U.S. Department of Justice

Washington D.C. 20530

March 24, 2019

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Steven A. Engel
Assistant Attorney General, Office of Legal Counsel

Edward C. O'Callaghan
Principal Associate Deputy Attorney General

SUBJECT: Review of the Special Counsel's Report

At your request, we have evaluated Volume II of the Special Counsel's Report on the Investigation into Russian Interference in the 2016 Presidential Election to determine whether the facts recited therein would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution, without regard to any constitutional barrier to such a prosecution under Article II of the U.S. Constitution. Over the course of the Special Counsel's investigation, we have previously discussed these issues within the Department among ourselves, with the Deputy Attorney General, and with you since your appointment, as well as with the Special Counsel and his staff. Our conclusions are the product of those discussions, as well as our review of the Report.

For the reasons stated below, we conclude that the evidence described in Volume II of the Report is not, in our judgment, sufficient to support a conclusion beyond a reasonable doubt that the President violated the obstruction-of-justice statutes.[1] In addition, we believe that certain of the conduct examined by the Special Counsel could not, as a matter of law, support an obstruction charge under the circumstances. Accordingly, were there no constitutional barrier, we would recommend, under the Principles of Federal Prosecution, that you decline to commence such a prosecution.

I. The Department Should Reach a Conclusion on Whether Prosecution Is Warranted Based on the Findings in Volume II of the Special Counsel's Report

The Special Counsel has investigated certain facts relating to the President's response to the FBI's Russia investigation and to the subsequent Special Counsel investigation. In so doing,

1 Given the length and detail of the Special Counsel's Report, we do not recount the relevant facts here. Our discussion and analysis assumes familiarity with the Report as well as much of the background surrounding the Special Counsel's investigation.

the Special Counsel reached no conclusion as to whether the President had violated any criminal law or whether, if so, such conduct warranted prosecution. The Special Counsel considered evaluating such conduct under the Justice Manual standards governing prosecutions and declinations, but determined not to apply that approach for several reasons. The Special Counsel recognized that the Office of Legal Counsel ("OLC") had determined that "a sitting President is constitutionally immune from indictment and criminal prosecution." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op O.L.C. 222, 260 (2000). Although the OLC opinion permitted the investigation of a sitting President, the Special Counsel concluded that it would be unfair to reach any charging decision, because the President would not then be afforded any opportunity to clear his name before an impartial adjudicator. Accordingly, the Report identifies evidence on both sides of the obstruction question and leaves unresolved what it viewed as "difficult issues" concerning whether the President's actions and intent could be viewed as obstruction of justice.

Although the Special Counsel has declined to reach a conclusion, we think that the Department should reach a judgment on this matter. Under traditional principles of prosecution, the Department either brings charges or it does not. Because the Department brings charges against an individual only where the admissible evidence would support the proof of such charges beyond a reasonable doubt, any uncertainty concerning the facts or the law underlying a proposed prosecution ultimately must be resolved in favor of that individual. That principle does not change simply because the subject of the investigation is the President. Although the Special Counsel recognized the unfairness of levying an accusation against the President without bringing criminal charges, the Report's failure to take a position on the matters described therein might be read to imply such an accusation if the confidential report were released to the public. Therefore, we recommend that you examine the Report to determine whether prosecution would be appropriate given the evidence recounted in the Special Counsel's Report, the underlying law, and traditional principles of federal prosecution.

II. Prosecution Would Not Be Warranted Based on the Findings in Volume II of the Special Counsel's Report

A fair evaluation of the Special Counsel's findings and legal theories weighs in favor of declining prosecution. While cataloguing actions that the President took, many of which took place in public view, the Report identifies no actions that, in our judgment, constituted obstructive acts, done with a nexus to a pending proceeding, with the corrupt intent necessary to warrant prosecution under the obstruction-of-justice statutes. Based on the evidence described and the legal theories articulated in Volume II of the Special Counsel's Report regarding "whether the President had obstructed justice in connection with Russia-related investigations," we believe that prosecution would not be warranted in these circumstances, wholly apart from constitutional considerations.

