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THE MUELLER REPORT: WHAT DID WE LEARN?

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PARTICIPANTS:

MODERATOR: BENJAMIN WITTES
Senior Fellow, Governance Studies, The Brookings Institution
Editor-in-Chief, Lawfare

SUSAN HENNESSEY
Senior Fellow, Governance Studies, The Brookings Institution
Executive Editor, Lawfare

CHUCK ROSENBERG
Former U.S. Attorney, Eastern District of Virginia
Former Senior Official, Federal Bureau of Investigation

MARGARET L. TAYLOR
Fellow, Governance Studies, The Brookings Institution
Senior Editor and Counsel, Lawfare

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P R O C E E D I N G S

MR. WITTES: So welcome to the Brookings Institution. My name is Benjamin Wittes. I'm a senior fellow here in Governance Studies. And I want to welcome you all on this beautiful day outside. It's good to be inside in an auditorium. (Laughter) And welcome, as well, to our online audience.

Before we get started I just wanted to say a word of thanks to the Democracy Fund, which has supported a great deal of our and Lawfare's work on rule of law issues, including events like this.

We have a huge amount of material to cover. Some of you may have noticed that the Mueller report is long. (Laughter) And we want to get to as much of it as we can, so I'm going to dispense with introductions of our panelists except in the briefest sense.

To my left is Susan Hennessey, executive editor of Lawfare, a senior fellow at Brookings. Chuck Rosenberg, former U.S. Attorney, long-time federal prosecutor, and I think perhaps most relevant to this discussion was chief of staff at FBI to Jim Comey for a period of time. And Margaret Taylor, formerly of the Senate Foreign Relations Committee, now also in Governance Studies and Lawfare at Brookings.

So welcome to you all. We're going to just dive right in. Susan, let's start with Volume 1. (Laughter) I've never, by the way, done an event at Brookings in which we have to -- we talk about page numbers, but this one we're going to start with volume numbers. Susan, talk to me about Volume 1.

Volume 1, for those of you who haven't actually read the entire thing, deals with the Russia investigation itself. Volume 2 deals with obstruction of justice in connection with the investigation of Volume 1.

If there were no Volume 2, that is if Bob Mueller had never been appointed and Volume 1 had come out as the final report of the FBI's investigation of Russian interference in the election and possible coordination with it by the Trump campaign, how big a deal would Volume 1 be alone without subsequent efforts to obstruct the investigation

described in Volume 2?

MS. HENNESSEY: I think it would be an extraordinarily big deal. I actually think it is a quite devastating document that is, to some extent, getting short shrift because Volume 2 is itself so bad (Laughter); that there hasn't sort of been, you know, sort of the intellectual bandwidth or the public space bandwidth to really reckon with what Volume 1 documents.

And what Volume 1 documents in excruciating detail is a criminal conspiracy on the side of the Russians to interfere in the U.S. election; the awareness of that at a broad sense criminal conspiracy on the Russian side by a candidate and campaign, a candidate and campaign who welcomes -- who understand that it's being undertaken to assist them; who welcome that assistance; who delight in that assistance; who brazenly serially lied to the American public about the existence; who construct a campaign public relations strategy based around the fruits of those efforts. And that this documents a Russian conspiracy and a political campaign that share a common goal and a common purpose; that are largely aware of one another's goal and purpose; who both work toward that same goal and purpose, but who lack the important, but single element of having a sufficient meeting of the minds. Not just an agreement of intention to work towards the same goal, but an agreement to work with one another that is the predicate for an actual criminal conspiracy charge.

And so while that's an important critical distinction, I don't want to make light of it, it still paints an absolutely chilling portrait. And that's before we even get to the long-term counterintelligence ramifications that this document starts to elucidate.

MR. WITTES: All right. So I want to ask you one of the things that distinguishes Volume 2 from Volume 1, Volume 2 is centrally about the conduct of Donald Trump. Volume 1 is not centrally about the conduct of Donald Trump himself. It is about the conduct of the world around him in connection with this Russian actually pair of conspiracies.

And so my question is, how do you understand in Volume 1 only the conduct of the President? What's the portrait painted not of the campaign, but of the President himself?

MS. HENNESSEY: So this is the piece where the redactions play a really critical role because the one question that is not answered here is the extent to which Donald Trump is personally knowledgeable about what the Russians are doing in terms of communication with this campaign and what other individuals within his campaign are undertaking. And so these actually aren't grant jury redactions.

We have redactions that appear, they're marked "Harm to an ongoing matter." That appears to be related to the Roger Stone case. But we have a number of scenes in which literally the paragraph opens in Donald Trump's office with "a discussion of," large redacted section, the final line is, "and the President says that's great." (Laughter) The President and Rick Gates are in the car on the way to the airport. "They're discussing," redacted, and the last line is the President's response.

That detail of sort of pinning down his personal knowledge I think is a really, really important piece that certainly the unredacted portions very, very strongly hint at the answer. But having that in black and white is significant.

I do think that Volume 1 establishes conclusively that the worst possible explanation, that the President was somehow a witting, knowing, sort of Manchurian candidate agent of the Russians, this Volume 1 says that is not what happened. That is not what happened here. That's the good news. Thank god for that. It eliminates a lot of sort of the absolute almost unthinkable versions of what might have happened. But those that remain are still incredibly consequential and pose really difficult questions for where the country goes from here.

MR. WITTES: All right. There is this one other area and this is a rabbit hole that I -- and it's a real rabbit hole that I want to go down only because I think it is so probative of the President's personal conduct.

There is this scene in which the President gives the famous "Russia, if you're listening" speech, which he then has subsequently described as a joke. And a lot of serious people, I criticized that speech in a screaming post the day that it happened and I got a lot of response from very serious people whom I take very seriously who said, oh, he was clearly joking, you're overreacting.

So it turns out that right around the same time he gives that speech, in the wake of that speech he orders Michael Flynn repeatedly to retrieve these missing emails. And this prompts Mike Flynn to go on what turns into a protracted effort outside of the Trump campaign to retrieve these emails, including -- now, of course, these emails didn't exist and the Russian hackers who -- the outsiders who were doing this thought they were dealing with probably also didn't exist.

And so my question is, Susan, are they saved from conspiracy here by the fact that it is not illegal to fantasize missing emails and fantasize hackers and order your people to go collaborate and coordinate with them? And it's really the fact that they were such conspiracy theorists that even as a real hacking operation was going on and they were benefiting from it and enjoying the benefits, they were colluding or coordinating or conspiring with fake hackers about fake emails, and they kind of lucked into it, into not violating the law?

MS. HENNESSEY: I do think they get lucky that they pick the wrong thing to pursue. (Laughter) I mean, legitimately, I think that is what happened. Right? There is this sort of sustained effort.

Now, it's not clear how much that's Michael Flynn sort of in coordination with people who are true satellites to the campaign as opposed to sort of the core staff, although, of course, Flynn goes on to be himself the national security advisor.

I don't want to sort overly speculate about what they would have done. Right? You always want to sort of imagine that maybe as things develop they suddenly realize, my god, this might actually be illegal. I do think that it speaks to a commitment and

a propensity that is, regardless of the lack of criminal charges, really, really important, and that's that Volume 1 documents over 100 pages of contacts between individuals associated with the campaign and people on the Russian side. And it describes the ability to manipulate and convince people to pick up positions that are not favorable to the interests of this country, that provide the heart of basic counterintelligence concerns. Right?

We see Jared Kushner completely willing to meet with people, people passing him documents, who he then takes to the incoming Secretary of State. Right? That is exactly what intelligence officials worry about on the counterintelligence side. Mind you, this is someone who still works in the White House for whom there are still profound questions about how and why he obtained his security clearance. These are very much ongoing live issues that are not resolved by the conclusion of this report.

