BIAS, CORRUPTION & OBSTRUCTION, OH MY!: THE DUE PROCESS "SHOCKS THE CONSCIENCE" LIMIT ON INVESTIGATIVE & PROSECUTORIAL CONDUCT

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ABSTRACT

Due process guarantees the government will not exercise its power in a manner falling below the standard of civilized decency. Under Supreme Court precedent, behavior by government officials, including prosecutors and investigators, that objectively may be characterized as outrageous, arbitrary, capricious, biased, vindictive, or conscience shocking violates due process. Whether officials' behavior crosses the constitutional threshold requires an assessment of the totality of the circumstances and is, accordingly, a factually sensitive inquiry.

Facts disinterred thus far suggest that the "collusion" narrative—alleging that Russia and Donald Trump's campaign colluded to throw the 2016 presidential election—may have a corrupt or politically biased genesis. As the facts continue to unfold, the depth and breadth of bias against Trump by Executive Branch officials, including those at the FBI and DOJ, may well rise to conscience-shocking levels. The taint of antecedent corruption or bias, in turn, could infect the prosecutorial effort of Special Counsel Robert Mueller.

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I. INTRODUCTION

> *"The time to guard against corruption and tyranny, is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered."*
> Thomas Jefferson[1]

Most of us have never seriously entertained the notion that our "constitutional democracy"[2] is endangered. We assume "corruption" is mostly a second-world or third-world problem. We assume our Constitution, with its elaborate checks and balances, will prevent any deep corruption from taking root.

But in recent years, the United States' constitutional regime seems to have entered a new era of stress testing in which corruption has sprouted like weeds. Americans' identities and private conversations have been unmasked at alarming rates by high-ranking Executive Branch officials.[3] Politically powerful people have been permitted to destroy potential evidence[4] and have been cleared of crimes before investigations were concluded.[5] FBI investigators in field offices around the country may have been told by higher-ups in D.C. to stand down on investigations of pay-to-play behavior

1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Q.XIII (1781), https://docsouth.unc.edu/southlit/jefferson/jefferson.html.

2. We of course have a constitutional "republic," not a constitutional democracy, but the latter is the more popularly used colloquial expression and the stated topic of this symposium.

3. *See* Andrew C. McCarthy, *Explosive Revelation of Obama Administration Illegal Surveillance of Americans*, NAT'L REV. (May 25, 2017), https://www.nationalreview.com/2017/05/nsa-illegal-surveillance-americans-obama-administration-abuse-fisa-court-response/; Katie Bo Williams, *NSA Granted Nearly 2K 'Unmasking' Requests in 2016*, HILL (May 2, 2017), http://thehill.com/policy/national-security/331642-nsa-granted-2k-unmasking-requests-in-2016-report.

4. *See, e.g.*, *FBI Agreed to Destroy Laptops of Clinton Aides with Immunity Deal, Lawmaker Says*, FOX NEWS NETWORK (Oct. 3, 2016), http://www.foxnews.com/politics/2016/10/03/fbi-agreed-to-destroy-immunized-clinton-aides-laptops-sources-say.html; Louis Nelson, *Gowdy: Clinton Used Special Tool to Wipe Email Server*, POLITICO (Aug. 25, 2016), https://www.politico.com/story/2016/08/hillary-clinton-emails-bleachbit-227425.

5. *See* Letter from Charles E. Grassley, Chairman, Senate Comm. on the Judiciary & Lindsey O. Graham, Chairman, Subcomm. on Crime & Terrorism, Senate Comm. on the Judiciary, to Christopher Wray, Dir., FBI (Aug. 30, 2017), https://www.judiciary.senate.gov/imo/media/doc/2017-08-30%20CEG%20+%20LG%20to%20FBI% 20(Comey%20Statement).pdf.

by the former Secretary of State.[6] Political-opposition research may have been used pretextually to launch an FBI investigation of an ongoing presidential campaign.[7] Investigators and Department of Justice (DOJ) lawyers appear to have made material misrepresentations to courts in order to obtain warrants to spy on individuals connected to an ongoing presidential campaign.[8] High-ranking law-enforcement personnel have held overtly partisan views[9] and schemed to devise an "insurance policy"[10] to "stop"[11] a presidential candidate that they despised. High-ranking officials have repeatedly lied (both to Congress and to Inspectors General)[12] and resisted congressional subpoenas,[13] frustrating the ability to disinter the extent of

6. *See* Devlin Barrett, *FBI in Internal Feud over Hillary Clinton Probe*, WALL ST. J. (Oct. 30, 2016), https://www.wsj.com/articles/laptop-may-include-thousands-of-emails-linked-to-hillary-clintons-private-server-1477854957 ("Others further down the FBI chain of command, however, said agents were given a much starker instruction on the case: 'Stand down.' When agents questioned why they weren't allowed to take more aggressive steps, they said they were told the order had come from the deputy director —Mr. McCabe. Others familiar with the matter deny Mr. McCabe or any other senior FBI official gave such a stand-down instruction.").

7. *See generally* Letter from Donald F. McGahn, Counsel to the President, The White House, to Devin Nunes, Chairman, House Permanent Select Comm. on Intelligence (Feb. 2, 2018), https://intelligence.house.gov/uploadedfiles/memo_and_white_house_letter.pdf.

8. *See generally id.*

9. *See generally* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 171 (2018) [hereinafter IG Report], https://www.justice.gov/file/1071991/download.

10. *See* Chuck Ross, *'We Can't Take That Risk'—FBI Officials Discussed 'Insurance Policy' Against Trump Presidency*, DAILY CALLER (Dec. 13, 2017), http://dailycaller.com/2017/12/13/fbi-officials-discussed-insurance-policy-against-trump-presidency/.

11. *See* Michael S. Schmidt, *Top Agent Said F.B.I. Would Stop Trump from Becoming President*, N.Y. TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/us/politics/fbi-texts-trump.html.

12. *See* Adam Goldman & Nicholas Fandos, *Former F.B.I. Deputy Director Is Faulted in Scathing Inspector General Report*, N.Y. TIMES (Apr. 13, 2018), https://www.nytimes.com/2018/04/13/us/politics/former-fbi-deputy-director-is-faulted-in-scathing-inspector-general-report.html; Pete Kasperowicz, *'Growing Body of Evidence' James Comey Lied to Congress*, WASH. EXAMINER (Apr. 19, 2018), https://www.washingtonexaminer.com/news/growing-evidence-that-james-comey-lied-to-congress-says-mark-meadows.

