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Lawyers' Confidential Memo to Mueller, Explained

By THE NEW YORK TIMES JUNE 2, 2018

The Times obtained copies of a confidential letter sent by President Trump's lawyers to the special counsel, Robert S. Mueller III. Reporters added context in annotations. Below it is [another letter from the president's lawyers](#) sent last summer. Read the [related article](#).

The Trump Legal Team's Jan. 29, 2018, Confidential Memo to Mueller

January 29, 2018

By Hand

Confidential

John M. Dowd
Attorney at Law
Washington, D.C. 20015

Robert S. Mueller
Special Counsel
United States Department of Justice
Washington, D.C. 20024

Re: Request for Testimony on Alleged Obstruction of Justice

Gentlemen:

This letter will address the recent request by your office for an interview with the President and our discussions with you concerning the same on November 21, 2017, and January 8, 2018.

In our conversation of January 8, your office identified the following topics as areas you desired to address with the President in order to complete your investigation on the subjects of alleged collusion and obstruction of justice:

A RESPONSE TO MUELLER

Mr. Trump's lawyers hand-delivered a 20-page confidential letter to Mr. Mueller in January. The letter was a response to his request that Mr. Trump agree to be questioned about allegations that he committed obstruction of justice. The lawyers argued that Mr. Mueller does not need to talk to the president and laid out a series of claims that foreshadow a potential fight over a subpoena, were the special counsel to try to force the president to testify.

The Times obtained a copy of the letter as well as an earlier one sent to Mr. Mueller in June 2017, a month after he was appointed, which argues that "there is no statutory or constitutional basis for any obstruction charge" based on Mr. Trump's firing of James B. Comey as F.B.I. director.

1. Former National Security Advisor Lt. Gen. Michael Flynn — information regarding his contacts with Ambassador Kislyak about sanctions during the transition process;
2. Lt. Gen. Flynn's communications with Vice President Michael Pence regarding those contacts;
3. Lt. Gen. Flynn's interview with the FBI regarding the same;
4. Then-Acting Attorney General Sally Yates coming to the White House to discuss same;
5. The President's meeting on February 14, 2017, with then-Director James Comey;
6. Any other relevant information regarding former National Security Advisor Michael Flynn;
7. The President's awareness of and reaction to investigations by the FBI, the House and the Senate into possible collusion;
8. **The President's reaction to Attorney General Jeff Sessions' recusal from the Russia investigation;**
9. The President's reaction to Former FBI Director James Comey's testimony on March 20, 2017, before the House Intelligence Committee;
10. Information related to conversations with intelligence officials generally regarding ongoing investigations;
11. Information regarding who the President had had conversations with concerning Mr. Comey's performance;
12. Whether or not Mr. Comey's May 3, 2017, testimony led to his termination;
13. Information regarding communications with Ambassador Kislyak, Minister Lavrov, and Lester Holt;
14. The President's reaction to the appointment of Robert Mueller as Special Counsel;
15. The President's interaction with Attorney General Sessions as it relates to the appointment of Special Counsel; and,
16. The statement of July 8, 2017, concerning Donald Trump, Jr.'s meeting in Trump Tower.

QUERIES WITHOUT RESPONSE

The letter does not address three of Mr. Mueller's topics of discussion: the president's reaction to the attorney general's recusal and to Mr. Mueller's appointment, as well as his discussions with Mr. Sessions about that appointment. The lawyers' view, according to people close to the case: Those subjects are covered by executive privilege.

Maggie Haberman

It is our understanding that the reason behind the request for the interview is to allow the Special Counsel's office to complete its report. After reviewing the list of topics you presented, it is abundantly clear to the undersigned that all of the answers to your inquiries are contained in the exhibits and testimony that have already been voluntarily provided to you by the White House and witnesses, all of which clearly show that there was no collusion with Russia, and that no FBI investigation was or even could have been obstructed.

It remains our position that the President's actions here, by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself, and that **he could, if he wished, terminate the inquiry, or even exercise his power to pardon if he so desired.** Nevertheless, the President's strong desire for transparency indicated the need to obtain an honest and complete factual report from the Special Counsel, which would sustain and even benefit the Office of the President and the national interest throughout his time in office. Thus, full cooperation was in order, and was in fact provided by all relevant parties.

THE POWER TO KILL CASES

This is a striking line — and an ambiguous one. Mr. Trump's lawyers may be suggesting that he had the lawful power to shut down the investigation into the national security adviser at the time, Michael T. Flynn, or even to pardon Mr. Flynn if he wanted — so that whatever he said to Mr. Comey about that case could not have amounted to obstruction. But the sentence may also leave open the possibility that he could order the obstruction investigation into himself shut down or even pardon himself. No

We express again, as we have expressed before, that the Special Counsel's inquiry has been and remains a considerable burden for the President and his Office, has endangered the safety and security of our country, and has interfered with the President's ability to both govern domestically and conduct foreign affairs.

This encumbrance has been only compounded by the **astounding public revelations about the corruption within the FBI and Department of Justice which appears to have led to the alleged Russia collusion investigation** and the establishment of the Office of Special Counsel in the first place.

²The Special Counsel acknowledged that he was aware of and understands this burden and, accordingly, has committed to expedite his effort.

Counsel for both sides developed an informal, confidential, and cooperative relationship to expedite the conclusion of the inquiry. It was agreed that all conversations were confidential and “off the record” so as to encourage candor and engagement as opposed to adversarial hostility. It was agreed that each side could call or meet at any time to facilitate the exchange of information. **We agreed on the parameters of the inquiry and that if anything changed, the Special Counsel would notify us before proceeding.**

We all remain in agreement that your office has received unprecedented access and voluntary cooperation in the collection of all documents requested from the White House³, the Donald J. Trump For President, Inc. (the “Campaign”)⁴, and individual witnesses⁵, and that our offices have developed a collegial and professional working relationship which encourages honesty and candor. Further, we all agree that your office and the Congressional Committees have received the full cooperation and testimony of both present and former White House staff members, including White House Counsel, as well as the President’s most senior advisers and his most senior Campaign employees. The majority of that information could have been rightfully withheld on multiple privilege grounds, including but not limited to the presidential communications privilege⁶.

We cannot emphasize enough that *regardless of the fact that the executive privilege clearly applies to his senior staff*, in the interest of complete transparency, the President has allowed — in fact, has directed — the voluntary production of clearly protected documents. This is because the President’s desire for transparency exceeded the policy purposes for the privilege under the circumstances. Without question, the privilege “attaches not only to direct communications with the President, but also to discussions between his senior advisors, who must be able to hold confidential meetings to discuss advice they secretly will render to the President.”⁷ The privilege applies and is available for the President to claim here because “restricting the presidential communications privilege to communications that directly involve the President will impede the President’s ability to perform his constitutional duty.”⁸

[C]ommunications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President. Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these

president has ever purported to pardon himself, and it is [unclear whether he could](#).

Charlie Savage

DELEGITIMIZING THE INVESTIGATION

The letter briefly shifts in tone to an attack on law enforcement institutions and the legitimacy of the investigation. The president and his allies routinely use such language in the public relations arena. But his lawyers’ use of it in a private missive to Mr. Mueller is striking: a reminder to the special counsel that he will face more than legal pushback if he subpoenas the president or accuses him of wrongdoing.

Charlie Savage

MUTUAL UNDERSTANDING

This is why defense lawyers have been so confident in saying that Mr. Mueller is not investigating Mr. Trump’s personal finances or his family’s real estate dealings.

Michael S. Schmidt

advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.⁹

The privilege applies to communications authored or solicited and received by members of an immediate White House adviser's staff who are responsible for advising the President.¹⁰

As you know, **under our system of government, the President is not readily available to be interviewed.** Ample academic and jurisprudential material supports this important principle. Moreover, as we have indicated in our meetings, we are reminded of our duty to protect the President and his Office. **Thus, in deciding whether to advise the President to be interviewed, we are guided by the controlling law in this Circuit, *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997)** (the "*Espy*" case), that those seeking information from the President must "demonstrate with specificity why it is likely that the subpoenaed materials [here, his testimony] contain important evidence and why this evidence, or equivalent evidence, is not practically available from another source."¹¹

PREVIEWING A SUBPOENA FIGHT

While styled as a letter about whether the president will voluntarily sit for an interview, it is essentially a warning to Mr. Mueller about the array of legal pushback he will face if he tries to subpoena Mr. Trump.

Charlie Savage

Although there is not a lot of case law directly on point concerning the issue at hand, scholars have noted that the law here is clear, being that the "[*Espy*] two prong analysis developed-as the D.C. Circuit construed the meaning of a 'demonstrated, specific need' over the course of two decades," and that while "the first requirement is essentially the equivalent of Federal Rule of Criminal Procedure 17(c) [t]he second requirement entails detailed documentation of efforts to obtain the needed information from other sources."¹²

A CLINTON-ERA PRECEDENT

In arguing that the president need not talk to investigators, his lawyers invoked [a 1997 appeals court ruling](#) involving Mike Espy, a secretary of agriculture under President Clinton who was accused of improperly accepting gifts from businesses. (Mr. Espy was charged but acquitted.) An independent counsel prosecuting Mr. Espy subpoenaed for notes from the White House counsel's own investigation into the matter, prompting a fight over the scope of executive privilege. An appeals court ruled that the White House counsel's materials were covered by executive privilege, so the prosecutor could only get them if they were important and he could not obtain the information another way.

Charlie Savage

In an effort to provide complete transparency, the President waived the obviously applicable privileges where appropriate in order to allow both the Congress and the Special Counsel to see all relevant documents.¹³ The documents provided include notes from and concerning advisors at the highest level. They reflect contemporaneous corroboration, which is an inherently and fundamentally weightier type of evidence — unlike former FBI Director James Comey's (Mr. Comey's) testimony. Perhaps most notably, your office has already been given access to conversations with the President himself. Case law in this district teaches that for the presumptive privilege to possibly be overcome and the requisite need and specificity sufficiently demonstrated, the need for the exact "content of a conversation" involving high-level White House advisers must be "undeniable" and "the only sources of that testimony are those persons participating in the conversations."¹⁴

The records and testimony we have, pursuant to the President's directive, already voluntarily provided to your office allow you to delve into the conversations and actions that occurred in a significant and exhaustive manner, including but not limited to the testimony of the President's interlocutors themselves. In light of these voluntary offerings, your office clearly lacks the

LIMITS OF EXECUTIVE PRIVILEGE

The president's lawyers are arguing that because they have turned over so many documents and made other witnesses available for depositions, Mr. Mueller has already obtained the same information

requisite need to personally interview the President. The information you seek is “practically available from another source,”¹⁵ and your office, in fact, has already been given that other source.

We have, pursuant to the standard set forth in the *Espy* case, carefully reviewed your list of questions and the topics you have identified, and we have concluded that your office **has already received the answers from the documents and testimony which have been voluntarily and expeditiously** provided by the President, the White House, his staff, the Trump campaign and the Trump organization. This letter will respond to your inquiries, and direct your attention to the evidence and testimony that is already in your possession.

