

1. 1.

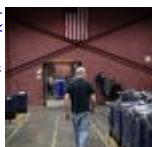


Sections

Search

[Trump's Lawyers, in Confidential Memo, Argue to Head Off: Politics | The Trump Lawyers' Confidential Memo to Mueller, Explained](#)

- [Share](#)
- [Tweet](#)
- [Email](#)
- [More](#)
- [Save](#)



Log In

0

Settings

Close search

[This Factory Was Ready to Expand. Then Came the Trump T](#)

Site Search Navigation



Search NYT

 Clear this text input

Go

<https://nyti.ms/2xE3h28>

[U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Say](#)

Site Navigation

4.

- [Home](#)
- [World](#)
- [U.S.](#)
- [Politics](#)
- [N.Y.](#)
- [Business](#)
- [News Analysis](#)
- [Business](#)
- [Opinion](#)
- [Trump Veers to a Korea Plan That Echoes Failures of the Past](#)
- [Opinion](#)



[News Analysis](#)

- [Tech](#)
- [Science](#)
- [Health](#)
- [Sports](#)
- [Trump Plan to Lower Drug Prices Could Increase Costs for S](#)
- [Sports](#)

5.

- [Arts](#)
- [Arts](#)
- [Books](#)
- [Fashion](#)



- [Fashion & Style](#)

- [Food](#)

- [Food](#)

1. • [Travel](#)

- [Magazine](#)

- [TMagazine](#)

- [Real Estate](#)

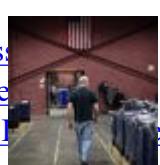
- [Obituaries](#)

- [Video](#)

[Trump's Lawyers, in Confidential Memo, Argue to Head Off a](#)

- [Reader Center](#)

- Conferences



- [Crossword](#)

- [Time](#)

- [The Learning Network](#)

- [Multimedia](#)

[This Factory Was Ready to Expand. Then Came the Trump Tr](#)

- [Podcasts](#)



3. • [NYT Store](#)

- [NYT Books](#)

- [nytEditions](#)

- [Time](#)

- [Meal Kits](#)

[U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says](#)

- [Subscribe](#)

- [Manage Account](#)

- [Today's Paper](#)

- [Tools](#)

- [Jobs](#)

- [Classes](#)

- [Corrections](#)



- More [News Analysis](#)

Site Mobile Navigation

[Trump Veers to a Korea Plan That Echoes Failures of the Past](#)

Advertisement

[Politics](#)



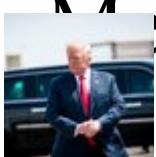
The

Trump

• [Share](#)

Lawyers' Confidential Memo to Mueller, Explained

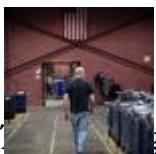
1. 1.



By THE NEW YORK TIMES JUNE 2, 2018

The Times obtained copies of a confidential letter sent by President Trump's lawyers to the special counsel, Robert S. Mueller III. Reporters added context in annotations. Below it is another letter from the president's lawyers sent last summer. Read the [related article](#).

2.



The Trump legal Team's Jan. 29, 2018, Confidential Memo to Mueller

This Factory Was Ready to Expand. Then Came the Trump Tr

3. January 29, 2018

By Hand



Confidential

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

John M. Dowd

Attorney at Law

Washington, D.C. 20015



Robert S.

Special Counsel

News Analysis United States Department of Justice

Washington, D.C. 20024

Trump Veers to a Korea Plan That Echoes Failures of the Past

Re: Request for Testimony on Alleged Obstruction

of Justice

Trump Plan to Lower Drug Prices Could Increase Costs for So Gentlemen:

6. This letter will address the recent request by your office for a meeting with the President and our discussion concerning the same on



A RESPONSE TO MUELLER

Mr. Trump's lawyers hand-delivered a 20-page confidential letter to Mr. Mueller in January. The letter was a response to an inquiry that Mr. Trump agreed to be questioned about allegations that he committed obstruction of justice. The lawyers argued that Mr. Mueller does not need to talk to the president and laid out a series of claims that foreshadow a potential fight over a subpoena, were the special counsel to try to force the president to testify.

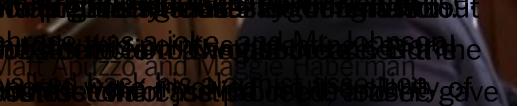
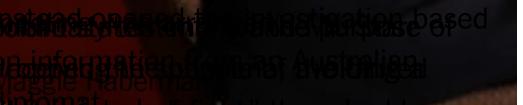
The Times obtained a copy of the letter as well as an earlier one sent to Mr. Mueller in June 2017, a month after he was appointed, which argues that "there is no statutory or constitutional basis for any obstruction charge" based on Mr. Trump's firing of James B.

3. James B. Comey, director.

November 21, 2017, and January 8, 2018.

In our conversation of January 8, your office identified the following topics as areas you desired to discuss with the President in order to complete the investigation on the subjects of alleged collusion and obstruction of justice:

1. Former National Security Advisor Lt. Gen. Michael Flynn — information regarding his contacts with Ambassador Kislyak about same during the transition process;
2. Lt. Gen. Flynn's communications with Vice President Michael Pence regarding those contacts;
3. Lt. Gen. Flynn's interview with the FBI regarding the same;
4. Then-Acting Attorney General Sally Yates coming to the White House to discuss same;
5. The President's meeting on February 14, 2017, with FBI Director James Comey;
6. Any other relevant information regarding former National Security Advisor Michael Flynn;
7. The President's awareness of and reaction to investigations by the FBI, the House and the Senate into possible collusion;
8. The President's reaction to Attorney General Jeff Sessions' recusal from the Russia investigation;
9. The President's reaction to Former FBI Director James Comey's testimony on March 20, 2017, before the House Intelligence Committee;
10. Information related to conversations with intelligence officials generally regarding ongoing investigations;
11. Information regarding who the President had had conversations with concerning Mr. Comey's performance;
12. Whether or not Mr. Comey's May 3, 2017, testimony led to his termination;
13. Information regarding communications with Ambassador Kislyak, Minister Lavrov, and Lester

MISADING STATEMENT         

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

This Factory Was Ready to Expand. Then Came the Trump Tr

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

Trump Veers to a Korea Plan That Echoes Failures of the Past

Trump Plan to Lower Drug Prices Could Increase Costs for So

Mr. Trump's lawyers are arguing that this stream-of-consciousness speaking style, that he fired Mr. Comey because of the Russia investigation, based on an information from an Australian newspaper, "there had been no misconduct."

Charlie Savage

Charlie Savage

Mr. Trump's lawyers are arguing that this stream-of-consciousness speaking style, that he fired Mr. Comey because of the Russia investigation, based on an information from an Australian newspaper, "there had been no misconduct."

Charlie Savage

Charlie Savage

Holt;

14. The President's reaction to the appointment of Robert Mueller as Special Counsel;
15. 1. The [REDACTED]'s interaction with Attorney General [REDACTED] as it relates to the appointment of [REDACTED] Counsel; and,
16. The [REDACTED] of July 8, 2017, concerning Donald Trump, Jr.'s meeting in Trump Tower.

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

It is our understanding that the reason behind the request for the interview is to allow the Special Counsel's [REDACTED] complete its report. After reviewing [REDACTED] topics you presented, it is abundant [REDACTED] the undersigned that all of the answers to your inquiries are contained in the exhibits and testimony that have already been voluntarily provided to you by the White House and witnesses, all of which clearly show that there was [REDACTED] on with Russia, and that no FBI investigation or even could have been obstructed.



U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

It remains our position that the President's actions here, by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally be obstruction because that would amount to him obstructing himself, and that he could, if he wished, terminate the inquiry, or even exercise his power to pardon if he so desired.⁴ Nevertheless, the President's strong

desire for transparency indicated the need to obtain an honest and complete factual report

from the Special Counsel, which would sustain and even benefit the Office of the President and the national interest throughout his time in office.

Thus, full cooperation was in order, and was in fact provided by all relevant parties.



We express [REDACTED] as we have expressed before,

that the Special Counsel's inquiry has been and remains a considerable burden for the President and his Office, has endangered the safety and security of the country, and has interfered with the President's ability to both govern domestically and conduct foreign affairs. This encumbrance has been only compounded by the **astounding**

Trump's Lawyers, in Confidential Memo, Argue to Head Off a
the FBI and Department of Justice which

appears to have led to the alleged Russia

collusion [REDACTED] and the establishment of the Office [REDACTED] Counsel in the first place.

²The Special Counsel acknowledged that he was aware of and understands this burden and,

This Factory Was Ready to Expand. Then Came the Trump Tr

Counsel for both sides developed an informal, confidential [REDACTED] operative relationship to expedite the conclusion of the inquiry. It was agreed that [REDACTED] conversations were confidential and "off the record" so as to encourage candor and engagement as opposed to adversarial

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

hostility. It was agreed that each side could call or meet at any time to facilitate the exchange of information. [REDACTED] agreed on the parameters of the inquiry and [REDACTED] anything changed, the Special Counsel would notify us before proceeding.

News Analysis

We all remain in agreement that your office has received unprecedented access and voluntary cooperation in the collection of all documents

requested from the White House³, the Donald J. Trump For President, Inc. (the "Campaign")⁴, and individual witnesses⁵, and that our offices have

developed a collegial and professional working relationship⁶ which encourages honesty and candor. Furthermore, all agree that your office and the Congressional committees have received the



Trump Veers to a Korea Plan That Echoes Failures of the Past

Trump Plan to Lower Drug Prices Could Increase Costs for So

full cooperation and testimony of both present and former White House staff members, including White House Counsel, as well as the President's senior advisers and his most senior Cabinet employees. The majority of that information [REDACTED] have been rightfully withheld on multiple privilege grounds, including but not limited to the presidential communications privilege.⁶



Trump's Lawyers, in Confidential Memo, Argue to Head Off a Privilege

2.

