The assault on Capitol Hill of January 6, 2021: freedom of expression or rather freedom to impeach and to acquit?

di Giovanni Poggeschi

Abstract: L'assalto al Campidoglio del 6 gennaio 2021: libertà di espressione o piuttosto libertà di impeachment e di assoluzione? – On January 6th, 2021, american democracy has survived one of the toughest tests of its history. The assault of Capitol Hill was «inspired» by the vehement speech of Donald Trump held the same day in front of the Capitol, the day of the oath of Joe Biden as the new President of the USA. The following weeks were marked by the process of impeachment, which witnessed a harsh discussion between the supporters of the impeachment on the side of the Democratic Party, and the opponents to it, on the side of the Republican Party, a discussion reflected in the media. Some of the Republican senators voted for the impeachment, but that was not enough to reach the 2/3rd majority needed in the Senate; Trump was acquitted. The article makes an analysis of the history and the meaning of the procedure of impeachment, especially the reason for its use on an outgoing president and a private citizen. The main grounds for the accusations are also object of the research, namely the «high Crimes and Misdemeanours» charged to Donald Trump, to which his attorneys and supporters reply with the argument of the freedom of expression which is protected by the First Amendment, and which has a long story of Supreme Court fundamental judgments.

Keywords: Trump, Capitol Hill, Impeachment, Freedom of Expression, Supreme Court.

1. Introduction

January 6th, 2021, will be forever remembered as the day of the assault on Capitol Hill in Washington. D.C., by a mob of supporters of President Donald J. Trump. That day the Oath of Office of Joe Biden had to take place, during the Joint Sessions of the United States Parliament. The violent mob that took place that day impeded the Congress Confirmation of the winner of the presidential election, Joseph R. Biden. The insurrectionists assaulted police officers with weapons and chemical agents, and seized control of the Senate chamber floor, the Office of the Speaker of the House, and major sections of the Capitol complex. Members and their staffs were trapped and terrorized. Many officials (including the Vice President himself) barely escaped the rioters. The Capitol was placed under lockdown while lawmakers were evacuated. Five people died, and more than 140 were injured.

The alleged role of Donald Trump in inciting the rioters of the "save America rally" to go for Capitol Hill is the reason of the quick starting of the

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procedure of impeachment: on January 13th the House of Representatives passed a resolution stating that Trump "is impeached for high crimes and misdemeanours". The procedure ended February 13th, when the Senate acquitted the former President, with 57 votes in favour of his conviction, and 43 against (67 were needed for his conviction).

In this article an analysis of the background of the procedure of impeachment will be carried, with some considerations of its role and impact on the constitutional values of USA in the contemporary era. Freedom of expression and its implications will be also analysed in this framework.

2.The Constitution Provisions on Impeachment and its legal nature and purpose

The legal basis set forth in the US Constitution is the following:

Clause 5 of Section 2 of Article 1 says that "The House of Representatives shall chuse their Speaker and other Officers;and shall have the sole Power of Impeachment".

Section 4 of Article 2 of the Constitutions states that "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors".

According to Clause 6 of Section 3 of Article 1 "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present".

Impeachment is rooted in Common Law, being an old procedure instituted to control the abuse of power of the King of England. It was first used in 1386 against some ministers of Edward III and his lover Annette Perrers. In USA it has been widely used especially against members of the judiciary power, and, before the Trump cases, with no final conviction, against two Presidents: Andrew Johnson (1868) and Bill Clinton (1998). The procedure of impeachment against Richard Nixon (1973) for the scandal Watergate could not begin for the President's resignation[1].

In the US Constitution Article 1 deals with the legislative power, Article 2 with the executive, and Article 3 with the judiciary. Presidential Impeachment deals with all the mentioned powers, being promoted by the House of Representatives, towards a (prominent, the highest in rank) member of the executive and finally dealt by the Senate which stands, like the British House of Lords[2], as a judicial body.

[1] For a chronical about those three events of the American history see Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, in *Dayton Law Review*, n. 44.3, 2019, pp. 535-548.
[2] Louis Blom Cooper – Brice Dickson – Gavin Drewry (edited by), *The Judicial House of Lords. 1876-2009*, Oxford, 2009.

In the words of Justice William H. Rehnquist "those who wrote the Constitution realized there could also be malfeasance by high officials of the government, and so they borrowed from England the concept of impeachment and removal of such officials"[3].

