

SEXING THE MUELLER REPORT

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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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1. 1 ROBERT MUELLER, *REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION* (2019) [hereinafter MUELLER REPORT VOL. I]; 2 ROBERT MUELLER, *REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION* (2019) [hereinafter MUELLER REPORT VOL. II]. Both available at <https://www.justice.gov/storage/report.pdf>.

2. See 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), available at: <https://www.documentcloud.org/documents/5316868-AppointmentLetter.html>. The appointment letter also authorizes any other matters within the scope of 28 C.F.R. 600.4(a). A subsequent letter from Acting Attorney General Rod Rosenstein clarified certain matters, some of which remain redacted. See Memorandum from Rod J. Rosenstein, Acting Attorney General, to Robert S. Mueller, III, Special Counsel, *The Scope of Investigation and Definition of Authority* (Aug. 2, 2017), <https://assets.documentcloud.org/documents/5987023/Rod-Rosenstein-Memo-Outlining-Scope-of-Mueller.pdf>.

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

In short, the Mueller Report is no Starr Report.³ The Starr Report, authored by Independent Counsel Kenneth Starr⁴ on President Bill Clinton, had its genesis in a banking and real estate investigation popularly known as “Whitewater,”⁵ 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.⁶ Judge and legal scholar Richard Posner wrote that the details “distract, confound, and embarrass more than they inform or deter.”⁷ He was not alone in criticizing the Starr Report’s inclusion of unnecessary sexual and salacious minutiae.⁸ Indeed, to read the Starr Report even two decades later is to be

3. See Kenneth W. Starr, Independent Counsel, *Referral to the United States House of Representatives filed pursuant to 28 U.S.C. § 595(c)*, H.R. Doc. No. 105-310 (1998) [hereinafter Starr Report].

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 MD. 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).

7. RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 83 (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

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.

13. MUELLER REPORT VOL. II, *supra* note 1, at app. C at 1–23.

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.”)

15. MUELLER REPORT VOL. II, *supra* note 1, at app. C at 1.

16. *Id.* at app. C at 2.

Counsel's office considered but decided against a subpoena of the president.¹⁷ One can only wonder how much fuller an account we might have if we had we 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.¹⁸ Indeed, Trump's refusal to testify might well have been influenced by the example of the Starr Report.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.²⁰

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.

Id.

18. See *infra* Part IV.

19. While President Trump did not mention Bill Clinton, he did use the phrase "perjury trap," see Jeremy Diamond & Jeff Zeleny, *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 Davy, *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*, BRENNAN CENTER FOR JUSTICE (Aug. 21, 2018), <https://www.brennancenter.org/blog/trap-giulianis-perjury-trap-argument>.

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.²¹ 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."²² 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).

21. For sexual matters not referenced in the Mueller Report, including the sexual misconduct allegations that have plagued Trump, see generally Ruthann Robson, *The Sexual Misconduct of Donald J. Trump: Toward a Misogyny Report*, 27 MICH. J. GENDER & L. 81 (2020).

22. MUELLER REPORT VOL. I, *supra* note 1, at 58 n.239.

revealed by the *Washington Post*.²³ The most notorious of the “graphic statements”²⁴ 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.²⁵

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.²⁶

Understandably, the release of the *Access Hollywood* tape upset Trump.²⁷ Some members of the Trump campaign considered it to be “fatal” to his prospects of election.²⁸ Trump issued statements, including arguing that

23. David Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 7, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.55b5ef4f2584.

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.”).

28. The “fatal” comment is attributed to Republican Congressman Paul Ryan. See Tim Alberta, *Mother Is Not Going to Like This: The 48 Hours That Almost Brought Down Trump*, POLITICO MAGAZINE (July 10, 2019), at 8, <https://www.politico.com/magazine/story/2019/07/10/american-carnage-excerpt-access-hollywood-tape-227269>, excerpt from TIM ALBERTA, AMERICAN CARNAGE: ON THE FRONT LINES OF THE REPUBLICAN CIVIL WAR AND THE RISE OF PRESIDENT TRUMP (2019).

it was simply “locker room talk”²⁹ 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.”³⁰ 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.³¹ 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,”³² and a fourth woman who was the victim in a criminal case of sexual assault in which Hillary Clinton represented the defendant,³³ garnering media attention.³⁴ 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.³⁵ During this

29. *Id.*

30. *Id.*

31. *Id.*

32. Daniella Diaz & Jeff Zeleny, *Trump Appears with Bill Clinton Accusers Before Debate*, CNN (Oct. 10, 2016), <https://www.cnn.com/2016/10/09/politics/donald-trump-juanita-broadrick-paula-jones-facebook-live-2016-election/index.html>.

33. *Id.*

34. See, e.g., *id.*; Charlotte Alter, *Donald Trump Highlighted Bill Clinton’s Accusers at Debate*, TIME (October 10, 2016), <https://time.com/4341892/presidential-debate-donald-trump-bill-clinton/>; Robert Costa et al., *Trump Wanted to Put Bill Clinton’s Accusers in his Family Box. Debate Officials Said No.*, WASH. POST (October 10, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/10/10/trumps-debate-plan-to-seat-bill-clintons-accusers-in-family-box-was-thwarted/>.

35. Comm. on Presidential Debates, Debate Transcript (Oct. 9, 2016) (transcript at <https://www.debates.org/voter-education/debate-transcripts/october-9-2016-debate-transcript/>). 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 didn’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,³⁶ although there was a tweet by Trump which stated exactly that.³⁷ 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

very effective way of communication. So you can put it down, but it is a very effective form of communication. I'm not un-proud of it, to be honest with you.

@realDonaldTrump, TWITTER (Sept. 30, 2016 5:30 AM), <https://twitter.com/realDonaldTrump/status/781788223055994880> ("Did Crooked Hillary help disgusting (check out sex tape and past) Alicia M become a U.S. citizen so she could use her in the debate?").

38. See e.g., Alberta, *supra* note 28, at 17–18.

39. See Robson, *supra* note 21, at 42–43 (discussing statement by Nancy O'Dell).

40. *Id.* at 18–30 (discussing women who were motivated to come forward).

41. MUELLER REPORT VOL. I, *supra* note 1, at 11, 36, 58–59.

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).

45. Sam Frizell, *What Leaked Emails Reveal About Hillary Clinton's Campaign*, TIME (Oct. 8, 2016), <https://time.com/4523749/hillary-clinton-wikileaks-leaked-emails-john-podesta/>.

