

STATEMENT OF JOHN W. DEAN
U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY HEARINGS:
“LESSONS FROM THE MUELLER REPORT: PRESIDENTIAL OBSTRUCTION AND OTHER CRIMES.”

JUNE 10, 2019

Chairman Nadler, Ranking Member Collins, the last time I appeared before your committee was July 11, 1974, during the impeachment inquiry of President Richard Nixon. Clearly, I am not here as a fact witness. Rather I accepted the invitation to appear today because I hope I can give a bit of historical context to the Mueller Report.

In many ways the Mueller Report is to President Trump what the so-called Watergate “Road Map” (officially titled “Grand Jury Report and Recommendation Concerning Transmission of Evidence to the House of Representatives”) was to President Richard Nixon. Stated a bit differently, Special Counsel Mueller has provided this committee a road map.

The Mueller Report, like the Watergate Road Map, conveys findings, with supporting evidence, of potential criminal activity based on the work of federal prosecutors, FBI investigators, and witness testimony before a federal grand jury. The Mueller Report explains – in Vol. II, p. 1 – that one of the reasons the Special Counsel did not make charging decisions relating to obstruction of justice was because he did not want to “potentially preempt [the] constitutional processes for addressing presidential misconduct.” The report then cites at footnote 2: “See U.S. CONST. ART. I § 2, cl. 5; § 3, cl. 6; cf. OLC Op. at 257-258 (discussing relationship between impeachment and criminal prosecution of a sitting President).”

Today, you are focusing on Volume II of the report. Neither of the two volumes are formally titled, but the first sentence of the second paragraph, on page 1 of Volume II states it’s focus: “Beginning in 2017, the President of the United States took a variety of actions towards the ongoing FBI investigation into Russia’s interference in the 2016 presidential election and related matters that raised questions about whether he had obstructed justice.” Volume II concludes on page 182: “[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state.” However, the Special Counsel’s office was unable to reach that conclusion, so the report neither alleges criminal behavior by the president nor, as the report states, does it “exonerate him.” (SEE MUELLER REPORT, VOL. II, PP. 1 AND 182.)

I would like to address a few of the remarkable parallels I find in the Mueller Report that echo Watergate, particularly those related to obstruction of justice. And I hasten to add that I learned about obstruction of justice the hard way, by finding myself on the wrong side of the law.

The examples that follow are illustrative rather than exhaustive, and before turning to obstruction of justice, I must make brief mention of the underlying events to place the material in context:

UNDERLYING EVENTS

MUELLER REPORT VOLUME I: The underlying crimes were a Russian “active measures” social media campaign and hacking/dumping operations, which Mueller describes as a “sweeping and systematic” effort to influence our 2016 presidential election. The targets of the hacking were the Democratic National Committee and the Clinton campaign, from which information was stolen and released to harm the Clinton campaign and in turn would help the Trump campaign.

WATERGATE: In 1972, the underlying crime was a bungled break-in, illicit photographing of private documents and an attempt to bug the telephones and offices of the chairman of the Democratic National Committee, with plans to do likewise that same night with Nixon’s most likely Democratic opponent Senator George McGovern, which because of the arrests of five men at the Watergate, did not happen.

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MUELLER REPORT VOLUME I: The Mueller Reports finds no illegal conspiracy, or criminal aiding and abetting, by candidate Trump with the Russians.

WATERGATE: I am aware of no evidence that Nixon was involved with or had advance knowledge of the Watergate break-in and bugging, or the similar plans for Senator McGovern.

Yet events in both 1972 and 2016 resulted in obstruction of the investigations. (See *U.S. vs. HALDEMAN*, 559 F.2d 31 (D.C. Cir. 1976); AND “IMPEACHMENT OF RICHARD NIXON, PRESIDENT OF THE UNITED STATES,” *REPORT OF THE COMMITTEE ON THE JUDICIARY* (WASHINGTON, D.C: GOV. PRINTING OFFICE, 1974); AND SPECIAL COUNSEL ROBERT S. MUELLER, III, “REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION,” *VOLUMES I AND II* (WASHINGTON, D.C: GOV. PRINTING OFFICE, 2019).

