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Lawfare: How the Manhattan District Attorney's Office and a New York State Judge Violated the Constitutional and Legal Rights of President Donald J. Trump

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**LAWFARE: HOW THE MANHATTAN DISTRICT ATTORNEY’S OFFICE AND A NEW
YORK STATE JUDGE VIOLATED THE CONSTITUTIONAL AND LEGAL RIGHTS
OF PRESIDENT DONALD J. TRUMP**

Interim Staff Report of the
Committee on the Judiciary
and the
Select Subcommittee on the Weaponization of the Federal Government
U.S. House of Representatives



July 9, 2024

EXECUTIVE SUMMARY

On April 4, 2023, Manhattan District Attorney Alvin Bragg announced that he secured a 34-count criminal indictment against President Trump that bootstrapped misdemeanor state charges for allegedly falsifying New York business records to an ambiguous, unknown federal crime to aggravate the charges to felonies.¹ The indictment focused on payments that former Trump employee Michael Cohen made to Stephanie Clifford (also referred to as Stormy Daniels) in 2017. Legal experts have detailed serious legal and constitutional deficiencies with Bragg’s politicized prosecution. First, as one legal scholar explained, even if the alleged bookkeeping irregularities “amount[ed] to fraud crimes . . . the transactions in question could not possibly have had the slightest impact on the 2016 election. They didn’t occur until months later—specifically, from February 14 through December 5, 2017.”² Second, “even if Bragg had jurisdiction to enforce federal campaign finance law” and “even if Bragg were correct that the . . . payments were in-kind campaign contributions that had to be disclosed,” any disclosure would have been due “several months into 2017. Again, there could not conceivably have been any impact on the 2016 election.”³

In March 2023, the Judiciary Committee opened an investigation into Bragg’s unprecedented indictment of President Trump, including by requesting that former Manhattan Special Assistant District Attorney Mark Pomerantz provide relevant documents and testimony pertaining to his role leading the investigation into President Trump.⁴ On instructions from Bragg, Pomerantz refused to cooperate with our oversight.⁵ The Committee issued a subpoena for Pomerantz’s testimony, litigated it in the U.S. District Court for the Southern District of New York upon Bragg’s objection, and prevailed, resulting in Pomerantz appearing for a deposition before the Committee on May 12, 2023.⁶ Despite Pomerantz’s conduct at the deposition—he refused to answer the most basic of questions—the Committee’s investigation proved fruitful.⁷ On April 25, 2024, the Committee released its interim findings—in short, Bragg’s prosecution of President Trump was politically motivated, unethically and likely unlawfully focused solely on one person, and “opened the door for future prosecutions of a former president—or current candidate—that would be widely perceived as politically motivated.”⁸

On May 15, 2024, the Judiciary Committee’s Select Subcommittee on the Weaponization of the Federal Government held a hearing highlighting the weaponization of the rule of law

¹ Press Release, N.Y. Cnty. Dist. Atty’s Office, District Attorney Bragg Announces 34-County Felony Indictment of Former President Donald J. Trump (Apr. 4, 2023) [hereinafter “Bragg Press Release”].

² Andrew C. McCarthy, *Bragg’s case against Trump is utterly incoherent*, N.Y. POST (Apr. 5, 2023).

³ *Id.*

⁴ Letter from Rep. Jim Jordan, H. Comm. on the Judiciary, to Mr. Mark F. Pomerantz, Former N.Y. Cnty. Special Assistant District Att’y (Mar. 22, 2023) [hereinafter “Mar. 22, 2023 Letter to Pomerantz”].

⁵ Letter from Mr. Mark F. Pomerantz, Former N.Y. Cnty. Special Assistant District Att’y, to Rep. Jim Jordan, H. Comm. on the Judiciary (Mar. 27, 2023).

⁶ *See* Opinion and Order Denying Temporary Restraining Order, *Bragg v. Jordan*, 1:23-cv-3032 (MKV) (S.D.N.Y. Apr. 19, 2023); STAFF OF THE H. JUDICIARY COMM., 118TH. CONG., AN ANATOMY OF A POLITICAL PROSECUTION: THE MANHATTAN DISTRICT ATTORNEY’S OFFICE’S VENDETTA AGAINST PRESIDENT DONALD J. TRUMP, at 3 (Apr. 25, 2024) [hereinafter “ANATOMY OF A POLITICAL PROSECUTION”].

⁷ ANATOMY OF A POLITICAL PROSECUTION at 3.

⁸ *Id.* at 34.

through the use of lawfare tactics and exposing the two-tiered justice system that extends from the highest offices in the Department of Justice to the offices of politically ambitious state and local prosecutors. The Committee heard testimony from former federal prosecutor James Trusty, who testified about the dangers of lawfare, or, as Trusty put it, “an end-justify-the-means mentality” that is the “antithesis of justice.”⁹ The Committee also heard from Gene Hamilton, a former Department of Justice official, who highlighted the unprecedented use of lawfare against President Biden’s political opponents. Finally, the Committee also heard from Robert Costello, Michael Cohen’s former attorney, who testified about Cohen’s credibility and highlighted the deficiencies in Cohen’s testimony.

On June 13, 2024, the full Committee on the Judiciary convened a hearing to further examine the left’s use of lawfare to target political adversaries.¹⁰ The Committee heard testimony from experts that President Trump’s prosecution in Manhattan was riddled with defects. The Committee heard testimony from Federal Election Commission (FEC) Commissioner James “Trey” E. Trainor, III who explained how Bragg’s prosecution was “a significant deviation” from a well-established legal framework as Bragg “usurped the jurisdiction that Congress [] explicitly reserved for federal authorities.”¹¹ The Committee also heard from a constitutional law scholar and attorney Elizabeth Price Foley who explained in detail how the trial violated President Trump’s constitutionally protected due process rights. Finally, the Committee heard from Missouri Attorney General Andrew Bailey who drew on his expertise as Missouri’s chief law enforcement officer to discuss how Bragg’s prosecution was clearly “politically motivated and replete with legal error.”¹²

A fundamental principle of the American system of justice is that no individual is above the law. But just as important is the precept that prosecutors prosecute conduct, not individuals. Manhattan District Attorney Alvin Bragg, however, ran for office on a platform of investigating and prosecuting President Trump, bragging about his extensive experience suing President Trump. Although Bragg was initially hesitant to bring charges once he became district attorney, he faced intense political pressure to do so, including a leaked resignation letter from a special assistant district attorney who attacked Bragg for being too timid. That same prosecutor, Mark Pomerantz, later authored a tell-all book in which he took Bragg to task for failing to prosecute President Trump. Unsurprisingly, just months after Pomerantz’s book premiered—and *after* President Trump declared his candidacy for the 2024 Republican presidential nomination¹³—Bragg succumbed to this political pressure and filed charges relying on Pomerantz’s theory of the case.

⁹ *Hearing on the Weaponization of the Federal Government, Before the H. Comm. on the Judiciary*, 118th Cong. (May 15, 2024) [hereinafter “May 15, 2024 Weaponization Hearing”] (written testimony of James Trusty).

¹⁰ *Hearing on the Manhattan District Attorney’s Office Before the H. Comm. on the Judiciary*, 118th Cong. (2024) [hereinafter “Manhattan District Attorney Hearing”].

¹¹ Manhattan District Attorney Hearing (Written testimony of Comm’r James E. “Trey” Trainor, III, Fed. Election Comm’n [hereinafter “Trainor Written Testimony”]).

¹² Manhattan District Attorney Hearing (written testimony of Attorney General Andrew Bailey).

¹³ Gabby Orr, *et al.*, *Former President Donald Trump announces a White House bid for 2024*, CNN (Nov. 16, 2022).

This interim staff report explains the several ways in which Bragg’s prosecution of President Trump suffers from severe legal and procedural defects. These infirmities include, but are not limited to:

- Bragg’s unconstitutional and unprecedented Russian-nesting-doll theory of criminal liability, in which the jury never had to reach unanimity beyond a reasonable doubt as to each element of the criminal offenses;
- Bragg’s usurpation of the federal government’s exclusive authority to prosecute alleged violations of federal campaign finance laws and the Biden-Harris Administration’s refusal to intercede to protect federal interests; and
- Judge Merchan’s egregious legal rulings before and during the trial that all cut against President Trump’s rights, including:
 - Judge Merchan’s failure to recuse himself for manifest political bias against President Trump;
 - The unconstitutional gag order he imposed on President Trump during the trial;
 - Judge Merchan’s admission of plainly inadmissible, irrelevant, and unfairly prejudicial testimony against President Trump; and
 - Judge Merchan’s refusal to permit former Federal Election Commission Chairman Bradley Smith to testify as to the meaning and complexities of the Federal Election Campaign Act.

President Trump never had a real shot at a fair trial in Manhattan. In a more neutral jurisdiction, where a politically ambitious prosecutor was not motivated by partisanship and a trial judge with perceived biases did not refuse to enforce a fair proceeding, President Trump would have never been found guilty.¹⁴ But Manhattan is anything but a neutral jurisdiction. President Trump promised to appeal, stating, “We will fight for our constitution. This is far from over.”¹⁵ But the Democrats’ use of lawfare accomplished its short-term goal—it removed President Trump from the campaign trail and diverted attention away from President Biden’s missteps and failing policies.

Since Alvin Bragg announced last year his political prosecution of President Trump, the Committee and Select Subcommittee have conducted oversight of politically motivated prosecutions and the partisan use of lawfare to achieve political ends. The state or local prosecution of a current or former president by a popularly elected district attorney raises substantial federal interests and raises serious concerns about conflict between state and federal entities. While Bragg and Congressional Democrats dismiss these concerns, the Committee has taken steps to ensure that certain federal officials may have a fair trial in a more neutral venue. The Committee’s and Select Subcommittee’s oversight work is not done, but this interim report presents the facts about how the Manhattan District Attorney’s Office and a Manhattan judge worked together to deprive President Donald J. Trump of his constitutional and legal rights.

¹⁴ James Lynch, *Trump Found Guilty on All Counts in Hush-Money Trial*, NAT’L REV. (May 30, 2022).

¹⁵ *Id.* (internal quotation marks omitted).

