SEXING THE MUELLER REPORT

Ruthann Robson*

I. INTRODUCTION

Sexual indiscretion, misconduct, and deceit percolate throughout the extensive 2019 Report On The Investigation Into Russian Interference In the 2016 Presidential Election—known as the Mueller Report.¹ President Trump’s sexual behaviors are certainly not the focus of the Mueller Report, which resulted from the Acting Attorney General’s appointment of Robert S. Mueller, III as Special Counsel for the United States Department of Justice to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump,” and “any matters that arose or may arise directly from the investigation.”² Volume I of the Mueller Report addresses Russian interference with the 2016 election and any Trump campaign links in approximately 200 pages. Volume II of the Mueller Report, which is slightly longer at 241 pages, focuses on the question of whether the president obstructed justice in connection with the Russia-related investigations, including presidential actions related to the Special Counsel’s investigation itself. Given its charge, it is both predictable and understandable that the Mueller Report only obliquely addresses President Trump’s sexual

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behaviors, his treatment of women, or his representations about sex or women.

In short, the Mueller Report is no Starr Report. The Starr Report, authored by Independent Counsel Kenneth Starr on President Bill Clinton, had its genesis in a banking and real estate investigation popularly known as “Whitewater,” but it transformed into an investigation about whether Bill Clinton was truthful when he denied sexual encounters with Monica Lewinsky in a civil suit for sexual harassment brought by Paula Jones. Judge and legal scholar Richard Posner wrote that the details “distract, confound, and embarrass more than they inform or deter.” He was not alone in criticizing the Starr Report’s inclusion of unnecessary sexual and salacious minutiae. Indeed, to read the Starr Report even two decades later is to be


4. Id. After Kenneth Starr—and most likely because of him—the independent counsel statute was allowed to lapse. See Ken Gormley, Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage - A Minimalist View, 60 Mo. L. Rev. 97, 104 (2001) (Starr’s expansion of his inquiry into the Monica Lewinsky scandal and the “subsequent unleashing of bloody impeachment proceedings” will be remembered for “sounding the funeral dirge for the independent counsel law”).

5. The original Attorney General Order provided that the Independent Counsel had authority to “investigate whether any individuals or entities have committed a violation of any federal criminal or civil law relating to President William Jefferson Clinton’s or Mrs. Hillary Rodham Clinton’s relationships with the Madison Guaranty Savings & Loan Association, the Whitewater Development Corporation, or Capital Management Services, Inc.” Independent Counsel: In re Madison Guaranty Savings & Loan Ass’n, 59 Fed. Reg. 5321 (Feb. 4, 1994) (codified at 28 C.F.R. pt. 603).

6. The Starr Report itself contains a brief explanation of how this transformation occurred, stating it is “complex but direct,” H.R. Doc. No. 105-310, at 7. Federal district judge Susan Weber Wright, presiding over Jones v. Clinton, before and after the United States Supreme Court held that President Clinton was not immune to civil lawsuits during the pendency of his term in Clinton v. Jones, 520 U.S. 681, 681–82 (1997), also offered a brief description of the involvement of Independent Counsel. Jones v. Clinton, 36 F. Supp. 2d 1118, 1122-23 (E.D. Ark. 1999).


8. See e.g., Robert Batey, Kenneth Starr—Among Others—Should Have (Re)read Measure for Measure, 26 Okla. City U. L. Rev. 261, 272–73 (2001) (“Starr had numerous opportunities to relent,” including “during the preparation of the special prosecutor’s mammoth and salacious report to Congress”); Charles W. Collier & Christopher Slobogin, Terms of Endearment and Articles of Impeachment, 51 Fla. L. Rev. 615, 616–17 (1999) (arguing that the massive embarrassing detail in the Starr Report, paradoxically showed that the Clinton and Lewinsky sexual relationship, and Clinton’s false testimony about it, was not relevant or material to the underlying sexual harassment lawsuit, brought by Paula C. Jones); Richard M. Pious, Impeaching the President: The Intersection of Constitutional and Popular Law, 43 St. Louis U. L.J. 859, 896 (1999) (a majority of people surveyed were “repelled by the salacious character of Starr’s report.”). For a contrary view, see Kathleen McGarvey Hidy, The Way We Were, 46 Fed. Law. 3, 5 (June 1999) (“the fashionable argument that nasty Ken Starr is responsible for the pornographic nature of the Starr Report” does not recognize that independent counsel was “forced” to “extract excruciatingly lurid detail after lurid detail from Lewinsky” because of Clinton’s denial.)
inundated with specifics that seem to serve little purpose. By contrast, the Mueller Report has very few mentions of sex and provides no descriptions of sexual behaviors, instead alluding to them in the most genteel manner. The Mueller Report refers only once to “sex” (in the phrase “an alleged sexual encounter”),\(^9\) characterizes one tape as capturing Candidate Trump as making “graphic statements about women,”\(^10\) and another alleged tape as “personally sensitive” and “compromising.”\(^11\)

Nevertheless, references to Trump’s sexual behavior and his veracity surrounding his conduct appear in the Mueller Report in the context of both relationships with Russia and obstruction of justice and are certainly implicated by the Mueller Report’s larger issues, including possibilities of impeachment and immunity from criminal and civil actions. The Mueller Report is seriously impaired by the absence of Donald Trump’s testimony. President Trump refused to testify or otherwise appear in person in any connection with the preparation of the Mueller Report.\(^12\) President Trump did respond to agreed-upon written questions; the questions and answers appear as Appendix C in the Mueller Report.\(^13\) None of these questions relate to sexual misconduct or scandals, understandably so given the scope of the Special Counsel charge.\(^14\)

Yet even within that limited scope, President Trump’s “testimony” is hardly adequate. As the Mueller Report states, the Special Counsel’s office informed the President’s personal counsel “of the insufficiency” of the President’s written responses “in several respects”: “among other things,” the President stated on more than thirty occasions that he “does not ‘recall’ or ‘remember’ or have an ‘independent recollection’ of information called for by the questions.”\(^15\) The president “declined” the request for an in-person interview for follow-up questions.\(^16\) The Special

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\(^9\) Mueller Report Vol. II, supra note 1, at 144. This is a reference to Stormy Daniels, see infra Part II.B.

\(^10\) Mueller Report Vol. I, supra note 1, at 58 n.239. This is a reference to the Access Hollywood tape, see infra Part I.

\(^11\) Mueller Report Vol. II, supra note 1, at 27.; id. at 27 n.112. This is a reference to the Moscow Sex tape, see infra Part II.

\(^12\) See Mueller Report Vol. II, supra note 1, at app. C.


\(^14\) Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915–2017, 28 C.F.R. 600.4 (Dep’t of Justice May 17, 2017) (Special Counsel was to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump,” and “any matters that arose or may arise directly from the investigation.”)


\(^16\) Id. at app. C at 2.
Counsel’s office considered but decided against a subpoena of the president. One can only wonder how much fuller an account we might have if we had heard from the president. One must also wonder whether or not Trump would have been truthful about the sexual matters under oath, given the appearance that he has not been truthful in all of his statements to the American public about the sex scandals which surfaced in the Mueller Report.\textsuperscript{18} Indeed, Trump’s refusal to testify might well have been influenced by the example of the Starr Report.\textsuperscript{19}

But even if perjury or other crimes had been uncovered, sexual or otherwise, the Mueller Special Counsel role seemed limited by the Department of Justice policy, as expressed in a 1973 Office of Legal Counsel memo, that a sitting president should not be indicted.\textsuperscript{20}

\textsuperscript{17} Id.

Recognizing that the President would not be interviewed voluntarily, we considered whether to issue a subpoena for his testimony. We viewed the written answers to be inadequate. But at that point, our investigation had made significant progress and had produced substantial evidence for our report. We thus weighed the costs of potentially lengthy constitutional litigation, with resulting delay in finishing our investigation, against the anticipated benefits for our investigation and report.

\textsuperscript{18} See infra Part IV.

\textsuperscript{19} While President Trump did not mention Bill Clinton, he did use the phrase “perjury trap,” see Jeremy Diamond & Jeff Zelevy, Trump Frets Over ‘Perjury Trap’ If He Sits Down with Mueller, CNN (Sept. 7, 2018), https://www.cnn.com/2018/09/07/politics/donald-trump-perjury-trap-mueller-interview/index.html (quoting an interview with the President). The phrase was bandied about in the media after Trump’s personal lawyer Rudolph Giuliani stated he was “not going to be rushed into having him testify so he gets trapped into perjury,” see Javier David, Rudy Giuliani Says ‘Truth isn’t Truth’ as He Explains His Concern that Mueller Could Set a Perjury Trap for Trump, CNBC (Aug. 19, 2018), https://www.cnbc.com/2018/08/19/rudy-giuliani-truth-is-not-truth-fears-trump-perjury-charge.html. However, the phrase “perjury trap” more accurately describes the situation when “the government calls a judicial or quasi-judicial proceeding (e.g., a grand jury) in order to create an opportunity for perjury on matters that are not material or germane to a legitimate investigation,” Jon Reidy et. al., An Alternative Justification for the Perjury Trap Defense, 87 U. Det. Mercy L. Rev. 179, 180–81 (2010). Cf. Billy Joe McLain, Note, Debunking the Perjury-Trap Myth, 88 Tex. L. Rev. 883 (2010) (defining a perjury trap as “when a prosecutor brings a defendant before the grand jury in order to secure a perjury indictment, rather than to indict the defendant for a previously committed crime.”) On these definitions, setting a perjury trap would raise issues of prosecutorial misconduct, see Daniel S. Goldman, The Trap of Giuliani’s “Perjury Trap” Argument, BRENNA CENTER FOR JUSTICE (Aug. 21, 2018), https://www.brennancenter.org/blog/trap-giuliani-perjury-trap-argument.

\textsuperscript{20} See generally A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000) (available at: https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution). For a contrary view on the amenability of indictment of a sitting President, see Walter Dellinger, Indicting a President Is Not Foreclosed: The Complex History, Lawfare [June 18, 2018], available at: https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history; See also...
However, the Mueller Report is not the Starr Report; the Mueller Report is not an explicit referral for impeachment.

This Article posits that the sex scandals raised in the Mueller Report merit a closer examination. This scrutiny is necessary to understand the Mueller Report and its limits, including its desexualization of Trump’s conduct. Resexualizing the Mueller Report is also necessary to enable the populace to make judgments about the President, specifically in the context of impeachment. To that end, this Article delves more deeply into the sexual matters surfacing in the Mueller Report: the Access Hollywood Tape, the alleged Moscow sex-tape, and the “hush-money” for silence regarding consensual sexual relationships. More specifically, in Section I, this Article examines the Access Hollywood tape in the context of relationships between Trump (or his campaign) and the Russian government. Section II focuses on the Mueller Report’s treatment of the Moscow sex tape, also known as “the pee tape,” primarily as it relates to the relationship between Trump and the Director of the FBI, James Comey, who Trump fired. Section III analyzes the most substantial problem raised in the Mueller Report, the so-called “hush money” payments to Stormy Daniels and Karen McDougal. The analysis of “hush money” continues in Section IV with a concentration on Trump’s personal lawyer and so-called “fixer,” Michael Cohen, who pleaded guilty to campaign finance violations in a criminal proceeding in the Southern District of New York. In the final part, Section V, this Article considers all of these sexual scandals and the question of impeachment proceedings.

II. THE ACCESS HOLLYWOOD TAPE

As the Mueller Report gingerly phrases it, in the Access Hollywood tape “Candidate Trump can be heard off camera making graphic statements about women.” The three minute video, recorded in 2005, in the NBC Studios parking lot by the entertainment news program Access Hollywood, co-hosted by Billy Bush, was retained by NBC and first

Susan Frontiera, The Office of Legal Counsel Juggernaut: No One Is Above the Law, 48 SW. L. REV. 151 (2019) (arguing that the OLC should not be relied on or deferred to on questions of presidential prosecution).


22. MUELLER REPORT VOL. I, supra note 1, at 58 n.239.
revealed by the *Washington Post*. The most notorious of the “graphic statements” captured is Trump’s statement to Billy Bush as they prepare to meet a woman from another NBC show on which Trump was to appear as a guest:

I’ve got to use some Tic Tacs, just in case I start kissing her. . . . You know I’m automatically attracted to beautiful—I just start kissing them. It’s like a magnet. Just kiss. I don’t even wait . . . And when you’re a star, they let you do it. . . . You can do anything. . . . Grab ’em by the p--y. . . . You can do anything.

A short time before that, as the video portion shows a bus from which Trump and Billy Bush will exit, Trump’s voice describes his encounter with another woman, the cohost of *Access Hollywood* who was not present:

I moved on her, and I failed. I’ll admit it. . . . I did try and f--- her. She was married. . . . And I moved on her very heavily. In fact, I took her out furniture shopping. She wanted to get some furniture. I said, “I’ll show you where they have some nice furniture.” I moved on her like a bitch, but I couldn’t get there. And she was married. . . . Then all of a sudden I see her, she’s now got the big phony tits and everything. She’s totally changed her look.

