Testimony Submitted for the Record

House Committee on the Judiciary

Hearing on "Executive Privilege and Congressional Oversight"

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Chairman Nadler, Ranking Member Collins, and members of the Committee, thank you for the opportunity to submit written comments for the record of the Committee's May 15 hearing on "Executive Privilege and Congressional Oversight." We write on behalf of the Presidential Investigation Education Project (PIEP), a joint initiative of the American Constitution Society and Citizens for Responsibility and Ethics in Washington, which promotes informed public evaluation of the legal and policy issues relating to the investigations of Russian interference in the 2016 election.

These comments describe the limitations of a legal strategy by the President to invoke executive privilege to refuse cooperation with the investigation by this Committee of alleged public corruption, obstruction of justice, and other abuses of power by the President and his associates. With respect to key information sought by this Committee, including Special Counsel Robert Mueller's Report on the Investigation Into Russian Interference in the 2016 Presidential Election ("Mueller Report") and underlying materials of Special Counsel Robert Mueller, and documents and testimony from former White House Counsel Donald McGahn, assertions of executive privilege rest on tenuous legal grounds. The applicability of executive privilege is outright implausible where much of the material in question concerns conduct that occurred before the President took office or has already been disclosed without an assertion of the privilege. Administration misconduct may also be subject to Congressional scrutiny even where a valid claim of privilege lies. Below we provide detail on the limited applicability of executive privilege to the documents and testimony the Committee is seeking to evaluate the Mueller Report and its implications.

I. The Contours of Executive Privilege

Executive privilege is a collection of related privileges intended to "resist disclosure of information the confidentiality of which [executive officials] felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government."[1] As discussed in

[1] *In re Sealed Case (Espy)*, 121 F.3d 729, 736 (D.C. Cir. 1997).

depth the May 2018 PIEP report on evidentiary privileges,[2] the executive confidentiality interests encompass two major categories of information[3]: (1) "presidential communications," or direct communications with the president and information in the possession of the president's close advisers that is "revelatory of the President's deliberations;"[4] and (2) "deliberative process" information consisting of "opinions, recommendations, or advice offered in the course of the executive's decision-making process[5] that are "'antecedent to the adoption of an agency policy.'"[6]

Courts have drawn clear boundaries on the scope of executive privilege and have found that the public interest may outweigh even the legitimate assertion of the privilege. This section outlines major restrictions on the applicability of the privilege.

A. Inapplicability of Executive Privilege to Pre-Inauguration Communications

No court has recognized the presidential communications privilege with respect to communications that occurred before a president took office. As the federal district court recently explained in rejecting a claim that executive privilege applied to a document provided to President-elect Trump, neither presidential candidates nor presidents-elect have the

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[2] Norman L. Eisen and Andrew M. Wright, Evidentiary Privileges Can Do Little To Block Trump-Related Investigations, *American Constitution Society and Citizens for Responsibility and Ethics in Washington*, June 2018, *available at* https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/06/28214023/ACS-CREW-Report-Evidentiary-Privileges-Can-Do-Little-to-Block-Trump-Related-Investigations.pdf (Prepared for the ACS/CREW Presidential Investigation Education Project).

[3] *See Espy*, 121 F.3d at 735 n.2 ("[W]e refer to the privileges asserted by the White House more specifically as the presidential communications privilege, or presidential privilege, and the deliberative process privilege."). The executive branch has also asserted its prerogative to claim privilege over other categories of information such as state secrets and open investigative files. *See* 26 Charles Alan Wright & Arthur R. Miller Edward H. Cooper, *Federal Practice & Procedure: Federal Rules of Evidence* § 5673 (1st ed.). The comments we are submitting today to the Committee in this document apply the narrower understanding of executive privilege to the Mueller Report and related testimony. While other potentially relevant privileges, such as the attorney-client privilege, the state secrets privilege, and the investigative files privilege may prove relevant to other congressional requests for executive branch material, we do not believe it is necessary to analyze their application in this context. *See generally In re Lindsey*, 158 F.3d 1263 (1998); Wright & Miller § 5664; *Id*, § 5681.

[4] *Espy*, 121 F.3d at 745, 752 (holding that the presidential communications privilege covers not only communications by the president him-or herself, but also "communications made by presidential advisers in the course of preparing advice for the President . . ., even when those communications are not made directly to the President"); *but see id.* at 753 ("Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential advisers is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.")

[5] Gerald Wetlaufer, Justifying Secrecy: An Objection to the General Deliberative Privilege, 65 IND. L.J. 845, 851 (1990).

