

The Only Constitutional Path Is Impeachment,  
Initiated By Members of Congress Who Are Politically Accountable

Testimony of

Dr. John C. Eastman

Henry Salvatori Professor of Law & Community Service  
Chapman University's Dale E. Fowler School of Law<sup>1</sup>

Founding Director, The Claremont Institute's  
Center for Constitutional Jurisprudence

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<sup>1</sup> Institutional affiliations listed for identification purposes only. The views presented by Dr. Eastman are his own, and do not necessarily reflect the views of the Institutions with which he is affiliated.

The Only Constitutional Path Is Impeachment,  
Initiated By Members of Congress Who Are Politically Accountable

By John C. Eastman

Good afternoon, Chairman Nadler, Ranking Member Collins, and the other members of the House Judiciary Committee. Thank you for inviting me to address the important question as to what processes the Constitution provides for addressing presidential misconduct. My name is John Eastman, and I am the Henry Salvatori Professor of Law & Community Service, and former Dean, at the Chapman University Fowler School of Law, where I have been teaching and writing about constitutional law for the past twenty years. I am also a Senior Fellow at The Claremont Institute, where I direct the Center for Constitutional Jurisprudence, a public interest law firm that specializes in constitutional litigation, particularly in matters involving core structural components of the Constitution such as separation of powers.

Before turning to the substance of my remarks addressing that precise question, however, I think it important to take issue with the underlying assumption contained in the full title of this hearing. By tying the question of presidential misconduct to the Mueller report, you imply that the Mueller report identified presidential misconduct that would trigger whatever constitutional processes might be available. As a factual matter, I could not disagree more, for I do not find anything even remotely rising to the level that would trigger the one constitutional path designed to address presidential misconduct, namely impeachment.

I should also note that this is not the first time a congressional Judiciary Committee has considered this question. In 1998, the Senate Judiciary Committee's subcommittee on the Constitution, Federalism, and Property Rights held a hearing entitled: "Impeachment or

Indictment: Is a Sitting President Subject to the Compulsory Criminal Process?”<sup>2</sup> I commend the proceedings of that hearing to your attention, particularly the extremely persuasive testimony and submitted scholarly work of Yale Law Professor Akhil Amar. The conclusion he reached then is the same one I reach now, and it is the same one that has been reached by the Office of Legal Counsel in both Democrat and Republican administrations spanning nearly a half century. Because of the unique role the Constitution assigns to the office of President, a sitting President cannot be indicted. That does not place the President “above the law,” as some have claimed. But it does recognize that the sole remedy envisioned by the Constitution for illegal conduct by a President *while he is President* is the impeachment process outlined in Article I, Section 3 of the Constitution. As Professor Amar so aptly put it, the “grand jury” in such a case is the House; the “indictment” is the articles of impeachment; and the Senate is the petit jury.<sup>3</sup>

**I. The Office of Legal Counsel in Both Republican and Democrat Administrations Has Concluded That A Sitting President Cannot Be Indicted While He Remains In Office.**

**a. Watergate and President Richard Nixon**

In 1973, near the height of one of the most significant political-criminal scandals in our nation’s history,<sup>4</sup> the Office of Legal Counsel prepared a memorandum analyzing whether,

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<sup>2</sup> Hearing Before the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary, United States Senate, on Examining the Extent to Which a Sitting President Should be Subject to Indictment or Other Compulsory Criminal Process, 105<sup>th</sup> Cong., 2d Sess., S. Hrg. 105-969 (Sept. 9, 1998),

<sup>3</sup> *Id.* at 186.

