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UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS

Misc. Action No. 98-278

UNDER SEAL**FILED**

AUG 11 1998

IVANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM ORDER

Lanny Breuer, Special Counsel to the President of the United States, has refused to answer certain questions before a grand jury, asserting both the governmental attorney-client privilege and executive privilege. At a hearing on August 4, 1998, the Office of Independent Counsel ("OIC") orally moved to compel Mr. Breuer's testimony.¹ The Court then ordered the OIC to submit materials that show its need for the evidence claimed to be covered by the executive privilege.

Preliminarily, the Court finds that the doctrine of collateral estoppel does not prevent Mr. Breuer and the Office of the President ("the White House") from asserting executive privilege. It is true that Bruce Lindsey asserted executive privilege in a previous matter before this Court and that the Court found that the executive privilege applied but was overcome by the OIC's showing of need. While choosing not to appeal that ruling, the White House now seeks to litigate some of the same issues again, including the OIC's need for privileged information. Although the legal issues remain much the same, the importance and sensitivity of this matter require a case-by-case determination of whether the executive privilege applies and whether it has been overcome by a proper showing of need. The factual issue of whether the OIC needs the particular information

¹ The Court resolved the motion to compel pertaining to the governmental attorney-client privilege in its Order of August 7, 1998.

apparently possessed by Mr. Breuer is sufficiently different from the issue involving Mr. Lindsey to convince the Court that Mr. Breuer is not barred from asserting privilege in these circumstances.

Scope of the Presumptive Executive Privilege

In its Order of August 5, 1998, the Court found that the communications to which Mr. Breuer has asserted the executive privilege are presumptively privileged. Executive privilege, also known in this context as the presidential communications privilege, is a governmental privilege intended to promote candid communications between the President and his advisors concerning the exercise of his Article II duties. United States v. Nixon, 418 U.S. 683, 705, 708, 711 (1974); In re Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997). In accordance with binding precedent on the issue, this Court must treat the subpoenaed testimony of Mr. Breuer as presumptively privileged.²

The executive privilege is limited to "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the

² See Nixon, 418 U.S. at 713 (holding that when the President of the United States claims executive privilege, the district court has a "duty to . . . treat the subpoenaed material as presumptively privileged"); In re Sealed Case, 121 F.3d at 744 ("The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged."); see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974) ("Presidential conversations are 'presumptively privileged,' even from the limited intrusion represented by in camera examination of the conversations by a Court."); Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) ("We . . . agree with the District Court that such conversations are presumptively privileged.").

particular matter to which the communications relate.” *Id.* at 752. Communications that do not relate to presidential decision-making are not included within the scope of the executive privilege. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (noting that the privilege is “limited to communications ‘in performance of [a President’s] responsibilities,’ ‘of his office,’ and made ‘in the process of shaping policies and making decisions.’”); *In re Sealed Case*, 121 F.3d at 752 (“Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters.”).

While finding the other communications at issue to be “presumptively privileged,” the Court holds that Mr. Breuer’s communications with persons in the Office of Legislative Affairs do not fall within the scope of the presumptive executive privilege. Mr. Breuer testified that he was asked by the head of the Legislative Affairs Office, where Monica Lewinsky had worked, to speak to a group of individuals in that Office who were fearful of being called by the press or the OIC. Mr. Breuer states that he provided legal advice to those individuals. This conversation does not appear to have been in the course of Mr. Breuer’s advising the President on official government matters and thus cannot be covered by the executive privilege.

The Standard Required to Overcome the Privilege

The executive privilege is not absolute. *Sirica*, 487 F.2d at 716. In order to overcome this privilege, the OIC must make a sufficient showing of need as defined by the D.C. Circuit in *In re Sealed Case*, 121 F.3d at 754. *In re Sealed Case* directs that the OIC must show with specificity “first, that each discrete group of the subpoenaed materials [or testimony] likely contains important evidence; and second, that this evidence is not available with due diligence

elsewhere.” *Id.* The information sought need not be “critical to an accurate judicial determination.” *Id.*

The White House asserts that the recent decision of the Court of Appeals in *In re Lindsey*, No. 98-3060 (D.C. Cir. July 27, 1998), has heightened the required showing of need for materials allegedly covered by the executive privilege in the context of this case. According to the White House, it should be more difficult for the OIC to obtain these materials because the President anticipates impeachment proceedings and that fact should alter the relevant need analysis. In *In re Lindsey*, the Court of Appeals states: “[I]nformation gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege. While the need for secrecy might arguably be greater under these circumstances, the district court’s ruling on executive privilege is not before us.” *Id.*, slip op. at 24.

