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Presidential Impunity and the Mueller Report: How the Department of Justice's Failure to Subject the Special Counsel Regulations to Notice and Comment Undermined the Rule of Law

by M. AKRAM FAIZER[1]

Abstract:

Department of Justice ("DOJ") Special Counsel, Robert S. Mueller, III's two-volume, 448-page *Report on the Investigation into Russian Interference in the 2016 Presidential Election* ("the *Report*"), did an outstanding job in evidencing that President Trump's actions in office satisfied the federal obstruction of justice standards. However, due to Mueller's limited brief and his concern for maintaining the proper separation of powers, the *Report*, submitted confidentially to former Attorney General Barr as required by Department of Justice Regulations, abjured a determination as to Presidential criminality. This regulatory confidentiality requirement in conjunction with the requirement that Barr disclose an unverifiable *Report* summary to Congress, entitled the former Attorney General to mischaracterize the then-confidential report as an effective exoneration of the President, when the full *Report* actually reads like a depressing Mafia boss indictment. By the time Barr released the *Report* almost a full month later, the damage was done. The former President and his supporters by then had succeeded in manipulating the political culture to accept Barr's dishonest mischaracterization of the *Report* and stymie its use to commence either an impeachment proceeding or force the President to put a stop to Russian election interference.

Barr's success in marginalizing the *Report* tragically facilitated Presidential impunity by encouraging the President's worst instincts as manifested by his abuse of power in the Ukraine matter and his Administration's dishonest, bungling and divisive response to both the COVID-19 pandemic

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and the civil rights protests that followed George Floyd's killing. Indeed, although the President was subsequently impeached and tried by the full U.S. Senate twice for abuse of power and obstruction of Congress with respect to U.S. relations with the Government of Ukraine and for inciting an insurrection by his supporters to prevent Congress from certifying the 2020 Presidential election results in favor of his opponent, current President Joseph Biden, the ostensible "Russia Hoax" and "witch hunt" against the President was cited by the President and his supporters to delegitimize the impeachment proceedings and facilitate the President's partisan acquittals by the Senate.

Although presidential impunity has been facilitated by political polarization and partisan media, it is also, in this instance, attributable to infirmities in the Department of Justice Special Counsel regulations ("Special Counsel Regulations") that would have been ferreted out had they been timely submitted for notice and comment feedback when first implemented by former Attorney General Reno in 1999. This is because the Special Counsel Regulations, as written, never contemplated an unprincipled and partisan-inclined Attorney General who would undermine the *Report* to further Presidential impunity.

I recommend submitting the Special Counsel Regulations for notice and comment review under The Administrative Procedure Act Section 553 to solicit feedback from civil society as to how they can be improved consistent with the President's powers under Article II of the U.S. Constitution. At a minimum, I would expect that the received public comment will recommend future Attorneys General be disallowed from disclosing synopses or summaries of Special Counsel reports without simultaneously disclosing the entire redacted document. If this requirement had been in place at the time when the *Report* was first submitted to Barr, the political culture would have reacted far more forcefully against presidential abuse of power and obstruction of justice. Most likely, former President Trump would either have been removed from office or chastened by a near conviction in the Senate after impeachment in the House. Certainly, the country would not be facing the current struggle of maintaining national cohesion after an unprecedented second impeachment of a president, after former President Trump, egregiously and systematically abused his power to undermine public confidence in the 2020 presidential election, and, after losing the election to President Biden, both refused to concede the election, and incited a mob of his supporters to invade the U.S. Capitol on January 6, 2021, which temporarily prevented Congress from certifying the results of the 2020 presidential election.

Introduction

In June 2020, the highly regarded New York Times columnist and public intellectual David Brooks wrote that America was facing five simultaneous crises: 1) the losing fight against the Covid-19 pandemic; 2) the rapid opinion shift surrounding race relations and racial inequality; 3) major political realignment brought about by the public's apparent rejection of President Trump's Republican Party; 4) the quasi-religion of Social Justice, which is seeking to control the nation's cultural institutions; and 5) an economic depression.[2] Although all five of these epic crises are attributable to broad social forces, including the spread of communicable disease in the era of globalization, it cannot be disputed that they were worsened by former President Trump's reflexive authoritarianism, contempt for the rule of law and overall unfitness for office. Needless to say, these factors help explain why Trump narrowly lost the 2020 presidential election to his opponent, Joe Biden, notwithstanding his parlous disregard for the country's democratic norms and the rule of law. Indeed, the problems related to the five simultaneous crises are so pronounced that it is easy to forget that in early 2020, President Trump looked like a formidable candidate for reelection after he was first acquitted by the Senate on impeachment charges for abuse of power and obstruction of Congress based on the President's improper and politically-motivated threat to withhold Congressionally appropriated military assistance from Ukraine.[3] The first Senate acquittal was nominally unrelated to the *Report*,[4] which was delivered to former United States Attorney General William Barr on March 22, 2019, and demonstrated that the Russian Federation interfered in the 2016 Presidential Election in favor of then-candidate Trump and detailed numerous instances where former President Trump sought to obstruct and hinder the Special Counsel's investigation.[5] The *Report* now seems, to paraphrase the British aphorism, like ancient history. It should not. Rather, due to Barr's mischaracterization of the *Report*'s key findings and conclusions, it failed to elicit the appropriate political response, either from Congress or the broader political culture, which emboldened former President Trump to further abuse his powers and enabled Trump

2. David Brooks, *America is Facing 5 Epic Crises All at Once,* N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/opinion/us-coronavirus-protests.html.

3. Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html.

4. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN ELECTION INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, Volumes 1 and 2 (2019), https://www.justice.gov/storage/report.pdf [hereinafter THE *REPORT*].

5. *Id.*

and his partisans to mischaracterize both the Special Counsel's investigation into the extent of Russian interference in the 2016 presidential election and the facts surrounding the two subsequent impeachment proceedings brought against him as partisan-driven "witch hunts." It also furthered the former President's reflexive authoritarianism to undermine effective preparedness and response to what Brooks describes as the five simultaneous crises. In short, the *Report*'s ultimate failure to hold the former President accountable for his criminal actions not only undermined the rule of law but furthered the Trump's sense of impunity, which, when conjoined with his reflexive authoritarianism, worsened the current crises facing American government and society.

Why did the *Report* fall as flat as it did when the evidence of presidential criminality was so strong? One answer is that the *Report*'s failure to elicit the level of indignation commensurate with the President's crimes is partly attributable to the political polarization and ratings-driven partisan media entities that reflexively defend the former President. However, presidential impunity has, in this instance, also been furthered by infirmities in the DOJ Special Counsel Regulations ("Special Counsel Regulations") that effectively enabled Barr to gutter the *Report*.[6] This is because, per the Special Counsel Regulations, the *Report* had to be submitted confidentially to Barr, who was entitled to publicly discuss the *Repor*t and submit an unverifiable *Report* synopsis to Congress and the public without any obligation to publicly disclose the full *Report*.[7] It also denied Mueller or members of his team the ability to publicly dispute the former Attorney General's public mischaracterizations of the *Report*.[8] In a March 24, 2019 letter to the leadership of the House and Senate Judiciary Committees ("March 24 Letter"), Barr's mischaracterized the *Report* as failing to find evidence of presidential criminality.[9] This enabled the Trump and his supporters, in the month-long timeframe between the *Report*'s submission to Barr and its eventual disclosure to the public, to claim that the *Report* exonerated Trump and his White House from allegations of criminal wrongdoing related to the Russia

6. 28 C.F.R. § 600.8 (1999) provides that the Special Counsel's report is to be confidentially provided to the Attorney General without any limitation as to how the Attorney General can use or characterize such report.

7. 28 C.F.R. § 600.9 (1999).

8. 28 C.F.R. § 600.8. Section C entitled Attorney General Barr to submit an unrebutted and publicly available four-page summary of the *Report* to the Chair and Ranking Members of the House and Senate Judiciary Committees, that definitively mischaracterized the *Report*'s conclusions in President Trump's favor.

9. Letter from William Barr to Lindsey Graham, Jerrold Nadler, Dianne Feinstein and Doug Collins (Mar. 24, 2019), https://www.justice.gov/ag/page/file/1153021/download [hereinafter March 24 Letter].

Investigation. This was followed by a subsequent letter, dated April 18, 2019, which anticipated the next day's release of the fully redacted *Report* by ostensibly summarizing the *Report*'s the conclusions in a manner consistent with the March 24 Letter.[10]

When Barr finally released the fully redacted *Report* on April 19, 2019, the damage was done. Because neither Mueller nor members of his team could challenge Barr's characterization of the *Report* in the interim, Barr's written mischaracterizations, in conjunction with public statements he made regarding the *Report*'s conclusions, took hold of the political culture and facilitated a supposition that former President Trump's misdeeds, although depressingly laid out in the *Report*, neither constituted abuse of power, nor merited an impeachment inquiry by the House of Representatives.

I. Informal Notice and Comment Rulemaking under Administrative Law

The Administrative Procedure Act's ("APA") most important "innovation was establishing a procedure for rulemaking," which typically does not require a hearing on the record and instead is subject to the notice and comment procedure set out in Title Five of the Unites States Federal Code Section 553.[11] This consists of:

1. General notice of a proposed rulemaking in the Federal Register, specifying the time and place of the rulemaking proceedings, the legal authority relied on for their issuance, and the content or subject matter of the proposed rule;
2. Opportunity for interested persons to submit written comments on the proposed rule, and, at the agency's option, opportunity for oral presentations;
3. Agency consideration of the comments;
4. Issuance, when the final rule is promulgated, of a concise statement of its basis and purpose;
5. Publication of the final rule in the Federal Register;

10. Letter from William Barr to Lindsey Graham, Jerrold Nadler, Dianne Feinstein and Doug Collins (Apr. 18, 2019), https://www.justice.gov/archives/ag/page/file/1167086/download [hereinafter April 18 Letter].

11. STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY, 519 (7th ed. 2011).

6. In the case of substantive rules that impose new requirements, delay of the rule's effective date for at least thirty days after publication.[12]

The purpose of the procedure is to enlighten decisionmakers by exposing them to the viewpoints of interested persons and allow those persons to have a say in the final rules.[13] It, furthermore, improves the quality of rulemaking by helping agencies anticipate what former Defense Secretary Donald Rumsfeld has called the "known unknowns" and "unknown unknowns" to improve upon the previously issued tentative rules.[14] Indeed, in recent years, notice-and-comment rulemaking has been transformed, especially as regards controversial proposals, into "a rather elaborate paper hearing procedure that generates a full documentary record and an elaborate agency option that attempts to justify the agency rule and respond to evidentiary, analytical, and policy criticisms of the rule and its supporting material."[15] *United States v. Nova Scotia Products Corp*[16] is paradigmatic. *Nova Scotia* involved the Food and Drug Administration's conduct of 553 notice-and-comment rulemaking for purposes of issuing safety regulations for the smoking of fish to safeguard against botulism poisoning.[17] The FDA sued to enjoin Nova Scotia Food Products Corp. and its officers from processing hot-smoked whitefish in violation of the regulations.[18] After the district court granted the injunction, the Second Circuit Court of Appeals reversed, concluding that the FDA's rule promulgation was based on inadequate procedures because FDA failed to disclose the scientific data and the methodology upon which it relied and because "it failed utterly to address itself to the question of commercial feasibility," i.e. it never addressed the interposed comment that applying the proposed regulations to whitefish would destroy the commercial product.[19] In particular, the Court of Appeals concluded that the failure to notify interested persons "of the scientific research upon which the agency was relying actually prevented the presentation of relevant comment, means the agency failed to consider all the relevant factors" because to "suppress meaningful comment by failure to disclose the

12. *Id. See* 5 U.S.C. §§ 552, 553 (West 2016).
13. BREYER ET AL., *supra* note 11, at 519.
14. *Id.* at 519. Former Defense Secretary Rumsfeld was famously quoted as saying "[a]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know."
15. *Id.* at 552.
16. 568 F.2d 240 (2nd Cir. 1977).
17. *Id.*
18. *Id.*
19. *Id.*

basic data relied upon is akin to rejecting comment altogether" and leads to arbitrary decision-making.[20] Similarly, in *Chamber of Commerce v. SEC*,[21] the District of Columbia Court of Appeals set aside a Securities and Exchange Commission rule because the agency never publicly disclosed, during notice-and-comment, that it had relied on extra-record studies that were the essential foundation for the SEC's basic assumptions in making its analysis.[22]

The purpose behind notice-and-comment is to aid the agency in arriving at and enlightened policy choice. *Department of Homeland Security v. Regents of the University of California,*[23] points to the importance of administrative proceduralism and the effectuation of "hard look" review to insulate the professional civil service from illegitimate political pressure. In *DHS,* the Court invalidated the Trump Administration's rescission of the Obama Administration-implemented Deferred Action for Childhood Arrivals ("DACA") program on the grounds it failed to satisfy "hard look" review, notwithstanding a change in Presidential Administration, because 1) the agency's purported reasons for the rescission consisted primarily of "post hoc" rationalizations that undermine agency accountability; 2) DHS treated the former Attorney General Sessions' illegality conclusion regarding DACA's provision of lawful presence benefits to unauthorized migrants as sufficient to rescind both benefits and forbearance of deportation, without explaining why it failed to consider only forbearance as an alternative policy; and 3) DHS arbitrarily and capriciously failed to consider legitimate reliance interests on the original DACA Memorandum by failing to weigh them against competing policy concerns.[24]

There are, however, broad exceptions to APA mandated notice-and-comment rulemaking. Under Section 553(a), military and foreign affairs functions and rules relating to "agency management or personnel or to public property, loans, grants, benefits or contracts" are exempted from the section's requirements.[25] Moreover, the requirements of notice in the Federal Register and opportunity for comment do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," or when the agency for "good cause" finds the notice and comment procedure is "impracticable, unnecessary, or contrary to the public

20. *Id*.
21. 443 F.3d 890 (D.C. Cir. 2006).
22. *Chamber of Commerce*, 443 F.3d 890.
23. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. __, 140 S. Ct. 1891 (2020).
24. *Id*.
25. BREYER ET AL., *supra* note 11, at 520.

interest."[26] Recognizing that time and resources can be saved in bypassing notice and comment, doing so precludes an agency from improving upon the tentative rules through public comment by exposing the agency to, perhaps, unanticipated counterfactuals and contingencies.[27] This is tragically what happened with the Special Counsel Regulations when former Attorney General Reno bypassed notice-and-comment and instead issued them as direct final rules in 1999.[28]

II. The DOJ Special Counsel Regulations

The Special Counsel Regulations were issued as direct final rules, exempt from the APA's typical notice and comment requirements, when they were promulgated in 1999.[29] Four reasons were given for the exemptions:

> First, 'this [r]ule relates to agency management or personnel, and is therefore exempt from the usual requirements of prior notice and comment and a 30-day delay in the effective date.' Second, 'this rule would be exempted from the requirements of notice and comment as a rule of agency organization, procedure, practice.' Third, 'the effective date of the rule need not be delayed for 30 days after publication because the rule is not a 'substantive rule.'' The fourth reason is potentially the most important . . . 'because the provisions of the Independent Counsel Reauthorization Act of 1994 expire on June 30, 1999, the Attorney General has

26. *Id*.

27. Professor Sidney Shapiro has estimated that the comment period only takes a minimum of three months and there is a typical four to eight-year timeframe to implement important rules using notice and comment. *See* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE, 137 (5th ed. 2014).

28. The DOJ issued the Special Counsel Regulations as direct final rules based on section 553 (b)(3)(A) and (b)(3)(B), which provides that notice and comment can be avoided when deemed "impracticable, unnecessary, or contrary to the public interest" by the agency. 28 C.F.R. § 600.7. *See also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402 (1971) (finding that the APA requires that prior to implementation of a final rule that has force of law, the agency must publish a notice of proposed rulemaking in the Federal Register under Section 553 (b) that gives interested parties an opportunity to submit data, views or arguments regarding the proposed rule that must be considered and given a "hard look" by the agency prior to issuing final rules that have the force of law.)

29. *See* Josh Blackman, *Can the Special Counsel Regulations Be Unilaterally Revoked?*, LAWFARE (July 5, 2018), https://www.lawfareblog.com/can-special-counsel-regulations-be-unilaterally-revoked.

> determined that it is imperative to have these rules governing the appointment and service of a Special Counsel in place as soon as possible.'"[30]

Accordingly, even if the rule were not exempt from the usual requirements of prior notice and comment and a thirty-day delay in the effective date, there would be "good cause" for issuing this rule without prior notice and comment and without a thirty-day delay in the effective date.[31]

The Special Counsel Regulations allow the Attorney General to appoint a Special Counsel "where he or she determines that criminal investigation of a person or matter is warranted, that investigation or prosecution of that person by the U.S. Attorney's Office or litigating division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances"[32] and that "it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."[33] The Special Counsel is to be cloaked with all the powers of "any United States Attorney"[34] and the Special Counsel can be disciplined or removed from office "only by personal action by the Attorney General," who may remove a Special Counsel for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[35] The Special Counsel Regulations further provide that the Special Counsel's final report is to be submitted confidentially to the Attorney General, explaining the final prosecution or declination decision,[36] and the Attorney General has sole discretion to determine whether the final report is to be publicly released.[37] The regulation then provides that the Attorney General shall issue a notification and report to the Chairman and Ranking Members of the Judiciary Committees of each house of congress, upon appointing a Special Counsel, upon removing a Special Counsel, and, most importantly for purposes of this article, upon conclusion of the Special Counsel's investigation.[38] Moreover, the regulations leave to the Attorney General the power to determine whether to release to Congress or the public all or parts of a Special Counsel's fiscal, annual or final reports.[39]

30. *See id.*
31. *See* Blackman, *supra* note 29.
32. 28 C.F.R. § 600.1.
33. *Id.*
34. 28 C.F.R. § 600.6.
35. 28 C.F.R. § 600.7 (d).
36. 28 C.F.R. § 600.8.
37. 28 C.F.R § 600.9.
38. *Id*.
39. 28 C.F.R. § 600.9 (c).

The Special Counsel Regulations have proven ineffective at protecting against Executive Branch corruption in the Trump Administration. This is for several reasons. First, they never anticipated the growth of profit-driven partisan media to protect the Administration from accountability. This is attributable to technology and broader cultural phenomena that are beyond this paper's scope. Second, the Special Counsel Regulations never anticipated a partisan Attorney General publicly mischaracterizing a Special Counsel report as has been the case with Attorney General Barr and the *Report*. A remedy is needed. My recommendation, in view of these infirmities and abuses, is to subject the Special Counsel Regulations to a new round of notice and comment feedback under Section 553, anticipating expert feedback on means of assuring executive branch accountability in a polarized political environment.[40]

This is because the APA requires agencies to incorporate feedback received as to the tentative rules from the public, regulated entities, legal experts and civil society, to assist it in arriving at better regulations to effectuate the goals behind the rulemaking. In other words, it helps the agency arrive at better rules by enabling it to incorporate concerns that were not addressed in the tentative rulemaking.[41] Indeed, bypassing notice and comment as the DOJ did when promulgating the Special Counsel Regulations, may seem logical from an expediency perspective, but is not the best way to evolve public law and policy.[42] Ideally, the comments received would educate the DOJ as to means of improving Special Counsel Regulations in view of recent history consistent with separation of powers concerns. They would most likely recommend amended rules that, at the very least, preclude the Attorney General from issuing any report summary to Congress without contemporaneously releasing a full report to both Congress and the public.[43]

40. 5 U.S.C. § 553.

41. *See* Chocolate Mfrs. Ass'n of the U.S. v. Block, 755 F.2d 1098 (4th Cir. 1985) (where the court remanded to the agency to resubmit tentative rules when the initial tentative rules had adequately advised the flavored milk industry that its interests could be affected by tentative rules designed to improve nutrition in the Special Supplemental Food Program for Women, Infants and Children; *see also* Mack Trucks, Inc. v. Envtl. Prot. Agency, 682 F.3d 87 (D.C. Cir. 2012) (concluding that interim final rules promulgated by the Environmental Protection Agency ("EPA") had to be vacated for failure to subject the rulemaking to notice and comment because EPA could not show that use of notice and comment was contrary to the public interest); *but see* U.S. v. Dean, 604 F.3d 1275 (11th Cir. 2010) (concluding that the Attorney General's invocation of a good cause exception to the usual notice and comment requirement for implementation of retroactive rules applicable to all sex offenders convicted prior to the Sex Offender Registration and Notification Act, was merited to withstand judicial review).

42. U.S. v. Johnson, 632 F.3d 912, 929–31 (5th Cir. 2011).

43. After making appropriate redactions to protect existing court proceedings and future prosecutions.

Although this change would not be a panacea in that ideologically driven media will still seek to distort any report conclusions, it will, at least, protect a Special Counsel Report's integrity from a dispositive mischaracterization by a partisan Attorney General keen on protecting the president at whose pleasure he serves. Although it might seem counterintuitive for an Administration to, in effect, weaken its executive power over criminal investigations by enacting such a regulatory amendment via notice and comment, it would, over time, enhance the power and prestige of the presidency by encouraging trust in government in a country where cynicism and misanthropy undermines national cohesion.[44] After all, former President Trump, while apparently immune from accountability for presidential abuse of power, remained a very weak president during his term of office, notwithstanding full employment prior to the COVID-19 pandemic and, a relatively robust domestic economy during his presidential term of office.[45] If my proposal were to have been implemented in the almost eighteen years between the Special Counsel Regulations' initial implementation and the appointment of Special Counsel Mueller, the end result might have been a more effective response to both Russian election interference and presidential abuse of power and obstruction of justice. It might also have fortuitously strengthened the hand of republican senators such as Mitt Romney who, as a matter of principal, object to presidential abuse of power.[46] At the very least, a properly chastened President Trump might never have dared abuse his power to coerce Ukraine's President into investigating a political rival for partisan advantage, nor feel emboldened to undermine public confidence in both the 2020 election and the 2020 presidential election result. I now turn to the subject of how the U.S. Constitution protects against Presidential impunity.

