

A CAMPAIGN TO DEFRAUD

President Trump's Apparent Campaign
Finance Crimes, Cover-up, and Conspiracy

Noah Bookbinder, Conor
Shaw, and Gabe Lezra



CREW | citizens for responsibility
and ethics in washington

Noah Bookbinder is the Executive Director of Citizens for Responsibility and Ethics in Washington (CREW). Previously, Noah has served as Chief Counsel for Criminal Justice for the United States Senate Judiciary Committee and as a corruption prosecutor in the United States Department of Justice’s Public Integrity Section. **Conor Shaw** and **Gabe Lezra** are Counsel at CREW.

The authors would like to thank Adam Rappaport, Jennifer Ahearn, Stuart McPhail, Eli Lee, Robert Maguire, Ben Chang, and Lilia Kavarian for their contributions to this report.

TABLE OF CONTENTS

TABLE OF CONTENTS	3
EXECUTIVE SUMMARY	5
TABLE OF POTENTIAL CRIMINAL OFFENSES	7
I. FACTUAL BACKGROUND	8
A. Trump’s familiarity with federal laws regulating campaign contributions	8
B. Trump, Cohen, and Pecker’s hush money scheme.....	10
C. AMI’s purchase of the McDougal story and assignment to Cohen	11
D. Trump’s treatment of women and his alleged infidelity	13
E. Cohen’s purchase of Clifford’s (Stormy Daniels’s) story	15
F. Concealment of the hush money scheme	16
G. Disclosure and investigation of potential FECA violations	18
II. TRUMP’S POTENTIAL CAMPAIGN FINANCE OFFENSES	22
A. Key terms in the FECA	23
1. Who is considered a candidate and what is required of them?.....	23
2. What constitutes a “contribution”?	24
3. What constitutes acceptance or receipt of an unlawful contribution?	27
B. Relevant provisions of the FECA	28
1. Ban on corporate contributions, 52 U.S.C. § 30118(a).....	28
2. Limit on individual contributions, 52 U.S.C. § 30116	28
3. Reporting requirements, 52 U.S.C. § 30104.....	29
C. Additional elements required to establish criminal FECA violations.....	29
1. A contribution exceeding \$2,000 (for a misdemeanor) or \$25,000 (for a felony) during a calendar year	29
2. Knowing and willful intent	30
D. Principal liability under 18 U.S.C. § 2.....	31
E. Trump’s potential FECA liability	31
1. Evidence of President Trump’s knowing and willful intent	32
a. Trump’s knowledge of the individual contribution limit	32
b. Trump’s knowledge of the reporting requirements.....	33
c. Trump’s knowledge of the federal ban on corporate contributions.....	34

d. Trump’s knowledge that a third-party’s hush-money payment could constitute an in-kind campaign contribution.....	35
2. Potential Violation I: Causing AMI to make and/or accepting (or causing Cohen to accept) an unlawful corporate contribution (McDougal story).....	35
3. Potential Violation II: Causing Cohen to make and or/accepting an unlawful individual contribution (Clifford Story).....	38
4. Potential Violations III & IV: Causing Donald J. Trump for President LLC’s failure to report AMI and Cohen’s contributions (McDougal & Clifford Stories).....	40
5. Potential Violation V: Causing Donald J. Trump for President LLC’s failure to report that contribution (February 2015 online poll)	42
III. TRUMP’S POTENTIAL COVER-UP OFFENSES	44
A. Potential Violation VI: Felony Causing False Records (FEC submissions, false Trump invoices, Form 278), in violation of 18 U.S.C. § 1519.....	44
B. Potential Violation VII. Felony False Statement (2017 Form 278), in Violation of 18 U.S.C. § 1001	45
C. Other Possible Concealment Offenses.....	47
IV. TRUMP’S POTENTIAL PARTICIPATION IN A CRIMINAL CONSPIRACY	48
A. Overview of Federal Conspiracy Law (18 U.S.C. § 371)	48
1. Federal “Defraud Clause” Conspiracy Law as Applied to the FECA.....	49
2. Federal “Offense Clause” Conspiracy as Applied to the FECA.....	50
B. Potential Violation VIII. Conspiracy to defraud the United States by undermining the lawful function of the FEC and/or violating the FECA (the “hush money” payments, false statement, and cover-up)	51
CONCLUSION.....	53

EXECUTIVE SUMMARY

There is compelling evidence that Donald J. Trump may have personally committed up to eight criminal offenses while campaigning for president and during the first year of his presidency.¹ The potential offenses include violations of laws regulating campaign contributions and their disclosure, making false records and statements, and a conspiracy to defraud (or to violate the laws of) the United States.

We take no pleasure in explaining why anyone, much less a sitting president, could face criminal liability for his conduct, but we hope to make two modest contributions to the public discourse on this subject: First, by collecting and setting forth the remarkable volume of facts that have been admitted by two of President Trump's likely co-conspirators or established in press reports, we hope to recapture the narrative that is so easily lost in an era of ever-shortening news cycles. Second, by articulating how the criminal law could be applied to the facts as we know them, we hope to provide structure to the ongoing conversation about the gravity of President Trump's conduct.

Five of Trump's potential violations involved his apparent knowing and willful direction, receipt, and concealment of unlawful contributions to his presidential campaign in violation of the Federal Election Campaign Act (FECA), 52 U.S.C. § 30101 *et seq.* While it is true that technical offenses of the FECA are penalized with civil fines, more serious offenses are subject to criminal penalties. Unlawful campaign contributions or expenditures in excess of \$25,000, made knowingly and willfully, are felonies punishable by up to five years in prison.

Far from representing incidental offenses that would best be met with civil fines, Trump's conduct appears to have been part of a deliberate effort to manipulate public opinion and to prevent damaging information about his past from coming to light. One of the central issues in the 2016 campaign—particularly the pivotal final month—was Trump's attitude toward and treatment of women. Preventing the American people from learning about accusations that he had affairs with two women appears to have been one of the main objectives of the apparent criminal scheme.

Trump potentially committed at least two additional felonies while attempting to cover up his campaign finance offenses. By causing his campaign to submit false records to the Federal Election Commission (FEC), Trump likely violated 18 U.S.C. § 1519, which prohibits the destruction, alteration, or falsification of records in federal investigations. And by submitting a public financial disclosure form to the Office of Government Ethics (OGE) on which he failed to disclose that he owed Michael Cohen \$130,000 (for paying one of the women), President Trump also potentially made a false statement in violation of 18 U.S.C. § 1001.

Finally, Trump potentially participated in a criminal conspiracy to perpetrate these offenses and/or defraud the United States by undermining the FEC. Under 18 U.S.C. § 371, it is a separate felony, also

¹ This report does not address potential campaign finance and other offenses relating to Russian interference in the 2016 election, the release of stolen emails and other information by WikiLeaks, and possible cooperation with members or associates of the Trump Campaign, or potential obstruction of justice of any of these investigations. For discussion of those matters, see Barry H. Berke, Dani R. James, Noah Bookbinder, and Norman L. Eisen, Considering Collusion: A Primer on Potential Crimes, *Brookings*, Oct. 31, 2018, available at <https://brook.gs/2RiabyF>; Barry H. Berke, Noah Bookbinder, and Norman L. Eisen, Presidential Obstruction of Justice: The Case of Donald J. Trump, Second Edition, *Brookings*, Aug. 22, 2018, available at <https://brook.gs/2QTuu69>; Bob Bauer and Ryan Goodman, Yes, Collusion: The Legal Significance of the New Mueller Revelations, *Just Security*, Nov. 29, 2018, available at <https://bit.ly/2KFvfgV>; Paul Seamus Ryan, Roger Stone Indictment Implicates Trump Campaign in Election Law Violations, *Just Security*, Jan. 25, 2018, available at <https://bit.ly/2MBgf4s>.

punishable by up to five years in prison, for two or more persons to agree to commit an offense or undermine a lawful government function such as enforcement of federal election law. Trump may have participated in such a conspiracy by agreeing with Cohen, the Trump Organization, two Trump Organization executives, American Media Inc. (AMI), David Pecker (the CEO of AMI), the Trump Campaign, and possibly others to undermine the enforcement of federal election law and/or to commit the FECA violations and conceal them.

A considerable portion of the evidence substantiating these offenses has already been laid out by federal prosecutors in filings from the prosecution of Michael Cohen and in a non-prosecution agreement with AMI. Prosecutors have represented that they have collected evidence in addition to the admissions of Cohen and AMI to support the allegations they present in those filings. Other facts have been reported by news organizations, including in an extensive story by the *Wall Street Journal*.² While the facts we rely on in this report necessarily represent an approximation of the evidence that federal prosecutors can prove beyond a reasonable doubt, we believe the sources supporting the narrative we present are due significant weight.

The conduct we describe appears to have been calculated to defraud the American people. The likely campaign finance violations detailed in this report involved the suppression of stories that had the potential to undercut political support for Trump in the final months of the 2016 presidential campaign. The country will never be certain what might have happened if those allegations had come to light or if the unlawful contributions had been reported, as federal law required. However, any assessment of the gravity of these offenses must acknowledge that the outcome of the 2016 election was potentially in the balance.

It is also significant that Trump's potential criminal conduct continued well into his presidency. The apparent criminal conspiracy to orchestrate and cover up the hush money payments continued at least through the end of 2017, and President Trump appears to have clearly committed at least one additional criminal act—the false statement on his public financial disclosure form—in June 2017. Were President Trump an ordinary citizen, unprotected by the Department of Justice's policy of not seeking indictment of a sitting president, he could well be facing the prospect of imminent criminal charges. As it stands, the president could be named as an unindicted co-conspirator if his business and campaign are indicted, or he could be indicted upon leaving office. And regardless of what prosecutorial decisions are made, it will be important for the American people and their elected representatives to carefully and critically evaluate this conduct.

² Joe Palazzolo, Nicole Hong, Michael Rothfeld, Rebecca Davis O'Brien, and Rebecca Ballhaus, [Donald Trump Played Central Role in Hush Payoffs to Stormy Daniels and Karen McDougal](https://on.wsj.com/2OAW9qq), *Wall Street Journal*, Nov. 9, 2018, available at <https://on.wsj.com/2OAW9qq>.

TABLE OF POTENTIAL CRIMINAL OFFENSES

POTENTIAL VIOLATION	STATUTE(S)	PAGES
I. Causing AMI to make and/or accepting (or causing Cohen to accept) an unlawful corporate contribution (McDougal story)	52 U.S.C. §§ 30109, 30118 18 U.S.C. § 2	35 - 38
II. Causing Cohen to make and/or accepting an unlawful individual contribution (Clifford Story)	52 U.S.C. §§ 30109, 30116, 30118 18 U.S.C. § 2	38 - 40
III. Causing Donald J. Trump for President LLC's failure to report AMI's contribution (McDougal Story)	52 U.S.C. §§ 30104, 30109 18 U.S.C. § 2	40 - 42
IV. Causing Donald J. Trump for President LLC's failure to report Cohen's contribution (Clifford Story)	52 U.S.C. §§ 30104, 30109 18 U.S.C. § 2	40 - 42
V. Causing Cohen to make and/or accepting an unlawful individual contribution (February 2015 online poll)	52 U.S.C. §§ 30109, 30116, 30118 18 U.S.C. § 2	42 - 43
VI. Causing Donald J. Trump for President LLC to file false reports with the FEC	18 U.S.C. § 1519 18 U.S.C. § 2	44 - 45
VII. Making a false statement by failing to disclose liability to Cohen for Clifford payment on 2017 public financial disclosure form	18 U.S.C. § 1001	45 - 47
VIII. Conspiracy to defraud the United States by undermining the lawful function of the FEC and/or violating the FECA (the "hush money" payments, false statement, and cover-up)	18 U.S.C. § 371	51 - 52

I. FACTUAL BACKGROUND

A. Trump's familiarity with federal laws regulating campaign contributions

Before his successful campaign for president in 2016, Trump was the scion of an eponymous real estate empire (the “Trump Organization”³) and was regularly engaged, both as a commentator and donor, in federal and state politics. Between 1989 and 2015, Trump donated more than one million dollars to candidates in federal elections as well as nearly \$800,000 to candidates in state elections.⁴ Trump also frequently made donations to candidates for state and local office through corporate entities he controlled. For instance, between 1998 and 2002, Trump Hotels & Casino Resorts donated nearly \$200,000 to political candidates and committees in three states.⁵

In 1999, Trump went one step further and formed an exploratory committee for president. During a *Larry King Live* interview in which he announced his exploratory committee, Trump claimed, “nobody knows more about campaign finance than I do, because I'm the biggest contributor.”⁶ In 2011, Trump again flirted with the possibility of running for president but ultimately did not form an exploratory committee.⁷

Trump had reason to be familiar with federal campaign finance laws beyond being a frequent donor and potential candidate. In testimony before New York's Commission on Government Integrity in 1988 and in a sworn affidavit submitted to the Federal Election Commission (FEC) in 2000, Trump demonstrated knowledge of fundamental components of federal campaign finance law, namely: the limit on individual contributions, the ban on direct contributions from corporations, and reporting requirements.⁸

Trump was also the subject of two FEC complaints. In 2000, the FEC investigated whether Trump Hotels & Casinos violated federal election laws by hosting a fundraiser for United States Senate candidate William Gormley.⁹ Trump submitted a four-page sworn affidavit to the FEC in which he

³ See Joy Blenman, The Companies Donald Trump Owns, *Investopedia*, Oct. 22, 2018, available at <https://bit.ly/2HrgzDS>.

⁴ History of Donald Trump's political donations, *Ballopeda*, Oct. 26, 2016, available at <https://bit.ly/2jtql7g>.

⁵ Mark Dixon, You're Hired!: Business Icon Donald Trump Invests in Lawmakers, *The Institute on Money in State Politics*, Jun. 3, 2004, available at <https://bit.ly/2FJtqQg>.

⁶ Larry King Live, Transcript: Donald Trump Announces Plans to Form Presidential Exploratory Committee, *CNN*, Oct. 8, 1999, available at <https://cnn.it/1OFy4ZK>; Donald Trump Interview on Larry King Live, *CNN*, Oct. 8, 1999, available at <https://bit.ly/2FPaNdN> (note: the *CNN* transcript reads “that I do;” however, the video of the appearance makes clear that Trump says “than I do.”). See also Robert D. McFadden, Citing Public Support, Trump Forms Exploratory Committee on Presidency, *New York Times*, Oct. 8, 1999, available at <https://nyti.ms/2GRNFuQ>.

⁷ Jim Rutenberg, Trump Bows Out, but Spotlight Barely Dims, *New York Times*, May 16, 2011, available at <https://nyti.ms/2T5jcI5>; CNN Wire Staff, Donald Trump announces he won't run for president, *CNN*, May 16, 2011, available at <https://cnn.it/2FOSqWw>.

⁸ See State of New York Commission of Government Integrity, Hearing on Campaign Finance Practices of Citywide and Statewide Officials: Testimony of Donald J. Trump (henceforth “Trump Testimony”), Mar. 14, 1988, at 261, available at <https://on.wsj.com/2Rcz4vt>; Response from Mark A. Brown; Fred A. Buro; Lawrence Mullin; Donald J. Trump; and Trump Hotels & Casino Resorts, Inc. (henceforth “Trump FEC Affidavit”), *In the Matter of Gormley for Senate et al*, FEC MUR 5020, Jun. 30, 2000, available at <https://www.fec.gov/files/legal/murs/5020/00002D89.pdf>. Trump's affidavit was signed on May 23, 2000. *Id.* See also Rebecca Ballhaus and Joe Palazzolo, Trump Testimony From Decades Ago Indicates Knowledge of Campaign-Finance Laws, *Wall Street Journal*, Dec. 19, 2018, available at <https://on.wsj.com/2LrbxWn>.

⁹ Ballhaus and Palazzolo, *Wall Street Journal*, Dec. 19, 2018.

demonstrated knowledge of federal campaign finance laws, including the regulation of corporate donations.¹⁰ Trump explicitly disavowed the existence of any scheme to reimburse employees of Trump Hotels & Casinos for their donations to Gormley for Senate and also stated that he was not reimbursed by his businesses for the expense of hosting the fundraiser.¹¹

The FEC investigated Trump and his business a second time in 2011 to determine whether Trump received excessive or impermissible contributions from his business in the form of a website, www.ShouldTrumpRun.com, and associated legal work performed by a Trump Organization employee.¹² That employee was none other than Michael Cohen, a former plaintiff's attorney who Trump hired in 2007 to be Executive Vice President at the Trump Organization and Special Counsel to Trump.¹³ Over the next ten years, Cohen proved to be a crucial member of Trump's team, variously described as Trump's "fixer," "consigliere," and "pit bull."¹⁴

In 2012, Trump also commented on the prosecution of former presidential candidate John Edwards for alleged FECA violations associated with hush money payments made to a former aide with whom Edwards had had an affair.¹⁵ Trump was critical of the prosecution and told Fox News that "a lot of very good lawyers" had told him that the government did not have a good case.¹⁶

After years of considering a run for elected office, Trump began competing in the 2016 election in February 2015, when Cohen asked John Gauger, the owner of a small technology company called Redfinch Solutions LLC, to help rig an online survey of support for potential candidates for the Republican nomination for president.¹⁷ With Gauger's help, Trump placed fifth.¹⁸ Gauger claims that Cohen paid him at Cohen's Trump Organization office.¹⁹ According to Gauger, Cohen gave him a Wal-Mart bag containing approximately \$12,000 to \$13,000 in cash and a boxing glove that Cohen claimed had been worn by a Brazilian martial arts fighter as payment for rigging the poll.²⁰

¹⁰ Trump FEC Affidavit, *In the Matter of Gormley for Senate et al*, FEC MUR 5020, Jun. 30, 2000, available at <https://bit.ly/2FUg3Mt>.

¹¹ *Id.*

¹² Statement of Reasons, *In the Matter of Donald J. Trump et. al.*, FEC MUR 6462 (Sept. 18, 2013), available at <http://eqs.fec.gov/eqsdocsMUR/13044342667.pdf>; Michael Falcone, Donald Trump's 'Pit Bull': Meet Michael Cohen, *ABC News*, Apr. 16, 2011, available at <https://abcn.ws/2DynFmb>.