We cannot emphasize enough that *regardless of the fact that executive privilege clearly applies to his senior advisers* the interest of complete transparency, the President has allowed — in fact,



has directed [REDACTED] the voluntary production of clearly protected documents. This is because the

President's desire for transparency exceeded the policy purpose of the privilege under the

circumstances. Without question, the privilege “attaches [REDACTED] to direct communications with the President, but also to discussions between his senior advisers, who must be able to hold



confidential meetings to discuss advice they

secretly will give to the President.”⁷ The

privilege at [REDACTED] is available for the President to claim he can use “restricting the presidential communications privilege to communications

that directly involve the President will impede the



President’s ability to perform his constitutional

duty.”⁸ **Trump Veers to a Korea Plan That Echoes Failures of the Past**

[C]ommunications made by presidential advisers in the course of preparing advice for

Trump Plan to Lower Drug Prices Could Increase Costs for Some

communications privilege, even when these

communications are not made directly to the

President, given the need to provide sufficient

elbow room for advisers to obtain information



from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from

1. other [redacted] those they authored them [redacted] the privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice
2. to be given to the President.⁹



The privilege applies to communications authored or solicited and received by members of an immediate White House adviser's staff who are responsible for advising the President.



As you know, under our system of government, the President is readily available to be interviewed. Academic and jurisprudential material supports this important principle.



Moreover, as we have indicated in our meetings, we are reminded of our duty to protect the President and his Office. Thus, in deciding

whether to interview the President to be interviewed, we are guided by the controlling law in this case, *In re Sealed Case (Espy)*, 121



F.3d 729 (D.C. Cir. 1997) (the "Espy" case), that those seeking information from the President must "demonstrate with specificity why it is likely

Trump Vows to a Korea Plan That Echoes Failures of the Past

that the subpoenaed materials [here, this testimony] contain important evidence and why this evidence, or equivalent evidence, is not

practically available from another source.¹⁰



Trump Plan to Lower Drug Prices Could Increase Costs for Some

Although there is not a lot of case law directly on point concerning the issue at hand, scholars have noted that [here, there] is clear, being that the "[Espy] two-prong analysis developed as the D.C.

Circuit construed the meaning of a ‘demonstrated, specific need’ over the course of two decades,” and that while “the first requirement is essentially the equivalent of Federal Rule of Criminal Procedure 17(c) [t]he second requirement entails detailed documentation of efforts to obtain the needed information from other sources.”¹²



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

In an effort to provide complete transparency, the President believes obviously applicable privileges are appropriate in order to allow both the Counselor and the Special Counsel to see all relevant documents.¹³ The documents

provided include notes from and concerning advisors at the highest level. They reflect

contemporaneous corroboration, which is an inherently fundamentally weightier type of evidence than former FBI Director James Comey's (). Perhaps most notably, your office has already been given access to conversations with the President himself. Case

law in this district teaches that for the

presumption to possibly be overcome and the record need and specificity sufficiently demonstrating need for the exact “content of a conversation” involving high-level White House advisers must be “undeniable” and “the only

News Analysis

sources of that testimony are those persons

participating in the conversation.” The record

and testimony we have, pursuant to the

President’s directive, already voluntarily

provided to your office allow you to delve into

Trump Plan to Lower Drug Prices Could Increase Costs for So

the conversations and actions that occurred in a

significant and exhaustive manner, including but

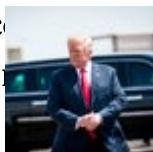
not limited to testimony of the President’s

interlocutors themselves. In light of these

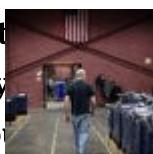
voluntary your office clearly lacks the



requisite need to personally interview the President. The information you seek is "practically available from another source,"¹⁵ and your office has already been given that other source.



We have, pursuant to the standard set forth in the Espy case, carefully reviewed your list of questions and the topics you have identified, and we have concluded that your office has already received the answers from the documents and testimony that have been voluntarily and expeditiously provided by the President, the



White House, his staff, the Trump campaign and the Trump organization. This letter will respond to your inquiries, and direct your attention to the evidence and testimony that is already in your possession.



RESIGNATION OF LT. GEN. FLYNN

In our most recent meeting, you mentioned the possibility of obstruction in connection with the case of former National Security Advisor and Lt. Gen. Michael T. Flynn (Ret.) ("Lt. Gen. Flynn"), and that you could speak with the President



specifically regarding his conversation with then-Director Comey one day after the President fired Lt. Gen. Flynn for lying to the Vice President. You have already been provided the testimony of



White House Counsel and his extensive internal file memo as well as the testimony and notes of the President's Chief of Staff, Reince Priebus ("Mr.

Priebus"), and other members of the White House

Counsel's office. According to former Mr. Comey,

the following occurred at a February 14, 2017, meeting between [REDACTED] and the President:



- 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 said anything wrong on his calls with the Russian president but had misled the Vice President. 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." He replied only that "he is a good guy." ... I did not say I would "let this go."¹⁶

1. The White House denied and refuted that the President made false words to Mr. Comey.¹⁷ We decline to recommend to the President that he be interviewed on this subject for many reasons.

This Factory Was Ready to Expand. Then Came the Trump Tr

What follows is a non-exhaustive list:

3. •  President was not under investigation by the FBI;
-  There was no obvious investigation to obstruct since the FBI had concluded on January 24, 2017, that Lt. Gen. Flynn had not lied, but was merely confused.¹⁸ Director Comey confirmed this in his closed-door Congressional testimony on March 2, 2017.
-  a matter of law, even if there had been an FBI investigation there could have been no actionable obstruction of said investigation under 18 U.S.C. § 1505, since an FBI investigation is not a "proceeding" under that statute. Since there is no cognizable offense, no testimony is required,

4. • Fourth, both Mr. Comey and Mr. McCabe subsequently testified under oath that there was "no effort to impede" the investigation. Mr. McCabe's testimony followed Mr. Comey's testimony on May 3, 2017, just six days before his termination,  could be a big deal to tell the FBI to g something . . . for a political hat would be a very big deal. It's
5. •
6. •

not happened in my experience.”²¹

1. 1. • Fifth, the investigation of Lt. Gen. Flynn proceeded unimpeded and actually resulted in a charge and a plea;
- Assuming, *arguendo*, that the [redacted] had made a comment to Mr. [redacted] that Mr. Comey claimed to be a direction, as the chief law enforcement official pursuant to Article II of the United States Constitution, the President had every right to express his view of the case;

2.

- [redacted] your office already has an ample [redacted] on which to base your findings of [redacted]. As such there is no [redacted], specific need for the President's responses; and,

3.

- Eighth, by firing Lt. Gen. Flynn, the President actually facilitated the pursuit of justice. He removed a senior public official from office within seventeen days, in the absence of any action by the FBI and well before any action taken by your office.



To briefly review the relevant law and facts, §

1505 of Title 18, United States Code, as

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

amended by the Victim and Witness Protection

Act of 1982, forbids anyone from corruptly, or by

threats of [redacted] any threatening

communi[redacted] fluencing, obstructing, or

impeding [redacted] proceeding before a

department or agency of the United States, or

Congress.²² Under § 1505, a “pending proceeding”

is limited only to agencies with rule-making or

Trump Vows to a Korea Plan That Echoes Failures of the Past

Gen. Flynn was being conducted by the FBI,

which possesses only investigative authority, not

adjudicative; it cannot conduct “proceedings”

Trump Plan to Lower Drug Prices Could Increase Costs for Some

within the cognizance of § 1505.²³ No court has

ever held than an FBI investigation constitutes a §

1505 proceeding and the U.S. Attorney’s Manual

makes clear that investigations by the Federal



Bureau of Investigation (FBI) are not §1505 proceedings.”²⁴ The DOJ has even expressly acknowledged as much to the United States Court of Appeals for the Fourth Circuit.²⁵ As a matter of law, then, the investigation of Lt. Gen. Flynn was not, at least in part, of the President’s comments as recalled by Mr. Comey, within the scope of § 1505.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

The following facts are taken from information voluntarily provided to your office or from information publicly available. These facts further demonstrate that the President did not obstruct justice in any manner concerning Lt. Gen. Flynn.



This Factory Was Ready to Expand. Then Came the Trump Tr

According to Acting Attorney General Sally Yates (“Ms. Yates”), on January 24, 2017, Lt. Gen. Flynn was interviewed by the FBI. According to reports, “The FBI interviewers believed Flynn was cooperative and provided truthful answers.”



Although U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says, the officials say that they don’t believe he was intentionally misleading them, the officials say.”²⁶



This account of the FBI’s interview and subsequent conclusions was later confirmed by the closed-door congressional testimony of Mr. Comey.²⁷ News Analysis Mr. Comey also confirmed in his May 3,

2017, Senate Intelligence Committee testimony, that he “did participate in conversations about that matter” with Ms. Yates, referring to the FBI’s interview of Lt. Gen. Flynn, before she conveyed

the information to the White House the day that followed.²⁸

6.

On January 24, 2017, Ms. Yates met with White House Counselor McGahn (“Mr. McGahn”). As



outlined by Mr. McGahn in his White House Counsel's Office memo dated February 15, 2017,²⁹

"Yates expressed two principal concerns during the meeting: (1) that Flynn may have made false representations to others in the Administration regarding the content of the calls; and (2) that Flynn's potentially false statements could make him susceptible to foreign influence or blackmail because the Russians would know he had lied."

"Yates further indicated that on January 24, 2017, FBI agents [redacted] questioned Flynn about his contacts with [redacted].³⁰ Yates claimed that Flynn's statement to the FBI were similar to those she understood he had made to Spicer and the Vice President." **This Factory Was Ready to Expand. Then Came the Trump Tr**

On January 26, 2017, Mr. McGahn briefed the President [redacted] g the information conveyed by Ms. Yates. [redacted]ional advisors were brought in, including [redacted]hite House Chief of Staff Mr. Priebus.

It was agreed that additional information would be needed before any action was taken. As recorded by Mr. McGahn, "Part of this concern was a recognition by McGahn that it was unclear from the meeting with Yates whether an action could be taken without jeopardizing an ongoing investigation." At that time "President Trump asked McGahn to further look into the issue as well as finding out more about the calls."

Trump Veers to a Korea Plan That Echoes Failures of the Past

On January 27, 2017, at Mr. McGahn's request, Ms.

Yates and Mr. McGahn had another meeting.

