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PART 59 APR 17 2023

April 14, 2023

The Honorable Juan M. Merchan
New York State Supreme Court, Criminal Term, Part 59
100 Centre Street
New York, NY 10013

Re: The People v. Donald J. Trump, Ind. No. 71543-23

Dear Justice Merchan,

Your Honor has asked us to provide in writing our position on Mr. Tacopina's potential conflict relating to his and/or his law firm's prior privileged communications with Stephanie Clifford (aka Stormy Daniels), who is a potential witness at trial. Respectfully, for the reasons set forth below, the People request that the Court make certain additional inquiries of Mr. Tacopina and conduct a *Gomberg* inquiry of the defendant.

At the defendant's arraignment on April 4, 2023, the People raised the potential conflict with the Court, given certain information that came to our attention. On April 3, 2023, we had received a letter from Ms. Clifford's counsel, Clark Brewster, addressed to Mr. Tacopina, raising the issue of a conflict based on communications Ms. Clifford had in 2018 with Mr. Tacopina and lawyers in his law firm. On April 5, 2023, the People filed with the Court and served on defense counsel the letter from Mr. Brewster.

Mr. Brewster's April 3rd letter states that Ms. Clifford had consulted with the Tacopina law firm as a prospective client about substantially the same subject matter at issue in this criminal case, including in emails exchanged with the firm and "a long teleconference" with Mr. Tacopina and other lawyers in his firm. Mr. Clark states that Mr. Tacopina's representation of the defendant, whom he characterizes as "an opposing party," would amount to an ethical breach.

The People were also aware of an interview on March 16, 2018 with CNN's Don Lemon in which Mr. Lemon asked "So before being represented by Avenatti, Stormy approached you about representation. Did you get any impression that she may have signed NDA under duress and was she afraid for her physical safety?" Mr. Tacopina responded "Yes, of course, and I can't really talk about my impressions or any conversations we had because there is an attorney-client privilege that attaches even to a consultation." See Tr. of March 16, 2018 Don Lemon Tonight interview (highlighted portions added), attached hereto as Exhibit A.

When this issue was raised in Court on April 4th, Mr. Tacopina represented to the Court that while others at his firm had spoken to Ms. Clifford, Mr. Tacopina never spoke to Ms. Clifford. ("We refused the case. I did not offer her representation. Didn't speak to her. Didn't meet with her. And it is as simple as that.") See April 4, 2023 Tr. 23:24-24:11. Mr.

Tacopina also stated that he had learned and had documents supporting that Ms. Clifford had signed an “attorney client waiver” when she turned over all attorney-client communications to federal prosecutors in the Southern District, thereby waiving any attorney-client privilege. See April 4, 2023 Tr. 24:24-25:5.

[REDACTED]

Mr. Tacopina has not provided the Court with the attorney-client waiver he referenced in Court on April 4th.

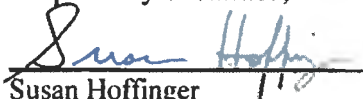
In his April 12, 2023 letter to the Court, Mr. Tacopina states in substance that any information Ms. Clifford provided to his firm has already been made public by Ms. Clifford herself, attaching three exhibits containing public accounts by Ms. Clifford -- a civil complaint she filed against the defendant on March 6, 2018, an interview with CNN on August 22, 2018 and portions from her book “Full Disclosure” published in October 2018. In his letter, Mr. Tacopina states that his firm’s consultation with Ms. Clifford “pertained exclusively to the issue of whether her non-disclosure agreement with President Trump was enforceable.” See Tacopina Letter at p. 3.

Ms. Clifford’s 2018 book, upon which Mr. Tacopina relies, includes a passage that appears to describe her interactions with Mr. Tacopina. She writes that before retaining Mr. Avenatti, she spoke with a “very high-powered lawyer” who seemed to take her call just for the curiosity factor, dragged it out for a couple of weeks and didn’t seem to share her passion, so she ended it. She wrote that she was “anxious that this guy now knew my story and my strategy for confronting Cohen and Trump.” See Tacopina Letter Ex. C at p. 342.

In light of the information provided by Mr. Tacopina and the People, we request that the Court ask Mr. Tacopina for the following additional information: 1) provide to the Court *in camera* any record containing his or his firm’s communications with Ms. Clifford, including notes, memoranda, correspondence and emails, 2) disclose to the Court *in camera* the extent to which he may have shared any information he received from Ms. Clifford with the defendant or counsel for the defendant, 3) provide the written waiver Mr. Tacopina referred to in Court on April 4th [REDACTED] and 4) disclose any steps he has taken to alleviate issues related to this potential conflict.

Critically, in order to protect the defendant’s right to effective assistance of counsel, the People request that the Court, informed by any additional information provided to the Court by Mr. Tacopina, conduct a *Gomberg* inquiry of the defendant to ascertain, on the record, whether he has an awareness of the potential risks involved in his continued representation by Mr. Tacopina and has knowingly chosen to continue such representation. See *People v. Lombardo*, 61 N.Y.2d 97, 102 (1984).

