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

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Executive Summary

There are significant questions as to whether President Trump obstructed justice. We do not yet know all the relevant facts, and any final determination must await further investigation, including by Special Counsel Robert Mueller. But the public record contains substantial evidence that President Trump attempted to impede the investigations of Michael Flynn and Russian interference in the 2016 presidential election, including by firing FBI Director James Comey. There is also a question as to whether President Trump conspired to obstruct justice with senior members of his administration although the public facts regarding conspiracy are less well-developed.

Attempts to stop an investigation represent a common form of obstruction. Demanding the loyalty of an individual involved in an investigation, requesting that individual's help to end the investigation, and then ultimately firing that person to accomplish that goal are the type of acts that have frequently resulted in obstruction convictions, as we detail. In addition, to the extent conduct could be characterized as threatening, intimidating, or corruptly persuading witnesses, that too may provide additional grounds for obstruction charges.

While those defending the president may claim that expressing a "hope" that an investigation will end is too vague to constitute obstruction, we show that such language is sufficient to do so. In that regard, it is material that former FBI Director James Comey interpreted the president's "hope" that he would drop the investigation into Flynn as an instruction to drop the case. That Comey ignored that instruction is beside the point under applicable law. We also note that potentially misleading conduct and possible cover-up attempts could serve as further evidence of obstruction. Here, such actions may include fabricating an initial justification for firing Comey, directing Donald Trump Jr.'s inaccurate statements about the

purpose of his meeting with a Russian lawyer during the president's campaign, tweeting that Comey "better hope there are no 'tapes' of our conversations," despite having "no idea" whether such tapes existed, and repeatedly denouncing the validity of the investigations.

The fact that the president has lawful authority to take a particular course of action does not immunize him if he takes that action with the unlawful intent of obstructing a proceeding for an improper purpose.

The president's legal authority to remove an FBI director is a red herring—at least insofar as it has been used as a blanket justification for the president's actions. The fact that the president has lawful authority to take a particular course of action does not immunize him if he takes that action with the unlawful intent of obstructing a proceeding for an improper purpose. The president will certainly argue that he did not have the requisite criminal intent to obstruct justice because he had valid reasons to exercise his authority to direct law enforcement resources or fire the FBI head. While we acknowledge

The public record contains substantial evidence that President Trump attempted to impede the investigations of Michael Flynn and Russian interference in the 2016 presidential election, including by firing FBI Director James Comey.

that the precise motivation for President Trump's actions remains unclear and must be the subject of further fact-finding, there is already evidence that his acts may have been done with an improper intent to prevent the investigation from uncovering damaging information about Trump, his campaign, his family, or his top aides.

Special Counsel Mueller will have several options when his investigation is complete. He could refer the case to Congress, most likely 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 coordinated with Congress after the grand jury returned an indictment against President Nixon's co-conspirators. Special Counsel Mueller could also obtain an indictment of President Trump and proceed with a prosecution. 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. 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.

Congress also has actions that it can take, including continuing or expanding its own investigations, issuing public reports, and referring matters for criminal or other proceedings to the Department of Justice or other executive branch agencies. In addition, there is the matter of impeachment. We describe the articles of impeachment drafted against Presidents Richard Nixon and Bill Clinton, as well as those drafted against Judges Harry Claiborne and Samuel Kent to show that obstruction, conspiracy, and conviction of a federal crime have previously been considered by Congress to be valid reasons to remove a duly elected president from office. Nevertheless, the subject of impeachment on obstruction grounds remains premature pending the outcome of the special counsel's investigation.

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.

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Introduction

On May 9, 2017, President Donald Trump fired FBI Director James Comey. Comey had been overseeing the investigation into Russian interference in the 2016 election, including possible collusion between Russia and the Trump campaign. The FBI was also investigating former National Security Advisor and Trump campaign adviser Michael Flynn, who failed to disclose communications with Russian officials and reportedly lied to Vice President Mike Pence about those communications.

President Trump's firing of Comey and the subsequent revelations about President Trump's earlier exchanges with Comey while he was FBI Director raise the question of whether President Trump obstructed justice by endeavoring to impede those investigations. In June, press reports indicated that Special Counsel Robert Mueller is indeed investigating the very question of whether President Trump obstructed justice.¹ Mueller has since impaneled a grand jury in Washington D.C., issued subpoenas, and has begun seeking interviews with current and former White House officials.²

In this paper, we break down and analyze the question of whether President Trump may have obstructed justice and explain the criminal and congressional actions that could follow from an obstruction investigation. Addressing the possibility of criminal behavior by President Trump and the complicated issues it raises is not a task that we take lightly. Dissecting allegations of criminality leveled against an individual who has been duly elected president and who has sworn to preserve, protect, and defend our Constitution is an inherently solemn task. But it is our hope that by presenting a rigorous legal analysis of the potential case against the president, we will help the American people and their representatives understand the contours of the issues, regardless of whether it is eventually litigated in a court of law, the halls of Congress, or the court of public opinion.

Dissecting allegations of criminality leveled against an individual who has been duly elected president and who has sworn to preserve, protect, and defend our Constitution is an inherently solemn task.

Our paper proceeds in four parts. In Section I, we summarize the relevant facts and allegations that can be gleaned from witness testimony and credible media reports. In Section II, we explain the law governing obstruction of justice and how it applies to the apparent facts and allegations as currently known. In Section III, we lay out the options available after Special Counsel Mueller has completed his investigation. These options include referral of the case to

¹ Devin Barrett, Adam Entous, Ellen Nakashima, & Sari Horwitz, Special Counsel Is Investigating Trump for Possible Obstruction of Justice, Officials Say, *Washington Post*, Jun. 14, 2017, available at https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-trump-for-possible-obstruction-of-justice/2017/06/14/9ce02506-5131-11e7-b064-828ba60fbb98_story.html.

² Carol D. Leonnig, Rosalind S. Helderman, & Ashley Parker, Mueller Gives White House Names of 6 Aides He Expects to Question in Russia Probe, *Washington Post*, Sept. 8, 2017, available at https://www.washingtonpost.com/politics/spicer-priebus-hicks-among-six-current-and-former-trump-aides-mueller-has-expressed-interest-in-interviewing-for-russia-probe/2017/09/08/3b32779e-949a-11e7-aace-04b862b2b3f3_story.html?utm_term=.386350336a7c.

Congress, indictment of the president, holding the case pending removal of the president, and closing the case without indictment. Finally, in Section IV, we discuss the actions that Congress could take concurrently with or in addition to Mueller's investigation. We explain that although Congress's decision to take those steps is ultimately governed by both political and legal standards, there is precedent for impeaching a president on grounds that he has obstructed justice, obstructed a congressional investigation, or been convicted of a crime, should those circumstances arise.

We also have appended a number of documents that form the factual and legal basis for this white paper. Appendix A contains a factual chronology with the sources we relied on as well as a copy of former FBI Director James Comey's statement for the record before the Senate Intelligence Committee. Appendix B contains copies of the federal obstruction laws and other relevant criminal statutes. Appendix C contains the authorities governing Special Counsel Mueller, including the Department of Justice's special counsel regulations and the order defining his jurisdiction. Appendix D contains the articles of impeachment we discuss, official versions of which can be difficult to locate.

Finally, one crucial caveat that is important to note: the publication of this paper comes at a time when our understanding of the facts is still developing and without the benefit of the investigative tools that a prosecutor (or even a defense attorney) might employ. While we fully expect that our understanding of the facts relevant to this case will improve in the weeks and months ahead, we believe that the analysis we provide and the precedents we have collected will be relevant to the discussion regardless of what the investigations by Special Counsel Mueller and by Congress uncover.

The publication of this paper comes at a time when our understanding of the facts is still developing and without the benefit of the investigative tools that a prosecutor (or even a defense attorney) might employ.

I. What are the relevant facts?

In this section, we summarize the facts and allegations relevant to the potential obstruction case against the president. Though we have endeavored to rely on primary sources (public testimony, interview transcripts, and Twitter posts (“tweets”)) as much as possible, this paper, by necessity, also includes published press accounts that were developed using anonymous sources. Any prosecution arising from Special Counsel Mueller’s investigation will necessarily rely on facts that are both admissible and provable in court.

We have opted to depart from a strict chronological recitation of the facts and allegations in this section in the interest of making them easier to understand; however, you can find a chronology of facts at Appendix A.1.

A. Key players

Donald J. Trump announced his candidacy for president on June 16, 2015.³ 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.⁴ 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.⁵ Former Alabama Senator Jeff Sessions served as chairman of the campaign’s national security advisory committee.⁶ Carter Page served as a member of the campaign’s foreign policy team.⁷

³ Jose A. DelReal, Donald Trump Announces Presidential Bid, *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/>.

⁴ Jonathan Mahler, In Campaign and Company, Ivanka Trump Has a Central Role, *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, *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, *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>.

⁵ Dana Priest, 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 & Steve Holland, Trump Being Advised by Ex-U.S. Lieutenant General Who Favors Closer Russia Ties, *Reuters*, Feb. 26, 2016, available at <http://www.reuters.com/article/us-usa-election-trump-advisor-idUSMTZSAPEC2Q6G3JRH>.

⁶ Tom LoBianco, Trump Taps Sessions to Lead National Security Efforts, *CNN*, Mar. 3, 2016, available at <http://www.cnn.com/2016/03/03/politics/donald-trump-jeff-sessions-national-security/index.html>.

⁷ Post Opinions Staff, A Transcript of Donald Trump’s Meeting with the Washington Post Editorial Board, 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/>.

Paul Manafort served as campaign chairman and chief strategist from May 19, 2016 to August 19, 2016.⁸

On November 9, 2016, Donald Trump was declared the winner of the November 8 election and became president-elect of the United States. In the weeks that followed, President-elect Trump named Michael Flynn his intended White House national security advisor⁹ and Senator Jeff Sessions as his pick for attorney general.¹⁰ President-elect Trump also tapped Jared Kushner to be a Senior White House Adviser¹¹ and Republican National Committee Chairman Reince Priebus to be his Chief of Staff.¹² He also indicated his intent to retain James Comey, who was appointed to a ten-year term as FBI Director in 2013.¹³

B. The investigation into Russian interference in the 2016 presidential campaign and possible coordination with the Trump campaign

Since the summer of 2016, the FBI has been investigating Russian interference in the 2016 presidential election. That investigation has evolved and now includes possible coordination with those Russian efforts by individuals associated with the Trump campaign as well as possible efforts to obstruct the FBI's (and related) investigations. At this point, there is no proven connection between Russia's interference and the multiple contacts that the Trump campaign had with Russian officials and individuals with close ties to the Russian government. In this subsection, we explain the basic contours of the Russia investigations.

⁸ Maggie Haberman & Ashley Parker, Trump Aide Paul Manafort Promoted to Campaign Chairman and Chief Strategist, *New York Times*, May 19, 2016, available at <https://www.nytimes.com/2016/05/20/us/politics/paul-manafort-trump.html>; Maggie Haberman & Jonathan Martin, Paul Manafort Quits Donald Trump's Campaign After a Tumultuous Run, *New York Times*, Aug. 19, 2016, available at <https://www.nytimes.com/2016/08/20/us/politics/paul-manafort-resigns-donald-trump.html>.

⁹ Bryan Bender, Trump Names Mike Flynn National Security Adviser, *Politico*, Nov. 17, 2016, available at <http://www.politico.com/story/2016/11/michael-flynn-national-security-adviser-231591>.

¹⁰ David Nakamura & Elise Viebeck, Trump Chooses Sen. Jeff Sessions for Attorney General. Rep. Mike Pompeo for CIA Director, *Washington Post*, Nov. 18, 2016, available at https://www.washingtonpost.com/politics/trump-chooses-sen-jeff-sessions-for-attorney-general-rep-mike-pompeo-for-cia-director-transition-sources-say/2016/11/18/a0c170ae-ad8e-11e6-a31b-4b6397e625d0_story.html.

¹¹ Glenn Thrush & Maggie Haberman, Jared Kushner Named Senior White House Adviser to Donald Trump, *New York Times*, Jan. 9, 2017, available at <https://www.nytimes.com/2017/01/09/us/jared-kushner-senior-adviser-white-house-trump.html?mcubz=3>.

¹² Michael D. Shear, Maggie Haberman, & Adam Rappeport, Donald Trump Picks Reince Priebus as Chief of Staff and Stephen Bannon as Strategist, *New York Times*, Nov. 13, 2016, available at <https://www.nytimes.com/2016/11/14/us/politics/reince-priebus-chief-of-staff-donald-trump.html>.

¹³ Michael S. Schmidt & 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>.

1. Hacking of the Democratic National Committee and the launch of the FBI investigation

On June 14, 2016, the *Washington Post* reported that Russian government hackers had penetrated the computer network of the Democratic National Committee (DNC).¹⁴ The security breach allowed the hackers to access the DNC's opposition research on Donald Trump and all its email traffic. Some of the hackers had access to the network for about a year.¹⁵ On July 22, 2016, a collection of the hacked emails and documents were published by WikiLeaks.¹⁶ Three days later, the FBI confirmed that it had opened an investigation into the hacking of the DNC.¹⁷

In addition to the DNC hack, Russian-backed hackers also stole the emails of Hillary Clinton's campaign chairman, John Podesta, and distributed them through WikiLeaks. The Podesta emails, which were taken by means of a successful "spear-phishing" endeavor in March 2016, were published serially throughout the election, starting on October 7, 2016.¹⁸

Prior to President-elect Trump's inauguration, the United States intelligence community released a report explaining its assessment that Russia was behind these and other actions and had been seeking to influence the 2016 US presidential election.¹⁹ The report assessed that "Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency."²⁰ The report further assessed that "[Russian President Vladimir] Putin and the Russian Government developed a clear preference for President-elect Trump."²¹

2. Contacts between the Trump campaign and Russian individuals and officials

During the primary and general election campaigns, individuals associated with the Trump campaign had contacts with Russian individuals and officials. Some of these contacts

¹⁴ 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.

¹⁵ *Id.*; Sam Biddle & 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>.

¹⁶ 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>.

¹⁷ Mike Levine, Rick Klein, & 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>.

¹⁸ Eric Lipton, David E. Sanger, & 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>.

¹⁹ Office of the Director of National Intelligence, Assessing Russian Activities and Intentions in Recent US Elections, Jan. 6, 2017, available at https://www.dni.gov/files/documents/ICA_2017_01.pdf.

²⁰ *Id.*

²¹ *Id.*

were publicly known soon after they happened, but many others were not disclosed until after President Trump took office.

In early 2016, executive vice president of the Trump Organization and Trump campaign surrogate, Michael Cohen, emailed Dmitry Peskov, the personal spokesman of Russian President Vladimir Putin, to ask for help with a stalled development in Moscow.²² Cohen's email came months after Felix Sater, a New York real estate mogul, reached out to Cohen to offer to broker a real estate deal in Russia with the help of President Putin.²³

In June, 2016, senior members of the Trump campaign met with Russian individuals on the premise that they would provide incriminating information about Hillary Clinton on behalf of the Russian government.²⁴ On June 3, 2016, Rob Goldstone, a former tabloid reporter and entertainment publicist long acquainted with the Trump family²⁵, 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?

²² 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.

²³ Matt Apuzzo & 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.

²⁴ Jo Becker, Adam Goldman, & 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>.

²⁵ *Id.*; Shawn Boburg & 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?utm_term=.0c9958302cc5.

I can also send this info to your father via Rhona, but it is ultra sensitive so wanted to send to you first.²⁶

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.”²⁷ 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.”²⁸

A meeting was scheduled for June 9, 2016 at Trump Tower. Trump Jr., Paul Manafort, and Jared Kushner attended on behalf of the Trump campaign.²⁹ They 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.³⁰ The fact that this meeting took place did not become public until July 8, 2017.³¹

Around the same time as this meeting, Rick Dearborn, Chief of Staff to then-Senator Jeff Sessions, is reported to have sent an email to campaign officials about a separate attempt to connect the Trump campaign with Russian President Vladimir Putin.³² This attempt to arrange a meeting did not become known to the public until August 23, 2017.³³

²⁶ Donald Trump Jr.’s Email Exchange with Rob Goldstone, *attached as Appendix A.3*. Original photos of the exchange were published by Donald Trump Jr. on his twitter account. See <https://twitter.com/donaldjtrumpjr/status/884789418455953413>; <https://twitter.com/DonaldJTrumpJr/status/884789839522140166>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 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>.

³⁰ Sharon LaFraniere & 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>.

³¹ See Jo Becker, Matt Apuzzo, & 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>.

³² Manu Raju & Marshall Cohen, Exclusive: Top Trump Aide’s Email Draws New Scrutiny in Russia Inquiry, *CNN*, Aug. 24, 2017, available at <http://www.cnn.com/2017/08/23/politics/donald-trump-rick-dearborn-email-russia-investigation/index.html>.

³³ *Id.*

On July 8, 2016, Trump campaign foreign policy adviser Carter Page visited Moscow to give a commencement lecture, during which he criticized U.S. policy toward Russia.³⁴ The trip reportedly prompted the FBI to open an investigation into connections between Russia and the Trump campaign.³⁵

On July 18, 2016, Senator Jeff Sessions met Russian Ambassador Kislyak and several other foreign ambassadors after a Heritage Foundation panel on European relations during the Republican National Convention.³⁶ Sessions and Kislyak then had a follow-up private meeting on September 8, 2016 at Sessions's Senate office.³⁷ Neither of these contacts became public until March 1, 2017.³⁸

3. The Steele dossier

During the primary and general election campaign, 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 and unverified" 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).³⁹

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

³⁴ Scott Shane, Mark Mazzetti, & Adam Goldman, Trump Adviser's Visit to Moscow Got the FBI's Attention., *New York Times*, Apr. 19, 2017, available at <https://www.nytimes.com/2017/04/19/us/politics/carter-page-russia-trump.html>.

