TESTIMONY OF

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Hearing on the Weaponization of the Federal Government Manhattan District Attorney's Office

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that works to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment.

Chairman Jordan, Ranking Member Nadler, and members of the Committee:

Introduction

As we consider the topic of today's hearing, I would urge everyone to consider and follow the instructions given by Judge Merchan to the jury in *New York v. Trump*:

> "You must set aside any personal opinions or bias you might have in favor of or against the Defendant, and you must not allow any such opinions to influence your verdict."

My interest in this case, and in testifying here today, stems from having dedicated my career to seeing campaign finance laws properly interpreted, enforced, and kept within the boundaries of the Constitution, to justice and the rule of law, and to the defense of democratic institutions, norms, and values. No one should assume from what I say here today anything about my views on the presidential elections of 2016 or 2020, or of the candidates and campaigns in this year's race. Except as I specifically explain in my testimony, no one should draw any other conclusions regarding my views on any of the other actions of the participants in this trial, whether the defendant, the prosecutors, the witnesses, or the judge.

Furthermore, I am not here to testify about the propriety of a state district attorney bringing a case in state court that necessarily requires him to prove a violation of federal law. I am testifying about the substance of the Federal Election Campaign Act ("FECA"), and whether alleged violations of that Act support the verdict in the trial, the theory of the prosecutors, and the instructions of Judge Merchan. I believe the answer to that is clearly "no." Further, I believe that allowing this prosecution to go forward, and the ultimate jury decision, threaten the enforcement procedures established by Congress under the FECA and stretch the meaning of the statute in such a way as to threaten due process of law.

Before I explain why, I want to quickly clarify one issue. It has been widely reported that Judge Merchan refused to let me testify as an expert witness at the trial.[1] This is not quite correct. The judge would have allowed me to testify. However, it was clear from his pre-trial rulings that such testimony would be limited to little, or perhaps nothing, more than reading portions of the statute to the jury, and given those rulings, the defense chose not to call me to the stand. It is fair to say that Judge Merchan refused to allow any meaningful testimony that would have contextualized the charges against Mr. Trump and provided valuable factual information to the jury, and I believe his restrictive rulings were erroneous. In my testimony today, I will at times draw legal conclusions about the law. Such legal conclusions go beyond what I would have testified to. My testimony would not have been instructing the jury on the law of the case—but as I will explain, it would have offered relevant context that, I believe, would quite likely have led the jury to a proper, legally correct reading of the law and a "not guilty" verdict.

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[1] I had been engaged by Mr. Trump's defense team as a potential expert witness. This engagement was in my personal capacity, unrelated to the Institute for Free Speech.

Prosecution Theory of the Case in New York v. Trump

Mr. Trump was charged with violating New York Penal Law 175.10, "falsifying business records ... when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof."

What, then, was the underlying crime that was "commit[ted]" or "conceal[ed]?" Although the indictment never so says, at some point the Manhattan District Attorney's office seems to have concluded that that underlying crime was a violation of New York Election Law 17-152, which provides, "Any two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor."[2]

This merely begs the question, what "unlawful means" was used to promote or prevent the election" of a person? Although hinted at in some pre-trial proceedings, only during the trial itself did it truly become clear that the prosecution intended to allege that Mr. Trump had sought to conceal violations of the Federal Election Campaign Act.

In his opening statement at trial, Senior Prosecutor Matthew Colangelo finally laid bare the prosecution theory of the case. In the run-up to the 2016 presidential election, a pornographic "actress" using the screen name Stormy Daniels was threatening to make public allegations of a one-night liaison with Mr. Trump in 2006. According to Mr. Colangelo, Trump and the campaign "desperately" wanted to keep the story out of the public eye; the Daniels allegations would have been "devastating" to the campaign; "His [Mr. Trump's] hope was to delay it [public revelation of the allegations] until after the election." Therefore, according to Mr. Colangelo, Michael Cohen, then an attorney for the Trump organization, arranged a payment from his (Cohen's) personal funds to Ms. Daniels in exchange for her signing a non-disclosure agreement ("NDA"), with the understanding that he would be reimbursed by Mr. Trump. This constituted, according to Mr. Colangelo, an "illegal payment to Ms. Daniels." "It was election fraud, pure and simple." (Trial Transcript, p. 867, 874, 875, 882, 877; see transcript generally p. 858-887). Thus, Mr. Colangelo was necessarily accusing the Trump campaign of violating the Federal Election Campaign Act ("FECA").