And I think it's all rooted in an openness, a propensity, a suggestion that the conspiracy exists on the Russian side and we know that. And they reach out lots of times and 9 times out of 10 the answer they receive from the many different elements of the Trump campaign core and also sort of satellite is, yes, let's explore this further.

MR. WITTES: All right. So, Chuck, before we turn to Volume 2, I want to get your reaction to Susan's account of Volume 1. First of all, is there any component of the way Susan described that that you think is hyperbolic, exaggerated, or over the top?

MR. ROSENBERG: No. (Laughter) But I'll add one thing. If you were to take the word "Russia" out of Volume 1 and substitute the word "Switzerland," it would still be dangerous and wrong. Right? So it's not -- the laws that Susan describes, the counterintelligence concerns that Susan describes have to do with a foreign power. The fact that the foreign power is Russia, oh, my god, you don't have to be that experienced, that thoughtful, that smart to know that's a problem.

And so I don't want it to be lost that this is a counterintelligence concern regardless. And the fact that it's Russia just exacerbates that. And I don't think Susan was the least bit hyperbolic or off in any sense.

MR. WITTES: I don't either. (Laughter)

Number two, again, this is a sort of follow-up still on Volume 1, but --

MR. ROSENBERG: We are going to talk about Volume 2, aren't we?

MR. WITTES: We are going to talk momentarily about Volume 2.

MR. ROSENBERG: I hope so.

MR. WITTES: But I do want to ask you as somebody who knows conspiracy law intimately, the whole sting where Trump orders Flynn to go after those emails and those emails that he orders him to go after don't exist and the hackers that Barbara Ledeen and Peter Smith seem to make contact with appear to be frauds or shysters. Are they being saved there as a matter of conspiracy by the degree of fantasy in their own thinking?

MR. ROSENBERG: It's a close call legally, I think. So conspiracy requires an agreement to do something that the law forbids and then some step to effectuate that agreement. That's it. And so if you think about each of those elements, right, an agreement to do something that the law forbids and some step to effectuate that, you really have all the elements. The fact that these people don't exist, the fact that part of it's fantasy or a mistake or what have you, sort of helps them atmospherically, but I would say not legally.

MR. WITTES: All right. Let's turn to Volume 2. And Volume 1 is the relative good story, I think, for the President. (Laughter) I want to start, Chuck, by having you give a little bit of an account of your own experience prosecuting obstruction cases.

MR. ROSENBERG: Sure.

MR. WITTES: You know, if we're going to think about 200 pages of evidence of possible obstruction, how many obstruction cases have you handled?

MR. ROSENBERG: So as a line federal prosecutor, as an AUSA, probably dozens. As the U.S. Attorney, you know, we oversee thousands of cases. I wouldn't say that we have obstruction in every case or even in most cases, but we see it regularly. I've lost count would be a fair answer.

MR. WITTES: And is it fair to say that on a spectrum from, you know, this is as strong a case as I've ever seen to this is a case that nobody -- no reasonable prosecutor would bring, which is, for example, the language that Jim Comey used about Hillary Clinton's emails, right, where would you describe -- you know, it's very rare that we have a public laying out of evidence like this in the absence of an indictment.

MR. ROSENBERG: It's extremely rare, yeah.

MR. WITTES: How do you -- like Bob Mueller declines to evaluate it as a binary. We will come back to why later.

MR. ROSENBERG: That's a completely separate issue.

MR. WITTES: Separate issue we'll discuss in a moment, but start with how do you evaluate this evidence? If you were a prosecutor today presented with this case without any of the inhibitions that Mueller clearly experienced about delivering a binary judgment, how do you evaluate it?

MR. ROSENBERG: Yes, so on the scale that you constructed, Ben, this is closer to oh, my god than a case you would walk away from. Here's why.

And again, imagine substituting in the word "Switzerland" instead of "Russia" in Volume 1. Now imagine in Volume 2, which is about obstruction, substituting any other name and any other title for "Trump" and "President." Right? And it's a useful exercise actually to think about it that way. Any other name and any other title. And of course, that removes all the Article II constraints that we'll discuss later.

This is not a close call. To give you some context, I prosecuted personally as a line AUSA cases in which someone goes into the grand jury on one occasion and denies knowing another person or knowing of a transaction or participating in a conversation, and that's sufficient to find obstruction of justice and/or perjury; of course, if it's material to our investigation and the case I'm thinking of it was. So where you lie repeatedly and ask others to lie repeatedly for you and where it is highly material to the underlying investigation and you do it knowingly and intentionally, in other words, absence of mistake or

confusion, then it's not a close call. This is a very compelling set of facts for an obstruction of justice case, but there are other issues.

MR. WITTES: And so just to hone in on that for a second, do you -- there are 10 fact patterns described separately here.

MR. ROSENBERG: Right.

MR. WITTES: Do you look at those 10 fact patterns as discrete episodes of possible obstruction or do you look at it as one broad pattern that is an obstructive pattern that would be -- that you would think of as a prosecutor as a single aggregate fact pattern with individual components?

MR. ROSENBERG: More the latter. I mean, I can make an argument for why there are 10 discrete events and that they're not connected, but, of course, they are because they're all aimed to thwart a single underlying investigation that opened on May 17th of 2017. And it was clear from the facts as laid out by Mueller.

And I should tell you, I also worked for Bob Mueller at the FBI, which was one of the great professional privileges of my life. If anyone in this room has any questions about his integrity or his ability, his veracity, his work ethic, please don't. Please leave that in your seat on the way out. (Laughter) What you see in Volume 1 and Volume 2 is the product of a remarkably talented and dedicated team of investigators and prosecutors.

And so I am taking everything in those two reports at face value. This is one series of -- a series of obstructive conduct designed to thwart a single underlying investigation in which we now know in black and white Donald Trump was a subject of.

MR. WITTES: All right. So you said along the way there that we should substitute the President's name for some other name and the title "President" for some other title.

MR. ROSENBERG: Right.

MR. WITTES: But, of course, that would take away the principal defenses that the President has here, which are based on Article II and based on the idea that these

are legitimate exercises of presidential authority.

So now let's keep the name Donald Trump and keep the name "President" and say if you're a prosecutor trying to decide whether to bring this case, you have to anticipate the defenses that, hey, these are Article II authorized activities; they're facially valid exercises of Article II authority. The report has a lengthy discussion at the end of Volume 2 that seeks to rebut this defense preemptively and argue that it is appropriate to apply the obstruction statutes as written to the President.

How afraid would you be, first as a matter of law that a court would agree with those defenses and disagree with the view that the report lays out as a prosecutor? And number two, how afraid would you be as a matter of fact that those defenses when presented to a jury would be compelling by way of acquittal?

MR. ROSENBERG: Yeah. That's a really good way to frame a question, Ben.

So as a matter of law, I wouldn't be the least bit afraid because, frankly, that's what the courts are for. I mean, if you have a question about how the law is applied in a given circumstance you litigate it and eventually you get an answer and, whether you like the answer or not, in our society you live with it. And so there are plenty of times I've litigated questions -- not that one, by the way -- but where I've litigated questions and sometimes you win and sometimes you lose, and that becomes the law of the case. So that wouldn't concern me.

Factually, I think, it is a very difficult question because the things that you see this President do -- pardons; firings; un-recusals, whatever the hell that is -- all arguably fall within his Article II authority. And so assuming you got past the legal hurdle and a court found that you could prosecute this type of case, that Article II doesn't bar it from prosecution, the President could mount a credible defense that he was acting within his Article II authority and that might appeal to jurors, or at least enough jurors.