13. Samuel Chamberlain, *Lisa Page Will Not Appear for Capitol Hill Interview Despite Subpoena, Attorney Says*, FOX NEWS NETWORK (July 10, 2018), http://www.foxnews.com/politics/2018/07/10/lisa-page-will-not-appear-for-capitol-hill-

their miscreant behavior.[14] Prosecutors have initiated raids of homes and office[15]—and even raided lawyers' offices[16]—to investigate crimes with no relation to their original mandate.[17]

Such behavior by Executive Branch officials must give us pause, regardless of which side of the political aisle we are on. No one—whether Republican or Democrat or Independent—should think such behavior is acceptable. And I doubt anyone does. But whatever one's political affiliation, those of good faith agree that we ought to continue to investigate in order to ascertain the full extent of corruption.

The recently issued report of the DOJ Inspector General (IG) has confirmed alarming evidence of bias by the highest-ranking law-enforcement officials of the federal government in conducting an election-year investigation of Hillary Clinton, the 2016 Democratic nominee for President, regarding her mishandling of classified information while serving as Secretary of State.[18] Communications between officials leading the Clinton investigation "reflected political opinions in support of former Secretary Clinton and against her then political opponent, Donald Trump. Some of these text messages and instant messages mixed political commentary with discussions about the Midyear investigation, and raised concerns that political bias may have impacted investigative decisions."[19] Indeed, the ubiquity of such political commentary among high-ranking FBI and DOJ officials led the IG to conclude:

interview-despite-subpoena-attorney-says.html.

14. *See id.*

15. *See* Carol D. Leonnig, Tom Hamburger & Rosalind S. Helderman, *FBI Conducted Raid of Former Trump Campaign Chairman Manafort's Home*, WASH. POST (Aug. 9, 2017), https://www.washingtonpost.com/politics/fbi-conducted-predawn-raid-of-former-trump-campaign-chairman-manaforts-home/2017/08/09/5879fa9c-7c45-11e7-9d08-b79f191668ed_story.html?utm_term=.968885f51282.

16. *See* Erica Orden, Rebecca Ballhaus & Michael Rothfeld, *Agents Raid Office of Trump Lawyer Michael Cohen in Connection with Stormy Daniels Payments*, WALL ST. J. (Apr. 9, 2018), https://www.wsj.com/articles/fbi-raids-trump-lawyers-office-1523306297.

17. *See* Sharon LaFraniere, *Judge Questions Whether Mueller Has Overstepped His Authority on Manafort*, N.Y. TIMES (May 4, 2018), https://www.nytimes.com/2018/05/04/us/mueller-authority-paul-manafort-case-judge.html.

18. *See generally* Goldman & Fandos, *supra* note 12.

19. *See* IG Report, *supra* note 9, at iii.

> [T]he conduct by these employees cast a cloud over the FBI Midyear investigation and sowed doubt the FBI's work on, and its handling of, the Midyear investigation. Moreover, the damage caused by their actions extends far beyond the scope of the Midyear investigation and goes to the heart of the FBI's reputation for neutral factfinding and political independence.[20]

Indeed, according to the IG, some of the high-ranking officials' private communications were "not only indicative of a biased state of mind but, even more seriously, implie[d] a willingness to take official action to impact a presidential candidate's electoral prospects."[21]

The IG's report notably adds that "most of the text messages raising such questions pertained to the Russia investigation" involving that country's alleged "collusion" with that presidential campaign of Donald Trump.[22] Given how biases ineluctably shape behavior, the facts uncovered in the IG report create the impression that a group of high-ranking law-enforcement officials may have acted to squelch the Clinton investigation, to build a narrative of Trump–Russia collusion in the hopes of bolstering Mrs. Clinton's electoral chances, and, if the unthinkable happened, to obtain an insurance policy to cripple the Trump Administration with accusations of illegitimacy. Federal law enforcement, in other words, may have been weaponized for purposes of affecting the 2016 presidential election.

If the wolf of corruption did enter the fold of high-level federal law enforcement during the 2016 presidential election, how can it be rooted out? Specifically, what existing legal remedies may be available to prevent such corrupt officials from feasting on the fruit of their behavior? These questions will be explored in the next Part.

II. REMEDIES FOR EXECUTIVE BRANCH CORRUPTION

A. *The Constitutional Power to Fire Subordinates*

The primary constitutional check against Executive Branch corruption is the President's authority to fire his subordinates, a power the Supreme Court has concluded "is incident to the power of appointment"[23] found in

20. *Id.* at xi, 420.
21. *Id.* at xii, 420–21.
22. *Id.* at iii, 420.
23. Myers v. United States, 272 U.S. 52, 122 (1926).

the Appointments Clause.[24] The Executive Branch is not a "fourth branch"[25] of government; it is the second branch, a manifestation of power granted to the President—and the President alone—in Article II of the Constitution. In the words of the Supreme Court in *Myers v. United States*, the Executive Branch is the "alter ego" of the President.[26] The Executive Branch is not "independent" of the President; it is the President.[27]

The Supreme Court has made clear that a key aspect of separation of powers is that the President "must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay."[28] You would never know this if you picked up a newspaper or watched television last May when the President fired the then-FBI Director James Comey.[29] Cries of "obstruction of justice" were immediately levied by formerly sober individuals.[30] As the next sub-Part will show, however, those who accuse the President of obstruction are making political, not legal, arguments.

24. U.S. CONST. art. II, § 2, cl. 2 ("He shall have power . . . [to] nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

25. *See* Fed. Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." (citation omitted)).

26. *Myers*, 272 U.S. at 133.

27. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (quoting 30 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 334 (John C. Fitzpatrick ed., 1939)) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'").

28. *Myers*, 272 U.S. at 134.

29. *See* Dahlia Lithwick, *How the President Obstructed Justice*, SLATE (May 13, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/05/did_president_trump_obstruct_justice_in_firing_james_comey.html.

30. *See id.*; Maia Davis, *There's "Absolutely Evidence" to Begin Obstruction of Justice Case on Trump: Bharara*, ABC NEWS (June 11, 2017), https://abcnews.go.com/Politics/absolutely-evidence-begin-obstruction-justice-case-bharara/story?id=47958033.

1. *Obstruction of Justice Statutes*

Constitutional law is supreme to statutory law.[31] A President who exercises his superior constitutional authority to fire a subordinate cannot be prosecuted for violation of a legally inferior obstruction of justice statute.[32] This does not mean the President is "above the law"; it simply means, when exercising his constitutional authority, the President *is* the law, acting pursuant to the highest law of the land. A statute cannot stand in the way of the Constitution.

