

President Biden's Counter-Terrorism Strategy: Latest Issues and Main Challenges for the Next Presidency

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Abstract: *La strategia antiterrorismo del Presidente Biden: questioni recenti e sfide per la futura presidenza* - This Article examines President Biden's approach to the domestic and international terrorism threat focusing on the last two years of his presidency (2023-2024). More specifically, it starts from acknowledging what had been done by the Biden Administration in the first two years of mandate as well as what was expected, and assesses what has actually been achieved in the last biennium. In its conclusions, this paper highlights some of the main challenges lying ahead for the next presidency in the field of counter-terrorism.

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

1. Introduction

The current electoral debate in the United States, which sees Kamala Harris, for the Democrats, and Donald Trump,¹ for the Republicans, battling it out in the race towards presidential elections,² is reviving some topics that have been at the core of US policy and legislative efforts for a very long time, and counter-terrorism is one of these. We heard Trump's supporters claim that, if foreign policy is left in the hands of the Democrats for the next four years, another 9/11-like terrorist attack may happen. A speech held on 16 September 2024 by Republican senator Lindsay Graham during a TV program on elections is paradigmatic in this regard.³ Not to mention the

*Arianna Vedaschi authored §3; Chiara Graziani authored §2. The Introduction and Concluding Remarks of this work are the result of shared thoughts between the two Authors.

¹ For a theory on the impossibility for Donald Trump to be re-elected, based on constitutional considerations regarding the XXII Amendment, see M. Patrono, A. Vedaschi, *Donald Trump e il futuro della democrazia americana*, Milan, 2022.

² G.F. Ferrari, *La presidenza Biden e gli orizzonti futuri della democrazia americana*, in *DPCE*, 3/2024, 5 ss.

³ Reference to the speech can be found at The Economist Time, *US May Witness Another 9/11-like Terrorist Attack, Claims Senator Lindsey Graham*, Sept. 16, 2024, <https://economictimes.indiatimes.com/news/international/us/us-may-witness-another-9/11-like-terrorist-attack-claims-senator-lindsey-graham/articleshow/113373982.cms?from=mdr>.

arguments, still brought forward by the Republicans, that the Biden Administration, while in office, only *pretended* to take steps against domestic terrorism, and above all that most of their policies were ineffective. This accusation was even revigorated when we witnessed at least two attempts to assassinate a presidential candidate, i.e. Donald Trump, a manifest act of political violence that brought us back to scenes of the past, with attempted – or, as in the case of President Kennedy, accomplished – murders against US Presidents. As a matter of fact, a recent statistic from the Pew Research Center – an independent fact tank that analyzes issues and trends in the US society – reported that more than 76% of Republican voters agreed that Democrats should have done more to prevent violent extremism in the domestic scenario, while at power.⁴ More generally, the same research showed that the need to fight against terrorism – both in its national and international dimension – has been ranked as the second policy priority among US citizens in 2023, another sign that the issue of terrorism is very widely perceived within the country.

Against this background, it is possible to wonder whether, looking at legal and policy data, the assertions that Democrats and, in particular, President Joseph Biden have not done “enough” during the presidential mandate match reality, at least in terms of verified failures or missed opportunities, or these statements are more rhetorical devices used by Republicans in the electoral campaign to discredit their competitors than acknowledgments of fact. In this view, the present Article aims at examining the measures enacted in the last two years of the Biden presidency, i.e. 2023-2024,⁵ to deal with the terrorist threat, both the domestic and the international one.

As a starting point, we will rely on our previous essay, *President Biden’s Counter-Terrorism Strategy. Between Old and New Threats*,⁶ where we studied the counter-terrorism strategy of the first two years of the Biden presidency (2021-2022). The Article’s purpose is not only to point out the main trends emerging from the latest years of the Biden Administration and the connected legal issues, but also to shed light on the challenges that the forthcoming presidency, no matter whether it will be led by Democrats or Republicans, as well as next Congress will have to face.

In order to answer this research question, this work is divided into two main parts. Specifically, after this brief Introduction, paragraph 2 focuses on domestic terrorism, by briefly synthesizing “where we were”, i.e. the steps taken in the first years of the Biden presidency,⁷ what was expected in the final two years of mandate, and what the Biden Administration has actually put into practice, also in the light of the evolution of factual and political

⁴ Pew Research Center, *Americans’ Top Policy Priority for 2024: Strengthening the Economy*, Feb. 29, 2024 available at: <https://www.pewresearch.org/politics/2024/02/29/americans-top-policy-priority-for-2024-strengthening-the-economy/>.

⁵ More specifically, the Article is updated to end of October 2024.

⁶ A. Vidaschi, C. Graziani, *President Biden’s Counter-Terrorism Strategy. Between Old and New Threats*, in *DPCE Online*, special issue 1/2023, 209 ff.

⁷ A topic that we extensively addressed in our previous work dedicated to the Biden presidency, A. Vidaschi, C. Graziani, *President Biden’s Counter-Terrorism Strategy. Between Old and New Threats*, cit.

circumstances. The same structure is followed by paragraph 3, which instead has international terrorism as its main object of study. In both parts, in addition to policy and legislative tools, we address, when relevant, the stance embraced by competent courts, since they are essential actors in the interplay with political bodies. In the conclusion of the analysis, we detect a set of topics that will need to be taken into consideration by the next US Administration, along with some crucial legal issues connected with them.

2. Domestic Terrorism

During the first two years of his mandate, President Biden had responded to the threat of domestic terrorism through both policy and (attempted) legislative actions.⁸ The need to counter domestic terrorism had indeed displayed as a priority of the very first week of his Administration, if we take into account that his mandate opened with the well-known Capitol Hill events.⁹

From the policy viewpoint, President Biden was the first US President to enact, in 2021, a National Strategy for Countering Domestic Terrorism.¹⁰ This is a policy document identifying four pillars, i.e. strategic areas of intervention (addressed *infra*) to improve the US framework regarding the fight against domestic terrorism.

In its first biennium, the Biden Administration had also issued two further policy documents in which more generic references to domestic terrorism were contained, i.e. the 2022 National Security Strategy¹¹ and the 2022 National Defense Strategy.¹² While the former, a very general policy document, merely refers to the 2021 strategy as far as domestic terrorism is concerned, the latter limits itself to calling into question the “persistence” of terrorism, both in its international and national dimension.

Turning to attempts to pass legislation on domestic terrorism, in the first two years of Biden’s mandate there had been two major legislative proposals, i.e. the Domestic Terrorism Prevention Bill and the Domestic Terrorism and Hate Crime Prevention Bill.

⁸ A. Vedaschi, C. Graziani, *op. cit.*, 216 ff.

⁹ See L. Melica, *The National Commission to Investigate the January 6th Attack*, in *DPCE Online*, 1/2023, 191 ff.; G. Poggeschi, *The Assault on Capitol Hill of January 6, 2021: Freedom of Expression or rather Freedom to Impeach and to Acquit?*, in *DPCE Online*, 1/2021, 1301 ff.; B. Grofman, *Prospects for Democratic Breakdown in the United States: Bringing the States Back In*, in *20 Perspect. Polit.* 1040 (2022).

¹⁰ 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>. See C. Lee, Y. Lee, W. Bang, *U.S. National Strategy and Implications for Domestic Terrorism. Focus on Violent Extremism*, in *7 Int’l J. of Terrorism & Nat’l Sec.* 61 (2022).

¹¹ 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>.

¹² U.S. Department of Defense, *2022 National Defense Strategy*, October 2022, available at: <https://media.defense.gov/2022/Oct/27/2003103845/-1/-1/1/2022-NATIONAL-DEFENSE-STRATEGY-NPR-MDR.pdf>.

In the next paragraphs, we aim at assessing whether there have been progresses in the mentioned initiatives, meaning in terms of new policy strategies or implementation of previous ones as well, and whether new steps have been taken from scratch.

In the analysis, we start from policy tools (§ 2.1.) and then we focus on binding ones (§ 2.2.). A last paragraph (§ 2.3.) is dedicated to some judicial cases that concerned acts labelled as domestic terrorism; although judicial litigation is not part of the strategy put in place by the Administration *stricto sensu*, it is undoubtedly essential to touch upon some key judicial developments that we could observe in the last two years in order to have a clear and complete idea of how the US responsiveness to the issue of domestic terrorism has been framed.

2.1 Policy Tools: A Good Start, Lost in the Way?

When, in our 2023 work, we analyzed policy strategies adopted by the Biden Administration, we pointed out that these tools, in spite of their non-binding nature, were pivotal for the progress of the legislative reforms as well as of other normative tools.¹³ In the light of the crucial nature of these documents, we need to assess whether existing strategies have found any form of implementation in the 2023-2024 biennium and whether new or updated ones were enacted.

Starting from the implementation of existing strategies, the most relevant one is undoubtedly the 2021 National Strategy to Counter Domestic Terrorism. This strategy is significant from our perspective not only because it is specifically concentrated on domestic terrorism, but also because, if compared to the 2022 National Security Strategy and the 2022 National Defense Strategy, it is more “operative” and not based on mere principled declarations. As a matter of fact, it establishes clear policy objectives, to be reached over the time.

These policy objectives can be found in the four pillars of which the 2021 strategy is made up. Examining each of them is the clearest way to assess whether and to what extent they were implemented in practice.

The first pillar is called “Understand and Share Domestic Terrorism-Related Information” and it was expected to be implemented through the passage of legislative acts, like the above-mentioned Domestic Terrorism Prevention Act.¹⁴ However, this bill is stuck in Senate, in spite of the attempt to reintroduce it by its main sponsor, senator Richard Durbin. Hence, the lack of implementation of this pillar is directly linked with poor progress in the legislative field, which we analyze in the remainder (see §2.2.).

