

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Report on Possible Misconduct by Department of Justice in Revoking Michael Cohen's Bail for Speech Protected by the First Amendment

Possible Violation of the Law

Did officials at the United States Department of Justice and Bureau of Prisons violate the law by modifying the conditions of Michael Cohen's parole in order to limit his ability to speak about and publish opinions of Donald Trump?

Introduction

In August 2018 former Trump Organization Attorney Michael Cohen pled guilty to Criminal Tax Evasion and Campaign Finance Violations.¹ He admitted to concealing \$4 million in income from tax authorities and to making \$280,000 in illegal contributions to the campaign of Donald Trump. This plea received heavy media coverage because the illegal contributions were paid as hush money to conceal Donald Trump's affairs with adult film actress Stormy Daniels and model Karen McDougal.² Separately, Cohen pled guilty to lying to Congress to conceal the extent of Donald Trump's business connections with Russia. While correcting those lies in new testimony before Congress Cohen described Donald Trump's collusion with efforts to interfere in the 2016 presidential election.³ Cohen's testimony was subsequently confirmed by the Republican-led Senate Intelligence Committee.⁴ Trump viewed Cohen's pleas and testimony before congress as a betrayal.⁵

Cohen started a three-year prison sentence at Otisville Correctional Facility on May 6, 2019.⁶ He worked on a memoir in the prison's law library throughout his incarceration. By April 2020, the memoir and its focus on Trump was common knowledge among inmates and officials working for the Bureau of Prisons.⁷ Among other things, the memoir characterizes Trump as "a cheat, a liar, a fraud, a bully, a racist, a predator, [and] a con man" based on Cohen's experiences during twelve years as a high-level executive in the Trump Organization.⁸

On April 16, 2020 Cohen was released from prison due to his risk of contracting COVID-19, which had already infected 21 people at Otisville.⁹ The Bureau of Prisons expected Cohen to serve the remainder of his sentence under home confinement. However, on July 9, 2020 Cohen's parole officers detained him after attempting to have Cohen sign a gag order as a condition of his continued release.¹⁰ Two weeks later, a federal judge found that the Department of Justice's purpose in re-incarcerating Cohen was "retaliatory because of his desire to exercise his First Amendment rights[.]" This judicial finding of explicit and unconstitutional retaliation against Cohen is alarming. Did members of the Trump Administration use the power of the Department of Justice in an attempt to silence a critic?

Facts

The Trump Organization employed Michael Cohen for approximately twelve years beginning in 2006.¹¹ During this time Cohen acted as an attorney and executive, acquiring a reputation as Trump's "pit bull" based on his aggressive tactics. Cohen acknowledged that "if somebody does something Mr. Trump doesn't like, I do everything in my power to resolve it to Mr. Trump's benefit."¹² In 2015, for example, Cohen attempted to intimidate a reporter investigating rape allegations against Donald Trump. Cohen warned the reporter to "tread very f[]ing lightly because what I'm going to do to you is going to be f[]ing disgusting".¹³ Trump viewed this bullying style as an asset and assigned Cohen to responsibilities across his businesses and political campaigns.

During his time with the Trump Presidential Campaign in 2016, Cohen arranged payments to two women to conceal their affairs with Donald Trump ten years earlier. Cohen stated that he used personal funds "to facilitate a payment of \$130,000 to Ms. Stephanie Clifford [a.k.a. Stormy Daniels]."¹⁴ This payment, ordered by Donald Trump, constituted a campaign finance violation.¹⁵ Separately Cohen recorded himself receiving permission from Donald Trump to pay \$150,000 to Karen McDougal to conceal an affair.¹⁶ This payment constituted a separate campaign finance violation.¹⁷ Both payments involved complex facts and law which are not the subject of this report. In short, Cohen pled guilty to making illegal payments on behalf of Donald Trump to benefit the Trump Campaign. Cohen made these payments just prior to his tenure as Deputy Finance Chairman of the Republican National Committee.¹⁸

In 2017, Cohen appeared before the Senate and House Intelligence Committees to testify on connections between Donald Trump and the Russian government. In that testimony, Cohen lied about negotiations to build Trump Tower Moscow, stating the deal was dead by January 2016. In fact, negotiations had continued through June 2016.¹⁹ Cohen changed the timeline in this testimony to align with Donald Trump's "repeated disavowals of commercial and political ties between himself and Russia."²⁰