MR. WITTES: So given that the U.S. Attorney's Manual, now renamed the

Justice Manual --

MR. ROSENBERG: That's right.

MR. WITTES: -- says that you're not supposed to bring a case unless you foresee a probability of conviction.

MR. ROSENBERG: Reasonable probability of conviction is the requirement in the Justice Manual.

MR. WITTES: So you see this 200 pages of evidence that you look at and you say it's in the wow department, not in the walk away department.

MR. ROSENBERG: Mm-hmm.

MR. WITTES: But you also foresee factual defenses rooted in the President's constitutional authority that you cannot be dismissive of their potential viability before a jury. Does U.S. Attorney Chuck Rosenberg bring this case?

MR. ROSENBERG: Yeah, it's a tough one, Ben. You know, it would be informed by my view. I understand that there are people who have genuinely held views that Article II does confer this type of authority on a President and so that he is free to act as he sees fit within those Article II constraints. Firing and pardoning and all those things that seem obstruction-y to us would be okay to that Article II, I don't know, purist. What's the right word for that, Ben?

MR. WITTES: Purist works for me. Hardliner.

MR. ROSENBERG: But I don't have that view, right? So let's say Margaret wanted to be the U.S. ambassador to France, which seems like a good job. (Laughter) The President would have the complete authority to nominate her to that, but not for a $5 million cash bribe in return. Right? So my view, and I think the Mueller team shares it, is that one of the limits that you would have to impose on Article II authorities of the President is that those acts be free of corruption. Right? And so my view, Ben, as U.S. Attorney, would be that these are not corrupt-free acts. And so Article II provides no harbor.

So I wouldn't be -- and then we also recognize as prosecutors that

sometimes jurors see things differently than we do. That happens all the time. Right? And that's okay. And I shouldn't say, "all the time." Our conviction rate in the federal court system is extraordinarily high because we bring good facts with good cases supported by good law. But sometimes jurors see it differently and that's okay.

So it would be informed by my view and my view is that whatever Article II authorities that the President has, they would have to be free of corruption and free of taint.

MR. WITTES: So you would bring -- leaving aside any OLC can't indict the President considerations, you bring this case?

MR. ROSENBERG: Yes.

MR. WITTES: All right, Margaret. (Laughter) The case, in fact, will not be brought and we will talk about why in a minute, but it does present in a different forum, which is to say your neck of the woods. And this showed up in Congress in one atmospheric set of conditions and it seems to me anyway to be significantly changing the atmospheric conditions in Congress, if not in general public opinion.

So talk to me about the reception of this report in Congress, particularly in the House of Representatives, which is, of course, the frontline of any impeachment discussion.

MS. TAYLOR: So I want to take us all back a long time ago, one week ago -- (Laughter) -- when what we all were talking about and what the conversation in the press was, was all about how redacted is the report going to be? That was the whole discussion. You know, Chairman Nadler, chairman of the Judiciary Committee in the House authorized a subpoena for that and actually ended up issuing it. But it just strikes me this sort of whiplash that has gone on over the last week in terms of what the discussion has been in the press and in the public, but also on Capitol Hill in terms of what the concerns were.

The way I sort of interpret, in part, what sort of popped out of the Justice Department, it could show that some of that pressure that was being put on Attorney General Barr and others to redact as little as possible had some effect. Because I think the

first impression, at least that I had, is that how substantive and how much there really is in the report. There are redactions in there, of course, that are a bit of a mystery and we're not quite sure what they are, but it's true that the sort of arc of the report and what Mueller's sort of saying is pretty clear, I think, which is what I think changed the conversation when it was released.

So I think you will also recall a few weeks ago Speaker of the House Nancy Pelosi basically sort of came out and said, you know, Trump's not worth it. Unless something really, really fundamental changes here, you know, she didn't see the House pursuing impeachment proceedings. And I think that was sort of the soil that this report was sort of put into.

I do think that the initial sorts of responses that came out were along those lines. Even before any human could have sort of read the entire report, there was some of those responses. So, for example, Steny Hoyer, who's the Majority Leader in the House, basically came out and said, you know, we're in the same place where we were a few weeks ago.

I do think that as people on the Hill and in the public actually started to read the report and to see just how bad it is as articulated by my two colleagues here, I think that that sort of firm position has softened somewhat. You all probably see it in the press. There are various actors coming out on various sides of whether to pursue impeachment proceedings or not. So, for example, Elizabeth Warren has come out pretty strongly that, you know, when you read this report and you get to the end, how can you not begin impeachment proceedings?

You know, on the other hand, I think Nancy Pelosi is looking very much at the politics of all of this. She had a conference call yesterday with Democrats in the House to try to chart a way forward, a common position for Democrats. And she said, you know, the President has engaged in highly unethical and unscrupulous behavior which does not bring honor to the office he holds. But she also basically said that impeachment

proceedings are not the only way to uncover the facts needed for Congress to hold Trump accountable.

So she is in the space where she is trying to throw cold water on people who are calling for those impeachment proceedings right away. I think she's keeping her options open. And I think she's looking at, you know, there are two valid ways here in our political system to remove a President: one is through impeachment proceedings and a conviction, the other is through an election.

Nancy Pelosi is looking at those two options and she's looking at the impeachment option and it is not going to work. In the current atmosphere it is not going to work because Republicans in the Senate will not convict. That's just not what the political atmosphere is. So she's leaving her options open.

I do just want to telescope back a little bit, though, because, you know, I think this is being presented very much as such a difficult choice for House Democrats to make. But I think we also need to be asking ourselves like why is that? Why is this such a difficult situation for House Democrats to be in? And I think it forces us to take a look at, you know, the sort of status of our politics.

And if we take Chuck's thought experiment of substituting names, you know, if you took Donald Trump out of the Mueller report and you substituted in Barack Obama, the reaction on the part of Republicans on Capitol Hill would be extraordinary. It would be swift. It would be certain. I think there's like no one that would even like argue with me on that point.

So, you know, there is this broader question of the, in some sense, brokenness of our partisan politics that is creating this situation for House Democrats and making it a hard choice about what to do.

MR. WITTES: All right. So I am fascinated by the dynamics of congressional politics on this because it seems to me that everybody has instinctively set up the following rough equation. We can quibble about the details of it, but there's a safe

strategy, which is do nothing, keep doing oversight stuff, but do -- certainly don't say the word "impeachment." Right? Don't actually formally constitute an impeachment inquiry.

And fight out -- and then have candidates who will talk about sort of mom-and-pop, breakfast table kind of issues, not ethics issues or Russia and let the press do that. And so you kind of get the atmospheric benefit of the scandal, but you don't -- your candidates aren't talking about it and the Hill is driving it not by talking about impeachment, but by talking about -- but by doing substantive or quasi-substantive oversight, which then fuels the press. So that's considered the safe option.

The unsafe, risky option, which is associated with the left, but which, frankly, I find as a non-left person much more appealing philosophically and as an evidentiary matter, is the sort of no holds barred, move ahead with impeachment, there's a constitutional obligation to take this seriously. And everybody understands that to be, A, more ideological and more dangerous.

And my question is why is that assumption so universally held that the philosophically -- that the active position is considered risky and the relatively passive position is considered safe? Is there an actual basis for that belief or is that just one of these kind of congressional conventional wisdom ideas that everybody repeats because everybody repeats?

MS. TAYLOR: So I'm going to hit you with some polling numbers, which, you know --

MR. WITTES: I love polling numbers. (Laughter)

MS. TAYLOR: Okay, great, fantastic. So at the current moment, only 34 percent of voters think Congress should begin impeachment proceedings to remove the President, which is actually down from 39 percent in January. Nearly half, 48 percent, say Congress should not begin impeachment proceedings. A majority of Democratic voters who want impeachment, which is 59 percent, which is slightly more than a third of the electorate that agrees; 3 in 4 Democrats, 73 percent, want Congress to keep investigating; more than

59 percent who want Congress to being impeachment proceedings, so it's more.

