

## The Constitutional Vanguard

# Fine, I'll Write About the Federal Trump Indictment for Trying to Steal the Election

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Yet again I find myself forced against my will to write about a Trump indictment. This time, it's the indictment charging Trump with various crimes in connection with his scheme to steal the 2020 presidential election. (Yes, with the Georgia indictment about to come out, my timing is impeccable.)

You have probably read any of several varieties of reactions to this indictment. But it's my impression that a lot of the analysis reflects the two sides talking past one another. On the conservative side, there has been some misleading legal commentary, which I will discuss below in the section for paid subscribers. But placing those arguments to one side, many conservative arguments against the indictment advance **prudential concerns**: that an indictment like this is too broad and sweeping; that it criminalizes too much standard political activity and/or First Amendment speech; and that it sets a dangerous precedent. On the left side of the aisle, commentators seem content to correct conservatives' misleading statements about the law (which is good), and to emphasize how bad Trump's actions were (which is fine as far as it goes). But the folks on the left, to me, don't seem to be genuinely engaging with the conservatives' prudential arguments.

I intend to address those prudential concerns here. I will treat them with respect, although I think ultimately those arguments fail.

A warning: this newsletter is long. I mean *long*. As noted, it's been a while since my last one, because I have spent a *lot* of time thinking about this and writing it up. If long newsletters are your thing, then man, I am telling you, this one is for you.

The newsletter will be in two parts. First, the free part of the newsletter will address the prudential questions, and why I think they lack merit. This section will necessarily include a fairly extensive discussion of many of the key bits of evidence supporting the indictment. The second part, for paid subscribers, will have a discussion of the charges and relevant legal concepts, including a discussion of the ways in which some of your favorite conservative commentators have served you poorly in advising you what evidence prosecutors have, and what they really need to prove.

But to me the most fascinating discussion is the one that addresses the prudential concerns. It is my goal to take them seriously, and address them head on in a way that I have not seen done elsewhere. Despite all of the bad arguments out there, the prudential concerns strike me as . . . not outlandish, even though I ultimately think they are wrong.

But in order to really address those arguments, I think we have to take a Giant Step Back and ask ourselves some very basic questions, to provide some important context for why this prosecution is so important. The first is: **why do we even bother to have a democracy in the first place?**

### **Why Do We Even Have a Democracy?**

**What is the point of democracy anyway?** I have a pretty simple answer: **we have democracy to avoid violence during the transfer of power.** It's a way of convincing the citizens of the country that they have a voice in who rules over them. Rule by the majority is not inherently more moral than any other sort of rule. But since we will always have winners and losers in politics and in power struggles, it helps keep the peace if the citizenry reasonably believes that, even if their side loses, they have lost according to a set of rules that applies to everyone—one that has not been undermined by people **going outside the system** to simply fix the election. Once you have lost the public's faith in elections, you have lost something incalculably important, and avoiding violence is no longer a given.

We have all heard the supposed quote from Winston Churchill that democracy is the worst form of government except for all of the others. The actual quote is a bit more supportive of the notion of popular rule:

[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, and that public opinion expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.

I think Churchill was onto something, but he failed to take the next step in the thought experiment: what happens if that “broad feeling . . . that the people should rule” is **utterly ignored**? What other option is left to the people, now that the established system has taken away their voice?

### **The remaining option is violence.**

The easiest way to visualize the importance of democracy is to imagine what it is like in countries where the people *truly* have no choice over who governs them. I'm talking about countries where, if elections are held, they are an *utter sham*. Russia provides a prime example.

**If you live in Russia, you have absolutely no say over who rules you.** The government *pretends* to give you a choice, but you actually have none.

If I lived in Russia, I would feel justified in putting a bullet in Vladimir Putin's brain. Does that statement startle you? Good. It is my goal to wake you up. It is not hyperbole and it is not an exaggeration. Killing him would be an absolutely justifiable act. When an election becomes an

impossible way to get rid of the guy in power, the only option left is force. And by force, I mean: any force necessary. Including killing the guy at the top.

In fact, I have said before that this is the sort of sentiment that motivated the people who attacked the Capitol on January 6, 2021. This is not a terribly popular opinion, but I think that **if they had been correct** in their beliefs that the election had been blatantly stolen, violence was indeed the only option. The reason that crowd's actions were indefensible is that **they were acting on the basis of a lie**. If they had been acting on a **genuinely accurate belief** that the election had really been stolen from the citizenry, they would truly have had no other choice but to storm the seat of government power. Again: when you take the option of an election away, violence is all that is left.

That's a bad, *bad* situation for a country to be in.

The next question to answer, which I think is really just rhetorical, is: **is a governmental action legitimate if it merely *pretends* to follow an established process, even if the pretense is an *obvious sham*, and everyone knows it?**

### **Is Governmental Action Legitimate Because It Pretends to Follow an Established Process, Even if the Pretense Is an Obvious Fraud?**

Here we are approaching the topic of the specific prudential arguments involved with the Trump indictment, but humor me and let's just keep the discussion general for the moment. Let's say a government pretends to follow an established process to make a decision about who will be in power. Indeed, let's say *any* group of people pretends to follow an established process to make *any* decision. Does the group's *pretense* in following an established process signify that the group's action is legitimate, even if it is **really not following the established process** and everyone knows it?

