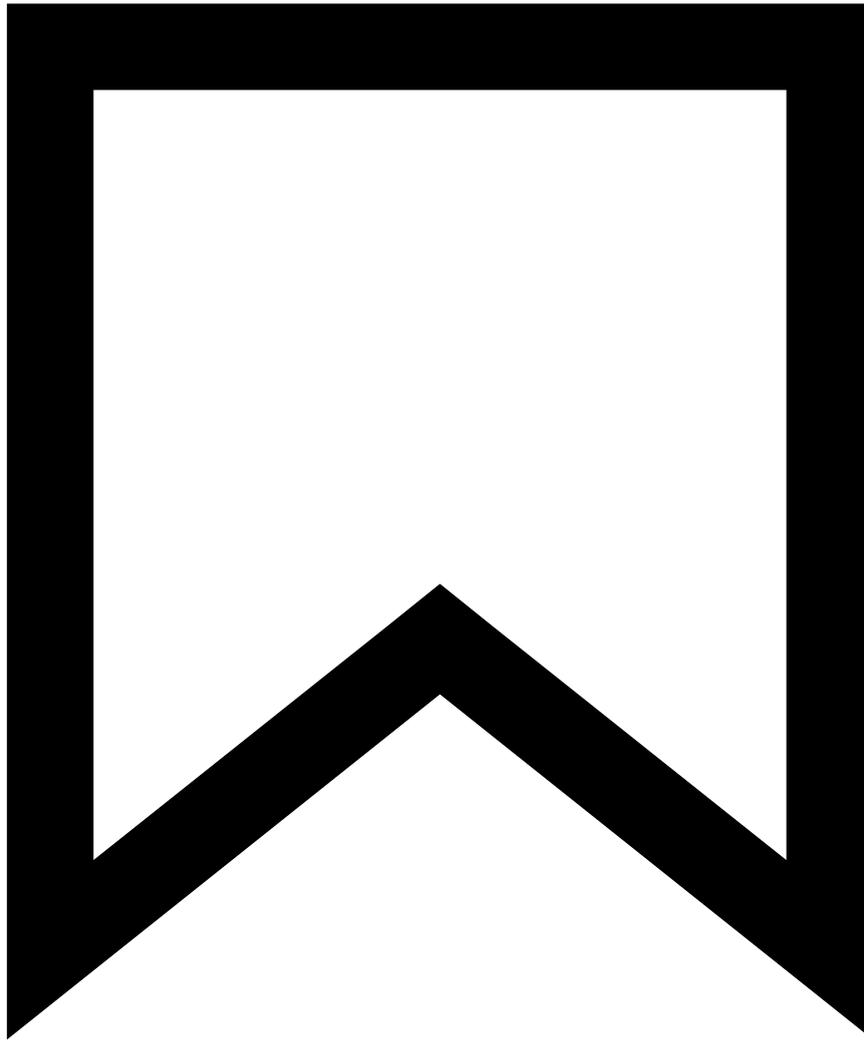


Opinion The Trump indictment tramples no one's First Amendment rights

[Ruth Marcus](#)

President Donald Trump arrives onstage to speak to supporters near the White House on Jan. 6, 2021. (Brendan Smialowski/AFP/Getty Images)



Save

[Accused of conspiring](#) to subvert the Constitution, Donald Trump now wants to wrap himself in it. He plans to fight the [criminal charges](#) in the Jan. 6 case by claiming that the prosecution would violate his constitutionally protected right to freedom of speech.

This is rich coming from the man who wants to [“loosen” the libel laws](#) to make it easier to go after news organizations that criticize him. No matter; the [First Amendment](#) exists to protect the rights of all, even those whose views are the most repulsive.

But don't buy the former president's arguments that prosecuting him on these charges represents a threat to freedom of speech. You're already hearing a lot of this. A new lawyer, John Lauro, [was on CNN](#) in the hours after the indictment, previewing the claim that “we've now entered a constitutional abyss as a result of this indictment.”

“Our focus is on the fact that this is an attack on free speech and political advocacy,” he told host Kaitlan Collins. “What we have now is an administration that has criminalized the free speech and advocacy of a prior administration during the time that there is a political election going on. That's unprecedented.”

