



**New York State's
Trump Investigation:
An Analysis of the Reported Facts
and Applicable Law**

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Executive Summary

In the months since ex-president Donald J. Trump left office, both the New York State Attorney General (“NYAG”) and the District Attorney for the County of New York (“DANY”) have publicly acknowledged moving forward in their investigations relating to the former president’s business dealings.¹ The ultimate value of these investigations is simple: accountability. The most fundamental precept of American governance is that no person, no matter how powerful, is above the law. The very fact of these continuing investigations lends credence to the idea that, in the words of John Adams, we are “a government of laws, not of men.”

With the media now reporting that criminal charges against the Trump Organization may be imminent, the question presents itself: What about the former president? In this report, we conclude based on the publicly available information that Trump is at serious risk of eventual criminal indictment in New York State.² To reach that conclusion, we bring together a large amount of factual and legal information that can be found scattered among court filings, media reports, congressional transcripts, and other sources, but that has not before been gathered in one place. The co-authors are experts with a broad array of backgrounds as scholars, practitioners, former prosecutors, and defense lawyers, who have served under

1 As set forth below, the fact of the DANY’s criminal investigation has been public since 2018. It also has long been publicly known that the NYAG has been civilly investigating the Trump Organization. Shayna Jacobs & David A. Fahrenthold, *Investigation of Trump Organization now exploring possible criminal conduct, N.Y. attorney general’s office says*, The Washington Post (May 19, 2021, 1:25 PM), www.washingtonpost.com/national-security/trump-investigation-new-york-attorney-general-letitia-james/2021/05/18/cd2f1288-b0cf-11eb-a980-a60af976ed44_story.html. Recently, the NYAG announced that its investigation had taken on a “criminal capacity,” later clarifying that two assistant attorney generals have been cross-designated as assistant district attorneys to work on the criminal investigation. Michael R. Sisak, *New York AG has 2 lawyers working with DA on Trump probe*, The Associated Press (May 21, 2021), <https://apnews.com/article/donald-trump-new-york-business-government-and-politics-9aebc26a54a083db72cbe3068ca2b87f>.

2 William K. Rashbaum, Ben Protess and Jonah E. Bromwich, *Trump Organization Could Face Charges in D.A. Inquiry*, The New York Times (June 25, 2021, 2:43 PM), <https://www.nytimes.com/2021/06/25/nyregion/trump-organization-criminal-charges.html>. Note that this paper deals solely with potential state criminal matters and does not address possible federal offenses against Trump, such as allegations that Trump obstructed justice. See Barry H. Berke, Noah Bookbinder & Norman L. Eisen, *Presidential Obstruction of Justice: The Case of Donald J. Trump* (2018), https://www.brookings.edu/wp-content/uploads/2018/08/GS_82218_Obstruction_2nd-edition.pdf.

state or federal administrations headed by leaders of both political parties, and who have substantial relevant experience with the particular investigating offices here.³

We begin in Section I with the facts: We gather and distill the publicly available evidence, and group it into the principal categories of alleged wrongdoing that it appears are under investigation. We then turn in Section II to the procedural posture of the investigation, describing the investigative authorities and the stages of their work to date. In Section III, we delve into the criminal laws that may be implicated by the reported conduct of Trump as well as his associates. In Section IV, we consider potentially available defenses. Finally, in Section V, we address practical considerations such as possible timing and the implications of charging a former president. As in all criminal investigations, we emphasize the importance of not pre-judging the guilt of any individuals or entities involved in the investigation, or even the certainty that charges will be brought, and we await additional evidence that may emerge related to the case. Given that we are not privy to confidential internal prosecutorial deliberations or other information, our analysis is simply based on the facts in the public record today and the law that might apply to those facts.

The most fundamental precept of American governance is that no person, no matter how powerful, is above the law. The very fact of these continuing investigations lends credence to the idea that, in the words of John Adams, we are “a government of laws, not of men.”

Cutting across the five sections of the report, we probe five main areas that appear to be the focus of the investigation:

Allegations of Falsifying Business Records: We first unpack the evidence that Donald Trump allegedly directed his personal attorney to facilitate clandestine payments to two women to induce their silence about their relationships with Trump, and that the reimbursements for those payments may have been improperly reflected in the company's books and records.⁴ The Trump Organization accounted for Michael Cohen's \$130,000 payment to one

³ Donald Ayer served as United States Attorney and Principal Deputy Solicitor General in the Reagan administration and as Deputy Attorney General under George H.W. Bush. Prior to December 31, 2018, Mr. Ayer was an attorney in the law firm of Jones Day which has been publicly reported to represent the Trump campaign. While at the firm, he did not work on any matter for that or any other Trump-related entity or receive any related confidential client information. No such confidential information has been utilized in the preparation of this report, which is entirely based upon publicly available sources. John Cuti is a co-founder and an attorney at Cuti Hecker Wang LLP in New York. He litigates criminal law, constitutional law, and other matters and has considerable experience with New York State proceedings of the kind discussed in this report. Norman Eisen is a senior fellow in Governance Studies at Brookings and an attorney with three decades of experience. He served as impeachment counsel to the U.S. House Judiciary Committee from February 2019 to February 2020, and in that capacity worked on several of the issues covered in this report. Danya Perry is a co-founder and attorney at Perry Guha LLP in New York, as well as a former federal prosecutor and NYS Deputy Attorney General. Perry Guha LLP previously represented Trump's former attorney Michael Cohen in connection with Mr. Cohen's challenge to the Department of Justice and Bureau of Prisons for retaliating against him for his exercise of his First Amendment rights. The firm no longer represents Mr. Cohen, and none of the issues discussed herein are based upon any confidential information obtained as a result of the firm's prior and limited representation of Mr. Cohen.

⁴ Information at ¶ 28, *United States v. Michael Cohen*, No. 1:18-cr-00602-WHP (S.D.N.Y. Aug. 21, 2018), <https://bit.ly/3eFWbMJ> (hereinafter “SDNY Information”); Joe Palazzolo, Nicole Hong, Michael Rothfeld, Rebecca Davis O'Brien & Rebecca Ballhaus, *Donald Trump Played Central Role in Hush Payoffs to Stormy Daniels and Karen McDougal*, *The Wall Street Journal* (Nov. 9, 2018, 1:03 PM), <https://on.wsj.com/331oakG>.

of the women, Stephanie Clifford (also known as “Stormy Daniels”), as “legal expenses.” In total, Cohen was reimbursed \$420,000, including a \$60,000 bonus, for election-related expenses by the end of 2017.⁵ Trump’s alleged involvement in these payments is well-documented, and Trump is famously referred to only as “Individual-1” in the charging instrument against Cohen.⁶ Reportedly, when made, the payments may not have been accurately or fully described in the business records of the Trump Organization.

Similar issues may be raised by the company’s alleged treatment of fringe benefits directed towards its CFO, Allen Weisselberg, and members of his family. The payments under investigation reportedly include private school tuition, rents on apartments, and car leases. Based upon this evidence, as well as the handling of the hush money reimbursements, the DANY could potentially charge the Trump Organization or its executives, including Trump himself, with falsification of business records. The offense is upgraded to a felony if prosecutors can prove intent to further or conceal another criminal offense, such as tax fraud.⁷ We turn next to that possible offense.

Alleged Tax Fraud: In addition to the allegations regarding fringe benefits, we also review reports of other Trump Organization behaviors relating to its taxes, such as reporting approximately \$26 million in questioned “consulting fees.”⁸ We consider the allegations that some of these fees were actually payments to the Trump family that were misclassified as deductible expenses. Other conduct subject to review includes over \$45 million in tax deductions for conservation agreements on two properties.⁹ In addition, in 10 of the past 15 years Trump did not pay federal income tax, and only paid \$750 in federal income tax in 2016 and 2017 as a result of a number of tax deductions that have been questioned and may carry over to state tax filings.¹⁰

It is likely that prosecutors are scrutinizing charges of tax fraud against not only the Trump Organization but Trump and others. Under New York law, a person is guilty of tax fraud if that person commits an act of tax

5 Rebecca Ballhaus & Nicole Hong, *Allen Weisselberg, Longtime Trump Organization CFO, Testified and Was Granted Immunity in Cohen Probe*, The Wall Street Journal (Aug. 24, 2018, 6:34 PM), <https://on.wsj.com/3bAPPO3>; Carol D. Leonnig & Michelle Ye Hee Lee, *Trump’s company approved \$420,000 in payments to Cohen, relying on ‘sham’ invoices, prosecutors say*, The Washington Post (Aug. 21, 2018, 10:56 PM), https://www.washingtonpost.com/politics/trumps-company-approved-420000-in-payments-to-cohen-relying-on-sham-invoices-prosecutors-say/2018/08/21/b6b327fc-a596-11e8-97ce-cc9042272f07_story.html.

6 See generally SDNY Information.

7 New York Penal Law § 175.10.

8 Russ Buettner, Susanne Craig & Mike McIntire, *Long-Concealed Records Show Trump’s Chronic Losses and Years of Tax Avoidance*, The New York Times (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html>.

9 *Id.*; Joseph Tanfani, *How Trump scored a big tax break for conserving a golf range*, Reuters (Apr. 30, 2021, 12:37 PM), <https://reut.rs/3xG8wt0>; Richard Rubin, *Trump Golf Course Tax-Break Deal Appears Vulnerable to IRS Challenge*, The Wall Street Journal (Sept. 2, 2020, 5:30 AM), <https://on.wsj.com/3uolmZY>; Joshua Partlow, Jonathan O’Connell & David A. Farenthold, *Trump got a \$21 million tax break for saving the forest outside his N.Y. mansion. Now the deal is under investigation*, The Washington Post (Oct. 9, 2020, 8:35 AM), https://www.washingtonpost.com/politics/trump-got-a-21-million-tax-break-for-saving-the-forest-outside-his-ny-mansion-now-the-deal-is-under-investigation/2020/10/07/de84c1ba-ff6b-11ea-830c-a160b331ca62_story.html; Peter Grant & Alexandra Berzon, *Trump and His Debts: A Narrow Escape*, The Wall Street Journal (Jan. 4, 2016, 10:14 PM), <https://www.wsj.com/articles/trump-and-his-debts-a-narrow-escape-1451868915>.

10 Buettner et al., *supra* note 8.

fraud with the intent to evade any tax or defraud the state by paying less than the tax liability that is due.¹¹ The Trump Organization, Trump, or other individuals involved would have committed a “tax fraud act” if they failed to submit a tax report or return, filed a fraudulent tax return or other document with materially wrong information, failed to pay a tax that was due to the State of New York, failed to pay taxes, or schemed to cheat the State of New York by making or providing fraudulent representations that are material and related to a tax.¹² In the case of the fringe benefit issues, for example, the relevant taxes could include New York State payroll tax.

Alleged Insurance Fraud and Scheme to Defraud Banks: We next turn to the Trump Organization’s alleged inflation of its assets and occupancy rates to loan officers and insurance representatives while financial reports filed for tax purposes reported different numbers.¹³ With the apparent direction and knowledge of Trump, these overvalued assets were presented to lenders in statements of financial condition, which allegedly contained flawed financial numbers and omitted properties that carried substantial debts.¹⁴ The alleged misrepresentation of the Trump Organization’s assets could potentially lead the DANY to charge that enterprise, or Trump and his business associates, with a variety of offenses, including insurance fraud and a scheme to defraud in the first degree. For the former, under New York Penal Law § 176.30, prosecutors would need to prove that Trump inflated the Trump Organization’s assets.¹⁵ Any inflation of assets on valuation paperwork provided to lenders to obtain a loan could also expose those involved to a charge of a scheme to defraud in the first degree. If the fringe benefit allegations were sufficiently extensive, they could also form a basis of scheme to defraud charges.

Enterprise Fraud Allegations: We then discuss the possibility that the DANY could file an enterprise corruption charge by establishing a “pattern of criminal activity.” Under New York Penal Law § 460.20(1), any individual associated with the Trump Organization would be guilty of enterprise corruption if that person intentionally conducted or participated in the affairs of an enterprise with a pattern of criminal activity—such as the falsification of business records, insurance fraud, and a scheme to defraud—and engaged in three or more criminal acts.¹⁶ The DANY would have to prove that these acts were part of a common plan or scheme, rather than isolated incidents, and that the Trump Organization or its executives are in fact a criminal enterprise.¹⁷ Depending on the evidence available to prosecutors, the DANY could potentially argue that the predicate criminal acts were part of a common scheme to enrich Trump and protect his brand, and that the criminal enterprise had an ascertainable structure headed by Trump.

11 New York Tax Law § [1803-1806](#).

12 New York Tax Law § [1801](#).

13 David A. Fahrenthold & Jonathan O’Connell, *How Donald Trump Inflated His Net Worth to Lenders and Investors*, The Washington Post (Mar. 28, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-statements-of-financial-condition/>.

14 *Id.*

15 New York Penal Law § [176.05](#) and [176.30](#).

16 New York Penal Law § [460.20\(1\)](#) and [460.20\(2\)](#).

17 New York Penal Law § [460.10\(4\)](#).

There is one important note applying across the board to all five of these areas of investigation. While the NYAG's recent announcement of a criminal investigation referred to the Trump Organization, the DANY has reportedly been investigating both Trump as an individual and Trump as a business, and there is likely little daylight between the two on some of the matters discussed herein.¹⁸ Trump is a notorious micro-manager of his companies.¹⁹ He has posted photographs of himself personally signing stacks of tax documents.²⁰ So he seems likely to have had personal knowledge of facts relevant to the criminal investigations, and this can give rise to the specific criminal intent required for prosecutors to prove a criminal case. Any personal knowledge of any alleged scheme described in this report may open Trump up to criminal liability. We discuss the relative potential liability of Trump and his company at greater length in Sections III and IV.

Defenses: Of course, any potential criminal case would not simply be a matter of affirmative charges and their legal and factual bases. Should Trump, the Trump Organization, or anyone associated with it be charged, we can expect a vigorous response. In Section IV, we set forth some principal defenses and discuss their potential impact.

First, New York felony criminal violations generally have a statute of limitations of only five years. Some of the conduct predates the five-year period.²¹ On the other hand, continuation of an ongoing criminal conspiracy and other tolling doctrines (such as the protracted absence of a defendant from the jurisdiction) can operate to extend statutes of limitations.

Second, with respect to a potential falsification of records charge, employees of the Trump Organization could cite New York Penal Code § 175.15, which provides that any clerk, bookkeeper, or other employee cannot be guilty of falsifying business records if they are merely acting on the orders of a supervisor and received no personal benefit from the act.²² However, employees acting under the orders of a supervisor must still provide an affirmative defense with evidence at trial to prove that they were merely acting under the orders of a superior.²³

Third, if Trump is charged in his personal capacity, prosecutors will have to prove that he had the specific intent to defraud.²⁴ Trump may rebut such proof by claiming that he simply relied on his accountants, lawyers, and other professionals to do what was best for the company within the constraints of the law. To succeed,

18 Paragraph adapted from Norm Eisen & Danya Perry, *The walls are closing in on Trump, for real this time*, Daily News (June 7, 2021, 4:00 PM), <https://www.nydailynews.com/opinion/ny-oped-the-walls-are-closing-in-on-trump-for-real-this-time-20210608-xupq77x-jfvhntmqdvkgsob6im-story.html>. See also William K. Rashbaum & Benjamin Weiser, *D.A. Is Investigating Trump and His Company Over Fraud, Filing Suggests*, The New York Times (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/nyregion/donald-trump-taxes-cyrus-vance.html>.

19 Emily Flitter, *Trump's Obsessive Micromanagement Could be a Major Liability as President*, Insider (Dec. 1, 2016, 6:04 AM), www.businessinsider.com/r-separation-anxiety-trumps-management-style-poses-challenges-in-oval-office-2016-1.

20 Jedd Rosche, *Donald Trump tweets photo of tax returns*, CNN (Oct. 15, 2015, 6:17 PM), <https://www.cnn.com/2015/10/15/politics/donald-trump-tweets-tax-return/index.html>.

21 New York Criminal Procedure Law § 30.10(2)(b).

22 New York Penal Law § 175.15.

23 New York Penal Law § 25.00(2).

24 *United States v. Autori*, 212 F.3d 105, 116 (2d Cir. 2000); New York's criminal statutes regarding schemes to defraud are based on the federal mail fraud statute, and state courts will often look to federal court decisions in this area. See *People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 616 (N.Y. 1995).

Trump will have to prove that he honestly and in good faith relied on the advice of counsel.²⁵ Prosecutors can be expected to hotly contest this point, and it likely will emerge as one of the most critical battles of any trial.

Fourth, if the former president is charged personally, prosecutors also would have to show the materiality of false statements.²⁶ In his defense, Trump may attempt to claim that, even if he knowingly provided false information to banks and lenders on financial statements, such statements are immaterial. For example, he could attempt to argue that false statements to a particular insurer were not of the kind that tended to influence the insurer's coverage decisions.²⁷

Fifth, if he is charged personally, Trump may seek to deflect, pointing the finger at others, including arguing that the Trump Organization, rather than he in his personal capacity, should be held criminally responsible. New York law does provide that a corporation may be held criminally liable for the criminal behavior of senior executives acting within the scope of their employment or on the behalf of the corporation,²⁸ although it does not prevent prosecutors from also criminally prosecuting a high managerial agent in his personal capacity.

Outcome: While we do not know whether charges will be brought against Trump, the Trump Organization, or any of its employees, the available facts and law that we present in this report suggest that the business practices of the Trump Organization and the former president could well lead to an indictment. Shortly before this report was released, the press reported that the first charges may be imminent. Recognizing the inherent

uncertainty of such a projection, additional charges may come as soon as this summer or fall because a special six-month grand jury has been impaneled, statutes of limitations are running (as we discuss in detail in Section IV.A), and Manhattan District Attorney Cyrus Vance, Jr.'s term is set to expire at the end of this year. He likely will want to either bring, or decline, charges before he leaves office. Notwithstanding some serious challenges that any prosecution would face, one factor that may ultimately weigh heavily in favor of a decision to go forward is the principle that, as District Attorney Vance has stated: "No one—not even a president—is above the law."²⁹

While we do not know whether charges will be brought against Trump, the Trump Organization, or any of its employees, the available facts and law that we present in this report suggest that the business practices of the Trump Organization and the former president could well lead to an indictment.

25 United States v. Scully, 877 F.3d 464, 476 (2d Cir. 2017).

26 See *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality").

27 In a prosecution for scheme to defraud, it is not necessary for the government to prove reliance by a particular victim upon specific misrepresentations where a defendant's misrepresentations were central to the course of conduct by which property was fraudulently obtained. *People v. Kaminsky*, 486 N.Y.S.2d 814, 822 (N.Y. Supt. Ct. 1985) (citing *People v. White*, 101 A.D.2d 1037 (N.Y. 2nd Dep't. 1984)); see also *People v. Downey*, 4 A.D.3d 233, 235 (1st Dep't. 2004) (explaining that "proof of reliance by a particular victim upon specific misrepresentations [is] not required" for "the crime of scheme to defraud").

