Press Here to Reset the System

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So, another impeachment. On the very last inches of his term in office, the House of Representatives has Donald Trump stand once again trial in the Senate for inciting his supporters to storm the Capitol. Why go to all that trouble if, by the time the Senate decides, Joe Biden will be President? Why strip Trump of an office that he no longer holds? Why burden the future Senate and the future president with a process that is facing to the past? What is the use, as the Americans say, of shutting the stable door after the horse has bolted?

The most common answer to these questions is that a conviction would make sure that Trump not being able to run for re-election in 2024. That is a valid reason, to be sure, but neither the only nor the most compelling one why Trump's impeachment and conviction is exactly what is called for now.

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By a stroke of academic publishing luck, a tremendously interesting study on presidential impeachment in international comparison has been published just this week. It comes from three titans of comparative constitutional law, Tom Ginsburg, Aziz Huq, and David Landau, and is timely because US constitutional law, often so notoriously disinterested in anything non-US, seems to have a hard time to come up with satisfactory answers to many questions about impeachment. What exactly are those "high crimes and misdemeanors" mentioned in Art. II § 4 of the Constitution which the person to be impeached must have committed? Does a punishable trifle suffice, say: a false statement about oral sex? What about a non-punishable but democracy-endangering abuse of office, such as asking a foreign head of state to hurt your opponent in the election? There is hardly any practice, no case law, little research, just the bare words of constitutional text which both sides interpret as they find politically useful. The impeachment process, many warn, is degenerating into a political slingshot by means of which any political opponent can shoot holes into the President's legitimacy at any time, no matter what misdeeds he has provenly committed. And indeed, the experience of the last decades seems to confirm this: Since Jimmy Carter, there has not been one president who hasn't been subject of at least one motion for impeachment.

As is so often the case, however, the United States is less exceptional than it tends to believe. In Brazil, South Korea, Paraguay and South Africa, too, presidents have been successfully thrown out of office in recent years. In addition, there is comparative material from other countries that also have procedures in place to remove directly elected heads of state or government from power prematurely. Ginsburg/Huq/Landau have compiled this data and come to the conclusion that the point of impeachment may not be so much to sanction Presidential misbehavior. Perhaps this procedure is better understood as a kind of political reset button in the event that the president, whatever amount of guilt he/she has brought upon him/herself, is simply no longer tenable due to a lack of support in Parliament. As a piece of parliamentary

accountability within the presidential system, a balancing piece that makes the risk of that much power in the hand of the chief executive sustainable in the first place.

In Trump's second impeachment trial, as far as his culpability is concerned, the case for removal appears to be as clear as can be. He incited an armed mob to overthrow the democratically elected government in full view of the entire world. If that's not high enough for high crime and misdemeanor, what is? This is a case in which Congress must take responsibility. All elected officials in both chambers are called upon to take a stand on this unprecedented event, this thrust into the heart of American democracy. Impeaching and convicting Trump for this egregious deed is a way for Congress to say: the buck stops here! As bitterly as we hate one another, as little as we trust one another, as fundamentally different and opposed as our political values and goals are and will remain, this mustn't stand. This conduct is incompatible with being President of the United States, and declaring it so isn't a Democratic, nor a Republican, but an American matter. This is what we, in extremis, will agree upon: the Constitution.

In the House of Representatives, most Republicans have turned down this opportunity, some voluntarily, some allegedly under threat. But what counts will be the Senate. There, a two-thirds majority is needed to for a conviction which thus has to be a bipartisan decision, with at least 17 Republicans joining in. If they will, a system reset is possible. If they don't…

This week on Verfassungsblog

We had a very special adventure this week, namely an full-blown high-end academic conference right here on the Verfassungsblog website, over three days, with parallel panels and a few dozen participants from America to Australia, through all time zones, live and in real time. "**Multiple Legalities**" was the topic, HANNAH BIRKENKÖTTER and NICO KRISCH were the conveners, and Zoom and Vimeo the apps which made it technically possible. Don't worry if you have missed it: All discussions are archived on video on Verfassungsblog.

In **Trump**-related matters, our digital overlords, unlike the institutions of U.S. democracy, did not have go through any tiresome constitutional procedures in order to remove the president from his position of communicative power: As masters of their respective platforms, they can simply do it. Why only now and not much earlier? *Car tel est leur plaisir,* they are subject to no law but their own supreme will. JÖRN REINHARDT examines the case and considers the decision of Twitter, Facebook et al. to deny their services to Trump to be correct, lawful and long overdue.

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the Verfassungsblog team

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The **Digital Services Act**, the draft of which was recently presented by the EU Commission, will keep us busy for a long time to come. Some believe to find in it a "good samaritan clause" that will allow social media to more proactively screen their users' uploads for illegal content. ALEKSANDRA KUCZERAWY disagrees. While the draft contains an article that is supposed to allow for more initiative, it comes with many unanswered questions.

It has been five years since EU Commission first activated the so-called "Rule of Law Framework" for **Poland**. The Polish authorities' ongoing attacks on the rule of law since then threaten the entire European legal order. LAURENT PECH, PATRYK WACHOWIEC, and DARIUSZ MAZUR report on how things went from bad to worse in Poland in 2020.

After decades of debate over the constitutional status of children, the governing coalition in Germany has agreed on a proposal to amend the Basic Law.

While the introduction of **children's rights** into the constitution would fulfill an important promise from the coalition agreement, in its current form it is not in line with international and European law, finds JAN-PHILLIP GRAF. FRIEDERIKE WAPLER also does not think much of the proposed wording. In her opinion, nothing at all remains of the intended goal of treating children as subjects rather than passive objects of parental and state educational efforts. MICHAEL VON LANDENBERG-ROBERG, on the other hand, is less critical, but draws attention to the ambiguities that the legislature should urgently clear up if it wants to avoid constitutional collateral damage.

Yesterday, the German Bundestag determined that party assemblies to nominate **candidates for the 2021 federal election** are impossible because of the pandemic. FABIAN MICHL criticizes the resolution and the underlying rule that lawmakers created last fall.

The State Court of **Hesse** has confirmed that the distribution of seats in the State Parliament after the 2018 election is correct. The court has confirmed that the goal set by law when dealing with compensatory mandates is to minimize the deviation from the ideal proportional distribution of seats. BENJAMIN JUNGKIND agrees with the ruling.

In the Corona pandemic, many are still refuse wearing **face masks**, some equipped with a doctor's certificate. Not all of those certificates are what they claim to be, which is why lawmakers in Brandenburg intervened but took a beating in the Higher Administrative Court. LUKAS MITSCH takes a closer look at the decision and comes to the conclusion that it does not necessarily take away all of the legislature's leeway.

JOSEF FRANZ LINDNER intervenes in the debate about the **right to reproduction** in Germany and calls for a revision of the Embryo Protection Act and for a modern law on reproductive medicine.

So much for this week, which has once again brought more constitutional and political excitement than most cares for. Thanks for your attention! The slot into which you can drop your penny for the upkeep of Verfassungsblog is here (recurring) and here (one-off). All the best, and see you next week!

Max Steinbeis

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