TWENTY-FIVE: THE TRUMP FAMILY MEMBER AND OTHER ATTORNEY-CLIENT DELUSIONS

On January 9, I did a post noting that at least 25 of the known witnesses or subjects of the January 6 investigation into Trump were attorneys.

In a filing yesterday, DOJ said the same thing: At least 25 witnesses, including one member of Trump's family, withheld testimony or documents based on an attorney-client claim.

> During the course of the Government's investigation, at least 25 witnesses withheld information, communications, and documents based on assertions of the attorney-client privilege under circumstances where the privilege holder appears to be the defendant or his 2020 presidential campaign. These included co-conspirators, former campaign employees, the campaign itself, outside attorneys, a non-attorney intermediary, and even a family member of the defendant.

To be clear, we're measuring two different things: for example, while the two Pats — Cipollone and Philbin — as well as Mike Pence's counsel, Greg Jacob, withheld testimony in their first grand jury appearances, that was based at least partly on an Executive Privilege claim, one prosecutors ultimately overcame, not exclusively on their role as White House lawyers.

And I know I missed a bunch of people who invoked attorney-client privilege. For example, Bernie Kerik — who I didn't count in my list — withheld documents until forced to share them in the Ruby Freeman lawsuit, based on a claim that

his work as a researcher was attorney work product. The Georgia indictment alerted me that I had missed accused Trump co-conspirator Robert Cheeley — and there are probably attorneys in all the other swing states I missed too. I didn't count the campaign itself. I sure as hell didn't count any family member (I wonder if the big gap in the January 6 indictment where Ivanka should be is there based off a claim she was acting at the direction of Eric Herschmann, though Herschmann seems to have offered far more cooperation than Ivanka did).

However you count it, though, it's a breathtaking number, one rarely taken into account by the TV lawyers wailing because it took so long to charge Trump.

And charge Trump alone.

That's something I kept thinking about as I read this filing: Thus far, not even Trump's alleged co-conspirators — all of whom might make an attorney-client claim (even Mike Roman might be that non-lawyer intermediary, though I think it more likely Boris Ephsteyn is CC6) have been charged.

The government's argument itself makes a lot of sense. For example, it enumerates that Trump or his attorneys have claimed they'll rely on an advice of counsel defense at least seven times.

> 1 Fox News, Aug. 1, 2023, at minute 3:03, available at https://www.foxnews.com/video/6332255292112.
>
> 2 CNN, Aug. 1, 2023, at minute 2:20, available at https://www.youtube.com/watch?v=GW7Bixvkpc0.
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> 3 NPR All Things Considered, Aug. 2, 2023, available at https://www.npr.org/2023/08/02/1191627739/trump-charges-indictment-attorney-jan-6-probe.

> 4 Meet the Press (NBC), Aug. 6, 2023, available at https://www.nbcnews.com/meet-thepress/meet-press-august-6-2023-n1307001.
>
> 5 Face the Nation (CBS), Aug. 6, 2023, at minute 24:11, available at https://www.cbsnews.com/news/face-the-nation-full-transcript-2023-08-06/.
>
> 6 CNN, Aug. 6, 2023, at minute 7:58, available at https://www.cnn.com/videos/politics/2023/08/06/sotu-lauro-full.cnn.
>
> 7 Donald Trump interview with Tucker Carlson, Aug. 23, 2023, at minute 34:35, available at https://twitter.com/TuckerCarlson/status/1694513603251241143?lang=en.

The government lays out precedent stating that Trump would have to waive privilege over and share communications that support his advice-of-counsel defense, but also communications over which he and the lawyer are currently shielding behind a privilege claim that would undermine it.

