

STEVE BANNON'S LAWYER MADE HIMSELF A WITNESS AND NOW WANTS TO BE JUST A LAWYER

Last night, along with a previously scheduled Motion for Discovery, Steve Bannon filed a Motion to Compel disclosure regarding some records requests DOJ made targeting Bannon's attorney, Robert Costello. In it, he revealed that the government had obtained phone and Internet toll records (that is, metadata, not content) of his attorney spanning the period between the last event in Bannon's prosecution in the Build the Wall fraud case, March 5, 2021, through the day he was indicted, November 11, 2021.

Predictably, the filing wails a lot about his lawyer being spied on and misrepresents what happened.

While Bannon included two exhibits with his Motion to Compel (a letter asking for information about the Costello material and the government response), Bannon included the most important information pertaining to the Costello records with his Motion for Discovery, not his Motion to Compel: reports of two interviews (302s) he did with DOJ and FBI, one on November 3 and the other on November 8, 2021.

At the time Costello gave the interviews, his representation of Bannon before the January 6 Select Committee was ended and Bannon had not yet been indicted. And as the first 302 notes, "there were no agreements or conditions governing the conversation between COSTELLO and representatives of USAO-DC or FBI." Effectively, those interviews made Costello a voluntary fact-witness in the criminal case against Bannon, one exacerbated when Bannon belatedly added Costello

to his criminal defense team and grew squishy about whether Bannon would invoke Costello's advice in his own defense.

And Costello made so many contradictory claims in his 302s (to say nothing of providing evidence that Bannon knew well he had no privilege claim with which to refuse to testify entirely), that it is unsurprising that the FBI made records requests to test whether Costello lied in those interviews to the FBI. Among the claims Costello made about communications he had or did not have are:

- J6 sent the subpoena to Costello (on September 23) before he had been able to consult with Bannon
- Costello did not know who was representing the other people subpoenaed – Dan Scavino, Kash Patel, Mark Meadows, or Donald Trump – at the time of the subpoena
- Through the entire subpoena response, Bannon and Costello have “operated independently of the others subpoenaed”
- Costello was not told who was representing Trump, Meadows, or the others subpoenaed, but he found out on his own who represented Trump and Meadows
- Costello sent the subpoena to Bannon to review
- Costello's advice to Bannon that he didn't have to respond was verbal

- Costello was sure he sent the J6 letters to Bannon; he wasn't sure whether Bannon read the letters but Costello did quote lines from the letters to him
- Costello sent Bannon an email that he ended with the word BEWARE because defying the subpoena could result in a referral to DOJ
- Costello's only contact with J6 Chief Counsel Kristin Amerling came the day before and the day of the subpoena service [the record shows she sent him at least one letter after that]
- Costello tried to contact the attorney he believed was representing Trump (whom he didn't name) but that attorney referred Costello to Justin Clark
- Costello reached out to Clark a few days before October 6, though their first substantive conversation came when Clark responded
- Costello did not provide any documents to attorneys for Trump for an Executive Privilege review
- Justin Clark was vague but Costello was sure Trump asserted Executive Privilege

with regards to Bannon

- Clark would not ID for Costello what would be covered under Executive Privilege
- In spite of Costello's claims not to have consulted with any Trump lawyer, he also claimed that Clark told him not to respond to item 17 on the subpoena (covering Mike Flynn), because lawyers like Rudy Giuliani might have been present when Bannon communicated with Flynn
- In spite of his admitted conversations with Justin Clark, Costello claimed he had not had communications with attorneys for Trump prior to October 18, 2021 (when Trump filed a lawsuit challenging the privilege waivers on materials from the Archives)
- Costello had "an email or two" with Clark, who he believed filed the lawsuit, but he did not learn until later that Jesse Binnall filed the lawsuit
- Costello sent copies of Bennie Thompson's letters to the VA lawyer representing Trump (probably Binnall)
- Costello had no advance

- knowledge of Trump's lawsuit and would have handled things differently if he had
- Attorneys representing Trump (Costello doesn't name him or describe when this was) told him everyone who got a subpoena would get Executive Privilege
 - Costello did not talk about "disposing of any documents requested in the ... subpoena with any attorneys who represented former President TRUMP"
 - Costello said he'd sent to USAO all memorializations of communications he had with the Committee, Clark, and Trump's attorneys

Effectively, these claims only make *any* sense if he had extended discussions with an attorney who did not represent Donald Trump, on whose representation he advised Bannon that Trump wanted Bannon to invoke Executive Privilege. But even there, there are still all sorts of temporal problems with Costello's claims (and probable inconsistencies regarding the timing of events on October 18, though I need to unpack what those are further).

Costello's interviews were all over the map on other topics as well, topics that affect both Rudy Giuliani (whom Costello also represents) and Bannon: that he could and could not claim Executive or Attorney Client privilege over certain topics, that he advised or did not advise Bannon to do so, that he admits that Bannon provided no response about issues – most damningly, his public podcasts – that could in no way be covered by Executive Privilege.

But the key detail is that Costello's claims about communications he had and did not have defy belief and (particularly with regards to Justin Clark) may be physically impossible.

So, in response to these interviews (and probably in possession of contradictory evidence from J6), DOJ obtained all the records they would need to test Costello's claims.

As I've noted, Costello has played a key role in past obstruction efforts, going back to 2018. It's certainly conceivable DOJ has an open investigation into Costello (and Rudy) for those activities.

Whether or not they already did, Costello gave them far more reason to question his role in obstructing investigations into Donald Trump in his two interviews.

Update: Here's Bannon's subpoena (h/t Kyle Cheney). It confirms that Item 17, which Clark told Costello to tell Bannon not to respond to, included Mike Flynn.

Timeline

March 5: Beginning date for Costello records request (last event involving Bannon and Costello in Kolfage)

September 22: First contact between J6 and Bannon

September 23: Bannon subpoena

September 24: Costello accepts service

October 6: Costello claims Clark invoked privilege

October 7, 10AM: Original deadline for document production

October 7, 5:05PM: Costello letter claiming Trump invoked privilege

October 8: Thompson letter to Bannon rejecting non-compliance

October 13: Second Costello letter, demanding accommodation with Trump

October 14, 10AM: Original date for Bannon testimony

October 15: Letter noticing failure to comply with subpoena, warning of contempt meeting, setting response deadline for October 18, 6PM

October 18: Thompson letter to Bannon with deadline; Trump sues Thompson and the Archives on privilege issues

October 19: Bannon claims they intended to respond; Amerling letter to Costello; J6 business meeting to hold Bannon in contempt

October 20: Rules committee meeting to hold Bannon in contempt

October 21 Bannon held in contempt

October 28: Matthew Graves confirmed as US Attorney

November 2: Kristin Amerling interview

November 3: First interview with Robert Costello

November 5: Matthew Graves sworn in as US Attorney

November 8: Second interview with Robert Costello

November 11: Subpoena to Internet provider

November 12: End date for Costello records request

November 12: Indictment

November 15: Bannon arrest; David Schoen and Evan Corcoran file notices of appearance

November 18: At status conference, government says there are just 200 documents of discovery

December 2: Costello moves to appear PHV; Government asks if Bannon intends to rely on advice of counsel defense

December 7: Returns on Internet provider (623 pages)

December 7 to 16: Bannon refuses to submit joint status report

January 4: DOJ turns over 790 pages of records from Costello

January 6: Bannon request for more information on Costello

January 7: Government response to Bannon request

January 14: Bannon discovery request letter; Bannon motion to compel regarding Costello

January 28: Government response to discovery demand

February 4: In guise of Motion to Compel, Bannon complains about "spying" on Robert Costello