

Obstruction

Roman Mars [00:00:00] One Saturday in March of 2005, the servers for the Lion Brand Yarn company crashed.

Elizabeth Joh [00:00:06] More than 40,000 people had tried to download a new crochet pattern. The instructions showed you step by step how to create a lacy, gray garment called the Coming Home Poncho. Why was it so popular? The poncho looked exactly like the one that millions had seen Martha Stewart wearing on TV that month as she boarded a private jet home. If you don't know her, Martha Stewart was the head of a media empire in the 1980s and '90s. She showed people in her TV shows and magazines how to lay out the perfect table setting, serve the right appetizer for your party, or to make sweet potato spoon bread.

Martha Stewart [00:00:48] Wouldn't you like to have a centerpiece like this on your Thanksgiving table? A grouping of rich autumn-colored gourds?

Roman Mars [00:00:55] I love a good gourd.

Elizabeth Joh [00:00:56] But in March 2005, Martha was boarding her private jet from a minimum-security women's prison in Alderson, West Virginia. She'd finished serving a five-month sentence.

Newscaster [00:01:08] There she is--Martha Stewart--getting on the plane. They begin to hear the cheers. Waving to the handful of fans there. There with her daughter.

Elizabeth Joh [00:01:19] And the poncho had been made for her by a fellow inmate. Martha's troubles started in 2001 when she told her stockbroker to sell her shares in a biotech company. And that sale happened just before the company publicly announced some bad news.

Roman Mars [00:01:36] Martha later told investigators that the timing wasn't suspicious. She just told her broker to sell shares if they fell to a certain price. The government didn't believe her.

Elizabeth Joh [00:01:47] Here's what their investigation uncovered: The day before the announcement of the company's bad news, Martha got a call from her broker. He said the stock's price was about to fall. Martha told him, "Sell." He had some inside information. Remember, that wasn't the story Martha told the FBI, the S.E.C., or the Department of Justice. She was trying to cover behavior that suggested a crime--insider trading. That involves profiting illegally from some nonpublic information. In 2004, a federal jury convicted Martha Stewart on the four criminal counts she was facing. She was never charged with insider trading. Instead, she was found guilty of conspiracy, making false statements to investigators, and obstructing justice.

Roman Mars [00:02:39] Her conviction led to prison, a weird TV show with Snoop Dogg, that poncho, and crashing the Yarn company's servers.

Elizabeth Joh [00:02:47] One of the tasks given to special counsel Robert Mueller was to investigate whether President Trump had engaged in any obstruction. What exactly is the crime of obstruction? And why did it appear to be such a complicated issue in the Mueller report?

Roman Mars [00:03:05] Time to find out. This is What Trump Can Teach Us About Con Law, an ongoing series of indefinite length and now monthly release--third Friday of every month, mark your calendars--where we take the tweets of the 45th President of the United States and his critics and use them to examine our Constitution like we never had before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. The basic idea behind obstruction of justice is that it's a crime to interfere with a criminal investigation.

Elizabeth Joh [00:04:03] If that sounds a bit vague, that's because there are many kinds of conduct that can count as obstruction. And obstruction of justice itself is best understood as part of a family of criminal offenses that punishes not harms to people or to property but to the justice system itself. Crimes like perjury, witness intimidation, and making false statements to investigators are like obstruction because they all involve actions that make the machinery of justice work less effectively than it should. There are a lot of different federal laws that make it a crime to obstruct justice. But we can take one statute as an example.

Roman Mars [00:04:45] The federal law says, "Whoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object or attempts to do so with the intent to impair the object's integrity or availability for use in an official proceeding or otherwise obstructs influence or impedes any official proceedings or attempts to do so is guilty of obstruction." It's quite a mouthful.

Elizabeth Joh [00:05:10] Even if there are many different federal criminal laws that target the obstruction of justice, they generally share three common parts or "elements," as we'd call them in the criminal law. They are 1) some obstructive conduct, 2) a connection between the obstructive conduct and an official proceeding, and 3) what the law calls "corrupt intent." One way to think about why these three elements are important is because these are the things that would have to be proven by a prosecutor in a criminal proceeding. The thing you did that the government said was obstructing, the connection to an official investigation, and the improper or corrupt state of mind you had when you engaged in the conduct.

Roman Mars [00:05:56] If you have all three, then you presumably engaged in obstruction of justice.

Elizabeth Joh [00:06:01] The funny thing about this crime is that the actions that count as obstruction can be things that aren't necessarily criminal by themselves. What turns it into a crime is that you do these things with the intent of interfering with an investigation. And here's another thing. You can even be guilty of attempting to obstruct justice. That's right. You can be an unsuccessful obstructor and still be guilty. That part's consistent with the rest of criminal law. You can be punished for criminal attempts even if you fail.

Roman Mars [00:06:32] So let's get to Trump.