Beyond the mere act of firing, however, President Trump's remarks to Mr. Comey, prior to his termination, likewise cannot constitute an obstruction of justice. According to a memo to file penned by James Comey dated February 14, 2017, President Trump told Comey:

> Flynn is a good guy, and has been through a lot. He misled the Vice President but he didn't do anything wrong in the call [to Russian Ambassador Kislyak while incoming National Security Advisor]. He 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."[33]

As I have repeatedly pointed out, a fundamental precept of obstruction statutes is that the defendant's actions must obstruct a "proceeding" of government, such as a court or congressional proceeding.[34] More

31. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

32. *See* Anna Giaritelli, *Alan Dershowitz: 'You Cannot Charge a President with Obstruction of Justice for Exercising His Constitutional Power'*, WASH. EXAMINER (Dec. 4, 2017), https://www.washingtonexaminer.com/alan-dershowitz-you-cannot-charge-a-president-with-obstruction-of-justice-for-exercising-his-constitutional-power; David B. Rivkin, Jr. & Lee A. Casey, *Can a President Obstruct Justice?*, WALL ST. J. (Dec. 10, 2017), https://www.wsj.com/articles/can-a-president-obstruct-justice-1512938781?shareToken=st43b2cfc7e8824c63924afbbf9be20a7e&reflink= article_email_share.

33. *See* Memorandum from James Comey, Dir., FBI, to File of James Comey, Dir., FBI (Feb. 14, 2017) [hereinafter Comey Memo.], https://www.scribd.com/document/376858614/c2018-4-19-Comey-Memo-Enclosure-Unclassified#from_embed. Common reporting indicates the call was with Russian Ambassador Kislyak. *See, e.g.*, Eugene Kiely, *Michael Flynn's Russia Timeline*, FACTCHECK.ORG (Dec. 1, 2017), http://www.factcheck.org/2017/12/Michael-flynns-russia-timeline/.

34. *See, e.g.*, 18 U.S.C. § 1510 (2012); Elizabeth Price Foley, Opinion, *Those Who Tout Trump's 'Obstruction' Misrepresent the Concept*, HILL (June 11, 2018) [hereinafter

specifically, to constitute obstruction of justice, the defendant's act must be undertaken with a culpable mindset (*mens rea*), and it must actually obstruct, or attempt to obstruct, an official government proceeding.[35] Put simply, one cannot obstruct justice if there is no government proceeding that one is trying to obstruct.[36]

For example, imagine Bob shreds a bunch of documents (a rather common practice). Shredding documents, without more, is not obstruction of justice. If there is no pending or reasonably foreseeable government proceeding to which Bob's documents may be relevant, Bob has not obstructed justice. Moreover, even if there *is* a governmental proceeding, Bob does not obstruct justice unless he shreds his documents with the requisite *mens rea*.[37]

Several obstruction statutes have been invoked in an attempt to make the case against President Trump. For example, some argue[38] the President's remarks violated § 1505 of Title 18, which declares that anyone who "corruptly" endeavors to obstruct the proper administration of law "under which any pending proceeding is being had before any department or agency of the United States" is guilty of a felony.[39] Even putting aside the difficulty of proving, beyond a reasonable doubt, that President Trump's brief and generalized words evince a corrupt mindset,[40] § 1505 applies only to a pending proceeding.[41]

Foley, *Those Who Tout*], http://thehill.com/opinion/white-house/391348-those-who-tout-trumps-obstruction-misrepresent-the-concept; Elizabeth Price Foley, Opinion, *Trump's Statements Are Not an Obstruction of Justice*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/opinion/trumps-fbi-comey-statements-are-not-an-obstruction-of-justice.html.

35. *See, e.g.*, United States v. Leisure, 844 F.2d 1347, 1366 (8th Cir. 1988) (discussing the varying degrees of *mens rea* required for different obstruction statutes and the fact that § 1510 requires a "willful" and not merely "knowing" act as an element of the crime).

36. *See, e.g.*, 18 U.S.C. § 1512.

37. *See* Foley, *Those Who Tout*, *supra* note 34.

38. *See, e.g.*, David French, *Donald Trump Is Not Constitutionally Immune from an Obstruction of Justice Charge*, NAT'L REV. (Dec. 4, 2017), https://www.nationalreview.com/corner/donald-trump-not-constitutionally-immune-obstruction-justice-charge/.

39. 18 U.S.C. § 1505.

40. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005) (defining a corrupt mindset as "wrongful, immoral, depraved, or evil").

41. *See* 18 U.S.C. § 1505.

Courts interpreting § 1505's pending proceeding language have uniformly concluded that it refers to judicial or quasi-judicial proceedings by administrative agencies, but *not* to an FBI investigation.[42] The legislative history of § 1505 suggests Congress did not intend it to reach FBI investigations, with the House Judiciary Committee report declaring that "attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the proscription" of § 1505.[43] Those hoping to prosecute President Trump for obstruction based upon his statements to Mr. Comey thus cannot rely on § 1505.

Indeed, only one federal statute criminalizes obstruction with an *ongoing criminal investigation*. It is found at 18 U.S.C. § 1510, titled "Obstruction of Criminal Investigations," and it states:

> Whoever willfully endeavors *by means of bribery* to *obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute* of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.[44]

As the italicized portions of § 1510 indicate, the statute deems as "obstruction": (1) a willful act (2) that obstructs/delays/prevents communication of information about a federal crime to a criminal investigator and (3) which is accomplished by means of bribery. The statute is designed to punish those who bribe witnesses to be quiet and not cooperate with federal investigators, thereby obstructing an ongoing criminal investigation.[45] It is purposefully narrow because of the nature of criminal investigations and what criminal defense attorneys say and do on a daily basis.[46] If saying something to an FBI investigator (or even the FBI Director) akin to "Bob is a good guy; I hope you'll let Bob go"[47] constituted

42. United States v. McDaniel, No. 2:12-CR-0028-RWS-JCF, 2013 WL 3993983, at *5–6 (N.D. Ga. Jan. 29, 2013); United States v. Higgins, 511 F. Supp. 453, 454–56 (W.D. Ky. 1981); *see also* United States v. Wright, 704 F. Supp. 613, 614–15 (D. Md. 1989) (finding that § 1505 applies only to a proceeding before an agency with rulemaking or adjudicative power, not purely investigative power).

43. H.R. REP. NO. 90-658, at 1 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 1760, 1760 (emphasis added).

44. 18 U.S.C. § 1510 (emphasis added).

45. *See, e.g.*, United States v. Williams, 470 F.2d 1339, 1343 (8th Cir. 1973).

46. *See, e.g.*, United States v. San Martin, 515 F.2d 317, 320 (5th Cir. 1975).

47. According to a memo to file penned by James Comey dated February 14, 2017, President Trump told Comey, "[T]hat Flynn is a good guy, and has been through a lot.

obstruction of justice, every criminal defense attorney in the country would be guilty of obstruction. Telling an FBI investigator (even the FBI Director) that Michael Flynn is a "good guy" and expressing hope that the FBI will drop its investigation neither constitutes an act of bribery (element three) nor obstructs/delays/prevents communication of information about a federal crime (element two).[48] The attempt to pin obstruction of justice charges on President Trump's comments to Mr. Comey, therefore, cannot rest on the narrow Obstruction of Criminal Investigations statute, § 1510.[49]

Those pushing the obstruction narrative have recently shifted their attention to a broader obstruction statute, § 1512 of Title 18.[50] Some argue[51] that the President's statements to Mr. Comey violate subsection (b) of § 1512, which addresses acts of intimidation, threats, corrupt persuasion, or misleading conduct,[52] because he "threatened" or tried to "intimidate"

He misled the Vice President but he didn't do anything wrong in the call [to Russian Ambassador Kislyak while incoming National Security Advisor]. He 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.'" *See* Comey Memo., *supra* note 33.