46. *United States of America v. Roger Jason Stone, Jr.*, No. 1:19-cr-00018, indictment at 1 (D.D.C., filed Jan. 24, 2019) (available at <https://www.documentcloud.org/documents/5694704-Stone-Indictment-012419.html>).

47. *Id.*

48. *Id.*

49. *Id.* at 4.

50. See Ephrat Livni, *Who's who in the Cryptic Mueller Investigation Indictment of Roger Stone*, QUARTZ (Jan. 25, 2019), <https://qz.com/1533656/whos-who-in-the-cryptic-mueller-investigation-indictment-of-roger-stone/> (discussing the identity of Organization 1 as "evidently WikiLeaks" and noting that "Julian Assange, WikiLeaks' founder, has been living" at the Ecuadorian Embassy in London "since June 2012, when he applied for asylum").

51. *United States of America v. 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.

54. Christopher Steele, "The Steele Dossier" (2016), https://archive.org/stream/TheSteelDossierTrumpIntelligenceAllegations/The%20Steele%20Dossier%20-%20Trump-Intelligence-Allegations_djvu.txt.

55. Ken Bensinger, Miriam Elder & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BUZZFEED (Jan. 10, 2017), <https://www.buzzfeednews.com/article/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia>. The Steele Dossier is a collection of "raw, unverified intelligence" and has been accurately described as a "political Rorschach test," so that depending on one's perspective, "it's either a hoax used to defame a future president or a credible guide to allegations about Trump's involvement with Russia." Glenn Kessler, *What the Steele Dossier Said vs. What the Mueller Report Said*, WASH. POST (Apr. 24, 2019), <https://www.washingtonpost.com/politics/2019/04/24/what-steele-dossier-said-vs-what-mueller-report-said/>.

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

57. *Id.*

58. @realDonaldTrump, TWITTER (Jan. 10, 2017, 8:19 P.M.), <https://twitter.com/realDonaldTrump/status/818990655418617856>.

59. Aaron Blake, *Donald Trump's Big Press Conference Transcript: Annotating Everything the President-elect Said*, WASH. POST (Jan. 11, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/11/trump-press-conference-annotating-what-the-president-elect-said-on-russia-the-economy-and-more/>.

Trump had apparently learned of the dossier's sexual allegation before it was published.⁶⁰ The then-Director of the FBI, James Comey, had previously informed the president-elect about the allegations, according to memos⁶¹ and later recounted in his book.⁶² 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,"⁶³ and then recounted "cases where women had accused him of sexual assault."⁶⁴ Comey writes that after the dossier was published, Trump telephoned Comey to say he "now recalled he had not even stayed overnight in Moscow,"⁶⁵ a fact with which investigative journalists disagree.⁶⁶ 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."⁶⁷

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."⁶⁸ In his subsequent book, Comey speculates on Trump's marital

60. The Comey memos were disclosed by the Department of Justice. Quinta Jurecic, *Get Yer Comey Memos Here*, LAWFARE (Apr. 19, 2018), <https://www.lawfareblog.com/get-yer-comey-memos-here>, linking to memos, <https://www.documentcloud.org/documents/4442900-Ex-FBI-Director-James-Comey-s-memos.html> [hereinafter Comey Memos].

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 Universes 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-wasnt-real.html>; Lauren Efron & 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?”⁶⁹ A few months after the conversation between Trump and Comey, Trump would fire James Comey from his position as Director of the FBI.⁷⁰

The Mueller Report in Volume II, focusing on the possibility of obstruction of justice by the president,⁷¹ 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.⁷² 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.”⁷³ 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. . . .”⁷⁴ 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.⁷⁵ But as this footnote related, there was also the matter of the “tapes.”⁷⁶ 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

prostitute allegations in ‘dossier’, ABC NEWS (Apr. 13, 2018), <https://abcnews.go.com/Politics/comey-trump-asked-disprove-salacious-prostitute-allegations-dossier/story?id=54433989> (with video of James Comey interview).

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.

70. See e.g., Michael D. Shear and Matt Apuzzo, *F.B.I. Director James Comey is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

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.”⁷⁷ 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.”⁷⁸ 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.”⁷⁹

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.⁸⁰ 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*⁸¹ does raise the stakes considerably. That this blackmail would be by a foreign power implicates national security.⁸² 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.

81. Kompromat is described in the Steele Dossier as “compromising material.” Bensinger, Elder & Schoofs, *These Reports Allege Trump Has Deep Ties To Russia*, BUZZFEED (Jan. 10, 2017), <https://www.buzzfeednews.com/article/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia> (linking to the dossier file at <https://assets.documentcloud.org/documents/3259984/Trump-Intelligence-Allegations.pdf>).

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 Cohen*⁹⁰ and “a second woman” in the Mueller

83. Jim Rutenberg, *Ex-Play Boy Model Karen McDougal Details 10-Month Affair with Donald Trump*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/us/politics/karen-mcdougal-interview.html>.

84. Steve Krakauer, *Trump's wedding to Melania was 15 years ago. It explains so much about our cultural moment.*, NBC NEWS (Jan. 22, 2020), <https://www.nbcnews.com/think/opinion/trump-s-wedding-melania-was-15-years-ago-it-explains-ncna1120236>.

85. Ronan Farrow, *Donald Trump, a Playboy Model, and a System for Concealing Infidelity*, THE NEW YORKER (Feb. 16, 2018), <https://www.newyorker.com/news/news-desk/donald-trump-a-playboy-model-and-a-system-for-concealing-infidelity-national-enquirer-karen-mcdougal>.

86. Complaint ¶ 5, *McDougal v. American Media, Inc.*, <https://stris.com/wp-content/uploads/2018/03/BC698956-McDougal-Complaint.pdf> (Cal. Super. Ct. Mar. 20, 2018) (No. BC 698956).

87. MUELLER REPORT VOL. II, *supra* note 1, at 144–45.

88. *Id.* at 149.

