

[Letter from Marc E. Kasowitz, Personal Counsel to the President, to Robert S. Mueller III, Special Counsel, Department of Justice, Re: Propriety of an Obstruction of Justice Investigation of the President (Jun. 23, 2017).]

JUNE 23, 2017

BY HAND

Kasowitz Benson Torres LLP
1633 Broadway
New York, N.Y. 10019

Robert S. Mueller
Special Counsel
United States Department of Justice
Washington, D.C. 20004

Re: Governing Constitutional Principles

Dear Mr. Mueller:

This firm is personal counsel to President Donald J. Trump. We write to address news reports, purportedly based on leaks, indicating that you may have begun a preliminary inquiry into whether the President's termination of former FBI Director James Comey constituted obstruction of justice. According to these recent stories, Mr. Comey's testimony, and his prior assurances to the President, there was no investigation into the President prior to the termination of Mr. Comey. Nevertheless, in the interest of completeness, we will address certain events and issues related to the period before Mr. Comey was terminated as well.

It is clear that there is no statutory or Constitutional basis for any obstruction charge based on Mr. Comey's termination. As Mr. Comey himself stated in the first sentence of his farewell letter to the FBI, "the President can fire the FBI Director for any reason, or no reason at all." Indeed, the President not only has unfettered statutory and Constitutional authority to terminate the FBI Director, he also has Constitutional authority to direct the Justice Department to open or close an investigation, and, of course, the power to pardon any person before, during, or after an investigation and/or conviction. Put simply, the Constitution leaves no question that the President has exclusive authority over the ultimate conduct and disposition of all criminal investigations and over those executive branch officials responsible for conducting those investigations. Thus, as set forth more fully below, as a matter of law and common sense, the President cannot obstruct himself or subordinates acting on his behalf by simply exercising these inherent Constitutional powers.

This is particularly the case where, as here, the Department of Justice, through the Attorney General and Deputy Attorney General, unequivocally advised the President that the "FBI is

unlikely to regain public and congressional trust” unless Director Comey was replaced. That recommendation was supported by, among other things, the almost universal rebukes Mr. Comey’s unprecedented conduct as director had generated from, among many others, President Obama, dozens of Democratic members of Congress, and numerous former senior DOJ officials, including President Clinton’s former Deputy Attorney General Jamie Gorelick, who described Director Comey’s conduct as “a kind of reality TV ... antithetical to the interest of justice.” Plainly, removing a director under these circumstances is well within the President’s Constitutional power, and the proposition that he could obstruct a Department of Justice investigation by taking action the Department of Justice said needed to be taken is patently nonsensical. The same is true with respect to the exercise of the President’s Constitutional authority to direct or terminate investigations, which is addressed more fully below.^{1 2}

As we have previously expressed, our goal is to facilitate a swift conclusion of any preliminary inquiry into the termination of Mr. Comey, or any other conduct concerning Mr. Comey. For months, the President has suffered under a public and international cloud generated by unsubstantiated stories based on law enforcement leaks, and an unwillingness by Mr. Comey to state publicly what he repeatedly told the President privately about not being under investigation. Almost immediately after Mr. Comey finally informed the public of this fact in his testimony this month, new leaks generated stories that the President was nevertheless now under investigation for firing Mr. Comey. To the extent any inquiry or consideration is being given to this issue, it can be promptly resolved as a matter of law, and we respectfully submit doing so is necessary for important United States’ interests. Continuing uncertainty about whether the sitting President of the United States is being investigated for exercising his inherent Constitutional powers is detrimental to the President’s ability to effectively govern.

While we have confidence that you will come to the same conclusions set forth below, if you conclude a further investigation is warranted, we respectfully request to be advised and be provided the opportunity to raise our statutory and Constitutional objections with the Acting Attorney General.

