

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515-6216

One Hundred Sixteenth Congress

April 22, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Over the past several days, you and many of your Democrat colleagues have been promoting a wildly inaccurate narrative about what Special Counsel Robert S. Mueller, III stated in his March 2019 report to the Attorney General on the Investigation Into Russian Interference In The 2016 Presidential Election (Report). You claim the Report states the Special Counsel wanted Congress to decide whether the President committed obstruction of justice. For example, last Friday on *Good Morning America* you stated:

The . . . special prosecutor, made very clear that he couldn't reach a determination on obstruction of justice . . . but that he laid it out . . . for Congress to do it.¹

You later stated on the same show, "The special prosecutor invited Congress to look into that."²

However, a plain reading of the Report does not at all indicate—let alone make "very clear," as you claim—the Special Counsel intended for Congress to decide whether President Trump obstructed justice. In fact, it is the exact opposite.

I trust by now you have thoroughly read the entire Report from the Special Counsel's 22-month investigation. As such, you would recognize the passages in question, on page 8 of Volume II, are a summary of a lengthier legal discussion on pages 168-180 of Volume II, at the very back of the entire Report. The passages are not, in fact, an invitation for Congress to pick up where the Report left off.

As you are certainly aware, the legislative branch writes the laws and the executive branch enforces them. This simple maxim from Civics 101 has become a casualty of false claims. Special Counsel Mueller asked Congress to decide whether President Donald Trump obstructed

¹ *Good Morning America*, April 19, 2019, available at <https://www.goodmorningamerica.com/news/video/rep-jerry-nadler-mueller-report-fallout-possibility-impeachment-62503958>.

² *Id.*

justice.³ The Special Counsel did not say that—and would not say that—because Congress is neither a prosecutorial nor judicial body. Those responsibilities lie under the purview of the executive and judicial branches, respectively.

Discussion

Pages 7-8 of Volume II of the Report contain a summary of analysis of certain “statutory defenses” and “constitutional defenses” to obstruction of justice allegations. This summary, however, is a summary of a more detailed legal analysis of constitutional defenses outlined on pages 168-180. This detailed legal analysis confirms the oft-misinterpreted quotes on page 8 are about Congress’s ability to legislate generally—not prosecute or enforce the laws in this specific case.

According to the Report, President Trump’s counsel wrote a letter to Special Counsel Mueller arguing that under constitutional principles of separation of powers, a President cannot be found to have obstructed justice by exercising his “constitutional authority.”⁴ The question the Special Counsel was addressing on pages 7-8 and 168-180 is whether “Congress can validly regulate the President’s exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice.”⁵ This is what the passages on page 8 are about—whether Congress has authority *generally* to regulate a President’s conduct in this area—not whether Congress should do it *in this instance*. The argument is a general one, and a legal one, in response to a letter from the President’s counsel.

While acknowledging “courts have not definitively resolved these issues,” Special Counsel Mueller “concluded that Congress has authority to prohibit a President’s corrupt use of his authority in order to protect the integrity of the administration of justice.”⁶ It is unclear why so many Democrats have used this sentence—which includes the word “prohibit,” indicating forbiddance of a *future* act, not a past act—to claim the Special Counsel intended for Congress to make a determination on obstruction of justice in the *current* matter. This isn’t a matter of legal interpretation; it’s reading comprehension.

The report further states:

“[W]e concluded that Congress can validly regulate the President’s exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice. The limited effect on presidential power that results from that restriction would not impermissibly undermine the President’s ability to perform his Article II functions.”⁷

³ See, e.g., Kyle Cheney and Andrew Desiderio, “Dems accuse Barr of misleading Congress and public,” POLITICO, April 18, 2019, available at <https://www.politico.com/story/2019/04/18/democrats-barr-misleading-congress-mueller-report-1282391>.

⁴ *Id.* at 169 (“The President’s counsel has argued that ‘the President’s exercise of his constitutional authority . . . cannot constitutionally constitute obstruction of justice.’”) & 169 n. 1086 (citing letter from the President’s counsel); see also pp. 7-8.

⁵ *Id.* at 169.

⁶ *Id.* 8.

⁷ *Id.* at 169.

In other words, Special Counsel Mueller concluded Congress may write obstruction of justice laws that apply to the President, even when the President is exercising facially lawful Article II powers, if those powers are exercised corruptly. That is the crux of the Report's summary on page 8—not the Special Counsel deferring his decision-making authority to Congress.