¹³ Government's Sentencing Memorandum (henceforth "Gov't Sentencing Memo, *United States v. Cohen*"), *United States v. Cohen*, No. 18-cr-00602 (S.D.N.Y. Dec. 7, 2018) available at <https://bit.ly/2B1x3Nz>.

¹⁴ See, e.g., Mike McIntire, Jim Rutenberg and Maggie Haberman, Michael Cohen, 'Ultimate Trump Loyalist,' Now in the Sights of the F.B.I., *New York Times*, Apr. 10, 2018, available at <https://nyti.ms/2GOQ8aE>; Brian Ross and Matthew Mosk, Congress expands Russia investigation to include Trump's personal attorney, May 30, 2017, available at <https://abcn.ws/2CNQ8CQ>.

¹⁵ <https://twitter.com/realDonaldTrump/status/195584554290003969>;
<https://twitter.com/realdonaldtrump/status/196982439522992129>;
<https://twitter.com/realdonaldtrump/status/197002017258999808>.

¹⁶ Greg P., FLASHBACK: Here's what Donald Trump and Lanny Davis had to say about John Edwards in 2011 and 2012, *Twitchy*, Aug. 22, 2018, available at <https://bit.ly/2Uxxma4>.

¹⁷ Michael Rothfeld, Rob Barry and Joe Palazzolo, Cohen Hired IT Firm to Rig Early CNBC, Drudge Polls to Favor Trump, *Wall Street Journal*, Jan. 17, 2019, available at <https://on.wsj.com/2QXc4k6>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* A portion of this payment may have been intended to compensate Gauger for help trying to rig a CNBC poll identifying the country's "top business leaders" in January 2014. *Id.*

Trump announced in March 2015 that he was forming an exploratory committee for a potential bid for president,²¹ and in June 2015, formally announced his candidacy for the 2016 presidential election.²² Trump’s principal campaign committee, Donald J. Trump for President, Inc. filed a statement of organization with the FEC on June 29, 2015 and its first report of receipts and disbursements on July 15, 2015.²³ Donald J. Trump for President, Inc. did not disclose a contribution from Cohen in that or any subsequent report.²⁴ While Cohen was not given an official title with the Trump campaign, he received a campaign email address, advised the campaign on media strategy, made regular media appearances as a campaign surrogate and continued to serve in his role as Trump’s fixer.²⁵

B. Trump, Cohen, and Pecker’s hush money scheme

In August 2015, two months after Trump formally launched his campaign for the president, Cohen and, reportedly, Trump²⁶ met with David Pecker at Trump’s office in Trump Tower.²⁷ Pecker was (and remains) the Chairman and Chief Executive Officer of American Media, Inc. (AMI),²⁸ a media holding company that owns and publishes the *National Enquirer*, a national tabloid magazine.²⁹ Before Pecker took charge of publishing the *National Enquirer*, the magazine had occasionally sought out and run unflattering stories about Trump; under Pecker’s leadership, that stopped thanks to Pecker’s friendship with Trump.³⁰

At the August 2015 meeting, Pecker went one step further: he offered to “assist[] the [Trump] campaign in identifying [unflattering stories about Trump] so they could be purchased and their publication avoided.”³¹ Both Cohen and AMI have admitted that their intent in setting up the scheme was to influence the election by preventing these women with potentially unflattering information from

²¹ Kendall Breitman, Trump to form exploratory committee for possible 2016 presidential bid, *Politico*, Mar. 3, 2018, available at <https://politi.co/2UcB09l>.

²² Jose A. DelReal, Donald Trump announces Presidential bid, *Washington Post*, Jun. 16, 2015, available at <https://wapo.st/2HwChXf>.

²³ Donald J. Trump for President, Inc., Statement of Organization, *Federal Election Commission*, Jun. 29, 2015, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1011720/>; Donald J. Trump for President, Inc., July 2015 Quarterly Report, *Federal Election Commission*, Jul. 15, 2015, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1015464/> (covering the period from Apr. 2, 2015 through Jun. 30, 2015).

²⁴ Contributions from AMI and Cohen do not appear in the FEC’s database of contributions to Donald J. Trump for President. See <https://bit.ly/2RDm1Cl> (Cohen); <https://bit.ly/2MQDFCV> (AMI).

²⁵ Information (henceforth “Cohen Information”), *United States v. Cohen*, No. 1:18-cr-00602, S.D.N.Y. Aug. 21, 2018, at ¶ 25, available at <https://bit.ly/2FL5RXs>.

²⁶ Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018. See also Kara Scannell, Erica Orden and Marshall Cohen, Trump was at 2015 meeting about hush money payments, sources say, *CNN*, Dec. 13, 2018, available at <https://cnn.it/2MuDihh>.

²⁷ Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

²⁸ See, e.g., Jeffrey Toobin, The National Enquirer’s Fervor for Trump, *The New Yorker*, Jul. 3, 2017, available at <https://bit.ly/2np1wAD> (quoting Pecker saying of Trump, “[T]he guy’s a personal friend of mine.”).

²⁹ Company Overview of National Enquirer, Inc., *Bloomberg*, updated Jan. 24, 2019, available at <https://bloom.bg/2CHgNBf>.

³⁰ Toobin, *The New Yorker*, Jul. 3, 2017.

³¹ U.S. Dept. of Justice, United States Attorney for the Southern District of New York, Letter re: American Media Inc. Non-Prosecution Agreement and Statement of Admitted Facts (hereafter “AMI Statement of Admitted Facts”), Sept. 20, 2018, at ¶ 3, available at <https://bit.ly/2WcT8BI>. See also Cohen Information at ¶ 27.

speaking to the media about Trump.³² Ultimately, both AMI and Cohen followed through on the plot, and investigators have obtained documents from both outlining the structure of the payments.³³

C. AMI's purchase of the McDougal story and assignment to Cohen

Cohen, Pecker, and Trump put the “catch and kill” scheme into action in the summer of 2016. In June of that year—around the same time that Trump became the presumptive Republican presidential nominee—Pecker and Dylan Howard, an editor at the *National Enquirer*, called Cohen to inform him that a model and actress, Karen McDougal, was trying to sell a story of her alleged extramarital affair with Trump.³⁴ According to McDougal, she and Trump shared a consensual sexual relationship for about ten months in 2006 and 2007; only a year after Trump married his current wife, Melania Trump, and within months of the birth of their son.³⁵

Cohen and Pecker agreed that AMI would negotiate the purchase of McDougal's story.³⁶ Howard interviewed McDougal on June 20, 2016.³⁷ After McDougal took steps towards giving her story to other outlets, including by meeting with investigative reporters at *ABC News*, AMI offered to purchase McDougal's story for \$150,000, ostensibly to prevent its broader public release.³⁸

On August 5, 2016, AMI entered into an agreement with McDougal to acquire the “limited life rights” to the story of her relationship with “any then-married man,” in exchange for \$150,000—much more than AMI would usually pay for such content—as well as a commitment to feature her on two magazine covers and the option to publish health and fitness columns under McDougal's name.³⁹ AMI has since admitted that its principal purpose in entering the agreement was “to suppress the model's story so as to prevent it from influencing the election” and that “[a]t no time . . . did AMI intend to publish the story or disseminate information about it publicly.”⁴⁰ On August 10, 2016, AMI paid McDougal \$150,000 via her attorney.⁴¹ Cohen promised that Trump would reimburse AMI for the expense.⁴² As a result of the arrangement, McDougal did not speak to the press about her story before the election.⁴³

³² Cohen Information at ¶ 35; AMI Statement of Admitted Facts at ¶¶ 2, 5.

³³ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

³⁴ AMI Statement of Admitted Facts at ¶ 4; Gov't Sentencing Memo, *United States v. Cohen*, at 12; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

³⁵ Christal Hayes, [Karen McDougal to Melania: I'm sorry for sleeping with Donald Trump](https://bit.ly/2RNku2V), *USA Today*, Mar. 22, 2018, available at <https://bit.ly/2RNku2V>.

³⁶ AMI Statement of Admitted Facts at ¶ 4; Cohen Information at ¶ 30; Gov't Sentencing Memorandum, *United States v. Cohen*, at 12.

³⁷ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

³⁸ AMI Statement of Admitted Facts at ¶ 4; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

³⁹ AMI Statement of Admitted Facts at ¶ 5; Cohen Information at 30; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018. Although prosecutors frequently employ the phrase “on or about” when referring to specific dates, we will assume that specific dates referenced in court filings are accurate.

⁴⁰ AMI Statement of Admitted Facts at ¶ 5.

⁴¹ *Id.*

⁴² Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁴³ Cohen Information at ¶ 36. Nonetheless, on November 4, 2016, four days before the election, the *Wall Street Journal* reported that the *National Enquirer* had paid McDougal \$150,000 “for her story of an affair a decade ago with the Republican presidential nominee, but then didn't publish it,” Joe Palazzolo, Michael Rothfeld and Lukas I. Alpert, [National Enquirer Shielded Donald Trump From Playboy Model's Affair Allegation](https://on.wsj.com/2MpYFR1), *Wall Street Journal*, Nov. 4, 2016, available at <https://on.wsj.com/2MpYFR1>.

In September 2016, Cohen and Trump discussed arrangements for reimbursing Pecker in a conversation that Cohen secretly recorded.⁴⁴ On the tape, Cohen can be heard discussing the plan with Trump and rejecting Trump’s suggestion that they reimburse AMI with cash:

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

TRUMP: Give it to me and [UNINTELLIGIBLE].

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

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.]⁴⁵

The recording demonstrates Trump’s familiarity with the scheme. For instance, although Cohen does not describe the details of the scheme directly, he refers to “the transfer of all of that info regarding our friend, David.”⁴⁶ Trump also recalls, correctly, the precise amount in thousands —“150”—that AMI was

⁴⁴ Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁴⁵ Aaron Blake, [The Trump-Michael Cohen tape transcript, annotated](https://wapo.st/2DwifMx), *Washington Post*, Jul. 24, 2018, available at <https://wapo.st/2DwifMx>. See also Chris Cuomo, Kara Scannell and Eli Watkins, [Exclusive: CNN obtains secret Trump-Cohen tape](https://cnn.it/2JRuSxF), *CNN*, Jul. 25, 2018, available at <https://cnn.it/2JRuSxF>.

⁴⁶ Blake, *Washington Post*, Jul. 24, 2018. The reference to David is likely either to David Pecker or to David Dennison, a pseudonym later used by Cohen as a reference to Trump in a non-disclosure agreement with Clifford. See Dylan Matthews, [Michael Cohen’s hush money payments to Stormy Daniels and Karen McDougal, explained](https://bit.ly/2NtC066), *Vox*, Aug. 21, 2018, available at <https://bit.ly/2NtC066>.

set to pay McDougal.⁴⁷ And Cohen tells Trump twice that he has spoken with Allen Weisselberg, the Chief Financial Officer of the Trump Organization, about how to make the payment.

On September 30, 2016, Pecker agreed to assign the rights to McDougal’s story about her affair with Trump to Cohen for \$125,000.⁴⁸ That figure reflected the \$150,000 AMI paid McDougal minus the approximate value of the rights that AMI retained—covers and fitness columns featuring McDougal.⁴⁹

Both AMI and Cohen tried to conceal the existence of the transaction. AMI assigned the rights through an unaffiliated company, while Cohen incorporated an entity called Resolution Consultants LLC⁵⁰ through which he issued AMI an invoice that he fraudulently characterized as “for advisory services.”⁵¹ After Cohen and AMI had entered into the agreement but before Cohen paid AMI, Pecker contacted Cohen to tell him “that the deal was off and that Cohen should tear up the assignment agreement.”⁵² Pecker reportedly had spoken to counsel and been told that any reimbursement from Cohen could violate federal law.⁵³

AMI never received reimbursement for its \$150,000 payment to McDougal, nor did it report the expenditure to the FEC.⁵⁴ The Trump Campaign did not report a contribution from AMI in reports covering August and September 2016.⁵⁵

D. Trump’s treatment of women and his alleged infidelity

On October 7, 2016, Trump’s treatment of women and potential infidelity reappeared as a central issue in the 2016 presidential campaign when the *Washington Post* published a video of Trump having an “extremely lewd” conversation about women in 2005.⁵⁶ In the video, recorded months after his marriage to his current wife Melania Trump, Trump is recorded describing a failed attempt to seduce another woman:

⁴⁷ Cuomo, Scannell and Watkins, *CNN*, Jul. 25, 2018.

⁴⁸ AMI Statement of Admitted Facts at ¶ 6; Cohen Information at ¶ 31; Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁴⁹ AMI Statement of Admitted Facts at ¶ 6; Cohen Information at ¶ 31; Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁵⁰ See Certificate of Formation: Resolution Consultants LLC, *State of Delaware Secretary of State*, Sept. 30, 2016, available at http://online.wsj.com/public/resources/documents/Resolution_Conultants_LLC_01_12_18.pdf.

⁵¹ Cohen Information at ¶ 31; AMI Statement of Admitted Facts at ¶ 6.

⁵² AMI Statement of Admitted Facts at ¶ 6.

⁵³ Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁵⁴ AMI Statement of Admitted Facts at ¶ 8.

⁵⁵ Donald Trump for President, Inc., September Monthly 2016, *Federal Election Commission*, Sept. 20, 2016, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1100920/> (covering the period from Aug. 1 to Aug. 31, 2016); Donald Trump for President, Inc., October Monthly 2016, *Federal Election Commission*, Oct. 20, 2016, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1111849/> (covering the period from Sept. 1 to Sept. 30, 2016). Both reports have since been amended multiple times, but neither shows a contribution from AMI. See Donald Trump for President, Inc., September Monthly 2016, Amendment 4, *Federal Election Commission*, Dec. 20, 2018, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1301972/>; Donald Trump for President, Inc., October Monthly 2016, Amendment 3, *Federal Election Commission*, Jul. 15, 2018, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1171914/>.

⁵⁶ David A. Fahrenthold, Trump recorded having extremely lewd conversation about women in 2005, *Washington Post*, Oct. 8, 2016, available at <https://wapo.st/2WfV4cJ> (originally published on October 7, 2016). See Paul Farhi, A caller had a lewd tape of Donald Trump. Then the race to break the story was on., *Washington Post*, Oct. 7, 2016, available at <https://wapo.st/2HxJ7Ma>.

Trump: I moved on her, actually. You know, she was down on Palm Beach. I moved on her, and I failed. I'll admit it.

Unknown: Whoa.

Trump: I did try and fuck her. She was married.

Unknown: That's huge news.

Trump: No, no, Nancy. No, this was [unintelligible] — 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 took her out 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.⁵⁷

As the video continues, Trump appears to see an actress waiting to escort him to a set and begins to converse with Access Hollywood host Billy Bush about her:

Trump: Yeah, that's her. With the gold. I better 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.

Bush: Whatever you want.

Trump: Grab 'em by the pussy. You can do anything.⁵⁸

Although Trump's record of making offensive remarks about women had received attention earlier in the race,⁵⁹ the *Access Hollywood* video put the issue front and center for the final month of the campaign.⁶⁰ Later on the night of October 7, the Trump Campaign released a video statement from Trump claiming that the *Access Hollywood* video didn't reflect who he was.⁶¹ In the weeks that followed, at least four women came forward to accuse Trump of unwanted sexual advances, prompting additional denials by Trump.⁶²

⁵⁷ Transcript: Donald Trump's Taped Comments About Women, *New York Times*, Oct. 8, 2016, available at <https://nyti.ms/2jaECZT>.

⁵⁸ *Id.*

⁵⁹ See, e.g., Michael Barbaro and Megan Twohey, Crossing the Line: How Donald Trump Behaved With Women in Private, *New York Times*, May 14, 2016, available at <https://nyti.ms/2SbYzBX>; Andrew Kaczynski and Nathan McDermott, Donald Trump Said A Lot Of Gross Things About Women On "Howard Stern", *BuzzFeed News*, Feb. 24, 2016, available at <https://bit.ly/2S6WcQy>.

⁶⁰ See, e.g., Donald Trump's Long Record of Degrading Women, *New York Times*, Oct. 8, 2016, available at <https://nyti.ms/2Hu191H>; Transcript: Michelle Obama's Speech On Donald Trump's Alleged Treatment of Women, NPR, Oct. 13, 2016, available at <https://n.pr/2JUVI8N>.

⁶¹ Donald Trump releases statement about vulgar 2005 recording, *Washington Post*, Oct. 8, 2016, available at <https://wapo.st/2sJ8ct8>.

⁶² Jose A. DelReal and Sean Sullivan, Trump calls women's claims of sexual advances 'vicious' and 'absolutely false', *Washington Post*, Oct. 13, 2016, available at <https://wapo.st/2RMvNbn>.

E. Cohen's purchase of Clifford's (Stormy Daniels's) story

On October 8, 2016, the day after the release of the *Access Hollywood* video, an agent of Stephanie Clifford, an adult film actress whose stage name is Stormy Daniels, contacted the *National Enquirer* to let the magazine know that she was also willing to go on the record confirming an alleged affair with Trump, which also took place in 2006 within months of the birth of Donald and Melania Trump's son.⁶³ The story had previously been reported by a gossip blog in 2011, but at the time, Clifford had denied it.⁶⁴

Pecker and the editor again contacted Cohen to warn him about the new potentially damaging story. Cohen asked Pecker to purchase Clifford's story, but Pecker refused, reportedly because he did not want AMI to pay an adult film actress.⁶⁵ Instead, Pecker put Cohen directly in touch with Clifford's attorney.⁶⁶ Cohen and Clifford's attorney negotiated the sale of her story to Cohen for \$130,000 as well as a confidential settlement agreement; however, Cohen did not immediately execute the payment.⁶⁷

Cohen has reportedly told prosecutors that he discussed the purchase of Clifford's story with Trump in the weeks before the 2016 election and that he coordinated with Trump and a Trump Organization executive on the mechanics of paying Clifford without disclosing that Trump was behind the deal.⁶⁸ Cohen reportedly told prosecutors that Trump told him to "get it done."⁶⁹

Cohen and Weisselberg (the Trump Organization's CFO), reportedly struggled to figure out a way to pay Clifford that would not be traceable to Trump.⁷⁰ Cohen reportedly asked Weisselberg to pay Clifford; Cohen also reportedly considered paying Clifford through a Trump-owned property to conceal the transaction.⁷¹

On October 25, 2016, Clifford's attorney told the *National Enquirer* editor that Clifford was close to completing a deal with another outlet for her story.⁷² The editor texted Cohen that "[w]e have to coordinate something on the matter [the attorney] is calling you about or it could look awfully bad for everyone."⁷³ Pecker and the editor then spoke to Cohen on an encrypted telephone application.⁷⁴ On the call, Cohen told Pecker and the editor that he would make the payment to Clifford and subsequently called Clifford's attorney to finalize the deal.

