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EXECUTIVE PRIVILEGE WON'T SAVE TRUMP FROM HOUSE INQUIRY

The president's ability to protect his sensitive discussions doesn't apply to his campaign or informal advisers.

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President Donald Trump [has indicated that he may not want to comply](#) with a series of 81 requests sent by the House Judiciary Committee as part of [a strategy of full-on investigation](#) of the president and his associates.

His reaction is understandable, but his ability to resist is much more limited than he seems to think.

If the House committee issues subpoenas, as opposed to simple requests, the addressees will have a duty to comply unless the information falls within the zone of a legally recognized privilege. And the relevant possibilities, executive privilege and attorney-client privilege, don't apply widely.

Executive privilege, as explained by the courts, applies only to communications between the president and his official senior advisers, occurring while he is president. That excludes unofficial advisers such as Trump's adult sons. It also excludes communications during the presidential campaign and probably also during the transition.

Attorney-client privilege applies to communications between the president and his personal lawyers. But it may not apply to government lawyers, including former White House counsel Donald McGahn, who work for the government and don't represent the president personally.

So far, the Judiciary Committee is only asking for voluntary cooperation, which anyone can refuse. But that's probably just politeness. The committee has the power to issue subpoenas.

A legislative subpoena has much the same effect as a subpoena issued by a court. The Latin word itself means, essentially "under threat of punishment." The recipient of the subpoena has to show up and answer questions, or else will be found in contempt of Congress, and can be fined or even jailed.

The only way to avoid answering questions once you've been subpoenaed is to assert what's called a "privilege." The most famous comes from the Fifth Amendment right against self-incrimination. A person called before Congress can "take the Fifth," just like a witness in a criminal trial. That entails saying that you won't answer questions on the ground that your answers might incriminate you — that is implicate you in a crime.

Many alleged Communists or fellow travelers called before the House Un-American Affairs Committee early in the Cold War invoked this option instead of naming names. That action was arguably heroic.

In contrast, if, for example, Donald Trump Jr. or Eric Trump took the Fifth in front of Congress, that would come close to acknowledging their involvement in whatever criminal activity the committee is asking about.

Some government officials called before the House Judiciary Committee could be directed by the president to invoke executive privilege. The idea behind this doctrine is that the president has constitutional authority as the executive to perform the core tasks of his office in an effective way. To do so, he needs advice. Consequently, his communications with senior advisers are shielded from Congress.

This idea goes all the way back to George Washington, who told Congress he wouldn't disclose his correspondence with U.S. diplomats who were negotiating with foreign powers, even after the fact.

In the modern era, the U.S. Supreme Court recognized some scope for executive privilege in a 1974 decision, [U.S. v. Nixon](#). In that landmark case, the court refused to treat Richard Nixon's White House tapes as privileged, and required him to turn them over to the court that was hearing the criminal case against a group of Nixon advisers connected to the coverup of the Watergate break-in. In reaching this conclusion, the court weighed the interests of the rule of law and criminal justice against the president's need for confidentiality.

In rendering its judgment, the Supreme Court spoke of "the president's acknowledged need for confidentiality in the communications of his office." That need applies to the advice the president gets in his official capacity — while in office. There's no precedent saying that this privilege should extend to the president's unofficial advisers, including his family members. Any advice sought from them is unofficial, and logically outside the privilege.

The same goes for communications that took place before Trump took office: The president can't have official communications when he isn't yet the president. Trump could conceivably try to argue that communications during the transition period after the election but before inauguration should be privileged, because during that time the president is preparing himself for office. But that argument wouldn't fit the Supreme Court's paradigm.

The upshot is that Trump's cabinet members or other government officials could claim executive privilege regarding communications with the president while he was president. But that doesn't include anyone from the Trump Organization, or anyone involved in the campaign or transition, or unofficial advisers like Corey Lewandowski, who never worked in the administration.

Then there are the lawyers. Trump's personal lawyers enjoy attorney-client privilege. That privilege, however, disappears when a client plans a crime with his lawyer. That's the main reason Michael Cohen, Trump's erstwhile lawyer, was able to testify in court and before Congress about his communications with Trump.

As for government lawyers like the White House counsel and Ty Cobb, who worked for the White House to coordinate the presidential response to investigations, the law is more complicated. The Supreme Court has never expressly decided whether government lawyers, who don't work for the president personally but for the people of the U.S., are subject to attorney-client privilege.

The federal appeals courts that have ruled on the issue have [split](#), with three, including the U.S. Court of Appeals for the D.C. Circuit, saying there's no attorney-client privilege, and one appellate court, the 2nd Circuit, saying there can be.

The weight of authority is therefore that Trump won't enjoy attorney-client privilege when it comes to communications with McGahn. In any event, Trump in the past has said that he instructed McGahn to speak freely to Robert Mueller's investigation. That likely waived any privilege he might have had.

So expect the House Democrats' investigation strategy to proceed apace, no matter what Trump tries to do to limit it. The game's afoot.