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THE POLITICIZATION OF CRIMINAL PROSECUTIONS

Wadie E. Said*

This Article offers a critical review of how political considerations—rooted both in domestic and foreign policy—have distorted the criminal process, thereby offering a complementary analysis of what ails the criminal justice system. This analysis builds on the by-now well-known critiques of the racial and socioeconomic discrimination at the system's heart. The result is a criminal justice system that allows political considerations to dictate results far more than they should. In domestic prosecutions, criminal law is mostly used to target those who seek to question the legitimacy of state policies, state agencies (especially the police), or corporate interests, rendering the act of protest in and of itself as criminal. This is in contrast to right-wing protest activity, which must be violent to merit prosecutorial attention. The chief example here is that of the January 6 riot, where the violent activities of the participants have driven the prosecutorial response, not the protest itself. The difference between the two types of protest has clear racial implications as well, as noted below. When foreign policy interests drive a prosecution, the authorities can be more explicit in articulating racial and religious biases, with criminal defendants often powerless to defend themselves, even if their culpability is questionable at best. Even when defendants are found not guilty, the possibility of extended immigration detention looms. In other words, criminal prosecution articulates a national interest that encompasses a constructed racial component, which captures both minorities and foreigners as representative of the threat.

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I. INTRODUCTION

Working at its level best, a criminal prosecution aims to hold accountable those in society who have violated one or more of the codified norms that are worthy of the special condemnation of a criminal conviction. In this idealized version, the criminal conviction, which opens the door for punishment not authorized in civil matters—imprisonment and supervised release chief among them—brings with it a whole host of collateral consequences as well, typifying the unique nature of a criminal sanction. These are well-known principles on how a criminal prosecution ought to proceed, and perhaps are theoretically true in cases of well-understood crimes, such as murder, robbery, rape, kidnapping, burglary, and the like. Of course, the past several decades have revealed that the actual operations of American criminal justice have produced a whole host of discriminatory and unjust outcomes, both on the basis of race and class, as many scholars have demonstrated with trenchant and ever-growing clarity. In two recent articles, I have attempted to join in those critiques. In the first article, I pointed out the tremendous amount of discretion—on a worldwide basis—that law enforcement enjoys in prosecuting its wars on terror and drugs, and the distorting effect of that
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discretion. In the second, I documented how the authorities granted to the government in the national security realm have redounded to the areas of criminal and immigration enforcement, and vice versa, with the result being that the objects of enforcement are viewed as a kind of foreign perma-threat to the national polity. These critiques build on my prior engagement with the foreign policy implications of war-on-terror practices, most directly encapsulated by the ban on providing material support to foreign terrorist organizations.

This Article constitutes a critical review of how domestic and foreign political considerations have distorted the criminal process, thereby offering a complementary analysis of what ails the criminal justice system. This analysis builds on the well-entrenched critiques of the racial and socioeconomic discrimination at the system’s heart. The Article demonstrates the dangers inherent in using political considerations to drive law enforcement and prosecutions. In domestic prosecutions, criminal law is mostly used to target those who seek to question the legitimacy of state policies, state agencies, or corporate interests. Specifically, criminal law is applied disproportionately against people protesting against the police or corporate interests, rendering the act of protest criminal in and of itself. In those instances, the police, legislators, and prosecutors respond proactively to the protest itself. This is in contrast to right-wing protests—the chief example is that of the January 6 riot—that do not challenge entrenched structures of power, but only insist that its preferred candidate or leader be in charge. The law enforcement or prosecutorial response has been rooted in the fact that the protest itself was violent. The difference between the two types of protest has clear racial implications as well. When foreign policy interests drive a prosecution, the authorities can be more explicit in articulating racial and religious biases, with criminal defendants often powerless to defend themselves, even when their culpability is questionable at best. Even when defendants are acquitted, the possibility of extended immigration detention looms. In other words, criminal prosecution articulates a national interest that encompasses a constructed racial component, which captures both minorities and foreigners as representative of the threat.

1. Wadie E. Said, Limitless Discretion in the Wars on Drugs and Terror, 89 U. COLO. L. REV. 93 (2018). See also WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (“The criminal justice system has run off the rails. The system dispenses not justice according to law, but the ‘justice’ of official discretion. Discretionary justice too often amounts to discriminatory justice.”).


In this analysis, I identify three areas in which political considerations produce a jurisprudence far removed from the notion of criminal prosecution as an expression of condemnation of localized acts of well-known and understood violations of the law. These three areas are of (1) prosecutions related to domestic protests in the United States; (2) prosecutions involving foreign citizens whose prosecution furthers American foreign policy goals; and (3) prosecutions involving governmental figures, almost all of which are from sovereign Latin American nations. All these areas are in essence unique to the United States, its interests, and its position in world affairs. Taken as a whole, these three categories represent an American criminal justice system that appears to function as a kind of alternative global court, outside any of the transnational United Nations adjudicative bodies. Given that these prosecutions take place in American federal courts, they retain none of the ostensible neutrality of an international body, and reflect a criminal justice system that allows political considerations to dictate results much more than it should. It is in that context that we begin to understand the generally unreviewable discretion that American law enforcement enjoys, based on international power politics and the United States’ preeminent role in that order. In other words, prosecutions with a political and/or transnational bent proceed according to the ability of the United States authorities to operate essentially without accountability, ungoverned by principles of global due process or its equivalent.

What might be most availing in the government’s rendering of the threat that a criminal prosecution is geared to combat, is the perception that national security is furthered by such prosecutions. This perception is of special importance here. In his seminal work, Governing Through Crime, Jonathan Simon demonstrates how American politicians use a societally entrenched fear of crime as a method to govern, bolstered particularly by the fact that such a fear is often exaggerated or inflated. Of the key corollaries generated by Simon’s claim that the American political elite govern through crime, two are of particular relevance to this Article. The first is related to the strategic value of invoking crime, as throughout “institutional settings, people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes.” Of the key corollaries generated by Simon’s claim that the American political elite govern through crime, two are of particular relevance to this Article. The first is related to the strategic value of invoking crime, as throughout “institutional settings, people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes.” Perhaps even more pertinent is the second corollary, in that “we can expect people to deploy the category of crime to legitimate interventions that have other motivations.” Under these precepts, federal law enforcement authorities act legitimately when they deem actions taken by domestic and foreign targets as criminal,

5. Id. at 4.
6. Id.
while pursuing investigations and prosecutions geared at national security-based policy. The fear of crime that normally animates politicians, of violent and antisocial villains making the streets unsafe, transforms into a more nebulous fear of a political/foreign threat, and has the effect of accomplishing a particular policy goal or position. However, a look at the three areas of cases noted above demonstrates that the generally recognized twin aims of criminal prosecution—deterrence and punishment—are not always the primary motivators driving the cases discussed here.

Therein lies the danger of prosecutions driven by foreign policy and national security interests, which are not the same as keeping the community at home safe, no matter what the government claims. Too often, prosecutions rooted in politics have the effect of ensnaring nonculpable individuals, who by their very identity are associated with a threat, even if they have done nothing to engender that threat. Even in cases where there is credible evidence that the defendants have committed crimes, the lack of standards and ad hoc nature of their prosecution in the United States raise questions about the uniform applicability of the laws against them. The clear exception to this reality is in the protest by overwhelmingly white citizens to pursue political power, not fundamental change; in such cases, there must be an underlying act of violence to support prosecution more generally. Finally, there is a critical distinction available to prosecutions of noncitizens that sound in foreign policy: that of detention and deportation by the immigration authorities, even if the government is unsuccessful in obtaining a criminal conviction. There is something particularly untoward and oppressive about continuing to detain someone against their will, especially after they have already demonstrated their innocence in an adversarial criminal prosecution, or even served their full sentence, with the intended result being a forced deportation.

This Article proceeds in four Parts. Part I of this Article analyzes the prosecutions of individuals involved in various types of domestic actions with a political component. In the protest context, prosecutions of Black Lives Matter protests contrast with those of the January 6 Presidential Election riot, with the clearly violent nature of the latter distinct from the mostly peaceful nature of the former. Part II looks at the impact of laws imposed to heighten the criminal penalties for participating in protests, with a specific focus on anti-pipeline activity. Part III considers the prosecutions with a foreign policy component, where racial constructs of the threat merge with foreignness. The examples here touch on both economic policy and war-on-terror-adjacent prosecutions. Part IV then analyzes the prosecutions of former governmental figures, principally within a war-on-drugs framework, which also underscore how the United States functions as a kind of alternative world court. With such sweeping prosecutions of foreign leaders, the government demonstrates
its essentially global power to enforce its criminal laws the world over, even when political considerations are at work. The Article concludes that prosecutions based on political considerations, both in the domestic and foreign policy context, convey the government’s preference for those prosecutions that also align with its political agenda. These politically motivated prosecutions result in the further deterioration of the neutrality and reliability of criminal prosecutions, adding to myriad, well-founded allegations of racial and socioeconomic bias already well entrenched in the criminal process.

II. PROSECUTIONS RELATED TO DOMESTIC PROTESTS

An inquiry into the way political considerations can feature in a criminal prosecution begins on the domestic front. A look at the recent experience of law enforcement’s approach to domestic protests reveals the vast discretion that local authorities enjoy to police expressive conduct. And with vast discretion comes disparities in how law enforcement views protests according to their political orientation or message. In the domestic sphere, politically motivated protest actions straddle the line between legality and illegality, based on the First Amendment’s protection of the right of the people to “peaceably assemble,” which has, over time, come to embody certain characteristics. In a 2015 law review article, Tabatha Abu El-Haj exhaustively documents how the First Amendment’s protections of freedom of speech and peaceable assembly have come to be defined by state and federal legislatures and courts, with the result being a series of rulings and precepts that effectively constrain the right of protest, as long as a jurisdiction does not engage in content-based discrimination. She notes how, by allowing municipalities wide latitude to require permits and other forms of prior approval for demonstrations and protests, the Supreme Court has construed such regulations as explicitly not prior restraint of speech. The net “result is that cities today are able to regulate virtually all outdoor assemblies in advance through an array of complicated and convoluted regulations.” When lower courts are asked to examine and rule on the validity of restrictions on the right to protest, they rarely overturn such restrictions.