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I. INTRODUCTION

The New York County District Attorney’s Office’s (DANY) multi-year investigation into former President Donald J. Trump—and subsequent indictment and prosecution—is unprecedented. Since at least 2018, the DANY has weaponized the New York criminal justice system, combing through every aspect of President Trump’s personal life and business affairs in an effort to indict and convict him of a crime, no matter how ill-conceived, contrived, or unlawful the theory of criminal liability.¹⁶

Around the time the DANY began its pretextual investigation into President Trump, Michael Cohen, President Trump’s former disgraced lawyer—and Bragg’s star trial witness—pleaded guilty to five counts of willful tax evasion; one count of making false statements to a bank; one count of causing an unlawful campaign contribution; and one count of making an excessive campaign contribution in federal court.¹⁷ Federal prosecutors in Manhattan described Cohen’s criminal conduct in that case as “knowing and calculated acts—acts Cohen executed in order to profit personally, build his own power, and enhance his level of influence.”¹⁸ Three months later, Cohen pleaded guilty to lying to Congress.¹⁹ By July 2019, the U.S. Attorney’s Office for the Southern District of New York (SDNY) ended its investigation into payments made by Cohen to Stephanie Clifford. Federal prosecutors determined that no additional people would be charged alongside Cohen and that no one else—including President Trump—was responsible for the conduct.²⁰

Although the SDNY ended its investigation, the DANY under the leadership of Cyrus (“Cy”) Vance continued its investigation. In mid-2019, the DANY interviewed Cohen in prison²¹ and, by October 2019, the DANY gathered some of the facts related to the payments that Cohen made to Clifford.²² In late 2019, however, Vance decided not to bring charges “against anyone in connection with the . . . money paid to Clifford or the [allegedly] phony invoicing scheme by which Michael Cohen had been reimbursed for the money he had laid out.”²³

Nonetheless, Vance continued with the investigation. In December of 2020, Carey Dunne, who at the time served as counsel to Vance, asked Mark Pomerantz to join a group of outside advisors to Vance’s team investigating President Trump, which Pomerantz accepted

¹⁶ MARK POMERANTZ, *PEOPLE VS. DONALD TRUMP: AN INSIDE ACCOUNT* (2023) [hereinafter “POMERANTZ”]; Andrew Feinberg, *New York prosecutors warn Trump of possible indictment, report says*, THE INDEPENDENT (Mar. 10, 2023).

¹⁷ Press Release, U.S. Attorney’s Office, Southern District of New York, Michael Cohen Pleads Guilty In Manhattan Federal Court To Eight Counts, Including Criminal Tax Evasion And Campaign Finance Violations (Aug. 21, 2018); Information, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018).

¹⁸ The Government’s Sentencing Memorandum at 27-28, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Dec. 7, 2018).

¹⁹ Information, *United States v. Cohen*, No. 18-cr-850 (S.D.N.Y. Nov. 29, 2018).

²⁰ See POMERANTZ at 1; Mark Berman, *et al.*, *The prosecutor, the ex-president and the ‘zombie’ case that came back to life*, WASH. POST (Mar. 17, 2023); Shawna Chen, *Timeline: The probe into Trump’s alleged hush money payments to Stormy Daniels*, AXIOS (Mar. 18, 2023); Mar. 22, 2023 Letter to Pomerantz, *supra* note 4.

²¹ Kara Scannell, *et al.*, *Trump defense cross-examines Michael Cohen in hush money trial*, CNN (May 14, 2024) (“Cohen confirms first time he met DA office officials was 3 months into his prison sentence[.]”).

²² See Berman, *supra* note 20; Chen, *supra* note 20.

²³ POMERANTZ at 41-42.

immediately.²⁴ Throughout 2020 and 2021, the DANY’s investigation of President Trump continued.²⁵ In his self-serving book, *People v. Trump: An Insider’s Account*, Pomerantz explained the many legal theories that the DANY considered to prosecute President Trump and he made clear that his goal was to prosecute President Trump—it was just a matter of finding the crime to pin on the President.²⁶

After President Trump left office, Pomerantz revisited “whether there were other felony charges that could be brought in connection with the payment that Cohen had made to Clifford and the ensuing [alleged] coverup.”²⁷ Pomerantz concocted a “novel legal theory” under New York’s money laundering statute, which he admitted was “neither intuitive nor obvious.”²⁸ According to Pomerantz, money laundering is a series of financial transactions that are designed to “conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of criminal conduct.”²⁹ This theory was “novel” because the “proceeds” were based on Clifford’s criminal conduct—namely, her “extortion of Donald Trump.”³⁰ That theory, however, went nowhere because New York’s money laundering statute required the payments that Cohen allegedly agreed to be made on President Trump’s behalf—or the “dirty money”—to have been actually received by Clifford.³¹

Pomerantz then began focusing on President Trump’s Statements of Financial Condition (SOFC), which he believed, based on Cohen’s claims, must be criminal.³² Pomerantz examined multiple years’ worth of the financial statements made for multiple golf properties, Deutsche Bank, the Old Post Office Hotel, Doral Resort, Trump International Hotel & Tower in Chicago, Mar-A-Lago, Seven Springs, 40 Wall Street, the Triplex Apartment, and Trump Tower.³³

Despite repeated failure, Pomerantz considered another novel theory of criminal liability—charging President Trump under New York’s Enterprise Corruption statute for “pattern crimes.”³⁴ Under this theory, Pomerantz attempted to amalgamate several unrelated and baseless allegations against President Trump into a crime. Pomerantz was not subtle. He prejudged the results of this case and had decided that President Trump would be prosecuted for some crime—any crime. It was only a matter of pinning a crime on him.

Pomerantz faced one major hurdle in his pursuit of President Trump: his colleagues did not entirely agree with him. For daring to question his novel theories, Pomerantz accused his fellow DANY lawyers and investigators of being “relentlessly negative, dwelling on all the difficulties and issues with the case, and refusing to acknowledge the positives” during an internal meeting on December 10, 2021, where he referred to his former colleagues as

²⁴ POMERANTZ at 4.

²⁵ See generally POMERANTZ.

²⁶ *Id.*

²⁷ POMERANTZ at 43-44.

²⁸ *Id.* at 58.

²⁹ *Id.* at 44; N.Y. PENAL LAW § 470.10.

³⁰ POMERANTZ at 57.

³¹ *Id.* at 60.

³² *Id.* at 97-100.

³³ *Id.* at 64, 74, 99, 152, 165, 167, 185, 208.

³⁴ *Id.* at 105-106.

“conscientious objectors”³⁵ for stating that the obvious: the case was “weak” and had “many fatal flaws.”³⁶ Rather than engage in meaningful reflection and attempt to meet the concerns of his colleagues, Pomerantz dismissed them as either too lazy to do the work, ignorant of the evidence, or afraid of bringing charges against President Trump.³⁷

A. Alvin Bragg’s Political Prosecutorial Pursuit of President Trump

Throughout his run for district attorney, Alvin Bragg made President Trump a focal point of his campaign.³⁸ On December 13, 2020, for instance, Bragg stated:

Let’s talk about what’s waiting for the new DA. The docket. We know there’s a Trump investigation. I have investigated Trump and his children and held them accountable for their misconduct with the Trump Foundation. I also sued the Trump administration more than 100 times for DACA, the travel ban, separation of children from their families at the border. So I know that work. I know how to follow the facts and hold people in power accountable.³⁹

On March 17, 2021, Bragg stated that, as district attorney, he “will hold [Trump] accountable”⁴⁰ Similarly, on March 23, 2021, he boasted that he had “sued the Trump administration over 100 times”⁴¹ In June 2021, Bragg stated, “It is a fact that I have sued Trump more than a hundred times. I can’t change that fact, nor would I. That was important work. That’s separate from anything that the D.A.’s office may be looking at now.”⁴² In Bragg’s view, he had one purpose: to prosecute President Trump.

On January 1, 2022, Bragg was sworn in as the New York County District Attorney.⁴³ Immediately upon taking office, Bragg issued a ten-page manifesto that promised radically soft-on-crime, anti-victim policies in New York County.⁴⁴ This so-called “Day One” memorandum, dated January 3, 2022, instructed his assistant district attorneys not to prosecute several crimes,

³⁵ Of his DANY colleagues, Pomerantz stated: “[I]t was frustrating to feel like we were about to march into battle, and were strapping on our guns and equipment, but when we looked around at the rest of the platoon we saw a lot of conscientious objectors.” *Id.* at 194.

³⁶ *Id.* at 191–92, 194.

³⁷ *Id.* at 160, 171–72.

³⁸ See, e.g., Maria Ramirez Uribe & Loreben Tuquero, *Here’s what Manhattan District Attorney Alvin Bragg said about Donald Trump during his DA campaign*, POLITIFACT (Apr. 12, 2023); Katelyn Caralle, *Meet the Dems competing to prosecute Trump: Manhattan DA candidate BRAGGED about suing Donald ‘more than 100 times’ – while his opponent interviewed to be federal judge but didn’t get it*, DAILY MAIL (June 2, 2021).

³⁹ Uribe & Tuquero, *supra* note 38.

⁴⁰ *Id.*

⁴¹ Emily Ngo, *Why the Manhattan DA Candidates Say They’re Ready to Take on the Trump Investigation*, SPECTRUM NEWS NY 1 (Mar. 23, 2023).

⁴² Jonah E. Bromwich, *et al.*, *2 Leading Manhattan D.A. Candidates Face the Trump Question*, N.Y. TIMES (June 2, 2021).

⁴³ Michael Gold & Jonah E. Bromwich, *Who Is Alvin Bragg, the D.A. Leading the Prosecution of Trump*, N.Y. TIMES (Apr. 13, 2023).

⁴⁴ Letter from Alvin L. Bragg, Manhattan Dist. Att’y, to Manhattan Dist. Att’y Staff (Jan. 3, 2022) [hereinafter “Day One Memo”].

including trespassing, resisting arrest, and engaging in prostitution.⁴⁵ Bragg would no longer prosecute armed robberies as felonies.⁴⁶ Rather, he directed that armed robberies be considered as misdemeanor larcenies unless someone was shot during the course of the robbery.⁴⁷ Moreover, Bragg announced that his office would not seek prison sentences for criminal defendants unless they were charged with homicides, domestic violence felonies, sex crimes, and public corruption.⁴⁸ Bragg directed his prosecutors not to request prison sentences in excess of 20 years, absent “exceptional circumstances.”⁴⁹ The public backlash that followed—including from local law enforcement—forced Bragg to walk back some of the policies in his Day One memo.⁵⁰

Meanwhile, despite campaigning heavily on his goal of prosecuting President Trump, Bragg realized that the case against President Trump was thin. On January 8, 2022, Pomerantz told Bragg that his case against President Trump “was ready to be charged.”⁵¹ On January 11, 2022, Pomerantz and Dunne presented former President Trump’s financial statements to Bragg and his team in support of their theory of prosecution.⁵² Bragg’s team, however, expressed “considerable angst” about using Cohen as a witness and sought to pivot away from Pomerantz’s proposed fraud charges.⁵³ On January 24, 2022, an investigative team meeting “quickly degenerated into a whirlwind of negativity” because other DANY officials rightly questioned the credibility of Pomerantz’s main witness, Michael Cohen.⁵⁴

Shortly thereafter, within the first few weeks of February 2022, Pomerantz and Dunne held several conversations with Bragg and his team to explain their multi-faceted investigation into President Trump.⁵⁵ Pomerantz argued that the case against President Trump based upon the Clifford payment facts—famously known as the “zombie” case—had multiple pitfalls, and notwithstanding possible “work-arounds,” none were appealing.⁵⁶ Further, his DANY colleagues were “dubious about whether Trump had been ‘extorted’ in the first place.”⁵⁷ Bragg therefore halted the investigation into President Trump despite “fac[ing] incredible political pressure from

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Nicole Gelinas, *Let’s Break Down Exactly What Manhattan DA Alvin Bragg’s Memo Says*, N.Y. POST (Jan. 11, 2022).

