

Talking Feds Podcast

Episode 09

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Host: Harry Litman

Guests: Carol Lam, Jennifer Rodgers, Frank Figliuzzi

Harry Litman [00:00:00] Talking Feds is brought to you by Constantine Cannon. Constantine Cannon has extensive experience representing whistleblowers under both federal and state whistleblower laws. Their team of attorneys has an unsurpassed record of success. Learn more at Constantine-Cannon-dot-com.

Harry Litman [00:00:25] Welcome back to Talking Feds. A prosecutors roundtable that brings together prominent former Department of Justice officials for a dynamic discussion of the most important legal topics of the day.

Harry Litman [00:00:39] This week has probably been the single most important of the last 22 months. We've now finally had our first look at the redacted version of the Mueller Report. Along with everyone else, we gave our quick take on the top line conclusions of the report. And now we are delving deeply into the almost 400 pages of facts, law and analysis set out there.

Harry Litman [00:01:06] I'm Harry Litman. I'm a former United States Attorney, Deputy Assistant Attorney General and Assistant United States Attorney, and a Washington Post columnist.

Harry Litman [00:01:16] Today, I'm in La Jolla, California and I'm joined by three former feds who have especially detailed knowledge about the Mueller Report.

Harry Litman [00:01:27] Carol Lam joins us for the first time on talking Feds. Carol is a former United States attorney for the Southern District of California, where's the top and bottom?

Carol Lam [00:01:37] It lies between the Pacific Ocean and Arizona to the west and east, and then Mexico to the south and Riverside County to the north.

Harry Litman [00:01:44] So you occasionally have immigration crimes?

Carol Lam [00:01:47] Every now and then.

Harry Litman [00:01:48] Yeah. She was an assistant United States Attorney in the Southern District California, and chief of the Major Fraud Section from 1997 to 2000. Moreover Carol served as judge of the Superior Court in San Diego and was then appointed as U.S. Attorney by President Bush, George W. Bush, in 2002.

Harry Litman [00:02:08] We're also joined by returning Fed, Jennifer Rodgers, former deputy chief appellate attorney at the United States Attorney's Office for the Southern District of New York, which is known well to listeners. She was also the chief of the organized crime unit there and a chief of the General Crimes Unit there. What was the sort of division of your line prosecutor versus supervisor career?

Jennifer Rodgers [00:02:31] I was there for 13 and a half years, and about eight of them were on the line and then I became a supervisor and moved around among those units.

Harry Litman [00:02:41] And so 13 years, I mean that would be a very long tenure in many U.S. Attorney's offices, was it also in the SDNY?

Jennifer Rodgers [00:02:49] It was definitely more than average. I think the the tenure there averages about five or six years, so, you do start to feel like a bit of a dinosaur at 13 years in the SDNY for sure. Not many people stay around that long.

Harry Litman [00:03:01] And you feel like when am I going to leave or what's my sort of exit strategy? But the job's so great, basically?

Jennifer Rodgers [00:03:08] Exactly. Exactly if you don't have to go it's kind of hard to go.

Harry Litman [00:03:11] Yeah. And finally we're thrilled really to welcome to the program for the first time, Frank Figliuzzi. He retired as the assistant director of the FBI Counterintelligence Division in 2011. Frank had been the Division's Deputy Assistant Director and since his appointment as an FBI special agent in 1987, he served in many different divisions of the FBI. What are a couple of the places that you've hung your hat for temporary assignments?

Frank Figliuzzi [00:03:42] Well temporary is the name of the game if you're in FBI management. There were lots of moves, but of course in typical Bureau fashion, they sent this Connecticut Yankee down to the Deep South for his first assignment, so I was in Atlanta for my first field office, worked counterintelligence, counterterrorism. And then in typical fashion for management there's a series of moves between headquarters in Washington and the field. So, I've been in Miami and San Francisco, I ran the Palo Alto resident agency out of the San Francisco field office. That's a unique office dedicated entirely to counterintelligence and Silicon Valley. I was the S.A.C., the Special Agent in Charge in Cleveland Ohio, I was the Assistant Special Agent in Charge the number two role in the Miami office for five years. So both coast, and lots of great adventure.

Harry Litman [00:04:34] And when you come in, do you have to sort of make your reputation anew every time, are the agents sort of wary of who's the, who's the new supervisor and you have to kind of win their trust?

Frank Figliuzzi [00:04:46] Oh boy. As with any leader you absolutely have to spend time initially developing trust and credibility. But there's also another unique aspect to the Bureau because of all the moves and because it's a close knit family your reputation precedes you. And it's very hard to overcome any negative connotations and it's kind of a "what have you done for us lately" mentality so it's, it's kind of it's kind of a tough, it's a tough operating environment but if you do well and the reputation is good, you, you really have a great working environment no matter what field office you walk into.

Harry Litman [00:05:21] Okay, let's dive in. This is arguably the biggest week of the twenty three month probe. There was so much we were waiting to find out and we found it out, and some things that I think are still a bit of a mystery. Probably like me, you three have now delved into the report and tried to tease out some of the things that Mueller was saying.

