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**Governance Studies**  
at BROOKINGS

**PRESIDENTIAL OBSTRUCTION OF JUSTICE:  
THE CASE OF DONALD J. TRUMP**

**2<sup>ND</sup> EDITION**

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## Preface to the Second Edition

When we released the first edition of this report in October 2017, the case that President Trump had obstructed justice was still in its relatively early stages. Even then, we concluded that there was substantial evidence that the president may have obstructed justice. Evidence supporting the elements of that offense—an obstructive act undertaken with corrupt intent and having the requisite connection to a grand jury or congressional proceeding—was available in public reports and testimony. In our view, the president’s then-known conduct, including his demand of loyalty from then-FBI Director Comey, his request that Comey “see [his] way clear” to letting National Security Advisor Michael Flynn go, his termination of Comey, and his other statements was similar to conduct that has previously supported federal obstruction charges and convictions.

Ten months later, it has become apparent that the president’s pattern of potentially obstructive conduct is much more extensive than we knew. To take only a few examples, it has since been reported that President Trump: attempted to block Attorney General Sessions’ recusing himself from the Russia investigation despite the AG’s clear legal duty to do so; asked Sessions to reverse his recusal decision; demanded and obtained the resignation of Sessions for his failure to contain the Russia investigation (before ultimately rejecting it); twice ordered the firing of Special Counsel Robert Mueller; dictated a false account for a key witness, his son Donald Trump Jr., of the June 9, 2016 Trump Tower meeting between campaign and Russian representatives; publicly attacked Special Counsel Mueller and key witnesses to the obstruction case; and has repeatedly disputed the underlying Russian attack and Vladimir Putin’s role in it despite possessing evidence to the contrary. We also know that White House Counsel Don McGahn and his lawyer at one point were reportedly so concerned that the president was going to blame McGahn that he provided extraordinary cooperation with the special counsel, including sitting for 30 hours of interviews in an apparent effort to exonerate himself.

We also now have a better understanding of the conduct possibly implicating the president or those associated with him that he may have been trying to cover up. We know that there were more than eighty contacts between Russia-linked individuals and associates of the Trump campaign and transition team. Since our last report, we learned that in April 2016, George Papadopoulos, a foreign policy adviser to the Trump campaign, met a Russian national who informed him that the Russians had “dirt” on Clinton. We have learned that Trump Campaign Chair Paul Manafort and his Deputy, Rick Gates, were in regular contact with a Russian oligarch with ties to Russian President Vladimir Putin throughout the Summer of 2016. And after the election, the president’s son-in-law Jared Kushner, his chief strategist Steve Bannon, and Flynn may have been involved in efforts to secure secret back channels to Russia. These and other new facts that provide crucial context to the obstruction case against the president, as well as analysis of their potential impact, have been added in the new edition.

If the facts before us at the time of the first edition of this report led us to the view that the president likely obstructed justice, the facts that have been reported since that time have made the case that President Trump obstructed justice significantly stronger. This is further evidenced by the weaknesses of the factual and legal defenses that have been advanced by the president and his team of lawyers. There is no doubt a difference between what is in the public record and what Special Counsel Mueller and his colleagues have uncovered in their investigation, and there remain factual disputes among key participants. Nevertheless, analyzing the current allegations against the president under the legal framework laid out in our original report even more strongly supports that the president obstructed justice under ordinary

application of the relevant criminal law. It is no wonder the president's lawyers reportedly do not want him to undergo live questioning about obstruction by Mueller.

The possibility of an indictment or impeachment of a president has also been discussed extensively in the months since our initial report. We have here expanded our refutation of several of the defenses that the president's legal team has developed. We explain that the fact that a president may have exercised his constitutional authority, such as to remove subordinate officers, is no defense if those otherwise lawful actions were done with a corrupt intent to obstruct a criminal or congressional proceeding. The notion that a public official cannot be charged with obstructing justice for actions that are within his or her public authority finds no support in the annals of American law.

Past special prosecutors have deferred to Congress' primary jurisdiction over matters involving the president and have referred such matters to the House Judiciary Committee. The investigations involving Presidents Nixon and Clinton serve as important precedent for this option, even accounting for the legal and factual distinctions between those cases and this one. Deference to Congress' primary jurisdiction does not mean that the criminal justice system has no role to play in the obstruction case. Conspiracy charges against subordinate officers would be entirely appropriate if the facts bear out such a claim even if the case against the president has been referred to Congress. And should Congress not take up the obstruction case against the president after such a referral, the special counsel may also leave open the possibility of indicting the president at a later time.

We also explain our view that a sitting president does not enjoy immunity from prosecution, as some have claimed. If facing an indictment so burdens the president that he cannot fulfill the duties of his office, it is hardly self-evident that those obligations should trump the rule of law. Under our constitution, we elect a vice president whose principal responsibility is to assume the office of the president if the chief executive resigns or is incapacitated. Temporary or permanent incapacitation of a president by indictment is not the same as incapacitation of the office or of the executive branch. For those reasons, we believe that criminal indictment of a president is better viewed as an option of last resort rather than one that is foreclosed by any binding legal opinion.

Stepping back, it is telling that those defending the president are resorting to the narrowest of defenses—that even if the president obstructed justice, holding him accountable would be unconstitutional. In what is perhaps a reflection of the strength of the evidence that can now be marshaled against the president, his defenders have shifted the fight in large measure away from the merits of the obstruction case to a series of questionable defenses based upon the possible consequences of even a meritorious case. In many ways, the question has become less about whether there is a case that Donald J. Trump obstructed justice, and more about whether and in what form the rule of law will be followed.

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## Executive Summary

In this paper we conclude that, based upon public reports, there is substantial evidence that President Trump may have obstructed justice. While a final determination must wait until Special Counsel Mueller has completed his investigation, that body of reported evidence has only grown deeper in quantity and quality in recent months. The apparent depth of the evidence is further underscored by reporting that White House Counsel Don McGahn was extensively cooperating with the special counsel, which could provide otherwise unavailable details of the president's exact state of mind and actions during critical moments.

The obstruction case against President Trump includes the entire pattern of conduct detailed in Section I (pages 10-83). Although President Trump's firing of Director Comey is incriminating in its own right, the strength of the case against the president lies in the pattern of obstructive conduct in which he has potentially engaged. Far from engaging in acts that may constitute only a technical violation of the statutes that in ordinary circumstances might not be prosecuted, President Trump appears to have been engaged in an ongoing campaign of obstructive conduct since taking office. It includes the following events and allegations:

1. Candidate Trump was warned that foreign adversaries including Russia would try to infiltrate his campaign (Section I.D.1, page 54);
2. President-elect Trump was briefed on Russia's interference in the 2016 election (Section I.D.2, page 54);
3. President-elect Trump asked James Comey to stay on as FBI Director (Section I.D.3, page 55);
4. In January 2017, Acting Attorney General Sally Yates reportedly informed the White House about Flynn's misrepresentations regarding his communications with Russian Ambassador Kislyak (Section I.D.4, pages 55-56);
5. According to FBI Director Comey, President Trump requested his loyalty during a private White House dinner (Section I.D.5, pages 56-57);
6. During a one-on-one meeting with Director Comey in the Oval Office, President Trump expressed "hope" that Comey drop the investigation of Michael Flynn (Section I.D.6, pages 57-58);
7. President Trump reportedly instructed White House Counsel Don McGahn to prevent Attorney General Sessions from recusing himself in the Russia investigation (Section I.D.7, pages 58-59);
8. President Trump reportedly asked Attorney General Sessions to undo his recusal (Section I.D.8, page 59);
9. President Trump reportedly asked CIA Director Mike Pompeo and Director of National Intelligence Dan Coats to deny publicly that there was evidence of coordination between the Trump campaign and Russia (Section I.D.9, page 60);
10. According to FBI Director Comey, President Trump asked him to "lift the cloud" and announce publicly that Trump was not under investigation (Section I.D.10, pages 60-61);

11. President Trump tried to engage Sessions in discrediting and ousting Comey (Section I.D.11, pages 61-62);
12. President Trump fired FBI Director Comey, advanced a pretextual basis for the firing, and then admitted that he fired Comey because of the “Russia thing” (Section 1.D.12, pages 62-64);
13. Shortly after firing FBI Director Comey, President Trump summoned Comey’s deputy and Acting FBI Director Andrew McCabe to the White House and asked him who he voted for in the 2016 election (Section I.D.13, page 64);
14. President Trump demanded Attorney General Sessions’ resignation after the appointment of Special Counsel Robert Mueller (Section 1.D.14, pages 64-65);
15. President Trump attempted to influence Comey’s congressional testimony or otherwise discredit him (Section I.D.15, pages 65-68);
16. President Trump has sought to discredit others who might be witnesses against him, including Deputy FBI Director McCabe (Section I.D.16, pages 68-70);
17. President Trump requested that White House Counsel McGahn fire Special Counsel Mueller (Section I.D.17, pages 70-72);
18. President Trump reportedly dictated a misleading public statement for his son about the June 2016 meeting with Russians in Trump Tower (Section I.D.18, pages 72-75);
19. President Trump reportedly directed then-Chief of Staff Reince Priebus to obtain Attorney General Sessions’ resignation (Section 1.D.19, pages 75-76);
20. President Trump’s personal attorneys reportedly floated the possibility of pardons for Manafort and Flynn with their lawyers (Section 1.D.20, pages 76-79);
21. President Trump urged senior Republican members of Congress to stop investigating the 2016 election (Section I.D.21, page 79);
22. President Trump acknowledged in a tweet (even if it was written by his attorney) that he knew that Flynn had committed a crime when he fired him (Section I.D.22, pages 79-80);
23. President Trump reportedly told advisers that he wanted Special Counsel Mueller’s investigation to be shut down (Section I.D.23, page 80);
24. President Trump reportedly asked Deputy Attorney General Rosenstein if Rosenstein was on “my team” (Section I.D.24, pages 80-81);
25. President Trump repeatedly attacked and attempted to undermine the investigation (Section I.D.25, pages 81-83); and
26. President Trump revoked former CIA Director John Brennan’s security clearance reportedly because of Brennan’s involvement with the Russia investigation, and threatened to revoke the clearances of other law enforcement personnel who supervised the investigation. (Section I.D.26, page 83-84)

We begin our analysis of those facts in Section II (pages 84-140) under the law of obstruction of justice, which is, in essence, interference with the rule of law. Congress has created a number of offenses to capture the broad range of conduct that constitutes such interference. President Trump faces the possibility of criminal liability for obstructing justice under three different theories.

- **Obstruction of a Proceeding.** President Trump’s apparent attempts to influence, impede or obstruct congressional and grand jury proceedings represent possible violations of 18 U.S.C. §§ 1503, 1505, and 1512(c);
- **Witness Intimidation.** President Trump’s misleading conduct or attempts to threaten, intimidate, and corruptly persuade witnesses may also constitute violations of Section 1512(b); and
- **Conspiracy.** President Trump’s potential coordination with other individuals to perpetrate this obstruction of justice could be a criminal conspiracy in violation of 18 U.S.C. § 371.

### **Obstruction of a Proceeding (Section II.A, pages 84-131)**

Sections 1503, 1505, and 1512(c)(2) prohibit a broad range of overlapping conduct—including acts or attempts to obstruct, interfere, or influence a qualifying proceeding. Sections 1503 and 1512(c)(2) are known as “omnibus” or “catch-all” provisions, and Section 1505 has similarly been interpreted as having a broad and all-inclusive meaning. Congress’ intent in drafting these statutes was to capture all corrupt methods by which someone might seek to hinder the proper administration of justice. Where, as here, multiple actions might be viewed as obstructing justice, they are viewed in sum.

President Trump’s pattern of conduct is of a kind and type that is regularly prosecuted as obstruction of justice. As we explain in Section II.A (at pages 85-132):

- One need not speak literally about obstructing justice to obstruct justice—vague or suggestive statements are sufficient.
- President Trump’s statements emphasizing loyalty, vouching for Flynn, and alluding to a quid pro quo relationship provide further evidence of obstruction of justice.
- President Trump’s position of power further bolsters the obstruction case because an individual’s status and ability to fire subordinates is relevant to the question of whether there was an attempt to influence, impede, or obstruct.
- Comey’s perception of President Trump’s comments as a directive that he (and the FBI) drop any investigation of Flynn for Flynn’s false statements about his conversations with the Russian ambassador further bolsters the obstruction case.
- Cover-up attempts, including President Trump’s apparently false justification for firing Comey and his dictation of a false statement for his son about the Trump Tower meeting, may also be grounds for obstruction charges.

We further explain that certain defenses advanced by the president and his allies do not hold water. Contrary to arguments made by the president and his allies, otherwise lawful actions

may constitute obstruction if undertaken with corrupt intent as we explain in Section II.A.1.f (pages 100-102). Otherwise legal conduct is just that—*otherwise* legal. Just as an employer can lawfully fire an employee, but not based on her sex, race, or religion, a president’s right to fire an FBI director does not mean he can do so if it is done for the corrupt purpose of obstructing an investigation.

Similarly, we explain in Section II.C that the theory that a president’s exercise of Article II powers cannot be the subject of criminal prosecution for obstruction of justice is also wrong. Although there are unique separation-of-powers concerns when the president’s decision to fire a subordinate is at issue, Congress has the power to impose conditions on that authority—including making corrupt attempts to influence, obstruct, or impede an investigation a crime.

### **Witness Intimidation (Section II.A.2, pages 103-109)**

Section 1512(b) criminalizes threats, intimidation, corrupt persuasion, and misleading conduct intended to: “influence, delay, or prevent the testimony of any person in an official proceeding”; “cause or induce any person to withhold testimony, or . . . be absent from an official proceeding”; or “hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense.” Like Sections 1503, 1505, and 1512(c), an attempt to obstruct justice under Section 1512(b) is sufficient; one need not succeed. Such conduct need not be explicit or overt. Nor does it require coercion, threats, or intimidation. Suggestively threatening, intimidating, or persuasive statements are sufficient to support a case under Section 1512(b).

In addition to the conduct outlined in conjunction with Sections 1503, 1505, and 1512(c), the case that President Trump violated Section 1512(b) may include:

1. President Trump’s questioning of Acting FBI Director Andrew McCabe’s political loyalties shortly after Comey’s firing and President Trump’s efforts to discredit McCabe.
2. President Trump’s tweet that “James Comey better hope there are no ‘tapes’ of our conversations before he starts leaking to the press!”, his subsequent admission that he has “no idea” whether such tapes ever existed, and his assertion that his false claim that there were tapes “may have changed” Comey’s story.
3. President Trump’s repeated classification of the Russia investigation as a “witch hunt” via Twitter and elsewhere, including his tweets stating that Democrats did not want Carter Page to testify about Russia because “He blows away their...case against him & now wants to clear his name by showing ‘the false or misleading testimony by James Comey, John Brennan...’ Witch Hunt!”
4. President Trump’s reported pressure on senior aides in June 2017 to “devise and carry out a campaign to discredit” three senior FBI officials, Deputy Director Andrew McCabe, Comey’s Chief of Staff Jim Rybicki, and then-general counsel James Baker, after learning they “were likely to be witnesses against him as part of special counsel Robert Mueller’s investigation.”
5. President Trump’s attorney reportedly telling counsel for Flynn and Manafort that the President was considering pardons for them in the Summer of 2017 and President Trump’s adviser and personal lawyer, Rudy Giuliani’s suggestion that President Trump may pardon people investigated by Mueller.

6. President Trump’s suggestion that while he is not currently considering a pardon for Flynn, he may do so in the future: “I don’t want to talk about pardons with Michael Flynn yet. We’ll see what happens.”
7. President Trump’s reportedly telling an aide that McGahn should deny a January 2018 story that alleged that the president had asked McGahn to fire Special Counsel Mueller.
8. President Trump reportedly revoking John Brennan’s security clearance because Brannan “led” the “sham” Russia investigation.

**Meaning of a “Proceeding” (Section II.A.3, pages 109-122)**

Sections 1503, 1505, and 1512 all require obstruction of a “proceeding,” but diverge on what is required to demonstrate a proceeding; however, there are potential avenues for prosecution under each.

Statute	“Proceeding” element	Potential qualifying proceeding(s)
§ 1512	Pending <i>or foreseeable</i> grand jury or congressional proceeding	Grand jury investigation of Michael Flynn and Paul Manafort as well as the congressional investigations of Russian interference and Michael Flynn
§ 1505	A pending congressional proceeding	Congressional investigations of Russian interference and Michael Flynn
§ 1503	A pending grand jury proceeding	The grand jury investigations of Michael Flynn, Paul Manafort, and Russian interference

Section 1512: Our analysis demonstrates that President Trump’s alleged actions would likely satisfy the “proceeding” requirement under Section 1512, which prohibits obstruction of pending or foreseeable grand jury and congressional investigations. There is a strong argument that President Trump foresaw a grand jury investigation or indictment of Flynn when he asked Comey to drop the investigation and subsequently fired him. He may also have foreseen a grand jury investigation when he dictated a misleading statement for his son, Donald Jr., regarding the purpose of the critical June 2016 Trump Tower meeting. The president could also be held responsible under Section 1512 for attempting to obstruct congressional investigations into Russia or Flynn by, among other things, dictating the misleading statement regarding the Trump Tower meeting and by pressuring and ultimately firing Comey. Moreover, much of the newly reported conduct that has come to light since the first edition of this paper occurred while proceedings were clearly pending. Grand jury and congressional proceedings were, for example, underway throughout the president’s attempts to prevent Attorney General Sessions from recusing himself and to persuade him to subsequently reverse the recusal. Additionally, Dowd’s reported suggestions to Flynn’s and Manafort’s attorneys of a possible pardon, which raises questions of a quid pro quo, occurred while grand jury investigations were ongoing. Although the strength of the nexus between President Trump’s potentially obstructive acts under Section 1512 and grand jury and congressional proceedings differ somewhat by act and proceeding, there appears to be at least a plausible nexus for all of the president’s likely obstructive conduct under the statute.

Section 1505: Similarly, President Trump’s alleged actions would likely satisfy the “proceeding” requirement under Section 1505, which prohibits obstruction of congressional investigations. Section 1505 explicitly states that a congressional investigation constitutes a “proceeding.” Congressional investigations need not have formal committee authorizations to fall within the purview of Section 1505. The House and Senate Intelligence Committee investigations qualify as pending proceedings, and all of President Trump’s potentially obstructive acts—including the January 27, 2017 “loyalty” dinner with Comey at the White House—took place while they were pending. Further fact-finding would be necessary to prove that the president’s obstructive acts had the natural and probable effect of interference with the ongoing criminal investigations, but it represents another plausible route for investigation and possible prosecution.

Section 1503: President Trump may have also attempted to influence ongoing grand jury investigations into Flynn, Manafort, or Russian interference under Section 1503 in satisfaction of that statute’s proceeding requirement. When President Trump fired Comey on May 9, 2017, there was an active grand jury investigation probing General Flynn’s lobbying activities on behalf of the Republic of Turkey. It also appears likely, but not certain, that a grand jury that has issued indictments in the ongoing Russia investigation was active by July 8, 2017, when President Trump dictated the misleading statement about the purpose of the June 9, 2016 Trump Tower meeting. Like the Section 1505 proceedings, further fact-finding is necessary, but if it can be demonstrated that President Trump’s obstructive acts had the natural and probable effect of interfering with these ongoing grand jury investigations, he could potentially be prosecuted under Section 1503 as well.

### **Corrupt Intent (Section II.A.4, pages 122-132)**

In addition to obstructive acts and a qualifying proceeding, each of the obstruction laws requires President Trump to have acted “corruptly,” a term that is used regularly in criminal law but is notoriously vague. In the context of the obstruction statutes, the most appropriate definition of “corruptly”—and the one adopted by most courts of appeals—is “motivated by an improper purpose.”

Even if there may be “innocent” motives for some of the president’s obstructive acts, the law does not require the government to prove that obstruction was a defendant’s sole, or even primary, purpose. So long as the government proves that President Trump acted in part for a corrupt reason, the existence of other, uncorrupt motives are not exonerative. In addition, purportedly altruistic motives—such as trying to help a friend—can be improper and therefore corrupt.

President Trump may have acted with the requisite corrupt intent if his actions were undertaken to influence the Russia or Flynn investigations to benefit or protect himself, his family, or his top aides—all of which are improper purposes. The fact that the Russia and Flynn investigations could have enormous impacts on the personal, financial, and political wellbeing of the president himself, several of his family members, including his son and his son-in-law, and many of his closest advisers, is relevant, though not decisive, to the analysis.

Besides the obstructive acts listed above, the evidence relating to President Trump’s corrupt intent includes:

- Any knowledge of the conduct underlying the investigation of Russian interference in the 2016 election and potential cooperation with the Trump campaign, including the more

than eighty contacts that the Trump campaign and transition officials had with Russia-linked operatives.

- Creating and promulgating a cover story for the Comey firing—ordering Rosenstein to draft a memo on Comey’s conduct that the president would subsequently use as cover for Comey’s firing, despite the fact that it did not contain a formal recommendation that Comey be terminated and was written after President Trump had already written another termination letter to Comey (that was never sent).
- Repeatedly clearing the room before making his requests related to the Russia and Flynn investigations, which is suggestive of knowledge of an improper purpose.
- Demanding loyalty from Comey.
- Requesting that DNI Coats intervene with Comey to get the FBI to back off the investigation into Flynn as well as President Trump’s request that DNI Coats and NSA Director Rogers deny the existence of evidence of collusion during the election.
- Stating to Russian officials one day after Comey’s firing that, “I just fired the head of the FBI. He was crazy, a real nut job. I faced great pressure because of Russia. That’s taken off.”
- Stating to *New York Times* reporters that if Special Counsel Mueller were to look at his finances and his family’s finances, it would be “a violation” and would cross a red line.
- Decrying Attorney General Sessions’ decision to follow applicable law and recuse himself from the Russia investigation, including that he would not have appointed Sessions had he known that he was going to do so, and threatening to fire Sessions in the wake of the special counsel’s appointment.
- Preparing Donald Trump Jr.’s misleading statement describing why he and other members of the Trump campaign met with a lawyer linked to the Kremlin in June of 2016.
- Tweeting—even if written with or by counsel—that “I had to fire General Flynn because he lied to the Vice President and the FBI. He has pled guilty to those lies. It is a shame because his actions during the transition were lawful. There was nothing to hide!” shortly after Flynn was indicted, indicating he knew Flynn had likely committed a crime.
- Telling the press, “I don’t want to talk about pardons with Michael Flynn yet. We’ll see what happens. Let’s see. I can say this: When you look at what’s gone on with the FBI and with the Justice Department, people are very, very angry.”

### **Conspiracy to Obstruct Justice (Section II.B, pages 132-135)**

Section 371 makes it a crime for two or more people either to agree to commit “any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose” and act to achieve the object of the conspiracy. Criminal conspiracy requires proof of three elements: (1) an agreement between two or more people to pursue an illegal goal; (2) the defendant’s knowledge of the illegal goal and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the

conspiracy. The illegal goal (or object) of the conspiracy may be either to violate a federal law (the “offense clause”) or to defraud the United States or any agency thereof (the “defraud clause”).

President Trump faces exposure under both the “offense clause” and the “defraud clause” of the conspiracy statute. The “offense clause” of Section 371 applies to any conspiracy that violates, or is intended to violate, a federal statute. President Trump’s obstruction or attempt to obstruct justice in violation of 18 U.S.C. §§ 1503, 1505, or 1512 would satisfy the offense clause. The “defraud clause” is even broader, requiring the government only to show that the defendant entered into an agreement “to obstruct a lawful government function by deceitful or dishonest means.” The U.S. Attorneys’ Manual defines this to include “obstructing, in any manner, a legitimate government function.” President Trump’s repeated attempts, potentially with the help of others, to exercise personal influence over the Russia investigation could satisfy this requirement.

Courts permit triers of fact to infer the presence of an agreement based entirely on circumstantial evidence due to the secretive nature of conspiracies. Relevant circumstantial evidence includes: concert of action among co-defendants, the relationship among co-defendants, negotiations in furtherance of the conspiracy, mutual representations to third parties, and evidence suggesting “unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy.” Each participant in a conspiracy also must have known of the illegal goal and willfully joined the unlawful plan. The government needs to show that the defendant had “a general knowledge” of the scope and objective of the plan, not necessarily that a defendant knew every detail. Similar to proving an agreement to enter a conspiracy under Section 371, the “knowledge and intent” element may be established using circumstantial evidence.

### **Possible Consequences (Sections III and IV, pages 141-167)**

Given this pattern of reported evidence, the special counsel has sufficient legal basis to seek to interview the president. However, due to that same strong evidence, the president is, we believe, ultimately unlikely to accede to the minimum level of live oral questioning that Mueller’s duties as a prosecutor require. The fact that the president has not yet agreed to an interview after eight months of reported negotiations is telling. It is impossible to know whether Mueller will abandon his effort to interview the president and simply issue a report, or alternatively, whether he will seek a subpoena and, if the president persists in his refusal, seek to compel the testimony. If so, the litigation could be lengthy and delay the issuance of a report.

Whichever course he takes, Special Counsel Mueller will have several options when his investigation is complete—including referral of matters to Congress, indictment of the president (followed by litigation of a likely challenge), and delayed prosecution of the president until after he has left office.

It is an open question as to whether the special counsel can obtain an indictment of a sitting president. While the matter is not free from doubt, it is our view that neither the Constitution nor any other federal law grants the president immunity from prosecution. The structure of the Constitution, the fundamental democratic principle that no person is above the law, and past Supreme Court precedent holding that the president is amenable to other forms of legal process all weigh heavily in favor of that conclusion. And while there can be debate as to whether a sitting president can be indicted, there is no doubt that a president can face

indictment once he is no longer in office. Reserving prosecution for that time, using a sealed indictment or otherwise, is another option for the special counsel.

Obstruction of justice by a public official is also an abuse of power of the highest order, and Congress has used impeachment proceedings against federal judges and presidents from both parties to address such conduct. For these reasons, the question of whether President Trump obstructed justice by interfering with investigations implicating his campaign for president and senior members of his White House staff and, if he did, what consequences might follow, is no mere sideshow—it is one that has lasting consequences for our democracy.

The special counsel can refer the obstruction case against the president to Congress, including by asking the grand jury and the court supervising it to transmit a report to the House Judiciary Committee. That is how the Watergate Special Prosecutor gave relevant information to Congress after the grand jury returned an indictment against President Nixon's co-conspirators. Mueller could, alternatively, transmit a report to the Deputy Attorney General pursuant to applicable regulations and request the report be released to Congress.

President Trump could be impeached and removed from office if he is deemed by Congress to have obstructed justice. While evaluation of the merits of such proceedings is premature, the gravity of President Trump's conduct is underscored by the fact that President Nixon resigned after facing the prospect of impeachment on charges that included obstruction of justice. President Clinton was impeached (but not convicted) on obstruction charges for conduct that in comparison involved substantially weaker accusations regarding his misuse of his authority. Such a proceeding need not establish all the technical elements of a criminal obstruction case; but where those elements are shown, the lesser congressional standard is certainly met.

## I. What are the relevant facts?

In this Section, we present an overview of the facts and allegations relevant to the potential obstruction case against the president.<sup>1</sup> Though we have endeavored to rely on primary sources (including public testimony, interview transcripts, and Twitter posts (“tweets”)) as much as possible, this paper, by necessity, also includes published references to press accounts that were developed using anonymous sources. In Subsection A (page 10) we detail the public evidence of foreign interference in the 2016 election, and possible collusion with the Trump campaign. In Subsection B (page 33), we detail the public evidence of the Trump transition team’s contacts with foreign nationals and officials. In Subsection C (page 39) we discuss the public facts about the various investigations and related proceedings that have arisen out of the Trump campaign’s contacts with foreign officials. In Subsection D (page 54) we outline President Trump’s pattern of potentially obstructive conduct and corrupt intent.

While the accumulated evidence takes many pages to detail, the basic narrative we present is simple: President Trump’s potentially obstructive actions—of which there are many—appear to have been calculated to prevent damaging (and possibly criminal) acts by those close to him, including campaign associates, friends, and family, from coming to light, or to wind down an investigation that could undermine his presidency. Any one of these motivations (or some combination of them) could constitute “corrupt intent,” which, when associated with an obstructive act that has a requisite nexus to a qualifying criminal or congressional proceeding, amounts to obstruction of justice.

### A. Foreign interference in the 2016 presidential campaign and possible coordination with the Trump campaign

The obstruction case begins, as it must, with what we currently know about foreign interference in the 2016 election and possible coordination between foreign elements and the Trump campaign. These facts and allegations provide crucial context for the obstruction case against the president because they demonstrate the seriousness of the investigation that the president has repeatedly attacked and sought to manipulate. They also provide an insight into a possible motive for the president’s efforts to influence the investigation of his campaign. If the president knew about even a few of these contacts (which we detail in the chronology we have attached as Appendix 1A), he may have been motivated to obstruct the investigation with the aim of preventing information that could be politically damaging or even incriminating from coming to light.

#### **1. *Russian-linked social media enterprise campaigned to sow discord in the U.S. electorate, support the candidacy of Donald Trump, and disparage Hillary Clinton***

According to allegations in an indictment obtained by the special counsel and unveiled on February 16, 2018, beginning as early as 2014, a group of individuals and companies collectively known as the “Internet Research Agency” engaged in a social media campaign to

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<sup>1</sup> We depart from a strict chronological recitation of the facts in the interest of providing a narrative that is as straightforward as possible. A chronology of facts is presented in Appendix A.1.

influence the 2016 election.<sup>2</sup> The campaign involved the creation and dissemination of political content on human-operated social media accounts that impersonate accounts of American influencers and voters. It also included the use of social media “bots” to promote messages distributed by Internet Research Agency or consistent with its goals.<sup>3</sup> By early to mid-2016, these efforts reflected a strategic goal of sowing discord in the U.S. political system, supporting then-candidate Donald Trump, and disparaging Hillary Clinton.<sup>4</sup>

Content created or promoted by the Internet Research Agency had a wide reach on social media. Facebook estimated that “approximately 126 million people may have been served content from a Page associated with the [Internet Research Agency] at some point during the two-year period [2014-16].”<sup>5</sup> In addition, Facebook estimates that “[a]pproximately 1.8 million people followed at least one Facebook Page associated with the Internet Research Agency.”<sup>6</sup> Facebook’s understanding of the scope of the disinformation campaign is still unfolding, as evidenced by their July 31, 2018 decision to shut down thirty-two false pages and accounts associated with the Internet Research Agency.<sup>7</sup> Twitter estimated that two Russian-linked accounts, @RT\_COM and @RT\_America, promoted election-related tweets that violated Twitter’s ads policies and generated 192 million impressions, 53.5 million of which were generated by U.S. users.<sup>8</sup> Twitter further estimates that Internet Research Agency-linked accounts had approximately 2.7 million followers.<sup>9</sup> One handle that posed as the Tennessee Republic Party using the handle “@TEN\_GOP” had 152,099 followers prior to its suspension.<sup>10</sup>

Although accounts associated with the Internet Research Agency had communications with low-level members of the Trump campaign, there is no publicly reported evidence that members of the Trump campaign were aware that those accounts were fraudulent or of the Internet Research Agency’s larger goals. The case against the Internet Research Agency and twelve co-defendants is still pending as of publication.

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<sup>2</sup> Internet Research Agency Indictment, at ¶¶ 1-2 (D.D.C. Feb. 16, 2018) available at <https://www.justice.gov/file/1035477/download>.

<sup>3</sup> *Id.* at ¶¶ 76-79.

<sup>4</sup> *Id.* at ¶ 6.

<sup>5</sup> Testimony of Colin Stretch, General Counsel, Facebook, U.S. Senate Committee on the Judiciary Subcommittee on Crime and Terrorism, Oct. 31, 2017, available at <https://www.judiciary.senate.gov/imo/media/doc/10-31-17%20Stretch%20Testimony.pdf>, at 5.

<sup>6</sup> Colin Stretch, Responses to Questions for the Record, U.S. Senate Committee on the Judiciary Subcommittee on Crime and Terrorism, Oct. 31, 2017, available at <https://www.judiciary.senate.gov/imo/media/doc/Stretch%20Responses%20to%20QFRs.pdf>.

<sup>7</sup> Elizabeth Dwoskin and Tony Roman, Facebook says it has uncovered a coordinated disinformation operation ahead of the 2018 midterm elections, *Washington Post*, Jul. 31, 2018 available at [https://www.washingtonpost.com/technology/2018/07/31/facebook-says-it-has-uncovered-coordinated-disinformation-operation-ahead-midterm-elections/?utm\\_term=.22d917bc63bd](https://www.washingtonpost.com/technology/2018/07/31/facebook-says-it-has-uncovered-coordinated-disinformation-operation-ahead-midterm-elections/?utm_term=.22d917bc63bd).

<sup>8</sup> Sean J. Edgett, Responses to Questions for the Record, U.S. Senate Committee on the Judiciary Subcommittee on Crime and Terrorism, Oct. 31, 2017, available at <https://www.judiciary.senate.gov/imo/media/doc/Edgett%20Responses.pdf>, at 1.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 12.

## **2. Russian military intelligence officers hacked into and stole data from Clinton campaign email accounts and servers of Democratic Party computer networks at the DNC and DCCC**

According to an indictment obtained by the special counsel and unveiled on July 13, 2018, officers of Russia's military intelligence agency GRU participated in a criminal conspiracy that conducted "large-scale cyber operations to interfere with the 2016 U.S. presidential election."<sup>11</sup> The indictment alleges that starting in at least March 2016, Russian intelligence officers hacked the email accounts of volunteers and officials working for the Clinton Campaign.<sup>12</sup> By April 2016, the Russian intelligence officers had also hacked into the computer networks of two organizations of the Democratic Party: DCCC and the DNC.<sup>13</sup> According to news reports, the hacking of the DNC began as early as 2015<sup>14</sup> and allowed the hackers to access the DNC's opposition research on Donald Trump, as well as all of the DNC's email traffic.<sup>15</sup>

The indictment alleges that Russian hacking activities occurred in March and April 2016. On or about March 19, Russian officers sent a spearphishing<sup>16</sup> email to the chairman of the Clinton campaign and approximately two days later stole the contents of that account--over 50,000 emails.<sup>17</sup> Also on March 19, Russian officers sent spearphishing emails to accounts of other Clinton officials, including its campaign manager and a senior foreign policy advisor.<sup>18</sup> Through these attacks, the Russian officers gained access to additional accounts and successfully stole email credentials and thousands of emails from other individuals affiliated with the campaign. On or about April 6, the conspirators created an email account that was very similar to a known email address of a member of the Clinton campaign and used it to send a spearphishing email to more than 30 other Clinton campaign employees.<sup>19</sup> In April, May, and

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<sup>11</sup> Indictment, U.S. v. Netyksho et. al. at ¶ 1 (D.D.C. Jul. 13, 2018) available at <https://d316fh83elv35t.cloudfront.net/static/2018/07/Muellerindictment.pdf>.

<sup>12</sup> *Id.* at ¶ 3.

<sup>13</sup> *Id.* at ¶¶ 4-5.

<sup>14</sup> See Jim Sciutto, How one typo helped let Russian hackers in, *CNN*, Jun. 27, 2017, available at <https://www.cnn.com/2017/06/27/politics/russia-dnc-hacking-csr/index.html>.

<sup>15</sup> Ellen Nakashima, Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump, *Washington Post*, Jun. 14, 2017, available at [https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0\\_story.html](https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html); Sam Biddle and Gabrielle Bluestone, This Looks Like the DNC's Hacked Trump Oppo File, *Gawker*, Jun. 15, 2016, available at <http://gawker.com/this-looks-like-the-dncs-hacked-trump-oppo-file-1782040426>.

<sup>16</sup> The FBI defines "spearphishing" (or "spear phishing") as emails sent to "select groups of people with something in common—they work at the same company, bank at the same financial institution, attend the same college, order merchandise from the same website, etc. The e-mails are ostensibly sent from organizations or individuals the potential victims would normally get e-mails from, making them even more deceptive." Spear Phishers: Angling to Steal Your Financial Info, *Federal Bureau of Investigation* (Apr. 1, 2009) available at [https://archives.fbi.gov/archives/news/stories/2009/april/spearphishing\\_040109](https://archives.fbi.gov/archives/news/stories/2009/april/spearphishing_040109).

<sup>17</sup> Netyksho Indictment at ¶ 21a.-b.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶ 21d.

June 2016, Russian officers hacked into the networks of the DNC and the DCCC and stole thousands of emails and documents from computers and email accounts.<sup>20</sup>

The first public report of the DNC hack was published on June 14, 2016. *The Washington Post* reported that hackers believed to be associated with the Russian government had penetrated the DNC's computer network.<sup>21</sup> Nonetheless, similar attacks continued throughout the Summer of 2016. On or about July 27, 2016—Russian officers attempted to spearfish a domain used by Clinton's personal office as well as seventy-six email addresses at the Clinton campaign.<sup>22</sup> Those attacks allegedly occurred on the same day that then-candidate Trump said, in reference to reports of Russian hacking of the Clinton campaign, "By the way, if they hacked, they probably have her 33,000 emails. I hope they do," and "They probably have her 33,000 emails that she lost and deleted."<sup>23</sup> Then-candidate Trump also added, "Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing."<sup>24</sup>

The indictment further alleges that Russian military officers released tens of thousands of stolen emails in documents using fictitious online personas, such as DC Leaks and Guccifer 2.0, to mask the involvement of the Russian government.<sup>25</sup> Beginning in June 2016 and continuing through the presidential election, the Russian officers used DCLeaks and Guccifer to release documents and emails that they had stolen from their hacking operations.<sup>26</sup> Russian officers released stolen documents and emails in a variety of ways, including on websites and social media accounts they created under the fake identities DCLeaks and Guccifer 2.0.

Using these identities, the Russian officers allegedly communicated with U.S. persons about the release of stolen documents. For instance, the indictment alleges that on or about August 15, 2016, the Russian officers wrote to "a person who was in regular contact with senior members of the presidential campaign of Donald J. Trump."<sup>27</sup> Trump associate Roger Stone has acknowledged that he is probably the person referred to in the indictment.<sup>28</sup> Russian officers also allegedly engineered the release of documents they stole from the DNC and the Clinton campaign through a third-party entity referred to as "Organization 1" in the indictment,

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<sup>20</sup> *Id.* at ¶¶ 26-31.

<sup>21</sup> Nakashima, *Washington Post*, Jun. 14, 2017; Kevin Poulsen and Spencer Ackerman, EXCLUSIVE: 'Lone DNC Hacker' Guccifer 2.0 Slipped Up and Revealed He Was a Russian Intelligence Officer, *The Daily Beast*, Mar. 22, 2018, available at <https://www.thedailybeast.com/exclusive-lone-dnc-hacker-guccifer-20-slipped-up-and-revealed-he-was-a-russian-intelligence-officer?source=email&via=desktop>.

<sup>22</sup> *Id.* at ¶ 22.

<sup>23</sup> Morgan Winsor, Michael Hayden, Candace Smith, and John Santucci, Trump Says He Hopes Russian Hackers Find Clinton's Deleted Emails, *ABC News*, Jul. 27, 2016, available at <https://abcnews.go.com/Politics/donald-trump-spoken-vladimir-putin-urges-russian-president/story?id=40922483>.

<sup>24</sup> *Id.*

<sup>25</sup> Netyksho Indictment at ¶¶ 6-8.

<sup>26</sup> *Id.* at ¶ 37.

<sup>27</sup> *Id.* at ¶ 44.

<sup>28</sup> <https://twitter.com/ChrisCuomo/status/1017939029143113729>; Charles Ventura, Roger Stone: I'm 'probably' unnamed person mentioned in Robert Mueller indictment, *USA Today*, Jul. 14, 2017, available at <https://www.usatoday.com/story/news/politics/onpolitics/2018/07/14/roger-stone-robert-mueller-indictment-russia-hacking-donald-trump/785103002/>.

which has been identified by *The Washington Post* and others as WikiLeaks.<sup>29</sup> WikiLeaks began posting hacked DNC emails and documents on July 22, 2016.<sup>30</sup> The indictment states that using the Guccifer 2.0 persona, the Russian officers discussed the timing of the release of stolen documents with WikiLeaks to maximize the impact of those documents on the election.<sup>31</sup> For instance, WikiLeaks released over 20,000 emails and documents stolen by Russian officers from the DNC on July 22—only days before the start of the Democratic National Convention.<sup>32</sup> Three days later, the FBI confirmed that it had opened an investigation into the hacking of the DNC.<sup>33</sup>

The emails of Clinton’s campaign chairman were released starting on October 7, 2016.<sup>34</sup> The first release came on the same day as two other major events: First, the Department of Homeland Security and the Office of the Director of National Intelligence on Election Security released a joint statement asserting that “[t]he U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations.”<sup>35</sup> Second, *The Washington Post* published a video showing Trump bragging about assaulting women behind the scenes of a 2005 appearance on Access Hollywood.<sup>36</sup> The WikiLeaks release occurred less than one hour after the *Post*’s story.<sup>37</sup>

Prior to President-elect Trump’s inauguration, the United States intelligence community released a public version of an otherwise classified report explaining its assessment that Russia was behind these and other actions and had been seeking to influence the 2016 U.S. presidential election.<sup>38</sup> The report assessed that “Russia’s goals were to undermine public faith

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<sup>29</sup> Netyksho Indictment at ¶ 47. Devlin Barrett and Matt Zapposky, Mueller probe indicts 12 Russians with hacking of Democrats in 2016, *Washington Post*, Jul. 13, 2018, available at [https://www.washingtonpost.com/world/national-security/rod-rosenstein-expected-to-announce-new-indictment-by-mueller/2018/07/13/bc565582-86a9-11e8-8553-a3ce89036c78\\_story.html?utm\\_term=.9d0e2e426e3d](https://www.washingtonpost.com/world/national-security/rod-rosenstein-expected-to-announce-new-indictment-by-mueller/2018/07/13/bc565582-86a9-11e8-8553-a3ce89036c78_story.html?utm_term=.9d0e2e426e3d).

<sup>30</sup> Joe Uchill, WikiLeaks Posts 20,000 DNC Emails, *The Hill*, Jul. 22, 2017, available at <http://thehill.com/policy/cybersecurity/288883-WikiLeaks-posts-20000-dnc-emails>.

<sup>31</sup> Netyksho Indictment at ¶ 47 (D.D.C. Jul. 13, 2018).

<sup>32</sup> *Id.* at ¶ 48.

<sup>33</sup> Mike Levine, Rick Klein, and Shushannah Walshe, FBI Confirms Investigation into Massive Hack of DNC, *ABC News*, Jul. 25, 2016, available at <http://abcnews.go.com/US/fbi-confirms-investigation-massive-hack-dnc/story?id=40855489>.

<sup>34</sup> Netyksho Indictment at ¶ 49 (D.D.C. Jul. 13, 2018); Eric Lipton, David E. Sanger, and Scott Shane, The Perfect Weapon: How Russian Cyberpower Invaded the U.S., *New York Times*, Dec. 13, 2016, available at <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html>.

<sup>35</sup> Joint Statement, *Department of Homeland Security and Office of the Director of National Intelligence on Election Security*, Oct. 7, 2016, available at <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national>.

<sup>36</sup> Watch: Donald Trump recorded having extremely lewd conversation about women in 2005, *Washington Post*, Oct. 7, 2016, available at [https://www.washingtonpost.com/video/national/watch-donald-trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3bf16d1e-8caf-11e6-8cdc-4fbb1973b506\\_video.html?utm\\_term=.81d63f2a6ab5](https://www.washingtonpost.com/video/national/watch-donald-trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3bf16d1e-8caf-11e6-8cdc-4fbb1973b506_video.html?utm_term=.81d63f2a6ab5).

<sup>37</sup> Aaron Sharockman, It’s True: WikiLeaks dumped Podesta emails hour after Trump video surfaced, *Politifact*, Dec. 18, 2016, available at <http://www.politifact.com/truth-o-meter/statements/2016/dec/18/john-podesta/its-true-wikileaks-dumped-podesta-emails-hour-afte/>.

<sup>38</sup> Assessing Russian Activities and Intentions in Recent US Elections, *Office of the Director of National Intelligence*, Jan. 6, 2017, available at [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

in the U.S. democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.”<sup>39</sup> The report further assessed that “[Russian President Vladimir] Putin and the Russian Government developed a clear preference for President-elect Trump.”<sup>40</sup>

### **3. *Contacts between the Trump campaign and Russian individuals and officials—including meetings about “dirt” on Clinton***

Donald J. Trump announced his candidacy for president on June 16, 2015.<sup>41</sup> Three of his adult children, Donald Trump Jr., Eric Trump, and Ivanka Trump, as well as his son-in-law, Jared Kushner, were principal advisers or surrogates for the Trump campaign.<sup>42</sup> Although many other individuals played a role in the campaign, we highlight the roles of only a few here: Lt. General (Ret.) Michael Flynn provided the campaign with foreign policy advice.<sup>43</sup> Former Alabama Senator Jeff Sessions served as chairman of the campaign’s national security advisory committee.<sup>44</sup> George Papadopoulos and Carter Page served as members of the campaign’s foreign policy team.<sup>45</sup> Paul Manafort served as campaign chairman and chief strategist from May 19, 2016 to August 19, 2016.<sup>46</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Jose A. DelReal, [Donald Trump Announces Presidential Bid](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/donald-trump-to-announce-his-presidential-plans-today/), *Washington Post*, Jun 16, 2015, available at <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/donald-trump-to-announce-his-presidential-plans-today/>.

<sup>42</sup> Jonathan Mahler, [In Campaign and Company, Ivanka Trump Has a Central Role](https://www.nytimes.com/2016/04/17/us/politics/ivanka-trump-donald-trump.html), *New York Times*, Apr. 16, 2016, available at <https://www.nytimes.com/2016/04/17/us/politics/ivanka-trump-donald-trump.html>; Stephen Collinson, [Trump Pick Shows Power of Family Brain Trust](http://www.cnn.com/2016/07/14/politics/donald-trump-mike-pence-vice-president-children/index.html), *CNN*, Jul. 15, 2016, available at <http://www.cnn.com/2016/07/14/politics/donald-trump-mike-pence-vice-president-children/index.html>; Steven Bertolini, [Exclusive Interview: How Jared Kushner Won Trump the White House](https://www.forbes.com/sites/stevenbertoni/2016/11/22/exclusive-interview-how-jared-kushner-won-trump-the-white-house), *Forbes*, Nov. 22, 2016, available at <https://www.forbes.com/sites/stevenbertoni/2016/11/22/exclusive-interview-how-jared-kushner-won-trump-the-white-house>.

<sup>43</sup> Dana Priest, [Trump Adviser Michael T. Flynn on His Dinner with Putin and Why Russia Today Is Just Like CNN](https://www.washingtonpost.com/news/checkpoint/wp/2016/08/15/trump-adviser-michael-t-flynn-on-his-dinner-with-putin-and-why-russia-today-is-just-like-cnn/), *Washington Post*, Aug. 15, 2016, available at <https://www.washingtonpost.com/news/checkpoint/wp/2016/08/15/trump-adviser-michael-t-flynn-on-his-dinner-with-putin-and-why-russia-today-is-just-like-cnn/>; Mark Hosenball and Steve Holland, [Trump Being Advised by Ex-U.S. Lieutenant General Who Favors Closer Russia Ties](http://www.reuters.com/article/us-usa-election-trump-advisor-idUSMTZSAPEC2Q6G3JRH), *Reuters*, Feb. 26, 2016, available at <http://www.reuters.com/article/us-usa-election-trump-advisor-idUSMTZSAPEC2Q6G3JRH>.

<sup>44</sup> Tom LoBianco, [Trump Taps Sessions to Lead National Security Efforts](http://www.cnn.com/2016/03/03/politics/donald-trump-jeff-sessions-national-security/index.html), *CNN*, Mar. 3, 2016, available at <http://www.cnn.com/2016/03/03/politics/donald-trump-jeff-sessions-national-security/index.html>.

<sup>45</sup> Post Opinions Staff, [A Transcript of Donald Trump’s Meeting with the Washington Post Editorial Board](https://www.washingtonpost.com/blogs/post-partisan/wp/2016/03/21/a-transcript-of-donald-trumps-meeting-with-the-washington-post-editorial-board/), *Washington Post*, Mar. 21, 2016, available at <https://www.washingtonpost.com/blogs/post-partisan/wp/2016/03/21/a-transcript-of-donald-trumps-meeting-with-the-washington-post-editorial-board/>; Sharon LaFraniere, Mark Mazzetti and Matt Apuzzo, [How the Russia Inquiry Began: A Campaign Aide, Drinks and Talk of Political Dirt](https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html), *New York Times*, Dec. 30, 2017, available at <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html>.

<sup>46</sup> Maggie Haberman and Ashley Parker, [Trump Aide Paul Manafort Promoted to Campaign Chairman and Chief Strategist](https://www.nytimes.com/2016/05/20/us/politics/paul-manafort-trump.html), *New York Times*, May 19, 2016, available at <https://www.nytimes.com/2016/05/20/us/politics/paul-manafort-trump.html>; Maggie Haberman and Jonathan Martin, [Paul Manafort Quits Donald Trump’s Campaign After a Tumultuous Run](https://www.nytimes.com/2016/08/19/us/politics/paul-manafort-quits-trump-campaign.html), *New York*

In the Summer of 2016, the FBI began probing possible connections between Russia and the Trump campaign. According to *The New York Times*, when the leaked DNC emails appeared online, the Australian intelligence community informed U.S. authorities that George Papadopoulos, a young foreign policy adviser to the Trump campaign, had disclosed to an Australian diplomat in May 2016 that he was aware that “Russia had political dirt on Hilary Clinton.”<sup>47</sup> Another reported “catalyst” for the investigation was a July 7-8, 2016, trip to Moscow by a second Trump campaign foreign policy adviser, Carter Page, during which Page criticized U.S. policy toward Russia.<sup>48</sup>

We now know that Trump campaign officials reportedly had at least 60 contacts with Russian individuals and officials during the 2016 election cycle.<sup>49</sup> Some of these contacts were publicly known soon after they happened, while many others were only disclosed after President Trump took office. Here, we summarize the most significant of these contacts.

**a. George Papadopoulos admitted meetings with the “overseas professor” and “female Russian national”**

According to court papers, on March 14, 2016, shortly after learning he would be a foreign policy adviser to the Trump campaign with a focus on improving U.S.-Russia relations, George Papadopoulos met an “overseas professor,” identified by *The Washington Post* as Joseph Mifsud.<sup>50</sup> Papadopoulos believed that Mifsud had “substantial connections to Russian government officials,” and who took an interest in Papadopoulos in light of his campaign position.<sup>51</sup> On March 21, 2016, then-candidate Trump referenced Papadopoulos by name as

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*Times*, Aug. 19, 2016, available at <https://www.nytimes.com/2016/08/20/us/politics/paul-manafort-resigns-donald-trump.html>.

<sup>47</sup> LaFraniere, Mazzetti, and Apuzzo, *New York Times*, Dec. 30, 2017.

<sup>48</sup> Scott Shane, Mark Mazzetti, and Adam Goldman, *Trump Adviser’s Visit to Moscow Got the F.B.I.’s Attention*, *New York Times*, Apr. 19, 2017, available at <https://www.nytimes.com/2017/04/19/us/politics/carter-page-russia-trump.html>; Michael S. Schmidt, *Major Takeaways From Carter Page’s Congressional Interview on Russian Election Meddling*, *New York Times*, Nov. 7, 2017, available at <https://www.nytimes.com/2017/11/07/us/politics/trump-adviser-carter-page-transcript-meeting-2016-campaign-russia.html>. Christopher Steele, a former British intelligence officer reached out independently to the FBI during the Summer and Fall of 2016 with information about possible ties between the Russians and the Trump campaign that he had documented in a series of reports comprising thirty-five pages commonly referred to as the “Steele Dossier.” The Steele Dossier contained compromising and “salacious” allegations about then-candidate Trump and those in his orbit, referring to Page and others by name. LaFraniere, Mazzetti, and Apuzzo, *New York Times*, Dec. 30, 2017; Nicholas Fandos, Matthew Rosenberg and Sharon LaFraniere, *Democratic Senator Releases Transcript of Interview With Dossier Firm*, *New York Times*, Jan. 9, 2018, available at <https://www.nytimes.com/2018/01/09/us/politics/feinstein-fusion-gps-glenn-simpson-transcript.html>.

<sup>49</sup> *Trump’s Russia Cover-Up by the Numbers – 82+ Contacts with Russia-Linked Operatives*, *The Moscow Project – Center for American Progress*, Mar 21, 2018 (updated Jul. 10, 2018), available at <https://themoscowproject.org/explainers/trumps-russia-cover-up-by-the-numbers-70-contacts-with-russia-linked-operatives/>. (While there were at least 82 contacts between Trump associates and Russia-linked operatives, some of these contacts during the transition period after the election.)

<sup>50</sup> Rosalind S. Helderman, *Who’s Who in the George Papadopoulos Court Documents*, *Washington Post*, Nov. 2, 2017, available at [https://www.washingtonpost.com/politics/whos-who-in-the-george-papadopoulos-court-documents/2017/10/30/e131158c-bdb3-11e7-97d9-bdab5a0ab381\\_story.html](https://www.washingtonpost.com/politics/whos-who-in-the-george-papadopoulos-court-documents/2017/10/30/e131158c-bdb3-11e7-97d9-bdab5a0ab381_story.html).

<sup>51</sup> *Statement of the Offense*, *U.S. v. George Papadopoulos*, No. 17-Cr.-182 (RDM) (D.D.C. October 5, 2017), ECF No. 19, at ¶ 5 available at <https://www.justice.gov/file/1007346/download>.

one of his foreign policy advisers during a meeting with *The Washington Post*.<sup>52</sup> Three days later, on March 24, 2016, Papadopoulos met with Mifsud and a “female Russian national” who was identified to him as both a relative of Putin and someone with “connections to senior Russian government officials.”<sup>53</sup> (*The New York Times* has identified the female Russian national as Olga Polonskaya, a former manager of a wine distribution company.<sup>54</sup>)

Following the meeting, Papadopoulos emailed Trump campaign national co-chairman Sam Clovis<sup>55</sup> and “several members of the Campaign’s foreign policy team and stated that he had just met with his ‘good friend’ the Professor, who had introduced him to the Female Russian National,” who he described as Putin’s niece (though Papadopoulos later learned she was not his niece), as well as the Russian Ambassador in London (with whom Papadopoulos did not in fact meet).<sup>56</sup> Papadopoulos “stated that the topic of their discussion was ‘to arrange a meeting between us and the Russian leadership to discuss U.S.-Russia ties under President Trump.’ [Clovis] responded that he would ‘work it through the campaign,’ but that no commitments should be made at that point. [Clovis] added: ‘Great work.’”<sup>57</sup>

According to court papers, on March 31, 2016, Papadopoulos attended a national security meeting in Washington D.C. with then-candidate Trump, then-Senator Sessions,<sup>58</sup> and other foreign policy advisers for the campaign. Papadopoulos shared with the group that “he had connections that could help arrange a meeting” between Putin and Trump.<sup>59</sup> Another adviser present at the meeting disclosed to *The New York Times* that Senator Sessions “‘shut [Papadopoulos] down,’” and said “‘We’re not going to do it’ ... ‘I’d prefer that nobody speak about this again,’” while others present reportedly raised questions about the propriety of a meeting in light of the U.S. sanctions imposed on Russia.<sup>60</sup> Then-candidate Trump posted a photograph of this meeting to Twitter in which he, Papadopoulos, and Sessions are visible.<sup>61</sup>

On or around April 18, 2016, according to court papers, Mifsud introduced Papadopoulos over email to an individual in Moscow.<sup>62</sup> This individual was identified by *The Washington Post* to be Ivan Timofeev, a program director at the Russian International Affairs Council, a Russian government-funded think tank, who claimed connections to the Russian Ministry of Foreign Affairs.<sup>63</sup> A week later, on April 25, 2016, Papadopoulos emailed a “Senior

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<sup>52</sup> *Id.* at ¶ 6; *Washington Post*, Mar. 21, 2016.

<sup>53</sup> *Statement of the Offense* at ¶¶ 2, 7, *U.S. v. George Papadopoulos*, 17-cr-182 (D.D.C. Oct. 5, 2017) (henceforth “*Papadopoulos Stmt.*”), available at <https://www.justice.gov/file/1007346/download>.

<sup>54</sup> Sharon LaFraniere, David D. Kirkpatrick, Andrew Higgins, and Michael Schwartz, *A London Meeting of an Unlikely Group: How a Trump Adviser Came to Learn of Clinton ‘Dirt’*, *New York Times*, Nov. 10, 2017, available at <https://www.nytimes.com/2017/11/10/us/russia-inquiry-trump.html>.

<sup>55</sup> Helderman, *Washington Post*, Nov. 2, 2017. An attorney for Clovis confirmed that references in the court papers to “the campaign supervisor” referred to Clovis.

<sup>56</sup> *Papadopoulos Stmt.* at ¶ 8 & n.1 (D.D.C. Oct. 5, 2017).

<sup>57</sup> *Id.*

<sup>58</sup> Sessions’ presence was not mentioned in the court papers but was reported by the *New York Times*. See Scott Shane, *Trump Campaign Got Early Word Russia Had Democrats’ Emails*, *New York Times*, Oct. 30, 2017, available at <https://www.nytimes.com/2017/10/30/us/politics/trump-russia-mueller-indictment.html>.

<sup>59</sup> *Papadopoulos Stmt.* at ¶ 9.

<sup>60</sup> Shane, *New York Times*, Oct. 30, 2017.

<sup>61</sup> [https://twitter.com/realDonaldTrump/status/715725628465680386?ref\\_src=twsrc%5Etfw](https://twitter.com/realDonaldTrump/status/715725628465680386?ref_src=twsrc%5Etfw).

<sup>62</sup> *Papadopoulos Stmt.* at ¶ 11.

<sup>63</sup> Helderman, *Washington Post*, Nov. 2, 2017; *Papadopoulos Stmt.* at ¶ 11 (D.D.C. Oct. 5, 2017).

Policy Advisor” within the campaign that, “The Russian government has an open invitation by Putin for Mr. Trump to meet him when he is ready....”<sup>64</sup> On or around the next day, April 26, 2016, Mifsud and Papadopoulos had a breakfast meeting in which Mifsud informed Papadopoulos that he had just returned from Moscow, where he met with high-level Russian government officials and that he had learned that the Russians possessed “‘dirt’ on then-candidate Hillary Clinton in the form of ‘thousands of emails. . . .”<sup>65</sup> The day after, Papadopoulos emailed another Trump campaign policy advisor, reported by *The New York Times* to be Stephen Miller,<sup>66</sup> and stated that he had “‘some interesting messages coming in from Moscow about a trip when the time is right.”<sup>67</sup> Papadopoulos also emailed Trump campaign manager Corey Lewandowski and stated that he had “‘been receiving a lot of calls over the last month about Putin wanting to host [Trump] and the team when the time is right.”<sup>68</sup>

Between May and August 2016, Papadopoulos continued to communicate with Mifsud, Polonskaya, and Timofeev about the possibility of a meeting between the Russian government and the Trump campaign.<sup>69</sup> Papadopoulos reportedly kept others in the Trump campaign apprised of these communications,<sup>70</sup> including campaign chairman Paul Manafort, chief executive Steve Bannon, and campaign adviser Michael Flynn.<sup>71</sup>

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<sup>64</sup> Papadopoulos Stmt. at ¶ 13 (D.D.C. Oct. 5, 2017).

<sup>65</sup> *Id.* at ¶ 14. Then-candidate Trump delivered a primary victory speech on April 26, 2017, in which he said: “We’re going to have a great relationship with Putin and Russia,” followed by a speech the next day at the Mayflower Hotel in which he called for “improved relations with Russia.” Presidential Candidate Donald Trump Primary Night Speech, C-SPAN, Apr. 26, 2016, available at <https://www.c-span.org/video/?408719-1/donald-trump-primary-night-speech&start=1889&transcriptQuery=putin> (at approx. minute 31); Ryan Teague Beckwith, Read Donald Trump’s ‘America First’ Foreign Policy Speech, *Time*, Apr. 27, 2016, available at <http://time.com/4309786/read-donald-trumps-america-first-foreign-policy-speech/?iid=sr-link5>. *The New York Times* has reported that Papadopoulos helped edit the Mayflower speech and both Senator Sessions and Kushner are understood to have had what have been characterized as brief exchanges with Russian Ambassador Sergey Kislyak at the event. See LaFraniere, Kirkpatrick, Higgins, and Schwirtz *New York Times*, Nov. 10, 2017. See also Adam Entous, Ellen Nakashima, and Greg Miller, Sessions discussed Trump campaign-related matters with Russian ambassador U.S. intelligence intercepts show, *Washington Post*, Jul. 21, 2017, available at [https://www.washingtonpost.com/world/national-security/sessions-discussed-trump-campaign-related-matters-with-russian-ambassador-us-intelligence-intercepts-show/2017/07/21/3e704692-6e44-11e7-9c15-177740635e83\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-discussed-trump-campaign-related-matters-with-russian-ambassador-us-intelligence-intercepts-show/2017/07/21/3e704692-6e44-11e7-9c15-177740635e83_story.html).

<sup>66</sup> LaFraniere, Kirkpatrick, Higgins, and Schwirtz, *New York Times*, Nov. 10, 2017.

<sup>67</sup> Papadopoulos Stmt. at ¶ 15(a)-(b) (D.D.C. Oct. 5, 2017). Lewandowski is the “High-Ranking Campaign Official” discussed in the court papers, according to the *Washington Post*. Helderman, *Washington Post*, Nov. 2, 2017.

<sup>68</sup> Papadopoulos Stmt. at ¶ 15(a)-(b) (D.D.C. Oct. 5, 2017); Helderman, *Washington Post*, Nov. 2, 2017.

<sup>69</sup> Papadopoulos Stmt. at ¶¶ 16-21 (D.D.C. Oct. 5, 2017).

<sup>70</sup> *Id.* at ¶¶ 15, 18-20.

<sup>71</sup> *Id.* at ¶ 19; Helderman, *Washington Post*, Nov. 2, 2017; Rosalind S. Helderman, and Tom Hamburger, ‘You should do it’: Trump officials encouraged George Papadopoulos’s foreign outreach, documents show, *Washington Post*, Mar. 23, 2018, available at [https://www.washingtonpost.com/politics/you-should-do-it-trump-officials-encouraged-george-papadopoulos-foreign-outreach-documents-show/2018/03/23/2dae8c8e-2d38-11e8-8688-e053ba58f1e4\\_story.html](https://www.washingtonpost.com/politics/you-should-do-it-trump-officials-encouraged-george-papadopoulos-foreign-outreach-documents-show/2018/03/23/2dae8c8e-2d38-11e8-8688-e053ba58f1e4_story.html).

Papadopoulos pleaded guilty under seal on October 5, 2017 to making a false statement to FBI investigators about his contact with Russians.<sup>72</sup> On October 30, 2017, Papadopoulos' contacts and communications were revealed to the public for the first time when the court papers were publicly disclosed.<sup>73</sup>

### **b. Roger Stone**

Roger Stone served as Donald Trump's political advisor and consultant for a number of years before, and for a brief period during, the 2016 campaign.<sup>74</sup> After he ended his official position with the campaign on August 8, 2015, Stone continued to play an unofficial role advising the campaign and appearing in various media outlets as a pro-Trump commentator.<sup>75</sup>

In late May of 2016, Stone met with a Russian man who called himself "Henry Greenberg" and promised dirt on Hillary Clinton. The meeting was organized by Michael Caputo, a communications official with the Trump campaign. After the meeting, Caputo checked in with Stone, texting him "how crazy is the Russian?" to which Stone replied that the meeting was "a big waste of time" because the Russian "wants big &\$ for the info- waste of time."<sup>76</sup> "The Russian way. Anything at all interesting?" Caputo replied.<sup>77</sup> "No," Stone replied.<sup>78</sup>

In subsequent media statements both Stone and Caputo insisted that the meeting was inconsequential, and that they are of the belief that the meeting was an FBI sting operation. "Henry Greenberg"—who also has gone by the name "Henry Oknyansky"—has claimed that he was once an FBI informant, but also that he had stopped his FBI cooperation sometime after 2013. Neither Caputo nor Stone disclosed the meeting during their testimony before the House Permanent Select Committee on Intelligence.<sup>79</sup>

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<sup>72</sup> See Papadopoulos Stmt., (D.D.C. Oct. 5, 2017).

<sup>73</sup> Matt Apuzzo and Michael S. Schmidt, Trump Campaign Adviser Met With Russian to Discuss 'Dirt' on Clinton, *New York Times*, Oct. 30, 2017, *available at* <https://www.nytimes.com/2017/10/30/us/politics/george-papadopoulos-russia.html>.

<sup>74</sup> Ben Schreckinger, Trump's debate "dirty trickster", *Politico*, Aug. 6, 2015 *available at* <https://www.politico.com/story/2015/08/donald-trumps-debate-dirty-trickster-121098>

<sup>75</sup> See, e.g., Philip Rucker and Robert Costa, While the GOP worries about convention chaos, Trump pushes for 'showbiz' feel, *The Washington Post*, Apr. 17, 2016 *available at* [https://www.washingtonpost.com/politics/while-the-gop-worries-about-convention-chaos-trump-pushes-for-showbiz-feel/2016/04/17/482cc914-0322-11e6-9d36-33d198ea26c5\\_story.html?utm\\_term=.a961ebc7abc7](https://www.washingtonpost.com/politics/while-the-gop-worries-about-convention-chaos-trump-pushes-for-showbiz-feel/2016/04/17/482cc914-0322-11e6-9d36-33d198ea26c5_story.html?utm_term=.a961ebc7abc7).

<sup>76</sup> Manuel Roig-Franzia and Rosalind S. Helderman, Trump associate Roger Stone reveals new contact with Russian national during 2016 campaign, Jun. 17, 2018 *available at* [https://www.washingtonpost.com/politics/trump-associate-roger-stone-reveals-new-contact-with-russian-national-during-2016-campaign/2018/06/17/4a8123c8-6fd0-11e8-bd50-b80389a4e569\\_story.html?utm\\_term=.7e2843fa31a6](https://www.washingtonpost.com/politics/trump-associate-roger-stone-reveals-new-contact-with-russian-national-during-2016-campaign/2018/06/17/4a8123c8-6fd0-11e8-bd50-b80389a4e569_story.html?utm_term=.7e2843fa31a6).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

### c. Paul Manafort

Paul Manafort joined the Trump campaign on March 28, 2016 to manage the campaign's delegate process and the Republican nominating convention.<sup>80</sup> Manafort was promoted to campaign chairman and chief strategist on May 19, 2016,<sup>81</sup> and then again on June 20, 2016, when Trump fired campaign manager Corey Lewandowski and put Manafort in charge.<sup>82</sup>

Shortly after joining the Trump campaign, Manafort reportedly was in contact with Russian oligarch Oleg Vladimirovich Deripaska through one or more intermediaries. For instance, on April 11, 2016, Paul Manafort exchanged emails with his longtime colleague Konstantin Kilimnik, in which Manafort wrote, "I assume you have shown our friends my media coverage, right?" Kilimnik responded, "Absolutely. Every article." Manafort responded, "How do we use to get whole. Has OVD operation seen?"<sup>83</sup> (*The Atlantic* and *The Washington Post* have identified Russian oligarch Oleg Vladimirovich Deripaska as the individual referred to as OVD in Manafort's emails.<sup>84</sup>) On July 7, 2016, Paul Manafort again contacted Kilimnik and asked that a message be sent to Deripaska.<sup>85</sup> Manafort reportedly told Kilimnik that he could arrange "private briefings" for Deripaska on campaign activities if needed, though no evidence has emerged proving that these briefings in fact took place.<sup>86</sup>

Papadopoulos also corresponded with Manafort about efforts to arrange a high-level meeting between the Trump campaign and Russia. On May 21, 2016, Papadopoulos emailed another high-ranking campaign official (identified by *The Washington Post* as Paul Manafort<sup>87</sup>) to inform him that "Russia has been eager to meet Mr. Trump for quite some time and have been reaching out to me to discuss."<sup>88</sup> Manafort reportedly forwarded the email to Rick Gates and wrote, "We need someone to communicate that [Trump] is not doing these trips."<sup>89</sup> Manafort continued, "It should be someone low level in the campaign so as not to send any signal."<sup>90</sup>

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<sup>80</sup> Alexander Burns and Maggie Haberman, Donald Trump Hires Paul Manafort to Lead Delegate Effort, *New York Times*, Mar. 28, 2016, available at <https://www.nytimes.com/politics/first-draft/2016/03/28/donald-trump-hires-paul-manafort-to-lead-delegate-effort/>.

<sup>81</sup> Haberman and Parker, *New York Times*, May 19, 2016.

<sup>82</sup> Emily Flitter and Emily Stephenson, Trump Fires Campaign Manager in Shakeup for Election Push, *Reuters*, Jun. 20, 2016, available at <https://www.reuters.com/article/us-usa-election-idUSKCN0Z61L5>.

<sup>83</sup> Julia Ioffe and Franklin Foer, Did Manafort Use Trump to Curry Favor With a Putin Ally?, *Atlantic*, Oct. 2, 2017, available at <https://www.theatlantic.com/politics/archive/2017/10/emails-suggest-manafort-sought-approval-from-putin-ally-deripaska/541677/>.

<sup>84</sup> *Id.*; Tom Hamburger, Rosalind S. Helderman, Carol D. Leonnig, and Adam Entous, Manafort offered to give Russian billionaire 'private briefings' on 2016 campaign, *Washington Post*, Sept. 20, 2017, available at [https://www.washingtonpost.com/politics/manafort-offered-to-give-russian-billionaire-private-briefings-on-2016-campaign/2017/09/20/399bba1a-9d48-11e7-8ea1-ed975285475e\\_story.html](https://www.washingtonpost.com/politics/manafort-offered-to-give-russian-billionaire-private-briefings-on-2016-campaign/2017/09/20/399bba1a-9d48-11e7-8ea1-ed975285475e_story.html).

<sup>85</sup> Hamburger, Helderman, Leonnig, and Entous, *Washington Post*, Sept. 20, 2017.

<sup>86</sup> *Id.* See also Ioffe & Foer, *Atlantic*, Oct. 2, 2017.

<sup>87</sup> Helderman, *Washington Post*, Nov. 2, 2017.

<sup>88</sup> Papadopoulos Stmt. at ¶ 19 (D.D.C. Oct. 5, 2017).

<sup>89</sup> Tom Hamburger, Carol D. Leonnig, and Rosalind S. Helderman, Trump campaign emails show aide's repeated efforts to set up Russia meetings, *Washington Post*, Aug. 14, 2017, available at [https://www.washingtonpost.com/politics/trump-campaign-emails-show-aides-repeated-efforts-to-set-up-russia-meetings/2017/08/14/54d08da6-7dc2-11e7-83c7-5bd5460f0d7e\\_story.html](https://www.washingtonpost.com/politics/trump-campaign-emails-show-aides-repeated-efforts-to-set-up-russia-meetings/2017/08/14/54d08da6-7dc2-11e7-83c7-5bd5460f0d7e_story.html).

<sup>90</sup> *Id.*; Bump, *Washington Post*, Oct. 30, 2017.

Manafort's time at the helm of the Trump campaign ended on August 19, 2016, a few days after *The New York Times* reported that Ukraine's then-newly formed National Anti-Corruption Bureau had unearthed ledgers showing \$12.7 million in undisclosed cash payments designated for Paul Manafort from former Ukraine President Viktor Yanukovich's pro-Russian political party.<sup>91</sup> In the same story, *The New York Times* also reported that Ukrainian investigators were looking into a group of shell companies that engaged in shady transactions, including an "\$18 million deal to sell Ukrainian cable television assets to a partnership put together by Mr. Manafort and a Russian oligarch, Oleg Deripaska . . . ."<sup>92</sup>

Manafort and his deputy, Rick Gates, were later indicted by two different grand juries on charges including conspiracy to defraud the U.S., money laundering, tax evasion, and making false statements.<sup>93</sup> Gates pleaded guilty to the conspiracy charge and a false statement charge and is cooperating with investigators.<sup>94</sup> So far, the charges filed against Manafort and Gates do not relate directly to their conduct on the Trump campaign.

#### **d. Michael Flynn's failure to report income from Russia**

In December 2015, Flynn traveled to Moscow for a paid speaking engagement with RT, the Russian government-backed media outlet, and was photographed meeting Vladimir Putin at a dinner celebrating the tenth anniversary of the Russian television network.<sup>95</sup> It was later reported that Flynn failed to disclose payments from Russia on his application for a security clearance, which, if true, would be a violation of federal law.<sup>96</sup>

#### **e. Russian approaches to the Trump campaign via the National Rifle Association**

In February 2016, Paul Erickson, a Republican political operative from South Dakota, formed Bridges LLC with Mariia<sup>97</sup> Butina, a Russian national who ran Right to Bear Arms, an

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<sup>91</sup> Andrew E. Kramer, Mike McIntire, and Barry Meier, Secret Ledger in Ukraine Lists Cash for Donald Trump's Campaign Chief, *New York Times*, Aug. 14, 2016, available at <https://www.nytimes.com/2016/08/15/us/politics/paul-manafort-ukraine-donald-trump.html>.

