COLLEEN KOLLAR-KOTELLY'S BABY-SPLITTING WITH DAN RICHMAN'S DEVICES

Judge Colleen Kollar-Kotelly issued an order that — if DOJ abides by it — should have the effect of forcing DOJ to do what they should have done in the first place before charging Jim Comey: Obtain a warrant for materials it claims supports their imagined crime.

At first, this looks like a tidy solution — and (as Politico notes) it may well present unbridgeable barriers to a renewed indictment of Jim Comey in EDVA, to say nothing of the Grand Conspiracy in SDFL. It's also a solution that may prove resilient to appeal and because of that, avoid further scrutiny of its apparent tidiness.

But I'm not sure it is a just solution.

Start with the end result: DOJ has to destroy all copies of Dan Richman's data in its possession, but first, Kollar-Kotelly ordered, they must give a copy of it all under seal to EDVA.

> [T]he Court shall further ORDER that, before returning the covered materials to Petitioner Richman, the Government may create one complete electronic copy of those materials and deposit that copy, under seal, with the U.S. District Court for the Eastern District of Virginia, which shall have supervisory authority over access to this material, for future access pursuant to a lawful search warrant and judicial order. The U.S. District Court for the Eastern District of Virginia may then exercise its discretion to decide whether to allow Petitioner Richman an opportunity to move to quash any such warrant before

> it is executed.

Kollar-Kotelly describes this as a balancing solution, protecting Richman but preserving the government's ability to use this data against Comey.

> Allowing the Government to retain a copy in its own possession therefore would not provide adequate redress to Petitioner Richman. Meanwhile, requiring the Government to return all copies of the files to Petitioner Richman could unduly impede the Government's interests in pursuing future investigations and prosecutions if—as the Government strongly suggests in its briefing—it intends to pursue further prosecution of Mr. Comey. See supra Section III.C. The appropriate way to balance these interests, and to provide redress to Petitioner Richman without transforming his motion into a "collateral (and premature) motion to suppress evidence in another criminal proceeding," see Gov't's Opp'n & Mot. at 7, is to allow a copy of the files to be retained for

As noted, this solution may well pose grave problems for the government, at least its hopes of reindicting in EDVA.

When Magistrate Judge William Fitzpatrick first laid out the Fourth Amendment violations involved in the searches targeting Jim Comey, he speculated that the reason DOJ did not get a warrant to access the material is because they were rushing to beat the statute of limitations.

That may be part of it, but there's another reason. The theory of crime behind the indictment is that Jim Comey lied in September 2020 when he said that he had never authorized anyone *at the FBI* to leak *anonymously*. But as Comey laid out as part of his bid for a Bill of Particulars, none of the exhibits presented to

the grand jury match that theory: they either involve stuff Richman did publicly or stuff he did after he left the FBI.

> Here, the government has repeatedly failed to provide a coherent factual basis for its theory that Mr. Comey authorized Mr. Richman to be an "anonymous source" in news reports regarding the Midyear Exam investigation while Mr. Richman was "at the FBI." Of the communications following Mr. Comey's October 28, 2016 letter that the government cites in both briefs, none reflect Mr. Comey authorizing Mr. Richman to be an anonymous source. For instance, the communications show Mr. Richman discussed materials that were already public, like Mr. Comey's letter to Congress. See, e.g., Opp. at 3 ("Wittes and I are spending a lot of time *saying your letter means exactly, and only what it says*." (emphasis added)); id. at 3-4 (quoting the defendant as telling Mr. Richman that Richman's contributing to a New York Times Opinion piece "would [be] shouting into the wind," and "that they would 'figure it out'" without Richman's contributions). And even where the government alleges that Mr. Comey encouraged Mr. Richman to speak to the press in late October and early November 2016, there is no indication that Mr. Richman did so anonymously; to the contrary, one of the exhibits the government cites references Mr. Richman's televised interview with Anderson Cooper. Opp. at 4 (citing ECF No. 138-6, 138- 7). The remaining communications cited by the government in its Opposition to Defendant's Motion to Dismiss Indictment Based on Vindictive and Selective Prosecution suffer from numerous defects, but most critically, all occurred *after* February 7, 2017, when Mr. Richman left the FBI.

