

ESSAY

TRUMP UNIVERSITY AND PRESIDENTIAL IMPEACHMENT

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Donald J. Trump (“Trump”), the Republican Party’s 2016 nominee for President of the United States, currently faces three lawsuits accusing him of fraud, false advertising, and racketeering. These ongoing cases focus on a series of wealth seminars Trump called “Trump University” which collected over \$40 million from consumers seeking to learn Trump’s real estate investing strategies. Although these consumer protection cases are civil proceedings, the underlying legal elements in several counts plaintiffs seek to prove run parallel to the legal elements of serious crimes under both state and federal law. Somehow in the cacophony of the 2016 presidential campaign, no legal academic has yet turned to the question of whether Trump’s alleged behavior would, if proven, rise to the level of impeachable offenses under the impeachment clause of the United States Constitution.

Addressing this issue of public concern, this essay provides a legal analysis exploring whether the United States House of Representatives could lawfully impeach and the Senate could convict a President Trump for fraud and racketeering in connection with Trump University. In the sections that follow, I first provide a summary of the evidence assembled in the three pending Trump University civil lawsuits. Part two describes the legal claims involved in each matter. Part three briefly summarizes the applicable law of presidential impeachment under the United States Constitution and analyzes whether Trump’s actions in connection with Trump University are impeachable offenses. And finally, I offer concluding thoughts, considering in particular the policy implications of a major presidential candidacy with simultaneously pending legal complaints of fraud and racketeering.

I. TRUMP UNIVERSITY BUSINESS PRACTICES

A. *“Every single resource Mr. Trump has at his disposal”*

Trump University opened to much fanfare in a press conference at Trump’s Manhattan corporate offices in 2005.¹ In a promotional video Trump explained: “At Trump University, we teach success. That’s what it’s

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¹ DAVID CAY JOHNSTON, THE MAKING OF DONALD TRUMP 117-18 (2016).

all about—success. It’s going to happen to you.”² Similar to elite private Universities, Trump University had a vintage trademark featuring a British heraldic lion. But, unlike other Universities, Trump University did not have a campus, grade students, or offer degrees. Reflecting its unorthodox roots, early press descriptions of the Trump’s new school explained that “[c]ourses will cost \$300 and will take one to two weeks to complete.”³ Advertising for Trump University focused almost exclusively on Trump’s role in developing the curriculum and selecting the instructors. As a narrator explained in the promotional video, “Donald trump is without question the world’s most famous business man. As a real estate developer he has reshaped the New York skyline with some of that great city’s most prestigious and elegant buildings. Now Donald Trump brings his years of experience to the world of business education with the launch of Trump University.”⁴ One newspaper advertisement extolled:

He’s the most celebrated entrepreneur on earth. He’s earned more in a day than most people do in a lifetime. He’s living a life many men and women only dream about. And now he’s ready to share—with Americans like you—the Trump process for investing in today’s once-in-a-lifetime real estate market.⁵

Trump University distributed similarly breathless marketing materials including newspaper ads and direct mail solicitation letters—all with large color photographs of a smiling Donald Trump in suit and tie—in cities across the country.

Capitalizing on Trump’s name recognition, Trump University advertisements emphasized that Trump himself “handpicked” Trump University instructors and taught Trump’s own real estate strategies, techniques, and “Secrets of Real Estate Marketing.”⁶ Trump University staff were trained to “[t]ake every opportunity to emphasize that they need to learn the Trump way for continued and growing success!”⁷ Instructors often boasted of having close personal relationships with Trump.⁸ Advertisements reinforced these claims by, for example, quoting Trump claiming that “I can turn anyone into a successful real estate investor,

² Trump University Intro, Youtube.com (Uploaded on Dec 5, 2009) <https://www.youtube.com/watch?v=BvaaeHP9xtQ>.

³ *Trump University Founded for Student ‘Customers’*, FORBES (May 23, 2005), <http://www.forbes.com/2005/05/23/0523autofacescan06.html>.

⁴ Trump University Intro, Youtube.com (Uploaded on Dec 5, 2009) <https://www.youtube.com/watch?v=BvaaeHP9xtQ>.

⁵ *See, e.g., Advertisement: The Time to invest in Texas Real Estate is NOW!*, HOUSTON CHRONICLE (Sept. 24, 2009), B4.

⁶ *Id.*

⁷ TRUMP UNIVERSITY, PLAYBOOK 104, 109 (2010).

⁸ *See, e.g., Affidavit of Nora Hana, Affirmation of Assistant Attorney General Tristan C. Snell in Support of the Verified Petition, Exhibit K13, p. 1, New York v. Trump Educational Initiative., LLC. (July 12, 2013) (“He said that he was Mr. Trump’s ‘right hand man.’”)* (hereinafter “Snell affirmation”).

including you.”⁹ Similarly, Trump explained, “We’re going to have professors and adjunct professors that are absolutely terrific—terrific people, terrific brains, successful. We are going to have the best of the best. ... These are all people that are handpicked by me.”¹⁰ Trump continued, “We’re going to teach you better than the business schools are going to teach you, and I went to the best business school. We’re going to teach you better. I think it’s going to be a better education and it’s going to teach you what you know.”¹¹ A letter signed by Trump soliciting enrolment in Trump University explained, “my hand-picked instructors will share my techniques. which took my entire career to develop, Then just copy exactly what I’ve done and get rich.”¹²

Students intrigued by these promises began their Trump University studies by attending widely marketed “free” 90-minute introductory classes. Advertisements for these classes promised that students “will learn from Donald Trump’s handpicked instructors a systematic method for investing in real estate that anyone can use effectively. You’ll learn investing from the inside out. You’ll learn how to finance your own deals using other people’s money. You’ll learn how to overcome your fear of getting started.”¹³ However, the Trump University’s confidential employee training manual, called the *Trump University Playbook*, explained that these 90-minute seminars were not intended to actually teach anything. The goal of these sessions, called previews in the *Playbook*, was to “set the hook” in order to sell three-day seminars such as the Profit from Real Estate seminars which cost \$1,495.00.¹⁴ The *Playbook* summarized the point of previews in a heading: “The Preview Strategy—90 Minute Selling.”¹⁵ The book explains:

In a one-off selling situation, you are selling to someone who you may or may not see again. You must form a connection in a one to two hour period. And, it must start as soon as the future student walks into the registration area in a preview scenario. The prospective students must make an immediate decision, based on the opportunity, brand, and the newly formed relationship, because they have the most to lose by not making the decision.¹⁶

Despite promising to teach “a systematic method for investing in real estate” in advertisements, the *Trump University Playbook* specifically

⁹ HOUSTON CHRONICLE, *supra*, at B4.

¹⁰ Trump University Intro, Youtube.com (Uploaded on Dec 5, 2009) <https://www.youtube.com/watch?v=BvaaeHP9xtQ>.

¹¹ *Id.*

¹² Letter of Donald J. Trump, Affirmation In Opposition to Respondent’s Motions for Partial Summary Judgment, Exhibit FF, p. 409, New York v. Trump Educational Initiative., LLC. (June 3, 2016).

¹³ Snell Affirmation, *supra*, Exhibit E, p. 221.

¹⁴ PLAYBOOK, *supra*, at 6, 19.

