

# President Biden's Counter-Terrorism Strategy: Between Old and New Threats

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**Abstract:** This Article starts from the acknowledgement that President Biden's counter-terrorism strategy focuses on domestic terrorism as the "main enemy" – an almost natural consequence of the Capitol Hill events – but does not forget the long-lasting threat posed by international terrorism. Therefore, this analysis addresses the two "souls" of Biden's counter-terrorism action. Firstly, it examines both policies and (draft) binding tools relating to domestic terrorism; secondly, it studies how the Biden presidency is handling some strategic measures aimed at fighting international terrorism, in comparison with his predecessors, especially Trump and Obama. The conclusions shed some light on the relationships between these two sides of counter-terrorism and what they could entail from a legal perspective.

**Keywords:** United States; Biden Presidency; National Security; Counter-Terrorism; Domestic and International Terrorism.

## 1. Introduction

International terrorism (and specifically jihadist terrorism) has been one of the main issues for United States Administrations since (at least) 11 September 2001.<sup>1</sup> From George W. Bush to Barack Obama – when Joseph (Joe) Biden was the Vice President – and even to the "atypical" presidency of Donald J. Trump,<sup>2</sup> all Presidents of the last twenty years had to deal with this persistent and ever-changing threat.<sup>3</sup> In other words, the United

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\* Arianna Vedaschi authored paragraph 3; Chiara Graziani authored paragraph 2. The Introduction and the Conclusions of this work result from shared thoughts of both Authors. This paper is updated to end of November 2022.

<sup>1</sup> On the patterns of reaction to international terrorism, see A. Vedaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, Turin, 2007.

<sup>2</sup> On the "atypical" presidency of Trump and the subsequent risks for the US democracy, M. Patrono, A. Vedaschi, *Donald Trump and the Future of American Democracy. The Harbinger of a Storm?*, Milan, forthcoming; see also the Italian version of the same work, Id., *Donald Trump e il futuro della democrazia americana*, Milan, 2022.

<sup>3</sup> On the "metamorphosis" of the terrorist threat over the years and on the rise of jihadism in the form of a state, A. Vedaschi, *Da al-Qā'ida all'IS: il terrorismo internazionale si è fatto Stato?*, in *Rivista trimestrale di diritto pubblico*, 2016, 41 ff.

States of America have been the “champion” of the war on terror for more than two decades.<sup>4</sup>

However, President Biden’s mandate started with events that let international terrorism (and, indeed, any other challenging issue of US politics) *temporarily* fall by the wayside. As known, on 6 January 2021, the “temple of democracy”, Capitol Hill, was assaulted by the so-called Patriots. This mob of Trump’s supporters wanted to keep the 45<sup>th</sup> President of the United States in power by preventing a Joint Session of Congress from counting the electoral college votes and formalising Joe Biden’s victory. This attack has been qualified as a full-fledged act of terrorism<sup>5</sup> and a wound to democracy not only by several scholars,<sup>6</sup> but also by the Committee on Homeland Security of the House of Representatives.<sup>7</sup>

In the aftermath of Capitol Hill events, during his inaugural address held on 20 January 2021, President Biden himself said that those shocking events showed how «democracy is precious; democracy is fragile».<sup>8</sup> Hence, in order to preserve democracy (this “fragile” good), domestic terrorism has become one of the main challenges for the Biden Administration and its counter-terrorism action. Therefore, if one compares President Biden with other Presidents who stayed in office in the last twenty years, there is no doubt that the very core of his anti-terrorism policies is no longer international terrorism, but domestic one.

Nevertheless, the international dimension of the terrorist threat has not been left behind over the first two years of the Biden presidency. Rather, the fight against international terrorism is still a paramount concern for the United States and, as such, it keeps being part of the Biden Administration’s political agenda, as is clear from the 2022 National Security Strategy, issued on 7 October 2022.<sup>9</sup> Addressing those considered

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<sup>4</sup> For an overview of multilevel reactions from 11 September 2001 onwards, A. Vidaschi, K.L. Scheppele (Eds), *9/11 and Global Anti-Terrorism Law. How the UN Security Council Rules the World*, Cambridge, 2021. See also M. Scheinin, *Terrorism*, in D. Moeckli, S. Shah, S. Sivakumaran (Eds), *International Human Rights Law*, Oxford, 2014, 550 ff.

<sup>5</sup> As defined by the Patriot Act: «the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives». 18 U.S. Code 2331(5).

<sup>6</sup> See, e.g., B. Hoffmann, *Domestic Terrorism Strikes U.S. Capitol, and Democracy*, in *Council on Foreign Relationship*, 7 January 2021, available at <https://www.cfr.org/in-brief/domestic-terrorism-strikes-us-capitol-and-democracy>. According to Hoffmann, «those who answered his call [i.e. Trump’s call to violently contest Biden’s election] achieved what Osama bin Laden failed to on September 11, 2001: a successful assault on the cherished and sacred citadel of U.S. democracy».

<sup>7</sup> Meeting of 4 February 2021, Serial No. 117-1.

<sup>8</sup> For the whole speech, see The White House, *Inaugural Address by President Joseph R. Biden, Jr.*, 20 January 2021, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/>.

<sup>9</sup> The White House, *National Security Strategy*, October 2022, available at <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>.

as the main threats to US national security,<sup>10</sup> this general policy document highlights the seriousness of the domestic terrorist danger, but acknowledges – at the same time – that international terrorist groups «still intend to carry out or inspire others to attack the United States and [their] interests abroad»,<sup>11</sup> so the United States cannot afford dropping their guard down. Actually, as will be clarified by this research, the domestic and international sides of terrorism are not as detached as one could imagine at first sight (see *infra*).

In the light of this twofold scenario, where domestic and international terrorism simultaneously pose a serious threat that the Biden Administration is called to face, the present Article is divided into two main parts, focused on these two dimensions (domestic and international) respectively. Specifically, in the first part, we examine measures taken to tackle domestic terrorism, which has become the focus of Biden’s counter-terrorism strategy and marks the difference from previous presidencies (paragraph 2). In the second part, our analysis moves to Biden’s policies on international terrorism, outlining continuity and discontinuity with former Presidents, especially Trump and Obama (paragraph 3).

In the conclusions, some remarks are made on both sides of Biden’s counter-terrorism approach. In particular, the reasons why these two dimensions are not so unrelated are explained in terms of similar features and possible common reactions. Consequently, some light is shed on what these links between the “two souls” of Biden’s counter-terrorism strategy imply from a legal perspective.

## 2. Domestic Terrorism: The “Main Enemy” of the Biden Presidency

The events of Capitol Hill were definitely shocking and unexpected in an advanced democracy, nonetheless domestic terrorism is not an “absolute novelty” in the United States.<sup>12</sup>

Emblematically, the Ku Klux Klan (KKK) has been an issue for more than 150 years. Established during the second half of the XIX century, in the wake of the American civil war, it still exists today (although, according to some studies,<sup>13</sup> in a more fragmented form than in the past, i.e. with several groups professing partially different types of racial and ethnic hatred, all under the KKK “label”).<sup>14</sup>

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<sup>10</sup> Among the threats, the 2022 National Security Strategy also mentions the relationships with China and Russia, the climate change, the energetic crisis, food insecurity.

<sup>11</sup> *National Security Strategy*, *supra* note 9, 30.

<sup>12</sup> See, in this regard, B.L. Smith, K.R. Dampousse, *Pre-Incident Indicators of Terrorist Incidents: The Identification of Behavioral, Geographic, and Temporal Patterns of Preparatory Conduct*, DOJ document no. 214217, 2006. See also J.P. Bjelopera, *The Domestic Terrorist Threat: Background and Issues for Congress*, Cong. Rsch. Serv., r 42536, 2013, available at <https://sgp.fas.org/crs/terror/R42536.pdf>.

<sup>13</sup> See D. Cunningham, *Klansville, U.S.A. The Rise and Fall of the Civil Rights-Era Ku Klux Klan*, Oxford, 2016.

<sup>14</sup> J.H. Madison, *The Ku Klux Klan in the Hearthland*, Bloomington, 2020.

The underlying existence of potentially dangerous groups based on white supremacist ideologies and on other extremist views was periodically spotted and considered as a threat by the Department of Homeland Security (DHS) and the Department of Justice (DOJ). These Departments constantly warned US Presidents in office about these risks in several reports issued through the last two decades,<sup>15</sup> but either these Presidents (especially Bush and Obama) were too focused on international terrorism, or anyway they chose not to take the domestic side of terrorism seriously. The latter approach is typical of Donald Trump, who, in 2019, simply ignored the DHS's forewarnings that «a growing threat from domestic terrorism and targeted violence here at home»<sup>16</sup> loomed over. The DHS duly remarked the need to «address and prevent the mass attacks» that this internal threat would perpetrate, but Trump did not even bother to make efforts to obtain resources and personnel specifically tasked with making the United States safer against domestic terrorism. In retrospect, Trump's inertia in this context is not so surprising. It is enough to remember that, in the few hours after the Capitol Hill events, no statement was made by Donald Trump, and its subsequent words almost vindicated the "Patriots", holding that the riots were the natural consequence of victory being «stripped away» from him.<sup>17</sup> His justification to the Capitol Hill rioters through claims of election fraud led to the impeachment of President Trump, for the second time during his mandate, ended up with his acquittal decided by the Senate.<sup>18</sup>

Therefore, recent presidencies' inability or unwillingness to seriously address domestic terrorism entailed that, at present, the United States lack a comprehensive and well-structured federal legal framework to handle it.

