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By MICHAEL MCAULIFFE  
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Now that the Manhattan district attorney has secured indictments of the Trump organization and one of its top executives alleging financial crimes, the nation awaits the prosecutors' next moves. Charging a subordinate and Trump's corporate entity are unmistakable signs that the D.A.'s ultimate focus is on the principal: Donald Trump.

Other investigations that could reach the former president are ongoing in New York, Georgia, Washington and possibly elsewhere. The opaqueness of such investigations, grounded in necessary secrecy, leaves us wondering what law enforcement officials are relying on when, or if, they decide to charge Trump. An easy answer does not exist, but prosecutors should be guided by several critical considerations.

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The starting point is the proposition that the desire to prosecute a person is not the same as the justification to prosecute. That may come as a disappointment to those who loathe Trump. But if the desire is based on information and facts, then prosecutors' pursuit of, say, a suspected gang member or possible rapist can apply, with some changes, to white-collar investigations — including a former president.



Michael McAuliffe (Special to the Sun Sentinel)

Authorities must possess enough admissible evidence to prove the elements of an offense, usually involving both conduct and intent. The primary purpose of a criminal charge is punishment for specific illegal conduct and to deter similar conduct in the future.

In the Trump investigations, the evidence of a crime (whether tax fraud or something more dramatic) needs to be compelling. The evidence must establish with clarity what was illegal and why Trump is responsible. We don't know what information the authorities have gathered so far, but the practical standard to bring a criminal case must be rigorous, given the intense

scrutiny that will occur of any attempt to imprison Trump.

The world will use any criminal case against Trump to make lasting judgments about America's rule of law. The irony of that assertion is notable given Trump's repeated exhortations of summary punishment for any and all who disagree with him.

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Even with a high evidentiary threshold, prosecutors can still use their broad discretion to decide Trump should be a defendant. For example, prosecutors routinely evaluate whether a suspect poses a threat to others in deciding whether to move forward with a case. The gang enforcer's next victim is best protected if the offender is arrested before he attacks again.

In white-collar criminal cases, the notion of future threat becomes more nuanced, less about physical harm and more about a continuing pattern of misconduct. Trump's continued indiscriminate use of demonstrably false information in an attempt to subvert an institution of democracy such as elections becomes a legitimate factor in deciding whether to charge him for past illegal behavior.

Framing Trump's conduct as part of an overall pattern of deceit and false information is well within a prosecutor's discretion even if Trump's most recent conduct is not itself charged. In essence, a prosecutor can choose to charge only some misconduct and is free to consider the target's overall behavior in reaching that decision. How is Trump any different from the con artist who refuses to stop scamming people?

The likelihood of securing a conviction looms large. While approximately 95 percent of prosecutions result in some type of guilty plea or verdict, in certain types of cases such as police misconduct or public corruption, high expectations of a conviction are rare.

Righteous cases that are difficult still must be brought. If state and federal prosecutors in the Jeffrey Epstein matters were more courageous and less tentative in the face of aggressive defense lawyers and arguably imperfect — though very real — victims, one of the most significant miscarriages of justice in recent memory might have been avoided.

That type of unwarranted prosecutorial reticence should not occur with the Trump investigations. If there is sufficient evidence that Trump committed crimes, then his continued misconduct should support the decision to charge him. Prosecutors need to have faith that the best final arbiters of allegations against Trump could be a duly constituted jury in a public courthouse, not the private conference rooms of a district attorney and the U.S. attorney general.

*Michael McAuliffe is a former federal prosecutor at the U.S. Department of Justice and as a supervisory assistant U.S. attorney in the Southern District of Florida. He also served as state attorney for Palm Beach County. He is an adjunct professor at William & Mary's Law School and a senior lecturing fellow at Duke University School of Law. His novel, No Truth Left To Tell, was*

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