Eric Rasmusen,
December 19, 2017.

This is a fisking of Paul Rosenzweig's LawFare defense of Mueller against the Trump Transition Letter.

I got interested in this and have been scanning the web for legal explanations of this kerfuffle, since I am not a lawyer. There aren't any good ones. As I said, I'm not a lawyer, but I know a lot of law (I've co-authored numerous scholarly articles with law professors from Indiana, Illinois, UCLA, Chicago, Yale,Tokyo, and Harvard and I'm the relator in New York ex rel. Eric Rasmusen v. Citigroup). I think I know more law than Mr. Rosenzweig, even though I feel my limitations keenly in this area of law (try me on tax whistleblower law, agency law, or the tax treatment of net operating losses and I'll do better). So I'll post this, to better inform the public. Maybe it will encourage real experts to come forward too. I wrote a book on game theory when I was 30 that had lots of mistakes, but it was the first in its field and I did stimulate, I fancy, older and wiser people to write books to improve on mine.

If I have mistakes below, please email me. I see an enormous amount of ignorant and arrogant commenting on these issues on the Internet, though, so please only email me if you use your real name and you aren't just mouthing off.

THE RUSSIA CONNECTION

Mueller, the GSA and the Trump Transition

By **Paul Rosenzweig**
Monday, December 18, 2017, 6:28 PM

The other day I posted a tweetstorm on the issues raised by the Trump transition's letter to Congress relating to the Special Counsel's access to transition data stored at GSA. The TL;DR summary: Not much there, there. I thought the entire text might be of interest to Lawfare readers:

Yes, I've been looking out for a defense of Mueller against the Trump Transition letter. I'd like to see what happens when Mueller's defenders give it their best shot. The letter is here.

Paul Rosenzweig@RosenzweigP

A thread on the allegations of impropriety in Mueller's collection of Trump transition emails from the GSA /1

Assume the facts as stated by Trump -- that Trump for America is a private entity using GSA services (phones, email, computers, etc.) to conduct its transition function /2

Yes, we'll assume that here. I don't think there's any argument about it, actually. Trump for America is a private nonprofit corporation.

Paul Rosenzweig@RosenzweigP

Replying to @RosenzweigP

Assume, also, that the relationship between GSA ant TFA is covered by an MOU and that all of the data in question is housed on government servers and/or is content sent to/from a "http://ptt.gov " email address /3

OK, we'll assume that too. Here is the MOU, the Memorandum of Understanding.

Paul Rosenzweig@RosenzweigP

Replying to @RosenzweigP

Even assuming all this, the Trump complaint is utter arrant nonsense. To begin with, the MOU (per Buzzfeed) contains an explicit caution that use of government resources means no privacy rights exist /4

Wow-- the Trump complaint is both utter and arrant? I suspect other errant nonsense is at work.

The caution says that no privacy rights exist vis a vis a GSA employee who monitors the computer systems for misuse and for maintenance. That's a standard caution for anyone buying or being given computer services. It's like having no privacy rights in your locked office, because the janitor has the right to come in and empty the garbage. It doesn't mean that just anybody in government has the right to come look at your emails for kicks, or to sell them to telemarketing companies, or that members of the general public can look at your emails. There are plenty of privacy rights--- but not absolute rights.


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Replying to @RosenzweigP
More to the point, no corporation has any Fourth Amendment right to protection for documents/records held by a third-party -- just like individuals. This doctrine has been the law since the 1970s (if not earlier) /5

Sure there is--- if the third party is a "bailee", that is, someone who holds your documents for you for pay or by promise. The police cannot look at your emails held by Comcast unless they have a subpoena, court order, or warrant.

What Rosenzweig is thinking of is something different. If I write a letter to third party Exxon, and the FBI asks Exxon if they can see the letter and Exxon agrees, then maybe my 4th amendment rights haven't been violated-- I don't know, but it's clearly a different case.


Paul Rosenzweig@RosenzweigP
Replying to @RosenzweigP
And, no subpoena or warrant would, generally, be necessary when one part of government (DOJ) requests documents from another (GSA) /6

"Generally" is the key here. Generally, documents aren't confidential, and even members of the public can see them using FOIA. But "generally" is irrelevant. If one agency wants Classified information, or personnel information, or tax records, or lots of other giant exceptions, then a subpoena or warrant is required.


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Replying to @RosenzweigP
And almost certainly, even if viewed as a request for records from a third party akin to Google, this request falls inside the SCA/ECPA 6-month window where no warrant is required /7

A warrant isn't needed after 6 months, but a subpoena is. There apparently wasn't one. Even if there was, the statute requires the customer (the transition) to be notified that their emails were disclosed. See 18 U.S. Code § 2703 - Required disclosure of customer communications or records


Paul Rosenzweig@RosenzweigP
Replying to @RosenzweigP
So, first conclusion: Complaints that this violates the Fourth Amendment are utterly without foundation /8

Rosenzweig didn't even read Orin Kerr's article in the same outlet, Lawfare, which is a much more careful analysis. Professor Kerr comes down on Mueller's side, pretty much, but he's not a partisan hack, so he discusses the arguments on both sides and recognizes that foundations for both sides do exist.

