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## **Evidentiary Privileges Can Do Little to Block Trump-Related Investigations**

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## Table of Contents

<b>I.</b>	<b>Executive Summary .....</b>	<b>3</b>
<b>II.</b>	<b>Executive Privilege: A Contested Doctrine.....</b>	<b>5</b>
	A. Executive Privilege Issues in the Russia Investigations to Date.....	5
	B. The Process: Executive Privilege Requires a Presidential Act.....	7
<b>III.</b>	<b>Executive Privilege Components .....</b>	<b>9</b>
	A. Presidential Communications .....	9
	B. Deliberative Processes .....	9
	C. State Secrets .....	10
	D. Law Enforcement.....	11
<b>IV.</b>	<b>Executive Privilege Forums and Contexts.....</b>	<b>11</b>
<b>V.</b>	<b>Other Executive Privilege Questions in the Russia Investigations.....</b>	<b>15</b>
	A. Categorical White House Resistance Undermines Future Privilege Claims .....	15
	B. Allegations of Misconduct.....	16
	C. Executive Privilege Applies to Former Officials for Official Communications .....	16
	D. Waiver of Executive Privilege .....	17
	E. Applicability to Presidential Transitions .....	18
	F. Attorney-Client Privilege.....	19
<b>VI.</b>	<b>Attorney-Client Privilege in the Investigations of Russian Interference and Trump Associates .....</b>	<b>20</b>
	A. Attorney-Client Privilege Does Not Cover a Trump-Trump-Hicks Communication.....	21
	B. The Attorney-Client Privilege is Likely Unavailable for Conversations Among Executive Branch Employees in a Criminal Investigation .....	22
	C. Congress Has Discretion Not to Recognize Attorney-Client Privilege .....	23
	D. The Crime-Fraud Exception .....	23
<b>VII.</b>	<b>The Work Product Doctrine .....</b>	<b>24</b>
<b>VIII.</b>	<b>The Fifth Amendment Privilege Against Self-Incrimination .....</b>	<b>25</b>
<b>IX.</b>	<b>Conclusion .....</b>	<b>26</b>

## I. Executive Summary

From the early days of the investigations into matters involving President Trump and his campaign, issues regarding legal privileges have loomed large. In the investigation by Special Counsel Robert Mueller into Russian interference in the 2016 election, the initial approach taken by the president's legal team has been to provide voluminous documentary production.<sup>2</sup> In contrast, on the congressional front, the White House appeared to take a different tack, repeatedly instructing witnesses to refuse to respond to questions – an approach seemingly grounded in executive privilege despite no formal official invocation of it. In the investigation of Michael Cohen by the U.S. Attorney in the Southern District of New York, the president's attorneys have used a third strategy, aggressively asserting attorney/client privilege in tandem with Cohen's legal team and triggering the spectacle of a Special Master review of document disputes.

Further, the most consequential showdown over privilege may involve the ongoing negotiation over whether President Donald J. Trump will participate in a voluntary interview or engage in a subpoena fight with the Office of Special Counsel Robert S. Mueller, III. Rudy Giuliani, the latest public face of the president's reshuffled personal legal team, made the legally dubious claim that the president could resist a subpoena on executive privilege grounds<sup>3</sup> and the legally sound—but politically unthinkable—claim that President Trump could assert the Fifth Amendment privilege against self-incrimination.<sup>4</sup>

This paper examines privilege doctrines raised by witnesses in the congressional and criminal investigations of President Trump and his associates—including executive privilege, attorney-client privilege, and the Fifth Amendment right against self-incrimination. It reaches the following conclusions:

- Over the past year, a number of officials associated with Trump have refused to respond to congressional investigative inquiries without invoking executive privilege or offering an alternative legal theory that justifies their non-cooperation.
- In numerous instances where Trump associates have refused to respond to congressional inquiries in the investigations into Russian interference in the election, Congress's need is compelling and the White House position is untenably overbroad.

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<sup>2</sup> Philip Ewing, *White House Touts 'Unprecedented' Cooperation Amid Mueller Interview Talks*, NPR (Jan. 25, 2018), <https://www.npr.org/2018/01/25/580637953/white-house-touts-unprecedented-cooperation-amid-mueller-interview-talks> (noting 20,000 plus pages had been produced by the White House and over a million pages by the campaign).

<sup>3</sup> See Jonathan Lemire, *Giuliani: Don't Expect Trump-Russia Interview Decision Soon*, ASSOCIATED PRESS (May 11, 2018), <https://www.apnews.com/5e89530f62374cdba4936fa62b32e0a5>.

<sup>4</sup> See Mark Landler & Noah Weiland, *Giuliani Says Trump Would Not Have to Comply With Mueller Subpoena*, N.Y. TIMES (May 6, 2018), <https://www.nytimes.com/2018/05/06/us/politics/giuliani-says-trump-would-not-have-to-comply-with-mueller-subpoena.html>.

- Supreme Court precedent renders it very unlikely that President Trump could successfully assert executive privilege to prevent his aides from testifying before the Mueller grand jury—or to shield himself from providing such testimony.
- Since the president is expected to assert any executive privilege claims on a document-by-document basis, blanket refusals by aides including former White House Communications Director Hope Hicks and former White House Chief Strategist Steve Bannon regarding addressing entire swaths of time during their tenure are not legally defensible.
- Because executive privilege is not grounds for shielding misconduct, the need to obtain information to evaluate core issues in the Special Counsel’s obstruction of justice investigation, including the president’s removal of FBI Director James Comey and pretextual reasons offered for it, would weigh heavily against any executive privilege claim.
- While executive privilege applies to former White House officials regarding their conversations with the president during their official tenure, it does not apply to communications the president has with former staff once they have left government service.
- Executive privilege may be waived where information has been voluntarily revealed to third parties outside the White House, the White House probably fatally compromised its legal firewall as to many of the topics sought by congressional investigators due to leaks by the White House to numerous media publications.
- Attempts by the Trump campaign and Trump associates to apply a theory of executive privilege to presidential transition communications do not have precedential support.
- The attorney-client privilege is not likely available for conversations among executive branch officials in a criminal investigation, as courts have emphasized the strong policy interest in executive branch employees reporting information related to potential criminality.
- The attorney-client privilege also would have limited applicability to any materials seized in the FBI’s raid on the offices of Michael Cohen if they concern perpetuation of a crime, under the “crime-fraud” exception to the attorney client rule.

## II. Executive Privilege: A Contested Doctrine

Executive privilege is an assertion of presidential authority to withhold information from a judicial or congressional proceeding in order to preserve executive branch confidentiality interests.<sup>5</sup> The term “executive privilege” refers to a bundle of components that cover a number of different types of executive branch confidentiality interests.<sup>6</sup> The executive has confidentiality interests in presidential communications, deliberative processes, state secrets, and citizen civil liberties that it may seek to shield from disclosure.<sup>7</sup> Executive privilege claims can arise in Congress, criminal investigations, and civil litigation involving private parties, especially litigation arising under the Freedom of Information Act (FOIA).<sup>8</sup>

Executive branch interests in secrecy sit in stark tension with the information needs of other actors, including congressional oversight committees, grand juries, and the public. Executive privilege thereby pits executive branch functionality against democratic transparency and accountability. For that reason, a presidential order to refuse to give evidence should be used sparingly. A fully valid and justifiable assertion of executive privilege can look like stonewalling—especially to a skeptical press corps that benefits from disclosure—and therefore assertions of privilege traditionally come at a political cost to the president.

### A. Executive Privilege Issues in the Russia Investigations to Date

President Trump has not yet formally invoked executive privilege. However, the president’s lawyers recently suggested that the president would not have to comply with a subpoena for grand jury testimony in the investigation by Special Counsel Mueller.<sup>9</sup> The president’s lawyers have indicated their opposition to a subpoena would be grounded in a view that criminal process per se impermissibly interferes with the discharge of the president’s

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<sup>5</sup> See, e.g., Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1383 (1974); Executive privilege may be asserted in a criminal matter or in litigation involving private parties.

<sup>6</sup> See, e.g., Assertion of Exec. Privilege over Commc’ns Regarding EPA’s Ozone Air Quality Standards and Cal.’s Greenhouse Gas Waiver Request, 32 Op. Att’y Gen., slip op. at 3 (June 19, 2008) (discussing “presidential communications and deliberative process components of executive privilege”).

<sup>7</sup> William P. Barr, Asst. Att’y Gen., Office of Legal Counsel, Memorandum Opinion for the General Counsel’s Consultative Group, *Congressional Requests for Confidential Executive Branch Information* (June 19, 1989) (“There are at least three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process.”).

<sup>8</sup> See e.g., *United States v. Nixon*, 418 U.S. 683 (1974) (addressing a claim of executive privilege asserted against a grand jury subpoena); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974) (addressing a claim of executive privilege asserted against a congressional subpoena); *United States v. Reynolds*, 345 U.S. 1 (1953) (addressing a claim of executive privilege raised against discovery in civil litigation); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (addressing a claim of executive privilege under Freedom of Information Act exemption (b)(5)).

