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A Porn Star, a Perjurer, and a Prosecutor Walk Into a Courtroom

AP Images

"Show me the man, and I'll show you the crime." — Popular Stalinist-era Soviet phrase

The case against Donald Trump in the New York hush-money scandal rests on some shaky legal ground. Here's why:

Firstly, for the misdemeanor charge, prosecutors need to prove Trump *intended* to defraud. For the felony charge, they must show he intended to commit or cover up another, separate crime. This second crime *must* involve unlawful means and a conspiracy. So, the threshold questions are: Who was defrauded, and what unlawful act was carried out to cover up that fraud?

Next, for these acts to be felonies, the allegedly fraudulent business records must be both fraudulent *and* unlawful. Is paying hush money either of those things? If so, then it is the obligation of the state prosecutor to prove that, and in this case, they've brought forth not a single sheet of evidence that would meet that legal standard.

Lastly, the legal standard is that the alleged criminal act — in this case, falsifying business records — must have been done fraudulently and unlawfully, *and* for the purpose of interfering in an election. Each of those three elements of the charges must be proven beyond a reasonable doubt for a defendant facing these charges to be found guilty, even if that defendant is Donald Trump.

Unlike the sale of stocks and bonds, political campaigns don't require full disclosure of all facts, and politicians are granted a very wide berth when it comes to legal protections of their exercise of free speech. Why a politician says or does something — the fact that he does say or do something during an election — is not evidence, much less proof, that the motivation for the speech is criminal, even though it may be murky or a little unseemly.

Another major issue is the two-year statute of limitations for election-law misdemeanors, which has already expired. Despite this, the district attorney and many anti-Trump talking heads claim that just showing Trump made false records is enough, and since he was running for president, then it's obvious that he falsified the records in order to influence the election. By that logic, everything a candidate does during a campaign could be considered an attempt to influence elections, no matter what the true motive might have been.

With regard to the necessary element of unlawful purpose, some experts argue that the District Attorney only needs to prove Trump *thought* his actions were criminal. This is a fine example of the prosecution's penchant for jurisprudential gymnastics, but that's not how the law works. One cannot intend to commit or hide a crime if the act being committed or hidden isn't illegal. While prosecutors

don't need to charge and convict someone of the underlying crime, they must still prove the intended act was criminal.

In this case, the act that Trump supposedly intended to cover up — paying Stormy Daniels not to talk about their relationship — must be a crime in New York, and the DA must prove Donald Trump knowingly committed that crime. However, falsifying records to hide a *legal* act isn't a crime under this statute.

Here's a quick and easy analogy: Suppose a business owner wants pays his 14-year-old son a salary, even though he (the business owner/father) incorrectly believes it's illegal in his state to hire anyone younger than 16 years old to work. Has the dad committed a crime by paying his son a salary? No. Why? Because the thing he thought was a crime wasn't illegal! If a neighbor went down to the county district attorney's office and "reported" the business owner's "criminal" act, would the DA seek to indict the dad who paid his son the salary? Again, no. Right now, you're probably rolling your eyes or laughing. Well, that's how disinterested and honest lawyers react when they witness the circus being billed as a criminal trial in New York.

In order to have any shot at seeing Donald Trump led out of the courtroom in handcuffs, the DA must prove his claims. Even if Trump denies it, it's hard to believe Michael Cohen paid $130,000 to Stormy Daniels without expecting reimbursement from Trump.

But why Cohen made the payment is unclear (maybe to avoid linking it directly to Trump), and that lack of clarity and purpose for the way the money changed hands is key to this case.

Beyond all the blustering and the cringeworthy behavior of a petulant judge with delicate feelings, one central issue remains: Were the payments to Stormy Daniels fraudulent or unlawful? If so, the DA must prove two things beyond a reasonable doubt: First, that someone was misled by the false records at election time; and second, that at the time he covered up Cohen's payment of money to Stormy Daniels, Donald Trump knew about and willfully and knowingly violated an obscure New York election law. The DA has not produced a paragraph of evidence or put on the stand a single witness who even comes close to meeting the accepted legal standards that would apply to any defendant, any defendant not named Donald J. Trump.

Remember, if it was legal for Trump to pay Daniels directly, then having Cohen do it doesn't show intent to conceal another crime or conspire to illegally influence the election. The DA's case relies on three separate criminal statutes, each of which has its own unique and distinct requirement of the commission of fraudulent acts or crimes, none of which have been proven in this case.

