



When Mueller Concludes

Congress's Role in Assessing Any Findings of
Presidential Obstruction-of-Justice and Abuse of Power
and Ensuring Accountability



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I. Introduction and Background

Special Counsel Robert Mueller is reportedly investigating whether President Trump obstructed the Department of Justice (“DOJ”) investigation into Russian interference in the 2016 election. As set forth below, the close of his investigation should not be the end of the examination of that question by the federal government; Congress still has an essential role to play. A president’s abuse of his powers to obstruct an investigation into his own crimes puts him above the law in a way that is anathema to our constitutional scheme. History, law, and constitutional principles make it clear that such behavior demands accountability and could be grounds for impeachment. When credible allegations of abuses of power to obstruct justice arise, Congress must conduct its own investigation and weigh the myriad factual and political questions presented by the president’s behavior to determine whether, under the circumstances, it should be.

The public record is now replete with actions President Trump has taken, in his official capacity, with the apparent intent to slow or halt investigations into Russian interference with the 2016 election, and his campaign’s involvement (or not) with that interference. To offer just a few examples: With respect to the investigation of Michael Flynn’s connections to Russia, Trump told then-Federal Bureau of Investigation (“FBI”) Director James Comey, “I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy.”¹ He later urged Director of National Intelligence Dan Coats to pressure Comey to end the investigation into Russia’s election interference.² In June 2017, Trump reportedly ordered White House Counsel Don McGahn to fire Mueller, though McGahn refused to carry out the request.³ Trump has repeatedly published tweets disparaging the Special Counsel’s investigation, the investigators, and witnesses who have shared information with the Special Counsel.⁴ And he has left pardoning his campaign chairman, Paul Manafort, “on the table,” while praising Manafort’s refusal to cooperate after the Special Counsel’s office told a federal judge that Manafort repeatedly lied to investigators in violation of his cooperation agreement.⁵ Mueller’s investigation is likely to

¹ James B. Comey, *Statement for the Record: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. (June 8, 2017), available at <https://www.intelligence.senate.gov/sites/default/files/documents/os-jcomey-060817.pdf>.

² Adam Entous, *Top Intelligence Official Told Associates Trump Asked Him If He Could Intervene with Comey on FBI Russia Probe*, WASH. POST (Jun. 6, 2017), https://www.washingtonpost.com/world/national-security/top-intelligence-official-told-associates-trump-asked-him-if-he-could-intervene-with-comey-to-get-fbi-to-back-off-flynn/2017/06/06/cc879f14-4ace-11e7-9669-250d0b15f83b_story.html.

³ Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html>.

⁴ See, e.g., Jen Kirby, *Trump Attacks Michael Cohen and Praises Roger Stone in Anti-Mueller Tweets*, VOX (Dec. 3, 2018), <https://www.vox.com/policy-and-politics/2018/12/3/18123838/trump-tweets-mueller-cohen-stone>.

⁵ Chad Day, *Trump Says He Wouldn’t Take Manafort Pardon ‘Off the Table’*, AP NEWS (Nov. 29, 2018), <https://www.apnews.com/5ee8f1fd099f4f7fb10bfe5d161525f3>.

supplement this public record and inform Congress and the public of any attempts at interference undertaken by the President behind closed doors. Taken in the context of a criminal investigation into the president's campaign and whether or not it coordinated with an unprecedented — and illegal — attack on free and fair elections, Congress reasonably could conclude that Trump engaged in these acts to protect himself, his family, or his top aides.

As the Brookings Institution has laid out in a detailed white paper explaining why President Trump's actions may constitute criminal obstruction-of-justice, Congress sought to counteract self-interested motivations in enacting the obstruction statutes.⁶ "Obstruction of justice" describes a wide range of conduct that impedes our system of justice. Congress has criminalized efforts to obstruct different components of the justice system, including grand jury inquiries and Congressional investigations.⁷ These prohibitions apply to any acts undertaken with a "corrupt" intent to obstruct. Thus, the linchpin of an obstruction of justice investigation is the subject's state of mind, not the commission or effectiveness of any particular obstructive act. As a result, obstruction of justice can involve endeavoring to influence a witness not to testify, falsifying a report likely to be submitted to a grand jury, hiding subpoenaed documents, submitting false or misleading information to a proceeding, or any number of other actions.⁸

More fundamentally, however, Trump's abuse of the powers of the presidency to protect himself, and perhaps his family and friends, is not merely a violation of law, but an egregious abuse of power and violation of the public trust. This white paper builds on the important work done by the researchers at the Brookings Institution and others to explain why, under these circumstances, Congress has an obligation to investigate the president's actions.⁹ Setting aside whether President Trump can or will be indicted for a crime, Congress has a role to play in policing the President's exercise of his constitutional powers. Should Congress fail to take action in response to these allegations, it will be an unprecedented derogation of Congress's constitutional duties.