<sup>9</sup> Mark Landler and Noah Weiland, *Giuliani Says Trump Would Not Have to Comply with Mueller Subpoena*, N.Y. TIMES (May 6, 2018), <https://www.nytimes.com/2018/05/06/us/politics/giuliani-says-trump-would-not-have-to-comply-with-mueller-subpoena.html>.

constitutional duties, and have also suggested that executive privilege may justify refusal to comply.<sup>10</sup>

Beyond anticipated disputes over the president's possible refusal to provide grand jury testimony, a number of witnesses associated with President Trump's campaign, transition, and administration, already have relied on executive privilege doctrine to refuse to answer questions or produce documents to Russian interference investigators. In an aside during that went almost unnoticed at the time, former Director of National Intelligence James Clapper indicated at the outset of a May 2017 Senate hearing that his testimony would be limited "[b]ecause of both classification and *some executive privilege strictures requested by the White House.*"<sup>11</sup> During a Senate Intelligence Committee hearing one month later, Attorney General Sessions claimed: "I'm protecting the president's constitutional right by not giving it away before he has a chance to view it and weigh it."<sup>12</sup> A week earlier before the same committee, both Director of National Intelligence Dan Coats and National Security Agency Director Mike Rogers refused to answer questions about media reports that the president had asked them to intervene with Mr. Comey to dial back the Russia investigation.<sup>13</sup> None of these individuals based their refusal to answer questions on the grounds that the president asserted executive privilege. Rather, they indicated it would be "inappropriate" or argued for the need to preserve the president's power to make an executive privilege determination in light of a pending congressional request.

A similar drama played out in appearances before the House intelligence committee. Trump advisors Corey Lewandowski,<sup>14</sup> Steve Bannon,<sup>15</sup> and (at least initially) Hope Hicks<sup>16</sup> all resisted answering questions about any presidential transition or White House roles.

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<sup>10</sup> See *Id.*; *Letters to Special Counsel Robert Mueller from the Trump Legal Team*, LAWFARE (June 2, 2018), <https://www.lawfareblog.com/documents-letters-special-counsel-robert-mueller-trump-legal-team>.

<sup>11</sup> See *Full transcript: Sally Yates and James Clapper testify on Russian election interference*, WASH. POST (May 8, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference/?utm\\_term=.6ccef0cd30cc](https://www.washingtonpost.com/news/post-politics/wp/2017/05/08/full-transcript-sally-yates-and-james-clapper-testify-on-russian-election-interference/?utm_term=.6ccef0cd30cc) (emphasis added).

<sup>12</sup> Charlie Savage, *Explaining Executive Privilege and Sessions' Refusal to Answer Questions*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/us/politics/executive-privilege-sessions-trump.html>.

<sup>13</sup> Kyle Cheney & Josh Gerstein, *Coats and Rogers refuse to say if Trump asked them to sway Russia probe*, POLITICO (June 7, 2017), <https://www.politico.com/story/2017/06/07/mike-rogers-dan-coats-senate-intelligence-hearing-russia-239244>.

<sup>14</sup> Olivia Beavers & Katie Bo Williams, *Top Intel Dem: Lewandowski refused to answer questions in testimony*, THE HILL (Jan. 17, 2018), <http://thehill.com/policy/national-security/369438-top-intel-dem-lewandowski-refused-to-answer-questions-one-day-after>. Mr. Lewandowski served as Trump campaign manager until June 2016. *Id.* At a January 2018 interview, he said he was unprepared to answer any questions about matters after his campaign departure but that he would return to answer them. *Id.* He thereafter resisted returning to the committee, prompting Rep. Adam Schiff (D-Calif.), the committee's Ranking Member, to accuse the White House of interfering with witness access. See Olivia Beavers, *House Intel Dem: Lewandowski breaking his pledge to answer questions*, THE HILL (Feb. 7, 2018), <http://thehill.com/policy/national-security/372782-schiff-lewandowski-refusing-to-appear-before-intel-committee-despite>.

<sup>15</sup> See Kristen Welker & Mike Memoli, *Bannon subpoenaed by House committee after refusing to answer questions*, NBC NEWS (Jan. 16, 2018), <https://www.nbcnews.com/politics/donald-trump/bannon-subpoenaed-house-committee-after-refusing-answer-questions-n838191>.

<sup>16</sup> Karoun Demirjian, *In Russia probe, Hope Hicks refuses to answer questions about Trump administration*, WASH. POST (Feb. 27, 2018), <https://www.washingtonpost.com/powerpost/house-russia-probe-investigators-set-to-question-hope-hicks-but-will-she-answer/2018/02/27/3b2c5dfe-1b78-11e8-9de1->

The White House has also sought to deter disclosures by asserting presidential ownership of the privilege equates to presidential ownership of the underlying information.<sup>17</sup> During the dustup over the prospect of executive privilege in advance of former Acting Attorney General Sally Yates’s testimony before the Senate Judiciary Committee on the Russia investigation, the Department of Justice warned her attorney: “The President owns those privileges.”<sup>18</sup> Similarly, after former FBI Director James Comey’s bombshell congressional testimony about his interactions with President Trump, White House Press Secretary Sarah Huckabee Sanders accused him of “leaking privileged information to journalists”<sup>19</sup> and that he had leaked “privileged government information.”<sup>20</sup>

## **B. The Process: Executive Privilege Requires a Presidential Act**

A 1982 memorandum from President Ronald Reagan reserves to the president, and president alone, any decision to invoke executive privilege in response to a congressional request for information.<sup>21</sup> The D.C. Circuit noted in *In re Sealed Case (Espy)*<sup>22</sup>: “Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the President’s alone.”<sup>23</sup>

The president’s personal involvement in the decision to formally invoke privilege serves important interests. First, it conserves the use of the privilege by ensuring the issue merits

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[147dd2df3829\\_story.html?utm\\_term=.a359932756de](#). Ms. Hicks appeared as White House Communications Director, and had served on the staff of the Trump campaign and presidential transition. *Id.* At the direction of the White House, she refused to answer some questions about the transition and all questions about her service in the White House. *Id.*

<sup>17</sup> It is appropriate for former presidential advisers to be stewards of information that could be subject to an assertion of executive privilege by the president. However, an information stewardship obligation does not equate to formal presidential ownership of unclassified information that could nevertheless be subject to a privilege claim. See Andy Wright, *Bob Gates, Disclosure & Executive Privilege*, JUST SECURITY (Jan. 16, 2014), <https://www.justsecurity.org/5755/bob-gates-disclosure-executive-privilege/> (criticizing, due to privilege concerns, former Secretary of Defense Bob Gates for unilaterally recounting Oval Office discussions about war deliberations in his book, *Duty: Memoirs of a Secretary at War*, while President Obama was still in office).

<sup>18</sup> Letter to David O’Neil from Scott Schools, Associate Deputy Attorney General, U.S. Department of Justice (Mar. 24, 2017), <https://www.courthousenews.com/wp-content/uploads/2017/03/YATES-LETTERS.pdf> (at page 624, 2017).

<sup>19</sup> Matt Shuham, *Sanders: Justice Dept. ‘Should Certainly Look At’ Investigating James Comey*, TALKING POINTS MEMO (Sept. 12, 2017), <https://talkingpointsmemo.com/dc/sanders-investigate-james-comey>.

<sup>20</sup> See Press Briefing by Press Secretary Sarah Sanders, The White House (Sept. 12, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-091217/> (accusing Mr. Comey of having leaked “privileged government information”).

<sup>21</sup> See Memorandum from President Ronald Reagan to Heads of Executive Departments and Agencies (Nov. 4, 1982) at 1 (“To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.”), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-4.pdf>.

<sup>22</sup> 121 F.3d 729 (D.C. Cir. 1997).

<sup>23</sup> *Id.* at 748.

presidential attention. Second, it requires the president to internalize the political costs of a decision to withhold information from a legitimate tribunal. The democratically elected president is the appropriate officer to weigh the relative equities of the information access dispute within the constitutional framework from the executive branch perspective.

Executive branch officials generally feel constrained by the president's ownership of the privilege.<sup>24</sup> They will therefore usually seek to resist providing information in which, per the Office of Legal Counsel or the White House Counsel, the executive branch has significant confidentiality interests. As a matter of executive branch legal doctrine, privilege is beyond their authority to assert. As such, subordinate officials often seek to preserve the president's ability to assert executive privilege by refusing to respond to requests that could be subject a presidential claim of privilege.

This phenomenon partially explains the awkward dynamics to date in the congressional Russia investigations. Over the past year, a number of officials have refused to provide information about conversations with President Trump with various verbal formulations that scrupulously avoid asserting executive privilege but do not offer an alternate legal theory for failure to answer. Attorney General Jeff Sessions, for example, told the Senate intelligence committee he was refusing to answer because he was preserving space for the president.<sup>25</sup> Those episodes caused varying degrees of consternation among members of Congress and outrage from many quarters on social media. However, as discussed below, Congress has thus far failed to use its enforcement tools to ripen the legal dispute with the White House and force the president to either assert privilege or accommodate the investigators.<sup>26</sup>

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<sup>24</sup> "Executive privilege belongs to the President of the United States. It's not Mr. Bannon's right to waive it," Mr. Bannon's lawyer William Burck said in a statement to ABC News. Benjamin Siegel et al., *Steve Bannon has reached an agreement with Special Counsel Robert Mueller to come in for an interview: Sources*, ABC NEWS (Jan. 17, 2018), <http://abcnews.go.com/Politics/steve-bannon-reached-agreement-special-counsel-robert-mueller/story?id=52418777>. Mr. Burck told *Axios* "The White House instructed Mr. Bannon not to talk about the transition and the White House until the President decides what information he will invoke executive privilege over and what information he will not. That had not happened as of yesterday or today." See Andy Wright, *Bannon's Silence Before Congress: All You Need to Know*, NEWSWEEK (Jan. 18, 2018), <http://www.newsweek.com/bannons-silence-congress-all-you-need-know-and-more-784679>.