A. Principles of Federal Prosecution

The applicable Principles of Federal Prosecution articulated in the Justice Manual state that "a determination to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances – recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails

profound consequences for the accused, crime victims, and their families, whether or not a conviction ultimately results." Justice Manual § 9-27.001. This statement of principles advances "two important purposes: ensuring the fair and effective exercise of prosecutorial discretion and responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case." *Id.*

These principles must be applied by the Department to all prosecution decisions, no matter the status of the subjects or targets of the investigation. The Justice Manual instructs that, as a threshold matter, a prosecutor should only "commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, *and* that the admissible evidence will probably be sufficient to obtain and sustain a conviction." Justice Manual § 9-27.220 (emphasis added). The Comment to this section further clarifies, "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact." *Id.* If these threshold factors are satisfied, the prosecutor then should weigh other relevant considerations in deciding whether to commence or recommend a prosecution. *See id.* §§ 9-27.220 to 9-27.250.

Applying these principles, if the person's conduct under scrutiny is not a federal offense *or* the admissible evidence is not sufficient to obtain and sustain a guilty verdict, then the prosecution should be declined.

B. There Is No Precedent for an Obstruction Case on Similar Facts

To our knowledge, the Special Counsel's investigation of potential obstruction is not similar to any reported case that the Department has previously charged under the obstruction-of-justice statutes. The Report identifies no obstruction case that the Department has pursued under remotely similar circumstances, and we have not identified any either. Of course, any investigation concerning the President would be exceptional, but the President is hardly the only public official who could be subject to investigation. The Department has investigated the potential misuse of official authority, including the obstruction of official proceedings, in a host of different circumstances.

The Special Counsel's obstruction theory would not only be novel, but, based on his own analysis, it would also be unusual because Volume I of the Special Counsel's Report is conclusive that the evidence developed "was not sufficient to charge that any member of the Trump Campaign [including the President] conspired or coordinated with representatives of the Russian government to interfere in the 2016 election." Given that conclusion, the evidence does not establish a crime or criminal conspiracy involving the President toward which any obstruction or attempted obstruction by the President was directed. It would be rare for federal prosecutors to bring an obstruction prosecution that did not itself arise out of a proceeding related to a separate crime. Moreover, much of the President's potentially obstructive conduct amounted to attempts to modify the process under which the Special Counsel investigation progressed, rather than efforts to impair or intentionally alter evidence (documentary or testimonial) that would negatively impact the Special Counsel's ability to obtain and develop evidence.

The Special Counsel's Report cites over a dozen federal obstruction decisions in the Report, yet in nearly every one, the charged conduct involved (i) inherently wrongful acts to destroy evidence, to create false evidence, or to tamper with witnesses or jurors, and (ii) an effort to prevent the investigation or punishment of a separate, underlying crime. We have identified only two cases that lack one of those elements. The first is *Arthur Anderson LLP v. United States*, 544 U.S. 696, 707–08 (2005), which concerned the destruction of evidence in advance of an expected SEC investigation. Although there was no evidence in that case of an underlying crime, the exception essentially proves the rule, because the Supreme Court vacated the conviction precisely because the prosecution could have covered innocuous conduct. When it comes to actions otherwise lawful in themselves, the Court emphasized the need to "exercise restraint in assessing the reach of a federal criminal statute," because of the need to provide "fair warning." *Id.* at 696, 703–04. The Court emphasized that such restraint is particularly appropriate where the "act underlying the conviction . . . is by itself innocuous," is not "inherently malign" and could be performed for appropriate, non-criminal reasons. *Id.* In construing the obstruction statute, the Supreme Court observed that "corrupt" and "corruptly" "are normally associated with wrongful, immoral, depraved, or evil" conduct, and the Court vacated the conviction because the jury instruction did not meet that demanding standard. *Id.* at 705.