The next day, Cohen obtained the corporate formation documents for a shell entity, Essential Consultants LLC,⁷⁵ that he created a few days prior to serve as a vehicle to anonymize the transaction.⁷⁶ Cohen withdrew \$131,000 from a home equity line of credit that he had fraudulently obtained and

⁶³ Cohen Information at ¶ 32.

⁶⁴ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁶⁵ *Id.*

⁶⁶ Cohen Information at ¶ 32.

⁶⁷ *Id.* at ¶¶ 32-33.

⁶⁸ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Cohen Information at ¶ 33.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See [Certificate of Formation: Essential Consultants LLC](https://on.wsj.com/2GAskXp), *State of Delaware Secretary of State*, Sept. 30, 2016, available at <https://on.wsj.com/2GAskXp>.

⁷⁶ Cohen Information at ¶ 34.

transferred that amount to a bank account in the shell company's name.⁷⁷ On October 27, 2016, Cohen wired \$130,000 to Clifford's attorney, deceptively labelling the purpose of the wire as "retainer."⁷⁸ Cohen received an executed copy of the confidential settlement agreement and side letter on November 1, exactly one week before the date of the 2016 presidential election.⁷⁹ As a result of the agreement, Clifford did not speak to the press about her story prior to the 2016 election.⁸⁰

The Trump Campaign did not report Cohen's payment to Clifford as a contribution or disbursement.⁸¹

F. Concealment of the hush money scheme

Efforts to conceal the hush-money scheme began before any payments had been made. According to prosecutors, Cohen "coordinated with one or more members" of the Trump campaign, "including through meetings and phone calls, about the fact, nature, and timing of the payments."⁸² The *Wall Street Journal* has reported that individuals familiar with this allegation have explained that the unnamed campaign member or members is a reference to Trump.⁸³

Cohen claims that after the election, he met with Weisselberg to discuss reimbursement for the Clifford payment.⁸⁴ Cohen reportedly also asked Pecker to lobby President-elect Trump to ensure that Cohen was repaid.⁸⁵ Pecker reportedly met with Trump twice during the presidential transition and on both occasions discussed aspects of the hush-money scheme.⁸⁶

In January 2017, Cohen sought reimbursement from the Trump Organization by presenting company executives with a statement from the Essential Consultants LLC bank account that reflected Cohen's \$130,000 payment to Clifford's attorney.⁸⁷ Cohen also requested \$35 for the fees he paid to wire the money, and \$50,000 for purported "tech services" relating to "work Cohen had solicited from a technology company during and in connection with the campaign."⁸⁸ Trump Organization executives ultimately decided to pay Cohen a total of \$420,000.⁸⁹ That amount reflected the need to "gross up" Cohen's request from \$180,035 to \$360,000 because he would have to pay federal, state, and local taxes

⁷⁷ *Id.*

⁷⁸ *Id.* See also Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁷⁹ Cohen Information at ¶ 34.

⁸⁰ *Id.* at ¶ 36.

⁸¹ See Donald Trump for President, Inc., Pre-General 2016, *Federal Election Commission*, Oct. 27, 2016, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1119574/> (covering the period Oct. 1 to Oct. 19, 2016); Donald Trump for President, Inc., Post-General 2016, *Federal Election Commission*, Oct. 27, 2016, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1133930/> (covering the period Oct. 27 to Nov. 28, 2016). Both reports have since been amended multiple times, but neither shows a contribution from AMI. See Donald Trump for President, Inc., Pre-General 2016, Amendment 2, *Federal Election Commission*, May 12, 2017, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1162172/>; Donald Trump for President, Inc., Post-General 2016, Amendment 3, *Federal Election Commission*, Oct. 27, 2016, available at <http://docquery.fec.gov/cgi-bin/forms/C00580100/1162153/>.

⁸² Cohen Information at ¶ 35.

⁸³ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Cohen Information at ¶ 37.

⁸⁸ *Id.*

⁸⁹ Gov't Sentencing Memo, *United States v. Cohen*, at 14.

on that income.⁹⁰ The total paid by the Trump Organization also included a \$60,000 pre-tax bonus for Cohen.⁹¹

At the instruction of at least two unnamed executives (one of whom is believed to be Weisselberg⁹²), the Trump Organization paid Cohen in monthly \$35,000 installments.⁹³ According to prosecutors, Cohen submitted invoices to the Trump Organization that fraudulently indicated that he needed to be reimbursed for services rendered under a retainer agreement.⁹⁴ The Trump Organization falsely accounted for these payments as “legal expenses.” Cohen, in fact, provided negligible legal services to the Trump Organization in 2017.⁹⁵ Over the course of 2017, the first year of Trump’s presidency, Cohen was paid the full \$420,000 in eleven payments (one for both January and February, and ten that followed).⁹⁶

President Trump also may have personally participated in the cover-up of the scheme by failing to disclose his liability to Cohen on the 2017 public financial disclosure report (2017 Form 278) that he submitted to the Office of Government Ethics (OGE).⁹⁷ The Form 278 is a document in which all public filers—including the president—are required to report the “identity and category of value of the total liabilities owed to any creditor . . . which exceed \$10,000 at any time during the preceding calendar year.”⁹⁸ The implementing regulations require that each financial disclosure report “identify and include a brief description of the filer’s liabilities over \$10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed.”⁹⁹ President Trump’s 2017 Form 278 did not include any mention of Cohen or Essential Consultants LLC in the section requiring disclosure of liabilities.¹⁰⁰

Officials at the Office of Government Ethics became concerned that President Trump had not disclosed the payments as liabilities to Cohen on his Form 278 and sought explanation from the White House in March and April of 2018.¹⁰¹ OGE officials conducted a number of interviews with President Trump’s personal attorney Sheri Dillon and Deputy White House Counsel for Compliance and Ethics Stefan Passantino regarding the hush money payments. During these interviews Dillon first argued in discussions between March 22, 2018 and April 26, 2018 that no liability existed at all.¹⁰² When President Trump disclosed the arrangement with Cohen on May 3, 2018, Dillon changed her story, arguing to OGE officials in a May 8, 2018 interview that “all payments are in connection with legal expenses” and

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Ben Protess, William K. Rashbaum and Maggie Haberman, Done With Michael Cohen, Federal Prosecutors Shift Focus to Trump Family Business, *New York Times*, Dec. 9, 2018 available at <https://nyti.ms/2QKr6O7>. See also Aaron Blake, A big question looming over Trump just got bigger: What is Allen Weisselberg spilling about?, *Washington Post*, Dec. 13, 2018, available at <https://wapo.st/2En5Jvr>.

⁹³ Cohen Information at ¶¶ 37-38.

⁹⁴ See Gov’t Sentencing Memo, *United States v. Cohen*, at 14; Carol D. Leonnig and Michelle Ye Hee Lee, “Trump’s company approved \$420,000 in payments to Cohen, relying on ‘sham’ invoices, prosecutors say,” *Washington Post* (Aug. 21, 2018) available at <https://wapo.st/2CLglSw>.

⁹⁵ Gov’t Sentencing Memo, *United States v. Cohen*, at 14.

⁹⁶ Cohen Information at ¶¶ 38-40.

⁹⁷ See Donald J. Trump 2017 Form 278e, *United States Office of Government Ethics*, Jun. 14, 2017, available at <https://bit.ly/2sBHq7b>.

⁹⁸ Ethics in Government Act of 1978, 5 U.S.C. app. 4 § 102(a)(4) (2018).

⁹⁹ 5 C.F.R. § 2634.305(a) (2019).

¹⁰⁰ See Donald J. Trump 2017 Form 278e, Jun. 14, 2017.

¹⁰¹ Rep. Elijah E. Cummings, Letter to Pat Cipollone, *House Committee on Oversight and Reform* (Fed. 15, 2019), at 3, available at <https://bit.ly/2V7eAqr>.

¹⁰² *Id.* at 3.

that Cohen “incurred legal expenses, Trump reimbursed for those expenses.”¹⁰³ Passantino echoed this argument, telling OGE officials that he understood the arrangement to be a revolving credit related to legal fees based on a retainer agreement.¹⁰⁴ However, when asked to provide a copy of the purported “retainer” agreement to OGE, the White House (via Dillon and Passantino) refused.¹⁰⁵ This refusal disturbed OGE, and led Acting OGE Director David Apol to question whether such a retainer even existed.¹⁰⁶

On May 15, 2018, after Cohen’s \$130,000 payment had been reported, President Trump again submitted his annual Form 278 to OGE, and this time included a reference to Cohen’s payment to Clifford in the liabilities section. He indicated, however, that he was of the view that the payment to Cohen did not need to be reported.¹⁰⁷ The following day, on May 16, 2018, Acting OGE Director Apol informed Deputy Attorney General Rod Rosenstein that Cohen’s payment to Clifford was “required to be reported as a liability.”¹⁰⁸ President Trump has not amended either his 2017 Form 278 or his or 2018 Form 278, despite Acting OGE Director Apol’s letter.¹⁰⁹

President Trump has repeatedly claimed that he did not know about the payments to McDougal or Clifford.¹¹⁰ For instance, on April 5, 2018, President Trump told reporters that he was unaware of the 2016 payment to Clifford.¹¹¹ However, by December 2018, President Trump had tacitly admitted that he was aware of the transaction, denying on Twitter¹¹² and in an interview on Fox News that he had ever asked Cohen to break the law.¹¹³

G. Disclosure and investigation of potential FECA violations

In January 2018, the *Wall Street Journal* reported that Cohen had established a limited liability corporation, Essential Consultants LLC, as part of a scheme to pay Clifford for her silence about her alleged affair with Trump.¹¹⁴ Following publication of the report, the nonpartisan, grassroots organization Common Cause submitted complaints with the FEC and DOJ requesting an investigation of whether Donald J. Trump for President, Inc. (Trump’s principal campaign committee), the Trump Organization, or John Doe (an individual contributor) violated the reporting requirements and contribution limits of the

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ Donald J. Trump 2018 Form 278, *United States Office of Government Ethics*, May 15, 2018, available at <https://bit.ly/2llug7D>.

¹⁰⁸ David Apol, *Letter to Rod Rosenstein*, *United States Office of Government Ethics*, May 16, 2018, available at <https://bit.ly/2UgmVI0>.

¹⁰⁹ See Presidential and Vice Presidential Financial Disclosure Reports, *United States Office of Government Ethics*, accessed Jan. 25, 2019, available at <https://bit.ly/2RehOWU>.

¹¹⁰ See, e.g., Antonia Blumberg, *Donald Trump Says He Didn’t Know About Stormy Daniels Payment*, *Huffington Post*, Apr. 5, 2018, available at <https://bit.ly/2MsjT0o>.

¹¹¹ *Id.*

¹¹² <https://twitter.com/realDonaldTrump/status/1073205176872435713>.

¹¹³ John Wagner, Trump denies directing Michael Cohen to break the law to buy the silence of Playboy playmate and porn star, *Washington Post*, Dec. 13, 2018, available at <https://wapo.st/2sJemtg>.

¹¹⁴ Joe Palazzolo and Michael Rothfeld, *Trump Lawyer Used Private Company, Pseudonyms to Pay Porn Star ‘Stormy Daniels’*, *Wall Street Journal*, Jan. 18, 2018, available at <https://on.wsj.com/2rnmqC6>.

FECA.¹¹⁵ Common Cause amended their DOJ and FEC complaints on March 12, 2018 to request that President Trump, Michael Cohen, and Essential Consultants LLC also be investigated.¹¹⁶

On March 8, 2018, Citizens for Responsibility and Ethics in Washington (“CREW”) wrote to the Department of Justice (“DOJ”) and the Office of Government Ethics requesting an investigation into whether Cohen’s payment to Clifford “should have been reported as a liability on [President Trump’s] public financial disclosure (“OGE 278”)” report, and if President Trump knowingly and willfully failed to report it.¹¹⁷ As CREW noted, failure to properly disclose information required to be reported on Form 278 can result in civil penalties and criminal prosecution. The Ethics in Government Act of 1978 provides for civil penalties of up to \$50,000, and imprisonment of up to one year for knowingly and willfully failing to report required information.¹¹⁸ CREW further noted that federal law also prohibits anyone from knowingly and willfully making “any materially false, fictitious, or fraudulent statement or representation” in any matter within the jurisdiction of the executive, legislative, or judicial branch, with violations punishable by up to five years in prison.¹¹⁹ Shortly thereafter, OGE conducted the series of interviews with Dillon and Passantino described above, and Acting Director Apol sent his letter to Rosenstein concluding that the Clifford payment was required to be reported as a liability.¹²⁰

On August 21, 2018, Cohen pleaded guilty to eight felony charges, including one count of causing an unlawful corporate contribution in violation of the FECA,¹²¹ and one count of making an excessive campaign contribution in violation of the FECA.¹²² In late November 2016, the Special Counsel’s office revealed that Cohen had agreed to plead guilty to making false statements to Congress about the timing of a real estate deal that the Trump Organization pursued in Moscow throughout 2016.¹²³ According to the Special Counsel, Cohen has provided significant assistance in the investigation into Russia’s attempt to influence the 2016 presidential election and potential cooperation by United States individuals, including the Trump Campaign.¹²⁴ Also, according to the Special Counsel, Cohen met with investigators on seven occasions and “voluntarily provided the Special Counsel with information about his own conduct and that of others on core topics under investigation.”¹²⁵

Cohen has apparently not been fully forthcoming with federal prosecutors working out of the Southern District of New York.¹²⁶ He affirmatively decided not to become a cooperating witness, and only met with Southern District prosecutors about the participation of others in the campaign finance crimes to

¹¹⁵ Letter to Deputy Attorney General Rod Rosenstein, Common Cause, Jan. 22, 2018, available at <https://bit.ly/2FXwHec> (enclosing Complaint, *In the Matter of Donald J. Trump for President et al.*, MUR No. 7313 (Jan. 22, 2018)).

¹¹⁶ Letter to Deputy Attorney General Rod Rosenstein, Common Cause, March 12, 2018, available at <https://bit.ly/2RK9W4m> (enclosing Complaint (Amended), *In the Matter of Donald J. Trump for President et al.*, MUR No. 7313 (Mar. 12, 2018)).

¹¹⁷ Letter to Deputy Attorney General Rod Rosenstein and David Apol, Acting Director of OGE, Citizens for Responsibility and Ethics in Washington, Mar. 8, 2018, available at <https://bit.ly/2Th2nPC>; Letter to Deputy Attorney General Rod Rosenstein, Deputy U.S. Attorney Robert Khuzami, and David Apol, Acting Director of OGE, Citizens for Responsibility and Ethics in Washington, May 3, 2018, available at <https://bit.ly/2DwvV65>.

¹¹⁸ Ethics in Government Act of 1978, 5 U.S.C. app. 4 §§ 104(a)(1)-(2) (2018).

¹¹⁹ 18 U.S.C. § 1001(a)(2) (2019).

¹²⁰ Rep. Cummings, Letter to Cipollone, Feb. 15, 2019, at 3; Apol, Letter to Rod Rosenstein, May 16, 2018.

¹²¹ Federal Elections Campaign Act of 1972, 52 U.S.C. § 30118(a) (2018); See Cohen Information at ¶¶ 41-44.

¹²² Federal Elections Campaign Act of 1972, 52 U.S.C. § 30116(a)(1)(A) (2018); See Cohen Information at ¶¶ 41-44.

¹²³ Information, United States v. Cohen, No. 18-cr-850 (Nov. 29, 2018), available at <https://bit.ly/2UuTqCu>; Plea Agreement, United States v. Cohen, No. 18-cr-850 (Nov. 29, 2018), available at <https://bit.ly/2UuTqCu>.

¹²⁴ Special Counsel’s Sentencing Memorandum, *United States v. Cohen*, Case 1:18-cr-00602-WHP (S.D.N.Y. Dec. 7, 2018) at 2, available at <https://bit.ly/2zKYquE>.

¹²⁵ Special Counsel’s Sentencing Memorandum, *United States v. Cohen*, at 2.

¹²⁶ Gov’t Sentencing Memo, *United States v. Cohen*, at 16.

which Cohen had already pleaded guilty.¹²⁷ Cohen also specifically declined to be debriefed on other uncharged criminal conduct, if any, in his past and declined to provide information about other areas of investigative interest.¹²⁸ On December 12, 2018, partly as a result of his less-than-full cooperation, Cohen was sentenced to three years in prison.¹²⁹

On December 12, 2018, the acting¹³⁰ United States Attorney for the Southern District of New York, Robert Khuzami, also publicly released a copy of the non-prosecution agreement that his office had reached with AMI on September 20, 2018.¹³¹ In that statement, Khuzami agreed not to prosecute AMI for any crimes related to AMI's participation in the wide-ranging scheme to make an illegal corporate campaign contribution to the Trump Campaign during calendar year 2016.¹³² As part of that agreement, AMI accepted and acknowledged as true the various facts laid out in a lengthy factual appendix—including the fact that AMI's "principal purpose in entering into the agreement [with McDougal] was to suppress the model's story so as to prevent it from influencing the election."¹³³ Since September, AMI has apparently provided "substantial and important assistance" to investigators, including making various AMI personnel available for "numerous" interviews.¹³⁴

After Attorney General Sessions resigned in November, 2018, President Trump reportedly called then-Acting Attorney General Matthew Whitaker to ask whether Geoffrey Berman, the United States Attorney for the Southern District of New York could be put in charge of the investigation into the hush-money scheme.¹³⁵ Berman, however, had previously recused himself from the investigation, and Whitaker reportedly understood that Berman's participation would be impossible.¹³⁶

On December 13, 2018, President Trump published a series of tweets, in which he claimed,

I never directed Michael Cohen to break the law. He was a lawyer and he is supposed to know the law. It is called "advice of counsel," and a lawyer has great liability if a mistake is made. That is why they get paid. Despite that many campaign finance lawyers have strongly.....¹³⁷

....stated that I did nothing wrong with respect to campaign finance laws, if they even apply, because this was not campaign finance. Cohen was guilty on many charges unrelated to me, but he plead to two campaign charges which were not criminal and of which he probably was not...¹³⁸

¹²⁷ *Id.* at 15-16.