Respectfully Submitted,



Susan Hoffinger
Executive Assistant District Attorney

cc: Counsel for Defendant (by email)

Exhibit A

TRANSCRIPTS



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**Don Lemon
Tonight**

Transcript Providers

Sessions Fires Former FBI Director Andy McCabe; New Developments in Stormy Daniels Saga; CNN Hero Carol Rosenstein. Aired 11-12a ET

Aired March 16, 2018 - 23:00 ET

THIS IS A RUSH TRANSCRIPT. THIS COPY MAY NOT BE IN ITS FINAL FORM AND MAY BE UPDATED.

(COMMERCIAL BREAK)

UNIDENTIFIED MALE: This is CNN breaking news.

DON LEMON, CNN HOST: Indeed, breaking news here at CNN TONIGHT. I'm Don Lemon, a little past 11:00 p.m. -- actually it's 11:00 p.m. on the dot here. We have breaking news about Andrew McCabe, the former director at the FBI, fired tonight, just two days shy of his official retirement on Sunday.

McCabe tells CNN, he denies misleading the inspector general in any way. And he says the accusations against him fit into what he calls a pattern of attacks against him, including by President Trump.

And there is also breaking news on Stormy Daniels tonight. We're going to bring you that later on in this program.

First, let's get to Pamela Brown, Chris Cillizza, Josh Campbell, and also I want to bring in CNN national security analyst, Juliette Kayyem. Good evening to both of you.

Pamela, another big huge story on a Friday night here, you spoke to McCabe. Also it's interesting that through your reporting or at least through your contacting him that is actually how he found out about his firing.

PAMELA BROWN, CNN HOST: That's right. I contacted his representative as soon as the news came out just before 10 o'clock and they had not heard the news yet. And so his representative reached out to him to let him know and read him the press release the Department of Justice sent out from the Attorney General, saying that he was in fact terminated.

Now, the Justice Department does say Don that it sent him an e-mail and I'm told that that e-mail was sent shortly before it was sent his work account, which, of course, he wasn't checking, because now he is retired. But this is huge news, and really unprecedented, Don, for a career FBI agent who spent more than 20 years in the bureau to be fired in such a public fashion.

The Department of Justice, the Attorney General Jeff Sessions, making this decision late on this Friday night saying it was because Andrew McCabe gave unauthorized disclosures of information to the media and misled investigators. This is all revolving around a Wall Street Journal report in October of 2016.

Andrew McCabe says that the reporter in this case wanted to write something that was factually inaccurate

that he was trying to slow role the Clinton Foundation investigation. So, he authorized two agents to speak to that reporter to clear up any confusion and to give the facts in his view.

And he told me in an interview, Don, that he never misled anyone, never misled the inspector general, any investigators. And he believes that all of this is really a pattern of attacks to undermine his credibility and his reputation by the President.

And in fact, he released a statement tonight, Don, Andrew McCabe releasing this statement singling out the president saying, "The OIG's focus on me and this report became a part of an unprecedented effort by the administration driven by the president himself to remove me from my position, destroy my reputation and possibly strip me of a pension, that I worked 21 years to earn."

And in his view, he believes it's twofold. He believes that the president began to direct his ire to him, once the Wall Street Journal reported that his wife ran for a Democratic State Senate seat in 2015 and accepted money from the Clinton family friend, Terry McAuliffe. It was the next year, Andrew McCabe oversaw the Clinton e-mail -- the server e-mail probe, and so he believes that is one reason.

But also, Don, he told me in this interview that he believes, because he could be a witness in Robert Mueller's probe and the firing of the former FBI Director James Comey, he believes that is a big reason why he is being targeted, why he is being turned into a political punching bag.

Now, I asked him, because as you know the inspector general is supposed to be non-partisan. The I.G. worked under both administrations, the Obama administration as well. I asked him whether he thought the I.G. was being unduly influenced, because all these allegations are spinning from an I.G. report. He says, "I don't know. All I can say is the investigation seems to escalate once it became clear I was going to be a witness for James Comey in the Mueller investigation," Don.

LEMON: When might possibly we get to see the I.G. report, Pamela?

BROWN: That's a big question. There -- a lot of us thought that it would happen, it would be released before he turned 50, which is when he will be eligible to receive the pension. But instead, he is being fired. The I.G. report is being referenced, but we still don't know the specific allegation of how he misled investigators and other details in that I.G. report.

[23:05:09] We expect it to come out fairly soon, but I should note he told me in this interview -- because it's important to hear both sides here in this case. We know there is an I.G. report with these allegations. We don't know the specifics, but he says that he wasn't misleading the investigators. He realized that there was a misunderstanding after he was interviewed on a couple of occasions. And he proactively went back to them to clear up any confusion. But again, we are sort of operating in the dark because we don't know the specific allegations are in the report, Don.

LEMON: Yes. So, listen, Pamela, I want you to stand by. I want to bring in Josh Campbell, former FBI supervisory agent. Let us talk about this, because as Pamela read from the statement from Andrew McCabe there. But also his representative, he is saying that he believes that the I.G. report is distorted. OK.

And so McCabe's counsel, the former DOJ inspector is called Michael Bromwich and here's what he says, he blasted the process that led to McCabe's firing in a statement saying, "This distortion of the process begins at

the very top with the President, repeated offensive, drive-by twitter attacks on Mr. McCabe," Josh?