OBSTRUCTION OF JUSTICE

In both situations the White House Counsel was implicated in the coverup activity. While I was an active participant in the coverup for a period of time, there is absolutely no information whatsoever that Trump’s White House Counsel, Don McGahn, participated in any illegal or improper activity – to the contrary, there is evidence he prevented several obstruction attempts. But there is no question Mr. McGahn was a critical observer of these activities. Mr. McGahn is the most prominent fact witness regarding obstruction of justice cited in the Mueller Report. He is mentioned in the report on 529 occasions, and based on the footnotes he was interviewed at various lengths by the FBI on not less than 9 occasions: July 24, 2015, December 11, 2015 and April 1, 2016 (thus three occasions before Mr. Trump was elected), and July 7, 2017, January 19, 2018, February 16, 2018, March 2, 2018, October 22, 2018, and March 20, 2019 (and on six occasions after Mr. Trump was elected). This is based on my count of FBI 302 reports cited in the Mueller Report.

The Mueller Report also refers to corroboration of McGahn as a witness in that he made contemporaneous notes on occasions (e.g., MUELLER RPT, VOL. II, P.117); McGahn discussed

matters with others (e.g. Eisenberg, MUELLER RPT, VOL. II, P. 32); his chief of staff Annie Donaldson made contemporaneous notes of McGahn's conversations with the president (e.g., MUELLER RPT, VOL. II, P. 52), and McGahn is the only witness that the Special Counsel expressly labels as reliable, calling McGahn "a credible witness with no motive to lie or exaggerate given the position he held in the White House." (MUELLER RPT, VOL. II, P. 88.)

A few specific examples of the Mueller findings and the Watergate parallels (**HEADER CITES ARE TO VOLUME II**):

MUELLER REPORT RE MICHAEL FLYNN (PP. 24-48): When President Trump learned that his National Security Advisor Michael Flynn lied to the FBI and others about his telephone conversations with the Russian Ambassador to the United States regarding U. S. sanctions imposed because of Russia's election interference, he met with FBI Director James Comey at a private White House dinner and asked for Comey's loyalty. The day following Flynn's resignation, President Trump in a one-on-one Oval Office conversation with Director Comey said, "I hope you can see your way clear to letting this go, to letting Flynn go."

WATERGATE: In a like situation, when President Nixon learned of his re-election committee's involvement in the Watergate break-in, he instructed his Chief of Staff, H. R. Haldeman, to have the CIA ask the FBI not to go any further into the investigation of the break-in for bogus national security reasons. The Oval Office exchange between the President and Haldeman was on June 23, 1972, six days after the after the arrests at the Watergate complex. The words Nixon used were strikingly like those uttered by President Trump. Nixon said, "And, ah, because these people are playing for keeps, . . .they should call the FBI and say that we wish for the country, don't go any further into this case, period. And that destroys the case."³

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MUELLER REPORT RE TERMINATION OF COMEY (PP. 62-77): President Trump called Director Comey multiple times, against the advice of Don McGahn, to have him confirm that he, Trump, was not personally under investigation. Mr. Trump asked Comey to "lift the cloud" of the Russia investigation by saying so to the public. After Comey's testimony to Congress on May 3, 2017, in which he declined to answer questions about whether the President was personally under investigation, the President decided to terminate Comey. The White House dissembled on the reason for firing Comey, but President Trump later admitted in a television interview that he made the decision because "the thing with Trump and Russia is a made-up story." Mr. Trump made similar remarks to visiting Russians in Oval Office.

WATERGATE: The Comey firing echoes Nixon's firing of Special Prosecutor Archibald Cox in the infamous "Saturday Night Massacre" in October 1973. Cox had been appointed after President Nixon fired his Attorney General Richard Kleindienst in April 1973 and the Senate insisted a special prosecutor be appointed by Kleindienst's replacement, Elliot Richardson. Like Comey, Cox was charged with investigating wrongdoing by the President and his advisors and Cox refused an ultimatum from the White House to limit his access to the secret White House tapes by accepting written transcripts, prepared by the White House and verified by a near deaf senior member of the U.S. Senate, former judge John Stennis, rather than allowing Cox to listen to the tapes. When Cox refused this arrangement, Nixon ordered his Attorney General to fire