⁴⁸ Day One Memo.

⁴⁹ *Id.*

⁵⁰ Jonah E. Bromwich, *Manhattan D.A. Sharpens Crime Policies That Led to Weeks of Backlash*, N.Y. TIMES (Feb. 4, 2022).

⁵¹ POMERANTZ at 205-07.

⁵² *Id.* at 207-08.

⁵³ *Id.* at 208-209 (internal quotation marks omitted).

⁵⁴ *Id.* at 212 (“As I started to detain Cohen’s potential testimony against Trump, Susan Hoffinger brought her phone out to play a recording of one of Cohen’s recent media appearances, in which he had taken credit as the person who had first spoken about the false financial statements and had crowed about his importance as a witness in the case. This was exactly opposite to the point I was making at the meeting”); *Id.* at 213 (“Although the new team knew nothing about the underlying facts, and nothing about how the Weisselberg case had been put together, they had read the defense motion papers attributing critical importance to Cohen, dumping all over him, and claiming that he had tainted the prosecution.”).

⁵⁵ *Id.* at 221-26, 228.

⁵⁶ *Id.* at 61.

⁵⁷ *Id.*

his Democratic base to indict [President] Trump.”⁵⁸ As a result, Pomerantz and Dunne dramatically resigned in protest, with Pomerantz leaking his scathing resignation letter to the *New York Times*.⁵⁹ Amid the fierce backlash to the First Day Memo and the fallout from the investigation into President Trump, Bragg issued an “unusual” public statement about the DANY’s investigation into President Trump, “emphasizing that the investigation into Trump and his business was far from over.”⁶⁰

In December 2022, Bragg “beefed up [his] office” by hiring senior U.S. Department of Justice official Michael B. Colangelo to fill the void left by the abrupt departure of Pomerantz and Dunne.⁶¹ Bragg hired Colangelo to “jump-start” his office’s investigation of President Trump, reportedly due to Colangelo’s “history of taking on Donald J. Trump and his family business.”⁶²

Colangelo’s employment history demonstrated the obsession that he shared with Bragg and Pomerantz to investigate a person—Donald Trump—rather than prosecute a crime.⁶³ At the New York Attorney General’s Office, Colangelo—who, for some time, held the title of Chief Counsel for Federal Initiatives⁶⁴—ran investigations into President Trump,⁶⁵ leading “a wave of state litigation against Trump administration policies.”⁶⁶ On January 20, 2021, the first day of the Biden Administration, Colangelo began serving as the Acting Associate Attorney General—the number three official at the Justice Department.⁶⁷ Upon the confirmation of Associate Attorney General Vanita Gupta, Colangelo began serving as the Principal Deputy Associate Attorney General.⁶⁸ However, in December 2022, Colangelo seemingly stepped down from his senior Justice Department position to become a line prosecutor at a local prosecutor’s office and to lead its investigation of President Trump.

⁵⁸ Jeff Coltin, *Alvin Bragg’s about to become the most famous prosecutor in America (but no questions, please)*, POLITICO (Apr. 13, 2024); see also Jeff Coltin, *This reluctant prosecutor just made Donald Trump a felon*, POLITICO (June 1, 2024) (“Bragg was also criticized by many Democrats for not quickly bringing a criminal conspiracy case against Trump that assistants in the office had been building.”).

⁵⁹ Coltin, *supra* note 58. *Read the Full Text of Mark Pomerantz’s Resignation Letter*, N.Y. TIMES (Mar. 23, 2022).

⁶⁰ Berman, *supra* note 20.

⁶¹ Jacob Shamsian, *Manhattan DA’s office hires attorney with extensive experience investigating Trump, suing his administration*, BUSINESS INSIDER (Dec. 5, 2022); see Erica Orden, *Liberal Manhattan DA takes on Trump in perilous legal fight*, POLITICO (Dec. 5, 2022); Ben Protess *et al.*, *How the Manhattan DA’s investigation into President Donald Trump unraveled*, N.Y. TIMES (March 5, 2022).

⁶² Jonah E. Bromwich, *Manhattan D.A. hires ex-Justice official to help lead Trump inquiry*, N.Y. TIMES (Dec. 5, 2022); see also Emma Colton, *Trump prosecutor quit top DOJ post for lowly NY job in likely bid to ‘get’ former president, expert says*, FOX NEWS (Apr. 25, 2024) (noting that Mr. Colangelo also held high-level positions in the Obama-Biden Administration, including “deputy director of the . . . National Economic Council and as chief of staff at the Labor Department.”).

⁶³ Shamsian, *supra* note 61; Patricia Hurtado, *Ex-DOJ Lawyer With Trump Experience Joins Manhattan DA’s Team*, BLOOMBERG (Dec. 5, 2022).

⁶⁴ Staff Profile, U.S. Dep’t of Justice, Former Acting Associate Attorney General Matthew Colangelo (last updated Apr. 22, 2021) [hereinafter “Colangelo Staff Profile”].

⁶⁵ Shamsian, *supra* note 61; Hurtado, *supra* note 63.

⁶⁶ *Who’s who in the Manhattan DA’s Donald Trump indictment*, ASSOCIATED PRESS (Mar. 31, 2023).

⁶⁷ Colangelo Staff Profile, *supra* note 64.

⁶⁸ Bromwich, *supra* note 62.

Shortly after Colangelo joined the DANY, Bragg empaneled a grand jury to hear evidence in a “years-old probe” regarding the alleged 2016 payment to Clifford.⁶⁹ Then, on April 4, 2023, Bragg announced his indictment of President Trump on 34 counts of first-degree falsifying business records⁷⁰—violating the American Bar Association’s guidance that a “prosecutor should not file or maintain charges greater in number or degree than . . . are necessary to fairly reflect the gravity of the offense or deter similar conduct.”⁷¹ Even without the egregious overcharging, the indictment was an “unprecedented abuse of prosecutorial authority.”⁷² Falsifying business records is ordinarily a misdemeanor subject to a two-year statute of limitations,⁷³ which would have expired long ago. Bragg used a novel and untested legal theory to bootstrap the misdemeanor allegations as a felony by alleging that President Trump was involved in falsifying records to conceal a second crime.⁷⁴ The facts surrounding Bragg’s indictment of President Trump have “been known for years,”⁷⁵ and federal officials had previously declined to bring charges.⁷⁶

Although both the SDNY and the DANY previously declined to further investigate the alleged payments to Clifford,⁷⁷ Bragg opted to revive the DANY’s investigation at a politically opportune moment—shortly after President Trump announced his White House run.⁷⁸ The timing and basis for the DANY’s prosecution of President Trump was clearly motivated by political calculations.

On April 15, 2024, President Trump’s trial began in Manhattan, where Colangelo led the opening statements for the prosecution.⁷⁹ The prosecution ultimately called 20 witnesses.⁸⁰ On May 30, 2024, the Manhattan jury found President Trump guilty on all 34 charges of falsifying business records.⁸¹ President Trump’s sentencing is scheduled for September 18, 2024.⁸²

⁶⁹ *Reports: New grand jury in NY examining Trump hush money*, ASSOCIATED PRESS (Jan. 30, 2023).

⁷⁰ Bragg Press Release, *supra* note 1.

⁷¹ AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(d) (4th ed. 2017). *Cf. Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (conceding the “grave risk[] of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”).

⁷² See Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary *et al.* to Alvin L. Bragg, Dist. Att’y, N.Y. Cnty. (Mar. 20, 2023).

⁷³ *Id.*

⁷⁴ See *id.*; Ben Protess, *et al.*, *In Trump Case, Bragg Pursues a Common Charge With a Rarely Used Strategy*, N.Y. TIMES (May 7, 2023).

⁷⁵ Berman, *supra* note 20.

⁷⁶ Jed Handelsman Shugerman, *The Trump Indictment Is a Legal Embarrassment*, N.Y. TIMES (Apr. 5, 2023) (“Mr. Bragg’s predecessor, Cyrus Vance Jr., had almost a year to bring this case after Mr. Trump left office, but did not do so, and Attorney General Merrick Garland’s Justice Department also declined.”).

⁷⁷ POMERANTZ at 39, 61; see also Berman, *supra* note 20.

⁷⁸ POMERANTZ at 46; see also William K. Rashbaum, *et al.*, *Manhattan prosecutors begin presenting Trump case to grand jury*, N.Y. TIMES (Jan. 30, 2023).

⁷⁹ Graham Kates & Katrina Kaufman, *Trump trial gets underway in New York with jury selection in historic case*, CBS NEWS (Apr. 15, 2024); Ben Feuerherd, *Colangelo ends opening statement by preempting defense’s expected attack on Cohen’s credibility*, POLITICO (Apr. 22, 2024).

⁸⁰ Zach Schonfeld, *Here are the 22 witnesses who testified at Trump’s trial*, THE HILL (May 21, 2024).

⁸¹ *Read the Verdict Sheet in the Trump Manhattan Criminal Trial*, N.Y. TIMES (May 30, 2024).

⁸² Jake Offenhartz & Jennifer Peltz, *Judge delays Trump’s hush money sentencing until at least September after high court immunity ruling*, ASSOCIATED PRESS (July 2, 2024).

B. Bragg Relied on Convicted Perjurer Michael Cohen to Convict President Trump

Although Bragg stated in February 2022 “that he ‘could not see a world’ in which he would indict Trump and call Michael Cohen as a prosecution witness,”⁸³ Bragg’s “star witness” in his prosecution of President Trump was none other than Michael Cohen. Cohen, however, had a serious credibility problem, which is why prosecutors were reluctant to rely on him in the first place.