28 New York Penal Law § 20.20(2)(b).

29 Press Release, Manhattan District Attorney's Office, Statement from Manhattan D.A. Cy Vance, Jr. on U.S. Supreme Court Opinion in *Trump v. Vance* (July 9, 2020), <https://www.manhattanda.org/statement-from-manhattan-d-a-cy-vance-jr-on-u-s-supreme-court-opinion-in-trump-v-vance/>.

I. Reported Facts

We first describe the putative facts that likely will form the basis of any indictment. These facts rely on reported details, including newspaper articles, previously filed criminal charges, and testimony. The factual assertions detailed here in Section I are entirely based upon public reporting. Likewise, the legal conclusions we reach in Sections II–V are based upon our research and experience, as applied to that public reporting.

A. Hush Money Allegations

In the months leading up to the 2016 presidential election, Michael Cohen—Donald Trump’s former personal attorney—facilitated payments to two women, Karen McDougal and Stephanie Clifford (Stormy Daniels), to remain silent about their relationships with Trump in order to influence the election.³⁰ The payment to Ms. Daniels in particular was finalized quickly in the waning days of the campaign.

According to the federal criminal information against Cohen and associated reporting, in August 2015 Donald Trump and Michael Cohen met with David Pecker, the pro-Trump Chairman of tabloid publisher American Media Inc., at Trump Tower.³¹ During that meeting, Pecker “offered to help deal with negative stories about [Trump’s] relationships with women.”³²

In June 2016, Playboy model Karen McDougal had begun to shop around her story of a nearly year-long affair with Trump.³³ In August 2016, American Media Inc. acquired the “limited life rights” to McDougal’s story for

30 Jen Kirby, *Michael Cohen Says He Arranged Hush Money Payments “At the Direction of” Trump*, Vox (Aug. 21, 2018, 6:25 PM), <https://www.vox.com/2018/8/21/17765954/michael-cohen-trump-stormy-daniels-hush-money-sdny>.

31 Palazzolo et al., *supra* note 4.

32 Sarah Ellison & Paul Farhi, *Publisher of the National Enquirer admits to hush-money payments made on Trump’s behalf*, The Washington Post (Dec. 12, 2018, 7:47 PM), https://washingtonpost.com/lifestyle/style/publisher-of-the-national-enquirer-admits-to-hush-money-payments-made-on-trumps-behalf/2018/12/12/ebf24b76-fe49-11e8-83c0-b06139e540e5_story.html; Ronan Farrow, *Donald Trump, a Playboy Model, and a System for Concealing Infidelity*, The New Yorker (Feb. 16, 2018), <https://bit.ly/2SV91Q1>.

33 Farrow, *supra* note 32.

\$150,000, also agreeing to “feature her on two magazine covers and publish over one hundred magazine articles authored by her.”³⁴ Pecker subsequently agreed to assign those rights to Michael Cohen for \$125,000.³⁵ To prepare for this arrangement, Cohen “incorporated a shell entity called ‘Resolutions Consultants LLC.’”³⁶ The deal, however, was later called off by Pecker upon advice from his counsel.³⁷

In October 2016, Pecker informed Cohen about a second woman who was preparing to go public about her own story of a tryst with Trump.³⁸ Through her agent, the adult film actress known as Stormy Daniels “was in preliminary talks with ABC’s ‘Good Morning America,’” and had approached one of Pecker’s editors “about selling her story of a sexual encounter with Mr. Trump” for “upward[s] of \$200,000.”³⁹ Soon after becoming aware of these facts, Cohen negotiated an agreement with Daniels to purchase her silence for \$130,000.⁴⁰ In order to pay Daniels, Cohen drew down \$130,000 from his home-equity line of credit and requested that it be deposited into a bank account in the name of Essential Consultants, a shell entity Cohen had incorporated a few days prior.⁴¹ The next morning, Cohen went to another bank and wired \$130,000 from Essential Consultants to Daniels’ counsel.⁴² When completing the paperwork required for this wire transfer, Cohen indicated that the transaction’s purpose was a “retainer.”⁴³ The next day after the transaction was complete, Daniels executed the confidentiality agreement and side letter agreement with Cohen.⁴⁴

In 2017, the Trump Organization was invoiced by Cohen for the Daniels payment.⁴⁵ Every month, in accordance with an instruction from a Trump Organization executive, Cohen submitted an invoice for \$35,000 that stated, “Pursuant to the retainer agreement, kindly remit payment for services rendered for” the relevant month.⁴⁶

34 *Id.*

35 Mike McIntire, Charlie Savage & Jim Rutenberg, *Tabloid Publisher’s Deal in Hush-Money Inquiry Adds to Trump’s Danger*, *The New York Times* (Dec. 12, 2018), <https://nyti.ms/2Rr2aNX>; Palazzolo et al., *supra* note 4.

36 Joe Palazzolo & Michael Rothfeld, *Trump Lawyer Used Private Company, Pseudonyms to Pay Porn Star ‘Stormy Daniels’*, *The Wall Street Journal* (Jan. 18, 2018, 5:48 PM), <https://on.wsj.com/3ymlUSg>.

37 McIntire et al., *supra* note 35.

38 Palazzolo et al., *supra* note 4.

39 *Id.*

40 *Id.*; Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged \$130,000 Payment for Adult-Film Star’s Silence*, *The Wall Street Journal* (Jan. 12, 2018, 3:13 PM), <https://on.wsj.com/3eFYOOE>.

41 Phillip Bump, *How money flowed through Michael Cohen’s multi-purpose shell company*, *The Washington Post* (Mar. 8, 2018, 8:47 PM), <https://wapo.st/33Rc7Xy>; Palazzolo et al., *supra* note 4.

42 Bump, *supra* note 41.

43 Francine McKenna, *Michael Cohen’s hush payments provided prosecutors a crucial Trump paper trail*, *Market Watch* (Aug. 25, 2018, 9:22 AM), <https://www.marketwatch.com/story/cohens-clumsy-payments-gave-paper-trail-to-prosecutors-2018-08-22>.

44 Palazzolo et al., *supra* note 4.

45 Ballhaus & Hong., *supra* note 5.

46 SDNY Information at ¶ 39.

These invoices were accounted for in the Trump Organization as “legal expenses,” and by the end of 2017, totaled \$420,000.⁴⁷

Trump’s alleged involvement in these payments is well documented.⁴⁸ In his guilty plea for federal campaign finance violations, Cohen testified that “Donald Trump directed him to commit a crime by making payments to two women for the principal purpose of influencing an election.”⁴⁹ Cohen has further elaborated in press interviews, congressional testimony, and his memoir that Trump was involved in or briefed on nearly every step of the agreements. An audiotape of Trump and Cohen discussing the \$150,000 payment to McDougal also has been released.⁵⁰

Initially, Trump and his representatives denied the allegations.⁵¹ On November 4, 2016, Trump Communications Director Hope Hicks stated that it was “absolutely, unequivocally” false that Trump and Daniels had had a relationship.⁵² On January 12, 2018, a White House official further denied the affair, stating: “These are old, recycled reports, which were published and strongly denied prior to the election.”⁵³ On March 26, 2018, the day after Daniels’ *60 Minutes* interview aired, Trump tweeted: “So much Fake News. Never been more voluminous or more inaccurate.”⁵⁴ On April 5, 2018, Trump explicitly denied any knowledge of the payment, including why it was made and where it came from.⁵⁵

As evidence implicating Trump began to emerge, Trump and his representatives changed their story.

As evidence implicating Trump began to emerge, Trump and his representatives changed their story. On April 26, 2018, Trump admitted that Cohen represented him with regards to the Daniels’ deal, but that “[t]here was

47 Ballhaus & Hong, *supra* note 5.

48 See, e.g., Devlin Barrett, *Trump spoke repeatedly with Cohen, aides amid scramble to pay Stormy Daniels, court documents show*, The Washington Post (July 18, 2019, 4:04 PM), <https://wapo.st/3wgEhaM>; Palazzolo, *supra* note 4; James Hill, *Trump personally involved in legal effort to silence Stormy Daniels: Sources*, ABC News (Oct. 2, 2018, 5:42 PM), <https://abcn.ws/3fkXFw8>; Joe Palazzolo & Michael Rothfeld, *The Fixers: The Bottom Feeders, Crooked Lawyers, Gossipmongers, and Porn Stars Who Created the 45th President* (2020).

49 Weija Jiang, *Michael Cohen says he paid off women at Trump’s direction to influence election*, CBS News (Aug. 21, 2018, 6:32 PM), www.cbsnews.com/news/michael-cohen-guilty-plea-says-payoffs-were-meant-to-influence-2016-election-in-court-today-2018-08-21/.

50 Matt Apuzzo, Maggie Haberman & Michael S. Schmidt, *Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model*, The New York Times (July 20, 2018), <https://nyti.ms/3vA3wED>.

51 See generally Phillip Rucker & John Wagner, *Trump’s falsehoods on hush-money payments are ‘coming home to roost’*, The Washington Post (Dec. 13, 2018, 7:36 PM), <https://wapo.st/3yfbrcB>.

52 Joe Palazzolo, Michael Rothfeld & Lukas I. Alpert, *National Enquirer Shielded Donald Trump From Playboy Model’s Affair Allegation*, The Wall Street Journal (Nov. 4, 2016), <https://on.wsj.com/3vwc27m>.

53 Rothfeld & Palazzolo., *supra* note 40.

54 Jen Kirby, *It sure seems like Trump just subtweeted Stormy Daniels*, Vox (Mar. 26, 2018, 10:00 AM), <https://bit.ly/3xAPaFS>.

55 Jen Kirby, *Trump: I don’t know anything about the \$130,000 my lawyer paid Stormy Daniels*, Vox (Apr. 5, 2018, 6:00 PM), <https://bit.ly/3e6VL38>.

no campaign funds going into this, which would have been a problem.”⁵⁶ On May 2, 2018, Trump’s attorney Rudolph Giuliani stated that the payment to Daniels was “funneled through a law firm, and the president repaid it.”⁵⁷ On May 3, 2018, Trump confirmed by tweet that he repaid Cohen for the Daniels settlement through a monthly retainer.⁵⁸ On August 22, 2018, Trump reiterated that the payments did not constitute a campaign finance violation because they “came from me,” and “didn’t come out of the campaign.”⁵⁹

As noted, Cohen ultimately pled guilty in federal court with respect to his involvement in these hush money payments, as well as several other charges, and was later sentenced to three years in prison.⁶⁰ As a part of the investigation, both Trump Organization CFO Allen Weisselberg and Pecker cooperated and were granted immunity.⁶¹ As for Trump, federal prosecutors did not identify him by name in the August 2018 SDNY filing against Cohen.⁶² However, based on press reports and other context, the individual repeatedly referred to as “Individual-1” is Trump.⁶³ Some of the prosecutorial logic and evidence that formed the basis for Cohen’s federal guilty plea also would bear upon state charges against Trump, as we discuss in Section II.⁶⁴

B. Fringe Benefits and Other Tax Issues

On June 25, 2021, *The New York Times* reported that New York prosecutors are considering imminently charging the Trump Organization in connection with fringe benefits it allegedly provided to its CFO, Allen Weisselberg and members of his family. There may be tax and other legal implications if, as has been reported, such perks as luxury cars and private school tuition were not treated as income, properly recorded in the books and records of the company, and appropriate taxes paid. We address the known facts about the fringe benefits in Section II.E and F below, assess possible criminal laws that may apply in Section III, and in Section IV consider the legal rules under which Trump himself may be liable. If he had personal knowledge of relevant facts, that can give rise to the specific criminal intent required for prosecutors to prove a criminal case.^{65 66}

56 Jen Kirby, *A timeline of Trumpworld’s changing story on Stormy Daniels*, Vox (May 4, 2018, 3:05 PM), <https://bit.ly/3t6pflG>.

57 The New York Times, *What Giuliani Said About Cohen’s Payment to Stormy Daniels*, The New York Times (May 2, 2018), <https://nyti.ms/3xBjZtR>.

58 Kirby, *supra* note 56.

59 FOX & Friends (@foxandfriends), Twitter (Aug. 22, 2018, 12:31 PM), <https://bit.ly/2SjITzn>.

60 Benjamin Weisser & William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, The New York Times (Dec. 12, 2018), <https://nyti.ms/3bGNppl>.

61 Ballhaus & Hong, *supra* note 5.

62 See generally SDNY Information.

63 Dara Lind, *Michael Cohen: ‘Individual 1 is Donald J. Trump’*, Vox (Feb. 27, 2019, 11:16 AM), <https://bit.ly/3hIQnoQ>.

64 The staff of the Federal Election Commission “found ‘reason to believe’ violations of campaign finance law were made ‘knowingly and willfully’ by the Trump campaign.” However, the commission itself deadlocked 3-3 along party lines on whether to proceed or drop the case. Shane Goldmacher, *F.E.C. Drops Case Reviewing Trump Hush-Money Payments to Women*, The New York Times (May 6, 2021), <https://www.nytimes.com/2021/05/06/us/politics/trump-michael-cohen-fec.html>.

65 Rashbaum et al., *supra* note 2.

66 Buettner et al., *supra* note 8.

But that is hardly the end of the analysis when considering the potential exposure of Trump for tax matters. Trump reportedly paid just \$750 in federal income tax both in 2016 and 2017. This low tax liability was the result of a number of tax deductions and practices that have been the subject of investigative reporting and other scrutiny.⁶⁷ To the extent that some of the same information was provided as part of, or affected, state tax filings (as is typical), these deductions and practices potentially also raise state criminal issues. We turn now to some of those that have been the reported focus of the New York investigators.

1. Consulting Fees

Between 2010 and 2018, the Trump Organization reported approximately \$26 million in “consulting fees.”⁶⁸ These fees could have provided an avenue by which the Trump Organization could reduce its taxes because companies are able to write off consulting fees as a business expense, reducing the amount of final profit subject to tax.⁶⁹

These fees, at least in part, appear to have been payments to the Trump family that were claimed as tax deductions. In her White House financial disclosure, Trump’s daughter Ivanka Trump reported, for example, that she received \$747,622 in payments from a consulting company she co-owned.⁷⁰ That amount was identical to the amount of “consulting fees” reported by the Trump Organization for hotel projects in Vancouver and Hawaii.⁷¹ The payments were in addition to income Ms. Trump received from the Vancouver and Hawaii projects as a Trump Organization executive.⁷² Thus, Ms. Trump “appears to have been treated as a consultant on the same hotel deals that she helped manage as part of her job at her father’s business.”⁷³ That raises tax issues, as we explain further below.

Between 2010 and 2018, the Trump Organization reported approximately \$26 million in “consulting fees.” These fees could have provided an avenue by which the Trump Organization could reduce its taxes because companies are able to write off consulting fees as a business expense, reducing the amount of final profit subject to tax.

Other reported “consulting fees” appear to be inconsistent with express representations made by Trump Organization associates. On a failed hotel deal in Azerbaijan, for example, the Trump Organization reported \$1.1 million in consulting fees.⁷⁴ Yet a Trump Organization lawyer told *The New Yorker* that “[w]e did not pay

67 *Id.*

68 Buettner et al., *supra* note 8.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

any money to anyone.”⁷⁵ Similarly, on a possible Trump building in Turkey, the Trump Organization reported \$2 million in consulting fees.⁷⁶ But “a person directly involved in developing two Trump towers in Istanbul expressed bafflement when asked about consultants on the project, telling the *The New York Times* there was never any consultant or other third party in Turkey paid by the Trump Organization.”⁷⁷

Allegations of shielding income provided to children from tax liability appear to be nothing new in the Trump family. As reported by *The New York Times* in 2018, Trump’s late father, Fred Trump, “employed a number of legally dubious schemes decades ago to evade gift taxes on millions of dollars he transferred to his children.”⁷⁸

Ivanka Trump has denied the more recent allegations on Twitter, stating: “They know very well that there’s nothing here and that there was no tax benefit whatsoever.”⁷⁹ Alan Garten, Chief Legal Officer for the Trump Organization, has also denied the allegations.⁸⁰

2. Conservation Easements

Trump’s potentially problematic business loss deductions extend beyond consulting fees. For example, Trump received a \$21.1 million tax break for a conservation easement for 158 acres of forest in Westchester County on a compound known as Seven Springs.⁸¹ That tax break was based on a \$56.5 million valuation of Seven Springs—more than double the assessed value for local tax purposes.⁸² If that valuation was too high, it would have inflated the tax write-off. As publicly reported, the valuation Trump utilized “appears to have relied on unsupported assumptions and misleading conclusions that boosted the value of Trump’s charitable gift—and his tax break, according to two independent appraisers.”⁸³ These assumptions included that a future buyer could build and sell up to 24 mansions on the set-aside property, even though Trump himself was never able to build housing or a golf course due to opposition by local groups and environmental concerns.⁸⁴ The appraisal also said that the preserved land had no independent economic value, which would have the effect of driving up the tax deduction, because it is “calculated by subtracting the value for the conserved property from the value when it could be developed”; one independent appraiser described this valuation as “crazy,” according to *The Washington Post*.⁸⁵

75 *Id.*; Adam Davidson, *Donald Trump’s Worst Deal*, *The New Yorker* (Mar. 5, 2017), <https://bit.ly/3eG9LQq>.

76 Buettner et al., *supra* note 8.

77 *Id.*

78 David Barstow, Suzanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father*, *The New York Times* (Oct. 2, 2018), <https://nyti.ms/3u9BRKf>.

79 Ivanka Trump (@IvankaTrump), Twitter (Nov. 19, 2020, 7:57 PM), <https://bit.ly/3u6thvS>.

80 Danny Hakim, Mike McIntire, William K. Rashbaum & Ben Protess, *Trump Tax Write-Offs Are Ensnared in 2 New York Fraud Investigations*, *The New York Times* (Nov. 19, 2020), <https://nyti.ms/2QLPFMq>.

