



The Indictment of Former President Trump

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[00:00:00] Jeffrey Rosen: On April 4th, former president Donald Trump was indicted in a Manhattan court on 34 felony counts of falsifying business records related to hush money payments to Stormy Daniels. President Trump pleaded not guilty. As the first indictment of a former president in American history, the case is legally and constitutionally significant, and on this episode of *We The People*, we'll break down the best arguments on all sides of the debate.

[00:00:27] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of The National Constitution Center, and welcome to *We The People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. To help us understand the legal charges against former president Trump, as well as the broader legal significance of the case, we're joined by two of America's leading commentators on the Constitution.

[00:00:56] Jeffrey Rosen: David French is an opinion columnist at *The New York Times*. He's written several pieces about this case for *The Times*, and he hosts the legal podcast *Advisory Opinions*. David, it is an honor to welcome you back to *We The People*.

[00:01:09] David French: Well, thanks so much for having me back. I really appreciate it.

[00:01:11] Jeffrey Rosen: And Kimberly Wehle is professor of law at the University of Baltimore School of Law, and a legal analyst at ABC News. She has been writing and speaking about the Trump indictment on *The Bulwark*, ABC News, and elsewhere. Kim, it's wonderful to welcome you back to *We The People*.

[00:01:26] Kim Wehle: Thanks, Jeff. It's great to be here.

[00:01:28] Jeffrey Rosen: Let's just begin with the legal charges. David, the indictment was unsealed yesterday. What are the core of the legal charges against President Trump?

[00:01:40] David French: Well, there's 34 felony counts related to falsification of business records. All of those 34 counts are related to the Stormy Daniels payoffs. So the way the story goes, Trump allegedly had an affair with Stormy Daniels. In the weeks leading up to the election, she struck a deal with Michael Cohen, Trump's former attorney and fixer, to receive \$130,000, from Cohen. He used a home equity line of credit, I believe, to pay that \$130,000, and then he

received reimbursement over from between February 2017 and December 2017 from Trump and Trump-affiliated entities totaling well over 130,000.

[00:02:24] David French: There was a gross-up for taxes, and then an additional sort of sweetener on top of this. So, he began to receive \$35,000 a month or so for, 11 months. And each count relates to a different phase of the reimbursement. So, there would be a count related to his invoice, so how the Trump Organization or the Trump entities would classify the invoice. There'd be a count related to the, um, ledger entry, and the bookkeeping entry. And then there would be a count related to the f- writing of the check.

[00:03:00] David French: So each one of the 11 payments had a minimum of three counts attached to it, and one of the payments had four counts attached to it, but they were all related to specific entries. That's the narrow-cast version of this. The bigger sort of broadening the scope, what the prosecution argues makes what is normally a misdemeanor, falsification of business records, into a felony is its connection to other crimes.

[00:03:26] David French: Now, the indictment does not spell out the other crimes. There was a statement of fact that was released along with the indictment that tells a bit more of the story, and from the statement of fact and also the DA's press conference, you can see that the other crimes include, uh, allegations of federal campaign finance violations. This is specifically referred to in the statement of facts, potential violations of New York conspiracy law regarding a conspiracy to promote a candidate through unlawful means.

[00:03:57] David French: There's an oblique reference to New York tax law. So, the question in this case has not really ever been... I mean, it is a question, but it is not the prime question. It's not really ever been "Did Trump pay off Stormy Daniels and try to hide the payment, and also misclassify the, the reimbursements to Cohen." That part's pretty well-established. It's... I'm not sure you're gonna say slam-dunk, but maybe a layup [laughs].

[00:04:30] David French: And then, but that only gets you a misdemeanor under New York law. To get to the felony, you have to tie the misdemeanor to another crime, and that has always been the question. What's the other crime? And Bragg began to answer that, at least in his statement of facts, although that's been far from clearly established yet.

[00:04:55] Jeffrey Rosen: Kim, what can you say about the 34 counts, and about the other crimes that David mentioned? He identified three possible ones, federal campaign finance violations, and New York prohibitions on promoting candidates by unlawful means, as well as an oblique reference to New York tax law. Help us unpack those other crimes.

[00:05:16] Kim Wehle: Yeah, so I think that's exactly right. The New York code, and I'm quoting, says, "A person's guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree; that is, just the falsification, and when his intent to defraud includes an intent to commit another crime, or to aid or conceal the commission thereof." So the other crime, again, David indicated, not set forth in the indictment or the statement of facts, which you understand is not unusual for this office and in New York.

[00:05:47] Kim Wehle: However, it does kind of leave a lot, you know, people, including, I'm sure, Trump's lawyers, scratching their head as to what exactly is the predicate underlying crime that makes this more serious, but Alvin Bragg said it...So there's an allusion to tax fraud, but what he talked about at his press conference, um, was either campaign finance violations, which let's not forget that under Trump's DOJ, the fixer lawyer Michael Cohen was charged and pled guilty to, multiple felonies relating to the Stormy Daniels payoff.

[00:06:21] Kim Wehle: So, with respect to Michael Cohen that narrative was quasi-established at the federal level, and the second question, alternatively, would be under New York state law that makes it illegal to conspire to promote a candidacy by unlawful means. Now, the sort of legal questions among many... One is, can, is it fair or legal for Manhattan to use a federal crime, that is, the federal election campaign violation, allegedly, as the basis for the felony of falsifying records? And the flip side is, what's the Manhattan's interest in using the Manhattan campaign finance, or campaign question, that is conspiring to promote the candidacy by unlawful means, when you're talking about a federal election?