<sup>92</sup> *Id.*

<sup>93</sup> See First Indictment, *U.S. v. Manafort*, 17-cr-201 (D.D.C. Oct. 30, 2017), available at [https://www.washingtonpost.com/apps/g/page/world/manafort-and-gates-indictment/2252/?tid=a\\_inl\\_manual](https://www.washingtonpost.com/apps/g/page/world/manafort-and-gates-indictment/2252/?tid=a_inl_manual) (superseded by Third Superseding Indictment, *U.S. v. Manafort*, 17-cr-201 (D.D.C. Jun. 8, 2018), available at <https://www.justice.gov/sco/page/file/1070326/download>); Indictment, *U.S. v. Manafort*, 18-cr-83 (E.D. Va. Feb. 22, 2018), available at <https://www.justice.gov/file/1038391/download>.

<sup>94</sup> Plea Agreement, *U.S. v. Gates*, 17-cr-201-2 (D.D.C. Feb. 23, 2018), available at <https://www.justice.gov/file/1038801/download>.

<sup>95</sup> Rosiland S. Helderman and Tom Hamburger, Trump Adviser Flynn Paid by Multiple Russia-Related Entities, New Records Show, *Washington Post*, Mar. 16, 2017, available at [https://www.washingtonpost.com/politics/new-details-released-on-russia-related-payments-to-flynn-before-he-joined-trump-campaign/2017/03/16/52a4205a-0a55-11e7-a15f-a58d4a988474\\_story.html?utm\\_term=.55b25352c701](https://www.washingtonpost.com/politics/new-details-released-on-russia-related-payments-to-flynn-before-he-joined-trump-campaign/2017/03/16/52a4205a-0a55-11e7-a15f-a58d4a988474_story.html?utm_term=.55b25352c701).

<sup>96</sup> Tom LoBianco and Manu Raju, House Oversight Committee: Flynn Might Have Broken the Law, *CNN*, Apr. 25, 2017, available at <http://www.cnn.com/2017/04/25/politics/michael-flynn-house-oversight-committee/index.html>.

<sup>97</sup> In some reports, Butina's first name is spelled "Maria."

organization to promote the gun rights movement in Russia. Erickson later claimed that Bridges LLC made monetary assistance available to Butina for her graduate studies.<sup>98</sup>

According to an indictment filed on July 17, 2018, Butina was in fact a Russian agent operating “under the direction and control” of a Russian official,<sup>99</sup> identified in press reports as Alexander Torshin.<sup>100</sup> Torshin, a deputy head of the Russian Central Bank,<sup>101</sup> reportedly has ties to Putin, Russia’s security services, and organized crime.<sup>102</sup> The two worked together to set up Right to Bear Arms and claim to be the only two Russians who hold lifetime memberships to the NRA.<sup>103</sup> They also cultivated separate political relationships with various prominent Americans, and served as go-betweens for politicians in both countries—Butina, for example, helped coordinate a meeting between a Russian official and a U.S. congressman during a Congressional Delegation trip to Moscow.<sup>104</sup> Butina and Torshin continued to work on developing these channels of communication, and even attended the 2016 National Prayer Breakfast together in Washington D.C.<sup>105</sup>

In May 2016, Erickson sent an email with the subject “Kremlin Connection” to Rick Dearborn, Trump campaign advisor and chief of staff to then-Senator Jeff Sessions. In the email, Erickson explained that he had close ties to the National Rifle Association (NRA) and Russia and offered to set up a “back-channel meeting” between then-candidate Trump and Putin.<sup>106</sup> According to *The New York Times*, the email stated that Russia was “quietly but actively seeking a dialogue with the U.S.” and would try to use the NRA’s annual convention to make “first contact.”<sup>107</sup> Erickson also wrote that “‘Putin is deadly serious about building a good relationship with Mr. Trump’ . . . ‘He wants to extend an invitation to Mr. Trump to visit him in the Kremlin before the election. Let’s talk through what has transpired and Senator Sessions’

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<sup>98</sup> Peter Stone and Greg Gordon, FBI investigating whether Russian money went to NRA to help Trump, *McClatchy*, Jan. 23, 2018, available at <http://www.mcclatchydc.com/news/nation-world/national/article195231139.html>.

<sup>99</sup> Indictment, U.S. v. Butina, No. 18 cr-218, Jul. 17, 2018, available at <https://www.documentcloud.org/documents/4609327-D-D-C-1-18-Cr-00218-TSC-7-0.html#document/p1>.

<sup>100</sup> Matt Apuzzo, Katie Benner, and Sharon LaFraniere, Mariia Butina, Who Sought ‘Back Channel’ Meeting for Trump and Putin, Is Charged as Russian Agent, *New York Times*, Jul. 16, 2018, available at <https://www.nytimes.com/2018/07/16/us/politics/trump-russia-indictment.html>.

<sup>101</sup> Stone and Gordon, *McClatchy*, Jan. 23, 2018; Ken Dilanian and Carol E. Lee, Kushner failed to disclose outreach from Putin ally to Trump campaign, *NBC News*, Nov. 18, 2017, available at <https://www.nbcnews.com/news/us-news/kushner-failed-disclose-outreach-putin-ally-trump-campaign-n822021>.

<sup>102</sup> Dilanian and Lee, *NBC News*, Nov. 18, 2017.

<sup>103</sup> [https://twitter.com/torshin\\_ru/status/796465054094868480](https://twitter.com/torshin_ru/status/796465054094868480); Denise Clifton and Mark Follman, The Very Strange Case of Two Russian Gun Lovers, the NRA, and Donald Trump, *Mother Jones*, Mar. 8, 2018, available at <https://www.motherjones.com/politics/2018/03/trump-russia-nra-connection-maria-butina-alexander-torshin-guns/> (translating Torshin’s tweet as: “Today in NRA (USA) I know only 2 people from the Russian Federation with the status of ‘Life Member’: Maria Butina and I.”).

<sup>104</sup> Affidavit in Support of an Application for a Criminal Complaint at ¶ 22, U.S. v. Butina, No. 18 cr-218, Jul. 14, 2018, available at <https://www.documentcloud.org/documents/4600290-Butina-Mariia-Affidavit-July-2018-0-0.html> (henceforth “Butina Affidavit”).

<sup>105</sup> *Id.* at ¶ 26.

<sup>106</sup> Nicholas Fandos, Operative Offered Trump Campaign ‘Kremlin Connection’ Using N.R.A. Ties, *New York Times*, Dec. 3, 2017, available at <https://www.nytimes.com/2017/12/03/us/politics/trump-putin-russia-nra-campaign.html>.

<sup>107</sup> *Id.*

advice on how to proceed.”<sup>108</sup> According to *The New York Times*, it is unclear how Dearborn handled the communication but he forwarded a similar request from an advocate for Christian causes to Kushner, which Kushner reportedly rebuffed.<sup>109</sup> Both requests appear to have involved the NRA’s annual meeting and Torshin.<sup>110</sup> *CBS News* has reported that Trump Jr. met briefly with Torshin at an NRA event that same month, May 2016.<sup>111</sup> Whether Torshin funneled money to the National Rifle Association as part of an effort to support then-candidate Trump’s 2016 campaign was reportedly under investigation as of early 2018.<sup>112</sup>

#### f. Carter Page’s Russian contacts

In March 2016, Preet Bharara, United States Attorney for the Southern District of New York and John P. Carlin, Assistant Attorney General for National Security, announced that Russian national Evgeny Buryakov had pleaded guilty to conspiring to act as a foreign agent of Russia in the United States without providing notice to the Attorney General (a violation of the Foreign Agents Registration Act).<sup>113</sup> According to DOJ, Buryakov “operated under ‘non-official cover,’ meaning he entered and remained in the United States as a private citizen, posing as an employee in the Manhattan office of a Russian bank, Vnesheconombank, also known as ‘VEB.’”<sup>114</sup> Buryakov and his co-defendants “targeted [Carter] Page for recruitment.”<sup>115</sup>

Page was named as a member of the Trump campaign’s foreign policy team in March 2016,<sup>116</sup> and soon afterwards was invited to speak at the New Economic School, a university in Moscow.<sup>117</sup> Prior to the trip, Page emailed Trump campaign official J.D. Gordon suggesting he would happily cede his speaking engagement to then-candidate Trump.<sup>118</sup> On July 8, 2016, Page traveled to Moscow to give a commencement lecture.<sup>119</sup> Page later testified that he informed individuals associated with the Trump campaign, including then Senator Sessions,

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Jeff Pegues, Trump Jr. met with man with close ties to Kremlin, *CBS News*, Nov. 20, 2017, available at <https://www.cbsnews.com/news/trump-jr-met-with-man-with-close-ties-to-kremlin/>.

<sup>112</sup> Peter Stone and Greg Gordon, FBI investigating whether Russian money went to NRA to help Trump, *McClatchy*, Jan. 18, 2018, available at <http://www.mcclatchydc.com/news/nation-world/national/article195231139.html>.

<sup>113</sup> Evgeny Buryakov Pleads Guilty In Manhattan Federal Court In Connection With Conspiracy To Work For Russian Intelligence, *U.S. Attorney’s Office for the Southern District of New York*, Mar. 11, 2016, available at <https://www.justice.gov/usao-sdny/pr/evgeny-buryakov-pleads-guilty-manhattan-federal-court-connection-conspiracy-work>.

<sup>114</sup> *Id.*

<sup>115</sup> Minority Memo re: Correcting the Record – the Russia Investigation, *Minority Members, House Permanent Select Committee on Intelligence*, Jan. 29, 2018, at 3, available at [https://democrats-intelligence.house.gov/uploadedfiles/redacted\\_minority\\_memo\\_2.24.18.pdf](https://democrats-intelligence.house.gov/uploadedfiles/redacted_minority_memo_2.24.18.pdf) (This memo was released to the public on Feb. 24, 2018.); see also Page Testimony at 45.

<sup>116</sup> *Washington Post*, Mar. 21, 2016.

<sup>117</sup> Testimony of Carter Page, *House Permanent Select Committee on Intelligence*, Nov. 2, 2017, available at [https://intelligence.house.gov/uploadedfiles/carter\\_page\\_hpsci\\_hearing\\_transcript\\_nov\\_2\\_2017.pdf](https://intelligence.house.gov/uploadedfiles/carter_page_hpsci_hearing_transcript_nov_2_2017.pdf) (henceforth Page Testimony) at 53.

<sup>118</sup> *Id.* at 169-170.

<sup>119</sup> Shane, Mazzetti, and Goldman, *New York Times*, Apr. 19, 2017.

Lewandowski, campaign Press Secretary Hope Hicks, and campaign Director of National Security J.D. Gordon, about the event.<sup>120</sup>

According to intelligence collected by former British intelligence officer Christopher Steele, Page held “secret meetings in Moscow with SECHIN and senior Kremlin Internal Affairs official, DIVYEKIN.”<sup>121</sup> The memo alleges that “DIVYEKIN discusse[d] release of Russian dossier of 'kompromat' [damaging political information] on TRUMP's opponent, Hillary CLINTON, but also hint[ed] at Kremlin possession of such material on TRUMP.”<sup>122</sup> After Page's trip, he emailed Gordon and promised to send a “readout soon regarding some incredible insights and outreach I've received from a few Russian legislators and senior members of the Presidential administration.”<sup>123</sup>

In September 2016, following a report that U.S. intelligence officials were probing ties between Carter Page and Russia,<sup>124</sup> *The Washington Post* reported that Page had taken a leave of absence from working with the campaign.<sup>125</sup> After the election, Carter Page again travelled to Russia and had dinner with individuals at the New Economic School, where Russian Deputy Prime Minister Arkady Dvorkovich “stopped by.”<sup>126</sup>

#### **g. Trump's efforts to secure a Russian real estate deal continued into the Summer of 2016**

Donald Trump pursued business deals in Russia long before he ran for President.<sup>127</sup> Those efforts date back to the late 1980s, when Trump met with Soviet Ambassador Yuri Dubinin at a luncheon and (according to Trump) talked about the possibility of a luxury hotel across from the Kremlin.<sup>128</sup>

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<sup>120</sup> Page Testimony at 19, 68-69.

<sup>121</sup> Dossier of Trump Intelligence Allegations, published by *BuzzFeed*, Jan. 10, 2017, available at <https://assets.documentcloud.org/documents/3259984/Trump-Intelligence-Allegations.pdf> (henceforth Steele Dossier) at \*9.

<sup>122</sup> *Id.*

<sup>123</sup> Page Testimony at 40-41.

<sup>124</sup> Michael Isikoff, U.S. intel officials probe ties between Trump adviser and Kremlin, *Yahoo! News*, Sept. 23, 2016, available at <https://www.yahoo.com/news/u-s-intel-officials-probe-ties-between-trump-adviser-and-kremlin-175046002.html>.

<sup>125</sup> Josh Rogin, Trump's Russia adviser speaks out, calls accusations 'complete garbage', *Washington Post*, Sept. 26, 2016, available at [https://www.washingtonpost.com/news/josh-rogin/wp/2016/09/26/trumps-russia-adviser-speaks-out-calls-accusations-complete-garbage/?utm\\_term=.93d5f2127866](https://www.washingtonpost.com/news/josh-rogin/wp/2016/09/26/trumps-russia-adviser-speaks-out-calls-accusations-complete-garbage/?utm_term=.93d5f2127866).

<sup>126</sup> Page Testimony at 36.

<sup>127</sup> Anthony Cormier and Jason Leopold, The Definitive Story of How Trump's Team worked the Trump Moscow Deal During the Campaign, *Buzzfeed*, May 17, 2018, available at [https://www.buzzfeed.com/anthonycormier/trump-moscow-micheal-cohen-felix-sater-campaign?utm\\_term=.ksaDM0rz0#.xtqzoKank](https://www.buzzfeed.com/anthonycormier/trump-moscow-micheal-cohen-felix-sater-campaign?utm_term=.ksaDM0rz0#.xtqzoKank).

<sup>128</sup> Paula Span, When Trump hoped to meet Gorbachev in Manhattan, *Washington Post*, Dec. 3, 1998, available at [https://www.washingtonpost.com/lifestyle/style/from-the-archives-when-trump-hoped-to-meet-gorbachev-in-manhattan/2017/07/10/3f570b42-658c-11e7-a1d7-9a32c91c6f40\\_story.html](https://www.washingtonpost.com/lifestyle/style/from-the-archives-when-trump-hoped-to-meet-gorbachev-in-manhattan/2017/07/10/3f570b42-658c-11e7-a1d7-9a32c91c6f40_story.html).

In 2006 and 2007, Trump explored the possibility of developing a Trump-branded real estate project in Moscow, but nothing came of those efforts.<sup>129</sup> Donald Trump Jr., then an executive in the Trump Organization, stated that the Trump organization would like to develop property in Moscow, St. Petersburg, and Sochi at a real estate conference in 2008.<sup>130</sup> Additionally in 2008, Donald Trump Jr. said that Trump businesses "see a lot of money pouring in from Russia" and that Russian money now makes up "a disproportionate cross-section of a lot our assets."<sup>131</sup>

In 2010, Alexander Shnaider, the Canadian developer behind the Trump International Hotel and Tower in Toronto, sold his company's share in a Ukrainian steelmaker to the Russian state-owned bank Vnesheconombank, or VEB, for \$850 million. At the time, VEB was chaired by Vladimir Putin. Shnaider reportedly used part of the windfall to finance the Toronto project.<sup>132</sup> According to a *Financial Times* investigation, to set up the deal, Shnaider, who has a history of doing business in the former Soviet Union and whose father-in-law reportedly "[has] links to powerful political figures in the former Soviet Union," paid a \$100 million "commission" to middlemen representing Kremlin interests.<sup>133</sup>

In 2014, Eric Trump reportedly told golf writer James Dodson that all the funding for Trump golf courses comes from Russia while the two were at one of the family's clubs, the Trump National Golf Club in Charlotte, N.C.<sup>134</sup> Eric Trump reportedly said, "Well, we don't rely on American banks. We have all the funding we need out of Russia....We've got some guys that really, really love golf, and they're really invested in our programs. We just go there all the time."<sup>135</sup>

In 2013, the Miss Universe Organization, which Trump co-owned at the time, held its pageant in Moscow.<sup>136</sup> In the years following the pageant, Trump renewed his efforts to move forward with a real estate project in Moscow. After he launched his campaign for the Republican

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<sup>129</sup> Jeffrey Toobin, *Trump's Miss Universe Gambit*, *New Yorker*, Feb. 26, 2018, available at <https://www.newyorker.com/magazine/2018/02/26/trumps-miss-universe-gambit>.

<sup>130</sup> Twohey and Steve Eder, *New York Times*, Jan. 16, 2017.

<sup>131</sup> Nelli Black and Curt Devine, *These are Trump's ties to Russia*, *CNN*, Jan. 12, 2017 available at <http://www.cnn.com/2017/01/11/politics/trump-ties-with-russia/>.

<sup>132</sup> Rob Barry, Christopher S. Stewart, and Brett Forrest, *Russian State-Run Bank Financed Deal Involving Trump Hotel Partner*, *Wall Street Journal*, May 17, 2017, available at <https://www.wsj.com/articles/russian-state-run-bank-financed-deal-involving-trump-hotel-partner-1495031708>.

<sup>133</sup> Robert Cribb, Marco Chown Oved, Jeremy Blackman, Sylvia Varnham O'Regan, Micah Maidenberg, and Susanne Rust, *How every investor lost money on Trump Tower Toronto (but Donald Trump made millions anyway)*, *Toronto Star*, Oct. 21, 2017, available at <https://www.thestar.com/news/world/2017/10/21/how-every-investor-lost-money-on-trump-tower-toronto-but-donald-trump-made-millions-anyway.html>; Oscar Williams-Grut, *New investigation says partner in Trump's Toronto hotel raised financing after sending \$100 million to a middleman with Kremlin links*, *Business Insider*, Jul. 12, 2018, available at <https://www.businessinsider.com/trump-toronto-tower-financing-linked-to-russia-2018-7>.

<sup>134</sup> Bill Littlefield, *A Day (and a Cheeseburger) With President Trump*, *WBUR 90.9*, May 5, 2017 available at <http://www.wbur.org/onlyagame/2017/05/05/james-dodson-donald-trump-golf>.

<sup>135</sup> Caitlin Yilek, *Author claims Eric Trump told him all funding for Trump golf courses comes from Russia in 2014*, *The Washington Examiner*, May 7, 2017 available at <https://www.washingtonexaminer.com/author-claims-eric-trump-told-him-all-funding-for-trump-golf-courses-comes-from-russia-in-2014/article/2622364%20>.

<sup>136</sup> *Id.*

nomination for president, Trump signed a letter of intent to develop a Trump-branded real estate project in Moscow with I.C. Expert Investment Co.<sup>137</sup> Felix Sater, a New York real estate mogul who has been convicted of racketeering and reportedly has ties to *The Mafia*, reportedly proposed trying to revive the deal by emailing President Putin's lieutenant.<sup>138</sup> Sater also purportedly emailed Michael Cohen, executive vice president of the Trump Organization, and offered to broker a real estate deal in Russia with the help of Russian President Vladimir Putin.<sup>139</sup>

After these plans apparently stalled, Michael Cohen reportedly sent an email to the general Kremlin press email address that he addressed to Dmitry Peskov, the personal spokesman of President Putin. Cohen asked Peskov for help with a stalled development in Moscow in an email described to *The Washington Post*: "As this project is too important, I am hereby requesting your assistance. I respectfully request someone, preferably you, contact me so that I might discuss the specifics as well as arranging meetings with the appropriate individuals. I thank you in advance for your assistance and look forward to hearing from you soon."<sup>140</sup>

Sater, Cohen, and their Russian contacts were reportedly in touch into the Summer of 2016 to try to move the deal forward.<sup>141</sup> In June 2016, Sater reportedly emailed Cohen, who by then had become a Trump campaign surrogate, with an invitation to attend the St. Petersburg International Economic Forum, a conference in Russia. Sater reportedly indicated that Peskov, could assist in arranging introductions to Russian Prime Minister Dmitry Medvedev, top financial leaders, and perhaps President Putin.<sup>142</sup>

#### **h. The June 2016 Trump Tower meeting between Trump's son, son-in-law, campaign chair, and Russians about information that would "incriminate Hillary and her dealings with Russia"**

In June 2016, senior members of the Trump campaign met with Russian individuals on the premise that the Russians would provide incriminating information about Hillary Clinton on

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<sup>137</sup> Rosalind S. Helderman, Carol D. Leonnig, and Tom Hamburger, Top Trump Organization Executive Asked Putin Aide for Help on Business Deal, *Washington Post*, Aug. 28, 2017, available at [https://www.washingtonpost.com/politics/top-trump-organization-executive-reached-out-to-putin-aide-for-help-on-business-deal/2017/08/28/095aebac-8c16-11e7-84c0-02cc069f2c37\\_story.html?utm\\_term=.1522a967c563](https://www.washingtonpost.com/politics/top-trump-organization-executive-reached-out-to-putin-aide-for-help-on-business-deal/2017/08/28/095aebac-8c16-11e7-84c0-02cc069f2c37_story.html?utm_term=.1522a967c563).

<sup>138</sup> *Id.*; Andrew Rice, The Original Russia Connection, *New York Magazine*, Aug. 3, 2017, available at <http://nymag.com/daily/intelligencer/2017/08/felix-sater-donald-trump-russia-investigation.html>.

<sup>139</sup> Matt Apuzzo and Maggie Haberman, Trump Associate Boasted That Moscow Business Deal 'Will Get Donald Elected', *New York Times*, Aug. 28, 2017, available at [https://www.nytimes.com/2017/08/28/us/politics/trump-tower-putin-felix-sater.html?\\_r=1](https://www.nytimes.com/2017/08/28/us/politics/trump-tower-putin-felix-sater.html?_r=1).

<sup>140</sup> Helderman, Leonnig, and Hamburger, *Washington Post*, Aug. 28, 2017.

<sup>141</sup> Cormier and Leopold, *Buzzfeed*, May 17, 2018.

<sup>142</sup> Tom Hamburger, Rosalind S. Helderman and Adam Entous, Trump's company had more contact with Russia during campaign, according to documents turned over to investigators, *Washington Post*, Oct. 2, 2017, available at [https://www.washingtonpost.com/politics/trumps-company-had-more-contact-with-russia-during-campaign-according-to-documents-turned-over-to-investigators/2017/10/02/2091fe5e-a6c0-11e7-850e-2bdd1236be5d\\_story.html](https://www.washingtonpost.com/politics/trumps-company-had-more-contact-with-russia-during-campaign-according-to-documents-turned-over-to-investigators/2017/10/02/2091fe5e-a6c0-11e7-850e-2bdd1236be5d_story.html).

behalf of the Kremlin.<sup>143</sup> On June 3, 2016, Rob Goldstone, a former tabloid reporter and entertainment publicist long acquainted with the Trump family,<sup>144</sup> emailed Donald Trump Jr.:

Emin [Agalarov] just called and asked me to contact you with something very interesting.

The Crown prosecutor of Russia met with his father Aras this morning and in their meeting offered to provide the Trump campaign with some official documents and information that would incriminate Hillary and her dealings with Russia and would be very useful to your father.

This is obviously very high level and sensitive information but is part of Russia and its government's support for Mr. Trump - helped along by Aras and Emin.

What do you think is the best way to handle this information and would you be able to speak to Emin about it directly?

I can also send this info to your father via Rhona, but it is ultra sensitive so wanted to send to you first.<sup>145</sup>

Seventeen minutes later, Trump Jr. replied, "Thanks Rob I appreciate that. I am on the road at the moment but perhaps I just speak to Emin first. Seems we have some time and if it's what you say I love it especially later in the Summer."<sup>146</sup> On June 6, Goldstone followed up: "Let me know when you are free to talk with Emin by phone about this Hilary info . . . ."<sup>147</sup> On June 7, 2016, Goldstone wrote, "Emin asked that I schedule a meeting with you and The Russian government attorney who is flying over from Moscow for this Thursday."<sup>148</sup>

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<sup>143</sup> Jo Becker, Adam Goldman, and Matt Apuzzo, Russian Dirt on Clinton? 'I Love It,' Donald Trump Jr. Said, *New York Times*, Jul. 11, 2017, available at <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html>. The fact that this meeting took place did not become public until July 8, 2017. See Jo Becker, Matt Apuzzo, and Adam Goldman, Trump Team Met with Lawyer Linked to Kremlin Campaign, *New York Times*, Jul. 8, 2017, available at <https://www.nytimes.com/2017/07/08/us/politics/trump-russia-kushner-manafort.html>.

<sup>144</sup> *Id.*; Shawn Boburg and Jack Gillum, Who Is Rob Goldstone, Whose Email to Trump Jr. on Russia Caused a Sensation, *Washington Post*, Jul. 25, 2017, available at [https://www.washingtonpost.com/investigations/who-is-rob-goldstone-whose-email-to-trump-jr-on-russia-caused-a-sensation/2017/07/15/8471f520-68c0-11e7-8eb5-cbccc2e7bfbf\\_story.html](https://www.washingtonpost.com/investigations/who-is-rob-goldstone-whose-email-to-trump-jr-on-russia-caused-a-sensation/2017/07/15/8471f520-68c0-11e7-8eb5-cbccc2e7bfbf_story.html).

<sup>145</sup> Read the Emails on Donald Trump Jr.'s Russia Meeting, *New York Times*, Jul. 11, 2017, available at <https://www.nytimes.com/interactive/2017/07/11/us/politics/donald-trump-jr-email-text.html>; see also Becker, Goldman, and Apuzzo, *New York Times*, Jul. 11, 2017.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*; Later that evening Trump delivered a victory speech after winning primaries in five states, in which he called Secretary Clinton corrupt and promised that "probably Monday" of the following week, he would "give a major speech . . . discussing all of the things that have taken place with the Clintons." See Phillip Bump, What happened and when: The timeline leading up to Donald Trump Jr.'s fateful meeting, *Washington Post*, Jul. 11, 2017, available at

A meeting was scheduled for June 9, 2016, (“the June 9 meeting”), at Trump Tower. Trump Jr., Paul Manafort, and Jared Kushner attended on behalf of the Trump campaign.<sup>149</sup> They reportedly met with several individuals, including Rob Goldstone, Russian lawyer Natalia Veselnitskaya, Russian-American lobbyist Rinat Akhmetshin, Russian translator Anatoli Samochornov, and real estate financier Irakly Kaveladze.<sup>150</sup> Veselnitskaya has since acknowledged that since 2013, she has been a source of information for the Russian government and has been “actively communicating with the office of the Russian prosecutor general.”<sup>151</sup> Emails obtained by news outlets show that Veselnitskaya corresponded with the Russian prosecutor general about a request from the U.S. Department of Justice as recently as 2014.<sup>152</sup>

According to press accounts, Veselnitskaya brought a memorandum to the meeting that adhered closely to a document from Russia’s prosecutor general, Yuri Y. Chaika, that had been provided to a Republican Congressman, Dana Rohrabacher, two months prior.<sup>153</sup> According to that document, an entity that financed President Obama’s election campaign—and “cannot be ruled out” to have financed the Clinton campaign—had allegedly invested funds in a Moscow-based firm and evaded tens of millions of dollars of Russian taxes.<sup>154</sup>

According to Veselnitskaya’s statement to the Senate Judiciary Committee on November 20, 2017, “Donald Trump, Jr. asked if [she] had any financial documents proving that what may have been illegally obtained funds were also being donated to Mrs. Clinton’s foundation. [She]

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<https://www.washingtonpost.com/news/politics/wp/2017/07/11/what-happened-and-when-the-timeline-leading-up-to-donald-trump-jr-s-fateful-meeting/>.

<sup>149</sup> Dan Merica, Recreating June 9: A Very Consequential Day in the 2016 Campaign, *CNN*, Jul. 12, 2017, available at <http://www.cnn.com/2017/07/11/politics/trump-campaign-june-9/index.html>.

<sup>150</sup> Sharon LaFraniere and Adam Goldman, Guest List at Donald Trump Jr.’s Meeting with Russian Expands Again, *New York Times*, Jul. 18, 2017, available at <https://www.nytimes.com/2017/07/18/us/politics/trump-meeting-russia.html>; Eileen Sullivan, Kenneth P. Vogel, Adam Goldman, and Jo Becker, Russian-American Lobbyist Attended Meeting Organized by Trump’s Son, *New York Times*, Jul. 14, 2017, available at <https://www.nytimes.com/2017/07/14/us/politics/russian-american-lobbyist-meeting-trump.html?mcubz=3>.

<sup>151</sup> Russian lawyer who met with Kushner, Don Jr. admits to being an informant, *NBC News*, Apr. 27, 2018, available at <https://www.nbcnews.com/nightly-news/video/russian-lawyer-who-met-with-kushner-don-jr-admits-to-being-an-informant-1221063235886>.

<sup>152</sup> *Id.*; Andrew E. Kramer and Sharon LaFraniere, Lawyer Who Was Said to Have Dirt on Clinton Had Closer Ties to Kremlin Than She Let On, *New York Times*, Apr. 27, 2018, available at <https://www.nytimes.com/2018/04/27/us/natalya-veselnitskaya-trump-tower-russian-prosecutor-general.html?smid=pl-share>.

<sup>153</sup> Sharon LaFraniere and Andrew E. Kramer, Talking Points Brought to Trump Tower Meeting Were Shared With Kremlin, *New York Times*, Oct. 27, 2017, available at <https://www.nytimes.com/2017/10/27/us/politics/trump-tower-veselnitskaya-russia.html>. The FBI reportedly warned Congressman Rohrabacher that the Russians consider him a valuable source of intelligence and have given him a Kremlin code name. Nicholas Fandos, He’s a Member of Congress. The Kremlin Likes Him So Much It Gave Him a Code Name., *New York Times*, Nov. 21, 2017, available at [https://www.nytimes.com/2017/11/21/us/politics/dana-rohrabacher-putin-trump-kremlin-under-fire.html?\\_r=0](https://www.nytimes.com/2017/11/21/us/politics/dana-rohrabacher-putin-trump-kremlin-under-fire.html?_r=0).

<sup>154</sup> Elias Groll, Here’s the Memo the Kremlin-Linked Lawyer Took to the Meeting with Donald Trump Jr., *Foreign Policy*, Oct. 16, 2017, available at <http://foreignpolicy.com/2017/10/16/heres-memo-kremlin-lawyer-took-to-meeting-donald-trump-jr/>.

said that [she] did not and that it was not [her] issue.”<sup>155</sup> Veselnitskaya also claims that Trump Jr. said that should his father win the presidential election they would revisit U.S. sanctions under the Magnitsky Act.<sup>156</sup> Shortly thereafter, on June 14, 2016, Goldstone reportedly forwarded a news article about the hacked DNC emails to two others present at the June 9 meeting, Agalarov and Kaveladze, describing the news as ““eerily weird”” in light of their discussions that day.<sup>157</sup>

#### **i. Meetings at the Republican National Convention and alteration of the party platform language regarding Ukraine**

On July 11 and 12, 2016, Trump campaign officials reportedly worked behind the scenes at the Republican National Convention to strip a provision of the foreign policy platform that would have called for providing weapons to Ukraine to fight Russian and Russian-backed forces.<sup>158</sup> According to two Republican delegates, Trump campaign official J.D. Gordon led the efforts to make the change.<sup>159</sup> Minutes taken at the meeting were reportedly discarded.<sup>160</sup> A few days later, on July 14, Carter Page emailed Trump foreign policy advisers, including J.D. Gordon, “As for the Ukraine amendment, excellent work.”<sup>161</sup>

#### **4. Contacts between WikiLeaks and the Trump campaign**

Several Trump associates reportedly had contact with WikiLeaks during the final months of the 2016 general election campaign. In October and November of 2016, then-candidate Trump commented on his love of WikiLeaks during various campaign rallies.<sup>162</sup> Even though Trump associates Roger Stone, Trump Jr. and Alexander Nix all apparently had contact with WikiLeaks or its founder Julian Assange, then-vice presidential candidate Mike Pence denied

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<sup>155</sup> Testimony of Natalia Veselnitskaya Before the Senate Judiciary Committee, Nov. 20, 2017, available at <https://www.scribd.com/document/366458588/2017-11-20-Veselnitskaya-to-Grassley-June-9-Meeting-FARA-Visa>.

<sup>156</sup> Irina Reznik and Henry Meyer, Trump Jr. Hinted at Review of Anti-Russia Law, Moscow Lawyer Says, *Bloomberg*, Nov. 6, 2017, available at <https://www.bloomberg.com/news/articles/2017-11-06/trump-jr-said-anti-russia-law-may-be-reviewed-moscow-lawyer-says>.

<sup>157</sup> Jim Sciutto, Manu Raju, and Jeremy Herb, Exclusive: Previously undisclosed emails show follow-up after Trump Tower meeting, *CNN*, Dec. 7, 2017, available at <https://www.cnn.com/2017/12/07/politics/previously-undisclosed-emails-after-trump-tower-meeting/index.html>.

<sup>158</sup> See Josh Rogin, Trump campaign guts GOP’s anti-Russia stance on Ukraine, *Washington Post*, Jul. 18, 2016, available at [https://www.washingtonpost.com/opinions/global-opinions/trump-campaign-guts-gops-anti-russia-stance-on-ukraine/2016/07/18/98adb3b0-4cf3-11e6-a7d8-13d06b37f256\\_story.html?utm\\_term=.1f71ad368e6e](https://www.washingtonpost.com/opinions/global-opinions/trump-campaign-guts-gops-anti-russia-stance-on-ukraine/2016/07/18/98adb3b0-4cf3-11e6-a7d8-13d06b37f256_story.html?utm_term=.1f71ad368e6e); Tim Mak, Alexa Corse, Trump Campaign Changed Ukraine Platform, Lied About It, *Daily Beast*, Aug. 3, 2016, available at <https://www.thedailybeast.com/trump-campaign-changed-ukraine-platform-lied-about-it>; Katiana Krawchenko, The GOP convention committee meetings: Here’s what you need to know, *CBS News*, Jul. 11, 2016, available at <https://www.cbsnews.com/news/gop-committee-meetings-heres-what-you-need-to-know/>.

<sup>159</sup> Tim Mak, Alexa Corse, *Daily Beast*, Aug. 3, 2016.

<sup>160</sup> *Id.*

<sup>161</sup> Page Testimony at 195.

<sup>162</sup> David Choi, 5 times Trump praised WikiLeaks during his 2016 election campaign, *Business Insider*, Nov. 13, 2017, available at <http://www.businessinsider.com/trump-wikileaks-campaign-speeches-julian-assange-2017-11>.

any connection between WikiLeaks and the campaign in October 2016. Following the publication of an *Atlantic* article describing several of these contacts in November 2017, Vice President Pence's press secretary claimed that "The vice president was never aware of anyone associated with the campaign being in contact with WikiLeaks," and that "[Pence] first learned of this news from a published report [that day]."<sup>163</sup>

### a. Roger Stone

Roger Stone, a confidant of Donald Trump and longtime Republican political operative, was reportedly in contact with WikiLeaks about information stolen from the DNC and John Podesta.<sup>164</sup> Stone made repeated (and in some cases accurate) predictions that hacked information would be leaked. For instance, in a speech to the Southwest Broward Republican Organization in early August 2016, Roger Stone stated that he "actually had communicated with Assange" and that he "believe[d] the next tranche of his documents pertain to the Clinton Foundation but there's no telling what the October surprise may be."<sup>165</sup> Not long after that, on the #MAGA podcast, Roger Stone also stated that he thought that Assange had Clinton emails that were deleted by Huma Abedin and Cheryl Mills, two of Clinton's top aides.<sup>166</sup> Stone added, "In fact I know [Assange] has them"<sup>167</sup> and that he believed Assange would "expose the American people to this information in the next 90 days."<sup>168</sup> On August 21, 2016, Stone tweeted, "Trust me, it will soon [be] Podesta's time in the barrel."<sup>169</sup> On September 16, 2016, Stone revealed in a radio interview that he expected "Julian Assange and the WikiLeaks people to drop a payload of new documents on a weekly basis fairly soon."<sup>170</sup> He added, "And that of

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<sup>163</sup> Matthew Nussbaum, *Pence denies knowing about Trump Jr. WikiLeaks contacts*, Politico, Nov. 13, 2017, available at <https://www.politico.com/story/2017/11/13/pence-trump-wikileaks-russia-244863>.

<sup>164</sup> The *Wall Street Journal* reported that on August 4, 2016, Stone wrote to Trump adviser Sam Nunberg, "I dined with my new pal Julian Assange last nite." Shelby Holliday and Rob Barry, *Roger Stone's Claim of a 2016 Julian Assange Meeting Draws Scrutiny*, *Wall Street Journal*, Apr. 2, 2018, available at <https://www.wsj.com/articles/roger-stones-claim-of-a-2016-julian-assange-meeting-draws-scrutiny-1522695471>. Stone has since asserted (and it seems likely) that the claim he actually dined with Assange was written in jest. Philip Bump, *An alleged dinner with Assange is unlikely. The real Roger Stone questions are elsewhere.*, *Washington Post*, Apr. 4, 2018, available at [https://www.washingtonpost.com/news/politics/wp/2018/04/04/an-alleged-dinner-with-assange-is-unlikely-the-real-roger-stone-questions-are-elsewhere/?utm\\_term=.46046536453a](https://www.washingtonpost.com/news/politics/wp/2018/04/04/an-alleged-dinner-with-assange-is-unlikely-the-real-roger-stone-questions-are-elsewhere/?utm_term=.46046536453a).

<sup>165</sup> Roger Stone Confirms That He's In Communication With Julian Assange, *Media Matters*, Aug. 9, 2016, available at <https://www.mediamatters.org/video/2016/08/09/roger-stone-confirms-hes-communication-julian-assange/212261>; Tom Hamburger, Josh Dawsey, Carol D. Leonnig and Shane Harris, *Roger Stone claimed contact with WikiLeaks founder Julian Assange in 2016, according to two associates*, *Washington Post*, Mar. 13, 2018, available at [https://www.washingtonpost.com/politics/roger-stone-claimed-contact-with-wikileaks-founder-julian-assange-in-2016-according-to-two-associates/2018/03/13/a263f842-2604-11e8-b79d-f3d931db7f68\\_story.html?utm\\_term=.e61b9f0e3477](https://www.washingtonpost.com/politics/roger-stone-claimed-contact-with-wikileaks-founder-julian-assange-in-2016-according-to-two-associates/2018/03/13/a263f842-2604-11e8-b79d-f3d931db7f68_story.html?utm_term=.e61b9f0e3477).

<sup>166</sup> Andrew Kaczynski, Nathan McDermott, and Chris Massie, *Trump adviser Roger Stone repeatedly claimed to know of forthcoming WikiLeaks dumps*, *CNN*, Mar. 20, 2017, available at <http://www.cnn.com/2017/03/20/politics/kfile-roger-stone-wikileaks-claims/index.html>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Philip Bump, *The confusing timeline on Roger Stone's communications with WikiLeaks*, *Washington Post*, Mar. 13, 2018, available at [https://www.washingtonpost.com/news/politics/wp/2018/03/13/the-confusing-timeline-on-roger-stones-communications-with-wikileaks/?utm\\_term=.3c40e7c8d4a0](https://www.washingtonpost.com/news/politics/wp/2018/03/13/the-confusing-timeline-on-roger-stones-communications-with-wikileaks/?utm_term=.3c40e7c8d4a0).

<sup>170</sup> Kaczynski, McDermott, and Massie, *CNN*, Mar. 20, 2017.

course will answer the question of exactly what was erased on that email server."<sup>171</sup> Stone added that he was "in touch with [Assange] through an intermediary."<sup>172</sup>

In October 2016, Stone exchanged private messages with the WikiLeaks Twitter account. Stone wrote to WikiLeaks, "Since I was all over national TV, cable and print defending [W]ikiLeaks and [A]ssange against the claim that you are Russian agents and debunking the false charges of sexual assault as trumped up bs you may want to reexamine the strategy of attacking me- cordially R."<sup>173</sup> The WikiLeaks account responded, "We appreciate that. However, the false claims of association are being used by the [D]emocrats to undermine the impact of our publications. Don't go there if you don't want us to correct you."<sup>174</sup> A later Stone message to WikiLeaks stated, "Ha! The more you 'correct' me the more people think you're lying. Your operation leaks like a sieve. You need to figure out who your friends are."<sup>175</sup>

## b. Donald Trump Jr.

On September 20, 2016, Trump Jr. reportedly received a private message from WikiLeaks's Twitter account warning him that "'A PAC run anti-Trump site putinrump.org is about to launch. The PAC is a recycled pro-Iraq war PAC. We have guessed the password. It is 'putintrump.' See 'About' for who is behind it. Any comments?'"<sup>176</sup> Trump Jr. replied, "'Off the record I don't know who that is, but I'll ask around,'" and then emailed senior campaign officials including Kushner,<sup>177</sup> Chief Campaign Strategist Stephen Bannon, Campaign Manager Kellyanne Conway, and Digital Media Director Brad Parscale, informing them that WikiLeaks had made contact.<sup>178</sup>

In early October 2016, the U.S. government publicly accused Russia of hacking and releasing emails stolen from the DNC as part of an effort to interfere with the U.S. election.<sup>179</sup> On October 12, 2016, WikiLeaks reportedly contacted Trump Jr. again, this time to suggest that

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Natasha Bertrand, *Roger Stone's Secret Messages with WikiLeaks*, *Atlantic*, Feb. 27, 2018, available at <https://www.theatlantic.com/politics/archive/2018/02/roger-stones-secret-messages-with-wikileaks/554432/>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Julia Ioffe, *The Secret Correspondence Between Donald Trump Jr. and WikiLeaks*, *Atlantic*, Nov. 13, 2017, available at <https://www.theatlantic.com/politics/archive/2017/11/the-secret-correspondence-between-donald-trump-jr-and-wikileaks/545738/>.

<sup>177</sup> *Id.* CNN reported in November 2017 that Kushner allegedly informed congressional investigators in closed-door testimony that "he did not communicate with WikiLeaks and didn't recall anyone on the Trump campaign who had." He testified on July 24, 2017, before the news of the alleged communications between Trump Jr. and WikiLeaks's Twitter accounts was publicly revealed. Jeremy Herb and Evan Perez, *Kushner testified he did not recall any campaign WikiLeaks contact*, *CNN*, Nov. 18, 2017, available at <https://www.cnn.com/2017/11/17/politics/jared-kushner-july-testimony-did-not-recall-campaign-wikileaks-contact/index.html>; Matt Apuzzo and Maggie Haberman, 'I Did Not Collude,' Kushner Says After Meeting Senate Investigators, *New York Times*, Jul. 24, 2017, available at <https://www.nytimes.com/2017/07/24/us/politics/jared-kushner-russia-senate.html>.

<sup>178</sup> Ioffe, *Atlantic*, Nov. 13, 2017.,

<sup>179</sup> David E. Sanger and Charlie Savage, *U.S. Says Russia Directed Hacks to Influence Elections*, *New York Times*, Oct. 7, 2016, available at <https://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html>.

then-candidate Trump tweet out the link “wsearch.tk” to help Trump followers search the leaked emails for stories, noting, “Btw we just released Podesta Emails Part 4.” Fifteen minutes later, then-candidate Trump tweeted, “Very little pick-up by the dishonest media of incredible information provided by WikiLeaks. So dishonest! Rigged system!” Two days later, Trump Jr. tweeted the same link that WikiLeaks had sent him.<sup>180</sup> *The Atlantic*, which first disclosed these communications in November 2017, described the series of private messages between WikiLeaks’s and Donald Trump Jr.’s Twitter accounts between September 2016 and July 2017, as a “long and largely one-sided” correspondence, in which WikiLeaks “actively solicit[ed] Trump Jr.’s cooperation” and was not rebuffed.<sup>181</sup>

### c. Alexander Nix

Prior to the November 2016 election, Alexander Nix, the head of Cambridge Analytica, which worked for the Trump campaign’s data operation, also reached out to Assange. According to the *Daily Beast*, the basis for this overture was to suggest that Cambridge Analytica and WikiLeaks work together to find then-candidate Clinton’s 33,000 emails that had been deleted from her private email server after she turned over work-related emails from that server to the State Department in 2014.<sup>182</sup> The *Wall Street Journal* reported that Nix’s outreach was to “offer help better indexing the messages WikiLeaks was releasing to make them more easily searchable.”<sup>183</sup> Following the public revelation of this news in October 2017, Assange confirmed that Cambridge Analytica had approached WikiLeaks and that WikiLeaks had rejected the offer.<sup>184</sup> Assange declined to confirm the subject matter of the approach.<sup>185</sup> Nix has generally denied any relationship between Cambridge Analytica and Wikileaks, but recent reporting has uncovered a new connection: Cambridge Analytica director Brittany Kaiser visited Assange on February 17, 2017, holding a meeting that was “a retrospective to discuss the US election.”<sup>186</sup> Kaiser reportedly told Assange that she had funneled money to WikiLeaks in the form of cryptocurrency.<sup>187</sup> WikiLeaks denied the entirety of the Kaiser story in a tweet.<sup>188</sup>

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<sup>180</sup> Ioffe, *Atlantic*, Nov. 13, 2017.

<sup>181</sup> *Id.*

<sup>182</sup> Betsy Woodruff, [Trump Data Guru: I Tried to Team Up With Julian Assange](https://www.thedailybeast.com/trump-data-guru-i-trying-to-team-up-with-julian-assange), *Daily Beast*, Oct. 25, 2017, available at <https://www.thedailybeast.com/trump-data-guru-i-trying-to-team-up-with-julian-assange>; Matthew Nussbaum, [Assange: Trump-tied firm sought WikiLeaks’s help before election](https://www.politico.com/story/2017/10/25/julian-assange-wikileaks-trump-analytica-244164), *Politico*, Oct. 25, 2017, available at <https://www.politico.com/story/2017/10/25/julian-assange-wikileaks-trump-analytica-244164>.

<sup>183</sup> Rebecca Ballhaus, [Trump-Linked Company Reached Out to WikiLeaks on Hacked Emails](https://www.wsj.com/articles/wikileaks-assange-says-he-rejected-overture-from-trump-linked-group-1508961298), *Wall Street Journal*, Oct. 25, 2017, available at <https://www.wsj.com/articles/wikileaks-assange-says-he-rejected-overture-from-trump-linked-group-1508961298>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Carole Cadwalladr and Stephanie Kirchgaessner, [Cambridge Analytics director ‘met Assange to discuss US election’](https://www.theguardian.com/uk-news/2018/jun/06/cambridge-analytica-brittany-kaiser-julian-assange-wikileaks), *The Guardian*, Jun. 7, 2018 available at <https://www.theguardian.com/uk-news/2018/jun/06/cambridge-analytica-brittany-kaiser-julian-assange-wikileaks>.

<sup>187</sup> *Id.*

<sup>188</sup> <https://twitter.com/wikileaks/status/1004375796570578944?lang=en>.

## 5. **Contact between the Trump campaign and the Saudi and Emirati governments**

Russia may not have been the only foreign government to unlawfully interfere in the 2016 election. Evidence has emerged that the middle-eastern nations of Saudi Arabia and the United Arab Emirates may have offered their own assistance to the Trump campaign. According to a report by *The New York Times*, Donald Trump Jr. met with at least three others at Trump Tower on August 3, 2016 to discuss an offer of help to the Trump team.<sup>189</sup> The meeting was also attended by private security contractor Erik Prince, the founder of Blackwater and an informal adviser to the transition team; Joel Zamel, an Israeli social media specialist; and George Nader, an emissary for Saudi and Emirati princes.<sup>190</sup> According to the *Times* report, Trump Jr. responded approvingly to initial offers of help, but it is unclear whether any of the proposals discussed were executed.<sup>191</sup> Reports suggest that these discussions could have been linked to an effort by Emirati and other officials to encourage a bargain between the United States and Russia involving lifting U.S. sanctions on Russia for its intervention in Ukraine in exchange for Russia's cooperation in resolving conflict in Syria.<sup>192</sup>

### **B. Trump transition contacts with foreign nationals and officials**

Investigators are also scrutinizing the conduct of Trump associates during the transition period between the election and President Trump's inauguration. This conduct provides additional context for the obstruction case because some of President Trump's alleged obstructive acts are closely tied to the investigation of his campaign advisor and short-lived National Security Advisor, Michael Flynn. In December 2017, Flynn pleaded guilty to a charge of making a false statement to FBI agents about his contact with the Russian ambassador Sergey Kislyak in December 2016. Flynn was also allegedly involved in a plan to kidnap a Turkish cleric who lives in Pennsylvania and deliver him to the Turkish government (allegations for which Flynn has not been charged).<sup>193</sup>

Other potential misconduct during the transition has since come to light, though the details of what transpired are still murky. The president-elect's son-in-law Jared Kushner, Michael Flynn, and then-incoming White House Communications Director Steve Bannon had a secret meeting at Trump Tower with Crown Prince Sheikh Mohammed bin Zayed Al-Nahyan of the United Arab Emirates on December 15, 2016.<sup>194</sup> This was followed by a secret meeting

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<sup>189</sup> Mark Mazzetti, Ronen Bergman and David D. Kirkpatrick, Trump Jr. and Other Aides Met with Gulf Emissary Offering Help to Win Election, *New York Times*, May 19, 2018, available at <https://www.nytimes.com/2018/05/19/us/politics/trump-jr-saudi-uae-nader-prince-zamel.html>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Adam Entous, Israeli, Saudi, and Emirati Officials Privately Pushed for Trump to Strike a "Grand Bargain" with Putin, *New Yorker*, Jul. 9, 2018, available at <https://www.newyorker.com/news/news-desk/israeli-saudi-and-emirati-officials-privately-pushed-for-trump-to-strike-a-grand-bargain-with-putin>.

<sup>193</sup> James V. Grimaldi, Shane Harris, and Aruna Viswanatha, Mueller Probes Flynn's Role in Alleged Plan to Deliver Cleric to Turkey, *Wall Street Journal*, Nov. 10, 2017, available at <https://www.wsj.com/articles/mueller-probes-flynn-s-role-in-alleged-plan-to-deliver-cleric-to-turkey-1510309982>.

<sup>194</sup> Manu Raju, Exclusive: Rice told House investigators why she unmasked senior Trump officials, *CNN*, Sept. 18, 2017, available at <https://www.cnn.com/2017/09/13/politics/susan-rice-house-investigators-unmasked-trump-officials/index.html>.

attended by Erik Prince, George Nader, and Crown Prince Zayed Al-Nahyan in the Seychelles in early 2017.

### **1. *The Trump transition team's contacts with Russian officials and efforts to undermine U.S. foreign policy***

Trump associates had numerous contacts with Russian Ambassador to the United States Sergey Kislyak in December 2016. On December 1 or 2, Jared Kushner and Michael Flynn met with Kislyak at Trump Tower in New York City, where they reportedly “discussed the possibility of setting up a secret and secure communications channel between Trump’s transition team and the Kremlin . . . .”<sup>195</sup> Two weeks later, on December 13 or 14, Kushner reportedly met with Sergey Gorkov, the chief executive of Vnesheconombank, a Russian-state-owned bank that had been sanctioned by the Obama Administration.<sup>196</sup> Vnesheconombank was also where Eugeny Buryakov—the Russian agent who was charged for conduct including his attempt to recruit Carter Page as an asset—pretended to work.<sup>197</sup>

On December 21, Egypt introduced a resolution at the U.N. Security Council condemning Israeli settlements as illegal.<sup>198</sup> According to court filings, on December 22, 2016, a “very senior member of the Presidential Transition Team” (identified by *The Washington Post* as Jared Kushner<sup>199</sup>) “directed Flynn to contact officials from foreign governments, including Russia,” about their position on that resolution, which was scheduled for a vote that day.<sup>200</sup>

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<sup>195</sup> Ellen Nakashima, Adam Entous and Greg Miller, Russian Ambassador Told Moscow that Kushner Wanted Secret Communications Channel with Kremlin, *Washington Post*, May 26, 2017, available at [https://www.washingtonpost.com/world/national-security/russian-ambassador-told-moscow-that-kushner-wanted-secret-communications-channel-with-kremlin/2017/05/26/520a14b4-422d-11e7-9869-bac8b446820a\\_story.html](https://www.washingtonpost.com/world/national-security/russian-ambassador-told-moscow-that-kushner-wanted-secret-communications-channel-with-kremlin/2017/05/26/520a14b4-422d-11e7-9869-bac8b446820a_story.html); Devlin Barrett, Philip Rucker, and Karoun Demirjian, Kushner Questioned by Senate Investigators on Russia, *Washington Post*, Jul. 24, 2017, available at [https://www.washingtonpost.com/world/national-security/kushner-arrives-at-senate-for-closed-door-questioning-on-russia/2017/07/24/f5be2b26-7073-11e7-8f39-eeb7d3a2d304\\_story.html](https://www.washingtonpost.com/world/national-security/kushner-arrives-at-senate-for-closed-door-questioning-on-russia/2017/07/24/f5be2b26-7073-11e7-8f39-eeb7d3a2d304_story.html).

<sup>196</sup> The Trump White House and the Russian bank later gave different explanations for the purpose of this meetings. “The bank maintained . . . that the session was held as part of a new business strategy and was conducted with Kushner in his role as the head of his family’s real estate business. The White House says the meeting was unrelated to business and was one of many diplomatic encounters the soon-to-be presidential adviser was holding ahead of Trump’s inauguration.” David Filipov, Amy Brittain, Rosalind S. Helderman, and Tom Hamburger, Explanations for Kushner’s Meeting with Head of Kremlin-Linked Bank Don’t Match Up, *Washington Post*, Jun 1, 2017, available at [https://www.washingtonpost.com/politics/explanations-for-kushners-meeting-with-head-of-kremlin-linked-bank-dont-match-up/2017/06/01/dd1bdbb0-460a-11e7-bcde-624ad94170ab\\_story.html](https://www.washingtonpost.com/politics/explanations-for-kushners-meeting-with-head-of-kremlin-linked-bank-dont-match-up/2017/06/01/dd1bdbb0-460a-11e7-bcde-624ad94170ab_story.html); Barret, Rucker, and Demirjian, *Washington Post*, Jul. 24, 2017.

<sup>197</sup> See Section I.A.3.f, *supra*.

<sup>198</sup> Karen DeYoung, How the U.S. came to abstain on a U.N. resolution condemning Israeli settlements, *Washington Post*, Dec. 28, 2016, available at [https://www.washingtonpost.com/world/national-security/how-the-us-came-to-abstain-on-a-un-resolution-condemning-israeli-settlements/2016/12/28/fed102ee-cd38-11e6-b8a2-8c2a61b0436f\\_story.html](https://www.washingtonpost.com/world/national-security/how-the-us-came-to-abstain-on-a-un-resolution-condemning-israeli-settlements/2016/12/28/fed102ee-cd38-11e6-b8a2-8c2a61b0436f_story.html).

<sup>199</sup> Carol D. Leonnig, Adam Entous, Devlin Barrett, and Matt Zapotosky, Michael Flynn pleads guilty to lying to FBI on contacts with Russian ambassador, *Washington Post*, Dec. 1, 2017, available at [https://www.washingtonpost.com/politics/michael-flynn-charged-with-making-false-statement-to-the-fbi/2017/12/01/e03a6c48-d6a2-11e7-9461-ba77d604373d\\_story.html](https://www.washingtonpost.com/politics/michael-flynn-charged-with-making-false-statement-to-the-fbi/2017/12/01/e03a6c48-d6a2-11e7-9461-ba77d604373d_story.html).

<sup>200</sup> Statement of the Offense at ¶ 4.b, *U.S. v. Michael T. Flynn*, No. 17-Cr.-232 (D.D.C. December 1, 2017) (henceforth “Flynn Stmt.”), available at <https://www.justice.gov/file/1015126/download>.

Flynn contacted Russian Ambassador Sergey Kislyak and informed him of the incoming administration's opposition to the resolution. Flynn asked that Russia delay or vote against it. The next day Flynn spoke with the Russian Ambassador again and Kislyak informed Flynn that Russia would not vote against the resolution if it came to a vote.<sup>201</sup>

On December 29, 2016, President Obama sanctioned four individuals and five entities with ties to Russia, expelled 35 Russian diplomats, and ordered the closure of two Russian compounds in response to Russian interference with the U.S. presidential election.<sup>202</sup> That day, in response to a call from the Russian Ambassador the day prior, General Flynn reached out to "a senior official of the Presidential Transition Team" (identified by *The New York Times* as KT McFarland, President-elect Trump's incoming deputy national security advisor<sup>203</sup>), to discuss what, if anything, to communicate to the Russian Ambassador about the U.S. sanctions.<sup>204</sup> At the time, McFarland was at Mar-a-Lago with other senior members of Trump's transition team, as well as the president-elect.<sup>205</sup> According to court papers, Flynn and McFarland discussed the impact sanctions would have on the incoming administration's foreign policy objectives and that "members of the [transition team] at Mar-a-Lago did not want Russia to escalate the situation."<sup>206</sup>

Trump advisers strategized over email about how best to reassure Russia, which included Flynn's outreach to the Russian Ambassador. According to emails "provided or described to *The New York Times*," on December 29, 2016, McFarland wrote to Thomas P. Bossert, another transition official and the President's current Homeland Security Adviser, that the new sanctions would make it harder to improve relations with Russia, "which has just thrown USA election to him," and that the "key will be Russia's response over the next few days."<sup>207</sup> Bossert allegedly forwarded the email exchange to six other transition advisers, including Flynn, Priebus, Bannon, and then-transition spokesman and incoming White House press secretary Sean Spicer, writing "defend election legitimacy now."<sup>208</sup>

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<sup>201</sup> *Id.* at ¶ 4.d.

<sup>202</sup> Evan Perez and Daniella Diaz, White House Announces Retaliation against Russia: Sanctions, Ejecting Diplomats, *CNN*, Jan. 2, 2017, available at <http://www.cnn.com/2016/12/29/politics/russia-sanctions-announced-by-white-house/index.html>.

<sup>203</sup> Michael S. Schmidt, Sharon LaFraniere and Scott Shane, Emails Dispute White House Claims That Flynn Acted Independently on Russia, *New York Times*, Dec. 2, 2017, available at <https://www.nytimes.com/2017/12/02/us/russia-mcfarland-flynn-trump-emails.html>.

<sup>204</sup> *Flynn Stmt.* at ¶ 3.c (D.D.C. Dec. 1, 2017).

<sup>205</sup> Michael D. Shear and Adam Goldman, Michael Flynn Pleads Guilty to Lying to the F.B.I. and Will Cooperate With Russia Inquiry, *New York Times*, Dec. 1, 2017, available at <https://www.nytimes.com/2017/12/01/us/politics/michael-flynn-guilty-russia-investigation.html>; Jeff Zeleny and Kevin Liptak, Inside Mar-a-Lago for 48 hours critical to the Russia investigation, *CNN*, Dec. 10, 2017, available at <https://www.cnn.com/2017/12/08/politics/michael-flynn-donald-trump-mar-a-lago/index.html>.

<sup>206</sup> *Flynn Stmt.* at ¶ 3.c (D.D.C. Dec. 1, 2017). In response to written questions from congressional investigators in July 2017 as to whether she had ever spoken with Flynn about his contacts with Ambassador Kislyak prior to Trump taking office, McFarland replied: "I am not aware of any of the issues or events described above." Michael S. Schmidt and Sharon LaFraniere, McFarland's Testimony About Russia Contacts is Questioned, *New York Times*, Dec. 4, 2017, available at <https://www.nytimes.com/2017/12/04/us/politics/kt-mcfarland-flynn-russia-emails-congressional-testimony.html>.

<sup>207</sup> Schmidt, LaFraniere, and Shane, *New York Times*, Dec. 2, 2017.

<sup>208</sup> *Id.*

According to court papers, Flynn returned Ambassador's Kislyak's call on December 29 and requested that Russia not escalate the situation. Flynn reported back to McFarland shortly thereafter.<sup>209</sup> On December 30, 2016, Putin released a statement that Russia would not take retaliatory measures in response to the sanctions, a reaction that reportedly surprised the outgoing Obama administration.<sup>210</sup> President-elect Trump tweeted, "Great move on delay (by V. Putin) – I always knew he was very smart!"<sup>211</sup> Kislyak and Flynn spoke again the next day, December 31, and Kislyak informed Flynn that Russia would not retaliate as a result of Flynn's request.<sup>212</sup> Flynn relayed his conversations with Kislyak to senior members of the transition team.<sup>213</sup>

On January 12, 2017, *The Washington Post* first reported that Flynn spoke with Kislyak several times on December 29, 2016.<sup>214</sup> The day after this report, Spicer denied that sanctions were discussed on the call, saying that the two merely "exchanged logistical information" on how to set up a call between President Putin and President-elect Trump.<sup>215</sup> On January 15, 2017, Vice President-elect Pence made the same representation in an interview on *CBS News*; Pence asserted, "what I can confirm, having spoken to [Flynn] about it is that those conversations that happened to occur around the time that the United States took action to expel diplomats had nothing whatsoever to do with those sanctions."<sup>216</sup>

After President Trump's inauguration, White House Press Secretary Spicer was again asked about Flynn's calls with Kislyak; he responded, "I talked to General Flynn about this again last night. One call, talked about four subjects. One was the loss of life that occurred in the plane crash that took their military choir, two was Christmas and holiday greetings, three was to talk about a conference in Syria on ISIS and four was to set up a – to talk about after the inauguration setting up a call between Russian President Vladimir Putin and President Trump."<sup>217</sup>

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<sup>209</sup> Flynn Stmt. at ¶ 3.c (D.D.C. Dec. 1, 2017).

<sup>210</sup> Neil MacFarquar, Vladimir Putin Won't Expel U.S. Diplomats as Russian Foreign Minister Urged, *New York Times*, Dec. 30, 2016, available at [https://www.nytimes.com/2016/12/30/world/europe/russia-diplomats-us-hacking.html?mcubz=3&\\_r=0](https://www.nytimes.com/2016/12/30/world/europe/russia-diplomats-us-hacking.html?mcubz=3&_r=0).

<sup>211</sup> <https://twitter.com/realdonaldtrump/status/814919370711461890>.

<sup>212</sup> Flynn Stmt. at ¶ 3.a.

<sup>213</sup> *Id.* at ¶ 3.e.

<sup>214</sup> David Ignatius, Why Did Obama Dawdle on Russia's Hacking?, *Washington Post*, Jan. 12, 2017, available at [https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e\\_story.html](https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html).

<sup>215</sup> Tamara Keith, Trump Team: Top Adviser Talked with Russian Ambassador Before U.S. Hacking Response, *NPR*, Jan. 13, 2017, available at <http://www.npr.org/2017/01/13/509670980/trump-team-top-adviser-talked-with-russian-ambassador-before-u-s-hacking-respons>.

<sup>216</sup> Justin Sink, Trump Aide Called Russian Ambassador on Same Day as Sanctions, *Bloomberg Politics*, Jan. 13, 2017, available at <https://www.bloomberg.com/news/articles/2017-01-13/trump-aide-s-call-with-russian-ambassador-described-as-routine>; Face the Nation Transcript January 15, 2017: Pence, Manchin, Gingrich, *CBS News*, Jan. 15, 2017, available at <http://www.cbsnews.com/news/face-the-nation-transcript-january-15-2017-pence-manchin-gingrich/>.

<sup>217</sup> White House Briefing by Sean Spicer – Full Transcript, Jan. 23, 2017, *CBS News*, Jan. 24, 2017, available at <https://www.cbsnews.com/news/sean-spicer-press-conference-transcript-jan-23-2017/>.

## 2. Meetings with officials from the United Arab Emirates

Trump associates also reportedly had multiple meetings with Crown Prince Sheikh Mohammed bin Zayed Al-Nahyan of the United Arab Emirates during the transition. On December 15, 2016, the Crown Prince met for three hours with several Trump transition officials, including Michael Flynn, Jared Kushner, and Steve Bannon. The trip raised concerns in the Obama administration because the United Arab Emirates did not notify the U.S. government of the trip (which is customary when foreign dignitaries are traveling).<sup>218</sup> That concern apparently prompted outgoing National Security Advisor Susan Rice to “unmask” the identities of Americans who were communicating with foreign officials who were under surveillance; these individuals turned out to be Trump associates (though it is unclear exactly who).<sup>219</sup> At some point after the meeting, Steve Bannon met with Erik Prince and told him that the Crown Prince Zayed Al-Nahyan is a “great guy.”<sup>220</sup>

In early January 2017, George Nader reportedly attended a meeting convened by the Crown Prince Zayed Al-Nahyan in the Seychelles.<sup>221</sup> In attendance along with Nader were Kirill Dmitriev, the manager of Russian Direct Investment Fund, and Erik Prince.<sup>222</sup> Dmitriev was chosen by Russian President Vladimir Putin to manage the fund, which was one of the entities sanctioned by the Obama administration in 2014.<sup>223</sup> According to reporting by *The Washington Post*, a witness cooperating with the Special Counsel’s Office “told investigators the meeting was set up in advance so that a representative of the Trump transition could meet with an emissary from Moscow to discuss future relations between the countries . . . .”<sup>224</sup>

How that meeting came about is unclear. In testimony before the House Intelligence Committee, Prince described the visit as a business trip but acknowledged meeting Dmitriev at

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<sup>218</sup> Raju, *CNN*, Sept. 18, 2017.

<sup>219</sup> *Id.*

<sup>220</sup> Testimony of Erik Prince, *House Permanent Committee on Intelligence*, Nov. 30, 2017, available at <http://docs.house.gov/meetings/IG/IG00/20171130/106661/HHRG-115-IG00-Transcript-20171130.pdf> (henceforth “Prince Testimony”), at \*6, 14, 20; Karoun Demirjian and Adam Entous, [Erik Prince discussed trade, terrorism with Russian banker in Seychelles, interview transcript says](https://www.washingtonpost.com/powerpost/erik-prince-discussed-trade-terrorism-with-russian-banker-in-seychelles-interview-transcript-says/2017/12/06/9f99836c-dac2-11e7-a841-2066faf731ef_story.html), *Washington Post*, Dec. 6, 2017, available at [https://www.washingtonpost.com/powerpost/erik-prince-discussed-trade-terrorism-with-russian-banker-in-seychelles-interview-transcript-says/2017/12/06/9f99836c-dac2-11e7-a841-2066faf731ef\\_story.html](https://www.washingtonpost.com/powerpost/erik-prince-discussed-trade-terrorism-with-russian-banker-in-seychelles-interview-transcript-says/2017/12/06/9f99836c-dac2-11e7-a841-2066faf731ef_story.html).

<sup>221</sup> Prince Testimony at \*7.

<sup>222</sup> Adam Entous, Greg Miller, Kevin Sieff and Karen DeYoung, [Blackwater founder held secret Seychelles meeting to establish Trump-Putin back channel](https://www.washingtonpost.com/world/national-security/blackwater-founder-held-secret-seychelles-meeting-to-establish-trump-putin-back-channel/2017/04/03/95908a08-1648-11e7-ada0-1489b735b3a3_story.html), *Washington Post*, Apr. 3, 2017, available at [https://www.washingtonpost.com/world/national-security/blackwater-founder-held-secret-seychelles-meeting-to-establish-trump-putin-back-channel/2017/04/03/95908a08-1648-11e7-ada0-1489b735b3a3\\_story.html](https://www.washingtonpost.com/world/national-security/blackwater-founder-held-secret-seychelles-meeting-to-establish-trump-putin-back-channel/2017/04/03/95908a08-1648-11e7-ada0-1489b735b3a3_story.html); Mark Mazzetti, David D. Kirkpatrick, and Adam Goldman, [Adviser to Emirates With Ties to Trump Aides Is Cooperating With Special Counsel](https://www.nytimes.com/2018/03/06/us/politics/george-nader-special-counsel-mueller-cooperating-seychelles.html?smid=tw-share), *New York Times*, Mar. 6, 2018, available at <https://www.nytimes.com/2018/03/06/us/politics/george-nader-special-counsel-mueller-cooperating-seychelles.html?smid=tw-share>.

<sup>223</sup> Mazzetti, Kirkpatrick, and Goldman, *New York Times*, Mar. 6, 2018.

<sup>224</sup> Sari Horwitz and Devlin Barrett, [Mueller gathers evidence that 2017 Seychelles meeting was effort to establish back channel to Kremlin](https://www.washingtonpost.com/world/national-security/mueller-gathers-evidence-that-2016-seychelles-meeting-was-effort-to-establish-back-channel-to-kremlin/2018/03/07/b6a5fb8c-224b-11e8-94da-ebf9d112159c_story.html?utm_term=.2d1c17f17e38), *Washington Post*, Mar. 7, 2018, available at [https://www.washingtonpost.com/world/national-security/mueller-gathers-evidence-that-2016-seychelles-meeting-was-effort-to-establish-back-channel-to-kremlin/2018/03/07/b6a5fb8c-224b-11e8-94da-ebf9d112159c\\_story.html?utm\\_term=.2d1c17f17e38](https://www.washingtonpost.com/world/national-security/mueller-gathers-evidence-that-2016-seychelles-meeting-was-effort-to-establish-back-channel-to-kremlin/2018/03/07/b6a5fb8c-224b-11e8-94da-ebf9d112159c_story.html?utm_term=.2d1c17f17e38).

a hotel bar for approximately thirty minutes.<sup>225</sup> Prince further testified that he did not know that he would be meeting with Dmitriev, that Dmitriev was the head of the Russian Direct Investments Fund, or that the fund was under U.S. sanctions.<sup>226</sup> Nevertheless, Special Counsel Mueller reportedly has evidence that calls into question Prince's testimony that the meeting was a chance encounter, including testimony from Nader that he organized Prince's meetings in the Seychelles with Russian and Emirati contacts.<sup>227</sup>

Nader reportedly continued to enjoy access to Trump's inner circle after President Trump assumed office and continued to advocate for the United Arab Emirates.<sup>228</sup> Nader reportedly also campaigned for the removal of Secretary of State Rex Tillerson,<sup>229</sup> and began cooperating with investigators in 2018.<sup>230</sup>

### **3. Michael Flynn's potential involvement in a conspiracy to kidnap a Turkish cleric**

After retiring from the U.S. Army as a lieutenant general, Michael Flynn opened a consulting firm in the fall of 2014 and took on a number of foreign clients including at least two Russian companies with ties to the Russian government.<sup>231</sup> In August 2016, his firm was also hired by Turkish businessman Kamil Ekim Alptekin—the head of the Turkish-American Business Council, an organization with ties to the Turkish government—to advocate for the extradition of Fethullah Gulen, the leader of a movement that Turkish President Recep Erdogan blamed for a failed coup attempt.<sup>232</sup> On November 8, 2016, the day of the 2016 U.S. presidential election, an editorial titled "Our ally Turkey is in crisis and needs our support," written by Flynn, was published in *The Hill*.<sup>233</sup>

The *Hill* article, a diatribe against Gulen, reportedly drew the attention of the Department of Justice and raised concerns that Flynn was working as an unregistered foreign agent, in

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<sup>225</sup> Prince Testimony at 7.

<sup>226</sup> *Id.* at 36, 75

<sup>227</sup> Pierre Thomas and James Gordon Meek, Mueller has evidence that Trump supporter's meeting with Putin ally may not have been a chance encounter: Sources, *ABC News*, Apr. 6, 2018, available at <https://abcnews.go.com/Politics/mueller-evidence-raising-questions-prince-testimony-meeting-russian/story?id=54277090>.

<sup>228</sup> David D. Kirkpatrick and Mark Mazzetti, How 2 Gulf Monarchies Sought to Influence the White House, *New York Times*, Mar. 21, 2018, available at <https://www.nytimes.com/2018/03/21/us/politics/george-nader-elliott-broidy-uae-saudi-arabia-white-house-influence.html>.

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

<sup>230</sup> Mazzetti, Kirkpatrick, and Goldman, *New York Times*, Mar. 6, 2018.

<sup>231</sup> Full Transcript and Video: Trump News Conference, *New York Times*, Feb. 16, 2017, available at <https://www.nytimes.com/2017/02/16/us/politics/donald-trump-press-conference-transcript.html>; Nicholas Confessore, Matthew Rosenberg and Danny Hakim, How Michael Flynn's Disdain for Limits Led to a Legal Quagmire, *New York Times*, Jun. 18, 2017, available at <https://www.nytimes.com/2017/06/18/us/politics/michael-flynn-intel-group-trump.html>.

<sup>232</sup> *Id.*; Borzou Daragahi, The Man at the Center of This Trump Scandal Wants to Clear His Name, *BuzzFeed News*, Jun. 20, 2017, available at [https://www.buzzfeed.com/borzoudaragahi/the-man-at-the-center-of-this-trump-scandal-wants-to-clear?utm\\_term=.afW9543Wl#.aboO4vMmE](https://www.buzzfeed.com/borzoudaragahi/the-man-at-the-center-of-this-trump-scandal-wants-to-clear?utm_term=.afW9543Wl#.aboO4vMmE).