**A. The President Cannot Obstruct Merely By Exercising
His Constitutional Authority to Terminate the FBI Director.**

Under the Appointments Clause of Article II of the Constitution, the President has the exclusive authority to appoint federal officials, including the FBI Director. That Constitutional power to appoint federal officials carries with it the power to remove those officials for any reason, except

¹ It is not necessary to go so far as to contend that no conduct by a President could ever amount to obstruction of justice. All that is necessary here is to understand that the set of facts alleged in this situation cannot amount to obstruction of justice. We also note that, a President has no constitutional authority to bribe witnesses or suborn perjury and any such conduct would of course be subject to the relevant statutes. But such conduct has not even remotely been alleged against the President. And, we leave aside for now the well-established rule that a sitting President cannot be indicted, as opposed to impeached, for any crime (A Sitting President’s Amenability to Indictment and Criminal Prosecution, Op. O.L.C. (Oct. 16, 2000)). In sum, it remains clear that the President’s exercise of his constitutional authority at issue here — to terminate an FBI Director and to close investigations — cannot constitutionally constitute obstruction of justice.

² [There was no footnote number 2 in original; simply used here as a placeholder]

in limited circumstances. No such restrictions have been imposed on the President's power to remove the FBI Director.

As the Office of Legal Counsel (OLC) explained in an opinion binding on your office, there is no Congressionally imposed limitation on the President's power to remove an FBI Director and it is dubious that Congress could Constitutionally impose any such restriction:

As we have previously concluded, the FBI Director is removable at the will of the President. ... No statute purports to restrict the President's power to remove the Director. Specification of a term of office does not create such a restriction. See *Parsons v. United States*, 167 U.S. 324, 342 (1897). Nor is there any ground for inferring a restriction. Indeed, tenure protection for an officer with the FBI Director's broad investigative, administrative, and policymaking responsibilities would raise a serious constitutional question whether Congress had "impede[d] the President's ability to perform his constitutional duty" to take care that the laws be faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The legislative history of the statute specifying the Director's term, moreover, refutes any idea that Congress intended to limit the President's removal power. See 122 Cong. Rec. 23,809 (1976) "Under the provisions of my amendment, there is no limitation on the constitutional power of the President to remove the FBI Director from office within the 10-year term.") (statement of Sen. Byrd); *id.* at 23,811 "The FBI Director is a highly placed figure in the executive branch and he can be removed by the President at any time, and for any reason that the President sees fit.") (statement of Sen. Byrd). Constitutionality of Legislation Extending the Term of the F.B.I. Director, Op. O.L.C. at *3 (June 20, 2011), available at <http://www.justice.gov/file/18356/download>.

This is a long-standing principle. And Director Comey elected to open his farewell to the FBI staff acknowledging this same Constitutional principle: "I have always believed the President can fire the F.B.I. Director for any reason, or no reason at all." This view is supported by historical precedent. President Clinton fired FBI Director Sessions in July 1993 at a time when the FBI had multiple open investigations implicating the Clintons, including the Whitewater and the Travel Office investigations, yet there were no claims and certainly no investigations into whether President Clinton's exercise of his Constitutional power constituted obstruction.

It is obvious that the President's mere exercise of this explicit Constitutional power to appoint and remove officials cannot itself constitute obstruction of justice. And this is certainly clear where, as here, there were ample and notorious reasons to replace Mr. Comey even though the President needed none. Mr. Comey's high-profile leadership of the FBI during the 2016 Presidential election was controversial and generated widespread bi-partisan criticism from, among others, President Obama and numerous Congressional Democrats and Republicans.

Most important, Deputy Attorney General Rosenstein and Attorney General Sessions recommended that Director Comey be removed based on a detailed, three-page memorandum setting forth multiple instances of improper conduct and criticisms from six former Attorneys General and Deputy Attorneys General from both parties. That memorandum concluded "the FBI is unlikely to regain public and congressional trust until it has a Director who understands the gravity of the mistakes and pledges never to repeat them. Having refused to admit his errors,

the Director cannot be expected to implement the necessary corrective actions.” In a letter to the President forwarding DAG Rosenstein’s letter, the Attorney General also concluded “that a fresh start is needed at the leadership of the FBI” and that the Director should be one who “follows faithfully the rules and principles of the Department of Justice.” As he explained in his termination letter to Director Comey, the President concurred that Director Comey was “not able to effectively lead the Bureau. It is essential that we find new leadership for the FBI that restores public trust and confidence in its vital law enforcement mission.” Based on this record, although not required, to the extent the President required a basis for removing Mr. Comey, there was ample basis for him to do so.