Understandably, the release of the *Access Hollywood* tape upset Trump. Some members of the Trump campaign considered it to be “fatal” to his prospects of election. Trump issued statements, including arguing that

24. MUELLER REPORT Vol. I, supra note 1, at 58 n.239.
25. Fahrenthold, supra note 23.
26. Id.
27. The Mueller Report mentions the *Access Hollywood* tape again, in Volume II, comparing Trump’s reaction to the disclosure of the tape with his reaction to the appointment of Special Counsel Mueller, according to Trump’s assistant Hope Hicks. MUELLER REPORT Vol. II, supra note 1, at 79 (“Hicks saw the President shortly after [Attorney General Jefferson] Sessions departed and described the President as being extremely upset by the Special Counsel’s appointment. Hicks said that she had only seen the President like that one other time, when the Access Hollywood tape came out during the campaign.”).
it was simply “locker room talk” and then issued an apology in a Facebook video: “Anyone who knows me know these words don’t reflect who I am. I said it, I was wrong, and I apologize.” There were rumored to be additional misogynist and possibly racist videos and tapes in the possession of NBC, and Mike Pence was reportedly ready to resign as the vice-presidential candidate. But Trump was unwilling to concede. A few days later, hours before the next scheduled presidential debate against the Democratic nominee Hillary Clinton, Trump live-streamed “an appearance with three women who have in the past accused former President Bill Clinton of inappropriate sexual behavior,” and a fourth woman who was the victim in a criminal case of sexual assault in which Hillary Clinton represented the defendant, garnering media attention. During the debate, Trump again stated that the Access Hollywood tape was “locker room talk,” refuted the moderator’s statement that Trump “bragged that [he had] sexually assaulted women,” and stated “I apologize to the American people,” before shifting to ISIS as “more important,” and then returning to the topic. The transcript colloquy is instructive:

COOPER: Thank you, Mr. Trump. The question from Patrice [a debate audience member] was about are you both modeling positive and appropriate behavior for today’s youth? We received a lot of questions online, Mr. Trump, about the tape that was released on Friday, as you can imagine. You called what you said locker room banter. You described kissing women without consent, grabbing their genitals. That is sexual assault. You bragged that you have sexually assaulted women. Do you understand that?

TRUMP: No, I don’t say that at all. I don’t think you understood what was—this was locker room talk. I’m not proud of it. I apologize to my family. I apologize to the American people. Certainly, I’m not proud of it. But this is locker room talk.

You know, when we have a world where you have ISIS chopping off heads, where you have—and, frankly, drowning people in steel cages, where you have wars and horrible, horrible sights all over, where you have so many bad things happening, this is like medieval times. We haven’t seen anything like this, the carnage all over the world.

And they look and they see. Can you imagine the people that are, frankly, doing so well against us with ISIS? And they look at our country and they see what’s going on.
debate he also denied tweeting “check out a sex tape” of a woman who had been referenced in the previous debate, although there was a tweet by Trump which stated exactly that. Some commentators credit

Yes, I’m very embarrassed by it. I hate it. But it’s locker room talk, and it’s one of those things. I will knock the hell out of ISIS. We’re going to defeat ISIS. ISIS happened a number of years ago in a vacuum that was left because of bad judgment. And I will tell you, I will take care of ISIS.

COOPER: So, Mr. Trump . . .
TRUMP: And we should get on to much more important things and much bigger things.
COOPER: Just for the record, though, are you saying that what you said on that bus 11 years ago that you did not actually kiss women without consent or grope women without consent?
TRUMP: I have great respect for women. Nobody has more respect for women than I do.
COOPER: So, for the record, you’re saying you never did that?
TRUMP: I’ve said things that, frankly, you hear these things I said. And I was embarrassed by it. But I have tremendous respect for women.
COOPER: Have you ever done those things?
TRUMP: And women have respect for me. And I will tell you: No, I have not. And I will tell you that I’m going to make our country safe. We’re going to have borders in our country, which we don’t have now. People are pouring into our country, and they’re coming in from the Middle East and other places.
We’re going to make America safe again. We’re going to make America great again, but we’re going to make America safe again. And we’re going to make America wealthy again, because if you don’t do that, it just—it sounds harsh to say, but we have to build up the wealth of our nation.
COOPER: Thank you, Mr. Trump.
TRUMP: Right now, other nations are taking our jobs and they’re taking our wealth.
COOPER: Thank you, Mr. Trump.

36. Id.
37. Id. Again, the transcript colloquy is instructive:

COOPER: Mr. Trump, let me follow up with you. In 2008, you wrote in one of your books that the most important characteristic of a good leader is discipline. You said, if a leader doesn’t have it, quote, “he or she won’t be one for very long.” In the days after the first debate, you sent out a series of tweets from 3 a.m. to 5 a.m., including one that told people to check out a sex tape. Is that the discipline of a good leader?
TRUMP: No, there wasn’t check out a sex tape. It was just take a look at the person that she [Hillary Clinton] built up to be this wonderful Girl Scout who was no Girl Scout.
COOPER: You mentioned sex tape.
TRUMP: By the way, just so you understand, when she said 3 o’clock in the morning, take a look at Benghazi. She said who is going to answer the call at 3 o’clock in the morning? Guess what? She didn’t answer it, because when Ambassador Stevens . . .
COOPER: The question is, is that the discipline of a good leader?
TRUMP: . . . 600—wait a minute, Anderson, 600 times. Well, she said she was awake at 3 o’clock in the morning, and she also sent a tweet out at 3 o’clock in the morning, but I won’t even mention that. But she said she’ll be awake. Who’s going—the famous thing, we’re going to answer our call at 3 o’clock in the morning. Guess what happened? Ambassador Stevens—Ambassador Stevens sent 600 requests for help. And the only one she talked to was Sidney Blumenthal, who’s her friend and not a good guy, by the way. So, you know, she shouldn’t be talking about that.
Now, tweeting happens to be a modern day form of communication. I mean, you can like it or not like it. I have, between Facebook and Twitter, I have almost 25 million people. It’s a
Trump’s ability to overcome the consequences of the *Access Hollywood* tape to his aggressive style.38

The *Access Hollywood* tape prompted a statement from the woman whom Trump was referencing.39 The tape and Trump’s denials also prompted multiple women to come forward to reveal similar acts by Trump.40 But the reactions of women affected by the tape and Trump’s reactions were apparently outside the purview of the Mueller Report. Perhaps they should not have been. Or, more narrowly, perhaps the reactions and allegations by women should have figured more prominently, given that what the Mueller Report did investigate were the reactions of foreign powers or agents to the *Access Hollywood* tape, which included an effort to mute the reactions and allegations of women to the tape.

The Mueller Report considers the *Access Hollywood* tape in the context of its investigation into “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump,” of Volume I, in the section on “Russian Hacking and Dumping Operations.”41 In the subsection entitled, “Trump Campaign and the Dissemination of Hacked Materials,” much of which is redacted as “Harm to Ongoing Matter,” a further subsection is entitled “WikiLeaks’s October 7, 2016 Release of Stolen Podesta Emails.”42 In this subsection, the Mueller Report states that “Less than an hour after the video’s publication, WikiLeaks released the first set of emails stolen by the GRU”—GRU is the Main Intelligence Directorate of the General Staff of the Russian Army—”from the account of Clinton Campaign chairman John Podesta.”43

Based on the portions that are not redacted, it seems that Jerome Corsi—a far-right figure not officially connected with the Trump campaign—intimated that he was in communication with WikiLeaks and had advised members that the *Access Hollywood* tape was “coming.” However, the Report found “little corroboration for his allegations” that

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38. See e.g., Alberta, supra note 28, at 17–18.
40. Id. at 18–30 (discussing women who were motivated to come forward).
42. Id. at 51–58.
43. Id. at 58, Appendix B-12.
he was in communication with those reporters who would reveal the *Access Hollywood* tape or those who would release the hacked Podesta emails.\(^44\) The specific content of Podesta’s emails merited much media coverage, with Time Magazine reporting they “offer a glimpse into the inner workings of the Clinton campaign as it weathered its formative stages and the Democratic primary.”\(^45\)

The *Access Hollywood* tape plays only a small role in the Mueller Report, but it tantalizingly suggests the possibility of coordination by those within or associated with the Trump Campaign and WikiLeaks and GRU. The redacted portions will shed further light on any coordination. It is possible that the “Harm to Ongoing Matter” involves *United States v. Roger Jason Stone*,\(^46\) although Stone’s indictment does not mention the *Access Hollywood* tape.\(^47\) The indictment of Stone, a long-time confidant of Trump and political operative, alleges that Stone was having ongoing communications with “Organization 1,” an organization which had “previously posted documents stolen by others from U.S. persons, entities, and the U.S. government”\(^48\)—presumably WikiLeaks, and the organization’s head who was “located at all relevant times in the Ecuadorian Embassy in London, United Kingdom”\(^49\)—presumably Julian Assange.\(^50\) For example, the Indictment alleges that on October 3 Stone wrote “a supporter involved with the Trump Campaign, ‘Spoke to my friend in London last night. The payload is still coming.’”\(^51\) Yet this does nothing to connect the WikiLeaks release of documents on October 7 to the *Access Hollywood* tape released a few hours earlier.

On the whole, the Mueller Report’s discussion of the *Access Hollywood* tape and any connection between its appearance and WikiLeaks release of stolen Democratic National Committee materials remains deeply unsatisfying. The Mueller Report does not provide the

\(^{44}\) Id. at 58–59, Appendix B-3 (identifying Corsi as an author associated with WorldNetDaily and InfoWars).


\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id. at 4.


\(^{51}\) Roger Jason Stone, Jr., No. 1:19-cr-00018, indictment at 8.
context for why the Access Hollywood tape would have been damaging to Trump’s campaign for president and thus prompt any effort to divert attention from it. By describing Trump’s statements as “graphic statements about women,” the Mueller Report elides what can be construed as an admission of sexual assault, or at least sexual misconduct.52 Further, perhaps because of the redacted portions, the Mueller Report fails to connect the jolting gendered content of the Access Hollywood tape with the WikiLeaks release of unrelated material about Trump’s female opponent. Instead, the Mueller Report omits the potential “fatal” nature of the tape to Trump’s election prospects,53 thus blurring the sense of emergency that could have contributed to further actions, including possible coordination with WikiLeaks.

III. THE MOSCOW SEX TAPE (THE “PEE TAPE”)

One of the most salacious allegations involving Donald Trump is that Russian officials had one or more videotapes of him from 2013 in a Ritz Carlton Moscow hotel room witnessing women urinating on a bed.54 This allegation arose from the so-called Steele Dossier, a collection of memos compiled by Michael Steele, a former British intelligence agent hired in a private capacity, which was published by the media outlet BuzzFeed on January 10, 2017, less than two weeks before President Trump’s inauguration.55 In a section on the Kremlin’s “cultivation” of Trump and dated June 20, 2016, the dossier first discussed “feeding” Trump and “his team valuable intelligence on his opponents, including Democratic presidential candidate” Hillary Clinton for “several years,” and offering Trump “various lucrative real estate development business deals in Russia.”56 The dossier then relied on three anonymous sources—Source E and Source F (female staffers at the hotel) as

52. MUELLER REPORT VOL. I, supra note 1, at 58.
53. See supra text accompanying note 28.
56. Steele, supra note 54.
witnesses, and Source B (a former top-level Russian intelligence officer) as corroboration—to report:

3. However, there were other aspects to TRUMP’s engagement with the Russian authorities. One which had borne fruit for them was to exploit TRUMP’S personal obsessions and sexual perversion in order to obtain suitable ‘kompromat’ (compromising material) on him. According to Source D, where s/he had been present, TRUMP’s (perverted) conduct in Moscow included hiring the presidential suite of the Ritz Carlton Hotel, where he knew President and Mrs OBAMA (whom he hated) had stayed on one of their official trips to Russia, and defiling the bed where they had slept by employing a number of prostitutes to perform a ‘golden showers’ (urination) show in front of him. The hotel was known to be under FSB control with microphones and concealed cameras in all the main rooms to record anything they wanted to.

4. The Moscow Ritz Carlton episode reported above, confirmed by Source E, [redacted in original], who said that s/he and several of the staff were aware of it at the time and subsequently. S/he believed it had happened in 2013. Source E provided an introduction for a company ethnic Russian operative to Source F, a female staffer at the hotel when TRUMP had stayed there, who also confirmed the story. Speaking separately in June 2016, Source B (the former top level Russian intelligence officer) asserted that TRUMP’s unorthodox behavior in Russia over the years had provided the authorities there with enough embarrassing material on the now Republican presidential candidate to be able to blackmail him if they so wished.57

Within two hours of the Steele Dossier’s publication, and presumably in response to it, President-Elect Donald Trump tweeted “FAKE NEWS - A TOTAL POLITICAL WITCH HUNT!”58 In a press conference after the Press Secretary derided the dossier, Mr. Trump repeated that it was “fake news,” adding that it was gathered by “a group of opponents that got together -- sick people -- and they put that crap together,” and that the dossier “number one, shouldn’t have even entered paper. But it should have never have been released. But I read what was released and I think it’s a disgrace. I think it’s an absolute disgrace.”59
Trump had apparently learned of the dossier’s sexual allegation before it was published. The then-Director of the FBI, James Comey, had previously informed the president-elect about the allegations, according to memos and later recounted in his book. Comey reports that in the initial conversation, Trump denied the allegations, asking rhetorically, Comey assumed, “whether he seemed like a guy who needed the services of prostitutes,” and then recounted “cases where women had accused him of sexual assault.” Comey writes that after the dossier was published, Trump telephoned Comey to say he “now recalled he had not even stayed overnight in Moscow,” a fact with which investigative journalists disagree. According to Comey, Trump also stated that he was a “germaphobe,” so there was “no way I would let other people pee on each other around me.”