There are, in these facts, two provisions of the FECA that could arguably have been violated—receiving a contribution in excess of the legal limit, and improperly reporting contributions or expenditures. Note further that in the daisy chain of "unlawful" behaviors necessary to support the prosecution's theory, it is not enough that there be a technical violation of FECA. Rather, in order to violate N.Y. Election Law 17-152, which is necessary to prove a felony violation of New York Penal Law 175.10, the behavior had to have been part of a conspiracy

[2] In fact, the indictment not only does not cite or quote this law, it never even uses the term "election." Supreme Court of the State of New York, Indictment 71543, April 4, 2023. The accompanying "Statement of Facts" does mention attempts to influence an election, but never mentions, by name or citation, the specific statute allegedly violated. Statement of Facts, Indictment 71543.

to promote or prevent the election of a candidate. Mr. Trump and any co-conspirators would have had to be conspiring to use “unlawful” means to influence the election.

In fact, Donald Trump and/or the Trump for President campaign had plenty of cash to pay for the Daniels non-disclosure agreement on October 27, 2016. They did not need money in order to pay Daniels. Further, even assuming the expense was a campaign expenditure, no public disclosure of the expense would have been legally required before the election. As a practical matter then, having Michael Cohen front the money for a non-disclosure agreement between Mr. Trump and Stormy Daniels could have had no influence on the 2016 election. This undercuts the entire theory of the case offered by the prosecution.

Further—and to me the important principle of campaign finance law—is that any payments to Daniels were not, and should not be, considered campaign expenditures in the first instance, and thus cannot support a finding of a FECA violation.

Possible Reporting Violations Under FECA

I begin my substantive analysis of potential FECA violations by looking at reporting. For this purpose only, I will assume that the payments to Ms. Daniels constituted campaign “expenditures” under FECA (I will explain later why they should not be considered “expenditures.”)

Remember that the prosecution’s theory, in the words of Prosecutor Colangelo, is that Mr. Trump and his campaign “desperately” wanted to keep the payments to Daniels private “until after the election.” (At trial, the prosecutors elicited testimony from Michael Cohen that, “what he [Trump] had said to me is: What I want you to do is just push it out as long as you can. Just get past the election,” and “during my conversations with Mr. Trump, it was again about delaying the deal and trying to push it past the election which was upcoming.” (Trial Trans. at 3390, 3395). For now, I will assume the truth of Mr. Cohen’s testimony, since it is at the core of the prosecution’s theory that the goal was to influence the election.

FECA requires presidential campaigns to report to the Federal Election Commission (“FEC”) monthly all expenditures to a recipient aggregating in excess of $200. These reports are filed on the 20th day of each month, reporting on the previous month. Thus, the September report of the Trump campaign was filed on September 20, 2016, covering expenditures made through August of 2016. The October report was filed on October 20, covering expenditures made through the end of September.

At this point, the FEC’s reporting schedule changes. Rather than wait until November 20 to file a report for October expenditures, the law requires campaigns to file a “Pre-Election Report,” known colloquially in the business as a “20-day report” because it reports expenditures made up to the point 20 days before the election. This report is due 8 days after the reporting cut-off. That means that in 2016, with the election on November 8, the Pre-Election report covered expenditures made through October 19, and was filed on October 27. The next report due is then a “Post-Election Report.” This report covers expenditures made after the cut-off date for reporting in the Pre-Election Report, up to 20 days after the election (campaigns, of course, typically

continue to pay bills due after the election). In 2016, the Post-Election Report covered expenditures made from October 21 through November 28, and was due on December 8, one month after the election. The payment to Daniels was made on October 27, 2016.