¹⁵ *Id.* 98.

¹⁶ *Id.*

instructed staff to “never imply [students] will learn a particular strategy at the preview.”¹⁷ Despite advertisements promising that “attendees receive a FREE Secrets of Real Estate Marketing CD-Rom,” the Trump University playbook instructed staff to “[n]ever distribute materials unless you have some form of payment, as we want to use these as a sales tool.”¹⁸ Trump University staff were expected to “create a sense of urgency,” get “in a sales mindset,” and be “ready to Sell, Sell, Sell!”¹⁹

Thousands of students agreed to purchase three-day seminars. But, even in these longer courses, the focus at Trump University remained squarely on up-selling consumers to a more expensive, next level of service. Rather than presenting a meaningful educational program, Trump’s three-day “Profit from Real-Estate Workshop” was, in the words of the Trump University’s business handbook, a “sales environment.”²⁰ Sales practices at each seminar were systematically designed, painstakingly choreographed, and implemented ruthlessly. Although in the 90-minute sessions students were promised that the three-day seminars would teach them “everything we needed to know about investing in real estate and about how to buy and sell real estate using other people’s money,”²¹ instructors in the three-day seminars said that mentorship programs “would be the only way to succeed in real estate investment.”²² Like the 90-minute sales pitch before it, “teachers” in the three-day seminars were hired as independent contractors and exclusively paid based on commissions from selling Trump elite mentoring packages.²³

Posing as teachers, sales staff, were trained to manipulate students emotions in order to sell expensive “Trump elite” packages. For example, the *Trump University Playbook* explains “[t]he words ‘I noticed’ have a powerful subconscious effect on people because they send a subliminal message to them that they stood out in the crowd, that they are attractive or charismatic or that they impressed you. It sends a message to the person that

¹⁷ *Compare Advertisement: The Time to invest in Texas Real Estate is NOW!*, HOUSTON CHRONICLE (Sept. 24, 2009), B4 with PLAYBOOK, *supra*, at 98.

¹⁸ *Compare HOUSTON CHRONICLE, supra with PLAYBOOK, supra*, at 117.

¹⁹ PLAYBOOK, *supra*, at 22, 110.

²⁰ PLAYBOOK, *supra*, at 98.

²¹ Affidavit of Kathleen Meese, Snell Affirmation, *supra*, at Exhibit K17, p. 1 (“We were also told that at the three-day seminar we would get to have our pictures taken with Donald Trump. It ended up being a cardboard cutout of Mr. Trump.”); Third Amended Class Action Complaint, *Makaeff v. Trump Univ., LLC*, No. 10-CV-940-IEG WVG, Doc. 128, at 35 (S.D. Cal. Sept. 26, 2012) (quoting consumer complaint: “I was told that after taking the first 3 day seminar, which cost \$1,500 I could go out start making deals. . . . The only thing they want you to do is sign up for the next seminar which can cost up to \$35,000.”).

²² Affidavit of June Harris, Snell Affirmation, *supra*, at Exhibit K14, p. 3.

²³ Trump University Independent Contractor Agreement, p. 15; Verified Petition, *New York v. The Trump Entrepreneur Initiative LLC f/k/a Trump University LLC*, N.Y. Sup. Ct. ¶ 92 (Aug. 24, 2016).

you have interest in them. People love recognition and attention.”²⁴ These manipulative sales tactics were carefully refined and iterated.²⁵ Indeed, to avoid actual teaching, the sales team was instructed to pay “special attention” to prevent “needy attendees” from asking questions during break times that would prevent speaker from making more effective one-on-one sales pitches to the most likely buyers.²⁶ Instead, Trump University trained staff to find the emotional vulnerabilities of students and exploit those vulnerabilities to sell additional Trump University packages. As the Playbook explained, “[y]ou don’t sell products, benefits or solutions—you sell feelings. . . [because] a sole focus on products leads to objections.”²⁷ Trump University trained staff to use the three day seminars to pretend to care about their students in order to establish the trust necessary to close each sale: “[T]he critical factor is trust. You have three days to build a relationship where a student accepts you will always keep their best interests at heart.”²⁸

Trump University established this trust in order to take as much money as possible from each of their students. Beginning at registration Trump University staff would take photographs of every student. The purpose of the photograph was to design one-on-one sales portfolios of each student that would allow staff to make more effectively sales pitches.²⁹ Using the justification of providing personal financial advice, Trump University would also extract detailed financial information from each student. The real purpose obtaining this information was to discover the student’s liquidity so instructors could more effectively sell expensive “Trump Elite” “Bronze,” “Silver,” and “Gold” packages that cost \$8,995.00, \$19,495.00, and \$34,995.00 respectively.³⁰ The *Trump University Playbook* explained that during the first evening of each three-day seminar:

[T]he team should go through each profile and determine who has the most and least liquid assets and rank them using the following scale:

- E1 – Over \$35,000 of liquid assets
- E2 – Between \$20,000 and \$30,000 of liquid assets
- E3 – Under \$10,000 of liquid assets

²⁴ PLAYBOOK, *supra*, at 100 (“We also have the advantage of testing the question out on hundreds of people and adjusting it to increase our chances for a desirable response. The attendee does not have the luxury of “practicing” his or her answer.”).

²⁵ PLAYBOOK, *supra*, at 99.

²⁶ PLAYBOOK, *supra*, at 37, 39. *See also* Third Amended Class Action Complaint, *Makaeff v. Trump Univ., LLC*, No. 10-CV-940-IEG WVG, Doc. 128, at 35 (S.D. Cal. Sept. 26, 2012) (quoting consumer complaint: “What a SCAM I attended the three day seminar and really learned very, very little. [Their] goal is to talk you into joining the next seminar, which can cost up to 35,000. They use almost Gestapo tactics to sign for this seminar Any questions you ask are never answered.”).

²⁷ PLAYBOOK, *supra*, at 100.

²⁸ *Id.* at 99.

²⁹ *Id.* at 32.

³⁰ *Id.* at 9-10.

E4 – Less than \$2,000 of liquid assets.”³¹

Ranking students from top to bottom by assets allowed sales staff to target the consumer with the most expensive package each consumer could possibly pay for.³²

An important part of the three-day seminar was convincing students to call their credit card companies to increase their credit limits. Instructors characterized this part of the training as a way to increase the ability of the students to obtain funds to purchase real estate.³³ However, the real purpose of the activity was to ensure that three-day seminar students would have enough liquidity to purchase “Trump elite” mentorship packages at the end of the seminar. As a student named Wilma Fisher explained:

[T]he Trump speakers encouraged us to call our credit card companies to request that our credit limits be increased. The Trump speakers said that we would need the extra capital for real estate investment, but in reality they just wanted us to have more money available for extremely expensive mentorship programs. Those who were successful in having their credit card limits increased were celebrated and cheered by the Trump staff like they had just been induced into a fraternity.³⁴

Ms. Fisher’s explanation is corroborated by the Trump University *Sales Playbook* which trained employees to sell mentoring programs to students no matter how dire their financial situation. Trump University relied on sales scripts to train Trump University staff to ignore and overcome students’ resistance to maxing out their credit cards to pay for more Trump University services.³⁵ According to the *Trump University Playbook*: “Money is never a reason for not enrolling in Trump University; if they really believe in you and your product, they will find the money. You are not doing any favor by letting someone use lack of money as an excuse.”³⁶

³¹ *Id.* at 36.

