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INSIGHT: The Mueller Investigation and Waiving Presidential Communications Privilege

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Two days before former Special Counsel Robert Mueller testified before two House committees, he was warned by the Justice Department that ''any testimony must remain within the boundaries of your public report because matters within the scope of your investigation were covered by executive privilege.''

Although it remained in the background during last month's hearings, the months-long dispute between the House and the DOJ over executive privilege has moved into a new phase with the filing of a lawsuit to force former White House Counsel Don McGahn to testify before the House Judiciary Committee.

The House Judiciary Committee issued its subpoena to McGahn shortly after the Mueller report was made public, and seeks documents and testimony provided to the Special Counsel's Office. The White House has claimed that McGahn, as a former White House official, is absolutely immune from testifying before Congress.

If the courts reject the administration's immunity claim, just as Judge John Bates did in 2008 with regard to President George W. Bush's White House Counsel Harriet Miers, *see Committee on Judiciary, U.S. House of Representatives v. Miers*, the legal dispute would then turn on the President's assertion of privilege (President Trump has not yet formally invoked executive privilege).

Media coverage of the lawsuit has so far focused on the immunity claim, with little or no discussion of the strength of the privilege claim. The DOJ is not claiming privilege over material within the unredacted portion of the Mueller report.

The critical question is now whether executive privilege claims were waived over *all* information provided to the Special Counsel, even if that information was not included in the report. The committee argues that it was and seeks an injunction ordering McGahn to testify to those matters as well.

Why the Committee Has The Better Argument Three key cases from the U.S. Supreme Court and D.C. Circuit indicate that, if the court reaches the privilege question, the committee has the better argument: the presidential communications privilege was likely waived as to any documents or testimony provided to the Special Counsel.

The DOJ letter to Mueller claimed that several subsets of executive privilege may apply to materials provided to Mueller, namely ''law enforcement, deliberative process, attorney work product, and presidential communications privileges.''

Our analysis focuses on the latter, because, as the D.C. Circuit has explained, ''congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of'' executive privilege rooted in common law rather than the Constitution. *See In re Sealed Case (Espy)*.

Thus, if the presidential communications privilege has been waived, it follows that so too have the lesser varieties of executive privilege.

Before jumping into the waiver analysis, what exactly is the presidential communications privilege?

According to the Supreme Court in *United States v. Nixon*, the ''privilege of confidentiality of Presidential communications in the exercise of Art. II powers . . . derive[s] from the supremacy of each branch within its own assigned area of constitutional duties.''

By protecting the president's ''conversations and correspondence,'' it protects ''the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.'' After all, the president ''*and those who assist him* must be free to explore alternatives in the process of shaping policies and making decisions.''

Interpreting *Nixon* 23 years later in *Sealed Case*, the D.C. Circuit explained that the presidential communications privilege is much broader than the deliberative process privilege in that it applies ''to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.''

However, like any other privilege, the presidential communications privilege can be waived by the holder, whether explicitly and deliberately or not. As we will see, the confidentiality requirement is critical.

In 1997, the D.C. Circuit decided a dispute between the Clinton White House and the Office of Independent Counsel over the presidential communications privilege.

Allegations had been made that the Secretary of Agriculture, Mike Espy, had unlawfully accepted gifts; this prompted the appointment of an independent counsel, an investigation by the White House Counsel's Office, and Secretary Espy's resignation.

The White House Counsel's Office produced a report which was made public, and the Independent Counsel then issued a grand jury subpoena for all documents ''that were 'accumulated for, relating in any way to, or considered in any fashion, by those persons who were consulted and/or contributed directly or indirectly to all drafts and/or versions' of the'' report.

Although the White House complied with the subpoena, it withheld 84 documents as privileged. The Independent Counsel challenged that designation, arguing that release of the report, among other White House statements, had waived the privilege.

The D.C. Circuit held that, in contrast to the ''all-or-nothing approach'' to attorney-client privilege, the ''limited approach'' to the presidential communications privilege meant that the public release of the White House Counsel's Office report did not constitute waiver as to the underlying documents.

But, it found that ''the White House ha[d] waived its claims of privilege in regard to the specific documents that it voluntarily revealed to *third parties outside the White House*,'' including Secretary Espy's counsel. In other words, presidential privilege was waived when the document were no longer kept confidential.

The DOJ will likely argue that the presidential communications privilege applies to materials shared with the Special Counsel that did not make it into the now-public Mueller report. After all, the argument would go, executive privilege was maintained because Mueller, as Special Counsel, was within the DOJ.

D.C. Circuit Has Not Been Persuaded . . . Twice The D.C. Circuit has weighed similar assertions twice, and both times it was not persuaded. In *Sealed Case*, the court held that the privilege extends to ''presidential advisers in the course of preparing advice for the President . . . even when these communications are not made directly to the President,'' and even to ''communications authored or received in response to a solicitation by members of a presidential adviser's staff.''

However, the court was careful to note that not everyone who ''plays a role'' can ''qualify'': ''In particular, the privilege should not extend to staff outside the White House in executive branch agencies.''

Moreover, the privilege ''should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President.'' Under this reasoning, disclosures to the Special Counsel would waive the privilege because the Special Counsel is neither in the White House nor a part of ''advising the President on official government matters.''

Indeed, more recently, in *Judicial Watch v. Department of Justice*, the D.C. Circuit rejected the DOJ's argument for extending ''the presidential communications privilege to communications of persons in the Justice Department who are at least twice removed from the President, among and between the Offices of the Pardon Attorney and the Deputy Attorney General, as well as other agencies.''

Importantly, like the information McGahn provided to the Special Counsel, those communications ''were never received by immediate White House advisers in the Office of the President.''

Given these precedents, any assertion of the presidential communications privilege over materials or testimony provided by the White House to the Special Counsel likely fails, even for material that was left out of the four corners of Mueller's report.

The Special Counsel was an ''inferior officer'' within the DOJ, *see In re Grand Jury Investigation* (Miller), not a presidential advisor within the White House. His tasks, as enumerated in the Acting Attorney General's order appointing him, did not include assisting the president ''in the process of shaping policies and making decisions.'' *See U.S. v. Nixon*.

Thus, D.C. Circuit case law regarding the scope of the presidential communications privilege indicates that confidential presidential communications to or from White House officials that were provided to the Special Counsel are arguably no longer *confidential*—waiving any previously protectable privilege.

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