JUDGE PAUL OETKEN ELIMINATES LEV PARNAS' LAST ATTEMPT TO WEAPONIZE THE FORMER PRESIDENT'S FORMER LAWYER IN HIS DEFENSE

Yesterday, Judge Paul Oetken ruled on all but one of the pre-trial motions in the Lev Parnas trial(s). The rulings have the effect of neutralizing any benefit that Parnas might have tried to get from his association with the former President's former lawyer, Rudy Giuliani. But the order also appears against the background of the Special Master review in Rudy's own case in interesting ways, and in ways that might change Parnas' incentives.

The only request that Oetken granted was a request to sever the campaign finance charges — what Oetken describes as the Straw Donor scheme (funneling money to pro-Trump entities) and the Foreign Donor scheme (funneling Russian money to pro-marijuana politicians).

> The "Straw Donor Scheme" (Parnas and [Igor] Fruman): First, the Government alleges that Parnas and Fruman conspired in 2018 to disguise and falsely report the source of donations to political action committees and campaigns, thereby evading federal contribution limits, in order to promote their nascent energy business venture and boost Parnas's profile.
>
> The "Foreign Donor Scheme" (Parnas, Fruman, and [Andrey] Kukushkin): During the same time period, Parnas and Fruman were working with Kukushkin on a separate business venture: a nascent

> cannabis business. Among their activities was making political contributions to candidates in states where they intended to seek licenses to operate a cannabis business. The Government alleges that Parnas, Fruman, and Kukushkin conspired to disguise a one-million-dollar contribution from a Russian national to evade the prohibition on political contributions from foreign nationals.

Oetken will sever those charges from the Fraud Guarantee charges, which currently involve only Parnas (and in which David Correia already pled guilty and cooperated with the government).

> The "Fraud Guarantee Scheme" (Parnas): Parnas was also working with David Correia on pitching another business venture to be called "Fraud Guarantee." The Government alleges that Parnas and Correia defrauded several investors in Fraud Guarantee by making material misrepresentations to them, including about the business's funding and how its funds were being used.

That puts the trial involving Rudy, in which only Parnas is currently charged, after the non-Rudy trial, which is due to start on October 4.

Then, in two steps, Oetken denied Parnas' bid to claim to 1) get access to Rudy and Victoria Toensing's seized content to prove that 2) he was selectively prosecuted to protect the former President. Mind you, Parnas requested those in reverse order (indeed, in its response to Parnas on the selective prosecution claim, the government claimed that some of what he was asking for might be privileged). So Oetken denied those requests in order, first by ruling that Parnas hadn't provided proof of either basis to claim selective prosecution, that he was discriminated against or that it was done out of some discriminatory purpose.

> Parnas does not meet either required prong. Regarding discriminatory effect, Parnas fails to show that others who are similarly situated have not been prosecuted. This requires showing that individuals outside the protected class committed roughly the same crime in roughly the same circumstances but were not prosecuted. See United States v. Lewis, 517 F.3d 20, 27 (1st Cir. 2008). However, individuals similarly situated to Parnas were prosecuted along with Parnas, including two who share his national origin (Fruman and Kukushkin) and one (Correia) who does not. Moreover, while Parnas was subject to a Congressional demand for information at the time of his arrest, Fruman was as well, and while Parnas complied with that demand several months later, Fruman did not.
>
> Regarding discriminatory purpose, Parnas's argument is not just speculative, but implausible. Citing Twitter posts, Parnas argues that "[m]illions of Americans already believe that [former] Attorney General Barr may have interfered in some aspect of Mr. Parnas's investigation and prosecution, based on the public record." Parnas asserts that his indictment and arrest were a means to thwart Parnas's testimony in the impeachment inquiry of former President Donald Trump. But the theorizing of Twitters users, and Parnas's own speculation, do not constitute evidence of an improperly motivated prosecution. Indeed, Parnas was, by his own admission, not cooperating with the Congressional demand as of the day of his indictment. To accept Parnas's conspiracy theory, the Government would have to have known that, one day in the future, Parnas would change his mind and decide to cooperate with the Congressional demand.

> Furthermore, the Government's conduct since Parnas's arrest undermines his theory. The Government consented to allowing Parnas to produce documents to the House impeachment committee, and it has not objected to Parnas's media interviews and television appearances.

It's actually not a conspiracy theory that Parnas was prosecuted in the way he was partly as an attempt to shut him up, though when Parnas first argued this, he claimed he was prosecuted to prevent him from testifying in the Former's first impeachment which, as Oetken notes (and I noted in the past) doesn't accord with the known facts. And Parnas chose not to present some of the most damning evidence of this, probably because it would incriminate himself.

In any case, having denied Parnas' selective prosecution claim, in the very next section, Oetken denies Parnas' request (in which the other defendants joined) to get access to the Rudy-Toensing content, citing his decision rejecting Parnas' selective prosecution claim.

> The Giuliani and Toensing warrants do not authorize the Government to search for evidence related to this case, nor do any of the accounts or devices involved belong to Defendants. The Government represents that it will not use any of the evidence seized pursuant to these warrants at trial in this case. Thus, the only bases for discovery of these materials would be (1) if they contain statements by Defendants that are "relevant" to the charges in this case, or (2) if they are "material" to preparing a defense to the Government's case.
>
> First, Defendants contend that the search warrant returns are likely to contain communications between Giuliani and Toensing and Parnas. But such communications are likely to have

> already been produced from Parnas's and Fruman's own accounts and devices, and Defendants have not shown that they are related to the charged case, material, and noncumulative.
>
> Second, Parnas suggests that the warrant returns may contain evidence relevant to his selective prosecution claim. The Court has already rejected that claim, and nothing in Parnas's letter alters the fact that Parnas has failed to make the requisite showing for such a claim.

This is unsurprising on a matter of law, but several points about it are worth closer focus: First, Oetken notes that the government can only access that information seized from Rudy and Toensing that relates to the crimes for which probable cause was laid out in the warrants, that is, Rudy's influence-peddling, which also implicates Parnas. By description, those warrants do not include any claim that Rudy, with Parnas, attempted to obstruct the impeachment inquiry by hiding details of the influence-peddling scheme. So the warrants would not have provided access to the content of most interest to Parnas, content he's pretty sure exists or existed.

Oetken is silent about whether any warrants have been obtained since the government finally got access to the first tranche of material seized in 2019.

Oetken then claims that if useful communications existed, they would not have been turned over in the warrant returns served on Parnas and Fruman's own devices, because those warrants obtained permission for evidence of different crimes. Except there's very good reason to believe that's not true: that's because, by October 21, 2019, the government and Oetken both know, Parnas attempted to delete his own iCloud account. Parnas did not succeed in that attempt — the government had already gotten a preservation order with Apple. But that doesn't

mean there isn't some other content he once had that he thinks Rudy or Toensing may have retained. Indeed, in his request for the information, Parnas asserted the information seized from Rudy and Toensing likely included conversations — conversations that may have been deleted — about how to address their prior relationships and the unfolding investigation.

> The seized evidence will also likely contain a number and variety of communications between Giuliani and Toensing and Parnas that are directly discoverable under Fed. R. Crim. P. 16, evidence of any conversations between Giuliani, Toensing, and others, including Parnas, that may have been deleted, communications between Giuliani, Toensing and others about the defendants and how to address their prior relationships, the arrests, and the unfolding investigation.

Those materials might help Parnas describe why John Dowd attempted to assert an interlocked attorney-client relationship that ultimately put the then-President in a joint defense agreement with at least one pretty sketchy Ukrainian, which in turn might explain how this investigation proceeded as it did (including why it didn't expand into Rudy's dalliance with a different Ukrainian agent of Russia). But Parnas as much as describes it as an obstruction attempt — an obstruction attempt he, when he attempted to delete his own iCloud account, would have been a part of before he wasn't a part of it anymore. Given Rudy's descriptions of the crimes covered by the warrants, that attempt was not a part of the warrants originally obtained on Rudy and Toensing in 2019, and it wasn't a part of the warrants obtained in April, but given the new evidence (Parnas' own declaration), and given that Jeffrey Rosen is no longer around to obstruct investigations into the Former, SDNY (or EDNY) could ask for new warrants for permission to

search for evidence of that crime.

