LAWFARE AND THE PRESIDENCY

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In their quest to use the criminal justice system to drive Donald Trump out of the 2024 elections, state and federal prosecutors dealt a heavy blow to American political and constitutional norms. Prosecutors crossed a constitutional Rubicon: no former President in American history had ever been charged with federal or state crimes. To make matters worse, Trump was not just a former President but also the leading candidate of the main opposition party again for that same office. Rather than allow the electorate to render its verdict on Trump in the 2024 elections, state and federal prosecutors sought to use the criminal law to drive Trump from the race.

Substituting the jury box for the ballot box boomeranged badly. If the prosecutors sought to prevent Trump from running again, their efforts had the opposite effect. The Trump trials kicked off with the FBI's search of Trump's Mar-a-Lago residence in Palm Beach, Florida, on August 8, 2022. The Justice Department executed the search to find evidence that Trump had kept highly classified documents after he had left office in violation of the Espionage Act.[1] At that time, Trump faced a stiff challenge for the nomination from Florida Governor Ron DeSantis. As late as December 2022, the Wall

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1. *In re Sealed Search Warrant* (S.D. Fla. Aug. 11, 2022) (Case No. 9:22-mj-08332-BER), https://int.nyt.com/data/documenttools/mar-a-lago-search-warrant-and-inventory/6478c5980764438f/full.pdf [https://perma.cc/X8HN-WCFS].

Street Journal poll showed DeSantis beating Trump by 52 to 38 percent.[2] Multiple prosecutions, however, focused media attention on Trump's travails for a year and produced a Republican rally-around-the-flag effect in his favor. By January 2023, Trump held a 10-point lead over his rivals, which only grew from there.[3]

At the time, polls suggested that the trials and even a guilty verdict had little negative effect on Trump's political standing. Polls taken before Trump's conviction in a Manhattan court on New York state felony counts reported that a conviction would make only seven percent of self-identified Trump voters less likely to vote for the former President. Amongst voters overall, two-thirds said a guilty verdict would have no effect on their vote, fifteen percent said they would be more likely to vote for Trump, and seventeen percent said they would be less likely.[4] In the midst of multiple prosecutions, Trump clinched the Republican nomination on March 12, 2024. He continued to lead in national polls and in six of the seven battleground states during the summer of 2024.[5] The trials may have helped him win the nomination, even though they might have cost him support from independents in the general election.

Even as the prosecutions did not bear the hoped-for benefits, they generated significant costs to the political system. The district attorneys in New York and Atlanta, Alvin Bragg and Fani Willis, lodged indictments that had such serious defects that they raised doubts

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2. John McCormick, *Ron DeSantis Holds Early Lead Over Donald Trump Among GOP Primary Voters, WSJ Poll Shows*, WALL ST. J. (Dec. 14, 2022), https://www.wsj.com/articles/ron-desantis-holds-early-lead-over-donald-trump-among-gop-primary-voters-wsj-poll-shows-11670989311 [https://perma.cc/Z9NK-5E8D].

3. https://projects.fivethirtyeight.com/polls/president-primary-r/2024/national/ [https://perma.cc/U6F3-B3R3].

4.https://maristpoll.marist.edu/wp-content/uploads/2024/05/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_202405241406.pdf [https://perma.cc/3THF-MS5Q].

5. *Latest US Swing States Voting Intention (31 July – 3 August 2024)*, REDFIELD & WILTON STRATEGIES (Aug. 6, 2024), https://redfieldandwiltonstrategies.com/latest-us-swing-states-voting-intention-31-july-3-august-2024/ [https://perma.cc/76D8-ZBMD].

about their partisan motives.[6] The U.S. Department of Justice's reputation for neutrality took a serious blow, as the special counsel Jack Smith rushed—unsuccessfully—for a trial to take place before the November election.[7] Smith's indictment presented no new facts and, worse yet, charged Trump with garden variety white-collar crimes that never applied to the January 6 attacks.[8] Attorney General Robert H. Jackson had famously warned against targeting an individual, rather than a crime, lest prosecutors abuse their powers and the public lose faith in the criminal justice system.[9] By the coming of the November election, prosecutors had given the distinct impression that they had sought to prosecute Trump to drive him from the election, rather than punish him for what critics characterized as an attempted coup.

Trump's critics undoubtedly view him as a threat to our constitutional democracy—former President Biden even labeled him "an existential threat" to democracy.[10] Yet the only long-lasting effect

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6. Indictment of Donald Trump, *People v. Trump* (N.Y. Sup. Ct. 2025) (No. 71543/2023) ("New York Indictment"), https://www.manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf [https://perma.cc/JZ37-X3HS] (Manhattan D.A. indictment); Indictment of Donald Trump, State v. Trump (Ga. Super. Ct. Aug. 14, 2023) (No. 23SC188947), https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf [https://perma.cc/J3UU-H24D] (Fulton County, Georgia, indictment).

7. Response in Opposition to Application for a Stay of the Mandate, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23A745), https://www.supremecourt.gov/DocketPDF/23/23A745/300627/20240214180323991_23A745_Trump%20v.%20United%20States_Gov.%20stay%20resp_FINAL.pdf [https://perma.cc/TY9B-DUCB].

8. Grand Jury Indictment, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. Aug. 1, 2023) (No. 1:23-cr-00257-TSC), https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf [https://perma.cc/7JAV-WSVG].

9. Robert H. Jackson, The Federal Prosecutor (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf [https://perma.cc/U3LP-C8ZE].

10. Libby Cathey, Gabriella Abdul-Hakim & Lalee Ibssa, *Biden argues Trump is an existential threat to America; Trump tries to point finger back at Biden*, ABC NEWS (Dec. 5, 2023), https://abcnews.go.com/Politics/biden-argues-trump-existential-threat-america-trump-point/story?id=105401847 [https://perma.cc/G3GB-8P75].

on the Constitution from the lawfare campaign is an unprecedented presidential immunity. The breaking of norms had become so blatant that it drew in the U.S. Supreme Court to decide, for the first time, whether a former President enjoyed immunity from federal prosecution. In *Trump v. United States*, a 6-3 majority held that Presidents could not be prosecuted for official actions taken under their core powers and that a presumption of immunity would even include actions taken under shared or non-core powers.[11] This unprecedented holding reflects the Supreme Court's disapproval of the use of prosecution for political purposes. While the ruling restrained the federal special counsel, it did not curtail the more constitutionally troubling prosecutions brought by state district attorneys, who struck an even graver blow to the Presidency by operating outside federal oversight.