To summarize the timeline:

1. October 27, 2016: Pre-Election Report filed, covering expenditures through October 19.
2. October 27, 2016: Payment delivered to Daniels' attorney. (Trial Trans. p. 3442-43)
3. October 28, 2016: Non-Disclosure Agreement executed. (Trial Trans. p. 3446-47, 3449-50).
4. November 8, 2016: Election Day.
5. December 8, 2016: Post-Election Report filed, covering expenditures made from October 20 through November 20. First date to report expenditures made on October 27.

In other words, assuming the payment to Daniels was required to be reported as a campaign expenditure, it would not have been reported until *after* the election. But according to the prosecution's star witness, and the prosecutors themselves, the goal of the "conspiracy" was to hide the expenditure until after the election. So any "conspiracy," if that is what it was, to prevent public disclosure of the payment "until after the election" makes no sense. Under no circumstances would the Trump campaign have been required to report the expenditure before the election. Any violation of FECA for failure to report a campaign expenditure could not have influenced the election, since the expenditures at issue would not have been required to be reported until after the election.

This completely undercuts the prosecution's narrative of the case—but this was information that was denied the jury by Judge Merchan.

Since the verdict, it has been suggested by Adav Noti, whom the prosecution proposed to use as a rebuttal expert had I been allowed to testify to such matters, that my analysis fails to consider that, in the last 20 days before the election, campaigns are required to report contributions in excess of $1000 within 48 hours. (Adav Noti, Post on X, https://x.com/AdavNoti/status/1797681535665213902, June 3, 2024). But continuing to assume, for the sake of argument, that Cohen's fronting the money to Daniels constituted a campaign contribution, this observation from Mr. Noti, a former Associate General Counsel at the FEC, misses the point: The payments to Daniels would not have been disclosed prior to the election. All that would have been reported was the contribution from Cohen—not what it was spent for. But according to both the prosecutors and to Cohen, it was the payments to Daniels—not the fact that Cohen might have contributed to his boss's presidential campaign—that the campaign sought to hide. And the purpose of any Cohen "contribution" would not have been required to be disclosed prior to the election.

Thus, any theory that the Trump campaign N.Y. Election Law 17-152 by violating FECA reporting requirements in order to "delay [public disclosure] until after the election" simply makes no sense and, in fact, the reporting schedule makes the prosecution argument look foolish.

The Cohen Loan

Context of a "Conspiracy:" Did the Cohen Loan Actually Influence the Election?

This takes us to the second potential FECA violation: Whether Cohen's fronting of the money to pay Daniels was an illegal campaign contribution and whether, as a practical matter, it influenced the election, or even could have been reasonably intended to influence the election.

In 2016, the legal limit on how much Michael Cohen could contribute to a campaign was $2700. The $130,000 Cohen put up to pay Daniels far exceeds that amount, and, additionally, was not reported to the FEC, as would be required by law for any campaign contribution exceeding $200. The FECA defines a campaign "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. §30101 (9)(A). The prosecution argued that the Trump team hoped to "influence the election" by paying for the Daniels non-disclosure agreement, thus making the payment an "expenditure" under the law. And although the campaign never saw the money, because the prosecution alleges that because the payment was made "in cooperation, consultation, or concert" with candidate Trump, it should be considered a campaign contribution. 52 U.S.C. §30116 (a)(7)(B)(i).

Once again, context is crucial to truly understanding the case. First, while Mr. Cohen was subject to a $2700 limit on contributing to the campaign, the law allowed Mr. Trump to contribute an unlimited amount to his own campaign. And in fact, by the time the Daniels payment was made, Mr. Trump had already contributed over $60 million to his own campaign. Had Mr. Trump merely paid Daniels directly, and reported it as a campaign contribution, it would not have raised an eyebrow.

