Indicted!

Nancy L. Rosenblum

A Criminal Indictment

Manhattan District Attorney Alvin Bragg’s 34 count indictment of Donald Trump is the first charge of criminal conduct against the former president. This, after years of impunity: two impeachments without a conviction, Special Prosecutor Robert Mueller’s Report aborted by the Department of Justice’s own rule against indicting a sitting president, the belated appointment of another Justice Department Special Prosecutor by the hesitant Attorney General Merrick Garland.

Now, there is a traffic jam of cases in the pipeline. It is not clear who if anyone will referee potential overlaps or when any of them will get to trial. In no particular order: Jack Smith’s portfolio with what appears to be a new addition - grift – using the ‘big lie’ to raise money. (Trump has called the special counsel a “radical left lunatic” and a “totally biased thug,” and continued his ongoing charge that Jack Smith isn’t the prosecutor’s real name. (Birth Certificate redux). There is Fulton County District Attorney Fani T. Willis’ investigation into Trump’s [efforts to overturn Georgia’s 2020 election results](https://www.washingtonpost.com/national-security/2022/07/27/trump-georgia-investigation-explained/" \o "https://www.washingtonpost.com/national-security/2022/07/27/trump-georgia-investigation-explained/); the Manhattan civil defamation lawsuit brought by E. Jean Carroll, the writer who said Trump raped her nearly three decades ago; and New York Attorney General Letitia James’s civil case accusing Trump, his family business and three of his children of a “staggering” fraud for overvaluing his assets by billions of dollars.

Take a moment to reflect on the range of legally cognizable depravity.

Two things command attention and make Bragg’s case significant: the indictment as a matter of law and the indictment as an occasion for threats, intimidation, and Trumpist violence.

The Law

Bragg’s indictment lists 34 counts of bookkeeping fraud related to reimbursement in 2017 to Michael Cohen that were represented as payments for legal services. The first paragraph reads “the indictment of Donald J. Trump for falsifying business records in order to conceal damaging information and unlawful activity from American voters before and after the 2016 election.” It cites a “catch and kill” scheme to identify, purchase, and bury negative information to boost his electoral prospects. It also cites the lengths Trump went to – the dozens of false entries in business records -- to conceal criminal activity, including “attempts to violate state and federal election laws.”

My first observation has to do with responses to the indictment. In opinion pieces, on legal list serves, and in conversations with colleagues there is near unanimous disappointment at the timing and disparagement of the outlines of the case. Many of the same commentators were furious when the Manhattan DA quashed the work of his predecessor Cyrus Vance and two of the attorneys on the project resigned – one publishing an unethical book about the work in progress. It turns out that Bragg reviewed the Vance team’s work, recast the case, and presented new evidence to a grand jury. This indictment appears to be sounder and stronger.

Still, leading election law analyst Richard Hasen speaks for many when he says it is a mistake legally and politically. Why?

Three political points are familiar by now. One argument insists that an affair with a porn star and a $130, 000 hush money pay off will not hurt Trump with voters. It’s just sex. Remember Ken Starr’s grotesque overreach in the Clinton/Monica Lewinsky affair, and the verdict exonerating presidential candidate John Edwards who lied about fathering a child out of wedlock. A unanimous jury is always uncertain, but especially around covering up and denying sexual affairs. #MeToo has work to do.

Then there is the expectation that Trump will milk this indictment for money and the spotlight. He has cultivated an automatic reflex in his followers in response to “witch hunt”: righteous anger and contributions.

Above all, the negative response reflects the wish that the first criminal indictment would focus on political assaults on democracy committed during his presidency: insurrection, attempts to overturn state election results, stealing documents. Only these charges get to Trump’s degradation of his office and to what the nation suffered at his hands and is suffering still.

I don’t share this disappointment or these objections.

True, hush-money payment to prevent Stormy Daniels from airing her story before the 2016 election is not as blatant an authoritarian move as intimidating Georgia officials to find 11,780 votes, or a conspiracy of fake electors, or organizing and inciting a violent attack on the Capitol to prevent the certification of votes that would make Joe Biden president. But the hush-money indictment had the same intent: to use illicit means – *any means at all* – to ensure Trump’s hold on power. That is the issue in this case. The intent to corrupt the presidential election is at its center. Trump told Michael Cohen to try to delay payments to Stormy Daniels until after the election, when he would avoid paying altogether because then it would not matter if the story became public.

The crimes – whether they end up being misdemeanors or felonies – go straight to the heart of Trump’s efforts in 2016, 2018, 2020, 2022, and now ahead of 2024 to degrade elections. In this case, to cover up acts that he thought likely to influence voters to support his opponent Hillary Clinton. The hush-money scheme was one non-trivial step in the long wind-up to pitching the ‘big lie’.