The second pillar, “Prevent Domestic Terrorism Recruitment and Mobilization to Violence”,¹⁵ has been better implemented than the previous one from a practical and operative viewpoint. In this regard, the Department

¹³ A. Vidaschi, C. Graziani, *op. cit.*, 216.

¹⁴ R. Shawe, I.R. McAndrew, *Domestic Cyberterrorism & Strategic Communications: Literature Review*, in 14 *J. Int'l Sec.* 472 (2023).

¹⁵ This pillar has been labeled as a fundamental one by some scholars. See C. Doxsee, *The Heightened Threat of U.S. Domestic Terrorism*, in N. Stockhammer (Ed), *Routledge Handbook of Transnational Terrorism*, London, 2023, 411 ss.

of Homeland Security (DHS), the Federal Bureau of Investigation (FBI), and the National Counterterrorism Center (NCTC) at least released the US Violent Extremist Mobilization Indicators booklet (which latest update dates back to December 2023).¹⁶ This booklet lists some observable behaviors that could signal whether individuals – including domestic violent extremists – are pursuing ideologically-motivated violent extremist activities. This is a non-binding document, so an act of soft law, but can work as a guidance for judges and practitioners in the settlement of practical cases as well as for those operators involved in programs of anti-radicalization and de-radicalization.

The third pillar is “Disrupt and Deter Domestic Terrorism Activity”. Through this pillar, financial resources should have been allocated in order to ensure that the DOJ, the DHS and the FBI have sufficient personnel to face domestic terrorist threats. This pillar has been the object of some form of implementation since, at the end of fiscal year 2022, the DOJ has been given funds to establish a domestic terrorism unit within the National Security Division’s Counterterrorism Section to better coordinate with U.S. Attorney’s Offices, the FBI, and others to charge and prosecute domestic violent extremism and terrorism subjects as appropriate.¹⁷ Funds have been allocated to the DHS to in order to carry out the establishment of prevention networks and provide training to community members.

Getting to the fourth pillar, “Confront Long-Term Contributors to Domestic Terrorism”, we can say that the implementation of this point has been more or less “demonstrative”, rather than consisting of tangible policies or pieces of legislation.¹⁸ The only initiative taken in this regard consisted of launching the “United We Stand” summit, making commitments towards a more bipartisan and united America. Although initiatives like this one may have important positive consequences from the social viewpoint, as they may stimulate US citizens’ feeling of belonging and unity, the fact that no legal tool followed – not even in the form of a non-binding declaration – leaves a sense of incompleteness.

Hence, concerning the 2021 strategy, it appears that two pillars out of four were implemented in some way over the last biennium, while two of them (the first and the fourth one) either suffered a setback or were more exhibitivite than concrete actions.

Moreover, the Biden Administration has not published any new or updated versions of mentioned strategies, but in 2023 it has released a couple of further documents, namely the National Intelligence Strategy¹⁹ and the

¹⁶ Department of Homeland Security, Federal Bureau of Investigation, National Counterterrorism Center, *The U.S. Violent Extremist Mobilization Indicators Booklet 2021*, January 2022, updated December 2023, available at: https://www.dni.gov/files/NCTC/documents/news_documents/Mobilization_Indicators_Booklet_2021.pdf.

¹⁷ As remarked by S.D. Romano, *Prosecuting the Mob: Using RICO to Create a Domestic Extremism Statute*, in 80 *Wash. & Lee L. Rev.* 967 (2023).

¹⁸ See B. McQuade, *Not a Suicide Pact: Urgent Strategic Recommendations for Reducing Domestic Terrorism in the United States*, in 5 *Tex. Nat’l Sec. Rev.* 109 (2022).

¹⁹ Office of the Director of National Intelligence, *2023 National Intelligence Strategy*, August 2023, available at:

National Cybersecurity Strategy.²⁰ They both contain very general references to terrorism and do not differentiate between its national and international forms. What is more, the phenomenon appears particularly sidelined by these documents, since both strategies focus more on the working methods of intelligence and cybersecurity agencies, than on the threats that they have to tackle. For instance, these strategies refer to ethic principles to be observed by the intelligence community as well as on the strengthening of partnership with the so-called technology giants. Still in 2023, the Biden Administration released the first-ever US National Strategy to Counter Antisemitism.²¹ Although this strategy is very specific on a limited domain, it can be seen, at least in theory, as a plan to counter political violence that can be assimilated to domestic terrorism, an aspect that is explicitly acknowledged in the introduction of the strategy. However, reading the strategy leave some disappointment, as the document, also made up of pillars, focuses very much on encouraging a pivotal role of web platforms and of civil society. In this way, the Biden Administration appears to be “externalizing” its action against domestic terrorism by calling into question non-state actors. These actors are certainly important in the process, but they cannot be “left alone”, a *leitmotif* that instead seems to emerge between the lines of the strategy.

A last aspect of interest with regards to policy tools on domestic terrorism addresses a specific side of the phenomenon, i.e. the prevention of political violence during the current electoral campaign, which can be considered as a not new, but reviving form of domestic terrorism. In this regard, no specific and innovative federal actions have been taken, but these measures have been managed more at the state and local level, e.g. through state-level plans to ensure safety of election, establishment of state or local task forces, appointment of cyber-teams tasked with monitoring communications among potential assaulters.²² The handling of this type of measures by state and local administrations may be coherent with the fact that this kind of violence is often perpetrated at rallies and other political speeches, typically held on the territory; nevertheless, given the huge impact

https://www.odni.gov/files/ODNI/documents/National_Intelligence_Strategy_2023.pdf.

²⁰ White House, *National Cybersecurity Strategy*, March 2023, available at: <https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf>.

²¹ White House, *U.S. National Strategy to Counter Antisemitism*, May 2023, available at: <https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf>.

²² B. M. Jenkins, *Addressing the Threat of Political Violence in the 2024 Elections*, July 2024, available at: <https://political-violence.s3.us-west-2.amazonaws.com/ADDRESSING+THE+THREAT+OF+POLITICAL+VIOLENCE+IN+THE+2024+ELECTIONS+-+July-24.pdf>. See also M.A. Jensen, S. Kane, *QAnon Inspired Violence in the United States: An Empirical Assessment of a Misunderstood Threat*, in 16 *Behav. Sci. Terrorism & Political Aggression* 65 (2023); J. Ware, *Election Violence Is Already in Full Swing*, in *Lawfare*, Sept. 22, 2024; M.W. Hanna, *Risks of Violence around the 2024 U.S. Presidential Election: A Primer*, in *Int'l Crisis Group*, Oct. 29, 2024. On how to prevent political violence (not only in the United States), see R. Kleinfeld, N. Bibbins Sedaca, *How to Prevent Political Violence*, in 35 *J. Democracy* 35 (2024).

of these acts of violence, federal steps in this regard would have been welcome.

At large, it seems that the promises made by Biden at the beginning of his mandate regarding domestic terrorism have not been fully fulfilled. This does not mean that no further steps nor improvements have been taken in 2023-2024, but rather that the plans made at beginning were significantly resized along the way.

Given this overview on policy tools, which are not binding per se, it is now crucial to examine how the Biden Administration progress in the field of binding pieces of legislation concerning domestic terrorism.

2.2 Legislative Tools: Was the Last Biennium a Full Stop?

As remarked above, during the first two years of the Biden Administration two main legislative tools had been introduced in Congress, namely the Domestic Terrorism Prevention Bill and the Domestic and Hate Crimes Prevention Bill. The former had as its main purpose to extend the availability of information on domestic terrorism by vesting the DHS, the DOJ and the FBI with very strong monitoring powers. It also set 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 at the time of the introduction of the bill in Congress. The latter, instead, equated some Covid-19 hate crimes (e.g., targeting some ethnic groups as Covid-19 spreaders) to acts of domestic terrorism.

These two bills were not signed into law in the 2023-2024 time span. Looking at the Domestic Terrorism Prevention Bill, this legislative proposal is stuck in the Senate and congressional reports show that Republican senators are heavily filibustering it.²³ In order to try to speed up the process, Democrat senator Durbin reintroduced the bill (in an identical form) in December 2023. The 2023 bill has followed the same path as its predecessors as it has been approved by the House of Representatives, but not yet by the Senate. Senators – especially Republicans – contend that the bill implies excessive intrusion in the life of citizens, since it is mainly based on surveillance, quite a paradoxical argument if we think that Republican Administrations have historically been very favorable to surveillance when it was enacted to fight international terrorism. Given the deadlock of the bill, Durbin even tried to plead with his colleagues to have them vote the Domestic Terrorism Prevention Bill and use it as the vehicle for bipartisan gun safety compromise legislation, but this plan did not work so far. It then appears very unlikely that the Act will be passed before the end of the Biden presidency. In order to make some considerations on the path followed by this bill, it is essential to take into account the composition of the 118th Congress. The 118th Congress (2023-2024) sees a very slight Democrat majority in the Senate (49 Democrats, 47 Republicans, 4 Independents caucusing with the Democrats), presided by Kamala Harris, and a moderately slight Republican majority in the House of Representatives (220

²³ See analysis by E. Benjamin, *Is the United States Currently Living in a Pre-Trump 2 or Pre-Trumpian Time Period?*, in A. Akande (Ed), *Globalization, Human Rights, and Populism*, Cham, 2024, 427 ff.