That points to a difference in intended audience. Kerr is writing for smart people, and Rosenzweig is writing for dumb people. Smart people realize that hyperbole such as "utterly without foundation" discredits the author. Dumb people just trust him, because they like his conclusion.

Of course, I'm being a bit sloppy here. Jonathan Haidt explains in *The Righteous Mind* that it's not smart and dumb in terms of IQ or book-knowledge that's relevant. Rather, some people--- most people--- just look for reasons to justify the beliefs they want to have anyway, rather than looking at evidence and arguments as a way to decide what to believe. Blind partisanship, including anti-Trump mania, is a symptom of that. See the recent Paul Cooke evisceration of Trump hater Jennifer Rubin. .


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Replying to @RosenzweigP
Turn now to the question of whether or not some of the materials are "privileged." The Trump letter mentions 3 possible privileges that would be applicable: attorney-client; presidential communications and deliberative process /9
The last two are frivolous assertions -- they apply only to government communiications. But the premise of the complaint is that Trump for America is a "private" organization. By definition it cannot have a government privilege /10
Even more importantly, before Trump takes the oath, he is just a private citizen. Neither he nor anyone working for him can claim a governmental privilege. /11

I don't know this area of law. I bet it's more complicated than that, though. For example, Trump IS President now. So is it clear he cannot call on executive privilege for deliberations made prior to his being President but relevant to current decisions? If Congress asks for testimony on a meeting between the President and his staff to decide on Russia policy, I should think that would be covered by executive privilege (if not, what would be?) If Congress instead asked for testimony on a similar meeting during the transition, could they get it?

But someone else needs to fisk this bit.

Paul Rosenzweig@RosenzweigP

Replying to @RosenzweigP

The attorney-client privilege claim is wrong also. For one thing the privilege protects only the corporation (Trump for America) and not any of the officers, directors or employees of the private entity /12

So what? Mueller took all the emails, including, it seems, those from lawyers of the corporation. Furthmore, why can't Trump for America also complain on behalf of its employees whose rights have been violated?

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Replying to @RosenzweigP

For another, for a privilege to remain intact it much be zealously guarded. The privilege holder cannot expose the privileged information to other people. Here, again, the failure to protect the information by allowing it to be hosted on a third party server ... /13

effectively waives the privilege. And, of course, the attorney client privilege would only apply to advice sought by the company for the purpose of conducting its business. Since none of its business could lawfully involve interactions with Russia, no privilege could . . . /14

apply to those communications. Indeed, one suspects that Mueller got the docs from GSA precisely to avoid bogus claims of privilege for withholding. /15

Ridiculous. If a law firm rents a server from a tech services company, it doesn't lose attorney-client privilege. If a lawyer sends a letter by U.S. mail, he doesn't lose attorney-client privilege just because he let the mailman hold the letter.

The doctrine Rosenzweig refers to applies to things like an attorney giving his client legal advice via a blog post, or cc'ing all his other clients on the legal advice he gives one client who has a similar case.

I don't know what he means by "advice sought by the company for the purpose of conducting its business". Suppose someone in Trump for America was asking the organization's lawyer whether it was legal to interact with Russia. That would undoubtedly be privileged. In fact, suppose he were saying he thought his boss was molesting children and TFA was going to be sued--- that would also be privileged. It's privileged especially if you're really in legal trouble--- that's the whole point of attorney-client privilege, not an exception.

Rosenzweig seems to think you get attorney-client privilege only if you don't really need a lawyer.

"One suspects that Mueller got the docs from GSA precisely to avoid bogus claims of privilege for withholding"

Actually, one suspects that Mueller got the docs from GSA precisely to be able to violate attorney-client privilege.

And, even worse, so he could violate attorney-client privilege secretly, without attorney and client being aware he was doing so. It's as bad as putting an illegal bug in the lawyer's office.

Paul Rosenzweig@RosenzweigP

Replying to @RosenzweigP

What then to make of all this? First, it is clear Trump team fears that Mueller has evidence of perjury/false statements since contemporaneous emails may well contradict subsequent exculpatory statements /16

This is the Democrat talking point, I figure, since I've seen it so many places so quickly. If someone has the memo giving soldiers like Rosenzweig their marching orders, please leak it to us.

It is true, to be sure that the Trump team fears Mueller set this up as a perjury trap---or, in this case, a false-statement trap. As in the case of Flynn, a dirty prosecutor can use the "Martha Stewart" law that says false statements to federal officials are criminal even if you're not under oath selectively, to threat anyone they don't like with prison time. It's a terrible law. I wish Trump would use it against Mueller's team, just to show them. Prosecutors use this when they find that the defendant is innocent of the crime they've been investigating, but they want to get him anyway.

But fear of being charged with perjury or false statements isn't the only reason someone doesn't like his enemy to secretly steal his emails. I would worry that if Mueller has my emails, so has the Democrat Party, in effect. Mueller will leak emails irrelevant to his case but embarassing to me, reveal all my strategic plans to opposition politicians either directly or by public leaks, know who on my team thinks what, and so forth.