On February 28, 2019, Republicans on the House Committee on Oversight and Reform referred Cohen to the Justice Department for perjury and knowingly making false statements during his testimony before the Committee on February 27, 2019.⁸⁴ Urging the Justice Department to take appropriate action, Members cited six specific lies told by Cohen, including:

1. Cohen denied committing various fraudulent acts to which he had pleaded guilty in federal court.⁸⁵
2. Cohen repeatedly testified that he did not seek employment in President Trump’s White House, despite evidence from the U.S. Attorney’s Office for the Southern District of New York demonstrating that “Cohen privately told friends . . . that he expected to be given a prominent role and title in the new administration.”⁸⁶
3. Cohen stated that he did not direct the creation of a Twitter account known as @WomenForCohen, which is contradicted by statements from the owner of the IT firm that created the account for Cohen.⁸⁷
4. Cohen attested in his Truth in Testimony form that he did not have any reportable foreign government contracts, despite entering into two contracts in 2017 with entities owned in part by foreign governments.⁸⁸
5. Cohen’s testimony at the hearing contradicted various aspects of his written statement submitted in advance of the hearing.⁸⁹
6. Cohen asserted that he committed crimes out of “blind loyalty” to President Trump, which was contradicted by findings made by federal prosecutors and a federal court.⁹⁰

⁸³ POMERANTZ at 208-09.

⁸⁴ Letter from Rep. Jim Jordan & Rep. Mark Meadows to Hon. William Barr, Att’y Gen., U.S. Dep’t of Justice (Feb. 28, 2019); *Hearing with Michael Cohen, Former attorney for President Donald Trump: Hearing before the H. Comm. on Oversight & Reform*, 116th Cong. (2019).

⁸⁵ Letter from Rep. Jim Jordan & Rep. Mark Meadows to Hon. William Barr, Att’y Gen., U.S. Dep’t of Justice (Feb. 28, 2019).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

Cohen’s willful and intentional false statements of material fact were contradicted by the record established by the Justice Department in *United States v. Cohen*.⁹¹ On May 8, 2024, Chairman Jim Jordan and Oversight Committee Chairman James Comer renewed the referral to the Biden-Garland Justice Department.⁹² The Biden-Garland Justice Department has taken no action to indict Cohen for making false statements to Congress.

In 2023, Cohen admitted to lying to Congress during a separate proceeding before Congress in 2019. At a hearing in the politicized lawsuit brought by the New York Attorney General against President Trump, Cohen admitted to lying under oath during a 2019 deposition before the House Permanent Select Committee on Intelligence (HPSCI).⁹³ President Trump’s attorney asked Cohen if he lied during the deposition when testifying about whether he was directed to inflate certain financial numbers, to which Cohen responded, “Yes.”⁹⁴ This revelation in court prompted HPSCI to refer Cohen again to the Justice Department for perjury and knowingly making false statements to Congress.⁹⁵

During a May 15, 2024, hearing before the Select Subcommittee, Robert Costello, Cohen’s former attorney, testified about Cohen’s credibility. Costello testified that the SDNY previously “turned down” the exact case Bragg brought against President Trump because “they assessed that Michael Cohen . . . was totally unworthy of belief.”⁹⁶ Throughout Costello’s representation of Cohen, Costello would ask Cohen for “information that would implicate [President] Trump” to help “get [Cohen] out of his legal troubles”⁹⁷ Cohen told Costello many times that he did not have any incriminating evidence on President Trump.⁹⁸ Despite not having any evidence on President Trump, Cohen told Costello that he would “do whatever the F . . . [he] has to do” to not spend a day in jail.⁹⁹ Cohen had the ability “to implicate [President] Trump in exchange for eliminating his own enormous legal problems [but] he repeatedly said he had nothing truthful on [President] Trump.”¹⁰⁰ Costello further testified that, throughout his representation of Cohen, Cohen would “lie[] repeatedly both about consequential and inconsequential details. Whenever it suited his purposes, Michael Cohen showed no hesitation to lie.”¹⁰¹ Costello also testified at the Manhattan trial and provided similar information—including

⁹¹ 18-cr-602 (S.D.N.Y. Aug. 21, 2018); Letter from Rep. Jim Jordan & Rep. Mark Meadows to Hon. William Barr, Att’y Gen., U.S. Dep’t of Justice (Feb. 28, 2019).

⁹² Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight and Accountability, to Hon. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Justice (May, 8, 2024).

⁹³ Letter from Rep. Michael Turner, Chairman, H. Permanent Select Comm. on Intelligence, and Elise Stefanik, Member of Congress, to Hon. Merrick Garland, Att’y Gen., U.S. Dep’t of Justice (Nov. 14, 2023) (citing Transcript of Record at 2407:24-2410:22, *People of the State of New York v. Donald J. Trump et al.*, No. 452564/2022, Part 37 (N.Y. Sup. Ct. Oct. 25, 2023)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ May 15, 2024 Weaponization Hearing (written testimony of Robert Costello).

⁹⁷ *Id.* at 6.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.* 8-9.

that Cohen previously told him that “President Trump knew nothing about [the] payments” at the heart of Bragg’s case.¹⁰²

Despite Cohen’s lack of credibility, during President Trump’s trial, Bragg heavily relied on Cohen’s testimony and credibility.¹⁰³ Cohen was the prosecution’s last witness and he spent four days testifying with the purpose of shedding light on President Trump’s alleged crime.¹⁰⁴ Yet, the only discernible crime that Cohen shed light on was his own. In particular, Cohen admitted on the stand that he stole from the Trump Organization.¹⁰⁵ Cohen testified that he sought reimbursement from the Trump Organization for \$50,000 to pay a vendor but only gave the firm about \$20,000—pocketing about \$30,000 for himself.¹⁰⁶ When asked on cross-examination if he “stole [the money] from the Trump Organization,” Cohen responded, “Yes, sir.”¹⁰⁷ When asked why he stole \$30,000, Cohen testified that he was “angry” because his annual bonus had been reduced.¹⁰⁸ *Politico* reported that “[t]he total theft actually amounted to \$60,000, because all sums were doubled to cover taxes Cohen might owe.”¹⁰⁹ One legal analyst explained, “The fact that [Cohen] was never charged with larceny is important because . . . larceny in New York State[] is more serious of a crime than falsifying business records.”¹¹⁰ In other words, Bragg’s star witness committed a more serious offense than President Trump, yet Bragg not only let him off the hook but also relied on him to go after President Trump.

Even more troubling, Cohen’s advisor, Lanny Davis, boasted to *Politico* that Bragg’s prosecution of President Trump all stemmed from Cohen’s testimony to Congress in 2019—the same testimony for which he was referred for perjury.¹¹¹ Davis confessed to calling the DANY after “Michael was sent to prison” because “the evidence of financial fraud was on the record in the [congressional] hearings and that Vance’s office should interview Michael And that’s how it began.”¹¹² In short, to prosecute President Trump, Bragg revived this “zombie” case relying on a known—and convicted—liar and his testimony at a congressional hearing in which he lied at least six times.¹¹³

¹⁰² Erica Orden, *Costello testifies that Cohen told him ‘Trump knew nothing about’ the Daniels payment*, POLITICO (May 20, 2024).

¹⁰³ Erica Orden, *Michael Cohen is an admitted liar. He’s still going to be the star witness against Trump*, POLITICO (Apr. 14, 2024).

¹⁰⁴ Matthew Haag, *Michael Cohen’s Trump Testimony Was Intense. Here Are the Highlights*, N.Y. TIMES (May 21, 2024) (“Mr. Cohen, Donald J. Trump’s former personal lawyer and fixer, spent four days on the stand in Mr. Trump’s criminal trial.”).

¹⁰⁵ Josh Gerstein, *Cohen admits he stole from the Trump Organization*, POLITICO (May 20, 2024).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Madeline Halpert & Kayla Epstein, *Trump trial: Cohen says he stole thousands from company*, BBC (May 20, 2024).

¹⁰⁹ Gerstein, *supra* note 105.

¹¹⁰ Hanna Panreck, *Michael Cohen stealing from Trump org ‘more serious’ than alleged Trump crime: CNN legal analyst*, FOX NEWS (May 20, 2024).

¹¹¹ Politico Staff, *Porn Stars, felons, and spin doctors: Who will jurors believe in Trump’s case?*, POLITICO (Mar. 24, 2023).

¹¹² *Id.*

¹¹³ Jonathan Turley, *Get ready for Manhattan DA’s made-for-TV Trump prosecution: high on ratings, but short on the law*, THE HILL (Mar. 18, 2023); Letter from Rep. Jim Jordan & Rep. Mark Meadows to Hon. William Barr, Att’y Gen., U.S. Dep’t of Justice (Feb. 28, 2019); Letter from Rep. Michael Turner, Chairman, H. Permanent Select

II. BRAGG’S “RUSSIAN-NESTING-DOLL” THEORY OF CRIMINALITY AND JUDGE MERCHAN’S JURY INSTRUCTIONS VIOLATED PRESIDENT TRUMP’S DUE PROCESS RIGHTS

The Fourteenth Amendment’s Due Process Clause prohibits the deprivation of any individual’s life, liberty, or property without due process of law.¹¹⁴ Due process embodies the idea that “criminal prosecutions must comport with prevailing notions of fundamental fairness.”¹¹⁵ The U.S. Supreme Court has made clear that due process requires “notice of the specific charge” levied against the accused and a meaningful opportunity to be heard “on the issue raised by that charge.”¹¹⁶ Several legal scholars, including former federal prosecutor Andrew McCarthy, have explained how Bragg’s prosecution of President Trump violated his due process rights. As McCarthy wrote, this is because the indictment against President Trump took:

[A] single transaction—Trump’s reimbursement to Michael Cohen of the \$130,000 Cohen paid to [Stephanie Clifford] to stay mum about an alleged 2006 fling [pursuant to an agreed-upon non-disclosure agreement (NDA)]—and ludicrously slic[ed] it into 34 transactions, each of which [it] brands as felony falsification of business records.¹¹⁷

In the words of law professor Elizabeth Price Foley, the procedural and substantive defects of this theory of liability amount to an unlawful “Russian-nesting doll theory of criminality” that offends notions of due process.¹¹⁸

On June 13, 2024, Professor Foley testified before the Committee and explained that Bragg’s case against President Trump presented a textbook example of a “Russian-nesting-doll theory of criminality: The charged crime hinged on the intent to commit another, unspecified crime, which in turn hinged on the actual commission of *yet another* unspecified offense.”¹¹⁹ She explained:

[President Trump] was charged with first-degree falsification of business records, which hinged on the intent to commit another, unspecified crime. As elaborated below, it became clear what this other, predicate crime was (New York election law) only when, after all evidence had closed, the judge instructed the jury. That predicate crime, moreover, required *further proof* that Mr. Trump *actually committed* yet another offense—i.e., the “unlawful means” by which New York’s election law was violated. At trial, there was no proof

Comm. on Intelligence, and Elise Stefanik, Member of Congress, to Hon. Merrick Garland, Att’y Gen., U.S. Dep’t of Justice (Nov. 14, 2023).

¹¹⁴ U.S. CONST. art. XIV, § 1.