³² *Id.* (“When you introduce the price, don’t make it sound like you think it’s a lot of money, if you don’t make a big deal out of it they won’t. If they can afford the gold elite don’t allow them to think about doing anything besides the gold elite.”).

³³ *See, e.g.*, Affidavit of Robert Jones, Snell Affirmation, *supra*, at Exhibit K15, p. 2 (“During the three-day seminar, there was very strong pressure to sign up for one of Trump’s mentorship programs. Towards the end of the course, the speakers told us to increase our credit limits so that we could use our credit cards to pay for the advanced Trump Elite course.”).

³⁴ Affidavit of Wilma Fisher, Snell Affirmation, *supra*, at Exhibit K9, p. 2.

³⁵ PLAYBOOK, *supra*, at 112-13 (sales script reading: “I see, do you like living paycheck to paycheck? Do you like just getting by in life? Do you enjoy seeing everyone else but yourself in their dream houses and driving their dreams cars with huge checking accounts? Those people saw an opportunity, and didn’t make excuses, like what you’re doing now.”).

³⁶ PLAYBOOK, *supra*, at 99. *Compare* Third Amended Class Action Complaint, Makaeff v. Trump Univ., LLC, No. 10-CV-940-IEG WVG, Doc. 128, at 35 (S.D. Cal. Sept. 26, 2012) (quoting consumer complaint: “Trump University and their staff should be ashamed of themselves! They RUINED my credit!!! They told me I would get my large investment back in my first real estate deal because I would have access to amazing mentors and course content. I did what they told me in all of the courses and it was nonsense!”).

To this end, Trump University sales staff pressured families to mortgage their homes and cash out their retirement funds to purchase Trump Elite packages.³⁷ At the heart of every closing one-on-one sales pitch were sales scripts that promised “every single resource Mr. Trump has at his disposal” and “and most importantly a hand selected Trump certified multi-millionaire mentor.”³⁸ These appeals to Trump’s judgment and expertise were effective in convincing thousands of consumers to purchase “Trump Elite” mentoring packages that cost, in some cases, more than the entire annual salary of typical employees at one of Trump’s Casinos.³⁹

B. “Phantom Mentors”

After the excitement of the high-intensity Trump University sales pitches wore off, many customers became upset, demanded refunds, and submitted complaints to the Better Business Bureau, state Attorneys General, and the Federal Trade Commission. Customers complained that Trump University newspaper advertisements, direct mail letters, and the 90-minute sales pitches for the three-day seminars were false or misleading. In one typical example, a consumer complained to the New York State Education Department: “I responded to a free workshop from Donald Trump University. At the workshop, they sold me on taking the next step to further my real estate education. At the weekend seminar I went to (\$995) all they did was try to sell me the next package for \$35K. I paid \$999 and a weekend of my life to hear a long pitch.”⁴⁰ Former Trump University students complained so frequently, that the Better Business Bureau eventually lowered the Trump University’s ratings. The BBB itself explained: “During the period when Trump University appeared to be active in the marketplace, BBB received multiple customer complaints about this business. These complaints affected the Trump University BBB rating, which was as low as D- in 2010.”⁴¹

While complaints about Trump University three day seminars were common, it was the students that purchased costly mentoring packages that suffered most. Despite paying as much as \$35,000, consumer complaints against Trump University reveal that many purchasers of Trump Elite

³⁷ Affidavit of Nora Hana, Snell Affirmation, *supra*, at Exhibit K13, p. 2.

³⁸ PLAYBOOK, *supra*, at 129.

³⁹ Blackjack Dealer Salaries in Atlantic City, New Jersey (September 20, 2016), <http://www1.salary.com/NJ/Atlantic-City/Blackjack-Dealer-salary.html> (reporting a median annual Blackjack Dealer salary in Atlantic City, NJ of \$17,259, as of August 29, 2016).

⁴⁰ Complaint of Daniel Rivera, New York State Education Department, reprinted in Snell Affirmation, *supra*, at Exhibit L36, p. 3.

⁴¹ Statement by the Better Business Bureau Servicing Metropolitan New York and the Council of Better Business Bureaus (March 8, 2016) <http://www.bbb.org/council/news-events/news-releases/2016/03/statement-by-better-business-bureau-servicing-metropolitan-new-york-and-council-of-better-business-bureaus/>.

mentoring packages did not receive meaningful real estate mentoring. Consumers complained that Trump University's "Trump Elite" mentors:

- Did not return phone calls;
- Set up voicemail inboxes that did not accept messages;
- Were inexperienced or could not provide useful advice;
- Advised students to engage in illegal practices;
- Blamed students for their inability to make money;
- Frequently delayed or refused to provide refunds despite promised "guarantees."⁴²

Many Trump University students lost their life savings or were forced into bankruptcy by their expenditures on the Trump University's "phantom mentors."⁴³ For example, Trump University took thousands of dollars from a divorced, unemployed Seattle, Washington woman who was suffering from multiple sclerosis and a recent stroke. Even though she had no experience in real estate, instructors encouraged her to max out her credit cards to invest in more classes. When she filed a complaint with the Federal Trade Commission, she wrote "I wanted to depend on me, not my government, [but] I don't understand how they can take my money and not help me"⁴⁴

Another New York customer explained: "My entire 'mentorship' with [my Trump University mentor] consisted of three telephone conversations. . . . I wasted my entire life savings on Trump. I spent \$1,495 on the Trump three-day seminar and \$24,995 on the Trump Gold Elite mentorship package only to be demeaned and belittled. I feel like such a fool. Trump did not help me with my real estate investment questions. Nor did I learn anything of application to other real estate transactions. My finances deteriorated significantly and I was left insolvent by Trump University"⁴⁵

Many complaints suggest that Trump University particularly targeted older Americans. For example, the adult child of one consumer complained: This is the biggest SCAM I've ever seen! My 82 year old father went to a free seminar promising to make him rich through real estate. The seminar was solely for the purpose of upselling him into attending a \$1500 three day workshop by promising him they would teach him how to buy and sell foreclosures for huge profits . . . [H]e goes to the 3 day workshop and when he comes home we

⁴² Request for Approval to File, Consumer Protection and Public Health Division, Houston Regional Office, Office of Texas Attorney General (May 6, 2010); Affidavit of Nelly Cunningham, Snell Affirmation, *supra*, at Exhibit K6, pp. 3-4. *See also* PLAYBOOK, *supra*, at 114 ("Mr. Trump won't listen to excuses and neither will we. Excuses will never make you more money; they will just continue to cost you more missed opportunities in life.").

⁴³ Letter from Louis Piatt to Trump Organization, *in* Snell Affirmation, *supra*, at Exhibit L32.

⁴⁴ Consumer Sentinel Network Complaint, No. 30938978, Snell Affirmation, *supra*, at Exhibit L39.

