U.S. Senate Committee on the Judiciary
Subcommittee on Privacy, Technology, and the Law Subcommittee

"Arctic Frost Accountability: Oversight of Telecommunications Carriers' Responses to Jack Smith's Witch Hunt"

Senator Lee's Questions for the Record

and the Witness's Answers

Dan Schwager

Chairman Grassley, Senator Lee, and members of the Committee, thank you again for allowing me to participate in this important discussion through your questions. Below are my answers to Senator Lee's questions, based on my own experience and training, and my general familiarity with the relevant law and some of the vast publicly available evidence related to this topic, to the best of my recollection and understanding. As a reminder, I am not speaking on behalf of any employer, current or former, but in my personal and private capacity.

1. The Department of Justice is presently investigating the alleged Somali welfare fraud scheme in Minnesota, in which potentially billions of taxpayer dollars were misappropriated. It remains an unresolved question whether, and to what extent, any local, state, or federal Democratic officials were involved in, facilitated, or possessed prior knowledge of the alleged conspiracy to defraud public welfare programs.

   In the course of that investigation, should the Department of Justice be authorized to obtain, by means of sealed or non-public subpoena, the toll and call-detail records associated with both the official and personal telephones of such political figures, including the Mayor, the Governor, and Members of Congress?

   ANSWER: I believe the question of whether any particular investigative step should be taken depends on an honest and non-partisan review of the actual evidence and credibility of the allegation of criminal conduct or credible suggestion of the potential for relevant evidence of criminal conduct. The mere fact that a question is asked and is considered "unresolved," is not sufficient on its own. Mere questions may be baseless or raised for improper purposes. There must instead be a credible and non-partisan basis in fact and in the law to warrant the use of resources and exercise of power involved in any investigative step.

In general, if a credible allegation of criminal conduct exists in fact, if it is based in an honest and non-partisan review of available evidence, and if the appropriate policy and legal thresholds are met, then the use of a subpoena—and, if appropriate, a non-disclosure order—for the non-content records of targets, subjects, or even potential witnesses may be warranted and is in fact a common investigative step taken by prosecutors across the nation investigating a wide variety of crimes, as authorized by Congress pursuant to the Stored Communications Act. This is true whether the targets, subjects or witnesses are public officials or not. As discussed below, where the records may reflect details of core legislative acts of Members of Congress, however, I would hope that a deferential approach to the Speech or Debate Clause would be considered.

With regard to the specific question you raise as unresolved, I am not familiar with the basis for that question or any evidence which could inform whether or not the investigative steps you pose may be warranted. For that reason, I cannot offer a specific opinion.

Do you endorse investigative practices that permit broad or insufficiently particularized inquiries into the private communications of political opponents?

ANSWER: The fact that a person is a political opponent of the leadership of the prosecuting or investigative office, or their chief executive, should never be a consideration in whether any investigative practice is or is not warranted or "endorsed." The rule of law requires that accountability for criminal conduct by public officials must be pursued without regard to the partisan affiliation (aligned or opposing) of the targets, subjects, or witnesses in the investigation, or the executive leadership of the prosecuting or investigative office.

Instead, well predicated, professional and non-partisan investigations, ideally by a deep bench of experienced, non-partisan investigators and prosecutors, must be permitted to be conducted, based on actual evidence, regardless of the party of the subject or of the executive leadership of the prosecuting or investigative office. Similarly, if a person of an opposite party is likely to possess relevant evidence as a witness due to the conduct of the actual subject or target of the investigation, then that evidence must be permitted to be pursued in a lawful manner—including through the use of subpoenas to obtain toll records, and if necessary non-disclosure orders to protect the integrity of the investigation from anyone's interference, including intimidation or interference that may occur by the target or subjects if the target or subjects simply become aware of the subpoenas of others' records.

Putting partisan considerations aside, whether an investigative practice or inquiry is impermissibly "broad or insufficiently particularized," could be the subject of various legal principles and requirements as determined by the Constitution, Congress or the Courts. I generally endorse non-partisan and well-predicated investigative practices and inquiries consistent with the facts and the law. I do not endorse clearly unlawful investigative practices or inquiries.

Do you condemn any actions of the weaponization of the Department of Justice in investigations involving sitting Republican Senators?

ANSWER: In general, my answer would be the same for investigations involving Republican or Democratic Senators, conducted by the Department of Justice or other investigative bodies under Republican or Democratic leadership. Whether or not I "condemn" actions in any particular investigation would depend on an honest and non-partisan review of the predicating facts, allegations and law at issue. Specifically, though, it is unclear what other investigations you refer to and so I cannot offer opinions about unspecified investigations or investigative acts.

In order to provide a specific answer then, I'll assume you are referring to the subpoenas at issue in the Subcommittee's February 10th hearing from which these questions arise. Based on the publicly available evidence I have seen, the allegations at issue and some of the relevant law as I understand it, I do not interpret the subpoenas or any other investigative action I am aware of in that matter to amount to "weaponization of the Department of Justice." I do not condemn common and reasonable investigative steps taken in the investigation of well predicated allegations of attempted fraud on the American public in an alleged effort to fraudulently and violently overturn the results of an American election.

2. "Part of the official duties of members of Congress is to confer with members of other branches, especially the President. What basis do you have to suggest that the identity of calls placed by members of Congress is not shielded by the Speech and Debate Clause?

ANSWER: I do not believe my written or oral testimony made any such definitive suggestion and I apologize if I created that impression.

While it is certainly not the case that every call made by a Senator, or the record of it, will be covered by the Speech or Debate Clause, I do agree with you that records that reveal "legislative acts," as defined

for purposes of the Clause by the Supreme Court and lower courts, should ideally be protected from disclosure, to protect from an abusive or retributive Executive. It is unclear however if the current state of the law would apply that position to these facts because no precedential case, to my understanding, has dealt with materially identical facts, namely non-content toll records of mere witnesses subpoenaed from third parties. I also do not consider myself more expert than the multiple career civil service Department of Justice lawyers involved in the decision-making behind the subpoenas issued in this matter.

Therefore, I believe it is reasonable for the Department of Justice to take the position at the time of the issuance of these subpoenas that the law of the Speech or Debate Clause did not yet extend to the non-content toll records of mere witnesses who are members of Congress. Even if I might disagree with their approach, if the communications at issue could have involved legislative acts under the law, I would then consider that a reasonable disagreement. It is, after all, critical to our national cohesion to be able to disagree reasonably and civilly.

I hope these answers are helpful and have contributed to frank and, ideally, non-partisan oversight of these important questions, such as whether legislative action is needed to direct the Department of Justice and Court's application of the Speech or Debate Clause to the disclosure of records revealing core legislative acts of Members of Congress.

Once again, thank you for allowing me to share my thoughts with you, the Committee, and the American public.

Sincerely,

s/ Dan Schwager