> This alone makes the government's theory that Mr. Richman was "at the FBI" when these communications occurred incomprehensible. [Emphasis original]

To get a warrant — at least for the theory of the case presented in the EDVA indictment — DOJ would have to lay out what it failed to here, that there's probable cause that Comey intentionally had Richman leak stuff anonymously while still at the FBI. Worse, in a warrant affidavit, unlike in a grand jury, the FBI would have to be honest about all the exculpatory evidence, such as the date Richman left. And even assuming DOJ could get that warrant, they would have to adhere to the terms of it; the warrant likely would not permit them to access materials that post-date Richman's FBI departure, for example, which is the stuff they want the most.

Putting the materials at EDVA — where DOJ claims, unpersuasively, any and all ongoing investigation is — would ensure that prosecutors from WDVA or SDFL have to go there to obtain this information for other investigations. Even if Aileen Cannon approved an outrageous warrant for the Grand Conspiracy investigation, EDVA would have some visibility on it, most notably on any claim that there's something criminal about releasing a memo showing Trump's corruption when John Durham couldn't find a crime in that after four years of looking.

And putting the material at EDVA would ensure that prosecutors do what they tried to avoid with their bid for a filter protocol: ignoring Fourth Circuit precedent by excluding courts from any privilege determination. They will not get a warrant in EDVA that does not provide Comey an opportunity to assert his own privilege claims.

Where I have some discomfort with Kollar-Kotelly's opinion, though, is in limiting her holding to how badly DOJ fucked Richman's Fourth Amendment rights.

Date	Warrant	Target	Dates	Actual Range
August 27, 2019	19-sw-182	Hard drive	February 1, 2017 to April 30, 2017	February 1, 2017 to June 10, 2017
October 22, 2019	19-sc-2097	Columbia email accounts	March 1, 2016 to May 30, 2017	
November 22, 2019		Richman interview		
January 31, 2020	20-sw-200	iCloud account	March 1, 2016 to May 30, 2017	March 1, 2016 to August 13, 2019
June 4, 2020	20-sw-143	iPhone and iPad backup	March 1, 2016 to May 30, 2017	
June 29, 2021		Comey shares phone		

As she laid out, Richman described three ways DOJ violated his Fourth Amendment rights: (1) by seizing data outside the temporal limits of the warrants, (2) by failing to scope the data specific to the crimes under investigation and sealing or destroying the rest, and then (3) by searching the raw data without a warrant five years later.

> To obtain the return of his property under Rule 41(g), Petitioner Richman must show that "the property's seizure was illegal." United States v. Wright, 49 F.4th 1221, 1225 (9th Cir. 2022) (citation modified). Petitioner Richman contends that the Government's seizure of his property violated his Fourth Amendment rights "in at least three ways." Pet'r's T.R.O. Mem., Dkt. No. 9-1 at 17. *First*, he argues that the Government "exceeded the scope" of the prior warrants it obtained in 2019 and 2020 to search his property by "seizing both responsive and non-responsive materials." Id. at 17–20. *Second*, he argues that the Government has continued to retain his materials for an "unreasonable" period of time. Id. at 17, 20–22. *Third*, he argues that the Government executed an unreasonable warrantless search of the retained property in 2025. Id., at 17, 22–23.

William Fitzpatrick, in ruling these were likely Fourth Amendment violations, put the fault on the original Arctic Haze investigators more than on the current Jim Comey team.

> There is nothing in the record to suggest the government made any attempt to identify what documents, communications or other materials seized

> from Mr. Richman constituted evidence of violations of 18 U.S.C. § 641 and § 793. To be clear, ensuring that agents and prosecutors seize only those things which a court has authorized is a critical early step in the execution of any warrant and an elemental responsibility of all government agents.

But having laid those out as three problems, Kollar-Kotelly then flattens item one and two into one issue: the initial seizure. Her initial discussion discusses *only* whether or not the government scoped the material it seized within the two crimes at question; it ignores the question of the temporal overseizure, which (unless there are warrants DOJ is hiding) should be clearcut.

> Petitioner Richman's motion concerns the Government's seizure of his property pursuant to four different search warrants executed in 2019 and 2020. Petitioner Richman claims that the Government's execution of these warrants violated his Fourth Amendment rights because the Government seized more material than the warrants authorized. Pet'r's Mem., Dkt. No. 2-1 at 13. Petitioner Richman neither contests the validity of the four search warrants nor disputes the fact that the warrants permitted the Government to search his property "broadly." Id. Petitioner Richman, however, claims that the warrants only authorized the Government to seize information that constituted "evidence and/or instrumentalities of" a violation of either 18 U.S.C. § 641 (theft and conversion of government property) or 18 U.S.C. § 793 (unlawful gathering or transmission of national defense information).