Independents are split, 39 percent, 37 percent on whether Congress should keep investigating. Just 31 percent of Independents support beginning impeachment proceedings compared with 44 percent who oppose impeachment.

You know, opinion polling isn't the only thing to be considered in the context of politics. There is principle, there is the Constitution and doing constitutional duty, but it is something that people on Capitol Hill pay attention to. And Speaker Pelosi has repeatedly sort of talked about these types of issues.

So remember back when the whole government shutdown over the wall was going on. What she said was, you know, if you have the weight of public opinion behind what you're doing, you can get it done. So how I read this is Nancy Pelosi saying the weight of public opinion isn't yet behind this effort to do impeachment.

I think there is a possibility that through these efforts, investigations not using the word "impeachment," but through these other efforts, she is leaving open the possibility that the weight of public opinion could change. These poll numbers could change if it's -- you know, sort of (inaudible) education campaign goes on with Americans through, for example, congressional hearings about what is really in this report and other sort of external issues that connect to it. So I think she's sort of leaving open that possibility.

So, no, I don't think this is just a kind of conventional wisdom that's going on. I do think that Democrats have in mind 1998 when Republicans pursued the impeachment of Bill Clinton and then, you know, sort of suffered as a result electorally in the next set of elections.

SPEAKER: President Ford.

MS. TAYLOR: They do have that in mind in thinking about it.

MS. HENNESSEY: I mean, I do think it's worth picking up on one thread or one comment that you made, Margaret, which is that there are two ways to remove a President who's unfit: one is impeachment and one is voting him out of office. Only one of

those the Constitution commits to Congress. Right? The decision about who we vote for as President is the decision for the public to make.

And so my concern, and I think you're diagnosing it accurately what the thinking on the Hill is, but my concern about what we're seeing emerge from the Hill is that this is becoming a political calculation. I mean, I understand the good faith sort of intention behind that, which is the belief that the best way to preserve the institutions of the United States is for Democrats to win in 2020. The problem with that thinking is when you convince yourself that the best way to protect institutions is for your side to win. You can convince yourself to not do a lot of the things that the Constitution tells your branch is your obligation. I would suggest that it's a similar calculus to what some Republicans have gone through.

And so my fear is that the primary difference between now and the Clinton impeachment hearings is the report and the evidence. And so I do think we have to take step back and ask ourselves if in light of the kinds of evidence that Robert Mueller has placed on the table, placed on the table for Congress, what would it mean for Congress not to act, not to at least begin impeachment inquiries? And I think what it would say was impeachment is actually just a measure of how many votes there are in the Senate.

So impeachment is not a higher constitutional responsibility or obligation, though it is discretionary. But instead, it's this raw political calculation. And if that's the case, and we can go back to the OLC memo that says that a President can't be indicted, but don't worry, there is this other remedy, there is this other branch that can come in. What we're talking about is a systemic structural failure that is going to have larger implications in terms of how we think about the separation of powers.

MR. WITTES: All right, so that's a great vehicle through which to transition to the next subject I want to talk about, which is all the things that Bob Mueller didn't do. And one of them, because of that OLC opinion that Susan mentions, is, you know, he didn't issue the obstruction indictment that Chuck Rosenberg says U.S. Attorney Chuck Rosenberg not bound by that OLC opinion would have asked for and sought from a grand

jury.

I want to get all of your sense, but starting with Chuck of Mueller's decision not to render a judgment on obstruction, which seems to me to have two distinct components. One is the decision not to decide whether a crime was committed and the second is the decision based on that not to even publicly evaluate the question, merely to lay out the evidence.

So, Chuck, is Mueller being too conservative here?

MR. ROSENBERG: I don't think so. So I've wrestled with this quite a bit, Ben. Let's go back a step. There are actually OLC opinions, but they come to the same conclusion, one in 1974 and one in 2000, I believe.

MR. WITTES: Yes.

MR. ROSENBERG: And highest level, but they both say is that it would be unduly burdensome to a President, it would unduly stigmatize the presidency to indict a sitting President. Okay? That's what the policies say.

Whether or not that's right, and I can make an argue that it is for any President, sort of the right course, Mueller's bound by it. Everyone understands that Mueller is a special counsel, works within the structure of the Department of Justice, unlike Ken Starr who was an independent counsel and wasn't bound by OLC policy; Mueller is. So if the concern is that you don't want to stigmatize the President or burden the presidency by charging, then you would take that one logical step further, right, and you wouldn't recommend charging the President. And I think, you know, my reading, I mean, Mueller doesn't say it quite that way, but I think he comes pretty darn close to that formulation. And that makes sense to me. Right?

So when you asked me earlier do the facts warrant the prosecution, the answer is yes. Could you prosecute him? No. That's also incredibly clear to me. And, therefore, nor should you recommend it. Because in some ways recommending that you charge someone and then not being able to do it is even more burdensome because you

don't get your day in court. You don't get to defend yourself against the charges.

And so to the way I think about it, it was both appropriate and principled that Mueller stopped short there.

MS. HENNESSEY: I also think, though, I think that's correct. I also think it's worth thinking through the logical conclusion of that. And if that's the thinking, and it clearly is Mueller's thinking, he's quite explicit on the point, that means that a special counsel investigation can only exonerate the President. It cannot charge the President. If the President is not charged, it cannot accuse him of crimes.

MR. WITTES: And Mueller's explicit on this last point, as well, right? He says if I could clear the President, I would.

MR. ROSENBERG: But, Susan, but it can lay out facts for another branch of government.

MS. HENNESSEY: Exactly. And so that's why I think the -- there's an asymmetric sense of responsibility here. Right? There's Mueller being quite cautious, saying I can't even go down this road. I only have two choices: it's exonerate or do nothing. I am not exonerating him, putting that in black and white; handing the factual record one might even call a roadmap over to Congress. And the weird, perverse thing that is happening is the OLC opinion, which is predicated on this notion that there is an alternative remedy of impeachment or impeachment inquiries in order to avoid the absurd outcome, is becoming the basis for which members of Congress are saying, well, we don't want to proceed to impeachment because this report didn't accuse him of a crime. Right?

And so I do think that there is a -- we're sort of trapped in a somewhat absurd loop, but I don't disagree on any individual point except for when we step back, it's hard to understand how this can function in a healthy way.

MR. WITTES: So, Margaret, this brings -- all roads lead straight back to you here. (Laughter) But I want to --

MS. TAYLOR: I'd like to be ambassador to France. (Laughter)

MR. WITTES: But again, I don't understand how this affects the congressional politics. So on the one hand, the dynamic that Chuck is describing, which is essentially a dynamic of deference to Congress, would militate toward Congress having to take its impeachment responsibility seriously. Page 1 of Volume 2, I don't have it in front of me, explicitly says that one of the factors that Mueller is considering in not making this decision, and this is close to a quote, if not a quote, is the desire to avoid preempting other -- congressional and other means of determining presidential misconduct. Right?

And on the other hand, Susan's point that the absence of a decision as to the substantive answer, did he commit a crime or not, gives Congress all this latitude to say, well, he didn't make a determination, there's no determination of a crime here, there's nothing for us to do. And so my question is, does the specific form of Mueller's deference here accentuate or diminish the likelihood of Congress treating this seriously in an impeachment process? Or doesn't it matter?

