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**Monday, February 10, 2025**

## Trump Isn't Going to be Impeached. Let's Not Pretend That's OK.

Richard Primus

Amidst the predictable chaos, cavalier illegality, and general destruction of the first weeks of the new Trump Administration, it is unfortunately necessary to remember the following fact: there are no foreseeable circumstances under which President Trump could be removed from office through the impeachment process. Nearly ten years ago, during his first campaign, he said that he could shoot someone in the middle of Fifth Avenue and his supporters wouldn't abandon him. He hasn't yet actually shot someone in the middle of Fifth Avenue, but the idea he was expressing has been pretty well borne out. Even after President Trump inspired a violent attack on Congress in the hopes of preventing the peaceful transfer of power to a legitimately elected president, his supporters mostly stayed with him, and four years later he was elected president again. It's hard to think there is anything he could do that would bring significant numbers of incumbent Republican officeholders to the conclusion that he had to be removed. That being the case, impeachment is essentially impossible, and everybody knows it.

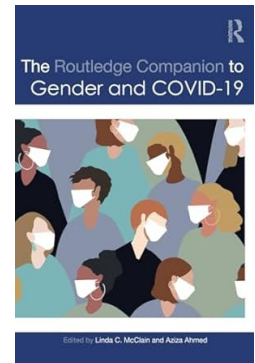
Nonetheless, it is important to continue to assert that certain conduct in which President Trump engages is, on the merits, conduct that ought to be regarded as inconsistent with the duties of the office in a fundamental enough way to require impeachment and removal. In other words, in full knowledge that the President will not in fact be impeached and removed, it is important to say, when it's true, that he has done something for which he *should* be impeached and removed, and for which he *would* be impeached and removed in a properly functioning version of the American constitutional system.

Here I want to outline a way of thinking about how and why President Trump could and should be removed, now, for two aspects of his relationship to the January 6 riot. The first, for which he was already impeached once, is his encouragement and support of the riot itself. The second is his pardoning and commuting the sentences of people convicted of criminal offenses for their participation in the riot.

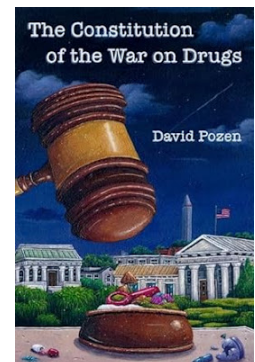
As we all know, President Trump has already been impeached on the first ground, and the Senate held a trial in 2021. So you might be wondering why I am bothering to bring it up again. There's a straightforward reason. At the 2021 impeachment trial, seven Republicans voted to convict. That was ten short of the number needed. But at least twenty-six Republican senators who voted against conviction explained their votes by saying that in their view, Trump was not subject to an impeachment trial, because he was no longer in office.<sup>[1]</sup> For reasons that have been explained at length elsewhere, that was a lousy argument.<sup>[2]</sup> But if nothing else, it gave cover to Republicans who knew that Trump's conduct related to January 6 was impeachable but still preferred not to cross him. Senator Mitch McConnell, for example, [said on the floor of the Senate](#) that "There's no question, none, that President Trump is practically and morally responsible for provoking the events of the day [*i.e.*, January 6]," but that as a matter of process President Trump was not subject to impeachment, because he was no longer in office.

What would follow from taking that argument seriously? If being out of office shields an impeachment defendant from conviction, then that shield no longer protects President Trump. He is in office again. And it is clear that an officeholder can be impeached for conduct undertaken while serving a prior term of office. If it came to light during a president's second term that he had taken bribes or committed treason during his first term, nothing would stand in the way of impeachment. (Much of the conduct for which President Nixon would have

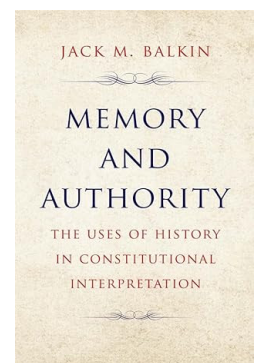
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been impeached, had he not resigned, occurred during his first term, and the impeachment process began only in his second term.) In essence, Senator McConnell and others justified their votes in 2021 with an argument that the impeachment was untimely, or that a precondition had not been met. Those arguments are now inapposite, because President Trump is again in office. So the rationale on which dozens of senators voted against conviction in 2021—indeed, a rationale that was likely dispositive, if we (perhaps naively, but not unfairly) take senators at their word when they explain their public actions—now provides no justification for refusing to remove President Trump from office, and bar him from future officeholding, as a consequence of his actions connected to January 6.