³⁵ *Id.*

³⁶ Adam Entous, Ellen Nakashima, & 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; Philip Bump, What Jeff Sessions Said about Russia, and When, *Washington Post*, Mar. 2, 2017, available at <https://www.washingtonpost.com/news/politics/wp/2017/03/02/what-jeff-sessions-said-about-russia-and-when/>.

³⁷ Entous, Nakashima, & Miller, *Washington Post*, Mar. 1, 2017, *supra* n. 36.

³⁸ *Id.*

³⁹ Office of the Director of National Intelligence, Jan. 6, 2017, *supra* n. 19; James B. Comey, Statement for the Record, Senate Select Committee on Intelligence, Jun. 8, 2017, (June 8, 2017 Statement for the Record) 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 & 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, & 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>.

Steele Dossier,⁴⁰ and *BuzzFeed News* published the document.⁴¹ Several of the individuals mentioned in the Steele Dossier have disputed the veracity of its allegations: Michael Cohen described it as fake news,⁴² and President-elect Trump tweeted, presumably in reference to the dossier, “FAKE NEWS – A TOTAL POLITICAL WITCH HUNT!”⁴³ On the day the Steele Dossier was published, Manafort called Priebus to discuss the Steele Dossier and told him that it was full of inaccuracies and was unreliable.⁴⁴

Nevertheless, later, 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 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.”⁴⁵ The discovery of corroborating evidence was said to give investigators greater confidence that parts of the Steele Dossier were credible.⁴⁶ *CNN* later reported that the FBI relied at least in part on the Steele Dossier to obtain a warrant to monitor the communications of Trump campaign foreign policy adviser Carter Page.⁴⁷

4. Launch of congressional investigations

In December, 2016, congressional committees began to announce that they would be investigating Russian interference in the 2016 election. On December 13, 2016, Senator Bob Corker announced that the Senate Foreign Relations Committee, which he chairs, will “systematically walk through the entire Russia issue and fully understand what had

⁴⁰ Perez, Sciuotto, Tapper, & Bernstein, *CNN*, Jan. 12, 2017, *supra* n. 39.

⁴¹ Ken Bensinger, Miriam Elder, & 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; Steele Dossier, available at <https://assets.documentcloud.org/documents/3259984/Trump-Intelligence-Allegations.pdf>.

⁴² 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/>.

⁴³ <https://twitter.com/realDonaldTrump/status/818990655418617856>.

⁴⁴ 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>.

⁴⁵ Jim Sciuotto & 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>.

⁴⁶ *Id.*

⁴⁷ Evan Perez, Shimon Prokupecz & Manu Raju, *FBI Used Dossier Allegations to Bolster Trump-Russia Investigation*, *CNN*, Apr. 18, 2017, available at <http://www.cnn.com/2017/04/18/politics/fbi-dossier-carter-page-donald-trump-russia-investigation/index.html>; see also Ellen Nakashima, Devin Barrett, & Adam Entous, *FBI obtained FISA Warrant to Monitor Trump Adviser Carter Page*, *Washington Post*, Apr. 11, 2017, available at https://www.washingtonpost.com/world/national-security/fbi-obtained-fisa-warrant-to-monitor-former-trump-adviser-carter-page/2017/04/11/620192ea-1e0e-11e7-ad74-3a742a6e93a7_story.html.

transpired.”⁴⁸ On January 13, 2017, after the revelation of the Steele Dossier, 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.”⁴⁹ 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.”⁵⁰ Finally, 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 the Committee had been undertaking an inquiry into, among other issues, “[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.”⁵¹

C. Lt. Gen. (Ret) Michael Flynn

In what was—at least initially—a separate matter, the FBI had also been investigating retired Lieutenant General Michael Flynn for a variety of possible offenses. This included Flynn’s alleged failure to register as a foreign agent when he did work on behalf of the Turkish government, his purported failure to disclose payments he received from Russia on his security clearance application, and his alleged misrepresentations to FBI investigators. In this subsection, we describe events related to those possible crimes as well as Flynn’s brief tenure as national security adviser to President Trump.

1. Flynn’s failure to register as a foreign agent for the Turkish government

Flynn, a top adviser to the Trump campaign, had opened a consulting firm in the fall of 2014 after he was fired from public service, and took on a number of foreign clients – including at least two Russian companies with ties to the Russian government.⁵² In August 2016, his firm was 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 Fetullah Gulen, the leader of a movement blamed by Turkish President Recep

⁴⁸ 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>.

⁴⁹ 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>.

⁵⁰ *Id.*

⁵¹ 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>.

⁵² Nicholas Confessore, Matthew Rosenberg & 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>.

Erdogan for a failed coup attempt.⁵³ 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*.⁵⁴ The article, a jeremiad against Gulen, reportedly drew the attention of the Department of Justice, and raised concerns that Flynn was working as an unregistered foreign agent, in violation of federal law.⁵⁵

2. Flynn’s selection as national security advisor and alleged failure to disclose foreign payments on his application for a security clearance

Two days after the election, then-President Obama warned President-elect Trump not to hire Flynn as national security advisor, believing that he was a poor fit for the position.⁵⁶ On November 18, 2016, Trump named Flynn his national security advisor.⁵⁷ Twelve days later, Flynn received notice from the Department of Justice that his Turkish lobbying activities were being investigated—notice of which he passed on to the presidential transition team.⁵⁸

In addition, it was later reported that Flynn failed to disclose payments from Russia on his application for a security clearance, which would be a violation of federal law.⁵⁹ 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.⁶⁰

⁵³ *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=.afW9543WI#.aboO4vMmE.

⁵⁴ 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>.

⁵⁵ Matthew Rosenberg & 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>.

⁵⁶ Michael D. Shear, Obama Warned Trump about Hiring Flynn, Officials Say, *New York Times*, May 8, 2017, available at <https://www.nytimes.com/2017/05/08/us/politics/obama-flynn-trump.html>.

⁵⁷ Bender, *Politico*, Nov. 17, 2016, *supra* n. 9.

⁵⁸ Rosenberg & Mazzetti, *New York Times*, May 17, 2017, *supra* n. 55.

⁵⁹ Tom LoBianco & 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>.

⁶⁰ Rosiland S. Helderman & 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.

3. Obama's imposition of sanctions on Russia and Flynn's contacts with the Russian ambassador

On December 29, 2016, President Obama sanctioned four individuals and five entities with ties to Russia, expelled thirty-five Russian diplomats, and ordered the closure of two Russian compounds in response to Russian interference with the U.S. presidential election.⁶¹ Later that day, Flynn reportedly made five phone calls to Russian ambassador Sergey Kislyak during which he reassured Kislyak that the U.S. approach to Russia would change in the Trump administration, insinuating that U.S. sanctions against Russia would be reevaluated.⁶² The next day, after Putin announced, surprisingly, that Russia would not retaliate in response to the U.S. punishments,⁶³ President-elect Trump tweeted "Great move on delay (by V. Putin) – I always knew he was very smart!"⁶⁴

On January 12, 2017, the *Washington Post* first reported that Flynn spoke with Kislyak several times on December 29, 2016.⁶⁵ The next day, transition spokesman (and incoming White House Press Secretary) Sean 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.⁶⁶ Three days later, 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."⁶⁷

⁶¹ Evan Perez & 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>.

⁶² Jonathan Landay & Arshad Mohammed, Trump Adviser Had Five Calls with Russian Envoy on Day of Sanctions: Sources, *Reuters*, Jan. 13, 2017, available at <http://www.reuters.com/article/us-usa-trump-russia-idUSKBN14X1YX>; Matthew Rosenberg & Matt Apuzzo, Flynn Is Said to Have Talked to Russians About Sanctions Before Trump Took Office, *New York Times*, Feb. 9, 2017, available at <https://www.nytimes.com/2017/02/09/us/flynn-is-said-to-have-talked-to-russians-about-sanctions-before-trump-took-office.html>.

⁶³ 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>.

⁶⁴ <https://twitter.com/realdonaldtrump/status/814919370711461890>.

⁶⁵ 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.

⁶⁶ 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>.

⁶⁷ 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>; CBS News, Face the Nation Transcript January 15, 2017:

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."⁶⁸

4. Acting Attorney General Sally Yates's disclosure to the White House that Flynn misled the FBI and administration officials

On January 24, 2017, in an interview with FBI agents, Flynn reportedly denied having discussed U.S. sanctions during his conversation with Kislyak, contradicting the contents of intercepted communications collected by intelligence agencies.⁶⁹

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 Donald McGahn on January 26, 2017 and explained to him that the Department of Justice knew Flynn's representations to be untrue.⁷⁰ After the meeting, McGahn immediately briefed President Trump on the meeting with Yates.⁷¹ At McGahn's request, Yates returned to the White House the next day, January 27, 2017.⁷² At this second meeting, McGahn expressed concern that the White House taking action on Flynn would interfere with the FBI's investigation into Flynn; Yates informed him that it would not.⁷³

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/>.

⁶⁸ *CBS News*, *White House Briefing by Sean Spicer – Full Transcript*, Jan. 23, 2017, Jan. 24, 2017, available at <https://www.cbsnews.com/news/sean-spicer-press-conference-transcript-jan-23-2017/>.

⁶⁹ Sari Horwitz & 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.

⁷⁰ Matt Apuzzo & 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.

⁷¹ 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/the-press-office/2017/02/14/press-briefing-press-secretary-sean-spicer-2142017-12> ("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.").

⁷² Riley Beggin & Veronica Stracqualursi, *A Timeline of Sally Yates' Warnings to the White House about Mike Flynn*, *ABC News*, May 8, 2017, available at <http://abcnews.go.com/Politics/timeline-sally-yates-warnings-white-house-mike-flynn/story?id=47272979>.

⁷³ *Id.*

5. Flynn's resignation

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.⁷⁴ Days later, on February 13, 2017, Flynn resigned as National Security Advisor.⁷⁵ 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."⁷⁶

Three days later, on February 16, 2017, the House Committee on Oversight and Government Reform's investigation made what appears to be its first request for documents relating to Flynn's December 2015 trip to Moscow.⁷⁷

D. President Trump's potential attempts to influence the investigations of Russian interference in the 2016 election and of Flynn

President Trump is alleged to have engaged in a course of conduct intended to influence the investigations into Russian interference in the 2016 election and into Michael Flynn. In this subsection, we detail the critical components of President Trump's conduct beginning with first meeting, as President-elect, with FBI Director James Comey and ending with his decision to terminate Comey.

1. FBI Director Comey's transition briefing to President-elect Trump and Trump's request that Comey stay on as FBI Director

On January 6, 2017, after a national security briefing, FBI Director Comey spoke to President-elect Trump in private, notifying President-elect Trump that there was no counter-intelligence investigation against him and informing him about a dossier containing "salacious and unverified" material about him (the Steele Dossier).⁷⁸

⁷⁴ Greg Miller, Adam Entous & Ellen Nakashima, National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say, *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.

⁷⁵ Maggie Haberman, Matthew Rosenberg, Matt Apuzzo & Glenn Thrush, Michael Flynn Resigns as National Security Adviser, *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>.

⁷⁶ *Id.*

⁷⁷ House Oversight and Government Reform Committee, Oversight Committee Requests Sources and Amounts of Foreign Funding to Flynn for Trip to Moscow, Feb. 16, 2017, available at <https://democrats-oversight.house.gov/news/press-releases/oversight-committee-requests-sources-and-amounts-of-foreign-funding-to-flynn-for>.

⁷⁸ Comey, June 8, 2017 Statement for the Record, *supra* n. 39. See Steele Dossier, *supra* n. 41.

Shortly before his inauguration, President-elect Trump called FBI Director Comey. According to Comey, President-elect Trump followed up on their January 6 conversation and said, "Hope you're going to stay, you're doing a great job."⁷⁹ 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.⁸⁰

During a reception for law enforcement and first responders after his inauguration, President Trump pointed out Director Comey, calling him "James" and said, "He's become more famous than me."⁸¹

2. The January 27 private dinner and President Trump's purported request for FBI Director Comey's loyalty

According to former FBI Director Comey, around lunchtime on January 27, 2017, Comey received a phone call from President Trump, asking him to dinner at the White House. 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 year. Comey responded that he loved his job and "intended to stay and serve out his ten-year term as Director." Moments later, President Trump purportedly 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 is said to have replied, "that's what I want, honest loyalty."⁸²

3. President Trump expresses "hope" that FBI Director Comey can drop Flynn investigation

The day after 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 alone, President Trump told Director Comey 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 he agreed that Flynn "is a good guy."⁸³

The day after President Trump's one-on-one with Comey in the White House, President Trump's Chief of Staff, Reince Priebus, was reported to have spoken to Deputy FBI Director Andrew McCabe about the FBI's inquiry into links between President Trump's associates and

⁷⁹ 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>.

⁸⁰ Schmidt & Goldman, *New York Times*, Jan. 24, 2017, *supra* n. 13.

⁸¹ Steve Holland, FBI Director Comey, Who Angered Democrats, Gets Hug from Trump, *Reuters*, Jan. 22, 2017, available at <http://www.reuters.com/article/us-usa-trump-comey-idUSKBN156146>.

⁸² Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

⁸³ *Id.*

Russia, a conversation which may have violated rules developed to prevent even the appearance of political tampering with law enforcement.⁸⁴ Priebus reportedly “ask[ed] the FBI’s top two officials to rebut news reports about Trump allies’ ties to Russia.”⁸⁵

4. Attorney General Sessions’s recusal from the Russia investigation

On March 1, 2017, the *Washington Post* reported that Attorney General Sessions failed to report at least two contacts with the Russian ambassador to the United States.⁸⁶ The contacts reported by the *Post* contradicted Sessions’s testimony at his confirmation hearing that he “did not have communications with the Russians.”⁸⁷ 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.”⁸⁸ President Trump reacted to the recusal by tweeting: (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....”⁸⁹; (2) “...intentional. This whole narrative is a way of saving face for Democrats losing an election that everyone thought they were supposed.....”⁹⁰; (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...”⁹¹; (4) “...is all of the illegal leaks of classified and other information. It is a total ‘witch hunt!’”⁹² The next day, President Trump “gathered his senior aides in the Oval Office for a meeting, during which he purportedly fumed about Sessions’ decision.”⁹³

⁸⁴ Spencer Ackerman, White House Confirms Conversation with FBI about Trump and Russia, *The 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>.

⁸⁵ Jeremy Diamond & 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>.

⁸⁶ Entous, Nakashima, & Miller, *Washington Post*, Mar. 1, 2017, *supra* n. 36.

⁸⁷ 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/>.

⁸⁸ Mark Landler & Eric Lichtblau, Jeff Sessions Recuses Himself from Russia Inquiry, *New York Times*, Mar. 2, 2017, available at <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>.

⁸⁹ <https://twitter.com/realdonaldtrump/status/837488402438176769>.

⁹⁰ <https://twitter.com/realdonaldtrump/status/837489578193846278>.

⁹¹ <https://twitter.com/realdonaldtrump/status/837491607171629057>.

⁹² <https://twitter.com/realdonaldtrump/status/837492425283219458>.

⁹³ Tara Palmeri, Eliana Johnson & Josh Dawsey, Sessions Offered to Resign Before Trump’s Trip Abroad, *Politico*, Jun. 6, 2017, available at <http://www.politico.com/story/2017/06/06/jeff-sessions-trump-resign-239226>.

5. President Trump's firing of U.S. Attorney Bharara

On November 30, 2016, after the election, President-elect Trump met with Preet Bharara, the U.S. Attorney for the Southern District of New York, and asked him to stay on.⁹⁴ On March 9, 2017, U.S. Attorney Bharara received a voicemail at his office from President Trump's personal secretary, Madeleine Westerhout, asking him to call her back. Bharara consulted with his deputy U.S. attorney about the propriety of the communication and spoke with Jody Hunt, Attorney General Jeff Sessions's chief of staff.⁹⁵ Ultimately, Bharara decided to return the call and told Ms. Westerhout that the Attorney General's Office had advised him not to speak with President Trump. Bharara later explained that in the phone call to Mr. Hunt, he said that "it appeared to be that [President Trump] was trying to cultivate some kind of relationship."⁹⁶ Bharara also later observed, "It's a very weird and peculiar thing for a one-on-one conversation without the attorney general, without warning between the president and me or any United States attorney who has been asked to investigate various things and is in a position hypothetically to investigate business interests and associates of the president."⁹⁷

On March 11, 2017, President Trump fired U.S. Attorney Bharara after Bharara refused an order instructing him and 45 other U.S. Attorneys appointed by President Obama to resign.⁹⁸ Marc Kasowitz, who President Trump would eventually hire to represent him in matters relating to the Russia investigation, reportedly bragged at the time that he played a central role in Bharara's termination and had told President Trump, "This guy is going to get you."⁹⁹

6. Director Comey's confirmation that the FBI was investigating possible coordination between Russia and the Trump campaign

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

⁹⁴ Ellen Nakashima, *Trump Asks U.S. Attorney in Manhattan to Stay on*, *Washington Post*, Nov. 30, 2016, available at https://www.washingtonpost.com/world/national-security/trump-asks-us-attorney-in-manhattan-to-stay-on/2016/11/30/41715c18-b72f-11e6-a677-b608fbb3aaf6_story.html?utm_term=.5bb19babfa47.