Importantly, DOJ leadership declined to confirm to the White House that Lt. Gen. Flynn was under any type of investigation. According to Mr.

McGahn's



During the meeting, McGahn sought



During the meeting, McGahn sought



During the meeting, McGahn sought

- clarification regarding Yates's prior statements regarding Flynn's contact with Ambassador Kislyak. Among the issues discussed was
1. whether removal of Flynn by the President would compromise any ongoing investigations. Yates was unwilling to confirm or deny that there was an ongoing investigation but did indicate that the DOJ would not object to the White House taking action against Flynn.
- (Emphasis added.)



Further supporting the White House's understanding that there was no FBI investigation that could conceivably have been impeded, "Yates also indicated that the DOJ would not object to

This Factory Was Ready to Expand. Then Came the Trump Tr

obtained the information relayed to the White

House regarding Flynn's calls with Ambassador Kislyak."



In other words, the DOJ expressed that the White House could make public that Lt. Gen.

Flynn's calls with Ambassador Kislyak had been surveilled. It seems quite unlikely that if an

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

ongoing DOJ investigation of Lt. Gen. Flynn was

underway, the DOJ would approve its key

investigat



eds and sources being

publicized

Your office is also aware that, in the week leading up to Lt. Gen. Flynn's termination and the

President's alleged comments to Mr. Comey, Lt.

Gen. Flynn had told both White House Counsel

and the Chief of Staff at least twice that the FBI

agents had told him he would *not* be charged.

The first instance occurred during a discussion at

Trump Plan to Lower Drug Prices Could Increase Costs for So

the White House on February 8, 2017, between Mr.

McGahn, Mr. Priebus, Mr. John Eisenberg and Lt.

Gen. Flynn. Flynn had led the questioning" and

"asked Flynn whether Flynn spoke about



sanctions on his call with Ambassador Kislyak.” Lt. Gen. Flynn’s “recollection was inconclusive” and he responded that “he either was not sure whether he [had] called sanctions, or did not remember.”⁵ Priebus specifically asked Flynn who [REDACTED] was interviewed by the FBI.

Flynn stated that FBI agents met with him to inform him that their investigation was over.⁶ The second occurred on a telephone call on February 10, 2017, wherein Mr. McGahn, Mr. Priebus, and the Vice President [REDACTED] confronted Lt. Gen. Flynn concerning [REDACTED] discussions with Ambassador Kislyak. A [REDACTED] in Mr. McGahn’s memo, “On the phone, Flynn is asked about the FBI investigation [REDACTED] which he says that the FBI told him they were closing it out.”⁷

On February 13, 2017, upon confirming the true content and context of Lt. Gen. Flynn’s three telephone calls to Ambassador Kislyak, and in light of his statements to them and the Vice President, White House Counsel Don McGahn and Chief of Staff Reince Priebus advised the President that Lt. Gen. Flynn “had to be let go.” As a result, on February 13, 2017, the President accepted Lt. Gen. Flynn’s resignation.

According to Mr. Comey’s testimony, the next day, on February 14, 2017, the President made

comments expressing his “hope” that Mr. Comey “could see [his] way to letting this go” in reference to the situation with Lt. Gen. Flynn. The White House disputed Mr. Comey’s recollection of that conversation. Regardless, the White House Counsel and Chief of Staff, as well as others surrounding the President, had every reason to believe at [REDACTED] that the FBI was not investigating Lt. Gen. Flynn, especially in light of

the fact that Lt. Gen. Flynn was allowed to keep his active security clearance.

1. 1.
For all inter [redacted] oses, and appearances, the FBI had a [redacted] Flynn's account; concluded that he was co [redacted] t truthful; decided not to investigate him further; and let him retain his clearance. As far as he could tell, the President was the *only one* who decided to continue

gathering and reviewing the facts in order to ascertain [redacted]

 Lt. Gen. Flynn's actions necessitated [redacted] and consequential action — removal from [redacted]. The President ordered his

White House Counsel to continue its review of the situation, which ultimately concluded that Lt. Gen. Flynn had misled the Vice President. The President did not obstruct justice. To the contrary, he facilita



We emphasize these points because even if an FBI investigation constituted a "proceeding" under the statute which it does not, the statute also requires *intent* to obstruct. There could not possibly have been intent to obstruct an

"investigation" [redacted] had been neither confirmed nor denied by White House Counsel, and that they had every reason (based on Lt. Gen. Flynn's statements and his continued security clearance) to assume was not ongoing. Further, by insisting

on and accepting Lt. Gen. Flynn's public resignation as national security adviser, the

President expedited the pursuit of justice while the DOJ and the FBI were apparently taking no action. [**Trump Veers to a Korea Plan That Echoes Failures of the Past**](#)

So, to reiterate, within seventeen days of first being advised by DOJ leadership concerning Lt. Gen. Flynn [redacted] in just three days of the



President's senior team confirming the requisite facts, the President took decisive action and directed Lt. Gen. Flynn, his highest ranking national security advisor, to resign. The President did so in spite of the fact that the FBI had, apparently, not to pursue the case further. The President did so in spite of the great political cost to himself. Far, far from obstructing justice, the only individual in the entire Flynn story that ensured swift justice was the President. Actions speak louder than any words.



While Mr. Comey may or may not have

This Factory Was Ready to Expand. Then Came the Trump Tr
misunderstood, misinterpreted or
misremembered the President's alleged

comments.³ The "hard" evidence already
voluntarily provided to your office shows not only
that the President almost certainly did not obstruct
justice, but at the time, Mr. Comey certainly
did not believe that he had in any way obstructed
justice. If Mr. Comey had believed otherwise, he
would have opened an obstruction investigation
and directed his investigators accordingly. He did
not do so.



What the entire allegation of obstruction amounts
to, then, is a critical examination of the
News Analysis

conversation that occurred between the President
and then-Director Comey on the night of February
14, 2017, in light of Mr. Comey's self-serving
testimony and leaked memos. Again, according to
Mr. Comey's prepared testimony, the following
occurred during that February 14 meeting:

⁶ The President then returned to the topic of
Mike Flynn, saying, "He is a good guy and has
been a good guy for 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 [redacted] to letting this go, to letting Flynn [redacted] a good guy. I hope you can let this go [redacted] and 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 [redacted] go."³¹



On June 8, 2017, Comey was asked about that conversation in great detail. While acknowledging that the President only said "hope," Mr. Comey said he took it as a direction. However in his Senate Judiciary Committee testimony he responded:



RISCH: He [redacted] direct you to let it go.

COMEY: Not in his words. no.

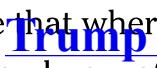
U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

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

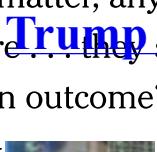
COMEY: Again, those words are not an order.



RISCH: He [redacted] "hope." Now, like me you probably [redacted] hundreds of cases, maybe thousands of cases charging people with criminal offenses, and, of course, you have knowledge of the thousands of cases out there that where people have been charged.



Trump Veers to a Korea Plan That Echoes Failures of the Past
Do you know of any case where a person has been charged for obstruction of justice, or for that matter, any other criminal offense,



where [redacted] they said or thought they hoped for an outcome?

6.

COMEY: I [redacted] well enough to answer. And the reason I keep saying his words is I took it as a direction. It is the 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
1. didn't obey that, but that's the way I took it.

RISCH: You have taken it as a direction, but that's what he said. He said — he said "I hope"

COMEY: Those are the exact words, correct.

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

RISCH: You don't know of anyone that has ever been charged for hoping something, is that a fair s

COMEY: I sit here.³²

The White House refuted Mr. Comey's account in

This Factory Was Ready to Expand. Then Came the Trump Tr

"While the president has repeatedly expressed his v general Flynn is a decent man who l protected our country, the presi ever asked Mr. Comey or

anyone else to end any investigation, including

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

president has the utmost respect for our law enforcement agencies. and all investigations. This is faithful or accurate portrayal of the c n between the president and

Mr. C

Even if we [News Analysis](#) the White House's version of events and take Comey's

Trump Veers to a Korea Plan That Echoes Failures of the Past

understanding at face value, Mr. Comey did not

confront the President, nor did he report the

attempted obstruction." He also did not "let this

go," and he received no further communication

Trump Plan to Lower Drug Prices Could Increase Costs for So

from the President or any other person from the

White House on the matter.

Mr. Comey very significantly, admitted that he did in response to the so-called

"direction" except make self-serving notes. He admitted he did not raise an objection with the President to what he "understood." He did not open an investigation of the



President. *Contrary, he told the President in their subsequent March 30, 2017, phone call "that we were not personally investigating the*

President." Had he really understood the

President to be attempting to obstruct justice, undoubtedly he would not have made that would-be false statement.



In his testimony, Comey admitted that not only did he fail to confront the President, at the time he also never told the Attorney General, the Deputy Attorney General or even the FBI agents



then conducting the counterintelligence investigation. His conclusion that he believed he had received a direction from the President.

Instead, he only told his senior FBI leadership, but did nothing to act on it.



Interestingly, Mr. Comey claimed he did not tell the Attorney General because he thought that the



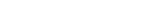
Attorney General was going to recuse himself.

While this is only a significant assumption by Mr. Comey, it raises significant questions, it still does not justify failing to tell the DOJ about the alleged conversation—if Mr. Comey truly



perceived it the way he now claims he did. And,

two days after Mr. Comey was removed, the most senior member of his FBI leadership, Deputy FBI



Director Andrew McCabe, contradicted Mr.

