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LEGISLATIVE TESTIMONY

Lessons from the Mueller Report: Presidential Obstruction and Other Crimes

Testimony before the Committee on the Judiciary

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Chairman Nadler, Ranking Member Collins, and distinguished Members of Congress:

Thank you for the opportunity to speak to you today about Volume II of the Mueller Report. My name is John Malcolm. I am the Vice President of the Institute for Constitutional Government and the Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.¹ I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the U.S. Justice Department, and a criminal defense attorney.

Special Counsel Mueller deserves a lot of credit for conducting a thorough investigation. As stated in his Report, he “employed 19 lawyers who were assisted by a team of approximately 40 FBI agents, intelligence analysts, forensic accountants, and other professional staff.” His office “issued more than 2,800 subpoenas, executed nearly 500 search warrants, obtained more than 230 orders for communications records, issued almost 50 orders authorizing use of pen registers, made 13 requests to foreign governments for evidence, and interviewed approximately 500 witnesses.” This should, of course, come as no surprise to anyone who is at all acquainted with Robert Mueller.

Volume I of the Mueller Report also contains important information about how the Russian government attempted to interfere in our election. The Russians, and likely other governments, have probably been doing this for years, and we cannot afford to be complacent about the continuing threats that this poses to the integrity of our elections. Regarding the so-called “collusion” issue, the Report states that “the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.” In other words, with respect to the subject matter that prompted the appointment of the Special Counsel in the first place, there was no underlying crime committed by anyone connected to the Trump campaign, though it was not from a lack of trying by the Russians.

For the reasons that I shall articulate below, I am less enthusiastic about Volume II of the Special Counsel’s Report, which is the subject of this hearing.

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I. Special Counsel Mueller failed in his duty to make a decision about whether a prosecutable case of obstruction of justice existed, and he applied an erroneous “exoneration” standard as part of his analysis

Under the regulations governing his appointment, it was the duty of the Special Counsel to “provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.”² The Attorney General would then have to determine, subject to notifying Congress, whether “any ... prosecutable step” recommended by the Special Counsel was nullified because it is “so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”³ By deciding “not to make a traditional prosecutorial judgment”⁴ with respect to the allegations of obstruction of justice, Special Counsel Mueller failed to fulfill that duty.

The Special Counsel reiterated in his Report that governing opinions from the Department of Justice’s Office of Legal Counsel (OLC) provide that a sitting president cannot be indicted.⁵ While that is certainly true, there was nothing to preclude him from concluding and stating in his confidential report to the Attorney General that the evidence his Office uncovered would be sufficient to charge and convict the President of various criminal offenses, just as Independent Counsel Kenneth Starr did at the conclusion of his Office’s investigation against President Clinton. After all, the President could always be indicted once he leaves office. Besides, if it was Mr. Mueller’s belief that the OLC opinions would preclude him from making such a determination, then it would be reasonable to ask why he ever bothered to investigate whether the President committed obstruction of justice in the first place.

Further compounding that error, the Special Counsel’s Report stated that, with respect to the issue of obstruction of justice, the evidence “prevent[ed] it from conclusively determining that no criminal conduct occurred.”⁶ The Report further states that while the evidence “does not conclude that the President committed a crime, it also does not exonerate him.”⁷

With all due respect, the role of a prosecutor is not to “exonerate” someone who is under investigation. It is to decide whether there is enough evidence to charge somebody with a crime. If so, then it is up to a jury to decide, via a unanimous verdict and after a trial in which the government’s evidence is subject to challenge, whether the government, in fact, has established a defendant’s guilt beyond a reasonable doubt. I would also note that a jury verdict of “not guilty” is also not a definitive determination that the accused did not commit the crime with which he was charged; it is only a determination that the government did not prove his guilt beyond a reasonable

² 28 C.F.R. § 600.8(c).

³ 28 C.F.R. § 600.9(a)(3).

⁴ Mueller Report, Volume 2, pg. 1.

⁵ See Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Re: A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. OLC 222 (2000); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973).

⁶ Mueller Report, Volume 2, pg. 2.

⁷ Id.

doubt. In our system of justice, the accused is cloaked with the presumption of innocence, and it is never his burden to exonerate himself by definitively establishing his innocence of the crime under investigation.