Against this background, President Biden, urged by contingent events and with a view to remedying a long-lasting flaw of the US legal system, made some steps towards this direction. For the time being, most of these steps mainly amount to non-binding policy documents, but something is being made towards the enactment of binding tools as well. The following sub-paragraphs considers both these dimensions. Specifically, sub-paragraph 2.1. focuses on non-binding policy tools, while sub-paragraph 2.2. examines some legislative initiatives, currently pending

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<sup>15</sup> See, e.g., US Department of Justice, *Terrorism 2002-2005*, 2005; US Department of Homeland Security, *Strategic Framework for Countering Terrorism and Targeted Violence*, 2010.

<sup>16</sup> US Department of Homeland Security, *Strategic Framework for Countering Terrorism and Targeted Violence*, 2019. This document was issued in the aftermath of the El Paso attacks (3 August 2019), fuelled by white supremacist and racists sentiments.

<sup>17</sup> Trump's words are reported by K. Breuninger, *Trump tells Capitol rioters to 'go home' but repeatedly pushes false claim that election was stolen*, CNBC, 6 January 2021, available at <https://www.cnbc.com/2021/01/06/trump-tells-capitol-rioters-to-go-home-now-but-still-calls-the-election-stolen.html>.

<sup>18</sup> The charge for "incitement to insurrection" was brought by the House of Representatives on 13 January 2021. At trial stage, the Senate acquitted Trump on 13 February 2021. See M. Patrono, A. Vidaschi, *supra* note 2. For a comparative analysis of "disqualifications from political offices", starting from Trump's impeachment after the Capitol Hill events, see T. Ginsburg, A.Z. Huq, D. Landau, *The Law of Democratic Disqualification*, in 111 *California Law Review* (2023) (forthcoming).

in Congress, whose purpose is to transpose Biden's policies into binding legislation.

## 2.1. Fighting Domestic Terrorism: President Biden's Policy Orientations

In terms of non-binding documents embodying political orientations of the President and his Administration, Joe Biden was the first-ever<sup>19</sup> President to issue a national counter-terrorism strategy *wholly* focused on *domestic* terrorism. Reference is to the National Strategy for Countering Domestic Terrorism (hereinafter, the 2021 Strategy or the Domestic Terrorism Strategy), prepared by the National Security Council<sup>20</sup> over the first 100 days of Biden's mandate and released in June 2021.<sup>21</sup> Although not being a binding document, the 2021 Strategy identifies some strategic areas where some intervention would be needed. In particular, the Domestic Terrorism Strategy singles out for main "pillars".

The first pillar is "Understand and Share Domestic Terrorism-Related Information", and mainly recalls the need to share information and enhance techniques to analyse available data potentially useful to prevent the outbreak of a domestic terrorist attack. This pillar strongly relies on the need for cooperation among major law enforcement and intelligence agencies as well as some federal departments (e.g. the DOJ). Importantly, this pillar highlights that not only terrorism-related information has to be available and interoperable among different bodies, but also that analysing and combining such information in the proper way is essential. For instance, the document remarks that domestic terrorist groups do have «transnational boundaries» that must be fully understood and tracked. In shedding light on such transnational dimension of domestic terrorism, the 2021 Strategy clearly points out a first, significant connection between the two sides of terrorism (the international and the internal one). Moreover, the first pillar clarifies that joining forces of the federal, state and even local levels is crucial to meet the information-sharing objective, so

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<sup>19</sup> See 117<sup>th</sup> Congress, House of Representatives, Hearing before the Committee on Civil Rights and Civil Liberties of the Committee on Oversight and Reform, *Confronting Violent White Supremacy (Part IV): Examining the Biden Administration's Counterterrorism Strategy*, 29 September 2021. Before the Biden presidency, national counter-terrorism strategies were focused on both sides of terrorism (actually, in recent years, they were almost totally centred on international terrorism). In other words, before June 2021, no counter-terrorism strategy addressing *only* domestic terrorism had ever been published.

<sup>20</sup> The National Security Council is a body chaired by the President of the United States himself and made up of main cabinet officials and senior national security advisors. The National Security Council was established by the National Security Act of 1947 (PL 235 – 61 Stat. 496; U.S.C. 402), under President Truman.

<sup>21</sup> White House, National Security Council, *National Strategy for Countering Domestic Terrorism*, June 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>. For an analysis of this strategy, see C. Lee, Y. Lee, W. Bang, *U.S. National Strategy and Implications for Domestic Terrorism. Focus on Violent Extremism*, in 7 *International Journal of Terrorism & National Security* 61 (2022).

showcasing the necessity for an increasing “vertically cooperative” component of the US federalism.<sup>22</sup>

The second pillar is “Prevent Domestic Terrorism Recruitment and Mobilization to Violence”. This pillar stresses the existing relationship between the spread of disinformation, misinformation<sup>23</sup> and hate contents (especially online), on the one side, and adherence to extremist ideologies potentially leading to acts of terrorism, on the other side. According to this part of the Domestic Terrorism Strategy, the “antidote” to this full-fledged radicalisation path consists of two limbs. The first is the enhancement of «media literacy and critical thinking skills», i.e. educating users to an aware and well-informed use of electronic and digital resources. The second is the improvement of partnerships between public authorities and technology companies, with a view to working together to ensure that the web is as free as possible from terrorist content.<sup>24</sup> In this regard, in May 2021, just one month before the release of the Domestic Terrorism Strategy, the United States joined the “Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online”. The Christchurch Call was launched in May 2019, in the aftermath of the 2019 terrorist attack to a mosque in New Zealand. The Call is a commitment by governments,<sup>25</sup> providers of online services, civil society bodies and other non-state organisations to make all possible efforts to remove terrorist and violent extremist contents online. It is worth noting that public-private partnerships and, more generally, actions to eliminate terrorist contents online are a typical response to international terrorism.<sup>26</sup> Thus, once again, some interplay between the two sides of terrorism peeks out.

The third pillar of the 2021 Strategy is “Disrupt and Deter Domestic Terrorist Activities”. It mandates the allocation of additional

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<sup>22</sup> On the transformation of US federalism from its original dual version into a cooperative form, see J. Kincaid, *The Eclipse of Dual Federalism by One-way Cooperative Federalism*, in 49 *Arizona State Law Journal* 1062 (2017).

<sup>23</sup> On the differences and the interrelationships among disinformation, misinformation and fake news, see A.C. Normandin, *Redefining “Misinformation,” “Disinformation,” and “Fake News”: Using Social Science Research to Form an Interdisciplinary Model of Online Limited Forums on Social Media Platforms*, in 44 *Campbell Law Review* 289 (2022).

<sup>24</sup> In general on the role of Internet in spreading terrorist radicalisation, M. Conway, *Determining the Role of the Internet in Violent Extremism and Terrorism: Six Suggestions for Progressing Research*, in 40 *Studies in Conflict & Terrorism* 77 (2017); on possible responses, A. Beutel, S. Weine, A. Saeed, A. Mihajlovic, A. Stone, J. Beahrs, S. Shanfield, *Guiding Principles for Countering and Displacing Extremist Narrative*, in 7 *Journal of Terrorism Research* 35 (2016).

<sup>25</sup> The first promoters were the governments of New Zealand (where the Christchurch attack took place) and France. On the Christchurch Call, see W.J. Hoverd, L. Salter, K. Veale, *The Christchurch Call: Insecurity, Democracy and Digital Media - Can It Really Counter Online Hate and Extremism?*, in *SN Social Science* 1 (2021).

<sup>26</sup> The importance given to strategies aimed at removing terrorist content online is patent if one considers that the European Union enacted a comprehensive framework on this topic, embodied in a regulation, applicable as of 7 June 2022. See Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, OJ L 172, 17.5.2021, 79–109. M. Scheinin, T. Gherbaoui, *A Dual Challenge to Human Rights Law: Online Terrorist Content and Governmental Orders to Remove it*, in available on SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4247120](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4247120).

financial resources (over \$100 million) to ensure that the DHS, the DOJ and the Federal Bureau of Investigation (FBI) have sufficient personnel and infrastructures to devote to the fight against domestic terrorism. This third pillar can be defined as a “cost estimate” to make the United States safer against domestic terrorism and coincides with what President Trump simply neglected to do when, in 2019, he was faced with the problem and decided to ignore it, by abstaining from seeking for the necessary financial resources.

