

BILL BARR, “SO FAR AS WE KNEW”

As I described, the book written by Aaron Zebley and two of Robert Mueller’s other former prosecutors breaks most new ground in its description of discussions between Mueller’s team, Trump’s lawyers, and those supervising the investigation at DOJ.

As it describes, for months, the investigation was working towards a January 27, 2018 interview of Trump, to be held at Camp David. But shortly after Mike Flynn pled guilty, Trump attorney John Dowd (whose call to Rob Kelner floating a pardon made it into the report but not the book), started getting cold feet. On January 30, Dowd told Jim Quarles, “I can’t let this guy testify. I will resign before he does.” On March 1, Dowd and Jay Sekulow first pitched the idea of written questions. Four days later, Mueller first raised the possibility of a subpoena; Dowd said that would be war. Trump would plead the Fifth before he’d respond to a subpoena.

Three weeks later, Dowd resigned.

On April 18, Sekulow told Quarles that Trump was close to bringing on new lawyers. Of Jane and Marty Raskin, Sekulow spoke of their high stature.

“We are talking to people with high stature to take over the representation,” Sekulow said. “Just finalizing everything now.”

“Good,” Jim said.

“You know them, actually. I think you’ve worked with them in the past. They are like-minded people who share our desire to get to the goal line.”

Of Rudy Giuliani (who was officially disbarred in DC yesterday), Sekulow said he hoped he wouldn’t join the team.

Sekulow continued, "There's a third person too, but I'm hopeful he won't join." He did not divulge this person's identity.

[snip]

Sekulow then said, "And the third person is, well, America's Mayor."

Jim thought for a brief moment. "Rudy?"

"That's correct," Sekulow said. "Rudy Giuliani is coming on too."

Rudy almost immediately ran afoul of the Mueller team.

At a meeting on April 24, there was a discussion about whether Trump even could be charged. Bob told Rudy that "we plan to follow the [OLC] regulations" prohibiting the indictment of a sitting President, though in a way that left wiggle room in case (as the book describes) the team found "evidence proving Trump truly was a Manchurian candidate." Rudy asked whether Trump was a witness, a subject, or a target; Mueller answered he was a subject.

Giuliani asked, "Is he a subject regardless of the OLC opinion?" In other words, were we not labeling Trump a "target" simply because he couldn't be indicted? Or was he a subject because there was not enough evidence to make him a target?

Bob said that we had deliberately withheld making a judgment about the president's conduct, but we would get back to them if we could say more.

In spite of repeated assurances the meeting was confidential, Rudy promptly ran to the press and (per the book, at least) misrepresented what Mueller said. As the book describes, Rudy told journalists that if Trump couldn't be indicted, he couldn't be subpoenaed.

That's all background to the discussion of whether Trump could be charged with obstruction. As the book describes, Trump's request that Don McGahn make a false statement disclaiming Trump's effort to replace Mueller involved the creation of a false record in an attempt to obstruct the investigation; it clearly involved creating a false evidentiary record, and so would qualify no matter how you interpret 18 USC 1512(c)(2). But the other obstruction incidents did not (this issue has now been decided by *Fischer* to require evidentiary impairment, meaning the only obstruction incident that could be charged against Trump, ignoring the immunity opinion, is the McGahn one). So there was an extended dispute, starting in May 2018, which a long chapter discusses at length.

But then, unbeknownst to Mueller, Bill Barr weighed in, writing Rod Rosenstein and OLC head Steven Engel that Mueller's views on obstruction were wrong.

As the book describes, Barr's allegedly unsolicited memo was "remarkably timely," because, from that point forward, Rosenstein's team seemed to adopt precisely the analysis Barr offered.

We didn't know it at the time, but just as we were starting our subpoena discussion with the DOJ, another person weighed in with the department on these very issues.

On June 8, 2018, the once-and-future attorney general, William Barr, submitted a nineteen-page memo to Rosenstein and Assistant Attorney General Steven Engel, who was then head of the DOJ's Office of Legal Counsel. In his memo, Barr argued that section 1512 did not apply to President Trump in the manner Barr imagined we might be seeking to apply it. We say "imagined" because Barr had no actual insight into our work, so far as we knew.

Given that Barr was a private citizen at that time, his memo was remarkably timely. It posited (fairly accurately) that we were then “demanding that the President submit to interrogation about [obstruction] incidents, using the threat of subpoenas to coerce his submission.” Barr’s bottom line was that a prosecutor, even a special counsel, should not be allowed to require an examination of the president regarding these incidents, end of story. According to Barr, section 1512 prohibited only corrupt acts that impaired the integrity or availability of evidence, for instance, an act that destroyed a document or induced a witness to change his testimony. Barr’s memo stated that a president’s conduct can “obviously” be considered obstruction of justice in the “classic sense of sabotaging a proceeding’s truth-finding function. Thus, for example, if a President knowingly... induces a witness to change testimony... then he, like anyone else, commits the act of obstruction.”

But Barr maintained that the obstruction statute did *not* apply to what he termed the president’s “facially-lawful” actions—such as firing an FBI director or ending a federal criminal prosecution—even if such an action were done with corrupt intent and impacted a grand jury proceeding. In other words, even if Trump fired Comey for a corrupt purpose, that could not be a crime, in Barr’s view.