Republicans, 211 Democrats, 4 vacant seats), whose speaker has been Mike Johnson since October 2023.²⁴ Hence, it can be said that Biden had to work in a situation of (moderately) divided government,²⁵ but not certainly in a totally hostile Congress.²⁶ The gap in the numbers is very small, and even in the House where the President does not have the majority it is not abstractly impossible to have initiatives approved. Thus, failure of the bill may signal that even Democrats are no longer politically interested in having it passed.

Even the other draft piece of legislation, namely the Domestic Terrorism and Hate Crimes Prevention Bill is stuck in Senate, where, according to available reports, it is not even being discussed. As for the House of Representatives, it has not passed the bill yet nor has it started its examination. Also in this case, we can identify a certain lack of interest and political will regarding the implementation of President Biden's strategy on domestic terrorism, as enacted in 2021.²⁷ Indeed, disinterest in this bill may be even higher than disinterest in the previously-addressed Domestic Terrorism Prevention Bill. In effects, the fact that the Domestic Terrorism and Hate Crimes Prevention Bill addresses Covid-19-related issues, in addition to and in connection with hate speech terrorist crimes, immediately brings to label the content of the draft as a "problem of the past".

Against this background, it seems clear that the Biden Administration has lost much of its interest in the domestic terrorist threat during the last two years. This could be due, among others, to the geopolitical scenario, which has been focused on the Hamas-Israeli conflict, at least since 7 October 2023. The fact that – as we will highlight later on – measures against Hamas terrorism have been smoothly passed by Congress appears to confirm this conjecture.

Nevertheless, if the echo of the 2021 Capitol Hill events²⁸ is no longer so loud at the political level *stricto sensu*, the same cannot be said regarding federal courts, at least lower ones, as the next paragraph pinpoints.

2.3 Convictions for Domestic Terrorism: The Current State of Play

The most significant judicial actions against behavior consisting of domestic terrorism have undoubtedly been those concerning the 2021 Capitol Hill

²⁴ Congressional Research Service, *Membership of the 118th Congress: A Profile*, R47470, Sept. 12, 2024. See also Pew Research Center, *The Changing Face of Congress in 8 Charts*, Feb. 7, 2023, available at: <https://www.pewresearch.org/short-reads/2023/02/07/the-changing-face-of-congress/>.

²⁵ On the divided government in US politics, see G.C. Edwards III, A. Barrett, J. Peake, *The Legislative Impact of Divided Government*, in 41 *Am. J. Pol. Sc.* 545 (1997); G. Cox, S. Kernell (Eds), *The Politics of Divided Government*, London-New York, 1991.

²⁶ G.F. Ferrari, *President Biden and the Congress*, in this *special issue*.

²⁷ See L. Nguyen, *Domestic Terrorism*, Harvard Model Congress, 2023, available at: https://static1.squarespace.com/static/612fdeb8ae0c5815484a61c9/t/63f2c51667ba5d2fb8cb126e/1676854558354/R3_Dom_HouseIntell_Nguyen_Terrorism.pdf. See also Editorial Board, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, in 136 *Harv. L. Rev.* 1914 (2023).

²⁸ See M. Patrono, A. Vendaschi, *op. cit.*, 82 ff.

rioters.²⁹ According to available information,³⁰ more than 1,500 people have been charged with federal crimes, bringing to the conviction of at least 900 of them.³¹ The most recent conviction, against David Nicholas Dempsey, dates back to August 2024 and was among the harshest ever imposed against Capitol Hill attackers, consisting of twenty years imprisonment.³²

It is worth noting that, at the federal level, a provision exists *defining* domestic terrorism,³³ but there is no federal criminal law norm *punishing* it.³⁴ Consequently, federal courts convicting the assaulters had to rely on related crimes, such as murder, conspiracy, illegal use of weapons, hate crimes, etc. In other words, these crimes relate to conduct that may amount to domestic terrorism, but do not punish domestic terrorism per se, which is only indirectly prosecuted and punished. Pointing out to this legislative lacuna, the Congressional Research Service in 2023 issued a report³⁵ considering the pros and cons of the enactment of a new federal statute specifically punishing domestic terrorism. Among the pros, we can mention easier and more precise enforceability before federal courts as well explicit acknowledgment of domestic terrorism in the realm of national security threats. The latter is traditionally a federal competence, so the Federation would be more directly endowed with this responsibility. Looking at the cons, some have highlighted the risk of discrimination against certain groups (e.g., some activists, individuals from Muslim or Asian countries, etc.) that may lurk behind the enforcement of such a statute.

Notwithstanding the lack of a federal criminal statute on domestic terrorism, above-mentioned data point out that federal courts are being

²⁹ For some guidelines on how courts should address the issue, see A. Nhek, *Judicial Uncertainty and Domestic Terrorism: Reforming the Sentencing Guidelines after January 6*, in 11 *Nat'l Sec. L.J.* 263 (2021).

³⁰ NPR, *The Jan. 6 Attack: The Cases behind the Biggest Criminal Investigation in U.S. History*, updated Oct. 25, 2024, available at: <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories>.

³¹ The Federal Bureau of Investigation labeled the whole attack as an act of domestic terrorism. See Federal Bureau of Investigation, *Examining the January 6 Attack on the U.S. Capitol*, Statement before the House Oversight and Reform Committee, June 15, 2021, available at: <https://www.fbi.gov/news/testimony/examining-the-january-6-attack-on-the-us-capitol-wray-061521>. See also L.T. Trautman, *Democracy at Risk: Domestic Terrorism and Attack on the U.S. Capitol*, in 45 *Seattle U. L. Rev.* 1153 (2022).

³² United States District Court, District of Columbia, *United States of America v. David Nicholas Dempsey*, 21cr556, Aug. 9, 2024.

³³ Reference is to 18 U.S.C. §2331(5). According to it, the definition of domestic terrorism covers behavior that

“(A) involve(s) acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States...”.

³⁴ Congressional Research Service, *Understanding and Conceptualizing Domestic Terrorism: Issues for Congress*, R47885, Dec. 2, 2023.

³⁵ *Ibid.*

quite proactive in the conviction of those involved in the Capitol Hill attacks. Hence, differently from the political bodies, lower courts are still considering the matter as a top priority.³⁶

The situation is more peculiar with regard to former President Donald Trump and his involvement in these events. As known, he was impeached in January 2021, after having been charged by the House of Representatives on incitement and insurrection, but he was acquitted by the then-Republican Senate in February 2021.³⁷

However, he was indicted for the same acts at the federal level, i.e. by ordinary justice. In August 2023, he was charged by a grand jury on conspiracy related to the 6 January 2021 facts, along with other three crimes.³⁸ The trial had been scheduled by US District Judge Tanya Chutkan to start in March 2024. Nonetheless, Trump brought forward several arguments aimed at having his case dismissed. Among them, the most notable was the theory, pursued by Trump's team of lawyers, according to which former Presidents are to be considered immune from criminal charges relating to their official conduct. Even the federal Supreme Court was called to decide on Trump's immunity. With a 6-3 ruling delivered on 1 July 2024,³⁹ the majority of US supreme judges sided with the former President. Based on the majority opinion, the Supreme Court held that the immunity of Presidents is "absolute" for charges related to acts deriving from their "core constitutional powers"; it is "presumptive" for all other official acts; and, lastly, there is no immunity for non-official acts. After declaring these principles, the Supreme Court sent the case back to Judge Chutkan to determine the merit of the case, included whether to classify Trump's incitement and justification of the 6 January attacks as official acts. In doing so, the Supreme Court prevented the trial from taking place before Election Day.

Against this background, it appears that, even concerning the position of former President Donald Trump, the approach of lower courts persists being quite muscular, insofar as they did not miss the chance to try to convict him; differently, the Supreme Court – whose majority is made up of judges appointed by Republican Presidents – did everything was possible to avoid the presidential trial to take place, at least before. Hence, the Supreme Court's posture is more similar to that of political bodies, such as the Senate when it acquitted Trump from Biden's charges. Actually, it is relevant to

³⁶ On judges of lower courts appointed within Biden's mandate, see P. Passaglia, *An Overview of President Biden's Appointments*, in this *special issue*. See also V. Barsotti, *The President and the Supreme Court*, *ibid*.

³⁷ L. Melica, *op. cit.*; G. Poggeschi, *op. cit.*

³⁸ United States District Court for the District of Columbia, United States of America v. Donald J. Trump, Case 1:23-cr-00257-TSC D. Regarding the other crimes, two of them relate to the disruption of Congress' certification of the electoral vote seeing President Biden as the winner, while another is about efforts made to impede citizens' right to vote and to have their votes counted.

³⁹ Trump v. the United States, n. 23-939, 603 U.S. 593 (2024). C.R. Sunstein, *Presidential Immunity and Democratic Disorder*, available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4896559; S.G. Roisman, *Trump v. United States and the Separation of Powers*, in 173 *U. Penn. L. Rev. Online* (forthcoming 2025).

notice that, for impeachment trial, the Senate is presided over by the Chief Justice of the Supreme Court, who stood with the majority in the immunity decision. It is to be hoped that the Supreme Court's judgment will not deter lower courts from persisting in the in-depth approach showed until now in the punishment of domestic terrorism cases.

Anyway, the same muscularity of lower courts cannot be detected in recent international terrorism cases, as will emerge from the next paragraph, focused on efforts to counter this phenomenon and, when relevant, on the latest judicial posture on it.

