally, any such objection to the proposed treason-spectrum enhancement would likely be an objection to *all* enhancements. My point is not one in support of all enhancements, it is simply that the Guidelines fail to account for the severity of subversive activities.

207. *See* U.S. SENT'G GUIDELINES MANUAL §2M1.1, ch. 5, pt. A & app. n.1 (U.S. SENT'G COMM'N 2023) (providing life in prison as the only punishment for treason).

promulgated guidelines for any of the other offenses like sedition, rebellion, or insurrection, and these offenses are in the rare class of offenses sentenced under §2X5.1. This fact may evidence the unique nature of these offenses.[208]

However, the unique nature of offenses on and related to the treason spectrum is no excuse for not accounting for their increased severity, especially now that an event like the Capitol Breach is not only conceivable—it has actually happened. The system accounts for the increased severity of offenses involving arson, strangling, and even using a fake website,[209] but there is oddly no enhancement or offenses involving the spectrum of the "highest"[210] and "worst crime of all."[211] This sentencing blind spot should be resolved by adding staggered sentencing enhancements for offenses that involve those on the treason spectrum.

As a concrete example, compare Samira Jabr with Jesus Rivera. Completely unrelated to the Capitol Breach, Jabr drove across the country in an attempt to meet then-President Trump in person to inform him that "[s]he believed herself to be the victim of a conspiracy between law enforcement and various casinos."[212] When she arrived at what she thought was the White House (it was actually the nearby United States Treasury Building), she "scaled two fences, ran across a courtyard, and sprinted up the stairs of the building towards the entrance, where Secret Service officers intercepted her."[213]

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208. The Commission might have believed that the conduct that comprises offenses on the treason spectrum is too context-dependent to enact rigid guidelines. For example, the Sentencing Commission has not promulgated a guideline for contempt because of the variety of forms contempt can take. *See id.* §2J1.1, app. n.1 ("Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent . . . .").

209. *See id.* §3C1.4 (citing 18 U.S.C. § 3559(g)(1)).

210. BLACKSTONE, *supra* note 134, at 75. For an overview of the evolution of treason across English and American law, *see* Fletcher, *supra* note 134, at 1613; HURST, *supra* note 134, at 1–11.

211. Katz v. United States, 389 U.S. 347, 360 (1967) (Douglas, J., concurring).

212. United States v. Jabr, 4 F.4th 97, 99 (D.C. Cir. 2021).

213. *Id.* at 99–100.

Rivera, on the other hand, attended the Capitol Breach on January 6.[214] He videotaped himself walking past "destroyed fencing marked with 'Area Closed' signs" and "rioters attempting to break through a police line."[215] As he filmed the crowd breaching the Senate Wing and Parliamentarian Doors, apparently referencing a prior discussion or plan, he remarked:

> This is what me and my boy were talking about, saying [that] the only way this would be a real revolution is if we go in and pull their asses out of there. This is the only fucking way. All this fucking talk—it has to get done, dude. This is what we need. This is what they needed.[216]

After guiding fellow rioters that "there's an easier way up" into the Capitol Building, he entered the Capitol through a broken window.[217]

Jabr and Rivera both trespassed on restricted federal land in Washington, D.C. They were charged and convicted under 18 U.S.C. § 1752(a)(1), which prohibits "knowingly enter[ing] or remain[ing] in any restricted building or grounds without lawful authority to do so."[218] But their conduct is qualitatively different.

Jabr's conduct in no way involved treason as the Constitution contemplates—it did not involve levying war against the United States or giving aid and comfort to its enemies.[219] It did not involve "concerted, forcible resistance to the authority of government to execute the laws in at least some significant respect" (insurrection), nor did it involve overturning, replacing, or displacing "lawful government authority by unlawful means" (rebellion).[220] Her crime did not

214. United States v. Rivera, No. 22-3088, 2023 WL 8594077, at *1 (D.C. Cir. Dec. 12, 2023).
215. *Id.* at *1–2.
216. *Id.* at *2.
217. *Id.*
218. United States v. Jabr, 4 F.4th 97, 101 (D.C. Cir. 2021); *Rivera*, 2023 WL 8594077, at *3.
219. *See* U.S. CONST. art. III, § 3.
220. *See* Baude & Paulsen, *supra* note 108, at 676–77.

involve a breach of duty of allegiance to the United States,[221] nor did it involve the unique class of crimes that are crimes "against the nation itself."[222]

Rivera, on the other hand, sought a "real revolution," apparently involving pulling members of Congress out of the Capitol Building to thwart the peaceful transfer of power after his preferred candidate lost the election.[223] To be clear, his conduct, like other January 6 conduct that comes to mind, was not treasonous nor did it *involve* treason in the strict sense of the term because it did not involve levying war or helping a foreign enemy.[224] But Rivera's conduct on January 6 "included within its scope or ramifications"—involved—a concerted, forcible resistance to the authority of government to execute the laws and "included within its scope or ramifications" the overturning, replacing, or displacing lawful government authority by unlawful means (at minimum, thwarting the Electoral Vote count and/or pulling members of Congress out of their lawful session).[225] Though he was not charged or found guilty of insurrection, rebellion, or any offense on the treason spectrum, his trespass (and other offenses)[226] involved insurrection or rebellion, which are on the treason spectrum. Conduct involving offenses on the treason spectrum is more severe, justifying sentencing enhancements. As set forth more

221. *See* BLACKSTONE, *supra* note 134, at 74.

222. *See* Fletcher, *supra* note 134, at 1618.

223. *See* United States v. Rivera, No. 22-3088, 2023 WL 8594077, at *2 (D.C. Cir. Dec. 12, 2023).