Additionally, according to Mr. Cohen's own testimony, it was always understood that he would be reimbursed for the Daniels non-disclosure agreement payment. While the law considers a loan that is not made in the ordinary course of business to be a "contribution," it is again context here that matters—this was not a cash-strapped campaign desperately in need of a final boost in spending. The campaign had almost $16 million cash on hand on October 19, 2016, the cutoff date for its Pre-Election Report, and over $7.6 million cash on hand on November 28, the cut-off date for its Post-Election Report. It still had over $7.6 million cash on hand at the end of calendar 2016, nearly two months after the election. Coming up with $130,000 to purchase an NDA from Daniels was not a problem for the Trump campaign.

To put two and two together, then, it is clear that Mr. Trump and/or the Trump for President campaign had plenty of cash to pay for the Daniels non-disclosure agreement on October 27, 2016, and further, that no public disclosure of the payment to Daniels would have been legally required before the election. As a practical matter then, having Mr. Cohen front the settlement money could have had no influence on the 2016 election. The Prosecution's entire theory of the case makes no real sense.

Why, then, was Mr. Cohen involved at all? His own testimony was that Mr. Trump simply did not want his name on a check to Daniels—he preferred to reimburse someone else. Trial Trans.

at 3418, 3419-20, 3424. This further suggests that having Mr. Cohen front the cash was not part of any "election conspiracy" but based more on privacy or other concerns. Given that Trump had money to pay, and that had he paid directly, and reported it as a campaign expenditure, there would still have been no public disclosure before the election, this further undercuts the prosecution's theory of the case.

This basic contextual information, however, did not reach the jury.

Was the Cohen Advance a "Contribution" at All?

Thus far, I have assumed that the payment to Daniels constituted a campaign expenditure, and, therefore, that the Cohen advance that was used to make the payment in the first instance constituted a campaign contribution. In fact, I believe both such characterizations are incorrect as a matter of law.

A payment by a third party is treated as a contribution if made in consultation, cooperation, or concert with a candidate or campaign. In common parlance, this is known as a "coordinated expenditure." To be a "coordinated expenditure," such a third-party payment must first meet the definition of "expenditure." *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986).

As noted above, the statutory definition of "expenditure" is any payment "for the purpose of influencing any election for Federal office." The prosecution emphasized repeatedly that Mr. Cohen's advance of funds was an illegal contribution because it was made, at least in part, "for the purpose of influencing the election." Judge Merchan's instructions to the jury also emphasized that bare-bones reading of the statutory language. In fact, however, the sweep of the FECA is not nearly so broad as this language seems to suggest.

Most obviously, the Supreme Court has long recognized that while anything a candidate's campaign spends can be presumed to be "for the purpose of influencing an election," for a payment by a third party to qualify as an "expenditure" under the statute it must meet an objective test: it must "expressly advocate" the election or defeat of a candidate, using explicit calls to action such as "vote for," "vote against," "support," "defeat," etc. *See Buckley v. Valeo,* 424 U.S. 1 (1976).

Furthermore, we know that there are a great many things that candidates and their campaigns spend money on that are "for the purpose of influencing an election," but yet are not "expenditures" under the FECA.

Let's start with an easy, high-profile example to illustrate the point. In 1999, Bill and Hillary Clinton purchased a home in Chappaqua, New York. It was well understood at the time, and still today, that this was done in part so that Hillary Clinton could run for the U.S. Senate from New York. But though the home was, therefore, purchased with the purpose of influencing an election, it was not, I think we would all agree, a campaign expense. And, in fact, the FEC rejected complaints to that effect. *See* MUR 4960 (Hillary Rodham Clinton for U.S. Senate, 2000) (assistance with moving expenses not a campaign contribution); MUR 4926 (Hillary Rodham Clinton for U.S. Senate, 2000) (provision of collateral for home loan by campaign business

associate of candidate not a campaign expenditure); MUR 4924 (Hillary Rodham Clinton, 2000) (same); *see also* MUR 4944 (PNC Mortgage Corp., 2001) (loan to purchase home, and favorable loan terms, not a campaign contribution).

