

TRUMP ORGANIZATION'S OTHER NEW YORK STATE CASE

[NB: check the byline, thanks. /~Rayne]

Because we're running in excess of 500 comments across the last three threads about Donald Trump's indictment and arraignment in Manhattan, I want to post another thread for more discussion.

I'll remind you now I'm not a lawyer and I don't have either Marcy's holographic memory or her skills at fine reading, nor bmaz's experience representing criminal defendants.

But I want to bring up a couple subjects we haven't discussed which are related to D.A. Alvin Bragg's criminal suit against Trump.

First, only one member of the emptywheel community made a passing reference to Trump's post-arraignment speech. They didn't mention Trumps' threats.

Yes, that's plural Trumps, because Donnie Jr. and Eric posted in social media a photo of New York Supreme Court Justice Juan Merchan and his daughter on the day of his father's arraignment. They targeted Merchan's daughter for having worked for Kamala Harris' campaign.

You'll recall in July 2020 that U.S. District Court for the District of New Jersey Judge Esther Salas' family members were attacked at their home – her husband was shot three times and her son shot and killed. The attacker was an aggressive anti-feminist who killed himself shortly after the attack on Salas' family. He had been able to locate Salas' home using her personal information publicly available online.

Last November, Congress passed the Daniel Aderl Judicial Security and Privacy Act of 2021, named after Salas' son, to protect the personal information about judges on the internet.

Trump himself attacked Judge Merchan verbally in his speech from Mar-a-Lago after returning from his arraignment. He'd been strongly cautioned against threatening speech during his arraignment, but he fulminated anyhow about Merchan being a "Trump-hating judge with a Trump-hating wife and family," repeating the same disparaging remarks he'd made earlier the same day over social media. He also targeted Merchan's daughter.

Apart from the obvious potential incitement to violence the Trumps attempted against Judge Merchan and his family, was this a move to manipulate the Manhattan case?

Being a state jurist, Merchan and his family are not protected by the federal Judicial Security and Privacy Act. But I wonder if these threats made online and on an interstate basis were intended not just to influence the judge or D.A. Alvin Bragg.

Are there potential federal repercussions?

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Secondly, the emptywheel community and the legal commentariat at large have sifted through Trump's indictment and the statement of facts. The amount of related discussion across social media has been exhausting.

However community member c-i-v-i-l shared a link to a thread by University of Texas Professor of Law Lee Kovarsky which checked me short and made me rethink the 34 count indictment.

You can catch the thread on the Wayback Machine at this Internet Archive link (I won't make you go to Elmo's House of Doge Nazi Bar for this).

What gave me pause was Kovarsky's analysis of preemption and the matrix of possible underlying crime(s) which Bragg did not disclose but underpin the charges Bragg filed against Trump.

Here's what the matrix looked like, with Not-Trump = Pecker, Cohen, etc. according to Kovarsky:

(1) federal tax law violation by Trump	(2) federal tax law violation by Not-Trump
(3) state tax law violation by Trump	(4) state tax law violation by Not-Trump
(5) federal election law violation by Trump	(6) federal election law violation by Not-Trump
(7) state election law violation by Trump	(8) state election law violation by Not-Trump

Kovarsky made a lot of sense to a non-lawyer like me as he pointed out where others' arguments about preemption are weak and what's most likely as a preemption.

And then it clicked, all the tumblers fell into place.

In my uneducated opinion, the underlying crime isn't one which can be preempted by federal law.

It's a crime which has been prosecuted by the state of New York already.

It's a crime which has already been prosecuted by the Manhattan D.A.

It's a crime which explains the narrow emphasis on *business* records and falsification of the same, and a crime which relied on falsified *business* records.