¹²⁸ *Id.* at 16.

¹²⁹ United States Attorney's Office for the Southern District of New York, Michael Cohen Sentenced to 3 Years In Prison, Dec. 12, 2018, available at <https://bit.ly/2LfjwFP>.

¹³⁰ In this case, Khuzami is acting as United States Attorney under authority conferred by 28 U.S.C. § 515 due to the recusal of United States Attorney Geoffrey Berman. *See id.*; Laura Jarrett and David Shortell, Top Manhattan prosecutor recused from Cohen investigation before search warrant issued, *CNN*, Apr. 10, 2018, available at <https://cnn.it/2v3eOqB>.

¹³¹ AMI Statement of Admitted Facts.

¹³² *Id.* at 2.

¹³³ *Id.* at ¶ 5.

¹³⁴ *Id.* at ¶ 9.

¹³⁵ Mark Mazzetti, Maggie Haberman, Nicholas Fandos and Michael S. Schmidt, Intimidation, Pressure and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him, *New York Times*, Feb. 19, 2019, available at <https://nyti.ms/2XenpjV>.

¹³⁶ *Id.*

¹³⁷ <https://twitter.com/realdonaldtrump/status/1073205176872435713>.

¹³⁸ <https://twitter.com/realdonaldtrump/status/1073207272069890049>.

....guilty even on a civil basis. Those charges were just agreed to by him in order to embarrass the president and get a much reduced prison sentence, which he did-including the fact that his family was temporarily let off the hook. As a lawyer, Michael has great liability to me!¹³⁹

In January 2019, after the *Wall Street Journal* published a story about Cohen's transactions with Gauger, Cohen tweeted, "As for the @WSJ article on poll rigging, what I did was at the direction of and for the sole benefit of @realDonaldTrump @POTUS. I truly regret my blind loyalty to a man who doesn't deserve it."¹⁴⁰

¹³⁹ <https://twitter.com/realdonaldtrump/status/1073210823936495617>. The original third Tweet in this thread, which employed the word "bases" instead of "basis" was deleted. *See*

<https://twitter.com/realdonaldtrump/status/1073209480828067840>.

¹⁴⁰ <https://twitter.com/michaelcohen212/status/1085900900835778560>.

II. TRUMP'S POTENTIAL CAMPAIGN FINANCE OFFENSES

Trump's potential criminal liability for FECA violations stems from his dual role as a candidate for president and as the head of the Trump Organization. As we will explain below, Trump's status as a candidate made his acceptance or receipt of a contribution (or direction that someone else accept or receive a contribution) tantamount to acceptance or receipt by his campaign. As the head of the Trump Organization (and as Cohen's boss), Trump appears to have induced and directed others to make unlawful campaign contributions and to have used the Trump Organization to reimburse them. Additionally, by concealing the unlawful contributions from his campaign, Trump appears to have caused it to fail to report those contributions.

The aforementioned set of facts implicate three provisions of the FECA:

- Section 30118 provides that “[i]t is unlawful for 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,” for “any officer or any director of any corporation . . . to consent to any contribution . . . by the corporation;” or for any “candidate [or] political committee . . . knowingly to accept or receive any [corporate] contribution.”¹⁴¹
- Section 30116 provides that it is unlawful for any person to make contributions “to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed [\$2,700]”¹⁴² or for any candidate or political committee to knowingly accept any contribution in violation of this limit.¹⁴³
- Section 30104 requires the campaign treasurer of a principal campaign committee of a candidate for the office of president to accurately report contributions and expenditures in monthly or quarterly reports during a non-election year and in monthly, quarterly, pre-election, and post-election reports during an election year.¹⁴⁴

Particularly egregious FECA violations are felonies subject to criminal prosecution:

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 —

(i) aggregating \$25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or

¹⁴¹ Federal Elections Campaign Act of 1972, 52 U.S.C. § 30118(a) (2018).

¹⁴² § 30116(a). Note: the original limit of \$2,000 is indexed to inflation. *See* Contribution Limits for 2015-2016 Federal Elections, *Federal Election Commission*, available at <https://bit.ly/2B17ITQ>.

¹⁴³ § 30116(f).

¹⁴⁴ §§ 30104(a)(3)(A), (b)(2)(A), (b)(3)(A), (b)(5)(A).

(ii) aggregating \$2,000 or more (but less than \$25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.¹⁴⁵

As we explain in greater detail below, Trump’s potential FECA violations were not mere technical violations of the sort that typically yield civil, rather than criminal, forms of punishment. To the contrary, Trump’s potential violations reflect a deliberate effort to manipulate public opinion by fixing online poll results and preventing the disclosure of damaging information about two alleged affairs that Trump had in 2006 and 2007—right after his marriage to his current wife and the birth of their son. The transactions that give rise to Trump’s exposure to felony and misdemeanor FECA charges could easily have been conducted in a manner compliant with the FECA; had President Trump paid for these transactions rather than AMI and Cohen, and had Donald Trump for President LLC disclosed them as candidate contributions, they would have been legal.

That, of course, appears to have been the rub. Compliance with the FECA would have meant disclosing to the American people the truth: that Trump was paying two women for their silence.

This section begins by explaining how the FECA defines several important terms that are critical to understanding why Trump’s actions were illegal. Second, we lay out the provisions that Trump appears to have violated, and the additional elements required to prove criminal FECA violations. Third, we explain that an individual who aids, abets, counsels, commands, induces or procures a criminal violation or who causes an act to be done by another that if done directly would constitute an offense, can be liable as if he or she personally committed the offense. Finally, we discuss President Trump’s potential exposure to at least four felony and one misdemeanor FECA violation.

A. Key terms in the FECA

1. Who is considered a candidate and what is required of them?

Under the FECA, a candidate is an “individual who seeks nomination for election, or election, to Federal office.”¹⁴⁶ An individual is deemed to be seeking nomination for election or election when that individual “has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000” or “if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in excess of \$5,000.”¹⁴⁷

Once an individual becomes a candidate for Federal office, he or she must designate in writing a political committee to serve as his or her principal campaign committee.¹⁴⁸ The treasurer of that committee must keep records of:

- (1) all contributions received by or on behalf of such political committee;

¹⁴⁵ § 30106(d)(1).

¹⁴⁶ § 30101(2).

¹⁴⁷ *Id.*

¹⁴⁸ § 30102(e).

- (2) the name and address of any person who makes any contribution in excess of \$50, together with the date and amount of such contribution by any person;
- (3) the identification of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution;
- (4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and
- (5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or canceled check for each disbursement in excess of \$200.¹⁴⁹

According to FEC regulations, “all funds received or payments made” in connection with a campaign prior to an individual becoming a candidate (including those received when an individual is testing the waters) “shall be considered contributions or expenditures under the [FECA] and shall be reported . . . in the first report filed by such candidate’s principal campaign committee.”¹⁵⁰

2. *What constitutes a “contribution”?*

The definition of what constitutes a “contribution” varies depending on which aspect of the FECA is at issue. As explained in greater detail below, both the provisions of the FECA that ban corporate contributions and limit individual contributions include supplemental definitions of the term “contribution;” however, the starting point in both cases is the definitional section of the FECA, which provides that the term “contribution” includes:

- (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.¹⁵¹

As this definition makes clear, a thing of value need not be given directly to a candidate or campaign for it to be considered a contribution. For instance, if person A pays person B to knock on doors in support of person C’s candidacy for president, then person A’s payment is a contribution. Similarly, if person A pays person B to provide services to person C’s campaign committee, that is also a contribution. The FECA also specifies that certain things are *not* contributions, including the value of services provided by volunteers, unreimbursed travel expenses under certain limits, the use of real or personal property for candidate or political party-related activities, loans that are made in accordance with the law and reflect the customary interest rate of the lender.¹⁵²

¹⁴⁹ § 30102(c).

¹⁵⁰ 11 C.F.R. § 101.3.

¹⁵¹ 52 U.S.C. § 30101(8)(A).

¹⁵² § 30101(8)(B).

Pursuant to FEC regulations, “anything of value” includes what are referred to as “in-kind” contributions of things such as facilities, equipment, supplies, personnel, advertising services, and mailing lists (which would be counted at the fair market value of the good or service).¹⁵³

a. Influencing an election need not be the sole purpose motivating a gift, loan, deposit, etc. for it to be a contribution

Importantly, courts have not interpreted the FECA as requiring that influencing the election be the *sole* purpose for a gift, loan, deposit, etc. to be considered a contribution. For instance, the Second Circuit has defined the phrase simply as “an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents.”¹⁵⁴

This issue was disputed in a case involving payments made to a woman with whom former presidential and vice presidential candidate John Edwards had an extramarital affair. In 2011, Edwards was indicted on six counts related to payments that two of his supporters, one of whom was his campaign finance chairman, indirectly made to the woman between June of 2007 and January of 2008.¹⁵⁵ Some of the expenditures were made while Senator Edwards was running in the Democratic Party primary for president, but all of them occurred more than a year prior to the election.¹⁵⁶ The government alleged that Edwards conspired with others to receive contributions in excess of the individual limit on contributions and to file false and misleading reports with the FEC.¹⁵⁷ At trial, the jury deadlocked on five of the counts, including the conspiracy charge, and acquitted Edwards on the sixth, which related to an alleged illegal contribution that occurred after Edwards had already left the race.¹⁵⁸ Edwards moved to dismiss the conspiracy count and the judge denied the motion without prejudice to renewal at trial.¹⁵⁹

Edwards argued that the payments to the woman did not constitute a contribution because the main objective was to protect his marriage. Rejecting this argument, the Court explained,

The government does not have to prove that the sole or only purpose of the money was to influence the election. People rarely act with a single purpose in mind. On the other hand, if the donor would have made the gift or payment notwithstanding the election, it does not become a contribution merely because the gift or payment might have some impact on the election. Nor does it become a contribution just because the donor knew it might have some influence on the election and found that acceptable, if the donor’s real purpose was personal or otherwise unrelated to the election. In other words, the government has to prove that [the donor] had a real purpose or an intended purpose to influence an election in making the gift or payment. If [the donor’s] real purpose was personal or otherwise not for the purpose of influencing the election, or if you cannot say what the purpose was beyond a reasonable doubt, then that would not be sufficient

¹⁵³ 11 C.F.R. § 100.52(d) (relating to contributions); 11 C.F.R. § 100.111(e)(1) (relating to expenditures).

¹⁵⁴ *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972).

¹⁵⁵ Indictment, *United States v. Edwards*, No. 1:11-CR-161 (M.D.N.C. Jun. 3, 2011) available at <https://bit.ly/2Hv4KNg> (hereinafter Edwards Indictment).

¹⁵⁶ *See id.* at ¶ 14.

¹⁵⁷ *Id.*

¹⁵⁸ *See* Manuel Roig-Franzia, John Edwards acquitted on one count as jury deadlocks on five others and judge declares mistrial, *Washington Post*, May 31, 2012, available at <https://wapo.st/2Ssdrrft>.

¹⁵⁹ Edwards Dkt. 108, No. 11-cr-161 (2012).

to satisfy this element. *If you find beyond a reasonable doubt that one of her purposes was to influence an election, then that would be sufficient.*¹⁶⁰

The Second Circuit in *United States v. National Committee for Impeachment* emphasized the relationship to the candidate in order to trigger a FECA violation. In dismissing a FECA case against a group advocating for President Nixon’s impeachment, and thus restricting the breadth of the 1971 FECA, the court argued that the “made for the purpose of influencing an election” FECA prong is triggered in cases where the candidate or a campaign is involved precisely because these contributions are related to a group whose intent to influence the election can, essentially, be inferred.¹⁶¹ The court also noted later in the opinion that when a group is not directly affiliated with a candidate or campaign, courts must apply a “somewhat more burdensome” “major purpose of influencing” test when determining if the FECA applies to their activities.¹⁶² Congress slightly expanded the breadth of the Act with respect to independent contributions in the 1974 amendments to the FECA, and the core provision regulating contributions by people who are directly affiliated with a candidate or campaign remained the same: the intent was to keep the language open as a way to respond to changing economic trends and new methods of gaming the system.¹⁶³

This broader interpretation of the “influencing an election” element is consistent with case law interpreting the phrase “for the purpose of” as allowing for multiple purposes in the criminal context—for example, the Ninth Circuit noted that “in ordinary usage, doing X ‘for the purpose of’ Y does not imply that Y is the exclusive purpose.”¹⁶⁴ The Seventh Circuit adopted this reasoning when construing the same phrase in the context of child exploitation laws,¹⁶⁵ as did the Fourth Circuit in the context of human trafficking and prostitution laws.¹⁶⁶ And, as discussed earlier, the Second Circuit distinguished the “for the purpose of influencing” test in the 1971 FECA (which was restated in the 1974 FECA) from the “more burdensome” “major purpose” test.¹⁶⁷

If Congress had meant for the FECA to apply only to expenditures made solely for the purpose of influencing an election, it could easily—and much more naturally—have adopted language referring to “the sole (or exclusive) purpose” of the expenditure. In fact, this statutory language, referring to the “sole purpose” of an expenditure, can be traced back to the beginning of the republic.¹⁶⁸ Since then, this

¹⁶⁰ *Final Jury Instructions, United States v. Edwards*, No. 1:11-CR-161 (M.D.N.C. May 18, 2012) at 8-9 (emphasis added), available at <https://bit.ly/2MwDOv8>.

¹⁶¹ *Nat’l Comm. for Impeachment*, 469 F.2d at 1141.

¹⁶² *Id.* at 1142.

¹⁶³ H.R. Rep. 93-1239, at 6 (1974). *See also* 120 Cong. Rec. 35, 131 (1974) (statement of Rep. Wayne Hays, D-OH) and subsequent debate. Congress originally tried this strategy in the 1971 FECA and faced strong pushback from the White House, though they eventually prevailed. Jeffrey M. Berry & Jerry Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 Harv. J. On Leg. 331, 334-36 (1973) (describing President Nixon’s veto of campaign finance legislation). *See generally* Rebecca Curry, *Making Law with Lawsuits: Understanding Judicial Review in Campaign Finance Policy*, 465 Suffolk U. L. Rev. 389 (2013).

¹⁶⁴ *United States v. Banks*, 514 F.3d 959, 966 (9th Cir. 2008); *United States v. Hughes*, 282 F.3d 1228, 1231 (9th Cir. 2002) (rejecting defendant’s argument that “for the purpose of” in sentencing guideline provision relating to child exploitation means “for the sole purpose of”); *Dingess v. United States*, 315 F.2d 238, 240 n.2 (4th Cir. 1963); *United States v. Veazey*, 491 F.3d 700, 706-07 (7th Cir. 2007) (adopting reasoning of Hughes in similarly construing child exploitation guideline).

¹⁶⁵ *Veazey*, 491 F.3d, at 706-07.

¹⁶⁶ *Dingess*, 315 F.2d, at 240 n.2.

¹⁶⁷ *Nat’l Comm. for Impeachment*, 469 F.2d at 1141-2.

¹⁶⁸ An Act for the Relief of Sick and Disabled Seamen, 1 Stat. 605 (1798), available at <http://history.nih.gov/research/downloads/1StatL605.pdf>.

language (or functionally identical language¹⁶⁹) has appeared¹⁷⁰ in numerous¹⁷¹ other statutes,¹⁷² suggesting that not only is Congress aware of this construction, it is willing to call upon it when it is determined to be more precise. This provision of the FECA, however, contains no reference to the defendant’s “sole” or “exclusive” or “primary” or “major” purpose—and neither the text nor the context of the provision nor common practice demand such a modifier be read into the statute.¹⁷³

b. A third party’s payment of a “personal use” expense is a contribution unless it would have been made irrespective of the candidacy

The FECA places numerous restrictions on the use of campaign contributions or donations. Chief among them is a prohibition on converting a contribution to personal use by, for instance, using it to pay a home mortgage, rent or utility payment or on non-campaign related travel.¹⁷⁴ FEC regulations further provide that a third party’s payment of a personal expense *is a contribution* unless it would have been made “irrespective of the candidacy.”¹⁷⁵ That means that in certain circumstances, a third party’s payment of a candidate’s personal expense may be a contribution even if it was not made for the purpose of influencing an election. For instance, if person C is a candidate for federal office and person A pays person C’s home mortgage, that payment is a contribution unless person A would have done so irrespective of person C’s candidacy.

3. What constitutes acceptance or receipt of an unlawful contribution?

Candidates are not generally liable for their campaign committees unless they are personally involved in the conduct that is illegal (or, as discussed below, they direct someone else to engage in the conduct that is illegal). FEC regulations provide:

Any candidate who receives a contribution, . . . obtains any loan or makes any disbursement in connection with his or her campaign, shall be considered as having received the contribution, obtained the loan or made the disbursement as an agent of such authorized committee(s).¹⁷⁶

A contribution need not be accepted or received by a campaign committee or by the candidate (though either would likely constitute acceptance or receipt).¹⁷⁷

The words “accept” and “receive” are accorded their ordinary meanings under the FECA.¹⁷⁸ According to *Merriam Webster*, “accept” means, among other things, “to receive (something offered) willingly,” and “receive” means “to come into possession of : acquire.”¹⁷⁹

¹⁶⁹ 29 U.S.C. § 1104(a)(1)(A) (using “for the exclusive purpose”).

¹⁷⁰ 26 U.S.C. § 501(c)(12)(A).

¹⁷¹ 16 U.S.C. § 798(a).

¹⁷² 17 U.S.C. § 101.

¹⁷³ *See* Federal Election Campaign Act of 1972, 52 U.S.C. § 30101(8)(A) (2018).

¹⁷⁴ 52 U.S.C. § 30114(b).

¹⁷⁵ 11 C.F.R. § 113.1(g)(6).

¹⁷⁶ 11 C.F.R. § 102.7(d).

¹⁷⁷ Final Jury Instructions, *United States v. Edwards*, No. 1:11-CR-161 (M.D.N.C. May 18, 2012), at 9.