If SDNY asked for such warrants, Oetken would have been the one they would ask.

Meanwhile, a month after Special Master Barbara Jones first described how she would proceed in reviewing Rudy and Toensing's seized materials, including her promise to, "provide the Court with a timeline for concluding the privilege review once she better understands the volume of the materials to be reviewed," she has made no public reports. Given the pace at which she worked to review Michael Cohen's content in 2018, in which her first report was issued 38 days after she was appointed, we should expect a report from her in the near future (the same 38 days would have been July 13, though COVID has slowed everything down).

Meanwhile, yesterday's ruling took a curious approach to privilege issues. One thing Kukushkin complained about was that, by choosing to share information with the impeachment inquiry, Parnas shared information in which they had an attorney-client privilege. Oetken dismissed this concern (and Kukushkin's larger bid to sever his trial from Parnas') in part by relying on prosecutors' representation that they would not rely on privileged material

> Kukushkin also argues that because Parnas waived the attorney-client privilege by providing certain materials to Congress, the Government may be able to introduce privileged materials against Parnas, prejudicing Kukushkin. This argument is speculative, and the Government disavows any intent to seek to offer privileged materials.

Finally, all the defendants complained that a key email used against them in the superseding indictment was privileged, and argued that that, plus all fruit of that (a number of other search warrants), should be thrown out.

> Defendants assert that an email, quoted in several search warrant applications, is protected by the attorney-client privilege and that, as a result, the returns from the search warrants should be suppressed and the Superseding Indictment itself should be dismissed. This issue will be addressed in a separate opinion and order.

This is a different attorney-client dispute, not the claims of privilege that John Dowd invented to protect a cover-up in 2019. The government argued that it was not privileged, but even if it were it would be covered by the crime-fraud exception. "[T]he crime-fraud exception applies because the email furthered a criminal effort by the defendants to utilize attorneys to structure a new business to conceal the involvement of a foreign national." But Oetken, who presumably approved of those allegedly poisoned fruit warrants like he approved of the warrants against Rudy and Toensing, has deferred it to a separate opinion.

Oetken knows far more about the substance of these attorney-client disputes, and this is actually the third attempt in this case where a defendant attempted to hide evidence by invoking privilege. In the third, prosecutors successfully argued that materials pre-existing attorney-client privilege are not privileged.

But given all these claims of attorney-client privilege he has been watching, it's likely he's unimpressed with the third one.

WHY WOULD ALLEN WEISSELBERG TOLERATE

HAVING TO CHEAT ON HIS TAXES RATHER THAN GETTING A RAISE?

I want to pull several salient facts out of the indictment against Trump Organization CFO Allen Weisselberg and Trump Organization rolled out yesterday. The indictment alleges that the Trump Organization paid Weisselberg and other Trump Org executives off the books in such a way that allowed them to underpay their taxes.

> The purpose of the scheme was to compensate Weisselberg and other Trump Organization executives in a manner that was "off the books": the beneficiaries of the scheme received substantial portions of their income through indirect and disguised means, with compensation that was unreported or misreported by the Trump Corporation or Trump Payroll Corp. to the tax authorities. The scheme was intended to allow certain employees to substantially understate their compensation from the Trump Organization, so that they could and did pay federal, state, and local taxes in amounts that were significantly less than the amounts that should have been paid. The scheme also enabled Weisselberg to obtain tax refunds of amounts previously withheld.

It goes through one after another way that Weisselberg was paid in this way:

- A lease on a Riverside apartment that was Weisselberg's full time residence (which, scandalously, was not owned by Trump)

- For some years in which he lived in the Riverside apartment, the ability to claim he was not a resident of New York City and so avoid taxes there
- Private school tuition payments for his grand-kids
- Use of two Mercedes
- Cash to pay his holiday gratuities
- Some compensation paid by the Mar-a-Lago Club and Wollman Rink Operations LLC as non-employee compensation that he dumped into a Keogh plan (this appears to be the same scheme that the NYT described Ivanka being paid as a consultant under)

It makes it clear he was in charge of this system — the entire system, just not the part that benefitted him, but also the parts that benefitted his own kid and Donald Trump's kids.

> At all relevant times, Weisselberg had authority over the Trump Organization's accounting functions, including its payroll administration procedures. He supervised the Comptroller of the Trump Organization, who managed the day-to-day affairs of the accounting department, including payroll administration, and who reported to Weisselberg. At all relevant times, Weisselberg was authorized to act on behalf of the Trump Corporation and Trump Payroll Corp, to formulate corporate policy, and to supervise subordinate employees in a managerial capacity.

Thus far I get how this is supposed to work: Weisselberg has thus far been charged only for the tax fraud that benefitted him. If he doesn't cooperate, his kid will be charged for the tax fraud that benefitted him, and Weisselberg will also be charged for the tax fraud that *didn't* benefit him but over which he was in charge anyway.

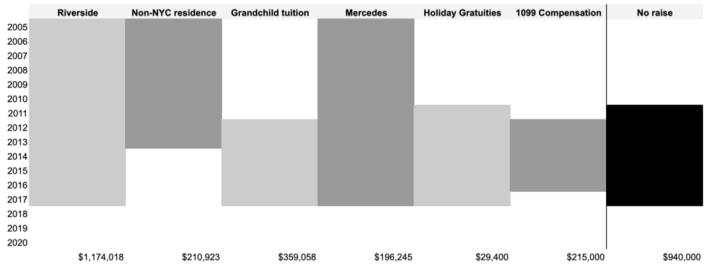
What I don't understand is this. Before the indictment was revealed, some well-informed people had assumed that all the fringe benefits — the free tuition, the free car, the free apartment, the free tips — were on top of Weisselberg's compensation. But they weren't. The indictment reveals that from 2011 to 2018, Weisselberg's compensation remained fixed at $940,000, with $540,000 in base and $400,000 in bonuses that could be paid via one or another of these slushy tax dodges.

> For example, from 2011 through 2018, his compensation was fixed at $940,000, to be comprised of $540,000 in base salary and $400,000 in end-of-year bonus. However, at Weisselberg's direction, the Trump Organization excluded from his reported gross income the amounts that were paid to him indirectly in the form of rent paid on his New York City apartment, tuition paid on his behalf to his family members" private school, the automobile expenses paid in connection with his and his wife's personal cars, and the other items described above. Weisselberg, received the benefit of these payments, and the Trump Organization internally tracked and treated 'many of them as part of his authorized annual compensation, ensuring that he was not paid more than his pre-authorized, fixed amount of gross compensation. However, the corporate defendants falsified other compensation records so that the indirect compensation payments were not reflected in Weisselberg's reported gross income.

> Therefore, the W-2 forms and other compensation records reported to federal, state, and local tax authorities fraudulently understated the income that the 'Trump Organization had paid Weisselberg. Weisselberg included the falsified information set forth on his W-2 forms when he filed his personal income tax returns.

So while the benefit to Weisselberg of all this alleged tax cheating was $1.76 million, he really wasn't pocketing all that as a result (probably no more than $100,000 benefit per year). Effectively, the Federal Government, New York State and New York City were paying Weisselberg's raises every year rather than Donald Trump — with one notable exception, explained below.

Here's how it looks with each benefit over the years that Weisselberg received that benefit.