<sup>25</sup> Charlie Savage, *Explaining Executive Privilege and Sessions' Refusal to Answer Questions*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/us/politics/executive-privilege-sessions-trump.html> ("I'm protecting the president's constitutional right by not giving it away before he has a chance to view it and weigh it.").

<sup>26</sup> See William P. Barr, Asst. Att'y Gen., Office of Legal Counsel, Memorandum Opinion for the General Counsel's Consultative Group, *Congressional Requests for Confidential Executive Branch Information* (June 19, 1989) at 1 ("While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-à-vis Congress except in response to a lawful subpoena.").

### III. Executive Privilege Components

Executive Privilege is a bundle of legal concepts that are all designed to protect important executive functions and confidentiality interests. Its components consist of those categories of information sought to be shielded from disclosure.<sup>27</sup>

#### A. Presidential Communications

The presidential communications component of executive privilege protects direct communication with the president as well as information that is “revelatory of his deliberations” and held by advisors with operational proximity to the president.<sup>28</sup> It is grounded in the “constitutional separation of powers principles and the President’s unique constitutional role.”<sup>29</sup> As a constitutionally based privilege, it can limit access to Executive information sought by Congress, grand juries, and civil litigants. Congress acknowledges its validity but takes a narrow view of the scope of communications covered and the advisors with sufficient presidential proximity.

#### B. Deliberative Processes

The deliberative process privilege protects the decision-making process of government agencies.<sup>30</sup> It is designed to encourage frank discussions on matters of policy within the Executive, protect against premature disclosure of policies before they have been adopted, and minimize public confusion that might result from disclosure of discarded policy options and rationales.<sup>31</sup> In terms of scope, the privilege generally “extends to written and oral communications comprised of opinions, recommendations or advice offered in the course of the executive’s decisionmaking processes.”<sup>32</sup>

Unlike presidential communications, the deliberative process privilege focuses on the nature of the executive branch discussion, whether or not it involves the president.<sup>33</sup> Because of its focus on deliberations, the privilege is limited to predecisional information.<sup>34</sup> It generally

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<sup>27</sup> See generally John E. Bies, *Primer on Executive Privilege and the Executive Approach to Congressional Oversight* (June 15, 2017), <https://lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight>.

<sup>28</sup> *Espy*, 121 F.3d at 752.

<sup>29</sup> *Id.* at 745.

<sup>30</sup> See generally Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989).

<sup>31</sup> See U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 366 (2009).

<sup>32</sup> Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, IND. L.J. 845, 851 (1990).

<sup>33</sup> See *Espy*, 121 F.3d at 745-46 (noting that, unlike deliberative process privilege, presidential communications privilege requires a presidential nexus to the communication).

<sup>34</sup> See *id.* at 737.

does not protect communications excerpts consisting of factual material otherwise subject to discovery,<sup>35</sup> final determinations, or post-decisional information.<sup>36</sup>

It is also more doctrinally contested among the branches. The Executive Branch maintains that the constitutional structure gives rise, like the presidential communications privilege, to a deliberative process privilege.<sup>37</sup> In contrast, Congress argues that the deliberative process privilege is a mere common law privilege subject to congressional discretion as to its validity.<sup>38</sup> This was one of the central points of contention in the litigation the House of Representatives brought to enforce subpoenas in its inquiry into problematic Operation Fast and Furious anti-gun trafficking law enforcement investigations along the southwest border.<sup>39</sup> Congress successfully obtained a judicial order for production of the subpoenaed materials subject to President Barack Obama's assertion of executive privilege. However, the district court rejected Congress's claim that the deliberative process privilege was a common law privilege, and instead sided with the Executive Branch on its constitutional origin.<sup>40</sup>

### C. State Secrets

In *United States v. Reynolds*,<sup>41</sup> the Supreme Court recognized a privilege shielding disclosure of significant state secrets related to military, diplomatic, and intelligence matters. In that case, the court construed the Executive's state secrets claim to prohibit judicial officers from access to the alleged secrets materials even for the limited purpose of assessing the privilege

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<sup>35</sup> See *E.P.A. v. Mink*, 410 U.S. 73, 91 (1973) (declining to apply deliberative process privilege to "factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion").

<sup>36</sup> See *Taxation with Representation Fund v. I.R.S.*, 646 F.2d 666, 677-78 (D.C. Cir. 1981) (holding that FOIA Exemption 5, as a vehicle for deliberative process privilege, "does not apply to final agency actions that constitute statements of policy or final opinions that have the force of law, or which explain actions that an agency has already taken") (citing *Ryan v. Dep't of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980)).

<sup>37</sup> See, e.g., *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (opinion of Attorney General John D. Ashcroft) ("The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.")

<sup>38</sup> Frederick M. Kaiser, Walter J. Olszek & Todd B. Tatelman, *Congressional Oversight Manual*, CONG. RESEARCH SERV, at 45 (2011), [https://digital.library.unt.edu/ark:/67531/metadc40175/m1/1/high\\_res\\_d/RL30240\\_2011May19.pdf](https://digital.library.unt.edu/ark:/67531/metadc40175/m1/1/high_res_d/RL30240_2011May19.pdf) (characterizing deliberative process privilege as a "common law privilege . . . that is easily overcome by a showing of need by an investigatory body" and noting that "congressional practice has been to treat . . . acceptance [of deliberative process privilege] as discretionary with the committee").

<sup>39</sup> The House brief included a section titled, "Deliberative Process Privilege...Does Not Apply to Congressional Subpoenas." Mem. of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 25-33, *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-cv-01332-ABJ (D.D.C. Dec. 16, 2013).

<sup>40</sup> See Memorandum Opinion and Order, *Comm. on Oversight & Gov't Reform v. Lynch*, No. 12-cv-01332-ABJ (D.D.C. Jan. 19, 2016) ("[T]he Court rejects the Committee's suggestion that the only privilege the executive can invoke in response to a subpoena is the Presidential communications privilege."); see also Andy Wright, *Fast and Furious Litigation: Losing the Battle to Win the War?*, JUST SECURITY (Jan. 25, 2016), <https://www.justsecurity.org/28957/fast-furious-litigation-losing-battle-win-war/>.

<sup>41</sup> 345 U.S. 1 (1953).

question before the court.<sup>42</sup> Since that time, it has been used widely. The doctrine has been criticized by government accountability and transparency advocates, legal commentators, and politicians.<sup>43</sup> Further, subsequent investigative journalism and document releases significantly undermined the government's characterization of the national security value and gravity of the information withheld.<sup>44</sup> In response, Attorney General Eric Holder issued policy guidance designed to "strengthen public confidence that the U.S. Government will invoke the privilege only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."<sup>45</sup> Nevertheless, the state secrets doctrine remains a viable component of executive privilege.

#### **D. Law Enforcement**

The Executive Branch has also long argued that executive privilege may shield information from open law enforcement files from disclosure.<sup>46</sup> Information contained in open criminal files could undermine ongoing law enforcement operations. For example, an undercover operation could be compromised. In addition, the civil liberties of suspects and witnesses could be harmed by public dissemination of unproven derogatory information contained in law enforcement files. However, the Executive Branch evaluates requests for law enforcement information on a case-by-case basis.<sup>47</sup> Moreover, courts have ordered production of information withheld by the Executive on these grounds.<sup>48</sup>

### **IV. Executive Privilege Forums and Contexts**

The president may attempt to claim executive privilege in response to a grand jury subpoena, a congressional subpoena, a civil litigation discovery request, or a Freedom of

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<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *The State of State Secrets Privilege*, Symposium, Collaboration on Government Secrecy, American University Washington College of Law (Nov. 18, 2009), webcast video available at: <https://www.wcl.american.edu/lawandgov/cgs/webcasts.cfm> (containing four panels including legislators, journalists, and transparency advocates). See also Laura Donohue, *The Shadow of State Secrets*, 159 U. PENN. L. REV. 77, 78 (2010) (noting that more than 120 law review articles discussing state secrets doctrine were published after 9/11).

<sup>44</sup> See Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES (Apr. 19, 2004) (concluding from subsequently declassified documents that the documents withheld by the government in *Reynolds* were an embarrassment to the Air Force rather than state secrets).

<sup>45</sup> See Memorandum from Attorney General Eric Holder for Heads of Executive Departments, *Policies and Procedures Governing Invocation of the States Secrets Privilege* (Sept. 23, 2009), at 1. That policy remains in effect.

<sup>46</sup> See Attorney General Robert Jackson, 40 Op. Att'y Gen. 45, 46 (1941) (arguing that law enforcement investigative reports are confidential, disclosure of which could "seriously prejudice law enforcement").

<sup>47</sup> See Attorney General William French Smith, *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files* (Nov. 30, 1982) at 32 ("This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request.").

<sup>48</sup> For example, Congress overcame this objection in the Operation Fast and Furious litigation. See Mem. Op. & Order, *Comm. on Oversight & Gov't Reform v. Lynch*, No. 12-cv-01332-ABJ (D.D.C. Jan. 19, 2016).

Information Act request. The privilege may be claimed across those forums' different procedural rules and enforcement mechanisms. Nevertheless, the strength of an executive privilege claim will vary across contexts and forums. As a qualified privilege, executive branch confidentiality interests may be overcome by sufficient demonstration of need by the requesting party seeking the information. A statutory privilege to obtain government records under FOIA, expressly exempting privilege claims, is weaker than an objection based on constitutional separation of powers. While civil discovery rules are broader than criminal procedure, a civil litigant likely has a lesser claim of need to information asserted by the Executive as privileged than a grand jury.