224. *See* Fletcher, *supra* note 134, at 1613 ("[T]he distinction between sedition (overthrowing the government) and treason (as attachment to a foreign power) is fundamental to understanding the nature of the latter.").

225. *Compare* United States v. Quiroga, No. 22-10915, 2022 WL 4295414, at *5 (11th Cir. Sept. 19, 2022) (defining "involve" in the Sentencing Guidelines Manual as its plain meaning: "to include within its folds or ramifications"), *with Rivera*, 2023 WL 8594077, at *1–3 (finding that Rivera filmed the riot, encouraged others to enter the building, and claimed that "the only way this would be a real revolution is if we go in and pull their asses out of there").

226. Rivera was also convicted of Disorderly and Disruptive Conduct in a Restricted Building in violation of 18 U.S.C. § 1752(a)(2), Violent Entry and Disorderly Conduct in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(D), and Parading, Demonstrating, or Picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G). *See Rivera*, 2023 WL 8594077, at *1, *3.

fully below, if an enhancement applied to Rivera's sentence,[227] it would be greater than someone whose offense involved failing to register as a foreign agent, but less than someone whose offense involved treason.

1. Source of enhancement

Congress. Congress created the Commission, has the authority to establish sentencing enhancements statutorily, and can also direct the Sentencing Commission to amend the Sentencing Guidelines to add enhancements.[228] Since creating the Commission, Congress has passed a host of laws directing the Sentencing Commission to take certain actions regarding the Sentencing Guidelines.

For example, after the 1993 World Trade Center attack, Congress directed the Commission to increase sentences on terrorism, and after the 1995 attack on the Murrah Building in Oklahoma City, Congress directed the Commission to increase certain punishments to better address domestic terrorism.[229] In 2000, Congress directed the Commission to increase penalties related to student financial aid fraud,[230] including specifically telling the Commission how many levels certain enhancements should be.[231] In 2002, it directed the Commission to increase

227. These cases were used to introduce the differences between offense conduct. As explained in the next sections, although the qualitative difference should still be taken into account in other ways, the enhancement proposed in Section II.B.2 would not apply to Rivera because his crimes were misdemeanors, not felonies.

228. *See* 28 U.S.C. § 991.

229. *See* John D. Cella & Craig R. Heeren, *The "Terrorism" Sentencing Enhancement and Its Application to Domestic Terrorism*, 71 DEPT. OF JUST. J. FED. L. & PRAC. 195, 198 (2023) (discussing U.S. Sentencing Guideline §3A1.4); *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 129, at 1916–17 (illustrating a historical overview of terrorism statutes and guidelines).

230. *See* U.S. SENT'G GUIDELINES MANUAL §2B1.1 (U.S. SENT'G COMM'N 2023).

231. U.S. DEP'T OF EDUC., U.S. DEP'T OF JUST. & FED. TRADE COMM'N , COLLEGE SCHOLARSHIP FRAUD PREVENTION ACT OF 2000 ANNUAL REPORT TO CONGRESS 3 (2012), https://www.ftc.gov/sites/default/files/documents/reports/college-scholarship-fraud-prevention-act-2000-eleventh-annual-report-congress-united-states/1211scholarshipfraudreport.pdf ("[The Act] amended Section 2B1.1(b)(7)(D) of the sentencing guidelines to add a provision raising the relevant offense level by two levels if the crime involved misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for attending an institution of higher education.").

penalties for the most egregious conduct in the context of assaulting officers, and the Commission adjusted the Sentencing Guidelines accordingly.[232] Congress also directed the Commission in 2002 to add an enhancement for certain offenders who use body armor, even telling the Commission that "[i]t is the sense of Congress that any sentencing enhancement under this subsection should be at least 2 levels."[233] The Commission soon promulgated §3B1.5, enhancing two levels if violent offenders' or drug offenders' offenses "involved the use of body armor," and four levels if the offenders used body armor during the commission or preparation of the offense.[234] And in 2004, Congress told the Commission to increase penalties for offenders who use a fake domain name in the commission of their offense, and the Commission promptly obliged.[235]

These enactments reveal that if something sufficiently captures Congress's attention, Congress acts and demands sentencing changes. After the Capitol Breach, offenses involving the treason spectrum should capture Congress's attention.[236] Congress has instructed sentencing judges to consider the "nature and circumstances of the offense and the history and characteristics of the defendant" to impose a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.[237] It has imposed

232. *See* U.S. SENT'G GUIDELINES MANUAL §2A2.2 cmt. background (U.S. SENT'G COMM'N 2023).

233. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11009(d)(2), 116 Stat. 1758, 1821 (2002) (codified at 34 U.S.C. § 10534(d)(2)); U.S. SENT'G GUIDELINES MANUAL §3B1.5 (U.S SENT'G COMM'N 2023).

234. U.S. SENT'G GUIDELINES MANUAL §3B1.5 (U.S SENT'G COMM'N 2023). This enhancement actually applied in sixteen cases in FY2022. *See* U.S. SENT'G COMM'N, 2022 ANN. REP. & SOURCEBOOK OF FED. SENT'G STAT. 73 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

235. *See* U.S. SENT'G GUIDELINES MANUAL §3C1.4 (U.S SENT'G COMM'N 2023) (citing 18 U.S.C. § 3559(g)(1)).

236. It was, after all, the "Capitol" Breach.

237. 18 U.S.C. § 3553(a).