JOSH CAMPBELL, CNN LAW ENFORCEMENT ANALYST: Well, I think what we see here is a disservice, not only to Mr. McCabe, but to the FBI and to the American people because we don't have that I.G. report. We are left to take the Department of Justice word for the statement that they provided to us, which I already find fault with. And let me give an example as I sat there and listen to -- Pamela read the statement, you know, they mentioned the idea of misleading investigators, which is a very serious allegations.

And if he did that, there should be consequences. But in the same statement they say, you know, there was an accusation of unauthorized media disclosures, which doesn't hold up, because under FBI policy the Deputy Director can decide what to authorize for disclosure to the press. So, it sounds like a House of Cards that they are just trying to build and -- you know, which won't last.

I think what we need -- and again, I think that the inspector general is non-partisan, but we need that report. We need it out right now. Because what we are left to do is try to make this determinations about what happened in a vacuum. And lastly if I could just say --

BROWN: Can I just -- OK.

CAMPBELL: Yes, please.

BROWN: No, go ahead. I was just going to make that point, Josh, on the, you know, being authorized to disclose information to the media, it is true, he is one of three officials -- was one -- who could speak to the media or could authorize a disclosure of information to the media.

And in this case, it had to do with the Clinton foundation investigation. And I asked him whether he was concerned or whether part of the issue was that he was disclosing information having to do with an active ongoing investigation into the Clinton foundation, which of course, as you know, Josh, that would not be allowed, but he said that he did not view it that way.

The details that the investigation was ongoing were already out in public -- in the public for a while. And he only authorized according to his -- what he has to say, a very small piece of it. And that a phone call that took place between him and someone at DOJ where he said he wanted the investigation to move forward. I just think that is an important point for context.

LEMON: Let's talk a little bit more about that Juliette, because Bromwich, who said that he and McCabe, just saw the final report a week ago and only had four days to review a voluminous amount of relevant evidence prepared to response to -- and make presentations to the office of the Deputy Attorney General.

Bromwich said the process had fallen far sharp -- short of what Mr. McCabe deserved. This concerted effort and this is a quote, "to accelerate the process in order to beat the ticking clock of Mr. McCabe retirement violates any sense of decency and basic principles of fairness." Juliette.

JULIETTE KAYYEM, CNN NATIONAL SECURITY ANALYST: I think that is such an important statement from Bromwich because as everyone is stating, you know, he is -- in this world of maybe no fair players, he is viewed as one, and the fact he is coming out saying that McCabe's due process was in some way denied or unfair is absolutely important to note as part of this process.

But I want to get -- let's get away from process, let's get away from politics, let's get away from, you know,

just the gut wrenching feeling all of us feel for McCabe's pension. I trust McCabe. He is going to be fine. There is probably a lot of book agents calling him right now. And let's talk about Mueller because that is what this is about.

Looking at what happened tonight and it's outside the context of the Russia investigation, you're missing the big story here. And I think -- I think, you know, just focusing on why would they have done this? Right? Because of McCabe's knowledge of the investigation, early on he was part of the investigation early on, and then of course of his contemporaneous knowledge of why Comey was fired.

Those two things are relevant not just for obstruction of justice but also for potential collusion, which of course we know the special prosecutor is looking for.

So, are the Trump people stupid, right? Because they have now unleashed McCabe. And I have to believe they are not. And what they had -- what they probably did is they weighed the -- they weighed these two things, right? Firing McCabe and letting him be unleashed as he is or trying to undermine him now because they know he knows a lot.

[23:10:00] And they chose tonight. And they chose to try undermine a key witness who potentially has information against them. So I don't think they're going to, you know, regret this. I think they knew that this was going to happen. And they had to choose and they choose one of two bad options for a White House that is looking at an investigation by the special prosecutor that is getting closer and closer to the Oval Office.

LEMON: And they wanted to get him out of the process, because of his knowledge. Listen, Josh -- Chris, I'm going to bring you in, but I see Josh nodding here.

CAMPBELL: Yes.

LEMON: Let me just read this, because she actually -- she is actually saying, I think what -- McCabe's statement says, "Here is the reality." Here is what he says and he is sort of saying what Juliette is saying, "I'm being singled out and treated this way, because of the role I played, the actions I took and the events I witnessed in the aftermath of the firing of James Comey." Josh.

CAMPBELL: No, you're right. The reason why I was sitting there nodding is because Juliette is spot on. I mean, if you look at the time line. Look where we are, Don. It's Friday night, a day and a half before he is eligible to retire. I was in the FBI for over a decade. And I can't tell you one example of an investigation or an inquiry that ever had a time line attached to it.

But you know -- and I'll tell you something else. One thing Jim Comey used to say is that we in law enforcement aren't big believers of coincidence. So, if you look at the way the investigation took place, if you look at where we are now, it does provide serious questions to be answered by the Attorney General and by the Inspector General, as far as why we are, where we are now on the day before he is eligible to retire.

CHRIS CILLIZZA, CNN CORRESPONDENT: And by the way, Don, just to add to that --

LEMON: Yes.

