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## ALL THE PRESIDENT'S PRIVILEGES

*Ann M. Murphy\**

*Is President Trump's attorney-client privilege really dead, as he asserted in a recent tweet? Special Counsel Robert Mueller's investigation of Russian interference in the 2016 presidential election has thus far resulted in the conviction of his former campaign chair, guilty pleas of six individuals, and twelve additional individuals and entities being charged with federal crimes. Those close to President Trump have raised the attorney-client privilege and the executive privilege, but many have testified before the Special Counsel and Congress. Are the attorney-client and executive privileges applicable in the present cases?*

*Although Special Counsel investigations are relatively rare, Special Counsels have investigated recent acts of presidential associates and former presidents. Criminal charges have been quite rare, and the law on privileges in this area is sparse. The single source of much of this is the U.S. v. Nixon case, where a subpoena duces tecum was refused by President Nixon in a pending criminal case where he was an unindicted coconspirator. He was ordered to provide the material to the prosecutor's office. The Clinton v. Jones case is another rare case in this area and established that a president does not have immunity of any kind for unofficial conduct.*

*This article provides a historical perspective of the evidentiary privilege doctrines that are in play in the current Special Counsel investigation. New issues of waiver by tweet are addressed. It is well established that a sitting president is subject to judicial process in certain circumstances, and that President Trump and his close advisors have and will continue to claim one or both of these privileges. I predict that these privileges will be inapplicable, applicable but waived, or applicable but fall within the crime-fraud exception to the privileges. The crime-fraud exception has never been raised in a Special Counsel investigation of a sitting*

*president. This timely article explains the privileges and the likely outcomes of claims of the claims.*

The “Attorney-Client Privilege is Dead!”<sup>1</sup>

Search warrants for the residential properties and offices of President Trump’s long-time personal lawyer were approved by the U.S. Attorney for the Southern District of New York, and executed by the FBI on April 9, 2018,<sup>2</sup> prompting the above-referenced tweet from the President. However, the attorney-client privilege is alive and well. Although few court cases analyze a sitting president’s evidentiary privileges, such privileges do apply, unless they are waived or subject to an exclusion.<sup>3</sup>

Nevertheless, these privileges may be limited by public policy, such as when the client or subpoenaed witness is a government entity under federal criminal investigation.<sup>4</sup> With the exception of President Obama, a Special Counsel has been appointed to investigate every president since Nixon,<sup>5</sup> and the trend continues

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<sup>1</sup> Donald Trump (@realDonaldTrump), TWITTER (Apr. 10, 2018, 4:07 AM), <https://twitter.com/realDonaldTrump/status/983662868540346371>.

<sup>2</sup> Matt Apuzzo, *FBI Raids Office of Trump’s Longtime Lawyer Michael Cohen; Trump Calls it ‘Disgraceful’*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html>.

<sup>3</sup> See generally *In re Lindsey* (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998) (describing multiple cases involving presidential evidentiary privileges).

<sup>4</sup> See *In re Grand Jury Subpoena Duces Tecum* (Whitewater), 112 F.3d 910, 921 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997). (“We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the action of public officials.”).

<sup>5</sup> See generally CYNTHIA BROWN AND JARED P. COLE, CONG. RESEARCH SERV., SPECIAL COUNSELS, INDEPENDENT COUNSELS, AND SPECIAL PROSECUTORS: LEGAL AUTHORITY AND LIMITATIONS ON INDEPENDENT EXECUTIVE INVESTIGATIONS (Apr. 13, 2018), <https://fas.org/sgp/crs/misc/R44857.pdf> (detailing the investigative procedures

with President Trump; a Special Counsel investigation into Russian interference in the 2016 presidential election is currently in progress.<sup>6</sup> Issues of presidential privilege inevitably arise during these Special Counsel investigations. This Article explores the position of Special Counsel, the regulations that govern its investigations, and the potential privileges that have been and may potentially be invoked by President Trump during the investigation that is presently underway.

## I. THE SPECIAL COUNSEL AND THE PRESIDENT

On May 17, 2017, Acting Attorney General Rod Rosenstein<sup>7</sup> appointed Robert S. Mueller III to serve as Special Counsel for the United States Department of Justice to investigate the role of the Russian government in the presidential campaign of Donald Trump.<sup>8</sup> The appointment followed former FBI Director James Comey's testimony before the House Intelligence Committee, in which he publicly confirmed that the FBI was investigating Russian interference in the 2016 election.<sup>9</sup> The terms of the Special Counsel appointment include, in relevant part:

(b) The Special Counsel is authorized to conduct the investigation confirmed by then-FBI Director James

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involving Special Counsels and presidential authority); *see also* Sonam Sheth, *Obama is the Only President Since Nixon Who Didn't Face an Independent Investigation*, *BUS. INSIDER* (Oct. 23, 2017), <https://www.businessinsider.com/obama-nixon-trump-russia-independent-investigation-2017-10>.

<sup>6</sup> Office of Deputy Att'y Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 President Election and Related Matters, <https://www.justice.gov/opa/press-release/file/967231/download>.

<sup>7</sup> Debra Cassens Weiss, *Rosenstein Plans to Leave Justice Department if Barr is Confirmed as Attorney General*, *ABA JOURNAL* (Jan. 9, 2019), <http://www.abajournal.com/news/article/reports-rosenstein-plans-to-leave-the-justice-department-if-barr-is-confirmed-as-attorney-general>.

<sup>8</sup> *See id.*

<sup>9</sup> *See Excerpts from the House Intelligence Committee Hearing on Russia*, *N.Y. TIMES* (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/us/politics/james-comey-mike-rogers-transcript-excerpts.html?login=smartlock&auth=login-smartlock>.

B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including:

(i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump;

(ii) any matters that arose or may arise directly from the investigation; and

(iii) any other matters within the scope of 28 C.F.R. § 600.4(a).

(c) If the Special Counsel believes it is necessary and appropriate, the Special Counsel is authorized to prosecute federal crimes arising from the investigation of these matters.

(d) Sections 600.4 through 600.10 of Title 28 of the Code of Federal Regulations are applicable to the Special Counsel.<sup>10</sup>

Special Counsels (also known as Independent Counsels or Special Prosecutors)<sup>11</sup> have been a part of the U.S. justice system since 1875, when Ulysses S. Grant was president.<sup>12</sup> Attorneys General have made *ad hoc* appointments of Special Counsels over the years.<sup>13</sup> During the Nixon Administration, Attorney General-Designate Elliot L. Richardson selected Archibald Cox as the Special Counsel to oversee the Watergate investigation.<sup>14</sup> In what

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<sup>10</sup> Office of the Deputy Att’y Gen., Order No. 3915-2017.

<sup>11</sup> *Special Counsel: What is it and what is Robert Mueller Doing?*, BBC NEWS (Feb. 20, 2018), <https://www.bbc.com/news/world-us-canada-39961732>.

<sup>12</sup> Jeff Nilsson, *Allegation Nation: A Brief History of Presidents and Special Prosecutors*, THE SATURDAY EVENING POST (May 11, 2017), <https://www.saturdayeveningpost.com/2017/05/allegation-nation-brief-history-presidents-special-prosecutors/>.

<sup>13</sup> Benjamin J. Priester, Paul G. Rozelle, & Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 LAW & CONTEMP. PROB. 5, 10 (1999).

<sup>14</sup> Anthony Ripley, *Archibald Cox Appointed Prosecutor for Watergate*, N.Y. TIMES (May 19, 1973), <https://www.nytimes.com/1973/05/19/archives/archibald-cox-appointed-prosecutor-for-watergate-richardson.html>. Cox had been the Solicitor General in the Kennedy and Johnson Administrations and was a Harvard Law School professor. *Id.*

became known as the “Saturday Night Massacre,” President Nixon ordered Richardson to fire Cox, and when Richardson refused, President Nixon discharged him.<sup>15</sup> Next, President Nixon turned to Deputy Attorney General William D. Ruckelshaus.<sup>16</sup> When Ruckelshaus refused to fire Cox, he was either fired or resigned.<sup>17</sup> Next in line for the position of Attorney General was Solicitor General Robert H. Bork, who carried out the President’s order and fired Cox.<sup>18</sup> Later, Leon Jaworski was selected to replace Cox.<sup>19</sup>

Congress, recognizing that the Special Counsel could be a highly politicized position, consequently passed the Ethics in Government Act of 1978.<sup>20</sup> The Act was reauthorized twice,<sup>21</sup> and the U.S. Supreme Court upheld its constitutionality in 1988.<sup>22</sup> The

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<sup>15</sup> Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, THE WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm> (stating that Richardson submitted a letter of resignation); Ron Elving, *A Brief History of Nixon’s ‘Saturday Night Massacre’*, NPR (Oct. 21, 2018), <https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre>.

<sup>16</sup> Kilpatrick, *supra* note 15.

<sup>17</sup> *Id.* (stating that Ruckelshaus also wrote a resignation letter).

<sup>18</sup> *Id.*; see generally Linda Greenhouse, *Bork’s Nomination is Rejected, 58-42; Reagan ‘Saddened’*, N.Y. TIMES (Oct. 23, 1987), <https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html> (mentioning that Bork was later rejected by the Senate as President Ronald Reagan’s choice for the U.S. Supreme Court. His rejection came to be known as being “Borked.”).

<sup>19</sup> John Herbers, *Nixon Names Saxby Attorney General; Jaworski Appointed Special Prosecutor*, N.Y. TIMES (Nov. 2, 1973), <https://www.nytimes.com/1973/11/02/archives/nixon-names-saxbe-attorney-general-jaworski-appointed-special.html>.

<sup>20</sup> See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 28 U.S.C. §§ 591-598).

<sup>21</sup> Ethics in Government Act Amendments of 1982, Pub.L. No. 97-409, 96 Stat. 2039; Independent Counsel Reauthorization Act of 1987, Pub.L. No. 100-191, 101 Stat. 1293.

<sup>22</sup> *Morrison v. Olson*, 487 U.S. 654, 660 (1988) (“[P]rovisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President’s authority under Article II in violation of the constitutional principle of separation of powers.”).

Act was again reauthorized in 1994,<sup>23</sup> and per its terms naturally expired in 1999.<sup>24</sup> That year, the Department of Justice promulgated regulations on the use of a Special Counsel<sup>25</sup> that replaced the Ethics in Government Act.<sup>26</sup>

According to the Department of Justice (DOJ), a Special Counsel is used “when appropriate, to prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for a matter from the DOJ.”<sup>27</sup> These rules provide that when an Attorney General is recused, the Acting Attorney General has the power to appoint a Special Counsel.<sup>28</sup> In the Russian interference case, former Attorney General Jeff Sessions<sup>29</sup> recused himself on March 2, 2017<sup>30</sup> from “any existing or future investigations of any matters related in any way to the campaigns for president of the United States.”<sup>31</sup> Accordingly,

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<sup>23</sup> U.S. v. Manafort, Crim. Action No. 1:18-cr-83, Mem. Op. at 2–3 (E.D. Va. Jun. 26, 2018), <https://www.politico.com/f/?id=00000164-3dc7-dbdca96d-3dff8c890001>; U.S. v. Tucker, 78 F. 3d 1313, 1320 (8th Cir. 1996) (describing the power of the Independent Counsel under the 1994 Act as “exceedingly broad.”).

<sup>24</sup> See U.S. v. Concord Mgmt. & Consulting, LLC., 317 F. Supp. 3d 598, 603 (D.D.C. 2018).

<sup>25</sup> See Final Rule, 64 Fed. Reg. 131, 37038-01 (July 9, 1999), <https://www.gpo.gov/fdsys/pkg/FR-1999-07-09/html/99-17327.htm>; *In re Grand Jury Investigation* (Miller), Redacted, No. 18-34 at 13–17, <https://drive.google.com/file/d/1nRQqOs7kNxH2oabC5tIWShkYS6hBrgow/view>.

<sup>26</sup> *Concord Mgmt. & Consulting, LLC.*, 317 F. Supp. 3d. at 603.

<sup>27</sup> Final Rule, 64 Fed. Reg. 131, 37038-01 (July 9, 1999), <https://www.gpo.gov/fdsys/pkg/FR-1999-07-09/html/99-17327.htm>.

<sup>28</sup> 64 Fed. Reg., 131, 37038, 600.1 (July 9, 1999).

<sup>29</sup> Attorney General Jeff Sessions resigned as Attorney General. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

<sup>30</sup> *Attorney General Sessions Statement on Recusal*, DEP’T OF JUSTICE (Mar. 2, 2017), <https://assets.documentcloud.org/documents/3480076/Read-the-full-DOJ-statement-on-the-recusal-of.pdf>.

