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OPINION | POTOMAC WATCH

The Unprecedented Jack Smith

If lying politicians can be prosecuted for ‘fraud,’ as he proposes in the Trump indictment, we’ll need a lot of new prisons.

By Kimberley A. Strassel

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Special counsel Jack Smith in Washington, Aug. 1. PHOTO: SAUL LOEB/AGENCE FRANCE-PRESSE/GETTY IMAGES

If there’s one word to describe what everyone might wish Washington would stop producing, it’s “unprecedented.” Yet here we go again, with special counsel Jack Smith’s unprecedented indictment of a politician for engaging in “a conspiracy to defraud the United States.” Be prepared for this new and startlingly elastic precedent to ensnare plenty of others.

That's the biggest problem with Mr. Smith's latest broadside against Donald Trump, on top of its untested legal theories and evidence of a Justice Department double standard. As former Attorney General William Barr told CNN on Wednesday, "there were reasons not to bring" the case, and among them is "the slippery slope of criminalizing legitimate political activity."

Take Mr. Trump out of the equation and consider more broadly what even the New York Times calls Mr. Smith's "novel approach." A politician can lie to the public, Mr. Smith concedes. Yet if that politician is advised by others that his comments are untruthful and nonetheless uses them to justify acts that undermine government "function," he is guilty of a conspiracy to defraud the country. Dishonest politicians who act on dubious legal claims? There aren't enough prisons to hold them all.

Consider how many politicians might already be doing time had prosecutors applied this standard earlier. Both Al Gore and George W. Bush filed lawsuits in the 2000 election that contained bold if untested legal claims. Surely both candidates had advisers who told them privately that they may have legitimately lost—and neither publicly conceded an inch until the Supreme Court resolved the matter. Might an ultimate sore winner have used this approach to indict the loser for attempting to thwart the democratic process?

And why limit the theory to election claims? In 2014 the justices held unanimously that President Barack Obama had violated the Constitution by decreeing that the Senate was in recess so that he could install several appointees without confirmation. It was an outrageous move, one that Mr. Obama's legal counselors certainly warned was a loser, yet the White House vocally insisted the president had total "constitutional authority" to do it. Under Mr. Smith's standard, that was a *lie* that Mr. Obama used to *defraud* the public by jerry-rigging the function of a labor board with illegal appointments.

What's the betting someone told President Biden he didn't have the power to erase \$430 billion in student loan debt. Oh, wait! That's right. He told himself.

“I don’t think I have the authority to do it by signing with a pen,” he said in 2021. The House speaker advised him it was illegal: “People think that the president of the United States has the power for debt forgiveness. He does not,” Nancy Pelosi said. Yet Mr. Biden later adopted the *lie* that he did, and took action to *defraud* taxpayers by obstructing the federal *function* of loan processing—until the Supreme Court made him stop.

If even a former president can be hit with conspiracy charges, what’s to protect a mere congressman, or a failed candidate, or a consultant? For how long did Stacey Abrams falsely dispute her loss in the 2018 Georgia governor’s race and pressure Georgia lawmakers to alter election procedures in ways that might undermine voting integrity on the basis of untruths? Would the advisers who egged her on in that pursuit qualify as co-conspirators, like the lawyers in Mr. Smith’s indictment?

The press is rooting for the special counsel to go after Republican lawmakers who on the basis of Mr. Trump’s claims objected to slates of electors on Jan. 6, 2021. Let’s line them all up, including dozens of Democrats who objected to slates in 2001, 2005 and 2017—on the basis of *lies* and with the purpose of conspiring to obstruct (as the Smith indictment puts it) “the lawful federal government function by which the results of the presidential election are collected, counted, and certified.”

We now know that Rep. Adam Schiff looked at a classified surveillance warrant application against a Trump adviser, *lied* about its contents publicly, memorialized those lies in an official memo, and used it to help gin up an investigation that definitely impeded the *function* of the Trump administration. We have evidence that the Federal Bureau of Investigation officials behind that application—James Comey, Andrew McCabe, Peter Strzok—used a dossier full of *lies* to get that warrant. Fortunately for them, special counsel John Durham chose not to take a flyer by indicting them for conspiracy.

Smith fans will say this is a special case, the “big” lie, a one-time necessity for justice. Yet once a bar is lowered, it will be lowered further. Remember when impeachments, special committees, the stripping of committee assignments, and contempt citations were rare? Of course future prosecutors will take this precedent and expand it in ever more novel ways.

There are any number of things as certain as death and taxes. One is that politicians will lie, and act on those untruths. Now that might make them felons.

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About this article

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