The fourth pillar of the Domestic Terrorism Strategy is characterised by a strong interplay between legal and sociological responses. It is named “Confront Long-Term Contributors to Domestic Terrorism”, and it calls for the identification and rooting out of elements that can potentially contribute to fuel extremist ideologies and violent behaviours. Among these elements, the fourth pillar mentions racism and religious hatred, but also social marginalisation and «de-humanisation» of some parts of the American community.<sup>27</sup> This section of the strategy sparks interest for two main reasons. Firstly, in discussing the role of social marginalisation, it emphasises the huge social gap that is increasingly emerging in the American society and that, according to some studies,<sup>28</sup> is likely to bring significant changes to the US democracy in the next years. Secondly, social inclusion and the fight against marginalisation have been for a long time among the major strategies aimed at fighting jihadist extremism,<sup>29</sup> especially in the wake of the self-proclamation of the Islamic State.<sup>30</sup> Therefore, this is further demonstration that some counter-measures may be common to domestic and international terrorism, as the roots of the two types of extremism are not so divergent.

These four pillars and their importance to effectively handle domestic terrorism at the federal, state and local levels were confirmed in the 2022 National Security Strategy.<sup>31</sup> This is the first full National Security Strategy issued by the Biden Administration (in 2021, only an “interim” version had been released)<sup>32</sup> and, like many unclassified national

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<sup>27</sup> On the role of social marginalisation in fuelling radicalisation, see S. Ghatak, A. Gold, B.C. Prins, *Domestic Terrorism in Democratic States: Understanding and Addressing Minority Grievances*, in 63 *Journal of Conflict Resolution* 439 (2019).

<sup>28</sup> M. Patrono, A. Vidaschi, *supra* note 2.

<sup>29</sup> See C. Walker, *The War of Words with Terrorism: An Assessment of Three Approaches to Pursue and Prevent*, in *Journal of Conflict and Security Law* 1 (2017). The Author identifies three main approaches to fight terrorist radicalisation. The first is the use of criminal law to punish those who disseminate a “terrorist message”; the second is the resort to administrative law to remove or block websites that display terrorist content; and the third is reliance on inclusion programmes and other sociological measures enacted by public authorities often in cooperation with social communities. The Author also highlights that these three approaches are frequently mixed at the domestic level.

<sup>30</sup> See A. Vidaschi, *Da al-Qā‘ida all’IS: il terrorismo internazionale si è fatto Stato?*, *supra* note 3.

<sup>31</sup> The White House, *National Security Strategy*, *supra* note 9.

<sup>32</sup> The White House, *Interim National Security Strategic Guidance*, March 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/03/NSC-1v2.pdf>. See P. Lettow, *U.S. National Security Strategy: Lessons Learned*, in 4 *Texas National Security Review* 117 (2021).

security documents published by US Administrations,<sup>33</sup> it is a very broad and deliberately not detailed document. The 2022 National Security Strategy dedicates two out of its forty-eight pages<sup>34</sup> to “terrorism” in general and, as far as domestic terrorism is concerned, it merely refers to the 2021 Domestic Terrorism Strategy and commits to the ongoing implementation of its four areas.

Not even the National Defense Strategy goes any further. The National Defense Strategy is another policy document that is periodically released and focuses on the Department of Defense (DOD)’s role in implementing the National Security Strategy, so it can be defined as an “ancillary” strategy. In fact, when the DOD published the National Defense Strategy on 27 October 2022, it only called into question the “persistence” of domestic and international terrorist groups alike and stressed the need to keep a close eye on their activities.

In spite of their non-binding nature, the four pillars of the 2021 document, their reiteration in the 2022 National Security Strategy and even the vague references found in the 2022 National Defense Strategy are undoubtedly pivotal to push ahead with legislative reforms and other normative interventions to tackle domestic terrorism. There is actually no part of these documents that explicitly recommends the enactment of new legislation, but some lines of the third pillar suggest that the DOJ should at least carry out a screening to check which legislative amendments and/or innovations could be appropriate. If one looks at congressional works, it emerges that some steps in this direction are being taken.

## 2.2. Fighting Domestic Terrorism: (Proposed) Binding Tools

In order not to leave the fight against domestic terrorism just “on paper”, and turn the mentioned strategic documents into principled declarations without any practical consequences, some bills were introduced in Congress.

For the sake of clarity, two of these legislative proposals are worth being analysed in detail. Further ones,<sup>35</sup> after being presented, were either joined with one or the other due to identity of sponsor(s) and/or similarity

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<sup>33</sup> This point is remarked by A.H. Cordesman, *Further Definitions of the Biden Administration’s National Security Strategy*, Center for Strategic and International Studies, 1 November 2022, available at <https://www.csis.org/analysis/further-definitions-biden-administrations-national-security-strategy>.

<sup>34</sup> There is a difference with President Trump also in terms of length, since Trump’s National Security Strategy amounted to sixty-eight pages. See White House, *National Security Strategy of the United States of America*, December 2017, available at <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

<sup>35</sup> Other related projects were the following: S.964 (introduced in Senate); S.4255 (introduced in Senate). In general on the possible introduction of a new framework for domestic terrorism, see F. Laguardia, *Considering a Domestic Terrorism Statute and its Alternatives*, in 114 *Northwestern University Law Review* 212 (2020); N. Anderson, *Exploring the Viability of a Federal Domestic Terrorism Statute*, in 55 *Gonzaga Law Review* 475 (2020).

of contents, or dropped during their stages in the Houses. Hence, their in-depth examination would be redundant and not add much to this work.

The two bills that deserve analysis are the (draft) Domestic Terrorism Prevention Act and the (draft) Domestic Terrorism and Hate Crimes Prevention Act.

The Domestic Terrorism Prevention Act<sup>36</sup> was introduced in the House of Representatives on 19 January 2021 – only a couple of weeks after the Capitol Hill events – by Democrat Representative Bradley Scott Schneider along with more than 200 co-sponsors. After being examined by some House committees,<sup>37</sup> the bill was passed by the House of Representatives on 18 May 2022 and is currently being considered by the Senate. Yet, while Representatives were discussing, an identical bill had been introduced in the Senate in March 2021 by Democrat Senator Richard Durbin, following to a widespread practice in common law countries' parliamentary procedure aimed at expediting bills.<sup>38</sup> Though, the bill is progressing more slowly in the Senate than in the House of Representatives, since, in the 117<sup>th</sup> Congress, Republican Senators hold enough seats to engage in an intense filibustering activity.<sup>39</sup>

Moving from procedural issues to the substantive content of this bill, its main purpose is to extend the availability of information on domestic terrorism. In particular, it vests the DHS, the DOJ and the FBI with very wide powers to monitor and investigate potential terrorist threats, including through surveillance over suspects. A public report of these activities must be issued by the involved departments and agencies every six months.

In addition, the bill sets up an interagency task force mandated with combating white supremacy and neo-Nazism, perceived as the two major and most dangerous grounds for domestic terrorism.<sup>40</sup>

Lastly, it directs the FBI to assign a special agent to assist investigating authorities (e.g. public prosecutors) every time there is a suspicion that a hate crime has a nexus with domestic terrorism.

Overall, this bill especially implements the already mentioned first pillar of the 2021 Domestic Terrorism Strategy and is characterised by an evident *preventive* approach, since it relies on the enhancement of monitoring, surveillance and information sharing (all tools deployed

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<sup>36</sup> H.R. 350. The bill is titled «A bill to authorize dedicated domestic terrorism offices within the Department of Homeland Security, the Department of Justice, and the Federal Bureau of Investigation to analyze and monitor domestic terrorist activity and require the Federal Government to take steps to prevent domestic terrorism».

<sup>37</sup> Reference is to the Committee on Armed Services, the Committee on Homeland Security, the Committee on Judiciary.

<sup>38</sup> More in detail, two identical bills are presented in both Houses within a few days, so as both Houses can work simultaneously on the same text. In the United Kingdom this practice is called “No. 2 bill procedure”. See M. Zander, *The Law-Making Process*, Oxford, 2020.

<sup>39</sup> In the 117<sup>th</sup> Congress, Senate is composed of 48 Democrats, 50 Republicans and two Independents, who both caucus with the Democrats.

<sup>40</sup> For the historical reasons that led to the focus on these two specific types of threat, see G. Beverly, *Terrorism and the American Experience: A State of the Field*, in 98 *Journal of American History* 73 (2011); D. Levitas, *The Terrorist Next Door: The Militia Movement and the Radical Right*, New York, 2002.

against international terrorism as well). As years of countering international terrorism have taught us, *prevention* is often considered by legislators and policy-makers as the key action of counter-terrorism law, being it preferable to *prevent* terrorists from attacking than to *punish* them for already committed dreadful acts.<sup>41</sup> Coherently with this preventive approach, the bill does not create new criminal offences nor establish listing mechanisms for domestic terrorist groups. While some clarification on what a crime of “domestic terrorism” is might have been useful for the sake of legal certainty, refraining from establishing “terror lists” could be seen as a wise choice. As a matter of fact, in the past, “listing” international terrorist organisations brought significant problems with respect to procedural fairness and infringement of other human rights.<sup>42</sup>

The second bill to be addressed, i.e. the Domestic Terrorism and Hate Crimes Prevention Act,<sup>43</sup> was introduced in the Senate by Richard Durbin on 24 March 2021, read twice and referred to the Senate Committee on the Judiciary. To this days, it has not made further progress yet.

