



Beyond January 6th: White House Confidentiality and Congressional Investigations

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One significant aspect of the recent hearings held by the [House Select Committee to Investigate the January 6th Attack on the United States Capitol](#) (Committee) has been the frequency and prevalence of testimony by White House staffers and executive branch officials about private conversations and interactions they had with each other and sometimes directly with then-President Donald Trump. Presidential advisers [have testified to congressional committees before](#)—both voluntarily and under compulsion—but rarely has Congress been given such a clear window into the inner workings of the White House during a time of crisis. Recent history provides a number of high-profile [examples](#) of Congress [struggling](#) to obtain information from the White House and other executive branch officials regarding presidential decisions and actions.

The Committee’s recent successes are likely due to a combination of political, legal, and practical factors. One salient factor contributing to the Committee’s robust and timely access to relevant evidence appears to have been a series of decisions by the Biden Administration, all of which have prioritized transparency and accountability over the confidentiality of executive branch communications. These include

- the decision [not to invoke](#)—or support former President Trump’s invocation of—executive privilege over White House communications and documents relevant to the Committee’s investigation;
- the decision to [indict](#) and [prosecute](#) Stephen Bannon and [Peter Navarro](#) for criminal contempt of Congress based on their failure to comply with Committee subpoenas; and
- the decision to [reject](#) asserted claims of absolute testimonial immunity for former advisers to former Presidents in favor of “a form of *qualified* immunity.”

Each of these decisions has contributed, or likely will contribute, to the Committee’s ability to obtain information necessary to carry out its [mandate](#), either by removing obstacles for those willing to cooperate with the Committee’s investigation or by weakening defenses for those unwilling to cooperate. With the Committee’s investigation possibly—[though not necessarily](#)—approaching a conclusion, it is not entirely clear how these developments in the law and practice of executive privilege, contempt of

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Congress, and testimonial immunity will impact future congressional investigations. Ultimately, it is possible that these developments may not substantially impact Congress's ability to access internal White House communications outside the unique January 6th context.

Overview of Biden Administration Actions

The Biden Administration has taken several actions that appear to have assisted the Committee in obtaining information regarding the events of January 6th.

First, President Biden did not support former President Trump's attempts to use executive privilege to restrict the Committee's access to both White House [documents](#) and the [testimony](#) of certain former White House advisers. This decision effectively removed a possible hurdle to the Committee obtaining information from a variety of sources. For example, after former President Trump attempted to use executive privilege to block the National Archives and Records Administration (National Archives) from providing the Committee with relevant presidential documents, President Biden [determined](#) that under these "unique and extraordinary circumstances," asserting executive privilege over the requested documents would not be "in the best interests of the United States." He therefore [notified](#) the National Archives that he would "not uphold the former President's assertion of Privilege." In the ensuing litigation—which ultimately resulted in a court order directing the National Archives to turn the requested documents over to the Committee—the [D.C. Circuit](#) reasoned that President Biden's determination that it was not in the public's interest to assert executive privilege "carries immense weight in overcoming the former President's" claim. President Biden has made [similar determinations](#) for the use of executive privilege by former advisers to President Trump.

Second, the Department of Justice (DOJ) has brought criminal actions against certain individuals for their failure to comply with Committee subpoenas. These [indictments](#) and prosecutions both seek to punish the specific witness and may deter others from following a similar path of noncompliance. Reported widely in media outlets, DOJ recently obtained a [conviction](#) of Stephen Bannon—a private citizen who, in that capacity, appears to have helped advise former President Trump on matters relating to January 6th—for criminal contempt of Congress. DOJ has also [indicted](#) former White House trade adviser Peter Navarro for his refusal to comply with Committee subpoenas. Navarro's trial is scheduled to begin in November.