⁴⁵ Affidavit of Nelly Cunningham, Snell Affirmation, *supra*, at Exhibit K6, pp. 3-4.

find out that they pressured him into spending \$35k MORE! . . . Then he proceeds to tell us how the majority of people there were SENIORS like him! These aren't long term investors here, these are people being tricked into thinking they can make a quick profit! If this isn't the definition of preying on the elderly then I don't know what is.⁴⁶

Another student explained to a Trump University instructor that she could not afford to purchase the Trump Gold Elite mentoring package because she needed her resources to care for her child with Down's Syndrome. The Trump University instructor persuaded the mother to buy the Trump Gold Elite mentoring package by guaranteeing that she would make back her \$25,000 in sixty days. The instructor promised her that he would be her personal mentor, that she could make unlimited calls to him for life, and that she would receive valuable real estate leads, legal forms, and lifetime access to Trump University webinars. But, after the mother agreed to buy the mentoring package, Trump University substituted a different mentor who blamed her for being unprepared and did not provide any useful advice. Eventually all the phone numbers she received were disconnected and none of the real estate leads, legal forms or lifetime access to webinars were provided. Despite asking for a refund, she explained:

I was unable to get my refund and am still paying off my debts from Trump tuition. Donald Trump received \$25,000 of my money. For \$25,000, I have received a lifetime membership to nothing! No one contacted me and I have not been able to contact anyone because the phone numbers have all been disconnected. There is no Trump University."⁴⁷

Far from unusual, consumers filed complaints like these with the Better Business Bureau, law enforcement offices in at least eleven states, the Federal Trade Commission, and the U.S. Department of Justice.⁴⁸

II. FRAUD, RACKETEERING, AND TRUMP UNIVERSITY

When officials in Trump's home state of New York inevitably began looking into these consumer complaints, they quickly discovered that Trump University did not meet even the most basic labeling and licensing requirements of the state. In many jurisdictions it is common for the names of certain business types to be reserved for only those businesses that meet specific legal criteria. For example, a barber shop is not legally entitled to call itself a bank. In New York, the state legislature adopted laws that restrict the use of the word "University" to only those institutions

⁴⁶ Complaint, *Makaeff v. Trump University, LLC.*, Case 3:10-cv-00940-CAB-WVG, p. 37 (S.D. Cal September 26, 2012) (quoting <http://www.moneystance.com/trump-university-reviews>).

⁴⁷ Affidavit of Kathleen Meese, Snell Affirmation, *supra*, at Exhibit K6, p 5.

⁴⁸ Complaint, *Cohen v. Trump*, Case 3:13-cv-02519-DMS-RBB, at ¶ 50 (S.D. Cal. October 18, 2013).

designated by the New York Board of Regents or have a private university charter from the legislature.⁴⁹ Trump unambiguously violated New York law by naming a “university” after himself.

In addition to its illegal name, New York law provided that “no private school which charges tuition or fees related to instruction . . . shall be operated by any person . . . for the purpose of teaching or giving instruction in any subject or subjects, unless it is licensed by the Department [of Education].”⁵⁰ The purpose of this law is to allow the state Department of Education to monitor teaching quality and protect vulnerable students. Trump never bothered to obtain a license and illegally used independent contractors for solicitation, unlicensed teachers, and an unlicensed school director—all of which were obvious violations of New York Law.⁵¹ When New York officials wrote to Trump himself explaining how he was operating an illegally named and unlicensed for-profit school, he refused to change the name and simply ignored authorities for nearly five years.⁵² After exercising considerable patience, the New York Attorney General eventually sued to enforce state law.

A. *The People of the State of New York v. The Trump Entrepreneur Initiative, LLC f/k/a/ Trump University*

While the New York Attorney General’s complaint included counts directed at the licensing and labeling violations, it was the first and most prominently featured count that captured the headlines in August of 2013: Fraud.⁵³ The New York Court of Appeals has explained that, “[t]he elements of a cause of action for fraud require [1] a material misrepresentation of a fact, [2] knowledge of its falsity, [3] an intent to induce reliance, [4] justifiable reliance by the plaintiff and [5] damages.”⁵⁴ Fraud is both a crime and a civil tort. In most states the Attorney General has the discretion to attack fraud either by charging the fraudster with a crime or suing civilly.

⁴⁹ N.Y. Education Law § 224(a) (“No individual . . . not holding university, college or other degree conferring powers by special charter from the legislature . . . , shall . . . use, advertise or transact business under the name university . . . unless the right to do so shall have been granted by the regents . . .”).

⁵⁰ N.Y. Educ. Law §5001(1).

⁵¹ N.Y. Educ. Law § 5001-5010.

⁵² *Matter of People by Schneiderman v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 410, 26 N.Y.S.3d 66, 67 (N.Y. App. Div. 2016) (“By letter dated May 27, 2005, the New York State Department of Education (SED) notified Donald Trump individually, Sexton, and Trump University that they were violating the New York Education Law by using the word “University” when it was not actually chartered as one.”).

⁵³ Michael Gormley, *N.Y. AG sues Trump, ‘Trump University,’ claims fraud*, USA TODAY (August 26, 2013), <http://www.usatoday.com/story/money/business/2013/08/24/trump-university-fraud-ny/2696367/>.

⁵⁴ *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559, 910 N.E.2d 976 (2009).

Both approaches have benefits and drawbacks. Prosecuting fraud as a crime requires proof “beyond a reasonable doubt,” while a civil case only requires proof by a “preponderance of the evidence”—a lower burden of proof. Moreover, successfully prosecuting fraud as a crime can sometimes leave the incarcerated defendant without resources to actually repay victims and can also take much longer to bring the defendant to trial. But even in civil fraud cases, courts routinely dismiss fraud allegations if the accusations are conclusory or do not point to particular facts or circumstances justifying the case.⁵⁵ To survive a motion to dismiss, “averments of fraud must be accompanied by the “who, what, when, where, and how” of the misconduct charged.⁵⁶

In the state of New York’s case against Trump, the top law enforcement officer in New York accused Trump University of making the following material misrepresentations in their marketing:

- consumers would learn “everything [they] need[ed] to know” to become successful real estate investors;
- consumers would quickly recoup their investment by doing real estate deals, with some instructors claiming that consumers would earn tens of thousands of dollars within thirty days;
- instructors were “handpicked” by Donald Trump;
- consumers would be taught Donald Trump’s very own real estate strategies and techniques;
- consumers would receive access to private sources of financing (“hard money lenders”); and
- the three-day seminar would include a year-long “Apprenticeship Support” program.⁵⁷

Although Trump and Trump University have aggressively litigated the New York Attorney General’s case for over the three years, Trump has lost on almost every important issue so far. Trump’s initial litigation strategy was to seek dismissal of the case because the claims were too old,⁵⁸ because there were fine print disclosures that disclaimed any responsibility for false representations,⁵⁹ and to argue that Trump himself could not be held accountable for the alleged fraud and violations committed by Trump University.⁶⁰ Trump also filed a counter-suit claiming that the New York Attorney General’s office was harassing him with a malicious prosecution

⁵⁵ *Id.*

⁵⁶ *Makaeff v. Trump Univ., LLC*, No. 10CV0940-IEG WVG, 2011 WL 1872886, at *3 (S.D. Cal. May 16, 2011).