But then she just waves her hands and says she doesn't have enough information to hold that

that is a Fourth Amendment violation.

> In light of Magistrate Judge Fitzpatrick's findings, the Court concludes that Petitioner Richman has established a reasonable basis for his claim that the Government exceeded the scope of the 2019 and 2020 "Arctic Haze" warrants when seizing his property. On the present record, however, the Court shall not determine whether Petitioner Richman has conclusively established a violation of his Fourth Amendment rights based on his claim that the 2019 and 2020 "Arctic Haze" seizures at issue were overbroad. Magistrate Judge Fitzpatrick's findings raise a substantial question as to whether Petitioner Richman's Fourth Amendment rights were violated when the Government executed the 2019 and 2020 warrants at issue. However, the parties have not provided the Court with additional information in the record that would enable the Court to make a conclusive determination of Petitioner Richman's Fourth Amendment claim about over-seizure as to the 2019 and 2020 "Arctic Haze" warrants.

So Kollar-Kotelly bases her baby-splitting ruling exclusively on DOJ's search in 2025 without a warrant.

> The Court will address each of Richman's arguments in turn. In doing so, the Court concludes that, although the Government's initial seizure of Richman's property and its continued retention of that property did not violate Richman's Fourth Amendment rights, the Government's warrantless search of his property in 2025—approximately five years after it initially seized that property—did violate those rights. The Court further concludes that the Government's

> mishandling of Petitioner Richman's property renders its continued retention of that property an unreasonable Fourth Amendment seizure.

My guess is Kollar-Kotelly did this because she didn't need to pursue the question further to achieve her Solomonic outcome. Simply finding a clear Fourth Amendment violation — here, in searching Richman's data without a warrant — proved enough to find him aggrieved and injured.

There are several problems with this.

Having dispensed with the mystery overseizure by date and the failure to seize the data pertinent to two suspected crimes and seal the rest, Kollar-Kotelly then applies four different decisions to this data:

- United States v. Jacobsen: A 1984 case about the test of white powder after having seized it.
- Asinor v. DC: An effort to get a bunch of physical cell phones (one belonging to an independent journalist) back years after DC's Metropolitan Police Department seized them at an August 13, 2020 George Floyd protest. Last year, Greg Katsas ruled for the protesters.
- In the Matter of the Search of 26 Digital Devices: A set of opinions in which first Magistrate Judge Michael Harvey and subsequently then-Chief Judge Beryl

> Howell considered a warrant to access a bunch of devices. Harvey first held that the government could not go back into data retractions after closing an investigation. Howell reversed that.

Here's how Kollar-Kotelly incorporated these decisions.

> Judge Howell noted two critical procedural requirements for searches of stored extracts of digital device data from prior investigations, both of which had been satisfied in the case before her. First, and most fundamentally, "in order for the [G]overnment to search a cell phone's digital data[,] the [G]overnment must get a probable cause warrant." Digital Devices II, 2022 WL 998896, at *15 (citing Riley v. California, 573 U.S. 373 (2014)). Second, "[o]nce the government's investigation unearths the likelihood that evidence of offenses not covered by the initial warrant exists, the government must set forth adequate probable cause and particularity to secure a warrant expanding the scope of its search of previously seized evidence." Id.
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> Although nearly all of Judge Howell's reasoning remains powerfully persuasive, one aspect of her analysis appears to have been altered by the D.C. Circuit's intervening decision in Asinor v. District of Columbia, 111 F.4th at 1262. Judge Howell's decision that the closure of the prior investigation did not preclude the Government from obtaining a warrant to search the stored extracts for a later proceeding rested in part on

> a conclusion that "[t]he Fourth Amendment does not operate as an arbiter of law enforcement retention policies for lawfully seized evidence." Digital Devices II, 2022 WL 998896, at *1. Although Judge Howell's conclusion on this point is consistent with the law of many circuits, the D.C. Circuit recently held in Asinor that the Fourth Amendment does regulate the Government's retention of evidence by requiring "continuing retention of seized property to be reasonable." 111 F.4th at 1261. The court reasoned that although it is not clear from the text of the Fourth Amendment's protection of the right to be "secure" against "unreasonable . . . seizures" whether the provision regulates retention after an initial lawful seizure, history and common-law tradition from the Founding era support the conclusion that the reasonableness requirement governs not only the "taking possession" but also the "continued retention" of property. Id. at 1254–55.
>
> [snip]
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> Applying each of these principles, the Court concludes that it was reasonable for the Government to retain Petitioner Richman's files after it closed the "Arctic Haze" investigation, but only so long as the Government adequately protected those files by refraining from accessing or searching them without a warrant.

