

Lessons from the Mueller Report: Presidential Obstruction and Other Crimes

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Good afternoon, Chairman Nadler, Ranking Member Collins, and Members of the Committee. Thank you for calling this important hearing and inviting me to testify.

My name is Joyce White Vance. Currently, I am a Professor of the Practice of Law at the University of Alabama Law School, where I focus on criminal law. Before joining the law school faculty, I was the U.S. Attorney for the Northern District of Alabama, leading an office in which I served for more than 25 years. I entered duty in that office as an Assistant U.S. Attorney on July 1, 1991. I was hired by U.S. Attorney Frank Donaldson, an appointee of President Reagan, and served in the criminal division as a line prosecutor for the next ten years, under both Republican and Democratic administrations, until I moved to our appellate division, ultimately serving as chief of that division before I was confirmed as the office's U.S. Attorney in 2009. I was in the first group of U.S. Attorneys the Senate confirmed during the Obama administration, and served until I retired on January 19, 2017. While I was a U.S. Attorney, I served on the Attorney General's Advisory Committee and co-chaired its Criminal Practice Subcommittee.

Like all prosecutors, all people, I'm an individual with personal views on politics and social issues. But one of the very first things I learned as a young prosecutor was to leave personal views at the office door when I entered on duty. And I instructed the assistant U.S. attorneys who served while I was U.S. Attorney to do the same. For prosecutors, there are only two relevant considerations when determining whether a case should be indicted: the law and the facts.

Although respect for career government employees has gone out of fashion, as someone who had the honor of serving, I can tell you that my Justice Department colleagues were rigorous in developing and analyzing evidence during an investigation and in applying the law to those facts without fear or favor. The Justice Department has a long tradition of independence from political influence, which is particularly important in the decision-making process criminal cases. The people with whom I served were deeply committed to ensuring that no one was above the law.

That's the framework that I use for reviewing the evidence detailed in the Mueller Report, to consider whether any of the conduct it discusses merits criminal prosecution. I understand that Congress has broader powers to sanction conduct that may be corrupt or abusive but not criminal, but I limit my consideration of the evidence gathered during the Special Counsel's investigation to its prosecutive merit.

In his report, Special Counsel Mueller declined to make a traditional prosecutive decision. In other words, he did not state expressly whether the evidence developed during his investigation into obstruction of justice was sufficient to warrant an indictment.

There has been a lot of criticism and confusion about why he did this. Two decades-old opinions issued by the Justice Department's Office of Legal Counsel ("OLC")—one during the Nixon era

and another following President Clinton’s impeachment—establish a Justice Department policy against indicting a sitting President. OLC policies are binding on prosecutors considering whether to indict a case. People can and are debating the wisdom of this particular policy, but federal prosecutors must and Mueller did accept it as controlling, as do I for purposes of discussion of the report.

Because the OLC policy prevented indictment, Mueller concluded that stating whether the President’s actions amounted to crimes, while not giving him a judicial forum in which he could contest that determination, raised prudential concerns about fairness and could impair the President’s ability to carry out his duties effectively. In light of those concerns, Mueller explained the elements prosecutors must establish to indict an obstruction charge, laid out the evidence his investigation had revealed for each instance of conduct he investigated, and analyzed whether there was sufficient evidence to establish each element. But he left the ultimate conclusions about the President’s conduct to the American people and their elected representatives, and possibly for future prosecutors to consider when the President is no longer in office.

It is worth noting Mueller’s approach is not entirely unprecedented. DOJ’s Principles of Prosecution provide prosecutors with a number of options when assessing the evidence at the conclusion of an investigation. They may choose to indict. They may decide indictment is not warranted. But they also may refer the case to a prosecutor with superior jurisdiction.¹ For me, as a U.S. Attorney, that sometimes meant that although I concluded federal law did not prohibit a target’s conduct or there was not a sufficient federal interest to indict under federal law, a matter should be referred to a local district attorney for consideration under state law. Here, Mueller appears to have done something akin to that, referring the results of his investigation to Congress, the superior forum to consider whether the President should be charged in some manner since DOJ policy stripped Mueller of authority to do so. That makes sense in light of OLC’s conclusion that a president, while he cannot be indicted, can be impeached in Congress if the House feels his conduct warrants it.²

Mueller explains that the decision not to indict is not the same thing as exonerating the President. The report says:

[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. Based on the facts and the

¹ Justice Manual, Principles of Federal Prosecution § 9-27.240, *available at* <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.240>.