<sup>4</sup> The re-election campaign of the then-sitting President, Richard Nixon, known as the Committee for the Re-Election of the President (appropriately, “CREEP”), had spied on his political opponents and then engaged in a massive cover-up and obstruction of justice of the illegal conduct. The matter would have been even worse had the President used government sources to do the spying, as appears to have happened more recently when high-ranking officials in the administration of President Barack Obama obtain FISA warrants to spy on key figures in the political campaign of the nominee of the opposition party.

constitutionally, a sitting President could be imprisoned, tried, or even indicted for criminal conduct while he remained in office.<sup>5</sup> After a comprehensive review of the arguments on both sides of that question, it concluded that a sitting President could not be indicted while he remained in office (even while also concluding that other federal officers, up to and including the Vice President, could be indicted while in office, and that the President himself would be subject to criminal prosecution after he left office). The OLC reached this conclusion not because the President is, *in his person*, above the law (like the King of England was), but rather because the *office of the President* is, in our constitutional system, unique. It offered two principal grounds for this conclusion. First, as the sole head of the Executive branch who controls criminal prosecutions, controls part of the evidence as holder of the power of Executive privilege, and is vested with the pardoning power, he cannot at the same time be the defendant in a criminal case he is responsible for bringing.<sup>6</sup> Second, the “unique official duties” that the Constitution assigns to the President, “most of which cannot be exercised by anyone else,” counseled against not only a trial and possible incarceration upon conviction of the President while he was in office, but also against even an indictment, which would not only distract the President from the official duties uniquely assigned to him but also undermine the authority of the office itself, and hence the nation, not just at home but on the world stage.<sup>7</sup> The Office of Legal Counsel also offered a third, and I think even more dispositive reason: “the President’s role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency.”<sup>8</sup> To

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<sup>5</sup> 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) (“1973 OLC Memo”).

<sup>6</sup> *Id.* at 26.

<sup>7</sup> *Id.* at 27-32.

<sup>8</sup> *Id.* at 32.

allow for ordinary criminal process to operate against the President would place in the hands of a single prosecutor or a single grand jury, regionally drawn, the ability to incapacitate a President chosen through a national election by the whole people of the United States. That is why, the OLC concluded, that “the decision to terminate the mandate ... is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.”<sup>9</sup>

**b. Whitewater, Monica Lewinsky, and President Clinton**

A quarter century after the Office of Legal Counsel in the Nixon administration determined that a sitting President could not be indicted, the Office of Legal Counsel in the Clinton administration revisited the issue and reached the same conclusion.<sup>10</sup> Specifically, it noted the inherent conflict in the Chief Executive also being the defendant – “just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time.”<sup>11</sup> It also agreed with the earlier OLC conclusion that a criminal indictment would impermissibly interfere with the President’s duties, quoting the earlier conclusion that “under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.”<sup>12</sup> And it continued its agreement with the earlier OLC conclusion with respect to the “non-physical” interference with the President’s duties, namely, that because “the President

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<sup>9</sup> *Id.*

<sup>10</sup> Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, “A Sitting President’s Amenability to Indictment and Criminal Process” (Oct. 16, 2000) (“2000 OLC Memo”), reprinted in *Opinions of the Office of Legal Counsel*, Vol. 24, pp. 222-260.

<sup>11</sup> *Id.* at 228.

<sup>12</sup> *Id.* at 229.

is the symbolic head of the Nation,” “[t]o wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs.”<sup>13</sup>

The 2000 OLC memo also agreed with the concern that allowing a normal criminal indictment “would confer upon a jury of twelve the power, in effect, to overturn” a presidential election, which is the only national election for which there is no substitute.<sup>14</sup> Again quoting from the 1973 OLC memo, it noted that “The decision to terminate this mandate . . . is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.”<sup>15</sup> It also noted that, in contrast to a normal jury trial, “[t]he whole country is represented at the [impeachment] trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.”<sup>16</sup>

Significantly, the 2000 OLC memo also considered several important intervening decisions by the Supreme Court that allowed for various actions against a sitting President, and concluded that none of the holdings in those cases altered its conclusion. *United States v. Nixon*<sup>17</sup> rejected a claim of executive privilege in response to a subpoena in a criminal matter against someone other than the President. *Nixon v. Fitzgerald*<sup>18</sup> upheld presidential immunity from defending civil actions arising out of official conduct. And *Clinton v. Jones*<sup>19</sup> denied presidential immunity from defending civil actions arising out of personal conduct before the President was elected. OLC took particular note of the fact that in *Fitzgerald*, the Supreme Court had “noted

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<sup>13</sup> *Id.* at 230.