The table suggests two things (though someone smarter than me would have to do the math to prove it). First, starting in 2013, after he sold his house on Long Island, Weisselberg lost a significant tax dodge, the ability to claim he didn't live in NYC, so at that point, his compensation would have effectively been cut $23,000 in the yearly tax dodge not paying NYC taxes had given him to that point. Then, in the period when Donald Trump was too cheap (or, importantly, too broke) to just give Weisselberg a raise like normal people, Weisselberg was just adding on the tax dodges: first, the paltry holiday gratuities, then the 1099 payments and the tuition payments.

In that period — which stretched roughly from the period when Trump first entertained running for President through his first year as president — Weisselberg was doing more and more tax cheating just to get paid the same (or adding roughly $100,000 a year income in the best scenario, but again, someone smarter than me needs to do that math).

And for at least two years, Trump didn't even benefit from this scheme. For the first two years Trump Organization was paying Weisselberg's grand-kids' tuition, he was paying it out of his own pocket.

> Beginning in 2012, one of Weisselberg's family members began attending a private school in Manhattan. Beginning in 2014, second Weisselberg family member began attending the same private school. From 2012 through 2017, and as part of the scheme to defraud, Trump Corporation personnel, including Weisselberg, arranged for tuition expenses for Weisselberg's family members to be paid by personal checks drawn on the account of and signed by Donald J. 'Trump, and later drawn on the account of the Donald J. Trump Revocable Trust dated April 7, 2014.

As far as we know, Donald Trump has only made this kind of payment out of his own pocket when trying to buy off former sex partners. But for two years, he was paying part of Weisselberg's compensation — the tuition of one grand-kid — out of his own pocket.

What I don't understand is why — aside from loyalty — Weisselberg was allegedly willing to commit new kinds of tax fraud just to retain the same salary. Michael Cohen went along with these kinds of games, but when it came time, he tried (unsuccessfully) to cash in on all his years of being a loyal Trump crook. Did Weisselberg take on all this legal exposure out of loyalty?

Or was there something about Trump's business that required them to squeeze more and more out of unpaid taxes just to stay afloat?

Update: This piece from Jennifer Taub is one of the most helpful pieces I've seen on why this was valuable for Trump.

> It's easy to see what was in it for Weisselberg and the employees getting the equivalent of tax-free income. But how would Trump and his businesses benefit from these give-a-ways? It's a way to give employees higher pay at a lower cost to the company. Here's a simple, but not precise example for a New York employee. If the company pays an extra $100,000 in cash compensation the net pay for that extra is around $72,000 after withholding and payroll taxes. Then the employee can use that money to pay expenses like private school tuition or car leases. But, if instead, the company directly pays $72,000 worth of the employee's school and car expenses off-the-books, and the employee and company hide that, it only costs the company the $72,000 (which it can still finagle a deduction as some kind of business expense).
>
> By hiding that fringe benefit income, by pretending that he was not a New York City resident, and by claiming tax refunds to which he was not entitled, as the indictment alleges, he deprived city, state, and federal tax authorities of approximately $1,034,236 all together. A large sum, to be sure, but one that's probably already been or soon will be dwarfed by Weisselberg's legal bills. Weisselberg allegedly owes more than half of that cool million in *federal* taxes.

She also notes that Trump knew about the apartment.

> There is a section of the indictment accusing Trump Corporation, Trump Payroll Corp., and Weisselberg with conspiracy in the fourth degree. Allegedly they agreed with “Unindicted Co-conspirator #1” (who appears to be someone who works *for* Weisselberg (so it’s not The Donald) to implement the off-the-books compensation scheme. This part of the indictment goes on to enumerate twelve separate overt acts that were carried out by the conspirators in furtherance of the conspiracy.
>
> [snip]
>
> The very first overt act that seems to indicate the ex-president’s involvement was Donald Trump on behalf of the corporation entering into a lease around March 31, 2005 for an apartment in Manhattan on Riverside Boulevard (the Trump Place building). That lease had a rider that permitted only Allen Weisselberg and his wife to occupy the apartment and to use it as their primary residence.
>
> Why is this lease rider important? Well, it communicates that the grand jury knows that Donald Trump knew Weisselberg was living in the apartment on the company’s dime. It also means that Manhattan District Attorney Cy Vance does not yet have enough evidence to bring to the grand jury to show probable cause that Trump was part of the underlying agreement that formed the conspiracy.

LEV PARNAS' GAMBLE: THE THREE NESTED INVESTIGATIONS

As I noted the other day, Lev Parnas has inserted himself, along with his co-defendants, in the middle of the presumed Special Master review of Rudy Giuliani and Victoria Toensing's seized devices. He's doing so as part of a strategy he has pursued since shortly after he was arrested to either make his prosecution unsustainable for Donald Trump (that strategy has presumably failed) or to bring a whole lot of powerful people — possibly up to and including Trump — down with him. The Special Master review will be critical to this strategy, because it will determine whether material that might otherwise be deemed privileged can be reviewed by the Southern District of New York as evidence of a cover-up of crimes that Donald Trump committed.

In this post, I will lay out how there are two — and if Lev is successful, three — sets of crimes in question, each leading to the next.

1a, Conspiracy to donate money: 18 USC 371, 52 USC 30122, 18 USC 1001, 18 USC 1519 and 2, and 18 USC 371, 52 USC 30121.

The first set of crimes pertain to efforts by Parnas, Igor Fruman, and two co-defendants, to gain access to the Republican Party with donations prohibited by campaign finance law. They were first charged — as Parnas and Fruman were about to fly to Vienna to meet with Victor Shokin — on October 9, 2019. The charges relate to allegations that they used their company,

Global Energy Partners, to launder money, including money provided by a foreigner, to donate to Trump-associated and other Republican candidates.

These charges almost certainly arose out of a complaint and then a follow-up by Campaign Legal Center.

The overall motive of these crimes, as described, was basically grift: to improve their connections to facilitate a fairly dodgy business proposition. One prong of the business, explicitly funded by a Russian businessman, involved funding recreational marijuana efforts.

But along the way, one of their alleged acts was to give Pete Sessions $20,000 in a way that associated that donation with an effort to get rid of Marie Yovanovitch, possibly on behalf of Yuri Lutsenko.

> [T]hese contributions were made for the purpose of gaining influence with politicians so as to advance their own personal financial interests and the political interests of Ukrainian government officials, including at least one Ukranian government official with whom they were working. For example, in or about May and June 2018, PARNAS and FRUMAN committed to raise $20,000 or more for a then-sitting U.S. Congressman [Sessions],
>
> [snip]
>
> At and around the same time PARNAS and FREEMAN committed to raising those funds for [Sessions], PARNAS met with [Sessions] and sought [his] assistance in causing the U.S. Government to remove or recall the then-U.S. Ambassador to Ukraine.

1b, Conspiracy to donate money: 18 USC 371, 52 USC 30122, 18 USC 1001, 18 USC 1519 and 2, and 18 USC 371, 52 USC 30121, 18 USC 1349.

The campaign finance indictment was superseded on September 17, 2020 to add a fraud charge associated with Parnas and David Correia's Fraud Guarantee, which literally was a fraud claiming to insure people against losses from fraud. They got a bunch of investors to invest in the business based on false representations, which Parnas (and to a lesser degree, David Correia) allegedly spent on his personal expenses. The superseding indictment took out the charge related to Yovanovitch.

Shortly after this superseding indictment, Correia flipped, entering into a plea agreement.

2, Foreign influence peddling: 22 USC §§612 and 618, 18 USC §951, 18 USC §2, and 18 USC §371

As you can see already, the first indictment against Parnas and Fruman pertained to an effort — to get Yovanovitch fired — that they were undertaking with Rudy Giuliani. And the superseding indictment adds fraud associated with the Fraud Guarantee they used Rudy's name to help sell. So Rudy was bound to get dragged into this.

According to a letter submitted by Rudy Giuliani's lawyer, he is being investigated for

a bunch of influence-peddling crimes: FARA, acting as an unregistered Foreign Agent, abetting, and conspiracy.

