

AMID CLAIMS OF WITNESS TAMPERING, REVISITING PETER NAVARRO'S ALLEGED CONTEMPT

Last week, Steve Bannon engaged in a stunt, claiming that a Carl Nichols order requiring DOJ to provide official documents on things like executive privilege and testimonial immunity must cover DOJ's declination decision with respect to Mark Meadows and Dan Scavino.

The stunt itself isn't all that interesting.

Bannon claimed that he refused to testify in part on the same basis that Mark Meadows and Dan Scavino did, and so understanding how DOJ had distinguished them (whose prosecution DOJ declined) from him (who got charged) would reflect official policy.

The letters Trump lawyer Justin Clark sent to Meadows and Scavino made one difference clear, however (which the Bannon filing obliquely acknowledges). In instructing Meadows and Scavino to refuse to testify to the January 6 Committee as much as possible, Clark included language invoking testimonial immunity, on top of Executive Privilege.

Furthermore, President Trump believes that Mr. Meadows is immune from compelled congressional testimony on matters related to his official responsibilities. *See Testimonial Immunity Before Congress of the Former Counsel to the President*, [citing the Don McGahn OLC opinion]

The letter that Clark sent Bannon on the same day, October 6, had no such language on testimony immunity.

Indeed, after Robert Costello kept making claims about Trump instructing Bannon not to testify, Clark emailed him twice more, the first time to resend the same letter, and the second time to explicitly say that they didn't think Bannon had testimonial immunity.

In light of press reports regarding your client I wanted to reach out. Just to reiterate, our letter referenced below didn't indicate that we believe there is immunity from testimony for your client. As I indicated to you the other day, we don't believe there is. Now, you may have made a different determination. That is entirely your call. But as I also indicated the other day other avenues to invoke the privilege – if you believe it to be appropriate – exist and are your responsibility.

Effectively, Trump's team told Bannon to stall, but gave him no legal tools to do so. Bannon didn't entirely ignore testimonial immunity. In a footnote, he accused Carl Nichols of misapplying the law with respect to immunity and privilege.

Finally, on this question, the Court's oral Order of June 15, 2022, appears to indicate a view by the Court that Justin Clark's view on the question of "immunity" is either relevant or somehow undercuts the invocation of executive privilege. It certainly is not relevant – immunity, unlike, executive privilege is not a legal concept for the President to invoke or confer and his view on "immunity" is of no consequence at all on the question of whether executive privilege was invoked. It was.

But he said the common invocation of Executive Privilege was itself enough to merit a more formal comparison (ignoring, of course, that Meadows provided some materials to the Committee

that did not involve the President, whereas Bannon withheld even his public podcasts).

Though some of the news reports he cites name Peter Navarro, Bannon doesn't invoke his case. In Navarro's now-withdrawn lawsuit against the Committee, he invoked both testimonial immunity and Executive Privilege. But he cites no letter from Trump; instead, he relies on the same Don McGahn OLC opinion Bannon invoked in his filing. Of course, by the time Navarro was subpoenaed – February 9, as compared to the September 23 subpoenas for Bannon, Meadows, and Scavino (as well as Kash Patel) – SCOTUS had already ruled against Trump's privilege claim.

So it may be that DOJ's decision tree regarding charges looks like this:

	White House Official	Non-White House Official
Prior to SCOTUS ruling	Don't charge	Charge
After SCOTUS ruling	Charge	

Bannon's filing may be a stunt, but he may be right that DOJ didn't charge Meadows and Scavino because they could claim to have been covered by both Executive Privilege and testimonial immunity (and in Meadows' case, even attempted to comply with non-privileged materials).

Given the evidence in Tuesday's hearing that Trump and his associates continued to try to influence Cassidy Hutchinson's testimony at least through March 7, I want to return to something I noted before: because Navarro didn't lawyer up, whatever communications he exchanged with Trump's lawyers would not be privileged.

After Bannon got indicted for contempt, DOJ obtained the call records for his lawyer, Robert Costello's, communications going all the way back to when Costello's previous representation of Bannon ended. If they did that with Navarro, they could get more than the call records, though.

Whatever else DOJ did with their charging decision, they also allowed themselves the

greatest visibility into ongoing obstruction,
while sustaining the case in chief.