

# STEVE BANNON'S PHANTOM EXECUTIVE PRIVILEGE

In a reply motion demanding to know why DOJ subpoenaed the toll records for him, the lawyer Steve Bannon shares with Rudy Giuliani, Robert Costello, claims DOJ obtained the email information, including hundreds of pages from Google, for different Robert Costellos, not him.

The hundreds of pages of email information they obtained from Google, including email addresses (and IP addresses) of the sender and recipient, date and time of the emails, metadata, social media and meeting (Google Hangouts) data, information as to whether each email was read, remained unread, was deleted, or what filing box the recipient put it in, and more [See e.g., 0011510001249; 001339-1732] were all for another completely uninvolved citizen apparently named Robert Costello or Robert M. Costello. In fact, not one of the email accounts the Government sought access to in this case, intending to get defense counsel's emails, actually was defense counsel's email account.

He even issued a declaration stating, among other things, that,

I have no association whatsoever with email accounts with the addresses "RobertCostello@gmail.com," or "Robert.Costello@gmail.com," or "Robert.Costello@comcast.net," or "bobcostello@yahoo.com."

We shall see how the government explains this claimed mix-up, assuming Judge Carl Nichols permits them to file a surreply (Costello claims

he only just discovered these weren't his emails after reviewing them for months).

That said, Costello did not deny association with email accounts with the addresses of, rmc35@cornell.edu, robertcostello35@gmail.com, or robertmichaelcostello@gmail.com, which appear to be included in the friends and family accounts of the main Gmail account in question. And though Costello claims to provide the exhibits to back his claims, he doesn't provide the Comcast return and doesn't provide back-up for the bulk of the returns he is complaining about (US 001339-001732 below).

What Costello has also shown is that, in a memo to DOJ, he claimed to quote from a letter from Justin Clark, who would have been acting as Trump's lawyer, invoking privilege on Trump's behalf.

"President Trump vigorously objects to the overbreadth and scope of these requests and believes they are a threat to the institution of the Presidency and the independence of the Executive Branch." Mr. Clark added that:

"Through the Subpoenas, the Select Committee seeks records and testimony purportedly related to the events of January 6th, 2021, including but not limited to information which is potentially protected from disclosure by the executive and other privileges, including among others, the presidential communications, deliberative process, and attorney-client privileges. President Trump is prepared to defend these fundamental privileges in court.

As I've previously noted, at a meeting on November 3 at which Costello was supposed to be presenting that memo, Costello alternately claimed:

- He had had *no* communications

with Trump lawyers prior to October 18

- Clark refused to reach out to the January 6 Committee on behalf of Costello or Bannon
- Costello could not recall who brought up Executive Privilege first, him or Clark
- Costello did not ask Clark to attend the hearing because he wouldn't contact the committee on his behalf (even though his later complaint was that the Committee refused to have a Trump lawyer present)

In that November 3 meeting, Costello said he'd provide all the backup to support his claims.

But when JP Cooney asked for all the documents Costello claimed to be relying on in the memo and an interview with DOJ and the FBI on November 3, 2021, Costello said, "as soon as I locate the letter I received from Justin Clark, acting as counsel for President Trump, I will forward that under separate cover." Cooney responded, making sure, "please review and let us know if this constitutes your entire production."

There's no evidence in this filing that Costello ever provided it.

Which may be why, in a follow-up interview on November 8 – after searching and (at least as this record shows) not finding any letter from Clark – Costello told DOJ:

- Clark was trying to be intentionally vague; however

Costello was clear former President Donald Trump asserted Executive Privilege with regard to Bannon

- Costello stated Clark did not have to interfere, Clark just had to say they asserted executive privilege

There are additional discrepancies disclosed by the materials Costello has included.

In his declaration, Costello (who, remember, was investigated as part of the Mueller investigation for helping to dangle pardons) complained that this meeting to stave off an indictment didn't work like all the previous times he had had such meetings.

[I]t is clear to me that the representatives of the United States Attorney's Office for the District of Columbia never had any intention of engaging in a lawyer like discussion of the legal merits of a prosecution of Mr. Bannon for criminal contempt of Congress. This position was and is shocking to me because of the many prior instances when this same Office declined to prosecute others, including sitting United States Attorney Generals based upon a referral from Congress.

There's more: For example, Costello misrepresents when he joined Bannon's defense team for this.

But the key detail is that Costello claimed to have a letter from Trump invoking Executive Privilege. And when DC USAO asked to see it, Costello changed his story.

Update, April 19: I've updated the timeline below with two documents DOJ submitted on April 15. They raise further inconsistencies in Costello's statements to the FBI and DOJ in his

interviews.

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## **BATES STAMP RANGE: US 001093-001883**

US 001093: Grand jury subpoena

US 001145-001768: 623-page return from Internet provider showing IP activity, status (read or unread, inbox, etc.) and other details concerning emails and other activity offered by the carrier obtained with a Section 2703(d) Order on November 11, 2021 [US 001733] that includes a case number [US 001732-001735] and returned on December 7, 2021. Returns include:

- US 001093-001095: Subpoena for email account
- US 001151-001249: 98 pages showing IP activity for the email account sought from March 5, 2021 through November 12, 2021, as well as a report on what other services from the provider Costello uses
- US 001339-001732 Emails?
- US 001733-001737, 001739-001743: Response letter for robertcostello@gmail.com
- US 001765-001768: Grand jury subpoena for robert.costello@gmail.com

US 001769-001789: Costello's 302s

US 001808: Yahoo return

US 001833-001878: Subpoenas for home, direct

office, and cell phone from September 1 to October 20, 2021

US 001834: Case number

US 001842: Case number

US 001863: Subscriber record showing payment method for Costello's cell phone

US 001866: Costello's data usage

US 001872; Grand jury subpoena

US 001874-001875: SMS (text messaging) information, including the numbers to which texts were sent and from which they were received

## 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 5: Media reports on subpoenas to Mark Meadows and others; call from Justin Clark

*October 6: Clark instructs Costello to invoke whatever privileges he can, including executive, deliberative, and attorney-client*

October 6: Costello claims Clark invoked privilege; Costello's memo quotes Clark invoking privilege; undated call with Tonolli (actually on October 12)

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 12: Call with Tonolli re representation from Trump

*October 13: Costello and Clark speak*

October 13: Second Costello letter, demanding accommodation with Trump

*October 14: Clark corrects Costello that he had simply reiterated his October 6 letter*

October 14, 10AM: Original date for Bannon testimony

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

*October 16: Clark emails Costello stating clearly that he had not told him he had immunity from testifying*

October 18: Thompson letter to Bannon with deadline; Trump sues Thompson and the Archives on privilege issues; Costello claims he sent a note to Thompson;

October 18, 6:50 PM: White House says no privilege after 2017

October 19: Bannon claims they intended to respond; Amerling letter to Costello; J6 business meeting to hold Bannon in contempt; Thompson letter to "change course"?

October 20: Rules committee meeting to hold Bannon in contempt

October 21 Bannon held in contempt

October 25: Costello email exchange with Cooney (and Phillips); Costello asks for meeting after October 27

October 28: Matthew Graves confirmed as US Attorney

October 29: Cooney suggests November 3

November 1: Costello emails memo arguing against prosecution, dated October 29

November 2: Kristin Amerling interview

November 3: Costello informs he'll be joined by Katz; First interview with Robert Costello; Cooney follows up asking for documents

November 4: Cooney asks Costello to confirm full production

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