

TF 32: McCastrophe

Harry Litman [00:00:06] Welcome to Talking Feds Now. A special breaking news episode of Talking Feds, a prosecutors roundtable that brings together some of the best known former Department of Justice officials for a dynamic discussion of the most important legal topics of the day. And today Friday the 13th at the Department of Justice we have the breaking news that, well we're not exactly sure, that there is a big question mark at best looming over the proposed indictment and prosecution of Andrew McCabe the former deputy director of the FBI who has famously been vilified by the president of the United States in a series of tweets that have accused him of everything from being a liar to committing treason. We're going to be talking about what has happened in the McCabe prosecution which right now looks to be an embarrassing debacle within the department and what might be happening next.

Harry Litman [00:01:10] I'm Harry Litman. I'm a former United States Attorney and Deputy Assistant Attorney General and also a Washington Post columnist and I'm joined today by three veteran cracker jack prosecutors who have vantage points onto exactly what's happening in this unusual situation. First we have Glenn Kirschner a long time assistant U.S. attorney in the very office where McCabe's prosecution is pending the District of the District of Columbia. Glenn welcome.

Glenn Kirschner [00:01:44] Hey, Harry. How are you?

Harry Litman [00:01:46] I'm good. Do you know the prosecutors who have been reported to be involved in the McCabe case?

Glenn Kirschner [00:01:54] I do. There was a prosecutor formerly on the case, his name is David Kent. I know him we had a case in common back when I was in a AUSA in D.C. J.P. Cooney is on the case presently. He came in after David left, JP was one of the homicide prosecutors that I had in my homicide section when I was chief. So these are very good honest ethical dedicated people who, you know, I will tell you if they have heartburn with the righteousness of this investigation I would expect them to speak up.

Harry Litman [00:02:23] All right. We're also joined by Mimi Rocah well-known to listeners of Talking Feds. Longtime assistant at the Southern District of New York where she held multiple supervisory positions. And today a Criminal Justice Fellow at Pace University. Welcome, Mimi.

Mimi Rocah [00:02:44] Thanks Harry.

Harry Litman [00:02:46] And finally Barb McQuade also a stalwart on Talking Feds a longtime assistant and then the United States attorney in the Eastern District of Michigan. Look, let's dive in. There's a lot of experience between us but this is a very unusual situation. Let me just start right there. How strange--if there is-- if the grand jury as has been reported but not confirmed came back after a long absence yesterday, convened, was asked to indict Andrew McCabe and 12 out of twenty three sitting grand jurors did not do it. They they refused to do it. How unusual would that be based on your sort of experience? Let's start with you Barb. In your many years as assistant U.S. attorney. How often did that occur?

Barb McQuade [00:03:44] Highly unusual. Harry I recall it happening just one time and even that one time it was kind of an aberration. It was a brand new grand jury with a brand new AUSA, federal prosecutor, who didn't understand that they could rely on hearsay evidence in the grand jury and then the very next day they did return a true bill, an indictment so highly unusual. And I think not surprising in light of the fact that the standard the grand jury is is probable cause and a prosecutor typically does not bring an indictment unless he or she believes he can prove the case at trial beyond a reasonable doubt. So there have been significant disconnect there.

Harry Litman [00:04:21] Yeah. Yeah I mean just to underscore you you have 12 people saying it's, you know, probable cause. But that's going to be a proxy for a unanimous 12 instead of the 23 of the grand jury convicting. Mimi, how about you? How often have you come across it?

Mimi Rocah [00:04:39] Yeah. In my 16 and a half years as a prosecutor in the Southern District I think I saw it happen twice and I don't remember the details but it's extremely extremely rare.

Harry Litman [00:04:52] And right away when it happened I assume there was all kinds of scrambling and kind of an automatic crisis within the office. Yes? What do we do now?

