

***The Cutting Edge:
Current Issues in White Collar Crime and Corporate Governance***

Episode 1: “Why Wasn’t Donald Trump Criminally Prosecuted in New York? What Happened and Why?”

John C. Coffee Jr.: This is *The Cutting Edge: Current Issues in White Collar Crime and Corporate Governance*. I’m John Coffee. I’m a law professor at Columbia Law School, and I will be serving as the moderator of this series of programs. These programs will focus on current issues in white collar crime and corporate governance, with a special focus on those that involve significant ethical and professional issues. I will be joined in this podcast by Judge [Jed] Rakoff, who is a senior United States district judge in the Southern District of New York and also an adjunct professor at Columbia Law School. Put simply, Judge Rakoff is greatly respected by the bar, by his fellow judges, and by the academic community. [You have] got to take that on faith, because I don’t have time to cite all the evidence. But more relevant is the fact that Judge Rakoff is a former federal prosecutor who’s had significant experience on both sides of the aisle in the field of white collar crime. He will be joining us in most or all of these podcasts as our lead commentator and our resident philosopher king.

OK. Now, today’s first episode has a title: “Why Wasn’t Donald Trump Criminally Prosecuted in New York?” What happened and why? OK. In it, we are focused on prosecutorial charging discretion. Prosecutors do not always agree on many things, but a particular topic for some disagreement is what level of confidence prosecutors should have before deciding to indict. Some prosecutors want a case to approach a near certainty of conviction—a so-called slam dunk standard. Others strongly believe that if they are convinced the defendant is guilty and that they have sufficient and legally valid evidence to withstand an appeal and gain a conviction, they can and should proceed in the face of greater risk. And probably they should particularly do so in cases where a failure to prosecute might seem to signal that some privileged person was, quote, above the law, quote. OK.

Such a dispute may underlie the recent decision of New York County District Attorney Alvin Bragg not to continue an investigation of Donald Trump and to let the grand jury expire. This investigation had focused on potential charges that Trump had falsified his business records, leading to an overstatement of the assets of the Trump Organization in violation of New York state law. Former District Attorney Cyrus Vance had initiated this investigation and basically approved it to go forward to the indictment stage before his term expired, on December 31, 2021. The Trump Organization and its financial manager, Allen Weisselberg, were indicted on multiple counts of tax evasion. What happens next and why is the focus of this podcast.

Now, our special and critical guest today is Mark Pomerantz, who was asked by Cy Vance to oversee the Trump investigation, along with another distinguished litigator, Carey Dunne. I could also introduce Mr. Pomerantz at great length, but I have to keep it short in view of our time limits by saying that no one—no one in this city—has had more experience at senior levels in prosecuting or defending major white collar criminal cases. At various times, he’s led the criminal division of the Southern District of New York and also its appeals office, and he has been a senior partner at the Paul, Weiss law firm, one of the most distinguished law firms in New York or the country. Oh, and incidentally, early in his career, he was a law professor at Columbia Law School until he left for the more exciting world of trying cases. Boy, he succeeded at that—he found them. Now, Mark, we want to thank you for your participation, without which this program would be quite impossible.

Mark Pomerantz: I’m glad to be here.

Coffee: Let me start at the beginning, Mark. You had just retired from your partnership with Paul, Weiss, and were probably living a more relaxed life with no pressure on you and plenty of time for family and leisurely pursuits, including golf, I understand. Now, all of a sudden you find yourself overseeing a complex and unprecedented investigation into the business practices of a former president. In your own words, how did this transition happen?

Pomerantz: Well, I was retired. I had been retired, actually, for some time. And I did devote a little bit of effort to playing golf, which led to my friends asking why I left off

doing something I was good at to take up something I was so bad at. But I was enjoying life, and what happened was the district attorney had convened a little working group of outside lawyers in connection with the district attorney's litigation in the Supreme Court of the United States. He'd served a subpoena for Trump's tax returns and accounting records. That case went all the way up to the Supreme Court of the United States, and Cy Vance had convened a group of outside lawyers with Supreme Court experience to help prepare for that argument, which Carey Dunne argued and won. And having convened a group of outsiders to advise on the court argument, the thought was that the office would convene a little group of outsiders thereafter to advise on the investigation. And I got asked to take part in that group, along with other lawyers. We had several conference calls. And then I got a telephone call from Cy Vance and Carey Dunne asking if I would consider getting sworn in as a special A.D.A. to help investigate. And I said I would, first of all, because it was interesting and exciting. Criminal law is a practice area that involves drama, and it involves all the complexities of human behavior. The variations—little variations in states of mind and conduct—can have huge legal implications. And so I thought to myself, "What could be more dramatic, more exciting, more complicated than the investigation of a former president, somebody who had millions of supporters and also millions of people who hated this guts?" I also thought the investigation could use some focus and maybe I could make a difference. So I agreed to get involved and then went to work.

