

Statement
of
J. Michael Luttig
before
The United States House Select Committee
on the January 6, 2021, Attack on the United States Capitol
Washington, D.C.
June 16, 2022

Honorable Members of the House Select Committee --

A stake was driven through the heart of American democracy on January 6, 2021, and our democracy today is on a knife's edge.

America was at war on that fateful day, but not against a foreign power. She was at war against herself. We Americans were at war with each other -- over our democracy.

January 6 was but the next, foreseeable battle in a war that had been raging in America for years, though that day was the most consequential battle of that war even to date. In fact, January 6 was a separate war unto itself, a war for America's democracy, a war irresponsibly instigated and prosecuted by the former president, his political party allies, and his supporters. Both wars are raging to this day.

A peaceful end to these wars is desperately needed. The war for our democracy could lead to the peaceful end to the war for America's cultural heart and soul. But if a peaceful end to the war for America's democracy is not achievable, there is little chance for a peaceful end to that war. The settlement of this war over our democracy is necessary to the settlement of any war that will ever come to America, whether from her shores or to her shores. Though disinclined for the moment, as a political matter of fact only the party that instigated this war over our democracy can bring an end to that war.

Like our war from a distant time, these twin wars are "testing whether th[is] nation or any nation . . . so conceived in Liberty . . . can long endure." We must hope that January 6 was the final battle of at least the deadly war for America's democracy.

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These senseless wars are of our own making, and they are now being waged throughout the land, in our city centers and town squares, in our streets and in our schools, where we work and where we play, in our houses of worship -- even within our own families. These wars were conceived and instigated from our Nation's Capital by our own political leaders collectively and they have been cynically prosecuted by them to fever pitch, now to the point that they have recklessly put America herself at stake.

America is now the stake in these unholy wars.

Serious thinkers about the American experiment who are not given to apocalyptic prophesying question whether America is on the verge of a literal civil war. But is even this figurative civil war to be our generation's legacy to posterity?

These wars that we are waging against each other are immoral wars, not moral ones, being immorally waged over morality itself. We Americans no longer agree on what is right or wrong, what is to be valued and what is not, what is acceptable behavior and not, and what is and is not tolerable discourse in civilized society. Let alone do we agree on how we want to be governed or by whom, or where we go from here and with what shared national ideals, values, beliefs, purposes, goals, and objectives -- if any at all.

America is adrift. We pray that it is only for this fleeting moment that she has lost her way, until we Americans can once again come to our senses.

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The war on democracy instigated by the former president and his political party allies on January 6 was the natural and foreseeable culmination of the war for America. It was the final fateful day for the execution of a well-developed plan by the former president to overturn the 2020 presidential election at any cost, so that he could cling to power that the American People had decided to confer upon his successor, the next president of the United States instead. Knowing full well that he had lost the 2020 presidential election, the former president and his allies and supporters falsely claimed and proclaimed to the nation that he had won the election, and then he and they set about to overturn the election that he and they knew the former president had lost.

The treacherous plan was no less ambitious than to steal America's democracy.

Called to Washington D.C. that day by the president, the president himself, and the president's followers, supporters, and allies gathered near The White House for a "Stop the Steal" rally. The president maintained at that rally that the 2020 presidential election had been "fraudulently stolen" from him. The president addressed his faithful followers thus: "We're going to the Capitol. . . . We're going to try and give them [the Republicans in the Congress, presumably] the kind of pride and boldness that they need to take back our country. . . . We will *never* give up. We will *never* concede."

Inflamed, the gathered mob marched up the hill from The White House to the United States Capitol to protest, disrupt and prevent the counting of the electoral votes for the presidency, which the president falsely charged were wrongly about to be counted by the Congress in his political opponent's winning favor and in his own losing favor.

Once staged at the Capitol, the mob soon erected gallows on the United States Capitol grounds, chanting that Vice President Mike Pence should be hanged. Hanged, the mob chanted, for "cowardly" refusing the president's lawless entreaties that his Vice President declare their president reelected, against the will of the American People, though he had lost both the Electoral College and the popular vote for the presidency.

There were many cowards on the battlefield on January 6. The Vice President was not among them.

Soon thereafter, the rioters stormed the Capitol itself, breaching, occupying, and ransacking the temple of our democracy for seemingly endless wrenching hours -- at the precise democratic moment when the Congress of the United States convened in Joint Session to begin the constitutional counting of the votes for the presidency of the United States.

Not until over three hours after the riot had begun, and then only after the siege had achieved what by that time was its truncated objective to interrupt and indefinitely delay the counting of the vote, did the president finally yield to the pleas and prayers from his own family, friends, and political allies, and grudgingly ask his supporters in a hastily forced video tweet to disperse and return to their homes.