The procedures of the House of Representatives and of the Senate are highly technical: strictly speaking, "impeachment" means "accusation" or "charge". The House of Representatives has the power to bring charges of the commission of one or more impeachable offenses: these charges are called "Articles of Impeachment", and the House "impeaches" by simple majority of tgose present. Then the Senate "tries" all impeachments, determining "on evidence presented, whether if the charge is true, the acts that are proven constitute an impeachable offense. Such an affirmative finding is called a 'conviction' on the Article of Impeachment being voted upon. A two-thirds majority of the senators presenti s necessary for conviction"[4].

But when impeachment procedure can start? And why? While promoting the failed attempt of this procedure against Justice William O. Douglas in 1970, "the brilliant and erratic arch-liberal appointed decades earlier by Franklin D. Roosevelt"[5], the Representative (and future President after the resignation of Nixon) Gerald Ford stated that "an impeachable offense is whatever a majority of the house of Representatives considers it to be at a given moment in history", and he added that conviction by the Senate depended only on "whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office"[6].

Within a year, the campaign to impeach Justice Douglas died a well deserved death. But Ford's cynical view of impeachment lives on, with some reason if we think of the acquittal of Donald Trump by the Senate trial of February 2021, despite the evidences show serious grounds for his conviction. But "impeachment shouldn't be understood as merely a cleaner and more orderly form of political assassination. Rather, it's a democratic process by which the American people, speaking through Congress, decide that for the constitutional system to live, a presidency must die. This is a great power, and a terrible one … And it's a power that might someday save us all"[7].

This is why it has to be carried through strict legal rules, though its nature it is mainly political, in order to safeguard the essence of American democracy and system of government: "to raise or lower the impeachment bar is to move the nation closer to an imperial presidency or a parliamentary

[3] William H. Renhquist, *Grand Inquests: The Historical Impeachments of Justice Samuel Chase and President Andrew Johnson*, New York, 1992), p. 9.
[4] Charles L. Black, Jr., in Charles L. Black Jr. - Philip Bobbitt, *Impeachment. A Handbook, New Edition*, New Haven and London, 2018, p. 7.
[5] Laurence Tribe and Joshua Matz, *To end a Presidency: the Power of Impeachment*, New York, 2018, p. 25.
[6] Bruce Allen Murphy, *Wild Bill: The Legend and Life of Willian O. Douglas*, New York, Random 2003, p. 433.
[7] Tribe and Matz, *supra* note 5, p. 24.

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system"[8]. Alexander Hamilton already insisted on the political nature of impeachment; in federalist 65 he wrote taht impeachable offenses are "of nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself". The "society of which Hamilton wrote was the political society the new Constitution would shape and govern. Impeachment was inserted into the Constitution as a legislative defense against a president who threatens constitutional order"[9].

Turning our attention to the reasons of the impeachment, "treason" and "bribery", even if not defined in the Constitution, have a rather clear legal meaning, not too difficult to interpret[10]: treason is for instance when there is an agreement with a foreign enemy nation, bribery "involves official corruption of a highly malignant sort, threatening the very soul of a democracy committed to equality under the law"[11].

On the other hand, "few terms in Constitutional Law have been so fiercely contested as 'high Crimes and Misdemeanors'"[12]. The Framers meant to broaden the scope already enlisted in "Treason" and "Bribery", to leave more space to the consideration of conducts which could result dangerous for the American democracy. "In short, when a president commits an impeachable offense, he has done something so awful that we must seriously consider removing him without waiting for teh next election. We face that decision because the president has lost legitimacy and viability as our leader, and because we fear he'll inflict further damage to our policy if he remains in power"[13]. Whatever the Framers had in mind, the expression did not mean just common crimes like felonies or breaches of the peace[14].

