

WILL THE MUELLER PROBE END WITH A CONSTITUTIONAL CRISIS?

In May 2017, Deputy Attorney General Rod Rosenstein appointed former FBI Director Robert Mueller as special counsel to investigate Russian interference in the presidential election of 2016. Specifically, Mueller's task was to look into interference to benefit then-candidate Donald Trump. Many elected officials, news analysts, and scholars wonder if the special counsel's investigation (aka the Mueller probe) could lead to a constitutional crisis.

The term *constitutional crisis* is complex. Generally, a constitutional crisis is a conflict in the function of government that the U.S. Constitution cannot resolve. Either the Constitution does not say what to do about the conflict, is too vague to resolve the conflict, or presents options to resolve the conflict that lead to other serious political dilemmas. Any constitutional crisis threatens the proper functioning of the government.

In the case of the Mueller probe, some political observers worry that President Trump might interfere with Mueller's investigation, especially if the president believes it will lead to charges against him personally. President Trump has repeatedly called the investigation a "witch hunt" and accused Mueller and members of his investigative team of unfair bias. The press has reported that Trump twice told aides that he wanted the Mueller probe to end.

The administration has also repeatedly stated that Mueller ought to complete his investigation. To date, President Trump has not made any moves to hinder the investigation.

Russia's Interference

In 2011, then-Secretary of State Hillary Clinton questioned the victory of Russian President Vladimir Putin's party in a Russian parliamentary election. Clinton also supported financial sanctions against Russia in response to its illegal annexation of Crimea. In doing so, she earned Putin's ire. Beginning in 2014, employees of the Internet Research Agency, a Russian company, used fake internet identities to troll popular internet sites to attack Hillary Clinton's prospective candidacy.

The Democratic National Committee (DNC) is the controlling organization of the Democratic Party and administers that party's primary election to choose the party's presidential candidate. In 2016, hackers stole emails from the DNC, which ended up in the hands of WikiLeaks, an organization that publishes leaked information from governments, corporations, and individuals. Several of the emails were embarrassing for the DNC and Clinton. WikiLeaks published the emails during the DNC party convention.

Several U.S. intelligence agencies concluded that people with some ties to the Russian government had passed the emails to WikiLeaks. After the email hack, the FBI launched an investigation. The FBI investigated Trump campaign advisor George Papadopoulos on suspicion that he knew of the DNC email theft before WikiLeaks made the emails public.

As a result, the FBI began to focus on possible Trump campaign knowledge of and involvement with Russian



Clockwise from top: President Donald Trump, Paul Manafort, George Papadopoulos, Michael Flynn, Michael Cohen.

meddling in the election. In October 2016, the Department of Homeland Security declared it was "confident" that the Russian government was behind the hacking in order "to interfere with the U.S. election process."

President Barack Obama waited until after Donald Trump's election on November 8, 2016, before taking stronger action. On December 29, the Obama administration expelled 35 Russian officials from the United States, closed two Russian East Coast compounds, and imposed new sanctions on Russian organizations suspected of meddling in the election.

Putin at first threatened to retaliate against the administration's actions. Later, he announced that he would not engage in "irresponsible diplomacy" but would work to improve relations with the incoming administration of Donald Trump. Trump also repeatedly stated that he wanted better relations with Russia and dismissed the allegations of Russian hacking as "ridiculous."

The FBI continued to investigate members of the incoming Trump administration. Trump campaign advisor Mike Flynn telephoned the Russian ambassador to the United States, Sergei Kislyak, after Obama placed the sanctions on Russian organizations. Later, Vice President-elect Mike Pence told the press that Flynn had assured him that the conversation with Kislyak had nothing to do with sanctions against Russia. When Trump took office in January 2017, Flynn joined Trump's Cabinet as national security advisor.

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James Comey succeeded Robert Mueller (standing to Comey's right) as director of the FBI and is pictured here at the White House in 2013 after his nomination for that position by President Barack Obama. Below is the letter in which President Trump fired Comey.

