**MICHAEL D. COHEN V WILLIAM BARR**

**Closed**

**United States, North America**

**EXPANDS EXPRESSION**

**MODE OF EXPRESSION**

Books/Plays

**DATE OF DECISION**

July 23, 2020

**OUTCOME**

Preliminary Injunction Granted.

**CASE NUMBER**

**20 Civ. 5614 (AKH)**

**JUDICIAL BODY**

First Instance

**TYPE OF LAW**

Constitutional Law

**THEMES**

Content Regulation/Censorship

**TAGS**

Prior Restraint, Retaliation

**CASE ANALYSIS**

**Case Summary and Outcome**

The District Court of Southern New York granted the Preliminary Injunction sought by Michael D. Cohen to restrain the United States government from retaliation and further act of retaliation by which he was re-confined to prison custody. The Petitioner had approached the court for a Preliminary injunction against the Respondents who are officers of the United States government. The Petitioner had on conviction been previously held in solitary confinement at the Federal Correctional Institution in Otisville, New York (“FCI Otisville”) but was released on furlough by the Bureau of Prisons (BOP) due to his medical history of severe hypertension which made him susceptible to the coronavirus pandemic. He was however again remanded at FCI Otisville for notifying the public via twitter of the book he was writing about President Trump. He subsequently approached the court asking for a temporary restraining order and his release to home confinement. The court, in arriving at its decision, reasoned that the respondent’s action was an unjustifiable violation of the Petitioner’s First Amendment rights to publish a book critical of the President and to discuss the book on social media. The court consequently granted the Petitioner’s injunction and ruled that the Petitioner be released from custody and be provided with COVID-19 test. The court further directed parties to conduct negotiations and file a proposed order to the court not later than July 31, 2020. Responding to the order of the court, the United States Department of Justice in a letter dated July 30, 2020 wrote the court assuring the court of the government’s compliance with the order of the court and in particular that it would neither further litigate nor appeal the ruling of the court and that specific provision on the Applicant’s contact with the media would no longer be necessary.

**Facts**

The Petitioner is Michael D. Cohen who is a former personal lawyer to Donald J. Trump, the President of the United States. The Respondents who were sued in their official capacities are William Barr who is the Attorney General of the United States, Michael Carvajal, who is the Director of Bureau of Prisons and James Petrucci who is a Warden of the Federal Correctional Institution, Otisville. For over ten years, the Petitioner was President Donald Trump personal lawyer and adviser until in 2018 when he was convicted for offences that included tax evasion, lying to congress and facilitating illegal payments to silence two women who claimed they have had affairs with President Donald Trump and was sentenced to three years jail term.

While in the prison custody at FCI Otisville, the Petitioner commenced the writing of manuscript of a book that describes the Petitioner’s firsthand experiences and relationship with President Donald Trump and his family with the working title *Disloyal:The True Story of Michael Cohen, Former Personal Attorney to President Donald J. Trump* Working on a book in itself is consistent with BOP’s, policies as the BOP has always encouraged *“inmates to use their leisure time for creative writing and to permit the direct mailing of all manuscripts as ordinary correspondence.”* [Pg.3 of the Memorandum of Law dated 07/20/2020].The petitioner noted that the *“BOP policy provides that “[a]n inmate may prepare a manuscript . . . for publication while in custody without staff approval,” and “may mail a manuscript as general correspondence.*” [Pg.3 of the Memorandum of Law dated 07/20/2020]. The manuscript according to the petitioner “*provides graphic and unflattering detail about the President’s behavior behind closed doors”* [Pg.2 of the Memorandum of Law dated 07/20/2020]. He further stated that the “*book will be truthful but unfavorable to President Trump and his administration”* [Pg.3 of the Memorandum of Law dated 07/20/2020]. While in prison, the Bureau of Prisons in April, 2020 confirmed that the Petitioner was at serious risk of sickness and death should he remain in custody given that about one-half of the prisoners had become infected with COVID-19 and his situation could be worse given the Petitioner’s underlying health conditions of severe hypertension and history of respiratory complications.