[00:07:13] Kim Wehle: So, I completely agree there's some technical, legal, theoretical problems here, less so than while what factually happened. I don't hear either in the debates on Twitter and online, and various op-eds, people debating whether this prob is legitimate, a factual basis for Donald Trump engaging in something like this. It's more, okay, technical problems with the charging, and then the bigger question, which is, is this the right thing to do with a former president, given the stakes on so many levels.

[00:07:50] Jeffrey Rosen: Well, let's dig into what Kim just called the technical legal question, which is, uh, is there a violation of federal campaign law in the hush money? David, it's an open, complicated question. Tell us about the strength of that charge as you see it.

[00:08:11] David French: Yeah, so let me kind of give you what I would see as the prosecution's sort of best stab at this, and, and kind of quickly what the defense would say in response. And so, you know, the prosecutor would state, as he did in the statement of facts, that, look, we know there was another crime, because Michael Cohen pled guilty to one in Southern District of New York related to this hush money scheme. He served time, in part, for this. And so, he says, "There's your other crime, right there, Michael Cohen pled guilty."

[00:08:43] David French: Uh, in addition, even aside from the fact of the Cohen guilty plea, a fundamental factual question at the heart of any claim that this was a federal campaign finance violation is, was the payment related to protecting Trump's position in the election, or was the payment related to protecting Trump's position with his family [laughs]?

[00:09:10] David French: And, if it was a hush money payment to preserve his reputation with his family, that's not gonna violate federal campaign finance law, 'cause that's not a campaign contribution, okay? But if it was intended to help his campaign, then that is deemed, under the law, a campaign contribution, and then this gets into the territory of an unlawful campaign contribution. So as a factual matter, the prosecutor would say, "Well, look, as a matter of fact, Cohen pled guilty to a crime. As a matter of fact, there was also evidence that Cohen said that Trump said, 'Hey, maybe we don't have to make this payment after the election.'" And that would

indicate that this was related to the election, and not to keeping this out, you know, away from Melania.

[00:09:57] David French: So I put it this way in a piece that I wrote. The DA's best case is based on the facts. Trump's best case is based on the law. So what Trump would say in response is, "Look, Cohen's guilty plea is not a legal determination that he violated the law. You cannot use Cohen's guilty plea as a legal precedent against Donald Trump." And in fact, if you look at the state of the law in this area, it's very up in the air. There was an unsuccessful John Edwards prosecution under similar facts when a donor paid money that was used to provide for John Edwards' mistress.

[00:10:34] David French: So there is a past prosecution of John Edwards, but again, all that you really have there is a district court determination allowing the case to go to trial. It's up in the air whether this kind of payment can be deemed a campaign contribution. There's not really controlling precedent on this point. And then, moving beyond that to the New York State law, then the question is, wait a minute. Isn't all this preempted by federal law? Federal campaign finance law is broad. Um, it, it tends to regulate all aspects of finance of, of candidates in federal elections, and that New York conspiracy statute...What is the unlawful means for promoting the candidate?

[00:11:22] David French: If the unlawful means is, well, the fraudulent business records, then that's a circular... What's the other crime is the underlying crime? It starts to get a little bit strange. If the other crime or the unlawful means is a violation of either federal or state campaign finance law, well, then the state campaign finance law is likely preempted by federal law.

[00:11:45] David French: And the way I...the analogy I've used to try to help listeners understand what I'm talking about is, if you are a political nerd, you might remember the Bob McDonnell case in Virginia. In the Bob McDonnell case in Virginia, he was accused of bribery, in essence, that a donor had provided gifts to him and his wife, very substantial, worth over \$170,000. There were things that McDonnell was pretty well-established that he did in response to those gifts, such as arranging meetings between his donor and people who could help the donor.

[00:12:24] David French: And the question wasn't so much did these things happen, but did they break the law? And were they official acts within the scope of the bribery statute? And the Supreme Court 8-0 said, "No, those were not official acts." And so, that's a classic case where you have sleazy facts, but they don't actually add up to a violation of the law. And that's gonna be, that's the, the strength of the Trump defense is not gonna be are the sleazy facts true.

[00:12:51] David French: They got a hard time with...they got a lotta sleazy facts running against them. It's, do those sleazy facts add up to a legally sufficient charge to merit this indictment?

[00:13:05] Jeffrey Rosen: Kim, David just summed up the arguments on both side, and said the central argument against the indictment on the law is that, if the other crime is a state law, it's preempted by federal law. And if the other crime is a federal campaign violation, it may not have

been triggered here, if the payments were to protect Trump's family, rather than to promote his campaign. How would you sum up the arguments on both sides, and the best case for the prosecution?

[00:13:30] Kim Wehle: Well, I would agree, actually with who David laid that out. These are really technical arguments that, you know, it's hard for lawyers to wrap their minds around, let alone laypeople that are listening. But the implications to just play it out procedurally...So they can move to dismiss the indictment altogether, and wipe it out. That would be a win. They could move to just, uh, dismiss the felony piece of it, and say, "Okay, we're gonna go forward on just falsification of records," or, "We're, we want to have Alvin Bragg be forced to do that without this discussion of the rationale behind the falsification" on these two legal theories that David laid out.