Elizabeth Joh [00:06:34] On March 22nd of 2019, Special Counsel Robert Mueller submitted his report to Attorney General William Barr. This concluded the two-year investigation conducted by Mueller and his team. As we later learned, when the attorney general--that was Jeff Sessions--told Trump in 2017 about the special counsel's appointment, Trump slumped back in his chair and said, "Oh my God. This is terrible. This is the end of my presidency. I'm f*****." But the public didn't immediately find out what the

report said. Instead, two days after the report was submitted, Attorney General Barr sent a four-page letter to Congress that claimed to summarize the report. As the letter notes, the special counsel's report looked at two issues--Russian interference in the 2016 presidential election and any interactions with the Trump campaign, and any actions by the president that may have raised obstruction of justice concerns. We learned from the attorney general's letter that while Russian interference in the election was serious, Barr quoted from the special counsel's report and said, "The investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian government in its election interference activities." But the part of Barr's letter that received the most attention was about obstruction.

William Barr [00:08:04] After carefully reviewing the facts and legal theories outlined in the report, and in consultation with the Office of Legal Counsel and other department lawyers, the Deputy Attorney General and I concluded that the evidence developed by the special counsel is not sufficient to establish that the president committed an obstruction of justice offense.

Roman Mars [00:08:27] The same day, Trump tweeted--

Elizabeth Joh [00:08:30] "No collusion. No obstruction. Complete and total exoneration. Keep America great." And on April 6th, he tweeted, "I have not read the Mueller report yet, even though I have every right to do so. Only know the conclusions. And on the big one, no collusion." But it turns out that the Mueller report laid out a much more complicated story than Barr's letter suggested if you read it. On April 18th, 2019, the Department of Justice released a redacted version of the 448-page report. It's divided into two parts. Volume I focuses on Russian interference with the 2016 election. The report states that the Russian government interfered in the 2016 presidential election in a sweeping and systematic fashion. But Volume I continues by stating that "the investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian government in its election interference activities." That's the part that the attorney general quotes in his own letter. Volume II, though, focuses on any potential obstruction on the part of President Trump. And it does so by focusing on several instances which Mueller's office investigated. These include many examples that the media had reported on, including the firing of FBI Director James Comey and Trump's criticism of Michael Cohen, his former personal attorney, when Cohen began to cooperate with investigators. Remember that tweet? December 16th, 2018, Trump said, "Remember, Michael Cohen only became a rat after the FBI did something which was absolutely unthinkable and unheard of until the witch hunt was illegally started. They broke into an attorney's office. Why didn't they break into the DNC to get the server or Crooked's office?" But let's take a longer look at an example on the special counsel's report. It's about Trump and former White House counsel Don McGahn. The report says that on June 17th, 2017, the president called McGahn twice and told him to have the special counsel fired. McGahn refused to follow Trump's instructions. Instead, McGahn started to pack up his office and decided he would resign. That same day, McGahn told White House Chief of Staff Reince Priebus that Trump had asked him to do "crazy sh**." White House officials persuaded him not to resign, and he remained in the job for another year. On January 25th, 2018, The New York Times published a story about Trump's attempt to have Mueller fired by McGahn. The next day, Trump demanded that McGahn put out a statement that refuted the Times story. McGahn refused. On February 6th, 2018, McGahn met with President Trump in person. Trump denied ever having ordered Mueller's firing, and then he asked McGahn for a correction. McGahn said no, and that was the end of that. In each of these instances, both Trump's attempt to have Mueller fired and then to have McGahn deny that he had ever tried to

have him fired are discussed in the report. Do they count as obstruction of justice? The Mueller report uses the term "substantial evidence" to describe the facts supporting whether Trump's interaction with McGahn fulfill the elements of the crime. What's important here is the context. The report examines many possible cases of obstruction by Trump. Sometimes the report says there's some evidence, or sometimes it says the evidence doesn't establish something. But with the McGahn events, we get a pretty clear hint that these acts by Trump could qualify as obstruction of justice.

Roman Mars [00:12:41] So why did nothing happen?

Elizabeth Joh [00:12:43] That's another story altogether. Because even though people are convicted on obstruction charges all the time, the person in question in the Mueller report, of course, is the president of the United States. In the usual case, a prosecutor does an investigation and decides whether or not to bring charges. But Mueller says he, quote, "did not make a traditional prosecutorial judgment." Instead, the special counsel's office felt bound by the Department of Justice's rules, and the report relies on a legal opinion from the Office of Legal Counsel from the year 2000, which says that a sitting president cannot be criminally prosecuted. And that memo? It's based on a 1973 legal memo that was written during the Watergate crisis and said the same thing. The Supreme Court has never decided whether a sitting president can be prosecuted. But it's a rule that the Department of Justice has followed. What does this all mean? The Mueller report should be understood as a document that lays out a lot of evidence and makes several observations about that evidence. But nowhere does it say, "And therefore the president committed a crime." Why? Because a sitting president can't be prosecuted, according to the Department of Justice. And if you think about it, it would be pretty unfair--even for a normal person--to not be prosecuted, but also to be accused of a crime without any way of defending himself in a legal proceeding. And that's why two observations in the Mueller report are revealing. Here's the first one.