RESIGNATION OF LT. GEN. FLYNN

In our most recent meeting, you mentioned the possibility of obstruction in connection with the case of former National Security Advisor and Lt. Gen. Michael Flynn (Ret.) (“Lt. Gen. Flynn”), and that you desired to speak with the President specifically regarding his conversation with then-Director Comey one day after the President fired Lt. Gen. Flynn for lying to the Vice President. You have already been provided the testimony of White House Counsel and his extensive internal file memo as well as the testimony and notes of the President’s Chief of Staff, Reince Priebus (“Mr. Priebus”), and other members of the White House Counsel’s office. According to former Mr. Comey, the following occurred at a February 14, 2017, meeting between him and the President:

The President then returned to the topic of Mike Flynn, saying, “He is a good guy and has been through a lot.” He repeated that Flynn hadn’t done anything wrong on his calls with the Russians, but had misled the Vice President. He then said, “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.” I replied only that “he is a good guy.” ... I did not say I would “let this go.”¹⁶

The White House denied and refuted that the President said these words to Mr. Comey.¹⁷ We decline to recommend to the President that he be interviewed on this subject for many reasons.

What follows is a non-exhaustive list:

- First, the President was not under investigation by the FBI;
- Second, there was no obvious investigation to obstruct since the FBI had concluded on January 24, 2017, that Lt. Gen. Flynn had not lied, but was merely confused.¹⁸ Director Comey confirmed this in his closed-door Congressional testimony on March 2, 2017.¹⁹
- Third, as a matter of law, even if there had been an FBI investigation there could have been no actionable obstruction of said investigation under 18 U.S.C. § 1505, since an FBI investigation is not a “proceeding” under that statute. Since there is no cognizable offense, no testimony is required;
- Fourth, both Mr. Comey and Mr. McCabe subsequently testified under oath that there was “no effort to impede” the

he would get from an interview with Mr. Trump. But if a subpoena fight does arise, Mr. Mueller will almost certainly argue that only by questioning Mr. Trump directly about what he was thinking can investigators determine his intent.

Charlie Savage

FULL COOPERATION MODE

The White House has been saying for months that it is in “full cooperation mode” with the special counsel. This is the payoff for that strategy. The president’s lawyers are signaling here that, if subpoenaed, Mr. Trump would argue that the many documents the White House has turned over and the hours of interviews with staff members have made his testimony unnecessary.

Matt Apuzzo

investigation.²⁰ Mr. McCabe's testimony followed Mr. Comey's testimony on May 3, 2017, just six days before his termination, that "it would be a big deal to tell the FBI to stop doing something . . . for a political reason. That would be a very big deal. It's not happened in my experience."²¹

- Fifth, the investigation of Lt. Gen. Flynn proceeded unimpeded and actually resulted in a charge and a plea;
- Sixth, assuming, _____, that the President had made a comment to Mr. Comey that Mr. Comey claimed to be a direction, as the chief law enforcement official pursuant to Article II of the United States Constitution, the President had every right to express his view of the case;
- Seventh, your office already has an ample record upon which to base your findings of no obstruction. As such there is no demonstrated, specific need for the President's responses; and,
- Eighth, by firing Lt. Gen. Flynn, the President actually facilitated the pursuit of justice. He removed a senior public official from office within seventeen days, in the absence of any action by the FBI and well before any action taken by your office.

To briefly review the relevant law and facts, § 1505 of Title 18, United States Code, as amended by the Victim and Witness Protection Act of 1982, forbids anyone from corruptly, or by threats of force or by any threatening communication, influencing, obstructing, or impeding any *pending proceeding* before a department or agency of the United States, or Congress.

²² Under § 1505, a "pending proceeding" is limited only to agencies with rule-making or adjudicative authority. The investigation of Lt. Gen. Flynn was being conducted by the FBI, which possesses only investigative authority, not adjudicative; it cannot conduct "proceedings" within the cognizance of § 1505.

²³ No court has ever held that an FBI investigation constitutes a § 1505 proceeding, and the U.S. Attorney's Manual makes clear that "investigations by the Federal Bureau of Investigation (FBI) are not § 1505 proceedings."²⁴ The DOJ has even expressly acknowledged as much to the United States Court of Appeals for the Fourth Circuit.²⁵ As a matter of law, then, the FBI's investigation of Lt. Gen. Flynn was not, at the time of the President's comments as recalled by Mr. Comey, within the scope of § 1505.

The following facts are taken from information voluntarily provided to your office or from information that is publicly available. These facts further demonstrate that the President did not obstruct justice in any manner concerning Lt. Gen. Flynn.

According to Acting Attorney General Sally Yates ("Ms. Yates"), on January 24, 2017, Lt. Gen. Flynn was interviewed by the FBI. According to reports, "The FBI interviewers believed Flynn was cooperative and provided truthful answers. Although Flynn didn't remember all of what he talked about, they don't believe he was intentionally misleading them, the officials say."²⁶

This account of the FBI's interview and subsequent conclusions was later confirmed by the closed-door congressional testimony of Mr. Comey.²⁷ Mr. Comey also confirmed in his May 3, 2017, Senate Intelligence Committee testimony that he "did participate in conversations about that matter" with Ms. Yates, referring to the FBI's interview of Lt. Gen. Flynn. before she

AN OUTDATED UNDERSTANDING OF THE LAW

Mr. Trump's lawyers are making a legalistic argument that he could not have violated an obstruction statute because F.B.I. investigations are not considered to be covered by it. But a [different obstruction statute](#) is relevant here, legal experts say. Enacted in 2002, it criminalizes the corrupt impeding of proceedings even if they have not yet started — like the potential grand jury investigation an F.B.I. case can prompt. The president's lawyers do not mention this statute, whose existence appears to render several of their arguments beside the point.

Charlie Savage

conveyed the information to the White House in the days that followed.²⁸

On January 26, 2017, Ms. Yates met with White House Counsel Don McGahn (“Mr. McGahn”). As outlined by Mr. McGahn in his White House Counsel’s Office memo dated February 15, 2017,²⁹ “Yates expressed two principal concerns during the meeting: (1) that Flynn may have made false representations to others in the Administration regarding the content of the calls; and (2) that Flynn’s potentially false statements could make him susceptible to foreign influence or blackmail because the Russians would know he had lied.” “Yates further indicated that on January 24, 2017, FBI agents had questioned Flynn about his contacts with Kislyak. Yates claimed that Flynn’s statements to the FBI were similar to those she understood he had made to Spicer and the Vice President.”³⁰

On January 26, 2017, Mr. McGahn briefed the President concerning the information conveyed by Ms. Yates. Additional advisors were brought in, including White House Chief of Staff Mr. Priebus. It was agreed that additional information would be needed before any action was taken. As recorded by Mr. McGahn, “Part of this concern was a recognition by McGahn that it was unclear from the meeting with Yates whether an action could be taken *without jeopardizing an ongoing investigation.*” At that time “President Trump asked McGahn to further look into the issue as well as finding out more about the calls.”

On January 27, 2017, at Mr. McGahn’s request, Ms. Yates and Mr. McGahn had another meeting. *Importantly, DOJ leadership declined to confirm to the White House that Lt. Gen. Flynn was under any type of investigation. According to Mr. McGahn’s memo:*

During the meeting, McGahn sought clarification regarding Yates’s prior statements regarding Flynn’s contact with Ambassador Kislyak. Among the issues discussed was whether dismissal of Flynn by the President would compromise any ongoing investigations. Yates was unwilling to confirm or deny that there was an ongoing investigation but did indicate that the DOJ would not object to the White House taking action against Flynn. (Emphasis added.)

Further supporting the White House’s understanding that there was no FBI investigation that could conceivably have been impeded, **“Yates also indicated that the DOJ would not object to the White House disclosing how the DOJ obtained the information relayed to the White House regarding Flynn’s calls with Ambassador Kislyak.”** In other words, the DOJ expressed that the White House could make public that Lt. Gen. Flynn’s calls with Ambassador Kislyak had been surveilled. It seems quite unlikely that if an ongoing DOJ investigation of Lt. Gen. Flynn was underway, the DOJ would approve its key investigation methods and sources being publicized.

Your office is also aware that, in the week leading up to Lt. Gen. Flynn’s termination and the President’s alleged comments to Mr. Comey, Lt. Gen. Flynn had told both White House Counsel and

NO OBJECTIONS TO DISCLOSING WIRETAP

This is new, though uncorroborated, information: By Jan. 27, 2017, the president’s lawyers say, the Justice Department had told the White House that it had no objections to the public disclosure of its wiretapping of the Russian ambassador. While the existence of that surveillance had already been reported, the contents of what the wiretaps picked

the Chief of Staff at least twice that the FBI agents had told him he would *not* be charged. The first instance occurred during a discussion at the White House on February 8, 2017, between Mr. McGahn, Mr. Priebus, Mr. John Eisenberg and Lt. Gen. Flynn. “Priebus led the questioning” and “asked Flynn whether Flynn spoke about sanctions on his call with Ambassador Kislyak.” Lt. Gen. Flynn’s “recollection was inconclusive” and he responded that “he either was not sure whether he discussed sanctions, or did not remember doing so.” “Priebus specifically asked Flynn whether he was interviewed by the FBI. Flynn stated that FBI agents met with him to inform him that their investigation was over.” The second occurred on a telephone call on February 10, 2017, wherein Mr. McGahn, Mr. Priebus, and the Vice President confronted Lt. Gen. Flynn concerning his discussions with Ambassador Kislyak. As recorded in Mr. McGahn’s memo, **“On the phone, Flynn is asked about the FBI investigation to which he says that the FBI told him they were closing it out.”**

On February 10, 2017, upon confirming the true content and nature of Lt. Gen. Flynn’s three telephone calls with Ambassador Kislyak, and in light of his statements to them and the Vice President, White House Counsel Don McGahn and Chief of Staff Reince Priebus advised the President that Lt. Gen. Flynn “had to be let go.” As a result, on February 13, 2017, the President accepted Lt. Gen. Flynn’s resignation.

According to Mr. Comey’s testimony, the next day, on February 14, 2017, the President made comments expressing his “hope” that Mr. Comey “could see [his] way to letting this go” in reference to the situation with Lt. Gen. Flynn. The White House disputed Mr. Comey’s recollection of that conversation. Regardless, the White House Counsel and Chief of Staff, as well as others surrounding the President, had every reason to believe at that time that the FBI was not investigating Lt. Gen. Flynn, especially in light of the fact that Lt. Gen. Flynn was allowed to keep his active security clearance.

For all intents, purposes, and appearances, the FBI had accepted Flynn’s account; concluded that he was confused but truthful; decided not to investigate him further; and let him retain his clearance. As far as he could tell, the President was the *only one* who decided to continue gathering and reviewing the facts in order to ascertain whether Lt. Gen. Flynn’s actions necessitated severe and consequential action — removal from office. The President ordered his White House Counsel to continue its review of the situation, which ultimately concluded that Lt. Gen. Flynn had misled the Vice President. The President did not obstruct justice. To the contrary, he facilitated it.

We emphasize these points because even if an FBI investigation constituted a “proceeding” under the statute, which it does not, the statute also requires *intent* to obstruct. There could not possibly have been intent to obstruct an “investigation” that had been neither confirmed nor denied to White House Counsel, and that they had every reason (based on Lt. Gen. Flynn’s statements and his continued security clearance) to assume was not ongoing. Further, by insisting on and accepting Lt. Gen. Flynn’s public resignation as national security adviser, the

up — Mr. Flynn discussing sanctions — came to light more than a week later in [The Washington Post](#). Mr. Trump fired Mr. Flynn shortly after, [denouncing](#) the leaks about the surveillance.

Charlie Savage

FLYNN'S INVESTIGATION

We learn here for the first time that Mr. Flynn told top White House officials that the F.B.I. investigation into him was nearly complete. Mr. Trump’s lawyers go on to say this is important because the president could not have tried to obstruct an investigation he believed was over.

Michael S. Schmidt

President expedited the pursuit of justice while the DOJ and the FBI were apparently taking no action.

