

# If the Mueller report tells us who wasn't prosecuted, that's significant, too

Analysis: Mueller's decisions not to prosecute certain individuals could cover a massive category of people and a broad swath of behavior.

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It's done. Special counsel Robert Mueller's report is in and [now with Attorney General William Barr](#). No one knows exactly what's in the Mueller report. It's [likely the public will never know the Mueller report](#) in its original incarnation. The notification or summary Barr provides to Congress may contain the only hint of what that report is. But what the Mueller report is *not* is also significant.

It's not solely a "prosecution" report. In fact, there's good reason to assume most of the revelations in the report would be about "declinations," not decisions to prosecute. The regulations under which Mueller operated required him to "provide the Attorney General with a confidential report explaining the prosecution or declination decisions [he] reached."

The prosecution decisions are already publicly known, because the special counsel's office already indicted those folks. Mueller's team included in those charging instruments a font of information normally not seen in a garden-variety, bare-bones federal indictment.

It may be that new information in the Mueller report is a tale of who was not prosecuted. That doesn't mean it's an insubstantial story.

Mueller's decisions not to prosecute certain individuals could cover a massive category of people and a broad swath of behavior. It may include individuals whose conduct was suspicious — but just shy of indictable. It also could include individuals on the other end of the spectrum: People were involved, or even initially suspected of criminal activity, but were cleared of wrongdoing by the investigation.

The Mueller report is not an "impeachment" report. At least, investigating impeachable offenses was never part of the special counsel's mandate. Nor is impeachment the constitutional responsibility of the Justice Department or the executive branch.

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Impeachment is a process reserved exclusively for Congress. The House of Representatives accuses. The Senate tries and potentially convicts. Even if the special counsel's report contains evidence that the president committed a crime, that alone is not necessarily an impeachable offense. That's because the mere presence of an indictable crime is neither a necessary, nor sufficient prerequisite for impeachment proceedings. What is required is "high" crimes and misdemeanors—which the framers of the Constitution viewed as abuses of official power.

An impeachable offense need not be a crime. One of the approved articles of impeachment against President Richard Nixon was for "[abuse of power](#)." Abuse of power is not itself an indictable crime. So

then, the Mueller report may not implicate the president in criminal conduct. It may instead include information demonstrating what a Democratic House would consider an abuse of presidential power. Assuming that Barr communicates that noncriminal abuse of power to Congress, then the information could form the basis of impeachment proceedings.

Not all crimes are impeachable. Because impeachable offenses are about misuse of the office, it follows that pre-office conduct is not ordinarily impeachable.

The Constitution intends to limit impeachment to acts committed in office. [As argued by Professor Jonathan Turley](#), early drafts of the Constitution tied removal to an officer's performance in office, allowing impeachment only for "malpractice or neglect of duty," or "maladministration" as then-suggested by George Mason. The history of how the Framers arrived at "high Crimes and Misdemeanors" demonstrates that the "high" implied "official," and not "felonious."

One major exception to requiring "maladministration" to impeach is pre-office conduct that corrupts the electoral process. A perfect example is if the report concludes there was significant and intentional collusion between the Trump campaign and Russia.

Another possible exception is this: That rule barring pre-office conduct as impeachable may not be a rule any longer. The 2010 impeachment and removal of federal judge Thomas Porteous for conduct before he held federal office has left many wondering if pre-office criminal acts are now impeachable — even if Trump as a private citizen held neither state nor federal office when the alleged crime was committed.

The Mueller report may contain information that the president in fact committed a crime before he took office, but Mueller declined to indict the president because of Justice Department policy that a sitting president can't be indicted.

Historically, pre-office conduct might not be impeachable — except that sometimes it is. Or, if the Porteous impeachment has precedential value, maybe pre-office conduct was always impeachable.

The Mueller report is all the things the regulations require it to be. It is not any of the things that the regulations prohibit. But, what it is not, is still of immeasurable importance for law enforcement decisions yet to be made by federal and state agencies, and possible impeachment decisions to be made by Congress.

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