Prosecutors in the Department of Justice are supposed to conduct thorough investigations and then make a binary choice about whether a prosecutable case exists or not, nothing more, nothing less. Robert Mueller was appointed to make that decision, subject to review by the Attorney General to whom he reported. The Special Counsel put the Attorney General in a difficult situation by not making a prosecution decision. As a result, the Attorney General was called upon to make a prosecution decision on behalf of the Department, which he did after consulting with Deputy Attorney General Rod Rosenstein and various career attorneys within the Department.⁸

While the president's behavior throughout the course of this investigation was, at times, certainly impulsive, intemperate, and ill-advised, prosecutors are guided by facts and the law, not *Miss Manners' Guide to Excruciatingly Correct Behavior*.⁹ Whether the American people approve or disapprove of the President's unconventional and at times uncivil conduct is up to them. As General Barr said during his recent testimony before the Senate Judiciary Committee: "The report is now in the hands of the American people. Everyone can decide for themselves. There's an election in 18 months. That's a very democratic process. But we [the Justice Department] are out of it. We have to stop using the criminal justice process as a political weapon."

II. Attorney General Barr's conclusion that a prosecutable case did not exist was eminently reasonable given the facts uncovered and the difficulty of establishing corrupt intent

Moreover, given the facts presented by the Special Counsel in his Report, General Barr's conclusion that the evidence was "not sufficient to establish that the President committed an obstruction-of-justice offense"¹⁰ beyond a reasonable doubt is eminently reasonable, even though there may be some former prosecutors who disagree.

⁸ As General Barr stated in his March 24, 2019 letter to Congress:

After reviewing the Special Counsel's final report on these issues; consulting with Department officials, including the Office of Legal Counsel; and applying the principles of federal prosecution that guide our charging decisions, Deputy Attorney General Rod Rosenstein and I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense. Our determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president.

See Barr March 24, 2019 letter at pg. 2, available at <https://www.documentcloud.org/documents/5779699-Letter-to-Congress-detailing-Robert-Mueller-s.html> (last visited on June 7, 2019).

⁹ Judith Martin, *Miss Manners' Guide to Excruciatingly Correct Behavior*, W.W. Norton & Co. (2005).

¹⁰ Barr March 24, 2019 letter at pg. 3.

Although there are many obstruction of justice statutes,¹¹ the offense generally applies to someone who commits an obstructive act with a corrupt intent¹² in connection with an official proceeding. And while I agree with the other witnesses on this panel that it is possible for an individual to commit the crime of obstruction of justice to impede an investigation even when he did not commit the underlying offense that is being investigated -- perhaps to avoid the disclosure of embarrassing but non-criminal information -- such a prosecution would be extremely rare. In the overwhelming majority of cases, individuals who attempt to obstruct justice do so because they know darn well that they committed the crime that is being investigated and fear that the investigation will uncover that fact. Certainly, any prosecutor considering charging someone with obstruction of justice would give considerable weight if his or her investigation revealed that the person did not, in fact, commit the underlying offense that was being investigated, as happened here.¹³

Moreover, it is almost invariably the case that someone attempting to obstruct an investigation simultaneously engages in other nefarious activities, such as destroying evidence, suborning perjury, bribing witnesses, or threatening them with (or actually inflicting) bodily harm. That is critically important. Obstruction of justice laws are designed to protect the fact-finding process from attempts to impair the integrity or availability of evidence or to compromise the ability of investigators to fulfill their duties. Here, the President engaged in no such obviously illegitimate conduct. President Donald Trump allowed key members of his staff, including his Chief of Staff and the White House Counsel, to be interviewed by the Special Counsel's Office, some on several occasions. He also provided more than a million pages of documents to the Special Counsel's Office and submitted written answer to questions that the Special Counsel posed to him. These actions certainly are not the actions of someone attempting to stonewall or frustrate an ongoing investigation, despite clearly being maddened by its existence.

As is the case in many (if not most) criminal prosecutions, the most difficult element of the crime to establish beyond a reasonable doubt is that the accused acted with the requisite unlawful intent. In obstruction of justice cases, federal law requires a showing of "corrupt" intent -- that is, proof that the defendant acted for an illegitimate purpose. When someone destroys or falsifies evidence or threatens witnesses, proof that the defendant acted with a corrupt intent is relatively straightforward. Proving that President Trump acted with a corrupt intent, however, would be a daunting undertaking. As the Mueller Report lays out, there might have been a host of entirely legitimate reasons why the President did what he did.