⁵⁷ Press Release, A.G. Schneiderman Sues Donald Trump, Trump University & Michael Sexton for Defrauding Consumers Out of \$40 Million with Sham “University” (August 25, 2013), <http://www.ag.ny.gov/press-release/ag-schneiderman-sues-donald-trump-trump-university-michael-sexton-defrauding-consumers>.

⁵⁸ Trump Respondent’s Affirmation of Motion to Dismiss, *New York v. Trump*, Index No. 451463/2013, p. 3 (October 31, 2013).

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 62-63.

and asking for \$100,000,000 in damages.⁶¹ While some of the alleged illegal activity occurred before the applicable statute of limitations, much of it—including alleged fraud—did not.⁶² The trial judge dismissed Trump’s malicious prosecution counterclaim as premature and baseless.⁶³ The Court also refused to resolve the case through summary judgment.⁶⁴ Following Trump’s unsuccessful appeal which allowed the Attorney General’s fraud claim to proceed, the parties are attempting to resolve several ongoing discovery disputes.⁶⁵ Importantly, barring settlement, it appears that the New York Attorney General’s Office now has no major procedural hurdles remaining before bringing Trump to trial for fraud.

B. Low v. Trump University, LLC and Cohen v. Trump University, LLC

Private litigants first sued Trump and Trump University in 2010.⁶⁶ The initial complaint listed over ten different consumer protection violations including violation of California’s Unfair Competition Law, False advertising, breach of contract, Financial Elder Abuse in violation of California law, and fraud.⁶⁷ The parties have aggressively litigated the *Low v. Trump* for nearly six years. Similar to the New York litigation, Trump’s early efforts to fight the case included a suing his former student accusing her of defamation. Trump’s countersuit spawned extensive litigation which proceeded alongside the original case. Eventually, after an appeal to the U.S. Court of Appeals for the Ninth Circuit, the district court struck Trump’s defamation counterclaim and awarded attorney fees and costs to the student.⁶⁸ The attorneys for the student expended nearly three quarters of a million dollars in defending against Trump’s defamation claim—all of

⁶¹ Trump Respondent’s Verified Answer with Counterclaim to the Petition, New York v. Trump Entrepreneur Initiative, Index No. 451463/2013, p. 70 (March 3, 2014).

⁶² New York v. Trump Entrepreneur Initiative, 26 N.Y.S.3d 66, 73 (App. Div. 1st Dep’t 2016).

⁶³ New York v. Trump Entrepreneur Initiative, 2014 WL 5241483, 2014 N.Y. Slip Op. 32685, *14-*15 (Sup. Ct. October 8, 2014).

⁶⁴ New York v. Trump Entrepreneur Initiative, 2014 WL 5241483, 2014 N.Y. Slip Op. 32685 (Sup. Ct. October 8, 2014). Trump did succeed eliminating the N.Y. Attorney General Office’s claim for violations of the Federal Trade Commission’s three-day rescission notice rule on the grounds that the this illegal activity occurred more than three years prior to filing. *Id.*

⁶⁵ New York v. Trump Entrepreneur Initiative, 26 N.Y.S.3d 66, 73 (App. Div. 1st Dep’t 2016).

⁶⁶ Class Action Complaint, Makaeff v. Trump University, 3:10-cv-00940-GPC-WVG, Doc. 1 (S.D. Cal. April 30, 1010).

⁶⁷ *See* Makaeff v. Trump Univ., LLC, No. 10-CV-940-IEG WVG, 2010 WL 3988684, at *1 (S.D. Cal. Oct. 12, 2010). The plaintiffs later amended their complaint to add claims relating to Florida residents. Third Amended Class Action Complaint, Makaeff v. Trump Univ., LLC, No. 10-CV-940-IEG WVG, Doc. 128, at 78-80 (S.D. Cal. Sept. 26, 2012).

⁶⁸ Makaeff v. Trump Univ., LLC, 26 F. Supp. 3d 1002, 1014 (S.D. Cal. 2014).

which Trump was ordered to repay.⁶⁹ Trump's other efforts to extinguish the case have also failed. Among the three most important milestones in the six year saga were, first, the district court's order preserving most of the consumers' counts over Trump's motion to dismiss.⁷⁰ Second, the certification of a class action for all consumers that purchased a Trump University three-day seminar or "Elite" program in California, New York and Florida.⁷¹ And third, the denial of Trump's motion for summary judgment on a variety of state consumer protection claims that include statutory fraud counts such as California's financial abuse of the elderly statute and Florida's misleading advertising law.⁷²

Unlike many private consumer protection lawsuits which often gradually lose steam, the Trump University claims have become increasingly serious as plaintiffs amassed additional evidence and prevailed in various motions. Most notably, in 2013 consumers' counsel in the *Low* litigation filed a second, related lawsuit called *Cohen v. Trump University*. The *Cohen* case pleaded a single claim: Racketeering. The Racketeer Influenced and Corrupt Organizations Act ("RICO") is a federal statute that provides criminal penalties and a private, civil right of action to stop corrupt organizations from engaging in a pattern of illegal activity. Although organized crime families figured prominently in legislative history of the RICO statute, Congress enacted language applicable to any corrupt organization that uses a pattern of specifically enumerated crimes.⁷³ According to the U.S. Supreme Court, a RICO plaintiff must demonstrate "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."⁷⁴

A pattern of racketeering activity is defined as at least two instances of any crime on a statutory list that includes murder, kidnapping, as well as mail fraud and wire fraud.⁷⁵ The federal crimes of mail fraud and wire fraud require a plaintiff to demonstrate two elements: "(1) having devised or

⁶⁹ *Makaeff v. Trump Univ., LLC*, No. 10CV0940 GPC WVG, 2015 WL 1579000, at *1 (S.D. Cal. Apr. 9, 2015) ("The Court AWARDs Makaeff fees in the amount of \$790,083.40, and costs in the amount of \$8,695.81.").

⁷⁰ *Makaeff v. Trump Univ., LLC*, No. 10-CV-940-IEG WVG, 2010 WL 3988684, at *8-*9 (S.D. Cal. Oct. 12, 2010)

⁷¹ *Makaeff v. Trump Univ., LLC*, No. 3:10-CV-0940-GPC-WVG, 2014 WL 688164, at *20 (S.D. Cal. Feb. 21, 2014).

⁷² *Makaeff v. Trump Univ., LLC*, 145 F. Supp. 3d 962, 980-81 (S.D. Cal. 2015) ("Financial abuse of an elder occurs when a defendant "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder ... for a wrongful use or with intent to defraud . . ."). Although the plaintiff stipulated to dismissal of the common law fraud claim in *Low v. Trump*, multiple remaining statutory counts require proof of the common law fraud elements of fraud. *See Id.* at 81 ("Under the [Florida Misleading Advertising Law], the plaintiff must 'prove reliance on the alleged misleading advertising, as well as each of the other elements of the common law tort of fraud in the inducement.'").

⁷³ S. Rep. No. 91-617 at 79.

