

**The Mueller Report: More Questions Than Answers
A Recipe for Foreign Interference in the 2020 Presidential Election?**

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Abstract:

This paper considers three major points of the Mueller Report, namely: Was the entire matter of Russian interference in the 2016 Presidential election a “hoax”? Did the Trump Campaign conspire with, coordinate with, or collude with Russia? And, did the President obstruct justice? The paper also includes our conclusions and commentary relating to Special Counsel Mueller’s decision-making and choices, many of which we argue were flawed, leaving more questions than answers for the American people.

KEY WORDS: Mueller Report; Collusion; Conspiracy; Obstruction of Justice; Campaign Finance Law; Separation of Powers.

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1. Introduction

On May 17, 2017, Deputy Attorney General Rod Rosenstein, who was then serving as Acting Attorney General for the Russian investigation following the voluntary recusal of Attorney General Jeff Sessions, appointed Robert Mueller, former Director of the Federal Bureau of Investigation (FBI), as Special Counsel to "investigate Russian interference with the 2016 presidential election and related matters" (Green, 2019).

Kotkin (2019, p. 62) described Mueller as follows: "He graduated in 1966 and soon thereafter volunteered for and was accepted into the Marine Corps. He won a Bronze Star for heroism in the Vietnam War and later attended law school at the University of Virginia. He has since spent nearly a half century in either private legal practice or law enforcement, including 12 years as director of the FBI."

His description of Donald Trump was far less flattering, stating that "Trump had "dogged the Viet Nam War, reportedly by asking a podiatrist to dishonestly attest to the presence of bone spurs in Trump's heel.... He tried his hand at running an airline and a get-rich-quick university before finally finding his true calling: playing a fantasy version of himself on a reality television show."

The mandate of the Special Counsel included investigating:

- "(i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and
- (ii) any matters that arose or may arise directly from the investigation; and
- (iii) any other matters within the scope of 28 C.F.R. Section 600.4(a)."

[28 C.F.R. Section 600.4(a) authorizes the Special Counsel to investigate and prosecute "federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses."]

Special Counsel issued his report on March 27, 2019. It appears that there are three main points of contention relating to the Mueller Report. Was the entire matter of Russian

interference a hoax, as maintained by the President? Did the Trump Campaign conspire with, coordinate with, or collude with Russia? Did the President obstruct justice? Part I of the paper deals with the first two questions; Part II will deal with the third.

It is very important that readers understand the issues clearly, the President's responses and actions, and the underlying legal principles that guided the determination by the Special Counsel whether President Trump was guilty of any crime in connection with the 2016 Presidential election and its aftermath.

Throughout this paper, we will refer to the Report issued by the Special Counsel, Robert Mueller, as the Mueller Report or simply as "The Report." The Office of the Special Counsel will be referred to either as "The Special Counsel" or "The Office." In addition, this paper relies primarily on the verbatim text of the Mueller Report (unless otherwise noted) for accuracy and objectivity, adding case and legal analysis where needed. Only in the conclusion do we offer our commentary relating to Special Counsel Mueller's decision-making process or choices, many of which we would argue were flawed, leaving more questions than answers for the American people.

Part I – Russian Interference or Hoax?

2. The Hoax Argument

From the outset, President Trump has maintained that the "Russian thing was a hoax"—made up by his opponents to discredit him and call into question his 2016 electoral victory. The Mueller Report, however, began with the following direct statement: "*The Russian government interfered in the 2016 presidential election in sweeping and systematic fashion*" (italics added).

The Report identified that Russia interfered in the 2016 Presidential election principally through two operations. First, a Russian entity carried out a *social media campaign* that favored Presidential candidate Donald J. Trump and disparaged presidential candidate Hillary Clinton.

Denton (2019, p. 184) reported:

“Agency hackers first created fake Facebook profiles under seemingly American names and identities. Next, Agency hackers used these profiles to purchase advertisements from Facebook, and designed inflammatory advertisements directed at hot-button political issues and the candidates themselves. Finally, using Facebook’s Core Audience and Custom Audience tools exactly as they are supposed to be used. Agency hackers directed these advertisements to target susceptible American voters by implementing specific demographic information into Facebook’s advertising tools. Algorithms by Facebook then used this demographic information to distribute the advertisements to the Agency’s target audience.”

Second, “a Russian intelligence service conducted *computer-intrusion operations* [hacking] against entities, employees, and volunteers working on the Clinton campaign and then released stolen documents.” to Secretary Clinton’s disadvantage.

3. A Short Summary

Part I of the Report dealing with Russian interference may be briefly summarized as follows:

1. The Office of the Special Counsel determined that Russia's actions violated U.S. criminal law. Sixteen individuals and entities were charged with participating in a "conspiracy to defraud the United States by undermining through deceptive acts the work of federal agencies charged with regulating foreign influence in U.S. elections, as well as related counts of identity theft" (see *United States v. Internet Research Agency*, 2018). In addition, in *United States v. Netysksho* (2018), twelve individuals were charged with conspiracy to violate, among other federal laws, the statute dealing with federal computer-intrusion (18 U.S.C. Section 2510).

