

My Collusion Confusion

[Andrew C. McCarthy](#)

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President-elect Donald Trump and Donald Trump Jr. at a Trump Tower news conference in January 2017. (Reuters photo: Lucas Jackson)

It's bad enough that I botched what I intended to say on [Laura Ingraham's show last night](#) (and what I think I was pretty clear about if you actually watched the interview). But *mea maxima culpa* if I've confused [Jonah](#) by the rest of what I said. And if there's a three-strikes-and-you're-out law, I'm going down in flames on that, too: This morning, when I found out to my surprise and annoyance that I'd misspoken, I considered posting another tweet to make it crystal clear that I have never changed my position on the Trump Tower meeting. Specifically, I was going to tweet out this [column](#) again . . . but I got distracted by a phone call and never got around to it.

Too bad, because maybe I could have saved Jonah some time.

I won't belabor what I've already corrected on Twitter (a correction I am grateful to Jonah for including). I have a bad habit of interrupting myself, particularly at the start of a sentence when I change my mind about how best to say something. When I did that last night, the garble resulted in what appears (if a dash is not inserted where I interrupted myself) to be a sentence that stands for the opposite of what I was arguing. Enough said.

Now, on to my confusion of collusion.

It is a challenge in a time-crunched television interview, with people occasionally talking over one another, to explain complex issues and distinctions adequately. I offer this in mitigation, not as an excuse. I've been harping on the distinction between "collusion" and "conspiracy" from the beginning. Since I criticize others for conflating the two, I have an added obligation to avoid that error myself, even when pressed for time. I didn't do that well enough last night. When I said that turning to a foreign government for campaign dirt was not "collusion," I meant it was not *the collusion that is the rationale for the Trump-Russia investigation* — specifically, the cyber-espionage conspiracy to influence the 2016 campaign.

To be clear, *collusion* is literally just concerted activity. It can be made to sound sinister, but it is not necessarily good or bad, criminal or innocent. It's just people doing stuff together.

A subset of collusion is *conspiracy*. Conspiracy is a crime. Technically, it is an agreement between two or more people to commit a crime — the conspiratorial agreement is a crime even if its criminal objective is never realized.

The rationale for what the Justice Department and FBI have referred to as Trump campaign "coordination" with Russia has always been suspicion (without much proof) of a very specific kind of conspiracy: the aforementioned conspiracy to commit cyber-espionage for the purpose of influencing the 2016 election. When people invoke "collusion" in discussing the FBI's or the special counsel's investigation, it is to this cyber-espionage conspiracy that I understand them to be referring.

Now, there may be all kinds of contacts between Trump people and operatives of the Russian government that can be called "collusion" with literal accuracy. But the one that would be of interest to *prosecutors*, under the circumstances as we understand them, is the cyber-espionage conspiracy. Patently, that kind of collusion (which I usually try to not refer to as "collusion" because of the confusion that ambiguous term causes), would be an impeachable offense.

Let's turn to other species of collusion. There is, to my mind, undeniable evidence that the Trump campaign hoped and attempted to get dirt on Hillary Clinton — what is euphemistically known as "opposition research" — from Kremlin-connected people. I am not in the politics biz. Nor am I a babe in the woods unacquainted with the reality that many (most?) politicians are delighted to receive compromising information about their opponents and not fastidious about the source. Nevertheless, I personally believe it is reprehensible for an American political campaign knowingly to seek or accept opposition research from foreign governments, particularly hostile foreign governments.

As Jonah is wont to point out, not everything that is bad is illegal — that's life in a free country. In American law-enforcement practice as it currently exists, I do not believe it is *illegal* to take oppo-research from a foreign source (including a foreign-government source). I've heard some lawyers argue that it could technically amount to an illegal in-kind campaign contribution under federal election law. I'd have no

problem if the government started enforcing the law that way; but it is a widespread problem, so I think it would be wrong (in the due-process sense) to start enforcing the law that way without the Justice Department's first putting everyone on notice.

Consequently, since I do not think oppo-research collusion is illegal, I refer to it by that well known term of art, "icky."

Finally, on the matter of impeachment, there is no question that Congress can impeach a president for conduct that does not violate the penal law. High crimes and misdemeanors are violations of an official's public trust, what Hamilton referred to as "political" wrongs, in the abuse-of-power sense. Consequently, while Special Counsel Mueller — who is an executive-branch prosecutor, not a lawyer for Congress — must focus on forms of collusion that amount to prosecutable conspiracies, Congress has no such limitations.

Could Congress impeach for collusion with a foreign power to obtain opposition research? I believe (again, guided by current practice) that this would fall woefully short of high crimes and misdemeanors. But it is worth observing that the Constitution commits impeachment *solely* to Congress — it is a political remedy with no judicial check.

One hopes (as the Framers hoped) that Congress would honestly apply the standard for impeachable offenses and not use impeachment as a weapon to harass political enemies. And happily, the two-thirds' supermajority required for Senate conviction makes abusive use of Congress's impeachment power less likely. Still, I cannot say it is impossible that Congress would pretextually impeach a president based on "collusion" to obtain oppo-research from a foreign source. Highly unlikely? Yes. Impossible . . . who knows?

In any event, I am sorry that by tripping over some of my words, and invoking "collusion" in a sloppy way that I usually try to avoid, I seem to have caused some of my friends (and some not so friendlies) to suspect that I've changed my position on the Trump Tower meeting. I haven't.