Comey's account by testifying that, "there has been no effort to impede our investigation to date."³⁴



Again, the contemporaneous testimony of his senior colleague, and the inaction of Mr. Comey himself, make clear that at the time of the conversation in question Mr. Comey did not

Trump Plan to Lower Drug Prices Could Increase Costs for Some

Trump's lawyers' confidential memo to Mueller, explained

really understand the President to be attempting an obstruction of justice. Recall that Mr. Comey's June 8, 2017 testimony (after his termination) about the [REDACTED] ion followed both Mr. McCabe's [REDACTED] and *Mr. Comey's own earlier testimony* [REDACTED] 2017, just six days before his termination, that "it would be a big deal to tell the FBI to stop doing something — for a political reason. That would be a very big deal. It's not happened in my experience."³⁵

In addition, [REDACTED] New York Times reported that following [REDACTED] 0, 2017, telephone call with the President, Mr. Comey said "that his relationship with the president and the White House staff was now in the right place. 'I think we've kind of got them trained,' Mr. Wittes said, paraphrasing [REDACTED] Mr. Comey told him."³⁶ On March 8, 2017, [REDACTED] Comey told an audience at a cybersecurity conference, 'You're stuck with me for another 6-1/2 years,' indicating he expects to serve the remainder of his 10-year term — and also belying any sentiment that he was suffering under the [REDACTED] of a Presidential directive he was refused to execute.³⁷

All of these facts refute the novel account Mr. Comey articulated only *after* he was fired and after he had, by his own admission, leaked information *in order to* "prompt the appointment of a special counsel"³⁸ — despite never suggesting, while in his position as FBI Director, that a special counsel was necessary or that [REDACTED] **Trump Plan to Lower Drug Prices Could Increase Costs for Some**

6.

FBI DIRECTOR COMEY

You have [REDACTED] evidence related to the firing

of Mr. Comey, including information on with whom the President consulted in advance of the decision to let Mr. Comey go, in an attempt to see if this firing of itself, might constitute obstruction. Again, we note that you have been fully provided with abundant materials and possess all of the answers to your questions, including how the President evaluated Mr. Comey's performance. As such, and pursuant to *Espy*,² we respectfully decline to allow our client to testify. It is apparent with the benefit of subsequent developments, the firing of Mr. Comey has made the discovery of corruption within the FBI at the highest levels.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

As you know, and as Mr. Comey himself has acknowledged, a President can fire an FBI Director at any time and for any reason. To the extent that this action has an impact on any investigation pending before the FBI, that impact is simply an effect of the President's lawful exercise of his constitutional power and cannot constitute obstruction of justice here. No President⁴ faced charges of obstruction merely for exercising his constitutional authority.



A President can also order the termination of an investigation by the Justice Department or FBI at

News Analysis

any time and for any reason. Such an action obviously has an impact on the investigation, but that is simply an effect of the President's lawful exercise of his constitutional power and cannot constitute obstruction of justice. We remind you

Trump Veers to a Korea Plan That Echoes Failures of the Past

of these facts simply because even assuming,⁶ *arguendo* that the President did order the termination of an investigation (and the President did not do so), with Mr. Comey in his



testimony and in his actions, have made it clear
that he did not) this could not constitute
obstruction of justice.



The following are based on Mr. Comey's
June 8, 2017, testimony before the Senate
Intelligence Committee as well as Attorney
General Jeff Sessions' June 13, 2017, testimony.

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

Based on this testimony, the President did not
commit obstruction of justice.⁴⁰ The only possible
evidence, in the light most favorable to your
office, is the memo from Mr. Comey.⁴¹ The
circumstance in which this memo arose —

several months after the conversation and only
after Mr. Comey was fired in disgrace — raises

serious doubts about its veracity, if indeed it

even exists. In addition, Mr. Comey could
possibly face criminal action for the unauthorized
leaking of conversations with the President to the
media,⁴³ an admission especially noteworthy

given his refusal to comment on conversations

with the President in, for example, his March 20,

2017, congressional⁴¹ testimony, during which he
refused to answer questions about conversations
with the President, indicating that such
information should not be shared publicly.⁴⁴



News Analysis

There is no other evidence to validate Mr.

Comey's claims since Attorney General Sessions
Trump Veers to a Korea Plan That Echoes Failures of the Past

never substantiated any of the allegations that the
President fired Mr. Comey because of the Russian
investigation.⁴⁵ To the contrary, Attorney General

Sessions stated that his recommendation to the
Trump Plan to Lower Drug Prices Could Increase Costs for So

President was that Mr. Comey be fired because of
the way he handled⁶ the Clinton email
investigations and his refusal to admit his mistakes.⁴⁶



It is also worth responding to the popular suggestion that the President's public criticism of the FBI either constitutes obstruction or serves as evidence of obstruction. Such criticism ignores the sacred responsibility of the President to hold his subordinates accountable — a function not unlike public Congressional oversight hearings.

After all, the FBI is not above the law and we are now learning of the disappointing results of a lack of accountability in both the DOJ and FBI.

The fact is, Deputy Attorney General Rod Rosenstein ("Rosenstein") expressed precisely the same concerns as the President regarding Mr. Comey in his May 9, 2017, Memorandum to Attorney General Jeff Sessions:

3.

The Federal Bureau of Investigation has long been viewed as our nation's premier federal investigation agency. Over the past year, however, the FBI's reputation and credibility have suffered substantially, largely because it has affected the entire Department of Justice. That is deeply troubling to many Department employees, veterans, legislators and citizens.

To summarize, the Deputy Attorney General and the Attorney General both agreed, in writing, that Mr. Comey should be fired, for reasons unrelated to any investigation after Russian interference.

To quote again from Mr. Rosenstein's May 9, 2017, memo:

Trump Vows to a Korea Plan That Echoes Failures of the Past

Trump Plan to Lower Drug Prices Could Increase Costs for Some

Although the president has the power to remove an FBI director, the decision should not be taken lightly.⁶ I agree with the nearly unanimous opinions of former department officials that say the director handled the

conclusion of the email investigation was wrong. As a result, the FBI is unlikely to regain public and congressional trust until it has a Director who understands the gravity of the mistake and pledges never to repeat them. Having failed to admit his errors, the Director cannot be expected to implement the necessary corrective actions.



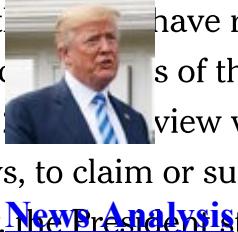
Trump's Lawyers, in Confidential Memo, Argue to Head Off a

As you also know, far from merely signing off on a Presidential decision or taking a weak or indirect action indicating a tacit or pressured approval, [REDACTED] *Stein actually helped to edit Mr. Comey's termination letter and actively advised the President accordingly.* It is unthinkable that a President acting (1) under his Constitutional authority; (2) on the written recommendation of his Deputy Attorney General; and (3) consistent with the advice of his Attorney General, to fire a subordinate who has been universally condemned by bipartisan leadership⁴⁸ could then be accused of obstruction for doing so.



This Factory Was Ready to Expand. Then Came the Trump Tr

4.
Many in the media have relied on mischaracterizations of the President's remarks in a May 11, 2017 interview with Mr. Lester Holt of NBC News, to claim or suggest that in that interview, the President stated that the real reason he fired Comey is the Russia investigation.⁴⁹



Trump Veers to a Korea Plan That Echoes Failures of the Past

Unfortunately, so has Mr. Comey. He testified that, "I [take] the president, at his word, that I was fired because of the Russia investigation."⁵⁰

Regrettably, no one asked Mr. Comey when he thought the President had actually said any such thing because, in fact, the President did not ever say such a thing.



Because it was reported so widely misreported and

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says



News Analysis

The President stated that the real reason he fired Comey is the Russia investigation.⁴⁹



Unfortunately, so has Mr. Comey. He testified that, "I [take] the president, at his word, that I was fired because of the Russia investigation."⁵⁰



Because it was reported so widely misreported and

mischaracterized, we believe it is important to present the exchange in its entirety. What the President actually said was this: "I was going to fire Comey [redacted]; there was no good time to do it. And in [redacted] I decided to just do it, I said to myself [redacted] you know, this Russia thing with Trump and Russia is a made-up story."⁵¹ The

President and Mr. Holt then talk over each other for approximately a minute, before the President completed his original thought by saying,

As far as [redacted] 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 [redacted] I've been over with a long time ago [redacted] — all it is an excuse. But I said to myself [redacted] I can't 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.⁵²

4.

Later in the interview, the following exchange took place:



PRESIDENT: I want very simply a great FBI director.
[News Analysis](#)

HOLT: And will you expect if they would — they would continue on with this investigation

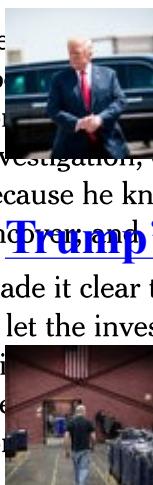
PRESIDENT: *Oh, yeah, sure. I expect that.*⁵³

Reading the entire interview, the fair reading of the President's remarks demonstrates that the President:⁶



1. Fired Comey for incompetence;

2. Knew, based on the timing of the firing, that his action could actually lengthen the Russian investigation and in any event would not terminate it;
3. De [redacted], with his comments to Mr. Holt about the Russia investigation, that he was not concerned about the continuation of any current investigation, even a now-lengthier investigation, because he knows there is no “collusion” to understand;
4. Made it clear that he was willing, even expecting, to let the investigation take more time, though he thinks it is ridiculous, because he believes that the American people deserve to have a complete understanding of the FBI.



LAVROV MEETING OF MAY 9, 2017

This Factory Was Ready to Expand. Then Came the Trump Tr

There have also been press reports — *citing*

³ *anonymous sources* — about comments the

President [redacted] made during a May 9, 2017,

meeting with [redacted]ian government officials that

Comey was a “rare nut job” and that “great

pressure because of Russia” has been “taken off”

him.⁵⁴ Assuming arguendo the President said

any such things, it (i) does not establish that the

termination [redacted] cause of the Russia

investigation [redacted]less of the validity of such an

opinion, presumably any President would not

want someone he considered a “nut job” running

the FBI; and (ii) an event would be irrelevant

to the constitutional analysis. A short, separate,

classified response addressing this subject will be

submitted to the Office of Special Counsel.

5.

INTELLIGENCE CHIEFS

Trump Plan to Lower Drug Prices Could Increase Costs for So

On a related note, you had expressed a desire for

information [redacted] to conversations with

intelligence chiefs generally regarding ongoing

investigations [redacted] intelligence chiefs themselves



have already very clearly testified on the subject before Congress. In the words of Director Rogers, "In the three-plus years that I have been the director of the National Security Agency, to the best of my recollection, I have never been directed to do anything I believe to be illegal, immoral, unethical or inappropriate, and to the best of my recollection during that same period of service I do not recall ever feeling pressured to do so."