From a substantive viewpoint, this bill is halfway between a Covid-19-related act<sup>44</sup> and a full-fledged counter-terrorism tool. It has a first part that is very similar to the draft Domestic Terrorism Prevention Act, explained above, remarking the need for better information-sharing among agencies. Yet, it also has a second part dealing with some Covid-19-focused crimes. In particular, it frames “Covid-19 hate crimes” as offences characterised by two main co-existing features. First, they are motivated by the actual or perceived characteristic (e.g., race or ethnicity) of any person; and, second, they are driven at the same time by the actual or perceived relationship between that specific characteristic and the spread of Covid-19. A possible example could be the targeting of some ethnic groups

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<sup>41</sup> See the very well-known words of Lord Bingham in the *A. and others (Belmarsh)* case, decided by the Appellate Committee of the House of Lords in 2004, synthesising the idea of prevention in counter-terrorism: «The Government [...] need not wait for disaster to strike before taking necessary steps to prevent it striking». *A. and others v. Secretary of State for the Home Department* [2004] UKHL 56, para 25 (per Lord Bingham).

<sup>42</sup> On the listing procedures and their human rights impact, see C.M. Minnella, *Counter-Terrorism Resolutions and Listing of Terrorists and Their Organizations by the United Nations*, in E. Shor, S. Hoadley (Eds), *International Human Rights and Counterterrorism. International Human Rights*, Singapore, 2019. On the very well-known case of Mr. Kadi, still related to listing procedures, see G.F. Ferrari, *Kadi: verso una Corte di giustizia costituzionale?*, in *Diritto pubblico comparato ed europeo*, 2009, 187 ff.; G. della Cananea, *Global Security and Procedural Due Process of Law between the UN and the EU*, in 15 *Columbia Journal of European Law* 511 (2009). Nevertheless, some scholars held that listing could instead be useful to streamline the strategies to fight domestic terrorism. See M. Ken, *Combating Domestic Terrorism: Constitutional Issues and Practical Solutions*, in 19 *Rutgers Journal of Law & Public Policy* 43 (2021).

<sup>43</sup> S. 963. The bill is titled «A bill to authorize dedicated domestic terrorism offices within the Department of Homeland Security, the Department of Justice, and the Federal Bureau of Investigation to analyze and monitor domestic terrorist activity and require the Federal Government to take steps to prevent domestic terrorism».

<sup>44</sup> For a wide comparative analysis of legal reactions to Covid-19 worldwide, see A. Vendaschi, *General Report on Governmental Policies to Fight Pandemic. The Boundaries of Legitimate Limitations to Fundamental Rights*, Cambridge, forthcoming.

as Covid-19 spreaders, resulting in violent actions or narrative against them – something that happened in several contexts, including the United States, during the pandemic.<sup>45</sup> The two limbs of this bill (i.e. domestic terrorism and Covid-19) are inextricably linked since, based on the draft text, Covid-19 hate crimes may amount to domestic terrorism crimes and thus be subjected to the same provisions, for example regarding the width of monitoring and surveillance powers by public authorities.

This bill raises significant interest from both a theoretical and practical perspective. On the theoretical side, it finds some contact points between a “political” emergency (terrorism) and a “technical” one (Covid-19), albeit limited to the single aspect of hate speech. In other terms, the bill gives some food for thought regarding the potential “hybridisation” of these two types of emergency, and this is a wide research stream bursting with repercussions on future patterns to regulate emergencies.<sup>46</sup> On the practical side, in case the bill becomes law, it would be very challenging – especially for courts – to identify the degree of offensiveness and impact that a Covid-19 hate crime needs to have in order to be classified as a “terrorist” crime as well. This tricky issue arises because the proposal does not give any guidance in this regard, and this is worrisome if one considers that this bill touches upon criminal law, a field where vagueness and lack of clarity should be avoided as much as possible. However, notwithstanding the interest it sparks and the legal issues it entails, a Covid-19 bill may seem partially outdated at present, when the Covid-19 emergency has almost totally come to an end (or perceived as such in most jurisdictions). Along with more general political ones (see *infra*) this is among the reasons that may hinder the enactment into law of this particular bill.

After having examined both non-binding and (draft) binding tools on which the Biden Administration and its supporters in Congress worked and are working to tackle domestic terrorism, some general considerations can be made.

Firstly, Biden’s efforts towards enhancing the legal framework to fight domestic terrorism are significant in terms of policy documents and programmatic guidelines, *but* still at an initial stage if one looks at their transposition into legally binding tools.

Secondly, and very importantly, even those draft legislative acts that are currently pending in Congress need to be read in the light of the renewed political scenario in the United States. As known, midterm congressional elections were held on 8 November 2022 and electoral results saw the victory of the Republican party at the House of

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<sup>45</sup> H. Tessler, M. Choi, G. Kao, *The Anxiety of Being Asian American: Hate Crimes and Negative Biases During the COVID-19 Pandemic*, in 45 *American Journal of Criminal Justice* 636 (2020).

<sup>46</sup> Some initial thoughts on the hybridisation of emergencies can be found in A. Vedaschi, *COVID-19 and the Notion of “Emergency”: Towards New Patterns?*, in *IACL/AIDC Blog*, 7 September 2021, <https://blog-iacl-aidc.org/2021-posts/2021/9/7/covid-19-and-the-notion-of-emergency-towards-new-patterns-3b3gs>; Id., *L'emergenza sanitaria nel contesto globale*, in *Atti del 66° Congresso di Studi Amministrativi tenutosi a Varenna il 17 settembre 2022*, Milan, forthcoming.

Representatives (unseating the previous Democratic majority)<sup>47</sup> and a prevalence of votes cast for the Democratic party at the Senate.<sup>48</sup> In both Houses, the respective winning party prevailed thanks to a handful of votes, so obtaining very thin majorities.<sup>49</sup> In political terms, the outcome of the midterm elections is a so-called divided government, i.e. a scenario where at least one of the Houses of Congress is controlled by a party different from that of the President.<sup>50</sup> Typically, a divided government is likely to bring the system to political deadlock and legislative impasse, as the passing of legislation requires continuous compromise. In the case of the United States after the 2022 midterm elections, the situation is even more peculiar, since 118<sup>th</sup> Congress (which will be sitting as of 3 January 2023) will have two Houses with narrow majorities of their respective controlling parties. Consequently, individual members of each House will have more power to influence or block bills on which they do not agree.

In this very complex political framework, current legislative initiatives on domestic terrorism, all sponsored by Democrats, could face difficulties in being finalised and signed into law, even if reintroduced in the “new” Houses of Congress.

It remains to be seen whether, against this potential stalemate, President Biden decides to carry out his policies through unilateral presidential acts – e.g., executive orders–, <sup>51</sup> as many of his predecessors did in situations of divided government, or try to engage in complex negotiations with political forces in Congress.<sup>52</sup> Certainly, his political plans, included those on a new framework for domestic terrorism, will have a harder life. And what is most worrying is that, while the enactment of legal measures is slowed down, the terrorist threat does not stop looming over the United States.

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<sup>47</sup> The House of Representatives of the 118th Congress (2023–2025) will be composed as follows: Democrats 213 seats, Republicans 220 seats, 2 vacant seats.

<sup>48</sup> The Senate of the 118th Congress (2023–2025) will be composed as follows: Democrats 50 seats, Republicans 49 seats, 1 vacant seat.

<sup>49</sup> The outcome of the 2022 midterm congressional elections can be found at <https://edition.cnn.com/election/2022/results/house?election-data-id=2022-HG&election-painting-mode=projection&filter-key-races=false&filter-flipped=false> (for the House of Representatives) and at <https://edition.cnn.com/election/2022/results/senate?election-data-id=2022-SG&election-painting-mode=projection&filter-key-races=false&filter-flipped=false> (for the Senate).

<sup>50</sup> On the divided government and its effects on the legislative activity, see G.C. Edwards III, A. Barrett, J. Peake, *The Legislative Impact of Divided Government*, in 41 *American Journal of Political Science* 545 (1997); G. Cox, S. Kernell (Eds), *The Politics of Divided Government*, London-New York, 1991.

<sup>51</sup> This scenario seems quite likely, if one considers that, already in the first two years of his mandate, Biden made a wide use of executive orders. On this trend and on its rationales, see G.F. Ferrari, *President Biden and Congress*, in this Special Issue. More generally on the use of rule-making powers by the President, see Id., *L'esperienza statunitense*, in M. Luciani, M. Volpi (Eds), *Il Presidente della Repubblica*, Bologna, 1997, 473, 493.

<sup>52</sup> On presidential negotiation strategies, see R. Neustadt, *Presidential Power. The Politics of Leadership*, New York, 1960. According to this Author, the President's role should be strongly grounded on bargaining, persuasion, and compromise.