CILLIZZA: -- since I'm in the business of covering politics, I'm also a big believer in no coincidences. If you believe that McCabe was rightly fired, then ask yourself this. Why was it announced at 10:00 p.m. on a Friday night?

I mean, if you think the White House was 100 percent within its rights, Jeff Sessions -- this was a decision that I.G. recommended. Jeff Sessions took the recommendation of the Inspector General, they've had the inspector general report. It didn't come out at 9:50 p.m. the last time I checked, Friday night.

So, why do it now? I know for a fact that these things don't happen by accident. There are less eyeballs on something at 10:00 p.m. on a Friday night than there are at -- let's say three in the afternoon or 11 in the morning on a Friday or at a Wednesday. These are not -- that is not a coincidence.

I would just -- if you believe this was rightfully done, figure out an answer to that question. Why if this was the right thing to do and the White House is standing firm behind it and feels good about it was it announced at 10:00 on Friday night.

LEMON: Chris, listen, I think that is the old paradigm. I mean, we see the numbers. And Friday nights now have become very highly rated, because --

CILLIZZA: Very.

LEMON: -- no one --

CILLIZZA: -- a lot of news.

LEMON: No one knows what's exactly going to happen. So, there may be more eyes at 10 o'clock on Friday night than there are at 3 o'clock in the afternoon on a week day. It's no longer news dump Friday. It's not because I'm sitting here, but that is indeed the truth.

But let's talk a little bit more about this. I mean, Juliette said, you know it's not just the process, but quickly, Chris, because I have to get to the break. What happened to the president or officials standing in front of the podium saying, you know, it was -- "because of these reasons that we thought it was the proper thing to do, to fire the Deputy FBI Director today at 3:00, we made this decision." Do you know what I'm saying? Instead of -

CILLIZZA: Yes. Well, --

LEMON: Yes.

CILLIZZA: -- I mean the same thing that happened when you -- when Rex Tillerson learns via twitter that he's been fired. This is the Secretary of State. This isn't some eighth level appointee of the State Department. This is the head of it.

Donald Trump, weirdly, for a guy who made his career, at least his celebrity on the phrase you're fired, doesn't like to actually be that person who says you're fired. We know even if you -- John Kelly was the one who told Rex Tillerson, "Hey, FYI, you're not going to be long for this job at the end of last week." It wasn't Donald Trump. I just -- these things are not accidental. They are not coincidental. And I think you have to realize that.

(CROSSTALK)

LEMON: But so much of it -- what we witness on reality television is actually not reality television. This President is kind of the opposite of what he presented himself to be --

CILLIZZA: Right.

LEMON: -- on reality television sitting in the fake board room on a fake television show, so interesting.

Juliette, I think you're spot on with this. What did Andrew McCabe know and why is this administration so afraid of what he knew? We'll talk about that, as well. Thank you all.

When we come back, much more on our breaking news tonight, the firing of former FBI Deputy Director, Andrew McCabe, some 48 hours before his planned retirement. Congressman Eric Swalwell from the House Intel Committee joins me next.

(COMMERCIAL BREAK)

[23:15:00] (COMMERCIAL BREAK)

LEMON: Breaking news tonight, Attorney General, Jeff Sessions, firing former FBI Director -- Deputy Director, Andrew McCabe. McCabe telling CNN Tonight quote, "I absolutely never misled the Inspector General in any way."

Joining me now on the phone is Democratic Congressman, Eric Swalwell. He is a member of the House Intelligence Committee.

Congressman, I appreciate you joining us. First, let me get your reaction to McCabe's termination, do you think this is politically motivated?

REP. ERIC SWALWELL, (D), CALIFORNIA (via telephone): Don, I think that Donald Trump and Jeff Sessions are sending a message to other people in the administration who may have seen something or who may be saying something to Special Counsel or Congress about the President and his ties to Russia.

We interviewed Andy McCabe for nearly 10 hours. I found him to be an honest decent person who knew a lot about the President's ties to Russia. And I just fear that this is a punitive act, a petty act, right before he is about to collect his pension, but more intended to send a message to anyone who would cross the President.

LEMON: CNN national security analyst, Juliette Kayyem, was on just moments ago before the break and she said, she believes that the administration and the President are concerned about how much Andrew McCabe knows about the investigation, and they weighed the choices.

Do they deal with the political fallout with this or do they keep him there knowing that he has been there since the beginning of the investigation?

SWALWELL (via telephone): To me, you know, being a former prosecutor, it looks like they are trying to dirty him up that, you know, they figure that there is more charges from Mueller coming down the pike and that eventually McCabe is going to be a figure in a trial, in a narrative, and that if they can dirty him up now, put an asterisk around his role, that -- that could mitigate, you know, their exposure.

[23:20:21] And you know, I know that McCabe knows things because he told the House Intelligence Committee what he knows. And he was you know at the genesis of this investigation. And he actually countered a lot of what the House Intelligence Committee Republicans put in their memo -- in their memo, their false memo. So, this is I think just an effort to take a key player off the field.

