SDNY PROSECUTORS PROTECT TRUMP'S PRIVACY TO ENTER INTO A JOINT DEFENSE AGREEMENT WITH THE RUSSIAN MOB

Whooboy is there an interesting flurry of motions over in the Ukrainian grifter prosecution. Effectively, SDNY prosecutors and (two of) Lev Parnas' co-defendants want to slow him from sharing information with HPSCI. The letters include:

- January 17: Parnas asks to modify the protective order a third time
- January 22: Igor Fruman lawyer Todd Blanche says he has an attorney-client interest in some of what Parnas wants to and has already shared
- January 22: Andrey Kukushkin lawyer Gerald Lefcourt says he just wants a privilege review
- January 23: SDNY says Parnas should not be able to share iCloud information he obtained via discovery without review
- January 24: Parnas lawyer Joseph Bondy makes a quick argument asserting they should be able to share the

information
- January 24: Bondy responds to Fruman letter at more length
- January 27: Blanche responds again, invoking Dmitry Firtash to speak on behalf of unnamed others

The dispute started when Parnas asked to share content that the FBI seized from Parnas' iCloud account and then provided to him in discovery. He listed just 11 Bates stamp numbers in the initial request, but it's unclear what kind of files these are. In response, the lawyer that Fruman shares with Paul Manafort, Todd Blanche, objected to that request, and also asked to "claw back" any privileged materials that Parnas already produced to HPSCI (remember that Victoria Toensing has already complained that Parnas has violated privilege). Blanche makes a dig at Parnas' media tour:

> My obvious concern is that Mr. Bondy's hasty efforts to find a forum (beyond MSNBC and CNN) for someone — anyone — to listen to his client's version of events caused him to irresponsibly produce privileged materials to the HPSCI.

One of the two other co-defendants, Andrey Kukushkin, weighed in — having been alerted by SDNY that, "its filter team identified materials in Mr. Parnas' iCloud account that may fall within a common-interest attorney-client privilege held jointly by Mssrs. Kukushkin, Parnas, and aothers" — and stated that he did not object to Parnas sharing information "if all privileged materials can be removed from Mr. Parnas' iCloud account prior to production to HPSCI."

Having thus cued Parnas' co-defendants to submit complaints, SDNY then weighed in, objecting to

Parnas' request. They invoke two reasons for their objection. The first poses interesting Fourth Amendment considerations; effectively SDNY argues that Parnas' warrant return from Apple includes material that Parnas never possessed (and some material he deleted that only still exists because prosecutors obtained a preservation request).

> The materials at issue include records that, as far as the Government knows, were never in Parnas's possession. For instance, the data produced by Apple includes deleted records (which may only exist because of the Government's preservation requests), account usage records, and other information to which a subscriber would not necessarily have access. The form of the report, which was created by the FBI, was also never in Parnas's possession.
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> [snip]
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> Additionally, to the extent Parnas seeks to produce his own texts, emails, photographs or other materials, he should have access to the content stored on his iCloud account through other means: he can simply download his own iCloud account and produce it to HPSCI (and in fact, it appears he has already done so).
>
> [snip]
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> To the extent that Parnas has deleted materials from his iCloud account, the Government is willing to work with counsel to ensure that Parnas can produce his own materials that are responsive to the Congressional request to HPSCI. To that end, the Government respectfully submits that Parnas's counsel should identify for the Government any specific chats, emails, photographs, or other content Parnas is unable to access from his iCloud

> currently, but whic exist within the discovery that has been produced to him and in his view are responsive to the Congressional subpoena.

I find that stance interesting enough — basically a reverse Third Party doctrine, saying that subscribers aren't the owners of the information Apple has collected on them, at least not in the former that FBI reports it out.

It's the other objection I find most interesting. SDNY prosecutors — including one of the ones who argued against broad claims of privilege in the Michael Cohen — objects because the data from Parnas' iCloud,

> [I]t public disclosure still has the potential to implicate the privacy and privilege interests of third parties and co-defendants.

It then argues that requiring Parnas to specifically request content that he already deleted,

> would also permit his co-defendants to raise any concerns with respect to their privilege or privacy interest prior to the materials' release.

SDNY's prosecutors are arguing that Parnas can't release his own iCloud material because of other people's privacy interests!! As if it is the place for SDNY's prosecutors to decide what HPSCI considers proper levels of disclosure!!

I've been giving SDNY the benefit of the doubt on this prosecution, assuming that as prosecutors they would push back against any Bill Barr attempt to protect Rudy (though not the President). But this alarms me. It seems like SDNY is using Fruman — who is in a Joint Defense Agreement with Rudy — to speak for Rudy's interests.

After making a cursory response to SDNY, Bondy

responded in more detail to Fruman. In it, Bondy makes the kind of argument about the limits of privilege you'll almost never see a lawyer make.

