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by Rebecca Roiphe and Bruce Green

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A few days after President Joe Biden's inauguration, news reports broke that then-President Donald Trump had met with Jeffrey Clark, the acting chief of the Department of Justice's (DOJ) civil division, to discuss installing him as Attorney General, with the intent of overturning the election results. This was part of a broader assault on the integrity of the election that culminated in the Jan. 6 attack on the U.S. Capitol, which is the subject of the upcoming impeachment trial.

On Tuesday, House impeachment managers delivered their brief, which refers to the conversation between Clark and Trump, to the Senate. So far, all that we know of this conversation is what has been publicly reported – Clark has declined to present his version of events, citing legal privilege. But is the conversation actually covered by any relevant privilege?

The Conversation as Reported

According to the *New York Times*, former officials say that Trump contemplated replacing Rosen with Clark, who was more sympathetic to the President's efforts to overturn the election results. Trump was reportedly unhappy that top department officials, including Acting Attorney General Jeffrey Rosen, had refused to pressure Georgia to change the election outcome. Trump was also disappointed that, with the support of his own White House Counsel, DOJ declined to sue the swing states in the Supreme Court to challenge Biden's victory.

Clark allegedly went to the meeting without Rosen's knowledge, violating longstanding DOJ policy which protects its lawyers from undue political influence by requiring DOJ lawyers to seek approval from the Attorney General or Deputy Attorney General before meeting with the president or his top advisors.

According to the news accounts, the plot to enlist DOJ in Trump's election challenges was thwarted only when Rosen and other high-ranking Justice Department officials discovered the plan and threatened to resign *en masse* if it went forward. The Justice Department's Inspector General is investigating these events.

Clark acknowledges meeting with Trump but disputes aspects of the story. According to the *New York Times* report, Clark said that there were "no 'maneuvers'" but only "a candid discussion of options and pros and cons with the president."

Beyond that, Clark says that he is professionally constrained from publicly defending himself, averring that his discussion with the president was "a privileged conversation" and that "[o]bserving legal privileges . . . prevents me from divulging specifics regarding the conversation." The implication is that, while the unnamed officials who revealed his secret encounter with Trump may have been betraying confidences, he is abiding by his professional duty by suffering in relative silence while false accusations fly. Some may suspect, however, that Clark is hiding behind a bogus privilege claim in order to avoid revealing embarrassing truths.

Because Clark is using an unspecified legal privilege to justify denying the public account without offering his own version, it is worth questioning the validity of the claim. The challenge is that Clark gives us very little to go on, which may suggest that his privilege claim is pretty flimsy. What privilege does he think applies to the conversation? If he's referring to the attorney-client privilege, who was the client, what was the legal matter, and what was the general subject of the conversation? Ordinarily, when lawyers claim that they cannot disclose a privileged conversation, they are permitted – and often required – to answer basic questions such as these, so that courts can decide whether the claims are legitimate. So, while we identify reasons to be skeptical of Clark's privilege claim, it is hard to resolve all questions given the rudimentary and disputed account of his meeting that has emerged so far. We may have to wait for the DOJ watchdog to issue its report to find out the answer to these questions.

What privilege?

It is not even clear what privilege Clark has in mind when he describes his meeting with Trump as "a privileged conversation." The obvious candidate is the attorney-client privilege, which generally covers confidential communications between lawyers and their

clients for the purpose of enabling the lawyers to give legal advice or assistance. That's where we will focus for the majority of this article.

We pause to note, however, that Clark may have been referring to executive privilege, or what the Supreme Court in *United States v. Nixon* characterized as "the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities." In Nixon's case, the Court recognized that this privilege is not absolute and that criminal prosecutors at the time had a paramount need for information about White House conversations relating to the Watergate break-in.

In this case, it seems farfetched to suggest that Trump's conversations about subverting the election related to "the President's responsibilities" and were therefore privileged. It is furthermore unlikely that, even if the conversations were privileged at the inception, they remained privileged after the president left office and the substance of the conversations became public. And, of course, it is questionable that any conceivable public interest in confidentiality outweighs the public need to know what happened in the room, given that the former president has been impeached and will shortly be tried in the Senate for, among other things, trying to subvert the election, including by fomenting violence.

Who's the Lawyer, Who's the Client, and What's the Legal Matter?

To invoke a valid claim of attorney-client privilege, there has to be an attorney and a client who seeks or receives the attorney's help in a legal matter. If Trump consulted Clark about a legal matter, presumably Clark's client was the United States, not Trump, since, as a DOJ lawyer, Clark had no authority to represent Trump personally. If Clark was attorney for the United States, however, what legal matter could they have been discussing?

Although Trump was not Clark's client, that alone does not make the privilege inapplicable. In *Upjohn Co. v. United States*, the Supreme Court held that lawyers' confidential communications with constituents of an organization such as a corporation are privileged as long as they help the lawyer provide legal advice to the organization. The concept applies to government lawyers' confidential communications with public officials for the purpose of enabling the lawyer to assist the government or to advise public officials in their own role as government representatives. The DOJ's client is the United States or the federal government, and the Attorney General and other DOJ lawyers

act on the client's behalf, just as a corporate attorney acts on behalf of the entity for which he works. As a public official, the President would certainly count as a constituent of the federal government – and so that element of the Upjohn privilege might be met. Even so, it is doubtful that Clark was providing legal assistance to the United States at that meeting, especially if the acting Attorney General and other top DOJ officials had already affirmed the integrity of the election and rejected any potential role of DOJ in contesting the results , as the news story reports.