Mimi Rocah [00:05:02] Oh yeah, before the prosecutor even got back to the office, I think word had gotten back to the office that this had happened. Yeah. There was immediate scrambling. You know, there might have been a few cases more than that where prosecutors thought that the grand jury wasn't going to vote in favor in the indictment return a true bill and they pulled the indictment. They said you know we're not going to have it voted on because they could see that the grand jury was really struggling with it. And then you know that happens sometimes and then you go back and you try to strengthen your case and work on your investigation so that that is a possible development here as well.

Harry Litman [00:05:44] All right. And we know grand juries differ in different jurisdictions. I was in four offices. The only time it ever happened to me, not to me, but I knew about it and the office was when I was in San Francisco and it was a sort of notorious prosecution that you know involved an artist. So you you thought that might have had had something to do with it. Well here the District of Columbia is known for having a more liberal grand jury and jury base than say the Eastern District of Virginia across the river. How often--you were in that office many years Glenn--how often did it happen there?

Glenn Kirschner [00:06:24] I've seen it happen a little bit more frequently than Barb and Mimi only because I think of our unique jurisdictional mandate in D.C. because we do all of the federal prosecutions and we do all of the local prosecutions in D.C. what people would ordinarily think of as state prosecutions. So you know and because in Superior Court which is the local side of our practice we bring anywhere between 12000 and 20000 prosecutions every year depending on the year. We occasionally have a no bill and where we see no bills, it's when the the prosecution is righteous we believe we have the right person and we believe we have enough evidence to convict. But it's not overwhelming evidence. And then what you see is a case where you have maybe an unusually sympathetic defendant and a set of facts that sort of have some of the equities going the defendant's way. Just real quick for example we've had a number of cases where hospital security guards would restrain a patient and they would do it wrong. They would do it

contrary to procedures and protocols that they would were taught and the patient died and then we would investigate in the grand jury to see whether there would be homicide charges. And even though we believed there was not only a crime committed but enough evidence to persuade both the grand jury and a trial jury, we thought we had a reasonable likelihood of success on the merits. The equities were such that we couldn't convince enough grand jurors that it was a case that ought to be indicted. So we lived with the grand jury's decision contrary to the popular saying we can't indict a ham sandwich if we're doing our job right. We can only indict a case that is adequately supported by the evidence.

Harry Litman [00:08:10] Yeah. Now you've mentioned a couple of times as has everybody we thought that a conviction was probable. The reason that comes up is we are ethically bound not to bring a case that we asked to which we don't think conviction is probable. It's not enough. It's necessary but not sufficient to think the defendant has done it and is guilty. But you have to look at your evidence and if your evidence doesn't seem to make a conviction probable you're not allowed to bring the case. Any other thoughts Mimi about you know what what might have turned the grand jury against the case here if indeed they returned just now a no bill.

Mimi Rocah [00:08:49] Well I mean I think you have to look at it in the context of some other things that we're hearing about right now. If you were reporting, you know, one of which is that at least one witness who testified before the grand jury basically said that they didn't believe that McCabe had the intent to lie when you know, which is a key element of this kind of charge and that essentially you know because he was authorized to speak to the press in his role during the underlying acts he wouldn't have had to lie about that when asked about it by DOJ investigators and so he didn't have that intent. You know putting aside what I think about that, I mean, if you're . grand juror and you hear that from a witness if that is in fact true that someone said that that that could put a damper on the prosecutors ability to get the case and you know in general I mean I think most grand jurors probably would have to live in a hole to not have heard the president's criticisms very public criticisms of McCabe from day one and calling for his prosecution and really outrageous ways which would give I think anyone pause about the motivation of this prosecution. So I think you know those things all could play a factor.

Harry Litman [00:10:17] Yeah. Now. So just to underscore he was legally authorized. We know that. And so he would say he didn't have a motive. It's not an element of the crime but still not having a motive makes it seem less likely he would he would lie. But what about all this, you know the whole sort of fusilade of nasty tweets from the president, would the grand jury have heard that Barb? Is that something they would know just because they listen to the news outside or would that have been something that would have been part of the prosecutor's presentation?