Coffee: Now, in terms of timing, how long did you have, before Cy Vance's term expired, to conduct an investigation? And do you feel over this time you were able to conduct an adequate investigation and get a good understanding of the case and its issues?

Pomerantz: Sure. Well, when I joined the effort, it was late January of 2021. Cy had not yet announced that he would not be seeking another term. That announcement came in March of the year 2021. But in any event, we had the rest of Cy's term, of course, to investigate. And perhaps more importantly, there was no thought that the transition from one district attorney to another means that the work of the office would stop. So there wasn't really a calendar by which the work had to get done. And nor should there have been, I think. In any event, we did the work, and as it happened by the end of Cy Vance's tenure, we thought we had done a reasonably adequate investigation. There's

always more work you can do, but everybody working on the case and on the investigative team thought we knew what we had, the basic contours of what had happened were in place, and the time was right for making a decision on whether to go forward.

Coffee: Now, in terms of making a decision, let me get to focus. My understanding is, and you can correct me, that you did have a final meeting in the last weeks or months of Cy Vance's term at which you analyzed all of the evidence, presented it to District Attorney Vance, and at this meeting, he both was convinced, satisfied and told you to proceed, although you weren't in a position to indict at that point. Is that a fair statement that you convinced this longstanding district attorney who's made many of these decisions?

Pomerantz: Well, we certainly had a meeting. We had many, many meetings during the course of the year leading up to the end of Cy's tenure. He was involved intimately throughout the investigation. He sat in on witness interviews, on update calls. He sat in on grand jury testimony. He was constantly updated via email. I think it's fair to say he was all over the case. And then as we moved toward the end of the year and the end of his tenure, we decided to have kind of a more rigorous analysis of the facts, the law, the strong points of the case, the weak points. And we did that over the course of several days. One meeting involved reconvening a panel of our outside experts to hear us go through the proof and the theory of the case and the applicable law and advise whether they thought it hung together. And then, of course, we met internally as a group. So those were long and very focused meetings. And a little bit different. We'd had many, many meetings, but when we met with the outside advisers, there was the unprecedented step of actually having refreshments at the meeting. Then you knew for sure it was a special meeting. You know, in private practice, when we had meetings at Paul, Weiss, there were always cookies and big bowls of popcorn and soda and all the accoutrements. The D.A.'s office doesn't really work like that. But when we had the outside experts in, we actually had sandwiches, which was a gross departure from the normal way business got conducted.

Judge Jed Rakoff: So what you're saying is that D.A.s are lean and mean?

Pomerantz: They were. Well, they're certainly lean.

Coffee: Now we have one constraint. We cannot discuss the evidence presented to the grand jury or any dialog with the grand jury, because that is by, law, confidential. However, I think I can ask you whether you were personally satisfied that you had sufficient evidence to conclude that Mr. Trump was guilty, in your judgment, and that you had sufficient and valid evidence that made conviction a probability. Can you respond to that?

Pomerantz: Yeah, I can. I was certainly myself personally satisfied that Trump had committed crimes under the New York penal law that warranted prosecution and that the evidence was sufficient to convict. And I should say, as I think I ultimately said—turning the clock ahead when I resigned from the investigation—that was not just my peculiar view. The view of the investigative team was that Trump had committed crimes, and I don't think there were dissents from that view. The problem was fitting his conduct within the pigeonholes of the New York penal law. It was very easy to do that under federal law, but, of course, we weren't sitting as federal prosecutors. But even under the New York penal law, I thought that, A., he was factually guilty and also that [B.] the evidence was sufficient to convict, and indeed that if tried before an impartial jury, it was likely that there would be a conviction.

Coffee: Well, you have answered everything there, but for a moment, just a very brief moment, let me be a devil's advocate. Some have pointed to possible problems in your case. One may have been the reliability of Mr. Michael Cohen as a potential witness for the prosecution because Mr. Cohen, who had been Trump's personal attorney and had gone to prison, had later feuded with Mr. Trump and might be seen as having a bias against him. That's one possible problem. Another might have been that the banks who saw these financial records were sophisticated, might have conducted their own research, and did not wholly rely on Trump's financial statements. And finally, the banks did not clearly suffer losses. How concerned were you with these kind of problems?