The Respondents also determined that, once the Petitioner’s term of furlough ended he would be transitioned into home confinement for the remainder of his term of imprisonment. While the petitioner was on furlough, he made public his intention to publish his book about President Donald Trump soon. On June 26, 2020, he tweeted #WillSpeakSoon via his twitter handle and on July 2, 2020, he tweeted that he was already finalizing the book which would be a tell-all book about his experience with Mr. Trump. On July 9, 2020, U.S. Probation Officers in downtown Manhattan, working for BOP, presented Mr. Cohen with Federal Location Monitoring Program Participant Agreement (the “FLM Agreement”) which contains conditions of release to home confinement with a complete bar on speaking to or through any media of any sort, including via a book. This is with the fact that the BOP itself had earlier stated that transfer to home confinement was necessary for his health. Being conscious of his health and what a remand to the custody could do to him, the petitioner did not refuse the condition but he and his lawyer sought clarification on the limitation of bar to speaking through the media given his desire to continue working on his book. Even though the Probation Officer told the petitioner that he would make the request on clarification to higher authorities, the Petitioner was instead remanded to FC Otisville.

On July 20, 2020 the Petitioner and American Civil Liberties Union Foundation (ACLU) filed a Verified Petition for Writ of Habeas Corpus and Memorandum of Law In Support Of Petitioner’s Emergency Motion for a Temporary Restraining Order. In response, the Respondents filed Memorandum of Law in Opposition To Petitioner’s Emergency Motion for a Temporary Restraining Order and Declaration of Jon Gustin on July 22, 2020. The Petitioner argued that remanding him was an act of retaliation for the book being published about President Donald Trump and that such acts would have chilling effect on exercising First Amendment right by ordinary citizen. The Petitioner further stated that he has been chilled from further exercising his First Amendment rights and he continued to be chilled by furtherance of such retaliatory acts of his continued detention in custody.

As to whether the Petitioner is entitled to the injunctive relief sought, the Petitioner cited the cases of *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) and *Yang v. Kosinski*, 960 F.3d 119, 127–28 (2d Cir. 2020) where four requirements of obtaining injunctive relief were established as: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm inthe absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunctionis in the public interest. In establishing that he is entitled to the injunctive relief sought, the Petitioner has argued as follows:

*Likelihood of Success*

The Petitioner argued that for a claimant on a retaliation claim to succeed, such a claimant must show that the ‘(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the Petitioner, and (3) that there was a causal connection between the protected speech and the adverse action.’” *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009) (quoting *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004)).

The Petitioner here argued that writing a book is a protected speech under the First Amendment. The Petitioner further argued that the First Amendment guarantees Petitioner’s right to freedom of speech. The Petitioner submitted that “*drafting a book for publication is speech protected by the First Amendment. The FirstAmendment encompasses the freedoms “to speak, write, print [and] distribute information or opinion,” Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 160 (1939), and “the right to publish is central to the First Amendment and basic to the existence of constitutional democracy.” Branzburg v. Hayes, 408 U.S. 665, 727 (1972)”*. [Pg.13 of the Memorandum of Law dated 07/20/2020]. The Petitioner also submitted that the *“Supreme Court has long made clear “that the free publication and dissemination of books and other forms of the printed word” are First Amendment “protected freedoms.” Smith v. People of the State of California, 361 U.S. 147, 150 (1959)”*. In making robust submission in this regard, the Petitioner submitted that his “manuscript, which is critical of the President and promises to reveal new information damaging to the President, sits at the zenith of First Amendment protection. The First Amendment reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”—including the President. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269(1964). Such speech “is more than self-expression; it is the essence of self-government.” *Garrison v.* *Louisiana*, 379 U.S. 64, 74–75 (1964)”

