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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

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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). https://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-9aebc26a54a083db772cae3068ca2b87f.

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

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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.

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. 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. 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. 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.” 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. 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.

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

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6 See generally SDNY Information.

7 New York Penal Law § 175.10.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{11} New York Tax Law § 1803-1806.
\textsuperscript{12} New York Tax Law § 1801.
\textsuperscript{14} Id.
\textsuperscript{15} New York Penal Law § 176.05 and 176.30.
\textsuperscript{16} New York Penal Law § 460.20(1) and 460.20(2).
\textsuperscript{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. Trump is a notorious micro-manager of his companies. He has posted photographs of himself personally signing stacks of tax documents. 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. 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. 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.

Third, if Trump is charged in his personal capacity, prosecutors will have to prove that he had the specific intent to defraud. 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,

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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.

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\(^{26}\) 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”).


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

31 Palazzolo et al., supra note 4.
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.
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/3eFYOQE.
42 Bump, supra note 41.
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. 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.
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." 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.” On May 3, 2018, Trump confirmed by tweet that he repaid Cohen for the Daniels settlement through a monthly retainer. 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.”

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. As a part of the investigation, both Trump Organization CFO Allen Weisselberg and Pecker cooperated and were granted immunity. As for Trump, federal prosecutors did not identify him by name in the August 2018 SDNY filing against Cohen. However, based on press reports and other context, the individual repeatedly referred to as “Individual-1” is Trump. 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.

**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.

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58 Kirby, *supra* note 56.
61 Ballhaus & Hong, *supra* note 5.
62 See generally SDNY Information.
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](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. 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.” 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.

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. That amount was identical to the amount of “consulting fees” reported by the Trump Organization for hotel projects in Vancouver and Hawaii. The payments were in addition to income Ms. Trump received from the Vancouver and Hawaii projects as a Trump Organization executive. 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.” 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. Yet a Trump Organization lawyer told The New Yorker that “[w]e did not pay...
any money to anyone.”\textsuperscript{75} Similarly, on a possible Trump building in Turkey, the Trump Organization reported $2 million in consulting fees.\textsuperscript{76} But “a person directly involved in developing two Trump towers in Istanbul expressed bafflement when asked about consultants on the project, telling the \textit{The New York Times} there was never any consultant or other third party in Turkey paid by the Trump Organization.”\textsuperscript{77}

Allegations of shielding income provided to children from tax liability appear to be nothing new in the Trump family. As reported by \textit{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.”\textsuperscript{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.”\textsuperscript{79} Alan Garten, Chief Legal Officer for the Trump Organization, has also denied the allegations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 \textit{The Washington Post}.\textsuperscript{85}


\textsuperscript{76} Buettner et al., supra note 8.

\textsuperscript{77} Id.


\textsuperscript{81} Partlow et al., supra note 9.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id.
In addition, since 2014, the Trump Organization has deducted $2.2 million for property taxes paid on Seven Springs. This deduction is made possible only because the Trump Organization has classified Seven Springs as an investment property in its tax filings. 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.” 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.”

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." 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. This 2014 easement ultimately would be reported by the Trump Organization as a $25 million tax deduction. The NYAG has civilly subpoenaed financial records relating to this easement and has publicly raised questions about whether the valuation was accurate. According to press reports, courts have also begun challenging the validity of easements of this kind, albeit in civil cases.

3. Chicago Unit Acquisition

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

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86 Buettner et al., supra note 8.
87 Id.
89 Buettner et al., supra note 8.
90 Tanfani, supra note 9.
91 Id.
92 Id.
94 Rubin, supra note 9.
96 Id.
and Fortress Investment. Press reports suggest he could not fully repay Fortress.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 Weisseberg 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.”\textsuperscript{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.”\textsuperscript{102}

\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Fahrenthold & O’Connell, supra note 13.
\textsuperscript{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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104 Vogell, supra note 103.
105 Id.
107 Vogell, supra note 103.
108 Id.
109 Id.
110 Id.
111 Id.
than 15 percent increase. The alleged reporting inconsistencies on 40 Wall Street continued after the loan received approval. 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. Similarly, in 2017, insurance costs were reported as $744,521 to tax authorities and $457,414 to Ladder Capital.

