AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers: Immunity for Judicial Process

Robert S. Mueller, **“Report on the Investigation into Russian Interference in the 2016 Presidential Election (Volume II)** (2019)

*Evidence emerged during the summer and fall of 2016 election that the Russian government was attempting to interfere with the presidential election in the United States. Russian entities conducted a social media campaign that favored Republican candidate Donald Trump and sought to discredit Democratic candidate Hillary Clinton. Russian intelligence services hacked the computers of persons involved in the Clinton campaign and, through the intermediary of Wikileaks, released information damaging to the Democratic Party and Clinton. Evidence also emerged that links existed between the Russian campaign operation and the Trump campaign. In May 2017, the Trump administration agreed to appoint Robert S. Mueller III as a special counsel to investigate “the Russian government’s efforts to interfere in the 2016 presidential election, including any links or coordination between the Russian government and individuals associated with the Trump campaign.”*

*The excerpts below are from the second volume of the two volume report Mueller issued on April 2019, which discusses obstruction of justice issues in the Special Counsel’s investigation of Russian interference with the 2016 national election. Mueller made a decision not to charge the president with obstruction of justice. Why did he make that decision? Was that decision a good one? What is the evidence of obstruction? Is this evidence sufficient to charge the president with a crime? Is this evidence sufficient to impeach the president? Is there a difference between the evidence necessary to impeach a president and charge a president with obstruction of justice? Given the president has the power to fire most executive branch officials, can the president ever obstruct justice by exercise his Article II authority to remove an executive branch official? Why does the report claim such a decision might obstruct justice? Is the report correct? President Trump claimed to be exonerated by the Mueller Report even though the report declared that Trump had not been exonerated. Why did Trump make this claim? Does that claim have any legal basis? Any political basis?*

**INTRODUCTION TO VOLUME II**

A traditional prosecution or declination decision entails a binary determination to initiate or decline a prosecution, but we determined not to make a traditional prosecutorial judgment. The Office of Legal Counsel (OLC) has issued an opinion finding that "the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions" in violation of "the constitutional separation of powers." . . . And apart from OLC's constitutional view, we recognized that a federal criminal accusation against a sitting President would place burdens on the President's capacity to govern and potentially preempt constitutional processes for addressing presidential misconduct.

While the OLC opinion concludes that a sitting President may not be prosecuted, it recognizes that a criminal investigation during the President's term is permissible. The OLC opinion also recognizes that a President does not have immunity after he leaves office. . . . Given those considerations, the facts known to us, and the strong public interest in safeguarding the integrity of the criminal justice system, we conducted a thorough factual investigation in order to preserve the evidence when memories were fresh and documentary materials were available.

We considered whether to evaluate the conduct we investigated under the Justice Manual standards governing prosecution and declination decisions, but we determined not to apply an approach that could potentially result in a judgment that the President committed crimes. Fairness concerns counseled against potentially reaching that judgment when no charges can be brought. The ordinary means for an individual to respond to an accusation is through a speedy and public trial, with all the procedural protections that surround a criminal case. An individual who believes he was wrongly accused can use that process to seek to clear his name. In contrast, a prosecutor's judgment that crimes were committed, but that no charges will be brought, affords no such adversarial opportunity for public name-clearing before an impartial adjudicator,

The concerns about the fairness of such a determination would be heightened in the case of a sitting President, where a federal prosecutor's accusation of a crime, even in an internal report, could carry consequences that extend beyond the realm of criminal justice. OLC noted similar concerns about sealed indictments. Even if an indictment were sealed during the President's term, OLC reasoned, "it would be very difficult to preserve [an indictment 's] secrecy," and if an indictment became public, "[t]he stigma and opprobrium" could imperil the President's ability to govern." , , ,

Fourth, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President 's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.

**EXECUTIVE SUMMARY TO VOLUME II**

. . . .

***The Campaign’s response to reports about Russian support for Trump***. During the 2016 presidential campaign, questions arose about the Russian government's apparent support for candidate Trump. After WikiLeaks released politically damaging Democratic Party emails that were reported to have been hacked by Russia, Trump publicly expressed skepticism that Russia was responsible for the hacks at the same time that he and other Campaign officials privately sought information [*redacted*] about any further planned WikiLeaks releases. Trump also denied having any business in or connections to Russia, even though as late as June 2016 the Trump Organization had been pursuing a licensing deal for a skyscraper to be built in Russia called Trump Tower Moscow. . . .