2. While the investigation by the Special Counsel identified numerous "links" between individuals with ties to the Russian government and individuals associated with the Trump campaign, described in detail below, the evidence was judged to be insufficient to support the filing of criminal charges. Specifically, the Special Counsel concluded that the evidence was not sufficient "to charge any Campaign official as an unregistered agent of the Russian government or other Russian principal." The Special Counsel also determined that evidence relating to the June 9, 2016 meeting at Trump Tower, attended by Donald Trump, Jr. (hereinafter Trump Jr.), Jared Kushner, and Paul Manafort, and the later Wikileaks releases of hacked materials was not sufficient to charge a specific campaign-finance violation. Finally, the Special Counsel found that "the evidence was not sufficient to charge that any member of the Trump campaign conspired with representatives of the Russian government to interfere in the 2016 election."

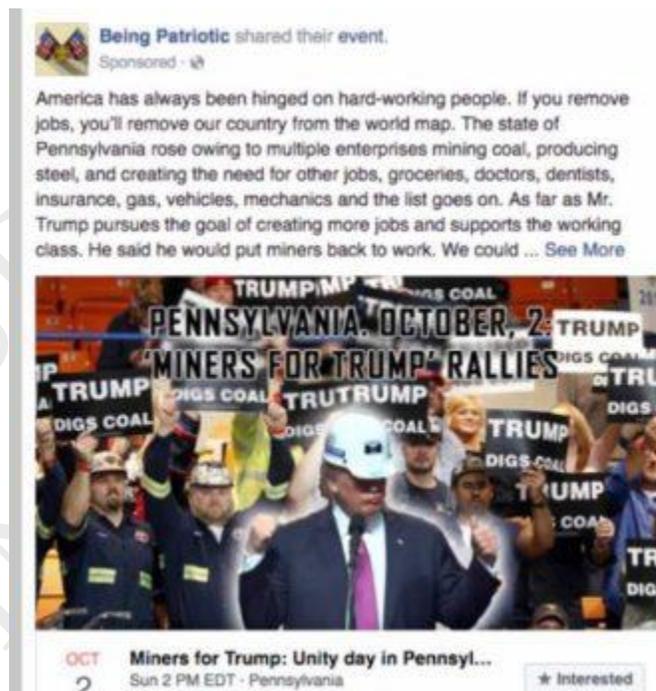
3. The investigation did determine that severe individuals affiliated with the Trump campaign had lied to the Office of the Special Counsel and to the Congress about their "interactions with Russian-affiliated individuals and related matters" and that these falsehoods had "materially impaired the investigation of Russian interference."

Specifically, former National Security Advisor Michael Flynn pleaded guilty to lying about interactions with Russian Ambassador Kisylak during the transition period. George Papadopoulos, a foreign policy advisor during the campaign, pleaded guilty to lying to investigators relating to interactions with Joseph Migsud, a London-based Professor, who had told Papadopoulos that he had "dirt" on candidate Clinton contained in thousands of captured emails. Michael Cohen, Trump Organization attorney, and long time associate of President Trump, pleaded guilty to making false statements to Congress about the Trump Tower Moscow project. And, in February 2019, the Federal District Court for the District of Columbia found that Republican Convention Chair Paul Manafort had lied to

the Office of Special Counsel and to the grand jury relating to his personal interactions and communications with Konstantin Kilimnik, a Russian army veteran and manager of Manafort's consulting business in Ukraine, about sharing Trump campaign polling data and a possible peace plan for Ukraine.

3.1 Actions of the Russian Government

The Report found that the Internet Research Agency (IRA) carried on a social media campaign that was designed to "provoke and amplify political and social discord in the United States" (see generally Kovarik & Jackson, 2019). The IRA is an organization based in St. Petersburg, Russia, that received funding from a Russian oligarch, Yevgeniy Prigozhin, widely reported as having close ties to Russian President Vladimir Putin. The IRA employed social media accounts, engaged in "information warfare," posed as various pro-Trump "grassroots entities," purchased political advertisements, and staged political rallies inside the United States. They created fictitious support groups (Denton, 2019)—one of the most prominent was "Miners for Trump"—and organized media events touting the Trump candidacy.



Second, “a Russian intelligence service conducted computer-intrusion [hacking] operations against entities, employees, and volunteers working on the Clinton campaign and then released stolen documents.” Activities were undertaken by the Main Intelligence Directorate of the Russian Army or GRU (Gioe, Goodman, & Frey, 2019). These activities commenced as early as March of 2016, when the GRU began hacking the email accounts of former Secretary Clinton, and the computer of John Podesta, Clinton's campaign manager. In April, the GRU hacked into the computer network of the Democratic Congressional Campaign Committee (DCCC) and the Democratic National Committee (DNC). Around mid-June, the GRU began disseminating stolen materials through two fictitious online personas—*DCLeaks* and *Gucifer 2.0*. Later, the GRU released additional materials through the organization *WikiLeaks*.