<sup>31</sup> *Id.*

Acting Attorney General Rosenstein appointed Special Counsel Mueller.<sup>32</sup>

The DOJ requires that the individual appointed as Special Counsel:

be a lawyer with a reputation for integrity and impartial decision making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies.<sup>33</sup>

Accordingly, Mueller's appointment received bipartisan support.<sup>34</sup> He had previously served as FBI Director for twelve years, under Presidents George W. Bush and Barack Obama.<sup>35</sup>

Special Counsel Mueller has the "full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney."<sup>36</sup> The Special Counsel may also determine "whether and to what extent to inform or consult with the Attorney General or others within the DOJ."<sup>37</sup> Further, the Special Counsel may only be removed by the Attorney General for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies."<sup>38</sup> Due to the sensitive nature of the investigation, the Appointment Order was "worded categorically in order to permit

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<sup>32</sup> Madeleine Sheehan Perkins & Harrison Jacobs, *The Justice Department Has Appointed a Special Counsel to Investigate Trump-Russia Ties — Here's How It Works*, BUS. INSIDER (May 17, 2017, 6:19 PM), <https://www.businessinsider.com/what-is-special-prosecutor-counsel-trump-russia-james-comey-2017-5>.

<sup>33</sup> 28 C.F.R. § 600.3 (2018).

<sup>34</sup> Madeleine Sheehan Perkins, *Robert Mueller's Appointment as Special Counsel in the Trump-Russia Investigation is Getting Bipartisan Support*, BUS. INSIDER (May 17, 2017, 9:54 PM), <https://www.businessinsider.com/rosenstein-appoint-special-counsel-republican-democratic-reactions-2017-5>.

<sup>35</sup> *Directors, Then and Now*, FBI HISTORY, <https://www.fbi.gov/history/directors>.

<sup>36</sup> 28 C.F.R. § 600.6.

<sup>37</sup> *Id.*

<sup>38</sup> 28 C.F.R. § 600.7(d).



its public release.”<sup>39</sup> A memorandum issued on August 2, 2017 provided a more specific description of Mueller’s duties.<sup>40</sup>

The first target of Special Counsel Mueller’s investigation was Paul J. Manafort, who served as chairman of the Trump presidential campaign from March 2016 to August 2016.<sup>41</sup> On October 27, 2017, a grand jury indicted Manafort for conspiracy, failing to report as an agent of a foreign country, false and misleading statements, and failure to file required reports.<sup>42</sup> Another indictment was filed in Virginia in February 2018, charging Manafort with filing false tax returns, failing to file reports of foreign bank accounts, bank fraud, and conspiracy to commit bank fraud.<sup>43</sup> On August 21, 2018, a jury found Manafort guilty of eight of these counts.<sup>44</sup>

On September 14, 2018, additional charges were brought against Manafort.<sup>45</sup> He was first charged with conspiracy to defraud the U.S. and conspiracy to obstruct justice (witness tampering).<sup>46</sup> Manafort pled guilty to these charges.<sup>47</sup> In exchange,

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<sup>39</sup> Classified memorandum from Rod J. Rosenstein to Robert S. Mueller, III (August 2, 2017) (referred to in *U.S. v. Manafort*, 312 F. Supp. 3d. 60, 67 (D.D.C. 2018) (A redacted copy of this Memorandum was released by the Department of Justice, <https://www.justsecurity.org/wp-content/uploads/2018/04/4-2-18-Rosenstein-Memo-to-Mueller.pdf>).

<sup>40</sup> *Id.*

<sup>41</sup> *U.S. v. Paul J. Manafort, Jr.*, No. 1:18-cr-00083-TSE, (E.D. Va. filed June 26, 2018), <https://www.courtlistener.com/docket/6314471/united-states-v-manafort/>.

<sup>42</sup> Indictment, *U.S. v. Paul J. Manafort, Jr. and Richard Gates, III*, No. 1:17-cr-00201-ABJ (D.D.C. Oct. 27, 2017), <http://documents.latimes.com/charges-against-paul-manafort-and-rick-gates/>.

<sup>43</sup> Superseding Indictment, *U.S. v. Paul J. Manafort, Jr. and Richard Gates, III*, No. 1:18-cr-00083-TSE (E.D. Va. Feb. 22, 2018), <https://www.justice.gov/file/1038391/download>.

<sup>44</sup> Carrie Johnson, *Jury in Manafort Trial Reaches Verdict on 8 Charges, Judge Declares Mistrial on Others*, NPR (Aug. 21, 2018), <https://www.npr.org/2018/08/21/640691954/jury-in-manafort-trial-reaches-verdict-on-8-charges-judge-declares-mistrial-on-o>.

<sup>45</sup> Superseding Criminal Information, *U.S. v. Paul J. Manafort, Jr.*, No. 1:17-cr-00201-ABJ (D.D.C. filed Sept. 14, 2018), <https://www.justice.gov/file/1094141/download>.

<sup>46</sup> *Id.* at 32–33.

the government agreed that no additional criminal charges would be brought against him.<sup>48</sup> Manafort agreed to “cooperate fully, truthfully, completely, and forthrightly with the Government and other law enforcement authorities identified by the Government in any and all matters as to which the Government deems the cooperation relevant.”<sup>49</sup> In a Joint Status Report filed in November 2018, Special Counsel Mueller reported to the Court that Manafort had breached his plea agreement.<sup>50</sup>

Prior to his guilty plea, Manafort moved to dismiss the indictment in Virginia, arguing that Rosenstein’s Order appointing the Special Counsel was invalid, and further that even if it were valid, the charges fell outside the scope of the Order.<sup>51</sup> Manafort later abandoned his scope argument and questioned only whether the indictment fell within the jurisdiction of the Special Counsel.<sup>52</sup> U.S. District Court Judge T.S. Ellis denied the motion.<sup>53</sup> He determined that the Special Counsel’s investigation and prosecution fell “squarely within the jurisdiction outlined” in the Appointment Order.<sup>54</sup> Manafort was a political consultant and he later admitted he received payments from then-President Victor Yanukovych of Ukraine and the Party of Regions, which had strong pro-Russian ties.<sup>55</sup> The Order authorized Mueller to investigate Manafort’s ties with individuals financially and politically supported by the Russian government and thus was

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<sup>47</sup> Plea Agreement, U.S. v. Paul J. Manafort, Jr., No. 1:17-cr-00201-ABJ (D.D.C. filed Sept. 14, 2018), <https://www.justice.gov/file/1094151/download>.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 6.

<sup>50</sup> Joint Status Report, U.S. v. Paul J. Manafort, Jr., No. 1:17-cr-00201-ABJ (D.D.C. filed Nov. 26, 2018), <https://int.nyt.com/data/documenthelper/491-paul-manafort-plea-agreement-breach/49c0d15e0a829872d8c9/optimized/full.pdf>.

<sup>51</sup> U.S. v. Paul J. Manafort, Jr., Case No. 1:18-cr-83-TSE, at \*12 (E.D. Va. filed June 26, 2018), <https://www.courtlistener.com/docket/6314471/united-states-v-manafort/>.

<sup>52</sup> *Id.* at 13.

<sup>53</sup> *Id.* at 1–9, 22. Judge Ellis included a rather lengthy discussion of the criticisms of the Special Counsel, but ultimately upheld the indictment.

<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.* at 14.

within Rosenstein's Appointments Order.<sup>56</sup> In another case, a Trump-appointed federal judge held similarly, finding that the Special Counsel had not exceeded his authority in investigating and prosecuting a company controlled by a Russian national.<sup>57</sup>

At least two grand-jury-subpoenaed witnesses moved to quash their subpoenas, arguing that the Special Counsel lacked the authority to issue the subpoenas.<sup>58</sup> One such witness was reportedly Andrew Miller, an aid to Trump adviser Roger J. Stone, Jr.<sup>59</sup> Miller's attorneys filed a motion to quash his subpoena, and argued that the Special Counsel was appointed unlawfully.<sup>60</sup> Chief Judge Howell of the U.S. District Court for the District of Columbia disagreed in a 92-page opinion denying Miller's motion,<sup>61</sup> holding that the Special Counsel was validly appointed.<sup>62</sup>

Furthermore, Mueller's Appointment Letter gave his investigation wide latitude. Often a Special Counsel will begin an investigation into one area and then then branch off into others. This was seen in the Nixon inquiry, which was initially about a break-in, and later expanded to encompass a cover-up.<sup>63</sup> It occurred again as Kenneth Starr, the Special Counsel appointed to

<sup>56</sup> *Id.*

<sup>57</sup> U.S. v. Internet Research Agency, LLC, et al. Indictment (Feb. 16, 2018), <https://www.justice.gov/opa/press-release/file/1035562/download> (permitting indictment despite challenges to Special Counsel's authority).

<sup>58</sup> Memorandum Opinion, *In re* Grand Jury Investigation (Grand Jury Action No. 18-34-BAH), <https://drive.google.com/file/d/1nRQqOs7kNxH2oabC5tIWShkYS6hBrgow/view>.

<sup>59</sup> Maggie Haberman, *Ex-Aide to Roger Stone is Subpoenaed in Russia Investigation*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/roger-stone-andrew-miller-subpoenaed-trump.html>. Mr. Stone was indicted by a grand jury on January 24, 2019. U.S. v. Roger Jason Stone, Jr., 1:19-cr-00018 ABJ (Jan. 24, 2019), <https://www.justice.gov/file/1124706/download>.

<sup>60</sup> Memorandum Opinion, *In re* Grand Jury Investigation (Grand Jury Action No. 18-34-BAH), at \*3.

<sup>61</sup> *See generally id.*

<sup>62</sup> *See id.* at 67–92.

<sup>63</sup> Daniel Bush, *The Complete Watergate Timeline (It Took Longer than you Realize)*, PBS NEWS HOUR (May 30, 2017), <https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize>.

investigate President Clinton's involvement in a land deal in Arkansas known as Whitewater, and later received approval to investigate the president's sexual relations with a White House intern.<sup>64</sup>

## II. THE PRESIDENT'S EXECUTIVE PRIVILEGE

A President may shield information from the other two branches of government and the public. This "executive privilege" was first exercised by George Washington,<sup>65</sup> and it has always been controversial.<sup>66</sup> The first judicial review of executive privilege occurred in *U.S. v. Burr*, when, in connection with the treason trial of Aaron Burr, a subpoena was issued to President Thomas Jefferson.<sup>67</sup> During the presidential election of 1800, Jefferson and Burr both received the same number of electoral votes.<sup>68</sup> Pursuant to the then-Constitution, the House of Representatives voted to break the tie.<sup>69</sup> Jefferson became the

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<sup>64</sup> Neil A. Lewis, *Final Report by Prosecutor on Clintons is Released*, N.Y. TIMES (Mar. 21, 2002), <https://www.nytimes.com/2002/03/21/us/final-report-by-prosecutor-on-clintons-is-released.html>.

<sup>65</sup> Mark J. Rozell, *The Law: Executive Privilege: Definition and Standards of Application*, 29 PRESIDENTIAL STUDIES QUARTERLY 918, 920–21 (1999). See also TODD GARVEY, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS (2014), <https://fas.org/sgp/crs/secrecy/R42670.pdf> ("Presidential claims of a right to preserve the confidentiality of information and documents in the face of legislative demands have figured prominently, though intermittently, in executive-congressional relations since at least 1792.").

<sup>66</sup> Rozell, *supra* note 65, at 918. For example, Benjamin Franklin stated the following: "I was struck dumb with astonishment at the sentiments . . . [t]hat the executive alone shall have the right of judging what shall be kept secret, and what shall be made public, and that the representatives of a free people, are incompetent to determine on the interests of those who delegated them." Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007) (quoting DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 101 (1981)).

<sup>67</sup> See *U.S. v. Burr*, 25 F.Cas. 187 (C.C.D. Va. 1807).

<sup>68</sup> *Presidential Election of 1800: A Resource Guide*, LIBRARY OF CONG. (Oct. 23, 2018), <http://www.loc.gov/rr/program/bib/elections/election1800.html>.

<sup>69</sup> See 10 ANNALS OF CONG. 1022 (1801).

President, and Burr the Vice President.<sup>70</sup> Although they both belonged to the Republican Party, the two were no longer allies.<sup>71</sup> Burr was off the ticket in the 1804 election, and instead ran for Governor of New York.<sup>72</sup> When he failed in his bid to be governor, he blamed Alexander Hamilton, which led to their famous duel.<sup>73</sup> Burr's fortunes diminished considerably after his duel with Hamilton, and he fled New York.<sup>74</sup> He was arrested in 1807 and tried for treason,<sup>75</sup> suspected of initiating plans to start a rebellion in the Western Territories.<sup>76</sup> One of his compatriots was actually a spy, and wrote of Burr's plans to President Jefferson.<sup>77</sup> Before trial, Burr filed a motion requesting that the President produce this letter.<sup>78</sup> Chief Justice Marshall issued a subpoena to President Jefferson and, when Jefferson refused to comply, held that sitting presidents are still subject to the judicial process.<sup>79</sup> The *Burr* case also stood for the proposition that even though a sitting president is subject to judicial process, special procedures should be followed.<sup>80</sup>

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<sup>70</sup> See *id.* at 1033.

<sup>71</sup> See *Aaron Burr, 3rd Vice President (1801–1805)*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/generic/VP\\_Aaron\\_Burr.htm](https://www.senate.gov/artandhistory/history/common/generic/VP_Aaron_Burr.htm) (last visited Nov. 4, 2018); Andrew Prokop, *The Real-Life Election of 1800 Was Even Wilder than Hamilton The Musical Lets On*, VOX (Nov. 28, 2015), <https://www.vox.com/2015/11/28/9801376/hamilton-election-of-1800-burr-jefferson>.