¹¹⁵ *California v. Trombetta*, 467 U.S. 479, 485 (1984).

¹¹⁶ *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)

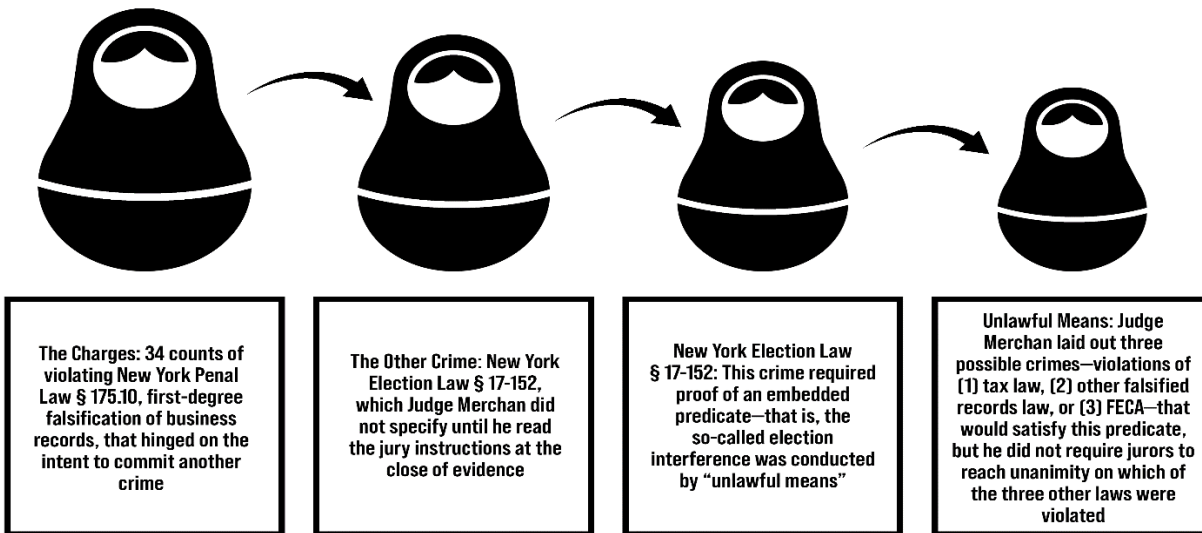
¹¹⁷ McCarthy, *supra* note 2.

¹¹⁸ Manhattan District Attorney Hearing (written testimony of Prof. Elizabeth P. Foley, FIU College of Law [hereinafter “Foley Written Testimony”]).

¹¹⁹ David B. Rivkin Jr. & Elizabeth Price Foley, *Trump’s Trial Violated Due Process*, WALL ST. J. OPINION (last updated June 4, 2024).

that this *second* predicate offense was actually committed, and indeed, it wasn't even clear what the second predicate was—like the first predicate—until the judge instructed the jury.¹²⁰

Professor Foley testified that “unpacking the nesting dolls reveals layers upon layers of due process defects inhering in these bizarre, unprecedented charges.”¹²¹



As a result, in the words of Professor Foley, “Mr. Trump’s New York trial violated [the] twin pillars of due process”: notice of the specific charges and the elements therein and a meaningful opportunity to be heard on those charges.¹²² Utilizing an actual nesting doll at the hearing to help demonstrate the due process problems, Professor Foley observed:

But I thought I would also bring another visual of the Russian nesting dolls to give you some sense of the complexity of the theory of criminality with which Mr. Trump was faced [with] in New York.

The first doll represents the actual charges in the indictment against Mr. Trump. There were 34 charges of felony falsification of business records under New York law. And to make it a felony falsification, you have to meet all of the elements of misdemeanor falsification which means you have to have a falsified business record with an intent to defraud and then to make it a felony, you have an additional that must be proven. That additional element is the intent to commit another crime. All right?

¹²⁰ Foley Written Testimony at 2.

¹²¹ *Id.* at 3.

¹²² Manhattan District Attorney Hearing at 23.

So the next nesting doll is what is that other crime that Mr. Trump intended to commit? Well, Mr. Trump wasn't sure and neither were his attorneys, so he asked the New York prosecutor for what is called a bill of particulars, saying hey, please tell me what that other crime you think it was that I intended to commit. The prosecutor interestingly responded and said you don't have a right to know. We don't have to tell you what that specific crime was and . . . in other words, without limiting our ability to change our minds during the trial, the other crimes that Mr. Trump may have intended to commit, may include one of four things: first, New York election law; second, New York tax law; third falsification of other business records, presumably other than the 34 with which he was actually charged; and finally, the Federal Election Campaign Act, FECA, right?

* * *

FECA, as you probably know, is the Federal Election Campaign Act, is a federal law that is over 100 pages long. And if you read it, you see that there is lots of different crimes embedded in that one mega statute. So Mr. Trump didn't know for sure what was that other crime that the prosecutor thought he intended to commit and in fact, the first time he learned what it was during the jury instruction when Judge Juan Merchan told the jury that that other crime was New York election law. Okay? That is far too late for due process purposes, for purposes of notice, right? That is after all of the evidence has closed.¹²³



¹²³ *Id.* at 23-26.

Professor Foley concluded that the layers, complexities, novelty, and lack of notice that President Trump had of the charges against him resulted in “a travesty of justice,” which was “clearly a violation of due process.”¹²⁴

The violation of President Trump’s due process rights did not end with the nesting-doll theory of criminality. It was compounded by the defective jury instructions that Judge Juan Merchan read to the jurors after the close of evidence. The instructions were comprised of 55-pages of confusing and seemingly unlawful charges.¹²⁵ Specifically, Judge Merchan told the jury that they had to agree unanimously on whether to convict President Trump on each of the 34 counts of falsifying business records with the intent to conceal damaging information before the 2016 election.¹²⁶ This required them, unanimously, to determine that President Trump used “unlawful means” to conceal this information.¹²⁷ However, Judge Merchan instructed the jurors that they “did not have to agree on a singular unlawful act” to convict.¹²⁸ He instructed the jurors “that they would have to find only that Mr. Trump committed bookkeeping infractions to conceal [1] a campaign finance violation, [2] tax law infraction or [3] falsification of business records,” but they “didn’t have to agree on the underlying crime to find the former president guilty.”¹²⁹

One New York criminal law expert reasoned that, by offering “three different theories as to how the false records could have violated state election law, limit[ing] instruction on what some of those theories required, and the fact that jurors were not required to agree on which had been proven,” Judge Merchan created “a real issue for the appeal.”¹³⁰ As a matter of law, legal scholar Andrew McCarthy explained, Judge Merchan should have instructed the jurors “that they had to find at least one of these objective crimes and they had to be unanimous on that finding in order to convict Trump.”¹³¹

Professor Foley underscored the constitutional defect that emanated from Judge Merchan’s jury charge, calling it “a cafeteria style of approach where non-unanimity was allowed on the underlying means by which the New York election [law] was violated. I think those are clear due process violations.”¹³² Professor Foley elaborated:

It was not until all evidence was closed that the New York trial judge, Judge Juan Merchan, finally revealed, in his jury instructions, that the other crime Trump intended to commit was Section 17-152 of New York election law. Moreover, he instructed the jury: “Although you must conclude unanimously that the defendant conspired to

¹²⁴ *Id.* at 27.

¹²⁵ See Aysha Bagchi, *Read the jury instructions in Donald Trump’s New York criminal hush money trial*, USA TODAY (May 20, 2024).

¹²⁶ Erica Orden & Ben Feuerhead, *Looming over Trump’s conviction: Reversal by the ‘13th juror,’* POLITICO (June 2, 2024).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Alex Swoyer, *Here are Trump’s top three arguments for appeal after guilty verdict in hush money trial*, WASH. EXAM. (May 30, 2024).

¹³⁰ Orden & Feuerhead, *supra* note 126 (internal quotation marks omitted).

¹³¹ Andrew C. McCarthy, *The ‘Other Crime’ in the Trump Trial: Conflating Ends and Means*, NAT’L REV. (June 3, 2024).

¹³² Manhattan District Attorney Hearing at 71.

promote or prevent the election of any person to a public office by unlawful means, you need not be unanimous as to what those unlawful means were.” Judge Merchan then hand-selected three laws that he told the jury “you may consider” as the “unlawful means” by which state election law was violated. . . . These instructions violated due process in several critical ways.

* * *

However one slices it, therefore, unanimity was required to determine the basis upon which the predicate crime Mr. Trump allegedly intended to commit—New York’s election law—was based. New York election law was the “other crime” that elevated Mr. Trump’s falsification of business records to a felony offense. . . . Judge Merchan’s instruction that the jury “need not be unanimous as to what those unlawful means were” was therefore unconstitutional¹³³

Simply put, Professor Foley explained, “due process demands that felony verdicts be unanimous.”¹³⁴

Indeed, Representative Kelly Armstrong, who spent many years as a criminal defense attorney, homed in on this exact point with Professor Foley during the hearing. In an exchange with Representative Armstrong, Professor Foley articulated the fundamental flaw in the trial: the prosecutor, the defendant, and the judge ultimately “don’t know how the jury got to where they got at the end.”¹³⁵ She testified:

Q. I’ve actually read all the jury[] [instructions]. The unlawful means is where we get this grab bag, right, Ms. Foley?

A. Yes, that’s where we get three possibilities instructed by the
—

Q. And basically pick. But I went through the jury instructions and here’s my question. What elements of any of those predicate claims are unlawful? I mean, conspiracy in and of itself is – so if you charge a second offense driving under the influence usually the sentence for a second offense is different than a first offense. In order to get to the second offense you have to prove the first offense beyond a reasonable doubt.

A. Right.

¹³³ Foley Written Testimony at 3-5.

¹³⁴ *Id.* at 4 (internal citation omitted).

¹³⁵ Manhattan District Attorney Hearing at 154.

Q. Now, in those types of cases it's a certified record of a court judgment. You just put it in the record. . . . So when we're talking about these unlawful offenses and these three pictured things and dealing with the New York misdemeanor statute that when you combine with the other misdemeanor statute you end up getting to this felony and passed it to your statute of limitations. But was the jury required to prove any of those underlying elements beyond a reasonable doubt to any of those crimes? Because I'm talking about the Fifth Amendment and the due process part of that.

A. No, and in fact, you know, based on the instructions we don't even know which of those possible three areas of law the jury decided –

Q. Yeah, I've read it.

A. — because they didn't have to be unanimous. But it's really more than three laws too, by the way, because the tax laws that he instructed the jury on could include local, state, and federal tax laws. And by the way, the mention of local or federal tax laws had never been made at all before at most, right. The prosecution had mentioned the possibility of state tax laws as being the first predicate, not second.