48. *See* 18 U.S.C. § 1510.

49. *See id.*

50. *Id.* § 1512.

51. *See* Tim Hains, *Rep. Brad Sherman: Donald Trump Is Guilty of Obstruction of Justice*, REALCLEARPOLITICS (July 12, 2017), https://www.realclearpolitics.com/video/2017/07/12/rep_brad_sherman_donald_trump_is_guilty_of_obstruction_of_justice.html.

52. The full text of 18 U.S.C. § 1512(b) reads as follows:

> (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to—
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
>
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
>
> (D) be absent from an official proceeding to which such person has been summoned by legal process; or
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission

Comey by stating that he hoped the FBI would let Mr. Flynn go.

But Trump's remarks do not constitute a "threat" or "intimidation" punishable consistent with the First Amendment. In *Virginia v. Black*, the Supreme Court concluded that the First Amendment permits criminalization only of "true threats," which are defined as "a serious expression of an intent to commit an act of unlawful violence."[53] The *Black* Court made clear "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[54] No matter how capaciously one views President Trump's statements to Mr. Comey, it is clear from Mr. Comey's own memorandum to file memorializing his meeting with the President that he was not in fear of bodily harm or death.[55]

Others argue that subsection (c) of § 1512 provides a basis for obstruction charges against President Trump.[56] This subsection defines obstruction as the alteration or concealment of documents and other objects used in an "official proceeding," and more broadly, any other act that obstructs, influences, or impedes such a proceeding.[57] But Congress imposed higher *mens rea* under subsection (c), requiring proof that the defendant acted corruptly, which the Supreme Court in *Arthur Andersen LLP v. United States* defined as "wrongful, immoral, depraved, or evil."[58] A defendant must know, therefore, that he is interfering with an official proceeding and must have the specific, evil desire to do so.[59] There is no evidence President Trump did this.

> or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 20 years, or both.

53. Virginia v. Black, 538 U.S. 343, 359 (2003).

54. *Id.* at 360.

55. *Compare id.*, *with* Comey Memo., *supra* note 33.

56. *See, e.g.*, Randall Eliason, *Did President Trump Obstruct Justice? A Prosecution Analysis*, SIDEBARSBLOG.COM (May 15, 2017), https://sidebarsblog.com/did-president-trump-obstruct-justice/ (noting the high-profile convictions of President George W. Bush official "Scooter" Libby and celebrity homemaker Martha Stewart were obtained with obstructionist charges, though the ultimate investigation yielded no more substantive wrongdoing).

57. 18 U.S.C. § 1512(c).

58. Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005).

59. *See id.*

Section 1512's attractiveness as an alternative to §§ 1505 and 1510 is likely due to its language in subsection (f), which has been misconstrued by some as dispensing with the official proceeding requirement of obstruction law.[60] More specifically, subsection (f) declares, "an *official proceeding need not be pending* or about to be instituted at the time of the offense."[61] This language does not, however, eliminate the need to prove obstruction with an official proceeding.[62] There must still be an official proceeding that the defendant is corruptly trying to obstruct, though the official proceeding need not be pending at the time the defendant acted.[63]

The Supreme Court recently made this clear in *Marinello v. United States*, a prosecution under an IRS obstruction statute that contained no official proceeding language.[64] The statute broadly criminalized "corruptly or by force . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]."[65]

Despite the absence of any official proceeding language in the IRS obstruction statute, the *Marinello* Court insisted that the Government prove the defendant intended to obstruct an official proceeding, declaring, "[T]he Government must show (among other things) that there is a 'nexus' between the defendant's conduct and a particular [IRS] proceeding . . . ."[66] The Court further clarified that the official proceeding must be "pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant."[67] In other words, said the Court, "the proceeding must at least be in the offing" at the time the defendant acted.[68]

60. *See The Trump Lawyers' Confidential Memo to Mueller, Explained*, N.Y. TIMES, at n.22 (June 2, 2018) [hereinafter *Lawyers' Confidential Memo.: Explained*], https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html#footnote-0-22 (asserting that § 1512 "criminalizes the corrupt impeding of proceedings even if they have not yet started—like the potential grand jury investigation an F.B.I. case can prompt").

61. *See* 18 U.S.C. § 1512(f)(1) (emphasis added).

62. *See id.*

63. *See id.*

64. Marinello v. United States, 138 S. Ct. 1101, 1109–10 (2018).

65. *See id.* at 1105 (quoting 26 U.S.C. § 7212(a)).

66. *Id.* at 1109–10.

67. *Id.* at 1110.

68. *Id.*

Pursuant to *Marinello*, therefore, an obstruction defendant must impede an official proceeding—either already ongoing or reasonably foreseeable—even if the obstruction statute under which he is charged omits official proceeding language.[69] This is logical: Without an official proceeding requirement, obstruction laws would be breathtakingly broad.[70] Without a nexus requirement, the Court observed, the IRS obstruction statute under which Mr. Marinello was charged could "apply to a person who pays a babysitter $41 per week in cash without withholding taxes, leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant" since such acts colloquially obstruct the IRS's ability to collect taxes.[71]

President Trump's remarks to Mr. Comey did not impede an official proceeding, which—unlike the obstruction statute in *Marinello*—is expressly required by § 1512(c).[72] Moreover, official proceeding is defined in § 1515 of Title 18 as a proceeding involving a federal court or grand jury, Congress, a federal agency, or an insurance regulatory agency.[73] The United States Court of Appeals for the Ninth Circuit recently ruled in *United States v. Ermoian* that an FBI investigation is not a proceeding before a federal agency for purposes of § 1512 obstruction.[74]

But what about the Flynn grand jury? Some argue President Trump's remarks to Mr. Comey impeded the Flynn grand jury,[75] which is explicitly included within the definition of official proceeding in § 1515.[76] But expressing hope that the FBI would let Mr. Flynn go could not, by definition, obstruct the grand jury investigating Mr. Flynn or any court or grand jury proceeding for two reasons. First, there is no evidence that a grand jury was in the offing at the time the President spoke to Comey.[77] Grand juries are secret, and Flynn told the White House that the FBI had cleared him.[78]