Although irrelevant to the Constitutional issues addressed herein, it is worth noting that many in the media have relied on mischaracterizations of the President’s remarks in a May 11, 2017 interview with Lester Holt, to suggest the President admitted he removed Mr. Comey because of the Russian investigation.³ Relying on that interview, Director Comey also testified that: “I [take] the president at his word that I was fired because of the Russia investigation.”⁴ However, the President never said any such thing.

What the President actually said was: “I was going to fire Comey knowing there was no good time to do it. And in fact, when I decided to just do it, I said to myself - I said, you know, this Russia thing with Trump and Russia is a made-up story.”⁵ The President and Mr. Holt then talk over each other for approximately a minute, before the President completes his original thought, making clear that he: (a) wanted the Russian investigation to go forward and “to be absolutely done properly”; (b) removed Mr. Comey in spite of the fact he understood doing so might prolong the investigation; and (c) did so because “I have to do the right thing for the American People. He’s the wrong man for that position”:

As far as I’m concerned, I want that thing [the Russia investigation] to be absolutely done properly. When I did this now, I said I probably maybe will confuse people. Maybe I’ll expand that — you know, I’ll lengthen the time because it should be over with. It should — in my opinion, should’ve been over with a long time ago because it — all it is an excuse. But I said to myself I might even lengthen out the investigation. But I have to do the right thing for the American people. He’s the wrong man for that position.

Id.(emphasis added). Later in the interview, he further noted that he wanted a “simply great FBI director” and fully “expect[ed]” the investigation to continue even without Director Comey.⁶

³ Devlin Barrett & Philip Rucker, Trump Said He was Thinking of Russia Controversy When He Decided to Fire Comey, WASH. POST (May 11, 2017); Andrew Prokop, Trump has now Admitted He Fired Comey Because of the Russia Investigation, VOX.COM (May 11, 2017); Abigail Abrams, President Trump Links His Decision to Fire James Comey to Frustration With Russia Investigation, TIME.COM (May 11, 2017),

⁴ Full Transcript and Video: James Comey’s Testimony on Capitol Hill, NEWYORKTIMES.COM (June 8, 2017), (hereinafter, “Comey Transcript”).

⁵ Tim Hains, President Trump’s Full Interview with Lester Holt: Firing of James Comey, REAL CLEAR POLITICS (May 11, 2017),

⁶ There have also been press reports - citing anonymous sources - about comments the President allegedly made during a May 20, 2017 meeting with Russian government officials that Corney was a “real nut job” and that “great pressure because of Russia” has been “taken off” him. Matt Apuzzo, Maggie Haberman, & Matthew Rosenberg,

Put simply, there is no Constitutionally permissible or factually supportable view under which the President's removal of Director Comey could constitute obstruction.

**B. The President Cannot Obstruct By
Exercising His Constitutional Authority
to Terminate or Direct an Investigation.**

As a Constitutional matter, the President also possesses the indisputable authority to direct that any executive branch investigation be open or closed because the Constitution provides for a unitary executive with all executive power resting with the President:

As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States "The Executive Power," which means the whole executive power. Because no one individual could personally carry out all executive functions, the President delegates many of these functions to his subordinates in the executive branch. But because the Constitution vests this power in him alone, it follows that he is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions.

Statute Limiting the President's Auth. to Supervise the Dir. of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. O.L.C. 47, 48 (1988).

Without question, the investigation and prosecution of criminal cases are core executive functions committed to the sole discretion of the executive branch (and thus ultimately the President). The Executive Branch "has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); see also *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982) (Prosecutorial discretion is a "special province" of the Executive Branch.). "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (citations omitted). Thus, the President has exclusive authority to direct that a matter be investigated, or that an investigation be closed without prosecution, or that the subject of an investigation or conviction be pardoned. As the United States Court of Appeals for the D.C. Circuit succinctly explained:

The President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law. The President may decline to prosecute or may pardon because of the President's own constitutional concerns about a law or because of policy objections to the law, among other reasons.