⁶ See BARRY H. BERKE, NOAH BOOKBINDER & NORMAN L. EISEN, PRESIDENTIAL OBSTRUCTION OF JUSTICE: THE CASE OF DONALD J. TRUMP 124-26 (2d ed. Aug. 22, 2018), *available at* https://www.brookings.edu/wp-content/uploads/2018/08/GS_82218_Obstruction_2nd-edition.pdf.

⁷ See 18 U.S.C. §§ 1503, 1505, 1512; *see also* BERKE, BOOKBINDER & EISEN, *supra* note 6, at 85-88.

⁸ DEPARTMENT OF JUSTICE, CRIMINAL RESOURCE MANUAL § 1724, *available at* <https://www.justice.gov/jm/criminal-resource-manual-1724-protection-government-processes-omnibus-clause-18-usc-1503>.

⁹ BERKE, BOOKBINDER & EISEN, *supra* note 6; *see also* Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018); Renato Mariotti, *It's Now Likely Mueller Thinks Trump Obstructed Justice*, POLITICO (Jan. 26, 2018), *available at* <https://www.politico.com/magazine/story/2018/01/26/mueller-trump-obstruction-of-justice-russia-216532>.

II. History supports Congress taking action when there is credible evidence a president obstructed justice.

History supports the conclusion that allegations of presidential abuse of power, including obstruction of justice, must be investigated by Congress, and if found credible, followed by political accountability — in its strongest form, removal from office. The House of Representatives has twice considered articles of impeachment that included charges of obstruction of justice. President Nixon obstructed justice by impeding a federal investigation into the break-in at Democratic Party headquarters in the Watergate Hotel, and resigned to avoid impeachment. Congress's investigation of President Clinton began with his involvement in a land deal, called Whitewater, but ultimately centered on allegations that he obstructed justice by seeking to cover up his affair with Monica Lewinsky; the Senate declined to remove him from office. One key difference between the two presidents is that President Nixon, unlike President Clinton, abused his official powers over the FBI, Central Intelligence Agency, and DOJ to stymie the investigation into his own conduct. But in both cases, Congress conducted aggressive investigations of the president's actions to determine whether the president could appropriately remain in office.

The obstruction of justice allegations against Nixon arose from his efforts to cover up his campaign's ties to the Watergate burglary.¹⁰ Among other things, the House Judiciary Committee found that he had obstructed justice by “interfering or endeavoring to interfere with the conduct of investigations” by federal officials, as well as “making or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing that . . . there was no involvement of [White House or Nixon campaign] personnel in such misconduct.”¹¹ The recently-released Watergate Road Map, sent by Watergate Special Prosecutor Leon Jaworski to Congress, offers a detailed account of Nixon's efforts to influence senior DOJ officials, and his efforts to obtain information from them about the progress of the investigation.¹² Among other things, the Road Map details how Nixon used conversations with Assistant Attorney General Henry Petersen — who supervised the DOJ and FBI investigation into Watergate — to get information about, and perhaps try to shape, the course of the investigation. When Petersen urged Nixon to fire White House aides John Ehrlichman and H.R. Haldeman because of their involvement in the cover-up, Nixon “spoke well” of them as “fine upstanding guys.”¹³ Nixon also used conversations with Petersen to get information about the state of the FBI and grand jury investigations, and may have passed that information to Ehrlichman and Haldeman.¹⁴ And in his conversations with Petersen, Nixon talked about

¹⁰ Art. I, *Impeachment of Richard M. Nixon, President of the United States*, H. Comm. on the Judiciary, H.Rept. 93-1305 (July 27, 1974), available at <http://watergate.info/impeachment/articles-of-impeachment>.

¹¹ *Id.* at cl. 8.

¹² Jim Baker & Sarah Grant, *What the Watergate ‘Road Map’ Reveals About Improper Contact Between the White House and the Justice Department*, LAWFARE (Nov. 19, 2018), <https://www.lawfareblog.com/what-watergate-road-map-reveals-about-improper-contact-between-white-house-and-justice-department>.