Among many exceptions to the language that any payment for "the purpose of influencing an election" meets the statutory definition of "expenditure" under FECA is what is called "personal use." The FECA specifically prohibits spending campaign funds for any "personal use." 52 U.S.C. § 30114 (b). I am sure that all the members of this Committee are familiar with this provision, at least in a general sense, because it is what prohibits you from spending your campaign funds on any obligation that would exist irrespective of whether you were a candidate or officeholder. As the FEC has specifically explained, this removes such expenses from the definition of an "expenditure" under FECA: "Any use of funds that would be personal use ... will not be considered an expenditure." 60 FR at 7870, Explanation and Justification of Final Rules, Personal Use of Campaign Funds.

The law provides a number of examples of personal expenses that are specifically prohibited from being paid by the campaign. These include country club memberships (even though the purpose of the membership may be to use it for campaign fundraising), clothing purchases (even though a new wardrobe may be for the purpose of influencing the campaign by improving the candidate's appearance), and health club dues (even though the membership may be for the purpose of helping the candidate lose weight and improve stamina to look better and have more energy while campaigning). Note that it is irrelevant that the purpose of the expenditure was to influence the campaign, or even that the candidate or campaign would not otherwise have made the payment.

Closer to home, then, a candidate for office could not use campaign funds to hire a lawyer to seal divorce records simply because he would like to keep that information, which may be personally embarrassing and therefore harmful to his candidacy, from the public. *See* Federal Election Commission, Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862 (Feb. 9, 1995) ("legal expenses will not be treated as though they are campaign or officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status.").

The statutory language of FECA makes clear that it is the source of the obligation, not the intention of the spender or candidate, that controls: "a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 52 U.S.C. 30114(b)(2). The FEC's regulations, naturally, follow the statute: "Personal use means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 C.F.R. 113.1(g). As the FEC further explains, "if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use." Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7863-64 (Feb. 9, 1995)

For example, in 2007 Senator Larry Craig, a candidate for re-election, was arrested for disorderly conduct in a Minneapolis-St. Paul Airport restroom. After initially pleading guilty and promising to resign his seat, Senator Craig changed his mind and tried to retain his seat. As part of this effort, he then used his campaign funds to pay legal fees in an attempt to withdraw his guilty plea. Even though withdrawing the plea would clearly have benefited Senator Craig's political prospects and was, by Craig's own admission, the primary reason for making the payments, the FEC voted 5-0 to find that payment of the legal expenses with campaign funds was illegal personal use. The reason was that the source of the obligation—his behavior and arrest—would have existed irrespective of whether or not he was a candidate. Craig refused to conciliate with the FEC and remedy the violation, so the FEC sued Craig and his campaign committee to enforce the law. The Court of Appeals, in a unanimous opinion authored by then-Judge Merrick Garland, affirmed the lower court's ruling for the FEC and specifically rejected a standard, proposed by Senator Craig, based on whether or not the obligation was "reasonably relate[d]" to the campaign. *Federal Election Commission v. Craig*, 816 F.3d 829, 839-840 (D.C. Cir. 2016) (opinion by Garland, C.J.).

The FEC's explanation of the relation between "personal use" and the definition of "expenditure" bears repeating: under 11 C.F.R. 113.1(g), "any use of funds that would be personal use ... will not be considered an expenditure." 60 FR at 7870, Explanation and Justification of Final Rules, Personal Use of Campaign Funds. The standard to be applied is an objective one based on the source of the obligation, and not on whether any benefits were primarily, or at all, related to a campaign for office. Id. at 7863.