When the FBI interviewed Flynn about his conversation with Kislyak, Flynn denied that he had discussed sanctions with Russian ambassador. The Justice Department warned the Trump administration, however, that Flynn had misled Trump, Pence, and the Justice Department about the communications with Kislyak. The White House demanded his resignation. Flynn resigned in February 2017. The press reported that Flynn had discussed sanctions with Kislyak. The Kremlin (Russian government) denied the press reports.

The Comey Firing

On May 9, 2017 Trump fired FBI Director James Comey. The White House communications staff portrayed Comey's firing as a response to Comey's handling of the probe into Hillary Clinton's use of a private email server. The staff claimed that the firing was a joint decision between President Trump and the attorney general's office. But during a televised interview, Trump himself stated that he alone had made the decision to fire Comey. And he said it was, in part, because of the "Russia thing."

Comey's firing touched off a firestorm of criticism. Many Democrats accused the president of trying to obstruct the FBI's investigation. They demanded the appointment of a special counsel, an attorney who officially investigates official wrongdoing independent from the attorney general's office. The U.S. attorney general appoints the special counsel. Attorney General Jeff Sessions had been involved in Trump's campaign, however, so he recused himself from the Russia investigation. Deputy Attorney General Rod Rosenstein had to decide what to do.

Rosenstein appointed Robert Mueller, a former head of the FBI under Presidents George W. Bush and Barack Obama, as special counsel. Mueller, in turn, hired 15 or so attorneys and several other support staff. While Democrats generally praised the appointment, Republican leaders disagreed on the need for a special counsel.

Conspiracy?

As of February 2019, Mueller has not yet filed the final report of the investigation with the attorney general. But the investigation has resulted in over 30 criminal indictments, as well as a few criminal convictions, including those of Papadopoulos and Flynn. Twenty-five Russian citizens and three Russian companies have also been indicted.

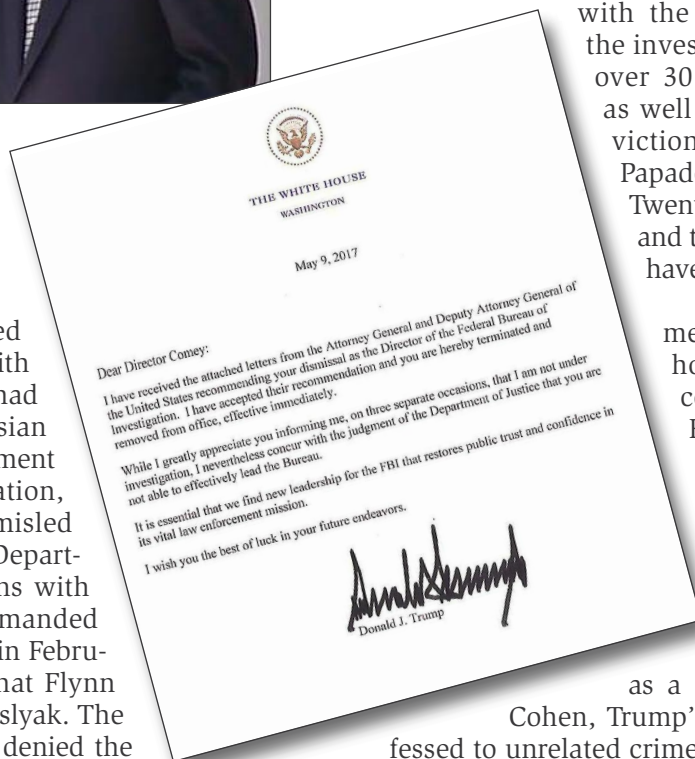
None of the indictments or convictions are, however, for criminal conspiracy related to Russian interference in the election. For example, Trump's campaign chair Paul Manafort was convicted of multiple counts of income tax evasion and failure to register

as a foreign agent. Michael

Cohen, Trump's personal lawyer, confessed to unrelated crimes discovered during the investigation. The FBI arrested Trump's campaign advisor Roger Stone for making false statements to Congress and other charges.