Furthermore, the Petitioner argued that the prisoners regardless of their status retain the right to write and publish a manuscript. In *Shaheen v. Filion*, No. 9:04 Civ. 625 (FJS/DRH), 2006 WL 2792739, at \*3 (N.D.N.Y. Sept. 17, 2006) the court held that *“writing of articles critical of . . . officials” is “clearly [an] assertion[] of [a prisoner’s] constitutional rights protected by the First Amendment.”* Arguing further in this line, the Petitioner submitted that a prisoner’s *“[f]reedom of expression encompasses the publication and dissemination of written materials*,” and courts have decided in *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1118, 1126 (D. Colo.2007) that BOP’s attempts to prohibit prisoners from writing for publication would *“violate[] the First Amendment rights of . . . inmates in federal institutions, and the press.”*

The Petitioner must also show that the protected speech led to the Respondent’s adverse action(s). In this regard, the record strongly shows that Mr Cohen’s announcement of his book led to his being remanded in the custody by the Respondents. On July 2, 2020, the Petitioner tweeted that he was already finalizing the book which would be a tell-all book about his experience with Mr. Trump, while on July 9, 2020 he was remanded by the Respondents. In *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009) the court held that “*A Petitioner can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action.”* *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009). The court further held that even with the passage of six months between protected conduct and adverse action, causation can still be inferred. The Petitioner therefore submitted that that his book and announcement about it led to his re-confinement to custody by the Respondents.

The Petitioner further cited the case of *Ragbir v. Homan* which is very relevant to this case. In the *Ragbir*’s case where a known immigration activist filed a *habeas* petition alleging that the federal government sought to remove him from the United States in retaliation for his public criticism of U.S. immigration officials and systems the Second Circuit held that a *“plausible, clear inference is drawn that Ragbir’s public expression of his criticism, and its prominence, played a significant role in the recent attempts to remove him” because of statements government officials made about the activist’s protected protests”* [Pg.20 of the Memorandum of Law dated 07/20/2020]. The Petitioner therefore submitted that Respondents were aware that the Petitioner was a writing a book critical of the President and the actions they decided to remanding him to prevent him from publishing the book which came in the way of his First Amendment right. The Petitioner therefore submitted that he would likely succeed on merits.

*Irreparable Harm*

The Petitioner herein stated that “irreparable harm” is the most important prerequisite in obtaining a preliminary injunction. Firstly, it has been established by the courts that a violation of constitutional rights constitutes irreparable harm in law. See *Conn. Dep’t of Envtl. Prot. v. OSHA*, 356 F.3d 226, 230–31 (2d Cir. 2004). The Petitioner also cited the case of *Coronel v. Decker*, No. 20 Civ. 2472 (AJN), 2020 WL 1487274, at \*3 (S.D.N.Y. Mar. 27, 2020). In submitting that irreparable harm will be established where the petitioner faces imminent risk to their health, safety, and lives.” In the instant case, the BOP has determined that the Petitioner was at serious health risk should should he continue in detention and that the best decision was to transfer the Petitioner to home confinement for the completion of his prison term. In *Helling v. McKinney*, 509 U.S.25, 33 (1993) the court held that “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”. Even in *Basank v. Decker,* No. 20 Civ. 2518 (AT), 2020 WL 1481503, at \*2 (S.D.N.Y. Mar. 26, 2020) the court held that the risk of harm to a detainee constitutes and irreparable harm.

*Balance of Equities and Public Interest*

In making his submissions under this sub-head, the Petitioner argued that where the government is the Respondent the last two factors in obtaining a preliminary injunction always go together. In establishing this position, the Petitioner cited the case of *Coronel v. Decker*, No. 20 Civ. 2472 (AJN), 2020 WL 1487274, at \*7 (S.D.N.Y. Mar. 27, 2020) where it was held that *“Where the Government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge.”* Firstly, the fact that the BOP has already determined that continued detention of the Petitioner at FCI Otisville poses a serious health risk to him shows that the balance of equities already tilts in favour of the Petitioner. On the strength of the Petitioner’s constitutional claim, he submitted that the public interest will be served if the relief sought is granted. In addition, the book which is critical of President Donald Trump in an election year is consistent with the right to know of the American public and the continued detention of the Petitioner threatens that right.

