

Statement of  
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Good Morning Chairman Nadler, Ranking Member Collins, and members of the Judiciary Committee. Thank you for the opportunity to participate in this hearing on lessons from the Mueller Report.

Though I am a Professor of Law and Miller Center Senior Fellow at the University of Virginia, I want to underscore that my testimony reflects no one's views, save for my own. I also wish to emphasize that I don't come here as a Republican or Democrat. Nor do I come before you today as a supporter or opponent of the President. Rather I come as an American, a lawyer, and a legal scholar with a deep interest in the issues raised by the Mueller Report, by the prolonged investigation of the president, and by the president's actions. I am not here to praise or bury either President Donald Trump or that distinguished graduate of the University of Virginia, Robert Mueller.

I have spent my career studying the Constitution's separation of powers, with a particular emphasis on presidential power over law execution, war powers, and foreign affairs. I have authored a book on the creation of the presidency and several articles on law execution, prosecution, and presidential control over the bureaucracy.

Today, I have four points. First, presidents have broad constitutional authority to supervise the Department of Justice (DOJ), including directors of the Federal Bureau Investigation (FBI) and special counsels. That is their constitutional job—to execute the laws—just as yours is to make those laws. Attempts to paint the President's actions as sinister *interference* merely because of his influence in the investigatory process reflect profound constitutional errors. Second, the Mueller Report does not demonstrate that the President committed obstruction of justice because the obstruction statutes do not apply to his official

acts and, even if they did, we do not have clear proof that he acted with a corrupt intent. Without more, neither the removal of James Comey nor the attempted removal of Robert Mueller constitutes a crime. Third, presidents may be prosecuted while in office. Contrary to the DOJ, I believe that sitting presidents can be indicted and prosecuted. Moreover, the Mueller Report is mistaken in hinting that DOJ opinions prevented it from declaring that the president committed a crime. There is no such DOJ bar, much less a constitutional one. If the Special Counsel thought that the President committed a crime, he was (and is) entirely free to say so. Fourth, the category of impeachable offences is rather broad and covers not only constitutional violations but also abuses of constitutional authority. For instance, if you believe that the President violated the Emoluments Clause or dishonored the Appropriations Clause, you can impeach him. If you believe that the President abused his constitutional powers in connection with the Russia investigation, then you can certainly vote to impeach him for a high crime and misdemeanor.

#### The President's Plenary Power over Prosecutions and Prosecutors

First, the Constitution makes the president, as Alexander Hamilton put it, the “constitutional EXECUTOR” of federal law because the Constitution grants the office the executive power, a power principally concerned with law execution. Both Hamilton and Madison believed that the president had control over law execution, as did dozens of others. George Washington himself came to these conclusions. Without any statutory warrant and relying upon his constitutional authority alone, Washington directed prosecutors to commence and cease prosecutions. His successors did the same, with John Adams directing

prosecutions of his critics and Thomas Jefferson supervising the prosecution of his former Vice President, Aaron Burr. No one objected to these presidential commands to prosecutors because they understood that the president could control government attorneys. After all, prosecutors were exercising the *president's power* to execute the law. In sum, the Founding Fathers understood that, per the Constitution, the President was the Chief Prosecutor. In a manner of speaking the President is both a special and independent counsel. See Saikrishna Bangalore Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

The president's powers over prosecutors and criminal investigators extend to firing them should he disagree with their actions in office. Prosecutors and investigators serve at the president's pleasure. Before the election, I and a colleague wrote that the new President could fire Director Comey if she or he believed that new leadership was in order. The piece was written under the assumption that Senator Hillary Clinton would prevail in the 2016 presidential contest. Saikrishna Prakash & Aditya Bamzai, *The Somewhat Independent FBI Director*, L.A. TIMES (Nov. 2, 2016).

Unlike the earliest occupants of the office, modern presidents have tended to avoid becoming enmeshed in particular investigatory or prosecutorial decisions. There are prudential reasons for presidents to adopt a hands-off approach—they have many other responsibilities, they do not wish to be drawn into minor matters, and they often do not know the merits of the underlying cases. But this pragmatic approach is in no way constitutionally required. It is but a matter of caution and discretion.

How does that background constitutional law apply here: President Trump did nothing constitutionally suspect when he fired James Comey. Indeed, I am dumbstruck that

this act (and the others that took place prior to the appointment of Robert Mueller) became the predicate for an obstruction of justice investigation. Without more, presidential involvement in the DOJ cannot and should not be a justification for an obstruction investigation. The mere firing of Comey was not, to my mind, evidence of corrupt motive. The mere thought (and perhaps attempt) to fire Mueller, without more, is not a crime. Too many people have casually conflated presidential supervision of the Justice Department with illegal obstruction. In fact, it is the president's job to supervise the DOJ; such direction is part of the constitutional scheme, authorized by the Vesting Clause and mandated by the Take Care Clause.