<sup>72</sup> *Aaron Burr, 3rd Vice President (1801–1805)*, *supra* note 71.

<sup>73</sup> See *id.*; Alison L. LaCroix, *To Gain the Whole World and Lose his Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501 (2004).

<sup>74</sup> Joanne B. Freeman, *Dueling as Politics: Reinterpreting the Burr-Hamilton Duel*, 53 THE WILLIAM AND MARY QUARTERLY 289, 313 (1996).

<sup>75</sup> *Aaron Burr Arrested for Treason*, HISTORY, <https://www.history.com/this-day-in-history/aaron-burr-arrested-for-treason> (last visited Oct. 22, 2018).

<sup>76</sup> See *id.*

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

<sup>78</sup> *U.S. v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807).

<sup>79</sup> John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1451 (1998).

<sup>80</sup> *Id.*

The specific term “executive privilege” was not used until President Dwight D. Eisenhower’s administration.<sup>81</sup> Prior to Eisenhower, several presidents had asserted the power to resist the courts’ and Congress’ attempts to secure information from the Executive Branch: Jackson, Tyler, Hayes, Cleveland, Franklin D. Roosevelt, and Truman.<sup>82</sup> Every president since Eisenhower has claimed this privilege.<sup>83</sup>

The U.S. Supreme Court officially recognized the concept of an executive privilege in *U.S. v. Nixon*.<sup>84</sup> Many of President Nixon’s close administrative officials were indicted by a grand jury in connection with the Watergate break-in and subsequent cover-up.<sup>85</sup> President Nixon was listed by the grand jury as an

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<sup>81</sup> Aziz Huq, *Background on Executive Privilege*, BRENNAN CENTER FOR JUSTICE (Mar. 23, 2007), <https://www.brennancenter.org/analysis/background-executive-privilege>.

<sup>82</sup> Archibald Cox, *Executive Privilege*, 122 PENN. L. REV. 1383, 1398–1401 (1974).

<sup>83</sup> Garvey, *supra* note 65, at 24–28 (describing claims of executive privilege used by Presidents Kennedy, Johnson, Nixon, Ford, Carter, Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama); TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS (Aug. 21, 2012), [https://www.everycrsreport.com/files/20120821\\_R42670\\_a319b0843c12dfcc04c185f1a570317f85f6318a.pdf](https://www.everycrsreport.com/files/20120821_R42670_a319b0843c12dfcc04c185f1a570317f85f6318a.pdf); MORTON ROSENBERG, CONG. RESEARCH SERV. REPORT FOR CONGRESS, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS (Aug. 21, 2008), <https://fas.org/sgp/crs/secrecy/RL30319.pdf>; *see also* Scott Bomboy, *A Brief Review of Executive Privilege from Washington to Trump*, CONSTITUTION DAILY (June 5, 2017), <https://constitutioncenter.org/blog/a-brief-review-of-executive-privilege-from-washington-to-trump>.

<sup>84</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>85</sup> The seven defendants were John Mitchell (Attorney General and campaign chair), H.R. Halderman (White House Chief of Staff), John Ehrlichman (Assistant for Domestic Affairs), Charles Colson (White House Special Counsel), Robert Mardian (Campaign to Re-elect the President Counsel), Kenneth Parkinson (Committee to Re-elect the President Counsel), and Gordon Strachan (Aide to Halderman). They were known collectively as the “Watergate Seven.” Katherine Graham, *The Watergate Watershed: A Turning Point for a Nation and a Newspaper*, WASH. POST (Jan. 28, 1997), <https://www.washingtonpost.com/politics/the-watergate-watershed-a-turning-point-for-a-nation-and-a->

“unindicted coconspirator.”<sup>86</sup> The Special Counsel issued a subpoena to President Nixon, requiring him to produce audio taped in the Oval Office.<sup>87</sup> President Nixon refused, and filed a motion to quash the subpoena.<sup>88</sup> District Court Chief Judge John Sirica denied the motion,<sup>89</sup> and the U.S. Supreme Court granted certiorari before judgment because of “the public importance of the issues presented and the need for their prompt resolution.”<sup>90</sup>

President Nixon argued that his executive privilege was absolute in protecting confidentiality of executive communications.<sup>91</sup> The Court disagreed, citing *Marbury v. Madison*, which establish its power to review a president’s claim of privilege.<sup>92</sup> The court further emphasized that Presidential privilege has “constitutional underpinnings.”<sup>93</sup> Although there is no specific grant of executive privilege in the Constitution, it “is implicit in the President’s Article II powers and in the Constitution’s separation of powers scheme.”<sup>94</sup>

The Court concluded the following: “Neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial

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newspaper/2012/06/04/gJQA2BxmIV\_story.html?noredirect=on&utm\_term=.31a06b773cba.

<sup>86</sup> *Nixon*, 418 U.S. at 687.

<sup>87</sup> Transcript of Grand Jury Subpoena Issues by Special Prosecutor Archibald Cox to President Richard Nixon, No. 47-73 (D.D.C. 1973), [https://www.fordlibrarymuseum.gov/museum/exhibits/watergate\\_files/content.php?section=3&page=c&transcript=](https://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=3&page=c&transcript=).

<sup>88</sup> *In re Subpoena to Nixon*, 360 F. Supp. 1, 4 (D.D.C. 1973).

<sup>89</sup> The oral argument in this matter is referred to as the “longest and most widely reported oral argument in the history of the law of privilege.” WRIGHT, GRAHAM & MURPHY, *FEDERAL PRACTICE AND PROCEDURE*, § 5673, at 26.

<sup>90</sup> *Nixon*, 418 U.S. at 686–87.

<sup>91</sup> *Id.* at 703.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 706.

<sup>94</sup> Jonathan K. Geldert, *Presidential Advisors and their most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy*, 49 B.C. L. Rev. 823, 829 (2008).

process under all circumstances.”<sup>95</sup> On the other hand, according to the Court, the president does need candor and objectivity from his advisors, and should therefore receive “great deference” from the courts.<sup>96</sup>

This deference takes shape as follows: Communications are presumptively privileged, and a court should perform an in camera inspection before making its decision.<sup>97</sup> Ultimately, the court “must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice.”<sup>98</sup> The Special Counsel has the burden of establishing that the material is “essential to the justice of the [pending criminal] case.”<sup>99</sup> Public confidence in government depends upon “proof that there is capability to discover and punish wrongdoing even at the highest levels in the Executive Branch.”<sup>100</sup>

Although a president is entitled to great deference, the Court has recognized that privileges block the “right to every man’s evidence.”<sup>101</sup> In executive privilege cases, a court must weigh the general need of a president for confidentiality against the specific need of the public for disclosure of the evidence.<sup>102</sup> The Court used this balancing test and determined that the subpoenaed records and tapes must be disclosed.<sup>103</sup> As a result of the tapes and the surrounding circumstances, the House Judiciary Committee approved three articles of impeachment against President Nixon,<sup>104</sup> who then resigned effective at noon on August 9, 1974.<sup>105</sup>

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<sup>95</sup> *Nixon*, 418 U.S. at 706.

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

<sup>97</sup> *Id.* at 706, 708.

<sup>98</sup> *Id.* at 711–12.

<sup>99</sup> *Id.* at 713.

<sup>100</sup> Cox, *supra* note 82, at 1412.

<sup>101</sup> *Nixon*, 418 U.S. at 709; Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L. J. 845, 891 (1990).

<sup>102</sup> *Nixon*, 418 U.S. at 711–12.

<sup>103</sup> *Id.* at 713.

<sup>104</sup> Gerhard Peters & John T. Woolley, *Articles of Impeachment Adopted by the House of Representatives, Committee on the Judiciary*, THE AM. PRESIDENCY PROJECT (July 27, 1974),



The U.S. Supreme Court's ruling in *Nixon* was built on a past hodgepodge of recognized privileges with respect to the Executive Branch. The various privileges are recognized today under the broad umbrella of executive privilege, but are actually discrete privileges, or a "bundle of components."<sup>106</sup> Today, these privileges are divided into the following categories:

1. Law Enforcement;<sup>107</sup>
2. Military, Diplomatic, and National Security Information;
3. Administrative Decisions that have a Judicial Character;
4. Presidential Communications; and
5. Deliberative Process.<sup>108</sup>

Beginning in 1875, U.S. courts recognized the executive's right to withhold documents which would reveal military or state secrets, the identities of government informants, and "information relat[ing] to pending investigations."<sup>109</sup> In *United States v. Reynolds*, the U.S. Supreme Court recognized a "military secrets" privilege, and indicated that even if a party showed great necessity, the documents still might not be disclosed.<sup>110</sup> On the other hand, the Court provided that "even the most compelling necessity

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<https://www.presidency.ucsb.edu/node/277077>; see also John Herbers, *Nixon Resigns*, N.Y. TIMES (Aug. 8, 1974), <http://movies2.nytimes.com/learning/general/onthisday/big/0808.html>.

<sup>105</sup> Herbers, supra note 19.

<sup>106</sup> NORMAN L. EISEN & ANDREW M. WRIGHT, EVIDENTIARY PRIVILEGES CAN DO LITTLE TO BLOCK TRUMP-RELATED INVESTIGATIONS 5 (Am. Const. Soc'y & Citizens for Responsibility and Ethics in Wash. eds., 2018), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2018/06/28214023/ACS-CREW-Report-Evidentiary-Privileges-Can-Do-Little-to-Block-Trump-Related-Investigations.pdf>.

<sup>107</sup> *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

<sup>108</sup> John E. Bies, *Primer on Executive Privilege and the Executive Branch Approach to Congressional Oversight*, LAWFARE (June 16, 2017), <https://www.lawfareblog.com/primer-executive-privilege-and-executive-branch-approach-congressional-oversight>; see also *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953).

<sup>109</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 736–37 (D.C. Cir. 1997); see *Roviaro*, 353 U.S. at 59; see also *Reynolds*, 345 U.S. 1 at 6.

<sup>110</sup> *Reynolds*, 345 U.S. at 10–11.

cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”<sup>111</sup>

Accordingly, courts have determined that a sitting president may not be compelled to perform a discretionary act, and that a president has absolute immunity from civil liability for official acts.<sup>112</sup> The U.S. Supreme Court held that absolute immunity of the president will not “leave the Nation without sufficient protection against misconduct on the part of the Chief Executive.”<sup>113</sup> This protection is afforded by the impeachment process. On the other hand, acts undertaken by a president *before* taking office are not similarly protected.<sup>114</sup>

The deliberative process privilege is the oldest of the categories under the broad umbrella of executive privilege,<sup>115</sup> traceable to the British House of Lords and the Crown Privilege.<sup>116</sup> Its rationale is that it encourages frank discussions within the government when formulating policy decisions.<sup>117</sup> The first use of the general deliberative process privilege was by the U.S. Court of Claims in *Kaiser Aluminum & Chemical Corp. v. U.S.*<sup>118</sup> The Court stated the following: “It is not a privilege to protect the official but one to protect free discussion of prospective operations and policy.”<sup>119</sup> This privilege does not extend to purely factual matters, but rather the policymaking process.<sup>120</sup>

Moreover, the deliberative process category of executive privilege was considered when the Federal Rules of Evidence were

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<sup>111</sup> *Id.* at 11.

<sup>112</sup> *In re Sealed Case (Espy)*, 121 F.3d at 737; *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982).

<sup>113</sup> *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

<sup>114</sup> *Clinton v. Jones*, 520 U.S. 681, 688, 694 (1997) (explaining that this reasoning provides no support for an immunity for *unofficial* conduct).

<sup>115</sup> *Wetlaufer*, *supra* note 101, at 868.

<sup>116</sup> *Id.* at 858.

<sup>117</sup> *United States v. Am. Tel. & Tel. Co.*, 1979 U.S. Dist. LEXIS 12959, at \*152 (D.C. Apr. 18, 1980).

<sup>118</sup> *Kaiser Aluminum & Chem. Corp. v. United States*, 141 Ct. Cl. 38 (1958); *Wetlaufer*, *supra* note 97, at 848.

<sup>119</sup> *Id.* at 49.

<sup>120</sup> *Dudman Comm'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1567–68 (D.C. Cir. 1987); *Huq*, *supra* note 81.

written by the Advisory Committee.<sup>121</sup> Proposed Rule 509 privileged “secret[s] of state” and “official information.”<sup>122</sup> The deliberative process privilege part of this proposed rule is Rule 509(a)(2)(A), “intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions.”<sup>123</sup> Federal Rules of Evidence Draft Article V contained thirteen separate provisions covering a host of different privileges.<sup>124</sup> After the Draft Rules were finalized, they were promulgated by the U.S. Supreme Court and submitted to Congress in November 1972.<sup>125</sup>

Proposed Rule 509 ultimately “underwent the most substantial modification” of all of the Rules.<sup>126</sup> The Advisory Committee struggled with the draft of the Proposed Rule because there were Acts of Congress affecting the concept of executive privilege.<sup>127</sup> Additionally, Congress was concerned about giving the president too much authority.<sup>128</sup>

Beginning with President John F. Kennedy’s administration, the Chairman of the House Subcommittee on Government Information has requested written clarification of each administration’s policy on executive privilege.<sup>129</sup> Interestingly, President Nixon provided the most direct and narrow policy

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<sup>121</sup> Wetlaufer, *supra* note 101, at 880.