Harry Litman [00:05:45] Let me start with what seemed to me the biggest thing before and after this unusual decision not to bottom line on the determination of whether the President had committed obstruction of justice. So, you know, why did Mueller let these so-called "fairness considerations" dictate that choice, was it surprising to you? And was it a mistake, having read his rationale? Does it still strike you as problematic or unbalanced the right thing given the position he was in?

Jennifer Rodgers [00:06:23] Well I was surprised to see that in the report, and I couldn't figure out before the report why in the world he wouldn't make that decision right? That's what prosecutors do every day. That was what he was expected to do. I think as the Special Counsel, so I was really eager to read his reasoning for why he didn't come to a legal conclusion on obstruction. When I read it, I understood it. I mean, I understand what he's saying. I mean if you say "Listen we can't indict you. So we won't indict you, but we would have indicted you so live with that for the rest of your administration, right." That doesn't seem fair. And I've kind of gone back and forth as to whether I think that was the right thing to do. But I think it was not. Like I come down I think it was not, because I think that was his job to do that. And I think honestly I understand the fairness point. I think he's giving the president more fairness than the president deserves in this situation. And I think he should have told us the answer on obstruction. I think we deserved that. I think he really did tell us when you look at the report itself and see what he said about the evidence on obstruction. But I think he should have made it explicit.

Harry Litman [00:07:30] Does everyone agree that he actually did bottom line while seeming not to and in some ways that makes it even more mysterious?

Carol Lam [00:07:36] Every time I read it I feel more and more strongly that he really was saying "Yeah, he obstructed justice." But I have I think a simpler explanation for why he didn't explicitly say so. I think when Bill Barr became the nominee and then was sworn in, I think Bob Mueller saw himself in the position of the very person he was reporting to obviously had a very, very different view of whether a president can be found to have obstructed justice for the kinds of acts that were laid out in the report. And I think he didn't want to end up in a situation where

he was making a firm recommendation that was clearly going to be diametrically opposed to the firm position of the person he reported to. And I think he just felt in that situation, he did what he did, which is sort of split the baby, say "I'm not going to make a decision that's you know but the facts are there, if you want to find them."

Harry Litman [00:08:32] So, you think it was after the Barr nomination that he decided to go that route? And remember that the report itself does say it, it looks to this question. Now, I mean to just go back, I think you're you're talking about Barr's sometimes expressed view that if you're exercising enumerated powers then you wouldn't be obstructing. But he goes to OLC, OLC says that's not the position of the Department of Justice. Why, why wouldn't he think that his base is covered at that point?

Carol Lam [00:09:02] I'm sorry you're saying Mueller went to OLC?

Harry Litman [00:09:04] Well in the report, the report he goes to OLC, OLC says no you, that's, it specifically says you can obstruct justice. You still think he's just...

Carol Lam [00:09:12] I think he's deferring to Bill Barr.

Harry Litman [00:09:15] Let me put it this way. Why, just out of deference not out of like, if I do it this way and he reverses me I'll look uh, it'll look crazy?

Carol Lam [00:09:23] I think I think Bob Mueller is saying you know if the Special Counsel regulations had not been written in such a way that he now reported to the Attorney General he may have said things differently. But I think he didn't want a situation where the Special Counsel who reported to a superior was going to make a recommendation that he knew the superior was not going to support.

Harry Litman [00:09:44] Frank?

Frank Figliuzzi [00:09:45] Well first I was disappointed in the fact that Mueller didn't make the hard call. I think that's what the nation demanded of him. And I think that's what history is going to demand that he did and I think it's unfortunate. And I, to get into the mind of Mueller, um, look we're getting more, the more I read this report, the more I see the insights into what he was thinking. If you look at appendix C where he talks about why he didn't subpoena Trump to the grand jury, why he didn't absolutely fight like hell on an in-person interview, you'll see a sentiment that basically says "I think I had the evidence. I had substantial evidence that I needed." And so, I think what happened here was we have we have a special counsel who has lived his entire career playing by the rules and that works really well if your boss plays by those same rules. And I think we're looking at a boss, in the Attorney General, who simply isn't playing by those rules. And I, I think there's some inherent trust that Mueller placed in Barr, to do the right thing and he tried to take this solemn, Solomon-like approach, as Carol has said. But it didn't work. So now we're left to wonder what he's going to say in testimony on the Hill. And I

know from having worked with Mueller, having briefed him twice a day as Assistant Director, that he's going to stick largely to the four corners of the report, unless, as I think it was Carol earlier said, unless he is completely so upset with Barr's conduct that he feels the need to raise his hand and say "No, no no. This is what should be happening."

Harry Litman [00:11:38] And Frank. So why do you think it's been pretty conspicuous. We're led to believe that on the fifth, is the first time he tells this to Barr: "I'm not going to bottom line." And Barr apparently thinks it's a dereliction. One thing Barr might have said at the time is "Go bottom line. That's I'm telling you to do that." But apparently from that time on Mueller seems to, as best we know this only from Barr, but to have kind of exited the stage and he doesn't participate in the letter of March 24th, they apparently don't confer about any aspect of it. He is conspicuously absent from the press conference the other day. Do you take that as a sign that he's a little bit either nursing his wounds or wants to separate himself now from what the boss has done?