8. Id. at 967–72.
9. Id. at 967–80.
10. Id. at 979.
11. Id.
12. Id. ("Lower courts, meanwhile, uphold virtually all means that government officials devise to quash the disruptive elements of assemblies, so long as the government refrains from..."
“peaceably” differs from state to state, with some hewing to the traditional standard that the line is crossed only when a protest engages in or threatens violence, while others, like New York, have lowered the standard to not require violence to persons or property. The authorities often combine these restrictions with liberal arrests of protesters on disorderly conduct charges, which serve to disrupt protests even though courts have routinely pointed out such arrests violate the First Amendment; although the arrest is unlikely to result in a successful prosecution and conviction, it effectively removes protesters from the street, rendering their First Amendment rights practically useless.

A. Black Lives Matter Protests

This is no mere academic point, as shown by a review in the Guardian of arrest rates and subsequent prosecutions during the Black Lives Matter (BLM) protests in the wake of the May 2020 George Floyd killing. In city after city, the vast majority of arrests did not result in corresponding prosecutions, except for a tiny minority of the most serious cases involving felonies. Activists and advocates among the protesters were adamant that the police engaged in mass arrest campaigns across the spectrum of American cities with the purpose of harassing and disrupting the protesters; after all, the protests were geared at halting excessive police violence and impunity against minority communities. Even the spokesperson for Larry Krasner, the progressive District Attorney of Philadelphia, agreed with the sentiment that the police were strategically utilizing their arrest powers to disrupt, rather than respond to a genuine threat: “Police were making arrests as a form of crowd content or viewpoint discrimination. They rarely scrutinize the means-ends fit carefully, and they willingly accept virtually any interest the government offers as substantial enough to suppress the disorder and inconveniences associated with demonstrators. Even ordinances prohibiting the blocking of streets and sidewalks are typically not considered infringements on the right of assembly.”

13. Id. at 974–75 (explaining how New York’s law criminalizing riot in the second degree requires only the intentional or reckless “grave risk of [causing] public alarm,” not violence to person or property).

14. Id. at 974 (“From the perspective of the First Amendment, the fact that state courts would be likely to dismiss charges or overturn convictions provides little comfort. Such arrests take protesters off the streets, rendering their formal constitutional rights meaningless. Overcharging is a substantial problem for protesters. As a practical matter, it does not matter if one could not be successfully indicted or convicted of the crime for which one was arrested.”).


16. Id.

17. See id.
control, so in many instances there were no criminal charges to file. In other instances, there was simply not enough information to proceed on opening a criminal case.”

The issue of police violence and heavy-handedness that BLM protestors raised sounds in the contested nature of that violence. While, as noted above, restrictions on demonstrations are widely considered legal, police overusing or purposely misconstruing their arrest power to thwart protests is not, bringing the issue of whether the police actions more generally enjoy popular legitimacy. In this particular context, Jeremy Waldron has remarked that the BLM protests may be seen as a popular expression of the idea that policing as practiced is no longer accepted by significant sectors of the population, thereby losing its legitimacy in the eyes of those protesting. The normal methods of changing such practices, whether through elections or lawsuits, have failed to bring about the desired change, so demonstrations—which come replete with civil disobedience and violations of the law—are the only way to get the message across that police violence must end, for example.

The police response to the protests against the use of excessive force was to respond with even more force, thereby highlighting the clash between legality, police power, and popular legitimacy in most stark terms.

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20. Id. at 33–34 (“Another use of the idea of legitimacy invites us to consider that a demonstration may mark a decline in respect within the political community for the regular rhythms of politics . . . . Now, perhaps a large demonstration or sustained series of demonstrations may manifest the refusal of a portion of the community to accept these rhythms, this ordering. Maybe a demonstration just aims to show the passion behind a particular oppositional view; nothing more. But it is possible that the demonstrators are displaying their willingness to break the routine of turn-taking compliance in a spirit of ‘We ain’t gonna take it anymore,’ at worst to by-pass, at best to complement the ordinary structures of representation, voting, public deliberation, lobbying, and so on . . . . I think something like that is going on with the Black Lives Matter demonstrations, consummating a sense that has been brewing for a while that various forms of official and institutional racism—in particular, homicidal official and institutional racism—need to be put beyond the pale.”).

The overwhelmingly hostile response to the BLM protests was not limited to the actions of the police. In response to several of the demonstrations, then-President Donald Trump described them as promoting violence “worse than Afghanistan,” and expressed his view that the protesters themselves were terrorists.22 Then-Attorney General William Barr articulated similar sentiments, lamenting the “rioting” carried out by “violent radical elements,” concluding by saying that “[t]he violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly.”23 And that view fueled a prosecutorial response on the federal level that had the effect of targeting BLM activists, despite the fact that in the great majority of cases brought against activists in federal court, similar—and less severe—state charges were also available.24 This effort produced some 326 federal prosecutions in the period between May 31, 2020, and October 25, 2020, with 20 of the prosecutions featuring the involvement of integrated Joint Terrorism Task Forces, reflecting how the government viewed the individuals and actions under criminal investigation.25 While only 89 defendants (27% of the total defendants charged) were identified on the basis of their race, 52% of those identified were Black, a significant overrepresentation in comparison to the percentage of Black residents in the general population.26 The heated rhetoric associating protesters with riots and violence reached its apogee when Barr urged local federal prosecutors to consider charging them with sedition, which in its most serious form targets individuals conspiring to overthrow the government, a

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25. See id. at 2–4.
26. Id. at 3.
highly unusual and difficult to prove scenario. While the severity of the response in the Trump/Barr era was unprecedented, it was part of a historical pattern of targeting domestic protest, especially of Black movements and leftist groupings more generally. Even the shift from the Trump administration to the Biden administration has not necessarily affected federal prosecutions of individuals charged with civil disobedience offenses stemming from the 2020 BLM demonstrations. The nature and frequency of government concern with BLM protestors has receded, but the Department of Justice has continued to prosecute those individuals charged with federal crimes from the Summer/Fall 2020 protests, indicating that the government’s posture has shifted, rather than changed comprehensively. In some respects, the Biden administration has taken a broader view of domestic extremism, raising the possibility of more protest-related prosecutions in the future.


28. See, e.g., TIM WEINER, ENEMIES: A HISTORY OF THE FBI 195–201 (2012); ATHAN THEOHARIS, FROM THE SECRET FILES OF J. EDGAR HOOVER 86–112 (1991); CHIP GIBBONS, DEFENDING RTS. & DISSENT, STILL SPYING ON DISSENT: THE ENDURING PROBLEM OF FBI FIRST AMENDMENT ABUSE 17–23 (2019), https://drive.google.com/file/d/1z-i_XCoZub8lSKEZ5Dj0Mh0bPS5u1Xm/view [https://perma.cc/F3DV-EQC2]. This pattern stretches from the COINTELPRO era to the present day, with more recent examples being that of the FBI subjecting the Occupy movement to surveillance by counterterrorism agents in 2011, and the identification of a supposed threat called Black Identity Extremism (BIE) that purports to equate anti-racist protestors with white supremacist extremists under the larger umbrella of counterterrorism. See Adam Clark Estes, The FBI Treated Occupy Like a Terrorist Group, ATLANTIC (Dec. 23, 2012), https://news.yahoo.com/fbi-treated-occupy-terrorist-group-021450389.html [https://perma.cc/ER76-7EL6]; Michael S. Schmidt & Colin Moynihan, F.B.I. Counterterrorism Agents Monitored Occupy Movement, Records Show, N.Y. TIMES (Dec. 24, 2012), https://www.nytimes.com/2012/12/25/nyregion/occupy-movement-was-investigated-by-fbi-counterterrorism-agents-records-show.html [https://perma.cc/9ZVG-4DA7]; Said, supra note 2, at 833 (noting that the creation of the BIE category was criticized as “a continuation of the FBI’s long-standing hostility to politically active black organizations in general,” while citing criminologist Geoff Ward’s proposition that BIE represents “a legal rationale by which to equate anti-racist activists and White supremacist organizations, and to criminalize and violently repress lawful protests of state violence.”).


30. See id.

31. See id.
The aggressive response by the police to the BLM protests stands in stark contrast to the passive and ineffectual posture taken by the Capitol Police during the January 6, 2021 protest, the purpose of which was to overturn the results of the 2020 Presidential election.\textsuperscript{32} In that instance, the protestors used force to gain entry into the Capitol Building, and several actively battled with the Capitol Police throughout the day.\textsuperscript{33} The contrast between the police response to the overwhelmingly peaceful BLM protests and the openly defiant and more forceful January 6 protestors is striking. As opposed to the BLM demonstrators, a large proportion of the January 6 protestors used violence in service of their goal, but the police response was qualitatively different, with Capitol Police leaders ordering that officers not use their most powerful crowd control tools, and the force itself being woefully underprepared for the demonstration.\textsuperscript{34} This was the case, even though the police had conducted an intelligence assessment warning of the fact that the protest was targeting Congress directly and was likely to include many elements, several armed and prepared to use violence in service of the goal of overturing the election results.\textsuperscript{35} To be fair, the federal authorities have responded with a broad prosecutorial effort, encompassing some 1,146 individuals charged with crimes in the 32 months since the incident, the majority of which have resulted in guilty pleas on misdemeanor charges, with felony convictions being the distinct minority.\textsuperscript{36} So far, however, the median sentence for those convicted of January 6-related crimes has been 60 days, with the maximum sentence for a substantive crime handed out reaching 14 years for a Pennsylvania welder who attacked police officers with pepper spray and a chair.\textsuperscript{37} With respect to


\textsuperscript{33} See Broadwater, supra note 32.