A grand jury is investigating whether a June 2016 meeting at Trump Tower between at least one Russian official and Paul Manafort (and others from the Trump campaign) involved a conspiracy to release the DNC emails. Nonetheless, the special counsel has not yet answered the central question of the probe: *Did any members of the Trump campaign conspire with Russian operatives to influence the 2016 U.S. presidential election?*

Critics of the Mueller probe point to more than a lack of proof of collusion or conspiracy. They also argue that members of Mueller's team have a political bias against Donald Trump. At least seven of the original attorneys on Mueller's legal team had donated to Democratic Party candidates. FBI lawyer Peter Strzok was on Mueller's team, but he had exchanged texts critical of Trump during the 2016 presidential campaign with another FBI lawyer. When the texts were revealed in summer 2017, however, Mueller fired Strzok.



A Looming Constitutional Crisis?

To understand whether a constitutional crisis might result from the Mueller probe, we need to look at previous events that scholars rank as constitutional crises.

Reacting to the election of Abraham Lincoln in 1860, 11 southern states seceded from the United States on a theory that individual states, having voluntarily agreed to join the Union, could voluntarily leave it. They seceded primarily because Lincoln pledged to contain slavery in the South. The Constitution, however, provides no procedure for a state to secede. Naturally, the federal government disputed the southern states' position. Only four bloody years of the Civil War decided the argument.

Another constitutional crisis occurred in 1876. Republicans and Democrats disputed the Electoral College votes of several states, leaving neither presidential candidate with a clear majority. The Constitution did not define how to settle a disagreement about electors, so Congress appointed a special commission to decide the matter. The commission members voted along party lines. The Republican candidate Rutherford B. Hayes became President. Congress had found a solution. But the winning Republicans promised Southern Democrats that Hayes would end the deployment of federal troops in the South. Once Hayes removed the troops, an era of segregation and disenfranchisement of African-Americans began.

In 1973, special prosecutor Archibald Cox formally demanded that the White House turn over tapes in the investigation of the break-in of the DNC headquarters in the Watergate office complex. President Richard Nixon ordered the U.S. attorney general to fire Cox. The attorney general declined to fire Cox and resigned instead. Nixon then ordered the acting attorney general to fire Cox, but he also refused and resigned. Finally, Solicitor General Robert Bork, who had assumed the leadership of the Justice Department, terminated Cox and his staff. The firing was dubbed the "Saturday Night Massacre." Members of Congress, including some in Nixon's own Republican Party, saw Nixon's actions as an attempt to cover up wrongdoing. They saw this as a constitutional crisis, and it caused a political furor that contributed to Nixon's eventual downfall.

In the first two examples, the Constitution was silent on the issues at hand: secession and disagreement about electors. Today, the Constitution's silence on issues involved in the special counsel's investigation might lead to a crisis. On the one hand, many Democrats and some Republicans suggest that if President Trump fires Mueller *without cause* (without a legal reason), it would be to stop an investigation into Trump's own campaign. They believe that would be obstruction of justice, a crime, and therefore a constitutional crisis.

The Constitution is clear that no president is above the law. On the other hand, current Justice Department

guidelines say that a sitting president cannot be indicted even for a crime like obstruction of justice. Given that, Robert Mueller himself could trigger a crisis if he tries to indict the president.

The Supreme Court eventually resolved the issue in the third example above by ordering Nixon to release the tapes to the special prosecutor. Similarly, the Supreme Court would likely have to resolve any constitutional crisis related to the Mueller probe. Should a president refuse to comply with a ruling from the Supreme Court, the remedy the Constitution offers is impeachment (formal accusation) and removal from office.

Impeachment would happen if and only if the House of Representatives initiates the process. And removal would happen if and only if the Senate votes to remove the president. It was the threat of impeachment that led Richard Nixon to resign from office. But because the Constitution provides a remedy, which we saw in the example of Nixon, perhaps this would not be a constitutional crisis if it happened today.

Who Could Fire Mueller?

In 1999, Attorney General Janet Reno issued regulations that restored a previous power of the attorney general to appoint independent, or special, counsel. The attorney general also has the exclusive power to fire the special counsel. In turn, the president appoints the U.S. attorney general, so he also has the authority to order the attorney general to fire the special counsel or terminate an investigation. However, under the 1999 regulations the president cannot directly fire the special counsel.