I think the answer to this is so obvious that it almost answers itself—but again, humor me. Because the thing is, as I will show you, a lot of people misapply this very simple principle. So let me hammer it home, so that we can approach the Trump discussion while operating from clearly defined and agreed-upon first principles.

The 2018 Russian presidential election was a sham. But Putin pretended to follow the established process. So is he a legitimately elected president? Hell no. If the Russians deposed him by force and strung him up from a lamppost, I would cheer.

Vladimir Putin's prosecution of Alexei Navalny on phony criminal charges is a sham. Here again, Putin pretends to be following a normal governmental process—that of the use of the criminal courts—but the world sees very clearly that it's a sham.

In case any reader is not familiar enough with these real-world examples to accept them as valid analogies, let's make up a simple (if perhaps silly) hypothetical, just to elucidate the underlying principle.

The hypo is this: you're in the Italian Mob, and there is to be a meeting of the mob boss and his top 16 capos (bosses). The mob boss tells the group they can vote on who his new Number Two

will be—the underboss or “capo bastone”—and because the boss wants everyone to feel like they are part of the decision, he will hold a vote, and let the majority decide. But before the vote, you hear the boss whisper to his consigliere: “I want Luigi as my number two, period. If they pick Antonio, I’m getting Luigi anyway. Fuck da rules.”

The group votes for Antonio, 12-5. But the boss finds some reason to count the votes differently. He says under the family’s traditional rules established for voting on the new capo bastone, if he believes there’s a genuine dispute about the results, he gets to step in and unilaterally decide. (The rules don’t actually say that, but he claims they do.) He then says, “I tink there is a genuine dispute here, because . . .” and he shrugs, looking around with an expression that says “because I said so.” One of the five who voted for Luigi says: “uh, yeah, boss, dere’s a dispute on account of we tink the votes was counted wrong, boss.” The boss says: “yeah, dat’s right. Da votes was counted wrong. Like he said. So dat’s why I gotta invoke my traditional family authority, and so Luigi’s the new capo bastone.”

The process was followed, right? A vote was held. After the vote, objections were raised, and they were ruled on by the man with the authority to rule on them. Everything is totally kosher and aboveboard here, right?

Well, no. Not remotely. Not one man in the group thinks so. The “process” was a sham. This is obvious.

**Just because you pretend to follow the process doesn’t mean you actually did.** Sometimes a “process” is just a total fraud. A sham is a sham is a sham.

### **Trump’s Claims of Fraud Were Total and Complete Horseshit—And He Damn Well Knew It**

OK, enough general discussion and hypotheticals. Let’s get into the nitty gritty of Trump’s efforts to steal the election. Before we discuss what the actual plan was, I think it’s *very, very* important, right off the bat, to establish that **Trump’s arguments about the election being stolen from him are utter, complete, and total horseshit, and he knew it.** Everything I discuss in this post depends on this.

The indictment itself actually does a great job of laying out what the main allegations of fraud were in each state, and how they were all lies. I actually think it’s worth summarizing these lies briefly, because it’s so important to how we view this entire episode. A lot of the conservatives’ prudential arguments, at their essence, reduce to “maybe Trump was right” or perhaps “maybe Trump really believed what he was saying.” And so I think it’s worth putting **right in your face** the specifics of Trump’s claims, to show how very false they were, and how clear it was that Trump knew they were false. Let’s take the specific arguments that were being made at the time, state by state. I’ll try to go through this quickly, but I think a *brief* summary, even as just a reminder of things you know or have heard before, is very much worth your time to see all in one place.

#### **Arizona**

Trump went around saying that “a substantial number of non-citizens, non-residents, and dead people had voted fraudulently in Arizona.” (At times he cited the number 36,000.) According to Rusty Bowers, the Speaker of the House of Representatives there, he asked Trump for evidence and never got any. State investigations showed the claims were false.

## Georgia

The facts of Georgia are well known, but it’s worth spending a little extra time on them because they beautifully illustrate some of Jack Smith’s evidence that Trump **knowingly lied**. Here we have more than just people telling Trump that his claims of fraud were false. We also have his admissions that certain claims he promoted were false, and direct contradictions between his public claims and things said in a recorded phone call. **In short, Trump lied, and the government looks like it can prove it.**

For example, Sidney Powell filed a bonkers lawsuit about voting machines, and the indictment says that **Trump, in speaking with his advisers about her claims, “conceded that they were unsupported and that Co-Conspirator 3 [Powell] sounded ‘crazy.’” Yet, he promoted the lawsuit in a retweet.**

This is very, *very* significant, in my view. **If the government can prove that Trump promoted claims that he privately told advisers he knew to be “unsupported” claims from a “crazy” sounding person, that’s as clear evidence of a knowing and deliberate lie as I can imagine in real life.** To the people who say the government will have trouble showing that Trump didn’t really believe what he was saying, I point to evidence like this. I ask such people: *what sort of evidence would it take to convince you that Trump knowingly lied? Do you want a video of him telling people “I know I lost but I am going to lie to the public as part of an illegal scheme to steal an election I lost?”* Such evidence does not typically exist in real life, but the allegation here is about as close as you can get.