\textsuperscript{34} See id.

\textsuperscript{35} Id.


inchoate crimes, several former leaders of the violent right-wing group the Proud Boys were convicted on charges of seditious conspiracy, and received sentences ranging from 15 years up to 22 years, in the case of former leader Enrique Tarrio. The leader and members of another right-wing group, the Oath Keepers, were also found guilty of seditious conspiracy charges in earlier trials, which marked the first time the government has brought such charges since the mid-1990s prosecution of individuals convicted of plotting to blow up landmarks around New York City in the wake of the first World Trade Center bombing. As a result, the Oath Keepers’ leader, Stewart Rhodes, received an 18-year prison sentence, but already the two leading Republican candidates for President in 2024, former President Trump and Florida Governor Ron DeSantis, have raised the potential of pardons for
January 6 defendants. Finally, there is the possibility that former President Trump may face charges, as the January 6 congressional panel accused him of insurrection and referred its findings to the Department of Justice with a recommendation that he be prosecuted.

One of the main disputes is how to characterize the events of January 6, 2021, with some referring to it as domestic terrorism and urging Congress to pass a law criminalizing it as such; for now, the Biden administration seems to have settled on a strategy for countering domestic terrorism that does not depend on new legislation. Of course, as Shirin Sinnar has demonstrated conclusively, the essence of the distinction between domestic and international terrorism is that the latter term encompasses Islamist political violence in its entirety, even if the perpetrator and acts are exclusively American. Making such a distinction allows the government to deploy laws like the ban on providing material support to designated foreign terrorist organizations (FTOs), which have the effect of criminalizing speech and association activities, and also pave the way for more extensive surveillance under the more relaxed standards of the Foreign Intelligence Surveillance Act (FISA).


45. Sinnar, Biden’s Counterterrorism Strategy, supra note 43.
it is “more politically palatable to issue a national strategy on domestic terrorism than on far-right extremism.”

The terrorism moniker and disputed characterization of the events of January 6 continue to reverberate. Despite the availability of a sentencing enhancement provision that would allow for much greater penalties upon a judge’s finding that politically motivated attacks on federal personnel or property are “federal crimes of terrorism,” federal prosecutors have been reluctant to push for such an enhancement in the case of the January 6 defendants. This is the case even though the predicate crimes for a “federal crime of terrorism” include, *inter alia*, politically motivated destruction of property, a finding easily satisfied by the events of that day in many defendants’ cases. Whether a federal prosecutor chooses to ask for the application of the sentencing enhancement is entirely within the prosecutor’s discretion, and one may speculate as to the reasons behind this hesitation, given that the enhancement has been applied in many cases involving terrorism charges, particularly—but not exclusively—those of the Islamist variety.

C. Violent Domestic Plots and Their Ramifications

Incidentally, the government’s response to post-January 6 right-wing extremism has been to employ much-criticized tactics from the war on terror, thereby bolstering principled arguments that passing a domestic terrorism

46. *Id.* ("The facially neutral reference may also appeal to those who prefer to stigmatize political violence or activism from the left, including within law enforcement or security agencies . . . ").


48. See U.S. SENT’G GUIDELINES MANUAL § 3A1.4 cmt. n.1 (U.S. SENT’G COMM’N 2018) ("For purposes of this guideline, ‘federal crime of terrorism’ has the meaning given that term in 18 U.S.C. § 2332b(g)(5). “); 18 U.S.C. § 2332b(g)(5) ("[T]he term ‘Federal crime of terrorism’ means an offense that—(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of . . . [section] 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States) . . . ").

statute will only serve to enhance legal disparities, create problems of application, and reinforce existing biases such as those that exist in the context of international terrorism.\textsuperscript{50} The prosecution of several men arrested in October 2020 and charged with plotting to kidnap Michigan Governor Gretchen Whitmer has revealed that the government employed up to twelve informants, one of whom had a long criminal record, and another who the defendants allege actually suggested the kidnapping scheme.\textsuperscript{51} The prosecution itself resembled many of the by-now-familiar post-9/11 terrorism investigations and prosecutions driven by informants using highly provocative and suspect methods.\textsuperscript{52} There, as here, the issue of entrapment was at the heart of the government’s case, with the question of how far the informants and undercover agents went in pushing the criminal enterprise to the fore.\textsuperscript{53} In the war on terror context, the entrapment defense has essentially never worked in cases involving government-led sting operations, for reasons to do entirely with race and religion.\textsuperscript{54} However, in the Whitmer kidnapping plot, with the matter of association with Islamist causes taken out of the equation, the jury acquitted two defendants and failed to reach a verdict on the other two.\textsuperscript{55} The latter were subsequently convicted after a second trial, a result that says more about the risks of conviction on retrial in federal court, as opposed to anything substantive about the FBI’s aggressive investigatory

\begin{thebibliography}{9}
\bibitem{53} MacFarquhar, supra note 51.
\end{thebibliography}
tactics. Sting operations, so effective in so-called international terrorism prosecutions, stumbled at the first hurdle in a domestic terrorism case.

It is even more notable that one of the only other major prosecutions of domestic extremists actually involved charges of materially supporting an FTO, in a sting operation that again involved informants and undercover agents. In September 2020, two members of the anti-government “Boogaloo Bois” militia were arrested and charged with, *inter alia*, conspiring and attempting to provide material support to the FTO Hamas. Specifically, the charges came as a result of the men initially informing a confidential informant they believed to be a member of Hamas that they could supply the group with parts that could convert firearms into fully automatic weapons.

The case was suffused with war on terror terminology and understandings; the defendants were members of a subgroup that referred to itself as the “Boojahideen” and pointed out to the informant that, as white men, they were unlikely to arouse suspicions and gain the attention of the authorities. In any event, both men ended up pleading guilty to the charge of conspiring to provide material support to Hamas. Tying the defendants to an FTO certainly avoided prosecuting individuals for purely domestic activity of a

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58. See id.

59. Id. (noting also that Hamas issued a statement in response to the charges, remarking that it did not know or have anything to do with the defendants or the Boogalo Bois, decrying the attempt by the government to link it with the defendants and their group, and concluding by saying “[w]e, in Hamas, are strongly aware of the oppression suffered by people of color in America. We express our solidarity with them and hope one day their rights will be acknowledged, as well as our inalienable rights.”).

political nature, where a foreign bogeyman cannot be employed to draw associations with terrorism that the government has deemed a national security threat. They were eventually sentenced to three and four years in prison, respectively.61

A further complication lies in the perceived legitimacy of the January 6 protestors, with former President Trump pledging to pardon those convicted of crimes resulting from participation in storming the Capitol in case he is reelected in 2024, and the Republican National Committee referring to the actions of the demonstrators as “legitimate political discourse.”62 Whatever else can be said, defendants in post-9/11 terrorism prosecutions have never enjoyed the unadulterated support of a key agency of one of the two main political parties for the activities of an FTO or terrorist group with which they might have affiliated. Simply put, Islamist terrorist charges are politically radioactive the way right-wing domestic extremism is not, regardless of how violent the latter may be. As noted above, in one instance where the government could link defendants to an FTO, they ended up pleading guilty.63

Where, in the case of the attempted kidnapping of Michigan’s Governor, the authorities conducted what looks like an elaborate sting, involving active participating by informants, who may have even suggested the plot, almost all the defendants chose to fight the charges by going to trial.64 Their position was vindicated when the jury acquitted two defendants outright and failed to reach a verdict for the other two.65 While an entrapment defense is a risky proposition at best, in the first test case on the matter, white defendants targeted by government informants and undercover agents were considered in a sympathetic light by a federal jury, something that Muslim defendants in a terrorism prosecution have not yet enjoyed.66


64. Smith, supra note 55.

65. Id.

66. Cf. SAID, supra note 37, at 43 (“[In.Jacobson v. United States,] [t]he majority opinion made sure to note the defendant’s status as ‘a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska.’ In a terror entrapment case, it is rare to see a defendant’s
III. NEW LAWS THAT HEIGHTEN CRIMINAL PENALTIES FOR PROTEST

In any event, the federal response to January 6 has been positively limited in comparison to the actions of state legislators in response to the BLM protests. A search of the U.S. Protest Law Tracker database of the International Center for Not-For-Profit Law website, covering the period from June 2020 to the end of September 2023, turns up 85 pending or enacted laws from 45 states that restrict and heighten criminal penalties for protest behavior, as well as introduce civil liabilities for the actions of protesters.\(^{67}\)

Arkansas’ HB 1508 is a typical example.\(^{68}\) Signed into law in April 2021, the law increases civil penalties for all sorts of protest-related activities, and ratchets up criminal penalties accordingly.\(^{69}\) It establishes a mandatory minimum sentence of thirty days for carrying out a “riot,” which is defined as someone with “two (2) or more other persons ... knowingly engaging in tumultuous or violent conduct that creates a substantial risk of: (1) Causing public alarm; (2) Disrupting the performance of a governmental function; or (3) Damaging or injuring property or a person.”\(^{70}\) The expansive nature of the definition holds the potential of sweeping up vast amounts of protest activity, and any violator of the law can be held financially liable for any damage caused by their commission of a “riot.”\(^{71}\) This twin attack on protest activity, by both criminalizing the actions of those who engage in it, while making protestors civilly liable for any damages that activity—liberally construed—produces, is indicative of a wider trend of states’ targeting protesters since


\(^{69}\) Id.