Jerrold Nadler [00:14:23] You wrote, quote, "If we had confidence after a thorough investigation of the facts that the president clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment," close quote. Now, does that say there was no obstruction?

Robert Mueller [00:14:45] No.

Elizabeth Joh [00:14:46] Because he feels bound by these rules, Mueller could not conclude that Trump committed a crime even if he wanted to. But they were free to say that there was no case for obstruction, and they refused to say that. Second, the Mueller report basically says, "Well, we can't make a traditional prosecutor's judgment. But there are other constitutional processes." This means impeachment. That's not guesswork; the report drops a footnote referring to the Constitution's clauses on impeachment. The report reminds us that even if a sitting president can't be criminally prosecuted--and that's a big if--the president can be impeached by the House and removed by the Senate. Remember, obstruction of justice was among the charges levied against both Presidents Nixon and Clinton when they faced impeachment--Nixon for trying to interfere with the investigation into Watergate, and Clinton for trying to interfere with the Paula Jones case. For Nixon, the full House never voted on the proposed articles of impeachment against him. He resigned. Clinton actually did face two articles of impeachment, including the one charging him with obstruction. And the Senate eventually acquitted him after a five-week trial on February 12, 1999. Of course, the current House has not impeached Trump--not yet. After the Mueller report was issued, the House Judiciary Committee had called several witnesses in

the report to testify, including Don McGahn, who didn't show up as ordered on May 21st. President Trump told the former White House counsel not to comply. And the House in turn authorized the Judiciary Committee to sue, to force McGahn to comply, which it did in August. The lawsuit argues that McGahn is the Judiciary Committee's "most important fact witness in its consideration of whether to recommend articles of impeachment." It may be that President Trump will not face either impeachment or criminal charges as a sitting president. But the special counsel's report pointed out that any immunity would not last beyond his presidency. In fact, when Mueller publicly testified before the House Judiciary Committee in July, this very issue came up. Chairman Jerry Nadler asked Mueller--

Jerrold Nadler [00:17:06] Under Department of Justice policy, the president could be prosecuted for obstruction of justice crimes after he leaves office. Is this correct?

Robert Mueller [00:17:13] True.

Elizabeth Joh [00:17:15] This doesn't mean that Trump will likely face criminal charges, but only that it's theoretically possible. And then there are the tweets. On April 25th of this year, after reports that House Democrats were seeking testimony from Don McGahn, Trump tweeted, "As has been incorrectly reported by the fake news media, I never told then White House Counsel Don McGahn to fire Robert Mueller, even though I had the legal right to do so. If I wanted to fire Mueller, I didn't need McGahn to do it. I could have done it myself. Nevertheless, Mueller was not fired and was respectfully allowed to finish his work on what I and many others say was an illegal investigation--there was no crime--headed by a Trump hater who was highly conflicted and a group of 18 very angry Democrats. Drain the swamp." And just a few weeks later, Trump tweeted on May 1st, "No collusion. No obstruction. Besides, how can you have obstruction when not only was there no collusion by Trump, but the bad actions were done by the other side? The greatest con job in the history of American politics." Trump is suggesting you can't be guilty of obstruction when there's no underlying crime charged. That's not quite right. Remember, you can be charged with obstruction of justice even when the government doesn't prosecute you for the underlying crime. Remember Martha Stewart? She was convicted of obstruction and lying to investigators, even though she never faced any charges about insider trading itself.

Roman Mars [00:18:53] And here's a fun fact about the Martha Stewart case.

Elizabeth Joh [00:18:56] In 2003, the U.S. attorney for the Southern District of New York--that's the chief federal prosecutor in the case--held a press conference. Here's what he said about Martha Stewart. "This is a criminal case about lying, lying to the FBI, lying to the S.E.C., lying to investors. Martha Stewart is being prosecuted not for who she is but because of what she did." She was convicted, of course. And the U.S. attorney? His name was James Comey.

Roman Mars [00:19:31] What gives a memo written in 1973 and then updated in 2000 any type of legal weight to make any decisions on? Like, I don't quite understand what these memos are about and if there's any process to critically reappraise the conclusions that they came with in order to suggest, you know, other outcomes about how a president should be charged for something.

