OBSTRUCTION OF JUSTICE?

Donald Trump is certainly no saint, but I think Attorney General Barr was basically correct in concluding that, based on the facts disclosed in Robert Mueller’s report, President Trump’s efforts to stop or impede Mueller’s investigation of the issue of collusion between the Trump campaign and Russia’s interference in the 2016 election did not constitute obstruction of justice as a matter of the Constitution or federal law.

This is an important issue, and it’s important that people consider it in a broader context than who happens to be President today and what they think of him. What many of the talking heads I’ve seen lately don’t seems to recognize, or don’t address, is that there may be valid reasons for a President to decide that his subordinates should not investigate certain matters, even if those reasons are partly political and partly to protect his reputation.

Consider the question in terms of Presidents almost everyone admires. In 1940, when Franklin Roosevelt was trying desperately to help Britain defend itself against Nazi Germany and Fascist Italy and to win election to a third term in the face of strong, often rabid, isolationist sentiment in the electorate and many who hated him for other reasons, suppose his Attorney General or FBI Director wanted to launch investigations into Roosevelt’s alleged violations of the Neutrality Act or into rumors, which FRD believed to be baseless, that some of his top advisors or political supporters had had improper communications with Germans or Soviets. Or suppose, when John Kennedy was President, confronting Soviet missiles in Cuba or trying to enforce new civil rights legislation in southern states that were on the verge of insurrection, that his Attorney General or FBI Director, egged on by Republicans and southern Democrats in Congress, wanted to launch investigations into Kennedy’s relationship with various women or into Martin Luther King’s supposed ties to Communists. In those circumstances, would it have been improper, or constituted obstruction of justice, for FDR or JFK to order those officials not to undertake such investigations or to terminate any that had begun? Would it have been improper for them to remove those officials if they had insisted on going forward? Not in my opinion. In my opinion, valid reasons of state could, and would, have justified such actions even if they also served those Presidents’ personal and political interests.

The Constitution establishes one, and only one, Chief Executive, whose main job is to enforce the laws of the United States. The President’s principal instruments in carrying out that job are the Department of Justice and the FBI. An essential part of that job and of carrying out his or her overall policies is setting law enforcement priorities and, in some cases, deciding whether or not to investigate specific matters and prosecute specific individuals. When the President’s control of those decisions is reduced or taken away and put in other hands, as in the case of independent counsels like Ken Starr under the now-expired Independent Counsel statute, we have seen how such investigations can weaken a President and his ability to implement the policy agenda for which he was elected. It may be, as Barr has written, that a President can commit the crime of obstruction of justice when he or she, for example, suborns perjured testimony or manufactures or destroys evidence in a judicial proceeding. (Whether or not he can be indicted and tried for that or any other crime when in office is a separate question; the Department of Justice’s position has long been no, he cannot.) But I agree with Barr that the President’s acting within his lawful powers to prevent, stop or otherwise influence an investigation should not be considered obstruction of justice under the law and the Constitution.

None of this is to excuse (or “exonerate” to use Mueller’s term) President Trump’s other actions and rhetoric in the matters discussed in Mueller’s report or to suggest that the President is above the law. But when a President behaves in ways that are widely unacceptable, the Constitution provides a remedy, as Mueller’s report points out: impeachment and removal by Congress. It also gives Congress broad power to investigate executive misconduct and also guarantees a free press to add its spotlight on such misdeeds. Also, when a President impedes and investigation into his activities or fires the investigator, he may pay a steep, and ultimately fatal, political price for it, as Richard Nixon found. But we should not count among the President’s punishable sins her efforts to control her main instruments of law enforcement unless we wish to fundamentally change and weaken her ability to carry out the job the Constitution assigned to her.

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