The Report also cites *United States v. Cueto*, 151 F.3d 620, 631 (7th Cir. 1998), which was a case that clearly involved an effort to protect an underlying crime—namely an illegal gambling operation—but that also involved actions that would have been lawful if undertaken for a non-corrupt purpose. The Seventh Circuit there affirmed the conviction of one of the owners of the gambling operation, because he had repeatedly abused state court processes in order to take discovery from grand jury witnesses in an effort to impede the federal investigation. Although the obstruction charge involved otherwise lawful conduct, we cannot describe it as in any way resembling the facts described in the Special Counsel's Report.[2]

In our prior discussions, the Special Counsel has acknowledged that "we have not uncovered reported cases that involve precisely analogous conduct." *See* Special Counsel's Office Memorandum to the 600.4 File, *Preliminary Assessment of Obstruction Evidence*, at 12 (July 3, 2018). Indeed, in seeking to identify cases in which the misuse of otherwise lawful authority established an obstruction case, the memorandum cited three *charging* documents, two of which arose from state court and thus did not involve federal criminal violations. *See id.* All three cases involved an effort to use official authority to prevent the prosecution or punishment of a distinct crime. The one federal case did not involve just the abuse of official authority, but rather witness tampering and manufacturing false evidence, concerns that go to the heart of the obstruction statutes. Accordingly, there simply does not appear to be any clear legal precedent similar to the kinds of conduct evaluated here.

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[2] The Special Counsel also cites *United States v. Cintolo*, 818 F.2d 980, 992 (1st Cir. 1987), which recognized that "any act by any party—whether lawful or unlawful on its face—may abridge § 1503," but that case involved both an inherently wrongful act (tampering with a grand jury witness) and separate, underlying crimes (an illegal gambling and loan-sharking operation).

C. The Report Does Not Identify Any Actions Rising To Obstruction of Justice

We have carefully reviewed Volume II of the Report and concluded that it does not identify sufficient evidence to prove any criminal offense beyond a reasonable doubt. Although Volume II makes no conclusions about the President's conduct, it adopts an expansive reading of 28 U.S.C. § 1512(c)(2) as prohibiting any act, including an otherwise lawful act, that impedes an official proceeding, so long as the act is done with a corrupt intent. According to the Special Counsel, there is no requirement that the act be inherently malign or impair the availability of witnesses or evidence. At the same time, the Report advances several definitions of "corruptly," including one that would establish intent by proof of an "improper purpose." The Report thus suggests that the President's exercise of executive discretion for any improper reason, including the prevention of personal embarrassment, could constitute obstruction of justice if it impeded a pending investigation. As we have discussed with you, we do not subscribe to such a reading of the obstruction-of-justice statutes. No reported case comes close to upholding a conviction of such breadth, and a line of Supreme Court precedent, including *Arthur Anderson*, weighs heavily in favor of objectivity and certainty in the federal criminal law. In order to reach the conclusions in this memorandum, however, we do not believe it necessary to address this disagreement further, because in our view, Volume II of the Report does not establish offenses that would warrant prosecution, even under such a broad legal framework.

The Report evaluates ten episodes involving the President's conduct. For many of those episodes, the Special Counsel advises that there is significant evidence to indicate that the President's actions would not meet one or more of the elements of the obstruction-of-justice statutes. For others, the Special Counsel's evaluation of the evidence is more equivocal, and he identifies evidence on both sides of the question. Having reviewed the Report in light of the governing legal principles, and the Principles of Federal Prosecution, we conclude that none of these instances would warrant a prosecution for obstruction of justice, without regard to the constitutional constraint on bringing such an action against a sitting President. Having discussed each of these episodes with you on multiple occasions, this memorandum summarizes the reasons for our conclusions, without analyzing each and every item described in the Report.

1. The President's Response to the FBI's Russia Investigation

The Special Counsel's Report divides the President's alleged obstructive conduct into two broad categories, one before he fired the former FBI Director, James Comey, when the President had been told that he was not personally under investigation; and the other after that firing, when the President learned that he was then under scrutiny for potential obstruction. The former category includes the President's private meetings with Comey concerning his "loyalty" and the investigation of Michael Flynn; the President's efforts to convince his senior national security officials to confirm publicly that he was not under investigation; and the events surrounding Comey's termination.