Today, if Trump decided to terminate Mueller or the investigation itself, he might have to accept the resignations of several Justice Department leaders, just as Nixon did in 1973. However, it is likely that Trump would eventually find someone to do the deed. Such an act may amount to obstruction of justice, since Mueller is investigating Trump's own 2016 campaign.

Again, many believe that obstruction of justice would be a constitutional crisis in itself. However, many others point out that the Constitution makes the president the chief executive, the highest authority in the executive branch of government. With that authority, they believe the president may fire whomever he wants within the executive branch. That authority seems to stretch back to a political conflict in the 19th century.

In 1867, Congress passed the Tenure of Office Act, which required the president to seek Senate approval for terminating any Cabinet-level officers. President Andrew Johnson then violated this law by firing the Secretary of War Edward Stanton. The House of Representatives impeached Johnson, but the Senate failed by a single vote to remove him from office. Later, in 1926, the Supreme Court affirmed the president's sole power to remove appointed officers of the federal government.

The Constitution is clear that no president is above the law.

Others, however, believe that it would not be a constitutional crisis because the Constitution specifies a remedy for such a “high crime or misdemeanor”: impeachment and removal from office. Article I, sec. 2, of the Constitution gives the House of Representatives the power to impeach federal officials, including the president. Article I, sec. 3, gives the Senate the sole power put the impeached official on trial. Only a two-thirds majority of senators may convict and then order the removal of the official from office.

In the end, it is up to Congress to determine whether a sitting president’s action involved obstruction of justice, and whether the crime is serious enough to reverse the decision of the voters who elected the president.

WRITING & DISCUSSION

1. Choose one of the three historical crises described in the section “A Looming Constitutional Crisis?”. Explain in your own words why some consider the event you chose to be a constitutional crisis.
2. Do you think that President Trump’s firing of James Comey made appointment of the special counsel necessary? Why or why not?
3. Is it more important that (a) the results of the 2016 election be final to reflect the will of the people, or that (b) the allegations of wrongdoing by the Trump campaign be investigated thoroughly? Use evidence from the article in your answer.

ACTIVITY: Where’s the Crisis?

Form small groups. In your group, discuss the following hypothetical events and determine if any of them would be a constitutional crisis. Discuss reasons for your group’s answers. Choose a spokesperson to share your findings with the class.

| Hypothetical Outcome of the Mueller Probe | Constitutional Crisis? | | Reasons |
|---|------------------------|----|---------|
| | Yes | No | |
| 1. President Trump fires Robert Mueller himself. | | | |
| 2. President Trump orders his attorney general to fire Mueller. | | | |
| 3. Mueller probe finds no wrongdoing, and the House Judiciary Committee does not accept the findings. | | | |
| 4. Mueller probe finds no wrongdoing, yet the House impeaches President Trump. | | | |
| 5. House votes to impeach, yet the Senate does not put the president on trial. | | | |
| 6. The Senate votes to remove Donald Trump, but he refuses to leave office. | | | |

Sources

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Standards Addressed

Mueller Probe

National Civics Standard 4: Understands the concept of a constitution, the various purposes that constitutions serve, and the conditions that contribute to the establishment and maintenance of constitutional government. **High School Benchmark 2:** Understands how constitutions set forth the structure of government, give the government power, and establish the relationship between the people and their government.

California History-Social Science Standard 12.4: Students analyze the unique roles and responsibilities of the three branches of government as established by the U.S. Constitution. (1) Discuss Article I of the Constitution as it relates to the legislative branch, including . . . the roles of the House and Senate in impeachment proceedings [and] . . . the enumerated legislative powers . . .

Common Core State Standards: SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10, 8/11-12.2, RH.6-8/11-12.3, RH.6-8/11-12.4, RH.6-8/11-12.10, WHST.6-8/11-12.1, WHST.6-8/11-12.2, WHST.6-8/11-12.9, WHST.6-8/11-12.10.

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