We must anyway stress the difference between criminality and impeachability. This fundamental principle is linked to the idea of impeachment having more a political than legal nature. In USA this power is "about political accountability and popular sovereignty, not criminal

[8] *Ibidem*, p. 28.
[9] As the historian Laura Beers writes in the *Washington Post* on February 14th, 2021, in her article "The Senate acquitted Trump. But his impeachment may yet have make a major impact", impeachment was inserted in the American Constitution few years after the British process of Warren Hastings, the former governor of the colony of Bengal, for a "a laundry list of misdemeanors, most of which amounted to extortion and arbitrary cruelty" direceted especially towartds the Indian people. He wasn't anymore in office during the trial, promoted by the great politician and writer Edmond Burke. This event has been also quoted during the Trial of February 2021 by Jamie Ruskin, one of the "House managers". Hastings was acquitted by the House of Lords, but the case helped to reform the East India Company. Lisa Beers ends the article with a wish: ".Despite his acquittal, the Hastings case gives hope that this mountain of evidence may yet spur a similar shift in our modern political culture".
[10] Tribe and Matz, *supra* note 5, pp. 28-34 to clarify the few doubts about it.
[11] Akhil Reed Amar, *The Constitution Today. Timeless Lessons for the Issues of Our Era*, New York, 2016, p 302.
[12] Tribe and Matz, *supra* note 5, p. 36.
[13] *Ibidem*, p. 42.
[14] Philip Bobbitt, *Seven Fallacies*, in Charles L. Black, Jr. - Philip Bobbitt, *Impeachment. A Handbook, New Edition*, *supra* note 4, p. 118.

punishment and parliamentary supremacy"[15]. Of course there can be a link between the two factors, and "requiring investigators to show that a common crime has been committed may be useful as a check on hyperpartisanship in the impeachment process"[16]. But ontologically "the argument that only criminal offenses are impeachable is deeply and profoundly wrong. It misunderstands the Constitution, US history and the nature of criminal law in important ways"[17]. Also Republican Senator Mitch McConnell, in his speech during the trial on February 13, although he vote against the conviction of Donald Trump, for the reason he was no longer in office (see the following pages for the analysis of this point), has declared that "while former official were not formally eligible for impeachment or conviction, they were still liable to be tried and punished in the ordinary tribunals of justice. Put another way, in the language of today, President Trump is still liable for everything he did while he was in office as an ordinary citizen". Nevertheless this idea of melting impeachment with the criminal justice is deeply rooted, and it serves to the immediate political needs of both the Democrats and the Republicans, who use it for their partisan needs. One negative aspect of this idea is also that a focus on criminality makes the issue seem legalistic and dry, "the province of fancy lawyers, not ordinary Americans"[18].

Linked to the issue of distinguishing the political and the criminal aspects of the Presidential conduct there is also another feature: this is the purpose of exiting a deep structural crises that presidential systems of government sometimes undergo, rather than removing criminals, as also a survey of comparative law about impeachment suggests[19].

The power to impeach of the House is not a duty, as it is neither for the Senate the power to convict, in spite of the evidences of High Crimes and Misedemeanors. In this framework, the House and the Senate must interpret the public opinion[20]: the procedure must also take in consideration not only a single event, but the overall behaviour of the President and also the consequences[21]. "These decisions reach beyond the president's alleged

[15] Tribe and Matz, *supra* note 5, p. 40.
[16] Philip Bobbitt, *Seven Fallacies*, in Charles L. Black, Jr. - Philip Bobbitt, *Impeachment. A Handbook, New Edition*, *supra* note 4, p. 108.
[17] Tribe and Matz, *supra* note 5, p. 45.
[18] *Ibidem*, p. 51. Tribe and Matz insist on the distance between ordinary Americans and the legal practices imposed by the Constitutional system : for instance, p. 127, they write that "to most well-adjusted adults, the phrase 'legal procedure' inspires a pang of boredom. Buti t shouldn't, at least not here. Procedure is where romantic ideas about legislator sas the voice of the people collide with institutional reality. Good processi s crucial to making thoughtful, accurate, and legitimate decisions".
[19] Tom Ginsburg–Aziz Huq-David Landau, *The Comparative Constitutional Law on Impeachment*, in *University of Chicago Law Review*, n. 88, 2021, pp. 81-164.
[20] Tribe and Matz, *supra* note 5, p. 73, where they explain the House' final decision in 1987 not to accuse Ronald Reagan of impeachable offenses linked to the "Iran-Contra" saga, for the great popularity that Reagon had in those years.
[21] This approach is the "mosaic theory", which means that "searches can be analyzed as a collective sequence of steps rather than as individual steps": Orin S. Kerr, *The Mosaic*

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misdeeds. They often encompass big questions about what's best for the Republic, and small questions about what's best for each legislator and political party"[22].