<sup>233</sup> Lt. Gen. Michael T. Flynn, Our Ally Turkey Is in Crisis and Needs Our Support, *The Hill*, Nov. 8, 2016, available at <http://thehill.com/blogs/pundits-blog/foreign-policy/305021-our-ally-turkey-is-in-crisis-and-needs-our-support>.

apparent violation of federal law.<sup>234</sup> Twelve days after being named President-elect Trump's pick for national security advisor, Flynn reportedly received notice from the Department of Justice that his Turkish lobbying activities were being investigated, and Flynn passed the notice on to the presidential transition team.<sup>235</sup>

In mid-December 2016, after Flynn was tapped as national security advisor, Flynn and his son, Michael Flynn Jr. reportedly met in New York with Turkish officials and reportedly proposed to deliver Muslim cleric Fethullah Gulen to the Turkish government in exchange for as much as \$15 million.<sup>236</sup> According to one source, Flynn was "prepared to use his influence in the White House to further the legal extradition of the cleric . . . ."<sup>237</sup>

### **C. Criminal and congressional investigations and related proceedings**

Since at least the Summer of 2016, the FBI has been investigating Russian interference in the 2016 presidential election and possible coordination with those Russian efforts by individuals associated with the Trump campaign. The investigation has developed into congressional and grand jury proceedings, and it has also evolved to include possible efforts to obstruct those associated proceedings. In this Subsection, we summarize pivotal moments in those investigations and associated proceedings with particular emphasis on when developments became public or may have otherwise been known to Donald Trump before and after he took office.

#### **1. *In July 2016, the FBI publicly confirmed a criminal investigation of DNC hacking and quietly launched a counterintelligence probe of contacts between the Trump campaign and Russia***

On July 25, 2016, three days after WikiLeaks released the first set of stolen DNC emails and documents,<sup>238</sup> the FBI publicly confirmed that it had opened an investigation into the hacking of the DNC.<sup>239</sup> Around the same time, the FBI also reportedly initiated a counterintelligence investigation into possible contacts between the Trump campaign and Russia.<sup>240</sup> The FBI probe initially focused on four Trump campaign associates: Michael Flynn, Paul Manafort, Carter Page, and George Papadopoulos.<sup>241</sup> The existence of the counterintelligence investigation was a closely-kept secret—only about five Department of Justice officials reportedly knew the full scope of the case.<sup>242</sup>

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<sup>234</sup> Matthew Rosenberg and Mark Mazzetti, Trump Team Knew Flynn Was Under Investigation Before He Came to White House, *New York Times*, May 17, 2017, available at <https://www.nytimes.com/2017/05/17/us/politics/michael-flynn-donald-trump-national-security-adviser.html>.

<sup>235</sup> Rosenberg and Mazzetti, *New York Times*, May 17, 2017.

<sup>236</sup> Grimaldi, Harris, and Viswanatha, *Wall Street Journal*, Nov. 10, 2017.

<sup>237</sup> *Id.*

<sup>238</sup> Joe Uchill, *The Hill*, Jul. 22, 2017.

<sup>239</sup> Mike Levine, Rick Klein, and Walshe, *ABC News*, Jul. 25, 2016.

<sup>240</sup> Matt Apuzzo, Adam Goldman and Nicholas Fandos, Code Name Crossfire Hurricane: The Secret Origins of the Trump Investigation, *New York Times*, May 16, 2018, available at <https://www.nytimes.com/2018/05/16/us/politics/crossfire-hurricane-trump-russia-fbi-mueller-investigation.html>.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

## 2. ***The FBI received intelligence collected by former British intelligence officer Christopher Steele alleging additional contacts between Trump associates and Russia***

During the primary and general election campaigns, political opponents of President Trump hired the political research firm Fusion GPS to conduct opposition research about President Trump. In conjunction with Fusion GPS, former British MI6 agent Christopher Steele completed a series of reports that were eventually circulated as a 35-page dossier (the “Steele Dossier”). The Steele Dossier contained “salacious” material about Trump, as well as allegations of multiple contacts between Russian officials and members of Trump’s circle—including Carter Page, Paul Manafort, Michael Flynn, and Michael Cohen (Trump’s attorney and former executive vice president of the Trump Organization).<sup>243</sup> (Many of the allegations contained in the report about contacts with Russians have since been corroborated, though the salacious allegations regarding Trump have not.<sup>244</sup>)

On January 6, 2017, FBI Director James Comey briefed President Trump in private about the Steele Dossier. Four days later, on January 10, *CNN* reported the existence of the Steele Dossier,<sup>245</sup> and *BuzzFeed News* published the document.<sup>246</sup> Several of the individuals mentioned in the Steele Dossier have disputed the veracity of its allegations: Michael Cohen once described it as fake news,<sup>247</sup> and President-elect Trump tweeted soon after the dossier was published, “FAKE NEWS – A TOTAL POLITICAL WITCH HUNT!”<sup>248</sup> On the day the Steele

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<sup>243</sup> Office of the Director of National Intelligence, Jan. 6, 2017; James B. Comey, Statement for the Record, Senate Select Committee on Intelligence, Jun. 8, 2017, *available at* <https://assets.documentcloud.org/documents/3860358/Comey-Prepared-Remarks-Testimony.pdf> and attached as App. A.2; Evan Perez, Jim Sciutto, Jake Tapper and Carl Bernstein, Intel Chiefs Presented Trump with Claims of Russian Efforts to Compromise Him, *CNN*, Jan. 12, 2017, *available at* <http://edition.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html>; Bradley Hope, Michael Rothfeld, and Alan Cullison, Christopher Steele, Ex-British Intelligence Officer, Said to Have Prepared Dossier on Trump, *Wall Street Journal*, Jan. 11, 2017, *available at* <https://www.wsj.com/articles/christopher-steele-ex-british-intelligence-officer-said-to-have-prepared-dossier-on-trump-1484162553>.

<sup>244</sup> See John Sipher, The Steele Report, Revisited, *Slate*, Sept. 11, 2017, *available at* <http://www.slate.com/news-and-politics/2018/07/trump-cant-brush-aside-the-evidence-in-this-indictment-but-he-probably-will-anyway.html>; Cristina Maza, How True Is the Trump-Russia Dossier? One Year Later, What We Know About Its Claims, *Newsweek*, Jan. 10, 2018, *available at* <https://www.newsweek.com/trump-russia-dossier-one-year-later-what-we-know-777116>.

<sup>245</sup> Perez, Sciutto, Tapper, and Bernstein, *CNN*, Jan. 12, 2017.

<sup>246</sup> Ken Bensinger, Miriam Elder, and Mark Schoofs, These Reports Allege Trump Has Deep Ties to Russia, *BuzzFeed News*, Jan. 10, 2017, *available at* [https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm\\_term=.urx58BvNO#.em60edvNQ](https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.urx58BvNO#.em60edvNQ); Steele Dossier, *available at* <https://assets.documentcloud.org/documents/3259984/Trump-Intelligence-Allegations.pdf>.

<sup>247</sup> Rosie Gray, ‘It Is Fake News Meant to Malign Mr. Trump’, *Atlantic*, Jan. 10, 2017, *available at* <https://www.theatlantic.com/politics/archive/2017/01/michael-cohen-it-is-fake-news-meant-to-malign-mr-trump/512762/>.

<sup>248</sup> <https://twitter.com/realDonaldTrump/status/818990655418617856>.

Dossier was published, Manafort reportedly called incoming Chief of Staff Reince Priebus to tell him that the dossier was full of inaccuracies and was unreliable.<sup>249</sup>

Nevertheless, in February 2017, *CNN* reported that U.S. investigators had corroborated some aspects of the Steele Dossier based on intercepted communications of foreign nationals. According to *CNN*'s sources, the intercepts "confirm[ed] that some of the conversations described in the dossier took place between the same individuals on the same days and from the same locations as detailed in the dossier."<sup>250</sup> The discovery of corroborating evidence reportedly gave investigators greater confidence that parts of the Steele Dossier were credible.<sup>251</sup>

### **3. In late 2016 and early 2017, congressional committees launched investigations into Russian interference in the 2016 election**

In December 2016, congressional committees started launching investigations into Russian interference in the 2016 election. On December 13, 2016, Senator Bob Corker announced that the Senate Foreign Relations Committee, which he chairs, would "systematically walk through the entire Russia issue and fully understand what had transpired."<sup>252</sup>

Formal announcements of congressional investigations followed in early 2017. On January 13, 2017, Senators Richard Burr and Mark Warner, the Chairman and Vice Chairman of the Senate Select Committee on Intelligence, announced that the Committee would be conducting an inquiry into "Russian intelligence activities impacting the United States."<sup>253</sup> They stated that the inquiry would cover "[c]ounterintelligence concerns related to Russia and the 2016 U.S. election, including any intelligence regarding links between Russia and individuals associated with political campaigns."<sup>254</sup> On January 25, 2017, Representatives Devin Nunes and Adam Schiff, the Chair and Ranking Member of the House Permanent Select Committee on Intelligence, announced that their committee had also been undertaking an inquiry into, among other issues, "[c]ounterintelligence concerns related to Russia and the 2016 U.S. election,

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<sup>249</sup> Kenneth P. Vogel, *Manafort Advised Trump Team on Russia Scandal*, *Politico*, May 25, 2017, available at <http://www.politico.com/story/2017/05/25/manafort-trump-russia-advise-238803>.

<sup>250</sup> Jim Sciutto and Evan Perez, *US Investigators Corroborate Some Aspects of the Russia Dossier*, *CNN*, Feb. 10, 2017, available at <http://www.cnn.com/2017/02/10/politics/russia-dossier-update/index.html>.

<sup>251</sup> *Id.*

<sup>252</sup> Manu Raju, *Bob Corker Plans to Launch New Russia Hacking Inquiry*, *CNN*, Dec. 13, 2017, available at <http://www.cnn.com/2016/12/13/politics/bob-corker-russia-hacking-investigation/index.html>.

<sup>253</sup> Senate Select Committee on Intelligence, *Joint Statement on Committee Inquiry into Russian Intelligence Activities*, Jan. 13, 2017, available at <https://www.intelligence.senate.gov/press/joint-statement-committee-inquiry-russian-intelligence-activities>.

<sup>254</sup> *Id.*

including any intelligence regarding links between Russia and individuals associated with political campaigns.”<sup>255</sup>

**4. In January 2017, Acting Attorney General Sally Yates reportedly informed the White House about Flynn’s misrepresentations regarding his communications with Russian Ambassador Kislyak.**

On January 24, 2017, in an interview with FBI agents, Flynn denied having discussed U.S. sanctions during his conversation with Kislyak, contradicting the contents of intercepted communications collected by intelligence agencies.<sup>256</sup> Flynn told the FBI that on December 29, 2016, he did not ask the Russian Ambassador to refrain from escalating the situation in response to U.S. sanctions and that he “did not recall the Russian Ambassador subsequently telling him that Russia had chosen to moderate its response to those sanctions as a result.”<sup>257</sup> He also falsely represented that he did not ask the Russian Ambassador “to delay the vote on or defeat a pending United Nations Security Council resolution; and that the Russian Ambassador subsequently never described . . . Russia’s response to this request.”<sup>258</sup>

Reportedly troubled by the White House’s inaccurate claims about the contents of Flynn’s conversations with Kislyak, Acting Attorney General Sally Yates met with White House Counsel Don McGahn on January 26, 2017, and explained to him that the Department of Justice knew Flynn’s representations to be untrue.<sup>259</sup> After the meeting, McGahn reportedly briefed President Trump on the conversation with Yates.<sup>260</sup> It is unclear exactly how much McGahn disclosed; however, at least one report suggests that McGahn told the president that Flynn was being investigated by the FBI and that Flynn had falsely represented to the FBI that he had not spoken to Kislyak about sanctions.<sup>261</sup>

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<sup>255</sup> House Permanent Select Committee on Intelligence, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures, Jan. 25, 2017, available at <https://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=211>.

<sup>256</sup> Sari Horwitz and Adam Entous, Flynn in FBI Interview Denied Discussing Sanctions with Russian Ambassador, *Washington Post*, Feb. 16, 2017, available at [https://www.washingtonpost.com/world/national-security/flynn-in-fbi-interview-denied-discussing-sanctions-with-russian-ambassador/2017/02/16/e3e1e16a-f3d5-11e6-8d72-263470bf0401\\_story.html](https://www.washingtonpost.com/world/national-security/flynn-in-fbi-interview-denied-discussing-sanctions-with-russian-ambassador/2017/02/16/e3e1e16a-f3d5-11e6-8d72-263470bf0401_story.html).

<sup>257</sup> Information, *U.S. v. Michael T. Flynn*, 17-cr-232 (D.D.C. November 30, 2017), available at <https://www.justice.gov/file/1015026/download>.

<sup>258</sup> *Id.*

<sup>259</sup> Matt Apuzzo and Emmarie Huetteman, Sally Yates Tells Senators She Warned Trump about Michael Flynn, *New York Times*, May 8, 2017, available at [https://www.nytimes.com/2017/05/08/us/politics/michael-flynn-sally-yates-hearing.html?\\_r=0](https://www.nytimes.com/2017/05/08/us/politics/michael-flynn-sally-yates-hearing.html?_r=0).

<sup>260</sup> The White House, Press Briefing by Press Secretary Sean Spicer 2/14/2017, #12, *The White House Office of the Press Secretary*, Feb. 14, 2017, available at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-021417/> (“Immediately after the Department of Justice notified the White House Counsel of the situation, the White House Counsel briefed the President and a small group of senior advisors.”); Murray Waas, Flynn, Comey, and Mueller: What Trump Knew and When He Knew It, *New York Review of Books*, Jul. 31, 2018, available at <https://www.nybooks.com/daily/2018/07/31/what-trump-knew-and-when-he-knew-it/>.

<sup>261</sup> Waas, *New York Review of Books*, Jul. 31, 2018.

At McGahn's request, Yates returned to the White House the next day, January 27, 2017.<sup>262</sup> According to Yates, McGahn asked her "about the applicability of . . . certain criminal statutes" and whether he could review the "underlying evidence" that Yates had described to him about Flynn's conduct.<sup>263</sup> Press accounts suggest that Yates informed McGahn that Flynn may have violated the Logan Act.<sup>264</sup> Yates testified that she declined to respond when McGahn asked "how'd he do" in reference to Flynn's FBI interview.<sup>265</sup> Yates also testified that McGahn expressed concern as to whether the White House taking action on Flynn would interfere with the FBI's investigation; Yates informed him that it would not.<sup>266</sup>

On February 9, 2017, two weeks after Yates had warned the White House about Flynn's misrepresentations, *The Washington Post* reported that Flynn had privately discussed sanctions against Russia with Kislyak, contrary to assertions made by Flynn, Vice President Pence, and the White House.<sup>267</sup> On February 13, 2017, Flynn resigned as National Security Advisor.<sup>268</sup> In his resignation letter, Flynn wrote, "Unfortunately, because of the fast pace of events, I inadvertently briefed the vice president-elect and others with incomplete information regarding my phone calls with the Russian Ambassador."<sup>269</sup>

##### **5. In March 2017, FBI Director Comey confirmed that the FBI was investigating possible coordination between the Trump campaign and Russia**

On March 20, 2017, in testimony before the House Permanent Select Committee on Intelligence, Director Comey confirmed the FBI's investigation into Russia's interference in the presidential election, as well as whether individuals affiliated with President Trump were in

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<sup>262</sup> Riley Beggin and Veronica Stracqualursi, [A Timeline of Sally Yates' Warnings to the White House about Mike Flynn](http://abcnews.go.com/Politics/timeline-sally-yates-warnings-white-house-mike-flynn/story?id=47272979), *ABC News*, May 8, 2017, available at <http://abcnews.go.com/Politics/timeline-sally-yates-warnings-white-house-mike-flynn/story?id=47272979>.

<sup>263</sup> Full transcript: Sally Yates and James Clapper testify on Russian election interference, *Washington Post*, May 8, 2017 (henceforth "Yates and Clapper Testimony"), available at [https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference/?utm\\_term=.88e502c2bc1a](https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference/?utm_term=.88e502c2bc1a).

<sup>264</sup> Tom McCarthy, [What did the White House counsel tell Trump about Flynn – and why does it matter?](https://www.theguardian.com/us-news/2017/feb/14/michael-flynn-resignation-explainer-white-house-counsel), *The Guardian*, Feb. 14, 2017, available at <https://www.theguardian.com/us-news/2017/feb/14/michael-flynn-resignation-explainer-white-house-counsel>.

<sup>265</sup> Yates and Clapper Testimony, *Washington Post*, May 8, 2017.

<sup>266</sup> *Id.*

<sup>267</sup> Greg Miller, Adam Entous and Ellen Nakashima, [National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say](https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html), *Washington Post*, Feb. 9, 2017, available at [https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5\\_story.html](https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html).

<sup>268</sup> Maggie Haberman, Matthew Rosenberg, Matt Apuzzo and Glenn Thrush, [Michael Flynn Resigns as National Security Adviser](https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html), *New York Times*, Feb. 13, 2017, available at <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.

<sup>269</sup> *Id.*

contact with Russian nationals.<sup>270</sup> Comey said:

I have been authorized by the Department of Justice to confirm that the FBI, as part of our counterintelligence mission, is investigating the Russian government's efforts to interfere in the 2016 presidential election and that includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts. As with any counterintelligence investigation, this will also include an assessment of whether any crimes were committed.<sup>271</sup>

President Trump was reportedly angry that Comey refused to testify at this hearing that President Trump was not personally under investigation.<sup>272</sup> Soon afterwards, President Trump reportedly began to speak openly about his desire to fire Comey.<sup>273</sup> One of McGahn's deputies was reportedly concerned enough about this possibility that the attorney reportedly misled the president by falsely suggesting that the president did not have the authority to fire Comey.<sup>274</sup>

#### **6. *In the weeks before and after Comey's firing, reports emerged that a grand jury had been empaneled in conjunction with the Russia investigation***

In testimony before the Senate Judiciary Committee on May 3, 2017, Comey confirmed that the FBI was investigating potential ties between Trump associates and the Russian interference in the 2016 campaign.<sup>275</sup> Comey also confirmed that the FBI was coordinating with two sets of prosecutors: the Department of Justice's National Security Division and the U.S. Attorney's Office for the Eastern District of Virginia.<sup>276</sup>

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<sup>270</sup> Matthew Rosenberg, Emmarie Huetteman and Michael S. Schmidt, Comey Confirms F.B.I. Inquiry on Russia; Sees No Evidence of Wiretapping, *New York Times*, Mar. 20, 2017, available at <https://www.nytimes.com/2017/03/20/us/politics/intelligence-committee-russia-donald-trump.html>.

<sup>271</sup> Washington Post Staff, Full Transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election, *Washington Post*, Mar. 20, 2017, available at <https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election/>.

<sup>272</sup> Michael S. Schmidt, Obstruction Inquiry Shows Trump's Struggle to Keep Grip on Russia Investigation, *New York Times*, Jan. 4, 2018, available at <https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-mcghahn.html>.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Washington Post Staff, Read the Full Testimony of FBI Director James Comey in Which He Discusses Clinton Email Investigation, *Washington Post*, May 3, 2017, available at <https://www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/> (SEN. RICHARD BLUMENTHAL, D-CONN.: . . . . You have confirmed, I believe, that the FBI is investigating potential ties between Trump Associates and the Russian interference in the 2016 campaign, correct? COMEY: Yes.”).

<sup>276</sup> *Id.* (“HIRONO: So in the investigations that you're currently doing on the Russian interference and the Trump team's relationship, are you coordinating with any U.S. attorney's office in these investigations? COMEY: Yes, well -- two sets of prosecutors, the Main Justice the National Security Division and the Eastern District of Virginia U.S. Attorney's Office.”).

On May 10, 2017, *CNN* reported that in the weeks leading up to Comey's termination, the U.S. Attorney's Office for the Eastern District of Virginia issued grand jury subpoenas in connection with the Flynn investigation.<sup>277</sup> There were multiple grand jury subpoenas issued in connection with Flynn and Manafort in the months prior to the Summer of 2017.<sup>278</sup> *The New York Times* (after Comey's termination) also reported that, in early May, Comey requested greater resources to intensify the FBI's investigation into Russian interference in the presidential election.<sup>279</sup> However, his deputy, Andrew McCabe, later testified that he was unaware of any request that Director Comey made for additional resources for the Russia investigation.<sup>280</sup>

### **7. On May 17, 2017, Special Counsel Mueller was appointed to oversee the Russia investigation as well as potential obstruction of justice by President Trump**

On May 17, 2017, in the wake of President Trump's firing of FBI Director Comey, Deputy Attorney General Rod Rosenstein named former FBI Director Robert Mueller as special counsel to oversee the Russia investigation.<sup>281</sup> In his order appointing Mueller, Rosenstein authorized him to "conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including: (i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and (ii) any matters that arose or may arise directly from the investigation; and (iii) any other matters within the scope of 28 C.F.R. § 600.4(a)."<sup>282</sup> The regulation cited—28 C.F.R. § 600.4(a) — authorizes the special counsel "to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted."

In early June 2017, reports emerged that Special Counsel Mueller had assumed control of the grand jury investigation of Michael Flynn<sup>283</sup> and a separate criminal probe of Paul

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<sup>277</sup> Evan Perez, Shimon Prokupecz and Pamela Brown, CNN Exclusive: Grand Jury Subpoenas Issued in FBI's Russia Investigation, *CNN*, May 10, 2017, available at <http://www.cnn.com/2017/05/09/politics/grand-jury-fbi-russia/>; Eli Stokols, Natalie Andrews, and Del Quentin Wilber, Russia Probe Heats Up as Trump Tries to Limit Damage, *Wall Street Journal*, May 18, 2017, available at <https://www.wsj.com/articles/russia-probe-heats-up-as-trump-tries-to-limit-damage-1495156529>.

<sup>278</sup> Tom Winter and Ken Dilanian, Flynn, Manafort Are Key Figures in Russia Probe Mueller Will Lead, *NBC News*, May 17, 2017, available at <https://www.nbcnews.com/news/us-news/flynn-manafort-are-key-figures-russia-probe-mueller-will-lead-n761256>.

<sup>279</sup> Matthew Rosenberg and Matt Apuzzo, Days Before Firing, Comey Asked for More Resources for Russia Inquiry, *New York Times*, May 10, 2017, available at <https://www.nytimes.com/2017/05/10/us/politics/comey-russia-investigation-fbi.html>.

<sup>280</sup> Adam Goldman and Matthew Rosenberg, Acting FBI Chief Contradicts White House on Russia and Comey, *New York Times*, May 11, 2017, available at <https://www.nytimes.com/2017/05/11/us/politics/andrew-mccabe-fbi-chief-russia-trump.html>.

<sup>281</sup> Rod Rosenstein, Order No. 3915-2017, *Office of the Deputy Attorney General*, May 17, 2017, available at <https://www.justice.gov/opa/press-release/file/967231/download>.

<sup>282</sup> *Id.*

<sup>283</sup> Nathan Layne, Mark Hosenball, and Julia Edwards Ainsley, Exclusive: Special Counsel Mueller to Probe ex-Trump Aide Flynn's Turkey Ties, *Reuters*, Jun. 2, 2017, available at <http://www.reuters.com/article/us-usa-trump-flynn-turkey-exclusive-idUSKBN18T276>.

Manafort.<sup>284</sup> In early August 2017, additional reports emerged that Special Counsel Mueller had empaneled a separate grand jury in Washington D.C.<sup>285</sup>

Subsequent investigative steps, including interviews of senior DOJ officials, as well as public reports have made clear that Special Counsel Mueller has been actively investigating possible obstruction of justice.<sup>286</sup>

## **8. Beginning in the Summer and Fall of 2017, Congressional investigations began issuing subpoenas and interviewing witnesses**

Congressional investigations into Russian interference in the 2016 election began hearing testimony from witnesses in the Summer and Fall of 2017. The Senate Intelligence Committee heard public testimony from DNI Coats and NSA Director Mike Rogers<sup>287</sup> as well as former FBI Director Comey.<sup>288</sup> The Senate Intelligence Committee also met privately with Jared Kushner.<sup>289</sup>

Nevertheless, by October 2017, congressional investigations had run into various problems: the Senate Judiciary Committee inquiry had barely started, in part due to delays caused by negotiations over the scope of the investigations, and in the House, Democrats accused their Republican counterparts of playing “defense attorney” for Kushner during a closed-door interview.<sup>290</sup> Meanwhile, the Senate Intelligence Committee was less rancorous, but

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<sup>284</sup> Sadie Gurman, Eric Tucker, and Jeff Horwitz, Special Counsel’s Trump Investigation Includes Manafort Case, *Associated Press*, Jun. 3, 2017, available at <https://www.apnews.com/35b610bf8d66416798be8abb2ebd85b0>.

<sup>285</sup> Del Quentin Wilber and Byron Tau, Special Counsel Robert Mueller Impanels Washington Grand Jury in Russia Probe, *Wall Street Journal*, Aug. 3, 2017, available at <https://www.wsj.com/articles/special-counsel-mueller-impanels-washington-grand-jury-in-russia-probe-1501788287?mod=e2tw>; Christian Berthelsen and Greg Farrell, With Bank Subpoenas, Mueller Turns Up the Heat on Manafort, *Bloomberg Politics*, Aug. 10, 2017, available at <https://www.bloomberg.com/news/articles/2017-08-10/with-bank-subpoenas-mueller-is-said-to-turn-up-heat-on-manafort>.

<sup>286</sup> See, e.g., Josh Gerstein, Mueller’s team interviewed Rosenstein over the summer, *Politico*, Sept. 20, 2017, available at <https://www.politico.com/story/2017/09/20/robert-mueller-team-interviews-rod-rostein-242924>; Michael S. Schmidt and Maggie Haberman, Sessions Is Questioned as Russia Inquiry Focuses on Obstruction, *New York Times*, Jan. 23, 2018, available at <https://www.nytimes.com/2018/01/23/us/politics/jeff-sessions-special-counsel-russia.html>; Matt Zapotosky, Dana Boente, former top Justice Department official now at FBI, has been interviewed by Mueller and turned over notes, *Washington Post*, Apr. 10, 2018, available at <https://www.washingtonpost.com/news/post-nation/wp/2018/04/10/dana-boente-former-top-justice-department-official-now-at-fbi-has-been-interviewed-by-mueller-and-turned-over-notes/>.

<sup>287</sup> Kyle Cheney and Josh Gerstein, Coats and Rogers Refuse to Say if Trump Asked Them to Sway Russia Probe, *Politico*, Jun. 7, 2017, available at <http://www.politico.com/story/2017/06/07/mike-rogers-dan-coats-senate-intelligence-hearing-russia-239244>.

<sup>288</sup> Comey Stmt. (Jun. 8, 2017).

<sup>289</sup> Devlin Barrett, Philip Rucker, and Karoun Demirjian, Kushner Questioned by Senate Investigators on Russia, *Washington Post*, Jul. 24, 2017, available at [https://www.washingtonpost.com/world/national-security/kushner-arrives-at-senate-for-closed-door-questioning-on-russia/2017/07/24/f5be2b26-7073-11e7-8f39-eeb7d3a2d304\\_story.html](https://www.washingtonpost.com/world/national-security/kushner-arrives-at-senate-for-closed-door-questioning-on-russia/2017/07/24/f5be2b26-7073-11e7-8f39-eeb7d3a2d304_story.html).

<sup>290</sup> Nicholas Fandos, Hopes Dim for Congressional Russia Inquiries as Parties Clash, *New York Times*, Oct. 22, 2017, available at <https://www.nytimes.com/2017/10/22/us/politics/russia-investigation-congress-intelligence-committees-gowdy.html>.

members sought to dampen expectations.<sup>291</sup> In December 2017, *PBS* reported that the Senate Intelligence Committee was likely to release a report in early 2018 with recommendations on how to counter Russia's interference, with any report about collusion to issue later in the year.<sup>292</sup> Representative Adam Schiff, Ranking Member of the House Intelligence Committee, meanwhile stated concerns that the Republican majority would shut down the House investigation in early 2018.<sup>293</sup>

In January and February 2018, some Republican members of Congress renewed efforts to shift public focus to allegations of purported misconduct by the Department of Justice in its investigations of President Trump and the Trump campaign. They alleged improper behavior by an FBI agent who had been part of the investigation and flaws in the FISA applications that led to the surveillance of Carter Page.<sup>294</sup> In April 2018, the House Intelligence Committee investigation ground to a halt, with House Republicans releasing a report that claimed that the committee had uncovered no evidence of collusion between the Trump campaign and Russia and that, contrary to the findings of U.S. intelligence agencies, Russia had not favored Trump's candidacy.<sup>295</sup> Nevertheless, in July 2018, the Senate Intelligence Committee published interim findings agreeing with the conclusions of the U.S intelligence agencies that Russia had intervened with the goal of aiding Trump.<sup>296</sup>

**9. In October 2017, the special counsel obtained indictments of Trump Campaign Chairman Paul Manafort and his deputy Rick Gates, and as well as the guilty plea of Trump campaign advisor George Papadopoulos**

On July 27, 2017, unbeknownst to the public, Papadopoulos was arrested at Washington Dulles International Airport and by the following day had "indicated that he [was] willing to cooperate with the government in its ongoing investigation into Russian efforts to interfere in the 2016 presidential election."<sup>297</sup> Papadopoulos was then charged on October 5, 2017 with one count of making false statements in violation of 18 U.S.C. § 1001 to which he pleaded guilty.<sup>298</sup> As part of the deal, Papadopoulos admitted that during a voluntary interview with FBI agents on January 27, 2017, he proceeded to make false statements as to the nature

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<sup>291</sup> *Id.*

<sup>292</sup> Mary Clare Jalonick, Senate may put off most anticipated Russian investigation findings, *Associated Press*, Dec. 15, 2017, available at <https://www.pbs.org/newshour/politics/senate-may-put-off-most-anticipated-russian-investigation-findings>.

<sup>293</sup> Erin Kelly and Kevin Johnson, What's next for the Russia investigations? No end in sight for Congress, Mueller probes, *USA Today*, Dec. 27, 2017, available at <https://www.usatoday.com/story/news/politics/2017/12/27/whats-next-russia-investigations-no-end-sight-congress-mueller-probes/942219001/>.

<sup>294</sup> Charlie Savage, The Real Aim of the Nunes Memo Is the Mueller Investigation, *New York Times*, Jan. 30, 2018, available at <https://www.nytimes.com/2018/01/30/us/politics/secret-memo-mueller-russia-investigation.html>.

<sup>295</sup> Nicholas Fandos, Despite Mueller's Push, House Republicans Declare No Evidence of Collusion, *New York Times*, March 12, 2018, available at <https://www.nytimes.com/2018/03/12/us/politics/house-intelligence-trump-russia.html>.

<sup>296</sup> Senate Select Committee on Intelligence, Jul. 3, 2018 available at [https://www.burr.senate.gov/imo/media/doc/SSCI%20ICA%20ASSESSMENT\\_FINALJULY3.pdf](https://www.burr.senate.gov/imo/media/doc/SSCI%20ICA%20ASSESSMENT_FINALJULY3.pdf).

<sup>297</sup> U.S. Motion to Seal All Filings Associated with the Criminal Complaint, *U.S. v. George Papadopoulos*, No. 17-Cr.-182 (RDM) (D.D.C. July 28, 2017), ECF No. 3, at ¶¶ 2, 3.

<sup>298</sup> Papadopoulos Stmt. (D.D.C. October 5, 2017); Plea Agreement, *U.S. v. George Papadopoulos*, No. 17-Cr.-182 (D.D.C. October 5, 2017).

of his contacts with Russian-linked individuals during the course of his work for the Trump campaign, minimized the nature of the communications, failed to disclose his having been introduced to Timofeev, and claimed that the information he was told about the Russians having “dirt” on then-candidate Clinton occurred prior to his tenure with the Trump campaign.<sup>299</sup> Papadopoulos also admitted that after he met with the FBI again on February 16, 2017, he deleted his Facebook account containing information about communications he had with Mifsud and Timofeev.<sup>300</sup> Papadopoulos’ admissions and guilty plea were publicly unveiled on October 30, 2017.<sup>301</sup>

On the same day, Special Counsel Mueller’s office also announced charges against President Trump’s former campaign chairman Paul Manafort and Manafort’s associate and campaign adviser Rick Gates stemming from the office’s investigation into possible Russian influence in the U.S. election. The charges did not mention the Trump campaign or any involvement of the Russian government in the U.S. election; instead, Manafort and Gates were charged with conspiracy to defraud the United States and conspiracy to commit money laundering in connection with their work on behalf of the Government of Ukraine between 2006 and 2015.<sup>302</sup> They were also charged with failure to file reports of foreign bank and financial accounts, failure to register as agents of a foreign government, and making false statements to the Department of Justice.<sup>303</sup> Manafort and Gates entered pleas of not guilty on all counts.<sup>304</sup>

On October 31, 2017, the day after the Manafort and Gates indictment and the Papadopoulos guilty plea were revealed, President Trump tweeted, (1) “The Fake News is working overtime. As Paul Manafort’s lawyer said, there was ‘no collusion’ and events mentioned took place long before he...” (2) “...came to the campaign.”<sup>305</sup> As to Papadopoulos, the White House immediately dismissed him as a low-level volunteer, none of whose activity “was ever done in an official capacity on behalf of the campaign.”<sup>306</sup> President Trump then

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<sup>299</sup> Papadopoulos Stmt. at ¶ 2a (D.D.C. October 5, 2017).

<sup>300</sup> *Id.* at ¶ 33.

<sup>301</sup> Jeremy Herb, Evan Perez, Marshall Cohen, Pamela Brown, and Shimon Prokupez, Ex-Trump campaign adviser pleads guilty to making false statement, *CNN*, Oct. 31, 2017, available at <http://www.cnn.com/2017/10/30/politics/paul-manafort-russia-investigation-surrender/index.html>. *ABC News* reported that a “person with direct knowledge of the investigation” claimed Papadopoulos initially lied to the FBI out of “loyalty” to President Trump. Brian Ross, Rhonda Schwartz, and Matthew Mosk, Trump adviser claims he lied to FBI out of loyalty to Trump: Source, *ABC News*, Nov. 10, 2017, available at <http://abcnews.go.com/Politics/trump-adviser-claims-lied-fbi-loyalty-trump-source/story?id=51059088>.

<sup>302</sup> First Indictment, *U.S. v. Manafort*. (D.D.C. Oct. 31, 2017).

<sup>303</sup> *See id.*

<sup>304</sup> *See* Matt Apuzzo, Adam Goldman, Michael S. Schmidt, and Matthew Rosenberg, Former Trump Aides Charged as Prosecutors Reveal New Campaign Ties With Russia, *New York Times*, Oct. 30, 2017, available at <https://www.nytimes.com/2017/10/30/us/politics/paul-manafort-indicted.html>; Byron Tau, Former Trump Campaign Chairman Paul Manafort Charged in Russia Probe, *Wall Street Journal*, Oct. 30, 2017, available at <https://www.wsj.com/articles/former-trump-campaign-chairman-paul-manafort-charged-in-russia-probe-1509365767>.

<sup>305</sup> <https://twitter.com/realDonaldTrump/status/925333956110757888>; <https://twitter.com/realDonaldTrump/status/925335577217683456>.

<sup>306</sup> Callum Borchers, George who? As Papadopoulos pleads guilty, Trump’s team seeks distance from ‘this individual’, *Washington Post*, Oct. 30, 2017, available at <https://www.washingtonpost.com/news/the-fix/wp/2017/10/30/george-who-as-papadopoulos-pleads-guilty-trumps-team-seeks-distance-from-this-individual/>.

tweeted again the following morning, “Few people knew the young, low level volunteer named George, who has already proven to be a liar. Check the DEMS!”<sup>307</sup>

On February 22, 2018, the special counsel obtained a superseding indictment against Manafort and Gates in the Eastern District of Virginia.<sup>308</sup> Additional superseding indictments were filed against Manafort and Gates in the District of Columbia on February 23, 2018.<sup>309</sup> Gates subsequently pleaded guilty and began cooperating with the special counsel’s investigation.<sup>310</sup>

The special counsel obtained a third superseding indictment on June 8, 2018 that included new charges of obstruction of justice and conspiracy to obstruct justice against Manafort and a new defendant, Manafort’s business associate Konstantin Kilimnik.<sup>311</sup> According to the new allegations, explained by the special counsel in a motion to revoke Manafort’s pretrial release, Manafort and Kilimnik conspired and attempted to persuade two individuals to provide false testimony about aspects of Manafort’s business.<sup>312</sup>

### **10. In December 2017, Special Counsel Mueller announced the guilty plea of General Flynn**

On December 1, 2017, Flynn pleaded guilty to one count of lying to the FBI in an interview on January 24, 2017, during which he was asked about his contacts with Russian Ambassador Kislyak in December 2016. Court papers described Flynn’s false statements to the FBI about his conversations with Kislyak on December 29 and 31, 2016 regarding U.S. sanctions, as well as those on December 22 and 23, 2016 concerning the U.N. vote.<sup>313</sup> Flynn also admitted that he made false statements or omissions in March 7, 2017 filings with the Department of Justice about his work on behalf of the Republic of Turkey.<sup>314</sup> As a condition of his plea deal, Flynn agreed to cooperate with the special counsel’s office “in any and all matters as to which [Mueller’s office] deems the cooperation relevant.”<sup>315</sup>

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<sup>307</sup> <https://twitter.com/realDonaldTrump/status/925335577217683456>.

<sup>308</sup> Superseding Indictment, U.S. v. Manafort et al., No. 18-cr-83 (E.D.Va. Feb. 22, 2018) available at <https://www.justice.gov/file/1038391/download>.

<sup>309</sup> Superseding Criminal Information, U.S. v. Gates, No. 17-cr-00201-ABJ (D.D.C. Feb. 23, 2018) available at <https://www.justice.gov/file/1038796/download>; Superseding Indictment, United States v. Paul Manafort, 17-cr-201 (D.D.C. Feb. 23, 2018), available at <https://www.justice.gov/file/1038741/download>.

<sup>310</sup> Plea Agreement, U.S. v. Gates, No. 17-cr-00201-ABJ (D.D.C. Feb. 23, 2018), ECF No. 205, available at <https://www.justice.gov/file/1038801/download>; Mark Mazzetti and Maggie Haberman, Rick Gates, Trump Campaign Aide, Pleads Guilty in Mueller Inquiry and Will Cooperate, *New York Times*, Feb. 23, 2018, available at <https://www.nytimes.com/2018/02/23/us/politics/rick-gates-guilty-plea-mueller-investigation.html>.

<sup>311</sup> Charlie Gile and Tracy Connor, Paul Manafort pleads not guilty to charges filed after Gates plea deal, *NBC News*, Feb. 28, 2018, available at <https://www.nbcnews.com/news/us-news/paul-manafort-pleads-not-guilty-charges-filed-after-gates-plea-n851936>.

<sup>312</sup> Third Superseding Indictment, U.S. v. Manafort., (E.D.Va. Feb. 22, 2018); Gov’t Mot. to Revoke or Revise Def’s Current Order of Pretrial Release, U.S. v. Manafort (E.D.Va. Feb. 22, 2018).

<sup>313</sup> Flynn Stmt. at ¶ 3 (D.D.C. December 1, 2017).

<sup>314</sup> *Id.* at ¶ 5.

<sup>315</sup> Plea Agreement, U.S. v. Michael T. Flynn, No. 17-Cr.-232 (D.D.C. December 1, 2017), available at <https://www.justice.gov/file/1015121/download>. Following the news of Flynn indictments, “Trump confidants” reportedly acknowledged his concerns over the news, “particularly because he is worried that

**11. In early 2018, public reports suggested that the special counsel was investigating contacts between associates of the Trump campaign and transition and an Emirati prince**

In January 2018, George Nader, who attended a January 2017 secret meeting with Emirati and Russian nationals in the Seychelles, was reportedly subpoenaed by a grand jury.<sup>316</sup> Nader allegedly began cooperating with the special counsel investigation soon afterwards.<sup>317</sup> In May 2018, reports also emerged that Erik Prince had spoken with investigators for the special counsel.<sup>318</sup>

**12. In the Fall of 2017 and Spring of 2018, the special counsel obtained documents from Trump's campaign and related entities as well as interviews from current and former Trump associates**

According to media reports, Special Counsel Mueller's investigation took two primary tracks, one focused on potential collusion between the Russian government and the Trump campaign, and a second focused on the president's potentially obstructive conduct.<sup>319</sup> By January 2016, the Trump campaign had turned over more than 1.4 million pages of documents to the special counsel,<sup>320</sup> and the special counsel had interviewed many current and former White House officials in President Trump's inner circle.<sup>321</sup>

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another deluge of stories about Russia could overshadow his achievements." Dan Merica, Jim Acosta, and Elizabeth Landers, *Russia investigation 'wearing' on White House, despite spin*, CNN, Dec. 1, 2017, available at <https://www.cnn.com/2017/12/01/politics/president-donald-trump-white-house-russia-fallout/index.html>.

<sup>316</sup> Mazzetti, Kirkpatrick, and Goldman, *New York Times*, Mar. 6, 2018.

<sup>317</sup> *Id.*

<sup>318</sup> Betsy Woodruff, *Special Counsel Mueller's Team Questioned Blackwater Founder Erik Prince*, *Daily Beast*, May 9, 2018, available at <https://www.thedailybeast.com/special-counsel-muellers-team-questioned-blackwater-founder-erik-prince>.

<sup>319</sup> Michael S. Schmidt, *Obstruction Inquiry Shows Trump's Struggle to Keep Grip on Russia Investigation*, *New York Times*, Jan 4, 2018, available at <https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-mcgnahn.html>.

<sup>320</sup> Robert Mueller has interviewed more than 20 White House staffers in Russia Probe, *Associated Press*, Jan. 26, 2018, available at <https://www.cbsnews.com/news/robert-mueller-has-interviewed-more-than-20-white-house-staffers-in-russia-probe/>.

<sup>321</sup> The special counsel has interviewed, among others, Jared Kushner, former chief of staff Reince Priebus, former press secretary Sean Spicer, senior policy adviser Stephen Miller, foreign policy adviser J.D. Gordon, former White House Communications Director Hope Hicks, Trump campaign official Sam Clovis, former Trump legal team spokesman Mark Corallo, White House Counsel Don McGahn, former strategist Stephen Bannon. *A list of people Special Counsel Robert Mueller's investigators have interviewed*, *CBS News*, March 29, 2018, available at <https://www.cbsnews.com/news/a-list-of-people-special-counsel-robert-muellers-investigators-have-interviewed/>; Hallie Jackson, *Steve Bannon Met With Mueller Multiple Times Over Past Week*, *NBC News*, February 15, 2018, available at <https://www.nbcnews.com/politics/donald-trump/steve-bannon-met-mueller-multiple-times-over-past-week-n848421>; Robert Costa, Carol D. Leonnig and Josh Dawsey, *Inside the secretive nerve center of the Mueller investigation*, *Washington Post*, Dec. 2, 2017, available at [https://www.washingtonpost.com/politics/inside-the-secretive-nerve-center-of-the-mueller-investigation/2017/12/02/e6764720-d45f-11e7-b62d-d9345ced896d\\_story.html](https://www.washingtonpost.com/politics/inside-the-secretive-nerve-center-of-the-mueller-investigation/2017/12/02/e6764720-d45f-11e7-b62d-d9345ced896d_story.html). Special Counsel Mueller has also interviewed the following officials: Attorney General Jeff Sessions, Deputy Attorney General Rod

The special counsel has also requested White House documents about the firing of former National Security Advisor Flynn, the firing of former FBI Director Comey, President Trump's meeting with Russian officials at the White House the day after he fired Comey, and the White House's response to questions about the June 2016 meeting at Trump Tower between Trump Jr., Kushner, Manafort, and several Russians.<sup>322</sup> Special Counsel Mueller interviewed witnesses about the misleading statement about the June 2016 Trump Tower meeting that President Trump reportedly dictated from Air Force One in July 2017.<sup>323</sup> Mueller's investigators have asked witnesses about Kushner's role in the decision to fire Comey, the June 9 meeting at Trump Tower, and the circumstances of the departures of other White House aides.<sup>324</sup> The special counsel's office reportedly was also asking questions about Kushner's meeting with the chief executive of Russian state-owned Vnesheconombank (VEB), Sergey Gorkov, in December 2016.<sup>325</sup>

**13. On February 16, 2018, Deputy Attorney General Rod Rosenstein announced the indictment of Russia-linked Internet Research Agency and several of its employees for election tampering**

On February 16, 2018, the special counsel obtained an indictment of 13 Russian citizens and three Russian companies for conspiring to interfere with the 2016 election by, among other things, using social media to support the Trump campaign and sow discord.<sup>326</sup>

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Rosenstein, Acting Attorney General Sally Yates, Former FBI Director James Comey, Former Deputy FBI Director and Acting FBI Director Andrew McCabe, CIA Director Mike Pompeo, National Security Agency Director Mike Rogers, and Director of National Intelligence (DNI) Dan Coats. *CBS News*, March 29, 2018. The special counsel interviewed Jared Kushner in April 2018 for the second time, with a reported focus on "potential Russian collusion, his contacts with foreigners during the transition and obstruction-related issues, including the firing of then-FBI Director James Comey." Marshall Cohen, Mueller's investigators questioned Kushner about potential Russian collusion, obstruction, *CNN*, May 23, 2018, available at <https://www.cnn.com/2018/05/23/politics/special-counsel-abbe-lowell-kushner-interview/index.html>.

<sup>322</sup> Michael S. Schmidt, Mueller Seeks White House Documents Related to Trump's Actions as President, *New York Times*, Sept. 20, 2017, available at [https://www.nytimes.com/2017/09/20/us/politics/mueller-trump-russia.html?\\_r=0](https://www.nytimes.com/2017/09/20/us/politics/mueller-trump-russia.html?_r=0).

<sup>323</sup> Jo Becker, Mark Mazzetti, Matt Apuzzo and Maggie Haberman, Mueller Zeros In on Story Put Together About Trump Tower Meeting, *New York Times*, Jan. 31, 2018, available at <https://www.nytimes.com/2018/01/31/us/politics/trump-russia-hope-hicks-mueller.html>.

<sup>324</sup> Evan Perez, Pamela Brown, and Shimon Prokupecz, Jared Kushner's team turned over documents to special counsel in Russia investigation, *CNN*, Nov. 3, 2017, available at <http://www.cnn.com/2017/11/02/politics/jared-kushner-robert-mueller-documents-russia-investigation/index.html>.

<sup>325</sup> Peter Nicholas, Aruna Viswanatha, and Rebecca Ballhaus, Special Counsel Mueller Probes Jared Kushner's Contacts With Foreign Leaders, *Wall Street Journal*, Nov. 21, 2017, available at <https://www.wsj.com/articles/special-counsel-mueller-probes-jared-kushners-contact-with-foreign-leaders-1511306515>.

<sup>326</sup> Matt Apuzzo and Sharon LaFraniere, 13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign, *New York Times*, Feb. 16, 2018, available at <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>; Internet Research Agency Indictment (D.D.C. February 16, 2018). An American, Richard Pinedo, with no apparent connection to the Trump campaign and no apparent knowledge of the Russian efforts to interfere in U.S. elections, pleaded guilty the same week to identity fraud for his role as a middle man buying and selling bank accounts in other peoples' names to Russian clients. Nicholas Fandos, Russians

**14. In late February 2018, the special counsel obtained guilty pleas from Gates and an attorney who worked with Gates and Manafort**

On February 20, 2018, Alex van der Zwaan, an attorney formerly with Skadden Arps from 2007 to 2017 and the son-in-law of German Khan, an owner of Alfa Group, Russia's largest financial and industrial investment group, pleaded guilty to making false statements to the FBI about his contacts with Gates.<sup>327</sup>

Three days later, Gates struck a deal with the special counsel's office in which he pleaded guilty to conspiracy and making a false statement in exchange for his cooperation.<sup>328</sup> That deal followed the unveiling of a new indictment of Gates and Manafort by a grand jury in the Eastern District of Virginia.<sup>329</sup>

**15. In 2018, the special counsel and President Trump's legal team reportedly engaged in negotiations over a possible interview of the president**

The President's legal team has reportedly been in discussions with Special Counsel Mueller concerning a potential interview of the President. In January 2018, the parties reportedly discussed the possibility of a multi-hour interview on January 27, 2018, but that plan was apparently rejected.<sup>330</sup> In April 2018, *The New York Times* published a list of questions that investigators have reportedly said they would like President Trump to answer.<sup>331</sup> As part of these negotiations, prosecutors reportedly informed President Trump's attorneys that the

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Bought Bank Accounts From California Man, Mueller Says, *New York Times*, Feb. 16, 2018, available at <https://www.nytimes.com/2018/02/16/us/politics/richard-pinedo-russia-bank-accounts-guilty-plea-mueller.html>; Statement Of The Offense, *U.S. v. Richard Pinedo*, No. 1:18-cr-00024-DLF (D.D.C. February 12, 2018) available at <https://www.justice.gov/file/1035547/download>.

<sup>327</sup> Spenser S. Hsu and Rosalind S. Helderman, In Mueller probe, son-in-law of Russian businessman pleads guilty to false statements, *Washington Post*, Feb. 20, 2018, available at [https://www.washingtonpost.com/local/public-safety/mueller-probe-london-based-son-of-russian-businessman-to-plead-guilty-to-false-statements/2018/02/20/142f4d2e-164b-11e8-b681-2d4d462a1921\\_story.html](https://www.washingtonpost.com/local/public-safety/mueller-probe-london-based-son-of-russian-businessman-to-plead-guilty-to-false-statements/2018/02/20/142f4d2e-164b-11e8-b681-2d4d462a1921_story.html); Statement of the Offense, *U.S. v. Alex Van Der Zwaan*, No. 1:18-cr-00031-ABJ (D.D.C. February 20, 2018), available at <https://www.justice.gov/file/1036406/download>.

<sup>328</sup> Devlin Barret and Spencer S. Hsu, Former Trump campaign official Rick Gates pleads guilty to 2 charges, *Washington Post*, Feb. 23, 2018, available at [https://www.washingtonpost.com/politics/former-trump-campaign-official-rick-gates-expected-to-plead-guilty-and-cooperate-with-special-counsel-in-probe-of-russian-election-interference/2018/02/23/ceaaeac8-16b4-11e8-b681-2d4d462a1921\\_story.html](https://www.washingtonpost.com/politics/former-trump-campaign-official-rick-gates-expected-to-plead-guilty-and-cooperate-with-special-counsel-in-probe-of-russian-election-interference/2018/02/23/ceaaeac8-16b4-11e8-b681-2d4d462a1921_story.html).

<sup>329</sup> Katelyn Polantz and Kara Scannell, Mueller files new charges against Manafort and Gates, *CNN*, Feb. 23, 2018, available at <https://www.cnn.com/2018/02/22/politics/new-charges-manafort-and-gates/index.html>.

<sup>330</sup> Gloria Borger and Evan Perez, Trump's legal team discussed January interview with Mueller, *CNN*, May 25, 2018, available at <https://www.cnn.com/2018/05/24/politics/trump-legal-team-january-2018-interview-robert-mueller/index.html>.

<sup>331</sup> Matt Apuzzo and Michael S. Schmidt, The Questions Mueller Wants to Ask Trump About Obstruction, and What They Mean, *New York Times*, Apr. 30, 2018, available at <https://www.nytimes.com/2018/04/30/us/politics/questions-mueller-wants-to-ask-trump-russia.html>.

president is under investigation but is considered to be a subject, rather than a target, of the investigation.<sup>332</sup> As of August 2018, the negotiations are ongoing.<sup>333</sup>

### **16. White House Counsel Don McGahn has reportedly been cooperating with the special counsel**

The *New York Times* reported in August 2018 that McGahn has “cooperated extensively” with the special counsel investigation into obstruction and has shared “detailed accounts about the episodes at the heart of the inquiry” into obstruction (it is unclear if this cooperation has extended to the Russia investigation).<sup>334</sup> McGahn has reportedly participated in at least three voluntary interviews totaling 30 hours over the past nine months, in which he discussed “[President] Trump’s comments and actions during the firing of [Comey],” President Trump’s “obsession with putting a loyalist in charge of the inquiry, including his repeated urging of Attorney General Jeff Sessions to claim oversight of it,” as well as “a sense of the president’s mind-set in the days leading to the firing of [Comey]” and “how the White House handled the firing of ... Flynn.”<sup>335</sup> The same article reported that investigators may not have discovered President Trump’s efforts to fire Mueller without McGahn’s cooperation.<sup>336</sup> McGahn reportedly cooperated extensively because he was concerned that President Trump “was setting up Mr. McGahn to take the blame for any possible illegal acts of obstruction.”<sup>337</sup> McGahn’s attorney, Bill Burck, reportedly explained to President Trump’s attorneys that McGahn had not “incriminated” President Trump.<sup>338</sup> Burck reportedly assured President Trump’s lawyers that McGahn did not witness President Trump engage in any crime and would have resigned from his post if he had.<sup>339</sup>

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<sup>332</sup> Carol D. Leonnig and Robert Costa, Mueller told Trump’s attorneys the president remains under investigation but is not currently a criminal target, *Washington Post*, Apr. 3, 2018, available at [https://www.washingtonpost.com/politics/mueller-told-trumps-attorneys-the-president-remains-under-investigation-but-is-not-currently-a-criminal-target/2018/04/03/d7832cf0-36c1-11e8-acd5-35eac230e514\\_story.html](https://www.washingtonpost.com/politics/mueller-told-trumps-attorneys-the-president-remains-under-investigation-but-is-not-currently-a-criminal-target/2018/04/03/d7832cf0-36c1-11e8-acd5-35eac230e514_story.html).

<sup>333</sup> See, e.g., Carol D. Leonnig, Mueller offers to limit investigators’ questions for Trump in special counsel’s latest effort to secure presidential interview, *Washington Post*, Aug. 1, 2018, available at [https://www.washingtonpost.com/politics/mueller-offers-to-limit-investigators-questions-for-trump-in-special-counsels-latest-effort-to-secure-presidential-interview/2018/08/01/239bfea0-95cc-11e8-a679-b09212fb69c2\\_story.html](https://www.washingtonpost.com/politics/mueller-offers-to-limit-investigators-questions-for-trump-in-special-counsels-latest-effort-to-secure-presidential-interview/2018/08/01/239bfea0-95cc-11e8-a679-b09212fb69c2_story.html); Michael S. Schmidt and Maggie Haberman, Trump Pushes for Interview With Mueller Against Lawyers’ Advice, *New York Times*, Aug. 1, 2018, available at <https://www.nytimes.com/2018/08/01/us/politics/trump-mueller-investigation-interview.html>.

<sup>334</sup> Michael S. Schmidt and Maggie Haberman, White House Counsel, Don McGahn, Has Cooperated Extensively in Mueller Inquiry, *New York Times*, Aug. 18, 2018, available at <https://www.nytimes.com/2018/08/18/us/politics/don-mcghahn-mueller-investigation.html>.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> Carol D. Leonnig, Rosalind S. Helderman and Josh Dawsey, McGahn does not believe he implicated Trump in legal wrongdoing in special counsel interviews, his attorney tells president’s legal team, *Washington Post*, Aug. 20, 2018, available at [https://www.washingtonpost.com/politics/mcghahn-does-not-believe-he-implicated-trump-in-wrongdoing-in-special-counsel-interviews-his-attorney-tells-presidents-legal-team/2018/08/20/37209d28-a49f-11e8-a656-943eefab5daf\\_story.html](https://www.washingtonpost.com/politics/mcghahn-does-not-believe-he-implicated-trump-in-wrongdoing-in-special-counsel-interviews-his-attorney-tells-presidents-legal-team/2018/08/20/37209d28-a49f-11e8-a656-943eefab5daf_story.html).

<sup>339</sup> *Id.*

#### **D. Key allegations regarding President Trump’s potentially obstructive conduct and corrupt intent**

President Trump may have engaged in a course of conduct intended to influence the proceedings associated with the investigations into Russian interference in the 2016 election, associated misconduct by Trump campaign and transition associates, and President Trump’s own potentially obstructive conduct. In this Subsection, we highlight the critical factual components of the case.

##### **1. Then-candidate Donald Trump was warned that foreign adversaries, including Russia, would try to infiltrate his campaign**

According to “multiple government officials familiar with the matter,” senior FBI officials held a high-level counterintelligence briefing with then-candidate Trump to warn him and his top aides that foreign adversaries, including Russia, would try to infiltrate his campaign.<sup>340</sup> The briefing took place shortly after Trump became the Republican presidential nominee on July 21, 2016.<sup>341</sup> According to *NBC News*, who first reported on the briefing in December 2017, the FBI allegedly urged Trump (and Clinton, who also received a similar briefing as the Democratic nominee) to inform them of any suspicious overtures.<sup>342</sup>

##### **2. President-elect Trump was briefed on Russia’s interference in the 2016 election**

On January 6, 2017, leaders of the intelligence community, including CIA Director John Brennan, and NSA Director Mike Rodgers, went to Trump Tower in New York to brief President-elect Trump and senior staff on the intelligence community’s joint assessment that Russia had endeavored to influence the 2016 presidential election.<sup>343</sup> They further informed President-elect Trump of their assessment that Russia had done so with several goals, including “undermining public faith in the American democratic process, denigrating Hillary Clinton and harming her electability and potential presidency, and helping Donald Trump get elected.”<sup>344</sup> The intelligence officials told President-elect Trump about various streams of evidence that convinced them of Putin’s role in the election meddling.<sup>345</sup> Vice President-elect Mike Pence, incoming Chief of Staff Reince Priebus, National Security Advisor Mike Flynn, future CIA-Director Mike Pompeo, and Press Secretary Sean Spicer (among others) joined the President for the briefing.<sup>346</sup>

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<sup>340</sup> Ken Dilanian, Julia Ainsley, and Carol E. Lee, FBI warned Trump in 2016 Russians would try to infiltrate his campaign, *NBC News*, Dec. 12, 2017, available at <https://www.nbcnews.com/news/us-news/fbi-warned-trump-2016-russians-would-try-infiltrate-his-campaign-n830596>.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> James Comey, *A Higher Loyalty*, *Flat Iron Books*, April 2018, at 211-12.

<sup>344</sup> *Id.* at 212-13.

<sup>345</sup> Daved E. Sanger and Matthew Rosenberg, From the Start, Trump Has Muddled a Clear Message: Putin Interfered, *New York Times*, Jul. 18, 2018, available at <https://www.nytimes.com/2018/07/18/world/europe/trump-intelligence-russian-election-meddling-.html>.

<sup>346</sup> James Comey, *A Higher Loyalty*, at 218-19.

### **3. President-elect Trump asked Comey to stay on as FBI Director**

At the conclusion of the intelligence community briefing, Director Clapper informed those assembled that there was additional sensitive material that Director Comey was going to review with a smaller group. After the room cleared, Comey met privately with President-elect Trump, who according to Comey began the conversation by saying that Comey had handled the Clinton email investigation honorably and by asking Comey to stay on as director.<sup>347</sup> Comey then briefed President-elect Trump on the allegations in the Steele Dossier, which included salacious material that the FBI had not verified.<sup>348</sup> According to Comey, President-elect Trump denied the allegations and then began discussing instances in which women had accused him of sexual assault.<sup>349</sup> Comey claims that he then informed the president that the FBI was not investigating him.<sup>350</sup>

According to Comey, President-elect Trump called FBI Director Comey on January 11 to follow up on their conversation.<sup>351</sup> Comey claims that Trump began the call by praising him and telling Comey he hoped Comey would stay.<sup>352</sup> Comey also claims that President-elect Trump then expressed concern about the “leaking” of the Steele Dossier, which was published by *Buzzfeed* days earlier.<sup>353</sup> Comey further claims that he told Trump that the document was not a government document, was not classified, and therefore was not properly described as having been leaked.<sup>354</sup> Comey says that Trump claimed that he had not stayed overnight in Moscow when he attended the 2013 Miss Universe pageant (where one of the most salacious events described in the Steele Dossier allegedly occurred).<sup>355</sup> On January 18, 2017, during a weekly conference call, Comey relayed to senior FBI officials that President-elect Trump asked him to stay on as FBI Director.<sup>356</sup>

### **4. White House Counsel Don McGahn briefed President Trump after Acting Attorney General Sally Yates informed him of Flynn’s misrepresentations about his contacts with Russian Ambassador Kislyak**

Then-Acting Attorney General Sally Yates and a senior member of DOJ’s national security division met with White House Counsel Don McGahn and one of his associates on January 26, 2017. Yates has testified that she and the senior DOJ employee informed McGahn that “there had been press accounts of statements from the vice president and others that related conduct that Mr. Flynn had been involved in that we knew not to be the truth.”<sup>357</sup> Yates

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<sup>347</sup> *Id.* at 223.

<sup>348</sup> Comey Stmt., Jun. 8, 2017.

<sup>349</sup> Comey, *A Higher Loyalty*, at 224-25.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 226.

<sup>352</sup> *Id.* See also *Full Transcript and Video: James Comey’s Testimony on Capitol Hill*, *New York Times*, Jun. 8, 2017, available at <https://www.nytimes.com/2017/06/08/us/politics/senate-hearing-transcript.html>.

<sup>353</sup> Comey, *A Higher Loyalty*, at 226.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 226-27.

<sup>356</sup> Michael S. Schmidt and Adam Goldman, *Trump Is Said to Keep James Comey as F.B.I. Director*, *New York Times*, Jan. 24, 2017, available at [https://www.nytimes.com/2017/01/24/us/politics/trump-comey-fbi-director-.html?\\_r=0](https://www.nytimes.com/2017/01/24/us/politics/trump-comey-fbi-director-.html?_r=0).

<sup>357</sup> *Id.* See also Apuzzo and Huetteman, *New York Times*, May 8, 2017.

has further testified that they told McGahn “how we had this information, how we had acquired it, and how we knew that it was untrue.”<sup>358</sup> In addition, Yates has testified that she informed McGahn about Flynn’s January 24 interview, that McGahn asked how Flynn did in the interview, and that she “declined to give him an answer to that.”<sup>359</sup> Yates testified that she told McGahn that she felt the White House was entitled to know that Vice President Pence and others were giving information to the American people was not true and that Flynn’s misrepresentations “created a compromise situation, a situation where the national security adviser essentially could be blackmailed by the Russians.”<sup>360</sup>

Yates testified, that on the following day, McGahn called Yates back to the White House. Yates further testified that McGahn asked her about four topics: why it “matter[s] to DOJ if one White House official lies to another”; “the applicability of criminal statutes and the likelihood that the Department of Justice would pursue a criminal case”; McGahn’s “concern that their taking action might interfere with an investigation of Mr. Flynn”; and a request by McGahn to see the underlying evidence.<sup>361</sup> Yates also testified that she told McGahn that she would work with the FBI to arrange for him to see the evidence regarding Flynn.<sup>362</sup>

Yates said that a few days later on January 30, 2017, she called McGahn to tell him that the material regarding Flynn was available if he wanted to review it; however, it was not clear whether McGahn ever did so.<sup>363</sup> Later that day, President Trump fired Yates, on the stated grounds that she directed DOJ lawyers not to defend the President’s January 27 executive order that banned travel to the U.S. of refugees and others from several predominantly Muslim countries.<sup>364</sup>

##### **5. According to FBI Director Comey, President Trump requested his loyalty during a private White House dinner**

On January 27, 2017, the day after Yates’ first meeting with McGahn about Flynn (which President Trump was reportedly briefed about<sup>365</sup>), FBI Director Comey received a phone call from President Trump around lunchtime in which Trump asked him to dinner at the White House.<sup>366</sup> Comey accepted.

That night, President Trump hosted Comey in the Green Room of the White House. The two dined alone. According to Comey, President Trump asked him during dinner whether he wanted to stay on as FBI Director, saying that lots of people wanted the job and he would understand if Comey wanted to walk away, considering the abuse he had taken over the past

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<sup>358</sup> *Yates and Clapper Testimony*, *Washington Post*, May 8, 2017.

<sup>359</sup> Yates misspoke at the hearing and said that the interview occurred on “February 24” when it in fact occurred on January 24, 2017. See *id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Yates and Clapper Testimony*, *Washington Post*, May 8, 2017.

<sup>364</sup> Michael D. Shear, Mark Landler, Matt Apuzzo, and Eric Lichtblau, *Trump Fires Acting Attorney General Who Defied Him*, *New York Times*, Jan. 30, 2017, available at <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html>.

<sup>365</sup> *The White House Office of the Press Secretary*, Feb. 14, 2017; Wass, *New York Review of Books*, Jul. 31, 2018.

<sup>366</sup> Comey Stmt., Jun. 8, 2017.

year. Comey responded that he loved his job and “intended to stay and serve out [his] ten-year term as Director.” According to Comey, moments later, President Trump said, “I need loyalty, I expect loyalty.” Before the dinner ended, President Trump allegedly expressed again to Director Comey that he “need[s] loyalty.” Director Comey declined to pledge his loyalty, instead telling the president that he would have his “honesty.” President Trump reportedly replied, “[t]hat’s what I want, honest loyalty.”<sup>367</sup>

**6. According to FBI Director Comey, during a one-on-one meeting in the Oval Office, President Trump expressed “hope” that Comey would drop the investigation of Michael Flynn**

On February 14, 2017, the day after Michael Flynn’s resignation, President Trump asked Comey to remain in the Oval Office after the conclusion of a national security briefing that involved several other senior security officials, including Attorney General Sessions. According to Comey, once he and the president were alone, President Trump told him that Flynn had done nothing wrong, adding, “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.” Director Comey said that he told the president that he agreed that Flynn “is a good guy.”<sup>368</sup>

On February 15, 2017, the day after President Trump’s one-on-one with Comey in the White House, then-Chief of Staff Reince Priebus reportedly spoke with Deputy FBI Director Andrew McCabe about the FBI’s inquiry into links between President Trump’s associates and Russia.<sup>369</sup> Priebus reportedly “asked the FBI’s top two officials to rebut news reports about Trump allies’ ties to Russia,” a conversation which may have violated rules developed to prevent even the appearance of political tampering with law enforcement.<sup>370</sup>

President Trump’s attorneys claimed in a letter to the Special Counsel that the “White House’s understanding” at this time was that there was no FBI or DOJ “investigation that could conceivably have been impeded,” based in part on statements made by Yates to McGahn and based on Flynn purportedly telling Reince Priebus and McGahn that Flynn was not under investigation by the FBI.<sup>371</sup> However, in July 2018 it was reported that a memo drafted by

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<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> Spencer Ackerman, *White House Confirms Conversation with FBI about Trump and Russia*, *Guardian*, Feb. 24, 2017, available at <https://www.theguardian.com/us-news/2017/feb/24/donald-trump-russia-reince-priebus-fbi-talks-james-comey>; Cristiano Lima, *Democrats Slam White House over Report It Asked FBI to Downplay Russia Stories*, *Politico*, Feb. 23, 2017, available at <http://www.politico.com/story/2017/02/democrats-trump-fbi-russia-communications-235332>.

<sup>370</sup> Jeremy Diamond and Joe Johns, *White House Denies Wrongdoing in Conversations with FBI*, *CNN*, Feb. 24, 2017, available at <http://www.cnn.com/2017/02/24/politics/white-house-denies-wrongdoing/index.html>.

<sup>371</sup> John M. Dowd, Letter to Special Counsel, Jan. 29, 2018, available at <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html>. The letter relates to negotiations over what subjects should be included in an interview between President Trump and the Special Counsel, and argues that the President should not be questioned about obstruction in connection with the Flynn investigation, because the White House believed there was no investigation to obstruct. It argues that Yates told McGahn 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, and that this implies it was likely an ongoing DOJ investigation of Flynn was not underway. The letter also contains legal analysis that does not undermine this report; for example, it undertakes an analysis of 18

McGahn on February 15, 2017, which is in the possession of the Special Counsel and which was selectively cited in the January 2018 letter to the Special Counsel, “explicitly states that when Trump pressured Comey he had just been told by two of his top aides—his then chief of staff Reince Priebus and his White House counsel Don McGahn—that Flynn was under criminal investigation.”<sup>372</sup> It was also reported that Priebus and McGahn “confirmed in separate interviews with the [S]pecial [C]ounsel that they had told Trump that Flynn was under investigation by the FBI before he met with Comey”<sup>373</sup> and that the White House did not rely on Flynn’s self-serving statements that the FBI had cleared him, contrary to assertions in the January 2018 letter to the Special Counsel.

## **7. President Trump reportedly instructed White House Counsel Don McGahn to prevent Attorney General Sessions from recusing himself in the Russia investigation**

On March 1, 2017, *The Washington Post* reported that Attorney General Sessions failed to disclose at least two contacts with the Russian ambassador to the United States.<sup>374</sup> The contacts reported by the *Post* contradicted Sessions’ testimony at his confirmation hearing that he “did not have communications with the Russians.”<sup>375</sup> Citing people with “knowledge of the episode,” *The New York Times* reported that President Trump gave “firm instructions” to White House Counsel Don McGahn in March 2017 to stop Attorney General Sessions from recusing

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U.S.C. § 1505 but ignores the other obstruction statutes, discussed at length below (*infra* Section II.A, B). The letter was publicly revealed in June 2018. Michael S. Schmidt, Maggie Haberman, Charlie Savage, and Matt Apuzzo, *Trump’s Lawyers, in Confidential Memo, Argue to Head Off a Historic Subpoena*, *New York Times*, Jun. 2, 2018, available at <https://www.nytimes.com/2018/06/02/us/politics/trump-lawyers-memo-mueller-subpoena.html>.

<sup>372</sup> Murray Waas, *Flynn, Comey, and Mueller: What Trump Knew and When He Knew It*, *New York Review of Books*, Jul. 31, 2018, available at <https://www.nybooks.com/daily/2018/07/31/what-trump-knew-and-when-he-knew-it/>.

<sup>373</sup> *Id.*

<sup>374</sup> Adam Entous, Ellen Nakashima and Greg Miller, *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*, *Washington Post*, Mar. 1, 2017, available at [https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html).

<sup>375</sup> Jessica Estepa, *What Did Al Franken Ask Jeff Sessions during His Confirmation Hearing?*, *USA Today*, Jun. 13, 2017, available at <https://www.usatoday.com/story/news/politics/onpolitics/2017/06/13/what-did-al-franken-ask-jeff-sessions-during-his-confirmation-hearing/102819246/>. At the hearing, Senator Franken asked, “If there is any evidence that anyone affiliated with the Trump campaign communicated with the Russian government in the course of this campaign, what will you do?” Senator Sessions responded, “Senator Franken, I’m not aware of any of those activities.” *Id.* After the revelations in the Papadopoulos plea that he had proposed a meeting with Putin on March 31, 2016 during a foreign policy strategy meeting at which Sessions was present, and Carter Page’s testimony that he had informed Sessions of his impending trip to Russia in July 2016, Sessions appeared before the House Judiciary Committee on November 14, 2017 and was asked about the apparent contradiction. Sessions said he did not recall either exchange but that he had rejected Papadopoulos’ suggestion of a meeting with Putin. Josh Gerstein and Kyle Cheney, *Sessions tries to distance himself from Trump advisers’ Russia talks*, *Politico*, Nov. 14, 2017, available at <https://www.politico.com/story/2017/11/14/sessions-no-clear-recollection-of-papadopoulos-proposing-trump-putin-meeting-244881>; Attorney General Sessions Testimony at Oversight Hearing, C-SPAN, Nov. 14, 2017, available at <https://www.c-span.org/video/?437024-1/attorney-general-sessions-fan-wikileaks>.

himself. McGahn allegedly “carried out the president’s orders and lobbied Mr. Sessions to remain in charge of the inquiry.”<sup>376</sup> Nevertheless, the day after the *Post* story, Attorney General Sessions announced at a press conference that he had “recused [himself] in the matters that deal with the Trump campaign.”<sup>377</sup> The next day, President Trump reportedly “gathered his senior aides in the Oval Office for a meeting, during which he fumed about Sessions’ decision.”<sup>378</sup>

When McGahn was unsuccessful in dissuading Sessions from recusing himself, the president reportedly “erupted in anger in front of numerous White House officials, saying he needed his attorney general to protect him” and that he “expected his top law enforcement official to safeguard him the way he believed Robert F. Kennedy, as attorney general, had done for his brother John F. Kennedy and Eric H. Holder Jr. had for Barack Obama. President Trump reportedly then asked, ‘Where’s my Roy Cohn?’ . . . referring to his former personal lawyer and fixer. . . .”<sup>379</sup> In addition, the day after Attorney General Sessions’ recusal, President Trump tweeted, (1) “Jeff Sessions is an honest man. He did not say anything wrong. He could have stated his response more accurately, but it was clearly not....”<sup>380</sup>; (2) “...intentional. This whole narrative is a way of saving face for Democrats losing an election that everyone thought they were supposed.....”<sup>381</sup>; (3) “...to win. The Democrats are overplaying their hand. They lost the election, and now they have lost their grip on reality. The real story...”<sup>382</sup>; (4) “...is all of the illegal leaks of classified and other information. It is a total ‘witch hunt!’”<sup>383</sup>

#### **8. President Trump reportedly asked Attorney General Sessions to undo his recusal**

During a meeting at Mar-a-Lago in March 2017, President Trump reportedly berated Attorney General Sessions for his recusal from the Russia investigation and told him to reverse his decision.<sup>384</sup> Trump also reportedly told aides prior to this meeting with Sessions that he needed someone loyal to him overseeing the inquiry.<sup>385</sup>

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<sup>376</sup> Schmidt, *New York Times*, Jan. 4, 2018.

<sup>377</sup> Mark Landler and Eric Lichtblau, [Jeff Sessions Recuses Himself from Russia Inquiry](https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html), *New York Times*, Mar. 2, 2017, available at <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>.