89. *Id.*

90. Information ¶ 29, *United States v. Cohen*, No. 18cr602, 2019 WL 3226988 (S.D.N.Y. July 17, 2018) (Available at: https://www.courtlistener.com/recap/gov.uscourts.nysd.499666/gov.uscourts.nysd.499666.2.0_6.pdf)

Report.⁹¹ In media accounts, she is usually identified as a model for *Playboy* magazine and *Playboy* Playmate of the Year in 1998.⁹² The most comprehensive discussion of the events from her point of view is her interview with Anderson Cooper on CNN in March 2018⁹³ and an article a month earlier by well-known journalist Ronan Farrow in *The New Yorker*.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 *Playboy*'s publisher, Hugh Hefner, hosted for the contestants of Donald Trump's reality show, *The Apprentice*.⁹⁵ Trump apparently "took a liking" to McDougal, causing a *Playboy* executive to observe she could "be his next wife."⁹⁶ After several telephone conversations, they had their "first date: dinner in a private bungalow at the Beverly Hills Hotel."⁹⁷ McDougal recounted she found Trump intelligent, charming, and polite, and they eventually "got naked + had sex."⁹⁸ Trump offered her money afterward, which made her feel "sad," and when she refused the money, he told her she was "special."⁹⁹ She continued to see him when he was in Los Angeles, staying at the same bungalow at the Beverly Hotel Hills Hotel.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.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.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.¹⁰³ He compared McDougal to his daughter, Ivanka Trump, and sent McDougal articles about himself or Ivanka.¹⁰⁴ McDougal eventually ended the

91. MUELLER REPORT VOL. II, *supra* note 1, at 148.

92. See Rutenberg, *supra* note 83.

93. *Playboy model speaks out on time with Trump*, CNN (Mar. 22, 2018), <https://www.cnn.com/videos/us/2018/03/23/karen-mcdougal-full-interview-ac.cnn>. A transcript of the portions of the interview that aired is available here: <http://transcripts.cnn.com/TRANSCRIPTS/1803/22/acd.01.html>.

94. Farrow, *supra* note 85.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

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.*

108. Complaint Exhibit A ¶ 3, *McDougal v. American Media, Inc.*, <https://stris.com/wp-content/uploads/2018/03/BC698956-McDougal-Complaint.pdf> (Cal. Super. Ct. Mar. 20, 2018) (No. BC 698956).

109. *Id.* ¶¶ 3, 5.

110. *Id.* ¶ 1.

111. Farrow, *supra* note 85.

Playboy Model's Affair Allegation.¹¹² 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.¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ 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,”¹¹⁹ which is slightly different from a flat

112. Joe Palazzolo, Michael Rothfeld & Lukas I. Alpert, *National Enquirer Shielded Donald Trump From Playboy Model's Affair Allegation*, WALL ST. J. (Nov. 4, 2016), <https://www.wsj.com/articles/national-enquirer-shielded-donald-trump-from-playboy-models-affair-allegation-1478309380>.

113. *Id.*

114. Farrow, *supra* note 85.

115. Complaint Exhibit B ¶ 7, *McDougal v. American Media, Inc.*, <https://stris.com/wp-content/uploads/2018/03/BC698956-McDougal-Complaint.pdf> (Cal. Super. Ct. Mar. 20, 2018) (No. BC 698956).

116. Farrow, *supra* note 85.

117. *Id.*

118. Charles Ventura, *WSJ: Enquirer paid \$150K for Trump affair story*, USA TODAY (Nov. 5, 2016), <https://www.usatoday.com/story/news/politics/onpolitics/2016/11/05/national-enquirer-donald-trump-karen-mcdougal-melania-trump/93340860/>.

119. Farrow, *supra* note 94.

denial given that it attributes the denial only to the president.¹²⁰ 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.¹²¹ 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.¹²²

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.¹²³ 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.¹²⁴ In less than a month, AMI settled

120. Aaron Blake, *The White House's strange denial of an alleged Trump affair with a Playboy Playmate fits a pattern*, WASH. POST (Feb. 16, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/02/16/the-white-houses-strange-denial-of-an-alleged-trump-affair-with-a-playboy-playmate-fits-a-pattern>. Blake comments:

"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.

Id.

121. Jim Rutenberg et al., *Tools of Trump's Fixer: Payouts, Intimidation and the Tabloids*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/us/politics/michael-cohen-trump.html>.

122. *Id.*

123. Complaint, *McDougal v. American Media, Inc.*, <https://stris.com/wp-content/uploads/2018/03/No. BC698956-McDougal-Complaint.pdf> (Cal. Super. Ct. Mar. 20, 2018) (No. BC 698956); Rutenberg, *supra* note 121.

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.¹²⁵

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.¹²⁶ 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.¹²⁷ In the recording of the September 2016 telephone call,¹²⁸ 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 Weisselberg¹²⁹ about how to set the whole thing up with . . .

125. Settlement Agreement and General Release, Exhibit A ¶ 4, *McDougal v. American Media*, <http://strismaher.com/wp-content/uploads/2018/04/2018-04-18-McDougal-AMI-Settlement-Agreement-fully-executed.pdf>.

126. See, e.g., Matt Apuzzo, Maggie Haberman & Michael S. Schmidt, *Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/michael-cohen-trump-tape.html>; Carol D. Leonnig & Rosalind S. Helderman, *In secret recording seized by FBI, Trump and Cohen discuss buying rights to model’s account of alleged affair*, WASH. POST (July 20, 2018), https://www.washingtonpost.com/politics/in-secret-recording-seized-by-fbi-trump-and-cohen-discuss-making-payments-for-story-of-former-model-who-alleged-affair-with-trump/2018/07/20/767476a8-8c34-11e8-85ae-511bc1146b0b_story.html.

127. Chris Cuomo et al, *Exclusive: CNN obtains secret Trump-Cohen tape*, CNN (July 25, 2018), <https://www.cnn.com/2018/07/24/politics/michael-cohen-donald-trump-tape/index.html> (“The recording, which was provided to CNN by Cohen’s attorney Lanny Davis, was made in September 2016.”); Carol Leonnig & Robert Costa, *Transcript of Cohen tape suggests Trump knew about model’s deal to sell story of alleged affair*, WASH. POST (July 25, 2018), https://www.washingtonpost.com/politics/transcript-of-cohen-tape-suggests-trump-knew-about-models-deal-to-sell-story-of-alleged-affair/2018/07/24/2b7a73c6-8fab-11e8-b769-e3fff17f0689_story.html (“The transcript, which was provided by President Trump’s legal team . . .”).

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 Giuliani, 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

130. Aaron Blake, *The Trump-Michael Cohen tape transcript, annotated*, WASH. POST (July 24, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/24/the-trump-michael-cohen-tape-transcript-annotated/>.

131. Sarah Sanders, Press Secretary, White House, Press Briefing (Jul. 23, 2018) (transcript at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-072318/>).