And the crime looked like this:

SIXTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuses the defendants the Trump Corporation, d/b/a the Trump Organization, Trump Payroll Corp., d/b/a the Trump Organization, and Allen Weisselberg of the crime of CRIMINAL TAX FRAUD IN THE THIRD DEGREE, in violation of Tax Law § 1804, committed as follows:

The defendants, in the County of New York and elsewhere, during the period on or about April 10, 2017, committed a tax fraud act and, with the intent to evade any tax due under the Tax Law, and to defraud the state and any political subdivision of the state, the defendants paid the state

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and a political subdivision of the state, by means of underpayment and receipt of refund and both, in a period of not more than one year in excess of ten thousand dollars less than the tax liability that was due.

The defendants committed a tax fraud act by willfully engaging in, and willfully causing another to engage in, the tax fraud act set forth in Tax Law § 1801(a)(2), in that the defendants knowing that a return contained any materially false and fraudulent information, and omitted any material information, filed and submitted that return, to wit, a 2016 New York Resident Income Tax Return (Form IT-201), with the state and any political subdivision of the state, and with any public office and public officer of the state and any political subdivision of the state.

SEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuses the defendants the Trump Corporation, d/b/a the Trump Organization, Trump Payroll Corp., d/b/a the Trump Organization, and Allen Weisselberg of the crime of CRIMINAL TAX FRAUD IN THE FOURTH DEGREE, in violation of Tax Law § 1803, committed as follows:

The defendants, in the County of New York and elsewhere, during the period on or about April 2, 2018, committed a tax fraud act and, with the intent to evade any tax due under the Tax Law, and to defraud the state and any political subdivision of the state, the defendants paid the state and a political subdivision of the state, by means of underpayment and receipt of refund and both, in a period of not more than one year in excess of three thousand dollars less than the tax liability that was due.

The defendants committed a tax fraud act by willfully engaging in, and willfully causing

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another to engage in, the tax fraud act set forth in Tax Law § 1801(a)(2), in that the defendants knowing that a return contained any materially false and fraudulent information, and omitted any material information, filed and submitted that return, to wit, a 2017 New York Resident Income Tax Return (Form IT-201), with the state and any political subdivision of the state, and with any public office and public officer of the state and any political subdivision of the state.

These are counts for which *Trump Organization* and its CFO (TO CFO) was already convicted and is now serving time in Rikers Island.

It's the April 2017 and April 2018 tax returns and related supporting documentation filed based on falsified business records for which TO CFO Allen Weisselberg has already been charged.

But so has the Trump Organization – the same organization which was responsible for the financial records of Donald J. Trump Revocable Trust, and the financial records of Donald J. Trump.

This January both Trump Corporation and the Trump Payroll Corporation were assessed a total

of \$1.6 million in fines for their tax fraud as part of Trump Organization.

Again, I'll remind you I'm not a lawyer, don't even play one on TV, though I've done bookkeeping for several small businesses in my career and worked for a lawyer and CFO. I've shared my speculation here knowing I'm going to get a drubbing from my partner in (im)moderation bmaz.

I don't even know if I can muster much defense of my own argument here except that Weisselberg's case is one which hasn't been discussed much at all since Tuesday morning.

Yet it was reported on March 30 that Weisselberg had "dumped" his Trump-funded lawyer Nicholas Gravante or that the Trump organization had fired Weisselberg's lawyer. Gravante was apparently too willing to let Weisselberg talk with Bragg's office.

Weisselberg is now represented by Seth L. Rosenberg who was a former member of the Manhattan D.A.'s office; Rosenberg has been with Clayman & Rosenberg LLP since 1986.

The late shuffle of attorneys could be a sign that it is the tax fraud for which Trump Org has already been charged that is the predicate to Trump's 34-count indictment.

This situation would explain why Bragg would have been reluctant to outline the underlying crime when the 34 counts against Trump were filed and Trump was arraigned. Trump has already been manipulating Weisselberg through the legal representation Trump organization has been providing him; it's reasonable to assume this is an attempt to throttle Weisselberg's possible testimony against Trump.

What other crime might have been the predicate upon which the Manhattan D.A.'s charges would have relied if not the tax fraud charges against Trump Organization?

What other underlying crime would avoid

preemption?