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BROOKINGS CAFETERIA PODCAST

THE TRUMP ORGANIZATION TAX FRAUD CHARGES

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P R O C E E D I N G S

DEWS: Welcome to the Brookings Cafeteria, the podcast about ideas and the experts who have them. I'm Fred Dews.

At the end of June, the Manhattan District Attorney, in a case conducted alongside the New York state attorney general, charged The Trump Organization and its chief financial officer Allen Weisselberg with charges including grand larceny and tax fraud.

Just days before the charges, Brookings published a report titled "New York State's Trump Investigation: An analysis of the reported facts and applicable law," by four leading experts who identify five possible areas of prosecutorial attention to Trump, his business, and its executives and also considers in depth the defenses that may be available in response to any indictment.

On this episode of the Brookings Cafeteria, I talk with one of the report's authors—Ambassador Norm Eisen, a senior fellow in Governance Studies at Brookings and an expert on law, ethics, and anti-corruption. Our conversation occurred after the initial charges were filed against the Trump Organization and one of its top executives, but before any other legal developments occurred.

Also on this episode, Tony Pipa, senior fellow in the Center for Sustainable Development at Brookings, focuses on opportunities for development in rural America in the Biden administration's American Rescue Plan.

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First up, here's Tony Pipa with a new Sustainable Development Spotlight.

PIPA: I'm Tony Pipa, a senior fellow in the Center for Sustainable Development here with a Sustainable Development Spotlight, a regular segment to highlight work from the center.

President Biden came into office with an ambitious agenda to stop the economic hemorrhaging caused by COVID-19, and then transform the very structure of the economy as it recovers, making it more fair, equitable, and sustainable as the nation moves forward.

Despite having carried the vote in only 10% of rural counties overall and 15% of rural counties that are in economic distress, he's publicly made it a priority to ensure that rural America is part of this transformation and economic rebirth. So, as large-scale relief legislation has passed and more is proposed, Natalie Geismar and I took a look at how well he's making good on that promise.

First step was the $1.9 trillion American Rescue Plan passed by Congress in March 2021. The legislation focuses primarily on providing relief from the worst ravages of COVID-19, but some of its provisions will represent significant opportunities for rural places.

A key provision is the $350 billion in state and local government release which is sending money to nearly every corner of the country. Of the $65.1 billion set aside for counties, about 23% will go to nonmetropolitan and rural counties. There are also billions for strengthening local food systems, expanding broadband, promoting economic development, and expanding small business credit, which may also sign their way to rural places.

So how can the administration maximize the impact of these? We proposed a three-point plan. First. make sure the rules governing these resources take rural into account and reduce barriers like match requirements and eligibility rules that disadvantage distressed rural place. This is key to the administration's equity agenda, given that over 50% of rural Black residents and 45% of rural native residents live in distressed counties, compared to just 18% of rural whites.

Second, ensure strategic follow-on. The funding in the American Rescue Plan is just a start. Intentional investments through other legislation organized through a national rural strategy will be important to improving long term success.

And third, improve transparency. Having high quality rural data, including the ability to follow these federal dollars right down to the specific rural communities they're meant to benefit, will be fundamental to better understanding what works and what is achieving success.

The administration is now underway in working with Congress to build out specifics of the bipartisan infrastructure framework. And it also has additional proposals that it might consider through a budget reconciliation process. One proposal, in particular, a $5 billion Rural Partnership Program, is envisioned to help rural regions, including tribal nations, build on their unique assets and realize their vision for inclusive community and economic development. This proposed program signals a real change in approach and recognizes that federal policy must shift in order to unlock the full potential of rural America.

It's important because it hints at making investments in the software that makes a community run: staffing, training, strong and healthy local nonprofits and other institutions, and connections among different leaders and groups of people who can work together locally to shape strategies and successfully carry them out.

It's also an opportunity to make two other fundamental changes to federal rural policy. One, rethink how we measure success. Rather than simply count the number of jobs created or dollars out the door, this is a chance to invest in data that measures how well federal investments are improving the overall quality of life in rural communities.