Adult "actress" Stephanie Gregory, aka "Stormy Daniels," claims she had a sexual encounter with Donald Trump at a Lake Tahoe hotel in July of 2006. To keep her from spreading this story, Michael Cohen, Trump's former personal attorney, says that Trump instructed him to pay Daniels $130,000 to sign a nondisclosure agreement just before the 2016 presidential election.

Subsequently, Daniels issued a statement denying an affair with Trump, and Cohen testified that he'd used his own money to buy the actress's silence. Later, Daniels said the NDA was invalid because Trump never signed it. Daniels made several TV appearances and filed suits against Trump, each of which she lost, ultimately being ordered by various courts to pay over $600,000 to Trump's law firm due to the defamation suit, but as of 2022 she publicly vowed she would never obey the court's order.

DA Alvin Bragg claims that this nondisclosure agreement was a serious crime that deligitimized democracy by keeping important information away from voters. However, out of all the accounts,

Bragg's is arguably the least credible.

Lead prosecutor Matthew Colangelo opened Trump's trial by saying, "This was a planned, coordinated, long-running conspiracy to influence the 2016 election, to help Donald Trump get elected through illegal expenditures, to silence people who had something bad to say about his behavior. It was election fraud, pure and simple."

Contrary to Colangelo's spin, there is nothing "pure and simple" about this case. Trump isn't charged with "conspiracy" or "election fraud." Instead, he's charged with violating a New York law against "falsifying business records" with "intent to defraud." Normally, falsifying business records is a misdemeanor, but it becomes a felony if the intent includes concealing "another crime." Bragg claims Trump had such an intent.

Here are the relevant statutes from the New York Criminal Code:

§ 175.05 Falsifying business records in the second degree. A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise; or

2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor.

§ 175.10 Falsifying business records in the first degree. A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.

Falsifying business records in the first degree is a class E felony.

As for the business records Trump is accused of having falsified: the reimbursing of Cohen for the $130,000 Cohen paid to Stormy Daniels and disguising those payments as attorney fees.

As for the crime that Donald Trump allegedly tried to conceal, prosecutors argue it was a violation of a rather obscure New York law, which makes it a misdemeanor for "two or more persons" to "conspire to promote or prevent the election of any person to a public office by unlawful means."

Here's the section of the New York criminal code that nearly no one had ever heard of before Bragg exhumed it:

§ 17-152. Conspiracy to promote or prevent election. Any two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor.

That word "unlawful" as applied to the facts of the case brought by Bragg is not as clear as he would lead the public to believe. Federal prosecutors in 2018 argued that by fronting the money, Cohen made an excessive campaign contribution. Cohen accepted this in a plea agreement that also resolved several

unrelated charges. However, Trump was never prosecuted for soliciting that "contribution," and there are valid reasons for that.

The case against Trump stands or falls on the DA's ability to prove beyond a reasonable doubt that Trump's payment to Daniels was a form of electoral interference rather than an attempt to avoid embarrassment. While both interpretations of the incident are plausible, proving the former beyond a reasonable doubt is challenging to say the least.

This difficulty is best illustrated by the unsuccessful 2012 prosecution of Democratic presidential candidate John Edwards, a case which, unlike the current case against Donald Trump, benefited from much clearer facts, more credible witnesses, and much more egregious efforts to create a conspiracy to cover illicit acts committed by the defendant.

Additionally, federal prosecutors must prove that Trump "knowingly and willfully" violated the Federal Election Campaign Act. Given the murky distinction between personal and campaign expenditures, it's plausible Trump didn't think paying Daniels for her silence was illegal. It is not illegal to pay a mistress not to reveal an adulterous affair, even if you're a politician. The difficulty would be drawing accurate boundaries between personal and political.

It is that very difficulty that would have prevented any honest, disinterested district attorney in this country from agreeing to prosecute this case. The *mens rea* (requisite mental state at the time an alleged crime is committed) in this case would be highly improbable to prove beyond a reasonable doubt without the element of personal interest in keeping a mistress quiet, and with such an element, it would be nearly impossible. Yet, Bragg persists, not dissuaded by facts or reasonable jurisprudential justifications for dropping the charges.