Paul Rosenzweig@RosenzweigP

Replying to @RosenzweigP

Second, as the letter makes clear in asking for a legislative fix, there is really no colorable claim of illegality. /17

No. Legislative fixes are often for clarity. Look at all the fuss over net neutrality. The problem is that the bill Congress passed long ago is unclear, so the FCC makes important interpretations by regulation and the regulation reverses whenever the White House changes party. It needs a legislative fix from Congress (which they don't want to provide because they'd rather have the FCC do the dirty work).

I think legislation is needed for enforcement provisions to keep this from happening again. It should be a criminal offense for GSA lawyers to leak transition documents. It's not now, unlike for private-sector spies who steal documents, so we need a legislative fix.

Also, remember: the letter is TO CONGRESS. Legislation is their business. You don't ask the courts for a legislative fix; you ask Congress.

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Replying to @RosenzweigP

And sending the letter to the two Government Oversight committees, which have no jurisdiction over Mueller at all, makes it clear that the Trump team knows this is just nonsense. /18

The Oversight committees must have jurisdiction over Mueller. Mueller is in charge of a special agency of the executive branch. Agencies of the executive branch get their funding from Congress, and their oversight. It would be unconstitutional to have an agency with zero Congressional control over its funding and zero oversight. Mueller is just as much under Congressional oversight as Sessions is. Otherwise, if Sessions wanted to avoid oversight, he could just set up a new Special Prosecutor, give it 99% of the budget of the Dept of Justice, and it would be free of the bother of having to answer to Congress.

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Replying to @RosenzweigP

Likewise their failure to assert any of these claims in court reflects an understanding that the claims have now legal merit. /19

Nope, not at all. They can file in court any time they want. You're not obligated to file a lawsuit immediately just because your rights have been violated. They only found out about the violation a few days ago. The letter was written with lightning speed, when you think about it. Even if they wanted to file a lawsuit quickly, they would want to move more carefully than with just a letter. Generally, you want to wait as along as the statute of limitations or other filing limit allows, so you can polish up your briefs and motions.

Also, the legal procedure and remedy isn't clear here, I think. There are multiple ways to do it. One way would be to wait until Mueller uses the illegal evidence in court and move to strike it at that time. I don't know if the issue would be "ripe" before that time. Probably they couldn't file a motion now to strike evidence that might never be used, and for a trial that might never occur, on charges that might never be brought.

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Replying to @RosenzweigP

Bottom line: Just another effort to create doubt about Mueller and/or set up a "reason" for firing him. But, as @RDEliason says Mueller would have committed malpractice had he not sought these records /20

Certainly they are raising doubt about Mueller. Whether they want him fired, I don't know. Mueller's behavior is actually good for any potential defendants, because it seems his goal is to get Trump's secrets rather than to successfully prosecute crimes. If his goal was successful prosecution, he'd have set up a taint team and gotten a court to mandate that the GSA give him the emails rather than just sending GSA a letter of request. So I read this as telling us that Mueller doesn't think he can prosecute successfully, certainly not for any underlying crime as opposed to "false statements", so he's going for his second-best preference: stealing Trump secrets and helping the Democrats and Establishment Republicans.

So it looks to me as if seeking the records **in this way** is what's malpractice. He's deliberately allowing his prosecution to be sabotaged, so he can get political advantage. Another possibility is that he doesn't think he can win on the merits, so he's intending to seek some indictments and then have them thrown out on technicalities so he can complain that he would have won if it hadn't been for that.

Paul Rosenzweig@RosenzweigP

Replying to @RosenzweigP

Craven Republicans will again condemn Mueller. This basis, however, is frivolously wrong. /End

Why "craven" Republicans? I can't see why he picked that particular insult. Actually, given how nasty Mueller is, I should think "Brave Republicans", or, less positively, "Rash Republicans" would be more accurate. (Mr. Mueller, I took Russian in high school, and I go to lunch with a Russian immigrant most weeks, but you won't find anything if you investigate me, and I will refuse to talk to any FBI agents unless you waive the Martha Stewart law first.)

Since I published the storm a couple of points have been made that are worth noting. First, the law REQUIRES the transition teams to use the GSA. This may mitigate, somewhat, the attorney-client waiver analysis. Second as Orin Kerr pointed out, the third party content doctrine may no longer be good law -- but the other reasons for thinking there is no Fourth Amendment violation remain sound.

This is an admission that his first conclusion is false:

So, first conclusion: Complaints that this violates the Fourth Amendment are utterly without foundation /8

Falsus in uno, falsus in omnibus.

It's odd that he picks those two points. I see that he has indeed read Orin Kerr's article by now. Why, then, didn't he correct the tweet above when he republished it at Lawfare, or put a note next to it instead of at the end here?

Paul Rosenzweig is the founder of Red Branch Consulting PLLC, a homeland security consulting company and a Senior Fellow at the R Street Institute. He is also a Senior Advisor to The Chertoff Group. Mr. Rosenzweig formerly served as Deputy Assistant Secretary for Policy in the Department of Homeland Security. He is a Professorial Lecturer in Law at George Washington University and an Adjunct Lecturer at Northwestern University.

- **@RosenzweigP**