

Mueller Report Puts Question To Congress: What Next?

By **Michael Macagnone**

Law360, Washington (April 18, 2019, 9:57 PM EDT) -- Special counsel Robert Mueller's report on Russian interference in the 2016 presidential election puts Congress in a tight spot, forcing lawmakers to decide whether to take action on issues ranging from impeachment to greater election security, experts said.

Mueller's investigators found that agents of the Russian government interfered in the 2016 presidential election, subverting social media and hacking the Democratic National Committee to benefit Republican Donald Trump's campaign. The redacted version of the report released Thursday also showed that Trump took actions while president to insert himself into the special counsel's probe, either to take control of it or curtail it, but did not commit obstruction of justice. Those findings, however, have so far taken a back seat to a partisan battle over how much more of the report should be handed over and who should testify about it before Congress.

The report as it stands now doesn't seem to provide the answers either side of the political divide has been looking for, according to Rebecca Ricigliano, a partner at Crowell & Moring LLP. The more than 440-page document goes into detail on its analysis of the legal and constitutional questions faced by the probe as well as the limitations of the investigation.

"People are going to look at this and want to justify whatever political aim they hope for and are aligned with, and I think if you take a step back and look at that report, it really is a really competent, well-written analysis of what Mueller and his team have done over the past two years," Ricigliano said.

In a section where Mueller discussed Trump's efforts to meddle in the probe, the special counsel goes into a several-dozen-page parsing of obstruction statutes and the limits of Article II powers. Ricigliano said that shows Mueller took his job seriously and that the investigators were not able to come to clear answers to thorny questions about whether the president obstructed justice.

"The laws were not written, especially the obstruction laws, to challenge an executive who has the authority to hire and fire at will, and as a result it becomes complicated making those analyses," Ricigliano said.

In a preemptive press conference Thursday before the report's release, U.S. Attorney General William Barr said he made a determination that the president had not committed obstruction. However, Mueller documented several of Trump's attempts to interfere in the investigation but could not reach a

"traditional prosecutorial decision" about obstruction and wrote that Congress has the power to rein in the president.

Mueller wrote that throughout the investigation, Trump "engaged in efforts to curtail the special counsel's investigation and prevent the disclosure of evidence to it, including through public and private contacts with potential witnesses," documenting 10 such instances. More than once, according to the report, Trump directed then-White House counsel Don McGahn to get Deputy Attorney General Rod Rosenstein to fire Mueller.

"The president's efforts to influence the investigation were mostly unsuccessful, but that is largely because the persons who surrounded the president declined to carry out orders or accede to his requests," the report said.

Day Pitney LLP partner Stanley Twardy said that because Mueller could not make a determination as a prosecutor about Trump's conduct, that question will have to be answered by Congress.

"There clearly was more than indicia of wrongdoing, and [Mueller] wanted to make sure Congress had all of the facts in front of it under the Constitution to determine whether there were high crimes and misdemeanors," Twardy said.

Jack Sharman, who served as special counsel on the House Financial Services Committee during the Whitewater investigation and is now a partner at Lightfoot Franklin & White LLC, agreed that those findings in the report raise serious questions for Congress going forward.

"There may be misconduct here, not criminal misconduct, and it may be up to the political branch to resolve that, and not in the hands of an Article II prosecutor," Sharman said.

Democrats have called for Mueller himself to testify before Congress and for the release of the full report and its supporting evidence. House Speaker Nancy Pelosi, D-Calif., and Senate Minority Leader Chuck Schumer, D-N.Y., argued that Barr "misled the public" with his rollout of the report and description of its findings on obstruction of justice. House Judiciary Committee Chair Jerrold Nadler, D-N.Y., has said he will call Mueller to testify, putting the details of the report under the microscope in the next few weeks.

"They did not exonerate the president, and the responsibility now falls to Congress," Nadler told reporters at a press conference in New York. "Congress must get the full and unredacted report, along with the evidence of special counsel Mueller."

Those requests have so far met a wall with Barr. The attorney general said the U.S. Department of Justice had redacted grand jury and classified information, information needed for further investigations, and information on uninvolved and unindicted third parties. Some of that material may be presented in limited form to some members of Congress but won't be made public, Barr said at a press conference before the report's release.

Sharman said there is typically "a little bit of a shadow dance that takes place" when members of Congress seek such sensitive information. A congressional committee may file a subpoena or even a lawsuit seeking documents that the executive wants to protect for various reasons, Sharman said, but later a deal will be worked out by both sides as they worry about an adverse court ruling.