But is the Bragg indictment weak? The outline of the negative consensus is that the legal argument is both obscure and faulty. False filings of business records are ordinarily misdemeanors. The bump-up to a felony requires falsifying records in service of another crime, meaning that the only reason for falsifying records was that crime. But, the criticism goes, Bragg does not say definitively what the other crime is. The “theory of the case” is unclear. There are multiple theories, including but not restricted to violations of state and federal campaign finance law. (NB: In practice, prosecutors do not have to publicly set out their ‘theory of the case’, and some spin out multiple threads of argument to the judge and jury.)

The focus, however, is on violation of state and federal campaign finance law, and legal criticism of the indictment centers on this bump-up from misdemeanor to felony. There is the problem of a New York court preempting action by the federal government or prosecuting a federal campaign finance case on its own when the federal government has decided not to. There is the added criticism that New York state law itself may not apply to a federal election violation.

One way of looking at this indictment favorably was suggested by Richard Pildes in conversation on the Election Law Blog.

New York Penal Law 175.10 reads “A person is guilty of falsifying business records in the first degree when his intent to defraud includes *an intent to commit another crime or to aid or conceal the commission thereof.* The statute does not require the DA to prove that Trump committed that second offense, or for a jury to agree that he is actually guilty of that federal crime beyond a reasonable doubt. The DA needs to prove that Trump’s falsification of business records was done with the intent to commit another crime, to aid in the commission of another crime, or to conceal the commission of another crime. Put simply, the key question is Trump’s state of mind, not federal vs state jurisdiction over that crime. Bragg could argue that he is only prosecuting violations of state law and is using intent to commit a federal crime to step up the state charge to a felony.

There is this reason to look favorably on Bragg’s indictment too. His charges and the Georgia charges expected to be brought this summer are state charges. If Trump is convicted, no pardon by a future Republican president would apply.

Law aside, there are other reasons to take satisfaction in this indictment. Chris Hayes on MSNBC reminded us that from his youth Trump was a familiar figure in civil courts. He sued and was sued: housing law, Trump University, business records and tax evasion, cases involving non-payment to workers and vendors in his real-estate business. Civil lawsuits are about money. Like any party to a civil suit Trump could pay the amount a court verdict demanded, or he could negotiate a settlement with the complainant, or he could declare bankruptcy so that workers, students, and many others injured by his violations receive only a tiny fraction of what he owed them. Civil suits often cause catastrophic harm to people’s small businesses, livelihoods, and well-being even when they “win”. Attempts to actually collect the judgment are costly and can take many years. Cases in which Trump is ordered to pay those he wronged are often the “cost of doing business”, and amount in effect to impunity.

Criminal charges are different.

They are different even if Bragg’s indictment is “just” a matter of bread-and-butter falsification of business records with the intent of tax evasion. (The Trump corporation was convicted of 17 counts of tax fraud last year – Judge Mechant, the judge in this case, presided.) For now Trump is in the criminal dock. He can’t bargain or negotiate with the judge or jury. He is subject to the requirements of due process and to the rulings of a judge in command of the courtroom. Due process rules are designed to protect defendants but also constrain them. The reason Trump’s lawyers argued against permitting cameras in the courtroom was to prevent the public from seeing Trump on a short leash.

Even before trial, Bragg has offered up another satisfaction: the sheer pleasure of his quick, energetic suit against MAGA Congressman Jim Jordan’s attempt to probe the New York investigation and to subpoena witnesses close to the case. Bragg is fighting Jordan straight-on: the Congressional subpoena violates “basic principles of federalism and common sense” and the House GOP is infringing on Bragg’s authority and New York’s sovereign interests.

But is the leash imposed by a court in the criminal indictment of defendant Trump a strong restraint?

Threats and Violence

Bragg’s indictment is significant as a matter of law. We should also recognize its significance as a target for threats, intimidation, and violence. That is the price for attempting to hold Trump accountable. The threat has already been delivered. There is the doctored photo of Trump with a baseball bat aimed at Bragg’s head and Tucker Carlson’s response to the indictment: “Probably not the best time to give up your AR-15”.

Consider what did not happen, what did happen, and what will happen when a trial begins.

What did not happen is armed protest at the arraignment. Organized militia, which we should think of as Trump’s private army, stayed away. Perhaps they were deterred by the arrests and convictions of January 6 insurrectionists, including some of their own. Or perhaps they were deterred by New York City’s much-publicized preparations: helicopters, barricades, 36,000 uniformed NYC police reporting for duty. The armed wing of the Republican party stayed home. Only a smattering of protestors with signs were at the scene.

But three things did happen; they are ongoing and will accompany every other criminal indictment. We’ve learned to pay attention to Trump’s words, and his communications to his followers tell us what we can expect.

