“LOOKING FORWARD” WILL BE HARDER FOR PRESIDENT BIDEN THAN IT WAS FOR PRESIDENT OBAMA

President Biden’s DOJ will have tough choices about investigations that Billy Barr attempted to kill, even if Biden would like to look forward (again). A more difficult decision, still, will pertain to the ICC investigation into crimes that happened, in part, under Barack Obama.

THE SCO STATEMENT AND WHY COHEN SHOULD NOT TESTIFY FEB. 7

Marcy wrote a great post this morning titled “Peter Carr Speaks“. I agree with almost all of it, if not all of it, but feel compelled to add a couple of things.

As to what the motivation of Carr and Mueller was, it is, at this date, unclear, despite the high handed and dismissive sudden reactive reportage of Devlin Barrett, Zapotsky and Demerjian at WaPo and Ken Dilanian of NBC/MSNBC. They have shown even less sources and credibility than Buzzfeed that they now conveniently and eagerly dismiss. Maybe the Mueller statement is a tad more nuanced and unknown than that.

As to what the target of the Mueller/Carr

statement was, when Marcy says:

> But I suspect Carr took this step, even more, as a message to SDNY and any other Agents working tangents of this case. Because of the way Mueller is spinning off parts of this case, he has less control over some aspects of it, like Cohen's plea. And in this specific case (again, presuming I'm right about the SDNY sourcing), Buzzfeed's sources just jeopardized Mueller's hard-earned reputation, built over 20 months, for not leaking. By emphasizing in his statement what happened in "the special counsel's office," "testimony obtained by this office," Carr strongly suggests that the people who served as sources had nothing to do with the office.

Yes, this looks almost certain from where I stand. Wasn't the only aim of Carr's arrow on behalf of Mueller, but was a rather large one.

Secondly, and since many media outlets and commenters are clacking about how the proof of Trump directly telling Cohen to lie is the end all and be all as to necessity for discussion, that is just wrong.

The record before the Buzzfeed article already established, through signed and accepted court filings, that Cohen indeed lied to Congress with the express intent of supporting the lies Trump was fostering.

That is not in dispute at this point. As to whether Trump personally ordered Cohen to do so, face to face, (and there is still a decent shot of that being true, but we do not know), that is not the end of the discussion legally.

First off, if those around Trump, (think lawyers and family, if not Trump himself), discussed and encouraged Cohen to lie to Congress, that is a huge problem for Trump. Let me remind people of one of the most basic definitional provisions in the criminal code, 18 USC §2:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

So, all of the nonsense by Rudy Guliliani is simply nonsense. That is without even considering conspiracy law and implications thereof.

So, sure, the SCO hit on Buzzfeed hurt the narrative in the press. Did it really hurt the narrative legally? No, not so much.

Lastly, I would like to address the upcoming House Oversight Committee hearing Cohen is scheduled for on February 7. He was voluntarily appearing after restrictions Cummings and the Committee agreed to, purportedly, with Mueller. The ground has changed. Frankly, I think the hearing this quickly was ill considered and premature grandstanding to start with, but now strikes me as nuts given the changed circumstances after the Buzzfeed piece, SCO brushback and Trump's direct threats to Cohen's extended family.

Given the aggressive nature of Trump's followers, there is a credible threat to Cohen and his family. But, more than that, there is a threat to his credibility and usability as a witness in the future. The ranking member on the House Oversight Committee is the odious Jim Jordan. His other GOP minority members will undoubtedly fall in line to attack Cohen, especially after the vague pushback comment of Carr/Mueller last night. It is set up now as a clown show.

The hearing should either be affirmatively postponed by Cummings or withdrawn from by Cohen

personally. There is nowhere near enough good that can come from Cohen's appearance, and a lot to lose for both him and Mueller given the shitshow that the GOP members will bring to the affair. Cancel that February 7 hearing and testimony. Just do not do it.

[For the record, I originally lodged this as a comment on Marcy's post, but for unrelated reasons, thought the points about criminal liability and conspiracy needed to be included in a separate post, and did not wish to step on hers at the time.]

MEANWHILE, OVER IN TURKEY . . .

Well isn't this interesting? From Diplopundit last Friday comes a post with this title: Tillerson Meets Erdoğan in Ankara With Turkish Foreign Minister as Interpreter. Notice anyone missing?

SANCTIONING GRU … AND FSB

The most interesting aspect of today's sanctions is that the White House sanctioned FSB, along with GRU. Does that mean they were working more closely together than previously known? Or the US is sanctioning activities it engages in?