"draconian"[238] mandatory minimums in an effort to "'deter the would-be drug trafficker from getting involved in drug trafficking.'"[239] If wearing body armor or using a fake website is important enough to motivate Congress to increase sentences, an increase for attempting to overturn, replace, or displace lawful government authority by unlawful means would seemingly sell itself. But political realities, including the 118th Congress potentially being the "least productive in US history,"[240] render this unlikely.[241]

Sentencing Commission. The Sentencing Commission is a more likely source of fixing this sentencing blind spot. It can do so with a new Chapter 3 adjustment. Unlike enhancements that are "specific-offense characteristics," which, as the name suggests, only apply to specific offenses,[242] Chapter 3 of the Sentencing Guidelines provides adjustments that can apply to virtually all offenses.[243] These adjustments take account of the context of the underlying offense and increase the guideline range if the offense involved more serious conduct.

Chapter 3 adjustments include a three-level enhancement if the offense was motivated by the victim being a member of a

238. Patti B. Saris, *So Much Accomplished, So Much Left To Do: A Retrospective on Six Years as Chair of the United States Sentencing Commission*, 87 UMKC L. REV. 145, 151, 157 (2018); GEORGE CLARKE COX, THE PUBLIC CONSCIENCE: SOCIAL JUDGEMENTS IN STATUTE AND COMMON LAW 75 (1922) (quoting PLUTARCH, PLUTARCH'S LIVES). Both stealing a cabbage and murder were punishable by death; Draco believed that the cabbage thief deserved death and he had no *higher* form of punishment for the murderer, so both received death. *Id.*

239. *See* Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 219–20 (2019) (quoting 132 CONG. REC. 22,731 (1986) (statement of Rep. Richard H. Lehman)).

240. *See* Joe LoCascio, Benjamin Siegel & Ivan Pereira, *118th Congress on Track to Become One of the Least Productive in US History*, ABC NEWS (Jan. 10, 2024, 7:30 PM), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/SH6C-MUMK].

241. *See, e.g.*, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 129, at 1915, 1922 ("[A] political climate marked by extreme polarization, decreasing trust in institutions, and increasing acceptance of political violence as legitimate . . . prevents the government from credibly calling out and labeling domestic terrorism as such.").

242. *See generally* U.S. SENT'G GUIDELINES MANUAL ch. 2 (U.S SENT'G COMM'N 2023) (listing enhancements for various specific crimes).

243. *See id.* ch. 3, introductory cmt.

protected class (hate crime),[244] a twelve-level enhancement if the offense involved terrorism,[245] a two-level enhancement if a violent or drug offense involved body armor,[246] and a two-level enhancement if the offender used a false domain name in the course of the offense.[247] If these circumstances are important enough to warrant Chapter 3 adjustments, enhancements should exist for the much more severe conduct involving offenses on the treason spectrum.

Judges. Finally, if neither Congress nor the Sentencing Commission act to fix this blind spot in sentencing, judges can depart or vary a sentence upward to account for the increased severity. Judges may sentence an offender outside of the guideline range through either a departure or a variance.[248] For the reasons articulated throughout this Article, the Sentencing Guidelines do not adequately account for offenses that involve conduct that is on the treason spectrum, meaning a departure[249] or variance is justified.[250]

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244. *Id.* §3A1.1.

245. *Id.* §3A1.4(a).

246. *Id.* §3B1.5.

247. *Id.* §3C1.4 (citing 18 U.S.C. § 3559(g)(1)).

248. *See* Irizarry v. United States, 553 U.S. 708, 714 (2008). A departure is a deviation from the guideline range typically for a reason expressly stated in the Sentencing Guidelines, while a variance is a deviation from the guideline range for a reason not stated in the Sentencing Guidelines—generally where the judge concludes that the Sentencing Guidelines do not adequately take something into account in order to meet the purposes of sentencing under 18 U.S.C. § 3553. *See* U.S. SENT'G GUIDELINES MANUAL §1B1.1 cmt. n.1(F) (U.S SENT'G COMM'N 2023) (defining departure); *Irizarry*, 553 U.S. at 714 (comparing departures and variances). *But see Irizarry*, 553 U.S. at 718 (Breyer, J., dissenting) (arguing that departures and variances are essentially the same thing).

249. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §5K2.0(a)(2)(B) (U.S SENT'G COMM'N 2023) ("A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.").

250. *See infra* Section II.B.4 (explaining why the terrorism enhancement is insufficient). One issue judges may face is the existing body of sentences that generally have not taken into account the treason spectrum. Without Congressional or Commission action, future sentences increased by variances may be considered disparate based on the existing body of sentences. This is one reason that Congressional or Commission action are preferable, but even if those bodies do not act, judges have broad discretion in sentencing, and judges need not perpetuate sentences that do not adequately take into account the severity of offenses. *Cf.* KATE STITH &

But judges are understandably hesitant to vary or depart from the Sentencing Guidelines because it opens their sentences to challenges on appeal.[251] There are existing departures that could arguably apply, including for conduct that disrupts government function[252] or is "extreme conduct,"[253] but these are insufficient for many reasons. Relying on them could lead to inconsistent application, both in terms of the offenders they apply to and the extent of the departures. More importantly, these departures fail to appreciate the unique severity of conduct that involves offenses on the treason spectrum. Conduct that involves the "most serious offense" should be built into the core of the Sentencing Guidelines; we should not rely on variances or departures to try to (inconsistently) capture it.

2. Extent of enhancement for offenses involving conduct on the treason spectrum

For the reasons stated throughout this Article, criminal conduct that involves an offense that is on the treason spectrum is qualitatively different and more severe than identical conduct that does not involve an offense on the treason spectrum, but how much more severe? It is difficult to compare offenses on the treason spectrum with non-subversive offenses given the unique nature of treason and subversive activities.[254] But Congress provided some insight into how much more seriously it takes treasonous offenses in 18 U.S.C. § 2382, misprision of treason.