> [T]he burden is on the party asserting the attorney-client privilege to first establish that there was: 1) a communication; 2) made in confidence; 3) to an attorney; 4) by a client; 5) for the purpose of seeking or obtaining legal advice. The part asserting attorney-client privilege has the burden of conclusively proving each element, and courts strongly disfavor blanket assertions of the privilege as "unacceptable." In addition, the merre fact that an individual communicates with an attorney does not make the communication privileged.
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> There are also instances in which the attorney-client privilege is waived, including when the substance of otherwise privileged communications are shared with third parties, when the communications reflect a criminal or fraudulent intent between the parties, when the communications are part of a joint—yet conflicted—representation, and in cases where the parties to a joint defense have become adverse in their interests.

Bondy then goes on to add that HPSCI "does not recognize attorney-client privilege," which may be why, at about the time these letters were breaking, Jay Sekulow was on the floor of the Senate haranguing Democrats for not respecting that privilege (which Sekulow suggested was in the Bill of Rights). He uses that stance to suggest SDNY is making a claim that violates separation of powers.

From there, Parnas goes on to disavow any privilege shared in his brief Joint Defense Agreement with the Russian mob, in part based on discussions about his initial response to the

HPSCI subpoena having been shared more widely.

> Mr. Parnas waives all privilege with respect to the communications he had with Mssrs. Dowd and Downing. Furthermore, the substance of his and Mr. Fruman's legal representation appears to have been shared with third parties, including Jay Sekulow, Rudolf Giuliani, John Sale, Jane Raskin, and others. … As the Court may know, Mssrs. Sekulow, Raskin, and Giuliani are also attorney for President Trump. Mr. Giuliani and the President have interests divergent from Mr. Parnas's wish to cooperate with Congress and the Government. Mr. Parnas believes that his and Mr. Fruman's ostensibly joint representation by Attorneys Dowd and Downing was conflicted and intended from its inception to obstruct the production of documents and testimony responsive to lawful congressional subpoena.
>
> [snip]
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> Here, Attorney Dowd undertaking a joint representation of Mr. Parnas and Mr. Fruman — with the President's explicit permission — constituted an actual conflict of interest at the time and appears designed to have obstructed Mr. Parnas's compliance with HPSCI's subpoenas and any ensuring efforts to cooperate with congressional investigators or federal prosecutors.

Bondy ends by saying it's up to those claiming a conflict to invoke it.

Bondy makes it fairly clear: he believes the privilege SDNY has set Fruman up to object to involves Rudy and Trump, neither of whom are in a position to object, particularly given that if they do, Bondy will argue that Parnas believes their grift might be criminal and therefore the privilege doesn't apply.

So instead of the President and his lawyer claiming that Parnas' release of this material will violate privilege, Fruman does.

> Mr. Fruman has reason to believe that the Production Material contains privileged information belonging to Mr. Fruman and others.

He invokes only the consultation of their shell company, Global Energy Producers, with [Rudy's former firm] Greenberg Traurig in conjunction to substantiate a common attorney-client interest, then nods to more:

> This is but one example, and there are many more, but certainly the privilege issues implicated by the repeated amendments to the Protective Order are far more expansive than the attorney-client relationships identified in Mr. Bondy's letter.

Fruman then complains that he cannot — as Parnas has said he must do — invoke privilege because he's not in possession of the materials (just the taint team and Parnas have them).

The best part is where, still faced with the problem that the people whose privilege is at issue (Rudy and Trump) cannot politically invoke it, Fruman finds someone else whose privilege, he says, has been violated: Dmitry Firtash.

> Mr. Fruman is not the only person whose privilege information is at risk. For example, Mr. Parnas has represented that he was employed as a translator for Victoria Toensing and Joseph DiGenova in connection with their representation of Dymitry Firtash. Clearly, any materials Mr. Parnas received as a translator assisting attorneys in the representation of Mr. Firtash would be protected by attorney-client privilege. And that privilege would be held by Mr. Firtash, the client, not Mr. Parnas.

It’s increasingly clear what Parnas and Bondy are up to: They’re trying to make it politically (and given the OLC memo prohibiting the indictment of the President) bureaucratically impossible to pursue further charges. If everything recent Parnas did was done for the President, he shouldn’t be the only one facing prosecution for it.

Fruman, meanwhile, seems to be the sole member of the Joint Defense Agreement with the Russian Mob who is a party here, trying to prevent his position from deteriorating by speaking for all the affected parties, only without naming Rudy or Trump (presumably backed by the same old pardon promises Trump always uses to get witnesses against him to take the fall).

What’s not clear is what SDNY is up to. Because it sure seems like they’ve used Fruman to protect Trump’s and even Rudy’s interests.

Judge Oetken scheduled a hearing for Thursday to resolve all this. Which may be too late for Parnas’ play.