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Amend the Constitution to Prevent Political Prosecutions

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None of the cases against Donald J. Trump would have been brought against anyone else. Each case relies on rarely used statutes, novel legal theories, or both. Moreover, cases have been brought against Mr. Trump for his alleged actions, while others who have taken similar actions have been left unprosecuted. Any clear-eyed observer realizes that no case would have been brought against Mr. Trump except for political reasons. In fact, Alvin Bragg Jr., the Manhattan District Attorney, pledged to bring charges against Mr. Trump—something, anything—before even taking office. It would be difficult to find a more obvious instance of prosecutorial targeting for political purposes in American history than we are now witnessing.

Unfortunately, the law of prosecutorial discretion allows for this political targeting. As the Supreme Court has held, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

In other words, under current law, the decision of whether to charge a person—regardless of how rarely used the charging statute is or how novel the legal theory is—rests entirely with the prosecutor so long as the prosecutor has probable cause that a statute was technically violated.

As we see now, this immense level of discretion can be easily abused by prosecutors who are dead set about prosecuting a particular individual for political purposes. For instance, such prosecutors have determined that they must hold Mr. Trump accountable for retaining classified documents in his possession after leaving office while simultaneously excusing other former officeholders for similarly retaining classified documents. In New York, AG Letitia James has brought a complaint calling for the “corporate death penalty” of Mr. Trump’s businesses for an alleged “crime” that is really an ordinary business practice. In so doing, AG James fulfilled the promise she made before even taking office that she would “look at his [Trump’s] business transactions and his holdings here in the state of New York.”

This sets a hazardous precedent. **The American legal system is in danger of degenerating into a system of political retribution, with the party in power targeting its opponents with prosecutions while ignoring similar violations by its allies under the cover of prosecutorial discretion.** This must not be allowed to happen.



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The most wrongly prosecuted man in American history, Donald J. Trump, has an opportunity to save America from this fate. He should propose a constitutional amendment that would defuse such political prosecutions to prevent America from entering an endless cycle of legal retribution. The proposed amendment could read as follows:

“It is a defense against any civil or criminal proceeding that the defendant would not be subject to legal process but for that defendant's political acts or affiliation. A defendant may introduce evidence at trial for the purpose of establishing such a defense.”

A constitutional amendment of this sort is needed because, as the law currently stands, Mr. Trump may not defend himself in this manner. This can be seen in the court papers filed by Special Counsel Jack Smith on December 27, 2023. In these papers, Jack Smith recites current law:

“A selective-prosecution claim is not a defense on the merits to the criminal charge itself.” United States v. Armstrong, 517 U.S. 456, 463 (1996); see FED. R. CRIM. P. 12(b)(3)(iv). Because “it relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged,” whether a prosecution was improperly instituted must be decided by the Court, not a jury. United States v. Washington, 705 F.2d 489, 495 (D.C. Cir. 1983)

...

A general claim of government misconduct “is, like a claim of selective prosecution, ultimately separate from the issue of [a defendant’s] factual guilt,” and is not an issue properly put before the jury. United States v. Regan, 103 F.3d 1072, 1082 (2d Cir. 1997).

This means, under current law, Trump may only argue that he is being selectively prosecuted for political reasons to the Democrat-appointed judge before the trial and not to the jury during the trial.

There are many good reasons to follow this rule in the ordinary course of justice. It is better that our criminal trials are not bogged down with claims that a criminal is only being prosecuted because he’s a man, or she’s a woman, or because he/she is Black/White, etc. Such arguments, as Jack Smith writes, “would be impermissible if made to the jury because they risk jurors’ ‘substitution of individual standards’ for the legal standards governing the jury’s determination of guilt or innocence—that is, jury nullification. Washington, 705 F.2d at 494. In other words, this rule prevents a defendant from asking a jury to find them not guilty, regardless of the evidence, based on some outside factor. In ordinary circumstances, this rule makes sense.

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But these are not ordinary circumstances. No politically motivated prosecution is ordinary. At least not in America. Political prosecutions are the stuff of communist dictatorships.

Accordingly, an amendment such as the one described above easily passes a cost-benefit test. While there is a slight risk that an ordinary criminal may make an outlandish claim that he is being prosecuted solely because of his political activity, it's highly unlikely that a jury would give much credence to such a claim. A defense such as Q: "Did you rob Mr. Jones?" A: "Yes, but they only charged me with a crime because I wouldn't put the District Attorney's lawn sign in my yard" is not going to be very effective with juries.

On the other hand, the benefits of this amendment are hard to understate, especially at this time in American history. We stand at a precipice of endless political prosecutions. Even Mr. Trump's most committed detractors can sense that the criminal justice system is wandering into dangerous territory. On, December 26, 2023, Joe Scarborough tweeted: "Terminate the Constitution, throw political opponents in jail, execute generals. Trump's promises for 2nd term." That obviously isn't true, but more and more of Mr. Trump's detractors are beginning to claim that his second term will consist of revenge prosecutions of his political opponents, despite the fact that Trump has stated that: "I'm Not Going to Have Time for Retribution" because his only focus would be on Making America Great Again.

While prosecutorial retribution may be what Democrats rightly deserve, an endless cycle of political prosecutions would tear at the very fabric of our nation. America, as we know it, would cease to exist.

Accordingly, Mr. Trump—the one man who might have a justification for launching political prosecutions—is also the perfect individual to call for adopting an amendment that would protect all Americans, even his political opponents, from facing the trials and tribulations he has been put through.

Such an amendment would be good for the country, and it would also be politically beneficial for Mr. Trump. With a sputtering economy, wars all over the world, and an immigration crisis on our southern border, all President Biden and the Democrats have to run on is baseless fears that Mr. Trump will do unto Democrats what Democrats have done to him—plunging America into four more years of political prosecutions instead of fixing America's (many) problems. A bold announcement that Mr. Trump will be advocating an amendment to the Constitution to undermine any presidential administration, including his, from taking the course of action the Biden administration has chosen to pursue would effectively neutralize this Democratic fear-mongering.

Taking a decisive stand against political prosecutions, regardless of the party affiliation of potential defendants, is the right thing to do. It's also the smart thing to do.

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Todd J. Aldinger is an attorney from Buffalo, New York, and the Co-Director of Litigation for the National Constitutional Law Union. He brought multiple lawsuits overturning Covid-related executive orders issued by Governor Cuomo, including those that opened gyms, opened restaurants, and ended virtual education. Todd studied Public and International policy at Princeton University and graduated at the top of his class, summa cum laude, from The University at Buffalo School of Law. He is admitted to practice law in New York State and the Western District of New York.

The National Constitutional Law Union

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