The White House strategy in responding to different investigative bodies appears to be driven by the difference in how the courts treat demands from grand juries and from Congress.<sup>49</sup> Deputy White House Counsel Uttam Dhillon reportedly concluded that executive privilege confidentiality interests covered Bannon's testimony before Congress but not before the Special Counsel.<sup>50</sup> Trump administration witnesses in the Russia investigations have followed that approach. Per public reporting, Trump advisers who have refused to answer congressional questions nevertheless insist they will cooperate with the Special Counsel's grand jury.<sup>51</sup>

This approach rests on tenuous grounds. The president's attorneys may point out that the court in *Senate Select Committee v. Nixon*<sup>52</sup> rejected the Senate investigative committee's request for a declaration that President Nixon comply with its subpoena to produce the Watergate tapes while the court in *United States v. Nixon*<sup>53</sup> ordered production of the Watergate tapes to a grand jury. However, these cases did not definitively establish that a grand jury subpoena in a criminal proceeding per se receives greater weight than a congressional subpoena when courts evaluate competing executive and investigative interests. In *Senate Select Committee*, the D.C. Circuit grounded its decision, in part, in the fact that the House Judiciary Committee had the Watergate tapes.<sup>54</sup> The House (not the Senate) has a constitutional mandate to consider impeachment charges, whereas the Senate sits as a trial related to the evidence gathered by the House. Therefore, there is reason to believe the court would have been more solicitous of the

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<sup>49</sup> See Tom LoBianco, Zeke Miller & Chad Day, *When can White House staffers claim executive privilege? Russia probe reopens the debate*, PBS NEWS HOUR (Jan. 18, 2018) (describing cooperation of the White House with the Special Counsel investigation relative to resistance to congressional requests for the same information).

<sup>50</sup> See Emily Sugeran, *Trump may not be able to keep Steve Bannon from telling all to Robert Mueller*, THE INDEPENDENT (Jan. 19, 2018), <http://www.independent.co.uk/news/world/americas/us-politics/trump-russia-bannon-mueller-latest-news-executive-privilege-a8168936.html>.

<sup>51</sup> See *id.*

<sup>52</sup> 498 F.2d 725 (D.C. Cir.1974).

<sup>53</sup> 418 U.S. 683 (1974).

<sup>54</sup> See 498 F.2d at 733 (“[T]here is no indication that the findings of the House Committee on the Judiciary and, eventually, the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.”).

House's need for the tapes than of the Senate's.<sup>55</sup> Further, since *Senate Select Committee*, the courts have been deferential to Congress's assertions of need.<sup>56</sup>

Regarding recent congressional inquiries into Russian interference with the 2016 election, Congress's need is compelling and the White House position is untenably overbroad. It is contrary to numerous examples of senior White House advisors testifying about their official conduct,<sup>57</sup> including recent Bush- and Obama-era precedent.<sup>58</sup> In addition, when Congress's investigative interests are at their strongest, even the most cherished executive branch secrets may yield to scrutiny.<sup>59</sup> Moreover, the president and his staff may have waived the potential

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<sup>55</sup> Nevertheless, where Congress's primary objective is legislative oversight, rather than impeachment, the House and Senate should sit on equal footing.

<sup>56</sup> See, e.g., Mem. Op., *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-cv-01332-ABJ (D.D.C. Sept. 30, 2013) at 42 (declining to "[m]ak[e] a decision that turns upon on the 'legitimacy' of [Congress's] inquiry, the 'need' for the documents, or how 'meaningful' the oversight would be"); Mem. Op. & Order, *Comm. on Oversight & Gov't Reform v. Lynch*, No. 12-cv-01332-ABJ (D.D.C. Jan. 19, 2016) at 21-22 (holding the court had no need to assess the relative legislative need against the executive branch confidentiality interests because the Executive conceded the subject-matter legitimacy of the legislative inquiry).

<sup>57</sup> While such testimony is not routine, it is far from unheard of. A 2007 study by the Congressional Research Service outlines significant examples of congressional testimony by senior presidential advisors about their official White House duties, including:

- White House deputy chief of staff
- National security adviser
- Homeland security adviser
- White house counsel
- Chief of staff to the vice president
- Senior staff of the office of the first lady
- White House communications staff
- Assistant to the president for presidential personnel

Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers' Testimony Before Congressional Committees: An Overview*, CONG. RESEARCH SERV. (Apr. 10, 2007).

<sup>58</sup> Condoleezza Rice and Susan Rice, respectively National Security Advisers to Presidents Bush and Obama, both testified before legislative bodies. See *Rice to testify in public, under oath*, NBC NEWS (March 30, 2004), [http://www.nbcnews.com/id/4623066/ns/us\\_news-security/t/rice-testify-public-under-oath](http://www.nbcnews.com/id/4623066/ns/us_news-security/t/rice-testify-public-under-oath) (President Bush's National Security Adviser, Condoleezza Rice testified in public, under oath, before the 9/11 Commission, which was itself a legislative inquiry); Tom LoBianco & Manu Raju, *Susan Rice agrees to testify before House intelligence panel*, CNN (June 29, 2017) (Susan Rice's testimony related to her official duties in connection with the Russian election interference investigation), <https://www.cnn.com/2017/06/29/politics/susan-rice-to-testify-house-intelligence/index.html> ).

<sup>59</sup> For example, the White House has produced or provided investigators access to review highly sensitive documents such as:

- A legal memorandum from the vice president's legal counsel to the vice president Vice President on the vice president's email system (see House Committee on Government Reform and Oversight, Special Investigations Division, Minority Staff, "Congressional Oversight of the Clinton Administration," at 5 (Jan. 17, 2006) (citing a November 2, 1993, memo by Todd Campbell, counsel to Vice President Albert Gore)),

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<https://wayback.archive-it.org/4949/20141031200116/http://oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf>.

- Emails between Vice President Albert Gore and his staff relating to allegations that foreign companies had inappropriate influence over Vice President Gore and President Clinton (*see* Letter from Rep. Henry A. Waxman to Alberto Gonzales, White House Counsel (Sept. 3, 2002) (describing release of these documents to the House Committee on Government Reform), <https://wayback.archive-it.org/4949/20141031201544/http://oversight-archive.waxman.house.gov/documents/20040827094318-24857.pdf>).
- Testimony by the attorney general on her conversations with the president (*see* House Committee on Government Reform and Oversight, Special Investigations Division, Minority Staff, “Congressional Oversight of the Clinton Administration,” at 5 (Jan. 17, 2006) (citing an October 5, 2000, Committee interview of Attorney General Janet Reno regarding discussions with the President of the incident at Waco, Texas involving confrontation between the FBI and members of the Branch Davidian religious group)), <https://wayback.archive-it.org/4949/20141031200116/http://oversight-archive.waxman.house.gov/documents/20060117103516-91336.pdf>.
- Notes of National Security Council staff on a phone conversation between President Bill Clinton and Ehud Barak, Prime Minister of Israel (*see* House Committee on Government Reform and Oversight, *Justice Undone: Clemency Decisions in the Clinton White House*, part 1, at 215, fn. 653 (107<sup>th</sup> Congress, 2<sup>nd</sup> Session, H. Rept. 107-454) (citing to and extensively quoting verbatim notes of a 19-minute conversation between Clinton and Barak on December 11, 2000)).
- Testimony by the White House counsel and White House chief of staff on pardon deliberations by the president (*see* “The Controversial Pardon of International Fugitive Marc Rich,” Hearings Before the Comm. on Govt. Reform, 107th Cong. 320 (Mar. 1, 2001) (testimony of John Podesta, former Chief of Staff to the President and Beth Nolan, former White House Counsel on deliberations by President Clinton), <https://www.gpo.gov/fdsys/pkg/CHRG-107hhrg75593/html/CHRG-107hhrg75593.htm>).
- Written intelligence documents briefed daily to the president, known as the President’s Daily Brief (PDB), including an August 6, 2001, PDB during the Bush Administration containing an article on Bin Laden’s intent to strike in the United States (*See* Congressional Research Service, Memorandum on “Congress as a Consumer of Intelligence Information” at p. 8, fns. 32 and 34 (Dec. 12, 2005), <https://fas.org/sgp/crs/intel/congress.pdf> <https://fas.org/sgp/crs/intel/congress.pdf> (describing negotiations over and ultimate agreement to provide the 9/11 Commission access to PDBs)).
- Emails of Assistants to the president concerning White House discussion of the April 22, 2004, death of Corporal Patrick Tillman in Afghanistan (House Committee on Oversight and Government Reform, “Misleading Information from the Battlefield: The Tillman and Lynch episodes,” at p. 10, 25-26 (H. Rept. 110-858, 2d. Sess.) (Sept. 16, 2008)).
- Summaries of FBI interviews (known as “FBI 302s”) of senior White House officials including the chief of staff to the president, chief of staff to the vice president, and the national security advisor, regarding the leak of a CIA employee’s identity during the Bush Administration (*see* House Committee on Oversight and Government Reform, “Report of the Committee on Oversight and Government Reform, House of Representatives, Regarding President Bush’s Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukasey, at 4 (approved by the Committee Dec. 9, 2008), <https://wayback.archive-it.org/4949/20141031185058/http://oversight-archive.waxman.house.gov/documents/20081215153517.pdf>).
- Emails between the director and deputy director of the White House Office of Management and Budget, and between senior advisors to the president concerning an energy loan guarantee to the company Solyndra (*see* House Committee on Energy and Commerce, Majority Report, “The Solyndra Failure,” p. 114, fns. 785-788 (Aug. 2, 2012)), [https://www.eenews.net/assets/2012/08/02/document\\_gw\\_01.pdf](https://www.eenews.net/assets/2012/08/02/document_gw_01.pdf)).
- Emails from Deputy National Security Advisors and communications between National Security Council staff and top State Department and Department of Defense officials relating to attacks in 2012 on American

claims as to many of the disputed conversations, as will be explained below. The stonewalling strategy will turn on Congress's will rather than legal merit.