[00:14:11] Kim Wehle: In that instance, it would be a problem potentially for the statute of limitations. So that could be a win, just because it might be stale at that point just in terms of the implications that it won't carry the kind of prison time. I think the max is four years, but it just makes the whole thing really seem frivolous, and would certainly play into the political arguments.

[00:14:34] Kim Wehle: Now, if Donald Trump were to make those motions and lose them, in most instances, he could not appeal that until after a trial. So that's, I think, an important implication to keep in mind, that even if this judge were to say, "Okay, these are colorable," as we say. "These are okay arguments. They're thorny. They're difficult. It's not decided either way," and let's not forget, um, you know, all of those 800-plus... I don't know if they were all prosecutions, but, but cases that DOJ brought against people that engaged in January 6th, a lot of threshold arguments.

[00:15:09] Kim Wehle: The crime of obstructing an official proceeding by going to the capitol, that was based on the Sarbanes-Oxley Act, a post-Enron reform. That was a really novel argument, and those folks were still prosecuted. And, of them were convicted. So, the fact that an argument is novel legally doesn't make it improper to prosecute it, and it doesn't mean that even if there's a good argument there, that this is going to avoid a trial.

[00:15:37] Kim Wehle: And that would mean going through the entire process, and then Donald Trump, like other defendants, could appeal everything that's a problem. But at that point, um, there would be a conviction. Now, if he went to trial and he was acquitted, everything goes away, which is why these appeals are, are kind of r- reserved for the very end of cases, so you don't just keep, you know, grass hopping up to the appeals court and dragging things out.

[00:16:03] Kim Wehle: I wanna add one other wrinkle here though, is, which is, has to do with the Nixon case, where there was a question relating to a crime trial subpoena for his tapes, and that is a instance where there, the court did allow an appeal, um, in the middle of, of a criminal proceeding, because it involved the president of the United States. And one of the other issues I'm wondering, and I expect could be raised, at this, is this question of immunity, some kind of immunity, because some of these checks were allegedly written while he was in the White House.

[00:16:36] Kim Wehle: And Donald Trump brought a question of immunity all the way to the, the current Supreme Court, without... Amy Coney Barrett, I believe, was on it. But in that instance, um, in, in connection with the same Manhattan, um, prosecutor's office, they were investigating, um, you know, tax fraud and other crimes for which the Trump Organization was convicted, and they wanted information from Donald Trump's personal accountants. And the Supreme Court said that that's not, you know, there's no immunity for that based on being president.

[00:17:05] Kim Wehle: I think this is a stronger case. I don't think it's a winnable, necessarily, case, but this is a case in which they could say, "Listen, this is not about stuff that Donald Trump did before he took office. This is about stuff he did while he took office." So that raises some, something that the court might take, and if that were the case, then we might see delays that we wouldn't see in a normal criminal case.

[00:17:27] Jeffrey Rosen: David, you've noted that the Supreme Court has narrowly construed, uh, allegation of campaign finance violations because of the First Amendment issues, and here Bradley Smith of the Federal Election Commission has argued that the underlying claim that Mr. Bragg must be alleging is that business records were intended to cover up the illegal conversion of campaign funds to personal use, since you're not allowed to use campaign funds to promote your personal interests. How would Bragg go about proving that at trial and do you think it's a convincing charge or not?

[00:18:01] David French: Well, I think there's, there's a factual question and a legal question. So let's, let's talk about the, the key... Let's talk about the legal question first. I think that makes more sense. So the, the legal question really is, uh, as Bradley has laid it out, and Bradley and I have actually talked, gone back and forth on this since 2018 [laughs]. So this, this issue has been hanging around out there for a while. And the, the legal issue that Bradley would raise is this. Look, the federal law governing this that's trying to define what is a campaign expenditure is just really broad.

[00:18:35] David French: Well, because it implicates core protected speech... In other words, you're talking about advocating for the election or defeat of a candidate, which is core protected speech. You can't have really broad regulations, so you've gotta get really specific, and that's what the FEC does. That's what federal regulations do, and trying to throw payment of hush money into the category of a campaign expenditure, that's not something that the specific portions of federal law... That's not something the specific portions contemplate.

[00:19:06] David French: So, you have to go to the more general, and that's where you've got your problem. You can't really have general regulations against expenses that just help a campaign that are outside of normal campaign expenses, because there's lots of things that you could do to help a campaign, like buy a new, a nicer new suit than you would ordinarily get, or settling a piece of civil litigation maybe a few months before you would ordinarily settle it. And these things get really difficult to parse out, and the First Amendment is just gonna really put the thumb on the scales of more individual liberty here.

[00:19:42] David French: And so, that's why Smith made an argument some time ago that Michael Cohen pled guilty to something that just wasn't even a crime. It just wasn't even a crime. It's not a crime. But, if a court says that it is a crime, then it, what's, what's the proof of it? The core element, the core, key claim of the crime would be, have to be, "This was because this, this expenditure is a campaign expenditure undertaken for the purpose of helping in the campaign."

[00:20:12] David French: And not even that it's the sole reason to help him in the campaign, but it's a, a key reason, and there, Trump would have to say, to defend it, if we do get to the point where he has to mount a legal defense here, that, "No, no, no, no, I would've made this expenditure no matter what. This is a key, a personal expenditure. I pay off my paramours [laughs]. That's what I do. It doesn't matter if I'm in a campaign or not in a campaign, I'm just gonna pay off my paramours." And then it wouldn't be a campaign expenditure. So that's a, a factual defense, but I think Smith has both a factual element here that he wonders about, but the legal element as well.

