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Abstract

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On Jan. 12, the *Wall Street Journal* broke the story that Cohen, one of Donald Trump's personal lawyers, had paid Daniels [npr.org] - or arranged for Daniels to be paid -- \$130,000 for her silence over an alleged affair she once had with the president. In a political climate jaded by the sexual shenanigans of politicians, many Americans were tempted to ask, "So what?"

Because, as they like to say in high-stakes poker, the Daniels affair represents a whole new opening. [*excerpt*]

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By [Guest Editorial](#)

By **Allen C. Guelzo**

Stormy Daniels would probably have never been much more than a name in the catalog of porn-movie stars had it not been for Michael Cohen.

On Jan. 12, the *Wall Street Journal* broke the story that Cohen, one of Donald Trump's personal lawyers, had [paid Daniels \[npr.org\]](#) - or arranged for Daniels to be paid -- \$130,000 for her silence over an alleged affair she once had with the president. In a political climate jaded by the sexual shenanigans of politicians, many Americans were tempted to ask, "So what?"

Because, as they like to say in high-stakes poker, the Daniels affair represents a whole new opening.

In the nearly year-long investigation by Robert Mueller into the Trump campaign's electoral "collusion" with Russian interests, little has emerged that connects Trump with "collusion."

Last week's leak to the *New York Times* of [forty-nine questions](#) Mueller would like to ask the president looked less like a criminal inquiry and more like a television interview, filled with questions posed as *what was your opinion* and *what did you think* and *what did you mean*.

And federal judge T.S. Ellis's [sharp rebuke](#) to Mueller's team of prosecutors on Friday does not hold out much hope that Mueller's questions are likely to get asked anyway. The same is not true of the Stormy Daniels affair. If anything, it may be exactly what Trump's sharpest critics have been looking for.

On March 25, in a sensational interview on *60 Minutes*, Daniels claimed not only that she had had an affair with Trump, but that she had been threatened and intimidated into signing a non-disclosure agreement in exchange for the cash Michael Cohen "facilitated."

Two weeks later, the [FBI raided Cohen's office and residences](#) after the U.S. Attorney's Office for the Southern District of New York received a "referral" from Mueller's office.

Here is where the dominoes may at last start to fall. Let us suppose that Cohen's "facilitated" payment of \$130,000 to Daniels can be construed as a Trump campaign activity. If so, the payment could be understood as an unreported campaign donation by Cohen. That, of course, is a federal offense under the Federal Election Campaign Act, which contains enough vagueness to permit indictments for money-laundering and bank fraud as well.

And if, as [Trump's most recent comments](#) indicate, the president had any knowledge of the payments or in some way reimbursed Cohen, then it would not be difficult for federal prosecutors to level charges of conspiracy at both Cohen and Trump. No one has ever indicted a sitting president, especially when it concerns possible crimes which occurred before the president assumed office.

The Justice Department's own Office of Legal Counsel has insisted, ever since Watergate, that the Constitution gives [no sanction](#) to indicting a president, largely because indicting a president would be, in effect, a strategy for subverting the electoral process.

It would shift "an awesome power to unelected persons lacking an explicit constitutional role vis-a-vis the President."

But nothing prevents federal prosecutors from attaching to Trump the Nixonian stigma of being an "unindicted co-conspirator." That effectively leverages all the presumed guilt without violating the Constitutional proprieties. The Daniels strategy - depending on how the Southern District reads the documents it raided from Cohen's possession - can taint Trump with a felony, without ever actually having to charge him. That, in turn, would be fuel for Democrats who have been chanting "Impeach 45" ever since his inauguration, and chill the willingness of Congressional Republicans to resist an impeachment motion.

The great weakness thus far of the *Impeach45ers* has been the lack of anything which reasonably rises to the Constitution's requirement of "high crimes and misdemeanors" as grounds for impeachment.

In fact, the phrase "high crimes and misdemeanors" poses problems of its own, since it lacks much in the way of specificity. The Constitutional Convention borrowed the phrase from British jurists, but offered little in the way of definition, partly because the Convention was noticeably reluctant to talk about using judicial means to punish presidential misbehavior.

And the cases of presidential impeachment which have occurred - Andrew Johnson and Bill Clinton -- do not offer examples of happy outcomes for any of those involved.

In fact, the most famous near-impeachment, that of Richard Nixon, produced a decade of foreign-policy disarray whose results (as in Iran) still haunt us.

Of course, the alternative would be for the Office of Legal Counsel to revisit the issue of indicting a president. If that occurred, an indictment would render an impeachment unnecessary.

But the specter of federal prosecutors free to summon grand juries and issue indictments of presidents on their own initiative could easily make the Oval Office untenable.

Special prosecutors can be dismissed; career civil-service U.S. attorneys cannot, and a handful of determined prosecutors could bring the entire executive branch to a shuddering halt.

Either way, however, by impeachment or indictment, the Cohen investigation poses a threat of far greater potential than the Mueller probe, and with far greater reach than many have supposed.

"So what?" may turn out to be the political and judicial understatement of the decade.

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