The abuse of prosecutorial power became more likely as the different Trump cases weakened. I am not arguing that prosecutors may never bring charges against a former President. Indeed, if the Biden administration's rhetoric—that Trump poses an existential threat to democracy and participated in some way in an actual insurrection—were true, prosecution could have been justified. But prosecutors pressed charges that fell far short of these doomsday warnings, leading to the suspicion that the real motivation behind the cases was electoral, not criminal.

The only case to reach a verdict, the prosecution brought in Manhattan, was the weakest of the cases. Observers could be forgiven if they did not realize that District Attorney Alvin Bragg was charging Trump for failing to characterize his payments to Stephanie Clifford (the real name of pornographic actress Stormy Daniels) under a Non-Disclosure Agreement as a campaign expenditure.[12] Bragg centered the trial on the salacious aspects of the encounter

11. *Trump v. United States*, 144 S. Ct. 2312, 2344 (2024).

12. New York Indictment, *supra* note 6; *see also District Attorney Bragg Announces 34-Count Felony Indictment of Former President Donald J. Trump*, MANHATTAN DIST. ATT'Y'S OFF. (Apr. 4, 2023), https://manhattanda.org/district-attorney-bragg-announces-34-count-felony-indictment-of-former-president-donald-j-trump/ [https://perma.cc/L8SC-LXTL].

between Trump and Clifford,[13] which had almost no relevance to the actual legal charges. Prosecutors even devoted time to whether Ms. Clifford saw Trump on the bed in his underwear—not to support any legal claim, but simply to tarnish Trump's character.

Meanwhile, prosecutors left the legal charges unconstitutionally vague. Bragg sought a grand jury indictment of Trump for a $130,000 hush money payoff to porn star Stephanie Clifford. Nondisclosure deals do not violate the criminal law. To make matters worse, the DA's star witness was Trump's fixer, Michael Cohen, who was convicted of a federal felony for lying under oath.[14] Cohen's credibility was so compromised that federal prosecutors decided to drop any further investigation into the payoff years ago.

But the real failure of Bragg's prosecution rested in the law more than in the facts. Bragg had to stretch the law to shoehorn Trump's indiscretion into a felony. He claimed that Trump violated the law by trying to account for the hush money as a payment to Cohen for "legal services." Fiddling with the corporate books, however, can only support a misdemeanor charge, one that had to be brought within two years of the act. To elevate this minor infraction into a felony with significant jail time and a longer statute of limitations, Bragg claimed that Trump falsified his business records to conceal another crime. What crime? Provoking the January 6, 2021, attack on the Capitol? No. Instead, Bragg suggested that Trump violated federal campaign finance laws by concealing what was effectively a contribution to his own presidential efforts. In other words, Bragg charged Trump because he did not pay Clifford out of campaign funds. It is not even clear that Bragg could prove that the payment had anything to do with the campaign, as Trump could claim that he would have paid the hush money anyway to spare his wife and

13. Lindsay Whitehurst & Michelle L. Price, *Here is what Stormy Daniels testified happened between her and Donald Trump*, AP NEWS (May 7, 2024), https://apnews.com/article/stormy-daniels-donald-trump-trial-takeaways-f34f094124fc7ec455d6a73cbb6eec21.

14. Michael R. Sisak et al., *Star witness Michael Cohen says Trump was intimately involved in all aspects of hush money scheme*, AP NEWS (May 13, 2024), https://apnews.com/article/trump-trial-stormy-daniels-michael-cohen-hush-money-f96dd7289cf952145cdd6737b29add3d.

family humiliation (this defense won Senator John Edwards acquittal when federal prosecutors put him on trial under the same theory).[15]

Put aside the absurdity of these acrobatics and their factual shortcomings, evermore concerning is that building Trump's prosecution upon federal campaign law breached a central principle of the separation of powers. Article II places upon the President the duty to "take Care that the Laws be faithfully executed."[16] Only the President can decide whether and how federal law is to be enforced. The President and his appointed subordinates must determine not only whether a federal law has been violated, but also whether the public interest is best served by devoting resources to pursue specific defendants. Neither Congress nor the Judiciary may transfer federal law enforcement authority outside the control of the President. Indeed, the Roberts Court has struck down efforts—such as those of the Consumer Finance Protection Bureau—to shield federal officers from presidential control, reaffirming that such insulation violates constitutional separation of powers.[17]

The Supreme Court has made clear that this presidential control over prosecution bars state officials from enforcing federal law. In *Printz v. United States*,[18] Congress sought to commandeer state sheriffs into conducting background checks for firearm sales. Writing for the majority, Justice Antonin Scalia held the law unconstitutional—not only because it transgressed core principles of federalism by undermining state autonomy, but also because it violated the separation of powers by allowing state officers "to implement the program without meaningful Presidential control."[19] According to Scalia, "the power of the President would be subject to reduction,

15. Josh Gerstein, *How Edwards prosecution stumbled*, POLITICO (June 1, 2012), https://www.politico.com/story/2012/06/how-the-edwards-prosecution-stumbled-076942.

16. U.S. CONST. art. II, § 1.

17. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

18. *Printz v. United States*, 521 U.S. 898 (1997).

19. *Id.* at 922.

if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[20]

In the Trump case, Bragg interpreted and prosecuted a violation of the federal campaign laws. He acted contrary to the view of the U.S. Justice Department, which conducted its own probe and chose not to bring a prosecution. If it is not ultimately reversed on appeal, Bragg's prosecution would effectively establish that hush money payoffs constitute campaign contributions, despite contrary conclusions reached by both past Presidents and Attorneys General. The President cannot fire Bragg, even though he can remove or countermand any U.S. Attorney, for acting contrary to his or her decisions on enforcing federal law. As a result, Bragg prevents voters from holding anyone accountable for mistakes in the prosecution of federal law.