Second, make long term, substantial and flexible investments that result in lasting community impact. Rather than giving discrete injections to put in water here or fix up housing over there, the Rural Partnership Program promises a block of strategic investment that can give communities a real on ramp to strengthen and sustain themselves over time.

The director of the Domestic Policy Council, Susan Rice, recently suggested that the road to prosperity runs through rural America. We agree. The Biden administration has taken an important first step through the American Rescue Plan to get that started. It needs to make sure those resources effectively meet rural communities where they're at, and then follow through on proposals like the Rural Partnership Program if rural America is to avoid the inadequate recovery it experienced after 2008 as we emerge from the COVID-19 pandemic.

DEWS: You can find more from Tony Pipa and Natalie Geismar on the proposed Rural Partnership Program on our website. And now, here’s my interview with Norm Eisen on the new report about New York’s Trump investigation.

Norm, welcome back to the Brookings Cafeteria podcast.

EISEN: Fred, thanks for having me back. It's always interesting when I'm with you because it means that something big is going on in my world.

DEWS: Yes, I looked at the history of this, and the last time I talked to you on this podcast was December 2016. And that was about a report that you and Brookings scholar Vanessa Williamson wrote about the ethics of the soon-to-be Trump administration. So just before he was inaugurated president. And now, here we are a few months after the end of the Trump presidency and we're again talking about a lot of issues related to Trump and his organization. So, yeah, it's always exciting to talk to you, Norm.

EISEN: We mark the milestones together, and we certainly have encountered one recently.

DEWS: Right, and so we're here today to talk about a new report that you coauthored, as I mentioned in the introduction, with three other folks. And that is about your investigation into the Trump organization. And since you published that, a big news event happened, and other news events might happen. Before we hear this, can you catch listeners up with the latest developments and the charges related to the Trump Organization and its personnel?

EISEN: Of course, the New York D.A., joined by the New York state attorney general, brought criminal charges against the Trump Organization, a number of Trump businesses, and the former president's closest financial adviser, CFO Allen Weisselberg, in connection with alleged wide-ranging tax fraud scheme. A total of 15 charges brought in this very sweeping indictment.

DEWS: So that gets us into the report because you cover that particular then-possibility in the report. Again, this report was published at the end of June, so before those charges were filed. Norm can you talk about what this report is and why you and your coauthors wrote it?

EISEN: Of course, we're very proud that our prognostication, based on analysis that charges were coming, proved to be accurate. The report is entitled "New York State's Trump Investigation and Analysis of the Reported Facts and Applicable Law." And I wrote it with three other experts. Collectively, we have over a century of prosecution and defense experience, including with these very actors—the New York D.A. and the New York A.G., who are responsible for this first set of charges. Very likely not the last set of charges as we explain in the report, and as you and I will discuss today, Fred.

My coauthors are Danya Perry, who worked as both a federal and state prosecutor and defense lawyer in New York. So, she's seen these kinds of cases from both sides of the table. Don Ayer, who had senior prosecutorial roles helping run the Justice Department, and also as a U.S. attorney in a series of four Republican administrations. And John Cuti, who, like me, for the most part, career defense specialists who have taken on and pushed back against these charges. And as we'll talk about, one of the things we do in the report is both lay out a prosecutorial roadmap—the first few signs, as you know, on that roadmap have now been passed. But also a very extensive defense roadmap on how these cases will be defended and, you know, the very substantial counterarguments to the arguments the prosecution is advancing.

DEWS: I think that's a very important fact to underscore for listeners that this report is both a prosecutorial roadmap, but it's also a defense roadmap. And also, I think it's important to note that neither you nor any of the three coauthors are parties in any way to any current or future lawsuits involved with the Trump organization. Right?

EISEN: That's right, we've all had our encounters with the former president and those around him in litigation in the past, but at the present time, none of the coauthors are parties to litigation against Trump or the Trump Organization.

