

HOW TRUMP COULD INSTALL A MOLE IN THE MUELLER INQUIRY

For six years, I've been working to raise attention to a 2002 OLC memo that authorized the sharing of grand jury information with the President with no notice to the district court. In the *New Republic*, I talk about how Trump might be able to use it to order a DOJ lawyer to spy on the Mueller grand jury.

A July 22, 2002, memo from the Justice Department's Office of Legal Counsel, written by Jay Bybee, the author of the infamous torture memos, held that, under the statute, the president could get grand jury information without the usual notice to the district court. It also found that the president could delegate such sharing without requiring a written order that would memorialize the delegation.

Bybee's memo relies on and reaffirms several earlier memos. It specifically approves two rationales for sharing grand jury information with the president that would be applicable to the Russian investigation. A 1997 memo imagined that the president might get grand jury information "in a case where the integrity or loyalty of a presidential appointee holding an important and sensitive post was implicated by the grand jury investigation." And a 2000 memo imagined that the president might need to "obtain grand jury information relevant to the exercise of his pardon authority."

If you set aside Trump's own role in obstructing the investigation—including the firing of former FBI Director James Comey—these rationales are defensible in

certain cases. In fact, the Justice Department has *already* shared information (though not from a grand jury) with the White House for one of these very reasons. In January, acting Attorney General Sally Yates warned White House Counsel Don McGahn that Russians might be able to blackmail then-National Security Advisor Mike Flynn. As Yates explained in her congressional testimony in May, after Flynn's interview with the FBI, "We felt that it was important to get this information to the White House as quickly as possible." She shared it so the White House could consider firing Flynn: "I remember that Mr. McGahn asked me whether or not General Flynn should be fired, and I told him that that really wasn't our call, that was up to them, but that we were giving them this information so that they could take action."

A similar situation might occur now that the investigation has moved to a grand jury investigation, if someone remaining in the White House—the most likely candidate is the president's son-in-law, Jared Kushner—were found to be compromised by Russian intelligence. In Kushner's case, there are clear hints that he has been compromised, such as when he asked to **set up a back channel** with the Russians during the transition.

If Trump were to rely on the memo, he might order a Justice Department lawyer to tell him what evidence Mueller had against Kushner, or whether Mike Flynn or former campaign manager Paul Manafort were preparing to cooperate with Mueller's prosecutors if they didn't get an immediate pardon. Unlike Yates, Trump would have an incentive to use such information to undercut the

investigation into Russia's meddling.

I point out that Trump's partisan nominee to be Assistant Attorney General for Criminal Division, Brian Benczkowski, would be far more likely to share such information than the career prosecutors that currently have visibility onto the investigation (Benczkowski has refused to recuse from the Russian investigation, but has promised to follow ethical guidelines at DOJ).

One thing didn't make the cut, though it's a key reason why I think it *possible* someone is trying to use this precedent to provide Trump with a mole on the investigation.

Viet Dinh was both the key author of the PATRIOT Act as well as the procedures implementing these sharing rules. Dinh is also the Kirkland & Ellis partner who asked Benczkowski to exercise the really poor judgment of overseeing an investigation for Alfa Bank while he was awaiting a likely DOJ appointment. "I've known Viet Dinh for twenty years," Benczkowski explained during his confirmation hearing for why he represented Alfa Bank while potentially up for nomination to DOJ.

Benczkowski certainly said the right things about honoring Mueller's work. But Dinh, a guy who had a key role in compromising Benczkowski with respect to the investigation just as he got nominated played a key role in the sharing rules that might make it possible.

As I say in the piece, we had better hope DOJ guards recusal concerns a lot more closely than they seem to have been doing.