Rudy Giuliani (“Co-Conspirator 1”—I’ll give you a complete list of the co-conspirators later) gave a presentation to Georgia lawmakers in which he made wildly false claims about “suitcases” of illegal ballots and 10,000 dead voters. One of Trump’s campaign advisors told Trump this stuff wasn’t true. That campaign advisor sarcastically wrote that “our research and campaign legal team can’t back up any of the claims made by our Elite Strike Force Legal Team” and compared the claims to “conspiracy shit beamed down from the mothership.” Numerous DOJ officials told Trump the claims were all false.

Noted scumbag John Eastman (Co-Conspirator 2) told people privately in writing that “he and the Defendant [Trump]” had been made aware that certain claims, which they had both previously affirmed to be true, were in fact not accurate . . . yet Eastman and Trump *subsequently* submitted a *new* verification from Trump reaffirming in writing the claims that they had been told were false. As a co-conspirator, Eastman’s admissions in the course of the conspiracy would be admissible against Trump, and provide **documentary evidence that Trump was knowingly affirming the truth of material he had been told was inaccurate.**

Again, going to the issue of knowing lies, we have the famous recorded Raffensperger call. In that call, Trump urged the Georgia Secretary of State to “find” 11,780 votes, which was the margin he needed to win, and insinuated that Raffensperger could be in criminal trouble if he failed to do this. In the recorded phone call, Raffensperger carefully went through the allegations and provided explanations for all alleged irregularities, but Trump shrugged off all of the explanations. The next day, Trump tweeted the **provable lie** that Raffensperger “was unwilling, or unable, to answer questions” about the election—questions that Raffensperger had not only been willing and able to answer, but *had* answered. **Here again, the fact that Trump lied shows his corrupt and dishonest state of mind.** Trump did *not* say Raffensperger had provided explanations but that they were unconvincing. Rather, Trump (who, when he tweeted, did not know the call had been recorded) told the public a provable lie: that Secretary of State Raffensperger had been “unwilling” or “unable” to answer the questions that a recorded call shows Raffensperger *did* in fact answer.

**If Trump genuinely believed he had won, why lie?** That is a question his lawyers will have to answer in the criminal trial. They will not have an easy time of it.

### **Michigan**

Trump’s allegations in Michigan revolved around his claims of “dumps” of votes. The Speaker of the Michigan House of Representatives and the Majority Leader of the Michigan Senate told him in the Oval Office that these claims were not true. Bill Barr told him they were not true. Trump repeated the claims anyway.

### **Pennsylvania**

In Pennsylvania, Giuliani went around saying “that Pennsylvania had issued 1.8 million absentee ballots and received 2.5 million in return.” This was a claim that mixed up data between the primary and general elections. DOJ officials and Trump’s campaign officials repeatedly told Trump the claim was false, but he repeated it anyway.

### **Wisconsin**

Trump’s campaign paid for a recount in Wisconsin. It showed Trump had been beaten even worse than the original totals had indicated. Trump went around repeating unsubstantiated claims “that there had been more votes than voters in Wisconsin”—claims which his own Acting Deputy Attorney General had told him were false. Trump went around repeating the claims anyway.

### **Let’s Be Real About What Trump’s Plan Was: To Steal an Election That He Knew He Had Lost**

At this point, I think we have the proper context needed to properly evaluate what Trump’s plan was. Here was the plan: **to steal an election he knew he had lost.** That is what Trump actually planned to do.

It’s not really a secret, by the way. Disgraced and soon-to-be-disbarred (and possibly indicted) lawyer John Eastman **actually wrote it all down.** (I can’t help but digress for a

moment here to note that I first learned about Eastman years ago from Hugh Hewitt's radio show. Hewitt called Eastman one of the "Smart Guys" along with (I swear I am not making this up) Erwin Chemerinsky. Well, this particular Smart Guy put his criming in writing. (As an aside, Chemerinsky likes to brag about how he will commit perjury if he is ever hauled into court for racially discriminatory hiring practices. These Smart Guys are just so Smart!)

Let's be *crystal clear* about *exactly* what Smart Guy Eastman's (and Trump's) plan was. Here is a generous quote from the relevant part of John Eastman's memo, with my bold emphasis:

So here's the scenario we propose:

1. VP Pence, presiding over the joint session (or Senate Pro Tempore Grassley, if Pence recuses himself), begins to open and count the ballots, starting with Alabama (without conceding that the procedure, specified by the Electoral Count Act, of going through the States alphabetically is required).
2. When he gets to Arizona, he announces that he has multiple slates of electors, and so is going to defer decision on that until finishing the other States. This would be the first break with the procedure set out in the Act.
3. **At the end, he announces that because of the ongoing disputes in the 7 States, there are no electors that can be deemed validly appointed in those States.** That means the total number of "electors appointed" – the language of the 12th Amendment -- is 454. This reading of the 12th Amendment has also been advanced by Harvard Law Professor Laurence Tribe (here). A "majority of the electors appointed" would therefore be 228. There are at this point 232 votes for Trump, 222 votes for Biden. Pence then gavels President Trump as re-elected.
4. **Howls, of course, from the Democrats**, who now claim, contrary to Tribe's prior position, that 270 is required. So Pence says, fine. Pursuant to the 12th Amendment, no candidate has achieved the necessary majority. That sends the matter to the House, where the "the votes shall be taken by states, the representation from each state having one vote . . . ." Republicans currently control 26 of the state delegations, the bare majority needed to win that vote. President Trump is re-elected there as well.
5. One last piece. Assuming the Electoral Count Act process is followed and, upon getting the objections to the Arizona slates, the two houses break into their separate chambers, we should not allow the Electoral Count Act constraint on debate to control. That would mean that a prior legislature was determining the rules of the present one — a constitutional no-no (as Tribe has forcefully argued). So someone – Ted Cruz, Rand Paul, etc. – should demand normal rules (which includes the filibuster). That creates a stalemate that would give the state legislatures more time to weigh in to formally support the alternate slate of electors, if they had not already done so.
6. The main thing here is that Pence should do this without asking for permission – either from a vote of the joint session or from the Court. Let the other side challenge his actions in court, where Tribe (who in 2001 conceded the President of the Senate might be in

charge of counting the votes) and others who would press a lawsuit would have their past position -- that these are non-justiciable political questions – thrown back at them, to get the lawsuit dismissed. The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.

Place to one side the “ha ha the other side made these arguments” snickering for a moment. If you’re a regular reader of mine, I assume you are familiar with my position that one should never justify doing unethical, stupid, and obviously wrong things by arguing that the “other side” once advocated (or actually did) unethical, stupid, and obviously wrong things.

Just take a look at what Eastman is advocating here.

He treats a plot to seize power despite the election results like it’s **some kind of a game** (“Howls, of course, from the Democrats”—ha ha!) which can be treated as a joke and justified with whatabout arguments. Ken White describes Eastman as looking like one of the more significant villains in American history, and I agree.

This plot is basically my mob boss example that I gave above. We had a vote. The losers manufactured a series of utterly unsupported claims, that they knew to be false, that they sometimes privately acknowledged were false, in order to create a phony “dispute.” Then they planned to use the phony dispute to have the Vice President declare that, because of the “dispute,” he would either unilaterally either throw out the disputed states’ electors (totally disenfranchising those states’ voters in the process) or throw the election into the House of Representatives, where the result was a foregone conclusion.

**This was a sham. It was *always* a sham. There was no validity to the plan. There was no *potential* validity to the plan. It was, always, a naked and illegal attempt to stay in power, by someone who had lost an election.**

I feel I need to be clear about this because I am very concerned by the argument articulated by Ted Frank (whom I admire greatly) here:

My particular concern with Ted’s tweet is this line: “If Hawley’s objection had been sustained by both houses of Congress, Trump wins and his argument isn’t fraudulent any more!”

No. No! A thousand times, no!

A fraud is not non-fraudulent because it succeeds. A fraud is a fraud. If it succeeds, its success does not make it suddenly non-fraudulent.

**If Trump had “won” this way, it would have been the end of the country.** It would mean elections no longer count for anything. That leaves only violence.

Indeed, the co-conspirators *expected violence* in response to their planned coup, and **Jeff Clark proposed to use the military to crush any opposition**. According to the indictment at paragraph 81:

The Deputy White House Counsel reiterated to Co-Conspirator 4 that there had not been outcome-determinative fraud in the election and that if the Defendant remained in office



nonetheless, there would be "riots in every major city in the United States." Co-Conspirator 4 responded, "Well, [Deputy White House Counsel], that's why there's an Insurrection Act."

**I don't see how any American can read that passage without getting angry.** Trump planned to steal an election he had lost, and if people took to the streets, Jeff Clark's plan was to send out the military.

Is this really the United States of America?

### **Contra the "Prudential" and First Amendment Arguments: This Is a Line-Drawing Exercise . . . And in Drawing Lines, It's Actually OK to Exercise Judgment Sometimes**

I think we're now ready to take on the "prudential" arguments out there. Many reasonable people, operating in good faith, argue that the prosecutors here are playing a dangerous game, because they are criminalizing First Amendment activity. Let me try to "steelman" (the opposite of "refuting a strawman") the argument, by restating it as strongly as possible, in a way that its proponents would agree is accurate.

#### **Steelmanning the Argument**

Let me start by quoting Justin Amash, whom I respect, who states his objections as follows:

The argument that "there is no limiting principle" to Jack Smith's approach is **at the bullseye of legitimate concern** about this indictment. For example, everyone agrees that Trump was allowed to take his arguments about the election to the courts. So why couldn't he also take those same arguments about the election to other branches and levels of government? Why couldn't he ask his Department of Justice to investigate the alleged fraud? If he could ask courts to take action, why couldn't he ask state legislators or state election officials to take action too?

In the legal portion below for paid subscribers, we will get into the nitty gritty of how these issues are covered by the specific statutes alleged in the indictment. For right now, I want to address matters at a more general and philosophical level. For purposes of the present argument, we will assume that the prosecutors may technically have a provable case, but address the concern that nevertheless, a prosecution like this sets a bad precedent, because it threatens to criminalize other legitimate political activity.