CLASSIFIED DOCUMENTS

The Biden administration would not cross its own constitutional Rubicon until June 2023, when federal prosecutors for the first time in American history charged a former President with a felony.[21] Also for the first time in our history, an executive branch held by the incumbent political party indicted the leading presidential candidate of the other main political party. The 49-page indictment contained 38 counts spanning seven criminal charges, including willful retention of national defense information, corruptly concealing documents, conspiring to obstruct justice, and making false statements to federal officials.

Biden administration officials could not explain why prosecuting Trump for the misuse of classified documents justified disregarding two centuries of constitutional practice. Presidents remain subject to the law just as anyone else. But our system has long understood that the Justice Department (which assists the President in his

20. *Id.*

21. Grand Jury Indictment, *United States v. Trump*, (S.D. Fla. June 8, 2023) (No. 23-cr-80101-AMC), https://d3i6fh83elv35t.cloudfront.net/static/2023/06/trump-indictment.pdf [https://perma.cc/C4LY-TWB2].

duty to "take Care that the Laws be faithfully executed") cannot prosecute every person for every violation of every federal law. Prosecutors must exercise discretion to choose the most important cases to bring; the critical factor is whether a prosecution serves the public interest. Even after the Civil War, the federal government did not make the Confederate President Jefferson Davis stand trial.[22]

The Founders believed that former Presidents could undergo investigation and prosecution. In *The Federalist Papers*, Alexander Hamilton argued that Presidents were subject to criminal law after their conviction in a Senate trial of impeachment for treason, bribery, or other high crimes and misdemeanors. "After having been sentenced to a perpetual ostracism from the esteem and confidence, and honours and emoluments of his country," the Founding's foremost defender of presidential power wrote, "he will still be liable to prosecution and punishment in the ordinary course of law."[23]

Even if a jury had convicted Trump, the charges against him did not rise to the level of such serious conduct that would justify breaking longstanding constitutional norms. There are good reasons for prosecuting someone who has taken classified information, such as ending the risk of disclosure or deterring future lawbreakers. But history has recognized weightier reasons for leaving former Presidents alone—the very reasons that caused the Court to recognize a broad immunity for former Presidents. We do not want the prospect of criminal investigations to distort the thinking of future Presidents and interfere with the energy in the executive so necessary for their success.

Our current political situation should raise the bar for prosecuting a former President even higher. Multiple events have increased popular distrust of law enforcement, which depends on public belief in its integrity for success. Law enforcement and national security leaders have already tried once to prevent Trump's election

22. *See generally* CYNTHIA L. NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS (2017).

23. THE FEDERALIST NO. 65, at 340 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

and cripple his presidency. In 2016, the Hillary Clinton campaign fabricated false reports of "collusion" between Trump and Russia and spread them to a sympathetic law enforcement and national security bureaucracy.[24] The "Russia Hoax" sparked a special counsel investigation that paralyzed the Trump White House for two years.[25] The Durham Report, which set out the Special Counsel's findings on whether U.S. intelligence and law-enforcement agencies acted properly in the Trump-Russia investigation, fingered political bias by high FBI officials as the culprit.[26] More stories of law enforcement bias followed. Members of Congress accused the FBI of blocking investigation into potential corruption by the Biden family.[27] The FBI apparently even worked with social media before the 2020 election to suppress the New York Post's reporting on Hunter Biden's laptop.[28]

In this context, the Trump indictment appeared to be a case of selective prosecution. The Justice Department did not prosecute either Biden or Mike Pence for keeping classified documents after their terms as Vice President. Perhaps these cases did not involve

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24. U.S. DEP'T OF JUSTICE, REPORT ON MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS (May 12, 2023), https://www.justice.gov/archives/sco-durham/media/1381211/dl [https://perma.cc/DWQ2-25FQ].

25. 1 U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (Mar. 2019), https://www.justice.gov/archives/sco/file/1373816/dl [https://perma.cc/33YG-DHF4].

26. U.S. DEP'T OF JUSTICE, REPORT ON MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS (May 12, 2023), https://www.justice.gov/archives/sco-durham/media/1381211/dl [https://perma.cc/DS2Z-CUDC].

27. *Biden Family Investigation*, U.S. HOUSE OF REPRESENTATIVES, COMM. ON GOV'T OVERSIGHT & ACCOUNTABILITY (last visited Mar. 25, 2025) https://oversight.house.gov/landing/biden-family-investigation/.

28. *Testimony Reveals FBI Employees Who Warned Social Media Companies about Hack and Leak Operation Knew Hunter Biden Laptop Wasn't Russian Disinformation*, U.S. HOUSE OF REPRESENTATIVES, COMM. ON GOV'T OVERSIGHT & ACCOUNTABILITY (July 20, 2023), https://judiciary.house.gov/media/press-releases/testimony-reveals-fbi-employees-who-warned-social-media-companies-about-hack [https://perma.cc/B4GJ-VCCU].

obstruction or false statements. Special counsel Robert Hur, however, suggested that DOJ would not prosecute Biden only because his diminished mental state would spur sympathy from a jury.[29] There seems little, however, to distinguish Hillary Clinton's case from Trump's. She installed a secret, home-brewed computer network to handle her emails—many of which contained sensitive or classified information—and then her staff destroyed thousands of those messages before allowing government investigators access.[30] Trump could not prove his innocence in the courtroom by arguing that Hillary is guilty too. But the difference in their treatment further undermined the Justice Department's credibility.