² 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).

applicable legal standards, however, we are unable to reach that judgment. . . . Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.

Department of Justice, Special Counsel Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* at Vol. II, p. 2 (2019) (“Report”).

Although the Report didn’t address the ultimate question, Volume II provides us with a roadmap for assessing the President’s conduct, the subject of today’s hearing. The crime of obstruction of justice is set forth in a series of statutes that overlap in some regards. The report clarifies the law in the beginning of Volume II, explaining there are, “[t]hree basic elements . . . common to most of the relevant obstruction statutes: (1) an obstructive act; (2) a nexus between the obstructive act and an official proceeding; and (3) a corrupt intent.” Report, Vol. II, p. 192.

Prosecutors must have sufficient proof to satisfy each of these elements for each separate instance, or count, of obstruction, they intend to charge in an indictment. Proving two of three elements isn’t enough. And, if a prosecutor intends to charge a defendant with more than one count of obstruction, they must have proof of all of the elements of the crime for each of those counts.

Cognizant of those rules, the report identifies ten instances of conduct the investigation uncovered and analyzes the strengths and weaknesses of the evidence as to each element for each potential obstructive act, although as noted above, it does not take the final step of concluding whether indictment is warranted.

As the rules of decorum have been explained to me, I am not permitted to provide my legal conclusion about whether indictment would be warranted based on the facts presented in the report. But, I have opined, along with other former federal prosecutors who have served in both Republican and Democratic administrations, outside of the bounds these rules.

Mueller was investigating an attack on our democracy by a hostile foreign power, and on multiple occasions, the President tried to thwart it, curtail it, or end it completely, either by removing the Special Counsel outright or interfering with his ability to gather evidence. In Volume II of the Report, Mueller meticulously lays out the evidence for each of these ten instances of potential misconduct and in each instance, he identifies the evidence relating to each of the three elements of the crime. Mueller also analyzed evidence that would cut against the President’s culpability, but often there was no such mitigating evidence to consider.

While the report details discrete acts, it is also important to look at the big picture in order to discern the broader pattern of the President’s intent and conduct. As Mueller wrote, “[t]hat pattern sheds light on the nature of the President’s acts and the inferences that can be drawn about his

intent.” Report, Vol. II, p. 157. This pattern began almost immediately after the President took office in January 2017, when he pressured FBI Director James Comey to stop investigating his National Security Advisor Michael Flynn for lying to federal investigators about conversations Flynn had with the Russian Ambassador regarding efforts to lighten sanctions on Russia for its interference in our elections. And the President’s behavior continued through to the end of Mueller’s investigation, with the last instance detailed in his report occurring in January 2019, as President Trump reportedly tried to intimidate his former personal attorney Michael Cohen, seeking to discourage Cohen’s cooperation with federal criminal investigations. In evaluating evidence of this nature, prosecutors tend to look at the full scope of an individual’s conduct, the totality of the evidence, to determine whether there is corrupt intent to engage in wrongdoing.

Rather than trying to focus on each of these courses of conduct, I’m going to focus on just one instance, to illustrate how Mueller analyzes the evidence in light of the law, and how prosecutors might proceed to a decision based on that analysis: the conduct that is discussed beginning on page 113 of Volume II of the report and labeled, “The President Orders [White House Counsel Don] McGahn To Deny That The President Tried To Fire The Special Counsel.”

We start with a summary of the relevant facts: On January 25, 2018, the media reported that, in June 2017, the President ordered McGahn to have Special Counsel Mueller fired. The investigation revealed that the President told McGahn to call Deputy Attorney General Rod Rosenstein and tell him that Mueller had conflicts and could not be the Special Counsel. McGahn interpreted this as an order to fire Special Counsel Mueller although the President did not use the word “fire.” The report relays that the President had been told any conflicts were insubstantial. McGahn refused to fire Mueller and told the White House Chief of Staff that he was going to resign because the President had asked him to “do crazy shit.”