Barb McQuade [00:10:51] No I doubt it would be part of the prosecutor's presentation. I think it would be improper for them to consider that but I wonder to what extent they're aware of it. It's been all over the news. It would be difficult to ignore. And so I don't know and I don't know to what extent it has impacted the decision of the prosecutors here. You know one thing that I would hope that they have heard evidence of if it were my case I would present evidence of is the fact that Andy McCabe actually recanted. And I don't know how much time had passed but ultimately went back to the investigators and said I think I made a mistake and got it wrong. You know I'm not sure I agree with your Mimi's assessment of the motive aspect of it because I think that it's possible that even if he was authorized to directly to speak to the media, it's possible that his motive was something

else. Like his motive was to protect himself from embarrassment about you know violating FBI policy about discussing an ongoing investigation. But I do think this aspect of recant--ordinarily when you're prosecuting a case of perjury or false statements, if the person recanted within the same interview that is considered a defense. Now he recanted sometime later not in the same interview but I think fairly shortly after he made the statement and so I would hope the grand jury heard about that and it could be that that fact is what has concerned them about this intent to lie.

Harry Litman [00:12:23] Yeah I think it was two days after after at least the second statement. So Glenn, you know these guys, is it fair to say that the grand jury would've heard about these arguably exculpating facts the recantation later, the absence of motive, but they wouldn't have heard about all the president's tweets unless they found out themselves. What do you think was in front of them?

Glenn Kirschner [00:12:45] Yeah I think that's that's a big ticket question because we have a policy that governs our grand jury practice whereby we're required to put significant Brady information before the grand jury. That is information that tends to exculpate or cut against the targets or the subject or the defendant's guilt. So I actually have a feeling knowing our grand jury practice in D.C. the way I do. We grand jury cases exhaustively and it may be that way at all U.S. Attorneys Offices Barb and Mimi would know better than I. I only know what we do in D.C. And you know we grand jury every witness sometimes twice. So and we will put lots of information before the jury that we think is not particularly helpful or supportive of an indictment because we try to do that out of a sense of fairness to the target. So I have a feeling that the prosecutors aired on the side of putting more information before the grand jury that probably included some of the president's shenanigans which you know they sure look like at a minimum overreach at a maximum a vindictive prosecution being orchestrated by the president through the attorney general and you know right down to the U.S. attorney's office in D.C. I have a feeling the jury had a lot of that kind of information before it which could very well have led to a sort of grand jury nullification issue, where they're like, "Listen, McCabe is generally a good man who has put a lot of time into serving this country honorably. He may have engaged in some missteps that may have actually been criminal offenses that some of the lies he told. But on balance we do not feel like this warrants a criminal prosecution." That that wouldn't surprise me if that ends up being their conclusion.

Harry Litman [00:14:45] And remember the timeline here. This is unusual. You normally give a full investigation to a grand jury and then ask them when you know you keep them there till you tell you're ready to ask for an indictment. Here they've been gone for a long time. So some of the details might have been distilled and also they might have been you know specifically following some of the, you know, what was national news about the way Trump was acting. So Barb you've been in charge in situations although not as quite as embarrassing. What do you think it's like now for the U.S. attorney Jesse lieu or just within the office? Anybody actually.. You know if they gave a no bill yesterday, what's happening inside the U.S. Attorney's Office for the District of Columbia you know this evening?

Barb McQuade [00:15:35] Well there is a provision of the Justice manual. I didn't know this because we didn't have to encounter this problem when I was U.S. attorney. But it says that if you get a no true bill before you go back either to the same grand jury or different grand jury and ask them for an indictment the U.S. attorney herself has to approve that.

Harry Litman [00:15:54] Right.