***Conduct involving FBI Director Comey and Michael Flynn***. In mid-January 2017, incoming National Security Advisor Michael Flynn falsely denied to the Vice President, other administration officials, and FBI agents that he had talked to Russian Ambassador Sergey Kislyak about Russia 's response to U.S. sanctions on Russia for its election interference. On January 27, the day after the President was told that Flynn had lied to the Vice President and had made similar statements to the FBI, the President invited FBI Director [James] Comey to a private dinner at the White House and told Comey that he needed loyalty. On February 14, the day after the President requested Flynn's resignation, the President told an outside advisor, "Now that we fired Flynn , the Russia thing is over." The advisor disagreed and said the investigations would continue.

Later that afternoon, the President cleared the Oval Office to have a one-on-one meeting with Comey. Referring to the FBI's investigation of Flynn, the President 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." Shortly after requesting Flynn's resignation and speaking privately to Comey, the President sought to have Deputy National Security Advisor K.T. McFarland draft an internal letter stating that the President had not directed Flynn to discuss sanctions with Kislyak. McFarland declined because she did not know whether that was true, and a White House Counsel's Office attorney thought that the request would look like a quid pro quo for an ambassadorship she had been offered.

***The President’s reaction to the continued Russia investigation.*** (*This section discusses Trump’s effort to get Attorney General Jeff Sessions not to recuse himself from overseeing the Mueller investigation, Trump’s effort to get Sessions to “unrecuse” himself, and Trump’s efforts to have intelligence agencies declare he had no connection to Russian efforts to influence to 2019 election.*)

***The President's termination of Comey***. , , , The day of the firing, the White House maintained that Comey's termination resulted from independent recommendations from the Attorney General and Deputy Attorney General that Comey should be discharged for mishandling the Hillary Clinton email investigation. But the President had decided to fire Comey before hearing from the Department of Justice. The day after firing Comey, the President told Russian officials that he had "faced great pressure because of Russia," which had been "taken off' by Comey's firing. The next day, the President acknowledged in a television interview that he was going to fire Comey regardless of the Department of Justice's recommendation and that when he "decided to just do it," he was thinking that "this thing with Trump and Russia is a made-up story." . . . .

***The appointment of a Special Counsel and efforts to remove him***. On May 17, 2017, the Acting Attorney General for the Russia investigation appointed a Special Counsel to conduct the investigation and related matters. The President reacted to news that a Special Counsel had been appointed by telling advisors that it was "the end of his presidency" and demanding that Sessions resign. Sessions submitted his resignation, but the President ultimately did not accept it. . . . On June 17, 2017, the President called McGahn at home and directed him to call the Acting Attorney General and say that the Special Counsel had conflicts of interest and must be removed. McGahn did not carry out the direction, however, deciding that he would resign rather than trigger what he regarded as a potential Saturday Night Massacre.

***Efforts to curtail the Special Counsel’s Investigation.*** [*This section discusses Trump’s failed effort to have subordinates urge Attorney General Sessions to declare publicly that the Mueller investigation was “very unfair” to Trump and that Trump had done nothing wrong.*]

***Efforts to prevent public disclosure of evidence***. . . . On several occasions, the President directed aides not to publicly disclose the emails setting up the June 9 meeting [between Donald Trump, Jr. and Russians claiming have damaging information about Hillary Clinton], suggesting that the emails would not leak and that the number of lawyers with access to them should be limited. Before the emails became public, the President edited a press statement for Trump Jr. by deleting a line that acknowledged that the meeting was with "an individual who [Trump Jr.] was told might have information helpful to the campaign" and instead said only that the meeting was about adoptions of Russian children. . . .

***Further efforts to have the Attorney General take control of the investigation.*** [*This section discusses Trump’s continued effort to have Attorney General Sessions “unrecuse” himself].*

***Efforts to have McGahn deny that the President had ordered him to have the Special Counsel removed.***In early 2018, the press reported that the President had directed McGahn to

have the Special Counsel removed in June 2017 and that McGahn had threatened to resign rather than carry out the order. The President reacted to the news stories by directing White House officials to tell McGahn to dispute the story and create a record stating he had not been ordered to have the Special Counsel removed. McGahn told those officials that the media reports were accurate in stating that the President had directed McGahn to have the Special Counsel removed. The President then met with McGahn in the Oval Office and again pressured him to deny the reports. . . . McGahn refused to back away from what he remembered happening and perceived the President to be testing his mettle.

