

Professor Charles Tiefer: Statement Regarding Why Congress, as well as the Special Counsel, Should Investigate High-Level Obstruction

Before Members of the House Committee on the Judiciary

June 29, 2017

Thank you for the opportunity to appear here. I served in the House General Counsel's office in 1984-1995, becoming General Counsel (Acting). (Since 1995, I have been a professor at the University of Baltimore School of Law.)

In 1987 I was Special Deputy Chief Counsel of the House Iran-Contra Committee and worked intensively on the most advanced of all Select House Committee investigative issues of Presidential matters, including high-level obstruction.

It is an honor to appear on such a distinguished panel of witnesses. Their perspectives on obstruction encompass a Special Prosecutor, and the White House counsel both inside and outside. My perspective is our perspective, the perspective of the House investigation itself. I have lengthy full-time experience on Congressional investigations: advising Congressional committees on investigations, participating in special investigations, and appearing in court on Congressional investigative matters.

Since becoming a professor I have written extensively on investigative and related issues. See Charles Tiefer, "*The Specially Investigated President*," 5 Univ. of Chicago Roundtable 143-204 (1998).

Special Counsels Are No Substitute

One question is whether Congressional investigations of obstruction should proceed even though there is Robert Mueller as Special Counsel. Members of Congress unsupportive of Congressional hearings about the Russian hacking scandal will presumably argue that the special counsel will do everything necessary. It is true that Robert Mueller III has excellent credentials, is nonpartisan, and has the powerful tools of a prosecutor.

Washington has a strong history of simultaneous investigations by special prosecutors and congressional committees of obstruction and its close relative, perjury. Let us note three examples: Watergate, Iran-contra, and the Clinton impeachment. Watergate is the field of other witnesses. The Clinton impeachment was on charges of obstruction of justice and perjury, after years of simultaneous investigation by House Committees and the zealous Ken Starr, Independent Counsel.

In the case of President Reagan's Iran-Contra affair, I speak from personal knowledge: I served as Special Deputy Chief Counsel of the House Iran-Contra committee. Independent Counsel Lawrence Walsh worked at the same time as our House committee, including as one focus the obstruction of justice, and perjury, by the White House, notably in the attempt by White House staff to protect, from involvement, President Reagan, by their lying and destroying evidence.

Independent Counsel Walsh worked in secret. My committee held about the scandal not just days, not even just weeks, but months of hearings, 4 and 5 days a week. We had excellent relations with him. We coordinated the timing of our key actions with him. The heart of both his, and our, exposure of obstruction and perjury cases was the White House attempt to block House investigations late in 1986, as the scandal began to be exposed by the House Intelligence Committee.

There are many important reasons for the consistent pattern of Congressional investigations of White House obstruction, at the same time as special counsels. A Special Counsel has his limits. Apart from trials, he has no forum like briefings, hearings, or even floor speeches and press releases, to present the press and the public with the evidence. He proceeds in secret and no one learns what he uncovers.

What Mueller digs up, the public will not see or know. In Iran-contra, we – the House Iran-contra committee – had to hold those months of hearings, for from the Independent Counsel the public would have learned only a tiny fraction of the scandal. Moreover, the Congressional committees must investigate to build a record for legislative action. How will Congress know what to do to protect the 2018 elections without investigative hearings?

Moreover, the Special Counsel focuses hard on prosecutions. That is his job. He might, as Independent Counsel Walsh did, focus on the figures whom he might indict and convict. But, Mueller may not think of the President in the class of those readily subject to indictment and conviction. (Neither the Watergate special prosecutors, nor Walsh, nor Starr, would indict a President during his term – rather, Richard Ben-Veniste's office sent the historic "bulging bag" of evidence to the House Judiciary committee, just as Starr did.) So, he may not present publicly the question of obstruction by the President the way Congress would.

House Judiciary¹

¹ Since I started advising Congressional investigations in 1979, I naturally familiarized myself with issues concerning, among other matters, the House Judiciary Committee and the special prosecutor in Watergate in 1974. A key precedent is *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974).

The renowned Chief Judge Sirica, who led Watergate matters, decided the question of whether a large collection of key materials gathered by the Special Prosecutor could "be submitted to the Committee on the Judiciary of the House of Representatives." *Id* at 1221. He said, "We begin here with the fact that the Grand Jury has recommended . . . delivery to the House Judiciary Committee." *Id.* at 1227. Judge Sirica ruled, "Having carefully examined the contents of the Grand Jury Report, the Court is satisfied that there can be no question regarding their materiality to the House Judiciary Committee's investigation." *Id.* at 1221.