<sup>14</sup> *Id.* at 231.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 418 U.S. 683 (1974).

<sup>18</sup> 457 U.S. 731 (1982).

<sup>19</sup> 520 U.S. 681 (1997).

that recognition of a presidential immunity from such suits ‘will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive,’ in light of other mechanisms creating ‘incentives to avoid misconduct’ (including impeachment).”<sup>20</sup>

In the end, the OLC found particularly compelling that the process actually set out in the Constitution is one “that may be initiated and maintained only by politically accountable legislative officials”—in significant contrast of a process of normal indictment and trial, which “would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his assigned constitutional functions.”<sup>21</sup>

## **II. “Political Accountability” Is, In My View, The Key Benefit of Impeachment as the Sole Remedy for Addressing Illegal Conduct by a Sitting President.**

I want to focus on that last piece of the OLC argument: political accountability. If this body truly believes that *anything* in the Mueller report (or otherwise) rises to the level of “Treason, Bribery or other high Crimes and Misdemeanors,” then the members of this body will likely be held accountable politically if the House *does not* initiate impeachment proceedings. But the flip side of that coin is also true. If, as I believe is clearly the case, nothing identified in the Mueller report remotely rises to that level, then the members of this body who continue to pursue impeachment investigations and even formal impeachment proceedings, that manifestly appear to the public to be an attempt to distract the President from the performance of his constitutional duties or, worse, to negate the results of the 2016 election, then they, too, should be and likely will be held politically accountable.

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<sup>20</sup> 2000 OLC Memo, *supra*, at 241.

<sup>21</sup> *Id.* at 246.

And in my view, that is as it should be, and it is the strongest argument in favor of the conclusions drawn by the Office of Legal Counsel in both the Nixon and Clinton administrations. The Constitution was created, after all, by “We, the People,”<sup>22</sup> and by virtue of the political accountability inherent in the impeachment process, it is ultimately “We, the People,” who will have the final say on the matter.

Both OLC memos cited above acknowledged that the same concerns about interference with the President’s duties and undermining the President’s authority both domestically and internationally would arise in the context of impeachment as well as ordinary criminal prosecution. “While the impeachment process might also, of course, hinder the President’s performance of his duties,” the 2000 OLC acknowledged, the fact that “the process may be initiated and maintained only by politically accountable legislative officials” would help ensure that such disruption to the conduct of government at home and risk to the national interest in international affairs would arise only in the gravest of circumstances.<sup>23</sup> So let us look at the allegations of Presidential misconduct in that light, and I think it clear that none remotely rise to that level, if they can be described as “misconduct” at all.

Let’s start with the claim that the President colluded with Russia to throw the election his way. The claim has been a farce since it was first raised, and it is even more so in light of the exhaustive Part I of the Mueller report admitting that “the investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian government in its election interference activities.”<sup>24</sup> Even more laughable is the claim that *candidate* Trump

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<sup>22</sup> U.S. Const., Preamble.

<sup>23</sup> 2000 OLC Memo, *supra* at 246.

<sup>24</sup> Special Counsel Robert S. Mueller, III, U.S. Dep’t Of Justice, Report On The Investigation Into Russian Interference In The 2016 Election, Vol. I, p. 4 (2019), <https://www.documentcloud.org/documents/5955118-The-Mueller-Report.html> (“Mueller Report”).

expressly invited Russian interference when, responding to the stunning disclosure of the fact that former Secretary of State Hillary Clinton had destroyed more than 30,000 emails weeks after they had been subpoenaed by this body, he jokingly replied that he hoped Russia could find the missing emails.<sup>25</sup> Although many reported Trump’s statement as an invitation for Russia to hack Secretary Clinton’s private email server, it was clearly an acknowledgement that Russia (and other foreign nations) had probably already done so.<sup>26</sup> After all, the emails had been on an *unsecure* private server Secretary Clinton appears to have set up deliberately to skirt government disclosure laws, and the FBI had concluded that it was “reasonably likely”<sup>27</sup> foreign nations had accessed the unsecured emails. In any event, these frivolous allegations pale in comparison to what we actually know about campaign collusion with foreign governments that occurred on the other side of the aisle. We know that the Hillary Clinton campaign and the DNC both paid millions of dollars to their law firm, illegally claiming that was for “legal services” when some of the payments were then funneled to Fusion GPS to pay for opposition research from a former British intelligence officer, Christopher Steele.<sup>28</sup> We know, from notes taken by a State Department official, that Mr. Steele claimed to have obtained at least some of the scurrilous information in the dossier he compiled from high-ranking Russian officials, namely Vyacheslav

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<sup>25</sup> *Id.*, Vol. 1, p. 62.