Of course, there were other reasons that Mr. Trump might have wanted to pay for an NDA with Daniels—marital harmony, see testimony of Michael Cohen, Trial Trans. at 3390-91, protection of his son, and the protection of the commercial viability of the Trump name (remember, by late October he was not at all expected to win and take public office), among other reasons. Indeed, history shows that this was the case. Mr. Cohen testified that in 2011, long before he became a candidate for office, in response to earlier threats by Daniels to publicize her allegations, Trump had instructed him to "to care of it." Mr. Cohen did so, including with threats to sue two online publications if they did not take down the story. He eventually reported back to Mr. Trump that the matter was "under control." Trial Transcript, p. 3383, 3388. So, even under the "primarily related" test rejected by the FEC, it's not clear that the payment would be a campaign expenditure. But it certainly doesn't pass the irrespective test the Commission adopted. And while Mr. Trump did have other reasons to make the payment, in the end, even that doesn't matter: the irrespective test, as set forth in both the statute and the FEC regulations, goes not to the subjective intent of the spender as to why the payment was made, but to whether the behavior creating the obligation came from the campaign or the officeholder's official duties.

In Mr. Trump's case, any obligation to pay Daniels for a non-disclosure agreement was not created by his candidacy for office, but by behavior alleged to have occurred a decade prior, in 2006. It certainly appears to be the case that Daniels leveraged Mr. Trump's candidacy in an attempt to maximum her settlement payment, and it may even be true that Mr. Trump agreed to any payment at least in part, and perhaps primarily, in an effort to keep the matter from going public before the election—as both the prosecution and Mr. Cohen claimed, although as we have seen that theory makes no sense. But the *obligation* was not caused by his candidacy.

To further illustrate the difference, let us consider another hypothetical that could easily be applicable to a candidate such as Mr. Trump: A successful business owner decides to run for Congress. There is pending against the business a lawsuit alleging sexual harassment against a manager in the firm. The candidate's lawyers have advised her that the claim is exceptionally weak, and advised her to take the case to trial—she herself does not believe the allegations. Nevertheless, she instructs the company's lawyers to settle the case with a cash payment and non-disclosure agreement, responding to their objections with, "I know the case is bogus, but I can't have reporters trying to make hay out of these charges while I'm running for office. It would be devastating to the campaign." The settlement payment and NDA would clearly be made for the purpose of "influencing an election"—indeed, that would be its only purpose—but because the obligation was not created by the candidacy, the company could not use campaign funds to settle the suit. At least I hope not!

The prohibition on personal use of campaign funds is a crucial part of FECA—arguably, *the* crucial part. Remember that at the time FECA was passed, officeholders and candidates were legally free to simply pocket "campaign contributions." I often hear cynics say that campaign contributions are a form of bribery. But that can't be right. We know that there is a difference because every state allows campaign contributions, and every state outlaws bribes. The same is true in democracies around the world, even in those with far less protection for the free speech aspects of campaign spending and contributions. And every one of you on this committee accepts campaign contributions but, to my knowledge, rejects bribes.

A key difference—perhaps the key difference—between bribes and campaign contributions is the personal use doctrine. Campaign contributions are used only to help the candidate gain election. Bribes, on the other hand, can be used to buy expensive watches, gifts, and gold bars, to line one's pockets, and to live beyond one's means. So, hiring a campaign manager and campaign staff, renting campaign office space, buying advertising, polling the electorate, and hosting rallies—these are things you only do if you are running for office. Buying better clothes, settling lawsuits against your business, paying to seal divorce records, and buying a gym or country club membership are things a person might decide to do because he or she is running for office, but they are not obligations that exist solely because the person is running for office. And, thus, under the law, they are properly considered personal use, and cannot be paid with campaign funds.

There is little doubt in my mind that had Mr. Trump instructed Daniels to be paid with campaign funds, his political adversaries would have filed complaints with the FEC accusing him of converting campaign funds to personal use. Perhaps some ambitious local DA—possibly even in Manhattan—would have found some way to ratchet that allegation into a charge that Mr. Trump had violated some local or state law.

Not only was the jury denied the type of context that might have helped it with its decision, such as information on the timeline for public disclosure of campaign contributions, but the only instructions it received on the FECA were clearly misleading as to the scope of the Act. Judge Merchan instructed the jury only that, "The terms CONTRIBUTION and EXPENDITURE include anything of value, including any purchase, payment, loan, or advance, made by any person for the purpose of influencing any election for federal office." (Jury Instructions, p. 32) (Caps in original).