Frank Figliuzzi [00:12:27] Well, we've got some insight into that apparent possible rift that's developed which is, in the most recent testimony on the Hill, you'll remember that Barr was asked the question: Did Mueller agree with your call? And his response was "I, I didn't ask I don't know. I don't know." And he said it in kind of a dismissive way. So that tells me that he's had enough with Mueller. He doesn't need or care as to what Mueller intended. And that's a problem.

Harry Litman [00:12:57] Look, I mean that was stunning right? How can you at least not talk it over with Mueller and try to, you know, explain, why, and hear his views and take them in. And on your point Carol I see what you mean, he doesn't want to set himself up for a contradiction. But, that is exactly what happened because the number one conclusion in a sense that Mueller drew was that fairness considerations prevent a bottom line. And Barr's number one consideration was prosecutions are binary. If he can't say yes, you must say no. And on this very big point Barr basically goes 180 degrees different in his decision at the end.

Carol Lam [00:13:40] You could interpret what Mueller did, as Barr apparently did, as saying "OK, I'm not making a decision. It's up to you. You know, Bill, you make the decision." I think where I depart from a lot of people is I don't think it was outrageous for Bill Barr to make a call. Now, you can argue whether he made it too fast or you know, but I don't think he made it so fast that he didn't understand what the findings were in the report. I think it was actually appropriate for the Attorney General to let Congress and the people know whether the department was going to move ahead with some kind of prosecution or not. I mean that is, it is binary, because what is the nation supposed to do, if Bill Barr doesn't make a decision? Congress is going to say "Well are you saying we should go ahead with impeachment or are we supposed to look at it and then say, Hey Mr. Attorney General, we order you to do a criminal prosecution?" That's not Congress's role. They're not entitled to do that. So I think it was actually ok, as a matter of concept, that the attorney general makes the decision that if he's not going to proceed. But you

know, how you do something matters as much as what you do. And the problem is that he did it in such a way that he, he sort of contorted --.

Harry Litman [00:14:52] He, Barr?

Carol Lam [00:14:55] He Barr sort of contorted Bob Mueller's report in such a way that he made it sound much more factually oriented with respect to how why he was making that decision. I think that I think most of the nation has correctly concluded that it was a misrepresentation of the report.

Jennifer Rodgers [00:15:11] Well not only that, but you know even if you put aside the misrepresentations and all of that, he decided the exact opposite of what Mueller told us, without telling us how. I mean he did not take on the evidence piece by piece and say "Here's why the three elements of obstruction of justice are not met" like Mueller --.

Harry Litman [00:15:30] Zero prosecutorial experience.

Jennifer Rodgers [00:15:31] Well yeah. Yeah but no analysis right? So instead of saying "All right, I'm gonna go through and tell you why the incident a firing Jim Comey was not obstruction because it wasn't an obstructive act or there was no nexus with a judicial proceeding or the President didn't have intent and here's why based on the evidence you know that." He didn't do any of that, he just said "Notwithstanding the pages and pages of of Mueller's report that go through piece by piece of the evidence and tell us why all three elements are met I'm going to say, no, not enough evidence."

Harry Litman [00:16:00] Yeah well I think he was saying this binary thing, if not yes then no. Although he did a little bit, in I thought very unpersuasive fashion, at the press conference. The press conference he seemed to be saying, to me, "Trump didn't have the requisite intent, because Trump was just so overwrought and angry, and poor Trump had unprecedented scrutiny on him." And I think he was trying to say "That, that kind of frustration and pique is actually different from the sort of nefarious obstructive pique. But first: it isn't. It's certainly consistent with it. And second: give me a break. As a representation of you know Trump's general mindset over that time it was it really was strikingly --

Carol Lam [00:16:51] You know, that was so ham fisted that it actually, you know, I have, I have a friend who actually said "Boy, I wonder if he's doing that intentionally to sort of undermine himself. Maybe he's being forced to do this press conference by the president and he's doing it so badly, you know, that that he's he's trying to make make this decision look, look bad. I mean that's how ham fisted I thought that that press conference was.

Harry Litman [00:17:19] You know we can and will talk about this for hours and hours. I again though want to go back to Mueller. We think of him as Mister Rules, but he was sort of here Mister, sort of, Free-Floating-Fairness. You know, I understand why he thought it was fair. But

it's still odd that he took, he made that the structure of his decision should he not somehow have to have checked in with a supervisory structure because you could see there was in what Barr said a kind of a subtext of, of pique. Was there not? That like, he had, he'd been derelict somehow. Whether that's true or not, I'm just surprised that that was a completely internal construct on his part, he didn't even think, he just announced it as a fact on March 5th when the ,when the probe was basically over.

Jennifer Rodgers [00:18:08] Well it does make you wonder about the relationship between the Special Counsel and his team, and Rosenstein, who was overseeing the investigation right. And you know we know that Rod Rosenstein appointed Mueller, that he was mostly I think protective of the Mueller probe. You know, certainly he seemed to be that way publicly. But it does make you wonder if they were worried about him and worried about his interference with their decision making processes and thought "We should of course update him on what we're doing. How subpoenas and so on, but are we really going to tell him what we're thinking? You know what what will the result of that be." And you know, obviously I'm just speculating here, but it but it makes you think about that, because you know why wouldn't they have been talking all along if they thought he was fully trustworthy? And also just the weirdness of, you know, Rosenstein standing behind Bill Barr, like a, like a. Like a Madame Tussaud's, you know, wax museum guy. I don't know. I don't know what was what was going on there and also how much Rod Rosenstein, how much impact he had into the whole decision making process that that Bill Barr ultimately gave us.