<sup>122</sup> FED. R. EVID. 509(a) (rejected 2018).

<sup>123</sup> *Id.*

<sup>124</sup> Edward J. Imwinkelreid, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 42 (2006).

<sup>125</sup> Josh Camson, *History of the Federal Rules of Evidence*, ABA SECTION OF LITIGATION (June 17, 2010), [https://apps.americanbar.org/litigation/litigationnews/trial\\_skills/061710-trial-evidence-federal-rules-of-evidence-history.html](https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html)

<sup>126</sup> Margaret A. Berger, *How the Privilege for Governmental Information Met its Watergate*, 25 CASE WESTERN RESERVE L. REV. 747, 771 (1975).

<sup>127</sup> See e.g., the Federal Housekeeping Act, 5 U.S.C. § 22 (1958) and as amended 5 U.S.C. § 301 (1970); and the Freedom of Information Act (FOIA) 5 U.S.C. § 552 (1970) and as amended 12 U.S.C. Cong. & Ad. News 5758 (1974).

<sup>128</sup> Rozell, *supra* note 65, at 923.

<sup>129</sup> *Id.*

regarding a president's right to withhold information.<sup>130</sup> In a 1969 letter to Representative John Moss, President Nixon wrote that "the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific presidential approval . . . I want open government to be a reality in every way possible."<sup>131</sup> This is an interesting perspective given the subpoena fight in which he would later become embroiled.

On June 17, 1972, five men were arrested at the Watergate office building after breaking into the Democratic National Committee's headquarters.<sup>132</sup> Over the next two years, it was disclosed that the burglary had been directed by G. Gordon Liddy, a former White House attorney and member of the Committee to Re-Elect the President.<sup>133</sup> As more was revealed about a conspiracy at the highest levels of government, Congress passed an Act giving itself more time to study and revise the rules.<sup>134</sup> Ordinarily, after the U.S. Supreme Court approves court rules, they automatically go into effect after 90 days, unless Congress acts.<sup>135</sup> The Act proposed by Congress provided that the Proposed Rules would not take effect "until approved by [an] Act of Congress," even beyond the 90-day limit.<sup>136</sup> The Proposed Rules had arrived at the doorstep of Congress just as "the Watergate crisis accelerated."<sup>137</sup> Senator Sam Ervin was Chair of the Judiciary

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Daniel Bush, *The Complete Watergate Timeline (It Took Longer Than You Realize)*, PBS NEWS HOUR (May 30, 2017), <https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize>.

<sup>133</sup> *The Nixon Administration and Watergate*, HISTORY COMMONS, [http://www.historycommons.org/timeline.jsp?nixon\\_and\\_watergate\\_tmtn\\_watergate\\_campaign\\_conspiracy=nixon\\_and\\_watergate\\_tmtn\\_watergate\\_burglary&timeline=nixon\\_and\\_watergate\\_tmtn](http://www.historycommons.org/timeline.jsp?nixon_and_watergate_tmtn_watergate_campaign_conspiracy=nixon_and_watergate_tmtn_watergate_burglary&timeline=nixon_and_watergate_tmtn) (last visited Nov. 29, 2018).

<sup>134</sup> The House of Representatives passed a measure on February 7, 1974, the Senate had passed a similar measure on February 7, 1973. The President signed Pub. Law. No. 93-12, 87 Stat. 9 on March 30, 1973.

<sup>135</sup> Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L. J. 125-173 (1973).

<sup>136</sup> Pub. Law No. 93-12, 87 Stat. 9 (1973).

<sup>137</sup> Berger, *supra* note 126, at 772.

Committee Select Committee on Presidential Campaign Activities, which later became known as the Watergate Committee.<sup>138</sup> Senator Ervin proposed the delay for the review of the Proposed Rules.<sup>139</sup> On the same day that the Special House Subcommittee began hearings on the rules, the Senate created the Watergate Committee.<sup>140</sup> Congress ultimately rejected Proposed Rules 509 and 510 and all of the other specified rules of privilege.<sup>141</sup> Instead, it passed the current privilege rule, Federal Rule of Evidence 501, which states the following:

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

the United States Constitution;  
a federal statute; or  
rules prescribed by the Supreme Court.<sup>142</sup>

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.<sup>143</sup>

Thus, due in large part to Watergate, there is a general rule of privilege, rather than thirteen specified rules covering each privilege.

In a sealed case decided during the Clinton Administration, the D.C. Circuit Court of Appeals distinguished between the presidential communications privilege and the deliberative process privilege.<sup>144</sup> Some courts do not distinguish between the two, but the Court in *Espy* determined that the two privileges are distinct.<sup>145</sup>

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<sup>138</sup> *Select Committee on Presidential Campaign Activities (the Watergate Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (last visited Nov. 29, 2018).

<sup>139</sup> Arthur John Keeffe, *The Snafu Blocking Federal Evidence Rules*, 59 A.B.A. J. 1055 (1973).

<sup>140</sup> Berger, *supra* note 126, at 772–73.

<sup>141</sup> *Id.* at 748; *Jaffee v. Redmond*, 518 U.S. 1, 8 n.7 (1996).

<sup>142</sup> FED. R. EVID. 501.

<sup>143</sup> *Id.*

<sup>144</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 736–37 (D.C. Cir. 1997); Rosenberg, *supra* note 83, at 38.

<sup>145</sup> *In re Sealed Case (Espy)*, 121 F.3d at 737–38, 745.

The U.S. Supreme Court in *Nixon* had arguably conflated the two distinct privileges.<sup>146</sup> One commentator argues that the deliberative process privilege should be merged with the presidential communication privilege.<sup>147</sup>

The D.C. Circuit Court stated that the presidential communications privilege applies to the decision-making of the president himself, and that the deliberative process privilege applies to “decisionmaking of executive officials generally.”<sup>148</sup> Moreover, the Court clarified that “the presidential communications privilege applies to documents in their entirety” and covers pre-deliberative, final, and post-decisional materials; whereas the deliberative process privilege only applies to pre-decisional materials.<sup>149</sup>

In *Espy*, the former Secretary of Agriculture under President Clinton, Alphonso Michael Espy, was indicted by a grand jury as part of a Special Counsel investigation.<sup>150</sup> The Special Counsel subpoenaed communications about Espy which were prepared for the White House by the Office of White House Counsel.<sup>151</sup> The Court struggled with the question of whether these communications should be analyzed under the presidential communications privilege or the deliberative process privilege,<sup>152</sup> eventually concluding that “the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”<sup>153</sup> There is a limited extension of the presidential communication privilege

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<sup>146</sup> See *U.S. v. Nixon*, 418 U.S. 683 (1974); Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U.L. REV. 1769, 1781 (2005).

<sup>147</sup> Kennedy, *supra* note 146, at 1771.

<sup>148</sup> *In re Sealed Case (Espy)*, 121 F.3d at 745.

<sup>149</sup> *Id.* at 737, 745.

<sup>150</sup> *Espy Indictments*, C-SPAN (Aug. 27, 1987), <https://manafortdefense.org/>. (detailing that former-Secretary Espy was charged with 39 counts of receiving illegal gifts).

<sup>151</sup> *In re Sealed Case (Espy)*, 121 F. 3d at 735.

<sup>152</sup> *Id.* at 752.

<sup>153</sup> *Id.* at 751–52.

when communications are made by immediate advisors, even if the president is not “personally familiar” with the materials.<sup>154</sup>

To a certain degree, the Court criticized the Supreme Court’s opinion in *Nixon*, lamenting that case’s failure to provide more instruction on exactly how to balance the general need for the president’s confidentiality with the specialized need for evidence in a pending criminal trial.<sup>155</sup> However, the Court did determine that judicial scrutiny of presidential claims of privilege will yield more often when the protection is based on the deliberative process privilege.<sup>156</sup> The Court suggested that, “the presidential communications privilege is more difficult to surmount.”<sup>157</sup> That privilege is owned by the president himself, and “the president enjoys more extensive privileges than other executive branch officers.”<sup>158</sup> At least one commentator has criticized the D.C. Circuit’s expansion of the presidential communications privilege to presidential advisors.<sup>159</sup> The *Espy* decision ultimately upheld the subpoena with respect to statements made by Espy or his counsel, but indicated that the Special Counsel would have to make a better showing of need for the other evidence requested.<sup>160</sup>

The Court built on *Espy* in *Judicial Watch v. Department of Justice*, in which over 4,300 documents were withheld from a FOIA disclosure.<sup>161</sup> While the District Court ruled that the presidential communications privilege extended to internal Justice Department documents, the Court of Appeals disagreed.<sup>162</sup> The Court determined that the presidential communications privilege did not extend to the Office of the Pardon Attorney or the Office of the Deputy Attorney General, as they are not “immediate” White

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<sup>154</sup> *Id.* at 749.

<sup>155</sup> *Id.* at 754.

<sup>156</sup> *Id.* at 745.

<sup>157</sup> *Id.* at 746.

<sup>158</sup> *Id.* at 748.

<sup>159</sup> *Constitutional Law—Executive Privilege—D.C. Circuit Defines Scope of Presidential Communications Privilege—In re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997), 111 HARV. L. REV. 861, 864 (1998).

<sup>160</sup> *In re Sealed Case (Espy)*, 121 F. 3d at 762.

<sup>161</sup> *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

<sup>162</sup> *Id.* at 1110; *Judicial Watch Inc. v. Dep’t of Justice*, 259 F. Supp. 2d 86, 87 (D.D.C. 2003).

House advisors.<sup>163</sup> The Court remanded the case to the District Court for analysis of the dispute using the deliberative process privilege.<sup>164</sup> Cabinet department heads are not “treated as part of the President’s immediate personal staff or as part of the Office of the President.”<sup>165</sup>

In an action by Congress to receive information from the Executive Branch, the District Court made it clear that neither the president nor his senior advisors have absolute immunity from compelled congressional appearances.<sup>166</sup> The D.C. Circuit further clarified *Espy* in *Loving v. Department of Defense*, in which it held that only those documents and communications that “directly involved the President” or were “solicited and received” by White House advisers were protected under the presidential communications privilege.<sup>167</sup>

With the deliberative process privilege, on the other hand, the government has the burden of showing that the material is both pre-decisional and deliberative.<sup>168</sup> This privilege protects “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”<sup>169</sup> Its purpose is “to prevent injury to the quality of agency decisions.”<sup>170</sup> In practice, judges often decide the application of the privilege based on the other party’s ability or inability to obtain the evidence elsewhere.<sup>171</sup> In this sense, it resembles the attorney work product protection of the Federal Rules of Civil Procedure Rule 26(b)(3)(A).<sup>172</sup>

Several Presidents have indicated that they would not assert executive privilege if fraud, corruption, illegal conduct, or

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<sup>163</sup> *Judicial Watch*, 365 F.3d at 1120.

<sup>164</sup> *Id.* at 1124.

<sup>165</sup> Garvey, *supra* note 65, at 11.

<sup>166</sup> *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008).

<sup>167</sup> *Loving v. Dep’t of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008).

<sup>168</sup> *Kennedy*, *supra* note 142, at 1772.

<sup>169</sup> *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

<sup>170</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

<sup>171</sup> *Kennedy*, *supra* note 146, at 1771.

<sup>172</sup> FED. R. CIV. P. 26(b)(3)(A).



unethical conduct are at issue.<sup>173</sup> Whether or not this has ever been the case is questionable.<sup>174</sup> Nevertheless, “the privilege disappears altogether when there is any reason to believe government misconduct occurred.”<sup>175</sup>

### III. PRIVILEGES AVAILABLE TO PRESIDENT TRUMP

In the Russian election interference investigation, the specific executive privilege at stake will undoubtedly be the presidential communications privilege. Thus far, the Special Counsel has not publicly issued a subpoena to President Trump, or to any of his immediate staff.<sup>176</sup> Congress has also been involved in examining Russia’s role in the election, holding hearings in connection with its own investigations. The rules of executive privilege before Congress are similar to those before the judiciary.<sup>177</sup>

Several high-ranking former and current officials have been subpoenaed to appear before both House of Representatives and Senate Committees.<sup>178</sup> These include former Director of National

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<sup>173</sup> Garvey, *supra* note 65, at 21.

<sup>174</sup> For example, President George W. Bush asserted executive privilege to block a subpoena in an investigation about corruption in the Boston FBI’s office. Charles Tiefer, “*The Law*”: *President Bush’s First Executive Privilege Claim: The FBI/Boston Investigation*, 33 PRESIDENTIAL STUDIES QUARTERLY (2003).

<sup>175</sup> *In re Sealed Case (Espy)*, 121 F. 3d at 746.

