THE GUY WHO DEFENDED ROGER STONE'S CAMPAIGN FINANCE SHENANIGANS DID NOT TESTIFY TO THE GRAND JURY

In response to an order from DC Chief Judge Beryl Howell, the government has revealed the two witnesses of interest to Congress who did not testify to the grand jury. The first, Don Jr, should not surprise anyone who has been following closely, as that was clear as soon as the Mueller Report came out.

The other—Don McGahn—is far more interesting, especially since he was interviewed on five different occasions: November 30, December 12, December 14, 2017; March 8, 2018; and February 28, 2019.

Most likely, the reason has to do with privilege, as McGahn's testimony, more than almost anyone else's, implicated privilege (in part because many witnesses' testimony cut off at the transition). McGahn ended up testifying far more than Trump knew, and it's possible he did that by avoiding a subpoena, but had he been subpoenaed, it would provide the White House opportunity to object.

Elizabeth De la Vega said on Twitter it likely had to do with how valuable McGahn was in his five interviews. By not making him testify to the grand jury, she argued, you avoid creating a transcript that might undermine his credibility in the future. That's certainly consistent with the Mueller Report statement finding McGahn to be "a credible witness with no motive to lie or exaggerate given the position he held in the White House." But that reference is footnoted to say, "When this Office first interviewed McGahn about this topic, he was reluctant to share

detailed information about what had occurred and only did so after continued questioning." Plus, while McGahn testified more than any other witness not under a cooperation agreement, Steve Bannon and Hope Hicks testified a bunch of times, too (four and three times respectively), but were almost certainly put before the grand jury.

But there is a different, far more intriguing possibility.

First, remember that Roger Stone was investigated for more than lying to Congress (indeed, just the last four warrants against him, all dating to this year, mentioned just false statements and obstruction). Which crimes got named in which warrants is not entirely clear (this government filing and this Amy Berman Jackson opinion seem to conflict somewhat). Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C), was named in all Stone's warrants before this year. But at least by August 3, 2018, the warrants against Stone listed a slew of other crimes:

> - *18 U.S.C. § 3 (accessory after the fact)*
> - *18 U.S.C. § 4 (misprision of a felony)*
> - *18 U.S.C. § 371 (conspiracy)*
> - *18 U.S.C. §§ 1505 and 1512 (obstruction of justice)*
> - *18 U.S.C. § 1513 (witness tampering)*
> - *18 U.S.C. § 1343 (wire fraud)*
> - *18 U.S.C. § 1349*

> *(attempt and conspiracy to commit wire fraud)*
> - *52 U.S.C. § 30121 (foreign contribution ban)*

For whatever reason, the government seems to have decided not to charge CFAA (if, indeed, Stone was the actual target of that investigation). They may have given up trying to charge him for encouraging or acting as an accessory after the fact.

The Mueller Report explains — albeit in mostly redacted form — what happened with the 52 U.S.C. § 30121 investigation. First Amendment and valuation concerns about a prosecution led Mueller not to charge it, even though he clearly seemed to think the stolen emails amounted to an illegal foreign campaign donation.

But that leaves wire fraud and conspiracy to commit wire fraud. During the month of August 2018, DOJ obtained at least 8 warrants relating to Stone including wire fraud. Beryl Howell — who in her order requiring the government unseal McGahn's name, expressed puzzlement about why Don McGahn didn't testify before the grand jury — approved at least five of those warrants. Rudolph Contreras approved one and James Boasberg approved two. So apparently, very late in the Stone investigation, three different judges thought there was probable cause Stone and others engaged in wire fraud (or tried to!).

And it's not just those judges. Roger Stone's aide, Andrew Miller, was happy to testify about WikiLeaks and Guccifer 2.0. But at least when his subpoena first became public, he wanted immunity to testify about the campaign finance stuff he had done for Stone.

> Miller had asked for "some grant of immunity" regarding financial transactions involving political action committees for which he assisted Stone,

> according to Alicia Dearn, an attorney for Miller.
>
> On that issue, Miller "would be asserting" his Fifth Amendment right to refuse to answer questions, Dearn said.

I'd like to consider the possibility that McGahn, Donald Trump's campaign finance lawyer before he became White House counsel, was happy to testify about Trump's attempt to obstruct justice, but less happy to testify about campaign finance issues.

Mind you, McGahn is not one of the personal injury lawyer types that Stone runs his campaign finance shenanigans with. Whatever else he is, McGahn is a professional, albeit an incredibly aggressive one.

That said, there are reasons it's possible McGahn limited what he was willing to testify about with regards to work with Stone.

At Roger Stone's trial the government plans (and has gotten permission) to introduce evidence that Stone lied about one additional thing in his HPSCI testimony, one that wasn't charged but that like one of the charged lies, involves hiding that Stone kept the campaign in the loop on something.

> At the pretrial conference held on September 25, 2019, the Court deferred ruling on that portion of the Government's Notice of Intention to Introduce Rule 404(b) evidence [Dkt. # 140] that sought **the introduction of evidence related to another alleged false statement to the HPSCI, which, like the statement charged in Count Six, relates to the defendant's communications with the Trump campaign**. After further review of the arguments made by the parties and the relevant authorities, and considering both the fact that the defendant has stated publicly that his alleged false

> statements were merely accidental, and that he is charged not only with making individual false statements, but also with corruptly endeavoring to obstruct the proceedings in general, the evidence will be admitted, with an appropriate limiting instruction. See Lavelle v. United States, 751 F.2d 1266, 1276 (D.C. Cir. 1985), citing United States v. DeLoach, 654 F.2d 763 (D.C. Cir. 1980) (given the defendant's claim that she was simply confused and did not intend to deceive Congress, evidence of false testimony in other instances was relevant to her intent and passed the threshold under Rule 404(b)). The Court further finds that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

A September hearing about this topic made clear that it pertains to what Stone's PACs were doing.

> Assistant U.S. Attorney Michael J. Marando argued that Stone falsely denied communicating with Trump's campaign about his political-action-committee-related activities, and that the lie revealed his calculated plan to cover up his ties to the campaign and obstruct the committee's work.

It sounds like Stone cleared up this testimony (Stone sent two letters to HPSCI in 2018, and one of those would have come after Steve Bannon testified about emails that included a Stone demand that Rebekah Mercer provide him funding), which may be why he didn't get charged on that front.

As I've suggested, if Stone was actively trying to deny that the work of his PACs had any interaction with the Trump campaign, it might explain why he threatened to sue me when I laid

out how McGahn's continued work for Trump related to Stone's voter suppression efforts in 2016.

And remember: when Stone aide Andrew Miller *did* finally testify — after agreeing to at virtually the moment Mueller announced he was closing up shop — he did so before a new grand jury, after Beryl Howell agreed with prosecutors that they were in search of evidence for charges beyond what Stone had already been indicted on or against different defendants.

McGahn's campaign finance work for Stone and Trump is one of the things he'd have no Executive Privilege claims to protect (though barring a showing of crime-fraud exception, he would have attorney-client privilege), since it all happened before inauguration.

Again, there are lot of more obvious explanations for why he didn't testify before the grand jury. But we know that Mueller investigated these campaign finance issues, and we know McGahn was right in the thick of them.