

# WHILE TV LAWYERS WAILED IMPOTENTLY, DOJ WAS ACQUIRING THE COMMUNICATIONS OF SIDNEY POWELL, RUDY GIULIANI, AND (PROBABLY) MARK MEADOWS

Because TV lawyers continue to wail that DOJ isn't doing enough to investigate Donald Trump, I want to dumb down this post.

While TV lawyers have been wailing impotently that DOJ has been doing nothing to investigate Donald Trump, DOJ and the National Archives have been acquiring the communications behind some of the most damning events leading up to January 6. DOJ has been doing so even as the TV lawyers guaranteed us they would know if DOJ were doing such things, yet insisting that DOJ was not.

Consider just the events leading up to the December 18, 2020 series of meetings at the White House, involving Sidney Powell, Rudy Giuliani, and Mark Meadows, which some of the same reporters that reported it in real time are reporting as if it were new news.

## Sidney Powell

According to the WaPo story on the grand jury investigation into Sidney Powell, a subpoena in that investigation issued in September asked for "communications and other records related to fundraising and accounting" related to Powell's gift.

Federal prosecutors have demanded the financial records of multiple fundraising organizations launched by

attorney Sidney Powell after the 2020 election as part of a criminal investigation, according to a subpoena reviewed by The Washington Post.

The grand jury subpoena, issued in September by the U.S. attorney's office for the District of Columbia, sought communications and other records related to fundraising and accounting by groups including Defending the Republic, a Texas-based organization claiming 501(c) 4 nonprofit status, and a PAC by the same name, according to the documents and a person familiar with the investigation who spoke on the condition of anonymity to share details of the probe.

As part of the investigation, which has not been previously reported, prosecutors are seeking records going back to Nov. 1, 2020.

The subpoena reviewed by The Post was signed by Assistant U.S. Attorney Molly Gaston, who is also handling politically charged matters related to the Jan. 6 attack on the Capitol, including contempt of Congress charges brought against former Trump adviser Stephen K. Bannon for refusing to testify in front of the House committee investigating the pro-Trump riot. [my emphasis]

While the predication of that investigation seems to be based on Powell's fundraising – soliciting money from dupes who believe her false claims of a stolen election – because proving that she knew those claims were false would require collecting everything about her efforts to manufacture false claims, it would get the communications explaining how to exploit those false claims as well. Plus, this September subpoena reveals just what DOJ did after moving to an overt phase. Prior to that, DOJ presumably

obtained – first – preservation orders and – then – warrants on the emails that, according to Patrick Byrne, Powell claims she sent Rudy about her schemes.

On January 21 (a week before Trump started dangling pardons again), Sidney Powell's lawyer revealed she is "cooperating" in that investigation, though in contemplating "cooperation" with the January 6 committee, she is reserving privilege claims about "advice" to Donald Trump.

A lawyer for Sidney Powell, a well-known, Trump-connected attorney, acknowledged that her organization's fundraising connected to the 2020 election is subject to an ongoing federal criminal investigation.

Powell's lawyer, Howard Kleinhendler, told CNN that his client "is cooperating" with the investigation into her organization, Defending the Republic, by the US Attorney's Office in the District of Columbia. That cooperation includes "rolling productions" of documents.

[snip]

Still, when the committee asks Powell about communications she had with Trump, that is "going to get a little hairy," Kleinhendler told CNN.

He said Powell believes that the times Trump called her to ask for legal advice may be covered by attorney-client privilege – even if he never paid her to be his or his campaign's lawyer. Powell never worked as a lawyer for the former President personally or for the Trump campaign, Kleinhendler said.

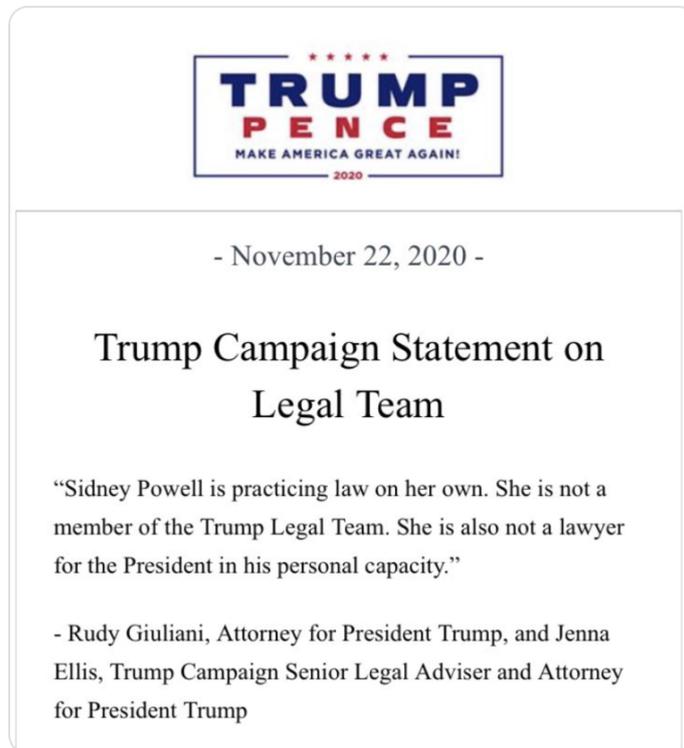
"We'll have to deal with that, and we'll have to try to discuss with the committee to see how" to handle privilege issues, Kleinhendler said.