We do not believe that any of these events establishes obstruction of justice. As the Report indicates, during this period, the President was repeatedly informed by Comey that he was not personally under investigation. There is no clear evidence that the President knew of Flynn's conversation with Kislyak or that he had misrepresented it to the Vice President, prior to McGahn

informing him of those facts. At the same time, the President repeatedly demonstrated his belief that the Russia investigation had cast a cloud on his nascent Administration and that it was being exploited, if not outright conducted, by his political opponents to frustrate his efforts to implement his agenda. As the Report indicates, many of the President's actions in these matters can readily be explained by his desire to have the FBI Director or others in the Administration inform the public that he was not under investigation. Indeed, the Report identifies substantial evidence that the FBI Director's refusal to make such a public statement was the driving force in the President terminating him.

We also do not believe that the President's actions regarding Michael Flynn present any case of obstruction of justice. The Special Counsel did not uncover any evidence that the President had any personal culpability in the Flynn investigation or that his actions were motivated by improper considerations. The President's expression of "hope" that Comey would "let this go" did not clearly direct a particular action in the Flynn investigation, and Comey did not react at the time as though he had received a direct order from the President. By the same token, as the Special Counsel acknowledges, the President's decision to remove the FBI Director did not constitute obstruction either. In our view, none of these actions constitutes a case of obstruction of justice, either as a matter of law or fact.

2. The President's Actions Concerning the Management of the Special Counsel's Investigation

The Report also discusses a second category of actions taken by the President after the appointment of the Special Counsel, most notably after he learned that the Special Counsel had opened an investigation into potential obstruction of justice. Most of the conduct identified consists of facially lawful actions that are part of the President's constitutional responsibility to supervise the Executive Branch. The Special Counsel considers, for example, whether the President obstructed justice by asking the White House Counsel to direct the firing of the Special Counsel; by asking Corey Lewandowski to contact the Attorney General and seek his assistance in narrowing the Special Counsel's investigation; and by asking the Attorney General to reverse his recusal and to supervise the Special Counsel's investigation.

We do not believe that the principles of federal prosecution support charges based upon any of those actions. As noted, the evidence does not establish that the President took any of these actions because he sought to prevent the investigation of an underlying criminal offense, separate and apart from the obstruction case, and the Department rarely brings obstruction cases absent a separate criminal offense. Such a prosecution is doubly inappropriate where, as here, the conduct under investigation is lawful on its face, and the evidence of any corrupt motive is, at the very least, questionable. Federal criminal statutes should be construed to avoid criminalizing generally innocent conduct. *See, e.g.*, *Arthur Anderson*, 544 U.S. at 703–04; *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994). The standard for demonstrating that a public official acted with corrupt intent is demanding. And there is considerable evidence to suggest that the President took these official actions not for an illegal purpose, but rather because he believed the investigation was politically motivated and undermined his Administration's efforts to govern.

Moreover, in evaluating the nature of the President's conduct, it bears emphasis that none

of his requests to change the supervision of the investigation were actually carried out. The conduct under investigation is based entirely upon "directions" by the President to subordinates to take actions on his behalf that they did not undertake. In each instance, if the President truly wanted to cause those actions, he could have done it himself (for instance, ordering the Deputy Attorney General to terminate the Special Counsel or directing the Attorney General to unrecuse or to resign). After the President provided his direction, in each instance, the orders were not carried out. Of course, it is true that an act may constitute an attempt or an endeavor, even if unsuccessful. But the facts that the President could have given these directions himself, and did not remove any subordinate for failing to convey his directions, weigh against finding an intent to obstruct justice.

3. Conduct Related To Witnesses

The Special Counsel's Report also describes a variety of other actions taken by the President that could have had some effect on potential witnesses to the investigation. Those actions include the President's public and private comments concerning the recollections and testimony of potential witnesses, including the President's effort to encourage the White House Counsel, Don McGahn, to deny the newspaper reports that the President had directed McGahn to fire the Special Counsel; his involvement in responding to media interest in the Trump Tower meeting; and his public and private statements concerning witnesses, whom he appeared to praise or condemn based upon whether they were fighting the charges against them or cooperating with the investigation.