3. International Terrorism

Alongside with domestic terrorism, the Biden Administration has targeted international terrorism as an objective of its policy and legislation. According to the 2024 Homeland Threat Assessment published by the Department for Homeland Security (DHS),⁴⁰ this threat never ceases to loom over the United States, also in the light of reported recent efforts by Al-Qaeda and the Islamic State⁴¹ to rebuild overseas, while maintaining worldwide networks of supporters, included in the Western world and specifically in the United States.⁴²

Looking backward, i.e. at the first two years of his mandate, to fight international terrorism President Biden had taken some steps that had seemed to revive the "Obama era", for example in terms of guarantees to be applied in the use of drones. In that time lapse he had confirmed some traditional approaches on other issues, typical of many among his predecessors. Reference is, for instance, to repeated assertions of the state secrets privilege before courts to shield the acts committed during some controversial counter-terrorism operations, especially those that, in the past, resulted in imprisonment in so-called black sites. He had then embraced new strategies, differentiating him from previous Presidents, on further areas, like the Guantánamo detention site and the use and transnational exchange of digital data to contribute to national security policies.

Over the last two years, Joe Biden has progressed on the same line on some of these areas, while he seems to have slowed down on others. Additionally, recent relevant events in the geopolitical scenario – namely, the Israeli-Hamas conflict – urged him to intervene on partially new sides, that could not be forecast a couple of years ago.

Four main areas of counter-terrorism deserve to be examined, and for each of them we draw our attention on how these correlated measures were handled the first two years – drawing from and referring to our previous work –, their expected progresses, and the actual action that was taken in 2023-2024.

⁴⁰ Department for Homeland Security, *Homeland Threat Assessment*, 2024, available at: https://www.dhs.gov/sites/default/files/2023-09/23_0913_ia_23-333-ia_u_homeland-threat-assessment-2024_508C_V6_13Sep23.pdf.

⁴¹ A. Vidaschi, *Da al-Qā'ida all'IS: il terrorismo internazionale si è fatto Stato?*, in *Riv. trim. dir. pubbl.*, 1/2016, 41 ff.

⁴² S.G. Jones, C. Doxsee, N. Harrington, *The Escalating Terrorism Problem in the United States*, Center for Strategic and International Studies, 2020.

3.1 Targeted Killings: A Step Backward behind a Step Forward?

In our Article on the first two years of the Biden presidency, we had underscored two main features about how the Administration handled the use of drones to target and kill the objectives of the so-called war on terror, performing the questionable practice known as targeted killings (TKs).⁴³ First, in the 2021-2022 biennium, while Biden was in office drone strikes were reduced of 54% if compared to Trump's last year of mandate.⁴⁴ Second, in 2022 Joseph Biden adopted the Presidential Policy Memorandum (PPM), re-introducing some safeguards in the performing of TKs typical of the "Obama era". Among them, we can mention the re-centralization of the "kill list", now under the presidential oversight and not fully in the hand of military authorities; the "imminent threat" standard to act; and then the "near certainty" that no civilian casualty occurs. Although this approach can be praised from the perspective of human rights protection, the main controversial aspect – which we had already pointed out in our 2023 Article – was that the PPM had been classified by Biden himself, and the only information we had at our disposal was the one leaked out from the press and from statements of the President's National Security Advisor.

After two years, we can wonder how data regarding TKs evolved, and – very importantly – whether the PPM has been declassified.

Starting from the resort to the TKs practice, the Biden Administration has not released full official data about the exact number of strikes ordered in 2023-2024, limiting itself to disclose some of them, but not the full list. However, we can rely on some facts and figures published by non-governmental organizations (NGOs). This unofficial data⁴⁵ reports at least 76 drone strikes in Iraq, Syria and Yemen, 60 of which after 7 October 2023, i.e. the day of the attack on Israel by Hamas. In effects, many of these strikes were performed against Hezbollah's leaders, like those executed in February 2024.⁴⁶ Still regarding the Israeli-Hamas situation, there is no official evidence that the United States is actively cooperating in supporting those strikes formally claimed by Israel alone, in the light of the well-established relationship that the two countries hold. Rather, in August 2024 the US

⁴³ A. Vidaschi, *Osama bin Laden: l'ultimo targeted killing. Gli Stati Uniti hanno dunque la licenza di uccidere?*, in *DPCE*, 3/2011, 1196 ff.; W.J. Fisher, *Targeted Killing, Norms and International Law*, in 45 *Colum. J. of Transnat'l L.* 711 (2006); E. Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict*, Cambridge, 2015, 95 ff.; 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.

⁴⁴ See U.S. Air Forces Central, *Combined Forces Air Component Commander*, 2021 Statistics (unclassified), Nov. 30, 2021, available at: https://www.afcent.af.mil/Portals/82/November%202021%20Airpower%20Summary_FINAL.pdf.

⁴⁵ Armed Conflict Location and Event Data, *ACLED Factsheet | US strikes and counter-strikes in the Middle East*, Feb. 3, 2024, available at: <https://acleddata.com/2024/02/03/acled-factsheet-us-strikes-and-counter-strikes-in-the-middle-east/>.

⁴⁶ J. Arraf, J. Hider, *U.S. Drone Strike Kills a Leader of an Iran-backed Militia in Iraq*, NPR, Feb. 7, 2024, available at: <https://www.npr.org/2024/02/07/1229849017/kataib-hezbollah-leader-killed-us-drone-strike-iraq-iran-backed>.

Defense Department explicitly denies involvement.⁴⁷ Nevertheless, there is proof that the United States are contributing to shoot down several Iran-launched drone attacks.⁴⁸ Therefore, it appears that the United States are helping Israel more from the “passive” than from the “active” side, which, though, is not less important from the strategic viewpoint.

Again concerning the number of TKs, in addition to above-mentioned operations, one must count 37 strikes declared by the Administration itself – so this is official data – in Somalia.⁴⁹

If we consider that, in 2021-2022, the total number of alleged strikes – counting official and unofficial information – had been of 477,⁵⁰ it is possible to notice that airstrikes fell to an historic low, at least in the light of the combination of official and unofficial data.

Shifting to the rules and standards according to which TKs are performed, it is worthwhile to look at the status of the PPM, i.e. the document containing the presidential policy on drone strikes and reinstating some safeguards such as the “imminent threat” requirement and the “near certainty” test. At present, the PPM has been declassified, so the Biden Administration seems to have accomplished the goal for which many human rights organizations had advocated since the very first enactment of the memorandum. More precisely, in June 2023, President Biden decided to disclose most content of the PPM to the general public, leaving only some sentences redacted. Indeed, this decision was made after the American Civil Liberties Union (ACLU) filed a lawsuit based on the Freedom of Information Act (FOIA)⁵¹ seeking disclosure before the District Court for the District of Columbia.⁵² Without waiting for the District Court’s decision, the Biden Administration autonomously released the policy document,⁵³ although some parts are still inaccessible.

Regarding the PPM and its path towards disclosure, at least two considerations are worth being made. First, there is no doubt that the final outcome, consisting of (almost full) disclosure of the policy, has to be praised and coincides with the final goal that those seeking disclosure (namely, ACLU) had in mind. Nevertheless, in a democratic country disclosure of this

⁴⁷ France 24, *US Helped Track Hezbollah Rocket, Drone Attacks against Israel, Says Defence Official*, Aug. 24, 2024, available at: <https://www.france24.com/en/middle-east/20240825-%F0%9F%94%B4-live-israel-launches-massive-strikes-on-lebanon-to-prevent-large-scale-hezbollah-attack>.

⁴⁸ M.L. Price, Z. Miller, *US Helps Israel Shoot Down ‘Nearly All’ Iran-launched Attack Drones as Biden Pledges Support*, in *AP News*, Apr. 14, 2024, available at: <https://apnews.com/article/biden-israel-iran-proxies-mideast-tensions-hamas-c57e89a9cbe178b20b53bac404a86728>.

⁴⁹ Airwars, *Strikes by US President in Somalia*, available at: <https://airwars.org/research/strikes-by-us-president-in-somalia/>.

⁵⁰ This number emerges from summing available official and non-official data.

⁵¹ Freedom of Information Act (FOIA), 5 U.S.C. § 552.

⁵² *ACLU v. Department of Defense*, case lodged with the US District Court for the District of Columbia and then dismissed due to voluntary disclosure of the PPM by the Biden Administration.

⁵³ The document is currently accessible at the following link: <https://www.aclu.org/documents/biden-administrations-presidential-policy-memorandum-governing-direct-action-counterterrorism-operations-outside-areas-of-active-hostilities>.

kind of policies should not be the consequence of litigation in courts – although, as said, once sued the Biden Administration voluntarily complied, without the need to wait for a final decision by federal judges. Rather, transparency should be the rule applied by public powers, and it would not have been desirable to get before courts in order to obtain disclosure. The second consideration, instead, pertains to the content of the PPM, now that it can be openly read by the general public. According to the document, guarantees such as the oversight on the kill list and the “imminent threat” standards as well as the “near certainty” safeguard to minimize civilian casualties do not apply when TKs are carried out for the purpose of “collective self-defense” of US partner forces.⁵⁴ In this way, the Biden Administration is exempting deadly strikes conducted in Somalia from the PPM rules, since the operations carried out in that country have been classified by the US government as “collective self-defense” in support of the Somali Government against the Shabaab terrorist group.

Therefore, in general, even if some steps forward have been made in the last two years of the Biden Administration regarding TKs, significant dark sides still exist, and some of them are hidden exactly behind apparent improvements. Metaphorically, it looks like Biden followed a scheme that can be described as a “knight’s move”, using the language of the chess.