[00:20:51] David French: And the legal element is, look, the federal campaign finance law is just really too broad. To the extent that it's been narrowed, the way it's narrowed doesn't encompass this kind of behavior. So, you're gonna have to go back out to the broad aspects of the law that are constitutionally suspect. The, so that's sort of the basis of the idea that, it's just not a crime at all to, to pay off a porn star. It's just not a crime under federal campaign finance law.

[00:21:19] Jeffrey Rosen: Kim, make the best argument, if you could, on behalf of the prosecutors to both of those defenses. David argued that on the facts President Trump will say, "I would've made this expenditure no matter what. I pay off my paramours. It's not a campaign expenditure," and on the law, will say that the law can't be construed to compass, uh, payments, uh, for personal use. What will the prosecutor say, and do you think they'll be convincing or not?

[00:21:45] Kim Wehle: Well, if we set aside this preemption question, that is whether the state law that forbids conspiring to promote a candidacy by unlawful means, that somehow that gets scooped up in the federal law... That's a separate question. Under state law, these arguments wouldn't apply, right? They wouldn't necessarily dictate how that state law underlying would apply.

[00:22:12] Kim Wehle: When you go back to John Edwards that case did go forward. He was not convicted, but there wasn't any law created. But, and I haven't gone back and looked at the docket to see what was raised, but presumably, his lawyers made similar arguments to dismiss that indictment, and it didn't happen.

[00:22:30] Kim Wehle: So as David says, the question of whether this constitutes a violation of federal law is an open question. There's been a lot of critiques of the Federal Election Commission for many years as sort of just not it's meant to be bipartisan in the result, in terms of who's actually on the commission itself tends to be sort of stalemating, and it isn't, some would argue, really vigorously enforcing the law in a way that creates precedents that give us some guidance. And if they do anything, they go after small fish, not the big fish. That's the critique. I don't really have an opinion on it either way.

[00:23:05] Kim Wehle: But from a factual standpoint, I think the distinction with John Edwards was...he reportedly did have an affair. He fathered a child. His wife at the time was undergoing cancer treatments, and he continued to pay, or in this instance, he had someone arrange to pay this woman after the election. So, the idea was, there was a strong factual argument that his intent was really about protecting his wife and his family.

[00:23:32] Kim Wehle: Under the statement of facts here that's filed along with the indictment, Alvin Bragg or the grand jury was persuaded, that there was a meeting early on with David Pecker, who was then the head of *The National Enquirer*, a big player in this. He got immunity in connection with the federal government's investigation, um, and indictment of Michael Cohen, but that he sort of sat down early on and agreed to be the eyes and the ears of the Trump campaign in connection with dealing with all of these whack-a-mole problems that came up that needed potentially to be paid off, the so-called "catch and kill" program.

[00:24:13] Kim Wehle: And the statement of facts goes beyond just the Stormy Daniels payoff. It talks about Karen McDougal, who was a Playboy model, who was paid off \$150,000, as well as; a doorman, unnamed, from Trump Tower, who claimed that Trump had fathered a child. Apparently, that was debunked later, but he was paid \$30,000. And it says that... I'm reading from the statement of facts: "Defendant 1-, when it came to Stormy Daniels, directed Michael Cohen to delay making a payment to Stormy Daniels as long as possible, instructing him if they could delay the payment until after the election, they could avoid paying altogether, because at that point, it would not matter if the story became public."

[00:24:55] Kim Wehle: And of course, was on the heels of the Access Hollywood tape, when he was caught on tape bragging about sexually assaulting women, and so, I think the theory would be, "listen, he was really worried maybe about conservative family value voters and this tight time prior to the election. And then, it goes on to allege that David Pecker and Donald Trump met afterwards kind of to circle back, sort of like that that went well, or to have conversations around it.

[00:25:26] Kim Wehle: So, the narrative here is, this really was about keeping this quiet, and I should just note, and this isn't... This is more of a policy question. It's not really about Donald Trump. But, but just keep in mind, in terms of presidential elections, when we have thousands of federal employees...I've been on one of them that do background checks, or have to have careful disclosures to make sure that, that the government knows whether there's any potential problems with the fitness for office.

[00:25:58] Kim Wehle: For purposes of presidential elections, it is making information that the voters would care about public, so the voters, just through the hurly-burly of the process, the voters will know what's important when they cast a ballot. And so, I think the theory of that, behind this is that, listen, this was important information for voters, and hiding it is, is a problem. Alvin Bragg says, or I suppose he kind of framed it more as, I guess, threshold initially around the idea of the, um, the falsification of records.

[00:26:29] Kim Wehle: He says, "Manhattan is the center of the financial world, and we care about accuracy," but then he also makes the, the other argument that, and it's important that

voters have accurate information, New Yorkers have actual information. So that's the theory that they'd have to persuade a jury mattered enough to find what some would say is a technical argument important enough to, to convict.

[00:26:54] Jeffrey Rosen: David, Kim just noted that the statement of fact alleges that President Trump's meetings with David Pecker to pay off, Karen McDougal and the Trump doorman, as well as Stormy Daniels and his statement to Michael Cohen to avoid payment after the election both support the charge on the facts that he was trying to influence the election. Do you find that statement of facts convincing or not, and do you think a jury might find it convincing or not?