81 Partlow et al., *supra* note 9.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

In addition, since 2014, the Trump Organization has deducted \$2.2 million for property taxes paid on Seven Springs.⁸⁶ This deduction is made possible only because the Trump Organization has classified Seven Springs as an investment property in its tax filings.⁸⁷ The problem with that classification, however, is that it is inconsistent with the Trump family's own statements about their clear non-commercial use of the property. In a 2014 *Forbes* video interview titled, "Growing Up Trump: Inside The Family's \$19.5M Estate," for example, Eric Trump described Seven Springs as "home base for us for a long, long time," and added that "this is really our compound."⁸⁸ Similarly, until *The New York Times* expressly noted as much in September 2020, the Trump Organization website stated that Seven Springs was used as a "retreat for the Trump family."⁸⁹

Questions have also been raised about the tax treatment involving a conservation easement on another Trump property. In 2002, Trump acquired a 261-acre property near Los Angeles, California with the intention of developing the land to build "some of the most beautiful houses in California."⁹⁰ After receiving numerous denials from city geologists to proceed with the development, however, Trump opted instead to enter into an agreement with a nonprofit conservancy to abstain from developing the land and establish a conservation easement, though the agreement allowed the conserved land to continue to be used as a driving range for the Trump National Golf Course.⁹¹ This 2014 easement ultimately would be reported by the Trump Organization as a \$25 million tax deduction.⁹² The NYAG has civilly subpoenaed financial records relating to this easement and has publicly raised questions about whether the valuation was accurate.⁹³ According to press reports, courts have also begun challenging the validity of easements of this kind, albeit in civil cases.⁹⁴

3. Chicago Unit Acquisition

For several years, Trump has reported that he owes \$50 million to a company he controls, Chicago Unit Acquisition LLC.⁹⁵ This debt is reportedly attributable to the construction of the Trump International Hotel and Tower in Chicago.⁹⁶ According to a 2008 lawsuit, this construction was initially financed by Deutsche Bank

86 Buettner et al., *supra* note 8.

87 *Id.*

88 *Growing Up Trump: Inside The Family's \$19.5M Estate*, *Forbes* (July 17, 2014, 1:04 PM), <https://bit.ly/3aQifmQ>.

89 Buettner et al., *supra* note 8.

90 Tanfani, *supra* note 9.

91 *Id.*

92 *Id.*

93 *Id.*; Deanna Paul & Rebecca Davis O'Brien, *New York Attorney General Investigating Trump Organization, President Trump's Assets*, *The Wall Street Journal* (Aug. 24, 2020, 5:22 PM), https://www.wsj.com/articles/new-york-attorney-general-investigating-whether-president-trump-organization-inflated-his-assets-11598291821?mod=article_inline.

94 Rubin, *supra* note 9.

95 Russ Choma, *Donald Trump Has Never Explained a Mysterious \$50 Million Loan. Is It Evidence of Tax Fraud?*, *Mother Jones* (Nov./Dec. 2019), <https://bit.ly/33dEMWs>.

96 *Id.*

and Fortress Investment. Press reports suggest he could not fully repay Fortress.⁹⁷ That lender reportedly agreed to accept just \$48 million, even though the loan was worth around \$100 million. Under applicable tax regulations, the discounted amount of forgiven debt is generally treated as taxable income to the debtor.⁹⁸ However, *Mother Jones* has reported that Trump may have engaged in a “controversial tax avoidance scheme known as debt parking,” purchasing the unpaid debt through a corporation and treating it as an outstanding loan.⁹⁹ If that is the case, it would allow Trump to avoid paying the tax despite the fact that the obligation was actually reduced by Fortress. The NYAG has subpoenaed records regarding the Trump Chicago project.¹⁰⁰

4. Other Tax Issues

In Sections II.E and F we address additional tax issues relating to Trump, the Trump Organization, and CFO Allen Weisselberg and his family. Prosecutors may well be looking at still other tax matters that are not public. That said, we wish to emphasize that based on the public record alone there is not enough information to determine whether criminal tax charges will be filed as to any of these matters. As we discuss in detail in Section IV, there are also substantial defenses that may apply if charges are filed (or may cause prosecutors not to proceed). Criminal tax claims are highly fact-specific. To definitively ascertain liability we would, for example, need to know more about the tax treatment of the questioned consulting fees (including whether all applicable income taxes were paid by all concerned), about the work of the appraisers in connection with the easements, and about the structuring of the apparent debt parking. That undoubtedly explains why New York authorities have waged years-long court battles to obtain access to a vast amount of internal records bearing upon these issues, including two (ultimately successful) trips to the U.S. Supreme Court.

C. Alleged Misrepresentations to Loan Officers and Insurance Representatives

According to reporting by *The Washington Post*, the Trump Organization prepared and distributed inflated statements of financial conditions to lenders, journalists, or business partners when “Trump wanted to make a good impression.”¹⁰¹ These statements purported to describe “properties, debts, and multibillion-dollar net worth” that in fact “were deeply flawed” in that they “overvalued” assets, “omitted properties that carried big debts,” and included “key numbers [that] were wrong.”¹⁰²

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 Fahrenthold & O’Connell, *supra* note 13.

102 *Id.*

According to these reports, while the Trump Organization's reporting to tax authorities told one story, the organization's reporting to loan officers and insurance representatives told quite a different one. For at least the past decade, the Trump Organization appears to have maintained two sets of inconsistent numbers for its properties. One set, which was provided to lenders, allegedly reflected inflated profitability metrics. The other set, which was provided to tax authorities, allegedly reflected deflated metrics.¹⁰³

In October 2019, *ProPublica* published an investigation into inconsistencies for 40 Wall Street and the Trump International Hotel and Tower.¹⁰⁴ According to the *ProPublica* report, in 2015, the Trump Organization sought to refinance its debts for 40 Wall Street with Ladder Capital Finance LLC.¹⁰⁵ At the time, Jack Weisselberg, son of Allen Weisselberg, was a director of Ladder Capital.¹⁰⁶ During the negotiations, the Trump Organization reported an occupancy rate of 58.9 percent as of January 2013 and 95 percent as of January 2016.¹⁰⁷ After being provided with these reported rates, Ladder Capital approved a 10-year loan with a lower interest rate and terms that would allow Trump to delay paying off the principal in full until the end of the loan.¹⁰⁸ According to financing experts, the more than 36 percentage point occupancy rate increase reported by the Trump Organization would have been a "selling point" to Ladder Capital because it demonstrated "leasing momentum."¹⁰⁹

The occupancy rates reported to Ladder Capital, however, were apparently inconsistent with the rates reported to tax authorities.¹¹⁰ In property tax filings for 40 Wall Street, the Trump Organization reported an occupancy rate of 81 percent as of January 2013.¹¹¹ Under this rate, the more than 36 percent occupancy rate increase—a "selling point" for refinancing—would have been reduced to a less

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103 Fahrenthold & O'Connell, *supra* note 13; Heather Vogell, *Never-Before-Seen Trump Tax Documents Show Major Inconsistencies*, *ProPublica* (Oct. 16, 2019, 4:00 AM), <https://bit.ly/3xvO3at>.

104 Vogell, *supra* note 103.

105 *Id.*

106 Jack Weisselberg, LinkedIn, <https://bit.ly/3gNfwyb>.

107 Vogell, *supra* note 103.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

than 15 percent increase.¹¹² The alleged reporting inconsistencies on 40 Wall Street continued after the loan received approval.¹¹³ In 2015, for example, the payment for the right to rent the building was reported as \$1.65 million to tax authorities and \$1.24 million to Ladder Capital.¹¹⁴ Similarly, in 2017, insurance costs were reported as \$744,521 to tax authorities and \$457,414 to Ladder Capital.¹¹⁵

The Trump Organization and Ladder Capital have declined to comment to the media on the specifics of these allegations.¹¹⁶ The attorneys and accountants involved in preparing the inconsistent records have also declined to comment to journalists.^{117 118}

The reporting inconsistencies also extended to at least one other property, the Trump International Hotel and Tower.¹¹⁹ For at least eight years, the associated gross income reported to tax authorities “was typically only about 81% of what [Trump’s company] reported to the lender.”¹²⁰ In 2017, for example, the associated gross income was reported as \$822,000 to tax authorities and \$1.67 million to the lender.¹²¹ Consistent with this discrepancy, the category of income from leasing space on the roof for television antennas that was reported to the lender “as major sources of income” was omitted entirely from tax filings.¹²²

Alleged discrepancies are also found, for instance, in a 2011 financial statement in which Trump reported that he had 55 home lots for sale in Southern California at a price of at least \$3 million per lot. In reality, however, only 31 lots were zoned and ready for sale. Trump thereby claimed credit for at least \$72 million in prospective future revenue that did not then exist. Other inaccuracies include Trump’s claim that his vineyard in Virginia was 2,000 acres, when it was only roughly 1,200. Trump has also said that the Trump Tower has 68 floors even though it only has 58.¹²³

112 Vogell, *supra* note 103.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 The Trump Organization—namely Ivanka Trump and Donald Trump, Jr.—also allegedly reported inaccurate occupancy figures to prospective buyers of units in Trump SoHo, a hotel and condo development in New York City, but after a yearslong investigation, the Manhattan District Attorney’s Office declined to prosecute the Trump children. See Andrea Bernstein, *How Ivanka Trump and Donald Trump, Jr., Avoided a Criminal Indictment*, *The New Yorker* (Oct. 4, 2017), <https://www.newyorker.com/news/news-desk/how-ivanka-trump-and-donald-trump-jr-avoided-a-criminal-indictment>.

119 Vogell, *supra* note 103.

120 *Id.*

121 *Id.*

122 *Id.*

123 Farenthold & O’Connell, *supra* note 13.

In addition to statements to lenders, the Trump Organization also has allegedly reported inflated assets to insurance companies. According to Cohen's congressional testimony, the inflated assets were reported to insurance companies at Trump's "direction and with his knowledge" for at least three years between 2011 and 2013.¹²⁴ The purpose of reporting inflated assets was to reduce insurance premiums: "[W]hen we were dealing later on with insurance companies we would provide them with these copies so that they would understand that the premium, which is based sometimes on the individual's capabilities to pay, would be reduced."¹²⁵ In addition to Trump and Cohen, Allen Weisselberg and others allegedly were aware of this reporting practice with insurance companies.¹²⁶

Notably, Trump also appears to have a close relationship with the broker from the Trump Organization's main insurance provider, Aon.¹²⁷ In a 2011 profile of Aon's Pamela Newman, Trump is introduced as "one of her biggest clients."¹²⁸ In 2015, Newman was the first individual to officially donate to Trump's presidential campaign.¹²⁹ This may raise questions for investigators as to how closely the broker scrutinized any false statements Trump may have made, or whether she was duped by him. We hasten to add that we do not know the answer to that question, and it may turn out that nothing was amiss. Our point is simply that this is a matter for prosecutorial review in light of the questions about the alleged divergent valuations.

The Trump Organization has declined to comment on the specifics of these allegations.¹³⁰ Aon, which has been subpoenaed at least by the New York State Department of Financial Services (DFS) and the DANY, has indicated only that it intends to cooperate with the subpoena.¹³¹ The DFS subpoena sought, among other things, documents relating to Aon's business with Trump and the Trump Organization dating back to 2009, including all communications, contracts, and agreements between the parties, copies of the issued insurance policies, and applications and financial statements used to secure those insurance policies.¹³²

124 *Hearing with Michael Cohen: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 1, 38 (2019), <https://docs.house.gov/meetings/GO/G000/20190227/108969/HHRG-116-G000-20190227-SD003.pdf>.

125 *Id.*

126 David Voreacos, Shahien Nasiripour, Gregg Farrell, Andrew Martin & Bloomberg, *Trump Business Aides Under Microscope After Cohen Names Names*, *Fortune* (Feb. 28, 2019, 10:13 AM), <https://fortune.com/2019/02/28/trump-business-aides-michael-cohen/>.

127 Greg Walters, *Trump's insurance practices are under investigation now. He can thank Michael Cohen*, *Vice* (Mar. 6, 2019, 10:44 AM), <https://bit.ly/3aQika8>.

128 *Id.*

129 *Id.*

130 William K. Rashbaum, Ben Protess & David Enrich, *Trump Organization's Insurance Policies Under Scrutiny in New York*, *The New York Times* (Mar. 5, 2019), <https://nyti.ms/3eFVKSB>.

131 *Id.*

132 *Id.*

II. The Genesis, Evolution, and Status of the Investigations

Public reporting suggests that the DANY's initial focus was on the possible falsification of business records with respect to the narrow issue of the \$130,000 "hush money" payments made by Michael Cohen on behalf of Trump.¹³³ Those payments initially were proceeds from Cohen's home-equity line of credit and then were reimbursed to Cohen on the basis of invoices from Cohen, who falsely described them as payable "pursuant to retainer agreement"; although they were not valid "legal expenses," the Trump Organization reportedly accounted for the payments as such.¹³⁴

A. Initial Subpoenas

On August 1, 2019, the DANY served a grand jury subpoena on the Trump Organization seeking documents concerning the hush money payments to Stormy Daniels and Karen McDougal, including any involvement by Cohen or American Media, Inc.¹³⁵ The Trump Organization did not entirely resist the subpoena, and its lawyers began communication with the DANY about collecting and producing responsive documents.¹³⁶ The DANY insisted that the subpoena requests covered the Trump Organization's tax returns, but Trump's lawyers disagreed.¹³⁷

133 Ben Protess & William K. Rashbaum, *Manhattan D.A. Subpoenas Trump Organization Over Stormy Daniels Hush Money*, The New York Times (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/nyregion/trump-cohen-stormy-daniels-vance.html>.

134 SDNY Information at ¶¶ 34, 39–40; Ballhaus & Hong, *supra* note 5; Tom Llamas, *Michael Cohen dismisses claims of email as proof that Trump knew about payment to porn star to buy her silence*, ABC News (Mar. 9, 2018, 3:12 PM), <https://abcn.ws/3bzIXBN>.

135 Protess & Rashbaum, *supra* note 133; Kara Scannell, *Manhattan DA subpoenas Trump Organization and AMI in Stormy Daniels hush money investigation*, CNN (Aug. 1, 2019, 10:19 AM), <https://www.cnn.com/2019/08/01/politics/manhattan-da-trump-organization-stormy-daniels/index.html>.

136 William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, The New York Times (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/nyregion/trump-tax-returns-cy-vance.html>; Shiro Tarlo, *Trump sues Manhattan DA and Mazars USA to block prosecutors from obtaining his tax returns*, Salon (Sep. 19, 2019, 4:48 PM), <https://www.salon.com/2019/09/19/trump-sues-manhattan-da-and-mazars-usa-to-block-prosecutors-from-obtaining-his-tax-returns/>.

137 Tarlo, *supra* note 136.

In response to the parties' impasse on the full scope of the August 1, 2019 subpoena, the DANY served a grand jury subpoena on Trump's accounting firm, Mazars USA, seeking eight years of tax returns and related documents for Trump and the Trump Organization,¹³⁸ as well as additional financial information. The August 29, 2019 subpoena also sought the same financial records as had previously been requested by the U.S. House Committee on Oversight and Reform and other House committees.¹³⁹

On September 19, 2019, Trump filed a lawsuit in Manhattan federal district court seeking to enjoin the DANY from enforcing the Mazars subpoena.¹⁴⁰ In the complaint, Trump argued that he was immune from all criminal process while he was president.¹⁴¹ The case was assigned to U.S. District Judge Victor Marrero.

B. District Court and Second Circuit Opinions

Judge Marrero issued an order dismissing Trump's lawsuit on October 7, 2019.¹⁴² The district court rejected Trump's "categorical and limitless assertion of presidential immunity" as "repugnant to the nation's governmental structure and constitutional values."¹⁴³ The court also held that compliance with subpoenas issued by a grand jury is in the public interest, asserting that "grand juries are an essential component of our legal system and the public has an interest in their unimpeded operation" and citing several cases upholding the particular importance of grand juries to the health of the U.S. legal system.¹⁴⁴

Trump appealed the ruling to the Second Circuit. Though its reasoning differed from that of Judge Marrero in the district court, the Second Circuit nevertheless refused to provide Trump the relief he sought based on skepticism about his presidential immunity claims. In its rejection, the court relied on the principle that "the President is subject to judicial processes in appropriate circumstances" and on precedent that saw the Supreme Court rule unanimously against President Richard Nixon in his refusal to comply with a subpoena for tapes during the Watergate scandal.¹⁴⁵ Thus, the court wrote, "Because we conclude that the President is

138 Rashbaum & Protess, *supra* note 136.

139 Lucien Bruggeman, *Trump Fighting Congressional Subpoena for his Financial Records*, ABC News (April 22, 2019, 6:06 PM), <https://abcnews.go.com/Politics/president-trump-trump-org-sue-house-oversight-committee/story?id=62551381>; Memorandum from Chairman Elijah E. Cummings to Members of the Committee of Oversight and Reform (April 12, 2019) (on file with Politico), <https://www.politico.com/f/?id=0000016a-131f-da8e-adfa-3b5f319d0001>.

140 Michael Gold, *Trump Lawyers Argue He Cannot Be Criminally Investigated*, The New York Times (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/nyregion/trump-tax-returns-lawsuit.html>.

141 Complaint at ¶ 4, *Trump v. Vance*, 395 F.Supp.3d 283 (S.D.N.Y. 2019) (No. 1:19-cv-08694-VM) https://storage.courtlistener.com/recap/gov.uscourts.nysd.523086/gov.uscourts.nysd.523086.1.0_2.pdf.

142 *Trump v. Vance*, 395 F.Supp.3d 283 (S.D.N.Y. 2019).

143 *Id.* at 289, 290.

144 *Id.* at 316.

145 *Trump v. Vance*, 941 F.3d 640 (2d Cir. 2019).

unlikely to succeed on the merits of his immunity claim, we agree with the district court that he is not entitled to injunctive relief.”¹⁴⁶ Trump then appealed to the Supreme Court.

C. DANY Wins at SCOTUS

In July 2020, the Supreme Court affirmed the Second Circuit’s ruling. In an opinion authored by Chief Justice John G. Roberts, Jr., the Court held that the president is subject to a state grand jury subpoena issued as part of an ongoing criminal investigation.¹⁴⁷ It remanded the case back to the district court to allow Trump to make more focused objections to the breadth of the subpoena. After further losses at both the district court and

appellate court levels, on February 22, 2021, the Supreme Court ultimately ended Trump’s seventeen-month gambit to shield his financial and tax records from the Manhattan prosecutors in a terse, one-sentence order denying a final request for a stay.¹⁴⁸

Around this time, the DANY enlisted Mark F. Pomerantz to lead its investigation.¹⁴⁹ Pomerantz is a storied former federal prosecutor who cut his teeth prosecuting and defending complex white collar and organized crime cases.¹⁵⁰ The DANY also has retained FTI Consulting to assist in the forensic analysis of the voluminous financial records in the case.¹⁵¹ It is notable for a prosecutor to bring in outsiders in this manner, and these moves are telling about both the complexity of the case and the DANY’s apparent resolve.

After further losses at both the district court and appellate court levels, on February 22, 2021, the Supreme Court ultimately ended Trump’s seventeen-month gambit to shield his financial and tax records from the Manhattan prosecutors in a terse, one-sentence order denying a final request for a stay.

146 Trump v. Vance, 941 F.3d 640 (2d Cir. 2019).

147 Trump v. Vance, 591 U.S. ___, 140 S. Ct. 2412 (2020).

148 Trump v. Vance, 977 F.3d 198 (2nd Cir. 2020), *cert. denied*, 19 S.D.N.Y. 8694 (U.S. Feb. 22, 2021) (No. 19-635); Adam Liptak, William K. Rashbaum, Ben Protess & Benjamin Weiser, *Supreme Court Denies Trump’s Final Bid to Block Release of Tax Returns*, The New York Times (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/supreme-court-trump-taxes-financial-records.html>.