3.2 Extraordinary Renditions, Guantánamo and State Secrecy: “How Goes the Night?”

Another critical topic when it comes to the fight against international terrorism is the “legal black hole”⁵⁵ created by extraordinary renditions (ERs) operations.⁵⁶ ERs consist of the secret abduction of suspected terrorists, then transferred to so-called black sites, the most well-known of which is the Guantánamo facility, made operational immediately after President Bush declared the “war on terror” in the aftermath of the 9/11 attacks.⁵⁷

⁵⁴ See *ACLU (American Civil Liberties Union) Statement on President Biden’s Overdue Release of Rules Governing Drone Strikes and Lethal Force Abroad*, June 2023, available at: <https://www.aclu.org/press-releases/aclu-statement-on-president-bidens-overdue-release-of-rules-governing-drone-strikes-and-lethal-force-abroad>.

⁵⁵ See J. Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh F.A. Mann Lecture, British Institute of International and Comparative Law, Nov. 25, 2003, reprinted in 53 *Int’l & Comp. L. Q.* 1 (2004); S. Borelli, *Casting light on the legal black hole: International law and detentions abroad in the “war on terror”*, in 1 *Int’l Rev. of the Red Cross* 41 (2005).

⁵⁶ 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 *DPCE*, 4/2013, 1255 ff.; M.L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, in 75 *Geo. Wash. L. Rev.* 1333 (2007); L. Fisher, *Extraordinary Rendition: The Price of Secrecy*, in 57 *Am. U. L. Rev.* 1405 (2008).

⁵⁷ See George W. Bush, *Address to a Joint Session of Congress and the American People*, 20 September 2001, available at: <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>. Immediately

Over the time from 2001 onwards, US Presidents never put an end to Guantánamo incarcerations, since no one of them ever closed the prison, although some efforts in that sense were announced, but never actually accomplished, under the Obama Administration. Those attempts were then fully frustrated by Trump, who passed an executive order depriving the plan to close Guantánamo from any effect.⁵⁸ Moreover, as widely known, in case ERs operations or conditions of detention at Guantánamo come to be adjudicated by courts, because prisoners claim damages due to acts of torture suffered there, judges are often prevented from deciding the merits of cases. This is due to the state secrets privilege, promptly and repeatedly invoked over the time by involved government officials before courts.⁵⁹

Focusing on Biden's action regarding Guantánamo, as we highlighted in our previous work, during the first two years in office he embraced a more silent and less sensational approach, if compared to Obama's (unfulfilled) promises to close the prison. Rather, Biden had started making efforts to move the prisoners who were still there to other countries to serve their sentence, given that Congress had passed a law⁶⁰ – still into force – according to which no Guantánamo prisoner can be transferred to US prisons. As a result, in the first two years of his mandate, Biden had reduced the total number of Guantánamo detainees from forty-three (at the end of the Trump presidency) to thirty-five. In some court cases, raised by Guantánamo prisoners on their ERs and/or on torture and other degrading treatment, the Biden Administration had perpetuated the traditional posture on state secrecy, consisting of alleging that national security considerations allow these facts to remain undisclosed, even when serious violations of human rights are alleged. This stance was constantly validated by courts, including the US Supreme Court.⁶¹

To have a clear idea of how the situation evolved in 2023-2024, at least three aspects need to be examined. First, whether Biden has progressed with emptying Guantánamo; second, whether he has gone ahead with the mentioned approach on secrecy, consisting of using the state secrets privilege as a “curtain” to hide even potential serious violations of human rights; and third, whether he has taken some steps towards closure, e.g. repealing Trump's executive order preventing the shutdown of the facility, or adopting any other legislative or policy act to change the situation at Guantánamo.

Starting from facts and figures, we need to acknowledge that the number of Guantánamo prisoners has not increased, given that, based on

after this speech, Guantánamo opened. On Guantánamo and on the litigation arising in courts, see P. Bargiacchi, *Orientamenti della dottrina statunitense di diritto internazionale*, Milan, 2011, 261 ff. and Id., *Elementi di convergenza del modello di sicurezza europeo verso il modello statunitense nella gestione dei flussi misti irregolari*, in *Riv. coop. giur. int.*, 2/2018, 61 ff.

⁵⁸ Executive Order (E.O.) 13823 of Jan. 30, 2018 “Protecting America Through Lawful Detention of Terrorists”, available at: <https://www.govinfo.gov/content/pkg/CFR-2019-title3-vol1/pdf/CFR-2019-title3-vol1-eo13823.pdf>.

⁵⁹ On the use of state secrecy in courts, see A. Vedaschi, *The Dark Side of Counter-Terrorism: Arcana Imperii and Salus Rei Publicae* in 66 *Am. J. Comp. L.* 877 (2018).

⁶⁰ National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 118-31).

⁶¹ *United States v. Zubaydah*, 595 U.S. 195 (2022).

available data, no further ER resulting in detention at Guantánamo nor at any other black site has reportedly been performed since 2010, when the last ER was carried out in cooperation with the UK Government.⁶² Out of the thirty-five detainees remaining in Guantánamo at the end of 2022, five were transferred in 2023 and thirty are still there.⁶³

Looking at the ones that were allowed to leave Guantánamo, they have been moved to Saudi Arabia, Belize and Pakistan, after the US signed individual agreements with each of these countries. The need for an individual agreement for each transfer depends on the fact that a law passed by Congress prohibits transfer of detainees to the United States and to certain foreign countries.⁶⁴ Therefore, in order to get them out of Guantánamo, it is necessary to find an agreement time by time with other countries accepting to take these detainees. Importantly from our perspective, Biden took no action to repeal or circumvent the 2015 ban put by Congress and, in parallel, he did not intervene to revoke Trump's executive order preventing Guantánamo's closure.⁶⁵

Among the thirty detainees remaining in Guantánamo, sixteen are imprisoned but recommended for transfer if security conditions are met; three are jailed and not recommended for transfer, being in a condition of indefinite detention under the law of war; seven are charged in military commission system and awaiting judgment; four have already been convicted in military commission system, and so they will remain in Guantánamo indefinitely unless the facility is closed or they meet security conditions to be transferred.

The situation of these people still detained in Guantánamo deserves some further analysis.

Before all, the fact that some detainees are awaiting transfer provided that security conditions are met means they can be moved out of Guantánamo only if three requirements come together: first, another country is available to take them; second, such a country is able to maintain control over detention centers and is not considered to be among those supporting terrorism; third, the detainee in question is not deemed to have active links with terrorist groups that may endanger national security of the receiving country itself.⁶⁶ Given the difficulties in finding countries where the first two requirements are combined together (i.e. they should be willing to take the prisoners *and* they should not be considered as countries

⁶² House of Commons, Intelligence and Security Committee, *Detainee Mistreatment and Rendition: 2001-2010*, HC 1113, June 28, 2018.

⁶³ Data from the New York Times Guantánamo Docket, updated to August 2024, available (with subscription) at: <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>, last update Aug. 7, 2024.

⁶⁴ Fiscal Year 2015 National Defense Authorization Act (Pub. L. 113-291); the ban is constantly reiterated and the last extension took place in 2023 with the Fiscal Year 2024 National Defense Authorization Act (Pub. L. 118-31), encompassing also the prohibition to transfer detainees to Afghanistan, Libya, Somalia, Syria and Yemen.

⁶⁵ Differently from what he did with some executive orders adopted by Trump in the field of migration, namely the well-known travel bans. See R. Scarciglia, *President Biden's Immigration Policies: A Pyrrhic Victory?*, in *this special issue*, forthcoming.

⁶⁶ Congressional Research Service, *Closing the Guantánamo Detention Center: Legal Issues*, R40139, May 30, 2013.

cooperating with terrorists), transferal of *all* of them seems quite a remote possibility.

The detainees that are under indefinite detention on law of war grounds represent an even more serious concern, since this means that these detainees can be jailed in Guantánamo *sine die*, or at least, looking at rules laid down by the law of war, until the conflict lasts.⁶⁷ Nonetheless, given that the war on terror is not a traditional war, characterized by clear steps leading to an identifiable act determining its end, it is almost impossible to detect a potential termination of detention, which – it is worth being noted – was initiated without any charge nor process based on fair trial principles.

Similar problems arise concerning the detainees that were charged or are awaiting charges, since no fair trial is applied to them – and this issue is endemic in the very resort to military commissions – and punishment amounting to degrading treatments can be dealt out. In this respect, the military commissions issued recent decisions, which demonstrate exactly this statement. For example, in September 2023, one Guantánamo detainee, Ramzi Bin al Shibh, was ruled by a military commission to be “mentally incompetent” to stand trial, so he will be in indefinite detention until when (and if) the post-traumatic stress disorder caused by “enhanced interrogations” is successfully treated.⁶⁸ This seems quite a paradoxical decision in its outcome, because while it appears to guarantee the rights of the person – by avoiding that he stands a trial while mentally incapable – it *de facto* condemns him to potentially never-ending detention under the conditions that are the same (or similar to those) that caused such mental distress to him.

Within this analysis on Guantánamo detainees, an observation should be made that sheds light on the intertwinement between the current geopolitical scenario and the Guantánamo situation. If we look at declarations issued by some US officials in April 2023,⁶⁹ the Administration was set to transfer at least eleven detainees (hence, six more than the five actually transferred). However, in October 2023, the Hamas attack to Israel happened, and six of them were not considered to meet the security requirements for transferal, due to suspect links with Hamas. As a result, no detainee was transferred after October 2023, so it can be said that the Hamas attack slowed down (or even blocked) Biden’s transferal plan.

Moreover, as pointed out before, the Guantánamo issue comes quite close to the one of the use of secrecy, especially in courts. Here, the Biden Administration is perpetuating the traditional approach characterizing US

⁶⁷ C. Jenks, E. Talbot Jensen, *Indefinite Detention under the Laws of War*, in 22 *Stan. L. Pol’y Rev.* 41 (2011).