[6] *Citizens for Responsibility & Ethics in Washington* v. *U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 233 (D.D.C. 2009) (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C.Cir.1978)); *see also Espy*, 121 F.3d at 737 ("Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative."); *Providence Journal Co.* v. *U.S. Dep't of Army*, 981 F.2d 552, 557 (1st Cir. 1992) (holding that a document is predecisional if it (i) correlates to a specific agency decision, (ii) was "prepared . . . for the purpose of assisting the agency official charged with making the agency decision," and (iii) was created prior to the decision to which it relates).

"*constitutional* power to make any decisions on behalf of the Executive Branch."[7] Similarly, regarding the deliberative process privilege, case law strongly supports the view that the privilege does not apply to campaign or transition periods.[8] That is, the deliberative process privilege protects only "the pre-decisional deliberations of *federal* government *agencies*,"[9] and neither campaign staff nor transition employees are part of a federal government agency or decision- or policy-making power.[10]

B. Inapplicability of Executive Privilege to Misconduct

Courts also have held that the presidential communications privilege is inapplicable to information concerning wrongdoing by members of the executive branch.[11] "[T]he Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing."[12] However, mere allegations of wrongdoing or the existence of a criminal investigation are insufficient to overcome the privilege. Instead, a party seeking to obtain privileged presidential communications "must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials."[13] Like the presidential communications privilege, the deliberative process privilege does not apply "where there is reason to believe the documents sought may shed light on government

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[7] *Fish* v. *Kobach*, No. 16-cv-2105, 2017 WL 1373882, at *6 (D. Kan. Apr. 17, 2017), *review denied*, No. 16-2105, 2017 WL 1929010 (D. Kan. May 10, 2017).

[8] *See Illinois Inst. for Continuing Legal Educ.* v. *U.S. Dep't of Labor*, 545 F. Supp. 1229, 1232-33 (N.D. Ill. 1982) (noting that "transition staff . . . is not within the executive branch of government and hence not an 'agency'" within the meaning of a FOIA exemption premised on executive privilege); *see also Fish*, 2017 WL 1373882 at *6 ("No court has recognized the applicability of the executive privilege to communications made before a president takes office.").

[9] *Fish*, 2017 WL 1373882 at *5; *see also N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) ("The cases uniformly rest the [executive] privilege on the policy of protecting the decision making processes of government agencies and focus on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.") (internal citations and quotations omitted).

[10] The Supreme Court has recognized that the privilege may extend to certain communications generated by former Presidents while they were in office, on the grounds that time limits for confidentiality assurances regarding discussions that occur between a president and his or her aides during the president's tenure would undermine the goal of promoting frank and fulsome decision-making. *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977). While the district court in *Fish* underscored that this rationale "doesn't directly translate to communications with presidents elect," 2017 WL 1373882 at *5, there may be outlier circumstances, such as where a sitting president includes a president-elect in a decision, that provide justification for applying the privilege. *See, e.g.*, Wright & Miller, § 5673 ("It is a reasonable inference from the cases and the policy of the executive privilege that it only applies to communications to the president during his term of office, though there is something to be said for extending the privilege to communications to a president-elect during the transition between administrations."). It is also unlikely that most campaign and transition materials fall within the scope of the state secrets privilege; materials produced for security briefings of the candidate or president-elect and senior staff are among the only documents that would be likely to contain secrets of the U.S. government.

[11] *United States v. Nixon*, 418 U.S. 683, 712 (1974).

[12] *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).

[13] *Espy*, 121 F.3d at 746.

misconduct . . . on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'"[14]

The Department of Justice's policies also are instructive on this issue. Departmental guidelines state that DOJ's principles regarding protecting the integrity of prosecutorial decision-making "will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review,"[15] suggesting that any claim of privilege will be diminished in circumstances where it would shield evidence of misconduct by the president or other executive officers.