149 William K. Rashbaum, Ben Protess & Jonah E. Bromwich, *Manhattan D.A. Recruits Top Prosecutor for Trump Inquiry*, The New York Times (Feb. 18, 2021), <https://www.nytimes.com/2021/02/18/nyregion/trump-investigation-manhattan.html>.

150 *Id.*

151 *Id.*

D. NYAG Investigation

The NYAG began a civil probe into Trump and the Trump Organization in 2019, focused on Trump's finances and business dealings.¹⁵² The investigation's scope includes whether Trump and the Trump Organization "improperly inflated the value of Mr. Trump's assets on annual financial statements in order to secure loans and obtain economic and tax benefits."¹⁵³ On May 19, 2021, the NYAG confirmed reports that it had informed the Trump Organization that it had begun investigating the organization "in a criminal capacity, along with the Manhattan DA."¹⁵⁴ It has been reported that two assistant attorneys general from the NYAG will join the DANY team to conduct the criminal investigation in tandem, rather than the NYAG pursuing an independent criminal probe.¹⁵⁵

This action is a noteworthy one for the NYAG, whose investigations more often focus on complex financial frauds as civil matters. By all accounts, it has been doing just that for the past two years, as it has reviewed mountains of documents and interviewed witnesses. But the investigators—those closest to the minutiae—apparently saw something serious enough and clear enough along the way that they have made the very public decision to move the case over to the criminal side of the ledger. Whatever the precise reasons that brought it about, the NYAG's decision, together with the DANY's already advanced criminal investigation, make clear that Trump's bookkeeping practices—and his interactions with tax authorities, lenders, and insurers—now face even more intense scrutiny.

But the investigators—those closest to the minutiae—apparently saw something serious enough and clear enough along the way that they have made the very public decision to move the case over to the criminal side of the ledger.

E. Focus on Fringe Benefits

On June 25, 2021, *The New York Times* reported that New York prosecutors are considering imminently charging the Trump Organization in connection with its treatment of fringe benefits to its long-time chief financial officer. According to published accounts, prosecutors have of late focused on investigating benefits

¹⁵² Sonia Moghe & Kara Scannell, *New York attorney general adds 'criminal capacity' to probe of Trump Organization*, CNN (May 19, 2021, 12:40 PM), <https://www.cnn.com/2021/05/18/politics/new-york-attorney-general-trump-organization-criminal-probe/index.html>.

¹⁵³ Athena Jones, *New York's new top attorney moves to take on Trump*, CNN (Jan. 3, 2019, 5:39 PM), <https://www.cnn.com/2019/01/03/politics/tish-letitia-james-james-trump-investigations>; NYSCEF Doc. No. 11 at 6, *People v. Trump Organization, Inc.*, Sup Ct, NY County, Aug. 24, 2020, index No. 451685/2020, https://ag.ny.gov/sites/default/files/doc_11_memorandum_of_law.pdf (hereinafter "NYSCEF Doc. No. 11").

¹⁵⁴ *Id.*

¹⁵⁵ Danny Hakim, William K. Rashbaum & Ben Protess, *New York's Attorney General Joins Criminal Inquiry Into Trump Organization*, *The New York Times* (May 18, 2021), <https://www.nytimes.com/2021/05/18/nyregion/trump-ny-ag-investigation-vance.html>.

given to CFO Allen Weisselberg and/or his son Barry during their tenure with the Trump Organization.¹⁵⁶ There may well be tax implications if such perks as private school tuition for Weisselberg's grandchildren were not treated as compensation by the company or affected employees, and if the perks were not properly accounted for in the company's books, they may implicate New York law on falsification of business records.¹⁵⁷ Jennifer Weisselberg, Barry Weisselberg's ex-wife, has confirmed that investigators have asked for some of her ex-husband's financial records.¹⁵⁸

According to documents and deposition testimony that has emerged from his divorce proceeding, Barry Weisselberg and his family received "an array of payments and perks" for Weisselberg's employment with the Trump Organization.¹⁵⁹ These perks included a "corporate apartment where his family previously lived" and about \$40,000 in annual "bonuses."¹⁶⁰ These recently disclosed "payments and perks" have led investigators to question whether "proper taxes were paid," and Barry Weisselberg testified during the divorce proceeding that he had "no idea" whether they had been.¹⁶¹ Investigators may also be looking at whether taxes were properly paid on revenue generated from the cash-only Wollman Rink that Barry Weisselberg managed for the Trump Organization.¹⁶² The investigation has expanded in recent weeks as the DANY prosecutors subpoenaed records of the Columbia Grammar and Preparatory School, investigating "tens of thousands of dollars in tuition payments" that the former president made on behalf of Barry Weisselberg's child—Allen Weisselberg's grandchild.¹⁶³

The Trump Organization is not the only apparent target here. What has already been reported suggests that the investigators are also wielding one of the most potent hammers in the prosecutorial tool kit: applying pressure to Allen Weisselberg and his family. Given Allen Weisselberg's deep knowledge of Trump's business dealings over a period of many decades, and the involvement of his son, this effort has the potential to vastly increase the amount of information available to prosecutors if it can overcome the considerable influence

156 Rashbaum et al., *supra* note 2; Ben Protess, William K. Rashbaum & Danny Hakim, *Top Trump Executive Under Criminal Investigation Over Taxes*, The New York Times (May 19, 2021), <https://www.nytimes.com/2021/05/19/nyregion/trumpo-ny-ag-taxes.html?smid=fb-nytimes&smtyp=cur>.

157 For further legal analysis, see Sections III.A and B below. For further reporting on the fringe benefits, see, e.g., Corinne Ramey, *Prosecutors Seek Cooperation of Trump Confidant, Subpoena Manhattan Private School*, The Wall Street Journal (May 13, 2021, 3:36 PM), https://www.wsj.com/articles/prosecutors-seek-cooperation-of-trump-confidante-subpoena-manhattan-private-school-11620921963?mod=hp_lead_pos10; William K. Rashbaum, Ben Protess & Jonah E. Bromwich, *Trump Executive Could Face Charges as Soon as This Summer*, The New York Times (June 15, 2021), <https://www.nytimes.com/2021/06/15/nyregion/trump-weisselberg-vance-investigation.html?referringSource=articleShare>.

158 David A. Fahrenthold & Shayna Jacobs, *N.Y. attorney general probes key Trump aide's finances*, The Seattle Times (Apr. 1, 2021, 4:44 PM), <https://www.seattletimes.com/nation-world/n-y-attorney-general-probes-key-trump-aides-finances/>.

159 Shayna Jacobs, Jonathan O'Connell & David A. Fahrenthold, *Trump executive's son was given sizable salary, generous perks, documents show*, The Washington Post (Apr. 9, 2021, 4:29 PM), <https://wapo.st/3b4dXlx>.

160 *Id.*

161 *Id.*

162 *Id.*

163 Jonah Bromwich, Ben Protess & William K. Rashbaum, *Trump's 'Fringe Benefits' for Employees Are Under Scrutiny*, The New York Times (May 13, 2021), <https://nyti.ms/3wLEtF8>.

that Trump still wields on those in his circles.¹⁶⁴ The alternative to cooperation for Allen Weisselberg may be dire: media reports have indicated that he may face charges as soon as this summer.¹⁶⁵

F. Grand Jury Proceedings and Initial Charges

In May 2021, the DANY convened a special grand jury that is reportedly “expected to decide whether to indict former president Donald Trump, other executives at his company or the business itself, should prosecutors present the panel with criminal charges.”¹⁶⁶ While the press is reporting that the first charges are expected imminently, additional charges may follow. Such special grand juries typically have a duration of up to six months (unless extended by a judge); guided by prosecutors, such grand juries subpoena and review documents, witnesses, and other evidence in determining whether to indict.¹⁶⁷ Grand jury witnesses so far have reportedly included the Trump Organization’s longtime controller, Jeffrey McConney.¹⁶⁸ McConney is an authority on the financial issues under investigation, and so his testimony bears upon the potential liability of the company, Trump, and other executives. As a close colleague of CFO Weisselberg, McConney’s testimony could also be part of prosecutors’ effort to secure the CFO’s cooperation. That is both because McConney can offer testimony against Weisselberg, and because the (well-publicized) appearance of McConney can serve as a reminder to Weisselberg that others can aid the prosecution with financial matters too, potentially motivating him to accept a deal while he can.¹⁶⁹ There could well be further developments as prosecutors and the grand jury do their work in the period ahead.^{170 171}

164 See, e.g., Josh Gerstein, *Manafort jailed after alleged witness tampering*, Politico (June 15, 2018, 4:14 PM), <https://www.politico.com/story/2018/06/15/manafort-jailed-after-alleged-witness-tampering-648988>; Susan Hennessey & Quinta Jurecic, *Is Donald Trump’s Tweet About Roger Stone Witness Tampering?*, Lawfare (Dec. 3, 2018, 4:17 PM), <https://www.lawfareblog.com/donald-trumps-tweet-about-roger-stone-witness-tampering>; Bess Levin, *Trump Insists He Can Intimidate Any Witness He Pleases Via Tweet*, Vanity Fair (Nov. 15, 2019), <https://www.vanityfair.com/news/2019/11/donald-trump-marie-yovanovitch-witness-intimidation>.

165 Rashbaum et al., *supra* note 157; Rashbaum et al., *supra* note 2.

166 Shayna Jacobs & David A. Fahrenthold, *Prosecutor in Trump criminal probe convenes grand jury to hear evidence, weigh potential charges*, The Washington Post (May 25, 2021, 8:52 PM), https://www.washingtonpost.com/national-security/trump-investigation-grand-jury/2021/05/25/5f47911c-bcca-11eb-83e3-0ca705a96ba4_story.html.

167 Jacob Shamsian, *A Special Grand Jury Is Secretly Hearing Witnesses in the Manhattan DA’s Trump Investigation. Here’s How It’ll Decide Whether to Bring Criminal Charges*, Business Insider (Jun. 7, 2021, 5:44 PM), <https://www.businessinsider.com/trump-grand-jury-how-it-works-what-charges-jurors-bring-2021-6>.

168 Adapted from Eisen & Perry, *supra* note 18.

169 *Id.*

170 *Id.*

171 Cohen has also been interviewed by the DANY on numerous occasions as part of New York’s grand jury investigation into Trump. Celine Castronuovo, *Michael Cohen Interviewed by Prosecutors about Trump’s Finances*, THE HILL (Jan. 16, 2021, 8:13 AM), <https://thehill.com/regulation/court-battles/534553-michael-cohen-interviewed-by-prosecutors-about-trumps-finances>; Tom Porter, *Michael Cohen Tweeted That His Multiple Meetings with the Manhattan District Attorney Prosecutors ‘Aren’t Good News’ for Trump*, Insider (March 14, 2021 6:32 AM), <https://www.insider.com/michael-cohen-tweets-manhattan-da-meetings-arent-good-news-for-trump-2021-3>.

III. Potentially Relevant Criminal Statutes

The DANY broadly outlined its investigation in an August 2020 court filing, in which it informed the court that it is investigating “possibly extensive and protracted criminal conduct” at the Trump Organization.¹⁷² In a September 2020 filing, the DANY’s lawyers noted that “mountainous” indicia of misconduct by the company could warrant an investigation into “possible tax fraud, insurance fraud and falsifying business records.”¹⁷³

As we have only limited insight into the evidence being gathered by the DANY, the outline of possible charges presented below is neither intended to be exhaustive nor predictive of what, if any, charges the DANY might in fact seek to bring. Our work here is based only on in-depth public reporting and specific public records, but the DANY, of course, has access to witnesses and millions of pages of documents that we do not. So the possible charges we analyze here might not fit the predicate facts as they develop. But based on information known today from the public record, the following possible avenues seem particularly plausible.

One broad note is well worth making at the outset. The NYAG had long made clear that its civil investigation was focused on the Trump Organization, rather than on any particular individual or individuals within the company. In its recent announcement, it said that its investigation of the Trump Organization is “no longer purely civil in nature” and that it was “actively investigating the Trump Organization in a criminal capacity, along with the Manhattan DA.”¹⁷⁴ The NYAG later clarified that two assistant attorneys general have been cross-designated as assistant district attorneys to work on the criminal investigation.¹⁷⁵ The DANY, for its part, indicated in its court filings last year that its investigation encompassed *both* the Trump Organization and its executives.¹⁷⁶

172 Brief for Defendant, *Trump v. Vance*, 481 F.Supp.3d 161 (S.D.N.Y. 2020) (No. 1:19-cv-08694-VM) ECF No. 63, https://storage.courtlistener.com/recap/gov.uscourts.nysd.523086/gov.uscourts.nysd.523086.63.0_1.pdf.

173 Brief for Defendant-Appellee at 33, *Trump v. Vance*, 977 F.3d 198 (2d Cir. 2020) (No. 20-2766) ECF No. 116, <https://oversight-cases.org/wp-content/uploads/2020/10/2020-9-21-Vance-appellee-brief-seeking-to-dismiss-Trump-lawsuit.pdf>; Jonathan Stempel, *Trump could face tax fraud probe, Manhattan prosecutor says*, Reuters (Sept. 21, 2020), <https://www.reuters.com/article/us-usa-trump-vance/trump-could-face-tax-fraud-probe-manhattan-prosecutor-says-idUSKCN26C2W9>.

174 Jacobs & Fahrenthold, *supra* note 1.

175 Sisak, *supra* note 1.

176 *Trump v. Vance*, No. 1:19-cv-08694-VM, *supra* note 172, at 17.

In this report we frequently examine possible charges against Trump individually. The available evidence suggests tight overlap between Trump as an individual and Trump as a business with respect to many of the matters we discuss.¹⁷⁷ Trump is famous for his close control of the companies he owns.^{178 179} He seems likely to have had personal knowledge of many of the facts relevant to the criminal investigators, and this can give rise to the specific criminal intent required for prosecutors to prove a criminal case. Any personal knowledge of any alleged scheme described in this report may open Trump up to criminal liability. That being said, initial reporting about the fringe benefits case expected imminently does not indicate that Trump himself will be charged, and prosecutors would need strong evidence of his personal knowledge and involvement to bring such charges.

It remains to be seen whether that or other cases will also charge corporate executives, as well as the company. The two often (though not always) go hand in hand, including because of the need to associate allegations with actual persons at trial. In this situation, the NYAG is also investigating the Trump Organization civilly, and if prosecutors are unable to mount sufficient evidence to charge Trump criminally as an individual, the NYAG may seek to bring a civil complaint against the company.

Conversely, if Trump *is* charged criminally with respect to conduct that benefited the Trump Organization (and even more so if other executives are also charged), it would be a relatively simple matter for the organization to be charged as well. A corporation may be criminally liable for the unlawful conduct of its high managerial agents, provided that the prosecution can establish that the corporate agent's conduct was within the scope of his duties and were intended, at least in part, to benefit the corporation.¹⁸⁰ In our experience, prosecutors tend to favor corporate prosecutions where the conduct is committed by management of the company and where that conduct is pervasive. Thus, if the DANY charges Trump (or other high-ranking executives), charges against the company may follow.¹⁸¹

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177 Eisen & Perry, *supra* note 18.

178 Flitter, *supra* note 19.

179 Jedd Rosche, *Donald Trump tweets photo of tax returns*, CNN (Oct. 15, 2015, 6:17 PM), <https://www.cnn.com/2015/10/15/politics/donald-trump-tweets-tax-return/index.html>.

180 See New York Penal Law § 20.20(2)(b); see also *People v. Highgate LTC Mgmt., LLC.*, 69 A.D.3d 185, 187–89 (3d Dep't 2009); 4E N.Y.Prac., Com. Litig. in New York State Courts § 125:47 (5th ed.).

181 For a further discussion of this point, see Section IV, Subsection C.

A. Falsification of Business Records

Under a flexible and often-used statute, the DANY potentially could seek to charge Trump or the Trump Organization with falsification of business records. New York Penal Law § 175.10 makes it a misdemeanor crime to delete, alter, or make a false entry in the business records of an enterprise with the intent to defraud. The offense is upgraded to a felony if prosecutors can prove intent to further or conceal another criminal offense, such as insurance or tax fraud.¹⁸² A misdemeanor conviction is punishable by up to one year in jail, while the felony offense carries a potential penalty of up to four years.¹⁸³ The statute of limitations is two years for the misdemeanor offense and five years for the felony.¹⁸⁴

Falsifying business records in the first degree is codified in New York Penal Code § 175.10. For the government to sustain a conviction for this crime, the government must prove each of the following elements beyond a reasonable doubt:

- The person either: (i) made or caused a false entry in the business records of an enterprise; (ii) altered, erased, obliterated, deleted, removed, or destroyed a true entry in the business records of an enterprise; (iii) omitted to make a true entry in the business records of an enterprise in violation of a duty to do so, which they knew to be imposed upon them by law or by the nature of their position; or (iv) they prevented the making of a true entry or caused the omission of a true entry in the business records of an enterprise;¹⁸⁵ and
- The person did so with the intent to defraud that included the intent to commit another crime or to aid or conceal the commission thereof. A person acts with “intent” to defraud when it is their conscious objective or purpose to do so.¹⁸⁶

For purposes of this offense, the term “enterprise” is broad, meaning any person or group of persons engaged in any organized activity where regular records are kept.¹⁸⁷ The actual definition of business record, however, is more narrowly tailored. For purposes of this offense, a business record is a record that is “kept or maintained” by the enterprise for the specific purpose of “evidencing or reflecting its condition or activity.”¹⁸⁸ For example, the alteration of compensation or expense records for the purpose of minimizing tax liabilities could support charges both for the crime of tax fraud and for the separate felony of falsifying business records.

182 New York Penal Law § [175.10](#) provides that “A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.”

183 New York Penal Law §§ [70.15\(1-a\)](#), [70.00\(2\)\(e\)](#).

184 New York Criminal Procedure Law §§ [30.10\(2\)\(b\)](#) and [\(c\)](#).

185 New York Penal Law § [175.05](#).

186 New York Penal Law § [175.10](#).

187 New York Penal Law § [175.00\(1\)](#).

188 New York Penal Law § [175.00\(2\)](#).

A defendant who indirectly falsifies a business record by requesting or demanding that someone else do so may be held liable just as if they did it themselves. Notably, “[i]t is clear that the Legislature, in enacting section 175.00 et seq., intended to protect outsiders, as well as insiders, from fraudulent falsification of an enterprise’s records.”¹⁸⁹

As noted, a narrow case could focus on any mischaracterization of hush payment reimbursements and of fringe benefits in the Trump Organization’s bookkeeping. Given the two-year statute of limitations for a misdemeanor offense, prosecutors may think twice before bringing that charge as a freestanding one simply for falsification of records (although we discuss the applicability of various tolling doctrines to extend statutes of limitations in Section IV.A). But if that falsification were carried over into the Trump Organization’s tax returns—if, for example, it turns out that the payments were intentionally misclassified to reduce tax liabilities—the elements of both business records falsification and tax fraud (more on that later in Section III.B) potentially could be met. In that event, the longer five-year statute could apply here. The DANY also could focus on the annual “Statements of Financial Condition” that the Trump Organization prepared, in which the value of assets are reported to have been inflated.¹⁹⁰ If the Trump Organization submitted those statements of financial condition to lenders, such as when it sought to refinance its debts for 40 Wall Street and the Trump International Hotel and Tower, then the elements of both business records falsification and scheme to defraud (as discussed in Section III.D) could be met.