III. Holding a President to Account: The President's Powers under Article II and the Congress's Sole Remedy of Impeachment and Conviction

The U.S. Constitution provides that "the executive Power shall be vested in a President of the United States"[47] who "shall take Care that the Laws be faithfully executed…"[48] Because presidents are in charge of the

44. *See* Janan Ganesh, *Public Cynicism is Destroying American Politics,* FINANCIAL TIMES (Oct. 23, 2019), https://www.ft.com/content/cf8d0622-f56c-11e9-b018-3ef8794b17c6.

45. James Carville, *Hey Democrats, It's the Winning, Stupid!*, FINANCIAL TIMES (Feb. 7, 2020), https://www.ft.com/content/aa0677e0-48fe-11ea-aee2-9ddbdc86190d.

46. *See* Anne Applebaum, *History Will Judge the Complicit*, THE ATLANTIC, (July/Aug. 2020), https://www.theatlantic.com/magazine/archive/2020/07/trumps-collaborators/612250/.

47. U.S. Const. art. II, § 1.

48. U.S. Const. art. II, § 3. *See also* Morrison v. Olson, 487 U.S. 654 (1988) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Executive Branch, which, in turn, is responsible for prosecuting all federal crimes, the problem of presidential or Executive Branch corruption becomes manifest. Thankfully, the U.S. has been spared an excess of presidential or Executive Branch corruption such that the matter of investigating presidential corruption has not been paradigmatic.[49]

One obvious remedy for presidential corruption, when it has arisen, is impeachment by the House of Representatives followed by conviction by the U.S. Senate after a trial presided over by the Chief Justice of the U.S. Supreme Court.[50] There has been a paucity of Presidential impeachments with only three Presidents, including President Trump, being impeached by the full House of Representatives and none being convicted after a full trial before the U.S. Senate.[51] This small number of successful impeachments is possibly explained by an enlightened awareness by legislators, over time, that impeaching a sitting president can problematically undermine national cohesion.[52] It is also possible that our Framers, in requiring a two-thirds supermajority to convict in the U.S. Senate, inadvertently set the threshold for presidential conviction and removal too high, especially in a polarized political environment.[53]

Impeachment has been mischaracterized as requiring presidential criminality in office when the Framers saw it as a remedy to the broader problem of presidential unfitness.[54] Moreover, President Trump and previous presidents threatened with impeachment improperly claimed it will reverse an election outcome when, as a result of the Twelfth Amendment, the duly elected Vice-President, in the case of President Trump, Mike Pence, would have assumed office should the President have been convicted by the Senate.[55]

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49. I say this recognizing that there are undoubtedly many examples of corruption that have not been disclosed and have therefore been kept secret. My point is merely that the United States has had lower levels of Executive Branch corruption than other major countries.

50. U.S. Const. art. I, § 2, cl. 5, art. I, § 3 cl. 6 and 7 and art. II, § 4.

51. Both Presidents Andrew Johnson and Bill Clinton were impeached and acquitted by the U.S. Senate and President Nixon resigned from office before the full House of Representatives could vote on the House Judiciary Committee's Articles of Impeachment.

52. *See* Ronald Dworkin, A Kind of Coup, New York Review of Books (July 14, 1999); *see also* Cass. R. Sunstein, *Impeaching the President,* 147 Penn. L. Rev. 279 (1998).

53. *See* GENE HEALY, INDISPENSABLE REMEDY, THE BROAD SCOPE OF THE CONSTITUTION'S IMPEACHMENT POWER (Cato Institute 2018), https://www.cato.org/white-paper/indispensable-remedy-broad-scope-constitutions-impeachment-power (arguing that the Framers settled on the two-thirds conviction requirement at the very end of discussions on the matter and most likely did not anticipate that it was setting too high a threshold for Presidential removal).

54. *Id.*

55. *Id.* The Twelfth Amendment, which was enacted and ratified to remedy problems that arose after the 1800 Presidential Election, provides that the Electors are to vote for President and Vice-President separately such that the successor to a president who is assassinated, dies in office,

Because a president is in charge of the Executive Department with sole responsibility to take care that the laws be "faithfully executed," such that his nominated Attorney General is responsible for the Justice Department's prosecution and declination decisions, investigation of presidential criminality becomes problematic.[56] This unitary approach to executive branch power explains the textual legality of the "Saturday Night Massacre," when President Nixon, seeking to avoid disclosure of the Watergate tapes to the then Watergate Special Prosecutor, Archibald Cox, accepted the resignation of his Attorney General, Elliott Richardson, when Richardson refused to fire Cox, and then fired Richardson's deputy, William Ruckleshaus, after Ruckleshaus also refused to fire Cox.[57] What is often forgotten about this episode is that when Nixon nominated Richardson to be his Attorney General in the midst of the Watergate imbroglio, Richardson promised Democrats on the Senate Judiciary to select and protect a special prosecutor as a condition of confirmation.[58] According to Blackmun, Richardson did not resign because he thought discharging Cox would be illegal, notwithstanding the regulations that limited grounds for his removal to "extraordinary improprieties."[59] Rather, as evidenced by a letter Richardson contemporaneously wrote to President Nixon, he felt obliged to resign rather than fire Cox based on the personal commitment he made to the Senate Judiciary Committee to not interfere with the Special Prosecutor's Counsel's independence.[60] This same commitment to the Senate Judiciary Committee explains why Ruckleshaus also refused to fire Cox.[61]

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resigns from office or is, perhaps in the future, convicted in the Senate, will take office consistent with the prior general election's result.

56. HEALY, *supra* note 53. Because the Attorney General is a cabinet member removable at the President's will, Justice Department Special Prosecutors cannot be provided constitutional protection when investigating alleged Executive Branch malfeasance. *Id.*

57. Cox, who was appointed by Richardson in conjunction with 38 C.F.R. 14688-01, which established the Watergate Prosecution Force, provided that "[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." Cox was eventually fired by then Solicitor General Robert Bork after both Richardson and Ruckleshaus resigned their office as Attorney General and Deputy Attorney General, respectively.

58. Josh Blackmun, *Could Trump Remove Special Counsel Mueller? Lessons from Watergate*, LAWFARE (May 23, 2017), https://www.lawfareblog.com/could-trump-remove-special-counsel-robert-mueller-lessons-watergate.

59. *Id.*

60. *Id.*

61. *Id.* According to a Washington Post article cited by Blackman, Ruckleshaus's resignation was refused, and he was fired by President Nixon for his failure to fire Cox. *See* Carroll Kipatrick, *Nixon Forces Firing of Cox; Richardso Ruckleshaus Quit*, WASH. POST (Oct. 21, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.html. The Post article posits that Nixon allowed Richardson to resign because he accepted Richardson's promise to the Senate as a valid reason for resignation but did not feel the same way about Ruckleshaus.

Solicitor General Bork eventually carried out President Nixon's order to fire Cox based on his understanding that the regulations in place cannot prevent a president from removing a lower-level executive officer, especially one who sought to publicly defy the President's directive.[62] Bork testified during his confirmation hearings as President Reagan's nominee to be an associate Supreme Court Justice, that Richardson actually told him to fire Cox because Bork was in a different moral position, never having given Cox a Special Prosecutor's charter and never having promised the Senate that he would ensure the Special Prosecutor's independence.[63] Although, in *Nader v. Bork*, Judge Gesell concluded that Cox's firing was illegal because it contravened the Justice Department regulation that corresponded with his appointment, this decision was subsequently vacated by the D.C. Circuit Court on October 22, 1975, well after the Watergate tapes were released, President Nixon resigned the Presidency, and his successor, President Ford, issued him a prospective pardon for all acts he committed as President.[64]

The legality of a presidential order to fire a lower-level Executive Branch official notwithstanding regulations stating otherwise has not been resolved. The orthodox view is that such a directive would be within a president's authority, e.g. Bork felt obliged to fire Cox at Nixon's behest because control of the Justice Department is an inherent executive power under Article II. Justice Scalia's dissent in *Morrison v. Olson*,[65] wherein he characterizes both the appointment and removal provisions of the Independent Counsel under the Ethics in Government Act of 1978 as an unconstitutional usurpation of the president's powers under Article II, has succeeded in relegating Chief Justice Rehnquist's majority opinion in *Morrison* to the ranks of the Court's jurisprudential anti-canon. In short, congressional and regulatory measures designed to protect an Independent or Special Counsel from removal by their superiors are, most likely, violative of Article II's Take Care Clause.[66]

As such, DOJ investigations into Executive Branch lawlessness can be scuppered without contemporaneous criminal consequence by a president willing to pay the political price as President Nixon did when he ordered Cox's firing, and as President Trump was prepared to do when he, on several occasions, sought to have Special Counsel Mueller removed or his authority curtailed. Compounding the problem of impunity, an authoritative 1973

62. Blackmun, *supra* note 58.

63. *Id.*

64. *Id.* The Watergate "smoking gun" tape was released on August 5, 1974, Nixon resigned from office on August 9, 1974 and President Ford pardoned Nixon on September 8, 1974.

65. Morrison v. Olson, 487 U.S. 654 (1988).

66. *Id*.

Office of Legal Counsel ("OLC") opinion, adopted by Special Counsel Mueller, concludes that a sitting President cannot be criminally prosecuted while in office.[67] This is because such a prosecution would violate the constitutional structure—in other words, a president, who is responsible for public prosecutions, cannot be a criminal defendant consistent with his Article II obligations.[68] This hornbook understanding of U.S. Constitutional jurisprudence means that the exclusive remedy against a lawless chief executive is either impeachment and removal from office based on a Senate trial conviction or a delayed prosecution that would commence once the president's term of office expires.[69] Furthermore, because the constitution affords a sitting president the ability to use Article II's pardon power to pardon subordinates from future federal criminal liability, the sole remedy against a lawless president is congressional impeachment and conviction.[70] This, in turn, is problematic because congressional subpoenas are increasingly disregarded by the White House on executive privilege grounds,[71] and the sole means of effectively investigating executive branch corruption is via the appointment of a special counsel who can constitutionally be removed from office by the Attorney General.

IV. The Lack of Constitutional Remedies to Presidential Lawlessness and the Special Counsel Regulations

The Watergate-era evidenced the need to remedy Presidential lawlessness, especially when the House Judiciary and Senate Watergate Committees' hearings into the matter were effectively marginalized as improperly partisan until the very end.[72] No impeached president has been convicted by the Senate and, in the case of President Trump, the Senate went so far as to reject the calling of any witnesses prior to acquittal.[73] As we have seen, the

67. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C 222 (2000).

68. *Id.*

69. *See* THE REPORT, *supra* note 4 (which concluded that a sitting president cannot be prosecuted in office, although criminal prosecution can be commenced either upon completion of the president's term in office or subsequent to removal by conviction in the Senate). This is why President Ford pardoned former President Nixon after Nixon resigned the Presidency in August 1974. *See also* THE FEDERALIST NOS. 65, 69, 77 (Alexander Hamilton).

70. *See* U.S. CONST. art. II, § 2(2).

71. *See, e.g.*, the White House's refusal to comply with Congressional subpoenas during the first Trump impeachment involving the Ukraine matter.

72. It was only because the White House tapes evidenced lawlessness at the highest levels that support for the President within his own party collapsed and Nixon was forced to resign to preempt conviction and removal by the Senate. Nixon, moreover, remains the only president forced from office based on an impeachment investigation.