132. *Id.*

about the arrangement before the conversation took place.¹³³ For his part, President Trump responded with a tweet regarding the propriety and authenticity of the tape.¹³⁴

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.¹³⁵ 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,¹³⁶ is “Woman-2” in the Criminal Information in *United States v. Michael Cohen*¹³⁷ and “a woman” in the Mueller Report.¹³⁸ 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 2018.¹³⁹ Like McDougal and only a few days afterward, Daniels gave an extensive televised interview to Anderson Cooper,¹⁴⁰ 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

133. Apuzzo, Haberman & Schmidt, *supra* note 126.

134. @realDonaldTrump, Twitter (Jul. 25, 2018, 8:34 AM), <https://twitter.com/realDonaldTrump/status/1022097879253635072> (“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!”).

135. Defendant’s Plea Agreement, *United States v. Cohen*, 18 Cr. 602 (S.D.N.Y. 2018) (No. 1:18-cr-00602) (available at: <https://assets.documentcloud.org/documents/4779473/Michael-Cohen-Plea-Agreement.pdf>).

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.”).

137. See Information ¶ 32, *United States v. Cohen*, 18 Cr. 602 (S.D.N.Y. 2018) (available at: https://www.courtlistener.com/recap/gov.uscourts.nysd.499666/gov.uscourts.nysd.499666.2.0_6.pdf).

138. MUELLER REPORT VOL. II, *supra* note 1, at 144–45.

139. STORMY DANIELS, *FULL DISCLOSURE* (2018).

140. Interview by Anderson Cooper with Stormy Daniels, 60 MINUTES (CBS Broadcasting Aug. 25, 2018), <https://www.cbsnews.com/news/stormy-daniels-describes-her-alleged-affair-with-donald-trump-60-minutes-interview/>.

2006,¹⁴¹ and like McDougal, alleges that Trump said she reminded him of his daughter, Ivanka.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ In two subsequent phone calls, they discussed the possibility of her appearance on *Celebrity Apprentice*, which was not to be.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ She gave the interview and also took a lie detector test. Before *In Touch* published the story, the editor said they would contact Donald Trump for a comment.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.”¹⁵³ She did not tell anyone about the threat, but the editor at *In Touch* and the entertainment manager both stopped returning her calls, and the story did not appear—at least not for another seven years.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.¹⁵⁵ She scheduled a television appearance with *Good Morning America*.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.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

151. *Id.* at 195.

152. *Id.* at 198.

153. *Id.* at 199–200.

154. *Id.* at 202; ‘*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/>.

155. Mike Murphy, *Stormy Daniels says she was intimidated into keeping quiet over Trump affair*, 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.’”).

156. *Stormy Daniels denies having affair with Trump*, EXPRESSDIGEST, <https://expressdigest.com/stormy-daniels-denies-having-affair-with-trump/> (last visited Aug. 10, 2020); Joe Palazzolo et al., *National Enquirer Shielded Donald Trump From Playboy Model’s Affair Allegation*, WALL ST. J. (Nov. 4, 2016), <https://www.wsj.com/articles/national-enquirer-shielded-donald-trump-from-playboy-models-affair-allegation-1478309380> [hereinafter National Enquirer Shielded].

157. *Stormy Daniels Describes Her alleged Affair with Donald Trump*, CBS NEWS (Aug. 22, 2018), <https://www.cbsnews.com/news/stormy-daniels-describes-her-alleged-affair-with-donald-trump-60-minutes-interview/>; see generally Complaint for Declaratory Relief Ex. 1, Clifford v. Trump (Cal. Super. Ct. 2018) (No. BC696568) [hereinafter Stormy Daniels’ State Court Complaint]. Also read *Stormy Daniels’ lawsuit against Donald Trump*, USATODAY (Mar. 6, 2018), <https://www.usatoday.com/story/news/politics/2018/03/06/read-stormy-daniels-lawsuit-against-donald-trump/401930002/>.

Consultants, with a mailing address c/o Michael Cohen, “and/or David Dennison,” and on the other part, “Peggy Peterson.”¹⁵⁸ The agreement avers that these “are pseudonyms whose true identity will be acknowledged in a Side Letter Agreement.”¹⁵⁹ 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.¹⁶⁰

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.”¹⁶¹ 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.¹⁶² 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.¹⁶³

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.¹⁶⁴ Stormy Daniels signed a brief prepared statement denying rumors of “hush money” and a “sexual and/or romantic affair with Donald Trump.”¹⁶⁵ 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

Id.

166. Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged \$130,000 Payment for Adult-Film Star’s Silence*, WALL ST. J. (Jan. 12, 2018 3:13 PM EST), <https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678>.

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

168. Rothfeld and Palazzolo, *supra* note 166.

169. National Enquirer Shielded, *supra* note 156.

170. *Jimmy Kimmel Live: Jimmy Kimmel’s Full Interview with Stormy Daniels* (NBC Television broadcast Jan. 30, 2018) (available at <https://www.youtube.com/watch?v=Ntl5Da1vblI>).

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

172. DANIELS, *supra* note 139, at 230–31.

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.¹⁷⁴ The complaint was prompted in part because Michael Cohen was attempting to enforce the arbitration clause in the agreement.¹⁷⁵ The defendants, Trump and Essential Consultants, LLC, removed the matter to federal court on the basis of diversity jurisdiction.¹⁷⁶ Daniels soon filed an amended complaint adding Michael Cohen individually as a defendant and adding a count of defamation against him.¹⁷⁷ 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 2019.¹⁷⁸ Second, the complaint in *Clifford v. Trump*,¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ The complaint included text messages between Davidson and

174. Stormy Daniels' State Court Complaint, *supra* note 157, at ¶¶ 16, 38–39.

175. Stormy Daniels' State Court Complaint, *supra* note 157, at ¶¶ 29–30.

176. Notice of Removal of Action Under 28 U.S.C. § 1441(b) Diversity by Defendant Essential Consultants, LLC, *Clifford v. Trump*, https://www.courtlistener.com/recap/gov.uscourts.cacd.704250/gov.uscourts.cacd.704250.1.0_2.pdf (C.D. Cal. 2018) (No. 2:18-cv-02217-SJO-FFM).

177. First Amended Complaint For: (1) Declaratory Relief/Judgment; and (2) Defamation Demand for Jury Trial, *Clifford v. Trump*, <https://www.courtlistener.com/recap/gov.uscourts.cacd.704250/gov.uscourts.cacd.704250.14.0.pdf> (C.D. Cal. 2018) (No. 2:18-cv-02217-SJO-FFM) [hereinafter First Amended Compl.].

178. Order Granting Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and Remanding Case to Los Angeles Superior Court, *Clifford v. Trump*, https://www.courtlistener.com/recap/gov.uscourts.cacd.704250/gov.uscourts.cacd.704250.109.0_1.pdf (C.D. Cal. 2019) (No. 2:18-cv-02217-SJO-FFM).