C. Congress's Interests in Disclosure May Outweigh Legitimate Application of Executive Privilege

Even where a communication by a President or his aides may constitute information subject to executive privilege, Congress's legislative interest in disclosure may outweigh executive confidentiality concerns.[16] The Supreme Court has recognized that "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function."[17] When considering whether Congress can overcome an assertion of executive privilege, courts evaluate "whether the information requested is essential to the responsible fulfillment of [Congress's] functions," "whether there is an available alternative which might provide the required information without forcing a showdown on the claim of privilege," and "the circumstances surrounding and the basis for the Presidential assertion of privilege."[18]

The Department of Justice's practices in investigations of presidential misconduct are instructive. In every investigation that has produced evidence of possibly impeachable offenses, DOJ has ensured that Congress could access investigative materials. In Watergate, Special Prosecutor Leon Jaworski had a grand jury transmit a report to Congress containing a summary of findings and accompanying evidence.[19] In the 1990s, Independent Counsel Kenneth Starr transmitted to

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[14] *Espy*, 121 F.3d at 738 (quoting *Texaco P.R., Inc.* v. *Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)); *see also id.* at 746 ("[T]he [deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred."); *Alexander* v. *FBI*, 186 F.R.D. 170, 177–78 (D.D.C. 1999) ("[I]f there is 'any reason' to believe the information sought may shed light on government misconduct, public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.").

[15] Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31, 36 (1982), *available at* https://www.justice.gov/file/22886/download.

[16] *See Espy*, 121 F.3d at 753 ("The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings.").

[17] *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927); *see also Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975) (noting that the issuance of a congressional subpoena "pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking").

[18] *United States* v. *Am. Tel. & Tel. Co.*, 419 F. Supp. 454, 460 (D.D.C. 1976).

[19] Referral to the United States House of Representatives pursuant to Title 28, United States Code, § 595(c), *Office of the Independent Counsel*, Sept. 9, 1998, *available at* https://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm#L8.

Congress a voluminous report and appendix that included a host of grand jury materials, including a transcript and video of the president's grand jury testimony.[20]

II. The Limited Reach of Executive Privilege Regarding the Mueller Report, Testimony of White House Counsel Don McGahn, and Related Matters

The President formally notified the Committee of his "protective assertion" of executive privilege regarding the redacted portions of the Mueller Report and underlying material and evidence subpoenaed by the Committee,[21] and former White House Counsel Don McGahn has declined to provide the Committee documents and testimony at the direction of the White House.[22] In each of these cases, executive privilege is a legally tenuous basis for refusing the Committee's requests because of both waiver and public interest considerations.[23]

A. Infirmities with Executive Privilege Claims Concerning the Mueller Report

First, the President has waived executive privilege over almost all of the Mueller Report. Most of the report has already been released publicly, and there is likely significant overlap between the material for which privilege has been explicitly waived and the material that the President now seeks to protect. Barr himself has argued that, while the President "would have been well within his rights" to exert executive privilege over the Mueller Report, "the President confirmed that, in the interests of transparency and full disclosure to the American people, he would not assert privilege over the Mueller Report."[24] Importantly, the President may have already waived any

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[20] Report and Recommendation, *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives* (March 1, 1974), *available at* https://www.archives.gov/research/investigations/watergate/roadmap. In addition, in the late 1990s, Special Counsel John Danforth, who was appointed to investigate the FBI's role in and investigation of the *Waco* incident published an extensive report clearing the government of wrongdoing. *See* Final Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt. Carmel Complex, *Office of the Special Counsel*, Nov. 8, 2000, *available at* https://upload.wikimedia.org/wikipedia/commons/8/85/Danforthreport-final.pdf.

[21] Letter from Stephen E. Boyd, Assistant Attorney General, Department of Justice, to Jerrold Nadler, Chairman, House Committee on the Judiciary (May 8, 2019), *available at* https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Chairman%20Nadler%20letter_8%20May%202019%20%28003%29.pdf.

[22] Letter from Pat A. Cipollone, White House Counsel, to Jerrold Nadler, Chairman, House Committee on the Judiciary (May 7, 2019), *available at* http://cdn.cnn.com/cnn/2019/images/05/07/pacletter05.07.2019.pdf.

[23] These comments address the applicability of executive privilege to key documents and testimony sought by the Committee, and do not focus on the additional argument advanced by the Department of Justice's Office of Legal Counsel in several administrations that senior White House officials such as McGahn have absolute immunity from congressional process for testimony. *See, e.g.*, Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach From Congressional Subpoena, 38 Op. O.L.C. ___, 2014 WL 10788678 (July 15, 2014), *available at* https://www.justice.gov/file/30896/download; Immunity of the Former Counsel from Compelled Congressional Testimony, 31 Op. O.L.C. 191 (2007). It merits note, however, that this absolute immunity position was addressed and squarely rejected by the district court of the District of Columbia in *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F.Supp. 2d 53, 99-107 (D.D.C. 2008).