73. Baker, *supra* note 3.

appointment of a Special Prosecutor is no panacea. Nor are legislative innovations to immunize prosecutors from executive branch oversight.

For example, a Democratic Congress enacted, and President Carter signed into law the now expire Ethics in Government Act of 1978 ("Act") to prevent a repeat of the "Saturday Night Massacre" and institutionalize a means of protecting against Presidential abuse of power.[74] Under Title Five of the Act, the "independent counsel" could investigate and, if appropriate, prosecute high-ranking Government officials for violation of federal criminal laws.[75] It required the Attorney General, upon receipt of information deemed sufficient to constitute grounds to investigate whether any person covered by the Act may have violated a federal criminal law, to conduct a preliminary investigation of the matter.[76] After the Attorney General either completed this investigation, or ninety days elapsed, the Attorney General was required to report to a special court (the Special Division), a three judge panel of the District of Columbia Circuit Court of Appeals, created by the Act for the purpose of appointing independent counsels, such that if the AG determined there were no reasonable grounds to believe that further investigation was warranted, the Attorney General must so notify the Special Division.[77] If, however, there were reasonable grounds to believe further investigation or prosecution was warranted, then the Attorney General **must** apply for the appointment of an independent counsel under the Act (emphasis added).[78] Upon receiving this application, the Special Division appointed an independent counsel with full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.[79] The independent counsel could be removed from office only by a) impeachment and conviction by Congress; or b) by personal action by the Attorney General for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[80]

Although the Supreme Court, in *Morrison***,** concluded that both the appointment and removal provisions were consistent with the "Appointments" and "Take Care" clauses, Justice Scalia, in dissent, concluded the Act was unconstitutional because the independent counsel, clothed with such

74. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, titles I–V, 92 Stat. 1824–1867 (1978) (current version 28 U.S.C. § 591).
75. *Id.*
76. *See Morrison*, 487 U.S. 654 (1988).
77. *Id*.
78. *Id.*
79. *Id.*
80. *Id*.

immense prosecutorial power, is a high executive official who can only serve at the president's pleasure and therefore cannot be appointed by the judicial branch.[81] Recognizing Scalia's perspective was then in the minority, his dissent has become canonical, especially since Independent Counsel Kenneth Starr's lengthy investigation resulted in the highly unpopular impeachment and subsequent acquittal of former President Clinton based on Clinton's lies, cover-up, and suborning of perjury related to an improper sexual affair he had with a female White House intern.[82] Consequently, both major political parties consented to the Act's expiration in 1999 based on the manifest evidence of prosecutorial overreach adumbrated in Scalia's *Morrison* dissent. As a result, the Justice Department under then-Attorney General Reno issued the current Special Counsel Regulations as emergency regulations, without notice and comment, to provide future attorneys general the ability to appoint Special Counsel absent statutory authorization.[83] It was under these Special Counsel Regulations that Mueller was appointed by then-Acting Attorney General Rod Rosenstein after the then-Attorney General, Jefferson Sessions III, recused himself from the Justice Department's Russia Investigation. It is to the *Report* and its principal findings and conclusions that this paper now turns.

V. The *Report*'s Key Findings of Fact

On May 17, 2017, "to ensure a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential election," especially after Trump fired then-FBI Director James Comey, the then-Acting Attorney General Rod J. Rosenstein, appointed Special Counsel Mueller to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump" as well as matters arising directly from the investigation and other matters within the scope of 28 C.F.R. 600.4 through 600.10, which, among other things, covers efforts to interfere and obstruct the investigation.[84] The *Report* was delivered confidentially to Barr on March 22, 2019.[85] It highlights numerous findings of fact as to Russian Government in the U.S.

81. *Id.*

82. *See, e.g., Free Enterprise Fund v. Public Co. Oversight Bd.,* 561 U.S. 477 (2010) (conceding that legislative limitations imposed on the removal of executive officials are constitutionally problematic and invalidating the removal provision of the Sarbanes Oxley Act's Public Company Oversight Board).

83. 28 C.F.R. 600 et seq. (1999).

84. *Id.* at vol. 1, pp. 8, 11.

85. Sharon LaFraniere and Katie Benner, *Mueller Delivers Report on Trump Russia Investigation to Attorney General*, N.Y. TIMES (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/us/politics/mueller-report.html.

presidential election, contacts between Russian officials and the Trump Campaign and subsequent presidential abuses of power.[86]

The *Report* divided the President's actions into two phases.[87] The first involved the period up to Comey's firing when the President had been told repeatedly that he was not under investigation.[88] The second phase involved the time period after the Special Counsel was appointed and the President learned he was personally being investigated in an obstruction-of-justice inquiry.[89] In this phase, the President publicly attacked the investigation, privately undertook efforts to control it, and publicly and privately encouraged witnesses not to cooperate.[90] The *Report* evaluated the President's motives using a totality of circumstances approach.[91]

After a detailed analysis demonstrating the Russian Federation intervened in the 2016 presidential election, the *Report* concluded that the evidence was insufficient to charge any Trump Campaign official as an unregistered Russian government agent or other Russian principal.[92] The *Report* further concluded that the evidence was insufficient to charge that any member of the Trump Campaign conspired with Russian government officials to interfere in the 2016 Presidential election.[93] The *Report* wrote that there was no proven coordination or conspiracy between the Russian government and Trump Campaign to alter the election outcome, including with respect to Russia providing assistance to the Campaign in exchange for favorable treatment in the future.[94] That said, candidate Trump's public statements and those of his campaign aides would have made Russian assistance more likely. These statements, at a minimum, conveyed to the Russians that their interests would definitively be further under a Trump Administration.[95] This is because candidate Trump consistently spoke admiringly of President Putin, Trump campaign members met on several occasions with Russian officials, evidencing a willingness to, at the very least, normalize relations between the two countries and welcome campaign assistance from Russian-backed entities.[96] Mueller chose not to prosecute Trump officials with conspiracy because it could not establish that they were involved in a criminal

86. *See* THE REPORT, *supra* note 4.
87. THE REPORT, *supra* note 4, at vol. 2, pp. 7, 158.
88. *Id.*
89. *Id.*
90. *Id*.
91. *Id.*
92. *Id.* at vol. 1, p. 9.
93. THE REPORT, *supra* note 4, at vol. 1, p. 9.
94. *Id.* at p. 66.
95. *Id.* at p. 173.
96. *Id.*

conspiracy, which, of course, is very difficult to prove. The *Report* makes clear, however, that this does not absolve either the President or his Campaign from political accountability for soliciting and accepting assistance from a hostile government.[97]

The President, however, reacted to news of Mueller's appointment as Special Counsel by telling advisors that it was "the end of his presidency" and demanding that former Attorney General Sessions resign.[98] Sessions submitted his resignation by letter, which the President ultimately did not accept.[99] The President then directed former White House Counsel Donald McGahn to fire the Special Counsel, but McGahn did not carry out the order, stating that he would rather resign than trigger what he considered to be another Saturday Night Massacre.[100] By June 2017, Trump became aware of emails setting up a June 9, 2016 meeting between senior Trump campaign and Russian government officials who offered derogatory information on the Clinton campaign as part of Russian government's support for candidate Trump.[101] On multiple occasions in late June and early July 2017, Trump directed aides not to publicly disclose the emails and then he dictated a statement about the meeting to be issued by his son, Donald Trump Jr., wrongly describing the meeting as about adoptions from Russia.[102] When the press asked questions regarding former President Trump's involvement in editing his son's statement, Trump's personal lawyer lied by repeatedly denying the President played any role in editing Don Jr.'s message.[103]

In early Summer 2017, the President called Sessions at his home and once again asked him to reverse his recusal decision in the Russia investigation, which Sessions refused.[104] In October 2017, Trump met with Sessions at the Oval Office and asked him to take a look at investigating Hillary Clinton.[105] In December 2017, the President met with Sessions at the Oval Office after his former National Security Advisor, Michael Flynn, plead guilty to a felony conviction and advised Sessions that he would be a "hero" if he unrecused and took back control of the Russia election interference investigation.[106] The President also repeatedly claimed the Special Counsel had a conflict of interest that merited his being removed from the Russia

97. THE REPORT, *supra* note 4, at vol. 1, p. 175.
98. *Id.* at vol. 2, p. 4.
99. *Id.*
100. *Id.* at p. 4, 88.
101. *Id.* at p. 4, 98.
102. *Id.*
103. THE REPORT, *supra* note 4, at vol. 2, p. 5.
104. *Id.*
105. *Id*. at p. 5.
106. *Id.*

investigation.[107] This claim by the President and his personal lawyer was rejected as incorrect not only by McGahn, but by the Acting Attorney General for the Russia Investigation, Deputy Attorney General Rod Rosenstein.[108]

In early 2018, it was reported that the President, in June 2017, ordered McGahn to have the Special Counsel removed and that McGahn responded by saying he would rather resign than carry out the order.[109] McGahn was then pressured by Trump to deny to officials that he had been instructed to fire Mueller and was questioned by Trump as to why he advised the Special Counsel as such and took notes of their meetings.[110] McGahn felt Trump was testing his mettle and was prepared to resign over what he perceived to be an improper directive by the President to fire the Special Counsel and do "other crazy shit" at the President's behest. McGahn, who communicated this to his own personal lawyer, was dissuaded from resigning by both his then White House Chief of Staff, Reince Priebus and his then White House Chief of Staff, Steve Bannon.[111]

The Special Counsel concluded that the President's subsequent claims that he did not direct McGahn to fire the Special Counsel were untrue based on McGahn's credibility and lack of motivation to lie, his clear recollection of events, and his preparation to resign over the President's request to improperly convey information to Rosenstein.[112]

The *Report* concluded that substantial evidence demonstrates the President's repeated attempts to remove the Special Counsel were based on the Special Counsel's oversight investigations that involved the President's conduct and to reports that the Special Counsel was investigating the President for potential obstruction of justice.[113] The *Report* further concluded that the President knew that he was acting improperly by ordering McGahn to fire the Special Counsel.[114] The *Report* also stated that the reason the President wanted Sessions to unrecuse was to have him take back control of the Russia investigation and protect himself from the Special Counsel's investigation.[115]

The day after the 2018 mid-term elections, when it was clear that the Republican Party had increased its majority in the U.S. Senate, Trump fired

107. *Id.* at pp. 82–3.
108. THE REPORT, *supra* note 4, at vol. 2, pp. 82–3.
109. *Id.* at p. 6.
110. *Id*.
111. *Id.* at p. 87.
112. *Id.* at p. 88.
113. *Id.* at p. 89.
114. THE REPORT, *supra* note 4, at vol. 2, p. 90.
115. *Id.* at p. 113

Sessions and replaced him with Sessions' Chief of Staff as Acting Attorney General.[116] After the New York Times reported that Trump had ordered McGahn to fire the Special Counsel, Trump ordered McGahn to publicly deny the report. McGahn, who refused to do so, was rebuked by Trump for taking notes of his meetings with the former President and telling the Special Counsel that Trump ordered him to fire the Special Counsel.[117]