[00:27:20] David French: Well, let me put it this way. If the trial court allows this to go to trial under the prosecution's underlying legal theory, and allows for the prosecution to try to prove that the other crime was the campaign finance violation, and he has to walk into court and make that factual defense, that he did not make those payments to advance, uh, to, to support his candidacy, but rather to keep it out of Melania's ears, um, he's in real trouble.

[00:27:46] David French: I mean, he's just in real trouble. Now, it's not open-and-shut, because a lot of the testimony relies on, uh, Michael Cohen. Uh, you know, a lot of the factual allegations rely on Michael Cohen's testimony, and Cohen is a disaster when it comes to [laughs] honesty. He's just, he's a defense attorney's cross-examination dream, in many ways, but the case does not depend entirely on Michael Cohen. There are timing issues. There are other issues related to, for example, the, the McDougal story, and Pecker, and AMI, and there are lots of moving parts here that make it, I think make it pretty easy for the prosecution to say these payments were related to the campaign.

[00:28:32] David French: That's why I have said the strongest case against Trump is the factual case, the factual case that can we prove that he paid Stormy Daniels hush money to influence the election, and then committed various, uh, acts of, of, you know, falsified various business records to cover that up. That's the strongest case right there. The question isn't so much did that occur, although that is a question, and I think the prosecution has a lot of evidence that it occurred. The question is, was it illegal, uh, to con-... Was it, was it, uh, did it constitute a first-degree, uh, falsification of business records felony, because was the underlying campaign finance violation in fact a campaign finance violation?

[00:29:18] David French: So it's the facts help the prosecution. The law is Trump's strongest defense.

[00:29:25] Jeffrey: Kim, if the case does go to trial, do you think a jury would find it convincing on the facts, or not?

[00:29:32] Kim Wehle: Well, I, again, I tend to agree that it's a strong factual case. I mean, I, you know, there's gonna be a challenge to find a jury that is going to be open-minded, because we are such a polarized country. Um, you don't want anyone on the jury of 12, it has to be unanimous to be, "I wanna see Donald Trump go down under this, enough is enough," and you don't want anyone on there that's, "There's no circumstance under which I'd convict Donald

Trump." So it, there's going to be important for both the defense, and the prosecution, and the judge here to very, very carefully, well, we'd say voir dire the jury.

[00:30:13] Kim Wehle: "Voir" is to, "to say" in French, to ask the questions, and there are experts in nonverbal communication. They'll probably have long sort of surveys they'll have to fill out, but to have be sure that they are open-minded, but we do this all the time. This is the jury system, and, and when they get in the jury room, there's this kind of collective intelligence that comes to play, where they start picking at each other to make sure they're accurate.

[00:30:42] Kim Wehle: So, I think that that will be, that will be fairly, that process will go fairly. As far as the factual case, up until, I think we saw the indictment much of the discussion was around the credibility of Michael Cohen as a witness, and just also, you know, to be clear, you know, prosecutors use cooperating witnesses who have pled guilty to crimes all the time. That's not unusual. This is a very high-profile witness, and if the entire case were based on him, that would really be a problem.

[00:31:12] Kim Wehle: But the new person really is David Pecker and he appears to be first-hand knowledge of Donald Trump's intent. And that's the critical thing in a criminal case. It's, you know, hush money's not illegal. It's the why, assuming the legal theory holds up, but it's the why he paid hush money that would make it illegal. It's the same thing with anti-trust.

[00:31:37] Kim Wehle: If you don't wanna compete with the burger joint across the street, you don't have to, but if you have a cup of coffee with the owner of the burger joint across the street and decide to sort of raise or lower prices, it's that meeting of the minds that, that makes it illegal. And that's, I think now, reading the statement of facts, it's not just Cohen. It's David Pecker, plus there are references to Allen Weisselberg. There's references to bookkeepers within the Trump Organization, um, and Michael Cohen told ABC's George Stephanopoulos last week that there's a lot of documentary evidence to, to follow up on this.

[00:32:16] Kim Wehle: So ,Donald Trump is famously not someone who sends emails or puts anything in writing, but few people know him as well as Michael Cohen. And I agree, we take what he says with a grain of salt, but we're just not gonna know what Alvin Bragg's grand jury's collected unless this case goes to trial, in terms of corroborating, documentary evidence, or maybe even something that's on audio tape. Who knows these days? The fact outpaces fiction when it comes to these storylines these days.

[00:32:49] Jeffrey Rosen: Thanks to both of you for evaluating the legal and factual case so thoughtfully. Let's now turn to the questions of prudence. David, you wrote on March 26th "the potential Trump indictment is unwise." Now that the indictment's been unsealed, do you still feel that, and why?

[00:33:09] David French: More so than ever [laughs].I would say whenever you're asked to write a piece anticipating an indictment y- you're a little bit nervous, because, you know what? You've not seen the indictment [laughs]. And so, you're writing a piece like that anticipating, you know, reading tea leaves, essentially, based on who, what, you know, what are le-, what leaks, uh, uh, have we seen, what witnesses have we seen.

[00:33:33] David French: And the thought was, and my, my problem was, and the way I phrased it in the piece was, this isn't frivolous. It's unwise, and, and, and it's not frivolous for, uh, a lot of the reasons that, um, Kimberly just laid out, that there is a legal theory here. And it's not just a legal theory that was concocted, sort of pie-in-the-sky. It's a legal theory under which at least two people have been prosecuted, John Edwards, unsuccessful prosecution, Michael Cohen, successful prosecution, but not because of court rulings, but because of a guilty plea.