Q. Yeah. And I'm actually into the third layer of this because unlawful means – I mean, I'm just thinking of – I've never defended a case in New York. I just never practiced in New York. But I have defended cases in state court and I've defended cases in federal court and I'm thinking about arguing against a case when you – I mean, I made my living on if there were seven elements of a crime. Winning one of them – like, I don't need to win all seven. I got to get proof beyond a reasonable doubt on one of the seven elements and they're not laid out anywhere in this whole process, are they?

A. No. I mean, that's the problem. You don't know how the jury got to where they got at the end. In fact, you didn't even know how they could get there until they were instructed, and then once they were instructed because they could, you know, kind of pick and choose which of the unlawful means they wanted to base the New York election law violation on you have absolutely no idea why President Trump was guilty of a felony based upon theories of two different

misdemeanors.¹³⁶

Judge Merchan's jury instructions unconstitutionally permitted the jury to find President Trump guilty even if they disagreed on what the "unlawful means" were.

The record could not be clearer: Bragg's trial of President Trump violated basic principles of due process. Given these fundamental constitutional violations, experts have concluded that ample grounds support President Trump's success on appeal.

¹³⁶ *Id.* at 152-54.

III. BRAGG USURPED THE AUTHORITY OF THE FEDERAL GOVERNMENT BY PURSUING CHARGES RELATED TO ALLEGED VIOLATIONS OF FEDERAL CAMPAIGN FINANCE LAWS

When Congress established the Federal Election Campaign Act (FECA) of 1971, it granted the Federal Election Commission (FEC) and the Justice Department the “exclusive jurisdiction over the enforcement of federal campaign finance laws.”¹³⁷ FEC Commissioner Trey Trainor explained that this exclusivity “ensures a uniform and consistent application of campaign finance laws across the United States, preventing a patchwork of enforcement that could vary from state to state and district to district.”¹³⁸ By prosecuting President Trump on a theory that he violated federal campaign finance laws, Commissioner Trainor concluded that Bragg “usurped the jurisdiction that Congress has explicitly reserved for the federal authorities” and “undermine[d] the statutory framework established by FECA.”¹³⁹

During his testimony on June 13, 2024, Commissioner Trainor explained that Bragg’s usurpation of federal prerogative should have compelled “Attorney General Garland and the DOJ” to “intervene in the prosecution of Donald Trump.”¹⁴⁰ Indeed, the Justice Department had previously intervened in the FEC’s investigation into the \$130,000 payment to Clifford and requested the agency stand down—which it did.¹⁴¹ Despite the Justice Department’s failure to intervene to halt Bragg’s usurpation of federal authority, Commissioner Trainor noted how the Biden-Garland Justice Department “had no issues with intervening in eight pending investigations being conducted by the FEC into the supposed \$130,000 payment that was alleged to be misreported on a campaign finance report.”¹⁴² Commissioner Trainor testified:

Those eight matters involved Michael Cohen, Donald J. Trump, Donald J. Trump for President and its treasurer, Trump Organization, LLC, Timothy Jost, and Essential Consultants, LLC. The public now knows that on July 31, 2018, the FEC, at the request of DOJ, voted to provide certain documents from the matters to DOJ and hold those matters in abeyance. Then, on June 5, 2019, the Commission voted, again at the behest of DOJ, to continue holding those matters in abeyance. Finally, on July 15, 2019, the United States Attorney’s Office for the Southern District of New York informed the United States District Court for the Southern District of New York that it had “effectively concluded its investigations” of the campaign finance violations to which Michael Cohen pled guilty, and, concurrently, that it no longer sought to maintain under seal the grand jury materials related to that investigation.

¹³⁷ Trainor Written Testimony at 1.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2.

¹⁴¹ Manhattan District Attorney Hearing at 60-61.

¹⁴² Trainor Written Testimony at 2.

DOJ inserted itself so fully into an ongoing FEC investigations that, once the abeyance request was lifted, the Commission faced a statute of limitations bar on prosecuting the matters. Clearly, the DOJ knows a great deal about the federal campaign finance issues that Alvin Bragg has prosecuted. DOJ counsel knew the extent to which they themselves had exercised federal jurisdiction, investigated, and found no illegal activity by anyone other than Michael Cohen. However, they have sat idly by and allowed a state officer to assert federal jurisdiction where they themselves had taken jurisdiction and couldn't prosecute.¹⁴³

During the hearing, Chairman Jordan asked Commissioner Trainor to elaborate on the Justice Department's decision to allow a rogue state prosecutor to claim jurisdiction over the matter despite the fact that the federal government had primary jurisdiction over it. Commissioner Trainor testified:

Q. Commissioner Trainor, I want to read from your testimony. "They have sat idly by and allowed the state officers to assert federal jurisdiction where they themselves had taken jurisdiction and couldn't prosecute." I want you to unpack that sentence for us again real quick.

A. . . . [A]ll of these claims with regard to the \$130,000 for Ms. [Clifford] stem from a complaint that was filed at the Federal Election Commission following the 2016 election.

Q. Which you guys were investigating?

A. We were in the process of investigating that.

Q. And the DOJ came to you and said stand down; we are taking over, and give us your information?

A. They asked us to abate that and several other matters.

Q. They, meaning the Southern District of New York?

A. That is correct.

Q. And they took your information and you guys . . . voted to stand down and give it to the federal authority, right?

A. That is correct, Mr. Chairman.

Q. And they determined that there was nothing there to

¹⁴³ *Id.*

prosecute other than Michael Cohen—

- A. That is correct. They took a . . . very long time in doing it and when they sent it back to us, we had no more authority to investigate because they sent it back to us and we were barred by the statute of limitations from even investigating the normal civil things that we would look at with regard to those type of expenditures.
- Q. But your point here is they have sat idly by and allowed a state officer to assert federal jurisdiction where they themselves had intervened, to use the word, and taken jurisdiction from you and concluded there was nothing there regarding a federal statute, right? . . .
- A. That is correct, Mr. Chairman. And I don't know what role Mr. Colangelo played in that investigation that took place when they took it away from the Federal Election Commission. [He] [d]id that investigation and then he later left the office to go prosecute this at the state level.¹⁴⁴

Commissioner Trainor further explained that, because “the Department of Justice did not zealously represent the United States in this particular case to go in and defend the jurisdiction that this Congress has given through FECA to the Federal Election Commission and to the Justice Department,” it “abrogated [its exclusive jurisdiction] to a local official to prosecute.”¹⁴⁵ In essence, the Justice Department’s inaction in this case, Commissioner Trainor explained, could create “50 different standards of what violat[es] federal election law.”¹⁴⁶ Such a disparity in the law would upend the uniform application of federal law and the principle of equal protection.¹⁴⁷ Commissioner Trainor testified:

The implications of such jurisdictional overreach and disregard for the principles of federalism at issue are profound. If local district attorneys are permitted to initiate prosecutions based on their interpretations of federal campaign finance laws, we risk eroding the uniformity and predictability that FECA aims to provide. This could lead to a fragmented enforcement landscape where political motivations and local biases influence the application of laws meant to govern national elections and provide public transparency into the financing of campaigns.

* * *

¹⁴⁴ Manhattan District Attorney Hearing at 60-62.

¹⁴⁵ *Id.* at 115.

¹⁴⁶ *Id.* at 115-16.

¹⁴⁷ *Id.*

This encroachment on federal jurisdiction should raise serious concern that qualified candidates will be deterred from seeking public office, fearing that their political activities, past and present, might be subjected to disparate legal standards depending on the locality. It is essential to preserve the centralized enforcement mechanism that FECA envisions to ensure fair and impartial oversight of federal campaign finance regulations.¹⁴⁸

Ultimately, Bragg’s prosecution of President Trump “under the guise of federal campaign finance violations represent[ed] a clear usurpation of federal jurisdiction,” an attack on equal protection of the law and the integrity of our electoral system, and set a “dangerous precedent of local prosecutorial overreach in matters of federal concern.”¹⁴⁹ The Biden-Garland Justice Department’s silence—in failing to stand up for federal interests in Bragg’s politically motivated prosecution of President Trump—speaks volumes.

¹⁴⁸ Trainor Written Testimony at 3.

¹⁴⁹ *Id.*

IV. JUDGE MERCHAN’S RULINGS DURING THE TRIAL VIOLATED PRESIDENT TRUMP’S CONSTITUTIONAL RIGHTS INSIDE AND OUTSIDE OF THE COURTROOM

In 2005, during his confirmation hearing, then-Judge John Roberts famously explained the proper role of judges. He stated:

Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.¹⁵⁰

By his actions and rulings, Judge Juan Merchan was no umpire, calling balls and strikes. Rather, at the trial of President Trump, he was a key player—pitching, catching, and batting—while draped in the judge’s robe. The legal errors in this case appear to go in only one direction: against President Trump. Stated differently, as former prosecutor Andrew McCarthy pointed out, Judge Merchan put “his thumb on the scale to get Trump convicted.”¹⁵¹

A. Judge Juan Merchan’s Political Bias Prejudiced President Trump

As a threshold matter, Judge Merchan and his family have close ties to the Democrat Party. Not only did his daughter, Lauren Merchan, work on Vice President Kamala Harris’s 2020 presidential campaign, she is currently the president of Authentic Campaigns, a “Chicago-based progressive political consulting firm” that works with Democrat Party candidates, including President Biden and Vice President Harris.¹⁵² According to Judge Merchan, prior to the trial he obtained an opinion from New York’s Advisory Committee on Judicial Ethics regarding his daughter’s employment. The Advisory Committee reportedly stated: “We see nothing in the inquiry to suggest that the outcome of the case could have any effect on the judge’s relative, the relative’s business or any of their interests.”¹⁵³

However, two of Authentic Campaigns’ top clients—Representative Adam Schiff and the Democrat-aligned Senate Majority PAC—have raised “at least \$93 million in campaign donations” while using President Trump’s New York indictments in their solicitation emails.¹⁵⁴ Notably, Rep. Schiff’s campaign for U.S. Senate has received “\$20 million in aid since he began soliciting donations off” Bragg’s indictment of President Trump last April.¹⁵⁵ The Senate

¹⁵⁰ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee, U.S. Supreme Court).

¹⁵¹ Andrew C. McCarthy, *How Judge Merchan’s Jury Instruction Undermines Trumps’s Defense*, NAT’L REV. (May 30, 2024).

¹⁵² Jon Levine & Rich Calder, *Dem clients of daughter of NY judge in Trump hush-money trial raised \$93M off the case*, N.Y. POST (Mar. 30, 2024); Priscilla DeGregory, *NY judge denies Trump’s bid for recusal in ‘hush money’ case, says he’s ‘certain’ he can be impartial*, N.Y. POST (Aug. 14, 2023).

¹⁵³ Erica Orden, *Judge overseeing Trump’s hush money case won’t recuse himself*, POLITICO (Aug. 14, 2023).