The President's actions on these matters more directly implicate the concerns of the obstruction statute. If the President were to perjure himself, tamper with witness testimony, or corruptly destroy evidence, then such actions would violate well-established law. But we do not believe that any of the actions described in the report would meet such a standard. None of these instances indicate that the President sought to conceal evidence of criminal conduct nor is there sufficient evidence to prove beyond a reasonable doubt that he sought to provide false evidence to the investigators.

For instance, when it comes to the President's request that McGahn deny the newspaper accounts, the Special Counsel recognizes that there is evidence suggesting that the President believed the newspaper stories to be false. The President repeatedly protested both to McGahn and to other witnesses that he believed that he had asked McGahn to advise the Deputy Attorney General about the Special Counsel's conflicts of interests and thereby induce the appointment of an unconflicted special counsel. The President vehemently denied telling McGahn that he wanted to "fire" the Special Counsel, and McGahn recalled the President's direction to be more ambiguous. While other evidence cuts against this understanding, there is insufficient evidence to conclude beyond a reasonable doubt that the President sought to induce McGahn to lie. In addition, at the time of this discussion, McGahn had already provided his recollection to investigators, and the President's principal focus was on rebutting those media reports. Given the timing of this conversation, there is insufficient evidence to conclude that the President's actions toward McGahn, which were themselves ambiguous, were intended to affect the investigation itself. Therefore, the evidence, in our judgment, does not suffice to warrant any criminal prosecution.

We likewise do not believe that the President's public statements exhorting witnesses like

Flynn, Manafort, Stone, or Cohen, not to "flip" should be viewed as obstruction of justice. The Report makes clear that the President equated a witness's decision to "flip" with being induced by prosecutors to manufacture false evidence against others. We cannot say that the evidence would prove beyond a reasonable doubt that the President's statements, most of which were made publicly, were intended to induce any of those witnesses to conceal truthful evidence or to provide false evidence. Once again, this conclusion is buttressed by the absence of any clear evidence that these witnesses had information that would prove the President had committed a crime. The President's public statements could be viewed as efforts to defend himself from public criticism related to the Special Counsel's investigation or to discourage the witnesses from making what the President believed might be false statements in exchange for a lesser sentence. Those statements do not warrant a prosecution for obstruction of justice.

D. Other Considerations

Although we have not identified any actions that present clear violations of the obstruction of justice statutes, there are other factors that would weigh against pursuing the President's actions as criminal violations. The Special Counsel's thorough investigation did not establish that the President committed any underlying crime related to Russian interference. As noted, in every successful obstruction case cited in the Report, the corrupt acts were undertaken to prevent the investigation and prosecution of a separate crime. The existence of such an offense is not a *necessary* element to proving an obstruction charge, but the absence of underlying guilt is relevant and powerful evidence in assessing whether otherwise innocent actions were undertaken with a corrupt motive. In the absence of an underlying offense, the most compelling inference in evaluating the President's conduct is that he reasonably believed that the Special Counsel's investigation was interfering with his governing agenda. Even if the President were objectively wrong about the intentions of the Special Counsel, many, if not all, of his actions could be viewed as lacking the intent element under the relevant statutes.

In addition, while our analysis would counsel against pursuing an obstruction charge against an ordinary party in the absence of any effort to impair evidence, there are additional prudential reasons that weigh against such an interpretation in these circumstances. Such a criminal prosecution would involve the application of a novel obstruction theory that arguably would apply to any official with the authority to take acts that could influence an investigation. Such an extension would involve serious questions of public policy and constitutional law that would weigh against pursuing criminal charges except under the clearest of cases.

RECOMMENDATION: We recommend that you conclude that, under the Principles of Federal Prosecution, the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.

APPROVE: WP Barr DATE: 3/24/2019

DISAPPROVE: _____ DATE: _____

OTHER: _____