#### **Brief Detour: The 2014 Rick Perry Indictment for**

I have not seen anyone make this analogy yet, but I am reminded of the 2014 indictment of Rick Perry as a potential analogy to this case (albeit one that I ultimately think is different). I don't want to get sidetracked *too much* by getting into the weeds on the Perry indictment, but it nicely illustrates some of the prudential concerns at play in the Trump indictment, and so I think it's worth briefly examining the Perry prosecution as we steelman the prudential arguments about the Trump indictment.

Perry was accused of a crime for threatening to veto, and for actually vetoing, funds for a Public Integrity Unit then run by Travis County District Attorney Rosemary Lehmberg. Lehmberg had famously been arrested for DWI and had been caught on tape threatening sheriff's deputies for

arresting her, citing her position as District Attorney and her friendship with the sheriff. Perry's supporters, of which I was one, argued that it was perfectly appropriate for him to veto (or threaten to veto) funds for that office until Lehmborg resigned. Perry's critics argued that it was illegal coercion; a governor abusing his veto power to weaken prosecutors' ability to prosecute corruption.

I took apart the Perry indictment in this furious 2014 post on my blog, and you are welcome to read that post in its entirety for the blow-by-blow analysis as to why that indictment was so outrageous. Of particular concern was the notion that threatening a veto could be considered unlawful "coercion" of a public official, because everyone understands (or should) that "[c]oercion of a lawful act by a threat of lawful action is protected free expression." The Texas Court of Criminal Appeals ended up tossing the indictment for similar reasons, ruling in part that the law violated the First Amendment because its provisions encompassed too much legitimate political or governmental activity. For example, the court said, the law was "broad enough to cover (for example) a trial judge's expression of an intent to grant a mistrial or an appellate judge's expression of an intent to write a dissenting opinion."

**Isn't that Justin Amash's concern?** That if Trump can be prosecuted for, say, attempting to persuade a state elections official or a state legislator that the state's election was fraudulent, then any president could be prosecuted for any number of questionable political behaviors? If Biden signed an executive order to forgive student debt and told an aide "I know this is unconstitutional but it will win me votes" then should Biden be *criminally prosecuted*?

The problem is, folks like Amash seem to think that their job is over once they have described different scenarios, which are distinct from the conduct alleged in the Trump indictment, and ask "could prosecutors treat this different situation the same?" Just asking the question is not the same as answering it.

Take the Rick Perry indictment, for example. As we have already said, *that* indictment raised the concern that prosecutors were treating as illegal "coercion" *a threat of a lawful action to incentivize another lawful action*. But that's not what Trump did. When Trump implicitly threatened Brad Raffensperger with federal criminal prosecution for failing to change the vote count in Georgia, **Trump was threatening an unlawful action (a baseless criminal prosecution) to incentivize another desired unlawful action (the changing of a state's vote count without legitimate basis)**. The concerns at play in the Perry indictment are wholly absent here. The same goes for any attempt by Trump to persuade state legislators to submit *unlawful* slates of electors to Congress.

The fact that you can try to draw an analogy does not mean the analogy is apt. The question becomes, **where do you draw the line?**

**It's a Line-Drawing Exercise: In Making Your Prudential Argument, Don't Forget the Prudential Concerns on the Other Side**

Ah, the old phrase “where do you draw the line”? When you see that phrase, you know you’re reading a post written by a lawyer. We lawyers love drawing lines. Many other members of the citizenry hate it.

Orin Kerr has written a great article called “Line-Drawing.” (He actually has a lot of neat little articles about topics like this!) One general theme of Kerr’s article, which is one of the lessons I first learned from Thomas Sowell, is that **everything in life is a trade-off**. Another of Kerr’s themes relates to the general application of laws; namely, when passing a law, you have to think about how *everyone* is affected by the law, and not just how *the situation you’re thinking about right now* ought to appropriately be resolved. As you think about this, you will have to think about trade-offs:

Once created, legal rules typically will apply to many people over a long period. Every person is unique. But we can’t design a different law for each person. Instead, we need to come up with a general approach that will apply for many years to potentially millions of different and unknown people. The scale of law creates inevitable trade-offs.

The starting point here is simple. When you write a law, you are creating a general rule that will apply to a large number of very different people over time. This requires you to think at scale. You start with some general category of people you are trying to regulate. You then imagine a bunch of situations that group might be in when they encounter your rule. You then consider how the members of the group might respond to different legal rules you might adopt. When you are designing your rule, you need to think at scale about the impact of the rule on everyone.

Put another way, **prudential concerns matter**. The worries like those expressed by Justin Amash above are weighty. You have to be concerned, not just with how these laws would apply to Donald Trump’s efforts to steal an election, but how they might be misused in other situations.

But that does not mean that once you have conceived of a prudential concern, that is the end of the equation. **Because there are always countervailing prudential concerns!** Kerr gives as an example a debate over the proper scope of authority to be given police in making traffic stops.

[One] person feared that traffic stops would necessarily lead to police uses of violent force. This is surely an important concern. But imagine this person wants the opposite rule. Instead of allowing traffic stops at any time, this person would say stops for traffic violations should never be allowed. This greatly lessens the risk of police violence. But articulating that rule exposes its own major problem. If officers have no power to pull over those violating traffic laws, does that mean there is no way to stop dangerous driving such as those speeding excessively in residential neighborhoods or those driving drunk?