Any emails obtained with a non-public warrant would be sent to a taint team that would review Sidney Powell's privilege claims independently. Of particular interest, after Trump claimed Powell represented him on November 15, 2020, Rudy stated as clearly as he can manage on November 22 that, "Sidney Powell is practicing law on her own. She is not a member of the Trump Legal Team. She is also not a lawyer for the President in his personal capacity."



Jenna Ellis ✓  
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10:23 PM · Nov 22, 2020 · Twitter for iPhone

With that statement, Rudy effectively waived privilege for *any* communications implicating both of them from that date forward, long in advance of that December 18 meeting at which Powell purportedly told him about all the communications she sent him in the interim.

Similarly, most of these events post-date the time, November 25, when Powell can credibly claim to be representing Mike Flynn in an effort to nullify the consequences of his lies and foreign agent work, because that's when Trump pardoned Flynn. So she may *want* to claim privilege, but after November 25, all visible

basis for that claim was affirmatively gone, and for anything seized from her email provider, she's likely not going to be involved in making that claim anyway.

As I previously noted, the prosecutor in charge of that investigation dropped off three other January 6 prosecutions by March 29 of last year (though there is at least one other investigation, the obstruction investigation into Capitol Police Officer Michael Riley, on which she was also working in the interim).

Gaston originally pulled three January 6 cases in the investigation's early days, those of Robert Packer, Robert Gieswein, and Derrick Evans, just the latter of which, involving a then-West Virginia state politician, had any possible public corruption component. But, at a time of immense staffing shortages at DC's US Attorney's Office, she dropped off those cases on February 18 (in the case of Packer) and March 29 (in the case of Gieswein and Evans). I've long wondered what, in the weeks after Merrick Garland came in, became a higher priority for the DC US Attorney's leading public corruption prosecutor. We now know one thing she picked up in the interim was the prosecution of Michael Riley, the Capitol Police Officer who advised rioter Jacob Hiles to delete Facebook posts about his role in the riot. And by September, Gaston's grand jury investigation into Sidney Powell's grift had started taking overt steps like subpoenaing Powell's nonprofit.

There continue to be some curious moves that suggest DOJ is shifting prosecutorial resources to unseen investigations in fairly urgent fashion.

# Rudy Giuliani

Meanwhile, on January 21 (the same day that CNN reported that Powell was “cooperating” in the DOJ investigation, and so also a week before Trump started dangling pardons again), Special Master Barbara Jones reported on the progress of the privilege review of 16 devices seized from Rudy Giuliani on April 28, 2021.

Here’s a summary of what that review and the earlier known seizures of Rudy’s communications in the Ukraine-related investigation into Rudy:

Content	Phones	Warrant date	Known Warrant Scope	Privilege Review Scope	Status	Special Master Results
Rudy's iCloud		11/4/19	5/1/18 to 11/4/19	5/1/18 to 11/4/19	Filter completed -5/21	
Rudy's email		11/4/19	5/1/18 to 11/4/19	5/1/18 to 11/4/19	Filter completed -5/21	
Toensing's iCloud		11/4/19	5/1/18 to 11/4/19	5/1/18 to 11/4/19	Filter completed -5/21	
Toensing's email		12/13/19	5/1/18 to 12/13/19	5/1/18 to 11/4/19	Filter completed -5/21	
Rudy's historical and prospective cell site		4/13/21	unknown			
Toensing's historical and prospective cell site		4/13/21	unknown			
Devices of Rudy and Giuliani partners	7 devices	4/21/21	8/1/18 to 12/31/19	1/1/18 through seizure	Completed 11/2/21	2,223 items provided to govt 3 items deemed privileged
	Device 1B05	4/21/21	8/1/18 to 12/31/19	1/1/18 through seizure	Initial release 11/11/21 Balance released 1/19/22	25,533 items provided with no privilege claim 40 items deemed privileged 56 privilege claims withdrawn, provided to govt
	8 devices	4/21/21	8/1/18 to 12/31/19	Initial review 12/1/18 through 5/31/19	Completed 1/19/22	3,204 items provided to govt
Toensing's phone	Firash hits	4/22/21	8/1/18 to 12/31/19	1/1/18 through seizure	4,229 initial items to Firash 12/21/21 2 addition items	Pending
	Initial review	4/22/21	8/1/18 to 12/31/19	Initial review 12/1/18 through 5/31/19	Ongoing	2,798 items provided to govt 1/20/22 2 items to Firash 98 items pending privilege claim

Because of the temporal scope Judge Paul Oetken approved last year, Jones has completed a privilege review of *all* communications that date between January 1, 2018 through April 28, 2021 on 8 of the devices seized from Rudy (April 28 was the day the devices were seized). We can’t know what dates during which Rudy was using those 8 devices. It could well be that they were older phones with nothing recent.