There are two easily foreseeable objections to this line of thinking. One is that having been impeached and tried once, impeaching and trying President Trump again on the same grounds would constitute double jeopardy—or, even if not double jeopardy in the strict sense, a violation of a general principle that judgments rendered should not be revisited. (The conclusion of an impeachment trial might constitute a sort of *res judicata* even in the absence of a double jeopardy bar.) The second objection is that even if President Trump's conduct was impeachable in 2021, his re-election in 2024 washes him clean, because the ultimate authority—the electorate—has judged him fit for office.

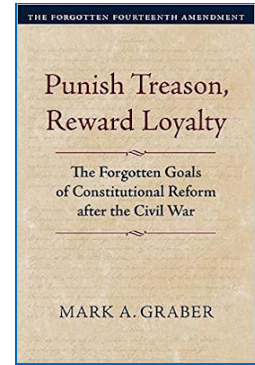
The first argument is flatly wrong. The second is also wrong, but in a more complex way.

Consider the double-jeopardy objection first. As a matter of constitutional doctrine, the bar on double jeopardy applies to criminal proceedings only. An impeachment is not a criminal proceeding; a Senate vote removing President Trump from office would not cause him to be imprisoned, fined, or otherwise criminally punished. To be sure, removal might re-expose President Trump to criminal liability on charges that were dismissed without prejudice when he was re-elected: with the shield of office removed, those prosecutions could be re-commenced. But the impeachment process itself works no criminal punishment.

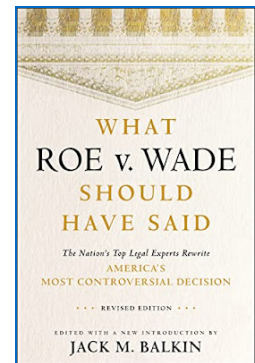
One could argue that the spirit of the double jeopardy rule should apply here even if the letter of the law does not. Perhaps the constitutional rule against double jeopardy is just one application of a broader principle about not reopening duly rendered judgments, and perhaps that principle requires us to regard the outcomes of impeachment trials as final resolutions of the questions they confront. But that claim would be too strong, both as applied to impeachments in general and as applied to this case in particular. If a president were impeached for treason and then acquitted by the Senate because the evidence supporting conviction was too weak, and the acquitted president then gave a press conference at which he announced "By the way, I totally committed treason, and here's the evidence proving it," the proper response by the House of Representatives would be to impeach him again and use the better evidence. Absent the double jeopardy rule applicable in the criminal context, the balance of interests in such a case would make it deeply perverse to say "Well, I guess he got us; the legal system's general interest in settlement and repose means that in this case, we need to leave a president known to be treasonous in command of the U.S. military." What's more, if one takes seriously that at least twenty-six senators voted against conviction in 2021 on the ground that Trump was not subject to impeachment because he was out of office, the 2021 trial cannot be regarded as having rendered a judgment on the merits of the charges Trump faced. As a result, it is not the case that the question of President Trump's fitness for office in light of January 6 has already been asked and answered in a court of impeachment.

Next, consider the idea that President Trump's re-election in 2024 immunizes him against liability for his 2021 conduct. It is true that the electorate handed the presidency to President Trump despite his relationship to the January 6 riot. No matter what else may be the case, the fact that the voters chose to elect as president a man who encouraged and supported political violence of the most visible and salient kind has enormous and unhappy significance for how we must now think about our constitutional democracy. But it does not follow, as a matter of constitutional reasoning, that President Trump's winning the 2024 election means that he cannot be impeached and removed from office on the basis of his role in the events of January 6. On the contrary, Article I, Section 3 of the Constitution specifically contemplates that conviction in an impeachment trial is an authority superior to the will of the electorate, because it announces that an