¹³ *Id.*

¹⁴ *Id.*

Petersen's own future prospects, suggesting that he could become White House counsel or an adviser to the President.¹⁵ Ultimately, the Road Map served as a guide for Congress to impeachable offenses committed by Nixon.¹⁶

The second article of impeachment approved by the House of Representatives against President Clinton also alleged obstruction of justice.¹⁷ In the articles of impeachment approved by the House, Clinton was not alleged to have used his official powers to interfere with an investigation. Instead, he was accused of encouraging Lewinsky and other witnesses to lie about Lewinsky's relationship with Clinton, and of lying to his aides, who were future grand jury witnesses.¹⁸ Importantly, the investigation determined that President Clinton did not try to use his powers *as president* to obstruct the investigation — a difference that some argued made impeachment inappropriate.¹⁹

A key lesson of the Nixon and Clinton obstruction of justice investigations is that an investigation does not lead inexorably to impeachment and removal from office. Congress can begin an investigation with the intent to find facts without committing themselves to impeachment proceedings. Indeed, the congressional investigation into Nixon's misdeeds, including obstruction of justice, lasted for approximately a year before Congress officially authorized an impeachment inquiry.²⁰ Moreover, an investigation that does not lead to impeachment or removal is still worthwhile: the Watergate and Whitewater investigations gave the American people an opportunity to understand allegations of presidential misconduct and informed political debate over whether or not the misconduct uncovered should lead to formal sanctions.

¹⁵ *Id.*

¹⁶ *Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives* (March 1, 1974) [hereinafter "Watergate Road Map"], available at <https://www.archives.gov/files/research/investigations/watergate/roadmap/docid-70105890.pdf>.

¹⁷ Art. III, *Impeaching William Jefferson Clinton, President of the United States, for High Crimes and Misdemeanors*, H. Res. 611, 105th Cong. (Dec. 19, 1998), available at <https://www.congress.gov/bill/105th-congress/house-resolution/611>.

¹⁸ *Id.*

¹⁹ Bernard J. Hibbitts, *More Than 430 Law Professors Send Letter to Congress Opposing Impeachment*, JURIST (Nov. 6, 1998), available at <https://web.archive.org/web/19990128143405/http://jurist.law.pitt.edu/petit1.htm>.

²⁰ The Senate passed Senate Resolution 60, authorizing the creation of the Select Committee on Presidential Campaign Activities, on February 7, 1973. S. Res. 60, 93d Cong. (1973) (enacted), available at <https://www.congress.gov/bill/93rd-congress/senate-resolution/60>. The House of Representatives voted on February 6, 1974 to authorize the House Judiciary Committee to launch an impeachment inquiry. H.R. Res. 803, 93rd Cong. § 2, 120 CONG. REC. 2349 (1974) (enacted), available at <https://www.congress.gov/bill/93rd-congress/house-resolution/803>.

III. Presidential obstruction-of-justice raises serious abuse-of-power concerns.

The abuse of official presidential powers to obstruct justice is particularly offensive to our constitutional scheme. The Constitution demands that the president “take Care that the Laws be faithfully executed.” When he uses his power over the executive branch to impede an investigation, he fails in that constitutional responsibility and jeopardizes the Founders’ careful balance of powers between the three coequal branches.

A constitutional democracy is built on the idea that those in office should not use that power to punish their opponents or reward their friends. Therefore, contrary to President Trump’s assertions, he does not have an “absolute right to do whatever [he wants] with the Justice Department.”²¹ Even though the President is the nation’s chief law enforcement officer, his power to interfere in specific law-enforcement matters is limited. The Constitution requires the President to execute his supervisory powers “faithfully” — not for corrupt or self-protective reasons.²² The Bill of Rights requires the president to comport with guarantees of due process and equal protection.²³ Indeed, the constitutional risks posed by presidential interference in specific law enforcement matters are so great that White House policies ordinarily expressly restrict the involvement of White House staff in such matters.²⁴ Moreover, once judicial proceedings (including a grand jury) are in progress, efforts to impede the court proceedings constitute “wrongful interfer[ence] with the proper functioning of another branch of government,” as Arizona Senator Jon Kyl explained in the context of his vote in favor of Clinton’s impeachment.²⁵

Efforts by the President to use his official powers to protect himself, his family, and his close associates are especially offensive to the Constitution. As Daniel Hemel and Eric Posner argue in a recent law review article, the Constitution “acknowledge[s] the impropriety of a public official participating in a proceeding in which he as a personal stake.”²⁶ Thus, for example, the Constitution prohibits the president from accepting emoluments from foreign governments or from the states.²⁷ The same principle should apply where a president commits obstruction of

²¹ *Excerpts from Trump’s Interview with the Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html>.