69. *See id.* at 1113 (Thomas, J., dissenting).
70. *See id.* at 1108 (majority opinion).
71. *See id.* at 1106, 1108.
72. 18 U.S.C. § 1512(c)(2) (2012).
73. *Id.* § 1515(a)(1).
74. United States v. Ermoian, 752 F.3d 1165, 1169–72 (9th Cir. 2013).
75. *See, e.g.*, Eliason, *supra* note 56.
76. 18 U.S.C. § 1515(a)(1)(A).
77. *See* Marinello v. United States, 138 S. Ct. 1101, 1110 (2018).
78. *See* Byron York, *Trump Lawyers Reveal Previously Unknown Evidence in Flynn Case*, WASH. EXAMINER (June 3, 2018), https://www.washingtonexaminer.com/

Moreover, according to a memo to file penned by White House Counsel Donald McGahn on January 27, 2017, acting Attorney General Sally Yates refused to confirm the existence of any investigation into Mr. Flynn.[79] It appears, therefore, that when President Trump made his statement to Mr. Comey on February 14, 2017, he had no reason to believe there was a Flynn grand jury in the offing.[80]

Second and more fundamentally, even if the President knew or had reason to know of the existence of a grand jury investigation of Mr. Flynn at the time he made his remarks to Mr. Comey, the President's comments could not obstruct the grand jury in any way. The FBI has zero jurisdiction over grand juries.[81] The FBI's job is to investigate potential crimes and, if

news/newly-leaked-memo-previously-unknown-evidence-michael-flynn-case ("A newly-leaked January 29 memo from President Trump's first legal team to special counsel Robert Mueller suggests the president believed fired national security adviser Michael Flynn was no longer under investigation when he famously asked FBI Director James Comey—by Comey's account—to let the Flynn case go.").

79. The letter to Mueller states the following:

> 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 memo:
>
> > During the meeting, McGahn sought clarification regarding Yates's prior statements regarding Flynn's contact with Ambassador Kislyak. Among the issues discussed was whether dismissal 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 the White House disclosing how the DOJ 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 ongoing DOJ investigation of Lt. Gen. Flynn was underway, the DOJ would approve its key investigation methods and sources being publicized.

Lawyers' Confidential Memo.: Explained, *supra* note 60.

80. *See id.*

81. *See A Brief Description of the Federal Criminal Justice Process*, FBI, https://www.fbi.gov/resources/victim-services/a-brief-description-of-the-federal-

warranted by evidence, recommend prosecution to the Department of Justice. The Department of Justice, not the FBI, has sole discretion to initiate prosecutions, including empaneling grand juries.[82] Expressing hope that Comey would let Flynn go could no more obstruct the Flynn grand jury than telling the Secretary of Agriculture.

B. *Due Process as a Remedy for Executive Branch Bias and Corruption*

So why do so many otherwise intelligent people perpetuate the claim that President Trump's firing of, or remarks to, Mr. Comey constituted obstruction of justice? Because they are playing a political game, not a legal one. By turning up the rhetoric, they are hoping to lay the foundation for impeachment should the President have the gall to exercise his constitutional authority.[83]

Such rhetoric makes it toxic for a President to exercise his constitutional authority to fire his subordinates, thus politically disabling the principle constitutional check on Executive Branch corruption.[84] If bad apples are no longer accountable to the President through firing, what else can be done, legally, to remedy corruption? One possible remedy may be the Supreme Court's due process jurisprudence.

The hallmark of our status as a civilized society is due process, which guarantees that the government must behave with "fundamental fairness" before taking our life, liberty, or property.[85] Fundamental fairness, in turn, means that the government cannot act "arbitrarily or capriciously" toward us.[86] The means by which the government conducts itself matter deeply: the government must respect the "decencies of civilized conduct."[87] It cannot behave in ways that "shocks the conscience."[88]

criminal-justice-process (last visited Sept. 4, 2018).

82. *Id.*

83. *See* Carol D. Leonnig & Robert Costa, *As Mueller Moves to Finalize Obstruction Report, Trump's Allies Ready for Political Battle*, CHI. TRIB. (June 16, 2018), http://www.chicagotribune.com/news/nationworld/politics/ct-mueller-trump-russia-20180616-story.html.

84. *See id.*

85. U.S. CONST. amends. V, XIV.

86. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981); Pitt v. Pine Valley Golf Club, 695 F. Supp 778, 783 (D.N.J. 1988).

87. Rochin v. California, 342 U.S. 165, 173 (1952).

88. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (citing *Rochin*, 342 U.S. at 172–73) ("[F]or half a century now, we have spoken of the cognizable level of

In *Rochin v. California*, the Supreme Court reversed a defendant's drug conviction, holding that the government's investigatory power is constrained by due process:

> It has long ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. . . . [There is a] general requirement that the States in their prosecutions respect certain decencies of civilized conduct.[89] Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."[90]

The Court concluded that forcibly pumping an individual's stomach to look for evidence of illegal drugs offended a civilized society's sense of justice and decency, and thus due process, because it shocks the conscience.[91]

In *United States v. Russell*, the Supreme Court rejected a due process, entrapment-based challenge to a drug conviction.[92] The defendant asserted the police informant's act of supplying a scarce methamphetamine ingredient violated fundamental fairness and, hence, due process.[93] The Supreme Court disagreed because the evidence demonstrated the defendant successfully obtained the scarce ingredient both before and after law enforcement supplied it, negating the possibility of entrapment.[94] The *Russell* Court acknowledged, however, that the method or means by which a prosecution emanates can, under the right set of facts, justify barring all prosecution efforts:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of

executive abuse of power [under the Due Process Clause] as that which shocks the conscience.").

89. *Rochin*, 342 U.S. at 172–73.
90. *Id.* at 173 (quoting Brown v. Mississippi, 297 U.S. 278, 285–86 (1936)).
91. *Id.* at 172–73.
92. United States v. Russell, 411 U.S. 423, 430 (1973).
93. *Id.* at 427–28.
94. *Id.* at 431.

> justice," mandated by the Due Process Clause of the Fifth Amendment.[95]

Given the right set of facts, therefore, the *Russell* Court believed due process bars the use of all judicial processes arising from outrageous law enforcement behavior.[96]

One year after *Russell*, the Court's premonition came true. In *Blackledge v. Perry*, the Court found that a prosecutor's potentially vindictive conduct violated due process.[97] The defendant was charged with misdemeanor assault, convicted at a bench trial, and received a six-month sentence.[98] He filed a notice of appeal, which under North Carolina law meant his earlier misdemeanor conviction was vacated, and a new de novo trial was initiated.[99] Before the new trial began, however, the prosecutor obtained an indictment charging the defendant with felony assault for the same conduct.[100] The defendant pled guilty to the felony charge and received a sentence of five to seven years.[101] He then petitioned for habeas corpus, claiming the prosecutor's felony prosecution violated double jeopardy and due process.[102]