DEWS: So, let's look at the report now, and you go through three major, at least by my count, three major sets of facts that could form the basis of future indictments. And as you just mentioned, one of them already has the charges against CFO Allen Weisselberg. The first involves hush money allegations paid to two women who were alleged to have had affairs with Donald Trump leading up to the 2016 election and then payments to them then and thereafter. Why could those incidents again become the basis for criminal indictment? I thought we had moved past that particular set of concerns in the legal sense. But now they're back and you and your authors are suggesting those could be the basis of new charges.

EISEN: Well, the hush money allegations were the origin of the New York investigation. We know that because the D.A. had two years of litigation against Trump and the Trump Organization to get their financial records principally from their outside accountants, Mazars, broad sweeping set of subpoenas that were litigated up to the United States Supreme Court twice. First, where the subpoenas were upheld and principles were established, and then the courts applied those rules. Trump appealed again. And the first time there was full argument and opinion. The second time the Supreme Court declined to take it up and Mazars honored the subpoenas.

The reason that those hush money allegations are still at issue is because they involve a very serious set of allegations about maintaining fraudulent books and records. I want to emphasize that these are just allegations, but it's within the applicable statute of limitations in New York for felony falsification of business records, violations. Only under investigation. No finding has been made.

But it's very telling, when you look at the first set of charges that came down, all of the things we're going to talk about, the three basic categories that you advocate, the foundation has been laid for these kinds of offenses. And now it's clear from the public record what prosecutors are saying. They're going to say there are allegations of falsification of records in this, not the hush money falsification, other forms of falsification in this indictment. And the question is going to be whether they build on that, by the 12th, 13th, 14th, and 15th counts in the indictments are for falsifying business records. So, as we read that, the hush money allegations are also, we know they're under investigation. We know that they may make out the crime in

New York of falsifying business records. The reason that they might be charged is because there's strong evidence that when the hush money was repaid by Donald Trump, the Trump Organization booked that in its books and records as legal expenses instead of what they actually were. So, now we'll see if this scaffolding of falsifying business records, this structure, this marker that has been laid down, if that is expanded to include the treatment of the hush money payments, that's the first big category. But, you know, a lot of clues suggest that is still getting a very hard look. And in my view, it should. It makes that a very serious set of allegations, as we explain in detail in the report.

DEWS: Well, so it's a much different set of facts, but it strikes me as being somewhat similar, which is the indictment against Mr. Weisselberg. It's not, in my understanding, illegal for an employee of a company to be compensated in the ways that perhaps he was compensated—tuition for his grandchildren, an apartment. But it's more at the way that those elements of compensation were recorded or not recorded by the business. Is that the case right now against Mr. Weisselberg?

EISEN: Exactly. And as you analyze the case against Weisselberg and the Trump Organization, because all of these four felony counts for falsifying business records target both the Trump businesses and Weisselberg. If you look at that, you say, well, the prosecutors have made clear in the indictment that they're looking at the Trump org and Weisselberg's falsification of business records. They've made clear publicly that they're also looking at the hush money payments, which involves falsification of business records. So, these tax issues about concealing things in the books and records for tax fraud purposes could also apply to the hush money misconduct. And we'll see whether there are additional charges on that front or not.

DEWS: Well, then a third major area that you cover in the report that has to do with tax fraud issues has to do with consulting fees and the way the Trump organization booked consulting fees, including as it relates to Ivanka Trump. Can you talk about what you detail in the report in that area?

EISEN: Sure, you're right. And that's the third of the three basic areas for potential expansion of this first case. The first is the hush money, the second is misrepresentations to loan officers and insurance brokers and representatives, basically insurance and bank fraud. And the third is tax fraud. And again, these are all allegations. We don't know if they're going to be charged or not. Everyone is innocent until proven guilty, even when they're charged. So, they're entitled to that presumption, how much more so before being charged. That's part of the reason that we spent so much time in this report addressing the defenses that might be available.

In this tax area there are a series of issues: consulting fees, conservation easements, handling of debt, so-called debt parking, that could provide additional tax fraud charges against Weisselberg, the Trump Org, and even Trump himself.