179. Complaint for Defamation and Jury Demand, *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018) (No. 2:18-cv-06893-DDP-MAA).

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 *6 (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.

181. Complaint for: (1) Breach of Fiduciary Duty; (2) Aiding and Abetting Breach of Fiduciary Duty, *Clifford v. Davidson*, <https://www.documentcloud.org/documents/4496396-Clifford-v-Davidson-Cohen-Complaint.html>. (Super. Ct. Cal. 2018) (No. SC129384).

Cohen and alleged that Cohen was attempting to have Stormy Daniels appear on the *Hannity* show on Fox News “after consultation with Mr. Trump.”¹⁸² 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.”¹⁸³ 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.¹⁸⁴ The parties filed a notice of settlement almost a year later, in May 2019.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ In an indictment charging wire fraud and aggravated identity theft,¹⁸⁸ Stormy Daniels appears not by name, but as Victim-1 who is defrauded with regard to a book contract.¹⁸⁹

182. *Id.* at ¶¶ 20–36

183. *Id.* at ¶ 41.

184. Order Granting Plaintiff’s Motion to Remand, *Clifford v. Davidson*, No. CV 2:18-05052 SJO, 2018 WL 3701961, (C.D. Cal. 2018) (No. CV 2:18-05052 SJO).

185. Notice of Settlement, *Clifford v. Davidson* (Super. Ct. Cal. 2019) (No. SC129384). *Accord* Danielle Haynes, *Stormy Daniels Settles Lawsuit with Michael Cohen, Former Lawyer*, UPI (May 17, 2019 7:56 PM), https://www.upi.com/Top_News/US/2019/05/17/Stormy-Daniels-settles-lawsuit-with-Michael-Cohen-former-lawyer/2651558135220/.

186. “I’m exploring a run for the presidency of the United States, and I wanted to come to Iowa and listen to people and learn about some issues that are facing the citizens of Iowa and do my homework,” Avenatti told the Des Moines Register in an interview Thursday.” Brianne Pfannenstiel, *Michael Avenatti: ‘I’m Exploring a Run for the Presidency of the United States’*, USA TODAY (Aug. 9, 2018 8:11 PM EST), 2018/08/09/michael-avenatti-exploring-president-run-stormy-daniels-lawyer/952946002/.

187. *United States v. Avenatti*, No. 19 Cr. 374, 2019 WL 4640232, at *1 (S.D.N.Y. Sept. 24, 2019); *United States v. Avenatti*, No. 19 Cr. 373, 2020 WL 70951, at *1 (S.D.N.Y. Jan. 6, 2020).

188. Indictment, *United States v. Avenatti*, <https://www.justice.gov/usao-sdny/press-release/file/1164986/download>. (S.D.N.Y. May 22, 2019) (No. 19 Cr. 374). In a simultaneous separate indictment, the United States Attorney indicted Avenatti in an unrelated extortion scheme related to athletic apparel. Indictment, *United States v. Avenatti*, No. 19 Cr. 373, 2019 WL 8272373 (S.D. N.Y. May 22, 2019) (No. 19 Cr. 373).

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, AVENATTI defrauded a client (“Victim-1”) by diverting money owed to Victim-1 to AVENATTI’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.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.¹⁹¹ The next section considers Cohen in relation to these crimes, the Mueller Report, and Trump.

control and use. After assisting Victim-1 in securing a book contract, AVENATTI allegedly stole a significant portion of Victim-1's advance on that contract. He did so by, among other things, sending a fraudulent and unauthorized letter purporting to contain Victim-1's signature to Victim-1's literary agent, which instructed the agent to send payments not to Victim-1 but to a bank account controlled by AVENATTI. As alleged, Victim-1 had not signed or authorized the letter and did not even know of its existence.

Specifically, prior to Victim-1's literary agent wiring the second of four installment payments due to Victim-1 as part of the book advance, AVENATTI sent a letter to Victim-1's literary agent purportedly signed by Victim-1 that instructed the literary agent to send all future payments to a client trust account in Victim-1's name and controlled by AVENATTI. The literary agent then wired \$148,750 to the account, which AVENATTI promptly began spending for his own purposes, including on airfare, hotels, car services, restaurants and meal delivery, online retailers, payroll for his law firm and another business he owned, and insurance. When Victim-1 began inquiring of AVENATTI as to why Victim-1 had not received the second installment, AVENATTI lied to Victim-1, telling Victim-1 that he was still attempting to obtain the payment from Victim-1's publisher. Approximately one month after diverting the payment, AVENATTI used funds recently received from another source to pay \$148,750 to Victim-1, so that Victim-1 would not realize that AVENATTI had previously taken and used Victim-1's money.

Approximately one week later, pursuant to AVENATTI's earlier fraudulent instructions, the literary agent sent another payment of \$148,750 of Victim-1's book advance to the client account controlled by AVENATTI. AVENATTI promptly began spending the money for his own purposes, including to make payments to individuals with whom AVENATTI had a personal relationship, to make a monthly lease payment on a luxury automobile, and to pay for airfare, dry cleaning, hotels, restaurants and meals, payroll, and insurance costs. Moreover, to conceal his scheme, and despite repeated requests to AVENATTI, as Victim-1's lawyer, for assistance in obtaining the book payment that Victim-1 believed was missing, AVENATTI led Victim-1 to believe that Victim-1's publisher was refusing to make the payment to the literary agent, when, as AVENATTI knew, the publisher had made the payment to the literary agent, who had then sent the money to AVENATTI pursuant to AVENATTI's fraudulent instructions.

Id.

190. See Matt Apuzzo, *F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful'*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html>.

191. *Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations*, U.S. DEP'T OF JUST. (Aug. 21, 2018), <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax>.

V. MICHAEL COHEN AND CAMPAIGN FINANCE VIOLATIONS

The Federal Election Campaign Act (FECA) of 1971,¹⁹² and its expansion in the 2002 Bipartisan Campaign Reform Act (BCRA),¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ In the first challenge, *Buckley v. Valeo*,¹⁹⁶ 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.¹⁹⁷ In one of the most well-known cases, *Citizens United v. Federal Election Commission*,¹⁹⁸ a closely-divided Court held unconstitutional a BCRA provision prohibiting corporations from spending money on an “electioneering communication.”¹⁹⁹ And a few years later, in *McCutcheon v. Federal Election Commission*,²⁰⁰ the Court held unconstitutional the aggregate limits imposed on individuals, again by a closely-divided vote.²⁰¹

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,²⁰² continue to require that campaigns report all

192. 52 U.S.C. § 30101 *et. seq.* (2018); Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972).