The *Blackledge* Court did not reach the double jeopardy question, ruling instead that the prosecutor's conduct violated the Due Process Clause.[103] Specifically, the Court believed the potential for prosecutorial vindictiveness—even without evidence of any actual retaliatory motive—tainted the prosecutorial effort sufficiently to violate due process.[104] In the Court's words: "Due process of law requires that such a potential for vindictiveness must not enter . . . the process."[105] If there is a "realistic likelihood of 'vindictiveness'" by a prosecutor, the Court said due process requires invalidation of the prosecutorial effort.[106] The right is a "right not to be haled into court at all" because the "very initiation of the

95. *Id.* at 431–32 (citations omitted).
96. *Id.*
97. Blackledge v. Perry, 417 U.S. 21, 23 (1974).
98. *Id.* at 22.
99. *Id.*
100. *Id.* at 23.
101. *Id.*
102. *Id.*
103. *Id.* at 25, 31.
104. *Id.* at 28.
105. *Id.*
106. *Id.* at 27.

proceedings . . . operated to deny him due process of law."[107]

In *Moran v. Burbine*, the Supreme Court denied civil relief under § 1983 for a due process claim based on *Rochin*.[108] In *Moran*, the plaintiff alleged that police failed to inform him that an attorney, who had been retained by his sister without his knowledge, was trying to reach him and misled his attorney as to the plaintiff's whereabouts.[109] The Court acknowledged that a *Rochin* claim could exist for "conduct of the police [that] was so offensive as to deprive [defendant] of the fundamental fairness guaranteed by the Due Process Clause."[110] But while the Court "share[d] respondent's distaste for the deliberate misleading of an officer of the court," it did not desire to extend *Miranda* to require informing arrestees and their attorneys of such information.[111] The Court declared:

> We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation. . . . We hold only that, on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.[112]

Moran reconfirmed that a due process violation can occur when investigators engage in fundamentally unfair behavior that shocks the conscience.[113] It also indicates that the Court may hesitate to deem behavior sufficiently conscience shocking when there are concerns about federalism—i.e., "federal intrusion into the criminal processes of the States."[114] Such federalism concerns would not be present, of course, in a due process challenge to the Trump–Russia collusion investigation, which involves behavior by federal, not state, investigatory officials.

107. *Id.* at 30–31.

108. Moran v. Burbine, 475 U.S. 412, 420 (1986); *see* 42 U.S.C. § 1983 (2012).

109. *Moran*, 475 U.S. at 417.

110. *Id.* at 432.

111. *Id.* at 424–25 ("The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.").

112. *Id.* at 432–33.

113. *See id.* at 433.

114. *See id.* at 433–34.

In *Young v. United States ex rel. Vuitton et Fils S.A.*, the Supreme Court invalidated a district court's appointment of a special prosecutor to prosecute contempt.[115] The special prosecutor was a private attorney who represented a client with a financial interest in the outcome of the contempt prosecution.[116] The Court observed that federal prosecutors exercise the following forms of vast power and discretion:

> [W]hich persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity.[117]

These discretionary decisions are "made outside the supervision of the court" and, consequently, necessitate that courts enforce "[t]he requirement of a disinterested prosecutor" because otherwise, personal, financial, or other interests "may bring irrelevant or impermissible factors into the prosecutorial decision."[118]

While seven Justices agreed that contempt proceedings must be "conducted in a manner consistent with basic notions of fairness," including disinterestedness, they concluded that this requirement should be enforced via the Court's "supervisory authority."[119] Accordingly, although the decision gives nod to concerns about fairness (and hence, due process), the majority saw no need to constitutionalize its holding.[120] One Justice, Justice Harry Blackmun, concurred separately to emphasize that the requirement of disinterestedness is indeed of constitutional, due process dimension.[121]

Most recently, in a pair of cases penned by Justice Anthony Kennedy, the Supreme Court has concluded that potential bias by judges may constitute a due process violation. In the first case, *Caperton v. A.T. Massey Coal Co.*, civil plaintiffs filed a motion asking a West Virginia Supreme Court justice to recuse himself because the defendant coal company made an independent campaign expenditure of $3 million supporting the justice's

115. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 791–92 (1987).
116. *Id.*
117. *Id.* at 807.
118. *Id.* at 807–08.
119. *Id.* at 808–09.
120. *See id.* at 815 (Blackmun, J., concurring).
121. *Id*.

re-election effort.[122] Subsequent to his election, the justice cast the deciding vote in the court's decision to reverse a $50 million jury verdict against the coal company.[123]

The Supreme Court concluded due process was violated because, under an objective assessment of the totality of the facts, there was a "risk of actual bias or prejudgment" that rose to an unconstitutional level.[124] The Court cited *County of Sacramento v. Lewis*—which itself relied on the *Rochin* shocks the conscience standard[125]—for the following proposition: "[E]xtreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated."[126]

Caperton's citation to the shocks the conscience standard and its statement that "extreme facts" may cross the due process line, necessitating Court intervention, suggest that the case is conceptually related to the outrageousness and shocks the conscience line of due process cases.[127] Whether one calls government action extreme, outrageous, fundamentally unfair, or conscience shocking, all of these adjectives transgress the due process boundary and necessitate court remediation.[128]

More recently, in *Williams v. Pennsylvania*, the Court again concluded that due process was violated based on evidence of judicial bias.[129] The case involved a habeas petition by an individual, Williams, who was convicted of capital murder.[130] A lower Pennsylvania court granted a habeas petition based on a *Brady v. Maryland* violation, granting a stay of execution and a new sentencing hearing.[131] The Commonwealth then submitted an emergency application to the Pennsylvania Supreme Court, seeking to vacate the stay of execution.[132] Williams filed a motion asking Chief Justice Ronald Castille of the Pennsylvania Supreme Court to recuse himself, as the

122. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873–74 (2009).
123. *Id.* at 874–75.
124. *Id.* at 883–85.
125. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).
126. *Caperton*, 556 U.S. at 887.
127. *See id.*
128. *See id.*
129. Williams v. Pennsylvania, 136 S. Ct. 1899, 1908–09 (2016).
130. *Id.* at 1904.
131. *Id.* (citing Brady v. Maryland, 373 U.S. 83 (1963)).
132. *Id.*

justice had been the district attorney who approved seeking the death penalty in Williams's murder trial twenty-six years earlier.[133] The chief justice refused to recuse himself, however, and the Pennsylvania Supreme Court, with the chief justice's support, reinstated Williams's death penalty.[134]

Williams argued that the justice's participation in reinstatement of his death sentence violated due process because the justice's activities as district attorney meant that he served as both an accuser and a judge in Williams's case.[135] The Court agreed: "The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[136] The Court noted that "[d]ue process guarantees 'an absence of actual bias' on the part of a judge"[137] and that the constitutional guarantee is enforced by an objective standard in which the "Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional potential for bias.'"[138]

The *Williams* Court observed, "No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision."[139] And while numerous other individuals were involved in the prosecution against Mr. Williams and six other justices sat on the Pennsylvania Supreme Court, this did not vitiate the concern about due process:

> The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible . . . is nevertheless

133. *Id.*
134. *Id.* at 1904–05.
135. *Id.* at 1905.
136. *Id.*
137. *Id.* (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
138. *Id.* (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009)) (quotation marks omitted).
139. *Id.* at 1906.