²² For a fuller discussion of limitations on the president’s power to direct law enforcement, see Protect Democracy, *No “Absolute Right” to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (March 2018), available at <https://protectdemocracy.org/resource-library/document/no-absolute-right-control-doj/>. See also Andrew Kent, Ethan J. Leib & Jed Shugerman, “Faithful Execution” and Article II, HARV. L. REV. (forthcoming 2018), available at <http://dx.doi.org/10.2139/ssrn.3260593>.

²³ *Id.*

²⁴ See Protect Democracy, *Memorandum on White House Communications with the DOJ and FBI* (Mar. 8, 2017), available at <https://protectdemocracy.org/agencycontacts/>.

²⁵ Sen. Jon Kyl, Impeachment Statement, 145 Cong. Rec. S1533 (daily ed. Feb. 12, 1999).

²⁶ Hemel & Posner, *supra* note 9, at 1311.

²⁷ U.S. Const. art. I, § 9, cl. 8; art. II, § 1, cl. 7.

justice by an official act to “significantly interfere[] with an investigation, prosecution, or other law enforcement action to advance narrowly personal, pecuniary, or partisan interests.”²⁸

Some Trump defenders contend that official presidential actions can never obstruct justice in a constitutionally-problematic way. Alan Dershowitz has argued, for instance, that the President “cannot be charged with [obstruction of justice] if his only actions were constitutionally authorized.”²⁹ President Trump’s lawyers have made a similar argument to the Special Counsel, claiming 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.”³⁰ Or, as Richard Nixon put it, “when the president does it, that means that it is not illegal.”³¹

As an initial matter, that position is wrong on the law. The Constitution doesn’t protect the president when he or she uses lawful powers in unlawful ways. For example, President Trump plainly has the power to fire the National Security Advisor — as President Trump fired then-National Security Advisor Michael Flynn early in his term because Flynn lied to the FBI and others. But if he were to fire current National Security Advisor John Bolton because China paid him to do so, that would be bribery, and plainly unlawful.³²

But even if a president’s abuse of power were tacitly exempted from the statutory definition of “obstruction,” it is certainly subject to investigation and sanction by Congress. When the president abuses his or her official powers — or is suspected to have done so — Congress has a duty to act. An investigation is the appropriate first step, to be followed by other measures like Congressional censure or impeachment when the facts support it.³³

²⁸ Hemel & Posner, *supra* note 9, at 1312. Like any other person, a president may also obstruct justice by non-official acts, such as destroying a document, but such actions do not raise the same constitutional complexities.

²⁹ Alan M. Dershowitz, *No One Is Above the Law*, HILL (Dec. 5, 2017), <http://thehill.com/opinion/judiciary/363387-no-one-is-above-the-law>.

³⁰ Letter from John M. Dowd & Jay A. Sekulow, Counsel to the President, to Robert S. Mueller, III, Special Counsel, U.S. Dep’t of Justice (Jan. 29, 2018), *available at* <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html>.

³¹ *Edited Transcript of David Frost’s Interview with Richard Nixon Broadcast in May 1977*, GUARDIAN (Sept. 7, 2007), *available at* <https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1>.

³² Indeed, the Constitution expressly recognizes that bribery is an offense that can merit impeachment. U.S. Const. art. II, § 4.

³³ Another Protect Democracy white paper reviews Congress’s conduct of past investigations into presidential misconduct and offers recommendations for how Congress should proceed today. See Jessica Marsden, David J. Leviss, John McDermott, David R. Fitzgerald, and Carolyn Appel, *When Mueller Concludes: Lessons from Previous Independent Investigations and Related Congressional Oversight*, (Dec. 2018), *available at* <https://www.documentcloud.org/documents/5632729-When-Mueller-Concludes-Lessons-from-Previous.html>.