<sup>176</sup> The Russian 2016 election interference investigation is ongoing with the extensive use of grand juries, it may be that subpoenas have been issued, but the grand jury activities are confidential and secret. Michael S. Schmidt & Maggie Haberman, *Mueller Subpoenas Trump Organization, Demanding Documents About Russia*, N.Y. TIMES (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/us/politics/trump-organization-subpoena-mueller-russia.html>

<sup>177</sup> For more on the executive privilege before Congress, see Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA J. CONST. L. 77 (2011).

<sup>178</sup> EISEN & WRIGHT, *supra* note 106, at 6–8. The Congressional Committees currently investigating Russian interference are the House Intelligence Committee, the Senate Intelligence Committee, the House Oversight Committee, and the Senate Judiciary Committee Subcommittee on Crime and Terrorism. *Four Congressional Committees Looking into Trump-*

Intelligence James Clapper, Director of National Intelligence Dan Coats, National Security Agency Director Mike Rogers, former campaign manager Corey Lewandowski, former Chief Strategist Steve Bannon, former Acting Attorney General Sally Yates, former FBI Director James Comey, former White House Communications Director Hope Hicks, and former Attorney General Jeff Sessions.<sup>179</sup> Each of these individuals asserted executive privilege, and either refused to answer questions or indicated that was not his or her privilege to assert or waive.<sup>180</sup>

When Bannon and former Attorney General Sessions utilized the concept of executive privilege before congressional committees,<sup>181</sup> some members of Congress voiced concern, but neither man was challenged on his exercise of the privilege.<sup>182</sup> The Deputy White House Counsel reportedly opined that Bannon could assert the executive privilege before Congress, but not with respect to information and testimony before Special Counsel Mueller.<sup>183</sup> Bannon did not answer any “questions relating to the transition period between the election and inauguration.”<sup>184</sup> Hicks answered some, but not all, questions concerning the same period of time.<sup>185</sup>

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*Russia Links*, VOA (March 17, 2017), <https://www.voanews.com/a/congress-committees-investigating-trump-russia-ties/3771636.html>.

<sup>179</sup> EISEN & WRIGHT, *supra* note 106, at 6–8.

<sup>180</sup> *Id.* at 6.

<sup>181</sup> Carrie Johnson, *Bannon and Trump White House Raising Questions about Executive Privilege*, *Lawyers Say*, NPR (Jan. 17, 2018), <https://www.npr.org/2018/01/17/578634802/bannon-and-trump-white-house-raising-questions-about-executive-privilege-lawyers>.

<sup>182</sup> *Id.*

<sup>183</sup> Murray Waas, *Trump Ordered Bannon to Limit Testimony*, FOREIGN POLICY (Jan. 18, 2018), <https://foreignpolicy.com/2018/01/18/trump-ordered-bannon-to-limit-testimony/>.

<sup>184</sup> Todd Garvey, *Does Executive Privilege Apply to the Communications of a President-elect?*, CONGRESSIONAL RESEARCH SERVICE (March 8, 2018), <https://fas.org/sgp/crs/secrecy/LSB10094.pdf>. It appears Bannon is cooperating with the Special Counsel. Michael S. Schmidt, *Bannon Agrees to Cooperate with Mueller Inquiry*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2018/01/17/us/politics/steve-bannon-mueller-special-counsel-investigation-interview.html>.

<sup>185</sup> Olivia Victoria Gazis, *Hope Hicks' Limited Testimony Divides House Intelligence Committee*, CBS NEWS (Feb. 27, 2018),

There is no case law extending the executive privilege to such a timeframe.

President Trump's former White House Press Secretary, Sean Spicer, did potentially waive the privilege by allowing former FBI Director James Comey to testify before Congress. He stated, "The president's power to assert executive privilege is well established. However, in order to facilitate a swift and thorough examination of the facts sought by the Senate Intelligence Committee, President Trump will not assert executive privilege regarding James Comey's scheduled testimony."<sup>186</sup>

Both Comey and Former FBI Deputy Director Andrew McCabe took extensive notes of their conversations with President Trump.<sup>187</sup> Comey took notes immediately after his meeting with President Trump on February 14, 2017.<sup>188</sup> President Trump allegedly told Comey, "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go."<sup>189</sup> Immediately after his meeting with the President, Comey prepared an unclassified memo about his

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<https://www.cbsnews.com/news/hope-hicks-testimony-house-intelligence-committee-today-2018-02-27/>.

<sup>186</sup> *Statement from the Press Secretary*, WHITE HOUSE (June 5, 2017), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-3/>.

<sup>187</sup> *Full Transcript and Video: James Comey's Testimony on Capitol Hill*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/us/politics/senate-hearing-transcript.html> (detailing Comey's testimony before the Senate Select Committee on Intelligence). Eric Tucker, *Mueller Now Has Memos McCabe Kept on Trump Dealings*, THE BOSTON GLOBE (Mar. 17, 2018), <https://www.bostonglobe.com/news/politics/2018/03/17/mccabe-kept-personal-memos-regarding-trump-interactions/XC5X6UYYLFI1dphIwtY8cJ/story.html>.

<sup>188</sup> Phillip Bump, *What the Comey Memos Say*, WASH. POST (Apr. 19, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/04/19/what-the-comey-memos-say/?noredirect=on&utm\\_term=.17ec4e133fe1](https://www.washingtonpost.com/news/politics/wp/2018/04/19/what-the-comey-memos-say/?noredirect=on&utm_term=.17ec4e133fe1); Tucker, *supra* note 187; Steven Harper, *A Timeline: Everything We Know About the Comey Firing*, MOYERS (April 24, 2018), <https://billmoyers.com/story/comey-timeline/>.

<sup>189</sup> Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), [Investigationhttps://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html](https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html).

conversation.<sup>190</sup> President Trump was referring to Michael T. Flynn, the National Security Advisor for the presidential campaign of Donald J. Trump, a senior member of President-Elect Trump's transition team, and the National Security Advisor to President Trump until February 13, 2017, when he resigned.<sup>191</sup>

Comey interpreted President Trump's statements as a request to drop the investigation of Flynn "in connection with false statements about his conversations with the Russian ambassador in December."<sup>192</sup> If President Trump did indeed attempt to halt an FBI investigation, this would likely be a violation of 18 U.S.C. Section 1505, "Obstruction of Proceedings before Departments, Agencies, and Committees."<sup>193</sup>

In fact, President Trump drafted a multipage termination letter for Comey, but it was never delivered.<sup>194</sup> On May 9, 2017, the President issued a letter indicating that Comey was terminated as FBI Director.<sup>195</sup> President Trump indicated in the letter that he relied on the advice of Deputy Attorney General Rosenstein and former Attorney General Sessions.<sup>196</sup> A memo by Rosenstein

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<sup>190</sup> SENATE SELECT COMM. ON INTELLIGENCE, STATEMENT FOR THE RECORD, JAMES B. COMEY 5 (June 8, 2017), <https://www.intelligence.senate.gov/sites/default/files/documents/os-jcomey-060817.pdf>.

<sup>191</sup> Statement of the Offense, U.S. v. Michael T. Flynn, Case 1:17-cr-00232-RC, December 1, 2017, <https://www.justice.gov/file/1015126/download> (detailing that Flynn pleaded guilty to making false statements to the FBI); Maggie Haberman, Matthew Rosenberg, Matt Apuzzo & Glenn Thrush, *Michael Flynn Resigns as National Security Advisor*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.

<sup>192</sup> *Statement for the Record, James B. Comey*, *supra* note 190, at 5.

<sup>193</sup> 18 U.S.C. § 1505 (2004).

<sup>194</sup> Michael S. Schmidt and Maggie Haberman, *Mueller has Early Draft of Trump Letter Giving Reasons for Firing Comey*, (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/us/politics/trump-comey-firing-letter.html>; Harper, *supra* note 188.

<sup>195</sup> Letter from President Donald Trump to FBI Director James B. Comey (May 9, 2017), <https://www.scribd.com/document/347865984/President-Donald-Trump-s-letter-to-FBI-Director-James-Comey#download>.

<sup>196</sup> *Id.*

indicated that Comey was terminated because of his handling of the Hillary Clinton email investigation in 2016.<sup>197</sup>

Following Comey's termination, President Trump and his agents offered contradictory statements about the decision. In an interview with Lester Holt of NBC News, the president indicated that he planned to fire Comey regardless of the recommendations of Sessions and Rosenstein, and that Comey had been fired because of the "Russia thing."<sup>198</sup> In January 2018, the president told the Wall Street Journal that he had fired Comey because everyone wanted him fired, and claimed the FBI was a mess.<sup>199</sup> Moreover, President Trump's attorney, Rudy Giuliani, indicated that Comey had been fired because he would not publicly state that the President was not under investigation in the Russia Special Counsel probe.<sup>200</sup> On May 11, 2018, Press Secretary Sarah Huckabee Sanders indicated that Comey's firing had nothing to do with the Russia investigation.<sup>201</sup> On May 31, 2018, President Trump sent a tweet stating the following: "Not that it matters but I never fired James Comey because of Russia! The Corrupt

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<sup>197</sup> Memorandum to Jeffrey Session, Attorney General, United States, from Rod J. Rosenstein, Deputy Attorney General, titled Restoring Public Confidence in the FBI (May 9, 2017), <https://www.documentcloud.org/documents/3711188-Rosenstein-letter-on-Comey-firing.html>.

<sup>198</sup> David Savage, *Trump's Statements Linking Russia Investigation to Comey Firing Could Lead to Legal Problems*, L.A. TIMES (May 13, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-s-statements-linking-russia-1494682462-htmstory.html>.

<sup>199</sup> *Transcript of the Donald Trump Interview with the Wall Street Journal*, WALL ST. J. (Jan. 14, 2018), <https://www.wsj.com/articles/transcript-of-donald-trump-interview-with-the-wall-street-journal-1515715481>.

<sup>200</sup> Michael Schmidt, *Giuliani Contradicts Trump on Comey Firing, Saying Russia Inquiry was a Factor*, N.Y. TIMES, (May 3, 2018), <https://www.nytimes.com/2018/05/03/us/politics/giuliani-comey-firing-trump.html>.

<sup>201</sup> Sarah Huckabee Sanders: Comey firing 'has nothing to do' with Russia probe, NBC NEWS (May 11, 2018), <https://www.nbcnews.com/feature/show-me/video/sarah-huckabee-sanders-comey-firing-has-nothing-to-do-with-russia-probe-941319235536>.

Mainstream Media loves to keep pushing that narrative, but they know it is not true!”<sup>202</sup>

Giuliani had indicated that President Trump might agree to speak with Mueller if the topic of firing Comey and the allegation of protecting Flynn were off the table.<sup>203</sup> In late December 2018, Giuliani indicated that President Trump would not meet with the Special Counsel nor answer any more questions asked of him.<sup>204</sup>

President Trump did answer questions posed to him by the Special Counsel.<sup>205</sup> The Special Counsel accepted written answers in lieu of an appearance.<sup>206</sup> Whether a sitting president must orally testify before a grand jury has never been a question squarely presented to the Supreme Court.<sup>207</sup> Authorities have given differing opinions on the legality of this.<sup>208</sup> President Trump’s

<sup>202</sup> Donald Trump (@realDonaldTrump), TWITTER (May 31, 2018, 5:11 AM), <https://twitter.com/realdonaldtrump/status/1002160516733853696>. The Justice Department has taken the legal position that President Trump’s tweets are “official statements of the President of the United States.” Lorelei Laird, *DOJ Says Trump’s Tweets Are Official Presidential Statements*, A.B.A. J. (Nov. 14, 2017), [http://www.abajournal.com/news/article/government\\_says\\_trumps\\_tweets\\_are\\_official\\_presidential\\_statements/](http://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements/).

<sup>203</sup> Jonathan Swan, *Rudy’s Mueller Demand: No Questions on Flynn, Comey*, AXIOS (Aug. 9, 2018), <https://www.axios.com/rudy-giuliani-donald-trump-robert-mueller-investigation-c99e726f-c889-421e-a694-72206a1618b9.html>.

<sup>204</sup> Allan Smith, *Giuliani: Trump Won’t Give Mueller Any More Written Answers*, NBC NEWS (Dec. 27, 2018), <https://www.nbcnews.com/politics/donald-trump/giuliani-trump-won-t-give-mueller-any-more-written-answers-n952401>.

<sup>205</sup> Michael S. Schmidt and Maggie Haberman, *Trump Answers Mueller’s Questions on Russian Interference*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/trump-mueller-questions-answers.html>.

<sup>206</sup> *Id.*

<sup>207</sup> The President could of course refuse to testify as could any individual, under the 5<sup>th</sup> Amendment. Pete Williams, *Trump Probably Could Not Refuse Mueller Subpoena to Answer Questions*, NBC NEWS (Jan. 8, 2018), <https://www.nbcnews.com/politics/justice-department/trump-likely-could-not-refuse-mueller-subpoena-answer-questions-n835921>.