Trump Told Russians that Firing 'Nutmeg' Comey Eased Pressure from Investigation, N. Y. TIMES (May 19, 2017), Assuming *arguendo* the President said any such things, it reflects nothing other than that President Trump has utterly lost confidence in Director Comey and believed that the highly public and sensational manner in which he handled the investigation was over.

In re Aiken Cty., 725 F.3d 255, 262-66 (D.C. Cir. 2013) (citations omitted).

Again, while there are various political checks and balances that would inform the President's exercise of this authority as a prudential matter, and various norms have developed over the years as a result of those checks and balances, none of these diminish the President's ultimate Constitutional authority over investigations and prosecutions. This has been borne out time and time again in our history. As one outspoken critic of the President, Professor Alan Dershowitz, has explained:

Throughout United States history — from Presidents Adams to Jefferson to Lincoln to Roosevelt to Kennedy to Obama — presidents have directed (not merely requested) the Justice Department to investigate, prosecute (or not prosecute) specific individuals or categories of individuals. It is only recently that the tradition of an independent Justice Department and FBI has emerged. But traditions, even salutary ones, cannot form the basis of a criminal charge.⁷

Again, Mr. Comey agreed in his testimony: “I think as a legal matter, president is the head of the executive branch and could direct, in theory, we have important norms against this, but direct that anybody be investigated or anybody not be investigated. I think he has the legal authority because all of us ultimately report in the executive branch up to the president.”⁸

Thus, as with the removal of the FBI Director, the President cannot obstruct merely by exercising his Constitutional authority to terminate an investigation, and he certainly cannot obstruct by merely expressing a view about an investigation (which the President disputes occurred) instead of terminating it. Again, historical precedent bears this out. No special counsel was appointed and no obstruction investigation was conducted in response to President Obama's public comments about the FBI investigation into Secretary Clinton's email server, including his statements in October 2015 that Secretary Clinton “hasn't jeopardized” classified information; in January 2016, that Secretary Clinton “is not a target” and the investigation was “not headed in the direction of an indictment;” and in April 2016, that Secretary Clinton “has not jeopardized national security” and “would never intentionally put America in any kind of jeopardy.” Of course, a short time after President Obama's April comments about the lack of intent, Director Comey used that exact basis for unilaterally announcing that “no reasonable prosecutor” would charge Secretary Clinton even though the relevant statute did not even require intent. Yet, no special counsel was appointed and no obstruction investigation was launched.

C. There is No Statutory Basis for An Obstruction Charge.

Even ignoring the President's Constitutional authority, it is nevertheless clear that none of the subject conduct constitutes obstruction even accepting Director Comey's account of events, which the President does not. The only statute that could even theoretically be implicated on the alleged facts is 18 U.S.C. § 1505, and the elements for obstruction simply cannot be met.

⁷ Alan Dershowitz, Alan Dershowitz: History, Precedent and James Comey's Opening Statement Show that Trump Did Not Obstruct Justice, WASH. EXAMINER (June 8, 2017, 9:21 AM)

⁸ Comey Transcript, *supra* note 7

First, there was no “pending proceeding” within the meaning of § 1505 regarding the investigation of Gen. Flynn. Under § 1505, a “pending proceeding” is limited only to agencies with rule-making or adjudicative authority.⁹ The investigation of Gen. Flynn is being conducted by the FBI, which possesses only investigative authority, not adjudicative ; it cannot conduct “proceedings “ within the meaning of § 1505.¹⁰ Courts have explained it this way:

[T]he meaning of “proceeding” in § 1505 must be limited to actions of an agency which relate to some matter within the scope of the rulemaking or adjudicative power vested in the agency by law. Since the F.B.I. has no rulemaking or adjudicative powers regarding the subject matter of this indictment, its investigation was not a “proceeding” within the meaning of the statute.

