
From: Steve Bannon <[REDACTED]>
Sent: Saturday, June 23, 2018 12:44 PM
To: jeevacation@gmail.com
Subject: Fwd: Re:

Big deal

Begin forwarded message:

Resent-From: <[REDACTED] <mailto:[REDACTED]>>
From: "Rivkin, David" <[REDACTED]>>
Date: June 23, 2018 at 8:14:49 AM EDT
To: Steve Bannon <[REDACTED] <mailto:[REDACTED]>>
Subject: Fwd: Re:

Here it is.

Sent from my iPhone

Begin forwarded message:

From: "Grossman, Andrew M" <[REDACTED]>>
Date: June 23, 2018 at 12:56:55 AM EDT
To: "Rivkin, David" <[REDACTED]>>
Subject: Re:

Mueller's Fruit of the Poisonous Tree

It makes no difference how honorable he is. His investigation is tainted by the bias that attended its origin in 2016.

By

David B. Rivkin Jr. and

Elizabeth Price Foley

June 22, 2018 6:38 p.m. ET

414 COMMENTS <https://www.wsj.com/articles/muellers-fruit-of-the-poisonous-tree-1529707087#comments_sector>

Special counsel Robert Mueller's investigation may face a serious legal obstacle: It is tainted by antecedent political bias. The June 14 report from Michael Horowitz, the Justice Department's inspector general, unearthed a pattern of anti-Trump bias by high-ranking officials at the Federal Bureau of Investigation. Some of their communications, the report says, were "not only indicative of a biased state of mind but imply a willingness to take action to impact a presidential candidate's electoral prospects." Although Mr. Horowitz could not definitively ascertain whether this bias "directly affected" specific FBI actions in the Hillary Clinton email investigation, it nonetheless affects the legality of the Trump-Russia collusion inquiry, code-named Crossfire Hurricane.

Crossfire was launched only months before the 2016 election. Its FBI progenitors—the same ones who had investigated Mrs. Clinton—deployed at least one informant to probe Trump campaign advisers, obtained Foreign Intelligence Surveillance Court wiretap warrants, issued national security letters to gather records, and unmasked the identities of campaign officials who were surveilled. They also repeatedly leaked investigative information.

Mr. Horowitz is separately scrutinizing Crossfire and isn't expected to finish for months. But the current report reveals that FBI officials displayed not merely an appearance of bias against Donald Trump, but animus bordering on hatred. Peter Strzok, who led both the Clinton and Trump investigations, confidently assuaged a colleague's fear that Mr. Trump would become president: "No he won't. We'll stop it." An unnamed FBI lawyer assigned to Crossfire told a colleague he was "devastated" and "numb" after Mr. Trump won, while declaring to another FBI attorney: "Viva le resistance."

The report highlights the FBI's failure to act promptly upon discovering that Anthony Weiner's laptop contained thousands of Mrs. Clinton's emails. Investigators justified the delay by citing the "higher priority" of Crossfire. But Mr. Horowitz writes: "We did not have confidence that Strzok's decision to prioritize the Russia investigation over following up on [the] investigative lead discovered on the Weiner laptop was free from bias."

Similarly, although Mr. Horowitz found no evidence that then-FBI Director James Comey was trying to influence the election, Mr. Comey did make decisions based on political considerations. He told the inspector general that his election-eve decision to reopen the Clinton email investigation was motivated by a desire to protect her assumed presidency's legitimacy.

The inspector general wrote that Mr. Strzok's text messages "created the appearance that investigative decisions were impacted by bias or improper considerations." The report adds, importantly, that "most of the text messages raising such questions pertained to the Russia investigation." Given how biases ineluctably shape behavior, these facts create a strong inference that by squelching the Clinton investigation and building a narrative of Trump-Russia collusion, a group of government officials sought to bolster Mrs. Clinton's electoral chances and, if the unthinkable happened, obtain an insurance policy to cripple the Trump administration with accusations of illegitimacy.