<sup>378</sup> Tara Palmeri, Eliana Johnson and Josh Dawsey, [Sessions Offered to Resign Before Trump’s Trip Abroad](http://www.politico.com/story/2017/06/06/jeff-sessions-trump-resign-239226), *Politico*, Jun. 6, 2017, available at <http://www.politico.com/story/2017/06/06/jeff-sessions-trump-resign-239226>.

<sup>379</sup> Schmidt, *New York Times*, Jan. 4, 2018.

<sup>380</sup> <https://twitter.com/realdonaldtrump/status/837488402438176769>.

<sup>381</sup> <https://twitter.com/realdonaldtrump/status/837489578193846278>.

<sup>382</sup> <https://twitter.com/realdonaldtrump/status/837491607171629057>.

<sup>383</sup> <https://twitter.com/realdonaldtrump/status/837492425283219458>.

<sup>384</sup> Michael S. Schmidt and Julie Hirschfeld Davis, [Trump Asked Sessions to Retain Control of Russia Inquiry After His Recusal](https://www.nytimes.com/2018/05/29/us/politics/trump-sessions-obstruction.html), *New York Times*, May 29, 2018, available at <https://www.nytimes.com/2018/05/29/us/politics/trump-sessions-obstruction.html>.

<sup>385</sup> Schmidt and Davis, *New York Times*, May 29, 2018.

**9. President Trump reportedly asked CIA Director Mike Pompeo and Director of National Intelligence Dan Coats to deny publicly that there was evidence of coordination between the Trump campaign and Russia**

On March 22, 2017, after a White House briefing attended by several agency officials, President Trump reportedly asked Central Intelligence Agency (CIA) Director Mike Pompeo and Director of National Intelligence (DNI) Daniel Coats to stay behind. According to press accounts, President Trump proceeded to complain to DNI Coats about the FBI investigation and FBI Director Comey's handling of it, and asked if Coats could intervene with Comey by asking him to back off its focus on Flynn in its Russia probe.<sup>386</sup> DNI Coats reportedly told associates about the president's request and to have determined that intervening with Comey would be inappropriate.<sup>387</sup>

Continuing to apply pressure, President Trump reportedly called DNI Coats on either March 23 or 24, 2017 and asked that Coats publicly deny that there was any evidence of coordination between the Trump campaign and the Russian government.<sup>388</sup> Around that time, President Trump also called Director of the National Security Agency (NSA) Mike Rogers, and reportedly urged him to make similar denials.<sup>389</sup> Both Coats and Rogers apparently refused the president's request. Rogers later testified to the Senate Intelligence Committee that he did not feel that he was directed or pressured to do anything "illegal, immoral, unethical or inappropriate"; Coats testified that he did not feel pressured to "intervene or interfere" with an ongoing investigation.<sup>390</sup>

**10. According to FBI Director Comey, President Trump asked him to "lift the cloud" and announce publicly that Trump was not under investigation**

On March 30, 2017, *The New York Times* reported that Flynn had offered to exchange testimony regarding possible ties between the Trump campaign and Russia for immunity from prosecution.<sup>391</sup> According to Comey, President Trump called him later that day and described the Russia investigation as a "cloud" that was impairing his ability to act on behalf of the country.<sup>392</sup> According to Comey, President Trump asked him what they could do to "lift the cloud," and asked Comey to "get out" the fact that the FBI was not personally investigating

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<sup>386</sup> Adam Entous, Top Intelligence Official Told Associates Trump Asked Him if He Could Intervene with Comey on FBI Russia Probe, *Washington Post*, Jun. 6, 2017, available at [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](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).

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> Adam Entous and Ellen Nakashima, Trump Asked Intelligence Chiefs to Push Back against FBI Collusion Probe after Comey Revealed Its Existence, *Washington Post*, May 22, 2017, available at [https://www.washingtonpost.com/world/national-security/trump-asked-intelligence-chiefs-to-push-back-against-fbi-collusion-probe-after-comey-revealed-its-existence/2017/05/22/394933bc-3f10-11e7-9869-bac8b446820a\\_story.html](https://www.washingtonpost.com/world/national-security/trump-asked-intelligence-chiefs-to-push-back-against-fbi-collusion-probe-after-comey-revealed-its-existence/2017/05/22/394933bc-3f10-11e7-9869-bac8b446820a_story.html).

<sup>390</sup> *Open Hearing on FISA Legislation: Hearing Before the Sen. Intel. Comm*, 115th Cong. (Jun. 7, 2017) available at <https://www.intelligence.senate.gov/hearings/open-hearing-fisa-legislation-0>.

<sup>391</sup> Matt Mazzetti and Matthew Rosenberg, Michael Flynn Offers to Testify Before Congress in Exchange for Immunity, *New York Times*, Mar. 30, 2017, available at <https://www.nytimes.com/2017/03/30/us/politics/michael-flynn-congress-immunity-russia.html>.

<sup>392</sup> Comey Stmt., Jun. 8, 2017.

him.<sup>393</sup> After receiving the call, Comey called Acting Deputy Attorney General Dana Boente to ask for guidance, but did not hear back.<sup>394</sup> The next day, President Trump tweeted, “Mike Flynn should ask for immunity in that this is a witch hunt (excuse for big election loss), by media & Dems, of historic proportion!”<sup>395</sup>

President Trump again called Comey on April 11, 2017, asking for an update on what action Comey had taken on his request that Comey “get out” that he was not personally being investigated. According to Comey, during that call, President Trump said, “Because I have been very loyal to you, very loyal; we had that thing, you know.”<sup>396</sup> The next day, during an interview on Fox Business Network, President Trump was asked by Maria Bartiromo whether it was too late to ask Comey to step down; Trump replied, “No, it’s not too late, but, you know, I have confidence in him. We’ll see what happens. You know, it’s going to be interesting.”<sup>397</sup>

### **11. President Trump tried to engage Sessions in discrediting and ousting Comey**

*The New York Times* has reported that in response to Comey’s May 3 testimony during which Comey again declined to publicly clear him, Trump “unloaded on Mr. Sessions,” reportedly criticizing him for recusing himself from the investigation and questioning “his loyalty.” Trump is reported to have said that he wanted Comey gone and to have “repeated the refrain that the attorneys general for Mr. Kennedy and Mr. Obama had protected the White House.”<sup>398</sup>

Two days later, on May 5, one of Sessions’ aides reportedly “approached a Capitol Hill staff member asking whether the staffer had any derogatory information about the F.B.I. director.” *The New York Times* claims that the “attorney general wanted one negative article a

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<sup>393</sup> *Id.*; *The New York Times* reported that the Special Counsel’s office allegedly has “handwritten notes from Mr. Trump’s former chief of staff, Reince Priebus, showing that Mr. Trump talked to Mr. Priebus about how he had called Mr. Comey to urge him to say publicly that he was not under investigation.” Schmidt, *New York Times*, Jan. 4, 2018.

<sup>394</sup> Comey Stmt., Jun. 8, 2017.

<sup>395</sup> <https://twitter.com/realdonaldtrump/status/847766558520856578>.

<sup>396</sup> Comey Stmt., Jun. 8, 2017. It is unclear to what “thing” the president was referring.

<sup>397</sup> Aaron Blake, *President Trump’s Thoroughly Confusing Fox Business Interview, Annotated*, *Washington Post*, Apr. 12, 2017, available at <https://www.washingtonpost.com/news/the-fix/wp/2017/04/12/president-trumps-thoroughly-confusing-fox-business-interview-annotated/>. Later in the interview, President Trump added that Comey “saved [Hillary Clinton’s] life” and that “Director Comey was very, very good to Hillary Clinton, that I can tell you. If he weren’t, she would be, right now, going to trial.” *Id.*

<sup>398</sup> Schmidt, *New York Times*, Jan. 4, 2018.

day in the news media about Mr. Comey” citing a “person with knowledge of the meeting” and noting that a Justice Department spokesperson has denied that the episode occurred.<sup>399</sup>

**12. President Trump fired FBI Director Comey, advanced a pretextual basis for the firing, and then admitted that he fired Comey because of the “Russia thing”**

On May 8, 2017, President Trump reportedly told Vice President Pence and several senior aides, including Chief of Staff Priebus, Chief Strategist Steve Bannon, and White House Counsel McGahn that he was ready to fire FBI Director Comey.<sup>400</sup> Following discussions with Jared Kushner, and with the help of White House Senior Adviser Stephen Miller, President Trump reportedly drafted a letter to FBI Director James Comey that explained his firing; however, White House Counsel Don McGahn prevented President Trump from sending it.<sup>401</sup> Several of the administration officials including Pence and McGahn reportedly “backed dismissing” Comey, and it is possible that they had their own motives for supporting or urging Comey’s firing.<sup>402</sup>

Trump then reportedly summoned Attorney General Sessions and Deputy Attorney General Rosenstein to a meeting at the White House and directed them to “explain in writing the case against Comey.”<sup>403</sup> Rosenstein delivered a three-page memo to Sessions the next day, May 9, 2017, titled “Restoring Public Confidence in the FBI,” which criticized Comey for flouting Department of Justice principles when he publicly revealed aspects of the investigation into

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<sup>399</sup> *Id.* In closed testimony before the House Judiciary Committee on November 30, 2017, Attorney General Sessions allegedly refused to answer a question from Congressman Schiff as to whether Trump had ever instructed him to take any action that he believed would hinder the Russia investigation. Emily Shugerman, Jeff Sessions refused to say whether Trump asked him to hinder Russia investigation, says member of House Intelligence Committee, *Independent*, Nov. 30, 2017, available at <http://www.independent.co.uk/news/world/americas/us-politics/jeff-sessions-trump-russia-investigation-refuse-say-hinder-adam-schiff-a8085676.html>.

<sup>400</sup> Philip Rucker, Ashley Parker, Sari Horwitz and Robert Costa, Inside Trump’s Anger and Impatience – and His Sudden Decision to Fire Comey, *Washington Post*, May 10, 2017, available at [https://www.washingtonpost.com/politics/how-trumps-anger-and-impatience-prompted-him-to-fire-the-fbi-director/2017/05/10/d9642334-359c-11e7-b373-418f6849a004\\_story.html](https://www.washingtonpost.com/politics/how-trumps-anger-and-impatience-prompted-him-to-fire-the-fbi-director/2017/05/10/d9642334-359c-11e7-b373-418f6849a004_story.html).

<sup>401</sup> Michael S. Schmidt and Maggie Haberman, Mueller Has Early Draft of Trump Letter Giving Reasons for Firing Comey, *New York Times*, Sept. 1, 2017, available at <https://www.nytimes.com/2017/09/01/us/politics/trump-comey-firing-letter.html?mcubz=3>; Peter Nicholas and Michael C. Bender, Trump Drafted Letter on Why He Wanted Comey Out, *Wall Street Journal*, Sept. 1, 2017, available at <https://www.wsj.com/articles/trump-drafted-letter-on-why-he-wanted-comey-out-1504303851>; Schmidt, *New York Times*, Jan. 4, 2018.

<sup>402</sup> See Maggie Haberman, Glenn Thrush, Michael S. Schmidt and Peter Baker, ‘Enough Was Enough’: How Festering Anger at Comey Ended in His Firing, *New York Times*, May 10, 2017, available at <https://www.nytimes.com/2017/05/10/us/politics/how-trump-decided-to-fire-james-comey.html>; Gabriel Sherman, Steve Bannon Readies His Revenge, *Vanity Fair*, Aug. 20, 2017, available at <https://www.vanityfair.com/news/2017/08/steve-bannon-readies-his-revenge>; Glenn Thrush, Trump Says There Was ‘No Collusion’ With the Russians, *New York Times*, May 18, 2017, available at <https://www.nytimes.com/2017/05/18/us/politics/trump-fbi-mueller-rosenstein.html?mcubz=3>. Roger Stone also reportedly urged the president to fire Comey.

<sup>403</sup> Rucker, Parker, Horwitz and Costa, *Washington Post*, May 10, 2017.

Hillary Clinton's use of a private email server.<sup>404</sup> President Trump then fired Comey, explaining that he did so because Comey inappropriately handled the Clinton investigation.<sup>405</sup> In his letter to Director Comey, President Trump wrote that he was "accept[ing] [the] recommendation" of Sessions and Rosenstein in terminating Comey.<sup>406</sup>

On May 10, 2017, the next day, President Trump met with Sergey Lavrov, Russia's foreign minister, and Sergey Kislyak, Russian Ambassador to the United States, in the White House. President Trump reportedly told Lavrov and Kislyak, "I just fired the head of the FBI. He was crazy, a real nut job. I faced great pressure because of Russia. That's taken off."<sup>407</sup> President Trump also issued a series of tweets, including: (1) "James Comey will be replaced by someone who will do a far better job, bringing back the spirit and prestige of the FBI,"<sup>408</sup> and (2) "Comey lost the confidence of almost everyone in Washington, Republican and Democrat alike. When things calm down, they will be thanking me!"<sup>409</sup> That same day, *CNN* reported that in recent weeks, the U.S. Attorney's Office for the Eastern District of Virginia had issued grand jury subpoenas in connection with its investigation into Flynn's lobbying activities.<sup>410</sup>

On May 11, two days after firing Comey, President Trump changed his explanation for why he fired Comey during an interview with *NBC News* reporter Lester Holt, explaining that, "regardless of [Rosenstein's] recommendation I was going to fire Comey . . . . 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, it's an excuse by the Democrats for having lost an election that they should have won."<sup>411</sup>

According to *The New York Times*, in meetings with other law enforcement officials in the days following Comey's firing, Rosenstein "repeatedly expressed anger about how the White House used him to rationalize the firing."<sup>412</sup> The *Times* further reported that in those meetings, Rosenstein "defended his involvement [in Comey's dismissal], expressed remorse at the tumult

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<sup>404</sup> Rod Rosenstein, *Memorandum for the Attorney General, U.S. Dep't of Justice*, May 9, 2017, available at <http://apps.washingtonpost.com/g/documents/politics/fbi-director-james-b-comeys-termination-letters-from-the-white-house-attorney-general/2430/>.

<sup>405</sup> Michael Shear and Matt Apuzzo, *FBI Director James Comey Is Fired by Trump*, *New York Times*, May 9, 2017, available at <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

<sup>406</sup> CNN, *Trump's Letter Firing FBI Director James Comey*, May 10, 2017, available at <http://www.cnn.com/2017/05/09/politics/fbi-james-comey-fired-letter/index.html>. Other members of the White House disseminated the same message, that President Trump had fired Comey at Rosenstein's recommendation: Kellyanne Conway said that, "He took the recommendation of [his] deputy attorney general . . ." Dan Merica, *Trump: It's Not Possible for Surrogates to Be Accurate All the Time*, *CNN*, May 12, 2017, available at <http://www.cnn.com/2017/05/11/politics/trump-comey-white-house-contradictions/index.html>.

<sup>407</sup> Matt Apuzzo, Maggie Haberman and Matthew Rosenberg, *Trump Told Russians that Firing 'Nut Job' Comey Eased Pressure from Investigation*, *New York Times*, May 19, 2017, available at <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html>.

<sup>408</sup> <https://twitter.com/realdonaldtrump/status/862265729718128641?lang=en>.

<sup>409</sup> <https://twitter.com/realdonaldtrump/status/862267781336752128?lang=en>.

<sup>410</sup> Perez, Prokupecz, and Brown, *CNN*, May 10, 2017.

<sup>411</sup> Partial Transcript: *NBC News Interview with Donald Trump*, *CNN*, May 11, 2017, available at <http://www.cnn.com/2017/05/11/politics/transcript-donald-trump-nbc-news/index.html>.

<sup>412</sup> Michael S. Schmidt and Adam Goldman, 'Shaken' Rosenstein Felt Used by White House in Comey Firing, *New York Times*, Jun. 29, 2018, available at <https://www.nytimes.com/2018/06/29/us/politics/rod-rosenstein-comey-firing.html>.

it unleashed, said the White House had manipulated him, fumed how the news media had portrayed the events and said the full story would vindicate him.”<sup>413</sup>

On June 2, 2018, *The New York Times* released two letters sent to the Special Counsel by the president’s legal team, dated June 23, 2017 and January 29, 2018 in which the president’s counsel, Marc Kasowitz and John Dowd respectively, set out arguments for why the president did not or could not obstruct justice.<sup>414</sup> The latter of the two letters relates to negotiations over what subjects should be included in an interview between President Trump and the Special Counsel.<sup>415</sup>

**13. Shortly after firing FBI Director Comey, President Trump summoned Comey’s deputy and Acting FBI Director Andrew McCabe to the White House and asked him who he voted for in the 2016 election**

Shortly after President Trump fired FBI Director Comey in May of 2017, President Trump summoned Comey’s deputy, Andrew McCabe to the White House and reportedly asked him who he voted for in the 2016 election.<sup>416</sup> According to *The Washington Post*, President Trump also “vented his anger at McCabe over the several hundred thousand dollars in donations that his wife, a Democrat, received for her failed 2015 Virginia State Senate bid from a political action committee controlled by a close friend of Hillary Clinton.”<sup>417</sup>

Due to Comey’s firing, McCabe was serving as acting director of the FBI at the time, and for the short period between Comey’s firing and the appointment of Robert Mueller as special counsel, he was leading the Russia investigation. Although the Department of Justice interviewed other candidates for the interim job, *The Washington Post* reported that President Trump consented to McCabe temporarily taking over because there were no better options.<sup>418</sup>

**14. President Trump demanded Attorney General Sessions’ resignation after the appointment of Special Counsel Mueller**

On May 17, 2017, Deputy Attorney General Rosenstein named former FBI Director Robert Mueller as special counsel to oversee the Russia investigation.<sup>419</sup> According to a *New York Times* article published in January 2018, Trump reportedly “erupted” at Attorney General Sessions in response to the news of Mueller’s appointment. President Trump reportedly characterized Sessions’ decision to recuse himself from the Russia investigation as disloyal and

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<sup>413</sup> *Id.*

<sup>414</sup> Schmidt, Haberman, Savage, and Apuzzo, *New York Times*, Jun. 2, 2018.

<sup>415</sup> Both letters echo many of the unsupported counterarguments discussed in greater detail in Sections II-IV and fail to even address two of the three key obstruction statutes at issue – 18 U.S.C. § 1503 and 1512.

<sup>416</sup> Ellen Nakashima, Josh Dawsey and Devlin Barrett, *Trump asked the acting FBI director how he voted during Oval Office meeting*, *Washington Post*, Jan. 23, 2018, available at [https://www.washingtonpost.com/world/national-security/trump-asked-the-acting-fbi-director-whom-he-voted-for-during-oval-office-meeting/2018/01/23/2cb50818-0073-11e8-8acf-ad2991367d9d\\_story.html](https://www.washingtonpost.com/world/national-security/trump-asked-the-acting-fbi-director-whom-he-voted-for-during-oval-office-meeting/2018/01/23/2cb50818-0073-11e8-8acf-ad2991367d9d_story.html).

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> Rod Rosenstein, *Order No. 3915-2017*, *Office of the Deputy Att’y Gen.*, May 17, 2017, available at <https://www.justice.gov/opa/press-release/file/967231/download>, also attached as App. C.2.

to have instructed Sessions to resign. Sessions reportedly submitted a resignation letter the following day, which President Trump apparently rejected.<sup>420</sup>

In early June 2017, Special Counsel Mueller assumed control of ongoing investigations of Michael Flynn<sup>421</sup> and Paul Manafort.<sup>422</sup> In July 2017, media reports surfaced that Special Counsel Mueller was investigating the June 9, 2016 meeting between Donald Trump Jr., Paul Manafort, Jared Kushner, and several individuals with ties to Russia as well as the role that President Trump may have played in covering up the purpose of this meeting.<sup>423</sup> In late July 2017, *Bloomberg* reported that Special Counsel Mueller was investigating a “broad range of transactions involving Trump’s businesses as well as those of his associates,” including “Russian purchases of apartments in Trump buildings, Trump’s involvement in a controversial SoHo development in New York with Russian associates, the 2013 Miss Universe pageant in Moscow and Trump’s sale of a Florida mansion to a Russian oligarch in 2008,” as well as “dealings with the Bank of Cyprus” and “the efforts of Jared Kushner . . . to secure financing for some of his family’s real-estate properties.”<sup>424</sup>

### **15. President Trump attempted to influence Comey’s congressional testimony or otherwise discredit him**

On May 11, 2017, *The New York Times* reported that President Trump had demanded loyalty from Comey during their January 27 dinner.<sup>425</sup> The next day, on May 12, President Trump denied the story during an interview on *Fox News*<sup>426</sup> and tweeted, “James Comey better hope that there are no ‘tapes’ of our conversations before he starts leaking to the press!”<sup>427</sup>

On June 22, 2017, two weeks after Comey testified before the Senate Intelligence Committee, President Trump tweeted that he “[had] no idea”<sup>428</sup> “...whether there are ‘tapes’ or recordings of my conversations with James Comey, but I did not make, and do not have, any

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<sup>420</sup> Schmidt, *New York Times*, Jan. 4, 2018. Before interviewing Sessions, the Special Counsel’s office reportedly received Department of Justice documents and correspondence related to the proposed resignation of Sessions. Mike Levine, *DOJ Gives Special Counsel Internal Docs on Proposed Sessions Resignation, Sources Say*, *ABC News*, Jan. 31, 2018, available at <http://abcnews.go.com/US/doj-special-counsel-internal-docs-sessions-resignation/story?id=52721241>.

<sup>421</sup> Layne, Hosenball, and Ainsley, *Reuters*, Jun. 2, 2017.

<sup>422</sup> Gurman, Tucker, and Horwitz, *Associated Press*, Jun. 3, 2017.

<sup>423</sup> Aaron Blake, *Today’s Big Takeaway: Robert Mueller Is Now Investigating Donald Trump Jr.’s Russia Meeting*, *Washington Post*, Jul. 18, 2017, available at <https://www.washingtonpost.com/news/the-fix/wp/2017/07/18/robert-mueller-is-now-the-ninth-person-in-donald-trump-jr-s-russia-meeting/>; Julia Ainsley and Tom Winter, *Mueller Team Asking if Trump Tried to Hide Purpose of Trump Tower Meeting*, *NBC News*, Aug. 28, 2017, available at <https://www.nbcnews.com/news/us-news/mueller-team-asking-if-trump-trying-to-hide-purpose-trump-tower-n796746>.

<sup>424</sup> Greg Farrell and Christian Berthelsen, *Mueller Expands Probe to Trump Business Transactions*, *Bloomberg*, Jul. 20, 2017, available at <https://www.bloomberg.com/news/articles/2017-07-20/mueller-is-said-to-expand-probe-to-trump-business-transactions>.

<sup>425</sup> Michael S. Schmidt, *In a Private Dinner, Trump Demanded Loyalty. Comey Demurred.*, *New York Times*, May 11, 2017, available at <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-firing.html>.

<sup>426</sup> *Fox News*, *Trump Warns His Fired FBI Director, Threatens the Media*, May 12, 2017, available at <http://www.foxnews.com/transcript/2017/05/12/trump-warns-his-fired-fbi-director-threatens-media.html>.

<sup>427</sup> <https://twitter.com/realdonaldtrump/status/863007411132649473>.

<sup>428</sup> <https://twitter.com/realDonaldTrump/status/877932907137966080>.

such recordings.”<sup>429</sup> The White House then referred the House Permanent Select Committee on Intelligence to the tweets in its official response to a committee’s request for the tapes (or any records of the tapes).<sup>430</sup> In an interview aired the following day on June 23, President Trump suggested that after his mention of possible tapes, Comey’s story “may have changed.”<sup>431</sup>

In June 2017, *The Washington Post* reported that the White House was gearing up for “a campaign-style line of attack aimed at undercutting [former FBI Director] Comey’s reputation.” According to the *Post*, the plan was to portray Comey as a “‘showboat’ and to bring up past controversies from his career, including his handling of the Hillary Clinton email investigation in 2016 . . . .”<sup>432</sup>

After Comey testified on June 8, 2017, a source close to President Trump’s legal team said that they would be filing a complaint with the Department of Justice’s Inspector General and the Senate Judiciary Committee regarding former FBI Director Comey’s leak of memos that he wrote memorializing his interactions with President Trump.<sup>433</sup> On June 28, 2017, President Trump’s personal lawyers announced that they were delaying plans to file the complaints.<sup>434</sup> No complaints matching those descriptions have been made public; however, President Trump’s legal team did send a letter to Special Counsel Mueller on June 27, 2017 outlining purported “facts disabling Mr. James Comey’s credibility and his testimony and claims about the President”<sup>435</sup> as well as a September 1, 2017 letter to Deputy Attorney Rod Rosenstein requesting a federal grand jury investigation of Former FBI Director Comey.<sup>436</sup>

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<sup>429</sup> <https://twitter.com/realDonaldTrump/status/877932956458795008>.

<sup>430</sup> Marc Short, Letter to Congressman Conaway and Ranking Member Schiff, *The White House*, Jun. 23, 2017, available at <http://i2.cdn.turner.com/cnn/2017/images/06/23/white.house.letter.pdf>.

<sup>431</sup> *Fox News*, Trump Says Comey-Mueller Friendship ‘Bothersome’, Jun. 23, 2017, available at <http://www.foxnews.com/politics/2017/06/23/trump-says-comey-mueller-friendship-bothersome.html>. President Trump also tweeted that Democrats did not want Carter Page to testify because he “blows away their[ ]case against him & now wants to clear his name by showing ‘the false or misleading testimony by James Comey, John Brennan...’ Witch Hunt!” <https://twitter.com/realDonaldTrump/status/869865463584620544>; <https://twitter.com/realDonaldTrump/status/869867413776601088>.

<sup>432</sup> Robert Costa, Ashley Parker, and Philip Rucker, Trump, Furious and Frustrated, Gears Up to Punch Back at Comey Testimony, *Washington Post*, Jun. 6, 2017, available at [https://www.washingtonpost.com/politics/trump-furious-and-frustrated-will-join-allies-in-attacking-comey-testimony/2017/06/06/171e6d00-4acf-11e7-9669-250d0b15f83b\\_story.html](https://www.washingtonpost.com/politics/trump-furious-and-frustrated-will-join-allies-in-attacking-comey-testimony/2017/06/06/171e6d00-4acf-11e7-9669-250d0b15f83b_story.html).

<sup>433</sup> Ali Vitali and Peter Alexander, Trump Lawyer to File Leak Complaint After Comey Testimony, Source Says, *NBC News*, Jun. 9, 2017, available at <http://www.nbcnews.com/politics/white-house/trump-lawyer-file-leak-complaint-after-comey-testimony-source-says-n770231>.

<sup>434</sup> Sarah Westwood, Trump Legal Team Delays Filing Complaints against Comey until ‘the Appropriate Time’, *The Washington Examiner*, Jun 28, 2017, available at <http://www.washingtonexaminer.com/trump-legal-team-delays-filing-complaints-against-comey-until-the-appropriate-time/article/2627325>.

<sup>435</sup> Marc Kasowitz, Letter to Special Counsel Robert Mueller Regarding the conduct and sworn testimony of Former FBI Director James B. Comey, Jun. 27, 2017, available at <https://www.apnews.com/a63dd6001a0c4796a23a3380337a8715/Text-of-Trump-team-memos-to-special-counsel-assailing-Comey>.

<sup>436</sup> John Dowd, Letter to Deputy Attorney General Rod Rosenstein Regarding a Request for Federal Grand Jury Investigation of Former FBI Director James B. Comey, Sept. 1, 2017, available at

On June 9, 2017, President Trump tweeted, “Despite so many false statements and lies, total and complete vindication...and WOW, Comey is a leaker!”<sup>437</sup> On the same day, President Trump gave a joint press conference with Romanian President Klaus Iohannis in which he denied that he told Comey to drop the investigation, but also claimed that there was “nothing wrong” if he did say something about Flynn.<sup>438</sup> On June 11, 2017, President Trump posited whether Comey had committed a crime, tweeting, “I believe the James Comey leaks will be far more prevalent than anyone ever thought possible. Totally illegal? Very ‘cowardly!’”<sup>439</sup> By July, President Trump was even more emphatic in alleging Comey’s criminality, tweeting on July 10, 2017, “James Comey leaked CLASSIFIED INFORMATION to the media. That is so illegal!”<sup>440</sup> On March 18, 2018, President Trump directly accused Comey of lying under oath in a tweet directed at the Twitter handle of the Fox News TV show “Fox and Friends”: “Wow, watch Comey lie under oath to Senator G when asked ‘have you ever been an anonymous source...or known someone else to be an anonymous source...?’ He said strongly ‘never, no.’ He lied as shown clearly on @foxandfriends.”

In September of 2017, President Trump began a new narrative about Comey, tweeting “Wow. Looks like James Comey exonerated Hillary Clinton long before the investigation was over...and so much more. A rigged system!”<sup>441</sup> In October the FBI released an email indicating that a draft of a Comey statement clearing Hillary Clinton was circulating among aides for two months before Comey announced the investigation’s end.<sup>442</sup> President Trump used that revelation to further the narrative that Comey’s investigation into Mrs. Clinton’s email server was fixed, tweeting, “FBI confirms report that James Comey drafted letter exonerating Crooked Hillary long before investigation was complete. Many people not interviewed, including Clinton herself. Comey stated under oath that he didn’t do this-obviously a fix? Where is Justice

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<https://www.apnews.com/a63dd6001a0c4796a23a3380337a8715/Text-of-Trump-team-memos-to-special-counsel-assailing-Comey>.

<sup>437</sup> <https://twitter.com/realDonaldTrump/status/873120139222306817>.

<sup>438</sup> Ali Vitali, [Trump ‘100 Percent’ Willing to Testify Under Oath on Comey Allegations](http://www.nbcnews.com/politics/white-house/trump-commits-testify-under-oath-100-percent-n770451), *NBC News*, Jun. 9, 2017, available at <http://www.nbcnews.com/politics/white-house/trump-commits-testify-under-oath-100-percent-n770451>. President Trump has similarly denied asking Comey to drop the Flynn investigation before Comey’s June 8 testimony. For example, on May 18, President Trump was asked during a press conference whether he had urged Comey “to close or to back down the investigation into Michael Flynn.” He responded, “No, no. Next question.” Ashley Parker and David Nakamura, [Trump Denies Telling Comey to Back Off Flynn Investigation](https://www.washingtonpost.com/news/post-politics/wp/2017/05/18/trump-to-hold-news-conference-at-white-house-as-political-crisis-deepens), *Washington Post*, May 18, 2017, available at <https://www.washingtonpost.com/news/post-politics/wp/2017/05/18/trump-to-hold-news-conference-at-white-house-as-political-crisis-deepens>. His attorneys have also denied this account in letters to the Special Counsel. See Marc Kasowitz, [Letter to Special Counsel Robert Mueller Regarding the conduct and sworn testimony of Former FBI Director James B. Comey](#), Jun. 27, 2017; John M. Dowd, [Letter to Special Counsel](#), Jan. 29, 2018.

<sup>439</sup> <https://twitter.com/realDonaldTrump/status/873879934040780801>.

<sup>440</sup> <https://twitter.com/realDonaldTrump/status/884361623514656769>.

<sup>441</sup> <https://twitter.com/realDonaldTrump/status/903587428488839170>.

<sup>442</sup> Anne Gearan, [Trump suggests Comey prematurely exonerated Clinton but investigators say probe was largely complete](https://www.washingtonpost.com/news/post-politics/wp/2017/10/18/trump-asks-whether-james-comey-was-truthful-about-clinton-probe/?utm_term=.d88905af6561), *Washington Post*, Oct. 18, 2017 available at [https://www.washingtonpost.com/news/post-politics/wp/2017/10/18/trump-asks-whether-james-comey-was-truthful-about-clinton-probe/?utm\\_term=.d88905af6561](https://www.washingtonpost.com/news/post-politics/wp/2017/10/18/trump-asks-whether-james-comey-was-truthful-about-clinton-probe/?utm_term=.d88905af6561).

Dept?”<sup>443</sup> He would come back to this narrative in subsequent tweets, talking about “the Comey fix” in a series of tweets on October 29, 2017<sup>444</sup> and again on December 3, 2017.<sup>445</sup>

On May 24, 2018 President Trump accused Comey of being “corrupt” and running an FBI full of “political corruption,” tweeting “Not surprisingly, the GREAT Men & Women of the FBI are starting to speak out against Comey, McCabe and all of the political corruption and poor leadership found within the top ranks of the FBI. Comey was a terrible and corrupt leader who inflicted great pain on the FBI! #SPYGATE.”<sup>446</sup> He also intimated that Comey had committed a number of other crimes in a series of tweets on April 15, saying, for example, “how come he gave up Classified Information (jail), why did he lie to Congress (jail), why did the DNC refuse to give Server to the FBI (why didn’t they TAKE it), why the phony memos, McCabe’s \$700,000 & more?”<sup>447</sup> Other descriptors he has used for Comey are “lying” on March 18, 2018,<sup>448</sup> “slimeball” on April 15, 2018,<sup>449</sup> “shadey” on April 20, 2018,<sup>450</sup> “proven liar and leaker” on April 21, 2018,<sup>451</sup> “dumb” on April 22, 2018,<sup>452</sup> “very sick or very dumb” on April 27, 2018,<sup>453</sup> “slippery” on April 18,<sup>454</sup> June 5<sup>455</sup> and 17, 2018,<sup>456</sup> and “shady” on June 28, 2018,<sup>457</sup> among others.

#### **16. President Trump has sought to discredit others who might be witnesses against him, including Deputy FBI Director McCabe**

*Foreign Policy* reported that in June 2017, President Trump “pressed senior aides . . . to devise and carry out a campaign to discredit senior FBI officials after learning that those specific employees were likely to be witnesses against him as part of special counsel Robert Mueller’s investigation.”<sup>458</sup> This direction came shortly after FBI Director Andrew McCabe reportedly told the highest-ranking members of the FBI that he and they should consider themselves potential witnesses in an investigation of possible obstruction of justice by President Trump.<sup>459</sup> Those FBI officials included McCabe, Comey’s then-Chief of Staff, Jim Rybicki, and then-General Counsel

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<sup>443</sup> <https://twitter.com/realDonaldTrump/status/920595564064100352>;  
<https://twitter.com/realDonaldTrump/status/920597192666157057>.

<sup>444</sup> <https://twitter.com/realDonaldTrump/status/920595564064100352>.

<sup>445</sup> <https://twitter.com/realDonaldTrump/status/937305615218696193>.

<sup>446</sup> <https://twitter.com/realDonaldTrump/status/999629710370983937>.

<sup>447</sup> <https://twitter.com/realDonaldTrump/status/985487209510948864>.

<sup>448</sup> <https://twitter.com/realDonaldTrump/status/975346628113596417>.

<sup>449</sup> <https://twitter.com/realDonaldTrump/status/985483513704124416>.

<sup>450</sup> <https://twitter.com/realDonaldTrump/status/987278269765517312>.

<sup>451</sup> <https://twitter.com/realDonaldTrump/status/987774054651301888>.

<sup>452</sup> <https://twitter.com/realDonaldTrump/status/988146462625181696>.

<sup>453</sup> <https://twitter.com/realDonaldTrump/status/989813047773614080>.

<sup>454</sup> <https://twitter.com/realDonaldTrump/status/986576502358671361>.

<sup>455</sup> <https://twitter.com/realDonaldTrump/status/1003949263481696256>.

<sup>456</sup> <https://twitter.com/realDonaldTrump/status/1008515606751084544>.

<sup>457</sup> <https://twitter.com/realDonaldTrump/status/1012295859072126977>.

<sup>458</sup> Murray Waas, *Trump Launched Campaign to Discredit Potential FBI Witnesses*, *Foreign Policy*, Jan. 26, 2018, available at <http://foreignpolicy.com/2018/01/26/trump-launched-campaign-to-discredit-potential-fbi-witnesses/>.

<sup>459</sup> Murray Waas, *Exclusive: top FBI officials could testify against Trump*, *Vox*, Aug. 3, 2017 available at <https://www.vox.com/policy-and-politics/2017/8/3/16084246/mueller-obstruction-case-stronger-trump-surrogates>. See also *infra* at II.A.2.

of the FBI James Baker.<sup>460</sup> (President Trump's attorney John Dowd issued a general denial of *Foreign Policy's* account.<sup>461</sup>)

On December 23, 2017, President Trump tweeted, "How can FBI Deputy Director Andrew McCabe, the man in charge, along with leakin' James Comey, of the Phony Hillary Clinton investigation (including her 33,000 illegally deleted emails) be given \$700,000 for wife's campaign by Clinton Puppets during investigation?" President Trump also tweeted, "FBI Deputy Director Andrew McCabe is racing the clock to retire with full benefits. 90 days to go?!!!"<sup>462</sup>

Following publication of *The Washington Post's* article in January 2018, which disclosed that after Comey's firing in May 2017, President Trump had asked McCabe about his vote, President Trump denied doing so, stating, "No. I don't think I did," adding, "I don't know what's the big deal with that. Because I would ask you, 'who did you vote for?'"<sup>463</sup>

According to press accounts from late January 2018, Attorney General Sessions and other members of the Trump administration had been pressuring FBI Director Christopher Wray for a number of weeks to remove or reassign top officials at the bureau who had served under Comey, including McCabe.<sup>464</sup> Citing "a person familiar with the exchange" *The New York Times* reported that Wray responded to Sessions' calls for McCabe's termination by suggesting that he would "move at his own pace" and if Sessions and the president "wanted replacements made more quickly, someone else would have to do it."<sup>465</sup> James Baker was replaced as general counsel in December 2017,<sup>466</sup> and chief of staff Jim Rybicki's retirement from the Bureau was announced in January 2018.<sup>467</sup>

Attorney General Sessions fired McCabe on March 16, 2018, after McCabe had earlier reportedly stepped aside before his planned retirement.<sup>468</sup> McCabe was fired shortly before he

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<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> Adam Goldman, [Andrew McCabe, F.B.I.'s Embattled Deputy, Is Expected to Retire](https://www.nytimes.com/2017/12/23/us/politics/mccabe-fbi-trump-russia.html), *New York Times*, Dec. 23, 2017, available at <https://www.nytimes.com/2017/12/23/us/politics/mccabe-fbi-trump-russia.html>.

<sup>463</sup> Dan Merica, [Trump attacks McCabe, denies asking who he voted for](https://www.cnn.com/2018/01/24/politics/andrew-mccabe-donald-trump/index.html), *CNN*, Jan. 24, 2018, available at <https://www.cnn.com/2018/01/24/politics/andrew-mccabe-donald-trump/index.html>.

<sup>464</sup> Sari Horwitz and Matt Zapotosky, [FBI director, under pressure to make changes, is replacing Comey aides](https://www.washingtonpost.com/world/national-security/fbi-director-under-pressure-to-make-changes-is-replacing-comey-aides/2018/01/23/e606d382-006e-11e8-8acf-ad2991367d9d_story.html), *Washington Post*, Jan. 23, 2018, available at [https://www.washingtonpost.com/world/national-security/fbi-director-under-pressure-to-make-changes-is-replacing-comey-aides/2018/01/23/e606d382-006e-11e8-8acf-ad2991367d9d\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-director-under-pressure-to-make-changes-is-replacing-comey-aides/2018/01/23/e606d382-006e-11e8-8acf-ad2991367d9d_story.html).

<sup>465</sup> Jonathan Swan, [Scoop: FBI director threatened to resign amid Trump, Sessions pressure](https://www.axios.com/scoop-sessions-fbi-trump-christopher-wray-877adb3e-5f8d-44a1-8a2f-d4f0894ca6a7.html), *Axios*, Jan. 23, 2018, available at <https://www.axios.com/scoop-sessions-fbi-trump-christopher-wray-877adb3e-5f8d-44a1-8a2f-d4f0894ca6a7.html>; Schmidt and Haberman, *New York Times*, Jan. 23, 2018.

<sup>466</sup> Devlin Barrett, Ellen Nakashima and Carol Leonnig, [FBI's top lawyer said to be reassigned](https://www.washingtonpost.com/world/national-security/fbis-top-lawyer-said-to-be-reassigned/2017/12/21/2ac76640-e6b5-11e7-833f-155031558ff4_story.html), *Washington Post*, Dec. 21, 2017, available at [https://www.washingtonpost.com/world/national-security/fbis-top-lawyer-said-to-be-reassigned/2017/12/21/2ac76640-e6b5-11e7-833f-155031558ff4\\_story.html](https://www.washingtonpost.com/world/national-security/fbis-top-lawyer-said-to-be-reassigned/2017/12/21/2ac76640-e6b5-11e7-833f-155031558ff4_story.html); Swan, *Axios*, Jan. 23, 2018.

<sup>467</sup> Sari Horwitz and Matt Zapotosky, [FBI director, under pressure to make changes, is replacing Comey aides](https://www.washingtonpost.com/world/national-security/fbi-director-under-pressure-to-make-changes-is-replacing-comey-aides/2018/01/23/e606d382-006e-11e8-8acf-ad2991367d9d_story.html), *Washington Post*, Jan. 23, 2018, available at [https://www.washingtonpost.com/world/national-security/fbi-director-under-pressure-to-make-changes-is-replacing-comey-aides/2018/01/23/e606d382-006e-11e8-8acf-ad2991367d9d\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-director-under-pressure-to-make-changes-is-replacing-comey-aides/2018/01/23/e606d382-006e-11e8-8acf-ad2991367d9d_story.html).

<sup>468</sup> Julia Ainsley and Adam Edelman, [FBI Deputy Director Andrew McCabe stepping down](https://www.nbcnews.com/politics/politics-news/fbi-deputy-director-andrew-mccabe-2018), Jan. 29, 2018, available at [https://www.nbcnews.com/politics/politics-news/fbi-deputy-director-andrew-mccabe-](https://www.nbcnews.com/politics/politics-news/fbi-deputy-director-andrew-mccabe-2018)

planned to officially retire, ostensibly due to accusations in a then-upcoming Inspector General report concluding that he was not forthcoming about a conversation he authorized between FBI officials and a journalist.<sup>469</sup> McCabe, whose firing was reportedly recommended by FBI disciplinary officials, alleged after he was fired that the accusations were “part of an effort to discredit me [McCabe] as a witness” and that he was “being singled out and treated this way because of the role [he] played, the actions [he] took and the events [he] witnessed in the aftermath of the firing of James Comey.”<sup>470</sup> McCabe added that President Trump “called for [his] firing” and he views the “attack on [his] credibility” as part of “this Administration’s ongoing war on the FBI and the efforts of the Special Counsel investigation.”<sup>471</sup>

President Trump attacked McCabe and Comey again after McCabe was fired. President Trump tweeted the night of the firing: “Andrew McCabe FIRED, a great day for the hard working men and women of the FBI - A great day for Democracy. Sanctimonious James Comey was his boss and made McCabe look like a choirboy. He knew all about the lies and corruption going on at the highest levels of the FBI!”<sup>472</sup> President Trump tweeted the next day that while there was no collusion between Russia and the Trump campaign, “there was tremendous leaking, lying and corruption at the highest levels of the FBI, Justice & State.”<sup>473</sup> He also tweeted, “How many lies? How many leaks? Comey knew it all, and much more!”<sup>474</sup>

### **17. President Trump requested that White House Counsel McGahn fire Special Counsel Mueller**

As news reports circulated in mid-June 2017 that Special Counsel Mueller was also investigating whether the president had attempted to obstruct justice,<sup>475</sup> President Trump reportedly began suggesting that the special counsel had disqualifying conflicts because Mueller had previously disputed a membership fee at one of Trump’s golf clubs, had worked at a law firm that had previously represented Jared Kushner, the president’s son-in-law, and had been interviewed by President Trump to replace Comey as FBI Director after Comey’s termination.<sup>476</sup> *The Washington Post* reported that the president was “irritated by the notion that

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[stepping-down-n842176](#); Matt Apuzzo and Adam Goldman, *Andrew McCabe, a Target of Trump’s F.B.I. Scorn, Is Fired Over Candor Questions*, *New York Times*, March 16, 2018, available at <https://www.nytimes.com/2018/03/16/us/politics/andrew-mccabe-fbi-fired.html>.

<sup>469</sup> Apuzzo and Goldman, *New York Times*, March 16, 2018.

<sup>470</sup> *Id.*

<sup>471</sup> McCabe, Andrew, *Former FBI Deputy Director Andrew McCabe’s statement on his firing*, *CNN*, Mar. 17, 2018, available at <https://www.cnn.com/2018/03/16/politics/mccabe-fired-statement-fbi-deputy-director/index.html>.

<sup>472</sup> Matt Apuzzo and Adam Goldman, *Andrew McCabe, a Target of Trump’s F.B.I. Scorn, Is Fired Over Candor Questions*, *New York Times*, Mar. 16, 2018, available at <https://www.nytimes.com/2018/03/16/us/politics/andrew-mccabe-fbi-fired.html>; <https://twitter.com/realDonaldTrump/status/974859881827258369>.

<sup>473</sup> <https://twitter.com/realDonaldTrump/status/975057131136274432>.

<sup>474</sup> <https://twitter.com/realDonaldTrump/status/975062797162811394>.

<sup>475</sup> Michael S. Schmidt and Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, *New York Times*, Jan. 25, 2018, available at <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html>.

<sup>476</sup> *Id.*

Mueller's probe could reach into his and his family's finances" and had "fum[ed] about the probe" during this period.<sup>477</sup>

*The New York Times* reported in July 2017 that "President Trump's lawyers and aides [were] scouring the professional and political backgrounds of investigators hired by the special counsel Robert S. Mueller III, looking for conflicts of interest they could use to discredit the investigation — or even build a case to fire Mr. Mueller or get some members of his team recused, according to three people with knowledge of the research effort."<sup>478</sup> The effort reportedly included collecting information about the team's political donations, which might be used to argue that Mueller's team is biased.<sup>479</sup>

Citing purported conflicts of interest, President Trump reportedly directed White House Counsel McGahn to fire Mueller in June 2017, according to people "told of the matter." McGahn reportedly refused and threatened to quit, after which point the president "backed off." Another option President Trump reportedly considered was firing Deputy Attorney General Rosenstein with the understanding that Rachel Brand would thereby assume oversight of Mueller's investigation.<sup>480</sup> These accounts were first reported in January 2018.<sup>481</sup> When asked about them, President Trump denied the allegations as "fake news."<sup>482</sup> *The New York Times* reported

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<sup>477</sup> Carol D. Leonnig, Ashley Parker, Rosalind S. Helderman and Tom Hamburger, Trump Team Seeks to Control, Block Mueller's Russia Investigation, *Washington Post*, Jul. 21, 2017, available at [https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5\\_story.html](https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html). According to the *Washington Post*, Trump became concerned about the appointment of the Special Counsel after "a number of friends and advisers . . . convinced him that Mueller would dig through his private finances and look beyond questions of collusion with Russians. They warned that the probe could last years and would ruin his first term in office." Rosalind S. Helderman and Josh Dawsey, Trump moved to fire Mueller in June, bringing White House counsel to the brink of leaving, *Washington Post*, Jan. 26, 2018, available at [https://www.washingtonpost.com/politics/trump-moved-to-fire-mueller-in-june-bringing-white-house-counsel-to-the-brink-of-leaving/2018/01/25/9184a49e-0238-11e8-bb03-722769454f82\\_story.html](https://www.washingtonpost.com/politics/trump-moved-to-fire-mueller-in-june-bringing-white-house-counsel-to-the-brink-of-leaving/2018/01/25/9184a49e-0238-11e8-bb03-722769454f82_story.html).

<sup>478</sup> Michael S. Schmidt, Maggie Haberman and Matt Apuzzo, Trump Aides, Seeking Leverage, Investigate Mueller's Investigators, *New York Times*, Jul. 20, 2017, available at <https://www.nytimes.com/2017/07/20/us/politics/donald-trump-robert-mueller-russia-investigation.html>.

<sup>479</sup> *Id.*; see also Leonnig, Parker, Helderman and Hamburger, *Washington Post*, Jul. 21, 2017.

<sup>480</sup> Rachel Brand announced her intention to resign from the Justice Department in February 2018. Ariane de Vogue, Sophie Tatum, Laura Jarrett, and Evan Perez, Rachel Brand, 3rd ranking official at Justice Dept., is stepping down, *CNN*, Feb. 10, 2018, available at <https://www.cnn.com/2018/02/09/politics/rachel-brand-resigns/index.html>.

<sup>481</sup> Schmidt and Haberman, *New York Times*, Jan. 25, 2018. The *Wall Street Journal* reported in late September 2017 that earlier in the summer West Wing officials were concerned that White House Counsel Don McGahn might quit over alleged frustrations "about the lack of protocols surrounding meetings between President Donald Trump and Jared Kushner," that "could be construed by investigators as an effort to coordinate their stories." Trump's legal team may also have been concerned that any discussions between Kushner and the president or White House staff about the Russia investigation would be discoverable by Mueller, and reportedly determined that Kushner should step down. Peter Nicholas, Michael C. Bender and Rebecca Ballhaus, Officials Expressed Concerns White House Counsel Would Quit Over Donald Trump-Jared Kushner Meetings, *Wall Street Journal*, Sept. 29, 2017, available at <https://www.wsj.com/articles/white-house-counsel-weighed-quitting-over-donald-trump-jared-kushner-meetings-1506727150?tesla=y>. Kushner remains at the White House.

<sup>482</sup> Schmidt and Haberman, *New York Times*, Jan. 25, 2018. In August 2017, months prior to the *New York Times*' account of Trump's June 2017 request of McGahn to fire Mueller, Trump's counsel, John Dowd, denied that the President ever considered doing so. "That's never been on the table, never, . . .

on March 7, 2018, that President Trump told an aide that McGahn should deny the January 2018 story, and further reported that McGahn did not release such a statement and “later had to remind the president that he had indeed asked Mr. McGahn to see that Mr. Mueller was dismissed . . . .”<sup>483</sup> On March 17, 2018, President Trump’s lawyer, John Dowd, said that “I pray that Acting Attorney General Rosenstein will . . . bring an end to alleged Russia collusion investigation manufactured by [just-fired Andrew] McCabe’s boss James Comey based upon a fraudulent and corrupt dossier.”<sup>484</sup> Dowd initially said he was speaking on behalf of the president, but in a subsequent statement issued the same morning he claimed he was actually speaking in his personal capacity.<sup>485</sup>

### **18. President Trump reportedly dictated a misleading public statement for his son about the June 2016 meeting with Russians in Trump Tower**

On July 8, 2017, *The New York Times* reported that members of the Trump campaign, including Donald Trump Jr., met with a lawyer linked to the Kremlin during the campaign on June 9, 2016.<sup>486</sup> Before the story broke, President Trump’s advisers reportedly devised a strategy to get ahead of the story by releasing a truthful account that would not be discredited if more details about the meeting were reported.<sup>487</sup> Nonetheless, while flying home from Germany on July 8, 2017, President Trump intervened and reportedly personally “dictated” the following statement<sup>488</sup> that was released in Trump Jr.’s name:

It was a short introductory meeting. I asked Jared and Paul to stop by. We primarily discussed a program about the adoption of Russian children that was active and popular with American

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‘It’s a manifestation of the media. My dealings with Bob Mueller have always been cordial, respectful -- the way it should be.’” Trump similarly told reporters on August 10, 2017 that he had not considered firing Mueller. Marshall Cohen and Aileen Graef, 8 times since June the White House denied Trump was considering firing Mueller, *CNN*, Jan. 26, 2018, available at <https://www.cnn.com/2018/01/25/politics/robert-mueller-donald-trump/index.html>.

<sup>483</sup> Michael S. Schmidt and Maggie Haberman, Trump Asked Key Witnesses About Matters They Discussed With Special Counsel, *New York Times*, Mar. 7, 2018, available at <https://www.nytimes.com/2018/03/07/us/politics/trump-witnesses-special-counsel-priebus-mcgahn.html>. The same article reported that Trump had asked former chief of staff Reince Priebus “how his interview had gone with the special counsel’s investigators and whether they had been ‘nice’ . . . .”

<sup>484</sup> Betsy Woodruff, Trump’s Lawyer: It’s Time to End the Mueller Probe, *Daily Beast*, Mar. 17, 2018, available at <https://www.thedailybeast.com/trumps-lawyer-its-time-to-fire-robert-mueller>.

<sup>485</sup> *Id.*

<sup>486</sup> Becker, Apuzzo, and Goldman, *New York Times*, Jul. 8, 2017.

<sup>487</sup> Ashley Parker, Carol D. Leonnig, Philip Rucker, and Tom Hamburger, Trump Dictated Son’s Misleading Statement on Meeting with Russian Lawyer, *Washington Post*, Jul. 31, 2017, available at [https://www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304\\_story.html](https://www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304_story.html).

<sup>488</sup> President Trump’s attorneys stated in a January 2018 letter to the Special Counsel that President Trump “dictated a short but accurate response to the New York Times article on behalf of his son, Donald Trump, Jr.,” under the heading “Statement of July 8, 2017, to the New York Times.” This was first reported in June 2018. Schmidt, Haberman, Savage, and Apuzzo, *New York Times*, Jun. 2, 2018. The acknowledgment that President Trump dictated the message came after repeated public denials by Trump advisors. Matt Apuzzo, Trump Team Pushed False Story Line About Meeting With Kremlin-Tied Lawyer, Memo Shows, *New York Times*, Jun. 4, 2018, available at <https://www.nytimes.com/2018/06/04/us/politics/trump-mueller-falsehoods-tower-meeting.html>.

families years ago and was since ended by the Russian government, but it was not a campaign issue at the time and there was no follow up.<sup>489</sup>

The statement was soon shown to be misleading, and multiple revised statements were released before Trump Jr. finally disclosed the entire email chain himself shortly before the emails were to be published by *The New York Times*.<sup>490</sup>

Mark Corallo, at the time a legal spokesperson for the president, reportedly joined a conference call with then-Director of Strategic Communications Hope Hicks, and President Trump on July 8, 2017 in which Hicks suggested the relevant emails would “never get out.” Reportedly concerned that “Hicks could be contemplating obstructing justice,”<sup>491</sup> Corallo quit shortly thereafter.<sup>492</sup> (Hicks’ attorneys have strongly denied Corallo’s account.<sup>493</sup>) The day after she testified before the House Intelligence Committee, Hicks announced on February 28, 2018, that she would be resigning as White House Communications Director reportedly for reasons that had nothing to her testimony before the House.<sup>494</sup> Hicks officially left the White House on March 29, 2018.<sup>495</sup>

During his closed-door testimony before the House Intelligence Committee in December 2017 Trump Jr. was reportedly asked about the June 9 meeting and his contacts with WikiLeaks. Trump Jr. reportedly testified that he had not informed his father about his meeting with the Russian lawyer when it took place nor had he told his father about his private messages with WikiLeaks’s Twitter account. Trump Jr. reportedly testified that he spoke with Hicks in July 2017 about how to respond to the *Times*’ inquiries as it prepared to publish a story

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<sup>489</sup> Becker, Apuzzo, and Goldman, *New York Times*, Jul. 8, 2017.

<sup>490</sup> *Id.*; Becker, Goldman, and Apuzzo, *New York Times*, Jul. 11, 2017; Parker, Leonnig, Rucker, and Hamburger, *Washington Post*, Jul. 31, 2017; When news of the June 9 meeting broke, WikiLeaks reached out to Trump Jr. suggesting that he provide WikiLeaks the email to publish: “We think this is strongly in your interest” and that publishing it would “deprive[]” Trump’s enemies of the ability to spin an unfavorable narrative and is simultaneously “beautifully confounding.” A few hours later Trump Jr. posted the emails himself. See Ioffe, *Atlantic*, Nov. 13, 2017.

<sup>491</sup> Jo Becker, Mark Mazzetti, Matt Apuzzo, and Maggie Haberman, Mueller Zeros In on Story Put Together About Trump Tower Meeting, *New York Times*, Jan. 31, 2018, available at <https://www.nytimes.com/2018/01/31/us/politics/trump-russia-hope-hicks-mueller.html>.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> Maggie Haberman, Hope Hicks to Leave Post as White House Communications Director, *New York Times*, Feb. 28, 2018, available at <https://www.nytimes.com/2018/02/28/us/politics/hope-hicks-resign-communications-director.html>.

<sup>495</sup> Katie Rogers and Maggie Haberman, Hope Hicks Is Gone, and It’s Not Clear Who Can Replace Her, *New York Times*, Mar. 29, 2018, available at <https://www.nytimes.com/2018/03/29/us/politics/hope-hicks-white-house.html>.

on the June 9 meeting.<sup>496</sup> Trump Jr. reportedly declined to answer questions about a telephone call he had with his father on July 10, 2017 concerning the June 9 meeting.<sup>497</sup>

In early January 2018, media outlets announced the impending publication of what has been a highly criticized purported tell-all about the first year of the Trump presidency by journalist Michael Wolff. Wolff claims to have based his account on more than 200 interviews with the president, his close advisers and key players both within and beyond the administration.<sup>498</sup> Media outlets began circulating a quote from the book attributed to former Chief White House Strategist Stephen Bannon, in which he opined on the June 9 meeting, “The three senior guys in the campaign thought it was a good idea to meet with a foreign government inside Trump Tower in the conference room on the twenty-fifth floor—with no lawyers. *They didn’t have any lawyers*. Even if you thought that this was not treasonous, or unpatriotic, or bad shit, and I happen to think it’s all of that, you should have called the FBI immediately.”<sup>499</sup> Bannon allegedly further quipped, “The chance that Don Jr. did not walk these jumpos up to his father’s office on the twenty-sixth floor is zero.”<sup>500</sup>

On January 3, 2018, President Trump issued an official statement in response, writing that Bannon had “lost his mind” and that “Steve was rarely in a one-on-one meeting with me and only pretends to have had influence to fool a few people with no access and no clue, whom he helped write phony books.”<sup>501</sup> Bannon responded with a *mea culpa* in which he wrote, “Donald Trump, Jr. is both a patriot and a good man,” and that his comments were aimed at Manafort. He affirmed his “unwavering [support] for the president and his agenda.”<sup>502</sup>

Long-time Trump attorney and “fixer” Michael Cohen backed up Bannon’s conviction that Trump Sr. knew in advance about the meeting.<sup>503</sup> Cohen claims that he was present when Trump was informed of the Russian’s offer by Trump Jr—and that Trump approved going ahead

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<sup>496</sup> Karoun Demirjian and Rosalind S. Helderman, Donald Trump Jr. grilled about Russian contacts by House intelligence committee, *Washington Post*, Dec. 6, 2017, available at [https://www.washingtonpost.com/politics/donald-trump-jr-grilled-about-russian-contacts-by-house-intelligence-committee/2017/12/06/1256eb92-daa5-11e7-b859-fb0995360725\\_story.html](https://www.washingtonpost.com/politics/donald-trump-jr-grilled-about-russian-contacts-by-house-intelligence-committee/2017/12/06/1256eb92-daa5-11e7-b859-fb0995360725_story.html).

<sup>497</sup> Sharon LaFraniere and Nicholas Fandos, Trump Jr. Won’t Provide Details of a Call With His Father, *New York Times*, Dec. 6, 2017, available at <https://www.nytimes.com/2017/12/06/us/donald-trump-jr-intel-committee.html>.

<sup>498</sup> David Smith, Trump Tower meeting with Russians ‘treasonous’, Bannon says in explosive book, *Guardian*, Jan. 3, 2018, available at <https://www.theguardian.com/us-news/2018/jan/03/donald-trump-russia-steve-bannon-michael-wolff>; Jonathan Martin, From ‘Fire and Fury’ to Political Firestorm, *New York Times*, Jan. 8, 2018, available at <https://www.nytimes.com/2018/01/08/books/review/michael-wolff-fire-and-fury-trump-white-house.html>.

<sup>499</sup> Michael Wolff, *Fire and Fury*, *Henry Holt*, 2018, at 255.

<sup>500</sup> *Id.*

<sup>501</sup> Read Trump’s Reaction to Steve Bannon’s Comments, *New York Times*, Jan. 3, 2018, available at <https://www.nytimes.com/2018/01/03/us/politics/trump-statement-steve-bannon.html>.

<sup>502</sup> Steve Bannon’s full statement on comments attributed to him in ‘Fire and Fury’, *CNN*, Jan. 7, 2018, available at <http://www.cnn.com/2018/01/07/politics/read-bannon-full-statement/index.html>.

<sup>503</sup> Jim Sciutto, Carl Bernstein and Marshall Cohen, Cohen claims Trump knew in advance of 2016 Trump Tower meeting, *CNN*, Jul. 27, 2018 available at <https://www.cnn.com/2018/07/26/politics/michael-cohen-donald-trump-june-2016-meeting-knowledge/index.html>.

with the meeting.<sup>504</sup>

In apparent response to an August 5, 2018 report in *The Washington Post* that he was experiencing “lingering unease” about his son’s potential legal exposure stemming from the June 9 meeting,<sup>505</sup> President Trump denied knowing about the Trump Tower meeting, but implicitly admitted that it occurred and that the meeting was in fact “to get information on an opponent” and not about adoption policy, contrary to what the initial statement claimed. President Trump tweeted: “Fake News reporting, a complete fabrication, that I am concerned about the meeting my wonderful son, Donald, had in Trump Tower. This was a meeting to get information on an opponent, totally legal and done all the time in politics - and it went nowhere. I did not know about it!”<sup>506</sup>

### **19. President Trump reportedly directed then-Chief of Staff Reince Priebus to obtain Attorney General Sessions’ resignation**

In late July 2017, President Trump reportedly instructed then-Chief of Staff Reince Priebus to get Sessions’ resignation.<sup>507</sup> According to the report, President Trump told Priebus, “Don’t give me any bullshit. Don’t try to slow me down like you always do. Get the resignation of Jeff Sessions.” Priebus reportedly told President Trump, “If I get this resignation, you are in for a spiral of calamity that makes Comey look like a picnic”, and said that Rosenstein would then resign and that then-Associate Attorney General Rachel Brand (third in the line of succession at DOJ) would say, “forget it. I’m not going to be involved with this.”<sup>508</sup>

Around the same time, President Trump also publicly criticized Attorney General Sessions. In an interview with *The New York Times* in July 2017, Trump stated publicly that he never would have appointed Attorney General Sessions had he known he would recuse himself and “warned investigators against delving into matters too far afield from Russia. . . . [When asked] if Mr. Mueller’s investigation would cross a red line if it expanded to look at his family’s finances beyond any relationship to Russia, Mr. Trump said, ‘I would say yes.’ . . . ‘I think that’s a violation. Look, this is about Russia.’” He also suggested that Special Counsel Mueller, then Acting FBI Director McCabe and Deputy Attorney General Rosenstein suffer from conflicts of

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<sup>504</sup> Jim Sciutto, Carl Bernstein and Marshall Cohen, Cohen claims Trump knew in advance of 2016 Trump Tower meeting, *CNN*, Jul. 27, 2018 available at <https://www.cnn.com/2018/07/26/politics/michael-cohen-donald-trump-june-2016-meeting-knowledge/index.html>.

<sup>505</sup> Philip Rucker, Robert Costa and Ashley Parker, Trump at a precarious moment in his presidency: Privately brooding and publicly roaring, *The Washington Post*, Aug. 5, 2018 available at [https://www.washingtonpost.com/politics/trump-at-a-precarious-moment-in-his-presidency-privately-brooding-and-publicly-roaring/2018/08/04/4b463842-9736-11e8-810c-5fa705927d54\\_story.html?utm\\_term=.b37847986424](https://www.washingtonpost.com/politics/trump-at-a-precarious-moment-in-his-presidency-privately-brooding-and-publicly-roaring/2018/08/04/4b463842-9736-11e8-810c-5fa705927d54_story.html?utm_term=.b37847986424).

<sup>506</sup> <https://twitter.com/realDonaldTrump/status/1026084333315153924>.

<sup>507</sup> Chris Whipple, “Who Needs a Controversy over the Inauguration?”: Reince Priebus Opens Up about His Six Months of Magical Thinking, *Vanity Fair*, March 2018, available at <https://www.vanityfair.com/news/2018/02/reince-priebus-opens-up-about-his-six-months-of-magical-thinking>.

<sup>508</sup> *Id.* See also Devlin Barrett, Josh Dawsey, and Rosalind S. Helderman, Mueller Investigation Examining Trump’s Apparent Efforts To Oust Sessions In July, *Washington Post*, Feb. 28, 2018, available at [https://www.washingtonpost.com/world/national-security/mueller-investigation-examining-trumps-apparent-efforts-to-oust-sessions-in-july/2018/02/28/909cfa7c-1cd7-11e8-b2d9-08e748f892c0\\_story.html?utm\\_term=.d4f82a87ee3a](https://www.washingtonpost.com/world/national-security/mueller-investigation-examining-trumps-apparent-efforts-to-oust-sessions-in-july/2018/02/28/909cfa7c-1cd7-11e8-b2d9-08e748f892c0_story.html?utm_term=.d4f82a87ee3a).

interest.<sup>509</sup> Trump stated that as far as he was aware, he was not under investigation: “I don’t think we’re under investigation, . . . I’m not under investigation. For what? I didn’t do anything wrong.”<sup>510</sup>

Special Counsel Mueller has reportedly taken an interest in President Trump’s attacks on Attorney General Sessions. According to an article in *The Washington Post* in February 2018, the special counsel “questioned witnesses in detail about Trump’s private comments and state of mind in late July and early August of last year [2017], around the time he issued a series of tweets belittling his ‘beleaguered’ attorney general.”<sup>511</sup> The *Post* continued, “[t]he thrust of the questions was to determine whether the president’s goal was to oust Sessions in order to pick a replacement who would exercise control over the investigation into possible coordination between Russia and Trump associates during the 2016 election . . . .”<sup>512</sup> Similarly, *The New York Times* reported in July 2018 that the Special Counsel was interested in President Trump’s tweets and other statements attacking Comey and Sessions.<sup>513</sup>

## **20. President Trump’s personal attorneys reportedly floated the possibility of pardons for Manafort and Flynn with their lawyers**

During the Summer of 2017, President Trump’s personal attorney John Dowd reportedly told attorneys for Manafort and Flynn that the president may be willing to pardon them.<sup>514</sup> Neither Manafort nor Flynn had been charged at the time; Manafort was indicted in late October 2017 and Flynn pleaded guilty in December 2017.<sup>515</sup> Dowd denied that he had any such discussions.<sup>516</sup> According to *The Washington Post*, one source familiar with the Manafort outreach said Dowd relayed to Manafort’s attorneys over the Summer of 2017 that a pardon was a possibility, while “[a] person familiar with the Flynn discussions said Dowd called [Flynn

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<sup>509</sup>Excerpts from the Times’s Interview with Trump, *New York Times*, Jul. 19, 2017, available at <https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html>; Peter Baker, Michael S. Schmidt, and Maggie Haberman, Citing Recusal, Trump Says He Wouldn’t Have Hired Sessions, *New York Times*, Jul. 19, 2017, available at <https://www.nytimes.com/2017/07/19/us/politics/trump-interview-sessions-russia.html>.

<sup>510</sup> Peter Baker, Michael S. Schmidt, and Maggie Haberman, *New York Times*, Jul. 19, 2017.

<sup>511</sup> Barrett, Dawsey, and Helderman, *Washington Post*, Feb. 28, 2018.

<sup>512</sup> *Id.*

<sup>513</sup> Michael S. Schmidt and Maggie Haberman, Mueller Examining Trump’s Tweets in Wide-Ranging Obstruction Inquiry, *New York Times*, Jul. 26, 2018, available at <https://www.nytimes.com/2018/07/26/us/politics/trump-tweets-mueller-obstruction.html>.

<sup>514</sup> Carol D. Leonnig, Josh Dawsey, and Rosalind S. Helderman, Trump’s lawyer raised possibility of pardons for Manafort, Flynn last summer, *Washington Post*, Mar. 28, 2018, available at [https://www.washingtonpost.com/politics/trumps-lawyer-allegedly-raised-possibility-of-pardons-for-manafort-flynn-last-summer/2018/03/28/3c5e570c-32ae-11e8-8abc-22a366b72f2d\\_story.html](https://www.washingtonpost.com/politics/trumps-lawyer-allegedly-raised-possibility-of-pardons-for-manafort-flynn-last-summer/2018/03/28/3c5e570c-32ae-11e8-8abc-22a366b72f2d_story.html); Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, and Adam Goldman, Trump’s Lawyer Raised Prospect of Pardons for Flynn and Manafort, *New York Times*, Mar. 28, 2018, available at <https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html>. Dowd had resigned a week before these stories were published, reportedly because he did not want Trump to agree to an interview with the Special Counsel and Trump was prepared to ignore that advice. Michael S. Schmidt and Maggie Haberman, Trump’s Lawyer Resigns as President Adopts Aggressive Approach in Russia Inquiry, *New York Times*, Mar. 22, 2018, available at <https://www.nytimes.com/2018/03/22/us/politics/john-dowd-resigns-trump-lawyer.html>.

<sup>515</sup> Leonnig, Dawsey, and Helderman, *Washington Post*, Mar. 28, 2018.

<sup>516</sup> *Id.*

attorney Robert] Kelner sometime last year to tell him Trump believed there was no merit to the case against Flynn and the ‘president would consider a pardon.’”<sup>517</sup> *The New York Times* similarly reported that Dowd’s conversations with Kelner took place while the grand jury was hearing evidence against Flynn, and that Dowd had said privately that “he had told Mr. Kelner that the president had long believed that the case against Mr. Flynn was flimsy and was prepared to pardon him.”<sup>518</sup>

It was reportedly unclear whether Dowd had discussed the pardons with President Trump before bringing them up with counsel for Manafort and Flynn.<sup>519</sup> White House aides and President Trump’s legal advisers reportedly said that “Dowd may have mentioned pardons off the cuff and failed to recognize the intense sensitivity of the subject at that moment.”<sup>520</sup> President Trump reportedly “express[ed] a keen interest last Spring and Summer [of 2017] in his power to pardon,” but White House attorney Cobb issued a statement stating that “I’ve only been asked about pardons by the press, and have routinely responded on the record that no pardons are under discussion or under consideration at the White House.”<sup>521</sup>

The special counsel appears interested in this subject, as current and former administration officials reportedly “recounted conversations they had with the president about potential pardons for former aides under investigation by the special counsel” during interviews with Mueller’s investigators.<sup>522</sup>

On December 15, 2017, while speaking with the press on the White House lawn, President Trump replied to a pointed question as to whether he might consider pardoning Flynn: “I don’t want to talk about pardons with Michael Flynn yet. We’ll see what happens, let’s see. I can say this, when you look at what’s going on with the FBI and the Justice Department, people are very, very angry.”<sup>523</sup> White House lawyer Ty Cobb stated later that day that “[t]here is no consideration being given to pardoning Michael Flynn at the White House.”<sup>524</sup>

President Trump’s adviser and personal lawyer Rudy Giuliani has suggested President Trump may pardon people investigated by Mueller. On June 15, 2018, the same day that Paul Manafort’s bail was revoked, Giuliani stated to the *New York Daily News* that “[w]hen the whole thing is over, things might get cleaned up with some presidential pardons.”<sup>525</sup> Two days later, Giuliani stated that Trump “is not going to issue pardons in this investigation” but also said that

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<sup>517</sup> *Id.*

<sup>518</sup> Schmidt, Becker, Mazzetti, Haberman, and Goldman, *New York Times*, Mar. 28, 2018.

<sup>519</sup> *Id.*

<sup>520</sup> Leonnig, Dawsey, and Helderman, *Washington Post*, Mar. 28, 2018.

<sup>521</sup> *Id.*

<sup>522</sup> Schmidt, Becker, Mazzetti, Haberman, and Goldman, *New York Times*, Mar. 28, 2018.

<sup>523</sup> Betsy Klein, *Trump on a Flynn pardon: ‘Let’s see’*, *CNN*, Dec. 15, 2017, available at <http://www.cnn.com/2017/12/15/politics/donald-trump-michael-flynn-pardon/index.html>.

<sup>524</sup> *Id.*

<sup>525</sup> Chris Sommerfeldt, *Rudy Giuliani says Mueller probe ‘might get cleaned up’ with ‘presidential pardons’ in light of Paul Manafort going to jail*, *New York Daily News*, Jun. 15, 2018, available at <http://www.nydailynews.com/news/politics/ny-news-rudy-muller-pardons-trump-manafort-20180615-story.html>.

people involved in the investigation may ultimately get pardoned “if in fact the President and his advisers—not me—come to the conclusion you’ve been treated unfairly.”<sup>526</sup>

President Trump’s use of the pardon power thus far has demonstrated his willingness to grant clemency to individuals charged in similar investigations. On April 13, 2018, he pardoned I. Lewis “Scooter” Libby Jr., who was convicted in 2007 of perjury and obstruction of justice in connection with the disclosure of the identity of CIA officer Valerie Plame and whose sentence had been commuted by President George W. Bush.<sup>527</sup> Some critics, including Plame herself, suggested that President Trump’s pardon was not about Libby: “He’s saying, ‘If you get in trouble, don’t spill the beans, I’ll take care of you.’ This is how the mafia works.”<sup>528</sup> The president has also issued pardons to Sheriff Joseph M. Arpaio (August 25, 2017), who had been convicted of contempt of court, and Kristian Mark Saucier (March 9, 2018), who had been convicted of unauthorized retention of defense information.<sup>529</sup> On April 21, 2018, President Trump tweeted that he was considering a posthumous pardon for boxer Jack Johnson at the request of actor Sylvester Stallone,<sup>530</sup> and President Trump issued the posthumous pardon on May 24, 2018.<sup>531</sup> On May 31, 2018, the president pardoned conservative pundit Dinesh D’Souza, who had been convicted of campaign finance violations in 2014 and who had claimed that he was persecuted by the Justice Department under President Obama.<sup>532</sup> That same day, President Trump said that he was considering pardoning Martha Stewart, who was convicted in 2004 of conspiracy, obstruction, and making false statements to federal investigators, and that he was considering commuting the sentence of former Illinois Gov. Rod Blagojevich.<sup>533</sup> The president stated that Stewart was “to a certain extent ... harshly and unfairly treated.”<sup>534</sup> Blagojevich had published an op-ed in the Wall Street Journal three days before President Trump’s comments that criticized “[s]ome in the Justice Department and FBI” for “abusing their power to criminalize the routine practices of politics and government.”<sup>535</sup> On June 6, 2018, President Trump commuted the sentence of Alice Marie Johnson, a grandmother serving a life

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<sup>526</sup> Eli Watkins, Giuliani: Trump not issuing Russia investigation pardons during probe, *CNN*, Jun. 17, 2018, available at <https://www.cnn.com/2018/06/17/politics/rudy-giuliani-cnntv/index.html>.