HASSANSHAHI BIDS TO UNDERMINE THE DEA DRAGNET … AND ALL DRAGNETS

Often forgotten in the new reporting on the DEA dragnet is the story of Shantia Hassanshahi, the Iranian-American accused of sanctions violations who was first IDed using the DEA dragnet. That's a shame, because his case may present real problems not just for the allegedly defunct DEA dragnet, but for the theory behind dragnets generally.

As I laid out in December, as Hassanshahi tried to understand the provenance of his arrest, the story the Homeland Security affiant gave about the database(s) he used to discover Hassanshahi's ties to Iran in the case changed materially, so Hassanshahi challenged the use of the database and everything derivative of it. The government, which had not yet explained what the database was, asked Judge Rudolph Contreras to assume the database was not constitutional, but to upheld its use and the derivative evidence anyway, which he did. At the same time, however, Contreras required the government to submit an explanation of what the database was, which was subsequently unsealed in January.

Not surprisingly, Hassanshahi challenged the use of a DEA database to find him for a crime completely unrelated to drug trafficking, first at a hearing on January 29. In response to an order from Contreras, the government submitted a filing arguing that Hassanshahi lacks standing to challenge the use of the DEA dragnet against him.

> To the extent that defendant seeks to argue that the administrative subpoenas to telephone providers violated the statutory requirements of Section

> 876(a), he clearly lacks standing to do so. See, e.g., United States v. Miller, 425 U.S. 435, 444 (1976) ("this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant"); Moffett, 84 F.3d at 1293-94 (defendant could not challenge a Section 876(a) subpoena to third party on the grounds that it exceeded the DEA's statutory authority).

This is the argument the government currently uses to deny defendants notice on Section 215 use.

The government further argued that precedent permits it to use information acquired for other investigations.

> DEA acquired information through use of its own investigatory techniques and for its own narcotics-related law enforcement purposes. DEA shared with HSI a small piece of this information to assist HSI in pursuing a non-narcotics law enforcement investigation. In doing so, DEA acted consistently with the longstanding legal rule that "[e]vidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken." Jabara v. Webster, 691 F.2d 272, 277 (6th Cir. 1982) (quotation marks omitted); accord United States v. Joseph, 829 F.2d 724, 727 (9th Cir. 1987).
>
> Applying an analogous principle, the D.C. Circuit has held that querying an existing government database does not constitute a separate Fourth Amendment search: "As the Supreme Court has held, the process of matching one piece of personal information against government

> records does not implicate the Fourth Amendment." Johnson v. Quander, 440 F.3d 489, 498 (D.C. Cir. 2006) (citing Arizona v. Hicks, 480 U.S. 321 (1987)). The D.C. Circuit observed that a contrary rule would impose "staggering" consequences, placing "an intolerable burden" on law enforcement if each query of a government database "were subject to Fourth Amendment challenges." Id. at 499.

This is a version of the argument the government has used to be able to do back door searches of Section 702 data.

It also argued there was no suppression remedy included in 21 USC 876, again a parallel argument it has made in likely Section 215 cases.

Finally, it also argued, in passing, that its parallel construction was permissible because, "While it would not be improper for a law enforcement agency to take steps to protect the confidentiality of a law enforcement sensitive investigative technique, this case raises no such issue." No parallel construction happened, it claims, in spite of changing stories in the DHS affidavit.

Yesterday, Hassanshahi responded. (h/t SC) In it, his attorneys distinguished the use of the DEA dragnet for purposes not permitted by the law — a systematic violation of the law, they argue — from the use of properly collected data in other investigations.

> Title 21 USC § 876 allows the government to serve an administrative subpoena in connection with a purely drug enforcement investigation. Government has systematically violated this statute for over a decade by using the subpoena process to secretly gather a database of telephony information on all Americans, and then utilizing the database (while

> disguising its source) in all manner of investigations in all fields not related to drugs at all.
>
> [snip]
>
> This was not a one-time or negligent statutory violation that happened to uncover evidence of another crime, or even the sharing of information legitimately gathered for one purpose with another agency. Cf. Johnson v. Quander, 440 F.3d 489 (D.C.Cir. 2006) (government may use DNA profiles gathered pursuant to and in conformance with statute for other investigations). By its very nature, the gathering of telephony information was repeated and systematic, as was the making available of the database to all government agencies, and all aspects of the scheme (from gathering to dissemination outside drug investigations) violated the statute.

But more importantly, Hassanshahi pointed to the government's request — from before they were ordered to 'fess up about this dragnet — that the Judge assume this dragnet was unconstitutional, to argue the government has already ceded the question of standing.

> Defendant herein submits that a systematic statutory violation, or a program whose purpose is to violate the statute continuously over decades, presents a case of first impression not governed by Sanchez-Llamas or other government cases.
>
> But the Court need not reach the novel issue because in the instant case, the government *already conceded* that use of the database was a constitutional violation of *Mr. Hassanshahi's rights*. Indeed the Court asked this Court to assume the constitutional violation.