The strength of the classified documents case against Trump lay less in national security concerns than in the "process" charges. Prosecutors claimed that Trump had misled the FBI and concealed documents, with some of the most significant evidence obtained from his own attorneys—raising questions about potential violations of attorney-client privilege and the executive privilege waiver issued by President Biden. However, in July 2024, a federal judge dismissed the case on constitutional grounds, ruling that Special Counsel Jack Smith's appointment was invalid. Although Smith initially appealed, the Justice Department withdrew the appeal following Trump's re-election, citing its policy against prosecuting a sitting president. Although Trump's victory in November 2024 effectively brought the prosecution to an end, at least for the duration of his term, the case may well continue—and the issues remain alive—against President Trump's co-defendant, his valet Waltine

29. U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO UNAUTHORIZED REMOVAL, RETENTION, AND DISCLOSURE OF CLASSIFIED DOCUMENTS DISCOVERED AT LOCATIONS INCLUDING THE PENN EIDEN CENTER AND THE DELAWARE PRIVATE RESIDENCE OF PRESIDENT JOSEPH R. EIDEN, JR. (Feb. 5, 2024), https://www.washingtonpost.com/documents/84519e20-057e-4968-8dd1-e373df9e465e.pdf?itid=lk_inline_manual_3.

30. *Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System*, FED. BUREAU OF INVESTIGATION (July 5, 2016), https://www.fbi.gov/news/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system.

Nauta, who does not benefit from the Supreme Court's ruling on presidential immunity.

January 6

Jack Smith finally lodged charges serious enough to prosecute a former President in August 2023. The Special Counsel filed a grand jury indictment of Trump for crimes surrounding the January 6 attack on the Capitol.[31] Federal prosecutors charged the former president of trying to prevent the peaceful transfer of power—easily the most important federal criminal trial in the history of the Republic. Our legal system had not confronted such a serious criminal accusation since the Jefferson administration prosecuted former Vice President Aaron Burr for treason in 1807.[32] President Richard Nixon resigned rather than face removal through impeachment and President Gerald Ford pardoned him. Even the Republican victors in the Civil War declined to charge Confederate President Jefferson Davis, and the Founders did not prosecute loyalists after the Revolution.

In taking that fateful step of breaking with a tradition as old as the nation, the Justice Department should have brought a watertight case. If the United States were to use the criminal law for the first time to punish a former president for seeking to remain in power, it could not railroad the defendant—even someone as allegedly bad as Donald Trump—on circumstantial facts and extravagant legal theories. A verdict based on loose facts and flimsy law would have left many doubtful of the conviction and more distrustful of the criminal justice system, especially at a time when public trust in our institutions is already in decline.

Unfortunately, Special Counsel Jack Smith failed to deliver a sound case. This is not to defend Trump's actions on January 6. Smith's indictment made clear, if television and press reports at the time and congressional hearings in 2022 did not, that Trump attempted to change the outcome of an election that he had lost.

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31. Grand Jury Indictment, *supra* note 8.

32. *See* John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435 (1999).

Trump and his outside allies pressured state legislatures to adopt alternate slates of electors and demanded that Vice President Mike Pence use his role as presiding officer over the opening of electoral ballots to reject the votes from Arizona, Georgia, Michigan, and Pennsylvania.[33] As these ramshackle efforts failed, Trump gave a fiery speech at the White House that may or may not have inspired rioters to attack the Capitol and cause the suspension of the electoral vote count until the early hours of January 7.[34] For this, the House of Representatives impeached Trump, but the Senate properly refused to convict because he had already left office and was no longer subject to removal.[35]

But the special counsel had built a shaky case on these facts. Smith's public announcement of the indictment, which focused on the violence of the January 6 attack, gave the impression that he had uncovered links between Trump and the leaders of the riots.[36] He had not, at least judging from the four corners of the indictment. It does not claim that Trump's fiery speech on the Ellipse on January 6 incited the riot. Such political speech would most likely receive First Amendment protection under *Brandenburg v. Ohio*[37] in any event. Trump also said in his January 6 speech that "I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard," which

33. U.S. HOUSE OF REPRESENTATIVES, FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL (Dec. 22, 2022), https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf.

34. *Id.* at 586

35. 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43).

36. *Special Counsel Jack Smith Delivers Statement*, U.S. DEP'T OF JUSTICE (Aug. 1, 2023), https://www.justice.gov/sco-smith/speech/special-counsel-jack-smith-delivers-statement-0 [https://perma.cc/FPS2-PXZL].

37. 395 U.S. 444 (1969). Whether Trump's statement would fall within an exception for incitement is much debated, however. *See* Alexander Tsesis, *Incitement to Insurrection and the First Amendment*, 57 WAKE FOREST L. REV. 971 (2022); Joshua Azriel & Jeff DeWitt, *"We Fight like Hell": Applying the* Brandenburg *Test to Trump's Speech Surrounding the Siege at the U.S. Capitol*, 12 CRIM. L. PRAC. 23 (2022); Jay Sterling Silver, Thompson v. Trump*: Lost in the Funhouse of* Brandenburg, 107 IOWA L. REV. ONLINE 151 (2022); Michael Conklin, *Capitol Offense: Is Donald Trump Guilty of Inciting a Riot at the Capitol?*, 15 U. ST. THOMAS J.L. & PUB. POL'Y 483 (2022).

could undermine any claim that the speech incited the attack on the Capitol.[38]

Nor did Smith mention the two obvious criminal provisions that would address an actual plot to stop the peaceful transfer of power. He did not charge Trump with "insurrection against the authority of the United States or the laws thereof,"[39] even though Democrats and other critics have claimed that January 6 represented such an attack on the government. He did not bring forward an indictment for seditious conspiracy, which forbids planning "to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them," and further makes criminal efforts "by force to prevent, hinder, or delay the execution of any law of the United States."[40]

Instead, the special counsel charged Trump with four counts: (1) Conspiracy to Defraud the United States;[41] (2) Conspiracy to Obstruct an Official Proceeding;[42] (3) Obstruction of and Attempt to Obstruct an Official Proceeding; and (4) Conspiracy Against Rights.[43] These criminal law statutes were not designed to prevent or punish challenging or overturning election results.

Count 1 suffered from a fatal weakness due to the lack of financial fraud in Trump's January 6 conduct. Supreme Court cases beginning in 1987 with *McNally v. United States*[44] and ending with 2022's *Ciminelli*[45] and *Percoco*[46] caution against using the general federal fraud statute to prosecute political activity. They hold that "defrauding the United States" requires that the defendant fraudulently swindled money or other tangible property out of the federal

38. *What Trump Said to Supporters on Jan. 6 Before Their Capitol Riot*, WALL ST. J. (Jan. 12, 2021), https://www.wsj.com/articles/what-trump-said-to-supporters-on-jan-6-before-their-capitol-riot-11610498173.