Moreover, if prosecutors determine that the treatment of the reported hush money reimbursement payments, fringe benefits, and/or other alleged misrepresentations in the books and records of the company constituted an ongoing pattern of conduct, they could charge enterprise corruption so long as two incidents in the pattern occurred within the past five years and certain other conditions are met (as detailed in Section III.E). That is true even if the treatment of the reported hush money reimbursement payments or other matters preceded that period, and even if the treatment of those payments merely constituted misdemeanors (so long as other acts in the pattern were felonies). As noted, the DANY has made explicit that it has cast its net to encompass potentially wide-ranging criminal conduct.¹⁹¹

B. Tax Fraud

Under New York State Tax Law § 1806, a person is guilty of tax fraud in the first degree when that person commits a tax fraud act and, with the intent to evade any taxes due or to defraud the state, the person pays the state (whether by means of underpayment or receipt of refund or both) in excess of \$1,000,000 less than the tax liability that is due within a period of not more than one year.¹⁹² New York State Tax Law § 1805

¹⁸⁹ *People v. Bloomfield*, 6 N.Y.3d 165, 171 (N.Y. 2006).

¹⁹⁰ *Fahrenthold & O’Connell*, *supra* note 13.

¹⁹¹ *Trump v. Vance*, No. 1:19-cv-08694-VM, *supra* note 172.

¹⁹² New York Tax Law § [1806](#).

provides that a person commits criminal tax fraud in the second degree when he or she commits a tax fraud act or acts and pays the state in excess of \$50,000 less than the tax liability. The law also provides in Sections 1804 and 1803 for third and fourth degree felony tax fraud for lesser amounts (\$10,000 and \$3,000 respectively), with a fifth degree offense in Section 1802 that is a misdemeanor for simply committing a tax fraud act without an associated amount. A tax fraud act must be done “willfully” and with “intent”—that is, the person must have acted with either intent to defraud, intent to evade the payment of taxes, or intent to avoid a requirement of law, a lawful requirement of the tax commissioner, or a known legal duty.¹⁹³ As defined in New York State Tax Law § 1801, a “tax fraud act” includes the following examples:

- Failing to submit a tax report or return;
- Filing a fraudulent tax return or other document that has materially phony or fake information;
- Not submitting or remitting a particular tax that is due to the State of New York;
- Failing to pay taxes;
- Scheming to cheat the State of New York by making or providing fraudulent representations that are material and related to a tax.

Tax fraud in the first degree is punishable by up to 25 years incarceration, and in the second degree by up to 15 years, with lesser terms for the other lesser tax fraud offenses.¹⁹⁴ The felony offenses have a five-year statute of limitations and the misdemeanor, two years.¹⁹⁵

Based on the public reporting as to the fringe benefits investigation, prosecutors may seek to charge the Trump Organization (or those who received the benefits) with multiple tax fraud acts here under Section 1801. Elements of that section may be met, for example, if fringe benefits were misdescribed or entirely omitted from relevant filings and/or if appropriate taxes were not paid in connection with those benefits. The class of felony or misdemeanor is harder to ascertain because the exact value of the benefits and their impact on tax liabilities is unclear from the public record. Based upon what we know, a charge in the second degree or less is most likely. That is because the charge is not based upon the total value of the fringe benefits (which may well be over \$1,000,000) but upon the reduction of tax liability in a given year. Perhaps the most likely allegations to be charged against the company would be the failure to pay payroll taxes with respect to the fringe benefits. That said, we will need to await charges, if any, to know the answer to that question.

A number of caveats are important to note. Standalone criminal charges against an organization for tax fraud in connection with the tax treatment of fringe benefits for executives would be unusual. Trump has

193 New York Tax Law § [1801\(a\), \(b\)](#).

194 New York Penal Law §§ [70.00\(2\)\(b\)](#); New York Tax Law § [1806](#).

195 New York Criminal Procedure Law § [30.10\(2\)\(b\)](#).

broadly denied wrongdoing and his attorney stated that “In my more than 50 years of practice, never before have I seen a district attorney’s office target a company over employee compensation or fringe benefits....It’s ridiculous and outrageous.” We are aware of no comparable prosecutions narrowly based only upon fringe benefits allegations of this kind. The circumstances would be even more abnormal if charges were against the company only and not also brought against an individual or individuals.

The underlying breadth and scale of such a tax evasion scheme would have to be significant indeed to merit charges. That is why it is important to consider these allegations in the context of extensive reporting about a wide array of other tax issues. It was reported in February 2021 that the DANY subpoenaed the New York City Tax Commission to ascertain the “values Trump assigned to some commercial properties in tax filings and loan documents.”¹⁹⁶ The tax subpoena requires the Commission to produce income and expense statements that the Trump Organization allegedly filed to decrease the assessed values of its commercial real estate.¹⁹⁷ Such documents would include appraisals that the organization submitted “to challenge the market values assigned to [these properties]” by city tax assessors.¹⁹⁸

The DANY also has subpoenaed at least two of Trump’s frequent lenders, Deutsche Bank AG and Ladder Capital Finance LLC.¹⁹⁹ Taken together, information subpoenaed from these creditors and from the tax agency could help to determine whether the Trump Organization inflated property values to obtain favorable loans while also “deflating those values to lower tax bills for those same properties.”²⁰⁰ Any material difference in the assignment of value for a property in its tax filings and in its loan documents could support fraud charges.

Mazars has turned over several million pages of accounting documents.²⁰¹ The DANY could have obtained (and possibly has long since obtained) the actual filed returns from tax authorities, but the potential treasure trove here could lie in all of the accompanying accounting records, underlying data, work papers, and associated communications.²⁰² The subpoena called for “any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors’ reports,” which will enable the DANY to see how the tax numbers were calculated and could provide a window into criminal intent, if any.²⁰³

196 Peter Eisler & Jason Szep, *Exclusive: New York City tax agency subpoenaed in Trump criminal probe*, Reuters (Feb. 19, 2021, 9:10 PM), <https://www.reuters.com/article/us-usa-trump-investigation-subpoena-excl/exclusive-new-york-city-tax-agency-subpoenaed-in-trump-criminal-probe-idUSKBN2AK037>.

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 Tom Winter & Richard Shapiro, *Prosecutors just got millions of pages of Trump documents. His taxes are only the beginning*, NBC News (Feb. 25, 2021, 3:25 PM), <https://www.nbcnews.com/politics/politics-news/prosecutors-just-got-millions-trump-documents-his-taxes-are-just-n1258876>.

202 *Id.*

203 Jim Mustian & David B. Caruso, *What NY prosecutors could learn from Trump’s tax records*, ABC News (Feb. 23, 2021), <https://abcnews.go.com/US/wireStory/ny-prosecutors-learn-trumps-tax-records-76058218>.

As noted, Trump paid only \$750 in federal income taxes in 2016 and 2017. Yet *The New York Times* determined that his 2017 tax return included figures such as “\$373,000 in wages, \$6.7 million in taxable interest, and \$7.6 million in capital gains.”²⁰⁴ Despite \$14.6 million in stated income, Trump paid so little in income taxes by, among other things, claiming business losses of \$15.3 million.²⁰⁵ Presumably, his New York state returns would show a similar incongruity between stated income and taxes paid. Expenses, especially allegedly manufactured deductions, often come under particular scrutiny by investigators. In this case, certain other

In this case, certain other deductions might be closely scrutinized—such as the massive losses claimed by Trump, deductions in connection with Ivanka Trump’s work as an “independent contractor” while simultaneously working as a salaried employee, and any deductions claimed as a result of easements on Trump’s Southern California and Seven Springs, New York properties, among other things.

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The DANY routinely prosecutes tax fraud for schemes where a defendant makes false representations to tax authorities or third parties in order to evade paying taxes that are due. For example, in *People v. Myles*, the defendant was charged with felony tax fraud after failing to report and pay income taxes on funds he wrongfully diverted from his employer to himself.²⁰⁷ In *People v. Shvo*, the defendant set up a sham out-of-state limited liability corporation (LLC) and then purchased a luxury sports car and titled and registered the car in the LLC’s name to wrongfully avoid paying state and local use

taxes.²⁰⁸ Although the allegations regarding Trump’s possible crimes, taken together, are larger in scale and otherwise factually distinct from these examples, the alleged submission of materially false information in order to evade paying taxes due is prosecuted by the DANY regularly.

204 Adam Kaufmann, ‘*People v. Trump*’?, *New York Law Journal* (Jan. 12, 2021), <https://www.law.com/newyorklawjournal/2021/01/12/people-v-trump/>; Russ Buettner, Mike McIntire, Susanne Craig & Keith Collins, *Trump Paid \$750 in Federal Income Taxes in 2017. Here’s the Math*, *The New York Times* (Feb. 28, 2021), <https://www.nytimes.com/2020/09/29/us/trump-750-taxes.html>.

205 *Id.*

206 Trump likely has no criminal exposure for allegedly helping his father, Fred Trump, evade taxes on the transfer of assets to Trump and his siblings in the 1990s because the five-year statute of limitations has long passed. The statute of limitations also may have run on other potential tax issues, such as Trump’s eyebrow-raising \$72.9 million tax refund in 2009. However, there is no statute of limitations on *civil* tax fraud. See New York Tax Law § 683(c)(1)(b); New York State Department of Taxation and Finance, *Publication 131* (Oct. 2019), <https://www.tax.ny.gov/pdf/publications/general/pub131.pdf>.

207 Press Release, Manhattan District Attorney’s Office, DA Vance Announces Sentencing of Bookkeeper to 3-to-9 Years in State Prison for Stealing \$1.3 Million From His Former Employer (Aug. 2, 2016), <https://www.manhattanda.org/da-vance-announces-sentencing-bookkeeper-3-9-years-state-prison-stealing-13-million-hi/>.

208 Press Release, Manhattan District Attorney’s Office, DA Vance: Real Estate Developer, Companies Plead Guilty to Felony Tax Fraud (Apr. 26, 2018), <https://www.manhattanda.org/da-vance-real-estate-developer-companies-plead-guilty-to-felony-tax-fraud/>.

C. Insurance Fraud

Under New York Penal Law § 176.30, a person may be convicted of insurance fraud in the first degree if that person committed a fraudulent insurance act and “thereby wrongfully takes, obtains or withholds” property in excess of \$1,000,000 or attempts to do so.²⁰⁹ The prosecution must establish beyond a reasonable doubt that:

- A “fraudulent insurance act” was committed by a person who, knowingly and with intent to defraud, presented, caused to be presented, or prepared a false or fraudulent written statement either as part of or in support of any application for insurance, proof of self-insurance, a claim of payment and other documents.²¹⁰
- The accused must also commit this act knowingly, or under the belief that this written statement would be presented to or by an insurer.²¹¹ Additionally, the accused must also know that the written information contains materially false information concerning a material fact or that the written information will conceal the material fact by misleading the person or entity who receives the information.²¹²

A person acts knowingly with respect to particular conduct or to a particular circumstance when they are “aware that [their] conduct is of such nature or that such circumstance exists.”²¹³ A person acts with intent when that person acts with conscious objective or purpose. Insurance fraud in the first degree is punishable by up to 25 years in state prison.²¹⁴ The statute of limitations for the offense is five years.²¹⁵

As noted, the DANY is reported to be investigating claims that the Trump Organization inflated its assets in order to reduce its insurance premiums.²¹⁶ The DFS has subpoenaed Aon, Trump’s primary insurer, as has the DANY, which will presumably help to ascertain the asset valuations Trump provided in connection with his applications for insurance.²¹⁷ Because a conviction for insurance fraud in the first degree requires proof that the written information submitted to the insurer contained materially false information, it may not be enough for the DANY to establish that the asset valuations the Trump Organization provided to Aon were materially different than the valuations for the same assets that the Trump Organization provided in other contexts (although, to be sure, such differing valuations can be powerful evidence of fraud and criminal intent). The DANY will have to prove that the valuations provided to insurers were materially false and that the defendant knew those valuations

209 New York Penal Law § [176.30](#).

210 New York Penal Law § [176.05](#).

211 *Id.*

212 *Id.*

213 New York Penal Law § [15.05\(2\)](#).

214 New York Penal Law §§ [70.00\(2\)\(b\)](#) and [176.30](#).

215 New York Criminal Procedure Law § [30.10\(2\)\(b\)](#).

216 Cohen Oversight Committee Testimony, *supra* note 124.

217 Although the Department of Financial Services can only pursue civil actions, it can refer possible criminal conduct to the NYAG or a local district attorney. See New York Financial Services Law § [301](#); see also Rashbaum et al., *supra* note 130; see also Judy Greenwald, *Aon confirms subpoena after report details probe of Trump’s businesses*, Business Insurance (Dec. 11, 2020), <https://www.businessinsurance.com/article/20201211/NEWS06/912338448/Aon-confirms-subpoena-after-report-details-insurance-probe-of-Trump's-businesses>.

were false. For this, the DANY will need evidence of any defendant's state of mind. Evidence could come, for example, from email records it receives from the Trump Organization or testimony from those in Trump's orbit who prepared the applications and financial statements used to obtain the insurance policies.

The DANY routinely prosecutes felony insurance fraud cases where a defendant made false representations to an insurer in order to secure coverage at substantially reduced rates. For example, in *People v Almonte*, the defendants sought workers' compensation insurance for their employees engaged in the construction of skyscrapers, but in order to reduce the premiums they paid for that insurance, the defendants materially misrepresented the size of their workforce and the level of risk involved in the construction projects.²¹⁸ Here, of course, the allegation is that Trump misrepresented the value of his assets to insurers in order to obtain coverage at lower premiums.

D. Scheme to Defraud

Under New York Penal Law § 190.65, a person is guilty of a scheme to defraud in the first degree when that person:

- Engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person, or to obtain property from more than one person, by false or fraudulent pretenses, representations or promises;²¹⁹ and
- So obtains property with a value in excess of one thousand dollars from one or more such persons.²²⁰

In this case, intent means a conscious objective or purpose. The punishment for scheme to defraud in the first degree is up to four years in prison.²²¹ The offense has a five-year statute of limitations.²²²

One possible charge could arise from the Trump Organization's alleged handling of the fringe benefits. But prosecutors may be reviewing many other bases for scheme to defraud charges as well. Another possible charge could arise from false documents filed with lenders or other businesses if Trump provided false valuation paperwork to obtain financing. It can be difficult to establish criminal liability simply because a valuation is surprisingly high in relation to, say, comparable properties. It is easier to do so where the entity

218 Press Release, Manhattan District Attorney's Office, D.A. Vance, NYC DOI Commissioner, NYS Inspector General Announce Indictment of Unlicensed Labor Broker for Million-Dollar Insurance Fraud (Sep. 5, 2019), <https://www.manhattanda.org/d-a-vance-nyc-doi-com-missioner-nys-inspector-general-announce-indictment-of-unlicensed-labor-broker-for-million-dollar-insurance-fraud/>.

219 New York Penal Law § [190.65\(1\)\(b\)](#).

220 *Id.*

221 New York Penal Law §§ [70.00\(2\)\(e\)](#) and [190.65](#).

222 New York Criminal Procedure Law § [30.10\(2\)\(b\)](#).

filing the document claims a low valuation for one purpose and claims a high valuation on the same property for a different purpose.

The former president and his company have produced annual “Statement[s] of Financial Condition of Donald J. Trump” since 2004.²²³ Michael Cohen provided some of these documents in connection with his congressional testimony.²²⁴ As the NYAG has asserted in court filings, Trump submitted these statements of financial condition “to various financial institutions.”²²⁵ These documents presented estimates of Trump’s net worth, which were calculated by subtracting “outstanding debt” from the “asserted values of particular assets or groups of assets” that he or the Trump Organization controlled.²²⁶ One such asset found in Trump’s statements of financial condition is his Seven Springs Estate.

What we know about Seven Springs, largely as a result of a filing by the NYAG, could provide a window into how prosecutors may approach possible charges with respect to that property and perhaps with respect to other assets.

Seven Springs is a 212-acre property that spans the towns of Bedford, New Castle, and North Castle in Westchester County, New York.²²⁷ The property was purchased in December 1995 for \$7.5 million by Seven Springs LLC, under the Trump Organization umbrella.²²⁸ For approximately two decades, Trump unsuccessfully attempted to develop the property as a golf course or as a residential area.²²⁹ Eventually, Trump granted a conservation easement on Seven Springs, evidently “taking an income tax deduction based on the lost development value of the property.”²³⁰ The Trump Organization engaged Cushman & Wakefield Inc., an appraisal firm, to provide a property and easement valuation in order “[t]o document the value of a conservation easement placed on a parcel of land for Federal and State income tax purposes.”²³¹ The firm’s valuation was “intended only for” this use, per the terms of their letter of engagement.²³² The Trump Organization’s federal tax filings demonstrate that Cushman’s appraisal was in fact used for this purpose.²³³ In December 2015, Trump officially granted the conservation easement over approximately 158 acres of the property and later claimed

223 NYSCEF Doc. No. 11 at 6, *People v. Trump Organization, Inc.*, 2020 N.Y. Slip Op. 34173 (N.Y. Sup. Ct. 2020) No. 451685/2020, https://ag.ny.gov/sites/default/files/doc_11_memorandum_of_law.pdf.

224 Katie Mettler, *Here are the documents Michael Cohen brought to Congress*, *The Washington Post* (Feb. 27, 2019), <https://www.washingtonpost.com/politics/2019/02/27/here-are-documents-michael-cohen-brought-congress/>.

