

PARALLEL TRACKS: PROJECT VERITAS SERVED ON THEIR SUBPOENA STANCE

There's a temporal problem in Project Veritas' initial motion to appoint a Special Master to sort through materials seized from James O'Keefe in a search on November 6.

In one place, it described that, "At 6:00 AM on Saturday, November 6, 2021, the Federal Bureau of Investigation ("FBI") executed a search warrant at Mr. O'Keefe's home." In another, it described that, "On November 5, 2021, at approximately 6:00 AM, the FBI executed search warrants at the homes of two former Project Veritas journalists, seizing their cell phones and other electronic devices." But the very next paragraph describes that the O'Keefe search happened two days after the initial search: "Approximately two days later, the FBI executed a search warrant at the home of James O'Keefe." Then, the letter describes that, "on November 4, 2021 – two days before its search of Mr. O'Keefe's home – the undersigned had accepted service of a grand jury subpoena directed to Project Veritas." Shortly thereafter, the letter says the earlier search happened on November 4, not November 5. "On November 4, 2021, at about the same time that FBI agents finished searching the home of a former Project Veritas journalist."

Even while incorrectly stating that the initial search happened on November 5, the filing (and a subsequent one) don't describe precisely when NYT's Mike Schmidt twice reached out for comment about the searches, a key part of their obviously false narrative that Schmidt had to have gotten tipped off by the FBI.

No Subject

James,

I'm Mike Schmidt, a reporter with The New York Times.

We're preparing a story on the following matters:

- The Justice Dept is investigating the role of PV employees in illegally obtaining a diary kept by Ashely Biden that was published online in Oct. 2020

- Federal authorities on Thursday in New York executed search warrants at two locations associated with PV employees

- Federal authorities in recent weeks have reached out to at least one person who worked at PV to question them about the diary

Do you have any comment on this? Or can you refer me to a lawyer who can comment?

Many thanks

The searches happened on November 4 and 6, at 6AM. I asked Mike Schmidt when he reached out but he didn't respond, though Eric Cochran's motion to appoint a Special Master says Schmidt reached out approximately an hour after the 3-hour search happened, so around 10AM.

The incorrect claim in that initial filing that the first searches occurred on November 5 may be nothing more than a typo, but sorting through the timeline alerted me to a chronological detail of some import that PV may want to obscure. PV got word themselves of the investigation, and reached out to one of the prosecutors involved, Mitzi Steiner, to find out more about the investigation on October 26. After Steiner refused to reveal anything about the investigation, lawyers for PV offered to accept a subpoena the next day, promising they had "material and helpful information" to the

investigation. But after DOJ sent a subpoena on November 4 – almost certainly after the first searches, which targeted *former* PV staffers – PV persistently refused to say whether it would comply with the subpoena.

[T]he Government has repeatedly offered to be flexible about the Subpoena's return date if Project Veritas confirms that it will comply with the requests therein. Project Veritas has repeatedly declined to do so, and similarly declines in its motion here to represent that it will comply.

And after PV repeatedly declined to ask for an extension in response to reassurances they would comply with the subpoena, they used the search on O'Keefe as an excuse to try to get such an extension.

Judge Analisa Torres denied PV's request for an extension, which could have significant repercussions going forward.

There are several implications of this timeline. First, DOJ may believe, with some justification, that by first serving a subpoena on PV in response to their invitation to do so, only to have them equivocate about whether they would comply, they had fulfilled DOJ's requirements to seek alternative resolutions, short of a search. That is, PV's own games may have led to the search on O'Keefe.

The other issue is how this affects PV's ability to claim expansive privilege protections. When PV alerted DOJ that it not only knew of the investigation, but who was leading it, DOJ likely took measures to identify how they had learned of the investigation. That's a good way to identify attempts to obstruct an investigation. For example, after it became clear that Roger Stone was tampering in the Mueller investigation in 2018, Mueller obtained a pen register to learn with whom, besides Michael Caputo, Stone was communicating. That

appears to be what alerted Mueller to how panicked Stone was by the Andrew Miller interview. That, in turn, is something that may have helped them obtain probable cause on the others. In a directly relevant example, for example, DOJ learned that Lev Parnas had deleted his iCloud account, which seems to be one of the things that helped SDNY obtain warrants for Rudy's cloud-based accounts in 2019. When co-conspirators attempt to coordinate stories or delete evidence, it makes it a lot easier to obtain warrants.

As a result, there may be information pertaining to PV's involvement in the alleged theft in three different places. First, I would be shocked if SDNY had not obtained the cloud-based communications of O'Keefe, Eric Cochran, and Spencer Meads. That said, DOJ has already indicated that it knows key communications of interest took place on Telegram, and it's unclear what access DOJ has to that, independent of the phones Telegram texts were sent on. Then there are the contents of their phones, which may (and uncontroversially could) be subjected a Special Master review. If Torres grants PV's request for a Special Master, it would give PV an opportunity to at least understand what the full legal exposure is. But then there's the matter of the subpoena. I would be unsurprised if PV filed a challenge to the subpoena, which might go before Chief Judge Laura Taylor Swain rather than Judge Torres, and might be sealed as a grand jury matter. But this is a subpoena *they invited*, which will make it a lot harder to claim the subpoena was improper.

