

THE EXECUTIVE PRIVILEGE PUZZLE: THE CO-EQUAL BRANCH OF GOVERNMENT

As I noted during the summer, DOJ did two things in close succession.

On July 21, it rolled out the contacts policy that codifies that, “the Justice Department will not advise the White House concerning pending or contemplated criminal or civil law enforcement investigations or cases unless doing so is important for the performance of the President’s duties and appropriate from a law enforcement perspective.” At least from that point forward, Joe Biden would learn no details of the investigation into his predecessor unless absolutely necessary.

On July 26, DOJ wrote Jeffrey Rosen and several other former senior DOJ officials – including Jeffrey Clark – informing them that DOJ was waiving privilege for interviews the House and Senate wanted to conduct on, “any efforts by President Trump or any DOJ officials to advance unsubstantiated allegations of voter fraud, challenge the 2020 election results, stop Congress’s count of the Electoral College vote, or overturn President Biden’s certified victory.” As the letter from Bradley Weinsheimer laid out, this permission arose from a balancing of Legislative and Executive branch interests and determining that the Legislative interest was so significant as to warrant the waiver.

After balancing the Legislative and Executive Branch interests, as required under the accommodation process, it is the Executive Branch’s view that this presents an exceptional situation in which the congressional need for information outweighs the Executive Branch’s interest in maintaining

confidentiality.

The letter continues by explaining that DOJ consulted with the White House Counsel's Office to get their approval for waiving Executive Privilege.

Because of the nature of the privilege, the Department has consulted with the White House Counsel's Office in considering whether to authorize you to provide information that may implicate the presidential communications privilege. The Counsel's Office conveyed to the Department that President Biden has decided that it would not be appropriate to assert executive privilege with respect to communications with former President Trump and his advisors and staff on matters related to the scope of the Committees' proposed interviews, notwithstanding the view of former President Trump's counsel that executive privilege should be asserted to prevent testimony regarding these communications. See *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 449 (1977) ("[I]t must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." see also *id.* (explaining that the presidential communications privilege "is not for the benefit of the President as an individual, but for the benefit of the Republic") (internal citation omitted).

These events seems to have set up the series of developments – including Trump's lawsuit to attempt to prevent the Archives from turning over documents to Congress, and aborted attempts by Jeffrey Clark, Steve Bannon, and Mark Meadows, among others, to shield their own

testimony by invoking Executive Privilege.

As was laid out in the DC Circuit hearing the other day, this put the Executive Branch and the Legislative Branch in agreement that the documents Congress requested from the Archives should be released.

You've got Biden insulated from investigative details, making decisions about Executive Privilege for an investigation being conducted by a coequal branch of government.

Which is one of the reasons why I find Adam Schiff's comments from the other day so interesting. When asked if he wanted DOJ to be more aggressive, Schiff did not assent. Instead, he said that "it is certainly possible" Congress' effort to "expose the malefactors" "will inform the Justice Department of other facts that they may not yet be aware of yet."

We are now trying to expose the full facts of the former President's misconduct, as well as those around him. It is certainly possible that what we reveal in our investigation will inform the Justice Department of other facts that they may not yet be aware of yet. And so we will pursue our role in this, which is to expose the malefactors, to bring about legislation as a result of our investigation, to protect the country. But we will count on the Justice Department to play its role.

There's a high likelihood the January 6 Commission *will* discover things DOJ has not found on its own. After all, Biden is waiving privilege for their inquiry, not for DOJ's criminal investigation. So the Jan 6 is (or soon will be) examining a set of materials that are – as far as we know – otherwise inaccessible to DOJ. But, Schiff assures us, if they find something that DOJ doesn't know about, they'll inform DOJ.

As I've noted and as Schiff knows well, Mueller

relied on the Intelligence Committee investigations for key evidence in his investigation. But here, it seems like the dual investigations provides a way to free up otherwise privileged materials involving Trump without having Biden violate contact rules prohibiting him learning about the ongoing criminal investigation.