So, to reiterate, within seventeen days of first being advised by DOJ leadership concerning Lt. Gen. Flynn, and within just three days of the President's senior team confirming the requisite facts, the President took decisive action and directed Lt. Gen. Flynn, his highest ranking national security advisor, to resign. The President did so in spite of the fact that the FBI had, apparently, decided not to pursue the case further. The President did so in spite of the great political cost to himself.

Far, far, from obstructing justice, the only individual in the entire Flynn story that ensured swift justice was the President.

His actions speak louder than any words.

While Mr. Comey may or may not have misunderstood, misinterpreted or misremembered the President's alleged comments, the "hard" evidence already voluntarily provided to your office shows not only that the President most certainly did not obstruct justice, *but that at the time, Mr. Comey certainly did not believe that he had in any way obstructed justice.* If Mr. Comey had believed otherwise, he would have opened an obstruction investigation and directed his investigators accordingly. He did not do so.

DON'T THANK ME

Mr. Trump's lawyers say he should get credit for his handling of Mr. Flynn's case because he ultimately fired him.

Michael S. Schmidt

MORE SHOTS AT COMEY

Mr. Comey's contemporaneous memos paint an unflattering portrait of Mr. Trump and are key evidence in the case. Here, Mr. Trump's lawyers assail their credibility, saying perhaps Mr. Comey misunderstood the president's comments.

Matt Apuzzo

What the entire allegation of obstruction amounts to, then, is a critical examination of the conversation that occurred between the President and then-Director Comey on the night of February 14, 2017, in light of Mr. Comey's self-serving testimony and leaked memos. Again, according to Mr. Comey's prepared testimony, the following occurred during that February 14 meeting:

The President then returned to the topic of Mike Flynn, saying, "He is a good guy and has been through a lot." He repeated that Flynn hadn't done anything wrong on his calls with the Russians, but had misled the Vice President. He then said, "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." I replied only that "he is a good guy." (In fact, I had a positive experience dealing with Mike Flynn when he was a colleague as Director of the Defense Intelligence Agency at the beginning of my term at FBI.) I did not say I would "let this go."³¹

On June 8, 2017, Mr. Comey was asked about that conversation in great detail. While acknowledging that the President only said "hope," Mr. Comey said he took it as a direction. However in his Senate Judiciary Committee testimony he responded as follows:

RISCH: He did not direct you to let it go.

COMEY: Not in his words. no.

RISCH: He did not order you to let it go.

COMEY: Again, those words are not an order.

RISCH: He said "I hope." Now, like me you probably did hundreds of cases, maybe thousands of cases charging people with criminal offenses, and, of course, you have

knowledge of the thousands of cases out there that where people have been charged. Do you know of any case where a person has been charged for obstruction of justice, or for that matter, any other criminal offense, where . . . they said or thought they “hoped” for an outcome?

COMEY: I don't know well enough to answer. And the reason I keep saying his words is I took it as a direction. It is the president of the United States with me, alone, saying “I hope” this. I took it as this is what he wants me to do. I didn't obey that, but that's the way I took it.

RISCH: You may have taken it as a direction, but that's not what he said. He said — he said “I hope.”

COMEY: Those are the exact words, correct.

RISCH: You don't know of anyone that has ever been charged for hoping something, is that a fair statement?

COMEY: I don't, as I sit here.³²

The White House refuted Mr. Comey's account in a statement:

“While the president has repeatedly expressed his view that General Flynn is a decent man who served and protected our country, the president has never asked Mr. Comey or anyone else to end any investigation, including any investigation involving General Flynn. The president has the utmost respect for our law enforcement agencies, and all investigations. This is not a truthful or accurate portrayal of the conversation between the president and Mr. Comey.”³³

Even if we were to ignore the White House's version of events and take Comey's “understanding” at face value, Mr. Comey did not confront the President, nor did he report the “attempted obstruction.” He also did not “let this go,” and he received no further communication from the President or any other person from the White House on the matter.

Mr. Comey himself, very significantly, admitted that he did nothing in response to the so-called “direction” except make self-serving notes. He admitted he did not raise an objection with the President to what he “understood.” He did not open an obstruction investigation of the President. *To the contrary, he told the President in their subsequent March 30, 2017, phone call “that we were not personally investigating the President.”* Had he really understood the President to be attempting to obstruct justice, undoubtedly he would not have made that would-be false statement.

In his testimony Mr. Comey admitted that not only did he fail to confront the President, at the time **he also never told the Attorney General, the Deputy Attorney General or even the FBI agents** then conducting the counterintelligence investigation on collusion that he believed he had received any such direction from the President. Instead, he claimed he only told his senior FBI leadership, but did nothing to act on it. Interestingly, Mr. Comey claimed he did not tell the Attorney General because he thought that the Attorney General was going to recuse himself. While this is certainly a significant assumption by Mr. Comey and raises significant questions, it still does not justify failing to tell the DOJ about the alleged

A HIGHER LOYALTY

Mr. Comey relishes his reputation as a fiercely independent lawman. But in this instance, he might have benefited from sharing his concerns about Mr. Trump with someone at the Justice Department.

Matt Apuzzo

conversation — if Mr. Comey truly perceived it the way he now claims he did. And, two days after Mr. Comey was removed, the most senior member of his FBI leadership, Deputy FBI Director Andrew McCabe, *contradicted Mr. Comey's account* by testifying that, “there has been no effort to impede our investigation to date.”³⁴ Again, the contemporaneous testimony of his senior colleague, and the inaction of Mr. Comey himself, all make clear that at the time of the conversation in question Mr. Comey did not really understand the President to be attempting an obstruction of justice. Recall that Mr. Comey's June 8, 2017 testimony (after his termination) about the conversation followed both Mr. McCabe's testimony and *Mr. Comey's own earlier testimony* on May 3, 2017, just six days before his termination, that “it would be a big deal to tell the FBI to stop doing something ... for a political reason. That would be a very big deal. It's not happened in my experience.”³⁵

In addition, the New York Times reported that following a March 30, 2017, telephone call with the President, Mr. Comey said “that his relationship with the president and the White House staff was now in the right place. ‘I think we've kind of got them trained,’ Mr. Wittes said, paraphrasing what Mr. Comey told him.”³⁶ On March 8, 2017, Mr. Comey told an audience at a cybersecurity conference, ‘You're stuck with me for another 6-1/2 years,’ indicating he expects to serve the remainder of his 10-year term” — and also belying any sentiment that he was suffering under the pressure of a Presidential directive he was refusing to execute.³⁷

All of these facts refute the novel account Mr. Comey articulated only *after* he was fired and after he had, by his own admission, leaked information *in order* to “prompt the appointment of a special counsel”³⁸ — despite never suggesting, while in his position as FBI Director, that a special counsel was necessary or that obstruction had occurred.

FIRING OF FBI DIRECTOR COMEY

You have asked for evidence related to the firing of Mr. Comey, including information on with whom the President consulted in advance of the decision to let Mr. Comey go, in an attempt to see if this firing, in and of itself, might constitute obstruction of justice. Again, we note that you have been voluntarily provided with abundant materials and possess all of the answers to your questions, including how the President evaluated Mr. Comey's performance. As such, and pursuant to *Espy*, we respectfully decline to allow our client to testify. As is now apparent with the benefit of subsequent developments, the firing of Mr. Comey has led to the discovery of corruption within the FBI at the highest levels.

As you know, and as Mr. Comey himself has acknowledged, a President can fire an FBI Director at any time and for any reason. To the extent that such an action has an impact on any investigation pending before the FBI, that impact is simply an effect of the President's lawful exercise of his constitutional power and cannot constitute obstruction of justice here. **No**

MCCABE AS CREDIBLE WITNESS

Mr. Trump has relentlessly portrayed the former F.B.I. deputy director, Andrew G. McCabe, as untrustworthy. But here, he embraces Mr. McCabe's congressional testimony. The context matters, though. Mr. McCabe was asked whether Mr. Comey's termination had, in fact, impeded the Russia investigation. “The work of the men and women of the F.B.I. continues despite any changes in circumstance, any decisions,” he replied. “So there has been no effort to impede our investigation today.”

Matt Apuzzo

WHAT ABOUT A BAD REASON?

For the most part, executive branch officials serve at the pleasure of the president, who can fire them at his discretion. But the Supreme Court has ruled that Congress can create limits, upholding statutes that forbid the firing of certain officials without good cause. The novel legal question, which this

President has ever faced charges of obstruction merely for exercising his constitutional authority.³⁹

A President can also order the termination of an investigation by the Justice Department or FBI at any time and for any reason. Such an action obviously has an impact on the investigation, but that is simply an effect of the President's lawful exercise of his constitutional power and cannot constitute obstruction of justice. **We remind you of these facts simply because even assuming, *arguendo*, that the President did order the termination of an investigation (and the President, along with Mr. Comey in his testimony and in his actions, have made it clear that he did not) this could not constitute obstruction of justice.**

The following facts are based on Mr. Comey's June 8, 2017, testimony before the Senate Intelligence Committee as well as Attorney General Jeff Sessions' June 13, 2017, testimony.

Based on this testimony, the President did not commit obstruction of justice.⁴⁰ The only possible evidence, taken in the light most favorable to your office, is the single memo from Mr. Comey.⁴¹ **The circumstance in which this memo arose — several months after the conversation and only after Mr. Comey was fired in disgrace — raises serious doubts about its veracity, if indeed it even exists.**⁴² In addition, Mr. Comey could possibly face legal action for the unauthorized leaking of conversations with the President to the media,⁴³ an admission especially noteworthy given his refusal to comment on conversations with the President in, for example, his March 20, 2017, congressional testimony, during which he refused to answer questions about conversations with the President, indicating that such information should not be shared publicly.⁴⁴

There is no other evidence to validate Mr. Comey's claims since Attorney General Sessions never substantiated any of the allegations that the President fired Mr. Comey because of the Russian investigation.⁴⁵ To the contrary, Attorney General Sessions stated that his recommendation to the President was that Mr. Comey be fired because of the way he handled the Clinton email investigation and refusal to admit his mistakes.⁴⁶

It is also worth responding to the popular suggestion that the President's public criticism of the FBI either constitutes obstruction or serves as evidence of obstruction. Such criticism ignores the sacred responsibility of the President to hold his subordinates accountable — a function not unlike public Congressional oversight hearings. After all, the FBI is not above the law and we are now learning of the disappointing results of a lack of accountability in both the DOJ and FBI.

The fact is that Deputy Attorney General Rod Rosenstein ("Mr. Rosenstein") expressed precisely the same concerns as the President regarding Mr. Comey in his May 9, 2017, Memorandum to Attorney General Jeff Sessions:

statement evades, is whether statutes outlawing obstruction of justice implicitly constitute such a limit on when a president can fire an F.B.I. director. If so, it would be unlawful to fire an F.B.I. director for a corrupt reason — even though it would still be legal to fire him or her for a good reason or even for no particular reason..

Charlie Savage

EVERYTHING IS UNPRECEDENTED

No president has ever faced criminal charges about anything. Under Richard Nixon and Bill Clinton, the Justice Department opined that presidents are immune from prosecution while in office, and neither was prosecuted afterward because Gerald Ford pardoned Nixon and Mr. Clinton struck a deal with prosecutors on his last day in office. This is one of many ways that the Trump era is potentially taking the country into uncharted waters.

Charlie Savage

LAW ENFORCEMENT INDEPENDENCE

Presidents generally [respect prosecutorial independence and do not become involved in decisions about individual cases](#), a norm that was further entrenched after the Watergate scandal. Still, the Constitution does not expressly prohibit a president from telling the attorney general to close a case, and a president can fire the attorney general. The safeguard against abuse of such power would be potential impeachment by Congress.

