

MATT WHITAKER HAS AUTHORITY TO SHARE PROCEEDINGS OF NATIONAL SECURITY GRAND JURY INVESTIGATIONS WITH TRUMP

Just over a year ago, I worried that if and when Brian Benczkowski was confirmed as DOJ Criminal Division chief, it would probably provide Trump with a mole in the Mueller investigation. It took Benczkowski a long time, but after he was confirmed on July 11 of this year, he may have gotten visibility into parts of the Mueller investigation that relied on Criminal Division resources.

Whether or not Benczkowski shared anything he may have learned with Trump, we can be fairly certain that Matt Whitaker, whom Trump has just made Acting Attorney General, could share the information. Authority to do so stems from an OLC memo Jay Bybee wrote back in 2002.

Benczkowski could share information about wiretaps and proceedings from the grand jury directly with the president.

The cause for concern comes from an old Department of Justice interpretation of the PATRIOT Act. Along with expanding surveillance authorities, the PATRIOT Act permitted any government lawyer to share national security-related grand jury or wiretap information with any government official as long as it would help them perform their job better. The measure was passed in response to the September 11 attacks, with an eye to sharing counterterrorism information more broadly. But the authorization of

such sharing explicitly extended to “clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power”—precisely the kind of nation-state spying at the heart of the Russian investigation.

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.

[snip]

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.”

The memo envisioned such authority to be delegable, but ultimately puts the AG in charge of deciding what information the President gets.

The 2002 memo generally supports the notion that the attorney general should decide whether the president needs to see a particular piece of information.

And it doesn’t require any paper trail for the sharing of such information.

And the memo cites an old opinion from the Iran-Contra scandal to argue that the president doesn't have to memorialize any such delegations in writing. "Such a directive may be set forth in a formal executive order, in a less formal presidential memorandum, ... or pursuant to an oral instruction from the President to the Attorney General or other appropriate officials." So Trump could order someone to share information without leaving a paper trail.

Given that the entire purpose of this move seems to be about tampering with the Mueller inquiry, we should assume Whitaker will do as imagined, and let the President know what Mueller has been up to.