Trump Campaign Chairman Paul Manafort was hired by Trump without pay after being recommended by Trump associates Thomas Barrack and Roger Stone.[118] Though unpaid, Manafort's position would increase the likelihood he would paid for past work in the amount of $2 million by Russian Oligarch Oleg Deripaska, and result in Deripaska dropping a lawsuit against him.[119] Manafort's plan was also to monetize his relationship with Trump by acting as a compensated go-between while remaining outside the Administration should Trump win the presidency.[120] Manafort had connections to Russia through Deripaska and later through his work for former President Yanukovych's pro-Russian regime in Ukraine.[121] He stayed in touch with these contacts during the campaign through Konstantin Kilimnik, a longtime Manafort aide, who previously ran Manafort's Kiev office and who the FBI assesses as having ties to Russian intelligence.[122] Indeed, Manafort instructed his deputy, Rick Gates, to share internal polling data with Kilimnik during the campaign. Manafort also corresponded via Kilimnik with former Ukrainian President Yanukovych regarding a Ukrainian Peace Plan that would require U.S. support to succeed. The Special Prosecutor's office was unable to confirm that this information was shared with Trump and Manafort was forced to resign his position from the Trump Campaign in August 2016 due to media reports of his consulting work for the pro-Russian Party of Regions in Ukraine.[123]

During Manafort's subsequent prosecution for lying to federal prosecutors, when the jury was deliberating, Trump made public comments supportive of Manafort and, after his conviction, said that Manafort was right not to cooperate with prosecutors, that "flipping" ought to outlawed and made it known that Manafort could receive a pardon.[124] The *Report* concluded that the President's conduct toward Flynn and Manafort qualify as obstructive and would typically support obstruction of justice charges as they

116. *Id.* at p. 110.
117. THE REPORT, *supra* note 4, at vol. 2, pp. 113, 117.
118. *Id.* at vol. 1, p. 134.
119. *Id.*
120. *Id.* at p. 135.
121. *Id.* at p. 129.
122. *Id*.
123. THE REPORT, *supra* note 4, at vol. 1, pp. 129, 141, 144.
124. *Id.* at vol. 2, p. 6.

were both witnesses in the Special Counsel's investigation, and the President's conduct was intended to prevent both men from testifying truthfully, or otherwise would have the probable effect of influencing, delaying or preventing their testimony to law enforcement.[125]

The President's conduct involving his personal lawyer, Michael Cohen, changed from praise for Cohen when Cohen falsely minimized Trump's involvement in the Trump Moscow real estate development project, to castigation when Cohen became a cooperating witness.[126] From September 2015 to June 2016, Cohen had pursued the project on the Trump Organization's behalf and briefed candidate Trump on it numerous times, including whether the candidate should travel to Russia to advance the deal.[127] In 2017, Cohen provided false testimony to Congress about the project, including stating that he only briefed Trump on the project three times and never discussed travel to Russia with him, in an effort to adhere to a "party line" that sought to minimize the President's connections to Russia.[128] After FBI investigators raided Cohen's home and office in April 2018, Trump publicly asserted that Cohen would not flip and told Cohen to not cooperate with prosecutors and to "stay strong" and privately passed messages of support to him.[129] Cohen said that he had discussions with Trump's personal counsel and believed that if he stayed on message he would be "taken care of."[130] However, after Cohen began cooperating with the government in the summer of 2018, the President referred to him as a "weak person," publicly criticized him, calling him a "rat," suggested his family had committed crimes and that he should serve prison time.[131]

The *Report* concluded that Trump's actions regarding Cohen can constitute obstruction of justice as the then-President was aware of Cohen's false testimony to Congress, that he was, after Cohen's guilty plea, concerned about what Cohen would tell investigators regarding the Trump Tower Moscow project, and therefore sought to deter Cohen from cooperating with prosecutors.[132]

VI. The *Report's* Key Conclusions of Law

125. THE REPORT, *supra* note 4, at vol. 2, p. 131.
126. *Id.* at p. 6.
127. *Id.* at p. 134.
128. *Id.*
129. *Id.* at pp. 6, 134.
130. *Id.*
131. THE REPORT, *supra* note 4, at vol. 2, pp. 134, 149, 150, 151.
132. *Id.* at vol. 2, pp. 155–56.

The *Report* states that former President Trump, as head of the Executive Branch, had means of affecting the Russia investigation that are relevant to an obstruction of justice charge beyond the purview of a typical obstruction of justice case because some of his actions, including the firing of former FBI Director Comey, "are facially lawful acts within his Article II authority."[133] However, the Trump's position as head of the Executive Branch provided him with unique and powerful means of influencing official proceedings, subordinate officers, and potential witnesses, which is "relevant to a potential obstruction-of-justice analysis."[134] Second, the lack of proof of an underlying conspiracy crime committed by Trump related to Russian election interference also affects the analysis by requiring consideration of the possible motives of his conduct.[135] The fact that many of the former President's acts directed at witnesses, including discouraging their cooperation with prosecutors and suggesting possible future pardons, took place in public does not, according to the *Report*, immunize them from the reach of obstruction laws, i.e. the analysis is the same as for private acts because the likely effect of the former President's conduct was to influence witnesses or alter their testimony to the detriment of the justice system's integrity.[136]

The *Report* rejected the President's personal counsel's claim that the obstruction of justice statutes do not cover the President's actions because this is neither the position of the DOJ, nor is it supported by principles of statutory construction.[137] To illustrate, the federal obstruction of justice statute, in relevant part, prohibits all persons from corruptly obstructing, influencing or impeding any official proceeding, or attempting to do so.[138] The *Report* highlighted that the statute applies to all corrupt means of obstructing a proceeding, pending or contemplated, "including by improper exercises of official power."[139] Furthermore, the *Report* set forth that the statute covers a wide array of obstructive conduct, including the improper use of government processes, (see e.g., the Watergate cover-up perpetrated by White House officials and President Nixon).[140] It also applies to those improperly seeking to subvert, impede or obstruct a relevant judicial proceeding.[141] The *Report* concluded that the President's claim that his conduct falls outside the scope of obstruction laws "lacks merit"[142] such that the President lacked a

133. THE REPORT, *supra* note 4, at vol. 2, pp. 6, 156.
134. *Id.* at pp. 6, 157.
135. *Id.*
136. *Id.* at pp. 7, 157.
137. *Id.* at pp. 7, 159.
138. *Id.* at vol. 2, pp. 7, 160; *see also* 18 U.S.C. § 1512.
139. THE REPORT, *supra* note 4, at vol. 2, pp. 7, 160.
140. *Id.* at pp. 7, 165.
141. *Id.* at pp. 7, 166.
142. *Id.* at pp. 7, 168.

legitimate statutory defense to a potential criminal obstruction of justice charge.[143]

With respect to Constitutional defenses, the *Report* concluded that the President is subject to the same obstruction of justice statutes as a private citizen when his conduct does not implicate presidential constitutional authority.[144] With respect to whether a president can obstruct justice by exercising his Article II powers, the *Report* concluded "that Congress has authority to prohibit a president's corrupt use of his authority in order to protect the administration of justice."[145] This "accords with our constitutional system of checks and balances and the principle that no person is above the law."[146] The *Report* concluded that the President's claim that his conduct falls outside the scope of obstruction laws "lacks merit."[147]

Although the president has constitutional power "to take care that the laws be faithfully executed" and direct criminal investigations, as well as the power to appoint and remove all officers of the United States, the *Report* concluded that this does not provide a constitutional defense to an obstruction charge because when the President's official actions come into conflict with prohibitions in the obstruction statutes because "any constitutional tension is reconciled through separation of powers analysis."[148] Furthermore, Congress can validly regulate the president's official duties to prohibit actions motivated by corrupt intent to obstruct justice consistent with the president's Article II power because Congress can validly make obstruction statutes applicable to corruptly motivated Presidential official acts without impermissibly undermining his Article II functions.[149] Indeed, the *Report* concluded that protection of the criminal justice system from any person's corrupt acts–including the president–accords with the fundamental principle of our government that "no person in this country is so high that he is above the law."[150]

VII. The *Report's* Decision Not to Prosecute

The *Report* adopted the DOJ's position that a sitting president cannot be indicted for obstruction of justice and because of this, declined against

143. *Id.* at pp. 7–8, 159.
144. THE REPORT, *supra* note 4, at vol. 2, p. 8.
145. *Id.*
146. *Id.* at vol. 2, p. 8
147. *Id.* at pp. 7, 168.
148. *Id.*
149. *Id.* at vol. 2, p. 169.
150. THE REPORT, *supra* note 4, at vol. 2, pp. 180–81 (citing United States v. Lee, 106 U.S. 196, 220 (1882)).

making a prosecutorial judgment.[151] The *Report*, however, rejected the President's lawyers claims that the President has Article II authority to obstruct official proceedings consistent with separation of powers.[152] However, "while the [*Report*] does not conclude that the President committed a crime, it also does not exonerate him."[153] Because the *Report* concludes that though Trump cannot be criminally prosecuted while in office, it strongly states that he is not immune from accountability by leaving open impeachment and removal as an option available to Congress followed by a subsequent criminal prosecution.[154] The *Report* concludes that one of its purposes is to conduct a thorough factual investigation and preserve evidence while memories are fresh and documentary materials are still available, to facilitate a potential prosecution of the President upon his departure from office.[155]

Looking at the President's actions outlined above, the Special Counsel "determined that there was a sufficient factual and legal basis to further investigate potential obstruction-of-justice issues involving the President."[156] The former President refused to provide written answers regarding obstruction of justice matters to the Special Counsel, and notwithstanding the fact that the Special Counsel believed there was constitutional authority to compel the President's testimony regarding obstruction of justice via grand jury subpoena, Mueller chose not to do so.[157] Mueller cited to "the substantial delay that such an investigative step would likely produce at [such] a late stage of [the] investigation," and the significant body of evidence that was already obtained from the President's actions and his public and private statements describing or explaining those actions, including his manifest concern that the intelligence community's assessment of Russian election interference on his behalf jeopardized the legitimacy of his presidency.[158] The *Report*, moreover, made a point of not exonerating the President, stating that the Special Counsel was prepared to exonerate the President but could not.[159]

This inability to exonerate the President stems from the many instances of obstruction of justice outlined above. The *Report*, however, did not state that the President engaged in criminal conduct because such a statement would be, according to Mueller, improper and conflict with the

151. *Id.* at p. 8.
152. THE REPORT, *supra* at note 4, at vol. 2, p. 8.
153. *Id.*
154. *Id.*
155. *Id.* at p. 180.
156. *Id.* at p. 12.
157. *Id.*
158. THE REPORT, *supra* at note 4, at vol. 2, pp. 13–23.
159. *Id.* at p. 182.

President's immunity from criminal prosecution while in office.[160] There are four key points regarding Mueller's reticence.