At times, portions of the Mueller Report could be read to suggest that any presidential involvement in the Russian investigation was necessarily improper. This perspective perhaps reflects a certain sort of bureaucratic mindset, a desire for independence and turf-protection. But insofar as the Constitution is concerned, the turf was entirely the president's. In contrast, neither special counsels nor FBI directors have any constitutional claim to authority.

### Obstruction Statutes and Presidents

Second, the Report does not demonstrate that the President committed obstruction of justice both because the obstruction statutes do not apply to his official acts and, even if they did, we lack proof that he acted with a corrupt intent.

To begin with, I do not believe that the various obstruction statutes apply to the official acts of prosecutors, including the Chief Prosecutor. I do not believe that these

statutes should be read to apply to the decisions to prosecute, decline to prosecute, or any official decision in the context of an investigation or prosecution. If it did, *every* investigatory and prosecutorial act of every DOJ official satisfies the act and nexus elements of these obstruction statutes. After all, each official act, in the context of an investigation and prosecution, satisfies the requirement of an attempt to influence the investigation or prosecution. If the statutes do apply to the official acts of prosecutors, the only question would be whether these prosecutors acted corruptly. Two elements—the act and nexus elements—automatically would be satisfied given the context.

For instance, if the obstruction acts apply to DOJ personnel anyone can argue that Robert Mueller’s investigation of the president interfered with the president’s supervision of Justice Department investigation and therefore satisfied the act and nexus elements of the obstruction statutes; the only question would be whether Robert Mueller had a corrupt motive in influencing the president’s supervision of an ongoing investigation. Are we to have an investigation arise out of the bare fact that Mueller’s investigation of the president itself might have constituted obstruction of justice? In particular are we to have such an investigation to determine if Robert Mueller had a corrupt intent? If this were possible, someone might in turn investigate the obstruction investigation of Robert Mueller, and so on, leading to an infinite regression. My reading of the statutes—that they do not apply to the official acts of prosecutors and the Chief Prosecutor—eliminates these problems. We do not want endless investigations of investigations.

To be clear, I am not suggesting that either Robert Mueller or his assistants had a corrupt intent in investigating the President. My point is that on the Mueller Report’s

reading of the statute anyone can make such a claim, thereby potentially triggering an investigation into his personal motivations and the impulses of his many assistants.

More importantly, there are profound constitutional reasons why the statutes should not be read as applying to the official acts of presidents. To be clear, I would read the obstruction statutes to apply to the president's private acts. But where a statute would interfere with the exercise of the president's constitutional powers, the statute ought not be read to cover the president's official acts. If you tell a president he can be investigated every time he becomes involved in prosecutorial matters, you've neutered the president's power to supervise the Justice Department and to serve as the nation's chief law enforcement officer.

For similar reasons, the Supreme Court has concluded that generic statutes should not be read to cover (or interfere with) the president's official acts when doing so would chill the exercise of the president's constitutional powers. As the Supreme Court said in *Public Citizen v. Department of Justice* in the context of whether the Federal Advisory Committee Act (FACA) applied to the president's consultations with the American Bar Association, "we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." 491 U.S. 440, 466 (1989). The reason for this hesitation was the assertion that if FACA applied to the ABA, it would interfere with the president's ability to nominate individuals. To my mind this was a weak argument because the president might nominate whomever he wished; the only question is whether the ABA had to comply with FACA. In the case of the obstruction statutes, the interference with the president's constitutional

authority over prosecution is more direct and palpable. It regulates him, rather than some third party.

The Court has even applied this clear statement rule to situations that do not involve the president's core constitutional powers. In *Franklin v. Massachusetts*, the Court decided that presidents need not comply with the Administrative Procedure Act because that generic statute ought not be read to cover presidents. "Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA." 505 U.S. 788, 800-01 (1992). Likewise, out of respect for the president's constitutional authority over prosecution and his unique constitutional position, textual silence should not be enough to subject the President's constitutional acts to the generic obstruction of justice statutes.

Despite these sound rules emanating from the Supreme Court, the Mueller Report largely ignores these questions and thus marks a heedless, headlong charge into dangerous constitutional thickets. The Report misapplies the Supreme Court's doctrine as to the application of generic statutes to the president's official acts. The Report also pays insufficient attention to the possibility that the obstruction statutes might be unconstitutional if applied to the president because they would so chill the president's authority over law execution and impede the exercise of his other constitutional powers.