Under § 2382, if someone knows of the commission of treason but conceals and does not as soon as possible disclose

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JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 169 (1998) ("The federal Sentencing Guidelines of today are based on a fear of judging; they attempt to repress the exercise of informed discretion by judges.").

251. *Cf.* Gall v. United States, 552 U.S. 38, 46–47 (2007) (explaining courts must accurately calculate the guideline range and give reasons for departures or variances, and larger deviations from guidelines require more explanation).

252. *See* U.S. SENT'G GUIDELINES MANUAL §5K2.7 (U.S SENT'G COMM'N 2023).

253. *Id.* §5K2.8.

254. *See supra* Sections II.A.1–2.

the treason, the person is subject to imprisonment of up to seven years.[255] But misprision of a regular, non-treasonous felony is only punishable by imprisonment of up to three years.[256] At least according to Congress, it is over twice as severe to commit misprision of treason than misprision of a regular felony.[257] Thus, there is an argument that the statutory maximum (and concomitant guideline range) should double if an offense that is not on the treason spectrum involves treason. Congress actually enacted a similar mechanism for the false domain situations described above: if an offender used a false domain in the commission of another offense, "the maximum imprisonment otherwise provided by law for that offense shall be doubled or increased by 7 years, whichever is less."[258] Note that this "doubling" mechanism would likely only apply if the non-treasonous offense involved treason; if the offense involved conduct lower on the treason spectrum, the increase would be something less than double.[259]

The extent of enhancement is ultimately a decision for policymakers, but the Sentencing Guidelines also provide some direction by analogy. To the extent that treason is conceptually like terrorism,[260] §3A1.4 applies a twelve-level enhancement to any offense that "is a felony that involved, or was intended to promote, a federal crime of terrorism," with a minimum offense level of thirty-two.[261] One could persuasively argue that treason is more severe than terrorism. The statutory penalties for treason are higher—from five years to death in the case of

255. 18 U.S.C. § 2382.

256. *Id.* § 4.

257. *Compare id.* § 2382 (seven years of imprisonment for misprision of treason), *with id.* § 4 (three years of imprisonment for misprision of a regular felony).

258. *See id.* § 3559(g)(1). Congress also doubled the statutory maximum for any offender who is convicted more than once for operating a "chop shop." *Id.* § 2322(a)(1).

259. *See supra* Table 2.

260. *See, e.g.*, United States v. Rahman, 189 F.3d 88, 151–52 (2d Cir. 1999) (applying treason guidelines to seditious-conspiracy convictions in the context of plotting terrorist bombings because the conduct was analogous to "waging war against the United States").

261. U.S. SENT'G GUIDELINES MANUAL §3A1.4(a) (U.S SENT'G COMM'N 2023).

treason,[262] but death is only available for terrorism if the terrorism resulted in murder.[263] Other maximum punishments for terrorism are lower than the death penalty.[264] More importantly, terrorism does not implicate a breach of the duty of allegiance individuals have to their nation,[265] which has historically supported separating treason and subversive activities into a unique and more severe category of offenses.[266]

The Sentencing Commission might justify a larger starting increase,[267] but for the purposes of this Article, we can apply the terrorism level of enhancement (twelve) to offenses that involve treason (the most severe offense on the treason spectrum). Accordingly, a newly enacted sentencing guideline, which would be known as §3C1.5, would read:

§3C1.5 Treason, Sedition, and Subversive Activities[268]

a. If the offense is a felony that involved, or was intended to promote, an offense under 18 U.S.C. § 2381, increase by [12] levels.[269]

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262. *See* 18 U.S.C. § 2381.

263. *See id.* § 2332(a)(1).

264. *See, e.g.*, *id.* § 2332(a)(2) (maximum of ten years for voluntary manslaughter); *id.* § 2332(a)(3) (maximum of three years for involuntary manslaughter); *id.* § 2332(b)(1) (maximum of twenty years for attempting to murder); *id.* § 2332(b)(2) (maximum of life in prison for conspiring with others to murder if an overt act is committed to effect the conspiracy).

265. *See, e.g.*, *id.* § 2331(1), (5) (showing distinction between the definitions for "international terrorism" and "domestic terrorism" to indicate that no allegiance to the United States is necessary for terrorism).

266. *See* ROTUNDA & NOWAK, *supra* note 153 (noting the Framers' choice of a restrictive treason definition applicable to only "a limited number of acts" that would actually "subvert the government of the United States").

267. The Sentencing Commission generated the initial guidelines using data from tens of thousands of prior cases. *See* Newton & Sidhu, *supra* note 138, at 1197. The Commission cannot use data on prior sentences as a starting place for an insurrection enhancement because the existing sentences were imposed (1) under the guidelines and (2) when the guidelines did not account for the increased severity of offenses involving conduct on the treason spectrum. As Part I shows, observing prior sentences tells us little about how judges perceive severity of conduct on the treason spectrum. This is an issue for policymakers to address anew.

268. This title mirrors that of Title 18, Chapter 115 ("Treason, Sedition, and Subversive Activities").

269. The Commission would also likely incorporate a minimum offense level and criminal-history category, as the terrorism enhancement does (minimum offense level of thirty-two and

b. If the offense is a felony that involved, or was intended to promote, an offense under 18 U.S.C. § 2384, 18 U.S.C. § 2385, or 18 U.S.C. § 2388(a), increase by [10] levels.
c. If the offense is a felony that involved, or was intended to promote, an offense under 18 U.S.C. § 2383, 18 U.S.C. § 2387, or 18 U.S.C. § 2388(b), increase by [5] levels.
d. If the offense is a felony that involved, or was intended to promote, an offense under 18 U.S.C. § 2382, 18 U.S.C. § 2386, 18 U.S.C. § 2389, or 18 U.S.C. § 2390, increase by [3] levels.