Kerr at least implies that the answer is that **the line must be drawn somewhere** between untrammelled police authority and taking away any authority to conduct traffic stops at all.

Similarly, we often hear prudential arguments to the effect that it sets a bad precedent to criminally prosecute politicians for acts taken in office, because of the incentive political opponents have to misuse that power. As Kerr says in the traffic context: “This is surely an important concern.” And it is! But imagine that you have the opposite rule: that no matter what a

politician does in office, they can't be prosecuted. This greatly lessens the risk of politically motivated prosecutions. "But articulating that rule exposes its own major problem." Namely: there may be no way to stop a politician from wantonly committing crimes, and avoiding criminal consequences simply because he holds office.

**The line must be drawn somewhere** between never prosecuting politicians and wantonly prosecuting them for any conceivable violation.

In the case of the behavior underlying the Trump indictment, we confront a similar argument: that it sets a bad precedent to prosecute a candidate for president for trying to steal an election, because it could lead to prosecuting politicians for other dishonest or distasteful political activity. "That is surely an important concern." But imagine that you have the opposite rule: that a candidate can do anything he likes to try to steal an election. "But articulating that rule exposes its own major problem." Namely: it incentivizes any and all dishonest, threatening, and otherwise corrupt bending of our elections process to achieve power, regardless of how the people actually voted.

**The line must be drawn somewhere.**

But where?

### **Drawing the Line**

In the direct context of cheating on elections, I think Smith is on the correct side of the line. As I will discuss in detail below for paid subscribers, in the section of this newsletter that examines each charge and its elements, a long line of precedent holds that stuffing a ballot box violates 18 U.S.C. section 241. This includes conspiracies by vote counters to report votes actually cast for one candidate as having been cast for a different one.

I don't see how any prudential concerns are raised by, say, prosecuting Democratic election officials for burning a box of ballots from a Republican party., I don't see how any prudential concerns are raised by prosecuting vote counters for discarding ballots, or deliberately miscounting votes. If a candidate is engaged in a conspiracy with those vote counters, and persuades them (or tries to persuade them) to burn, or discard, or deliberately miscount votes, the decision to prosecute seems straightforward.

What's the difference between these scenarios and what Trump did? If Trump was part of a conspiracy to manufacture a phony controversy in order to persuade Congress to disregard the lawfully cast votes of the American public, I don't see the prudential concern in prosecuting him for that fraudulent and corrupt conspiracy.

After I drafted this section of the newsletter, I heard Jonah Goldberg make a very similar point on a recent edition of his *The Remnant* podcast. Citing the prudential arguments made by some of his conservative friends that the indictment sets a bad precedent, Goldberg responded in this way:

The problem I have with those arguments is they tend to discount or wholly ignore the moral hazard, the bad precedent, the unintended consequences, that will come from *not* doing anything

at all about Trump. Sending the signal into the future that you can try to steal an election, through fraud . . . *that* is not a good precedent to lay down for the future.

Keep in mind that Jonah and I are still discussing only the *prudential* argument. All elements of the charges must be proved beyond a reasonable doubt. But if you can do that, and you nevertheless forego prosecution because of the concerns about the precedent it would set . . . well, now you're just setting a *different* sort of precedent: one that says this kind of behavior is OK.

I don't think that's a precedent we want to establish.

### **But What About the Argument that the Indictment is Criminalizing Speech?**

Some will argue that, in the cases I have discussed, the defendants are election workers tasked with the counting. In the Trump indictment, Trump was the one manufacturing the controversy, and trying to *persuade* the people responsible for the vote counting to reach a conclusion other than the conclusion actually reached by the voters. Does this raise a prudential concern not evident in the cases I cited? I think the answer depends on whether Trump was engaged in illegal *conduct* or merely engaged in *advocacy with no attached conduct*.

These concerns merge with the concern expressed by many that Jack Smith is going after Trump for advocacy protected by the First Amendment: efforts to “jawbone” legislators and elections officials, like politicians often do.

Let's start the discussion with a seeming “gotcha” that turns out not to be quite the gotcha you might imagine it to be at first glance.

Jack Smith seems to agree that Trump had a First Amendment right to make false statements about having won the election . . . or does he? At first it seems like he does. Early in the indictment, in paragraph 3, we see this disclaimer:

The Defendant had a right, like every American, to speak publicly about the election **and even to claim, falsely**, that there had been outcome-determinative fraud during the election and that he had won. He was also entitled to formally challenge the results of the election through lawful and appropriate means, such as by seeking recounts or audits of the popular vote in states or filing lawsuits challenging ballots and procedures

But a bit later, in paragraph 12, Jack Smith also says this:

The Defendant widely disseminated his false claims of election fraud for months, despite the fact that he knew, and in many cases had been informed directly, that they were not true. **The Defendant's knowingly false statements were integral to his criminal plans** to defeat the federal government function, obstruct the certification, and interfere with others' right to vote and have their votes counted.

It seems like a contradiction, doesn't it? I'm not so sure it is, though. Keep reading.