### 3. International Terrorism: Old Threat and New Patterns

Along with domestic terrorism, President Biden keeps fighting jihadist extremism, as emerges from some interesting data of his first two years of presidency. Indeed, already during his electoral campaign, Joe Biden stated that he would stop the “forever wars”,<sup>53</sup> meant as the war on terror and all deriving military actions. Yet, since he took office, the war has not fully come to an end yet. It is true that, in August 2021, Biden withdrew US troops from Afghanistan,<sup>54</sup> ending a war waged by President George W. Bush against the Taliban, who supported Al-Qaeda and the 9/11 attacks. However, the withdrawal of the US troops only halted the conflict in its “traditional”, “typical” meaning. The same cannot be said regarding the “atypical” war against international terrorism that goes beyond formal declarations, official battlefields and armies, as demonstrated by the fact that the Biden Administration itself continues to act against international terrorist groups or cells, albeit in a less focused way than previous presidencies.<sup>55</sup>

As a matter of fact, from a policy perspective, Biden’s Interim National Security Strategic Guidance released in 2021, the 2022 National Security Strategy and the 2022 National Defense Strategy all address international terrorism, although briefly and vaguely. Notwithstanding their vagueness, these policy statements were implemented with tangible measures, sometimes on the same line of previous Presidents, other times departing from them.

Following this approach focused on stressing continuity and discontinuity, there are at least four main areas in which regard it is useful to make a comparison between Biden and the Presidents who came before him (especially Trump and Obama). First, targeted killings; second, extraordinary renditions, aimed at transferring terrorist suspects to so-called black sites and/or to the Guantánamo detention facility; third, resort to state secrecy in a number of cases linked to the enforcement of counter-terrorism; and fourth, mass surveillance techniques, made possible thanks to the transatlantic exchange of data. The following sub-paragraphs analyse each of these topics in details to take stock of such a complex puzzle.

#### 3.1. Targeted Killings

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<sup>53</sup> This excerpt can be read in an article of Bill Barrow. See B. Barrow, *Biden Promises to End “Forever Wars” As President*, in *Military Times*, 11 July 2019, available at <https://www.militarytimes.com/news/pentagon-congress/2019/07/11/biden-promises-to-end-forever-wars-as-president/>.

<sup>54</sup> On the withdrawal of US troops from Afghanistan, see L. Miller, *Biden’s Afghanistan Withdrawal: A Verdict on the Limits of American Power*, in 63 *Global Politics and Strategy* 37 (2021).

<sup>55</sup> For an analysis on Trump’s approach and some references to previous Presidents, see A. Vidaschi, G. Marino Noberasco, *Counter-Terrorism under the Trump’s Presidency*, in *DPCE Online*, 2021, 1117 ff.

As widely known, targeted killings (TKs) are predetermined actions – usually drone strikes –<sup>56</sup> carried out by the US military<sup>57</sup> and consisting of the assassination of a person who is considered to pose a very serious risk for national security. These operations take place in foreign territories and not always with the consent of the State on which soil the killing is performed.<sup>58</sup>

During the very first years of the war on terror, under the Bush Administration, TKs (along with extraordinary renditions) were considered the “spearheads” of US counter-terrorism measures, being them seen as one of the most practical and effective ways to “physically remove” the terrorist threat.

Under Obama and Trump, the practice of TKs continued, although each of these Presidents had his own “style” of carrying out drone strikes. Obama tried to proceduralise the killings with higher legal standards if compared to his predecessor, George W. Bush, and provide for additional guarantees, while Trump acted to reverse Obama’s efforts.<sup>59</sup>

Coming to Biden, available data<sup>60</sup> shows that, all over 2021, drone strikes were performed in Afghanistan, Iraq, Somalia, Syria.<sup>61</sup> In numbers, they were 439 overall, i.e. 54% less than President Trump in his last year of mandate (2020).<sup>62</sup> Even though an official and comprehensive set of data on 2022 TKs has not been published yet, it is known that also during this year the Biden Administration did not abstain from this practice. Emblematically, the killing of Ayman al Zawahiri, on 31 July 2022, was in the media spot-light for a long time and several scholars have commented on it.<sup>63</sup>

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<sup>56</sup> Although drone strikes are the most common technique to conduct TKs, there are cases where these operations are performed through different strategies (e.g., Osama bin Laden’s killing). See A. Vidaschi, *Osama bin Laden: l’ultimo targeted killing. Gli Stati Uniti hanno dunque la licenza di uccidere?*, in *Diritto pubblico comparato ed europeo*, 2011, 1196 ff.

<sup>57</sup> On the participation and accountability of the Central Intelligence Agency (CIA) along with the military, see P. Alston, *The CIA and Targeted Killings Beyond the Borders*, in 2 *Harvard National Security Journal* 283 (2011).

<sup>58</sup> See A. Vidaschi, *Osama bin Laden: l’ultimo targeted killing. Gli Stati Uniti hanno dunque la licenza di uccidere?*, *supra* note 56. W.J. Fisher, *Targeted Killing, Norms and International Law*, in 45 *Columbia Journal of Transnational Law* 711 (2006); E. Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict*, Cambridge, 2015, 95 ff.

<sup>59</sup> A. Vidaschi, G. Marino Noberasco, *Counter-Terrorism Under the Trump’s Presidency*, *supra* note 55.

<sup>60</sup> See Combined Forces Air Component Commander, *2021 Statistics (unclassified)*, 30 November 2021, available at: [https://www.afcent.af.mil/Portals/82/November%202021%20Airpower%20Summary\\_FINAL.pdf](https://www.afcent.af.mil/Portals/82/November%202021%20Airpower%20Summary_FINAL.pdf). For a comparison of this data with the number of strikes under the Trump Administration, see Airwars, *How Do the “Forever Wars” Look under President Biden?*, 22 December 2021, available at <https://airwars.org/news-and-investigations/how-do-the-forever-wars-look-under-president-biden/>.

<sup>61</sup> Strikes continue to be carried out under the (old) authority of the Authorization for the Use of Military Force, Public Law 107–40, 115 Stat. 224 (2001).

<sup>62</sup> See Airwars, *supra* note 60.

<sup>63</sup> See, e.g., C. Engelbrecht, E. Ward, *The Killing of Ayman al-Zawahiri: What We Know*, in *The New York Times*, 2 August 2022. For a scholarly analysis of the targeted

From a general perspective, statistics reveal a decrease in reliance on TKs by the Biden presidency; yet, what matters even more is *how* these operations are carried out under the 46<sup>th</sup> US President. In this regard, on 7 October 2022 President Biden signed a new policy on TKs, called Presidential Policy Memorandum (PPM). This document is currently classified, so its content can be inferred from some information leaked out from the press<sup>64</sup> and from statements of the President's Homeland Security Advisor.<sup>65</sup> From this few information, it appears that the new policy reverses some of the most worrying decisions of President Trump regarding TKs, contained in a document of 2017 named Principles, Standards and Procedures (PSP). From this point of view, Biden made a step back towards the "Obama era", when TKs were conducted with higher safeguards. More in details, the PPM recentralised the decision to add an individual to the "kill list", so reinstating presidential oversight embodied in Obama's 2013 Presidential Policy Guidance (PPG). Differently, under the Trump Administration, military personnel on the field could autonomously determine who ought to be targeted. Second, Biden's PPM reintroduced Obama's "imminent threat" requirement, which guarantees a strict standard in planning and executing the killing. In clearer words, the killing operation is not allowed unless it is demonstrated that the targeted person poses an "imminent threat" to the United States and that his capture is unfeasible. Trump had instead removed the "imminent threat" requirement and weakened the one on unfeasibility of capture, since his PSP only stated that capture was generally preferable over lethal action.

There is no question that this new policy pursued by President Biden represents an improvement if compared to Trump's approach. There are though still some contentious points. Among others, for instance, the very fact that the Biden's policy is classified is definitely not a "win for transparency". On the contrary, there should be no hesitation to publicly release a policy document if its content is lawful and it provides for appropriate safeguards. Failure to publish the PPM may raise suspicions that it contains further, more controversial elements that the Administration preferred the public opinion not to get to know. This is just a potential occurrence, not demonstrated by any fact so far; but, in a democratic environment, not even the mere doubt should be cast.

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killings of terrorist leaders and their implications, see B. Mendelsohn, *Ayman al-Zawahiri and the Challenges of Succession in Terrorist Organizations*, in *34 Terrorism and Political Violence* 1826 (2022). Moreover, unofficial data demonstrates that further TKs have recently been carried out in Afghanistan, Somalia and Yemen. See C. Cole, *A Deadly Legacy: 20 Years of Drone Targeted Killing*, in *Drone Wars*, 31 October 2022, <https://dronewars.net/2022/10/31/a-deadly-legacy-20-years-of-drone-targeted-killing/>. It is also worth noting that, on 29 November 2022, the third leader of the Islamic State, Abu al-Hassan al-Hashimi al-Qurashi, was killed in an operation conducted by the Free Syrian Army.

<sup>64</sup> C. Savage, *White House Tightens Rules for Counterterrorism Drone Strikes*, in *New York Times*, 7 October 2022.

<sup>65</sup> Liz Sherwood-Randall's words are reported by the CNN. See K. Bo Lillis, *Biden finalizes new rules for US drone strikes*, CNN, 7 October 2022, available at <https://edition.cnn.com/2022/10/07/politics/drone-strikes-counterterrorism-white-house-biden-new-rules/index.html>.