What does this have to do with Mr. Mueller, who was appointed in May 2017 after President Trump fired Mr. Comey? The inspector general concludes that the pervasive bias "cast a cloud over the FBI investigations to

which these employees were assigned,” including Crossfire. And if Crossfire was politically motivated, then its culmination, the appointment of a special counsel, inherited the taint. All special-counsel activities—investigations, plea deals, subpoenas, reports, indictments and convictions—are fruit of a poisonous tree, byproducts of a violation of due process. That Mr. Mueller and his staff had nothing to do with Crossfire’s origin offers no cure.

When the government deprives a person of life, liberty or property, it is required to use fundamentally fair processes. The Supreme Court has made clear that when governmental action “shocks the conscience,” it violates due process. Such conduct includes investigative or prosecutorial efforts that appear, under the totality of the circumstances, to be motivated by corruption, bias or entrapment.

In *U.S. v. Russell* (1973), the justices observed: “We may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” It didn’t take long. In *Blackledge v. Perry* (1974), the court concluded that due process was offended by a prosecutor’s “realistic likelihood of ‘vindictiveness’ ” that tainted the “very initiation of proceedings.”

In *Young v. U.S. ex rel. Vuitton* (1987), the justices held that because prosecutors have “power to employ the full machinery of the state in scrutinizing any given individual . . . we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.” Prosecutors must be “disinterested” and make “dispassionate assessments,” free from any personal bias.

In *Williams v. Pennsylvania* (2016), the court held that a state judge’s potential bias violated due process because he had played a role, a quarter-century earlier, in prosecuting the death-row inmate whose habeas corpus petition he was hearing. The passage of time and involvement of others do not vitiate the taint but heighten “the need for objective rules preventing the operation of bias that might otherwise be obscured,” the justices wrote. A single biased individual “might still have an influence that, while not so visible . . . is nevertheless significant.”

In addition to the numerous anti-Trump messages uncovered by the inspector general, there is a strong circumstantial case—including personnel, timing, methods and the absence of evidence—that Crossfire was initiated for political, not national-security, purposes.

It was initiated in defiance of a longstanding Justice Department presumption against investigating campaigns in an election year. And while impartiality is always required, a 2012 memo by then-Attorney General Eric Holder emphasizes that impartiality is “particularly important in an election year,” and “politics must play no role in the decisions of federal prosecutors or investigators regarding any investigations. . . . Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.”

Strong evidence of a crime can overcome this policy, as was the case with the bureau’s investigation of Mrs. Clinton’s private email server, which began more than a year before the 2016 election. But Crossfire was not a criminal investigation. It was a counterintelligence investigation predicated on the notion that Russia could be colluding with the Trump campaign. There appears to have been no discernible evidence of Trump-Russia collusion at the time Crossfire was launched, further reinforcing the notion that it was initiated “for the purpose” of affecting the presidential election.

The chief evidence of collusion is the hacking of the Democratic National Committee’s servers. But nothing in the public record suggests the Trump campaign aided that effort. The collusion narrative therefore hinges on the more generic assertion that Russia aimed to help Mr. Trump’s election, and that the Trump campaign reciprocated by embracing pro-Russian policies. Yet despite massive surveillance and investigation, there’s still no public evidence of any such exchange—only that Russia attempted to sow political discord by undermining Mrs. Clinton and to a lesser extent Mr. Trump.

Some members of the Trump team interacted with Russians and advocated dovish policies. But so did numerous American political and academic elites, including many Clinton advisers. Presidential campaigns routinely seek opposition research and interact with foreign powers. The Clinton campaign funded the Steele dossier, whose British author paid Russians to dish anti-Trump dirt. The Podesta Group, led by the brother of Mrs. Clinton's campaign chairman, received millions lobbying for Russia's largest bank and the European Center for a Modern Ukraine, both with deep Kremlin ties. The Clinton Foundation and Bill Clinton took millions from Kremlin-connected businesses.

