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## Trump's Hollow Free-Speech Defense

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NEW YORK – In response to the federal indictment accusing Donald Trump of conspiring to overturn the 2020 US presidential election and remain in office, Trump's lawyers and defenders argue that he was merely exercising his right to free speech under the First Amendment of the US Constitution. To understand the case, one therefore must understand where free speech ends and criminal fraud begins.

The fact that Trump's actions consisted of words does not make them constitutionally protected. On the contrary, numerous crimes imply limits on speech. For example, it is illegal to lie to law-enforcement officials or to a jury, and to misrepresent a product as safe when it isn't. You may not intentionally incite imminent violence, knowingly defame someone's reputation, or represent minors in sexually explicit ways. These and other information-limiting laws exist for good reason: they protect society from significant harms.

In a liberal democracy, deliberately undermining the electoral system may be the gravest harm of all. That is why there are laws to protect the legitimacy and fairness of elections by prohibiting the knowing or reckless dissemination of demonstrably false statements. In many states, you may not deliberately interfere with voter enfranchisement by lying about how to cast a ballot or by creating fake ballots. Nor may you lie about a campaign affiliation or in campaign statements or political advertisements. In each case, intentionally misleading or confusing voters about issues or candidates may be found to be illegal.

While socially valuable speech should never be chilled by the government, speech acts that constitute moral or commercial fraud – which operate, in effect, as “anti-speech acts” – should be discouraged and may be proscribed in the interests of preventing significant social and political harms. No one thinks that individual liberty suffers because it is illegal to lie to the FBI or deliberately make false claims about corporate earnings or products. The value to society afforded by these protections significantly outweighs the costs. As I have argued elsewhere, regulating speech acts that are designed to disrupt the democratic process follows a similar logic.

Often, anxieties about the risks of chilling protected speech eclipse the equally compelling, but at times competing, need to preserve the minimum conditions for a robust marketplace of opinions and ideas. Sometimes, state action that threatens free speech does indeed cause unacceptable harm; but sometimes, as with laws regulating speech acts that incite imminent violence or that constitute a fraud on the public, preventing unacceptable harm requires limiting access to information or curtailing expression.

Maintaining the integrity of the electoral process is an imperative that transcends political party affiliation. Liberal democratic societies are entitled to take appropriate steps to protect the integrity

of elections. They are also entitled to show intolerance toward intolerance, because, to paraphrase Supreme Court Justice Robert Jackson, democracy is not a suicide pact. A prime directive of any working constitution must be to establish and protect the minimum conditions required for that constitutional regime to survive and flourish. Those who, in the name of free speech, would forfeit the power to regulate illiberal practices that thwart the meaningful exercise of free speech are relying on a paradox that we neither can nor should accept.

State regulation of anti-speech acts is not about censoring unpopular ideas, or quashing disagreeable opinions. It is about securing the infrastructure of democracy so that a diverse range of opinions and ideas can freely circulate. That is the only way that informed (collective and individual) deliberation can proceed. A democracy's top priority must be to ensure a communications ecosystem in which all citizens may participate without being encumbered by deliberate efforts (foreign and domestic) to rob political communication of meaning. If a democracy cannot maintain trust in the process of deliberation itself, its days are numbered.

Those who seek an unfair advantage in elections by deliberately subverting democratic discourse forfeit the protections to which democratic discourse is entitled. The constitutional right to freedom of expression does not shield fraudulent speech. The preservation of electoral integrity and the democratic ideal of deliberative discourse, no less than the preservation of the economic marketplace, requires this limitation.

The promise of freedom without an appropriate legal and political framework to secure it is hollow. Fundamental safeguards that preserve individual dignity, autonomy, and expressive liberty must be based on a prudent assessment of conditions that generate unacceptable levels of social and political harm. Viewed in this light, the federal criminal charges against Trump for conspiring to overturn the 2020 presidential election serve vital national interests, including the integrity of the First Amendment itself.

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