Impeachment could even be seen as an ingredient of a Parliamentary system within a Presidential one, a control on the behaviour of a person who holds a huge, but non infinite and uncontrolled, power. More correctly it has to be considered an important piece of the system of checks and balances which assures the health of American democracy, without allowing one power to crush the others.

3.The Theories on the Impeachment once a President has ended its Office

The legality of a impeachment trial after a president has left office was highly debated; it was never tested in the courts before the Trump second impeachment. Precedents of non-presidential impeachments in the past suggests the Senate did have legal authority to put Trump on trial even after his term has ended. The impeachments of Senator William Blount in 1797 and Secretary of War William Belknap in 1876 both occurred after the men were no longer in office.

According to Michael W. McConnell and Ken Gormley there is the possibility to impeach Donald Trump as a private citizen[23]. The decisive moment is the beginning of the procedure, which occurred on January 13th, when the House passed a resolution stating that Trump "is impeached for high crimes and misdemeanors." Also Laurence Tribe, the eminent Harvard professor of Constitutional Law, stands for the possibility of an impeachment for an ex-president, any more holding the office. He considers this theory also backed by historical evidences, expressed for instance by the words of Hamilton already quoted.

Charles J. Cooper, a prominent conservative lawyer, added that because the impeachment power includes the authority to prevent officials from holding future office it "defies logic to suggest that the Senate is prohibited from trying and convicting former officeholders"[24].

On the contrary, according to J. Michael Luttig, the concept of constitutional impeachment presupposes the impeachment, conviction and removal of a president who is, *at the time of his impeachment*, an incumbent in the office from which he is removed. That seemed the purpose of the impeachment power, the removal from office a president or other "civil official" before he could further harm the nation from the office he then

Theory of the Fourth Amendment, in *Michigan Law Review*, n. 111, 2012, p. 313.
[22] Tribe and Matz, *supra* note 5, p. 74.
[23] "Opinion: Yes, the Senate has the power to try Trump. He was impeached in office", *The Washington Post*, February 5.
[24]"The Constitution doesn't bar Trump's Impeachment Trial", *Wall Street Journal*, February 7.

occupies. Luttig's idea is to call to the Supreme Court for the definitive answer, and "it is highly unlikely the Supreme Court would yield to Congress's view that it has the power to impeach a president who is no longer in office when the Constitution itself is so clear that it does not" [25].

One argument against the impeachment for a former officer points on the fact that he trial is useless with Trump no longer in office, because removal from office is the automatic punishment for an impeachment conviction. But Democrats note that after a conviction, the Senate also could bar Trump from holding any public office in the future. The provision simply establishes what is known in criminal law as a "mandatory minimum" punishment: if an incumbent officeholder is convicted by a two-thirds vote of the Senate, he is removed from office as a matter of law; if removal were the only punishment that could be imposed, the argument against trying former officers would be compelling. But it isn't. Article I, Section 3 authorizes the Senate to impose an optional punishment on conviction: "disqualification to hold and enjoy any office of honor, trust, or profit under the United States".

But Impeachment is not the only constitutional way to judge Donald Trump actions and presumed incitements: Bruce Ackerman and Gerard Magliocca remind us that "Section 3 of the 14th Amendment, passed in the aftermath of the Civil War, bars Trump from holding another federal office if he is found to have 'engaged in insurrection or rebellion against' the Constitution of the United States… The finding could be accomplished by a simple majority vote of both houses, in contrast to the requirement in impeachment proceedings that the Senate vote to convict by a two-thirds majority. Congress would simply need to declare that Trump engaged in an act of 'insurrection or rebellion' by encouraging the attack on the Capitol. Under the 14th Amendment, Trump could run for the White House again only if he were able to persuade a future Congress to, "by a vote of two-thirds of each House, remove such disability[26]".

The argument of the non constitutionality of trying a former President has been stressed in the Trial Memorandum of Donald Trump, together with other grounds of acquittal[27], like the protection of First Amendment. This Memorandum is the answer to the Memorandum of the House of the Representatives, the so called "House managers" of the Democratic Party who presented it in the Senate trial. The main arguments of both documents will be analyzed in the next paragraph. Anyway, finally the Senate voted for the constitutionality of moving forward with the trial on February 9th, with 55 votes against 45, a proportion that already showed ho difficult would have been to reach the two-thirds of the votes in the "real" conviction trial.