⁹⁵ Jason Leopold and Claudia Koerner, *Memo Shows Preet Bharara Was Concerned after Phone Call from White House*, *BuzzFeed News*, Jun. 22, 2017, available at https://www.buzzfeed.com/jasonleopold/memo-shows-preet-bahrara-was-concerned-about-contact-from?utm_term=.yqonQlk3ym#.udl5qn0XDG.

⁹⁶ ABC News, *'This Week' Transcript 6-11-17: Preet Bharara, Jay Sekulow, Sen. Mike Lee, and Sen. Joe Manchin*, Jun. 11, 2017, available at <http://abcnews.go.com/Politics/week-transcript-11-17-preet-bharara-jay-sekulow/story?id=47957684>.

⁹⁷ *Id.*

⁹⁸ Chas Danner, *Preet Bharara Fired after Refusing Trump Administration's Order to Resign*, *New York Magazine*, Mar. 11, 2017, available at <http://nymag.com/daily/intelligencer/2017/03/u-s-attorney-preet-bharara-is-refusing-trump-order-to-resign.html>.

⁹⁹ Jesse Eisinger & Justin Elliott, *Trump's Personal Lawyer Boasted that He Got Preet Bharara Fired*, *Pro Publica*, Jun. 13, 2017, available at <https://www.propublica.org/article/trump-personal-lawyer-boasted-that-he-got-preet-bharara-fired>.

presidential election, as well as whether those affiliated with President Trump were in contact with Russian nationals.¹⁰⁰ 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.¹⁰¹

7. *President Trump's purported complaint about the Russia investigation to CIA Director Mike Pompeo and Director of National Intelligence Dan Coats*

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.¹⁰² DNI Coats is said to have told associates about the president's request and to have determined that intervening with Comey would be inappropriate.¹⁰³ 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.¹⁰⁴ Around that time, President Trump also called Director of the National Security Agency (NSA) Mike Rogers, purportedly urging him to make similar denials.¹⁰⁵ Both Coats and Rogers are said to have refused the president's request.

¹⁰⁰ Matthew Rosenberg, Emmarie Huetteman & Michael Schmidt, [Comey Confirms F.B.I. Inquiry on Russia: Sees No Evidence of Wiretapping](https://www.nytimes.com/2017/03/20/us/politics/intelligence-committee-russia-donald-trump.html), *New York Times*, Mar. 20, 2017, available at <https://www.nytimes.com/2017/03/20/us/politics/intelligence-committee-russia-donald-trump.html>.

¹⁰¹ Washington Post Staff, [Full Transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election](https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/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/>.

¹⁰² Adam Entous, [Top Intelligence Official Told Associates Trump Asked Him if He Could Intervene with Comey on FBI Russia Probe](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), *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.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Adam Entous & Ellen Nakashima, [Trump Asked Intelligence Chiefs to Push Back against FBI Collusion Probe after Comey Revealed Its Existence](https://www.washingtonpost.com/world/national-security/trump-asked-intelligence-chiefs-to-push-back-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-collusion-probe-after-comey-revealed-its-existence/>.

8. President Trump's alleged request that FBI Director Comey "lift the cloud"

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.¹⁰⁶ 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.¹⁰⁷ President Trump is said to have asked Director Comey what they could do to "lift the cloud," and asked Comey to "get out" the fact that the FBI was not personally investigating him.¹⁰⁸ After receiving the call, Comey called Deputy Attorney General Dana Boente to ask for guidance, but did not hear back.¹⁰⁹ 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!"¹¹⁰

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."¹¹¹ 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."¹¹²

9. Developments in the investigation prior to FBI Director Comey's termination

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."¹¹³ Comey also confirmed that the FBI was coordinating with

[against-fbi-collusion-probe-after-comey-revealed-its-existence/2017/05/22/394933bc-3f10-11e7-9869-bac8b446820a_story.html](https://www.nytimes.com/2017/05/22/394933bc-3f10-11e7-9869-bac8b446820a_story.html).

¹⁰⁶ Matt Mazzetti & 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>.

¹⁰⁷ Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ <https://twitter.com/realdonaldtrump/status/847766558520856578>.

¹¹¹ Comey, June 8, 2017 Statement for the Record, *supra* n. 39. It is unclear what "thing" the president was referring to.

¹¹² Aaron Blake, President Trump's Thoroughly Confusing Fox Business Interview, Annotated, *Washington Post*, April 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.*

¹¹³ 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

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.¹¹⁴

Later, *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.¹¹⁵ The *New York Times* also reported after Comey’s termination that, in early May, he requested greater resources to intensify the FBI’s investigation into Russian interference in the presidential election,¹¹⁶ although his deputy, Andrew McCabe, later testified that he was unaware of any request that Director Comey made for additional resources for the Russia investigation.¹¹⁷

10. Termination of FBI Director Comey

According to press accounts, on May 8, 2017, President Trump 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.¹¹⁸ Sometime in early May, 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.¹¹⁹ 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.”¹²⁰ Rosenstein delivered a three-page memo to Sessions the next day titled “Restoring Public Confidence in the FBI,” which criticized Comey for flouting Department of

<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/>.

¹¹⁴ *Id.*

¹¹⁵ Evan Perez, Shimon Prokupez & 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/>.

¹¹⁶ Matthew Rosenberg & 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>.

¹¹⁷ Adam Goldman & 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>.

¹¹⁸ Philip Rucker, Ashley Parker, Sari Horwitz & 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.

¹¹⁹ 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>.

¹²⁰ *Id.*

Justice principles when he publicly revealed aspects of the investigation into Hillary Clinton's use of a private email server.¹²¹ President Trump then fired Comey, explaining that he did so because Comey inappropriately handled this investigation.¹²² In his letter to Director Comey, President Trump wrote that he was "accepting [the] recommendation" of Sessions and Rosenstein in terminating Comey.¹²³

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."¹²⁴ 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,"¹²⁵ and (2) "Comey lost the confidence of almost everyone in Washington, Republican and Democrat alike. When things calm down, they will be thanking me!"¹²⁶ 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.¹²⁷

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."¹²⁸

¹²¹ 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/>.

¹²² Michael Shear & 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>.

¹²³ 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>.

¹²⁴ Matt Apuzzo, Maggie Haberman & 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>.

¹²⁵ <https://twitter.com/realdonaldtrump/status/862265729718128641?lang=en>.

¹²⁶ <https://twitter.com/realdonaldtrump/status/862267781336752128?lang=en>.

¹²⁷ Perez, Prokupecz, & Brown, *CNN*, May 10, 2017, *supra* n. 115.

¹²⁸ CNN, Partial Transcript: NBC News Interview with Donald Trump, May 11, 2017, available at <http://www.cnn.com/2017/05/11/politics/transcript-donald-trump-nbc-news/index.html>.

E. Subsequent developments

In the months since President Trump terminated FBI Director Comey, there have been additional developments that may be relevant to a possible case against President Trump for obstructing justice. In this section, we briefly explain the direction that Special Counsel Mueller's investigation has taken, President Trump's apparent efforts to influence Comey's congressional testimony and potentially the Mueller investigation, and developments in the congressional investigations into Russian interference in the 2016 election.

1. *The appointment of Special Counsel Robert Mueller and development of his investigation*

On May 17, 2017, Deputy Attorney General Rosenstein named former FBI Director Robert Mueller as special counsel to oversee the Russia investigation.¹²⁹ Shortly after the appointment of Special Counsel Mueller, acting FBI Director Andrew McCabe is reported to have told the highest-ranking members of the Bureau that he and they should consider themselves possible witnesses in an investigation of possible obstruction of justice by President Trump.¹³⁰

Since Mueller's appointment as special counsel, reports have emerged that his investigation has proceeded apace. In early June, Special Counsel Mueller reportedly assumed control of ongoing investigations of Michael Flynn¹³¹ and Paul Manafort.¹³² In July, it was reported that Special Counsel Mueller is 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.¹³³ In late July, *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 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

¹²⁹ 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.

¹³⁰ 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>.

¹³¹ Nathan Layne, Mark Hosenball & 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>.

¹³² Sadie Gurman, Eric Tucker & Jeff Horwitz, Special Counsel's Trump Investigation Includes Manafort Case, *AP*, Jun. 3, 2017, available at <https://www.apnews.com/35b610bf8d66416798be8abb2ebd85b0>.

¹³³ 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 & 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-tried-hide-purpose-trump-tower-n796746>.

“dealings with the Bank of Cyprus” and “the efforts of Jared Kushner . . . to secure financing for some of his family’s real estate properties.”¹³⁴

Special Counsel Mueller has reportedly impaneled a grand jury in Washington D.C. to assist his investigation (in addition to the grand jury that was already being used for the investigation of Michael Flynn).¹³⁵ The FBI, presumably at Mueller’s direction, also conducted a pre-dawn raid on the Alexandria home of former Trump campaign chairman Paul Manafort on July 26, 2017.¹³⁶

2. President Trump’s potential attempts to influence Comey’s congressional testimony or otherwise discredit him

On May 11, the *New York Times* reported that President Trump had demanded loyalty from Comey during their January 27 dinner.¹³⁷ The next day, on May 12, President Trump denied the story during an interview on *Fox News*¹³⁸ and tweeted, “James Comey better hope there are no ‘tapes’ of our conversations before he starts leaking to the press!”¹³⁹

On June 22, two weeks after Comey testified before the Senate Intelligence Committee, President Trump tweeted that he “[had] no idea”¹⁴⁰ “...whether there are ‘tapes’ or recordings of my conversations with James Comey, but I did not make, and do not have, any such recordings.”¹⁴¹ 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

¹³⁴ Greg Farrell & 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>.

¹³⁵ Del Quentin Wilber & 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>.

¹³⁶ Carol D. Leonnig, Tom Hamburger & Rosalind S. Helderman, FBI Conducted Predawn Raid of Former Trump Campaign Chairman Manafort’s Home, *Washington Post*, Aug. 9, 2017, available at https://www.washingtonpost.com/politics/fbi-conducted-predawn-raid-of-former-trump-campaign-chairman-manaforts-home/2017/08/09/5879fa9c-7c45-11e7-9d08-b79f191668ed_story.html.

¹³⁷ 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>.

¹³⁸ *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>.

¹³⁹ <https://twitter.com/realdonaldtrump/status/863007411132649473>.

¹⁴⁰ <https://twitter.com/realDonaldTrump/status/877932907137966080>.

¹⁴¹ <https://twitter.com/realDonaldTrump/status/877932956458795008>.

records of the tapes).¹⁴² 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."¹⁴³

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" ¹⁴⁴

After Comey testified on June 8, 2017, a source close to President Trump's legal team 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.¹⁴⁵ On June 28, 2017, President Trump's personal lawyers announced that they were delaying plans to file the complaints.¹⁴⁶ As of the date of publication of this paper, there is no indication that any such complaints have been filed.

On June 9, President Trump tweeted, "Despite so many false statements and lies, total and complete vindication...and WOW, Comey is a leaker!"¹⁴⁷ 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

¹⁴² 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>.

¹⁴³ *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>.

¹⁴⁴ Robert Costa, Ashley Parker, & 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.

¹⁴⁵ Ali Vitali & 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>.

President Trump similarly denied asking Comey to drop the Flynn investigation before Comey's June 8 testimony. 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 & David Nakamura, Trump Denies Telling Comey to Back Off Flynn Investigation, *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>.

¹⁴⁶ 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>.

¹⁴⁷ <https://twitter.com/realDonaldTrump/status/873120139222306817>.

wrong” if he did say something about Flynn.¹⁴⁸ On June 11, President Trump followed up with another tweet: “I believe the James Comey leaks will be far more prevalent than anyone ever thought possible. Totally illegal? Very 'cowardly!'”¹⁴⁹

3. President Trump’s apparent attempts to influence Special Counsel Mueller’s investigation

Since Special Counsel Mueller’s appointment, President Trump has repeatedly tweeted criticism of the Russia investigation and on several of those occasions has referred to it as a “witch hunt.”¹⁵⁰ During an interview with the *New York Times*, President Trump said that he would not have appointed Jeff Sessions as attorney general if he had known that Sessions would recuse himself from the Russia investigation, and suggested that Special Counsel Mueller, Acting FBI Director McCabe, and Deputy Attorney General Rosenstein all suffer from conflicts of interest.¹⁵¹

In addition, 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, 2016.¹⁵² 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.¹⁵³ Nonetheless, while flying home from Germany on July 8, 2017, President Trump intervened and purportedly personally dictated the following statement¹⁵⁴ 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

¹⁴⁸ Ali Vitali, *Trump ‘100 Percent’ Willing to Testify Under Oath on Comey Allegations*, *NBC News*, Jun. 9, 2017, available at <http://www.nbcnews.com/politics/white-house/trump-commits-testify-under-oath-100-percent-n770451>.

¹⁴⁹ <https://twitter.com/realDonaldTrump/status/873879934040780801>.

¹⁵⁰ See <https://twitter.com/realDonaldTrump/status/875321478849363968>; see also <https://twitter.com/realDonaldTrump/status/875305788708974592>; <https://twitter.com/realDonaldTrump/status/875438639823675392>; <https://twitter.com/realDonaldTrump/status/875441788110110727>; <https://twitter.com/realDonaldTrump/status/875682853585129472>; <https://twitter.com/realDonaldTrump/status/875690204564258816>; <https://twitter.com/realDonaldTrump/status/875698062030778368>; <https://twitter.com/realDonaldTrump/status/875701471999864833>; & <https://twitter.com/realDonaldTrump/status/876388733607694336>.

¹⁵¹ The New York Times, *Excerpts from the Times’s Interview with Trump*, Jul. 19, 2017, available at <https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html>.

¹⁵² Becker, Apuzzo, & Goldman, *New York Times*, Jul. 8, 2017, *supra* n. 31.

¹⁵³ Ashley Parker, Carol D. Leonnig, Philip Rucker, & 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.

¹⁵⁴ *Id.*

Russian children that was active and popular with American 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.¹⁵⁵

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*.¹⁵⁶

On July 20, the *New York Times* reported 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.”¹⁵⁷ The effort purportedly included collecting information about the team’s political donations, which might be used to argue that Mueller’s team is biased.¹⁵⁸ Nevertheless, Mueller remains in the role of special counsel, and the investigation continues as of the date of publication of this paper.

On August 3, two bipartisan groups of senators introduced legislation that would make it more difficult for President Trump to terminate Special Counsel Mueller.¹⁵⁹ Senators Lindsey Graham, Cory Booker, Sheldon Whitehouse, and Richard Blumenthal’s Special Counsel Independence Protection Act would require the attorney general to file an action in the United States District Court for the District of Columbia to remove the special counsel.¹⁶⁰ Senators Thom Tillis and Chris Coons’s Special Counsel Integrity Act would allow the special counsel to challenge his or her removal in court after the fact.¹⁶¹ In both cases, the termination would only be valid if the special counsel was removed for “misconduct, dereliction of duty, incapacity,

¹⁵⁵ Becker, Apuzzo, & Goldman, *New York Times*, Jul. 8, 2017, *supra* n. 31.

¹⁵⁶ *Id.*; Becker, Goldman, & Apuzzo, *New York Times*, Jul. 11, 2017, *supra* n. 24; Parker, Leonnig, Rucker, & Hamburger, *Washington Post*, Jul. 31, 2017, *supra* n. 153.

¹⁵⁷ Michael Schmidt, Maggie Haberman & Matt Apuzzo, [Trump Aides, Seeking Leverage, Investigate Mueller’s Investigators](https://www.nytimes.com/2017/07/20/us/politics/donald-trump-robert-mueller-russia-investigation.html), *New York Times*, Jul. 20, 2017, *available at* <https://www.nytimes.com/2017/07/20/us/politics/donald-trump-robert-mueller-russia-investigation.html>.

¹⁵⁸ *Id.*; *see also* Carol D. Leonnig, Ashley Parker, Rosalind S. Helderman & Tom Hamburger, [Trump Team Seeks to Control, Block Mueller’s Russia Investigation](https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html), *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.

¹⁵⁹ Karoun Demirjian, [Senators Unveil Two Proposals to Protect Mueller’s Russia Probe](https://www.washingtonpost.com/powerpost/senators-unveil-two-proposals-to-protect-muellers-russia-probe/2017/08/03/b980d082-787a-11e7-8f39-eeb7d3a2d304_story.html), *Washington Post*, Aug. 3, 2017, *available at* https://www.washingtonpost.com/powerpost/senators-unveil-two-proposals-to-protect-muellers-russia-probe/2017/08/03/b980d082-787a-11e7-8f39-eeb7d3a2d304_story.html.

¹⁶⁰ S. 1735, 115th Cong. (2017), *available at* <https://www.congress.gov/115/bills/s1735/BILLS-115s1735is.pdf>.