To a critic of the indictment, what the above quotes *facially* seem to show is that there is a considerable overlap between what Jack Smith says is constitutionally protected speech (because he knows a court would say so) and what he says is part of Trump's criminal activity.

And so, prudentially, one could argue that the more Smith bases his prosecution on speech that could be considered constitutionally protected, the greater the likelihood that an objective observer will conclude that the prosecution ought not to have been brought. But conversely, the more we can say that Trump actually did something criminal, or participated in a criminal conspiracy that goes beyond gasbaggery of the sort politicians are constitutionally entitled to emit, the greater the justification for the prosecution.

But is it accurate to conclude that any "speech" on Trump's part that looks like advocacy is protected and noncriminal?

I'm not entirely sure. Here again, some hypothetical examples might shed some light on the subject.

Back before Bernie Madoff's investment firm was revealed to be an illegal Ponzi scheme, a disinterested citizen with no connection to the fraud could *not* have been prosecuted for writing an op-ed saying "I think Bernie Madoff's company is legit." Such an opinion would be protected by the First Amendment, even though the opinion is dumb and wrong and misleads a lot of people into losing money. But if that same person is **in on the fraud**, and runs around telling investors the same things that could be legally stated in an op-ed by a neutral party, those representations could form active representations in a scheme to defraud investors.

Similarly, let's say a disinterested observer who is not part of (or even coordinating with) the Trump campaign writes an op-ed in a newspaper, which advocates the following thesis: *Trump really won the election, but Joe Biden stole it. So Trump should persuade state legislators to create alternate slates of electors that Congress can vote for on January 6, 2021.* A disinterested citizen writing or publishing such an op-ed could not be prosecuted for that op-ed in the criminal courts. It would be protected by the First Amendment. This is true even though the op-ed is certifiably insane, and advocates a course of action without any basis in law or evidence.

But if Trump or his co-conspirators go around trying to pass off fraudulent claims of election irregularities, as part of a scheme to get public officials to throw out lawfully cast votes for a federal election, some of the same "speech" could end up forming an **operative part** of the fraudulent scheme. If, for example, Trump and his cronies are engaged in a plot to create a phony slate of electors, and he goes around making the same sorts of false claims *as part of the scheme*, then all of a sudden some of that "speech" might begin to look like part of a crime.

**What we call "speech" is often part of the commission of a crime.** It's impossible to imagine fraud without "speech." After all, fraud involves misrepresentations, which means "speech"—but not the sort of "speech" that is protected by the First Amendment.

When a fraudster says "click this link and you'll win a free laptop" . . . but instead of giving you a free laptop he gives you a free data colonoscopy, rooting around in your computer and stealing your bank account information, that is speech, but not *protected* speech. It's part of a crime.

When the mob boss says “go ahead and whack Antonio” that too is speech, but it’s not *protected* speech. It’s part of a crime.

If Trump says “change the vote count, Raffensperger, or I’ll have you federally prosecuted,” or words to that effect, his threat and illegal request are speech, but they are not *protected* speech. They look like part of a crime.

Walter Olson has an excellent piece on the Trump indictment that is worth your time. I commend to you this analogy on the “speech vs. conduct” conundrum:

I’m indebted to a colleague for the following analogy: you have a constitutional right to petition the government for redress of grievances, yet you may not file a bogus claim for veteran’s benefits. In the “stolen valor” case of *United States v. Alvarez*, the Supreme Court controversially took the view that you might even have a constitutional right to lie about your war record to gain undeserved social status. Yet lying about that same war record to obtain government benefits can be made a crime without controversy. And in both instances the law might reasonably distinguish criminal from merely mistaken untruth by reference to whether you held a reasonable good-faith belief in the truth of your speech or petition.

This is very similar to my point about how saying “x” in an op-ed (where “x” could be anything from “I lost the election” to “I am a brave combat veteran”) might be protected speech, but saying “x” in a context where you are trying to get an undeserved benefit (like veterans’ benefits, or winning a presidential election) might be criminal.

Ultimately, though, you’re going to need some bad conduct to tie the speech to—or at least some kind of *contemplated* bad conduct, even if the bad conduct never occurs. (The mob boss’s order to kill Antonio might never get carried out, but if he agrees with another person to try to make it happen, and someone commits an overt act in furtherance of the murder, you have a conspiracy to commit murder even if nobody dies.)

So let’s round out the free portion of this newsletter with a summary of what the indictment says Trump *actually did*. As we do, we’ll keep in mind that speech that might initially look like mere advocacy or persuasion might, once viewed in the proper context, end up looking like a part of a criminal act.

### **So What Did Trump Actually Do?**

I hear a lot of commentators complaining that Jack Smith was not very clear about exactly what conduct he believes Trump engaged in that is criminal. I don’t think that’s entirely fair. Smith lays it out pretty clearly in paragraph 10 of the indictment, which is titled “Manner and Means.” This is so critical to the analysis that I am just going to go ahead and quote the whole thing for you. I am going to bold some of the most relevant **verbs or verb phrases** to show the **action** on Trump’s part, in the view of Smith. (As you read the passage you’ll see that the bolding is more of an art than a science.)