[25] "Opinion: Once Trump leaves office, the Senate can't hold an impeachment trial", *The Washington Post*, January 12.
[26] "Impeachment won't keep Trump from running again. Here's a better way" *The Washington Post*, January 12
[27] The lawyers of Trump are Bruce L. Castor, Jr., David Schoen, Michael T. van der Veen.

DPCE online
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4.The Senate Trial, the legal discussion and the acquittal of Donald Trump

The trial began February 9th, presided by Senator Patrick Leahy, the longest serving member of the Senate, and not, as mandatory when the President is in office, by the Justice President of the Supreme Court.

According to the House managers "In his conduct while President of the United States … Donald John Trump engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States, in that: On January 6th, 2021, … shortly before the Joint Session commenced, President Trump addressed a crowd at the Ellipse in Washington, DC. There, he reiterated false claims that 'we won this election, and we won it by a landslide'. He also willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol, such as: 'if you don't fight like hell you're not going to have a country anymore'. Thus incited by President Trump, members of the crowd … unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious acts.

President Trump's conduct on January 6, 2021, followed his prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election. Those prior efforts included a phone call on January 2, 2021, during which President Trump urged the secretary of state of Georgia, Brad Raffensperger, to 'find' enough votes to overturn the Georgia Presidential election results 6 and threatened Secretary Raffensperger if he failed to do so. In all this, President Trump gravely endangered the security of the United States and its institutions of Government.

He threatened the integrity of the democratic system, interfered with the peaceful transition of power, and imperiled a coequal branch of Government. He thereby betrayed his trust as President, to the manifest injury of the people of the United States. Wherefore, Donald John Trump, by such conduct, has demonstrated that he will remain a threat to national security, democracy, and the Constitution if allowed to remain in office, and has acted in a manner grossly incompatible with self-governance and the rule of law. Donald John Trump thus warrants impeachment and trial, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States".

The House managers claim that "only hours after his mob first breached the Capitol did President Trump release a video statement calling for peace", telling the rioters[28] to go home. But not only the behaviour of

[28] Among them, More than a dozen were clear supporters of QAnon, the famous conspiracy theory. Major right-wing groups were involved, like the Oath Keepres militia and the Proud Boys, a far-right, neo-fascist and male-only white nationalist political organization. But the majority nevertheless expressed few organizing

that day is questioned, but also the preparatory declarations in which he said that Biden was improperly recognized as the winner: in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin, thus stealing his victory. Trump and his allies filed 62 lawsuits in state and federal courts contesting every aspect of those elections. But all of these suits were dismissed, save for one marginal Pennsylvania suit.

A vibrant support for the urgency of the impeachment has been also expressed by New York State Senator Chuck Schumer, who plainly declared that "His Act on the 6th of January was the most despicable thing any President has ever done …. He is the worst President ever". "If that's not an impeachable offense, than there is no such thing", also said the lead manager for the impeachment Jamie Raskin. The House managers have shown many video of that dramatic day, which would prove the correlation between Trump's speech and the assault on Capitol Hill.

Trump denies that his words were an incitement to violence: "I want to be very clear, I unequivocally condemn the violence that we saw last week. Violence and vandalism have absolutely no place in our country and no place in our movement"[29]. The Republican Senators also deny their responsibility, claiming that they immediately condamned the attitude of the rioters.

In the Trial Memorandum of Donald Trump his defense points on the "intellectual dishonesty and factual vacuity put forth by the House managers in their trial memorandum (which) only serve to further punctuate the point that this impeachment proceeding was never about seeking justice…. Instead of acting to heal the nation, or at the very least focusing on prosecuting the lawbreakers who stormed the Capitol, the Speaker of the House and her allies have tried to callously harness the chaos of the moment for their own political gain".

After having thanked the crowd for their "extraordinary love", Mr. Trump said "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard", and "despite the House managers' charges against Mr. Trump, his statements cannot and could not reasonably be interpreted as a call to immediate violence or a call for a violent overthrown of the United States' government.