39. 18 U.S.C. § 2383.

40. 18 U.S.C. § 2384.

41. 18 U.S.C. § 371.

42. 18 U.S.C. § 1512(k).

43. 18 U.S.C. § 241.

44. 483 U.S. 350 (1987).

45. *Ciminelli v. United States*, 143 S. Ct. 1121 (2023).

46. *Percoco v. United States*, 143 S. Ct. 1130 (2023).

government. Trump no doubt undertook his January 6 effort to suspend the electoral vote count in order to remain in power. However, those actions did not meet the requirement that fraud involve traditional property interests.

Counts 2 and 3 of the Trump January 6 indictment similarly stretched the law. In the wake of the Enron scandals, Congress amended the obstruction statute to punish witness tampering or document destruction that interferes with a congressional investigation.[47] Trump's conduct did not appear to involve tampering or destroying documents. At worst, he and his campaign aides offered alternative slates of electors, but these acts did not tamper or destroy the official electoral votes. Even if they did, the alternative electoral slates did not interfere with any congressional investigation. Congress's meeting on January 6 could never have qualified as a congressional investigation; indeed, it is not obvious that the counting of the electoral votes under the Twelfth Amendment represents an act of Congress at all.[48] In *Fischer v. United States*, the Supreme Court agreed with the outlines of this criticism by holding that the congressional obstruction statute did not apply to a defendant who had participated in the January 6 attack on the Capitol.[49]

Even if the obstruction law included political and constitutional maneuvering—however outrageous—it still would have required that the defendant acted "corruptly." The government would have had to prove that Trump believed or knew that he had lost the 2020 election and still tried to deceive others into blocking the Electoral College count anyway. It would not have mattered whether the average reasonable person in Trump's shoes would believe that he lost, nor whether Trump's advisers believed he had lost. What mattered was Trump's own state of mind. Did he actually know he lost and then proceed to pressure and deceive others to advance his corrupt scheme? Or did he reasonably rely on lawyers who told him he could influence legislators to change their states' electoral votes

47. 18 U.S.C. §1512.

48. Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count Act*, 73 CASE W. RES. L. REV. 27 (2022).

49. *Fischer v. United States*, 144 S. Ct. 2176 (2024).

or demand that Mike Pence reject questionable electoral votes? The special counsel would have had to mount circumstantial evidence that can overcome the (unfortunately) wide and consistent public record of Trump's claims of election fraud. It is not even clear that the special counsel was allowed to enforce laws that punish a President's state of mind. In two cases, the 2017 *Trump v. Hawaii*[50] travel ban case, and the 2024 *Trump v. United States*[51] presidential immunity case, the Court cautioned courts against entertaining causes of action or charges that depend on the President's state of mind.

Count 4 invoked a post-Civil War statute that was designed to punish the Ku Klux Klan and others who committed horrible violence against African Americans during Reconstruction. But President Trump used neither force nor violence to intimidate or prevent people from voting. He did nothing that affected or prevented anyone's vote because voting had already concluded on November 3. *Anderson v. United States*[52] nonetheless found that ballot box stuffing could amount to a violation of the law because it deprived all voters of the right to cast a meaningful ballot. But Smith did not allege that Trump or his allies created fictitious ballots to dilute the vote. Instead, Trump used lawyers to make arguments to persuade the state legislatures or the Vice President to use their constitutional powers to replace the popular vote—which the Constitution does in the Electoral College system itself. Trump could have claimed not only that he has a First Amendment right to assert election fraud—and the Free Speech Clause does not require that a speaker believe what he says—but also that Congress and prosecutors lacked authority to criminalize political rhetoric or strategy.

Stretching the law on fraud, obstruction of Congress, and deprivation of civil rights to January 6 was bound to require review by the Supreme Court. But the last time this special counsel had appeared before the Supreme Court, for concocting an "honest services" theory of fraud to prosecute the governor of Virginia, he lost

50. *Trump v. Hawaii,* 585 U.S. 667 (2018).

51. *Trump v. United States*, 144 S. Ct. 2312 (2024).

52. *Anderson v. United States*, 417 U.S. 211 (1974).

unanimously.[53] At such a perilous time, the situation called for utmost legal care and conservatism—not unproven legal theories and incomplete factual foundations. Just as no president had ever tried to reverse his defeat at the ballot box before, no prosecutor had ever brought charges for doing so. There was no precedent for applying the statutes on the books to the unprecedented attack on the Capitol and the effort to block the Electoral College count.

Following the 2024 election, the legal effort to prosecute Trump for his conduct surrounding January 6 came to an end. In early 2025, the federal case was formally dismissed after courts concluded that the indictment lacked sufficient legal foundation and could not overcome the constitutional protections afforded to presidential actions. Shortly thereafter, Jack Smith resigned from his position at the Department of Justice.

Concerningly—though not surprisingly—Smith's final report as Special Counsel expressed no regret, no second-guessing, and no recognition of the damage his efforts inflicted on constitutional norms. The report provides little reassurance that a future Democratic administration would not hesitate to take similar steps. Smith appears to believe he could have successfully prosecuted Trump had the Supreme Court not intervened. This is not the posture of someone who has reflected on the disastrous precedent this lawfare campaign has set. In the end, we are left with troubling questions: What will prevent this from happening again? How do we restore the norm that elections—not prosecutors or juries—determine who becomes President of the United States?

GEORGIA RICO

Unlike the discrete, narrow charges that other prosecutors brought against Trump, District Attorney Fani Willis charged Trump with running a vast conspiracy that includes almost every significant act of his campaign between Election Day and the January 6, 2021, attack on the Capitol, and beyond. Although that pros-

53. *See McDonnell v. United States*, 579 U.S. 550 (2016).

ecution ultimately collapsed, it reflects the far-reaching consequences of allowing state-level prosecutions of former presidents. In pursuit of their white whale, Democratic legal leaders risked unleashing a spiraling expansion of the criminal justice system to fight political battles. The Georgia case demonstrates that much of that damage can occur even when a prosecution collapses.