Pomerantz: Well, all of those points were discussed at length, you won't be surprised to learn. You know, any time you're considering a prosecutive decision, you want to focus and you do focus—experienced prosecutors ask themselves about the problems

in the case, and you're always concerned because virtually no case is perfect. And this case had issues, certainly. Michael Cohen, you know, you start with the fact that he had pleaded guilty to perjury. And on the laundry list of things you hope to see for any testifying witness for the people, a perjury conviction is not on the list of things you most want to have, to say the least. And everybody understands. He was not bashful about wanting to see Donald Trump convicted. Did he have an axe to grind? He certainly had an axe to grind. When he came out some years earlier in his testimony before Congress, he began the testimony by saying Donald Trump is a racist, a con man and a cheat. He had an axe to grind. But the key when it comes to a cooperator, of course, is corroboration. And when it came to the fabrication of Trump's financial statements, again, without going into the details, we thought we had lots of it.

Now, with respect to the banks, yes, the banks had the ability to do their own review of Trump's financial statements. And as you point out, banks had not lost money in connection with loans that had been extended to Trump. But financial loss was not required in connection with the charges we were anticipating. We did have the fact that the banks, of course, had parted with money in the form of hundreds of millions of dollars in loan proceeds. And we anticipated the ability to elicit testimony that those loans would not have been made, except for the fact that Donald Trump gave the banks personal financial statements and attested to their accuracy. So, yes, it would have made for a stronger case if we could point to a bank that had loaned money on the basis of a false financial statement, and then the loan had gone bad. But our view was that we didn't need that kind of evidence to sustain the charges we were contemplating to bring.

Coffee: Let me summarize the story so far. As I understand it, you were convinced, Cy Vance was convinced, the rest of the staff was convinced that you had a strong case and that there was very substantial evidence. Now, in January of this year, Mr. Bragg comes into office. This case has received a good deal of publicity in the press and obviously would have a significant, even historic, impact. The press would be dying to follow it. What contact did you have when Mr. Bragg came into office about this case?

Pomerantz: I'm going to back up for one second because, when you say the staff was entirely convinced, I think that is, perhaps, an overstatement. We had a vigorous debate

about the issues in the case that you talked about even before the new administration took office. As I said, nobody had the view that the case was a slam dunk in that, but for some kind of aberration, the result would certainly be a conviction. There were issues to try, and there was a spectrum of views about how troublesome those issues were. Having said that, it is certainly true that I thought, Carey Dunne thought, and the district attorney, most importantly, thought that the case should go forward and that it was likely that we would obtain a conviction if it did go forward. Of course, when that decision was made toward the end of 2021, everybody understood that there would be—by that point, it was clear there was going to be—a new district attorney, and that decision would have to, in effect, be ratified by the incoming administration and the incoming district attorney. We didn't really have any conversation about the case or any conversation not about the case—we had no conversations, period—until the end of December, the very end of December 2021. And I think it's fair to say that the incoming D.A., Alvin Bragg, understood the significance of the case. I'm not going to get into the back and forth and the details of what conversations we did have. But he certainly said, acknowledged, that the decision whether to go forward with the prosecution could well be the most significant legal judgment he would have to make. So there was no mistake about that.

Coffee: Now, what then happens in the months once he comes into office on January 1? Did he or his staff tell you or imply that the case represented too big of a risk? Or was there risk that, for other reasons, he did not want to run?

Pomerantz: Well, I'm not going to say that we had a one-on-one conversation at any point in which the D.A. shared all of his thinking with me. But I think it is fair to say that he and the new team were focused on the risk that we could lose the case. We had a series of meetings and discussions. There was discussion about Michael Cohen, what he brought to the case, what the pros and cons of his testimony might be. There were discussions about the proof of Donald Trump's mens rea, his state of mind. There were discussions about the legal issues that might arise if we were to proceed along the lines that we had thought we would be proceeding. And so those issues came up, and we responded—by going through the facts, by going through the law as best we could. It was a hugely complicated set of facts. It involved many, many assets being valued over a period of many, many years. And it's very hard to take somebody who has not been exposed to those facts on a trip through the capillaries of the financial statements in a

meeting or even a meeting or two. The devil was really in the details, and the details couldn't be explained in kind of short form. The investigation had taken the better part of a year, and we had had the benefit of the investigation into the same facts that had been done by the office of the attorney general. They had been investigating these facts for several years. So we did the best job we could to lay it out for the new team. Ultimately, the D.A.—the incoming D.A.—and the team were not comfortable going forward, so did we do a bad job of laying out the facts? Did they not hear what we were saying? Were the facts too complicated to explain in the format that we were using? You know, I can't psychoanalyze the decision.