Now, let's take the consulting fees that you raised as an example. There has been a lot of public reporting that suggests that apparently tax-deductible consulting fees that appear on the Trump Organization's tax returns, presumably with the approval of Mr. Weisselberg and Donald Trump himself, we need to know what their personal knowledge was. That's still an open question that prosecutors are looking at. Turns out that these consulting fee payments may have gone to members of the Trump family, such as the president's daughter, Ivanka Trump. And the question is whether, like the benefits that are at issue in the first indictment, question is are there going to be other charges where they say, hey, this was a tax fraud and somehow tax evasion occurred.

That might occur with consulting fees if, like many of the Weisselberg charges, instead of something being booked as income on which both the company and the recipient are required to pay taxes, it's somehow hidden or concealed and there's a negative tax impact for the state. I want to hasten to add that Ivanka has denied any impropriety and said there was no negative tax impact on the state as a result of the consulting fees that she collected. So, it might amount to something it might not. And there's two sides to each of these questions. And we marshal the evidence in the report on both sides, including people who deny, that associated with the Trump organization, who, when confronted with this tax line item of consulting fees, said what consulting fees? No consulting fees were paid.

So, there's legitimate questions about whether—and there may be good answers—were there two sets of books that really hits when you come to things like the conservation easements where it appears that there are such different valuations that are being applied. One set of being a valuation of these conservation easements Trump got in New York and in California, one set that were very high valuation as applied for tax deductibility purposes, and then lower valuations where that benefits Trump elsewhere. So, it raises the question: were there are two sets of books? Again, strong general denials by Trump world. And we'll just have to see where prosecutors go with it.

DEWS: Sure. So, let me move on, Norm, to another major set of facts that you and your coauthors detail in the report. And those relate to how the Trump Organization allegedly misrepresents property values to lenders, journalists, business partners, and so on. So, what's going on, is there potential criminal liability with that kind of action?

EISEN: One of the most important parts of the indictment can be found in paragraph 19, where the state alleges that the Trump Organization internally tracked and treated the tax fraud items as part of authorized annual compensation in one set of books, but that the corporate defendants falsified other compensation records. So, the disputed payments were not reflected in gross income. In other words, that there were two sets of books. And as we detail in the report, there are very substantial allegations that there were similar treatments of Trump properties for a bank and insurance purposes where you want to magnify the value of properties in order to—and again these are just allegations based on the public reporting, we'll see if no charges have been filed based on these, we'll see if they are—but where the allegation is that the Trump Organization and Trump personally is magnifying the value of these assets for insurance purposes and bank purposes so you get more insurance coverage, you get more leverage, more lending, but then minimizing the amounts when it comes to tax so you have to pay lower taxes.

So, again, it's that same allegation in a slightly different setting of two sets of books being kept. And that can be devastating if charged and proved in front of a jury. The larger point here is when it comes to falsification of business records, when it comes to allegations of tax fraud, when it comes to allegations of keeping two sets of books, all of these themes that we see in the existing first indictment of Weisselberg and the Trump Org also fit the pattern of other issues that we know are being investigated. And the question is, have the prosecutors built a basic structure, a set of categories? And now are they going to add on to that structure, maybe even to charge Trump himself?

DEWS: Well, I want to follow up on that particular issue in just a moment, but first I want to follow up on, you mentioned falsification of business records. You mentioned tax fraud. Those are two of some of the potentially relevant criminal statutes that you and your coauthors detail in the report. So, specific laws that the Trump Organization or its personnel that may be charged with breaking. One of those potentially relevant criminal statutes has to do with enterprise corruption. So, you've talked about a lot of the potential facts of these different events, but what is enterprise corruption? I'm really interested in that issue.

EISEN: There are a number of legal tools that the United States and the individual states, including New York, have enacted in order to get at crimes that are not one offs, but instead that are part of a broader scheme. It has basically three dimensions, let's say, in the Trump investigation, two of which are exhibited in the existing indictment. And the third is the one you're asking about: enterprise corruption. And we write about all three in the report. The most basic version is called conspiracy, and that means an agreement to do an illegal act. So, as opposed to a single illegal act done by a single person, in a conspiracy you have multiple people agreeing to do an illegal act and then taking some overt steps to execute it that allows you to charge conspiracy. And it's charged in the existing indictment.