225 NYSCEF Doc. No. 11, *supra* note 153.

226 *Id.*

227 *Id.*

228 *Id.* at 7.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

that donation as an income tax deduction.²³⁴ In March 2016, Cushman issued a written appraisal determining that Seven Springs was worth \$56.5 million as of December 1, 2015, before Trump granted the easement, an amount vastly higher than the \$20 million value that was assigned to the property by local government assessors that very same year.²³⁵ At the same time, Cushman valued the easement itself at \$21.1 million,²³⁶ and Seven Springs LLC used that valuation as the conservation easement's "appraised fair market value" on 2016 tax forms, "reporting the claimed value of donated property for income tax purposes."²³⁷

In a court hearing, Michael Colangelo of the NYAG summarized the "central question" regarding the Seven Springs easement as follows: "If the value of the easement was improperly inflated, who obtained the benefit from that improper inflation and in what amounts?"²³⁸ Colangelo continued: "It goes without saying that the attorney general needs to see the records that would reflect the value of that deduction, as it flowed up to intermediate entities, and ultimately to Trump, personally."²³⁹

At the same time, Michael Cohen testified that Trump had financial statements saying Seven Springs was worth a vastly different amount—\$291 million as of 2012.²⁴⁰ Cohen gave copies of three of Trump's financial statements which showed these valuations to the House Committee on Oversight and Reform during his testimony.²⁴¹ Cohen testified that the statements had been provided by Trump to Deutsche Bank in support of a loan application connected to a possible purchase of the National Football League's Buffalo Bills (as well as to *Forbes* magazine to substantiate his claim to a place on its list of the world's wealthiest people).²⁴² Trump, on his annual financial disclosure forms while president, assigned yet a different amount to the property, declaring that it was worth between \$25 million and \$50 million.²⁴³ *The New York Times* reported last year that Trump's tax records showed that he classified the estate not as a personal residence but an investment property, enabling him to write off more than \$2 million in property taxes since 2014.²⁴⁴ In contrast, he and his family have made public declarations of their use of their property as a family retreat.²⁴⁵

234 YSCEF Doc. No. 11, *supra* note 153.

235 Michael R. Sisak, *Claimed value of sleepy NY estate could come to haunt Trump*, ABC News (Mar. 8, 2021), <https://abcnews.go.com/Politics/wireStory/claimed-sleepy-ny-estate-haunt-trump-76316265>.

236 NYSCEF Doc. No. 11, *supra* note 153.

237 *Id.*

238 Sisak, *supra* note 235.

239 *Id.*

240 David Enrich, Matthew Goldstein & Jesse Drucker, *Trump Exaggerated His Wealth in Bid for Loan, Michael Cohen Tells Congress*, *The New York Times* (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/business/donald-trump-buffalo-bills-deutsche-bank.html>.

241 *Id.*

242 Cohen Oversight Committee Testimony, *supra* 124.

243 Michael D'Antonio, *Trump's financial disclosure conceals a ton of secrets*, CNN (May 17, 2019), <https://www.cnn.com/2019/05/16/opinions/trump-financial-disclosure-raises-more-questions-dantonio/index.html>.

244 Buettner et al., *supra* note 8.

245 *Forbes*, *supra* note 88.

We know that the DANY has issued subpoenas to Cushman & Wakefield Inc. for “records relating to its assessment work on Trump’s behalf; to law firms that worked on the Seven Springs project; and to Trump’s company, the Trump Organization, for records relating to its annual financial statements and the conservation easement.”²⁴⁶ In 2019, the DANY subpoenaed “zoning and planning records” from each of the three towns that Seven Springs crosses (Bedford, North Castle, and New Castle), including “tax statements, surveying maps, environmental studies and planning board meeting minutes.”²⁴⁷ We are aware that the NYAG has interviewed Trump’s son, Eric Trump, who holds executive positions at both the Trump Organization and Seven Springs LLC.²⁴⁸ The NYAG has also interviewed Allen Weisselberg, as well as lawyers that Trump hired for the Seven Springs venture for their expertise in “land-use and federal tax controversies.”²⁴⁹ The NYAG’s investigation also reportedly “scrutinizes valuations, tax burdens, and conservation easements at Trump’s holdings in Los Angeles, Chicago, and New York City.”²⁵⁰

Prosecutions charging an inflated value as a fraud can be difficult—particularly where the appraisal is done by an independent professional. But the difficulties facing such cases can be reduced when there are wildly divergent appraisals of that very same property at the very same time. The Seven Springs example makes the point that one set of facts could well form the basis for a menu of possible charges. Hypothetically, if Trump listed the value of this property as \$50 million for filing with tax authorities, that could support charges for tax fraud if the actual value was higher. If he listed it for \$75 million for purposes of insurance coverage with Aon, that could support insurance fraud charges if the actual value was materially different. If at the same time he listed the value at \$100 million in a loan application to Deutsche Bank, that could support charges for scheme to defraud.²⁵¹ From a prosecutor’s perspective, the jury wouldn’t have to really decide what the property was worth—they could think it is worth \$125 million and find him guilty of tax fraud; they could find it was worth \$25 million and find him guilty of a scheme to defraud. And even if the jury cannot decide on fraud charges, it could still find—based on the divergent property valuations—that the books were cooked and potentially return a verdict of guilty on a falsification of records count.

The DANY has not been shy about pursuing scheme to defraud charges, even against high-profile or well-connected defendants. Prosecutors charged Trump associate Paul Manafort with scheme to defraud in

246 Sisak, *supra* note 235.

247 *Id.*; Corinne Ramey, *Manhattan Prosecutors Advance Probe Into Trump’s Seven Springs Estate*, *The Wall Street Journal* (Mar. 9, 2021, 7:17 PM), <https://www.wsj.com/articles/manhattan-prosecutors-advance-probe-into-trumps-seven-springs-estate-11615333894>.

248 Jacobs & Fahrenthold, *supra* note 1.

249 Sisak, *supra* note 235.

250 Partlow et al., *supra* note 9.

251 Prosecutors may also consider whether to charge Trump’s misrepresentations to each individual lender as grand larceny by false pretense. Codified at New York Penal Law § 155.05(2)(a), grand larceny by false pretense is the wrongful obtaining of another’s property through misrepresentations with the intent to deprive the person of the property. It is grand larceny in the first degree if the dollar value of the wrongfully obtained property exceeds \$1 million. New York Penal Law § 155.42. The statute of limitations for grand larceny in the first degree is five years. New York Penal Law § 30.10(2)(b). The maximum punishment for the offense is twenty-five years imprisonment. New York Penal Law §§ 70.00(b) and 155.42. News reports suggest the factual predicate to look into this charge exists, but it is not yet publicly known whether DANY is pursuing this investigative avenue.

the first degree, among other offenses, for allegedly running a residential mortgage fraud scheme where he falsified business records to illegally obtain millions of dollars in loans.²⁵² The DANY also recently secured guilty pleas from a pair of media CEOs for their roles in fraudulently obtaining tens of millions of dollars in financing from lenders by overstating the financial health of their organizations and providing those lenders with false financial statements.²⁵³ As Manhattan District Attorney Vance stated in connection with the conviction of Joel Sander, the former CFO of Dewey & Leboeuf LLP, the DANY “is committed to prosecuting financial crimes at all levels of an organization, whether it is a small business, a major corporation, or a prestigious law firm.”²⁵⁴

E. Enterprise Corruption

Pursuant to New York Penal Law § 460.20(1), a person is guilty of enterprise corruption when that person:

- “[H]as knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed or associated with such enterprise,” the person
- “[I]ntentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.”²⁵⁵

The predicate criminal acts eligible for prosecution under enterprise corruption are defined in New York Penal Law § 460.10(1) and include falsification of business records, insurance fraud, and a scheme to defraud. Notably, the only tax crimes that may serve as predicate criminal acts for enterprise corruption are felonies defined by the tax law relating to alcohol, cigarette, and motor fuel taxes.²⁵⁶

252 Press Release, Manhattan District Attorney’s Office, District Attorney Vance Announces Indictment of Paul Manafort (Mar. 13, 2019), <https://www.manhattanda.org/district-attorney-vance-announces-indictment-of-paul-manafort/>. This case ultimately was dismissed on double jeopardy grounds; see Rebecca Rosenberg and Ben Feuerherd, *Cy Vance’s case against Paul Manafort officially dead*, The New York Post (Feb. 8, 2021, 6:00 PM), <https://nypost.com/2021/02/08/cy-vances-case-against-manafort-dismissed-by-nys-highest-court/>.

253 Press Release, Manhattan District Attorney’s Office, D.A. Vance Announces Guilty Pleas of Ex-Newsweek and Christian Media Chiefs in \$35 Million Fraud Probes (Feb. 14, 2020), <https://www.manhattanda.org/d-a-vance-announces-guilty-pleas-of-ex-newsweek-and-christina-media-chiefs-in-35-million-fraud-probe/>.

254 Press Release, Manhattan District Attorney’s Office, District Attorney Vance Announces Trial Conviction of Joel Sanders, Former CFO of Dewey & Leboeuf (May 8, 2017), <https://www.manhattanda.org/district-attorney-vance-announces-trial-conviction-joel-sanders-former-cfo-dewey-leboeuf/>.

255 New York Penal Law § [460.20\(1\)](#).

256 New York Penal Law § [460.10\(1\)](#).

Participation in a “pattern of criminal activity” requires both “intent to participate in or advance the affairs of the criminal enterprise” and engaging in three or more of the charged predicate criminal acts.²⁵⁷ To qualify as a “pattern,” all of the predicate criminal acts: (i) must have occurred within 10 years of commencement of the criminal action; (ii) cannot be isolated incidents nor so closely related in time or circumstance of commission as to constitute a single criminal transaction; and (iii) must either be related to each other through a common plan or scheme, or were “committed, solicited, requested, importuned or intentionally aided by persons acting with” the requisite *mens rea* and associated with the criminal enterprise.²⁵⁸ Moreover, at least two of the predicate criminal acts must be felonies other than conspiracy; two of the criminal acts, one of which must be a felony, must have occurred within five years of the commencement of the criminal action; and each of the criminal acts must have occurred within three years of a prior act.²⁵⁹

“Criminal enterprise” is defined as “a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure, and criminal purpose beyond the scope of individual criminal incidents.”²⁶⁰ In other words, the prosecution must establish, “in addition to a pattern of criminal activity, the existence of a separate criminal enterprise to which that pattern of activity is beneficially connected.”²⁶¹ However, the corrupted enterprise need not be the criminal enterprise at which the defendant is employed or associated, and in fact may be a legitimate enterprise.²⁶²

Enterprise corruption is punishable by up to 25 years imprisonment.²⁶³ The statute of limitations for the offense is five years.²⁶⁴

While we have only limited insight into the evidence being gathered by the DANY and no way to predict what, if any, charges the DANY will in fact pursue, the publicly discussed facts, coupled with the offenses outlined above, certainly raise the possibility of an enterprise corruption charge predicated on the criminal acts of falsification of business records, insurance fraud, and/or a scheme to defraud.

The DANY might plausibly seek to bring such a charge by establishing the “pattern of criminal activity” element. As outlined above, the potential predicate criminal acts include felony offenses, and the timing aspects of this element also could likely be satisfied. Assuming the DANY files any criminal action this year, at least some of the alleged underlying conduct for each offense occurred within the last 10 years (*e.g.*, business records relating to consulting fees spanned 2010–2018, submissions to insurer occurred from 2011–2013,

257 New York Penal Law § [460.20\(2\)](#).

258 New York Penal Law § [460.10\(4\)](#).

259 New York Penal Law § [460.20\(2\)](#).

260 New York Penal Law § [460.10\(3\)](#).

261 *People v. W. Express Int’l Inc.*, No. 156, slip op. at 4 (N.Y. 2012)

262 New York Penal Law § [460.20\(3\)](#).

263 New York Penal Law §§ [70.00\(2\)\(b\)](#) and [460.20](#).

264 New York Criminal Procedure Law § [30.10\(2\)\(b\)](#).

submissions to lenders for 40 Wall Street and Trump International Hotel and Tower were in 2015 and 2017, and business records relating to hush money payments were created in 2016 and 2017). Some of the alleged conduct underlying the felony scheme to defraud offense and the falsification of business records offense occurred within the past five years (e.g., submissions to lenders in 2017 and business records for hush money payments in 2016 and 2017). And each of the alleged criminal acts occurred within three years of a prior act (e.g., submissions to insurer in 2011–2013, submissions to lenders in 2015 and 2017, and records of hush money payments in 2016 and 2017).

Depending on the evidence prosecutors have uncovered, and whether Weisselberg's cooperation (if any) produces probative evidence, the DANY may be able to paint Trump as the leader of a criminal enterprise. They could, for example, argue that the purpose of such an enterprise was to enrich and defend Trump, with the subordinates in the enterprise receiving income and fringe benefits, such as the payments and perks Trump reportedly paid to the Weisselberg family.

The final aspect of the “pattern” element that the DANY must establish is that the predicate alleged criminal acts were not isolated incidents, and instead were related as part of a common plan or scheme or were committed or solicited by someone associated with the criminal enterprise and intentionally acting for the benefit of the enterprise. This dovetails with the final element the DANY must prove—that there was in fact a criminal enterprise.

One theory the DANY could seek to advance, if justified by the evidence, is that the Trump Organization itself is a criminal enterprise. Alternatively, the DANY could argue that a subset of Trump Organization executives, including Trump himself, is the criminal enterprise operating within what is otherwise a legitimate organization. Pursuing this latter theory could have the benefit of making it easier to prove that the predicate criminal acts were part of a common scheme, namely to enrich Trump (and his family) and protect his brand. The DANY could argue that the criminal enterprise had an ascertainable structure,

with Trump sitting atop the hierarchy, and that the criminal acts were committed by or at the direction of Trump. The DANY could further argue that the criminal enterprise had a continuity of existence and criminal purpose stretching back decades. Trump began leading the Trump Organization in the 1970s and Weisselberg also has been working for the Trumps since that time.²⁶⁵ Depending on the evidence prosecutors have uncovered, and whether Weisselberg's cooperation (if any) produces probative evidence, the DANY may be able to paint Trump as the leader of a criminal enterprise. They could, for example, argue that the purpose of such an enterprise was to enrich and defend Trump, with the subordinates in the enterprise receiving income and fringe benefits, such as the payments and perks Trump reportedly paid to the Weisselberg family.²⁶⁶

265 Ana Swanson, *The myth and the reality of Donald Trump's business empire*, The Washington Post (Feb. 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/29/the-myth-and-the-reality-of-donald-trumps-business-empire/>; Bernard Codon, *Out of the shadows: Loyal money man swept into Trump's probes*, The Associated Press (March 7, 2019), <https://apnews.com/article/17e6790bc8604ceb94fa9b5ebe9805b6>.

266 Cf. Press Release, Manhattan District Attorney's Office, DA Vance Announces Sentencing of Bonanno Crime Family Member (May 18, 2017), <https://www.manhattanda.org/da-vance-announces-sentencing-bonanno-crime-family-member/> (prosecution of members of the Bonanno crime family where the alleged common purpose was “to make money through illegal activities,” and the proceeds of the predicate criminal acts “flowed upwards to higher level of the organization”); Jacobs et al., *supra* note 159.

IV. Defenses

The DANY's years-long criminal investigation, now joined by cross-designated members of the NYAG, is wide-ranging and could result in any number of charges against Trump and his associates. Although it may appear that Trump has significant criminal exposure, there is an array of defenses he could present if a criminal action ever is filed.

A. Statutes of Limitations and Venue

The relevant statutes of limitations may present challenges for the prosecution. New York criminal fraud felonies—including scheme to defraud, insurance fraud, and tax fraud—carry a statute of limitations of only five years. Felony falsification of business records also has a five-year statute of limitations, and misdemeanor falsification has a two-year statute.²⁶⁷ So Trump already has the advantage of a clock that (unless tolled, as discussed below) has long been ticking away. His challenges to the Mazars subpoena, most of which pertained to his unique position as President of the United States, make the point: the DANY opened its criminal investigation in the summer of 2018 and issued its subpoena to Mazars in August 2019.²⁶⁸ Trump was able to run the subpoena up and down the court system until his ultimate defeat in February 2021. The DANY finally prevailed, but it was forced to spend one and a half years just trying to get the documents that are usually the starting point in a financial crimes investigation.

To take some examples, Trump may be able to avoid criminal liability based on expired statutes of limitations for: Fringe benefits in tax filings made outside the five (or if misdemeanor, two) year limitations period; insurance fraud relating to any material misstatements in his submissions to Aon, which Michael Cohen alleged occurred outside the five-year period, from at least 2011–2013; alleged felony falsification of business records relating to any consulting fees paid prior to 2016; alleged misdemeanor falsification of business records for suspicious consulting fees paid, some of which *The New York Times* reported occurred beginning

²⁶⁷ [New York Criminal Procedure Law § 30.10](#).

²⁶⁸ Jane Mayer, *Can Cyrus Vance, Jr., Nail Trump?*, *The New Yorker* (Mar. 12, 2021), <https://www.newyorker.com/magazine/2021/03/22/can-cyrus-vance-jr-nail-trump>; Rashbaum & Protess, *supra* note 136; Jacobs & Fahrenthold, *supra* note 1.

in 2010; and any alleged materially false statements made to Ladder Capital in connection with the 2015 loan refinancing for 40 Wall Street.²⁶⁹ Certain other of the possible criminal conduct originally may have occurred outside of the statute of limitations, but still might be chargeable as ongoing criminal activity. For example, any allegedly fraudulent tax deductions for conservation easements, if still being claimed on more recent tax returns, would still be chargeable for any returns filed within the five years prior to any indictment.

However, prosecutors could use three independent methods to pursue accountability for charges that might otherwise be foreclosed by the statute of limitations. First, the DANY could charge a broader conspiracy or continuing enterprise theory that could allow earlier events to be brought in as part of an ongoing offense that stretches into the period that remains within the statute of limitations.²⁷⁰ This is a common approach and one that the courts regularly uphold.

First, the DANY could charge a broader conspiracy or continuing enterprise theory that could allow earlier events to be brought in as part of an ongoing offense that stretches into the period that remains within the statute of limitations. This is a common approach and one that the courts regularly uphold.

Second, the DANY could attempt to introduce conduct outside the statute of limitations not as separately charged crimes, but as evidence supporting other related charges. The admissibility of such “prior bad acts” evidence would be fact-specific, and courts would likely prohibit propensity evidence—evidence that suggests, in layman’s terms, that because the accused did these bad things in the past, he must have done these other bad things with which the accused is actually charged.²⁷¹ However, there are exceptions to this rule; if, for example, the DANY can fit earlier conduct into a signature style of charged wrongdoing, such conduct may have evidentiary value. If admitted, any “prior bad acts” would not form the basis for an independent charge but could be (and often are) powerful evidence to a jury.

Third, the DANY could argue that the statute of limitations should be extended as to Trump because he has been outside of New York “continuously” over at least the last four years, during the term of his presidency.

269 David A. Fahrenthold, *New York state regulators subpoena documents from Trump Organization’s insurance broker after Cohen testimony*, The Washington Post, (Mar. 5, 2019, 4:41 PM), https://www.washingtonpost.com/politics/new-york-state-regulators-subpoena-documents-from-trump-organizations-insurance-broker-following-cohen-testimony/2019/03/05/85487df8-3f87-11e9-922c-64d6b7840b82_story.html; Hakim et al., *supra* note 80.