LEMON: Listen, I have to ask you this, because CNN is just learning that about 19 -- nearly 20 members of the FBI have been dismissed for lack of candor in the last year. That is a fireable defense -- offense.

SWALWELL (via telephone): Yes, Don, you know, when you're interviewed by Internal Affairs or the Office of Professional Responsibility as they have at the FBI, people should be straightforward, they should be honest.

But right now, there is no denying that it's a different environment in this Trump era that he certainly is going after his enemies. And he -- the president has made it clear on Twitter in his public comments that he viewed Andy McCabe as an enemy and not for anything Andy McCabe did.

LEMON: If he did mislead investigators though. If he did mislead them, is that a problem?

SWALWELL (via telephone): It is. If that occurred, of course. I don't know if that necessarily means losing someone's 22-year pension because I know for police officers and firefighters they work so hard, they get paid, you know, very little, but they do it for the pension, that, you know, perhaps it's a demotion or a reduction in rank, but if he misled them that is a problem.

I'm just suggesting that I think the President has telegraphed that Andy McCabe is an enemy and that he is very likely that he didn't get a fair shot. And he was very straight with us for 10 hours. And he faced the toughest Republican questioning. And he was straight, he was honest. He did not equivocate. He did not try and duck any answers as many of the Trump family witnesses did. We saw someone who was forthcoming. And you know, if he was like that with the FBI I think, he is getting a raw deal.

LEMON: Congressman, McCabe also told our Pamela Brown that the Republican memo that was released was claimed that the warrant to surveil Carter Page would not have been sought without the Steele dossier was selectively quoted and mischaracterized. What he said to the full Committee, that what's he said to the full Committee that -- that's what Democrats have said all along.

SWALWELL (via telephone): That is right, Don. And actually, I asked my colleagues during one of our open meetings to release Andy McCabe's transcript because I believe it would show that -- that is not what he said. That it actually was taken out of context and was used to, you know, try and embarrass Andy McCabe and to try discredit the Steele dossier. And if they really had evidence that that was the case that they would release the full transcript.

Now, in the larger context of the Russia investigation, the public should see the transcripts to show the public whether there is collusion or not. They should be able to decide for themselves. And the Republicans who said the transcripts would be available are now backing off that claim and saying that they are not going to release them.

LEMON: It's very interesting and it does seem shady, just from a lay -- from a lay person and also stopping the investigation now just before this happens, what in the world is going on here?

SWALWELL (via telephone): To me, it looks like the fix is in. They are ending the investigation. They gave the President, you know, the impetus to send out that all caps tweet that there is no collusion. And now, you know, they're firing a key witness in the investigation. And so, this is what we are up against. This is the snow that keeps falling that we have to plow through to get to the truth.

But fortunately I know the American people are on our side. I see them across the country. They want to know what we can do to harden the ballot boxes so Russia doesn't do this again. And I think anyone who continues to look the other way or works with the President to obstruct our investigation, they're going to

pay a steep price in November for really standing in the way of our great democracy.

LEMON: Someone who has been on this earth for quite a number of year, 52 years. Now, the truth always comes out and we will see the truth. I'm not sure how long it will take, but we certainly will. Thank you Representative Swalwell, I appreciate your time.

SWALWELL (via telephone): My pleasure, Don.

LEMON: When we come back, more on the firing of Andrew McCabe, just two -- just two days shy of his retirement. Plus, we will get to tonight's breaking news on Stormy Daniels.

[23:25:00] (COMMERCIAL BREAK)

LEMON: Breaking news on a Friday night. Jeff Sessions fires Andrew McCabe. The former FBI Deputy Director, just two days away from retiring. Here to discuss is Chris Whipple, he is the author of, *The Gate Keepers - How the White House Chief of Staff define every presidency*. And CNN's presidential historian, Douglas Brinkley. Good evening gentlemen.

So, Doug, former FBI Director -- Deputy Director, Andrew McCabe, fired after more than 20 years of service by the way. Is there any comparison to Nixon's Saturday night massacre?

DOUGLAS BRINKLEY, CNN PRESIDENTIAL HISTORIAN: Yes, I mean, this will be known as the Friday night slaughter, you know, this was -- the very idea that Jeff Sessions hasn't released something to inform the public what this is, it's done in a -- in a kind of cloak of secrecy late at night in a bizarre fashion, the fact that he was about to have his pension and they couldn't let it go. It's something very cruel and sad that's occurred tonight.

And I think our country now hopefully is going to wake up -- I mean Donald Trump is struggling for his life. He is paranoid. He felt that McCabe is -- was too close to Comey and he decided to get rid of anybody and anything that is standing in his way, kind of survival mode right now, but I think we can say tonight that the Trump White House is at war with our FBI.

DON LEMON, CNN HOST: Well, speaking of that, because, Chris, he isn't always -- isn't he in a fight with Christopher Wray at times as well, his handpicked director of the FBI?

CHRIS WHIPPLE, WRITER AND DOCUMENTARY FILMMAKER: Yes. You know, every time we think we hit rock bottom with this presidency, the bottom falls out and we sink to new depths. I mean this was petty. It was vindictive. It had all the hallmarks of a political and personal vendetta. And (INAUDIBLE) Donald Trump. But beyond that, I think what this shows is that a year -- more than a year into the Trump presidency, there are no grownups in the room. You know, this is not just on Donald Trump. It's obviously on Sessions. It's also on John Kelly. Kelly has failed time and again to --

LEMON: Members of Congress.

