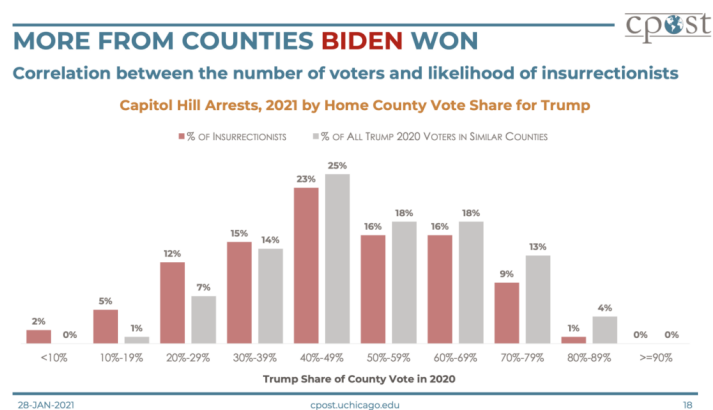


# THE JANUARY 6 INVESTIGATION REMAINS IN AN EARLY STAGE

A lot of people are talking about this report comparing the demographics of the January 6 arrestees with those of past right wing extremist arrests. The report has interesting data – most notably showing that those arrested after January 6 were disproportionately from counties that Biden won.



That said, the methodology behind the comparison is flawed because what would get someone arrested at a normal white supremacist event and what would get them arrested in the wake of January 6 are totally different.

Partly as a way to explain why – and to answer some questions I keep getting – I'd like to talk about what we know of the investigation.

## Chain-of-command

First, let's review who is in the chain-of-command of the investigation.

The investigation is being conducted out of FBI's Washington Field Office, overseen by Steven M. D'Antuono, and the DC US Attorney's Office, led by Acting US Attorney Michael Sherwin. Sherwin was Jeffrey Rosen's hand-selected replacement for Bill Barr flunky

Timothy Shea (who in turn replaced Jesse Liu, who did a good job and so was ousted), but unlike Shea (and Barr and Rosen), Sherwin is a career prosecutor with a background on national security cases. And while Sherwin oversaw some politicized shit (notably the later parts of the Mike Flynn gambit), others were involved in the day-to-day, which means, in part, that Sherwin doesn't necessarily know about the altered documents and whatnot.

In any case, Ken Kohl, a fairly problematic career prosecutor in DC who *was* personally involved in the Flynn corruption, hasn't been seen in any of the statements or court filings since the first days of the investigation, when he claimed the investigation wouldn't incorporate those who incited the attack.

There might have been a concern in the first weeks of investigation that Trump's dead-enders would limit it. But at this point, such a move would be reported on. Moreover, the top political appointee in DOJ until Merrick Garland or Lisa Monaco are confirmed is John Carlin, who served as Obama's National Security Division head for the last two years of his Administration. He was a long-time prosecutor himself and would be as comfortable overseeing a terrorism investigation like the DC one as Monaco will be.

It's unclear when Biden will get around to replacing Trump's US Attorneys, including Sherwin. But until that time, every single indictment of a Trump terrorist will be signed by a Trump appointee, which may undercut any claims of politicization. And the pace or focus of the investigation is unlikely to change when Garland is finally confirmed (which might be just days away in any case). The major thing he might approve would be the inclusion of Trump or any other political target, and possibly of a broader seditious conspiracy case – but the latter, at least, already seems likely under Sherwin's supervision.

The prosecution teams are still falling into

place right now. Among the prosecutors for the Zip-Tie guy, though, is one of the people who prosecuted Maria Butina. Among the prosecutors for the Oath Keeper conspiracy is one of the women brought into the Mueller team to deal with the Russian defendants.

## Triage

I get asked a lot whether the investigation will pick up once Garland is confirmed.

No.

One reason it won't is because the investigation is already moving at a remarkable clip; even without certain bottlenecks due to COVID (such as limited grand jury time and the difficulties created by dial-in court hearings), it would be hard to investigate much more quickly.