Comey also relates that when he was invited to dine alone with Trump about a week after the inauguration, Trump again raised the subject of the sexual allegations—Comey labels it a “zag” in Trump’s “barrage”—he stated that it “bothered him if there was ‘even a one percent chance’ his wife, Melania, thought it was true” and stated he was thinking of asking for an investigation of the allegation “to prove it was a lie.” In his subsequent book, Comey speculates on Trump’s marital

61. Id.
62. JAMES COMEY, A HIGHER LOYALTY 224 (2018)
63. Id.
64. Id. at 224–25.
65. Id. at 226–27.
66. On whether Trump stayed overnight in Moscow on the 2013 trip, journalists contend that Trump did spend the night of November 8, 2013 at the Moscow Ritz Carlton, see DAVID CORN & MICHAEL ISIKOFF, RUSSIAN ROULETTE: THE INSIDE STORY OF PUTIN’S WAR ON AMERICA AND THE ELECTION OF DONALD TRUMP 11–17 (2018) (discussing Trump landing in Moscow on November 8, attending a video shoot for Russian pop star Emin on the morning of November 9, and spending the rest of that “hectic” day in a press conference with 300 reporters, the Miss Universe red carpet event, broadcast, and after-party, and then to the airport); see also Vernon Silver & Evgenia Pismennaya, Trump’s Two Nights of Parties in Moscow Echo Years Later, BLOOMBERG (July 13, 2017), https://www.bloomberg.com/news/articles/2017-07-13/trump-s-two-nights-of-parties-in-moscow-reverberate-years-later (analyzing Facebook posts and flight records); Ken Dilanian & Jonathan Allen, Trump Bodyguard Keith Schiller Testifies Russian Offered Trump Women, Was Turned Down, NBC NEWS (Nov. 9, 2017), https://www.nbcnews.com/news/us-news/trump-bodyguard-testifies-russian-offered-trump-women-was-turned-down-n819386 (stating that Trump went to bed and that his bodyguard stayed outside the room for some of the night).
67. COMEY, supra note 62, at 227.
68. Id. at 240–41. Accord Comey Memos, supra note 60, at 9; Eric Levitz, Comey: Trump Asked Me to Investigate ‘Pee Tape’ to Prove It Didn’t Exist, N.Y. MAGAZINE (April 12, 2018), http://nymag.com/intelligencer/2018/04/comey-trump-asked-me-to-prove-the-pee-tape-wasn’t-real.html; Lauren Effron & Pete Madden, Comey says Trump asked if he could disprove salacious
relationship, comparing it unfavorably to his own—"In what kind of marriage, to what kind of man, does a spouse conclude there is only a 99 percent chance her husband didn’t do that?" A few months after the conversation between Trump and Comey, Trump would fire James Comey from his position as Director of the FBI.

The Mueller Report in Volume II, focusing on the possibility of obstruction of justice by the president, situates the allegation of these sexually compromising videotapes in the context of President Trump’s interactions with James Comey. Yet in a footnote, the Mueller Report offers additional information about Trump’s knowledge of the possibility of any compromising tapes. After explaining that “Comey’s briefing included the Steele reporting’s unverified allegation that the Russians had compromising tapes of the President involving conduct when he was a private citizen during a 2013 trip to Moscow for the Miss Universe Pageant,” the footnote added that during “the 2016 presidential campaign, a similar claim may have reached candidate Trump.” The footnote specified that on “October 30, 2016, Michael Cohen received a text from Russian businessman Giorgi Rtskhiladze that said, “Stopped flow of tapes from Russia but not sure if there’s anything else. Just so you know...” As earlier discussions in the Mueller Report make clear, the Russian businessman Giorgi Rtskhiladze and Trump’s attorney Michael Cohen were in communication about a proposed “Trump Tower” to be built in Moscow. But as this footnote related, there was also the matter of the “tapes.” Quoting a report of an interview with the Russian businessman in April 2018, the footnote explained that Giorgi Rtskhiladze stated that “tapes’ referred to compromising tapes of Trump rumored to be held by persons associated with the Russian real estate conglomerate Crocus Group, which had

69. James Comey writes that he “began wondering why his wife would think there was any chance, even a small one, that he had been with prostitutes urinating on each other in Moscow” and that there was a “literally absolute zero” chance that Comey’s own wife would believe that about him, but would instead “laugh at the very suggestion.” COMEY, supra note 62, at 240–41.


71. MUELLER REPORT VOL. II supra note 1, at 1.

72. Id. at 27–28 n. 112.

73. Id.

74. Id.

75. MUELLER REPORT VOL. I, supra note 1, at 76–77.

76. MUELLER REPORT VOL. II, supra note 1, at 27–28 n. 112.

helped host the 2013 Miss Universe Pageant in Russia." The footnote then quoted from a subsequent interview with Michael Cohen, Trump’s attorney, who stated that “he spoke to Trump about the issue after receiving the texts from Rtskhiladze.” Finally, the footnote concluded with additional information from a May 2018 interview with the Russian businessman Giorgi Rtskhiladze: “Rtskhiladze said he was told the tapes were fake, but he did not communicate that to Cohen.”

Thus, the Mueller Report leaves the impression that proof of the most lascivious allegation that circulated about Donald Trump—the existence of videotapes showing the future president in a luxurious Moscow hotel room with Russian sex workers urinating on a bed—may not actually exist. Yet this conclusion requires assessing hearsay communicated by the Russian businessman Giorgi Rtskhiladze as more credible than the same businessman’s text to Michael Cohen. Moreover, one need not accept James Comey’s comparative moralizing about his relationship with his own wife to wonder how we should appraise Trump’s arguable concern that Melania Trump, the President’s third wife, would be troubled by the Moscow sex-tape allegation. The question of whether the Moscow hotel allegations and any evidence of them is merely a private matter between husband and wife might be difficult to satisfactorily resolve, but the possibility that such tapes (or the belief in the existence of such tapes) could be used as blackmail or kompromat does raise the stakes considerably. That this blackmail would be by a foreign power implicates national security. The potential calamitous possibility of blackmail exists whether or not the underlying motive of the person being extorted is to protect his financial interests, defend his political reputation, or merely to safeguard marital harmony.

77. Id. The report of the interview is cited to Rtskhiladze 4/4/18 302, at 12, meaning that the statement is from FBI Form 302, written by the interviewer. Although it contains quotes from the interviewee it is not a verbatim transcript.
78. Id.
79. Id.
80. See supra text accompanying notes 54, 55.
82. Id.
IV. TWO WOMEN AND HUSH MONEY

Marital harmony as a possible motivation plays a more important role in one aspect of the convoluted issues arising from Trump’s alleged consensual sex with two women—Karen McDougal and Stormy Daniels—a decade before Trump became the Republican Party’s candidate for President in 2016.83

Donald Trump and his third wife, Melania Knauss (Knavs), were married to each other in January 2005.84 Their son Barron Trump was born in March 2006, and a few months later, in July 2006 during a celebrity golf tournament at Lake Tahoe, Donald Trump allegedly had separate sexual encounters with both Karen McDougal and Stormy Daniels.85 Trump’s alleged consensual encounters with Daniels and McDougal form the basis not only of sexual improprieties, but also allegations relating to the legality of nondisclosure agreements the women eventually signed,86 and possibilities of campaign finance violations, perjury, and obstruction of justice.87 As the Mueller Report made clear, it focused only on the obstruction of justice matter, but both women are alluded to in the Report.88 To even begin to understand both women’s relevance, it is necessary to recount at least some of the overlapping yet distinct allegations and litigation involving Karen McDougal and Stormy Daniels, which resulted in a guilty plea to criminal charges by Michael Cohen, Trump’s personal attorney.89

A. Karen McDougal

Karen McDougal is “Woman-1” in the Criminal Information in United States v. Michael Cohen90 and “a second woman” in the Mueller

87. MUELLER REPORT VOL. II, supra note 1, at 144–45.
88. Id. at 149.
89. Id.
Report.\textsuperscript{91} In media accounts, she is usually identified as a model for \textit{Playboy} magazine and \textit{Playboy} Playmate of the Year in 1998.\textsuperscript{92} The most comprehensive discussion of the events from her point of view is her interview with Anderson Cooper on CNN in March 2018\textsuperscript{93} and an article a month earlier by well-known journalist Ronan Farrow in \textit{The New Yorker}.\textsuperscript{94} Farrow, who reviewed and published portions of a diary-like account in McDougal’s handwriting, relates that in June 2006, McDougal met Trump at a pool party at the Los Angeles mansion of \textit{Playboy}’s publisher, Hugh Hefner, hosted for the contestants of Donald Trump’s reality show, \textit{The Apprentice}.\textsuperscript{95} Trump apparently “took a liking” to McDougal, causing a \textit{Playboy} executive to observe she could “be his next wife.”\textsuperscript{96} After several telephone conversations, they had their “first date: dinner in a private bungalow at the Beverly Hills Hotel.”\textsuperscript{97} McDougal recounted she found Trump intelligent, charming, and polite, and they eventually “got naked + had sex.”\textsuperscript{98} Trump offered her money afterward, which made her feel “sad,” and when she refused the money, he told her she was “special.”\textsuperscript{99} She continued to see him when he was in Los Angeles, staying at the same bungalow at the Beverly Hotel Hills Hotel.\textsuperscript{100} He also flew her to public events across the country; she paid her own expenses and he reimbursed her: “No paper trails for him,” she wrote in her account.\textsuperscript{101} These events included the American Century Celebrity Golf Championship, at the Edgewood Resort on Lake Tahoe in July 2006, where Stormy Daniels also alleges she had a sexual encounter with Donald Trump.\textsuperscript{102} McDougal wrote in her account that Trump introduced her to members of his family, including his son Donald Trump, Jr., his son’s then-wife Vanessa, and his son Eric Trump.\textsuperscript{103} He compared McDougal to his daughter, Ivanka Trump, and sent McDougal articles about himself or Ivanka.\textsuperscript{104} McDougal eventually ended the

\begin{thebibliography}{99}
\bibitem{91} Mueller Report Vol. II, supra note 1, at 148.
\bibitem{92} See Rutenberg, supra note 83.
\bibitem{94} Farrow, supra note 85.
\bibitem{95} Id.
\bibitem{96} Id.
\bibitem{97} Id.
\bibitem{98} Id.
\bibitem{99} Id.
\bibitem{100} Id.
\bibitem{101} Id.
\bibitem{102} Id.
\bibitem{103} Id.
\bibitem{104} Id.
\end{thebibliography}
relationship in April 2007 because she was feeling guilty given Trump’s marriage and because Trump had made, what she considered, objectionable comments: he called her mother an “old hag,” and remarked that McDougal’s white woman friend who was dating a Black man liked “the big black dick,” and then commented on the woman’s breast size.105

In 2016, as Trump’s political profile accelerated and an account of McDougal’s affair with Trump began to appear on social media, a friend of McDougal persuaded her to tell—and sell—her story.106 The friend’s connections eventually led McDougal to Keith M. Davidson, a Beverly Hills attorney. Davidson was in contact with America Media Company, Inc. (AMI), the publisher of the National Enquirer, whose CEO and chairman was David Pecker, a longstanding associate of Donald Trump.107 Despite some detours in which McDougal discussed telling, without direct payment, her story on ABC, the deal between McDougal and AMI was eventually completed. The August 2016 contract granted AMI “Limited Life Story Rights” (“Life Rights”) to “any romantic, personal and/or physical relationship McDougal has ever had with any then-married man.”108 AMI’s rights would be "complete, exclusive and without exception," and the contract specified that AMI was not obligated to use the Life Rights “in connection with any media.”109 McDougal further agreed that her name and image could be used for two years in connection with columns on fitness and aging and that she would pose for covers and be interviewed in fitness magazines.110 The contract sum was the amount of one hundred fifty thousand dollars—a substantial raise from AMI’s original offer of ten thousand dollars before Trump became the presidential nominee of the Republican Party—but McDougal’s attorney Keith Davidson, and the two other connections that had led to the deal, got forty-five percent of the payment.111

Four days before the presidential election in 2016, the Wall Street Journal published National Enquirer Shielded Donald Trump From

105. Id.
106. Id.
107. Id.
109. Id. ¶¶ 3, 5.
110. Id. ¶ 1.
111. Farrow, supra note 85.
Playboy Model’s Affair Allegation. The reporters described how AMI, the “company that owns the National Enquirer, a backer of Donald Trump, agreed to pay $150,000 to a former Playboy centerfold model for her story of an affair a decade ago with the Republican presidential nominee,” engaged in what is “known in the tabloid world as ‘catch and kill’”—buying a story it never had any intention of publishing. Yet the election did not terminate the importance of McDougal’s silence. According to Ronan Farrow, on election day AMI officials were on the phone with McDougal promising to boost her career in specific ways, Represented by new counsel, Karen McDougal entered into an amendment to the contract with AMI in late 2016, providing that “McDougal may respond to legitimate press inquiries regarding the facts of her relationship with Donald Trump,” but also—somewhat inconsistently—entitling AMI to “liquidated damages in the amount of $150,000” for any breach of the grant of her “Life Rights” exclusively to AMI. AMI officers were drafting comments for her to provide to reporters, and in August 2017 AMI CEO David “Pecker flew McDougal to New York and the two had lunch, during which he thanked her for her loyalty,” and discussed McDougal hosting AMI’s coverage of award shows such as the Oscars. In January 2018, AMI’s general counsel repeatedly emailed McDougal about a “contract extension” and the possibility of putting her photograph on a new magazine cover.