Upward Departure Provision.—The offenses in §3C1.5 reference offenses under Chapter 115 of Title 18 of the United States Code. There may exist other offenses that are analogous to Treason, Sedition, and Subversive Activities that are not specifically enumerated in §3C1.5. In such cases, an upward departure may be warranted.

The language in this adjustment ("involved, or was intended to promote") mirrors the language of the existing terrorism adjustment,[270] meaning the language has already survived a guideline-amendment process, and like many other Sentencing Guidelines[271] it references statutory offenses (here, those on the treason spectrum) to determine the extent of the increase. The graduated severity of the adjustments takes inspiration from the tiered statutory maximums for the referenced offenses—the highest being treason. Offenses in subsection (c) are half of that in subsection (b), mirroring the 50% lower statutory maximums for those offenses.[272] Notably, under this framework the distinction between insurrection or

CHC of VI). *See* U.S. SENT'G GUIDELINES MANUAL §3A1.4(a)–(b) (U.S. SENT'G COMM'N 2023). This puts the guideline range for offenses involving terrorism at 210–262.

270. *See id*. §3A1.4(a).

271. *See supra* Section II.B.

272. *See supra* Table 2.

rebellion[273] would be irrelevant (unless policymakers determined otherwise) because each is punished the same under 18 U.S.C. § 2383 and accordingly the same under the new §3C1.5(c).

The upward departure provision addresses circumstances in which the offense of conviction involves other subversive conduct that is not specifically enumerated in §3C1.5.[274] Most of the offenses in §3C1.5 have statutory definitions, but insurrection and rebellion do not. The Commission could define these terms[275] or leave the issue to the adversarial process, with the burden of establishing the applicability of the enhancement on the government.[276]

To the greatest extent possible, the enhancements should cohere with other enhancements in the Sentencing Guidelines. If offenses on the treason spectrum are more severe than other conduct that warrants enhancements, then the §3C1.5 enhancements would presumably be greater than most other enhancements in the guidelines.

3. Application to January 6 offenders

The government would have to establish that the Capitol Breach was "insurrection or rebellion,"[277] but commenters,[278]

273. *See supra* Section II.A.2 (defining and explaining the difference between insurrection and rebellion).

274. *See supra* notes 164–66 and accompanying text. The Commission could also survey the Criminal Code and add additional offenses to the treason spectrum, or it could simply instruct courts to determine which enumerated offense is most analogous to the unenumerated offense. *See supra* note 190.

275. *See supra* Section II.A.2.

276. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §6A1.3, cmt. (U.S. SENT'G COMM'N 2023) ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

277. *See supra* note 191 and accompanying text.

278. Baude & Paulsen, *supra* note 108, at 731 ("[I]t seems to us to be quite clear that the specific series of events leading up to and culminating in the January 6, 2021 attack qualifies as an insurrection within the meaning of Section Three").

federal judges,[279] two state courts,[280] a secretary of state,[281] and arguably even Congress[282] have answered in the affirmative.[283] The government would then have to establish that a particular offender was "involved" in an offense on the treason spectrum. District of Columbia District Court Judge Colleen Kollar-Kotelly's metaphor in Jesus Rivera's Capitol Breach case is instructive:

> Just as heavy rains cause a flood in a field, each individual raindrop itself contributes to that flood. Only when all of the floodwaters subside is order restored to the field. The same idea applies in these circumstances. Many rioters collectively disrupted Congressional proceedings, and each individual rioter contributed to that disruption. Because Rivera's presence and conduct in part caused the continued interruption to Congressional proceedings, the Court concludes that Rivera in fact impeded or disrupted the

279. *See, e.g.*, United States v. Bingert, 605 F. Supp. 3d 111, 115 (D.D.C. 2022) (describing the "unsuccessful insurrection"); United States v. Grider, 585 F. Supp. 3d 21, 24 (D.D.C. 2022) ("This criminal case is one of several hundred arising from the insurrection at the United States Capitol on January 6, 2021.").

280. *See* Anderson v. Trump, No. 2024 COEL 13, slip op. at 27 (Ill. Cir. Ct. Feb. 28, 2024), available at https://static01.nyt.com/newsgraphics/documenttools/356e00f60907ee5c/dd15e02b-full.pdf; Anderson v. Griswold, 543 P.3d 283, 329 (Colo. 2024) (determining that January 6 was an insurrection for the purposes of the Fourteenth Amendment), *rev'd on other grounds sub nom.* Trump v. Anderson, 601 U.S. 100 (2024).

281. Challenges of Kimberley Rosen, et al. to the Primary Nomination Petition of Donald J. Trump, Republican Candidate for President of the United States, slip op. at 23–24 (Sec. of State of Me. Dec. 28, 2023) ("The parties do not meaningfully dispute the events of January 6, 2021 . . . . I have little trouble concluding that the events of January 6, 2021 were an insurrection within the meaning of Section Three of the Fourteenth Amendment.").

282. *See* Act of Aug. 5, 2021, Pub. L. No. 117-32, § 1(2), 135 Stat. 322, 322 (2021) ("On January 6, 2021, a mob of insurrectionists forced its way into the U.S. Capitol building and congressional office buildings and engaged in acts of vandalism, looting, and violently attacked Capitol Police officers.").