⁷⁴ *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

⁷⁵ 18 U.S.C. § 1961(1), (5).

intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail [or wires] for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).”⁷⁶ To show a scheme to defraud, plaintiffs must generally present the same type of evidence of fraud normally at issue in any common law tort claim or state criminal prosecution. Importantly, plaintiffs’ evidence must show deceit “coupled with a contemplated harm to the victim.”⁷⁷ Nevertheless, “[t]he requisite intent under the federal mail and wire fraud statutes may be inferred from the totality of the circumstances and need not be proven by direct evidence.”⁷⁸ Prosecutors (and civil plaintiffs pleading predicate RICO violations) can argue that a defendant’s intent may be inferred “from statements and conduct”⁷⁹ as well as “from the modus operandi of the scheme.”⁸⁰ The intent to defraud can be established “if a representation is made with reckless indifference to its truth or falsity” including the use of “extravagant claims.”⁸¹

In *Cohen v. Trump* a United States federal district judge has already held that the plaintiffs have raised a triable issue of racketeering based on multiple predicate acts of mail and wire fraud.⁸² Judge Curiel held that Trump was not entitled to summary judgment on his argument that Trump did not engage in “conduct” within the meaning of RICO.⁸³ The Judge pointed to Trump’s own deposition testimony indicating that Trump had approved the allegedly fraudulent marketing materials. Moreover, unlike some RICO cases where the alleged enterprise is informal, Trump was the founder and majority owner of a Limited Liability Company—which surely satisfies RICO’s enterprise definition.⁸⁴ With thousands of allegedly false statements made to consumers in cities all across the country through a variety of print, online, and direct mail representations, the plaintiffs in *Cohen* can easily show a pattern of more than two misrepresentations. And perhaps most importantly, Judge Curiel has already held that this evidence raises triable issues of materiality and intent to deceive.⁸⁵ Moreover, liability for racketeering in the case is not limited to Trump University.

⁷⁶ *Schmuck v. United States*, 489 U.S. 705, 721 n. 10 (1989).

⁷⁷ *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (providing an example of legally insufficient evidence of intent).

⁷⁸ *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979), cert. denied, 445 U.S. 918 (1980).

⁷⁹ *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982) (citing *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979)), cert. denied, 461 U.S. 932 (1983).

⁸⁰ *United States v. Reid*, 533 F.2d 1255, 1264 n. 34 (D.C. Cir. 1976).

⁸¹ *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982).

⁸² *Cohen v. Trump*, No. 3:13-CV-2519-GPC-WVG, 2016 WL 4098221, at *10 (S.D. Cal. Aug. 2, 2016).

⁸³ *Id.* at *7.

⁸⁴ 18 U.S.C. § 1961(4) (“enterprise includes any individual, partnership, corporation, association, or other legal entity . . .”).

⁸⁵ *Id.* at *7-*9

Judge Curiel has specifically held that Trump himself is subject to a trial for racketeering in his individual capacity.⁸⁶

In both litigation and in his electoral campaign, Trump's foremost talking point has been his claim that 98 percent of Trump University students were satisfied.⁸⁷ However, Trump University did not use reliable methods for evaluating instruction. Normal Universities use standard procedures such as proctors or online survey methods to prevent faculty from pressuring students or even simply throwing away negative evaluations. The same Trump University staff that were being reviewed had control over administering, collecting, and returning Trump University evaluations. Students reported feeling pressured by Trump University staff to give positive reviews.⁸⁸ Even though studies suggest students are less comfortable giving negative feedback in non-anonymous reviews, Trump University evaluation forms required students to include their names and contact information.⁸⁹ Moreover, many of the most troubling allegations of broken promises occurred *after* students filled out evaluation forms. Court documents estimate that between 25 and 40 percent of paying Trump University students eventually demanded their money back.⁹⁰ And, Trump's claims about Trump University's self-proctored evaluations are hard to reconcile with the Better Business Bureau's independent "D-" rating. But perhaps more importantly, Trump's argument is legally irrelevant. It is not a legally recognized defense to say that a victim of fraud was satisfied with having been lied to. The evidence still remains that Trump and Trump University lied to their customers and this was illegal whatever the evaluation forms say.

⁸⁶ Cohen v. Trump, No. 3:13-CV-2519-GPC-WVG, 2016 WL 4098221, at *10 (S.D. Cal. Aug. 2, 2016).

⁸⁷ Trump Respondent's Affirmation in Support of Motion to Dismiss, New York v. Trump, Index No. 451463/2013, p. 10 (October 31, 2013); The Truth About Trump University, <http://www.98percentapproval.com/> (2016).

⁸⁸ Affidavit of Roberto Guillo, Snell Affirmation, *supra*, at Exhibit K11, p. 221 (Presenters "pleaded for a favorable rating so that 'Mr. Trump would invite [them] back to do other retreats.'").

⁸⁹ Christopher J. Fries & R. James McNinch, *Signed Versus Unsigned Student Evaluations of Teaching: A Comparison*, 31 TEACHING SOCIOLOGY 333, 334 (2003) ("[w]e can conclude that asking students to sign evaluation forms leads to more positive ratings across the board in all categories.").

⁹⁰ Julianna Goldman & Laura Strickler, *Documents Reveal What Trump Actually Said About His University*, CBS NEWS (Mar. 7, 2016, 7:46 AM) <http://www.cbsnews.com/news/elections-2016-donald-trump-university-lawsuits-court-documents-instructors/>; Trump Dep. 432:17–24, Dec. 10, 2015, Cohen v. Trump, No. 3:13-CV-2519-GPC-WVG, 2016 WL 4098221 (S.D. Cal. Aug. 2, 2016); Steven Brill, *What the Legal Battle Over Trump University Reveals About Its Founder*, TIME (Nov. 5, 2015), <http://time.com/4101290/what-the-legal-battle-over-trump-university-reveals-about-its-founder/>.

III. PRESIDENTIAL IMPEACHMENT FOR HIGH CRIMES AND MISDEMEANORS

The U.S. Constitution provides for impeachment of the President in Article 2 Section 4 which reads:

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.⁹¹

Authority to initiate impeachment proceedings rests exclusively with the U.S. House of Representatives.⁹² The Senate is sole power allowed to try all impeachments.⁹³ No person may be removed from office through conviction by the Senate without concurrence of two thirds of the senators present.⁹⁴ When the President is on trial, the Chief Justice of the U.S. Supreme Court presides.⁹⁵

A. *Fraud and Racketeering Constitute Impeachable “High Crimes or Misdemeanors”*

Fraud and racketeering are legally recognized as serious felonies in all fifty states. For example, in New York, where Trump currently faces pending allegations of fraud:

A person is guilty of a scheme to defraud in the first degree when he . . . engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more of such persons . . .⁹⁶

First degree fraud is a class E felony in New York and is punishable by imprisonment for up to four years.⁹⁷

Similarly, under federal law mail fraud and wire fraud are serious felonies. The United States Code states that:

Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office or authorized depository for mail . . . any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined under this title or imprisoned not more than 20 years, or both.⁹⁸

⁹¹ U.S. Const. Art III, § 4.

⁹² U.S. Const. Art I, § 2.

⁹³ U.S. Const. Art I, § 3.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ N.Y. Penal Law § 190.65 (McKinney).

⁹⁷ N.Y. Penal Law §§ 190.65, 70.00(2)(d) (McKinney)

⁹⁸ 18 U.S.C. § 1341. *See also* 18 U.S.C. § 1346 (wire fraud).

