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A Silver Lining For The Trump Indictment?

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The Founders understood perfectly well just how dangerous criminal law can be. Criminal law tends to be the first tool that tyrants reach for when they seek to punish and oppress their opponents; the indiscriminate threat of prosecution can be used to cow citizens into meek compliance, so it is important to ensure that citizens who are charged with crimes enjoy an array of rights and prerogatives to help level the playing field against the potentially abusive exercise of government's most fearsome power.

And that is precisely why more than half the Bill of Rights is devoted to criminal procedure, including particularly the jury trial, which is the only right mentioned both in the body of the unamended Constitution and the Bill of Rights—and yet is practically extinct on American soil today, having been replaced by the ad hoc, extra-constitutional, and often highly coercive process that we refer to euphemistically as “plea bargaining.”

This week's indictment of Donald Trump may end up being an indictment of America's criminal justice system as well. Unlike most citizens, Donald Trump possesses the resources and the stature to exercise the full panoply of rights the Constitution guarantees in principle to all Americans, but that most criminal defendants end up “choosing” to waive by pleading guilty.

As I [wrote here recently](#), however, it is extremely unlikely that prosecutors can induce Donald Trump to waive his constitutional right to a public jury trial, both because the charges against him appear less than ironclad and because prosecutors will likely be reluctant to utilize the complete toolbox of often shockingly draconian tactics they routinely employ against less high-profile defendants to induce a guilty plea, including pretrial detention, creative charge-stacking, mandatory minimums, [savage trial penalties](#), and even [threatening to indict a defendant's family members simply to exert plea leverage](#). All these tactics have been repeatedly challenged and repeatedly upheld by our plea-driven, mass-adjudication-facilitating judiciary.

Accordingly, prosecutors in Manhattan—and perhaps in other jurisdictions as well—will have to do something with Donald Trump that they rarely have to do against other defendants, which is to prove his guilt in open court to the satisfaction of a unanimous jury. In doing so, they may find themselves reminded of something that too many Americans seem to have forgotten, which is that the historical role of juries in this country was to protect each and every one of us—from the high-born to the low, including [political dissidents](#), [activists](#), and [cultural pariahs](#)—from the abuse of government power.

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