The second step in broadening out further is a scheme to defraud, and that is where you often have multiple illegal acts that are being undertaken—and we write about that—often by multiple people.

And then the third and the most extreme form, even broader than the first two, is where you have a company that is so—or another joint venture—hat is so riddled with conspiracies and schemes to defraud that the whole enterprise, the whole company, becomes corrupt. That is what is known as enterprise corruption. It's a concept that really involved in fighting against organized crime. By the way, you can have parts of an enterprise that become corrupt and other parts that are legit, but it represents the broadest degree of corruption that you have in these kinds of investigations.

And as we explain in the report, prosecutors would have grounds to investigate whether enterprise corruption may have occurred in the case of the Trump Organization—the rubric for the various Trump businesses—or not. We don't know if prosecutors will go there. We know that the first two steps on this scale of broader scope of crime have been alleged. That's conspiracy. That's the second count in the existing indictment and scheme to defraud. That's the first count in the existing indictment. So, we'll see if there are additional charges brought and if they take the additional step of alleging enterprise corruption or not. TBD.

DEWS: Well, again, for listeners, I think that's one of the reasons why this report is so interesting and important, because you and your coauthors detail what it means to have a charge in the enterprise corruption field. You go through the facts of the case to really educate people who want to know more about what's happening with the situation. And, Norm, you mentioned a few minutes ago the possibility that Donald Trump himself might get charged. So, I want to ask you, how do leaders of a business that's under investigation and may be charged with violating a statute, how does a leader him or herself become criminally liable for things that their company or their subordinates have done?

EISEN: We talk about this a lot in our report. And in order to hold the leader of a business responsible for the activity of the business—so, for example, in order to hold Donald Trump responsible for the alleged misconduct that has gone on in the Trump Org, you do need to show criminal intent. That is, prosecutors would have to show that Trump was aware of the misconduct, participated in the misconduct, and did so with the intent to take those actions. If Trump was not aware or if he were aware and the prosecutors didn't have the proof—and we explain that this is a particularly challenging case because the prosecutor's best friend, email, Donald Trump is not an email user. So far, Weissenberg has not agreed to cooperate against Donald Trump. That's another way that you're able to show this kind of intent. Even if prosecutors believe that he was aware, that's not enough. You've got to have sufficient evidence to show intent, to show the wrongful state of mind, bad acts by the leader of the business, and to be able to prove that beyond a reasonable doubt to a jury. That's the phase that we're in now. It's no secret the prosecutors are looking very hard at that. Mr. Trump has his own attorney who's been vocal out there, and we'll just have to see where the prosecution goes with this, Fred.

DEWS: So one question people are asking now, because it's been in the news, has to do with the statements that Donald Trump himself has made over the years about his business and about his knowledge of things in that business. And, for example, in March 2016, he said, "I know more about taxes than any human being that God ever created." And he said similar things since then. Many of the allegations or potential allegations involve tax issues. So, clearly, the former president couldn't say he didn't know about the tax issues or the tax laws. So, could statements like that help the prosecution's case?

EISEN: Yes, the president would be extremely hard pressed to argue that he was ignorant of these kinds of matters because he's proclaimed himself to be a very substantial expert. But those kinds of general proclamations are no substitute for having detailed evidence that the president took wrongful action himself, not just his business, and that he did so intentionally with what we call *mens rea*, with the bad state of mind. They're going to have to prove that kind of thing with each particular bad act. Still, the president's prior proclamations about what his level of expertise is on these matters will be helpful to prosecutors as they attempt to determine whether to charge him or not.

DEWS: I think that's a good segue into the set of possible defenses that you and your coauthors detail in the report. So, again, this report is not just about the facts in the possible prosecutorial road map available, but it's also about the possible defenses that the Trump

Organization and its personnel could mount against any potential charges. So, what are some of the most significant possible defenses?