⁶⁸ J. Ryan, *Judge Severs 9/11 Defendant from Case Due to Mental Illness*, in *Lawdragon*, Sept. 21, 2023, available at: <https://www.lawdragon.com/news-features/2023-09-21-judge-severs-9-11-defendant-from-case-due-to-mental-illness>. On trials conducted before military commissions, potentially leading to death penalty, see also C.O. Finkelstein, A. Mora, S.N. Xenakis, *Secretary Austin’s Fateful GTMO Plea Deals Decision*, in *Lawfare*, Aug. 20, 2024.

⁶⁹ C. Kube, K.E. Lee, *The U.S. Was Set to Move 11 Detainees out of Guantanamo. Then Hamas Attacked Israel*, NBC News, May 20, 2024, available at: <https://www.nbcnews.com/politics/national-security/biden-ready-move-11-detainees-guantanamo-october-paused-seven-months-rcna152985>.

Executives. This *modus operandi* consists of relying on any possible form of secrecy in order to avoid any interference of the judicial power to adjudicate what happened in Guantánamo as well as in other black sites around the world. This stance is coupled with the posture of courts, frequently very prone to embrace excessive deference towards the Executive. Two very recent cases are illustrative – but not innovative – in this regard: *Connell v. CIA*, which is still pending, and *Khadr v. United States*, which instead has already reached the federal Supreme Court, denying certiorari.

Specifically, the *Connell v. CIA* case concerns Ammar Al Balucchi, one of the detainees still held in Guantánamo (see *supra*). This person is detained at Camp VII, one of the detention facilities present at Guantánamo and known for particularly harsh practices of torture. His lawyer, James Connell, in order to better represent him before a military commission in Guantánamo that is supposed to trial him, asked the CIA to disclose information about the agency's control over torture practices carried out at Camp VII. The CIA only disclosed a very vaguely-drafted report and refused to disclose further information. Refusal of disclosure took the form of a so-called *Glomar* response. Under US law, the *Glomar* response is a particular form of assertion of secrecy (different from the *Reynolds* doctrine⁷⁰). According to the *Glomar* doctrine,⁷¹ an administrative agency (in this case, the CIA) can decide *neither* to confirm *nor* to deny the existence of a piece of information, when this can be risky for national security.⁷² Connell then challenged in court CIA's *Glomar* response. In March 2023, the competent court of first instance – i.e., the District Court for the District of Columbia – upheld CIA's determination to resort to a *Glomar* response.⁷³ Per the reasoning of the District Court, judges are obliged to pay deference to agencies when it comes to national security cases, since it is totally up to the executive branch – and to its administrative agencies – to decide whether and to what extent something should be kept secret or, anyway, confidential, for the sake of national security. Therefore, the District Court adhered to the traditional approach to secrecy that has been embraced on this topic by most US judges (at least) since 9/11.

Connell appealed the first instance decision before the Court of Appeals for the District of Columbia Circuit. The Court of Appeals ruled in August 2024⁷⁴ and affirmed the court of first instance's decision as well as

⁷⁰ *United States v. Reynolds*, 345 U.S. 1 (1953). The difference between *Reynolds* and *Glomar* is that in *Reynolds* the existence of secrecy is asserted and confirmed on a certain fact, so there is certainty that this fact exists, although shielded; in *Glomar* the fact itself is neither confirmed nor denied.

⁷¹ The use of the term “Glomar” relates to a case concerning CIA's secret Glomar Explorer project. *Philippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981).

⁷² R. Blakeley, M. Price, *Regime of Torture: Guantánamo Bay's Ongoing Detention and Prosecutions of the CIA's Rendition, Detention, and Interrogation Prisoners*, in *Rev. Int'l Stud.* 1 (2024).

⁷³ *Connell III v. CIA*, No. 21-627, 2023 WL 2682012, D.D.C. Mar. 29, 2023.

⁷⁴ *Connell v. CIA*, No. 23-5118, D.C. Cir. 2024.

its reasoning. According to available information,⁷⁵ the plaintiffs are now considering whether to seek Supreme Court's review.

Indeed, it seems not too a long shot to comment that, even in case review before the Supreme Court is sought, the answer of the latter is unlikely to be satisfactory for Al Balucchi and his lawyer, at least if we consider the recent stances of the supreme federal judges on national security, secrecy and Guantánamo issues. As a matter of fact, in the *Khadr v. United States* case,⁷⁶ the US Supreme Court denied certiorari on the case without providing any reasoning. The petitioner, a Guantánamo detainee convicted for war crimes and then transferred to Canada to finish serving his sentence, had requested US federal courts to reverse his conviction, since he presented several arguments according to which his action could not be considered as amounting to war crimes.⁷⁷ After negative responses by lower US courts,⁷⁸ based, among other, on the ground that exact information at the disposal of the Executive to label Khadr's activities as war crimes could not be disclosed, a petition for certiorari was filed. As anticipated, the US Supreme Court denied rehearing of the case without even motivating, probably in the light of the fact that its stance on ERs, national security and secrecy had been clarified a couple of years before in *United States v. Zubaydah*,⁷⁹ which we addressed in our 2023 work.

Interestingly, Zubaydah's case may get again before courts, this time not in the United States but in the United Kingdom, due to a peculiar course of events. In fact, while, in 2022, the US Supreme Court had rejected Zubaydah's application to compel the Executive to release some information on his ER and detention at Guantánamo, at the same time he had lodged a case before UK courts to claim damage. The request for damages was grounded on the UK Government's cooperation with the United States in the rendition. After being decided by UK lower courts,⁸⁰ the case was adjudicated by the UK Supreme Court in December 2023.⁸¹ This Supreme Court affirmed that the tort claim can be heard under UK law, so the US Government might be called to respond before UK courts. Although it is

⁷⁵ ACLU, *Connell v. CIA: Misuse of the "Glomar" Response*, in *ACLU District of Columbia*, May 25, 2023, available at: <https://www.acludc.org/en/cases/connell-v-cia-misuse-glomar-response>.

⁷⁶ *Khadr v. United States*, cert. den., 22 July 2024.

⁷⁷ For an initial analysis on the *Kadi* case, see K. Roach, *Uneasy Neighbors: Comparative American and Canadian Counter-Terrorism*, in 38 *Wm. Mitchell L. Rev.* 1701, 1749 (2011); for an overview on recent developments, see A. Thurschwell, *Two Roads to Guantanamo: The Canadian and United States Supreme Courts' Approaches to the Extraterritorial Application of Fundamental Rights*, in 31 *Const. Forum* 37 (2022). See also E. Guild, *Extraordinary Rendition. A Classic Example of the USA Avoiding ETOs as Seen in Europe*, in M. Gibney, G.M. Türkelli, M. Krajewski, W. Vadenhole (Eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations*, New York, 2022, 353 ff.

⁷⁸ *Kadhr v. the United States*, No. 21-1218 (D.C. Cir. 2023).

⁷⁹ *United States v. Zubaydah*, 595 U.S. 195 (2022).

⁸⁰ *Husayn (Zubaydah) v. Foreign and Commonwealth Office and Others* [2021] EWHC 331 (QB) (Feb. 19, 2021); *Zubaydah v. Foreign and Commonwealth Office and Others* [2022] EWCA Civ. 334 (Mar. 16, 2022).

⁸¹ *Zubaydah v. Foreign, Commonwealth and Development Office and Others* [2023] UKSC 50. See A.M. Murphy, *The Chamber of Secrets: The Death of Judicial Review of State Secrets*, in 55 *Colum. Hum. Rts. L. Rev.* 331 (2024).

tricky to forecast the approach that UK courts may take, it is noteworthy that the UK Supreme Court, through its decision on the applicability of UK law, took a very different stance if compared to the US Supreme Court.⁸² In effects, the UK judges at least assigned their own country the responsibility to take the case into examination, differently from US courts, whose approach is almost always based on deference and “undecidability” of national security matters.

From a general viewpoint, it emerges that the Guantánamo situation has not significantly improved over the last two years. Rather, the process aimed at emptying the facility seems to have come to a standstill after the 7 October attack; and, above all, the deferent attitude to state secrecy appears as an almost granitic dogma of US courts, which fuels increasing reliance of the Administration on doctrines justifying resort to national security grounds as a powerful “shield” even for serious human rights violations.

3.3 Transatlantic Digital Surveillance, Artificial Intelligence and Technology Issues: A Good Start Ended Badly?

Surveillance measures are another pivotal topic in the field of national security, and in particular of counter-terrorism, so it is worthwhile to have a look at how President Biden dealt with it in 2023-2024.

Differently from TKs and ERs, surveillance practices concern the “day-to-day” handling of terrorism prevention strategies, and may apply similarly to international and domestic terrorism, although most surveillance tools originated and were developed to fight against the former.

In our analysis published in 2023, we had highlighted that, in 2022, President Biden issued an executive order⁸³ to try to remedy to some flaws in the US framework concerning the processing of personal data transferred from the European Union to the United States and used for intelligence purposes. Among introduced guarantees, we can mention the introduction of redress mechanisms in case of wrongful processing of data, liability of intelligence personnel in the same circumstance, and periodic review by a specialized body – the Privacy and Civil Liberties Oversight Board – over the effects of intelligence policies over the protection of personal data.