If the obstruction statutes may constitutionally apply to the president, what is to prevent Congress from passing an obstruction of legislation statute that makes corrupt

vetoed illegal? What is to prevent Congress from making every constitutional act of the president a crime, at least when done with a corrupt motive? To be clear, I don't wish to take a position on these questions. Rather my point is that that the Mueller report did an inadequate job of grappling with the constitutional consequences of its broad reading of the statutes.

Going forward any president who attempts to supervise an investigation into politically sensitive matters has to know that he or she may face an obstruction investigation because opponents can easily allege a corrupt motive. This reality will systematically disable presidents from supervising politically sensitive investigations. So, for instance, if President Bernie Sanders believes that FBI Director Chris Wray is misusing resources to investigate some phony scandal involving the Sanders' administration, President Sanders cannot do anything to supervise the process lest he invite an investigation of his improper "influence" upon FBI investigations. President Sanders certainly cannot fire Wray because there will be a firestorm and calls for a special counsel to investigate the President for obstruction.

In any event, even if we assume that the obstruction statutes apply to the President's official acts and that their application would be constitutional notwithstanding their severe chilling effects on presidential power, the Mueller Report never definitively states whether the President acted with a corrupt intent. Indeed, the Report's terse discussion of what constitutes a corrupt motive make clear the extreme perils of this sort of inquiry. The Report quotes a law dictionary for the definition. Corrupt means acting with an intent to secure an "improper advantage for [him]self or someone else, inconsistent with official duty and the

rights of others.” BALLENTINE’S LAW DICTIONARY 276 (3d ed. 1969). This suggests that sometimes it might be permissible to advantage oneself, so long as doing so is not “improper.”

The Report itself suggest as much. On the one hand, the report says that if an actor influences an investigation due to personal or family reasons that would be corrupt. On the other hand, the Report says that influencing an investigation for political and policy reasons is not corrupt. This is no easy line to draw. Ending the investigation would have been permissible, the report seems to concede, if a president’s reasons had to do with its effects on his ability to deal with foreign nations. And it would have been permissible had politics been the reason for terminating an investigation or prosecution. But ending an investigation because one is concerned about one’s own standing or reputation would be impermissible. How are observers to know the difference? Every president can say, truthfully, that an investigation of this sort impedes his ability to carry out his constitutionally assigned tasks because that is absolutely true. No one can doubt that the President’s political standing and his ability to get things done, both overseas and at home, was impaired by the Russia investigation and then the obstruction investigation. Given this truth, how are we to discern the difference between permissible motives and corrupt ones? Barring an implausible confession by a president that he acted solely on personal grounds, attempting to rule out the permissible motives—politics and policy—is simply impossible. Having said that all this, a president’s critics will not be reluctant to ascribe evil motives, for every presidential intervention into a sensitive investigation can be seen as motivated by personal reasons.

Little wonder that the Mueller Report continually struggles over whether the President acted out of a corrupt motive. Everything the President did could have been motivated by a permissible, non-corrupt motive. The Report lays bare the perils of attempting to peer into a president's head and asking whether, in exercising his constitutional powers, he acted for corrupt personal reasons as opposed to permissible reasons of policy and politics.

### Prosecuting a Sitting President

To my third point: I disagree with the many Office of Legal Counsel (OLC) opinions which assert that a sitting president cannot be indicted or prosecuted while in office. To the contrary, I believe that the Constitution itself never grants the president any sort of privileges or immunities. I argue as much in my book and I draw from the more extensive argument there. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE*, Chapter 9 (2015). Unlike Congress, the President lacks any sort of textual immunity from prosecution. He lacks a Speech and Debate Clause and he lacks a Privilege from Arrest Clause. Moreover, such executive privileges were hardly unknown. Both Delaware and Virginia granted their states executives some limited immunities; neither could be convicted while in office. The Founders might have done the same for our President. They did not. Indeed, they did not convey any special textual immunities despite the fact that James Madison brought the absence of executive privileges to their attention on the floor of the Philadelphia Convention. The presence of congressional privileges and immunities and the absence for the president speaks is telling.

At the Founding, several individuals concurred with this framework of no presidential immunity from criminal liability. James Wilson said that not a “single privilege is annexed” to the president. He also said that the president “is amenable to [the laws] in his private character as a citizen.” Another Federalist said the president “is not so much protected as that of a member of the House of Representatives, for he may be proceeded against like any other man in the ordinary course of law.” IMPERIAL FROM THE BEGINNING, 221-22.