In contrast, Congressional investigations of presidential matters and FBI matters, especially by the House Judiciary Committee with its special mandate, have a different and necessary reason for their consistent pattern of proceeding even with special counsels out there also looking at high-level obstruction.

Such Congressional investigations are the eyes and ears of the nation. As a classic expression has it, they are the “Grand Inquest” of the nation. They are the avenue through which the House performs its function of examining Presidential matters. And as elected leaders, they are allowed to, and expected to -- under the Constitution -- bring a kind of publicly representative judgment to Presidential matters. They crystallize the judgment of the nation -- that a special counsel does not.

Let me give examples of House Judiciary overseeing what we have in Comey’s firing. Let me recount examples of House Judiciary overseeing the FBI, overseeing White House interference with the FBI, and overseeing White House interference with the FBI’s prosecutorial counterparts.

In the famous “U.S. Attorneys Firing” scandal late in the George W. Bush Administration, the White House, notably Karl Rove, interfered in justice by getting seven U.S. attorneys terminated for political reasons. It appeared that in some instances, important figures whom the U.S. attorneys had proceeded against, got the ear of the White House to purge the U.S. attorney – which certainly looked a lot like obstruction. You will readily see the parallel between firing the U.S. attorney because he was proceeding too effectively and firing the FBI head for the same reason.

There was plenty more. The White House was not sufficiently forthcoming with testimony and documents about the scandal. So the House Judiciary Committee cited, for contempt of Congress, White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers. The full House voted on Feb. 14, 2008, to certify the action of House Judiciary. In the contempt case, the district court ruled in favor of House Judiciary, and Miers and Karl Rove submitted to House Judiciary questioning.

Was there a Special Counsel anywhere around? Yes, but in contrast to the accomplishments of the Congressional investigations, she did little. Nora Dannehy acted as Special Counsel in 2008-2010 and ended without any charges and hence no information for the public. Congress brought out the truth about obstruction, not that Special Counsel.

During my House Iran-contra investigation, one of our major subjects was the Attorney General, Ed Meese. As the scandal broke, President Reagan asked Meese to conduct a so-called “inquiry,” in which he effectively coordinated the destruction of evidence and the fabrication of

There was, to repeat, “no question regarding [the report’s contents] materiality to the House Judiciary Committee’s investigation. The House Judiciary Committee’s responsibility to investigate Presidential matters was viewed as very special by Judge Sirica in transmitting these materials.

stories, especially to shield Reagan from blame as the FBI began its own interviews at the White House. Once again, the issue was White House obstruction of the FBI.

Our committee held full hearings about Meese. House Judiciary Chairman Peter Rodino and his very capable staff, including Chief Counsel Elaine Mielke, serving as part of our Committee, had prepared the way, by a monumental deposition in which Meese said “I don’t recall” or “I have no specific recollection” almost 400 times, again, at least the spirit, if not the letter, of obstruction.

I think very highly of Independent Counsel Lawrence Walsh and his staff. But, they did not bring charges against Meese. Congress brought out the truth about obstruction, not the Special Counsel.

Start Now

Another question is when can the Members of the House Judiciary Committee start doing their jobs, including investigation? As House Counsel, I worked with House committees countless times, including when they got started, and I have a very practical sense of what it means to “start doing their job.” Excuse me for repeating this, I have said it many times to House Committees. It means to get up out of their seats, if you excuse my putting it so bluntly, and go out to gather documents and interview witnesses. I urged them to do it, and I advised them as they got going. In my experience, to get going, all you need is a pad and pen, and some ideas about whom to talk to.

That is what is involved, especially at the start. There is a whole universe of material to be gathered from sources who are not recalcitrant. Of course, down some avenues, there is reluctance and resistance from some document custodians and witnesses. But, that can be dealt with in time. In the meantime, there are knowledgeable sources willing to give information to Congress.

Let me mention a subject for your inquiry some time when convenient. Some of President Trump’s defenders have argued that there cannot be obstruction, no matter what was done, because there is no underlying crime of collusion with Russia to cover up. There are many answers to this. One that particularly needs inquiry is about how it is a crime to willfully make or receive foreign contributions, which, like all contributions, can be of an “in-kind” nature. Recently this was explored publicly by an FEC Commissioner and distinguished expert, Ellen Weintraub, and further exploration was sought in a letter by Senator Amy Klobuchar, signed by 16 Senators.

The Russian hacked material may well have been the singly largest in-kind foreign contribution of all time. There was no shortage of malicious intent to achieve precisely what this provision of the law was meant to prevent foreign influence. If there was collusion by the Trump campaign, then it may be a party to the violation.

As to the criminal law about collusion of this nature, House Judiciary can --- as with other criminal law provisions -- summon election law experts – former Commissioners, academics, practitioners – to discuss this. You can. And perhaps you should.