¹⁵⁴ Levine & Calder, *supra* note 152.

¹⁵⁵ *Id.*

Majority PAC has “pocketed \$73.6 million since it also began firing off fundraising emails following the ex-president’s indictment.”¹⁵⁶

In 2020, Judge Merchan made donations to Democrat causes—including to President Biden’s campaign and a group called “Stop Republicans.”¹⁵⁷ According to Judge Merchan, the Advisory Committee found that his donations were “modest political contributions made more than two years ago [that] cannot reasonably create an impression of bias.”¹⁵⁸

Despite these conflicts, Judge Merchan denied President Trump’s recusal request in August 2023.¹⁵⁹ Judge Merchan’s bias was so obvious that one former federal prosecutor, a progressive legal analyst who is not a fan of President Trump, disagreed forcefully with Judge Merchan’s decision not to recuse, stating that he “absolutely should have recused himself” because “judges are not supposed to give any amount” to partisan political organizations.¹⁶⁰ By way of contrast, the former prosecutor observed, “[W]hat if the judge had donated a tiny amount, \$35, to Trump 2020 Would people be fine with that? I think people would be going nuts about that [T]here’s 40-something other judges in that courthouse who never donated, and it would have been safer [to have one of them oversee the trial.]”¹⁶¹

These conflicts of interest did not go unnoticed by one member of the New York congressional delegation, Representative Elise Stefanik. On May 28, 2024, Representative Stefanik filed a complaint with the New York State Commission on Judicial Conduct, requesting an investigation into the circumstances surrounding Judge Merchan’s “repeated assignment” to criminal cases related to President Trump.¹⁶² In her complaint, Representative Stefanik informed the Commission that Judge Merchan, “in violation of New York State Code of Judicial Conduct 100.5(h), donated to President Biden’s 2020 campaign, along with the Progressive Turnout Project and its ‘Stop Republicans’ subsidiary.”¹⁶³ She also highlighted for the Commission that Judge Merchan’s conflict extended to his Democrat-aligned political consultant daughter “whose firm stands to profit greatly if Donald Trump is convicted.”¹⁶⁴

¹⁵⁶ *Id.*

¹⁵⁷ William Rashbaum, *et al.*, *Ethics Panel Cautions Judge in Trump Trial Over Political Donations*, N.Y. TIMES (May 17, 2024); DeGregory, *supra* note 152. *See also* Victor Nava, *Judge Juan Merchan, who is overseeing Trump case, donated to Biden campaign in 2020*, N.Y. POST (Apr. 7, 2023).

¹⁵⁸ Michael R. Sisak, *Judge in Donald Trump’s hush-money case denies bias claim, won’t step aside*, ASSOCIATED PRESS (Aug. 14, 2023).

¹⁵⁹ DeGregory, *supra* note 152.

¹⁶⁰ Kaitlin Lewis, *Judge Merchan Should Have Recused Himself Over Biden Donation: Analyst*, NEWSWEEK (June 10, 2024) (quoting senior CNN legal analyst Elie Honig).

¹⁶¹ *Id.* (internal quotations marks omitted).

¹⁶² Letter from Rep. Elise Stefanik to N.Y. State Commission on Judicial Conduct & Kay-Ann Porter Campbell, Inspector Gen., N.Y. State Unified Court System (May 28, 2024) [hereinafter “Stefanik May 28, 2024 Letter”]. *See also* Letter from Rep. Elise Stefanik to N.Y. State Commission on Judicial (May 21, 2024) (focusing on conflict issue with Judge Merchan’s daughter’s partisan Democrat work).

¹⁶³ Stefanik May 28, 2024 Letter, *supra* note 162.

¹⁶⁴ *Id.*

B. Judge Merchan Unconstitutionally Silenced President Trump

Immediately before trial, Judge Merchan granted Bragg’s request for an unconstitutional gag order on President Trump, thereby prohibiting the presumptive 2024 Republican nominee for president from defending himself to the American people. On February 22, 2024, Bragg’s office filed a motion seeking to restrict President Trump’s “extrajudicial statements . . . for the duration of the trial” following several public comments made by President Trump regarding his pending trial in New York.¹⁶⁵ President Trump argued that as the “presumptive Republican nominee and leading candidate in the 2024 election” he must be able to “criticize these public figures” and respond to their attacks.¹⁶⁶

On March 26, 2024, Judge Merchan prohibited President Trump from making any public statements regarding “witnesses, prosecutors, jurors and court staff.”¹⁶⁷ The gag order did not restrict President Trump’s comments about Bragg or Judge Merchan.¹⁶⁸ On April 1, 2024, Judge Merchan extended the gag order to prohibit comments made by President Trump about the district attorney’s or the judge’s family members.¹⁶⁹

President Trump’s attorneys argued that the amended gag order was unconstitutional because it prohibited him from engaging in political speech, which is a core component of the First Amendment.¹⁷⁰ His campaign spokesman stated, “The voters of America have a fundamental right to hear the uncensored voice of the leading candidate for the highest office in the land.”¹⁷¹ One legal scholar, Professor Jonathan Turley, stated Judge Merchan’s gag orders “raise very serious free speech questions” as the orders prohibited President Trump from criticizing “central figures in this political campaign” such as star witness Michael Cohen, witness Stephanie Clifford, or key prosecutor Matthew Colangelo.¹⁷² During the trial, Judge Merchan fined President Trump \$10,000 for posts on his Truth Social platform and campaign website, ordered President Trump to delete the posts, and threatened him with jail for allegedly violating the gag order.¹⁷³

During the Committee’s June 13 hearing, Missouri Attorney General Andrew Bailey explained the unconstitutional nature of the Bragg-Merchan gag order. He testified:

[T]he prosecutor sought an unconstitutional gag order in this case. There’s a strong presumption against gag orders as violative of individual’s First Amendment rights of free speech. Bear in mind,

¹⁶⁵ Decision and Order, *People v. Donald J. Trump*, No. 71543-34 at 1 (N.Y. Co. Mar. 26, 2024).

¹⁶⁶ *Id.* at 2.

¹⁶⁷ Jesse McKinley, *et al.*, *Gag Order Against Trump Is Expanded to Bar Attacks on Judge’s Family*, N.Y. TIMES (Apr. 1, 2024).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Prof. Jonathan Turley, *The Gag and the Goad: Trump Should Appeal Latest Gag Order*, RES IPSA LOQUITUR (Mar. 27, 2024).

¹⁷³ Graham Kates & Katrina Kaufman, *Trump held in contempt for violating gag order in “hush money” trial. Here’s how much he owes.*, CBS NEWS (Apr. 30, 2024). *See also* Jeremy Herb, *et al.*, *Judge finds Donald Trump in contempt for 10th time over gag order and threatens jail time*, CNN (May 6, 2024).

the right to free speech protects not only the speaker, but Americans right to hear from a presidential candidate.¹⁷⁴

Indeed, Judge Merchan’s gag order is not only a constitutional defect but an active lawfare measure according to Robert Costello, a former federal prosecutor and veteran New York criminal defense lawyer. During the Select Subcommittee’s May 15 hearing, Costello testified in an exchange with Representative Stefanik:

Q. And the unconstitutional gag order on President Trump from New York Judge Merchan is unprecedented lawfare?

A. As far as I know, absolutely.¹⁷⁵

Likewise, former federal prosecutor and veteran criminal defense lawyer James Trusty testified at the same hearing as to the unprecedented nature of the gag order issued in President Trump’s case.¹⁷⁶ In an exchange with Representative Harriet Hageman, Trusty stated:

Q. Mr. Trusty, I think that you testified that in all your years of experience, you’ve never seen a circumstance where a defendant had a gag order imposed against them. Is that correct?

A. That’s correct.¹⁷⁷

C. Judge Merchan Permitted DA Bragg to Prejudice President Trump at Trial by Permitting Inadmissible Testimony

During the trial, Judge Merchan allowed Bragg “to spread before the jury in his Manhattan courtroom evidence that is blatantly inadmissible against” President Trump.¹⁷⁸ Generally, evidence is inadmissible if “its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties.”¹⁷⁹

In particular, as legal scholar Andrew McCarthy subsequently wrote, Bragg intended “to use Cohen’s guilty plea to establish that Trump was complicit in crimes because of the . . . payments [to Stephanie Clifford and Karen McDougal].”¹⁸⁰ Judge Merchan held that neither Cohen’s guilty plea nor prosecution witness David Pecker’s non-prosecution agreement were admissible because “evidence of another party’s guilty plea is not admissible to prove the

¹⁷⁴ Manhattan District Attorney Hearing at 114.

¹⁷⁵ May 15, 2024 Weaponization Hearing at 53-54.

¹⁷⁶ *Id.* at 108-09.

¹⁷⁷ *Id.* at 109.

¹⁷⁸ Andrew C. McCarthy, *Undercover Prosecutor Merchan Helps Bragg Lawlessly Stress Cohen’s Guilty Plea*, NAT’L REV. (May 25, 2024).

¹⁷⁹ *People v. Davis*, 43 N.Y.2d 17 (1977).

¹⁸⁰ Andrew C. McCarthy, *How Judge Merchan Is Orchestrating Trump’s Conviction*, NAT’L REV. (Apr. 29, 2024).

defendant's guilt."¹⁸¹ Nevertheless, Judge Merchan "simultaneously ruled that prosecutors could elicit testimony about Cohen's guilty pleas on the rationale that they are relevant to his credibility as a witness," which he permitted over President Trump's objection.¹⁸²

As a result, McCarthy explained, the jury heard testimony about criminal conduct that would have been inadmissible at trial otherwise. He further elaborated:

Michael Cohen's guilty pleas to two Federal Election Campaign Act (FECA) crimes, which he claimed were established by payments to [Stephanie Clifford] and Karen McDougal for non-disclosure agreements (NDAs); and David Pecker's non-prosecution agreement with the Justice Department, which he executed out of fear that he'd be indicted over the McDougal NDA (he wasn't, although his former company, AMI, agreed to pay the Federal Election Commission a fine—a disposition that allowed AMI to get out from under the federal government's investigation so it could sell the *National Enquirer*.)¹⁸³

Although inadmissible, this was the "evidence" that President Trump violated campaign laws—if Cohen pleaded guilty to violating FECA, and Pecker was concerned that he might be charged with violating FECA, then a juror could infer that President Trump must have violated FECA when he allegedly paid off Clifford and McDougal.¹⁸⁴ Professor Foley expounded on this point during the Committee's hearing, testifying in an exchange with Representative Scott Fitzgerald:

- Q. So Judge Merchan also ruled that Michael Cohen's guilty plea for violating FECA was inadmissible at trial. Why do you think he made that ruling? I think we know, but.
- A. Well, because you can't basically taint one individual by the guilty conduct of another.
- Q. Judge Merchan also ruled that DA Bragg could elicit testimony from Mr. Cohen about his guilty plea to impeach his credibility as a witness. DA Bragg then repeatedly made reference at trial in his [office's] closing arguments to the jury about Cohen's FECA guilty plea. Did repeatedly subjecting the jury to this testimony essentially get around the judge's own ruling that Cohen's FECA guilty plea was inadmissible as substantive evidence?

