

## Jan. 6 Committee Meets the Bar for Prosecuting Trump

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One of the many ways in which America has been lucky is that we've never had to prosecute a former president. Aaron Burr, tried for treason, was just a vice president; Richard Nixon, caught dead to rights, was pardoned by successor Gerald Ford. All our other chief executives who committed crimes got away with them.

With regard to prosecuting Donald Trump, 45th President of the United States, I've come around to a view that I held out against for a long time: that the law should take its course against him and justice be done.

Maybe I should stop right here, since many readers will be less curious about what made me come around than about what made me hold out in the first place. Given evidence of a crime, why would you *not* prosecute a former president and his henchmen? Wouldn't that place them above the law, resulting in one law for the powerful and another for the rest of us?

It's not as if I have any sympathy for Trump personally: I've written often to excoriate his character and conduct. I applauded both impeachments, and I wish they had succeeded in removing him from office. So why would I even think of letting such an odious person get away with his crimes?

*Let Justice Be Done, Though the Heavens Fall?*

Let me ease into that topic by introducing the concept of prosecutorial discretion. Every day, in my American community and yours, prosecutors decide not to bring a great many charges they could have. Sometimes they recognize that the law, the evidence or the jury appeal of a case is shaky enough that a good defense lawyer might well beat the rap. Sometimes they recognize the need to conserve judicial resources and avoid case overload rather than charge, say, every driver caught on camera making a rolling right turn at a stop sign. Sometimes, as when the reckless speeder gets mangled in a one-car crash, they may feel an offender has paid a steep enough price already or has been incapacitated from reoffending.

It can also make a difference whether a prospective defendant is contrite or a first-time offender. To me, and to many legal observers of diverse political sentiments, prosecutors' discretion not to bring charges is not some grave flaw in our system, but instead a necessary and indispensable part of it. I don't want an arrangement in which a student who brings a knife to school to cut a

birthday cake has to face a weapons-in-school charge with a mandatory sentence, formally guilty though she may be.

Now, most of these arguments for discretion do not apply to Trump in the least. He's neither a first-time wrongdoer nor penitent; his misconduct was on a vast and historic scale; he hasn't paid a huge price in other ways; and he's practically issued an engraved notice of his intent to reoffend.

Still, a couple of grounds for discretion are more relevant. In some instances, as with the fake-electors scheme, it's not clear whether courts would define the behavior at issue as illegal. In others, where the state of the law may be better settled, a good defense lawyer might successfully sow doubt about the former president's intentions or state of knowledge, and it's anyone's guess whether a jury would convict. An unsuccessful prosecution of Trump could allow him to claim vindication, embolden him to reoffend if returned to power, and mislead the public as to what presidents may legally do.

Let's also pause to note that the exercise of prosecutorial discretion is a different matter from the question of whether an actor in the system should enjoy "immunity." If someone has actual immunity, as officials sometimes do, discretion drops out of the picture. Prosecutorial discretion, which kicks in only once it's established that the law does *not* confer immunity, typically involves the weighing and trading off of prudential factors—a process that is roughly the opposite of immunity. That's important, because this weighing of prudential factors inevitably means being open to revising the balance for and against pressing charges as we learn more about the facts on the ground during the course of an investigation, whether by law enforcement agencies or other bodies, such as Congress's January 6 committee.

### *The Pitfalls of Public Office and the Value of Civic Peace*

What about the argument that prosecutorial powers need to be exercised even more rigorously against persons in high places than against the everyday offender? That's a good maxim as far as it goes, and yet, inevitably, things get more complicated.

To borrow from the famous title of Harvey Silverglate's book, a private citizen can expect to commit three felonies a day. One reason it's impossible to avoid breaking the law is that legislatures have enacted vague and open-ended criminal statutes that often do not spell out prohibited behavior or correspond to the average citizen's intuitions about what conduct is morally wrong. And here's the thing: The actions of presidents and other high officials are hedged about by hundreds of additional legal restrictions because of their office. While most of these restrictions arise under civil rather than criminal law, enough are criminal to leave prosecutors a massive docket should they go looking for one. This can be problematic. To take one example, prosecutors have sought punishment for corrupt and self-serving behavior in office by couching it as the felony of "honest services fraud" under mail and wire fraud laws. The unclarity of this standard was such that the Supreme Court has repeatedly cut back this law's scope, recognizing that a criminal law so vague and open-ended is dangerous and invites selective enforcement.

