

### **Editorial: The Prosecution of Trump May Have Terrible Consequences**

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It may be satisfying now to see the special counsel Jack Smith indict Donald Trump for his reprehensible and possibly criminal actions in connection with the 2020 presidential election. But the prosecution, which might be justified, reflects a tragic choice that will compound the harms to the nation from Mr. Trump's many transgressions.

Mr. Smith's indictment outlines a factually compelling but far from legally airtight case against Mr. Trump. The case involves novel applications of three criminal laws and raises tricky issues of Mr. Trump's intent, his freedom of speech and the contours of presidential power. If the prosecution fails (especially if the trial concludes after a general election that Mr. Trump loses), it will be a historic disaster.

But even if the prosecution succeeds in convicting Mr. Trump, before or after the election, the costs to the legal and political systems will be large.

There is no getting around the fact that the indictment comes from the Biden administration when Mr. Trump holds a formidable lead in the polls to secure the Republican Party nomination and is running neck and neck with Mr. Biden, the Democratic Party's probable nominee.

This deeply unfortunate timing looks political and has potent political implications even if it is not driven by partisan motivations. And it is the Biden administration's responsibility, as its Justice Department reportedly delayed the investigation of Mr. Trump for a year and then rushed to indict him well into G.O.P. primary season. The unseemliness of the prosecution will most likely grow if the Biden campaign or its proxies use it as a weapon against Mr. Trump if he is nominated.

This is all happening against the backdrop of perceived unfairness in the Justice Department's earlier investigation, originating in the Obama administration, of Mr. Trump's connections to Russia in the 2016 general election. Anti-Trump texts by the lead F.B.I. investigator, a former F.B.I. director who put Mr. Trump in a bad light through improper disclosure of F.B.I. documents and information, transgressions by F.B.I. and Justice Department officials in securing permission to surveil a Trump associate and more were condemned by the Justice Department's inspector general even as he found no direct evidence of political bias in the investigation. The discredited Steele dossier, which played a consequential role in the Russia investigation and especially its public narrative, grew out of opposition research by the Democratic National Committee and the Hillary Clinton campaign.

And then there is the perceived unfairness in the department's treatment of Mr. Biden's son Hunter, in which the department has once again violated the cardinal principle of avoiding any appearance of untoward behavior in a politically sensitive investigation. Credible whistle-blowers have alleged wrongdoing and bias in the investigation, though the Trump-appointed prosecutor denies it. And the department's plea arrangement with Hunter Biden came apart, in ways that fanned suspicions of a sweetheart deal, in response to a few simple questions by a federal judge.

These are not whataboutism points. They are the context in which a very large part of the country will fairly judge the legitimacy of the Justice Department's election fraud prosecution of Mr. Trump. They are the circumstances that for very many will inform whether his prosecution is seen as politically biased. This is all before the Trump forces exaggerate and inflame the context and circumstances and thus amplify their impact.

These are some of the reasons the Justice Department, however pure its motivations, will probably emerge from this prosecution viewed as an irretrievably politicized institution by a large chunk of the country. The department has been on a downward spiral because of its serial mistakes in high-profile contexts, accompanied by sharp political attacks from Mr. Trump and others on the right. Its predicament will now very likely grow much worse because the consequences of its election-fraud prosecution are so large, the taint of its past actions is so great and the potential outcome for Mr. Biden is too favorable.

The prosecution may well have terrible consequences beyond the department for our politics and the rule of law. It will probably inspire ever more aggressive tit-for-tat investigations of presidential actions in office by future Congresses and by administrations of the opposing party, to the detriment of sound government.

It may also exacerbate the criminalization of politics. The indictment alleges that Mr. Trump lied and manipulated people and institutions in trying to shape law and politics in his favor. Exaggeration and truth shading in the facilitation of self-serving legal arguments or attacks on political opponents have always been commonplace in Washington. These practices will probably be disputed in the language of, and amid demands for, special counsels, indictments and grand juries.

Many of these consequences of the prosecution might have occurred in any event because of our divided politics, Mr. Trump's provocations, the dubious prosecution of him in New York State and Mr. Smith's earlier indictment in

the classified documents case. Yet the greatest danger comes from actions by the federal government headed by Mr. Trump's political opponent.

The documents case is far less controversial and far less related to high politics. In contrast to the election fraud case, it concerns actions by Mr. Trump after he left office, it presents no First Amendment issue, and it involves statutes often applied to the mishandling of sensitive government documents.

Mr. Smith had the option to delay indictment until after the election. In going forward now, he most likely believed that the importance of protecting democratic institutions and vindicating the rule of law in the face of Mr. Trump's brazen attacks on both outweighed any downsides. Or perhaps he believed the downsides were irrelevant — "Let justice be done, though the heavens fall."

These are entirely legitimate considerations. But whatever Mr. Smith's calculation, his decision will be seen as a mistake if, as is quite possible, American democracy and the rule of law are, on balance, degraded as a result.

Watergate deluded us into thinking that independent counsels of various stripes could vindicate the rule of law and bring national closure in response to abuses by senior officials in office. Every relevant experience since then — from the discredited independent counsel era (1978-99) through the controversial and unsatisfactory Mueller investigation — proves otherwise. And national dissensus is more corrosive today than in the 1990s and worse even than when Mr. Mueller was at work.

Regrettably, in February 2021, the Senate passed up a chance to convict Mr. Trump and bar him from future office, after the House of Representatives rightly impeached him for his election shenanigans. Had that occurred, Attorney General Merrick Garland may well have decided not to appoint a special counsel for this difficult case.

But here we are. None of these considerations absolve Mr. Trump, who is ultimately responsible for this mammoth mess. The difficult question is whether redressing his shameful acts through criminal law is worth the enormous costs to the country. The bitter pill is that the nation must absorb these costs to figure out the answer to that question.

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**Problem 1.** Respond to the following questions.

- (a) In a word, phrase, or sentence, state the author's thesis. Identify one or more passages in the text which lead you to identify this thesis.
- (b) Find two or more subclaims in the article. Identify any supporting evidence.
- (c) Think about counterarguments. What would someone who disagreed with the authors' thesis give as their thesis? What might be their supporting evidence?