¹⁶¹ S. 1741, 115th Cong. (2017), *available at* <https://www.congress.gov/115/bills/s1741/BILLS-115s1741is.pdf>.

conflict of interest, or other good cause, including violation of policies of the Department of Justice.”¹⁶²

President Trump reportedly expressed his displeasure with these pieces of legislation to members of Congress. For instance, on August 7, President Trump is said to have called Senator Thom Tillis and told him that he opposed Tillis’s Special Counsel Integrity Act.¹⁶³ On August 9, President Trump purportedly also 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.¹⁶⁴

Reports also have emerged that President Trump’s legal team “has been in contact with [Special Counsel] Mueller’s office” including conveying the “president’s messages expressing ‘appreciation and greetings.’” President Trump’s chief counsel John Dowd reportedly said that “[t]he president has sent messages back and forth” and that the president “appreciates what Bob Mueller is doing.”¹⁶⁵ On August 10, President Trump told reporters that he does not intend to fire Special Counsel Mueller: “I’ve been reading about it from you people. You say, ‘Oh, I’m going to dismiss him.’ No. I’m not dismissing anybody.”¹⁶⁶

There have also been further indications that Special Counsel Mueller’s investigation is continuing apace. At the end of August, it was revealed that Mueller’s team is working with the New York attorney general’s office on the investigation of former Trump campaign chairman Paul Manafort¹⁶⁷ and has obtained the assistance of agents in the criminal investigations unit of the Internal Revenue Service.¹⁶⁸ Reports have emerged that Special Counsel Mueller has

¹⁶² S.1735, 115th Cong. §2(c) (2017); S. 1741, 115th Cong. §2(b) (2017).

¹⁶³ Josh Dawsey & Elana Schor, Trump Clashed with Multiple GOP Senators over Russia, *Politico*, Aug. 23, 2017, available at <http://www.politico.com/story/2017/08/23/trump-senate-yell-phone-calls-241950>.

¹⁶⁴ Alexander Burns & 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>; Manu Raju & Jeremy Diamond, Trump, McConnell Haven’t Spoken Since Angry Phone Call. Sources Say, *CNN*, Aug. 23, 2017, available at <https://amp.cnn.com/cnn/2017/08/22/politics/mitch-mcconnell-trump-relationship/index.html>.

¹⁶⁵ David Jackson & Kevin Johnson, President Trump Has Sent Private Messages to Russia Special Counsel Robert Mueller, *USA Today*, Aug. 8, 2017, available at <https://www.usatoday.com/story/news/politics/2017/08/08/donald-trump-exchanged-private-messages-special-counsel-mueller/547917001/>.

¹⁶⁶ Gregory Korte & Kevin Johnson, President Trump Says He Won’t Fire Special Counsel Robert Mueller: ‘I’m not dismissing anybody’, *USA Today*, Aug. 10, 2017, available at <https://www.usatoday.com/story/news/politics/2017/08/10/president-trump-says-he-wont-fire-special-counsel-robert-mueller-im-not-dismissing-anybody/557159001/>.

¹⁶⁷ Josh Dawsey, Mueller Teams Up with New York Attorney General in Manafort Probe, *Politico*, Aug. 30, 2017, available at <http://www.politico.com/story/2017/08/30/manafort-mueller-probe-attorney-general-242191>.

¹⁶⁸ Betsy Woodruff, Exclusive: Mueller Enlists the IRS for His Trump-Russia Investigation, *Daily Beast*, Aug. 31, 2017, available at <http://www.thedailybeast.com/exclusive-mueller-enlists-the-irs-for-his-trump-russia-investigation?source=email&via=mobile>.

sought interviews with at least six current and former White House aides¹⁶⁹ and that Special Counsel Mueller has also requested White House documents about the firing of former National Security Adviser 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.¹⁷⁰

4. Developments in the congressional investigations

Congressional investigations into Russian interference in the 2016 election and of Michael Flynn also continue to proceed. The House Permanent Select Committee on Intelligence has subpoenaed records and testimony from former National Security Advisor Michael Flynn and Michael Cohen, President Trump's personal attorney.¹⁷¹ The Senate Intelligence Committee has heard public testimony from DNI Coats and NSA Director Mike Rogers¹⁷² as well as former FBI Director Comey.¹⁷³ The Senate Intelligence Committee also has met privately with Jared Kushner.¹⁷⁴ The Senate Judiciary Committee reached agreements with Paul Manafort and Donald Trump Jr. to secure documents and private interviews.¹⁷⁵ In August, the Senate Judiciary Committee reportedly conducted a private interview of Glenn Simpson, co-founder of Fusion GPS, the company that compiled the Steele Dossier.¹⁷⁶ In September, Trump Jr. met with members and staffers of the Senate Judiciary Committee and reportedly stated that he was not aware that his father played any role in drafting his initial statement about the June 9, 2016 meeting at Trump Tower.¹⁷⁷

¹⁶⁹ Leonnig, Helderman, & Parker, *Washington Post*, Sept. 8, 2017, *supra* n. 2.

¹⁷⁰ 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>.

¹⁷¹ Erin Kelly & Kevin Johnson, House Intelligence Committee Issues Subpoenas in Russia Probe, *USA Today*, May 31, 2017, available at <https://www.usatoday.com/story/news/politics/2017/05/31/house-intelligence-committee-issues-subpoenas-russia-probe/102359046/>.

¹⁷² Kyle Cheney & 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>.

¹⁷³ Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

¹⁷⁴ Devlin Barrett, Philip Rucker, & 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.

¹⁷⁵ Miranda Green & Manu Raju, Trump Jr. and Manafort Reach Deal with Senate Panel to Avoid Public Hearing, *CNN*, Jul. 21, 2017, available at <http://www.cnn.com/2017/07/21/politics/trump-junior-manafort-agree-to-negotiate/index.html>.

¹⁷⁶ Eric Tucker, Committee Hears from Founder of Firm Tied to Trump Dossier, *Associated Press*, Aug. 22, 2017, available at <https://www.apnews.com/c120a1be86b94dcaba7d164bec8f071e>.

¹⁷⁷ Tom Hamburger and Karoun Demirjian, Trump Jr. Says He Can't Recall White House Role in Explaining Meeting with Russians, *Washington Post*, Sept. 7, 2017, available at https://www.washingtonpost.com/politics/trump-jr-says-nothing-came-of-2016-meeting-with-russians/2017/09/07/43f3f2ce-93e9-11e7-89fa-bb822a46da5b_story.html?utm_term=.cfd5857327a3.

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, we discuss the court decisions interpreting and applying the three on-point federal obstruction statutes. These prior cases demonstrate that President Trump’s potential conduct to date may be sufficient to build a case against him for obstructing criminal and congressional investigations of Michael Flynn. Those cases also support a case against him for obstructing criminal and congressional investigations into Russian interference in the 2016 election. In Subsection B, 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, 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, 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. Long before the Constitution was drafted and the 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.”¹⁷⁸ 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.”¹⁷⁹ This statute was replaced by 18 U.S.C. § 1503, which still bears very similar language.¹⁸⁰ And 18 U.S.C. § 1505 and §1512 – two other important federal obstruction statutes that have been added over the years – criminalize similar conduct.¹⁸¹

¹⁷⁸ Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, at 5 (Jul. 22, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876; Declaration of Independence, para. 10 (U.S. 1776).

¹⁷⁹ *Id.* (quoting Act of Mar. 2, 1831, Ch. 99, 4 Stat. 487).

¹⁸⁰ *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.3.

¹⁸¹ *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

Table of Obstruction Statutes			
	18 U.S.C. § 1503	18 U.S.C. § 1505	18 U.S.C. § 1512(c)
Types of Obstruction Covered ¹⁸²	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”
Kind of Proceeding	[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”
Criminal Intent	“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”
Possible Sentence	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 succeed in doing so.¹⁸³ As we explain below, in the obstruction statutes, a “proceeding” can, for certain provisions, include any foreseeable grand jury or congressional investigation.

Hemel & Posner, *supra*, n. 178 at 5-14. Full versions of 18 U.S.C. §§ 1505 & 1512 are attached as Appendices B.2 and B.4, respectively.

¹⁸² 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.

¹⁸³ 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

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;¹⁸⁴ and it is a “well-established rule” that the “omnibus clauses of federal obstruction statutes be broadly construed.”¹⁸⁵ Despite not being dubbed “omnibus,” Section 1505 has likewise “been given a broad and all-inclusive meaning.”¹⁸⁶ 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.’”¹⁸⁷

Moreover, when multiple actions may be categorized as obstructing, they are viewed together.¹⁸⁸ Courts often look to an accumulation or pattern of actions to determine whether a defendant obstructed justice, and the circumstances surrounding the defendant’s activity are

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. Lazzerini*, 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.”).

¹⁸⁴ See Devika Singh, Elena De Santis, Kelli Gulite, & 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.”).

¹⁸⁵ *U.S. v. Mitchell*, 877 F.2d 294, 298 (4th Cir. 1989) (citing cases).

¹⁸⁶ *U.S. v. Rainey*, 757 F.3d 234, 245 (5th Cir. 2014) (internal quotation marks and citation omitted).

¹⁸⁷ *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).

¹⁸⁸ 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.”).

instructive.¹⁸⁹ 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.¹⁹⁰

In any criminal case, the government bears the burden of proving, beyond a reasonable doubt, that a defendant committed an act prohibited by law and that the defendant did so with criminal intent. In Subsections 1 and 2, we address the ways in which the president's actions could have violated the federal obstruction statutes: Subsection 1 addresses how President Trump's alleged attempts to influence, obstruct, and impede criminal and congressional investigations into former National Security Advisor Michael Flynn is the type of conduct routinely found to be prohibited by Sections 1503, 1505, and 1512(c) of Title 18; Subsection 2 addresses how President Trump also may have violated Section 1512(b) of Title 18 by attempting to threaten, intimidate, and corruptly persuade investigators and potential witnesses in those investigations. In Subsection 3, we address what is sufficient evidence to prove that any obstructive actions were taken as part of attempts to influence a "proceeding;" and in Subsection 4, we discuss the standards that govern whether any attempts by the president to obstruct justice could be found to have been motivated by a corrupt (and therefore criminal) intent.

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*

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. First, we note that any attempt by President Trump to try to stop an ongoing investigation is facially obstructive. Second, we explain that he is alleged to have done so using language that courts have considered sufficient to constitute obstruction. Third, 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 indicative of obstruction. Fourth, 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. Fifth, we explain that former FBI Director Comey's statement that

¹⁸⁹ 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).

¹⁹⁰ See *Mitchell*, 877 F.2d at 299 n.4 (holding that the U.S. Court of Appeals for the Fourth Circuit "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).

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. Sixth, we explain why the fact that the president has legal authority to say or do certain things—like firing the FBI director—does not mean that he cannot be criminally liable if he does so corruptly.

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.

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.”¹⁹¹ 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.”¹⁹²

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:

- 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].”¹⁹³ Months later, he emphasized his own loyalty to Comey, and he said, “we had that thing you know,” language that suggests a possible threat.¹⁹⁴
- On February 14, 2017, after clearing the room, Trump directly told Comey to stop the investigation into Flynn in a closed-door, one-on-one setting. According to Comey, the

¹⁹¹ *Mitchell*, 877 F.2d at 296.

¹⁹² 833 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.”).

¹⁹³ Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

¹⁹⁴ *Id.*

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.”¹⁹⁵

- 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.¹⁹⁶
- In the weeks before Comey’s firing, there were several indications that the investigation was heating up. On May 3, Comey confirmed in testimony that the FBI was “investigating potential ties between Trump Associates and the Russian interference in the 2016 campaign” and that the FBI was coordinating with prosecutors in the Department of Justice’s National Security Division and at the U.S. Attorney’s Office for the Eastern District of Virginia.¹⁹⁷ Though the development was not publicly known at the time, federal prosecutors issued grand jury subpoenas to individuals associated with former National Security Advisor Michael Flynn, in conjunction with the investigation of Russian interference in the 2016 election.¹⁹⁸ Comey had also reportedly sought additional resources for the investigation.¹⁹⁹
- 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 Hillary Clinton’s e-mails,²⁰⁰ President Trump stated, “regardless of recommendation I was going to fire Comey . . .” and acknowledged that the “Russia thing” played a role in his decision.²⁰¹

b. One need not speak literally about obstructing justice to obstruct justice

President Trump cannot inoculate his February 14 statement to Director Comey to drop the investigation merely because it was prefaced with the word “hope” or by suggesting it was vague or something short of a direct order. There is no formula or set of magic words that qualify statements as obstruction. Requiring otherwise would contradict Congress’s intent to apply a broad interpretation to obstruction statutes and to prohibit the “variety of corrupt methods by which the proper

There is no formula or set of magic words that qualify statements as obstruction.

¹⁹⁵ *Id.*

¹⁹⁶ Entous, *Washington Post*, Jun. 6, 2017, *supra* n. 102.

¹⁹⁷ *Id.*

¹⁹⁸ Perez, Prokupecz, & Brown, *CNN*, May 10, 2017, *supra* n. 115.

¹⁹⁹ Rosenberg & Apuzzo, *New York Times*, May 10, 2017, *supra* n. 116.

²⁰⁰ Shear & Apuzzo, *New York Times*, May 9, 2017, *supra* n. 122.

²⁰¹ Partial Transcript: NBC News Interview with Donald Trump, *CNN*, May 11, 2017, *supra* n. 128.

administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.”²⁰²

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,²⁰³ Comey interpreted the “hope” statement as a directive to stop investigating General Flynn.²⁰⁴

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.”²⁰⁵

It is also worth noting that courts have not found that the use of words such as “hope” 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 . . . ”

Courts have not found that the use of words such as “hope” provide much protection for statements otherwise determined to constitute obstruction.

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.²⁰⁶ 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].”²⁰⁷ The court interpreted that statement as part of several comments constituting

obstruction that justified an obstruction of justice sentencing enhancement²⁰⁸ because “[t]he

²⁰² *Mitchell*, 877 F.2d at 299 (internal quotation marks and citation omitted).

²⁰³ See *infra* Section II.A.1.e.

²⁰⁴ [Full Transcript and Video: James Comey’s Testimony on Capitol Hill](#), *New York Times*, Jun. 8, 2017, *supra* n. 79.

²⁰⁵ 163 F. Supp. 257, 262 (D.D.C. 1958).

²⁰⁶ 827 F.3d 495, 509 (5th Cir. 2016).

²⁰⁷ 385 F.3d 127, 142 (2d Cir. 2004).

²⁰⁸ 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

natural understanding” was “that Williams was advising [Peterson] that [they] would be able to thwart the investigation against them as long as [Peterson] exercised her Fifth Amendment right.”²⁰⁹ Put differently, Williams was “urging [her] not to cooperate with the Government.”²¹⁰ 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.”²¹¹

In addition, there is no question that seemingly vague or suggestive statements may constitute obstruction. For example, in *U.S. v. Lazzarini*, 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.”²¹² 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.”²¹³ 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.”²¹⁴ 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[?]”²¹⁵

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 sentencing enhancement may be broader than the relevant obstruction statutes in some respects, cases involving the sentencing enhancement, while not dispositive, are instructive.

²⁰⁹ 385 F.3d at 143.

²¹⁰ *Id.*

²¹¹ 521 F.3d 975, 979 (8th Cir. 2008).

²¹² 611 F.2d 940, 942 (1st Cir. 1979).

²¹³ *Id.*

²¹⁴ 316 F.Supp. 846, 848 (W.D. Pa. 1970).

²¹⁵ 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

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.²¹⁶

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”).²¹⁷

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.”).²¹⁸

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.²¹⁹ See, e.g., *Maloney*, 71 F.3d at 652 (emphasizing that the judge’s obstruction occurred “[a]fter everyone else had left.”). And courts

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.

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.”).

²¹⁶ *Lazzerini*, 611 F.2d at 941.

²¹⁷ 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).

²¹⁸ 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.).

²¹⁹ 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)).

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].").²²⁰

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.²²¹ In the same vein, President Trump added that, "we had that thing" – which, Comey explained he interpreted as President Trump conveying that "I've been good to you, you should be good to me."²²²

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]."²²³ Moreover, 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, a course of conduct so unusual it prompted Director Comey to document what had happened.²²⁴ Before his direct request to Coats, the president also cleared the room of all but Coats and Director Pompeo.²²⁵

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 power to violate an obstruction law. The 2016 conviction of former Pennsylvania Attorney General Kathleen Kane under Pennsylvania's obstruction statute²²⁶ is a

²²⁰ 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).

²²¹ To the extent President Trump denies that he requested loyalty from Comey, this denial is undermined, at least in part, by a pattern of similar behavior, such as his admission that he would not have appointed Jeff Sessions if he knew Sessions was going to recuse himself from the investigation; he also described Session's recusal as "very unfair to the president." Peter Baker, Michael S. Schmidt, & 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>.

²²² Full Transcript and Video: James Comey's Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017, *supra* n. 79.

²²³ See *Lazzerini*, 611 F.2d at 942.

²²⁴ Full Transcript and Video: James Comey's Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017, *supra* n. 79 (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, June 8, 2017 Statement for the Record, *supra* n. 39 ("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.").

²²⁵ Entous, *Washington Post*, Jun. 6, 2017, *supra* n. 102.

²²⁶ 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

good example.²²⁷ 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 material to retaliate against former prosecutors, with whom she “was locked in a public battle” over how she handled previous cases.²²⁸ 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.²²⁹ 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.”²³⁰ *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.²³¹

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 U.S. Court of Appeals for 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.²³² And, in *U.S. v. Tiller*, the U.S. Court of Appeals for the Sixth Circuit affirmed an obstruction of justice sentencing enhancement where defendant “asked” two employees not to talk

Obstruction charges are especially common when employment consequences are implied, either by the defendant’s statements themselves or by virtue of defendant’s role as an employer.

to federal agents if questioned because they “were his employees, and therefore his ‘asking’ was tantamount to a demand.”²³³

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).

²²⁷ 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>.