The President had perfectly understandable reasons to be exasperated by the cloud hanging over his head during the pendency of this investigation, and for wishing it to come to a speedy conclusion. The investigation stemmed from a controversy that clearly represented a cloud over

¹¹ See Mueller Report, Volume 2, pg. 7.

¹² *Id.* at 10.

¹³ Indeed, Special Counsel Mueller acknowledged as much when he stated in his Report that "unlike cases in which a subject engages in obstruction of justice to cover up a crime, the evidence we obtained did not establish that the President was involved in an underlying crime related to Russian election interference. Although the obstruction statutes do not require proof of such a crime, the absence of that evidence affects the analysis of the President's intent and requires consideration of other possible motives for his conduct." Mueller Report, Volume 2, pg. 7.

his presidency. The investigation caused some members of the public to question the legitimacy of his election, because the allegations involved active participation by high-level people in his campaign in a conspiracy with a foreign government -- in this case, perhaps our greatest adversary -- to engage in illegal activities to “steal” the 2016 election from his opponent.

The investigation also clearly adversely affected his ability to govern. Accordingly, the President could, quite legitimately, have been concerned that the investigation was hampering his ability to govern. That problem might have been particularly acute in connection with the President’s ability to engage in foreign relations, especially his dealings with Russia.¹⁴ Plus, the manner in which the investigation was conducted, at least initially, might well have sown seeds of distrust between the President and the Intelligence Community that still appear to linger. After all, as Justice Stephen Breyer said in his concurring opinion in *Clinton v. Jones*, any “[i]nterference with a President’s ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out its public obligations.”¹⁵

President Trump might well have concluded, and reasonably so, the following: first, that the investigation should be curtailed or even terminated because it was impeding his ability to do the job that the American people elected him to do, and second, that the investigation therefore was not in the best interests of the nation. Those considerations, rather than naked self-interest, might have prompted him to act in the manner described in the Mueller Report. Such an alternative, non-corrupt motive might also explain how and why President Trump conducted himself the way he did during the pendency of the investigation. It was therefore quite reasonable for Attorney General Barr to conclude that in the absence of clear proof of a corrupt intent on the part of the President, a prosecutable case of obstruction of justice, based solely on the facts, simply did not exist.

III. Special Counsel Mueller’s theory of criminal liability is erroneous for two reasons: It lacks a “clear statement” from Congress to render a president liable for performing constitutionally-authorized actions, and it would interfere with the President’s ability to perform his constitutional duties

There are other reasons to support General Barr’s conclusion that a prosecutable case of obstruction of justice does not exist. Here, Special Counsel Mueller’s legal theory is highly questionable and problematic in that it could have a chilling effect on the presidency. Clearly the biggest bone of contention between Attorney General Barr and Special Counsel Mueller is the latter’s belief that a president could be charged with obstruction of justice for undertaking facially-valid, discretionary actions in the exercise of authority clearly vested in him under Article II of the Constitution, if he acts based on an improper motive.¹⁶

¹⁴ The Mueller Report is replete with statements from witnesses who said that the President was upset about the fact that the ongoing investigation was making it difficult for him to run the country and was particularly hurting his ability to address foreign relations issues, especially with Russia.

¹⁵ *Clinton v. Jones*, 520 U.S. 681, 711 (1997)(Breyer, J., concurring).

¹⁶ This is evident from the June 8, 2018 memorandum that William Barr sent to Deputy Attorney General Rod Rosenstein and Assistant Attorney General for the Office of Legal Counsel Steven Engel on “Mueller’s

Adopting Mueller’s theory would cause us to wade into perilous waters that most certainly could have a chilling effect on a president, preventing him from acting with the decisiveness, energy, and dispatch that Alexander Hamilton described in Federalist No. 70 as being both desirable and necessary in a Chief Executive. It might well result in a president hesitating before engaging in some aggressive or controversial action – such as appointing or removing a particular executive branch official, signing an executive order, or issuing a pardon to a former colleague¹⁷ or political supporter¹⁸ -- out of fear that his subjective intent and motivation might be questioned at some point in the future by a prosecutor -- perhaps a politically motivated one¹⁹ -- undertaking a criminal investigation.²⁰