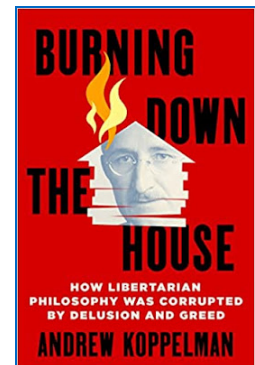
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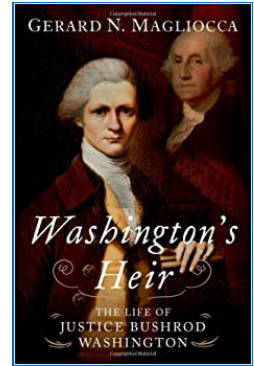
officeholder who is impeached and removed can be disqualified from future officeholding. The availability of disqualification as a penalty reflects the awareness that an officeholder who is impeached and removed might be popular enough to persuade the voters to return him to office. Article I, Section 3 empowers the Senate to overrule any such election, preemptively. A president who is impeached and removed can be barred from holding office in the future no matter how many elections he wins.

To be sure, it is politically more problematic for an impeachment based on pre-re-election conduct to negate re-election *ex post* than to preclude re-election *ex ante*. That's one of the reasons why the Senate should have convicted Trump in 2021, when he was out of power. As a realpolitik matter, the fact that President Trump was recently re-elected by an electorate that knows about the travesty of January 6 (or more precisely, an electorate some of which knows about the travesty of January 6 and some of which denies that it occurred) makes it vanishingly unlikely that Congress would proceed with an impeachment. As I said at the outset, there are no foreseeable circumstances under which President Trump will actually be impeached and removed. And as a prudential matter, it might be dangerous to impeach a president under these circumstances, because a large slice of the public would regard such an impeachment as illegitimate. My point is merely that the idea that such an impeachment would be illegitimate is an idea about public perceptions, not a point about what the Constitution authorizes. To be sure, public perceptions are part of what responsible decisionmakers need to consider when deciding what to do. But all that said, it remains the case that Article I regards conviction in an impeachment trial as capable of imposing a bar to office that the electorate is not entitled to overcome. To say that President Trump's re-election immunizes him from impeachment and disqualification—and more particularly, to understand that statement not as a prudential or predictive judgment but as a proposition of constitutional law—is to get the Constitution's view of the relative authority of impeachments and elections precisely backward.

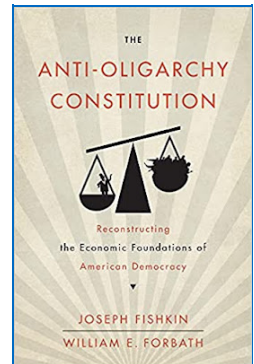
There is also a further reason why neither double jeopardy nor President Trump's re-election blocks impeaching President Trump for conduct related to January 6. Upon assuming office again, President Trump undertook a further impeachable action related to that day: he pardoned, and commuted the sentences of, all the people who had been convicted of criminal offenses connected to the Capitol riot.

Without question, President Trump had the authority to issue those pardons and commutations. The people who broke windows at the Capitol building, assaulted hundreds of police officers, called for the execution of the sitting Vice President, and more generally attempted to use violence and intimidation to nullify the results of an election are now legally relieved of the consequences of their crimes. But the fact that the Constitution empowers the president to issue pardons does not mean that the president cannot be impeached for wielding that power in a way that demonstrates his manifest unfitness for office. (According to the Supreme Court in *Trump v. United States*, a president cannot be held criminally liable for his official actions. Granting pardons is clearly official action for this purpose. But the fact that an action cannot be punished criminally does not mean that it cannot render an officeholder subject to impeachment. Impeachment is a constitutional judgment about fitness for office, not a legal conclusion about the applicability of a criminal statute.) Indeed, and for what it is worth, [James Madison argued at the Virginia ratifying convention](#) that the reason it was safe to give the pardon power to the president, even at the risk that a president might use that power to shield people who committed crimes to which the president himself was connected, was that Congress would impeach a president who used the pardon power that way.

