



Do the Legal Arguments Against Trump's Jan. 6 Indictment Hold Water?

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Does this prosecution seek to criminalize speech and advocacy?

Nothing in the charges filed Wednesday seeks to punish the former president for speech or advocacy as such. While the indictment does recite many things Trump said and calls them false, it identifies each such statement as being part of an overall course of conduct satisfying the elements of a crime under one of four federal statutes: conspiracy to defraud the United States, 18 U.S.C. section 371; conspiracy to obstruct an official proceeding, 18 U.S.C. section 1512(k); obstruction of and attempt to obstruct an official proceeding, 18 U.S.C. section 1512(c); and conspiracy to deprive persons of protected rights, 18 U.S.C. section 241.

It is long established and ordinarily uncontroversial that speech can lose the protection of the First Amendment if, for example, it seeks to intimidate a public official into shirking a legal duty, or if it consists of the submission of forged documents to a government agency, or if it solicits or facilitates crime generally (this past term's Supreme Court decision in United States v. Hansen, criticized by my colleague Thomas Berry on a different issue, reiterated that last simple truism). Speech that is part of a conspiracy to accomplish those things may be unprotected as well.

One popular commentator published a full column decrying the new prosecution as an assault on speech but never got around to naming the four statutes Trump is actually charged with violating, instead making it sound as if the charges were somehow based on the speech as such.

But I keep hearing this case could be a step toward making 'disinformation,' specifically untruthful denial of election results, a crime. Isn't that dangerous?

Yes, it would be highly dangerous were it true. I've written at length about why a general ban on the telling of falsehoods about elections would violate the First Amendment, and why even relatively small steps in that direction "can curtail legitimate speech and give the government power it's likely to misuse."

Fortunately, this indictment doesn't do that. One reason there's a lot of dust in the air is that two seemingly opposite factions unite in promoting the notion that convicting Trump would penalize

“disinformation”—Trump advocates, who aim to ring civil liberties alarm bells, and also various commentators on the left who would like to push the law into criminalizing more election denial than it does now. [This piece](#) by *The New York Times*’ Thomas Edsall generously conveys the views of left-leaning commentators who want to crack down on some currently lawful election speech, while also quoting some other voices on the left who (to their credit, in my view) resist that idea.

What matters in this case is not what outside experts might wish, but whether special counsel [Jack Smith](#) and his colleagues are in fact asking the courts to alter First Amendment law to make it less friendly toward election-related speech. Across the [45-page indictment](#), it’s hard for me to see where they argue for any such alteration. They appear to believe Trump can be squarely convicted on the current state of First Amendment law.

The right-to-vote charge is based on an 1870 law enacted in response to the outrages committed by groups like the Ku Klux Klan. But there is no claim of racial intimidation here, is there?

The conspiracy against rights provision, which you can [read here](#), never mentions race and by its terms forbids conspiracy to prevent “any person” from exercising civil rights such as the right to vote. Courts have long ruled that conspiracies to overturn legitimate election outcomes by fraud can violate section 241 by impairing the rights of persons who voted for the side that the conspiracy aims at defeating. Check out, for example, the 1984 case of *United States v. Olinger*, in which a Seventh Circuit panel found that a vote-stealing scheme by Chicago Democrats violated the 1870 civil rights law. Race was not an issue in the case.

So the legal side of the new Trump case, as distinct from the proving of disputed facts to a jury’s satisfaction, is clear sailing for the prosecutors, then?

No, it isn’t. As I suggested in a [recent post](#) at *Cato at Liberty*, Trump is likely to have at his disposal nonfrivolous arguments that if successful might narrow if not quash the charges. For example, he could contest whether the electoral vote count before Congress is a “proceeding” covered by section 1512, or challenge whether the prosecutors have sufficiently proved the elements of coordination toward a common purpose needed to prove each alleged conspiracy, or obtain favorable rulings on whether and how the actions of the pretend electors were illegal. This is not a slam-dunk case.

What about the *Kelly* case, in which the Supreme Court threw out the conviction of New Jersey officials for closing a bridge exit for improper motives, or the *McDonnell* case, in which the Supreme Court threw out a Virginia governor’s ‘honest services’ conviction? Don’t those help Trump?

Not in the way he might like. Both cases were unanimous at the high court.

The [Kelly case](#) confirmed that the federal wire fraud law does not reach misconduct by state officials that does not involve money or property, and stands as part of a series of cases declining to interpret a variety of federal fraud statutes to reach deprivation of “honest services” at the state government level. But [18 U.S.C. 371](#), which bans conspiracy to defraud the federal government,

is worded quite differently from the federal laws overseeing private and state-level misconduct and has accordingly been interpreted by courts quite differently. To begin with, its terms are sweeping, banning conspiracy “to defraud the United States, or any agency thereof in any manner or for any purpose.” And unlike garden-variety federal fraud statutes, it lacks language referring to property gain or enrichment. Courts have accordingly long interpreted it to reach much conspiracy that is aimed at securing improper government action by deceit whether or not it is meant to accomplish a transfer of money or property. The most that can be said is that some legal thinkers would like the Supreme Court to read an implicit property requirement into the 371 statute as well. Doing so would require the court to overturn a long list of old precedents.

In the *McDonnell* case, the court took a narrow view of what “official act” means for state-level bribery purposes. It is not clear that this issue will be important in the Trump prosecution.

I’ve heard that many key issues in the case depend on whether Trump held certain beliefs in good faith. How could your right to speak or advocate for your own interests ever depend on whether you are doing so in good faith?

Legal outcomes regularly hinge on good faith belief versus deceit—whether you genuinely believed a bicycle you rode off with was yours, for instance. Judges and juries regularly determine this question.

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.

There are dangers in prosecuting ex-presidents, though, aren’t there?

Yes, there undoubtedly are. One year ago, I published a piece in *The UnPopulist* outlining my concerns about these dangers and explained why I had concluded that in some circumstances the dangers of not prosecuting genuine and serious crime by the nation’s chief executive can be even greater.

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