\(^{70}\) Id. § 7.

\(^{71}\) See id.
While it is true that such legislation could also encompass domestic extremist protest, given the context and content of the passed and pending legislation, it is clear that the target of such legislative activity is dissenting political protest in the BLM mold and, as seen below, anti-pipeline actions.73

A. The Pipeline Protests

This becomes clearer when we consider the anti-protest laws passed by numerous states, which criminalize protests of the construction of oil and gas pipelines, and are referred to by the euphemistic moniker of “critical infrastructure.”74 Following a series of indigenous-led demonstrations, over (1) the Keystone XL Pipeline, which has been halted by executive order, and (2) the Dakota Access Pipeline, which has been the subject of adverse court rulings, twenty-one states have passed laws criminalizing protests that encroach on pipelines and other oil and gas infrastructure in the period from May 2017 to the present.75 The convergence of the political causes of indigenous rights and environmentalism in successful anti-pipeline protests demonstrates the effectiveness of organized action against a particular type of economic activity with far-ranging effects. Protests against such activity have drawn the attention of the FBI, which views individuals engaged in this type

73. See id.
74. See, e.g., OKLA. STAT. ANN. tit. 21, § 1792 A-B (West 2017) (“A. Any person who shall willfully trespass or enter property containing a critical infrastructure facility without permission by the owner of the property or lawful occupant thereof shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not less than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for a term of six (6) months, or by both such fine and imprisonment. If it is determined the intent of the trespasser is to willfully damage, destroy, vandalize, deface, tamper with equipment, or impede or inhibit operations of the facility, the person shall, upon conviction, be guilty of a felony punishable by a fine of not less than Ten Thousand Dollars ($10,000.00), or by imprisonment in the county jail for a term of six (6) months, or by both such fine and imprisonment. B. Any person who shall willfully damage, destroy, vandalize, deface, tamper with equipment in a critical infrastructure facility shall, upon conviction, be guilty of a felony punishable by a fine of not less than Ten Thousand Dollars ($10,000.00), or by imprisonment in the county jail for a term of six (6) months, or by both such fine and imprisonment. B. Any person who shall willfully damage, destroy, vandalize, deface or tamper with equipment in a critical infrastructure facility shall, upon conviction, be guilty of a felony punishable by a fine of not less than Ten Thousand Dollars ($10,000.00), or by imprisonment in the county jail for a term of six (6) months, or by both such fine and imprisonment. B. Any person who shall willfully damage, destroy, vandalize, deface or tamper with equipment in a critical infrastructure facility shall, upon conviction, be guilty of a felony punishable by a fine of not less than Ten Thousand Dollars ($10,000.00), or by imprisonment in the county jail for a term of six (6) months, or by both such fine and imprisonment.”).
of direct action with suspicion. In 2013, FBI agents broke their own internal regulations governing investigations of Keystone XL protesters, and then again in 2017, the FBI re-routed agents from a Joint Terrorism Task Force to surveil and track indigenous activists opposing the Dakota Access Pipeline. The coordination between the FBI, state agencies, and private security contractors was evident in the surveillance and crackdown on the Dakota Access Pipeline protestors, who were subject to these measures from a so-called “fusion center” overseen by the Department of Homeland Security, with the end result being a heightened and repressive focus on legitimate protest. The protesters were also met with criminal arrests and criminal charges from both state and federal authorities, who continued to prosecute and make strategic use of grand juries even four years after the protests ended. Here, the contrast with January 6 is telling, as in that moment the authorities seemed reticent and passive, even though they had advance notice of a violent mob storming the site on the national government, as opposed to the heavy-handed and coordinated crackdown on environmental and native rights advocates protesting the polluting presence of a fossil fuel pipeline on tribal land. In the first instance, a large group mobilized to thwart the results of a democratic election, with threats and acts of violence against political officials, and in the second, protestors organized on behalf of long-suppressed

79. Lennard, supra note 75; Sam Levin, Standing Rock: DoJ Steps up Aggression Against Those Still Battling the Pipeline, GUARDIAN (Feb. 18, 2017, 8:00 AM), https://www.theguardian.com/us-news/2017/feb/18/standing-rock-activists-justice-department-new-arrests [https://perma.cc/4DAY-EPU5]. As has become typical for FBI investigations of political protest, in one case the bureau used an informant who developed a romantic relationship with a protestor, a situation that resulted in criminal charges and a guilty plea for the protestor; she was accused of firing three shots from a revolver owned by the informant when being forcibly arrested and tackled by law enforcement agents. Will Parrish, Standing Rock Activist Accused of Firing Gun Registered to FBI Informant is Sentenced to Nearly Five Years in Prison, INTERCEPT (July 13, 2018, 1:31 PM), https://theintercept.com/2018/07/13/standing-rock-red-fawn-fallis-sentencing/ [https://perma.cc/ZVK2-QYQU].
80. See Broadwater, supra note 32; Brown, supra note 78.
native land rights in aid of stopping an environmentally destructive pipeline. When we take into account the political orientation and goals of the protestors in each instance, it seems that law enforcement and prosecutors are more prepared and likely to consider the latter a threat and respond accordingly.

In the main, laws criminalizing protest have their root in the concept of trespass and violation of property rights more directly. When those laws are targeted against a particular type of protest, such as “critical infrastructure” and oil and gas pipelines, legislators signal their prioritization of those business and property rights over those of protestors, even when they are driven by a sense of historical injustice or preventing environmental damage. A reliance on trespass, while a less serious offense, allows for the criminalization of protest that may not be destructive in any way, with the penalties increasing the more property rights are impeded, whether by blocking access to machinery or through its actual destruction. In passing these laws, state legislators assume the validity of the underlying economic activity, no matter how destructive it might be environmentally or otherwise. In essence, their judgment as to the substantive reasons behind the protest renders that protest extra-legal. As the only means to attempt to thwart something as ecologically harmful as an oil pipeline, a protest now exposes its participants to the potential of arrest, criminal charges, and a sentence. As noted by other scholars, this effort resembles the corporate-driven effort to criminalize animal rights protests of industries that rely on animals for production of goods and/or experimentation, which is reflected in the successful passage of the so-called federal Animal Enterprise Terrorism Act.

Challenges to the selective nature of the legislative and prosecutorial focus on animal rights advocates as criminal “terrorists” are unlikely to succeed in the courts, a harbinger of what might befall protesters challenging prosecution under the state laws against infrastructure protest.

B. Limited Avenues to Present a Defense

The law is unlikely to provide a defense to any protest-related crime on the grounds of stopping injustice. For example, in United States v. Schoon the Ninth Circuit ruled that the elements of the defense of necessity can never be

83. See, e.g., United States v. Johnson, 875 F.3d 360 (7th Cir. 2017) (denying constitutional challenge to the Animal Enterprise Terrorism Act in prosecution of activists who crossed state lines to release around 2,000 minks from a mink farm, and were on their way to do the same at a fox farm).
properly met in a case involving what it deemed “indirect civil disobedience”: in this instance the occupation of Internal Revenue Service offices in Arizona by individuals protesting American foreign policy in Central America.\(^84\) Although the protestors were motivated by concerns over the deadly effects of U.S. foreign policy, trespassing against government offices with no relation to the application of that policy could not be justified as the type of lesser harm protected by the necessity defense.\(^85\) In other words, “indirect civil disobedience”—breaking one law to protest the existence of another law or policy—cannot serve as the basis of a necessity defense.\(^86\) But this logic leaves open the potential of a necessity defense in cases of direct civil disobedience, where the law at the heart of the protest is the one being broken.\(^87\)

Applied directly to the January 6 defendants, this rationale could, in theory, provide the basis of a necessity defense, as those defendants were protesting directly the operation of Congress as it attempted to certify the results of the 2020 presidential election. While this is not, of course, meant to justify any of the acts of violence committed by the January 6 participants, it is striking how their activity more closely hews to the parameters of a successful necessity defense than people protesting, for example, American support for violent regimes abroad, or the military’s maintenance of ecologically destructive bombing ranges in Puerto Rico.

This is not to say that no protest-based defense can ever succeed, or that the government cannot go too far in its prosecution of peaceful protest. The prosecution of members of No More Deaths, a faith-based humanitarian organization in southern Arizona, for trespassing in a wildlife refuge and abandoning property in connection with their attempts to leave food and water in the desert so that undocumented migrants would not starve to death, is illustrative.\(^88\) Although the defendants in United States v. Hoffman were convicted in a bench trial before a magistrate judge, a district court overturned the convictions on the basis of a defense rooted in the Religious Freedom Restoration Act (RFRA).\(^89\) Since their actions were motivated by their religious beliefs held in good faith, and the government had other, less-

\(^{84}\) 971 F.2d 193, 197–99 (9th Cir. 1991) (“The protest in this case was in the form of indirect civil disobedience, aimed at reversal of the government’s El Salvador policy.”).

\(^{85}\) Id.

\(^{86}\) See, e.g., United States v. Montanes-Sanes, 135 F. Supp. 2d 281, 283 (D.P.R. 2001) (“In this case the defendant, Jose Montanes-Sanes, is alleged to have illegally entered into Camp Garcia in Vieques for the purpose of protesting the use of the island-municipality by the U.S. Navy for training. Therefore, the illegal act committed was trespass. However, the Defendant was not protesting the trespass statute, but rather the Navy presence in Vieques.”).

\(^{87}\) See Schoon, 971 F.2d at 196 (“Direct civil disobedience, on the other hand, involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow.”).