First is the continuation of wholesale delegitimation of prosecutors and the law. Delegitimation is more than a political attack that instills distrust. It has a specific intent. Delegitimation declares that the prosecutor and law have no meaning, value, or authority and there is no reason for compliance. Prosecutors and courts are justifiable targets of resistance. “THIS IS NO LEGAL SYSTEM, THIS IS THE GESTAPO, THIS IS RUSSIA AND CHINA, BUT WORSE.” Trump Jr. echoed his father’s inverted thinking: “This is stuff that would make Mao, Stalin, Pol Pot blush. It’s so flagrant. It’s so crazed.”

Read more of Trump’s words: “What kind of person can charge another person, in this case a former president of the US, who got more votes than any sitting president in history, and is a leading candidate (by far!) for the Republican Party nomination, with a crime, when it is known by all that NO crime has been committed & also known that potential death and destruction in such a false charge could be catastrophic for our Country.” “Why & who would do such a thing? Only a degenerate psychopath that truely hates the USA”. Trump heightened his apocalyptic message. “These Thugs and Radical Left Monsters have just indicated (sic) the 45th President of the United States...THIS IS AN ATTACK ON OUR COUNTRY THE LIKES OF WHICH HAS NEVER BEEN SEEN BEFORE.” He called the Manhattan district attorney “a Soros-backed animal.” He urged his people to “take our nation back.” **“Our country is being destroyed as they tell us to be peaceful.”** [bold added]

Symbolic actions underscored the torrent of words. The most flagrant was Trump’s first campaign rally for 2024 held in Waco Texas as he awaited arraignment. In 1993, after a stand-off of almost two months, federal agents had a shoot-out with members of the Branch Davidian cult. The siege became a touchstone for Timothy McVeigh and other anti-government terrorists. In Waco last month Trump urged revenge for the siege on the compound and for his own indictment against the backdrop of images of the January 6 insurrection.

A third thing of significance accompanied Trump’s indictment. Elected Republican officials on the spectrum from arrant submission to enthusiastic support were true to form. There was no push-back against Trump’s threats and incitment. Yet something has shifted. MAGA Republicans and allies in Washington have claimed for some time that they alone represent “the nation” and are the “true Americans”. Now we see a shift in action to the states.

Red state governors and state legislators present their states as sovereign. That is the significance of Governor Ron De Santis’s vow to block Florida from extraditing citizen Trump to New York for arraignment. The states have no authority over “extradition”; there is no such thing. The not-very-subtle message is a threat of secession, increasingly spoken aloud by state officials. It is a fantasy, of course that evokes the “lost cause” and authorizes violence.

At Trump’s arraignment Judge Juan Manuel Merchan warned the defendant to “refrain from comments or conduct that has the potential to incite violence and jeopardize the safety or well-being of any individual”. The judge could impose a gag order on defendant Trump or even arrest him for threatening court officers and their families. Bragg’s office has already received threatening calls and mail. Anticipating a summer indictment in Georgia, Fulton DA Fani Willis exhorted local law enforcement to prepare for “heightened security.”

The key phrase in the judge’ warning is “well-being”. The concern goes beyond safety. Doubtless in cases against Trump the jury, lawyers, and court workers will be assigned physical protection. Even so, their well-being will suffer. The nation has had a lot of experience now with just how intimidation harms physical and mental well-being. For some, the psychological and physical toll will be heavy. The experience of threatened election poll workers tells us that recovery from the trauma of Trumpist attack is painful and long. Normalcy is impossible when civil society becomes uncivil society and whole areas of ordinary public life are scenes of justified fear

‘No One is Above the Law’

‘No One is Above the Law’ is the mantra of everyone demanding that Trump face legal accountability. It was the working principle of impeachment and the January 6 committee. Adam Schiff and Liz Cheney probably repeat it in their sleep. It ought to be true. Repetition reflects the hope that people will believe it is true, or will agitate to make it true.

It should be true that no one is above the law. But we should also remember that no one should be effectively beneath the law. Many, many Americans are without benefit of fair and equal administration of justice. Injustice is structural from start to finish. From arrests to plea-bargaining, to the terms of incarceration and the after-life of prison and parole Americans are vulnerable to the sheer discretion of prosecutors and the vicissitudes of incompetent or indifferent or under-funded defense counsel. Over 90% of criminal cases do not go to trial. As a daily matter, citizens (and non-citizens!) are out in the legal cold. We are right to focus on Trump who has been effectively above the law; we should keep in mind those who are beneath the law as a result of racial prejudice, entrenched economic inequality, and indifference.

*J’accuse* is a powerful response to the catastrophe and national shame that is Donald Trump. Now, Bragg has brought a credible criminal indictment and a jury will deliver a verdict for the first but not last time on whether the tyrant will be punished.

Nancy Rosenblum is professor emerita of political theory at Harvard University. *“Indicted!”* was a presentation to a small group and the author has kept the informal, spoken form.