<sup>208</sup> See Mark Sherman & Eric Tucker, *Can Trump Be Forced to Testify? Legal Precedents Suggest Yes*, ASSOCIATED PRESS (May 2, 2018), <https://www.apnews.com/e955c483fbbf4e069b6e547f043bf57d>; Douglas

lawyers wrote a “confidential” letter to Mueller stating that executive privilege applies to all questions posed by Mueller, and that “under our system of government, the President is not readily available to be interviewed.”<sup>209</sup> Giuliani asserted in an interview that President Trump could not be indicted under any circumstances.<sup>210</sup>

Although no court has directly considered this issue, it seems very probable that Mueller could have legally subpoenaed President Trump to testify before a grand jury. In the *Nixon* case, a unanimous Supreme Court ruled that President Nixon must turn over the tapes in compliance with a subpoena *duces tecum*.<sup>211</sup> It is unlikely that a court would find a distinction between a subpoena for documents and one for testimony. Throughout history, presidents have nearly always voluntarily complied with a grand jury subpoena.<sup>212</sup> Indeed, Starr, the Special Counsel in the Whitewater investigation, served a subpoena on President Bill Clinton.<sup>213</sup> Accordingly, Clinton agreed to voluntarily testify before the grand jury.<sup>214</sup>

If either the presidential communication privilege or the deliberative process privilege applies, the balancing test would favor disclosure of the communications in question. The issue is whether Russia interfered in the 2016 U.S. presidential election, and it would be difficult to find a more compelling public interest.

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Kniec, Opinion, *Trump Can't Be Indicted. Can He be Subpoenaed?*, N.Y. TIMES (June 4, 2018), <https://www.nytimes.com/2018/06/04/opinion/trump-lawyers-indicted-subpoena.html>.

<sup>209</sup> Letter from Kasowitz Benson Torres, LLP to Robert S. Mueller (June 23, 2017), <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html>.

<sup>210</sup> Julia Manchester, *Giuliani: Even if Trump Had Shot Comey, He Could Not Be Prosecuted*, THE HILL (June 3, 2018, 6:28 PM), <https://thehill.com/blogs/blog-briefing-room/news/390486-giuliani-if-trump-shot-comey-he-still-couldnt-have-been>.

<sup>211</sup> See generally *U.S. v. Nixon*, 418 U.S. 683 (1974).

<sup>212</sup> See *Clinton v. Jones*, 520 U.S. 681, 703–704 (1997).

<sup>213</sup> *Clinton Served Subpoena in Lewinsky Inquiry*, ALLPOLITICS (July 26, 1998), <http://www.cnn.com/ALLPOLITICS/1998/07/26/clinton.subpoena/>.

<sup>214</sup> See generally Office of the Independent Counsel, *Testimony of William Jefferson Clinton* (August 19, 1998), <https://www.gpo.gov/fdsys/pkg/GPO-CDOC-105hdoc311/pdf/GPO-CDOC-105hdoc311-3.pdf>.

The presidential communications privilege may presumably cover President Trump's statements and communications directly with his senior staff after his inauguration. As noted above, that privilege is superior to the deliberative process privilege. The deliberative process privilege may cover communications of the Deputy Attorney General. In either case, a balancing test is used in which the need for confidentiality is weighed against the needs of the public. Given the high-profile issues, the privileges would give way to the public interest. Statements prior to the inauguration have never been found privileged.

It is further clear that before a balancing test is applied, there will likely be an argument that the president waived his privileges. With respect to the Comey firing, this is undoubtedly so. First, the president officially waived the privilege when he issued a press statement that the White House was waiving the privilege.<sup>215</sup> Second, if this did not constitute waiving of the privilege, his official and press statements indicating his rationale did. In one case involving the Trump Administration, the District Court stated the following: "The privilege may be inapplicable where the decision-making process is itself at issue."<sup>216</sup> Discussions about whether or not to fire Comey would involve the decision making itself.

Additionally, President Trump also likely waived his executive privilege when he revoked former CIA Director John O. Brennan's (Brennan) security clearance.<sup>217</sup> Although his official statement provides that the revocation was due to "wild outbursts on the internet and television" and "frenzied commentary," he later stated

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<sup>215</sup> See Statement from the Press Secretary, *supra* note 182.

<sup>216</sup> See *Wagafe v. Trump*, No. 17-094RAJ, 2018 U.S. Dist. LEXIS 84934 at \*5 (W.D. Wash. 9th Cir. May 21, 2018).

<sup>217</sup> Statement from the President, Exec. Office of the President (July 26, 2018), [https://content.govdelivery.com/attachments/USWHPO/2018/08/15/file\\_attachments/1055816/Statement%2Bfrom%2Bthe%2BPresident.pdf](https://content.govdelivery.com/attachments/USWHPO/2018/08/15/file_attachments/1055816/Statement%2Bfrom%2Bthe%2BPresident.pdf). (citing the President directing the staff of the National Security Council to implement the revocation of John O. Brennan's security clearance).



in a Wall Street Journal interview that he revoked Brennan's security status because of the Russia investigation.<sup>218</sup>

The crime-fraud exception could potentially also apply. There is no official case in which the crime-fraud exception has been applied to communications otherwise protected by the executive privilege, but it is likely that a court would follow the policy underlying the crime-fraud exception to other privileges. The *Espy* case establishes that in the case of illegal or unethical conduct, the privilege does not apply.<sup>219</sup> Certainly, if President Trump urged Comey to abandon an ongoing FBI investigation of an individual, this is a crime of obstruction. President Trump revoked Brennan's security clearance, and is "evaluating action" on revoking the security clearance of nine other former high-level intelligence officials who were all involved in the investigation of Russian interference in the 2016 election.<sup>220</sup> This may be viewed as further obstruction of justice.

Not all courts agree that the privilege is inapplicable in instances of governmental misconduct.<sup>221</sup> On the other hand, the Supreme Court has stated that "[t]he so-called executive privilege has never been applied to shield executive officers from

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<sup>218</sup> *Id.*; see also Peter Nicholas and Michael C. Bender, *Trump Revokes Ex-CIA Director John Brennan's Security Clearance*, WALL ST. J. (Aug. 15, 2018), <https://www.wsj.com/articles/trump-revokes-ex-cia-director-john-brennans-security-clearance-1534358658>.

<sup>219</sup> *In re: Sealed Case (Espy)*, 121 F. 3d 729, 738 (D.C. Cir. 1997).

<sup>220</sup> The individuals are the following: James Clapper, the former Director of National Intelligence, James Comey, the former FBI Director, Michael Hayden, the former CIA Director, Sally Yates, the former Acting Attorney General, Susan Rice, the former National Security Advisor, Andrew McCabe, the former Deputy FBI Director, Peter Strzok, a former FBI agent, Lisa Page, a former FBI lawyer, and Bruce Ohr, a former Associate Deputy Attorney General. Statement from the President, *supra* note 212; Michael D. Shear and Julian E. Barnes, *Revoking Clearance, Trump Aims Presidential Power at Russia Inquiry*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/us/politics/donald-trump-russia-presidential-power.html>; Blair Guild, *White House Strips Security Clearance from John Brennan*, CBS NEWS (Aug. 15, 2018), <https://www.cbsnews.com/news/john-brennan-former-cia-director-security-clearance-revoked-white-house-today-2018-08-15/>.

<sup>221</sup> *Karnowski v. Trump*, 2018 U.S. Dist. LEXIS 126249, at \*12 (W.D. Wash. July 27, 2018).

prosecution for crime.”<sup>222</sup> President Trump may of course assert executive privilege during any grand jury testimony, but as noted by the Supreme Court in *Nixon*, this privilege is not absolute.<sup>223</sup>

#### IV. PRESIDENTIAL ATTORNEY-CLIENT PRIVILEGE

The concept of attorney-client privilege traveled with the settlers from England to the United States.<sup>224</sup> It is a stronger privilege than the executive privilege.<sup>225</sup> The courts have treated the president “as the client of the Office of the White House Counsel.”<sup>226</sup> Less certain is whether a president has the same attorney-client privilege as that of an ordinary client. Many courts have held that the President does not.<sup>227</sup>

The attorney-client privilege has the following elements:

1. Where legal advice of any kind is sought
2. from a professional legal adviser in his capacity as such,
3. the communications relating to that purpose,
4. made in confidence
5. by the client,
6. are at his insistence permanently protected
7. from disclosure by himself or by the legal adviser,
8. except the protection be waived.<sup>228</sup>

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<sup>222</sup> *Gravel v. U.S.*, 408 U.S. 606, 627 (1972).

<sup>223</sup> *U.S. v. Nixon*, 418 U.S. 683, 706 (1974).

<sup>224</sup> Joseph Pratt, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company's Confidential Information*, 20 NW. J. INT'L L. & BUS. 145, 150 (1999).

<sup>225</sup> Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency after Twenty-Five Years*, 83 MINN. L. REV. 1337, 1381 (1999).

<sup>226</sup> Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 233 (2002).

<sup>227</sup> *In re Lindsey* (Grand Jury Testimony), 158 F.3d 1263, 1280 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997); *In re Witness Before the Grand Jury* (Ryan), 288 F.3d 289, 293 (7th Cir. 2002).

<sup>228</sup> 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. 1961).

The rationale for the privilege is to encourage full and frank disclosure to the attorney.<sup>229</sup> It is to be strictly construed, and confined to its “narrowest possible limits consistent with the logic of its principle.”<sup>230</sup>

In connection with the expanded Whitewater investigation overseen by Starr, Deputy White House Counsel and Assistant to the President Bruce R. Lindsey was subpoenaed to testify before the grand jury.<sup>231</sup> Lindsey declined to answer questions.<sup>232</sup> The Special Counsel moved to compel his testimony, and Lindsey claimed both the executive privilege and the government attorney-client privilege.<sup>233</sup> The Special Counsel argued that the government attorney-client privilege was not absolute.<sup>234</sup> The Court of Appeals for the D.C. Circuit framed the issue as follows: “[W]hether an attorney-client privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others.”<sup>235</sup>

The Court indicated that the president and other members of the Executive Branch are sworn to ensure that laws are faithfully executed.<sup>236</sup> The allegiance of a government lawyer is “complemented” by the public interest.<sup>237</sup> If a president truly wishes to protect his communications with an attorney, he may engage the services of his own private counsel.<sup>238</sup> Due to

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<sup>229</sup> See *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

<sup>230</sup> *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984); see also *Weil v. Investment/Indicators, Research & Mgmt., Inc.* 647 F.2d 18, 24 (9th Cir. 1981).

<sup>231</sup> *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.), 158 F.3d 1263, 1267 (DC Cir. 1998) (unsealed opinion – at the request of then-President Clinton), *cert. denied*, 525 U.S. 996 (1998) (Breyer, J. and Ginsburg, J., dissenting).

<sup>232</sup> *Testing of a President; Excerpts from a Ruling of Compelling Testimony of 3 in Lewinsky Case*, N.Y. TIMES (May 28, 1998), <https://www.nytimes.com/1998/05/28/us/testing-president-excerpts-ruling-compelling-testimony-3-lewinsky-case.html>.

<sup>233</sup> *In re Lindsey*, 148 F.3d at 1103.

<sup>234</sup> *Id.* at 1104.

<sup>235</sup> *Id.* at 1107.

<sup>236</sup> *Id.* at 1108.

<sup>237</sup> *Id.* at 1109.

<sup>238</sup> *Id.* at 1112.

“tradition, common understanding, and our governmental system,” the Court held that the government attorney-client privilege does not apply to testimony before a grand jury.<sup>239</sup>

The Eighth Circuit Court of Appeals reached a similar conclusion in a case in which the Special Counsel sought Hillary Clinton’s notes allegedly related to Whitewater.<sup>240</sup> The Court relied heavily on the *Nixon* opinion and looked to a balancing test.<sup>241</sup> This Eighth Circuit analysis has been controversial, generally because it relied so heavily on *Nixon*, which was not an attorney-client privilege case.<sup>242</sup> The Court determined that there was a governmental attorney-client privilege, but that it did not apply to criminal proceedings of public officials.<sup>243</sup> The Seventh Circuit is in accord in ruling that the government attorney-client privilege does not apply to testimony before a grand jury.<sup>244</sup> That Court stated, “It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.”<sup>245</sup> The leading treatise supports the position that the government attorney-client privilege is unavailable in the criminal context.<sup>246</sup> Material prepared in connection with a crime would be within the crime-fraud exception to the attorney-client privilege in any event.<sup>247</sup>

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<sup>239</sup> *Id.* at 1114.

<sup>240</sup> *In re Grand Jury Subpoena*, 112 F.3d 910, 913 (8th Cir. 1997).

<sup>241</sup> Lisa E. Toporek, “*Bad Politics Makes Bad Law*”: A Comment on the Eighth Circuit’s Approach to the Governmental Attorney-Client Privilege, 86 GEO. L.J. 2421, 2426 (1998).

<sup>242</sup> Michael Stokes Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 476 (1998).

<sup>243</sup> Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75, 95 (2006).

<sup>244</sup> *In re Witness Before the Special Grand Jury 2000-2* (Ryan), 288 F.3d 289, 293 (7th Cir. 2002).

<sup>245</sup> *Id.*

<sup>246</sup> Wright, *supra* note 89, at 5475.

<sup>247</sup> Toporek, *supra* note 241, at 2434.