"Contrary to the false narrative set forth by the House managers, Mr. Trump's speech was never directed to inciting or producing any imminent lawless action. It is important to read the speech in its entirety, because the House managers played shamefully fast and loose with the truth as they cherry-picked its content along with content from other speeches made to other audiences for their Trial Memorandum, desperately searching for incitement and desperate to deflect attention away from the glaring inability

principles, outside a fervent belief in the false assertion that President Donald J. Trump had won re-election.

[29] Reuters, *Trump condemns Capitol Hill violence*, Reuters (Jan. 13, 2021). https://www.reuters.com/article/us-usa-trump-remarks/trump-condemns-capitol-hill-violence-invideo-that-does-not-mention-impeachment-idUSKBN29I37G

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to show an insurrection".

The argument of the non justiciability for an ex-President is used with the creative thoughts of a scholar: "A half-grown boy reads in a newspaper that the President occupies the White House; if he would understand from that that all ex-Presidents are in it together he would be considered a very unpromising lad" [30]. Another mentioned jurist is Philip Bobbit, co-author of an important book about impeachment[31], who states simply that "There is no authority granted to Congress to impeach and convict persons who are not 'civil officers of the United States'"[32]. The Memorandum also quotes some cases of the past and the case-law of some States to corroborate this idea. The House managers on the contrary stress on the constitutionality of trying a former officer, embracing the above mentioned doctrine. They stress that "There is no 'January Exception' to impeachment or any other provision of the Constitution. A president must answer comprehensively for his conduct in office from his first day in office through his last", considering also that "the period in which we hold elections and accomplish the peaceful transfer of power is a source of great pride in our nation. But the transition between administrations is also a precarious, fragile time for any democracy—ours' included".

Another strong ground against the conviction is given, according to the Trump Memorandum, by the First Amendment. In this case the idea is opposed to the statement of the House managers: a public officer who occupies sensitive policymaking positions has even more freedom in expressing is views than a common citizen, not a special responsibility which limits it. The Supreme Court case quoted to strenghten the idea that Trump was protected by the First Amendment is Branderburg v. Ohio[33]. Under Brandenburg and its progeny, government actors may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[34].

Brandenburg is also quoted by the House managers for the opposite reason: First Amendment doesn't apply where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[35]. Given the tense, angry, and armed mob before him, PresidentTrump's speech plainly satsfies that standard".

In conclusion, according to the Trump defense, "the Article of

[30] Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, in Texas Reviwe of Law & Politics, n. 6, 2001, p. 13.
[31] Charles L. Black Jr. - Philipp Bobbit, *Impeachment. A Handbook, New Edition, supra* note 14.
[32] Philipp Bobbitt, Why the Senate Shouldn't Hold a Late Impeachment Trial, Law Fare Blog (January. 27, 2021), https://www.lawfareblog.com/why-senate-shouldnt-hold-late-impeachment-trial#
[33] *Brandenburg v. Ohio*, 395 U.S. (1969).
[34] *Ibidem*, p. 448.
[35] *Ibidem*, p 444 and p. 447.

Impeachment presented by the House is unconstitutional for a variety of reasons, any of which alone would be grounds for immediate dismissal. Taken together, they demonstrate conclusively that indulging House Democrats hunger for this political theater is a danger to our Republic democracy and the rights that we hold dear". The House managers on the contrary conclude that, although many have suggested that we should turn the page on the tragic events of January 6, 2021", in order "to heal the wounds he inflicted on the Nation, we must hold President Trump accountable for his conduct and, in so doing, reaffirm our core principles. Failure to convict would embolden future leaders to attempt to retain power by any and all means — and would suggest that there is no line a President cannot cross. The Senate should make clear to the American people that it stands ready to protect them against a President who provokes violence to subvert our democracy".

The Trial has been very quick, only five days. It could have lasted more had been accepted the request of Jamie Ruskin, the lead House impeachment manager, to hear as a witness Jaime Herrera Beutler, a Republican Member of the House of Representatives, for her statement about Trump refusing the entreaties of House Minority Leader Kevin McCarthy to call off the rioters. After nearly three hours of deliberations, the Senate came back to order and Raskin announced that he was willing to accept a compromise in which Herrera Beutler's statement would be admitted as evidence without having to hear from her personally. The Senate could then decide on February 13th, with the expected, but for this not less controversial, acquittal of Donald Trump.