MS. TAYLOR: I'm not sure it matters because, you know, Susan, my read, there probably are some people out there saying, well, we're not going to proceed to impeach him because he wasn't accused of a crime. I see some relatively serious people, they're not quite saying that. They're saying, you know, on the Democratic side it's more like 2020, our constituents want us to focus on kitchen table issues, so we have to be paying attention to that, it's really important to people. And on the Republican side I see people saying more sort of, oh, okay, well, this really shows us how bad Russia was, so, you know, focusing more on Russia. I don't see a lot of people saying just because there was a crime.

So I see this more in the sort of political space. And people are thinking politically largely about, you know, what do I as a Democratic congressman in the House, or woman? If I'm looking at my constitutional responsibility where impeachment is an option, it's not a requirement. It's not as though, you know, there's some threshold where it's a requirement as written in the Constitution. I think the Constitution does leave it to the political leaders in Congress to kind of decide what to do going forward in terms of what they

think is best for the country.

And I do think you can be a principled person and sit back and look at the situation and say I'm making a political judgment that pursuing impeachment will mean that Donald Trump will be in office for four more years. And so I'm not going to do that because I think that that is, you know, very dangerous for our democracy and we could lose our democracy in those circumstances. So I'm going to put my eggs, my political judgment and my eggs into the other way, which is having a chance of removing him from office.

And I would just say in this vein, you know, Ben, you talked earlier about how there are things that the President says where people think he's joking. You know, the President was out saying things I think it was just this week or late last week about, you know, sort of joking about the possibility of him being the President beyond eight years. And so, you know, I put this in the vein. People are like, oh, well, he was joking. I don't see things that way anymore and this report kind of helps with that. We see that he's not joking.

And so if I'm a member of Congress, I'm looking at the whole picture. I would love to be able to read this report, have impeachment proceedings, remove the President. That is not a political reality at the moment.

MR. WITTES: All right. Let's talk about two more things before we go to audience questions. Let's talk about two more things that Bob Mueller didn't do.

One of them is subpoena the President or at least we don't have clear evidence of a subpoena to the President. Mueller has taken a lot of criticism for this. Chuck, how valid is that criticism? And do you think that this was something that he should have done?

MR. ROSENBERG: Really interesting question. So we always as prosecutors want to talk to everyone, and that everyone includes subjects and targets of the investigation, and we know the President was a subject. There are circumstances under which we don't get to talk to everyone. For instance, if a subject or target invokes their Fifth Amendment right not to speak with us. So that happens all the time.

We don’t know that that happened or that it didn’t happen. If it did happen, Mueller shouldn’t comment about it publicly. But the reasons Mueller gives for not subpoenaing the President are other than that. He gives essentially two reasons: one, that he was able to infer intent from other witnesses and other evidence and circumstantially; and two, that it would take a long time to litigate the question of whether they could subpoena the President were he to pursue a subpoena.

And neither of those two stated reasons are all that compelling to me. The first reason is not that compelling to me because, as I said, you always want to talk to the subjects and targets of your investigation, particularly where the case turns on intent. Right? Maybe less important in a bank robbery where you find fingerprints and you have a video and you find a guy hiding in his closet covered in dye-pack stain. Right? (Laughter) Probably less important to talk to that guy. But where a case turns on intent it’s really important.

And second, his second proffered reason that it would take too long and they were at the end of a very long, 22-month investigation, well, in 1973, I think when Jaworski issued a subpoena to the Nixon White House for tapes and documents, from the day that subpoena was issued to the day that the Supreme Court decided that Nixon had to turn over that stuff, that executive privilege didn’t protect him, I think was about four and a half months.

MR. WITTES: All right. So I want to go back to your intimation that there may have been an assertion of Fifth Amendment privilege.

MR. ROSENBERG: And I don’t know that.

MR. WITTES: Right. So it is totally clear to me from the text and redactions in the document that Donald Trump, Jr., took the Fifth. That is there’s a place in which Mueller notes that he has declined to be interviewed voluntarily and then the subsequent passage is redacted for grand jury reasons. And the only reason I can imagine that you would have, A, that redaction and, B, no interview is if they subsequently subpoenaed him or

threatened to subpoena him and were told that he would assert the privilege and withdrew the subpoena.

There is no similar thing with respect to the President.

MR. ROSENBERG: Right.

MR. WITTES: And so is your working assumption that Mueller may have inferred that this was the likely outcome and withheld a subpoena anticipating it or that there may have been some discussions that are not disclosed in the report in which that happened or that it's likely not to be the case that the President in any way asserted his Fifth Amendment rights?

MR. ROSENBERG: Yeah, I'm going to take Mueller at face value on this. I mean, my experience in working for the man, you know, he's a Marine infantry officer. He's a straight-ahead runner. That if he said there were two reasons, then there were two reasons. I just don't find either of those two reasons all that compelling.

MR. WITTES: Okay, Susan, do you want to defend Bob Mueller on this point?

MS. HENNESSEY: No. (Laughter) I want to defend an even less likely person, which is I want to defend Donald Trump, Jr., for a moment.

There is nothing wrong with a United States citizen asserting their Fifth Amendment right. And if we take that right seriously, we take the presumptions it affords seriously, you have to take it seriously even when it's Donald Trump, Jr., even when it's the President's son. You have to take it seriously for everyone.

And ordinarily, prosecutors do not force the issue with a subpoena. If counsel says my client is going to assert the Fifth, they actually don't make them go through the process of formally making that invocation.

MR. ROSENBERG: In fact, we're not allowed, Susan, to make them invoke in front of the grand jury.

MS. HENNESSEY: And that is a reasonable and responsible rule for

everyone except the President of the United States. The President of the United States is actually one person whom it is reasonable to force the question, to force them to formally say I am invoking my Fifth Amendment right, which the President has. And it's for the very reasons that undergird the Watergate tapes decision.

And what that decision reduces down to is the determination that the President can't have it both ways. Yes, you can have -- the President can fire someone. He does have control over the Executive Branch. And there'll be political accountability there and that's the political accountability that is the protection of the Constitution.

What the President isn't allowed to do is pretend to be cooperating with an investigation and then assert executive privilege and litigate against his own Justice Department and hide from the American people that he isn't fully cooperating. The choice that the President has is of utmost transparency. And I think this is a similar circumstance in which the President is entitled to assert the Fifth Amendment if he does not want to answer questions, but he should have had to do it because the American people should have had to say, okay, the President decided not to answer these questions. What does that mean? Not in terms of guilt or innocence, but in terms of full cooperation.

MR. ROSENBERG: At great personal risk I'm going to disagree with Susan. (Laughter) Because she's a lot smarter than me. But if nobody's above the law, then nobody's below the law either. The Supreme Court has been absolutely clear that the Fifth Amendment privilege is intended to protect the guilty, but also to protect the innocent who may be caught up, you know, in an investigation in which they can't quite explain what happened, but there is an innocent explanation that hasn't been borne out yet.

That said, the President will one day be a former President. And I don't know when that'll be, but it will happen. And when it does happen, those policies no longer protect him. And so if you can't charge a sitting President, you can absolutely charge a former President.

And so I don't know, Susan, why he would have to waive his Fifth

Amendment privilege.

MS. HENNESSEY: Oh, no, no. I'm not asserting to waive the privilege, just to assert it.

MR. ROSENBERG: Or to assert it publicly. When he still could -- well, more than theoretically, when he still may very well face jeopardy upon leaving office.

MR. WITTES: All right. So, Margaret, will you defend the Mueller decision not to subpoena the President there?

MS. TAYLOR: Do you want me to? (Laughter)

MR. WITTES: I'm just soliciting opinion. If you don't, I will. Because I think somebody should make the argument that this was the right decision. And I actually don't know that I even disbelieve it. So I will do it if you don't want to.