This investigation may have come out of the way that the whistleblower complaint that launched Trump's first impeachment magnified an OCCRP profile of Parnas and Fruman's influence-peddling (which incorporated the profile), and the way that impeachment magnified the influence-peddling that Rudy and the grifters were involved with. The letter that failed to redact the targets of the warrants associated with Rudy listed two of the key players in the OCCRP profile, Yuri Lutsenko and Alexander Levin (Roman Nasirov is the one other person, in addition to Rudy and Victoria Toensing, who was targeted).

Indeed, even as impeachment was rolling out, during the period where Parnas was discussing cooperating with SDNY, he was refusing to admit that some foreigner — likely Lutsenko — was behind all this.

And it seems pretty clear that Parnas and Fruman are subjects of this investigation, too. The government's response to Parnas' request for discovery describes that he was notified of search warrants targeting him in January of this year (shortly after Joe Biden's inauguration).

On November 8, 2019, the Court authorized the Government to delay the disclosure and production of certain search warrant materials pursuant to Federal Rule of Criminal Procedure 16(d)(1) based on a showing of good cause. In particular, the Rule 16(d) order permitted the Government to redact and withhold search warrants, applications, and returns relating to an ongoing grand jury investigation concerning possible violations of [redacted]. On or about January 3, 2020, January 28, 2020, and March 6, 2020, the Court ordered that the Rule 16(d) order covered additional Government applications and search warrant returns. On or about March 6, 2020, April 17, 2020, September 4, 2020, December 17, 2020, and March 26, 2021, the Court granted the Government's requests to extend the Rule 16(d) order. On January 28, 2021, the Government produced search warrants and applications related to [redacted] investigation for certain of the defendants' accounts and devices that had previously been redacted or withheld pursuant to the Rule 16(d) order. On May 14, 2021, the Government disclosed to the defendants a list of the search warrants, applications, and returns that the Government has continued to withhold pursuant to the Rule 16(d) order, pursuant to a limited unsealing order issued by this Court. The search warrants, search warrant applications, and search warrant returns that have not been produced—identified below—all relate to accounts or devices that do not belong to the defendants, only authorize the search and seizure of material related to [redacted] investigation, and otherwise remain under seal.

#	Date	Docket No.	Item Subject to Search	Subject Offenses
1	11/04/2019	19 Mag. 10364	Email and iCloud accounts of Rudolph Giuliani; iCloud account of Victoria Toensing	[redacted]
2	[redacted]	[redacted]	[redacted]	[redacted]
3	[redacted]	[redacted]	[redacted]	[redacted]
4	12/13/2019	19 Mag. 11704	Email account of Victoria Toensing	[redacted]
5	[redacted]	[redacted]	[redacted]	[redacted]

3. Parnas' hoped for obstruction investigation

From the start, Parnas has been alleging — credibly — that at least the timing of his arrest was an effort to protect the President and maybe even to shut him up. From early on, he used impeachment as a way to share materials obtained in discovery showing Rudy's central role in it all. In January 2020, Parnas filed a letter he sent to Billy Barr requesting his recusal, based in part off a claim that DOJ delayed production of discovery past the time he could share it with the impeachment inquiry (in reality, the delay was partly due to the time it took to crack the password to Parnas' phone). In December, Parnas filed a motion to dismiss his indictment, alleging selective prosecution. He focused closely on the events leading up to impeachment (and falsely suggested these events started in 2019, not 2018). Amid a list of all the times Barr corruptly intervened to protect the President, Parnas described how, just as HPSCI was asking for his testimony, he and

Fruman were arrested.

> Later that day, Dowd wrote to HPSCI, 6 as he had indicated he would in his e-mail: Kindly refer to my letter of October 3, 2019. This is an update. We continue to meet with Mr. Parnas and Mr. Fruman to gather the facts and documents related to the many subjects and persons detailed in your September 30 letter and to evaluate all of that information in light of the privileges we raised in our last letter. This effort will take some additional time. Accordingly, Messrs. Parnas and Fruman will not be available for depositions scheduled for October 10, 2019. The following day, October 9, 2019, Mr. Parnas met with Mr. Giuliani at the BLT Steakhouse in the Trump Hotel, Washington DC. Mr. Parnas was scheduled to travel later that evening to Frankfurt, Germany, and then on to Vienna, Austria, to meet with the former Prosecutor General of Ukraine, Victor Shokin, to prepare him for an appearance on FOX News' Shawn Hannity Show to discuss Joe Biden. Although Mr. Giuliani, along with Victoria Toensing and Joseph DiGenova, had originally been scheduled to travel to Vienna with Parnas, Toensing and DiGenova had cancelled several days earlier, and Mr. Giuliani cancelled that day.
>
> After finishing meeting with Mr. Giuliani, Mr. Parnas and Mr. Fruman took a car to Dulles International Airport, where they waited in the Lufthansa lounge for approximately two hours before beginning to board their flight. Unbeknownst to Messrs. Parnas and Fruman, they had been indicted in the SDNY earlier that day.

Parnas also described others involved in his illegal campaign finance activities who were not indicted, including America First Action PAC and

Kevin McCarthy.

Among the things Parnas asked for was evidence that was already being collected in the second, influence-peddling investigation.

> All internal documents, including memoranda, notes, e-mails, and text messages that, in any way, reference the reasons why individuals and entities including but not limited to, America First Super PAC, [redacted], Rudy Giuliani, President Donald J. Trump, Victoria Toensing, Joseph DiGenova, and John Solomon, were not arrested or charged with Mssrs. Parnas and Igor Fruman;

The government dismissed Parnas' claim as lacking evidence but also said that some of the materials he was asking for would be covered by various privileges.

> Because Parnas's claim is meritless, the Court need not consider the contours of his discovery request (Parnas Mot. 32-33), but multiple of his requests seek materials that, if they exist, appear to be attorney work product, covered by the deliberative process privilege, and/or are outside of the scope of what would be reasonably necessary to try to advance his asserted claims rather than to gain a strategic advantage at trial.

Judge Oetken has not yet ruled on Parnas' selective prosecution claim (or a bunch of other pre-trial motions from all defendants).

But as I noted, just the other day, Gordon Sondland provided more evidence of a corrupt cover-up pertaining to impeachment.

In his redaction fail letter, Parnas addressed very specific things he believed to exist to show a cover-up just before the influence

peddling warrants got sent out, including emails he deleted.

> The seized evidence will also likely contain a number and variety of communications between Giuliani and Toensing and Parnas that are directly discoverable under Fed. R. Crim. P. 16, evidence of any conversations between Giuliani, Toensing, and others, including Parnas, that may have been deleted, communications between Giuliani, Toensing and others about the defendants and how to address their prior relationships, the arrests, and the unfolding investigation, communications between Giuliani and Toensing and others with potential Government witnesses, including communications about the defendants, the offenses charged, and the witnesses' potential disclosures and characterizations of alleged fraud-loss computations.

If Rudy and Toensing didn't delete these materials, then they are now in US government custody. And Parnas is doing all he can to make sure the government looks at them.

RICO COMES TO THE JANUARY 6 INVESTIGATION — BUT NOT THE WAY YOU THINK

Longterm readers of this site know that bmaz always gets incensed when people discuss RICO, mostly because those discussions tend towards

magical thinking that RICO can make complex legal questions magically result in jail time for bad guys.

That's why I put RICO in the title.

But RICO really has come up in a January 6 case: pertaining to DOJ's attempted seizure of the $90,000 John Sullivan made off selling his video of the insurrection. Much of that filing dismisses Sullivan's attempt to keep the money because he needs it for living expenses. If he genuinely needed it to pay his lawyer, he might have an argument, but DOJ says he's got other bank accounts with significant funds for that.