<sup>527</sup> Peter Baker, Trump Pardons Scooter Libby in a Case That Mirrors His Own, *New York Times*, Apr. 13, 2018, available at <https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html>.

<sup>528</sup> *Id.*

<sup>529</sup> Pardons Granted by President Donald Trump, Department of Justice, updated Apr. 24, 2018, last accessed Jul. 27, 2018, available at <https://www.justice.gov/pardon/pardons-granted-president-donald-trump>.

<sup>530</sup> Gregory Korte, Trump says he’s considering a ‘full pardon’ for boxer Jack Johnson – at Stallone’s request, *USA Today*, Apr. 21, 2018, available at <https://www.usatoday.com/story/sports/2018/04/21/trump-says-hes-considering-full-pardon-boxer-jack-johnson-stallones-request/539349002/>.

<sup>531</sup> Executive Grant of Clemency: John Arthur Johnson, Also Known As “Jack” Johnson, *Department of Justice*, May 24, 2018, available at <https://www.justice.gov/pardon/page/file/1066386/download>.

<sup>532</sup> Executive Grant of Clemency: Dinesh D’Souza, *Department of Justice*, May 31, 2018, available at <https://www.justice.gov/pardon/page/file/1067776/download>; Peter Baker, Trump Wields Pardon Pen to Confront Justice System, *New York Times*, Jun. 6, 2018, available at <https://www.nytimes.com/2018/05/31/us/politics/dsouza-pardon.html>.

<sup>533</sup> Jeremy Diamond, Trump floats Martha Stewart pardon, Rod Blagojevich commutation, *CNN*, May 31, 2018, available at <https://www.cnn.com/2018/05/31/politics/martha-stewart-rod-blagojevich-trump-pardons/index.html>.

<sup>534</sup> *Id.*

<sup>535</sup> *Id.*; Rod Blagojevich, I’m in Prison for Practicing Politics, *Wall Street Journal*, May 28, 2018, available at <https://www.wsj.com/articles/im-in-prison-for-practicing-politics-1527517322>.

sentence for drug crimes, after celebrity Kim Kardashian met with the president and pleaded Johnson's case.<sup>536</sup> *CNN* reported on June 6, 2018, that the White House was preparing pardoning paperwork for at least 30 people,<sup>537</sup> and President Trump pardoned Dwight and Seven Hammond (ranchers who had a long dispute with the federal government and were imprisoned for arson) since that report.<sup>538</sup>

President Trump has bypassed the traditional pardon system for all of his pardons and commutations.<sup>539</sup>

## **21. President Trump urged senior Republican members of Congress to stop investigating the 2016 election**

According to *The New York Times*, in the Summer of 2017, around the time he was reportedly "raging" at Sessions for recusing himself, President Trump "repeatedly urged senior Senate Republicans, including the chairman of the Senate Intelligence Committee, to end the panel's investigation into Russia's interference in the 2016 election, according to a half dozen lawmakers and aides."<sup>540</sup> The article quotes Senator Burr as stating that President Trump said something to the effect of "I hope you can conclude this as quickly as possible."<sup>541</sup> President Trump also reportedly told Republican Senators Mitch McConnell and Roy Blunt "to end the investigation swiftly" and reached out to other lawmakers with requests that they urge Burr to end the inquiry.<sup>542</sup> On August 9, 2017, President Trump purportedly spoke with Senate Majority Leader Mitch McConnell and berated McConnell for (among other things) refusing to protect him from investigations into Russian interference in the 2016 election.<sup>543</sup>

## **22. President Trump acknowledged in a tweet (even if it was written by his attorney) that he knew that Flynn had committed a crime when he fired him**

On December 2, 2017, a tweet issued from President Trump's official Twitter account: "I had to fire General Flynn because he lied to the Vice President and the FBI. He has pled guilty to those lies. It is a shame because his actions during the transition were lawful. There was nothing to hide!"<sup>544</sup> Shortly thereafter the media reported that this statement could be construed

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<sup>536</sup> Executive Grant of Clemency: Alice Marie Johnson, *Department of Justice*, June 6, 2018, available at <https://www.justice.gov/pardon/page/file/1068926/download>; Kaitlan Collins, *Exclusive: Trump considers dozens of new pardons*, *CNN*, Jun. 6, 2018, available at <https://www.cnn.com/2018/06/06/politics/donald-trump-pardons/index.html>.

<sup>537</sup> Collins, *CNN*, Jun. 6, 2018.

<sup>538</sup> Department of Justice, *Pardons Granted by President Donald Trump*, available at <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> (last accessed July 25, 2018).

<sup>539</sup> Baker, *New York Times*, Jun. 6, 2018.

<sup>540</sup> Jonathan Martin, Maggie Haberman, and Alexander Burns, *Trump Pressed Top Republicans to End Senate Russia Inquiry*, *New York Times*, Nov. 30, 2017, available at <https://www.nytimes.com/2017/11/30/us/politics/trump-russia-senate-intel.html>.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> Alexander Burns and Jonathan Martin, *McConnell, in Private, Doubts if Trump Can Save Presidency*, *New York Times*, Aug. 22, 2017, available at <https://www.nytimes.com/2017/08/22/us/politics/mitch-mcconnell-trump.html>.

<sup>544</sup> <https://twitter.com/realDonaldTrump/status/937007006526959618>.

as an admission that President Trump had knowledge that Flynn committed a crime when President Trump allegedly asked Comey to drop the investigation of Flynn.<sup>545</sup>

That Sunday, December 3, 2017, Trump's personal attorney John Dowd claimed authorship of the tweet, describing it as sloppily worded and stressing that it would be inaccurate to say the president had been told Flynn lied to the FBI.<sup>546</sup> The same day, President Trump tweeted, "I never asked Comey to stop investigating Flynn. Just more Fake News covering another Comey lie!"<sup>547</sup>

### **23. President Trump reportedly told advisers that he wanted Special Counsel Mueller's investigation to be shut down**

According to *The New York Times*, in early December 2017, President Trump reportedly told advisors "in no uncertain terms" that he wanted Special Counsel Mueller's investigation to be shut down.<sup>548</sup> The request apparently followed inaccurate reports that the special counsel had subpoenaed records relating to his businesses from Deutsche Bank.<sup>549</sup> President Trump reportedly backed down from his request after his advisors and attorneys were told by the special counsel's office that the reports were not accurate.<sup>550</sup>

### **24. President Trump reportedly asked Deputy Attorney General Rosenstein if Rosenstein was on "my team"**

In December 2017, President Trump reportedly asked Deputy Attorney General Rod Rosenstein if Rosenstein was "on my team" during a conversation at the White House about document demands from Republican House Intelligence Chairman Devin Nunes.<sup>551</sup> According

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<sup>545</sup> Daniella Diaz, *Critics react to Trump's tweet on firing Flynn*, *CNN*, Dec. 2, 2017, available at <https://www.cnn.com/2017/12/02/politics/trump-tweet-flynn-firing-fbi-reaction/index.html>; Julia Manchester, *Dem on Trump's Flynn tweet: 'This is obstruction of justice'*, *The Hill*, Dec. 2, 2017, available at <http://thehill.com/homenews/house/362936-dem-on-trumps-flynn-tweet-this-is-obstruction-of-justice>.

<sup>546</sup> Carol D. Leonnig, John Wagner, and Ellen Nakashima, *Trump lawyer says president knew Flynn had given FBI the same account he gave to vice president*, *Washington Post*, Dec. 3, 2017, available at [https://www.washingtonpost.com/politics/trump-lawyer-says-president-knew-flynn-had-given-fbi-the-same-account-he-gave-to-vice-president/2017/12/03/5c59a620-d849-11e7-a841-2066faf731ef\\_story.html](https://www.washingtonpost.com/politics/trump-lawyer-says-president-knew-flynn-had-given-fbi-the-same-account-he-gave-to-vice-president/2017/12/03/5c59a620-d849-11e7-a841-2066faf731ef_story.html).

<sup>547</sup> <https://twitter.com/realDonaldTrump/status/937141061343956992>; <https://twitter.com/realDonaldTrump/status/937279001684598784>.

<sup>548</sup> Maggie Haberman and Michael S. Schmidt, *Trump Sought to Fire Mueller in December*, *New York Times*, Apr. 10, 2018, available at <https://www.nytimes.com/2018/04/10/us/politics/trump-sought-to-fire-mueller-in-december.html>. Federal prosecutors in the Eastern District of New York have reportedly subpoenaed banking records from Deutsche Bank for entities associated with the Kushner family company. Ben Protess, Jessica Silver-Greenberg, and David Enrich, *Prosecutors Said to Seek Kushner Records From Deutsche Bank*, *New York Times*, Dec. 22, 2017, available at <https://www.nytimes.com/2017/12/22/business/kushner-deutsche-bank-subpoena.html>. The *New York Times* reported that there is "no indication that the subpoena is related to the investigation being conducted by Robert S. Mueller III, the special counsel, into Russian meddling in the 2016 United States presidential election." *Id.* A spokeswoman for the companies claimed no knowledge of any inquiry. *Id.*

<sup>549</sup> Haberman and Michael S. Schmidt, *New York Times*, Apr. 10, 2018.

<sup>550</sup> *Id.*

<sup>551</sup> Pamela Brown, Evan Perez, and Laura Jarrett, *Exclusive: Trump asked Rosenstein if he was 'on my team'*, *CNN*, Feb. 1, 2018, available at <https://amp.cnn.com/cnn/2018/01/31/politics/donald-trump-rod-rostenstein-december-meeting/index.html>.

to *CNN*, which described the alleged exchange in early February 2018, President Trump was focused on “where the special counsel’s Russia investigation was heading” as well as Rosenstein’s forthcoming testimony before the House Judiciary Committee.<sup>552</sup> At the hearing in December 2017 Rosenstein “pushed back” on questions about Trump’s demands for loyalty, testifying that ““Nobody has asked me to take a loyalty pledge, other than the oath of office....”<sup>553</sup>

## ***25. President Trump has repeatedly attacked and attempted to undermine the investigation***

President Trump has repeatedly stated in interviews and via Twitter that there has been no collusion between his campaign and the Russians. In conjunction with his tweets about the lack of collusion on the part of the Trump campaign he has frequently implied wrong-doing on the part of the FBI, the Justice Department and Democrats and at times he has urged Republicans to “DO SOMETHING!” and to “take control.”<sup>554</sup> For example, on January 10, 2018, President Trump tweeted: “The single greatest Witch Hunt in American history continues. There was no collusion, everybody including the Dems knows there was no collusion, & yet on and on

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<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> On October 27, 2017, Trump tweeted: “It is now commonly agreed, after many months of COSTLY looking, that there was NO collusion between Russia and Trump. Was collusion with HC!” <https://twitter.com/realDonaldTrump/status/923905540291522560>. On the Friday night before the charges against Manafort, Gates, and Papadopoulos were announced, *CNN* reported that the grand jury had approved criminal charges in the Special Counsel’s investigation. The White House was reportedly “scrambl[ing]” that Saturday to learn who would be implicated. Darren Samuelsohn, *Trump lawyers scramble to prepare for new stage of Russia probe*, *Politico*, Oct. 28, 2017, available at <https://www.politico.com/story/2017/10/28/trump-russia-probe-legal-244270>. On Sunday morning, October 29, 2017, Trump tweeted: (1) “As usual, the ObamaCare premiums will be up (the Dems own it), but we will Repeal & Replace and have great Healthcare soon after Tax Cuts!” <https://twitter.com/realDonaldTrump/status/924625061100867584>; (2) “Never seen such Republican ANGER & UNITY as I have concerning the lack of investigation on Clinton made Fake Dossier (now \$12,000,000?),....” <https://twitter.com/realDonaldTrump/status/924635359480303616>; (3) “...the Uranium to Russia deal, the 33,000 plus deleted Emails, the Comey fix and so much more. Instead they look at phony Trump/Russia,....” <https://twitter.com/realDonaldTrump/status/924637600094326784>; (4) “...“collusion,” which doesn’t exist. The Dems are using this terrible (and bad for our country) Witch Hunt for evil politics, but the R’s...” <https://twitter.com/realDonaldTrump/status/924639422066384896>; (5) “...are now fighting back like never before. There is so much GUILT by Democrats/Clinton, and now the facts are pouring out. DO SOMETHING!” (6) <https://twitter.com/realDonaldTrump/status/924641278947622913>; “All of this ‘Russia’ talk right when the Republicans are making their big push for historic Tax Cuts & Reform. Is this coincidental? NOT!” <https://twitter.com/realDonaldTrump/status/924649059520073730>. Trump’s White House counsel, Ty Cobb, told *NBC News* that the president’s tweets “had nothing to do with the Russia investigation.” Phil McCausland, *Trump Goes on Tweet Storm About Health Care, Clinton, Dossier and More*, *NBC News*, Oct. 29, 2017, available at <https://www.nbcnews.com/politics/donald-trump/trump-goes-tweet-storm-about-health-care-clinton-dossier-more-n815416>. The next day, on October 30, 2017, Trump tweeted, “Report out that Obama Campaign paid \$972,000 to Fusion GPS. The firm also got \$12,400,000 (really?) from DNC. Nobody knows who OK’d!” <https://twitter.com/realDonaldTrump/status/924963492645437441>. Later that morning, he tweeted, “Sorry, but this is years ago, before Paul Manafort was part of the Trump campaign. But why aren’t Crooked Hillary & the Dems the focus?????” <https://twitter.com/realDonaldTrump/status/925005659569041409>. Minutes later, he finished, “....Also, there is NO COLLUSION!” <https://twitter.com/realDonaldTrump/status/925006418989715456>.

it goes. Russia & the world is laughing at the stupidity they are witnessing. Republicans should finally take control!”<sup>555</sup> The president continued his attacks on the Special Counsel and other parties related to the investigation throughout the Summer of 2018, tweeting on June 28, 2018 for example: “When is Bob Mueller going to list his Conflicts of Interest? Why has it taken so long? Will they be listed at the top of his \$22,000,000 Report...And what about the 13 Angry Democrats, will they list their conflicts with Crooked H? How many people will be sent to jail and....persecuted on old and/or totally unrelated charges (there was no collusion and there was no obstruction of the no collusion)...And what is going on in the FBI & DOJ with Crooked Hillary, the DNC and all of the lies? A disgraceful situation!”<sup>556</sup>

On November 3, 2017, *The New York Times* reported that “[o]ne of President Trump’s biggest disappointments in office, by his own account, was discovering that he is not supposed to personally direct law enforcement decisions by the Justice Department and the F.B.I.”<sup>557</sup> Nevertheless, *NBC News* reported in January 2018 that President Trump had reportedly been “talking to friends about the possibility of asking Attorney General Jeff Sessions to consider prosecuting Mueller and his team.”<sup>558</sup>

In an interview with *The New York Times* on December 28, 2017, President Trump reiterated some persistent themes, saying among other things that it was “terrible” that Sessions recused himself; there was “absolutely no collusion” and “[v]irtually every Democrat has said there is no collusion”; “congressmen have been unbelievable in pointing out what a witch hunt the whole thing is”; “I think that Bob Mueller will be fair”; the Mueller investigation “makes the country look bad”; and former Attorney General Eric Holder “protected the president [President Obama]. And I have great respect for that, I’ll be honest, I have great respect for that.”<sup>559</sup>

President Trump continues to attack Sessions, Comey, and the investigation on a regular, sometimes daily, occasion as of this publication. For example, President Trump has tweeted some variation of “witch hunt” 84 times in 2018 alone,<sup>560</sup> including 20 times in May

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<sup>555</sup> Zapotosky, *Washington Post*, Jan. 10, 2018.

<sup>556</sup> <https://twitter.com/realDonaldTrump/status/1012315534220808192>; <https://twitter.com/realDonaldTrump/status/1012318771250384896>. On August 9, 2018 he renewed this attack, tweeting: “This is an illegally brought Rigged Witch Hunt run by people who are totally corrupt and/or conflicted. It was started and paid for by Crooked Hillary and the Democrats. Phony Dossier, FISA disgrace and so many lying and dishonest people already fired. 17 Angry Dems? Stay tuned!” <https://twitter.com/realDonaldTrump/status/1027585937163931648>.

<sup>557</sup> Peter Baker, ‘Very Frustrated’ Trump Becomes Top Critic of Law Enforcement, *New York Times*, Nov. 3, 2017, available at <https://www.nytimes.com/2017/11/03/us/politics/trump-says-justice-dept-and-fbi-must-do-what-is-right-and-investigate-democrats.html>. The article also quoted Trump saying: “‘I’m really not involved with the Justice Department,’ . . . ‘I’d like to let it run itself. But honestly, they should be looking at the Democrats. They should be looking at Podesta and all of that dishonesty. They should be looking at a lot of things. And a lot of people are disappointed in the Justice Department, including me.’” *Id.*

<sup>558</sup> Howard Fineman, The ‘state’ of Donald Trump? He thinks it couldn’t be better, *NBC News*, Jan. 30, 2018, available at <https://www.nbcnews.com/storyline/2018-state-of-the-union-address/state-donald-trump-he-thinks-it-couldn-t-be-better-n842501>.

<sup>559</sup> Excerpts from Trump’s Interview With The Times, *New York Times*, Dec. 28, 2017, available at [https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html?\\_r=0](https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html?_r=0).

<sup>560</sup> Olivia Paschal, Trump’s Tweets and the Creation of ‘Illusory Truth’, *Atlantic*, Aug. 3, 2018 available at <https://www.theatlantic.com/politics/archive/2018/08/how-trumps-witch-hunt-tweets-create-an-illusory-truth/566693/>.

2018, 27 times in June 2018, and 17 times in July 2018 (as of July 26, 2018),<sup>561</sup> and *Time Magazine* recounted 207 arguments about the Russia investigation made by President Trump as of July 30, 2018.<sup>562</sup> *The New York Times* reported in July 2018 that the Special Counsel was examining tweets and negative statements about Attorney General Sessions and about FBI Director Comey, as part of an analysis of a larger pattern of obstructive behavior and witness tampering.<sup>563</sup> On August 5, 2018, President Trump tweeted: “Why aren’t Mueller and the 17 Angry Democrats looking at the meetings concerning the Fake Dossier and all of the lying that went on in the FBI and DOJ? This is the most one sided Witch Hunt in the history of our country. Fortunately, the facts are all coming out, and fast!”<sup>564</sup>

**26. President Trump revoked former CIA Director John Brennan’s security clearance reportedly because of Brennan’s involvement with the Russia investigation, and President Trump threatened to revoke the clearances of other law enforcement personnel who supervised the investigation.**

On August 15, 2018 President Trump revoked the security clearance of former CIA Director John Brennan, and announced that he was reviewing the clearances of several other former officials.<sup>565</sup> Following the release of this statement, which Press Secretary Sarah Huckabee Sanders read aloud from the podium in the White House press briefing room, President Trump sat for an interview with the *Wall Street Journal*.<sup>566</sup> President Trump reportedly told the *Journal* that Mr. Brennan was among those [President Trump] held responsible for the investigation, saying, “I call it the rigged witch hunt, [it] is a sham, and these people led it! So I think it’s something that had to be done.”<sup>567</sup>

The President also reportedly said that he was reviewing the clearances of other former officials who had supervised the investigation, noting that, “You look at any of [the former officials] and you see the things they’ve done. In some cases, they’ve lied to Congress. The Hillary Clinton whole investigation was a total sham. I don’t trust many of those people on that list, I think they’re very duplicitous. I think they’re not good people.”<sup>568</sup>

The President also reportedly mentioned the Russia investigation when he was discussing the matter in private, and subsequently drafted a list of officials related to the

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<sup>561</sup> Niall McCarthy, *Trump Ramps Up “Witch Hunt” Tweets*, *statista*, Jul. 27, 2018, available at <https://www.statista.com/chart/14818/trump-ramps-up-%2522witch-hunt%2522-tweets/>.

<sup>562</sup> Ryan Teague Beckwith, *Read the 207 Arguments President Trump Has Made Against the Mueller Investigation*, *Time Magazine*, Jul. 30, 2018 (originally published Jun. 7, 2018), available at <http://time.com/5290531/donald-trump-robert-mueller-russia-investigation-arguments/>.

<sup>563</sup> Schmidt and Haberman, *New York Times*, Jul. 26, 2018.

<sup>564</sup> <https://twitter.com/realDonaldTrump/status/1026086905539174400>.

<sup>565</sup> *Statement of the President on John Brennan’s Security Clearance*, Aug. 15, 2018 available at <https://assets.documentcloud.org/documents/4758652/President-Trump-s-statement-on-security-clearances.pdf>.

<sup>566</sup> Peter Nicholas and Michael C. Bender, *Trump Revokes Ex-CIA Director John Brennan’s Security Clearance*, *Wall Street Journal*, Aug. 15, 2018 available at <https://www.wsj.com/articles/trump-revokes-ex-cia-director-john-brennans-security-clearance-1534358658>.

<sup>567</sup> Nichols and Bender, *Wall Street Journal*, Aug. 15, 2018.

<sup>568</sup> *Id.*

investigation who had angered him.<sup>569</sup> Press Secretary Sanders read this list—which includes various potential witnesses in the various investigations into President Trump and his campaign—aloud after the President’s statements.<sup>570</sup> The full list includes high-ranking former members of the Trump and Obama administrations: Brennan, former Director of National Intelligence James Clapper, former FBI Director James Comey, former NSA and CIA Director Michael Hayden, former Deputy FBI Director Andrew McCabe, former Associate Deputy Attorney General Bruce Ohr, former FBI Attorney Lisa Page, former FBI Agent Peter Strzok, former National Security Adviser Susan Rice, and former Deputy Attorney General Sally Yates.<sup>571</sup>

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<sup>569</sup> David Nakamura and Josh Dawsey, Trump gears up to strip more clearances from officials tied to Russia investigation, *Washington Post*, Aug. 17, 2018 available at [https://www.washingtonpost.com/politics/trump-gears-up-to-strip-more-clearances-from-officials-tied-to-russia-probe/2018/08/16/341fe418-a165-11e8-93e3-24d1703d2a7a\\_story.html?utm\\_term=.9594329829cd](https://www.washingtonpost.com/politics/trump-gears-up-to-strip-more-clearances-from-officials-tied-to-russia-probe/2018/08/16/341fe418-a165-11e8-93e3-24d1703d2a7a_story.html?utm_term=.9594329829cd).

<sup>570</sup> Philip Bump, The Trump enemies list: The critics the White House might strip of security clearance, *Washington Post*, Aug. 15, 2018 available at [https://www.washingtonpost.com/news/politics/wp/2018/08/15/the-trump-enemies-list-the-critics-the-white-house-might-strip-of-security-clearance/?utm\\_term=.e3b44c2afddd](https://www.washingtonpost.com/news/politics/wp/2018/08/15/the-trump-enemies-list-the-critics-the-white-house-might-strip-of-security-clearance/?utm_term=.e3b44c2afddd).

<sup>571</sup> *Id.*

## II. What is the case that President Trump obstructed justice?

In this Section, we describe the laws and court decisions governing obstruction of justice and explain how they apply to the facts and allegations as we know them. In Subsection A (page 85), we discuss the court decisions interpreting and applying the three on-point federal obstruction statutes. These prior authorities demonstrate that President Trump’s reported conduct to date may be sufficient to build a case against him for obstructing criminal and congressional investigations of Michael Flynn. Those court opinions also support a case against him for obstructing criminal and congressional investigations into Russian interference in the 2016 election. In Subsection B (page 132), we explain that President Trump could also be criminally liable if he is determined to have conspired with others in the administration to obstruct or impede an investigation. In doing so, we make no predictions about whether Special Counsel Mueller will seek such charges for obstruction of justice or conspiracy to obstruct justice, or whether a grand jury would return an indictment against the president. In Subsection C (page 135), we rebut the arguments of those who contend that there are structural or other barriers to bringing a case against the president for obstruction of justice, and in Subsection D (page 139), we argue that terminating Special Counsel Mueller would likely strengthen the case against the president because it would amount to a doubling down on the obstructive course of conduct in which the president may have already engaged.

### A. Potential violations of key federal obstruction of justice statutes—18 U.S.C. §§ 1503, 1505, and 1512

Obstruction of justice has a long history in the United States. Well before the Constitution was drafted and obstruction statutes were first enacted, the Declaration of Independence charged King George III with “obstruct[ing] the administration of justice, by refusing to assent to the laws for establishing judiciary powers.”<sup>572</sup> The first federal obstruction statute was passed in 1831 and prohibited “corruptly, or by threats or force, obstruct[ing], or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of justice” in “any court of the United States.”<sup>573</sup> This statute was replaced by 18 U.S.C. § 1503, which still bears very similar language.<sup>574</sup> And 18 U.S.C. § 1505 and § 1512, two other important federal obstruction statutes that have been added over the years, criminalize similar conduct.<sup>575</sup>

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<sup>572</sup> Daniel J. Hemel and Eric A. Posner, *Presidential Obstruction of Justice*, at 5 (Jul. 22, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3004876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876); Declaration of Independence, para. 10 (U.S. 1776).

<sup>573</sup> *Id.* (quoting Act of Mar. 2, 1831, Ch. 99, 4 Stat. 487).

<sup>574</sup> *Id.* In relevant part, 18 U.S.C. § 1503(a) punishes “[w]hoever . . . corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.” The full text of 18 U.S.C. § 1503 is attached as Appendix B.2.

<sup>575</sup> *Id.* at 5-6. Section 18 U.S.C. § 1505 punishes “[w]hoever corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede, the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . .”; 18 U.S.C. § 1512(c)(2) punishes “whoever . . . corruptly otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.” For a more thorough analysis of the history of the scope of federal obstruction statutes, see

<b>Table of Obstruction Statutes</b>			
	<b>18 U.S.C. § 1503</b>	<b>18 U.S.C. § 1505</b>	<b>18 U.S.C. § 1512(c)</b>
<b>Types of Obstruction Covered</b> <sup>576</sup>	Whoever “influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice”	Whoever “influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law”	Whoever “obstructs, influences, or impedes” “or attempts to do so”
<b>Kind of Proceeding</b>	[no language]	“under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress”	“any official proceeding”
<b>Criminal Intent</b>	“corruptly or by threats or force, or by any threatening letter or communication”	“corruptly, or by threats or force, or by any threatening letter or communication”	“corruptly”
<b>Possible Sentence</b>	Up to 10 years’ imprisonment	Up to 5 years’ imprisonment	Up to 20 years’ imprisonment

Today’s federal obstruction statutes prohibit a wide range of conduct. In addition to attempts to “obstruct” or “impede,” Sections 1503, 1505, and 1512(c) also criminalize attempts to corruptly “influence” proceedings. A mere “endeavor” (under Sections 1503 and 1505) or “attempt” (under Section 1512) to engage in such conduct is sufficient; a defendant need not

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Hemel and Posner, *Presidential Obstruction of Justice*, at 5-14. Full versions of 18 U.S.C. §§ 1505 & 1512 are attached as Appendices B.3 and B.4, respectively.

<sup>576</sup> We only include the language relevant to the theories of obstruction discussed in this paper. For instance, destroying documents, threatening physical force, or murder of a potential witness are also prohibited.

succeed in doing so.<sup>577</sup> As we explain below, in the obstruction statutes, a “proceeding” can, for certain provisions, include any foreseeable grand jury or congressional investigation.

Section 1512(c)(2) and part of Section 1503 are referred to as “omnibus” or “catch-all” provisions because they apply to a broad range of conduct;<sup>578</sup> and it is a “well-established rule” that the “omnibus clauses of federal obstruction statutes be broadly construed.”<sup>579</sup> Despite not being dubbed “omnibus,” Section 1505 has likewise “been given a broad and all-inclusive meaning.”<sup>580</sup> Indeed, the statutes were “drafted with an eye to ‘the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.’”<sup>581</sup>

Moreover, when multiple actions may be categorized as obstructing, they are viewed together.<sup>582</sup> Courts often look to an accumulation or pattern of actions to determine whether a

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<sup>577</sup> See *U.S. v. Cisneros*, 26 F.Supp.2d 24, 38-39 (D.D.C. 1998) (internal quotation marks and citations omitted) (“The statutory purpose of §1505 is to prevent any endeavor, whether successful or not, which is made for the purpose of corruptly influencing, obstructing or impeding an agency proceeding or congressional inquiry.”); *U.S. v. Barfield*, 999 F.2d 1520, 1523 (11th Cir. 1993) (internal quotation marks and citations omitted) (“[A] Section 1503 offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded.”) (emphasis in original); *U.S. v. Long*, No. 1:06 CR00028, 2007 U.S. Dist. LEXIS 6122, at \*16 (W.D. Va. Jan. 29, 2007) (noting that under Section 1512(c) “[j]ustice need not actually have been obstructed[;] [p]roof that the false statements were intended to obstruct is sufficient.”); *U.S. v. Lazzarini*, 611 F.2d 940, 941 (1st Cir. 1979) (citation omitted) (“[E]ndeavors” for obstruction purposes “connote[] a somewhat lower threshold of purposeful activity than ‘attempt[s]’”); *Barfield*, 999 F.2d at 1523 (internal quotation marks and citation omitted) (“The endeavor component of the offense describes any effort or assay to obstruct justice.”).

<sup>578</sup> See Devika Singh, Elena De Santis, Kelli Gulite, and Sohee Rho, *Obstruction of Justice*, 54 Am. Crim. L. Rev. 1605, 1607 (2017); *Barfield*, 999 F.2d at 1522 (internal quotation marks and citations omitted) (“It is clear that the omnibus clause is broad enough to encompass any act committed corruptly, in an endeavor to impede or obstruct justice.”); *Long*, 2007 U.S. Dist. LEXIS 6122, at \*12 n.1 (noting that “it is likely that Congress intended the scope of §1512(c) to be broader in scope than §1503”); *U.S. v. Cueto*, 151 F.3d 620, 630 (7th Cir. 1998) (“The omnibus clause of § 1503 is a catch-all provision.”); *U.S. v. Hutcherson*, No. 6:05CR00039, 2006 U.S. Dist. LEXIS 48708, at \*7 (W.D. Va. Jul. 5, 2006) (“Section 1512(c)(2) is the omnibus clause that intends to punish the myriad of obstructive conduct that cannot be adequately defined in the statute.”); see also *U.S. v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013) (“The expansive language [of 1512(c)(2)] operates as a catch-all to cover ‘otherwise’ obstructive behavior that might not fall within the definition of document destruction.”).

<sup>579</sup> *U.S. v. Mitchell*, 877 F.2d 294, 298 (4th Cir. 1989) (citing cases).

<sup>580</sup> *U.S. v. Rainey*, 757 F.3d 234, 245 (5th Cir. 2014) (internal quotation marks and citation omitted).

<sup>581</sup> *Id.* (quoting *U.S. v. Griffin*, 589 F.2d 200, 206-07 (5th Cir. 1979), *cert. denied*, 444 U.S. 825) (referencing Sections 1503 and 1505); *U.S. v. Cueto*, 151 F.3d at 630 (quoting *U.S. v. Tackett*, 113 F.3d 603, 607 (6th Cir. 1997)) (“[Section 1503] was intended to ensure that criminals could not circumvent the statute’s purpose ‘by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of § 1503’s specific prohibitions.’”); see also *U.S. v. Kumar*, No. 04-CR-846, 2006 WL 6589865, at \*4 (E.D.N.Y. Feb. 21, 2006) (explaining that 1512(c)(2) was intended to “eliminate . . . corporate criminality *in all of its guises* which, in the final analysis, had the effect of obstructing, influencing, or impeding justice . . .”) (emphasis added).

<sup>582</sup> See *U.S. v. Pedraza*, 636 Fed. Appx. 229, 236-37 (5th Cir. 2016) (quoting *U.S. v. Kingston*, 875 F.2d 1091 (5th Cir. 1989)) (“[W]here, as here, the government presents circumstantial evidence of an ongoing pattern of similar transactions, the jury may reasonably infer from the pattern itself that evidence otherwise susceptible of innocent interpretation is plausibly explained only as part of the pattern.”).

defendant obstructed justice, and the circumstances surrounding the defendant's activity are instructive.<sup>583</sup> In addition, because Sections 1503, 1505, and 1512(c) criminalize very similar conduct, many cases interpreting what constitutes sufficient conduct for 1503, 1505, and 1512(c) individually apply to all three statutes interchangeably.<sup>584</sup>

**1. There is a real possibility that President Trump violated Sections 1503, 1505, and 1512(c) by attempting to influence, obstruct, and impede criminal and/or congressional investigations into Michael Flynn and Russian interference in the 2016 election**

Many of President Trump's alleged actions could potentially qualify as attempts to obstruct justice under Sections 1503, 1505, and 1512(c). Here, we focus on the circumstances and law as they pertain to President Trump's possible attempts to impede the Russia and Flynn investigations. In Subsection (a) (page 87), we note that any attempt by President Trump to try to stop an ongoing investigation is facially obstructive. In Subsection (b) (page 92), we explain that he is alleged to have done so using language that courts have considered sufficient to constitute obstruction. In Subsection (c) (page 94), we discuss how his alleged persistent stressing of loyalty, vouching for Flynn, and alluding to a quid pro quo relationship in purposely-private conversations, is also conduct raising questions about obstruction. In Subsection (d) (page 96), we show why the president's authority to command and remove his subordinates (which he in fact exercised) provides additional context for statements that might have carried less weight if he were not in such a position. In Subsection (e) (page 98), we explain that former FBI Director Comey's statement that he interpreted the president's statements to him as a request to drop an investigation of Flynn is subjective evidence that further strengthens the case against the president. In Subsection (f) (page 99), we explain why the fact that the president has legal authority to say or do certain things—like firing the FBI director—is no defense to criminal liability if he does so corruptly. In Subsection (g) (page 101), we explain that cover-up attempts may also be grounds for obstruction charges.

While each of these points is critical to the overall discussion, the president's alleged actions must be viewed in conjunction with one another and with the surrounding circumstances in mind. Together, they mirror typical obstruction behavior that many courts have held is the kind of conduct that Congress intended to criminalize when it enacted the obstruction statutes.

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<sup>583</sup> See *Bourjaily v. U.S.*, 483 U.S. 171, 179–80 (1987) (characterizing as a “simple fact[] of evidentiary life” the proposition that “individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.”); see also *Huddleston v. U.S.*, 485 U.S. 681, 691(1988) (quoting *Bourjaily*) and *U.S. v. Peterson*, 385 F.3d 127, 143 (2d Cir. 2004) (quoting *Huddleston* and applying this principle to an obstruction of justice sentencing enhancement).

<sup>584</sup> See *Mitchell*, 877 F.2d at 299 n.4 (holding that the Fourth Circuit Court of Appeals “agree[s] with [its] sister circuits that the identity of purpose among these provisions makes case law interpreting any one of these provisions strongly persuasive authority in interpreting the others” and explaining that it is “analytically sound” to view Sections 1503 and 1505 “analogously.”); *Rainey*, 757 F.3d at 245 (describing 1503 and 1505 as “analogous”); *U.S. v. Friske*, 640 F.3d 1288, 1290 n.3 (11th Cir. 2011) (noting that “[w]e have previously observed that the elements of § 1503 are analogous to the elements of § 1512(c)(2).”); *Long*, 2007 U.S. Dist. LEXIS 6122, at \*12 n.1 (“[Ca]ses dealing with §1503 are instructive in dealing with §1512(c).”); cf. *U.S. v. Wilson*, 796 F.2d 55, 57 n.3,4 (4th Cir. 1986) (applying 1503 cases to a 1512(b) case as the former “is the predecessor to” the latter).

### a. Efforts to stop an investigation constitute obstruction

Efforts to stop an investigation fall squarely within the plain meaning of Sections 1503, 1505, and 1512(c)(2). To endeavor to “stop” something certainly fits within efforts to “influence,” “obstruct,” or “impede” it. In *U.S. v. Mitchell*, the U.S. Court of Appeals for the Fourth Circuit affirmed the Section 1505 conviction of two brothers who accepted a payment of \$50,000 to convince their uncle, a congressman, to stop a congressional investigation into a company’s eligibility for a government program designed to help “small minority businesses” by promising the company’s CEO that they would “get rid of the problem.”<sup>585</sup> Similarly, in *U.S. v. Lustyik*, a defendant was found guilty of obstructing justice under Sections 1503 and 1505 where he “used his status as an FBI agent” to try to stop a government investigation into his friend and business partner, Michael Taylor, by, among other things, “attempting to establish Taylor as a confidential source [and] contact[ing] multiple individuals connected with the [ ] investigation to dissuade them from indicting Taylor.”<sup>586</sup>

Here, there appears to be significant evidence from Comey’s testimony, President Trump’s own statements, and press reports that support that the president attempted to stop investigations into General Flynn and Russian interference on several occasions, leading up to and including his decision to fire Comey:

- According to Comey, President Trump repeatedly requested Comey’s “loyalty” at a private dinner at the White House on January 27, 2017. During that same dinner, he referenced Comey’s job and that “lots of people wanted [it].”<sup>587</sup> Months later, he emphasized his own loyalty to Comey, and he said, “we had that thing, you know,”<sup>588</sup> language that suggests a possible threat.
- On February 14, 2017, after clearing the room, President Trump directly told Comey to stop the investigation into Flynn in a closed-door, one-on-one setting. According to Comey, the president told him, “I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.”<sup>589</sup>
- When Comey did not agree to “let it go,” President Trump sought the help of others to stop the investigation. On March 22, 2017, after once again clearing the room—this time of everyone but DNI Coats and CIA Director Pompeo—President Trump reportedly raised the subject of the FBI investigation and requested that DNI Coats urge Comey to back off of the investigation of General Flynn.<sup>590</sup>

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<sup>585</sup> *Mitchell*, 877 F.2d at 296.

<sup>586</sup> 833 F.3d 1263, 1266 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 822 (2017); *U.S. v. Lustyik*, No. 12-CR-645, 2015 WL 1467260, at \*1, \*6 n.8 (C.D. Utah Mar. 30, 2015); *see also U.S. v. Grubb*, 11 F.3d 426, 438 (4th Cir. 1993) (affirming conviction of defendant state court judge under Section 1503 where there was sufficient evidence that he lied to an FBI agent about his involvement in a friend’s donation to a campaign in exchange for part-time employment and proffered innocent explanations for why his friend was hired because it constituted an “endeavor to stymie the grand jury investigation.”).

<sup>587</sup> Comey Stmt., Jun. 8, 2017.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> Entous, *Washington Post*, Jun. 6, 2017.

- After Comey testified on March 20, 2017, President Trump reportedly asked Coats and Director of the National Security Agency (NSA) Mike Rogers to publicly say there was no evidence of collusion.<sup>591</sup>
- Shortly after Director Comey’s testimony, President Trump reportedly began to discuss openly within the White House his desire to fire Comey, and a White House attorney reportedly was so concerned that he misled the president about whether he had the authority to fire Comey.<sup>592</sup>
- President Trump also reportedly gave “firm instructions” to White House Counsel Don McGahn in March of 2017 to stop Attorney General Sessions from recusing himself, efforts McGahn reportedly “carried out,” lobbying Sessions to remain in charge of the inquiry.<sup>593</sup>
- During a meeting at Mar-a-Lago in March 2017 after Attorney General Sessions’ decision to recuse himself from the Russia investigation, President Trump reportedly berated Attorney General Sessions for his recusal and told him to reverse his decision (which Sessions did not do).<sup>594</sup>
- President Trump twice called Comey to ask him about the FBI’s investigation. According to Comey, on March 30, 2017, President Trump called him and described the Russia investigation as a “cloud” that was impairing his ability to act on behalf of the country.<sup>595</sup> According to Comey, President Trump asked him what they could do to “lift the cloud,” and asked Comey to “get out” the fact that the FBI was not personally investigating him.<sup>596</sup>
- In response to Comey’s May 3, 2017 testimony during which Comey again declined to publicly clear him, President Trump “unloaded on Mr. Sessions,” reportedly criticizing him for recusing himself from the investigation and questioning “his loyalty.” President Trump reportedly said that he wanted Comey gone and to have “repeated the refrain that the attorneys general for Mr. Kennedy and Mr. Obama had protected the White House.”<sup>597</sup> On May 5, 2017, one of Sessions’ aides allegedly “approached a Capitol Hill staff member asking whether the staffer had any derogatory information about the F.B.I. director.” *The New York Times* claims that the “attorney general wanted one negative article a day in the news media about Mr. Comey” citing a “person with knowledge of the meeting” and noting that a Justice Department spokesperson denied that the episode occurred.<sup>598</sup>
- On May 9, 2017, after it became clear that Comey would not end the investigation, the president fired him. After first proffering that he did so at the recommendation of Rosenstein and Sessions because of the way Comey handled the investigation into

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<sup>591</sup> Entous and Nakashima, *Washington Post*, May 22, 2017.

<sup>592</sup> Schmidt, *New York Times*, Jan. 4, 2018.

<sup>593</sup> *Id.*

<sup>594</sup> Schmidt and Davis, *New York Times*, May 29, 2018.

<sup>595</sup> Comey Stmt., Jun. 8, 2017.

<sup>596</sup> *Id.*

<sup>597</sup> Schmidt, *New York Times*, Jan. 4, 2018.

<sup>598</sup> *Id.*

Hillary Clinton's emails,<sup>599</sup> President Trump stated, "regardless of recommendation I was going to fire Comey . . . ." and acknowledged that the "Russia thing" played a role in his decision.<sup>600</sup> The weekend prior, following discussions with Jared Kushner, and with the help of White House Senior Adviser Stephen Miller, President Trump reportedly drafted a letter to FBI Director James Comey that explained his firing; however, White House Counsel Don McGahn prevented President Trump from sending it.<sup>601</sup> According to press accounts, Trump then summoned Attorney General Sessions and Deputy Attorney General Rosenstein to a meeting at the White House and directed them to "explain in writing the case against Comey."<sup>602</sup>

Following Comey's May 9, 2017 termination, President Trump undertook a number of efforts that appear to have been intended to hamper the investigations into Flynn and Russia's interference in the U.S. election, as well as a potential obstruction charge:

- After President Trump fired FBI Director Comey, President Trump summoned acting FBI Director Andrew McCabe to the White House and reportedly asked him who he voted for in the 2016 election.<sup>603</sup> According to *The Washington Post*, President Trump also "vented his anger at McCabe over the several hundred thousand dollars in donations that his wife, a Democrat, received for her failed 2015 Virginia State Senate bid from a political action committee controlled by a close friend of Hillary Clinton."<sup>604</sup> These actions could be interpreted as an attempt to continue to harass McCabe in order to control the Russia investigation.
- Following the appointment of the special counsel in mid-May 2017, President Trump reportedly berated Attorney General Sessions for recusing himself from the investigation notwithstanding the fact that it was required by law<sup>605</sup> and told him to resign. Thereafter Sessions submitted his resignation letter, which President Trump ultimately rejected.<sup>606</sup>
- News reports began to circulate in June 2017 that Special Counsel Mueller was also investigating whether the president had attempted to obstruct justice. Citing various "conflicts of interest" theories, President Trump reportedly ordered White House Counsel McGahn to fire the special counsel. McGahn refused to carry out the request.<sup>607</sup>

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<sup>599</sup> Shear and Apuzzo, *New York Times*, May 9, 2017.

<sup>600</sup> Partial Transcript: NBC News Interview with Donald Trump, *CNN*, May 11, 2017.

<sup>601</sup> Schmidt and Haberman, *New York Times*, Sept. 1, 2017; Schmidt, *New York Times*, Jan. 4, 2018.

<sup>602</sup> Rucker, Parker, Horwitz and Costa, *Washington Post*, May 10, 2017.

<sup>603</sup> Nakashima, Dawsey, and Barrett, *Washington Post*, Jan. 23, 2018.

<sup>604</sup> *Id.*

<sup>605</sup> 28 C.F.R. § 42.5. See also Cameron Smith and Norman L. Eisen, Why Sessions is Right to Stand Up to Trump, *New York Times*, Mar. 2, 2018 available at <https://www.nytimes.com/2018/03/02/opinion/sessions-stand-up-trump.html>.

<sup>606</sup> Schmidt, *New York Times*, Jan. 4, 2018.

<sup>607</sup> Schmidt and Haberman, *New York Times*, Jan. 25, 2018. The President Trump and his attorney have denied reports that he considered firing Special Counsel Mueller. Derek Hawkins, 'Fake news, folks': President Trump denies report he ordered Mueller be fired, *The Chicago Tribune* Jan. 26, 2018 available at <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-mueller-firing-story-fake-news-20180126-story.html>.

- According to *Foreign Policy*, President Trump “pressed senior aides [in June 2017] to devise and carry out a campaign to discredit senior FBI officials,” Andrew McCabe, Jim Rybicki, and James Baker<sup>608</sup>, “after learning that those specific employees were likely to be witnesses against him as part of special counsel Robert Mueller’s investigation.”<sup>609</sup> McCabe and Rybicki later announced their retirement from the Bureau and Baker has been replaced in his role as general counsel.<sup>610</sup> McCabe was fired on March 16, 2018, shortly before his planned retirement, ostensibly for “failing to be forthcoming about a conversation he authorized between FBI . . . officials and a journalist” and a “lack of candor under oath on multiple occasions.”<sup>611</sup>
- President Trump’s legal team sent a letter to Special Counsel Mueller on June 27, 2017 outlining purported “facts disabling Mr. James Comey’s credibility and his testimony and claims about the President”<sup>612</sup> and sent a September 1, 2017 letter to Deputy Attorney General Rod Rosenstein requesting a federal grand jury investigation of Former FBI Director Comey.<sup>613</sup>
- In late July 2017, President Trump reportedly instructed Chief of Staff Reince Priebus to get Sessions’ resignation.<sup>614</sup> President Trump reportedly told Priebus, ““Don’t give me any bullshit. Don’t try to slow me down like you always do. Get the resignation of Jeff Sessions.””<sup>615</sup> Priebus was apparently able to rebuff the request.
- *The New York Times* reported that during the Summer of 2017, when the president was “openly raging” at Sessions for recusing himself, President Trump “repeatedly urged senior Senate Republicans, including the chairman of the Senate Intelligence Committee, to end the panel’s investigation into Russia’s interference in the 2016 election, according to a half dozen lawmakers and aides.”<sup>616</sup>
- Also evidencing interference with the Congressional investigations, on August 9, 2017, President Trump reportedly spoke with Senate Majority Leader Mitch McConnell and berated McConnell for (among other things) refusing to protect him from investigations into Russian interference in the 2016 election.<sup>617</sup>

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<sup>608</sup> James Baker is currently a Visiting Fellow in Governance Studies at the Brookings Institution. He took no part in the preparation or publication of this report.

<sup>609</sup> Waas, *Foreign Policy*, Jan. 26, 2018.

<sup>610</sup> *Id.*

<sup>611</sup> Apuzzo and Goldman, Mar. 16, 2018.

<sup>612</sup> Marc Kasowitz, [Letter to Special Counsel Robert Mueller Regarding the conduct and sworn testimony of Former FBI Director James B. Comey](https://www.apnews.com/a63dd6001a0c4796a23a3380337a8715/Text-of-Trump-team-memos-to-special-counsel-assailing-Comey), Jun. 27, 2017, *available at* <https://www.apnews.com/a63dd6001a0c4796a23a3380337a8715/Text-of-Trump-team-memos-to-special-counsel-assailing-Comey>.

<sup>613</sup> John Dowd, [Letter to Deputy Attorney General Rod Rosenstein Regarding a Request for Federal Grand Jury Investigation of Former FBI Director James B. Comey](https://www.apnews.com/a63dd6001a0c4796a23a3380337a8715/Text-of-Trump-team-memos-to-special-counsel-assailing-Comey), Sept. 1, 2017, *available at* <https://www.apnews.com/a63dd6001a0c4796a23a3380337a8715/Text-of-Trump-team-memos-to-special-counsel-assailing-Comey>.

<sup>614</sup> Whipple, *Vanity Fair*, March 2018.

<sup>615</sup> *Id.*

<sup>616</sup> Martin, Haberman, and Burns, *New York Times*, Nov. 30, 2017.

<sup>617</sup> Burns and Martin, *New York Times*, Aug. 22, 2017.

- In early December 2017, President Trump reportedly told advisors “in no uncertain terms” that he wanted Special Counsel Mueller’s investigation to be shut down.<sup>618</sup> The request apparently followed reports that the special counsel had subpoenaed records relating to his businesses from Deutsche Bank.<sup>619</sup> President Trump reportedly backed down from his request after his advisors and attorneys were told by the special counsel’s office that the reports were not accurate.<sup>620</sup>
- In January 2018, *NBC News* reported that President Trump was reportedly “talking to friends about the possibility of asking Attorney General Jeff Sessions to consider prosecuting Mueller and his team.”<sup>621</sup>
- On March 17, 2018, President Trump’s lawyer, John Dowd, said that “I pray that Acting Attorney General Rosenstein will . . . bring an end to alleged Russia Collusion investigation manufactured by [just-fired and then in the headlines Andrew] McCabe’s boss James Comey based upon a fraudulent and corrupt Dossier.”<sup>622</sup> Dowd initially said he was speaking on behalf of the president, but in a subsequent statement issued the same morning he claimed he was actually speaking in his personal capacity.<sup>623</sup>
- On August 1, 2018, President Trump tweeted, “...This is a terrible situation and Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!”<sup>624</sup>

**b. One need not speak literally about obstructing justice to obstruct justice**

Having addressed some of the public instances where President Trump or his team appeared to impede or hinder various investigations, we turn now to questions of how to determine whether President Trump’s statements constitute obstruction. President Trump’s defenders have, at times, attempted to inoculate his February 14, 2017 statement to Director Comey to drop the investigation because it was prefaced with the word “hope” or by suggesting it was vague or something short of a direct order.<sup>625</sup> That does not withstand scrutiny. There is

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<sup>618</sup> Haberman and Schmidt, *New York Times*, Apr. 10, 2018. In February 2018, the *Washington Post* reported that the special counsel was questioning witnesses about President Trump’s criticism of Sessions throughout the summer of 2017, and “[t]he thrust of the questions was to determine whether the president’s goal was to oust Sessions in order to pick a replacement who would exercise control over the investigation into possible coordination between Russia and Trump associates during the 2016 election.” Barrett, Dawsey, and Helderman, *Washington Post*, Feb. 28, 2018.

<sup>619</sup> Haberman and Schmidt, *New York Times*, Apr. 10, 2018.

<sup>620</sup> *Id.*

<sup>621</sup> Fineman, *NBC News*, Jan. 30, 2018.

<sup>622</sup> Woodruff, *Daily Beast*, Mar. 17, 2018.

<sup>623</sup> *Id.*

<sup>624</sup> <https://twitter.com/realdonaldtrump/status/1024646945640525826>.

<sup>625</sup> See, e.g., Andrew C. McCarthy, *Under the Obama Precedent, No Trump Obstruction of Justice*, *National Review*, May 17, 2017 available at <https://www.nationalreview.com/2017/05/donald-trump-obstruction-justice-james-comey-russia/> and Tom Basile, *Comey’s Testimony Is All About ‘Hope’*, *Forbes*, Jun. 8, 2017 available at <https://www.forbes.com/sites/thomasbasile/2017/06/08/comeys-testimony-is-all-about-hope/#558027ace655>. See also John M. Dowd, *Letter to Special Counsel*, Jan. 29, 2018.

no formula or set of magic words that qualify statements as obstruction. Requiring otherwise would contradict Congress' intent to apply a broad interpretation to obstruction statutes and to prohibit the "variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined."<sup>626</sup>

The context of President Trump's "hope" statement is critical. When a higher-ranking military official conveys his "wishes" to a subordinate, they are construed as "orders." When a supervisor tells her direct report that she "hopes" the employee finishes a task over the weekend or arrives to work on time, it is a directive. Similarly, when the President of the United States clears the room and tells the FBI director that he "hopes" the director can "let go" an investigation he had repeatedly disparaged because the target of the investigation is a "good guy," the statement would appear to convey more than just the president's idle fancies. Indeed, as discussed in greater detail below,<sup>627</sup> Comey interpreted the "hope" statement as a directive to stop investigating General Flynn.<sup>628</sup>

Outside the obstruction context, courts have readily construed statements by superiors to be orders even when framed as "hopes" or wishes. For example, in *Jackson v. McElroy*, the court explained that it was "impressed with plaintiff's argument that rarely do general [military] officers issue commands or orders in form as such, and by almost universal acceptance their expressed wishes are interpreted by their subordinates as orders."<sup>629</sup>

It is also worth noting that courts have found that the use of words such as "hope" do not provide much protection for statements otherwise determined to constitute obstruction. In *U.S. v. Bedoy*, for example, the court held that a statement by a police officer to a prostitute that "I'm just hoping you haven't told anyone anything . . . Like, ya know, talking or anything like that . . ." indicated an attempt to impede an FBI investigation into the officer's alleged communication of sensitive law enforcement information that helped prevent the prostitute from being caught in exchange for sexual favors.<sup>630</sup> Similarly, in *U.S. v. Peterson, Williams*—a co-defendant—sent a letter to the defendant, Peterson, stating that he "hope[s]" a third co-defendant "don't think you told all them lies on him, that he read in those court papers and get scared and cop-out thinking they going to railroad him [sic]."<sup>631</sup> The court interpreted that statement as part of several comments constituting obstruction that justified an obstruction of justice sentencing enhancement<sup>632</sup> because "[t]he natural understanding" was "that Williams was advising

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<sup>626</sup> *Mitchell*, 877 F.2d at 299 (internal quotation marks and citation omitted).

<sup>627</sup> See *infra* Section II.A.2 (page 103).

<sup>628</sup> Full Transcript and Video: James Comey's Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017.

<sup>629</sup> 163 F. Supp. 257, 262 (D.D.C. 1958).

<sup>630</sup> 827 F.3d 495, 509 (5th Cir. 2016).

<sup>631</sup> 385 F.3d 127, 142 (2d Cir. 2004).

<sup>632</sup> The obstruction of justice sentencing enhancement, U.S.S.G. § 3C1.1, covers conduct that overlaps substantially with the obstruction statutes discussed throughout this Paper. The sentencing enhancement provides that a defendant is subject to an offense level increase if he "willingly obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction" where "the obstructive conduct related to (A) the defendant's offense of conviction and any related conduct; or (B) a closely related offense." Moreover, Application note 4 of § 3C1.1 sets forth a "non-exhaustive list of examples of the types of conduct to which this adjustment applies." The first of these examples is "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so," which closely parallels the language of 18 U.S.C. § 1512(b). Although the

[Peterson] that [they] would be able to thwart the investigation against them as long as [Peterson] exercised her Fifth Amendment right.”<sup>633</sup> Put differently, Williams was “urging [her] not to cooperate with the Government.”<sup>634</sup> And, in *U.S. v. McDonald*, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court’s obstruction of justice sentencing enhancement where the defendant told a co-defendant, “I hope and pray to God you did not say anything about a weapon when you were in Iowa. Because it will make it worse on me and you even if they promised not to prosecute you.”<sup>635</sup>

In addition, there is no question that seemingly vague or suggestive statements may constitute obstruction. For example, in *U.S. v. Lazzerini*, the U.S. Court of Appeals for the First Circuit affirmed defendant’s Section 1503 conviction for endeavoring to influence a juror where he asked the juror’s sister, his employee, to tell the juror that she knew the man on trial (a friend of defendant’s), that he was also a friend of hers, and that he seemed like a “nice guy.”<sup>636</sup> The court reasoned that “[t]he conveying of information in a specially arranged and urgent visit of a sister to a juror that a party on trial was a friend of the sister and a ‘nice guy,’ even without any protestations of disbelief of guilt or knowledge of innocence, could reasonably be thought an effort to influence the juror in favor of the party on trial.”<sup>637</sup> Similarly, in *U.S. v. Torquato*, defendants were found guilty of obstructing justice under § 1503 when they requested that a Reverend ask a Monsignor to tell a juror, whose husband was employed by the Monsignor, that the plaintiff in the civil trial on which the juror sat was a “good man and needed help.”<sup>638</sup> And, in *U.S. v. Maloney*, a judge who was being investigated for accepting bribes was convicted of obstruction of justice under Section 1503 when he arranged one-on-one meetings in his chambers and back stairways at the courthouse with one of the attorneys from whom he accepted bribes and asked the lawyer “‘whether or not [he] was standing tall,’ which [the lawyer] understood to mean was he resisting the questions of federal investigators[?]”<sup>639</sup>

Accordingly, in analyzing whether President Trump’s actions and statements could constitute obstruction, the issue is not the specific word or words he used, but whether “the ingredients of both corrupt motive and an ‘endeavor’ to influence are present,” as the court in *Lazzerini* emphasizes.<sup>640</sup>

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sentencing enhancement may be broader than the relevant obstruction statutes in some respects, cases involving the sentencing enhancement, while not dispositive, are instructive.

<sup>633</sup> 385 F.3d at 143.

<sup>634</sup> *Id.*

<sup>635</sup> 521 F.3d 975, 979 (8th Cir. 2008).

<sup>636</sup> 611 F.2d 940, 942 (1st Cir. 1979).

<sup>637</sup> *Id.*

<sup>638</sup> 316 F.Supp. 846, 848 (W.D. Pa. 1970).

<sup>639</sup> 71 F.3d 645, 652, 661 (7th Cir.1995); see also *Cole v. U.S.*, 329 F.2d 437, 442, 444, 447 (9th Cir. 1964) (determining that there was sufficient evidence for the jury to conclude that defendant Cole’s “advice” to third-party Benton to exercise his Fifth Amendment right during upcoming grand jury testimony constituted “corruptly endeavoring” under Section 1503 where Cole warned Benton “that you know they have that other thing hanging over your head”; suggested that Benton “leave town” during a scheduled visit by the Attorney General; threatened to ensure that Benton would lose his job if he testified; and noted that “Benton was a ‘stand-up guy’ and wouldn’t get in any trouble if he kept his mouth shut.”).

<sup>640</sup> *Lazzerini*, 611 F.2d at 941.

**c. President Trump’s alleged persistence in stressing loyalty, vouching for Flynn, and alluding to a quid pro quo relationship in purposely-private conversations further signal obstruction**

Courts have held that statements emphasizing loyalty and urging it in return can constitute obstruction. See *U.S. v. Strode*, 552 F.3d 630, 634-35 (7th Cir. 2009) (affirming obstruction of justice sentencing enhancement where defendant met with codefendants “to see if he could persuade [them] not to cooperate with the government by demonstrating his own loyalty to them” and by attempting to convince them to “‘stay strong’ ... in the face of the federal indictment,” even though the transcript of the conversation with codefendants was “not entirely straightforward”). Furthermore, where a person suggests a benefit to someone for the purpose of impeding an investigation or otherwise alludes to a quid pro quo relationship, it can be a contributing factor to determining whether conduct constitutes obstruction. See *U.S. v. Tedesco*, 635 F.2d 902, 903–04, 907 (1st Cir. 1980) (holding that evidence of obstruction was sufficient where defendant told a potential witness that the target of a separate investigation was “in a ‘very good position’” and “‘could do a lot’ for him” —including helping his business—so long as the witness did not “add any more wood to the fire”).<sup>641</sup> Providing a positive assessment of the subject of an investigation to a key decision-maker can also support a finding of obstruction. See *Torquato*, 316 F. Supp. at 848 (Defendants obstructed justice by conveying to a juror that the plaintiff was a “good man and needed help.”).<sup>642</sup> In addition, clearing a room to have a one-on-one conversation—especially when doing so is somewhat out of the ordinary or noteworthy—is a common sign of a forthcoming obstruction attempt.<sup>643</sup> See, e.g., *Maloney*, 71 F.3d at 652 (emphasizing that the judge’s obstruction occurred “[a]fter everyone else had left.”). And courts have also weighed a defendant’s persistence in determining whether statements constitute obstruction. See *Lazzerini*, 611 F.2d at 942 (noting “the timing and persistence and urgency of appellant’s talks with [the juror’s sister].”).<sup>644</sup>

President Trump allegedly emphasized his loyalty to Comey and asked for “loyalty” in return, potentially suggesting that Comey drop the investigation as part of a quid pro quo. In the same vein, President Trump added that, “we had that thing” —a statement that Comey explained he interpreted as President Trump conveying that “I’ve been good to you, you should

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<sup>641</sup> Cf. *U.S. v. Risken*, 788 F.2d 1361, 1365 (8th Cir. 1986) (pointing to defendant’s comment that if the witness “would do him a favor, appellant would do a favor for him” in upholding Section 1512(b)(3) conviction).

<sup>642</sup> See also *Lazzerini*, 611 F.2d at 942 (affirming that defendant’s request that his employee tell a juror that the individual on trial seemed like a “nice guy” constituted obstruction).

<sup>643</sup> Cf. *U.S. v. Eaton*, 784 F.3d at 298, 303-05 (6th Cir. 2015) (noting closed-door, one-on-one nature of police sheriff’s obstruction attempt under Section 1512(b)).

<sup>644</sup> See also *U.S. v. Pompey*, 121 F.3d 381, 382 (8th Cir. 1997) (affirming obstruction of justice sentencing enhancement where defendant “repeatedly” urged his sister not to testify against him).

be good to me.”<sup>645</sup> In addition to Comey, President Trump also questioned the loyalty of other key figures in the relevant proceedings, including Sessions<sup>646</sup> and McCabe.<sup>647</sup>

Furthermore, like the defendants in *Lazzerini* and *Torquato*, President Trump is said to have emphasized “a positive assessment of” General Flynn by calling him a “good guy,” and his conversations with Comey about dropping the investigation were “persisten[t]” and “urgen[t],”<sup>648</sup> as were his repeated efforts to prevent Sessions from recusing himself and subsequently to convince him to reverse his recusal decision. Like in *Maloney*, before his direct request of Comey, President Trump reportedly cleared the room of all other personnel and closed the door so that only they would know what took place. That was a course of conduct so unusual it prompted Director Comey to document what had happened.<sup>649</sup> Before his direct request to Coats, the president also cleared the room of all but Coats and Director Pompeo.<sup>650</sup>

#### **d. Powerful people often have a greater ability to influence an investigation**

Courts routinely consider a person’s position of power to be relevant to whether the person used that status to violate an obstruction law. The 2016 conviction of former Pennsylvania Attorney General Kathleen Kane under Pennsylvania’s obstruction statute<sup>651</sup> is a good example.<sup>652</sup> In December of 2014, a grand jury presentment indicated that Kane leaked to the press secret grand jury documents from a 2009 grand jury investigation into a local civil rights leader. At least one of the 2014 grand jury witnesses testified that Kane leaked the

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<sup>645</sup> Full Transcript and Video: James Comey’s Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017.

<sup>646</sup> News accounts suggest that Trump has repeatedly emphasized Sessions’ lack of loyalty in recusing himself and thereby failing to protect him from investigations, asking “‘Where’s my Roy Cohn?’” Schmidt, *New York Times*, Jan. 4, 2018. The president has also admitted that he would not have appointed Sessions if he knew that Sessions was going to recuse himself from the investigation, and he described Sessions’ recusal as “‘very unfair to the president.’” Baker, Schmidt, and Haberman, *New York Times*, Jul. 19, 2017.

<sup>647</sup> President Trump reportedly asked then-Acting Director of the FBI Andrew McCabe who he had voted for shortly after Comey’s termination. Nakashima, Dawsey, and Barrett, *Washington Post*, Jan. 23, 2018.

<sup>648</sup> See *Lazzerini*, 611 F.2d at 942.

<sup>649</sup> Full Transcript and Video: James Comey’s Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017 (When asked why he memorialized his conversations with President Trump, Comey explained that he had a “gut feeling” given the “circumstances” – “that I was alone, the subject matter and the nature of the person I was interacting with, and my read of that person.”); Comey Stmt., Jun. 8, 2017 (“Creating written records immediately after one-on-one conversations with Mr. Trump was my practice from that point [the January 6 meeting at Trump Tower] forward. This had not been my practice in the past.”).

<sup>650</sup> Entous, *Washington Post*, Jun. 6, 2017.

<sup>651</sup> The Pennsylvania obstruction statute, 18 Pa.C.S.A. § 5101, that Kane was convicted of violating, has language similar to the federal statutes: “Obstructing the administration of law or other Governmental Function: A person commits a crime if they intentionally obstruct, impair, or pervert the administration of law or other governmental function, breach official duty, or engage in any other unlawful act.” *In re Thirty-Five Statewide Investigating Grand Jury*, No. 171 M.D.D. KT Misc. 2012, Notice No. 123, Presentment #60, at 26-27 (Sup. Ct. Pa., Ct. of Common Pleas, Dec. 19, 2014).

<sup>652</sup> See Jess Bidgood, Pennsylvania’s Attorney General is Convicted on All Counts, *New York Times*, Aug. 15, 2016, available at <https://www.nytimes.com/2016/08/16/us/trial-kathleen-kane-pennsylvania-attorney-general.html>.

material to retaliate against former prosecutors, with whom she “was locked in a public battle” over how she handled previous cases.<sup>653</sup> In fact, the leaked material redacted the names of all prosecutors involved except for two with whom Kane was “battling” and suggested that the prosecutors mishandled the 2009 investigation.<sup>654</sup> In support of its recommendation of obstruction charges, the grand jury emphasized testimony from Kane’s subordinates that when they suggested she open an investigation into who illegally leaked the grand jury information, Kane used her position to thwart their attempts, and explained that such an investigation would “not be a worthy use of [] resources,” and “indicated the matter should be dropped.”<sup>655</sup> *U.S. v. Lustyik* is also instructive. There, an FBI agent was found guilty of obstruction of justice under Sections 1503 and 1505 where he “used his status as an FBI agent” to try to “derail” a government investigation.<sup>656</sup>

Furthermore, obstruction charges are especially common when employment consequences are implied, either by the defendant’s statements themselves or by virtue of the defendant’s role as an employer. For example, in *Cole*, the Ninth Circuit determined that there was sufficient evidence for the jury to conclude that defendant “corruptly endeavored” to influence ongoing proceedings where, among other things, he threatened to ensure that a potential witness would lose his job if he testified.<sup>657</sup> And, in *U.S. v. Tiller*, the Sixth Circuit affirmed an obstruction of justice sentencing enhancement where defendant “asked” two employees not to talk to federal agents if questioned because they “were his employees, and therefore his ‘asking’ was tantamount to a demand.”<sup>658</sup>

Here, President Trump is alleged to have repeatedly used his position of power to encourage subordinates to stop an investigation where the investigation could yield personally damning results. President Trump appeared to threaten potential employment consequences at the January 27 dinner with Director Comey by asking him whether he wanted to stay on as FBI Director after Comey already made it clear that he did and by subsequently noting that “lots of people wanted [Comey’s] job.”<sup>659</sup>

President Trump has made similar comments about subordinates involved in the Mueller investigation that could be seen as threatening their employment. He has suggested, without merit,<sup>660</sup> that Special Counsel Mueller, Mueller’s colleagues, and Deputy Attorney General Rosenstein suffer from conflicts of interest.<sup>661</sup> In July 2017, *The New York Times* reported that

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<sup>653</sup> *In re Thirty-Five Statewide Investigating Grand Jury*, 171 M.D.D. KT 2012, at 10, 12.

<sup>654</sup> *Id.* at 10.

<sup>655</sup> *Id.* at 15.

<sup>656</sup> 833 F.3d at 1266.

<sup>657</sup> 329 F.2d 437, 448 (9th Cir. 1964).

<sup>658</sup> 238 F.3d 426, at \*4 (6th Cir 2000) (unpublished).

<sup>659</sup> Notably, the President has the authority to fire those that he apparently attempted to influence – the FBI Director, CIA Director, and Director of National Intelligence.

<sup>660</sup> See Noah Bookbinder, Norman Eisen, Caroline Fredrickson and Kristin Amerling, [The Smear Campaign Against Mueller: Debunking the Nunes Memo and the Other Attacks on the Russia Investigation](https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/02/05154515/The-Smear-Campaign-Against-Mueller-1.31.18.pdf), *American Constitution Society*, Jan. 31, 2018 available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/02/05154515/The-Smear-Campaign-Against-Mueller-1.31.18.pdf>.

<sup>661</sup> Excerpts from the Times’s Interview with Trump, *New York Times*, Jul. 19, 2017; <https://twitter.com/realdonaldtrump/status/1024646945640525826> (tweeting that “Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!”); <https://twitter.com/realDonaldTrump/status/984053549742067712> (tweeting that “Much of the bad blood

President Trump’s lawyers and aides were searching for information by which to discredit Mueller and members of his team.<sup>662</sup> President Trump has considered firing the Deputy Attorney General so that another DOJ official would assume supervision of the Mueller investigation.<sup>663</sup> President Trump in addition appeared to threaten Deputy Director Andrew McCabe’s job via Twitter and, at his reported public urging, Attorney General Jeff Sessions allegedly pressured FBI Director Wray to remove or reassign top FBI officials, including McCabe, who may be witnesses against Trump in an obstruction case.<sup>664</sup> (McCabe was eventually fired on March 16, 2018, shortly before his planned retirement, ostensibly due to findings in a then-upcoming Inspector General report that he was not forthcoming about contacts he authorized between FBI officials and the media.<sup>665</sup>)

President Trump has described Attorney General Sessions’ recusal as “very unfair to the president,” repeatedly emphasized his lack of loyalty, allegedly berated Sessions for recusing himself, demanded his resignation, and though he rejected it, has left open the prospect of firing Sessions if he did not investigate Democrats.<sup>666</sup> In addition, President Trump reportedly ordered Don McGahn to fire Mueller, and his then-personal attorney, John Dowd, suggested that Rosenstein should end the Mueller investigation—a statement he initially claimed was on behalf of the president before claiming it was only on his own behalf.<sup>667</sup>

The weight and impact of President Trump’s position of power is incomparable. More than a high-ranking official—like the FBI agent in *Lustyik*—or a run-of-the-mill employer, President Trump’s statements have the added potential to influence by virtue of his extraordinarily powerful position. Indeed, the surrounding circumstances certainly suggest—and Mueller’s investigation may very well confirm—that Comey’s termination was retaliation for not heeding President Trump’s instructions.

#### **e. Comey’s perception of President Trump’s conduct is instructive**

Comey’s own perceptions of the statements related to the Flynn investigation—while not dispositive—are considered persuasive indications of what President Trump was trying to convey under applicable law.

When determining whether an obstructive act has occurred, courts have taken into account the subjective interpretations of witnesses. For example, in *U.S. v. Bell*, the Fourth

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with Russia is caused by the Fake & Corrupt Russia Investigation, headed up by the all Democrat loyalists, or people that worked for Obama. Mueller is most conflicted of all (except Rosenstein who signed FISA & Comey letter). No Collusion, so they go crazy!”)

<sup>662</sup> Schmidt, Haberman, and Apuzzo, *New York Times*, Jul. 20, 2017.

<sup>663</sup> Pamela Brown, Gloria Borger, Evan Perez, Jeff Zeleny, Dana Bash, and Dan Merica, [Trump considering firing Rosenstein to check Mueller](https://www.cnn.com/2018/04/10/politics/trump-rod-rostenstein-robert-mueller/index.html), *CNN*, Apr. 10, 2018, available at <https://www.cnn.com/2018/04/10/politics/trump-rod-rostenstein-robert-mueller/index.html>.

<sup>664</sup> Goldman, *New York Times*, Dec. 23, 2017; Jonathan Swan, [Scoop: FBI director threatened to resign amid Trump, Sessions pressure](https://www.axios.com/scoop-sessions-fbi-trump-christopher-wray-877adb3e-5f8d-44a1-8a2f-d4f0894ca6a7.html), *Axios*, Jan. 23, 2018, available at <https://www.axios.com/scoop-sessions-fbi-trump-christopher-wray-877adb3e-5f8d-44a1-8a2f-d4f0894ca6a7.html>.

<sup>665</sup> Apuzzo and Goldman, *New York Times*, Mar. 16, 2018.

<sup>666</sup> See *supra* Section I.D.8 (page 59); Jon Sharman, [Donald Trump refuses to rule out sacking Attorney General Jeff Sessions if he will not investigate his political opponents](https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-sack-fire-jeff-sessions-investigate-hillary-clinton-dnc-rig-donna-brazile-democrats-a8037456.html), *The Independent*, Nov. 4, 2017, available at <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-sack-fire-jeff-sessions-investigate-hillary-clinton-dnc-rig-donna-brazile-democrats-a8037456.html>.