Moreover, Biden’s policy maintains the “near certainty” standard, meaning that TKs can only be used if it almost certain that no civilian casualties ensue. Yet, it did not reinstate Obama’s rule – struck down by Trump – that the number of civilian casualties should be publicly reported.<sup>66</sup> Again, Biden’s PPM is surely not a champion of transparency.

In addition, the PPM is a presidential policy, i.e. a non-binding tool. Consequently, the President himself may decide to depart from it whenever he wants and without declaring it. No US citizens will ever know whether he is complying with his own policy.

Indeed, at least according to some scholars<sup>67</sup> – including the Authors of this work –, TKs are unlawful *per se*, since they violate a number of rules of international law and international human rights law,<sup>68</sup> not to mention domestic due process guarantees, as killing someone without any trial is unlawful even in those countries where death penalty is applied. Thus, no matter how good a policy on TKs could be, it will always regulate an *unlawful* matter.

### 3.2. Extraordinary Renditions, Black Sites and Guantánamo

Along with TKs, extraordinary renditions made up the core of the US counter-terrorism strategy for a long time. This practice can be defined as the forcible abduction of a suspected (or even a potential) terrorist, led by the US intelligence in cooperation with intelligence agencies of foreign countries (among which mature democracies). The abduction is normally aimed at secretly transferring the captured individual – by means of covert flights (so-called ghost flights) – to places of detention (so-called black sites)<sup>69</sup> outside of the United States and/or to the Guantánamo detention camp located on the Cuba island.<sup>70</sup> Actually, most of the thirty-five

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<sup>66</sup> It is worth reminding that, instead, in other policy fields, the Biden Administration acted more promptly to dismantle Trump’s measures. An example is immigration. See R. Scarciglia, *President Biden’s Immigration Policies: Between Continuity and Discontinuity*, in this Special Issue.

<sup>67</sup> This thesis is argued, among others, by Mary Ellen O’Connell, who reaffirmed it in an interview on Biden’s latest policy. S. Roddel, *The Future of US Drone Policy: A Conversation with International Law Professor Mary Ellen O’Connell*, in *Notre Dame News*, 14 October 2022, available at <https://news.nd.edu/news/the-future-of-us-drone-policy-a-conversation-with-international-law-professor-mary-ellen-oconnell/>; see also M.J. Foreman, *When Targeted Killing Is Not Permissible: An Evaluation of Target Killing Under the Laws of War and Morality*, in 15 *University of Pennsylvania Journal of Constitutional Law* 921 (2013).

<sup>68</sup> For an overview of international law issues, see M.E. O’Connell, *Targeted Killings*, in C. Binder, M. Nowak, J.A. Hofbauer, P. Janig (Eds), *Elgar Encyclopedia of Human Rights*, Cheltenham and Northampton, 2022.

<sup>69</sup> Black sites are secret prisons placed in countries where torture is used as an advanced interrogation technique.

<sup>70</sup> On the practice of extraordinary renditions, see A. Vidaschi, *Extraordinary Rendition: A Practice Beyond Traditional Justice*, in D. Bigo, E. Guild, M. Gibney (Eds), *Extraordinary Renditions. Addressing the Challenges of Accountability*, New York-London, 2018, 89 ff.; Id., *Extraordinary renditions: esiste una giustizia transnazionale?*, in *Diritto pubblico comparato ed europeo*, 2013, 1255 ff.; M.L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, in 75 *George Washington Law Review* 1333

detainees currently held there<sup>71</sup> were captured by US forces abroad or brought there after ERs operations and have been detained incommunicado and without any charge for many years.

There is no recent data about renditions and transferrals to black sites,<sup>72</sup> not even by international or non-governmental organisations,<sup>73</sup> so it appears that ERs have not been performed in the first two years of the Biden Presidency.

However, Guantánamo detention camp has not been closed yet, despite it was defined «an anathema to [US] national values» by Joe Biden in a speech delivered in 2007,<sup>74</sup> when he was still a Senator from Delaware.

Differently from Barack Obama, Joe Biden did not speak loudly about plans for (imminent) closure of Guantánamo, neither in his electoral campaign<sup>75</sup> nor after he took office. Rather, he relied on a “low profile” approach, that is, since the beginning of his mandate, Biden started working to unload Guantánamo by transferring as many detainees as possible outside of the prison. In doing so, President Biden has to face some issues. First, these detainees cannot be transferred to US prisons, as Congress passed acts that place an absolute ban on the President to do so.<sup>76</sup> Second, finding third countries that agree to hold these detainees in their prisons often proves challenging. Despite these tricky issues, from the outset of his mandate, President Biden has transferred eight of the forty-three detainees who were at Guantánamo at the end of Trump’s term, so reaching the current and mention above number of thirty-five detainees still there. Of these thirty-five prisoners, twenty have already been

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(2007); L. Fisher, *Extraordinary Rendition: The Price of Secrecy*, in 57 *American University Law Review* 1405 (2008).

<sup>71</sup> The New York Times, *The Guantánamo Docket*, available at <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

The present data is updated to 29 October 2022.

<sup>72</sup> The latest official report on extraordinary rendition was issued in 2018 by the Intelligence and Security Committee of the House of Commons (United Kingdom) and refers to facts that took place between 2001 and 2010. See House of Commons, Intelligence and Security Committee, *Detainee Mistreatment and Rendition: 2001-2010*, HC 1113.

<sup>73</sup> In past years, international and non-governmental organisations were the ones to issue most informative reports on renditions. See, e.g., Open Society, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, New York, 2013.

<sup>74</sup> J.R. Biden, *Remarks at the Drake University Law School*, 3 April 2007, <https://www.presidency.ucsb.edu/documents/remarks-the-drake-university-school-law>.

<sup>75</sup> More specifically, during his electoral campaign, there were references to Guantánamo, but they were much more intermittent than Obama’s. For a comparison with previous approaches to terrorism in electoral campaigns, see G. Rubin, *Presidential Rhetoric on Terrorism Under Bush, Obama and Trump. Inflating and Calibrating the Threat after 9/11*, New York, 2020.

<sup>76</sup> Congressional prohibition to transfer Guantánamo detainees to the United States or to certain foreign countries (among which Libya, Somalia, Syria and Yemen) dates back to the Obama era, but it was constantly reiterated through the years. S. Moreno Haire, *No Way Out: The Current Military Commissions Mess at Guantánamo*, in 50 *Seton Hall Law Review* 855 (2020).

recommended for transferral to other countries;<sup>77</sup> ten have been charged by military commissions and are awaiting trial; three are held without any charge and not recommended for transferral; and two have already been convicted by military commissions.<sup>78</sup> The resulting framework is definitely not free from thorny features.

Biden's choice to deprive Guantánamo of its prisoners without "making noise" is surely a partial step back to Obama and, in general, a commendable approach, especially considering that, before Biden, Trump, planned to «load up Guantánamo with bad dudes».<sup>79</sup>

Nevertheless, some dark sides can be identified. For instance, while pursuing his "low profile" approach and working to unload the facility, Biden could have likewise revoked Trump's executive order that deprived Obama's plan for closure of any effects.<sup>80</sup> Instead, he missed the opportunity to do so. Another controversial aspect of Biden's stance on Guantánamo – which puts him on the same line of all his predecessors – is the resort to military commissions in Guantánamo<sup>81</sup> and reduced fair trial

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<sup>77</sup> In this regard, Biden also appointed a senior diplomat to oversee transferral operations.

<sup>78</sup> The two convicted detainees are Al-Bahlul and Shoukhat Khan. Al Bahlul, a Yemeni enemy combatant, was convicted in 2008 by a military commission to life imprisonment for "aiding and abetting terrorism" as well as for "terrorist conspiracy" and "material support to terrorism", as he was the one who managed Osama Bin Laden's media relationships. He appealed the decision before the US Court of Appeals for the District of Columbia, which affirmed its conviction only for "terrorist conspiracy", in a panel in 2013 and en banc in 2016. In October 2017, the US Supreme Court denied certiorari. See C. Graziani, *La saga Al-Bahlul v. Usa: ultimi sviluppi giurisprudenziali in materia di giurisdizione delle military commissions*, in *DPCE Online*, 2018, 267 ff.

Shoukat Khan was captured in Pakistan and brought to Guantánamo. He allegedly cooperated in a bombing in Jakarta, Indonesia, and had links with those who organised the 9/11 attacks. In 2021, he stood before a military jury and was convicted to 26 years of imprisonment. He pleaded clemency and was granted it by a senior Pentagon official in 2022. His lawyers argue that he should be released, but the US has yet to reach an agreement with a country to receive him. See C.O. Finkelstein, H. Rishikoff, *Beyond Guantánamo: Restoring the Rule of Law to the Law of War*, in *University of Pennsylvania Carey Law School 4* (2020).

<sup>79</sup> NPR, *Trump Has Vowed to Fill Guantanamo with "Some Bad Dudes" — But Who?*, 14 November 2016, available at [www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who](http://www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who). President Trump actually did not realise his plan, but still was very unwilling to transfer detainees (only two left the facility under his term).