On August 2018, Cohen, pled guilty to Criminal Tax Evasion and Campaign Finance Violations in the Southern District of New York.²¹ The plea to concealing \$4 million was related to Cohen's personal assets, including to real estate and tax medallions. The plea to making \$280,000 in unlawful campaign contributions was relevant to his work with Donald Trump, the Trump Organization, and the Trump Campaign. On November 29, 2018 Cohen also pled guilty to charges brought by Special Counsel Robert Mueller for lying in his 2017 testimony before Congress.²²

In February 2019, Cohen reappeared before the House Oversight Committee to testify on the Trump Administration and the 2016 Presidential Campaign.²³ In his opening statement, Cohen issued a searing indictment of Trump's behavior over the years, and his conduct regarding Russia. Cohen stated that "Donald Trump was a presidential candidate who knew that Roger Stone was talking with Julian Assange about a WikiLeaks drop of Democratic National Committee emails."²⁴ The Senate Intelligence Committee confirmed Cohen's account in a report released this year.²⁵ Cohen's other remarks were similarly damaging and show Trump's desire to mislead the public and to obstruct investigations into Russian meddling in the 2016 election. For example, Cohen stated that "at the same time I was actively negotiating in Russia for him, Mr.

Trump would look me in the eye and tell me there's no business in Russia and then go out and lie to the American people by saying the same thing."²⁶

Cohen's cooperation with investigators and testimony before congress constituted a dramatic break with Donald Trump and the Trump Organization.²⁷ Previously, Trump had "dangled pardons" and praised Cohen on social media.²⁸ But unlike Paul Manafort and Roger Stone, Cohen continued to speak against Donald Trump and the Trump Administration. As Cohen's relationship with Donald Trump soured, Trump publicly advocated for Cohen to serve a long prison term.²⁹

Cohen worked on a personal memoir while serving his three year sentence at Otisville Correctional Facility.³⁰ He worked long hours on the book and disclosed his project to prison officials.³¹ By the time COVID-19 hit in 2020, the memoir-in-progress was common knowledge.

On April 16, 2020, the Bureau of Prisons released Cohen to home confinement to prevent spread of COVID-19, which had already infected 21 people at Otisville.³² He returned to his apartment in New York City to serve the remainder of his sentence.

However, on July 9, 2020 Cohen was sent back to prison following a meeting with his parole officer.³³ Federal Parole Officer Patrick McFarland issued an order returning Cohen to detention at the Metropolitan Detention Center because he "failed to agree to the terms of Federal Location Monitoring for SDNY US probation."³⁴ In fact, Cohen's disagreement was tentative, and he was seeking clarification on a specific term relating to media interactions. McFarland stated he would consult with their "chain of command" on the term.³⁵ After an hour and a half of waiting, parole officers abruptly took Cohen into custody without further discussion of the term.³⁶

The disputed term was a gag order preventing Cohen from communicating with members of the media or publishing any writings. Cohen questioned this requirement because it would prevent him from completing publication of his memoir.³⁷ This is the same memoir in which Cohen refers to Trump as "a cheat, a liar, a fraud, a bully, a racist, a predator, a con man" based on Cohen's personal experiences.³⁸

Two weeks later, Federal District Judge Allen Hellerstein found that the Department of Justice's purpose in re-incarcerating Cohen was "retaliatory because of his desire to exercise his First Amendment rights[.]"³⁹ Judge Hellerstein added that "I've never seen such a clause [as this gag order], in 21 years in being a judge and sentencing people." The court was not able to investigate how the unconstitutional prohibition on Cohen's speech was written or approved, but its text is informative:

"No engagement of any kind with the media, including print, tv, film, books, or any other form of media/news. Prohibition from all social media platforms. No posting on social media and a requirement that you communicate with friends and family to exercise discretion in not posting on your behalf or posting any information about you. The purpose is to avoid glamorizing or bringing publicity to your status as a sentenced inmate serving a custodial term in the community."⁴⁰

This clause resembles a contract term drafted by an attorney or someone with legal experience. The clause uses Cohen’s status as a convict to provide cover for an otherwise blatantly unconstitutional term of parole. As Cohen’s lawyers believe, it appears “custom-made for Mr. Cohen.”⁴¹ It is likely that a government lawyer working for the Bureau of Prisons or Department of Justice drafted or edited this term. Legal drafting and editing typically leaves a paper trail, but no further details have been released by the Department of Justice.