The Nation wept during the evening of January 6, as the Capitol police began to clear and resecure the Capitol at day's end. Finally, at 8:00 p.m. on January 6, seven hours after the siege on the Capitol had begun, Vice President Pence gaveled the Joint Session back into order with measured, understated resolve: "Today was a dark day in the history of the United States Capitol. . . . Let's get back to work."

January 6 was a dark day in the history of the United States, too.

It was not until the next day, January 7, 2021, at 3:42 a.m. in the morning -- almost fifteen hours after the Joint Session had first been gaveled into session by Speaker Nancy Pelosi -- that the Vice President finally declared that Joe Biden had been elected the 46th President of the United States.

On January 6, 2021, the prescribed day for choosing the American president, there was not to be a peaceful transfer of power -- for the first time in the history of our Republic.

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Over a year and a half later, in continued defiance of our democracy, both the former president and his political party allies still maintain that the 2020 presidential election was "stolen" from him, despite all evidence -- all evidence now --that that is simply false. All the while, this false and reckless insistence that the former president won the 2020 presidential election has laid waste to Americans' confidence in their national elections. More alarming still is that the former president pledges that his *reelection* will not be "stolen" from him next time around, and his Republican Party allies and supporters obeisantly pledge the same.

False claims that our elections have been stolen from us corrupt our democracy, as they corrupt us. To continue to insist and persist in the false claim that the 2020 presidential election was stolen is itself an affront to our democracy and to the Constitution of the United States -- an affront without precedent.

Those who think that because America is a republic, theft and corruption of our national elections and electoral process are not theft and corruption of our democracy are sorely mistaken. America is *both* a republic and a representative democracy, and therefore a sustained attack on our national elections is *a fortiori* an attack on our democracy, any political theory otherwise notwithstanding.

Accordingly, if, and when, one of our national elections is actually stolen from us, our democracy will have been stolen from us. To steal an election in the United States of America *is* to steal her democracy.

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As in all things, the essence of our participation in democracy is not knowledge, but judgment -- studied, discerning judgment. No more so is this true than in the Constitution and in the Law.

Very few ever have the honor of counseling the President of the United States of America. That highest of honors carries with it the highest of obligations. Counsel provided to the President of the United States must be the product of not only exquisite, penetrating legal analysis but also profound, insightful legal judgment. These two combined are so far from mere technical legal competence as almost to be its polar opposite. The President and the country deserve nothing less from those who counsel the President, so consequential are the stakes for the Nation when the President acts upon the advice of his or her Counsel.

Whatever else, the President of the United States did not receive such counsel during his sustained effort to overturn the 2020 presidential election. It is as much the former president's fault as anyone's that he did not.

Irrespective of the merits of the legal arguments that fueled the former president's efforts to overturn that election -- irrespective of them, though there were none -- those arguments, and therefore those efforts, by the former president were the product of the most reckless, insidious, and calamitous failures in both legal and political judgment in American history.

From their inception, the legal arguments that underlaid the efforts to overturn the 2020 election were, *in that context*, little more than beguiling and frivolous, perhaps appropriate for academic classroom debate, but singularly *inappropriate* as counsel to the President of the United States of America in his effort to overturn the presidential election -- an election he had lost fair and square and as to which there was not then, and there is not to this day, evidence of fraud.

It is breathtaking that these arguments even were conceived, let alone entertained by the President of the United States at that perilous moment in history.

Had the Vice President of the United States obeyed the President of the United States, America would immediately have been plunged into what would have been tantamount to a revolution within a paralyzing constitutional crisis.

The former president's accountability under the law for the riot on the United States Capitol on January 6 is incidental to his responsibility and accountability for his attempt to steal the 2020 presidential election from the American People and thereby steal America's democracy from America herself. This said, willful ignorance of law and fact is neither excuse nor defense in law. Willful ignorance, thus, is neither political nor legal excuse or defense available to the former President of the United States, his allies, and his supporters.

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On January 6, 2021, revolutionaries, not patriots, assaulted America and American democracy. The walls of all three of our institutions of democracy were scaled and breached on that appalling day. And almost two years thence, one of America's two political parties cannot even agree whether that day was good or bad, right or wrong. Worse, it cannot agree over whether January 6 was needed, or not. *Needed or not*. Pause for a moment and reflect on that. The former president and his party cannot decide whether the revolt at the United States Capitol to disrupt and prevent the constitutional counting of the votes for the presidency was *needed*, and therefore whether another revolt might be *needed* at a future date to accomplish that which the previous revolt failed to accomplish.

If one of our national political parties -- one of the two political guardians of our democracy -- cannot agree even as to whether the violent riot and occupation of the United States Capitol, inspired by the President of the United States and carried out by his followers to prevent Congress from counting the votes for the presidency of those same United States, was reprehensible insurrection or needed, legitimate political discourse, we all can agree on nothing.

Nor should we.

