

Thoughts On Prosecutorial Discretion After Trump Indictments

By **Scott Coffina** (July 6, 2023, 5:57 PM EDT)

As a former assistant U.S. attorney and county prosecutor, the recent indictments of Donald Trump have caused me to consider the wisdom of bringing these cases against a former president and a frontrunner of the Republican Party in the 2024 presidential campaign.

For different reasons, both current prosecutions of Trump are ill-advised.

The hush-money case — *New York v. Trump*, pending in the New York County Supreme Court — arguably is the product of a prosecutorial focus on an individual in search of a crime, while in the Mar-a-Lago documents case — *U.S. v. Trump in the U.S. District Court for the Southern District of Florida* — the broader implications of the case should counsel against bringing a criminal prosecution at this time.

When I joined the U.S. attorney's office, a wise friend and former prosecutor advised me to always respect the power of the office.



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That advice stayed with me, and over time, it became clear that prosecutors can find themselves on shaky ground when they target the individual first, and then try to find a crime.

This approach harks back to Michael Corleone's caution in "The Godfather: Part III" — "Never hate your enemies. It affects your judgment" — in that the prosecutor might experience confirmation bias or rush to charge with relatively benign evidence, thereby advancing a weak case.

"The Godfather's" admonition has seemingly played out in the hush-money case brought by Manhattan District Attorney Alvin Bragg, who discussed the former president during his campaign, and noted — some might even say bragged — that he helped sue Trump multiple times.[1]

Perhaps due to an approach targeting an individual in search of a crime, commentators across the political spectrum have noted that the district attorney's case rests on questionable and untested legal grounds.[2]

Bragg charged Trump with the felony version of New York's law prohibiting falsification of business records to commit or conceal another crime.

Trump's business records allegedly were falsified to have payments to adult film actress Stormy Daniels made through his former lawyer appear as legal fees. The other crime, reportedly, is that Trump violated federal election law by paying off Daniels to prevent damage to his 2016 campaign from disclosure of their alleged affair, which Trump denies.

The problem for Bragg is that the Federal Election Commission dropped its inquiry as to whether these payments to Daniels violated federal election law.

Moreover, it is uncertain that New York can attach a violation of federal law to a state law violation of its business records falsification statute. There are also statute of limitations concerns.

In contrast to the belief by many that the New York case is the product of Trump being personally targeted by political adversaries, with the recent federal case involving classified documents,[3] Trump "gave them a sword" (to quote Richard Nixon, ironically) with his alleged failure to properly respond to the subpoena for the documents in his possession.

The investigation leading to the federal indictment was led by a veteran prosecutor with no identified history with, or expressed enmity toward, Trump, and the case, perhaps not surprisingly, has more substance than the New York matter. Still, about half the country asks whether this case should have been brought, which evokes prosecutorial discretion.

It is inherent in a prosecutor's job, and duty, to exercise discretion, which is an assessment of whether pursuing a particular case serves the interests of justice, and there can be a variety of reasons why it may not.

For example, prosecutors may consider the individual circumstances of the subject in deciding whether to pursue charges, such as whether their conduct reflects aberrant behavior, or whether justice would be better served by diverting them to drug treatment rather than prison. In the present context, a prosecutor should ask whether the potential societal harm outweighs the merits of this particular prosecution.

Thus, with the federal case against Trump, an analysis of prosecutorial discretion would consider the following.

The Nature of the Offense

Focusing initially on the Espionage Act charges related to his retention of documents, Trump, as a former president, would be entitled to access all these documents, even the classified ones, through proper channels under the Presidential Records Act. Trump didn't follow procedures, but that would make this a mere process crime.

This begs the question: What's the harm?

The harm seems negligible, since the indictment does not allege that Trump compromised national security. So, while there is probable cause for the Espionage Act offenses, the significance of those offenses in the context of this overall matter is slight.

Moreover, Trump's retention of government documents is an offense for which the government did not prosecute former President Bill Clinton, former Secretary of State Hillary Clinton or former Vice President Mike Pence in similar circumstances. One thus must ask whether Trump should be charged for illegally retaining documents he'd otherwise be entitled to access if he followed the right steps, when others were not charged for the same conduct. That answer seems self-evident.

However, Trump is also charged with several obstruction-related offenses arising from his response to the grand jury subpoena, a point that critics of the Trump indictment often overlook. The alleged obstruction should not be taken lightly — it is a serious affront to our justice system — and must be factored into the prosecutorial discretion calculus as well. Frankly, these appear to be the more credible charges, and present the bigger threat to the former president.