<sup>26</sup> *See, e.g., id.* at Vol. I, p. 62 (quoting Barbara Ledeen memo “stating that the ‘Clinton email server was, in all likelihood, breached long ago,’ and that the Chinese, Russian, and Iranian intelligence services could ‘re-assemble the server’s email content.’”).

<sup>27</sup> The final version of the FBI report was sanitized by then-Director James Comey so say only that foreign access was “possible.” Office of the Inspector General, U.S. Department of Justice, “A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election,” p. 193 (June 2018) (“IG Report”).

<sup>28</sup> Verified Complaint, ¶ 2, *Coolidge Reagan Foundation v. Federal Election Commission*, No. 1:19-cv-01493-ESH (D.D.C., filed 5/22/2019); *see also* Memo from HPSCI Majority Staff to HPSCI Majority Members, “Foreign Intelligence Surveillance Act Abuses at the Department of Justice and the Federal Bureau of Investigation,” p. 2 (Jan. 18, 2018) (“Nunes Memo”), available at [https://upload.wikimedia.org/wikipedia/commons/2/25/Nunes\\_Memo.pdf](https://upload.wikimedia.org/wikipedia/commons/2/25/Nunes_Memo.pdf).

Trubnikov, the former head of the Russian Intelligence Service, and Vladislav Surkov, former Deputy Prime Minister of the Russian Federation and a close advisor to Russian President Vladimir Putin.<sup>29</sup> And we know that that Russian-sourced, unverified dossier written by a former British spy was used (at least in part) by the Obama administration to obtain FISA warrants to spy on members of the opposition party’s presidential campaign team.<sup>30</sup> This is a scandal of Nixonian proportions that ought to trigger the bipartisan concern of this committee and indeed of every American, yet you’re focused instead on trifles to score political points.

Let me turn, then, to the claims of obstruction of justice. Most of the allegations are based on various claims that the President might have attempted to “interfere” with the Russia investigation or interfere with the investigation of alleged wrongdoing by his first National Security Advisor, Michael Flynn. Such claims—and they are manifest in this Committee’s own hearing memo—reflect a fundamental misunderstanding of the role of the President in our constitutional system. The power to conduct investigations and to initiate (or decline to initiate) prosecutions is a core executive power, and the Constitution makes clear that “The Executive power”—all of it—“shall be vested in a President of the United States.”<sup>31</sup> The power of the FBI to conduct investigations is derivative of the President’s constitutional authority, as is the power of the Department of Justice to prosecute. In other words, the President has full authority under the Constitution to direct both the investigation and any prosecutions that might flow from it.

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<sup>29</sup> Kathy Kavalec, “Notes from Meeting with Chris Steele and Tatyana Duran of Orbis Security, Oct. 11, 2016), available at <https://www.scribd.com/document/409446360/CU-FOIA-Document-Release-Kavalec-Memo-Related-Records> (p. 17); *see also* Chuck Ross, “Steele Identified Russian Dossier Sources, Notes Reveal,” Daily Caller (May 16, 2019), available at <https://dailycaller.com/2019/05/16/steele-dossier-sources-state-department/>.

<sup>30</sup> Nunes Memo, *supra*, at 2.

<sup>31</sup> U.S. Const. Art. II, Sec. 1, cl. 1.

That Presidents typically don't get involved in the day-to-day activities of either the FBI or the Department of Justice does not negate the constitutional chain of command.