Wikileaks first release of emails came in July 2016. At the same time, candidate Donald Trump announced that he hoped that Russia would recover emails that were described as “missing” from a private email server maintained by Mrs. Clinton when she was serving as Secretary of State. Said candidate Trump: “Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press.” Trump later said he was not serious and was speaking “sarcastically.” Wikileaks began the release of Podesta's stolen emails on October 7, 2016, less than one hour after the media had released video [The Billy Bush interview] that could have been very damaging—and perhaps fatal—to the Trump campaign.

Contrary to the assertion that the statement relating to Russia was made sarcastically, the Special Counsel outlined numerous contacts from the Trump campaign relating to Wikileaks, including comments made by former campaign chairman Rick Gates, Michael Cohen, Convention Manager Paul Manafort, and actions undertaken by “a technical campaign outsider” Jerome Corsi, a noted conspiracy theorist and anti-Barack Obama “birther.”

4. Collusion: Prosecution or Declination? That Is the Question.

The Report outlined the nature and extent of Russian contacts with the Trump campaign, including:

2015: Some of the earliest interactions were made in connection with the Trump Organization's real estate project in Russia known as "Trump Tower Moscow." The Trump Organization in fact continued to pursue the project through *at least* June 2016—although candidate Trump falsely stated on numerous occasions that he had "no business interests with Russia."

Spring 2016: George Papadopoulos, who served as a foreign policy adviser to the campaign, made an early contact with Joseph Misfud, a "London-based professor who had connections to Russia," who informed Papadopoulos that the Russian government had "dirt" on Hillary Clinton in the form of thousands of stolen emails. Both Papadopoulos and Manafort tried unsuccessfully to arrange for a meeting between the Russian government and the campaign.

Summer 2016: On June 8, 2016, a Russian lawyer met with Donald Trump, Jr. (hereinafter Trump Jr.), Jared Kushner (Trump's son-in-law and husband of Ivanka Trump), and Paul Manafort at the Trump Tower in New York City (*The Trump Tower Meeting*) in order to ostensibly deliver what had been described as "official documents and information that would incriminate Hillary." Mueller wrote that the materials were offered to Trump Jr. as "part of Russia and its government's support of Mr. Trump" and the campaign anticipated receiving the information at the Trump Tower meeting. In fact, the meeting produced no such information, despite expectations to the contrary.

Fall 2016: October 7 saw the release of a video of Donald Trump talking about women in graphic and disparaging terms. As was noted earlier, less than one hour later, Wikileaks made a second release of thousands of emails that the GRU had stolen in late March.

As the investigation determined, it should be noted that contrary to statements later made by President Trump that the Obama administration had done virtually nothing with regard to these developments, the U.S. Department of Homeland Security and the Office of the Director of National Intelligence issued a joint statement to the public that "the Russian Government directed the recent compromise of e-mails from US persons and institutions including from US political organizations" and that these "thefts" and "disclosures" were "intended to interfere with the US election process."

Post-Election: Immediately after the 2016 election victory of Donald Trump, "Russian government officials and prominent Russian businessmen began trying to make inroads into the new administration." These included attempts by Kirill Dmitriev, chief executive officer of Russia's sovereign wealth fund, to make contact with senior Trump advisor Steve Bannon and introductions to friends of Jared Kushner.

On December 29, President Obama imposed sanctions on Russia for its interference in the election. Incoming Trump administration National Security Advisor Michael Flynn called Russian Ambassador Sergey Kislyak and "asked Russia not to escalate the situation in response to the sanctions." On December 30, President Putin announced that Russia would not take retaliatory measures. This announcement was met by a Trump tweet: "Great move on delay..."

2017 (Pre-Inauguration): On January 6, 2017, President-elect Trump received a joint assessment by the CIA, the FBI, and the National Security Agency that concluded "with great confidence" that Russia had indeed interfered in the 2016 election through a variety of means to assist the Trump candidacy and to harm the candidacy of Secretary Clinton.

Why, then, did Mueller not find *collusion* between Russia and the Trump campaign?

4.1 The Trump Tower Meeting: Crossing the Rubicon or Innocent Encounter?

The Special Counsel had to make a series of critical decisions whether to charge individuals or entities with a federal crime. Perhaps the most important public focus has been the June 9 Trump Tower meeting in New York City. The Office would evaluate "whether the conduct of the individuals considered for prosecution constituted a federal offense ["implicating the federal election law ban on contributions and donations by foreign nationals"] and whether admissible evidence would probably be sufficient to obtain a conviction for such an offense."

At the outset, the Office made it clear that it had evaluated potential criminal conduct not under the "rubric of "collusion," "but through the lens of conspiracy law." The Report noted that "collusion is not a specific offense or theory of liability found in the United States Code, nor is it a term of art in federal penal law." (Berke, James, & Bookbinder, 2018).

4.2 What Exactly is a Campaign Violation Relating to a Foreign National?

Did the June 9, 2016 meeting at the Trump Tower constitute prosecutable violations of campaign finance laws?