<sup>80</sup> E.O. 13823, 83 Fed. Reg. 23 (Jan. 30, 2018).

<sup>81</sup> Resort to military commissions is based on the Military Commissions Act 2009, enacted by Congress during the Obama presidency and representing a "softer" version of the original Military Commissions Act 2007, adopted under George W. Bush's mandate and declared unconstitutional by the US Supreme Court in 2007 with the *Boumediene v. Bush* decision. *Boumediene v. Bush*, 553 U.S. 723 (2008). The 2009 Act allows the use of military commissions in case of alien detainees, who do not reside in the United States and have no property on the US soil. M.I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, in 103 *Northwestern University Law Review* 1683 (2009); K. McCall-Smith, *How Torture and National Security Have*

guarantees entailed thereof. For example, in two recent cases, *Al-Hela v. Biden*<sup>82</sup> and *Ali v. Biden*,<sup>83</sup> his Administration argued – and lower courts agreed<sup>84</sup> – that the petitioners, as foreigners and non-resident in the United States, did not have any constitutional due process right, and could accordingly be detained in Guantánamo and eventually tried by a military commission.

In sum, the “Biden’s way” of handling the detention camp in Guantánamo Bay is far better than the Trump’s, but definitely not a muscular one nor a gamechanger.<sup>85</sup>

### 3.3. The Use(s) of State Secrecy

TKs, ERs and Guantánamo are all linked by a common feature, that is the pivotal topic of state secrecy, another major one in the last twenty years of counter-terrorism measures. For two decades, US Administrations have relied on secrecy in order either to prevent some classified documents about terrorist attacks from being disclosed to the general public, or to inhibit courts’ scrutiny over some counter-terrorism practices and subsequent alleged wrongdoings (if not crimes, e.g. torture) committed by US intelligence.<sup>86</sup>

On the matter of state secrecy, it is possible to identify two different, and not always consistent, approaches taken by President Biden. On the one hand – and this is a clear point of discontinuity with Trump –, Biden committed to transparency and disclosure regarding documents concerning the 9/11 attacks. In August 2021, he directed the FBI to review all files dealing with 11 September that remained classified, in order to determine whether all or some of them could be declassified.<sup>87</sup> And, just to demonstrate how, in this circumstance, practice followed theory, many of these documents are now public, thus accessible to anyone from the website of the FBI.<sup>88</sup> It should be borne in mind that Trump constantly

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*Corrupted the Right to Fair Trial in the 9/11 Military Commissions*, in 27 *Journal of Conflict and Security Law* 83 (2022).

<sup>82</sup> United States Court of Appeals for the District of Columbia, *Al-Hela v. Biden*, 1:05-cv-01048-UNA.

<sup>83</sup> United States Court of Appeals for the District of Columbia, *Ali v. Biden*, 18-5297.

<sup>84</sup> On the *Ali* case, a petition for certiorari was filed with the US Supreme Court, which denied it in May 2021.

<sup>85</sup> On this topic, see J. Hafetz, S. Roehm, H. Shamsi, *How the Biden Administration’s Initial Litigation Positions on Guantánamo Could Undercut Biden Policy to Close the Prison*, in *University of Illinois Law Review Online* 93 (2021).

<sup>86</sup> A. Vidaschi, *The Dark Side of Counter-Terrorism*. *Arcana Imperii and Salus Rei Publicae*, in 66 *American Journal of Comparative Law* 877 (2018).

<sup>87</sup> In particular, reference was to «conducting a fresh review of documents where the government has previously asserted privileges, and to doing so as quickly as possible». J.R. Biden, Statement on Department of Justice Filing, 9 August 2021. Following to this statement, Biden signed an executive order to formalise this direction. E.O. 14040, 86 Fed. Reg. 50439 (September 3, 2021).

<sup>88</sup> Federal Bureau of Investigation, *9/11 Material Released in Response to Executive Order 14040*, available at <https://vault.fbi.gov/9-11-attacks-investigation-and-related-materials/9-11-material-released-in-response-to-executive-order-14040>.

refused to take any measure toward disclosure of these documents, notwithstanding pressure from the families of 9/11 victims.

On the other hand, Biden is far less committed to openness when it comes to court cases involving claims of state secrets privilege, and this is a patent point of continuity with all of his predecessors at least from 2001 onwards. When ERs and other situations involving classified materials reached courts, the Biden Administration systematically invoked secrecy. This posture is particularly evident in *Zubaydah* and *Fazaga*, two cases recently decided by the US Supreme Court, about ERs and foreign surveillance, respectively. In both circumstances, previous Administrations had invoked the state secrets privilege before lower courts, and the Biden Administration did the same before the Supreme Court. Emblematically, in *Zubaydah*, the Administration argued that disclosing any element of the plaintiff's ER and detention in a Polish black site would have frustrated US diplomatic relationships with the Polish government. In *Fazaga*, it remarked that the right of individuals to have surveillance measures reviewed by courts<sup>89</sup> shall never prevail over national security needs and required secrecy. In March 2022, the Supreme Court decided both cases<sup>90</sup> and sided with the Executive, so perpetuating lower courts' typically self-restrained approach in matters of state secrecy and national security.<sup>91</sup>

In brief, President Biden's attitude towards state secrecy has been a dual and somewhat inconsistent one, to the extent that it could probably be better to talk of *uses* (in the plural), rather than of *use* (in the singular), of state secrecy. This is due to the different approaches when state secrecy regards general documents to be released, on the one hand, and when it addresses specific court cases, on the other hand. In the former case, Biden embraces transparency and enables the families of the victims as well as society as a whole to get to know about one of the main tragedies of the 21<sup>st</sup> century (the 9/11 attack); in the latter, his repeated secrecy claims – upheld by deferent judicial stances, even by the Supreme Court – could hide serious human rights violations or other alleged abuses committed by government officials.

### 3.4. Privacy, Surveillance and Transatlantic Exchange of Data

A last topic that deserves analysis from the perspective of countering international terrorism is how Biden is managing the transatlantic flow of personal data. This subject may seem partially divergent from previous ones, since, differently from TKs and ERs (often shielded by secrecy as well), exchange of data does not imply – at least, not directly – the same serious violations of basic rights (life, personal integrity). Data exchange is

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<sup>89</sup> The applicants claimed that they had been targeted by FBI-led surveillance on the sole basis of their belonging to a Muslim community, so they alleged a violation of the First Amendment due to discrimination on the ground of religion.

<sup>90</sup> *United States v. Zubaydah*, 595 \_\_ US (2022); *FBI v. Fazaga*, 595 \_\_ US (2022). Notably, *Zubaydah* is the first ER case where the US Supreme Court granted certiorari and decided, so breaking a long-lasting tradition consisting of denying certiorari when ERs and secrecy were involved.

<sup>91</sup> See A. Vidaschi, *The Dark Side*, *supra* note 86.

anyway a key area when counter-terrorism is at stake. In fact, data transfers relate to surveillance, which is the main tool for prevention. And, as known, prevention is the very basis of counter-terrorism law. Therefore, it is useful to address this topic.

Regarding data flows, even those performed just for commercial purposes, among the main “partners” of the United States there are the European Union (EU) and its Member States. In July 2020, the European Court of Justice (ECJ) invalidated the EU Commission’s adequacy decision that grounded the so-called Privacy Shield, i.e. the legal framework regulating the exchange of personal data between the EU and the United States.<sup>92</sup> Among the main reasons there was the fact that data transferred to the United States was used not just for commercial purposes, but also by the intelligence for counter-terrorism operations, in defiance of some basic guarantees (e.g. effective oversight, well-working redressing mechanisms, responsibility rules).<sup>93</sup> Since then, there has been no agreement between the EU and the US on data transfers, and any exchange takes place based on standard contractual clauses.<sup>94</sup> This situation means that data flows are complicated – as they need to be negotiated almost case-by-case –, costly and surrounded by legal uncertainty.

In the aftermath of the ECJ’s decision delivered in July 2020, the Trump Administration did not take any steps to encourage negotiations towards a new exchange scheme and to solve this complex situation. Rather, President Trump almost mocked the EU for its strict privacy rules, stating that the GDPR and other provisions of the EU privacy framework «provides cover to cybercriminals».<sup>95</sup>

President Biden, instead, spent some efforts to smooth again the flow of data between the United States and the EU. On 7 October 2022, he signed an executive order<sup>96</sup> where he tried to “remedy” some of the flaws found by the ECJ, especially in terms of redress and purpose limitation. The executive order provides for additional safeguards to be observed by the United States when carrying out signals intelligence activities,<sup>97</sup> so as to reassure the EU that, even if exchanged data is handled by intelligence

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<sup>92</sup> European Court of Justice, Judgment of the Court (Grand Chamber) of 16 July 2020, *Data Protection Commissioner vs Facebook Ireland and Maximillian Schrems*, Case C-311/18.