Cox, which Richardson refused to do and resigned himself. His deputy, William Ruckelshaus, also refused to fire Cox and also resigned, with the next man in succession, Solicitor General Robert Bork carrying out the president's order to terminate Cox. (Following Cox's firing, a dozen plus bills calling for Nixon's impeachment or creating a special prosecutor were filed in the House. The public pressure was so great, Nixon had to appoint a new special prosecutor, Leon Jaworski. After listening to Nixon's March 21, 1973 secretly recorded conversation with me, Jaworski pursued more tapes as vigorously as had Cox. And by early February 1974, this Committee formally commenced impeachment proceedings.) In short, the firing of FBI Director Comey, like Nixon's effort to curtail the Watergate investigation, resulted in the appointment of Special Counsel Mueller.

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MUELLER REPORT RE APPOINTMENT/REMOVAL OF THE SPECIAL COUNSEL (PP. 78-90, 113-133): According to Mueller's account, Don McGahn played a critical role in interdicting the President's express efforts to fire Special Counsel Mueller. According to the Mueller Report, President Trump directed Mr. McGahn to have the Special Counsel removed on June 17, 2017, over purported conflicts of interest. McGahn refused to follow the President's order, recalling the opprobrium that met Robert Bork following the Saturday Night Massacre. McGahn decided he would resign rather than carry out the orders, not unlike Elliot Richardson and William Ruckelshaus when they refused to fire Cox. For whatever reason, President Trump did not follow up with the directive to fire Mueller and McGahn did not resign. Further compounding the situation in 2018, in response to press reports that McGahn had considered resigning over the direction to fire Mueller, Trump asked another White House official (Rob Porter, also an attorney serving as Staff Secretary) to tell McGahn to dispute the story and create a false record stating that he had not been ordered to have the Special Counsel removed. Again, McGahn's testimony about these events, which are described in detail in the Mueller Report, are important for Congress to understand and, as noted later, claims of executive privilege or attorney-client privilege have been waived (because of disclosure of the Mueller Report authorized by President Trump, and the so-called crime-fraud exception to all privileges).

WATERGATE: This is much like Richard Nixon's attempt to get me to write a phony report exonerating the White House from any involvement in Watergate. Nixon first announced on August 29, 1973, that I had investigated the situation under his direction and found "nobody presently employed at the White House had anything to do with the bizarre incident at the Watergate." Since I had conducted no such investigation, I resisted months of repeated efforts to get me to write a bogus report.

Nixon also sought to influence my testimony after I openly broke with the White House and began cooperating with prosecutors and the Senate Watergate Committee. Nixon met with me privately on the evening of April 15, 1973, to try to influence how I would relate the events, particularly our conversation of March 21, 1973, when I warned him of the "cancer on the presidency." In the March 21 conversation, I tried to convince him to end the coverup, pointing out that paying hush money and dangling pardons constituted obstruction of justice, and that people were going to go to jail, myself included. By April 15, Nixon tried to tell me he was "kidding" about finding \$1 million in hush money to pay the burglar defendants to maintain their silence. He was trying to shape my future testimony.

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MUELLER REPORT RE EFFORTS TO CONTROL ATTORNEY GENERAL SESSIONS (PP. 90-98): According to Mueller, in addition to McGahn, President Trump pressured former campaign aide Cory Lewandowski and White House Chief of Staff Reince Priebus to curtail the Special Counsel’s investigation through Attorney General Jeff Sessions, who had recused himself from the investigation.

WATERGATE: President Trump repeated efforts to have Attorney General Sessions reverse his recusal – “un-recuse” himself – to take control of the Special Counsel’s investigation parallels President Nixon’s attempt to control the FBI investigation through his former White House Counsel John Ehrlichman. Later Nixon worked directly with Henry Petersen, the top Justice Department official in charge of the Watergate investigation, once I had broken with the White House. Petersen provided Nixon with confidential information from the prosecutors and the grand jury proceedings. President Nixon’s direct interference with the Department of Justice, while facially proper under his Article II constitutional powers, was for the improper purpose of obstructing the investigation. In Watergate, the lesson learned was that no person, even the President, was above the law.