> Mem. Dec. p. 9. Where there is a statutory violation plus an individual constitutional violation, the evidence shall be suppressed even under government's cited cases.
>
> [snip]
>
> Government now argues Mr. Hassanshahi "lacks standing" to contest the statutory violation. Again, government forgets it previously conceded that use of the database was unconstitutional, meaning unconstitutional *as to defendant* (otherwise the concession was meaningless and afforded no grounds to withhold information). Mr. Hassanshahi obviously has standing to assert a conceded constitutional violation. [emphasis original]

In short, Hassanshahi is making a challenge to the logic behind this and a number of other dragnets, or demanding the judge suppress the evidence against him (which would almost certainly result in dismissal of the case).

We'll see how Contraras responds to all this, but given that he has let it get this far, he may be sympathetic to this argument.

In which case, things would get fun pretty quickly. Because you'd have a defendant *with standing* arguing not just that the use of the DEA dragnet for non-DEA uses was unconstitutional, but also that all the arguments that underly the use of the phone dragnet and back door searches were unconstitutional. And he'd be doing so in the one circuit with a precedent on mosaic collection that could quickly get implicated here. This case, far more than even the ACLU lawsuit against the Section 215 database (but especially the Smith and Klayman challenges), and even than Basaaly Moalin's challenge to the use of the 215 dragnet against him, would present real problems for the claims to dragnet

legally.

In other words, if this challenge were to go anywhere, it would present big problems not only for other uses of the DEA dragnet, but also, possibly, for the NSA dragnets.

Mind you, there is no chance in hell the government would let it get that far. They'd settle with Hassanshahi long before they permitted that to happen in a bid to find a way to bury this DEA dragnet once and for all and retain their related arguments for use with the NSA dragnets and related collection.

But we might get the dragnetters sweat just a bit.

MORE STRAWS ON US FINANCIAL HEGEMONIC CAMEL'S BACK

Over the weekend, Juan Cole laid out how, if nuke negotiations with Iran fail this week, Europe is likely to weaken or end its sanctions anyway.

> Iran-Europe trade in 2005 was $32 billion. Today it is $9 billion. There isn't any fat in the latter figure, and it may well be about as low as Europe is willing to go. Tirone also points out that European trade with Iran has probably fallen as low as is possible, and that those who dream of further turning the screws on Tehran to bring it to its knees are full of mere bluster.
>
> Arguably, Iran has simply substituted China, India and some other countries, less impressed by the US Department of Treasury than Europe, for the EU trade.

> Iranian trade with the global south and China has risen by 70%, Tirone says, to $150 billion. Indeed, at those levels Iran did more than make a substitution. It pivoted to Asia with great success before the phrase occurred to President Obama.
>
> China is so insouciant about US pressure to sanction Iran's trade that it recently announced a plan to expand Sino-Iranian trade alone to $200 billion by 2025. (It was about $52 billion in 2014). And Sino-Iranian trade was only $39 bn. in 2013, so the rate of increase is startling.

Cole notes – and quotes a British diplomat strongly suggesting – that the US may lack credibility because of the stunts by people like Tom Cotton.

Meanwhile, Dan Drezner assigned blame to both a an obstinate Congress and Obama for losing its allies to China's Asian Infrastructure Investment Bank (the first domino of which I noted here).

> The Obama administration has been reduced to backbiting U.S. alliesin the press – which, by the by, is a passive-aggressive habit that it really should stop. Newspapers articles, Economist leaders, and smart China analysts are all blasting the Obama administration on this issue. Indeed,most China-watchers advised the administration to join the AIIB six months ago on the logic that influencing it from within was a much smarter move than the course of action they actually pursued.
>
> So, no contest, the executive branch screwed this up. But it would be selfish for the Obama administration to hog all of the credit on this policy failure. No, one of the main drivers behind

> China's push for the AIIB has been frustration that Beijing's clout at the IMF and World Bank has not matched its economic rise. The way to fix that has been quota reform to give China more power. As it turns out, the Obama administration ***negotiated that very thing*** five years ago. All that was needed was for the U.S. Congress to pass it. And as I wrote two years ago:
>
> > If Congress stalls this quota reform measure that the executive branches from both parties have negotiated , they will be weakening a U.S.-friendly international institution and inviting potential rivals to set up or bolster alternatives. Which, if you think about, is a really stupid way to run U.S. foreign economic policy.
>
> And hey, what do you know, Congress did that stalling thing.

These are just two straws on a still very big camel's back. But slowly, US financial hegemony is getting weighed down by our hubris.