Then there's the whole overlay of often recent international law, under which a certain sector of opinion (some populist, some high-toned) believes that one or another recent American official

should be hauled off to The Hague, Geneva or some similar location for trial. Call me a traditionalist if you like, but I'm not a fan of that.

This proliferation of laws governing public officials is relevant to America's convention—and it is a convention, not an article of law—that the inauguration of a new administration not be followed by a zealous campaign to put the previous one behind bars. If there are prosecutions, as there sometimes are, they should be for offenses that are both quite serious in nature and well clear of any gray zones in the law or the evidence. I believe the danger is real of a cycle in which a new team begins seizing on even sketchy grounds to prosecute the departing administration—a process sometimes called the criminalization of policy differences. It's hard to trust people to treat their political adversaries impartially. That's not a Republican problem or a Democratic problem; that's a human nature problem.

One result could be to raise further the perceived stakes in elections, which are close enough to apocalyptic as they are. Initiating a cycle of free and full prosecution of outgoing administrations could even incentivize more coup attempts by backing current officeholders into a corner in which the only way to avoid the blunt end of the law is to stay in power. Note, by contrast, how the constitutional remedy directly crafted to deal with official misconduct—impeachment—deftly avoids many of these dangers.

This ties into a final point, among the most important: The law should abet civic peace. In fact, I'd put it more provocatively: Across a wide range of legal application, the unrealistic goal of perfect justice often needs to yield to the practical cause of civic peace. Few evils can match those of civil war, and if the law is to accomplish even its workaday goals, it must be accepted as legitimate by a broad public.

### *The Case for Prosecuting Donald Trump*

I still believe all those things. But I believe other things too, and after the Jan. 6 hearings those have added more weight on the prosecution side of my scale. First, and most straightforward, the work of the January 6 committee has helped to make clear many facts relevant to whether to prosecute. These facts include Trump's state of mind and state of knowledge regarding events at the Capitol and the efforts to derail the certification of electors, as well as the seriousness of those events. I've always accepted in principle that these might be enough to overcome a presumption against prosecution, but the committee's output moved me along to where I was willing to say, "Yes, they do."

Second, if you're going to trade off the interests of thorough justice against those of civic peace, you need to actually *get* the civic peace. Approve or disapprove of the Nixon pardon, Nixon, having resigned, soon settled into a post-presidential career of benign elder statesman, a role seemingly meant to calm the storms of his tenure and help Americans forget what a divisive figure he had been.

In retrospect, I think I underrated how divisive and destructive of civic peace it can be to see criminal behavior prosper, above all when it strikes at the process of democratic succession itself. Letting a brazenly unrepentant elected official walk free after such conduct will only embolden more and worse behavior of the same kind.

Of course, we are kidding ourselves if we think we can calculate all the repercussions of prosecuting Trump. At least two, however, should not influence any decision to prosecute. One is the prediction that prosecuting Trump and his close associates would propel him to a second term by enabling him to rally his supporters behind the narrative that *they* are the real victims—a narrative that, as political scientist and commentator Nicholas Grossman points out, members of Trump’s leadership team are certain to use anyway.

The other speculation that should not influence a decision to prosecute is that Trump-supporting mobs, militias or lone wolves might become violent if he is prosecuted. A threat is not an argument. The United States must not give in to threats—especially not of this sort.

I have also come to think that this is a moment in which America can no longer see itself as all that different from the rest of the world. We, too, are vulnerable to criminal conduct by a head of state in a form that we associate with unstable and vulnerable democracies—in this case, an attempt to stay in power despite losing the election. We cannot ignore that conduct, and we must deter it, even at the cost of new dangers.

That doesn’t mean falling into the populist practice of chanting, in an echo of the 2016 GOP conventioners, “Lock him up.” It does mean being willing to accept that there is no longer good reason for prosecutors to give Donald Trump any benefit of the doubt they would not give, say, a former state official or private citizen. After that, we should be willing to see the law run its normal course.

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