The Trump Campaign, through its spokeswoman Hope Hicks, had denied Trump’s affair with McDougal, calling it “totally untrue,” when it surfaced a few days before the election. But as time went on, there were subtle shifts. In Ronan Farrow’s February 2018 New Yorker article, an unnamed White House spokesperson is quoted as saying, “This is an old story that is just more fake news. The President says he never had a relationship with McDougal,” which is slightly different from a flat
denial given that it attributes the denial only to the president. Further, the prospect that the contract between McDougal and AMI occurred independently of involvement from Donald Trump was becoming more and more questionable. In a February 2018 New York Times report on Trump’s personal attorney, Michael Cohen, entitled Tools of Trump’s Fixer, Payouts, Intimidation and the Tabloids, McDougal is one of several women who are featured. The article stated although Cohen was not representing any party to the August 2016 agreement between McDougal and AMI, Cohen knew of McDougal’s allegations and Keith Davidson, McDougal’s own attorney, apprised Cohen of the contract’s completion. The revealed role of Michael Cohen as Trump’s personal attorney and “fixer” occupies center stage in McDougal’s complaint filed in California state court shortly thereafter, seeking declaratory relief that her contract with AMI was void. McDougal, through her new attorneys, alleged the contract was invalid for three reasons: there was fraud in its execution; it was illegal as an in-kind corporate donation from AMI to Donald J. Trump for President, Inc. in violation of the Federal Election Campaign Act, 52 U.S.C.§30118(a); and it was void as against public policy as seeking to curtail “core political speech” as protected by the First Amendment. In less than a month, AMI settled


“The president says!” Most official comments in stories like this include flat denials with no secondhand attribution. “The president never had a relationship with McDougal” is a flat denial. “The president says he never had a relationship with McDougal” attributes that denial directly to the president and suggests that the spokesperson is relying only on Trump’s word. 

This might seem like a whole lot of nitpicking and over-the-top parsing, and it doesn’t mean press secretaries of previous presidents haven’t done it, but this is part of a pattern for this White House. In defending a president who has problems with the truth and regularly embraces conspiracy theories, his aides will often attribute comments and denials directly to him rather than to themselves. It’s as if they want to make sure their own credibility isn’t harmed in case Trump’s theory or denial doesn’t wind up being based in reality.

121. Id.

122. Id.


124. Id. at 20–22.
the case, with a reversion of “Life Rights” to McDougal, although AMI was entitled to 10% of revenue (with a cap of $75,000) received by McDougal for sale of her story for one year after the April 2018 Settlement Agreement.

Doubts as to whether Michael Cohen’s knowledge about the McDougal deal should be attributed to Donald Trump were further diminished when audio tapes Michael Cohen recorded of a conversation with Donald Trump discussing the matter became public. This was after the FBI executed a search warrant on Cohen’s office and the recording surfaced in the review of seized materials by Cohen’s attorneys which was eventually disclosed. In the recording of the September 2016 telephone call, Trump and Cohen are discussing polls, an attempt from the New York Times to unseal the divorce pleadings from his first wife, Ivana Trump, and presumably the nondisclosure agreement between McDougal and AMI:

COHEN: . . . I need to open up a company for the transfer of all of that info regarding our friend, David, you know, so that — I’m going to do that right away. I’ve actually come up and I’ve spoken —

TRUMP: Give it to me and [UNINTELLIGIBLE].

COHEN: And, I’ve spoken to Allen Weisselberg about how to set the whole thing up with . . .


128. Cuomo, supra note 127.

129. Allen Weisselberg is the Chief Financial Officer of Trump Organization and has worked with the Trump family since the 1970s.
TRUMP: So, what do we got to pay for this? One-fifty?

COHEN: . . . funding. Yes. Um, and it's all the stuff.

TRUMP: Yeah, I was thinking about that.

COHEN: All the stuff. Because — here, you never know where that company — you never know what he's —

TRUMP: Maybe he gets hit by a truck.

COHEN: Correct. So, I'm all over that. And, I spoke to Allen about it, when it comes time for the financing, which will be —

TRUMP: Wait a sec, what financing?

COHEN: Well, I'll have to pay him something.

TRUMP: [UNINTELLIGIBLE] pay with cash . . .

COHEN: No, no, no, no, no. I got it.

TRUMP: . . . check.

[Tape cuts off abruptly. Separate recording begins.]130

As the tape recording surfaced in the media, Press Secretary, Sarah Huckabee Sanders, was asked at a White House Press briefing: “Does the President still deny that he ever had a relationship with a woman named Karen McDougal?”131 Sanders responded: “Once again, the President maintains that he's done nothing wrong, and I would refer you to Rudy Giuliani for all questions on that matter.”132 Indeed, Rudy Guiliani, former mayor of New York City and Trump’s personal attorney, was making public statements about the Cohen recording, confirming “that Mr. Trump had discussed payments to Ms. McDougal with Mr. Cohen in person on the recording,” but adding that Trump did not know he was being recorded and nothing in conversation suggested that Trump knew

132. Id.
about the arrangement before the conversation took place. For his part, President Trump responded with a tweet regarding the propriety and authenticity of the tape.

As discussed below, within the month Michael Cohen would enter a guilty plea to criminal charges brought not by Special Counsel Mueller but by the Acting United States Attorney in the Southern District of New York. These charges included a campaign finance violation surrounding the money paid to Karen McDougal, as well as a campaign finance violation surrounding the money paid to Stormy Daniels.

B. Stormy Daniels

Daniels, whose given name is Stephanie Clifford, but more commonly known as Stormy Daniels, is “Woman-2” in the Criminal Information in United States v. Michael Cohen and “a woman” in the Mueller Report. In media accounts, she is usually described as an “adult-film star” or “porn actress,” although she is also a writer and director in the genre as well as a dancer. The most comprehensive discussion of the events from her point of view, and situated in the larger context of her life, is her book Full Disclosure, published in October 2018. Like McDougal and only a few days afterward, Daniels gave an extensive televised interview to Anderson Cooper, and there are also many media accounts. Also like McDougal, Daniels alleged she had a sexual encounter with Donald Trump in his hotel room at the American Century Celebrity Golf Championship at the Edgewood Resort in July 2011.

133. Apuzzo, Haberman & Schmidt, supra note 126.
134. @realDonaldTrump, Twitter (Jul. 25, 2018, 8:34 AM), https://twitter.com/realDonaldTrump/status/102209787925365072 (“What kind of a lawyer would tape a client? So sad! Is this a first, never heard of it before? Why was the tape so abruptly terminated (cut) while I was presumably saying positive things? I hear there are other clients and many reporters that are taped - can this be so? Too bad!”).
136. See @StormyDaniels, Twitter (Aug. 24, 2018, 12:55 PM), https://twitter.com/StormyDaniels/status/1033035009358262272 (replying to author Jill Filipovic, referencing her op-ed, Stormy Daniels, Feminist Hero, thanking Filipovic “for not only the article but for being one of the very few journalists to respect and use my preferred name.”).
2006, and like McDougal, alleges that Trump said she reminded him of his daughter, Ivanka. But unlike McDougal, Stormy Daniels states this was her first and last time having sex with Trump and—unlike McDougal—she has described the experience in detail, including Trump greeting her in “black silk pajamas and slippers,” her spanking him with a “money magazine with him on the cover,” and his body and sexual performance. During their meeting, he had broached the possibility that she could appear on his television show *The Apprentice*, although both understood her adult-film involvement was an obstacle. He did continue to telephone her and she saw him on several other occasions, including one where Karen McDougal was also present, as he continued to dangle *The Apprentice* possibility. In July 2007, she came to his private bungalow at the Beverly Hills Hotel (again, a place he had met with McDougal) where he was absorbed by a popular documentary about sharks on the television, took a call from Hillary Clinton who he called a “great friend[],” and a sexual encounter was forestalled by a false excuse from Stormy Daniels. In two subsequent phone calls, they discussed the possibility of her appearance on *Celebrity Apprentice*, which was not to be. She soon met her future husband, and they eventually had a child.

While Daniels was recovering from a difficult birth, she received a phone call from a friend and then an entertainment manager, which led to a phone call from attorney Gloria Allred, asking her about her “story,” which Stormy Daniels says she told without the sex. Allred wasn’t interested. But a few months later, in March 2011, the same entertainment manager called again, this time to tell Stormy Daniels that a story had appeared on a gossip site, *The Dirty*, recounting that Daniels and Trump had a sexual affair. The entertainment manager suggested that her attorney Keith Davidson—the same Keith Davidson that represented Karen McDougal—could get the story taken down, which happened. But a couple of weeks later, someone from another gossip magazine and site, *In Touch*, contacted Stormy Daniels and discussed the story it was ready to publish. The representative related that the story

141. DANIELS, supra note 139, at 108, 113, 128.
142. Id. at 118.
143. Id. at 109–31.
144. Id. at 119–20.
145. Id. at 137–46.
146. Id. at 142–45.
147. Id. at 146.
148. Id. at 192–93.
149. Id. at 193–94.
150. Id. at 194.
could either be published as it was, or as a Stormy Daniels’ interview, for which she would be compensated.\textsuperscript{151} She gave the interview and also took a lie detector test. Before \textit{In Touch} published the story, the editor said they would contact Donald Trump for a comment.\textsuperscript{152} Stormy Daniels recounts that on her way to a postnatal fitness class with her daughter in tow, she was approached by a man in the parking lot, who said her daughter was beautiful and that it would be “a shame if something happened to her mom,” adding, “Forget the story. Leave Mr. Trump alone.”\textsuperscript{153} She did not tell anyone about the threat, but the editor at \textit{In Touch} and the entertainment manager both stopped returning her calls, and the story did not appear—at least not for another seven years.\textsuperscript{154}

Similar to Karen McDougal’s situation, as Trump’s political profile accelerated, people began to suggest that Stormy Daniels tell and sell her story, and that she come forward given Trump’s politics; however, she was worried about her safety.\textsuperscript{155} She scheduled a television appearance with \textit{Good Morning America}.\textsuperscript{156} Then the same entertainment manager contacted her at the set of a movie Daniels was directing in California, bringing with her the attorney, Keith Davidson, who offered her $130,000 to sign a nondisclosure agreement.\textsuperscript{157} As the contract appended to Stormy Daniels later lawsuit demonstrates, the parties to the fifteen page “Confidential Settlement Agreement and Mutual Release” were on the one part “EC, LLC,” identified later as Essential

\textsuperscript{151} Id. at 195.
\textsuperscript{152} Id. at 198.
\textsuperscript{153} Id. at 199–200.
\textsuperscript{154} Id. at 202; ‘\textit{In Touch’} Explosive Interview With Stormy Daniels: Donald Trump Cheated on Melania With Me (Jan. 19, 2018), https://www.intouchweekly.com/posts/stormy-daniels-affair-donald-trump-151571/.
\textsuperscript{155} Mike Murphy, Stormy Daniels says she was intimidated into keeping quiet over Trump affair, \textsc{MarketWatch} (Mar. 26, 2018), https://www.marketwatch.com/story/stormy-daniels-says-she-was-intimidated-into-taking-hush-money-over-trump-affair-2018-03-25 (Stormy Daniels recounted "I was in a parking lot going to a fitness class with my infant daughter, and a guy walked up on me and said to me, ‘Leave Trump alone. Forget the story.’ And he leaned round and looked at my daughter and said, ‘That’s a beautiful little girl, it would be a shame if something happened to her mom.’").
Consultants, with a mailing address c/o Michael Cohen, “and/or David Dennison,” and on the other part, “Peggy Peterson.” The agreement avers that these “are pseudonyms whose true identity will be acknowledged in a Side Letter Agreement.” However, the two-page Side Letter Agreement does not identify David Dennison, or even Michael Cohen; there are only blacked out redactions, although it identifies “Stephanie Clifford a.k.a Stormy Daniels” as Peggy Peterson.