Harry Litman [00:19:13] Frank you'd probably have insight and I got to believe that there must have been differences of opinion within the Mueller camp on on this. Any any sense or surmise there.

Frank Figliuzzi [00:19:25] Yeah. There is a sense and there's been some reporting on the periphery that there were some differences of opinion and even perhaps some heated discussions. That's not unusual among a prosecutive team. And I wonder though now in retrospect, if some of those debates, discussions, would have factored in the appointment of Barr, and whether he was going to be an honest broker and could be trusted to, to fall in line with Mueller's approach to the report and whether or not there was a hard call to be made or not. I bet you Barr factored into any tensions or debate within the Mueller team.

Harry Litman [00:20:08] OK. Uh, you know, I'm sure we'll have many episodes or many times on Talking Feds to talk about this stuff or this very topic. Let's, let's maybe go round the horn with final thoughts. Does it seem clear to you that notwithstanding his saying he didn't want to do this for fairness considerations, a careful read of the report reveals that Mueller did in fact conclude that, in many of these ten episodes, Trump had crossed the criminal line, had obstructed justice. Jen you want to start?

Jennifer Rodgers [00:20:42] Yeah it does to me, Harry. And it's because of the way they set forth the evidence and then when element by element. You know, if they didn't intend for us to

conclude that all of the elements were met here, meaning there actually was a crime committed here, they could have just put in the evidence. They could have said "Yeah here's what we learned about the episode where the President tried to fire Mueller using Don McGahn. Here's the facts." You know, he didn't have to then go: "You know what was the obstructive action. What was the President's intent. What was the nexus. And doing that, says to me, he wanted us all to know that that in fact that was a crime here.

Carol Lam [00:21:16] I think that he was saying there was a crime there because it's the easiest thing in the world for a criminal prosecutor to say there was insufficient evidence to find that a crime was committed. He was able to do that in the Russian part of the, of the report. So it's not only the fact that he said, you know, "Here's all the evidence and I'm not going to say that we should bring charges because of all of these reasons having to do with policy and being the President and all that." But he also said very clearly this does not exonerate the President. So he's finished his investigation and he's saying the president's not exonerated, which is a very strange thing for a criminal prosecutor to say, and he's giving all these policy reasons why he's not saying that the President, that charges should bring it, be brought against the president. So where does that leave me? It leaves me, it leaves me believing that he's saying the president has committed obstruction of justice.

Harry Litman [00:22:10] Frank, you agree?

Frank Figliuzzi [00:22:11] I do. I read the report as Mueller telling us "I found the evidence. I was constrained by policy and not only that but I think there is a remedy here and I think Congress has the ability to handle this." And telling us that he could have exonerated, if he could have exonerated the president he would have is essentially telling us this guy, this guy did it. I found the evidence.

Harry Litman [00:22:37] Yeah I thought that as well, both as in analysis but also specifically,, to Carol's point, the collusion analysis shows that Mueller knows how to go, to say, "There are certain crimes, they went right up to the line but failed." I think that that's some of the Trump Tower stuff, was that, 50/50. And you don't do it. So he, when when we get to obstruction I went carefully through the 10 and I, just as Jen is saying, there were at least five or six times where when we get to the key question, it's clear these are obstructive acts. It's clear there's a nexus. And then I would say six out of the 10 times at a minimum when you read the intent part, the most important, he's saying intent is proven even beyond a reasonable doubt.

Harry Litman [00:23:24] OK, we could talk about this for hours.

Harry Litman [00:23:26] But first a word about our sponsor. The Constantine Cannon Whistleblower Lawyer Team has extensive experience representing whistleblowers under a wide array of federal and state whistleblower laws. Constantine Cannon's whistleblower attorneys have acted as lead counsel to recover well over a billion dollars for the government and hundreds of million dollars in awards for whistleblower clients. I actually know this, because

I am a member of the Constantine Cannon Whistleblower Team. Learn more at Constantine-Cannon-dot-com.

Harry Litman [00:24:09] Now it's time to take a moment to explain some of the terms and relationships basic to federal prosecutorial practice that you hear about in this podcast and on the cable news. In a segment we call Sidebar. Today, Toni Trucks a fantastic actress, who's currently starring on the hit CBS series "Seal Team." She's also been featured on "NCIS: New Orleans." And in the feature film "Twilight: Breaking Dawn Part 2." Toni will explain the differing roles of the federal agencies.

Toni Trucks [00:24:48] The Department of Justice is made up of more than prosecutors and trial attorneys. Among its divisions, referred to as components, are several that enforce federal law and investigate and develop criminal cases prosecuted by the DOJ. Much like police officers investigate state crimes and assist local prosecutors.

Toni Trucks [00:25:08] The most well-known of these divisions is the FBI. The FBI is a general federal investigative service that is tasked with upholding and enforcing the criminal laws of the United States, and assisting state and local law enforcement officials. The FBI also protects and defends the United States against terrorism and foreign intelligence threats.