EISEN: Well, there's a boatload of them, and we do detail them in considerable length in the report. Statute of limitations: many of these events that are charged in the first indictment and that are under investigation go past New York's five-year statute of limitations that generally applies. In other words, as a general matter, prosecutors can't charge something that happened more than five years ago. But, and we also include the responses to each of the defenses, those conspiracy and scheme to defraud offenses that you and I talked about earlier, the broader scope and scale, those allow prosecutors to go back further, because if there's an ongoing period of misconduct that extends, as they claim here, all the way back to 2005. So, this is a 15 year plus scheme, then that tolls the statute, that extends the statute. So, statute of limitations is the big one.

Factual defenses that these tax benefits here were not required to be disclosed. The taxes were actually paid. That consulting fees and other things we talked about were entirely proper. That no money was taken from New York. Those kinds of fact specific defenses will also come into play.

And then a set of technical legal defenses, which we call *actus reus*, that no bad action was undertaken. This is where the President Trump would say whatever other people might have done, I didn't do it. So, we were just talking about this with the difference between corporate liability and executive liability. No *mens rea*. I didn't know it was wrong. I didn't intend to do anything wrong. Again, we just touched on that. There's a set of defenses around materiality that in essence, the misrepresentations that were made were not sufficiently important. It's not the kind of thing that anybody would have cared about. I'm paraphrasing for the lay listener. It's a very technical area of the law.

So, those are the kinds of things we go through them in detail. We point out as the relevant case law. We explain how it might be argued and what the counterarguments are. And readers can judge for themselves whether these defenses will be substantial enough to succeed at trial or not.

DEWS: Norm, setting aside the particulars of the case or potential future cases themselves, can you put this into the context in terms of the big historical picture? I mean, have any previous presidents and their organizations ever been charged like this?

EISEN: No, there's no precedent for a president both hanging on to a commercial venture of this kind that was exposed to investigation and then for charges being filed against the business that bears the president's name and his closest financial associate at that business. There have been allegations about the business dealings of presidents or their family members, but there's no example in modern times that's remotely comparable to this.

DEWS: So, what should people expect in the coming weeks and months? We've seen one set of charges against Allen Weisselberg, the CFO of the Trump Organization. What do you think people should be looking out for? What are you going to be looking out for in the coming weeks and months?

EISEN: Well, the Brookings report talks a lot about both the prosecution and the defense roadmap for what lies ahead. Now, the wrangling has begun in the existing case over how much time the defense will need. The defense always wants as much time as possible to kick the can down the road. The prosecution has already turned over a large volume of documents, the same documents that, some of them, that Mr. Trump worked so hard to deny the prosecution for so many months, almost two years. So, there'll be a period of pretrial wrangling.

Once we get past that, there will be pretrial motions practice. The defense will try to throw out the case, the existing case, and at some point, we will get a trial date. But we're a ways away from that in the first case. That's what I'm looking out for in the existing case.

But probably the more interesting set of questions is what's next? The prosecutors have said the investigation is ongoing. We know there's intense pressure being applied to Mr. Weisselberg, who's been charged in this case, to cooperate. He's potentially looking at substantial jail time, ruinous fines for him and his family. Will he cooperate? I'll be looking for that. Will other cooperators emerge whether or not he cooperates? And we've described how this first case seems to set up the scaffolding that fits with the other subjects being investigated. Will additional charges be brought? And then finally, will they include the ex-president? Those are some of the questions that we're now grappling with after this first set of charges has become public.

DEWS: Well, Norm, I'd like to conclude this discussion just by quoting from your report real quick, near the conclusion you and your coauthors write, "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." So, Norm, I want to thank you for sharing your time and expertise today on this very important and timely topic. It's always a joy to talk to you.

EISEN: Thank you, Fred. It's always nice to be with you and we'll be watching to see what happens.

DEWS: And the report again is "New York State's Trump investigation: An analysis of the reported facts and applicable law." You can find it on our website, Brooking.edu.

A team of amazing colleagues helps make the Brookings Cafeteria possible. My thanks go out to audio engineer Gaston Reboredo; Bill Finan, director of the Brookings Institution Press, who does the book interviews; my communications colleagues Marie Wilkin, Adrianna Pita, and Chris McKenna for their collaboration. And finally, to Soren Messner-Zidell and Andrea Risotto for their guidance and support.

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Until next time, I'm Fred Dews.