²²⁸ *In re Thirty-Five Statewide Investigating Grand Jury*, 171 M.D.D. KT 2012, at 10, 12.

²²⁹ *Id.* at 10.

²³⁰ *Id.* at 15.

²³¹ 833 F.3d at 1266.

²³² 329 F.2d 437, 448 (9th Cir. 1964).

²³³ 238 F.3d 426, at *4 (6th Cir 2000) (unpublished).

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. Also, President Trump appeared to threaten potential employment consequences at the January 27 dinner by purportedly asking Comey 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.”²³⁴ Moreover, 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 – while not dispositive – are persuasive indications of what President Trump was trying to convey. 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 U.S. Court of Appeals for the Fourth 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.”²³⁵ 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.”²³⁶ Also, in *U.S. v. Cioffi*, the U.S. Court of Appeals for 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.”²³⁷

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

Because the relevant obstruction statutes do not require that an obstruction attempt be successful, Comey’s subjective understanding that the statement was an attempt to impede the investigation is not necessary to the case, but it is telling.

²³⁴ 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.

²³⁵ 523 Fed. Appx. 956, 962 (4th Cir. 2013).

²³⁶ *Id.*

²³⁷ 493 F.2d 1111, 1116 (2d Cir. 1974).

“hope” statement as a “directive,” and 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,”²³⁸ 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.”²³⁹ 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 an 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.

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, or pardon national security advisors, family, and friends, 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 U.S. Court of Appeals for the Ninth Circuit affirmed the convictions of 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.²⁴⁰ Among the actions that constituted obstruction, the court pointed to behavior that could otherwise be justified as necessary to maintaining inmates’ safety. For

²³⁸ Comey, June 8, 2017 Statement for the Record, *supra* n. 39; *see also Full Transcript and Video: James Comey’s Testimony on Capitol Hill*, *New York Times*, Jun. 8, 2017, *supra* n. 79 (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.).

²³⁹ Comey, June 8, 2017 Statement for the Record, *supra* n. 39; Full Transcript and Video: James Comey’s Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017, *supra* n. 79 (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”).

²⁴⁰ 831 F.3d 1207, 1211 (9th Cir. 2016).

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 twenty-four hour surveillance.²⁴¹ 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.²⁴² Similarly, in *U.S. v. Mitchell*, where defendants accepted money to convince a member of Congress to stop a congressional investigation, the U.S. Court of Appeals for 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.”²⁴³

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.²⁴⁴ 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.”²⁴⁵ Likewise, in *U.S. v. Cintolo*, the U.S. Court of Appeals for 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.”²⁴⁶ 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 individual’s status as an attorney engaged in litigation-related conduct

²⁴¹ *Id.* at 1211-14.

²⁴² 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.”).

²⁴³ 877 F.2d at 299.

²⁴⁴ 151 F.3d 620, 628-29 (7th Cir. 1998).

²⁴⁵ *Id.* at 631, 633.

²⁴⁶ 818 F.2d 980, 991 (1st Cir. 1987).

does not provide protection from prosecution for criminal conduct.”²⁴⁷ 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.”²⁴⁸

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.²⁴⁹ President Trump’s authority to stop the investigation into General Flynn or fire the FBI director 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.²⁵⁰ 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.”²⁵¹

g. Cover-up attempts may also be grounds for obstruction charges

Attempts to cover up illegal or obstructing 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.”).

President Trump is alleged to have personally directed, in whole or part, 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 2016.²⁵² 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

²⁴⁷ *Cueto*, 151 F.3d at 631.

²⁴⁸ See *Cintolo*, 818 F.2d at 993-94.

²⁴⁹ See *Cintolo*, 818 F.2d at 990.

²⁵⁰ 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.”).

²⁵¹ *Cintolo*, 818 F.2d at 996.

²⁵² See Parker, Leonig, Rucker, & Hamburger, *Washington Post*, Jul. 31, 2017, *supra* n. 153.

adoption story crafted by the president and others was an attempt to cover up the real purpose of the meeting – to receive damaging information about then-presidential candidate Hillary Clinton.²⁵³ Also, President Trump's initial, admittedly fabricated 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.²⁵⁴ And President Trump's repeated statements categorizing the investigation as a "witch hunt"²⁵⁵ 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.

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."²⁵⁶ Like Sections 1503, 1505, and 1512(c), an attempt to obstruct justice under Section 1512(b) is sufficient; one need not succeed.²⁵⁷

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, and implied employment threats – 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

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²⁵³ See *id.*; Becker, Apuzzo, & Goldman, *New York Times*, Jul. 8, 2017, *supra* n. 31.

²⁵⁴ See Shear & Apuzzo, *New York Times*, May 9, 2017, *supra* n. 122; Rucker, Parker, Horwitz, & Costa, *Washington Post*, May 10, 2017, *supra* n. 118.

²⁵⁵ See, e.g., <https://twitter.com/realDonaldTrump/status/875321478849363968>.

²⁵⁶ 18 U.S.C. § 1512(b)(1)-(3).

²⁵⁷ 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 the crime.").

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's "first-hand knowledge of his erratic personality and violent temper."²⁵⁸ 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."²⁵⁹ 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."²⁶⁰

Like the defendants in *Freeman*, *Craft*, and *Shotts*, President Trump may be liable for intimidating, threatening, and corruptly persuading Comey in order to influence, prevent, or delay his testimony or cause Comey or others to withhold testimony from congressional or grand jury proceedings even if his "words did not contain overt threats."²⁶¹ President Trump's alleged months-long conduct must be viewed as a whole in determining whether it constitutes a pattern of threats, intimidation, and corrupt persuasion that falls 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. . . ."²⁶²
- President Trump's request that DNI Coats urge Comey to back off the FBI's investigation of Flynn.²⁶³
- President Trump's repeated requests for "loyalty" during a one-on-one dinner with Comey.²⁶⁴

²⁵⁸ 208 F.3d 332, 338 (1st Cir. 2000).

²⁵⁹ 478 F.3d 899, 900-01 (8th Cir. 2007).

²⁶⁰ 145 F.3d 1289, 1301 (11th Cir. 1998).

²⁶¹ See *Freeman*, 208 F.3d at 338.

²⁶² Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

²⁶³ Entous, *Washington Post*, Jun. 6, 2017, *supra* n. 102.

²⁶⁴ Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

- 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.”²⁶⁵
- 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.²⁶⁶
- President Trump’s corresponding threat that “we had that thing you know.”²⁶⁷
- President Trump’s firing of Comey.²⁶⁸
- President Trump’s tweet 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,²⁶⁹ and assertion that his false claim that there were tapes “may have changed” Comey’s story.²⁷⁰
- President Trump’s 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!”²⁷¹

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”²⁷² during the January dinner. Indeed, President Trump not only threatened Comey’s job, he eventually terminated him, and ultimately admitted doing so because of the Russia investigation.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Perez, Prokupecz, & Brown, *CNN*, May 10, 2017, *supra* n. 115.

²⁶⁹ <https://twitter.com/realDonaldTrump/status/877932907137966080>;
<https://twitter.com/realDonaldTrump/status/877932956458795008>.

²⁷⁰ 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>.

²⁷¹ <https://twitter.com/realDonaldTrump/status/869865463584620544>;
<https://twitter.com/realDonaldTrump/status/869867413776601088>.

²⁷² See *Craft*, 487 F.3d at 900-01.

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 as 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.²⁷³

Even after terminating Comey, President Trump's possible attempts to intimidate him continued when he tweeted that Comey "better hope there are no 'tapes' of our conversations," despite having "no idea" whether such tapes existed.

Accordingly, this tweet could be viewed as a message to Comey to testify favorably to 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."²⁷⁴ Comey himself also indicated that the tweet had a "major impact."²⁷⁵

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,"²⁷⁶ most courts have deemed "the existence of a pending judicial proceeding [] a prerequisite for convictions" under Section

²⁷³ 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).

²⁷⁴ Williams, *Vox*, Jun. 23, 2017, *supra* n. 270.

²⁷⁵ [Full Transcript and Video: James Comey's Testimony on Capitol Hill](#), *New York Times*, Jun. 8, 2017, *supra* n. 79 ("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.").

²⁷⁶ The omnibus clause of Section 1503 criminalizes endeavors to influence, obstruct, or impede "the due administration of justice."

1503.²⁷⁷ 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 “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 1503.²⁷⁸

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.”²⁷⁹ 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*.”²⁸⁰ Under each of these subsections, a “proceeding” “need not be pending or about to be instituted at the time of the offense.”²⁸¹ 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,”²⁸² and the government must demonstrate a “nexus between the obstructive act and the proceeding.”²⁸³ Like Section 1512, for actions

²⁷⁷ *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).

²⁷⁸ 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)).

²⁷⁹ 18 U.S.C. § 1505 (emphasis added).

²⁸⁰ 18 U.S.C. 1512(b)(1),(b)(2), &(c)(2) (emphasis added).

²⁸¹ 18 U.S.C. § 1512(f)(1).

²⁸² *U.S. v. Martinez*, 862 F.3d 223, 237 (2d Cir. 2017).

²⁸³ 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.

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.”²⁸⁴ Put differently, “the endeavor must have the natural and probable effect of interfering with the due administration of justice.”²⁸⁵ The courts of appeals are split over whether there is a similar nexus requirement for actions brought under Section 1505.²⁸⁶

a. President Trump’s alleged actions would likely satisfy the ‘proceeding’ requirement under Section 1512

i. The grand jury investigations

President Trump’s potential obstruction attempts influenced a “proceeding” or testimony in a “proceeding” under Sections 1512(c)(2), (b)(1), and (b)(2) if they were attempts to influence a foreseeable grand jury investigation or to influence or cause a person to withhold testimony in a 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.”²⁸⁷

➤ **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.²⁸⁸ It also is not required that

²⁸⁴ *Aguilar*, 515 U.S. at 599.

²⁸⁵ *Id.*

²⁸⁶ The U.S. Courts of Appeals for 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.”).

²⁸⁷ 18 U.S.C. § 1515(a)(1)(A).

²⁸⁸ *See, e.g., U.S. v. Licciardi*, No. CV 14-284, 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.”) At least one of President Trump’s potentially obstructive actions – firing 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, *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.

President Trump had actual knowledge of a grand jury investigation.²⁸⁹ 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.²⁹⁰

In *U.S. v. Martinez*, the U.S. Court of Appeals for the Second Circuit recently 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.²⁹¹ The court determined that it was "easily inferable" that the arrests of his

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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."²⁹² 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."²⁹³

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 investigation uncover evidence that President Trump knew of, or was involved in, any criminal behavior reasonably related to the Flynn investigation, 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.²⁹⁴

²⁸⁹ See *Martinez*, 862 F.3d at 236.

²⁹⁰ *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).

²⁹¹ *Martinez*, 862 F.3d at 236, 238.

²⁹² *Id.* at 238.

²⁹³ *Id.*

²⁹⁴ 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

While the outcome of the Mueller and congressional investigations are critical on this point, several events that have been the subject of testimony and public reports suggest that President Trump likely foresaw a grand jury investigation or indictment of Flynn. First, Flynn is said to have informed the Trump transition team that he was under investigation by the Department of Justice for his Turkish lobbying activities in early January.²⁹⁵ Second, 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, 2017,²⁹⁶ and the White House has stated that McGahn immediately briefed President Trump on his meeting with Yates.²⁹⁷ It seems likely, although not certain, that McGahn would have discussed with President Trump the possibility of charges against Flynn under 18 U.S.C. § 1001 for misstating facts to federal investigators.²⁹⁸ Third, the language that President Trump allegedly used during his February 14 conversation with Comey 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, Trump was evidently thinking ahead to the consequences of the investigations into Flynn and potentially others. Fourth, President Trump understood that Comey would have the responsibility of recommending to the Department of Justice whether to prosecute Flynn. He repeatedly criticized Comey for his decision not to recommend charges against Hillary Clinton for her use of a private email server.²⁹⁹ Finally, the foreseeability element does not require that a defendant fully understand

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).

²⁹⁵ Rosenberg & Mazzetti, *New York Times*, May 17, 2017, *supra* n. 55.

²⁹⁶ Apuzzo & Huetteman, *New York Times*, May 8, 2017, *supra* n. 70.

²⁹⁷ The White House Office of the Press Secretary, Feb. 14, 2017, *supra* n. 71.

²⁹⁸ Yates testified that she “specifically declined to answer” when McGahn asked how Flynn had performed in his FBI interview. *Washington Post*, Full Transcript: Sally Yates and James Clapper Testify on Russian Election Interference, May 8, 2017, 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=.2a4f023def66. Nonetheless, the conversation, as recounted by Yates, indicates that the possibility of a Section 1001 violation had occurred to McGahn – as it would to any defense lawyer.

²⁹⁹ On July 5, 2016, Director Comey held a press conference to explain his decision not to recommend prosecution; later that night Trump appeared on Fox News and said that he was “surprised” by the recommendation, and that it was a “great miscarriage of justice” that Clinton would not be prosecuted. Emily Schultheis, Donald Trump: FBI decision on Clinton Emails a “Total Miscarriage of Justice”, *CBS News*, Jul. 5, 2016, available at <https://www.cbsnews.com/news/donald-trump-fbi-decision-on-clinton-emails-a-total-miscarriage-in-justice/>. Trump continued to discuss the recommendation decision in later months; for instance, complaining that Comey “let [Clinton] off the hook” at an October 13, 2016 rally, and tweeting that “FBI Director Comey was the best thing that ever happened to Hillary Clinton in that he gave her a free pass for many bad deeds!” on May 2, 2017. See Michelle Ye Hee Lee, Did Trump and Sessions Flip-flop on Comey’s Decisions in the Clinton Investigation?, *Washington Post*, May 11, 2017,

the minutiae of the legal process.³⁰⁰ Nonetheless, courts will consider whether a defendant's position and experience supports the inference that he or she would foresee a future proceeding.³⁰¹ President Trump was not only advised by a battery of experienced lawyers and counselors, but he is 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.³⁰² 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.

➤ Nexus

To determine whether there is the required nexus between the conduct and the actual or foreseeable proceeding, courts consider whether the defendant's acts had the natural and probable consequence of interfering with an official proceeding.³⁰³ The requirement that obstructive acts have the natural and probable effect of disrupting the 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 do if a certain line is passed."³⁰⁴ Responding to a dissent that argued that intent to obstruct was sufficient to impose liability without the need for a "natural

available at <https://www.washingtonpost.com/news/fact-checker/wp/2017/05/11/did-trump-and-sessions-flip-flop-on-omeys-decisions-in-the-clinton-investigation/>.

³⁰⁰ 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)).

³⁰¹ 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).

³⁰² See Jacob Gershman, *You're Sued: Donald Trump's 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 & Susan Page, *Exclusive: Trump's 3,500 Lawsuits Unprecedented for a Presidential Nominee*, *USA Today*, Jun. 1, 2016, available at <https://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/>.

³⁰³ 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.").

³⁰⁴ *Aguilar*, 515 U.S. at 600 (internal quotations omitted).

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.³⁰⁵ 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.”³⁰⁶

President Trump’s potential obstructive acts do not appear to raise such concerns about culpability for acts that lack a nexus to a proceeding. First, President Trump has all but admitted that his intent in firing the FBI director mid-term was to end the Russia investigation.³⁰⁷ Second, the appointment of a special counsel to continue the Russia investigation 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.”³⁰⁸ In *Aguilar*, the Court affirmed the culpability of the defendant who lies to a subpoenaed witness, where the witness subsequently testifies but does not end up repeating the defendant’s lie when testifying.³⁰⁹ 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.

ii. The congressional investigations

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 the congressional investigations into Russia or General Flynn. 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;³¹⁰ 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 1505.³¹¹

³⁰⁵ 515 U.S. at 602.

³⁰⁶ *Id.*

³⁰⁷ 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).

³⁰⁸ 515 U.S. at 601-602.

³⁰⁹ *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.”).

³¹⁰ We were unable to locate any cases brought under Section 1512 for obstructing a proceeding before Congress.

³¹¹ *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

Nonetheless, the House and Senate investigations likely meet the threshold formality. The relevant congressional investigations were ongoing for 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, 2017.³¹² 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.³¹³ 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.³¹⁴

Although the nexus between President Trump’s alleged actions and the congressional investigations may be less obvious than that with the contemplated grand jury proceeding, it is still potentially sufficient given that the threshold is only whether his acts had the “natural and probable consequence of interfering with an official proceeding.” Would pressuring

Although the nexus between President Trump’s alleged actions and the congressional investigations is less obvious than that with the contemplated grand jury proceeding, it still is potentially sufficient given the threshold is only whether his acts had the “natural and probable consequence of interfering with an official proceeding.”

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.³¹⁵ 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.³¹⁶ Further, the intelligence community assessment report on Russian involvement in

used in § 1512, its sense is that of a hearing rather than simply any investigatory step taken by an agency.”).

³¹² Senate Select Committee on Intelligence, Jan. 13, 2017, *supra* n. 49.

³¹³ House Permanent Select Committee on Intelligence, Jan. 25, 2017, *supra* n. 51.

³¹⁴ House Oversight and Government Reform Committee, Feb. 16, 2017, *supra* n. 77.

³¹⁵ See, e.g., Office of the Director of National Intelligence, Jan. 6, 2017, *supra* n. 19.