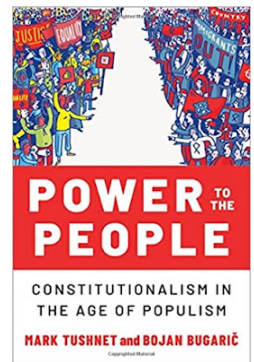
Not all of the January 6 criminals were equally culpable. I am open to the possibility that some of them were dealt with more harshly than they deserved—the criminal justice system does that to people more than occasionally—and if so, there is nothing wrong with commuting their sentences. But President Trump granted commutations to *all* of the January 6 criminals, no matter what their roles were. That was not merely an act of mercy; it was a statement. With his general amnesty, President Trump sanctioned prior acts of political violence. He also encouraged future ones, because he demonstrated his willingness to place people who engage in such violence on his behalf under his protection. That conduct is not consistent with the role of chief executive in a system dedicated to the rule of law, which is another way of saying that it should be regarded as an impeachable



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offense. And because the pardons were issued in January 2025, an impeachment trial based on them could not be subject either to a double-jeopardy objection based on a trial in 2021 or a cleansing-election objection based on the election of 2024. (Yes, President Trump said during his campaign that he intended to pardon the January 6 rioters, so the voters should have known he was likely to do that, and one could say they endorsed the decision. But it is hazardous to infer mandates for specific policies from gross electoral results, and in fact [significant majorities of Americans](#) consistently say that the rioters should not have been pardoned.)

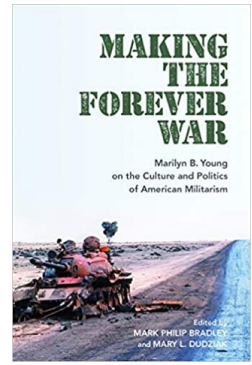
I am not professing shock that no impeachment resolutions have been introduced in the House of Representatives. Few if any Republican members of the House want to remove the President, and probably every Democratic member figures that it would be a waste of time to try to impeach him—which, if one measures by the probability of such a resolution's leading to a conviction in the Senate, is assuredly correct. But neither our realistic understanding of what will and will not happen nor our prudential understanding of what the polity will presently tolerate should not lull us into thinking that egregious conduct is any less egregious. Put differently, we must not lose the habit of recognizing the enormous chasm that now yawns between the constitutional system as it actually operates and the constitutional system as it would operate in non-pathological circumstances. If we do not maintain the sense that President Trump's conduct on January 6, 2021 was incompatible with the rule of law, and that his pardoning the rioters sent an inexcusable message about political violence, we will lose our ability to recognize the dysfunctional nature of the present. And if we do not maintain a sense of what a healthier system would look like, we make it less and less likely that we will ever bring one into being.

[1] Twenty-six is the most conservative count. Depending on how one reads the statements of various senators, the total number who justified their votes against conviction on this ground might be as high as thirty-eight. I thank Kathleen Ross for helping me count.

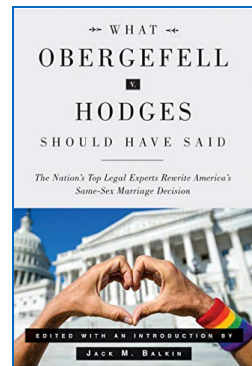
[2] See, e.g., JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT 2 (2021); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. LAW & POL. 13, 75 (2001) (explaining that Congress's power to impeach and remove officials even after they leave office is "essential" because impeachment is about disqualification from future officeholding, not just about removal from current office); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 716 (1988) (explaining that if former officeholders were not subject to impeachment, then officeholders who committed impeachable offenses could "short-circuit the impeachment inquiry by resignation, with the hope of later reentering public service, when memories have faded and evidence is stale").

Posted 9:44 PM by Richard Primus [link]

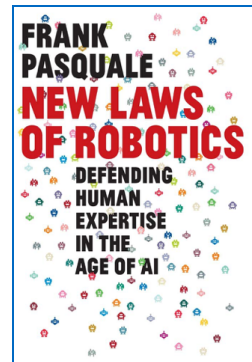
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