[24] Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election, *Department of Justice*, Apr. 18, 2019, *available at* https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian.

claim to executive privilege over the bulk of the underlying material when he voluntarily allowed the Department of Justice to release to the public the conversations that McGahn and others disclosed to the Special Counsel in hundreds of hours of interviews.[25] Whether disclosure of this information to investigators constituted waiver of the privileges is an open question.[26]

Second, large portions of the materials assembled by Mueller are outside of the scope of executive privilege based on the fact that they occurred before President Trump took office. This likely includes nearly all of Volume I of the Mueller Report, which details the Trump Campaign's numerous, repeated communications with Russia and Russia-linked individuals, all of which occurred prior to Trump's inauguration.[27] Volume I is also where the vast majority of the redactions can be found.[28] No court has recognized an assertion of executive privilege over documents or information regarding pre-administration conduct, and it is difficult to imagine a credible claim that Volume I concerns presidential decision-making.

Third, executive privilege is not absolute and cannot be used to cover up evidence of misconduct – significant evidence of which is outlined in Mueller's Volume II on obstruction of justice. In this case, Volume II of the Mueller Report contains compelling evidence that President Trump obstructed justice – so compelling that more than 900 former federal prosecutors from both Democratic and Republican administrations signed a letter explaining that Trump would have been indicted for obstruction if he were not a sitting president.[29] As the former prosecutors noted, the question of whether any other person would have been indicted "are not matters of close professional judgment."[30]

Simply put, even valid assertions of privilege can be overcome by the public interest in disclosure to Congress – especially in situations that involve executive misconduct. Here, the public interest in rooting out and preventing corruption in our government and ensuring a secure and functional election process going forward outweighs the executive interest in maintaining confidentiality. Where particularly sensitive information is at stake, such as material that may be

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[25] The Mueller Report drew heavily from McGahn's contemporaneous recollections of the President's obstructive behavior, which were memorialized in a daily diary kept by his chief of staff Annie Donaldson. Those notes, and McGahn's testimonial recollections, will likely corroborate a number of Mueller's most damning findings, including that the President ordered McGahn to fire the Special Counsel, and later, ordered McGahn to create an internal record denying that he attempted to fire Mueller. *See, e.g.*, Report On The Investigation Into Russian Interference In The 2016 Presidential Election ("Mueller Report"), Special Counsel Robert S. Mueller III, March 2019, available at https://www.justice.gov/storage/report.pdf, Vol. II, at pg. 31 n.145., n.148.

[26] *See Peck v. United States*, 514 F. Supp. 210, 213 (S.D.N.Y.), on reargument, 522 F. Supp. 245 (S.D.N.Y. 1981) ("[W]e find that voluntary disclosure of a significant portion of the privileged matter of the Rowe Report in the Summary waived the qualified official information privilege."); *but see Citizens for Responsibility & Ethics in Washington*, 658 F. Supp. 2d at 238 (finding that Vice President Dick Cheney's failure to invoke executive privileges when making statements to the Special Counsel "did not preclude the White House's future reliance on those privileges"). For an overview of the issues regarding waiver of government privileges, *see* Wright & Miller § 5692.

[27] *See* Muller Report, Vol. I, at pg. 4-13.

[28] Matt Stieb, the Most Redacted Sections of the Mueller Report, *New York*, Apr. 18, 2019, *available at* http://nymag.com/intelligencer/2019/04/the-most-redacted-sections-of-the-mueller-report.html

[29] Statement by Former Federal Prosecutors (May 6, 2019), *available at* https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1.

[30] *Id.*

relevant to an ongoing prosecution, Congress and the executive can – as they have in the past[31] – work out an accommodation to ensure that Congress has access to the information necessary to fulfill its constitutional responsibilities.

B. Infirmities Concerning Executive Privilege Claims Over Documents and Testimony from Former White House Counsel Donald F. McGahn, II

Similar arguments apply to the testimony and documents of individuals who provided evidence and testimony to the Special Counsel and who could be called by congressional committees to testify. This point can be illustrated by considering the subjects that former White House Counsel Donald F. McGahn, II might address in testimony before this committee.[32] As explained above, President Trump cannot exert executive privilege to prevent McGahn from testifying about conversations and conduct that has already been disclosed in the Mueller Report. To the extent that McGahn's testimony regarding any of this material was subject to executive privilege, the privilege has been waived.

It bears emphasis that the unredacted, already publicly released portions of the Mueller Report describe in great detail the central role played by White House Counsel McGahn in two incidents where the President appeared to attempt obstruction of justice, and discuss several other obstruction-related incidents where McGahn may have insight and knowledge.