Director Coats testified in a very similar vein: "In my time on the [redacted] which is interacting with the President of the United States or anybody in his administration, I've never been pressured — I have never felt pressured — to intervene or interfere in any way with shaping intelligence in a political way or in relation to an ongoing investigation."⁵⁵



STATEMENT, JULY 8, 2017, TO THE NEW YORK TIMES

You have received all of the notes, communications and testimony indicating that

the President dictated a short but accurate

response to a New York Times article on behalf of his son, Donald Trump, Jr. His son then followed up by making a full public disclosure regarding the meeting, including his public testimony that there was nothing to the meeting and certainly no evidence of collusion.⁵⁶



Trump Veers to a Korea Plan That Echoes Failures of the Past

This subject is a *private* matter with the New York Times. The President is not required to

Trump Plan to Lower Drug Prices Could Increase Costs for Some

anyone else, for his private affairs with his children.⁶ In any event, the President's son, son-in-law, and White House advisors and staff have made a full disclosure on these events to both



your office and the congressional committees.⁵⁷

1. 1. CONCLUSION

According to [REDACTED] upon the foregoing, we have advised the [REDACTED] that, pursuant to the standard clearly set forth in *Espy* and its progeny, your inquiry thus far demonstrates that no obstruction of the Flynn investigation or Russian collusion investigation appears to have occurred, and that your [REDACTED] has already been provided the voluminous [REDACTED]imony and documentation from which the conclusion is clearly drawn.

Therefore, your office lacks “a focused

This Factory Was Ready to Expand. Then Came the Trump Tr
responses, which is required by law “even when there are³ allegations of misconduct by high-level officials.”⁵⁸

Again, the [REDACTED]ute implicated here is 18 U.S.C. § 1505, but its application to the President is a constitutional and legal impossibility, and even if it were applicable the elements for obstruction simply cannot be satisfied. For further detail and analysis on this point, we respectfully refer you to our letter [REDACTED]ice of June 23, 2017.

What all of the foregoing demonstrates is that, as to the questions that you desire to ask the

President, absent any cognizable obstruction offense, and in light of the extraordinary cooperation by the President and all relevant parties, you have been provided with full responses.⁵⁹ Much of the topics you pose need obviating any need for an interview with the President. As all of the evidence demonstrates, every action the President took was taken with full constitutional authority pursuant to

Article II of the United States Constitution. As such, these actions cannot constitute obstruction, whether viewed separately or even as a totality.

As recognized by the Framers in Article II and as articulated with prudence, the President's prime function is that the Chief Executive ought not be hampered by requests for interview. Having

him testify demeans the Office of the President before the world. The imposition on the time and attention of the President caused by this inquiry has already caused unwarranted damage on the President and his office. This imposition is one reason why the President directed the most

extensive and transparent cooperation with the numerous requests of the Special Counsel. The time and attention that would be required to

³ prepare for an interview is significant and would represent an unwarranted imposition that would directly impinge upon the administration.

More is at stake here than just this inquiry, more even than just the Presidency of Donald J. Trump.

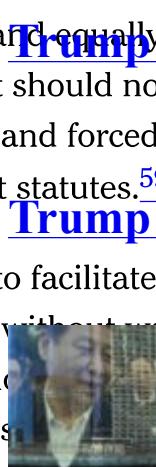
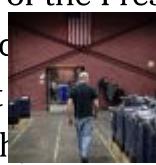
This inquiry, and the precedents set herein, will also impact the Office of the President of the

United States of America in perpetuity. Ensuring that the Office remains sacred and above the fray of shifting political winds and gamesmanship is of critical importance. Of course, the President of the United States is not above the law, but just as

⁴ News Analysis the President should not be subjected to strained readings and forced applications of clearly irrelevant statutes.⁵⁹

Trump Vows to a Korea Plan That Echoes Failures of the Past

In order to facilitate a fair process, as a practical solution, without waiver of the President's constitutional statutory privileges or objections, in exchange for a rapid



Trump Plan to Lower Drug Prices Could Increase Costs for Some

conclusion, we are willing to receive any further questions and **provide you the answers** to help you complete your report and resolve any other remaining [REDACTED]s you might have. We are prepared [REDACTED] discuss a final list of questions [REDACTED] need to be answered so that the Nation may move forward, and so that we may preserve the dignity of the Office of the President of the United States.

2.

Thank you [REDACTED] courtesy and cooperation,

Very Resp[REDACTED]

John M. Dowd

This Factory Was Ready to Expand. Then Came the Trump Tr

Jay A. Sekulow

3.

Counsel to the President



U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

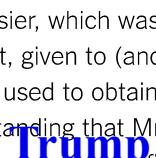
¹ We respectfully refer you to our correspondence to your office of June 23, 2017, on the subject of Governing Constitutional Principles [REDACTED] Constitutionality of Legislation Extending the Term of the [REDACTED] for Op.



² See, e.g., [FBI's Strzok and Page spoke of 'Secret Society After Trump Election, Lawmakers Say](#), FoxNEWS.COM (Jan. 23, 2018); Brooke Singman, [FBI's Strzok Allegedly Dismissed After Analysis of 'Big There There'](#), FoxNEWS.COM (Jan. 23, 2018); Jonathan Easley, [GOP Reps Demand Release of 'Shocking' Surveillance Memo](#), THE HILL (Jan. 19, 2018). The

Trump Years to a Korea Plan That Echoes Failures of the Past

genesis of the entire investigation was apparently the Fusion GPS dossier, which was paid for by the President's political opponent, given to (and possibly paid for by the FBI), and almost certainly used to obtain wiretaps of the Trump Campaign, notwithstanding that Mr. Corney himself admitted that much of the dossier was unverified and unreliable.



³ Records voluntarily produced to your office by the White House total over 20,000 pages. These records include, but are not limited to

view of Michael Flynn at the White House

on January 24, 2017 (SCRO01), 9 documents, 66 pages;

1. 1. • Communications of DAG Sally Yates, DOJ, FBI, & WH regarding Michael Flynn (SCR002), 28 documents, 64 pages;



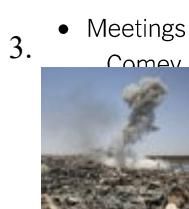
• Communication of Michael Flynn (SCR004), 311 documents, 762 pages;

- White House communications regarding campaign and transition communications between Michael Flynn and Sergey Kislyak or Russian Federation officials (SCR007), 303 documents, 912 pages;



• Communications between White House staff during the FBI's investigation into Russian interference or James Comey (SCR003), 53 documents, 248 pages;

- Sean Spicer's May 3, 2017, statements to the press regarding James Comey (SCR005), 445 documents, 2,572 pages;



3. • Meetings between the President and James Comey (SCR012), 109 documents, 725 pages;

• Presidential decision to terminate James Comey (SCR013), 1 document, 1,455 pages;

• June 13, 2017, White House meeting with Russian Federation officials (SCR008), 808 documents, 2,990 pages;

This Factory Was Ready to Expand. Then Came the Trump Tr

- June 9, 2016, meeting between Donald Trump, Jr., and Natalia Veselnitskaya (SCR009), 117 documents, 1,821 pages;

• June 17, Air Force One participants regarding Trump, Jr., press statements concerning Veselnitskaya meeting (SCR010), 1 document, 1 page;

- White House communications concerning News Analysis campaign and transition communications between Manafort, Gates, Gordon, Kellogg, Page, Papadopoulos, Charles Closser and others (SCR006), 75 documents, 978 pages; and,

Trump Vows to a Korea Plan That Echoes Failures of the Past

5. • Communications of individuals identified in category number 10 (SCRO! I), 141 documents, 284 pages

Trump Plan to Lower Drug Prices Could Increase Costs for So

⁴ By letter dated May 17, 2017, the Campaign received a request for documents from the Senate Select Committee on Intelligence (SPCI).⁶ Letter dated June 7, 2017, the Campaign received a request for documents from the House Permanent Select Committee on Intelligence (HPSCI). The records requested by SPCI include records generated from June 16, 2015, to



12pm on January 20, 2017, and hence, included the transition period. The Campaign voluntarily responded to these requests by providing 840 documents on July 21, 2017, and another set of 4,800 documents on July 31, 2017. By letter dated July 19, 2017, the Campaign received a request for documents from the Senate Judiciary Committee (SJC). The Campaign voluntarily responded to these requests by providing 840 documents on July 21, 2017, and another set of 4,800 documents on July 31, 2017. By letter dated July 19, 2017, the Campaign received a request for documents from the Senate Judiciary Committee (SJC). The Campaign responded by providing the requested documents, totaling 4,800, on August 2, 2017. By letter dated August 9, 2017, the Campaign sent all three committees a letter identifying the search terms used to identify the responsive documents. On September 15, 2017, the Campaign provided all three committees with an additional set of responsive documents totaling 2,100, which included an attached log of custodians whose records were searched along with a complete list of the search terms used.

Finally, on September 29, 2017, the Campaign sent all three committee chairs sets of documents which included 19 documents and 113 documents now provided with revised or removed privilege redactions. This production was accompanied with a privilege log. All, the Campaign produced well over 28,000 pages of records to the committees in response their requests. Now, copies of all documents provided to the committee chairs, Campaign, and all search term lists and the privilege log, were also provided to the Special Counsel. And, the Campaign produced well over 1.4 million pages of records to your office.

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

- 5** To our knowledge, over twenty White House personnel voluntarily gave interviews, including eight individuals from the White House office. In addition, seventeen Campaign employees eleven individuals affiliated in some way or another with the Campaign gave interviews to your office, congressmen, or both.

