

# Trump Faces Uphill Battle If He Tries To Target Prosecutors

By **William Johnston** (November 18, 2024)

One of President Donald Trump's campaign promises was to go after the state and federal prosecutors who had investigated and prosecuted him.

On the evening he reclaimed the mantle of president-elect, Trump vowed to govern by the motto "promises made, promises kept."

The list of prosecutors he would need to target to keep his promise includes special counsel Jack Smith; New York Attorney General Letitia James; Manhattan District Attorney Alvin Bragg; Fulton County, Georgia, District Attorney Fani Willis; and potentially their staff.



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His quick nomination of now-former Rep. Matt Gaetz, R-Fla., for attorney general suggests his intent to follow through.[1]

Opening a criminal investigation will be the easy part. Filing charges and obtaining convictions will be much more challenging. What exactly will these prosecutors be investigated for? Under what legal theories? And where might the obstacles lie? Those questions will serve as the building blocks for defense counsel retained to represent these prosecutors in potential investigations.

There are some 5,000 federal criminal statutes on the books, but few will be available to prosecute the prosecutors — to say nothing of the evidence needed to substantiate those theories. Personnel challenges may further complicate efforts to build chargeable cases. And even if the investigations amass sufficient evidence to file charges, the cases could face strong hostility from judges, juries and the public.

Let's start with the basics. Prosecutors enjoy broad civil immunity for their roles as prosecutors, but they have no analogous immunity from criminal liability.[2] But exercising the core powers of their job — investigating crimes and filing charges — provides an exceedingly narrow basis for criminal liability.

Few prosecutors have ever faced criminal charges solely for their official conduct. This is largely because grand juries or judges must sign off on the filing of criminal charges. And prosecutors must back up their charges in court with evidence and legal authority.

Judicial scrutiny and the adversarial process usually check outright fabrication of evidence or patently frivolous legal theories. Even a politically motivated or vindictive prosecution is not one that exposes the prosecutor to personal criminal liability if the charges are otherwise meritorious, or at least appeared meritorious at the time the prosecutor pursued them.

To be sure, egregious forms of prosecutorial conduct, such as intentionally withholding exculpatory evidence or altering evidence, have occasionally resulted in charges.

In 2013, for example, a former district attorney in Texas, Ken Anderson, was charged with contempt for withholding exculpatory evidence that led to the wrongful conviction of a man

for murder.[3]

In 2007, in *In re: Nifong*, the Superior Court of North Carolina, Durham County, held District Attorney Michael Nifong in criminal contempt for suppressing evidence that undermined the credibility of the main accuser in the Duke lacrosse rape case, and then lying about it to the judge.[4]

And in 2020, in the U.S. District Court for the District of Columbia, FBI lawyer Kevin Clinesmith pled guilty to a false statement charge brought by special counsel John Durham for altering an email in connection with a renewal application for a wiretap under the Foreign Intelligence Surveillance Act.[5]

Prosecutors have also faced charges for bribery, extortion and other forms of corruption in connection with their official duties.[6] But such flagrant abuses of power are rare, and unlikely to be uncovered among the state and federal prosecutors who have gone after Trump.

Without more, ethical missteps — such as Willis' romantic relationship with a special prosecutor hired onto her team to investigate the Georgia alternate electors case — are unlikely to be chargeable as crimes.

There are other offenses related to the judicial process that could theoretically ensnare those same prosecutors. If an investigation required prosecutors to obtain or view classified documents — as the classified documents case against Trump in the Southern District of Florida surely did — mishandling those documents could be a criminal offense.[7]

So could willful violations of grand jury secrecy.[8] And false statements to judges could be prosecuted as contempt or obstruction of justice. Prosecutors talk to lots of witnesses, gather terabytes of data and make numerous representations to the court. A thorough audit might uncover errors that could be construed as crimes.

Yet these are all intent-based crimes, and absent "smoking gun" evidence, it would be difficult to prove that any false statement or unauthorized disclosure of grand jury information — assuming one can even be identified — was made intentionally or willfully. Anyone prosecuting a former president would have known that their work would be subject to unprecedented scrutiny. So it is hard to imagine that the new attorney general will find the intent evidence needed to bring such charges.

Some supporters of Trump, including Vice President-elect JD Vance, have touted federal civil rights statutes — such as Title 18 of the U.S. Code, Section 241 (conspiracy against rights), and Title 18 of the U.S. Code, Section 242 (deprivation of rights) — as a potential basis for criminal liability.[9]

Indeed, Section 241 was one of the charges in the Jan. 6 indictment filed by Smith against Trump.[10] Those statutes originated from legislation passed during the Reconstruction era that sought to criminalize violence and intimidation directed against newly freed African Americans by white Southerners.[11] But the statutes are not limited to violent conduct.