After the story broke, according to the report, the President directed McGahn to lie about his previous order and deny that he ever asked McGahn to fire the Special Counsel. The President made four separate attempts to have McGahn change his story and put into writing a repudiation of the media reports, with a new story saying the President never ordered him to have Mueller fired.

- First, on January 26, 2018, the President had his personal counsel call McGahn’s lawyer and tell him McGahn “needed to put out a statement denying he had been asked to fire the Special Counsel and that he had threatened to quit in protest.” McGahn said the story correctly reported the President “wanted the special counsel removed” and that although it was inaccurate in other regards, he would not make the statement the President wanted.
- On January 26, the President also directed his press secretary to contact McGahn about the story. McGahn told her parts of it were accurate and there was no need to respond.

- On February 5, 2018, the President told White House Staff Secretary Rob Porter that the article was “bullshit.” The President directed Porter to tell McGahn to “create a record to make clear that the President never directed McGahn to fire the Special Counsel.” The President wanted McGahn to write a letter “for our records,” more than a press statement, to say the media reports were wrong. The President told Porter something to the effect that he might have to get rid of McGahn if he wouldn’t do this. Porter repeated the conversation to McGahn, who told Porter the report was true and that he had been prepared to resign rather than fire Mueller, although he didn’t personally convey his threatened resignation to the President. McGahn again declined to write the letter the President wanted.
- On February 26, 2018, a meeting was scheduled for McGahn to meet with the President in the Oval Office to discuss the press report. The President told McGahn the report didn’t “look good” and he needed to fix it. He told McGahn he had not said he wanted Mueller fired. McGahn told the President the story was accurate, with the exception of the detail that he had not told the President directly he planned to resign rather than fire Mueller. He agreed that the President didn’t use the word “fire” but he understood the order to call Rosenstein and tell him Mueller couldn’t be Special Counsel as an order to have Mueller fired. The President asked McGahn to “do a correction” and McGahn declined. In this same conversation, the President asked why McGahn told the Special Counsel, when he was interviewed, about the President’s efforts to have Mueller fired and also about why he took notes in meetings, noting, “[l]awyers don’t take notes.” McGahn assured him that real lawyers do take notes.

Next, Mueller analyzed those facts in the context of the three elements necessary to prove obstruction; an obstructive act, a nexus to a proceeding, and corrupt intent.

- Obstructive act: “The President’s repeated efforts to get McGahn to create a record denying that the President had directed him to remove the Special Counsel would qualify as an obstructive act if it had the natural tendency to constrain McGahn from testifying truthfully or to undermine his credibility as a potential witness if he testified consistently with his memory, rather than with what the record said.” Report, Vol. II, p. 118.
- Nexus to an official proceeding: “The President was aware that the Special Counsel was investigating obstruction-related events. . . . If the President were focused solely on a press strategy in seeking to have McGahn refute the New York Times article, a nexus to a proceeding or to further investigative interviews would not be shown. But 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.” Report, Vol. II, p. 119-20.

- Intent: “Substantial 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.” Report, Vol. II, p. 120.

Mueller walks through a similar analysis for each of the ten instances of potentially obstructive conduct. This is the process that needs to be used: a methodical weighing of the evidence for each event against the legal standard for proving obstruction.

At his press conference last week, Mueller said, as many experienced prosecutors predicted he would, that the report speaks for itself. In other words, the report contains all of the evidence his team obtained and their assessment of it. The report is the best path to seeking the truth here. But, our analysis today is informed by a redacted version of the report and it is clear that if we had access to an unredacted version and underlying documents, it would add to and not subtract from the available evidence to support these conclusions regarding the President’s conduct. Mueller states in Volume I of the report that he did not have sufficient evidence to charge a conspiracy between the Trump campaign and members of the Russian Government to interfere in the election. But he notes investigators were prevented from gaining access to testimony and evidence in a number of ways and that the assessment of the facts could change with the availability of additional evidence they were prevented from obtaining. So too, with regard to the assessment of obstruction, it is important to note that conclusions are drawn based on the available evidence. We do not know for certain, but, while it is unlikely that redacted portions of the report would contain exculpatory evidence, it is possible that they would reinforce the strength of any conclusions regarding potential misconduct.

Based on my experience of over twenty-five years as a prosecutor, I believe the conduct described in Article II of the Report warrants further congressional scrutiny under Congress’ oversight and Article I powers.