In short, if Trump was not Clark's client (which he could not have been given Clark's duties as a DOJ lawyer), and Clark was not representing the United States in any legal matter to which their conversation related, then their conversation was not privileged, no matter how much law they discussed. A lawyer can talk to a non-client about the law, and even give legal advice to a non-client, but that does not make the conversation privileged.

Of course, there is a dispute about what they discussed, and Clark is not yet saying. It is conceivable that Trump and Clark discussed whether the United States should file its own brief to challenge to the election results reported in swing states, weeks after the Court rejected a similar plea from the Texas Attorney General. That is the sort of subject on which DOJ lawyers legitimately give legal advice to the officers of the entities they represent, especially given that Clark was in charge of the civil division.

But it is doubtful whether such a conversation, though on a legal subject, can be said to be connected to Clark's representation of his actual client, the United States. Trump did not have authority to decide whether DOJ should file a brief in the Supreme Court. Acting Attorney General Rosen, who did have authority, had decided against doing so. Further, even if Clark was involved in the decision, he certainly was not the DOJ lawyer in charge. That Clark conducted the meeting without approval or direction from Rosen – and indeed, without his knowledge – suggests that, whatever the purpose of the meeting, it was not to give legal advice or assistance to Trump in his capacity as a public official.

It is worth noting as well that even if the conversation were privileged, the privilege would belong to the United States, not to Trump. Further, the person with authority to assert or waive the privilege would be the current Attorney General, not Trump or former Acting Attorney General Rosen. President Biden's Acting Attorney General Monty Wilkinson could waive this privilege if he felt doing so would be in the country's interest.

Legal, Business, or Political Advice?

In sum, it seems unlikely that the entire conversation was privileged, if any of it was. The conversation between Trump and Clark could conceivably be privileged only if Clark was giving legal advice or legal assistance, which, as outlined above, he was extremely unlikely to have been doing. If, on the other hand, Clark was giving business advice, political advice, or any other non-legal assistance, then the conversation was not privileged. Courts are clear that corporate lawyers' communications with corporate representatives are not privileged when the lawyer is providing business or other non-legal assistance. The same goes for government lawyers. If the conversation was about replacing acting Attorney General Rosen with Clark, then it involved a business or political decision, not the provision of legal assistance.

The Crime-Fraud Exception

Moreover, if the president was seeking Clark's help in committing a crime – such as election fraud – then the conversation would not be privileged, as it would fall under the crime-fraud exception. But this depends both on the content of the conversation and on whether Trump had the necessary intent to commit a crime. If Trump actually believed the election was rigged, he would likely lack the requisite mental state for criminal culpability for election fraud and the crime-fraud exception would not apply.

Importantly, the crime-fraud exception does not require that Clark knowingly attempt to assist in a crime or fraud. Although lawyers may not encourage clients or others to commit a crime or fraud or assist in doing so, lawyers may discuss the legality of various courses of conduct. But even if, as Clark suggests, he benignly discussed legal options, and he had no intention to assist Trump in committing a crime or fraud, the conversation still would not be privileged if the President was seeking to use Clark's services to commit a crime or fraud. (Of course, Clark could face criminal prosecution if he intended to help or encourage the President to fraudulently overturn what he knew was a lawful election result).

Was the Meeting Confidential?

Lawyers also owe confidentiality duties to clients that go beyond the protection of privileged information. In the unlikely event that the current DOJ administration were to object to Clark's testimony about his meeting with Trump, a court would probably reject

a privilege claim. But even so, Clark may want to err on the side of caution. And even if he knows that his conversation with Trump is not privileged, he may feel that everything he did as a DOJ lawyer is confidential and should not be publicly discussed. While that is probably not how most former DOJ lawyers view their obligation, Clark might be particularly punctilious in avoiding loose public chatter about his former employment.

But even if Clark were to rely on his broad ethical duty of confidentiality, that duty would relate only to Clark's legal work. If Clark and Trump were discussing a plan to oust Acting Attorney General Rosen and replace him with Clark, this would have been a job interview, not a conversation relating to legal representation. And, of course, like the attorney-client privilege, whatever confidentiality duty Clark may have had could be relinquished by the client's representative – in this case, the current Attorney General.

The Bottom Line

There are many reasons to be skeptical of Clark's reference to privilege in his refusal to discuss the reported conversation with Trump. To be sure, lawyers are trained to resolve doubts about privilege and confidentiality in favor of silence. But if Clark were to ask the current acting Attorney General to release him from any confidentiality or privilege obligations so that he could defend himself publicly by giving his side of the story, it seems pretty likely that he would receive the permission he sought. It is hard to avoid the suspicion that Clark has engaged in a strategic dodge, not an expression of honest concern about ethical obligations.

Image: US President Donald Trump speaks to a White House staffer as he makes his way to board Marine One from the South Lawn of the White House in Washington, DC on September 26, 2020. (Photo by OLIVIER DOULIERY/AFP via Getty Images)

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