In her book, Stormy Daniels related the conditions of her signing the agreements: “they opened the trunk so [she] could sign it right there under the light.” She wrote that she later learned that Trump’s personal attorney, Michael Cohen, had reached out to Davidson when he learned that Stormy Daniels might appear on Good Morning America and offered that amount for her silence. The promised money did not appear, and Daniels stated that a second contract had to be completed. “Ten days before the election, Cohen wired the $130,000 to Davidson,” and after deducting almost half for his share and the entertainment manager, Davidson wired the remaining money to Stormy Daniels’ husband’s bank account.

Almost a year later, the same entertainment manager and the attorney Davidson contacted Stormy Daniels given the “rumblings” that the story would become public and apparently again instigated by Trump’s personal attorney, Michael Cohen. Stormy Daniels signed a brief prepared statement denying rumors of “hush money” and a “sexual and/or romantic affair with Donald Trump.” But the story soon

158. Stormy Daniels’ State Court Complaint, supra note 157, at Ex. 1.
159. Id. at Ex. 1.
160. Id. at Ex. 2.
161. DANIELS, supra note 139, at 213.
162. Id.
163. Id. at 214.
164. Id. at 217.
165. Ellie Hall, Here’s What You Need to Know About Stephanie Clifford, the Adult Film Star Known As Stormy Daniels, BUZZFEEDNEWS (Jan. 12, 2018 5:12 PM EST), https://www.buzzfeednews.com/article/ellievhall/stormy-daniels (with image of statement). The full statement reads:

To Whom It May Concern:

I recently became aware that certain news outlets are alleging that I had a sexual and/or romantic affair with Donald Trump many, many, many years ago. I am stating with complete clarity that this is absolutely false. My involvement with Donald Trump was limited to a few public appearances and nothing more. When I met Donald Trump, he was gracious, professional, and a complete gentleman to me and EVERYONE in my presence.

Rumors that I have received hush money from Donald Trump are completely false. If I indeed did have a relationship with Donald Trump, trust me, you wouldn’t be reading about it in the news, you would be reading about it in my book. But the fact of the matter is, these stories are not true.
appeared. On January 12, 2018, a headline in the Wall Street Journal read: “Trump Lawyer Arranged $130,000 Payment for Adult-Film Star’s Silence,” with the subtitle: “Agreement just before election required woman to keep quiet about an alleged sexual encounter with Trump in 2006, people familiar with the matter say.”166 The article was by two of the same reporters who had written the November pre-election story about the payment to Karen McDougal, which had mentioned Stormy Daniels as being “in discussions with ABC’s ‘Good Morning America’ in recent months to publicly disclose what she said was a past relationship with Mr. Trump.”167 The article on the Stormy Daniels payment stated that Michael Cohen had supplied a two-paragraph denial from Daniels, and that Cohen did not address the payment but did say that President Trump denied “any such occurrence.”168 Shortly thereafter, Stormy Daniels appeared on the late night television show Jimmy Kimmel Live, but only after Daniels signed yet another prepared statement presented to her by her lawyer Keith Davidson and released to the public by Trump’s attorney Michael Cohen.169 On the show, Kimmel discussed the fact that the signature on this statement was very different from her other signatures.170

Stormy Daniels began to question the nondisclosure agreement she had signed in light of Cohen’s disclosures about the same matters, including his statements that he was writing a book about being Trump’s fixer and that he had paid the $130,000 from his own funds.171 She also became increasingly skeptical about her attorney Davidson, especially wondering why “he and Michael Cohen seemed so chummy.”172 She began to seek other legal representation and eventually retained California attorney, Michael Avenatti.

Avenatti would file three lawsuits on behalf of Stormy Daniels in quick succession. First was the complaint in Clifford v. Trump, filed in California state court on March 6, 2018.173 Avenatti sought declaratory relief that what it termed the “Hush Agreement” was invalid because

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167. Id.; National Enquirer Shielded, supra note 156.

168. Rothfeld and Palazzolo, supra note 166.

169. National Enquirer Shielded, supra note 156.


171. DANIELS, supra note 139, at 228–30.


173. See generally Stormy Daniels’ State Court Complaint, supra note 157.
Donald Trump had not signed it, did not provide any valuable consideration, and alternatively because the agreement was unconscionable. The complaint was prompted in part because Michael Cohen was attempting to enforce the arbitration clause in the agreement. The defendants, Trump and Essential Consultants, LLC, removed the matter to federal court on the basis of diversity jurisdiction. Daniels soon filed an amended complaint adding Michael Cohen individually as a defendant and adding a count of defamation against him. Within a few months, Defendants, Essential Consultants LLC and Michael Cohen, had dismissed the arbitration proceeding and executed a Covenant Not To Sue pursuant to the agreement and then moved to dismiss the complaint as moot, which the judge granted in March 2019. Second, the complaint in *Clifford v. Trump*, originally filed in federal court in New York but then transferred to the same California federal district judge hearing the first lawsuit, sought damages for defamation on the basis of a Trump tweet, which the judge decided against Daniels. Third, in *Clifford v. Davidson*, the complaint filed in state court in California in June 2018, Stormy Daniels alleged that her attorney Keith Davidson had breached his fiduciary duty to her and that Michael Cohen had aided and abetted Davidson’s breach of fiduciary duties. The complaint included text messages between Davidson and

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175. Stormy Daniels’ State Court Complaint, supra note 157, at ¶¶ 29–30.
180. Clifford v. Trump, 339 F. Supp. 3d 915, 919-20, 929 (C.D. Cal. 2018). The judge held that Trump’s tweet was opinion rather than a factual statement and was the type of “rhetorical hyperbole” that is “normally associated with politics and public discourse in the United States” and protected by the First Amendment. Id. at 925. The judge assessed costs, attorneys’ fees, and sanctions against Stormy Daniels in the amount of almost three hundred thousand dollars. Clifford v. Trump, No. CV 18-06893-SJO. 2018 WL 6519029, at ¶ (C.D. Cal. Dec. 11, 2018). For more discussion of the case in the context of other defamation suits by women against Trump, see generally Robson, supra note 21.
Cohen and alleged that Cohen was attempting to have Stormy Daniels appear on the *Hannity* show on Fox News “after consultation with Mr. Trump.” The complaint also alleged that Davidson revealed some of Stormy Daniels’ plans to Cohen, who then “undertook efforts to meet the next day with Mrs. Melania Trump, in order to ‘get out in front’ of the approaching lawsuit and publicity, and convince her that Ms. Clifford was a liar and not to be trusted.” The defendants removed the case to federal court and it was assigned to the same judge as the earlier cases. However, in August 2018, the judge granted Clifford’s motion to remand the case back to state court on the basis of the Forum Defendant Rule given Davidson’s California residency. The parties filed a notice of settlement almost a year later, in May 2019.

Avenatti’s representation of Stormy Daniels included lawsuits, managing multiple appearances, keeping her “in the news,” and representing her in negotiations for her book. His vigorous representation also enhanced his own fame to the degree that he spoke of running for President. Yet his ethics—and more—were increasingly called into question. On May 22, 2019, the United States Attorney for the Southern District of New York indicted Michael Avenatti in two separate cases resulting from his actions as an attorney. In an indictment charging wire fraud and aggravated identity theft, Stormy Daniels appears not by name, but as Victim-1 who is defrauded with regard to a book contract.

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182. Id. at ¶¶ 20–36
183. Id. at ¶ 41.
189. Indictment, United States v. Avenatti, No. 19 Cr. 374, 2019 WL 4164925 (S.D.N.Y. May 22, 2019) (No. 19 Cr. 374). The indictment alleges from August 2018 through February 2019, AVENATI defrauded a client (“Victim-1”) by diverting money owed to Victim-1 to AVENATI’s
As previously mentioned, the Acting United States Attorney in the Southern District of New York also charged Michael Cohen with a crime relating to his interactions with Stormy Daniels.\textsuperscript{190} Cohen ultimately pled guilty and was sentenced to prison. The crimes to which Michael Cohen would plead guilty included a campaign finance violation surrounding the money paid to Stormy Daniels, as well as the money paid to Karen McDougal.\textsuperscript{191} The next section considers Cohen in relation to these crimes, the Mueller Report, and Trump.
V. MICHAEL COHEN AND CAMPAIGN FINANCE VIOLATIONS

The Federal Election Campaign Act (FECA) of 1971, and its expansion in the 2002 Bipartisan Campaign Reform Act (BCRA), are statutes regulating the role of money in elections. Campaign finance laws are largely administered by the Federal Election Commission (FEC), although there are also criminal provisions enforced by the Department of Justice. There have been numerous and often successful First Amendment challenges to various provisions in the FECA and BCRA that have reached the United States Supreme Court, usually resulting in lengthy, complex, and fractured opinions. In the first challenge, *Buckley v. Valeo*, the Court equated money with speech, but drew a distinction between expenditures of campaigns (which could not be constitutionally limited) and contributions to campaigns which would be subject to further First Amendment review. In one of the most well-known cases, *Citizens United v. Federal Election Commission*, a closely-divided Court held unconstitutional a BCRA provision prohibiting corporations from spending money on an “electioneering communication.” And a few years later, in *McCutcheon v. Federal Election Commission*, the Court held unconstitutional the aggregate limits imposed on individuals, again by a closely-divided vote.

Nevertheless, the campaign finance statutes have important current applications to the “hush money” payments to Stormy Daniels and Karen McDougal facilitated by Michael Cohen. The campaign finance laws continue to set limits on campaign contributions by individuals to a specific campaign, continue to require that campaigns report all

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194. See infra note 205.
197. Id. at 16, 29, 58-59.
199. Id. at 321, 372.
201. Id. at 227.
202. 52 U.S.C. § 30116(a)(1)(A) provides that no person shall make contributions “to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000.” The statute provides that the $2,000 original limit will be increased yearly based on the price index. Id. § 30116(c)(1)(A). The limit in 2016 was $2,700.
contributions to the FEC\textsuperscript{203} and continue to bar campaign contributions and expenditures by corporations.\textsuperscript{204} The “hush-money” payments to Daniels and McDougal were obviously not the usual direct contributions to a campaign, so definitions become crucial. The FECA defines a contribution as including “(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.”\textsuperscript{205} The FEC defines an expenditure as including “(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure.”\textsuperscript{206}

Applying the campaign finance statutes to the complex facts of the Daniels and McDougal payments facilitated by Michael Cohen raises some relatively simple issues that can be quickly resolved. There is no dispute that the Trump Campaign did not report the payments. There is also no dispute that if the source of those payments was an individual, including Michael Cohen or David Pecker, then the payments of $130,000 and $150,000 would be far in excess of the campaign limits per


\textsuperscript{204}52 U.S.C. § 30118(a) provides:

\begin{quote}
It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.
\end{quote}


individual per campaign of $2,700. Additionally, there is no dispute that if the payments were made by a corporation, such as A.M.I. or Trump Organization, they would be absolutely barred.

However, application of the federal campaign statutes to the “hush money” payments to Daniels and McDougal also implicates the difficult issue of intent. The statutes themselves provide that the contribution or corporate expenditure be made “for the purpose of influencing any election for Federal office.” The statutes also provide that “Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure,” is subject to a fine or imprisonment of not more than five years if the sums are $25,000 or more. As the organization Common Cause explained, the Department of Justice’s own Handbook provides that the DOJ has responsibility to prosecute “knowing and willful violations” of campaign finance laws.

The question of whether the payments to Daniels and McDougal were knowingly and willfully made for the purpose of influencing the

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207. Id. § 30116(a)(1)(A).
BCRA significantly enhanced the criminal penalties for knowing and willful violations of the Federal Election Campaign Act. BCRA did so in response to identified anti-social consequences, namely, corruption and the appearance of corruption arising from FECA violations, and their adverse effect on the proper functioning of American democracy. . . .
In view of the enhanced criminal penalties for FECA crimes and the legislative history supporting their enactment, it is the Justice Department’s position that all knowing and willful FECA violations that exceed the applicable jurisdictional floor specified in the Act’s criminal provision should be considered for federal prosecution. . . .
election—and whether that could be proven—reanimates the subject of Trump’s marital harmony with his wife Melania. Here, unlike the possible blackmail scenario involving the alleged Moscow tape, Trump’s intent matters. It could be argued that Trump’s motivation in allegedly arranging these hush money payments was to procure the women’s silence so that his wife would not discover his alleged indiscretions. On this view, if Trump made these payments, they would be personal rather than connected to the campaign; a person running for office still has personal expenses. However, even on the view that they were personal expenses, if a third party—Michael Cohen, David Pecker, AMI, or the Trump Organization—paid these personal expenses, they would be excessive campaign contributions or unlawful corporate campaign expenditures, unless, as the FEC regulations provide, such payments would have been made “irrespective of the candidacy.”

The Mueller investigation did not confront these difficult campaign finance issues and the Mueller Report specifically stated Special Counsel’s Office “did not investigate Cohen’s campaign-period payments to women.” Instead, the Mueller investigation referred the campaign to the Federal Election Commission (FEC).