270 See, e.g., *People v. Minott*, 972 N.Y.S.2d 499, 503-04 (Crim. Ct., City of New York, N.Y. Cnty. 2013) (defining “continuing offenses,” such as schemes to defraud, as offenses for which “the limitations period commences on the date of completion, not the date the offense began”); *People v. Manache*, 98 A.D.2d 335, 336 (2d Dep’t 1983) (stating that only one of alleged overt acts is required to have occurred with the statute of limitations period to support a conspiracy charge). For more on the effects of the continuing enterprise approach, see Section III.E.

271 This rule of evidence, known as the *Molineux* rule, provides that “evidence of a defendant’s uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant’s propensity to commit the crime charged.” *People v. Cass*, 18 N.Y.3d 553, 559, 965 N.E.2d 918, 923 (N.Y.2012); see also *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (N.Y.1901).

New York law provides for the exclusion of any period of time following the commission of the offense during which “the defendant was continuously outside this state.”²⁷² The DANY successfully argued that this out-of-state tolling should apply in its prosecution of Harvey Weinstein for a sexual assault that otherwise would have been time-barred.²⁷³ Given that Trump only rarely visited New York during his presidency,²⁷⁴ prosecutors might well also prevail with the same argument here. In addition, the statute of limitations for the commencement of criminal cases was tolled in New York between March 2020 and May 2021 during the pandemic by executive order.²⁷⁵ While the legal effect of this tolling may well be subject to litigation in the courts, it potentially could grant the DANY more time with respect not only to Trump, but other defendants as well.

The New York State legislature has begun taking action to help remedy the statute of limitations problem with respect to potential state prosecutions of former presidents by introducing the No Citizen is Above the Law Act, which provides that if a former president is charged with a New York state crime, the amount of time he was president is excluded from the calculation of the statute of limitations.²⁷⁶ Should this bill become law, it remains to be seen and no doubt litigated if it can apply to criminal conduct that predated the law’s passage.

The possibility also exists that Trump may enter a tolling agreement with the DANY. In that event, the statute of limitations relating to the relevant potential crimes would by agreement expire later, giving the DANY more time to prove its case against Trump. Defendants often enter into such agreements when both sides are trying to avoid a hasty indictment and are trying to work out terms of a plea agreement. It is unclear under what circumstances if any Trump would be willing to agree to such an arrangement (and, indeed, it seems highly unlikely that he would be motivated to do so in this case).

B. Fact-Specific and Statute-Specific Defenses

Every potential offense we have outlined is, of course, susceptible to highly fact-specific defenses that will turn on the evidence, much of which is not yet in the public record. Take the tax issues, for example. On the fringe benefits and consulting fees, if appropriate taxes were substantially or entirely paid by some or all applicable parties despite imperfect disclosures, a court might be skeptical that the arrangement was fraudulent (and that skepticism might be sharpened if there are no comparable recent criminal prosecutions

272 New York Criminal Procedure Law § 30.10(4).

273 Kara Scannell, *Trump’s time in White House could end up benefiting New York prosecutors*, CNN (Mar. 12, 2021, 11:07 AM), <https://www.cnn.com/2021/03/12/politics/trump-statute-of-limitations/index.html>.

274 *Id.*

275 N.Y. Exec. Order No. 202 (2020) <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>; N.Y. Exec. Order No. 202.106 (2021) <https://www.governor.ny.gov/news/no-202106-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

276 The New York State Senate passed the No Citizen is Above the Law Act (S.1408) on February 10, 2021. It was subsequently delivered to the state’s Assembly, which has not yet voted on the bill as of the writing of this report. See New York State Senate, S1408 (2021), <https://www.nysenate.gov/legislation/bills/2021/s1408>.

and it appears this was a selective prosecution). On the conservation easements, if the appraisals were in good faith (and it would be surprising for appraisers to act otherwise considering the consequences to them), charges might not be brought or stick if they were. On the “debt parking,” unrelated party debt repurchases are a standard tax planning technique, and if the rules were not brazenly disregarded, charges might not succeed or be brought at all.

Of the offenses outlined above, the law provides a built-in affirmative defense for the falsification of business records charge. This defense, codified at New York Penal Code § 175.15, provides that if the defendant was a clerk, bookkeeper, or any other employee, and was merely acting on the orders of a supervisor and received no personal benefit from the act, then the person is not guilty of this crime. As with all affirmative defenses, however, this defense does not immunize the person from arrest or prosecution. The defendant must prove at trial, through a preponderance of the evidence, the exculpatory facts to prevail with this defense.²⁷⁷

C. *Actus Reus, Mens Rea, and Materiality*

One hurdle for the prosecution will be placing criminal responsibility on Trump in his individual capacity. Even if it becomes clear to prosecutors that, for instance, business records were falsified or tax filings were fraudulent, it is quite another thing for it to be in a position to assign criminal blame on any one target. Trump may claim he was aware of the fringe benefits but had no idea how these relatively minor amounts in the larger scheme of things were booked at the company or treated on tax forms. To take another example, if the prosecution develops proof that business records were falsified to inflate assets for one purpose and deflate them for another, it still will have to prove that any one person knowingly, intentionally, and willfully did this for some criminal purpose. But assignment of specific criminal intent can be difficult. If, for example, Trump himself signed a particular loan application, it might not be provable that he knew it was false, absent extrinsic evidence. Such extrinsic evidence could come in many forms, such as email communications, witness testimony, and/or proof that Trump himself pushed, or was aware of, unjustifiably different values for certain properties in different filings at the same time. The need for this type of extrinsic evidence in order to prove a case to a jury beyond a reasonable doubt is why cooperating witnesses are important and explains the apparent pressure prosecutors are applying to Trump Organization CFO Allen Weisselberg, for example.

Trump is well known for denying responsibility even when the buck plainly stops with him.²⁷⁸ He has a penchant for excusing his own behavior by saying that he didn't mean harm but was only joking or puffing.²⁷⁹

277 New York Penal Law § 25.00(2).

278 See, e.g., Caitlin Oprysko, *'I don't take responsibility at all': Trump deflects blame for coronavirus testing fumble*, Politico (Mar. 13, 2020), <https://www.politico.com/news/2020/03/13/trump-coronavirus-testing-128971>.

279 See, e.g., Dan Merica & Jim Acosta, *Trump was 'joking' when he accused Democrats of treason, White House says*, CNN (Feb. 6, 2018), <https://www.cnn.com/2018/02/06/politics/treason-donald-trump-joking/index.html>.

So there is good reason to think that he will take the approach of deflecting blame in defending himself if he is indicted. He can deny responsibility in three basic ways, which we discuss in greater detail below.²⁸⁰

First, Trump could argue that he is not responsible for specific actions taken by his business because those actions were delegated to others. Second, on a more specific level concerning particular actions, he could argue that he never had the conscious intent to defraud, which the law requires for the fraud-based criminal charges he may face (indeed, Michael Cohen has previewed that he expects Trump to say he was simply relying on his accountants, lawyers, and other professionals).²⁸¹ Third, Trump could assert that even if he caused the submission of false information with the intent to defraud, he is not criminally liable for fraud because the inflated (or deflated) valuation information provided to the banks and other counterparties was not material.²⁸²

1. No *Actus Reus*

Depending on the nature of any charges, Trump's first line of defense may be that he did not commit the *actus reus*—the “guilty act”—required for a crime. As a threshold matter, he will almost certainly attempt to demonstrate that there was no criminal conduct at all—that, for example, a particular fringe benefit, tax deduction, or loan application in question was above board and reflected legitimate expenses or valuations. The plausibility of this defense is difficult to assess without the benefit of all the evidence gathered by prosecutors, but Trump will have some ammunition to argue that such things as valuations on property can be subjective and therefore cannot constitute willful insurance fraud, or that entitlement to certain tax deductions can be arguable and therefore cannot constitute willful tax fraud.

Trump also can be expected to argue that *he* was not the person seeking the loans, the insurance coverage, or the tax breaks on which this criminal investigation has been focused (despite the fact that he was a primary beneficiary). Rather, he might argue that the “person” engaging in that conduct was the Trump Organization—or perhaps another person, such as Weisselberg (a possibility that becomes more likely if the CFO ends up as a cooperating witness or if prosecutors charge that he personally gained from fringe benefits). Trump might, for example, contend that he never rolled up his sleeves and personally created financial statements or filled out loan applications, but instead delegated and left details to others. That includes colleagues and inside and outside lawyers and accountants upon whom he relied and who he expected would do what was best for the company within legal bounds. (We discuss the reliance argument at length in Section IV.C.2 below.)

280 Trump, of course, also would have a defense if the various financial submissions that media reports suggest were fraudulently manipulated were, in fact, accurate. But because we do not have access to the detailed underlying evidence, further evaluating factual defenses regarding the various submissions is beyond the scope of this report.

281 Sarah K. Burris, “They have Rudy Giuliani documents too”: Michael Cohen sounds the alarm that Trump grand jury is big and broad, Raw Story (May 26, 2021), <https://www.rawstory.com/rudy-giuliani-michael-cohen-donald-trump/> (reporting on Cohen's appearance on the Ari Melber show).

282 The report principally addresses the potential criminal prosecution of Donald J. Trump, not the Trump Organization. As addressed in the report, the Trump Organization well might be charged with crimes. Of the defenses Donald Trump might assert for himself, the first—“the Trump Organization did it, not me”—plainly would not apply to the Trump Organization. But the Trump Organization could assert the other two likely Trump defenses—lack of fraudulent intent and immateriality of any false statements.

Even if the Trump Organization were to be charged with crimes, Trump can assert the defense that he is not vicariously liable for the company's wrongdoing. Of course, he has an ownership interest in the Trump Organization, he was the chief executive officer until he resigned the day before being sworn in as President of the United States, and he reportedly continued to keep tabs on its performance in various ways.²⁸³ But that won't necessarily stop Trump from simply denying that he was aware of bad behavior.²⁸⁴ As facile as such a defense may seem—how can the long-time, micromanaging boss of an eponymous company not be responsible for the company's conduct—it could be advanced.

To better evaluate this defense, as well as the relative potential liability of Trump and the Trump Organization, it is important to understand New York's law of corporate criminal liability. The Trump Organization, like any corporate entity, is an incorporeal person that can act only through its agents. Under New York law, a corporation may be held criminally liable for the acts of an agent acting within the scope of his employment and on behalf of the corporation.²⁸⁵ This rule is codified in New York Penal Law § 20.20(2). The Penal Law specifies two types of corporate agents whose conduct may result in the corporation's criminal liability: an "agent" and a "high managerial agent." An agent is defined to be "any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation."²⁸⁶ And a high managerial agent is defined to be "an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees."²⁸⁷ Trump is both an agent (because he was an officer of the Trump Organization), as well as a high managerial agent (because he was for a substantial period of time unquestionably the boss of the organization and ultimately responsible for formulating its policies).

As relevant here, a criminal prosecution of the Trump Organization may be based on Penal Law §20.20(2)(b), which focuses on the conduct of a high managerial agent.²⁸⁸ Under that section, a corporation is criminally

283 See, e.g., Dan Alexander, *After Promising Not To Talk Business With Father, Eric Trump Says He'll Give Him Financial Reports*, Forbes (Mar. 24, 2017, 9:00 AM), <https://www.forbes.com/sites/danalexander/2017/03/24/after-promising-not-donald-talk-business-with-father-eric-trump-says-president-give-him-financial-reports/?sh=7d8a709d359a>; Anita Kumar, *How Trump fused his business empire to the presidency*, Politico (Jan. 20, 2020, 8:09 AM), <https://www.politico.com/news/2020/01/20/trump-businesses-empire-tied-presidency-100496>.

284 See, e.g., Phillip Bump, *Trump rejects blame for coronavirus problems as he takes credit for low death toll*, The Washington Post (Mar. 13, 2020), <https://www.washingtonpost.com/politics/2020/03/13/trump-rejects-blame-coronavirus-problems-he-takes-credit-low-death-toll/> (asked about his administration's decision to remove a pandemic response office from the White House: "when you say me, I didn't do it"; "We have a group of people. I could...ask perhaps in my administration,...perhaps ask Tony [Fauci] about that, because I don't know anything about it...I mean you say—you day we did that. I don't know anything about it").

285 See *People v. Rochester Railway and Light Co.*, 195 N.Y. 102, 105 (N.Y. Ct. 1908) ("a corporation...is liable [civilly] for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority...and it is but a step further in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf").

286 New York Penal Law § 20.20(1)(a).

287 *Id.* at §20.20(1)(b).

288 [Penal Law § 20.20\(2\)\(b\)](#) also refers to conduct of a corporation's board of directors. Given the relative lack of information about the functioning of the management boards of the various LLCs that comprise the Trump Organization, we focus here only on Trump's status as a high managerial agent. Penal Law § 20.20(2)(c) permits a corporation to be held criminally liable even for the acts of a relatively low-level agent, but only for non-felony offenses and other specific statutory offenses not relevant here.

liable if “conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated...by a high managerial agent acting within the scope of his employment and in behalf of the corporation.”²⁸⁹ The statute thus limits the types of behavior by a high managerial agent that can result in his corporation’s criminal liability. If such a senior manager, acting in the scope and in furtherance of his corporate employment, engages in the subject conduct himself, or if he directly authorized, solicited, requested, or commanded that someone else perform that conduct, then the corporation can be held criminally liable for it.²⁹⁰ And merely because the law would support a criminal conviction of the company, that is not a defense to also criminally prosecuting the high managerial agent personally.²⁹¹ Thus, the DANY has the discretion to prosecute the corporation, the senior manager, or both.

A high managerial agent may sometimes be personally liable for engaging in, or causing others to perform, conduct as part of his corporate duties that also creates criminal liability for the corporation—but that does not mean he always is. No matter how senior or influential a corporate agent may be, he is not vicariously liable for the corporation’s criminal offense. That is, he cannot be convicted for a crime except for criminally culpable conduct in which he personally engaged.

The case of *People v. Byrne* illustrates the principle.²⁹² In this example, the defendant and his brother each owned 50 percent of a corporation that operated a tavern; the defendant was the corporation’s president, and he actively participated in the management of the tavern.²⁹³ But the defendant happened not to be in the tavern when his brother sold alcohol to a minor.²⁹⁴ Even though selling alcohol to a minor is a strict liability offense, because the defendant was not involved directly in making that sale, he could not be held liable for the crime.²⁹⁵ That is because, under the criminal law of New York, “individuals ‘must...answer for their own behavior.’”²⁹⁶

Thus, the mere fact that Trump is the majority owner and chief executive of the Trump Organization is not enough, as a matter of law, to hold him criminally responsible even if the company has engaged in criminal

289 New York Penal Law § [20.20\(2\)\(b\)](#).

290 [Penal Law § 20.20\(2\)\(b\)](#) also provides that a corporation can be held liable for a crime if one of its high managerial agents “recklessly tolerated” the fact that other corporate agents were engaging in criminal conduct. Unlike engaging in, authorizing, soliciting, requesting, or commanding an action—all of which involve the high managerial agent’s intentional act—the Penal Law also allow a corporation to be held liable for a crime if its high managerial agent was merely reckless in allowing the criminal conduct to occur. The significance of this fact is discussed below.

291 [Penal Law § 20.25](#) (“[a] person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf”); *People v. Claudia Dowling, Inc.*, 57 Misc.3d 52, 57–58 (App. Tm. 2d Dep’t 2017) (“[a] corporate officer cannot escape individual criminal liability for violations of the law, even though the corporate entity may also be named as a defendant”).

292 See *People v. Byrne*, 77 N.Y.2d 460 (N.Y. 1991).

293 *Id.* at 464.

294 *Id.*

295 *Id.* at 464–67.

296 *Id.* at 466 (quoting Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harvard L. Rev., 689, 701; alterations in original).

conduct. As the Court of Appeals made clear in *Byrne*, “Penal Law §§ 20.20 and 20.25, which detail the circumstances under which corporations may be held liable for the acts of their agents and vice versa, do not go so far as to suggest that a corporate principal may be held liable for corporate acts in which he did not participate and which he did not intend.”²⁹⁷ *Byrne* reflects the fundamental requirement of the criminal law that conviction for a crime generally requires the defendant to have both committed a prohibited act and to have done so with criminal *mens rea*.

Thus, the mere fact that Trump is the majority owner and chief executive of the Trump Organization is not enough, as a matter of law, to hold him criminally responsible even if the company has engaged in criminal conduct.

Ergo the possible Trump personal defense that “whatever the company may have done, *I* didn’t do it.” Based on the evidence they have developed, prosecutors may of course argue that Trump is not like the business owner in *Byrne* who was not even aware of the illegal conduct, much less directly involved in it. Prosecutors may counter this defense by pointing to Trump’s purported personal involvement in reimbursing Michael Cohen for the hush money payments, or his awareness that his company was applying for loans and insurance policies (and, at a minimum, that he likely was briefed on negotiations and/

or signed documents).²⁹⁸ In response, it can sometimes be persuasive for a defendant in a criminal case to admit to flawed conduct, but contend that it just does not amount to a crime. Here, Trump can argue that even if he “recklessly tolerated”²⁹⁹ conduct at the Trump Organization that resulted in the company’s criminal culpability under the applicable New York statute, the jury cannot convict him for fraud offenses without proof that he intended to defraud. The full extent of that proof developed by the prosecution to the contrary remains, of course, to be seen.

2. No Mens Rea

Trump’s next line of defense likely will be that, even if he is responsible for committing the acts in question, he lacked the requisite *mens rea*—a “guilty mind”—to support a conviction. It appears that most of the charges Trump may face revolve around fraud. And in a criminal fraud case, the government must prove the defendant’s “fraudulent intent.”³⁰⁰ ³⁰¹ That is a high bar. “It is not sufficient that [the] defendant realizes that the scheme is fraudulent and that it has the capacity to cause harm to its victims. Instead, the proof must demonstrate that the defendant had a ‘conscious knowing intent to defraud...[and] that the defendant contemplated or intended some harm to the property rights of the victim.’”³⁰²

297 See *People v. Byrne*, 77 N.Y.2d 460 (N.Y. 1991) at 467.

298 Hill, *supra* note 48.

299 New York Penal Law § 20.20(2)(b).

300 *Autori*, 212 F.3d. at 116.

301 New York’s criminal statutes regarding schemes to defraud are based on the federal mail fraud statute, and state courts will often look to federal court decisions in this area. See *People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 616 (1995).

302 *Autori*, 212 F.3d. at 116.