\(^{89}\) Id. at 1276–78.
restrictive means than criminal prosecution to achieve its interests in maintaining the wildlife refuge free of trespass and pollution—which, incidentally, was not a sufficiently compelling interest that needed to be safeguarded through criminal prosecution—the RFRA defense succeeded. However, this is probably more the exception than the norm, as demonstrated by the Eleventh Circuit’s 2021 decision in United States v. Grady. In Grady, the court of appeals denied the defendants’ RFRA arguments and upheld their convictions and sentences for trespass and destruction of government property in protesting the possession and maintenance of nuclear weapons on a military base in Georgia. Despite the sincerity of their religious beliefs, in this instance, the court found the RFRA defense to be insufficient to overcome the government’s compelling security and property interests, with prosecution being the least restrictive method to protect those interests.

Taken together, these decisions demonstrate the difficulty of effecting change through protest, due to the constant nature of the threat of prosecution. The prosecution of even peaceful, humanitarian protest in the Hoffman case initially produced guilty verdicts at a bench trial before a magistrate judge, based on a theory of harm that was highly convoluted at best. RFRA provided no relief for the Grady defendants, who were directly protesting the presence of the world’s most dangerous weapons on United States soil. The end picture is that the government views political protest with great suspicion, all the more so when the cause animating the protest is humanitarian in nature. While the authorities do not state a preference for one political position over the other, or protests of one cause over the other, the sum total of the laws governing domestic protest, police practice, and substantive crimes related to protest do suggest a political position against such humanitarian protest, which may be grouped under a left-wing heading. Right-wing protest garners less law enforcement and prosecutorial attention as a result.

90. Id. at 1287–89. Roughly contemporaneously, the government also prosecuted the leader of No More Deaths, Scott Warren, on more serious charges of harboring unauthorized migrants, and he was eventually acquitted of the charges after a retrial, where the jury in the first trial deadlocked. Jasmine Aguilera, Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border, TIME (Nov. 21, 2019, 3:29 PM), https://time.com/5732485/scott-warren-trial-not-guilty/ [https://perma.cc/5ZKF-52NQ]. Incidentally, Congress can make the provision of humanitarian aid, even when carried out peacefully and in good faith, a crime; note that, in a prosecution for providing material support to an FTO, even undisputed humanitarian aid provides the basis for charges under that statute, which carries a lengthy prison term upon conviction. See SAID, supra note 37, at 51–53.

91. 18 F.4th 1275 (11th Cir. 2021).
92. Id. at 1280–81.
93. Id. at 1286–88.
94. Most recently, the community-led protests against the Atlanta Police Department’s building a massive training center outside the city limits dubbed “Cop City,” illustrate official
IV. PROSECUTIONS RELATED TO FOREIGN PROTESTS

A. China Initiative

What the domestic arena suggests, the foreign policy realm makes explicit. The government can follow law enforcement and prosecutorial strategies more targeted and overt when the target is foreign. In November 2018, then-Attorney General Jeff Sessions announced a so-called “China Initiative,” geared at stopping what the government characterized as “Chinese economic espionage against the United States.” Noting that this threat may have “been overshadowed in the press by threats from Russia or radical Islamic terrorism,” Sessions promised that law enforcement and prosecutorial attention would now focus not just “against traditional targets like our defense and intelligence agencies, but against targets like research labs and universities,” where “we see Chinese propaganda disseminated on our campuses.”

Initial headlines related to the China Initiative concerned the saga of Meng Wanzhou, the CEO of the Chinese telecommunications firm Huawei, who was detained by the Canadian authorities in late 2018 on the basis of an extradition request by the United States to face fraud charges related to violating American sanctions on Iran by Huawei’s Iranian subsidiary. She was eventually released and returned to China, but not

and police hostility to protests of a left-wing vein. So far, one protester has been killed, forty-two have been charged with domestic terrorism, three with police intimidation and stalking, and finally three more were arrested in late May 2023 with money laundering and fraud charges for running a mutual aid and bail fund geared at supporting the protestors. See Hannah Riley, Atlanta Is Trying to Crush the Opposition to “Cop City” by Any Means Necessary, THE NATION (June 7, 2023), https://www.thenation.com/article/activism/cop-city-arrests-atlanta-repression/ [https://perma.cc/WJ8Q-NFFF]. The latest arrests finally drew a reaction from Senators Jon Ossoff and Raphael Warnock of Georgia, who both criticized the aggressive police actions against constitutionally protected protest activity. George Chidi, No One Believes in Cop City. So Why Did Atlanta’s City Council Fund It?, INTERCEPT (June 6, 2023, 4:58 PM), https://theintercept.com/2023/06/06/cop-city-atlanta-funding-vote/ [https://perma.cc/FM4F-BZBY]. So far, the authorities have shown no letup in their approach, as Georgia prosecutors charged over sixty protesters in September 2023 as being part of a wide-ranging criminal conspiracy to obstruct the construction of Cop City under the state’s RICO laws. Rick Rojas & Sean Keenan, Dozens of “Cop City” Activists Are Indicted on Racketeering Charges, N.Y. TIMES (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/us/cop-city-atlanta-indictment.html [https://perma.cc/7WLH-ZE2Q]

96. Id.
before China detained and prosecuted two Canadians on espionage charges, who were also freed in September 2021.98

While no doubt a headline-grabbing incident, the main thrust of the China Initiative in the United States was in American universities, where, for the most part, scholars of Chinese origin in the sciences were targeted for prosecution based on perceived irregularities in their applications for federal research grants.99 The program produced a few convictions of individual researchers who falsified or withheld information in grant applications, for example, but did not pass on trade secrets to China; it largely failed in its focus on researchers, with acquittals in high-profile cases involving scientists Gang Chen at M.I.T. and Anming Hu at the University of Tennessee being the most prominent.100 The program also engendered major opposition from academic researchers themselves, when in September 2021, 177 scholars at Stanford signed an open letter to the Attorney General to discontinue the China Initiative; the letter was subsequently endorsed by over 2,000 other academics from institutions all over the country.101 The prosecutions have suffered from numerous deficiencies, as Hu’s case demonstrates. He was targeted based on an FBI agent’s inaccurate reliance on Google Translate to tie him to China, which caused the criminal prosecution to fall apart.102 Despite that, Hu and his son were subjected to surveillance for twenty-one months, and he was put on a no-fly list and fired from his university, which only reinstated him in early 2022.103 Perhaps even more chilling, the FBI tried to pressure him to become an informant based on his work in Beijing University,104 repurposing

98. Id. at 747–49.
100. See id.
101. See id.; WINDS OF FREEDOM, https://sites.google.com/view/winds-of-freedom [https://perma.cc/QQ82-Y5Y2] (showing effort of group of 177 Stanford academics to combat the China Initiative on campus, with endorsements from faculty across the country).
a tried-and-true tactic amplified by the practices of the post-9/11 war on terror.105

The failures have shaken the government. In late February 2022, it was announced that the DOJ was contemplating changes to the China Initiative, up to and including its name, as well as de-emphasizing its focus on prosecutions involving university researchers.106 A mere few days later, it canceled the program and subsumed the effort to counter Chinese espionage into a wider one encompassing several other countries, including Russia and North Korea.107 Regardless, the damage may have already been done, as the focus on China as the locus of the threat may continue to shape law enforcement and prosecutorial attitudes that have in the very recent past viewed Chinese ethnicity as a proxy for suspicion on a repeated basis. Even former officials who now support rolling back the program in the university arena do so, in the words of the former United States Attorney for the District of Massachusetts, because “[d]eterrence has been achieved,” no matter the costs to those acquitted of any economic espionage charges.108

Regardless of deterrence and what experts assert as the wide and real scope of the threat of Chinese trade theft, the China Initiative needs to be placed in its proper context. Modern federal immigration law begins with the 1889 Supreme Court decision in Chae Chan Ping v. United States, also known as the Chinese Exclusion Case, which held that the government had essentially unreviewable power to exclude noncitizens.109 The language of the

105. Said, supra note 52; Shamas, supra note 52; Aaronson, supra note 52.
108. Eileen Guo et al., The US Crackdown on Chinese Economic Espionage Is a Mess. We Have the Data to Show It., MIT TECH. REV. (Dec. 2, 2021), https://www.technologyreview.com/2021/12/02/1040656/china-initiative-us-justice-department/ [https://perma.cc/C392-UKC7]. Rolling back the investigation of university researchers does not mean that the pernicious effects of the China Initiative are entirely mitigated. The recent prosecution of Haoyang Yu and his wife Yanzhi Chen on charges related to trade secret theft and wire fraud resulted in his acquittal on eighteen of nineteen counts against him and the government dropping the charges against her; in context of the China Initiative, what was essentially a trade secret dispute between him and his former employer turned into a criminal investigation and prosecution on account of him being a naturalized U.S. citizen of Chinese origin. Mara Hvistendahl, Chipped Away, INTERCEPT (Dec. 22, 2022, 10:32 AM), https://theintercept.com/2022/12/22/semiconductor-trade-secret-haoyang-yu/ [https://perma.cc/L6F5-KD3H].
majority opinion was perhaps a product of its time, with the Court referring to the Chinese presence in the United States as "vast hordes . . . who will not assimilate with us," and are "dangerous to . . . peace and security." The critical decision on the government’s power to exclude foreigners remains in effect, and helped serve as the basis for a race-derived ban on Asians acquiring U.S. citizenship, which lasted for many decades after. The effects of stigmatizing Asians, and Chinese ethnicity in particular, have never really left. In the nearly two-decade period preceding the issuance of the China Initiative, several naturalized American citizens of Chinese descent were falsely charged with spying for China, based on their employment with the federal government. The most notable of these cases was that of the Los Alamos National Laboratory scientist Wen Ho Lee, who received very hostile and accusatory coverage in the national press when he was charged, only to see those charges disappear as falsely levied a short while later. Whatever the Chinese government’s involvement in destructive trade theft, based on past and more recent history, the government does not really attempt to grapple with the racial implications of anti-China rhetoric or policy, an especially dangerous exercise in light of anti-Chinese prejudice present in American law for well over a century.