> significant. A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call.[140]

The involvement of numerous other actors did not relieve the Pennsylvania Supreme Court chief justice of his constitutional, due process-based obligation to recuse himself.[141] His failure to do so constituted a "structural error" of fundamental unfairness that was not amenable to harmless error analysis.[142] The Court believed:

> [T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. . . . Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.[143]

Case-by-case adjudication of due process claims requires great sensitivity to the facts.[144] But when the facts indicate investigative or prosecutorial behavior is outrageous or conscience shocking—including the reasonable potential for bias or vindictiveness—due process provides a meaningful judicial remedy.[145] It should be recognized, however, that what may be outrageous or conscience-shocking bias for a judge may not be outrageous or conscience-shocking bias for a prosecutor or investigator.[146] Indeed, seven Justices in *Young* acknowledged "[t]he requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges" because prosecutors are expected to be "permitted to be zealous in their enforcement of the law"[147] and thus biased against the accused in a way that would be "intolerable" for a judge.[148] Moreover, ordinarily courts "can

140. *Id.* at 1906–07.
141. *Id.* at 1907.
142. *Id.* at 1909.
143. *Id.*
144. *See, e.g.*, *id.* at 1902.
145. *See, e.g.*, *id.* at 1905–06.
146. *See, e.g.*, *id.*
147. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 807 (1987) (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980)).
148. *Id.* (citing *Marshall*, 446 U.S. at 250–52).

only speculate whether other interests are likely to influence an enforcement officer."[149]

This does not mean, however, that prosecutorial or investigatory bias may never be sufficiently outrageous or conscience shocking enough to cross the due process line, as demonstrated by *Blackledge*.[150] When the facts indicate investigators or prosecutors have used their vast power to pursue a biased, vindictive, or corrupt agenda rather than pursue justice, the judicial conscience may indeed be shocked. Indeed, the *Young* Court stated that where there is "no need to speculate whether the prosecutor will be subject to extraneous influence"—such as a professional or financial bias against the accused—the requirement of a disinterested prosecutor, and thus due process, is violated.[151] The *Blackledge* decision bolsters this impression. Due process was violated in *Blackledge* by a prosecution that, under the circumstances, reasonably appeared vindictive.[152] The Court noted that previous decisions had found due process violations based on "apprehension of . . . a retaliatory motivation on the part of the sentencing judge" and concluded that it was "clear that the same considerations apply" to a charge of due process-level impropriety levied against prosecutors.[153]

In addition, an early Supreme Court case, *Berger v. United States*, acknowledges that prosecutors have an obligation to carry out their duties impartially:

> The United States Attorney is the representative not of an ordinary party . . . but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[154]

Presumably, the obligation to carry out duties impartially includes a lack of biased or vindictive motivations and extends to all members of an investigative or prosecutorial team.[155] Behavior that reasonably appears to

149. *Id.*
150. Blackledge v. Perry, 417 U.S. 21, 31 (1974).
151. *Young*, 481 U.S. at 807–08.
152. *Blackledge*, 417 U.S. at 27–28.
153. *Id.* at 28.
154. Berger v. United States, 295 U.S. 78, 88 (1935).
155. *See id.*

be motivated by bias or vindictiveness crosses the constitutional line precisely because it shocks the conscience of a civilized society, which rightfully demands that prosecutions be initiated based on evidence of a crime, not animus against the accused.[156]

It should also be noted that under the rationale of *Williams*, conscience-shocking behavior by just one individual can taint the entire prosecutorial effort, even if numerous other officials involved did nothing wrong.[157] Thus, even assuming arguendo that Special Counsel Mueller's investigatory team itself has no conscience-shocking bias or other behavior, this should not remove the taint of unconstitutionality imposed by antecedent FBI investigators. If conscience-shocking behavior by executive officials is to be effectively deterred, it cannot be laundered by passing the investigative buck to others. Conscience-shocking, antecedent behavior of investigative officers, in other words, may rot the foundation upon which Special Counsel Mueller's investigation rests.

This is as it should be: Corruption corrodes democracy. It cannot be tolerated in a civilized society. Corruption is especially pernicious in those who wield the awesome power of investigating and prosecuting crimes.

III. CONCLUSION

The vast power of investigators and prosecutors must be effectively checked, either by the power to fire them or by judicial enforcement of the outer boundaries of acceptable behavior under the Due Process Clause. Because the potential to wield investigative and prosecutorial power for political gain is far too tempting, judicially enforceable limits to the manner in which such power is exercised are needed, particularly when the prize is the power flowing from the U.S. Presidency. When an abuse of investigative power potentially culminates in the appointment of a special prosecutor to investigate the President, the risk to democracy is one hundred-fold greater. As the history of independent and special prosecutors has shown, the ineluctable inclination of such prosecutors is to leverage their independence and vast power to bring down the President and effectively overturn his election.

Justice Robert Jackson knew a little something about the risk of investigative and prosecutorial corruption. He was a U.S. attorney, the

156. *See id.*; Rochin v. California, 342 U.S. 165, 172–73 (1952).

157. *See* Williams v. Pennsylvania, 136 S. Ct. 1899, 1908–09 (2016).

Solicitor General, the Attorney General, a Supreme Court Justice, and chief counsel at the Nuremburg Trials.[158] In 1940, while serving as Franklin Delano Roosevelt's Attorney General, Justice Jackson reminded a group of U.S. attorneys something fundamental about the nature of their duty and due process:

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.[159]

Justice Jackson's words ring true today. Justice Jackson was of course focusing on ordinary investigators and prosecutors. But the harms he identified are heightened when the prosecutor is an "independent" or "special" prosecutor. If the American people are angered by corrupt or biased behavior of an ordinary prosecutor, the President can fire him or choose not to fire him and bear the brunt of the people's ire come election day.[160] The political buck, in other words, will stop with the President.[161]

158. *Robert H. Jackson*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Robert-H-Jackson (last updated Sept. 4, 2018).

159. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940), https://www.roberthjackson.org/wp-content/uploads/2015/01/The_Federal_Prosecutor.pdf.

160. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492–93 (2010).

