3 Presidential Privilege Questions After Trump Ruling

By **Jeremy Bates** (August 22, 2024)

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On July 1, the U.S. Supreme Court announced its judgment in Trump v. U.S.,[1] remanding the case to the U.S. District Court for the District of Columbia. There, U.S. District Judge Tanya Chutkan has asked the parties to propose a schedule for pretrial proceedings.[2]

In Trump, the high court established a presidential immunity from criminal prosecution.[3] And in Part III — C of its decision, the court carved out, but did not develop, a new evidentiary privilege for presidents.

Indeed, the Trump decision leaves unanswered several key questions: Is this new presidential privilege waivable? Is the privilege subject to exceptions, including the crime-fraud exception or the fiduciary exception? And judged by the justices' own words, will the new presidential privilege long endure?

1. Is the new presidential privilege subject to waiver?

According to Rule 501 of the Federal Rules of Evidence, claims of privilege are governed by the common law "as interpreted by United States courts in the light of reason and experience," unless the Constitution, a federal statute or a rule prescribed by the Supreme Court provides otherwise.[4] And under the common law, developed by reason and experience, evidentiary privileges usually may be waived.

As the U.S. Supreme Court in 1981 wrote in Upjohn Co. v. U.S., the "oldest of the privileges for confidential communications known to the common law" is the attorney-client privilege.[5]

Yet although it is ancient and venerable,[6] the attorney-client privilege is subject to waiver. Federal Rule of Evidence 502 sets the federal waiver framework. Disclosure of communications or information subject to the attorney-client privilege may waive the privilege, whether intentionally or, in certain circumstances, inadvertently.[7]

In Trump, the justices never used any form of the word "waive." The court did say, rather obliquely, that "the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency."[8] This wording suggests that the presidential privilege may not be waivable, at least not by an individual president-defendant.

Yet evidentiary privileges have costs. As the court observed 50 years ago in U.S. v. Nixon, "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[9] And the court has reiterated recently that no statute pursues its purposes at all costs.[10] Presumably such a balance, of purposes against costs, also applies to the new presidential privilege.

In Trump, the court did not explicitly address whether an assertion of presidential privilege, designed to protect the institution of the presidency, might be outweighed by other interests, including protecting the institution of Congress or effectuating a constitutional transfer of power. That silence may leave open whether the conduct charged in Trump

effectuated a waiver.

2. Is the new presidential privilege subject to a crime-fraud exception?

Waiver may not, however, be the best question. What of exceptions? Even the paradigmatic privilege, the attorney-client privilege, has an exception that allows a prosecutor to offer evidence about an attorney-client communication that furthers a crime or a fraud.[11]

To offer such evidence, at least in a case involving anyone other than a U.S. president, a prosecutor may show that the privileged communication advanced some criminal or fraudulent conduct, either contemplated or ongoing.[12]

In Trump, as the court noted, the indictment charged the former president with, among other things, "conspiracy to defraud the United States."[13] So the court carved out the privilege in the context of alleged crime and fraud. Yet the court did not discuss any crime-fraud exception.

The court most likely did not decide sub silentio that the presidential privilege has no crime-fraud exception. To invoke the crime-fraud exception in an ordinary case, a prosecutor must show both that a crime or fraud has been attempted or committed and that the communication at issue was in furtherance thereof.[14]

Although a bare indictment may support the first element, the indictment does little to support the latter element.[15] Indeed, to decide if the crime-fraud exception applies, a district court may — but need not — review proposed evidence in camera.[16] A crime-fraud exception argument requires proffered evidence, not mere allegations. So far, the Trump case features mainly allegations.

Perhaps this is part of what the Trump court meant when it emphasized the case's interlocutory posture and the resulting "lack of factual analysis in the lower courts."[17] Factual analysis matters for privilege as well as immunity.

3. Is the new presidential privilege subject to a fiduciary exception?

There is another possibility — the traditional fiduciary exception, which applies to trustees. As Justice Samuel Alito wrote for the court in U.S. v. Jicarilla Apache Nation in 2011, in a case about the government's trust relationship with Native American tribes, a common law trustee "must produce trust-related information to the beneficiary on a reasonable basis."[18]

Thus, as he wrote, "a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust."[19] This rule operates as an exception to evidentiary privileges for private fiduciaries.

Is there a similar exception for public fiduciaries? A public officer — like an officer of any private corporation, trust or nonprofit — is a fiduciary and owes fiduciary duties to the employing entity.

The Supreme Court regards this rule as a corollary of the agency theory of government. The court held last year in Percoco v. U.S. — a case about public corruption — that "[a]n 'agent owes a fiduciary obligation to the principal,' … and therefore an agent of the government has a fiduciary duty to the government and thus to the public it serves."[20]

Moreover, fiduciary duties often accompany employment relationships. Donald Trump has already established that as president, he was an employee of the U.S.[21]

The Supreme Court has never considered whether the president is a fiduciary. But if the president is a government agent or employee, then the president should owe the government fiduciary duties and the government ought to be able to demand trust-related information from him.[22] In other words, fiduciary duties might operate to override the new presidential privilege, just as they may override the ancient attorney-client privilege.