Coffee: I'm not asking you to do that. But eventually, did you learn that the district attorney was going to call a halt to this investigation, or was it just that you found that other signals told you that he was giving it his lowest priority?

Pomerantz: No, I think, neither of those things actually. I'll tell you what happened. We weren't told the case would be closed. We were told the investigation would continue. And what we were told explicitly is that an indictment would not be authorized on the current state of the record. So the investigation wasn't closed, but it wasn't going to result in an indictment given the state of the record. Now, inevitably, that leads to the question, well, what's going to change? Was there a reasonable likelihood that things would change? And, you know, the answer to that question probably depends on the person of whom you ask it. But for myself—and I think it's fair to say, not just for myself—the team that had been working on this shared the view that we were far enough along to know what the contours not only were, but far enough along so that a decision had to be made. And there wasn't a reasonable expectation that the facts were going to change in any big way in the foreseeable future.

Coffee: Am I accurately summarizing this by saying you've recognized that Mr. Bragg is not going to permit this case to go forward under existing circumstances, and you saw no likely major change in circumstances? At that point, what did you do?

Pomerantz: I think that is fair. And what I did—and I don't think it came as a big surprise—I had told the district attorney that—ook, several things. First, I didn't have an interest in kicking the can down the road for the indefinite future, you know, hoping that

some unexpected event might happen that would change the equation. And that was not what I was interested in doing, so, in a nutshell, I resigned. I thought it was the wrong decision, I thought the case should have gone forward, and I didn't want to be passively staying as part of an effort that I did not understand or believe would lead to a different result in the future. And, you know, look, he's the district attorney. He gets to make that decision.

Coffee: Let me get to my most important question. In your judgment, was this a critical case that really had to be brought, and why?

Pomerantz: Well, I think it was a case that should have been brought. And I'm asking you to accept for the moment that, first, I believe that Donald Trump, in fact, was guilty and, second, that there was sufficient evidence as a matter of law to have sustained a guilty verdict if we went forward. My view is that it is toxic to have people believe that the criminal justice system is unable to hold people accountable if those people have huge financial and political influence. The rule of law is supposed to extend to the rich and poor alike, to the vulnerable, to the powerful. And jurors are charged every day in the Southern District of New York and elsewhere that all parties stand as equals before the bar of justice. You know, I believed very deeply in the notion that it's a government of laws and not men, and that means the rule of law is for everybody. And I was utterly convinced that if the defendant had not been Donald Trump or the putative defendant, if it had been Joe Blow from Kokomo, we would have indicted without a big debate. You just—you don't give fabricated financial statements to banks to get loans without running the risk that you're going to get charged with a crime. And people are charged with that crime, I venture to say, every day of every week somewhere in the United States. So I thought it was essential to charge the case to vindicate the rule of law. People can quantify the risk of loss differently. You know, could we have lost the case? Of course we could have lost the case. But I believe very deeply that sometimes it's better to bring a case and risk losing it than not to bring the case at all.

Coffee: Sounds like you're implying that there is a cost to the integrity of the office when you don't make a case where the background factor might be, or will be seen by some as, this person is powerful and politically very influential.

Pomerantz: I want to be clear: I'm not saying that Alvin Bragg decided not to bring the case because Donald Trump was powerful or politically influential. That's not the point. The point is the decision will be perceived by people in a certain way. And as the decision became known, and as time moved forward and obviously the decision got a lot of coverage in the press, I was very disheartened to see comment after comment after comment from people who expressed the view that, you know, the D.A. must have been corrupt, we should look at his bank accounts, and so on. That's ridiculous. There was utterly nothing to suggest any form of corruption here. It was an honest decision—a decision I deeply disagreed with. But the fact that you have people questioning the integrity of the district attorney for having made the decision he made is a reflection of the fact that it is a decision that, in my view, caused people to lose some confidence in the broad applicability of the rule of law. And I think that is a big cost. And we have to be mindful of those costs when we make the decisions to charge or not to charge.