While Trump currently faces allegations of mail and wire fraud as predicate RICO offenses in *Cohen v. Trump*, RICO violations are also serious crimes in and of themselves. Under the RICO: “[w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years.”⁹⁹

The history of federal impeachment has seen much debate over whether a variety of unethical or illegal conduct rises to the level of a high crime or misdemeanor.¹⁰⁰ Sometimes both Congress and commentators have taken a broader view of high crimes and misdemeanors that permits impeachment for activity that includes “abuses of office” that are not criminal especially with respect to federal judges.¹⁰¹ Some have also argued against a plain reading of the words “high crimes and misdemeanors” in favor of the view that only crimes relating to an official’s public office are impeachable.¹⁰² Thus, during the Watergate scandal, the House Judiciary Committee voted against impeaching President Nixon on judicially untested allegations of tax fraud.¹⁰³

However, the most plain reading of the phrase “high Crimes and Misdemeanors” is simply that impeachable behavior “is only that which would subject an ordinary person to criminal indictment and prosecution.”¹⁰⁴ The founders themselves dedicated significant debate to the precise formulation of impeachable offenses amending the text of the Constitution several times before arriving at the phrase “treason, bribery, or other high crimes and misdemeanors.”¹⁰⁵ An earlier draft of the Constitution allowed impeachment for “high crimes and misdemeanors *against the*

⁹⁹ 18 U.S.C. § 1693(a).

¹⁰⁰ See generally RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 56-82 (1973) (summarizing 600 years of impeachment history).

¹⁰¹ EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1878 TO THE PRESENT* 6 (1999); CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 35 (1974); Frank O. Bowman, III & Stephen L. Sepinuck, “*High Crimes & Misdemeanors*”: *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1523 (1999); Merrill Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 KAN. CITY L. REV. 3, 22 (1938); C.S. Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 24 (1927).

¹⁰² Bowman & Sepinuck, *supra* at 1557 (suggesting that crimes are more impeachable the more closely they relate to the functions of the president’s office); Black, *supra*, at 37 (arguing impeachable high crimes and misdemeanors ought to include offenses “(1) which are extremely serious, (2) which in some way corrupt or subvert the governmental process, and (3) which are plainly wrong in themselves to a person of honor. . . .”); Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 89 (1998) (statement of Cass R. Sunstein) (arguing for impeachment only for “egregious misconduct that amounts to the abusive misuse of the authority of his office.”).

¹⁰³ Bowman & Sepinuck, *supra*, at 1533.

¹⁰⁴ EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1878 TO THE PRESENT* 6 (1999).

¹⁰⁵ BERGER, *supra*, at 77-81.

United States.”¹⁰⁶ But, the fact that the phrase “against the United States” was eventually eliminated suggests that the framers ultimately decided to take a broader view of potentially impeachable high crimes.¹⁰⁷ Indeed the breadth of this of the phrase inevitably leaves much to the wisdom and judgment of the House of Representatives and the Senate. Despite historical debate, as a matter of law it is clear that Congress would be well within its prerogatives to impeach and remove a president for grave felonies—crimes which are punishable by years in prison—such as fraud or racketeering.

To this end, the currently pending Trump University civil cases could legally inform Congress on whether impeachment is justified. The law is settled that civil lawsuits against Trump may continue to proceed while he is in office.¹⁰⁸ Impeachment proceedings have never required prior criminal conviction: Neither President Johnson, nor President Clinton were convicted of crimes prior their impeachment. Indeed the Constitution explicitly separates impeachment from criminal prosecution. Specifically, Article I, Section 3 provides that:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to Law.¹⁰⁹

This separation of impeachment from other judicial proceedings arose from an awareness of the long and bloody history of political tides in England. The Framers wanted criminal prosecution separate from the political act of removal from office through impeachment so “political passions could no longer sweep an accused to his death.”¹¹⁰

Thus, there is no clear legal hurdle that would prevent Congress from beginning impeachment proceeding against Trump simply because the currently pending cases arose in civil court. Most crimes also have a parallel civil claim that allows victims to seek compensation. Fraud is, in this respect, ordinary. And the fact that RICO is a relatively new criminal law—it was adopted in 1970—is of no consequence. Nothing in the U.S. Constitution’s impeachment provisions limits impeachable offenses to those crimes that existed at the time of ratification.

Although civil cases for fraud and racketeering are put to a finder of fact with a lower burden of proof, the underlying legal elements of these criminal and civil cases are the same. With respect to RICO, Congress

¹⁰⁶ MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 551 (emphasis added).

¹⁰⁷ FARRAND, *supra*, at 600.

¹⁰⁸ Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (holding the Constitution does not afford the President temporary immunity from cases seeking civil damages in litigation arising out of events that occurred before he took office).

¹⁰⁹ U.S. CONST. Art II, § 2.

¹¹⁰ BERGER, *supra*, at 58.

adopted both criminal and civil sanctions under RICO because it recognized the need for broad equitable remedies:

Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach . . . or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from illicit activity.¹¹¹

Congress would be well within its legal rights under the Constitution to insist upon a President who is not a fraudster or a racketeer as defined in its own laws.

B. Under the U.S. Constitution Impeachment is Permissible for Pre-incumbency Conduct

The plain language of the U.S. Constitution does not limit impeachable offenses to actions that take place while the official is in office. In general, “the words governing a text are of paramount concern, and what they convey, in their context, is what the text means.”¹¹² And more particularly, “[i]f the framers were minded to shield misconduct outside of office, they knew well enough how to limit undesirable facets of ‘high crimes and misdemeanors.’”¹¹³ For example, the framers could have used the phrase “corrupt, oppressive or other grave misconduct in office” instead of the particular phrase they chose.¹¹⁴ The Constitution says that Congress may impeach and remove a president for “high crimes and misdemeanors” not “high crimes and misdemeanors occurring in office.”

This plain reading of the Constitution also reflects the framers rejection of George Mason’s proposal to permit impeachment for “maladministration”—an act that by its nature must occur while the official is in office.¹¹⁵ On this point, Madison argued that allowing impeachment for “so vague a term” as maladministration within office would place tenure of the president “at the pleasure of the Senate.”¹¹⁶ Instead, the framers selected the still flexible, but more concrete reference to “high crimes.”

¹¹¹ S. Rep. No. 91-617 at 79. See also G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 348–49 (1982) (arguing Congress intended an expansive reading of RICO in cases of fraud).

¹¹² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012).

¹¹³ BERGER, *supra*, at 206.

¹¹⁴ *Id.*

¹¹⁵ FARRAND, *supra*, at 550; BERGER, *supra*, at 78-79; Impeachment Inquiry Staff, Committee on the Judiciary of the U.S. House of Representatives, *Constitutional Grounds for Presidential Impeachment*, in *PRESIDENTIAL IMPEACHMENT: A DOCUMENTARY OVERVIEW* 1, 11-12 (1974).

¹¹⁶ FARRAND, *supra*, at 550.