Perhaps this is unsurprising. In the war on terror context, the government actively uses informants to spy on Muslim communities and drive prosecutions where no threat may have existed, based on theories of Muslims being susceptible to being “radicalized.” The government also maintains a program to “Counter Violent Extremism,” aimed at curbing radicalization in Muslim communities. Adopting similar logic that members of a particular ethnicity are more inclined to be spies for a foreign country constitutes a weak and constitutionally dubious racial profile, but one that the government seemingly does not hesitate to use. Just because the foreign country in question does actually spy or engage in trade theft cannot justify the use of profile against an entire ethnic group or suggest any type of propensity to spy

110. Ping, 130 U.S. at 606.
111. Chin, supra note 109, at 23.
114. See id.; Lee v. Dep’t of Just., 413 F.3d 53 (D.C. Cir. 2005).
115. See SAI, supra note 37, at 14–30.
on behalf of that ethnicity. Given the history of anti-Chinese racism in American law, we might expect an insistence on rigid adherence to actual evidence of spying, with ethnicity not playing a role in the evidentiary assessment.

The Department of Justice has, in the past, recognized racial profiling in law enforcement as a real problem, and in 2014, then-Attorney General Eric Holder issued a policy document forbidding the use of racial profiling in most federal law enforcement contexts. But in the context of much official hostility to China, including from President Trump himself, and the history of anti-Chinese discrimination, such a program was always in danger of morphing into a type of profile, whatever the validity of the threat from China itself. The key difference between mass shooting events or the January 6 incident and the China Initiative or Countering Violent Extremism is that the former have yet to generate targeted programs that seek to offer an officially promulgated theory of what groups—which include religions and ethnicities—have a predilection to engage in such violent activity, unlike the latter. A right-wing shooter or insurrectionist is not the subject of an official profile, which the government uses to drive surveillance and prosecution, while Chinese ethnicity or Muslim religion decidedly are, whether such profiles are retired or repurposed under different names.

Despite the inherent bias at the heart of the China Initiative, its goal was to disrupt the workings of a powerful nation state, which is able to advocate for its interests and citizens even in the face of American criminal prosecution, as the saga of Huawei CEO Meng Wanzhou demonstrates. In cases that implicate American foreign policy and center on accusations against individuals from countries less powerful than China, criminal prosecution can serve as a tool to pressure foreign citizens for purposes far removed from accountability for wrongdoing. In pursuing criminal charges as a means to

117. See generally, e.g., Volpp, supra note 112.
119. See Schiavenza, supra note 99 (“But Trump, who campaigned on a platform of cracking down on China, and other like-minded Republicans regarded Chinese students in the United States as a liability. In 2018, Trump reportedly came close to banning Chinese students from the United States altogether, before being talked out of it by former U.S. Ambassador to China Terry Branstad.”).
120. See Volpp, supra note 112, at 471 (noting how counterterrorism policies have had the effect of associating terrorism with "Arab, Middle Eastern or Muslim" appearance).
advance foreign policy goals, the government manipulates the judicial process and the notion of due process that should undergird each criminal prosecution. As a secondary—but no less important—matter, a noncitizen defendant is always at the risk of prolonged immigration detention, even if the government fails to secure a criminal conviction. This factor alone distinguishes the prosecution of foreign nationals in cases with political overtones from similar cases in the domestic political context.

B. Trumped-Up Charges Rooted in Foreign Policy Aims

The case of Iranian scientist Sirous Asgari is the most striking recent example of the misuse of criminal charges for foreign policy purposes discussed here. Asgari, who had previously worked in the United States as a nuclear researcher at Case Western University in Cleveland, received news that he and his wife had been awarded a visa to the United States in 2017; the timing was suspicious since President Trump had just issued the first iteration of the so-called “Muslim Ban” barring, among others, Iranian citizens from traveling to the United States. Upon arriving in the country, Asgari was met by FBI agents who, rather than admitting him officially, used a process known as “silent parole” to allow him entry into the country for a specific purpose, which they soon revealed. Asgari and his wife were taken to a hotel near the airport and presented with an indictment charging him generally with theft of business secrets for the purpose of aiding the Iranian nuclear industry, based on his work several years earlier at Case Western. The charges were not well founded and were intended by the FBI as a mechanism to get Asgari to spy on Iran for the United States. When he chose not to cooperate with the government, even though he spoke several times with the FBI agents to

123. See Aydiner v. Giusto, 401 F. Supp. 2d 1129, 1131, n. 1 (D. Or. 2005) (“[T]he Attorney General has the discretion to temporarily parole an alien into the United States for ‘significant public benefit.’”); 8 U.S.C. § 1182(d)(5)(A) (“The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.”).
124. Secor, supra note 121.
125. See id.
answer their questions about the factual basis for the indictment, he was detained for over two months before being released on bond.\textsuperscript{126} Right after being released from federal detention, he was taken into custody by Immigration and Customs Enforcement (ICE), as his entry under silent parole did not amount to a lawful admission.\textsuperscript{127} He was released over a week later, on condition that he self-deport at the conclusion of the federal prosecution against him.\textsuperscript{128}

Rather than accept any plea deal or the FBI’s repeated attempts to have him serve as an informant, Asgari fought the charges against him.\textsuperscript{129} On at least two occasions, favorable pre-trial rulings by the district court were overturned by the Sixth Circuit,\textsuperscript{130} but when the case finally went to trial, the evidence was paltry and unconvincing.\textsuperscript{131} The district court accepted the defense motion to dismiss the case, and at the conclusion of the proceedings, the prosecution signaled for ICE to take Asgari into custody pending deportation, even though he had stipulated that he would self-deport immediately upon the conclusion of the federal criminal proceedings against him.\textsuperscript{132} He then spent over seven months in ICE custody in multiple facilities, during which he developed several health problems, as well as contracted COVID-19.\textsuperscript{133} The irony of his situation was that, had he been convicted in the criminal case of trade secret theft, he would have been much more likely to obtain compassionate release based on the risk from the global pandemic to incarcerated prisoners.\textsuperscript{134} In ICE detention, no such prospect existed, as it is a system apart. Although he filed a habeas petition to be released from ICE custody, it was not granted until the end of his time there, and he was ultimately deported to Iran as a precursor to a different prisoner exchange deal worked out between the government and Iranian authorities.\textsuperscript{135}

Asgari’s case illustrates the difficult predicament of the foreign national targeted for prosecution for whatever reason, in that the prospect of deportation looms once the criminal process is complete. The FBI employed the mechanism of criminal charges, however speculative and far-fetched, for a foreign policy/intelligence goal that had nothing to do with holding

\begin{thebibliography}{99}
\bibitem{126} See id.
\bibitem{127} Id.
\bibitem{128} See id.
\bibitem{129} Id.
\bibitem{130} See United States v. Asgari, 940 F.3d 188, 189 (6th Cir. 2019); United States v. Asgari, 918 F.3d 509, 510 (6th Cir. 2019).
\bibitem{131} See Secor, supra note 121.
\bibitem{132} Id.
\bibitem{133} See id.
\bibitem{134} Id.
\bibitem{135} Id.
\end{thebibliography}
wrongdoers accountable for their harm to society. 136 When the targeted individual chose to fight the charges and the attempts to recruit him as a spy, the dire prospect of a spell in the poorly regulated system of immigration detention awaited. As it appeared to a journalist covering his case, the decision to turn over Asgari to ICE after his acquittal on the criminal charges against him appeared to be vindictive, not to serve the two traditional goals of detention pending deportation, which are: (1) to ensure attendance at any future proceedings and (2) to remove a danger to the community. 137 Asgari met neither of those conditions and should have been released. Further, his immigration difficulties were entirely fabricated, as the FBI agents greeting him at the airport refused to stamp his ostensibly valid visa and took advantage of their power to allow him entry on a limited basis known as parole, which conferred no legal status or rights that a properly admitted immigrant would enjoy. Simply put, Asgari was induced to come to the United States on a pretext, pressured to spy under threat of criminal prosecution, prosecuted unsuccessfully, and then rendered into immigration detention, where he was largely out of the reach of judicial oversight, until an extrajudicial arrangement allowed for his deportation to Iran. There have been a recent spate of important articles trying to grapple with the foreign affairs implications of transnational prosecutions in the United States and the tension between criminal law enforcement and accountability on the one hand, and executive branch primacy in foreign affairs on the other. 138 While the authors of these articles make thoughtful points about striking proper balances between duly empowered federal government actors, their suggestions do not cover a case like that of Asgari’s, which lacks any of the indicia of a bona fide

136. See, e.g., R. A. DUFF, THE REALM OF CRIMINAL LAW 6 (2018) (advancing the position that “criminal law is concerned with wrongs,” and that “the wrongfulness of a type of conduct is essentially relevant to the legitimacy of its criminalization”); VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 4 (2011) (arguing that punishing individuals for crimes they have committed is rooted in “the duty to protect others, that offenders incur as a result of their wrongdoing,” which “justifies general deterrence”).