Responding to the Petitioner’s case, the Respondents argued that decision whether or not to transfer the Petitioner to home confinement is not subject to judicial review. The Respondents argued that governing statute 18 U.S.C. § 3621(b) provides that BOP *“shall designate the place of the prisoner’s imprisonment,” and this designation “is not reviewable by any court.”* The Respondents also cited the decision of a Louisiana District Court in *Livas v. Myers*, No. 20 Civ. 00422, 2020 WL 1939583, at \*6-8 (W.D. La. Apr. 22, 2020) in a challenge to the COVID-19 conditions at a federal prison, where the court noted that “[b]oth placement in a Residential Reentry Center (“RRC”) (more commonly known as a halfway house) and on home confinement are within the BOP’s discretion” The Respondents therefore submitted that the decision of the Respondents on where the Petitioner should complete his jail term is subject only to the unreviewable discretion of the Respondents. The Respondents who agreed with the Petitioner is the most important prerequisite of obtaining an injunctive relief submitted that the Petitioner failed to prove an irreparable harm that would be resulted if the injunctive relief was not granted. The Respondents argued that the Petitioner was bound to provide evidence of such irreparable harm and that he could not be a speculative harm. The Respondents cited the holding of court in *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) where the court held of parties seeking to succeed in a claim for injunctive relief that *“they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.”*

The Respondents also argued that the Petitioner has not shown the likely of his success on merits. The Respondents stated that Petitioner’s claim to his re-confinement at FCI Otisville as being retaliatory is without basis. The Respondents further argued that the decision to remand Petitioner to FCI Otisville on July 9, 2020, was also devoid of any nefarious motive pertaining to Petitioner’s book but as a result of his being defiant when being presented with conditions contained in the FLM Agreement for transfer to home confinement. The Respondents finally argued that the Attorney General and BOP have the statutory powers to manage the affairs of Prisoners and ordering that transfer of the Petitioner to home confinement would be tantamount to interference with the BOP’s ability to manage the Prisons’ operations. The Respondents finally submitted that balance of equities rather tilts in favour of the respondents.

**Decision Overview**

Judge Alvin K. Hellerstein delivered the Order of the District Court of Southern District of New York in this case. The main issue the court considered in the action is whether the Plaintiff is entitled to a preliminary injunction against the defendants. The main issue the court considered in this case was justification of the transfer of the Petitioner from home confinement back to custody for exercising his First Amendment rights of writing a book and notifying the public about it on social media. The court in its two page succinct order started out by expressing its finding about the motive for transferring the Petitioner to custody as being retaliatory. Putting it unequivocally, Judge Hellerstein stated that *“The Court finds that Respondents’ purpose in transferring Cohen from release on furlough and home confinement back to custody was retaliatory in response to Cohen desiring to exercise his First Amendment rights to publish a book critical of the President and to discuss the book on social media”*[Pg.1]

The learned Judge granted an injunction restraining the Respondents from any act of furtherance of retaliation or future retaliation against the Petitioner preventing him exercising his First Amendment rights. As a consequence, the court directed that the Petitioner be released from custody to any member of his family at the place of detention not later than 2:00pm on July24, 2020, after a COVID-19 test must have been conducted on him with the results promptly reported to him and his Probation Officer as soon as they are available.

The Court further ordered that upon release of the Petitioner from custody, he will only be subject to *“the eight conditions of release set forth in the Federal Location Monitoring Agreement, see ECF No. 7-2, provided, however, that adherence to condition one, except for the last sentence, is temporary, subject to the parties’ renegotiation of said temporary condition”* [Pg.1-2] In this regard, the court stated clearly that the condition shall not only be of such legitimate penological limitations on Petitioner’s conduct based on parties’ mutual agreement or court’s subsequent order but must also be consistent with the First Amendment. The court ordered the parties to conduct negotiation on condition of the Petitioner’s release within one week effective from the date of the court’s order and filed a proposed order to the court by July 31, 2020. The court noted that the order given in the case is final and that a written decision stating fuller statement of findings and conclusions of the court will be made available when ready. The learned judge nonetheless stated that that the court still reserves the right to continue to exercise jurisdiction on the matter if need be, when Judge Hellerstein stated that *“I reserve continuing jurisdiction to resolve any disputes in settling an order and enforcing same”* [Pg.2]