³¹⁶ “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

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!"³¹⁷

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 certainly buttressed by the president's own tweets on the subject. 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.

b. President Trump likely endeavored to influence a proceeding under Section 1505

i. The congressional investigations

Prosecutors also have a reasonable basis to seek to prove that President Trump endeavored to obstruct a "pending proceeding" under Section 1505, which applies to congressional investigations (though not grand jury proceedings). Like Section 1512, the term "proceeding" in Section 1505 applies to congressional investigations. Section 1505 explicitly states that a congressional investigation constitutes a "proceeding." 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 1505.³¹⁸ The House and Senate Intelligence Committee investigations qualify as pending proceedings, and all of President Trump's potentially obstructive acts –

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, *supra* n. 101.

³¹⁷ <https://twitter.com/realdonaldtrump/status/843776582825267201>.

³¹⁸ 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).

including the January 27, 2017 “loyalty” dinner with Comey at the White House – took place while they were pending.

Even so, like the nexus analysis 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.³¹⁹ 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 represents another plausible route for investigation and possible prosecution.

ii. The FBI investigation

The clear 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*.³²⁰ 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 and adjudicative power vested in the agency by law.”³²¹ Because the FBI is a purely *investigatory* agency, not an adjudicator, its investigations do not meet the definition of “proceeding.”³²² *Higgins* has been widely followed.³²³

The clear 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.

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

³¹⁹ This analysis presupposes that a nexus requirement is required under Section 1505, though the U.S. Court of Appeals for the Ninth Circuit 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.”).

³²⁰ 511 F. Supp. 453 (W.D. Ky. 1981).

³²¹ *Id.* at 455.

³²² *Id.*

³²³ 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).

1512, not Section 1505.³²⁴ Some scholars have recently questioned the court's reasoning in *Higgins*, citing its "shaky foundations."³²⁵ 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

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.³²⁶ Grand jury investigations, once undertaken, qualify as "proceedings" under Section 1503 (which, like Section 1505 but unlike Section 1512, requires that the proceeding is pending, and not just foreseeable).³²⁷ 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.³²⁸

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 Flynn's lobbying shortly after the election, and informed General Flynn of the investigation by letter dated November 30, 2017.³²⁹ Flynn reportedly informed President Trump's transition lawyer (now White House Counsel) Don McGahn of the investigation on

³²⁴ 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.")

³²⁵ Hemel & Posner, at 12, *supra* n. 178.

³²⁶ Perez, Prokupecz, & Brown, *CNN*, May 10, 2017, *supra* n. 115.

³²⁷ Singh *et. al*, Obstruction of Justice, 54 Am. Crim. L. Rev. 1605, 1610 (Fall 2017).

³²⁸ 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 because "the agents were not conducting 'some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority.'"). The U.S. Court of Appeals for the Seventh Circuit 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.

³²⁸ *Macari*, 453 F.3d at 936.

³²⁹ See Rosenberg & Mazzetti, *New York Times*, May 17, 2017, *supra* n. 55.

January 4, 2017.³³⁰ 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.³³¹ 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.³³² 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."³³³ 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.³³⁴ 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.

In addition, it has been reported that Special Counsel Mueller is using a Washington, D.C.-based grand jury to issue subpoenas relating to the Russia investigation, including to banks seeking records of transactions involving Paul Manafort, and in relation to the June 2016 meeting between Manafort, Donald Trump Jr., Kushner, and Russian lawyer Natalia Veselnitskaya.³³⁵ It appears likely but not certain that the grand jury was active by July 8, 2017, when President Trump participated in drafting the misleading statement describing that meeting as "primarily" about the "adoption of Russian children." 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. The defense would have 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.

Despite the challenges posed by the nexus and proceeding requirements, 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. Viable routes to obstruction charges also potentially could be based on the obstruction of

³³⁰ See *id.*

³³¹ Layne, Hosenball, & Ainsley, *Reuters*, Jun. 2, 2017, *supra* n. 131.

³³² *Id.*

³³³ James Comey, May 3, 2017 Testimony to the Senate Judiciary Committee.

³³⁴ See Rosenberg & Mazzetti, *New York Times*, May 17, 2017, *supra* n. 55.

³³⁵ See Christian Berthelsen & Greg Farrell, [With Bank Subpoenas, Mueller Turns Up the Heat on Manafort](https://www.bloomberg.com/news/articles/2017-08-10/with-bank-subpoenas-mueller-is-said-to-turn-up-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>; Karen Freifeld, [Exclusive: Grand Jury Subpoenas Issued in Relation to Russian Lawyer, Trump Jr. Meeting – Sources](http://www.reuters.com/article/us-usa-trump-russia-subpoena-idUSKBN1AJ2V0), *Reuters*, August 3, 2017, available at <http://www.reuters.com/article/us-usa-trump-russia-subpoena-idUSKBN1AJ2V0>.

congressional investigations under Sections 1505 and 1512(b), and 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.”³³⁶ The term “corruptly” is peppered throughout criminal law but is notoriously vague.³³⁷ 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.³³⁸

Some circuit courts have indicated that one acts “corruptly” whenever he or she acts with the specific intent to obstruct justice.³³⁹ This view is sound in most circumstances, as efforts by

³³⁶ 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 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).

³³⁷ 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.”).

³³⁸ See *U.S. v. Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985) (The term corruptly “takes on different meanings in various contexts.”).

³³⁹ 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 U.S. Court of Appeals for the 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”)

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.³⁴⁰ 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."³⁴¹ This definition, already in use 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."³⁴² 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.³⁴³

Although "improper purpose" is hardly narrower than "corruptly,"³⁴⁴ 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.

(citing *Rasheed*); U.S. Court of Appeals for the Fifth Circuit, Jury Instructions § 2.63A ("defendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.").

³⁴⁰ 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.).

³⁴¹ 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, 114–115 (D.C. Cir. 1976) (finding the following instruction proper: "The word, 'corruptly,' as used in this statute 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.").

³⁴² 18 U.S.C. § 1515(b).

³⁴³ *U.S. v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).

³⁴⁴ 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).

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.³⁴⁵ 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 U.S. Court of Appeals for 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.”³⁴⁶ 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.”³⁴⁷ 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 defendant’s actions were not merely to “[t]ell individuals to exercise their constitutional right not to testify,” as defendant argued, but to “‘protect’ himself.”³⁴⁸

It appears that President Trump acted with an improper purpose because his actions were undertaken to influence the Russia or Flynn investigations in order to benefit or protect himself, his family, or his top aides.

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

³⁴⁵ Professors Hemel and Posner suggest in their recent 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).” Hemel & Posner, at 30, *supra* n. 178; *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.”).

³⁴⁶ 613 F.2d 233, 238 (2d Cir. 1979) (citation omitted)

³⁴⁷ 151 F.3d at 631

³⁴⁸ 2013 WL 5477373, at *4; *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.”).

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.

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.³⁴⁹ President Trump's behavior is certainly suggestive of corrupt intent with respect to the Russia and Flynn investigations. For

Shifting explanations are classic indicia of guilty intent.

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 tweet³⁵⁰ 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.³⁵¹ Soon thereafter, President Trump reversed course and said that he was going to fire Comey regardless of what Rosenstein's memo said, admitting that the Russia investigation was on his mind when he made the decision to fire Comey.³⁵² Shifting explanations are classic indicia of guilty intent.³⁵³ Moreover, as explained in greater detail

³⁴⁹ *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 . . . "An 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 § 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).

³⁵⁰ 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.").

³⁵¹ See Rosenstein, *U.S. Dep't of Justice*, May 9, 2017, *supra* n. 121; Merica, *CNN*, May 12, 2017, *supra* n. 123.

³⁵² Partial Transcript: NBC News Interview with Donald Trump, *CNN*, May 11, 2017, *supra* n. 128 ("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.'").

³⁵³ For instance, the Supreme Court recently 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

above, President Trump's apparent communications to 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:

- Creating a cover story for the Comey firing – the created-in-one-day Rosenstein memo, which did not contain a formal recommendation that Comey be terminated and which was written after President Trump had already written another termination letter to Comey (that was never sent).³⁵⁴
- Repeatedly clearing the room before making his requests related to the Russia and Flynn investigations, which is suggestive of knowledge of an improper purpose.³⁵⁵
- Making repeated demands for loyalty from Comey.³⁵⁶
- Telling Comey that he “hopes” Comey can “let go” of the Flynn investigation because Flynn is a “good guy.”³⁵⁷
- Asking DNI Coats on March 22 to intervene with Comey to get the FBI to back off the investigation into Flynn.³⁵⁸
- Making phone calls in March to DNI Coats and NSA Director Rogers asking them to deny the existence of evidence of collusion during the election.³⁵⁹
- 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.”³⁶⁰

‘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).

³⁵⁴ See Rosenstein, *U.S. Dept of Justice*, May 9, 2017, *supra* n. 121; Schmidt & Haberman, *New York Times*, Sept. 1, 2017, *supra* n. 116; Nicholas & Bender, *Wall Street Journal*, Sept. 1, 2017, *supra* n. 119.

³⁵⁵ Comey, June 8, 2017 Statement for the Record, *supra* n. 39; Entous, *Washington Post*, Jun. 6, 2017, *supra* n. 102.

³⁵⁶ Comey, June 8, 2017 Statement for the Record, *supra* n. 39.

³⁵⁷ *Id.*

³⁵⁸ Entous, *Washington Post*, Jun. 6, 2017, *supra* n. 102.

³⁵⁹ *Id.*; Entous & Nakashima, *Washington Post*, May 22, 2017, *supra* n. 105.

³⁶⁰ Apuzzo, Haberman & Rosenberg, *New York Times*, May 19, 2017, *supra* n. 124.

- 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.³⁶¹
- Making statements decrying Attorney General Sessions's 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.³⁶²
- Helping prepare 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 2016.³⁶³

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 certainly 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.³⁶⁴ 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.³⁶⁵ Some

The law does not require the government to prove that obstruction was a defendant's sole, or even primary, purpose.

³⁶¹ See 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?_r=0; see also Baker, Schmidt, & Haberman, *New York Times*, Jul. 19, 2017, *supra* n. 221.

³⁶² See *id.*

³⁶³ See Parker, Leonig, Rucker, & Hamburger, *Washington Post*, Jul. 31, 2017, *supra* n. 153.

³⁶⁴ 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).

³⁶⁵ See, e.g., Shannon Pettypiece, Jennifer Jacobs & 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,

have even speculated that President Trump fired Comey because Comey is so tall.³⁶⁶

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.³⁶⁷ Courts "recognize[] that there may be multiple motives for human behavior."³⁶⁸ This basic concept is not limited to the obstruction context; it applies throughout the body of criminal law.³⁶⁹ An improper motive is not "negated by the simultaneous presence of another motive" as well.³⁷⁰ 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, Trump could still be acting with an improper purpose. For example, in *U.S. v. Matthews*, the U.S. Court of Appeals for 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."³⁷¹ Similarly, in *U.S. v. Durham*, the U.S. Court of Appeals for 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.³⁷² When the officer learned that the home of his friend's sister was among the

[Trump's] answer was unequivocal: loyalty."); Peter Baker & Michael D. Shear, [Trump Shifts Rationale for Firing Comey, Calling Him a 'Showboat.'](https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html) *New York Times*, May 11, 2017, available at <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html>.

³⁶⁶ See Kathleen Parker, [A Theory: Trump Fired Comey Because He's Taller](https://www.washingtonpost.com/opinions/a-theory-trump-fired-comey-because-hes-taller/2017/05/12/ca2378f0-3751-11e7-b373-418f6849a004_story.html), *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.

³⁶⁷ 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 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.").

³⁶⁸ *U.S. v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014).

³⁶⁹ 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).

³⁷⁰ *Smith*, 831 F.3d at 1217.

³⁷¹ 505 F.3d 698, 706-707 (7th Cir. 2007)

³⁷² 432 Fed. Appx. 88, 89 (3d Cir. 2011)

locations to be searched, he called his friend to warn him that his sister might be in danger.³⁷³ 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.”³⁷⁴

It is certainly possible that President Trump’s actions to potentially influence the Flynn investigation – such as his statement to Comey that he “hopes” he “lets 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. 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 several 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.³⁷⁵

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.”³⁷⁶

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*

³⁷³ *Id.*

³⁷⁴ *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).

³⁷⁵ 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).

³⁷⁶ *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).

attempt to shut down an investigation.³⁷⁷ 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.

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. section 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.³⁷⁸ A conspiracy may be charged even if the underlying offense was attempted but did not actually occur.³⁷⁹ 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.³⁸⁰ 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

³⁷⁷ 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.").

³⁷⁸ 18 U.S.C. § 371.

³⁷⁹ *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.").

³⁸⁰ *Cueto*, 151 F.3d at 635.

and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the conspiracy.³⁸¹

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.³⁸² 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.”³⁸³

The U.S. Attorneys’ Manual defines this to include “obstructing, in any manner, a legitimate government function.”³⁸⁴ Courts have held that interference with a federal agency’s investigation satisfies the defraud clause.³⁸⁵

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.

President Trump’s well-documented demands for “loyalty” from his subordinates³⁸⁶ raise the specter that he may have conspired with other senior White House or administration officials. If members of the administration met the president’s demands for loyalty by attempting to obstruct the Russia investigations, there may be a basis to bring criminal conspiracy charges. It also is possible that administration officials took the initiative with President Trump for improper motives of their own.³⁸⁷

³⁸¹ 18 U.S.C. § 371; *U.S. v. Fisch*, 851 F.3d 402, 406-7 (5th Cir. 2017).

³⁸² Damon Porter, *Federal Criminal Conspiracy*, 54 Am. Crim. L. Rev. 1307, 1313 (2017).

³⁸³ *U.S. v. Conti*, 804 F.3d 977, 980-81 (9th Cir. 2015).

³⁸⁴ U.S. Dep’t of Justice, *U.S. Attorneys’ Manual*, Criminal Resource Manual § 925.

³⁸⁵ 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”).

³⁸⁶ See, e.g., *Comey*, *June 8, 2017 Statement for the Record*, *supra* n. 39; Schmidt, *New York Times*, May 11, 2017, *supra* n. 137.

³⁸⁷ See Maggie Haberman, Glenn Thrush, Michael S. Schmidt & 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>.

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.³⁸⁸ 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 2014.³⁸⁹ 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.

The involvement of Attorney General Sessions should also be scrutinized under the conspiracy statute. On March 2, 2017, Sessions announced his decision to recuse himself "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States."³⁹⁰ James Comey later testified to the Senate Intelligence Committee that FBI leadership at the time was "aware of facts that I can't discuss in an open setting that would make [Sessions'] continued engagement in a Russia-related investigation problematic."³⁹¹ Yet despite his recusal, Sessions reportedly "instructed his deputies to come up with reasons to fire Mr. Comey" while President Trump considered whether to take action.³⁹² President Trump eventually fired Comey on May 9, 2017, and announced that he had acted in part based on the "clear recommendations" of Sessions.³⁹³ Sessions's participation in the decision to fire Comey raises the question as to whether the facts that made his engagement in the Russia investigations "problematic"³⁹⁴ (which have not been disclosed publicly) also motivated his efforts to have Comey fired.

If evidence demonstrates that President Trump reached an agreement with anyone in the administration to obstruct justice, there may be a basis to bring additional charges against them and President Trump under section 371. It is unlikely that Kushner, Attorney General Sessions, or any other senior administration official would have formally agreed to a request from Trump to obstruct 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

³⁸⁸ See, e.g., 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>; <https://twitter.com/NorahODonnell/status/864807174479982592>.

³⁸⁹ Matt Zapotosky, 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.

³⁹⁰ Press Release: Attorney General Sessions Statement on Recusal, *U.S. Dep't of Justice*, Mar. 2, 2017, available at <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal>.

³⁹¹ Full Transcript and Video: James Comey's Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017, *supra* n. 79.

³⁹² Haberman, Thrush, Schmidt & Baker, *New York Times*, May 10, 2017, *supra* n. 387.

³⁹³ White House, Statement from the Press Secretary, *White House Office of the Press Secretary*, May 9, 2017, <https://www.whitehouse.gov/the-press-office/2017/05/09/statement-press-secretary-1>.

³⁹⁴ Full Transcript and Video: James Comey's Testimony on Capitol Hill, *New York Times*, Jun. 8, 2017, *supra* n. 79.

entirely on circumstantial evidence due to the secretive nature of conspiracies.³⁹⁵ Relevant circumstantial evidence includes: concert of action among co-defendants,³⁹⁶ 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.”³⁹⁷ In evaluating whether there is circumstantial evidence of an agreement between President Trump and members of his administration to disrupt the Russia investigations, the facts surrounding the firing of Comey need to be further developed and will be highly relevant to this question.

Courts permit triers of fact to infer the presence of an agreement based entirely on circumstantial evidence due to the secretive nature of conspiracies.

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.³⁹⁸ Similar to proving an agreement to enter a conspiracy under Section 371, the “knowledge and intent” element may be established using circumstantial evidence.³⁹⁹ Knowledge may be inferred when a defendant acts in furtherance of the conspiracy’s objective,⁴⁰⁰ 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.⁴⁰¹ Because conspiracy is a specific intent crime, “proof that the defendant knew *some* crime would be committed is not enough.”⁴⁰² 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.”⁴⁰³ 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 investigations.

³⁹⁵ *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.”).

³⁹⁶ *Fisch*, 851 F.3d at 407.

³⁹⁷ *Wardell*, 591 F.3d at 1287-88.

³⁹⁸ *U.S. v. Pulido-Jacobo*, 377 F.3d 1124, 1130 (10th Cir. 2004).

³⁹⁹ *U.S. v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006).