MS. TAYLOR: So, I mean, I guess what I would say is I do question the value of -- and this is my personal opinion, I question the value of questioning Donald Trump on anything. (Laughter) Because we've seen him. He sort of says everything, he says all sides of an issue, he lies; it's all well documented. And so, you know, I guess there is a question of if I'm asking him questions, you know, in a sense like it would be sort of a perjury trap because he's almost certainly going to lie. And what is the value necessarily when I'm trying to build a case that's important for Americans to understand?

So maybe that's one thing just like the -- what is the value exactly in terms of the probative value of really getting honest answers? I think there's just a big question mark around that.

MR. WITTES: All right. I will make a strong case for what Mueller did. (Laughter) And by the way, I have no reservation about any perjury trap issue with respect to the Donald Trump. I don't think you get out of the obligation of interface with law enforcement by being such a pervasive liar that any interview would be assumed to be one in which you would likely perjure yourself.

MR. ROSENBERG: Would you just say what a perjury trap is, though?

MR. WITTES: Yeah. A perjury trap is a very specific form of entrapment --

MR. ROSENBERG: Right.

MR. WITTES: -- that dates from case law in the 1970s where you put somebody in front of a grand jury or conduct an interview as a prosecutor with the specific intention of getting them to lie on a point, being unable to prosecute them for the underlying offense, in order to make a criminal case that you wouldn't otherwise be able to make.

MR. ROSENBERG: So believing that someone may lie when you put them in the grand jury is not a perjury trap?

MR. WITTES: It's a character judgment.

MR. ROSENBERG: Right. (Laughter)

MS. TAYLOR: Right. So to be clear, I was using perjury trap in the same way that the President used the word "collusion."

MR. WITTES: No, no, no. (Laughter)

MS. TAYLOR: That's what he thinks it is or what he says -- you know, he can have -- make his supporters think it is, so.

MR. WITTES: I am not suggesting you were misusing the word "perjury trap." I do think it is commonly misused.

MS. TAYLOR: Yes.

MR. WITTES: And I don't have any reservation about getting the President's testimony. That said, I do think there's more to be said for Mueller's decision here than is being acknowledged, and here's why.

If you are not going to make the binary judgment and you are thereby deferring, but you're also not closing the matter, right, so that a future -- once he leaves office, a future attorney general can say, okay, now he's out of office, it's time to make the binary judgment. If at that point you need his input in order to make a responsible judgment, you can subpoena him then.

So right now the question is, do you spend months litigating this?

Embedded in that question is, you'd probably have to ask the Justice Department hierarchy for approval to issue that subpoena and Matt Whitaker and Bill Barr might be less than disposed to say yes to that. And you're going to have a litigation over whether you have the authority to issue that subpoena. That's going to be time-consuming.

You don't need the answers to his questions in order to issue a comprehensive report. So issue the report now. Congress can do its job now. And if future prosecutors want to say, hey, there's a case to be made here, I'm going to ask Chuck Rosenberg to be the U.S. Attorney to bring this case because he thinks there's a thing, and Chuck feels like it would be really important to have the President, now the former President, he can issue the subpoena at that point. The President can either answer questions or can assert his Fifth Amendment rights. But I don't see what you actually lose by not doing that now.

MR. ROSENBERG: I have -- oh, go ahead, Susan.

MS. HENNESSEY: I think the answer is because that version of events is a fantasy. Right? So yes, the perfectly scrupulous prosecutor, which Mueller is and took that approach to this, and it's defensible by that read, but that wasn't really the task. And there isn't really going to be a conversation three or five or however many years from now that this was the one account for the American people, this was one serious investigation that was going to occur. And so the question really was, to force the issue now or not at all.

And so I agree with you formally, but to the extent it was, well, maybe someday, that strikes me as a punt or even sort of delusional thinking to the extent that the answers were needed. Because I just -- maybe I will be wrong and there will be this prosecution, but.

MR. ROSENBERG: I think there's one other issue, Ben, which is the evidentiary value of having interviews and testimony closer in time to the conduct. Right? So maybe he talks to us in four years and maybe he doesn't, but if there's any value -- and I take Margaret's point that there may not be any value -- that value is in talking to him as

close in time to the events that you're interested in.

MR. WITTES: But so that point is taken. I'm not saying it's of equal value, but they did give him a year's worth of opportunity to come in and have that conversation. And so I think there's -- you know, I'm not sure that that combination is without integrity.

I'm going to step out of school for a minute here, and so just as to whether it's delusional thinking that a subsequent administration might reopen a question that a prior administration had declined, when Eric Holder became attorney general, he reopened a series of criminal cases that had been declined with respect to treatment of detainees in the CIA program. And I believe, if I'm not mistaken, that those declinations were by you.

MR. ROSENBERG: That is true. (Laughter)

MR. WITTES: And so I --

MR. ROSENBERG: Can I just add that after a three-year subsequent investigation all the cases that we declined in the Eastern District of Virginia were declined again.

MR. WITTES: Right. No, so I would say the possibility that it could happen -- and by the way, I thought it was outrageous when Holder reopened that matter because I believed that prosecutorial declinations in the absence of some reason to think they are corrupt or wildly inappropriate for some reason, and I then as now have the highest regard for Chuck's judgment, I thought it was outrageous to reopen them.

In this case, it seems to me quite different because Mueller is not issuing a declination and he's explicitly holding the question open. And so I think it would be quite appropriate for the next administration to come in and say the only person who has declined this is the prior attorney general.

MR. ROSENBERG: Is the head of the Justice Department, Ben.

MR. WITTES: Yes.

MR. ROSENBERG: Which is what Holder was.

MR. WITTES: Right, but there was not a judgment by the prosecutors in

question to decline this case. There was a decision by the political leadership to decline this case along the way or mischaracterizing the work of the prosecutors. I think that's entitled to a lot less deference than you were, to be honest.

MS. HENNESSEY: Right, although I would suggest that the proper analogy here is not Eric Holder, but Gerald Ford; that the decision about what you do with past presidential criminality or potential criminality is a decision of such different character that that's the more appropriate or the closer sort of analogy and history.

MR. WITTES: All right. So before I want to get to your questions, I have one more area that I want to cover briefly of things Mueller didn't do first. So while the panelists are answering these questions, I'm going to scan the room and point at people who will get microphones.

But one thing Mueller didn't do is there are a series of cases that he seemed to have come close to or through hard about bringing that he didn't bring. These are particularly the case in Volume 1 actually.

So, Susan, what are the standouts to you, areas where a more aggressive prosecutorial office that leaned farther forward would have brought cases that we didn't see? And is that a commendable restraint on Mueller's part or is it inappropriate, too much deference?

MS. HENNESSEY: So I think that the biggest one was Mueller's decision to not pursue charges in the wake of the June 9th Trump Tower meeting in which Donald Trump, Jr., Jared Kushner, Paul Manafort, and others thought that they were going to receive dirt on Hillary Clinton. The question there was one of campaign finance violations. The Mueller report lays out relatively clearly the elements that they believe are met. So they believe that it does constitute a thing of value under the law.

They declined to pursue charges because they're concerned about proving two other elements. They're concerned about proving the willful element, meaning you actually have to know. It's one of those crimes where you have to know it's a crime at the

time that you're doing it. They aren't sure they can prove that.

And second, you have to prove that it's either a thing of value that's worth $2,000 for the misdemeanor offense or $25,000 for the felony. So Mueller's team is saying how are we going to -- we think it's a thing of value, but how do you put a dollar sign? We aren't really going to pursue charges there.

As our colleague Bob Bauer has argued I think pretty persuasively, I think they got that one wrong. They could have reasonably and I think maybe should have, and I think broadly we should defer to Mueller's prosecution decisions as being reasonable prosecutorial judgments. But to the extent we are, you know, critiquing his work after the fact, however unfairly, I think that is one category in which certainly charges could have been brought against the campaign. And I think that they really restrained themselves there in a quite consequential way.