<sup>667</sup> Schmidt and Haberman, *New York Times*, Jan. 25, 2018; Woodruff, *Daily Beast*, Mar. 17, 2018.

Circuit affirmed an obstruction of justice sentencing enhancement based on the defendant's call to a potential witness who subsequently phoned law enforcement "very upset and crying," indicating that she "was concerned for her safety" because defendant said he was "'very angry'" with her, he "'knew everything," and "thought they were friends."<sup>668</sup> The court reasoned that despite defendant's insistence that the facts "reveal 'no threat by [him] to influence [her] and therefore no intent to obstruct justice,'" "[t]here can be little doubt that [she] was intimidated by the call, as she told [law enforcement] that she was afraid for her safety because of it."<sup>669</sup> Also, in *U.S. v. Cioffi*, the Second Circuit explained that "[w]hile the words and phrases used by [the defendant] were not in Aesopian language, they were probably used at least partially to conceal the real purport of the messages conveyed by [the defendant] . . . in case anyone else heard the conversations, and [the person defendant was speaking to] was permitted to state what these words and phrases . . . meant to him."<sup>670</sup>

Here, too, Comey's statements of what President Trump's words and phrases meant to him are important in analyzing whether the president obstructed justice. Comey has made clear that he interpreted President Trump's "hope" statement as a "directive," that he "understood the President to be requesting that we drop any investigation of Flynn in connection with false statements about his conversations with the Russian ambassador in December,"<sup>671</sup> and that the conversation about Comey's job "was, at least in part, an effort to have [Comey] ask for [his] job and create some sort of patronage relationship."<sup>672</sup> Because the relevant obstruction statutes do not require that an obstruction attempt be successful, Comey's subjective understanding that President Trump's statement was an attempt to impede the investigation is not necessary to the case, but it is telling.

**f. Otherwise legal actions may constitute obstruction if undertaken with corrupt intent**

Even if some of President Trump's conduct would have been legal but for his corrupt intent, that does not insulate his actions from the obstruction statutes' reach. Arguments that President Trump did not obstruct justice because he had the authority to fire subordinates like the FBI director or stop an investigation, either by direct order or by pardoning its target, are not persuasive under the law. Otherwise legal conduct is just that—*otherwise* legal. Just as an employer can lawfully fire an employee but not based on her sex, race, or religion, the President's right to fire an FBI director does not mean he can do so if it is done for the corrupt purpose of obstructing an investigation.

Courts have found many other types of otherwise lawful conduct to be obstruction if conducted with corrupt intent. In *U.S. v. Smith*, the Ninth Circuit affirmed the convictions of

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<sup>668</sup> 523 Fed. Appx. 956, 962 (4th Cir. 2013).

<sup>669</sup> *Id.*

<sup>670</sup> 493 F.2d 1111, 1116 (2d Cir. 1974).

<sup>671</sup> Comey Stmt., Jun. 8, 2017; see also [Full Transcript and Video: James Comey's Testimony on Capitol Hill](#), *New York Times*, Jun. 8, 2017 (adding that, "it rings in my ear, as, well, 'will no one rid me of this meddlesome priest?'" – a quote ascribed to King Henry II which his supporters assumed to mean that he wanted Thomas Becket killed and did so.).

<sup>672</sup> Comey Stmt., Jun. 8, 2017; [Full Transcript and Video: James Comey's Testimony on Capitol Hill](#), *New York Times*, Jun. 8, 2017 (noting that he found the President's comment about his job "strange because he had already told me twice in earlier conversations that he hoped I would stay, and I had assured him that I intended to").

several members of the Los Angeles Sheriff's Department—including lieutenants, sergeants, and deputies—under Section 1503 for engaging in conduct that would have been legal but for its interference with an FBI investigation into civil rights violations at Los Angeles County jails.<sup>673</sup> Among the actions that constituted obstruction, the court pointed to behavior that could otherwise be justified as necessary to maintaining inmates' safety. For example, defendants seized a cell phone from an inmate that an FBI agent smuggled to him as part of the investigation, imposed stringent communication restrictions upon the inmate, interviewed the inmate several times regarding the cell phone and the FBI investigation, transferred the inmate to the medical ward and subsequently to a new jail "for his safety," and placed him under 24-hour surveillance.<sup>674</sup> Although these acts may have otherwise been legal—perhaps even common practice—and well within the officers' authority, they were deemed obstruction because they were intended to interfere with the FBI investigation.<sup>675</sup> Similarly, in *U.S. v. Mitchell*, where defendants accepted money to convince a member of Congress to stop a congressional investigation, the Fifth Circuit rejected defendants' contentions that their obstruction convictions conflicted with their right to lobby Congress because "means, other than 'illegal means,' when employed to obstruct justice fall within the ambit of the 'corrupt endeavor' language of federal obstruction statutes."<sup>676</sup>

Several federal appellate courts have also established that "otherwise legal" or even routine conduct by attorneys can constitute obstruction when undertaken to influence investigations. In *U.S. v. Cueto*, the U.S. Court of Appeals for the Seventh Circuit determined that there was sufficient evidence to convict an attorney for obstructing justice under Section 1503 where he prepared and filed pleadings and other court papers and encouraged the State Attorney to indict an investigator who was looking into an illegal gambling scheme perpetuated by his client and business partner because the lawyer's conduct was undertaken with corrupt intent.<sup>677</sup> In doing so, the court explained that "[o]therwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids" even if the actions constitute "traditional litigation-related conduct in form, but not in substance."<sup>678</sup> Likewise, in *U.S. v. Cintolo*, the First Circuit explained that "any act by any party—whether lawful or unlawful on its face—may abridge § 1503 if performed with a corrupt motive," and that preventing a jury, as a matter of law, from considering why a defendant "committed acts not unlawful in and of themselves would do enormous violence to [§ 1503] and play unwarranted havoc with its enforcement."<sup>679</sup> See also *Cioffi*, 493 F.2d at 1119 (affirming the trial judge's instruction "that while a witness violates no law by claiming the Fifth Amendment . . . one who . . . advises with corrupt motive a witness to take it, can and does obstruct or influence the administration of justice" because "[t]he lawful behavior of the person invoking the Amendment cannot be used to protect the criminal behavior of the inducer."). These cases have also emphasized that "an

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<sup>673</sup> 831 F.3d 1207, 1211 (9th Cir. 2016).

<sup>674</sup> *Id.* at 1211-14.

<sup>675</sup> See also Jury Instructions, *U.S. v. Baca*, No. 16-cr-00066 (C.D. Cal. Mar. 13, 2017) ("A local officer has the authority to investigate potential violations of state law. This includes the authority to investigate potential violations of state law by federal agents. A local officer, however, may not use this authority to engage in what ordinarily might be normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates, for the purpose of obstructing justice.").

<sup>676</sup> 877 F.2d at 299.

<sup>677</sup> 151 F.3d 620, 628-29 (7th Cir. 1998).

<sup>678</sup> *Id.* at 631, 633.

<sup>679</sup> 818 F.2d 980, 991 (1st Cir. 1987).

individual's status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct."<sup>680</sup> Indeed, "[n]othing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the madding crowd and sheltered from the rigors of 18 U.S.C. §1503."<sup>681</sup>

Like the police officers in *Smith*, the "lobbyists" in *Mitchell*, and the attorneys in *Cueto*, *Cintolo*, and *Cioffi*, the president's conduct cannot be viewed in a vacuum. Just as the fact that actions are "clothed, at least in part, in the mantle of superficially 'professional' conduct does not exonerate the lawyer from culpability," the fact that President Trump's actions were similarly "clothed" does not shield his conduct from criminality.<sup>682</sup> President Trump's authority to stop the investigation into General Flynn or fire FBI Director Comey, Attorney General Sessions, or others does not allow him to do so with corrupt intent. Even though a president may have authority to take some action, that action is still criminal if done for an improper purpose.

Furthermore, like the attorneys in *Cueto* and *Cintolo*, President Trump should not be "plucked gently from the madding crowd and sheltered from the rigors" of the law.<sup>683</sup> Neither attorneys nor police officers nor presidents are permitted to obstruct justice with impunity by virtue of their positions of authority. To suggest otherwise would undermine "[a]cceptable notions of evenhanded justice," which "require that statutes like §1503 apply to all persons, without preferment or favor."<sup>684</sup>

#### **g. Cover-up attempts may also be grounds for obstruction charges**

Attempts to cover up illegal conduct may also violate federal obstruction statutes. See *U.S. v. Dimora*, 750 F.3d 619, 627 (6th Cir. 2014) (holding that the district court did not abuse its discretion by denying a motion for a new trial on an obstruction of justice charge where the defendant "coached a co-conspirator about what to say to government investigators."); *U.S. v. Townsley*, 843 F.2d 1070, 1076 (8th Cir. 1988) (explaining that evidence regarding obstruction of a grand jury investigation was "legion" where defendants housed a co-defendant in order to prevent him from being questioned by the police and held "sessions" with "various witnesses expected to be called by the grand jury" that could "only be characterized as coaching them to present a unified, fabricated front.").

On or around July 8, 2017, President Trump "dictated" Donald Trump Jr.'s misleading statements describing why he and other members of the Trump campaign met with a lawyer linked to the Kremlin in June of 2016.<sup>685</sup> Just a few days after Trump Jr.'s initial statements that the purpose of the meeting was to discuss an adoption program, press accounts and Trump Jr.'s release of emails leading up to the meeting supported that the adoption story crafted by the president and others was an attempt to cover up the real purpose of the meeting—to receive

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<sup>680</sup> *Cueto*, 151 F.3d at 631.

<sup>681</sup> See *Cintolo*, 818 F.2d at 993-94.

<sup>682</sup> See *Cintolo*, 818 F.2d at 990.

<sup>683</sup> See *Cueto*, 151 F.3d at 632; *Cintolo*, 818 F.2d at 993-94; *Cintolo*, 818 F.2d at 996 (rejecting appellant's argument, which "[s]horn of hyperbole, . . . reduces to the thoroughly unsupportable claim that §1503 has two levels of meaning – one (more permissive) for attorneys, one (more stringent) for other people.").

<sup>684</sup> *Cintolo*, 818 F.2d at 996.

<sup>685</sup> See Parker, Leonnig, Rucker, and Hamburger, *Washington Post*, Jul. 31, 2017; see also Becker, Mazzetti, Apuzzo, and Haberman, *New York Times*, Jan. 31, 2018.

damaging information about then-presidential candidate Hillary Clinton.<sup>686</sup> President Trump ultimately admitted that it was “a meeting to get information on an opponent,”<sup>687</sup> and after repeated public denials by Trump subordinates, the president’s attorneys told the Special Counsel that President Trump had “dictated” the misleading statement.<sup>688</sup> The president’s true intent in crafting the misleading statement is, like many of his actions, subject to further fact-finding. However, if President Trump dictated Donald Jr.’s misleading statement to signal to any of the attendees of the Trump Tower meeting how he wished them to testify, thereby “coaching” them as witnesses in a foreseeable or ongoing grand jury or congressional proceeding, it could very well constitute obstruction of justice.<sup>689</sup> Dictating the misleading statement, which the president knew would be widely disseminated, could also be construed as obstructive if it was intended to cause a grand jury, members of a congressional committee, prosecutors, or investigators to believe a false narrative of the critical Trump Tower meeting, thereby interfering with an ongoing or foreseeable grand jury or congressional proceeding.

Also, President Trump’s apparently false justification for firing Comey—because of the way he handled the investigation into Hillary Clinton’s emails—may have been an attempt to cover up his obstruction attempts regarding the Russia investigation.<sup>690</sup> And President Trump’s repeated statements categorizing the investigation as a “witch hunt”<sup>691</sup> and proffering seemingly disingenuous alternative explanations for the investigation and his actions may have been further cover-up attempts aimed at impeding the criminal and congressional proceedings.<sup>692</sup>

## **2. President Trump’s misleading conduct or attempts to threaten, intimidate, and corruptly persuade witnesses may also constitute violations of Section 1512(b)**

Section 1512(b) criminalizes threats, intimidation, corrupt persuasion, and misleading conduct intended to: “influence, delay, or prevent the testimony of any person in an official proceeding”; “cause or induce any person to withhold testimony, or . . . be absent from an official proceeding”; or “hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense.”<sup>693</sup> Like Sections 1503, 1505, and 1512(c), an attempt to obstruct justice under Section 1512(b) is sufficient; one need not succeed.<sup>694</sup>

Many indicators of attempts to impede, influence, or obstruct—such as a person’s position of power, requests for “loyalty,” one-on-one, closed-door conversations, implied

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<sup>686</sup> See *id.*; Becker, Apuzzo, and Goldman, *New York Times*, Jul. 8, 2017.

<sup>687</sup> <https://twitter.com/realDonaldTrump/status/1026084333315153924>.

<sup>688</sup> See Schmidt, Haberman, Savage, and Apuzzo, *New York Times*, Jun. 2, 2018; Apuzzo, *New York Times*, Jun. 4, 2018.

<sup>689</sup> See, *infra*, Section II.A.3 for a discussion on the foreseeability of such grand jury or congressional investigations.

<sup>690</sup> See Shear and Apuzzo, *New York Times*, May 9, 2017; Rucker, Parker, Horwitz, and Costa, *Washington Post*, May 10, 2017.

<sup>691</sup> See, e.g., <https://twitter.com/realDonaldTrump/status/875321478849363968>; see *supra* at Section I.D.25 (page 81) (discussion of “witch hunt” and similar comments).

<sup>692</sup> This conduct is also supportive of corrupt intent. See Section II.A.4.c.

<sup>693</sup> 18 U.S.C. § 1512(b)(1)-(3).

<sup>694</sup> See 18 U.S.C. § 1512(b); *U.S. v. Wilson*, 796 F.2d 55, 57 (4th Cir. 1986) (“The statute . . . state[s] that ‘attempts to’ dissuade testimony are sufficient for conviction[;] [t]he success of an attempt or possibility thereof is irrelevant; the statute makes the endeavor a crime.”).

employment threats, and retaliatory exercises of executive power against potential witnesses—are also indicators of attempts to threaten, intimidate, or corruptly persuade. And courts have routinely held that *suggestively* threatening, intimidating, or persuasive statements are sufficient to bring a case under Section 1512(b).

Such conduct need not be explicit or overt. For example, in *U.S. v. Freeman*, the U.S. Court of Appeals for the First Circuit explained that statements to a witness such as “I hear you’ve been talking and the feds are around” and “keep the lip zipped” were part of the defendant’s intimidating, threatening, or corruptly persuading conduct in violation of Section 1512(b) even though defendant’s “words did not contain overt threats,” because “a reasonable jury could infer” that such words would be threatening given, among other things “[defendant’s] status as a police officer” and the witness’ “first-hand knowledge of his erratic personality and violent temper.”<sup>695</sup> In *U.S. v. Craft*, the U.S. Court of Appeals for the Eighth Circuit affirmed defendant’s Section 1512(b) conviction for influencing his employee’s testimony by engaging in “corrupt persuasion” where defendant “made several subtle threats against [the employee’s] job.”<sup>696</sup> And, in *U.S. v. Shotts*, the U.S. Court of Appeals for the Eleventh Circuit determined that there was sufficient evidence that defendant corruptly persuaded his secretary, under 1512(b)(3), to refrain from talking to agents investigating a third party where the secretary testified that defendant “said just not say anything and I wasn’t going to be bothered [sic]” because the “jury could reasonably have inferred from this testimony that [defendant] was attempting with an improper motive to persuade [the secretary] not to talk to the FBI” despite defendant’s argument that the testimony “proves only that [the secretary] asked [defendant] about talking to the FBI and that he observed that if she did not talk to the FBI, she would not be bothered.”<sup>697</sup>

Moreover, Section 1512(b) does not require coercion, threats, or intimidation.<sup>698</sup> For example, in *U.S. v. Khatami*, the Court of Appeals for the Ninth Circuit determined that the target of an investigation into whether the defendant lied on her Social Security disability benefits application by stating that she did not have independent sources of income violated Section 1512(b) when she asked potential witnesses who paid her for babysitting services to refrain from talking to investigators, to tell investigators that they were “simply friends,” that the potential witnesses never compensated the defendant for babysitting services, and by suggesting that because they had paid the defendant in cash, “no one would ever know” about the arrangements.<sup>699</sup> Courts have also held that offering something in exchange for a witness’ silence, resistance, or uncooperative behavior may constitute corrupt persuasion under Section 1512(b). In *Khatami*, the court explained that “[a]ttempting to persuade a witness to give false testimony and bribing a witness to withhold information are both forms of non-coercive conduct that fall within the reach of [1512(b)].”<sup>700</sup> In *U.S. v. Arnold*, the Court of Appeals for the Seventh Circuit determined that defendants obstructed justice by corruptly influencing a witness, in part, by promising rewards for his silence where “[t]he defendants promised [the witness] that they would take care of his expenses, provide an attorney, forgive his debt, visit him in jail if he were

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<sup>695</sup> 208 F.3d 332, 338 (1st Cir. 2000).

<sup>696</sup> 478 F.3d 899, 900-01 (8th Cir. 2007).

<sup>697</sup> 145 F.3d 1289, 1301 (11th Cir. 1998).

<sup>698</sup> See *U.S. v. Khatami*, 280 F.3d 907, 911 (9th Cir. 2002) (“It can be readily hypothesized, for example, that friends of a target could be persuaded to furnish false information without being coerced or threatened into doing so.”).

<sup>699</sup> *Id.* at 909.

<sup>700</sup> 280 F.3d 907, 913 (9th Cir. 2002).

imprisoned for remaining silent, and provide him with spending money while he was incarcerated[,]” and “reminded [the witness] that they had aided him in the past and would be in contact with him in the future.”<sup>701</sup>

Like the defendants in *Freeman*, *Craft*, *Shotts*, *Khatami*, and *Arnold*, President Trump may be liable for intimidating, threatening, and corruptly persuading Comey and others—including Flynn and Manafort—in order to influence, prevent, or delay their testimony or cause them to withhold testimony from congressional or grand jury proceedings even if the president’s “words did not contain overt threats.”<sup>702</sup>

President Trump’s many months of alleged misconduct must be viewed as a whole in determining whether it constitutes a pattern of threats, intimidation, and corrupt persuasion. The following are among the individual reported acts that may fall within the range of what 1512(b) prohibits:

- President Trump’s statement expressing his “hope” that Comey could “see [his] way clear to letting this go, to letting Flynn go. . . .”<sup>703</sup>
- President Trump’s request that DNI Coats urge Comey to back off the FBI’s investigation of Flynn.<sup>704</sup>
- President Trump’s repeated requests for “loyalty” during a one-on-one dinner with Comey.<sup>705</sup>
- President Trump’s apparent threat to replace Comey by asking him whether he wanted to keep his job when Comey had already indicated that he did and by mentioning that “lots of people wanted [Comey’s] job.”<sup>706</sup>
- President Trump’s emphasis on the loyalty he demonstrated toward Comey, implying that such loyalty could come to an end if not reciprocated by Comey curtailing the investigation as the president requested.<sup>707</sup>
- President Trump’s corresponding threat that “we had that thing, you know.”<sup>708</sup>
- President Trump’s firing of Comey.<sup>709</sup>

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<sup>701</sup> 773 F.2d 823, 834 (7th Cir. 1985). Although *Arnold* is a Section 1503 case, it applies to an analysis under Section 1512(b) as witness tampering was predominantly prosecuted under Section 1503 before Section 1512 was enacted in 1982, and *Arnold* predates the implementation of the phrase “corrupt persuasion” in 1988. See *Khatami*, 280 F.3d at 912; *U.S. v. Tackett*, 113 F.3d 603, 606-607 (6th Cir. 1997) (acknowledging a circuit split on the issue but determining that witness tampering could still be prosecuted under Section 1503 after Section 1512’s enactment).

<sup>702</sup> See *Freeman*, 208 F.3d at 338.

<sup>703</sup> Comey Stmt., Jun. 8, 2017.

<sup>704</sup> Entous, *Washington Post*, Jun. 6, 2017.

<sup>705</sup> Comey Stmt., Jun. 8, 2017.

<sup>706</sup> *Id.*

<sup>707</sup> *Id.*

<sup>708</sup> *Id.*

<sup>709</sup> Perez, Prokupecz, and Brown, *CNN*, May 10, 2017.

- President Trump’s tweets that “James Comey better hope there are no ‘tapes’ of our conversations before he starts leaking to the press!”, subsequent admission that he has “no idea” whether such tapes ever existed,<sup>710</sup> and assertion that his false claim that there were tapes “may have changed” Comey’s story.<sup>711</sup>
- President Trump’s questioning of Acting FBI Director Andrew McCabe’s political loyalties shortly after Comey’s firing and President Trump’s discrediting of McCabe.<sup>712</sup>
- President Trump’s reported pressure on senior aides in June 2017 to “devise and carry out a campaign to discredit” three senior FBI officials, Deputy Director Andrew McCabe, Comey’s chief of staff Jim Rybicki, and then-general counsel James Baker, after learning they “were likely to be witnesses against him as part of special counsel Robert Mueller’s investigation.”<sup>713</sup>
- President Trump’s subtle suggestion that while he is not currently considering a pardon for Flynn, he may: “I don’t want to talk about pardons with Michael Flynn yet. We’ll see what happens.”<sup>714</sup>
- President Trump’s personal attorney John Dowd reportedly telling counsel for Flynn and Manafort that the President was considering pardons for them in the Summer of 2017<sup>715</sup> and President Trump’s adviser and personal lawyer Rudy Giuliani’s suggestion that President Trump may pardon people investigated by Mueller.<sup>716</sup>
- President Trump’s reportedly telling an aide that McGahn should deny a January 2018 story which alleged that the president had asked McGahn to fire Special Counsel Mueller.<sup>717</sup>
- President Trump revoking former Director of National Intelligence John Brennan’s security clearance, and publicly naming other former officials involved in the investigations for clearance review because “these people led [the rigged witch hunt]”.<sup>718</sup>

During each of President Trump’s alleged “requests” of Comey and his directive to DNI Coats, he used his position of authority as both the President of the United States and as their boss. Also, like the boss in *Craft*, President Trump made “subtle threats against [Comey’s] job”<sup>719</sup> during the January dinner. Indeed, President Trump not only threatened Comey’s job, he

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<sup>710</sup> <https://twitter.com/realDonaldTrump/status/877932907137966080>;  
<https://twitter.com/realDonaldTrump/status/877932956458795008>.

<sup>711</sup> Gareth Williams, *Trump’s Conspiracy-Filled Interview with Fox & Friends*, Vox, Jun. 23, 2017, available at <https://www.vox.com/policy-and-politics/2017/6/23/15861628/trump-fox-comey-mueller-tapes-clinton-conspiracy>.

<sup>712</sup> Section I.D.16 (page 68); Waas, Vox, Aug. 3, 2017.

<sup>713</sup> Waas, *Foreign Policy*, Jan. 26, 2018.

<sup>714</sup> Klein, *CNN*, Dec. 15, 2017.

<sup>715</sup> Leonnig, Dawsey, and Helderman, *Washington Post*, Mar. 28, 2018; Schmidt, Becker, Mazzetti, Haberman, and Goldman, *New York Times*, Mar. 28, 2018.

<sup>716</sup> Sommerfeldt, *New York Daily News*, Jun. 15, 2018.

<sup>717</sup> Schmidt and Haberman, *New York Times*, Mar. 7, 2018.

<sup>718</sup> Section I.D.26. Nicholas and Bender, *Wall Street Journal*, Aug. 15, 2018.

<sup>719</sup> See *Craft*, 478 F.3d at 900-01.

eventually terminated him, and ultimately admitted doing so because of the Russia investigation.

Even after terminating Comey, President Trump's possible attempts to intimidate him to influence his testimony continued when he tweeted that Comey "better hope there are no 'tapes' of our conversations," despite having "no idea" whether such tapes existed. The timing of the "tapes tweet" could help demonstrate its potentially intimidating nature. It occurred just two days after Comey's termination seemingly for his refusal to conduct himself and the investigation the way the president wanted and less than one month before Comey's impending congressional testimony. The tweet also occurred after the United States Attorney's Office for the Eastern District of Virginia issued grand jury subpoenas in connection with the Flynn investigation.<sup>720</sup>

Accordingly, this tweet could be viewed as a message to Comey to testify favorably for the president. In the months preceding the tweet, President Trump indicated that he was concerned with "loyalty." After Comey's congressional testimony, President Trump pointed out that "when [Comey] found out that I, you know, that there may be tapes out there, whether it's governmental tapes or anything else, and who knows, I think his story may have changed."<sup>721</sup> Comey himself also indicated that the tweet had a "major impact."<sup>722</sup>

In addition to his actions toward Comey, the reported suggestions directed toward Flynn and Manafort's attorneys, while Flynn and Manafort were under investigation, that the president was contemplating pardoning them, Rudy Giuliani's suggestion<sup>723</sup> that President Trump pardon people investigated by Mueller, and the president's December 2017 suggestion<sup>724</sup> that he may consider a pardon for Flynn, could constitute parts of a pattern of corrupt persuasion under Section 1512(b). To the extent the president's actual execution of pardons while Manafort and Flynn were being investigated (in the case of Sheriff Joseph Arpaio)<sup>725</sup> or after Manafort was indicted and Flynn pleaded guilty (in the cases of Scooter Libby, Kristian Mark Saucier, Dinesh D'Souza, Jack Johnson, and Dwight and Steven Hammond)<sup>726</sup> were intended to send a similar message, those actions would also be relevant to this analysis.

As we explained in greater detail above, courts have made clear that attempting to corruptly influence potential witnesses to remain silent or avoid cooperating with investigators constitutes corrupt persuasion. Reaching out to Flynn and Manafort's attorneys, via the president's own attorney, to tell them that the president was contemplating pardons (if true), and

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<sup>720</sup> See *U.S. v. Camick*, 796 F.3d 1206, 1222 (10th Cir. 2015), *cert denied*, 136 S. Ct. 601 (2015) (timing of the filing of a non-meritorious lawsuit supported circumstantial evidence of intent to obstruct justice).

<sup>721</sup> Williams, *Vox*, Jun. 23, 2017.

<sup>722</sup> [Full Transcript and Video: James Comey's Testimony on Capitol Hill](#), *New York Times*, Jun. 8, 2017 ("To me, it's major impact. It occurred in the middle of the night, holy cow, there might be tapes. If there's tapes it's not just my word against him on the direction to get rid of the Flynn investigation.").

<sup>723</sup> Chris Sommerfeldt, [Rudy Giuliani says Mueller probe 'might get cleaned up' with 'presidential pardons' in light of Paul Manafort going to jail](#), *New York Daily News*, Jun. 15, 2018 available at <http://www.nydailynews.com/news/politics/ny-news-rudy-muller-pardons-trump-manafort-20180615-story.html>.

<sup>724</sup> Betsy Klein, [Trump on a Flynn pardon: "Let's see"](#), *CNN*, Dec. 15, 2017 available at <https://www.cnn.com/2017/12/15/politics/donald-trump-michael-flynn-pardon/index.html>.

<sup>725</sup> Department of Justice, [Pardons Granted by President Donald Trump](#), available at <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> (last accessed July 25, 2018).

<sup>726</sup> *Id.*

that he thought Flynn’s case was weak, as well as Giuliani’s suggestion that the president may pardon people investigated by Mueller, raise serious questions about whether they were intended as inducements to avoid cooperating with investigators. These acts are especially questionable in light of the surrounding circumstances—the president’s public suggestion that he may consider pardoning Flynn, reports of the president expressing an interest in his pardon power around the same time as Dowd’s alleged conversations with Flynn and Manafort’s attorneys, and President Trump’s demonstrations of his willingness to execute pardons. How the president’s actions are construed will depend largely on evidence not yet in the public domain, including the extent to which the president knew about or instructed Dowd’s alleged messaging to Flynn and Manafort’s attorneys and other conversations Trump may have had behind closed doors about the purpose behind the alleged suggestions of pardons to Flynn and Manafort. Mueller’s team has demonstrated an interest in this information, as current and former administration officials have reportedly “recounted conversations they had with the president about potential pardons for former aides under investigation by the special counsel” during interviews with investigators.<sup>727</sup> While the president clearly has broad powers to grant pardons, holding out the promise or possibility of a pardon to Manafort and Flynn with the intent to persuade them to not cooperate with the investigation, could very well provide additional grounds for an obstruction charge under Section 1512(b).<sup>728</sup>

President Trump’s other actions with respect to the Mueller investigation, including the investigation into whether the president committed obstruction of justice, may also come under the ambit of 1512(b). For example, in an interview with *The New York Times* in July 2017, the president stated publicly that he never would have appointed Attorney General Sessions, a potential witness regarding the Comey firing, had he known he would recuse himself, and President Trump “warned investigators against delving into matters too far afield from Russia.”<sup>729</sup> In January 2018, President Trump reportedly asked Deputy Attorney General Rod Rosenstein, another potential witness regarding the Comey firing, if Rosenstein was “on [Trump’s] team,” allegedly in contemplation of his upcoming testimony before the House Judiciary Committee.<sup>730</sup> In August 2018, President Trump revoked former Director of National Intelligence Brennan’s security clearance, and publicly named a list of former officials whose security clearances he planned to review, because “these people led” the Russia investigation (the “rigged witch hunt”).<sup>731</sup>

While some of these individual incidents by themselves alone might not rise to the level of illegality, the President’s actions described above, as well as his many other public attacks on Comey, Mueller, and the special counsel’s investigation,<sup>732</sup> must be considered as a whole. As

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<sup>727</sup> Schmidt, Becker, Mazzetti, Haberman, and Goldman, *New York Times*, Mar. 28, 2018.

<sup>728</sup> See generally *Cioffi*, 493 F.2d at 1119 (affirming instruction that while a “witness violates no law by claiming the Fifth Amendment . . . one who . . . advises with corrupt motive a witness to take it, can and does obstruct or influence the administration of justice” because “[t]he lawful behavior of the person invoking the Amendment cannot be used to protect the criminal behavior of the inducer.”); see also *Khatami*, 280 F.3d at 909.

<sup>729</sup> Excerpts from the *Times’s* Interview with Trump, *New York Times*, Jul. 19, 2017; Baker, Schmidt, and Haberman, *New York Times*, Jul. 19, 2017.

<sup>730</sup> Brown, Perez, and Jarrett, *CNN*, Feb. 1, 2018.

<sup>731</sup> Nicholas and Bender, *Wall Street Journal*, Aug. 15, 2018.

<sup>732</sup> See, e.g., *supra* at Section I.D.25 (describing President Trump’s repeated use of the phrase “witch hunt” in public statements about the investigation); Beckwith, *Time Magazine*, Jul. 30, 2018 (originally published Jun. 7, 2018).

part of that analysis, the special counsel may find that President Trump's tweets bolster arguments of witness tampering in violation of § 1512, where the president has implied both threats against<sup>733</sup> and the possibility of protection for<sup>734</sup> individuals who might be witnesses against him. Trump has also wielded Twitter as a means of attacking and threatening the employment of individuals in a position to disrupt the Mueller investigation.<sup>735</sup> Indeed, *The New York Times* reported in July 2018 that the Special Counsel was examining tweets and negative statements about Attorney General Sessions and about FBI Director Comey, as part of an analysis of a larger pattern of obstructive behavior and witness tampering.<sup>736</sup>

### **3. President Trump's actions may constitute an attempt to influence a "proceeding" as that term is defined in Sections 1503, 1505, and 1512**

In Subsections 1 and 2, we explained how President Trump's alleged actions could constitute attempts (whether successful or not) to impede, influence, or obstruct the Russia and Flynn investigations or intimidate witnesses to a proceeding under the federal obstruction statutes; here we address another important component of a potential case: whether those actions had a sufficient connection to a "proceeding" as that term is used in the obstruction statutes.

In this context, the texts of the three statutes diverge. Although the omnibus clause of Section 1503 does not explicitly mention a "proceeding,"<sup>737</sup> most courts have deemed "the existence of a pending judicial proceeding [] a prerequisite for convictions" under Section 1503.<sup>738</sup> The term "proceeding" is construed broadly. See *Rice v. U.S.*, 356 F.2d 709, 712 (8th Cir. 1966) ("Proceeding' is a comprehensive term meaning the action of proceeding . . . including all steps and stages in such an action from its inception to its conclusion."); *U.S. v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir. 1970) (explaining that "proceeding" should be given a

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<sup>733</sup> See e.g., May 12, 2017: "James Comey better hope there are no 'tapes' of our conversations before he starts leaking to the press!" <https://twitter.com/realdonaldtrump/status/863007411132649473>; <https://twitter.com/realdonaldtrump/status/890207082926022656?lang=en>; April 15, 2018: "The big questions in Comey's badly reviewed book aren't answered like, how come he gave up Classified Information (jail), why did he lie to Congress (jail), why did the DNC refuse to give Server to the FBI (why didn't they TAKE it), why the phony memos, McCabe's \$700,000 & more?" <https://twitter.com/realDonaldTrump/status/985487209510948864>.

<sup>734</sup> See e.g., March 31, 2017: "Mike Flynn should ask for immunity in that this is a witch hunt (excuse for big election loss), by media & Dems, of historic proportion!" <https://twitter.com/realdonaldtrump/status/847766558520856578?lang=en>.

<sup>735</sup> See e.g., <https://twitter.com/realDonaldTrump/status/890207082926022656> ("Why didn't A.G. Sessions replace Acting FBI Director Andrew McCabe, a Comey friend who was in charge of Clinton investigation but got..."); <https://twitter.com/realDonaldTrump/status/944666448185692166> ("FBI Director Andrew McCabe is racing the clock to retire with full benefits. 90 days to go?!?!"). See also Sari Horwitz, Devlin Barrett and Lynh Bui, *Trump takes a Twitter swipe at deputy attorney general, a key figure in Russia probe*, *Washington Post*, Jun. 16, 2017 available at [https://www.washingtonpost.com/world/national-security/deputy-attorney-general-rosenstein-sees-no-reason-to-recuse-himself-from-russia-probe-justice-department-says/2017/06/16/ba1dafd4-52ae-11e7-91eb-9611861a988f\\_story.html](https://www.washingtonpost.com/world/national-security/deputy-attorney-general-rosenstein-sees-no-reason-to-recuse-himself-from-russia-probe-justice-department-says/2017/06/16/ba1dafd4-52ae-11e7-91eb-9611861a988f_story.html).

<sup>736</sup> Schmidt and Haberman, *New York Times*, Jul. 26, 2018.

<sup>737</sup> The omnibus clause of Section 1503 criminalizes endeavors to influence, obstruct, or impede "the due administration of justice."

<sup>738</sup> Singh *et. al*, *Obstruction of Justice*, 54 Am. Crim. L. Rev. at 1609 (citing examples from the U.S. Courts of Appeals for the Fifth, Seventh, Ninth, and Second Circuits).

“broad scope.”); *Mitchell*, 877 F.2d at 298, 300 (“proceeding” “should be construed broadly to effectuate [1505]’s purposes.”). Notably, however, the U.S. Courts of Appeals for the Eighth and Eleventh Circuits have questioned whether a “pending proceeding” is actually necessary to convict a defendant under Section 1503.<sup>739</sup>

Section 1505 prohibits endeavors to influence, obstruct or impede “the due and proper administration of the law under which any *pending proceeding* is being had before any department or agency of the United States . . . or any committee of either House or any joint committee of the Congress.”<sup>740</sup> As a result, a pending proceeding is clearly a prerequisite under Section 1505.

Unlike Sections 1503 and 1505, Section 1512 does not require a pending proceeding. Section 1512(b)(1) prohibits attempts to mislead, intimidate, threaten, or corruptly persuade someone to “influence, delay, or prevent the testimony of any person in an *official proceeding*,” Section 1512(b)(2) prohibits, in relevant part, attempts to do so to “cause or induce any person to withhold testimony . . . from an *official proceeding*,” and Section 1512(c)(2) prohibits attempts to obstruct, influence, or impede “*any official proceeding*.”<sup>741</sup> Under each of these Subsections, a “proceeding” “need not be pending or about to be instituted at the time of the offense.”<sup>742</sup> Section 1512(b)(3), on the other hand, does not have any proceeding requirement, pending or otherwise.

While a proceeding under Section 1512 need not be “pending or about to be instituted,” it must be “reasonably foreseeable to the defendant,”<sup>743</sup> and the government must demonstrate a “nexus between the obstructive act and the proceeding.”<sup>744</sup> Like Section 1512, for actions brought under Section 1503, prosecutors must demonstrate a nexus between the obstructing conduct and the proceeding. “[T]he act must have a relationship in time, causation or logic with the judicial proceedings.”<sup>745</sup> Put differently, “the endeavor must have the natural and probable

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<sup>739</sup> See *U.S. v. Novak*, 217 F.3d 566, 571 (8th Cir. 2000) (“As an initial matter, we question whether § 1503 imposes any requirement that there be a ‘pending judicial proceeding.’”); *U.S. v. Vaghela*, 169 F.3d 729, 734-35 (11th Cir. 1999) (“[T]o sustain a conviction for conspiracy to obstruct justice under 18 U.S.C. § 371 and 18 U.S.C. § 1503, the government need not always show that a judicial proceeding existed at the time the defendants formed the conspiracy, but must demonstrate that the actions the conspirators agreed to take were directly intended to prevent or otherwise obstruct the processes of a specific judicial proceeding in a way that is more than merely ‘speculative.’”) (citing *U.S. v. Aguilar*, 515 U.S. 593, 601 (1995)).

<sup>740</sup> 18 U.S.C. § 1505 (emphasis added).

<sup>741</sup> 18 U.S.C. § 1512(b)(1), (b)(2), & (c)(2) (emphasis added).

<sup>742</sup> 18 U.S.C. § 1512(f)(1).

<sup>743</sup> *U.S. v. Martinez*, 862 F.3d 223, 237 (2d Cir. 2017).

<sup>744</sup> See *Arthur Anderson LLP v. U.S.*, 544 U.S. 696, 708 (2005); see also *U.S. v. Tyler*, 732 F.3d 241, 249 (3d Cir. 2013) (applying the “nexus requirement” to “any prosecution brought under a § 1512 provision charging obstruction of justice involving an ‘official proceeding’”). As Section 1512(b)(3) does not require a “proceeding,” it also does not require a nexus between a proceeding and obstructing conduct.

<sup>745</sup> *Aguilar*, 515 U.S. at 599.

effect of interfering with the due administration of justice.”<sup>746</sup> The courts of appeals are split over whether there is a similar nexus requirement for actions brought under Section 1505.<sup>747</sup>

**a. President Trump’s alleged actions would likely satisfy the “proceeding” requirement under Section 1512**

**i. The grand jury investigations**

President Trump’s actions could be deemed to have influenced a “proceeding” (or testimony in a “proceeding”) under Sections 1512(c)(2), (b)(1), and (b)(2). The key analysis is whether President Trump attempted to either influence an ongoing or foreseeable grand jury investigation or to influence (or cause a person to withhold) testimony in an ongoing or foreseeable grand jury investigation. Section 1515, the relevant definitions Section, plainly states that “the term ‘official proceeding’” as used in Section 1512 means, among other things, “a proceeding before . . . a Federal grand jury.”<sup>748</sup>

While much of President Trump’s potentially obstructive conduct necessitates analysis of whether the president undertook actions to interfere with a *foreseeable* grand jury investigation under Section 1512, Dowd reportedly suggested to Flynn and Manafort, via their attorneys, that they could be pardoned while grand jury investigations were ongoing. *The New York Times* reported that Dowd’s conversation with Flynn’s attorney took place while the grand jury was hearing evidence against Flynn.<sup>749</sup> And there had reportedly been multiple grand jury subpoenas issued in connection with Manafort (as well as Flynn) in the months prior to the Summer of 2017, when Dowd’s pardon conversations allegedly took place.<sup>750</sup> President Trump’s adviser and personal lawyer Rudy Giuliani also suggested that President Trump may pardon people investigated by Mueller while grand jury investigations were ongoing.<sup>751</sup> Therefore, prosecutors would have no trouble identifying a viable “proceeding” for a 1512(b)

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<sup>746</sup> *Id.* (quotation omitted). The Supreme Court’s recent decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018) extends this nexus requirement to the Omnibus Clause of the tax code’s obstruction of justice provision, 26 U.S.C. 7212(a). The court held that, for the purposes of the tax code, it is not enough for the government to show that the “taxpayer knows that the IRS will review her tax return every year . . . and may eventually catch on to [an] unlawful scheme.” There must be a nexus with “a particular investigation or audit.” *Id.* at 1104, 1110. That opinion does not limit a potential defendant’s liability under Sections 1503, 1505, or 1512.

<sup>747</sup> The Seventh and Second Circuits have held that the nexus requirement does apply to Section 1505, while the Ninth Circuit has held that it does not. *Compare U.S. v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006) (citation omitted) (Satisfying the element that “the defendant corruptly endeavored to influence, obstruct, or impede the due and proper administration of the law under which the proceeding was pending,” requires a “wrongful intent or improper motive to interfere with an agency proceeding, including the judicially grafted nexus requirement”) and *U.S. v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002) (“In order to prove that Senffner ‘endeavored’ to obstruct an SEC proceeding under Section 1505, the government need only show that Senffner’s actions had the “natural and probable” effect of interfering with that proceeding. Such a showing is sufficient to satisfy the requisite mental state required in Section 1505.”) with *U.S. v. Bhagat*, 436 F.3d 1140, 1148 (9th Cir. 2006) (“Because Bhagat was charged under Section 1505 with obstructing an agency proceeding and not a judicial one, there was no need to create a causal nexus.”).

<sup>748</sup> 18 U.S.C. § 1515(a)(1)(A).

<sup>749</sup> Schmidt, Becker, Mazzetti, Haberman, and Goldman, *New York Times*, Mar. 28, 2018.

<sup>750</sup> Winter and Dilanian, *NBC News*, May 17, 2017.

<sup>751</sup> Sommerfeldt, *New York Daily News*, Jun. 15, 2018.

charge if they pursued a case on grounds that President Trump sought to influence Flynn and Manafort with the promise of pardons. So too for the president's persistent attempts to prevent Sessions from recusing himself and to subsequently "un-recuse" himself to potentially manipulate, control, or impede ongoing investigations that the president wanted Sessions to take over.

### ➤ **Foreseeability**

Because a "proceeding" need not be "pending or about to be instituted" for Section 1512 purposes, President Trump's conduct could have been intended to influence a "proceeding" under the statute if a grand jury investigation was foreseeable even if the obstructive behavior took place before a grand jury investigation actually commenced.<sup>752</sup> It also is not required that President Trump had actual knowledge of a grand jury investigation.<sup>753</sup> To show that President Trump's attempts to impact the grand jury investigation constituted an attempt to influence a "proceeding" under Section 1512, a prosecutor need only demonstrate that the grand jury investigation was "reasonably foreseeable" and that there was a nexus between the attempted obstruction and the foreseeable grand jury investigation.<sup>754</sup>

In *U.S. v. Martinez*, the U.S. Court of Appeals for the Second Circuit affirmed the Section 1512(c)(2) conviction of Tejada, a New York City police officer involved in a conspiracy to rob drug traffickers. The officer had repeatedly searched NYPD databases for his own name and the names of his coconspirators after some of the conspiracy members were arrested.<sup>755</sup> The court determined that it was "easily inferable" that the arrests of his coconspirators "made it foreseeable to Tejada—who estimated that as an NYPD officer, he had testified 15-20 times in grand jury proceedings—that there would be a grand jury proceeding leading to numerous indictments."<sup>756</sup> The court also held that "it could be easily inferred" that Tejada's database searches "and his reports back to coconspirators who had not been arrested, were intended to make it possible for them to avoid arrest . . . thereby potentially interfering with an ongoing grand jury proceeding."<sup>757</sup>

The argument that a future proceeding was "reasonably foreseeable" to President Trump depends, in part, on facts to be determined by the ongoing investigations. Should the Mueller

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<sup>752</sup> See, e.g., *U.S. v. Licciardi*, No. 14-cv-284, 2016 WL 1161270, at \*3 (E.D. La. Mar. 24, 2016) ("The plain language of § 1512 states that the grand jury need not actually be empaneled at the time of the obstructive act.") Notably, President Trump's firing of James Comey did in fact occur after a grand jury in the Eastern District of Virginia had issued grand jury subpoenas in connection with an investigation into General Flynn's lobbying efforts on behalf of a Turkish company. On May 10, 2017 *CNN* reported that hours before President Trump fired James Comey, it learned that "in recent weeks," the grand jury subpoenas were issued. While predating the commencement of the grand jury investigation is not necessary, it may strengthen the argument that firing James Comey influenced a "proceeding" under Section 1512.

<sup>753</sup> See *Martinez*, 862 F.3d at 236.

<sup>754</sup> *Martinez*, 862 F.3d at 246. Other courts have formulated the "foreseeability" requirement slightly differently. See *U.S. v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015) (must prove "defendant contemplated a particular, foreseeable proceeding"); *Friske*, 640 F.3d at 1292 (government required to prove defendant "at least foresaw" a proceeding); *U.S. v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009) ("foreseeable"); *U.S. v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (same).

<sup>755</sup> *Martinez*, 862 F.3d at 236, 238.

<sup>756</sup> *Id.* at 238.

<sup>757</sup> *Id.*

investigation uncover evidence that President Trump knew of, or was involved in, any criminal behavior reasonably related to the Flynn or Russia investigations, then a future proceeding—e.g. a grand jury or a trial—was almost certainly “foreseeable” to President Trump under any standard. Like the police officer in *Martinez*, President Trump’s knowledge of criminal activity and of an active investigation into matters relating to that activity makes a grand jury proceeding “easily” inferable.<sup>758</sup>

While we must await the outcome of the Mueller investigation on this point, several events that have been the subject of testimony and public reports suggest that President Trump likely foresaw various proceedings. For example, the President likely foresaw a grand jury investigation or indictment of Flynn, because Flynn reportedly informed the Trump transition team that he was under investigation by the Department of Justice for his Turkish lobbying activities in early January 2017.<sup>759</sup> Acting Attorney General Sally Yates informed White House counsel Don McGahn of Flynn’s untrue statements about his meetings with the Russian ambassador on January 26, 2017,<sup>760</sup> and the White House has stated that McGahn immediately briefed President Trump on his meeting with Yates.<sup>761</sup>

Indeed, shortly after Flynn was indicted, the president tweeted that he fired Flynn because he lied to the FBI, a felony, supporting the notion that the president could have easily foreseen that a grand jury proceeding was imminent. President Trump’s personal attorney, John Dowd, who claimed authorship of the tweet, attempted to dampen any suggestion that the president knew Flynn had committed a crime, as implied by the tweet. He did so by claiming that all the president knew at the time Flynn resigned was that Flynn’s accounts to the FBI were the same as those to Pence, and ““that the [Justice] Department was not accusing him of lying.””<sup>762</sup>

President Trump’s attorneys claimed in a letter to the Special Counsel that the “White House’s understanding” was that there was no FBI or DOJ “investigation that could conceivably have been impeded.” That assertion was based in part on statements made by Yates to McGahn, as well as based on Flynn purportedly telling Reince Priebus and McGahn that he was not under investigation by the FBI.<sup>763</sup> However, it has been reported that a memo drafted by

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<sup>758</sup> See also *U.S. v. Bunday*, 804 F.3d 558, 590-91 (2d Cir. 2015) (“That every inquiry from the FBI might not render a grand jury investigation reasonably foreseeable is of no avail to [defendant], as there was sufficient evidence of foreseeability in this case. [Defendant] knew that the subject of the FBI’s inquiries was in fact a large insurance fraud scheme in which he participated and about which he possessed incriminating documents. That a grand jury had not been commenced or specifically discussed with [defendant] at the time of the destruction does not render a grand jury proceeding unforeseeable.”). The evolution of an FBI proceeding into federal grand jury proceedings has been held “foreseeable” by a number of courts. See, e.g., *U.S. v. Holloway*, No. CR-F-08-224 OWW, 2009 U.S. Dist. LEXIS 108387 (E.D. Cal. Nov. 19, 2009); *U.S. v. Frankhauser*, 80 F.3d 641, 652 (1st Cir. 1996) (evidence defendant knew of FBI investigation indicates that he expected federal grand jury investigation or trial to begin soon).

<sup>759</sup> Rosenberg and Mazzetti, *New York Times*, May 17, 2017.

<sup>760</sup> Apuzzo and Huetteman, *New York Times*, May 8, 2017.

<sup>761</sup> The White House Office of the Press Secretary, Feb. 14, 2017.

<sup>762</sup> Leonnig, Wagner, and Nakashima, *Washington Post*, Dec. 3, 2017.

<sup>763</sup> John M. Dowd, Letter to Special Counsel, Jan. 29, 2018, available at <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html>. The letter was publicly revealed in June 2018. Schmidt, Haberman, Savage, and Apuzzo, *New York Times*, Jun. 2, 2018. The letter argues that Yates told McGahn that the DOJ would not object to the White House

McGahn on February 15, 2017, which is in the possession of the Special Counsel, “explicitly states that when Trump pressured Comey he had just been told by two of his top aides—his then Chief of Staff Reince Priebus and his White House Counsel Don McGahn—that Flynn was under criminal investigation.”<sup>764</sup> The same article reported that Priebus and McGahn “confirmed in separate interviews with the special counsel that they had told Trump that Flynn was under investigation by the FBI before he met with Comey.”<sup>765</sup> The article also reported that the White House did not rely on Flynn’s self-serving statements that the FBI had cleared him, contrary to assertions in the January 2018 letter to the Special Counsel.

Regardless of whether that reporting is accurate, contemporaneous statements from when Flynn resigned indicated that President Trump was concerned that Flynn had misled the vice president. If the president understood Flynn had given the same account to the FBI, it follows that he would have been aware of Flynn’s potential exposure to prosecution (for lying to the FBI<sup>766</sup>) even if the Justice Department had not yet made the accusation.<sup>767</sup> That knowledge (that Flynn had committed a crime and that the FBI was conducting an investigation into matters relating to that crime) would likely be sufficient under the case law.<sup>768</sup>

The language that President Trump allegedly used during his February 14 conversation with Comey further indicates that he knew that Flynn faced potential criminal charges—he referred to letting Flynn go. That comment can be reasonably interpreted as letting Flynn go “unindicted” and “unprosecuted.” That is, President Trump was evidently thinking ahead to the consequences of the investigations into Flynn and potentially others. President Trump also understood that Comey would have the responsibility of recommending to the Department of Justice whether to prosecute Flynn.

The foreseeability element does not require that a defendant fully understand the minutiae of the legal process.<sup>769</sup> Nonetheless, courts will consider whether a defendant’s position and experience supports the inference that he or she would foresee a future

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disclosing how the DOJ obtained the information relayed to the White House regarding Flynn’s calls with Ambassador Kislyak, and that this implies it was likely an ongoing DOJ investigation of Flynn was not underway.

<sup>764</sup> Murray Waas, *Flynn, Comey, and Mueller: What Trump Knew and When He Knew It*, *New York Review of Books*, Jul. 31, 2018, available at <https://www.nybooks.com/daily/2018/07/31/what-trump-knew-and-when-he-knew-it/>.

<sup>765</sup> *Id.*

<sup>766</sup> 18 U.S.C. § 1001.

<sup>767</sup> Leonnig, Wagner, and Nakashima, *Washington Post*, Dec. 3, 2017; [Sean Spicer Says President Asked Michael Flynn to Resign Over “Eroded” Trust](https://www.c-span.org/video/?c4656691/sean-spicer-president-asked-michael-flynn-resign-eroded-trust), *C-SPAN*, Feb. 14, 2017, available at <https://www.c-span.org/video/?c4656691/sean-spicer-president-asked-michael-flynn-resign-eroded-trust>. During a press conference on February 14, 2017 Sean Spicer explained that “that President was very concerned that General Flynn had misled the vice president and others...”

<sup>768</sup> See *Martinez*, 862 F.3d at 246.

<sup>769</sup> See, e.g., *U.S. v. Cervantes*, No. 12-CR-00792, 2016 WL 6599515, at \*5 (N.D. Cal. Nov. 8, 2016) (“the government is not required to show that the defendant knew or contemplated that such official proceeding would be a federal proceeding, as opposed to a state one.”) (citing 18 U.S.C. § 1512(g)(1)); *Binday*, 993 F. Supp. 2d at 369 (“Even if the record conceivably could have supported the inference that [defendant] contemplated obstruction of a civil or regulatory proceeding, as opposed to a federal grand jury investigation or federal criminal prosecution . . . there still would be no basis for vacating” conviction under Section 1512(c)(1)).

proceeding.<sup>770</sup> President Trump was not only advised by a battery of experienced lawyers and counselors—he is also the head of the executive branch of the United States of America, including the departments responsible for law enforcement. In addition, prior to assuming office, he had extensive experience with the judicial system related to his business ventures.<sup>771</sup> He and those around him were likely to have been aware that a grand jury investigation is standard practice for a complex federal white-collar investigation like that of Flynn. A person standing in his shoes could easily be held to have “reasonably foreseen” a grand jury proceeding based on the circumstances.

Similarly, a grand jury proceeding could have been reasonably foreseeable on or around July 8, 2017, at the time the president dictated a misleading statement to Donald Trump Jr. regarding the purpose of the June 2016 Trump Tower meeting. By that time, various counter-intelligence and congressional investigations into Russian interference with the 2016 election, including counter-intelligence investigations of the Russian cyber-attack on the Democratic National Committee and the Hillary Clinton campaign, were well underway. Indeed, some counter-intelligence investigations were announced as early as July 2016.<sup>772</sup> The president could very well have foreseen grand jury investigations stemming from such counter-intelligence or congressional investigations that would prompt testimony regarding the purpose of the Trump Tower meeting.

### ➤ Nexus

In addition to determining that an obstruction defendant knew about (or could reasonably foresee) a proceeding, prosecutors have to establish that there was a “nexus” between the defendant’s conduct and the grand jury investigation. In order to determine whether there is the required nexus between the conduct and the actual or foreseeable proceeding, prosecutors must establish that the defendant’s acts had the natural and probable consequence of interfering with an official proceeding.<sup>773</sup> The requirement that obstructive acts have the natural and probable effect of disrupting an ongoing or foreseeable grand jury investigation is rooted in concerns over culpability. Afraid that the breadth of the omnibus provision of Section 1503 could sweep up innocent conduct, courts began reading into the law additional requirements to ensure that the behavior charged was sufficiently blameworthy. In *Aguilar*, the Supreme Court endorsed such “nexus” requirements, emphasizing that it had “traditionally exercised restraint” in interpreting the scope of federal criminal statutes “out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to

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<sup>770</sup> See, e.g., *Martinez*, 862 F.3d at 238 (defendant had testified 15-20 times in grand jury proceedings); *Frankhauser*, 80 F.3d at 652 (defendant had been previously convicted of obstruction).

<sup>771</sup> See Jacob Gershman, [You’re Sued: Donald Trump’s Long History of Litigation](https://blogs.wsj.com/law/2016/03/14/youre-sued-donald-trumps-long-history-of-litigation/), *Wall Street Journal*, Mar. 14, 2016, available at <https://blogs.wsj.com/law/2016/03/14/youre-sued-donald-trumps-long-history-of-litigation/>; Nick Penzenstadler and Susan Page, [Exclusive: Trump’s 3,500 Lawsuits Unprecedented for a Presidential Nominee](https://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/), *USA Today*, Jun. 1, 2016, available at <https://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/>.

<sup>772</sup> Levine, Klein, and Walshe, *ABC News*, Jul. 25, 2016.

<sup>773</sup> See *Phillips*, 583 F.3d at 1264 (quoting *Aguilar*, 515 U.S. at 601) (explaining that “a conviction under [Section 1512(c)(2)] is proper if it is foreseeable that the defendant’s conduct will interfere with an official proceeding[;] [o]r, in terms of the *Aguilar* nexus requirement, a conviction is proper under the statute if interference with the official proceeding is the ‘natural and probable effect’ of the defendant’s conduct.”).

do if a certain line is passed.”<sup>774</sup> Responding to a dissent that argued that intent to obstruct was sufficient to impose liability without the need for a “natural and probable effect” test, the majority laid out a hypothetical scenario in which, without a nexus requirement, a man who had merely lied to his wife about his whereabouts at the time of a crime could be found guilty of obstruction.<sup>775</sup> In such a scenario, “[t]he intent to obstruct justice is indeed present, but the man’s culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability.”<sup>776</sup>

Many of President Trump’s potential obstructive acts do not appear to raise any such concerns about an attenuated nexus. The president’s apparent instruction to Comey to drop the Flynn investigation would plainly have the natural and probable effect of ending that investigation. The president has all but admitted that his intent in firing the FBI director mid-term was to end the Russia investigation.<sup>777</sup> He has reportedly “fumed” about and “berated” Attorney General Jeff Sessions for recusing himself, emphasizing his lack of loyalty in doing so.<sup>778</sup> And, the president dictating a misleading statement about the purpose of the Trump Tower meeting, a key focus of the Russia investigation. This would likely have had the natural and probable consequence of interfering with a foreseeable grand jury investigation into Russian interference with the 2016 election, especially given his position of power, his knowledge that the statement would be widely disseminated, and the likelihood that attendees of the Trump Tower meeting, and therefore potential witnesses, would have construed the misleading statements as signals from the president on how he wanted them to testify.

The appointment of a special counsel to continue the Russia investigation after Comey was fired was an unforeseen development that does not mitigate President Trump’s culpability. President Trump still would be viewed to have acted in a manner “likely to obstruct justice,” even if that attempt was “foiled.”<sup>779</sup> In *Aguilar*, the Court affirmed the culpability of the defendant who lied to a subpoenaed witness, where the witness subsequently testified but did not end up repeating the defendant’s lie when testifying.<sup>780</sup> Like that witness, the Department of Justice may have proven to be a more resilient target than anticipated, but that would not mitigate President Trump’s culpability for attempting to nip in the bud an investigation that would foreseeably ripen into a grand jury proceeding.

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<sup>774</sup> *Aguilar*, 515 U.S. at 600 (internal quotations omitted).

<sup>775</sup> 515 U.S. at 602.

<sup>776</sup> *Id.*

<sup>777</sup> President Trump’s alleged statement to Russian ambassador Kislyak and Foreign Minister Lavrov the day after firing Comey that he “faced great pressure because of Russia” that was now “taken off” strongly indicates that President Trump believed that firing Comey would have the effect of derailing the Russia investigation(s).

<sup>778</sup> Palmeri, Johnson, and Dawsey, *Politico*, Jun. 6, 2017; Schmidt and Hirschfeld Davis, *New York Times*, May 29, 2018.

<sup>779</sup> 515 U.S. at 601-602. Other events that thwarted potential obstruction attempts such as Don McGahn ignoring the president’s request to fire Mueller and Reince Priebus reportedly refusing the president’s request to obtain Sessions’ resignation similarly do not prevent the requisite nexus. Schmidt and Haberman, *New York Times*, Jan. 25, 2018; Whipple, *Vanity Fair*, Mar. 2018.

<sup>780</sup> *Id.* at 602; see also *U.S. v. Muhammad*, 120 F.3d 688, 695 (7th Cir. 1997) (a “defendant who intends (*i.e.*, corruptly endeavors) to obstruct justice remains culpable even though his plan is thwarted.”).

## ii. The congressional investigations

Outside the grand jury context, President Trump's conduct also raises questions in relation to the various congressional investigations into Michael Flynn and the Trump campaign's ties to Russia. In addition to any attempts to influence an actual or foreseeable grand jury proceeding, President Trump also could be held responsible under Sections 1512(c)(2) and (b)(1) and (b)(2) for attempting to obstruct the congressional investigations into Russia or General Flynn or influence or cause a person to withhold testimony in those same congressional investigations. Section 1515(a)(1)(B) specifically states that "a proceeding before Congress" is an "official proceeding" under Section 1512. There is limited authority on the question of when a congressional investigation becomes sufficiently formalized so as to constitute an "official proceeding" under Section 1515;<sup>781</sup> however, the case law suggests that there may be a heightened formality required before the investigation becomes a "proceeding" for the purposes of Section 1512 as compared to Section 1505.<sup>782</sup>

Nonetheless, the House and Senate investigations likely meet the threshold formality. The relevant congressional investigations were ongoing throughout most of the president's potential obstruction attempts. The Senate Select Committee on Intelligence ("Senate Intelligence Committee") announced its investigation into Russian involvement in the 2016 election on January 13, 2017.<sup>783</sup> The House Permanent Select Committee on Intelligence ("House Intelligence Committee") issued a press release on January 25, 2017 indicating that its investigation into, among other things, "links between Russia and individuals associated with political campaigns," was well underway.<sup>784</sup> Finally, the House Committee on Oversight and Government Reform's investigation began at least as early as its February 16, 2017 request for documents relating to Flynn's December 2015 trip to Moscow.<sup>785</sup>

Given that congressional investigations were well underway by the time President Trump dictated Donald Trump Jr.'s misleading statement regarding the June 2016 Trump Tower meeting, that act could very well have a sufficient nexus to ongoing congressional investigations, insofar as it had the natural and probable effect of influencing witnesses' testimony in those investigations. Indeed, every known participant in the Trump Tower meeting has given congressional testimony or has been interviewed by Congress regarding the meeting.<sup>786</sup>

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<sup>781</sup> We were unable to locate any cases brought under Section 1512 for obstructing a proceeding before Congress.

<sup>782</sup> See *U.S. v. Ramos*, 537 F.3d 439, 462-63 (5th Cir. 2008) ("official proceeding" is consistently used throughout § 1512 in a manner that contemplates a formal environment in which persons are called to appear or produce documents . . . , in all the instances in which the term 'official proceeding' is actually used in § 1512, its sense is that of a hearing rather than simply any investigatory step taken by an agency.").

<sup>783</sup> Senate Select Committee on Intelligence, Jan. 13, 2017.

<sup>784</sup> House Permanent Select Committee on Intelligence, Jan. 25, 2017.

<sup>785</sup> House Oversight and Government Reform Committee, Feb. 16, 2017.

<sup>786</sup> Materials from Inquiry into Circumstances Surrounding Trump Tower Meeting, Senate Judiciary Committee, May 16, 2018, available at <https://www.judiciary.senate.gov/press/releases/materials-from-inquiry-into-circumstances-surrounding-trump-tower-meeting>; Helderman and Demirjian, Manafort testifies to Senate Intelligence Committee, turns over notes from Trump Tower meeting with Russian lawyer, *Washington Post*, Jul. 25, 2017, available at <https://www.washingtonpost.com/politics/manafort->

Although the nexus between some of President Trump's other alleged actions and the congressional investigations may be less obvious than with the contemplated grand jury proceeding, it is still potentially sufficient. Would pressuring Comey—both directly and through DNI Coats—and ultimately firing him have the natural and probable effect of interfering with separate, ongoing congressional investigations? There is certainly an argument that it would. Congressional investigations have limited resources and rely on the work conducted by other agencies.<sup>787</sup> For instance, congressional investigations conducted by the intelligence committees, related to intelligence activities, rely almost exclusively on material prepared by, and testimony given by, the U.S. intelligence community—including the FBI. During a March 20, 2017 hearing of the House Intelligence Committee, Rep. Adam Schiff emphasized the Committee's need for FBI assistance, cooperation, and resources.<sup>788</sup> Further, the intelligence community assessment report on Russian involvement in the election, released January 6, 2017, was prepared with the help of the FBI. That report was the document that precipitated the initiation of the Senate Intelligence Committee's investigation. Comey and the FBI under his leadership demonstrated a willingness to assist the congressional investigations, and President Trump noticed. President Trump was reportedly angry with Comey's testimony to the House Intelligence Committee on March 20, 2017, tweeting that day that, "The Democrats made up and pushed the Russian story as an excuse for running a terrible campaign. Big advantage in Electoral College & lost!"<sup>789</sup>

The work of the committees and the FBI is highly intertwined. The FBI's resources and investigative capabilities far outstrip those of the committees. As a result, any obstructive acts by President Trump directed at the FBI's investigation could potentially be seen as having the natural and probable effect of obstructing the congressional investigations into the same subjects.

The argument that President Trump's actions had the natural and probable effect of interfering with the congressional investigations is buttressed by the president's own tweets on the subject and by reports that the president repeatedly urged senior Senate Republicans, including the chairman of the Senate Intelligence Committee, to end the panel's investigation into Russian interference in the 2016 election.<sup>790</sup> While further development of facts related to the president's knowledge and intent is needed, the facts already known could provide a basis for a potentially viable theory of prosecution.

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[turns-over-notes-that-could-provide-new-details-on-trump-tower-meeting-with-russian-lawyer/2017/07/25/85989da6-713e-11e7-8839-ec48ec4cae25\\_story.html?utm\\_term=.1a7264e55a80](https://www.washingtonpost.com/news/energy-environment/wp/2017/07/25/85989da6-713e-11e7-8839-ec48ec4cae25_story.html?utm_term=.1a7264e55a80).

<sup>787</sup> See, e.g., Office of the Director of National Intelligence, Jan. 6, 2017.

<sup>788</sup> "Director Comey, what you see on the dais in front of you in the form of this small number of members and staff is all we have to commit to this investigation. This is it. We are not supported by hundreds or thousands of agents and investigators with offices around the world. It is just us and our Senate counterparts. In addition to this investigation we still have our day job which involves overseeing some of the largest and most important agencies in the country. Agencies which by the way are trained to keep secrets. I point this out for two reasons . . . . First because we cannot do this work alone and nor should we. We believe these issues are so important that the FBI must devote its resources to investigating each of them thoroughly, to do any less would be negligent in the protection of our country. We also need your full cooperation with our investigation so that we may have the benefit of what you know and so that we may coordinate our efforts in the discharge of both our responsibilities." *Washington Post*, Mar. 20, 2017.

<sup>789</sup> <https://twitter.com/realdonaldtrump/status/843776582825267201>.

<sup>790</sup> Martin, Haberman, and Burns, *New York Times*, Nov. 30, 2017.

**b. President Trump likely endeavored to influence a proceeding under Section 1505**

**i. The congressional investigations**

Having addressed proceedings outlined in Section 1512, we now turn to Section 1505, which applies specifically to congressional proceedings (and not grand jury investigations). We believe that prosecutors have a reasonable basis to seek to prove that President Trump endeavored to obstruct a “pending proceeding” under Section 1505. Like in Section 1512, the term “proceeding” in Section 1505 applies to congressional investigations. Section 1505 explicitly states as much. See *Mitchell*, 877 F.2d at 300 (“If it is apparent that the investigation is a legitimate exercise of investigative authority by a congressional committee in an area within the committee’s purview, it should be protected by § 1505”). Congressional investigations need not have formal committee authorizations to fall into the purview of Section 1505.<sup>791</sup> The House and Senate Intelligence Committee investigations qualify as pending proceedings, and all of President Trump’s potentially obstructive acts—including the January 27, 2017 “loyalty” dinner with Comey at the White House—took place while they were pending.

Like the nexus analysis under Section 1512 which we discussed above, the argument that President Trump’s potentially obstructive acts had the natural and probable effect of interfering with the congressional investigations (an analysis that most courts that have contemplated the issue consider a requirement for 1505) requires further fact finding about how the congressional investigations operated, the President’s familiarity with them and the foreseeable impact of his actions.<sup>792</sup> It is conceivable that President Trump could have caused collateral damage to those investigations without comprehending that he was doing so, which would not satisfy the requirement that the defendant have a specific proceeding in mind when engaging in his obstructive acts. Even with those caveats, however, interference with the congressional investigations in violation of Section 1505 represents another plausible route for investigation and possible prosecution.<sup>793</sup>

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<sup>791</sup> See *Mitchell*, 877 F.2d at 301 (“To give § 1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization.”); *U.S. v. Poindexter*, 725 F. Supp. 13, 22 (D.D.C. 1989) (both “preliminary and informal inquiries” by Congress as well as “formal proceedings” are within the scope of Section 1505).

<sup>792</sup> This analysis presupposes that a nexus requirement is required under Section 1505, though the Ninth Circuit Court of Appeals has held otherwise. See *U.S. v. Bhagat*, 436 F.3d 1140, 1148 (9th Cir. 2006) (“Because Bhagat was charged under Section 1505 with obstructing an agency proceeding and not a judicial one, there was no need to create a causal nexus.”).

<sup>793</sup> There is also a question of whether President Trump attempted to obstruct the congressional investigations in ways other than those described above. During the Summer of 2017, President Trump reportedly berated Senate Majority Leader Mitch McConnell for (among other things) refusing to protect him from investigations into Russian interference in the 2016 election. Trump “repeatedly urged” senior Senate Republicans, including the chairman of the Senate Intelligence Committee, to end the panel’s investigation, using language to the effect of “I hope you can conclude this as quickly as possible,” and that they should “end the investigation swiftly.” Burns and Martin, *New York Times*, Aug. 22, 2017; Raju and Diamond, *CNN*, Aug. 23, 2017; Martin, Haberman, and Burns, *New York Times*, Nov. 30, 2017.

## ii. The FBI investigation

The majority of courts that have considered the question of whether Section 1505 applies to obstruction of an FBI investigation alone have concluded that it does not. The question was first considered in the district court case *U.S. v. Higgins*.<sup>794</sup> In that case, an indictment against a police chief alleged to have alerted the subject of an FBI investigation to surveillance by undercover agents was dismissed; the court's rationale was that a "proceeding" under Section 1505 is limited to the actions of agencies relating to matters "within the scope of the rulemaking or adjudicative power vested in the agency by law."<sup>795</sup> Because the FBI is a purely *investigatory* agency, not an adjudicator, its investigations do not meet the definition of "proceeding."<sup>796</sup> *Higgins* has been widely followed.<sup>797</sup>

Despite the widespread acceptance of *Higgins*, there is at least one case in which an FBI investigation has been held to constitute an "official proceeding," though under Section 1512, not Section 1505.<sup>798</sup> Some scholars have recently questioned the court's reasoning in *Higgins*, citing its "shaky foundations."<sup>799</sup> However, in practical terms, the odds that Special Counsel Mueller rejects the overwhelming majority view and the U.S. Attorney's Manual, which accepts that "investigations by the [FBI] are not Section 1505 proceedings," are low.

## c. President Trump may have attempted to influence grand jury investigations under Section 1503

We turn now to the third of our three statutes, section 1503. As with Section 1512 which we explained above, grand jury investigations, once undertaken, qualify as "proceedings" under Section 1503; however, unlike Section 1512, Section 1503 requires that those proceedings be pending, not just foreseeable.<sup>800</sup> When President Trump fired Comey on May 9, 2017, there was an active grand jury investigation in the Eastern District of Virginia probing General Flynn's lobbying activities on behalf of the Republic of Turkey.<sup>801</sup> Accordingly, President Trump could be charged under Section 1503 for obstructive conduct that took place after the grand jury convened that would have the natural and probable effect of obstructing its investigative activities.<sup>802</sup>

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<sup>794</sup> 511 F. Supp. 453 (W.D. Ky. 1981).

<sup>795</sup> *Id.* at 455.

<sup>796</sup> *Id.*

<sup>797</sup> See, e.g., *U.S. v. Ermoian*, 752 F.3d 1165 (9th Cir. 2013); *U.S. v. McDaniel*, 13–CR–0015, 2013 WL 8476819, at \*12 (N.D. Ga. Oct. 2, 2013); *U.S. v. Simpson*, 09–CR–249, 2011 WL 2880885 (N.D. Tex. Jul. 15, 2011).

<sup>798</sup> See *Hutcherson*, 2006 WL 1875955, at \*3, \*7 (holding that "[g]overnment agency actions, such as the FBI investigation of the defendant, are 'official proceedings' under Section 1512, whether or not a grand jury has been convened because Congress intended to deter obstruction of more than judicial proceedings with Section 1512.").

<sup>799</sup> Hemel and Posner, at 12.

<sup>800</sup> Singh *et. al.*, *Obstruction of Justice*, 54 Am. Crim. L. Rev. 1605, 1610 (Fall 2017).

<sup>801</sup> Perez, Prokupecz, and Brown, *CNN*, May 10, 2017.

<sup>802</sup> Moreover, most courts consider an FBI investigation conducted in concert with a grand jury proceeding to be a covered "proceeding." See, e.g., *U.S. v. Dwyer*, 238 Fed. Appx. 631, 650-51 (1st Cir. 2007) (determining that an FBI investigation was a "judicial proceeding," satisfying Section 1503 where grand jury subpoenas were issued soon after the FBI began investigating because "the FBI was working as an arm of the grand jury by collecting evidence that was eventually presented to the grand jury" and

It is unclear what exactly President Trump knew, if anything, about the Alexandria-based grand jury investigation when he made the decision to fire Comey. The Department of Justice began inquiring about General Flynn's lobbying shortly after the election, and informed Flynn of the investigation by letter dated November 30, 2016.<sup>803</sup> Flynn reportedly informed President Trump's transition lawyer (now White House Counsel) Don McGahn of the investigation on January 4, 2017.<sup>804</sup> It is unclear when the FBI began working with a grand jury to conduct its investigation, though, and whether President Trump knew about it.