But even if it did—or even if Congress could, by statute, take away from the President a core executive power that the Constitution assigns to him—the factual allegations simply don't rise to the level of obstruction in any common sense understanding of that term. Take the Michael Flynn matter. My co-panelist here, Caroline Frederickson, claims that the President asked former FBI Director Comey to “let [Flynn] go.”<sup>32</sup> Note that even in Ms. Frederickson's version, the President merely made a request, not an order (with which Comey did not comply, in any event); a mere unfulfilled request hardly rises to the level of obstruction. But Ms. Frederickson's version is not even accurate. What Comey claims the President said, as reported in the Mueller report, is: “I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.”<sup>33</sup> Given what Flynn, a highly decorated retired Army Lieutenant General with a long career of service to the nation, had gone through in his short tenure on the transition team and as National Security Advisor (including fairly frivolous claims that he violated the Logan Act<sup>34</sup> by speaking with representatives of foreign governments during the transition—the very thing “transitions” are designed for),<sup>35</sup> the President (and quite

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<sup>32</sup> Testimony of Caroline Frederickson, President, American Constitution Society, Before the House Committee on the Judiciary (July 12, 2019), at 10.

<sup>33</sup> Mueller Report, Vol. II, p. 40.

<sup>34</sup> 18 U.S.C. § 953 (“Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both”).

<sup>35</sup> See, e.g., Kara Scannell, “Flynn charge suggests arcane law is 'leverage' for special counsel investigation,” CNN.com (Dec. 2, 2017) (quoting Michael Zeldin, former prosecutor and special assistant to Robert Mueller in the Justice Department, for the claim that Flynn's outreach to foreign governments was “facially” a violation of the Logan Act). If Flynn's communications with foreign governments

frankly most Americans who have looked at the matter) quite likely thought that he'd been through enough. Ordering the exercise of prosecutorial discretion to not pursue the matter would have been within the President's authority. Merely hoping that his subordinate would "see [his] way clear" to the same conclusion cannot possibly qualify as obstruction, therefore.

Or take the firing of Director Comey itself. As I recall, Democrats were furious with Comey for his breach of Department of Justice policy in holding a press conference in October 2016 about the reopening of the investigation into Hillary Clinton's email server<sup>36</sup> (just as

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during *a transition* violated the Logan Act, then necessarily the numerous communications with and intended to influence foreign governments by a number of former elected officials who had no such official role would also violate the Logan Act. For example, John Kerry, Secretary of State during the Obama administration, has admitted that he met with Iranian Foreign Minister Javid Zarif "three or four times" after he left office, to discuss the nuclear agreement that the Obama administration had negotiated with Iran and that President Trump withdrew from, and he reportedly has had numerous meetings or telephone conversations with various European leaders advising how to save the Iran nuclear deal in direct contradiction to Trump's policy. Jeff Dunetz, "Did John Kerry violate Logan Act?" *The Jewish Star* (May 22, 2019), available at <http://www.thejewishstar.com/stories/did-john-kerry-violate-logan-act,17566>. Indeed, former Secretary Kerry seems to have made a habit of Logan Act violations to pursue his own policy agendas that were contrary to those of the administration then in office. *See* Dunetz, *supra* (noting Kerry's 1985 unapproved friendly meeting in Managua, Nicaragua, with Nicaraguan Sandanista President Daniel Ortega, in opposition to the Reagan administration's support of Ortega's opponents; his 2006 meeting with Syrian dictator Bashar al-Assad over then-President George W. Bush's objection; and his 2018 meeting in London with Hussein Agha, a close associate of Palestinian Authority President Mahmoud Abbas, in which he reported urged Abbas "to hold on and be strong" until Trump was no longer in the White House and "not yield to President Trump's demands."). Speaker of the House of Representatives, Nancy Pelosi, has also "carrie[d] on ... correspondence or intercourse with" a foreign government without the authority of (and directly contrary to the stated position of) the Executive Branch, namely, Syria, in violation of the explicit terms of the Logan Act. *See, e.g.*, Center for Individual Freedom, "Did Nancy Pelosi Violate the Logan Act?" (April 12, 2007), available at [http://www.cfif.org/htdocs/freedomline/current/in\\_our\\_opinion/Did-Nancy-Pelosi-Violate-the-Logan-Act.html](http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/Did-Nancy-Pelosi-Violate-the-Logan-Act.html). No one has been prosecuted under the Logan Act since the 1850s, and no one has ever been convicted under it because, as most scholars agree, the Logan Act, adopted in 1799, is probably unconstitutional. *See, e.g.*, Kevin M. Kearney, "Private Citizens in Foreign Affairs: A Constitutional Analysis," 36 *Emory L.J.* 285, 346 (1987) (asserting that, if prosecuted, the Logan Act would most likely be unconstitutional for vagueness and overbreadth); Detlev F. Vagts, "The Logan Act: Paper Tiger or Sleeping Giant?," 60 *Am. J. Int'l L.* 268 (1966); *but see* Daniel Hemel and Eric Posner, "Why the Trump Team Should Fear the Logan Act," *New York Times* (Dec. 4, 2017), available at <https://www.nytimes.com/2017/12/04/opinion/trump-team-flynn-logan-act.html>.