Coffee: Well, I think that was fairly eloquent. But at this point, I want to turn to Judge Rakoff, who has been uncharacteristically silent for some time now. Judge, you have also made decisions about whether or not to prosecute crimes where there was a real possibility of acquittal. Let's suppose you as a prosecutor were to believe that the defendant was guilty, that the evidence was legally sufficient, but there was a strong chance of acquittal—say as much as 40 percent, if you can quantify it that clearly, I realize you probably can't. On that case—40 percent chance of acquittal, significant defendant, a case of some public import—what would you do and why, if you can generalize?

Rakoff: So you're right that you can't quantify it into a particular percentage. And the reason is that, especially in white collar cases, there are too many parameters involved. In any complex case, there's always some risk of acquittal. The facts may be too confusing for some juries. There are all sorts of respects in which they depart from an everyday juror's personal, everyday experience. And so all those things need to be thought about. But I think it's important—and what I did as chief of the fraud unit, for example, the U.S. Attorney's Office, was apply the basic federal standard, which reads as follows—and is still the federal standard—quote, "The attorney for the government should commence or recommend federal prosecution if he or she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will

probably be sufficient to obtain or sustain a conviction.” And two aspects of that, as you can see from those words, there is the personal belief that you, the prosecutor, are convinced beyond a reasonable doubt that the person is guilty and that you think it is more likely than not that a jury will find that the evidence is beyond a reasonable doubt. And I think it’s important for the rule of law to just focus on those factors and not to get waylaid into worrying about, oh, will this be a blotch on the office if we have an acquittal, will this be perceived one way or another? I think that once you get beyond the narrow focus on, did he do it and what’s the proof, that you just get into a never-never land of extraneous considerations that are really not the operation of the rule of law.

Coffee: Well, now, let me just focus on [this] a little bit [more]. Are you suggesting that the government can or should prosecute every case that it could convict? Because I don’t think any prosecutorial staff has the resources to prosecute every case that they probably could convict. Mark Pomerantz was stressing his rule of law argument that sometimes if a person is a privileged person of high status, there may be more reason to show that you’re not going to drop this case because the public may reach the wrong assumption that it was done because of their power and position. Do you agree or disagree with Mark on that theme?

Rakoff: Well, I agree, but also I think this clearly was not a case of whether you had sufficient resources in the D.A.’s offices to go forward with the case. In a situation where you have a slam dunk case, but you know that if you prosecute every such case, it will exhaust the office’s resources, you enter into plea bargains. That’s the classic response to that situation. And in fact, as you probably know, something like 97 percent of all criminal cases are resolved through plea bargains. So exhaustion of resources is, I think, not a real issue.

Pomerantz: We had plenty of resources devoted to this investigation. Indeed, I’m sure there were people working on the case that thought we had a superabundance of resources, particularly when it came to supervision. This case was more closely and heavily supervised than any within recent living memory. But I want to take issue with one thing, although it doesn’t really impact the Trump investigation, because, as I’ve said, I reached the judgment for myself that the probability of winning was greater than 50/50. But I think there are circumstances in which a prosecutor can proceed and

indeed should proceed even in the face of the likelihood of a conviction being less than 50 percent. And I'll give you an example of what I mean.

Years ago, I tried a police chokehold case in New York City. The defendant was a New York City police officer who had been involved in a street altercation. The altercation had resulted in the death of a young man, allegedly because the officer applied a chokehold. The cop went to trial first in state court and was acquitted of homicide in state court, all the other police officers on the scene having testified as defense witnesses. We opened a federal civil rights investigation and at the end of the investigation had to reach the judgment whether to proceed on a federal civil rights charge. We had a fight with the Justice Department's civil rights division, who did not want us to proceed on the basis that they thought the case was "unwinnable"—unwinnable, meaning the likelihood of actually getting a jury of 12 people to say guilty was way less than 50 percent. We decided in that case to go forward, notwithstanding the low probability of a conviction, because not doing that, we thought, would result in a miscarriage of justice. And so we went forward. Now as a happy footnote, it turned out the DOJ was wrong; the case was not only not unwinnable, we won it with a fairly prompt jury deliberation. So the defendant was convicted. But the point wasn't, "Yay, we won." The point was, I thought then—I still think—it was the right decision to proceed because there is a category of cases where you have to give some special weight to the vindication of the rule of law and the degree of public confidence in the legal system's ability to do its job.