**DECISION DIRECTION**

**Expands Expression**

The decision expands expression when it granted the Preliminary Injunction sought by Michael D. Cohen to restrain the United States government from retaliation and further act of retaliation by which he was re-confined to prison custody. The decision expressly identifies rights to publish a book critical of the President and to discuss the book on social media as First Amendment rights. The fact that the court ordered the conditions of release to be consistent with the First Amendment and the order was complied with by the respondents as reflected in the United States Department of Justice letter dated July 30, 2020, confirms the inviolability of free speech as protected by the First Amendment.

The United States Department of Justice in the said letter dated July 30, 2020 stated that the parties would consider the Court’s injunction to be permanent. It further stated that the respondents would not be litigating the natter further and shall not appeal the ruling as this has been agreed by the parties. In assuring the court of this position and to finally put a stop to the case, the letter expressly states that “*parties further request that the Court dismiss this matter*” [Pg.2 of the Letter]. The letter also disclosed, in compliance with the order of the court of July 23, 2020, that parties have filed a stipulation and proposed order to this effect.

**GLOBAL PERSPECTIVE**

**National standards, Laws or Jurisprudence**

*US, BDO Seidman v Hirshberg*, 93 NY2d 382, 389

*US, New York Times Co. v United States*, 403 US 713, 714

*US, Allen v. Pollack,* 289 A.D.2d 426, 427 [2d Dept 2001] )

*US,Macdonald v Clinger*, 84 A.D.2d 482 (4th Dep’t, 1982)

*US,Coca-Cola Company v Purdy*, 382 F.3d 774 (*United* States Court of Appeals, Eighth Circuit, 2004)

*US,Dallas Cowboys Cheerleaders, Inc. v Pussycat Cinema, Ltd.*, 604 F.2d 200 (United States Court of Appeals, Second Circuit, 1979)

*US,Nihon Keizai Shimbun, Inc. v Comline Business Data, Inc.*, 166 F.3d 65 (2d Cir. 1999)

*US,First National Bank of Boston v Bellotti*, 435 U.S. 765 (1978)

*US,New York Times Co. v United States*, 403 U.S. 713 (1971)

*US,Nihon Keizai Shimbun, Inc. v Comline Business Data, Inc.*, 166 F.3d 65 (2d Cir. 1999)

*US,Crosby v Bradstreet* Company, 312 F.2d 483

*US,Dr. Seuss Enterprises v. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997)

*US,Rodgers v United States Steel Corp.*, 536 F.2d 1001 (3rd Cir. 1976

*US,Trump v Trump*, 179 A.D.2d 201 (1st Dep’t, 1992)

*US,Ronnie Van Zant, Inc. v. Cleopatra Records, Inc*, 906 F.3d 253, 257 (2d Cir. 2018)

*US, Speken v Columbia Presbyt. Med. Ctr.,* 278 A.D.2d 154 (1st Dep’t, 2000)

*US, Speken v. Columbia Presbyterian Med. Ctr.*, 304 A.D.2d 489 (1st Dep’t, 2003)

*US, Democratic National Committee v. Republican National Committee*, 673 F.3d 192 (2012)

*US, United States v. Bolton*, 2020 WL 3401940 (United States District Court, District of Columbia)

**CASE SIGNIFICANCE**

The decision establishes binding or persuasive precedent within its jurisdiction.

**OFFICIAL CASE DOCUMENTS**

US Department of Justice Letter

Order granting Preliminary Injunction sought By Michael D Cohen

Memorandum of Law in Opposition to the Motion for Preliminary Injunction dated 07/22/2020

Declaration in Support of Opposition to the Motion for Preliminary Injunction

Verified Petition for Writ of Habeas Corpus by the Applicant & ACLU.

Memorandum of Law in support of Petitioner’s Emergency Motion dated 07/20/2020

AMICUS Curiae by Lawyers Defending American Democracy

Federal Location Monitoring Program Participant Agreement