WHIPPLE: -- to stand up to Trump when he has trashed constitutional norms, democratic institutions, attacked the FBI, now this. And I think what it shows is that, you know, there are no grownups in the room. And -- and nobody -- it's a real failure on the part of Kelly and the people around the president.

LEMON: McCabe released a statement saying in part this. He says, I am being singled out and treated this way because of the role I played, the actions I took, and the events I witnessed in the aftermath of the firing of James Comey.

The release of this report was accelerated only after my testimony to the House Intelligence Committee revealed that I would corroborate former deputy -- former Director Comey's accounts of his discussions with the president.

The OIG's focus on me and this report became a part an unprecedented effort by the administration, driven by the president himself, to remove me from my position, destroy my reputation, and possibly strip me of my pension that I worked for 21 years to earn.

Congressman Swalwell, Douglas, was on just before you. He said if you look at all of this and considering what McCabe statement was just then, the fix is in and it sounds like that's what McCabe is saying as well, the fix is in.

BRINKLEY: That's right. You know, McCabe now has to become a real courage spokesperson about what's going on in America. I mean, it's absolutely unacceptable the way this has gone down this week, the way Donald Trump is taunting people, the way that he is humiliating ourselves internationally. We have the Stormy Daniels situation brewing.

He is a president that's coming unglued. He is not right in personality or in thought or in action. And we did see that with Nixon when the pressure of Watergate came on, when Nixon would bark all sorts of odd orders to people and people didn't follow them. This time around people followed them. And the person that let us down is Jeff Sessions.

The attorney general either needed to recuse himself, Don, or not played in to this political hit job that Donald Trump just done on McCabe. And in FBI history to have this happen, you know to a man of that distinguished caliber and to be treated in this shabby way, and the way Rex Tillerson was treated this week, it's something diabolical about it. And I hope more people are waking up to Donald Trump's total fear of the Mueller investigation.

LEMON: Here is what the FBI -- FBI Agents Association released a statement. I'll read this for you, Chris. And saying basically, I'll just sum it up. The FBI Agents Association in a statement tonight says personnel decisions should never be politicized and that the association is committed to ensuring its members are provided appropriate procedural protections here.

WHIPPLE: Well, you know, Doug is right. I mean, the fish rots from the head. And, you know, everybody in the orbit of this president is ultimately sucked in and tarnished or destroyed. It happens to almost everyone. And I think that this -- this could -- let's hope this is a turning point. And that people like Kelly and others will -- will wake up and realize that we're in real danger here.

LEMON: Yes. Thank you, gentlemen. I appreciate both of your perspectives. When we come back, we got breaking news on the Stormy Daniels saga. We're going to give you all the details, next.

[23:35:00] (COMMERCIAL BREAK)

LEMON: Believe it or not, more breaking news tonight. For the first time, President Trump has joined legal action in the Stormy Daniels matter. Attorneys defending the president and the company of his personal legal counsel, Michael Cohen, have filed to move the lawsuit against their client by Daniels to federal courts, and they are claiming she could owe as much as \$20 million for violating a non-disclosure agreement.

I want to bring in criminal defense attorney Joe Tacopina, CNN legal analyst Areva Martin, the author of "Make it Rain." It is interesting because every day, it seems to be a new development in this situation.

Areva, tonight CNN has learned that Michael Cohen has filed papers in federal court seeking \$20 million from Stormy Daniels. He is alleging that she has violated her non-disclosure agreement 20 times. What is your reaction?

AREVA MARTIN, CNN LEGAL ANALYST: Not surprising. They are in a very difficult situation, Cohen and the Trump administration. Stormy Daniels is really outmaneuvering them. She went into a Los Angeles superior court, filed an action to have that non-disclosure agreement, the arbitration clause, the arbitration that was started by Michael Cohen declared null and void.

She is basically saying Donald Trump can't hold her to that non-disclosure agreement and that she is free to talk about her alleged affair with him. In fact, we know she already taped an interview that is set to air in about a week or so. So she is challenging the legal validity of this non-disclosure agreement.

And now, Trump's team is trying to fight back which is why they removed this case to federal court, I believe, thinking that they would have a greater chance, be more successful in federal court than they would be in a superior court in Los Angeles.

[23:40:10] LEMON: Well, it's interesting that they say 20 times, because every interview I've seen with Stormy Daniels unless there are other interviews, Joe, is that she says oh, I can't really talk about it. They sort of dance around it with everyone understanding that, you know, what's going on. But she doesn't really talk specifically about the alleged affair.

JOE TACOPINA, CRIMINAL DEFENSE ATTORNEY: My take is that he should also add a couple of other defendants to that lawsuit. He should sue Michael Cohen, because he certainly breached the confidentiality agreement by going out there and telling the bastion of reporters that he paid \$130,000 of his own money.

And his press secretary at the White House who talked about a private arbitration that the president was a party to that was not supposed to be anything but confidential.

