

Despite protestations, prosecution of Donald Trump for violating federal election law well-grounded: Mark R. Brown

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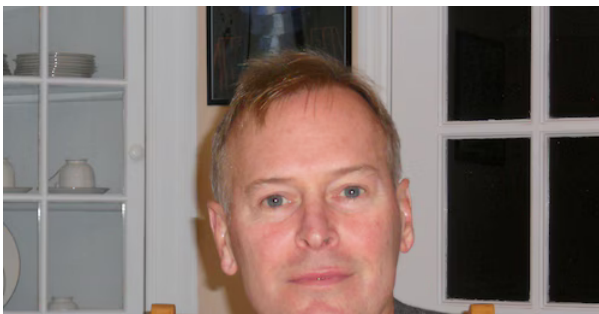
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By

- [Guest Columnist, cleveland.com](#)

COLUMBUS, Ohio -- Donald Trump's New York [sentencing date](#) is two weeks away. Trump was convicted of falsifying his business records in order to hide hush money paid to Stormy Daniels by his lawyer Michael Cohen before the 2016 election. Falsifying business records is a misdemeanor under [New York law](#), but when perpetrated to conceal another crime rises to a felony. Because Trump's third-party payment violated the Federal Election Campaign Act, falsifying his business records to cover it up was a felony under New York law.

Thirty-four felonies to be exact.





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Trump recently again sought to [delay sentencing](#) and [remove his case](#) (once again [unsuccessfully](#)) to federal court. He primarily relies on the Supreme Court's [stunning immunity decision \(handed down on July 1\)](#), hoping that it will win him a new trial. [Republicans in Congress](#), meanwhile, have begun an “investigation” of Trump’s trial and conviction. Armed with the [testimony](#) of Professor Bradley Smith, a former member of the Federal Election Commission, they have set out to prove that Trump could not have violated the FECA.

Smith claims that because Trump’s reporting of Cohen’s illegal payment would not have occurred until after election day, “[a]ny violation of the FECA for failure to report a campaign expenditure could not have influenced the election.” Smith then claims that because Trump’s failure to properly report the payment could not have influenced the election, the FECA could not have been violated.

Smith further asserts that because the mega-rich Trump could have easily paid Daniels himself without reporting anything, “having Mr. Cohen front the settlement money could have had no influence on the 2016 election.” All of this, Smith argues, “makes the prosecution argument look foolish,” and “stretch[es] the meaning of the [FECA] in such a way as to threaten due process of law.”

Smith’s points are misleading, confusing and often incorrect. The FECA places limits (\$2,700 in 2016) on how much individuals may legally contribute to federal campaigns, and Cohen’s payment of \$130,000 to Daniels plainly exceeded this limit. If coordinated with Trump’s campaign

and intended to influence the election, Cohen's payment constituted an illegal contribution to the Trump campaign under the FECA.

Not only was the payment illegal, so was Trump's subsequent failure to report it. This additional reporting violation, however, was not dependent on any intent to influence an election. Regardless of whether Trump's failure to report Cohen's payment was intended to influence the election, it violated the FECA. Smith's argument is irrelevant.

Smith is also incorrect about the need for effective influence. All that is needed is an intent to influence an election. Whether Cohen's payment "could have had no influence on the 2016 election," as Smith claims, is also irrelevant.

Smith further claimed in his testimony to Congress that because a candidate is precluded by the FECA from putting campaign funds to "personal use," Cohen's doing it somehow was insulated from the FECA's limits. Had Trump paid Daniels himself using campaign cash, Smith asserted, Trump's payment could have been for a "personal use." Having Cohen do it then, Smith argues, could not have been for the campaign, either.

Had Trump done it that way, however, his payment to Daniels would still have violated the FECA. Using campaign money for "personal use" is illegal. Further, federal law (11 C.F.R. [113.1\(g\)\(7\)](#)) expressly states that using third parties (like Cohen) to make coordinated payments that are intended to influence elections are still covered by the FECA

"[n]otwithstanding that the use of funds for a particular expense would be a personal use."

Regardless of whether Trump could have hypothetically paid Daniels himself and avoided violating the FECA, he did not. Cohen made the payment; it was coordinated with Trump; they both intended to influence

the election; the FECA was violated. QED.

Far from looking foolish and threatening due process, as Smith claimed before Congress, Trump's prosecution and conviction are well-grounded in the FECA.

Mark R. Brown holds the Newton D. Baker/Baker & Hostetler Chair at Capital University Law School. He has represented numerous third-party candidates in ballot-access matters, including representing Gary Johnson in 2012 when Johnson was disqualified in Michigan, and Ralph Nader in Ohio when Nader was disqualified in 2004, but has no connection with any candidate running in the 2024 presidential election.

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