There's also questions, and this is a largely redacted portion, and so you never want to lean too forward when you're talking about things that aren't completely clear, they clearly also considered bringing charges under a 1030, which is the Computer Fraud and Abuse Act. A reasonable reading, although not a conclusive one, might be that they considered whether or not Donald Trump, Jr.'s use of a password that had been given to him sort of as having been guessed or illicitly obtained, whether or not using that is a violation under the law. The prosecutors, based on the unredacted portions, appear to take sort of a prudential judgment, but, eh, that kind of sort of boneheaded mistake or not understanding how it works isn't really what this law is about.

I think that there are other cases of applications of the Computer Fraud and Abuse Act in which defendants have not been given the same presumption. And so that's another area in which I think a different prosecutor might have made a different decision. I don't know that it was the wrong one, but those are the two big ones for me.

MR. WITTES: What do you think, Chuck? What are some other areas where you look at and say, wow, that's Mueller being very conservative in his charging

decisions?

MR. ROSENBERG: Yeah, I agree with Susan. I was most focused on the June 9th Trump Tower meeting and whether the receipt of dirt on Hillary Clinton was a thing of value. But I just want to take you inside of the U.S. Attorney's conference room for a minute.

Because we would have knock-down, drag-out fights about whether to charge, who to charge, how to charge because this stuff is art and not science. There is no algorithm that tells you what to do and when to do it. You know, the easy cases are always easy; back to the bank robber. Right. We wouldn't be fighting about that charge. But where you have to prove intent and where you have prove that the person knew the underlying crime was a crime, that's where we would have those arguments.

And I cannot begin to tell you how many times when I was a line prosecutor, when I was chief of the Major Crimes Unit, and later when I was U.S. Attorney, how often you could 10, 11, 12, 13 well-intentioned, smart, experienced prosecutors in the room and come out with a 5-to-6 decision. Over and over and over.

And so in the end, someone has to make the call; Mueller did. And it's hard for me -- I mean, I think Susan analyzed it exactly right. It's hard for me to second-guess that having had those arguments.

MS. TAYLOR: I just have one thing to add. Just to put it in, again, the congressional frame, you know, I think there's just a separate question of people in Congress and Americans have to like look at all this activity and figure out what they think of it. So putting aside, you know, whether there was enough evidence or whatever, there's enough in there to look at this and say Trump pursuing Trump Tower Moscow, what do we as Americans think of a person running for President pursuing a business deal in a foreign country while they're running for President and lying to the American people about it?

So, you know, I just want to also remember there are these sort of moral decisions and norms about how what are we as Americans going to accept in terms of how

our politics are done, how our elections are run. How do we feel about how we ensure the sovereignty of our vote?

So I just want to -- and a little bit on that because I think that is really the questions going forward that Americans have to grapple with.

MR. WITTES: All right. When you get the microphone, please identify yourself. Please keep your questions brief. I will cut you off with a brutal lack of due process if you do not. (Laughter) And please state your question in the form of a question.

MR. PLISKIN: Hi, my name is Rich Pliskin and I'm an education writer and I also teach writing at G.W. And I haven't read the report; I've read of the report. So if the premise of my question is wrong I'll sit down. But it seems like it's written in very -- I'm not a lawyer, most people aren't lawyers, but it's written obviously by lawyers and some of it's very arcane language. And I just want to know if Mueller -- I understand that he's bound by the OLC opinion and all, but why couldn't he just say in plain English I can't indict, but some of this activity that we found is scandalous and a threat to democracy and it's really now up to Congress to make a decision? Why do they have to beat around the bush?

MR. WITTES: So that's a wonderful question. And I can answer that one, which is that is actually not the way federal prosecutors write. (Laughter) And there's a good reason for that. And if you think about when Jim Comey closed the Hillary Clinton email investigation and he didn't use words like "scandalous" or "a threat to democracy." He used two very descriptive words about her conduct, which was "extremely careless." And that very mild editorial comment, which, by the way, was amply supported by the record, was a huge problem for the way that closure of that case -- which also, by the way, concluded that no reasonable prosecutor would contemplate bringing a case in the situation, was received by the general public.

The fact that something as factually supported and close to the record as that generated that kind of reaction, and I'm not commenting on whether that was right or wrong, I think shows the wisdom of the general propensity of federal prosecutors when you

speak in public to not go beyond the question of whether crimes are committed and to not editorialize in any way about the facts that you're reporting.

MR. ROSENBERG: We're designed to be incredibly dull, just so you know. (Laughter)

MR. WITTES: Do any of you have anything to add to that?

MS. TAYLOR: I would just say that, you know, just because Mueller didn't use the type of language you're talking about doesn't mean we can't. And other actors in our political system absolutely should be using that type of language and being clear about what is going on here.

MS. HENNESSEY: I would also really encourage people, even who aren't lawyers, to pick up and read the report. It's more readable than you might think. It is a compelling document. It's a real page-turner. (Laughter)

I actually think it is incumbent, it's an obligation of being a citizen of this country to make the investment of picking it up and reading through it.

MS. FLINT: Hi, Lara Flint with Democracy Fund. And I want to pick up on something Margaret mentioned just there at the very end of the presentation, which is Congress has a number of roles here going forward. And it seems to me that reading this report, one of the things to think about is the many policy or legal changes that Congress might be considering going forward to address this kind of situation and to prevent it going forward. I would just love to hear your thoughts about where should Congress prioritize its policy and legal work going forward?

MS. TAYLOR: So maybe I'll start. In my opinion, I think the priority needs to be on protecting the sovereignty of the votes of Americans, protecting our elections, dealing with the reality that foreign malign actors are going to be attacking our democracy and our elections from here on out on Facebook, publicly, privately, you know, worming their way into conservative or liberal circles like we see this Maria Butina.

It is happening. It is happening now. There need to be solutions to it. The

President is not leading on that issue. I think Congress needs to lead on that issue.

MR. WITTES: I want to add something to that I've been thinking about it. I think this question is super profound and important. And I keep thinking about an obscure provision of banking law that requires banks to report suspicious activity. And it is called the Suspicious Activity Reporting Requirement, which, of course, this being Washington and the law has an acronym, which is the SARS. And the basic rule is if you're a bank and you see a pattern of wire transfers that look suspicious under any of a long list of categories, you're obliged to inform the Treasury Department. And there's a complicated set of forms that you have to -- called Suspicious Activity Reporting Forms, and these are really important sources of law enforcement information.

So here's my question. Why should a campaign that has dozens and dozens and dozens of contacts with foreign nationals that may have ties to foreign intelligence agencies and, by the way, that it thinks may have ties to foreign intelligence agencies, not have some kind of suspicious activity reporting requirement? And so I want to think about what the nature of political SARS would look like and what kind of requirement could you impose for routine reporting of highly suspicious contact that would not chill campaign behavior toward reasonable things; that would not create an onerous burden on campaigns. But that would give the FBI a little bit of a heads-up when a foreign intelligence agent or agency is making systematic probes of a political campaign.

Sir?

SPEAKER: Yes, I also have a political question, but I'll ask a legal one related to what you just said. And that is for us non-lawyers, it's kind of shocking that when people corruptly work together, if they don't have an explicit agreement, that somehow that's not chargeable. Because I've been told by those who study it in many corrupt foreign countries that normally corruption takes place by me doing a favor for you unasked; you do a favor for me unasked. We signal to each other by mutual favors and we coordinate and cooperate in that way. And that's the rule, not the exception.

So, you know, I'm wondering if this not a law? Should it be a law? What is the status of it when it comes to Congress?