With Michael Cohen, the government was able to demonstrate during the Special Master review that some of the materials that Cohen might otherwise have tried to claim were privileged were not, in part because they had already seized his cloud communications (including his Trump Organization emails, which were hosted and turned over by Microsoft). Here, if PV responded to the subpoena at all, the government get a privilege log, laying out why PV thinks

conversations O'Keefe had with 45 different lawyers were really privileged, thereby committing PV and O'Keefe to the claims they made in a subpoena response (assuming, of course, they don't buy time by challenging the subpoena).

Whatever the merit – or abuses – of the focus on PV, PV's games on the subpoena may have made efforts to protect O'Keefe far more difficult. And their game-playing with the subpoena will make it more difficult for other news outlets in the future to have DOJ treat efforts to accommodate reasonable requests in good faith.

It's a complex issue and we don't have enough information to know whether DOJ's case – that PV was involved in the theft of Ashley Biden's diary itself, and so not protected under any First Amendment precedent that might otherwise be available to them – is solid or if it instead charges them for involvement after the diary was already stolen, the First Amendment standard under *Bartnicki* which applies to journalists and non-journalists alike. PV is also trying to shield materials – including donor information and claimed attorney-client privileged materials – along with anything purporting to relate to journalism. The seeming desperation to hide donor information (which normally wouldn't be involved in the scope of such a request) raises real questions about the sincerity of their journalistic claims, particularly given the recent revelation that PV would let donors dictate the timing of PV's publications. And as DOJ noted in its response to PV's motion for a Special Master to review the seized material, PV is not trying to protect the identities of its purported (second-hand) sources for the diary, so some protections that might otherwise apply do not here.

It is troubling that DOJ seized records from O'Keefe citing crimes that suggest liability for a crime after the fact, because if PV genuinely was only involved after the fact, it would pose a dangerous precedent for actual journalists.

But the games that PV appears to have played with their subpoena dangle – and some changes they’ve already made to their story – suggest there may be more to the story.

Timeline

These events are covered by three SDNY dockets: 21-mc-813 for James O’Keefe, 21-mc-819 for Eric Cochran, and 21-mc-825 for Spencer Meads.

2020

October 12: O’Keefe sends email, not mentioning Ashley Biden by name (but clearly referring to her) explaining his decision not to publish “Sting Ray” Story.

October 25: National File publishes pages from Ashley Biden’s diary, linking parallel New York Post campaign targeting Hunter. It explains the provenance of the diary this way:

National File also knows the reported precise location of the physical diary, and has been told by a whistleblower that there exists an audio recording of Ashley Biden admitting this is her diary.

[snip]

National File obtained this document from a whistleblower who was concerned the media organization that employs him would not publish this potential critical story in the final 10 days before the 2020 presidential election. National File’s whistleblower also has a recording of Ashley Biden admitting the diary is hers, and employed a handwriting expert who verified the pages were all written by Ashley. National File has in its possession a recording of this whistleblower detailing the work his media outlet did in preparation of releasing these documents. In the recording, the

whistleblower explains that the media organization he works for chose not to release the documents after receiving pressure from a competing media organization.

November 3: PV provides the diary to local law enforcement in FL.

2021

October 26: Paul Calli call DOJ, asks for AUSA Mitzi Steiner, and asked to speak about the PV investigation; Steiner asked how Calli had obtained her name, what else he had obtained, and declined to speak with Calli.

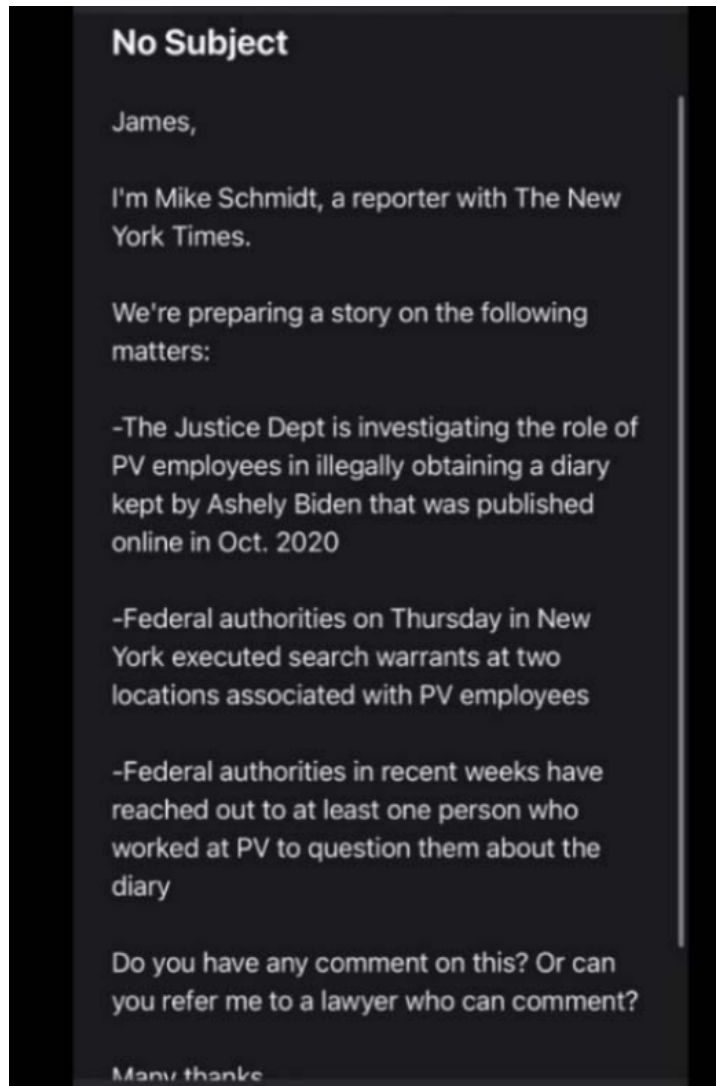
October 27: Lawyers for Project Veritas inform the DOJ that they will accept service for a subpoena relating to the investigation