⁴⁰⁰ *U.S. v. Scull*, 321 F.3d 1270, 1282 (10th Cir. 2003).

⁴⁰¹ *Peterson*, 244 F.3d at 389.

⁴⁰² *U.S. v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004).

⁴⁰³ *Cueto*, 151 F.3d at 365.

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.⁴⁰⁴ Trump's dismissal of Comey would satisfy this element.

Much evidence would need to be uncovered for a successful conspiracy charge involving President Trump, Sessions, Kushner, or other members of the Trump administration. It may never be. Nevertheless, it remains a plausible avenue of investigation, and almost certainly accounts for some of Special Counsel Mueller's reported intense interest in White House goings-on.⁴⁰⁵

C. Arguments that President Trump has no obstruction exposure are unpersuasive

In this section, we address some of the more prominent arguments that President Trump could not have committed obstruction of justice.

According to Alan Dershowitz, President Trump's attempts to stop the FBI's investigation cannot be considered obstruction of justice because the president has the constitutional authority to order the FBI to stop an investigation, fire the FBI Director for disobeying such orders, and pardon investigation targets.⁴⁰⁶ Professor Dershowitz also contends that whether the president's intent behind such actions was "corrupt" should not be at issue because such an inquiry would be too "vague."⁴⁰⁷

Dershowitz's contention that a corrupt intent inquiry is too "vague" or "elastic"⁴⁰⁸ fails to recognize that such analyses routinely distinguish lawful from unlawful behavior. Courts and jurors frequently assess defendants' motivations since a defendant's intent is an element of many criminal statutes, including those prohibiting obstruction of justice. Therefore, even if some of President Trump's conduct would have been legal but for his corrupt intent, that does not shield his actions from criminal liability. 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

⁴⁰⁴ *U.S. v. LaSpina*, 299 F.3d 165, 176 (2d Cir. 2002).

⁴⁰⁵ See, e.g., Leonnig, Helderman, & Parker, *Washington Post*, Sept. 8, 2017, *supra* n. 2; Michael 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?mcubz=1>.

⁴⁰⁶ 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>

⁴⁰⁷ 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>

⁴⁰⁸ *Id.*

legal but for its purposeful interference with an FBI investigation into civil rights violations at Los Angeles County jails.⁴⁰⁹

- 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.”⁴¹⁰
- 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.”⁴¹¹
- 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.”⁴¹²
- 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.”⁴¹³
- 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.”⁴¹⁴

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 Professor Dershowitz seems 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.

In an op-ed in the *New York Times*, Florida International University law professor Elizabeth Price Foley argued that President Trump’s February 14 comments to Comey did not

⁴⁰⁹ 831 F.3d at 1211.

⁴¹⁰ Jury Instructions, *U.S. v. Baca*, No. 16-cr-00066 (C.D. Cal. Mar. 13, 2017).

⁴¹¹ 877 F.2d at 299 (citations omitted).

⁴¹² 151 F.3d at 628-29, 631.

⁴¹³ 818 F.2d at 991.

⁴¹⁴ 493 F.2d at 1119.

constitute obstruction under 18 U.S.C. § 1510 or § 1505 because his comments lacked the bribery element necessary to satisfy Section 1510 and because an FBI investigation does not constitute a “pending proceeding” under Section 1505.⁴¹⁵

Foley’s focus on Section 1510 is a straw man. Nobody other than Foley herself appears to have argued that it is potentially relevant. Foley does not consider the applicability of other more appropriate obstruction statutes, including Sections 1503 and 1512. Foley only considered the FBI investigation as a “proceeding” for the purposes of her analysis, ignoring the obstructive acts’ effects on the grand jury and congressional investigations. As discussed in Section II(A)(3) of this paper, there is a potential basis for arguing that President Trump attempted to obstruct a foreseeable grand jury proceeding under Section 1512(c)(2), a statute that Foley overlooks entirely.

Finally, George Washington University law professor Jonathan Turley has argued that President Trump’s comments to Comey on February 14 do not establish a *prima facie* case for obstruction of justice, and it “would be a highly dangerous interpretation to allow obstruction charges at this stage.”⁴¹⁶ According to Turley, if prosecutors could “charge people at the investigation stage of cases, a wide array of comments or conduct could be criminalized.”⁴¹⁷

But Turley fails to recognize that prosecutors already have the unambiguous power to bring charges for obstructive acts during the investigation stage. Section 1512 is *specifically designed* to capture obstructive acts that occur before a proceeding has been initiated.⁴¹⁸ Charges relating to interference with federal investigators are already very common under 18 U.S.C. § 1001. Finally, Turley’s fear of a slippery slope is unpersuasive—President Trump’s obstructive acts are not limited to the February 14 meeting, and the president’s unique power to stymie an investigation allays any realistic concerns that ordinary citizens will be charged for making statements similar to those made by President Trump to Director Comey.

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 are loath 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

⁴¹⁵ See Elizabeth Price Foley, Trump’s Statements Are Not an Obstruction of Justice, *New York Times*, May 17, 2017, available at https://www.nytimes.com/2017/05/17/opinion/trumps-fbi-comey-statements-are-not-an-obstruction-of-justice.html?mcubz=3&_r=0.

⁴¹⁶ Jonathan Turley, James Comey’s Testimony Doesn’t Make the Case for Impeachment or Obstruction Against Donald Trump, *USA Today*, Jun. 7, 2017, available at <https://www.usatoday.com/story/opinion/2017/06/07/comey-testimony-no-obstruction-no-impeachment-jonathan-turley-column/102603050/>.

⁴¹⁷ *Id.*

⁴¹⁸ See 18 U.S.C. § 1512(f)(1) (a “proceeding” “need not be pending or about to be instituted at the time of the offense.”).

justice that began with his demands for loyalty from FBI Director Comey. In other words, terminating Mueller would strengthen the case that President Trump has obstructed justice.

The same body of caselaw 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 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,⁴¹⁹ firing Mueller would have a clear nexus to grand jury proceedings and quite foreseeably impact them. In fact, now that there are reports that Mueller also has been in direct contact with the White House to arrange interviews of current and former administration officials⁴²⁰ and that President Trump has been sending private messages to Mueller via his legal team,⁴²¹ it would seemingly be relatively straightforward to prove that President Trump has actual knowledge of the grand jury investigation. And assuming none of the rationales that have been advanced thus far for firing Mueller are legitimate,⁴²² 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

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.

⁴¹⁹ Wilber & Tau, *Wall Street Journal*, Aug. 3, 2017, *supra* n. 135.

⁴²⁰ Michael S. Schmidt, Matt Apuzzo & Maggie Haberman, Mueller Is Said to Seek Interviews with West Wing in Russia Case, *New York Times*, Aug. 12, 2017, available at <https://www.nytimes.com/2017/08/12/us/politics/mueller-trump-russia-priebus.html? r=0>.

⁴²¹ Jackson & Johnson, *USA Today*, Aug. 8, 2017, *supra* n. 165.

⁴²² See Richard Painter & Norman Eisen, 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; Richard Painter & Norman Eisen, Robert Mueller Terrifies President Trump. Of Course He Wants Him Gone, *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/>.

perceived by many as a challenge to the rule of law and our constitutional order.⁴²³ For that reason, it is encouraging that in recent weeks President Trump has signaled that he will not fire Mueller.

⁴²³ See Norm Eisen and Fred Wertheimer, Firing Mueller Would Be a Catastrophic Mistake, 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. In this section, we preview some of the considerations Mueller will face. We review the special counsel's authority and explain the range of options available to him.

We begin with the option of referring the issue 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 indict President Trump and proceed with the case. 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.

Alternatively, 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.⁴²⁴ 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, there are a few other options that we summarize in brief. Mueller could pursue some combination of those already enumerated (i.e. indict and 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.

⁴²⁴ 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.

A. Overview of Mueller's authority and retention as special counsel

Mueller's authority as special counsel stems from two sources: Deputy Attorney General Rod Rosenstein's⁴²⁵ Order No. 3915-2017 appointing the special counsel and the Department of Justice'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 1994.⁴²⁶

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)."⁴²⁷ The order further states that subsections 600.4 through 600.10 of the special counsel rule apply to Mueller. Section 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.⁴²⁸

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.⁴²⁹ This includes the power to prosecute, which Rosenstein also explicitly mentioned in Order No. 3915.⁴³⁰ Mueller is bound by the "rules, regulations, practices, and policies of the Department of Justice";⁴³¹ "subject to disciplinary action for misconduct and

⁴²⁵ 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, *supra* n. 390.

⁴²⁶ See Final Rule, *Office of Special Counsel*, 64 FR 37038-01 (Jul. 9, 1999).

⁴²⁷ Rosenstein, *Office of the Deputy Att'y Gen.*, May 17, 2017, *supra* n. 129, attached as App. C.2.

⁴²⁸ See Citizens for Responsibility and Ethics in Washington, Letter to Special Counsel Mueller, 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."); 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>.

⁴²⁹ 28 C.F.R. § 600.6.

⁴³⁰ Rosenstein, *Office of the Deputy Att'y Gen.*, May 17, 2017, *supra* n. 129, 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).

⁴³¹ 28 C.F.R. § 600.7(a).

breach of ethical duties” just like other Department of Justice employees;⁴³² 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.”⁴³³

Although Special Counsel Mueller is “not subject to day-to-day supervision”⁴³⁴ by other officials in the Department, he must notify the deputy attorney general in compliance with the Department’s guidelines on urgent reports.⁴³⁵ 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.⁴³⁶ 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.”⁴³⁷ 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.⁴³⁸ 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.”⁴³⁹ 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.⁴⁴⁰

Our discussion to this point has assumed that the Trump administration will leave in place the legal structure governing the special counsel and the personnel who have the power to shape it. Of late, the president seems to have taken a step back from exploring ways to

⁴³² 28 C.F.R. § 600.7(c).

⁴³³ 28 C.F.R. § 600.7(d).

⁴³⁴ 28 C.F.R. § 600.7(b).

⁴³⁵ 28 C.F.R. § 600.8(b).

⁴³⁶ U.S. Dep’t of Justice, U.S. Attorneys’ Manual, §§ 1-13.100, 1-13.110, 1-13.120.

⁴³⁷ 28 C.F.R. § 600.7(b).

⁴³⁸ *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”).

⁴³⁹ 28 C.F.R. § 600.8(c).

⁴⁴⁰ 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 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.

undermine Mueller's investigation.⁴⁴¹ But it is possible that lessening of hostilities will not hold permanently.

President Trump could follow through on earlier indications that he might fire Attorney General Jeff Sessions,⁴⁴² which would give him the opportunity to appoint a new attorney general who does not have conflicts precluding his involvement in Mueller's investigation. Authority to remove or overrule Mueller would in that case revert from Deputy Attorney General Rosenstein to the new attorney general. The pressure that President Trump had reportedly been applying to Sessions could also prompt Sessions to try to intervene in Mueller's investigation despite his recusal. Since there appears to be no documentation of Sessions's recusal other than a press release stating that Sessions is recusing himself "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States"⁴⁴³ as well as an email sent to senior department officials from Sessions's chief of staff that employed identical language,⁴⁴⁴ Attorney General Sessions might argue that the scope of his recusal does not extend to certain matters involving Mueller.

Other possibilities abound. President Trump might also order Deputy Attorney General Rosenstein to remove Mueller; if Rosenstein refused, Trump could then fire Rosenstein and repeat the process through the Department's line of succession until he found someone willing to do it.⁴⁴⁵ This would amount to a repetition of the "Saturday night massacre" in which Nixon essentially forced the resignations of Attorney General Elliot L. Richardson and Deputy Attorney General William D. Ruckelshaus, both of whom refused to fire Special Prosecutor Archibald Cox; Solicitor General Robert H. Bork then became acting attorney general and carried out the order to fire Cox.⁴⁴⁶ Some also have suggested that the administration could withdraw the Department of Justice regulations governing the special counsel,⁴⁴⁷ although some additional

⁴⁴¹ See, e.g., Leonnig, Parker, Helderman, & Hamburger, *Washington Post*, Jul. 21, 2017, *supra* n. 158; Noah Bierman, Trump Friend Says President Might Fire Special Counsel Robert Mueller, *Los Angeles Times*, Jun. 12, 2017, <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-confidant-says-president-may-1497315503-htmstory.html>.

⁴⁴² See Michael C. Bender, Trump Won't Say if He Will Fire Sessions, *Wall Street Journal*, Jul. 25, 2017, available at <https://www.wsj.com/articles/trump-wont-say-if-he-will-fire-attorney-general-sessions-1501010025>.

⁴⁴³ Press Release: Attorney General Sessions Statement on Recusal, *U.S. Dep't of Justice*, Mar. 2, 2017, *supra* n. 390; see also Betsy Woodruff, An Inside Look at the Day Jeff Sessions Recused Himself from the Russia Probe, *Daily Beast*, Jul. 25, 2017, available at <http://www.thedailybeast.com/an-inside-look-at-the-day-jeff-sessions-recused-himself-from-the-russia-probe>.

⁴⁴⁴ Jody Hunt, Email re: Recusal, Mar. 2, 2017, available at <http://www.politico.com/f/?id=0000015c-ffc1-d1e3-a97d-ffd540770001>.

⁴⁴⁵ Steve Vladeck, If the Rumors Are True: President Trump and the Firing of Bob Mueller, *ACS Blog*, Jul. 21, 2017, available at <https://www.acslaw.org/acsblog/if-the-rumors-are-true-president-trump-and-the-firing-of-bob-mueller>.

⁴⁴⁶ Carroll Kilpatrick, Nixon Forces Firing of Cox: Richardson, Ruckelshaus Quit, *Washington Post*, Oct. 21, 1973, available at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

⁴⁴⁷ Vladeck, *ACS Blog*, Jul. 21, 2017, *supra* n. 445. As Vladeck explains, it is unclear what procedural steps the Department of Justice would have to take to withdraw the regulations. *Id.*; see also David

action would be required to fire Mueller since the attorney general is authorized by statute to delegate his authority⁴⁴⁸ and withdrawing the Department of Justice special counsel regulations would not undo Order No. 3915-2017. Repealing the regulation could, however, arguably allow Mueller to be terminated for reasons other than good cause.⁴⁴⁹

A final, explosive possibility is that Trump could attempt to fire Mueller himself under the theory that the president cannot be bound by Department of Justice regulations and has inherent authority to fire any executive branch subordinate, whether he has good cause to fire Mueller or not. Such action would amount to a usurpation of the authority vested in the attorney general by Congress and would be in conflict with Supreme Court precedent upholding statutes under which executive branch officers are only removable for good cause by a political appointee who is removable for any reason.⁴⁵⁰ Using this method to fire Mueller could lead to a challenge in court⁴⁵¹ and would also raise extremely serious questions about the relationship between the president and the administrative state that would reverberate well beyond the Department of Justice.⁴⁵²

Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut, 120 Yale L. J. 276 (2010).

⁴⁴⁸ 28 U.S.C. § 510 (“The 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.”).

⁴⁴⁹ Neal Katyal, Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules., *Washington Post*, May 19, 2017, available at https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/?utm_term=.2a6a378007e0.

⁴⁵⁰ *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (“Nor do we think that the ‘good cause’ removal provision at issue here impermissibly burdens the President’s power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act.”).

⁴⁵¹ There is no dispositive precedent governing the matter, but Special Counsel Mueller might very well have standing to challenge his own termination. See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (suit brought by estate of deceased former FTC commissioner seeking recovery of monies lost from his removal from office). Although DOJ’s special counsel regulations purport to foreclose any private right of action, see 28 C.F.R. § 600.10, at least one court has held that similar disclaimer language in other regulations does not shield government actors from related claims brought under different statutes. See, e.g., *Rivas v. Martin*, 781 F. Supp. 2d 775, 779 (N.D. Ind. 2011) (holding that an immigrant plaintiff could bring a claim for a violation of 42 U.S.C. § 1983 premised on a violation of 8 C.F.R. § 287.7, notwithstanding that 8 C.F.R. § 287 contains almost identical rights-limiting language to 28 C.F.R. § 600.10). Individual members of Congress might also have standing to seek a declaratory judgment that a Mueller termination is illegal. See *Nader v. Bork*, 366 F. Supp. 104, 106 (D.D.C. 1973). But see *Harrington v. Bush*, 553 F.2d 190 (1977) (holding that an individual congressman did not have standing to challenge alleged impropriety at the CIA); *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that members of Congress did not have standing to challenge the constitutionality of the Line Item Veto Act because the dilution of their Article I voting power was a “wholly abstract and widely dispersed” injury”).

⁴⁵² For a discussion of the theory of the unitary executive and a discussion of its application to the modern administrative state, see Lawrence Lessig & Cass Sunstein, The President and the Administration, 94 Columbia L. Rev. 1, 2 (1994) (arguing that the theory of the unitary executive “ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper.”). But see Steven G.

One more point bears special emphasis: firing Mueller by any means for the purpose of impeding his investigation would amount to a doubling-down on the potential pattern of obstruction of justice that we have outlined. In other words, as discussed earlier, our analysis of the legal consequences for President Trump's decision to fire Comey would apply with equal force to Mueller. For that reason, if President Trump fired Mueller in an attempt to weaken the case against him, he would more likely strengthen it.

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 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 reelection committee attorney) in which President Nixon was named as an unindicted coconspirator.⁴⁵³ 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 Committee.⁴⁵⁴ 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.”⁴⁵⁵ Jaworski also explained that the grand jury “was

Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 550 (1994) (“Our thesis is that either the text or the relevant ‘legislative’ history, considered separately, demonstrates that the founding generation fully embraced and wrote into the Constitution the ‘myth’ of a chief administrator constitutionally empowered to administer all federal laws.”).