The Court rejects the White House’s argument that the possibility of impeachment changes the need analysis set forth in *In re Sealed Case*. First, the Court of Appeals did not change the need analysis in its *In re Lindsey* opinion. The issue of executive privilege was not before the Court of Appeals and its suggestion that the need for confidentiality could be heightened under certain circumstances was clearly dictum. In addition, the Court of Appeals’ supposition that “the need for secrecy might arguably be greater” in the face of potential impeachment, *In re Lindsey*, slip op. at 24 (emphasis added), does not lead this Court to conclude, as the White House contends, that the D.C. Circuit “made clear that the analysis of any assertion of the presidential communications privilege is different where the OIC investigation arises under the specter of impeachment proceedings.” White House’s Response to the OIC’s *In*

Camera Submission at 4.

Second, this Court declines to hold that the executive privilege need analysis changes when White House advisors are preparing for possible impeachment proceedings. In essence, the White House argues as follows: (1) The President may withhold privileged communications from Congress even when the same communications would be discoverable in judicial proceedings;³ (2) the OIC will likely submit an impeachment report to Congress; and (3) therefore, the White House should not be compelled to turn over information to the grand jury because that information might be given to Congress. However, the subpoena before the Court is a grand jury subpoena, not a congressional subpoena, and the Court must treat it as such even assuming that the OIC will prepare and submit a report to Congress. It is not known whether the information sought here by the grand jury will be included in any such report. Thus, the contention that information sought by the grand jury could at some time be given to Congress is not ripe for review.

The Court agrees that the President and his senior advisors have a significant need for confidentiality when discussing possible impeachment proceedings. Nevertheless, they have the same need when discussing all other kinds of presidential decisions and strategies. When it formulated the executive privilege need standard in In re Sealed Case, the D.C. Circuit explicitly recognized the “‘great public interest’ in preserving ‘the confidentiality of conversations that take place in the President’s performance of his official duties.’” 121 F.3d at 742 (quoting Sirica, 487

³ Compare Senate Select Committee, 498 F.2d at 732-33 (holding that the President need not produce materials in response to a subpoena from a legislative committee) with, e.g., Sirica, 487 F.2d at 717 (holding that the President must produce materials in response to a grand jury subpoena).

F.2d at 717). The Court of Appeals also understood that such a privilege was “necessary to guarantee the candor of presidential advisers and to provide ‘[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.’” *Id.* at 743 (quoting *Nixon*, 418 U.S. at 708). The same interests apply in the impeachment context and there is simply no authority for having the rigor of the executive privilege analysis depend upon the subject matter discussed.

In concluding its *In re Sealed Case* opinion, the D.C. Circuit stated:

In holding that the privilege extends to communications authored by or solicited and received by presidential advisers and that a specified demonstration of need must be made even in regard to a grand jury subpoena, we are ever mindful of the dangers involved in cloaking governmental operations in secrecy and in placing obstacles in the path of the grand jury in its investigatory mission. There is a powerful counterweight to these concerns, however, namely the public and constitutional interest in preserving the efficacy and quality of presidential decisionmaking. We believe that the principles we have outlined in this opinion achieve a delicate and appropriate balance between openness and informed presidential deliberation.

Id. at 762. The concerns raised by the White House have been amply considered by the D.C. Circuit. This Court cannot and will not disturb the “delicate and appropriate balance” so carefully struck by the Court of Appeals.

Thus, the Court will turn to this Circuit’s interpretation of the need standard. The first requirement — “that each discrete group of the subpoenaed materials [or testimony] likely contains important evidence” — charges that the evidence sought must be “directly relevant to the issues that are expected to be central to the trial.” *Id.* As the D.C. Circuit noted, this requirement will ordinarily have limited impact because Federal Rule of Criminal Procedure

17(c) already restricts the reach of a subpoena to relevant information. *Id.* at 754.

With respect to the second requirement — that “this evidence is not available with due diligence elsewhere” — the party seeking to overcome the privilege should first attempt to determine whether sufficient evidence could be obtained elsewhere. *Id.* at 755. The issuer of the subpoena “should be prepared to detail these efforts and explain why evidence covered by the presidential privilege is still needed.” *Id.* The D.C. Circuit noted:

there will be instances where such privileged evidence will be particularly useful, as when, unlike the situation here, an immediate White House advisor is being investigated for criminal behavior. In such situations, the subpoena proponent will be able easily to explain why there is no equivalent to evidence likely contained in the subpoenaed materials.

Id. (emphases added). That court also explained that “a grand jury will often be able to specify its need for withheld evidence in reasonable detail based on information obtained from other sources.” *Id.* at 757. Finally, if the grand jury has difficulty obtaining evidence from other sources, “this fact in and of itself will go far toward satisfying the need requirement.” *Id.*

Lastly, if a “demonstrated, specific need” is shown, then the subpoenaed testimony shall be given to the grand jury unless there is “no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” *United States v. R. Enterprises*, 498 U.S. 292, 300 (1991).