212. 11 C.F.R. § 113.1(g) defines “personal use” in relation to 52 U.S.C. § 30114 which prohibits campaign funds from being diverted to personal use. The regulation provides that “[p]ersonal use means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder,” and includes various examples. Id. Subsection 6, entitled “Third party payments,” more specifically provides:

Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under subpart B of part 100 to the candidate unless the payment would have been made irrespective of the candidacy. Examples of payments considered to be irrespective of the candidacy include, but are not limited to, situations where—

i. The payment is a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United States House of Representatives;

ii. The payment is made from funds that are the candidate’s personal funds as defined in 11 CFR 100.33, including an account jointly held by the candidate and a member of the candidate’s family;

iii. Payments for that expense were made by the person making the payment before the candidate became a candidate. Payments that are compensation shall be considered contributions unless—

A. The compensation results from bona fide employment that is genuinely independent of the candidacy;

B. The compensation is exclusively in consideration of services provided by the employee as part of this employment; and

C. The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

Id. § 113.1(g)(6).

213. Mueller Report Vol. II, supra note 1, at 145. However, as the footnote explains:
finance matters affecting Michael Cohen to the United States Attorney for the Southern District of New York.\textsuperscript{214} In August 2018, the United States Attorney for the Southern District of New York charged Michael Cohen in a criminal information that included campaign finance crimes.\textsuperscript{215} At the same time the charges were revealed, Cohen pleaded guilty pursuant to a specific plea agreement.\textsuperscript{216} Cohen would later be charged by Special Counsel with making false statements to Congress\textsuperscript{217} and enter a guilty plea pursuant to a different plea agreement.\textsuperscript{218}

The charges and plea in the Southern District of New York related to the payments to McDougal and Daniels to buy their silence concerning sex with Donald Trump.\textsuperscript{219} Count seven of the criminal information concerned “Woman-1,” an anonymous reference to Karen McDougal, and charged causing an unlawful corporate contribution: Cohen “caused Corporation-1 to make and advance a $150,000 payment to Woman-1, including through the promise of reimbursement, so as to ensure that Woman-1 did not publicize damaging allegations before the 2016

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The Office was authorized to investigate Cohen’s establishment and use of Essential Consultants LLC, which Cohen created to facilitate the $130,000 payment during the campaign, based on evidence that the entity received funds from Russian-backed entities. Cohen’s use of Essential Consultants to facilitate the $130,000 payment to the woman during the campaign was part of the Office’s referral of certain Cohen-related matters to the U.S. Attorney’s Office for the Southern District of New York.

\textit{Id.} at n.1008.


presidential election and thereby influence that election.” Count eight of the criminal information concerned “Woman-2,” again an anonymous reference to Stormy Daniels, and charged an excessive campaign contribution:

[Cohen] knowingly and willfully made and caused to be made a contribution to Individual-1, a candidate for federal office, and his authorized political committee in excess of the limits of the Election Act . . . by making and causing to be made an expenditure, in cooperation, consultation, and concert with, and at the request and suggestion of one or more members of the campaign . . . a $130,000 payment to Woman-2 to ensure that she did not publicize damaging allegations before the 2016 presidential election and thereby influence that election.

In the plea agreement, the Office of the United States Attorney agreed to accept a guilty plea from Cohen on counts seven and eight as well as on the six other counts in the information.

In the subsequent Sentencing Memorandum on Behalf of Michael Cohen, pertaining to both the Southern District of New York information and the Special Counsel information charging one count of lying to Congress, Cohen’s attorneys portray him as having taken personal responsibility for his actions and cooperating with the government. The sentencing memo argued that Cohen’s campaign finance violations arose from Cohen’s “fierce loyalty” to Trump, who is identified as Individual-1 in the criminal information, and Client-1 in Cohen’s Memo, and that Cohen’s “conduct was intended to benefit Client-1, in accordance with Client-1’s directives. Michael regrets that his vigor in promoting Client-1’s interests in the heat of political battle led him to abandon good judgment and cross legal lines.”

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220. Id. at 18. The information cited in 52 U.S.C. §§ 30118(a) and 30109(d)(1)(A), for the campaign finance violations, as well as 18 U.S.C. § 2(b), regarding being punished as a principal even if one aids or abets the offense.

221. Id. at 19. The information cited 52 U.S.C. §§ 30116(a)(1)(A), 30116(a)(7), and 30109(d)(1)(A), and 18 U.S.C. § 2(b). The statutes relate to the excessive contribution as well as it being in coordination with a campaign.


224. Id. at 22.

225. Id.

Moreover, the sentencing memo specifically addressed relevant issues under the campaign finance statutes and regulations regarding the purpose of the payments and Trump's knowledge:

The details of the offense conduct captured by Count Seven and Eight are set forth in the charging instrument. Concerning Count Seven, as relevant here, Michael himself did not make the payment to Woman-1 called for by the agreement reached between Corporation-1 and Woman-1, but participated in planning discussions with Client-1 and the Chairman and CEO of Corporation-1 relating to the payment made by Corporation-1, including obtaining the commitment of Client-1 to repay Corporation-1. As the matter unfolded, the contract was profitable for Corporation-1, and Client-1's failure to reimburse Corporation-1 was ultimately not contested by Corporation-1.

Concerning Count Eight, Michael made a payment to the lawyer for Woman-2 in coordination with and at the direction of Client-1, and others within the Company. Michael was assured by Client-1 that he would be repaid for his advance of funds, and, later, again with the approval of Client-1, agreed to an arrangement conceived by an executive of the Company whereby Michael would receive reimbursement during 2017 in the form of monthly payments by the Company for invoiced legal fees.

With respect to the conduct charged in these Counts, Michael kept his client contemporaneously informed and acted on his client's instructions. This is not an excuse, and Michael accepts that he acted wrongfully. Nevertheless, we respectfully request that the Court consider that as personal counsel to Client-1, Michael felt obligated to assist Client-1, on Client-1's instruction, to attempt to prevent Woman-1 and Woman-2 from disseminating narratives that would adversely affect the Campaign \textit{and} cause personal embarrassment to Client-1 and his family.\footnote{Sentencing Memorandum on Behalf of Michael Cohen at 22-23, United States v. Cohen, https://assets.documentcloud.org/documents/5360474/Gov-Uscourts-Nysd-505539-8-0.pdf (S.D.N.Y. Nov. 30, 2018) (No. 1:18-cr-00850) (bolding and italics in original).}

By bolfacing and italicizing the “and,” the sentencing memo on Cohen's behalf essentially contends that while “personal embarrassment” might be a factor, the campaign was equally a factor. Thus, the sentencing
Further, the representation in Cohen’s sentencing memo that he “kept his client contemporaneously informed and acted on his client’s instructions,” regarding both women\(^{228}\) contradicted earlier statements, both by Cohen and by Trump, regarding Stormy Daniels. In a statement to the *New York Times* in February 2018, Cohen stated he paid the money “out of his own pocket” and was not reimbursed: “Neither the Trump Organization nor the Trump campaign was a party to the transaction with Ms. Clifford, and neither reimbursed me for the payment, either directly or indirectly. . . . The payment to Ms. Clifford was lawful, and was not a campaign contribution or a campaign expenditure by anyone.”\(^{229}\) Further, “[i]n congressional testimony on February 27, 2019, Cohen testified that he had discussed what to say about the payment with the President and that the President had directed Cohen to say that the President ‘was not knowledgeable . . . of [Cohen’s] actions’ in making the payment.”\(^{230}\) For his part, President Trump denied knowledge of the payment, notably in a video-taped interview as he was boarding Air Force One in April 2018:

Q: Did you know about the $130,000 payment to Stormy Daniels?

A: No (shaking head no).

Q: Then why did Michael Cohen make it if there is no truth to the allegations?

A: You’ll have to ask Michael Cohen. Michael’s my attorney. And you’ll have to ask Michael.

Q: Do you know where he got the money to make the payment?

A: No, I don’t know (shaking head).\(^{231}\)

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\(^{228}\) Id. at 23.


About a month later, President Trump would alter this representation in a series of early morning tweets, stating that Cohen received a monthly retainer unconnected to the campaign and entered into “through reimbursement, a private contract,” known as a “nondisclosure agreement, or NDA.” An NDA, “common among celebrities and people of wealth,” would be enforced in arbitration. President Trump, in the same series of tweets, stated that this NDA was used to “stop the false and extortionist accusations” being made by Stormy Daniels “about an affair.”

Again, the Mueller Report specifically stated that the Special Counsel’s Office “did not investigate Cohen’s campaign-period payments to women,” presumably also including any liability of the President. However, campaign finance, ‘hush money,’ and alleged sexual indiscretions are integral to the relationship between Donald Trump and his so-called “fixer” Michael Cohen and are central to the Mueller Report’s inquiry into obstruction of justice. In the Mueller Report, Michael Cohen’s name appears more than anyone else in the Trump

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232. See @realDonaldTrump, TWITTER (May 3, 2018, 6:46 AM), https://twitter.com/realdonaldtrump/status/991992302267785216 (“Mr. Cohen, an attorney, received a monthly retainer, not from the campaign and having nothing to do with the campaign, from which he entered into, through reimbursement, a private contract between two parties, known as a nondisclosure agreement, or NDA. These agreements are ……”). For more discussion of Trump’s use of NDAs, see Robson, supra note 21 (forthcoming 2020).

233. See id.; @realDonaldTrump, TWITTER (May 3, 2018, 6:54 AM), https://twitter.com/realdonaldtrump/status/991994433750142976 (“… very common among celebrities and people of wealth. In this case it is in full force and effect and will be used in Arbitration for damages against Ms. Clifford (Daniels). The agreement was used to stop the false and extortionist accusations made by her about an affair, ……”). @realDonaldTrump, TWITTER (May 3, 2018, 7:00 AM), https://twitter.com/realdonaldtrump/status/991995845120753664 (“… despite already having signed a detailed letter admitting that there was no affair. Prior to its violation by Ms. Clifford and her attorney, this was a private agreement. Money from the campaign, or campaign contributions, played no roll [sic] in this transaction.”).

234. Mueller Report Vol. II, supra note 1, at 145. However, as the footnote explains:

The Office was authorized to investigate Cohen’s establishment and use of Essential Consultants LLC, which Cohen created to facilitate the $130,000 payment during the campaign, based on evidence that the entity received funds from Russian-backed entities. Cohen’s use of Essential Consultants to facilitate the $130,000 payment to the woman during the campaign was part of the Office’s referral of certain Cohen-related matters to the U.S. Attorney’s Office for the Southern District of New York.

Id. at n.1008.

235. This would include not only the campaign finance violations but also any falsehoods. The President’s statements to the press or tweets are not under oath or otherwise susceptible to perjury charges, so any falsehoods would not be criminal, and recall that the President did not meet with investigators or testify in conjunction with the Mueller investigation, only responding to a limited number of questions, none of which involved specific sexual allegations or campaign finance.

family. Specifically, the Mueller Report states in Volume II, regarding obstruction, that these events “are potentially relevant to the President’s and his personal counsel’s interactions with Cohen as a witness who later began to cooperate with the government.” For example, the Mueller Report notes that “the day after the New York Times wrote a detailed story attributing the payment to Cohen and describing Cohen as the President’s ‘fixer,’ Cohen received a text message from the President’s personal counsel that stated, ‘Client says thanks for what you do.’” The Mueller Report also recites negative tweets by President Trump maligning Cohen, including one after that “someone is trying to make up stories in order to get himself out of an unrelated jam (Taxi cabs maybe?) He even retained Bill and Crooked Hillary’s lawyer. Gee, I wonder if they helped him make the choice!” and another contrasting Cohen with Paul Manafort, who “unlike Michael Cohen ... refused to ‘break.’” There were additional tweets, statements, and communications by the President or his counsel, and the Mueller Report ultimately concluded that the “evidence concerning this sequence of events could support an inference that the President used inducements in the form of positive messages in an effort to get Cohen not to cooperate, and then turned to attacks and intimidation to deter the provision of information or undermine Cohen’s credibility once Cohen began cooperating.” As to intent, the Mueller Report concluded that the timing of some statements “supports an inference that they were intended at least in part to discourage Cohen from further cooperation.” The Mueller Report then goes on to analyze whether President Trump’s acts and statements, when taken as a whole, could constitute obstruction of justice given the case law and concludes, that


240. Mueller Report Vol. II, supra note 1, at 148–49 n.1043 (citing Donald Trump (@realDonaldTrump), TWITTER (July 27, 2018, 7:26 AM EDT); Donald Trump (@realDonaldTrump), TWITTER (July 27, 2018, 7:38 AM EDT); Donald Trump (@realDonaldTrump), TWITTER (July 27, 2018, 7:56 AM EDT). A footnote of the Report further indicates that “[at] the time of these tweets, the press had reported that Cohen’s financial interests in taxi cab medallions were being scrutinized by investigators.” Id. at 149 n.1043.