So, I mean, you know, we're here again not because of anything that Stormy Daniels -- Areva, you know how much I respect you, but I don't think they outmaneuvered Trump. I think Trump's own people have done him in.

We wouldn't be here if Michael Cohen hadn't stood up and made that pronouncement that he had paid the \$130,000 of his own money without his client knowing that which we all know is an ethical violation. It makes the agreement a fraud and unenforceable.

And then the press secretary of the White House talking about the private arbitration that the president was victorious in. We wouldn't be here talking about this.

Quite frankly, if Trump had taken the wind out of the sail a long time ago by saying, yes, 12 years ago, whatever, I had a relationship with her, do you think like -- does his bastion of support, does his party, does his supporters really care about that? Of course not. I mean, so, we would have nothing to be talking about except the Miller minor scandal that would just go away.

LEMON: Areva, can I ask you something?

MARTIN: Go ahead.

LEMON: I want to ask you about Charles Harder. That is the attorney behind the Gawker case, remember, which caused Gawker to go out of business. What do you think of the hiring of him and bringing him on?

MARTIN: Thank God that I think someone who has real legal skills has gotten involved in this case. If you look at what has happened in this case and I think that's what Joe is alluding to, Michael Cohen has made pretty much every mistake that a lawyer can make.

And then you add to that not just him e-mailing, using the Trump Organization e-mail as he is negotiating this settlement with Stormy Daniels's attorney while he is maintaining that the Trump organization has no knowledge of it and is not involved in it, then he goes out and talks about it.

Then Jill Martin, a lawyer that is the associate general counsel for the Trump Organization, she files the arbitration agreement, but yet claims that she did so in her individual capacity, not in the capacity as the associate general counselor or the assistant general counsel for the Trump Organization.

So I think there is a sense that they need to get a really smart, really skilled lawyer involved because Michael Cohen and company just keep making mistake after mistake after mistake.

LEMON: What do you say about that, Joe? Listen, I want to talk -- can we talk about Avenatti here who is -- Michael Avenatti who is Stormy Daniels's attorney? He also made some shocking claims today that Stormy had been physically threatened to keep quiet about the affair with Trump. Take a listen to this.

(BEGIN VIDEO CLIP)

MICHAEL AVENATTI, ATTORNEY FOR STORMY DANIELS: The fact is that my client was physically threatened to stay silent about what she knew about Donald Trump. The details surrounding that, she is going to discuss I'm sure on the "60 Minutes" interview on March 25.

And the American people are going to weigh her veracity and whether she can be trusted, whether she appears to be credible, and whether it happened or not, and they're going to learn the details surrounding that. And we're going to let them judge for themselves whether she is being honest. She is going to be able to provide very specific details about what happened here.

(END VIDEO CLIP)

LEMON: So before being represented by Avenatti, Stormy approached you about representation. Did you get any impression that she may have signed NDA under duress and was she afraid for her physical safety?

TACOPINA: Yes, of course, and I can't really talk about my impressions or any conversations we had because there is an attorney-client privilege that attaches even to a consultation.

But what I would say to that is without hearing from her attorney any further details regarding who that physical threat was made by, it's really hard for us to sit here and say it's Trump or Trump's people.

I mean, you know, it could have been some crackpot supporter of his saying, you know, I'm going to kill you if you take him down, whatever. That can't be attributable to him yet anyway.

LEMON: Real quickly, I just want you to stand by -- you believe that Michael Cohen breached the NDA even though it was reported by the newspaper first?

TACOPINA: Of course. I mean, again, I don't know what law school he went to or what law books he reads, but you cannot -- because a newspaper leaks something, it doesn't allow you to breach a confidentiality agreement as a lawyer and go out there and say, well it was already leaked, so I'm going to confirm that I paid her \$130,000. That is --

LEMON: Which is why --

TACOPINA: No court in the world is that permissible.

[23:45:01] And by the way, what he said -- what he said if he understands law is that he paid that out of his own money and his client didn't even know about the agreement.

If that's true, what he should know is that it's unenforceable agreement, an agreement quite frankly a fraud, also violation of the canons of ethics, for him to bind his client in agreement without the client knowing about it.

So, please, I don't want to think Michael Cohen (INAUDIBLE). If he thinks he is doing a good job, great, congratulations.

LEMON: Which is why I said to you that she came to you about this and you quickly said to me, you can report that and say that but I cannot confirm and that is attorney-client privilege, which means that you are violating --

TACOPINA: Which is exactly what we are doing right now.

LEMON: Thank you very much.

(LAUGHTER)

LEMON: We just proved your point. Thank you very much. When we come back, more breaking news. Andrew McCabe fired tonight. The former FBI deputy director telling CNN he was the victim of attacks designed to undermine his credibility, including President Trump

(COMMERCIAL BREAK)

LEMON: Our breaking news tonight, Attorney General Jeff Sessions firing Andrew McCabe. The former FBI deputy director was less than two days shy of his retirement. I want to bring in now CNN political commentators Tara Setmayer, Scott Jennings, and Maria Cardona.

I'm wondering how this firing is going to play out in the public. This is a guy who worked for 20 years for a pension and just like that it is gone.