 ***Conduct towards Flynn, Manafort*** [redacted]***.*** After Flynn withdrew from a joint defense agreement with the President and began cooperating with the government, the President 's personal counsel left a message for Flynn 's attorneys reminding them of the President 's warm feelings towards Flynn, which he said "still remains," and asking for a "heads up" if Flynn knew "information that implicates the President." When Flynn 's counsel reiterated that Flynn could no longer share information pursuant to a joint defense agreement, the President's personal counsel said he would make sure that the President knew that Flynn 's actions reflected "hostility" towards the President. During Manafort 's prosecution and when the jury in his criminal. trial was deliberating , the President praised Manafort in public, said that Manafort was being treated unfairly, and declined to rule out a pardon. After Manafort was convicted, the President called Manafort "a brave man" for refusing to "break" and said that "flipping" "almost ought to be outlawed.” [*redacted*]

 ***Conduct involving Michael Cohen***. . . . . While preparing for his congressional testimony, Cohen had extensive discussions with the President 's personal counsel, who, according to Cohen , said that Cohen should "stay on message" and not contradict the President. After the FBI searched Cohen's home and office in April 2018, the President publicly asserted that Cohen would not "flip," contacted him directly to tell him to "stay strong," and privately passed messages of support to him. Cohen also discussed pardons with the President's personal counsel and believed that if he stayed on message he would be taken care of. But after Cohen began cooperating with the government in the summer of 2018, the President publicly criticized him, called him a "rat," and suggested that his family members had committed crimes.

 . . . .

 Several features of the conduct we investigated distinguish it from typical obstruction-of justice cases. First, the investigation concerned the President, and some of his actions, such as firing the FBI director, involved facially lawful acts within his Article II authority, which raises constitutional issues discussed below. At the same time, the President's position as the head of the Executive Branch provided him with unique and powerful means of influencing official proceedings, subordinate officers, and potential witnesses-all of which is relevant to a potential obstruction-of-justice analysis. Second, unlike cases in which a subject engages in obstruction of justice to cover up a crime, the evidence we obtained did not establish that the President was involved in an underlying crime related to Russian election interference. Although the obstruction statutes do not require proof of such a crime, the absence of that evidence affects the analysis of the President's intent and requires consideration of other possible motives for his conduct. Third, many of the President's acts directed at witnesses, including discouragement of cooperation with the government and suggestions of possible future pardons, took place in public view. That circumstance is unusual, but no principle of law excludes public acts from the reach of the obstruction laws. If the likely effect of public acts is to influence witnesses or alter their testimony, the harm to the justice system’s integrity is the same.

 . . . .

 Under applicable Supreme Court precedent, the Constitution does not categorically and permanently immunize a President for obstructing justice through the use of his Article II powers. The separation-of-powers doctrine authorizes Congress to protect official proceedings, including those of courts and grand juries, from corrupt, obstructive acts regardless of their source. We also concluded that any inroad on presidential authority that would occur from prohibiting corrupt acts does not undermine the President's ability to fulfill his constitutional mission. The term "corruptly " sets a demanding standard. It requires a concrete showing that a person acted with an intent to obtain an improper advantage for himself or someone else, inconsistent with official duty and the rights ofothers. A preclusion of "corrupt" official action does not diminish the President's ability to exercise Article II powers. For example, the proper supervision of criminal law does not demand freedom for the President to act with a corrupt intention of shielding himself from criminal punishment, avoiding financial liability, or preventing personal embarrassment. To the contrary, a statute that prohibits official action undertaken for such corrupt purposes furthers, rather than hinders, the impartial and evenhanded administration of the law. It also aligns with the President's constitutional duty to faithfully execute the laws. Finally, we concluded that in the rare case in which a criminal investigation of the President 's conduct is justified, inquiries to determine whether the President acted for a corrupt motive should not impermissibly chill his performance of his constitutionally assigned duties. The conclusion that Congress may apply the obstruction laws to the President's corrupt exercise of the powers of office accords with our constitutional system of checks and balances and the principle that no person is above the law.

 . . . .

**III. LEGAL DEFENSES TO THE APPLICATION OF OBSTRUCTION-OF-JUSTICE STATUTES TO THE PRESIDENT**

The President's personal counsel has written to this Office to advance statutory and constitutional defenses to the potential application of the obstruction-of-justice statutes to the President's conduct. . . . As a constitutional matter, the President 's counsel argued that the President cannot obstruct justice by exercising his constitutional authority to close Department of Justice investigations or terminate the FBI Director. Under that view, any statute that restricts the President 's exercise of those powers would impermissibly intrude on the President's constitutional role. The President 's counsel has conceded that the President may be subject to criminal laws that do not directly involve exercises of his Article JI authority, such as laws prohibiting bribing witnesses or suborning perjury. But counsel has made a categorical argument that "the President's exercise of his constitutional authority here to terminate an FBI Director and to close investigations cannot constitutionally constitute obstruction of justice."