Charlie Savage

A BROAD VIEW OF POWER

This is the most sweeping legal claim in the letter: Even if Mr. Trump did order an investigation shut down and fire the F.B.I. director as part of a cover-up of wrongdoing, his lawyers say he still did not violate the law because he was exercising powers the Constitution has granted exclusively to him. Under this view, it would be unconstitutional to apply obstruction-of-justice statutes enacted by Congress to limit how a president chooses to use his power to supervise the executive branch.

Charlie Savage

ATTACKING COMEY'S CREDIBILITY

The president's lawyers devote much of the letter to attacking Mr. Comey as a potential witness, suggesting here that his memo [documenting](#) his conversation with Mr. Trump about Mr. Flynn may not exist. Three months after this letter was written, the memo was [made public](#). They also appear to suggest that Mr. Comey may have

The Federal Bureau of Investigation has long been regarded as our nation's premier federal investigative agency. Over the past year, however, the FBI's reputation and credibility have suffered substantial damage, and it has affected the entire Department of Justice. That is deeply troubling to many Department employees and veterans, legislators and citizens.

[47](#)

[written the memo](#) after Mr. Trump fired him, rather than documenting the conversation immediately after it happened, as Mr. Comey has said he did; there is no evidence no support that insinuation.

Charlie Savage

To summarize, the Deputy Attorney General and the Attorney General both agreed, in writing, that Mr. Comey should be fired, for reasons unrelated to any investigation about Russian interference. To quote again from Mr. Rosenstein's May 9, 2017, memo:

Although the president has the power to remove an FBI director, the decision should not be taken lightly. I agree with the nearly unanimous opinions of former department officials. The way the director handled the conclusion of the email investigation was wrong. As a result, the FBI is unlikely to regain public and congressional trust until it has a Director who understands the gravity of the mistakes and pledges never to repeat them. Having refused to admit his errors, the Director cannot be expected to implement the necessary corrective actions.

As you also know, far from merely signing off on a Presidential decision or taking a weak or indirect action indicating a tacit or pressured approval, **Mr. Rosenstein actually helped to edit Mr. Comey's termination letter and actively advised the President accordingly.** It is unthinkable that a President acting (1) under his Constitutional authority; (2) on the written recommendation and with the overt participation of his Deputy Attorney General; and (3) consistent with the advice of his Attorney General, to fire a subordinate who has been universally condemned by bipartisan leadership⁴⁸ could then be accused of obstruction for doing so.

ROD ROSENSTEIN, WITNESS FOR THE DEFENSE

Mr. Trump is pointing to the involvement of the deputy attorney general, Rod J. Rosenstein, in the Comey firing to argue that Mr. Trump could not possibly have tried to obstruct justice. This puts Mr. Rosenstein in a peculiar spot: His own actions are key to the president's defense. And as the supervisor of the special counsel investigation, he may ultimately have to decide whether the president's argument has merit.

Matt Apuzzo

Many in the media have relied on mischaracterizations of the President's remarks in a May 11, 2017, interview with Mr. Lester Holt of NBC News, to claim or suggest that in that interview, the President stated that the real reason he fired Comey is the Russia investigation.⁴⁹ Unfortunately, so has Mr. Comey. He testified that: "I [take] the president, at his word, that I was fired because of the Russia investigation."⁵⁰ Regrettably, no one asked Mr. Comey when he thought the President had actually said any such thing because, in fact, **the President did not ever say such a thing.**

THE LESTER HOLT INTERVIEW

Because it has been so widely misreported and mischaracterized, we believe it is important to present the exchange in its entirety. What the President actually said was this: "I was going to fire Comey knowing there was no good time to do it. And in fact, when I decided to just do it, I said to myself — I said, you know, this Russia thing with Trump and Russia is a made-up story."⁵¹ The President and Mr. Holt then talk over each other for approximately a minute, before the President completed his original thought by saying,

As far as I'm concerned, I want that thing [the Russia investigation] to be absolutely done properly. When I did this now, I said I probably maybe will confuse people. Maybe I'll expand that- you know, I'll lengthen the time because it should be over with. It should — in my opinion, should've been over with a long time ago because it — all it is an excuse. But I said to myself I might even lengthen out the investigation. But I have to do the right thing for the American people. He's the wrong man for that position.⁵²

Later in the interview, the following exchange took place:

PRESIDENT: I want very simply a great FBI director.

HOLT: And will you expect if they would — they would continue on with this investigation

PRESIDENT: *Oh, yeah, sure. I expect that.*⁵³

Reading the entire interview, the fair reading of the President's remarks demonstrates that the President:

1. Fired Mr. Comey for incompetence;
2. Knew, based on the timing of the firing, that his action could actually lengthen the Russian investigation and in any event would not terminate it;
3. Demonstrated, with his comments to Mr. Holt about the Russia investigation, that he was not concerned about the continuation of any current investigation, even a now-lengthier investigation, because he knows there is no "collusion" to uncover; and
4. Made it clear that he was willing, even expecting, to let the investigation take more time, though he thinks it is ridiculous, because he believes that the American people deserve to have a competent leader of the FBI.

LAVROV MEETING OF MAY 9, 2017

There have also been press reports — *citing anonymous sources* — about comments the President allegedly made during a May 9, 2017, meeting with Russian government officials that Comey was a "real nut job" and that "great pressure because of Russia" has been "taken off" him.⁵⁴ **Assuming *arguendo* the President said any such things, it (i) does not establish that the termination was *because of the Russia investigation*** (regardless of the validity of such an opinion, presumably any President would not want someone he considered a "nut job" running the FBI); and (ii) in any event would be irrelevant to the constitutional analysis. A short, separate, classified response addressing this subject will be submitted to the Office of Special Counsel.

INTELLIGENCE CHIEFS

On a related note, you had expressed a desire for information related to conversations with intelligence officials generally regarding ongoing investigations. The intelligence chiefs themselves have already very clearly testified on the subject before Congress. In the words of Director Rogers, "In the three-plus years that I have been the director of the National Security Agency, to the best of my recollection, I have never been directed to do anything I believe to be illegal, immoral, unethical or inappropriate, and to the best of my recollection



Mr. Trump's lawyers are arguing that this [excerpt from the interview](#) stream-of-consciousness speaking style, and that the president got that he fired Mr. Comey because of the Russia investigation, but that he prolonged the investigation.

Charlie Savage

PRESSURE'S OFF

Mr. Trump's lawyers do not concede that he said this — though the [Times' account](#) was based on an official document summarizing the meeting — but they say it does not matter even if he did. Most interesting is the reference to a confidential memo, suggesting a more expansive response could not be made in this letter without compromising classified information.

Matt Apuzzo and Maggie Haberman

during that same period of service I do not recall ever feeling pressured to do so.” Director Coats testified in a very similar vein: “In my time of service, which is interacting with the President of the United States or anybody in his administration, I have never been pressured — I have never felt pressured — to intervene or interfere in any way with shaping intelligence in a political way or in relation to an ongoing investigation.”⁵⁵

STATEMENT OF JULY 8, 2017, TO THE NEW YORK TIMES

You have received all of the notes, communications and testimony indicating that **the President dictated a short but accurate response** to the *New York Times* article on behalf of his son, Donald Trump, Jr. His son then followed up by making a full public disclosure regarding the meeting, including his public testimony that there was nothing to the meeting and certainly no evidence of collusion.⁵⁶

This subject is a private matter with the *New York Times*. The President is not required to answer to the Office of the Special Counsel, or anyone else, for his private affairs with his children. In any event, the President’s son, son-in-law, and White House advisors and staff have made a full disclosure on these events to both your office and the congressional committees.⁵⁷

CONCLUSION

Accordingly, based upon the foregoing, we have advised the President that, pursuant to the standard clearly set forth in *Espy* and its progeny, your inquiry thus far demonstrates that no obstruction of the Flynn investigation or Russian collusion investigation appears to have occurred, and that your office has already been provided the voluminous testimony and documentation from which this conclusion is clearly drawn. Therefore, your office lacks “a focused demonstration of need” for the President’s responses, which is required by law “even when there are allegations of misconduct by high-level officials.”⁵⁸

Again, the only statute implicated here is 18 U.S.C. § 1505, but its application to the President is a constitutional and legal impossibility, and even if it were applicable the elements for obstruction simply cannot be satisfied. For further detail and analysis on this point, we respectfully refer you to our letter to your office of June 23, 2017.

What all of the foregoing demonstrates is that, as to the questions that you desire to ask the President, absent any cognizable obstruction offense, and in light of the extraordinary cooperation by the President and all relevant parties, you have been provided with full responses to each of the topics you presented, obviating any need for an interview with the President. As all of the evidence demonstrates, every action that the President took was taken with full constitutional authority pursuant to Article II of the United States Constitution. As such, these actions cannot constitute obstruction, whether viewed separately or even as a totality. As recognized by the Framers in Article II and as articulated in jurisprudence, **the President’s**

TRUMP’S CENTRAL ROLE IN A MISLEADING STATEMENT

This is the first time that representatives of Mr. Trump concede that he dictated a “short but accurate” statement issued by his son to The New York Times about a meeting in June 2016 the younger Mr. Trump had with a Russian lawyer who an intermediary claimed had “dirt” on Hillary Clinton. Mr. Trump’s advisers have tried to muddy this point, suggesting several people were involved, so the clarity of the sentence is striking. The response about the statement from Mr. Trump’s lawyers also quickly shifts to Mr. Trump’s son, saying he soon after made a “full public disclosure” about how the meeting was arranged.

Maggie Haberman

LYING TO THE MEDIA IS NOT A CRIME

It is not a crime for a politician to lie to The Times and, by extension, to the public. But there are at least two reasons that Mr. Trump’s role in drafting a misleading statement may be of interest. First, it could be evidence of his mind-set when he undertook other actions that may have impeded the investigation. Secondly, a Watergate-era precedent exists for Congress to consider lies to the public to be obstruction of justice in the looser context of impeachment proceedings. An article of impeachment that lawmakers approved against Nixon before he resigned included “making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing” there had been no misconduct.

Charlie Savage

INTERVIEW AS DISTRACTION

Whether Mr. Trump can be forced, via subpoena, to submit to an interview is an open question. During Watergate, the Supreme Court ruled that Nixon had to turn over tapes of his Oval Office

prime function as the Chief Executive ought not be hampered by requests for interview. Having him testify demeans the Office of the President before the world. The imposition on the time and attention of the President caused by this inquiry has already inflicted unwarranted damage on the President and his Office. This imposition is one reason why the President directed the most extensive and transparent cooperation with the numerous requests of the Special Counsel. The time and attention that would be required to prepare for an interview is significant and would represent a continued imposition that would directly impact the nation.

More is at stake here than just this inquiry, more even than just the Presidency of Donald J. Trump. This inquiry, and the precedents set herein, will also impact the Office of the President of the United States of America in perpetuity. Ensuring that the Office remains sacred and above the fray of shifting political winds and gamesmanship is of critical importance. Of course, the President of the United States is not above the law, but just as obvious and equally as true is the fact that the President should not be subjected to strained readings and forced applications of clearly irrelevant statutes.⁵⁹

In order to facilitate a fair process, as a practical solution, without waiver of the President's constitutional and statutory privileges or objections, and in exchange for a rapid conclusion, we are willing to receive any further questions and **provide you the answers** to help you complete your report and resolve any other remaining questions you might have. We are prepared to meet to discuss a final list of questions that you need to be answered so that the Nation may move forward, and so that we may preserve the dignity of the Office of the President of the United States.