¹⁷⁸ *Id.* at 9-10.

¹⁷⁹ Accept, *Merriam Webster* (online 2019), available at <https://bit.ly/2BL6kVX>; Receive, *Merriam Webster* (online 2019), available at <https://bit.ly/2E1tN5g>.

A jury deciding whether a campaign or candidate accepted or received a contribution may consider any of the circumstances surrounding the delivery of a contribution.¹⁸⁰

B. Relevant provisions of the FECA

There are many potential ways to violate the FECA. Here, we discuss in depth the provisions that have particular relevance to the case against Donald Trump: the ban on corporate contributions, the limit on personal contributions, and the reporting requirements for the principal campaign committee of a presidential candidate.

1. *Ban on corporate contributions, 52 U.S.C. § 30118(a)*

Among other things, section 30118 of the FECA bans corporate contributions “in connection with any election to any political office” or “in 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.”¹⁸¹ Section 30118 also bans “any officer or any director of any corporation” from consenting to any such contribution.¹⁸² Section 30118 further bars any “candidate, political committee, or other person” from knowingly accepting “any contribution prohibited by this section.”¹⁸³ Although the Supreme Court struck down the provision banning independent corporate expenditures in *Citizens United v. Federal Election Commission*, the bans on corporate contributions, corporate officers consenting to corporate contributions, and individuals knowingly receiving corporate contributions are still good law.¹⁸⁴

For the purposes of section 30118, the term “contribution” includes the definition provided above and also includes “any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication.”¹⁸⁵ Several items are also specifically excluded from the definition of “contribution” for the purposes of this section, including a corporation’s communications to its stockholders, personnel, and their families; nonpartisan registration and get-out-the-vote campaigns targeted at the same individuals; and contributions to a separate segregated fund to be utilized for political purposes by a corporation.¹⁸⁶

2. *Limit on individual contributions, 52 U.S.C. § 30116*

Among other things, section 30116 bars any individual from making contributions to “any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed [\$2,700].”¹⁸⁷ Section 30116 also bars a candidate, political committee, or officer or employee of a political committee from “knowingly accepting any contribution” in violation of this limit.¹⁸⁸ For the purposes of section 30116, “expenditures made by any person in cooperation, consultation, or concert,

¹⁸⁰ Final Jury Instructions, *United States v. Edwards*, No. 1:11-CR-161 (M.D.N.C. May 18, 2012), at 9-10.

¹⁸¹ 52 U.S.C. § 30118(a).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010).

¹⁸⁵ 52 U.S.C. § 30118(b)(2).

¹⁸⁶ *Id.*

¹⁸⁷ § 30116(a).

¹⁸⁸ § 30116(f).

with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.”¹⁸⁹

3. Reporting requirements, 52 U.S.C. § 30104

The FECA requires the treasurer of the principal campaign committee for a candidate for president to report certain contributions and expenditures to the FEC.¹⁹⁰ Periodic reports must be filed on a monthly, quarterly, and/or yearly basis depending on whether it is an election year; additional reports must be filed before and after a general election.¹⁹¹ Among other things, these reports must identify:

- Each person who contributes during a reporting period whose contributions have an aggregate value of \$200 or more; and
- Each “person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan.”¹⁹²

Expenditures made by a candidate using his or her personal funds, contributions made by a candidate using personal funds, and loans secured using a candidate’s personal funds must also be disclosed to the FEC and to each candidate in the same election.¹⁹³

C. Additional elements required to establish criminal FECA violations

Criminal penalties are reserved for particularly egregious violations of the FECA and are the responsibility of DOJ.¹⁹⁴ There is no requirement that the FEC pursue administrative or civil remedies before criminal prosecution is pursued.¹⁹⁵ Establishing a criminal FECA violation requires satisfaction of two additional elements: the violations must have involved at least \$2,000 in a calendar year to be charged as a misdemeanor or at least \$25,000 in a calendar year to be charged as a felony, and in both cases, the offense must have been committed knowingly and willfully.

Since 2007, there have been at least thirty-six cases involving prosecution of a FECA offense.¹⁹⁶ In at least sixteen of those cases, defendants were sentenced to a period of incarceration.¹⁹⁷

1. A contribution exceeding \$2,000 (for a misdemeanor) or \$25,000 (for a felony) during a calendar year

¹⁸⁹ § 30116(a)(7)(B)(i).

¹⁹⁰ § 30104(a). Violations of the FECA’s reporting requirements can lead to imposition of civil or criminal penalties. § 30104(a)(6)(D) (cross-referencing 52 U.S.C. § 30109).

¹⁹¹ § 30104(a)(3).

¹⁹² § 30104(b)(3).

¹⁹³ § 30104(a)(6)(B).

¹⁹⁴ § 30109(a)(5)(C). The Federal Election Commission (FEC) has exclusive civil jurisdiction over non-willful violations of the FECA and violations involving less than \$2,000 within a calendar year. 52 U.S.C. §§ 30109(a), 30107(e).

¹⁹⁵ See Richard C. Pilger, *Federal Prosecution of Election Offenses, Eighth Edition, U.S. Dept. of Justice* (2017) at 151 (citing § 30109(a) & (d); *United States v. Int’l Union of Operating Eng’rs, Local 701*, 638 F.2d 1161, 1162–68 (9th Cir. 1979)), available at <https://bit.ly/2wBYaz3>.

¹⁹⁶ See DOJ Prosecutions of Election Crimes, attached as Appendix B-1.

¹⁹⁷ *Id.*

Offenses involving \$25,000 or more in a calendar year are felonies punishable by fines and up to five years in prison.¹⁹⁸ Offenses involving more than \$2,000 but less than \$25,000 are misdemeanors punishable by a fine or up to one year in prison.¹⁹⁹

2. *Knowing and willful intent*

For a FECA violation to give rise to criminal liability, the violation must also have been carried out “knowingly and willfully.”²⁰⁰ This means that the prosecution bears the burden of proving that a defendant knew that his or her conduct was unlawful; however, the defendant need not have been aware of the particular statutory provision that he or she was violating.²⁰¹ This *mens rea* standard was reflected in the jury instructions in *Edwards*, which explained that the prosecution had to demonstrate that the defendant acted with “knowledge that his course of conduct was unlawful and with the intent to do something the law forbids.”²⁰²

DOJ acknowledges that this element can be hard to satisfy, but it also has identified certain types of evidence that help establish that an offender acted with knowledge that their conduct was unlawful. According to DOJ’s manual for prosecuting election offenses, evidence that has been used to prove FECA violations includes:

“The use of surreptitious means, such as cash, conduits, or false documentation, to conceal the violation;

Making a prohibited “in-kind” contribution by paying directly for goods or services provided to a recipient political committee;

Proof that the offender is active in political fundraising and is personally well-versed in the federal campaign financing laws (such as offenders who can be shown to be professional lobbyists or fundraisers); [and]

Proof that the substantive FECA violation took place as part of another felonious end (such as the use of corporate funds to pay a bribe to a public official in violation of 18 U.S.C. § 201, with the bribe disguised as an ostensible campaign contribution to the official’s campaign committee)[.]”²⁰³

In addition, while DOJ has explained that establishing a knowing and willful violation is more challenging “[w]hen there is substantial doubt concerning whether the law applies to the facts of a particular matter,”²⁰⁴ certain aspects of the FECA are straightforward. Among the FECA’s unambiguous provisions are those that limit the amount of contributions by an individual, those that prohibit certain entities—such as corporations—from making contributions, and those that impose transparency

¹⁹⁸ 52 U.S.C. § 30109(d)(1)(A)(i).

¹⁹⁹ § 30109(d)(1)(A)(ii).

²⁰⁰ § 30109(d)(1)(A).

²⁰¹ See Pilger, *U.S. Dept. of Justice* (2017), at 153, citing *United States v. Whittemore*, 944 F. Supp. 2d 1003, 1010 (D. Nev. 2013), *aff’d*, 776 F.3d 1074 (9th Cir. 2015) (holding that the government must prove a defendant facing criminal liability under the FECA “knew his conduct violated *some law*, but it need not prove which one”).

²⁰² *Final Jury Instructions*, *United States v. Edwards*, No. 1:11-CR-161 (M.D.N.C. May 18, 2012) at 4.

²⁰³ Pilger, *U.S. Dept. of Justice* (2017) at 154.

²⁰⁴ *Id.* at 123.

requirements on campaigns to ensure that the voting public is made aware of how campaigns are raising and spending money.²⁰⁵

D. Principal liability under 18 U.S.C. § 2

Federal criminal law provides that an individual who “aids, abets, counsels, commands, induces or procures” the commission of an “offense” against the United States or who “willfully causes an act to be done which if directly performed by him or another would be an offense against the United States” may be charged as a principal; in other words, such an individual could be charged as if he personally violated the law.²⁰⁶ The term “offense” means any federal felony or and Class A misdemeanor (a crime that carries a maximum term of imprisonment of one year or less but more than six months).²⁰⁷

Accordingly, Trump’s exposure stems both from his own personal conduct and any conduct that he willfully caused. In other words, Trump is not merely exposed to liability for unlawful contributions that, as a candidate for federal office, he personally accepted or received;²⁰⁸ he is also exposed if he willfully caused or aided, abetted, or induced others to make or to receive unlawful contributions.

E. Trump’s potential FECA liability

Trump’s conduct yields five potential FECA violations. Four potential felony offenses stemming from the hush-money scheme are supported by compelling evidence:

- Causing AMI to make and/or accepting (or causing Cohen to accept) an unlawful corporate contribution (McDougal story)
- Causing Cohen to make and or/accepting an unlawful individual contribution (Clifford Story)
- Causing Donald J. Trump for President LLC’s failure to report AMI’s contribution (McDougal Story)
- Causing Donald J. Trump for President LLC’s failure to report Cohen’s contribution (Clifford Story)

Trump may also face exposure to criminal liability for a potential misdemeanor offense associated with rigging an online poll:

- Causing Donald J. Trump for President LLC’s failure to report Cohen’s unlawful contribution (February 2015 online poll)

We begin this subsection by laying out evidence of Trump’s knowing and willful intent that is relevant to all five potential violations. We then to turn to each of the potential violations and explain the key relevant facts underlying the possible offense, establish the threshold amount for criminal prosecutions (\$2,000 for misdemeanors; \$25,000 for felonies), and articulate why the offense appears to have been committed knowingly and willfully. Where applicable, we explain how Trump’s potential liability is

²⁰⁵ *Id.* at 124.

²⁰⁶ 18 U.S.C. § 2.

²⁰⁷ *See* 18 U.S.C. § 3156(b)(2); § 3559(a).

²⁰⁸ *See* 11 C.F.R. § 102.7(d).

based, at least in part, on directing the conduct of others, conduct that normally permits an individual to be charged as a principal under 18 U.S.C. § 2.

1. *Evidence of President Trump's knowing and willful intent*

Even though Trump has presented himself as an outsider to politics, he has in fact long been active in the political arena, hosting numerous fundraisers for candidates for office, making sizable donations to political candidates, and testifying publicly about the intricacies of federal and state campaign finance laws. Trump's three decades as a prolific donor, occasional fundraiser, subject of FEC complaints, and two-time potential candidate for president are powerful evidence that his possible FECA violations were knowing and willful. As explained above, DOJ has in previous cases relied on “[p]roof that the offender is active in political fundraising and is personally well-versed in the federal campaign financing laws (such as offenders who can be shown to be professional lobbyists or fundraisers).”²⁰⁹

Critically, Trump's political activities have exposed him to all three aspects of the FECA that he potentially violated in 2015 and 2016: (1) individual contribution limits; (2) the ban on corporate contributions; and (3) requirements that contributions be reported accurately to the FEC. And perhaps most significantly, Trump's public comments about the criminal campaign finance case against former presidential candidate John Edwards demonstrated that Trump knew that paying a woman for her silence about an affair could constitute an unlawful contribution.

a. Trump's knowledge of the individual contribution limit

Trump's awareness that individual contributions to a federal candidate above a certain dollar amount are unlawful is easily established. On multiple occasions, Trump has advocated for the elimination of the limit on individual contributions to a candidate for state or federal office. For instance, in 1988 Trump gave the following testimony to the New York State Commission on Government Integrity:

I have gone through federal campaigns, and frankly it's the best thing that ever happened to me because *you're limited to a thousand-dollar contribution*. But I see a lot of Congressmen who spend their entire tenure trying to raise money, *with a thousand dollar limit*, as opposed to maybe working.

Maybe that's the reason that Japan is doing so well against the United States, because all our representatives are out trying to raise money.

When you have *a thousand dollar limit, or the kind of limit that's so small*, and you have to raise millions of dollars to run in a race, or in the case of New York City officials in many cases millions, or hundreds of thousands of dollars, I think what it does is it really makes them campaign fundamentally to raise money and not be able to really keep their eye on the ball.²¹⁰

Trump made additional references to the federal contribution limits later in his testimony.²¹¹

²⁰⁹ Pilger, *U.S. Dept. of Justice* (2017) at 154.

²¹⁰ Trump Testimony at 257-58 (emphasis added).

²¹¹ See Trump Testimony at 260-61 (“I think it's a very bad precedent, in speaking to the various *federal officials* who were under the horrible problem of having to raise hundreds of thousands and millions of dollars *with \$1,000 contributions*.”) (emphasis supplied); Trump Testimony at 262 (“I believe the worst evil is where a candidate is unable to raise money

Trump had good reason to be keenly aware of federal limits on individual contributions because he was a prolific donor. In 1985, Trump's political contributions exceeded \$150,000.²¹² From 1989 to 2015, Trump personally gave a total of \$1,046,900 to federal candidates (an average of more than \$38,000 a year). If Trump had contributed that amount to any single candidate in any of those 27 years, he would have violated the FECA.

b. Trump's knowledge of the reporting requirements

In his testimony before the New York Commission, Trump also demonstrated knowledge of the requirement that campaign contributions be disclosed and accurately articulated the rationale for that requirement:

I also said to you that I felt that it may have the effect of making a certain person dishonest, because he is so intent on winning an election, *he can't raise money where it's obviously reported* such as this, and *everybody knows how it's reported*, and it may very well, and I don't know of any such instance, but it may very well be a tendency to panic a man running for office and make him dishonest.

Also as a third point I gave you at the time, *having the names reported like this, every time I make a contribution, it's open, it's reported in the New York Times, the News, the Post and every other newspaper*, and I think that a politician has a certain amount of pressure on him to vote against me because of the fact that I made a contribution.

So having an open system, a system where you can make contribution, I think puts certain politicians essentially on notice that everyone is watching, *everybody knows exactly what Donald Trump or anybody else made in terms of contributions to them*, and I think they have to watch.²¹³

Later in his testimony, Trump advocated for the disclosure requirements: "So I really feel that, as you said, I think one of the very, very, important things is fast, adequate and very strong disclosure, as opposed to limits on a campaign."²¹⁴ Trump did so again:

I really think the biggest thing, this is just my view and I am not certainly an expert on it, but I think the greatest contribution that you can make is a major disclosure of the contribution.

So that everybody is fully aware that Trump and that so-and-so and so-and-so gave to a certain person running for political office, and I really believe that public disclosure goes a long way to solving any of the problems that I would have with the law and the inequities of the law at it currently exists.²¹⁵

because the amounts are so low, they are set and they are very low, I believe that puts a tremendous amount of increased burden on that candidate.").

²¹² Trump Testimony at 251. It is unclear whether this figure includes political donations made through companies Trump owned.

²¹³ Trump Testimony at 258-59 (emphasis supplied).

²¹⁴ Trump Testimony at 264.

²¹⁵ Trump Testimony at 273-74.

As these passages demonstrate, Trump's testimony shows a deep understanding of the rationale for the campaign donor disclosure laws.

c. Trump's knowledge of the federal ban on corporate contributions

Trump's knowledge of the federal ban on corporate contributions is demonstrated by an affidavit that he submitted in response to an FEC complaint concerning a fundraiser that Trump held for United States Senate candidate William Gormley in March 2000. Trump defended himself on multiple fronts, but the one most relevant here is the first: Trump insisted that he personally, not his corporation, hosted the fundraiser. Trump stated under oath,

3. On Monday, March 27, 2000, I personally sponsored and hosted a reception for William L. Gormley, a candidate for election to the United States Senate from the State of New Jersey. I did so solely in my individual capacity, not in my representative capacity as Chairman of Trump Hotels & Casino Resorts, Inc.

4. The March 27, 2000 reception I sponsored and hosted for William L. Gormley was held in my residential premises at 721 Fifth Avenue, New York, New York, 10022.

5. I paid from my personal funds all the costs of the invitations, food, and beverages for the March 27, 2000 reception I sponsored and hosted for William L. Gormley.

6. I was not reimbursed, in whole or in part, for the costs of the invitations, food and beverages for the March 27, 2000 reception I sponsored and hosted for William L. Gormley.²¹⁶

Trump's attestation to the fact that he personally hosted and paid for the fundraiser was crucial to his defense because it would have been unlawful for his corporation to make contributions, or for him and the other officers of the corporation to consent to contributions.²¹⁷

For Trump, this detail would have been significant because in his 1988 testimony before the New York Commission, he acknowledged that he and his family had a practice of making contributions to *state* political candidates through a number of corporate entities owned by him and his family.²¹⁸ In other words, the legality of corporate contributions was not a technical detail that Trump was unlikely to consider; instead, it was (and in some cases remains²¹⁹) a key legal distinction limiting how he contributed to federal candidates, as opposed to state candidates.²²⁰ Indeed, between 1998 and 2002, Trump Hotels & Casino Resorts made \$198,500 in campaign contributions to state candidates in

²¹⁶ Trump FEC Affidavit at 3-5.

²¹⁷ In a letter that accompanied Trump's Affidavit, Trump's attorney wrote, "Trump sponsored and hosted the reception in his individual capacity; not as Chairman of Trump Hotels & Casino Resorts." Letter from J. Curtis Herge, Attorney, Herge, Sparks & Christopher, LLP, to Lawrence M. Noble, General Counsel, Federal Election Commission (June 30, 2000), available at <https://www.fec.gov/files/legal/murs/5020/00002D89.pdf>.

²¹⁸ Trump Testimony at 255-56.

