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Why Does the House Intel Committee Want to 'Kill the Lawyers'?

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House Intelligence Committee Chairman Adam Schiff has issued scattershot subpoenas seemingly designed to reinvent the Mueller report. In fact, we believe that the Mueller Report, as likely intended by Mueller, was designed precisely to provide the impetus for an impeachment proceeding based upon allegations of obstruction against the president, if the Congress were of a mind to do so. And, we believe, there would easily be sufficient evidence to support initiating such a proceeding.

But Chairman Schiff, presumably with the support of the Committee, has frankly gone way over the top—or stooped to a new low. No longer is the focus on whether the Trump campaign "colluded" (or more properly said, "conspired") with the Russians, or whether the president or his family members conspired or attempted to obstruct the Mueller investigation, as it should be. Rather, the question now appears to be: What did lawyers for members of the Trump family do to somehow help Michael Cohen (then still a member in good standing on Team Trump) falsify his 2017 statement to the Committee about the proposed Moscow Trump Tower? Why the shift in the Committee's focus? The issue should be whether Trump and his Campaign engaged in wrongdoing, not whether the president's former lawyer, Michael Cohen, who is already in jail, was assisted in his obstruction before the Committee by highly respected veteran lawyers.

Accepting, as we do, that there was a proposed Russian project and that Cohen lied about it, how does the Committee get from there to the lawyers? We begin with the lunacy of Congress's predicate presumption—that well-regarded and respected lawyers knowingly and collectively conspired to cause Cohen, presumably with his own then-lawyer, to defraud Congress. And consider also that even Cohen's current lawyer, Lanny Davis, who is not shy about calling it as he sees it, has publicly stated that Abbe Lowell, the lawyer for Ivanka and

Jared who has now been asked for privileged communications, would not knowingly participate in a criminal event. Indeed, while Congress issues subpoenas, neither the "cooperating" Cohen nor Davis suggest Lowell acted improperly. (The subpoenas to the lawyers, of course, seem to rest exclusively on the claims of Michael Cohen, an obviously vulnerable witness—not typically the kind of information that would warrant subpoenaing a lawyer, or indeed a group of lawyers. Importantly, as the May 21, 2019 edition of the Wall Street Journal reports (at p. A6), Mr. Lowell specifically emphasized in emails to Mr. Cohen's then attorney that any additions to Mr. Cohen's statement "should be accurate.")

But step back. Even if we assume, which seems reasonable, that Cohen lied, what is the Chair's basis, in his understandable enthusiasm to "get Trump," to try to "kill the lawyers" a la Henry VI's "Dick The Butcher"? The mere fact that counsel for those allegedly with first-hand knowledge of the events in question suggested language changes to Cohen's statement proves nothing. Nor does it provide a basis to believe that the lawyers did anything untoward, much less criminal. Not only is it perfectly reasonable for such language requests to have occurred, it is expected.

Further, let's assume for a moment that President Trump and his family members intended to influence Cohen to lie. Why does that argue that the appropriate way to get to the bottom of that is, in the first instance, to subpoena their lawyers? Not only is it unseemly, but it serves to undermine the sanctity of the attorney-client privilege, a bedrock principle of our legal system which serves to ensure that an individual's Constitutionally-guaranteed Sixth Amendment right to counsel (a right Congress seems unable or at least unwilling to appreciate), has meaning.

The privilege's purpose, according to Justice William Rehnquist, is "to encourage full and frank communications between attorneys and their clients … thereby promot[ing] broader public interests in the observance of law and administration of justice." And, it "recognizes that sound legal advice or advocacy serves public ends and such advice or advocacy depends upon the lawyer's being fully informed by their client." Even accepting that there is a crime-fraud exception to the privilege (i.e., there is no privilege when communications are used to further a crime or fraud), there is to our knowledge no indication that this narrow and sparingly used exception should or does apply.

Joint defense agreements too have been long-recognized and allow people under investigation to help defend themselves against the overwhelming power of the state to bring charges that are oftentimes unwarranted by sharing information among their lawyers and themselves. They provide such communications with the cloak of secrecy as if speaking with counsel alone. These agreements are time-tested and a sanctified-by-law procedure.

In a rush to "get Trump," the Committee is willing to cast aside the sanctity of these sacred privileges seemingly under the rubric of "the ends justify the means." The Committee is not reviewing the mechanics of the privilege's assertion. Rather, it takes the position that as "common-law, court-made privileges" neither the attorney-client privilege nor the work product privilege can "limit Congress's lawful Article I investigative powers," and while it can,

indeed, recognize application of the privileges, Congress "has not elected to do so here." This is a road fraught with danger. It is partisan politics at its worst and, we fear, gives Trump supporters and Republicans in general, deadly ammunition. What's more, the risks and stakes (and setting of precedent) are far too great to sit by idly—no matter one's political affiliation or disagreement with the president.

As Justice John Paul Stevens once wrote, Shakespeare "realized that disposing of lawyers is a step in the direction of a totalitarian form of government." Accepting the notion that Congress—many members of which are not attorneys—can simply pronounce that the attorney-client privilege is not recognized, is alarming. And even were Congress willing to recognize its applicability (as it most certainly should), overruling such a time-tested privilege in order to assert the crime-fraud exception requires sophisticated legal and factual analysis and should ultimately be left to the courts. Interestingly, Mueller and his team of experienced prosecutors undertook that review and ultimately themselves rejected the exception for purposes of for purposes of conducting their investigation given the high bar "crime fraud" should require. To state the obvious, even the important ends here of the House Intelligence Committee's work cannot justify the means.

It is easy (and laudable), indeed, to stand with a bullhorn and shout out loud against the Administration's current attacks on fundamental institutions. Here, though, we address the irony that some of those who are sincerely trying to get to the bottom of the president's conduct, are strong-arming members of the legal profession who are ardently dedicated to preserving those institutions. And isn't that the point? It is the criminal defense lawyers, the very targets of this Congressional misstep, who provide an impenetrable bulwark against governmental overreaching and abuse. We are all at risk when lawyers—whether representing "us" or "them"—find themselves in the cross-hairs.

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