Section 241 criminalizes any conspiracy to "injure, oppress, threaten, or intimidate any person ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." And Section 242 applies to government employees acting "under color of any law" who willfully deprive someone of their "rights, privileges, or immunities secured or protected by the Constitution or laws of the United

States."

Yet these civil rights statutes also have high mens rea requirements. They require that a defendant have the specific intent to deprive the victim of a constitutional or statutory right.[12]

Applied to the prosecutors who have pursued Trump, the theory would have to be that they knew there was no factual or legal basis to charge Trump with a crime, but they did so anyway. Merely getting the law or facts wrong would be insufficient.

That is a tall order — particularly when grand juries have returned indictments, judges have examined and approved the indictments for legal sufficiency, and any prosecution of a former president would have been accompanied by lengthy internal memoranda analyzing the evidence and relevant law.

Even if investigators found emails or texts suggesting that, say, Manhattan assistant district attorneys or members of the special counsel team despised Trump or his policies — similar to what was uncovered between FBI lawyer Lisa Page and FBI Special Agent Peter Strozik during the investigation into Russian election interference by special counsel Robert Mueller[13] — it is highly unlikely there will be evidence that they did not subjectively believe in the merits of their own cases.

Given that their official conduct will probably not yield a viable basis for prosecution, the next area for scrutiny is the prosecutors' personal lives.

Taxes and loans are soft targets. Tax returns and loan applications are lengthy, and misstatements — intentional or not — can be easy to spot once an investigator has bank or property records in hand.

A career prosecutor with simple finances probably has nothing to worry about. An elected official, with more complicated personal finances, could face trouble. For example, in the U.S. District Court for the District of Maryland, Baltimore State's Attorney Marilyn Mosby was convicted in February of making false statements in a mortgage application for a vacation home in Florida. And in 2023, she was convicted of perjury for making early withdrawals from her retirement plan.[14]

The federal and state prosecutors who worked on the Trump cases should probably prepare for uncomfortable financial probes.

The final avenue for liability is if the prosecutors obstruct any investigation the new attorney general opens. It is a Washington truism that the cover-up is worse than the crime. And in many instances, there is no crime at all — only a cover-up.

In the Mueller investigation, for instance, no one was charged with colluding with Russia, but multiple allies of Trump were charged with false statements or obstruction of justice for lying to investigators or Congress.

The prosecutors who pursued President Trump would likely know to be very careful when talking to agents or attorneys who are investigating them.

Assuming a viable legal theory can be found, personnel challenges may make these investigations tough to pursue to completion. While Trump's attorney general would only need a handful of federal prosecutors and agents to get things started, politically motivated

charging decisions or public commentary could prompt resignations.

As an example, Nora Dannehy, who worked on Durham's team, resigned when she disagreed with Attorney General Bill Barr's public comments about Durham's ongoing investigation.[15]

Ideological vetting could minimize the risks of resignations, but then the investigations could end up with inexperienced staff who cannot put together a case that will survive the adversarial process.

Judges and juries are also likely to be skeptical of any such cases, particularly in the districts where there would be venue. New York; Washington, D.C.; and Atlanta, where the prosecutors pursuing Trump were based, would not be ideal venues for the government in a criminal case that turned against those same prosecutors.

It would be hard to keep politics out of trial, and jurors in those cities would be more likely than average to have supported the prosecutions of Trump.

The Southern District of Florida, where the classified documents case was filed, is roughly split between Republicans and Democrats, also making it hard to get 12 jurors who would not view the charges through the lens of politics.

While conspiracy statutes can be stretched to establish venue in any district where an act in furtherance of the conspiracy was taken, there still may not be venue in any heavily Republican district.

Politics aside, stand-alone false statement or obstruction charges — which may be the most likely ones, if any, to result from these investigations — often have little jury appeal unless they are connected to some other bad conduct by the defendant.

For instance, juries in the U.S. District Court for the District of Columbia and the U.S. District Court for the Eastern District of Virginia acquitted Michael Sussman and Igor Danchenko, respectively, at trials in 2022, both of whom were charged by Durham with making false statements to the FBI in connection with the Russia investigation.

Finally, any prosecutor who is ultimately charged with a criminal offense may be able to bring a vindictive or selective prosecution claim. In essence, these defenses are available to individuals who are charged in retaliation for exercising a right or who are charged for a discriminatory purpose.[16]

While these defenses are generally difficult for defendants to assert, they may stand a decent shot of success with a sympathetic judge — particularly because charges against any prosecutor would have followed a multiyear public campaign by Trump saying he wanted to punish that very prosecutor for having filed charges against him.

At the end of the day, it is unlikely any prosecutor who pursued Trump will be convicted of a crime. That may be cold comfort to the current and former prosecutors who may be facing years of stressful and expensive investigations ahead. But understanding the challenges facing such investigations will help their attorneys and allies craft the most effective defenses and strategies at every step.