No mention was made of the personal use exception, and the jury was provided no context or background on standard practices either in political campaigns or FEC enforcement.

While denying the jury, either through expert testimony or proper instructions, information it ought to have had, Judge Merchan compounded his error by repeatedly allowing Michael Cohen (and prosecutors) to describe Mr. Cohen's conduct as violating the FECA. Although he correctly admonished the jury that Mr. Cohen's guilty plea could not be imputed to Trump, this is a bit like asking members of this committee not to think of a yellow Volkswagen minibus. Once you've received that admonishment, it's hard to think of anything else. At the same time, the judge prohibited any testimony that both the U.S. Department of Justice and the FEC had declined to pursue charges against Mr. Trump or the Trump campaign over the Daniels payment and Cohen's fronting of the NDA. He would not even allow testimony regarding the FEC's role in the enforcement process, which, without ever discussing the Daniels payment, might have gotten some jurors to wonder just what the case was doing in New York state court.

Finally, in concluding this analysis, I want to take note of one other question about my analysis. It has been suggested that even if the payment to Daniels was otherwise not a campaign expenditure, but personal use, and thus could not be paid with campaign funds, Cohen's advance of the settlement funds might still have been an illegal contribution because in some circumstances, FEC regulations treat payment by a third party of a candidate's personal expenses, including through loans, as if they were campaign contributions. *See* Rick Pildes, X, https://x.com/RickPildes/status/1797254317742735362 (June 2, 2024); 11 C.F.R. 113.1(g)(6). In other words, goes the argument, if the payment to Daniels was personal, but paid by Cohen, it might still counts as a campaign contribution, still far in excess of the legal limit. Is this the prosecution's ace in the hole? Well, no.

The regulation provides:

> Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under subpart B of part 100 to the candidate unless the payment would have been made irrespective of the candidacy."

In this case, there is good reason to believe that the payments would have been made "irrespective of the candidacy." Why? Because Mr. Cohen said so.

Mr. Cohen testified that in 2011 he had been involved in keeping the Daniels story under wraps, reporting back to Trump that he had it "under control." Trial Trans. at p. 3388. Would Mr. Cohen even have advanced the payment to Daniels if Trump were not running for office? Almost certainly. For, as Mr. Cohen himself put it, "I was doing everything that I could and more in order to protect my boss, which was something I had done for a long time." Trial Trans. at p. 3420. More generally, he testified at length that for years he had lied, bullied people, renegotiated agreements, threatened to sue, and otherwise done "what was needed to accomplish the task." Recounting one such incident, Mr. Cohen made clear, "the only thing that was on my mind was to accomplish the task to make [Donald Trump] happy." Trial Trans. p. 3271-72, 3279, 3280. At the time that he

negotiated and advanced funds for the Daniels NDA he was also, he stated, concerned about the effect of public allegations on Melania Trump. Trial Trans. at p. 3390-91. In fact, as late as February 2018, Mr. Cohen wrote, "I will always protect President Trump." Trans. at p. 3571.

Beyond these factual issues, there is the basic history of 11 C.F.R. 113.1(g)(6). The regulation exists to prevent a donor from essentially paying a candidate to run for office. The idea is that because it is personal use for the campaign to pay such expenses, a donor should not be allowed to pay them directly. It is not at all clear that the FEC's regulation here is permissible under the statute, which contains no such prohibition. But even if it is, the purpose of the regulation is to prevent corruption that comes from the payment of personal expenses—essentially, bribes. In this case, there was no question of corruption. Trump did not need the money to cover his living expenses while campaigning. In fact, the transaction cost him a considerable amount, given the terms of repayment. And the idea that Mr. Cohen was paying Mr. Trump's living expenses as part of a conspiracy to illegally influence the 2016 presidential election is, well, laughable. Trump was the financial benefactor, not the financial supplicant.