The source of the prosecution presents dangers not just to Trump, but to the Presidency. Unlike a federal prosecution, a state prosecution is not subject to presidential direction. Had the federal charges over mishandling of classified documents and the events of January 6 not been dropped after the 2024 election, Trump's return to the presidency in January 2025 would have allowed him to order their dismissal. Article II of the Constitution vests the President alone with the responsibility to "take care that the laws are faithfully executed." That Clause gives the President the authority to direct all federal law enforcement. The Office of Legal Counsel at the Justice Department has further held that DOJ cannot prosecute sitting Presidents.[54]

But as the Supreme Court first made clear in *Printz v. United States*,[55] the federal government cannot commandeer the executive officers of the States, just as the States cannot command federal officers. The independence of state law enforcement from federal control allows any state prosecutor—following the trail blazed by Willis and, before her, Manhattan district attorney Alvin Bragg—to file charges against former Presidents or even current candidates. Before 2023, our political system had followed a consensus that elected state prosecutors would not pursue former Presidents for their conduct in office. State officials declined to bring criminal charges against Bill Clinton, and even Richard Nixon rode off into the retirement sunset without state charges. Our political and legal system understood that presidents faced decisions that were difficult enough without having to worry about prosecution later.

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54. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000), https://www.justice.gov/file/146241-0/dl?inline.

55. *Printz*, 521 U.S. 898 (1997).

Since Willis brought charges against Trump for his actions while in office, future presidents will have to factor the possibility of prosecution after leaving office into their calculus. And investigators may not even wait until after a President has left office. State prosecutors could charge Presidents while the latter are still in office; nothing in the Constitution requires states to wait. This may make Presidents risk-averse, especially when partisan, elected prosecutors are the ones launching the investigations. At the very least, defending against one or more state criminal investigations will draw on the time and resources that a president could, and should, instead devote to carrying out his constitutional responsibilities and protecting national security.

While Democrats may welcome state prosecutors like Bragg and Willis who have investigated and prosecuted Trump, they should consider the whirlwind they have unleashed. Nothing prevents elected Republican district attorneys from opening investigations into Hunter Biden or even former President Joe Biden for corruption, bribery, and money laundering. All the state prosecutors would need to find is a link between the Bidens' alleged criminal enterprise, to borrow Willis' description of the Trump re-election campaign, and their jurisdictions.

State prosecutors also escape federal control because of the limits on the pardon power. Article II of the Constitution gives presidents "Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment." This means that even a sitting president, like Trump, could not pardon himself for a state crime. Presidents may be able to win some small solace by asking to remove state criminal cases to federal court,[56] but shifting to a federal forum would not halt the prosecutions entirely, nor would removal include actions Presidents allegedly took as private citizens.

The sprawling nature of the Georgia charges posed a further threat to the Presidency. While not all of the Georgia indictment's charges apply to Trump, he faced an array of serious allegations,

56. 28 U.S.C. § 1441(a)(1).

including violation of the Georgia Racketeer Influenced and Corrupt Organizations ("RICO") Act, three counts of solicitation of violation of oath by a public officer, two counts of conspiracy to commit forgery, two counts of conspiracy to make false statements and writings, two counts of making false statements and writings, conspiracy to commit impersonating a public officer, conspiracy to commit filing false documents, and filing false documents.

The Georgia RICO charge involved 161 alleged acts, 19 charged defendants, 30 unindicted co-conspirators, and spanned seven states and Washington, D.C. It was the most serious and extensive of the charges against Trump. Georgia's RICO is similar, but not the same, as the federal RICO statute, which gave the U.S. Department of Justice a powerful tool to charge, convict, and jail mafia bosses for crimes that their subordinates committed, such as murder and extortion. Ironically, Rudy Giuliani—also charged in the Georgia indictment under RICO and other crimes—wielded the federal RICO statute against the Mafia's Five Families during his service as U.S. Attorney in New York City in the 1980s. Georgia's RICO is broader than its federal counterpart; it includes a longer list of qualifying offenses. A Georgia RICO conviction is a felony, punishable by a prison term of 5 to 20 years, a fine of either $25,000 or three times the amount of money gained from the criminal activity (whichever is greater), or both a prison sentence and a fine.

The Georgia indictment's RICO charge, however, contained serious weaknesses. Some of the alleged overt acts clearly fell within activity protected by the First Amendment. For example, the first overt act alleged against Trump was his nationally televised speech on November 4, 2020, the day after the 2020 election. At that time, Trump believed he had won, no information was yet available as to whether any voting fraud in Georgia was outcome determinative, and no alternate electors plan yet existed. Several other overt acts in the indictment were merely Trump's tweets from various dates, which also constitute First Amendment protected activity, regardless of whether the information therein was true. The indictment stated that the dates of criminal activity are from November 4, 2020,

through September 15, 2022, well beyond the dates of any individual acts related to the January 6 Capitol attack.

The Georgia RICO statute prohibits "acquir[ing] or maintain[ing], directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money."[57] As with the federal fraud indictment, however, Trump did not engage in his post-election shenanigans to gain money or property. Moreover, unlike a traditional RICO case, the nineteen defendants demonstrated no interest in (a) being part of a criminal enterprise, nor (b) committing criminal acts for the purpose of keeping that enterprise going for the acquisition or control of property, money, or businesses. Instead, Trump was interested in being declared the winner of the 2020 election, which is not in and of itself illegal, and his fighting to stay in office would have ended one way or the other after January 6, 2021. In the federal RICO context, the U.S. Supreme Court has stated that the defendant must be shown to have engaged in "a series of related predicates extending over a substantial period of time"[58] or that "the predicates establish a threat of long-term racketeering activity[.]"[59] The Court also stated, and the DOJ's Criminal Resource Manual quotes, that "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct."[60] This is likely why the Georgia indictment elongates its time frame to almost two years.