[23:50:00] There's a statement from FBI Agents Association. There are people who support him out there, Tara, how is this going to play?

TARA SETMAYER, CNN POLITICAL COMMENTATOR: Well, I think it's complicated because in this case, obviously there was merit from what we understand. We need to see the IG report though to back it up.

LEMON: He's saying that report is misleading.

SETMAYER: Right. Of course, he's going to defend himself. There is due process. He will have an ability to appeal this. So, the jury is to allow as to whether he actually loses everything or what actually happens. This is not the end-all. And it's a shame that someone who has a record like his for so long, that it is ending this way.

However, there are some things that were questionable, you cannot mislead inspector general investigators. He was also under investigation for potential Hatch Act violation because of his wife's state senate run in 2015. He didn't recuse himself until -- from the Hillary Clinton investigation until a week before the election. There were issues here.

And inspector general reports are very nonpartisan. So that makes it seem to me like there was merit is the fact that the office of professional responsibility made this recommendation. I'm sure they didn't make it easily. That's something we have to consider.

Unfortunately, the president of the United States engaged in a personal campaign to destroy Andy McCabe at the same as all of these things which has muddied the water.

So you can't look at this firing objectively without taking into consideration that the president of the United States personally targeted him because of McCabe's proximity to the Russia investigation and his role in it. He telegraphed what he wanted --

LEMON: The head of the FBI said that -- I think it was the head of the FBI who said McCabe did everything when it came to his wife, calling, asking how he should handle this. He did everything on the up and up. Should his wife not run for office because he is a member of the FBI --

SETMAYER: No. What was under question is whether he properly reported some of the campaign donations. What was also investigated were he said he had nothing to do with her campaign, but there were Facebook pictures of him wearing campaign t-shirt and asking people to vote for his wife. So, you know, I mean, these are things that are when you are at that level you have to completely forthcoming.

LEMON: Maria, go ahead, what do you want to say?

MARIA CARDONA, CNN POLITICAL COMMENTATOR: Yes, I mean, I kind of agree with Tara and in a couple of things in that I don't think we can make a full judgment here until we actually see the IG report because there are people who were saying that it was misrepresented. He talks about how it was misrepresented and people who heard his testimony talk about how his testimony was misrepresented as well.

And in terms of the Hatch Act stuff, I mean, yes, that was supposedly his superior said that he did everything on the up and up. And it was his wife running, of course he is going to support her. I think that the question is whether he did that while he was on the clock, it doesn't seem like he did. So, therefore, it would not be a Hatch Act violation.

But I think let's go to the perception. You asked how this is going to affect Donald Trump. And I don't think it's going to be a positive thing. I don't think it's going to be a positive thing for Republicans because this does have all the perception that this was like a political hit job, a mob-like political hit job that was geared towards, directed towards somebody who quote, unquote, had the goods on Donald Trump and that it was a way to shut him up.

LEMON: OK.

CARDONA: But frankly now, I actually think it's going to do the opposite.

LEMON: Scott, what do you think?

SCOTT JENNINGS, CNN POLITICAL COMMENTATOR: I think the Trump administration led by Attorney General Jeff Sessions appears to be well within their rights to do it based on the fact that he lied to internal investigators. The guy is going to get due process. It doesn't blow out his entire pension.

What we're in for now is a public relations, a battle royal between McCabe who is trying to portray himself as a victim of a political hit job and the internal investigators at DOJ who obviously filed a report that was pretty damning. So, we need to see that document and we want to see how this plays out.

I think the DOJ has got to get out to the public the actual facts behind his misleading investigators because I think to the extent that Trump is going to get blamed for this, it could be mitigated by the facts as they come out if he did mislead internal investigators at the DOJ.

LEMON: I got to run. I got to run, guys, I'm out of time. Let me say this though, If all of this wasn't enough, Stormy Daniels will be 39 in five minutes.

(LAUGHTER)

LEMON: Happy birthday, Stormy.

CARDONA: All right.

LEMON: We'll be right back.

CARDONA: Happy birthday, Stormy.

[23:55:00] (COMMERCIAL BREAK)

LEMON: Tonight we begin another year of introducing you to everyday people changing the world, our incredible CNN heroes. After Carol Rosenstein's husband was diagnosed with a life-crippling dementia, she began to feel him slipping away and started to lose hope. Then one day, he sat down at a piano.

(BEGIN VIDEO CLIP)

CAROL ROSENSTEIN, CNN HERO: I was seeing something magical happening before my eyes. The doctor told me that we will watching the power of music changing brain chemistry. Playing a musical instrument is like a full body workout for the brain. The music actually resurrected him.

(END VIDEO CLIP)

LEMON: To get an incident look at the band Carol created for her husband called "The Fifth Dementia" and to watch Carol and Irwin's full story, go to cnnheroes.com right now. While you're there, nominate someone who inspires you, someone you think should be a 2018 CNN hero.

That's it for us tonight. Thanks for watching. Make sure you have a great weekend.

[24:00:00] There's a lot of news I'm sure that's going to happen over the weekend. Happy birthday, Stormy Daniels.

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