First, because the OLC made a legal conclusion that a sitting president cannot be indicted, as this would impermissibly undermine the Executive Branch's capacity to perform its constitutionally assigned functions, the Special Counsel declined to make a prosecutorial recommendation. In the *Report*, Mueller states, "we recognized that a federal criminal accusation against a sitting President would place burdens on the President's capacity to govern and potentially preempt constitutional processes . . . ."[161]

Second, while the OLC opinion concludes a sitting president cannot be prosecuted, it facilitates accountability and the rule of law by allowing for a criminal investigation during the president's term of office, such that executive officials other than the president can be criminally prosecuted for obstruction offenses during the president's term, subject, of course, to the president's pardon power.[162] It also facilitates the proper collection of evidence to ensure accountability. This is why the *Report* set forth that "[G]iven these considerations, the facts known to us, and the strong public interest in safeguarding the integrity of the criminal justice system, we conducted a thorough factual investigation in order to preserve the evidence when memories were fresh and documentary materials were available."[163]

Third, Mueller decided not to apply an approach that could potentially result in a conclusion that the President engaged in behavior that "constitutes a federal offense."[164] Mueller decided against reaching such a conclusion because the ordinary means for a person to respond to a criminal accusation, namely, a speedy public trial, with all the procedural protections attendant to a criminal case, are unavailable to a sitting president, i.e. a "prosecutor's judgment that crimes were committed, but that no charges will be brought, affords no such adversarial opportunity for a public name-clearing before an impartial adjudicator."[165] This, in turn, also precluded the use of an internal document such as a sealed indictment because it "could carry consequences that extend beyond the realm of criminal justice" and could imperil a president's ability to govern.[166] Moreover, although a prosecutor's internal report would not represent a formal public accusation akin to an indictment, the possibility of its public disclosure and the absence of a neutral

160. *Id.* at p. 2.
161. THE REPORT, *supra* note 4, at vol. 2, p. 1.
162. *Id.*
163. *Id.* at pp. 1–2.
164. *Id.* at p. 2.
165. *Id.*
166. *Id.*

adjudicatory forum to review its findings counseled against potentially determining that the President's conduct constitutes a federal offense.[167]

Fourth, the Special Counsel set forth that if he had confidence that the President clearly did not commit obstruction of justice, "we would so state."[168] Based on the facts and the applicable legal standards, however, "we are unable to reach that judgment."[169]

VIII. What the *Report* Might Have, But Did Not State

The *Report* adopted the OLC's conclusion that a sitting President cannot be criminally prosecuted during his term of office such that the remedies to presidential criminality are: (1) impeachment in the House followed by trial and conviction by the Senate; (2) the president's loss of reelection based on public revulsion by his behavior, and potentially; (3) criminal prosecution of the president upon his departure from office. Far from exonerating the President, however, the *Report* reads like a depressing indictment of a temperamental mafia boss with no understanding of the American system of government or the rule of law. Mueller's refusal to describe the former President's actions as criminal enabled Barr to publicly mischaracterize the *Report*, such that Trump and his supporters were subsequently able to effectively characterize the *Report* as a complete exoneration and as the "Russia hoax." As evidenced by the Senate's decision to acquit the former President of the abuse of power charges brought by the House regarding his repeated attempts to coerce the Government of Ukraine to open a criminal investigation into his political rival, the *Report*'s failure to elicit the proper response in the political culture has led to a framework whereby the majority of Republican voters see the President as unfairly persecuted and innocent. This, in turn, worsens the problem of presidential impunity by, to paraphrase Émile Durkheim, further defining deviancy downward.

Presidential impunity in this case, however, required an unprincipled and partisan former Attorney General who was willing to exploit the Special Counsel's exceeding caution and reticence to mislead the public, and thereby politically strengthen his boss. This was facilitated by a defect in the Special Counsel Regulations that required Mueller to confidentially submit his report to Barr, while entitling the former Attorney General to submit an unverifiable letter synopsis of the *Report's* conclusions to Congress without, at the

167. THE REPORT, *supra* note 4, at vol. 2, p. 2.
168. THE REPORT, *supra* note 4, at vol. 2, p. 2.
169. *Id.*

same time, disclosing the full *Report*.[170] As set forth more fully below, Barr masterfully exploited this defect for maximum political effect.

IX. Attorney General Barr's Executive Summary and Subsequent Characterization of the *Report*

The DOJ Special Counsel Regulations provide that a Special Counsel "shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel."[171] The Attorney General, in turn, "will notify the Chairman and Ranking Member of the Judiciary Committees of each House of Congress, with an explanation for each action [u]pon conclusion of the Special Counsel[']s investigation . . . ."[172] In short, the Special Counsel Regulations, interposed as they were without notice and comment feedback, entitled Barr to keep the *Report* secret and provide Congress with an unrebuttable synopsis of its conclusions. He did this via letter dated March 22, 2019 to Senate Judiciary Committee Chairman Graham, House Judiciary Committee Chairman Nadler, Senate Judiciary Ranking Member Feinstein, and House Judiciary Committee Ranking Member Collins and the March 24 Letter. The March 22, 2019 letter advised Congress that Special Counsel Mueller had concluded his investigation and had submitted to him a "confidential report explaining the prosecution or declination decisions he ha[d] reached, as required by 28 C.F.R. 600.8 (c)."[173] It concluded by stating that "I may be in a position to advise you of the Special Counsel's principal conclusions as soon as this weekend."[174] The March 24, 2019 letter ("March 24 Letter") set forth the following:

1. "The Special Counsel's investigation did not find that the Trump Campaign or anyone associated with it conspired or coordinated with Russia in its efforts to influence the 2016 U.S. presidential election."[175]
2. "The Special Counsel concluded that Russian government actors successfully hacked into computers and obtained emails from

170. 28 C.F.R. § 600.8 (1999) provides that the Special Counsel's report is to be confidentially provided to the Attorney General without any limitation as to how the Attorney General can use or characterize such report.

171. 28 C.F.R. § 600.8.

172. 28 C.F.R. § 600.9.

173. *William Barr's Letter to Congress on the Mueller Report*, N.Y. TIMES (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/us/politics/barr-letter-mueller.html.

174. *Id.*

175. March 24 Letter, *supra* note 9.

persons affiliated with the Clinton campaign and Democratic Party organizations, and publicly disseminated those materials through various intermediaries, including WikiLeaks."[176]

3. With respect to the crime of Obstruction of Justice, after making a thorough factual investigation, the Special Counsel chose not to make a traditional prosecutorial judgment regarding the President's activities, and "therefore did not draw a conclusion–one way or the other—as to whether the examined conduct constituted obstruction."[177]
4. "The Special Counsel's decision to describe the facts of his obstruction investigation without reaching any legal conclusions leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime."[178]
5. Both Barr and Deputy Attorney General Rosenstein "concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense," and that, "while not determinative, the absence of such evidence bears upon President Trump's intent with respect to obstruction."[179] "Our determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president."[180]
6. This, in turn, is based on the *Report*'s conclusion that the "President was not involved in an underlying crime with respect to Russian election interference," and "the absence of such evidence bears upon the President's intent with respect to obstruction."[181]
7. The *Report* "identifies no actions that, in our judgment, constitute obstructive conduct, had a nexus to a pending or contemplated proceeding, and were done with corrupt intent . . . ."[182]
8. Barr intended to "move forward expeditiously in determining" what information in the *Report* "can be released in light of applicable law, regulations and Departmental policies."[183]

176. *Id*.
177. March 24 Letter, *supra* note 9.
178. *Id.*
179. *Id*.
180. *Id.*
181. *Id.*
182. *Id*.
183. March 24 Letter, *supra* note 9, at 4.

9. That public release of the notification letter, per 28 C.F.R. Section 600.9 (c), is in the public interest and will be disclosed to the public.[184]

On March 27, 2019, Special Counsel Mueller, in a letter to Barr, set forth that the representations made in the March 24 Letter "did not fully capture the context, nature, and substance of the Special Counsel's Office's work and conclusions."[185] According to Mueller, the March 24 Letter sowed "public confusion about critical aspects of the results of his investigation," which, Mueller noted "threatened to undermine a central purpose for which the Department appointed Special Counsel Mueller: to assure full public confidence in the outcome of the investigations."[186]

On March 29, 2019, Barr, in a letter addressed to Chairmen Graham and Nadler, represented that "some media reports and other public statements mischaracterized [his] March 24, 2019 [letter] as a 'summary' of the Special Counsel's investigation and the report."[187] It also stated that his March 24 Letter "was not, and did not purport to be, an exhaustive recounting of Special Counsel's investigation or report."[188] The letter stated that everyone "will soon be able to read [the *Report*] on their own."[189]

Prior to disclosing the *Report*, Barr held a press conference on April 18, 2019 and stated that Special Counsel Mueller's "investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian government in its election interference activities."[190] Barr said that, "we now know that the Russian operatives who perpetrated these schemes did not have the cooperation of President Trump or the Trump campaign—or the knowing assistance of any other Americans for that matter."[191] Barr stated that the "bottom line" is that "after nearly two years of investigation, thousands of subpoenas, and hundreds of warrants and witness interviews," Mueller did not find that the "Trump campaign or other Americans

184. *Id.*

185. *See* Jason Breslow, *Mueller's Letter Expressing Concern About Barr's Summary of His Report*, NPR (Mar. 27, 2019), https://www.npr.org/2019/05/01/719004457/read-muellers-letter-expressing-concern-about-barr-s-summary-of-his-report.

186. Breslow, *supra* note 185.

187. Letter from William Barr, U.S. Attorney General, to Senator Lindsey Graham and Representative Jerrold Nadler, DEP'T OF JUSTICE (Mar. 29, 2019), https://www.justice.gov/ag/page/file/1153021/download [hereinafter March 29 Letter].

188. *Id*.

189. *Id*.

190. *See Barr's News Conference Remarks Ahead of the Mueller Report Release*, N.Y. TIMES (Apr. 18, 2019), https://www.nytimes.com/2019/04/18/us/politics/barr-conference-transcript.html [hereinafter *Barr's News Conference*].

191. *Id*.

colluded" in Russian government sponsored efforts to interfere in the 2016 presidential election.[192] Finally, Barr announced that he and Rosenstein "concluded that the evidence developed by Special Counsel Mueller is not sufficient to establish that President Trump committed an obstruction-of-justice offense."[193] He declared that-

> [i]n assessing President Trump's actions… it is important to bear in mind the context. President Trump faced an unprecedented situation. As he entered into office, and sought to perform his responsibilities as president, federal agents and prosecutors were scrutinizing his conduct before and after taking office, and the conduct of some of his associates. At the same time, there was relentless speculation in the news media about the President's personal culpability. Yet, as he said from the beginning, there was in fact no collusion. And as [the *Report*] acknowledges, there is substantial evidence to show that President Trump was frustrated and angered by a sincere belief that the investigation was undermining his presidency, propelled by his political opponents, and fueled by illegal leaks. Nonetheless, the White House fully cooperated with Special Counsel Mueller's investigation, providing unfettered access to campaign and White House documents, directing senior aides to testify freely, and asserting no privilege claims. And at the same time, President Trump took no act that in fact deprived Special Counsel Mueller of the documents and witnesses necessary to complete his investigation. Apart from whether the acts were obstructive, this evidence of non-corrupt motives weighs heavily against any allegation that President Trump had a corrupt intent to obstruct the investigation.[194]

That same day, Barr also released a letter to members of Congress purporting to summarize the *Report's* conclusions ("April 18 Letter").[195] The April 18 Letter set forth that Special Counsel Mueller's "bottom line conclusion on the question of so-called collusion was that the investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian government in its election interference activities.[196]

192. *Id*.
193. *Id*.
194. *Barr's News Conference*, *supra* note 190.
195. April 18 Letter, *supra* note 10.
196. *Id*.