The former president's party cynically and embarrassingly rationalizes January 6 as having been something between hallowed, legitimate public discourse and a visitors tour of the Capitol that got out of hand. January 6, of course, was neither, and the former president and his party know that. It was not legitimate public discourse by any definition. Nor was it a civics tour of the Capitol Building -- though that day proved to be an eye-opening civics lesson for all Americans.

January 6 was, rather, a defining, and a redefining, day in American history -- defining and redefining of America itself. On that day, America finally came face to face with the raging war that it had been waging against itself for years. So blood-chilling was that day for our democracy, that America could not believe her eyes and she turned them away in both fear and shame. Even so, many have already forgotten, and many more have *chosen* to forget. Some who rioted and occupied the Capitol that day had already decided how this war for our democracy must end, while others of their compatriots, upon sober reflection afterward, decided that no, no, this war must end now, before there is further bloodshed.

As did we, these latter saw how this war ends, and they realized that no one should want for such end.

For their part, the former president and many of his party remain to this day undecided as to which end of this war they will commit themselves -- undecided, that is, as to which end they *want* to commit themselves. To be undecided today as to whether to end this war over our democracy *is* to have decided how one wants this war to end.

Thus, for the rest of us Americans, the time has come for us to decide whether we *allow* this war over our democracy to be prosecuted to its catastrophic end or whether we ourselves demand the immediate suspension of this war and insist on peace instead.

We must make this decision because our political leaders are unwilling and unable, even as they recklessly prosecute this war in *our* name. We Americans begin to make this consequential decision this week, when Congress, rightly if painfully, takes us back to that day in January we want so much to forget but mustn't, and reminds us of what was at stake that day and still, in what is this most unholy of wars.

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America is at a perilous crossroads. Who is it that we have become and what is it that America has become? Is this who we want to be and what we want America to be? And if not, just who is it that we Americans want to be? And just what is it that we want our America to be?

Many will again turn their eyes away, miscalculating that this is the last time they must see, and thus remember. The partisan mercenaries, who have no interest

in either understanding or peace, will be the first who turn away and, in their determined ignorance, ignore. The mercenaries know better than we that what we forcibly put out of our minds or what we forget, we are destined to repeat.

No American ought to turn away from January 6, 2021, until all of America comes to grips with what befell our country that day, and we decide what we want for our democracy from this day, forward.

The genius that is America's democracy is this. The Constitution vests all power in "We the People." We agreed in the Constitution to delegate our power to our representatives, only during their time in our service, and at that, exclusively for the purpose of representing *our* interests in the Nation's Capital, not theirs. Our democracy is the process through which our representatives, using the power that we have delegated to them, in turn and in trust, govern us. We choose in our national elections those who we want to represent us, including most importantly the President of the United States. It is for this simple reason that to steal an election for the presidency from us is to steal our democracy from us.

America's democracy was almost stolen from us on January 6.

Our democracy has never been tested like it was on that day and it will never be tested again as it was then if we learn the lessons of that fateful day. On the other hand, if we fail to learn the lessons that are there to be learned, or worse, deny even that there are lessons there to be learned, we will consign ourselves to another January 6 in the not-too-distant future, and another after that, and another after that. While for some, that is their wish, that cannot be our wish for America.

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America can withstand attacks on her democracy from without. She is helpless to withstand them from within. The relentless assaults on America and its democracy from within, such as January 6, which designedly call into question the very legitimacy of the institutions and instrumentalities of our democracy, are simply not contemplated by the Constitution of the United States and are therefore not provided for by that Great Charter for our governance.

America is not in constitutional crisis until and unless the Constitution and the institutions and instrumentalities of our democracy are under withering, unsustainable, and unendurable attack from within. Then, and only then, is the constitutional order in hopeless constitutional disorder. Only then is America in

peril. Today, America is in constitutional crisis -- and at a foreboding crossroads with disquieting parallels to the fateful crossroads we came to over a century and a half ago.

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It is no wonder that America is at war over her democracy. Every day for years now we have borne witness to vicious partisan attacks on the bulwarks of that democracy -- our institutions of government and governance and the institutions and instrumentalities of our democracy -- by our own political leaders and fellow citizens. Every day for years now we have witnessed vicious partisan attacks on our Institutions of Law themselves, our Nation's Judiciary, and our Constitution and the Laws of the United States -- the guardians of that democracy and of our freedom. For years, we have been told by the very people we trust, and entrust, to preserve and to protect our American institutions of democracy and law that these institutions are no longer to be trusted, no longer to be believed in, no longer deserving of cherish and protection.

If that is true, then it is because those with whom we entrusted these institutions have themselves betrayed our sacred trust.

And, indeed, it does seem at the moment that we no longer agree on our democracy. Nor do we any longer seem to agree on the ideals, values, and principles upon which America was founded and that were so faithfully nurtured and protected by the generations and generations of Americans that came before us. Yet we agree on no other foundational ideals, values, and principles, either.

