

YESTERDAY NOEL FRANCISCO RAISED THE STAKES ON THE MYSTERY APPELLANT

Back when President Trump fired Jeff Sessions, there was a CNN report describing how two competing groups of people discussed what to do in response. It described that Solicitor General Noel Francisco was in the Sessions huddle, a huddle focused, in part, on how to protect the Mueller investigation.

Eventually, there were two huddles in separate offices. Among those in Sessions' office was Deputy Attorney General Rod Rosenstein, his deputy Ed O'Callaghan, Solicitor General Noel Francisco and Steven Engel, who heads the Office of Legal Counsel.

[snip]

The fact that Whitaker would become acting attorney general, passing over Rosenstein suddenly raised concerns about the impact on the most high-profile investigation in the Justice Department, the Russia probe led by Mueller.

The Mueller probe has been at the center of Trump's ire directed at Sessions and the Justice Department. Whitaker has made comments criticizing Mueller's investigation and Rosenstein's oversight of it, and has questioned the allegations of Russian interference.

Rosenstein and O'Callaghan, the highest-ranked officials handling day-to-day oversight of Mueller's investigation, urged Sessions to delay the effective date of his resignation.

Francisco's presence in the Sessions/Rosenstein huddle was significant for a number of reasons: If Rosenstein had been fired while Big Dick Toilet Salesman was Acting Attorney General, he would be the next superior officer, confirmed by the Senate, in the chain of command reviewing Mueller's activities. As Michael Dreeben testified in the days after the firing, Francisco would have (and has had) to approve any appeals taken by Mueller's team. In addition, it was significant that someone who is pretty fucking conservative was huddling with those who were trying to protect the investigation.

That's why I'm interested in several details from the Mueller response to the Mystery Appellant challenge to a Muller subpoena submitted to SCOTUS yesterday.

First, as I expected, the government strongly rebuts Mystery Appellant's claim that they are a foreign government (which was the spin in their own brief). Rather they are a commercial enterprise that a foreign government owns.

As the petition acknowledges (Pet. 1 n.1), petitioner is not itself a foreign government, but is a separate commercial enterprise that a foreign government owns.

That makes a ton of difference to the analysis, because the government has a much greater leeway in regulating businesses in this country than it does foreign governments.

Indeed, in one of the key parts of the brief, the government lays out the import of that: because if foreign owned companies were immune from subpoena, then on top of whatever problems it would create for regulating the foreign-owned corporation, it would also mean American citizens could deliberately use those foreign-owned corporations to shield their own criminal behavior.

Petitioner's interpretation would, as the court of appeals recognized, lead to a result that Congress could not have intended—i.e., that “purely commercial enterprise[s] operating within the United States,” if majority-owned by a foreign government, could “flagrantly violate criminal laws” and ignore criminal process, no matter how domestic the conduct or egregious the violation. Supp. App. 10a. **Banks, airlines, software companies, and similar commercial businesses could wittingly or unwittingly provide a haven for criminal activity and would be shielded against providing evidence even of domestic criminal conduct by U.S. citizens.** See id. at 10a-11a. Although petitioner declares that result to be “precisely what Congress intended,” Pet. 25, it cannot plausibly be maintained that Congress and the Executive Branch—which drafted the FSIA—would have adopted such a rule “without so much as a whisper” to that effect in the Act's extensive legislative history, *Samantar*, 560 U.S. at 319.8

In an unbelievably pregnant footnote to that passage, the government then notes that Mystery Appellant's suggestion that the President could retaliate if foreign-owned corporations engaged in crime via something like sanctions ignores what tools are available if foreign-owned corporations don't themselves engage in crime, but instead serve as a shield for the criminal activity of US citizens.

8 Petitioner suggests (Pet. 26) that Congress would not have been troubled by barring federal criminal jurisdiction over foreign state-owned enterprises because the President could use tools such as economic sanctions to address foreign instrumentalities “that commit crimes in the United States.” That

overlooks not only the legal and practical limits on sanctions, but also the threshold need to acquire evidence through grand jury subpoenas **in order to determine whether a crime has been committed—including by U.S. citizens.**

Consider: There is significant evidence to believe that a foreign country – Russia – bribed Trump to give them sanctions relief by floating a \$300 million business deal. There is also evidence that, after a series of back channel meetings we know Zainab Ahmed was investigating, such funds may have come through a Middle Eastern proxy, like Qatar. There is not just evidence that Qatar did provide funds no one in their right mind would have provided to the President's family, in the form of a bailout to Jared Kushner's albatross investment in 666 Fifth Avenue. But they're already laying the groundwork to claim they accidentally bailed him out, without realizing what they were doing.

So if Russia paid off a bribe to Trump via Qatar, and Qatar is trying to hide that fact by claiming Qatar Investment Authority is a foreign government that can only be regulated in this country by sanctions imposed by the guy who is trading sanctions to get rich ... well, you can see why that's a non-starter.

Finally – going back to why I'm so interested that Francisco was in the Sessions/Rosenstein huddle – just Francisco's name is on the brief, even though Dreeben and Scott Meisler surely had a role in drafting it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

This was noted to me by Chimene Keitner, who is an actual expert in all this (and did her own very interesting thread on the response).

I'm sure I understand only a fraction of the

significance that just Francisco signed the brief. But two things I do understand: One, Francisco is giving this argument a great deal of weight with SCOTUS, signaling the import of winning this argument.

Additionally, however, it means he stands as a shield for Mueller's work on this appeal. If Trump wants to retaliate against DOJ for exposing the payoff to a quid pro quo, the President is going to have to fire another Senate-confirmed officer to do it, and fire one against whom he hasn't laid a claim of partisanship. As I've already noted, by dint of this company being a foreign company, Mueller likely already knows what he's getting via SIGINT. This subpoena is likely significantly an attempt to parallel construct evidence for use at trial. And the brief seems to make it clear that Mueller suspects some US citizen used this foreign-owned corporation to shield his own criminal behavior.

Which might explain why Francisco sees the need and import of shielding Mueller in this step.

Update: I'm seeing people misunderstanding the significance of my point (which, again, was suggested by someone more expert than me and most journalists on this). It's not just that Francisco appears – that's normal. It's that only he appears, when we know that several other people had to have worked on the brief. That is, it's the fact that Dreeben is not named.

As comparison, here's the signature line for another brief that DOJ submitted (as amicus) today:

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As I disclosed last July, I provided information to the FBI on issues related to the Mueller investigation, so I'm going to include disclosure statements on Mueller investigation posts from here on out. I will include the disclosure whether or not the stuff I shared with the FBI pertains to the subject of the post.