Trump will have some “state of mind” arguments in his defense. For example, he may well be bolstered by his well-known penchant for exaggeration—he can argue that he always thinks his companies are the best and most successful, that everyone knows that about him, and indeed that he himself believed the exaggerated claims he was making. Even were he to decide not to testify, Trump’s persona is so familiar that his counsel may be able to contend that any false statements attributable to Trump were simply byproducts of his negotiating and marketing style—in other words, that he was simply being Trump and that he never intended to trick or deceive anyone. The argument would be that Trump, in his mind, was just driving for the best deal, believing that both sides in every negotiation engage in “truthful hyperbole.”³⁰³ As discussed below, this sort of argument also goes to the materiality of allegedly false statements—*i.e.*, whether they were capable of inducing action by third parties—but Trump also can assert that his mindset about business negotiations negates a finding that he harbored the “conscious knowing intent to defraud [or that he] contemplated or intended some harm to the property rights of the victim.”³⁰⁴

It would not be surprising for Trump’s lawyers to insist, as his defenders so frequently have done in other contexts, that Trump speaks “symbolically” and not “literally.”³⁰⁵ One can envision a defense at trial that relies on Trump’s idiosyncratic business style and well-known reputation for exaggeration and puffery. He might contend that he knows asset valuations are inherently subjective, and that banks order appraisals and do all sorts of other due diligence. So, the argument might go, Trump wasn’t trying to trick the banks into parting with their money. He was simply doing what he always does: promoting and trying to “win” the negotiation.³⁰⁶ If a jury were to credit that this was Trump’s state of mind, it might not be able to conclude that Trump had the requisite intent to defraud, which requires (among other things) that he “*contemplated* some actual harm or injury” to the alleged victims.³⁰⁷ This could be supplemented by claims that the prosecution is one undertaken for partisan purposes by his political adversaries, as discussed in Section IV.D below.

As outlandish as this sort of defense may sound to some, it is worth remembering that a criminal jury must vote unanimously to convict, and that Trump has enjoyed substantial success in defending his often outrageous conduct as president by insisting that he didn’t mean to do or say something he plainly did or said, or that he was being unfairly targeted.³⁰⁸

303 Donald Trump, *The Art of the Deal* 58 (1987).

304 *Autori*, 212 F.3d. at 116.

305 See Nolan D. McCaskill, *Trump adviser: Don’t take Trump literally, ‘take him symbolically’*, Politico (Dec. 20, 2016), <https://www.politico.com/story/2016/12/trump-symbolically-anthony-scaramucci-232848>.

306 “Money was never a big motivation for me, except as a way to keep score. The real excitement is playing the game.” Trump 63, *supra* note 303.

307 *United States v. Greenberg*, 835 F.3d 295, 305–06 (2d Cir. 2016) (emphasis in original).

308 See, e.g., Merica & Acosta, *supra* note 279 (Trump only “joking” when he accused Democrats of treason for not applauding him); Maggie Haberman, *Donald Trump Says His Mocking of New York Times Reporter Was Misread*, The New York Times (Nov. 26, 2015), <https://www.nytimes.com/2015/11/27/us/politics/donald-trump-says-his-mocking-of-new-york-times-reporter-was-misread.html> (Trump did not intend to mock a disabled reporter’s appearance, he was merely mimicking what a flustered reporter who was falsely denying an earlier story would look like).

Perhaps a more conventional line of defense to expect from Trump is that he acted in good-faith reliance on the company's lawyers and accountants. Trump can contend that he lacked the requisite intent to defraud because he relied in good faith on the advice of experts. Indeed, he has signaled that he will make this very argument.³⁰⁹ That may include lawyers, accountants, and other professionals; for example, in the case of the conservation easements discussed in Section I.B, Trump could argue that he reasonably relied on third-party assessors to determine the fair market value of the properties in question.

In a fraud case, such evidence or argument "if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an 'unlawful intent.'"³¹⁰ If Trump asserts this defense, the government will "at all times bear the burden of proving beyond a reasonable doubt that" he acted with the conscious intent to defraud.³¹¹

Trump will, of course, need to do more than offer some general assertion that he relied on experts. He will need to point to evidence such as that he honestly and in good faith sought the advice of counsel, fully and honestly laid all the facts before his counsel, and in good faith and honestly followed counsel's advice.³¹² But he is not required to show that he himself discussed any particular tax return, loan application, or other relevant documents with lawyers or accountants; it is sufficient if the advice was relayed to him through others.³¹³

The transactions at issue in any criminal case against Trump may be complex. The more complex the transactions at issue, the easier it will be for Trump to assert that they were esoteric and technical, and that he did not have any reason to delve into the details, or even pay much attention to them at all. The more complex the issues, the stronger the argument that he relied on long-term senior personnel at the company, empowered them to engage prominent outside experts, and had no reason to question the accuracy of their efforts. It is important to note that it does not matter whether the professionals upon whom Trump relied in fact provided accurate advice.³¹⁴ What matters is Trump's state of mind: If he relied in good faith even on incorrect legal advice, the defense is still available to him.³¹⁵

309 See William K. Rashbaum, Ben Protess, & Benjamin Weiser, *Here's What's Next in the Trump Taxes Investigation*, The New York Times (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/nyregion/trump-taxes-cyrus-vance.html> (stating that the "biggest and most prestigious law and accounting firms" reviewed tax returns and other filings).

310 *United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017).

311 *Id.*

312 *Id.*

313 See *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004) (prominent law firm had drafted complex securities documents for company; although the defendant had never discussed the transactions with the firm, that the company's internal counsel relayed the firm's advice to the defendant executive was sufficient to raise the defense); See *People v. Elhage*, 14 A.D.2d 986, 222 N.Y.S.2d 65 (N.Y. App. Div. 1961) (defendant convicted of second degree larceny and third degree burglary appealed; court held that the refusal to allow the defendant to testify relative to the defense that he held chattel mortgage on a tractor which was in default, and that he acted on the advice of the counsel in repossessing it, was a reversible error); See *People ex. rel. Spitzer v. Greenberg*, 851 N.Y.S.2d 196 (N.Y. App. Div. 2008) (Martin Act violations and common law fraud were alleged against corporation officers and directors in connection with alleged sham insurance transactions, court held that defendants had the right to inspect legal memoranda created during their tenure).

314 See *Scully*, 877 F.3d at 477 (citing *Williamson v. United States*, 207 U.S. 425, 453 (1908)).

315 *Id.*

Arguments to the contrary can include that inputs to obtain the advice were themselves fraudulent or purposefully misrepresentative; that Trump knew his reliance was unreasonable; and that the conduct was plainly wrongful. Trump's own boasts that he is, for example, more knowledgeable about taxes than most experts would seem to bolster such a rebuttal argument.³¹⁶ Here too, the success or failure of the defense would be a fact-intensive matter.

3. No Materiality

A third line of defense could be that the alleged false statements do not amount to fraud because none of them were material. Any such argument would rely on what is now settled law: There is no fraud unless the alleged misstatements in question were material.³¹⁷ "In general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed."³¹⁸ In other words, a material misrepresentation is conduct "constituting an inducement or motive to the act or omission of the other party."³¹⁹ As the Supreme Court has more recently explained, "[u]nder any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'"³²⁰

Because any such materiality defense by Trump is very close to an argument that no counterparty relied on his statements, the government may seek to prevent Trump from making it because, unlike in cases of civil fraud, "justifiable reliance" is *not* an element of a criminal fraud charge.³²¹ Many defendants in criminal fraud cases have sought to frame the question of materiality in a way that would immunize false statements if the recipient was unreasonable in failing to detect the falsity. For example, in *United States v. Thomas*, the defendant sought to introduce evidence of the victim's lack of sophistication to support his argument that the false statements were not material because no reasonable person hearing them would have been induced to take any action.³²² The Second Circuit rejected the argument because it "refuse[d] to accept the notion that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim."³²³ *Thomas* is one of many cases in which courts have rejected the defense that statements cannot be material unless

316 Aaron Blake, *19 things Donald Trump knows better than anyone else, according to Donald Trump*, The Washington Post (Oct. 4, 2016, 10:16 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/04/17-issues-that-donald-trump-knows-better-than-anyone-else-according-to-donald-trump/>.

317 See *Neder v. United States*, 527 U.S. 1, 22 (1999) (holding that materiality is an element of mail fraud because "the common law could not have conceived of 'fraud' without proof of materiality").

318 *Id.* at 16 (internal quotations and brackets omitted).

319 *Id.* at 22 (quoting 1 J. Story, *Commentaries on Equity Jurisprudence* § 195 (10th ed. 1870)).

320 *Universal Health Servs., Inc. v. United States*, 579 U.S. ___, 136 S. Ct. 1989, 2002 (2016) (quoting 26 R. Lord, *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003)).

321 *Neder*, 527 U.S. at 24–25.

322 *United States v. Thomas*, 377 F.3d 232 (2d Cir. 2004). at 241–43.

323 *Id.* at 243 (internal quotation omitted).

they would have deceived a reasonably savvy victim.³²⁴ These cases all reflect judicial reluctance to permit defendants to seek to escape liability for criminal fraud by conflating materiality and reliance.³²⁵

An instructive case in this regard is *United States v. Lindsey*. There, the defendants argued that the false statements contained in mortgage loan applications they submitted were not material because the banks would have made the loans in any event, *i.e.*, the false statements did not induce the banks to take any action. The defense theory was that during the housing boom lenders were accepting “no document/stated income” loan applications that they “were willing to approve...regardless of the information included in the application forms.”³²⁶ Thus, like Trump may do here, the defendants in *Lindsey* were not arguing that the banks were negligent. Rather, they contended that the banks knowingly chose not to consider the false statements for other business reasons. The Ninth Circuit rejected the argument, holding that the question of materiality in a criminal fraud case is an entirely objective inquiry focused on whether the statements at issue were *capable* of inducing a counterparty to act, whether or not that counterparty subjectively gave any weight to the statements.³²⁷ Indeed, the court held that evidence of what the counterparty bank actually thought about the transactions at issue was irrelevant and inadmissible.³²⁸

The court in *Lindsey*, however, acknowledged that its holding was in tension with the Supreme Court’s discussion of materiality. In *Universal Health Servs., Inc. v. United States*, the Supreme Court considered the question of materiality (although the context in that case was statements made to federal agencies that allegedly violated the False Claims Act). The Court noted that if the government routinely paid claims despite its actual knowledge that certain required items in the application were missing or false, “that is very strong evidence that those requirements are not material.”³²⁹ By analogy, if there is evidence that the sophisticated counterparties dealing with Trump intentionally disregarded information he submitted because it was not important in determining his application, then Trump could argue that the allegedly false statements were not material. Indeed, the argument that “a defendant is *not* liable for an objectively absurd lie if a subjectively *sophisticated* victim would *never* believe it” has yet to be squarely foreclosed.³³⁰

324 See, e.g., *United States v. Coyle*, 63 F.3d 1239, 1243–44 (2d Cir. 1995) (holding that although fraudulent scheme must be reasonably calculated to deceive persons of ordinary prudence and comprehension, the “negligence of the victim in failing to discover a fraudulent scheme is not a defense to criminal conduct”); *United States v. Coffman*, 94 F.3d 330, 333–34 (7th Cir. 1996) (Posner, J.) (rejecting “unreasonable victim” argument because otherwise the law would invite “con men to prey on people of below-average judgment or intelligence”).

325 See *United States v. Ghilarducci*, 480 F.3d 542, 546–47 (7th Cir. 2007).

326 *United States v. Lindsey*, 850 F.3d 1009, 1015 (9th Cir. 2017).

327 *Id.* at 1014–19.

328 *Id.*

329 136 S. Ct. at 2003.

330 *United States v. Corsey*, 723 F.3d 366, 373 (2d Cir. 2013) (emphasis in original).

D. Other Challenges for the Prosecution

As noted above, the law requires proof that Trump himself intentionally caused the allegedly false loan or insurance applications or tax filings to be made or submitted, and that he did so with the conscious intent to defraud. That is not necessarily going to be easy to prove.

Every litigator knows that some of the most powerful proof comes in the form of email or text messages sent by a defendant in an unguarded moment, not thinking about how the message might be construed if it comes to light. But it appears that Trump seldom personally uses email or text messaging.³³¹ Because it seems that the Trump Organization is run somewhat informally, with Trump giving whatever directions he gives orally to trusted managers, there may not be much documentary evidence reflecting what Trump knew or evidencing his state of mind.

As in most cases, criminal intent in any prosecution of Trump is highly unlikely to be proven based on explicit expressions of culpability.³³² And although “[i]ntent may be established by defendant’s conduct and the circumstances,” establishing those circumstances will be difficult for the government here.³³³ There must, of course, be evidence of things Trump said to his fellow executives. In the ordinary course, trusted managers occasionally cooperate with the government and testify against the boss. Even assuming, however, that the government is able to induce someone like Allen Weisselberg to testify against Trump, there remains the problem that Trump is an especially vague communicator. As Michael Cohen, Trump’s longtime in-house lawyer and confidante, has said, Trump did not directly order him to lie or do anything else illegal. “He doesn’t give you questions, he doesn’t give you orders, he speaks in a code. And I understand the code, because I’ve been around him for a decade.”³³⁴

Because it seems that the Trump Organization is run somewhat informally, with Trump giving whatever directions he gives orally to trusted managers, there may not be much documentary evidence reflecting what Trump knew or evidencing his state of mind.

Lastly, Trump’s lawyers may advance the same nullification arguments that Trump himself has repeatedly put forward since the inception of these investigations, namely that the prosecution is a “witch hunt” and

331 Jeremy Diamond, *Trump, the computer and email skeptic-in-chief*, CNN, (Dec. 30, 2016), <https://www.cnn.com/2016/12/29/politics/donald-trump-computers-internet-email/index.html>.

332 See *In re Gordon*, 23 N.Y.2d 643, 650 (1968).

333 *Id.*

334 Oversight Comm. Testimony, *supra* note 124.

politically motivated.³³⁵ Nullification arguments are carefully monitored and oftentimes are stricken by attentive judges. Such arguments, if passing the watchful eye of the court, are not defenses *per se*, but even one juror who seizes on the suggestion of a nullification argument could hang the jury and prevent a conviction. Thus, the judge to whom a prosecution is assigned should hold the defense to the appropriate standards and defenses. And jury selection will be particularly important in this prosecution because Trump, as the former commander-in-chief who garnered over 74 million votes nationally in the 2020 presidential election, and over 85,000 in Manhattan, may well have more than a few sympathetic ears in the jury pool.³³⁶

335 See, e.g., Katanga Johnson, *Trump says New York criminal probe is in 'desperate search of a crime'*, Reuters (May 19, 2021, 12:41 PM), <https://www.reuters.com/business/legal/trump-says-new-york-criminal-probe-is-desperate-search-crime-2021-05-19/>; Jacobs & Fahrenthold, *supra* note 1; Rashbaum et al., *supra* note 309.

336 Trump received 85,185 votes—12.25 percent of the ballots cast. *2020 Election Results*, New York State Board of Elections (2020), <https://www.elections.ny.gov/2020ElectionResults.html>.

V. Conclusion

As we have noted from the start, this report is based on publicly available information, which we have assembled and analyzed in light of the potentially governing statutes and relevant legal principles. We do not have any inside prosecutorial information, and are not privy either to unreported evidence uncovered by the prosecuting authorities, or to the particular insights that they have gleaned from their intense efforts in connection with the investigation. We thus cannot offer a definitive judgment or prediction of either what will occur, or what action should be taken in light of the complete record.

At the same time, the facts that are known and publicly accessible demonstrate numerous instances of business dealings through which the Trump Organization, and Donald Trump personally, are alleged to have secured many millions of dollars of financial advantage by alleged manipulations and misrepresentations. As we have discussed, each of these instances is its own story, and the prospects of any potential case to be brought must be evaluated in light of all the surrounding facts. And, as we have tried to do in Section IV, the prospects for success must be weighed in the context of the person of Trump, who, over a period of years, has proven to be quite effective in avoiding personal accountability.

All of these considerations, including the prospects that a prosecution will succeed or fail, will be front and center in the minds of those in New York charged with making the ultimate prosecution decisions—as well they should be. But also at the heart of prosecutors' thinking—as a basic tenet of the American legal system to be preserved above all others—will be the idea that our laws apply equally to everyone and that no person is above the law. That principle strongly suggests that if there is powerful evidence of substantial wrongdoing to secure personal advantage—evidence of the sort that would plainly cause others to be held to account—it should lead to prosecution even in the unusual case of a former president, his company, and its employees.³³⁷

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337 Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump's false or misleading claims total 30,573 over 4 years*, The Washington Post, (Jan. 24, 2021, 12:00 AM), <https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/>.

We have noted press reporting that the first charges may be imminent. Recognizing the inherent uncertainty of such a projection, additional charges if any may come as soon as this summer or fall. That is because a special six-month grand jury has been impaneled, statutes of limitations are running (as we discuss in detail in Section IV.A), and Manhattan District Attorney Cyrus Vance, Jr.'s term is set to expire at the end of this year. He likely will want to either bring, or decline, remaining charges before he leaves office. Recent press reports about the timing of the first of the possible cases are consistent with our projection.³³⁸

A complicating factor in the charging calculus that cannot be ignored is Trump's status as a failed political candidate, and the possibility that any proceeding will be viewed cynically as an act of political retribution by his opponents. With respect to federal charges, President Biden has determined to leave the matter to the U.S. Department of Justice.³³⁹ Whatever the DOJ may decide, this consideration obviously weighs differently where action by the DANY and the NYAG is concerned. While there are certainly those who will perceive

politicization in any criminal or enforcement action that may be taken, those in charge of these offices have never been Trump's direct electoral adversaries. And as the lead law enforcement officials in the locale where Trump has for decades centered his business dealings, they bear the greatest public responsibility for the integrity of the law enforcement process as it concerns nearly all of the dealings apparently at issue. Ultimately, they must choose between acting, or leaving the actions of Trump and those associated with him beyond public accountability. We think that the ability of state authorities to engage on the unique facts of this situation is a great strength of our federal system.

Ultimately, they must choose between acting, or leaving the actions of Trump and those associated with him beyond public accountability. We think that the ability of state authorities to engage on the unique facts of this situation is a great strength of our federal system.

While one should take extreme caution before pursuing charges against high-profile politicians and their associates, in principle the law applies equally to princes and paupers alike. A legal system that gives a free pass to the powerful would run contrary to the binding foundation of law that we have one system of justice, and that all are subject to it. Thus, with all the qualifications we have offered, we think there is serious risk that criminal enforcement action will be taken as a result of the ongoing investigations of the business dealings of Donald J. Trump and the Trump Organization.

A comprehensive list of resources cited in this report is available [here](#).

338 Rashbaum et al., *supra* note 157.

339 See e.g., Donald Ayer & Dennis Aftergut, *Biden team can't ignore Trump's lawless record, but that doesn't mean throw the book at him*, USA Today (Dec. 8, 2020, 12:26 PM), <https://www.usatoday.com/story/opinion/2020/12/08/prosecute-trump-for-ordinary-crimes-not-presidency-column/3848850001/>.

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