10. The Defendant's conspiracy to impair, obstruct, and defeat the federal government function through dishonesty, fraud, and deceit included the following manner and means:

a. The Defendant and co-conspirators **used** knowingly false claims of election fraud to **get** state legislators and election officials to subvert the legitimate election results and change electoral votes for the Defendant's opponent, Joseph R. Biden, Jr., to electoral votes for the Defendant. That is, on the pretext of baseless fraud claims, **the Defendant pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors in favor of the Defendant.**

b. The Defendant and co-conspirators **organized fraudulent slates of electors** in seven targeted states (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin), attempting to mimic the procedures that the legitimate electors were supposed to follow under the Constitution and other federal and state laws. This included **causing the fraudulent electors to meet** on the day appointed by federal law on which legitimate electors were to gather and **cast their votes; cast fraudulent votes** for the Defendant; and **sign certificates** falsely representing that they were legitimate electors. Some fraudulent electors were **tricked** into participating based on the understanding that their votes would be used only if the Defendant succeeded in outcome-determinative lawsuits within their state, which the Defendant never did. The Defendant and co-conspirators then **caused these fraudulent electors to transmit their false certificates to the Vice President** and other government officials to be counted at the certification proceeding on January 6.

c. The Defendant and co-conspirators **attempted to use the power and authority of the Justice Department to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns** that may have impacted the election outcome; **that sought to advance the Defendant's fraudulent elector plan** by using the Justice Department's authority to falsely present the fraudulent electors as a valid alternative to the legitimate electors; **and that urged, on behalf of the Justice Department, the targeted states' legislatures to convene** to create the opportunity to choose the fraudulent electors over the legitimate electors.

d. The Defendant and co-conspirators **attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results.** First, using knowingly false claims of election fraud, the Defendant and co-conspirators **attempted to convince the Vice President to use the Defendant's fraudulent electors,** reject legitimate electoral votes, or send legitimate electoral votes to state legislatures for review rather than counting them. When that failed, on the morning of January 6, the Defendant and co-conspirators **repeated knowingly false claims of election fraud to gathered supporters, falsely told them** that the Vice President had the authority to and might alter the election results, and **directed them to the Capitol to obstruct the certification proceeding and exert pressure on the Vice President** to take the fraudulent actions he had previously refused.

e. After it became public on the afternoon of January 6 that the Vice President would not fraudulently alter the election results, a large and angry crowd— including many individuals whom **the Defendant had deceived** into believing the Vice President could and might change the election results— violently attacked the Capitol and halted the proceeding. As violence



ensued, the Defendant and co-conspirators **exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification** based on those claims.

The critics of the indictment see a lot of pure protected advocacy there, and on a superficial level you can see why. We are told that Trump “pushed [state] officials” to ignore the votes of their states; “attempted to enlist the Vice President” to disregard the lawfully submitted votes of the states; “redoubl[ed] efforts to . . . convince Members of Congress to further delay the certification”; repeated false claims to gathered supporters and directed them to the Capitol “to obstruct the certification proceeding”; and the like. My goodness! Maybe we’re talking about advocacy that, while repulsive, could be protected by the First Amendment!

At least, that’s what the critics would tell you. But in full context, it’s not so clear.

First of all, there’s some **real conduct** alleged in the passage above too, and elsewhere in the indictment. Two examples stand out. First, we have the recorded call to Brad Raffensperger, discussed above, in which Trump arguably threatened Raffensperger with federal prosecution if Raffensperger did not alter the vote totals to favor Trump. This threat seems more like *conduct* than speech. The other notable example of alleged corrupt *conduct* is the scheme to create slates of false electors. We are told that Trump and his cronies “organized fraudulent slates of electors” and “caused” them to meet; “caused” them to “cast fraudulent votes” and to “sign certificates” with false representations; and “caused” them to “transmit their false certificates to the Vice President.”

Now: words like “caused” and “organized” are, on their own, rather empty vessels to be filled with particular meaning by the evidence. Smith does not really give the reader chapter and verse about what he can present at trial on this issue. But depending on what Smith can show, the allegations here seem to go well beyond the sort of “advocacy” that someone might engage in when writing or publishing an op-ed, or the “jawboning” that politicians routinely engage in.

And once you have clear examples of illegal conduct, what might otherwise look like mere speech can take on a different character. It’s all about the context.

## **Conclusion**

In short, the argument I have made here goes as follows: Donald Trump tried to steal a presidential election, a horrific action that would have destroyed the country if it had succeeded. While there are prudential arguments against prosecuting such activity, there are also prudential arguments against establishing a policy of *never* prosecuting such activity. Rather than throwing up our hands and being paralyzed with indecision, we should draw a line, and decide whether this case falls on the prosecutable part of the line. I conclude that it does.

Assuming Smith has the evidence to prove the elements of the charged crimes beyond a reasonable doubt, Trump engaged in a lot more than just protected advocacy. In addition to threatening at least one state official with prosecution if that official did not alter the vote count in Trump’s favor, Trump allegedly tried (and I believe did try) to engineer a scheme where his

co-conspirators would present fake documentation to Congress as a pretext for them and/or Vice President Pence to ignore the will of the people and install Trump through a sham.

If you have a provable case, prudence requires that you bring this case, so that nothing like this ever happens again.

*Is it a provable case?* To explore that, we must now look at the charges.