²¹⁹ See Contribution Limits, *New York State Board of Elections*, available at <https://on.ny.gov/2EmtCmE> (accessed Feb. 20, 2019).

²²⁰ See State Limits on Contributions to Candidates, 2015-2016 Election Cycle, *National Conference of State Legislatures*, available at <https://bit.ly/1Ydfu2r>.

Nevada, New York, and Florida.²²¹ If Trump Hotels & Casino Resorts had made *any* contributions to federal candidates, it would have violated the FECA.

Trump was again the subject of an FEC complaint in 2011 for activities that he and Cohen took to explore a possible presidential run.²²² The complaint pertained to the creation of the website www.ShouldTrumpRun.com as well as travel expenses incurred by Cohen and Stewart Rahr, an independent entrepreneur. Although the FEC ultimately decided to take no action, the FEC's General Counsel recommended that the FEC "find reason to believe that Trump LLC, Cohen, Rahr, and Should Trump Run violated [FECA regulations] by making in-kind disbursements with impermissible funds, and that Trump violated [FEC regulations] by accepting the in-kind disbursements."²²³ Although the FEC ultimately declined to take action against the Trump Organization, Trump, Cohen, and Rahr,²²⁴ this episode also exposed Trump to the concept that accepting corporate in-kind contributions prior to announcing one's candidacy is unlawful under the FECA.²²⁵

d. Trump's knowledge that a third-party's hush-money payment could constitute an in-kind campaign contribution

Trump also commented publicly about the criminal campaign finance case against John Edwards, demonstrating awareness that payments by a third party to a woman who had an affair with the candidate could be unlawful. On April 26, 2012 —three days after Edwards's trial began, Trump tweeted, "I have never been a fan of John Edwards but it is time for the gov't to focus on more important things. @johndwards."²²⁶ Trump was interviewed about the tweet afterwards on Fox News, where he claimed that "a lot of very good lawyers" had told him that the government did not have a good case.²²⁷ Even if Trump believed that the government should focus on more important things, his commentary on the Edwards case is another instance demonstrating Trump's knowledge that hush-money payments to a candidate's mistress could be unlawful.

Trump's apparent belief that the government had a *bad* case against Edwards is no defense. To meet the willful and knowing intent requirement, prosecutors do not need to establish that a defendant believed he or she could face successful criminal prosecution; rather, the standard merely requires that they show that an individual engaged in conduct knowing it was unlawful. To the extent that Trump in fact had conversations with "a lot of very good lawyers" about the merits of the case, and the prosecution's burden of proving facts beyond a reasonable doubt at trial, those conversations would likely have deepened Trump's understanding of what was unlawful.

2. Potential Violation I: Causing AMI to make and/or accepting (or causing Cohen to accept) an unlawful corporate contribution (McDougal story)

²²¹ Mark Dixon, "You're Hired:" Business Icon Donald Trump Invests In Lawmakers, The Institute on Money in State Politics (2004), available at <https://bit.ly/2FJtqQq>. During the same window, Trump contributed \$286,515 to state and local candidates.

²²² *In the Matter of Donald J. Trump et al*, Complaint, FEC MUR No. 6462, Mar. 11, 2011, available at <https://www.fec.gov/data/legal/matter-under-review/6462/>.

²²³ *In the Matter of Donald J. Trump et al*, First General Counsel's Report, FEC MUR No. 6462, Jan. 25, 2013, available at , available at <https://www.fec.gov/files/legal/murs/6462/13044334657.pdf>.

²²⁴ *See In the Matter of Donald J. Trump et al*, Statement of Reasons, FEC MUR No. 6462, Sep. 18, 2013 available at <http://eqs.fec.gov/eqsdocsMUR/13044342667.pdf>.

²²⁵ *See* Respondent Letter to Christopher Hughley, Acting General Counsel, FEC MUR 6462 (May 20, 2011), available at <https://www.fec.gov/files/legal/murs/6462/13044334606.pdf>.

²²⁶ <https://twitter.com/realDonaldTrump/status/195584554290003969>.

²²⁷ Greg P., *Twitchy*, Aug. 22, 2018.

Trump appears to have committed a felony FECA violation by knowingly and willfully causing (or aiding and abetting or inducing) AMI to make an unlawful corporate contribution consisting of AMI's \$125,000 purchase of McDougal's story, in violation of 52 U.S.C. §§ 30109, 30118(a) and 18 U.S.C. § 2. The key evidence substantiating this violation includes:

- Trump's personal involvement and agreement to participate in a scheme wherein AMI would help suppress negative stories by purchasing the rights to them and thereby avoiding their publication;²²⁸
- through his agent, Cohen, inducing AMI to purchase the rights to McDougal's story about her alleged affair with Trump by promising to reimburse AMI for the expense;²²⁹ and
- through his agent, Cohen, facilitating AMI's contribution of the rights to McDougal's story by establishing a shell corporation, Resolution Consultants LLC.²³⁰

Alternatively, Trump appears to have committed a felony FECA violation by knowingly and willfully accepting (or causing Cohen to accept) AMI's unlawful corporate contribution. The key evidence substantiating this violation includes:

- Trump's status, at all relevant times, as a candidate for president of the United States, which meant that his receipt or acceptance of a contribution constituted receipt or acceptance by Donald Trump for President, Inc.;²³¹
- accepting or directing Cohen to accept Pecker's offer, in July 2015, to help prevent unflattering stories about Trump by purchasing them;²³²
- apparently accepting or directing Cohen to accept Pecker's help negotiating the purchase of McDougal's story in July and August 2016;²³³ and
- directing Cohen to accept the transfer of rights to McDougal's story in September 2016.²³⁴

In either case, purchase of McDougal's story was very likely a contribution because it represented the purchase of a thing of value that was done at least in part for the purpose of influencing the election.

²²⁸ AMI statement of Admitted Facts at ¶ 3; Cohen Information at ¶ 27; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018; Scannell, Orden, and Cohen, *CNN*, Dec. 13, 2018.

²²⁹ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018. It is unclear what funds Trump and Cohen planned to use to reimburse AMI, but this fact is incriminating regardless of whether they intended to use Trump's personal funds or those of the Trump Organization. Had the Trump Organization reimbursed AMI for its assignment of the McDougal story to a shell corporation that Cohen established, the Trump Organization's reimbursement would have been an unlawful corporate contribution. See 52 U.S.C. § 30118(a). If in fact the plan was for Cohen to pay AMI using Trump's personal funds, then the payment would have been a contribution by a candidate using personal funds that needed to be reported to the FEC and to Trump's general election rivals. See § 30104(a)(6)(B).

²³⁰ AMI Statement of Admitted Facts at ¶ 6; Cohen Information at ¶ 31; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

²³¹ See 11 C.F.R. § 102.7(d).

²³² AMI statement of Admitted Facts at ¶ 3; Cohen Information at ¶ 27; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018; Scannell, Orden, and Cohen, Dec. 13, 2018.

²³³ Gov't Sentencing Memo, *United States v. Cohen*, at 11-12.

²³⁴ Cuomo, Scannell and Watkins, *CNN*, Jul. 25, 2018; Blake, *Washington Post*, Jul. 24, 2018; AMI Statement of Admitted Facts at ¶ 6; Cohen Information at ¶ 31; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

The “catch and kill” scheme was only established after Trump formally announced his campaign for president, and the negotiations with McDougal took place after Trump had effectively secured the Republican nomination for President. Most critically, AMI and Cohen have both admitted that the purpose of the agreement with McDougal was to prevent her story from influencing the 2016 election.²³⁵

The elements needed to establish a felony FECA violation are also likely satisfied. First, the value of the rights to McDougal’s story exceeded \$25,000 in a calendar year because they were worth at least \$125,000, the amount that Cohen had agreed to pay AMI for those rights.²³⁶ Second, there is compelling evidence that Trump’s violation was committed knowingly and willfully, including:

- Trump’s personal experience with and prior statements about campaign finance law, especially the provisions at issue here: the ban on corporate contributions, the limits on individual contributions, and the fact that a third party’s hush-money payment to an individual who had an affair with a candidate could constitute an unlawful contribution;²³⁷
- the conversation in which Trump and Cohen discuss the “transfer of all of that info regarding our friend David” and in which Trump is aware of the specific amount in thousands that AMI paid McDougal for the rights to her story;²³⁸
- Trump’s suggestion, in the same conversation, that Cohen “pay with cash,”²³⁹ a form of payment that would have concealed the transaction;²⁴⁰
- the use of conduits, including a corporation unaffiliated with AMI and Resolution Consultants LLC, to receive the rights to McDougal’s story from AMI, methods that for a time concealed the transaction;²⁴¹
- the fact that AMI made its in-kind contribution by paying a third party (McDougal) directly, which prevented records of the transaction from being submitted to the Trump Campaign;²⁴² and
- the fact that the negotiations and transactions relating to the scheme were arranged through Cohen, a Trump Organization employee, rather than an official representative of the Trump Campaign.

For these reasons, the evidence suggesting that Trump could face personal criminal liability for AMI’s unlawful corporate contribution is powerful. Trump not only appears to have participated in and sanctioned the “catch and kill” scheme from the outset; he also is on tape discussing reimbursement of AMI with Cohen. Because the contribution was a relatively clear violation of the FECA and the transactions were so clearly designed to conceal the nature of the transaction, there is strong evidence that Trump acted with the requisite intent.

²³⁵ AMI Statement of Admitted Facts at ¶ 5; Cohen Information at ¶¶ 30, 35.

²³⁶ Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018. AMI paid McDougal \$150,000, an amount that also reflected AMI’s purchase of the rights to two magazine covers featuring McDougal as well as the option to publish health and fitness columns under her name. *Id.*

²³⁷ See discussion, *supra* at Section II.E.1.

²³⁸ Cuomo, Scannell and Watkins, *CNN*, Jul. 25, 2018; Blake, *Washington Post*, Jul. 24, 2018.

²³⁹ Cuomo, Scannell and Watkins, *CNN*, Jul. 25, 2018; Blake, *Washington Post*, Jul. 24, 2018.

²⁴⁰ See Pilger, *U.S. Dept. of Justice* (2017), at 153.

²⁴¹ See *id.*

²⁴² See *id.*

In our estimation, the defenses available to Trump are unconvincing with respect to this potential violation. Here, Trump has potential liability for inducing or causing AMI's unlawful corporate contribution, for causing Cohen to aid and abet and to receive that contribution, and for his own acceptance and receipt of the contribution. While Trump might claim that AMI's purchase of McDougal's story was not made for the purpose of influencing an election and amounted to a third-party's payment of a personal expense, FEC regulations clearly state that personal expenses paid by third parties are contributions unless the payment would have occurred irrespective of the candidacy.²⁴³ Here, the facts admitted by AMI and Cohen demonstrate that the entire "catch and kill" scheme was agreed to and executed after Trump became a candidate for federal office, and both AMI and Cohen have also admitted that the payments were made with the principal purpose of influencing the 2016 election.

A defense grounded in the assertion that Trump's violation was not knowing and willful because he relied on Cohen to handle the details of the transaction or because he did not know that AMI's payment of McDougal is not supported by either the facts or the law. Because Cohen worked for Trump and Trump directed Cohen's conduct, Trump is liable for Cohen's conduct. In addition, prosecutors would not need to show that Trump knew the specific provisions of the FECA he was violating; rather, they would merely need to demonstrate that the manner of the transaction—including the manner in which it was hidden from the public and apparently Trump's own campaign—reflected Trump's knowledge that his conduct was unlawful.

3. Potential Violation II: Causing Cohen to make and or/ accepting an unlawful individual contribution (Clifford Story)

Trump appears to have committed a felony FECA violation by knowingly and willfully causing (or aiding and abetting) Cohen to make an individual contribution in excess of the \$2,700 limit, consisting of his \$130,000 purchase, via Essential Consultants LLC, of Clifford's story, in violation of 52 U.S.C. §§ 30109, 30116 and 18 U.S.C. § 2. The key evidence substantiating this violation includes:

- Trump's personal involvement and agreement to participate in a scheme wherein AMI would help suppress negative stories by purchasing the rights to them and thereby avoiding their publication;²⁴⁴
- Trump's personal involvement and knowledge of the execution of that scheme to purchase the rights to McDougal's story;
- Pecker's notification of Trump's agent, Cohen, that a second woman—Clifford (Stormy Daniels)—was attempting to sell the rights to her story that she had an affair with Trump in 2006 and 2007;
- Cohen's reported discussions with Trump about the purchase of Clifford's story in the weeks before the 2016 election;²⁴⁵

²⁴³ See 11 C.F.R. § 113.1(g)(6); 11 C.F.R. § 113.1(g)(6).

²⁴⁴ AMI statement of Admitted Facts at ¶ 3; Cohen Information at ¶ 27; Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018; Scannell, Orden, and Cohen, *CNN*, Dec. 13, 2018.

²⁴⁵ Palazzolo, Hong, Rothfeld, Davis O'Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

- Cohen’s reported coordination with Trump and Weisselberg about the mechanics of paying Clifford without disclosing Trump’s identity;²⁴⁶
- Cohen’s claim that Trump, referencing the deal with Clifford, instructed him to “get it done;”²⁴⁷
- the Trump Organization’s full reimbursement of Cohen for the personal funds he used to purchase the rights to Clifford’s story;²⁴⁸ and
- the Trump Organization’s payment of a \$60,000 bonus to Cohen on top of the costs he incurred while purchasing the rights to Clifford’s story.²⁴⁹

Alternatively, Trump appears to have committed a felony FECA violation by knowingly and willfully accepting Cohen’s unlawful individual contribution, in violation of 52 U.S.C. §§ 30109, 30116. The key evidence substantiating this violation includes:

- Trump’s status, at the time of Cohen’s contribution, as a candidate for president of the United States, which meant that his receipt or acceptance of a contribution constituted receipt or acceptance by his Donald Trump for President, Inc.;²⁵⁰
- Cohen’s reported claim that he acquired the rights to Clifford’s story with Trump’s knowledge and direction; and
- the apparent absence of any effort by Trump to prevent, reject, or report Cohen’s contribution.

Cohen’s purchase of Clifford’s story was very likely a contribution because it was the purchase of something of value made with the intent to prevent it from influencing the 2016 election. The negotiation with Clifford’s agent took place in the final month of the 2016 campaign, a time when Trump’s treatment of and attitudes concerning women was a key issue in the race. Cohen has admitted that the \$130,000 payment to Clifford was intended “to ensure that she did not publicize damaging allegations before the 2016 presidential election and thereby influence that election.”²⁵¹

The elements needed to establish a felony FECA violation are also likely satisfied. First, the value of the rights to Clifford’s story exceeded \$25,000 in a calendar year because they were worth at least \$130,000, the amount that Cohen paid Clifford. Second, there is compelling evidence that Trump’s violation was committed knowingly and willfully, including:

- Trump’s personal experience with and prior statements about campaign finance law, especially the provisions at issue here: the limit on individual contributions and the fact that a third party’s hush-money payment to an individual who had an affair with a candidate could constitute an unlawful contribution;²⁵²

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Gov’t Sentencing Memo, *United States v. Cohen*, at 14; Cohen Information at ¶ 37.

²⁴⁹ Gov’t Sentencing Memo, *United States v. Cohen*, at 14; Cohen Information at ¶ 37.

²⁵⁰ See 11 C.F.R. § 102.7(d).

²⁵¹ See Cohen Information at ¶ 44.

²⁵² See discussion, *supra* at Section II.E.1.

- Trump’s personal involvement and agreement in executing the “catch and kill” scheme regarding McDougal, including Pecker’s ultimate refusal to accept reimbursement from Trump or the Trump Organization for AMI’s purchase of the rights to McDougal’s story;²⁵³
- the use of a conduit, Essential Consultants LLC, to secure the rights to Clifford’s story and conceal the transaction;²⁵⁴
- the fact that Cohen made his in-kind contribution by paying Clifford through her attorney, which prevented records of the transaction from being submitted to the Trump campaign;²⁵⁵ and
- the use of fraudulent (and potentially unlawful²⁵⁶) payments to reimburse Cohen.²⁵⁷

For these reasons, the evidence substantiating Trump’s personal exposure to criminal liability for Cohen’s unlawful contribution is also powerful. Trump faces potential liability both for inducing or causing Cohen to make the unlawful contribution and also for accepting or receiving it. Although AMI’s involvement in the “catch and kill” of the Clifford story was merely to put Clifford’s agents in contact with Cohen, the transaction was consistent with the scheme that Trump sanctioned and participated in starting in August 2015.

In our estimation, the defenses available to Trump for this potential violation are unconvincing. Although no recording or documentary evidence showing that Trump directed Cohen has yet surfaced, Cohen has told prosecutors that Trump told him to get it done. The fact that Pecker reportedly lobbied the president-elect to reimburse Cohen and that the Trump Organization then reimbursed Cohen throughout 2017 is powerful evidence that Cohen did what Trump asked of him. It is particularly hard to argue that the purchase of the Clifford story was not a contribution because of its timing; Cohen negotiated the transaction in the final month of the campaign, after the *Access Hollywood* video surfaced. It is difficult to see how Cohen’s payment was not, as he admits, calculated to influence the election or how the payment would have occurred irrespective of Trump’s candidacy.²⁵⁸

4. Potential Violations III & IV: Causing Donald J. Trump for President LLC’s failure to report AMI and Cohen’s contributions (McDougal & Clifford Stories)

Trump appears to have committed two additional felony FECA violations by knowingly and willfully causing the treasurer of his principal campaign committee, Donald Trump for President, Inc., to fail to disclose AMI and Cohen’s contributions, in violation of 52 U.S.C. §§ 30109, 30104 and 18 U.S.C. § 2.²⁵⁹ The key evidence substantiating these violations includes:

²⁵³ See discussion, *supra*, at Section II.E.2; Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018; Cohen Information at ¶ 31.

²⁵⁴ Cohen Information at ¶ 34; Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

²⁵⁵ See Pilger, *U.S. Dept. of Justice* (2017), at 153.

²⁵⁶ See Section III.C, *infra*.

²⁵⁷ Gov’t Sentencing Memo, *United States v. Cohen*, at 4; Palazzolo, Hong, Rothfeld, Davis O’Brien, and Ballhaus, *Wall Street Journal*, Nov. 9, 2018.

