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A Progressive Case Against the Trump Trial

It's hard to write about a controversial public policy issue when you know that people you admire will be upset by your views and may be inclined to call you a heretic or a rat for expressing them. I don't enjoy this kind of criticism – not at all. But some situations demand that one refuse to go with the flow, even when friends find the ride perfectly comfortable.

My particular heresy is this: I think that the U.S. House of Representatives' impeachment of Donald Trump for inciting insurrection presented a very weak case, and that a Senate conviction of the former President would be both unjust and dangerous. Trump surely deserves to go down in history and memory as one of the worst American presidents ever elected. But impeaching and convicting him will solve none of the problems that made him a political menace. In fact, it will very likely worsen them.

I totally understand why lots of good people think that Trump should be convicted of “high crimes and misdemeanors” and barred from ever running for president again. The ex-President has three characteristics, in particular, that make him a danger to democracy and to groups protected (at least to some extent) by democratic norms:

- + He is a charismatic leader who knows how to attract and hold the support of tens of millions of Americans – almost half of the voting population.
- + He is an egomaniacal power-seeker who has little regard for the norms designed to separate personal from political power and to force powerholders to play by the rules.
- + He is a Far Right ideologue whose version of American nationalism is implicitly (and often explicitly) racist, xenophobic, fundamentalist, and authoritarian.

All these traits were blatantly on display during the last phase of Trump's presidential term, when he decided that the only way he could lose the election of 2020 was if there was significant electoral fraud, and when, having lost by at least seven million votes, he attempted to convince judges and pressure election officials to declare him the winner anyway. The strongest argument I know for convicting him asserts that this denigration of the electoral

process is analogous to the European fascists' attack on parliamentary rule prior to World War II, and that Trump is a potential *Fuhrer* who ought to be eliminated as a political player before he has a chance to realize his ambitions.

The implication of this position (almost never stated openly) is that it doesn't much matter *how* Trump is eliminated; the point is to disqualify a potential Mussolini or Hitler from returning to the White House. This argument is not absurd or silly; there has been a tendency among "respectable" commentators and political figures to downplay the danger of a mass-based fascist movement in the U.S.A. But there are two related problems with it, in my view. First, it *does* matter how Trump is eliminated. Second, punishing him doesn't solve the problem of a potential American fascism and may well increase the risk of mass radicalization.

Weakness of the Impeachment Case

According to the U.S. Constitution, impeaching a president or other high official requires that he/she be convicted of a "high crime or misdemeanor." What these terms mean has long been debated; the consensus these days is that the punishable behavior does not have to be a violation of a specific criminal law, but it must amount to a very serious dereliction of duty. In the case at hand, the House of Representatives decided that President Trump should be tried for "inciting an insurrection": the January 6 mob attack on the Capitol.

For many of us, this particular accusation rings an unpleasant bell, since spurious charges of "inciting a riot" and "sedition" were frequently used to put militant labor union and antiwar leaders out of commission. (See, for example, any biography of Eugene V. Debs as well as the current film, "The Trial of the Chicago Seven.") Harvard Law professor Alan Dershowitz is seldom right about such matters, but I'm afraid that he hits the mark in this instance by declaring that if the defendant were not Donald J. Trump, no civil libertarian worth the name would support his conviction for inciting an insurrection.

The facts are pretty well known. On January 6 of this year, the outgoing President invited his supporters to march to the Capitol in order to express their vehement opposition to the counting of electoral votes then taking place in Congress and the certification of Joe Biden as America's 46th President. In a long, intemperate rant, Trump repeatedly described the results of the November vote as "election theft," a "criminal enterprise," and "the most corrupt election in . . . history." He called on the large crowd to "walk down Pennsylvania Avenue" to the Capitol to cheer on the Republicans voting against certification. He encouraged his supporters to "fight like Hell," warning, "if you don't fight like Hell, you're not going to have a country anymore." But he also told them to "peacefully and patriotically make your voices heard."

Of course, the violence that took place when militant elements of the crowd broke into the House and Senate chambers was neither peaceful nor patriotic. Congressional members and staffers were terrified, and five people died in the ensuing fracas, including a demonstrator

and a Capitol Police officer. But did Trump incite the attack? Certainly not, if one uses the definition established in *Brandenburg v. Ohio* (1969). In that case the Supreme Court said that the prohibited speech must be “directed to inciting or producing imminent lawless action” and be “likely to incite or produce such action.” Trump’s speech on January 6 didn’t mention an attack on the Capitol and didn’t advocate violent action of any sort. In fact, it did far less “inciting” than that done in dozens of other cases in which *Brandenburg* was used to free defendants from responsibility for causing violence.