The very aim of this executive order issued by Biden was to drive the competent authorities in the European Union to adopt a new adequacy decision to smoothen the exchange of data between the European Union and the United States. As a matter of fact, after the Privacy Shield framework

⁸² On this judgment, see U. Grusic, *UK Supreme Court Rules Guantánamo ‘Forever Prisoner’ Can Sue the Government under English Law – Here’s Why It Matters*, in *The Conversation*, Dec. 21, 2023, available at: <https://theconversation.com/uk-supreme-court-rules-guantanamo-forever-prisoner-can-sue-the-government-under-english-law-heres-why-it-matters-207651>; A.A. Khan, *Palestinian Guantánamo Bay detainee wins in Supreme Court*, in *United Kingdom Immigration Law Blog*, Feb. 19, 2024, available at: <https://asadakhan.wordpress.com/2024/02/19/palestinian-guantanamo-bay-detainee-wins-in-supreme-court/>.

⁸³ Executive Order (E.O.) 14086 of Oct. 7, 2022 “Enhancing Safeguards for United States Signals Intelligence Activities”.

had been invalidated by the European Court of Justice in 2020,⁸⁴ such transatlantic transferal had taken place on the basis of standard contractual clauses,⁸⁵ something that inevitably slowed down and complicated the process. Indeed, after the passing of the executive order, the European Commission issued a decision of adequacy in July 2023,⁸⁶ so certifying that the guarantees for privacy and data protection in the United States are “essentially equivalent” to EU standards.⁸⁷ Based on the adequacy decision, a new framework for EU-US data transfer was officially adopted in August 2023, i.e. the EU-US Data Privacy Framework (DPF).⁸⁸ This means that, subject to the rules of the DPF, transatlantic flows of data can now happen freely between the United States and the European Union.

Although the DPF can be seen as an improvement for commercial transactions and even security relationships, since it allows more fluency in the transferal of data, some tricky aspects showed up in the last two years. First of all, while with the 2022 executive order the Biden Administration promised significant improvements in terms of guarantees for data protection, also in the field of national security surveillance, the President did not oppose – rather, to be precise, his party even promoted – in Congress the umpteenth renewal of Section 702 of the Foreign Intelligence Surveillance Act (FISA). As a matter of fact, in April 2024, Congress renewed Section 702 FISA up to 2026 through the Reforming Intelligence and Securing America Act 2024.⁸⁹ The bill, sponsored by Democrats⁹⁰ and then passed into law, extends for two years the application of the very controversial Section 702 regime. According to this very thorny provision, into force since 2008 and the periodically extended, US intelligence agencies are allowed to acquire communications of non-Americans outside the United States, without the need for any judicial warrant. Thus, per the FISA, this

⁸⁴ European Court of Justice, Judgment of the Court (Grand Chamber) of July 16, 2020, *Data Protection Commissioner v. Facebook Ireland and Maximilian Schrems*, Case C-311/18. See M.K. Aktipis, R.B. Katwan, *Data Protection Commissioner v. Facebook Ireland Ltd. and Maximilian Schrems (C.J.E.U.)*, in 60 *Int'l Legal Materials* 53 (2021).

⁸⁵ As stated by art. 46 of Regulation (EU) 2016/679 (General Data Protection Regulation), in the absence of an adequacy decision, the transfer of personal data from EU to non-EU countries is permitted only if an adequate level of protection is guaranteed. By ensuring adequate data protection safeguards, Standard Contractual Clauses (SCCs) are model contracts (usually pre-formulated by the European Commission) which can be used as grounds for the transfer of personal data.

⁸⁶ European Commission, Adequacy Decision for the EU-US Data Privacy Framework, July 10, 2023.

⁸⁷ See G. Resta, V. Zeno Zencovich (Eds), *La protezione transnazionale dei dati personali. Dai “safe harbour principles” al “privacy shield”*, Rome, 2016.

⁸⁸ EU-US Data Privacy Framework Principles Issued by the U.S. Department of Commerce, available at: https://privacyshielddev.blob.core.windows.net/publicsiteassets/Full%20Text_EU-U.S.%20DPF.pdf. For a general overview of the EU-US Data Privacy Framework, see S. Battle, A. van Waeyenberge, *EU-US Data Privacy Framework: A First Legal Assessment*, in 15 *Eur. J. Risk Reg.* 191 (2024).

⁸⁹ Pub. L. 118-49.

⁹⁰ N. Chauvin, *The Warrant Exception that Isn't: FISA Section 702, “Defensive” Searches, and the Fourth Amendment*, in 74 *Am. U. L. Rev.* (forthcoming), available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4914365; G.W. Croner, *FISA Section 702's Challenging Passage to Reauthorization*, in 14 *J. Nat'l Sec.* 55 (2023).

type of communication falls outside of Fourth Amendment protection.⁹¹ Under the 2024 law reauthorizing Section 702, any company under the US jurisdiction can be compelled by intelligence services and law enforcement authorities to release data concerning communications of a foreigner (non-US citizen) who is suspected of terrorism or related crimes. As a result, intercepted people must be targeted, e.g., because they are suspected of having committed a crime, but it is not uncommon that access to their data collaterally touches upon the data of other, unsuspected people, to the detriment not only of privacy rights, but also of the basic principle of presumption of innocence.

The re-authorization of Section 702 FISA has an undeniable impact on the meaningful and effective applications of the guarantees enshrined in the 2022 executive order. As a matter of fact, totally depriving the communications of foreign citizens from Fourth Amendment protection brings a significant lowering of material privacy standards, and so it cannot be excluded that even the DPF, as its two forerunners – the Safe Harbor and the Privacy Shield – might be brought before the European Court of Justice, and the underpinning adequacy decision invalidated.

In sum, Biden's initial approach on privacy and digital surveillance seems more a sort of payoff, given to EU authorities in order for the US to regain the "essential equivalence" status. Once this was done, Joe Biden did not prove different from his predecessors in terms of harsh surveillance measures, not only backed, but even sponsored by his party.

Still in the realm of the use of digital technology as counter-terrorism tool, there is another facet that is worth being highlighted. This is a new area, which we had not addressed in 2023 due to the fact that the Biden Administration had not taken action yet. Reference is to artificial intelligence (AI). In October 2023, President Biden took some steps towards the regulation of AI in general by adopting an executive order on "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence".⁹² However, in this executive order, Joe Biden missed the opportunity to regulate AI for national security aims, and specifically counter-terrorism purposes. Actually, the executive order does not address the issue of AI used in counter-terrorism or related operations (e.g. surveillance, facial recognition for law enforcement purposes, border controls, etc.).⁹³ There are only some generic references to national security (in general) which defer to further actions, more than effectively *taking* action. For instance, the order mentions the "national security risks" that the inappropriate use of artificial intelligence may pose as well as the need to take steps in this regard. Consequently, it refers to a subsequent "National Security Memorandum on AI" to be submitted to the President by his Assistant for National Security

⁹¹ L.K. Donohue, *The Evolution and Jurisprudence of the Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review*, in 12 *Harv. Nat'l Sec. J.* 198 (2021).

⁹² Executive Order (E.O.) 14110 of Oct. 30, 2023 "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence". See C. Sbailò, *Executive Order 14110 Governing Artificial Intelligence: Technological Leadership and Regulatory Challenges in an Era of Exponential Growth*, in this special issue, forthcoming.

⁹³ M. Wörsdörfer, *Biden's Executive Order on AI: Strengths, Weaknesses, and Possible Reform Steps*, in *AI & Ethics* 1 (2024).

Affairs and by the Deputy Chief of Staff for Policy, with a view to adopting more specific policies. Such memorandum has been submitted to the President in September 2024 in a classified version, then declassified in late October 2024.⁹⁴ The National Security Memorandum on AI (hereinafter, NSM) starts with a declaration of principles, according to which AI should be used in national security matters not only pursuing effectiveness, but also with a view to comply with democratic principles. It also directs the creation of a Framework to Advance AI Governance and Risk Management in National Security (hereinafter, the AI National Security Framework), requiring competent federal agencies to monitor and mitigate AI risks related to human rights.

Whether or not the NSM and the AI National Security Framework will be applied in practice will strongly depend on the outcome of the imminent elections. If Trump wins, the provisions of the memorandum will hardly be implemented, while more chances exist in case Kamala Harris will attain victory as the 47th President of the United States. In fact, neither the NSM nor the AI National Security Framework are binding, and they are vague and generic enough to be interpreted in several ways or even sidelined by an Administration that does not share its content.

Overall, undetailed regulation of AI is not a novelty in the US legal system, if we take into account that, traditionally, the United States embraces a very market-driven approach⁹⁵ to technology, which results in leaving most of the regulatory choices to big techs and, more generally, to web platforms. This stance is clearly routed in the US tradition on the First Amendment,⁹⁶ but could lead to dangerous effects when security is at stake. In parallel to this, it is worthwhile to consider the so-called Brussels effect, which, with the entry into force of the AI Act,⁹⁷ may entail that US companies will have to comply with stricter rules in the field of artificial intelligence, including in fields that are borderline with national security,

⁹⁴ Memorandum on Advancing the United States' Leadership in Artificial Intelligence; Harnessing Artificial Intelligence to Fulfill National Security Objectives; and Fostering the Safety, Security, and Trustworthiness of Artificial Intelligence of October 24, 2024, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/10/24/memorandum-on-advancing-the-united-states-leadership-in-artificial-intelligence-harnessing-artificial-intelligence-to-fulfill-national-security-objectives-and-fostering-the-safety-security/>.

⁹⁵ A. Bradford, *Digital Empires: The Global Battle to Regulate Technology*, Oxford, 2023, Chapter 1.