193. 52 U.S.C. § 30101 *et. seq.* (2018); Bipartisan Campaign Reform Act, Pub L. No. 107-155, 116 Stat. 81 (2002).

194. *See infra* note 205.

195. For good discussions of First Amendment campaign finance challenges in the United States Supreme Court, *see* Jacob Eisler, *The Deep Patterns of Campaign Finance Law*, 49 CONN. L. REV. 55 (2016); Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016).

196. *Buckley v. Valeo*, 424 U.S. 1 (1976).

197. *Id.* at 16, 29, 58-59.

198. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

199. *Id.* at 321, 372.

200. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014).

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,²⁰³ and continue to bar campaign contributions and expenditures by corporations.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.”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.”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

Contribution Limits for 2015–2016, FED. ELECTION COMM’N (Feb. 3, 2015), <https://www.fec.gov/updates/contribution-limits-for-2015-2016/>.

203. 52 U.S.C. § 30104 governs the general reporting requirements, 52 U.S.C. § 30104(a)(3) provides reporting requirements for “the principal campaign committee of a candidate for the office of President,” on a monthly basis, and 52 U.S.C. § 30104(b) details what reports must contain, including contributions from persons, 52 U.S.C. § (2)(A), and loans, 52 U.S.C. §§ (2)(G), (2)(H).

204. 52 U.S.C. § 30118(a) provides:

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.

Id.

205. 52 U.S.C. § 30101(8)(A). The statute also contains numerous exclusions. 52 U.S.C. § 30101(8)(B).

206. 52 U.S.C. § 30101(9)(A). The statute also contains numerous exclusions. 52 U.S.C. § 30101(9)(B).

individual per campaign of \$2,700.²⁰⁷ 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.²⁰⁸

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.”²⁰⁹ 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.²¹⁰ 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.²¹¹

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

207. *Id.* § 30116(a)(1)(A).

208. 52 U.S.C. § 30116(a)(1)(A) (2018).

209. *Id.* § 30101(8)(A)(i) (2018).

210. *Id.* § 30109(d)(1)(A) (2018).

211. The letters from Common Cause, accompanying its complaints, contain a good overview of the contentions that campaign finance laws were violated and that the DOJ should investigate. *See* Letter from Paul S. Ryan, Vice President, Common Cause, to Hon. Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dept. of Justice (Feb. 20, 2018), <https://www.commoncause.org/wp-content/uploads/legacy/press/press-releases/common-cause-v-trump.pdf> (regarding Karen McDougal); Letter from Paul S. Ryan, Vice President, Common Cause, to Hon. Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dept. of Justice (Jan. 22, 2018), <https://www.commoncause.org/wp-content/uploads/2018/04/fec-complaint-trump-january-22-2018.pdf> (regarding Stormy Daniels/Stephanie Clifford). The letters referenced the DOJ Handbook, FEDERAL PROSECUTION OF ELECTION OFFENSES (7th ed. May 2007), stating that the Handbook “takes particular note of the fact that Congress increased criminal penalties for campaign finance violations as part of the Bipartisan Campaign Reform Act of 2002 (BCRA),” and quoting it as providing:

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. . . .

Letter from Paul S. Ryan, Vice President, Common Cause, to Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dept. of Justice 1–2 (Feb. 20, 2018) (referencing DOJ Handbook pp 198–99). Common Cause simultaneously filed complaints with the Federal Election Commission, *see* Common Cause v. Trump & AMI (Karen McDougal), COMMON CAUSE (Feb. 20, 2018), <https://www.commoncause.org/resource/common-cause-v-trump-ami-karen-mcdougal/>; Common Cause v. Trump & Cohen, COMMON CAUSE (Jan. 22, 2018), <https://www.commoncause.org/resource/common-cause-v-trump-cohen-stormy-daniels/>.

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.”²¹²

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.”²¹³ Instead, the Mueller investigation referred the campaign

212. 11 C.F.R. § 113(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.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.²¹⁵ At the same time the charges were revealed, Cohen pleaded guilty pursuant to a specific plea agreement.²¹⁶ Cohen would later be charged by Special Counsel with making false statements to Congress²¹⁷ and enter a guilty plea pursuant to a different plea agreement.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.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

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.

214. See Application for Search and Seizure Warrant, Exhibit A ¶ 8, *United States v. Cohen*, <https://assets.documentcloud.org/documents/5775705/Cohen-Warrant-Exhibit-2.pdf> (S.D.N.Y. March 19, 2019) (No. 1:18-cr-00602) (“The SCO [Special Counsel Office] has since referred certain aspects of its investigation into Cohen to the USAO, which is working with the FBI’s New York Field Office.”).

215. See Information ¶¶ 42, 44, *United States v. Cohen*, [//www.courtlistener.com/recap/gov.uscourts.nysd.499666/gov.uscourts.nysd.499666.2.0_6.pdf](https://www.courtlistener.com/recap/gov.uscourts.nysd.499666/gov.uscourts.nysd.499666.2.0_6.pdf) (S.D.N.Y. Aug. 21, 2018) (No. 1:18-cr-00602).

216. See Plea Agreement at 2, *United States v. Cohen*, <https://assets.documentcloud.org/documents/4779473/Michael-Cohen-Plea-Agreement.pdf> (S.D.N.Y. Aug. 21, 2018) (No. 1:18-cr-00602). The plea agreement also provided that the United States Attorney would not further prosecute Cohen regarding tax offenses connected with the campaign contributions (and other crimes in the Information), provided Cohen filed amended tax returns for the relevant years.

217. Information, *United States v. Michael Cohen*, <https://www.justice.gov/file/1115596/download> (Note that Special Counsel filed the information in the Southern District of New York) (S.D. N.Y.) (No. 1:18-cr-00602).

218. Plea Agreement, *United States v. Cohen*, <https://www.justice.gov/file/1115566/download> (S.D.N.Y. Nov. 29, 2018) (No. 1:18-cr-00602).

219. Information, *United States v. Cohen*, https://www.courtlistener.com/recap/gov.uscourts.nysd.499666/gov.uscourts.nysd.499666.2.0_6.pdf (S.D.N.Y. Aug. 21, 2018) (No. 1:18-cr-00602).

presidential election and thereby influence that election.”²²⁰ 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.²²¹

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.²²²

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.²²³ 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,²²⁴ 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.”²²⁵ Cohen repeated these

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.