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

The reporting inconsistencies also extended to at least one other property, the Trump International Hotel and Tower. 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.” In 2017, for example, the associated gross income was reported as $822,000 to tax authorities and $1.67 million to the lender. 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.

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.

112 Vogell, supra note 103.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
119 Vogell, supra note 103.
120 Id.
121 Id.
122 Id.
123 Fahrendhold & 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. 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." In addition to Trump and Cohen, Allen Weisselberg and others allegedly were aware of this reporting practice with insurance companies.

Notably, Trump also appears to have a close relationship with the broker from the Trump Organization's main insurance provider, Aon. In a 2011 profile of Aon's Pamela Newman, Trump is introduced as "one of her biggest clients." In 2015, Newman was the first individual to officially donate to Trump's presidential campaign. 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. 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. 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.

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125 Id.
128 Id.
129 Id.
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. 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.

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. The Trump Organization did not entirely resist the subpoena, and its lawyers began communication with the DANY about collecting and producing responsive documents. The DANY insisted that the subpoena requests covered the Trump Organization’s tax returns, but Trump’s lawyers disagreed.


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/3bzlXBN.


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, 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.

On September 19, 2019, Trump filed a lawsuit in Manhattan federal district court seeking to enjoin the DANY from enforcing the Mazars subpoena. In the complaint, Trump argued that he was immune from all criminal process while he was president. 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. The district court rejected Trump's "categorical and limitless assertion of presidential immunity" as "repugnant to the nation's governmental structure and constitutional values." 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.

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. Thus, the court wrote, "Because we conclude that the President is

138 Rashbaum & Protesi, supra note 136.


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.”

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. 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.

Around this time, the DANY enlisted Mark F. Pomerantz to lead its investigation. Pomerantz is a storied former federal prosecutor who cut his teeth prosecuting and defending complex white collar and organized crime cases. The DANY also has retained FTI Consulting to assist in the forensic analysis of the voluminous financial records in the case. 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.

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

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

\textsuperscript{153} Athena Jones, New York's new top attorney moves to take on Trump, CNN (Jan. 3, 2019, 5:39 PM), \url{https://www.cnn.com/2019/01/03/politics/tish-getitia-james-james-trump-investigations/}

\textsuperscript{154} Id.

given to CFO Allen Weisselberg and/or his son Barry during their tenure with the Trump Organization.\textsuperscript{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.\textsuperscript{157} Jennifer Weisselberg, Barry Weisselberg’s ex-wife, has confirmed that investigators have asked for some of her ex-husband’s financial records.\textsuperscript{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.\textsuperscript{159} These perks included a “corporate apartment where his family previously lived” and about $40,000 in annual “bonuses.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{159} Shayna Jacobs, Jonathan O’Connell & David A. Fahrenthold, \textit{Trump executive’s son was given sizable salary, generous perks, documents show}, The Washington Post (Apr. 9, 2021, 4:29 PM), https://wapo.st/3b4dXIx.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Id.

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

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.” 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. Grand jury witnesses so far have reportedly included the Trump Organization’s longtime controller, Jeffrey McConney. 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. There could well be further developments as prosecutors and the grand jury do their work in the period ahead.

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165 Rashba et al., supra note 157; Rashba et al., supra note 2.


168 Adapted from Eisen & Perry, supra note 18.

169 Id.

170 Id.

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

174 Jacobs & Fahrenthold, supra note 1.
175 Sisak, supra note 1.
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.
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. 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. The statute of limitations is two years for the misdemeanor offense and five years for the felony.

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, 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.

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. 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.” 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.

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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.”

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. 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.

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. New York State Tax Law § 1805

190 Fahrenthold & O’Connell, supra note 13.
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.\textsuperscript{193} As defined in New York State Tax Law § 1801, a “tax fraud act” includes the following examples:

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

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.\textsuperscript{194} The felony offenses have a five-year statute of limitations and the misdemeanor, two years.\textsuperscript{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

\textsuperscript{193} New York Tax Law § 1801(a), (b).
\textsuperscript{194} New York Penal Law §§ 70.00(2)(b); New York Tax Law § 1806.
\textsuperscript{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


197 Id.

198 Id.

199 Id.

200 Id.


202 Id.

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 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.\(^{206}\)

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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.