Rakoff: But you notice in that case, regardless of what you may have been told by the civil rights folks, that you were convinced beyond a reasonable doubt that the guy was guilty. And my own experience is that the same facts that convince a prosecutor beyond a reasonable doubt that the guy is guilty are more likely than not going to convince a jury that the guy is guilty. I've had over 300 jury trials as a judge, and I talk or my clerks talk to the jurors after every case. And I am always impressed how carefully, especially in criminal cases, they take their obligation. And the only times I disagreed with the jury, there were two cases where there was an acquittal of a very low-level defendant. And in each case, the jury told me afterwards, "Yeah, we knew he was guilty, but [he] was such a schnook," for lack of a better term, that we just didn't feel he ought to suffer a conviction." But I think this notion that even though you have the proof beyond a

reasonable doubt and are convinced personally beyond a reasonable doubt, that somehow, someone can say, “Oh, well, the jury would never convict in that situation,” is nonsensical and not borne out by experience.

Coffee: Although you do quote the principles of justice language, which suggests you had to believe there was a probability of conviction.

Rakoff: Yes, that’s true. And if Mark had thought in that case that it was truly an unwinnable case, then I think I would have disagreed with him in going forward. And but that’s not really what I think he thought as I hear what he’s saying.

Pomerantz: No. And my reading of the principles of federal prosecution is that the prosecutor has to believe that the evidence is probably sufficient to obtain a conviction. But I read that perhaps a little bit differently to mean that the prosecutor has to believe the evidence is *sufficient* to obtain a conviction. In other words, it’s the kind of evidence, the quality of evidence that a jury reasonably, rationally could return a guilty verdict. That’s different, perhaps, than kind of a subjective handicapping that your probability of coming back with a guilty verdict is more than 50 percent. Now, it didn’t bear on the way I conceived of the Trump investigation because I, in my own mind, believe that the probability of conviction was more than 50 percent—and by a healthy margin more than 50 percent. You would love in those circumstances, and in all circumstances as a prosecutor, to be able to say the probability of conviction is 99.9 percent. Of course, you can believe that [but] that will never be true. There is an element of unpredictability, of course, but for myself I was satisfied that the proof was there.

But I brought up the chokehold case because I think there are circumstances in which, even if you don’t believe you’re likely to win the case, the right thing to do is to go forward. And to some extent, if you ask, “Well, does the status of the defendant make a difference? Should it make a difference whether the defendant is a schnook, “to use Judge Rakoff’s words, “or a former president?” I do think it makes a difference. And in the case of a president, or in the case of any public official who has the public trust, my view is that, when a public official commits a crime and the public learns that a public official has committed a crime, that makes for a rending of the social fabric; it makes it worse. It inspires a lack of confidence in the rule of law. It inspires public cynicism about

the ability of political leaders to conform their conduct to the law. And that special injury, to me, means you put a finger on the scale in favor of prosecution.

Coffee: If I hear one thing in what you're saying—and I think it unites both this case and the allegedly unwinnable case against the police officer—is that your focus is on the vindication of justice. You can lose a case but probably send a very strong message to the police department that the U.S. attorney will indict you if you get involved in a case where someone dies without much justification for your use of force. Winning and losing may not be as important as showing that the department—that the U.S. attorney—will vindicate the law and use its resources.

Rakoff: Well, I think I have to, not disagree, but put a slightly different spin on this. If you think that you have proof beyond a reasonable doubt, then it seems to me to follow in 99 cases out of 100 that you are convinced you will win the case. Because, again, my experience with jurors is that they are very good at what they do. If you nevertheless think it is, quote, “unwinnable,” then I think you need to worry whether there is a reasonable doubt. And if there is a genuine reasonable doubt, then I think you should not go forward just because it will send a message of some sort.

Coffee: Well, judge, let's go back to the kind of case that Mark was talking about. There have been across the nation many, many cases brought by prosecutors against police officers who used clearly excessive force, and yet the jury acquitted. And it was legally sufficient—in your heart you subjectively believed he was guilty as hell—but there was a cultural pattern under which juries did not convict police officers. If you follow the vindication of justice case, you may say there are times that we've got to bring the case because the evidence is so clear, but we know we have a very big obstacle in front of us.

Rakoff: No, but I don't think that's a different point. There you don't have a reasonable doubt. You think the case is unwinnable because of a prejudice, but that's not a reason not to bring a case.