Campaign or federal election law in the United States (Bauer & Kafka, 1983; Gardner & Guy-Uriel, 2017) broadly prohibits foreign nationals from "making

contributions, donations, expenditures, or other disbursements in connection with federal, state, or local elections,” and prohibits anyone from “soliciting, accepting, or receiving such contributions or donations... expressly advocating the election or defeat of a clearly identified candidate made independently of a campaign.” Campaign law also forbids disbursement for an “electioneering communication” or broadcast communication that “refers to a clearly identified candidate for Federal office.” The term “contribution” includes “any gift, subscription, loan, advance, or deposit of money or *anything of value* made by any person for the purpose of influencing any election for Federal office (52 U.S.C. Section 30101(8)(A)(i)).

However, the statute specifically excludes news stories and non-partisan “get-out-the-vote” activities. The definition of “foreign nations” includes foreign governments and political parties, individuals outside of the U.S. who are not legal permanent residents, and certain non-U.S. entities located outside of the United States.

A “knowing and willful” violation involving an “aggregate” of \$25,000 or more in a calendar year is a felony (*United States v. Danielczyk*, 2013).

4.3 What Exactly was the Evidence Relating to the June 9 Meeting?

On June 3, 2016 Robert Goldstone, “a British publicist, music manager, and former tabloid journalist,” had e-mailed Donald Trump Jr. to pass along an “offer” from Russia’s Crown Prosecutor to the Trump Campaign of “official documents and information that would incriminate Hillary and her dealings with Russia and would be very useful to [Trump Jr.’s] father”;

- Trump Jr. responded: “If it’s what you say I love especially later in the summer”;
- Trump Jr. and Emin Agalarov (a Russian pop star and real estate developer) had a series of follow-up discussions and within days,

scheduled the now famous meeting attended by Trump Jr., Manafort, and Kushner.

4.4 What did the Special Counsel Conclude? Applying the Law to the Facts.

Interestingly, the Special Counsel conceded that there were authorities that supported the view that “candidate related opposition research given to a campaign for the purpose of influencing an election could constitute a contribution to which a foreign-source ban could apply.” The rationale for such a position is quite direct: “A foreign entity that engaged in such research and provided resulting information to a campaign could exert a greater effect on an election, and a greater tendency to ingratiate the donor to the candidate, than a gift of money or tangible things of value.” However, the Special Counsel noted that “no judicial decision has treated the voluntary provision of uncompensated opposition research or similar information as a thing of value that could amount to a contribution under campaign finance law.” Additionally, the Special Counsel recognized unique Constitutional questions relating to gathering of traditional “opposition research” (Serazio, 2018) that might be protected by the First Amendment.

What did the evidence adduce regarding the extent of criminal liability, if any, on the part of individuals associated with the Trump Campaign? The investigation uncovered “extensive evidence” that Paul Manafort and Richard Gates, the deputy campaign manager, had engaged in pre-campaign work for the government of Ukraine that violated the Foreign Agent Registration Act or FARA (18 U.S.C. Section 951(d)) (Wright, 2018).

The WillmerHale law firm (2019) notes that the “FARA requires “agents” of “foreign principals” to register with DOJ and to file periodic reports regarding their work, unless their activities fit within one of FARA’s important statutory and regulatory exemptions.” They note that FARA “broadly defines “foreign principal” to encompass not only foreign governments, officials, and political parties, but also foreign individuals

and business enterprises—specifically, any “partnership, association, corporation, organization, or other combination of persons organized under the laws or having its principal place of business in a foreign country” (22 U.S.C. § 611(b)(3)).

FARA also defines the term “agent of a foreign principal” to “encompass those who engage in a range of activities directed at influencing U.S. policy or public opinion on behalf of foreign clients, as well as those who otherwise seek to advance foreign political interests in the United States. Specifically, the term applies to any person who acts “at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal.”

A criminal act is completed when “knowingly acting in the United States as an unregistered foreign-government agent.” Unlike other criminal statutes, FARA does not require “willfulness, and “knowledge of the notification requirement is not an element of the offense” (see *United States v. Campo*, 2008; *United States v. Duran*, 2010).

The statute outlines four separate *triggering activities* by an agent who:

1. Engages in “political activities for or in the interests of [the] foreign principal” which includes attempts to influence federal officials or the public;
2. Acts as “public relations counsel publicity agent, information-service employee or political consultant for or in the interests of such foreign principal”;
3. “Solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal”; or
4. “Represents the interests of such foreign principal before any federal agency or official.”

Both Manafort and Gates were charged with and eventually admitted to violations of the FARA when they both pleaded guilty in prosecutions in the District of Columbia

(*United States v. Richard W. Gates III* (Plea Agreement), 2018; *United States v. Paul J. Manafort, Jr.* (Plea Agreement), 2018). In addition, the investigation had adduced evidence of FARA violations by Michael Flynn in connection with Turkey, but not with Russia (*United States v. Michael Flynn*, 2017).