[00:34:04] David French: So this is not a frivolous charge. In my view, it's unwise, for many of the reasons that I've just described about the ambiguity of the law, the sort of bank-shot aspect to the case, where you're trying to tie a, what I would say is a pretty well-established falsification of business records misdemeanor to another crime that any one of the other crimes is what I would consider to be a neat or clean prosecution at all. It's a difficult case to make.

[00:34:38] David French: Now, prosecutors bring difficult cases all the time. There's no question about that. I have a problem with the extent to which prosecutors will bring difficult cases. I'm a believer in something called the rule of lenity, where if the law's ambiguous, then it should be resolved in favor of a defendant. We should be prosecuting people for laws that are clearly easy- easily able for the ordinary person to understand and to follow.

[00:35:06] David French: Um, and I, to show a contrast between this charge and what could be coming with Trump, that I think easily fits within the construct of a straightforward prosecution, let's just talk about Georgia, where, you know, Trump is on tape asking for 11,780 votes, and then not implying that the secretary of state of Georgia could face a criminal, uh, prosecution if he didn't deliver the votes, but coming very close to explicitly threatening that there could be a criminal prosecution of the secretary of the state if he didn't come forward with the votes.

[00:35:41] David French: And then, there's a Georgia statute that prohibits solicitation to commit election fraud. I mean, that's just straightforward, A, then B, then C, very straightforward, same with mishandling classified documents, same with obstruction of justice tied to the mishandling of the classified documents. There, it's all straightforward. Here, it's, I would classify it as a double bank-shot, and I don't like double bank-shots for anybody, including former presidents, who are not above the law, but they're not below the law either [laughs].

[00:36:13] David French: So I would be uncomfortable about this prosecution for anyone, including a former president.

[00:36:19] Jeffrey Rosen: Kim, do you think that the prosecution was wise or not?

[00:36:23] Kim Wehle: It's really hard to, to say. I think that there is a, a good-faith legal basis and factual basis for bringing it. Uh, I didn't hear, um, and I didn't read sort of the critiques at the time on the argument, um, that David mentioned, that Michael Cohen pled guilty to something that wasn't a crime. I mean, there was not this outpouring, this outrage of how could, you know, the federal government in that instance bring such a petty, frivolous, uh, charge against someone, um, which to me feels like, you know, presidents have a, there's a higher standard to indict presidents.

[00:37:00] Kim Wehle: I don't, I'm not sure... I mean, we can talk about that, um, if that, that's fair or not. You know, I know in the *New York Times*, Nicholas Kristof wrote about Ulysses S. Grant being arrested in his horse and buggy for a traffic violation when he was president. That didn't come to light until later. Um, but you could make the argument that, you know, people with that kind of power should actually be held to a higher standard, not a lower standard.

[00:37:24] Kim Wehle: I think it's fair to expect additional indictments to come. I hope there wasn't any coordination. That's problematic, if the various offices, just for our listeners... Manhattan is not, you know... The Manhattan DA, Alvin Bragg, used to work for the Southern District of New York, the Justice Department, but now, he does not. He's not part of the federal government, um, so this was a determination made by an elected official in Manhattan and a jury of Donald Trump's peers that is the grand jury, individuals within Manhattan. And he will be tried by a j-, a different jury, a petit jury, a trial jury, if it gets to that point, of his peers.

[00:37:58] Kim Wehle: So that, that, to me, is at their discretion, and the legal, the legal process will play out as to whether there's sufficient evidence and, and a good-enough legal theory to convict. And likewise in Georgia, for f-, for Fani Willis and the, the, uh, Fulton County DA, I mean, that's a local decision in the state of Georgia. The difference, legally, between the two, and this is my next book I'm writing about the president's pardon power, is, you know, a Republican governor could, could pardon Donald Trump in Georgia. Um, presumably, that would not happen in New York, and there would be, I think, pressure on, given the Gerald Ford precedent of pardoning Richard Nixon that was prior to any indictments, there would be pressure on any president, including Biden, to do that if, if, if the federal crimes were to f- ultimately follow.

[00:38:44] Kim Wehle: One thing I should say, though, is, you know, one, one thing this has accomplished, for better or worse, is the shock of indicting a former president is over. Um, that, that will be in the rear view mirror. We have a very short attention span, in terms of shock and awe, as well as the news cycle. And so, if, if it, if Jack Smith does actually indict for much more serious offenses relating to Mar-a-Lago and January 6th, and of course, there's also a third, a third investigation ongoing about the Truth Social, um, initial public offering, and whether that was illegal. The DOJ and the SEC is looking at that as well.

[00:39:17] Kim Wehle: So there's three criminal investigations ongoing. I think the debate will be less about whether this, um, whether, uh, it's okay to indict a president, and for what, and more about the merits, and how this affects the election. And, and I certainly have some thoughts on that, um, as well, just in terms of where we're going, and the trajectory of democracy with the GOP behind Donald Trump, who's a man who has said that if he's in office, he's going to, uh, gut the, the defense industry, department, and the national security agencies, and put his, his supporters in, in place.