IV. The President's role does not protect him from political accountability for obstruction of justice.

The President is not insulated from accountability for his actions by his constitutional role. Much public debate has focused on whether or not a president can be indicted for a crime while in office.³⁴ The DOJ's Office of Legal Counsel ("OLC") has opined that indictment of a sitting president would "unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."³⁵ Some legal experts have questioned this conclusion,³⁶ but Rudy Giuliani, Trump's lawyer, has told reporters that Special Counsel Mueller's team intends to follow the OLC opinion and will not indict the President while he remains in the White House.³⁷

But setting aside whether a sitting president may be indicted, the Constitution provides another means of accountability for presidential misdeeds: Congressional investigation, censure, or impeachment. As Senator Kyl explained during debate on the Clinton impeachment, "[i]t is conduct, not a proven crime, that is the basis for impeachment."³⁸ Watergate again offers a useful lesson. As the investigation reached its conclusion, Watergate Special Prosecutor Jaworski concluded — consistent with the OLC opinion — that a sitting president should not be indicted for obstruction of justice.³⁹ Instead, the proper route for presidential accountability was the impeachment process, which was already underway in the House of Representatives. Accordingly, Jaworski drafted the so-called "Road Map" to share with Congress the evidence he had found — though not his legal conclusions — related to President Nixon's obstruction of justice and other abuses of power.⁴⁰ Congress then continued with its ongoing investigation and impeachment inquiry, ultimately resulting in Nixon's resignation from office when the

³⁴ See, e.g., Garrett Epps, *The Only Way to Find Out If the President Can Be Indicted*, ATLANTIC (May 23, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/presidential-indictment/560957/>.

³⁵ *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000), available at https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf.

³⁶ See Norman Eisen & Elizabeth Holtzman, *Donald Trump Should Not Assume He's Above the Law. A Sitting President Can Be Indicted.*, USA TODAY (May 24, 2018), <https://www.usatoday.com/story/opinion/2018/05/24/donald-trump-not-above-law-sitting-president-can-indicted-column/634725002/>.

³⁷ Robert Costa, Josh Dawsey & Carol D. Leonnig, *Mueller's Team Told Trump's Lawyers the Special Counsel Cannot Indict a Sitting President, Giuliani Says*, WASH. POST (May 16, 2018), https://www.washingtonpost.com/politics/muellers-team-told-trumps-lawyers-the-special-counsel-cannot-indict-a-sitting-president/2018/05/16/cf4d5700-5961-11e8-858f-12becb4d6067_story.html.

³⁸ Kyl, 145 Cong. Rec. S1532.

³⁹ Stephen Bates, Jack Goldsmith & Benjamin Wittes, *The Watergate 'Road Map' and the Coming Mueller Report*, LAWFARE (Sept. 14, 2018), <https://www.lawfareblog.com/watergate-road-map-and-coming-mueller-report>.

⁴⁰ See Watergate Road Map, *supra* note 16.

congressional investigators obtained access to tapes proving that Nixon was a full participant in the cover-up of the Watergate burglary.

Whether or not Special Counsel Mueller drafts a similar “Road Map” document, Congress is well-positioned to conduct its own investigation into President Trump’s conduct. Congress can subpoena witnesses and documents from the White House and other agencies in order to fully understand the President’s actions with respect to the Russia investigation. It likely can obtain evidence directly from the grand jury that has heard evidence from the Special Counsel related to obstruction of justice.⁴¹ And if the President tries to shield the Special Counsel’s report or underlying evidence from Congress by claiming executive privilege, Congress can and should litigate that illegitimate privilege claim.⁴² Only after a full investigation should Congress reach a final conclusion on whether other corrective actions are appropriate.

V. Conclusion

The President’s Article II powers do not protect him from accountability for obstruction of justice. Using his official powers to stop, impede, or influence an investigation in order to protect himself, his family, or his close associates is not acting “faithfully” in the execution of the laws, and gets no special constitutional protection for such abuses of power. Moreover, if Congress allowed allegations of obstructive acts to go by without investigation, Congress would be disregarding one of its most important constitutional roles, as a check on abuses of presidential power. Whether or not the Special Counsel decides he can or should indict the president, Congress must conduct its own rigorous oversight and take appropriate corrective action, up to and including impeachment, if that is warranted.

⁴¹ Ryan Goodman & Alex Whiting, *How Mueller Can Make the Grand Jury Report Public or Hand It to Congress*, JUST SECURITY (Aug. 14, 2017), <https://www.justsecurity.org/44191/mueller-grand-jury-report-public-hand-congress/>.

⁴² Jessica Marsden & Andy Wright, *Executive Privilege and the Public Interest: Why the President Can’t Block Release of the Mueller Report*, JUST SECURITY (Sept. 13, 2018), <https://www.justsecurity.org/60708/executive-privilege-public-interest-president-cant-block-release-mueller-report/>.