United States v. Higgins, 511 F. Supp. 453, 455 (W.D. Ky. 1981) (noting government’s lack of precedent or legal support for assertion to the contrary).¹¹

Some have picked up on the language in the DOJ manual and cited other sources for the proposition that a “pending proceeding could include an informal investigation by an executive agency.”¹² But, as constitutional law professor Elizabeth Price Foley notes:

In the almost 120 years since Section 1505 and its predecessor have been on the books, no court appears to have ever held that an ongoing F.B.I. investigation qualifies as a “pending proceeding” within the meaning of the statute. Instead, Section 1505 applies to court or court-like proceedings to enforce federal law.¹³

⁹ See *United States v. Adams*, 472 F. Supp. 2d 811, 817 n.5 (W.D. Va. 2007); *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (“For an investigation to be considered a proceeding, then, it must be more than a “mere police investigation .”); cf *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1044 (9th Cir. 2002); *United States v. Leo*, 941 F.2d 181, 199 (3rd Cir. 1991). ¹⁰ *United States v. Wright*, 704 F.

¹⁰ *United States v. Wright*, 704 F. Supp. 613, 614-15 (D. Md. 1989) (“[A] false statement made to a purely investigative agency, such as the F.B.I., is not within the scope of 1505”); *United States v. Higgins*, 511 F. Supp. 453, 455 (W.D. Ky. 1981).

¹¹ See also, *Higgins*, 511 F.Supp. at 455-56 (quoting H.R.Rep.No. 658, 90th Cong., 1st Sess., 1967 U.S.Code Cong & Admin .News, p. 1760, for proposition that “attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the scope of the proscription of those sections,” i.e., §§ 1503 and 1505); see *United States v. Edgemon*, 1997 U.S. Dist. LEXIS 23820, **13-14 (E.D.Tenn. Aug. 18, 1997) (“Mere criminal investigations, according to the legislative history, are not within the scope of the proscriptions of § 1505. “); *United States v. Wright*, 704 F. Supp. 613 (D. Md. 1989) (criminal investigation of defendant by U.S. Attorney General for the District of Maryland was not a § 1505 proceeding as this agency lacked rule-making or adjudicative authority); *United States v. Persico*, 520 F. Supp. 96, 101 (E.D.N.Y. 1981) (accepting rationale of *Higgins* and that FBI has no rulemaking powers, but distinguishing IRS, which does have rulemaking powers and was conducting an administrative investigation).

¹² Domenico Montanaro, Is Trump Guilty Of Obstruction Of Justice? Comey Laid Out The Case, NPR (June 10, 2017, 7:01 AM), (citing to Cornell Law School’s Legal Information Institute, https://www.law.cornell.edu/wex/obstruction_of_justice) (emphasis added). The Congressional Research Service has also noted that *United States v. Kelley*, from the D.C. Circuit, has rejected the claim that “§ 1505 applies only to adjudicatory or rule-making activities, and does not apply to wholly investigatory activity.” Charles Doyle, Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities, CONGRESSIONAL RESEARCH SERVICE, at 24 (Apr. 17, 2014), available at

¹³ Elizabeth Price, Foley, Trump’s Statements Are Not an Obstruction of Justice, NY Times (May 17, 2017)

The House Judiciary Committee reports affirm this reading, noting that attempts to obstruct a criminal investigation “before a proceeding has been initiated” do not fall within the scope of the statute.¹⁴ Furthermore, the U.S. Attorneys’ Manual makes clear that “investigations by the Federal Bureau of Investigation (FBI) are not section 1505 proceedings.”¹⁵ And the Justice Department itself has acknowledged as much to the United States Court of Appeals for the Fourth Circuit. *See United States v. Adams*, 335 Fed. Appx. 338, 342 (4th Cir. 2009) (Government conceded that criminal investigation by FBI or DEA was not pending proceeding within the scope of 18 U.S.C. § 1505, and requested defendant’s conviction on that count be vacated). The FBI’s investigation of Gen. Flynn is therefore not within the scope of § 1505. As the *Higgins* Court explained, “[u]nder our system of separation of powers, a criminal investigatory agency, in contradistinction to an administrative or regulatory agency, has no power to engage in rulemaking or adjudication.” *Higgins*, 511 F. Supp. at 455.