Did the court consciously avoid these questions?

None of these questions — waiver, crime-fraud exception, fiduciary exception — was asked, much less answered, in Trump.

If the Trump decision feels underdeveloped, that's because incremental, case-by-case development is what inevitably will happen after the court announces a new evidentiary privilege as a matter of constitutional law.

A more deliberate, considered way to announce a new presidential privilege would have been to write a new Federal Rule of Evidence. The court amends the FREs with some frequency, last amending them in April.[23] The justices all know how to change the FREs.

An FRE that creates a new evidentiary privilege, however, takes effect only if it is approved by Congress.[24] That didn't happen here and likely never will, because the new presidential immunity has aroused a strong congressional reaction. Senate Majority Leader Chuck Schumer, D-N.Y., has already introduced legislation, dubbed the No Kings Act, that would undo the court's immunity holding and, presumably with it, the new presidential privilege.[25]

Of the five justices who wrote opinions in Trump, only Justice Amy Coney Barrett cited to the FREs at all.[26] And Justice Barrett disagreed with the privilege holding.[27]

One would have thought that the court would have addressed FRE 501's rule that the common law governs claims of privilege unless the Constitution provides otherwise.

Another FRE similarly provides that "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution," a federal statute, or a rule prescribed by the Supreme Court.[28]

Thus, the Trump decision begs questions under two FREs that the court did not even cite. When it came to how the new presidential privilege interacts with the common law development of privileges, eight justices kept their jurisprudential powder dry.

Indeed, on a close reading, the court seemed to suggest that it was writing a rule of prosecutorial conduct, rather than any principle that judges should apply. Responding to Justice Barrett's hypothetical about a bribery case, the court wrote that "the prosecutor may admit evidence of what the President allegedly demanded[or] received" — that is, the bribe in return for an official act.[29]

The court also wrote, "What the prosecutor may not do[ ] is admit testimony or private records of the President or his advisers probing the official act itself."[30]

That wording — from footnote 3 of part III-C — presents an ambiguity. In any court of the U.S., deciding whether to admit evidence is the province not of the prosecutor, but of the judge.[31] A prosecutor may offer or introduce evidence, but it is the judge who admits it or excludes it. So those two sentences, about what a prosecutor may or may not admit, could mean little in practice.

One wonders whether the court left prosecutors, judges and the future court itself room for an alternative interpretation. Footnote 3 may have been carefully crafted to generate freedom for district and circuit courts to develop the new presidential privilege in common law ways, through reason and experience, and for the court to adjust its evidentiary holding accordingly.

After all, on the same day that the court decided Trump, it also decided Moody v. NetChoice, which involved content moderation by social media platforms. There, the court observed that "courts usually handle constitutional claims case by case, not en masse."[32]

Even in Trump, the court seemed to want "to obtain 'guidance from the litigants [and] the courts below,'" — quoting from a June concurrence in which Justice Sonia Sotomayor had emphasized, in her very next sentence, the "settled principles of party presentation and adversarial testing."[33]

In the courts below, parties litigating over the new presidential privilege now face interesting choices.

If the special counsel's office fails to work with the ambiguity in footnote 3, and does not accept the court's implicit invitation to guide the common law development of the presidential privilege, then lawyers across the land may justifiably ask why the U.S. Department of Justice will not make the same arguments against a former president that the government routinely makes against private citizens.

Trusts-and-estates lawyers must contend with the fiduciary exception when they advise trustees. Business lawyers and compliance attorneys urge their clients to stay within the law in part because the attorney-client privilege evaporates if a crime is committed and the Justice Department comes knocking.

As corporate attorneys know, the crime-fraud exception applies to every CEO in the country. Why would it not apply to the chief executive of the U.S.?

A bold federal prosecutor, therefore, might argue waiver,[34] the crime-fraud exception, the fiduciary exception or all three. Then, as FRE 501 would contemplate, Judge Tanya Chutkan and the U.S. Court of Appeals for the D.C. Circuit would be able to develop the common law of presidential privilege and to test familiar principles in this new context.

That way, when the Trump case next reaches the Supreme Court, the justices will be able to decide more clearly what evidence a federal judge may admit when a president, entrusted with executive power,[35] is prosecuted for an alleged crime or fraud.

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discussed.

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[1] Trump v. United States , 603 U.S. ___, 144 S. Ct. 2312 (2024).

[2] Order, ECF Doc. 197, in United States v. Trump , No. 1:23-cv-00257-TSC (Aug. 3, 2024).

[3] Trump, 144 S. Ct. at 2347 ("The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts."). The Court based this new immunity in the separation of powers, but the holding feels more like an intra-executive, separation-of-administrations point.

