

June 19, 2020

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VIA EMAIL

Bradley Weinsheimer
Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
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Re: Aaron Zelinsky

Dear Mr. Weinsheimer:

We have received your letter regarding the subpoena Mr. Zelinsky received from the House Judiciary Committee. The subpoena, of course, is compulsory process issued by a coordinate branch of government. Mr. Zelinsky does not believe there are any grounds for him to decline to appear in response to the subpoena and your letter does not suggest otherwise.

At the same time, Mr. Zelinsky recognizes and intends to respect his obligation to protect information that is properly subject to privilege. He has no intention of testifying about any classified material, or any grand jury or law enforcement sensitive information. In addition, however, your letter makes a general reference to the possibility that some of Mr. Zelinsky's testimony may be covered by a deliberative process privilege. The applicability of any such privilege to Mr. Zelinsky's proposed testimony is uncertain, and we are seeking clarification from the Department. We set forth below some of the relevant legal principles.

The deliberative process privilege only applies to information that is both predecisional and deliberative. *In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997). It is therefore our understanding that the privilege has no applicability to communications that occur after a final decision has been made. Nor would it apply to any testimony about the manner in which the Department's final recommendation in this case departed from established policies or Mr. Zelinsky's own experience as a prosecutor.

Moreover, any concern that disclosure of discussions among prosecutors might have a "chilling effect" would seem to be significantly lessened in this particular situation by the public statements made by the Attorney General and others about the circumstances of, and reasons for, the Department's withdrawal of its sentencing recommendation – particularly

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since Mr. Zelinsky believes that some of those statements were materially misleading. Indeed, the Department has already disclosed deliberative information regarding the Roger Stone prosecution. *See Comm. on Oversight & Gov't Reform, United States House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 106 (D.D.C. 2016) (finding that the qualified privilege “must yield,” given that the “Department itself has already publicly revealed the sum and substance of the very material it is now seeking to withhold,” and “any harm that would flow from the disclosures sought here would be merely incremental.”).

For example, Attorney General Barr publicly discussed the internal discussions concerning the sentencing recommendation, and the position he and others wished to take: “A new U.S. attorney had just started in Washington D.C. and the week before the filing, he engaged in conversations with senior staff here who raised some questions about the sentencing because he was concerned that the so called guidelines, the sentencing guideline formula, was indicating a sentence between 7 and 9 years. Which, he felt and all of us immediately felt was very, very high and excessive in this case.” The Attorney General continued: “In those discussions here at the department, you know, I came to the view as my colleagues did that I wouldn't support affirmatively advocating what I thought was an excessive sentence. So, what I wanted to do what to provide dis -- defer to the discretion of the judge, let the judge make the determination.”¹

Finally, where there is reason to believe the information sought “may shed light” on government misconduct, the privilege is “routinely denied,” on the grounds that “shielding internal government deliberations in this context does not serve ‘the public's interest in honest, effective government.’” *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997). It is Mr. Zelinsky's view that the manner in which the Stone sentencing was handled violated fundamental principles of fairness and nonpartisanship in law enforcement, and established Justice Department policy, by according favorable treatment to a defendant by virtue of his political relationship to the President. The Congressional hearing for which he has been subpoenaed is investigating the same concerns.

To assist us in understanding how the Department believes that a privilege would nonetheless apply in these circumstances, we have enclosed a copy of a draft of Mr. Zelinsky's written statement. We would appreciate it if, by close of business Monday you would identify any specific portions of this testimony that you believe are protected by privilege, and explain why. We also urge you and the Committee (whose majority and minority counsel are receiving copies of this letter without Mr. Zelinsky's statement) to have prompt discussions to reach agreement pursuant to the accommodation process referenced in your letter.

¹ *Transcript of Attorney General Bill Barr's exclusive interview with ABC News*, ABC News, February 13, 2020, 9:40 PM, available at <https://abcnews.go.com/Politics/transcript-attorney-general-bill-barrs-exclusive-interview-abc/story?id=68975178>.

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Mr. Zelinsky understands the Committee to be interested in his testimony in respect of the Stone sentencing. To the extent questions are put to him about other matters, including the Special Counsel's investigation, he understands the Department's position to be that he would be very limited in his ability to provide testimony – and would accordingly as a general matter decline to elaborate on those matters for the same reasons that Robert Mueller did in his testimony. In any event Mr. Mueller's testimony did not involve issues of waiver or potential wrongdoing as are present here.

Thank you for your prompt attention to this matter of public importance.

Sincerely,


Robert S. Litt

Encl.

cc.: Acting Assistant Attorney General Stephen Boyd
Aaron Hiller (w/o enclosure)
Stephen Castor (w/o enclosure)