However, the Special Counsel stated that the investigation did not “yield evidence sufficient to sustain any charge that any individual affiliated with the Trump Campaign acted as an agent of a foreign principal within the meaning of FARA, or ... subject to the direction or control of the government of Russia, or any official thereof.” In particular, the Office did not find evidence likely to prove beyond a reasonable doubt that campaign officials such as Paul Manafort, George Papadopoulos, and Carter Page [National Security adviser to the Trump Campaign] had “acted as agents of the Russian government— or at its direction, control, or request— during the relevant time period.”

The Special Counsel conceded that the communications arranging for the meeting and the attendance by “high-level” Campaign representatives supported an inference that the Campaign had anticipated receiving derogatory documents and information from official Russian sources that could assist Trump’s electoral prospects; and that documentary evidence in the form of email chains supports the inference that Kushner and Manafort were aware of the purpose and attended the June 9 meeting in anticipation of the receipt of helpful information to the Campaign from Russian sources.

However, the Office did not establish that any of the contacts amounted to an *agreement* to commit any substantive violation of federal criminal law “to interfere with or obstruct a lawful function of a government agency during the campaign or transition period.” As to this issue of *defrauding* under Section 371 of the United States Code, the Office noted that this section “criminalizes participating in an agreement to obstruct a lawful function of the U.S. government or its agencies through deceitful or dishonest means” (see *Hammerschmidt v. United States*, 1924; *United States v. Concord Management and Consulting LLC*, 2018). The investigation also did not identify evidence that “any

Campaign official or associate knowingly and intentionally participated in the conspiracy to defraud.”

4.5.1 Procedural Issues

The Office determined that it had not obtained admissible evidence “likely to sustain a conviction” for two reasons:

First, the Office concluded that the evidence it had received was unlikely to meet the government’s burden of proof beyond a reasonable doubt that Trump Jr., Manafort, and Kushner had acted “willfully,” with “general knowledge of the illegality of their conduct”; and

Second, the government would likely “encounter difficulty in proving beyond a reasonable doubt that the value of the promised information exceeded the threshold for a criminal violation.”

The Special Counsel had raised a *scienter* requirement; that is, could it obtain admissible evidence that the defendant had “general knowledge” that his or her conduct was unlawful beyond a reasonable doubt. In fact, the Special Counsel raised the analytical stakes: “This standard creates an elevated scienter element requiring at the very least, that application of the law to the facts in question be fairly clear. When there is substantial doubt concerning whether the law applies to the facts of a particular matter, the offender is more likely to have an intent defense” (Election Offenses, p. 123).

In fact, the Special Counsel was quite explicit:

“Although members of the IRA had contact with individuals affiliated with the Trump Campaign, the indictment did not charge any Trump Campaign officials or any other U.S. person with participating in the conspiracy. That is because the investigation did not identify evidence that any U.S. person who coordinated or communicated with the IRA knew that he or she was speaking with Russian nationals engaged in the criminal conspiracy. The

Office therefore determined that such persons did not have the *knowing or criminal purpose* required to charge them ninth conspiracy to defraud the United states or in the separate count alleging a wire (Lanuiti, 2019) and bank-fraud conspiracy (Nichols, 2019) involving the IRA and two Russian nationals” (italics added).

Thus, in applying the “knowing and willful” standard, the Special Counsel concluded that “in light of the government’s substantial burden of proof on issues of intent, and the difficulty of establishing the value of the offered information, criminal charges would not meet the Justice Manual standard that “the admissible evidence will not probably be sufficient to obtain and sustain a conviction’ (Justice Manual Section 9-27.220).

To this point, the Special Counsel stated that the government would unlikely be able to prove *beyond a reasonable doubt* that Trump Jr., Manafort, or Kushner had “general knowledge” that their conduct was unlawful or that they were “familiar with the foreign contribution band.”

Finally, the Special Counsel stated that it would be difficult to prove beyond a reasonable doubt that the value of the promised documents and other information exceeded either the \$2,000 threshold for the commission of a misdemeanor or the \$25,000 for a felony. The descriptions of the evidence offered by Goldstone were “quite general” and lacked the specificity under applicable law. Accordingly, “taking into account the high burden to establish a culpable mental state in a campaign-finance prosecution and the difficulty in establishing the requisite valuation, the Office decided not to pursue criminal campaign-finance charges against Trump Jr. or other campaign officials for the events of the June 9 meeting.”

Although the Special Counsel declined to bring charges against individuals in the Trump Campaign, it sought charges against two sets of Russian nationals “for their roles in perpetrating the active measures social-media campaign and computer-intrusion

operation." Charges against various individuals included violating U.S. criminal laws in order to interfere with U.S. elections and political processes; conspiracy to defraud the United States; conspiracy to commit wire fraud and bank fraud; and aggravated identity theft (e.g., Solove & Citron, 2018). At the same time, the Office concluded that it would bring charges against certain individuals (Flynn, Papadopoulos, Cohen, and Manafort) with "making fall statements or otherwise obstructing the investigation or parallel congressional investigations."