> Here, the defendant has submitted no declaration, financial affidavit, or banking statements. He has not provided any information about his assets outside his bank account ending in 7715, the only account from which funds were seized. He has not provided information about his short- or long-term liabilities. He has not detailed his sources of income, despite being, to the government's understanding, currently employed by his father. He has not described his ability to use other assets, liquid and non-liquid, to pay basic necessities, including the assistance of family members and friends. He has not provided information regarding what funds he has recently expended toward household expenses and what any additional funds are requested, nor detailed what the "household expenses" entail. Such specification is particularly essential where expenditures can dramatically vary, irrespective of necessity, based on a defendant's typical lifestyle. Cf. United States v. Egan, 2010 WL 3000000, at *2 (S.D.N.Y. July 29, 2010) ("The Court does not take lightly a request to release funds allegedly stolen from former customers in order to finance

> luxuries" such as high-end vehicles or a multimillion-dollar home").
>
> A more fulsome showing is particularly warranted in light of the defendant's Pretrial Services Report from the arresting jurisdiction, which was prepared from an interview conducted on January 15, 2021 and, according to D.C. Pretrial Services, submitted to this Court with the Rule 5 papers. That document reported significant funds in unspecified bank accounts of the defendant — funds that wholly predate, and lie entirely outside the scope of, the government's seizure warrants. The government's seizure warrants instead surgically targeted the defendant's $90,875 in proceeds from sales of his video footage from the U.S. Capitol — all of which was deposited into his bank account subsequent to January 15. The Pretrial Services Report further noted multiple vehicles owned by the defendant. And it provided a specific estimate of the defendant's monthly expenses to include rent, groceries, cell phone, auto insurance, and other incidentals — which, if extrapolated, should mean that the defendant retains substantial assets notwithstanding the government's seizure of the $62,813.76 on April 29, 2021.
>
> The government, moreover, is aware of at least one other bank account of the defendant with America First Credit Union in which he retained a positive balance as of March 19, 2021. Again, this account and the funds therein lie wholly outside the scope of the government's seizure warrants.

But there's a part of the filing that probably answers a question I asked: aside from the First Amendment concerns of seizing funds from making a video, I wondered why DOJ had invoked the

obstruction charge against Sullivan to do so, rather than the civil disorder charge, as the basis for the seizure. There's more evidence that Sullivan was trying to maximize chaos than obstruct the counting of the vote, so it seemed like civil disorder was the more appropriate felony.

It seems that invoking obstruction gave DOJ a way to seize the funds, and even then it had to go through RICO magic.

Here's the language in question: I've highlighted the RICO reference in bright red letters for bmaz's benefit.

> Title 18, United States Code, Section 981(a)(1)(C) provides that "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of … any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of [Title 18 of the U.S. Code])" is "subject to forfeiture to the United States." The provision thus subjects "proceeds" traceable to violations of specified unlawful activities ("SUAs") to civil forfeiture. Meanwhile, criminal forfeiture is authorized when 18 U.S.C. § 981(a)(1)(C) is used in conjunction with 28 U.S.C. § 2461(c), which holds that "[i]f the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case." In turn, 18 U.S.C. § 1956(c)(7) – which was cross-referenced in § 981(a)(1)(C) – incorporates as SUAs all predicate offenses under the Racketeer Influenced and Corrupt Organizations ("RICO") statute – that is, "any act or activity constituting an offense listed in section 1961(1) of this title [Title 18] except an act which is indictable under subchapter II

> of chapter 53 of title 31."
>
> Finally, 18 U.S.C. § 1961(1) sets forth the RICO predicates and expressly includes, among those predicates, 18 U.S.C. § 1512. 3 Thus, "[b]y application of § 2461(c), *forfeiture of property is mandated for a violation of 18 U.S.C. § 1512*, since it is a racketeering activity identified in 18 U.S.C. § 1961(1), which is a specified unlawful activity under 18 U.S.C. § 1956(c)(7)(A)." United States v. Clark, 165 F. Supp. 3d 1215, 1218 (S.D. Fla. 2016) (emphasis added).

The forfeiture law, 18 USC §981, allows for forfeiture when a person profits off any of a bunch of crimes. Terrorism is in there, for example, but Sullivan is not charged with a crime of terrorism (they might get there with Sullivan if he were charged with breaking a window that surely cost more than $1,000 to fix, but they haven't charged him for that, even though his own video suggests he did break a window and all those windows are ridiculously expensive). Instead, DOJ is using 18 USC §1956, money laundering, to get to forfeiture. Sullivan is not alleged to have laundered money. But that law includes RICO's predicates among the unlawful activities for which one might launder money. And obstruction, 18 USC §1512, is a specific unlawful activity that may be part of RICO.

That is, they found a crime that Sullivan allegedly committed — obstruction — nested three layers deep in other statutes.

DOJ admits that obstruction hasn't led to forfeiture all that often — but they've found nine cases, none in DC, where it has.

> 3 There is a limited number of forfeiture allegations paired with § 1512 as the SUA. Section 1512 prohibits (a) killing or assaulting someone with

> intent to prevent their participation in an official proceeding, (b) intimidating someone to influence their testimony in such a proceeding, (c) corrupting records or obstructing, impeding, or influencing such a proceeding, and (d) harassing or delaying someone's participation in such a proceeding — crimes that do not often generate profits. Nonetheless, the government has identified at least nine indictments where a § 1512 count was a basis for the forfeiture allegation. See United States v. Clark, 4:13-cr-10034 (S.D. Fla.); United States v. Eury, 1:20CR38-1 (M.D.N.C.); United States v. Ford and Prinster, 3:14-cr45 (D. Or.); United States v. Shabazz, 2:14-cr-20339 (E.D. Mich.); United States v. Cochran, 4:14-cr-22-01-HLM (N.D. Ga.); United States v. Adkins and Meredith, 1:13cr17-1 (N.D. W. Va.); United States v. Faulkner, 3:09-CR-249-D (N.D. Tex.); United States v. Hollnagel, 10 CR 195 (N.D. Ill.); United States v. Bonaventura, 4:02-cr-40026 (D. Mass.). Congress likewise included some of § 1512's surrounding obstruction-related statutes as SUAs, and forfeiture allegations have also referenced these sister statutes. E.g., United States v. Fisch, 2013 WL 5774876 (S.D. Tex. 2013) (§ 1503 as SUA); United States v. Lustyik, 2015 WL 1401674 (D. Utah 2015) (same).

Of course, those obstruction charges were probably garden variety obstruction (say, threatening trial witnesses for pay), not the already novel application of obstruction that other defendants are challenging.

bmaz may swoop in here and accuse DOJ of using RICO for magical thinking. At the very least, this all seems very precarious, as a matter of law.

I'm all in favor of preventing someone from

profiting off insurrection. But this seems like a novel application of law on top of a novel application of law.

Sullivan has a hearing today before Judge Emmet Sullivan, so we may get a sense of whether the judge thinks this invocation of RICO is just magical thinking.

VICKY AND RUDY: THE SUBJECTS OF DELAY

When I asked around last year what the net effect of Billy Barr and Jeffrey Rosen's efforts to protect Rudy Giuliani would be, I learned that the net effect of refusing to approve searches on Rudy would only delay, but it would not change the outcome of, the investigation into the President's lawyer.

That's worth keeping in mind as you read SDNY's response to Victoria Toensing and Rudy's demand that they get to treat both the April warrants against them, as well as the 2019 warrants, like subpoenas. Effectively, SDNY seems to be saying, "let's just get to the indictment and discovery phase, and then you can start challenging these searches."

The filing several times speaks of charges hypothetically.