6 “The presidential communications privilege ‘is a governmental privilege intended to promote candid conversations between the President and his advisors concerning the exercise of his Article II duties.’ Blumenthal v. Drudge, 186 F.R.D. 236, 242 (D.D.C. 1999) (quoting *Interim Standard for Preserving Evidence*, 5 U.S.C. § 552a(c)(5) (D.D.C. 1998)). Courts have “recognized a ‘great public interest’ in preserving ‘the confidentiality of conversations that take place in the President’s performance of his official duties’ because such confidentiality is needed to protect ‘the effectiveness of the executive decision-making process.’ *Sealed Casi! (Espy)*, 121 F.3d at 742 (quoting *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973)). The Supreme Court “found

such a privilege necessary to guarantee the candor of presidents and their advisors and to provide ‘a President and those who assist him with the ability to explore alternatives in the process of shaping policy and making decisions and to do so in a way

many would be unwilling to express except privately.” Id at 742 (internal brackets and ellipses omitted) (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)). For these reasons,

¹ “presidential conversations ‘are presumptively privileged.’” Id. (emphasis added) (quoting Sirica, 487 F.2d at 717). The Supreme Court has recognized ‘a presumptive privilege for President’s ‘deliberative’ communications’ founded on a President’s generalized interest in confidentiality.” Id. at 743 (quoting United States v. Nixon, 418 U.S. at 708, 711).

⁷ In re Sealed Case (Espy), 121 F.3d at 748 (brackets and ellipses omitted, quoting Als v. White Physicians & Medical Clinton, 997 F.2d 898,909 (D.C. Cir. 1993)).

⁸ Id. at 751 (internal quotation marks and citation omitted).

⁹ Id. at 751.

¹⁰ Id.

¹¹ In re Sealed Case (Espy), 121 F.3d at 756.

¹² James M. Popson, In Re Grand Jury Proceedings: The Semantics of Presumptions and Needs, 32 U. RI. L.J. 153, 177-79 (1999) (discussing In re Grand Jury Proceedings, 5 F. Supp. 3d 21 (D.D.C.), aff’d sub nom. In re Lindsey, 148 F.3d 1100 (D.C. Cir. 1998), and aff’d in part, rev’d in part sub nom. In re Lindsey, 196 F.3d 263 (D.C. Cir. 1998)).

¹³ The pre- communication executive privilege applies to records “in preparation for, and covers final and post-decisional materials as well as pre-deliberative ones.” In re Sealed Case (Espy), 121 F.3d 729, 745 (D.C. Cir. 1997).

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

¹⁴ In re Grand Jury Proceedings 5 F. Supp. 2d 21, 29 (D.D.C. 1998)

¹⁵ 4.

¹⁵ In re Sealed Case (Espy), 121 F.3d at 756

¹⁶ We note that Mr. Comey declined our request on several occasions to provide unclassified notes of Mr. Corney, which have been released to the press and given to members of Congress and publicly disclosed. As Chief Executive Officer, the President has every right to have them. You provided them to **News Analysis** While House Counsel. In addition, we note that Mr. Comey has had to correct his testimony on multiple occasions.

Trump Vows to a Korea Plan That Echoes Failures of the Past

¹⁷ See infra p. 11 and n. 30.

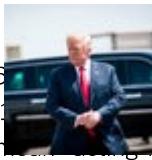
¹⁸ Evan Perez, [Flynn Changed Story to FBI; No Charges Expected](#), CNN (Feb. 17, 2017)

¹⁹ The Editorial Board, [The Flynn Information](#), WALL STREET JOURNAL (Dec. 1, 2017) (“A Congressional source also tells us that former FBI director James Comey told the House Intelligence Committee on March 2 that his agents had concluded that Flynn hadn’t lied but had forgotten that had been disclosed.”)

²⁰ Full Transcript [FBI Director McCabe and Others Testify](#)

[Before the Senate Intelligence Committee](#), WASH. POST (May 11, 2017),

- 21** [Read the Full Testimony of FBI James Comey in Which He Discusses Clinton Email Investigation](#), WASH. POST (May 3, 2017)



22 In 1996, Congress enacted a clarifying amendment to 18 U.S.C. § 1505 that defines the term “corruptly” as used in § 1505 to mean “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information. False Statements Accountability Act of 1996, Pub. L. No. 104-292, §3, 110 Stat. 3459, 3460.

- 23** Courts have explained it this way.



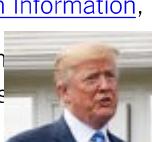
- 24** [U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL INVESTIGATIONS MANUAL § 1727, PROTECTION OF GOVERNMENT INFORMATION - OMNIBUS CLAUSE - 18 U.S.C. § 1505,](#)

- 25** United States v. Adams, 335 Fed. Appx. 330, 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 affirmed).



- 26** Perez, [FBI Agent Testifies in Story to FBI; No Charges Expected](#), supra n. 1

- 27** “A Congressional source also tells us that former FBI director James Comey told the House Intelligence Committee on March 2 that his agents had informed that Lt. Gen. Flynn had lied, but had forgotten what had been discussed.” The Editorial Board, [The Flynn Information](#), WALL STREET JOURNAL (Dec. 1, 2017).



- 28** Read the [Full Testimony of FBI James Comey in Which He Discusses Clinton Email Investigation](#), supra n.21.

- 29** This communication privileged memorandum was provided to your office as part of the White House's voluntary production, and is identified as SCR002b_SCR002b0000000001.

News Analysis

- 30** Recall that Lt. Gen. Flynn had previously been asked questions by other transition team personnel concerning his conversations with Ambassador Kislyak via email during January 11, 2017. See DJTFFP00027478. The response provided by Lt. Gen.

Flynn was vague, and appears to imply that sanctions were not discussed. DOJ leadership would not advise the White House that transcripts of the calls existed, and of concerns about the content of those transcripts. In July 2017, after being asked then, when asked by the White House, the DOJ refused to confirm that an investigation was underway.



- 31** [Read: James Comey's Prepared Testimony](#), CNN (June 8, 2017),

- 32** [Full Transcript and Video: James Comey's Testimony on Capitol](#)



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

This Factory Was Ready to Expand. Then Came the Trump Tr

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

News Analysis

Trump Vows to Reinstate a Korea Plan That Echoes Failures of the Past

Trump Plan to Lower Drug Prices Could Increase Costs for So

[Hill](#), N.Y.T. (June 8, 2017), (hereinafter, "June 8 Comey Transcript"). Mr. 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.

[33 Michael Flynn](#) [Comey Memo Says Trump Asked Him to End Flynn](#), N.Y.T. (May 16, 2017),

[34 Full Transcripts](#) [FBI Director McCabe and Others Testify Before the Senate Intelligence Committee](#), supra n. 20

[35 Read the Full Transcription of the Comey-Mueller Meeting](#) [He Discusses Clinton Email Investigation](#), Wash. Post (May 3, 2017), (emphasis added).

[36 Michael Flynn](#) [Comey, Unsettled by Trump, Is Said to Have Warned Him at a Distance](#), N.Y.T. (May 18, 2017),

[37 Jim Fink](#) [FBI Director at Cyber Conference: "You're Stuck With Me,"](#) REUTERS (Mar. 8, 2017)

[38 June 8 Comey Transcript](#), supra n. 32

This Factory Was Ready to Expand. Then Came the Trump Tr

[39 Mallory Sherburne](#), [Trump: Dershowitz Interview on 'Witch Hunt' a 'Must Watch'](#) The Hill (Dec. 4, 2017),

[3.](#)

[40 Schmidt](#) [Comey Memo Says Trump Asked Him to End Flynn Investigation](#), POLITICO Staff, POLITICO, June 13, 2017,



[41 Schmidt](#), [Comey Memo Says Trump Asked Him to End Flynn Investigation](#), supra n. 33.

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

[42 Id.](#)

[43 Dan Boylan](#), [Comey the Criminal? Leak Admission Puts Ex-FBI boss in Legal Hot Seat](#) WASH. TIMES (June 12, 2017),



[44 Full Transcripts](#) [FBI Director James Comey Testifies on Russian Interference in Election](#), Wash Post (Mar. 20, 2017) ("I'm not gonna be able to answer that particular case that matter, or any conversations I had with the president. So I can't answer that.")

[45 Politico News Analysis](#) [Sessions' Testimony on Trump and Russia](#), supra n. 40.

Trump Veers to a Korea Plan That Echoes Failures of the Past

[47 Annotated Memorandum from Rod J. Rosenstein, Deputy Attorney Gen. for the U.S. Dep't of Justice, to the U.S. Attorney Gen.](#) (May 9, 2017)

Trump Plan to Lower Drug Prices Could Increase Costs for Some

[49 Devlin Barrett & Philip Rucker](#), [Trump Said He Was Thinking of Russia Controversy When He Decided to Fire Comey](#), WASH



POST (Mar. 11, 2018); Andrew Prokop, [Trump has now Admitted He Fired Comey Because of the Russia Investigation](#), VOX.COM (May 11, 2018); Abrams, [President Trump Llanks His Decision to Fire Comey to Frustration With Russia](#)

[Investigation](#), TIME.COM (May 11, 2017)

⁵⁰ June 8 Comey Transcript, supra n. 32

⁵¹ Tim Hains, [President Trump's Full Interview with Lester Holt: Firing of James Comey](#) REAL CLEAR POLITICS

⁵² Id.

⁵³ (emphasis added) The fact that President understood that terminating [REDACTED] would not halt the Russia investigation contradicts a finding of corrupt intent and precludes an

obstruction of justice violation. Under multiple Supreme Court rulings, conviction for obstruction under the “omnibus clauses”

requires a showing that the defendant believed the act in question would have the “natural and probable effect of

interfering with a pending judicial proceeding (18 U.S.C. § 1503)

or a proceeding before an adjudicative government agency or Congress (18 U.S.C. § 1505). United States v.

Aguilar, 515 U.S. 599, 600 (1995); see also Pellibone v.

United States, 148 U.S. 197, 207 (1893). The President’s firing of Mr. Comey would not — and could not have been intended to

— have the natural and probable effect of interfering with the FBI’s investigation (assuming for the moment that an FBI investigation is a “proceeding” under § 1505, which it is not) or

the Congressional inquiries. Acting Director McCabe’s testimony makes clear that the President understood and as would be

obvious to anyone that Mr. Comey’s termination had no

impact on the investigation. Full Transcript: Acting FBI Director McCabe and Others Testify Before the Senate Intelligence

Committee, supra n. 20. Mr. Comey testified that it would not make sense to fire the FBI Director to try to stop an

investigation. June 8 Comey Transcript, supra n. 32. Moreover,

Mr. Comey testified that the President never asked him to stop

the FBI investigation into Russian involvement in the 2016

election. In contrary, the President agreed it would be

important to conduct a thorough investigation and if

anyone at the White House done anything wrong it would be good to

find that out.