242. Id. at 154.

243. Id. at 154.
in sum, "in light of the breadth" of the obstruction statutes, "an argument that the conduct at issue in this investigation falls outside the scope of the obstruction laws lacks merit."244 Despite this implied double negative phrasing—"outside," "lacks"—the Mueller Report is stating that the President obstructed justice regarding Michael Cohen.245 However, the next section of the Mueller Report discusses the constitutional status of the President246 and finally concludes that the report "does not conclude that the President committed a crime, it also does not exonerate him."247

Judge William H. Pauley III sentenced Michael Cohen to three years in prison.248 Mueller concluded the investigation, issuing the Report in March 2019.249 Given Cohen’s representations and the redactions in the materials supporting the search warrants applicable to Cohen, there did seem to be a potential for further charges brought by the Office of the United States Attorney for the Southern District of New York relating to campaign finance violations based on the hush-money paid to women alleging sexual relations with Trump.250 But this possibility receded a few months later. Considering whether or not to continue the redaction of certain portions in the Cohen search warrant materials, the judge stated that "[t]he Government now represents that it has concluded the aspects of its investigation that justified the continued sealing of the portions of the Materials relating to Cohen’s campaign finance violations."251 The judge reasoned that there were weakened privacy interests given that "the involvement of most of the relevant third-party actors is now public knowledge" and concluded that "the weighty public ramifications of the conduct described in the campaign finance portions warrant disclosure."252 He stated that the "campaign finance violations discussed in the Materials" supporting the warrants "are a matter of national importance. Now that the Government’s investigation into

244. Id. at 168.
245. Id.
246. Id. at 168–81.
247. Id. at 182.
249. See MUELLER REPORT VOL. II, supra note 1.
250. Id. at 149.
252. Id.
those violations has concluded, it is time that every American has an opportunity to scrutinize the Materials.” 253

Scrutinizing the materials, specifically the previously redacted portions of the FBI agent’s affidavit of April 8, 2018, regarding the “Illegal Campaign Contribution Scheme,” 254 does reveal matters that are—or should be—of national importance. The materials raise issues about Trump’s direct participation, the participation of Trump’s campaign staff, specifically Hope Hicks as press secretary for Trump’s presidential campaign, and the role of AMI officials David Pecker and Dylan Howard.

The FBI agent’s affidavit is a lengthy narrative of phone call records (phone numbers, but not the unavailable content of those calls), as well as previously seized emails and texts messages. The affidavit avers that Cohen did not speak regularly by phone with Trump, 255 Hicks, 256 or Pecker and Howard, 257 although this changed in October of 2016. For example, on the evening of October 8, 2016:

- Cohen received a call from Hope Hicks, which Trump immediately joined (4-minute call);
- Cohen and Hicks spoke about ten minutes after that call ended (2-minute call);
- Cohen immediately called David Pecker (30 seconds), then Cohen called back (more than 1-minute call);
- Cohen received a call from Dylan Howard three minutes later (1-minute call);
- Cohen called Hope Hicks eight minutes later (2-minute call);
- Cohen immediately received a call from David Pecker (2-minute call);
- Cohen called Trump three minutes later (8-minute call);
- Cohen received calls from Howard about thirty minutes later (4-minute call and 6-minute call);

253. Id. at 3.
255. See id. ¶ 34(a) (“Cohen and Trump spoke about once a month prior to this date – specifically, prior to this call on October 8, 2016, Cohen and Trump had spoken once in May, once in June, once in July, zero times in August, and twice in September.”).
256. Id. (“I believe this was the first call Cohen had received or made to Hicks in at least multiple weeks”).
257. Id. ¶ 34(c).
Cohen received text from Howard ten minutes later, stating that "Keith [Davidson] will do it."\(^{258}\)

There were more texts between Cohen, Howard, and Davidson, and a phone call between Cohen and Davidson over the following days. Additionally, there were more texts between Cohen and David Pecker and between Cohen and Howard, with an attempt by Cohen to call Trump.\(^{259}\)

There is a resumption of intense activity starting the evening of October 25, 2016:

- Howard sent Cohen a text message about Keith Davidson ("Keith calling you urgently. We have to coordinate something on the matter he’s calling you about or its [sic] could look awfully bad for everyone.");
- Davidson texted Cohen one minute later ("Call me.");
- Cohen and Davidson had a phone call (8-minute call, after several unsuccessful attempts to connect);
- Cohen called Trump the next morning (3-minute call);
- Cohen called Trump again less than ten minutes later ("minute and a half" call);
- Cohen sent emails to the person who had incorporated Essential Consultants, asking for filing receipt;
- Cohen went to the bank to create an account for Essential Consultants, LLC;
- Cohen called Davidson (2-minute call) and Davidson emailed Cohen wiring instructions for attorney-client trust account;
- Cohen transferred $131,000 into the Essential Consultants Account from a home equity line of credit with the bank;
- Cohen texted Pecker ("Can we speak? Important.");
- Cohen called Pecker approximately ten minutes later (30-second call);
- Cohen texted Howard approximately ten minutes later ("Please call me. Important.");
- Cohen called Howard minutes later (30-second call);
- Cohen called Pecker a few minutes later ("nearly" 13-minute call).\(^{260}\)

\(^{258}\) Id. ¶ 34(a)–(e).

\(^{259}\) Id. ¶¶ 34(b), (e)–(f), 35(a)–(b).

\(^{260}\) Id. ¶ 37(a)–(g).
Calls, texts, and emails between Cohen, Pecker, Howard, and Davidson continued on October 27, 2016. Cohen completed the paperwork to wire $130,000 from Essential Consultants to Davidson’s attorney-client trust account; there were additional confirmation emails as the transaction was finalized.

The next day:

- Cohen and Trump spoke on the phone (approximately 5-minute call);
- Cohen attempted calls to Davidson, Pecker, and Howard, but did not connect, or connected only with Howard;
- Cohen and Davidson exchanged texts that evening (“all is AOK”), with Howard also texting that all was good;
- Cohen and Hicks spoke on phone later that evening (3-minute call).

On November 1, 2016:

- Davidson sent Cohen an email with an audio file titled “Stormy.mp3” which was a five-minute recording of Davidson interviewing Stormy Daniels about recent public allegations made by another adult film actor, Jessica Drake, in which Daniels stated she believed Drake was not credible;
- Cohen called Trump less than an hour after receiving that email, but did not connect;
- Cohen then called Kellyanne Conway, Trump’s then-campaign manager, but they did not connect;
- Kellyanne Conway called Cohen less than an hour later (6-minute call).
- And on the evening of November 4, 2016, a few days before the election, the Wall Street Journal published a report concerning the “hush money” that AMI paid Karen McDougal to prevent her from discussing her sexual relationship with Trump. There are communications about the article both before and after it is published at 9:50 p.m.
Cohen texted Howard a screenshot of a request for comment from Trump or the campaign (forwarded to Cohen by “another Trump Organization lawyer”);

Cohen spoke with Hope Hicks “several times,” including “before and/or after calls with Pecker, Howard and Davidson,” and at 7:33 p.m. “using two different cellphones subscribed to him,” apparently “talking to Davidson and Hicks at the same time.”

Cohen texted Howard ("She’s being really difficult with giving Keith [Davidson] a statement. Basically went into hiding and unreachable.");

Howard texted Cohen back immediately ("I’ll ask him again. We just need her to disappear.");

Cohen texted Howard ("She definitely disappeared but refuses to give a statement and Keith cannot push her.");

Howard texted Cohen ("Let’s let the dust settle. We don’t want to push her over the edge. She’s on side at present and we have a solid position and a plausible position that she is rightfully employed as a columnist.");

Howard texted Cohen ("I think it’ll be ok pal. I think it’ll fade into the distance.");

Cohen texted Howard ("He’s pissed.");

Howard texted Cohen ("I’m pissed! You’re pissed. Pecker is pissed. Keith is pissed. Not much we can do.");

Hicks called Cohen at 9:03 pm (2-minute call);

Cohen called Howard (5-minute call);

Hicks called Cohen at 9:15 p.m. ("nearly" 7-minute call);

Cohen texted Pecker ("The boss just tried calling you. Are you free?");

Cohen texted Howard a minute later ("Is there a way to find David [Pecker] quickly?").

Hicks and Howard both sent Cohen a link to the article when it was published; Cohen and Howard exchanged text messages about the article. The next morning, at 7:35 am,

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266. Unredacted FBI Agent Affidavit, supra note 254, at ¶ 40(a).
267. Id. ¶ 40(b)-(d) ("Again, Cohen used different phones for these two calls, such that he appears to have been on both calls for about a minute of overlap").
268. Id. ¶ 40(d).
269. Id. ¶ 40(e).
Cohen texted Hicks (“So far I see only 6 stories. Getting little to no traction.”) Hicks texted Cohen (“Same. Keep praying! It’s working!”) Cohen texted Hicks (“Even CNN not talking about it. No one believes it and if necessary, I have a statement by Storm denying everything and contradicting the other porn stars statement.”)270

Hicks and Cohen apparently continued to text, facilitating a discussion between Trump and David Pecker.271

These exchanges described in the affidavit raise several issues beyond Cohen’s guilty plea to campaign finance violations involving both Stormy Daniels and Karen McDougal. As to Trump’s participation in the campaign finance scheme, these materials seriously undercut Trump’s statements made as President that he had no knowledge of the hush money payment to Stormy Daniels.272 The timing of the calls between Cohen and Trump—especially coupled with the representation that the two did not frequently speak by phone—is incriminating. It corroborates the tape recording of a conversation with Trump that Cohen revealed.273

Additionally, these communications reveal a lack of clarity regarding the role of the AMI officials, David Pecker and Dylan Howard. The FBI agent affidavit notes that AMI was “involved in a payment to model Karen McDougal,” but that her agreement was negotiated several months prior to these October 2016 conversations, and so “because these communications were in close temporal proximity to the events involving the negotiation of a payment to Clifford, . . . I believe that these communications were related to Clifford.”274 Yet there is no other evidence that AMI or its officials were involved with Clifford/Stormy Daniels. Indeed, as the United States Attorney’s Office for the Southern District of New York announced the same day as it announced Michael Cohen’s three-year sentence, it had “previously” entered into a non-prosecution agreement with AMI.275 This non-prosecution agreement

executed in September 2018, a few months after the FBI agent’s affidavit, sheds some light on what may have been transpiring during those October 2016 communications. According to the Statement of Admitted Facts appended to the non-prosecution letter, Michael Cohen and David Pecker had entered into an agreement to assign AMI’s “limited life rights” in Karen McDougal’s story, for which it had paid $125,000, to Michael Cohen. However, “in or about early October 2016, after the assignment agreement was signed but before Cohen had paid the $125,000, Pecker contacted Cohen and told him that the deal was off and that Cohen should tear up the assignment agreement.” Yet this may raise more questions than it answers. It remains unclear why in the weeks before the election Cohen, as Trump’s personal attorney, was attempting to purchase McDougal’s story from AMI, why the agreement failed, and what Trump may or may not have known about these negotiations given the phone calls, including one for eight minutes.

Third, the materials in the FBI agent affidavit surface serious issues regarding Hope Hicks as press secretary for Trump’s presidential campaign. Hicks was clearly in communication with Cohen and Trump at the time the hush money agreements were being negotiated, often contemporaneously with communications with the AMI officials. The FBI agent’s affidavit represented that Hicks stated to the FBI that she did not “learn about the allegations made by Clifford until early November 2016” but noted that Hicks was not asked about the 4-minute long call on October 8. Before the unredacted affidavit became public, Hicks testified before the House of Representatives Committee on the Judiciary. After the unredacted affidavit became public, the House Committee on the Judiciary invited Hicks to return to the Committee to


277. Id. ¶ 6. Neither the agreement nor the exhibit use Karen McDougal’s name—she is referred to as “a woman”—but the facts regarding the $125,000 payment, the “limited life rights,” and the agreement that AMI would feature the woman on magazine covers and publish articles by her are consistent with the agreement between AMI and Karen McDougal, see supra notes 123, 124 and accompanying text.