Toni Trucks [00:25:29] The Drug Enforcement Agency, or DEA, is charged with enforcing controlled substances laws, and supporting criminal and civil prosecutions of organizations involved in the manufacture and distribution of controlled substances.

Toni Trucks [00:25:44] The Bureau of Alcohol Tobacco Firearms and Explosives, or ATF, conducts criminal investigations involving firearms and explosives and regulates the industries to prevent terrorism, reduce violent crime, and protect the public.

Toni Trucks [00:26:00] The Department of Justice Office of the Inspector General is an independent entity within the DOJ whose mission is to detect and deter waste, fraud, abuse, and misconduct within DOJ programs and personnel. It investigates violations of criminal and civil laws by DOJ employees and audits and inspects DOJ programs. The office also assists and protects DOJ whistleblowers.

Harry Litman [00:26:28] Thanks very much to Toni Trucks for that informative Sidebar. You can follow Toni on Twitter @ToniTrucks.

Harry Litman [00:26:40] All right so let's turn to the other protagonist, or is an antagonist, in the big drama of this week: The Attorney General.

Frank Figliuzzi [00:26:47] Yeah I just see a fundamental disconnect between where Mueller was coming from and the role of the special counsel in this case and where Barr is coming from. So it seems to me that there's an inconsistency between Mueller approaching this whole thing,

for two years, with the notion that "I have policy constraining me from thinking about the President as a criminal" and then Barr coming in and say "Well if you can't figure this out I'll make the call. He's not a criminal." So we're on two different sheets of music here. And so for Barr to come in and say not only "I'm gonna make a call, but rather, I'm going to decide that you've been approaching this for two years from the wrong angle. I'm going to say that we should be making a criminal call and I'm going to make it for you." I think I think it's just a fundamental disconnect about what's supposed to have happened here.

Carol Lam [00:27:36] But Frank what what what do you think Barr should have done or should have said?

Frank Figliuzzi [00:27:40] So in an ideal world, which we don't live in, we would have had some harmony between the special counsel and his boss on how to approach this and if the agreement was that, "Yes, policy is going to constrain you Mr. Mueller from making this a prosecutive call, then and I'm going to come in behind you and have your back on that then then we're gonna be handing a fact, you are now a fact finder, Special Counsel. And the facts need to be presented to the public and to Congress for action." Instead, we had Mueller essentially had the ball taken away from him.

Harry Litman [00:28:13] Yeah I mean talk about, it's really true, talk about not having his back because he, he did go forward then with a completely different way of looking at it. There was a really telling answer in the press conference where somebody asked Barr "Do you think Mueller wanted to leave this up to Congress?" Which is basically what we're all concluding here and Barr didn't just say no. But I mean, he chastised the very idea. "No and I hope not because that's what we do at the Department of Justice. We make prosecution or declination decisions." But I mean it's far from clear that that's what Mueller was doing. And if they did have such a such a disagreement to kind of hang him out to dry that way rather than trying to harmonize it before they face the public would have been expected I think.

Jennifer Rodgers [00:29:00] Yeah it's all just very strange. I mean the notion that Bill Barr was without showing us the report you know spinning, what I called spinning on March 24th, which then turned into frankly just lying about what Mueller's report actually said in literally kind of the moments before we all got to see it, knowing that we were all going to get to see it.

Harry Litman [00:29:21] Harsh words there. So what, so what do you tell the actual lies are?

Jennifer Rodgers [00:29:24] Well he said that, I mean, when he was asked questions about Mueller's reasoning, you know, "Was Mueller's decision not to decide based on the OLC policy?" And he said "No it wasn't." And it was! And then he was asked like you said, you know "Well did, did Mueller say he didn't decide because he wanted it left to Congress?" And he said again "No." You know, as you said very vehemently. And that one's not quite as explicit in the report but there are a couple of places in the report where he does say, you know, "One of the problems with trying to proceed with charges here, in addition to the fact that we just can't do it

per DOJ policy, is that might preempt other constitutionally permitted remedies," like impeachment.

Harry Litman [00:30:04] Now I think, you're really right, when I think about what he's basically saying since he, since he's saying Mueller couldn't have been thinking that way is: "Mueller is this unbelievable ditherer," right? All he, he can only get to 50/50 and then "I don't know what..." You know, and that's just obviously not who Bob Mueller as a lifetime prosecutor is.

Jennifer Rodgers [00:30:22] And that's the other thing, because he's, you know, he suggested, and this is maybe more misleading than flat out lying, but there was actually factually a very tough call to be made here. And Mueller really had, had factual issues and there were difficult issues of fact that meant that he couldn't decide and that's not true at all. I mean, there really wasn't about the facts when you read the Mueller Report. Mueller talks about all sorts of other things that were difficult but it's not really about facts.

Harry Litman [00:30:46] He does say, does Mueller this troubled me though. Because I, I mean this has made my number one focus the last couple days. What exactly is Mueller saying, and I agree with everyone about that he's saying it's obstruction. But he did leave in these little statements about "There are these difficult questions of fact and law that we would have to resolve."