It is quite possible that Trump's plan to create alternate slates of electors and the legal advice supporting it, the cornerstones of the alleged overt acts and the RICO charge, were within the bounds of reasonable legal argument. In the 1876 election drama between Rutherford B. Hayes (R) and Samuel J. Tilden (D), Tilden won the popular vote and 184 electoral votes.[61] But Republicans challenged

57. O.C.G.A. § 16-14-4(a).
58. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989).
59. *Id.*
60. *Id.*
61. See Delahunty & Yoo, *supra* note 48, at 109–16.

the election results in Florida, Louisiana, and South Carolina on the ground that Democrats had engaged in election fraud and had intimidated Black voters. Hayes eventually won with 185 electoral votes, but the Democrats had presented alternate slates of electors from Oregon, South Carolina, Florida, Louisiana, and Vermont; they knew, particularly with Oregon, South Carolina, and Vermont, that their alternate electors were uncertified. No one was criminally charged. In the Hawaii example from the 1960 presidential election, Democrats challenged Nixon's initial win, signed alternate elector certificates, and sent them to Capitol Hill.[62] No one was criminally charged, and the Trump alternate elector certificates apparently were modeled after the John F. Kennedy/Democrat false elector documents from Hawaii.

It is worth noting that after the 2016 election, the Clinton campaign and allied groups such as Unite for America recruited celebrities and others to importune electors to not cast their electoral votes for Trump; electors received death threats, harassing phone calls, and hundreds of thousands of emails. The Clinton campaign tried to request an intelligence briefing on foreign intervention in the election in order to sway electors. Under the theory of the Georgia charges, a state district attorney could start an investigation of the Clinton campaign as a criminal enterprise.

In December 2024, the Georgia Court of Appeals disqualified Willis from the Georgia election interference case against Trump, citing a significant appearance of impropriety and conflict of interest stemming from Willis' relationship with a prosecutor on the case.[63] For nearly a year thereafter, no prosecutor was willing to assume responsibility for the case. Only in November 2025 did Pete Skandalakis, the executive director of the Prosecuting Attorneys' Council of Georgia, appoint himself as prosecutor.[64] Twelve days later, he moved to dismiss the indictment, concluding that continued

62. *Id.* at 120.

63. Roman v. State, No. A24A1580 (Ga. Ct. App. Dec. 19, 2024) (disqualification ruling).

64. Order Appointing Conflict Prosecutor, State v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct. Nov. 14, 2025).

prosecution would not serve the interests of the State or the courts.[65] On November 26, 2025, Judge Scott McAfee dismissed the RICO case in its entirety.[66]

The manner in which the Georgia case unraveled is telling. After the Georgia Court of Appeals flagged a serious conflict of interest and disqualified Willis, no prosecutor was willing to revive a case that portrayed Trump's re-election campaign as an organized criminal conspiracy. The case did not simply stall—it became increasingly difficult to justify as a matter of constitutional and prosecutorial judgment. In light of the Supreme Court's decision affirming presidential immunity for official acts, any state-level prosecution of Trump must, at minimum, be suspended while he remains in office. Even if prosecutors were able to bypass the immunity doctrine, they would still face the burden of excising any evidence tied to Trump's official presidential actions, including communications with White House officials.

What remained was a theory of criminal liability that asked a jury to resolve contested questions of presidential judgment as proof of criminal guilt: that Trump did not believe he had won the election; that he did not believe the legal advice he received authorized his actions; and that his communications with state officials constituted coercion rather than political advocacy. Framed this way, the prosecution no longer resembled a conventional criminal case, but an effort to criminalize disputed exercises of presidential discretion.

A similar dynamic continues to play out in New York, where prosecutors secured 34 felony convictions against Trump in the hush money trial. Although Judge Juan Merchan sentenced Trump to an "unconditional discharge"—no jail, fines, or restrictions—just ten days before his inauguration,[67] Trump's conviction technically stands, effectively leaving the case hanging over the President

65. Motion to Dismiss and Order of Dismissal, State v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct. Nov. 26, 2025).

66. State of Georgia v. Trump, No. 23SC188947 (Fulton Cnty. Super. Ct. Nov. 26, 2025) (order granting nolle prosequi).

67. People v. Trump, No. 71543-23, Sentencing Tr. (N.Y. Sup. Ct. Jan. 10, 2025) (unconditional discharge).

throughout his term. As in Georgia, the New York prosecution relied on evidence and testimony overlapping with Trump's time in office. Yet Merchan allowed the introduction of constitutionally protected presidential acts—material the Supreme Court has placed beyond prosecutorial reach—thereby tainting the proceedings from the outset.

Even if prosecutors could somehow overcome the hurdle of presidential immunity, they would still be required to suspend any proceedings while Trump remains in office—and would further need to revisit the entire indictment, scrubbing any evidence derived from White House officials or related to Trump's official presidential acts. In November 2025, a federal appeals court revived Trump's effort to move the case to federal court—a path that could lead to dismissal. Whatever the appeals may produce, the prosecution has already accomplished little beyond leaving the case indefinitely suspended and a conviction unresolved.

The result ultimately reflects a troubling pattern: state prosecutors stretching the law to pursue the sitting President, using tools originally designed to combat organized crime, while leaving open-ended legal threats that hang over the head of the nation's chief executive. The prosecutions in Georgia and New York have become emblematic of a broader lawfare campaign—one that threatens to blur the line between political accountability and prosecutorial abuse.

CONCLUSIONS

The superficiality of the facts and the vagueness of the crimes in these Trump prosecutions magnify the harm that these partisan-elected prosecutors have inflicted on our political norms. They crossed a constitutional Rubicon. For the first time in American history, they brought criminal charges against a former President. For the first time in American history, they brought criminal charges against the major opposition candidate for President during the actual campaign, who, at the time of the charges, was ahead in the polls.

If elected leaders, whom our constitutional system vests with the authority over prosecution, must break American political practice going back to 1789, they should do so for a compelling reason and with a case where the prosecution's facts and law are airtight. Instead, they brought prosecutions where the facts presented often had little to do with the charges and where the charges were unconstitutionally vague and beyond the authority of local district attorneys. The weakness of the case against Trump sets the bar for prosecuting future Presidents lower than it is for prosecuting garden variety criminals in New York City.