The U.S. Constitution’s impeachment provisions are distinguishable in this respect to impeachment provisions in many states. For example, the Nebraska Constitution takes a different tack. In that state, “[a]ll civil officers . . . shall be liable to impeachment for any misdemeanor *in office*.”¹¹⁷ But even in Nebraska, pre-incumbency conduct is relevant and admissible in impeachment proceedings “to extent it bears upon the officer’s pattern of conduct and shows the officer’s motives and intent as they relate to the officer’s conduct while in office.”¹¹⁸

It is true that impeachment for pre-incumbency conduct is rare. However, this may have more to do with the reluctance of the public to elect those accused of high crimes or misdemeanors than any legal hurdle. In normal election years, the public can generally be relied upon to vote against fraudsters and racketeers. Nevertheless, there is some precedent in state law for pre-incumbency impeachment articles, the most notable example being Governor William Sulzer of New York.¹¹⁹ Sulzer became the only Governor of New York to be impeached and removed from office after crossing Tammany Hall political bosses.¹²⁰ The Sulzer articles of impeachment included allegations of filing of false statements of campaign receipts and expenditures *prior* to taking office.¹²¹ A month-long impeachment trial before the state Senate ultimately convicted Sulzer on three articles—two of which concerned pre-incumbency conduct.¹²²

Arguably the strongest argument against the legality of impeachment of a President Trump is that the election would, in effect, serve as a referendum on whether impeachment is appropriate. Nevertheless, there are at least three arguments why the election would not legally preclude Trump’s impeachment and removal. First, the plain language of the Constitution reserves the rights of impeachment to the House and removal to the Senate. These rights, like many others, are not provided to the public in our representative form of government. If the country elects a president

¹¹⁷ Neb. Const. art. III, § 17. Article IV, § 5 (emphasis added).

¹¹⁸ Nebraska Legislature ex rel. State v. Hergert, 271 Neb. 976, 998, 720 N.W.2d 372, 391–92 (2006).

¹¹⁹ More recently, the Utah Legislature adopted a resolution to initiate impeachment proceedings against a sitting state Attorney General for pre-incumbency conduct relating to acts taken as an unelected deputy attorney general. House Resolution to Initiate Impeachment or Investigation Proceedings Against Attorney General John Swallow, 2013 First Special Session, Utah House of Representatives (June 14, 2013).

¹²⁰ Mathew Lifflander, *The Only New York Governor Ever Impeached*, N.Y. ST. B.J., June 2013, at 10.

¹²¹ 1 State of New York Proceedings of the Court for the Trial of Impeachments In the Matter of the Impeachment of William Sulzer, Governor of the State; John R. Dunne, *Impeachment As A Political Weapon: The Case of Governor Sulzer*, 6 JUD. NOTICE 31, 33 (2009).

¹²² 1 STATE OF NEW YORK PROCEEDINGS OF THE COURT FOR THE TRIAL OF IMPEACHMENTS IN THE MATTER OF THE IMPEACHMENT OF WILLIAM SULZER, GOVERNOR OF THE STATE 1686, 1698, 1767-71 (1913) (recording guilty votes for Articles 1 and 2 relating to improper campaign expenditures and false affidavit)

or vice president that has committed bribery, treason, or a high crime or misdemeanor, then they do so at risk that the efficacy of their votes may be impeded through impeachment and removal by their own elected representatives. We can expect occasion for this scenario to be rare because the public will generally vote against candidates with a track record of impeachable offenses. After all, it is highly unusual for people with a record of treason, bribery, or high crimes and misdemeanors to be elected. And, if Representatives and Senators were to concoct false charges, they themselves would be subject to losing their next elections for having flouted the public will. But, while the legal power of pre-incumbency impeachment is recondite, it nonetheless remains: the U.S. House and Senate may impeach and remove a President that has committed bribery, treason, or a high crime or misdemeanor—an election notwithstanding.

Second, the fact that Trump has attempted to publicly misrepresent the facts and circumstances surrounding his alleged fraud and racketeering should weigh in the calculus over whether impeachment for pre-incumbency crimes is appropriate. Just as Trump appears to have lied about his role in Trump University to students, he has throughout the election continued to misrepresent the cases that focus on his misrepresentations.¹²³ For example, he has attempted to deflect blame and tarnish the reputations of those involved in the cases against him. Most notably, when Trump suffered setbacks in private class action cases, Trump publicly criticized a widely respected jurist claiming that it was the judge's Mexican heritage that caused his losses—rather than the evidence showing Trump's sustained pattern of deception. Similarly, when the New York Attorney General's Office sued him, Trump accused the New York Attorney General of bias and political motives rather recognizing the evidence showing Trump University's failures. If Trump had apologized and accepted responsibility for the alleged fraud and racketeering, the argument that the election served as an effective referendum on the appropriateness of impeachment would be more persuasive. As it stands, Trump's own representations regarding the case may have distorted the public view of whether Trump committed fraud or racketeering. Under these circumstances, an argument sounding in the nature of estoppel seems resonant: House Representatives and Senators could reasonably argue Trump is estopped from claiming the election precludes his impeachment so long as he continues to publically deny his guilt.

Finally, in a real sense, the Trump University jury is still out. Currently, all three cases appear to be headed to trial, but none have yet reached a resolution on the merits. This fact deprives the public of the benefit of the judicial system's clear view on whether Trump did in fact engage in fraud and racketeering. Our system relies primarily on fixed, periodic elections to

¹²³ See, e.g., Trump University's D- Rating, Factcheck.org (March 8, 2016), <http://www.factcheck.org/2016/03/trump-universitys-d-rating/> (“[W]hat Trump literally holds out as evidence is meaningless and misleading.”).

resolve political differences. The Founders never intended for the use of impeachment as a tool for removing officers or judges with whom Congress has policy disagreements. Still, the founders also feared creating an impeachment standard so high that destructive or corrupt executives could not be removed from office in times of great necessity. By running for President while currently facing serious accusations of fraud and racketeering, Trump has planted seeds for a weakened presidency even if he prevails in the upcoming election.

IV. CONCLUSION

In the screech and din of contemporary American political discourse it can be easy to lose sight of important legal questions. This is especially true given Trump's habit of saying controversial things from time to time. Indeed, Trump has on several occasions promised to commit impeachable crimes as a matter of executive policy. For instance, he has said that, if elected, he would murder innocent family members of terrorism suspects¹²⁴ and order the torture of suspected criminal defendants.¹²⁵ As controversial as these actions—both of which are likely high crimes or misdemeanors—may be, they bear at least one important distinction with the controversy over Trump University. Unlike his promised crimes yet to come, the illegal acts in Trump's high pressure wealth seminars have already occurred. Indeed, a federal judge appointed under Article III of the U.S. Constitution has already determined that Trump's alleged actions, if true, constitute fraud and racketeering.

The campaign of a major presidential candidate with pending trials for fraud and racketeering is structurally corrosive to our system of government because it pits two of the Republic's most treasured values against each other. On the one hand Americans have always believed in the electoral process. And yet, on the other hand Americans have also always held to the view that no one is above the law. A Trump presidency may force Congress to choose between the two.

¹²⁴ Hardeep Matharu, *Donald Trump Reiterates Desire to Murder Terrorists' Families*, THE INDEPENDENT (March 4, 2016), <http://www.independent.co.uk/news/world/americas/donald-trump-reiterates-desire-to-murder-terrorists-families-a6912496.html>.

¹²⁵ Maggie Haberman, *Warning of U.S. Attacks, Donald Trump Advocates Allowing Torture*, N.Y. Times (March 22, 2016). *But see* U.S. CONST. AMEND. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).