137. Secor, supra note 121 (“The turn of events was stunning. Asgari had just been acquitted in a fair trial before a federal judge, but would end the day in prison. By all appearances, the government was acting out of vindictiveness. (Riedl, the prosecutor, declined to be interviewed.”). See Hernandez v. Sessions, 872 F.3d 976, 983 (9th Cir. 2017) (“If the DHS officer or IJ determines that the non-citizen does not pose a danger and is likely to appear at future proceedings, then he may release the non-citizen on bond or other conditions of release.”).

criminal prosecution. As a private citizen of one of the four countries listed by the State Department as a state sponsor of terrorism, no balancing of interests between federal actors would protect someone in his shoes from being targeted in exactly the same way if FBI agents chose to do so. The only things stopping them are discretionary factors, such as office priorities, time, and resources, but not any law or policy. As demonstrated above, politically driven prosecutions also incentivize the legally dubious policy of holding foreign nationals on weak pretexts or trumped-up charges as bargaining chips to use in a potential prisoner exchange. This is about as far as you can get from criminal prosecution as a method to express the condemnation of the community for wrongs committed, which must be rectified by actors who should be deterred.

C. The Further Misuse of Immigration Detention

Immigration detention serves as a valuable tool for the authorities to hold people targeted for prosecution as an alternative means to achieve the goals of such prosecution, even if they are initially successful in fighting the charges against them, or have simply completed their sentence. This is particularly the case in situations where the foreign nationals are from countries with limited geopolitical influence, or may, in fact, be stateless. The two examples here are of Iraqi national Omar Ameen and stateless Palestinian Adham Hassoun. Ameen, a prospective refugee in the United States, was detained for nearly three years as the authorities attempted to have him extradited to Iraq to face charges of leading an ISIS hit squad to kill an Iraqi police officer. In addition to the fact that the murder charges stemmed from an Iraqi militia official whose family held a grudge against Ameen’s family, the central problem in the case was that Ameen himself was not in Iraq the day he was alleged to have killed the police officer. He was already in Turkey with family, on his way to the United States having received refugee status. That

139. State Sponsors of Terrorism, BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, https://www.state.gov/state-sponsors-of-terrorism/ [https://perma.cc/2SJE-B94S] (listing Cuba, Iran, North Korea, and Syria under this designation, which brings with it “restrictions on U.S. foreign assistance; a ban on defense exports and sales; certain controls over exports of dual use items; and miscellaneous financial and other restrictions”).

140. See, e.g., Secor, supra note 121.


142. See Taub, Framing Ameen, supra note 141.

143. Id.
did not stop the government from pressing Iraq’s extradition claim in federal
court in California, with Ameen detained during the pendency of the
proceedings.\textsuperscript{144} Even though the court ultimately denied the extradition
request, Ameen was moved to immigration detention, based on purported
fraud in his visa application.\textsuperscript{145} Although the immigration judge hearing his
case made a finding that he lied on his visa application, he had applied for
asylum in the United States, based on the high likelihood of torture or
execution if he were returned to Iraq, a not-unreasonable claim based on the
arbitrary and cruel workings of the Iraqi justice system, especially when it
comes to allegations of ISIS activity.\textsuperscript{146} Allowing for Ameen’s deportation
would essentially accomplish the same goal as the failed extradition request,
thereby permitting the government to send him to Iraq to face almost certain
execution, notwithstanding his innocence on the charge of having killed a
police officer.

Finally, a resort to immigration detention and the largely unaccountable
power of the government in this area can create arbitrary and irrational results.
Consider the case of Adham Hassoun, who was convicted in the terrorism
conspiracy prosecution also involving the alleged al-Qaeda “dirty bomber”\textsuperscript{147}
Jose Padilla.\textsuperscript{148} At the end of Hassoun’s criminal sentence, the government

\textsuperscript{144} See \textit{In re} Extradition of Ameen, No. 2:18-mj-152-EFB, 2021 WL 1564520, at *1

\textsuperscript{145} Id.; Sacramento Resident Omar Ameen Files Writ of Habeas Corpus, Challenging
Detainment, KCRA3 (Jan. 11, 2022, 8:37 AM), https://www.kcra.com/article/sacramento-

\textsuperscript{146} See Ben Taub, Iraq’s Post-ISIS Campaign of Revenge, NEW YORKER (Dec. 17, 2018),
[https://perma.cc/D4XM-9494]; Brittany Johnson, Sacramento Resident Found to Have Lied on
Refugee Application Seeks Asylum, KCRA3 (Jan. 31, 2022, 9:40 PM),
https://www.kcra.com/article/sacramento-refugee-omar-ameen-lied-refugee-application-seeks-
asylum/38946908 [https://perma.cc/9Z7B-RXGF] (citing the testimony of expert witness,
University of Pittsburgh Law Professor Haider Ala Hamoudi, for the proposition that the
likelihood of ill-treatment at the hands of the Iraqi authorities was very high if Ameen were to
be returned to Iraq having been the subject of an arrest warrant, however lacking it may have
been).

\textsuperscript{147} The “dirty bomb” plot was almost certainly not accurate, and at the very least a serious
exaggeration with no hope of being implemented. See Adam Taylor, The CIA Claimed Its
Interrogation Policy Foiled a ‘Dirty Bomb’ Plot. But It Was Too Stupid to Work, WASH. POST
09/the-cia-claimed-its-interrogation-policy-foiled-a-dirty-bomb-plot-but-it-was-too-stupid-to-
work/ [https://perma.cc/8PUN-H3AB].

\textsuperscript{148} United States v. Jayyousi, 657 F.3d 1085, 1091–92 (11th Cir. 2011). I have criticized
this prosecution in greater detail, especially as far as it alleged a conspiracy that was so vast in
scope as to potentially sweep up any religious Muslim who was active politically, but not
violently, in most of the Muslim-majority countries of the world. See \textit{SAID}, supra note 37, at
moved him into immigration detention pending deportation, due to his status as a stateless Palestinian born and raised in Lebanon who was convicted of serious felony offenses. After six months in detention, and with no information on his deportation forthcoming, he filed a federal habeas petition to be released under the terms of the Supreme Court’s 2001 ruling in *Zadvydas v. Davis*, which held that the government may not detain a noncitizen for more than six months pending deportation if such removal is unlikely to occur, as that would amount to an impermissible situation of indefinite detention. The court ordered him released on that basis.

The *Zadvydas* opinion did leave open the possibility that a longer period of detention may be appropriate in exceptional situations, such as “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” In response to this potential loophole in the *Zadvydas* opinion, Congress added a provision to the 2001 Patriot Act to allow for post-six-month indefinite detention of an individual the Secretary of Homeland Security has “reasonable grounds to believe” is a threat to national security. Roughly contemporaneously, the Department of Justice passed a regulation allowing for a similar type of national security detention in cases that meet the

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152. 533 U.S. at 696.
Zadvydas terrorism exception, with the main difference between the two provisions being that the Patriot Act provision is subject to a habeas action, whereas the federal regulation is not subject to any sort of judicial review.\textsuperscript{154} Rather than release Hassoun under the terms of the court’s grant of his habeas petition, the government then asserted its right to hold him indefinitely under both the statutory provision and the federal regulation as someone who threatened national security.\textsuperscript{155} Hassoun challenged the government’s attempts to hold him, and during the hearings on the matter, it was revealed that false or misleading information provided by jailhouse informants represented the entirety of the factual basis to declare Hassoun a threat to national security.\textsuperscript{156} In a remarkable opinion, Chief Judge Elizabeth Wolford of the Western District of New York rejected the government’s attempts to indefinitely detain Hassoun as a national security threat under both the Patriot Act provision and the federal regulation after a review of the government’s factually flawed theory as to his dangerousness.\textsuperscript{157} She ordered his release under several conditions into home confinement at a relative’s house, with prior permission necessary to leave the house, and stayed the order to allow the government time to appeal.\textsuperscript{158} During the pendency of the appeal, Hassoun was deported to Rwanda, which agreed to accept him.\textsuperscript{159}

Hassoun remained in immigration detention for nearly three years after his federal sentence ended.\textsuperscript{160} And as seen in previous cases discussed above, much of his legal ordeal was due to his refusal to become an informant for the government.\textsuperscript{161} Clearly, refusing to serve as an informant for the government in war-on-terror cases has profound and painful consequences, and has been an ongoing phenomenon. In addition to the threat of criminal prosecution, FBI pressure tactics in aid of creating informants include threatening noncitizens with revocation of their immigration status and the wholesale use of placing individuals on the federal no-fly list.\textsuperscript{162} The latter tactic has spawned several


\textsuperscript{155} Hassoun v. Searls, 469 F. Supp. 3d 69, 75–76 (W.D.N.Y. 2020).

\textsuperscript{156} See id. at 86 ("In sum, the February FBI Memo is an amalgamation of unsworn, uninvestigated, and now largely discredited statements by jailhouse informants, presented as fact.").

\textsuperscript{157} Id. at 91–96.

\textsuperscript{158} Id. at 79–80.

\textsuperscript{159} See Hallett, supra note 153, at 580.

\textsuperscript{160} See Searls, 469 F. Supp. 3d at 75.

\textsuperscript{161} See ACKERMAN, supra note 148, at 104–05.

\textsuperscript{162} See Said, supra note 52, at 710–11 (discussing the case of Foad Farahi, an imam of Iranian origin, who claimed he was threatened by the FBI with having his application for asylum in the United States thwarted if he refused to work as a secret informant); Chelbi v. Kable: Lawsuit Challenging Placement on No Fly List, ACLU (May 12, 2021), https://www.aclu.org/cases/chelbi-v-kable-lawsuit-challenging-placement-no-fly-list [https://perma.cc/SH96-UQR4].
lawsuits and court interventions. Consider, then, the message behind the FBI’s position. By constantly seeking informants, the FBI assumes that the individuals targeted could either represent a threat or are uniquely situated to deliver information about threats. In either instance, the agency is convinced that such a threat exists, and it can be correlated with the target’s Muslim religion. If the individual targeted happens to be a foreigner with no or precarious ties to the United States, their ability to resist the pressure to inform is severely impacted. This tactic is so valuable and reliable, in the FBI’s eyes, that it is worth pursuing with threats of real and severe repercussions to its targets, whose guilt or innocence is often beside the point. As others have noted, this is the FBI transforming into a domestic intelligence agency, with a disproportionate focus on targets considered to be within a terrorist framework, which corresponds to the Muslim faith. The message about the type of society we live in and how the nation’s premier law enforcement agency views adherents of a major monotheistic faith is chilling, to say the least.