Regardless of the resolution of inquiries in the congressional context, *United States v. Nixon* renders it very unlikely that President Trump could successfully assert executive privilege to prevent his aides from testifying before the Mueller grand jury—or to shield himself from providing such testimony.<sup>60</sup>

## V. Other Executive Privilege Questions in the Russia Investigations

### A. Categorical White House Resistance Undermines Future Privilege Claims

Both the *Miers* and *Holder/Lynch* opinions demonstrate that the courts expect the president to assert executive privilege on a document-by-document or question-by-question basis, rather than asserting privilege over broad categories of information. In *Miers*, the district court held the White House Counsel was “not excused from compliance with the Committee’s subpoena by virtue of a claim of executive privilege that may ultimately be made.”<sup>61</sup> Rather, the court continued, “she must appear before the Committee to provide testimony, and invoke executive privilege where appropriate.”<sup>62</sup> The court also ordered the White House Chief of Staff and White House Counsel to provide a privilege log.<sup>63</sup> Similarly, Judge Jackson ordered the Department of Justice to produce a document-level executive privilege log in response to President Obama’s assertion of privilege over categories of documents in the *Holder/Lynch* Operation Fast and Furious litigation.<sup>64</sup>

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facilities in Benghazi, Libya (*see* House Select Committee on the Events Surrounding the 2012 Terrorist Attack on Benghazi, *Final Report*, at 82-127 (Dec. 7, 2016) (H. Rept. 114-848) (discussing emails of high-level White House staff); Letter from Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Trey Gowdy, Chairman, House Committee on Oversight and Government Reform (Feb. 18, 2018) (discussing document productions made during the Committee’s 2014-2016 investigation of 2012 attacks on American facilities in Benghazi), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-02-21.EEC%20to%20Gowdy%20re%20WH%20Niger.pdf>).

<sup>60</sup> *See In re Bruce R. Lindsey* (Grand Jury Testimony), 158 F.3d 1263, 1266 (D.C. Cir. 1998) (“The Supreme Court and this court have held that even the constitutionally based executive privilege for presidential communications fundamental to the operation of the government can be overcome upon a proper showing of need for the evidence in criminal trials and in grand jury proceedings.”). For additional analysis of weaknesses in President Trump’s potential executive privilege claims, *see* Norman Eisen and Andrew Wright, *Trump’s Executive Privilege Argument is a Loser*, CNN.com (June 4, 2018), <https://www.cnn.com/2018/06/04/opinions/trump-executive-privilege-fail-wright-eisen/index.html>.

<sup>61</sup> Mem. Op., *Comm. on Judiciary v. Miers*, No. 08-cv-0409-JDB (D.D.C. Jul. 31, 2008), at 91. The D.C. Circuit subsequently stayed the enforcement of the order pending appeal, which was later mooted by settlement. *See*

*Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 910 (D.C. Cir. 2008); *Comm. on Judiciary of U.S. House of Representatives v. Miers*, No. 08-5357, 2009 WL 3568649, at \*1 (D.C. Cir. Oct. 14, 2009).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 91-93.

<sup>64</sup> *See* Order, *Comm. on Oversight & Gov’t Reform v. Holder*, No. 12-cv-01332-ABJ (D.D.C. Aug. 20, 2014).

Therefore, blanket refusals by Hope Hicks and Steve Bannon to discuss anything during their White House service is not legally defensible. At the time, Bannon's attorney Bill Burck asserted it was merely a placeholder objection until the White House worked out the scope of Bannon's testimony. However, his restricted testimony did not comply with the congressional subpoena. Congress has not held Bannon in contempt and failed to subpoena Hicks, both of which validate the White House stonewalling strategy at the expense of institutional interests in legislative oversight.

## **B. Allegations of Misconduct**

Executive privilege should protect legitimate government functions, and therefore should not be used to hide misconduct. The privileges are qualified rather than absolute, and where there are credible allegations of misconduct, the investigative need increases relative to the legitimacy of executive's confidentiality interests. As the D.C. Circuit notes, "where there is reason to believe the documents sought may shed light on government misconduct, 'the privilege is routinely denied,' on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'"<sup>65</sup> In a highly charged political environment, what constitutes a sufficient allegation of official misconduct can be in the eye of the beholder. That led the *Espy* court to find note that the presidential communications privilege does not dissolve just because, as Leah Litman and Laurence Tribe put it, there is a "plausible set of facts that gives rise to an inference of possible governmental misconduct."<sup>66</sup>

Here, however, Special Counsel Mueller is conducting a counterintelligence investigation and a criminal investigation into Russian active operations, potential American involvement in those operations, and obstruction of justice by the president. Under normal circumstances, the president's deliberative communications with aides about whether to remove a senior Department of Justice appointee would be amenable to an assertion of executive privilege. However, President Trump's removal of FBI Director James Comey, as well as the pretextual and conflicting reasons offered publicly for it, remains at the center of the Special Counsel's obstruction of justice investigation. Therefore, the president's executive privilege claim over those discussions would be exceedingly weak.

## **C. Executive Privilege Applies to Former Officials for Official Communications**

To the extent executive privilege covers an official communication, deliberation, or state secret, that official character remains after the participant leaves government. In other words, Bannon's status as a former official does not alter the legal strength or weakness of privilege grounds flowing from his official conduct. Of course, the privilege does not apply to conversations the president has with former staff once they have left government service. And, the Executive Branch has less practical leverage over former employees in obtaining compliance

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<sup>65</sup> *Espy*, 121 F.3d at 737-38; see also *id.* at 746 (noting that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct has occurred").

<sup>66</sup> Leah Litman & Laurence H. Tribe, *Waivers of Executive Privilege Can Be Informal*, TAKE CARE (June 16, 2017), <https://takecareblog.com/blog/waivers-of-executive-privilege-can-be-informal>.

with White House wishes. While executive privilege may apply to former officials for testimony about their official conduct, they may feel less inclined to comply with a White House demand than current officials. Bannon appears to be complying with White House requests. The White House's effort to control former Acting Attorney General Sally Yates's congressional testimony, however, failed to dissuade her from testifying. Former FBI Director James Comey was even less likely to accede to White House confidentiality demands.

So what happens if the president learns that a former executive branch official wishes to testify about matters the president may consider privileged? The president has limited recourse. As an initial matter, the president cannot sue Congress to quash or enjoin a congressional subpoena by means of judicial intervention due to the Speech or Debate Clause.<sup>67</sup> He may however, be able to enjoin a former employee from speaking. At least once, the Executive Branch filed a lawsuit seeking to enjoin compliance with a congressional subpoena by a third-party in possession of information the president deemed privileged. In *United States v. AT&T*,<sup>68</sup> the United States sought an injunction to prohibit the telecom giant from producing its correspondence with the FBI.<sup>69</sup> The subject matter of the letters related to intelligence activities, and there were significant classification and national security interests at issue.<sup>70</sup> While the D.C. Circuit eventually held the matter justiciable,<sup>71</sup> it sought to approximate the traditional interbranch accommodation process of negotiation, albeit under judicial supervision.<sup>72</sup> By that process, to the dismay of the Executive, Congress got access to much of the information it sought. The Executive has not engaged in such extraordinary litigation measures since that time, likely due to the low likelihood of success, significant political costs, and unseemly nature of commencing litigation against former staffers.<sup>73</sup>

#### **D. Waiver of Executive Privilege**

As a preliminary matter, executive privilege will not protect documents and conversations involving non-government employees, including President Trump's personal attorneys or members of the press. Thus, to the extent Congress can establish that Bannon has

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<sup>67</sup> See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (holding that members of Congress acting in an oversight capacity fall within the immunity of the Speech or Debate Clause, and are therefore absolutely exempt from judicial intervention).

<sup>68</sup> 551 F.2d 384 (D.C. Cir. 1976).

<sup>69</sup> *Id.*

<sup>70</sup> If the information at issue is classified for national security reasons, then there is a body of statutory, regulatory, and contractual law that could, depending on the circumstances, restrict, regulate, or protect the former employees' disclosure. However, executive privilege is a separate, overlapping inquiry.

<sup>71</sup> See *AT&T v. United States*, 567.2d 121 (D.C. Cir. 1977) (*AT&T II*).

