

POLITICO

The Surprises in the Mueller Report

April 19, 2019

Mueller whiffed on a crucial legal question.

Josh Blackman is a constitutional law professor at the South Texas College of Law Houston, and an adjunct scholar at the Cato Institute.

The special counsel's report spans more than 400 pages. However, only 12 pages are dedicated to a critical question: Can the federal obstruction of justice statute apply to the president? Robert Mueller treated this question—which is separate from whether a sitting president can be indicted—in an underwhelming fashion.

Attorney General Barr stated in his press conference Thursday that he “disagreed with some of the special counsel's legal theories.” I can speculate about one such theory: Mueller failed to do the necessary work to show that the precedents of the Supreme Court, and the Justice Department, support the application of the obstruction statute in this context.

Mueller could have avoided the entire second volume of his report—which spends 182 pages summarizing his obstruction of justice investigation—if he had simply concluded that the obstruction statute does not apply to the president. There is no reason to detail whether the president violated a federal law, if the federal law does not apply to the president.

The Supreme Court has historically been hesitant to resolve disputes between Congress and the president, and its justices have suggested that general statutes should not limit the president's power unless Congress expressly indicated an intent to do so. Mueller declined to exercise this caution. Why? First, he reasoned, the Office of Legal Counsel has suggested that applying the federal bribery statute to the president “raises no separation of powers questions.” Second, Mueller reasoned that the prohibition on obstruction was indistinguishable from the prohibition on bribery. Therefore the obstruction statute could be applied to the president.

This analogy between bribery and obstruction, which supports much of Mueller's analysis, falters. Accepting a bribe is an impeachable offense that cannot in any situation be considered a lawful exercise of presidential authority. An obstruction charge is very different. For example, Mueller implies that Trump's removal of James Comey as the FBI director, with a corrupt intent, could constitute obstruction of justice. The president's lawyers countered that the termination was a lawful exercise of presidential authority. Applying the obstruction statute to the president raises separation of powers questions that the bribery statute does not. Mueller should have taken this more restrained, and correct, approach.

Josh Blackman is an Associate Professor of Law at the South Texas College of Law Houston who specializes in constitutional law, the United States Supreme Court, and the intersection of law and technology.