

Response on Behalf of Robert J. Costello

Below is the inquiry *Lawfare's* Roger Parloff sent Robert J. Costello seeking comment and the answer sent on Costello's behalf by his co-counsel David I. Schoen.

Robert--

I'm further along on my article. I'd like to give you an opportunity to comment

My impression is that you took a risky and dubious stance for which your client may now pay a price. The legal position you had Bannon take looks dubious to me mainly because

- a. No OLC ruling has ever asserted that a private person, subpoenaed in connection with their activities as a private person, was entitled to assert absolute immunity from a subpoena based on executive privilege.*
- b. Justin Clark, for whatever reason, wasn't even asserting executive privilege in a clear, unambiguous way, and certainly wasn't asserting the broad immunity you were asserting.*
- c. The OLC rulings asserting absolute immunity, even when invoked by high-level executive officials concerning their official conduct, have been rejected by the only courts to rule on them.*
- d. The substantial added uncertainties from the fact that the Biden Administration was not asserting executive privilege.*

Response of David I. Schoen:

The premise of your assertion mixes concepts and at least implies one erroneous premise that has been repeated over and over by this or that law professor who apparently feels compelled to comment in the media. Any reading of the relevant OLC opinions would demonstrate the error of that premise; but I am skipping ahead.

First, Mr. Costello's advice did not depend on a conclusion that Mr. Bannon had "absolute immunity" as you put it. There are, as I am sure you are aware, several OLC opinions that conclude that an executive branch employee who had communications which the President has deemed to be privileged has immunity (even post-dating the decisions you refer to later); but Mr. Costello's advice did not depend on that full concept applying. I would add here that it is, of course, true, as you write, that a court or two has rejected the notion of absolute immunity (district courts); but

we don't know how that would play out on any appeal and, again, it is not necessary to go that far to prevail here.

Independently of the legal concept of "immunity," one after another OLC opinion, going back decades makes clear the DOJ's position that it creates a separation of powers violation for congress to try to compel an executive branch employee with respect to whom executive privilege has been invoked to testify, notwithstanding that invocation. That is an issue conceptually independent of actual "immunity."

Secondly, to the extent you intend to assert, as many of these often quoted professors and other "experts" have - that executive privilege only applies to current executive branch employees and to not to former employees, from the perspective of the DOJ, as reflected in their OLC Opinions, this is just 100% wrong and that does not change no matter who says it or how often it is said. The OLC Opinions make it expressly clear that executive privilege can be invoked regarding communications with current and former employees and with respect to communications with outside consultants who have never been employed by the executive branch. This should be obvious and the rationale for it certainly is; but more to the point, it is right in the OLC Opinions.

Next, Mr. Costello's advice was based on far more. He based it, for example, on the DOJ's position, based on OLC analysis, that if a subpoena is issued and executive privilege is invoked, the refusal by the committee (as occurred here) to permit the privilege holder's representative to be present for any deposition, renders the subpoena constitutionally invalid.

Additionally, one consistent principle, reiterated for decades by both parties in no uncertain terms, is that when executive privilege is invoked, there can be no criminal charges for the failure to comply with a subpoena. This is reflected in OLC Opinions and in other writings and is a rock solid, constantly reiterated principle. This prosecution reflects the opposite of Attorney General Garland's claim that this case reflects the equal application of the law. This case reflects nothing other than a "Bannon Rule" that is irreconcilable with the DOJ's decades' long position.

Finally, I am not sure why you believe some greater "uncertainties" arise from the fact that the Biden administration

did not invoke executive privilege. The law is well settled that a former President can invoke executive privilege, even if under certain circumstances the current office holder can supersede. Here, former President Trump had full authority to invoke executive privilege and Mr. Clark had no independent authority to limit the former President with respect to what communications he deems privileged, nor did he, and nor does Congress while we are discussing it. It is the President's prerogative, not Congress's and it is presumptively valid when invoked.

Interestingly here, while President Biden did not hesitate to try to supersede in the matter giving rise to Trump v. Thompson, he did no such thing in Mr. Bannon's case until after the subpoena return date date had come and gone and when he did, the committee ignored it and instead, went forward with its contempt referral the very next day (ignoring as well Mr. Bannon's request to resolve it in a civil enforcement proceeding).

David Schoen