

## **Albany Times Union, The full extent of the law, 9/1/2024**

Roger H. Hull Sept 1, 2024

Donald Trump's upcoming sentencing in his New York trial prompts musings on the potential dangers of leniency.

Leniency is good, but not always.

Near Munich's main train station stands an old, nondescript building, in front of which there is an exhibit of a broken chair with an accompanying placard. The building, which is unmarked except for a plaque that identifies it as the Bavarian Ministry of Justice, was the scene of a historic trial.

Were Judge Juan Merchan aware of the long-ago trial, he might find it relevant as he contemplates the sentence to be imposed on Donald Trump in his New York trial for falsifying business records to illegally influence the 2016 presidential election. (Of course, the more apt historical comparison would be to Trump's effort to overturn the 2020 election, which the Supreme Court may well have legitimized in an opinion that complicates Judge Merchan's decision.)

As the placard explains, 100 years ago the building hosted the trial of Adolf Hitler following his abortive 1923 Beer Hall Putsch to overthrow the German government. The chair is meant to represent both the chair on which Hitler climbed to speak and, through its faulty construction, the failure of the judge to follow the law.

The trial, which took place early in 1924, resulted in a five-year prison sentence. For Hitler, the verdict and his subsequent release for good behavior after less than nine months were a victory, and he used them to help gain political control of Germany.

Would history have been different if Hitler had been held accountable to the full extent of the law? We will never know.

Georg Neithardt, the trial's judge, was sympathetic to Hitler and imposed a short sentence, rejecting available alternatives like expulsion from Germany and the death penalty. Instead, he sentenced Hitler to Landsberg, a protective custody prison, where Hitler used the time to dictate "Mein Kampf" to Rudolph Hess.

"Mein Kampf," of course, laid out what Hitler wanted to do, and he later followed the plan. While Trump has no written plan, the Heritage Foundation, staffed by former Trump administration appointees, does. In Project 2025, a second Trump administration would have the detailed plan it so clearly lacked in 2016.

Trump also has something more — a Supreme Court that has violated its own historic guidelines. Besides overturning decades-old precedents that expanded rights, the court recently rejected the bedrock American principle that no one is above the law.

Judge Neithardt put his thumb on the scale of justice in the 1924 Hitler trial. In 2024, six justices of the Supreme Court (three of them, as Trump proudly proclaims, his appointees) stood on that scale.

The contorted formula devised by the justices in Trump's immunity case makes it almost impossible to find a president criminally liable. Not only are official acts immune from prosecution, but actions on the outer perimeter of those acts are entitled to presumptive immunity.

Nowhere in the Constitution can one find words to support the majority's position. So much for their purported originalism and textualism.

For now, though, that is the law. The challenge for Judge Merchan is to determine not only the penalty to be imposed on the former president but also whether the Supreme Court decision, despite its questionable reasoning, requires him to exclude certain testimony on which the jury may have relied. For example, Trump's White House conversation with attorney Michael Cohen might have to be excluded, despite the fact it involved actions occurring before Trump became president.

We all want to be treated equally before the law. In New York, the penalty for a first-time offender in a similar case would be one to four years in prison. Very few people expect the former president to be sentenced to prison. Under New York law, though, a similarly remorseless defendant might well be.

We are a nation of laws. And despite the immunity ruling, no one is above them. As Judge Merchan reflects on the sentence he will impose on a 34-count felony conviction for America's would-be dictator-for-a-day, the judge might look back 100 years to when another judge ruled on a case that also had enormous consequences. Leniency can, indeed, be costly.

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