Jennifer Rodgers [00:31:03] And there were also a couple, and we're getting in the weeds now, but when you talk about the different obstructive actions that Mueller considered there were a couple that really don't have some of the legal issues that you know Bill Barr had such a hard time with, right? Some of the witness tampering stuff for example on Michael Cohen and Michael Flynn and Roger Stone, although he was redacted, that doesn't have anything to do with his article 2 powers. I mean you can kind of excise the pardon talk, some of that you know nonsense about, "Oh, you're on our team." And reaching out for them and then when they start to talk about cooperating "Oh, now you're a rat," and all that stuff, that's kind of garden variety witness tampering. It doesn't have anything to do with constitutional power, so there are a couple of obstructive acts that Mueller found were obstruction effectively, that to me don't have some of those same legal problems.

Harry Litman [00:31:49] Frank?

Frank Figliuzzi [00:31:49] Yeah I look at the Russian side of the case, and I find it fascinating that you know we're we're not really focusing on the dichotomy between the two, the two volumes in the report. And the fact that this, Barr's focus on criminality is, is just doesn't serve us well when it comes to counterintelligence cases. This case started as a Russian CI case. And counterintelligence, by and large, does not end up with prosecutive decisions to be made. It just doesn't. And so we have Barr coming in and saying -- and even, and even Mueller saying, "Look we're applying a criminal metric, criminal standard here, and there was no conspiracy or coordination and therefore nothing to see here go away," is where Barr is left with with his

finding, when in reality, we've got a hellacious story that's been told to us about the degree to which an adversary attacked us, targeted our elect -- our election process, the degree to which they set the table for Trump and his associates to dine. And the degree to which Trump and his associates come to the table hungry, ready to eat, right? And yet we have Barr dismissing that. So that shapes my, the lens through which I look at the next volume, the obstruction volume, is I've got Barr just, almost wholesale, dismissing the counterintelligence aspects of this and focusing only on criminality, and then he switches over on the obstruction side and says: "Yeah I'll, I'll, It's a difficult call, I'll make it. There's there's nothing there either." So that that clouds everything that Barr says, to me, is that he's he's going out of his way to use a simple criminal metric when it's not called for.

Harry Litman [00:33:41] And I'll say one other point about all the obstructive stuff, he does try to offer these defenses that seem out of place with what Mueller himself found about Trump's state of mind about some of it having been open and notorious. But Mueller draws a clear distinction between a first set of acts that were in public, but then, then there's a whole second round of things where we really do see Trump trying to influence things behind the scenes pushing again to try to fire Mueller himself, stuff that really, you know, basically just seems like classic obstruction and no other way to account for it, and Mueller says as much. Well look this is a tough question but I mean the Attorney General for the United States is coming in for some pretty severe criticism here. Any thoughts about what's going on? You know why, if you think he's not sailing the ship straight what's motivating him? Anybody have surmises there?

Carol Lam [00:34:40] I've tried to do a little more reading on Bill Barr's history,, and you know I'll say one thing for for Bill Barr, he's been consistent in his, in his views about the strength of the, of the executive branch and the powers of the presidency. He believes in such an almost unbounded power of the presidency, that's actually a little frightening the way it's playing out. And as he nears the end of his career I wonder if he's sort of saying "This is it. I'm in this for you know--" what his view of the importance to the nation. I don't have any way of telling whether he feels personally fond of Donald Trump or not. But I think he's personally fond of his own views.

Harry Litman [00:35:21] And of Article 2.

Carol Lam [00:35:23] And of Article 2, and..

Harry Litman [00:35:24] To clarify you're thinking he feels like he needs to do this to leave a constant, to leave executive power not weakened as it would be if...

Carol Lam [00:35:32] And in fact strengthened right. I mean I think that he's frustrated every time he perceives a weakening of the executive power and he's taking every opportunity he can now to try to strengthen it.

Harry Litman [00:35:46] Frank, what, any thoughts?

Frank Figliuzzi [00:35:47] Yeah yeah that's my that's my read pretty closely, is we're looking at someone who sees the executive powers of the president as a rising above the other two branches of government. I think he actually thinks that the president is, you know, they may be equal, but the executive branch is more equal than the others. And here's the problem with that: he's married up that that long standing legal philosophy with a guy, as president, that I'm not sure he wants to partner with. It's like somebody saying you know, "I've got a date for the dance tonight. I don't really like her but I love the band that's playing." So you know, he's, he's, he's, he's in for this for his for to promote a legal philosophy. And, and the problem is the Emperor President, that, that this may result in, is not someone that's going to serve us well.

Jennifer Rodgers [00:36:38] And here's the other problem. It makes you worry about the next couple of years. I mean you know, yes he's the attorney general, he's appointed by the President. I mean that's the very reason for the special counsel regulation in the first place. Right? Because it was acknowledged that if there needs to be a criminal investigation of the President it can't be the Attorney General and Department of Justice who does it. And so it just it makes me worry about the next couple of years. You know, we had some pushback on the president by Jeff Sessions even, and certainly Rod Rosenstein. Are we going to have any of that? Or is anything the president wants to do and wants to see going to just be handed over willy nilly to the president by the Department of Justice? That's very concerning especially when you start to think about like counterintelligence issues like Frank was discussing earlier.

Harry Litman [00:37:24] Now we move into Congress. Does the fact of no crime established, basically make clear sailing for Trump?