161. *See id.* ("The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President the 'general administrative control of those executing the laws.' It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase. As we

But who is to blame when an independent or special counsel goes rogue? Whom do the people vote out of office then? Justice Antonin Scalia once put it this way in his dissent in *Morrison v. Olson*:

> The mini-Executive that is the independent counsel . . . operating in an area where so little is law and so much is discretion, is intentionally cut off from . . . the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate . . . until investigation is no longer worthwhile . . . . How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.[162]

As this quote from Justice Scalia's dissent indicates, the majority in *Morrison* upheld the old independent counsel statute.[163] Whether the current Supreme Court would continue to abide by *Morrison* is in doubt.[164]

But whatever the case, for present purposes it is important to remember that the political nature of independent counsel investigations ultimately caused deep anger on both sides of the aisle. Republicans were unhappy with the Iran-Contra investigation led by Lawrence Walsh.[165] Democrats were unhappy with the Whitewater investigation led by Ken

explained in *Myers,* the President therefore must have some 'power of removing those for whom he can not continue to be responsible.'" (quoting Myers v. United States, 272 U.S. 52, 164 (1926)).

162. Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

163. *See id.* at 659–60 (majority opinion).

164. *See, e.g.*, Adrian Vermeule, Morrison v. Olson *Is Bad Law*, LAWFARE (June 9, 2017, 8:14 PM), https://www.lawfareblog.com/morrison-v-olson-bad-law.

165. *See* Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html (last visited Sept. 14, 2018) ("In December of 1992, the independent counsel law expired in the face of a Republican filibuster. In so doing, it drew a brief round of cheers from long-time skeptics and the law's other enemies, who continued to denounce the supposed excesses of the Iran-Contra investigation.").

Starr (which ultimately led to the House impeachment of President Clinton).[166]

Congress consequently let the independent counsel statute lapse in 1999.[167] In its place, we now have special counsel regulations issued by the Department of Justice.[168] As regulations, they could be rescinded or even ignored by any president who so desired.[169] And I have serious doubts about the ability of any Executive Branch department or agency to "self-entrench" one of its officers by regulation, making them fire-able only for good cause.[170] But assuming arguendo these special counsel regulations are followed, they were—at least in theory—designed to be "better" than the old independent counsel statute. Under the special counsel regulations, the lines of political accountability to the President are supposedly stronger with special counsel being an officer of the Department of Justice who is directly accountable to the Attorney General, who is in turn directly accountable to the President.[171]

But if the Attorney General recuses himself and cries of obstruction fill the air whenever whispers of firing the special counsel are overheard, the lines of political accountability become, pragmatically, just as blurred as with

166. *See* Tucker Carlson, *Trashing Kenneth Starr*, WKLY. STANDARD (June 29, 1998), https://www.weeklystandard.com/tucker-carlson/trashing-kenneth-starr.

167. Helen Dewar, *Independent Counsel Law Is Set to Lapse*, WASH. POST (June 5, 1999), https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel060599.htm.

168. 28 C.F.R. § 600.1–.10 (2001).

169. *See* CYNTHIA BROWN & JARED P. COLE, CONG. RESEARCH SERV., R44857, SPECIAL COUNSELS, INDEPENDENT COUNSELS AND SPECIAL PROSECUTORS: LEGAL AUTHORITY AND LIMITATIONS ON INDEPENDENT EXECUTIVE INVESTIGATIONS 22 (2018) ("[I]t is uncertain to what extent the regulations ultimately constrain the executive branch. Because no statute appears to *require* the Department to promulgate regulations concerning a special counsel, the Department likely enjoys discretion to repeal them.").

170. *See* 28 C.F.R. § 600.7(d) ("The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.").

171. *See* JACK MASKELL, CONG. RESEARCH SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 3–4 (2013) ("[S]pecial counsels are appointed by, are answerable to, and may have their prosecutorial or investigative decisions countermanded by, the Attorney General. The 'special counsels' under these regulations have, therefore, by express design, less 'independence' from the Attorney General and the Department of Justice than did the 'independent counsels' under the Ethics in Government Act of 1978, or the 'special prosecutors' appointed by the Attorney General for the Watergate matter.").

the old independent counsel law. We are right back where we started: we have a politically insulated prosecutor with virtually unlimited authority to target a President and his associates for acts undertaken both before and after his assumption of the Presidency.[172]

This is not healthy for a constitutional republic and separation of powers. It was not healthy in Iran-Contra.[173] It was not healthy in Whitewater.[174] And it is not healthy now. It feeds partisanship, like throwing chum in the water for political sharks who care more about party than country. It creates deep political resentments that fester and foster dreams of revenge.

We knew all this in 1999 when Congress let the independent counsel statute lapse.[175] Back then, we seemed to have burned each political side enough that we learned our lessons about allowing prosecutors to have so much power, unchecked by the political process.[176] Unfortunately, our political divisions have grown since 1999,[177] and the appetite for consuming a Presidency has grown commensurately.

There are those who believe the ends justify the means—that ending the Presidency of Ronald Reagan, Bill Clinton, or (now) Donald Trump is a noble goal[178] that warrants open opposition to, or distortion of, the Constitution.[179] But if we bend it too much, it is going to eventually break.

172. *Compare id.* at 6–7 (illustrating the removal process and authority of independent counsel), *with id.* at 11–12, 14 (explaining the removal process and authority of special counsel).

173. *See generally* Mokhiber, *supra* note 165 (criticizing the Iran-Contra investigation).

174. *See id.* (describing seven separate investigations of the Clinton Administration).

175. *See* MASKELL, *supra* note 171, at 2–3.

176. *See* Mokhiber, *supra* note 165 (stating that in 1998 the law was losing "key political and public support").

177. *See, e.g.*, Carroll Doherty, *Key Takeaways on Americans' Growing Partisan Divide over Political Values*, PEW RES. CTR. (Oct. 5, 2017), http://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/ ("Across 10 political values Pew Research Center has tracked since 1994, there is now an average 36-percentage-point gap between Republicans and Republican-leaning independents and Democrats and Democratic leaners. In 1994, it was only 15 points.").

178. *See, e.g.*, Zachary Warmbrodt, *Waters Scares Democrats with Call for All-Out War on Trump*, POLITICO (June 25, 2018), https://www.politico.com/story/2018/06/25/maxine-waters-democrats-reaction-trump-feud-648028.

179. *See, e.g.*, David S. Cohen, *Will Electors Vote Their Conscience & Prevent a*

And if we love our country, we must elevate means over ends. That is what due process is all about.

Trump Presidency?, ROLLING STONE (Dec. 15, 2016), https://www.rollingstone.com/politics/politics-features/will-electors-vote-their-conscience-and-prevent-a-trump-presidency-107863/ (documenting democratic efforts to convince electors to be faithless); Ross Douhat, *The 25th Amendment Solution for Removing Trump*, N.Y. TIMES (May 16, 2017), https://www.nytimes.com/2017/05/16/opinion/25th-amendment-trump.html (asserting in the fourth month of the Trump Administration that the President should be removed under the Twenty-Fifth Amendment because he is "unable to discharge the powers and duties of his office"); Editorial, *Let the People Pick the President*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/opinion/elections-electoral-college-voting.html (arguing that the electoral college should be repealed).