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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](https://www.tax.ny.gov/pdf/publications/general/pub131.pdf).


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.

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-Trumps-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. 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; and

- So obtains property with a value in excess of one thousand dollars from one or more such persons.

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. The offense has a five-year statute of limitations.

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

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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

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.\textsuperscript{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.\textsuperscript{235} At the same time, Cushman valued the easement itself at $21.1 million,\textsuperscript{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.”\textsuperscript{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?”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{244} In contrast, he and his family have made public declarations of their use of their property as a family retreat.\textsuperscript{245}

\textsuperscript{234} YSCEF Doc. No. 11, supra note 153.


\textsuperscript{236} NYSCEF Doc. No. 11, supra note 153.

\textsuperscript{237} Id.

\textsuperscript{238} Sisak, supra note 235.

\textsuperscript{239} Id.


\textsuperscript{241} Id.

\textsuperscript{242} Cohen Oversight Committee Testimony, supra 124.


\textsuperscript{244} Buettner et al., supra note 8.

\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{246} Sisak, supra note 235.
\item \textsuperscript{247} Id., Corinne Ramey, \textit{Manhattan Prosecutors Advance Probe Into Trump’s Seven Springs Estate}, The Wall Street Journal (Mar. 9, 2021, 7:17 PM), \url{https://www.wsj.com/articles/manhattan-prosecutors-advance-probe-into-trumps-seven-springs-estate-11615333894}.
\item \textsuperscript{248} Jacobs & Fahrenheit, supra note 1.
\item \textsuperscript{249} Sisak, supra note 235.
\item \textsuperscript{250} Partlow et al., supra note 9.
\item \textsuperscript{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 \textsection{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 \textsection{155.42}. The statute of limitations for grand larceny in the first degree is five years. New York Penal Law \textsection{30.10(2)(b)}. The maximum punishment for the offense is twenty-five years imprisonment. New York Penal Law \textsections{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.
\end{itemize}
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

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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. 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. 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.

“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.” 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.” 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.

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

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,

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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. 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 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. 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. 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.

in 2010; and any alleged materially false statements made to Ladder Capital in connection with the 2015 loan refinancing for 40 Wall Street.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{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).
274 Id.
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 exculpating 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).
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.)

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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.


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. But that won’t necessarily stop Trump from simply denying that he was aware of bad behavior. As facile as such a defense may seem—how can the long-time, micro-managing 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. 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.” 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.” 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. Under that section, a corporation is criminally


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. Cnty. Ct. 1908) (“a corporation…is liable [civily] 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”).


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

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”).
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.”\(^\text{297}\) 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 \textit{mens rea}.

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).\(^\text{298}\) 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"\(^\text{299}\) 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 \textit{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.”\(^\text{300}\) 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.”\(^\text{302}\)

\(^{297}\) See People v. Byrne, 77 N.Y.2d 460 (N.Y. 1991) at 467.

\(^{298}\) Hill, supra note 48.


\(^{300}\) 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.” 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.”

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.” 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.

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. 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.

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


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. 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. 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. In other words, a material misrepresentation is conduct “constituting an inducement or motive to the act or omission of the other party.” 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.’"

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. 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. 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.” Thomas is one of many cases in which courts have rejected the defense that statements cannot be material unless


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)).


323 Id. at 243 (internal quotation omitted).
they would have deceived a reasonably savvy victim. These cases all reflect judicial reluctance to permit defendants to seek to escape liability for criminal fraud by conflating materiality and reliance.

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.” 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. Indeed, the court held that evidence of what the counterparty bank actually thought about the transactions at issue was irrelevant and inadmissible.

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.” 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.

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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.


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

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


333 Id.

334 Oversight Comm. Testimony, supra note 124.
politically motivated. 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.


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

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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