The alleged obstructive conduct distinguishes Trump's case from the recent document investigations involving Pence and President Joe Biden,[4] but is similar in some respects to the case involving Hillary Clinton.

Clinton improperly utilized a personal server to conduct official business, and her server allegedly was wiped clean of 30,000 emails that likely included federal records.[5] This would seem to indicate the willful concealment that is the essence of the obstruction-related charges against Trump. Yet, she was not charged.

Indeed, articulating the exercise of prosecutorial discretion in the decision not to recommend that Clinton be prosecuted despite the alleged retention and destruction of government records, former FBI Director James Comey said, "Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case."

In a different factual context, Bill Clinton lied under oath about his relationship with Monica Lewinsky, for which he could have been charged with perjury, but discretion was exercised not to do so.

So, with the backdrop of viable charges against Trump, including serious charges of obstruction of justice — though charges that in relatively similar contexts were not pursued by prosecutors — the next step in the exercise of prosecutorial discretion would be to consider the broader context.

The Larger Context of This Unique Case

Despite the undeniable harm to the justice system from the alleged acts of obstruction by Trump, the prosecutorial discretion analysis must contemplate the potential negative forces unleashed by charging the former president and a current frontrunner for the 2024 Republican nomination, in a case in which there is no victim and no tangible harm, amid relevant precedent of the U.S. Department of Justice not pursuing similar charges. Heavy lies the special counsel's "crown."

Trump's alleged obstructive conduct makes it a close call, but given the profound implications of the Justice Department indicting a leading candidate of the opposite political party, the better course would have been for special counsel Jack Smith to exercise his discretion not to charge the former president.

An alternative path would have been to issue a detailed report outlining all the evidence so the public could evaluate Trump's conduct themselves, and conclude that notwithstanding provable violations of federal law, those are primarily process offenses, and the interests of justice dictate declining a prosecution here. The political implications are just too profound, balanced against this victimless crime.

Of course, the special counsel did proceed with charging Trump, with the implicit, if not explicit, approval of U.S. Attorney General Merrick Garland, who retained ultimate authority[6] on whether to pursue the case.[7]

In a CNN poll taken immediately after reports of the hush-money charges surfaced, 76% of Americans, including 60% of Democrats, believed that politics played a role in the indictment.[8] We almost certainly now will enter a helter-skelter cycle of prosecutions or threatened prosecutions of political opponents, including presidents, and this case establishes a low threshold for these investigations and/or prosecutions to commence.

Nobody, including the president, is above the law. But the bar for indicting a former president should be high, not low. With this indictment against Trump for alleged process violations, albeit some serious ones, the door has been opened for future prosecutions of a former president — or candidate — that rightly or wrongly would be widely perceived as politically motivated.

Biden is currently under investigation for wrongfully possessing government documents, including classified documents, from his time as vice president — potential Espionage Act violations, like those for which Trump has just been charged. Although public accounts do not suggest any improper use of those documents, the indictment of Trump makes it more likely that Biden would be similarly charged for inconsequential Espionage Act violations if a different party controls the White House in 2025.

One of the hallmarks of our democracy has been the peaceful transfer of power, and a historical practice of letting our political differences be decided at the ballot box. The federal and New York state indictments of Trump threaten to erode this separation between the criminal justice system and the political process, and in turn, the confidence of the American people in the integrity of both.

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[1] "DA Bragg's Looming Indictment of Trump Follows Campaign Trail Boasts," NYPost, March 23, 2023, <https://nypost.com/2023/03/23/da-bragg-boasted-during-campaign-about-suing-trump/>.

[2] <https://www.politico.com/news/2023/04/05/alvin-bragg-case-against-trump-00090602>.

[3] <https://www.washingtonexaminer.com/opinion/for-prosecutor-bragg-trump-indictment-is-campaign-promise-kept>.

[4] <https://apnews.com/article/classified-documents-biden-home-wilmington-33479d12c7cf0a822adb2f44c32b88fd>.

[5] <https://www.politico.com/story/2015/03/state-department-email-rule-hillary-clinton-115804>.

[6] <https://www.washingtonpost.com/national-security/2023/06/09/merrick-garland-trump-documents-case/>.

[7] The Attorney General has declined to publicly discuss his role in the charging process, other than to say that he followed the relevant regulations governing the use of a Special Counsel. These regulations require the Attorney General to notify Congress "if the Attorney General concludes that a proposed action by a Special Counsel should not be pursued." 28 C.F.R. § 600.7. There are no reports that any such notification was sent to Congress.

[8] <https://www.documentcloud.org/documents/23739177-cnn-poll-monday-april-3-2023>.