

IN ADVANCE OF THE KASHTASTROPHE, DOJ IG RAISES THE STAKES ON INVESTIGATIONS OF CONGRESS

Yesterday, DOJ's Inspector General released its long-awaited report on some subpoenas DOJ used in 2017, 2018, and 2020 to target, first, people in Congress, and then in the later round, journalists, including WaPo's Ellen Nakashima, Greg Miller, Adam Entous, NYT's Matt Apuzzo, Adam Goldman, Eric Lichtblau, Michael Schmidt, and CNN's Barbara Starr. The purported goal was to solve some leak investigations; with the exception of convicting James Wolfe for false statements to the FBI (the investigation into him arose out of the first congressional subpoenas discussed here), none were solved via these subpoenas.

Little of the narrative on the subpoenas targeting journalists is entirely new. It was covered in these stories in real time:

May 7, 2021: Trump Justice Department secretly obtained Post reporters' phone records

May 7, 2021: Justice Dept. Seized Washington Post's Phone Records

May 20, 2021: Trump Justice Dept. Seized CNN Reporter's Email and Phone Records

June 2, 2021: Trump Administration Secretly Seized Phone Records of Times Reporters

June 4, 2021: U.S. Waged Secret Legal Battle to Obtain Emails of 4 Times Reporters

June 10, 2021: Hunting Leaks, Trump Officials Focused on Democrats in Congress

June 11, 2021: Justice Dept. Watchdog to Investigate Seizure of Democrats' Data

June 11, 2021: In Leak Investigation, Tech Giants Are Caught Between Courts and Customers

The findings on the journalist side of the report were that Bill Barr properly approved the subpoenas, but didn't do a mandated review from a committee on media first (though Kerri Kupec bought off on the subpoenas), and didn't fully comply with a DNI statement saying the spooks still wanted to solve the leak for a few. The biggest controversy was how DOJ approved Non-Disclosure Orders to prevent journalists from learning of the investigation, but with the exception of the leak to Barbara Starr, those too followed the approach at the time, which was to issue knee-jerk NDOs.

One of the few new details is that Barr brought an AUSA from some field office into Main DOJ for a six month temporary assignment to renew focus on the leak, but the IG concluded that person wasn't brought in for partisan purposes.

The findings on the Congressional side of the report are somewhat more interesting, not least because the policy on third party subpoenas to phone companies, Google, and Apple implicating people (including staffers and Members, throughout this discussion) in Congress were nowhere as formalized as the media guidelines were.

Particularly given that House Intelligence Chair, Republican Mike Turner, issued the loudest response to this report, it could have interesting repercussions in a second Trump term.

The report actually describes that the congressional subpoenas were an interim step between investigating the Executive Branch people who had access to the classified information (in 2017) and the journalists (in 2020, for the WaPo and NYT). The reason it appeared that there were more Democrats targeted – including Adam Schiff and Eric Swalwell – was because a *Democratic* HPSCI staffer had suggested they had leaked (and also implicated a senior

staffers whose actual emails were collected).

The IG Report found that, aside from Schiff and Swalwell and a top Dem staffer, there was a fairly even balance of Democrats and Republicans targeted (including Kash Patel, though it doesn't name him); it does say that FBI was preparing to serve legal process on a Republican Member of Congress until the James Wolfe investigation proceeded to the point where they had one and only one perpetrator for the Carter Page FISA leak, so that person was not subpoenaed.

It's the recommendations where this report, issued after Patel already sued and lost over being subpoenaed, and in advance of Patel's likely confirmation as FBI Director whose activities will be overseen by whatever trash heap Trump makes of DOJ IG by then, that are of interest.

The Report reasons that since Congress is a co-equal branch of government protected by Speech and Debate privileges enshrined in the Constitution, it should have a similar kind of protocol that journalists benefit from (a protocol which has since been strengthened, but which Patel and Pam Bondi are sure to torch).

It made three recommendations to that effect.

Currently, DOJ's policy requires that a US Attorney and Public Integrity approve a third party subpoena implicating someone from Congress, with an Urgent notice (the kind of warning they have to give before indicting someone prominent) provided to top DOJ leadership. The current practice would allow a US Attorney's Office to rely primarily on the advice of career officials before investigating someone (whether a staffer or a Member) in Congress.

DOJ IG recommends instead more formal notice from the AG.

First, in order for senior leadership to be able to consider and decide matters

potentially raising constitutional separation of powers issues, we recommend that the Department evaluate when advance notification to a senior Department official, such as the Deputy Attorney General or Attorney General, should be required before compulsory process is issued, and any corresponding NDOs are sought, for records of a Member of Congress or congressional staffer and establish, as necessary, implementing policies and guidance.

In a Pam Bondi DOJ, this would virtually guarantee that no Republicans would be investigated, because she would have advance veto.

DOJ IG also recommended that when DOJ requests Non-Disclosure Orders implicating people from Congress, they tell the judge approving the NDO that it is someone from Congress.

Second, we recommend that the Department consider the circumstances in which NDO applications and renewals should identify for the reviewing judge that the records covered by a proposed NDO are records of Members of Congress or congressional staffers.

This is uncontroversial and would stop the kind of knee-jerk NDO requests that hid these subpoenas for five years.

The last entirely justified recommendation that nevertheless could have the most intriguing implications is that DOJ adopt the same kind of exhaustion requirement that the media policy has. That is, you can only start getting legal process on people in Congress after you've exhausted other investigative approaches.

Third, we recommend that the Department consider whether there are circumstances in which an exhaustion requirement should be a prerequisite for issuing

compulsory process to obtain records of Members of Congress and congressional staffers.

That is, in principle, what happened here: DOJ first checked Executive branch personnel and only then started investigating in Congress after stories started closely following Congressional briefings on the topics. But taken to its logical outcome, it would get interesting.

On the one hand, it would make it much *harder* to get even subpoenas on people in Congress than it already is (the one Democratic staffer and Wolfe were the only Congressional staffers whose content was collected).

This would make it easier for whistleblowers to leak to members of Congress and for them to leak to the press.

Such leaks might be one of the last failsafes going forward.

Except by rooting the notion of exhaustion in the constitutional protections afforded Congress, it might actually flip the current structure on its head. The reason why you would investigate a member of Congress before a journalist is because under the current approach, the congressional staffer with clearance is the only one who would be prosecuted (the of Wolfe example notwithstanding, that is exceedingly rare in any case; in the Jeffrey Sterling case the Senate protected a key Republican staffer who was suspected).

But if you decide Congress should have more protection, then an FBI Director who has already threatened to go after journalists might first choose to exhaust investigative remedies against journalists before turning to Congress.

That is, there's a chance these policy recommendations would be used as an excuse to prosecute *journalists* but not their sources.

None of this may matter anyway, because there's a high likelihood that Kash and Bondi will simply torch all the guidelines discussed as it is. They're not statutorily mandated. And if Trump does start firing Inspectors General as he has promised to do, then it's not clear we'd ever find out about all this. It took over three years to get this report.

Mike Turner says he wants to codify some of this. That might protect leaks about Republican adversaries as much as anything (the leaks investigated here mostly pertained to Carter Page and other Trump associates). But it might be one of the few means of transparency left.