It also stated that in light of Mueller's "decision not to reach a conclusion on whether President Trump obstructed justice," the evidence set forth in the *Report* was not sufficient to establish that President Trump committed an obstruction-of-justice offense."[197]

Barr's misleading and highly partisan statements were all that were made public between Mueller's March 22, 2019 confidential filing of the *Report* and April 19, 2019, when the redacted *Report* was finally made public. Barr's characterizations of the *Report* have proved determinative.

Barr systematically misled Congress and the public in numerous ways. First, he elided over the fact that the Russian Government deliberately sought to assist the Trump candidacy and undermine the Clinton Campaign.[198] Although Mueller found no proof that candidate Trump conspired with Russia to alter the election outcome, the *Report* did mention, on several occasions, that candidate Trump and his Campaign officials were more than willing to receive campaign assistance from Russia that may well explain the President's subsequent attempts to undermine the Special Counsel investigation.[199] Indeed, what both the *Report* and Barr's letters fail to state is that a conspiracy between the Trump Campaign and the Russian Government would have been both unnecessary and unhelpful from the Russian Government's perspective because only Russia and not the Trump Campaign had the expertise to alter the election campaign using social media disinformation and computer hacking and evidence of a conspiracy with Trump or his campaign would only have harmed Russia's interests regardless of who won the election.

Second, the March 24 Letter and the April 18 Letter state that the *Report* chose not to make a traditional prosecutorial judgment. Though true in the strictest sense, it completely omitted the reason, namely that per the DOJ guidelines as outlined in the OLC memo, a sitting president is immune from criminal prosecution and it would be accordingly unfair to publicly make a prosecutorial judgment against a president unable to clear his name via a speedy adjudication.[200] Indeed, both the March 24 Letter and the April 18 Letter systematically omitted the *Report*'s detailed itemization of Presidential obstructive conduct that would merit obstruction charges.[201] The *Report*'s detailed listing of presidential misbehavior, its conclusion that the President cannot be exonerated on an obstruction charge, and its conclusion

197. March 24 Letter, *supra* note 9.
198. THE REPORT, *supra* note 4, at vol. 2 pp. 4–5.
199. *Id*. at vol. 2, pp. 5–7, 24.
200. *Id*. at vol. 2, p. 8.
201. *Id*. at vol. 2, pp. 75–6, 82–3, 88–89, 92–93, 98, 113, 117, 131, 134, 149, 150–51 and 155–57.

that it preserved testimony and evidence for a potential prosecution of the President upon his departure from office, shows Mueller clearly felt that the President engaged in criminal conduct but prudentially could not say so in view of presidential immunity.[202] While both letters correctly state that Mueller chose not the make a prosecution recommendation, Barr falsely implied that this was because Mueller did not find sufficient evidence of presidential wrongdoing and incorrectly stated that it was left to Barr to determine whether the President committed a crime.[203]

Third, both the March 24 and April 18 Letters state that the evidence in the *Report* is insufficient to establish that the President committed an obstruction offense. This statement is, of course, belied by the *Report*'s exhaustive listing of presidential obstruction.[204]

Fourth, both the March 24 Letter and the April 18 Letter incorrectly state that the lack of proof of an illegal conspiracy between the Trump Campaign and the Russian Government supports a conclusion that the President did not have a reason to commit an obstruction offense.[205] This statement, which appears nowhere in the *Report*, is contradicted by the fact the *Report* concluded the President may have feared that the Special Counsel investigation would reveal such a conspiracy and that evidence of Russian assistance to him and his campaign would undermine his legitimacy in office.[206]

Fifth, both letters incorrectly state that the Special Counsel "identifies no actions that, in our judgment, constitute obstructive conduct, had a nexus to a pending or contemplated proceeding, and were done with corrupt intent . . . ."[207] This statement is definitively contradicted by the *Report*, which demonstrates that the President engaged in obstructive conduct to undermine actual or contemplated criminal proceedings involving former National Security Advisor Michael Flynn, former Trump Campaign Manager Paul Manafort, and Trump's personal lawyer Michael Cohen.[208]

The March 24 Letter, the April 18 Letter, Barr's testimony before Congress, and his subsequent press conference misled both Congress and the public as to the *Report*'s findings, and created unrebuttable narrative, for almost an entire month, that the Special Counsel declined to recommend prosecution based on a lack of evidence of presidential misbehavior. This was untrue and clearly contradicted by the eventually disclosed *Report*. However,

202. *Id*. at vol. 2, p. 8.
203. March 24 Letter, *supra* note 9 and the April 18 Letter, *supra* note 10.
204. THE REPORT, *supra* note 4 at vol. 2, pp. 5–7, 24.
205. March 24 Letter, *supra* note 9.
206. THE REPORT, *supra* note 4, at vol. 2, pp. 4, 75–7.
207. March 24 Letter, *supra* note 9.
208. THE REPORT, *supra* note 4, at vol. 2, pp. 4, 75–7.

for a full month, the DOJ Special Counsel Regulations precluded Mueller and members of his team from publicly disputing Barr's public statements.[209]

United States District Court Judge Reggie Walton, no less, concluded that he had "grave concerns about the objectivity of the process that preceded the public release of the redacted version of [the *Report*] and its impact on the DOJ's subsequent justifications that its redactions of the *Report* are authorized by the [Freedom of Information Act]" in adjudicating a suit seeking disclosure of the full unredacted *Report* brought by public interest and media plaintiffs.[210] In particular, Judge Walton's decision denying DOJ summary judgment on the FOIA issue, set forth that he concurred with Mueller's assessment, set forth in Mueller's March 27 Letter to Barr, that the March 24 Letter "did not fully capture the context, nature, and substance of the Special Counsel's Office's work and conclusions."[211] Judge Walton's decision set forth that "a review of the redacted version of [the *Report*] by the Court results in the Court's concurrence with Special Counsel Mueller's assessment that Attorney General Barr distorted the findings in [the *Report*]."[212] According to Judge Walton, Barr's summary:

> failed to indicate that Special Counsel Mueller identified multiple contacts—'links,' in the words of the Appointment Order—between Trump [c]ampaign officials and individuals with ties to the Russian government,' . . . and that Special Counsel Mueller only concluded that the investigation did not establish that 'these contacts involved or resulted in coordination or a conspiracy with the Trump [c]ampaign and Russia, including with respect to Russia providing assistance to the [Trump] [c]ampaign in exchange for any sort of favorable treatment in the future,' because coordination—the term that appears in the Appointment Order—'does not have a settled definition in federal criminal law,' (internal citations and parentheses omitted).[213]

Judge Walton concluded that although Barr can be "commended for his effort to expeditiously release a summary of Special Counsel Mueller's principal conclusions in the public interest, "the Court is troubled by his

209. *See* 28 C.F.R § 600.8 (requiring that the Special Counsel report be filed confidentially with the Attorney General).

210. Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, F. Supp.3d (D.C. Cir. 2020).

211. *Elec. Privacy Info.*, F. Supp.3d at 5.

212. *Id.* at 16.

213. *Id.* at 16–17.

hurried release of [the March 24 Letter] well in advance of when the redacted version of [the *Report*] was ultimately made available to the public."[214] Judge Walton writes:

> [t]he speech by which Attorney General released to the public the summary of Special Counsel Mueller's principal conclusions, coupled with the fact that Attorney General Barr failed to provide a thorough representation of the findings set forth in [the *Report*], causes the Court to question whether Attorney General Barr's intent was to create a one-sided narrative about [the *Report*]—a narrative that is clearly in some respects substantively at odds with the redacted version of [the *Report*].[215]

Judge Walton further concluded that Barr's decision to not only conduct a press conference but also issue the April 18 Letter immediately prior to releasing the redacted version of the *Report* to the public "also causes the Court concern."[216] This is because Barr's representations made during his April 18, 2019 press conference and letter cannot be reconciled with the *Report*'s findings.[217] This caused Judge Walton to "seriously question whether Attorney General Barr made a calculated attempt to influence public discourse about the *Report* "in favor of President Trump despite certain findings in the redacted version of the *Report* to the contrary."[218]

Judge Walton is undoubtedly correct. Barr's dishonest March 24 Letter ended up having a dispositive effect because by the time the fully redacted *Report* was released nearly a full month later, the political culture had already been misled into believing that Mueller chose not to make a prosecutorial recommendation based on a lack of evidence. This explains Mueller's March 27 Letter to Barr disputing characterization of the Special Counsel's report as failing "to capture the context, nature and substance" of the Russia investigation.[219] Mueller's letter set forth that Barr's summary of the *Report* improperly framed the *Report*'s findings which created "public confusion about critical aspects of the results of our investigation" that "threaten[ed] to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome

214. *Id.* at 17.
215. *Elec. Privacy Info.*, F. Supp.3d at 17–18.
216. *Id.* at 18.
217. *Id.* at 19.
218. *Id*.
219. Breslow, *supra* note 185.

of the investigations."[220] To protect against this, Mueller recommended that the *Report*'s executive summaries be immediately made public because such disclosure would "alleviate the misunderstandings that have arisen and would answer congressional and public questions about the nature and outcome of our investigation," and would, per Barr's letter to Congress, "be in the public interest."[221] Barr, however, failed to act on this request and instead allowed his letter's misleading characterization of the *Report*'s findings to adumbrate the President's claim of exoneration.

An April 3, 2019 New York Times article set forth that members of the Special Counsel's team were concerned that Barr's incorrect first narrative of the Special Counsel's findings "will have hardened" Americans' views "before the investigation's conclusions become public."[222] Indeed, President Trump, no less, claimed "complete and total exoneration" based on the Barr letter and went so far as to call on "the Justice Department and his allies on Capitol Hill to investigate and hold accountable those responsible for opening the inquiry."[223]

Because the Barr letter was so misleading and Mueller and his team were bound by Justice Department confidentiality, Barr was able to solidify his incorrect claim of no obstruction by the President and undermine the political impact of the redacted *Report* when it was eventually made public.[224] As U.S. Senator Chris Coons put it to Barr, "A critical three weeks passed between when you delivered [the March 24 Letter] with the focus on the principal conclusions and when we ultimately got the redacted report . . . My concern is that gave President Trump and his folks more than three weeks of an open field to say, 'I was completely exonerated.'"[225]

Barr effectively defanged a damning *Report* that reads like a criminal indictment, or under these circumstances, an impeachment referral to Congress, by misleading Congress and the public as to the *Report*'s conclusions and delaying the *Report*'s public release to mute its political effect.[226] This is because Congress, the press, and the public accepted the March 24

220. *Id*.
221. *Id*.
222. Nicholas Fandos et al., *Some on Mueller Team Say Report Was More Damaging than Barr Revealed*, N.Y. TIMES, (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/politics/william-barr-mueller-report.html.
223. *Id.*
224. David A. Graham, *Barr Misled the Public and it Worked,* THE ATLANTIC (May 1, 2019), https://www.theatlantic.com/ideas/archive/2019/05/barr-misled-the-publicand-it-worked/588463/.
225. *Id*.
226. *Id.*