In sum, the Special Prosecutor found that considering the considerable burden attendant to proof of intent ("knowing" and "willful") and the difficulty of establishing the "value" of the available information, criminal charges would not be brought. The Independent Counsel noted that filing of criminal charges would not meet the Justice Department's standard that "the admissible evidence will probably be sufficient to obtain and sustain a conviction" (Justice Manual Section 9-27.220).

However, it is important to note that the Report did *not* state "there was no evidence" (e.g., Smith, 2019). To the contrary, there *was* "evidence," but the Report stated that "*the evidence was not sufficient to charge that any member of Trump campaign conspired with representatives of the Russian government to interfere with the 2016 election*" (italics added).

Part II

5. Obstruction of Justice: Limitations on Action

The order appointing the Special Counsel gave the Special Counsel jurisdiction to investigate whether President Trump had obstructed justice in connection with the investigation into Russian interference in the 2016 election and other related matters, including the investigation itself.

The Special Counsel began the discussion of this issue by describing the considerations that guided the obstruction-of-justice investigation (Lavin, Bell, Dunker, & McBride, 2019). Only by understanding these considerations—actually *limitations*—will it be possible to appreciate the conclusion reached by the Special Counsel not to charge the President with obstruction.

First, because the President of the United States ostensibly was the object of their inquiry, the Special Counsel determined that it would not make a “traditional prosecutorial judgment.” History and practice weighed heavily on this determination (Hansen, 2019). In 2000, the Office of Legal Counsel (OLC) had issued an opinion found in “A Sitting President’s Amenability to Indictment and Criminal Prosecution” (Moss, 24 Op. O.L.C., 2000, pp. 251-52 (OLC Opinion)) in which it found that “*the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions*” in violation of “*the constitutional separation of powers*” (Kriner & Schickler, 2018). The Special Counsel, as an attorney in the Department of Justice, and in recognition of statutory authority (28 U.S.C. Section 155), accepted the OLC’s conclusion for the purpose of exercising prosecutorial jurisdiction, essentially determining that the President was protected by an overarching principle of immunity. In addition, the Special Counsel stated that apart from this constitutional consideration, a “prosecutorial accusation against a sitting President would place burdens on the President’s capacity to govern and potentially preempt constitutional processes for addressing presidential misconduct”— implicitly recognizing the implications of Article 1, Section 3 of the United States Constitution relating to impeachment.

Second, while the OLC had concluded that a sitting President may not be prosecuted, the OLC opinion (Moss, 2000) nonetheless recognized that “*a criminal investigation during the President’s term is permissible.*” In fact, the OLC stated directly that “A grand jury could continue to gather evidence throughout the period of immunity”

(OLC Opinion, 2000, p. 257). The OLC opinion, however, recognized that “a President does not have immunity after he leaves office... . And if individuals other than the President committed an obstruction offense, they may be prosecuted at this time.”

Third, since the Special Counsel concluded that no charge could constitutionally be leveled against a sitting President, it determined that it would not adopt “an approach that could potentially result in a judgment that the President committed crimes.” The Special Counsel stated that “Fairness concerns counseled against potentially reaching that judgment [whether or not a person’s conduct “constitutes a federal offense] when no charges can be brought.” As a matter of policy:

“The ordinary means for an individual to respond to an accusation is through a speedy and public trial, with all the procedural protections that surround a criminal case. An individual who believes he was wrongly accused can use that process to seek to clear his name. In contrast, a prosecutor’s judgment that crimes were committed, but that no charges will be brought, affords no such adversarial opportunity for public name-clearing before an impartial adjudicator.”

This consideration has also been raised against the practice of naming unindicted co-conspirators in an indictment. The United States Court of Appeals for the Fifth Circuit, tracking the Justice Manual (Section 9-11.130), noted in *United States v. Briggs* (1975): “The courts have struck down with strong language efforts by grand juries to accuse persons of crimes while affording them no forum in which to vindicate themselves.”

5.1 Did the President Nevertheless Obstruct Justice?

The Special Counsel delineated in great detail the areas of the investigation that could involve a potential charge of obstruction of justice:

1. The campaign’s response to reports about Russian support for Trump;

2. Conduct involving FBI Director James Comey, including the President's termination of Director Comey;
3. The President's reaction to the continuing Russia investigation;
4. The appointment of a Special Counsel and efforts to remove him;
5. Efforts to curtail the Special Counsel's investigation;
6. Efforts to prevent public disclosure of evidence;
7. Further efforts to have Attorney General Sessions take control of the investigation after his initial recusal;
8. Efforts to have Don McGahn, White House Attorney, deny that the President had ordered him to have the Special Counsel removed;
9. Conduct toward Flynn, Manafort, and an "unnamed" individual;
10. Conduct involving Michael Cohen.

In deciding whether a particular act might rise to the level of obstruction of justice, three elements are common: (1) an obstructive act which "reaches all corrupt conduct capable of producing an effect that prevents justice from being administered, regardless of the means employed" (*United States v. Silverman*, 1984); (2) a nexus (connection) between the obstructive act and an official proceeding, where the individual has "knowledge that his actions are likely to affect the judicial proceedings" (*United States v. Aguilar*, 1995, p. 599); and, (3) a corrupt intent.