222. Plea Agreement at 1, *United States v. Cohen*, <https://assets.documentcloud.org/documents/4779473/Michael-Cohen-Plea-Agreement.pdf> (S.D.N.Y. Aug. 21, 2018) (No. 1:18-cr-00602).

223. Sentencing Memorandum on Behalf of Michael Cohen at 5–10, *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).

224. *Id.* at 22.

225. *Id.*

sentiments in his sentencing hearing, stating that his blind loyalty to Trump led him to ignore his inner voice and moral compass.²²⁶

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 **and** cause personal embarrassment to Client-1 and his family.²²⁷

By bolofacing 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

226. See Benjamin Weiser & William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2018/12/12/nyregion/michael-cohen-sentence-trump.html>.

227. 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).

memo brings the campaign finance violation within the language of the statute.

Further, the representation in Cohen's sentencing memo that he "kept his client contemporaneously informed and acted on his client's instructions," regarding both women²²⁸ 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

228. *Id.* at 23.

229. Maggie Haberman, *Michael D. Cohen, Trump's Longtime Lawyer, Says He Paid Stormy Daniels Out of His Own Pocket*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/us/politics/stormy-daniels-michael-cohen-trump.html>.

230. MUELLER REPORT VOL. II, *supra* note 1, at 145 (citing *Hearing on Issues Related to Trump Organization Before the House Oversight and Reform Committee*, 116th Cong. (Feb. 27, 2019) (CQ Cong. Transcripts, at 147-148) (testimony of Michael Cohen)).

231. *Erin Burnett Out Front: Trump: No Knowledge of Stormy Daniels Payment*, 0:28-0:49 (CNN television broadcast Apr. 5, 2018), <https://www.cnn.com/videos/politics/2018/04/05/trump-didnt-know-about-stormy-daniels-payment-air-force-one-sot.cnn>.

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.”²³² 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.”²³³

Again, the Mueller Report specifically stated that the Special Counsel’s Office “did not investigate Cohen’s campaign-period payments to women,”²³⁴ presumably also including any liability of the President.²³⁵ 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.²³⁶ In the Mueller Report, Michael Cohen’s name appears more than anyone else in the Trump

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 non-disclosure 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.

236. MUELLER REPORT VOL. II, *supra* note 1, at 145.

family.²³⁷ 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.”²³⁸ 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.’”²³⁹ 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!”²⁴⁰ and another contrasting Cohen with Paul Manafort, who “unlike Michael Cohen . . . refused to ‘break.’”²⁴¹ 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.”²⁴² 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.”²⁴³ 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

237. Jordan Fischer, *Whose Name Appears Most in the Mueller Report?*, WUSA9 CBS, <https://www.wusa9.com/article/news/politics/mueller-report/whose-name-appears-most-in-the-mueller-report/65-fa092cdd-c18c-4931-ad2a-b9d78b744c2b> (last updated Apr. 19, 2019, 10:38 PM EDT).

238. MUELLER REPORT VOL. II, *supra* note 1, at 145.

239. *Id.* (citing Feb. 19, 2018 Text Message, President’s personal counsel to Cohen); see Jim Rutenberg et al., *Tools of Trump’s Fixer: Payouts, Intimidation and the Tabloids*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/us/politics/michael-cohen-trump.html>.

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 “[a]t 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.

241. MUELLER REPORT VOL. II, *supra* note 1, at 149 & n.1046 (citing @realDonaldTrump, TWITTER (Aug. 22, 2018, 9:21 AM EDT)).

242. *Id.* at 154.

243. *Id.* at 156.

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.

248. United States v. Cohen, No. 18-Cr-602 (S.D.N.Y. Dec. 12, 2018), <https://ecf.nysd.uscourts.gov/doc1/127123780595> (“36 months incarceration to be served concurrently to the sentence imposed on docket 18-Cr-850”); *See also* Benjamin Weiser & William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/michael-cohen-sentence-trump.html>.

249. *See* MUELLER REPORT VOL. II, *supra* note 1.

250. *Id.* at 149.

251. Mem. & Order at 2, United States v. Cohen, No. 18-Cr-602 (S.D.N.Y. July 17, 2019), <https://assets.documentcloud.org/documents/6205915/Memorandum-and-Order.pdf>.

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.

254. *See* Agent Aff. in Supp. of Appl. for Search & Seizure Warrant at 38–57, 18 Mag. 2969, https://www.courtlistener.com/recap/gov.uscourts.nysd.499666/gov.uscourts.nysd.499666.48.1_1.pdf (S.D.N.Y. Apr. 8, 2018), *unsealed by* United States v. Cohen, No. 18-Cr-602 (S.D.N.Y. Dec. 12, 2018), [hereinafter Unredacted FBI Agent Affidavit].

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, 2016.²⁶¹ 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.²⁶²

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).²⁶³

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).²⁶⁴
- 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.²⁶⁵ There are communications about the article both before and after it is published at 9:50 p.m.:

261. *Id.* at ¶ 38.

262. *Id.* ¶¶ 38–39.

263. *Id.* ¶ 39(a)–(b).

264. *Id.* ¶ 39(e).

265. See Palazzolo, Rothfield & Alpert, *supra* note 112.

- 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;”²⁶⁶
- 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);²⁶⁷
- 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?”).²⁶⁸

Hicks and Howard both sent Cohen a link to the article when it was published; Cohen and Howard exchanged text messages about the article.²⁶⁹ The next morning, at 7:35 am,

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

270. *Id.*

271. *Id.*

272. See Burnett, *supra* note 232 and accompanying text (containing Trump’s statement and linking to video).

273. See, e.g., Matt Apuzzo, Maggie Haberman & Michael S. Schmidt, *Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/michael-cohen-trump-tape.html>.

274. See Unredacted FBI Agent Affidavit, *supra* note 254, at 43 n.28.

275. Press Release, United States Attorney’s Office Southern District of New York, Michael Cohen Sentenced To 3 Years In Prison; U.S. Attorney’s Office Also Announces 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.²⁷⁶ 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."²⁷⁷ 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.²⁷⁸

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.²⁷⁹ 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 8.²⁸⁰ Before the unredacted affidavit became public, Hicks testified before the House of Representatives Committee on the Judiciary.²⁸¹ After the unredacted affidavit became public, the House Committee on the Judiciary invited Hicks to return to the Committee to

with American Media, Inc., Related to Its Payment of \$150,000 to a Woman to Influence 2016 Presidential Election, U.S. DEP'T OF JUSTICE (Dec. 12, 2018) <https://www.justice.gov/usao-sdny/pr/michael-cohen-sentenced-3-years-prison>.

