

THE WORD “PARDON” DOESN’T APPEAR IN THE BARR MEMO

As I noted in this post, there’s something missing in this passage – indeed, in the entirety of – the Barr Memo declining prosecution of former President Trump.

We likewise do not believe that the President’s public statements exhorting witnesses like Flynn, Manafort, Stone, or Cohen, not to “flip” should be viewed as obstruction of justice. The Report makes clear that the President equated a witness’s decision to “flip” with being induced by prosecutors to manufacture false evidence against others. We cannot say that the evidence would prove beyond a reasonable doubt that the President’s statements, most of which were made publicly, were intended to induce any of those witnesses to conceal truthful evidence or to provide false evidence. Once again, this conclusion is buttressed by the absence of any clear evidence that these witnesses had information that would prove the President had committed a crime. The President’s public statements could be viewed as efforts to defend himself from public criticism related to the Special Counsel’s investigation or to discourage the witnesses from making what the President believed might be false statements in exchange for a lesser sentence. Those statements do not warrant a prosecution for obstruction of justice.

The word “pardon.”

That’s important for two reasons. First, Barr said repeatedly, under oath, as part of his

confirmation hearing, that trading false testimony for a pardon would be obstruction. Here's what he said, for example, in response to a question from Lindsey Graham.

Lindsey: So if there was some reason to believe that the President tried to coach somebody not to testify or testify falsely, that could be obstruction of justice?

Barr: Yes, under that, under an obstruction statute, yes.

Here's what he said to Patrick Leahy.

Leahy: Do you believe a president could lawfully issue a pardon in exchange for the recipient's promise to not incriminate him?

Barr: No, that would be a crime.

And pardons are a critical part of the discussion in the Mueller Report to substantiate obstruction. The word pardon appears 67 times. Indeed, contrary to the discussion in the Barr Memo that claimed most of Trump's witness-tampering happened in public, several of the discussions of pardons described in the Mueller Report involved non-public communication.

A voicemail that John Dowd left for Rob Kelner in November 2017 was presented as background to Trump's public discussion of a pardon for Mike Flynn.

I understand your situation, but let me see if I can't state it in starker terms. . . . [I]t wouldn't surprise me if you've gone on to make a deal with . . . the government. . . . [I]f . . . there's information that implicates the President, then we've got a national security issue, . . . so, you know, . . . we need some kind of heads up. Um, just for the sake of protecting all our interests if we can. . . . [R]emember

what we've always said about the President and his feelings toward Flynn and, that still remains835

[snip]

On December 1, 2017, Flynn pleaded guilty to making false statements pursuant to a cooperation agreement.⁸⁴¹ The next day, the President told the press that he was not concerned about what Flynn might tell the Special Counsel.⁸⁴² In response to a question about whether the President still stood behind Flynn, the President responded, "We'll see what happens."⁸⁴³ Over the next several days, the President made public statements expressing sympathy for Flynn and indicating he had not been treated fairly.⁸⁴⁴ On December 15, 2017, the President responded to a press inquiry about whether he was considering a pardon for Flynn by saying, "I don't want to talk about pardons for Michael Flynn yet. We'll see what happens. Let's see. I can say this: When you look at what's gone on with the FBI and with the Justice Department, people are very, very angry."⁸⁴⁵

Paul Manafort told Rick Gates that Trump was "going to take care of us," which Gates took to suggest a pardon.

In January 2018, Manafort told Gates that he had talked to the President's personal counsel and they were "going to take care of us."⁸⁴⁸ Manafort told Gates it was stupid to plead, saying that he had been in touch with the President's personal counsel and repeating that they should "sit tight" and "we'll be taken care of."⁸⁴⁹ Gates asked Manafort outright if anyone mentioned pardons and Manafort said no one used that word.⁸⁵⁰

And the private comments Robert Costello made to Michael Cohen – again in the context of Trump’s public comments about Cohen not flipping – led him to believe Trump would, at least, pay his defense fees.

In an email that day to Cohen, Costello wrote that he had spoken with Giuliani.¹⁰²⁶ Costello told Cohen the conversation was “Very Very Positive[.] You are ‘loved’. . . they are in our corner. . . . Sleep well tonight[], you have friends in high places.”¹⁰²⁷

By issuing his prosecution declination while Trump’s attempted witness tampering was still in progress, Barr ensured that the corrupt trade-off would and could be completed, at least with Flynn, Stone, and Manafort.

And in doing so, he ensured that ongoing investigations wouldn’t find precisely the evidence he was sure didn’t exist.