Acting "knowingly" requires proof that the individual was "conscious of wrongdoing" (*Arthur Andersen v. United States*, 2005, pp. 705-706). The issue of "corrupt intent" requires some further amplification.

In *United States v. Gordon* (2013, p. 1151), the Tenth Judicial Circuit stated that "to act corruptly means to act with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct the relevant proceedings." For example, in consideration of any charge of *witness tampering*, the United States Code (Section 1512(b)(1)(3)) makes it a crime to "knowingly use

intimidation or corruptly persuade another person or engage in misleading conduct towards another person” with the intent to “influence, delay, or prevent the testimony of any person in an official proceeding” or to “hinder, delay, or prevent communication to a law enforcement officer... of information relating to the commission or possible commission of a Federal offense.” To establish *corrupt persuasion*, it is sufficient that a defendant had asked a potential witness to lie to investigators in contemplation of a likely federal investigation into his conduct (*United States v. Edlind*, 2018). Interestingly, corrupt persuasion may be found “where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it” (*United States v. Rodolitz*, 1986), or where a person, with an improper motive urges a witness not to cooperate with law enforcement (*United States v. Shotts*, 1998).

5.2 What the Evidence Showed

The Report indicated that after the appointment of the Special Counsel, the Office had obtained evidence relating to potential acts of obstruction of justice:

... “The President’s January 27, 2017 dinner with former FBI Director James Comey in which the President reportedly asked for Comey’s “loyalty,” one day after the White House had been briefed by the Department of Justice on contacts between former National Security Advisor Michael Flynn and the Russian Ambassador;

... The President’s February 14, 2017 meeting with Comey in which the President reportedly asked Comey not to pursue an investigation of Flynn;

... The President’s private requests to Comey to make public the fact that the President was not the subject of an FBI investigation in order to lift what the President regarded as a “cloud on his presidency”;

... The President's outreach to the Director of National Intelligence and the Directors of the National Security Agency and the Central Intelligence Agency about the FBI's Russia investigation;

... The President's stated rationales for terminating Comey on May 9, 2017, including statements that could reasonably be understood as acknowledging that the FBI's Russia investigation was a factor in Comey's termination; and

... The President's statement about the June 9, 2016 Trump Tower meeting between Russians and senior Trump Campaign officials that said that the meeting was about adoption and the *Magnitsky Act* (see Appendix I) (Contini & Shin, 2017) and omitted the fact that the Russians had offered to provide the Trump Campaign with derogatory information about Hillary Clinton.

Taking into account the evidence it brought forth, and an analysis of both statutory and constitutional principles, the Special Counsel determined that there was a sufficient factual and legal basis to "further investigate potential obstruction of justice issues involving the President." What did the Special Counsel do? It requested that the White House provide it with *documentary evidence* in its possession on relevant issues; it sought and obtained the White House's concurrence in *conducting interviews* of White House personnel who were deemed to have relevant information; it *interviewed witness* who had "pertinent knowledge;" it *obtained evidence* on a voluntary basis "where possible;" and it used *legal process* where appropriate.

The Special Counsel also sought a voluntary interview with the President. "After more than a year of discussion, the President declined to be interviewed." The President agreed to answer written questions on "certain Russia-related topics." To no one's real surprise, his answers included such responses as: "I have no recollection" (11 times); "I do not recall" (10 times); "I do not recall being aware" (2 times); "I have no independent recollection" (2 times); "I am not aware" (1 time); "I do not remember" (7 times); "I have become aware" (5 times); and "I have no current recollection" (1 time).

5.3 Why did the Special Counsel Not Insist on Interviewing the President?

The Special Counsel made it clear that he had the “authority and legal justification to issue a grand jury subpoena to obtain the President’s testimony.” The decision *not* to subpoena the President was made, in part, because of the “substantial delay that such an investigative step would likely produce at a late stage in our investigation.” The Special Counsel also believed that they had “sufficient evidence to understand relevant events and to make certain assessments without the President’s testimony because of the “significant body of evidence we had already obtained of the President’s actions and his public and private statements....”

5.4 Final Determination Relating to Obstruction of Justice

It is certainly true that the evidence the Special Counsel had uncovered relating to the President’s actions and intent “presented difficult issues that would need to be resolved” if the President were indicted on obstruction charges. Because the Special Counsel had made the threshold determination not to consider the charges relating to obstruction of justice based on a “traditional prosecutorial judgment,” namely whether a prosecutor could secure a conviction on underlying charges based upon proof “beyond a reasonable doubt,” the Special Counsel refused to draw “ultimate conclusions” about the conduct of the President.

However, it did not end its commentary there. The Special Counsel made what can only be an extraordinary statement, seemingly in conflict with its earlier cautionary representation:

“At the same time, if we had confidence after a thorough investigation of the facts that the President did not commit obstruction of justice, we would so state. Based on the facts and applicable legal standards, we are unable to reach that judgment. *Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him*” (italics added).