Barb McQuade [00:15:54] So I think that the U.S. attorney should be asking herself some hard questions if that is what has happened here. And you know I think a couple things to think about. I heard Glenn mentioned the concept of vindictive prosecution. I don't know that that's a bar here. I think vindictive prosecution plays a role when someone is attempting to exercise a legal right and in retaliation you prosecute them. I think we have a very mean spirited president who wants to prosecute for political reasons. I'm not sure that's enough to bar it but there is something else in the U.S. attorney's manual now called the Justice manual, you know, that we've all dealt with. One of the first questions we've talked about is has a crime been committed and you believe you could prove it by admissible evidence to obtain to sustain a conviction? But then you're also supposed to think about is there a substantial federal interest here. And I suppose one could say that deterrence of others especially by someone who has a leadership role in the FBI is a substantial federal interest. But you're still not done. There's one last question you have to ask yourself before you bring a case and that is, "Is there some other adequate legal remedy like a civil case or an administrative decision?" And in this instance where he has been terminated and his pension has been taken from him. Is that not an adequate remedy.

Harry Litman [00:17:10] By the way I would say not typically, I would say invariably. I've looked. I can't. I don't think there's any case, at least that I'm aware of, where you know you find lack of candor in an OIG report and it actually leads to criminal charges. Usually at worst someone has to resign. Well what about then--OK--So Jessie Liu it's now on her des officially--but what about the whole dynamic between her and Main Justice? McCabe's lawyers went to the deputy attorney general. So this already went all the way up and I'm sure Main Justice is sensitive to it just because of the role of the president. What's your sense Glenn or Mimi of kind of what's going on at Main Justice and if there's any kind of either kibbitzing or actual conferring involving you know the the deputy or even Bill Barr.

Glenn Kirschner [00:18:09] I can jump in and say at a minimum there's probably a departmental kibbitzing. You know I served with Jesse both on the line when she was first in our office and then she was the last of my, I think 10 U.S. attorneys under whom I served. And you know she's a a good no nonsense straight shooter, however. and I know Barb said that the protocol is that now it gets kicked back to her in the event it was a no bill and she can decide whether it should be represented. But I think the kibbitzing is really going on fast and furious and this is really more of a decision that's being made at Main Justice by Barr or the DAG rather than being made by Jesse, at least that's my suspicion.

Harry Litman [00:18:52] What do you think, Mimi, you agree?

Mimi Rocah [00:18:53] Yeah I totally agree. I mean I cannot imagine that the U.S. Attorney at this point could or frankly would want to make a move one way or the other without DOJ sort of at least signing on and it's more likely that DOJ is actually going to be the ones making the decisions. And I mean this at this point is sort of you know a bag that the Department of Justice as a whole is going to have to carry not just the U.S. Attorney's Office itself. So you know if I were her I would I would frankly want it to be known that they are the ones directing it if they are indeed doing that. And I think McCabe's lawyers did a really tactically smart move today by writing that letter and trying to flush out something that's really not a public process, the grand jury, and you know trying to force a more out in the open. I don't know whether they'll get an answer because you know what goes on in

the grand jury is secret. But the fact that they're even raising these questions in the public in the press saying, "Hey DOJ we heard this happened. What did happen and what grand jury you're trying to go to? Are you shopping for a grand jury? That's really smart lawyering.

Harry Litman [00:20:12] Right, with with you know national news over their over their shoulder. And to your point, Mimi, you know Jesse Lou and Glenn also has had about the worst 10 days of any U.S. Attorney in memory. Greg Craig was her case and he was acquitted. There was a mini black eye involving a prosecution of hate crimes in her office and now this. Let's just close for now and there's no closing on this because we don't know exactly what's happening. But as things stand and if it's a no bill, how big a black eye is this for the Department of Justice and what sort of lasting impact? I'd like to hear everybody's thoughts about that Barb.

Barb McQuade [00:20:54] Well I guess it depends on what ultimately gets publicly disclose matters occurring before the grand jury are supposed to be secret. But I guess it does seem like it's likely to come out if this happens and maybe you know the grand jurors maybe someone on the grand jury themselves will talk. I don't know. I do think it's a black eye because it's in many ways it's the way it's the reason we have a grand jury to serve as a buffer between the accused and the government when they think there is overreach. But boy I never saw in my career anything I thought was overreach which is why I guess we didn't have those no true bills. It's good to see that the system works. It's good to see that there is a check and balance on overreach by the executive branch. But I would be very sorry if it's come to that.