> If Giuliani is charged with a crime, he will, like any other criminal defendant, be entitled to production of the search warrant affidavits in discovery, at which time he will be free to litigate any motions related to the warrants as governed by Federal Rule of Criminal Procedure 12. Conversely, if the Government's grand jury investigation concludes without criminal charges, then the sealing calculus may be different,

> and Giuliani may renew his motion.
>
> [snip]
>
> If there is a criminal proceeding, the Government will produce the affidavits, warrants, and materials seized pursuant to those warrants, and at that time, the warrants' legality can be litigated.
>
> [snip]
>
> Finally, Toensing will have both a forum and an opportunity to litigate any privilege issues if there is a criminal proceeding. As the Second Circuit has noted, in affirming the denial of a return-of-property motion, "If [the grand jury's] inquiry results in indictment, the lawfulness of the seizure will be fully considered upon a motion to suppress, and any ruling adverse to the defendant will be reviewable upon appeal from a final judgment; if the grand jury declines to indict the movant, or adjourns without indicting it, its property will most likely be returned, and if not, it can initiate an independent proceeding for its return." [my emphasis]

But the filing repeatedly makes clear that not just Rudy, but also Toensing (whose lawyer made much of being informed that Toensing was not a target of the investigation), are subjects of this investigation.

> But the Government specifically chose not to proceed by subpoena in this case, for good reason, and there is no precedent for permitting the subjects of an investigation to override the Government's choice in this regard.
>
> None of the cases cited by Giuliani or Toensing supports their proposed approach. Toensing principally relies on United States v. Stewart, No. 02 Cr. 395

> (JGK), 2002 WL 1300059, at *4-8 (S.D.N.Y. June 11, 2002), 4 but that case is readily distinguishable because it involved the seizure of documents from several criminal defense attorneys who were *not* subjects of the Government's investigation and had many cases before the same prosecuting office
>
> [snip]
>
> Such concerns merely serve to highlight the many countervailing problems with Giuliani and Toensing's proposal: under their approach, the subjects of a criminal investigation would have the authority to make unilateral determinations not only of what is privileged, but also of what is *responsive* to a warrant.
>
> [snip]
>
> Nevertheless, Giuliani argues that, quite unlike other subjects of criminal investigations, he is entitled to review the affidavits supporting the warrants, which would effectively give him the extraordinary benefit of knowing the Government's evidence before even being charged with a crime.
>
> [snip]
>
> Her request is contrary to law and would effectively deprive the Government of its right to evidence in the midst of a grand jury investigation so that she, the subject of that investigation, may decide what is privileged and what is responsive in those materials.
>
> [snip]
>
> In other words, accepting Giuliani and Toensing's argument about the impropriety of using a filter team to review covert search warrant returns would entitle subjects of a criminal

> investigation to notice of that investigation any time a warrant were executed that related to them, no matter if the investigation were otherwise covert and no matter if the approving Court had signed a non-disclosure order consistent with the law. [my emphasis]

SDNY correctly treats Rudy and Toensing's demands to review this material before SDNY can obtain it as a delay tactic.

> Giuliani and Toensing's proposal to allow their own counsel to conduct the initial review of materials seized pursuant to lawfully executed search warrants, including making determinations of what materials are responsive to the warrants, on their own timeline is without any precedent or legal basis. The Government is aware of no precedent for such a practice, which has the effect of converting judicially authorized search warrants into subpoenas.

Indeed, their discussion of the Lynn Stewart precedent emphasizes their goal of obtaining this material expeditiously.

> None of the cases cited by Giuliani or Toensing supports their proposed approach. Toensing principally relies on United States v. Stewart, No. 02 Cr. 395 (JGK), 2002 WL 1300059, at *4-8 (S.D.N.Y. June 11, 2002), 4 but that case is readily distinguishable because it involved the seizure of documents from several criminal defense attorneys who were not subjects of the Government's investigation and had many cases before the same prosecuting office. (See infra at pp. 33-34). In any event, the Court appointed a special master in Stewart, as the Government seeks here. And the procedures adopted

> in Stewart illustrate why the Government's proposed approach is preferable. In Stewart, the presiding judge initially believed that the special master's review could be conducted expeditiously because the defendant's counsel could quickly produce a privilege log (as Toensing seeks to do here). Id. at *8. But 15 months later, the judge lamented that the special master still had not produced a report on the seized materials. United States v. Sattar, No. 02 Cr. 395 (JGK), 2003 WL 22137012, at *22 (S.D.N.Y. Sept. 15, 2003), aff'd sub nom. United States v. Stewart, 590 F.3d 93 (2d Cir. 2009). That cumbersome process stands in stark contrast to that adopted by Judge Wood in Cohen, wherein the special master completed her review on an expedited basis in parallel to Cohen's counsel, and set deadlines for Cohen's counsel to object to any of her designations. (Cohen, Dkt. 39 at 1-2). In Cohen, the special master was appointed in April 2018, and her review was complete by August 2018. The Cohen search involved approximately the same number of electronic devices seized here, but also included significant quantities of hard copy documents, which are not at issue here. In sum, the Court should follow the model set forth in Cohen, which resulted in an efficient and effective privilege review. [my emphasis]

Likewise, the government also offered to pay the costs of the Special Master, so long as the Special Master follows the expeditious procedure conducted with Michael Cohen's content.

> This Court should not permit Giuliani and Toensing to stall the investigation of their conduct in this manner, particularly where the Government's

> proposal will allow them to conduct the same review in parallel with a special master. The Government's proposal to appoint a special master to review the seized materials is the only proposal that is fair to all parties, respects the unique privilege issues that the 2021 Warrants may implicate, and will ensure that Government's investigation proceeds without undue delay.6
>
> 6 In the Cohen matter before Judge Wood, the Government and Cohen split the costs associated with the special master's privilege review. Here, because the Government made the initial request of the Court and considers the appointment of a special master appropriate in this matter, the Government is willing to bear the costs of the review insofar as the special master follows the procedures adopted by Judge Wood in the Cohen matter, namely to review the seized materials for potential privilege in parallel with counsel for Giuliani and Toensing. To the extent the Court adopts the proposals advanced by Giuliani and Toensing, including that the special master also conduct a responsiveness review of those same materials—which the Government strongly opposes for the reasons set forth above—Giuliani and Toensing should solely bear any costs associated with a responsiveness review, any review beyond the initial privilege review, or any cost-enhancing measures traceable to Giuliani and Toensing. [my emphasis]

I'm mindful, as I review the schedule laid out above, that Cohen was charged almost immediately after the Special Master review was completed, in August 2018. In addressing the partial overlap between the 2019 searches and the April ones, the government notes that, "the Government expects that some, but not all, of the materials

present on the electronic devices seized pursuant to the Warrants could be duplicative of the materials seized and reviewed pursuant to the prior warrants."

The government already knows what they're getting with these warrants (and if they don't get it, they're likely to be able to charge obstruction because it has been deleted). They're calling for a Special Master not because it provides any more fairness than their prior filter review (indeed, they speak repeatedly of the "perception of fairness"), especially since investigators are about to obtain the materials from the 2019 search, but because it ensures they can get this material in timely fashion, especially since, as it stands now, they're going to have to crack the passwords on seven of the devices seized from Rudy.

> The remaining seven devices belonging to Giuliani and his business cannot be fully accessed without a passcode, and as such the Government has advised Giuliani's counsel that the devices can be returned expeditiously if Giuliani were to provide the passcode; otherwise, the Government does not have a timeline for when those devices may be returned because the FBI will be attempting to access those devices without a passcode, which may take time.

Yes, Rudy and Toensing are trying to get an advance look at how bad the case against them is. But they're also hoping to delay, possibly long enough to allow a Republican to take over again and pardon away their criminal exposure.

Which suggests that all the hypotheticals about Rudy and Toensing being able to challenge these searches *if* they are indicted are not all that hypothetical. SDNY is just trying to get to the place where they *can* indict.

VICTORIA TOENSING'S SINGULAR MULTIPLE DEVICES

The government has docketed a less redacted version of the letter it originally posted asking for a Special Master to troll through Rudy Giuliani and Victoria Toensing's devices to separate out the privileged material. As I predicted, the redacted parts of the letter describe the filter team search conducted on the material seized in November and December 2019.