[00:39:50] Kim Wehle: And he's also said when he was in office the last round that he might not honor the two term limits under the Constitution for presidents, and I don't know. This is a man that tells us what he thinks, and he follows up on what he has to say. So I, I'm not saying that'll happen or not, um, but if, if, say he does not win. Um, you know, it, it's foolish to think we wouldn't have another contested election, and the last one really threw the, the country into

tremendous trauma. So, so the stakes for this process, um, if it could affect the race, I think, matter for, for wherever you are on the political spectrum, as well as the integrity of the Constitution and the presidency moving forward.

[00:40:27] Kim Wehle: Now, that's not necessarily something Alvin Bragg should be doing, um, but the, but that's the way I see the implications of this.

[00:40:35] Jeffrey Rosen: David, let's think about the implications for future presidents. Um, is there a distinction between state and federal indictments? Is there a special danger of state-elected DA's from across the country hauling former presidents into court, and what might some of the constitutional implications of this, uh, indictment be?

[00:40:57] David French: Yeah, that's a really good question. I mean, I do think there is a possibility of abusive prosecution at the local level. I think that's a possibility. I do not necessarily think it's a probability, nor do I think that the idea that there could be state abusive prosecutions means that meritorious prosecution shouldn't be brought [laughs]. So meritorious cases should be brought, and then we should condemn those attempts to bring frivolous cases.

[00:41:29] David French: There's a lot of talk online about, "Okay, Republican prosecutors, when are you gonna indict Joe Biden?" Um, a lot of that is just extremely overblown. Some local prosecutor, say, in Tennessee has no conceivable basis [laughs] for indicting Joe Biden at all. And so, um, I, I understand the slippery slope argument, but the slippery slope argument is not a reason at all to place a president above the law.

[00:41:59] David French: And, look, we have prosecuted former vice presidents. We have prosecuted governors. We have prosecuted federal judges. Goodness knows we've prosecuted members of Congress, and the Republic has been fine. In fact, the Republic is better for those prosecutions. If we had a rule, uh, a, a system where political leaders, the higher they ascended into the political firmament, the more removed they were from the rule of law, you would not have a constitutional republic very long.

[00:42:31] David French: So to me, the idea that a president is, should be immune from state or local prosecution, or federal prosecution, is an anathema to the constitutional order. So then, the question is, is the prosecution meritorious? That, that's, that's the key question, and as I've been, you know, looking at the various Trump investigations, the Georgia investigation, this Jack Smith special counsel investigation strike me as extremely problematic for Trump, extremely.

[00:43:06] David French: Now, doesn't mean an indictment's coming, you know, and, uh, let me, if I can just engage in some dime-store psychology for a moment that is worth exactly nothing, um, part of me wonders if the widespread sort of side-eye that I'm seeing kind of across the political spectrum about the Trump indictment in Manhattan... You're seeing a lot of people on the left, who are no fans of Trump, saying they're not so sure about this indictment. I'm no fan of Trump, even though I'm not on the left. I'm no fan of Trump either. I think it's unwise.

[00:43:40] David French: I wonder if that's raising an additional barrier for Fani Willis in Fulton County. I want her to look at the facts and the law, and indict if the facts and the law

indicate an indictment that would occur for anyone else. But I am not nearly as worried about abusive legal process as I am worried about the effects of exempting a president from legal process.

[00:44:07] Jeffrey Rosen: And Kim, how do you see the various prosecutions? Is there a greater danger of abuse at the state level from elected DAs, and do you think that the standard for indictment of former presidents should be higher or not?

[00:44:22] Kim Wehle: Well, you know, I also was an associate independent counsel on the Whitewater investigation. There was, you know, \$80 million, spent on that under the late Ken Starr. You know, Brett Kavanaugh, others were on the team, brilliant, brilliant lawyers, and there were, I think, 15 prosecutions, and they were serious, but nothing relating to the Clintons. And I just use that as an example of prosecutors are bound by not just the law, but the facts.

[00:44:50] Kim Wehle: So, uh, you know, the idea, um, the argument that while prosecutors can come up with anything, uh, and find a reason to prosecute, we have an independent judiciary also in this country, where judges at the federal level are there for life. They cannot be except by impeachment, they can't be fired. Their salaries are protected. At the state level, there are, there are elections, but, you know, in this moment still, and I think it's a, something for our country to be very proud of, our judicial system has its faults, particularly if you're low-income in this country and can't afford good lawyers. But, but due process does make sure that the- there are standards that are met. There are procedures. There's evidentiary standards. There's burdens of proof.

[00:45:32] Kim Wehle: So I think it's unlikely that this is going to e- end up sort of this ping-pong, anyone starts running for office, and then you do a whistle-stop through Wyoming, and the next thing you know, you're being hauled into a criminal court there. I also think that there would be, you know, a lot of political pushback, as there should be. People don't want that. This is just a different animal, and I hope it's the last time in my lifetime [laughs] we deal with this.

[00:45:56] Kim Wehle: I mean, the reason we're in this constitutional quagmire is not because of the, let's be clear, the Manhattan grand jury, as presented evidence by Alvin Bragg and his team. It's because Donald Trump, um, engaged in a lot of sort of norm-breaking and problematic behavior that has, has pushed the guardrails of democracy in many, many, many ways. Now, maybe that's a good thing. There'll be a correction. It happened after Watergate. Lots of legislation to shore up some of these guardrails didn't happen under the first few years of the Biden administration and Democratic Congress in my view, and that's unfortunate.