278. See Non-Prosecution Agreement, supra note 276, at ¶ 6; Unredacted FBI Agent Affidavit, supra note 254, at ¶ 40(d).

279. See infra Part VI.

280. See Unredacted FBI Agent Affidavit, supra note 254, at 41 n.27.

“clarify” her testimony given that it “appears to be inconsistent” with the material in the unsealed FBI agent affidavit.\textsuperscript{282} The House Committee on the Judiciary Letter detailed Hicks’ apparent inconsistencies.\textsuperscript{283} 

Finally, there is one bit of unsettling hearsay in the FBI agent’s affidavit. A text message on October 17, 2016 from AMI official Dylan Howard to Michael Cohen stated, “I’m told they’re going with Daily Mail. Are you aware?”\textsuperscript{284} As the FBI agent’s affidavit correctly relates, the Daily Mail is a “tabloid newspaper,” but the affidavit also interprets Howard’s text to mean “that he heard that Clifford was going to take her story of an extramarital affair with Trump to the Daily Mail. . . .”\textsuperscript{285} There is no

\begin{itemize}
\item As to your knowledge of payments made to Ms. Daniels, and your discussions relating to those payments, Representative Steve Cohen asked you directly: “[Y]ou said you’d had no knowledge—any information about hush payments to Ms. Stormy Daniels. How about to Ms.—was it—McDougal, Miss August?” You responded: “I wasn’t aware of anything—I wasn’t aware of a hush payment agreement.”
\item Counsel for the Committee asked if you had “any knowledge of whether the President knew that Mr. Cohen had made payments to Stormy Daniels during the campaign?” You responded: “I don’t have any direct knowledge.”
\item You were asked multiple times about your conversations with Mr. Cohen and the President about Ms. Daniels and any payments made to her. For example, Representative Sheila Jackson Lee asked you: “Were you ever present when Trump and Cohen discussed Stormy Daniels?” You responded: “No, ma’am.” Rep. Jackson Lee asked again, “You were never present when they discussed Stormy Daniels?” You again responded, “no.” When Rep. Jackson Lee asked a third time if you were “ever present when Trump and Mr. Cohen discussed Stormy Daniels,” you confirmed once again: “[N]o is my answer.” Rep. Jackson Lee then asked “[y]ou don’t know what would have been said?” You stated, “I was never present for a conversation.”
\item You also told counsel for the Committee, regarding when you learned about payments to Ms. Daniels: “I don’t recall speaking to [Mr. Cohen] about Stormy other than to relay what the reporter said to me, that she would be mentioned in [a] story, but there was no additional context. . . . I know the President had conversations with Michael separate from me, so it’s possible it was part of those. I don’t recall being part of those conversations.”
\item You were asked directly by counsel for the Committee “[d]id you have any contact with Keith Davidson during the campaign,” and you responded, “[n]ot that I’m aware of.”
\item You were additionally asked directly by counsel for the Committee: “And can we ask the same question about Dylan Howard or anyone else at AMI? Did you speak with anyone at AMI about a negative story about Trump prior to its release?” and you responded, “Not that I’m aware of.”
\end{itemize}

\textit{Id.} [footnotes to Transcript omitted].


\textsuperscript{283} Id. at 1–3. The letter states:

\begin{itemize}
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\item You also told counsel for the Committee, regarding when you learned about payments to Ms. Daniels: “I don’t recall speaking to [Mr. Cohen] about Stormy other than to relay what the reporter said to me, that she would be mentioned in [a] story, but there was no additional context. . . . I know the President had conversations with Michael separate from me, so it’s possible it was part of those. I don’t recall being part of those conversations.”
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\textit{Id.} [footnotes to Transcript omitted].

\textsuperscript{284} Unredacted FBI Agent Affidavit, \textit{supra} note 254, at ¶ 36(b)(i).

\textsuperscript{285} Id. (“Based on my involvement in this investigation, I understand Howard’s text to mean that he heard that Clifford [Stormy Daniels] was going to take her story of an extramarital affair with Trump to the Daily Mail, a tabloid newspaper.”)
evidence, including in Stormy Daniels’ book, that she ever contemplated going with the Daily Mail; she was considering mainstream outlets such as Good Morning America. There is also no evidence that Karen McDougal ever considered the Daily Mail. Howard’s hearsay may simply have been repeating incorrect information that he had heard. But what makes the Daily Mail reference disconcerting is that a woman who claimed she was raped by Trump and Jeffrey Epstein when she was thirteen years old was in contact with the tabloid; the Daily Mail eventually published a story when she dismissed her lawsuit a few days before the 2016 election. Given the substantiated allegations about hush money paid to Stormy Daniels and Karen McDougal, and Michael Cohen’s reputation as a “fixer,” the specter of other women who may have surfaced in investigations cannot be blithely dismissed.

However, the criminal investigations that produced the Mueller Report, along with the criminal investigations of the Southern District of New York that did not result in campaign finance charges against anyone other than Michael Cohen, do not seem adequate to the task of addressing the President’s arguable sexual indiscretions, misconduct, and deceits in a manner that is satisfying, at least to some. As the House Committee on the Judiciary Letter to Hope Hicks may portend, the forum may be shifting to Congress.

VI. THE QUESTION OF IMPEACHMENT

If the Mueller Report is construed as a referral or a blueprint for impeachment, this would render Trump’s numerous sex scandals,
including those relating to campaign finance matters, inconspicuous at best. But if there were to be an impeachment inquiry, the sexual indiscretions raised in the Mueller Report deserve consideration. Article II § 4 of the Constitution provides, "[t]he 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." There are weak arguments for treason or bribery. It could be that the Moscow sex tape is a predicate for treason; it could also be that the hush money arrangements could be a cover for bribery. Yet whether they are “high [c]rimes and [m]isdemeanors” in and of themselves is less clear. Under the constitutional text and using an originalist perspective it would be difficult to argue that sexual misconduct would be covered. It is safe to say that the men who drafted and adopted the Constitution did not consider sexual aggression a disqualification from governing.

Nevertheless, the Constitution in general and the Impeachment Clause are not limited to the failings of the framers. The Articles of Impeachment drafted against Andrew Johnson in 1868, for example, included charges directed at his “certain intemperate, inflammatory and scandalous harangues,” and “loud threats and bitter menaces . . . amid the cries, jeers and laughter of the multitudes then assembled and in hearing.” The drafted Articles of Impeachment against Richard Nixon included charges against him for high crimes and misdemeanors, related to his conduct as President of the United States. These charges were directed at his “certain intemperate, inflammatory and scandalous harangues,” and “loud threats and bitter menaces . . . amid the cries, jeers and laughter of the multitudes then assembled and in hearing.”

293. This argument is made in RON FEIN, JOHN BONIFAZ & BEN CLEMENTS, THE CONSTITUTION DEMANDS IT: THE CASE FOR THE IMPEACHMENT OF DONALD TRUMP 181–82 (2018). Writing before many of the facts regarding Cohen’s involvement became known, the authors write the legitimate seeming intermediary of Essential Consultants LLC, could be a cover for a briber to pay the LLC who then pays the creditor women; “Through this type of scheme, Trump would receive a financial benefit (debt repayment) from the briber without ever touching the money himself.” Id.
294. Proceedings in the Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors 51 (1868) [Hereinafter Johnson Impeachment]. Article X of the Articles of Impeachment of Andrew Johnson provided in part:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative powers thereof, (which all officers of the government ought inviolably to preserve and maintain,) and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and
in 1974 included “making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct.”

The charges of impeachment against Bill Clinton included false statements to the public, although the two adopted Articles of Impeachment focused on his statements under oath. However, the general consensus seems to be, Clinton

in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty-six, and on divers other days and times, as well before as afterward, make and deliver with a loud voice certain intemperate, inflammatory and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers and laughter of the multitudes then assembled and in hearing...

Id. at 6.


making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct.

Id. The Articles were adopted by the House Judiciary Committee, but Nixon resigned before they were presented to the House of Representatives. Id.


Article I: States that in his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice, in that William Jefferson Clinton swore to tell the truth, the whole truth, and nothing but the truth before a Federal grand jury of the United States. States that contrary to that oath, William Jefferson Clinton willfully provided perjurious, false and misleading testimony to the grand jury.

Article II: States that in his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice in that William Jefferson Clinton willfully provided perjurious, false and misleading testimony as part of a Federal civil rights action brought against him.
notwithstanding, that false statements alone are insufficient, a view that is consistent with First Amendment doctrine rejecting the constitutionality of criminalizing mere lies, without more. In general, the impeachable offenses should be directly linked to the presidential office, as they must be more specific than “maladministration,” a term that the constitutional framers rejected.

Article III: States that in his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding.

Article IV: States that using the powers and influence of the office of President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has engaged in conduct that resulted in misuse and abuse of his high office, impaired the due and proper administration of justice and the conduct of lawful inquiries, and contravened the authority of the legislative branch and the truth seeking purpose of a coordinate investigative proceeding, in that, as President, William Jefferson Clinton refused and failed to respond to certain written requests for admission and willfully made perjurious, false, and misleading sworn statements in response to certain written requests for admission propounded to him as part of the impeachment inquiry authorized by the House of Representatives of the Congress of the United States. States that William Jefferson Clinton, in refusing and failing to respond and in making perjurious, false and misleading statements, assumed to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives and exhibited contempt for the inquiry.

States, with reference to each article of impeachment, that: (1) in so doing, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States; and (2) William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Id. (Summary).

297. See CHARLES L. BLACK & PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK, NEW EDITION 81 (2018) (rejecting as grounds for impeachment when a president makes false statements in public that were neither crimes in themselves nor related to his performance in office, but stating that only if the false statement is part of a concerted effort to commit an impeachable offense).

298. See United States v. Alvarez, 567 U.S. 709 (2012) (holding “Stolen Valor” statute criminalizing falsehood that one had received a military honor violated First Amendment).

299. BLACK & BOBBITT, supra note 297, at 80. As Lawrence Tribe and Joshua Matz argue: a president may be impeached for his public statements when they are intimately connected to—or essential to the execution of—a broader course of corrupt and abusive conduct.
Trump's involvement in the "hush money" to Stormy Daniels and to Karen McDougal as a campaign finance violation could constitute an impeachable offense. Campaign conduct can be grounds for impeachment. Moreover, Trump executed a financial disclosure form under penalty of perjury while in office in June 2017, which does not list either the Daniels or McDougal payments. Trump's personal attorney Michael Cohen pleaded guilty to the crimes and implicated Trump. After the Southern District of New York United States Attorney's Office announced that its investigation had concluded without further charges, the House of Representatives Committee on Oversight and Reform wrote a letter to determine whether the internal Department of Justice policy against indicting a sitting President played a role in the decision and requesting all evidence and specific documents relating to the decision. The Committee letter focused on the unredacted FBI agent affidavit and argued it revealed that Trump "communicated directly with Mr. Cohen immediately before Mr. Cohen made arrangements for payments to silence these women."

Trump's possible argument that the campaign contributions and expenditures were not made "for the purpose of influencing any election" or that his acts were not "knowing or willful" could prove a weak one. The timing seems fatal; the allegations of Stormy Daniels and Karen McDougal were both known for years and the rush to silence the women through monetary compensation only became an issue as the campaign accelerated, heightened by concerns regarding Trump's sexual conduct after the Access Hollywood tape surfaced. Certainly, the campaign finance violations would be an appropriate subject in an impeachment inquiry.

Additionally, should there be an impeachment inquiry, Congress should look at the other sexual scandals that are mentioned in the

But rarely, if ever, will words alone suffice for impeachment. That's true even of offensive statements that target vulnerable minorities and undermine democratic institutions.

LAWRENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY 65 (2018).
300. FEIN, BONIFAZ & CLEMENTS, supra note 293, at 179–80.
301. Id.
302. See supra notes 217–19 and accompanying text.
304. Letter from Elijah Cummings, supra note 303, at 4–5. For more about the "hush money" payments, see supra notes 212–14 and accompanying text.
305. See supra note 213 and accompanying text.
306. See supra note 212 and accompanying text.
Mueller Report, including the facts surrounding the *Access Hollywood* tape and the so-called Moscow “pee tape.” After the revelation of the *Access Hollywood* tape, Trump stated that he had never assaulted women in the way that he describes himself as doing in the tape-recorded comments.\(^{307}\) Again, although mere falsity may not be an impeachable offense, Congress could interrogate this contradiction further, making analogies to the Article of Impeachment against Richard Nixon of “making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States.”\(^{308}\) Moreover, Congress could investigate the provenance of the tape, how it came to light, and whether there are additional compromising tapes, and any efforts on the part of Trump to discover, destroy, or secret them.\(^{309}\) The Moscow tape raises the issue of blackmail, and while the Mueller Report casts doubt on the tape’s existence, the question of its existence—and the question of whether Trump believed it existed and acted accordingly—implicate national security issues, as well as the issues of obstruction that the Mueller Report raised.\(^{310}\)

**VII. CONCLUSION**

The Mueller Report’s desexing of Donald Trump’s conduct in relation to its investigation into cooperation with foreign powers and obstruction of justice is perhaps understandable but nevertheless unfortunate. Sexual indiscretions—and more—are not merely a backdrop but are essential to the matters of the investigation. While the referral of campaign finance violations to another office can seem prudent, the result was that only a “middleman,” Michael Cohen as Trump’s personal attorney, would be penalized for the acts; the principals would remain unscathed. If the Mueller Report becomes a referral for impeachment, impeachment proceedings need to much more carefully interrogate Trump’s sexual indiscretions and deceits in

\(^{307}\) Comm’n on Presidential Debates, *supra* note 35.

\(^{308}\) *See supra* note 295, and accompanying text. The Articles were adopted by the House Judiciary Committee, but Nixon resigned before they were presented to the House of Representatives.


\(^{310}\) *See supra* note 69 and accompanying text (discussing James Comey).
the area of campaign finance than the Mueller Report decided to do. Further, it is not only campaign finance violations that merit attention. Like the “scandalous harangues” and “bitter menaces” in the Articles of Impeachment of Andrew Johnson,\footnote{Johnson Impeachment, supra note 294.} the failures to be honest in the drafted Nixon impeachment articles,\footnote{Nixon Impeachment, supra note 295.} and the failure to be forthcoming in the original draft of the Clinton impeachment,\footnote{Clinton Impeachment, supra note 296.} Trump’s sexual and related conduct should be considered in any impeachment inquiry. Trump’s failure to testify before the Mueller inquiry should not shield him from consequences. We must not be squeamish about the sexual matters raised but not resolved in the Mueller Report.