Thank you for your courtesy and cooperation,

Very Respectfully,

John M. Dowd

Jay A. Sekulow

Counsel to the President

conversations, but that did not involve testifying. When Paula Jones sued Mr. Clinton, his lawyers fought to the Supreme Court to freeze the lawsuit, making many similar arguments about the distraction it would create. But the court let the case proceed, and he gave a deposition. That eventually led the independent counsel, Kenneth W. Starr, to subpoena Mr. Clinton to testify before a grand jury. But Mr. Clinton's legal team negotiated a deal for voluntary testimony and Mr. Starr dropped the subpoena, avoiding a definitive court fight.

Charlie Savage

HAPPY TO HELP

The president's lawyers say they will answer questions on the president's behalf, a strategy that allows Mr. Trump the ability to say he has offered answers to every question — without the risk of actually having to sit for an interview. While prosecutors often take information (known as a proffer) from defense lawyers, most experienced investigators would say there is no substitute for having someone in the witness chair.

Matt Apuzzo

OUTDATED THEORIES

This footnote cites theories already debunked by the time this letter was sent. For example, the footnote cites a claim made on Jan. 23 by Senator Ron Johnson, Republican of Wisconsin, that the F.B.I. had a "secret society" devoted to bringing Mr. Trump down, as an excerpt from a F.B.I. text message suggested. But by Jan. 25 — four days before Mr. Trump's legal team sent the letter — it had become clear that phrase was a joke, and Mr. Johnson walked back his alarmist assertion. Similarly, the letter claims that the F.B.I. opened the investigation based on a politically funded dossier of alleged Trump-Russia ties. But The Times [had reported in December](#) that the F.B.I.

¹ We respectfully refer you to our correspondence to your office of June 23, 2017, on the subject of Governing Constitutional Principles. See also Constitutionality of Legislation Extending the Term of the F.B.I Director. Op.

² See, e.g., Adam Shaw, [FBI's Strzok and Page spoke of 'Secret Society After Trump Election, Lawmakers Say](#), FoxNEWS.COM (Jan. 23, 2018); Brooke Singman, [FBI's Strzok Allegedly Dismissed Mueller Probe: 'No Big, There There'](#), FoxNEWS.COM (Jan. 23, 2018); Jonathan Easley, [GOP Reps Demand Release of 'Shocking' Surveillance Memo](#), THE HILL (Jan. 19, 2018), The genesis of the entire investigation was apparently the Fusion GPS dossier, which was paid for by the President's political opponent, given to (and possibly paid for by the FBI), and almost certainly used to obtain wiretaps of the Trump Campaign, notwithstanding that Mr. Comey himself admitted that much of the dossier was unverified and unreliable.

³ Records voluntarily produced to your office by the White House total over 20,000 pages. These records include, but are not limited to:

- FBI Interview of Michael Flynn at the White House on January 24, 2017 (SCR001), 9 documents, 66 pages;
- Communications of DAG Sally Yates, DOJ, FBI, & WH regarding Michael Flynn (SCR002), 28 documents, 64 pages;
- The resignation of Michael Flynn (SCR004), 311 documents, 762 pages;
- White House communications regarding campaign and transition communications between Michael Flynn and Sergey Kislyak or other Russian Federation officials (SCR007), 303 documents, 912 pages;
- Communications between White House staff regarding the FBI's investigation into Russian interference or James Comey (SCR003), 53 documents, 248 pages;
- Sean Spicer's May 3, 2017, statements to the press regarding James Comey (SCR005), 445 documents, 2,572 pages;
- Meetings between the President and James Comey (SCR012), 109 documents, 725 pages;
- The decision to terminate James Comey (SCR013), 442 documents, 1,455 pages;
- May 10, 2017, White House meeting with Russian Federation officials (SCR008), 808 documents, 2,990 pages;
- June 9, 2016, meeting between Donald Trump, Jr., and Natalia Veselnitskaya (SCR009), 117 documents, 1,821 pages;
- July 8, 2017, Air Force One participants regarding Donald Trump, Jr., press statements concerning Veselnitskaya meeting (SCR010), 1 document, 1 page;
- White House communications concerning campaign and transition communications between Manafort, Gates, Gordon, Kellogg, Page, Papadopoulos, Phares, Clovis and Schmitz (SCR006), 75 documents, 978 pages; and,
- Communications of individuals identified in category number 10 (SCRO! I), 141 documents, 284 pages.

instead opened the investigation based on information from an Australian diplomat.

Charlie Savage

- ⁴ By letter dated May 17, 2017, the Campaign received a request for documents from the Senate Select Committee on Intelligence (SSCI). By letter dated June 7, 2017, the Campaign received a request for documents from the House Permanent Select Committee on Intelligence (HPSCI). The records requested included records generated from June 16, 2015, to 12pm on January 20, 2017, and hence, included the transition period. The Campaign voluntarily responded to these requests by providing 840 documents on July 21, 2017, and another set of 4,800 documents on July 31, 2017. By letter dated July 19, 2017, the Campaign received a request for documents from the Senate Judiciary Committee (SJC). The Campaign voluntarily responded to these requests by providing 840 documents on July 21, 2017, and another set of 4,800 documents on July 31, 2017. By letter dated July 19, 2017, the Campaign received a request for documents from the Senate Judiciary Committee (SJC). The Campaign responded by providing the requested documents, totaling 4,800, on August 2, 2017. By letter dated August 9, 2017, the Campaign sent all three committees a letter identifying the search terms used to identify the responsive documents. And on September 15, 2017, the Campaign provided all three committees with an additional set of responsive documents, totaling 2,100, which included an attached list of all record custodians whose records were searched along with a complete list of the search terms used. Finally, on September 29, 2017, the Campaign sent all three committees its final set of documents, which included 19 documents and 113 documents now provided with revised or removed privilege redactions. This production was accompanied with a privilege log. In all, the Campaign produced well over 28,000 pages of records to the committees in response their requests. And as you know, copies of all documents provided to the committees by the Campaign, and all search term lists and the privilege log, were also provided to the Special Counsel. And, the Campaign produced well over 1.4 million pages of records to your office.
- ⁵ To our knowledge, over twenty White House personnel voluntarily gave interviews, including eight individuals from the White House Counsel's office. In addition, seventeen Campaign employees and an addition eleven individuals affiliated in some way or another with the Campaign gave interviews to your office, congressional committees, or both.
- ⁶ "The presidential communications privilege 'is a governmental privilege intended to promote candid conversations between the President and his advisors concerning the exercise of his Article II duties.' *Blumenthal v. Drudge*, 186 F.R. 236, 242 (D.D.C. 1999) (quoting *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 25 (D.D.C. 1998)). Courts have "recognized a 'great public interest' in preserving 'the confidentiality of conversations that take place in the President's performance of his official duties' because such confidentiality is needed to protect 'the effectiveness of the executive decision-making process.' *In re Sealed Case* (Espy), 121 F.3d at 742 (quoting *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973)). The Supreme Court "found such a privilege necessary to guarantee the candor of presidential advisers and to provide 'a President and those who assist him with freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.'" *Id.* at 742 (internal brackets and ellipses omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)). For these reasons, "presidential conversations 'are presumptively

privileged.” Id. (emphasis added) (quoting *Sirica*, 487 F.2d at 717). The Supreme Court has also recognized “a presumptive privilege for Presidential communications’ founded on a President’s generalized interest in confidentiality.” Id. at 743 (quoting *United States v. Nixon*, 418 U.S. at 708, 711).

- 7 In re Sealed Case (Espy), 121 F.3d at 748 (brackets and ellipses omitted) (quoting *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898,909 (D.C. Cir. 1993)).
- 8 Id. at 751 (internal quotation marks and citation omitted).
- 9 Id. at 752
- 10 Id.
- 11 In re Sealed Case (Espy),, 121 F/ 3d at 756.
- 12 James M. Popson, In Re Grand Jury Proceedings: The Semantics of “Presumption” and “need,” 32 AKRON L. RI V. 155, 177-79 (1999) (discussing In re Grand Jury Proceedings, 5 F Supp. 2d 21 (D.D.C.), *aff’d sub nom.* In re Lindsey, 148 F/ 3d 1100 (D.C. Cir. 1998) and *aff’d in part, rev’d in part sub nom.* In re Lindsey, 158 F/ 3d 1263 (D.C. Cir. 1998)).
- 13 The presidential communication executive privilege applies to records “in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.” In re Sealed Case (Espy), 121 F/ 3d 729, 745 (D.C. Cir. 1997).
- 14 In re Grand Jury Proceedings 5 F. Supp. 2d 21, 29 (D.D.C. 1998)
- 15 In re Sealed Case (Espy), 121 F/ 3d at 756
- 16 We note that you have declined our request on several occasions to share the classified notes of Mr. Comey, which have been leaked to the press and given to members of Congress and publicly disclosed. As Chief Executive Officer, the President has every right to have them. You provided them to White House Counsel. In addition, we note that Mr. Comey has had to correct his testimony on multiple occasions.
- 17 See *infra* p. 11 and n. 30.
- 18 Evan Perez, [Flynn Changed Story to FBI: No Charges Expected](#), CNN (Feb. 17, 2017)
- 19 The Editorial Board, [The Flynn Information](#), WALL STREET JOURNAL (Dec. 1, 2017) (“A Congressional source also tells us that former FBI director James Comey told the House Intelligence Committee on March 2 that his agents had concluded that Mr. Flynn hadn’t lied but had forgotten that had been discussed.”).
- 20 Full Transcript: [Acting FBI Director McCabe and Others Testify Before the Senate Intelligence Committee](#), WASH. POST (May 11, 2017),
- 21 [Read the Full Testimony of FBI James Comey in Which He Discusses Clinton Email Investigation](#), WASH. POST (May 3, 2017)
- 22 In 1996, Congress enacted a clarifying amendment to 18 U.S.C. § 1515, which defines the term “corruptly” as used in § 1505 to mean “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” False Statements Accountability Act of 1996, Pub. L. No. 104-292, §3, 110 Stat. 3459, 3460.
- 23 Courts have explained it this way.
- 24 [U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL: CRIMINAL RESOURCE MANUAL § 1727, PROTECTION OF GOVERNMENT PROCESS - OMNIBUS CLAUSE - 18 U.S.C. § 1505](#).
- 25 *United States v. Adams*, 335 Fed. Appx. 338, 342 (4th Cir. 2009) (Government conceded that criminal investigation by FBI or DEA was not pending proceeding within the scope of 18 U.S.C. § 1505, and requested defendant’s conviction on that count be vacated).
- 26 Perez, [Flynn Changed Story to FBI: No Charges Expected](#), *supra* n. 18.
- 27 “A Congressional source also tells us that former FBI director James Comey told the House Intelligence Committee on March 2 that his agents had concluded that Mr. Flynn hadn’t lied, but had forgotten what had been discussed.” The Editorial Board, [The Flynn Information](#), WALL STREET JOURNAL (Dec. 1, 2017).
- 28 Read the Full Testimony of FBI James Comey in Which He Discusses Clinton Email Investigation, *supra* n.21.
- 29 This confidential and privileged memorandum was provided to your office as part of the White House’s voluntary production, and is identified as SCR002b_SCR002b000000001.
- 30 Recall that Lt. Gen. Flynn had previously been asked questions by other transition team personnel concerning his conversations with Ambassador Kislyak via an email chain of January 12, 2017. See DJTFP00027478. The response provided by Lt. Gen. Flynn was vague, and appears to imply that sanctions were not discussed. DOJ leadership would not advise the White House that transcripts of the calls existed, and of concerns about the content of those transcripts, until January 26, 2017, and even then, when asked by the White House, the DOJ refused to confirm that an investigation was underway.