Not only is it clear that an FBI investigation is not a “pending proceeding” for purposes of § 1505, under the statute, the President would have had to have knowledge that there was a pending proceeding. Since the FBI’s investigation at issue is not a “pending proceeding” under § 1505,¹⁶ it is therefore impossible for the President to have been made aware of said pending proceeding. For this reason alone, § 1505 does not and cannot apply to the President’s conduct or statements. Culpability under § 1505 is a legal impossibility. The President should not be investigated for violating a criminal statute that cannot apply to the alleged (albeit disputed) facts. We trust your office would have no desire to do so.

Second, even assuming § 1505 could apply to the President, Comey’s own characterization of the President’s comments fail to show that the President possessed the intent to obstruct the proceedings which is required by the statute.¹⁷ Under § 1505, intent to obstruct requires the defendant to “act purposefully,” meaning that he must know his actions are likely to influence the proceedings.¹⁸ Most courts agree that this “knowledge” element is satisfied by acting with the knowledge that his actions would have the “natural and probable” effect of interfering with the

¹⁴ Id. (“legislative history...confirms that Congress did not intend Section 1505 to reach F.B.I. investigations”).

¹⁵ U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL: CRIMINAL RESOURCE MANUAL § 1727, PROTECTION OF GOVERNMENT PROCESS — OMNIBUS CLAUSE — 18 U.S.C. § 1501, <https://www.justice.gov/usam/criminal-resource-manual-1727-protection-government-processes-omnibus-clause-18-usc-1505> (last visited June 22, 2017)

¹⁶ U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL: CRIMINAL RESOURCE MANUAL § 1725, PROTECTION OF GOVERNMENT PROCESSES — OBSTRUCTION OF PENDING PROCEEDING — 18 U.S.C. § 1505, <https://www.justice.gov/usam/criminal-resource-manual-1725-protection-government-processes-obstruction-pending-proceeding-18-usc-1505> (last visited June 22, 2017).

¹⁷ See 18 U.S.C. § 1505; *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991) (citing *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) and *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988)); see also *United States v. Warshak*, 631 F.3d 266, 325 (6th Cir. 2010); *United States v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006); *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006); *United States v. Kay*, 513 F.3d 432, 454 (5th Cir. 2007).

¹⁸ *Quattrone*, 441 F.3d at 178- 79; *Price*, 951 F.2d at 1031.

proceedings.¹⁹ Moreover, these actions must also be done “corruptly,” meaning they must be conducted with an improper purpose.²⁰

In this case, the only evidence of relevant Presidential action alleged by Comey is that the President expressed to Comey that General Flynn “is a good guy” and “I hope you can see your way clear to letting this go, to letting Flynn go.”²¹ The President, of course, has categorically denied saying “I hope you can see your way clear to letting this go, to letting Flynn go.” Of course, even assuming, arguendo, that he used such words, it still is merely a deliberative statement by the President that, in its proper and obvious context, cannot be reasonably construed as a threat. Moreover, the fact that Comey remained in his position after this alleged conversation, continued the investigation otherwise unimpeded, and brought this particular statement up only after he was terminated in disgrace refutes any suggestion that he viewed the President’s statement as a threat.

**D. The Facts Establish the President Did
Not Direct Any Investigation Be Closed.**

Again, while not relevant to the constitutional and statutory arguments discussed in this letter, we briefly discuss these facts as they have also been the subject of much misrepresentation.

According to Director Comey, the President said the following at a February 14, 2017, meeting:

The President then returned to the topic of Mike Flynn, saying, “He is a good guy and has been through a lot.” He repeated that Flynn hadn’t done anything wrong on his calls with the Russians, but had misled the Vice President. He then said, “I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.” I replied only that “he is a good guy.” (In fact, I had a positive experience dealing with Mike Flynn when he was a colleague as Director of the Defense Intelligence Agency at the beginning of my term at FBI.) I did not say I would “let this go.”

While acknowledging that the President only said “hope,” Director Comey said he took it as a direction:

RISCH: He did not direct you to let it go?

COMEY: Not in his words, no.

RISCH: He did not order you to let it go?

COMEY: Again, those words are not an order. ... The reason I keep saying his words is I took it as a direction.

