JUDGE NACHMANOFF PUNTS ON PRIVILEGE

I think the dispute between Lindsey Halligan's loaner AUSAs and Jim Comey is a fight that has ramifications for Trump's larger attempt to use DOJ to punish his enemies.

According to court filings, investigators from the case got access to Comey's attorney-client information, possibly on September 25, the day Halligan obtained the indictment. Before they had given Comey a shred of discovery, they sent him a draft filter protocol on October 10. Then on October 13 — still before they had handed over discovery, which appears to have revealed they got no *new* warrant to access this old material — the loaner AUSAs asked Judge Nachmanoff to approve a filter protocol that would give the government the first chance to make privilege determinations. Abiding by local rules, Comey didn't respond right away, leading prosecutors (on October 20) to ask the judge to hasten his consideration of the matter, even while accusing Patrick Fitzgerald of being part of a "leak" behind sharing unclassified information under Dan Richman's name. Which is one of the things Comey patiently explained that same day: the loaner AUSAs were defaming Fitzgerald. After Nachmanoff denied the prosecutors' bid to rush the issue, Comey laid out all the problems with this bid to get access to his privileged communications on Monday (which I wrote about here).

Among other things, he noted that prosecutors don't appear to have gotten a warrant to review this material for this alleged crime — they're still relying on warrants obtained in 2020 to investigate a leak of classified information.

Comey requested that, before he had to suppress this material, Judge Nachmanoff first require prosecutors to answer a bunch of questions, such as who already accessed the material and under what authority.

Nachmanoff didn't do that.

Instead, he ordered Magistrate Judge William Fitzpatrick to deal with it; Fitzpatrick, in turn, set a hearing for next Friday.

At one level, that looks like a punt.

But in effect, it makes it exceedingly unlikely that prosecutors will get their filter protocol.

Nachmanoff cited a relevant precedent for this, in which lawyers (including Roger Stone prosecutor, Aaron Zelinsky and Joe Biden Special Counsel Robert Hur, because this year of my life necessarily requires revisiting every fucking case I've ever covered before) tried to do the filter review for a law firm, only to have the Fourth Circuit remand it for a magistrate judge do it.

> This Court assesses the appropriate contours of a privilege filter protocol according to the guidelines set forth in In re Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019), as amended (Oct. 31, 2019). In In re Search Warrant, a Baltimore law firm challenged the government's use of a Department of Justice filter team to inspect attorney-client privileged materials seized from that firm. Id. at 164. The Fourth Circuit reversed the district court's denial of the law firm's motion to enjoin the filter team's review of the seized material. Relevant to this case, the Fourth Circuit held that "a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute." Id. at 176. The Fourth Circuit observed that, "[i]n addition to the separation of powers issues" that might arise, allowing members of the executive to conduct the filter, even if those members were trained lawyers, raised the possibility

> that “errors in privilege determinations” would result in “transmitting seized material to an investigation or prosecution team.” Id. at 177. It thus determined that the filter protocol “improperly delegated judicial functions to the Filter Team,” and that instead, “the magistrate judge (or an appointed special master) — rather than the Filter Team — must perform the privilege review of the seized materials[.]” Id. at 178, 181 (collecting cases).

Prosecutors had argued (in what might be their only reference to this, a directly relevant precedent) that informing Comey at the start mitigated the risk at the heart of the earlier case.

> Further, the Proposed Protocol creates a process by which the putative privilege holders remain engaged and may assert a privilege over PPM, with any remaining disputes to be resolved by the Court. Indeed, the Proposed Protocol requires authorization from the potential privilege holder(s) or the Court before the Filter Team may disclose PPM to the Prosecution Team. Thus, this Protocol does not authorize the Government to adjudge whether specific material is privileged. Instead, the Protocol leaves adjudication of any unresolved privilege claims to the Court. See Fed. R. Evid. 501. Accordingly, unlike the concerns raised by In re Search Warrant, the Government has engaged the putative privilege holders from the onset and will continue to engage them and the Court, if necessary, as prescribed by the Protocol before disclosing any PPM. Cf. In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 176-178 (4th Cir. 2019), as amended (Oct. 31, 2019) (discussing concerns of delegating

> judicial functions to the executive branch where the magistrate judge authorized an ex parte filter review of a search warrant return of a law firm).

Without even mentioning this (specious) claim from the loaner AUSAs, Nachmanoff treated the entire privilege review as one the *In re Search Warrant* opinion defines as a judicial function. That, plus the Fourth's citation to the 2018 treatment of Michael Cohen's communications (when I said every fucking case I've ever covered, I meant all of them) signals Nachmanoff will surely insist Fitzpatrick or someone Fitzpatrick appoints conduct any review.

But Nachmanoff went further in his seeming punt. He also suggested that, even before Fitzpatrick conduct a review, he should first answer a number of questions — questions that largely track those Comey raised, including the questions (cited at page 12 here) he raised.

> The Fourth Circuit further concluded that adversarial proceedings before the magistrate judge were needed prior to the authorization of a filter team and protocol. Id. at 179.
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> Similarly here, briefing on the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized. These questions include, but are not limited to, whether the original warrants authorizing the seizure of the materials at issue are stale, whether those warrants authorize the seizure and review of these materials for the crimes at issue in this case, whether the lead case agents or prosecution team in this case have been exposed to privileged materials, and what the proper procedures are, if any, for review of the materials at issue. See ECF 71 at 1, 5, 6, 8–10, 12.

Which is to say, this is a punt, but a punt saying, “binding Fourth Circuit precedent says Comey is right.”

Update: Comey has submitted three additional pretrial motions. He asked to:

- Access grand jury proceedings.
- Get a Bill of Particulars.
- Throw out the indictment because Ted Cruz’ questioning sucked and also Comey told the truth (and also to submit the actual video showing the questioning).