> In invoking the advice-of-counsel defense, the defendant waives attorney-client privilege on all communications concerning the defense. See White, 887 F.2d at 270; United States v. Crowder, 325 F. Supp. 3d 131, 137 (D.D.C. 2018). Accordingly, once the defense is invoked, the defendant must disclose to the Government (1) all "communications or evidence" the defendant intends to rely on to establish the defense and (2) any "otherwise-privileged communications" the defendant does "not intend to use at trial, but that are relevant to proving or undermining" it. Crowder, 325 F. Supp. 3d at 138 (emphasis in original). See United States v. Stewart Rhodes, 22- cr-15

> (D.D.C.), ECF No. 318 at 2 (quoting Crowder); Dallman, 740 F. Supp. 2d at 814 (waiver is for "information defendant submitted to the attorney on which the attorney's advice is based, the attorney's advice relied on by the defendant, and any information that would undermine the defense"); United States v. Hatfield, 2010 WL 183522, at *13 (E.D.N.Y. Jan. 8, 2010) ("This disclosure should include not only those documents which support [defendants'] defense, but also all documents (including attorney-client and attorney work product documents) that might impeach or undermine such a defense."); United States v. Scali, 2018 WL 461441, at *8 (S.D.N.Y. Jan. 18, 2018) (quoting Hatfield).

Given that Trump would have to identify exhibits on which he would rely for an advice of counsel defense by December 18, the government argues, he should have to also identify the specifics of any advice of counsel defense by that date as well.

> Given the potential number of attorneys and breadth of advice involved, the defendant's notice should describe with particularity the following: (1) the identity of each attorney who provided advice; (2) the specific advice given, including whether the advice was oral or written; (3) the date on which the advice was given; and (4) the information the defendant communicated or caused to be communicated to the attorney concerning the subject matter of the advice, including the date and manner of the communication.

It makes this argument while also noting something that doesn't, per se, support its case: that DOJ has already told Trump what these 25 people — and it invokes John Eastman, the

person most often mentioned in Trump's public claims of a advice of counsel defense, by caption — have identified in privilege logs.

> In addition to having publicly advanced the defense, the defendant knows what information the Government has—**and does not have**—that might support or undermine the defense. The Government produced in discovery the privilege logs for each witness who withheld material on the basis of a claim of privilege on behalf of the defendant or his campaign, and in some cases the defendant's campaign was directly involved in discussions regarding privilege during the course of the investigation. In other instances, the Government produced court orders requiring the production of material claimed to be privileged. Compelling the defendant to provide notice, and thereby discovery, would be reciprocal of what the Government already has produced. For example, defense counsel publicly identified one attorney on whose advice the defense intends to rely at trial, and the Government has produced in discovery substantial evidence regarding that attorney and his advice, including relevant search warrant returns.8 Any material relevant to that attorney's advice that remains shielded by the attorney-client privilege should be produced to the Government at the earliest date to avoid disruption of the trial schedule.
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> 8 That same attorney asserted an attorney-client privilege with the defendant and his campaign to shield material from disclosure to Congress. See Eastman v. Thompson, Case No. 8:22-cv-00099 (C.D. Cal.), ECF No. 260 at 15 ("The evidence clearly supports an attorney-client relationship between President Trump, his campaign, and [plaintiff] during January 4-7, 2021.").

> [my emphasis]

Whatever else this motion is — and on its face it makes a lot of sense — it would also provide a means for DOJ to sort through some of the privilege logs it is looking at, and at least in the case of Eastman (if Trump indeed invoked his counsel as a defense) to breach those privilege claims and even obtain communications it does not yet have. Particularly given Clarence Thomas' recusal on Eastman's recently rejected cert petition, Eastman might have unidentified communications of particular interest.

Advance notice would also force Trump to rule out relying on the advice of others, like Rudy or Sidney Powell, as a defense, something that might make charges against them more viable.

I don't imagine that DOJ would add any of Trump's co-conspirators to his indictment so long as Trump's trial happened before the election. They could always charge others separately, but so long as Trump had a chance of returning to the presidency, the only reason to do so would be if there were a legitimate hope of flipping the person or if it would make Trump's alleged crimes more damaging politically. Trump has pardoned his way out of problems in the past and DOJ has to assume he would again, given the opportunity.

But in addition to making a solid case that Judge Chutkan should make Trump declare his intentions in December, this filing also admits that attorney-client privilege claims continue to blind DOJ to some of the universe of related communications pertaining to January 6.