MR. ROSENBERG: So you don't need an explicit agreement to trigger the conspiracy statute. You just need an agreement. Of course, if it's explicit, even a prosecutor like me can succeed. (Laughter) In all of the conspiracy cases I prosecuted in my life only once, and god bless these two guys, did they ever reduce their conspiratorial to writing, which we cleverly made Exhibit Number 1. (Laughter) Blew it up to a 5-foot-by-7-foot chart and left it on an easel for the entire trial. (Laughter)

But most of the time agreements are implicit, okay, and that just becomes a matter of proof. That's just harder to discern. The scenario you described, right, where Person A does this and Person B does that and it causes Person C to do something else could be very compelling evidence of an agreement, but it's not explicit. Is it actionable? As a legal matter absolutely, but we have to be able to prove it. We have to be able to prove the agreement, and that's where I think you see prosecutors often, maybe in this case, pulling up short. Because they don't have the evidence to prove an implicit agreement.

SPEAKER: Could the law be stronger?

MR. ROSENBERG: The law's pretty strong. I mean, the law permits us to do that, but it really is not a question of strengthening the law. It's just ascertaining the facts.

MS. HENNESSEY: One thing that is also getting muddled is the report does show numerous elements of agreement. It just doesn't show agreement about something that is a crime. And so we have to take it all into its constituent parts. There are crimes, but there's no agreement as to those crimes. And there's agreement, but the underlying conduct isn't criminal in nature.

And so I tend to agree that the response to that -- our conspiracy laws tend to be plenty robust.

MR. ROSENBERG: They are.

MS. HENNESSEY: It's the question of sort of the underlying conduct,

whether or not we want that to be criminalized or not.

MR. WITTES: Okay, so we've got a lot of questions and we've got five minutes. So what I'm going to do is I'm going to gather some of the questions and then give each of the panelists a chance to wrap up addressing some of those questions as they go.

Ma'am?

SPEAKER: Hi, just a general question going back to the OLC and, you know, the decision in this report that Congress actually has the capability to do this even if we can't given the OLC memo, whatever that is. Are we sort of in a constitutional crisis?

MR. WITTES: All right. Sir?

MR. SCARLISS: I'm Basil Scarlis. I used to, years ago, work at the State Department. And I see three areas that the special counsel apparently did not pursue.

One is the issue of the allegations of the Trump Organization sold properties to Russian oligarchs. The second dis that reports that Russian state banks helped finance Trump at some point. And thirdly, that the special counsel didn't request copies of Donald Trump's tax returns, at least I don't see evidence of that, perhaps I'm wrong.

MR. WITTES: Okay, two rows in front of you we've got two people. And then we're going to close it out.

MR. ROSENBERG: You remembering all these, Ben?

MR. WITTES: Oh, all of them.

SPEAKER: So I worked on the independent counsel investigation in Iran-Contra and I'm well aware of the problems with the independent counsel statute. But it seems now that we're kind of back to where we were before that statute and the special counsel regulations don't seem to address the situation where you have the subject or target of your investigation is the President of the United States because you have the attorney general in charge. And we're now being told with the OLC opinions you can't indict the President anyhow.

So what is the purpose of having a grand jury investigation if you cannot

come to a conclusion of criminal conduct by the President? Isn't that an abuse of the grand jury process?

MR. WITTES: And one more.

SPEAKER: Thank you. My name is Steven. I teach law school in the District of Columbia. My question is one of strategy.

Didn't Special Counsel Mueller strategically lose a lot of potential force by not insisting on an interview of the President even if the President's answers were populated, as were his answers to his written interrogatories, by a series of "I don't recalls?"

MR. WITTES: All right. We've got a bunch on the table. We've got two minutes. (Laughter) Margaret.

MS. TAYLOR: Sure. So I'm going to take the question about the tax returns and include the sort of financial information. And I would just point out that there are these other investigations that the House is conducting. Okay. And you've been reading about this in the press. The Ways and Means Committee has made the request to the IRS for Donald Trump's tax returns. Looks like Trump or whoever is going to sort of fight that.

Similarly, Elijah Cummings in the House Oversight and Reform Committee has requested from Mazars Accounting, which is Trump's accounting firm, he has eight years of financial records. And actually Donald Trump in his personal capacity actually sued Elijah Cummings to prevent Mazars from providing that information.

So I just want to point out there are these other things going on, these other investigations. And the Mueller report is like sort of part of a body of information and evidence, and then there's also these other investigations going on, too. So it's one part.

I also just want to say, you know, on the constitutional crisis, I think it's just worth pointing out that the Madisonian conception of separation of powers and checks and balances, it's arguably not working right now. (Laughter) And so, you know, I guess my answer to your question would be like, yes, in the sense that the concerns that George Washington had about partisan politics seems to be more acute now than I've ever seen it

before, and him being sort of right about those concerns. And I want to see that change because I'd like to get out of this constitutional crisis.

MR. ROSENBERG: And please don't forget there are also investigations in the Southern District of New York, the Eastern District of New York, the Eastern District of Virginia, the District of Columbia. Many of those will look, I'm sure, at the Inaugural Committee, Trump Foundation, Trump Organization, campaign finance violations. Mueller's remit was relatively narrow and it doesn't preclude these other prosecutors from supplementing the work that's being done in the Congress.

MR. WITTES: Susan, final thoughts?

MS. HENNESSEY: So I will just briefly touch on sort of the question of constitutional crisis and something that I think people use too frequently. We've laughed a lot of times in this room. Right?

There's been a lot of sort of laugh points. I think it's actually not just a reflection of Chuck's sense of humor, which is pretty good, but also of the fact of how scary and uncomfortable this all is. Because if we stare down the barrel of this, if these facts are on the table and Congress shrugs and it's up to the American people maybe 18 months from now to figure this out, that's a really scary place.

And I don't think the term is constitutional crisis, which usually implies sort of point at which there's a breach with no remedy, but instead constitutional rot.

That when the branches stop performing their functions, when the President stops meaning his oath of office, when the Congress stops meaning the oaths that they swear to faithfully and well execute their duties, a process of rot begins that can be very, very difficult to recover from in the long term. And so while I don't think we should be hysterical, I also think that we shouldn't be afraid to take this moment seriously and really reflect on what it means to not do anything.

MR. WITTES: So I will close this out by addressing the question about the special counsel regs and the independent counsel law, the latter subject of which I wrote a

book about a number of years ago.

I don't think this problem is resolvable. I think it's inherent in the problem that Justice Scalia was writing about and the majority was struggling with in *Morrison v. Olson*. It's inherent in the problem of investigating the President.

I do think there are -- the independent counsel law as an imperfect and deeply flawed institutional solution to this. The special counsel regs are, too. And they're flawed in a different way.

And so one thing I would really want to know the answer to, and this is actually probably questions that people won't ask Bob Mueller initially in his testimony, but I really want to hear from him on, how encumbered was he by the fear of Justice Department intervention? Was he able to do the investigation that he wanted to do?

Was he afraid of this investigation being cut short, being managed? Or was this investigation, is this report from his point of view the ideal outcome given evidentiary factors that he would have wanted to produce under the best of circumstances? So part of my answer depends on the answer to that.

I do think there is one glaring thing missing from the special counsel regs and it goes to this question of deference to Congress and that is that there's no impeachment referral provisions. Leon Jaworski created one for himself through a litigation mechanism. Ken Starr had one in statute.

This process would have been a better process if Bob Mueller had been under an obligation to report to Congress from the language of the old independent counsel law 595-C, information that may be grounds for impeachment. That provision of the old law should not have failed to make it into the special counsel regs and that ought to be looked at in the wake of this.

With that, we've run a little bit over. My apologies. Thank you all for coming. (Applause)

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