Additionally, would Trump believe that news of his extramarital affair with Daniels would cost him the election? Unlikely, as other candidates for office have been caught behaving inappropriately yet were elected. It is plausible — plausible enough to cause reasonable doubt in a juror's mind — that Trump simply wanted to keep Daniels from damaging his marriage or from consuming media minutes with her self-serving and salacious account of her relationship with Donald Trump.

Most people look at the lawfare being waged against President Trump and they wonder why, if these charges are so compelling and so "pure and simple," as DA Bragg described them, the Justice Department did not file charges against the former president.

The fact is that the Justice Department didn't pursue the case, the statute of limitations bars them from pursuing it now, and Bragg doesn't have the authority to enforce federal campaign-finance laws. Instead, Bragg is relying on an outdated New York election law that experts say has never been enforced before. His attempt to turn a federal campaign finance issue into state felonies is legally dubious.

This proposal was so preposterous, in fact, that Bragg's predecessor, Cyrus R. Vance, Jr., refused to pursue it. The entire episode has nearly no resemblance to justice. In fact, it reeks of revenge and political desperation, and affords some credence to Trump's claim that it is the DA and the Democrats who are the ones conspiring to commit "election interference."

Undaunted, DA Bragg (whose campaign benefited from a $1 million donation from George Soros to a PAC supporting Bragg) asserts that Trump committed "election interference," calling it "the heart of the case." He claims his prosecutors "allege falsification of business records to the end of keeping information away from the electorate."

These records were produced *after* the election, making Bragg's narrative both foolish and irrelevant — a crucial point that the mainstream media prefers to see drowned in the deluge of the filthy details of the tale told by Stormy Daniels.

As for the role played in all of this by Michael Cohen, whom the defense accurately describes as a convicted felon and admitted liar with a grudge against Trump, he is the only witness linking Trump to these records.

On Monday, when asked by Trump attorney Todd Blanche about whether he stole $30,000 from the Trump Organization, Cohen replied, "Yes, sir."

When Blanche asked him why he stole from Trump, Cohen said it was because he was "angry" that Trump had slashed his annual bonus in 2016. "It was almost like self-help," Cohen added.

In other words, the prosecution's star witness — the only witness who can tie Donald Trump to the money paid to Daniels — admitted on the stand that he stole from the defendant and did so because he thought his annual bonus wasn't as much as he thought it should be. Could the legal arm of the Deep State possibly have found a less credible, more petulant perjurer to put forward as a star witness in a case already standing on shaky legal ground?

Ultimately, this case, as with so many others heard every day in courtrooms across the country, could hinge on Judge Merchan's jury instructions. Jury instructions, provided by the judge after all evidence and arguments are presented, guide the jury on the legal procedures and laws relevant to their decision. These instructions must be clear, concise, and accurate, ensuring jurors stay focused on the case and understand the relevant law without being misled or confused.

The instructions given to the jury by Judge Merchan will likely tell the tale. Will he instruct the jury that the prosecution must have proven beyond a reasonable doubt that Donald Trump committed a specific fraud and illegal act aimed at interfering with the election, separate from the false business records? Or will he allow the jury to convict Trump simply for trying to hide his hush-money payments, without reminding them of the requisite finding of guilt beyond a reasonable doubt of having committed a separate fraud and illegal act? The judge's decision could make or break the case.

The bottom line is that there is one thing that is "pure and simple" about this case: From the moment the charges were filed, the intent was to wage politically lethal lawfare against Donald Trump, to launch "shock and awe" against him as punishment for having the nerve to get elected president, and to keep that from ever happening again.

Finally, I practiced criminal law for years and I can tell you for a fact that cases with much clearer facts are routinely rejected by district attorneys as not being worth the time it would take to overcome the many mountainous legal obstacles in the path from charge to conviction. DAs offices are swamped with cases — open and shut cases of crimes committed against innocent people by violent men and women whose inhumanity leaves scars, physical and emotional, that don't heal. They don't have the time, the money, or the manpower to pursue political vendettas, unless those cases are egregious and reasonably provable violations of the law. The case against Donald Trump would not make it over that threshold. Period.

In this case, however, the DA was not concerned about limited money, limited manpower, or even the likelihood of his success because the process alone serves as proxy punishment, and his pecuniary and political bosses want one thing, and it isn't justice — it's revenge.