The acquittal of Donald Trump by the Senate responds probably more to political than juridical reasons, and very simple ones: the supporters of the ex-President are in huge proportion, and they view themselves as belomging to a victimized, disenfranchised class that has found its champion. To humiliate them could be more dangerous than "forgiving" Trump, who anyway will have to undergo many processes now he a private citizen. The american society is now very polarized, and to find a common spirit will be a hard task for Biden, his government, his party and also for the Republicans.

5. Conclusion

Donald Trump has been the most controversial President of the last decades, the only one to be tried twice for impeachment[36]. His action has provoked strong adverse reactions but it is undeniable that he has also millions and millions of supporters, and 74 millions votes at the election of 2020 is something really impressing. During its presidency, the economy went well, at the least before the pandemic, the US armed interventions were not

[36] Joel K. Goldstein, *Talking Trump and the 25th Amendment: Correcting the Record on Section 4*, in *University of Pennsylvania Journal of Constitutional Law*, n. 21, 2018, pp. 73-152.

increased, the politics toward China won't probably change too much with Biden, at least for the contents. Other issues like climate and (less) immigration will be lead in a very dififerent way; the question of poverty and the growing inequalities will be crucial[37], and some important decisions on minorities whoich will be taken at the federal level will not suffice.

The accusations of the House managers stress on many false assertions that Donald Trump expressed before January 6th and during his speech that day. In the political battlefield politicians all over the world often express statements using imprecise facts, with a very high degree of easiness and superficiality. But some "half-lies" are more innocent than others: the false statement about the "landslide" victory at the presidential election was used to incite the supporters "to fight like hell" (whatever it means… but in the mouth of a President those words are at least peculiar!), and the assault to the Capitol may be seen as a consequence of those words: this is a case of malicious lie, not at all innocent. As we have seen, Trump's defense insists that the accusation of the link between his statements and the riots is not evincible, and most of the Republican Senators considered conclusive the argument of the unconstitutionality of an impeachment trial of a private citizen (as we have seen, rebuffed by the Senate). Anyway the issue of spreading inaccurate informations, even if less grievous than the ones leading to the assault, are hard to admit from a President who should unite the nation, not divide it. In this framework, also the several racist references that Donald Trump has made during his politcal career seem relevant[38].

All those things are related to the debate on the First Emendment, which has always been intense in the American political and academical arena, and on which the Supreme Court offers a wide range of interpretations[39]. In our times the myth of the "marketplace of ideas"[40], invented by Oliver Wendell Holmes, must be revisited. According to this theory the truth may easily come out from a discussion involving different actors sharing a wide range of points of view. The best ideas and most reliable information will prevail, empowering the electorate to make well informed decisions. This "marketplace of ideas" model has proven to be one of the most influential concepts in First Amendment jurisprudence[41], but a blind acceptance of it doesn't seem possible today, at least it has to be carefully managed.

In the age of "surveillance capitalism"[42] the "free speech

[37] Appropriate reflections on crime, race and poverty are in Thomas W. Simon, *Critical Race Theory : Why Black Legal Theory matters* , to be published, 2021.
[38] Leonard M. Niehoff and Deeva Shah, *The Resilience of Noxious Doctrine : the 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, in *Michigan Journal of Race & Law*, n. 22.2, 2017., pp. 243-271.
[39] In Italian see Giovanni Poggeschi, *Ridere e deridere. La satira negli USA ed in Francia fra libertà individuale ed esigenze collettive*, in *Consulta Online*, fasc. 1, 2018, pp. 167-189.
[40] *Gilbert v. Minnesota*, 249 U.S. (1920).
[41] Alessandro Morelli-Oreste Pollicino, *Metaphors, Judicial Frames and Fundamental Rights in Cyberspace*, in *American Journal of Comparative Law*, n. 69, 2021.
[42] Shoshana Zuboff, *The Age of Surveillance Capitalism. The Fight for a Human Future at*

fundamentalism" protects more the platforms owning and managing data (an infinite amount of them) than the private citizen and consumer: this confirms the concern, shared by the same Oliver W. Holmes[43], according to which in the marketplace of ideas the opinions of the most powerful groups within a community is bound to prevail. It is impressing how actual this debate can be, but one of the problems in the nowadays platforms is the tendency to impose arguments and facts which are simply fake, it is often a very rotten market!