Letter as an authoritative synopsis of the *Report*'s conclusions.[227] To illustrate, upon reviewing the March 24 Letter, House Speaker Pelosi said "I'm not for impeachment . . . Unless there is something so compelling and overwhelming and bipartisan, I don't think we should go down that path, because it divides the country."[228] Highly regarded liberal media personalities accepted Barr's characterization of the *Report*.[229] National Public Radio's Domenico Montanaro wrote:

> There's nothing in [the *Report*], according to the Barr letter, that meets those thresholds. If there was "something so compelling and overwhelming," Barr would almost certainly have had to have written about it. At best, Democrats will pull at the obstruction string, hoping for evidence in a fuller version of [the *Report*] or underlying documents that help make that case.[230]

Montanaro went further to add that the March 24 Letter gave momentum to the President and his supporters' claim of "no collusion" with Russia and enabled the President to characterize the Russia Investigation as "an illegal takedown that failed" and on Twitter, a "total EXONERATION."[231]

Republicans in Congress did not equivocate in their support for Trump. An early Republican critic of the President, Senator Lindsey Graham, after reviewing the Barr letter, tweeted on the day of the letter's release that it was a "[G]ood day for the rule of law, Great day for President Trump and his team, No collusion or obstruction, The Cloud hanging over President Trump has been removed by this report."[232] Two things are manifested from Senator Graham's tweet. First, he reads the Barr letter as a vindication of the President when even the letter clearly stated that the Special Counsel refused to exonerate the President of obstruction. Second, Graham did not distinguish the March 24 Letter from the *Report* that, at the time, remained unavailable.[233] It evidences that Senator Graham, a very powerful and highly influential member of the U.S. Senate, was effectively misled by the March 24 Letter into publicly adopting an exoneration narrative. This, in turn,

227. Domenico Montanaro, *Impeachment Just Got Less Likely and 6 Other Takeaways from the Barr Letter,* NPR (Mar. 25, 2019), https://www.npr.org/2019/03/25/706432776/impeachment-just-got-less-likely-and-6-other-takeaways-from-the-barr-letter.

228. *Id*.

229. *Id.*

230. Montanaro, *supra* note 227.

231. *Id.*

232. *Id.*

233. *Id.*

dispositively prejudiced his view of the full *Report* when it was eventually released. Senator Graham's tweets are paradigmatic with respect to the Republican Congressional caucus. Subsequent calls for the President's impeachment based on the *Report* were thereafter made solely by the most partisan Democrats and did not include either Speaker Pelosi or members of her leadership team.[234]

Barr facilitated the former President and his supporters' ability to characterize the *Report* as an exoneration and the Russia Investigation itself as a partisan "witch hunt."[235] Problematically, it furthered the problem of presidential impunity by emboldening the President's reckless instincts by furthering a narrative that the President has been unfairly investigated by his "deep state" and partisan opponents.[236] The Reverend Franklin Graham called the President's impeachment "an unjust inquisition"[237] and suggested it was the work of a "demonic power."[238] Liberty University President Jerry Falwell, Jr. argued that Trump's term of office should be extended by two years based on the "failed coup" against him.[239] Others, including the entirety of the Republican House caucus and nearly the entire Republican Senate caucus, have fallen into line fearing for their own political survival.[240]

The March 24 Letter not only prevented the *Report* from eliciting a timely impeachment but facilitated presidential impunity and subsequent abuses of power by enabling the President and his supporters to

234. Stephen Collinson, *Pelosi Resists Calls for Impeachment after Mueller Refuses to Exonerate Trump,* CNN (May 30, 2019), https://www.cnn.com/2019/05/30/politics/donald-trump-robert-mueller-nancy-pelosi-impeachment/index.html.

235. Olivia Paschal and Madeleine Carlisle, *14 Must-Read Moments from the Mueller Report,* THE ATLANTIC (Apr. 18, 2019), https://www.theatlantic.com/politics/archive/2019/04/mueller-report-release-barr-trump/587176/.

236. *See* David Faris, *The Impeachment Hearings Have Demolished Trump's Deep State Defense,* THE WEEK (Nov. 20, 2019), https://theweek.com/articles/879457/impeachment-hearings-have-demolished-trumps-deep-state-defense.

237. *Benjamin Fearnow, Evangelist Franklin Graham Urges Prayers for Donald Trump by Promoting T-Shirt,* NEWSWEEK (Nov. 2, 2019), https://www.newsweek.com/pray-45-donald-trump-t-shirt-franklin-graham-advertisement-christians-prayer-abortion-1469377.

238. Peter Wehner, *Are Trump's Critics Demonically Possessed?*, THE ATLANTIC (Nov. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/11/to-trumps-evangelicals-everyone-else-is-a-sinner/602569/.

239. Owen Daugherty, *Trump Retweets Jerry Falwell Jr. Suggesting His Term Should Be Extended by Two Years*, THE HILL (May 5, 2019), https://thehill.com/homenews/administration/442222-trump-retweets-jerry-falwell-jr-suggesting-his-term-should-be-extended.

240. *See* Sherrod Brown, *In Private Republicans Admit They Acquitted Trump out of Fear,* N.Y. TIMES (Feb. 5, 2020); https://www.nytimes.com/2020/02/05/opinion/trump-senate-acquittal-impeachment.html (notwithstanding clear proof of abuse of power and obstruction of Congress, none of the 197 Republicans in the House of Representatives voted to impeach the President and fifty-two of fifty-three Senate Republicans voted to acquit the President after having voted not to take witness testimony regarding his alleged abuse of power).

mischaracterize the Russia Investigation as a "witch hunt" and incorrectly claim the *Report* completely exonerated the President of any wrongdoing. It also, tragically, furthered presidential impunity by facilitating the former President's narrative that his political opponents, rather than legitimately being opposed to presidential abuse of power, were merely loath to accept his legitimacy in office and obsessed with his removal. This narrative largely explains why the President's impeachment in the Ukraine matter did not gain political traction with Republicans in either the House or the Senate, e.g. all 197 Republicans in the House voted against impeaching the President and fifty-two out of fifty-three Senate Republicans vote to acquit after refusing to call any witnesses into Presidential abuse of power.[241] It also explains why many of the President's supporters, including the majority of Republican voters nationwide, sided with Trump when he incorrectly and dishonestly claimed the 2020 presidential election was stolen from him.[242]

X. Back to the Special Counsel Regulations

All of this was tragically facilitated by a defect in the Special Counsel Regulations that was neither seen nor anticipated when implemented without notice and comment in 1999, namely, that a sitting Attorney General would use the text of the Regulations to issue an incorrect report summary to effectively cover-up detailed evidence of presidential abuse of power and obstruction of justice. The DOJ's failure to subject the Special Counsel Regulations to notice and comment resulted in the final Regulations being premised on the supposition that the Attorney General would be a relatively nonpartisan such as Elliott Richardson or Janet Reno. This was a naïve supposition that overlooked the partisan attorneys general of the past and failed to anticipate the political hyperpolarization of today. The concern about an improper political manipulation of the Special Counsel Regulations would have been evidenced were they to have been subjected to notice and comment under APA 553 because that is what notice-and-comment is designed to do. Submission of the Regulations for public comment would have brought forth public commentary from all components of civil society and ferreted out the defect while the Regulations were tentative such that their concerns could

241. Senator Susan Collins broke ranks and was the first to republican to announce support to call witnesses. Paul LeBlanc, *Susan Collins becomes first Republican Senator to Say Yes to Witnesses in Impeachment Trial*, CNN (Jan. 30, 2020, Updated 11:45PM), https://www.cnn.com/2020/01/30/politics/susan-collins-impeachment-witnesses/index.html.

242. Jay Zilinsky et al., *Which Republicans are Most Likely to Think the Election was Stolen? Those Who Dislike Democrats and Don't Mind White Nationalists,* Washington Post (Jan. 19, 2021), https://www.washingtonpost.com/politics/2021/01/19/which-republicans-think-election-was-stolen-those-who-hate-democrats-dont-mind-white-nationalists/.

have been addressed in the final Regulations. In the end, the failure to subject the Special Counsel Regulations to notice-and-comment has resulted in a Special Counsel paradigm that not only fails to protect against presidential abuse of power, but actually facilitates abuse of power and presidential impunity in office by enabling a partisan attorney general to mischaracterize a special counsel report while keeping it confidential consistent with the Special Counsel Regulations.

Now that President Trump has departed from office, the Special Counsel Regulations should be submitted for notice and comment feedback by legal experts and the broader public. At a minimum, the comments will recommend that the Regulations should no longer allow an attorney general to issue a Special Counsel report summary without disclosing the entire redacted document to Congress and the public. The comments may also recommend allowing the Special Counsel to speak to the media and testify before Congress during the Special Counsel's investigation to protect the investigation's integrity. Recognizing the inordinately high threshold needed in the Senate to convict an impeached President, the current framework to ensure against presidential abuses of power is not working. I, therefore, recommend this simple improvement: subjecting the Special Counsel Regulations to notice-and-comment under the Administrative Procedure Act.

Conclusion

Special Counsel Mueller did an outstanding job at arriving at the truth with respect to Russian election interference in the 2016 presidential election. However, based on his limited brief and his concern to maintain the proper separation of powers, the *Report* abjured a determination as to whether the former President committed crimes when he, on several occasions, sought to scupper the investigation. This decision to abjure a finding of criminality gave former Attorney General Barr the opportunity to mislead Congress and the public as to the *Report*'s conclusions, and this month-long head start was determinative. Problematically, the lack of political response to the *Report*'s findings emboldened the President's recklessness and furthered his instinctive authoritarianism and contempt for the rule of law. The paradigmatic explanations for this problem of presidential impunity include the hyper-partisanship that characterizes today's Washington and the broader political culture, as well as profit-driven partisan media that furthers the nation's partisan divide. These explanations, though correct, are not sufficient.

Presidential impunity in this administration is also attributable to infirmities in the DOJ Special Counsel Regulations that might have been ferreted out if they were submitted for notice and comment feedback when first implemented by former Attorney General Reno in 1999. For reasons of political expediency, they have never since been revisited. This must change. Special Counsel Regulations which require Special Counsel to submit their reports confidentially to the Attorney General, while the Attorney General can, in turn, submit unverifiable synopses of report conclusions to Congress, leave too much room for abuse—especially in today's political climate. This is what undermined the *Report*'s effectiveness and furthered the narrative of an illegitimate, systemic and partisan-driven "witch hunt" against the President.

I recommend submitting the Special Counsel Regulations for notice and comment review under APA Section 553 to solicit feedback from experts and the public as to how the Special Counsel Regulations can be improved consistent with the President's powers under Article II of the U.S. Constitution. At a minimum, I would expect that the received public comment will recommend future Attorneys General be disallowed from disclosing synopses or summaries of Special Counsel reports without simultaneously disclosing the entire redacted document. If this requirement had been in place at the time when the *Report* was submitted to former Attorney General Barr, President Trump would either have been removed from office, or, chastened by near conviction in the Senate after impeachment in the House; the country would not be facing the current dystopia whereby Trump, who was impeached and tried twice, who sought to undermine the rule of law, who abused his powers of office to blackmail a friendly foreign government and who even attempt to illegally remain in power by undermining the peaceful transition of power, remains, by far, the most popular Republican politician in the country.