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(Thread) Reading the Mueller Report, VIII

Sometimes lying and obstructing is a crime.
Sometimes it isn't.

It's time for some Fun With Criminal Law.
(That means more IRAC)

Part I begins here:



Or here if you prefer blog posts: <https://terikanefield-blog.com/category/mueller-probe/mueller-report/>

1/ To review, IRAC is a method of legal analysis.

IRAC stands for:

- ❖ Issue
- ❖ Rule
- ❖ Analysis
- ❖ Conclusion

Let's start with this one:

Issue: Did Trump obstruct justice when he ordered McGahn (WH counsel) to fire Mueller, and then ordered McGahn to lie about it?

2/ For the Rule, we plug in the elements of the crime of obstruction of justice:

- ❖ an obstructive act
- ❖ a nexus between the obstructive act and an official proceeding
- ❖ a corrupt intent.

To get a conviction a prosecutor must prove each element beyond a reasonable doubt.

3/ To do the analysis, we look to see if there are facts to support each element beyond a reasonable doubt.

The facts are given more fully in Vol. II, 113- 110.
(I don't have room here to list them all)



June 2017: Trump ordered McGahn to fire Mueller;

4/ McGahn refused;

January 2018, the media reported the story;

Trump, through his personal lawyer and two aides, "sought to have McGahn deny" the story and create a false record;

McGahn refused because the story was true and he wouldn't lie.

Mueller did the analysis on 118-120.

5/ Element 1, Obstructive act: Yes.

Trump, in media interviews, denied that he had tried to fire Mueller.

Mueller looked at all the evidence and concluded that "the weight of the evidence" is against Trump. [Straight talk: Mueller concluded Trump was lying.]

6/ Evidence includes multiple witnesses (who testified under oath) and contemporaneous notes and records.

Now let's look at Element 2, Nexus between obstructive act and official proceeding.

7/ To establish a nexus, the prosecution must show that Trump's actions would tend to hinder, delay, or prevent communication of information to investigators.

Mueller concludes the answer to Element 2 is yes, from this evidence:

8/ Trump knew that Special Counsel was investigating obstruction-related events, and that the investigation wasn't complete;

McGahn changing his story would undercut McGahn's "credibility as a potential" witness;

9/ Trump specifically wanted McGahn to produce a written document: Trump wasn't simply engaging in a media strategy, or he would have given an interview denying the story. Instead he specifically asked McGahn to write a letter "for our records" 10 days after the stories ran.

10/ Element 3, Corrupt Intent: yes.

Several facts support the conclusion that Trump "acted for the purpose of influencing McGahn's account in order to deflect or prevent further scrutiny" of his "conduct toward the investigation."

These include:

11/ Trump had "laid the groundwork" for "pressing McGahn to alter his story" by telling others that it might be necessary to fire McGahn if he didn't deny the media story.

12/ Trump's statements to witnesses reflect his understanding that the events of the past summer (when he ordered McGahn to fire Mueller) would be part of an obstruction of justice inquiry.

Thus, Mueller concludes corrupt intent. (Notice the evidence is circumstantial)

13/ The Report explains that obstruction doesn't have to succeed for it to be obstruction. (v.II 11-12)

[This makes sense, right? If it succeeds, there won't be any charges. Kind of like: Treason never prospers, and what is the reason? If it prospers, none dare call it treason.]

Attempts and endeavors. Section 1512(c)(2) covers both substantive obstruction offenses and attempts to obstruct justice. Under general principles of attempt law, a person is guilty of an attempt when he has the intent to commit a substantive offense and takes an overt act that constitutes a substantial step towards that goal. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007). “[T]he act [must be] substantial, in that it was strongly corroborative of the defendant’s criminal purpose.” *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003). While “mere abstract talk” does not suffice, any “concrete and specific” acts that corroborate the defendant’s intent can constitute a “substantial step.” *United States v. Irving*, 665 F.3d 1184, 1198-1205 (10th Cir. 2011). Thus, “soliciting an innocent agent to engage in conduct constituting an element of the crime” may qualify as a substantial step. Model Penal Code § 5.01(2)(g); see *United States v. Lucas*, 499 F.3d 769, 781 (8th Cir. 2007).

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The omnibus clause of 18 U.S.C. § 1503 prohibits an “endeavor” to obstruct justice, which sweeps more broadly than Section 1512’s attempt provision. See *United States v. Sampson*, 898 F.3d 287, 302 (2d Cir. 2018); *United States v. Leisure*, 844 F.2d 1347, 1366-1367 (8th Cir. 1988) (collecting cases). “It is well established that a[n] [obstruction-of-justice] offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded.” *United States v. Davis*, 854 F.3d 1276, 1292 (11th Cir. 2017) (internal quotation marks omitted).

14/ OK, let’s try another.

Issue: Did Trump obstruct justice when he tried to prevent the relevant emails setting up the June 9, 2016 Trump Tower meeting from being disclosed, and when he dictated a false letter about the events?

Mueller did the analysis here: Vol.II, 98-107.

15/ We look at each of the three elements of obstruction.

❖ Was there an obstructive act? Yes.

On at least three occasions, Trump directed Hicks and others not to disclose the information, and he edited a misleading response for Trump, Jr.

16/

❖ Was there a nexus to an official proceeding? No.

The evidence (given more fully on Vol. II, pages 98-106) shows that Trump was trying to mislead the press, not investigators. The lying was a media strategy.

17/

❖ Was there corrupt intent? No.

Evidence established that Trump's intent was to minimize public disclosure about his campaign’s connection to Russia, but there was insufficient evidence that he intended to interfere with an investigation or proceeding.

18/ In other words, he corruptly intended to lie to the media, not obstruct a judicial proceeding.

Lying to the press isn't a crime (and it shouldn't be) because it would be too easy for prosecutions to be political . . .

19/ If lying in general was illegal, it would be too easy for such a law to include misstatements instead of egregious examples such as the President ordering the White House counsel to lie about something central to a major investigation into the president's own conduct.

20/ Not everything immoral is a crime. That would be impossible and not desirable.

I'll stop there and not start waxing philosophical about the nature and limits of the criminal justice system.

End Part VIII/

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