One Circuit has rejected the reasoning of the three Circuits mentioned above. In *U.S. v. Doe (In re Grand Jury Investigation)*, the former chief legal counsel was subpoenaed by a grand jury to testify about the contents of a conversation she had had with the Governor of Connecticut.<sup>248</sup> The court noted the opinions of the two courts above, but declined to apply a balancing test,<sup>249</sup> finding that “[m]uch uncertainty surrounds the reach of the attorney-client privilege in the context of investigations into public officials.”<sup>250</sup> In fact, the Court found a more compelling need for the attorney-client privilege for government officials.<sup>251</sup> Nonetheless, the U.S. Supreme Court has not yet weighed in on this issue. In fact, in many instances, the issue is covered by the Freedom of Information Act Exemption 5, which applies essentially an attorney-client privilege to “inter-agency or intra-agency memorandums or letters.”<sup>252</sup> Perhaps rather than the attorney-client privilege, the government attorney should be raising the executive privilege.<sup>253</sup> In most jurisdictions, it is more likely that a court would sustain the executive privilege because of the balancing test. In the majority of jurisdictions that have considered it, there is no government attorney-client privilege at all for criminal cases.<sup>254</sup>

It is highly likely that if this issue is raised in the Russian election interference investigation, government officials will be compelled to testify. The investigation is using a number of grand juries.<sup>255</sup> It is also likely that if the government attorney-client privilege is raised in a subpoena dispute, the case will be tried in

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<sup>248</sup> *U.S. v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 528 (2d Cir. 2005).

<sup>249</sup> *Id.* at 535.

<sup>250</sup> *In re Grand Jury Subpoena v. Kitzhaber*, 828 F.3d 1083, 1092 (9th Cir. 2016).

<sup>251</sup> *Doe*, 399 F.3d at 534.

<sup>252</sup> *Baker and Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

<sup>253</sup> See Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 *IND. L. J.* 469, 473 (2002).

<sup>254</sup> *Id.* at 472.

<sup>255</sup> See Del Quentin Wilber and Byron Tau, *Special Counsel Robert Mueller Impanels Washington Grand Jury in Russia Probe*, *WALL ST. J.* (Aug. 3, 2017), <https://www.wsj.com/articles/special-counsel-mueller-impanels-washington-grand-jury-in-russia-probe-1501788287>.

the District Court for the District of Columbia. As noted above, the D.C. Circuit has established law on the government attorney-client privilege before grand juries. Additionally, if the questioned communication predates the inauguration, the privilege does not apply.<sup>256</sup> President Trump's prolific use of social media puts his waiver of any privilege at risk. Express waiver occurs when "confidential communications are disclosed to a party outside the attorney-client relationship," and implied waiver occurs when a client "puts the substance of a confidential communication at issue in litigation" or when he or she voluntarily discloses such communications.<sup>257</sup> In the absence of an attorney-client relationship, it is likely that there is no attorney-client privilege.<sup>258</sup>

Former White House Counsel Donald F. McGahn participated in extensive interviews with Special Counsel Mueller.<sup>259</sup> McGahn resigned his position on October 17, 2018.<sup>260</sup> Reportedly, President Trump's previous personal legal team encouraged full cooperation with the Special Counsel, and waived both the executive privilege and the attorney-client privilege.<sup>261</sup> McGahn's attorney, William

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<sup>256</sup> See EISEN WRIGHT, *supra* note 106, at 18.

<sup>257</sup> *Elat v. Emandopngoubene*, PWG-11-2931, 2013 WL 1146205, at \*4 (D. Md. March 18, 2013).

<sup>258</sup> Donald Trump, Jr. invoked the attorney-client privilege before the House Intelligence Committee in connection with communication with his father. See Haley Britzky, *Trump, Jr. Cites Attorney-Client Privilege to Avoid Russia Questions*, AXIOS (Dec. 6, 2017), <https://www.axios.com/trump-jr-cites-attorney-client-privilege-1512608371-2c54385d-196a-4f4f-9759-cef51e3846e1.html>.

<sup>259</sup> Michael S. Schmidt & Maggie Haberman, *White House Counsel Don McGahn, Has Cooperated Extensively in Mueller Inquiry*, N.Y. TIMES (Aug. 18, 2018), <https://www.nytimes.com/2018/08/18/us/politics/don-mcghahn-mueller-investigation.html>. (detailing that Mr. McGahn resigned in October 2018). Scott Horsley, *White House Lawyer Quits After Helping Trump Put His Mark on the Federal Bench*, NPR (Oct. 26, 2018), <https://www.npr.org/2018/10/17/656945741/white-house-lawyer-quits-after-helping-trump-put-his-mark-on-the-federal-bench>.

<sup>260</sup> Michael S. Schmidt & Maggie Haberman, *McGahn, Soldier for Trump and Witness Against Him, Leaves White House*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/politics/don-mcghahn-leaves-trump-administration.html>.

<sup>261</sup> Shannon Van Sant, *President Trump Attacks Report on White House Counsel's Cooperation with Mueller*, NPR (Aug. 19, 2018),

Burck, issued the following statement: “President Trump, through counsel, declined to assert any privilege over Mr. McGahn’s testimony, so Mr. McGahn answered the Special Counsel team’s questions fulsomely and honestly, as any person interviewed by federal investigators must.”<sup>262</sup> President Trump sent out the following tweet concerning the interviews:

The failing @nytimes wrote a Fake piece today implying that because White House Counsel [sic], he must be a John Dean type of “RAT.” But I allowed him and all others to testify – I didn’t have to. I have nothing to hide . . . .”<sup>263</sup>

President Trump’s reference to John Dean was presumably made to distance his White House counsel’s statements to the Special Counsel from those of John Dean, White House counsel to President Nixon. Dean cooperated with the Watergate prosecutor, and pleaded guilty to obstruction of justice.<sup>264</sup>

President Trump has waived his executive privilege and the attorney-client privilege for McGahn and likely the entire White House Counsel Office. He may not selectively waive the privilege, unless this is provided and agreed to in advance. The Tenth Circuit has stated “privileges cannot be used as both a sword and a shield.”<sup>265</sup> Indeed, “once a party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter.”<sup>266</sup>

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<https://www.npr.org/2018/08/19/640038769/president-trump-attacks-report-on-white-house-counsels-cooperation-with-mueller>.

<sup>262</sup> Schmidt & Haberman, *supra* note 259.

<sup>263</sup> Donald Trump (@realDonaldTrump), TWITTER (Aug. 19, 2018, 4:01 AM), <https://twitter.com/realDonaldTrump/status/1031150465759633408>.

<sup>264</sup> Leslie Oelsner, *Dean Sentenced to 1 to 4 Years in Cover Up Case*, N.Y. TIMES (Aug. 3, 1974), <https://www.nytimes.com/1974/08/03/archives/dean-sentenced-to-1-to-4-years-in-cover-up-case-excounsel-to-nixon.html>.

<sup>265</sup> *Seneca Insurance Co. v. Western Claims*, 774 F. 3d 1272, 1278 (10th Cir. 2014). Interestingly, Justice Gorsuch was on the 10th Circuit panel which decided the case.

<sup>266</sup> *Id.* at 7–8.

Michael D. Cohen was President Trump's personal attorney for approximately ten years.<sup>267</sup> On April 9, 2018, the New York field office of the FBI executed search warrants for Cohen's residence, hotel room, office, safety deposit box, and electronic devices.<sup>268</sup> President Trump filed a motion to intervene in the action, and it was granted by Judge Kimba Wood.<sup>269</sup> Special Counsel Mueller referred the Cohen case to the United States Attorney for the Southern District of New York.<sup>270</sup> Mr. Cohen signed a plea agreement with the Special Counsel's Office in November 2018 and he was sentenced to a two-month prison term and a fine.<sup>271</sup>

President Trump could have attorney-client privilege for his communications with Cohen, despite his claim that the privilege is dead.<sup>272</sup> Due to the sensitivity of the case, District Court Judge Wood appointed a "special master" for privilege issues.<sup>273</sup> Cohen had earlier moved for a temporary restraining order to prevent the government from viewing the communications.<sup>274</sup> Searches of an

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<sup>267</sup> Jonathan Lemire and Jake Pearson, *How Michael Cohen, Trump's 'Image Protector,' Landed in the President's Inner Circle*, BUS. INSIDER (April 11, 2018), <https://www.businessinsider.com/michael-cohen-trump-relationship-2018-4>.

<sup>268</sup> Michael D. Cohen v. U.S., No. 1:18-mj-03161-KMW, (S.D.N.Y. April 13, 2018), <https://www.politico.com/f/?id=00000162-c035-db71-a37e-e4bff8f00001>.

<sup>269</sup> Sonam Sheth, *A Federal Judge Handed Trump and Michael Cohen a Setback After a Wild Day in Court*, BUS. INSIDER (Apr. 17, 2018), <https://www.businessinsider.com/judge-blocks-trump-cohen-request-to-review-documents-seized-by-fbi-2018-4>.

<sup>270</sup> Kevin Breuninger & Mike Calia, *Rosenstein Personally Approved FBI Raid Against Trump Lawyer Michael Cohen: NYT*, CNBC (Apr. 10, 2018), <https://www.cnbc.com/2018/04/10/rosenstein-personally-approved-fbi-raid-against-trump-lawyer-michael-cohen-nyt.html>.

<sup>271</sup> Plea Agreement, U.S. v. Michael Cohen (Nov. 29, 2018), <https://www.justice.gov/file/1115566/download>; *Special Counsel's Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/sco> (last visited Jan. 26, 2019).

<sup>272</sup> Donald Trump, *supra* note 1.

<sup>273</sup> Michael D. Cohen v. U.S., No. 1:18-mj-03161-KMW (S.D.N.Y. Apr. 27, 2018), <https://www.courtlistener.com/docket/6362926/30/in-the-matter-of-search-warrants-executed-onapril-9-2018/>; Michael D. Cohen v. U.S., No. 1:18-mj-03161-KMW (S.D.N.Y. April 13, 2018), <https://www.politico.com/f/?id=00000162-c035-db71-a37e-e4bff8f00001>.

<sup>274</sup> Sheth, *supra* note 269.



attorney's law office or other premises require special "heightened care."<sup>275</sup> Accordingly, the United States Attorney's Office and the FBI have "rigorous protocols" to ensure that the privilege will not be violated.<sup>276</sup>

Special Master Barbara Jones has determined that relatively few documents and files are potentially protected by the attorney-client privilege.<sup>277</sup> The record is sealed, but the small number of protected communications may be due to Cohen providing advice that is not legal advice (as he represented Donald Trump in business matters prior to the election), and the presence of the crime-fraud exception. On July 20, 2018, "the parties withdrew their designations of "privileged as to 12 audio items that were under consideration by the Special Master."<sup>278</sup> These "audio items" are Cohen-taped conversations with President and citizen Trump.

President Trump sent the following tweet after a taped conversation was disclosed: "Inconceivable that the government would break into a lawyer's office (early in the morning) - almost un heard of. Even more inconceivable that a lawyer would tape a client - totally unheard of & perhaps illegal. The good news is that your favorite President did nothing wrong!"<sup>279</sup>

The FBI did not break into Cohen's office; the search was pursuant to a validly issued warrant.<sup>280</sup> Additionally, it is legal in

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<sup>275</sup> Michael D. Cohen v. U.S., No. 1:18-mj-03161-KMW (S.D.N.Y. April 13, 2018).

<sup>276</sup> *Id.*

<sup>277</sup> See Report and Recommendation of the Special Master, Michael D. Cohen v. U.S., No. 1:18-mj-03161-KMW, at \*2 (S.D.N.Y. June 4, 2018), <https://www.courtlistener.com/recap/gov.uscourts.nysd.491943/gov.usCourts.nysd.491943.72.0.pdf>.

<sup>278</sup> Michael D. Cohen v. U.S., No. 1:18-mj-03161-KMW (S.D.N.Y. July 7, 2018), <https://www.courtlistener.com/recap/gov.uscourts.nysd.491943/gov.usCourts.nysd.491943.94.0.pdf>.

<sup>279</sup> Donald Trump (@realDonaldTrump), TWITTER (July 21, 2018, 5:10 AM), <https://twitter.com/realdonaldtrump/status/1020642287725043712>.

<sup>280</sup> Charlie Savage, *Warrants and Privilege: Legal Questions About the Raids on Trump's Lawyer*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/trump-cohen-raids-legal-issues.html>.

New York to tape a conversation as long as one person consents.<sup>281</sup> Further, the American Bar Association indicated that it did not violate attorney ethical obligations to tape a conversation with a client, provided it is not prohibited by law in that jurisdiction.<sup>282</sup> Cohen pled guilty to eight counts filed on August 21, 2018.<sup>283</sup> Mr. Cohen received a three-year prison sentence for the crimes.<sup>284</sup>

President Trump's attorneys waived the attorney-client privilege for 12 of the tapes made by Cohen.<sup>285</sup> The tape that was disclosed referred to potential payments to Playboy model Karen McDougal.<sup>286</sup> When President Trump waived his privilege for the 12 tapes, he may well have waived his privilege for the entire

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<sup>281</sup> *New York Recording Law*, DIG. MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/new-york-recording-law> (last visited Nov. 11, 2018).