Coffee: I was saying I call it the vindication to justice argument, which is, I think, unites the two themes that Mark has been talking about.

Rakoff: Well, all I'm saying is, if you think a case is unwinnable because when all is said and done a reasonable jury could have a reasonable doubt, and you think that perhaps it's more likely than not that they would acquit because of that reasonable doubt, then I don't think you should bring the case.

Coffee: We're running a little short on time and events are overtaking us because, as we see every day on the front page of newspapers, there is another attorney general. His name is Merrick Garland, the United States attorney general, who is also facing a decision as to whether to prosecute ex-President Trump for his involvement in the January 6 insurrection and for his efforts to prevent Congress's certification of the electors. Now, none of us know all the evidence that he has or that he may soon gather. Thus, without asking you to predict the outcome or to express any view about possible or probable guilt, I've got a set of interrelated questions. First, is the decision faced by Attorney General Garland more difficult, complex, or politically fraught than the decision faced by the New York County district attorney? Does this look a little bit like the history of some banana republics where the winning side tends to indict the losing side? And we've seen that recently in several strongman republics in Eastern Europe.

Pomerantz: I'll take a stab at that. Is the case involving January 6 and related conduct more politically fraught? I think it's certainly more politically fraught. You know, Merrick Garland, as the attorney general, is a member of the administration, and the question is whether to indict the main political rival of the head of the administration. That is not something that Cy Vance or Alvin Bragg had to worry about. Now, for myself, the decision, I think, no matter what the decision is, will be viewed by millions of people as political, whichever way it goes. And I would think that the attorney general will just keep his head down and make the decision according to the facts and the law. I think legally it's complicated because Trump had powers as president and [had] First Amendment rights. Was he inciting a riot on January 6 or rallying his political supporters? Those are issues that are perhaps unique to the circumstances. Having said all that, factually, it could well be an easier case, as you point out. We don't have all the evidence, but just based on public information, the facts seem quite damning. There's no evidence of any large-scale voter fraud, yet you have the repetition of the big lie that Donald Trump won the election. You have proof of efforts to intimidate state election officials, efforts to

concoct slates of phony electors, efforts to suborn the vice president, even expressing support for the people who were clamoring to hang him. You have efforts to replace DOJ leadership and get the DOJ to support the false claim of corrupt voting practices, and you have the insurrection at the Capitol on January 6, where there is evidence, as I understand it, that the president was even trying to join the mob.

Coffee: That's today's newspaper. [Note: this episode was recorded on June 28, 2022.]

Pomerantz: That's today's newspaper. And refusing to call off the demonstrators for a number of hours. So you put all that together. Does it look like an illegal effort to obstruct the orderly transfer of presidential power? Is that a crime? I'm not going to express a view, but you probably kind of know what view I'm yearning to express.

Coffee: But behind all that, aren't we still dealing with your basic idea that prosecutors have to vindicate the rule of law, and, boy, if the rule of law was ever in jeopardy, it was January 6?

Pomerantz: That is certainly a key factor. But I'm not sure it's the key factor on these facts. And the reason I say that is the nature of the conduct—if you look at it all taken together, packaged together, and view it as an effort to usurp the people's right to elect their president by the process that's laid out in the Constitution—that's pretty breathtaking. It strikes at the heart of our Constitution and our democracy. A prosecution may be necessary to vindicate the rule of law, but not in the sense that you're vindicating the rule of law that the guilty have to be charged where there's sufficient evidence. The point would be to vindicate the core ideal for which the whole Constitution was written that we would have a republican form of government. I know you know I don't mean by that a government headed by the Republican Party. It means a government where the people choose their leaders by electoral processes as opposed to a monarchy or a dictatorship. So, look, I'll shut up in a moment, but for me, the conduct of usurping the electoral process, if it can be proved, is like a cancer on the body politic. The cancer has to be exposed and treated. And a prosecution is like cancer surgery: It's risky, it may not succeed, it creates risks, it may even kill the patient. But my view is the conduct has already sickened the country, and if the facts are there, I don't think there's an option not to bring the case.

Coffee: I thought that, again, was eloquent. But judge, do you want to make any comment or do you want to steer clear?