. . . .

**B. Constitutional Defenses to Applying Obstruction-Of-Justice Statutes to Presidential Conduct**

The President has broad discretion to direct criminal investigations. The Constitution vests the "executive Power" in the President and enjoins him to "take Care that the Laws be faithfully executed." . . . The President also has authority to appoint officers of the United States and to remove those whom he has appointed. Although the President has broad authority under Article II, that authority coexists with Congress's Article I power to enact laws that protect congressional proceedings, federal investigations, the courts, and grand juries against corrupt efforts to undermine their functions. Usually, those constitutional powers function in harmony, with the President enforcing the criminal laws under Article II to protect against corrupt obstructive acts. But when the President's official actions come into conflict with the prohibitions in the obstruction statutes, any constitutional tension is reconciled through separation -of-powers analysis. . . . [W]e concluded that Congress can validly regulate the President's exercise of official duties to prohibit actions motivated by a corrupt intent to obstruct justice. The limited effect on presidential power that results from that restriction would not impermissibly undermine the President's ability to perform his Article II functions.

2. Separation-of-Powers Principles Support the Conclusion that Congress May Validly Prohibit Corrupt Obstructive Acts Carried Out Through the President's Official Powers

When Congress imposes a limitation on the exercise of Article II powers, the limitation's validity depends on whether the measure "disrupts the balance between the coordinate branches." "Even when a branch does not arrogate power to itself, ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." The "separation of powers does not mean," however, "that the branches 'ought to have no partial agency in, or no controul over the acts of each other."' In this context, a balancing test applies to assess separation -of-powers issues. Applying that test here, we concluded that Congress can validly make obstruction-of-justice statutes applicable to corruptly motivated official acts of the President without impermissibly undermining his Article II functions.

A congressionally imposed limitation on presidential action is assessed to determine "the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions," and, if the "potential for disruption is present [ ,] ... whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.” . . .

When an Article II power has not been "explicitly assigned by the text of the Constitution to be within the sole province of the President, but rather was thought to be encompassed within the general grant to the President of the 'executive Power,"' the Court has balanced competing constitutional considerations. . . . [T]he Court has applied a balancing test to restrictions on "the President's power to remove Executive officers, a power [that] ... is not conferred by any explicit provision in the text of the Constitution (as is the appointment power), but rather is inferred to be a necessary part of the grant of the 'executive Power. "” Consistent with that statement, *Morrison v. Olsen* (1988) sustained a good-cause limitation on the removal of an inferior officer with defined prosecutorial responsibilities after determining that the limitation did not impermissibly undermine the President's ability to perform his Article II functions. The Court has also evaluated other general executive-power claims through a balancing test. For example, the Court evaluated the President's claim of an absolute privilege for presidential communications about his official acts by balancing that interest against the Judicial Branch's need for evidence in a criminal case. *United States v. Nixon* (1974)

Only in a few instances has the Court applied a different framework. When the President's power is "both 'exclusive' and 'conclusive' on the issue," Congress is precluded from regulating its exercise. *Zivotofsky v. Kerry* (2015). . . . But even when a power is exclusive, "Congress’s powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow" the President's act. For example , although the President's power to grant pardons is exclusive and not subject to congressional regulation, Congress has the authority to prohibit the corrupt use of "anything of value" to influence the testimony of another person in a judicial , congressional, or agency proceeding, which would include the offer or promise of a pardon to induce a person to testify falsely or not to testify at all. The offer of a pardon would precede the act of pardoning and thus be within Congress's power to regulate even if the pardon itself is not. . . .

Under the Supreme Court's balancing test for analyzing separation-of-power s issues, the first task is to assess the degree to which applying obstruction-of-justice statutes to presidential actions affects the President 's ability to carry out his Article II responsibilities. . . . Applying obstruction -of-justice statutes to presidential conduct that does not involve the President's conduct of office-such as influencing the testimony of witnesses-is constitutionally unproblematic. . . .