Carol Lam [00:37:33] Whether criminal charges could be brought against Trump after he leaves office? Interesting point, but I'm not sure anyone really cares after Trump has left office. There's no criminal prosecution of the President while he's in office, the Democrats do not have the Senate, so they could start impeachment proceedings. But you know it's probably not going to end up being successful and I think you see that debate going on right now among the Democrats. So, where we are really and I think the President is probably focused on this as well, where we really are is the is the next election. That's, that's where the debate's going to be and whether the American people care enough about the fact that their president has engaged in this kind of conduct and frankly whether, whether Republicans secretly really care more than they're letting on. I think that's going to be the issue.

Jennifer Rodgers [00:38:24] Think about this though, because the report did talk about cases that were referred and that were redacted that we don't know what they are, one of those though undoubtedly is the inauguration case, the, the investigation into the inaugural committee, which we know is going on in the Southern District of New York. We also, of course, still have the campaign finance matter that they already implicated the President in. Are those things going to continue to percolate? What are we going to see out of some of these offices that took over some of the Mueller cases, or are just looking to do their own cases including state actors like the New York attorney general. You know, if there is a continued kind of drumbeat of "OK,

maybe we can't indict him but the president is a criminal." Is that going to kind of change the calculus? Can he really turn the page on all of this even after the Mueller Report is done.

Carol Lam [00:39:10] All right, but don't you worry a little bit that it all rolls up to Bill Barr again, at least as far as the federal cases go and remember his chosen deputy attorney general was, has never been a prosecutor. So Bill Barr is keeping control over the prosecutorial decisions at the Department of Justice. So that concerns me a bit.

Harry Litman [00:39:30] Yeah, although I think it's not like you're saying, Jen, that there will be any, we know there won't be an indictment of the President, including from the SDNY, a drumbeat as you say, you know just, just, until he's out of office, it's you know. he'll be being investigated in ways that seem serious if only for say the Trump organization or that kind stuff.

Jennifer Rodgers [00:39:49] Could be. Although Carol's point is, is that going to come out in the public eye right?

Harry Litman [00:39:53] Right. You're right. Frank?

Frank Figliuzzi [00:39:54] So look, the Attorney General's handling of this, his mischaracterization of, of Mueller's findings, and the Mueller Report are going to make it extremely difficult for Congress to engage in their true oversight function, and without the public thinking that this is one sided that they have only one agenda to take out a president. But nonetheless because of these very reasons we've decided that the Attorney General is actually going to, going to kind of control even the Southern District and other prosecutive districts. We need Congress to do this. We need them to hold hearings. We need the public to hear on their evening news Don McGahn saying "I was ordered to lie, I was ordered to remove the special counsel." We need this to come out. And then, the other facts in other cases in other districts still need to be aired out because we do have a president who's acting inappropriately and the American people need to make that decision.

Harry Litman [00:40:52] Well what about the counterintelligence piece, which we probably won't be hearing, having public hearings about. How does that go and will we ever even know when it's reached a conclusion.

Frank Figliuzzi [00:41:05] We may not. But we can't forget that this whole thing started with a classified Russian counterintelligence case. And that Andy McCabe, as acting director of the FBI, made a decision to add the President's name to the title of that counterintelligence case, to this day we don't know if the president's name has been removed from the counterintelligence side of this case and the House and Senate intelligence committees are owed a briefing by the FBI on the counterintelligence findings in this case. And I have some confidence left, in the House and Senate intel committees, that when they hear this and demand updates the right things will happen. But rest assured the counterintelligence division of the FBI is still at work trying to determine who, if anybody got co-opted, recruited. Who on the Russian side is still

operating inside the United States and moving forward, whether we still have any measures in place to stop this from happening again.

Harry Litman [00:42:08] Fascinating. What what crazy times we live in. I'll just add that I was really struck by Mueller's point that one of the things he was doing was preserving evidence while it was fresh. So obviously contemplating that this whole package would be handed off for a potential prosecution and what could that mean? Only a prosecution of the President after he's left office. Normally, this is the time where we take a question from a listener and answer it in five words or fewer. I propose we do something a little bit different, because we like everyone else has been about the business of rolling up our sleeves and wading through the 400 page report. I wonder if there's anything that you, each of you, noticed in there that either surprised you or struck you as inordinately significant or maybe that in the last three days of frenzied cable coverage nobody has noticed yet? Just any little nugget that you care to highlight.

Jennifer Rodgers [00:43:14] I was struck by the one piece, the factual piece that was new which was this whole Corey Lewandowski thing, where he enlists Corey Lewandowski who's in the private sector to help him get out from under the Mueller investigation by trying to get him to go to Sessions and have Sessions shut it down basically. And that was so interesting because first we didn't know about it. But secondly because it really showed the President's intent. And Mueller points this out he says: So the investigations going on the president wants to undermine it. He starts to do that directly with the Department of Justice at first, right? And that's what you would think he would do. He doesn't have a lot of subtlety this president. So he goes straight to Jeff Sessions and others and says "What can you do about this problem." And then people start telling him you know you really can't do that. That looks really terrible. So what does he do. He goes behind everybody's back outside of the White House outside of the government pulls in an old loyalist of his and says "You go do it for me." And the way that Mueller kind of describes how this happened and points to this in the intent section evaluation really demonstrates he says, and I think this is just such a great point, it'd be a great jury point, right, if you were arguing to a jury. He knows exactly what he's doing, because he goes the direct route of first gets shut down, and says "You know I still need this to happen so I'm going to go around about way and make it happen another way." I mean the intent is so glaringly clear there and I thought that was just a nice little nugget that if you were arguing you know you really would emphasize it, and the jury would be kind of nodding along with you right. "Yeah I see that I see how that happens."

