

Three reasons Mueller may not charge Trump with obstruction

By Jonathan Turley

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Washington is in another frenzy over the disclosure that [President Trump](#)'s lawyers are [preparing answers](#) to written questions from special counsel [Robert Mueller](#). Observers are speculating on the meaning of this move, as anticipation grows for the investigation's culmination.

If the suspense is killing you, a bigger surprise may await.

The most significant aspect of this story may be what it did not contain: questions about obstruction. Mueller is asking about Russian collusion, rather than the [driving force](#) behind his appointment after the firing of former FBI Director [James Comey](#). Indeed, ample reasons exist to question whether there is a serious obstruction charge in the making — the focus of so much media attention since Comey was ignobly dispatched on May 10, 2017.

Director Alfred Hitchcock once [chastised fans](#) not to confuse suspense with surprise. Hitchcock described a scene with two people “having a very innocent chat” with a bomb under their table — and then it explodes. That is surprise; as Hitchcock put it, “Nothing happens, and then all of a sudden, ‘Boom!’ ”

Now take the same scene and allow it to go longer with a bomb set to go off with a clock on the wall. Hitchcock explained: “The public is aware the bomb is going to explode. ... In these conditions, the same innocuous conversation becomes fascinating because the public is ... longing to warn the characters on the screen: ‘You shouldn't be talking about such trivial matters. There is a bomb beneath you and it is about to explode!’ ” The suspense comes from the waiting.

Mueller's obstruction investigation could well prove to be the suspense of the bomb that never goes off. Indeed, there is ample reason to question whether Mueller ever seriously believed obstruction had the capability of exploding into a criminal charge.

For two years, the public has watched this figurative bomb beneath a table at the Oval Office, waiting (and, in some cases, openly praying) for it to explode. Their wait has been fueled by commentators who scream “Boom!” with every disclosure, great or small. Former Watergate prosecutor [Nick Akerman](#) and former Attorney General [Eric Holder](#) have categorically declared that Trump committed obstruction of justice. Others have cited his tweets as a compelling basis for an obstruction charge. University of Notre Dame professor [Jimmy Gurlé](#) even suggested it was obstruction for Trump to extend his “appreciation and greetings” to special counsel Mueller. Boom.

The claim of an impending explosion contrasts sharply with the actual scene unfolding in Washington. Consider just three indicators that there is more suspense than surprise in this Hitchcockian scene.

This is not how you build an “O” bomb

As I have previously argued, none of the allegations raised over obstruction fit well with the criminal code or prior opinions defining that crime. There are a variety of obstruction crimes but most have no applicability to this controversy. There is Section [18 U.S.C. 1503](#) which broadly defines the crime of “corruptly” endeavoring “to influence, obstruct or impede the due administration of justice.” This “omnibus” provision, however, is most properly used for judicial proceedings such as grand jury investigations, and the Supreme Court has narrowly construed the provision.

There is also [18 U.S.C. 1512\(c\)](#), which makes it a crime for any person who corruptly or “otherwise obstructs, influences or impedes any official proceeding, or attempts to do so.” However, this provision has been narrowly construed as well on the underlying conduct and the need for some “official proceeding.” Mueller should be fully aware of that problem since his principal deputy, Andrew Weissmann, was responsible for overextending that provision in a jury instruction that led the Supreme Court to [reverse the conviction](#) in the Arthur Andersen case in 2005.

These and other provisions simply do not make for a compelling case against Trump. While Trump has shown breathtakingly poor judgment in firing Comey and publicly attacking investigators, that is not obstruction. Moreover, Trump had independent grounds to fire Comey, including many of the reasons cited by Deputy Attorney General [Rod Rosenstein](#) in his [scathing criticism](#) of Comey in 2017. Put simply, this is not what an “O” bomb looks like.

The wrong people are at the table

Another indicator is that, if Mueller were seriously investigating obstruction, Rosenstein should not be sitting at the table. For that matter, neither should Mueller. Mueller interviewed for Comey’s job after he was fired — making him a witness. Rosenstein has an even more direct and damaging conflict as someone involved in the firing and the controversy that followed. Indeed, Rosenstein recognized that “serious” allegations of a conflict exist but, inappropriately, he left the matter to Mueller: “Director Mueller ought to review that and make a determination of whether or not he believes it is within the scope of his investigation.”

Rosenstein’s position leads to a rather intriguing explanation for his continuation as Mueller’s superior. What if Mueller agreed that this is not a credible obstruction case? In that case, there would be no “O” bomb under the table, or any problem in Rosenstein sitting at the table. If there is no obstruction, there is no real conflict for Rosenstein.

The conversation is not about the bomb under table

That brings us to Mueller not asking about obstruction in his written questions. It is a curious thing when there is an “O” bomb in plain sight but no one in the room seems to be focusing on it. Trump’s testimony is far more important on obstruction than collusion; his intent would be vital to making even a marginal obstruction case. However, Mueller is asking nary a word about obstruction in these questions.

It certainly is possible that Mueller either wants an interview on obstruction or nothing at all. In that case, the “Boom!” comes with a subpoena to the president to sit down for an interview. Existing law would favor Mueller in demanding such an interview, but he has not requested it. He has reportedly asked witnesses about obstruction but, if he were serious about an actual charge (either during or after Trump’s presidency), he would demand answers from Trump. Otherwise, obstruction issues would become just part of the narrative in a report.

For all the hype, the Mueller investigation has not been particularly surprising. Indeed, any surprises are largely contrived with common plea agreements and charges in federal investigations. As I wrote after Mueller’s appointment, it was more likely that we would see charges of false statements under 18 U.S.C. 1001 as opposed to obstruction or collusion charges. That is almost the full extent of charges brought against former Trump associates; the remaining charges against people such as [Paul Manafort](#) are entirely unrelated to the campaign. [Mueller has charged](#) a variety of Russians with hacking and interfering with the election, but these filings notably do not implicate Trump and actually exonerate Trump campaign officials who “unwittingly” had contact with these individuals.

Does this mean Mueller’s investigation is a bomb? Of course not; he has done a thorough, commendable job of identifying and indicting Russian agents behind the effort to interfere with our election. He may also have other criminal acts to allege.

If, however, you are waiting for the “O” explosion, you may end up with little more than the suspense of a Hitchcockian bomb that fails to go off.

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