All of a sudden it seems that we are in violent disagreement over what has made America great in the past and over what will make her great in the future. In poetic tragedy, political campaign slogan has become divisive political truth. And there is no reason to believe that agreement about America by we Americans is anywhere on the horizon, if for no other reason than that none of us is interested in agreement. In the moral catatonic stupor America finds itself in today, it is only disagreement that we seek, and the more virulent that disagreement, the better.

This is not who we Americans are or who we want to be. Nor is this America or what we want America to be.

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Reeling from twin wars, leaderless, and rudderless, America is in need of help. Our polarized political leaders have shamefully and shamelessly failed us. They have summoned our worst demons at the very moment when we needed summoned our better angels.

As a consequence, America finds itself in desperate need of either a reawakening and quickening to the vision, truths, values, principles, beliefs, hopes, and dreams upon which the country was founded and that have made America the greatest nation in the world -- a revival of America and the American spirit.

Or, if it is to be, we are in need of a revival around a new vision, new truths, new values, new principles, new beliefs, new hopes and dreams that hopefully could once again bind our divided nation together into the more perfect union that “We the People” originally ordained and established it to be.

We cannot hobble along much longer, politically paralyzed and hopelessly divided, directionless and undecided as to which revival it will be -- if any at all.

Where do we begin? This is the easier question. Who has the patriotic and political courage to go first? This is the harder question.

As to the first question, we begin where the reconciliation of all broken human relationships, be they broken from war, anger, betrayal, or love, begins -- by talking with each other, and listening to one another again, as human beings and fellow citizens who share the same destiny and the same belief in America and hope for her future. For years now, taking the lead from our politicians, we Americans have spoken only coarse, desensitizing, dehumanizing political vile at each other, which enables us to speak to each other without guilt or regret. For too many years now, we have spoken to each other as charlatanic political gladiators in an arena that today has become annihilative of America’s future, not promising of that future.

By constitutional order, We the People of this great Nation confer upon our elected representatives the power that they are then, by solemn constitutional obligation, directed to wield *on our behalf and on America’s behalf*. But today our politicians live in a different world from the rest of us, and in a different world than that ordained by the Constitution. They live in a fictional world of divided loyalties between party and country, a world of their own unfaithful making.

Today's politicians believe that they never have to choose between partisan party politics and country, when in fact they are obliged by oath to choose between the two every day, and every day they defiantly refuse to choose. For today's politicians, never the twain shall meet between partisan ambition and country, and never the latter before the former, either. The politicians in today's America only sponsor partisan incitement and only traffic in the same, rather than sponsor bi-partisan reason and lead in thoughtful deliberation. They have purposely led us down the road not in the direction toward the bridging of our differences, but in the direction away from the bridging of those differences. They have proven themselves incapable of leading us.

But still, all it would take to turn America around is a consensus among some number of these political leaders who possess the combined necessary moral authority and who would agree to be bound together by patriotic covenant, to stand up, step forward, and acknowledge to the American People that America is in peril.

In order to end these wars that are draining the lifeblood from our country, a critical mass of our two parties' political leaders is needed, to whom the remainder would be willing to listen, at least without immediate partisan recrimination. The logic for reconciliation of these wars being waged in America today dictates that this number needs to include a critical mass of leaders from the former president's political party and that those leaders need to go first. All of these leaders then need to summon first the moral courage and then the political courage, the strength, and the patriotic will to extend their hands, and ask of the others -- and of all Americans -- "Can we talk? America needs us."

While Memorial Day is still fresh in our minds, we would all do well to remind ourselves of the immortal words spoken to the West Point cadets at the United States Military Academy a half century ago: "Duty, Honor, Country." Those three sacred words of profound American obligation were spoken on that occasion to reassure those who had given their lives for their country in the past, and who would give them in the future, that their sacrifice would not be in vain. Those words are as apt today for this occasion as they were on that day for that occasion, if not more.

Then we need to get back to work, and quickly. We need to get back to the solemn business of preserving, protecting, and defending the Constitution of the United States and the United States of America.

The hour is late. God is watching us.

Respectfully,

J. Michael Luttig

* With my respect to the Select Committee, I did not submit this statement prior to my testimony today pursuant to the Rules of the U.S. House of Representatives, so to avoid any appearance or suggestion that my testimony is that of an interested political party partisan or is on behalf of the Select Committee or any person involved with, on, or after January 6, or is that of a witness in any other way “interested” in these hearings.

I testify today only as a private citizen, and as a non-partisan, disinterested, independent former Federal Judge on the United States Court of Appeals who happens to have been a fact witness to the events surrounding January 6. The views, the thoughts, and the words herein are mine and mine alone, submitted to the Select Committee on my own behalf and no one else’s.