That makes the argument this argument all the more cynical.

> [T]he overt and public nature of these warrants necessitates, as Judge Wood observed, the appointment of a special master for the "perception of fairness, not fairness itself."

Particularly given the admission that the government already obtained, "certain emails and text messages," that they expect to find on the seized devices.

Which makes the other details more interesting. The FBI obtained 18 devices from Rudy in their search (though remember that thumb drives may count as a device for the purposes of a search).

But with Toensing, the government showed up with a warrant, "to search premises belonging to Victoria Toensing and seize certain electronic devices" — devices, plural. But the FBI came back with just one device.

So why did the government think they'd come back with multiple devices and where did those devices go?

IN REQUEST FOR SPECIAL MASTER, THE LEV PARNAS PROSECUTORS HINT AT PRIOR FILTER TEAM SEARCHES ON RUDY

The day after the search on Rudy Giuliani and a single Victoria Toensing phone, the prosecutors on the Lev Parnas case wrote a letter to the judge in that case, Paul Oetken, asking that he appoint a Special Master to review the content of their phones before turning that content over to prosecutors. It was unsealed yesterday after Rudy and Toensing's lawyers got to review the redactions and add any they wanted. Oetken has ordered a briefing schedule about how this should proceed, which will extend through May 17.

The letter suggests certain things:

- The participation of Oetken and the Parnas prosecution team (Rebekah Donalski, Nicolas Roos, and Aline Flodr) is consistent with this investigation arising out of the Parnas investigation, as has been reported.
- These searches were approved on April 21, which was the day after Lisa Monaco was confirmed on April 20. That suggests she approved of

this search. It's normal for the Deputy Attorney General to sign off on controversial searches like this, and this suggests they waited to have the confirmed DAG sign off rather than have John Carlin, who had been acting DAG until Monaco was confirmed.

- A court in Maryland signed off on the seizure of Toensing's phone before SDNY signed off on the search of it.
- The letter cites two exceptional circumstances when it might be appropriate to appoint a Special Master: when the attorney-client privilege would involve the President, and so implicate executive privilege, and when the attorney is involved in matters "adverse to the United States Attorney Office." It's not clear if prosecutors have something specific in mind with the latter reference, but it's certainly possible that this concerns matters that one or the other lawyer has clients who are before SDNY.
- Seemingly to explain why Rudy and Toensing aren't

making this request, the letter notes that defendants normally do but, in this case, "there is no pending criminal case against the subjects of the search." Make of that what you will.

- The government is basically asking for the same initial rules to be applied as were applied in the Michael Cohen case. They don't, however, ask that any legal discussions be submitted to the public docket, which is something that happened in Cohen's case that seemed to dissuade Trump from making frivolous claims of attorney-client privilege.

The most interesting bit of the letter, however, comes after a redacted passage with two redacted footnotes.

2. *Discussion*

[redacted] While the

[redacted]

[redacted]

That introduces the following discussion:

> The Government believes that its use of a filter team to conduct a review pursuant to established protocols is sufficient to protect applicable privileges and that [one line redacted] given that the searches [redacted] were done in an overt manner. [half line redacted] as well as the unusually sensitive privilege issues that the Warrants may implicate, the Government considers it appropriate for the Court to appoint a special master to make the privilege determinations as to materials seized pursuant to the Warrants. In particular, the overt and public nature of these warrants necessitates, as Judge Wood observed, the appointment of a special master under the "perception of fairness, not fairness itself."

That is, the government is explaining — in a letter that preempts any demand from Rudy and Toensing — that they don't really need to do it this way, but partly because this search was public, it justifies doing so here.

But remember that the search of these devices is not the only one alleged. Rudy and his lawyer, Robert Costello, claim that SDNY also got a "covert" warrant for Rudy's iCloud account sometime in late 2019.

> A lawyer for former New York City mayor and Donald Trump attorney Rudy Giuliani said the Justice Department revealed on a Thursday conference call that the feds had penetrated Giuliani's iCloud long before Wednesday's search warrants were executed.
>
> "I was told about it today in a conference call with the [U.S.] Attorney's office," attorney Robert Costello, a longtime friend of Giuliani's, told The Daily Beast on Thursday night. "They told me they obtained a 'covert warrant' for

> Giuliani's iCloud account in 'late 2019.' They have reviewed this information for a year and a half without telling us or [fellow Trump-aligned attorney] Victoria Toensing."
>
> During an appearance on Tucker Carlson's Fox News show on Thursday night, Giuliani himself briefly referenced the warrant to search his iCloud account. "In the middle of the impeachment defense, they invaded, without telling me, my iCloud," the Trump confidant said. "They took documents that are privileged. And then they unilaterally decided what they could read and not read. So the prosecutors at the Justice Department spied on me."

A year and a half would put the search in October 2019, quite possibly before impeachment had formally started, and around the time when Lev Parnas and Igor Fruman were first charged. It likely put it at a time when Trump had no overt defense needs, and so no acknowledged privilege here (unless you count John Dowd's October 3 letter to Congress that effectively put Trump in a joint defense agreement with Parnas and Fruman and alleged Russian mobster Dmitro Firtash).

I had thought this earlier reference might have been to a preservation order served to Apple, but the redacted passages are consistent with there having been a real search, one for which SDNY used only a taint team to weed out what was genuinely privileged. And there was clearly probable cause: Rudy was the business partner of two people charged for their business doings.

According to the terms of this letter, in the case of a covert search like the one Rudy claims occurred, there would be less cause for a Special Master.

Which is to say this letter may be more about the searches that have already occurred rather

than the forthcoming exploitation that will be done with the oversight of a Special Master.

GOVERNMENT REFUSES TO LET STEVE BANNON SNEAK AWAY FROM HIS FEDERAL FRAUD INDICTMENT

On February 11, Steve Bannon's pardon was lodged in his federal docket with no explanation, entered with a date of January 19. As compared to the Mike Flynn pardon, there was no DOJ request to dismiss the prosecution nor an indication that Bannon had accepted it.

Apparently, on February 18, Bannon's lawyer wrote Judge Analisa Torres an email requesting that she dismiss the indictment against Bannon. In response, yesterday the government submitted a letter agreeing that Bannon can be terminated from the docket and have his bond returned, but opposing that the indictment be dismissed.

As prosecutors explain, a pardon is only meant to forgive punishment, it is not intended to forget the crime. And if the court dismissed the indictment, prosecutors point out, it would have consequences beyond the pardon.

> The fact that Bannon was pardoned does not extinguish the fact that a grand jury found probable cause to believe that he committed the offenses set forth in the Indictment, nor does it undercut the evidence of his involvement therein which the Government expects to elicit as part of its presentation at trial. Were the Court to dismiss the Indictment against Bannon, it could have a broader

> effect than the pardon itself, among other things potentially relieving Bannon of certain consequences not covered by the pardon.
>
> [snip]
>
> Accordingly, because Bannon does not set forth any legal authority for the proposition that a court should dismiss an indictment following a pardon, and the only stated basis for his request is to "clarify" his status, the Court should deny the request.

The government also demands that Bannon file the letter in the docket.

> Finally, the Court should direct Bannon to publicly file his February 18th letter on the docket. Bannon's counsel submitted the letter to the Court by email—and therefore effectively under seal—because, in his view, "Bannon should no longer be a defendant in the case." However, until the defendant is administratively terminated, he remains a named defendant and more important, Bannon's status in the case is not a basis to make his submission under seal.

The government submitted the filing on the same day that CNN reported an accelerating state investigation into Bannon for the same crimes.