“There are these tools and procedures that are used in other contexts that will allow basically everybody to declare their victory and go home,” Sharman said, pointing to procedures that allow the House and Senate Intelligence Committees to review classified information.

Democrats may also benefit by building at least some support among Republicans before charging ahead to seek the report’s deepest secrets, Sharman said.

“History tends to show that congressional power and persuasiveness is at its highest when there is at least a bipartisan tinge to an oversight hearing or investigation,” he said.

Republicans didn’t show much support for the investigation before Thursday and don’t seem to have shown more since the report’s release. A handful, like Sen. Chuck Grassley, R-Iowa, have said they would support the full release of the report, but GOP leadership took a different tack Thursday. House Minority Leader Kevin McCarthy, R-Calif., argued that “it is time to move on” after the report’s release and finding of no collusion between the Trump campaign and agents of the Russian government.

“Democrats want to keep searching for imaginary evidence that supports their claims, but it is simply not there,” McCarthy said in a statement.

April Doss, a partner at Saul Ewing Arnstein & Lehr LLP who served as minority counsel on the Senate Intelligence Committee, said the report went into “extraordinary” detail about the lengths Russia went to in order to interfere in the 2016 election. It may make sense for the Intelligence and Judiciary Committee leaders to take a look at the redacted material and review whether holding back that evidence was appropriate, she said.

She noted that Congress has yet to grapple with the key finding of Russian election interference. Mueller wrote that “the Russian government interfered in the 2016 presidential election in sweeping and systematic fashion” in a two-pronged strategy. So-called “active measures” fermented Trump support on social media and separately, Russian agents hacked into the Democratic National Committee’s and other computer systems to release damaging information about Democratic presidential candidate Hillary Clinton throughout the campaign.

The detail that Mueller provided went beyond most public discussions of the Kremlin’s efforts, Doss said, and should give Congress the kind of push it needs to take steps to curtail further interference campaigns. She pointed out that members of Congress have previously introduced bills to enforce transparency in online advertising and increase cooperation between security agencies.

“I hope that we’ll see continued efforts on behalf of Congress and the legislative branch to get greater security in the election infrastructure,” Doss said.

As for whether Congress may be able to get its hands on the reams of evidence underlying the report, Doss said, “I don’t think we know enough right now to know to what extent every piece of evidence needs to be turned over to Congress.” But specific evidence, witness statements or emails mentioned in the footnotes may be of interest, she said.

The rollout of the report Thursday capped a nearly two-year investigation after Rosenstein appointed Mueller in May 2017. The appointment of the special counsel came after then-Attorney General Jeff Sessions had recused himself from the probe and Trump fired FBI Director James Comey.

Over the course of the investigation, Mueller charged 34 individuals, including six Trump associates. Seven defendants have pled guilty, including Trump's longtime lawyer Michael Cohen, who admitted to paying to keep two women's claims of affairs with Trump under wraps during the campaign, and former Trump campaign chairman Paul Manafort, who admitted to unregistered foreign lobbying for a pro-Russia Ukrainian political party.

That case also ensnared BigLaw firm Skadden Arps Meager & Flom LLP, which entered into a \$4.6 million civil settlement with the DOJ earlier this year. Two former Skadden attorneys have been charged in connection with the probe: Alex van der Zwaan pled guilty to lying to investigators, and Gregory Craig, a former Obama White House attorney, was charged with lying about Manafort's lobbying in a case brought by prosecutors outside Mueller's team. Craig, who was arraigned last week, has pled not guilty.

Republican political operative Roger Stone is the only former Trump adviser who maintains his innocence. Stone is accused of lying to Congress about seeking damaging material about Clinton.

The day before the Mueller report's release, prosecutors notified the judge overseeing Stone's case that the report would redact information that could affect his proceedings. A few members of Congress and their staff will later be shown the report without those redactions. Prosecutors said they will seek the judge's opinion before giving those legislators copies of the report if there is a "reasonable likelihood" that the information will be made public.

Twenty-five of the defendants Mueller charged are Russian nationals. Some are accused of attempting to sow discord among U.S. voters on social media ahead of the election. Three Russian business entities are accused of being behind that effort, and one is fighting the charges. A group of Russian intelligence agents was separately charged with hacking Clinton's campaign.

--Additional reporting by Jody Godoy. Editing by Jill Coffey.

Update: this story has been updated with the current status of the former Skadden attorneys.