AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Executive Privilege

*Bradley Weinsheimer*, **Testimonial Privileges before Congress of Former Justice Department Officials** (2021)[[1]](#footnote-1)

*Jeffrey Rosen served as the deputy attorney general and acting attorney general during the Trump administration. Early in the Biden administration, the House Oversight Committee and Senate Judiciary Committee requested that Rosen provide testimony regarding his service in the government relating to any efforts by the president or administration officials to challenge or cast doubt on the results of the 2020 presidential election. Those committees sought testimony on the same subject from other senior members of the Department of Justice during the final weeks of the Trump administration.*

*Bradley Weinsheimer, the associate deputy attorney general in the Biden administration, sent letters to each of those former officials providing the administration’s view of the extent to which executive privilege continued to apply. The Biden administration was willing to waive executive privilege for purposes of answering a limited set of questions on this extraordinary matter, but insisted that traditional privileges should otherwise be respected by Rosen when answering questions from the congressional committees.*

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Department attorneys, including those who have left the Department, are obligated to protect non-public information they learned in the course of their work. Such information could be subject to various privileges, including law enforcement, deliberative process, attorney work product, attorney-client, and presidential communication privileges. The Department has a longstanding policy of closely protecting the confidentiality of decision-making communications among senior Department officials. Indeed, the Department generally does not disclose documents relating to internal deliberations. For decades and across administrations, however, the Department has sought to balance the Executive Branch’s confidentiality interests with Congress’s legitimate need to gather information.

The extraordinary events in this matter constitute exceptional circumstances warranting an accommodation to Congress in this case. Congress has articulated compelling legislative interests in the matters being investigated, and the information the Committees have requested from you bears directly on Congress’s interest in understanding these extraordinary events: namely, the question whether former President Trump sought to cause the Department to use its law enforcement and litigation authorities to advance his personal political interests with respect to the results of the 2020 presidential election. After balancing the Legislative and Executive Branch interests, as required under the accommodation process, it is the Executive Branch’s view that this presents an exceptional situation in which the congressional need for information outweighs the Executive Branch’s interest in maintaining confidentiality.

The Executive Branch reached this view consistent with established practice. Because of the nature of the privilege, the Department has consulted with the White House Counsel’s Office in considering whether to authorize you to provide information that may implicate the presidential communications privilege. The Counsel’s Office conveyed to the Department that President Biden has decided that it would not be appropriate to assert executive privilege with respect to communications with former President Trump and his advisors and staff on matters related to the scope of the Committees’ proposed interviews, notwithstanding the view of former President Trump’s counsel that executive privilege should be asserted to prevent testimony regarding these communications. . . .

Therefore, given these extraordinary circumstances, including President Biden’s determination on executive privilege, and having reviewed the scope of the Committees’ requested interviews, the Department authorizes you to provide unrestricted testimony to the Committees, irrespective of potential privilege, so long as the testimony is confined to the scope of the interviews as set forth by the Committees. . . . The accommodation is unique to the facts and circumstances of this particular matter and the legislative interests that the Committees have articulated. . . .

Consistent with appropriate governmental privileges, the Department expects that you will decline to respond to questions outside the scope of the interview as outlined above. . . .

Please note that it is important that you not discuss Department deliberations concerning investigations and prosecutions that were ongoing while you served in the Department. The Department has a longstanding policy not to provide congressional testimony concerning prosecutorial deliberations. If prosecutors knew that their deliberations would become “subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or, just as troubling, that they might err on the side of prosecution simply to avoid public second-guessing.” . . .

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1. Excerpt taken from Bradley Weinsheimer, Letter to Jeffrey Rosen and Others Regarding Testimony before House Oversight Committee (July 26, 2021). [↑](#footnote-ref-1)