The role of immigration detention in the government’s construct of national security threats should not be minimized either. Where the above cases offer examples of the expansive use of immigration detention as a coercive tool—i.e., they embody the problems inherent in the system of “crimmigration”—the ordinary use of immigration detention even up to six months pending deportation can be deployed as a kind of punishment, outside the ambit of judicial review.

D. Postscript on Immigration Detention: United States v. Al-Arian

An example from my time as a public defender serves to make the point, when I served as counsel to Hatem Fariz, one of the defendants in the case of United States v. Al-Arian. At the conclusion of a six-month jury trial, two of the defendants, Ghassan Ballut and Sameeh Hammoudeh, were acquitted of all charges. Ballut, a United States citizen who had been free on bond


during nearly the entirety of the proceedings, went home.\textsuperscript{167} Hammoudeh, a West Bank resident who had conceded his deportability in an unrelated action, was hoping to be sent back to the Middle East, where there were no obstacles to his return.\textsuperscript{168} Unfortunately, he sat in immigration detention for six months, rather than travel right away.\textsuperscript{169} The immigration authorities characterized their decision to hold him as follows: """Hammoudeh is being held because (immigration) believes he still has ties to terrorism,"" said Pam McCullough, a spokeswoman for U.S. Immigration and Customs Enforcement.""\textsuperscript{170} McCullough went on to note that, while she acknowledged Hammoudeh’s acquittal, immigration officials did not agree with the jury’s not guilty verdict, hence their decision to detain him.\textsuperscript{171} When he challenged this logic in court, the government filed a brief essentially arguing that Hammoudeh had no basis to complain about any period of detention less than six months, a strange interpretation of the \textit{Zadvydas} decision, to be sure.\textsuperscript{172} So at the very least, in the case of a noncitizen who has conceded deportability, the immigration authorities can choose to demonstrate their disagreement with a jury verdict of not guilty by enforcing six months of confinement in what looks like their unreviewable discretion. This is a fitting—though unjust—postscript to the politicization of criminal prosecution with a national security angle.

V. PROSECUTIONS OF FOREIGN GOVERNMENTAL FIGURES

The final subset of cases deals with prosecutions involving high-ranking governmental figures, mostly from Latin American nations, on charges related to drug trafficking on a wide scale. These prosecutions, while small in number, raise questions about the propriety of the criminal prosecution as a vehicle driving foreign policy goals, which can highlight contradictions between American foreign and domestic policy goals. More to the point, they highlight the role selectivity plays in the criminal process where foreign policy is concerned.


\textsuperscript{169} Id.

\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Meg Laughlin, Immigration and Customs Enforcement Lawyers Argue They Can Hold Someone Six Months Without Justifying It, St. Petersburg Times, Mar. 22, 2006.
A. Manuel Antonio Noriega

Recent history provides a relatively well-known example in the prosecution and conviction of former Panamanian army chief Manuel Antonio Noriega, who was captured and rendered to the United States in a military invasion lasting several weeks over the period from late 1989 into early 1990.\textsuperscript{173} The justifications for a full military invasion of the country were, according to President George H.W. Bush, to “safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges in the United States.”\textsuperscript{174} The short conflict caused heavy damage to Panama and was clouded by the complicated history between Noriega and the United States, as he had served as a CIA asset and allowed his country to be used as a base to support America’s allies in Central America before a falling out in the late 1980s.\textsuperscript{175} After his capture, he was convicted on the drug trafficking charges and sentenced to twenty years in prison.\textsuperscript{176}

B. Nicolás Maduro

The more recent iterations of drug-related indictments of government officials resemble, to some degree, the Noriega prosecution but at this stage are unlikely to lead to an actual criminal prosecution. For example, in March 2020, the Department of Justice announced the indictment of Venezuelan President Nicolás Maduro and thirteen others on various charges related to an alleged scheme to smuggle tons of cocaine to the United States in coordination with the now-defunct Colombian FTO the FARC (Fuerzas Armadas Revolucionarias de Colombia).\textsuperscript{177} Not only was the indictment of a sitting

\textsuperscript{173} United States v. Noriega, 117 F.3d 1206, 1209–10 (11th Cir. 1997).
\textsuperscript{176} See Noriega, 117 F.3d at 1210.
head-of-state unusual, but so was the fact that he and his cohorts were charged with involvement in a narco-terrorism conspiracy, an unusual charge in which drug proceeds supposedly fuel political violence. As of now, it is exceedingly unlikely that Maduro or anyone else indicted along with him will be brought to trial in the United States. The upshot of the whole affair may be simply to pressure Maduro diplomatically and politically, as the investigation has continued with the extradition to the United States in October 2021 of one of his key advisers. Either way, the Maduro indictment indicates that the government makes use of the criminal prosecution for

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political purposes over and above any efforts to combat crime. Political considerations can also scuttle a case, as the government announced the indictment of the former Mexican Minister of Defense in October 2020 on drug trafficking charges, only to quietly drop the entire prosecution the next month on the basis of “sensitive and important foreign policy considerations,” without detailing what those considerations were.\textsuperscript{181} Even so, the fallout was not limited to the government merely dropping the case, as the Mexican Congress responded to the investigation and attempted prosecution by passing a law severely limiting the ability of American DEA agents to operate in the country.\textsuperscript{182}

C. Juan Orlando Hernandez

The most recent example is the February 2022 arrest of former Honduran President Juan Orlando Hernandez on narcotics trafficking charges, whose involvement in the drug trade was considered an open secret during his time in office, given that his brother was convicted and sentenced to life in prison for his role in the drug trade.\textsuperscript{183} He is currently the subject of an extradition request, which is all the more contradictory in that he was considered to be a reliable ally of the United States during his time in office.\textsuperscript{184}

While the above cases demonstrate how politicized federal prosecutions can become, they also symbolize how the United States acts essentially like a kind of world court for transnational crimes it deems important enough to

\textsuperscript{181} See Koh, supra note 97, at 771–72 (internal citations omitted). In an interesting development, the former head of Mexico’s version of the FBI, who also served as public security minister in an earlier government, is currently on trial in federal district court in Brooklyn on charges of facilitating drug trafficking operations in exchange for money. While he is the highest-ranking Mexican official ever to be prosecuted in the United States, he also represents a rival party to that of Mexico’s current president. Alan Feur & Natalie Kitroeff, ‘A Trunk Filled with Secrets’: Mexican Ex-Lawman Faces Trial in Brooklyn, N.Y. TIMES (Jan. 23, 2023) https://www.nytimes.com/2023/01/16/nyregion/garcia-luna-trial-mexico-court.html [https://perma.cc/XW9A-G9RN].


\textsuperscript{184} See Ernst, supra note 183.
prosecute. Congress has made clear it will not countenance any American military personnel being prosecuted before the International Criminal Court on charges related to American military operations abroad.\textsuperscript{185} And, in addition to not having the capacity to cover all forms of transnational crime the world over, the trajectory of federal prosecution can be politicized as well, even despite the good faith efforts of the prosecutors themselves. Regardless of the facts of each case, it perhaps came as no surprise that in late December 2020 President Trump pardoned his first National Security Advisor Michael Flynn, his campaign manager Paul Manafort, and his political advisor Roger Stone, due to the inevitably partisan atmosphere surrounding their convictions, which in the case of Flynn and Stone involved process crimes\textsuperscript{186} of lying to the authorities.\textsuperscript{187} What was more shocking was the pardon issued by President Trump to the security contractors convicted of crimes for opening fire indiscriminately on Iraqi civilians in Nisour Square, Baghdad, killing fourteen and wounding seventeen.\textsuperscript{188} Despite the dogged and good-faith efforts of federal prosecutors to bring the contractors to trial, which ultimately yielded convictions and prison sentences, President Trump erased those efforts with his pardon. This is the epitome of the nonneutrality of the American criminal process; a presidential pardon rooted in political considerations cancels out the work of prosecutors, defense attorneys, and judges in a case that could have been brought in an international criminal court the United States shuns.


\textsuperscript{186} See generally Erin Murphy, Manufacturing Crime: Process, Pretext, and Criminal Justice, 97 GEO. L.J. 1435 (2009) (surveying the “long and storied history” of process crimes in the American criminal justice system).


VI. CONCLUSION

By way of conclusion, a reference back to Jonathan Simon’s second corollary to the notion that authorities govern through crime: “[W]e can expect people to deploy the category of crime to legitimate interventions that have other motivations.”189 In a review of prosecutions that have political considerations at their heart, both in the domestic and foreign policy context, we have seen numerous instances of the misuse of criminal charges. Whether against demonstrators in the domestic context or noncitizens in the foreign policy context, the government articulates a preference for prosecutions that align with its political preferences, on criminal charges that can cross the line from malum prohibitum into trumped-up allegations in the extreme case. When protestors threaten the structures of establishment power, the government’s response is more pronounced, even along racial lines. The result is the further deterioration in the neutrality and reliability of a criminal prosecution, now even further diminished on the basis of politicized justice.

189. SIMON, supra note 4, at 4–5.