Elizabeth Joh [00:19:57] Well, that's a good question. But I think maybe the short answer is two things. Number one, we don't have a definitive case that has decided the question. Somebody has to give an opinion. And the Office of Legal Counsel is kind of the office that

provides legal advice to the Department of Justice when there's some sort of issue that needs to be resolved. And Mueller--operating within that framework--he can't be the one employee who says, "You know what? I don't like these rules." He's an organization man--he's been so his entire career. And so, he's bound by that. And I think one of the things that we see play out in the media coverage of both Barr's letter and the Mueller report was it's a very carefully laid out report that explains, "This is what Trump did. This is what the elements of obstruction of justice are." You know, there's a lot of evidence for a lot of events supporting an obstruction of justice charge in theory. And there are things we can do about it. But the problem is that no one--including President Trump apparently--read the 448-page report. So, all you can get are little snippets which suggest, "Well, look, you didn't charge him with anything. And therefore, he didn't do anything." But that's really not at all what Mueller was saying.

Roman Mars [00:21:20] Right. But it kind of puts you in a weird catch-22. So, if the memo from the Office of Legal Counsel says, "You can't charge the president." and therefore, you never charge a president, so therefore, it never gets tested in court and then never gets overturned. Then you're just kind of stuck.

Elizabeth Joh [00:21:36] Yeah, we are kind of stuck. I mean, unless you have an OLC which decides to change its mind... But, you know, it does kind of make a lot of sense. I mean, it is the executive branch. You're not thinking, "Well, they're going to say you can prosecute the president." The very idea--and we've talked about this before--of prosecuting a sitting president sits so uncomfortably on people of all political stripes. That you would just haul off a president to jail in the abstract sounds crazy because we would be doing nothing as a nation other than watching the criminal trial of a president if that were to happen. Whether or not it's legally possible, I think many people feel the appropriate mechanism is impeachment. And so, a lot of people sort of turn to Congress thinking, "Is there going to be impeachment?" But of course, impeachment itself is not just a legal consideration. It's a political consideration. You know, do you go through the process for the sake of going through the process? Or do you make a political calculation that "there's no way he can be removed, so let's not even begin"? And how you view what impeachment is supposed to do as a mechanism kind of colors how you interpret the events that are going on around us.

Roman Mars [00:22:51] So the Mueller investigation resulted in this thing called the Mueller report, which by most accounts, most people didn't actually read it.

Elizabeth Joh [00:22:58] Not even the president himself.

Roman Mars [00:23:00] So what was its point, and why was it disappointing to some people and vindicating to other people?

Elizabeth Joh [00:23:07] So there was what the public expected. They expected the Mueller report to just have a bottom-line conclusion. The president is guilty of a crime, or the president is not guilty of a crime. And then we can all move on depending on what happened next. But instead, as we've explained here, Mueller knew that he couldn't really come out and say-- Even if the evidence suggested to his office that President Trump had committed a crime, he was gagged from saying so. He essentially could not come to that conclusion. So instead, he draws out the most careful, ultimate law school exam. "Here are all of these facts. Do these amount to obstruction? I will lay out every single piece of evidence that we found in our hundreds of hours of interviews and looking at documents." If you're a law student, that is one of the things you do. If you're a busy member of the

public, it is boring. It does not sound like something that you really ought to be paying attention to. And so, it was never meant to be sort of an ultimate bottom line, I don't think. It was really meant to lay out the case as--you could say--a referral to Congress. The instant and, I think, erroneous conclusion is, "Oh, he's not guilty then. Let's move on."

Roman Mars [00:24:19] By his own interpretation of the Office of Legal Counsel, he really couldn't say a bottom-line thing of he's guilty of a thing--that just wasn't the job at all.

Elizabeth Joh [00:24:28] Right. I mean, there's so much more to say about the report, too. I mean, the president's lawyers went into a huge legal defense of what Trump did and said. All the things that Trump allegedly did--he's allowed to do. He's allowed to do things like fire the FBI director. But as we've explained, the problem with the crime of obstruction is that even ordinary things you're allowed to do--if you do them with a sort of corrupt state of mind, a bad state of mind, you're trying to interfere, and that's why you're engaging in this conduct, that's what makes it a crime.

Roman Mars [00:25:00] So if Trump has a corrupt mind...

Elizabeth Joh [00:25:06] It's a legal term of art.

Roman Mars [00:25:08] I know, but it's so funny because, like, even the most innocuous things he does so corrupt in so many ways--even when it's something as simple as wanting to buy Greenland.

Elizabeth Joh [00:25:22] That he's allowed to do probably.

Roman Mars [00:25:24] Yeah, unless he has a corrupt state of mind. All right. Thank you.

Elizabeth Joh [00:25:28] Thanks.

Roman Mars [00:25:33] This show is produced by Elizabeth Joh, Chris Berube, and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. There's a new SHREDDERS album. It is excellent. They're the ones who do the opening theme and the music I'm talking over right now. The new album is called Great Hits. Get on it, people. It is so good. You can find out more about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.