For this reason, and “[o]ut of respect for the separation of powers and the unique constitutional position of the president,” the Supreme Court in 1992 in *Franklin v. Massachusetts*

‘Obstruction’ Theory” as well as comments he has made since about not agreeing with some of Special Counsel Mueller’s legal theories. See, e.g., Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election, Dep’t of Justice Press Release, Apr. 18, 2019 (“Although the deputy attorney general and I disagreed with some of the special counsel’s legal theories and felt that some of the episodes examined did not amount to obstruction as a matter of law, we did not rely solely on that in making our decision. Instead, we accepted the special counsel’s legal framework for purposes of our analysis and evaluated the evidence as presented by the special counsel in reaching our conclusion.”), available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian> (last visited on June 7, 2019).

¹⁷ Consider President Ford’s pardon of Richard Nixon or President George H.W. Bush’s pardon of Caspar Weinberger and five others connected to the Iran-Contra Affair.

¹⁸ Consider President Clinton’s pardon of fugitive Marc Rich after his wife Denise made a generous donation to the Clinton Library and to Hillary Clinton’s senatorial campaign.

¹⁹ See, e.g., *U.S. v. Stevens*, 559 U.S. 460, 480 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

²⁰ The Supreme Court has recognized this danger in setting far less consequential than this one. For example, in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982), the Court observed in the context of a government official facing civil liability, that an inquiry into that official’s subjective state of mind would be unduly disruptive to the performance of that official’s duties. The Court stated:

It now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. ... In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

held that there must be “an express statement by Congress” before a generally worded statute -- such as the catchall obstruction of justice statute (18 U.S.C. § 1512(c)(2)) relied upon by the Special Counsel -- can be applied to the President if such application could possibly conflict with a president’s constitutional prerogatives.²¹ This principle has come to be known as the Clear Statement Rule. The canon of constitutional avoidance when it comes to statutory interpretation, whereby a court faced with two possible interpretations of a statute – one of which is clearly constitutional, with the other of questionable constitutionality – should generally apply the interpretation that avoids the hard constitutional question is also implicated here.²²

In a 1974 opinion further delineating the parameters of the clear statement rule, OLC clarified: “This is not a situation like the bribery statute (18 U.S.C. 201), where from the nature of the offense charged, no one, however exalted his position, should safely feel that he is above the law.” OLC elaborated upon this in a 1995 opinion in which it stated that applying the bribery statute to the president “raises no separation of powers questions were it to be applied to the President” because the Constitution “confers no power in the President to receive bribes.” That opinion further explained that the Constitution specifically contemplates impeachment for “bribery,” and “specifically forbids any increase in the President’s compensation for his service while he is in office, which is what a bribe would function to do.”

In his Report, the Special Counsel concluded, based on the reasoning of these OLC opinions, that the clear statement rule does not apply to the catchall obstruction of justice statute with respect to presidential actions, if those actions were undertaken with an improper motive, that is to say for the purpose of gaining some personal advantage in a manner that is inconsistent with his official duties.²³ As other notable scholars have also concluded,²⁴ I believe any such legal

²¹ *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). See also *Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995)(recognizing that the clear statement rule protects the “usual constitutional balance” between the branches by “requir[ing] an express statement by Congress before assuming it intended” to impinge upon presidential constitutional authority).

²² See, e.g., *Bond v. United States*, 134 S. Ct. 2077 (2014)(interpreting the Chemical Weapons Convention Implementation Act of 1998 so as to avoid deciding whether Congress could federalize a purely local crime through its authority under the Treaty Clause); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440 (1989)(applying the “cardinal principle” that statutes be interpreted to avoid serious constitutional questions and adding “we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted such perils.”). Had the President been charged, the rule of lenity might also be implicated. See, e.g., *United States v. Granderson*, 511 U.S. 39, 54 (1994)(“In these circumstances -- where text, structure, and history fail to establish that the Government’s position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”).

²³ See Mueller Report, Volume 2, pg. 8 & pgs. 159-181.