The Alexandria-based grand jury investigation appears to have been taken over by Special Counsel Mueller in late May or early June, 2017.<sup>805</sup> Before then, the investigation was being led by Brandon van Grack, an espionage prosecutor based at the Department of Justice, and prosecutors from the Eastern District of Virginia.<sup>806</sup> The extent of the FBI's involvement at the time of the Comey firing is not conclusively established, though Comey did testify on May 3, 2017 that the FBI was coordinating with "two sets of prosecutors, the Main Justice, the National Security Division, and the Eastern District of Virginia U.S. Attorney's Office."<sup>807</sup> Importantly, although both now fall within Mueller's broad purview, the Turkey investigation was conceptually distinct from the FBI investigation into Flynn's conversations with the Russian ambassador, which began in late December 2016 or early January 2017, and ultimately led to Flynn's firing.<sup>808</sup> Without more evidence that the FBI was actively involved in the grand jury's Turkey investigation, and President Trump was aware of it, it is not clear that the pressure that President Trump applied to Director Comey would have had the requisite nexus to that investigation.

As of the date of this publication, grand juries in the Eastern District of Virginia and in Washington, D.C., have issued a number of indictments in the ongoing Russia investigation, including indictments of George Papadopoulos, Rick Gates, Paul Manafort, Michael Flynn, Richard Pinedo, Alex van der Zwaan, 26 Russian nationals, and three Russian organizations.<sup>809</sup> Grand juries have reportedly issued a number of subpoenas relating to the investigation, including to banks seeking records of transactions involving Paul Manafort, and relating to the June 2016 Trump Tower meeting between Manafort, Donald Trump Jr., Kushner, and Russian

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because "the agents were not conducting 'some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority'"). The Seventh Circuit Court of Appeals has held that the government must demonstrate that the FBI was "'integrally involved' in the grand jury investigation, and that the FBI's investigation . . . was 'undertaken with the intention of presenting evidence before [the grand jury]' for the FBI investigation to be sufficiently intertwined with a grand jury investigation to constitute a proceeding under Section 1503. *U.S. v. Macari*, 453 F.3d 926, 936 (7th Cir. 2006). The facts as we currently understand them do not suggest that the FBI's involvement in the Turkey investigation rose to this level.

<sup>802</sup> *Macari*, 453 F.3d at 936.

<sup>803</sup> See Rosenberg and Mazzetti, *New York Times*, May 17, 2017.

<sup>804</sup> See *id.*

<sup>805</sup> Layne, Hosenball, and Ainsley, *Reuters*, Jun. 2, 2017.

<sup>806</sup> *Id.*

<sup>807</sup> James Comey, May 3, 2017 Testimony to the Senate Judiciary Committee.

<sup>808</sup> See Rosenberg and Mazzetti, *New York Times*, May 17, 2017.

<sup>809</sup> See, e.g., Indictment, *U.S. v. Paul Manafort et al.*, No. 17-Cr.-201 (ABJ) (D.D.C. October 31, 2017), ECF No. 13; Superseding Indictment, *U.S. v. Paul Manafort et al.*, 1:18-cr-83 (E.D.Va. Feb. 22, 2018), ECF No. 9, available at <https://www.justice.gov/file/1038391/download>; see *supra* at Sections I.A.2, 3(d), I.C.9, 10, 13, 14.

lawyer Natalia Veselnitskaya.<sup>810</sup> It appears likely but not certain that the grand jury was active by July 8, 2017, when President Trump dictated the misleading statement describing that meeting as “primarily” about the “adoption of Russian children.”<sup>811</sup>

If the investigation was underway at that point, and President Trump was proven to have known of it and to have known that the purpose of the June 2016 meeting was to receive dirt on Clinton, prosecutors may argue that the Trump Jr. statement was intended to, and had the natural and probable effect of, obstructing the investigation. As with Sections 1512 and 1505, the defense would have counter-arguments that the nexus requirement was not met because the statement was made to the press—not investigators or the grand jury—and may have been accorded little credibility by the FBI. However, as discussed above, the president’s statements to the press should be viewed in light of his unparalleled position of power and influence in determining whether they were intended to, and had the natural and probable effect of, influencing testimony or otherwise impacting the proceedings.

Despite the challenges posed by the nexus and proceeding requirements across all three statutes we have surveyed, multiple avenues of prosecution are potentially open. The clearest path appears to be through “foreseeable” congressional or grand jury proceedings under the Section 1512 omnibus clause, which was designed to capture illicit behavior beyond the scope of a pending proceeding. However, because there have been ongoing investigations throughout most of President Trump’s tenure, viable routes to obstruction charges also potentially could be based on the two statutes that require pending proceedings: first, obstruction of congressional investigations under Sections 1505 and 1512(b), and second, obstruction of the Eastern District of Virginia grand jury investigation into Flynn under Section 1503 (though potential obstacles may exist).

#### **4. *There is a real possibility that President Trump may have acted with corrupt intent***

Perhaps the greatest uncertainty regarding the case against President Trump is whether he acted with criminal intent. Assuming his alleged actions are sufficient to constitute obstruction, and the possibility of a criminal or congressional investigation was foreseeable, whether President Trump had criminal intent could very well prove to be the decisive question.

##### **a. *The most appropriate definition of “corruptly” is “motivated by an improper purpose”***

Each of the obstruction laws potentially in play requires President Trump to have acted “corruptly.”<sup>812</sup> The term “corruptly” is peppered throughout criminal law but is notoriously

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<sup>810</sup> See Berthelsen and Farrell, Aug. 10, 2017; Karen Freifeld, Exclusive: Grand Jury Subpoenas Issued in Relation to Russian Lawyer, Trump Jr. Meeting – Sources, *Reuters*, Aug. 3, 2017, available at <http://www.reuters.com/article/us-usa-trump-russia-subpoena-idUSKBN1AJ2V0>.

<sup>811</sup> United States Motion to Seal All Filings Associated with the Criminal Complaint, *U.S. v. George Papadopoulos*, No. 17-Cr.-182 (RDM) (D.D.C. July 28, 2017), ECF No. 3, at ¶¶ 2, 3; Schmidt, Haberman, Savage, and Apuzzo, *New York Times*, Jun. 2, 2018.

<sup>812</sup> For a prosecution under Section 1512(b) for threatening, intimidating, or misleading a witness, the government only needs to prove that the act was committed knowingly and with a specific intent to impact witness testimony as described in the statute. Courts do not require a showing of corrupt intent under Section 1512(b) except in prosecutions for corrupt persuasion. *U.S. v. Davis*, 854 F.3d 1276, 1289 (11th

vague.<sup>813</sup> In the context of the obstruction statutes, courts have defined it in various ways, and at least one court has suggested that, instead of a uniform definition, a case-by-case approach may be appropriate.<sup>814</sup>

Some circuit courts have indicated that one acts “corruptly” whenever he or she acts with the specific intent to obstruct justice.<sup>815</sup> This view is sound in most circumstances, as efforts by private citizens to obstruct a proceeding are inherently corrupt, but there are certain circumstances, such as invoking the Fifth Amendment, where a citizen has a legal right to obstruct a proceeding.<sup>816</sup> Similarly, the President of the United States may have valid reasons to interfere with a covered proceeding. For instance, a president might legitimately conclude that a particular investigation is consuming too many resources and ask that the FBI prioritize other law enforcement efforts. Although the president’s lawful authority to make decisions that can impact criminal investigations does not immunize him from charges of obstruction, it is relevant to the question of whether he acted with corrupt intent.

For this reason, the most appropriate definition of “corruptly” —and the one adopted by most courts of appeals—is “motivated by an improper purpose.”<sup>817</sup> This definition, already in use

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Cir. 2017) (holding that charges under Sections 1503 and 1512(b)(1) are not multiplicitous and that the elements of Section 1512(b)(1) are “that (1) the defendant knowingly used intimidation, physical force, or threats against another person; and (2) this conduct was intended to ‘influence, delay, or prevent the testimony of any person in an official proceeding.’”). As explained in Section II.A.2, *supra*, and for the reasons discussed in Section II.A.4, *infra*, there is a real possibility that President Trump’s threatening, misleading, or intimidating conduct was intended to prevent, influence, or delay Comey or potentially others from providing congressional or grand jury testimony in violation of Section 1512(b)(1).

<sup>813</sup> See, e.g., *U.S. v. Brady*, 168 F.3d 574, 578 (1st Cir. 1999) (“There is no hope in one opinion of providing a definitive gloss on the word ‘corruptly’; neither would it be wise to try.”).

<sup>814</sup> See *U.S. v. Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985) (The term corruptly “takes on different meanings in various contexts.”).

<sup>815</sup> See, e.g., *Cueto*, 151 F.3d at 630-31 (7th Cir. 1998) (stating that to prove that the defendant acted corruptly, that is, “with the purpose of obstructing justice,” the government “only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice”); *U.S. v. Rasheed*, 663 F.2d 843, 852 (9th Cir.1981) (holding that the word “corruptly” as used in the statute means that the act must be done with the purpose of obstructing justice); *U.S. v. Ogle*, 613 F.2d 233, 239 (10th Cir.1979); (explaining that “the term ‘corruptly,’ does not superimpose a special and additional element on the offense such as a desire to undermine the moral character of a juror. Rather, it is directed to the effort to bring about a particular result such as affecting the verdict of a jury or the testimony of a witness .... This is *per se* an obstruction of justice ....”); see also Ninth Circuit Model Jury Instructions: Criminal § 8.131 cmt. (2017) (“As used in § 1503, ‘corruptly’ means that the act must be done with the purpose of obstructing justice”) (citing *Rasheed*); Fifth Circuit Jury Instructions § 2.63A (“[D]efendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.”).

<sup>816</sup> See *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005) (acknowledging that under limited circumstances, a defendant is privileged to obstruct the prosecution of a crime – through the legal right to avoid self-incrimination, for instance.).

<sup>817</sup> See *U.S. v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978) (interpreting “corruptly” under Section 1503 to mean “motivated by an improper purpose”); *U.S. v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (“[C]orruptly,” for purposes of 1512(c), means “acting with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede, or obstruct the proceeding.”); *U.S. v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (“Section 1512(b) does not prohibit all persuasion but only that which is ‘corrupt[ ],’ or ‘motivated by an improper purpose.’”); *U.S. v. Haldeman*, 559 F.2d 31, 114–15 (D.C. Cir. 1976) (finding the following instruction proper: “The word, ‘corruptly,’ as used in this statute

in the context of Section 1503, was adopted by Congress in The False Statements Accountability Act of 1996, which provides that “[a]s used in Section 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, altering, or destroying a document or other information.”<sup>818</sup> The passage of that bill became necessary after the U.S. Court of Appeals for the District of Columbia held that the term “corruptly” was unconstitutionally vague in overturning the conviction of John Poindexter, President Reagan’s national security advisor, for obstruction of Congress in connection with the Iran/Contra scandal.<sup>819</sup>

Although “improper purpose” is hardly narrower than “corruptly,”<sup>820</sup> it appropriately frames the question of whether President Trump’s alleged attempts to obstruct the Russia or Flynn investigations were a legal exercise of his proper authority or for an improper purpose and therefore an illegal abuse of power.

**b. If President Trump interfered with an investigation to benefit himself, his family, or his top aides, that would likely constitute an improper purpose**

Although fact-finding is ongoing, it appears that President Trump acted with an improper purpose because his actions were undertaken to influence the Russia or Flynn investigations to benefit or protect himself, his family, or his top aides.<sup>821</sup> In determining whether obstructive actions are corrupt, courts often consider whether the actions constitute attempts to attain some sort of benefit or advantage. For example, in *U.S. v. Ogle*, the Tenth Circuit explained that “corruption” is commonly defined as “[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.”<sup>822</sup> In *U.S. v. Cueto*, the court explained that “it is the corrupt endeavor to protect the illegal gambling operation and safeguard his own financial interest which motivated Cueto’s otherwise legal conduct, that separates his conduct from that which is legal.”<sup>823</sup> And, in *U.S. v. Baldeo*, the court determined that a defendant-politician’s act of persuading “Straw Donors” not to cooperate with an FBI investigation into the defendant’s alleged violation of campaign finance laws violated Section 1512(b)(3) because the defendant’s

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simply means having an evil or improper purpose or intent. In terms of proof, in order to convict any Defendant of obstruction of justice, you must be convinced beyond a reasonable doubt that the Defendant made some effort to impede or obstruct the Watergate investigation or the trial of the original Watergate defendants”).

<sup>818</sup> 18 U.S.C. § 1515(b).

<sup>819</sup> *U.S. v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).

<sup>820</sup> See *U.S. v. Reeves*, 752 F.2d 995, 998-1000 (5th Cir. 1985) (criticizing the definition of “corruptly” as “improper motive or bad or evil purpose” as overly broad and vague).

<sup>821</sup> Professors Hemel and Posner suggest in their article on presidential obstruction that a president will be considered to have acted with an improper purpose if he “seeks to advance interests that are narrowly personal (e.g., in the well-being of family members), pecuniary (e.g., in the procurement of a bribe), or partisan (e.g., in winning the next election or in aiding the electoral prospects of a party member).” See Hemel and Posner, *Presidential Obstruction of Justice*, at 30; see also *id.* at 31 (“The president would be guilty of obstruction if he significantly interferes with an investigation because he believes that it will likely bring to light evidence of criminal activity or other wrongful or embarrassing conduct by himself, his family members, or his top aides.”).

<sup>822</sup> 613 F.2d 233, 238 (2d Cir. 1979) (citation omitted).

<sup>823</sup> 151 F.3d at 631.

actions were not merely to “[t]ell individuals to exercise their constitutional right not to testify,” as defendant argued, but also to “‘protect’ himself.”<sup>824</sup>

In analyzing whether President Trump acted with the improper motivation of seeking to benefit or protect himself, his family, or his aides, it is important to consider the nature of the “proceedings” he allegedly influenced. Of course, one cannot simply divine a person’s intent by looking at the nature of what he allegedly obstructed. But, the fact that the Russia and Flynn investigations could have enormous impacts on the personal, financial, and political wellbeing of the president himself, several of his family members, including his son and his son-in-law, and many of his closest advisers should be noted at the outset of an analysis of whether he may have acted with corrupt intent.

In fact, the notion that the president may have been motivated to protect not only himself and his presidency, but also others such as Trump Jr., Kushner, the Trump Organization’s business dealings, and the Kushner family’s business affairs, has become even more plausible as new details have come to light, such as:

- Reports regarding Trump Jr.’s connections to WikiLeaks;<sup>825</sup>
- Reports that Kushner may have been involved in the decision to fire Comey and may have been motivated by fears related to his personal finances;<sup>826</sup>
- Reporting that President Trump is concerned about his son’s legal jeopardy, particularly in relation to the June 9, 2016 meeting;<sup>827</sup>
- Kushner and Donald Trump Jr.’s involvement in the June 9 meeting;<sup>828</sup>
- The possibility, which has not been confirmed and has been denied by President Trump, that Trump Jr. informed his father about the June 9 Trump Tower meeting contemporaneously with its occurrence;<sup>829</sup>
- President Trump’s comments that a view into his finances would be crossing a line;<sup>830</sup> and
- The potential perjury of those who disavowed knowledge of contacts with Russians in sworn testimony (inasmuch as President Trump may have wanted to protect them from

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<sup>824</sup> 2013 WL 5477373, at \*4 (S.D.N.Y. Oct. 2, 2013); see also *id.* (quoting *U.S. v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2007)) (“The Second Circuit has held that ‘suggesting’ a witness ‘invoke the Fifth Amendment privilege’ to ‘ensure that [the witness] did not implicate’ the defendant in criminal conduct is an ‘improper purpose,’ which satisfies the corrupt persuasion requirement.”).

<sup>825</sup> See, e.g., Ioffe, *Atlantic*, Nov. 13, 2017.

<sup>826</sup> Perez, Brown, and Prokupecz, *CNN*, Nov. 3, 2017.

<sup>827</sup> Parker and Helderman, *Washington Post*, Aug. 5, 2018.

<sup>828</sup> Becker, Apuzzo, and Goldman, *New York Times*, Jul. 8, 2017.

<sup>829</sup> *Id.*; see *supra* at Section.I.D.18 (discussion of June 9 meeting, Cohen claim that President Trump knew about the meeting, and the July 8, 2017 statement about the June 9 meeting).

<sup>830</sup> Excerpts from the Times’s Interview with Trump, *New York Times*, Jul. 19, 2017; see also Baker, Schmidt, and Haberman, *New York Times*, Jul. 19, 2017.

liability or to prevent them from becoming witnesses against him or his family members).<sup>831</sup>

**c. Corrupt intent may be proved by the surrounding facts and circumstances**

In addition to the nature of the proceedings that the president may have allegedly influenced, prosecutors will consider many other facts and circumstances surrounding President Trump's potentially obstructive actions as case law makes clear that the requisite state of mind for obstruction of justice may be inferred from such information.<sup>832</sup> President Trump's behavior is suggestive of corrupt intent with respect to the Russia and Flynn investigations. For example, President Trump has articulated multiple, shifting rationales for Comey's firing. The first explanation for terminating Comey, as articulated by the president in a May 10, 2017, tweet<sup>833</sup> and in the Rosenstein memo, was that Comey had mishandled the investigation into Hillary Clinton's email and had lost the confidence of his subordinates.<sup>834</sup> Soon thereafter, President Trump reversed course and said that he was going to fire Comey regardless of what the Rosenstein memo said, admitting that the Russia investigation was on his mind when he made the decision to fire Comey.<sup>835</sup> Shifting explanations are classic indicia of guilty intent.<sup>836</sup> Moreover, as explained in greater detail above, President Trump's apparent communications to

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<sup>831</sup> See, e.g., Estepa, *USA Today*, Jun. 13, 2017; Schmidt and LaFraniere, *New York Times*, Dec. 4, 2017.

<sup>832</sup> *Cueto*, 151 F.3d at 631 ("Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive."); see also *U.S. v. Brooks*, 111 F.3d 365, 372 (4th Cir. 1997) ("Because evidence of intent will almost always be circumstantial, we have held that a defendant may be found culpable where the reasonable and foreseeable consequences of his acts are the obstruction of justice, concluding that 'when a defendant intentionally seeks to corrupt, the foreseeable consequence of which is to obstruct justice, he has violated § 1503.'") (citation omitted); *U.S. v. Little*, 611 F. App'x 851, 855 (6th Cir. 2015) (rejecting the defendant's contention that the government must show that he expressed his intent to obstruct justice under Section 1503 and stating that "[a]n explicit specific intent to obstruct, therefore, is not necessary for conviction."); *U.S. v. Petzold*, 788 F.2d 1478, 1485 (11th Cir. 1986) (in the context of a Section 1503 prosecution, "intent may be inferred by a jury from all the surrounding facts and circumstances."); *Bedoy*, 827 F.3d at 509 ("The prosecution can prove the defendant[s] intent or knowledge by circumstantial evidence alone" in a Section 1512(c)(2) case) (quotations and citations omitted).

<sup>833</sup> See <https://twitter.com/realdonaldtrump/status/862265729718128641> ("James Comey will be replaced by someone who will do a far better job, bringing back the spirit and prestige of the FBI.").

<sup>834</sup> See Rosenstein, *U.S. Dep't of Justice*, May 9, 2017; Merica, *CNN*, May 12, 2017.

<sup>835</sup> *Partial Transcript: NBC News Interview with Donald Trump*, *CNN*, May 11, 2017 ("And in fact, when I decided to do it, I just said to myself, I said, 'You know this Russia thing with Trump and Russia is a made-up story. It's an excuse by the Democrats for having lost an election that they should have won.'").

<sup>836</sup> For instance, the Supreme Court held that the government's shifting explanations for striking two black jurors were evidence of discriminatory intent in *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) ("There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,' we are left with the firm conviction that the strikes of [two black jurors] were 'motivated in substantial part by discriminatory intent.'"). In wrongful termination cases, shifting explanations for a firing are also held to be circumstantial evidence of pretext. See, e.g., *Kwan v. Andalex Grp. LLC*, 737 F.3d 834 (2d Cir. 2013).

Comey to drop the Flynn investigation bore potentially corrupt hallmarks—they were executed behind closed doors, and they were interpreted as an instruction to cease the investigation.

Examples of publicly reported actions by President Trump potentially supportive of a finding of corrupt intent include the following:

- Ordering Deputy Attorney General Rosenstein to write a memo that was critical of Comey's handling of the Clinton investigation, then using the memo as a cover story for the Comey firing (over Rosenstein's objections), despite having already written another termination letter that was never sent.<sup>837</sup>
- Repeatedly clearing the room before making his requests related to the Russia and Flynn investigations, which is suggestive of knowledge of an improper purpose.<sup>838</sup>
- Making repeated demands for loyalty from Comey.<sup>839</sup>
- Telling Comey that he "hopes" Comey can "let go" of the Flynn investigation because Flynn is a "good guy."<sup>840</sup>
- Asking DNI Coats on March 22, 2017 to intervene with Comey to get the FBI to back off the investigation into Flynn.<sup>841</sup>
- Making phone calls in March 2017 to DNI Coats and NSA Director Rogers asking them to deny the existence of evidence of collusion during the election.<sup>842</sup>
- Telling Lavrov and Kislyak: "I just fired the head of the FBI. He was crazy, a real nut job. I faced great pressure because of Russia. That's taken off."<sup>843</sup>
- Telling *New York Times* reporters that if Mueller were to look at his finances and his family's finances, it would be "a violation" and would cross a red line.<sup>844</sup>
- Making statements decrying Attorney General Sessions' decision to recuse himself from the Russia investigation, including that he would not have appointed Sessions had he known that he was going to do so,<sup>845</sup> and telling Sessions to resign in the wake of the special counsel's appointment.<sup>846</sup>

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<sup>837</sup> See Rosenstein, *U.S. Dep't of Justice*, May 9, 2017; Schmidt and Haberman, *New York Times*, Sept. 1, 2017; Nicholas and Bender, *Wall Street Journal*, Sept. 1, 2017.

<sup>838</sup> Comey Stmt., Jun. 8, 2017; Entous, *Washington Post*, Jun. 6, 2017.

<sup>839</sup> Comey Stmt., Jun. 8, 2017.

<sup>840</sup> *Id.*

<sup>841</sup> Entous, *Washington Post*, Jun. 6, 2017.

<sup>842</sup> *Id.*; Entous and Nakashima, *Washington Post*, May 22, 2017.

<sup>843</sup> Apuzzo, Haberman and Rosenberg, *New York Times*, May 19, 2017.

<sup>844</sup> See Excerpts from the Times's Interview with Trump, *New York Times*, Jul. 19, 2017; see also Baker, Schmidt, and Haberman, *New York Times*, Jul. 19, 2017.

<sup>845</sup> See *id.*

<sup>846</sup> Schmidt, *New York Times*, Jan. 4, 2018.

- Directing McGahn to fire the special counsel, an act McGahn refused to execute.<sup>847</sup>
- Dictating Donald Trump Jr.'s misleading statement describing why he and other members of the Trump campaign met with a lawyer linked to the Kremlin in June of 2016, and his advisors' repeated statements that President Trump was not involved in crafting the message before it was publicly revealed in June 2018 that President Trump's attorneys had acknowledged President Trump "dictated" the statement.<sup>848</sup>
- Tweeting on the Sunday before the Manafort, Gates, and Papadopoulos indictments were publicly revealed and following news speculation that one would be handed down shortly, that ". . .The Dems are using this terrible (and bad for our country) Witch Hunt for evil politics, but the R's..." "...are now fighting back like never before. There is so much GUILT by Democrats/Clinton, and now the facts are pouring out. DO SOMETHING!"<sup>849</sup>
- Telling *The New York Times* that one of his "biggest disappointments . . . was discovering that he is not supposed to personally direct law enforcement decisions by the Justice Department and the F.B.I."<sup>850</sup>
- Acknowledging in a tweet (possibly written by his attorney) that he knew that Flynn had committed a crime when he fired him: "I had to fire General Flynn because he lied to the Vice President and the FBI. He has pled guilty to those lies. It is a shame because his actions during the transition were lawful. There was nothing to hide!"<sup>851</sup>
- Telling the press, "I don't want to talk about pardons with Michael Flynn yet. We'll see what happens, let's see. I can say this: When you look at what's gone on with the FBI and with the Justice Department, people are very, very angry."<sup>852</sup>
- Suggesting that "Republicans should finally take control!" (Via Twitter: "The single greatest Witch Hunt in American history continues. There was no collusion, everybody including the Dems knows there was no collusion, & yet on and on it goes. Russia & the world is laughing at the stupidity they are witnessing. Republicans should finally take control!")<sup>853</sup>

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<sup>847</sup> Schmidt and Haberman, *New York Times*, Jan. 25, 2018.

<sup>848</sup> See Parker, Leonnig, Rucker, and Hamburger, *Washington Post*, Jul. 31, 2017; Schmidt, Haberman, Savage, and Apuzzo, *New York Times*, Jun. 2, 2018; Apuzzo, *New York Times*, Jun. 4, 2018.

<sup>849</sup> <https://twitter.com/realDonaldTrump/status/924639422066384896>; <https://twitter.com/realDonaldTrump/status/924641278947622913>. While Trump's counsel said that the tweet was not in relation to the Special Counsel's investigation in nonetheless stands apart because of its explicit directive to "DO SOMETHING!" right after public reports that indictments were imminent.

<sup>850</sup> Baker, *New York Times*, Nov. 3, 2017. The article also quoted Trump saying: "I'm really not involved with the Justice Department,' . . . 'I'd like to let it run itself. But honestly, they should be looking at the Democrats. They should be looking at Podesta and all of that dishonesty. They should be looking at a lot of things. And a lot of people are disappointed in the Justice Department, including me.'" *Id.*

<sup>851</sup> <https://twitter.com/realDonaldTrump/status/937007006526959618>.

<sup>852</sup> Klein, *CNN*, Dec. 15, 2017.

<sup>853</sup> <https://twitter.com/realDonaldTrump/status/951109942685126656>.

- Repeatedly attacking the Mueller investigation in a variety of ways,<sup>854</sup> including tweeting on August 1, 2018, that “..This is a terrible situation and Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!”<sup>855</sup>

The publicly reported allegations potentially supporting a finding of President Trump’s guilty state of mind continue to mount. Special Counsel Mueller is almost certainly looking for evidence of corrupt intent, including President Trump’s private statements to subordinates, other government officials, and friends. The evidence that Mueller is gathering may be exonerative or it may definitively prove that the president acted with an improper purpose, but what has been reported so far suggests the latter.

#### d. ‘Mixed’ motives do not preclude finding corrupt intent

Much of the commentary arguing that President Trump did not have the requisite criminal intent for obstruction focuses on his potentially “innocent” motives for his allegedly obstructive acts. For instance, many have speculated that President Trump was driven to put in a good word with Comey on Flynn’s behalf by friendship and personal loyalty.<sup>856</sup> Even critics of President Trump acknowledge that his frustration with Director Comey could possibly spring from the President’s dislike of insufficiently obsequious subordinates, or the two men’s radically contrasting personality traits, or President Trump’s jealousy of the media attention Comey received.<sup>857</sup> Some have even speculated that President Trump fired Comey because Comey is so tall.<sup>858</sup>

But the law does not require the government to prove that obstruction was a defendant’s sole, or even primary, purpose. Most courts that have considered mixed motives in the obstruction of justice context have determined that so long as a defendant’s obstructive acts were motivated in part by a corrupt motive, it does not matter if a defendant was driven by other, even altruistic, motives.<sup>859</sup> Courts “recognize[] that there may be multiple motives for human

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<sup>854</sup> See Beckwith, *Time Magazine*, Jul. 30, 2018 (originally published Jun. 7, 2018).

<sup>855</sup> <https://twitter.com/realdonaldtrump/status/1024646945640525826>.

<sup>856</sup> See, e.g., Andrew C. McCarthy, *Can You Obstruct a Fraud?*, *National Review*, Jun. 15, 2017, available at <http://www.nationalreview.com/article/448674/trump-wanted-comey-refute-false-notion-he-was-suspect> (arguing that Trump “lobbied Comey on Flynn’s behalf” because he felt “anguish over having to fire his friend” a “combat veteran who had served the country with distinction for over 30 years” and not for any corrupt motive).

<sup>857</sup> See, e.g., Shannon Pettypiece, Jennifer Jacobs and Margaret Talev, *Trump’s Premium on Loyalty Poses Hurdle in Search for FBI Chief*, *Bloomberg Politics*, May 14, 2017, available at <https://www.bloomberg.com/news/articles/2017-05-14/trump-s-premium-on-loyalty-poses-hurdle-in-search-for-fbi-chief> (“Asked during a 2014 speech about the trait he most looks for in an employee, [Trump’s] answer was unequivocal: loyalty.”); Peter Baker and Michael D. Shear, *Trump Shifts Rationale for Firing Comey, Calling Him a ‘Showboat,’* *New York Times*, May 11, 2017, available at <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html>.

<sup>858</sup> See Kathleen Parker, *A Theory: Trump Fired Comey Because He’s Taller*, *Washington Post*, May 12, 2017, available at [https://www.washingtonpost.com/opinions/a-theory-trump-fired-comey-because-hes-taller/2017/05/12/ca2378f0-3751-11e7-b373-418f6849a004\\_story.html](https://www.washingtonpost.com/opinions/a-theory-trump-fired-comey-because-hes-taller/2017/05/12/ca2378f0-3751-11e7-b373-418f6849a004_story.html).

<sup>859</sup> See, e.g., *U.S. v. Machi*, 811 F.2d 991, 996-97 (7th Cir. 1987) (approving jury instructions for a 1503 violation which read: “Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant’s only or even main purpose was to obstruct the due

behavior.”<sup>860</sup> This basic concept is not limited to the obstruction context; it applies throughout the body of criminal law.<sup>861</sup> An improper motive is not “negated by the simultaneous presence of another motive” as well.<sup>862</sup> Although pundits have offered many plausible explanations for the actions outlined above, so long as the government proves that President Trump acted in part for a corrupt reason, the existence of other, uncorrupt motives are not exonerative.

#### e. Friendship with Flynn

The true nature of President Trump’s relationship with Flynn remains murky. But even if President Trump was acting to obstruct the investigation into Flynn out of mere friendship, as opposed to something more explicitly nefarious like covering up Flynn’s contact with Russian agents, President Trump could still be acting with an improper purpose. For example, in *U.S. v. Matthews*, the Seventh Circuit upheld an obstruction of justice conviction, under Section 1512(c)(1), of a police officer that attempted to thwart the investigation of a close friend for federal firearm offenses where “the apparent motive for [defendant’s] obstructive acts—helping a friend escape legitimate prosecution—[wa]s surely improper.”<sup>863</sup> Similarly, in *U.S. v. Durham*, the Third Circuit affirmed a Section 1505 conviction of a Philadelphia police officer who was tasked with assisting in the execution of search and arrest warrants in connection with an investigation into a cocaine distribution operation.<sup>864</sup> When the officer learned that the home of his friend’s sister was among the locations to be searched, he called his friend to warn him that his sister might be in danger.<sup>865</sup> The court explained that “[e]ven if [the officer’s] primary motivation was to extricate the sister of his childhood friend from a troubled situation, he still could have intended to obstruct the [] investigation to accomplish this goal.”<sup>866</sup>

It is certainly possible that President Trump’s actions to potentially influence the Flynn investigation—such as his statement to Comey that he “hope[s]” he can “let [] go” of the investigation into Flynn and his request that DNI Coats ask Comey to back off the Flynn investigation—were undertaken because President Trump wanted to protect his friend.<sup>867</sup>

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administration of justice.”); *Cueto*, 151 F.3d at 631 (same); *Brand*, 775 F.2d at 1465 (“[O]ffending conduct must be prompted, at least in part, by a corrupt motive.”).

<sup>860</sup> *U.S. v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014).

<sup>861</sup> See, e.g., *Anderson v. U.S.*, 417 U.S. 211, 226 (1974) (conspiracy); *Spies v. U.S.*, 317 U.S. 492, 499, (1943) (tax-evasion); *U.S. v. Biaggi*, 909 F.2d 662, 683 (2d Cir.1990) (bribery).

<sup>862</sup> *Smith*, 831 F.3d at 1217.

<sup>863</sup> 505 F.3d 698, 706-707 (7th Cir. 2007).

<sup>864</sup> 432 Fed. Appx. 88, 89 (3d Cir. 2011).

<sup>865</sup> *Id.*

<sup>866</sup> *Id.* at 92 n.7; see also *Lazzerini*, 611 F.2d at 941-42 (explaining that where appellant convinced the sister of a juror on a trial in which one of appellant’s friends was the defendant to “assert her own friendship with [the defendant] and her own belief in his niceness,” the jury could have believed, “in light of the timing and persistence and urgency of appellant’s talks” with the sister, “appellant’s known friendship with [the juror],” and the content of the message, that appellant’s purpose was “improperly and corruptly to influence [the juror].”); *U.S. v. Barfield*, 999 F.2d 1520 (11th Cir. 1993) (no requirement that government prove defendant stood to gain personally from the obstruction); *Dimora*, 879 F. Supp. 2d at 730–31, *aff’d*, 750 F.3d 619 (6th Cir. 2014) (rejecting defendant’s argument in his motion for new trial that his conviction was against the weight of the evidence because the gifts he received were motivated by friendship and not extortion).

<sup>867</sup> Comey, Jun. 8, 2017; Entous, *Washington Post*, Jun. 6, 2017.

However, courts have indicated that such a motivation may still be considered improper and therefore sufficient to establish corrupt intent.

#### f. Meritless investigation

President Trump has variously objected that the Russia investigation is a “taxpayer funded charade,” “phony,” a “made-up story,” and on numerous occasions, a “witch hunt.” He may argue that his actions were lawful because he believed he was exercising his authority as the head of the executive branch to direct investigative resources in a productive manner, and therefore acting with a proper purpose.<sup>868</sup>

During the trial of Oliver North, the U.S. Court of Appeals for the District of Columbia Circuit speculated in the Section 1505 context that an “executive branch official . . . might call the chairman of a congressional committee convened to investigate some wrongdoing and say, ‘We both know this investigation is really designed to embarrass the President (or a Senator), not to investigate wrongdoing. Why don’t you call it off?’ . . . surely intend[ing] to obstruct or impede the inquiry, but it does not necessarily follow that he does so corruptly.”<sup>869</sup>

Notwithstanding this limited dictum, a prosecutor could still potentially find sufficient evidence of President Trump’s corrupt intent. First, this defense would directly conflict with various statements made by President Trump and the White House that the president did *not* attempt to shut down an investigation.<sup>870</sup> Second, there is a distinction between an attempt to persuade a congressional committee to terminate an investigation, as in *North*, and the president requesting that the FBI Director terminate a criminal investigation, then firing the Director after he did not obey that request. Third, the hypothetical is a narrow one, and does not incorporate the many badges of corrupt intent here at issue and which we have detailed above. Fourth, by stating “not necessarily,” the dictum recognizes that there may be circumstances where such a statement is evidence of corrupt intent.

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<sup>868</sup> It should be noted, however, that one can be guilty of obstructing an investigation even if one is innocent as to the underlying charge being investigated. See *U.S. v. Hopper*, 177 F.3d 824, 831 (9th Cir. 1999).

<sup>869</sup> *U.S. v. North*, 910 F.2d 843, 882 (D.C. Cir. 1990), *opinion withdrawn and superseded in part on reh’g*, 920 F.2d 940 (D.C. Cir. 1990).

<sup>870</sup> See, e.g., Michael S. Schmidt, [Comey Memo Says Trump Asked Him to End Flynn Investigation](https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html?mcubz=3&r=0), *New York Times*, May 16, 2017, available at <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html?mcubz=3&r=0> (quoting a White House statement that “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.”); [Read: President Trump’s Lawyer’s Statement on Comey Hearing](http://www.cnn.com/2017/06/08/politics/marc-kasowitz-statement-trump-comey/index.html), *CNN*, Jun 8, 2017, available at <http://www.cnn.com/2017/06/08/politics/marc-kasowitz-statement-trump-comey/index.html> (“[T]he President never, in form or substance, directed or suggested that Mr. Comey stop investigating anyone, including suggesting that that Mr. Comey ‘let Flynn go.’”); The White House, [Press Daily Briefing by Press Secretary Sean Spicer -- # 48](https://www.whitehouse.gov/the-press-office/2017/05/15/press-daily-briefing-press-secretary-sean-spicer-48), *White House Office of the Press Secretary*, May 15, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/05/15/press-daily-briefing-press-secretary-sean-spicer-48> (“And I think that we’ve got to be very clear as to the reason that the President took the actions that he did. He knew that what he did could be detrimental to himself, it could lengthen the investigation, but he knew it was the right thing for the country, the right thing for the FBI, and the right thing to get to the bottom of this.”).

Although the question of whether President Trump demonstrated the requisite criminal intent to obstruct justice must wait until the conclusion of Mueller’s investigation or other fact-finding for a definitive answer, the facts and allegations that have to date come to light strongly suggest that his intentions were improper.

## **B. Potential conspiracy to obstruct justice in violation of 18 U.S.C. § 371**

While thus far we have focused solely on President Trump’s efforts to impede investigations into General Flynn’s wrongdoing and Russia’s election meddling, he may not have acted alone. For that reason, a potential case against President Trump could also include charges of criminal conspiracy under Section 371 of Title 18.

Section 371 makes it a crime for two or more people either to agree to commit “any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose” and act to achieve the object of the conspiracy.<sup>871</sup> A conspiracy may be charged even if the underlying offense was attempted but did not actually occur.<sup>872</sup> Courts have recognized that the statute sweeps broadly enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any government department.<sup>873</sup> Criminal conspiracy requires proof of three elements: (1) an agreement between two or more people to pursue an illegal goal; (2) the defendant’s knowledge of the illegal goal and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the conspiracy.<sup>874</sup>

The illegal goal (or object) of the conspiracy may be either to violate a federal law (the “offense clause”) or to defraud the United States or any agency thereof (the “defraud clause”). The “offense clause” of Section 371 applies to any conspiracy that violates, or is intended to violate, a federal statute.<sup>875</sup> President Trump’s obstruction or attempt to obstruct justice in violation of 18 U.S.C. §§ 1503, 1505, or 1512 would satisfy the offense clause. The “defraud clause” is even broader, requiring the government only to show that the defendant entered into an agreement “to obstruct a lawful government function by deceitful or dishonest means.”<sup>876</sup> The U.S. Attorneys’ Manual defines this to include “obstructing, in any manner, a legitimate government function.”<sup>877</sup> Courts have held that interference with a federal agency’s investigation satisfies the defraud clause.<sup>878</sup>

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<sup>871</sup> 18 U.S.C. § 371.

<sup>872</sup> *Salinas v. U.S.*, 522 U.S. 52, 65 (1997) (“It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.”).

<sup>873</sup> *Cueto*, 151 F.3d at 635.

<sup>874</sup> 18 U.S.C. § 371; see *U.S. v. Fisch*, 851 F.3d 402, 406-7 (5th Cir. 2017).

<sup>875</sup> Damon Porter, *Federal Criminal Conspiracy*, 54 Am. Crim. L. Rev. 1307, 1313 (2017).

<sup>876</sup> *U.S. v. Conti*, 804 F.3d 977, 980-81 (9th Cir. 2015).

<sup>877</sup> U.S. Dep’t of Justice, *U.S. Attorneys’ Manual*, Criminal Resource Manual § 925.

<sup>878</sup> See, e.g., *Cueto*, 151 F.3d at 636 (finding acts including impairing an FBI investigation and impeding inquiries of the grand jury fall within the scope of the defraud clause under Section 371); *U.S. v. Mitchell*, 372 F. Supp. 1239, 1254 (S.D.N.Y. 1973) (finding that “the alleged efforts of the defendants to influence the lawful functions of the S.E.C., while concealing the purported motive for those efforts, [are] within the range of activities proscribed by 18 U.S.C. § 371”).

President Trump's well-documented demands for "loyalty" from his subordinates<sup>879</sup> raise the specter that he may have conspired with others, including senior White House officials. If members of the president's inner circle met his demands for loyalty by attempting to obstruct the Russia and Flynn investigations, there may be a basis to bring criminal conspiracy charges. Indeed, White House Counsel Don McGahn was so concerned about his own potential liability that he reportedly provided extraordinary cooperation with prosecutors in order to curry their favor and inoculate himself.<sup>880</sup> It also is possible that administration officials took the initiative with President Trump for improper motives of their own.<sup>881</sup> Indeed, the possible co-conspirator liability is not solely limited to those working in the administration.<sup>882</sup>

For example, there have been media reports that Comey was fired at the urging of Senior White House Adviser Jared Kushner, President Trump's son-in-law and a senior adviser to the President.<sup>883</sup> The FBI reportedly is investigating a series of meetings that Kushner held in December 2016 with then-Russian ambassador to the United States Sergey Kislyak and, separately, with Sergey Gorkov, the head of a Russian bank that has been subject to U.S. sanctions since 2014.<sup>884</sup> In December 2016, Kushner "directed Flynn to contact officials from foreign governments, including Russia," about their position on a resolution before the United Nations Security Council on the issue of Israeli settlements, and Kushner may have therefore had knowledge about Flynn's criminal exposure and may have been concerned about whether an investigation into Flynn would implicate Kushner.<sup>885</sup> Kushner was reportedly with President Trump when the Comey firing was being deliberated, and the Special Counsel interviewed Kushner in April 2018 for the second time, with a reported focus on "potential Russian collusion, his contacts with foreigners during the transition and obstruction-related issues, including the firing of then-FBI Director James Comey."<sup>886</sup> Although Kushner's precise role in the decision to fire Comey remains unclear, his involvement merits scrutiny given the FBI's ongoing investigation into his dealings with Russia.

If evidence indicates that President Trump reached an agreement with anyone in his inner circle to obstruct justice, there may be a basis to bring additional charges against President Trump under Section 371. It is unlikely that Kushner or any other senior administration official would have formally agreed to a request from President Trump to obstruct

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<sup>879</sup> See, e.g., Comey Stmt., Jun. 8, 2017; Schmidt, *New York Times*, May 11, 2017.

<sup>880</sup> Schmidt and Haberman, *New York Times*, Aug. 18, 2018.

<sup>881</sup> See Maggie Haberman, Glenn Thrush, Michael S. Schmidt and Peter Baker, 'Enough Was Enough': How Festering Anger at Comey Ended in His Firing, *New York Times*, May 10, 2017, available at <https://www.nytimes.com/2017/05/10/us/politics/how-trump-decided-to-fire-james-comey.html>; Gabriel Sherman, Steve Bannon Readies His Revenge, *Vanity Fair*, Aug. 20, 2017, available at <https://www.vanityfair.com/news/2017/08/steve-bannon-readies-his-revenge>.

<sup>882</sup> Norman L. Eisen, Caroline Fredrickson and Laurence H. Tribe, Is Devin Nunes Obstructing Justice?, *New York Times*, Feb. 12, 2018 available at <https://www.nytimes.com/2018/02/12/opinion/devin-nunes-obstruction-justice.html>.

<sup>883</sup> Glenn Thrush, Trump Says There Was 'No Collusion' With the Russians, *New York Times*, May 18, 2017, available at <https://www.nytimes.com/2017/05/18/us/politics/trump-fbi-mueller-rosenstein.html?mcubz=3>.

<sup>884</sup> Matt Zapposky, Sari Horwitz, Devlin Barrett, and Adam Entous, Jared Kushner Now a Focus in Russia Investigation, *Washington Post*, May 25, 2017, available at [https://www.washingtonpost.com/world/national-security/jared-kushner-now-a-focus-in-russia-investigation/2017/05/25/f078db74-40c7-11e7-8c25-44d09ff5a4a8\\_story.html?utm\\_term=.4aa45a6ad60f](https://www.washingtonpost.com/world/national-security/jared-kushner-now-a-focus-in-russia-investigation/2017/05/25/f078db74-40c7-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.4aa45a6ad60f).

<sup>885</sup> D. Leonig, Entous, Barrett, and Zapposky, *Washington Post*, Dec. 1, 2017.

<sup>886</sup> Cohen, *CNN*, May 23, 2018.

justice or otherwise break the law. But even without evidence of an explicit agreement, courts permit triers of fact to infer the presence of an agreement based entirely on circumstantial evidence due to the secretive nature of conspiracies.<sup>887</sup> Relevant circumstantial evidence includes: concert of action among co-defendants,<sup>888</sup> the relationship among co-defendants, negotiations in furtherance of the conspiracy, mutual representations to third parties,<sup>889</sup> and evidence suggesting “unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy.”<sup>890</sup> Additionally, the Special Counsel may be interested in misrepresentations to the media in connection with the June 9 meeting. *The New York Times* reported in January 2018 that the Mueller investigation has taken particular interest in a conference call in July 2017 involving President Trump,<sup>891</sup> Hope Hicks, and Mark Corallo, a spokesperson for President Trump’s legal team who resigned later that month. The conference call took place after a false statement about the purpose of the Trump Tower meeting was issued under Donald Trump Jr.’s name. The statement indicated that the Trump Tower meeting was a “short introductory meeting . . . . We primarily discussed a program about the adoption of Russian children . . . .” Trump Jr. reportedly insisted on the inclusion of the word “primarily.” Corallo was reportedly prepared to state that during the conference call, after Corallo suggested that the false statement would backfire because documents regarding the true purpose of the meeting would surface, Hope Hicks suggested that emails written by Donald Trump Jr. “will never get out.” An attorney for Hicks disputed this account.<sup>892</sup> Ultimately, in evaluating whether there is circumstantial evidence of an agreement between President Trump and members of his administration to disrupt the Russia or Flynn investigations, the facts surrounding the firing of Comey and the other events under investigation need to be further developed and will be highly relevant to this question.

It is important to note that each participant in a conspiracy also must have known of the illegal goal and willfully joined the unlawful plan. The government needs to show that the defendant had “a general knowledge” of the scope and objective of the plan, not necessarily that a defendant knew every detail.<sup>893</sup> Similar to proving an agreement to enter a conspiracy under Section 371, the “knowledge and intent” element may be established using circumstantial evidence.<sup>894</sup> Knowledge may be inferred when a defendant acts in furtherance of the conspiracy’s objective,<sup>895</sup> as may have been the case with President Trump’s termination of Comey.

Criminal intent for a conspiracy offense must be established to the same degree as is necessary to prove the underlying substantive offense.<sup>896</sup> Because conspiracy is a specific

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<sup>887</sup> *U.S. v. Wardell*, 591 F.3d 1279, 1288 (10th Cir. 2009); see also *U.S. v. Mickelson*, 378 F.3d 810, 821 (8th Cir. 2004) (explaining that the existence of a conspiracy may be inferred based on the parties’ actions “because the details of a conspiracy are often shrouded in secrecy”); *U.S. v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994) (“Direct evidence of a conspiracy is unnecessary; each element may be inferred from circumstantial evidence.”).

<sup>888</sup> *Fisch*, 851 F.3d at 407.

<sup>889</sup> Becker, Mazzetti, Apuzzo, and Haberman, *New York Times*, Jan. 31, 2018.

<sup>890</sup> *Wardell*, 591 F.3d at 1287-88.

<sup>891</sup> Becker, Mazzetti, Apuzzo, and Haberman, *New York Times*, Jan. 31, 2018.

<sup>892</sup> *Id.*

<sup>893</sup> *U.S. v. Pulido-Jacobo*, 377 F.3d 1124, 1130 (10th Cir. 2004).

<sup>894</sup> *U.S. v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006).

<sup>895</sup> *U.S. v. Scull*, 321 F.3d 1270, 1282 (10th Cir. 2003).

<sup>896</sup> *Peterson*, 244 F.3d at 389.

intent crime, “proof that the defendant knew *some* crime would be committed is not enough.”<sup>897</sup> That means each individual charged with a conspiracy count must have intended to obstruct justice. Intent may be inferred from circumstantial evidence related to “the relationship of the parties, their overt acts, and the totality of their conduct.”<sup>898</sup> The government likely would attempt to prove intent with the same circumstantial evidence used to show an agreement with President Trump to obstruct the Russia and Flynn investigations.

The final element of a criminal conspiracy under Section 371 requires an overt act intended to further the conspiracy. The act need only be performed by one of the conspiracy’s members and need not itself be a crime.<sup>899</sup> President Trump’s dismissal of Comey would satisfy this element.

Much evidence would need to be uncovered for a successful conspiracy charge involving President Trump, Kushner, or other members of the Trump administration. It may never be. Nevertheless, it remains a plausible avenue of investigation, and likely accounts for some of Special Counsel Mueller’s reported intense interest in White House goings-on.<sup>900</sup>

### **C. A president can face obstruction charges for actions taken pursuant to Article II authority**

Some have argued that a president cannot face obstruction of justice charges for conduct that is within his authority under Article II because it would unconstitutionally impair his authority.<sup>901</sup> Those who take this view believe that because the president has the constitutional authority to order the FBI to stop an investigation, fire the FBI Director for disobeying such orders, and potentially even pardon investigation targets, he cannot obstruct justice in doing

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<sup>897</sup> *U.S. v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004).

<sup>898</sup> *Cueto*, 151 F.3d at 365.

<sup>899</sup> *U.S. v. LaSpina*, 299 F.3d 165, 176 (2d Cir. 2002).

<sup>900</sup> See, e.g., Schmidt, *New York Times*, Sept. 20, 2017.

<sup>901</sup> This argument is distinct from the question of whether a president can face indictment for *any* criminal offense while in office—a separate argument that we confront in Section III. This argument relies in part on the unitary executive theory, an expansive reading of executive power that lacks support in the text and structure of the constitution. See generally, Victoria Nourse, *The Special Counsel, Morrison v. Olson, and the Dangerous Implications of the Unitary Executive Theory*, *American Constitution Society*, June 2018, available at <https://www.acslaw.org/sites/default/files/UnitaryExecutive.pdf>.

so.<sup>902</sup> They also contend that whether the president’s intent behind such actions was “corrupt” should not be at issue because such an inquiry would be too “vague.”<sup>903</sup>

In our view, the theory that a president’s exercise of Article II powers cannot be the subject of criminal prosecution for obstruction of justice is unquestionably incorrect. None of the obstruction statutes discussed above carve out conduct that is done in an official capacity. On the contrary, there are repeated examples in federal case law of individuals prosecuted for official but nonetheless obstructive acts that were committed with a corrupt intent. Although there are separation-of-powers concerns when the president’s decision to fire a subordinate is at issue, Congress has the authority to impose conditions on that authority. The statutory condition that Congress has placed on the President’s firing power—that he not do so (or attempt to do so) for the purpose of obstructing an investigation with corrupt intent—places a minimal restriction on the President’s Article II authority that is entirely consistent with the constitution’s separation of powers.

If Congress had wished, it could have carved out official acts from the conduct that can form the basis for an obstruction of justice charge, but it did not. Congress, for instance, chose to define murder as the “*unlawful* killing of a human being with malice aforethought,”<sup>904</sup> which by definition excludes the killing of a human being pursuant to a lawful authorization. The federal kidnapping statute also uses the term “unlawfully” to exclude official conduct that would otherwise match the elements of the offense.<sup>905</sup> None of the obstruction statutes contain such a modifier.<sup>906</sup> Instead, as discussed above, those statutes prohibit corruptly obstructing or impeding a proceeding and evince an intent to capture a wide range of conduct.

Federal criminal case law fully supports the notion that a defendant’s official acts may be part of an obstruction investigation. What distinguishes a valid exercise of authority from an invalid one is the official’s intent. As discussed in greater detail above, courts regularly consider otherwise lawful conduct to be obstruction if undertaken with corrupt intent:

- In *U.S. v. Smith*, several members of the Los Angeles Sheriff’s department obstructed justice for relocating and restricting access to a prisoner—conduct that would have been

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<sup>902</sup> See, e.g., Alan Dershowitz, *History, Precedent and James Comey’s Opening Statement Show that Trump Did Not Obstruct Justice*, *Washington Examiner*, Jun. 8, 2017, available at <http://www.washingtonexaminer.com/alan-dershowitz-history-precedent-and-james-comeys-opening-statement-show-that-trump-did-not-obstruct-justice/article/2625318>; Josh Blackman, *Obstruction of Justice and the Presidency: Part I*, *Lawfare*, Dec. 5, 2017, available at <https://lawfareblog.com/obstruction-justice-and-presidency-part-i>; Josh Blackman, *Obstruction of Justice and the Presidency: Part II*, *Lawfare*, Dec. 12, 2017, <https://www.lawfareblog.com/obstruction-justice-and-presidency-part-ii>; Josh Blackman, *Obstruction of Justice and the Presidency: Part III*, *Lawfare*, Dec. 18, 2017, available at <https://www.lawfareblog.com/obstruction-justice-and-presidency-part-iii>.

<sup>903</sup> Alan Dershowitz, *Trump Well within Constitutional Authority on Comey, Flynn – Would This Even Be a Question if Hillary Were President*, *Fox News Opinion*, Jun 12, 2014, available at <http://www.foxnews.com/opinion/2017/06/12/dershowitz-trump-well-within-constitutional-authority-on-comey-flynn-would-this-even-be-question-if-hillary-were-president.html>.

<sup>904</sup> 18 U.S.C. § 1111.

<sup>905</sup> See 18 U.S.C. §§ 1201.

<sup>906</sup> See 18 U.S.C. §§ 1803, 1805, 1812.

legal but for its purposeful interference with an FBI investigation into civil rights violations at Los Angeles County jails.<sup>907</sup>

- In *U.S. v. Baca*, the court explained that “[a] local [police] officer [] may not use [his] authority to engage in what ordinarily might be normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates, for the purpose of obstructing justice.”<sup>908</sup>
- In *U.S. v. Mitchell*, so-called “lobbying efforts” obstructed justice when they were used to accept money to convince a member of congress to stop a congressional investigation because “means, other than ‘illegal means’ when employed to obstruct justice fall within the ambit of the ‘corrupt endeavor’ language of federal obstruction statutes.”<sup>909</sup>
- In *U.S. v. Cueto*, an attorney obstructed justice by preparing and filing pleadings and other court papers and encouraging the State Attorney to indict an investigator who was looking into an illegal gambling scheme because “[o]therwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt motive to accomplish that which the statute forbids.”<sup>910</sup>
- In *U.S. v. Cintolo*, the court explained that “any act by any party—whether lawful or unlawful on its face—may abridge § 1503 if performed with a corrupt motive,” and that preventing a jury, as a matter of law, from considering why a defendant “committed acts not unlawful in and of themselves would do enormous violence to [§ 1503] and play unwarranted havoc with its enforcement.”<sup>911</sup>
- In *U.S. v. Cioffi*, the court affirmed an instruction that while a “witness violates no law by claiming the Fifth Amendment . . . one who . . . advises with corrupt motive a witness to take it, can and does obstruct or influence the administration of justice” because “[t]he lawful behavior of the person invoking the Amendment cannot be used to protect the criminal behavior of the inducer.”<sup>912</sup>

Like the police officers in *Smith* and *Baca*, the “lobbyists” in *Mitchell*, and the attorneys in *Cueto*, *Cintolo*, and *Cioffi*, President Trump’s conduct cannot be divorced from his motives, as some commentators seem to suggest. President Trump’s constitutional authority to stop the investigation into General Flynn, pardon him, or fire Comey does not permit him to do so with corrupt intent.

To be sure, these cases do not involve the president of the United States. That said, constitutional considerations do not bar Congress from imposing certain limits on the president’s Article II powers.

The Supreme Court has made clear that Congress may place certain conditions on the ability of a President to remove an inferior officer. In *Humphrey’s Executor v. U.S.*, the Court

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<sup>907</sup> 831 F.3d at 1211.

<sup>908</sup> *Jury Instructions*, *U.S. v. Baca*, No. 16-cr-00066 (C.D. Cal. Mar. 13, 2017).

<sup>909</sup> 877 F.2d at 299 (citations omitted).

<sup>910</sup> 151 F.3d at 628-29, 631.

<sup>911</sup> 818 F.2d at 991.

<sup>912</sup> 493 F.2d at 1119.

held that Congress has the power to create bodies within the executive that operate “independently of executive control,” including the authority to fix terms for their principal officers, and forbid their removal “except for cause.”<sup>913</sup> The Court went further in *Morrison v. Olson* by upholding restrictions placed by Congress on the president’s ability to fire a subordinate executive branch officer who exercised executive functions—namely, the investigation and prosecution of matters within the counsel’s special jurisdiction.<sup>914</sup> The statute upheld in *Olson* stated that the independent counsel could be fired “only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”<sup>915</sup> The Court held that this scheme afforded the president “sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”<sup>916</sup> The Supreme Court has made clear that both of these cases remain good law.<sup>917</sup>

Criminalizing obstruction of justice without providing an exception for the president’s exercise of Article II powers places a minimal restriction on the president’s ability to oversee the executive branch and is therefore fully consistent with Supreme Court precedent. The president’s firing of a subordinate law enforcement official, whether it is the attorney general or the FBI Director, simply will not raise the specter of obstruction-of-justice charges in cases where there is no reason to believe that the president has done so for a corrupt purpose, such as trying to control an investigation that could implicate him and his close associates. The president’s power to establish priorities for the Department of Justice and fire political appointees who do not follow through on those priorities are scarcely affected by criminal limits on the exercise of that authority

To be sure, the possibility of criminal charges for improper interference with Department of Justice investigations may have some chilling effect on communications between the department and the White House; however, that result is consistent with, and seen as positive under, White House policy for the last 40 years.<sup>918</sup> An instructive example of this practice is Attorney General Michael B. Mukasey’s 2007 memorandum to DOJ department components and United States Attorneys about communications with the White House.<sup>919</sup> Attorney General Mukasey stated that direct communication between the department on many subjects, including

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<sup>913</sup> *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935). See also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (“Nearly a decade later in *Humphrey’s Executor*, [the Supreme Court] held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies.”).

<sup>914</sup> *Morrison v. Olson*, 487 U.S. 654, 694, 108 S. Ct. 2597, 2621, 101 L. Ed. 2d 569 (1988) (“Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit.”).

<sup>915</sup> 28 U.S.C. § 596(a)(1).

<sup>916</sup> *Morrison*, 487 U.S. at 696.

<sup>917</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). In *Free Enterprise Fund* the Supreme Court struck down a statute on grounds inapplicable here. 561 U.S. at 492.

<sup>918</sup> See Protect Democracy, *Memo re: White House Communications with the DOJ and FBI*, Mar. 8, 2017, available at <https://protectdemocracy.org/agencycontacts/>.

<sup>919</sup> Michael B. Mukasey, *Communications with the White House, Memorandum for Heads of Department Components and U.S. Attorneys*, Dec. 19, 2007, available at <https://assets.documentcloud.org/documents/3371650/Mukasey-12-19-07.pdf>.

“policy, legislation, budgeting, political appointments, personnel matters related to political appointees, public affairs, informal legal opinions, intergovernmental relations, administrative matters, or similar matters” posed little concern; however, Mukasey instructed that communication about “pending criminal or civil-enforcement matters . . . must be limited” to circumstances “only where it is important for the performance of the President’s duties and where appropriate from a law enforcement perspective.”<sup>920</sup> Mukasey therefore stipulated that “[w]ith the exception of national security related matters . . . all initial communications between the White House staff and the Justice Department regarding any specific pending Department investigation or criminal or civil-enforcement matter should involve only the Counsel to the President or Deputy Counsel to the President and the Attorney General or Deputy Attorney General.”<sup>921</sup> The existence of policies that acknowledge the great sensitivity and risk that comes with communication between the Department of Justice and the White House about pending enforcement matters undermines the suggestion that criminal exposure to obstruction of justice charges would interfere with the president’s proper management of the executive branch.

Finally, it is critical to establish just how narrow this defense is: it applies only to the criminal repercussions that President Trump may face for obstructing justice; however, as we explain in Section III, President Trump also faces the prospect of congressional proceedings, not merely judicial ones. As we explain in Section IV, while criminal law sometimes informs the standards for impeachment, it does not control the House’s decision to impeach or the Senate’s decision to convict (and remove). Indeed, an official’s impeachment for “abuse of power” by definition contemplates the misuse of power granted to that official. Arguing that an action is within the president’s Article II power is no defense to an accusation that he abused it. For these reasons, an “Article II” defense of the president does not limit the president’s exposure to impeachment for obstructing justice.

#### **D. Terminating Special Counsel Mueller would likely strengthen the case that President Trump obstructed justice**

Our discussion thus far has centered on the case against President Trump based on events that are alleged to have already occurred and publicly available information about them. While we in general prefer not to comment on the legal consequences that might result from events that have not yet happened, one point merits emphasis here: terminating Special Counsel Mueller (especially under the pretextual justifications for doing so that have been advanced thus far) would likely support the argument that President Trump engaged in a pattern of obstruction of justice that began with his demands for loyalty from FBI Director Comey.<sup>922</sup> In other words, terminating Mueller would strengthen the case that President Trump has obstructed justice.

The same body of case law that we have described in conjunction with the firing of Director Comey would apply with equal force to Mueller’s termination. As Comey was doing before he was fired, Mueller is running an investigation into matters relating to President

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<sup>920</sup> *Id.*

<sup>921</sup> *Id.*

<sup>922</sup> Noah Bookbinder, Norman Eisen, and Caroline Fredrickson, *Why Trump Can’t (Easily) Remove Mueller—and What Happens If He Tries*, *American Constitution Society & Citizens for Responsibility and Ethics in Washington*, Dec. 6, 2017, available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/12/06181615/Why-Trump-Cant-Easily-Remove-Mueller%E2%80%94and-What-Happens-If-He-Tries-12.6.17.pdf>.

Trump's campaign (and probably now his administration as well); firing Mueller could also be an obstructive act. Aspects of the obstruction case against President Trump would be made far easier: The evidence that President Trump has acted with an improper motive and therefore criminal intent would be strengthened by a clear pattern of obstructive behavior similar to his treatment of Director Comey, including pretextual attacks on Mueller's impartiality, where Mueller appears to be investigating individuals who are close to President Trump. Because it is now publicly known that Mueller has convened a grand jury to assist his investigation,<sup>923</sup> firing Mueller would have a clear nexus to grand jury proceedings and quite foreseeably impact them. And assuming none of the rationales that have been advanced thus far for firing Mueller are legitimate,<sup>924</sup> President Trump might very well advance pretextual reasons for Mueller's termination, thereby adding to the argument that he has acted with corrupt intent.

Of course, there also would be consequences that go far beyond the legal case against President Trump and related proceedings in Congress, given that such action could be perceived by many as a challenge to the rule of law and our constitutional order.<sup>925</sup>

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<sup>923</sup> Wilber and Tau, *Wall Street Journal*, Aug. 3, 2017.

<sup>924</sup> See Richard Painter and Norman Eisen, [The White House May Claim Mueller Has Conflicts of Interest. Oh the Irony](https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-oh-the-irony/), *Washington Post*, May 22, 2017, available at [https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8\\_story.html?utm\\_term=.be6af6e00541](https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.be6af6e00541); Richard Painter and Norman Eisen, [Robert Mueller Terrifies President Trump. Of Course He Wants Him Gone](https://www.usatoday.com/story/opinion/2017/06/20/robert-mueller-needs-to-stay-sort-out-russia-mess-richard-painter-norman-eisen-column/103011308/), *USA Today*, Jun. 20, 2017, available at <https://www.usatoday.com/story/opinion/2017/06/20/robert-mueller-needs-to-stay-sort-out-russia-mess-richard-painter-norman-eisen-column/103011308/>.

<sup>925</sup> See Norm Eisen and Fred Wertheimer, [Firing Mueller Would Be a Catastrophic Mistake](http://www.cnn.com/2017/08/10/opinions/trump-mueller-constitutional-crisis-opinion-wertheimer-eisen/index.html), *CNN*, Aug. 10, 2017, available at <http://www.cnn.com/2017/08/10/opinions/trump-mueller-constitutional-crisis-opinion-wertheimer-eisen/index.html>.

### III. What actions might Special Counsel Mueller take?

Once Special Counsel Mueller is satisfied that he has uncovered the relevant facts and analyzed the strength of his case, he will have to decide what to do next. Given the pattern of reported evidence we outlined in Section I, and the various legal theories that pertain to that conduct which we discussed in Section II, the special counsel has sufficient legal and factual basis to seek to interview the president. However, due to that same strong evidence, the president is, we believe, ultimately unlikely to accede to the minimum level of live oral questioning that Mueller's duties as a prosecutor require. In Section III we outline Special Counsel Mueller's various options, and preview some of the considerations he will face as he moves the case forward.

In Subsection A (page 142) we review the special counsel's authority and explain why the challenges to his power are unlikely to be successful. In Subsection B (page 148) we turn to the options available to him. First, the special counsel may refer the obstruction case against the president to Congress, a step that is not without precedent. Mueller could ask the grand jury to refer the matter to the House Judiciary Committee—the same step that Watergate Special Prosecutor Leon Jaworski took in 1974. Mueller could also attempt to refer the matter to the House in his own capacity, though that course of action presents more difficulties, as we explain below.

Alternatively, should he determine the facts warrant it, Special Counsel Mueller could in our view indict President Trump and proceed with the case, as we explain in Subsection C (page 151). We acknowledge that there are special concerns raised by the criminal prosecution of a sitting president, but there are persuasive arguments that the concerns justify special accommodation for the president, not immunity from criminal prosecution. As we explain, the Constitution is silent on the issue, and the Department of Justice's opinion that a sitting president cannot be indicted may not be binding on Mueller and certainly does not limit what a Court might hold. Equally relevant authorities on the matter are the precedents set by Watergate Special Prosecutor Leon Jaworski and Independent Counsel Kenneth Starr, both of whom acted as if a president could be prosecuted. While the indictment of a sitting president would no doubt pose an array of challenges, the courts are, as we explain, well equipped to address them.

In Subsection D (page 160), we explain that Special Counsel Mueller could hold the case pending further developments, such as removal of President Trump from office by election, resignation, impeachment, or the end of his term.<sup>926</sup> As we discuss, the Constitution explicitly contemplates the possibility that a criminal indictment might follow impeachment—and presumably the same would be true if a president is removed by other means (namely resignation or election). In addition, the practical obstacles to prosecuting a president are greatly reduced when a president is no longer in office. Instead, the greatest challenge to prosecution is ensuring that the president receives a fair trial, especially if the president has already been the subject of highly publicized congressional proceedings or an electoral campaign that focuses on his perceived misdeeds.

Finally, in Subsection E (page 161), we outline the other options available to Special Counsel. Mueller could pursue some combination of those already enumerated (i.e. indict and

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<sup>926</sup> The availability of this option depends on whether the statute of limitations has run. A five-year statute of limitations applies to the offenses described in this paper. See 18 U.S.C. § 3282; Singh *et. al*, Obstruction of Justice, 54 Am. Crim. L. Rev. at 1620.

refer or hold and refer), he could close the case without comment, or he could close the case and make a recommendation against any further action.

## **A. Special Counsel Mueller's authority**

### **1. Appointment and governing law**

Mueller's authority as special counsel is governed by at least three sources: Deputy Attorney General Rod Rosenstein (who is Acting Attorney General for matters related to the 2016 campaigns for President of the United States)<sup>927</sup> appointed Mueller in Order No. 3915-2017, which was released on May 17, 2017. That order cross referenced a second authority: DOJ's rule governing the appointment of a special counsel (28 C.F.R. § 600.1 *et seq.*). That rule replaced the procedures for the appointment of an independent counsel under the Independent Counsel Reauthorization Act of 1994.<sup>928</sup> Finally, in subsequent litigation, the DOJ has revealed that Rosenstein penned a follow-up memorandum to Special Counsel Mueller detailing the scope of the investigation and definition of authority on August 2, 2017.<sup>929</sup> The version of the August 2, 2017 memorandum that was disclosed by the DOJ is heavily redacted. It is possible that the Deputy Attorney General has given Special Counsel Mueller additional authority in additional memos; however, no further documents have been made public at this time.

Order No. 3915-2017 authorizes Mueller to "conduct the investigation confirmed by then-FBI Director James B. Comey . . . including: (i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and (ii) any matters that arose or may arise directly from the investigation; and (iii) any other matters within the scope of 28 C.F.R. § 600.4(a)."<sup>930</sup> The order further states that Subsection 600.4 through 600.10 of the special counsel rule apply to Mueller. Sections 600.4(a) gives Mueller the additional authority to "investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the special counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." The range of matters that could fall within this mandate is broad and includes, for example, the authority to explore possible corrupt motives that President Trump might have had for obstructing justice.<sup>931</sup>

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<sup>927</sup> Rosenstein is acting as the Attorney General for the purposes of Mueller's appointment and supervision because Attorney General Jeff Sessions has recused himself from "any existing or future investigation of any matters related in any way to the campaigns for President of the United States." Press Release: Attorney General Sessions Statement on Recusal, U.S. Dep't of Justice, Mar. 2, 2017.

<sup>928</sup> See Final Rule, *Office of Special Counsel*, 64 FR 37038-01 (Jul. 9, 1999).

<sup>929</sup> Gov't.'s Resp. to Def.'s Mot. to Dismiss Superseding Indictment, Ex. C, *U.S. v. Manafort*, No. 17-cr-201 (D.D.C. Apr. 2, 2018) (Henceforth, "Rosenstein's Aug. 2 Memorandum"), available at <https://www.documentcloud.org/documents/4429989-Rod-Rosenstein-memo-outlining-scope-of-Mueller.html>.

<sup>930</sup> Rosenstein, May 17, 2017, *attached as App. C.2*.

<sup>931</sup> See Letter to Special Counsel Mueller, *Citizens for Responsibility and Ethics in Washington*, Jul. 12, 2017, available at <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/07/20163038/DOJ-Mueller-Trump-Russia-financial-ties-7-12-171.pdf> (asserting that Special Counsel Mueller's authority to investigate these matters extends to any possible financial ties that President Trump and his associates have with Russia, one of several possible corrupt motives that President Trump may have."); see also Barb McQuade, No Red Line: Mueller Will Follow the Money, *ACSblog*, Jul. 28, 2017, available at <https://www.acslaw.org/acsblog/no-red-line-mueller-will-follow-the-money>.

Subject to the limitations discussed below, Mueller has “the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney” with respect to these matters.<sup>932</sup> This includes the power to prosecute, which Rosenstein also explicitly mentioned in Order No. 3915.<sup>933</sup> Mueller is bound by the “rules, regulations, practices, and policies of the Department of Justice”,<sup>934</sup> “subject to disciplinary action for misconduct and breach of ethical duties” just like other Department of Justice employees;<sup>935</sup> and may be removed by the attorney general (or, in this case, by the deputy attorney general) “for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies.”<sup>936</sup>

Although Special Counsel Mueller is “not subject to day-to-day supervision”<sup>937</sup> by other officials in the Department, he must notify the deputy attorney general in compliance with the Department’s guidelines on urgent reports.<sup>938</sup> Urgent reports must be submitted when there are “major developments in significant investigations and litigation” such as the filing of criminal charges, arrests of defendants, pleas, as well as other steps that are likely to receive attention such as the execution of a search warrant, the interview or appearance before a grand jury of a significant witness, and noteworthy motions.<sup>939</sup> As the investigation proceeds, Deputy Attorney General Rosenstein “may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may, after review, conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”<sup>940</sup> In such circumstances, “great weight” must be afforded to the views of the special counsel, and any decision to overrule the special counsel requires that Congress be notified.<sup>941</sup> In addition, “[a]t the conclusion of the Special Counsel’s work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.”<sup>942</sup> Order No. 3915-2017 and the Department of Justice’s special counsel regulations are silent on the question of whether and how Mueller might refer a matter to Congress.<sup>943</sup>

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<sup>932</sup> 28 C.F.R. § 600.6.

<sup>933</sup> Rosenstein, *Office of the Deputy Att’y Gen.*, May 17, 2017, *attached as App. C.2* (authorizing Mueller “to prosecute federal crimes arising from the investigation” of the matters over which he has jurisdiction). The delegation of authority to prosecute to the special counsel was upheld in *U.S. v. Libby*, 429 F. Supp. 2d 27 (D.D.C 2006).

<sup>934</sup> 28 C.F.R. § 600.7(a).

<sup>935</sup> 28 C.F.R. § 600.7(c).

<sup>936</sup> 28 C.F.R. § 600.7(d).

<sup>937</sup> 28 C.F.R. § 600.7(b).

<sup>938</sup> 28 C.F.R. § 600.8(b).

<sup>939</sup> U.S. Dep’t of Justice, U.S. Attorneys’ Manual, §§ 1-13.100, 1-13.110, 1-13.120.

<sup>940</sup> 28 C.F.R. § 600.7(b).

<sup>941</sup> *Id.*; *see also* 28 C.F.R. § 600.9 (requiring that the attorney general notify the chairman and ranking member of the judiciary committees of both houses of Congress upon the appointment or removal of the special counsel and that the attorney general also furnish to them “a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Department practices that it should not be pursued”).

<sup>942</sup> 28 C.F.R. § 600.8(c).