⁵⁴ Matt Apuzzo, Maggie Haberman, & Matthew Rosenberg,

[Trump Told News Analysis 'Nut Job' Comey Eased Pressure from Investigation](#), N.Y.T. (May 19, 2017),

⁵⁵ Dana Bash, Perez, and Muñoz, [Investigators Trump Suggested They Refute Collusion With Russians](#), CNN (June 22, 2017).

⁵⁶ See also Catherine Herridge, Pamela K. Browne & Cyd Upson, [Russian Lawyer at Center of Trump Tower Meeting Dismisses Dossier Shared with FBI](#), FOX NEWS (Jan. 19, 2017) [sic — correct year is 2018]

⁵⁷ Karoun Demirjian, [More Than 20 White House Employees Talked to Late Panel to Release Trump Jr. Transcripts](#), CHICAGO TRIBUNE (Jan. 25, 2018),

⁵⁸ In re Seal of the Commonwealth of Massachusetts, 1 F.3d at 746

⁵⁹ Andrew C. McCarthy, [Donald Trump Should Refuse a Mueller Interview](#), NATIONAL REVIEW (Jan. 27, 2018)

1. 1.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

The Trump Legal Team's June 23, 2017,

^{2.} *Confidential Memo to Mueller*



JUNE 23, 2017

BY HAND **This Factory Was Ready to Expand. Then Came the Trump Tr**

^{3.} Kasowitz Benson Torres LLP

1633 Broa

New York 10019



Robert S. Mueller

Special Counsel **U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says**

United States Department of Justice

^{4.} Washington, D.C. 20004



Re: Gover stitutional Principles

Dear Mr. Mueller:

News Analysis

This firm is personal counsel to President Donald

J. Trump. We write to address news reports, **Trump Vows to a Korea Plan That Echoes Failures of the Past**

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

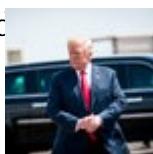
justice. According to these recent stories, Mr.

Comey's t and his prior assurances to

the Presid 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 [REDACTED] 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 [REDACTED] "The President can fire the FBI Director for any reason, or no reason at all."

Indeed, the [REDACTED] not only has unfettered statutory and Constitutional authority to terminate the FBI Director, he also has

This Factory Was Ready to Expand. Then Came the Trump Tr
Constitutional authority to direct the Justice Department to open or close an investigation, and, of course, power to pardon any person before, during or after an investigation and/or conviction. [REDACTED] In [REDACTED], the Constitution leaves no question that the President has exclusive

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

disposition of all criminal investigations and over those executive branch officials responsible for conducting such investigations. Thus, as set forth more [REDACTED] now, 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.

Trump Veers to a Korea Plan That Echoes Failures of the Past

This is particularly the case where, as here, the Department of Justice, through the Attorney General and Deputy Attorney General,

Trump Plan to Lower Drug Prices Could Increase Costs for So
unequivocally advised the President that the "FBI is unlikely to regain public and congressional trust" unless [REDACTED] or 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 [redacted]ic members of Congress, and numerous senior DOJ officials, including President [redacted] former Deputy Attorney General Jamie Gorelick, who described Director



Trump's Lawyers, In Confidential Memo, Argue to Head Off a

antithetical to the interest of justice." Plainly, removing a director under these circumstances is well within the President's Constitutional power, and the possibility that he could obstruct a Department [redacted]ce investigation by taking



action the Department of Justice said needed to

be taken is plainly unconstitutional. 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



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 suffered under a public and international [redacted] 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



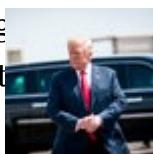
News Analysis about not being under investigation. Almost immediately after Mr. Comey finally informed the

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 given to this issue, it can be promptly resolved as a matter of law, and we respectfully 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 [redacted] Constitutional powers is detrimentally to the president's ability to effectively govern.



While we have confidence that you will come to [Trump's Lawyers, in Confidential Memo, Argue to Head Off a](#) the same conclusions set forth below, if you conclude ² a further investigation is warranted, we respectfully ³ to be advised and be provided ⁴ opportunity to raise our statutory and Constitutional objections with the Acting Attorney General.

[This Factory Was Ready to Expand. Then Came the Trump Tr](#)

A. The President Cannot Obstruct Merely By

3.

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 ⁴ federal officials comes with it the power to remove those officials for any reason, except in limited circumstances. No such restrictions have been imposed on the President's power to remove the FBI Director.

[News Analysis](#)

As the Office of Legal Counsel (OLC) explained in [Trump Veers to a Korea Plan That Echoes Failures of the Past](#) 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:

6.

As we 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.

1. Specification of a term of office does not create such a restriction. See *Parsons v. United States*, 167 U.S. 342 (1897). Nor is there any group of officers barring 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



^{2.} Congress could "impede[d] the President's ability to perform his constitutional duty" to take care that the laws are faithfully executed. *Morrison v. Olson*, 467 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

^{3.} removal power. See 122 Cong. Rec. 23,809 (1976) ("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

^{4.} 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 the President sees fit.")

(statement of Sen. Byrd). Constitutionality of Legislation Extending the Term of the F.B.I.

News Analysis
Director, Op. O.L.C. at *3 (June 20, 2011),

available at <http://www.justice.gov/file/18356/download>.

^{5.}

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 ⁶ always believed the President can fire the F.B.I. Director for any reason, or no reason at all."

This view was supported by historical precedent.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

This Factory Was Ready to Expand. Then Came the Trump Tr



See 122 Cong. Rec. 23,809 (1976) ("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 the President sees fit.")

(statement of Sen. Byrd). Constitutionality of Legislation Extending the Term of the F.B.I.

News Analysis
Director, Op. O.L.C. at *3 (June 20, 2011),

available at <http://www.justice.gov/file/18356/download>.

^{5.}

This is a long-standing principle. And Director Comey elected to open his farewell to the FBI staff acknowledging this same Constitutional principle:

Trump Plan to Lower Drug Prices Could Increase Costs for So

"I have ⁶ always believed the President can fire the F.B.I. Director for any reason, or no reason at all."

This view was 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 [REDACTED] water and the Travel Office investigation [REDACTED] there were no claims and certainly no investigations into whether President Clinton's exercise of his Constitutional power constituted obstruction.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

It is obvious that the President's mere exercise of this explicit Constitutional power to appoint and remove officers does not itself constitute obstruction. 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 criticism from, among others, President Obama and numerous Congressional Democrats and Republicans.



This Factory Was Ready to Expand. Then Came the Trump Tr

Most important, Deputy Attorney General

Rosenstein and Attorney General Sessions

recommended that Director Comey be removed based on [REDACTED] 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

News Analysis

unlikely to regain public and congressional trust until it has a Director who understands the gravity of the mistakes and pledges never to

Trump Veers to a Korea Plan That Echoes Failures of the Past

repeat them. Having refused to admit his errors,

the Director cannot be expected to implement the necessary corrective actions.⁶" In a letter to the

President [REDACTED]ing DAG Rosenstein's letter, the Attorney General so concluded "that a fresh



Trump Plan to Lower Drug Prices Could Increase Costs for So

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.” As he explained in his termination letter to Director Comey, the President argued 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 it is true that, to the extent the President required a reason for removing Mr. Comey, there was ample reason for him to do so.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a



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 Peter Holt, to suggest the President 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 did not say 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

News Analysis

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

Trump Veers to a Korea Plan That Echoes Failures of the Past

President completes his original thought, making clear that he: (a) wanted the Russian investigation to go forward “to be absolutely done properly”; (b) removed Mr. Comey in spite of the fact he understood doing so might prolong the



Trump Plan to Lower Drug Prices Could Increase Costs for Some

6.

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 that 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.



This Factory Was Ready to Expand. Then Came the Trump Tr

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



U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says
Put simply, there is no Constitutionally permissible or factually supportable view under which the ~~President~~⁴’s removal of Director Comey could constitute obstruction.



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

Trump Vows to a Korea Plan That Echoes Failures of the Past
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 he is the unitary executive, the President controls and coordinates officers within the

executive branch. The Constitution vests in the President of the United States “The Executive Power,” which means the whole executive power.¹ 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. 682, 693 (1974); see also *United States v. Gandy*, 57 U.S. 368,380 n.11 (1982)

(Prosecutorial discretion is a “special province” of the Executive Branch).² The power to decide when to investigate, and when to prosecute, lies

at the core of the executive 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 be convicted be pardoned. As the United States Court of Appeals for the D.C.



Circuit succinctly explained:

1. 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.
- 2.

In re Aiken, 2013 U.S. Dist. LEXIS 142500, F.3d 255, 262-66 (D.C. Cir. 2013) (citations omitted).

Again, while there are various political checks

and balances available to inform the President's exercise of this authority as a prudential matter,

and various norms have developed over the years as a result of these checks and balances, none of these dim

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 have ended. But traditions, even salutary ones, cannot form the

basis of a criminal charge.⁷



Again, Mr. Mueller agreed in his testimony: "I think as a 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 [redacted] he has the legal authority because a [redacted] imately report in the executive [redacted] to the president.”⁸



Thus, as with the removal of the FBI Director, the **Trump's Lawyers, in Confidential Memo, Argue to Head Off a** President cannot obstruct merely by exercising his Constitutional authority to terminate an investigation.



[redacted] he certainly cannot obstruct by merely expressing a view about an investigation (which the [redacted] 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 [redacted] the FBI investigation into



Secretary [redacted] email server, including his statement in October 2015 that Secretary Clinton

“hasn't jeopardized” classified information; in

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

target” and the investigation was “not headed in the direction of an indictment;” and in April 2016,

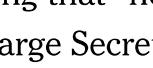


that Secretary Clinton “has not jeopardized national security” and “would never intentionally put America in any kind of jeopardy.” Of course, a short time after President Obama's April



comments about the lack of intent, Director

Comey used that exact basis for an attorney



Trump Vows to Re-Korea Plan That Echoes Failures of the Past

announcing that “no reasonable prosecutor”

would charge Secretary Clinton even though the relevant statute did not even require intent. Yet,



Trump Plan to Lower Drug Prices Could Increase Costs for So

no special counsel was appointed and no obstruction investigation was launched.⁶



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 [REDACTED] Comey's account of events, which the [REDACTED] does not. The only statute that could [REDACTED] theoretically be implicated on the alleged facts is 18 U.S.C. § 1505, and the elements for obstruction simply cannot be met.