<sup>282</sup> *See* ABA Standing Comm'n on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001), [http://www.abajournal.com/images/main\\_images/01-422.pdf](http://www.abajournal.com/images/main_images/01-422.pdf).

<sup>283</sup> Press Release, Michael Cohen Pleads Guilty in Manhattan Federal Court To Eight Counts, Including Criminal Tax Evasion And Campaign Finance Violations, Dep't of Justice (Aug. 21, 2018), <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax>; Plea Agreement, U.S. v. Michael Cohen, 18 Cr. \_\_\_ (WHP), <https://int.nyt.com/data/documenthelper/182-cohen-plea-deal/9bc6cd47e7c48e9f9469/optimized/full.pdf#page=1>.

<sup>284</sup> Benjamin Weiser and William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/michael-cohen-sentence-trump.html>.

<sup>285</sup> Debra Cassens Weiss, *Federal Prosecutors have 12 Cohen Tapes after Trump Waives Privilege*, ABA JOURNAL (July 24, 2018), [http://www.abajournal.com/news/article/federal\\_prosecutors\\_have\\_12\\_cohen\\_tapes\\_after\\_trump\\_waives\\_privilege](http://www.abajournal.com/news/article/federal_prosecutors_have_12_cohen_tapes_after_trump_waives_privilege).

<sup>286</sup> Matt Apuzzo, Maggie Haberman, & Michael S. Schmidt, *Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/michael-cohen-trump-tape.html>.

subject matter.<sup>287</sup> The Federal Circuit does not recognize the selective waiver doctrine.<sup>288</sup>

A court may make a distinction between what is disclosed to the public versus disclosures made in litigation.<sup>289</sup> In the *von Bulow* case, Claus von Bulow allowed his attorney to write a book about his high-profile murder trial.<sup>290</sup> The Court decided that von Bulow waived his privilege for what appeared in the book, but did not waive his privilege for all communication with his attorney.<sup>291</sup> The D.C. Circuit indicated that it considers Dean Wigmore's objective consideration of fairness when considering if the privilege has been waived.<sup>292</sup> President Trump has discussed Cohen's actions numerous times, and it is likely a court would rule that he waived his privilege.

If the attorney-client privilege applies at all, there could still be an exception. His communications with Cohen may well violate the law, and the crime-fraud exception bars any privilege. The Restatement provides the following:

The attorney-client privilege does not apply to a communication occurring when a client:

- (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
- (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.<sup>293</sup>

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<sup>287</sup> See *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

<sup>288</sup> Carla R. Walworth, Mor Wetzler, & Anne S. Bider, *Privilege Law, its Global Application, and the Impact of New Technologies*, Sixth Annual National Institute on E-Discovery, G-25 (2012).

<sup>289</sup> See *In re von Bulow*, 828 F.2d 94, 102 (9th Cir. 1987).

<sup>290</sup> Interestingly, the book's author is Alan M. Dershowitz, who has also written a book defending President Trump. *In re von Bulow*, 828 F.2d at 96; Alexandra Alter & Sydney Ember, *Yet Another Book Takes on Impeachment: This Time, the Case Against*, N.Y. TIMES (July 8, 2018), <https://www.nytimes.com/2018/07/08/books/alan-dershowitz-case-against-impeaching-trump.html>.

<sup>291</sup> *In re von Bulow*, 828 F.2d at 102.

<sup>292</sup> *In re Sealed Case*, 676 F.2d at 81.

<sup>293</sup> Restatement (Third) of the Law Governing Lawyers § 82 (2000).

Although the record is sealed in Cohen's case, he pled guilty to making an illegal campaign contribution.<sup>294</sup> President Trump has indicated the "hush money" payments came from him, but alleged he did not know of the payment's purposes until "later on."<sup>295</sup> Mr Cohen has testified that he made the payments to two women at President (then-candidate) Trump's direction.<sup>296</sup> President Trump sent a tweet in which he stated:

I never directed Michael Cohen to break the law. He was a lawyer and he is supposed to know the law. It is called "advice of counsel," and a lawyer has great liability if a mistake is made. That is why they get paid. Despite that many campaign finance lawyers have strongly . . . .<sup>297</sup>

The U.S. Attorney bears the burden of making a prima facie case that "the client retained the attorney to promote the continuing or intended illegal activity."<sup>298</sup> Given the multiple statements made by President Trump about whether or not payments were made, and whether he knew payments were made, it is likely a court could find that the exception applies. As one scholar has observed, "[i]f there were a conspiracy involving an attorney and a client to conceal the true source or intended use of funds from a federally insured [sic] financial institution in order to help secure financing for a "hush money" payment, there would be no privilege."<sup>299</sup>

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<sup>294</sup> William K. Rashbaum et al., *Michael Cohen Says He Arranged Payments to Women at Trump's Discretion*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html>.

<sup>295</sup> Justin Sink, *Trump Tells Fox He Knew 'Later On' About Hush Money Payments*, BLOOMBERG (Aug. 22, 2018), <https://www.bloomberg.com/news/articles/2018-08-22/trump-tells-fox-he-knew-later-on-about-hush-money-payments>.

<sup>296</sup> William K. Rashbaum, Maggie Haberman, Ben Protess, and Jim Rutenberg, *Michael Cohen Says He Arranged Payments to Women at Trump's Direction*, N.Y. TIMES (Aug 21, 2018).

<sup>297</sup> President Trump Tweet sent Dec. 13, 2017, 5:17 am.

<sup>298</sup> Todd A. Ellinwood, *"In the Light of Reason and Experience": The Case for a Strong Government Attorney –Client Privilege*, 2001 WIS. L. REV. 1291, 1299 (2001).

<sup>299</sup> Andy Wright, *In re the Cohen Raid: The Attorney-Client Privilege & Crime Fraud Exception*, AM. CONSTITUTION SOC'Y (April 19, 2018),

Moreover, the attorney-client privilege applies only to legal advice, not business or investment advice.<sup>300</sup> This is true even if the business advice is provided by a lawyer.<sup>301</sup> However, if legal advice was “one of the significant purposes” of the communication, the communication may be protected.<sup>302</sup> Cohen was Trump’s attorney for many years when he was a private citizen, and President Trump always refers to himself as a businessman,<sup>303</sup> so it is unlikely that a court would find legal advice one of the significant purposes.

President Trump has waived his privilege for many of his otherwise potentially protected communications. These privileges include the broad executive privilege and his attorney-client privilege for both his government lawyers and his private lawyer.<sup>304</sup> The ability to withhold information was raised by our first President and has continued with every administration.<sup>305</sup> With the exception of one Circuit, an administration’s use of the

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<https://www.acslaw.org/acsblog/in-re-the-cohen-raid-the-attorney-client-privilege-crime-fraud-exception/>.

<sup>300</sup> U.S. v. Ruehle, 583 F.3d 600, 608 n.8 (9th Cir. 2009); and Ryan Lucas, *Does FBI Raid on Trump Lawyer Cohen Mean Attorney-Client Privilege is Dead?*, NPR (Apr. 10, 2018), <https://www.npr.org/2018/04/10/601153729/does-fbi-raid-on-trump-lawyer-cohen-mean-attorney-client-privilege-is-dead>.

<sup>301</sup> Pac. Pictures Corp. v. U.S. Dist. Ct, 679 F.3d 1121 (9th Cir. 2012).

<sup>302</sup> *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

<sup>303</sup> Ryan Lessard, *Trump: I’m a Businessman, Not a Politician*, NEW HAMPSHIRE PUBLIC RADIO (June 18, 2015), <http://www.nhpr.org/post/trump-im-businessman-not-politician#stream/0>.

<sup>304</sup> Defendants’ Supplemental Submission and Further Response to Plaintiffs’ Post-Briefing Notices at 2, James Madison Project, *et al.* v. Department of Justice, *et al.*, United States District Court for the District of Columbia, No. 1:17-cv-00144-APM; Sara Cook, *Trump Legal Team Waived Attorney-Client Privilege on Cohen Recording*, CBS NEWS (July 21, 2018), <https://www.cbsnews.com/news/michael-cohen-secret-recording-trump-legal-team-waived-attorney-client-privilege/>; The Editorial Board, *Trump Waives the Privilege, How to Read Don McGahn’s Cooperation with Robert Mueller*, WALL ST. J. (Aug. 19, 2018), <https://www.wsj.com/articles/trump-waives-the-privilege-1534717159>; Jacqueline Thomsen, *Dem Lawmaker: Trump ‘Waiving Executive Privilege’ by Tweeting*, THE HILL (June 16, 2017), <https://thehill.com/blogs/ballot-box/338128-dem-lawmaker-trump-waiving-executive-privilege-by-tweeting>; Laird, *supra* note 202.

<sup>305</sup> Garvey, *supra* note 65.

government attorney-client privilege is severely limited.<sup>306</sup> It is nonexistent in cases of high-level government employee criminal fraud and misconduct.<sup>307</sup> Even in the event a privilege applied in those contexts, it is presumably subject to the exception for crime and fraud. No previously decided case has yet explored the crime-fraud exception under these circumstances because the communications have been deemed unprotected.

An administration may assert the executive privilege, which gives it more protection than the attorney-client privilege. This is because there are no hard and fast rules concerning when this privilege is raised. As the groundbreaking *Nixon* case established, the court must perform a balancing test and weigh the need of the executive with the needs of the public.<sup>308</sup> The deliberative process type of executive privilege is weaker than the presidential communication privilege, but both are subject to a balancing test.<sup>309</sup>

## CONCLUSION

In the Special Counsel investigation into Russian interference with the 2016 presidential election, the public's need for information is compelling. Attempts to persuade courts that the appointment of Special Counsel Mueller is unconstitutional or beyond Deputy Attorney General Rosenstein's authority have been uniformly unsuccessful.<sup>310</sup> Much of the communication that may

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<sup>306</sup> See *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998); David B. Leland, *Attorney-Client Privilege*, 68 GEO. WASH. L. REV. 598 (2000); Adam M. Chud, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999); Kerri R. Blumenuauer, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75 (2006); Michael W. Glenn, *Principles, Politics, and Privilege: How the Crime Fraud Exception Can Preserve the Strength of the Attorney-Client Privilege for Government Lawyers and Their Clients*, 40 FORDHAM URB. L. J. 1447 (2013).

<sup>307</sup> *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002).

<sup>308</sup> *United States v. Nixon*, 418 U.S. 683, 711 (1974).

<sup>309</sup> *In re Sealed Case (Espy)*, 121 F.3d 729, 746 (D.C. Cir. 1997).

<sup>310</sup> *United States v. Manafort*, 321 F. Supp. 3d 640, 653 (E.D. Va. 2018); Memorandum Opinion, *In re Grand Jury Investigation* (Grand Jury Action No.

be at issue occurred before President Trump was inaugurated.<sup>311</sup> Thus far, executive privilege has never been claimed for presidential communication taking place before the president was sworn in.

President Trump tweeted that the attorney-client privilege is dead. He is incorrect. The president has an attorney-client privilege like any other individual. Just as with any individual, the privilege may be waived, and it does not apply to conversations in which the president requests assistance to engage in a crime or fraud, or uses the advice to engage in a crime or fraud. If President Trump and his former lawyer communicated about a transaction that violates federal election law, the privilege does not apply. Overall, it is unlikely that any privileges apply to the communications currently under investigation, although Special Counsel Mueller and his team have not disclosed the extent of their investigation to the public. Only time will tell.

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18-34-BAH), [www.dcd.uscourts.gov/sites/dcd/files/REDACTED\\_In\\_re\\_GJ\\_18-gj-34\\_MEM\\_OP\\_20180802\\_FINAL.pdf](http://www.dcd.uscourts.gov/sites/dcd/files/REDACTED_In_re_GJ_18-gj-34_MEM_OP_20180802_FINAL.pdf).

<sup>311</sup> See Larry Buchanan & Karen Yourish, *The Russia Meeting at Trump Tower was to Discuss Adoption. Then it Wasn't. How Accounts have Shifted*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/interactive/2018/08/06/us/politics/trump-tower-russia-meeting.html>; Karen Yourish & Larry Buchanan, *Trump and His Associates Had More than 100 Contacts with Russians Before the Inauguration*, N.Y. TIMES (Jan. 26, 2019), <https://www.nytimes.com/interactive/2019/01/26/us/politics/trump-contacts-russians-wikileaks.html>; Clifford v. Trump, No. BC 696568 (C.D. Cal. October 15, 2018), <https://www.politico.com/f/?id=00000166-79ef-d3f0-a1f7-ffefca860002> (detailing an alleged incident involving Donald Trump that took place in 2011). The Trump Foundation has been operating since 1987 and is being sued by New York State. See generally Danny Hakim, *New York Attorney General Sues Trump Foundation after 2-Year Investigation*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/nyregion/trump-foundation-lawsuit-attorney-general.html>; Doug Stanglin & Kevin McCoy, *N.Y. Supreme Court Clears the Way for State Lawsuit Against Trump Foundation*, USA TODAY (Nov. 23, 2018), <https://www.usatoday.com/story/news/2018/11/23/trump-foundation-n-y-judge-says-suit-against-group-may-proceed/2093488002/>; David Barstow, Susanne Craig, & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from his Father*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html>.