¹⁹ Quattrone, 441 F.3d at 174; United States v. Senffer, 280 F.3d 755, 762 (7th Cir. 2002) (citing United States v. Aguilar, 515 U.S. 593, 599 (1995); cf Bhagat, 426 F.3d at 1147-48 (9th Cir. 2006) (declining to extend the natural and probable effects test from § 1503).

²⁰ 18 U.S.C. § 1505(b) (2012) “As used in §1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, alerting, or destroying a document or other information.”)

²¹ Comey Transcript, supra note 7.

RISCH: Right.

COMEY: I mean, this is a president of the United States with me alone saying I hope this. I took it as, this is what he wants me to do. I didn't obey that, but that's the way I took it.

RISCH: You may have taken it as a direction but that's not what he said.

COMEY: Correct.²²

Moreover, according to Director Comey's testimony, although Director Comey did not agree "to let this go," and although the investigation of Mr. Flynn continued, he does not contend that the President ever raised the matter with him again, and the President denies he ever said he "hoped" Comey could "let it go" in words or substance. Nor did anyone from the White House, or anyone else acting on the President's behalf, ever contact him about the Flynn investigation.²³

While Director Comey testified that the President pressed him several times, according to his testimony that "pressing" had nothing to do with the Flynn investigation, but rather with the President's completely proper and reasonable request that the Director say publicly what he had said privately three times, namely, that the President was not himself under investigation. The President made clear his reason for this request: according to Director Comey, the President explained "the cloud" was getting in the way of his ability to do his job."²⁴ As Director Comey himself testified in a discussion with Senator Reed, there would have been nothing improper about Director Comey publicly making the factually accurate statement he had repeatedly made privately to the President and Congress — namely, that the President was not under investigation.²⁵ Indeed Director Comey testified publicly to precisely this fact less than two months later. Yet, Director Comey declined to do so at the time despite the President's repeated requests.

It is also clear that at the time of their conversations, Director Comey did not construe the President's alleged remarks as an effort to obstruct justice. He did not at any time direct the FBI to commence an obstruction investigation. Although the comments were allegedly made on February 14, 2017, according to Director Comey, the President was still not under investigation when the Director was removed from office almost two months later. Deputy Director McCabe also testified that he was not aware of any pressure on the FBI regarding any investigation.²⁶ All of this indicates that Comey did not report his currently post-termination view to his Deputy at

²² Comey Transcript, *supra* note 7. Director Comey also testified that he took the President's remarks as only related to "any investigation connected to Flynn's account of his conversations with the Russians," and not any other aspect of any possible investigation. *Id.*

²³ Comey Transcript, *supra* note 7 (exchange with Senator Lankford). Press reports claim — as always, citing anonymous sources — that the President also asked DNI Coats to approach Comey to try to persuade him to close the Flynn investigation. But, Mr. Comey testified in exchanges with Senators Lankford and Reed that no such contacts occurred. *Id.* Regardless, even if such requests were made, for the same reasons stated above, this cannot constitute obstruction of justice.

²⁴ Statement for the Record, Before the S. Select Comm. on Intelligence, 115th Cong. 7 (June 8, 2017) (statement of James B. Comey, Former Director of the Federal Bureau of Investigation)

²⁵ Comey Transcript, *supra* note 7.

²⁶ Full Transcript: Acting FBI Director McCabe and Others Testify Before the Senate Intelligence Committee, WASH. POST (May 11, 2017)

the time, nor did Director Comey report any concerns of alleged obstruction to his superiors at the Justice Department.²⁷

* * * * *

We appreciate the opportunity to address these matters. We remain committed to working with your office to facilitate a swift and thorough review which we hope will lead to the conclusion we have clearly demonstrated, i.e., that constitutionally and as a matter of law, there is no basis for any investigation to include the conduct of the President of the United States.

Respectfully submitted,

Marc E. Kasowitz

Counsel to the President

²⁷ While some have made much of the fact that the President spoke to Director Comey privately about General Flynn, the President has made essentially identical public statements (including the day after meeting with Director Comey) that he thought General Flynn was a good guy who was being treated unfairly, hardly indicia of a secret, corrupt attempt to obstruct an investigation.