First, according to the Mueller Report, in June 2017, the President sought to have McGahn terminate Special Counsel Mueller. The Mueller Report states that after news outlets reported that the President was under investigation for obstruction of justice, the President called McGahn at home and directed him to call the Acting Attorney General and say that the Special Counsel had conflicts of interest and must be removed. McGahn did not carry out the direction, however, deciding that he would resign rather than trigger what he regarded as a potential Saturday Night Massacre."[33] According to the Mueller Report, McGahn told Trump that such a call to Rosenstein would "look like still trying to meddle in [the] investigation" and "knocking out Mueller" would be "[a]nother fact used to claim obstruction of justice."[34]

The Mueller Report states that there is substantial evidence of each of the three elements required for an obstruction of justice charge for this episode. With respect to whether the

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[31] *See, e.g.*, Rachel Bade & John Gerstein, FBI hands over Clinton email interview summary to Congress, *Politico*, Aug. 16, 2018, *available at* https://www.politico.com/story/2016/08/fbi-clinton-email-documents-to-congress-227069 (reporting that the FBI provided the House Oversight Committee with details about the contents of investigatory document as well as FBI interview reports); Darren Samuelsohn, Democrats want to know why Justice Department released FBI texts, *Politico*, Dec. 14, 2017, *available at* https://www.politico.com/story/2017/12/14/fbi-agents-text-message-justice-department-congress-democrats-297737 (reporting that DOJ released texts between two DOJ employees that were the subject of an ongoing investigation by the department's Inspector General).

[32] The Committee noticed a hearing for McGahn's testimony. *See* Oversight of the Report by Special Counsel Robert S. Mueller, III: Former White House Counsel Donald F. McGahn, II, *available at* https://judiciary.house.gov/legislation/hearings/oversight-report-special-counsel-robert-s-mueller-iii-former-white-house.

[33] Mueller Report, Vol. II, pg. 4.

[34] *Id.*, Vol. II, pg. 81-82 (quoting Donaldson 5/31/17 Notes).

President's request that McGahn fire the Special Counsel constituted an obstructive act, the Mueller Report states that "substantial evidence . . . supports the conclusion that the President went further and in fact directed McGahn to call Rosenstein to have the Special Counsel removed."[35] In addition, "This evidence shows that the President was not just seeking an examination of whether conflicts existed but instead was looking to use asserted conflicts as a way to terminate the Special Counsel."[36]

The Mueller Report further indicates that there was likely a nexus to a qualifying proceeding because "[s]ubstantial evidence indicates that by June 17, 2017, the President knew his conduct was under investigation by a federal prosecutor who could present any evidence of federal crimes to a grand jury."[37]

And finally, with respect to the President's intent, the Mueller Report states that "[s]ubstantial evidence indicates that the President's attempts to remove the Special Counsel were linked to the Special Counsel's oversight of investigations that involved the President's conduct and, most immediately, to reports that the President was being investigated for potential obstruction of justice."[38] The Mueller Report further states that "[t]here also is evidence that the President knew that he should not have made those calls to McGahn."[39]

The Mueller Report also highlights a related episode that features McGahn. The Mueller Report states that in January 2018, President Trump engaged in a multi-pronged effort to get McGahn to make untrue statements and create false records when reports surfaced that the President had asked McGahn to fire the special counsel. According to the Mueller Report, "[o]n January 26, 2018, the President's personal counsel called McGahn's attorney and said that the President wanted McGahn to put out a statement denying that he had been asked to fire the Special Counsel and that he had threatened to quit in protest." [40] It further notes:

> McGahn's attorney spoke with McGahn about that request and then called the President's personal counsel to relay that McGahn would not make a statement. McGahn's attorney informed the President's personal counsel that the Times story was accurate in reporting that the President wanted the Special Counsel removed."[41]

The Mueller Report also says that President Trump asked White House Staff Secretary Rob Porter to intervene with McGahn:

> Porter told McGahn that he had to write a letter to dispute that he was ever ordered to terminate the Special Counsel. McGahn shrugged off the request, explaining that the media reports were true. McGahn told Porter that the President had been insistent on firing the Special Counsel and that McGahn had planned to resign rather than carry out the order, although he had not personally told the

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[35] *Id.*, Vol. II, pg. 88.
[36] *Id.*, Vol. II, pg. 89.
[37] *Id.*
[38] *Id.*
[39] Mueller Report, Vol. II, pg. 90.
[40] *Id.*, Vol. II, pg. 114. *See also id.*, Vol. II, pg. 5-6.
[41] *Id.*, Vol. II, pg. 114.