Today, Cohen asserts that the Department of Justice is taking partisan action to interfere with the publication of his book by selectively leaking excerpts in possession of the U.S. government.⁴² Such allegations cannot be lightly dismissed in the context of the course of conduct described above. Donald Trump is openly hijacking the instrumentalities of government to serve his partisan political purposes.⁴³ This pattern of behavior makes it hard to ignore evidence that Trump is employing the same nefarious strategy behind closed doors in agencies like the Department of Justice.

Possible Misconduct

As Judge Hellerstein noted, the Department of Justice could not show that Cohen’s gag order was applied to any other parolee. If a government employee added this gag order for political purposes, two potential issues arise: (1) a violation of the Hatch Act, prohibiting political activity by government officials, and (2) general corruption, which is best addressed by civil remedies in the short term and legal reform under the next administration.

A. Hatch Act Violation – 5 U.S.C. § 7324

The Hatch Act prohibits government officials from engaging in political activity while on the job. Proving a Hatch Act violation requires following the chain of command up from Parole Officer McFarland to identify (1) the source of the gag clause in Cohen’s parole conditions and (2) the origin of the order to re-incarcerate Cohen. Further analysis under the Hatch Act is fact-intensive because it requires scrutinizing the reasons for either act.

If the gag clause was issued with an explicitly political purpose (like silencing Cohen) then it violates the Hatch Act’s prohibition on use of government employees and resources to further partisan political activity. Similarly, if the considerations on how to handle Cohen’s reticence to sign the agreement was framed in explicitly political language or with a political goal, that would also violate the Hatch Act. However, proving these violations requires documentary evidence of political motivations that may not exist. Despite the highly suspicious fact pattern, no actor needed to document explicit political intent to violate Cohen’s Constitutional rights.

B. Corruption & Civil Remedies – 28 U.S.C. 1983

Official corruption is not a crime under the US Code.⁴⁴ In this case, the constitutional injury to Cohen was addressed by the habeas corpus petitions filed by Cohen’s lawyers and the ACLU.⁴⁵ These petitions successfully released Michael Cohen within two weeks of his wrongful detention. This short period of confinement means that Cohen will have a harder time proving he

was seriously injured by the violation of his constitutional rights. However, the damage to Cohen must be considered separately from the damage to the United States from the Trump Administration's corrupt abuse of civil rights.

Cohen and other private parties may sue the U.S. government for any injury they suffer from violation of civil rights. One statute permitting this kind of lawsuit is 28 U.S.C. 1983, which permits a civil action for the deprivation of fundamental rights. However, the cost of attorney fees to bring a 1983 action will likely outweigh recovery for damages from two weeks in jail that did not result in injury. Punitive damages (to punish the wrongdoer, in excess of damage caused) might make a lawsuit viable, but winning punitive damages would require showing Bureau of Prisons officials engaged in reckless or callously indifferent conduct (a high bar given the available evidence).⁴⁶ Therefore, the high cost of a lawsuit and low value of damages provides Cohen with little incentive to file a lawsuit.

The lack of significant injury resulting from Cohen's unlawful re-incarceration is a relief for Michael Cohen, but not for other people in similar situations. The resolution of Cohen's incarceration does not disincentivize official misconduct in the future. Legal reform efforts targeting official corruption must provide for investigations and consequences when government officials abuse their power in violation of fundamental rights.

Conclusion

The process that led to Michael Cohen's return to prison involved an unexplained departure from the routine parole process. This sends a clear message to individuals complicit in Donald Trump's illegal schemes. Stay quiet, loyal, and compliant with Trump's corrupt orders, and you will receive leniency or even a pardon.⁴⁷ Stray from the line, and Trump will lean on the criminal justice system to prevent transparency and silence dissent.

Troublingly, the law and remedies for a situation like this are weak. There is no law that prevents the President from directing the Department of Justice to intervene in a specific case, as may have occurred with Cohen. Rather, recent Presidents largely followed a norm of independence within the Department of Justice. Cohen's treatment reveals the need to replace unenforceable norms with legal standards that ensure the neutrality of Justice Department actions.