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

First, there was no "pending proceeding" within the meaning of § 1505 regarding the investigation of Gen. Flynn under § 1505, a "pending proceeding" 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" in the meaning of § 1505.¹⁰

Courts have ruled it this way:



[T]he meaning of "proceeding" in § 1505 must

U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says

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.¹¹ Since the F.B.I. has no

ruler[...] adjudicative powers regarding

the subject matter of this indictment, its

investigation was not a "proceeding" within

the meaning of the statute.

News Analysis

Trump Vows to a Korea Plan That Echoes Failures of the Past

United States v. Higgins, 511 F. Supp. 535, 551 (W.D. Ky. 1981) (noting government's lack of precedent or legal support for assertion to the contrary).¹¹

Trump Plan to Lower Drug Prices Could Increase Costs for Some

Some have picked up on the language in the DOJ manual and other sources for the proposition that a pending proceeding could include an investigation by an executive



agency.”¹² But, as constitutional law professor Elizabeth Price Foley notes:

1. In the 120 years since Section 1505 and its purpose have been on the books, no court has 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

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 investigations by the Federal Bureau of Investigation (FBI) are not section 1505 proceedings—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 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

Trump Veers to a Korea Plan That Echoes Failures of the Past

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.

6.

Not only is it true 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  for the President to have been made aware of said pending proceeding. For this reason alone, § 1505 *does not and cannot*

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

Culpability under § 1505 is a legal impossibility.

The President should not be investigated for violating a  statute that cannot apply to the alleged ( disputed)facts. We trust your office would also desire to do so.

This Factory Was Ready to Expand. Then Came the Trump Tr

President, Comey's own characterization of the President's comments fail to show that the

President  the intent to obstruct the proceeding  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

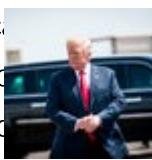
"knowledge" requirement is satisfied by acting with the knowledge that his actions would have the "natural and probable" effect of interfering with the proceedings.¹⁹ Moreover, these actions must also be done "corruptly" meaning they must be conducted with an improper purpose.²⁰

Trump Veers to a Korea Plan That Echoes Failures of the Past

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, , 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, could reasonably be 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 comment as a threat.



[Trump's Lawyers, in Confidential Memo, Argue to Head Off a](#)
up *only after* he was terminated in disgrace refutes any suggestion that he viewed the President's comment as a threat.



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

[This Factory Was Ready to Expand. Then Came the Trump Tr](#)

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 misrepresentation.



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

[U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says](#)

The President then returned to the topic of Mike Flynn, saying, "He is a good guy and has been a good guy 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

[Trump Veers to a Korea Plan That Echoes Failures of the Past](#)
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."⁶



While acknowledging that the President only said

"hope," Director Comey said he took it as a direction:

1. 1.
RISCH: H [redacted] direct you to let it go?

COMEY: No [redacted] words, no.

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

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

The reason I keep saying his words is I took it as a direction.



RISCH: R [redacted]

COMEY: I [redacted] s 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: ³You may have taken it as a direction but that's [redacted] he said.



Moreover, according to Director Comey's [U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says](#) testimony, although Director Comey did not agree

"to let this go," and although the investigation of Mr. Flynn [redacted], he does not contend that the President [redacted] d the matter with him again, and the P [redacted] denies he ever said he "hoped" Comey could "let it go" in words or substance.

Nor did anyone [Analyze](#) White House, or anyone else acting on the President's behalf, ever contact him about the Flynn investigation.

Trump Vows to a Korea Plan That Echoes Failures of the Past

While Director Comey testified that the President pressed him several times, according to his [Trump Plan to Lower Drug Prices Could Increase Costs for So](#) testimony that "pressing" had nothing to do with the Flynn investigation, but rather with the President's [redacted]ely proper and reasonable request that the Director say publicly what he had said privately [redacted] 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 [redacted] “the cloud” was getting in the way of his [redacted] do his job.”²⁴ As Director Comey himself [redacted] 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 [redacted], that the President was not under investigation.²⁵ Indeed Director Comey testified publicly [redacted] precisely this fact less than two months later. Yet, Director Comey declined to do so at the time despite the President's repeated requests.

3.

It is also claimed that the time of their conversation [redacted] 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 [redacted] will not under investigation when the [redacted] 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 record his currently post-termination view to his Deputy at the time;⁵ nor did Director Comey report any concerns of alleged obstruction to his superiors at the Justice Department.²⁷

6.



* * * * *

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 c [REDACTED] demonstrated, i.e., that constitutionally as a matter of law, there is no basis for a [REDACTED] allegation to include the conduct of the President of the United States.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

Respectfully submitted,

2.
Marc E. K [REDACTED]



Counsel to the President

This Factory Was Ready to Expand. Then Came the Trump Tr

3.

- ¹ It is not necessary to so far as to contend that no conduct by a President can rise to amount to obstruction of justice. All that is necessary is to understand that the set of facts alleged in this situation does not 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 [REDACTED] has not even remotely been alleged against the President. And, we leave aside for now the well-established rule that a sitting



U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says



News Analysis

- 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 15, 2017); Abigail Abrams, [President Trump Links His](#)

[Decision to Fire James Comey to Frustration With Russia](#)

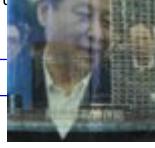
[Investigation](#), TIME.COM (May 11, 2017).

Trump Plan to Lower Drug Prices Could Increase Costs for So

Full Transcript and Video: [James Comey's Testimony on Capitol](#)

[Hill](#), NEWYORKTIMES.COM (June 8, 2017), (hereinafter, "Comey

Transcript")



[Tim Hains, Trump's Full Interview with Lester Holt: Firing](#)

[of James Comey](#)

[CLEAR POLITICS \(May](#)

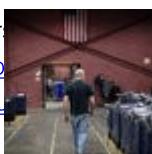
11,2017),

- 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 put on him. Matt Apuzzo, Maggie Haberman, & Matthew Futterman, [Trump Told Russians that Firing 'Nut Job' Corney Ended 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 Robert Comey and believes that the highly public and sensational manner in which he handled the investigation was over.



Trump's Lawyers, in Confidential Memo, Argue to Head Off a

- 7** Alan Dershowitz, [Dershowitz: History, Precedent and James Comey's False Statement Show that Trump Did Not Obstruct Justice](#), JURIST - EXAMINER (June 8, 2017, 9:21 AM)



- 8** Comey Transcript, supra note 7

- 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, it must be more than a "mere police investigation." United States v. Technic Servs., Inc., 314 F.3d 1031, 1035 (5th Cir. 2002); United States v. Leo, 941 F.2d 181, 199 (1st 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).4.



- 11** See also H.R. Rep. No. 90-111, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Admin. News 1967, 1967 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," [News Analysis](#); 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 prescriptions 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 powers⁶, but distinguishing IRS, which does have rulemaking

- powers and thus is not subject to § 1505 (conducting an administrative investigation)).



- 12** Domenick J. Jackson, [Is Trump Guilty Of Obstruction Of Justice? Or Just A Bit About 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 activity and does not apply to wholly investigatory activity.” ¹³

Obstruction  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

Trump's Lawyers, in Confidential Memo, Argue to Head Off a

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

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

¹⁵ U.S. DEPARTMENT 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. DEPARTMENT OF JUSTICE, U.S. ATTORNEY'S MANUAL: CRIMINAL RESOURCE MANUAL MANUALS § 1725, PROTECTION OF GOVERNMENT PROCESSES — OBSTRUCTION OF PENDING PROCEEDINGS — 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 [4](#) 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, 1487 (5th Cir. 1984) and United States v. Laurins, 857 F.2d 529, 532 (1st Cir. 1988)); see also United States v. Warshak, 550 F.3d 325 (6th Cir. 2010); United States v. Blackwell, 459 F.3d 759, 761-62 (6th Cir. 2006); United States v. Quattrone, 441 F.3d 153, 174 (2d Cir. 2006); United States v. Bhagat, 426 F.3d 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.

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 § 1505)).

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



Trump Plan to Lower Drug Prices Could Increase Costs for So

²¹ Comey Transcript, supra note 7.

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 F [redacted] not any other aspect of any possible investigation." 

²³ Comey [redacted] 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 be construed as obstruction of justice. 

²⁴ [Statement of James B. Comey, in Record, Before the S. Select Comm. on Intelligence](#), p. 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) 

²⁷ While some have made much of the fact that the President spoke to Lankford and Coats 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. 

News Analysis

Emily Cochrane contributed reporting.

Produced by  [Trump Veers to a Korea Plan That Echoes Failures of the Past](#)

- [Email](#)
- [Share](#)
- [Tweet](#)
- [More](#)

^{6.} More on [NYTimes.com](#) 

Advertiser

Site Information Navigation

- [© 2018 The New York Times Company](#)

- 1. • [Home](#)



• [Search](#)

• Accessible? We welcome your concerns? Email us at accessibility@nytimes.com. We would love to hear from you.

• [Contact Us](#)

• [Work with Us](#)

• [Advertise](#)

• [Your Trump's Lawyers, in Confidential Memo, Argue to Head Off a](#)

• [Privacy](#)

• [Terms of Service](#)

• [Terms](#)

Site Information Navigation

• [Site Map](#)

• [Help](#) **This Factory Was Ready to Expand. Then Came the Trump Tr**

• [Site Feedback](#)

• [Subscriptions](#)

[Go to the previous page](#)



[y](#)

[Go to the next page](#)

[n](#)

[U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says](#)

4.



[News Analysis](#)

[Trump Veers to a Korea Plan That Echoes Failures of the Past](#)

5.

[Trump Plan to Lower Drug Prices Could Increase Costs for So](#)

6.