I think people may misunderstand that because of the steady clip of arrests since the attack, with around 178 of around 800 people who were in the Capitol during the attack (181 have been charged so far, but that includes a few people who issued threats but didn't make it into the Capitol).

DOJ has said that they've been mostly arresting the people who mugged on social media bragging about the insurrection. What DOJ did in these first weeks, then, is to focus on all the people whose Facebook friends tipped off the FBI or who did interviews or who otherwise came to easy attention. Many of those people (about half of all the people who've been arrested so far) have been charged with just the two trespassing statutes that everyone who stepped foot in the Capitol got charged with, 18 USC 1752 and 40 USC 5104. This is one reason why the study on demographics is not a sound comparison: because literally everyone who stepped in the Capitol committed that trespassing crime, and many of the people who did will never be charged with anything but misdemeanor trespassing charges.

Those people may have loathsome beliefs or be

adherents to a cult (whether QAnon or Trump). But it seems that if people just rushed in with the crowds and didn't damage anything and didn't assault cops and weren't privy to or instrumental in a plan to disrupt the vote, it'll end there, with misdemeanor charges.

That said, as I laid out here, DOJ seems to be adding, at a minimum, 18 USC 1512(c)(2) charges for interfering with the certification of the vote to a subset of those initially charged with just the misdemeanors. They seem to be doing so with those who had a bigger role in delaying the vote count. If that's all these people are charged with (a number are also charged with property damage or assault) and they don't have a record, they might be facing 41 to 51 months in prison. I imagine there are some borderline people whom DOJ is suggesting should plead now to those misdemeanor charges to avoid the felony, and I imagine the felony charge(s) will be used to get some people to cooperate and to support keeping others in jail pre-trial.

Already for these defendants, we may not discover what DOJ saw that led them to believe the person merited more than a trespassing charge. In most cases, the FBI will be obtaining more legal process to understand better why a person showed up at the Capitol, what they did there, and what network got them to go to the riot in the first place, as well as any substantial ties to that network.

In other words, it's likely the 1512 charge is itself a midway point, perhaps a terminal charge for those who were conspiring with others to overturn democracy, perhaps a bookmark as DOJ conducts further investigation.

## **Sealed investigative steps**

Meanwhile, the FBI is conducting further investigation of the right wing networks that planned this attack, steps we're just seeing

hints of, such as with this report on a search of the homes of two people who organized the January 5 rally (and I've heard of a few more that haven't been publicly reported).

The FBI recently raided the homes of two men who sponsored an invective-laced rally near the US Capitol a day before the deadly insurrection, the first known search warrants involving people who organized and spoke at rallies preceding the attack.

[snip]

FBI spokeswoman Laura Eimiller confirmed that federal agents executed search warrants last week at two properties in Orange County, California, which public records indicate belong to Russell Taylor and Alan Hostetter. The two men run the American Phoenix Project, which co-sponsored a pro-Donald Trump rally near the Supreme Court on January 5, one day before the attack.

Neither man has been charged with any crimes.

Footage of the rally shows the men spewing militant vitriol: Hostetter told the crowd to prepare for "war tomorrow" against "vipers" in Congress who refused to nullify President Joe Biden's win. Taylor said, "We will not return to our peaceful way of life until this election is made right."

With anyone who didn't make it inside the Capitol, the government would need to do more to charge them. And for some networks (for example, we know there were around 40 Oath Keepers at the rally, yet only 3 have been charged), the government may want to wait before it starts charging one after another person. It may pick and choose which members of a known network – like the Proud Boys – it charges when.

The thing is, a lot of these people are going to

have better operational security than the people who posed for selfies (or managed to destroy evidence). A lot of them are going to be somewhat more difficult to implicate in the insurrection. And a lot of the investigative work will take more time, potentially a lot more time (and require cooperators). You shouldn't want DOJ to rush it because it's the kind of thing that good lawyers will mount a First Amendment challenge to.

It will take some time. But that's not because Billy Barr has come back from whatever corporate boardroom he's sitting in and sabotaged things. It will take some time because it will take some time.