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The President and the Fifth Amendment

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What is most telling is a message deriving from this investigation for virtually every target vacillating over whether to accept his lawyer's knee jerk, playbook advice to remain silent.

The dust has only just begun to settle. Based on Special Counsel Robert Mueller's specific finding of "no collusion" that should be the end of the day on that. The curious way he and (separately?) the Attorney General handled the obstruction case, though, is still up for grabs. And it will probably await their testimony before the Congress. And testify, Mueller surely will. Attorney General William Barr has already been called.

But the talking heads haven't much been talking about why Mueller didn't insist—if necessary, by grand jury subpoena—that the president give his own "oral account" to Mueller, or to his grand jury. Why did Mueller let him off the hook in this regard? Did he fear he would lose a constitutional fight? Maybe. Did he fear the unseemliness of such a battle with a sitting president? Who knows? Nonetheless, those issues will apply solely to an investigation of the president of the United States.

Still, it was the decision of Trump's lawyers to hold the line on this critical strategy call—maybe even overruling their own unruly client—that undoubtedly saved the day for the president himself. Anyone who has ever watched him talk even for a few minutes knows that had he testified or been interviewed he would have admitted far too much, misrepresented, distorted, or just lied if compelled to give his account to a questioning prosecutor with half a brain.

At bottom, though, there's a lesson here for every client who tells his lawyer that if he doesn't agree to an interview or to testify that everyone, including the prosecutor, will conclude that he's a guilty man. Most criminal lawyers with any experience have a "No Interview, No Testimony" placard as item Number One in their defense playbook. And, oftentimes, they will have to fight with the client to have their way on this decisive issue. It is likely that Rudy Giuliani, for all of his shortcomings, probably had to do that with the president, astonishingly going so far as to tell the press that he would literally throw himself in front of the president to stop him from testifying. Not uncommon, many lawyers take the public fall for the client, by

announcing that "My client truly wanted to testify—he has nothing to hide—but it was my decision and it was I who said no." But these are battles worth having and positions critical to the client's defense and salvation.

As recent prosecutions related to the Mueller investigation and the litany of high-profile prosecutions preceding them proves beyond any doubt, the risks attendant to having your client subject himself to an interview with a prosecutor are great, and the rewards often pale in comparison. A failed interview can result in the client being charged with providing false or misleading information, in addition to which the client has locked himself into a version of events and hamstrung his ability to proactively defend himself at trial. With the recent decisions in SEC v. Herrera (2017 WL 6041750 (S.D. Fla. Dec. 5, 2017)) and In re Grand Jury Investigations (2017 WL 4898143 (D.D.C. Oct. 2, 2017)), added to this already foreboding list is the risk of waiving the attorney-client privilege—particularly when it is the attorney that opts to meet with the government in place of the client.

What is most telling is a message deriving from this investigation for virtually every target vacillating over whether to accept his lawyer's knee jerk, playbook advice to remain silent. That is, no one, not the talking heads of the media or even the most strident members of the Democratic Party, have argued so far that the reason why Mueller came to no conclusion that the president committed a crime was likely because Mueller did not gain the pleasure of Trump's company in an interview chair opposite him or in a grand jury room.

In truth, no one seems particularly bothered by that. A lawyer's decision to have his client "Take The Fifth" or decline an office interview seems, today, almost de rigueor—or if not, it should be. Thankfully, we've come a long way from the days of Senator Joe McCarthy. Everyone—especially prosecutors—nowadays expects the Fifth or an interview declination. If we were asked by a prosecutor to interview our clients tomorrow, we'd simply say this: "If it's good enough for the president, it's good enough for my client."

Sound glib? Sure. Still, preferable indeed to an interview or testimony that risks damaging admissions, or alternatively perjury or false statement charges. Thank you, Mr. President!

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