<sup>72</sup> See *id.*

<sup>73</sup> President Trump took the unprecedented and legally dubious step of requiring certain White House officials to sign a nondisclosure agreement. See Julie Hirschfeld Davis, Maggie Haberman, Michael D. Shear & Katie Rogers, *White House Job Requirement: Signing a Nondisclosure Agreement*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/us/politics/trump-nondisclosure-agreement.html>. Numerous former White House lawyers, government ethics lawyers, civil liberties groups, and government accountability advocates have decried such agreements as unconstitutional and unenforceable as void against public policy.

already disclosed information about potentially privileged conversations within the White House to book authors and journalists, the privilege has been waived as to the information disclosed. As Rep. Trey Gowdy (R-S.C.) remarked, it angers members of Congress to see privilege asserted with respect to conversations that are quoted by major media publications.<sup>74</sup> The Trump White House has so many leaks that it has probably fatally compromised its legal firewall as to many of the topics sought by congressional and criminal investigators.

Executive privilege can be waived. Unlike attorney-client privilege, however, executive privilege waiver is narrowly construed.<sup>75</sup> In *Espy*, the D.C. Circuit rejected the Independent Counsel's argument that the White House had waived underlying documents related to the subject matter of a public report issued by the White House Counsel's Office.<sup>76</sup> However, the court also held the White House waived executive privilege as to "specific documents that it voluntarily revealed to third parties outside the White House," including *Espy*'s attorneys.<sup>77</sup> Moreover, public statements characterizing the subject matter of a White House privilege claim may weaken the claim even if not amounting to waiver.<sup>78</sup>

### **E. Applicability to Presidential Transitions**

Bannon initially refused to answer Congress's questions about the presidential transition on the theory that executive privilege applies before inauguration. That largely untested and aggressive argument does not have precedential support. A federal district court recently rejected Kansas Secretary of State Kris Kobach's objection to production of information about a conversation with president-elect Trump on a legal theory grounded in executive privilege. The federal magistrate there held:

Defendant's argument for withholding the photographed document under the executive privilege is unpersuasive. First, Secretary Kobach's communication was made to a president-elect, not to a sitting president. Although a president-elect by statute and policy may be accorded security briefings and other transitional prerogatives, he or she has no constitutional power to make any decisions on behalf of the Executive Branch. No court has recognized the applicability of the executive privilege to communications made before a president takes office. If that were the law, it would mean that potentially almost everything communicated

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<sup>74</sup> See Devan Cole, *Gowdy accuses DOJ of stonewalling investigation into alleged FBI abuses*, CNN (Apr. 8, 2018), <https://www.cnn.com/2018/04/08/politics/gowdy-doj-fbi-investigation/index.html>.

<sup>75</sup> See *SCM Corp. v. United States*, 473 F. Supp. 791, 796 (Cust. Ct. 1979) ("Since executive privilege exists to aid the government decisionmaking process, a waiver should not be lightly inferred.").

<sup>76</sup> See *Espy*, 121 F.3d at 741-42 (contrasting the scope of attorney-client subject matter waivers with the narrower executive privilege waiver doctrine).

<sup>77</sup> *Id.*

<sup>78</sup> See *Nixon v. Sirica*, 487 F.2d 700, 717718 (D.C. Cir. 1973) (considering public statements by President Nixon to be a factor undermining the White House claimed need for confidentiality in related conversations).

to a president-elect by the hundreds of persons seeking appointments in the new administration would be shielded by privilege.<sup>79</sup>

Therefore, there is no established legal basis to refuse to testify about conversations within a presidential transition team, including those with the president-elect. Both Hope Hicks and Steve Bannon drew that indefensible line in the sand, although Hicks retreated somewhat after pressure from Congress.<sup>80</sup> Congress, however, did not wield its subpoena and contempt enforcement powers to obtain fulsome answers to committee members' questions.<sup>81</sup> Further, as noted by the Department of Justice in the travel ban litigation, expansion of the executive privilege to transition communications would be inconsistent with arguments made by the administration in the context of the travel ban that statements by political candidates made as private citizens before assuming office "are made without the benefit of advice from an as-yet-unformed Administration and cannot bind elected officials who later conclude that a different course is warranted."<sup>82</sup>

## F. Attorney-Client Privilege

For reasons discussed below, the government attorney-client privilege is largely nonexistent for purposes of the Russia investigations underway by the Special Counsel and congressional committees. Rather, those confidentiality interests are analyzed under other executive privilege components such as presidential communications or deliberative processes.

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<sup>79</sup> Order, *Fish v. Kobach*, No. 16-2105-JAR, 2017 WL 1373882, at \*6 (D. Kan. Apr. 17, 2017), *review denied*, No. 16-2105-JAR-JPO, 2017 WL 1929010 (D. Kan. May 10, 2017).

A presidential transition could share some deliberative, communication, or national security interests in common with an incumbent president. According to one treatise: "It is a reasonable inference from the cases and the policy of the executive privilege that it only applies to communications to the president during his term of office, though there is something to be said for extending the privilege to communications to a president-elect during the transition between administrations." Wright & Miller 26A Fed. Prac. & Proc. Evid. § 5673 (footnotes omitted).

<sup>80</sup> See *White House Communications Director Hope Hicks plans to resign*, ABC NEWS (Feb. 28, 2018), <http://abc7news.com/politics/sources-white-house-communications-director-hope-hicks-plans-to-resign/3155146/> (noting Hicks eventually answered "most" of the House intelligence committee's questions about the transition after Democrats sought to subpoena her).

<sup>81</sup> See Olivia Victoria Gazis, *Steve Bannon says White House instructed him to invoke privilege before Congress*, CBS NEWS (Feb. 15, 2018), <https://www.cbsnews.com/news/steve-bannon-says-white-house-instructed-him-to-invoke-privilege-before-congress/> (noting that Bannon continued to refuse to answer "almost all" questions about the transition in his post-subpoena, second appearance before the House intelligence committee).

<sup>82</sup> Brief for Appellants at 49-50, *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 7, 2017), <https://assets.documentcloud.org/documents/3540526/US-Opening-Br.pdf>. Executive privilege would not apply to campaigns. The Ninth Circuit has recognized a First Amendment privilege where the disclosure of internal campaign communications would infringe upon the freedom of association and dissuade people from participating in campaigns. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159–63 (9th Cir. 2010). This privilege may be overcome by a demonstrated interest "sufficient to justify the deterrent effect... on the free exercise of [the] constitutionally protected right of association." *Id.* at 1164 (quoting *NAACP v. Alabama*, 357 U.S. 449, 463 (1958)). It is likely that the need for evidence in a criminal investigation would overcome any first amendment privilege—especially where the information sought would be communications between prominent public officials rather than information concerning rank-and-file volunteers.

## VI. Attorney-Client Privilege in the Investigations of Russian Interference and Trump Associates

Attorney-client privilege is an important foundational common law doctrine designed to promote candor and trust between lawyers and their clients by shielding their confidential communications from disclosure. The traditional elements of attorney-client privilege are: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining or providing legal assistance to the client.<sup>83</sup> It is likely unavailable for use for conversations involving government attorneys or third-party government officials in the congressional and criminal investigations into Russian election interference. It also will not be available for use in any context for communications that involve participation in criminal conduct.

Attorney client privilege issues took the spotlight following an early April raid by the FBI on the offices and residences of Trump attorney and associate Michael Cohen. This incident occurred in an investigation underway by the United States Attorney for the Southern District of New York that reportedly at least in part concerns a referral of matters from Special Counsel Mueller.<sup>84</sup> President Trump and Cohen moved in federal court to block the government from reviewing the seized documents, making broad assertions that the materials involve attorney-client privilege, and the presiding judge responded by appointing a special master who is reviewing specific privilege claims on an expedited basis.<sup>85</sup> As of the date of publication of this report, several hundred thousand documents have been reviewed under the special master process and the President Trump's and Cohen's attorneys have identified only a few documents as being subject to the privilege, although there are many remaining documents for review.<sup>86</sup>

The attorney-client privilege also has arisen in the congressional investigation of Russian interference in the election. When the House Permanent Select Committee on Intelligence (HPSCI) interviewed Donald Trump Jr., the president's son, he invoked attorney-client privilege to avoid answering questions about a phone conversation he had had with his father during the

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<sup>83</sup> See generally EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* (4th ed. 2001).

<sup>84</sup> Alan Feuer and Benjamin Weiser, *Special Master in Cohen Case Finds Few Seized Materials Are Privileged*, N.Y. TIMES (Jun. 4, 2018), <https://www.nytimes.com/2018/06/04/nyregion/cohen-special-master-review.html>.

<sup>85</sup> Benjamin Weiser and Alan Feuer, *Former Judge Chosen to Review Materials Seized from Michael Cohen*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/nyregion/michael-cohen-investigation-special-master.html>; Larry Neumeister and Tom Hays, *Judge: June 15 deadline in study of materials in Cohen raids*, WASHINGTON POST (May 30, 2018), [https://www.washingtonpost.com/national/judge-june-15-deadline-in-study-of-materials-in-cohen-raids/2018/05/30/1fd61706-6430-11e8-81ca-bb14593acaa6\\_story.html?utm\\_term=.cfdef415d73](https://www.washingtonpost.com/national/judge-june-15-deadline-in-study-of-materials-in-cohen-raids/2018/05/30/1fd61706-6430-11e8-81ca-bb14593acaa6_story.html?utm_term=.cfdef415d73).