Third, and most recently, DOJ has rejected assertions that its own doctrine of [absolute testimonial immunity](#) for close presidential advisers continues to apply after a President leaves office. Absolute immunity refers to the executive branch's belief that certain presidential advisers cannot be compelled to appear at a congressional hearing to testify about their official duties. The DOJ Office of Legal Counsel (OLC) has previously reached this determination for both [current](#) and [former](#) advisers to a sitting President. However, in a [brief](#) submitted as part of litigation between former Chief of Staff Mark Meadows and the Committee, the DOJ stated that "the Department does not believe that the absolute testimonial immunity applicable to such an adviser continues after the President leaves office." Instead, any "relevant constitutional concerns are lessened" and the adviser enjoys only a "form of qualified immunity." DOJ then concluded that the Committee had sufficiently justified its need for Meadows's testimony to overcome that qualified immunity.

Impact of Biden Administration Actions

Each of these decisions has arguably improved the Committee's ability to access information relevant to its investigation. The Committee's receipt of documents and testimony revealing internal White House communications and deliberations also has value as a historical precedent and may be used by future congressional committees to support access to similar information in new and subsequent investigations. Still, each decision was made in a fact-specific context, and none substantially shifted existing executive

branch policy vis-a-vis Congress. In the long term then, and as discussed below, it is unclear whether these recent precedents will open the door to repeat access to internal White House communications.

Executive Privilege

President Biden neither used [executive privilege](#) nor affirmed former President Trump's use of executive privilege to hinder the Committee's access to internal White House communications. These decisions aided the Committee's ability to obtain a fuller picture of White House discussions and decisions during and around January 6th. However, the President's decisions on executive privilege were not based on a lack of legal authority (i.e., the President did not determine that executive privilege was not legally available), nor did his decisions appear to alter how the executive branch thinks about congressional requests for potentially privileged information. Instead, the decisions were [effectively a limited waiver](#) of executive privilege for specific documents and specific testimony made under "unique and extraordinary circumstances."

Some brief legal context may shed greater light on the possible future impact of President Biden's decisions on [executive privilege](#). The courts have said little about executive privilege disputes between Congress and the President. What [legal doctrine does exist](#) suggests that such disputes should be resolved by political negotiations, or as a last resort, by the courts through a fact-based balancing test that weighs the President's need for confidentiality against Congress's need for disclosure.

President Biden's executive privilege determinations appear to have occurred within the context of this balancing test, with his reasoning affecting both sides of the scale. In the President's view, the [Committee's need](#) was "compelling" given the "extraordinary," "horrific," and "unprecedented" events of January 6th. The executive branch's interest in confidentiality was simultaneously [diminished](#), it was argued, because "the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities." The D.C. Circuit's [decision](#) on the dispute over former President Trump's presidential documents also appears to have relied heavily on both the House's "uniquely weighty interest" in investigating the causes of January 6th, and that the House and President Biden were in agreement that the documents should be turned over. Whether future congressional investigations, perhaps into more "typical" White House deliberations, will be treated similarly remains to be seen. A new investigation with new requests could call for a new balancing of the interests at stake and a new assessment by the executive branch that may not be as favorable to Congress's investigative interests.

Prosecution for Criminal Contempt of Congress

DOJ's indictment of Navarro and prosecution of Bannon may have deterred some other witnesses from taking a similar, uncooperative approach to Committee subpoenas. While Bannon was a private citizen at the time in question, the indictment of Navarro, who was a White House adviser, represents a rare instance of DOJ indicting a current or former government official for criminal contempt of Congress. There is a [long history](#) of DOJ refusing to present contempt citations against executive branch officials to a grand jury. This pattern has been the case despite the existence of statutory language stating that the DOJ has a "[duty](#)" to do so when either house of Congress holds an individual in contempt.

As with executive privilege, it is not clear whether DOJ's recent enforcement of the criminal contempt of Congress provision will have a substantial impact on future conflicts. It does not, for example, appear that DOJ has altered its [position](#) that it retains the sole authority to determine whether to seek an indictment for criminal contempt of Congress. That DOJ continues to view contempt of Congress prosecutions as an individualized, discretionary determination like any other prosecutorial decision can be inferred from indications that while indicting Bannon and Navarro, DOJ [reportedly](#) will not seek an indictment of the

two other former White House officials held in contempt by the House during the Committee's investigation: former Chief of Staff Mark Meadows and former Deputy Chief of Staff Dan Scavino.

