



## **A "Water Pistol Unnecessarily Preceding" a "Missile-Launching F-35 Attack": Thoughts on the New York Trump Indictment**

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Earlier this week, New York state prosecutor Alvin Bragg filed 34 state criminal law charges against Donald Trump, all arising from payoffs to his former mistress, porn star Stormy Daniels. Trump richly deserves to be prosecuted and punished for a variety of crimes. But this particular set of charges is unimpressive. Hopefully, they will soon become a relative sideshow, as Trump faces the music for at least some of his more serious wrongdoing.

There is nothing inherently wrong with charging a former president. Democracies around the world have tried and (in many cases) convicted current and former heads of government. Examples include France, Italy, Israel, and South Korea, among others. No one can seriously argue that these nations have become "banana republics" as a result.

In some cases, it is extremely important to try and punish high-ranking political leaders, as when their lawbreaking threatens basic liberal-democratic norms and institutions. Such a scenario can arise if the president tries to rig an election and stay in power after being defeated, to take a not-so-hypothetical situation. Punishing a president who participates in such a scheme is actually more important than punishing an ordinary person who tries to do the same thing, as the president's vast power and influence enable him to do much greater harm.

In most situations, however, we should not punish a prominent political leader for things that wouldn't get charged in the case of an ordinary person. If the average citizen won't get charged for jaywalking or for possessing a small amount of marijuana, neither should a former president. In a legal system with far too many petty laws, almost anyone can potentially be charged with something. We don't want to create a situation where prosecutors go on fishing expeditions to nail controversial celebrities or political adversaries.

When it comes to the New York charges, I largely agree with former Trump lawyer Ty Cobb (not to be confused with the legendary baseball Hall of Famer with the same name):

"I think the Bragg case is the water pistol unnecessarily preceding the missile-launching F-35 attack piloted by Jack Smith with [Attorney General] Merrick Garland as his wingman."

I won't go through all the potential flaws in Bragg's case. But prominent election law scholar Rick Hasen, Ian Milhiser of Vox, and former Cato Institute election law expert Andy Craig all have helpful analyses, and all have serious doubts about the soundness of the charges. Furthermore, none of them can easily be dismissed as Trump sympathizers eager to get him off the hook. Regular readers know that I'm no MAGA type myself, either.

I would add that, if New York courts decide the relevant law is ambiguous, that might still lead to a ruling in Trump's favor. Many states have abolished the rule of lenity, which requires ambiguities in criminal laws to be interpreted in the defendant's favor. New York, however, has not. In *People v. Badji* (2021), the New York Court of Appeals (the state's highest court), ruled that the rule of lenity applies "where the courts have the task of discerning the undeclared will of the legislature in an ambiguous statute," though it also went on to state that the ambiguity in question must be a "grievous" one.

I don't know if any of the issues raised by Craig, Hasen, and Millhiser rise to the level of "grievous" ambiguities. But some might. The difference between a "grievous" ambiguity and a regular ambiguity is itself often ambiguous!

It's not impossible that the prosecutor can ultimately prevail here. But his theory of the case is legally questionable and the underlying offense is pretty minor, especially compared to the genuinely awful things Trump has done. This isn't like getting Al Capone for tax evasion (a historical precedent to which Bragg's case has been compared). It's more like getting Capone for speeding a few miles over the limit in an area where the speed limit is unclear. And it's certainly reasonable to suspect these charges would not have been brought if the suspect were an ordinary Joe, as opposed to Trump.

The other likely charges against Trump are far stronger legally, and they relate to genuinely great evil on Trump's part (e.g.—attempting to stay in power despite having lost an election). The congressional January 6 Committee has recommended four potential charges related to Trump's efforts to reverse the outcome of the 2020 election and disrupt Congress' proceedings in certifying the electoral vote count (see pp. 98-118 of the Committee Report). I think at least three of these are very compelling (I have more doubts about the fourth charge of inciting, assisting, or providing aid and comfort to an insurrection). Georgia state prosecutors seem likely to file charges related to Trump's efforts to corrupt the election in that state. Those charges, too, seem likely to be strong. There is also the investigation into Trump's illegal retention of classified documents after he left the White House. The latter, like potential federal charges related to January 6, is under investigation by special counsel Jack Smith.

I hope and expect that Trump will go down for at least some of the above issues. In an ideal world, he would also deserve to serve time in prison for ordering the brutal (and illegal) family separation policy. Sadly, various unjust immunity doctrines preclude that.

At the very least, when—as seems likely—charges are brought in some or all of these other cases, the New York Stormy Daniels case will—rightly—begin to seem insignificant by comparison. Given Trump's extensive history of egregiously evil and illegal behavior, there is no need to resort to dubious legal theories about minor issues in order to give him his just deserts. Try and convict the man for his genuinely serious offenses.

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