<sup>86</sup> Christina Wilkie, *Special master in Michael Cohen case finds few privileged items in initial review of files*, POLITICO (June 4, 2018), <https://www.cnbc.com/2018/06/04/special-master-in-cohen-case-finds-few-privileged-items-in-initial-review.html>.

summer of 2017.<sup>87</sup> The conversation reportedly focused on how to handle the breaking news about Donald Trump, Jr.'s Trump Tower meeting in June 2016 with Russian attorney Natalia Veselnitskaya.<sup>88</sup> President Trump allegedly dictated a misleading public statement while flying back on Air Force One from the G20 summit in Germany.<sup>89</sup> According to the *Wall Street Journal*, “[a]ttorneys for both the president and his son were on the call, which took place sometime after a July 8, 2017 *New York Times* story about the meeting, according to the people familiar with the matter.”<sup>90</sup> By another account, White House Communications Director Hope Hicks, Alan Garten, Donald Trump, Jr.’s attorney, and President Trump were involved in the communications.<sup>91</sup>

### **A. Attorney-Client Privilege Does Not Cover a Trump-Trump-Hicks Communication**

In the case of the July 2017 conversations between Trump, Hicks, Trump Jr., and attorneys there are serious questions about whether the facts meet three elements of traditional attorney client privilege: that the communication be between privileged persons, in confidence, and to obtain legal advice. The mere participation of a lawyer in the conversation does not shield information. First, if the purpose of the call was to draft a public relations statement rather than to obtain legal advice, the privilege does not apply. Second, the privilege protects conversations between attorney and client. If the Trumps have a joint defense agreement or common interest privilege, they might be able to share information in a privileged manner. In any event, Hope Hicks is a stranger to the attorney-client relationship between either Trump and his personal attorney. Therefore, the privilege would not apply to a conversation involving a non-privileged person. Third, even if the otherwise privilege, it would be waived by any subsequent disclosure to Hicks as a third-party.<sup>92</sup>

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<sup>87</sup> See Kyle Cheney, *Trump Jr. cites attorney-client privilege in not answering panel’s questions about discussions with his father*, POLITICO (Dec. 6, 2017), <https://www.politico.com/story/2017/12/06/donald-trump-privilege-questions-284841>.

<sup>88</sup> See Jo Becker, Matt Apuzzo & Adam Goldman, *Trump Team Met with Lawyer Linked to Kremlin During Campaign*, N.Y. TIMES (Jul. 8, 2017), <https://www.nytimes.com/2017/07/08/us/politics/trump-russia-kushner-manafort.html>.

<sup>89</sup> Ashley Parker, Carol D. Leonnig, Philip Rucker & Tom Hamburger, *Trump dictated son’s misleading statement on meeting with Russian lawyer*, WASH. POST (Jul. 31, 2017), [https://www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304\\_story.html?utm\\_term=.ea8b50777c1a](https://www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.ea8b50777c1a).

<sup>90</sup> Byron Tau, *Donald Trump Jr. Refuses to Discuss Father-Son Talk With Investigators*, WALL STR. J. (Dec. 7, 2017), <https://www.wsj.com/articles/donald-trump-jr-refuses-to-discuss-father-son-talk-with-investigators-1512612451>.

<sup>91</sup> See Jo Becker, Mark Mazzetti, Matt Apuzzo & Maggie Haberman, *Mueller Zeros In on Story Put Together About Trump Tower Meeting*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/us/politics/trump-russia-hope-hicks-mueller.html>.

<sup>92</sup> As Epstein notes:

The existence of the privilege and its waiver are analytically distinguishable, although similar circumstances may give rise to a judicial determination that the privilege never attached in the first instance, or that although it attached, it has been waived. Disclosure of the privilege at the time of the communication may prevent the creation of the privilege. The necessary element of

## B. The Attorney-Client Privilege is Likely Unavailable for Conversations Among Executive Branch Employees in a Criminal Investigation

The first significant point to note is that the government attorney-client privilege in criminal cases was significantly weakened by the Clinton-era cases, *In re Grand Jury Subpoena Duces Tecum*<sup>93</sup> and *In re Bruce R. Lindsey (Grand Jury Testimony)*.<sup>94</sup> In *Subpoena Duces Tecum*, the Eighth Circuit rejected the White House assertion of attorney-client privilege over production of documents created by White House lawyers during meetings with the president and first lady.<sup>95</sup> It expressed a concern about the application of government attorney-client privilege to a grand jury investigation:

We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a government attorney-client privilege applicable to criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.<sup>96</sup>

A year later, the D.C. Circuit made a similar ruling in *In re Lindsey*. The case arose after Deputy White House Counsel refused to answer grand jury questions about President Clinton's relationship with Monica Lewinsky.<sup>97</sup> The court focused on a strong policy interest in executive branch employees reporting information related to potential criminality.<sup>98</sup> It echoed the Eighth Circuit by highlighting "the public's interest in uncovering illegality among its elected and appointed officials" and "transparent and accountable government."<sup>99</sup> These cases attracted significant criticism,<sup>100</sup> but they remain good law. Therefore, President Trump enjoys attorney-client privilege with his personal lawyer John Dowd but probably does not with White House

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confidentiality will be found to be lacking. Disclosure to a third person *after* the making of an otherwise privileged communication may constitute a waiver of the privilege.

EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE 264.

<sup>93</sup> 112 F.3d 910 (8th Cir. 1997).

<sup>94</sup> 158 F.3d 1263 (D.C. Cir. 1998).

<sup>95</sup> 112 F.3d at 914.

<sup>96</sup> *Id.* at 917921.

<sup>97</sup> 158 F.3d at 1267.

<sup>98</sup> *Id.* at 1274.

<sup>99</sup> *Id.* at 1273.

<sup>100</sup> See Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEORGETOWN J. LEGAL ETHICS 163, 171 n.50 (2007) (surveying scholarly criticism). One of the problems with the ruling is that it is impossible for government attorneys to predict in the abstract what matters could become the subject of a grand jury investigation. See Todd A. Ellinwood, "In the Light of Reason and Experience": *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291, 1321 (2001). That concern does not apply to the Trump White House with regard to the Russia investigation.

lawyer Emmet Flood.<sup>101</sup> To the extent confidential attorney-client communications within the Executive Branch can be protected from disclosure to a grand jury, it will be pursuant to executive privilege rather than the traditional common law doctrine.<sup>102</sup>

### C. Congress Has Discretion Not to Recognize Attorney-Client Privilege

Unlike judicial courts and grand juries,<sup>103</sup> Congress is not bound to honor common law evidentiary privileges like the attorney-client privilege.<sup>104</sup> Therefore, Congress does not need to acquiesce to Trump Jr.'s privilege claim as a legal matter. Congress's ability to obtain his testimony will turn more on the will of Republican members rather than any purported legal claim of attorney-client privilege. If Congress wants to get this information, the committee chair should rule that the privilege does not apply. If Don Jr. refuses to provide the subpoenaed information, then the House should hold him in contempt and undertake further actions as necessary to enforce that contempt order, either by means of judicial order, inherent contempt, or criminal contempt referral to the Justice Department (which, in this case, could potentially be to Special Counsel Robert Mueller).<sup>105</sup> As such, it is the will of the Republicans on the intelligence committee and in leadership that will most likely determine whether Congress vindicates its interests in the face of this claim of attorney-client privilege. So far, Congress has neither issued a subpoena nor pressed its case in the court of public opinion.

### D. The Crime-Fraud Exception

Special Counsel Mueller overcame an attorney-client privilege objection to obtain an order requiring grand jury testimony from a lawyer for former Trump campaign aides Paul Manafort and Rick Gates.<sup>106</sup> Chief Judge Beryl Howell applied the crime-fraud exception to

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<sup>101</sup> In fact, Flood would be a third party, disclosure to whom would destroy the existence of attorney-client confidence.

<sup>102</sup> See *In re Lindsey*, 158 F.3d at 1278 (“While we conclude that an attorney-client privilege may not be asserted by Lindsey to avoid responding to the grand jury if he possesses information relating to possible criminal violations, he continues to be covered by the executive privilege to the same extent as the President’s other advisers.”).

<sup>103</sup> The Federal Rules of Evidence grant federal courts the power, and impose the obligation, to observe common-law privilege claims. See Fed. R. Evid. 501. See also *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (recognizing the attorney-client privilege as “one of the oldest recognized privileges for confidential communications”).

<sup>104</sup> See Andrew McCause Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 447 (2016) (“Congress rejects the attorney-client privilege as a bar to production of information under its subpoenas.”); see also *id.* at 447 n.222 (quoting the Congress’s *Oversight Manual* for the proposition that “it is congressional committee alone that determines whether to accept a claim of attorney-client privilege”).

<sup>105</sup> For a discussion of these different forms of contempt, see Andrew McCause Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 932-37 (2014), <http://scholarship.law.marquette.edu/mulr/vol98/iss2/6/>.

<sup>106</sup> See Josh Gerstein, *Mueller team won battle to force testimony from lawyer*, POLITICO (Oct. 30, 2017), <https://www.politico.com/story/2017/10/30/mueller-manafort-gates-testimony-244339>.

pierce the attorney-client relationship.<sup>107</sup> The exception allows for discovery of attorney-client communications where the client obtained an attorney's assistance in the furtherance of criminal or fraudulent activity.<sup>108</sup> The court found that there was sufficient evidence that the attorney had been used as a conduit to pass false information to the Department of Justice.<sup>109</sup>

Similarly, if prosecutors made out a *prima facie* showing that the misleading public statement about the Trump Tower meeting with Russians was made in the furtherance of a scheme to obstruct justice, as one of Trump's former legal spokesman reportedly believed may be the case,<sup>110</sup> then the crime-fraud exception could apply to those conversations.