¹⁸¹ *United States v. Werne*, 939 F.2d 108, 113 (3rd Cir. 1991). See also *People v. Blades*, 93 N.Y.2d 166, 175-76 (1999) (cautioning that "rubrics must not be extended and applied as a blueprint for generalized admission of guilty plea colloquies into evidence, in lieu of live, confronted, cross-examinable trial testimony").

¹⁸² McCarthy, *supra* note 180.

¹⁸³ Andrew C. McCarthy, *How Merchan Enabled Prosecutors' Effort to Convict Trump Based on Improper Evidence*, NAT'L REV. (May 26, 2024).

¹⁸⁴ *Id.*

- A. Yeah, I mean, that should have been reined in. That was clearly trying to . . . taint one person through association with another who was guilty. They also did the same thing I believe with the CFO of Trump Organization and made similar comments because he also entered a guilty plea.¹⁸⁵

Judge Merchan also allowed Clifford to testify gratuitously and extensively about prejudicial matters that had no bearing on the allegations in the indictment. Judge Merchan unfairly prejudiced the jury against President Trump by permitting Clifford to testify about an alleged past encounter she claimed to have had with him—an encounter that had no relevance to the falsified business record-keeping charges at issue in the trial.¹⁸⁶ Indeed, several legal experts expressed “shock[] that the trial judge allowed such potentially damaging testimony into a low-level felony case focused on whether records were manipulated.”¹⁸⁷ This showing of unfair prejudice could be sufficient for the appeals court to vacate the guilty verdict and order a new trial.¹⁸⁸

Cohen’s and Clifford’s testimony unduly prejudiced President Trump and should not have been admitted. Despite this, Judge Merchan permitted both Cohen and Clifford to testify at length. And, as it relates to Clifford, her testimony was, at most, only tangentially related to the issues in dispute.

D. Judge Merchan Deprived President Trump of a Constitutionally Fair Trial by Refusing to Allow Former FEC Commissioner Bradley Smith to Testify as an Expert Witness on President Trump’s Behalf

While Judge Merchan permitted Bragg to elicit testimony from Cohen and Pecker about how they had violated federal election law, Judge Merchan denied President Trump’s request to have former FEC Chairman Bradley Smith testify that none of President Trump’s alleged involvement in these payments violated FECA.¹⁸⁹ This ruling had the effect of precluding President Trump from presenting “key exculpatory evidence” to the jury.¹⁹⁰ According to Professor Foley, this amounted to a due process violation.¹⁹¹ In an exchange with Representative Fitzgerald, she testified:

- Q. Ms. Foley, you argued in a recent *Wall Street Journal* op-ed that Judge Merchan likely denied President Trump a

¹⁸⁵ Manhattan District Attorney Hearing at 123-24.

¹⁸⁶ Swoyer, *supra* note 129.

¹⁸⁷ Shayna Jacobs, *Why Stormy Daniels’s testimony could fuel an appeal, and whether it matters*, WASH. POST (May 13, 2024).

¹⁸⁸ *People v. Weinstein*, No. 24, 2024 WL 1773181, at *1 (Apr. 25, 2024) (reversing guilty verdict and ordering new trial where the defendant “was judged, not on the conduct for which he was indicted, but on irrelevant, prejudicial, and untested allegations of prior bad acts”).

¹⁸⁹ *Id.*

¹⁹⁰ Kenin M. Spivak, *Prosecutor Alvin Bragg and Judge Juan Merchan have reached the pinnacle of selective prosecution and evisceration of due process*, AM. MIND (June 3, 2024).

¹⁹¹ Manhattan District Attorney Hearing at 122-23.

meaningful opportunity to be heard by denying the testimony of former FEC Chairman Brad Smith. Can you please elaborate a little bit on that?

A. Yeah, I mean there has been a lot . . . of misreporting on what happened here. Yes, Judge Merchan . . . did allow Brad Smith to testify. But the catch was he could not opine at all, either provide his opinion or any personal opinion or legal opinion, regarding whether or not President Trump’s actions had violated FECA, which . . . basically then he was useless. Which is why President Trump didn’t call him as a witness. So the whole point was President Trump wanted an expert witness to put before the jury to show the jury that what he had done did not in fact violate federal election law. And he was denied that opportunity, and that seems like a rather basic thing that he would have the opportunity to be heard on.

Q. Do you think there was a chance that he could have had success upon appeal?

* * *

A. Yeah, sure, absolutely [T]he due process issue is a question of law. It gets de novo review, the appellate courts get to look at it fresh with fresh eyes, no deference whatsoever. And more importantly, due process issues are issues that the Supreme Court can ultimately grant cert in here.¹⁹²

Despite Judge Merchan’s decision to allow highly prejudicial testimony that should not have been admitted, Judge Merchan refused to allow former FEC Chairman Smith to testify about relevant issues to the defense. This denied President Trump an opportunity to be heard on an issue at the heart of this case—his alleged violation of federal election law.

Indeed, former FEC Chairman Smith subsequently commented on Judge Merchan’s erroneous ruling on X, observing that “Judge Merchan has so restricted my testimony that [the] defense has decided not to call me.”¹⁹³ Smith’s testimony was intended to assist the jury in navigating the intricacies of FECA, which, as Smith noted, is so complex that “even Antonin Scalia—a pretty smart guy, even if you hate him—once said ‘this campaign finance law is so intricate that I can’t figure it out.’”¹⁹⁴ Smith analogized the FECA discussion at President Trump’s trial to a jury trial “in a product liability case” and expecting jurors “to figure out if a complex machine was negligently designed, based only on a boilerplate recitation of the general

¹⁹² *Id.*

¹⁹³ Brad Smith (@CommishSmith), X (May 20, 2024, 5:45PM).

¹⁹⁴ *Id.* (cleaned up).

definition of ‘negligence.’ They’d be lost without knowing technology & industry norms.”¹⁹⁵ Worse, Smith explained the deleterious practical effect of Judge Merchan’s ruling limiting his putative testimony: “While [the] judge wouldn’t let me testify on [the] meaning of [the] law, he allowed Michael Cohen to go on at length about whether and how this activity violated FECA. So effectively, the jury got its instructions on FECA from Michael Cohen!”¹⁹⁶

The odds of President Trump having a fair trial were stacked against him from the case’s inception. Judge Merchan’s and his family’s close ties to Democrat-aligned interests, on their own, provided sufficient grounds for Judge Merchan to recuse himself—he was clearly conflicted and by remaining on the case presented an appearance of impropriety. Nevertheless, he chose to remain. In the courtroom, Judge Merchan allowed testimony that deprived President Trump of a fair trial. Outside of the courtroom, Judge Merchan sought to hinder President Trump, the presumptive 2024 Republican nominee for president, from defending himself to the American people.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

CONCLUSION

Every person admitted to practice law in New York, including elected district attorneys and appointed judges, must take a “constitutional oath of office,” swearing or affirming to “support the constitution of the United States, and the constitution of the State of New York.”¹⁹⁷ By taking that oath, District Attorney Alvin Bragg and Judge Juan Merchan were legally “bound to a constitutional course of conduct.”¹⁹⁸ In their politicized efforts to indict and convict President Trump, they failed their oaths of office. But neither of these faithless officials will have the last word on the travesty of justice that transpired in lower Manhattan on May 30, 2024.¹⁹⁹

The testimony that the Committee and Select Subcommittee have received makes clear that President Trump’s trial was riddled with constitutional defects—defects that should prompt the New York appellate courts to reverse the verdict. The trial violated basic principles of due process.

As an initial matter, President Trump was deprived of the opportunity to defend himself from the alleged underlying crime because prosecutors never disclosed it—and Judge Merchan never forced them to do so. Because President Trump had no notice of the specific charges against him, in particular the underlying crime and its essential elements, he did not have a meaningful opportunity to defend himself from those charges. Then, Judge Merchan instructed the jurors that they “did not have to agree on a singular unlawful act” to convict.²⁰⁰ Rather, he gave the jurors a menu of potential avenues by which they could convict President Trump, instructing them that “they would have to find only that Mr. Trump committed bookkeeping infractions to conceal [1] a campaign finance violation, [2] tax law infraction or [3] falsification of business records,” but they did not have to agree on the underlying crime.²⁰¹ Finally, Judge Merchan permitted gratuitous and prejudicial testimony that should have been inadmissible.²⁰² As a general matter, evidence should be excluded if its prejudice outweighs its probative value.²⁰³ The testimony that Judge Merchan permitted at trial, particularly certain parts of Cohen’s and Clifford’s testimony, was unduly prejudicial and never should have been allowed.

New York appellate courts have been “dubbed the ‘13th juror’ . . . because judges are allowed to make decisions based on the facts of the case—not only the law.”²⁰⁴ One former Manhattan assistant district attorney called it “an underappreciated power that the appellate division has” when reviewing cases on appeal.²⁰⁵ The New York Court of Appeals characterized the intermediate appellate courts power to “review questions of law and questions of fact” as the

¹⁹⁷ N.Y. ST. CONST. art. XIII, § 1; N.Y. JUDICIARY LAW § 466.

¹⁹⁸ Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 315 (2016) (internal quotation marks omitted).

¹⁹⁹ Lynch, *supra* note 14.

²⁰⁰ *Id.*

²⁰¹ Swoyer, *supra* note 129.

²⁰² See Section IV(C).

²⁰³ *Id.*

²⁰⁴ Orden & Feuerherd, *supra* note 126; see also *People v. Rickert*, 58 N.Y.2d 122 (1983) (holding that, in appropriate cases, the appellate court has the power to review facts and substitute its own discretion).

²⁰⁵ Orden & Feuerherd, *supra* note 126 (internal quotation marks omitted).

“linchpin of our constitutional and statutory [appellate] design.”²⁰⁶ Given that President Trump’s indictment was conceived in legal and constitutional error and the trial exacerbated and compounded those errors, an honest review of the facts and the law will likely lead appellate courts to vacate the conviction and dismiss the indictment with prejudice. This will go a long way in restoring the American people’s trust and confidence in our justice system, although more work is ahead. In the meantime, the Committee and Select Subcommittee will continue our oversight of lawfare and its effect on the rule of law in the United States.

²⁰⁶ *People v. Bleakley*, 69 N.Y.2d 490, 493-94 (1987).