The President 's action in curtailing criminal investigations or prosecutions, or discharging law enforcement officials, raises different questions. Each type of action involves the exercise of executive discretion in furtherance of the President's duty to "take Care that the Laws be faithfully executed." Congress may not supplant the President's exercise of executive power to supervise prosecutions or to remove officer s who occupy law enforcement positions. Yet the obstruction-of-justice statutes do not aggrandize power in Congress or usurp executive authority. Instead, they impose a discrete limitation on conduct only when it is taken with the "corrupt " intent to obstruct justice. The obstruction statutes thus would restrict presidential action only by prohibiting the President from acting to obstruct official proceedings for the improper purpose of protecting his own interests.

The direct effect on the President 's freedom of action would correspondingly be a limited one. A preclusion of "corrupt" official action is not a major intrusion on Article II powers. For example, the proper supervision of criminal law does not demand freedom for the President to act with the intention of shielding himself from criminal punishment, avoiding financial liability, or preventing personal embarrassment. To the contrary, a statute that prohibits official action undertaken for such personal purposes furthers, rather than hinders, the impartial and evenhanded administration of the law. . . .

Nor must the President have unfettered authority to remove all Executive Branch officials involved in the execution of the laws. . . . While the President 's removal power is an important means of ensuring that officers faithfully execute the law, Congress has a recognized authority to place certain limits on removal. The President's removal powers are at their zenith with respect to principal officers-that is, officers who must be appointed by the President and who report to him directly. The President's "exclusive and illimitable power of removal" of those principal officers furthers "the President's ability to ensure that the laws are faithfully executed. . . . In light of those constitutional precedents, it may be that the obstruction statutes could not be constitutionally applied to limit the removal of a cabinet officer such as the Attorney General. In that context, at least absent circumstances showing that the President was clearly attempting to thwart accountability for personal conduct while evading ordinary political checks and balances, even the highly limited regulation imposed by the obstruction statutes could possibly intrude too deeply on the President's freedom to select and supervise the members of his cabinet.

The removal of inferior officers, in contrast, need not necessarily be at will for the President to fulfill his constitutionally assigned role in managing the Executive Branch. . . . The Supreme Court has long recognized Congress's authority to place for-cause limitations on the President's removal of "inferior Officers" whose appointment may be vested in the head of a department. The category of inferior officers includes both the FBI Director and the Special Counsel, each of whom reports to the Attorney General. Their work is thus "directed and supervised" by a presidentially appointed, Senate-confirmed officer.

Where the Constitution permits Congress to impose a good-cause limitation on the removal of an Executive Branch officer, the Constitution should equally permit Congress to bar removal for the corrupt purpose of obstructing justice. Limiting the range of permissible reasons for removal to exclude a "corrupt" purpose imposes a lesser restraint on the President than requiring an affirmative showing of good cause. It follows that for such inferior officers, Congress may constitutionally restrict the President's removal authority if that authority was exercised for the corrupt purpose of obstructing justice. . . . A narrow and discrete limitation on removal that precluded corrupt action would leave ample room for all other consideration , including disagreement over policy or loss of confidence in the officer's judgment or commitment. A corrupt-purpose prohibition therefore would not undermine the President' s ability to perform his Article II functions. Accordingly, because the separation-of-powers question is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty," *Morrison*, a restriction on removing an inferior officer for a corrupt reason-a reason grounded in achieving personal rather than official ends-does not seriously hinder the President's performance of his duties. The President retains broad latitude to supervise investigations and remove officials, circumscribed in this context only by the requirement that he not act for corrupt personal purposes.

Where a law imposes a burden on the President 's performance of Article II functions, separation-of -powers analysis considers whether the statutory measure "is justified by an overriding need to promote objectives within the constitutional authority of Congress." . . .

Congress has Article I authority to define generally applicable criminal law and apply it to all persons-including the President. Congress clearly has authority to protect its own legislative functions against corrupt efforts designed to impede legitimate fact-gathering and lawmaking efforts. Congress also has authority to establish a system of federal courts , which includes the power to protect the judiciary against obstructive acts. . . .

The Article III courts have an equally strong interest in being protected against obstructive acts, whatever their source. As the Supreme Court explained in *United States v. Nixon*, a "primary constitutional duty of the Judicial Branch" is "to do justice in criminal prosecutions." . . . As *Nixon* illustrates, the need to safeguard judicial integrity is a compelling constitutional interest.

Finally, the grand jury cannot achieve its constitutional purpose absent protection from corrupt acts. . . . If the grand jury were not protected against corrupt interference from all persons, its function as an independent charging body would be thwarted. And an impartial grand jury investigation to determine whether probable cause exists to indict is vital to the criminal justice process.