283. Relatedly, in his appeal to the Supreme Court in *Trump v. Anderson*, Petitioner Donald J. Trump appears to have conceded the issue of whether January 6, 2021, was itself an "insurrection" and focused his argument on whether he "*engaged* in insurrection." *See generally* Brief for Petitioner, Trump v. Anderson, 601 U.S. 100 (2024) (No. 23-719).

> orderly conduct of Government business or official functions.[284]

"Involve" for sentencing purposes seems even broader than this metaphor commands; Julieann Logsdon's false statement "involved" arson even though it did not "contribute" to arson.[285]

Assuming for the sake of this Article that the Capitol Breach constituted insurrection or rebellion, felony offenders who were involved would receive a five-level enhancement under §3C1.5(c).[286] Applying the enhancement to the sentences that were the focus of Part I would result in the following guideline ranges:[287]

Table 3: Enhanced Guideline Ranges

Offense	Actual Average Guideline Range	J6 Average Sentence	New CHC I Guideline Range	New CHC II Guideline Range
18 U.S.C. § 231; U.S. Sentencing Guideline §2A2.4	7 to 13	8	18 to 24	21 to 27
18 U.S.C. § 1512; U.S. Sentencing Guideline §2J1.2	28 to 36	28	46 to 57	51 to 63

284. United States v. Rivera, 607 F. Supp. 3d 1, 9 (D.D.C. 2022), *aff'd*, No. 22-3088, 2023 WL 8594077 (D.C. Cir. Dec. 12, 2023); *see also* United States v. Grider, 651 F. Supp. 3d 1, 18 (D.D.C. 2022) (applying metaphor); United States v. Wright, No. CR 21-341, 2023 WL 2387816, at *12 (D.D.C. Mar. 4, 2023) (same); United States v. Gunby, No. CR 21-0626, 2023 WL 4993483, at *9–11 (D.D.C. Aug. 4, 2023) (same); United States v. MacAndrew, No. CR 21-730, 2023 WL 196132, at *23 n.5 (D.D.C. Jan. 17, 2023) (same).

285. *See supra* Section II.B.

286. *See supra* Section II.B.2.

287. These were derived by identifying the approximate total offense level based on the actual J6 guideline ranges and adding five levels to that offense level.

18 U.S.C. § 111; U.S. Sentencing Guideline §2A2.2	46 to 57	43	78 to 97	87 to 108

Presumably, most offenders would be sentenced at or below the bottom end of the guideline range.[288] These increases may or may not seem harsh. They naturally follow the analysis described above, starting from the position that offenses on the treason spectrum are more serious than the Sentencing Guidelines currently contemplate and analogizing to related enhancements.[289]

Notably, the enhancement would only apply to more serious offenders. Misdemeanants would not be subject to the enhancement,[290] which would exclude 67.5% of Capitol Breach offenders.[291] While the increased severity of their conduct should be taken into account, it would not be by application of §3C1.5, which by its terms only applies to felonies. This will also serve as an important limitation outside of the Capitol Breach context—it takes more than peaceful or misdemeanor conduct to trigger the harsher §3C1.5 enhancements.[292]

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288. *See* U.S. SENT'G COMM'N, AN UPDATE OF THE MULTIVARIATE REGRESSION ANALYSIS, *supra* note 31, at tbl. A (most federal sentences are at or below the bottom end of the guideline range).

289. For example, potentially analogous guidelines include §3A1.4 (Terrorism, increase twelve levels), and §3A1.2 (Official Victim, increase six levels).

290. *See supra* Section II.B.2 (using language that limits the proposed enhancement in the same manner as the existing terrorism enhancement: "If the offenses is a felony. . ."); *see also* §1B1.9 ("The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.").

291. *See supra* Section I.E.3.

292. *Cf.* Nancy C. Marcus, *When "Riot" Is in the Eye of the Beholder: The Critical Need for Constitutional Clarity in Riot Laws*, 60 AM. CRIM. L. REV. 281, 299 (2023) ("Just like a peaceful Black Lives Matter protester would be loath to be lumped together with those who commit property damage and looters (who are frequently just as likely to be outsider right-wing agitators as civil rights protesters), so may peaceful January 6 protesters wish not to be painted with the same broad brush as those who were violent, who interfered with the peaceful transition of power, and who desecrated the hallowed halls of Congress.").

Relatedly, the Commission can carefully protect against potential abuses. It can distinguish common offenses or events that are *not* on the treason spectrum. For example, a riot tends to involve undirected violence "and certainly no plan to overthrow the government."[293] While rioting is criminalized federally,[294] it is not in Chapter 115 of Title 18 of the United States Code,[295] nor has it been historically within the scope of other subversive activities on the treason spectrum.[296] A protest or riot can morph into an insurrection or rebellion,[297] but without more neither are on the treason spectrum. The Commission can also consider distinguishing between democracy-undermining conduct like rebellion or treason and insurrectionist conduct that involves forcible resistance to the authority of government but does not necessarily threaten democracy—the former receiving a greater enhancement.

4. Relationship to existing enhancements

There are existing enhancements that might appear to potentially cover conduct involving offenses on the treason spectrum, but conceptually and in practice the enhancements fail to do so.

For example, an enhancement exists if the offense of conviction "involved" terrorism. Section 3A1.4 provides that:

> a. If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the

293. Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638, 643 (1968) (citing S. DOC. NO. 57-209, at 258 n.a (1903)).

294. 18 U.S.C. § 2101.

295. *See also* Marcus, *supra* note 292, at 317–19 (collecting definitions of "riot" in state and federal statutes).

296. *See supra* Section II.A.