Nevertheless, Trump’s critics insist that he ought to be convicted even if his words fail the *Brandenburg* test, since he should have known that violence was a likely outcome, and since, by insisting that the election was “rigged,” he was responsible for creating the intense right-wing hostility which led to the attempt to disrupt Congress. I wish that this argument made sense, but it doesn’t. True, Trump’s bitter critique of the election was taken by a militant fringe of his supporters as an invitation to interfere violently with the certification process. But, unless there is some evidence that the President knew or should have known of the extremists’ intentions, their plans actually constitute evidence of *lack* of incitement.

Current investigations of Far-Right groups like the Proud Boys, Oath Keepers, and Three Percenters suggest that some of their militant members decided to invade the Capitol well *before* Trump gave his speech. If so, the only real incitement on his part was to allege for months that the election was fraudulent. But this is like saying that my speeches and actions against the Vietnam War in the sixties incited the Weather Underground to bomb government buildings, or that President Nixon’s bitter criticism of “peaceniks” incited construction workers in New York to attack antiwar demonstrators. The whole point of a free speech regime is that, unless an intention to cause violence can be shown, speakers are *not* held responsible for the actions of listeners or viewers who may be inspired or enraged by their words. For this same reason, Trump’s conviction would set a precedent that could be used in years to come against progressive leaders “inciting” workers or oppressed identity groups to take action to defend their interests.

Bad Effects of the Trial

A conviction, in any event, is highly unlikely. It is hard to avoid concluding that the Democrats and independent Republicans pushing for this result know this and have other reasons for engaging in a largely symbolic ritual. Like so many of Mr. Trump’s political gestures, this one by his opponents is intended mainly as payback to the enemy and red meat for the “base.” Even so, what are the effects of the trial likely to be, given the current situation of intense neo-tribal conflict in the United States?

In order to answer this question, my liberal and progressive friends might do something that many of us often advocate: put themselves in the shoes of the “Other.” How would we feel to have one of our leaders – say, someone as outspoken and admired as Bernie or AOC – impeached on an arguably partisan charge and then tried with the intention of disqualifying

them permanently from seeking office? Would we feel chastened – or enraged? Would the trial “deradicalize” us – or make us more inclined to brand the system that permitted it hopelessly corrupt? Would we be likely to consider our embattled leader a failure and embarrassment – or a martyr and redeemer?

We do not have to speculate much about this, since analogous situations can be examined and analyzed. In 1923, for example, Hitler’s Nazi Party tried to seize power in Munich in a poorly organized effort that was later termed the “Beer Hall Putsch.” Hitler’s trial for treason in 1924 brought his ideas and associates to national prominence, and while serving a short jail sentence afterward, he wrote *Mein Kampf*. Nine years later, using legal methods, he became the Chancellor of the German Reich.

The great question for us is how to prevent 1923 from becoming 1933 – that is, how to prevent a right-wing movement with considerable popular support from becoming a mass-based fascist movement capable of taking state power. Answers to this are not obvious. I think we must develop a two-pronged policy that outlaws and punishes those who preach and practice violence, while making serious structural changes designed to satisfy the legitimate needs of hard-pressed working people, including many who currently support Mr. Trump. How to do this at the local, state, and national levels is something that requires immediate, intense discussion. But we can’t have that discussion while fixated on Trump’s alleged responsibility for the antics of the Proud Boys. Nor do we want to give him an audience for some Twitter version of *Mein Kampf*.

Oddly, many of those on the left of our political spectrum who sound most radical when it comes to punishing Trump and shaming his supporters display little or no interest in figuring out what it would take to restore America’s small towns and rural districts, not to mention its inner cities and barrios, to economic and social health. Is Trump really the problem, or is he a symptom and exacerbator of systemic failures? It is easier to damn the Donald and wave the Constitution than to face the need to restructure a system dominated by plutocrats, technocrats, and empire-builders.

Do we really want to avoid fascism? Really? Then let’s figure out how to give our needy brothers and sisters, Red and Blue alike, what they most urgently need.

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