[4] Fed. Rule Evid. 501 ("Privilege in General").

[5] Upjohn Co. v. United States , 449 U.S. 383, 389 (1981).

[6] United States v. Zubaydah , 595 U.S. 195, 255 (2022) (Gorsuch, J., dissenting).

[7] Fed. Rule Evid. 502 (a) & (b).

[8] Trump, 144 S. Ct. at 2341.

[9] United States v. Nixon , 418 U.S. 683, 710 (1974).

[10] Pulsifer v. United States , 601 U.S. 124, 152 (2024).

[11] Barbara E. Bergman, Nancy Hollander and Theresa M. Duncan, 3 Wharton's Crim. Evidence §11:27 (15th ed.); see also Clark v. United States , 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.").

[12] In re Grand Jury Subpoena , 419 F.3d 329, 343 (5th Cir. 2005).

[13] Trump, 144 S. Ct. at 2325.

[14] In re Richard Roe Inc. , 68 F.3d 38, 40 (2d Cir. 1995).

[15] United States v. Costanzo , No. 22-CR-281 (JPO), 2024 WL 2046053, at *2 (S.D.N.Y. May 8, 2024).

[16] See United States v. Zolin , 491 U.S. 554, 562 (1989).

[17] Trump, 144 S. Ct. at 2346.

[18] United States v. Jicarilla Apache Nation , 564 U.S. 162, 184 (2011) (citing Restatement (Third) of Trusts § 82 (2005)).

[19] Jicarilla Apache Nation, 564 U.S. at 167; see also United States v.Evans, 796 F.2d 264, 265–66 (9th Cir. 1986) ("There is no attorney-client privilege between a pension plan trustee and an attorney who advises the trustee regarding the administration of the plan.").

[20] Percoco v. United States , 598 U.S. 319, 329–30 (2023) (Alito, J., for the Court), citations omitted.

[21] Carroll v. Trump , 49 F.4th 759, 770 (2d Cir. 2022) (Westfall Act) ("[A]s Trump points out in his brief, the President is a government employee in the most basic sense of the term: He renders service to his employer, the United States government, in exchange for a salary and other job-related benefits.").

[22] The word "trust" appears four times in the 1787 Constitution. U.S. Const. art. I, § 3, ¶ 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"); U.S. Const. art. I, § 9, ¶ 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any [ ] Emolument… from any foreign State."); U.S. Const. art. II, § 1, ¶ 2 ("[N]o Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); U.S. Const. art. VI, ¶ 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

[23] See Letters from The Honorable John G. Roberts, Jr. to The Honorable Mike Johnson and The Honorable Kamala Harris (April 2, 2024) (transmitting to Congress "amendments and an addition to the Federal Rules of Evidence"), at https://www.supremecourt.gov/orders/courtorders/frev24_9o6b.pdf (visited Aug. 5, 2024).

[24] 28 U.S.C. §2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

[25] See https://www.congress.gov/bill/118th-congress/senate-bill/4973 (visited Aug. 7, 2024).

[26] Trump, 144 S. Ct. at 2355 (Barrett, J., concurring in part).

[27] Id. at 2354 (Barrett, J., concurring in part) ("I do not join Part III–C, however, which holds that the Constitution limits the introduction of protected conduct as evidence in a criminal prosecution of a President, beyond the limits afforded by executive privilege.").

[28] Fed. Rule Evid. 402.

[29] Trump, 144 S. Ct. at 2341 n.3.

[30] Id.

[31] See, e.g., Fed. Rule Evid. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."); Fed. Rule Evid. 104(b) ("The court may admit the proposed evidence . . . ."); Fed. Rule Evid. 105 ("If the court admits evidence . . . ."); Fed. Rule Evid. 406 ("The court may admit this evidence . . . .").

[32] Moody v. NetChoice LLC , 603 U.S. ___, 144 S. Ct. 2383, 2397 (2024).

[33] Trump, 144 S. Ct. at 2346 (brackets original) (quoting Vidal v. Elster , 602 U.S. 286, 328 (2024) (Sotomayor, J., concurring in judgment)); Vidal, 602 U.S. at 328 (same).

[34] Indeed, in the weeks since the Court decided Trump, New York County District Attorney Alvin L. Bragg, Jr., has already described immunity arguments as unpreserved or waived. See People's Memorandum of Law in Opposition to Defendant's Post-Trial Motion (July 24, 2024), People v. Trump , No. 71543-23, at https://s3.documentcloud.org/documents/25002778/20240724-people-redacted-peoples-mem-opp-defs-post-trial-motion-filed.pdf (visited Aug. 5, 2024).

[35] See Trump, 144 S. Ct. at 2333 (discussing "administration of public affairs as entrusted to the executive branch of the government"); see also Alexander v. S.C. State Conf. of the NAACP , 144 S. Ct. 1221, 1233 (2024) ("The Constitution entrusts state legislatures with the primary responsibility for drawing congressional districts.").