6. Commentary

Having considered the determinations and arguments of the Special Counsel, we will now offer our own commentary. We consider several points in opposition to the conclusions of the Special Counsel:

- The defense of “dumb and dumber and another” as to intent and knowledge on the part of Trump Jr., Manafort, and Kushner:

Although the Special Counsel declined to find that the Trump Campaign had conspired with Russia, several questions still persist: When Trump Jr. was approached with possible “dirt” on Mrs. Clinton, instead of immediately rejecting the overture or reporting the contact to law enforcement (such as the FBI), Trump Jr. seemingly relished the idea. Instead of publicly disdaining Russian interference with the 2016 election, candidate Donald Trump invited, even sarcastically, their efforts. And, in the end, the Special Counsel found that the Trump campaign could not conspire with the Russians because individuals such as Trump Jr., Manafort, and Kushner were unaware that their actions would or might violate U.S. campaign law. Considering the experience of the participants—most especially Paul Manafort—is it reasonable to believe that at least one of these individuals would not have exhibited the requisite knowledge and intent to violate U.S. campaign law? Perhaps the best tactic for the Special Counsel would have been to seek an indictment and trial of the President and leave it up to a jury to decide questions of “knowledge” and “intent.”

- Reliance on an “extra-constitutional” statement of the OLC:

Mueller’s position was that he was bound by the memo of the OLC that a sitting President could not be charged criminally. Yet, there was no opinion from any court to that effect—just an internal Justice Department memo from nearly twenty years earlier which was designed to apply to a different set of facts and totally unrelated parties.

- Refusal to subpoena the President based on an artificial “time line” that did not exist:

Mueller declined to pursue a subpoena for the President, citing some imaginary "time" issue. The Special Counsel had no mandated ending date for his work. In fact, the Office had consistently resisted all calls to set a "date certain" for wrapping-up its work. Yet, in considering this critical issue, the lateness of the date in the investigation loomed as a major point in Mueller's failing to act to issue a subpoena for the President.

- Reluctance to test the President's refusal to sit for a deposition or answer question by issuing a subpoena or moving to hold the President in contempt of court for such failure:

Deposing the president or insisting on the President offering written responses to questions on the issue of obstruction would have clarified issues relating to the President's *knowledge* and *intent*. Yet, Mueller reused to seek a definitive answer on these issues.

- Refusal to push back against the President's "non responsive" responses:

Considering the President had answered incompletely *39 times* in his written responses should have triggered further action on the part of the Special Counsel to seek more definitive answers—not a retreat from efforts to compel the President to respond in a timely fashion.

- Refusal to force the President to assert Fifth Amendment rights in the face of the possibility that the public would consider this action as an admission of guilt:

If the President had been compelled to answer a grand jury subpoena, the President would have two choices: Agree to testify on the record and under oath and presumably tell the truth or assert his Fifth Amendment right against self incrimination (O'Neill, 2002). Actually, there was a third choice: Continue to lie about these issues and risk indictment on that basis. The consequences of asserting his Fifth Amendment rights might have proved catastrophic for the President in a political context, but it would have been his decision to make—not the special counsel. As Professor O'Neill (2002, p. 2551) noted: "It must be remembered that the Fifth Amendment was designed to protect people

from being convicted and punished by the state as a consequence of their own admission; it was not intended to save them from the penalties of being unpopular or scorned for their beliefs.”

- Undertaking actions that might have possibly forced the president to fire the special counsel and risk the implications of a “Saturday Night massacre” (Blake, 2018):

If matters had deteriorated to the point of a legal stalemate with the Special Counsel, the President could have made the decision to fire the Special Counsel, a right he had asserted on many occasions. Whether or not this action would have triggered a public outcry as great as what had followed the “Saturday Night Massacre” during Watergate is a matter of pure speculation.

But in each of these cases, it would have been the President—and not the Special Counsel—that made a decision.

So, what we do have is evidence that that a President of the United States and his campaign *at least* colluded and may have illegally conspired with a foreign power with overtly hostile designs towards the United States in order to win an election. The evidence may not have risen to the point of a crime, but the evidence was there in any case.

Secondly, it is apparent that the President obstructed justice—and that had he not been the President, an indictment surely would have followed.

In either case, the Mueller Report did provide many facts—and legal analysis—of what had transpired in the run-up to the 2016 Presidential Election and beyond, how the Trump campaign had willingly sought the assistance of Russia, and how the President had gone to the extreme to cover up that fact.

In our view, Special Counsel Mueller left the American people with more questions than answers; more uncertainty than certainty; and with a great chance that

foreign interference could—or more likely will—occur in connection with the 2020 election as well.

APPENDIX I

The Magnitsky Act, which was formally known as the “*Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*,” is a bipartisan bill passed by the U.S. Congress and signed into law by President Barack Obama in December 2012. The Act was intended to punish Russian officials responsible for the death of Russian tax accountant, Sergei Magnitsky, in a Moscow prison in 2009.

The Act applies globally and since 2016, it authorizes the U.S. government to sanction those who it sees as human rights offenders, freezing their assets, and ban them from entering the U.S. (generally Ruys, 2018).

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