[00:46:33] Kim Wehle: But, I don't think we're going to see, you know, just the floodgates open, where it becomes open season, because the facts and the law won't allow that, prosecutors to do that. Those cases will get thrown out.

[00:46:46] Jeffrey Rosen: Well, it's time for closing thoughts in this great discussion. David, you also wrote a piece right before the indictment saying "the rule of law depends on the Republicans," and that accepting the judicial process would be crucial to sustaining the rule of

law. Do you still feel that, and how do you see the scenario moving forward, as we face the possibility of multiple indictments? What is the best way to preserve the rule of law?

[00:47:13] David French: Well, the rule of law depends on substance and process. So, in other words, just laws and just process. And if you feel as if you've been charged unjustly, you don't get to opt out of the process [laughs]. There is a mechanism for defending yourself against laws, or against prosecutions you feel are unjust. We have a process for that, and the point that I was making in that piece is, immediately after the Trump indictment was announced, you began to see some really disturbing commentary from very prominent people.

[00:47:45] David French: You saw, Tucker Carlson saying, "Well, you don't wanna, essen-, you know, you don't wanna be giving up your AR-15s now." You've had Glenn Beck on Tucker Carlson's show saying, "We're gonna be in a civil war. We'll be at war with each other by 2025 or so." You had this, uh, presidential candidate, Vivek Ramaswamy saying a national divorce is coming. You had Ron DeSantis saying, "I won't assist in extradition," which is actually not his call to make [laughs].

[00:48:13] David French: And all of these are where you see Republicans, who are angry at the substance, essentially saying, "Well, we may opt out of the process," and that is fundamentally opposed to the rule of law. So, I believe the charges were unwise, but you know where you contest charges that you think are, that lack merit? You contest them in court, and I was very disturbed to see Donald Trump call out the judge, call out the judge's wife and family. I was very disturbed to see prominent figures sharing pictures of the judge's daughter online. That, that is a, raising the specter of, of threats, and we know that... Jeff, we know the environment we're in. We know the environment we're in, and this is a time when responsible leaders call for calm, and call for people to respect process.

[00:49:07] David French: And as I wrote, there's a reason why defense attorneys say, "We look forward to vindicating our rights in court," rather than saying, "We're glad the public is arming itself," right? Because the process demands that we comply with legal procedures and contest this in court, and I'm very worried, especially post January 6th, not so much of a mass rally attacking a Manhattan courthouse in the way we saw in D.C., but I'm very worried about things like lone wolf violence, like we saw after the Trump search warrant, when someone attacked an FBI facility outside Cincinnati. That's what worries me.

[00:49:47] Jeffrey Rosen: The process demands that we comply with the legal process and test this in court. Kim, last word in this important discussion is to you. How do you see the best way of preserving the rule of law moving forward?

[00:50:01] Kim Wehle: Well, there are 400 million guns in this country, and, and we can't ignore, um, that the FBI has identified domestic terrorism as the number one problem. So, I agree with that. It's very serious business, to start attacking the process, and for, for people that are, are listening, um, we're so polarized. I was very taken by Judge Michael Luttig's conversation recently in a podcast. Of course, he was an icon of conservative jurisprudence, a protégé of Justice, um, Antonin Scalia.

[00:50:33] Kim Wehle: He tweeted when he was told by someone within the White House that he knew that Mike Pence was being courted by John Eastman to not certify the election, uh, he tweeted that that would be unconstitutional, and some say can, can take some credit for, for saving democracy on that very thin, in that moment, where we were hanging on by a thin reed.

[00:50:58] Kim Wehle: He would say it is time for the GOP in particular to come forward, uh, and stand behind the rule of law. It's not up to the Democrats at this point. And he used this phrase that Americans are in a, quote, "catatonic moral stupor," and I'm becoming to believe more and more that we need to reach into our own sense of values, and ethics, and integrity in this moment, and not so much go with politics, and what tweets are, and, and the instigation of violence and anger, and let the process play out.

[00:51:29] Kim Wehle: And again, I'll just reiterate. I mean, the rule of law is still standing in America. Lawyers, judges, and rules of evidence are here to protect everyone's rights, and that's the piece that, regardless of where you are on the political spectrum, we should stand behind both for Donald Trump and for anyone else who is embroiled in the criminal justice system.

[00:51:50] Jeffrey Rosen: Let the process play out, and avoid what Judge Luttig called "a catatonic moral stupor." Thank you so much, David French and Kimberly Wehle, for a superb discussion of this urgently important, uh, topic. In your calm wisdom, both of you have shed much light on a, a topic about which there's a lot of heat. David, Kim, thank you so much for joining.

[00:52:11] Kim Wehle: Great to be here.

[00:52:12] David French: Thanks so much, Jeff.

[00:52:15] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Bill Pollack, and Sam Desai. It was engineered by Greg Scheckler. Research was provided by Sofia Gardell, Emily Campbell, Sam Desai, and Lana Ulrich. Please recommend this show to friends, colleagues, or anyone who's eager for a weekly dose of civil dialogue and constitutional debate, and always remember that The National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to civil dialogue of folks like you who are inspired by our non-partisan mission of constitutional education and debate. It's so meaningful when you give donations of any amount, \$5 or \$10, or more, so please do that. Support the mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support the work, including the podcast, at constitutioncenter.org/donate. On behalf of The National Constitution Center, I'm Jeffrey Rosen.