> The Manhattan district attorney's office has subpoenaed financial records related to Steve Bannon's crowd-funding border-wall effort, signaling that its criminal investigation into former President Donald Trump's chief strategist is advancing, according to people familiar with the matter.
>
> Prosecutors sent the subpoenas after Trump pardoned Bannon in late January for federal conspiracy crimes tied to

> the southern border-wall project, making Bannon among the Trump world figures — including the former president — subjects of criminal investigations by Manhattan district attorney Cyrus Vance.
>
> The grand jury subpoenas were sent to Wells Fargo, one of the financial institutions that handled some of the accounts used in the fundraising effort, and to GoFundMe, the crowdfunding platform where Bannon's project, "We Build the Wall," once operated, the people said.
>
> The state grand jury investigation revives the possibility that Bannon, the conservative and outspoken political strategist, could face state criminal charges after shedding the federal case last month.
>
> In addition to the criminal investigation, the New Jersey attorney general's office has launched a civil inquiry into We Build the Wall. In September, the New Jersey Division of Consumer Affairs subpoenaed We Build the Wall for documents seeking a wide range of records, according to court filings.

This all suggests that Bannon may be in a far worse place for having obtained a Trump pardon.

In mentioning its intent to elicit testimony of Bannon's actions in the letter, the government seems to be alluding to the fact that Bannon is a named co-conspirator. They will want (and need) to introduce his actions and statements as a co-conspirator into evidence to convict the others. Thus, it is important for prosecutors that he remain a named — albeit pardoned — co-conspirator in the Federal crimes.

Forcing Bannon's attorney to submit the letter in the docket itself will effectively force him to officially accept the pardon, which prosecutors will then argue is admission of

guilt, making the co-conspirator evidence from him even more valuable by association.

The public filing may also be necessary before Cy Vance can request the grand jury materials from Judge Torres, as referenced in the CNN piece.

And, of course, rather than facing a sentence at some Club Fed prison, Bannon might now be facing a crappier New York State prison like Rikers.

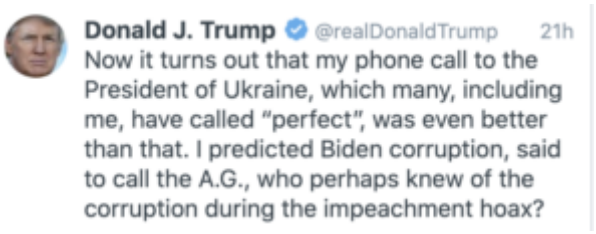
All that's before any other federal charges facing Bannon related for foreign influence peddling.

It was never going to be easy for Bannon to pull off a Trump pardon. Thus far, his attorney Robert Costello may be making things worse.

TRUMP PREPARES TO PARDON MASSIVE TAX CHEAT PAUL MANAFORT WHILE CLAIMING THAT SUSPECTED MIDSCALE TAX CHEAT HUNTER BIDEN DISQUALIFIES JOE

Poor Glenn Greenwald. After news broke that Hunter Biden was under investigation for things that have nothing to do with the allegations Rudy Giuliani was pressing from a laptop purportedly left at a repair office, Glenn wrote a post (purportedly unlocked, though it's not) claiming that everyone who had said Rudy's attempts to float claims from the Biden laptop was Russian disinformation had been proven wrong.

Since then, Donald Trump himself connected the investigation to his call to Volodymyr Zelenskyy, part of Rudy's work with a bunch of Russian-backed Ukrainians — at least one of whom has since been sanctioned by the Trump Treasury Department as a Russian agent — to dig up dirt on Hunter Biden.



And the NYT published a story that revealed that the Pittsburgh US Attorney's office — set up to vet the crap coming from Rudy because of his and therefore its ties to Russian agents — got the laptop.

Even worse for Glenn, the story revealed that those agents being run by a hyper-political US Attorney examined the laptop and found nothing.

> The F.B.I. viewed the investigative steps into Mr. Biden that Mr. Brady sought as unwarranted because the Delaware inquiry involving money laundering had fizzled out and because they were skeptical of Mr. Giuliani's material. For example, they had already examined a laptop owned by Mr. Biden and an external hard drive that had been abandoned at a computer store in Wilmington and found nothing to advance the inquiry.

In other words, people with subpoena power, under pressure to find something incriminating against Hunter Biden in the laptop that Glenn demanded the press drop everything to focus on, had nothing of real investigative interest on it. The DE investigation purportedly comes from normal channels, like Suspicious Activity Reports and divorce proceedings. Importantly, every report thus far say the investigation doesn't implicate the President-Elect, the key

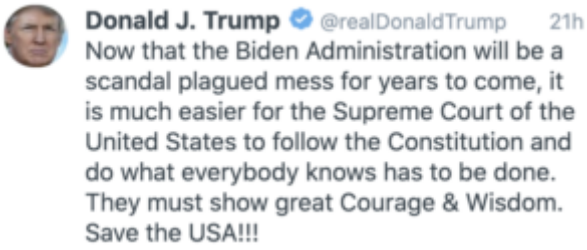
thing those waggling the laptop tried to claim.

Which was part of the point of it being disinformation: Stupid people could and did take things out of context and insinuate something nefarious was going on without evidence that it was, all because some of the emails on the laptop were “authentic.”

Meanwhile, the DE US Attorney’s office has actually been investigating Hunter Biden for longer than the entire Mueller investigation, at least two full years. They have reportedly ruled out a money laundering case but are now scrutinizing the younger Biden for tax crimes.

> In 2018, the F.B.I. and the U.S. attorney’s office in Wilmington, Del., quietly began investigating whether Hunter Biden had violated money laundering laws, according to people with knowledge of the inquiry.
>
> Investigators eventually determined that the money laundering aspect of the Hunter Biden inquiry was not going to lead to charges. But they had discovered potential tax law violations and felt they had the makings of a strong tax case against him, according to several people familiar with the matter. The inquiry came to involve I.R.S. agents.

Donald Trump is taking the report that the original US Attorney’s office investigating the President-Elect’s son, in Delaware, has focused on tax crimes after ruling out money laundering as proof that the entire Biden Administration will be brought down by the legal troubles of someone who will not be given a nepotism appointment in the White House.



Donald Trump almost certainly will, sometime over the next 38 days, pardon his former campaign manager, Paul Manafort, for crimes involving both money laundering *and* tax crimes. Paulie's crimes were at least one order of magnitude bigger than the ones for which Hunter Biden is being investigated (and Biden seems to believe he told his tax advisors honestly what he had earned, which Paulie was shown not to have at trial).

In other words, over the next several weeks, Trump will pardon Paulie for a crime far larger than the ones that — he claims — are of a magnitude that should disqualify someone not named Hunter Biden.

That's worth keeping in mind in the days ahead.

STEVE BANNON HIRES A PARDON BROKER (AND RUDY GIULIANI LAWYER) TO REPLACE HIS COMPETENT LAWYER

Steve Bannon just filed notice of what lawyer will defend him in his SDNY prosecution for defrauding Trump chumps. He had been represented by the very competent Bill Burck. But after Bannon started making death threats against Anthony Fauci and Christopher Wray, Burck dropped him.

Instead, Bannon hired Robert Costello.

> TO THE CLERK OF COURT AND ALL PARTIES OF RECORD: PLEASE TAKE NOTICE that Robert J. Costello of Davidoff Hutcher & Citron, LLP, with offices located at 605 Third Avenue, New York, New York 10158, hereby appears on behalf of Defendant Stephen Bannon.

Costello represents Rudy Giuliani in his many sordid influence peddling investigations.

He's also the guy who tried to buy Michael Cohen's silence with a pardon, an investigation that fairly obviously got referred under Mueller. I guess that makes it clear what Bannon's defense strategy will be.

The problem is, SDNY is now on notice (if they weren't already by Trump's promises that "Bannon will be okay"). So they can simply share their case file with New York State, where fraud is also a crime.

I may be missing something but I don't think Trump's evil genius is on his A game.