²⁵⁸ See 52 U.S.C. § 30101(8)(A).

²⁵⁹ See, e.g., *United States v. Benton*, 890 F.3d 697, 710 (8th Cir. 2018), judgment corrected (May 15, 2018) (“The jury was entitled to infer from these facts that Benton and Tate had knowingly and willfully caused Commission reports to be filed which falsely reported the payments to Sorenson for his endorsement as payments to ICT for audio/visual

- Trump’s status, at all relevant times, as a candidate for president of the United States, which meant that his receipt or acceptance of a contribution constituted receipt or acceptance by his Donald Trump for President, Inc.;²⁶⁰
- Trump’s personal involvement in and direction of the aforementioned FECA violations:
 - causing AMI to make and accepting (or causing Cohen to accept) an unlawful corporate contribution in the form of the rights to McDougal’s story;
 - causing Cohen to make and accepting an unlawful individual contribution in the form of the rights to Clifford’s story;
- Donald Trump for President, Inc.’s failure to disclose the in-kind contribution of the rights to McDougal’s story from AMI, possibly because of Trump and Cohen’s concealment of the contribution from campaign officials;²⁶¹ and
- Donald Trump for President, Inc.’s failure to disclose the in-kind contribution of the rights to Clifford’s story from Cohen.²⁶²

The elements needed to establish a felony FECA violation are likely satisfied in the case of both failures to report. As explained above, the McDougal and Clifford stories were worth at least \$125,000 and \$130,000, respectively, and therefore both exceeded the \$25,000 threshold for a felony FECA violation.

There is also compelling evidence that these potential violations were committed knowingly and willfully, including:

- Trump’s personal experience with, and prior statements about, campaign finance law, especially the provisions at issue here: the prohibition of corporate contributions, the limit on individual contributions, the requirement to report contributions, and the fact that a third party’s hush-money payment to an individual who had an affair with a candidate could constitute an unlawful contribution (as was alleged in the Edwards case);²⁶³
- Trump’s personal involvement and agreement in executing the “catch and kill” scheme regarding McDougal, including Pecker’s ultimate refusal to accept reimbursement from Trump or the Trump Organization for AMI’s purchase of the rights to McDougal’s story;
- the efforts made by Cohen and others to conceal both contributions, reportedly at Trump’s direction; and

services.”). As we explain in Section III.A, *infra*, this aspect of Trump’s conduct could also expose him to additional liability under 18 U.S.C. § 1519.

²⁶⁰ See 11 C.F.R. § 102.7(d).

²⁶¹ Donald Trump for President, Inc., *Federal Election Commission*, Sept. 20, 2016.; Donald Trump for President, Inc., *Federal Election Commission*, Oct. 20, 2016. Both reports have since been amended multiple times, but neither shows a contribution from AMI. See Donald Trump for President, Inc., *Federal Election Commission*, Dec. 20, 2018; Donald Trump for President, Inc., *Federal Election Commission*, Jul. 15, 2018.

²⁶² Donald Trump for President, Inc., *Federal Election Commission*, Oct. 27, 2016; Donald Trump for President, Inc., *Federal Election Commission*, Oct. 27, 2016. Both reports have since been amended multiple times, but neither shows a contribution from Cohen. See Donald Trump for President, Inc., *Federal Election Commission*, May 12, 2017; Donald Trump for President, Inc., *Federal Election Commission*, Oct. 27, 2016.

²⁶³ See Section II.E.1, *supra*.

- Trump’s use of his business, the Trump Organization, and an employee of his business, Cohen, to orchestrate and accept unlawful contributions, apparently to avoid disclosure of the contributions to other campaign officials.

The evidence supporting Trump’s personal exposure to liability for these offenses is considerable. The case would be even stronger if prosecutors can demonstrate that Trump or Cohen (at Trump’s direction) did not disclose the McDougal and Clifford transactions to other officials in the Trump campaign or, alternatively, disclosed the transactions but directed that they not be reported as contributions.

5. Potential Violation V: Causing Donald J. Trump for President LLC’s failure to report that contribution (February 2015 online poll)

Trump may have committed a misdemeanor FECA violation by apparently causing the treasurer of his principal campaign committee, Donald Trump for President, Inc., to fail to disclose Cohen’s payment for the rigging of a 2015 online poll as a contribution, and thereby violating 52 U.S.C. §§ 30109, 30104 and 18 U.S.C. § 2.²⁶⁴ While the facts supporting this potential violation have not been described in documents drafted by prosecutors, they have been developed in some detail by trusted news sources.²⁶⁵ At this point, they appear to include:

- Cohen’s payment in February 2015 of Gauger and/or Gauger’s company Redfinch Solutions LLC for help rigging an online survey of support for potential candidates for the Republican nomination for president.²⁶⁶
- Trump’s status, under the FECA, as a candidate for federal office once he received contributions or made expenditures exceeding \$5,000;²⁶⁷
- Donald Trump for President, Inc.’s failure to disclose Cohen’s February 2015 in-kind contribution once it began filing reports with the FEC;²⁶⁸
- the Trump Organization’s reimbursement, throughout 2017, of Cohen for this and other services that Cohen secured from Gauger and Redfinch Solutions LLC;²⁶⁹
- Cohen’s claim in January 2019, after this transaction was reported by the *Wall Street Journal*, that “what I did was at the direction of and for the sole benefit of @realDonaldTrump @POTUS. I truly regret my blind loyalty to a man who doesn’t deserve it.”²⁷⁰

Cohen’s payment of Gauger could have been an in-kind contribution under the FECA because the services rendered—manipulation of an online poll—are a thing of value and the object of those services

²⁶⁴ If Cohen was acting as an agent of the Trump Organization and paid the vendor with funds from the Trump Organization, the payment was an unlawful corporate contribution, in violation of section 30118, and it would have been unlawful for Trump, an officer of the Trump Organization, to consent to a contribution—even to his own campaign.

²⁶⁵ See, e.g., Rothfeld, Barry, and Palazzolo, *Wall Street Journal*, Jan. 17, 2019.

²⁶⁶ Rothfeld, Barry, and Palazzolo, *Wall Street Journal*, Jan. 17, 2019.

²⁶⁷ See 52 U.S.C. § 30101(2).

²⁶⁸ Contributions from Cohen do not appear in the FEC’s database of contributions to Donald J. Trump for President.

See <https://bit.ly/2RDm1Cl>.

²⁶⁹ Rothfeld, Barry, and Palazzolo, *Wall Street Journal*, Jan. 17, 2019.

²⁷⁰ <https://twitter.com/michaelcohen212/status/1085900900835778560>.

was to influence an election for federal office. Making it appear that Trump had support from the potential Republican electorate had the purpose of influencing the Republican presidential primary.

There is evidence that this violation meets the requirements for a misdemeanor FECA violation. First, the contribution in question likely exceeded \$2000. Gauger claims that Cohen paid him between \$12,000-\$13,000 in cash and gave him a pair of boxing gloves, which were worth some additional, unascertainable amount.²⁷¹ Although part of the payment was for services rendered in 2014, even half of the total figure would exceed the \$2,000 for the 2015 calendar year.²⁷²

In addition, there is evidence that this violation was committed knowingly and willfully, including:

- Trump’s personal experience with and prior statements about campaign finance law, especially the provisions at issue here: the prohibition of corporate contribution, the limit on individual contributions, and the requirement to report contributions;²⁷³
- Trump and Cohen’s prior experience being investigated by the FEC for similar conduct in 2011 that they engaged in before Trump had declared his candidacy;²⁷⁴
- the use of a surreptitious form of payment—the bag of cash that Cohen gave to the vendor—apparently to avoid creating a record of the transaction;²⁷⁵ and
- the fact that Cohen’s contribution was structured so that the vendor provided services “in kind” to Trump without invoicing or seeking payment from him (or later, his campaign committee).²⁷⁶

The evidence supporting Trump’s personal exposure to liability for this potential offense is sufficient to merit scrutiny; however, apart from Cohen’s claims, we are not aware of evidence that Trump knew about or directed Cohen’s conduct or intentionally concealed the payment from his campaign. In addition, unlike the other potential FECA offenses we discuss in this report, prosecutors have yet to claim that anyone engaged in criminal conduct with respect to this transaction.

²⁷¹ Rothfeld, Barry, and Palazzolo, *Wall Street Journal*, Jan. 17, 2019.

²⁷² *Id.*

²⁷³ See Section II.E.1, *supra*.

²⁷⁴ See Statement of Reasons, *In the Matter of Donald J. Trump et. al.*, FEC MUR 6462 (Sept. 18, 2013).

²⁷⁵ Rothfeld, Barry, and Palazzolo, *Wall Street Journal*, Jan. 17, 2019. See Pilger, *U.S. Dept. of Justice* (2017), at 153.

²⁷⁶ See Pilger, *U.S. Dept. of Justice* (2017), at 153.

III. TRUMP'S POTENTIAL COVER-UP OFFENSES

Trump may have committed at least two additional felonies in the process of concealing the potential felony campaign finance violations: First, by causing his campaign to submit false records to the FEC, Trump potentially violated 18 U.S.C. § 1519; Second, by failing to disclose his liability to Michael Cohen on his 2017 Form 278, Trump likely made a false statement, in violation of 18 U.S.C. § 1001.²⁷⁷ In addition, it is possible that President Trump is personally implicated in another offense—misprision of felony—relating to the reimbursement of Michael Cohen by or through the Trump Organization.

A. Potential Violation VI: Felony Causing False Records (FEC submissions, false Trump invoices, Form 278), in violation of 18 U.S.C. § 1519

It is a criminal offense to knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency.²⁷⁸ The Supreme Court has held that the “tangible object” considered by the statute need not be tangible in the narrow sense of able to be touched, but rather any item “used to record or preserve information.”²⁷⁹

Various courts have also found that 1519 applies to violations of the FECA—including “the production of false financial records by a political campaign.”²⁸⁰ The public facts in the Trump case track closely with the case of two members of Ron Paul’s 2012 presidential campaign who were charged, and convicted, with violating FECA, 18 U.S.C. § 1001 and 18 U.S.C. § 1519 for concealing a scheme to pay a state senator to endorse Paul by routing the payments through a third party and intentionally misreporting the payments to the FEC.²⁸¹ In furtherance of this scheme, the two campaign operatives arranged for the state senator to be paid \$73,000 which they reported to the FEC as “audio/visual expenses.”²⁸² After their conviction and subsequent appeal, the Eighth Circuit held that because the filing of reports to the FEC is a matter “within the Commission’s jurisdiction” under Section 1519, knowingly falsifying documents with the intent to impede the Commission’s administration of its authorized function (namely, ensuring compliance with campaign finance laws) was a violation of Section 1519.²⁸³ As such, it is likely that false reports to government agencies, including the FEC and

²⁷⁷ See Donald J. Trump, Public Financial Disclosure Report, June 14, 2017 (“2017 Form 278”), available at <https://oge.app.box.com/s/kz4qvbdbsbcfrzq16msuo4zmth6rerh1c>.

²⁷⁸ 18 U.S.C. § 1519.

²⁷⁹ *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015).

²⁸⁰ *United States v. Benton*, 890 F.3d 697, 711 (8th Cir. 2018), judgment corrected (May 15, 2018). See also *United States v. Rowland*, 826 F.3d 100 (2d Cir. 2016) (affirming convictions for violations of the FECA and 18 U.S.C. §§ 371, 1001, and 1519), cert. denied, — U.S. —, 137 S.Ct. 1330 (2017).

²⁸¹ *Benton*, 890 F.3d at 697.

²⁸² *Benton*, 890 F.3d at 707. See also Superseding Indictment, *United States v. Benton*, No. 15-cr-103 (S.D.I.A., 2015), 7.

²⁸³ *Benton*, 890 F.3d at 710.

OGE, would be covered by 1519, either under the category of records or documents, or included within the broader definition of a “tangible object.”

The false public financial records that Trump caused his campaign to submit to the FEC, the false business records that Trump caused the Trump Organization to create, and the 2017 Form 278 that Trump submitted to OGE, could amount to violations of Section 1519. Trump’s participation in the hush money scheme, his campaign’s false submission of reports designed to obscure the scheme from the FEC, the creation of false business records to conceal Cohen’s reimbursement, his personal submission of a fraudulent financial disclosure report, and his lawyers’ numerous “evolving” explanations of the conduct to OGE officials thus open him up to considerable potential liability under Section 1519.

B. Potential Violation VII. Felony False Statement (2017 Form 278), in Violation of 18 U.S.C. § 1001

To maintain public confidence in the integrity of the federal government, the Ethics in Government Act (EIGA) requires public filers²⁸⁴ such as President Trump to report the “identity and category of value of the total liabilities owed to any creditor . . . which exceed \$10,000 at any time during the preceding calendar year.”²⁸⁵ The implementing regulations further require that each financial disclosure report “identify and include a brief description of the filer’s liabilities over \$10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed.”²⁸⁶ The reporting period for President Trump’s 2017 Form 278 included all of 2016.²⁸⁷ Failure to properly disclose information required to be reported on the Form 278 can result in civil penalties and criminal prosecution. The EIGA provides for civil penalties of up to \$50,000, and imprisonment of up to one year for knowingly and willfully failing to report required information.²⁸⁸

Section 1001 of Title 18 provides that it is a felony, punishable with up to five years imprisonment for anyone to knowingly and willfully make a false statement “within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.”²⁸⁹ The statute is written to cover a broad range of behavior, including anyone who knowingly and willfully

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry[.]²⁹⁰

²⁸⁴ Ethics in Government Act of 1978, 5 U.S.C. app. 4 § 101 (2018).

²⁸⁵ § 102(a)(4).

²⁸⁶ 5 C.F.R. § 2634.305(a).

²⁸⁷ See 5 U.S.C. app. 4 § 102(a)(4)(B).

²⁸⁸ 5 U.S.C. app. 4 § 104(a)(1)-(2).

²⁸⁹ 18 U.S.C. § 1001(a).

²⁹⁰ *Id.*

In President Trump’s case, four elements must be established to prove a violation of section 1001: (1) concealment of a fact that the individual had a duty to disclose²⁹¹ or, alternatively, a false, fictitious or fraudulent statement or representation; (2) materiality of the false statement or concealed fact; (3) jurisdiction of a department or agency of the United States; and (4) knowing and willful intent.²⁹²

President Trump’s conduct likely satisfies each of these requirements. First, President Trump’s failure to disclose his \$130,000 liability to Michael Cohen could be construed as concealment of something he had a duty to disclose under the EIGA. Alternatively, President Trump’s certification that the statements that he had made in the report were “true, complete and correct to the best of [his] knowledge”²⁹³ could be construed as a false statement because he knew that he had a liability to Cohen that he had failed to disclose on his 2017 Form 278.

Second, the false statement or concealed fact was material because it had a “natural tendency to influence, or was capable of influencing,”²⁹⁴ the OGE. As the supervising ethics office for the executive branch, OGE provides “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.”²⁹⁵ In addition, OGE is charged with “monitoring and investigating compliance with the public financial disclosure requirements” of the EIGA and “recommending appropriate action to correct any conflict of interest or ethical problems” revealed by its review of financial statements.²⁹⁶ The OGE director is required to make an annual report to Congress including any information that the director deems appropriate.²⁹⁷ Had Trump disclosed his liability to Cohen, OGE might have recommended that he take certain steps to avoid conflicts of interest or disclosed President Trump’s involvement in a likely FECA violation to Congress. Similarly, had Trump not stated that his Form 278 was to the best of his knowledge complete and correct, OGE likely would not have certified that Trump’s 2017 Form 278 was “in compliance with applicable laws and regulations.”²⁹⁸

Third, the false statement was made on a public disclosure form that the president submitted to OGE. It was therefore plainly within the jurisdiction of OGE, an agency of the United States.²⁹⁹

Fourth, Trump’s false statement or concealment was likely knowing and willful. His lawyers repeatedly lied to OGE officials about the nature of Trump’s financial relationship with Cohen, including repeating the lie that Cohen was being reimbursed for the hush-money payments pursuant to a nonexistent retainer agreement.³⁰⁰ Some of the evidence suggesting that Trump had the requisite criminal intent to commit FECA violations is also relevant here. Trump was aware of and participated directly in meetings with Pecker and Cohen about the scheme that they hatched in 2015 to “capture and kill” negative stories about him. Trump was also updated by Cohen about the details of the McDougal payment. Cohen has also claimed that at all times, including when he borrowed money in his own name and used it to pay

²⁹¹ *United States v. White Eagle*, 721 F.3d 1108, 1116-18 (9th Cir. 2013) (“[A] conviction under § 1001(a)(1) is proper where a statute or government regulation requires the defendant to disclose specific information to a particular person or entity”); *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008) (“As Safavian argues and as the government agrees, there must be a legal duty in order for there to be a concealment offense in violation of §1001(a)(1)”).

²⁹² 18 U.S.C. § 1001.

²⁹³ *Id.*

²⁹⁴ *Neder v. United States*, 527 U.S. 1, 16 (1999).

²⁹⁵ 5 U.S.C. app. 4 § 402(a).

²⁹⁶ § 402(b)(3)-(4).

²⁹⁷ § 408.

²⁹⁸ Trump OGE 278e.

²⁹⁹ 5 U.S.C. app. 4 § 401.

³⁰⁰ Letter from Rep. Cummings (Feb. 15, 2019), 3-4.

Clifford (Stormy Daniels) for her silence, he was acting at Trump’s benefit and expected to be repaid. Trump himself has previously admitted that Cohen entered into the Clifford contract with the expectation of being reimbursed by Trump.³⁰¹ The method of Cohen’s repayment—fraudulent invoices for legal services that were never provided—also is highly indicative of consciousness of guilt.³⁰²

C. Other Possible Concealment Offenses

At this time, there is insufficient evidence available to analyze whether Trump could be personally liable for other potential offenses committed when the Trump Organization reimbursed Cohen for his expenses making the unlawful \$130,000 in-kind contribution of purchasing Clifford’s silence.