In the case of the raid on Michael Cohen's office, news accounts indicate that prosecutors may be reviewing potential illegal payments to former adult film star Stormy Daniels, who claims to have had an intimate relationship with the president.<sup>111</sup> If Cohen was working with his clients to perpetuate illegal transactions the crime-fraud exception may render relevant documents outside the scope of attorney-client privilege.

## VII. The Work Product Doctrine

Traditionally, the work product doctrine protects certain materials from disclosure to ensure diligent lawyer preparation for litigation.<sup>112</sup> Generally, the rule holds that an opposing party may not compel disclosure of written or oral material prepared by or for an attorney in anticipation of civil or criminal litigation.<sup>113</sup> It can be overcome where the requesting party has a substantial need or suffers undue hardship.<sup>114</sup> Unlike the attorney-client privilege, which belongs to the client, work product protection belongs to the attorney, too. As a common law doctrine, Congress is not bound to recognize work product protection. Moreover, congressional proceedings may not be "litigation" for purposes of the doctrine. In addition, the Eighth Circuit held that the White House lawyers were not preparing for litigation when conducting meetings

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<sup>107</sup> See Mem. Op., *In re Grand Jury Investigation*, Misc. No. 17-2336-BAH (D.D.C. Oct. 2, 2017), <https://www.politico.com/f/?id=0000015f-6f5a-db7b-aff-efde08130001>.

<sup>108</sup> See, e.g., *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223 (11th Cir. 1987); *In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997).

<sup>109</sup> See Mem. Op., *In re Grand Jury Investigation*, Misc. No. 17-2336-BAH (D.D.C. Oct. 2, 2017).

<sup>110</sup> See Tucker Higgins, *Spokesman for Trump's legal team left because he worried Trump obstructed justice*, CNBC (Jan. 4, 2018), <https://www.cnbc.com/2018/01/04/trump-spokesman-mark-corallo-left-over-obstruction-concerns-wolff-book-claims.html>. See also Kevin Johnson, *Mueller to question ex-Trump legal team spokesman about possible White House obstruction*, U.S.A. TODAY (Jan. 31, 2018), <https://www.usatoday.com/story/news/politics/2018/01/31/mueller-question-ex-trump-legal-team-spokesman-possible-white-house-obstruction/1083357001/>.

<sup>111</sup> Michael D. Shear, Matt Apuzzo, and Sharon LaFraniere, *Raids on Trump's Lawyer Sought Records of Payments to Women*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/trump-russia-mueller-rosenstein.html>.

<sup>112</sup> See generally EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE, PART II.

<sup>113</sup> See, e.g., *United States v. Nobles*, 422 U.S. 225 (1975).

<sup>114</sup> See FED. R. CIV. P. 26 (b)(3)(A).

related to the Whitewater investigation, and those documents were therefore subject to production to the Whitewater grand jury.<sup>115</sup>

One could see an argument that work product protection could shield documents containing work product opinions about, say, a potential motion to quash a Mueller grand jury subpoena. However, one would also expect the courts to view government work product doctrine with the same skepticism they have applied to the attorney-client privilege. Regarding the materials seized from Michael Cohen's residences and office, until the complete scope of the conduct under review is publicly known it is not possible to analyze extent to which the work-product doctrine would be available. However, with respect to Cohen's actions concerning the non-disclosure agreement with Stormy Daniels, President Trump's own statements that he was not aware of the Cohen payments to Daniels<sup>116</sup> raise questions about the work-product doctrine's applicability to relevant materials since the doctrine does not reach matters outside the scope of an attorney's representation.

### **VIII. The Fifth Amendment Privilege Against Self-Incrimination**

The Fifth Amendment privilege against self-incrimination is valid before judicial and congressional proceedings because it comes from the Constitution rather than common law.<sup>117</sup> While it is designed to protect the innocent and the guilty,<sup>118</sup> it is often perceived as supporting an inference of guilt, especially in politically charged investigations.<sup>119</sup> Where a tribunal is willing to forego use of the testimony in a criminal prosecution, it may grant use immunity and compel the testimony.<sup>120</sup> It is a personal right, and does not extend to business entities or other organizations.<sup>121</sup> Further, it can be waived.<sup>122</sup>

Lt. Gen. Michael Flynn, President Trump's first national security adviser, twice declined to comply with a subpoena to appear as a witness before the Senate Intelligence Committee in its

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<sup>115</sup> See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir. 1997).

<sup>116</sup> Ryan Teague Beckwith, *A Short History of President Trump's Changing Story on the Stormy Daniels Payoff*, TIME (May 4, 2018), <http://time.com/5264555/donald-trump-statements-stormy-daniels-payoff/>.

<sup>117</sup> See U.S. CONST., amend V ("No person...shall be compelled in any criminal case to be a witness against himself . . ."). See also *Quinn v. United States*, 349 U.S. 155, 161 (1955) ("Still further limitations on [Congress's] power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment privilege against self-incrimination.").

<sup>118</sup> See *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (*per curiam*) (emphasizing the Fifth Amendment's utility for the innocent).

<sup>119</sup> And, in fact, an adverse inference of guilt is permissible in civil cases. See *Baxter v Palmigiano*, 425 U.S. 308 (1976).

<sup>120</sup> See *Kastigar v. United States*, 406 U.S. 441, 448 (1972). 18 U.S.C. §§ 6002 and 6005 outline the procedure for issuance of *Kastigar* immunity in congressional proceedings.

<sup>121</sup> See *Bellis v. United States*, 417 U.S. 85 (1974).

<sup>122</sup> See, e.g., *Tollett v. Henderson*, 397 U.S. 742, 748 (1973); *Hodges v. Easton*, 106 U.S. 408, 411 (1882); see also *Testimonial Waiver of the Privilege against Self-Incrimination*, 92 HARV. L. REV. 1752 (1979).

Russia investigation.<sup>123</sup> He asserted his Fifth Amendment rights against self-incrimination.<sup>124</sup> The House Intelligence Committee has also subpoenaed him. In March, Flynn offered to testify before both committees in exchange for immunity from prosecution but neither committee took him up on the offer.<sup>125</sup> He later turned over business records that could not be shielded by the Fifth Amendment.<sup>126</sup> Flynn had been implicated in media reports in a number of activities that could potentially give rise to criminal exposure.<sup>127</sup> Subsequently, Flynn started cooperating with Special Counsel Mueller's investigation and pled guilty to felony false statements to FBI agents who interviewed him about the nature of his conversations with Russian Ambassador Sergey Kislyak during the presidential transition.<sup>128</sup> The Fifth Amendment remains available to all witnesses in the Russia investigations, including President Trump. That is not to suggest that such a decision would be absolutely without cost to President Trump or others – but those costs would be political, not legal.

## IX. Conclusion

The Russia investigations and the inquiry into Michael Cohen by the U.S. Attorney for the Southern District of New York implicate a number of evidentiary privileges, including executive privilege, attorney-client privilege, work product doctrine, and the Fifth Amendment privilege against self-incrimination. For the multitude of reasons recounted here, and with the exception of the Fifth Amendment, they are generally inapplicable to the information Trump advisers have refused to provide in congressional proceedings, and may have limited applicability in the Cohen proceeding. Grand jury secrecy renders it impossible to fully evaluate the privilege impediments to the Mueller inquiry, and the privilege debates in the Cohen investigation are still unfolding. However, it is already clear that Congress's Russia inquiries have been significantly hampered by recalcitrant witnesses associated with the Trump campaign, transition, and administration. Congress has the ability to enforce its oversight interests to get at the truth, but so far lacks the will.

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<sup>123</sup> See Jim Sciutto, *Flynn refusing new request to speak to Hill committee*, CNN (Sept. 13, 2017), <https://www.cnn.com/2017/09/12/politics/michael-flynn-senate-subpoena-refusal/index.html>.

<sup>124</sup> *Id.*

<sup>125</sup> See Shane Harris, Carol E. Lee & Julian E. Barnes, *Mike Flynn Offers to Testify in Exchange for Immunity*, WALL ST. J. (Mar. 30, 2017), <https://www.wsj.com/articles/mike-flynn-offers-to-testify-in-exchange-for-immunity-1490912959>.

<sup>126</sup> See *Michael Flynn turns over documents to panel as part of Russia investigation*, P.B.S. NEWS HOUR (June 6, 2017), <https://www.pbs.org/newshour/politics/michael-flynn-turns-documents-panel-part-russia-investigation>.

<sup>127</sup> See, e.g., Cameron Joseph, *Trump's national security adviser Michael Flynn misled Vice President Pence on Russia talk, source says*, N.Y. DAILY NEWS (Feb. 10, 2017), <http://www.nydailynews.com/news/politics/flynn-misled-vice-president-pence-russia-talk-source-article-1.2969554>; James V. Grimaldi, Shane Harris & Aruna Viswanatha, *Mueller Probes Flynn's Role in Alleged Plan to Deliver Cleric to Turkey*, WALL ST. J. (Nov. 10, 2017), <https://www.wsj.com/articles/mueller-probes-flynn-s-role-in-alleged-plan-to-deliver-cleric-to-turkey-1510309982>; Manu Raju & Marshall Cohen, *Dems to Mueller: Flynn failed to disclose trip to broker Saudi-Russian business deal*, CNN (Sept. 13, 2017), <https://www.cnn.com/2017/09/13/politics/democrats-mueller-flynn-middle-east-trip-disclosure/index.html>.

<sup>128</sup> See Statement of the Offense, *United States v. Flynn*, 17-cr-00232-RC (D.D.C., Dec. 1, 2018).