⁴⁵³ Frank Van Riper & 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 (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. 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>.

⁴⁵⁴ *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).

⁴⁵⁵ Reply Brief of the U.S. at *109-110, *U.S. v. Nixon*, 418 U.S. 683 (1974) (“Reply Brief, *U.S. v. Nixon*”).

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.”⁴⁵⁶

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.⁴⁵⁷ 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.⁴⁵⁸ 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.⁴⁵⁹

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

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.

⁴⁵⁶ *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.

⁴⁵⁷ *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.

⁴⁵⁸ *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.”).

⁴⁵⁹ *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.”).

he concludes is “inappropriate or unwarranted under established Departmental practices.”⁴⁶⁰ Rosenstein would need to notify Congress of a decision to overrule Mueller, but only after Mueller had concluded his investigation.⁴⁶¹ 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.”⁴⁶² 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.⁴⁶³

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.⁴⁶⁴ Attorney General Janet Reno’s order appointing Danforth required him to submit these reports in a form that would “permit public dissemination”,⁴⁶⁵ however, no comparable provision appears in Order No. 3915-2017 appointing Mueller.

⁴⁶⁰ 28 C.F.R. § 600.7(b).

⁴⁶¹ 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.”).

⁴⁶² 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.

⁴⁶³ U.S. Dep’t of Justice, U.S. Attorneys’ Manual, § 1-8.030.

⁴⁶⁴ Office of Special Counsel John Danforth, News Release, Nov. 8, 2000, *available at* <https://upload.wikimedia.org/wikipedia/commons/6/6f/Danforthreport-pressrelease.pdf>.

⁴⁶⁵ 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.

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.⁴⁶⁶ Mueller could use that report as an opportunity to lay out any findings that might support a case against President Trump for 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's recusal) would then have the responsibility of deciding whether to submit the report to Congress.⁴⁶⁷ 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."⁴⁶⁸ 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.⁴⁶⁹ 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.'"⁴⁷⁰

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 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.⁴⁷¹

⁴⁶⁶ 28 C.F.R. § 600.8(c).

⁴⁶⁷ 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.").

⁴⁶⁸ 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>.

⁴⁶⁹ 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>.

⁴⁷⁰ 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>.

⁴⁷¹ 28 C.F.R. § 600.9(a)(3).

C. Indictment and prosecution

Although some commentators have argued that a president cannot be indicted in office,⁴⁷² 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.⁴⁷³ Although the Department of 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.⁴⁷⁴

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.⁴⁷⁵ 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.”⁴⁷⁶ 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.*”⁴⁷⁷ These sections of the Constitution make clear that any officer who has been removed from

⁴⁷² See, e.g., Akhil Reed Amar, On Prosecuting Presidents, 27 Hofstra L. Rev. 677 (1999); Akhil Reed Amar & Brian C. Kalt, The Presidential Privilege Against Prosecution, 2 Nexus 11 (1997).

⁴⁷³ 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 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.”).

⁴⁷⁴ 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.

⁴⁷⁵ 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.

⁴⁷⁶ U.S. Const. art. II, § 4 (emphasis added).

⁴⁷⁷ U.S. Const. art. I, § 3, cl. 7 (emphasis added).

office as a result of impeachment—including the president—may also face criminal charges.⁴⁷⁸ 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.⁴⁷⁹ Both memoranda acknowledge that there is no explicit support in the Constitution for the conclusion that a sitting president cannot be indicted.⁴⁸⁰ Instead, the OLC memoranda rely heavily on “functionalist”⁴⁸¹ 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.⁴⁸²

The Department of Justice’s guidance that the president cannot be prosecuted is not dispositive as a matter of law.

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.⁴⁸³

⁴⁷⁸ 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.

⁴⁷⁹ 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, (henceforth “2000 OLC Memo”); OLC, [Memorandum Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution while in Office](https://fas.org/irp/agency/doj/olc/092473.pdf), Sept. 24, 1973, available at <https://fas.org/irp/agency/doj/olc/092473.pdf>, (henceforth “1973 OLC Memo”).

⁴⁸⁰ 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, *supra* n. 479 at *7.

⁴⁸¹ 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.”).

⁴⁸² 1973 OLC Memo, *supra* n. 479, at *24-32; see also 2000 OLC Memo, *supra* n. 479, at *226-232 (recounting the 1973 OLC Memo).

⁴⁸³ *Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010).

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”⁴⁸⁴ 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.⁴⁸⁵ On the one hand, the OLC guidance is generally considered to be binding on the executive branch.⁴⁸⁶ And Department of Justice regulations require that Special Counsel Mueller follow the “rules, regulations, practices, and policies of the Department of Justice,”⁴⁸⁷ 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.⁴⁸⁸ 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 States⁴⁸⁹; however, the latter source of the OLC authority does not reach agency officials who are authorized to conduct litigation without first

⁴⁸⁴ 655 F. Supp. 318, 322 (D.D.C. 1987).

⁴⁸⁵ Compare Andrew Crespo, [Is Mueller Bound by OLC’s Memos on Presidential Immunity?](https://www.lawfareblog.com/mueller-bound-olcs-memos-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?](https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html? r=1), *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>.

⁴⁸⁶ 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 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’y’s 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.”).

⁴⁸⁷ 28 C.F.R. § 600.7(a).

⁴⁸⁸ See Andrew Crespo, *Lawfare*, Jul. 25, 2017, *supra* n. 485.

⁴⁸⁹ 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>.

obtaining the attorney general's approval of the positions that they take.⁴⁹⁰ 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.⁴⁹¹ 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"⁴⁹² Walsh also actively investigated George H.W. Bush, who was Vice President during Iran/Contra, during Reagan's presidency and into Bush's presidency.⁴⁹³ Finally, in 1998, Independent Counsel Kenneth Starr obtained an opinion from 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.⁴⁹⁴ Although Jaworski and Starr held different positions with different authority,⁴⁹⁵ 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

⁴⁹⁰ Andrew Crespo, *Lawfare*, Jul. 25, 2017, *supra* n. 485; 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>.

⁴⁹¹ Reply Brief, *U.S. v. Nixon* at *5-6.

⁴⁹² 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.

⁴⁹³ *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 personal diary in December 1992), and because Bush pardoned six Iran/Contra defendants who might have been turned against him. *Id.* at 473-74.

⁴⁹⁴ Ronald Rotunda, Memorandum to Judge Starr Re: the Indictability of the President, May 13, 1998, available at <https://assets.documentcloud.org/documents/3899216/Savage-NY-T-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. Code § 594(f)(1) (authorization expired in 1999).

⁴⁹⁵ 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.

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”⁴⁹⁶ 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.⁴⁹⁷ 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 justify impeachment⁴⁹⁸ as well as impeachable offenses for conduct that could not be the subject of successful prosecution.⁴⁹⁹

⁴⁹⁶ 28 C.F.R. § 600.7(a).

⁴⁹⁷ 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.

⁴⁹⁸ 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.”).

⁴⁹⁹ 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.”).

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.⁵⁰⁰ 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.⁵⁰¹ 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.⁵⁰² 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).

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,⁵⁰³ 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

⁵⁰⁰ 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*.

⁵⁰¹ 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>.

⁵⁰² 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/?utm_term=.5e1b5d53f8cd. 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).

⁵⁰³ See 2000 OLC Memo, *supra* n. 479, at *246-47; 1973 OLC Memo, *supra* n. 479 at *27-29.

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.⁵⁰⁴ 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.⁵⁰⁵

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."⁵⁰⁶ 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."⁵⁰⁷ 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."⁵⁰⁸ "Marshall's statement," the Court explained, "*cannot be read to mean in 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."⁵⁰⁹ The Supreme Court instructed the district court to adhere to Marshall's standard by

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.

⁵⁰⁴ 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*.

⁵⁰⁵ *U.S. v. Nixon*, 418 U.S. 683 (1974).

⁵⁰⁶ *Id.* at 711-12.

⁵⁰⁷ *Id.* at 706.

⁵⁰⁸ *Id.* at 715 (quoting *U.S. v. Burr*, 25 F. Cas. pp. 192 (No. 14,692d) (CC Va.1807)).

⁵⁰⁹ *Id.* (emphasis added).

“accord[ing] to Presidential records that high degree of deference suggested in *United States v. Burr*” and to ensure that no *in camera* material was revealed to anyone.⁵¹⁰

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.⁵¹¹ 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.”⁵¹² 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.”⁵¹³ 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.⁵¹⁴

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.⁵¹⁵ Moreover, the “disruption” to the presidency caused by an indictment cannot be judged in the abstract; instead it must be

⁵¹⁰ *Id.*

⁵¹¹ 520 U.S. 681, 703 (1997).

⁵¹² *Id.*

⁵¹³ *Id.* at 707

⁵¹⁴ In *Clinton*, 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).

⁵¹⁵ 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.⁵¹⁶

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.”⁵¹⁷ 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.

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5. *To the extent that indictment does in fact incapacitate the president, the Constitution contemplates a variety of solutions, including the 25th 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.⁵¹⁸ 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

⁵¹⁶ See Carl B. Feldbaum, George T. Frampton, Gerald Goldman & 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>.

⁵¹⁷ The Federalist No. 51 (James Madison), available at http://avalon.law.yale.edu/18th_century/fed51.asp.

⁵¹⁸ 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. Sec. 1, cl. 7 (emphasis added).

in most cases will have been chosen by the same nation-wide electorate of the president, would assume the Office of the Presidency.⁵¹⁹

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.⁵²⁰ 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).

The president could also resign.⁵²¹ 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.⁵²²

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.*”⁵²³ President Nixon conceded this point in a brief to the Supreme Court.⁵²⁴

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,

⁵¹⁹ U.S. Const. amend. XXV, Sec. 1.

⁵²⁰ U.S. Const. amend. XXV, Sec. 3.

⁵²¹ See, e.g., President Richard Nixon, *Resignation Speech*, Aug. 8, 1974, available at 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>.

⁵²² There is also the possibility that indictment of a President would lead to impeachment proceedings because Congress believes the criminal case to be strong.

⁵²³ U.S. Const. Art. I, Sec. 3, cl. 7 (emphasis added).

⁵²⁴ 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.”).

Jaworski took the concurrent step of getting the grand jury to refer the case against President Nixon to the House).⁵²⁵ 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.⁵²⁶ 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 criminal matter would undermine efforts to prosecute them.⁵²⁷ 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.⁵²⁸ President Trump also has asserted the power to pardon himself, which if upheld, would obviously bring an end to a case against him;⁵²⁹ 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

⁵²⁵ Reply Brief at 11-34, *U.S. v. Nixon*, 418 U.S. 683 (1974)

⁵²⁶ See 1973 OLC Memo, *supra* n. 479 at *29.

⁵²⁷ 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>.

⁵²⁸ 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).

⁵²⁹ We think it unlikely that the President's pardon power extends to himself. See Laurence H. Tribe, Richard Painter & 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?utm_term=.f56eb2c5d033; 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.").

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.⁵³⁰

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.⁵³¹

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 declined because . . . [t]he person is subject to effective prosecution in another jurisdiction; or . . . [t]here exists an adequate non-criminal alternative to prosecution."⁵³² 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.⁵³³

⁵³⁰ 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>.

⁵³¹ 28 C.F.R. § 600.8(c).

⁵³² 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).

⁵³³ 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's 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.

A. Investigation

At the time of publication, several committees had already begun to investigate or conduct oversight on matters relating to possible Russian intervention in the 2016 election, including the Senate Select Committee on Intelligence (Chairman Burr and Vice Chair Warner),⁵³⁴ the Senate Committee on the Judiciary (Chairman Grassley and Ranking Member Feinstein),⁵³⁵ the House Committee on Oversight and Government Reform (Chairman Gowdy and Ranking Member Cummings),⁵³⁶ and the House Permanent Select Committee on Intelligence (Chairman Nunes and Ranking Member Schiff).⁵³⁷ Each of these committees could continue or ramp up its own efforts to explore matters relevant to its respective jurisdiction.⁵³⁸

Other investigative entities could also 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

⁵³⁴ See, e.g., Senate Select Intelligence Committee, Open Hearing: Open Testimony of Attorney General of the United States, Jeff Sessions, Jun. 13, 2017, available at <https://www.intelligence.senate.gov/hearings/open-hearing-open-testimony-attorney-general-united-states-jeff-sessions>.

⁵³⁵ See, e.g., Senate Judiciary Committee, Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations, Jul. 26, 2017, available at <https://www.judiciary.senate.gov/meetings/oversight-of-the-foreign-agents-registration-act-and-attempts-to-influence-us-elections-lessons-learned-from-current-and-prior-administrations>.

⁵³⁶ See, e.g., House Oversight and Government Reform Committee, Oversight Committee Requests All Documents on Flynn's Foreign Contacts and Payments, Mar. 22, 2017, available at <https://democrats-oversight.house.gov/news/press-releases/oversight-committee-requests-all-documents-on-flynn-s-foreign-contacts-and>. Rep. Gowdy succeeded Rep. Jason Chaffetz (R-UT), who resigned from office on June 30, 2017. Thomas Burr, Jason Chaffetz Is Done, and Utah Is Now without One Representative, Salt Lake Tribune, Jun. 30, 2017, available at <http://archive.sltrib.com/article.php?id=5461228&itype=CMSID>.

⁵³⁷ See, e.g., House Permanent Select Committee on Intelligence, Intelligence Committee Chairman, Ranking Member Establish Parameters for Russia Investigation, Mar. 1, 2017, available at <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=767>.

⁵³⁸ Although the House Committee on the Judiciary (Chairman Goodlatte and Ranking Member Conyers) also has jurisdiction over these issues, it has yet to take any concrete investigative action.

campaign.⁵³⁹ 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's legislative function, which could include public reports, referrals to the Department of Justice or other executive branch agencies, and legislation, as well as impeachment.⁵⁴⁰

B. Impeachment

Impeachment is fundamentally both a political calculation and a legal one.⁵⁴¹ For that reason, the legal standards that we have discussed above that that would govern a criminal 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 necessarily be decisive.⁵⁴² 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

⁵³⁹ See, e.g., S. Res. 60 (93rd Cong., Feb. 7, 1973), available at https://www.senate.gov/artandhistory/history/common/investigations/pdf/Watergate_ResolutionDebate1973.pdf.

⁵⁴⁰ 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, June 7, 2017, available at http://www.pogoarchives.org/m/co/2017_pogo_necessary_and_proper_report.pdf.

⁵⁴¹ 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 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.").

⁵⁴² 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.").

denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.⁵⁴³

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.⁵⁴⁴

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.⁵⁴⁵ Then the House, by a simple majority, may vote to impeach on any article of impeachment it debates.⁵⁴⁶ The Senate tries any articles of impeachment adopted by the House, and conviction requires a two-thirds majority.⁵⁴⁷

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

⁵⁴³ The Federalist No. 65 (Alexander Hamilton), *available at* http://avalon.law.yale.edu/18th_century/fed65.asp.

⁵⁴⁴ 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.”).

⁵⁴⁵ 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 (111th 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.

⁵⁴⁶ 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.”).

⁵⁴⁷ U.S. CONST. art. I, §3, cl. 6, 7; see also Jared P. Cole & Todd Garvey, Impeachment and Removal, *Congressional Research Service* at 18, Oct. 29, 2015, *available at* <https://fas.org/sqp/crs/misc/R44260.pdf>.

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.⁵⁴⁸

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 Committee⁵⁴⁹ 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 care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice,⁵⁵⁰

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 Democratic National Committee headquarters in the Watergate hotel; “to cover up, conceal and protect those responsible”; and to “conceal the existence and scope of other unlawful activities.”⁵⁵¹ 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

⁵⁴⁸ 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.”).

⁵⁴⁹ 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>.

⁵⁵⁰ Articles of Impeachment against President Nixon, App. D.2.

⁵⁵¹ *Id.*

and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.”⁵⁵²

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.”⁵⁵³ 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.”⁵⁵⁴

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”⁵⁵⁵ Article II then listed several “means” by which that course of conduct or scheme was implemented, including encouraging witnesses to give 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. § 1503.⁵⁵⁶

⁵⁵² *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ 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 (105th Congress, Dec. 16, 1998), available at <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>

⁵⁵⁶ Impeachment of William Jefferson Clinton, President of the United States, H. Rept. 105-830 at *64 (105th 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.

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.⁵⁵⁷

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 Committee⁵⁵⁸ and Article IV of the Articles of Impeachment Against President Clinton as passed by the House Judiciary Committee⁵⁵⁹ (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.⁵⁶⁰ 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).⁵⁶¹

⁵⁵⁷ H. Res. 520 (111th Congress, Jun. 24, 2009), *available at* <https://www.congress.gov/111/bills/hres520/BILLS-111hres520rds.pdf>.

⁵⁵⁸ Articles of Impeachment against President Nixon, App. D.2.

⁵⁵⁹ Impeaching William Jefferson Clinton, President of the United States, for High Crimes and Misdemeanors, H. Rep. No. 105-830 at *4-5 (105th Congress, Dec. 16, 1998), *available at* <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>.

⁵⁶⁰ Articles of Impeachment against Judge Harry E. Claiborne, App. D.4.

⁵⁶¹ 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, has lacked a detailed exploration of Trump's possible obstruction of justice. 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. 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 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.