- 31 [Read: James Comey's Prepared Testimony](#), CNN (June 8, 2017),
- 32 [Full Transcript and Video: James Comey's Testimony on Capitol Hill](#), N.Y.T. (June 8, 2017), (hereinafter, "June 8 Comey Transcript"). Mr. Comey also testified that he took the President's remarks as only related to "any investigation connected to Flynn's account of his conversations with the Russians," and not any other aspect of any possible investigation. Id.
- 33 Michael S. Schmidt, [Comey Memo Says Trump Asked Him to End Flynn Investigation](#), N.Y.T. (May 16, 2017),
- 34 [Full Transcript: Acting FBI Director McCabe and Others Testify Before the Senate Intelligence Committee](#), supra n. 20
- 35 [Read the Full Testimony of FBI Director James Comey in Which He Discusses Clinton Email Investigation](#), Wash. Post (May 3, 2017), (emphasis added)
- 36 Michael S. Schmidt, [Comey, Unsettled by Trump, Is Said to Have Wanted to Keep Him at a Distance](#), N.Y.T. (May 18, 2017),
- 37 Jim Finkle, [FBI Director at Cyber Conference: "You're Stuck With Me."](#) REUTERS (Mar. 8, 2017)
- 38 June 8 Comey Transcript, supra n. 32
- 39 Mallory Shelbourne, [Trump: Dershowitz Interview on "Witch Hunt" a "Must Watch"](#) The Hill (Dec. 4, 2017),
- 40 Schmidt, [Comey Memo Says Trump Asked Him to End Flynn Investigation](#), supra n. 33; Politico Staff, [Transcript: Jeff Sessions' testimony on Trump and Russia](#), POLITICO, June 13, 2017,
- 41 Schmidt, [Comey Memo Says Trump Asked Him to End Flynn Investigation](#), supra n. 33.
- 42 Id.
- 43 Dan Boylan, [Comey the Criminal? Leak Admission Puts Ex-FBI boss in Legal Jeopardy](#), WASH. TIMES (June 12, 2017),
- 44 [Full Transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election](#), Wash Post (Mar. 20, 2017) ("I'm not gonna get into either that particular case that matter, or any conversations I had with the president. So I can't answer that.")
- 45 Politico Staff, [Transcript: Jeff Sessions' Testimony on Trump and Russia](#), supra n. 40.
- 46 Id.
- 47 [Annotated Memorandum from Rod J. Rosenstein, Deputy Attorney Gen. for the U.S. Dep't of Justice, to the U.S. Attorney Gen.](#) (May 9, 2017)
- 48
- 49 Devlin Barrett & Philip Rucker, [Trump Said He Was Thinking of Russia Controversy When He Decided to Fire Comey](#), WASH POST (May 11, 2017), Andrew Prokop, [Trump has now Admitted He Fired Comey Because of the Russia Investigation](#), VOX.COM (May 11, 2017), Abigail Abrams, [President Trump Links His Decision to Fire James Comey to Frustration With Russia Investigation](#), TIME.COM (May 11, 2017)
- 50 June 8 Comey Transcript, supra n. 32
- 51 Tim Hains, [President Trump's Full Interview with Lester Holt: Firing of James Comey](#), REAL CLEAR POLITICS
- 52 Id.
- 53 (emphasis added). The fact that President understood that terminating Mr. Comey would not halt the Russia investigation contradicts a finding of corrupt intent and precludes an obstruction of justice violation. Under multiple Supreme Court rulings, conviction for obstruction under the "omnibus clauses" requires a showing that the defendant believed the act in question would have the "natural and probable effect of interfering with" a pending judicial proceeding (18 U.S.C. § 1503) or a proceeding before an adjudicative government agency or Congressional inquiry (18 U.S.C. § 1505). *United States v. Aguilar*, 515 U.S. 593, 599-600 (1995); see also *Pellibone v. United States*, 148 U.S. 197, 207 (1893). The President's firing of Mr. Comey would not — and could not have been intended to — have the natural and probable effect of interfering with the FBI's investigation (assuming for the moment that an FBI investigation is a "proceeding" under § 1505, which it is not) or the Congressional inquiries. Acting Director McCabe's testimony makes clear — as the President understood and as would be obvious to anyone — that Mr. Comey's termination had no impact on the investigation. Full Transcript: Acting FBI Director McCabe and Others Testify Before the Senate Intelligence Committee, supra n. 20. Mr. Comey testified that it would not make sense to fire the FBI Director to try to stop an investigation. June 8 Comey Transcript, supra n. 32. Moreover, Mr. Comey testified that the President never asked him to stop the FBI investigation into Russian involvement in the 2016 election, but to the contrary, the President agreed it would be important for the FBI to conduct a thorough investigation and if anyone around him had done anything wrong it would be good to find that out. Id

- ⁵⁴ Matt Apuzzo, Maggie Haberman, & Matthew Rosenberg, [Trump Told Russians that Firing 'Nut Job' Comey Eased Pressure from Investigation](#), N.Y.T. (May 19, 2017),
- ⁵⁵ Dana Bash, Evan Perez and Manu Raju, [Intel Chiefs Tell Investigators Trump Suggested They Refute Collusion With Russians](#), CNN (June 22, 2017)
- ⁵⁶ See also Catherine Herridge, Pamela K. Browne & Cyd Upson, [Russian Lawyer at Center of Trump Tower Meeting Dismisses Dossier Shared with FBI](#), FOX NEWS (Jan. 19, 2017) [sic - correct year is 2018]
- ⁵⁷ Karoun Demirjian, [More Than 20 White House Employees Talked to Mueller; Senate Panel to Release Trump Jr. Transcripts](#), CHICAGO TRIBUNE (Jan. 25, 2018),
- ⁵⁸ In re Sealed Case, 121 F.3d at 746
- ⁵⁹ Andrew C. McCarthy, [Donald Trump Should Refuse a Mueller Interview](#), NATIONAL REVIEW (Jan. 27, 2018)

The Trump Legal Team's June 23, 2017, Confidential Memo to Mueller

JUNE 23, 2017

BY HAND

Kasowitz Benson Torres LLP
1633 Broadway
New York, N.Y. 10019

Robert S. Mueller
Special Counsel
United States Department of Justice
Washington, D.C. 20004

Re: Governing Constitutional Principles

Dear Mr. Mueller:

This firm is personal counsel to President Donald J. Trump. We write to address news reports, purportedly based on leaks, indicating that you may have begun a preliminary inquiry into whether the President's termination of former FBI Director James Comey constituted obstruction of justice. According to these recent stories, Mr. Comey's testimony, and his prior assurances to the President, there was no investigation into the President prior to the termination of Mr. Comey. Nevertheless, in the interest of completeness, we will address certain events and issues related to the period before Mr. Comey was terminated as well.

It is clear that there is no statutory or Constitutional basis for any obstruction charge based on Mr. Comey's termination. As Mr. Comey himself stated in the first sentence of his farewell letter to the FBI, "the President can fire the FBI Director for any reason, or no reason at all." Indeed, the President not only has unfettered statutory and Constitutional authority to terminate the FBI Director, he also has Constitutional authority to direct the Justice Department to open or close an investigation, and, of course, the power to pardon any person before, during, or

Mr. Trump's legal team sent this 11-page memo to Mr. Mueller in June 2017, amid mounting speculation that the special counsel, appointed a month earlier, would examine not only the Trump campaign's contacts with Russia during its interference in the 2016 election, but also whether Mr. Trump's actions as president — including firing Mr. Comey as the F.B.I. director — amounted to obstruction of justice.

after an investigation and/or conviction. Put simply, the Constitution leaves no question that the President has exclusive authority over the ultimate conduct and disposition of all criminal investigations and over those executive branch officials responsible for conducting those investigations. Thus, as set forth more fully below, as a matter of law and common sense, the President cannot obstruct himself or subordinates acting on his behalf by simply exercising these inherent Constitutional powers.

This is particularly the case where, as here, the Department of Justice, through the Attorney General and Deputy Attorney General, unequivocally advised the President that the "FBI is unlikely to regain public and congressional trust" unless Director Comey was replaced. That recommendation was supported by, among other things, the almost universal rebukes Mr. Comey's unprecedented conduct as director had generated from, among many others, President Obama, dozens of Democratic members of Congress, and numerous former senior DOJ officials, including President Clinton's former Deputy Attorney General Jamie Gorelick, who described Director Comey's conduct as "a kind of reality TV ... antithetical to the interest of justice." Plainly, removing a director under these circumstances is well within the President's Constitutional power, and the proposition that he could obstruct a Department of Justice investigation by taking action the Department of Justice said needed to be taken is patently nonsensical. The same is true with respect to the exercise of the President's Constitutional authority to direct or terminate investigations, which is addressed more fully below.¹

As we have previously expressed, our goal is to facilitate a swift conclusion of any preliminary inquiry into the termination of Mr. Comey, or any other conduct concerning Mr. Comey. For months, the President has suffered under a public and international cloud generated by unsubstantiated stories based on law enforcement leaks, and an unwillingness by Mr. Comey to state publicly what he repeatedly told the President privately about not being under investigation. Almost immediately after Mr. Comey finally informed the public of this fact in his testimony this month, new leaks generated stories that the President was nevertheless now under investigation for firing Mr. Comey. To the extent any inquiry or consideration is being given to this issue, it can be promptly resolved as a matter of law, and we respectfully submit doing so is necessary for important United States' interests. Continuing uncertainty about whether the sitting President of the United States is being investigated for exercising his inherent Constitutional powers is detrimental to the President's ability to effectively govern.

While we have confidence that you will come to the same conclusions set forth below, if you conclude a further investigation is warranted, we respectfully request to be advised and be provided the opportunity to raise our statutory and Constitutional objections with the Acting Attorney General.

A. The President Cannot Obstruct Merely By Exercising His Constitutional Authority to Terminate the FBI Director.

Under the Appointments Clause of Article II of the Constitution, the President has the exclusive authority to appoint federal officials, including the FBI Director. That Constitutional power to appoint federal officials carries with it the power to remove those officials for any reason, except in limited circumstances. No such restrictions have been imposed on the President's power to remove the FBI Director.

As the Office of Legal Counsel (OLC) explained in an opinion binding on your office, there is *no* Congressionally imposed limitation on the President's power to remove an FBI Director and it is dubious that Congress could Constitutionally impose any such restriction:

As we have previously concluded, the FBI Director is removable at the will of the President. ... No statute purports to restrict the President's power to remove the Director. Specification of a term of office does not create such a restriction. See *Parsons v. United States*, 167 U.S. 324, 342 (1897). Nor is there any ground for inferring a restriction. Indeed, tenure protection for an officer with the FBI Director's broad investigative, administrative, and policymaking responsibilities would raise a serious constitutional question whether Congress had "impede[d] the President's ability to perform his constitutional duty" to take care that the laws be faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The legislative history of the statute specifying the Director's term, moreover, refutes any idea that Congress intended to limit the President's removal power. See 122 Cong. Rec. 23,809 (1976) "Under the provisions of my amendment, there is no limitation on the constitutional power of the President to remove the FBI Director from office within the 10-year term." (statement of Sen. Byrd); *id.* at 23,811 "The FBI Director is a highly placed figure in the executive branch and he can be removed by the President at any time, and for any reason that the President sees fit." (statement of Sen. Byrd). Constitutionality of Legislation Extending the Term of the F.B.I. Director, Op. O.L.C. at *3 (June 20, 2011), available at <http://www.justice.gov/file/18356/download>.