276. See Letter from Charles A. Stillman, et al., Esq., U.S. Attorney S.D.N.Y., to Messrs. Stillman & Michael, American Media, Inc., *Re: American Media, Inc.* (Sept. 20, 2018), <https://www.justice.gov/usao-sdny/press-release/file/1119501/download> [Hereinafter Non-Prosecution Agreement].

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.

281. Interview with Hope Hicks, Comm. on Judiciary, H.R. Washington, D.C. (June 19, 2019), <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/HJU170550%20Hicks%20interview.pdf>.

“clarify” her testimony given that it “appears to be inconsistent” with the material in the unsealed FBI agent affidavit.²⁸² The House Committee on the Judiciary Letter detailed Hicks’ apparent inconsistencies.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 DailyMail. Are you aware?”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* . . .”²⁸⁵ There is no

282. Letter from Jerrold Nadler, Chairman, House Committee on the Judiciary, to Hope Hicks, *Regarding Previous Testimony 1*, (July 18, 2019), <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/7.18.2019%20Letter%20from%20Chairman%20Nadler%20to%20Hope%20Hicks%20%28002%29.pdf>.

283. *Id.* at 1–3. The letter states:

- 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.”
- 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.”
- 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.”
- 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.”
- 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.”
- 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.”

Id. [footnotes to Transcript omitted].

284. Unredacted FBI Agent Affidavit, *supra* note 254, at ¶ 36(b)(i).

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*.²⁸⁶ There is also no evidence that Karen McDougal ever considered the *Daily Mail*.²⁸⁷ 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;²⁸⁸ the *Daily Mail* eventually published a story when she dismissed her lawsuit a few days before the 2016 election.²⁸⁹ 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.²⁹⁰

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 deceptions 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,²⁹¹ this would render Trump's numerous sex scandals,

286. DANIELS, *supra* note 139.

287. See *supra* notes 106–07 and accompanying text (discussing Karen McDougal).

288. Ryan Parry, *Trump's 13-year-old 'Rape Victim' Dramatically DROPS Her Case*, DAILY MAIL (Nov. 4, 2016), <https://www.dailymail.co.uk/news/article-3894806/Woman-alleged-raped-Donald-Trump-13-Jeffrey-Epstein-sex-party-DROPS-case-casting-doubt-truth-claims.html>.

289. *Id.* For more about these allegations and the complaints filed by the woman in federal courts, see Robson, *supra* note 21 (forthcoming).

290. See, e.g., Robson, *supra* note 21 (discussing misconduct allegations). There is also the possibility that such women were threatened. In Michael Cohen's rather dramatic testimony before Congress:

Congresswoman Jackie Speier asked Cohen, "How many times did Mr. Trump ask you to threaten an individual or entity on his behalf?" Cohen initially answered that he had quite a few times, but Speier pressed him on a number, asking 50 times, to which Cohen responded more, and only at the query "500 times" did Cohen say, "Probably, over the 10 years" that he had worked for Trump.

Id. at 50–51 (citing Meg Warren, et. al., *Michael Cohen Testifies Before Congress*, CNN (Feb. 27, 2019)).

291. See, e.g., Yoni Appelbaum, *The Mueller Report Is an Impeachment Referral*, ATLANTIC (Apr. 18, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/mueller-report-impeachment->

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.”²⁹² 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.²⁹³ 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.”²⁹⁴ The drafted Articles of Impeachment against Richard Nixon

referral/587509/; Martin Schram, *Mueller Report is a Blueprint for Congress*, *NEWSDAY* (Apr. 19, 2019), <https://www.newsday.com/opinion/commentary/mueller-report-trump-future-probes-president-investigation-1.29996365>.

292. U.S. CONST. art. II, § 4.

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.”²⁹⁵ 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.²⁹⁶ 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.

295. IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, REPORT OF THE COMM. ON THE JUDICIARY HOUSE OF REPRESENTATIVES, H.R. REP. NO. 93-1035, at 2 (1974) [Hereinafter Nixon Impeachment]. Article I, § 8 of the proposed articles provided:

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.*

296. See ARTICLES OF IMPEACHMENT AGAINST WILLIAM JEFFERSON CLINTON, H.R. RES. 611, 105TH CONG., 2D SESS. (1998) [Hereinafter Clinton Impeachment]. As the summary to the Resolution provides, it: “Sets forth four articles impeaching William Jefferson Clinton, President of the United States, for high crimes and misdemeanors.”:

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,²⁹⁷ a view that is consistent with First Amendment doctrine rejecting the constitutionality of criminalizing mere lies, without more.²⁹⁸ 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.²⁹⁹

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.³⁰⁰ 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.³⁰¹ Trump's personal attorney Michael Cohen pleaded guilty to the crimes and implicated Trump.³⁰² 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.³⁰³ 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."³⁰⁴

Trump's possible argument that the campaign contributions and expenditures were not made "for the purpose of influencing any election"³⁰⁵ or that his acts were not "knowing or willful"³⁰⁶ 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.

303. Letter from Elijah Cummings, Chairman, H.R. Comm. on Oversight & Reform, to Audrey Strauss, Deputy U.S. Attorney, S.D.N.Y. (July 19, 2019) <https://assets.documentcloud.org/documents/6207316/2019-07-19-COR-to-Strauss-SDNY-Re-Hush-Money.pdf>. For discussion of the Department of Justice OLC memo, *see supra* note 20.

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 deceptions 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.

309. For rumors of the existence of other tapes, see Paulina Firozi, ‘Apprentice’ Producer: There are ‘Far Worse’ Tapes of Trump, THE HILL (Oct. 8, 2016, 6:55 PM EDT), <https://thehill.com/blogs/ballot-box/presidential-races/300044-apprentice-producer-there-are-far-worse-tapes-of-trump>; Katie Mettler, ‘I Am NOT Pro-Trump,’ Clarifies ‘The Apprentice’ Producer Mark Burnett Amid Video Controversy, WASH. POST (Oct. 13, 2016, 3:57 AM EDT), <https://www.washingtonpost.com/news/morning-mix/wp/2016/10/13/i-am-not-pro-trump-clarifies-the-apprentice-producer-mark-burnett-amid-video-controversy>.

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,³¹¹ the failures to be honest in the drafted Nixon impeachment articles,³¹² and the failure to be forthcoming in the original draft of the Clinton impeachment,³¹³ 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.

311. Johnson Impeachment, *supra* note 294.

312. Nixon Impeachment, *supra* note 295.

313. Clinton Impeachment, *supra* note 296.