We wouldn’t become aware of Barr’s memo until December 2018, the day before his Senate confirmation hearing for attorney general. Nevertheless, his memo seemed to capture the fundamental issues Rosenstein and the department would raise throughout that summer when it came to subpoenaing the president. Barr

may have previewed the department's position when he wrote: "It is inconceivable to me that the Department could accept Mueller's interpretation of 1512(c)(2). It is untenable as a matter of law and cannot provide a legitimate basis for interrogating the President."
[my emphasis]

A couple of points about this.

First, the Zebley book doesn't address any documents that have subsequently been released. Most notably, while the book discusses the events immediately following the conclusion of the report at length, it doesn't address Bill Barr's memo declining prosecution on obstruction (the chapter on Barr's letter to Congress is called "The Barr Report"), even though Barr egregiously avoided comment on the pardons that Trump was using to silence Mike Flynn, Paul Manafort, and Roger Stone.

Similarly, it doesn't address the communications with OLC that were liberated via FOIA. Those show that starting on July 12 – the day before the GRU indictment incorporating reference to Roger Stone – Ed O'Callaghan shared everything that went between Mueller and Trump's lawyers with Engel who, like Rosenstein, got the Barr obstruction memo, and along with O'Callaghan would "advise" Barr to release his letter to Congress. Starting on July 26, National Security Division head John Demers got added. Those things, taken together, strongly suggest that OLC was involved from the start to find a way to find that Trump couldn't be charged (remember that Engel did similar cover-up work during impeachment).

All that is not that suspicious if, indeed, "Barr had no actual insight into our work."

"So far as we knew."

But it would be if Barr *did* have actual insight into what Mueller was doing.

LOLGOP and I are hard at work on our Ball of Thread episode on precisely how Bill Barr killed the Mueller investigation. And in that context, I've returned to something I've puzzled over for years: Barr's description, in his book, of his decision to return to government *with the intent* of killing the Mueller investigation and starting an investigation without a crime, the Durham investigation.

I would soon make the difficult decision to go back into government in large part because I saw the way the President's adversaries had enmeshed the Department of Justice in this phony scandal and were using it to hobble his administration. Once in office, it occupied much of my time for the first six months of my tenure. It was at the heart of my most controversial decisions. Even after dealing with the Mueller report, I still had to launch US Attorney John Durham's investigation into the genesis of this bogus scandal. At the end of my first year in office, the President was impeached over a harebrained effort, involving Rudy Giuliani, to push back on the Russia collusion canard by digging up an alleged counter-scandal in Ukraine implicating the Clinton campaign or Vice President Biden and his son Hunter.

The fallout from Russiagate continued during my last year in office. My relationship with the President frayed as he became frustrated by my failure to bring charges against those who had ginned up Russiagate and the failure of Durham's investigation to produce more rapid results.

I've always believed – even already taped for the podcast my belief – that you need no more than Barr's reactionary views (which happen to match those of several SCOTUS justices), his past work obstructing Iran-Contra, and years of

submersion in Fox News propaganda to explain his actions. Just like you need no more than Trump's narcissism to explain *his* actions, you need no more than those three characteristics of Barr to explain his willingness to chase Russian disinformation in his effort to kill concerns about Trump's ties to Russia.

You need no more to explain their actions, but I can never shake the possibility there's more.

All the more so given Lev Parnas' claim, in interviews after the release of From Russia with Lev, that Victoria Toensing got Barr hired.

Now, Parnas' reference – and his visibility on interactions between Toensing, Rudy, and Barr – post-dates Barr's June 2018 memo. He's talking about Toensing's assurances to Trump, after he fired Jeff Sessions, that Barr would make the Mueller investigation go away (though if Toensing made that assurance, the Ukraine stuff looks far different, as does Barr's treatment of it as a mere "counter-scandal").

But Toensing was involved in the effort to make the Mueller investigation go away far earlier.

She represented Sam Clovis (who was interviewed, without an attorney, in two parts on October 3, 2017, and interviewed, including before a grand jury, with Toensing, on October 26, 2017). George Papadopoulos probably told Clovis that Russia had Hillary's emails and Clovis was involved in Papadopoulos' apparent discussions about setting up a September 2016 meeting with Russia, but Clovis testified that he had no memory of either of those things. And she represented Erik Prince (who was interviewed on April 4 and May 3, 2018) – who, like Steve Bannon, deleted their texts to each other from during the period when Prince was meeting with Kirill Dmitriev in the Seychelles, but has no memory of doing so.

Indeed, Toensing's spouse, Joe DiGenova, even briefly said he was representing Trump, during that transition where Rudy got added. During his Ukraine caper a year later, Rudy repeatedly

proposed that he do the work while Toensing billed for it. So if you got Rudy, you got Toensing.

And if Toensing later was involved in getting Barr hired, it would be unsurprising if she was a contact with him before that.

Incidentally, Barr never once mentions Toensing in his book. He mentions Rudy, who is a central focus of his book, around 44 times. He exercised his right to remain silent about Toensing.

In a follow-up, I'm going to talk (again) about the blind spot that connects the Mueller investigation and the Durham investigation – the blind spot at the core of Bill Barr's effort to cover up Trump's ties to Russia.

For now, though, consider the possibility that Barr had a great deal more insight into the Mueller investigation when he wrote that memo than he let on.