But we know that of the communications on the phone with the most texts and chats – the phone designated 1B05 – the government received 99.8% of any communications dated between January 1, 2018 and April 28, 2021 and they received those communications no later than January 21.

Of particular note, Rudy at first tried to claim privilege over 56 items from phone 1B05. He thought better of those claims in 19 cases. And then, after Jones deemed 37 of them not to be privileged, he backed off that claim as well. During a period when Jones and Rudy’s team would have been discussing those 37 items, Judge Oetken issued a ruling saying that the basis for

any privilege claims (but not the substance of the communications) would have to be public. After precisely the same kind of ruling in the Michael Cohen Special Master review, Trump backed off his claim of privilege for Cohen's recording about the hush payments. That may be what persuaded Rudy to withdraw his claim of privilege over those materials here, as well.

And whether or not DOJ has *already* accessed the communications Rudy conducted during 2020 and 2021 on any of the 16 devices seized from him, we know all the phones Rudy was using in April 2021 are in DOJ's possession and that Judge Oetken has already approved a privilege review to cover those communications.

## Mark Meadows

On December 15, the House voted to send the Mark Meadows contempt referral to DOJ for prosecution. Much to the chagrin of the TV lawyers, DOJ has not taken overt action against Meadows on the criminal contempt of Congress referral.

But as I've repeatedly argued, that referral is better considered – and would be more useful to the pursuit of justice – as a referral of Mark Meadows for a violation of the Presidential Records Act and obstruction of the DOJ criminal investigation that he knew to be ongoing.

Among the things included in the referral are:

- A link to this Politico report quoting “a source close to former President Donald Trump’s ex-chief of staff,” insisting that, “all necessary and appropriate steps either were or are being taken” to ensure that Meadows is not deemed to have violated the

Presidential Records Act by failing to share Presidential communications he conducted on his personal email and phone

- Repeated references to Jonathan Swan's coverage of the December 18 meeting at which Powell and others discussed seizing the voting machines
- Indication that Meadows received notice on his personal phone (and so among the records withheld in violation of the PRA) the rally might get violent
- A citation of a message that Meadows turned over to the committee (but presumably not, originally, to the Archives) in which Alyssa Farah urged, "You guys have to say something. Even if the president's not willing to put out a statement, you should go to the [cameras] and say, 'We condemn this. Please stand down.' If you don't, people are going to die"
- Citation of several communications Meadows had with state politicians involved in the fake elector scheme (which Deputy Attorney General Lisa Monaco

has confirmed they are investigating), including one where Meadows said, "I love it" and another where he said, "Have a team working on it;" Monaco's confirmation puts Meadows on notice that his actions are the subject of a federal criminal investigation

- A claim of election fraud sent to Meadows on his private email (and so among the materials he violated the PRA by withholding)
- Citation of a tweet Meadows sent on December 21 reporting "'Several members of Congress just finished a meeting in the Oval Office with President @realDonaldTrump, preparing to fight back against mounting evidence of voter fraud. Stay tuned'"
- Citation of this story describing that Meadows' late December trip to Georgia to pressure election officials to find more votes could get him in legal trouble; when Fulton County DA Fannie Willis asked for increased protection in the wake of Trump's calls for riots, she stated explicitly that she was criminally

investigating, “former President Donald J. Trump and his associates,” putting Mark Meadows on notice that he’s under criminal investigation there, too

This entire process led Meadows and his attorney to make efforts to comply with the PRA, meaning they’ve been working to provide the communications cited here, as well as those Meadows intended to claim privilege over, to the Archives.

If they can’t comply – and some of the texts in question were sent via Signal, which is really hard to archive, and so may not have been preserved when Meadows sent his own phone back to his provider to be *wiped* and replaced – then Meadows will not just be in violation of the PRA (which is basically toothless) but also of obstructing the criminal investigation he knew was ongoing when he replaced his phone. Obstruction carries a far stiffer penalty than contempt of Congress does, and it serves as good evidence of involvement in a larger conspiracy.

As Carl Nichols, the Trump appointee presiding over the Steve Bannon criminal contempt case (and therefore likely to preside over one against Meadows if it were ever charged), criminal contempt is for someone from whom you’ve given up getting cooperation, not someone who still might offer useful cooperation.

Meanwhile if Meadows and his lawyer *do* belatedly comply with Meadows’ obligations under the PRA, it’s quite possible (particularly in the wake of the Supreme Court ruling denying Trump’s attempt to override Joe Biden’s privilege waiver) that DOJ has to do no more to obtain these records than to send a warrant to the Archives. If not, Meadows is now on notice that he is the subject of several criminal investigations (the fake elector one and the Fulton County one), and he may think twice before trying to withhold

communications that are already in possession of the Archives.

So whether or not DOJ has these documents in their possession right now, they have the means to get them very easily.

In other words, while TV lawyers have been wailing that DOJ has been doing nothing, DOJ has been acquiring the communications from *at least* two of the key participants in that December 18 meeting, and the Archives have been acquiring the communications of a third.