This is a long-standing principle. And Director Comey elected to open his farewell to the FBI staff acknowledging this same Constitutional principle: "I have always believed the President can fire the F.B.I. Director for any reason, or no reason at all." This view is supported by historical precedent. President Clinton fired FBI Director Sessions in July 1993 at a time when the FBI had multiple open investigations implicating the Clintons, including the Whitewater and the Travel Office investigations, yet there were no claims and certainly no investigations into whether President Clinton's exercise of his Constitutional power constituted obstruction.

It is obvious that the President's mere exercise of this explicit Constitutional power to appoint and remove officials cannot itself constitute obstruction of justice. And this is certainly clear where, as here, there were ample and notorious reasons to replace Mr. Comey even though the President needed none. Mr. Comey's high-profile leadership of the FBI during the 2016 Presidential election was controversial and generated widespread bi-partisan criticism from, among others, President

Obama and numerous Congressional Democrats and Republicans.

Most important, Deputy Attorney General Rosenstein and Attorney General Sessions recommended that Director Comey be removed based on a detailed, three-page memorandum setting forth multiple instances of improper conduct and criticisms from six former Attorneys General and Deputy Attorneys General from both parties. That memorandum concluded “the FBI is unlikely to regain public and congressional trust until it has a Director who understands the gravity of the mistakes and pledges never to repeat them. Having refused to admit his errors, the Director cannot be expected to implement the necessary corrective actions.” In a letter to the President forwarding DAG Rosenstein’s letter, the Attorney General also concluded “that a fresh start is needed at the leadership of the FBI” and that the Director should be one who “follows faithfully the rules and principles of the Department of Justice.” As he explained in his termination letter to Director Comey, the President concurred that Director Comey was “not able to effectively lead the Bureau. It is essential that we find new leadership for the FBI that restores public trust and confidence in its vital law enforcement mission.” Based on this record, although not required, to the extent the President required a basis for removing Mr. Comey, there was ample basis for him to do so.

Although irrelevant to the Constitutional issues addressed herein, it is worth noting that many in the media have relied on mischaracterizations of the President’s remarks in a May 11, 2017 interview with Lester Holt, to suggest the President admitted he removed Mr. Comey because of the Russian investigation.³ Relying on that interview, Director Comey also testified that: “I [take] the president at his word that I was fired because of the Russia investigation.”⁴ However, the President never said any such thing.

What the President actually said was: “I was going to fire Comey knowing there was no good time to do it. And in fact, when I decided to just do it, I said to myself - I said, you know, this Russia thing with Trump and Russia is a made-up story.”⁵ The President and Mr. Holt then talk over each other for approximately a minute, before the President completes his original thought, making clear that he: (a) wanted the Russian investigation to go forward and “to be absolutely done properly”; (b) removed Mr. Comey in spite of the fact he understood doing so might prolong the investigation; and (c) did so because “I have to do the right thing for the American People. He’s the wrong man for that position”:

As far as I’m concerned, I want that thing [the Russia investigation] to be absolutely done properly. When I did this now, I said I probably maybe will confuse people. Maybe I’ll expand that — you know, I’ll lengthen the time because it should be over with. It should — in my opinion, should’ve been over with a long time ago because it — all it is an excuse. But I said to myself I might even lengthen out the investigation. But I have to do the right thing for the American people. He’s the wrong man for that position.

Id. (emphasis added). Later in the interview, he further noted that he wanted a “simply great FBI director” and fully “expect[ed]” the investigation to continue even without Director Comey.⁶

Put simply, there is no Constitutionally permissible or factually supportable view under which the President’s removal of Director Comey could constitute obstruction.

B. The President Cannot Obstruct By Exercising His Constitutional Authority to Terminate or Direct an Investigation.

As a Constitutional matter, the President also possesses the indisputable authority to direct that any executive branch investigation be open or closed because the Constitution provides for a unitary executive with all executive power resting with the President:

As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States “The Executive Power,” which means the whole executive power. Because no one individual could personally carry out all executive functions, the President delegates many of these functions to his subordinates in the executive branch. But because the Constitution vests this power in him alone, it follows that he is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions.

Statute Limiting the President’s Auth. to Supervise the Dir. of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. O.L.C. 47, 48 (1988).

Without question, the investigation and prosecution of criminal cases are core executive functions committed to the sole discretion of the executive branch (and thus ultimately the President). The Executive Branch “has exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982) (Prosecutorial discretion is a “special province” of the Executive Branch.). “The power to decide when to investigate, and when to prosecute, lies at the core of the Executive’s duty to see to the faithful execution of the laws.” *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (citations omitted). Thus, the President has exclusive authority to direct that a matter be investigated, or that an investigation be closed without prosecution, or that the subject of an investigation or conviction be pardoned. As the United States Court of Appeals for the D.C. Circuit succinctly explained:

The President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law. The President may decline to prosecute or may pardon because of the President’s own constitutional concerns about a law or because of policy objections to the law, among other reasons.

In re Aiken Cty., 725 F.3d 255, 262-66 (D.C. Cir. 2013) (citations omitted).

Again, while there are various political checks and balances that would inform the President's exercise of this authority as a prudential matter, and various norms have developed over the years as a result of those checks and balances, none of these diminish the President's ultimate Constitutional authority over investigations and prosecutions. This has been borne out time and time again in our history. As one outspoken critic of the President, Professor Alan Dershowitz, has explained:

Throughout United States history — from Presidents Adams to Jefferson to Lincoln to Roosevelt to Kennedy to Obama — presidents have directed (not merely requested) the Justice Department to investigate, prosecute (or not prosecute) specific individuals or categories of individuals. It is only recently that the tradition of an independent Justice Department and FBI has emerged. But traditions, even salutary ones, cannot form the basis of a criminal charge.⁷

Again, Mr. Comey agreed in his testimony: “I think as a legal matter, president is the head of the executive branch and could direct, in theory, we have important norms against this, but direct that anybody be investigated or anybody not be investigated. I think he has the legal authority because all of us ultimately report in the executive branch up to the president.”⁸

Thus, as with the removal of the FBI Director, the President cannot obstruct merely by exercising his Constitutional authority to terminate an investigation, and he certainly cannot obstruct by merely expressing a view about an investigation (which the President disputes occurred) instead of terminating it. Again, historical precedent bears this out. No special counsel was appointed and no obstruction investigation was conducted in response to President Obama's public comments about the FBI investigation into Secretary Clinton's email server, including his statements in October 2015 that Secretary Clinton “hasn't jeopardized” classified information; in January 2016, that Secretary Clinton “is not a target” and the investigation was “not headed in the direction of an indictment;” and in April 2016, that Secretary Clinton “has not jeopardized national security” and “would never intentionally put America in any kind of jeopardy.” Of course, a short time after President Obama's April comments about the lack of intent, Director Comey used that exact basis for unilaterally announcing that “no reasonable prosecutor” would charge Secretary Clinton even though the relevant statute did not even require intent. Yet, no special counsel was appointed and no obstruction investigation was launched.

C. There is No Statutory Basis for An Obstruction Charge.

Even ignoring the President's Constitutional authority, it is nevertheless clear that none of the subject conduct constitutes obstruction even accepting Director Comey's account of events, which the President does not. The only statute that could even theoretically be implicated on the alleged facts is 18 U.S.C. § 1505, and the elements for obstruction simply cannot be met.

First, there was no “pending proceeding” within the meaning of § 1505 regarding the investigation of Gen. Flynn. Under § 1505, a “pending proceeding” is limited only to agencies with rule-making or adjudicative authority.⁹ The investigation of Gen. Flynn is being conducted by the FBI, which possesses only investigative authority, not adjudicative ; it cannot conduct “proceedings “ within the meaning of § 1505.¹⁰ Courts have explained it this way:

[T]he meaning of “proceeding” in § 1505 must be limited to actions of an agency which relate to some matter within the scope of the rulemaking or adjudicative power vested in the agency by law. Since the F.B.I. has no rulemaking or adjudicative powers regarding the subject matter of this indictment, its investigation was not a “proceeding” within the meaning of the statute.

United States v. Higgins, 511 F. Supp. 453, 455 (W.D. Ky. 1981) (noting government’s lack of precedent or legal support for assertion to the contrary).¹¹

Some have picked up on the language in the DOJ manual and cited other sources for the proposition that a “pending proceeding *could include* an informal investigation by an executive agency.”¹² But, as constitutional law professor Elizabeth Price Foley notes:

In the almost 120 years since Section 1505 and its predecessor have been on the books, no court appears to have ever held that an ongoing F.B.I. investigation qualifies as a “pending proceeding” within the meaning of the statute. Instead, Section 1505 applies to court or court-like proceedings to enforce federal law.¹³

The House Judiciary Committee reports affirm this reading, noting that attempts to obstruct a criminal investigation “before a proceeding has been initiated” do not fall within the scope of the statute.¹⁴ Furthermore, the U.S. Attorneys’ Manual makes clear that “investigations by the Federal Bureau of Investigation (FBI) are not section 1505 proceedings.”¹⁵ And the Justice Department itself has acknowledged as much to the United States Court of Appeals for the Fourth Circuit. *See United States v. Adams*, 335 Fed. Appx. 338, 342 (4th Cir. 2009) (Government conceded that criminal investigation by FBI or DEA was not pending proceeding within the scope of 18 U.S.C. § 1505, and requested defendant’s conviction on that count be vacated). The FBI’s investigation of Gen. Flynn is therefore not within the scope of § 1505. As the *Higgins* Court explained, “[u]nder our system of separation of powers, a criminal investigatory agency, in contradistinction to an administrative or regulatory agency, has no power to engage in rulemaking or adjudication.” *Higgins*, 511 F. Supp. at 455.

Not only is it clear that an FBI investigation is not a “pending proceeding” for purposes of § 1505, under the statute, the President would have had to have knowledge that there was a pending proceeding. Since the FBI’s investigation at issue is not a “pending proceeding” under § 1505,¹⁶ it is therefore

impossible for the President to have been made aware of said pending proceeding. For this reason alone, § 1505 *does not and cannot apply* to the President's conduct or statements. Culpability under § 1505 is a legal impossibility. The President should not be investigated for violating a criminal statute that cannot apply to the alleged (albeit disputed) facts. We trust your office would have no desire to do so.

Second, even assuming § 1505 could apply to the President, Comey's own characterization of the President's comments fail to show that the President possessed the intent to obstruct the proceedings which is required by the statute.¹⁷ Under § 1505, intent to obstruct requires the defendant to "act purposefully," meaning that he must know his actions are likely to influence the proceedings.¹⁸ Most courts agree that this "knowledge" element is satisfied by acting with the knowledge that his actions would have the "natural and probable" effect of interfering with the proceedings.¹⁹ Moreover, these actions must also be done "corruptly," meaning they must be conducted with an improper purpose.²⁰

In this case, the only evidence of relevant Presidential action alleged by Comey is that the President expressed to Comey that General Flynn "is a good guy" and "I hope you can see your way clear to letting this go, to letting Flynn go."²¹ The President, of course, has categorically denied saying "I hope you can see your way clear to letting this go, to letting Flynn go." Of course, even assuming, arguendo, that he used such words, it still is merely a deliberative statement by the President that, in its proper and obvious context, cannot be reasonably construed as a threat. Moreover, the fact that Comey remained in his position after this alleged conversation, continued the investigation otherwise unimpeded, and brought this particular statement up *only after* he was terminated in disgrace refutes any suggestion that he viewed the President's statement as a threat.