A review of some of the passages from pages 168-180 make the summary on page 7-8 crystal clear in recognizing the summary is about congressional lawmaking authority under separation-of-powers when constitutional tensions exist between the President's official Article II actions and obstruction of justice statutes. For example, on page 171 the Report states, "Congress can validly make obstruction-of-justice statutes applicable to corruptly motivated official acts of the President without impermissibly undermining his Article II functions."⁸ On page 176 the Report states, "Congress has Article I authority to define generally applicable criminal law and apply it to all persons—including the President. Congress clearly has the authority to protect its own legislative functions against corrupt efforts designed to impede legitimate fact-gathering and lawmaking efforts."⁹ On page 177 the Report states, "our assessment of the weighing of interests leads us to conclude that Congress has the authority to impose the limited restrictions contained in those statutes on the President's official conduct to protect the integrity of important functions of other branches of government."¹⁰

Finally, on page 180 the Report states, "[w]e concluded that, in light of the Supreme Court precedent governing separation-of-powers issues, we had a valid basis for investigating the conduct at issue in this report."¹¹ It is this overarching conclusion the summary section on pages 7-8 captures: whether or not any of the President's counsel's legal defenses constituted a basis for the Special Counsel not to investigate the facts. This section, and summary, has absolutely nothing to do with Congress either prosecuting the President or a specific intent by the Special Counsel that Congress continue to investigate the facts previously reviewed over the past two years.

The absence of any statement asking Congress to serve in a prosecutorial capacity in an obstruction of justice case should not be surprising, because that is not Congress's role—it is the role of the Department of Justice. While everyone agrees that Congress has impeachment authority, that is not what the special counsel is addressing in this context (which is perhaps why you have not dared claim that this Report invites you to impeach the President). As such, when Attorney General Barr said in his April 18, 2019 press conference, "Special Counsel Mueller did not indicate that his purpose was to leave the decision to Congress,"¹² he was exactly right. As

⁸ *Id.* at 171.

⁹ *Id.* at 176.

¹⁰ *Id.* at 177.

¹¹ *Id.* at 180.

¹² Zachary Basu, "Transcript: Bill Barr answers questions about Mueller Report," AXIOS, April 18, 2019, available at <https://www.axios.com/bill-barr-transcript-mueller-report-press-conference-42a9fb6a-741b-4af8-adb1-0693b8f15c25.html> ("Reporter: Did the special counsel indicate that he wanted you to make the decision or that it should be left for Congress? Barr: Well, special counsel Mueller did not indicate that his purpose was to leave the decision to Congress. I hope that was not his view, since we don't convene grand juries and conduct criminal investigations for that purpose. He did not -- I didn't talk to him directly about the fact that we were making the

The Honorable Jerrold Nadler
April 22, 2019
Page 4

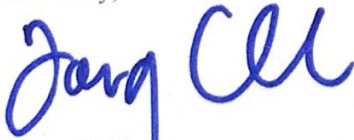
Attorney General Barr said of the Justice Department, "we don't convene grand juries and conduct criminal investigations" to let Congress make prosecutorial decisions.¹³ He further stated the job of prosecutors is "to determine yes or no, was alleged conduct criminal or not criminal."¹⁴ Such was the job performed by Attorney General Barr and Deputy Attorney General Rod Rosenstein when they decided not to bring charges of criminal obstruction.

Conclusion

Your deliberate misrepresentations to the American public threaten the fundamental separation-of-powers doctrine, are dangerous, and need to stop. The special counsel regulations—written by the Clinton Justice Department—require only for a special counsel to "provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel."¹⁵ Attorney General Barr had discretion whether to share the report with Congress and with the public.¹⁶ In a display of unprecedented transparency, Attorney General Barr has offered to share with you the entire report in accordance with federal law—an offer which you have refused. The Attorney General has gone far beyond what the regulations require, and your continued slandering of the Attorney General—while perhaps politically opportune—is wrong and also must end.

Moving forward, I urge you to be accurate in your claims before the American public and encourage you to take the Attorney General up on his offer to read the full report. Given the stakes, dismissing this offer and refusing to review the report you demanded as soon as possible amounts to dereliction of duty. I will be at the Justice Department later today to read the report and hope you will join me in doing so. If you do, I look forward to reading the report and discussing its contents together before we move on to conducting the important work the American people expect from the Judiciary Committee.

Sincerely,



Doug Collins
Ranking Member

decision, but I am told that his reaction to that was that it was my prerogative as attorney general to make that decision.").

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 28 CFR § 600.8.

¹⁶ 28 CFR § 600.9.