297. An interesting case study is the "Capitol Hill Autonomous Zone" ("CHAZ") created in the wake of the George Floyd protests in Seattle. The Seattle Police Department retreated from its east precinct and grassroots actors seized several blocks, creating an "autonomous zone" including "a grocery and food distribution program, a childcare center, a medical care facility, a mental health facility, a library, and a cooperative urban farm." Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80, 145–46 (2022).

> resulting offense level is less than level 32, increase to level 32.
>
> b. In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.[298]

The application notes for §3A1.4 clarify that by "terrorism" the guideline borrows the statutory definition of terrorism in 18 U.S.C. § 2332b(g)(5).[299] That statutory definition involves two requirements: (1) that the offense was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"; and (2) that the offense is one of the enumerated crimes listed in 18 U.S.C. § 2332b(g)(5)(B).[300] The government has only sought the terrorism enhancement in the most extreme Capitol Breach cases, with some judges applying it,[301] and others refusing to do so.[302]

While the terrorism enhancement may or may not be appropriate in certain Capitol Breach cases, it addresses qualitatively different conduct than offenses on the treason spectrum. Unlike offenses on the treason spectrum, it is not necessarily rooted in betrayal of allegiance to a nation. Indeed,

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298. U.S. SENT'G GUIDELINES MANUAL §3A1.4 (U.S. SENT'G COMM'N 2023).

299. *Id*. cmt. n.1.

300. *Id.* cmt. n.4.

301. Press Release, U.S. Dep't of Just., Two Leaders of the Proud Boys Sentenced to 17 and 15 Years in Prison on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach (Aug. 31, 2023), https://www.justice.gov/opa/pr/two-leaders-proud-boys-sentenced-17-and-15-years-prison-seditious-conspiracy-and-other [https://perma.cc/JWR2-RN2T] ("Judge Timothy J. Kelly applied the enhancement for a federal crime of terrorism to the defendant's final sentence.").

302. *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 129, at 1931 (Judge Dabney L. Friedrich refused to apply the enhancement not because she found that it was *inapplicable*, but rather because, pursuant to § 3553(a), the enhancement had not been applied in other cases involving January 6 defendants and would therefore result in an "'unwarranted sentencing disparity' with those cases"); Kyle Cheney & Josh Gerstin, *Judge Rejects 'Terrorism' Sentencing Enhancement for Leader of Jan. 6 Tunnel Confrontation*, POLITICO (Feb. 27, 2023, 2:23 PM), https://www.politico.com/news/2023/02/27/judge-rejects-terrorism-sentencing-jan-6-00084592 [https://perma.cc/Z5XP-AJ7K] (reporting that Judge Trevor N. McFadden "swept away efforts by prosecutors to apply several enhancements to Judd's sentence, most notably the so-called 'terrorism' enhancement'").

one need not have any allegiance to the United States to engage in terrorism (as indicated by the distinction between "international" and "domestic" terrorism in the statutes).[303] Additionally, the context behind terrorism is often to "instill mass panic and fear in the general public"[304] and not necessarily to: help any enemy (treason),[305] concertedly and forcibly resist the authority of government in some significant respect (insurrection),[306] or overturn, replace, or displace lawful government authority by unlawful means (rebellion).[307] While the conduct might sometimes overlap, treason and terrorism are conceptually distinct.

Interestingly, judges appear to have acknowledged the increased relative severity of Capitol Breach conduct for *one* of the studied offense combinations—convictions for obstructing an official proceeding and applying §2J1.2 (Obstruction of Justice).[308] As discussed above, in 95% of the J6 sentences, judges applied a three-level enhancement under U.S. Sentencing Guideline §2J1.2(b)(2) for "substantial interference with the administration of justice," when only 15% of non-J6 18 U.S.C § 1512 offenders sentenced under §2J1.2 received the three additional levels.[309]

The Sentencing Guidelines define a "substantial interference with the administration of justice" as including "a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources."[310] Judges have invoked the language of the final clause in J6

303. *See, e.g.*, 18 U.S.C. § 2331(1), (5) (defining "international terrorism" and "domestic terrorism").

304. Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465, 492 (2023).

305. *See* Simpson, *supra* note 144, at 2.

306. *See* Baude & Paulsen, *supra* note 108, at 676.

307. *See id.* at 677.

308. *See supra* Section I.D.1.

309. *See id.*

310. U.S. SENT'G GUIDELINES MANUAL §2J1.2 app. n.1 (U.S. SENT'G COMM'N 2023).

convictions sentenced under §2J1.2, reasoning that the conduct "impact[ed] the duration of the joint session" of Congress, "caus[ed] millions of dollars of damage, and divert[ed] police resources from numerous states, among other harms."[311] This enhancement seems to be in the ballpark of an enhancement for conduct involving offenses on the treason spectrum, but it too fails to capture the betrayal of allegiance and other considerations that underly treason-spectrum offenses. But more importantly for practical purposes, it is a specific-offense characteristic and applies *only* to offenses sentenced under §2J1.2. To apply to all offenses, an adjustment would need to be added to Chapter 3.[312]

To the extent that judges are trying to acknowledge the increased severity of government-undermining conduct when enhancing under §2J1.2(b)(2), the 95% application rate in J6 sentences tells us something very important: *when judges have clear and unambiguous guidance within the Sentencing Guidelines* that acknowledge the increased severity of government-undermining conduct, judges apply the enhancement.[313] By applying this enhancement, judges are following the Commission's express direction. As was previously shown, most J6 sentences were within the guideline range, and judges rarely departed or varied upward.[314] The Sentencing Guidelines "anchor" a judge's sentence.[315] Section 2J1.2(b)(2) enhancements suggest that when judges have guideline enhancements that account for the increased, authority-undermining severity of

311. United States v. Wright, No. CR 21-341, 2023 WL 2387816, at *12 (D.D.C. Mar. 4, 2023).

312. The Court of Appeals for the District of Columbia recently determined that this enhancement should not apply in Capitol Breach cases because the congressional proceeding was not the "administration of justice." *See* United States v. Brock, 94 F.4th 39, 51 (D.C. Cir. 2023). To the extent that the courts were using the §2J1.2(b)(2) enhancement to capture the increased severity of subversive conduct, they have now lost that tool. This increases the need for an enhancement like the one this Article proposes, which specifically addresses subversive conduct.