<sup>36</sup> *See, e.g.*, Eric Lichtblau, et al., "F.B.I. Chief James Comey Is in Political Crossfire Again Over Emails," *New York Times* (Oct. 28, 2016), available at <https://www.nytimes.com/2016/10/29/us/politics/fbi-clinton-emails-james-comey.html>.

Republicans had been furious with Comey for holding a press conference the previous July “exonerating” her despite the clear evidence that she had illegally used an unsecure private for government business, including transmission of classified material).<sup>37</sup> That alone was more than enough grounds to fire Comey. Add to that the fact that Comey advised the President he was not the subject of the Russia investigation, but then refused to state that fact publicly when he subsequently testified before Congress, the real question is why Comey was not fired earlier. As the President himself has noted, Comey’s duplicity on that score was having serious consequences for the President’s conduct of foreign affairs, one of the very concerns that led the OLC in both 1973 and 2000 to conclude that sitting Presidents cannot be indicted while in office. As volume II of the Mueller report recounts the President’s concern: “I can't do anything with Russia, there's things I'd like to do with Russia, with trade, with ISIS, they're all over me with this.”<sup>38</sup> In other words, the President believed (with good reason) that the investigation risked

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<sup>37</sup> See, e.g., Mark Landler and Eric Lichtblau, “F.B.I. Director James Comey Recommends No Charges for Hillary Clinton on Email,” *New York Times* (July 5, 2016), available at <https://www.nytimes.com/2016/07/06/us/politics/hillary-clinton-fbi-email-comey.html>; Andrew C. McCarthy, “FBI Rewrites Federal Law to Let Hillary Off the Hook,” *National Review* (July 5, 2016), available at <https://www.nationalreview.com/corner/fbi-rewrites-federal-law-let-hillary-hook/>. The FBI initially found Secretary Clinton’s conduct to be “grossly negligent,” which is the legal element necessary for illegality under 18 U.S.C. § 793(f). Director Comey instead sanitized that finding as well, asserting instead that she was merely “extremely careless.” See Victor Davis Hanson, “Scandals Sanitized with Linguistic Trickery,” *National Review* (June 21, 2018). Director Comey then assumed the mantle of prosecutor (which was not his role) and falsely stated that because Secretary Clinton did not have a specific intent to harm national security, no prosecutor would bring charges under such circumstances. Specific intent is not an element of the crime of mishandling classified information, and as the Senate Committee on Homeland Security and Government Affairs noted in its Interim Report on the email scandal, “[o]ther American citizens have been charged under this statute for less serious actions.” Interim Report at 8, citing e.g., *United States v. Roller*, 42 M.J. 264 (C.A.A.F. 1995) (service member inadvertently packing classified documents with his personal belongings on his last day before a transfer); *United States v. Gonzalez*, 16 M.J. 428 (C.M.A. 1983) (service member inadvertently intermingling classified messages with personal mail); Indictment, *United States v. Smith*, CR 03-0429 (C.D. Cal. 2003) (FBI agent allowed Chinese informant to handle classified documents). Comey’s preemptive exoneration was only made possible, of course, by the recusal of Attorney General Loretta Lynch, following her “chance” meeting with Secretary Clinton’s husband, former President Bill Clinton, on the tarmac of the Phoenix Airport while Hillary was under an active investigation.