Of course, the Office of Legal Counsel likely will never change its opinions on this question. And so long as it doesn't, no president will be prosecuted against his will, at least not by the DOJ. But, it seems to me, any president might choose to waive his supposed right. President Trump could test the assertion that he committed the crime of obstruction by seeking his day in court. I do not believe that the OLC opinions preclude this possibility. In other words, the privilege against criminal prosecution that OLC reads into the Constitution might be a waivable right rather than an absolute bar. Second, state attorneys general and state prosecutors could try to prosecute a president under state law because they are not bound to the OLC's conclusions on federal law. If they do so, the president's personal lawyers might interpose the constitutional claim of immunity. To be clear, I don't recommend that the President ask for his day in court or that state prosecutors bring state charges against President Trump.

At this point, some commentary on the Mueller Report's invocation of the OLC opinions is in order. The OLC has clearly stated that sitting presidents cannot be indicted and prosecuted. But it has never said that DOJ personnel, or anyone else for that matter,

are barred from making legal conclusions about whether the president violated the law. Hence nothing bars you, me, or any American from saying that the president committed a crime. More importantly, nothing in DOJ policy prevented Robert Mueller from reaching a conclusion about whether the President committed obstruction of justice. If Mr. Mueller ever testifies before the House or the Senate, I hope he clarifies why he reached no conclusion on obstruction in his voluminous report. It is a little startling to have a 182-page report on a possible crime and no conclusion on whether one was committed and no satisfactory explanation as to why no conclusions were reached. The report is like an apple pie without the filling. It is neither apple nor pie.

#### The Broad Scope of High Crimes and Misdemeanors

Fourth, let me say a few words about impeachment. Whether or not the obstruction statutes apply to a president's official acts and whether or not the current President violated any of them, the House may still impeach the President. In particular, Representatives can conclude that his acts over the course of the investigation amount to an abuse of his constitutional authority, whether we call it obstruction of justice or not. Very few (if any) scholars believe that "high crime & misdemeanors" is limited to actual federal crimes.

Furthermore, you don't need to believe the President committed obstruction of justice to impeach him, for you can rely upon a number of his other acts to do so, assuming you believe that they are high crimes and misdemeanors. If you believe the President violated the Emoluments Clause, of course you can impeach him for that. If you believe the President violated the Appropriations Clause by diverting funds from congressionally-sanctioned

purposes to his own purposes, of course you can impeach him for that. Finally, you could impeach him for his acts in Yemen and Syria, if you think that he violated your exclusive authority to declare war on behalf of the United States.

I believe that the President has committed impeachable offenses by acting beyond the Constitution and the statutes of the United States. The political difficulty is that he is not alone in this respect. Many modern presidents have usurped authority not theirs. Presidents have spent money without appropriations, started foreign wars, ignored the constitutional laws of Congress. I dare say that many, if not all of you, agree. The problem is that many members of Congress turn a blind eye to the constitutional faults of their co-partisans but then complain about presidents of the other party. Few will take you seriously if you say that President Trump's wall spending is illegal unless you also state that the Bush/Obama bailout of Chrysler and GM was illegal. No one will take you seriously if you say that Trump's war in Yemen is illegal but remain mum about Obama's wars in Libya and Yemen. Unfortunately, many members of Congress are letting us down by adopting inconsistent stances as to the scope of presidential power. The same power is sometimes broad and sometimes narrow and it all turns on who sits in the Oval Office. My advice is to pick a position and be consistent about the scope of presidential authority; utterly disregard a president's partisan affiliation. If you can do this consistently, Congress can regain some of its former glory, reputation, and power.

## Conclusion: Move Forward with Impeachment or Move Beyond it

My last suggestion is that if you are going to impeach the President, please get it over with soon. If you believe the President committed the many offenses that many are apt to reel off, there is no need for months of further investigations. The President and his minions have been investigated for longer than he has been president, for almost three years now. Impeach him, convict him if you can, and move on to other matters that are important.

Alternatively, think seriously about censuring the president. Presidents have been censured or reproached before, most notably Andrew Jackson, John Tyler and James Buchanan (in each instance, a single chamber of Congress gave voice to criticisms of overreach and impropriety).

I will add that it might prove quite useful to lay down markers for future presidents to consider with respect to involvement in criminal investigations, diversion of funds, or presidential wars. Congress might benefit from speaking up more often and voters might benefit from statements that put their legislators on the record. Having to vote on generic resolutions, ones not tied to a particular set of acts or presidents, might help voters reward those members consistently devoted to enduring constitutional principles. Members have a duty to support the Constitution and I can think of no better way to partially fulfill that duty than taking public, formal stands on nonpartisan resolutions that speak to the scope of presidential power.