313. *See supra* Section I.C.

314. *See supra* Section I.B.

315. *See, e.g.*, Molina-Martinez v. United States, 578 U.S. 189, 198–99 (2016) ("The [Sentencing] Guidelines are 'the framework for sentencing' and 'anchor . . . the district court's discretion'") (quoting Peugh v. United States, 569 U.S. 530, 542, 549 (2013)).

offenses, judges apply them, but otherwise the increased severity is not accounted for. This is a signal to Congress or the Sentencing Commission to take action to account for this increased severity for all offenses on the treason spectrum, not just those that happened to be sentenced under §2J1.2.

Finally, an existing enhancement can apply to any offense if the victim was an "official victim"—a current or former government officer or employee (or family member of an official victim).[316] One could reasonably argue that this enhancement is traceable to the feudal origins of treason in England, which included "petty treason."[317] Petty treason was viewed as a threat to feudal order: "If a subservient person could kill a superior, then anybody might kill the King."[318] To the extent that the official victim in §3A1.2 serves as a proxy for the authority of the Nation as a whole, protecting official victims and punishing petty treason could have analogous policy considerations. To this end, as an alternative to adopting a new guideline, the Sentencing Commission could amend §3A1.2 (in the manner described in the proposed §3C1.5) to cover not just individual official victims, but the Nation itself as a victim.

CONCLUSION

In Capitol Breach cases, existing enhancements often led judges to impose longer sentences than those given to offenders in non-January 6 cases convicted under the same statutes and applying the same guidelines. January 6 felony offenses more frequently involved physical confrontation with law enforcement, dangerous weapons, or substantial interference with the administration of justice, which led judges to apply more existing enhancements resulting in longer sentences. But

316. U.S. SENT'G GUIDELINES MANUAL §3A1.2 (U.S. SENT'G COMM'N 2023).

317. Petty treason occurs when a servant slays his master, "'or a Wife her husband, or when a man secular or religious slayeth his Prelate.'" Fletcher, *supra* note 134, at 1614 (quoting Treason Act 1351, 25 Edw. 3 c. 2 (Eng.)).

318. *Id.*

these existing enhancements apply outside of the context of subversive activities and fail to capture the severity of conduct that involves offenses on the treason spectrum.

Congress and the Sentencing Commission forcefully tell actual and would-be offenders that committing an offense is bad, but doing so with a firearm, body armor, or a fake website is worse. Yet both entities are silent when the conduct involves "the worst crimes of all."[319] The optimist may conclude that such conduct has historically been rare, so the issue has gone unnoticed. The race critic may recite the demographic statistics from Section I.A.[320] Regardless of the reason, a new sentencing enhancement for offenses involving conduct on the treason spectrum would acknowledge the unique severity of crimes that go beyond the scope of ordinary criminal conduct and aim to disrupt our constitutional order.

The Sentencing Guidelines promise to bring certainty, fairness, and uniformity to the justice system.[321] The enhancement proposed in this Article will further those aims and add a new, perhaps more important role: directly helping safeguard democracy and the Republic.

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319. Katz v. United States, 389 U.S. 347, 360 (1967) (Douglas, J., concurring) (declaring that treason is "the worst crime of all"); *see also* United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986) (regarding treason as "the most serious national crime . . . punishable by death"); Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943) ("Treason is the most serious offense that may be committed against the United States.").

320. *See supra* Section I.A (reporting that 89% of Capitol Breach offenders were White; 21% of non-Capitol Breach offenders were White).

321. 28 U.S.C. § 991(b) ("The purposes of the United States Sentencing Commission are to establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.").

APPENDIX A

Offenses With Longer J6 Sentences Than Non-J6 Sentences			
Offender	N	Mean	Median
18 U.S.C. § 1752			
J6	31	20	0
Non-J6	136	2	7
18 U.S.C. § 1363			
J6	1	32	32
Non-J6	28	30	12
18 U.S.C. § 1361			
J6	9	88	37
Non-J6	278	16	3
18 U.S.C. § 111			
J6	88	48	43
Non-J6	1219	42	16
18 U.S.C. § 231			
J6	64	42	21
Non-J6	38	18	19
18 U.S.C. § 371			
J6	2	77	77
Non-J6	8735	31	15
18 U.S.C. § 372			
J6	10	111	78
Non-J6	11	13	12
18 U.S.C. § 641			
J6	15	12	3
Non-J6	3308	8	0
18 U.S.C. § 661			
J6	1	50	50
Non-J6	176	5	0
18 U.S.C. § 2384			
J6	9	132	144
Non-J6	0	N/A	N/A

Offenses With Shorter J6 Sentences Than Non-J6 Sentences			
Offender	N	Mean	Median
18 U.S.C. § 1512			
J6	90	52	41
Non-J6	588	111	48
18 U.S.C. § 875			
J6	3	27	28
Non-J6	402	29	15
28 U.S.C. § 5861d			
J6	1	46	46
Non-J6	1156	54	36
18 U.S.C. § 2111			
J6	2	59	59
Non-J6	117	74	52