D. The Facts Establish the President Did Not Direct Any Investigation Be Closed.

Again, while not relevant to the constitutional and statutory arguments discussed in this letter, we briefly discuss these facts as they have also been the subject of much misrepresentation.

According to Director Comey, the President said the following at a February 14, 2017, meeting:

The President then returned to the topic of Mike Flynn, saying, "He is a good guy and has been through a lot." He repeated that Flynn hadn't done anything wrong on his calls with the Russians, but had misled the Vice President. He then said, "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." I replied only that "he is a good guy." (In fact, I had a positive experience dealing with Mike Flynn when he was a colleague as Director of the Defense Intelligence Agency at the beginning of my term at FBI.) I did not say I would "let this go."

While acknowledging that the President only said “hope,” Director Comey said he took it as a direction:

RISCH: He did not direct you to let it go?

COMEY: Not in his words, no.

RISCH: He did not order you to let it go?

COMEY: Again, those words are not an order. ... The reason I keep saying his words is I took it as a direction.

RISCH: Right.

COMEY: I mean, this is a president of the United States with me alone saying I hope this. I took it as, this is what he wants me to do. I didn't obey that, but that's the way I took it.

RISCH: You may have taken it as a direction but that's not what he said.

COMEY: Correct.²²

Moreover, according to Director Comey's testimony, although Director Comey did not agree “to let this go,” and although the investigation of Mr. Flynn continued, he does not contend that the President ever raised the matter with him again, and the President denies he ever said he “hoped” Comey could “let it go” in words or substance. Nor did anyone from the White House, or anyone else acting on the President's behalf, ever contact him about the Flynn investigation.²³

While Director Comey testified that the President pressed him several times, according to his testimony that “pressing” had nothing to do with the Flynn investigation, but rather with the President's completely proper and reasonable request that the Director say publicly what he had said privately three times, namely, that the President was not himself under investigation. The President made clear his reason for this request: according to Director Comey, the President explained “the cloud” was getting in the way of his ability to do his job.”²⁴ As Director Comey himself testified in a discussion with Senator Reed, there would have been nothing improper about Director Comey publicly making the factually accurate statement he had repeatedly made privately to the President and Congress — namely, that the President was not under investigation.²⁵ Indeed Director Comey testified publicly to precisely this fact less than two months later. Yet, Director Comey declined to do so at the time despite the President's repeated requests.

It is also clear that at the time of their conversations, Director Comey did not construe the President's alleged remarks as an effort to obstruct justice. He did not at any time direct the FBI to commence an obstruction investigation. Although the comments were allegedly made on February 14, 2017, according to Director Comey, the President was still not under investigation when the Director was removed from office almost two months later. Deputy Director McCabe also testified that he was not aware of any pressure on the FBI regarding any investigation.²⁶ All of this indicates that Comey did not report his currently post-termination view to his Deputy at the time, nor did Director Comey report any concerns of alleged obstruction to his superiors at the Justice Department.²⁷

* * * * *

We appreciate the opportunity to address these matters. We remain committed to working with your office to facilitate a swift and thorough review which we hope will lead to the conclusion we have clearly demonstrated, *i.e.*, that constitutionally and as a matter of law, there is no basis for any investigation to include the conduct of the President of the United States.

Respectfully submitted,

Marc E. Kasowitz

Counsel to the President

¹ It is not necessary to go so far as to contend that no conduct by a President could ever amount to obstruction of justice. All that is necessary here is to understand that the set of facts alleged in this situation cannot amount to obstruction of justice. We also note that, a President has no constitutional authority to bribe witnesses or suborn perjury and any such conduct would of course be subject to the relevant statutes. But such conduct has not even remotely been alleged against the President. And, we leave aside for now the well-established rule that a sitting President cannot be indicted, as opposed to impeached, for any crime (A Sitting President's Amenability to Indictment and Criminal Prosecution, Op. O.L.C. (Oct. 16, 2000)). In sum, it remains clear that the President's exercise of his constitutional authority at issue here — to terminate an FBI Director and to close investigations — cannot constitutionally constitute obstruction of justice.

³ Devlin Barrett & Philip Rucker, [Trump Said He was Thinking of Russia Controversy When He Decided to Fire Comey](#), WASH. POST (May 11, 2017); Andrew Prokop, [Trump has now Admitted He Fired Comey Because of the Russia Investigation](#), VOX.COM (May 11, 2017); Abigail Abrams, [President Trump Links His Decision to Fire James Comey to Frustration With Russia Investigation](#), TIME.COM (May 11, 2017),

[Full Transcript and Video: James Comey's Testimony on Capitol Hill](#), NEWYORKTIMES.COM (June 8, 2017), (hereinafter, "Comey Transcript").

[Tim Hains, President Trump's Full Interview with Lester Holt: Firing of James Comey](#), REAL CLEAR POLITICS (May 11, 2017),

⁶ There have also been press reports - citing anonymous sources - about comments the President allegedly made during a May 20, 2017 meeting with Russian government officials that Comey was a "real nut job" and that "great pressure because of Russia" has been "taken off" him. Matt Apuzzo, Maggie Haberman, & Matthew Rosenberg, [Trump Told Russians that Firing 'Nut Job' Comey Eased Pressure from Investigation](#), N. Y. TIMES (May 19, 2017), Assuming arguendo the President said any such things, it reflects nothing other than that President Trump has utterly lost confidence in Director Comey and believed that the highly public and sensational manner in which he handled the investigation was over.

⁷ Alan Dershowitz, [Alan Dershowitz: History, Precedent and James Comey's Opening Statement Show that Trump Did Not Obstruct Justice](#), WASH. EXAMINER (June 8, 2017, 9:21 AM)

⁸ Comey Transcript, supra note 7

⁹ See *United States v. Adams*, 472 F. Supp. 2d 811, 817 n.5 (W.D. Va. 2007); *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) "For an investigation to be considered a proceeding, then, it must be more than a "mere police investigation ."); cf *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1044 (9th Cir. 2002); *United States v. Leo*, 941 F.2d 181, 199 (3rd Cir. 1991). 10 *United States v. Wright*, 704 F.

¹⁰ *United States v. Wright*, 704 F. Supp. 613, 614-15 (D. Md. 1989) ("[A] false statement made to a purely investigative agency, such as the F.B.I., is not within the scope of 1505"); *United States v. Higgins*, 511 F. Supp. 453, 455 (W.D. Ky. 1981).

¹¹ See also, *Higgins*, 511 F.Supp. at 455-56 (quoting H.R.Rep.No. 658, 90th Cong., 1st Sess., 1967 U.S.Code Cong & Admin .News, p. 1760, for proposition that "attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the scope of the proscription of those sections," *i.e.*, §§ 1503 and 1505); see *United States v. Edgemon*, 1997 U.S. Dist. LEXIS 23820, **13-14 (E.D.Tenn. Aug. 18, 1997) "Mere criminal investigations, according to the legislative history, are not within the scope of the proscriptions of § 1505. "; *United*

States v. Wright, 704 F. Supp. 613 (D. Md. 1989) (criminal investigation of defendant by U.S. Attorney General for the District of Maryland was not a § 1505 proceeding as this agency lacked rule-making or adjudicative authority); United States v. Persico, 520 F. Supp. 96, 101 (E.D.N.Y. 1981) (accepting rationale of Higgins and that FBI has no rulemaking powers, but distinguishing IRS, which does have rulemaking powers and was conducting an administrative investigation).

- 12** Domenico Montanaro, [Is Trump Guilty Of Obstruction Of Justice? Comey Laid Out The Case](#), NPR (June 10, 2017, 7:01 AM), (citing to Cornell Law School's Legal Information Institute, https://www.law.cornell.edu/wex/obstruction_of_justice) (emphasis added). The Congressional Research Service has also noted that United States v. Kelley, from the D.C. Circuit, has rejected the claim that "§ 1505 applies only to adjudicatory or rule-making activities, and does not apply to wholly investigatory activity." Charles Doyle,
- Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities, CONGRESSIONAL RESEARCH SERVICE, at 24 (Apr. 17, 2014), available at
- 13** Elizabeth Price, Foley, [Trump's Statements Are Not an Obstruction of Justice](#), NY Times (May 17, 2017)
- 14** Id. ("legislative history...confirms that Congress did not intend Section 1505 to reach F.B.I. investigations").
- 15** U.S. DEPT OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 1727, PROTECTION OF GOVERNMENT PROCESS — OMNIBUS CLAUSE — 18 U.S.C. § 1501, <https://www.justice.gov/usam/criminal-resource-manual-1727-protection-government-processes-omnibus-clause-18-usc-1505> (last visited June 22, 2017)
- 16** U.S. DEPT OF JUSTICE, U.S. ATTORNEY'S MANUAL: CRIMINAL RESOURCE MANUAL § 1725, PROTECTION OF GOVERNMENT PROCESSES — OBSTRUCTION OF PENDING PROCEEDING — 18 U.S.C. § 1505, <https://www.justice.gov/usam/criminal-resource-manual-1725-protection-government-processes-obstruction-pending-proceeding-18t> (last visited June 22, 2017).
- 17** See 18 U.S.C. § 1505; United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991) (citing United States v. Sutton, 732 F.2d 1483, 1490 (10th Cir. 1984) and United States v. Laurins, 857 F.2d 529, 536-37 (9th Cir. 1988)); see also United States v. Warshak, 631 F.3d 266,325 (6th Cir. 2010); United States v. Blackwell, 459 F.3d 739, 761-62 (6th Cir. 2006); United States v. Quattrone, 441 F.3d 153, 174 (2d Cir. 2006); United States v. Bhagat, 436 F.3d 1140, 1147 (9th Cir. 2006); United States v. Kay, 513 F.3d 432, 454 (5th Cir. 2007).
- 18** Quattrone, 441 F.3d at 178- 79; Price, 951 F.2d at 1031.
- 19** Quattrone, 441 F.3d at 174; United States v. Senffer, 280 F.3d 755, 762 (7th Cir. 2002) (citing United States v. Aguilar, 515 U.S. 593, 599 (1995); cf Bhagat, 426 F.3d at 1147-48 (9th Cir. 2006) (declining to extend the natural and probable effects test from § 1503).
- 20** 18 U.S.C. § 1505(b) (2012) "As used in §1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, alerting, or destroying a document or other information."
- 21** Comey Transcript, supra note 7.
- 22** Comey Transcript, supra note 7. Director Comey also testified that he took the President's remarks as only related to "any investigation connected to Flynn's account of his conversations with the Russians," and not any other aspect of any possible investigation. Id.
- 23** Comey Transcript, supra note 7 (exchange with Senator Lankford). Press reports claim — as always, citing anonymous sources — that the President also asked DNI Coats to approach Comey to try to persuade him to close the Flynn investigation. But, Mr. Comey testified in exchanges with Senators Lankford and Reed that no such contacts occurred. Id. REgardless, even if such requests were made, for the same reasons stated above, this cannot constitute obstruction of justice.
- 24** [Statement for the Record, Before the S. Select Comm. on Intelligence](#), 115th Cong. 7 (June 8, 2017) (statement of James B. Comey, Former Director of the Federal Bureau of Investigation)
- 25** Comey Transcript, supra note 7.
- 26** [Full Transcript: Acting FBI Director McCabe and Others Testify Before the Senate Intelligence Committee](#), WASH. POST (May 11, 2017)
- 27** While some have made much of the fact that the President spoke to Director Comey privately about General Flynn, the President has made essentially identical public statements (including the day after meeting with Director Comey) that he thought General Flynn was a good guy who was being treated unfairly, hardly indicia of a secret, corrupt attempt to obstruct an investigation.

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