The weaker the Trump cases, the more open the invitation to future prosecutors to invent new cases to bring against presidents of the opposite party. After the Trump trial, any city, county, or state prosecutor can persecute any federal officer, for the most patently partisan reasons, for conjured violations of a state's criminal law. A state district attorney in upstate New Mexico could prosecute President Barack Obama for murder for ordering a drone strike on al-Qaeda leaders that included an American from Las Cruces. A California D.A. could prosecute President George W. Bush for kidnapping a San Francisco resident captured while fighting for the Taliban. All future presidents will have to worry about their personal legal liability every time they make decisions, which often can involve the most difficult conflicts of values, costs, and benefits. The prospect of future prosecution will encourage risk-averse thinking—we will have a Presidency filled with insurance claims adjusters.

Even without any constitutional text, judicial rulings, or congressional legislation immunizing Presidents, American leaders for 235 years have refused to pursue departing Presidents. Gerald Ford, in a great act of statesmanship, pardoned Richard Nixon even though it may have doomed his chances in the close 1976 election. Bush did not prosecute Clinton for lying to the Whitewater special counsel, even though Clinton's Justice Department conceded that he would become legally liable once he left office.[68] Obama did not attempt to

68. OLC Opinion, *supra* note 54.

relitigate the difficult policy decisions in the war on terrorism by prosecuting Bush and his aides (of which I was one). Trump did not order the investigation of Hillary Clinton, even though her intentional, illegal diversion of thousands of classified emails to her home computer network led to his campaign's central slogan of "Lock Her Up." No local or state prosecutors have dared to interfere with the workings of the Presidency before 2024.

American leaders of the past understood, perhaps only implicitly, that prosecuting past Presidents would undermine the very purpose of the executive power. The Presidency exists to wield a power that exists to act in situations that legislation cannot anticipate, such as crises, emergencies, and, ultimately, war. In *Federalist 70*, Alexander Hamilton explains why the Founders chose to concentrate the federal executive power in a single President—recall that the Articles of Confederation had diluted the executive power by locating it in a Congress composed of the states. "Energy in the executive is a leading character in the definition of good government," he wrote.[69] "It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws."[70] For the President to wield this power effectively, he must have the ability to act alone with "decision, activity, secrecy, and dispatch." If others could veto or review executive action, only paralysis would follow. Constraining a single executive "might impede or frustrate the most important measures of the government, in the most critical emergencies of the state," cautioned Hamilton.

For 235 years, American political leaders heeded Hamilton's warning. They understood that the benefits of executive independence outweigh the need to enforce the criminal law against Presidents. They knew that political stability precluded the use of prosecution to settle scores with partisan rivals. They appreciated that Presidents should spend their time in office leading the American people into a better future, rather than relitigating the past. This

69. FEDERALIST NO. 70, at 362 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

70. *Id.*

was no principle enforced by the courts or mandated by legislatures; it instead found expression in the wisdom of Presidents, Attorneys General, and prosecutors.

Courts, which generally refuse to review selective prosecution claims, are unable to preclude use of the criminal justice system for political purposes. Repairing this breach of constitutional norms will require Republicans to follow the age-old political maxim: do unto others as they have done unto you. In order to prevent the case against Trump from assuming a permanent place in the American political system, Republicans will have to bring charges against Democratic officers, even Presidents. A Republican DA will have to charge Hunter Biden for fraud or corruption in taking money from foreign governments. Another Republican DA will have to investigate Joe Biden for influence-peddling at the behest of a son who received payoffs from abroad. Only retaliation can produce the deterrence necessary to enforce a political version of mutually assured destruction. Without the threat of prosecution of their own leaders, Democrats will continue to charge future Republican presidents without restraint.

Tit-for-tat retaliation will do more than shore up executive independence. While pursuing their political self-interest, Republicans will generate the greater social benefit of repairing the rule of law. The Trump trials underscore a fact not often appreciated by the public. The rule of law—in this case, the idea that like cases should be treated alike—depends today on executive leaders as much as it does on the courts. It is the executive branch of the federal government, headed by an elected President, that bears the responsibility to "Take Care that the Laws are Faithfully Executed." It is the attorneys general of the states, and the elected district attorneys of cities and counties, that hold the power of law enforcement. The executive branches of the federal and state governments decide whom to investigate and prosecute long before a judge ever sees the case.

As Robert Jackson, FDR's Attorney General and later Supreme Court Justice declared in a speech that is still considered the greatest statement of prosecutorial ethics: "The prosecutor has more control over life, liberty, and reputation than any other person in

America."[71] He or she enjoys the unchecked discretion simply to have someone investigated, which can ruin their reputation and destroy their finances. A prosecutor can present one-sided evidence to a grand jury, win an indictment, and have someone held for trial. Under the principle of prosecutorial discretion, courts will not review the prosecutor's choice of a particular suspect for investigation or whether the government should have spent its time and resources on more deserving targets.

The American system has no effective check on prosecutors other than their own sense of professional ethics and perhaps the threat of rejection by the voters. Therefore a prosecutor must choose cases "in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain," Jackson argued.[72] The last thing he should do is "pick people that he thinks he should get, rather than pick cases that need to be prosecuted."[73] The rule of law is undermined when prosecution becomes a tool for the government to use for political purposes. "It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies," Jackson declared.[74]

In bringing a series of deeply flawed cases against Trump, both federal and local prosecutors have violated Jackson's principles. They have targeted an unpopular figure first and looked for the crime second. "Show me the man, and I'll show you the crime," Stalin's secret police chief Lavrentiy Beria reportedly said. Left uncorrected, the Trump trials will only encourage prosecutors to persecute public enemies, real and imagined, rather than choosing suspects for committing the most harmful crimes. Leaders of both parties once exercised the statesmanship, or at least showed the good judgment, necessary to restrain prosecutors from charging

71. Jackson, *supra* note 9.
72. *Id.*
73. *Id.*
74. *Id.*

past Presidents. Those qualities were all too rare, if not utterly absent, in the Biden administration, which not only could have left the Trump question to the ballot box but also could have persuaded Bragg or Willis to stand down. Instead, we must rely on Republicans to threaten an escalation of banana republic politics in order to prevent a spiral into actually becoming a banana republic.