No evidence has emerged of Trump-Russia collusion, and Mr. Mueller has yet to bring collusion-related charges against anyone. Evidence suggests one of his targets, George Papadopoulos, was lured to London, plied with the prospect of Russian information damaging to Mrs. Clinton, and taken to dinner, where he drunkenly bragged that he'd heard about such dirt but never seen it. These circumstances not only fail to suggest Mr. Papadopoulos committed a crime, they reek of entrapment. The source of this information, former Australian diplomat Alexander Downer, admits Mr. Papadopoulos never mentioned emails, destroying any reasonable inference of a connection between the DNC hack and the Trump campaign.

Crossfire's progenitors thus ignored an obvious question: If Russia promised unspecified dirt on Mrs. Clinton but never delivered it, how would that amount to collusion with the Trump campaign? If anything, such behavior suggests an attempt to entice and potentially embarrass Mr. Trump by dangling the prospect of compromising information and getting his aides to jump at it.

Given the paucity of evidence, it's staggering that the FBI would initiate a counterintelligence investigation, led by politically biased staff, amid a presidential campaign. The aggressive methods and subsequent leaking only strengthen that conclusion. If the FBI sincerely believed Trump associates were Russian targets or agents, the proper response would have been to inform Mr. Trump so that he could protect his campaign and the country.

Mr. Trump's critics argue that the claim of political bias is belied by the fact that Crossfire was not leaked before the election. In fact, there were vigorous, successful pre-election efforts to publicize the Trump-Russia collusion narrative. Shortly after Crossfire's launch, CIA Director John Brennan and Mr. Comey briefed Congress, triggering predictable leaking. Christopher Steele and his patrons embarked on a media roadshow, making their dossier something of an open secret in Washington.

On Aug. 29, 2016, the New York Times published a letter to Mr. Comey from Senate Minority Leader Harry Reid, saying he'd learned of "evidence of a direct connection between the Russian government and Donald Trump's presidential campaign," which had "employed a number of individuals with significant and disturbing ties to Russia and the Kremlin." On Aug. 30, the ranking Democratic members of four House committees wrote a public letter to Mr. Comey requesting "that the FBI assess whether connections between Trump campaign officials and Russian interests" may have contributed to the DNC hack so as "to interfere with the U.S. presidential election." On Sept. 23, Yahoo News's Michael Isikoff reported the Hill briefings and the Steele dossier's allegations regarding Carter Page. On Oct. 30, Harry Reid again publicly wrote Mr. Comey: "In my communications with you and other top officials in the national security community, it has become clear that you possess explosive information about close ties and coordination between Donald Trump, his top advisors, and the Russian government."

That these leaking efforts failed to prevent Mr. Trump's victory, or that Mr. Comey's ham-fisted interventions might have also hurt Mrs. Clinton's electoral prospects, does not diminish the legal significance of the anti-Trump bias shown by government officials.

The totality of the circumstances creates the appearance that Crossfire was politically motivated. Since an attempt by federal law enforcement to influence a presidential election "shocks the conscience," any prosecutorial effort derived from such an outrageous abuse of power must be suppressed. The public will learn more once the inspector general finishes his investigation into Crossfire's genesis. But given what is now known, due process demands, at a minimum, that the special counsel's activity be paused. Those affected by Mr. Mueller's investigation could litigate

such an argument in court. One would hope, however, that given the facts either Mr. Mueller himself or Deputy Attorney General Rod Rosenstein would do it first.

Mr. Rivkin and Ms. Foley practice appellate and constitutional law in Washington. He served at the Justice Department and the White House Counsel's Office during the Reagan and George H.W. Bush administrations. She is a professor at Florida International University College of Law.

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Best,

Andrew

Andrew Grossman

Partner

Washington Square

1050 Connecticut Ave, N.W. | Suite 1100

Washington, DC 20036-5304

[REDACTED]

[REDACTED] >

bakerlaw.com <<http://www.bakerlaw.com/>>

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<<http://www.bakerlaw.com/vcards/agrossman.vcf>> <<https://twitter.com/andrewmgrossman>>

From: "Rivkin, David" <[REDACTED]> >
Date: Friday, June 22, 2018 at 7:50 PM
To: "Grossman, Andrew M" <[REDACTED]> >
Subject: <no subject>

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