> President he intended to quit. Porter told McGahn that the President suggested that McGahn would be fired if he did not write the letter. McGahn dismissed the threat, saying that the optics would be terrible if the President followed through with firing him on that basis. McGahn said he would not write the letter the President had requested.[42]

Here, too, the Mueller Report states that there is evidence supporting each of the three elements required for an obstruction of justice. With respect to the President's request that McGahn make false statements and create a false record, the Mueller Report considers and rejects benign explanations of the President's conduct and concludes that "evidence indicates that by the time of the Oval Office meeting the President was aware that McGahn did not think the story was false and did not want to issue a statement or create a written record denying facts that McGahn believed to be true."[43] The Mueller Report continues, "The President nevertheless persisted and asked McGahn to repudiate facts that McGahn had repeatedly said were accurate."[44]

The Mueller Report further indicates that there was likely a nexus to a qualifying proceeding: "Because McGahn had spoken to Special Counsel investigators before January 2018, the President could not have been seeking to influence his prior statements in those interviews. But because McGahn had repeatedly spoken to investigators and the obstruction inquiry was not complete, it was foreseeable that he would be interviewed again on obstruction-related topics.[45] In addition, the Mueller Report states that "the President's efforts to have McGahn write a letter 'for our records' approximately ten days after the stories had come out – well past the typical time to issue a correction for a news story – indicates the President was not focused solely on a press strategy, but instead likely contemplated the ongoing investigation and any proceedings arising from it."[46]

The Mueller Report also states with respect to the President's intent that "[s]ubstantial evidence indicates that in repeatedly urging McGahn to dispute that he was ordered to have the Special Counsel terminated, the President acted for the purpose of influencing McGahn 's account in order to deflect or prevent further scrutiny of the President's conduct towards the investigation."[47]

Finally, the Mueller Report also notes that McGahn played a role in several other episodes relating to the evidence of the President's obstruction of justice, including:

- McGahn told the President that Flynn had made a false statement and that his conduct was potentially criminal.[48] (McGahn's testimony about what he told the President could help explain the President's state of mind when he met privately with FBI Director Comey and asked Comey let Flynn go.)

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[42] Mueller Report, Vol. II, pg. 116.
[43] *Id.*, Vol. II, pg. 119.
[44] *Id.*
[45] *Id.*
[46] *Id.*, Vol. II pg. 119-20.
[47] *Id.* Vol. II pg. 120.
[48] Mueller Report, Vol II pg. 46.

- "In early March, the President told White House Counsel Donald McGahn to stop Sessions from recusing. And after Sessions announced his recusal on March 2, the President expressed anger at the decision and told advisors that he should have an Attorney General who would protect him. That weekend, the President took Sessions aside at an event and urged him to 'unrecuse.'"[49]

- McGahn counseled the president to avoid direct contacts with the Justice Department, which the President ignored.[50]

- The Mueller Report indicates that McGahn has personal knowledge of efforts by the President to get then-Attorney General Sessions to resign: " . . . while aboard Marine One on the way to Norfolk, Virginia, the President told Priebus that he had to get Sessions to resign immediately." The Mueller Report continues, "Priebus believed that the President's request was a problem, so he called McGahn and asked for advice, explaining that he did not want to pull the trigger on something that was 'all wrong.' . . . McGahn told Priebus not to follow the President's order and said they should consult their personal counsel, with whom they had attorney-client privilege."[51] According to the Report, "McGahn and Priebus discussed the possibility that they would both have to resign rather than carry out the President's order to fire Sessions."[52]

In each of these cases, McGahn's testimony about materials that have already been disclosed to the public could shed light on the evidence that President Trump obstructed justice. Even if there were a colorable claim of executive privilege, that privilege would be outweighed by the public interest in preventing and addressing executive branch misconduct.

III. Conclusion

Executive privilege does not provide the President with a means to avoid congressional oversight and accountability. As explained above, scope of valid privilege claims is narrow. A significant portion of the conduct described in the Mueller Report is not subject to executive privilege and the privilege has likely been waived in other cases due to the public disclosure of communications and information. Even in cases where a valid privilege claim might lie, the fact that the privileged material concerns presidential and executive branch misconduct strengthens Congress's claim that disclosure of that material is in the public interest.

[49] *Id.*, Vol. II, pg. 3.
[50] *Id.*, Vol. II pg. 4.
[51] *Id.*, Vol. II, pg. 95.
[52] *Id.*, Vol. II, pg. 95-96.