Carol Lam [00:44:51] I was surprised to read, in black and white, in such detail about the president trying to create evidence and prevent evidence from coming to the fore. So, he instructed K.T. McFarland to write a memo saying things that weren't true.

Jennifer Rodgers [00:45:09] And Don McGahn.

Carol Lam [00:45:09] And Don McGahn. And he didn't want Don McGahn taking notes. And he instructed Rod Rosenstein, we of course knew about that, to write a memo explaining why Jim Comey had to be fired. And, he instructed people not to turn over emails. And the reason this

surprised me, was because in his confirmation hearing Bill Barr was asked "At what point would you say the President has committed a crime?" And I think he pretty clearly said "If he tries to keep evidence from being produced, if he interferes with evidentiary collection, that would be a crime." And then Bill Barr came out and said I don't see any obstruction of justice. So that was actually the biggest surprise to me.

Frank Figliuzzi [00:45:54] OK. First from the counterintelligence lines that I tend to view the world through, the level of detail that is in here, in the report, about the degree to which Russia tried very strongly to interfere with our election process was, was really eye opening. And for the upcoming election cycle, we're talking about Russians in the report who had targeted local, county and state registrar of voters. I mean, they are trying every which way they can to get inside our election process. But I also want to point out a nugget that I found in Appendix C that I think would be helpful for Congress to kind of reread as they struggle with what they should do as representatives of the American people. I see a redaction on page, starts on C-one but the redactions on page C-two in appendix C, and it has to do with, if you look at exactly what comes before the redaction and immediately after the redaction, I think we're hearing the voice of the American people in the form of the grand jurors. And here's what I mean, in the paragraph before the redaction, Mueller is saying "We, we got this give and take with the President's attorneys. He's refusing to do this in person. I get his written responses. I tell them that the written responses are inadequate. They're not going to work. I need him in person." And the last words before the redaction are: "The president declined." Then we have a redaction for grand jury purposes. The next sentence is: "Recognizing that the president would not be interviewed voluntarily, we considered whether to issue a subpoena for his testimony." I read that as the grand jurors saying and these are these are our neighbors, these are people just selected for for jury duty, saying "We've lived and breathed this case. We, we don't have it yet. We've got to hear the President. Where is he? Why isn't he in front of us? Why hasn't he been interviewed in person?" And they need more from this president. That tells me that Congress should be thinking about whether the American people need to hear more about this case and whether or not Mueller was so constrained that he couldn't make the call.

Harry Litman [00:48:02] That's really great. And of course I don't see it ever happening right. At least with Trump raising his right hand. Well, I would also like Carol was really struck by that McFarland episode. I'll just had two things about it. First, it's a classic obstruction, unless you're Rudy Giuliani. He basically was saying "Do this, write, draft the emails saying this thing about President, and I'll let you be the ambassador to Singapore." At least that that was the... Then McFarland not knowing one way or another, knows enough, about Trump to decline to do it. So you know the feelings of the troops. The other detail that really was vivid to me: I had known that Sessions on occasion, at least once when he was browbeaten so badly by Trump offered to resign, but it turned out that every meeting that Sessions went to the White House as the Attorney General, he carried a resignation letter in his pocket. That was a little nugget to me.

Harry Litman [00:49:02] OK. That is all we have time for on today's Talking Fed. So much to try to unearth in the Mueller Report.

Harry Litman [00:49:11] Thank you very much to Carol, Jennifer, and Frank for a fantastic discussion of the Mueller report and of this particular roles of Bob Mueller and Attorney General Bill Barr. And thank you very much, the listeners, for tuning in to Talking Feds. If you like what you've heard, please subscribe to us on Apple podcasts or wherever you get your podcasts. And please take a moment to rate and review this podcast. Talk with us on Twitter at @TalkingFedsPod. You can find out about future episodes ask us questions and tell us what you want to hear about next. And you can also check us out on the web at Talking-Feds-dot-com. Submit your questions to questions-at-Talking-Feds-dot-com, whether it's for five words or fewer or general questions about federal prosecutorial practice, for our Sidebar segment. Thanks for tuning in. And don't worry as long as you need answers. The Feds will keep talking.

Harry Litman [00:50:17] Talking Feds is produced by Jennie Josephson, Dave Moldavon, Anthony Lemos and Rebecca Lopatin. David Lieberman is our contributing writer. Production assistance by Sarah Phillipoom. Thanks to Mark McLemore from Arizona Public Radio and to Cover Edge in La Jolla for recording this episode. And thanks to the incredible Philip Glass who graciously lets us use his music. Special thanks to Toni Trucks for her discussion of federal agencies in our Sidebar segment.

Harry Litman [00:50:51] Talking Feds is a production of Dalito LLC. I'm Harry Litman. See you next time.