DOJ has not released an explanation for these declinations. As some [commentators](#) have suggested, a DOJ decision not to seek an indictment of Meadows despite explicitly [concluding](#) that he does not possess testimonial immunity could even suggest a broadening of DOJ's perceived discretion in whether to enforce the criminal contempt of Congress statute. In the [past](#), DOJ has [said](#) that it will not seek an indictment for criminal contempt of Congress when a witness appears to possess a valid constitutional defense to the subpoena—for example, when a witness asserts executive privilege at the behest of a sitting President or has invoked his or her right against self-incrimination. Given that President Biden has not invoked executive privilege, DOJ has rejected the existence of Meadows's testimonial immunity, and Meadows has not asserted his privilege against self-incrimination, no such constitutional defense appears to be at play here. Further, as the [Committee has noted](#), it is not clear how to distinguish Meadows and Scavino from Navarro, for all appear to have been close presidential advisers. There has been some [speculation](#) by commentators that the enforcement decisions may relate to the different levels of engagement with the Committee: Navarro effectively rebuffed the Committee, while Meadows and Scavino initially [cooperated](#) with the Committee's demands. Meadows, for example, provided the Committee with access to his text messages, which have played a sizable role in the Committee's hearings.

Testimonial Immunity for Presidential Advisers

The DOJ's recent decision [not to extend](#) its theory of absolute testimonial immunity to close advisers of a former President may also ease the Committee's access to testimony by making clear that DOJ will not treat advisers to former President Trump the same as advisers to a sitting President. As with executive privilege and contempt of Congress, this decision does not appear to represent a substantial alteration to existing executive branch policy.

Testimonial immunity is a [much-debated](#) executive branch theory. OLC has asserted its immunity doctrine "on more than a dozen occasions, over the course of the last eight presidential administrations," and each time the relevant congressional committee objected. In several instances, the House responded by either holding the adviser in contempt of Congress for failure to appear or filing a [civil lawsuit](#) to enforce the subpoena.

Although these disagreements have never been fully resolved by the courts, the two judicial opinions that have looked at [the immunity issue](#), albeit only at the district court level, have agreed with Congress and done so in rather strong language: calling the doctrine "[entirely unsupported](#)" and a "[fiction](#)" that does not exist. What judges in these cases have suggested is that presidential advisers should appear before the requesting committee, answer appropriate questions, and [assert executive privilege as needed](#) on specific questions. Despite opposition from Congress and the judicial statements mentioned above, the executive branch has continued to hold its position that senior presidential advisers enjoy absolute immunity from congressional testimony.

The DOJ has not withdrawn or amended any previously issued OLC opinions on the immunity question. Absolute testimonial immunity, at least from the executive branch's perspective, continues to apply with full force to current and former advisers of a sitting President.

The DOJ has now [concluded](#) in a court filing that once a President leaves office, former advisers do not continue to enjoy the protections of absolute immunity. In this sense, the DOJ refused to extend its absolute immunity doctrine beyond its current limits. However, the DOJ brief could also be read as an expansion of its immunity doctrine. The DOJ had never addressed what form of immunity, if any, advisers to former Presidents may possess. Now, however, the DOJ believes that these advisers do receive protections in the form of qualified, rather than absolute, immunity. Even under this "qualified immunity"

doctrine, Congress may only obtain the testimony it seeks when it has made a “sufficiently strong showing of need.” The strength of Congress’s showing of need would appear to be evaluated, at least in the first instance, by the executive branch. As a result, even the DOJ’s vision of *qualified* immunity may give a witness *absolute* protections from compelled congressional testimony in some cases.

Conclusion

The Biden Administration has made a variety of decisions that appear to have aided the Committee in its ability to obtain documents and testimony reflecting internal White House communications related to January 6th. These decisions, however, do not appear to have made substantial alterations to existing executive branch policies on executive privilege, the enforcement of contempt of Congress citations, or the executive’s theory of absolute testimonial immunity for close presidential advisers. As such, the degree to which the precedents set during the Committee’s investigation will impact the ability of future and unrelated congressional investigations to obtain similar levels of access to internal White House communications remains uncertain.

Author Information

Todd Garvey
Legislative Attorney

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