3. The OIC’s Showing of Need

The OIC has made an extensive ex parte submission to the Court regarding its need for this evidence, which the Court has carefully reviewed in camera. This submission incorporates and updates the OIC’s previous need submission in connection with Bruce Lindsey’s invocation of executive privilege as well as two other prior in camera need submissions from the OIC. The

OIC's current need submission describes fifteen categories of information that it seeks from Mr. Breuer and explains how each category meets the In re Sealed Case need standard. Because the Court has reviewed the OIC's submission in camera, it is unable to describe in any detail the basis for its findings. See In re Sealed Case, 121 F.3d at 740.

As for the first requirement, the Court finds that the testimony the OIC seeks likely contains important evidence that would be directly relevant to central issues in the grand jury's investigation. The OIC has been authorized to investigate whether Monica Lewinsky "or others" suborned perjury, obstructed justice, or tampered with witnesses, Order of the Special Division, Jan. 16, 1998, and the testimony withheld on the basis of executive privilege is likely to shed light on that inquiry.

Regarding the second requirement, the Court finds that the OIC has shown with sufficient specificity that the evidence it seeks is not available with due diligence elsewhere. See id. at 754. First, as this Court has noted before, "the crimes being investigated by the grand jury are inherently crimes of conversation and such conversations are unlikely to be recorded on paper." Order of May 4, 1998, at 12. The D.C. Circuit has declared that if a crime being investigated by the grand jury relates to "the content of certain conversations," then the grand jury's need for the exact text of those conversations is "undeniable. Obviously, this evidence is not available elsewhere; even if . . . counsel offered to provide the grand jury with every statement that was made to the White House, the grand jury would need to review the evidence in the White House files to confirm that no statements were omitted." Id. at 761 (quoting Senate Select, 498 U.S. at 732) (emphasis added). The OIC "may also be able to demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove." Id. There is no

indication that the conversations at issue here were recorded; the only sources of information regarding those conversations are the participants themselves.

Even if the grand jury possesses testimony of one party to a conversation, it may still need the testimony of other parties to the conversation to confirm or disprove the veracity of the prior testimony. The Court is well aware that two parties to a conversation may testify quite differently. As the D.C. Circuit recognized, even if a witness agrees to testify, the grand jury would still need to review further evidence to determine if it has the complete story. *Id.* In this instance, even if one witness has testified regarding a specific conversation, the grand jury may still need to subpoena other participants in that conversation to obtain the full picture. The evidence sought here is Mr. Breuer's version of certain conversations; such evidence can be obtained only from Mr. Breuer.

Second, the OIC has provided the Court with detailed information about its unsuccessful efforts to obtain this evidence through other sources. As the Court found significant in its previous executive privilege opinion, the OIC has diligently pursued other alternatives in seeking this information. The OIC has issued 23 subpoenas duces tecum to the White House since the beginning of its investigation and has issued one to President Clinton individually. Declaration of Julie A. Corcoran ¶ 4. In addition, the OIC interviewed eighty current or former White House employees during its investigation and thirty-five current or former White House employees have testified before the grand jury. Declaration of Patrick F. Fallon, Jr. ¶¶ 4-5.

The D.C. Circuit found that, in practical terms, "the primary effect of [the unavailability] standard will be to require a grand jury to delay subpoenaing evidence covered by presidential privilege until it has assured itself that the evidence sought from the President or his advisers is

both important to its investigation and practically unavailable elsewhere.” In re Sealed Case, 121 F.3d at 756-57. The fact that the OIC has not called Mr. Breuer until this time is consistent with the OIC’s having unsuccessfully attempted to obtain the evidence elsewhere and having determined the evidence to be necessary to the grand jury’s investigation.

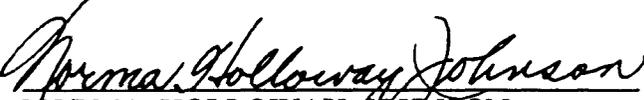
The White House contends that the OIC has many alternative sources for the information sought from Mr. Breuer, including Secret Service agents, Monica Lewinsky, and others. On the basis of the in camera submission, including declarations submitted by the OIC, the Court finds that these sources have not provided the grand jury with the information withheld by Mr. Breuer under the executive privilege. Moreover, it is not clear at this time how much information President Clinton will provide to the grand jury at his deposition.⁴ He may not remember certain events about which the grand jury seeks information.

The OIC has made a significant factual showing to the Court and has fully demonstrated its need for Mr. Breuer’s testimony. The Court also finds that the communications covered by the presumptive privilege likely contain evidence important to the grand jury’s investigation and cannot be obtained elsewhere with due diligence. The Court will therefore grant the OIC’s motion to compel the testimony of Mr. Breuer insofar as he has asserted the executive privilege.

Accordingly, upon consideration of the OIC’s in camera need submissions and the White House’s response to that submission, it is this 11th day of August 1998,

⁴ As the OIC points out, if the President intends to testify about his communications with Mr. Breuer, it is strange that Mr. Breuer is asserting executive privilege with respect to those very communications.

ORDERED that the Office of Independent Counsel's motion to compel the testimony of Lanny Breuer be, and hereby is, granted as to testimony covered by the executive privilege.


NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