Michael Cohen was briefly a political prisoner under the Trump administration. After Cohen was released to home confinement due to medical risks, he was re-incarcerated because he refused to waive his First Amendment rights to political speech. These coercive actions are unacceptable in the United States of America. Cohen's treatment is a case study in political interference in the Justice System. This incident is ripe for investigation under the next administration.

¹ *Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations*, DEPARTMENT OF JUSTICE, Aug. 21, 2018 (available at: <https://www.justice.gov/usao-sdny/pr/michael-cohenpleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax>).

² Joe Palazzolo et al., *Donald Trump Played Central Role in Hush Payoffs to Stormy Daniels and Karen McDougal*, WALL STREET JOURNAL, Nov. 9, 2020 (available at: <https://www.wsj.com/articles/donald-trump-played-central-role-in-hush-payoffs-to-stormy-daniels-and-karen-mcdougal-1541786601>).

³ Andrew Prokop, *Michael Cohen's opening statement makes explosive claims about Trump, WikiLeaks, and more*, Vox, Feb. 27, 2019 (available at: <https://www.vox.com/2019/2/27/18242619/michael-cohen-opening-statement-trump-russia-mueller>).

⁴ Dustin Volz and Warren Strobel, *Senate Panel's Russia Probe Found Counterintelligence Risks in Trump's 2016 Campaign*, WALL STREET JOURNAL, Aug. 18, 2020 (available at: <https://www.wsj.com/articles/senate-intelligence-committee-releases-final-report-from-russia-investigation-11597758014>) (“The committee assesses that Trump did, in fact, speak with Stone about WikiLeaks and with members of his Campaign about Stone’s access to WikiLeaks on multiple occasions” which contradicts Trump’s written testimony provided to Special Counsel Robert Mueller. Collusion defined here as a ‘secret or illegal cooperation or conspiracy’).

⁵ William Rashbaum, *Why It Matters That Trump and Michael Cohen Had a Falling Out*, NEW YORK TIMES, Apr. 21, 2019 (available at: <https://www.nytimes.com/2019/04/21/us/politics/michael-cohen-donald-trump-history.html>).

⁶ William Cummings and Kevin Johnson, *Otisville: The federal camp in New York where Michael Cohen is serving 3-year sentence*, USA TODAY, May 6, 2019 (available at: <https://www.usatoday.com/story/news/politics/onpolitics/2019/05/06/michael-cohen-begin-3-year-sentence-federal-prison/1117314001/>).

⁷ Benjamin Weiser and Alan Feuer, *Judge Orders Cohen Released, Citing ‘Retaliation’ Over Tell-All Book*, NEW YORK TIMES, July 23, 2020 (available at: <https://www.nytimes.com/2020/07/23/nyregion/michael-cohen-trump-book.html>).

⁸ Kara Scannell, *Michael Cohen offers a glimpse of upcoming Trump book*, CNN, Aug. 13, 2020 (available at: <https://www.cnn.com/2020/08/13/politics/michael-cohen-book-cover/index.html>).

⁹ Kara Scannell, *Michael Cohen will be released from prison due to pandemic*, CNN, April 16, 2020 (available at: <https://www.cnn.com/2020/04/16/politics/michael-cohen-to-be-released-prison-coronavirus/index.html>).

¹⁰ Jonathan Stempel and Karen Freifeld, *Ex-Trump lawyer Cohen returned to prison for resisting home confinement conditions, prosecutors say*, REUTERS, Jul. 22, 2020 (available at: <https://www.reuters.com/article/us-usa-trump-cohen/ex-trump-lawyer-cohen-returned-to-prison-for-resisting-home-confinement-conditions-prosecutors-say-idUSKCN24N2WN>).

¹¹ *Who is Michael Cohen?*, CBS NEWS, Mar. 26, 2018 (available at: <https://www.cbsnews.com/news/michael-cohen-trump-personal-lawyer/>).

¹² Michael Falcone, *Donald Trump's Political ‘Pit Bull’: Meet Michael Cohen*, ABC NEWS, Apr. 15, 2011 (available at: <https://abcnews.go.com/Politics/donald-trumps-political-pit-bull-meet-michael-cohen/story?id=13386747>).