<sup>943</sup> Independent counsels, who operated under a statutory regime that expired in 1999, were required to submit annual reports to Congress and to “advise the House of Representatives of any substantial and credible information which such independent counsel receives . . . that may constitute grounds for an

Rosenstein's August 2, 2017 follow-up memorandum laid out specific allegations within the scope of Special Counsel Mueller's authority at the time of his appointment. Most of the matters listed in the document are redacted; however, unsealed portions of the memorandum authorize Mueller to investigate allegations that Trump campaign chairman Paul Manafort "[c]ommitted a crime or crimes by colluding with Russian government officials with respect to the Russian government's efforts to interfere with the 2016 election for President of the United States, in violation of United States law" or "[c]ommitted a crime or crimes arising out of payments he received from the Ukrainian government before and during the tenure of President Viktor Yanukovich."<sup>944</sup> Rosenstein has clarified in testimony before Congress that he has authorized Mueller "to investigate anybody who there is predication to believe obstructed justice."<sup>945</sup>

## **2. Mueller's appointment was a valid and constitutional exercise of the power delegated to the Attorney General by Congress**

Contrary to the views expressed by some commentators,<sup>946</sup> Rosenstein's appointment of Mueller is consistent with the statutory authority enjoyed by the Attorney General and precedent interpreting the Appointments Clause of the Constitution, and the courts have so found.<sup>947</sup>

The attorney general's authority to delegate the power to investigate and prosecute cases is clearly laid out in statute. Section 509 of Title 28 vests the attorney general with all functions of the Department of Justice, except for the authority carved out for administrative law judges and the Federal Prison Industries Corporation (and its board). Section 510 allows the Attorney General to delegate these functions: "[t]he Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." Section 515 further specifically permits the Attorney General to direct another DOJ officer or an attorney specially appointed "to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct . . . ."

The special counsel regulations promulgated by the attorney general and the specific appointment of Mueller as special counsel are consistent with the attorney general's broad authority to delegate matters to subordinates and to appoint special officers or attorneys to conduct certain proceedings. In this case, Mueller enjoys the power to investigate and

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impeachment." Ethics in Government Act of 1978, Pub. L. 95–521, title VI, § 601(a) as amended, and codified at 28 U.S.C. § 595(c). The statute was reauthorized every five years until 1999, when it lapsed.

<sup>944</sup> Rosenstein's Aug. 2 Memorandum.

<sup>945</sup> Laura Jarrett, Daniella Diaz, David Shortell and David Wright, *Rod Rosenstein: No good cause to fire Mueller*, *CNN*, Dec. 14, 2017, available at <https://www.cnn.com/2017/12/13/politics/rod-rosenstein-house-judiciary-committee/index.html>.

<sup>946</sup> Steven G. Calabresi, *Mueller's Investigation Crosses the Legal Line*, *Wall Street Journal*, May 13, 2018, available at <https://www.wsj.com/articles/muellers-investigation-crosses-the-legal-line-1526233750>; Steven G. Calabresi, *Opinion on the Constitutionality of Robert Mueller's Appointment*, *Northwestern Public Law Research Paper No. 18-14*, May 25, 2018, available at <https://ssrn.com/abstract=3183324>; Margot Cleveland, *3 Reasons Rod Rosenstein's Special Counsel Appointment Was Illegal*, *Federalist*, May 31, 2018, available at <http://thefederalist.com/2018/05/31/3-reasons-rosensteins-special-counsel-appointment-illegal/>.

<sup>947</sup> See, e.g., Mem. Op & Order at 2 n.1, *U.S. v. Manafort*, No. 18-cr-83 (E.D. Va. Jun. 26, 2018), available at <https://www.politico.com/f/?id=00000164-3dc7-dbdca96d-3dff8c890001>; see also Mem. Op & Order, *United States v. Manafort*, No. 17-0201-01 (ABJ) (D.D.C., May 15, 2018).

prosecute the set of matters outlined in Order no. 3915-2017 and in Rosenstein's follow-up August 2, 2017 memorandum (as well as any subsequent authorization that Mueller has received).

Rosenstein's appointment of Mueller as special counsel pursuant to this authority is also fully consistent with the Constitution. Article II Section 2 lays out the President's appointment power:

. . . and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.<sup>948</sup>

The Constitution accordingly recognizes two classes of executive officers: principal officers who must be nominated by the President and confirmed by the Senate (and who serve at the President's pleasure) and inferior officers, appointments of whom can be vested in the President or in the heads of executive branch departments.<sup>949</sup>

The Supreme Court has not established a bright line between principal and inferior officers; however, it has identified factors for consideration in two cases. In *Edmond v. United States*, the Court held that judges on the Coast Guard Court of Criminal Appeals were inferior officers for the purposes of the Appointments clause. In so doing, the Court relied on the fact that their "work [was] directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate" and on the fact that they had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."<sup>950</sup> In *Morrison v. Olson*, the Court rejected an Appointments Clause challenge to the independent counsel (the precursor to the special counsel) citing four factors: the fact that the independent counsel could be removed by a higher executive branch official, the limited duties enjoyed by the counsel that did not include policymaking, the office's limited jurisdiction, and the officer's limited tenure.<sup>951</sup>

Under either of these standards, Special Counsel Mueller is an "inferior officer" whose appointment by Rosenstein is consistent with the requirements of the Appointments Clause.<sup>952</sup> Under the special counsel regulations, Special Counsel Mueller is supervised directly by Acting Attorney General Rosenstein who enjoys the authority to discipline or remove Mueller "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including

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<sup>948</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>949</sup> *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary").

<sup>950</sup> 520 U.S. 651, 663, 655, 661 (1997).

<sup>951</sup> 487 U.S. 654, 671-72 (1988).

<sup>952</sup> See generally Eric Posner and Steve Vladeck, [Letter to Senate Judiciary Committee Chairman Charles Grassley and Ranking Member Dianne Feinstein](https://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf), Apr. 24, 2018, available at <https://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf>.

violation of Departmental policies.”<sup>953</sup> Rosenstein, in turn, can be terminated by the President with or without cause—which satisfies the first prongs of the test in *Edmond* and *Morrison*.<sup>954</sup>

In addition, Special Counsel Mueller does not have final authority to make a decision on behalf of the United States without the permission of Rosenstein. The special counsel regulations make clear that the special counsel must “notify the Attorney General of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports”<sup>955</sup> and that the attorney general can overrule the special counsel if he concludes that a proposed investigative or prosecutorial step is “so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”<sup>956</sup>

Other aspects of Special Counsel Mueller’s appointment make clear that he is an inferior officer under the remaining factors articulated in *Morrison*: he also only enjoys a limited delegation of authority that does not include the authority to set policy for the DOJ. Instead, DOJ regulations specifically state that special counsel has only “the full power and independent authority to exercise all *investigative and prosecutorial functions* of any United States Attorney.”<sup>957</sup> In addition, Rosenstein’s authority under Order No. 3915-2017 grants him jurisdiction over a limited set of offenses. Special Counsel Mueller has no authority to influence decisions made by DOJ employees in cases that do not fall within his limited jurisdiction. Finally, while Special Counsel Mueller’s tenure is not fixed by date, his tenure is coterminous with his investigation and prosecutions stemming from it. The special counsel regulations require that the attorney general make an annual determination as to whether the investigation should continue and establish a budget for the upcoming fiscal year.<sup>958</sup>

One distinction between the special counsel regulations and the independent counsel statute upheld in *Morrison* bears mentioning: one of the major distinctions between the two is that the special counsel is exclusively a creation of the executive branch whereas the independent counsel was appointed by a federal court after application from the attorney general pursuant to statutory requirements established by Congress.<sup>959</sup> From this standpoint, the separation of powers concerns implicated in the case of the special counsel are minimal: although Congress has authorized the attorney general’s delegation of power and appointment of a special counsel, the promulgation of regulations governing such appointments and the terms of this particular delegation are the product of executive branch decisions. These distinctions vitiate any “separation of powers” concerns lingering after *Morrison*.<sup>960</sup>

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<sup>953</sup> 28 C.F.R. § 600.7(d). In sworn testimony before Congress, Acting Attorney General Rosenstein has stated that he is “appropriately exercising [his] oversight responsibilities” and that “the special counsel is conducting himself consistently with our understanding about the scope of his investigation.” Jarrett, Diaz, Shortell, and Wright, *CNN*, Dec. 14, 2017.

<sup>954</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding that the President has exclusive authority to remove principal executive branch officials and that Congress could not condition the removal of first-class postmasters on the advice and consent of the Senate).

<sup>955</sup> 28 C.F.R. § 600.8(b).

<sup>956</sup> § 600.7(b).

<sup>957</sup> § 600.6.

<sup>958</sup> See § 600.8(a)(2); § 600.8(c).

<sup>959</sup> See 28 U.S.C. §§ 592-93.

<sup>960</sup> George Conway, *The Terrible Arguments Against the Constitutionality of the Mueller Investigation*, *Lawfare*, Jun. 11, 2018, available at <https://www.lawfareblog.com/terrible-arguments-against-constitutionality-mueller-investigation>; Steve Vladeck, *The Confusing and Confused New Attack on the*

### 3. Courts have thus far rejected challenges to Mueller's appointment

Federal courts presiding over the two criminal cases against Trump campaign chairman Paul Manafort have rejected his challenges to Mueller's appointment as special counsel.<sup>961</sup> Some aspects of Manafort's challenge—such as whether the charges filed against him fall within Mueller's jurisdiction, are of limited value in the context of obstruction of justice, which without question falls within Mueller's jurisdiction. Nevertheless, the other bases for the rulings against Manafort suggest that the Courts would view a challenge to Mueller's authority with skepticism if such a motion were filed in an obstruction case.

In the case in the U.S. District Court for the District of Columbia, Judge Amy Berman Jackson denied Manafort's motion to dismiss his indictment on several grounds, including the fact that the special counsel regulations "do not create any substantive rights for the benefit of individuals under investigation."<sup>962</sup> Jackson further reasoned that Rosenstein's appointment order comported with the special counsel regulations, which allow delegation of significant jurisdiction and merely require a specific factual statement of that jurisdiction.<sup>963</sup> In addition, Jackson concluded that Rosenstein's more specific articulation of Special Counsel Mueller's jurisdiction in his August 2 memorandum was further evidence that the special counsel had the authority to prosecute Manafort's case.

In the case filed in the U.S. District Court for the Eastern District of Virginia, Judge T.S. Ellis rejected similar challenges to the scope of Special Counsel Mueller's authority. In the opinion, Judge Ellis endorsed Scalia's dissent in *Morrison*, which argued that the independent counsel represented an unconstitutional infringement of executive power.<sup>964</sup> Ellis also expressed the view that "[s]ome of the criticisms leveled at the provisions of the [intendent counsel statute] seem equally applicable to the current Special Counsel scheme."<sup>965</sup> Nonetheless, when it came to the special counsel regulation and Mueller's appointment, Ellis explained both that Manafort had not actually raised an Appointments Clause challenge and that such an argument would in any event "likely fail."<sup>966</sup> In Ellis' view, the special counsel "appears quite plainly to be an inferior officer" because "[h]e is required to report to and is

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Constitutionality of the Special Counsel's Investigation, *Just Security*, May 24, 2018, available at <https://www.justsecurity.org/56979/confusing-confused-attack-constitutionality-special-counsel-investigation/>; Posner and Vladeck, Apr. 24, 2018.

<sup>961</sup> Judge Jackson has also heard and rejected a collateral civil case Manafort filed challenging Mueller's appointment on the grounds that Manafort did not have a right to an injunction to restrain an ongoing criminal proceeding and that Manafort did not have a valid claim under the Administrative Procedure Act because he had a viable alternative means of vindicating his rights by moving to dismiss the indictment. Mem. Opinion, *Manafort v. Dep't. of Justice*, No. 18-cv-11 (D.D.C. Apr. 27, 2018), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2018cv0011-37](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0011-37).

<sup>962</sup> Mem. Op. & Order at 20-28, *U.S. v. Manafort*, No. 17-cr-201 (D.D.C. Apr. 2, 2018) (Henceforth, "Rosenstein's Aug. 2 Memorandum"), available at <https://www.politico.com/f/?id=00000163-6599-d92c-a17f-edde22f0001>. See also 28 C.F.R. § 600.10 (explaining that the special counsel regulations "are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.").

<sup>963</sup> *Id.* at 28-34.

<sup>964</sup> Mem. Op. & Order at 2 n.1, *U.S. v. Manafort*, No. 18-cr-83 (E.D. Va. Jun. 26, 2018), available at <https://www.politico.com/f/?id=00000164-3dc7-dbdca96d-3dff8c890001>.

<sup>965</sup> *Id.* at 6.

<sup>966</sup> *Id.* at 7 n.5.

directed by the Deputy Attorney General.”<sup>967</sup> Because “Congress may vest the appointment of inferior officers in the ‘heads of departments,’” Congress’ decision to vest the power to appoint a special counsel in the acting attorney general is valid pursuant to the Appointments Clause.”<sup>968</sup>

In another case filed in the U.S. District Court for the District of Columbia, Judge Beryl Howell rejected a challenge to a grand jury subpoena issued by Special Counsel Mueller. In her opinion, Judge Howell wrote that “while the witness raises legitimate questions,” his concerns “are not legally sustainable” because “the scope of the Special Counsel’s power falls well within the boundaries the Constitution permits, as the Special Counsel is supervised by an official who is himself accountable to the elected president.”<sup>969</sup>

While these opinions are not binding on future courts that hear challenges to the special counsel’s authority, they suggest that litigants are unlikely to succeed in dismissing indictments obtained by Special Counsel Mueller on similar grounds.

## **B. Referral of a case to Congress**

Even though there is no prescribed mechanism for Mueller to refer a case to a congressional committee, there are two options for effectuating a referral that are grounded in precedent. Mueller could ask a grand jury to seek permission from the district court in which it is convened to transmit a Report to the House Judiciary Committee. Alternatively, Mueller could file a report with Deputy Attorney General Rosenstein and recommend that he refer the matter to Congress.

### ***1. Sealed report from a grand jury to the House Judiciary Committee***

The first option—advising a grand jury that it may refer matters to the House Judiciary Committee—is specifically authorized by Congress and based on precedent established in the investigation of the Watergate break-in and cover-up. On March 1, 1974, a grand jury investigating the matter returned an indictment against seven individuals (six aides and one re-election committee attorney) in which President Nixon was named as an unindicted coconspirator.<sup>970</sup> The same day, the grand jury also submitted two other documents to the district court: a sealed *Report and Recommendation* containing material evidence concerning President Nixon’s involvement in the conspiracy and a two-page letter to the Court recommending that the *Report and Recommendation* be submitted to the House Judiciary

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<sup>967</sup> *Id.*

<sup>968</sup> *Id.* citing U.S. Const. art. II, § 2, cl. 2.

<sup>969</sup> Mem. Op. at 3, *In re Grand Jury Investigation*, Grand Jury Action No. 18-34 (BAH) (D.D.C. Jul. 31, 2018) available at <https://drive.google.com/file/d/1nRQqOs7kNxH2oabC5tIWShkYS6hBrgow/view>.

<sup>970</sup> Frank Van Riper and James Wieghart, *7 of Nixon’s Ex-Aides Indicted*, *Daily News*, Mar. 2, 1974, available at [http://assets.nydailynews.com/polopoly\\_fs/1.2129084.1424893620!/img/httpImage/image.jpg\\_gen/derivatives/article\\_1200/watergate26a-3-web.jpg](http://assets.nydailynews.com/polopoly_fs/1.2129084.1424893620!/img/httpImage/image.jpg_gen/derivatives/article_1200/watergate26a-3-web.jpg) (full text available in “flashback reprint” available at <http://www.nydailynews.com/news/national/grand-jury-indicts-watergate-break-in-1974-article-1.2129087>). The fact that Nixon had been named in the indictment as a co-conspirator did not become public until June 1974. Anthony Ripley, *Jury Named Nixon a Co-conspirator but Didn’t Indict*, *New York Times*, Jun. 7, 1974, available at <http://www.nytimes.com/1974/06/07/archives/jury-named-nixon-a-coconspirator-but-didnt-indict-st-clair-confirms.html>.

Committee.<sup>971</sup> In a brief Jaworski later filed before the Supreme Court, Jaworski explained that despite its name, the grand jury's *Report and Recommendation* contained "*no recommendation, advice or statements that infringe on the prerogatives of other branches of government*"; rather, it was "a simple and straightforward compilation of information gathered by the Grand Jury and no more."<sup>972</sup> Jaworski also explained that the grand jury "was not free to ignore the evidence that it had heard" and that the grand jury stated in its *Report and Recommendation* that it was "'deferring' to the 'primary jurisdiction' of the House."<sup>973</sup>

After soliciting input from counsel for all affected parties—President Nixon, the defendants named in the indictment, the Judiciary Committee, and the Special Prosecutor—and holding a hearing on the matter, the Court ordered that the grand jury's report and recommendation and accompanying materials be delivered to the Judiciary Committee.<sup>974</sup> The Court found that the grand jury had the power to make the report and recommendation and that transmittal of the materials to Congress was permissible under Rule 6(e) of the Federal Rules of Criminal Procedure, which with certain exceptions barred (and continues to bar) unauthorized disclosure of grand jury proceedings by jurors.<sup>975</sup> Two of the defendants filed writs of mandamus and prohibition in the U.S. Court of Appeals for the D.C. Circuit, but the Court, sitting *en banc*, denied that relief in a brief order.<sup>976</sup>

Jaworski's Watergate-era model suggests that Mueller could advise the grand jury that is investigating President Trump's obstruction of justice that it may seek Court permission to submit a sealed report to the House of Representatives. Although the Court would have discretion to grant or deny the request and President Trump might oppose the move rather than acquiescing as Nixon did, there would be few reasons for the Court to reach a different decision. In addition, this course of action would seem to sidestep Department of Justice regulations barring disclosure of pending matters because those regulations apply to the special counsel, not the grand jury, an entity that is independent from the Department of Justice. That said, if Mueller determined that he was required to report such a development to Deputy Attorney General Rosenstein, the special counsel regulations empower Rosenstein to block any action he concludes is "inappropriate or unwarranted under established Departmental practices."<sup>977</sup>

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<sup>971</sup> *In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1221 (D.D.C. 1974).

<sup>972</sup> Reply Brief of the U.S. at \*109-110, *U.S. v. Nixon*, 418 U.S. 683 (1974) ("Reply Brief, *U.S. v. Nixon*").

<sup>973</sup> *Id.* at \*5. Deferring to the "primary jurisdiction" of the House of course leaves open the possibility that the grand jury had "secondary jurisdiction" to indict the president. We discuss that issue separately below.

<sup>974</sup> *In re Report & Recommendation*, 370 F. Supp. at 1221, 1231. The seven indicted defendants opposed the transmission of the materials, but President Nixon did not. *Id.* at 1221.

<sup>975</sup> *Id.* at 1224-30; see also Fed. R. Crim. P. 6(e); Fed R. Crim. P. 6(3) Note 1 to Subdivision (e) ("This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure.").

<sup>976</sup> *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) ("It has been asserted, both in the District Court and here, that the discretion ordinarily reposed in a trial court to make such disclosure of grand jury proceedings as he deems in the public interest is, by the terms of Rule 6(e) of the Federal Rules of Criminal Procedure, limited to circumstances incidental to judicial proceedings and that impeachment does not fall into that category. Judge Sirica has dealt at length with this contention, as well as the question of the grand jury's power to report, in his filed opinion. We are in general agreement with his handling of these matters, and we feel no necessity to expand his discussion.").

<sup>977</sup> 28 C.F.R. § 600.7(b).

Rosenstein would need to notify Congress of a decision to overrule Mueller, but only after Mueller had concluded his investigation.<sup>978</sup> Mueller might try to force disclosure by concluding his investigation around this time, but events may not make that possible. For example, Mueller may have other prosecutions, or lines of investigation, pending.

## **2. Department of Justice referral to Congress**

Alternatively, Mueller could seek to make a referral to Congress, either on his own or through regular Department of Justice channels. Mueller's authority to make such disclosures without involving Deputy Attorney General Rosenstein is limited by Department of Justice regulations and guidance as well as the absence of any specific authorization in Order No. 3915-2017 to issue a direct or public referral. Section 600.9(c) of Title 28 of the Code of Federal Regulations states that "[a]ll other releases of information by any Department of Justice employee, including the Special Counsel and staff, concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with respect to any criminal investigation, and relevant law."<sup>979</sup> The US Attorney's Manual, the primary source of Department of Justice guidelines, prohibits department offices from disclosing to Congress information relating to pending investigations, closed investigations that did not become public, matters involving grand juries, matters that reveal the reasons behind the exercise of prosecutorial discretion, or matters that might reveal the identity of individuals who have been investigated but not indicted.<sup>980</sup>

Whether this guidance applies to the special counsel is unclear. Special Counsel John Danforth, who investigated the possible cover-up of the federal government's role in the 1993 confrontation at the Mt. Carmel Complex in Waco, Texas, issued interim and final reports detailing his findings as well as a November 8, 2000 press release summarizing them.<sup>981</sup> Attorney General Janet Reno's order appointing Danforth required him to submit these reports in a form that would "permit public dissemination";<sup>982</sup> however, no comparable provision appears in Order No. 3915-2017 appointing Mueller.

Regardless of whether Mueller might make his own findings public or disclose them selectively to Congress, Department of Justice regulations require that Mueller submit a confidential report to Deputy Attorney General Rosenstein at the conclusion of his work explaining the prosecution and declination decisions he made.<sup>983</sup> Mueller could use that report as an opportunity to lay out any findings that might support a case against President Trump for

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<sup>978</sup> 28 C.F.R. § 600.9(a)(3) ("Upon conclusion of the Special Counsels [sic] investigation, including, to the extent consistent with applicable law, a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.").

<sup>979</sup> The only releases that may be made public under Section 600.9 are the attorney general's reports to Congress of the appointment or removal of a special counsel as well as a report of instances in which the attorney general overruled a course of action proposed by the special counsel.

<sup>980</sup> U.S. Dep't of Justice, *U.S. Attorneys' Manual*, § 1-8.030.

<sup>981</sup> Office of Special Counsel John Danforth, *News Release*, Nov. 8, 2000, available at <https://upload.wikimedia.org/wikipedia/commons/6/6f/Danforthreport-pressrelease.pdf>.

<sup>982</sup> Attorney General Order No. 2256-99, Exhibit 1, Office of Special Counsel John Danforth, *Exhibits to the Final Report*, available at <https://upload.wikimedia.org/wikisource/en/4/40/Danforthreport-exhibits.pdf>. The order does not mention the US Attorney's Manual guidelines, so it is not clear how the Department of Justice reconciled the two authorities.

<sup>983</sup> 28 C.F.R. § 600.8(c).

obstruction of justice (and/or related offenses) but explain that he has chosen to decline prosecution because he thinks that the matter should be referred to Congress for impeachment. Deputy Attorney General Rosenstein (again in the capacity of acting attorney general because of Jeff Sessions' recusal) would then have the responsibility of deciding whether to submit the report to Congress.<sup>984</sup> The ability to override Department of Justice guidelines and regulations precluding such disclosure is presumably within his authority since the Department of Justice ignored those rules when it published the Danforth Report.

### **3. Additional coordination with Congress**

The Watergate episode serves as precedent for even more direct forms of coordination between a prosecutor investigating the president and Congress. On June 28, 1974, House Judiciary Committee Chairman Peter Rodino, Jr. wrote to Jaworski to request that Jaworski give John Doar, a special counsel to the Committee, the "opportunity to examine any memorandum that [Jaworski had] prepared which summarizes all of the evidence pertaining to President Nixon's conduct as it relates to the Watergate cover-up conspiracy."<sup>985</sup> Doar wrote an accompanying letter to Jaworski expressing the Chairman's belief that the materials could be subpoenaed if Jaworski did not grant the request.<sup>986</sup> Jaworski wrote back to Rodino the same day and offered to let Mr. Doar review "a summary memorandum prepared here in connection with our duty . . . to investigate 'allegations involving the President.'"<sup>987</sup>

Whether Mueller could engage in similar coordination with congressional staff is unclear. Assuming the Department of Justice regulations and guidelines against disclosure would apply to him, Mueller could request permission from Deputy Attorney General Rosenstein to share a summary of his case against President Trump with congressional staff. If Rosenstein overruled Mueller, the special counsel regulations might require him to notify Congress of that decision, though only upon conclusion of Mueller's investigation.<sup>988</sup>

### **C. Indictment and prosecution**

Although some commentators have argued that a president cannot be indicted in office,<sup>989</sup> the law is unsettled on that point. The Constitution is silent on the issue, the framers did not discuss it, and no Court has ruled one way or another.<sup>990</sup> Although the Department of

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<sup>984</sup> We presume that this authority stems from the attorney general's authority to oversee the department. 28 U.S.C.A. § 510; *see also* 28 C.F.R. § 0.5 ("The Attorney General shall . . . [s]upervise and direct the administration and operation of the Department of Justice, including the offices of U.S. Attorneys and U.S. Marshals, which are within the Department of Justice.").

<sup>985</sup> Peter Rodino, Letter from Peter W. Rodino, Jr., to Leon Jaworski, *House Committee on the Judiciary*, Jun. 28, 1974, available at <http://geoffshepard.com/wp-content/uploads/2015/06/AD-5-3.pdf>.

<sup>986</sup> John Doar, Letter from John Doar, Special Counsel, to Leon Jaworski, *House Committee on the Judiciary*, Jun. 28, 1974, available at <http://geoffshepard.com/wp-content/uploads/2015/06/AD-5-3.pdf>.

<sup>987</sup> Leon Jarowski, Letter from Leon Jaworski to Peter W. Rodino, Jr., Office of the Special Prosecutor, Jun. 28, 1974, available at <http://geoffshepard.com/wp-content/uploads/2015/06/AD-5-3.pdf>.

<sup>988</sup> 28 C.F.R. § 600.9(a)(3).

<sup>989</sup> *See, e.g.*, Akhil Reed Amar, On Prosecuting Presidents, 27 Hofstra L. Rev. 677 (1999); Akhil Reed Amar and Brian C. Kalt, The Presidential Privilege Against Prosecution, 2 Nexus 11 (1997).

<sup>990</sup> The issue was fully briefed in *U.S. v. Nixon*, but the Supreme Court did not address it. *See* Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at \*95-122, *U.S. v. Nixon*, 418 U.S. 683 (1974), available at 1974 WL 187588 ("Response Brief, *U.S. v. Nixon*"); Reply Brief for the United States at \*24, *U.S. v. Nixon*, 418 U.S. 683 (1974), available at 1974 WL 159436 ("Resort to

Justice's Office of Legal Counsel (OLC) has twice opined that a sitting president may not be indicted, Special Prosecutor Jaworski and Independent Counsel Kenneth Starr—the individuals charged with investigating Presidents Nixon and Clinton—thought otherwise. In our view, subjecting the president to criminal prosecution will not necessarily incapacitate the executive branch. While we acknowledge there are special considerations that must impact any form of litigation involving the president, the possibility of a criminal case against President Trump is consistent with the Article III jurisdiction of federal courts and Supreme Court precedent.<sup>991</sup>

### **1. *Whether a sitting president may be indicted is an open question***

The Constitution does not grant the president—or any other member of the executive branch—immunity from criminal prosecution.<sup>992</sup> Instead, the Constitution provides that “[t]he President, Vice President and all civil Officers of the United States, shall be *removed* from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>993</sup> The Constitution also makes clear that the only consequences of conviction on charges of impeachment are removal from office and disqualification from holding office in the future; the same passage also explicitly states that “*the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*”<sup>994</sup> These sections of the Constitution make clear that any officer who has been removed from office as a result of impeachment—including the president—may also face criminal charges.<sup>995</sup> The question left open by the Constitution is not whether a president can be indicted—it is when.

### **2. *The Office of Legal Counsel's opinion that a sitting president cannot be indicted is not dispositive***

The OLC has issued two memoranda finding that a sitting president cannot be indicted: one in 1973 during the Watergate investigation and one in 2000 as Kenneth Starr was contemplating indicting President Clinton.<sup>996</sup> Both memoranda acknowledge that there is no

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constitutional interpretation, history, and policy does not provide a definitive answer to the question of whether a sitting President enjoys absolute immunity from the ordinary processes of the criminal law. What we believe is clear is that nothing in the text of the Constitution or in its history—including close scrutiny of the background of relevant constitutional provisions and of the intent of the Framers—imposes any bar to indictment of an incumbent President.”).

<sup>991</sup> We only discuss whether the President may face federal prosecution. Whether a state may pursue charges against the President is a separate matter, though we expect that some of the arguments we take on in Subsection 4 would be leveled against any form of criminal action against the president.

<sup>992</sup> See U.S. Const. art. II. In fact, the only form of immunity contained in the Constitution is the privilege from arrest enjoyed by members of Congress “during their Attendance at the Session of their respective Houses, and in going to and returning from the same” for “all Cases, except Treason, Felony and Breach of the Peace.” U.S. Const. art. I, § 6, cl. 1.

<sup>993</sup> U.S. Const. art. II, § 4 (emphasis added).

<sup>994</sup> U.S. Const. art. I, § 3, cl. 7 (emphasis added).

<sup>995</sup> This reading is supported by Article III, Section 2, Clause 3, which distinguishes between criminal trials by jury, which “shall be by Jury” and cases of impeachment, which under Article II, Section 3, Clause 6 are tried in the Senate.

<sup>996</sup> OLC, [A Sitting President's Amenability to Indictment and Criminal Prosecution](https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf), Oct. 16, 2000, available at [https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf), (henceforth “2000 OLC Memo”); OLC, [Memorandum Re: Amenability of the President, Vice President and](#)

explicit support in the Constitution for the conclusion that a sitting president cannot be indicted.<sup>997</sup> Instead, the OLC memoranda rely heavily on “functionalist”<sup>998</sup> arguments: that the trial of a president would raise separation of powers concerns by subjecting the president to trial in a court overseen by the Judiciary; that the prosecution of a president would impede the ability of a president to govern by requiring his personal attendance or by interrupting official duties that “cannot be performed by anyone else”; and that impeachment is preferable to indictment because Congress, not a jury, should decide whether a president should continue to discharge his unique, national mandate.<sup>999</sup>

While we address the substance of the OLC memoranda below, we start with the simple observation that the Department of Justice’s guidance that the president cannot be prosecuted is not dispositive as a matter of law. In other words, if President Trump attempted to dismiss a criminal case on the grounds that a sitting president cannot be prosecuted, the courts would not be obliged to grant the motion.<sup>1000</sup> Indeed, the OLC has seen its guidance overruled in the past. For instance, in *Public Citizen v. Burke*, the District Court held that an OLC memorandum directing the National Archives and Record Administration to honor all claims of executive privilege asserted by former presidents “is contrary to law and cannot be relied on by the National Archives . . . .”<sup>1001</sup> As a matter of law, the OLC memoranda have no bearing—other than their persuasiveness—on whether a Court would permit indictment of a sitting president.

But there is a separate, equally relevant question: whether the OLC memoranda are binding on Special Counsel Mueller. The answer to that question is unclear.<sup>1002</sup> On the one hand, the OLC guidance is generally considered to be binding on the executive branch.<sup>1003</sup> And

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Other Civil Officers to Federal Criminal Prosecution while in Office, Sept. 24, 1973, available at <https://fas.org/irp/agency/doj/olc/092473.pdf>, (henceforth “1973 OLC Memo”).

<sup>997</sup> The 1973 OLC Memo, which is recounted at length by the 2000 OLC Memo, concluded that “the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings.” 1973 OLC Memo at \*7.

<sup>998</sup> See Jonathan Turley, *‘From Pillar to Post’: The Prosecution of American Presidents*, 37 Am. Crim. L. Rev. 1049, 1075 (2000) (“Once the textualist and historical claims are stripped away, theories like the sequentialist theory are reduced to their functionalist core.”).

<sup>999</sup> 1973 OLC Memo at \*24-32; see also 2000 OLC Memo at \*226-232 (recounting the 1973 OLC Memo).

<sup>1000</sup> *Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010).

<sup>1001</sup> 655 F. Supp. 318, 322 (D.D.C. 1987).

<sup>1002</sup> Compare Andrew Crespo, *Is Mueller Bound by OLC’s Memos on Presidential Immunity?*, *Lawfare*, Jul. 25, 2017, available at <https://www.lawfareblog.com/mueller-bound-olcs-memos-presidential-immunity> with Adam Liptak, *A Constitutional Puzzle: Can the President Be Indicted?*, *New York Times*, May 29, 2017, available at [https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html?\\_r=1](https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html?_r=1).

<sup>1003</sup> Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1305 (2000) (“When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General.”); Trevor W. Morrison, Libya, “Hostilities,” *the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 Harv. L. Rev. F. 62, 73 (2011) (“OLC does not have the power to impose conclusive, binding legal obligations on the President, but by longstanding tradition its opinions are treated as presumptively binding and are virtually never

Department of Justice regulations require that Special Counsel Mueller follow the “rules, regulations, practices, and policies of the Department of Justice,”<sup>1004</sup> a requirement that at least on its face would seem to include the OLC 1973 and 2000 memoranda.

On the other hand, the OLC justification for treating its guidance as binding may not extend to the special counsel.<sup>1005</sup> The OLC authority to issue authoritative interpretations of law is based on its statutory obligation to render opinions to the heads of other executive agencies and to conduct litigation on behalf of the United States<sup>1006</sup>; however, the latter source of the OLC authority does not reach agency officials who are authorized to conduct litigation without first obtaining the attorney general’s approval of the positions that they take.<sup>1007</sup> This raises two separate issues: First, neither of the OLC 1973 and 2000 memoranda were issued pursuant to a request from an agency or in conjunction with litigation in which the president’s amenability to prosecution was at issue. Second, because the special counsel has “the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney,” Mueller’s office simply may be beyond the purview of the OLC.

A significant point that weighs in favor of the latter view is that Special Prosecutor Jaworski, Independent Counsel Walsh, and Independent Counsel Starr did not view themselves to be bound by the OLC guidance. In 1974, Watergate Special Prosecutor Leon Jaworski filed a Supreme Court brief defending his ability to prosecute the president—in defiance of the 1973 OLC memorandum.<sup>1008</sup> Although Lawrence Walsh declined to file charges against President Reagan, he spent an entire chapter of his final report explaining his decision not to prosecute President Reagan “because a President, and certainly a past President, is subject to prosecution in appropriate cases . . . .”<sup>1009</sup> Walsh also actively investigated George H.W. Bush, who was Vice President during Iran/Contra, during Reagan’s presidency and into Bush’s presidency.<sup>1010</sup> Finally, in 1998, Independent Counsel Kenneth Starr obtained an opinion from

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overruled by the President or Attorney General.”); See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to Att’ys of the Office of Legal Counsel, Dep’t of Justice, Best Practices for OLC Legal Advice and Written Opinions 1, (Jul. 16, 2010, *available at* <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>). (“OLC’s core function, pursuant to the Attorney General’s delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.”).

<sup>1004</sup> 28 C.F.R. § 600.7(a).

<sup>1005</sup> See Andrew Crespo, *Lawfare*, Jul. 25, 2017.

<sup>1006</sup> Office of Legal Counsel, Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding, Aug. 6, 1987 at \*96-98, *available at* <https://www.justice.gov/file/23976/download>.

<sup>1007</sup> Andrew Crespo, *Lawfare*, Jul. 25, 2017; see also Cornelia T. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676, 710-14 (2005), *available at* <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1190&context=facpub>.

<sup>1008</sup> Reply Brief, *U.S. v. Nixon* at \*5-6.

<sup>1009</sup> Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters* at \*445, Aug. 4, 1993, *available at* <https://archive.org/details/WalshReport>. Walsh ultimately concluded, “President Reagan’s conduct fell well short of criminality which could be successfully prosecuted. Fundamentally, it could not be proved beyond a reasonable doubt that President Reagan knew of the underlying facts of Iran/Contra that were criminal or that he made criminal misrepresentations regarding them.” *Id.* at 445.

<sup>1010</sup> *Id.* at 473. Walsh described the investigation of Bush as “regrettably incomplete,” because evidence pointing to Bush’s involvement was uncovered late in the investigation (Bush produced his

Professor Ronald Rotunda concluding that a sitting president could be subject to indictment even though he presumably knew that the OLC had already reached the opposite conclusion.<sup>1011</sup> Although Jaworski and Starr held different positions with different authority,<sup>1012</sup> their actions nevertheless suggest that Mueller is not clearly bound by the OLC opinion.

The risk that Special Counsel Mueller would run, of course, is that there is a potential argument that Rosenstein would have cause to fire him if he were to ignore the OLC memoranda. An alternative that would pose less risk to Mueller would be to ask Rosenstein for relief from the OLC memoranda. The Department of Justice special counsel regulations permit Mueller to consult with the attorney general (in this case Deputy Attorney General Rosenstein) in the event “that the extraordinary circumstances of any particular decision would render compliance with required review and approval procedures by the designated Departmental component inappropriate . . . .”<sup>1013</sup> Mueller could argue to Rosenstein that, just like Jaworski and Starr, his duties require that he investigate the president and consider appropriate charges, and that he cannot perform these duties within the limits of the OLC memoranda because those limits run counter to the very purpose of having a special counsel. There is no guarantee that Rosenstein would grant such a request, but proceeding in this manner would avoid furnishing Rosenstein with a possible reason to terminate Mueller based on the argument there was “good cause.”

### **3. *The availability of impeachment does not foreclose the possibility of indictment***

Regardless of whether the OLC opinion is binding, there are reasons to think that it is incorrect. Chief among them is the fact that the OLC erroneously treats impeachment and indictment as interchangeable processes, even though it has been clear from the earliest days of the Republic that these processes involve different adjudicators, procedures, standards, and consequences of conviction.<sup>1014</sup> While the same conduct may, as we argue here, justify both impeachment and indictment, one can imagine crimes that are so minor that they would not

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personal diary in December 1992), and because Bush pardoned six Iran/Contra defendants who might have been turned against him. *Id.* at 473-74.

<sup>1011</sup> Ronald Rotunda, Memorandum to Judge Starr Re: the Indictability of the President, May 13, 1998, available at <https://assets.documentcloud.org/documents/3899216/Savage-NYT-FOIA-Starr-memo-presidential.pdf>. In fact, the statute under which Starr operated included language similar to the Department of Justice regulations under which Mueller is operating: “An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.” 28 U.S.C. § 594(f)(1) (authorization expired in 1999).

<sup>1012</sup> Jaworski served as a Special Prosecutor at the pleasure of the Attorney General; Starr was an Independent Counsel who operated under the Ethics in Government Act of 1978, as amended.

<sup>1013</sup> 28 C.F.R. § 600.7(a).

<sup>1014</sup> See, e.g., The Federalist No. 69 (Alexander Hamilton) (explaining that the President may “even pardon treason, when prosecuted in the ordinary course of law” but “could shelter no offender, in any degree, from the effects of impeachment and conviction”), available at [http://avalon.law.yale.edu/18th\\_century/fed69.asp](http://avalon.law.yale.edu/18th_century/fed69.asp).

justify impeachment<sup>1015</sup> as well as impeachable offenses for conduct that could not be the subject of successful prosecution.<sup>1016</sup>

As past cases involving members of the executive branch and judiciary have demonstrated, indictments (and occasionally convictions) have preceded an official's removal by impeachment, resignation, or—in the case of Congress—House and Senate procedure. Federal Judges Samuel Kent and Harry Claiborne were both convicted of federal crimes before being impeached.<sup>1017</sup> Vice President Spiro Agnew faced charges that he received corrupt payments while he was a Baltimore county executive, Governor of Maryland, and Vice President and resigned from office as part of a plea deal.<sup>1018</sup> Although Members of Congress are subject to removal under the procedures governing each house, Members of Congress have also been indicted (and in some cases convicted) of crimes prior to their removal from office.<sup>1019</sup> Each of these cases supports the notion that enforcement of criminal laws against a government official is distinct from the question of whether that person will continue to hold the office to which he or she was elected (or appointed).

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<sup>1015</sup> Cass R. Sunstein, *Impeaching the President*, 147 U. Pa. L. Rev. 279, 284–85 (1998) (“It would be far more sensible, textually speaking, to understand ‘other high Crimes and Misdemeanors’ to conform to ‘treason’ and ‘bribery,’ and to require the relevant ‘misdemeanors’ to have to meet a certain threshold of ‘highness’ as well. Thus, the phrase ‘high Crimes and Misdemeanors’ would be read as a piece, to suggest illegal acts of a serious kind and magnitude and also acts that, whether or not technically illegal, amount to an egregious abuse of office.”).

<sup>1016</sup> See Akhil Reed Amar, *On Impeaching Presidents*, 28 Hofstra L. Rev. 291 at 295 (1999) (“[A] President might be unfit to govern even if his misconduct was not an ordinary crime. (Imagine a President who simply runs off on vacation in the middle of a crisis.) Conversely, not every technical offense in statute books—especially offenses that are not ordinarily prosecuted—should count as the kind of high misconduct that unfits a man to be President after his fellow citizens have chosen him.”); Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 Geo. Wash. L. Rev. 712, 717 (1999) (“It follows that ‘high Crimes and Misdemeanors’ cannot be equated with mere crimes, however serious. Indeed, it appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order for it to be impeachable as a high crime or misdemeanor. A President who completely neglects his duties by showing up at work intoxicated every day, or by lounging on the beach rather than signing bills or delivering a State of the Union address, would be guilty of no crime but would certainly have committed an impeachable offense.”).

<sup>1017</sup> See Articles of Impeachment of Judge Harry E. Claiborne, *attached as App. D.4*; Impeachment of Judge Samuel B. Kent, H. Rept. 111-159 (111th Congress, Jun. 17, 2009), *available at* <https://www.congress.gov/111/crpt/hrpt159/CRPT-111hrpt159.pdf> and *attached as App. D.5*.

<sup>1018</sup> James Naughton, *Agnew Resigns the Vice Presidency and Admits He Evaded Taxes on 1967 Income*, *New York Times*, Oct. 10, 1973, *available at* <http://www.nytimes.com/learning/general/onthisday/big/1010.html#article>.

<sup>1019</sup> See, e.g., Hunter Schwarz, *More than Two Dozen Members of Congress Have Been Indicted Since 1980*, Jul. 29, 2015, *available at* <https://www.washingtonpost.com/news/the-fix/wp/2015/07/29/more-than-two-dozen-members-of-congress-have-been-indicted-since-1980/>. Senators who have been indicted include: Sen. Bob Menendez (D-NJ), Sen. Ted Stevens (R-AK), Sen. David Durenberger (R-MN), Sen. Kay Bailey Hutchison (R-TX), Sen. Harrison A. Williams (D-NJ). Representatives who have been indicted include: Rep. Michael Grimm (R-NY), Rep. Chaka Fattah (D-PA), Rep. Rick Renzi (R-AZ), Rep. William Jefferson (D-LA), Rep. Tom DeLay (R-TX), Rep. James Traficant (D-OH), Rep. Wes S. Cooley (R-OR), Rep. Nicholas Mavroules (D-MA), Rep. Mel Reynolds (D-IL), Rep. Walter R. Tucker III (D-CA), Rep. Dan Rostenkowski (D-IL), Rep. Joseph Kolter (D-PA), Rep. Albert Bustamante (D-TX), Rep. Donald E. Lukens (R-OH), Rep. Patrick Swindall (R-GA.), Rep. Mario Biaggi (D-NY), Rep. George Hansen (R-ID), Rep. John Jenerette (D-SC), and Rep. Richard Kelly (R-FL).

#### **4. Subjecting the president to criminal prosecution need not incapacitate the executive branch**

A frequent response to these points, and indeed one that features heavily in the OLC memoranda,<sup>1020</sup> is that the president is unique: unlike judges, members of congress, or subordinate members of the executive branch, the president has powers that only he can exercise. The president is the only member of our government who serves a nationwide electorate (other than the vice president, whose formal powers under the Constitution are extremely limited). The argument, then, is that subjecting a president to indictment would incapacitate the executive branch in a manner that is inconsistent with the responsibility that the Constitution places in the president alone.

The flaw with this argument is that it disregards an equally powerful Constitutional interest: preserving the Article III jurisdiction of federal courts to resolve alleged violations of the criminal law by any person, regardless of station. Reconciling the jurisdiction of the judiciary with the president's Article II power as head of the executive branch does not require us to choose the latter over the former. Instead, as the Supreme Court has held on several occasions, the unique powers enjoyed by the president justify special accommodation but not immunity from judicial process. As a result, there are reasons to be skeptical that a president's generalized assertions of executive privilege or appeals to the "separation of powers" are sufficient to preclude the possibility of indictment. There is a strong argument that the mutual respect that the Constitution demands of co-equal branches of government requires that the judiciary maintain jurisdiction over criminal actions against a sitting president.<sup>1021</sup> In exceptional cases, especially those in which Congress is disinclined to impeach, it is crucial that the judiciary provide a forum in which the president can be held accountable to the rule of law.

This view finds support in two cases in which presidents have raised objections to legal process. In *U.S. v. Nixon*, the Supreme Court affirmed a decision denying President Nixon's motion to quash a subpoena of tape recordings and documents relating to conversations with aides and advisers.<sup>1022</sup> The Court recognized the importance of the confidentiality of presidential communications, but weighed these concerns against "the inroads of such a privilege on the fair administration of criminal justice."<sup>1023</sup> According to the Court, "[n]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."<sup>1024</sup> Near the end of its opinion, the Court referenced a quotation from Chief Justice Marshall when he sat as a trial judge in the criminal case against Aaron Burr: "(i)n no case of this kind would a court be required to proceed against the president as against an ordinary individual."<sup>1025</sup> "Marshall's statement," the Court explained, "*cannot be read to mean in*

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<sup>1020</sup> See 2000 OLC Memo at \*246-47; 1973 OLC Memo at \*27-29.

<sup>1021</sup> The separation-of-powers concern that the Court considered in *Morrison v. Olson*, 487 U.S. 654 (1988) is distinct. In *Morrison*, the Supreme Court held that the Ethics in Government Act did not violate the appointments clause, Article III, or the separation of powers doctrine by establishing an independent counsel who was appointed by a panel of three judges and was required to make certain reports to Congress. Because the special counsel is a creation of the Department of Justice, not Congress, the regulations do not appear to implicate the separation of powers issues discussed in *Morrison*.

<sup>1022</sup> *U.S. v. Nixon*, 418 U.S. 683 (1974).

<sup>1023</sup> *Id.* at 711-12.

<sup>1024</sup> *Id.* at 706.

<sup>1025</sup> *Id.* at 715 (quoting *U.S. v. Burr*, 25 F. Cas. pp. 192 (No. 14,692d) (CC Va.1807)).

any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."<sup>1026</sup> The Supreme Court instructed the district court to adhere to Marshall's standard by "accord[ing] to Presidential records that high degree of deference suggested in *U.S. v. Burr*" and to ensure that no *in camera* material was revealed to anyone.<sup>1027</sup>

Similarly, in *Clinton v. Jones*, the Court rejected President Clinton's argument that he was entitled to immunity for civil actions based on unofficial conduct that preceded his Presidency.<sup>1028</sup> Like Nixon, President Clinton's appeal to the text and structure of the Constitution was unavailing. As the Supreme Court in *Nixon* explained, "The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."<sup>1029</sup> Later in the opinion, the Court explained that even though the "high respect that is owed to the office of the Chief Executive" did not justify a rule of categorical immunity, that respect nonetheless "should inform the conduct of the entire proceeding, including the timing and scope of discovery."<sup>1030</sup> In other words, a balance could be struck by the Courts to preserve their duty to exercise Article III jurisdiction and the president's authority to lead the executive branch, pursuant to Article II.<sup>1031</sup>

We think the Supreme Court would reach a similar conclusion if it were asked to hold that a president has immunity from prosecution. Although the president might understandably argue that a criminal trial would impose a particularly severe burden on the president, the courts' interest in maintaining jurisdiction would also be heightened. While preparing for a criminal trial would put strains on the president, there are plenty of ways that a court could make special accommodations: Trial could be scheduled (and rescheduled) to fit the president's schedule; the execution of any sentence might, for instance, be delayed until the completion of the president's term or subsequent removal from office.<sup>1032</sup> Moreover, the "disruption" to the presidency caused by an indictment cannot be judged in the abstract; instead it must be

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<sup>1026</sup> *Id.* (emphasis added).

<sup>1027</sup> *Id.*

<sup>1028</sup> 520 U.S. 681, 703 (1997).

<sup>1029</sup> *Id.*

<sup>1030</sup> *Id.* at 707.

<sup>1031</sup> In *Clinton v. Jones*, the Court also noted that there had been many other interactions between the Courts and sitting Presidents: "President Monroe responded to written interrogatories, . . . President Ford complied with an order to give a deposition in a criminal trial, and President Clinton has twice given videotaped testimony in criminal proceedings. Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case under such circumstances, and President Carter similarly gave videotaped testimony for use at a criminal trial. *Id.*; 520 U.S. 704–05 (internal citations omitted).

<sup>1032</sup> See Eric M. Freedman, *On Protecting Accountability*, 27 Hofstra L. Rev. 677, 707-708 (1999); see also Turley, *From Pillar to Post* at \*1079-80 ("Obviously, the most serious Presidential function is that of commander-in-chief in wartime. Nevertheless, it is far from evident how a state or federal prosecution would clearly curtail such functions. Short of incarceration, which will be discussed later, it is difficult to see why a President could not focus on such matters as have other Presidents facing impeachment, personal or physical trauma, or national crisis. In any foreign emergency, no trial court would likely compel an appearance in contradiction of Presidential duties and, if it did, it is unlikely the President would comply rather than appealing the order.").

assessed in relation to the disruption caused by impeachment proceedings, which of course is contemplated by the Constitution.<sup>1033</sup>

Allowing a president to avoid indictment during his term simply because the demands of his office might require complicated balancing of interests raises more questions than it answers. In Federalist 51, James Madison wrote, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>1034</sup> The separation of powers—legislative, executive, and judicial—was the solution to that great difficulty, and allowing the president, the head of the executive, to avoid or delay scrutiny in the judiciary for violations of criminal law would undermine the balance that the framers struck in the Constitution.

**5. To the extent that indictment does in fact incapacitate the president, the Constitution contemplates a variety of solutions, including the 25<sup>th</sup> Amendment and resignation**

Although we think that a president could find a way to balance the demands of preparing a criminal defense and the responsibility of executing the responsibilities of his office, the Constitution presents several options if that is not the case. Those options are based on the crucial distinction that the Constitution makes between the Office of the Presidency and the person elected to fill that office.<sup>1035</sup> The Office of the Presidency does not simply disappear if a president is incapacitated. If there is indeed a conflict between a president’s ability to execute the Office of the Presidency and the president’s amenability to prosecution, the Constitution permits the president to vacate that office on a temporary or permanent basis. In the case of the president’s temporary incapacitation or resignation from office, the vice president, an officer who in most cases will have been chosen by the same nation-wide electorate of the president, would assume the Office of the Presidency.<sup>1036</sup>

Section 3 of the Twenty-Fifth Amendment authorizes the president to step aside on a temporary basis by declaring to the president pro tempore of the Senate and the speaker of the House of Representatives “that he is unable to discharge the powers and duties of his office,” thereby making the vice president the acting president until the president issues another declaration to the contrary.<sup>1037</sup> It is possible to envision a president employing this mechanism so that he can devote his full capacities to a criminal trial and then reclaiming the presidency if he is acquitted. (If the president were found guilty, we assume that he likely would either resign or face impeachment unless he had a strong case on appeal).

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<sup>1033</sup> See Carl B. Feldbaum, George T. Frampton, Gerald Goldman and Peter F. Rient, Memorandum to Leon Jaworski at 728-749, Feb. 12, 1974, *available at* <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2059&context=hlr>.

<sup>1034</sup> The Federalist No. 51 (James Madison), *available at* [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).

<sup>1035</sup> For example, before entering office, each President must swear or affirm that he “will faithfully execute the *Office of the President* of the United States.” U.S. Const. Art. II, § 1, cl. 7 (emphasis added).

<sup>1036</sup> U.S. Const. amend. XXV, § 1.

<sup>1037</sup> U.S. Const. amend. XXV, § 3.

The president could also resign.<sup>1038</sup> While some might view this as a rather extreme solution, it is far more consistent with the core tenets of our democracy than granting a sitting president immunity from criminal prosecution. If it is the president's duty to take care that the laws are faithfully executed and to preserve and defend the constitution, then surely it is also his duty to step aside when his own conduct leads to circumstances in which he cannot fulfill the functions of his office.<sup>1039</sup>

#### **D. Deferred prosecution pending the removal or resignation of the president**

Another alternative available to Mueller is to hold the case pending the removal or resignation of the president. The Constitution explicitly provides that officers who have been impeached, including the president, may be prosecuted after they have been impeached and removed: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: *but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*"<sup>1040</sup> President Nixon conceded this point in a brief to the Supreme Court.<sup>1041</sup>

Special Counsel Mueller could "hold" the case in two ways: First, if the case involves other individuals, he can indict them and treat the president as an unindicted co-conspirator. This is precisely what Special Prosecutor Jaworski did in Watergate (as mentioned above, Jaworski took the concurrent step of getting the grand jury to refer the case against President Nixon to the House).<sup>1042</sup> Although President Nixon challenged the legality of naming a sitting president as an unindicted co-conspirator and it was fully briefed in *U.S. v. Nixon*, the Supreme Court never ruled on the matter. Second, Mueller could seek a sealed indictment against President Trump but defer further proceedings until he is no longer in office. This option is less attractive than the first because it would be difficult to keep the indictment secret, would deprive President Trump of an opportunity to respond to any charges levelled against him, and might also deprive voters of information that could prove consequential in an intervening election.<sup>1043</sup> The main justification for taking such a step would be to avoid running up against any applicable statutes of limitations and to preserve the special counsel's jurisdiction over the matter, which would end if the case were closed.

Deferring prosecution poses additional risks regardless of the manner in which Special Counsel Mueller retains the case. Independent Counsel Lawrence Walsh, who led the Iran/Contra investigation, warned that congressional grants of immunity to principal players in a

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<sup>1038</sup> See, e.g., President Richard Nixon, Resignation Speech, Aug. 8, 1974, available at [http://www.pbs.org/newshour/spc/character/links/nixon\\_speech.html](http://www.pbs.org/newshour/spc/character/links/nixon_speech.html); John Herbers, Nixon Resigns, *New York Times*, Aug. 9, 1974, available at <http://www.nytimes.com/learning/general/onthisday/big/0808.html>.

<sup>1039</sup> There is also the possibility that indictment of a President would lead to impeachment proceedings because Congress believes the criminal case to be strong.

<sup>1040</sup> U.S. Const. Art. I, § 3, cl. 7 (emphasis added).

<sup>1041</sup> Response Brief at 98, *U.S. v. Nixon*, 418 U.S. 683 (1974) ("This is particularly true in light of the impeachment clause which makes a President amenable to post-impeachment indictment. This clause takes account of the fact that the President is not indictable and recognizes that impeachment and conviction must occur before the judicial process is applicable to the person holding the office as President.").

<sup>1042</sup> Reply Brief at 11-34, *U.S. v. Nixon*, 418 U.S. 683 (1974).

<sup>1043</sup> See 1973 OLC Memo at \*29.

criminal matter would undermine efforts to prosecute them.<sup>1044</sup> President's Trump's efforts to undermine the case could also make it grow weaker over time, not stronger. His pardoning other individuals implicated in the case could reduce Mueller's ability to entice them to testify voluntarily;<sup>1045</sup> President Trump also has asserted the power to pardon himself, which if upheld, would obviously bring an end to a case against him;<sup>1046</sup> and there is also the ongoing risk that the President could interfere with a pending investigation by firing Attorney General Sessions or Deputy Attorney General Rosenstein. A case also could become more prejudicial to the president over time because a highly-publicized impeachment proceeding could make it difficult to empanel an impartial jury and ensure that the president receives a fair trial.<sup>1047</sup>

## **E. Other options for the special counsel**

### **1. Declination of prosecution**

Special Counsel Mueller could close his investigation without initiating any prosecutions or referring any matters to Congress; however, Department of Justice regulations require that he document any declination (or prosecution) decisions in a confidential report to Deputy Attorney General Rosenstein.<sup>1048</sup>

Federal prosecutors can prosecute or decline cases for a variety of reasons. The United States Attorneys' Manual explains that a prosecutor should recommend prosecution "if he/she believes that the person's conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that a substantial federal interest would be served by the prosecution, unless, in his/her judgment, prosecution should be

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<sup>1044</sup> Lawrence Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters*, Aug. 4, 1993, at \*xxi, 557-58, available at <https://archive.org/details/WalshReport>.

<sup>1045</sup> That said, a witness who has accepted a pardon might also forfeit his right against self-incrimination. See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 81 (1973) ("Immunity is required if there is to be rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.") (internal quotation and citation omitted).

<sup>1046</sup> We think it unlikely that the President's pardon power extends to himself. See Laurence H. Tribe, Richard Painter and Norman Eisen, *No, Trump can't pardon himself. The Constitution tells us so.*, *Washington Post*, Jul. 21, 2017, available at [https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5\\_story.html](https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html); Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 *Yale L.J.* 779, 809 (1996) ("Looking at the question from a cooler vantage point, the intent of the Framers, the words and themes of the Constitution they created, and the wisdom of the judges that have interpreted it all point to the same conclusion: Presidents cannot pardon themselves."), available at <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1233&context=facpubs>; Office of Legal Counsel, *Presidential or Legislative Pardon of the President*, at 370 (Aug. 5, 1974), available at <https://www.justice.gov/file/20856/download> ("Pursuant to Article II, Section 2 of the Constitution, the 'Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment,' is vested in the President. This raises the question whether the President can pardon himself. Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative.").

<sup>1047</sup> President Nixon's attorney argued in a memorandum to Special Prosecutor Leon Jaworski that the events and publicity surrounding Nixon's impeachment, especially the proceedings in the House Judiciary Committee, would be so prejudicial as to preclude the possibility of a fair trial. Herbert Miller, *Memorandum to the Special Prosecutor on Behalf of Richard Nixon*, available at <https://www.fordlibrarymuseum.gov/library/document/0019/4520659.pdf>.

<sup>1048</sup> 28 C.F.R. § 600.8(c).

declined because . . . [t]he person is subject to effective prosecution in another jurisdiction; or . . . [t]here exists an adequate non-criminal alternative to prosecution.”<sup>1049</sup> For that reason, a decision by Mueller to decline prosecution would not necessarily mean that he has concluded that President Trump’s conduct does not constitute a federal offense. It also could mean that the evidence available is insufficient to obtain and sustain a conviction or that impeachment pursuant to a referral is an adequate non-criminal alternative prosecution.

## **2. *Non-referral to Congress***

Mueller may also decide that the case he has assembled does not merit referral to Congress regardless of whether he proceeds with a criminal case against President Trump.

## **3. *Combination of actions***

We have previously alluded to the possibility that Special Counsel Mueller could pursue a combination of the options we have discussed. This might include indicting and referring; holding and referring; or declining and referring.<sup>1050</sup>

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<sup>1049</sup> USAM § 9-27.220; *see also* USAM § 9-27.230 (defining “substantial federal interest”); USAM § 9-27.250 (detailing the considerations that should inform a determination that adequate, non-criminal alternatives to prosecution exist).

<sup>1050</sup> Of course, there is also the possibility that Mueller will seek to prosecute cases against other members of the Trump campaign or administration first and then use any convictions he obtains as leverage to collect more information about the President’s involvement in their offenses or his obstruction of justice.

## IV. What actions might Congress take?

It is premature to engage in a full discussion of Congress' powers to investigate and impeach President Trump for obstruction, since the investigation of that possible offense is ongoing. We would nevertheless be remiss if we did not note that, regardless of the action that Special Counsel Mueller ultimately takes, Congress has the independent power to investigate President Trump and hold him accountable if it sees fit. In this Section, we briefly describe how a congressional investigation might proceed and walk through previous articles of impeachment that are relevant to the conduct we outlined in Section I.<sup>1051</sup>

### A. Investigation

Several committees in the House and Senate have conducted limited investigation of possible Russian intervention in the 2016 election and possible coordination with the Trump campaign; however, apart from the testimony delivered by FBI Director Comey to the Senate Intelligence Committee on July 8, 2016, there has been no serious investigation of allegations that the president obstructed justice.

Existing investigations could be expanded to include investigation of the president's potential obstruction or new investigative entities could be formed. During the Watergate investigation, the Senate created the Select Committee on Presidential Campaign Activities that was empowered to investigate "illegal, improper, or unethical activities" relating to the 1972 presidential campaign.<sup>1052</sup> The House or Senate could create a similar select committee to investigate President Trump's obstruction of justice and related offenses if it so desired.

These investigations could inform one or more potential actions within Congress' legislative function, which could include public reports, referrals to the Department of Justice or other executive branch agencies, and legislation, as well as impeachment.<sup>1053</sup>

### B. Impeachment

Impeachment is fundamentally both a political calculation and a legal one.<sup>1054</sup> For that reason, the legal standards that we have discussed above that that would govern a criminal

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<sup>1051</sup> For an excellent overview of the origins, law, and practice of impeachment, see Laurence Tribe and Joshua Matz, *To End a Presidency: The Power of Impeachment*, Basic Books, May 2018.

<sup>1052</sup> See, e.g., S. Res. 60 (93<sup>rd</sup> Cong., Feb. 7, 1973), available at [https://www.senate.gov/artandhistory/history/common/investigations/pdf/Watergate\\_ResolutionDebate1973.pdf](https://www.senate.gov/artandhistory/history/common/investigations/pdf/Watergate_ResolutionDebate1973.pdf).

<sup>1053</sup> For broader discussion of Congress's investigatory powers, see Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, *The Constitution Project*, 2017, available at <http://constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf> and Project on Government Oversight, *Necessary and Proper: Best Practices for Congressional Investigations*, Jun. 7, 2017, available at [http://www.pogoarchives.org/m/co/2017\\_pogo\\_necessary\\_and\\_proper\\_report.pdf](http://www.pogoarchives.org/m/co/2017_pogo_necessary_and_proper_report.pdf).

<sup>1054</sup> See *Articles of Impeachment against President Johnson*, App. D.1; see also Sunstein, *Impeaching the President*, 147 U. Pa. L. Rev. at 295 ("President Johnson was impeached less because of a violation of law—though there was a violation of law—than because radical Republicans were critical of Johnson on unambiguously political grounds."); Akhil Reed Amar, *On Impeaching Presidents*, 28 Hofstra L. Rev. at 294–95 ("[I]mpeachment is sensibly political as well as legal. Politicians judge other politicians

case against President Trump would inform the House’s decision of whether to impeach the president (as well as the Senate’s decision of whether to convict him if he was impeached), but would not be decisive.<sup>1055</sup> As Alexander Hamilton explained in Federalist 65,

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. *The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.* They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.<sup>1056</sup>

Conviction on an article of impeachment results in immediate removal from office. There is no mechanism for the president or any other officer to appeal a conviction on articles of impeachment.<sup>1057</sup>

The basic process of impeachment and trial proceeds as follows: by custom, the House Judiciary Committee usually is charged with drafting articles of impeachment in a resolution and issues a report to the full House, though that responsibility can also be delegated to a different committee.<sup>1058</sup> Then the House, by a simple majority, may vote to impeach on any article of

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and impose political punishments--removal from office and disqualification from future office-holding. The standard of conduct is not narrowly legal but also political: what counts as a “high crime and misdemeanor” cannot be decided simply by parsing criminal law statutes.”).

<sup>1055</sup> H.R. Rep. No. 101–36, “Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H. Res. 87,” 101st Cong. (1989) at 5 (“The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined “other high Crimes and Misdemeanors” to be serious violation of the public trust, not necessarily indictable offenses under criminal laws. Of course, in some circumstances the conduct at issue, such as that of Judge Nixon, constituted conduct warranting both punishment under the criminal law and impeachment.”). See also Tribe and Matz, at 43-53 (explaining that while there is no historical or prudential reason to think that only indictable crimes can serve as grounds for impeachment, the criminal code can nonetheless serve as an incomplete guide to wrongful acts).

<sup>1056</sup> The Federalist No. 65 (Alexander Hamilton), available at [http://avalon.law.yale.edu/18th\\_century/fed65.asp](http://avalon.law.yale.edu/18th_century/fed65.asp).

<sup>1057</sup> See, e.g., *Nixon v. U.S.*, 506 U.S. 224 (1993) (holding that a challenge to Senate impeachment procedures was non-justiciable); Akhil Reed Amar, On Impeaching Presidents, 28 Hofstra L. Rev. at 295 (“Impeachment is also beautifully final. No appeal lies from the judgment of an impeachment court.”).

<sup>1058</sup> See, e.g., Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, H. Rept. 111-427 (111<sup>th</sup> Congress, Mar. 4, 2010), available at <https://www.congress.gov/111/crpt/hrpt427/CRPT-111hrpt427.pdf>; Articles of Impeachment against Judge Kent, App. D.5; Articles of Impeachment against President Clinton, App. D.3.

impeachment it debates.<sup>1059</sup> The Senate tries any articles of impeachment adopted by the House, and conviction requires a two-thirds majority.<sup>1060</sup>

### C. Precedent for impeachment

We lay out the applicable precedent for articles of impeachment that could potentially be based on the conduct described in Section I; as with the discussion of potential criminal offenses, any decisions related to impeachment could well depend significantly on additional facts that are not yet known. Because the question of whether to impeach a president is ultimately a matter of congressional discretion, we do not comment on the appropriateness of impeaching the president on the grounds discussed; instead, we highlight and summarize the precedent that we consider most relevant.

We discuss three categories of articles of impeachment: obstruction of justice, which includes similar concepts like “impeding” justice; obstruction of congressional investigations of impeachable behavior; and commission of other criminal offenses. We focus on the articles of impeachment drafted against Presidents Nixon and Clinton, but we also discuss the articles of impeachment drafted against Judges Samuel B. Kent and Harry E. Claiborne.<sup>1061</sup>

#### 1. **Obstruction of justice**

The impeachment proceedings against President Nixon, President Clinton, and Judge Samuel B. Kent all involved articles of impeachment relating to obstruction of justice.

Article I of the Articles of Impeachment against President Nixon adopted by the House Judiciary Committee<sup>1062</sup> charged,

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take

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<sup>1059</sup> U.S. CONST. Art. I, § 2, cl. 5; see also Jonathan Turley, Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President, 67 Geo. Wash. L. Rev. 735, 773 (1999) (“There is no guidance as to how impeachment inquiries are to be raised, conducted, or concluded in the House, nor is there any requirement to conduct House proceedings under oath.”).

<sup>1060</sup> U.S. CONST. Art. I, § 3, cl. 6, 7; see also Jared P. Cole and Todd Garvey, Impeachment and Removal, *Congressional Research Service* at 18, Oct. 29, 2015, available at <https://fas.org/sqp/crs/misc/R44260.pdf>.

<sup>1061</sup> Although there may be differences between the constitutional and political standards between impeaching a President and impeaching a judge (who have tenure “during good behavior”), the articles of impeachment against Judges Kent and Claiborne are similar in nature to those that were pursued against Presidents Johnson, Nixon, and Clinton. See Sunstein, Impeaching the President, 147 U. Pa. L. Rev. at 300 (“My basic conclusion is that our history establishes that, as applied, the constitutional standard for impeaching the President has been distinctive, and properly so.”).

<sup>1062</sup> Nixon resigned before the House voted on the Articles of Impeachment drafted by the House Judiciary Committee. See John Herbers, Nixon Resigns, *New York Times*, Aug. 9, 1974, available at <http://www.nytimes.com/learning/general/onthisday/big/0808.html#article>.

care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, . . . .<sup>1063</sup>

Article I accused President Nixon of using the powers of his office to engage “in a course of conduct or plan designed to delay, impede, and obstruct the investigation” of the June 17, 1972 break-in of the DNC headquarters in the Watergate hotel; “to cover up, conceal and protect those responsible”; and to “conceal the existence and scope of other unlawful activities.”<sup>1064</sup> The Article listed nine components of this “course of conduct or plan,” including: “interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees”; “endeavoring to misuse the Central Intelligence Agency, an agency of the United States”; “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 a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct”; and “endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.”<sup>1065</sup>

Article II of the Articles of Impeachment against President Nixon charged that he “repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.”<sup>1066</sup> The specific means cited included the accusation that Nixon “failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial and legislative entities . . . .” and that “[i]n disregard of the rule of law, he knowingly misused the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed.”<sup>1067</sup>

Article II of the Articles of Impeachment against President Clinton followed a similar pattern. The Article charged that President Clinton “prevented, obstructed, and impeded the administration of justice” by engaging in a “course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him . . . .”<sup>1068</sup> Article II then listed several “means” by which that course of conduct or scheme was implemented, including encouraging witnesses to give

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<sup>1063</sup> Articles of Impeachment against President Nixon, App. D.2.

<sup>1064</sup> *Id.*

<sup>1065</sup> *Id.*

<sup>1066</sup> *Id.*

<sup>1067</sup> *Id.*

<sup>1068</sup> Articles of Impeachment against President Clinton, App. D.3. Note that this article was originally number III in the articles reported to the House by the House Judiciary Committee. Impeachment of William Jefferson Clinton, President of the United States, H. Rept. 105-830 at \*63 (105<sup>th</sup> Congress, Dec. 16, 1998), available at <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>.

perjurious, false, and misleading affidavits and testimony; allowing his attorney to make false and misleading statements to a Court; relating false and misleading accounts to a potential witness to a federal civil rights action; and making false and misleading statements himself. The House Judiciary Committee report explaining this Article asserted that even though impeachment did not require proof that these actions constituted a criminal obstruction of justice, it nonetheless argued that “some if not all of his actions” violated 18 U.S.C. § 1503.<sup>1069</sup>

Finally, Article III of the Articles of Impeachment against Judge Kent charged that he “corruptly obstructed, influenced, or impeded an official proceeding” by making false statements to a Special Investigative Committee of the U.S. Court of Appeals for the Fifth Circuit.<sup>1070</sup>

## **2. Obstruction of the congressional investigation of impeachable offenses**

A distinct theory of obstruction appeared in the preliminary stages of the impeachment proceedings against Presidents Nixon and Clinton. Article III of the Articles of Impeachment Against President Nixon as passed by the House Judiciary Committee<sup>1071</sup> and Article IV of the Articles of Impeachment Against President Clinton as passed by the House Judiciary Committee<sup>1072</sup> (though not adopted by the full House) charged that the respective presidents unlawfully withheld documents from Congress and impermissibly assumed the “functions and judgments” necessary to the House’s exercise of its impeachment power. These articles demonstrate that Congress could also pursue an independent theory of obstruction: that the president’s failure to respond to congressional inquiries relating to an investigation of impeachable offenses constitutes an attempt to usurp the House’s power to impeach.

## **3. Criminal conviction**

In two cases, Congress has considered articles of impeachment based on a criminal conviction. Article III of the Articles of Impeachment against Judge Harry Claiborne alleged that he committed a high crime because he was found guilty of tax fraud, in violation of 26 U.S.C. 7206(1) and was sentenced to two years’ imprisonment.<sup>1073</sup> In addition, Article III of the Articles of Impeachment against Judge Kent relied in part on the fact that “Judge Kent was indicted and pled guilty” to obstruction of justice in violation of 18 U.S.C. 1512(c)(2).<sup>1074</sup>

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<sup>1069</sup> Impeachment of William Jefferson Clinton, President of the United States, H. Rept. 105-830 at \*64 (105<sup>th</sup> Congress, Dec. 16, 1998), available at <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>. The Report further stated, “To prove in a court of law that obstruction of justice had occurred, three things have to be proved beyond a reasonable doubt: First, that there was a pending federal judicial proceeding; Second, that the defendant knew of the proceeding; and Third, that the defendant acted corruptly with the intent to obstruct or interfere with the proceeding or due administration of justice.” *Id.* The report also summarized federal obstruction of justice statutes and relevant case law in conjunction with its discussion of the same article. *Id.* at 120-21.

<sup>1070</sup> H. Res. 520 (111<sup>th</sup> Congress, Jun. 24, 2009), available at <https://www.congress.gov/111/bills/hres520/BILLS-111hres520rds.pdf>.

<sup>1071</sup> Articles of Impeachment against President Nixon, App. D.2.

<sup>1072</sup> Impeaching William Jefferson Clinton, President of the United States, for High Crimes and Misdemeanors, H. Rep. No. 105-830 at \*4-5 (105<sup>th</sup> Congress, Dec. 16, 1998), available at <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>.

<sup>1073</sup> Articles of Impeachment against Judge Harry E. Claiborne, App. D.4.

<sup>1074</sup> Articles of Impeachment against Judge Samuel B. Kent, App. D.5.

## Conclusion

In our estimation, the public discourse surrounding President Trump's course of conduct, including the firing of FBI Director Comey, can benefit from a detailed exploration of Trump's possible obstruction of justice. Even in recent months, these issues have often been addressed without a clear understanding of the full picture when it comes to the law and facts factoring into the obstruction analysis. That may be due to the necessarily piecemeal and delayed manner of disclosures about the relevant facts. It also may be the product of the cacophony of voices that dominate our news cycles—ones that can be too varied and conflicting to make a lasting impression. Our goal in this paper has been to inform the conversation by collecting the relevant facts and allegations (at least as we know them) and engaging in a rigorous and sustained analysis of the legal consequences that might flow from them. In that regard, the analysis herein is likely similar to that undertaken behind closed doors by the special counsel and his team on a daily basis. We of course recognize that their investigation is ongoing, and many facts are still to be determined.

With that caveat, our review of the facts and the law leads us to the view that the president likely obstructed justice, a conclusion even more strongly supported by the evidence now than it was last fall, when we published the first edition of this paper. Should that conclusion be borne out, we believe he will be held to account under one or another of the vehicles we have outlined, for no one is above the law in our system. Accountability will have significant consequences for the functioning of our democracy. We offer the second edition of this paper as a framework to evaluate the facts and the investigation as they develop, and to help prepare for the turbulence that may well lie ahead.