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# But ... Is The Cuomo Nursing Home Conduct Prosecution-Worthy?

By [Joel Cohen](#)

**Prosecutorial discretion—the valuable practice of prosecutors often using their discretion to decline cases—suggests that there is no “criminal” case worth pursuing regarding the nursing homes.**

Public opinion about Gov. Andrew Cuomo is at a low ebb—he is currently awash in two independent scandals. This article, though, is about the nursing home issue. Not the harassment spectacle (which, I personally believe, he simply won't be able to weather). Still, even though I'm clearly not a supporter of the Governor, prosecutorial discretion—the valuable practice of prosecutors often using their discretion to decline cases—suggests that there is no “criminal” case worth pursuing regarding the nursing homes.

As important background, some tabloids argue that, despite applauding himself when the pandemic was at its height last year, Cuomo actually caused the deaths of many elderly nursing home residents. How? By [directing](#) hospitals—in order to make room for COVID-19 patients who required beds—to send infected patients, as long as they were “medically stable,” to nursing homes that, no one questions, house medically-vulnerable populations. Many believe that the decision, even though consistent with CDC policy (as Cuomo [maintains](#)), would invariably endanger the nursing home population. A Sophie's Choice—these endangered in exchange for those! No one would want to be faced with having to make that critical decision to keep asymptomatic patients in hospitals, rather than dispatch them to nursing homes to make room for those individuals who were symptomatic and possibly on the verge of being in extremis.

But, the argument goes, when faced with this unfolding problem, Cuomo and his team “conspired” to deliberately mislead Trump's Justice Department (that [had initiated inquiries to several “Blue” state officials](#)) in a cover-up. I say “Trump's” Justice Department intentionally. And whether or not Main Justice was itself claiming “lies,” many of Cuomo's media antagonists were almost willing to call him a [murderer](#). This, particularly when Cuomo's Chief of Staff later [told](#) Democrat legislators that the administration had “frozen” in answering the Justice Department's relevant questions about death rates. Many inferred this to mean that the administration deliberately misled the Justice Department. Who really knows?

Unquestionably, the March 25, 2020 advisory from Cuomo's Health Department that directed patient transfers to nursing homes remains extremely [controversial](#), especially for those who lost loved ones. It would, indeed, be impossible to satisfactorily defend the decision to survivors, saying “Our condolences, but we did this for the greater good.” Who can blame the survivors even if the decision was well-intended, as surely it was?

The real question, though, is whether any of this was criminal. Based on published reports, the Justice Department [appears](#) to be largely investigating whether the department was lied to by the Cuomo

administration—an “obstruction” that followed an undeniably very difficult public health decision. (However, a recent [Wall Street Journal story](#) also says that, in the process, Justice is also questioning the Cuomo administration’s effort to amend a legislative bill. It addressed civil and criminal immunity protection not only for hospitals, doctors and staffers regarding COVID-19 but, as proposed by the administration, for nursing homes as well.)

At bottom, though, once the online locomotive starts rolling down the track, it’s often hard to stop it. Particularly given the public outcry. A totally dispassionate Justice Department—now that normalcy seems to have resurfaced there—is needed to apply the brakes and consider even politically-charged cases on the merits. And nothing else.

And, yes, of course, the “cover-up” is often worse than the crime—even assuming dispatching the hospital patients to nursing homes was a crime. To the credit of the U.S. Attorney’s office, there have been no leaks about the evidence being examined, or the theory of the investigation. It’s not clear precisely what the supposed lie(s) were, even given the ostensibly mischievous nature of the statistical “cleanup”—in the nature of “let’s make this look better”—that was presented to Justice, as has been [reported](#) by *The New York Times*.

If the goal of the “false statements,” if they were indeed false, had actually been intended to obtain more funds or PPE for New York State from the Trump administration, such conduct would likely be criminal and worth pursuing by prosecutors, even without personal financial benefit to those engaged in the cover-up. However, although financial gain isn’t technically needed to establish “obstruction,” neither personal or even state financial benefit seem to have been at play here.

Rather, it seems, the issue is whether the Justice Department was deliberately misled about whether nursing home deaths had risen significantly due to Cuomo’s decision to transfer hospital patients to nursing homes, and whether such conduct should actually be prosecuted. One can’t ignore that Cuomo was undeniably in an open war begun by Trump—whose politicized Justice Department wouldn’t likely have been at all averse to helping show that it wasn’t Trump alone, among politicians, who was responsible for the then-horrifying spread of the pandemic. And Cuomo was clearly in his crosshairs.

Mark Twain famously said that “there are three kinds of lies: lies, damned lies, and statistics.” Cuomo will possibly wake up one day soon realizing that, because of a diminished capacity to govern, he may need to walk off into the sunset. That decision is way beyond my pay grade. If I understand the nursing home facts correctly, however, Cuomo should simply be allowed to take his administration’s lies, bad lies and statistics, if that’s what’s happened, and put them in his briefcase on his way out the door, whenever that occurs.

Despite the terrible death toll in nursing homes and Cuomo’s ill-considered decision to publish a self-laudatory book while the pandemic still threatened to resurge, the goals of an investigation into the nursing home scandal—that is, to shed revealing light on what bad, if any, actually happened to ensure that it won’t happen again—have already been importantly accomplished through Attorney General James’s own [detailed](#) report.

My personal view? Next case.

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