As the Members may know, I signed a public statement concerning these issues with more than 1000 of my former colleagues. Those former federal prosecutors include political appointees to high ranking positions at DOJ under both Republican and Democratic presidents, but far more importantly, the vast majority were career prosecutors who were never political appointees but instead civil servants within the Department, in some cases for decades, as I was for almost 18 years before being appointed as U.S. Attorney. We reached our conclusion based on the law and the facts. There is no room for politics in the decisions made by prosecutors.

As former prosecutors, we understand just how serious the crime of obstruction of justice actually is. Congress has designated conduct intended to obstruct justice as a crime because if people engaged in misconduct were free to obstruct investigations into their crimes, our entire criminal justice system would crumble. To prosecute and convict criminals, we must obtain evidence and present witness testimony. If we can't do those things, criminals go free. That's why obstruction does not require proof of an underlying crime. The law says so and logic tells us the same thing; if an underlying crime were required to obtain an obstruction conviction, then the most successful obstructors, the ones who did the best job of concealing their crimes from investigators, would get off with no charges at all. Through our criminal law of obstruction, we convey our expectation that all Americans tell the truth and cooperate with investigations into federal crimes and not seek to undermine our system of justice. Certainly we should expect at least that much of our President.

Because of the serious nature of obstruction of justice, Congress has also decided to criminalize not just the completed act of obstruction, but also attempts, or what is called inchoate (or incomplete) crimes of obstruction. In other words, one need not succeed in obstructing justice to be guilty of the crime. We are worried about people who try to interfere with the workings of the criminal justice system and their guilt is judged by their acts and intentions, not by whether they actually succeed.

As Special Counsel Mueller explained at his press conference:

The matters we investigated were of paramount importance. It was critical for us to obtain full and accurate information from every person we questioned. When a subject of an investigation obstructs that investigation or lies to investigators, it strikes at the core of their government's effort to find the truth and hold wrongdoers accountable.

Finally, some people, including the President's lawyers and our current Attorney General, take an expansive view of the powers of the presidency and suggest that a president *cannot* be guilty of obstruction of justice when exercising the powers of his office. Even the President's lawyers concede he could be charged with obstruction of justice by bribing a witness or suborning perjury, Report, Vol. II, p. 8, because the Constitution gives him neither the power to bribe or encourage people to commit perjury. But they believe actions he takes, using his executive power, can never subject him to criminal prosecution. They believe that because he is entitled, for instance, to remove executive branch officials, even law enforcement officers who are investigating him, without regard to his motivation. This is a strained interpretation of the law, the result of which is to say that a president can use that power for corrupt purposes, such as to impede an investigation into his own potential wrongdoing. The principle that no one is above the law, not even a president, is the animating principle in our constitutional structure. Illinois' former Governor Rod Blagojevich was convicted of federal crimes for performing an act within his official powers, appointing a new Senator to an empty seat. But he was convicted because he did that otherwise

lawful act in exchange for a bribe. Similarly, the Report concludes corrupt use of authority by a president can be charged under the obstruction statutes “in order to protect the integrity of the administration of justice.” *Id.*

Mueller resolves any tension between the President’s Article II powers and Congress’s authority to regulate the President’s exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice by relying, in part, on the Constitution’s Take Care Clause. The Take Care Clause, in Article II, Section 3, requires the President to “take care that the laws be faithfully executed.” The constitutionally prescribed Oath contains a similar command to “faithfully execute” the office (i.e., the powers assigned) and to “preserve, protect and defend the Constitution of the United States.” It was no accident that the Framers included this requirement in the Constitution twice—for representative government only works if those in office act in good faith and in the public interest, not corruptly for his own self-interest.

The task before this Committee and before the Congress is not an easy one. Co-equal branches of government must operate with deference and respect for the powers our Constitution grants to each branch. But the Framers established co-equal branches not to grease the wheels of corruption but to ensure that each branch serves as a powerful check on the others. And the Congress—constitutionally, the first branch among equals—has a duty to investigate, expose, and hold accountable anyone who abuses the power of the presidency. This hearing is a first step in fulfilling that duty, and I am both honored and sobered to contribute to this essential work.

Thank you, Mr. Chairman and Members of the Committee.