Rakoff: Well, I can't comment at all on the prospective possible case involving Merrick Garland. I'm prohibited by law from commenting on that. I did want to pick up on your theme about banana republics and that kind of situation. Much more commonly in the United States is that high government officials—governors, senators, and so forth—get indicted, and the first thing they always say is, "Oh, this is just a political vendetta against me." And therefore, if we were to allow that to be the controlling factor, we would just exclude all sorts of wrongdoers from prosecution.

Coffee: I'm not going to say it should be universal exclusion. I just want to throw that into the equation.

Rakoff: Well, I'm suggesting that it should not play a big role in the equation.

Coffee: Well, let me go back—if I can, because we're at closing time now—to the New York state case. I want to get sort of your final assessment, final concluding diagnosis. Let me begin with this observation, which you are certainly free to criticize or attack. Sadly, the New York state prosecution, or rather the New York County prosecution, ended not with a bang, but a whimper. The D.A. simply walked away from the case without even a clear statement that it was being dropped.

Pomerantz: Well, if you ask him, I will just say, he will tell you the investigation is continuing.

Coffee: I think that [he] might have a problem—say[ing] it under oath. Given its potential historical significance, that decision seems to me to have been unfortunate. In effect, the rule of law, as some of us have been calling it, lost but by default. The rule of law has lost before, but never quite in this way, or by default, in a case of such historic significance. Now, do each of you agree or disagree? And how would you refine that, that assessment? Now, let me begin with Judge Rakoff, your view.

Rakoff: Well, I basically agree with that. But I would say what I see missing in so many of these situations, including this one, is a detailed statement from the head prosecutor as to why he or she declined a given prosecution. I think it is very unfortunate and, frankly, inconsistent with the rule of law to just say, “Oh, as a matter of fiat, we’ve decided not to go forward,” or something like, “Well, we didn’t think there was proof beyond a reasonable doubt,” but without getting into any specifics as to why you thought that in a case where at least ostensibly there was proof beyond a reasonable doubt. This is a long tradition with prosecutors, I’m sorry to say

Coffee: Sometimes they say, “We don’t yet have the evidence, but the investigation will continue.”

Rakoff: Yes. And that’s, as you say, [their noses tend] to get elongated in that situation. But I think here, at a very minimum, it would be helpful to hear from the district attorney as to precisely why he has chosen not to go forward, if that’s the case, and I doubt very much we’re going to hear that.

Coffee: Mark, this is sort of a closing statement. This has been probably something of an ordeal for you. Certainly a likely disappointment. Any final comment or evaluation of what this New York case says?

Pomerantz: Well, I think it’s not uncommon to hear the expression that you don’t shoot for the king unless you’re sure you can kill the king. The problem with that is it puts the king in a special category, and that is the unfortunate byproduct of the whole experience: Is a concern that the public comes to believe that Donald Trump, who has a lifetime of experience of dancing between the raindrops of accountability, that he’s in a special category and somehow he always finds a way. And I think that does violence to public confidence in the rule of law, and it’s regrettable. You know, you ask if it was a disappointment. It was a disappointment, but I don’t feel like I was working for nothing. I know I did the best I could to put together a sound case, and I thought we did that, and I have reflected on the aftermath. I know Trump put out a statement calling me a lowlife, and I’m sure that in his book I am branded as a loser. But I’ve lived long enough to know that nobody gets everything and nobody wins every fight. A loser in my book is someone who doesn’t appreciate what she or he has. And I had a great experience, I

had the opportunity to work on a fascinating investigation, and it often turns out that when one door closes, another one opens. If you allow yourself to get depressed or to get mired in an outcome that doesn't turn out the way you hope, you can turn yourself into a loser. And I'll take my comfort in the work that I did and the friends that I made and the many blessings of life. If you want to see a loser, I think you can look at the way Donald Trump handled his electoral defeat, and you don't have to look much further than that.

Coffee: Gentlemen, I think this was just an excellent discussion. You both made very good points, and I thank you again. On that point, we will close.

The Cutting Edge is a production of Columbia Law School and the Blue Sky Blog. This episode was written by John Coffee, who was joined today by Judge Jed Rakoff and our special guest, Mark Pomerantz. The podcast is produced by John Coffee, Julie Godsoe, Reynolds Holding, and Michael Patullo. Editing and engineering by Jake Rosati. Special thanks to Nancy Goldfarb. If you like what you hear, please leave us a review on your podcast platform. The more reviews we have, the more people will listen. If you're interested in learning more about law, white collar crime, and corporate governance, visit us at law.columbia.edu, or follow us on Facebook, Twitter, and Instagram.