Nonetheless, one offense merits mention—albeit in passing—because the revelation of additional facts could make it relevant to the president. Section 4 of Title 18 of the United States Code makes it a criminal offense for someone with “knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States”³⁰³ Misprision of a felony is not simply the failure to report a felony; rather, it requires a “positive act designed to conceal from authorities commission of the felony,” which is a higher bar than mere knowledge.³⁰⁴ However, misprision of a felony does not require a specific intent to conceal or obstruct justice, but only knowledge of the underlying felony; nothing in the statute references the specific purpose for which the concealment must be undertaken.³⁰⁵

Trump could potentially face charges for misprision of felony to the extent that he directed the Trump Organization to help conceal Cohen’s unlawful individual contribution, a FECA felony, by reimbursing him in \$35,000-a-month payments over the course of 2017 in response to fraudulent invoices. The fraudulent “retainer” payments, coupled with his numerous public statements denying the existence of any such agreement with Cohen, could be enough to satisfy the “positive act” requirement, assuming Trump had the requisite involvement in that element of the scheme.

³⁰¹ <https://twitter.com/realDonaldTrump/status/991992302267785216>.

³⁰² See Pilger, *U.S. Dept. of Justice* (2017), at 153.

³⁰³ 18 U.S.C. § 4.

³⁰⁴ See, e.g., *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934); *United States v. Caraballo-Rodriguez*, 480 F.3d 62, 71 (1st Cir. 2007).

³⁰⁵ *Robles-Urrea v. Holder*, 678 F.3d 702, 710 (9th Cir. 2012).

IV. TRUMP'S POTENTIAL PARTICIPATION IN A CRIMINAL CONSPIRACY

President Trump may have participated in one criminal conspiracy to violate FECA and/or defraud the United States by undermining enforcement of campaign finance law as well as to cover up those violations. This potential conspiracy, involved Cohen, the Trump Organization, at least two Trump Organization executives, Pecker, and AMI pertained to the hush money payments to Karen McDougal and Stephanie Clifford, the failures to report these unlawful contributions to the FEC, and the cover-up of these offenses including Trump's false statement on his Form 278.

A. Overview of Federal Conspiracy Law (18 U.S.C. § 371)

18 U.S.C. § 371 proscribes an agreement among two or more persons to engage in two types of activities: the “offense clause” outlaws conspiracies to commit any offense against the United States, while the “defraud clause” prohibits conspiracies to defraud the United States. Both types of conspiracies under 18 U.S.C. §371 have been used to prosecute individuals for illegal conduct during campaigns for federal office.³⁰⁶ Corporations are “persons” for the purpose of section 371 and may be charged as conspirators.³⁰⁷ In addition, “[t]he actions of two or more agents of a corporation, conspiring together on behalf of the corporation, may lead to conspiracy convictions of the agents (because the corporate veil does not shield them from criminal liability) and of the corporation (because its agents conspired on its behalf).”³⁰⁸ Some courts have held that there can be no conspiracy under section 371 where the conspiracy alleged involves only one human actor and a corporation that he or she controls.³⁰⁹

Elements of the two conspiracies are similar, but one distinction merits emphasis: an “offense clause” conspiracy requires proof of an agreement and intent to commit a “substantive” or “underlying” federal

³⁰⁶ Note that conspiracy to commit election related offenses receives relatively minimal treatment in the DOJ's 200 page treatise concerning prosecution of election offenses. See Pilger, *U.S. Dept. of Justice* (2017).

³⁰⁷ 1 U.S.C. § 1 (In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”); *Alamo Fence Co. of Houston v. United States*, 240 F.2d 179, 181 (5th Cir. 1957) (“‘Whoever’ commits the inhibited acts is covered by Section 1010, while Section 371 refers to a conspiracy of ‘two or more persons.’ The context of neither section indicates any meaning other than that a ‘corporation’ is included in accordance with 1 U.S.C. § 1”). See also *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994), as amended (Apr. 28, 1994) (“[A] corporation may be liable under § 371 for conspiracies entered into by its agents and employees.”); *United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) (“This court has held a number of times that a corporation may conspire with its officers and employees.”).

³⁰⁸ *United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984).

³⁰⁹ See, e.g., *United States v. Stevens*, 909 F.2d 431, 434 (11th Cir. 1990) (“Even if it can be said that Stevens made up his mind as an individual to pursue fraudulent ends and at the same time made up the ‘minds’ of his corporations to pursue these same ends, this case lacks any interaction between multiple autonomous actors. The basis for punishing Stevens for the separate offense of conspiracy, in addition to the substantive offenses he committed, is not present in this case.”); *Peters*, 732 F.2d at 1008 n.6 (“A corporate officer, acting alone on behalf of the corporation, could not be convicted of conspiring with the corporation. But this is not such a case.”) (internal citation omitted).

offense;³¹⁰ however, a “defraud clause” conspiracy merely requires proof that the defendant “knowingly agreed . . . to deceptively interfere with the lawful functions of the targeted agency.”³¹¹

1. Federal “Defraud Clause” Conspiracy Law as Applied to the FECA

To demonstrate a conspiracy to defraud the United States government under section 371, it must be proven that:

- (1) two or more persons entered into an agreement to obstruct a lawful function of the government or an agency of the government;
- (2) by deceitful or dishonest means; and
- (3) at least one overt act was taken in furtherance of that conspiracy.³¹²

Under a defraud theory, the prosecution would likely argue that concealing in-kind corporate contributions obstructs the lawful functioning of the FEC. Under this prong of §371, the government need not charge or prove that the defendant “agreed to commit, or actually did commit a substantive offense. He merely must have agreed to interfere with or obstruct one of the government’s lawful functions by means that are dishonest.”³¹³

The Special Counsel’s office included a conspiracy to defraud charge in the February 16, 2018 indictment of the Russian “Internet Research Agency,” and others alleging that defendants conspired to impede the lawful functioning of the FEC and other federal agencies by, among other actions, spending money to influence the election in violation of the FECA’s ban on electioneering communications by foreign nationals.³¹⁴ One of the defendants in that case, Concord Management, moved to dismiss the 18 U.S.C. § 371 charge against them.³¹⁵

In denying Concord’s motion to dismiss the conspiracy to defraud charge, the court made a number of relevant observations. First, the specifics of the FECA and defendant’s knowledge of that law might be relevant, but only insofar as they are probative of the operative question, namely “whether it was deceptive and intended to frustrate the lawful government functions of the FEC.”³¹⁶ The court acknowledged, however, that if the defendant were able to prove that their expenditures were in fact lawful, this would be pertinent to, or even dispositive of, whether the alleged expenditures did in fact deceive or impede the government. The court also considered defendant’s request to require a “willfulness” *mens rea* standard to the conspiracy to defraud charge. After a lengthy discussion of relevant precedent, the court declined, finding an allegation that the defendants had a general knowledge of the government functions they were impairing to be sufficient, at least at the stage of considering a motion

³¹⁰ *United States v. Am. Inv'rs of Pittsburgh, Inc.*, 879 F.2d 1087, 1100 (3d Cir. 1989).

³¹¹ *United States v. Concord Mgmt. & Consulting LLC*, No. 18-CR-32-2 (DLF), 2018 WL 6000253, at *8 (D.D.C. Nov. 15, 2018) (internal punctuation and citations omitted).

³¹² *United States v. Concord Mgmt. & Consulting LLC*, No. 18-CR-32-2 (DLF), 2018 WL 6000253, at *4 (D.D.C. Nov. 15, 2018). See also *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (defining “defraud” as interfering or obstructing “lawful government functions by deceit, craft, or trickery, or at least by means that are dishonest”).

³¹³ *United States v. Berger*, 22 F. Supp. 2d 145, 150 (S.D.N.Y. 1998) (citing *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988) and *United States v. Ballistrea*, 101 F.3d 827, 831 (2d Cir. 1996)) (internal quotations omitted).

³¹⁴ [Indictment, United States v. Internet Research Agency](https://www.justice.gov/file/1035477/download), No. 18-cr-32 (D.D.C. Feb. 16, 2018) at ¶¶ 1-2, <https://www.justice.gov/file/1035477/download>.

³¹⁵ *Concord Mgmt.*, No. 18-CR-32-2 (DLF), 2018 WL 6000253 at *1.

³¹⁶ *Id.* at *5.

to dismiss the indictment—more could be required later in the trial, including in instructions to the jury.³¹⁷

Circuit courts have upheld prosecutions for conspiracy to defraud the United States in other campaign finance contexts. In *United States v. Hsia*, the D.C. Circuit affirmed the district court’s order denying defendant’s motion to dismiss a section § 371 count related to a straw donor scheme run by a Buddhist temple in California.³¹⁸ The Buddhist temple at issue in *Hsia* later paid a \$120,000 penalty to the FEC as part of a broader FEC civil enforcement action.³¹⁹

In *United States v. Hopkins*, the Fifth Circuit affirmed § 371 conspiracy to defraud convictions for two savings and loan officers who facilitated reimbursements to straw donors from corporate accounts in violations of the FECA.³²⁰ In this case, reimbursements were made through false cash advances and travel vouchers to employees who had made contributions directly to a political action committee controlled by the heads of the bank. The court held that a rational jury could find that the defendants knew that corporate contributions were illegal and that they intended to impede the functioning of the FEC.³²¹

The Fifth Circuit observed in *Hopkins* that the Supreme Court has held that “efforts at concealment [may] be reasonably explainable only in terms of motivation to evade” lawful obligations.³²² This legal maxim applies throughout the case of Donald J. Trump.

2. Federal “Offense Clause” Conspiracy as Applied to the FECA

To prove an offense clause criminal conspiracy, the government must show that:

- (1) two or more persons entered into an agreement to violate one or more federal laws (including, for example, the ban on corporate contributions to individual candidates or the limit on individual donations);
- (2) the defendant knew about the conspiracy and deliberately, knowingly, willfully, and voluntarily joined the conspiracy; and
- (3) during the course of the conspiracy, one of the members of the conspiracy performed an overt act to further or advance the common purpose of the conspiracy.³²³

Conspiracy to commit offense charges effectively import the intent standard applicable to the underlying substantive offense.³²⁴ Thus, as with proving a direct violation of the FECA, knowledge of the explicit

³¹⁷ *Id.* at *12.

³¹⁸ 176 F.3d 517 (D.C. Cir. 1999).

³¹⁹ Richard A. Oppel, Jr., Democrats Are Fined \$243,000 for Fund-Raising Violations, *New York Times*, Sep. 21, 2002 available at <https://nyti.ms/2HSuIdI>.

³²⁰ 916 F.2d 207, 210 (5th Cir. 1990).

³²¹ *Id.* at 213-214.

³²² *Id.* at 214, quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959).

³²³ See Final Jury Instructions, *United States v. Edwards*, No. 1:11-CR-161 (M.D.N.C. May 18, 2012) at 28.

³²⁴ See, e.g., *United States v. Hernandez-Orellana*, 539 F.3d 994, 1006-1007 (9th Cir. 2008) (finding that proof of the “requisite intent to commit the substantive crime” is an element of a conspiracy charge); *United States v. Dadi*, 235 F.3d 945, 950 (5th Cir. 2000) (“[T]he government must prove the same degree of criminal intent as is necessary for proof of the underlying criminal offense.”).

provision that co-conspirators seek to violate need not be proven; however, the prosecution must demonstrate that the conspirators knew that their actions would violate some law.

Perhaps the most relevant use of the offense clause in the context of campaign finance violations involved former presidential candidate John Edwards. In that case, the government argued that Edwards conspired with numerous people to violate the individual contribution limits in the FECA. Importantly, the government argued that the purpose of the conspiracy was to “protect and advance Edwards’ candidacy for President of the United States” by concealing his affair because the conspirators knew that “public revelation of the affair and pregnancy would destroy [Edwards’] candidacy by, among other things, undermining Edwards’ presentation of himself as a family man and by forcing his campaign to divert personnel and resources away from other campaign activities to respond to criticism and media scrutiny regarding the affair and pregnancy.”³²⁵ To further the argument that Edwards and his co-conspirators knew that their conduct was illegal, the government presented evidence that the checks that eventually went to Edwards were falsely annotated as purchases of antique furniture, that the various parties continuously lied about their motivations, and that Edwards intentionally filed false reports to the FEC.³²⁶

B. Potential Violation VIII. Conspiracy to defraud the United States by undermining the lawful function of the FEC and/or violating the FECA (the “hush money” payments, false statement, and cover-up)

President Trump potentially participated in a conspiracy that could be charged as either a scheme to defraud the United States by undermining the lawful function of the FEC or to violate the FECA and conceal those violations.³²⁷ Trump appears to have engaged in a conspiracy in violation of section 371 by agreeing with Cohen, the Trump Campaign, the Trump Organization, two Trump Organization executives, Pecker, and AMI to undermine the lawful functions of the FEC or to violate the FECA. The object of this conspiracy appears to have been preventing damaging information about Trump from coming to light during the 2016 presidential campaign by unlawful means, by frustrating the lawful government function of the FEC and also by frustrating the lawful government function of the OGE.

There were numerous overt acts made in furtherance of this conspiracy. They include the actual hush-money payments to McDougal and Daniels, the creation of shell corporations to make the payments and receive the life rights to the stories of these women, Cohen’s creation and submission of fraudulent invoices to the Trump Organization, the reimbursement of Cohen by the Trump Organization, and Trump’s failure to disclose his liability to Cohen on his Form 278. Each of these acts would likely satisfy the deceitful means requirement if the offense were charged as a conspiracy to defraud.

Finally, there is substantial evidence that Trump acted with the requisite intent to be charged with participating in a “defraud clause” conspiracy. To make this case, the government would need to prove that Trump and his co-conspirators deceptively “intended to frustrate the lawful government functions

³²⁵ Edwards Indictment at 6.

³²⁶ Edwards Indictment at 6-14.

³²⁷ To the extent that Donald J. Trump for President LLC’s failure to report Cohen’s payment for the rigging of a 2015 online poll is deemed to be a violation of the FECA, it could serve as the basis for a separate conspiracy liability for Trump (and Cohen). See Section II.E.5, *supra*.

of the FEC.”³²⁸ The cover-up scheme orchestrated by Cohen and the Trump Organization to conceal the reimbursement payments to Cohen, in addition to Trump’s failure to report the Clifford payment liability to Cohen on his Form 278 (despite potential liability for lying to the government), show that Trump was motivated to evade his lawful obligations. We return, once again to the maxim that “efforts at concealment [may] be reasonably explainable only in terms of motivation to evade” lawful obligations.³²⁹ In this case, by evading his legal obligations to report these various payments, Trump, Cohen and the other members of the conspiracy likely frustrated the lawful function of the FEC.

There is also substantial evidence suggesting that Trump acted with the requisite intent to be charged with an “offense clause” conspiracy.³³⁰ Such a conspiracy would include the unlawful corporate and individual in-kind contributions in the form of hush-money payments to McDougal and Clifford, the failure to report those contributions to the FEC, the scheme to reimburse Cohen for the Clifford payment via the Trump Organization, and Trump’s concealment of Cohen’s payment to Clifford by making a false statement on his OGE Form 728. As we have summarized above, there is substantial evidence that Trump was not only generally aware that this conduct was illegal, but that he was intimately familiar with the exact requirements at issue given his long history of involvement with political campaign contributions and the FEC.³³¹

³²⁸ Edwards Indictment at 5.

³²⁹ *Hopkins*, 916 F.2d at 214, quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959).

³³⁰ As discussed above, conspiracy to commit offense charges effectively import the intent standard applicable to the underlying substantive offense. *See, e.g., United States v. Hernandez-Orellana*, 539 F.3d 994, 1006-1007 (9th Cir. 2008) (finding that proof of the “requisite intent to commit the substantive crime” is an element of a conspiracy charge); *United States v. Dadi*, 235 F.3d 945, 950 (5th Cir. 2000) (“[T]he government must prove the same degree of criminal intent as is necessary for proof of the underlying criminal offense.”). The level of intent required in a conspiracy to commit offense prosecution appears to be approximately the same level of intent that is required with direct criminal prosecutions of the FECA, wherein only a general awareness that the conduct is illegal is sufficient to qualify as “willful” violation of the campaign finance laws. *United States v. Whittemore*, 944 F. Supp. 2d 1003, 1010 (D. Nev. 2013), *aff’d*, 776 F.3d 1074 (9th Cir. 2015) (noting that in such a case the government needs to prove intent to violate some law, but not the particular law, and that “such knowledge may be shown by conduct that is not inconsistent with a good-faith belief in the legality of the enterprise.”) (internal quotations and citation omitted).

³³¹ *See* Section II.E, *supra*.

CONCLUSION

President Trump may have personally engaged in several criminal offenses involving violations of federal election law and concealment of those violations while seeking and holding the highest office in our land. Those potential offenses include five knowing and willful violations of the FECA, one submission of false documents to impede the administration of the law, one false statement, and Trump’s participation in a criminal conspiracy. Because many of the facts we rely on have already been established by federal prosecutors or have been confirmed in in-depth reporting by news organizations, we have a high degree of confidence in the factual predicate for our analysis of the president’s conduct.

No court has decided the question of whether a sitting president may be indicted. Although it is the policy of the Department of Justice that a sitting president cannot be indicted, we hold a different view. If a president’s ability to fulfill the duties of his or her office is burdened by the prospect of criminal charges, it is not obvious to us that the rule of law should yield.³³² While indictment of the president should always be viewed as an option of last resort, that high bar could be met when a candidate personally directed criminal conduct that deprived the American people of the ability to make a fully-informed decision about whom to elect president.

It would be a mistake, though, to view the criminal law as the sole articulation of our values. Our constitution establishes a higher ambition for our president and would-be presidents than that they merely avoid criminal behavior. It requires that the president “take care that the laws be faithfully executed” and provides that “he shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”³³³ It also establishes regular elections in which “We, the people” are empowered to decide whether an elected representative embodies the values that we have enshrined in the soul of our republic.

Our campaign laws are in place for a reason; it is crucial for the American people to understand who is supporting candidates and how. Our constitutional order instills within every citizen a belief that public service is, at base, a public trust. An apparent conspiracy to conceal key measures taken to aid his candidacy is an affront to the people who voted in the 2016 election and to the people whom Trump represents as president. What consequences should follow if the facts conclusively demonstrate that the president engaged in criminal conduct is as much a question for Congress and the American people as it is for a prosecutor.

³³² See Berke, Bookbinder, and Eisen, *Brookings*, Aug. 22, 2018.

³³³ U.S. Const., Art. II, §§ 3-4.