But let's go back and look at the problems. The most direct precedent, the 26 Digital Devices, involves warrants served the same year (2021) as the phones were originally seized. There's a difference between retention for a matter of months and for years.

And *all of these rulings assume the initial seizure was legal*; by hand-waving over the two

claimed overseizures in 2020 (one based on temporal overseizure, another based on failure to scope and seal), Kollar-Kotelly has applied potentially inapt precedents to this case, and in so doing simply said that the government needed a warrant and the government needs a warrant.

And then she sent the data to EDVA in the Fourth Circuit, where a different set of precedents apply which … now that part of the decision looks especially reckless.

From there, Kollar-Kotelly goes further, refusing to adopt Richman's application of taint to the data the government already unlawfully seized (Kollar-Kotelly dodges all discussion of DOJ's attorney-client violations in this opinion as well).

> Finally, Petitioner Richman requests an order barring the Government from "using or relying on in any way" the information derived from the image of his laptop. See Pet'r's Rule 41(g) Mem. at 26; see also id. at 19 (arguing that the Government should be "barred from using evidence obtained from" the image in its case against Mr. Comey). This remedy would be broader than an order for return of property to which Petitioner Richman is entitled. It would not only deprive the Government of the opportunity to use Petitioner Richman's materials as evidence, but it would also presumably bar the Government from presenting testimony or Finally, Petitioner Richman requests an order barring the Government from "using or relying on in any way" the information derived from the image of his laptop. See Pet'r's Rule 41(g) Mem. at 26; see also id. at 19 (arguing that the Government should be "barred from using evidence obtained from" the image in its case against Mr. Comey). This remedy would be broader than an order for

> return of property to which Petitioner Richman is entitled. It would not only deprive the Government of the opportunity to use Petitioner Richman's materials as evidence, but it would also presumably bar the Government from presenting testimony or pursuing investigative leads based on what Government agents learned by reviewing those materials before returning them. Such a broad order might also bar the Government from seeking to obtain the materials again in the future by obtaining a valid search warrant from a judicial officer

Here, too, Kollar-Kotelly's initial scope — accepting just one of Richman's three claimed injuries — allows her a baby-splitting solution. The searches that got into Jim Comey's privileged communication would have been illegal on the scope issue, but Kollar-Kotelly is making it available the government (pending a warrant and privilege review) in a way in which Comey would not have Fourth Amendment injury.

As I said, perhaps Kollar-Kotelly adopted this solution because she just wants an answer that is far easier than the data provides. Perhaps she adopted the solution because something that the unnamed AUSA with whom she was in communication (who might be Jocelyn Ballantine) explained — at least — the temporal overcollection but did so in such a way that renders the AUSA's testimony unavailable to Richman.

> First, although the Court has been in communication with attorneys from the U.S. Attorney's Office for the District of Columbia, 1 the U.S. Attorney's Office for the District of Columbia has not yet entered an appearance to make representations on behalf of the Government, and counsel for the Government has not yet been identified. See Pet'r's Ex. A, Dkt. No. 9-2.

> 1 These attorneys have helpfully facilitated communication on administrative matters. The Court appreciates counsel's prompt assistance on these matters.

And maybe it'll work? Maybe this will result in Richman's entire digital life collecting dust in EDVA, where his standing to challenge it is much less clear.

Or maybe DOJ will give the data to Richman (as opposed to simply destroying it) and he'll have basis to prove the two underlying Fourth Amendment injuries and be able to (and willing to) ask for more.

But while it is an interesting ruling for the Comey case, it is a highly unsatisfying ruling from a Fourth Amendment.

Update: The government is requesting a week, during which period they claim they won't access the data. But in a footnote they ask for reconsideration because Kollar-Kotelly found a Fourth Amendment violation with a search, not a seizure.

> 5 The Government maintains its position that the Government did not engage in an impermissible search in the 2025 investigation, nor did the Government engage in an unreasonable seizure by continuing to hold the documents obtained by the Government through a lawful search warrant in 2019. Petitioner Richman voluntarily provided these documents pursuant to consent, and while the consent agreement with Petitioner Richman includes limitations on searches, it does not provide, in the event of a prohibited search, for return of property or render continued possession of the property an unlawful seizure. Accordingly, this Court erred in treating any impermissible search as authorizing this Court's order under

> Rule 41(g)—which addresses unlawful or harmful seizures—and the Court should grant reconsideration on that basis.