<sup>38</sup> Mueller Report, Vol. II, p. 56.

delegitimizing him on the world stage, and that misperception was perpetuated by the fact that Comey had failed to clarify that he was not the center of the investigation.

Or take the alleged order to fire Mueller because of his manifest conflicts (or at the very least appearance of conflicts) of interest, namely, his close personal relationship with key players in the investigation (former Director Comey, whose illegal leak of information to the New York Times spurred the appointment of Mueller in the first place; and Rod Rosenstein, who authorized one of the FISA warrants) as well as with an organization that Mueller once ran—the FBI—whose alleged conduct was, or at least should have been, a significant part of any comprehensive investigation. Note here that the President, as the nation’s Chief Executive, could have fired Mueller himself merely for the appearance of such conflicts, and would have been well advised to do just that so that the investigation could continue without such a taint—avoidance of even the appearance of conflict is particularly important in high profile matters such as this one. But Mueller was not fired, and even if he had been, the investigation would not have been stopped but would have continued.

Again, if that is obstruction, it pales in comparison to recent examples of real obstruction that have gone largely unremarked. Take, for example, the scandal involving the IRS during the previous administration. I am particularly familiar with the specifics of this one, because an organization for which I serve as Chairman of the Board was the victim of the illegal disclosure of confidential portions of its tax returns. The Department of Justice refused to grant immunity to Matthew Meisel, the individual to whom the illegal tax return information was provided, even though it had determined that it was not going to prosecute Meisel. Meisel had asserted his Fifth Amendment right against self-incrimination, but the grant of immunity would have required Meisel to testify as to the name of his source within the IRS; if the refusal to grant immunity was

done to shield an IRS official who made an illegal disclosure, then the Department of Justice itself obstructed justice.

Or take the series of events more directly related to the 2016 Presidential campaign. The Obama administration's Department of Justice allowed witnesses in the criminal investigation involving transmission of classified information over Secretary Clinton's unsecure private server to participate in interviews as "counsel" even though they were also witnesses, granted them immunity when they were themselves implicated in the illegal conduct, allowed them to conduct their own searches of their laptop computers and personal phones (some of which were even destroyed—literally, with sledgehammers—and with them any potentially incriminating evidence).<sup>39</sup> None of that is remotely normal operating procedure; rather, it appears it was designed to shield the administration's preferred candidate for President and her staff from potential criminal liability. If true—and the evidence certainly points strongly in that direction—then we have real obstruction of justice, not just the feigned claims under consideration now.

Let me close with this. The incessant harassment of the President of the United States and his top aides is quite likely taking a real toll on the President's ability to perform the duties of the office to which he was elected, and even more importantly undermining our national interest in the international arena, the very thing that led the OLC to determine that a sitting President must be immune from indictment while he remained President. That such a risk must be taken when there is documented evidence of serious wrongdoing that rises to the level of treason, bribery, or other high crimes and misdemeanors warranting impeachment is a fundamental and necessary component of the checks and balances inherent in our constitutional

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<sup>39</sup> See, e.g., Andrew C. McCarthy, "In Politicized Justice, Desperate Times Call for Disparate Measures," *National Review* (May 19, 2018), available at <https://www.nationalreview.com/2018/05/clinton-email-trump-russia-probes-justice-department-double-standards/>.

system. But the harm to the national interest is simply too great for such inquiries to be undertaken on such weak evidence as we have before us, and certainly when, by all appearances, the real motive behind the perpetuation of this investigation strongly appears to be base partisan interests and continued pique over the loss of the last president election. There is good reason that, as the OLC recognized, our Constitution places the power to conduct impeachment proceedings in the hands of *politically accountable* elected officials: “We the People” can hold political actors to account for any abuse of that power for mere partisan gain. I strongly urge you, therefore, to accept the closing of the investigation by the Mueller team, to accept the results of the last election, and to get on with the business of actually addressing through legislation many of the serious problems our nation currently faces.