November 3, 3:49 PM: Search warrants for Eric Cochran and Spencer Meads approved.

November 4, AM: FBI executes search warrants on former PV employees, Cochran and Spencer Meads.

November 4: PV lawyers accept service of subpoena.

November 4, one hour after the search: Mike Schmidt reaches out to Cochran and O'Keefe for comment about the investigation.

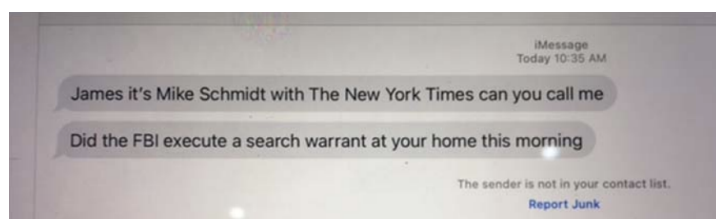


November 5, 11:18 AM: Warrant for O'Keefe authorized

November 5: NYT publishes story on investigation including language that PV would later baseless claim had to have come from the FBI.

November 6: FBI executes a search warrant on James O'Keefe

November 6: Schmidt contacts O'Keefe for comment.



November 6: Lawyers for Project Veritas ask the FBI to sequester material from the phone.

November 7: DOJ declines PV's request and states the FBI has complied with all media guidelines.

November 8, 6:11PM: DOJ emails PV and tells them the extraction may start as soon as the next day.

November 8: After PV says it'll file a legal challenge, FBI says it'll only stop extraction after PV files such a challenge.

November 10: On behalf of PV, Calli Law moves to appoint a Special Master.

November 11, 12:51-12:53AM: Calli asks for confirmation that DOJ stopped extraction and review on O'Keefe's phone on November 8.

November 11, 7:57AM: DOJ responds that the substantive review of O'Keefe's phone was paused upon filing of motion on November 10.

November 11; 2:13PM: Judge Analisa Torres sets initial briefing schedule; in response to Torres order, DOJ stops extraction of O'Keefe phone.

November 12: In response to DOJ request, Torres extends briefing schedule.

November 12: Greenberg Traurig lawyer Adam Hoffinger, representing Eric Cochran, asks for Special Master to apply to materials seized from him, as well.

November 12: Letter signed by FL attorney Brian Dickerson but apparently docketed by NY lawyer Eric Franz asks for Special Master to apply to Spencer Meads

November 12, 3:49PM: Calli asks for clarification on review and extraction.

November 12, 3:59PM: DOJ responds that, "upon the filing of your motion, the Government paused the review of all material obtained from the search of your client's residence."

November 14: Calli submits clarification letter regarding extraction and review.

November 15: Torres sets schedule in Cochran

docket.

November 15: DOJ requests permission to reply to PV on November 19.

November 15: Calli requests inquiry into government leaks to NYT.

November 16: Torres grants permission to respond on November 19.

November 16: Ian H. Marcus Amelkin asks to delete initials of PV source, A.H., from docket.

November 17: Torres denies Amelkin request without prejudice.

November 17: Cochran motion to appoint Special Master.

November 18: For Meads, Dickerson formally moves for Special Master (and also complains that FBI seized dated devices).

November 19: Calli requests extension on response deadline for PV subpoena.

November 19: Government files opposition to request for Special Master and inquiry into purported leaks.

November 19: DOJ requests permission to respond to motion for extension on subpoena. Torres grants request.

November 21: DOJ opposition to extend subpoena deadline.

November 21: Government motion to oppose unsealing affidavits.

November 22: Torres denies motion for extension on subpoena.

November 22: PV reply to government opposition to Special Master.

November 23: Torres denies motion (including from RCFP) to unseal affidavits.

November 23: Cochran reply to government opposition to unseal affidavits.

November 24: Meads reply to refusal to unseal affidavits, including letters from House and Senate complaining to DOJ.