Though it is necessary for those platforms to filter the informations provided by the users, in order to ascertain the truth - more if the fake news come from a premiment personality having power, like a member of the House of Representatives, the Senate, or even more the President of the USA -, it is not always easy to distinguish the free use of ideas and the lies. It also must make us wonder if it is fair and normal in a democratic country to leave such a great power of deciding what is true or false to those new masters of the world like Facebook, Google and Twitter.

Purpose may be important: the doubttful information can be innocent, both in the intention and in the consequence, or malicious. It is proper of the judicial process to ascertain the truth through the analysis of the evidences. It is also fundamental to judge the conformity of the conduct to the freedom of speech taking account of the circumstances and historical framework: "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"[44], Justice Holmes wisely declared that more than one century ago, adding, in the same case, that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"[45].

This standard of the "*clear and present danger*" is rather libertarian[46], and it has been criticized for opposed reasons by eminent scholars in the last 100 years. In Brandenburg, the case evoked by the defense of Trump in the Senate Trial, the Supreme Court erected an extremely high bar to proving incitement. But also the House managers invoked this historical judgment, with the opposite purpose. This proves how different views can be echoed in the debate on First Amendment and all over the world on freedom of expression.

Restrictions on freedom of expression are sometimes necessary to preserve the peaceful living together, to make us hear the voice of the

the New Fronti3er of Power, New York, 2019.
[43] V. *Letter from Oliver Wendell Holmes, to Learned Hand* (June 24, 1918), in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine : Some Fragments of History*, in *Stanford Law Review*, n. 27, 1975, p. 757.
[44] *Schenk v. US*, 249 US 52 (1919).
[45] *Ibidem.*
[46] David O'Brian, *The Public's Right to Know. The Supreme Court and the First Amendment*, New York, 1981, p. 72.

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weaker[47], in order to keep and foster democracy through its deepest values. It is on the contrary unacceptable within a democratic system to silence the voices of opponents, with the excuse that they bother public security and stability. Too many examples come to mind, and they are common in non democratic country[48].

It is not surprising that the eternal question of freedom of expression is so present in the debate on Trump's conduct: it is an extraordinary fuel for democracy, only sometimes subject to limits to avoid the short circuit that can block a society.

Law, and Constitutions, are called to enunciate rights and define their limits and their interactions. Being US a strong democracy, it is obvious to counterbalance the power that a President (mis)used with the exercice of a procedure which has its roots in the Common Law of the Middle Age[49], but that today it is a safeguard of proper use of the presidential prerogatives, a practical application of the principle of checks and balances, which oversees the life and the health of American democracy[50].

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[47] Jeremy Waldron, *The Harm in Hate Speech*, Cambridge, Massachusettes – London, 2012.

[48] When I write this article (February 2021), the protest in Italy for the detention (which began in February 2020) of the Master student of the University of Bologna Patrick Zacky are intensifying. The charge on him is to have written three posts on Facebook against the Egyptian government. In the same days, the rallies in Myanmar

[49] Some scholar, especially in Europe, considers this system anachronistic. For instance I quote a post of February 15 on Facebook (speaking about the power of social platforms!) of Otto Pfersmann, a leading Austrian (and french) constitutionalist, who writes that the procedure of Impeachment shows how deeply the American system is rooted in a medieval conception of "Parliament", where such an assembly is at the same time judge, legislator and council to the souverain".

[50] We can add to the argument explained in the previous foot-note another remark, not so critical of the impeachment system itself but rather of the interpretation that in the modern times is made of an old procedure, which the Framers did not enviasage for a two-party system: "History has not rewritten the constitutional provisions concerning presidential impeachment any more than it has rewritten the constitutional provisions concerning presidential election, but it has dramatically altered the reality of the two processes. It is perhaps too much to expect political partisans not to exploit every opening left by text and context, but constitutional commentators can at least point out that the original words do not necessarily express the original intention": John V. Orth, *Presidential Impeachment: the Original Misunderstanding*, in *Constitutional Commentary*, n. 17, 2000, p. 591. Anyway on January 6th 2021, according to Antonio Di Bella, *L'assedio. Washinton, 06/01/2021. Cronaca del giorno che ha cambiatjo la storia*, Roma, 2021, "the american democratic and parliamentary system survived one of the toughest tests" in its history.