<sup>93</sup> On the shift from the so-called Safe Harbor to the Privacy Shield, see V. Zeno-Zencovich, G. Resta (Eds), *La protezione transnazionale dei dati personali. Dai “Safe Harbor Principles” al “Privacy Shield”*, Rome, 2016. See also M. Scheinin, *Towards Evidence-Based Discussion on Surveillance: A Rejoinder to Richard E. Epstein*, in 12 *European Constitutional Law Review* 341 (2016).

<sup>94</sup> Standard contractual clauses are issued by the EU Commission to regulate the exchange of data between the EU and third countries in which regard there is no adequacy decision. Their latest version of the standard contractual clauses was published on 4 June 2021.

<sup>95</sup> Statement reported by N. Vinocur, *Why Trump’s Administration Is Going After GDPR*, in *Il Politico*, 29 June 2020.

<sup>96</sup> E.O. 14086, 87 Fed. Reg. 62283 (October 7, 2022).

<sup>97</sup> Signals intelligence (acronym: SIGINT) is a type of surveillance, carried out by intelligence services, which consists of collecting, analysing and storing data captured thanks to interception of radio signals emitted between machines or individuals. SIGINT normally involves the use of cryptanalysis.

services too, standards of data protection “essentially equivalent” to EU ones are applied.

More in detail, the Biden’s order addresses three main areas. First, it sets up a two-tier redress mechanism in case a person alleges that his/her personal data has been violated due to the application of national security surveillance measures.<sup>98</sup>

Second, it extends responsibilities of intelligence personnel in case of wrongful handling of personal data (for instance, for non-predeclared purposes). To this effect, each intelligence unit has to include “compliance officials”, i.e. employees who are trained in the field of data protection and are legally responsible in case of data breaches.

Third, it mandates a board (the Privacy and Civil Liberties Oversight Board) to periodically review intelligence policies and their effects on the protection of personal data.

This “new course” of intelligence activities and their privacy impact should facilitate the EU Commission to take a new adequacy decision, which should ground a novel EU-US data exchange scheme. At the time of writing (November 2022), the EU Commission is reviewing Biden’s executive order and its implications, in order to decide whether (or not) it is enough to ground an adequacy decision.

Regardless of what the Commission’s assessment will be, Biden’s executive order is undoubtedly a first step in the right direction,<sup>99</sup> as it points out that something is moving ahead in the US approach to surveillance, traditionally characterised by harsh measures and low guarantees.<sup>100</sup> Though, an executive order is definitely not enough to dismantle the US surveillance system,<sup>101</sup> or at least bring it into the track of full respect for the rule of law. As a matter of fact, the most controversial surveillance measures are embodied in acts of Congress, such as the Patriot Act<sup>102</sup> and the Foreign Intelligence Surveillance Act,<sup>103</sup> two “giants” that an executive order alone can hardly affect. Thus, it is desirable that further reforms follow the President’s executive order. At any rate, whether (or not) there will be efforts to carry them out mainly depends on two points. First of all, how President Biden will manage to handle the situation in

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<sup>98</sup> First, when a breach of data protection in the field of intelligence is alleged, the Civil Liberties Protection Officer (CLPO) of the Office of the Director of National Intelligence can open an investigation. The CLPO can take a binding decision on the case. CLPO’s decisions can be reviewed (on appeal) by a “Data Protection Review Court”, which the Attorney General is mandated to establish.

<sup>99</sup> American Civil Liberties Union, *New Biden’s Executive Order on EU-US Data Transfers Fails to Adequately Protect Privacy*, 7 October 2022, available at <https://www.aclu.org/press-releases/new-biden-executive-order-eu-us-data-transfers-fails-adequately-protect-privacy>.

<sup>100</sup> See C. Graziani, *Privacy vs. sicurezza tra Stati Uniti ed Europa nell’era del terrorismo internazionale: un esempio di «circolazione inversa» dei modelli?*, in *Rassegna di diritto pubblico europeo*, 2019, 365 ff.

<sup>101</sup> See E. Goiten, *The Biden Administration’s SIGINT Executive Order, Part I: New Rules Leave Door Open to Bulk Surveillance*, in *Lawfare*, 31 October 2022, available at <https://www.justsecurity.org/83845/the-biden-administrations-sigint-executive-order-part-i-new-rules-leave-door-open-to-bulk-surveillance/>.

<sup>102</sup> Public Law No. 107–56, 115 Stat. 272 (2001).

<sup>103</sup> Public Law No. 95–511, 92 Stat. 1783 (1978).

Congress given the divided government scenario.<sup>104</sup> In other words, his “negotiation skills” in Congress might mean a lot in this regards. Second, how EU institutions will react to the executive order. To clarify this second point, one can underline that, if the Commission is satisfied with the order, the President might not go any further and avoid a pitched battle in Congress to change legislation; instead, if the Commission requires for further action – or, in the future, the ECJ strikes down also the forthcoming EU-US exchange framework –, legislative reform (i.e. not just a presidential order) might become almost inevitable.

#### 4. Conclusions

In the light of this overview of Biden’s policies and measures against domestic and international terrorism, it is worth highlighting some key findings.

First of all, considering the last twenty years, Biden is unquestionably the President who is taking domestic terrorism “seriously”. Differently from his predecessors and perhaps due to events that “shocked” the beginning of his presidency, he made the fight against domestic extremism the priority of his counter-terrorism strategy.

Nevertheless, at least until now, his actions in this regard were more political and programmatic than fully “legal” ones. Moreover, the current situation after mid-term elections may not help carry out effective reforms of the legal framework. The divided government scenario is likely to entail an impasse that could frustrate the efforts spent by President Biden to improve the US legal arsenal to counter domestic terrorism.

Second, as far as the struggle against international terrorism is concerned, Biden is pursuing this goal as well; however, we are before a kind of “diminished” version of Obama’s posture. Some examples provided in this work are useful to explain why. For instance, Biden’s policy on TKs clearly mirrors Obama’s, but with a lower level of transparency and without reinstating the full set of guarantees that his party colleague and predecessor had introduced. Furthermore, Biden is unloading Guantánamo, but without taking strong actions and “forgetting” to dismantle Trump’s ban on closure. Additionally, he is piercing the veil of secrecy regarding some issues – e.g., he made the disclosure of many 9/11 documents possible, which is praiseworthy – but confirmed and perhaps even thickened such veil in other circumstances. As previous paragraphs explained, reference is to court cases where his Administration firmly and constantly invoked the state secrets privilege, notwithstanding alleged gross violations of human rights (i.e. abduction, inhuman treatments and even torture) that secrecy could shield.

This picture clarifies how, when it comes to state secrecy before courts in national security cases, no distinction between Democrats and Republicans exists any longer. Therefore, the state secrets privilege seems to be one of the most “bipartisan” matters of the last twenty years, which connects “opposite poles” (i.e. Presidents from different political parties and with very divergent political visions one from each other).

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<sup>104</sup> G.F. Ferrari, *President Biden and Congress*, *supra* note 51.

On a more general note, this research demonstrated that domestic and international terrorism – and the legal responses to them – are not so unrelated as they may seem. This is for at least three reasons.

Firstly, as already pointed out, some studies underscored that domestic terrorists often have links with foreign groups; this point has been remarked also by the 2021 Strategy released by the Biden Administration. Consequently, the external and the internal threats might sometimes overlap.

Secondly, adherence to “extreme” ideologies (at the domestic and international level) is frequently boosted by similar factors, all of them identified in Biden’s strategy (e.g., disinformation, racism, social marginalisation, lack of integration).

Thirdly, and connected to the mentioned previous points, some responses might be common to counter the two types of terrorism. From the side of reactions, these links could mean that, at least in some circumstances, the fight against domestic terrorists boosts the struggle against jihadist extremists, and the other way around. At the same time, if certain measures work for one category of terrorism, they will probably work for the other as well. This is particularly straightforward in the field of surveillance. Surveillance measures, made possible by the exchange of information and data, may be helpful to tackle both domestic and international terrorism, since the rationale is the same (preventing the threat and avoiding damages to national security). This is exactly what analysed pending bills, focused on the enhancement of information sharing, seem to suggest. In the light of this finding, the US surveillance framework should be enhanced and improved, repealing most controversial measures (e.g., warrantless surveillance). From this perspective, Biden’s executive order of 7 October 2022 might be a very first but not sufficient starting point.

More generally, it could be useful for the United States to rely on some measures originally conceived against post-9/11 terrorism in order to address domestic terrorism. Whereas some other countries – e.g. Italy and the United Kingdom – had a pre-existing set of tools against domestic terrorism that constituted a useful background when it came to facing the post-9/11 threat, the United States could work in the opposite way, benefitting from post-9/11 legislation and “experience” to tackle new and growing forms of domestic extremism. Nonetheless, such a strategy is only feasible if these measures are substantially “cleansed” of their most criticised aspects. From a theoretical perspective, this would mean giving up the “super-primary” nature that, until this moment, has been recognised to national security by US policies and measures (to the detriment of basic human rights), and putting national security in a continuous and well-thought-out balance with human rights and personal freedoms. Mitigating the harshness of some counter-terrorism measures may make them more widely applicable (e.g. to domestic terrorism) and, hence, even more efficient.

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