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MUELLER REPORT RE EFFORTS TO PREVENT OR DISTORT DISCLOSURE OF THE JUNE 9, 2016 TRUMP TOWER MEETING (PP. 98-103): According to the report, in June 2017 after emails setting up a June 9, 2016 meeting between senior campaign officials and Russians became known in the White House, the President engaged in efforts to prevent disclosure of the emails and then dictated a false or misleading statement characterizing the meeting as about adoptions in order to protect his son, Don, Jr.

WATERGATE: On the weekend that the Nixon reelection committee men were arrested in the DNC offices at the Watergate, Nixon’s campaign manager, and former attorney general, John Mitchell, along with his chief of staff, Bob Haldeman and former White House Counsel, John Ehrlichman, drafted a false press release about the men arrested at the Watergate. This press statement put a coverup in place immediately, by claiming the men arrested at the Democratic headquarters “were not operating either in our behalf or with our consent” in the alleged bugging attempt. The press statement was false. As Nixon’s secret tape recordings reveal, President Nixon knew the statement was false, and suspected (correctly) that his former attorney general John Mitchell had approved the operation. (Mitchell would not admit this fact, even privately, for almost a year.) Nixon chose not to disclose the information he did have in order to protect his friend Mitchell, believing that revealing this truth would “destroy” Mitchell.

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MUELLER REPORT RE EFFORTS TO INFLUENCE WITNESSES WITH PARDONS (PP. 6-7, 122-28, 131-32, 134, 147-48, ET AL):The Mueller Report addresses the question of whether President Trump dangled pardons or offered other favorable treatment to Michael Flynn, Paul Manafort, Michael Cohen and Roger Stone (whose name is redacted so I assume it is him based on educated conjecture) in return for their silence or to keep them from fully cooperating with

investigators. The Mueller Report offers a powerful legal analysis that, notwithstanding the fact the pardon power is one of the most unrestricted of presidential powers, it cannot be used for improper purposes. (See “Separation-of-Powers Principles Support the Conclusion that Congress May Validly Prohibit Corrupt Obstructive Acts Carried Out Through the President’s Official Powers,” MUELLER REPORT, PP. 171-181). Mueller refutes the dubious contention that when the president exercises his Constitutional powers, he is not subject to federal criminal laws.

WATERGATE: Nixon used the possibility of presidential pardons to keep witnesses from fully testifying in legal proceedings, a practice that was condemned in the Articles of Impeachment drawn up by the House Judiciary Committee in 1974. Howard Hunt’s lawyer sought assurances through Nixon’s Special Counsel Chuck Colson that Hunt would not spend years in prison if he pled guilty in the trial before Judge Sirica in January 1973. When Colson relayed President Nixon’s positive response, Hunt pled guilty and the so-called Cuban American defendants followed his lead and pled guilty, as well. All believed that they could rely on the President to offer clemency under the President’s pardon power.

Yet President Nixon knew that offering such pardons or giving pardons to try to control witnesses in legal proceedings was wrong.

In an exchange with me on March 21, 1973, Nixon conceded such a use of the pardon power was improper:

DEAN: Well, that’s the problem.

PRESIDENT: That’s a problem. You have the problem of clemency for Hunt.

DEAN: That’s right. And you’re gonna have the clemency problem for the others. They all would have expected to be out and that may put you in a position that’s just . . .

PRESIDENT: Right.

DEAN: . . . untenable at some point. You know, the Watergate hearings just over, Hunt now demanding clemency or he’s gonna blow. And politically, it’d just be impossible for, you know, you to do it. Because, you know, after everybody...

PRESIDENT: That’s right.

DEAN: I’m not sure that you’ll ever be able to deliver clemency. It may just be too hot.

PRESIDENT: You can’t do it, till after the ’74 elections, that’s for sure. But even then ... your point is that even then you couldn’t do it.

DEAN: That’s right. It may further involve you in a way you shouldn’t be involved in this.

PRESIDENT: *No, it would be wrong.* That’s for sure. [Emphasis added.]