²⁴ See, e.g., Jack Goldsmith, *The Mueller Report’s Weak Statutory Analysis*, Lawfare, May 11, 2019, available at <https://www.lawfareblog.com/mueller-reports-weak-statutory-interpretation-analysis> (last visited on June 7, 2019); Jack Goldsmith, *The Mueller Report’s Weak Statutory Interpretation Analysis: Part II*, Lawfare, May 23, 2019, available at <https://www.lawfareblog.com/mueller-reports-weak-statutory-interpretation-analysis-part-ii> (last visited on June 7, 2019); Josh Blackman, *The Special Counsel’s Constitutional Analysis: The Clear Statement Rule*, Lawfare, Apr. 19, 2019, available at

theory is wrong. It is easy to disentangle acts such as paying a bribe, destroying evidence, and threatening witnesses – all facially criminal acts -- from legitimate exercises of presidential constitutional authority. After all, there is never a proper motive to engage in such conduct. The same cannot be said of obstruction of justice and many of the acts that were investigated by the Special Counsel.

One obvious problem with applying the obstruction of justice statute to a president is that the Constitution vests in him the responsibility to “take Care that the Law be faithfully executed”²⁵ That provision imposes upon him a duty that he must carry out. The Take Care Clause certainly contemplates that there are times when it would be entirely appropriate, if not necessary, for a president to involve himself in an ongoing investigation, including perhaps ending one and removing the officials who conducted it.²⁶

Moreover, the Constitution and the public are harmed whenever a prosecutor investigating a president goes beyond facially illegitimate conduct, such as paying a bribe or threatening a witness. Some of the president’s activities that were investigated by the Special Counsel – publicly (or privately) criticizing the fairness of an ongoing investigation, asking subordinates to publicly defend him and attack the credibility of the prosecutor²⁷, contemplating (or actually) removing an executive branch official, contemplating issuing a pardon – may have been undertaken for a mixed motive or an entirely pure motive. Deciding which is which – indeed, even probing into such matters -- would inevitably and inescapably, not just possibly or arguably, interfere with and limit the President’s ability to serve the nation as he sees fit in the exercise his Article II powers, thereby raising profound separation of powers issues.

<https://www.lawfareblog.com/special-counsels-constitutional-analysis-clear-statement-rule> (last visited on June 7, 2019).

²⁵ U.S. CONST. Art. II, § 3. See also U.S. CONST. Art. II, § 1, cl. 8 (prior to entering office, the President must take the following oath of office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.").

²⁶ This could be the case when the President might derive some personal benefit from such an intervention. For example, there was speculation at the time that by pardoning six individuals connected with the Iran-Contra affair, thereby effectively terminating Independent Counsel Lawrence Walsh’s investigation, President George H.W. Bush might have prevented some of those individuals from challenging his assertion that he was “out of the loop” whenever the matter was discussed in the White House. See, e.g., Robert Jackson and Ronald Ostrow, *Prosecutor accuses President of misconduct, claims Bush kept own notes of arms-for-hostages affair. Christmas Eve clemency scuttles six-year investigation.*, Los Angeles Times, December 25, 1992, available at <https://www.latimes.com/archives/la-xpm-1992-12-25-mn-2472-story.html> (last visited on June 7, 2019).

²⁷ Consider, for example, the attacks on the credibility of Independent Counsel Ken Starr by President Clinton and his subordinates. See, e.g., Jack Nelson, *Carville Resumes Campaign Against Starr*, L.A. Times, Dec. 11, 1996, available at <https://www.latimes.com/archives/la-xpm-1996-12-11-mn-8074-story.html> (last visited on June 7, 2019).

Conclusion

While it is certainly true that no man, including the President of the United States is above the law, it is equally true that the President occupies a unique position in our constitutional structure. Some laws apply differently to him and some don't apply at all, at least in the absence of a clear statement from Congress that a law should apply to him and, even then, not in instances in which the law impinges upon the exercise of the President's constitutional prerogatives.

Given the lack of clear evidence that the President acted with a corrupt intent, that many of the actions he undertook or contemplated undertaking were pursuant to powers clearly vested in him by Article II of the Constitution, the lack of a clear statement from Congress that the obstruction of justice statute that the Special Counsel relied upon applies to the President, and the inescapable danger that its application could interfere with the President's ability to carry out his duties, Attorney General Barr acted properly in concluding that a prosecutable case of obstruction of justice against the President did not exist.

I thank you for inviting me here to testify today, and I look forward to answering any questions you might have.