The final step in the constitutional balancing process is to assess whether the separation-of-powers doctrine permits Congress to take action within its constitutional authority notwithstanding the potential impact on Article II functions. . . . A general ban on corrupt action does not unduly intrude on the President 's responsibility to "take Care that the Laws be faithfully executed." To the contrary, the concept of "faithful execution" connotes the use of power in the interest of the public, not in the office holder's personal interests. And immunizing the President from the generally applicable criminal prohibition against corrupt obstruction of official proceedings would seriously impair Congress's power to enact laws "to promote objectives within [its] constitutional authority," i.e., protecting the integrity of its own proceedings and the proceedings of Article TTI courts and grand juries.

. . . .

Applying the obstruction statutes to the President 's official conduct would involve determining as a factual matter whether he engaged in an obstructive act, whether the act had a nexus to official proceedings, and whether he was motivated by corrupt intent. But applying those standards to the President's official conduct should not hinder his ability to perform his Article II duties. Several safeguards would prevent a chilling effect: the existence of settled legal standards, the presumption of regularity in prosecutorial actions, and the existence of evidentiary limitations on probing the President's motives. And historical experience confirms that no impermissible chill should exist.

As an initial matter, the term "corruptly" sets a demanding standard. It requires a concrete showing that a person acted with an intent to obtain an "improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others." . . . [V]irtually everything that the President does in the routine conduct of office will have a clear governmental purpose and will not be contrary to his official duty. Accordingly, the President has no reason to be chilled in those actions because, in virtually all instances, there will be no credible basis for suspecting a corrupt personal motive.

That point is illustrated by examples of conduct that would and would not satisfy the stringent corrupt-motive standard. Direct or indirect action by the President to end a criminal investigation into his own or his family members' conduct to protect against personal embarrassment or legal liability would constitute a core example of corruptly motivated conduct. So too would action to halt an enforcement proceeding that directly and adversely affected the President's financial interests for the purpose of protecting those interests. . . . In contrast, the President's actions to serve political or policy interests would not qualify as corrupt. The President's role as head of the government necessarily requires him to take into account political factors in making policy decisions that affect law-enforcement actions and proceedings. For instance, the President 's decision to curtail a law-enforcement investigation to avoid international friction would not implicate the obstruction-of-justice statutes. . . .

There is also no reason to believe that investigations, let alone prosecutions, would occur except in highly unusual circumstances when a credible factual basis exists to believe that obstruction occurred. Prosecutorial action enjoys a presumption of regularity: absent "clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." The presumption of prosecutorial regularity would provide even greater protection to the President than exists in routine cases given the prominence and sensitivity of any matter involving the President and the likelihood that such matters will be subject to thorough and careful review at the most senior levels of the Department of Justice. Under OLC's opinion that a sitting President is entitled to immunity from indictment, only a successor Administration would be able to prosecute a former President. But that consideration does not suggest that a President would have any basis for fearing abusive investigations or prosecutions after leaving office. There are "obvious political checks" against initiating a baseless investigation or prosecution of a former President.

In the rare cases in which a substantial and credible basis justifies conducting an investigation of the President, the process of examining his motivations to determine whether he acted for a corrupt purpose need not have a chilling effect. Ascertaining the President's motivations would turn on any explanation he provided to justify his actions, the advice he received, the circumstances surrounding the actions, and the regularity or irregularity of the process he employed to make decisions. But grand juries and courts would not have automatic access to confidential presidential communications on those matters; rather, they could be presented in official proceedings only on a showing of sufficient need.

In any event, probing the President's intent in a criminal matter is unquestionably constitutional in at least one context: the offense of bribery turns on the corrupt intent to receive a thing of value in return for being influenced in official action. There can be no serious argument against the President's potential criminal liability for bribery offenses, notwithstanding the need to ascertain his purpose and intent.

Finally, history provides no reason to believe that any asserted chilling effect justifies exempting the President from the obstruction laws. As a historical matter, Presidents have very seldom been the subjects of grand jury investigations. And it is rarer still for circumstances to raise even the possibility of a corrupt personal motive for arguably obstructive action through the President's use of official power. Accordingly, the President's conduct of office should not be chilled based on hypothetical concerns about the possible application of a corrupt -motive standard in this context.

. . . . [T]he application of the obstruction statutes would not impermissibly burden the President's performance of his Article II function to supervise prosecutorial conduct or to remove inferior law-enforcement officers. And the protection of the criminal justice system from corrupt acts by any person-including the President-accords with the fundamental principle of our government that "[n]o [person] in this country is so high that he is above the law."