Trump “had every right to advocate for his position while he was president. He saw irregularities, he saw deficiencies in the voting process, he raised those,” Lauro said. “He had every right, in fact a responsibility, as a United States president, to raise those issues and now his advocacy is being criminalized.”

The prosecution agrees, to a point. As the [indictment makes](#)

[clear](#), Trump “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.”

But Trump is not being prosecuted for his repeated lies about a stolen election. He is being prosecuted for the *efforts* he made, the *actions* he took to operationalize that contention and prevent the clear will of the voters from being realized, or what the indictment calls “unlawful means of discounting legitimate votes and subverting the election results.”

Just because words are involved in the commission of these alleged crimes does not mean that prosecuting Trump violates his First Amendment rights. The protections of the First Amendment are strong and capacious, but they are not unlimited.

Corporate executives accused of defrauding investors by making false statements engage in speech, but that does not immunize them. Same for those who engage in insider trading or a conspiracy to fix prices.

Or, to bring things closer to home, if Trump at a rally encouraged his supporters to beat up a protester, that would not prevent him from being sued or even criminally charged. If he were to falsely accuse a political opponent of being a

child molester, the libel laws that he wants to weaken would not shield him from legal recourse. (Here, I am borrowing examples from U.S. District Judge Amit Mehta, [ruling in a civil case](#) that Trump could be sued for inciting the Capitol rioters.)

“The heart of our jurisprudence with respect to the First Amendment is the difference between regulating speech and regulating conduct,” Rep. Jamie B. Raskin (D-Md.), once a constitutional law professor, told me. “Everything charged in the indictment involves criminal conduct by Donald Trump and not the mere expression of political views. If Donald Trump wanted to say that the joint session organizing the peaceful transfer of power was a fraud and a charade, he had every right to say that. But he had no right to actually obstruct the proceeding.”

Thus, [the indictment](#) doesn't accuse Trump of breaking the law by claiming the election was stolen. It asserts, instead, that Trump, “on the pretext of baseless fraud claims,” pushed state officials to ignore the popular vote; that he organized “fraudulent slates of electors,” including some who were “tricked into participating,” and that and his co-conspirators “used knowingly false claims of election fraud” to pressure the vice president to refuse to certify the election results.

All this implicates the adjacent issue of Trump's intent. That

is, if, in the face of the mountainous evidence to the contrary, Trump truly believed the election had been stolen from him, does that mean he did not have the requisite intent to obstruct? Here, Raskin offers a useful analogy.

"If you honestly and sincerely believe that the U.S. currency system is unlawful, then you have a right to go around and tell everybody they have a right to print their own money," he observed. "But the moment you start printing your own money and putting it into traffic you are engaged in counterfeiting."

Lauro argued that Trump, in pursuing the fake electors scheme, was simply relying on the advice of an as-yet-unindicted co-conspirator, John Eastman, whom Lauro described as "one of the most respected constitutional scholars in the United States." But the reliance on counsel defense has its limits. Raskin, again: "If John Eastman tells you that you have a right to rob a bank because he has questions about the currency system, that is not a defense to having robbed a bank."

If anything, special counsel Jack Smith appears to have tried to *avoid* First Amendment complications in deciding what charges to bring. Of the [charges referred to the Justice Department](#) by the Jan. 6 select committee, one that is not contained in this week's indictment involves aiding and abetting the insurrection and giving aid and comfort to

insurrectionists — the charge that edges most closely into the province of speech.

It was wise of Smith to avoid getting embroiled in what would have been a much harder quest: proving that Trump's speech strayed so far outside the boundaries of acceptable discourse that it amounted to incitement. He cried fire on a crowded Ellipse, for sure, but it is dicey to try to make that into a criminal case.

These are not easy charges to bring or to prove. Of necessity, they lack the clarity and focus of, say, [the Mar-a-Lago indictment](#). But they capture the singular horror of what Trump sought to achieve — preventing the peaceful transfer of power. And they manage to do so without, Trump's claims to the contrary, trampling on his constitutional rights.

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