Similarly, when President Nixon met with me on April 15, 1973, after my break with the White House, he raised the concern about the Hunt pardon again. We were in his Executive Office Building office late on a Sunday night when he got up from his chair and walked to the corner of the room and in a stage-whisper asked me, “I was wrong to offer clemency to Hunt, wasn’t I?” I responded, “Yes, Mr. President, that would be an obstruction of justice.” As I later testified, at the time it struck me his moving across the office and whispering was to keep what he was saying from being picked up by a hidden microphone in the room. This small piece of

testimony, of course, became highly significant for it led to the discovery of the secret White House taping system.

The point is: Richard Nixon knew he could not use his pardon power, unrestricted as it is in Article II, for the improper purpose of gaining the silence of witnesses in legal proceedings.

MCGAHN'S DILEMMA TESTIFYING BEFORE THIS COMMITTEE

Mr. McGahn has expressed concern about being caught between two branches of government in responding to this Committee's subpoena for his documents and testimony. For several reasons I believe he should testify. First, he is a key witness in understanding the Mueller Report. Secondly, I believe as an attorney, he has an ethical obligation to testify.

Let me briefly address the ethics question. Following my testimony before the Senate in 1973, the American Bar Association began to look anew at its code of legal ethics. My telling the Senate Watergate Committee of how so many lawyers found themselves on the wrong side of the law during Watergate hit a chord. I learned this fact from Robert Kutak, with whom I had a friendship from our days when we worked as staffers for Congress. Bob, as a leading legal scholar, was asked to chair an ABA commission to reconsider the ABA's Code of Professional Conduct in light of the Watergate scandal. I met with Kutak and his commission to provide my own insights.

One of the major clarifications that came about through the new ABA Model Rules was with respect to an attorney's obligations when representing an organization. Every and the District of Columbia have adopted a version of these rules. Model Rule 1.13 provides that a lawyer representing an organization represents the entity and not the individuals running the entity. Hence, it is now clear that White House Counsel represents the Office of the Presidency and not the current occupant of that office.

Rule 1.13 further provides that when an attorney representing an organization encounters ongoing crime or fraud, he or she must first try to solve the problem within the organization, by "going up the ladder" to the highest authority that can address the problem. In a corporation, for example, the attorney would report up to the board of directors or a special committee of the board.

If the problem cannot be solved internally, Model Rule 1.13 provides that an attorney *may* report out, despite his or her confidentiality, what is going on, despite his duty of confidentiality or the attorney-client privilege. This "reporting out" provision provides lawyers with leverage to stop wrongdoing if the client fails to take appropriate advice.

Since 2011, I have been using the mistakes I made as a young White House lawyer to teach this rule of ethics with a continuing legal education partner, Jim Robenalt, who is here today. Jim is a trial attorney and a partner in a major multi-state law firm. Eight years ago, we created a course called The Watergate CLE. Since we began, we have presented over 150 programs throughout the United States, reaching somewhere between 45,000 to 50,000 attorneys.

Don McGahn represented the Office of the Presidency, not Donald Trump personally. This appears to have been well understood by McGahn and his lawyer, and I have read news accounts that McGahn has explained this concept to President Trump. In short, McGahn's loyalty is to his client, the Office of the Presidency, not the occupant. He had only a limited attorney-client privilege when interacting with the President and advisors and the privilege belongs to the Office in any event.

Jim Robenalt and I have discussed this at length. We also talked with Michael Frisch, a friend who is the Ethics Counsel at Georgetown University Law Center. We believe Don McGahn is not in a conflict situation in testifying to this Committee, for his duty is to protect the Office of the Presidency, sometimes against the very person in charge of it.

To the extent Mr. McGahn wishes to assert Executive Privilege or the Attorney-Client privilege, he can do so, but those privileges were waived regarding the material plainly set forth in the Mueller Report. In addition, it has long been the rule there is no executive privilege attached to criminal or fraudulent activity. Accordingly, I sincerely hope that Mr. McGahn will voluntarily appear and testify. His silence is perpetuating an ongoing coverup, and while his testimony will create a few political enemies, based on almost 50 years of experience I can assure him he will make far more real friends.

Thank you.