Given that, there is no question in my mind that had the issue been put to the FEC in these terms, even if the Commission were to conclude that Cohen's loan was, technically, a contribution, the Commission would, at most, have issued a letter of "admonishment," perhaps with a small ($1000?) fine. More likely, it would have dismissed the matter either as an exercise of prosecutorial discretion, or with a finding of no violation. And as we know—but the jury did not—the FEC did dismiss a complaint against Mr. Trump over the Daniels NDA payment.

Which leads us to a final, important fact: The prosecution never raised the argument that FEC regulations might prohibit such payments, even as a back-up to the basic theory that the payment was a campaign expense. I suspect that the reason for this is that the prosecution definitely did not want the jury to know about the personal use exception to the definition of "expenditure" because, as we have seen, the personal use exception starts to make the prosecution's whole theory of the case fall apart. It would likely have opened the door to introducing the fact that the FEC had dismissed a complaint against Mr. Trump over this very matter, a fact which the prosecution desperately wanted to keep hidden. And frankly, the idea that Mr. Trump needed Michael Cohen to help him out with personal expenses would have been laughed out of court.

To return to the larger issue, the jury was not instructed on the personal use doctrine at all. The only oblique reference to the doctrines was actually made in such a way as to imply that it disfavored any defense by Mr. Trump. Judge Merchan's instruction here read:

> Under federal law, a third party's payment of a candidate's expenses is deemed to be a contribution to the candidate unless the payment would have been made irrespective of the candidacy. If the payment would have been made even in the absence of the candidacy, the payment should not be treated as a contribution.

Jury Instructions at 32. Note again that this confusing language does not track the statute, which provides that a payment is personal use (that is, not a campaign expenditure), "if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person." By focusing on the reason for the "payment" rather than, as the statute and the regulations require, the source of

the obligation, and ignoring the FEC's explanation of its rules published in the Federal Register, the judge changed the focus of inquiry from the objective source of the obligation to the subjective intent of the spender.

Conclusion

In my opinion, the campaign finance aspects of the trial in New York were abused by the prosecutors and horribly mismanaged by the trial judge. Judge Merchan's instructions to the jury were incorrect, mainly through the omission of relevant portions of the statute and misstating the basis for personal use. Further, even as Judge Merchan sharply limited my potential testimony based on fears that I might testify as to what the law is (as opposed to how the campaign finance system and FEC work), he allowed the prosecutors and Mr. Cohen to incorrectly "educate" the jury on the meaning of the law, repeatedly allowing them to state as facts that certain actions and payments violated the law. But the jury was denied the context of how FEC reporting and enforcement work, and how campaigns and candidates in fact account for expenditures that might constitute "personal use." Such information could only have come through expert testimony.

The decisions of the prosecutors and Judge Merchan place in danger the entire enforcement scheme designed by Congress when it passed the FECA. Congress feared partisan enforcement of campaign finance law. Senator Alan Cranston, a supporter of the law implored Congress not to "allow the FEC to become a tool for harassment by future imperial Presidents" like Richard Nixon. FEC, *Legislative History of Federal Election Campaign Act Amendments of 1976*, at 88–89 (1977), available at https://perma.cc/EQ9C-TP3M.

If this verdict stands, there is nothing to prevent any (or every) state from passing a law such as New York Election Law 17-152. Such a law could then be used to prosecute federal candidates and officeholders on the theory that they had influenced an election through unlawful means. Those means could include alleged violations of FECA for which the defendants—maybe one of you—had never been found to have violated, and indeed that neither the DOJ nor the FEC would pursue, or even consider a violation of the FECA. And as in New York, this can be done by partisan elected judges, in venues chosen by prosecutors for their hostility to the targeted defendant. That is not a world anyone should want.

I hope this testimony has been helpful in sorting through the campaign finance issues that were so central to, and so mishandled in, *New York v. Trump*. I am pleased to take any questions you may have.