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[1] Eric Tucker, Gaetz Pick Shows Value Trump Places on Loyalty – and Retribution – as He Returns to Washington, Associated Press, Nov. 14, 2024, <https://apnews.com/article/gaetz-fbi-trump-justice-department-ratcliffe-0aa4f13e1e3186a6c3664a1d3b248eb7>.

[2] See *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.").

[3] Alex Ura, Anderson to Serve 9 Days in Jail, Give up Law License as Part of Deal, The Texas Tribune, Nov. 8, 2013, <https://www.texastribune.org/2013/11/08/ken-anderson-serve-jail-time-give-law-license/>.

[4] Shaila Dewan, Duke Prosecutor Jailed; Students Seek Settlement, New York Times, Sept. 8, 2007, <https://www.nytimes.com/2007/09/08/us/08duke.html>.

[5] Dkts. 1 & 8, *United States v. Kevin Clinesmith*, 1:20-cr-00165-JEB (Aug. 14, 2020 D.D.C.).

[6] Press Release, Former Assistant District Attorney Indicted on Bribery, Money Laundering Conspiracy, and Other Felony Charges, United States Department of Justice, Sept. 18, 2024, <https://www.justice.gov/opa/pr/former-assistant-district-attorney-indicted-bribery-money-laundering-conspiracy-and-other>; Press Release, Former DOJ Attorney Pleads Guilty To Obstruction Of Justice And Interstate Transportation Of Stolen Property, United States Department of Justice, Nov. 29, 2017, <https://www.justice.gov/usao-ndca/pr/former-doj-attorney-pleads-guilty-obstruction-justice-and-interstate-transportation>; Press Release, Former Brooklyn Assistant District Attorney Charged With Illegally Wiretapping Cellular Telephones, United States Department of Justice, Mar. 27, 2017, <https://www.justice.gov/usao-edny/pr/former-brooklyn-assistant-district-attorney-charged-illegally-wiretapping-cellular>; Press Release, Philadelphia District Attorney Rufus Seth Williams Indicted On Bribery And Extortion Charges, United States Department of Justice, Mar. 21, 2017, <https://www.justice.gov/usao-nj/pr/philadelphia-district-attorney-rufus-seth-williams-indicted-bribery-and-extortion-charges>.

[7] 18 U.S.C. § 1924.

[8] See 18 U.S.C. §401(3); *Finn v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996) ("[C]riminal contempt may appear to be a harsh remedy, but compromising grand jury secrecy is a serious matter.").

[9] Letter from Senator JD Vance to Attorney General Merrick Garland, May 29, 2024, available at <https://www.vance.senate.gov/wp-content/uploads/2024/05/Merchan-Investigation-Letter-5.29.2024.pdf>; Ken Dilanian, Trump's Legal Allies Set the Stage for DOJ Investigations of Adversaries, NBCNews.com, Nov. 8,

2024, <https://www.nbcnews.com/politics/donald-trump/trump-legal-allies-set-stage-doj-investigations-adversaries-rcna179089>.

[10] Dkt. 1, *United States v. Trump*, 23-cr-257 (D.D.C. Aug. 1, 2023).

[11] Paul J. Watford, *Screws v. United States and the Birth of Civil Rights Enforcement*, 98 Marq. L. Rev. 465, 470 (2014); *United States v. Price*, 383 U.S. 787, 802-04 (1966).

[12] See *Screws v. United States*, 325 U.S. 91, 104 (1945); *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999); *United States v. Reese*, 2 F.3d 870, 882 (9th Cir. 1993).

[13] Michael S. Schmidt, *Top Agent Said F.B.I. Would Stop Trump from Becoming President*, *New York Times*, June 14, 2018, <https://www.nytimes.com/2018/06/14/us/politics/fbi-texts-trump.html>.

[14] Press Release, *Federal Jury Convicts Former Baltimore City State's Attorney Marilyn Mosby*, United States Department of Justice, Feb. 6, 2024, <https://www.justice.gov/usao-md/pr/federal-jury-convicts-former-baltimore-city-states-attorney-marilyn-mosby>.

[15] Susan Haigh & Eric Tucker, *Former Prosecutor who Quit Trump-Russia probe Says She Left Over Concerns with Barr*, *Associated Press*, Sept. 20, 2023, <https://apnews.com/article/connecticut-supreme-court-dannehy-barr-russia-investigation-cdb85689f026f05e9f87be098cd8ed40>.

[16] See, e.g., *Wayte v. United States*, 470 U.S. 598, 609-10 (1985) (selective prosecution claim); *United States v. Falcon*, 347 F.3d 1000, 1004 (7th Cir. 2003) (vindictive prosecution claim).