¹³ *Who is Michael Cohen?*, CBS NEWS, Mar. 26, 2018 (available at: <https://www.cbsnews.com/news/michael-cohen-trump-personal-lawyer/>).

¹⁴ Mark Berman, *Longtime Trump attorney says he made \$130,000 payment to Stormy Daniels with his money*, WASHINGTON POST, Feb. 14, 2018 (available at: <https://www.washingtonpost.com/news/post-nation/wp/2018/02/14/longtime-trump-attorney-says-he-made-130000-payment-to-stormy-daniels-with-his-money/>).

¹⁵ Geoffrey Lou Guray, *How Michael Cohen broke campaign finance law*, PBS NEWS HOUR, Dec. 12, 2018 (available at: <https://www.pbs.org/newshour/politics/how-michael-cohen-broke-campaign-finance-law>).

¹⁶ Matt Apuzzo, Maggie Haberman and Michael Schmidt, *Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model*, NEW YORK TIMES, Jul. 20, 2018 (available at: <https://www.nytimes.com/2018/07/20/us/politics/michael-cohen-trump-tape.html>).

¹⁷ Geoffrey Lou Guray, *How Michael Cohen broke campaign finance law*, PBS NEWS HOUR, Dec. 12, 2018 (available at: <https://www.pbs.org/newshour/politics/how-michael-cohen-broke-campaign-finance-law>).

¹⁸ Note that Cohen’s fellow RNC deputies, Louis DeJoy and Elliot Broidy, are likely to feature prominently in future reports. Broidy was subsequently convicted of similar campaign finance violations, while DeJoy is the current leader of the US Postal Service.

¹⁹ David Barrett et al., *Michael Cohen, Trump's former lawyer, pleads guilty to lying to Congress about Moscow project*, WASHINGTON POST, Nov. 29, 2018 (available at: https://www.washingtonpost.com/politics/michael-cohen-trumps-former-lawyer-pleads-guilty-to-lying-to-congress/2018/11/29/5fac986a-f3e0-11e8-bc79-68604ed88993_story.html).

²⁰ *Id.*

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- ²⁵ Senate Select Committee on Intelligence, *Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Volume 5: Counterintelligence Threats and Vulnerabilities*, SENATE REPORTS 116-XX (available at: https://www.intelligence.senate.gov/sites/default/files/documents/report_volume5.pdf).
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- ³⁰ William Cummings and Kevin Johnson, *Otisville: The federal camp in New York where Michael Cohen is serving 3-year sentence*, USA TODAY, May 6, 2019 (available at: <https://www.usatoday.com/story/news/politics/onpolitics/2019/05/06/michael-cohen-begin-3-year-sentence-federal-prison/1117314001/>).
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⁴² Michael Cohen (@MichaelCohen212), TWITTER, Sep. 1, 2020, https://twitter.com/MichaelCohen212/status/1300956925966913544?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet.

⁴³ Andy J. Semiotuk, *Use of White House For Citizenship Ceremony By Trump Campaign Sparks Criticism*, FORBES, Aug. 30, 2020 (available at: <https://www.forbes.com/sites/andyjsemotiuk/2020/08/30/use-of-white-house-for-citizenship-ceremony-by-trump-campaign-sparks-criticism/#6ff88569556d>).

⁴⁴ Ellen Pogdor, *Symposium: Corruption is not a crime*, SCOTUSBLOG, Sep. 25, 2019, (available at: <https://www.scotusblog.com/2019/09/symposium-corruption-is-not-a-crime/>).

⁴⁵ Isabel Togoh, *ACLU Files Legal Challenge Claiming Michael Cohen was Sent Back to Prison in Retaliation for His Tell-All Book on Trump*, FORBES, Jul. 21, 2020 (available at: <https://www.forbes.com/sites/isabeltogoh/2020/07/21/aclu-files-legal-challenge-claiming-michael-cohen-was-sent-back-to-prison-in-retaliation-for-his-tell-all-book-on-trump/#212034f4339d>).

⁴⁶ See *Smith v. Wade*, 461 U.S. 30 (1983).

⁴⁷ Justin Wise, *Former DHS Official says Trump offered pardons for carrying out illegal policies*, THE HILL, Aug. 25, 2020 (available at: <https://thehill.com/homenews/administration/513588-former-dhs-official-says-trump-offered-pardons-for-carrying-out>).