⁹⁶ See G. Stone, *When It Is Speech that Causes Unlawful Conduct Protected by Freedom of Speech? The Case of the First Amendment*, in A. Stone (Ed.), *The Oxford Handbook on Freedom of Speech*, Oxford, 2021, 331; A.Z. Rozenstein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, in 1 *J. Free Speech L.* 337 (2021); E. Armijo, *Faint-Hearted First Amendment Lochnerism*, in *B.U. L. Rev.* (forthcoming), available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544459; R. Post, A. Shanor, *Adam Smith's First Amendment*, in 128 *Harv. L. Rev. Forum* 165, 167 (2015) (according to the Authors, "the First Amendment has become a powerful engine of constitutional deregulation"); J. Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, in 77 *Law & Contemp. Probs.* 195 (2014); A. Shanor, *The New Lochner*, in *Wis. L. Rev.* 133 (2016); L. Ferguson, *The Limits of Lochnerism*, in 32 *Wm. & Mary Bill Rts. J.* 929 (2024).

⁹⁷ Regulation (EU) 2024/1689.

such as law enforcement. Perhaps this effect, rather than actual normative steps towards more regulation, will be able to tarnish the traditional libertarian posture of the United States on technology.

3.4 Counter-Terrorism and New Developments in a Multipolar Geopolitical Scenario

In addition to the mentioned fields, that are typical of the struggle against international terrorism, some further measures were adopted by the Biden Administration in the light of the new geopolitical scenario, and, specifically, to face the Israel-Hamas issue. This conflict represents a wide and multifaceted topic,⁹⁸ which interplays with traditional counter-terrorism law. As far as the interplay between the two is concerned, the most relevant point is represented by a draft bill, introduced by Sen. Marco Rubio (Republican) in May 2024, titled “*Hammas and Palestinian Islamic Jihad International Terrorism Support Prevention Act of 2024*” (hereinafter *Hammas Prevention Act*).⁹⁹ Although being introduced by the Republicans, this was a bipartisan bill, so it was quickly signed into law.

The *Hammas Prevention Act* strengthens the sanctions on foreign persons, governments and agencies supporting *Hammas* and related terrorist groups, such as the *Palestinian Islamic Jihad* and others. These sanctions may consist of asset freezing, travel restrictions and commercial bans.

From a procedural viewpoint, the Act poses most of obligations related to the sanctioning regime on the President (rather than on senior officials of his Administration). For instance, the President to report annually to regarding foreign persons, agencies or governments assisting these terrorist organizations. After identifying them, it is the President himself to impose sanctions through his own acts. In case the identified supporter is a government, the President has to block US assistance to that government for at least one year, and forbid any financial transaction from the US to that jurisdiction.

The law does not introduce real novelties in terms of qualification of *Hammas* and related groups as “terrorists”, since they have been designated as such since 1997.¹⁰⁰ Yet, independently on not innovative its content, this bill with its smooth and bipartisan passage in Congress, is a good example of how, when there is political interest in enacted some counter-terrorism measure, congressional steps are effortless and fast, very differently from what happened with regard to measures on domestic terrorism, where political dissent proved much wider (see § 2.2.). This statement is further proofed if we take into account some other “hot topics” of the current multipolar geopolitical panorama, which anyway we did not address specifically since they do not have an explicit links with international terrorism. Among them, we can list the adoption of sanctions related to the

⁹⁸ See D.W. Drezner, *How Everything Became National Security, and National Security Became Everything*, in 103 *For. Aff.* 122 (2024).

⁹⁹ S.3874 – *Hammas and Palestinian Islamic Jihad International Terrorism Support Prevention Act of 2024*.

¹⁰⁰ Bureau of Counterterrorism, *Foreign Terrorist Organizations*, available at: <https://www.state.gov/foreign-terrorist-organizations/>.

Russian-Ukrainian conflict and measures on the Taiwan situation. In fact, also the provisions to set sanctions against Russia¹⁰¹ or to settle US-Taiwan economic relationships in the context of the tensions with China¹⁰² were seamlessly passed, again due to political urgency to do so.

4. Concluding Remarks

Against the analyzed background, some concluding considerations are worth being remarked.

From a general angle, counter-terrorism efforts have not been fully absent during the last two years of the Biden presidency, so we cannot endorse claims that his Administration has remained totally inactive. Although some efforts could be detected, not all of them can though be deemed as entirely positive from a legal and strategic viewpoint. In particular, starting from domestic terrorism, our study has highlighted that Biden's action in 2023-2024 has been focused more on the policy side than on the normative one, as no significant legislative reforms have been passed nor federal laws have been enacted, punishing domestic terrorism as an autonomous crime. The paths of the Domestic Terrorism Prevention Bill and of the Domestic Terrorism and Hate Crime Prevention Bill clearly demonstrate this tendency. This lack of action in the legislative field contributed to leaving many of the promises contained in the 2021 strategy and in its pillars "in the dream book". This inactivity in the legislative field was fueled, most of all, by diminished political interest in the area of domestic terrorism, probably driven, in turn, by matters considered more urgent standing on the geopolitical scenario, after the Hamas attack to Israel of 7 October 2023. In other words, the conflict between Hamas and Israel – along with other pressing geopolitical issues such as the situation in Ukraine and the tensions between China and Taiwan – "stole the spotlight" to domestic terrorism, which was the priority in 2021-2022.

A different posture was indeed taken by US courts, at least lower ones, which imposed high criminal penalties on acts qualified as amounting to domestic terrorism, especially those crimes connected to the 6 January 2021 attacks. Dempsey's conviction in August 2024 is a significant example and, most of all, Judge Chutkan's attempt to indict Trump. Therefore, those courts have demonstrated to still have domestic terrorism as a priority, even when it came to indicting former President Donald Trump. Notwithstanding these attempts to punish domestic terrorism, the Supreme Court frustrated them as far as Trump's position is concerned, with its July 2024 decision. Not only did the judgment have an impact on Trump's trial – which will not be held before Election Day – but it might also cool down lower judges' intentions to intervene muscularly on pending and forthcoming domestic terrorism cases.

Shifting to international terrorism, the Biden Administration's policies have suffered some significant steps back on a number of crucial points.

¹⁰¹ See Congressional Research Service, *U.S. Sanctions: Overview of the 188th Congress*, IF12390, Mar. 4, 2024.

¹⁰² On this topic from the perspective of international relations, see A. Colli, *The Biden Doctrine: A Contemporary Analysis of U.S. Foreign Policy*, in *this special issue*, forthcoming.

Among them, we have mentioned the *de facto* stop to Guantánamo prisoners' transfers after 7 October 2023, i.e. the start of the current Israeli-Hamas conflict. This event slow-motioned Biden's policy and sidelined the need to find a solution for Guantánamo, which has been a "legal black hole" in the US legal system for almost twenty-four years.

Another field where there was a step back, indeed after a step forward, was the declassification of the PPM (Presidential Policy Memorandum). As highlighted, the decision to make the memorandum public (although driven by courts) should be praised, but in accessing the policy we found some worrisome contents, such as the collective self-defense issue, which we have critically commented in the paragraph on TK.

On some other aspects of the fight against international terrorism, Joe Biden perpetrated a posture characterized by lack of transparency. This stance can be seen, among others, in the Administration's decision to keep invoking state secret privilege in judicial cases, without any exceptions, not only through the *Reynolds* doctrine, but also by referring to other forms of confidentiality, as the *Glomar* response. Indeed, another worrying sign of lack of transparency can be detected in the Administration's choice not to clarify the actual relationship with the Israeli drone policy, whose disclosure would be essential for the keeping of a trust relationship between public powers and citizens.

A last, but not least, note on international terrorism is referred to the fact that there have been some inconsistencies between external and domestic policies about certain matters. A patent example is the approach to digital data. In this respect, on one side, the Biden Administration showed off privacy-compliance *vis-à-vis* the EU with the 2022 executive order, promising better privacy standards. On the other, in 2024 the President did not hesitate to re-authorize Section 701 FISA, so making it evident that the 2022 executive order was a shortcut to obtain an adequacy decision, rather than a tool aimed at actually taking a new perspective on privacy rights.

These trends, applying to both domestic and international terrorism, showcase that President Biden's policy on counter-terrorism over the last two years was very much led by foreign policy considerations, which constituted the most important flywheel in his choices. Taking into account the current geopolitical scenario as a whole is certainly crucial, but the risk is to leave aside some further threats that could appear as dormant but still represent a danger.

At the same time, the instrumental and to some extent predatory use of some measures, as the ones on digital data, clarify that the traditional US libertarian and deregulatory approach on technology is far from being abandoned.

Against this background, several challenges arise for the next US Administration as well as for the next Congress. First, it will be necessary to consider whether to transform some policy issues into binding legislation, e.g., with a view to enacting a stronger federal framework in the field of countering domestic terrorism. Second, from a more strategic viewpoint, it would be pivotal to ensure overall consideration of all the threats, not only of the ones that appear on the spotlight of the geopolitical scenario. As a matter of fact, those threats that may seem "dormant" are not excluded to revive, as happened with domestic terrorism a few years ago and as agencies

warned may happen with international jihadist terrorism. Lastly, in the light of the increasing role of technology, even in the field of security, it will be worth working in order to strike a balance between the traditional approach of the US to technology and privacy, characterized by the recessive conception of privacy rights and *laissez-faire* in favor of the tech industry, and the need to maintain relationships with actors, such as the EU, requiring very different standards. This aspect is decisive even to safeguard privacy compliance from a more global perspective, and avoid that US lower standards excessively pull down EU higher ones.

On a concluding note, much will depend not only on which candidate will win the presidential seat and how the Congress will be composed, but also on which approach the next Administration will choose to take in the relationships with strategic partners, such as the European Union, Israel, China, just to mention some. In case of victory of the Democrats, this might be on the same line that we have analyzed until now; in the circumstance of a “Trump-bis”, instead, the current state of play is very likely to be disrupted.

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