Harry Litman [00:21:39] Mimi?

Mimi Rocah [00:21:40] So yeah I mean I again I'd like Barb want to see what happened but it seems to me that really no matter what happens here whether they don't get a true bill or whether they do get the indictment returned. You know this this is a stain on the Department of Justice because it really goes back to what we're talking about beginning about Trump and the very you know inflammatory statements that he made in the past calling for McCabe's prosecution. So whether or not you think McCabe should be prosecuted, Trump tainted it from the beginning. Whether there is a defense, a vindictive prosecution or not in the general public eye of having faith that the justice system is bringing cases for the right reasons, this is a huge stain and that's going to be true whether, as Barb said I'll be relieved if the system works, but you know either way it's the fact that the case is trying to be brought just makes, once again, the Department of Justice look like an arm of a very politically vindictive president.

Harry Litman [00:22:41] What do you think, Glenn?

Glenn Kirschner [00:22:43] Yeah I don't think I would call it a stain on the Department of Justice. But if the grand jurors no billed this case then I think it's a stain on Bill Barr and by extension Donald Trump. Not the whole department. I think we we all know that there are 100,000 plus employees over there with their heads down and they're doing the people's work honestly and ethically every single day. And there is this rot at the top that hopefully is not making its way down and permeating the ranks. So I think it would be a stain on Bill Barr's decision and on Trump's heavy handedness in the way he just completely berated McCabe in public. But you know it also does seem like maybe the grand jurors are performing the checks and balances on governmental power that the Republicans in

Congress steadfastly refuse to carry out. So I kind of agree with Barb that the system's working here and you know I only wish that some in Congress would catch the checks and balances fever.

Harry Litman [00:23:50] Yeah. So really interesting. I think, well I'm kind of putting in my my lot with Mimi though because this was so discouraging as a former prosecutor. We do know that but people in general don't. And I just think it's bound to go down as being inseparable from the whole torrent of charges from Trump and it'll look like the department as a whole, you know to the root and branch, were kind of doing his bidding. We don't. We can't see it that way. It's almost inconceivable that the infection would have gone to the line prosecutor level but I think that's part of the terrible impact of these two years of assaults on on the federal justice system and all the institutions I think it's a pretty big black eye because it's not simply like a no bill on a normal case or a no bill in a high profile case it's going to be a no bill probably--It'll depend as Barb says about what comes out what grand jurors say what--But I think it will be taken as a no bill based on supposition that this was you know a vindictive prosecution by no less than the president of the United States and if that's true if that's the kind of legacy of this case you know that's something that really redounds to the detriment of all of the hundred thousand you're talking about and you know we're going to have to have some time to clear out the stalls after after Trump leaves.

Harry Litman [00:25:30] All right. This is a topic that's going to have dramatic developments over the next couple of days. I'm sure as Barb, Mimi, and Glenn all emphasize, there's a lot of scrambling going on at both the U.S. Attorney's Office for the District of Columbia and Main Justice in conjunction and the possibility that everyone in the department is aware of this being one of the bigger black eyes in many many years. All right. We will leave it there and with everyone else await the news of the next few days maybe it will prompt a another Talking Feds Now. But for now we're signing off. Thank you very much. To Mimi, Glenn, and Barb and thank you very much listeners for tuning into this special episode of Talking Feds Now. 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 or even tell a friend about us. You can follow us on Twitter at Talking Feds pod to find out about future episodes and other Feds related content.

Harry Litman [00:26:43] And you can also check us out on the web at Talking Feds dot com where we have full episode transcripts. Thanks for tuning in on this Friday the 13th. And don't worry as long as you need answers. The feds will keep talking. Talking Feds is produced by Jennie Josephson, Dave Moldovan, Anthony Lemos, and Rebecca Lopatin. David Lieberman is our contributing writer production assistance by Sarah Philipoom. Thank you as always to Mr. Philip Glass who graciously lets us use his beautiful music. Talking Feds is a production of Dalito LLC.

[00:27:28] I'm Harry Litman. See you next time.