Lawyering in Private: Privilege and Confidentiality – Sacred Protection or Overused Cloak of Secrecy?

By Miranda Rhodes

I. Scope of President Attorney-Client and Executive Privileges

Two types of privilege are paramount when considering matters involving the President: executive privilege and attorney-client privilege. These protections prevent the legally compelled disclosure of communications that fall within their ambit, not cover every confidential presidential communication.[1] Apart from this, lawyers also owe a general duty of confidentiality to clients, which is broader in scope than the privileges, but more limited in terms of the protection afforded. Specifically, lawyers are prohibited from volunteering information relating to the representation of a client.[2] Government lawyers, including the Attorney General and White House Counsel, are subject to the same ethical standards as other lawyers, as well as to other state and federal restrictions,[3] determining the proper application and scope of the pertinent confidentiality protections for government lawyers can be especially challenging.[4] The President works closely with the Attorney General and White House Counsel, among other lawyers, and some of their communications are certainly protected by the attorney-client and/or executive privilege. The critical question, though, is: Where does one draw the line?

A. Attorney-Client Privilege

[1] Ann M. Murphy, *All the President's Privileges*, 27 J. L. & POLICY 1, 2 (discussing how attorney-client and executive privilege "may be limited by public policy, such as when the client or subpoenaed witness is a government entity under federal criminal investigation").

[2] *See* MODEL RULES OF PRO. CONDUCT R. 1.6 (AM. BAR. ASS'N 1983) (outlining a lawyer's duty of confidentiality to their client).

[3] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 754 (1986).

[4] *Id.* (discussing the complexities of identifying the client of a government lawyer in different settings).

While the elements of the attorney-client privilege can vary slightly between jurisdictions, the *Restatement of the Law Governing Lawyers* authoritatively expresses the general approach adhered to in most jurisdictions. In particular, the attorney-client privilege may be invoked with respect to: "(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of obtaining or providing legal assistance for the client."[5]

1. Attorney-Client Privilege in Presidential Capacity

Identifying the client in a government setting is nuanced. For example, some argue that the client is "the people," and so the public's interest is the ultimate factor when determining whether a communication is privileged.[6] Others have observed that the government's attorney-client privilege has been applied in a manner analogous to the corporate attorney-client privilege.[7] "Often with little underlying analysis, courts have seemingly deferred to a version of the control-group test by assuming that elected officials have authority to assert the privilege."[8] Under this approach, "the President is the Chief Executive Officer of USA, Inc.," and thus is typically viewed as the holder of the privilege.[9] It can also be argued that given the public purpose served by the governmental attorney-client privilege, it is reasonable "for a court to be more generous in the

[5] RESTATEMENT (THIRD) OF L. GOVERNING LAW. §68 (AM. L. INST. 2000).

[6] *See, e.g.*, Rebecca Roiphe & Bruce Green, *Is Jeffrey Clark's Secret Conversation with Trump "Privileged"?*, JUST SECURITY (Feb. 5, 2021) https://www.justsecurity.org/74475/is-jeffrey-clarks-secret-conversation-with-trump-privileged/ (contending that Trump could not claim attorney-client privilege over communications with a DOJ attorney even if he was acting as president because the DOJ is arguably the representative of the people).

[7] Michael Stokes Paulsen, *Who "Owns" Government's Attorney Client Privilege?*, 83 MINN. L. REV. 473, 474 (1998) ("My thesis in this article is that the United States government possesses, as a matter of common law, the same attorney-client privilege that exists for a corporation . . . ."); Jason Batts, *The Weintraub Principle: Attorney-Client Privilege and Government Entities*, 92 S. CA. L.R. POSTSCRIPT 1, 5 (2018) (contending that in determining the ability to revoke the predecessor of an official's claim of attorney-client privilege "courts should apply the corporate principle outlined in . . . *Weintraub* to government actors").

[8] Batts, *Weintraub*, *supra* note 7, at 7.

[9] Paulsen, *supra* note 7, at 475.

treatment of the privilege in such a context."[10] Whatever the theory, the key is to identify the client, because that will dictate for whom the protection can properly be invoked.

2. Individual Capacity

The attorney-client privilege, of course, can apply to communications between presidents and their personal lawyers. The privilege that the President enjoys as a private citizen is clearer and arguably stronger than the privilege applicable in his official capacity. This is so because, in the private citizen context, the President's lawyer plainly represents him personally and not the amorphous greater public interest.[11] In this regard, the D.C. Circuit has recommended that "government officials should hire private counsel to engage in privileged communications" that they do not want to be assessed in relation to the broader public interest.[12] The scope of the attorney-client privilege for the President is dependent on "whether the attorney is representing the entity of the White House or the President . . . individually."[13]

B. Executive Privilege

The executive privilege "shield[s] information from the other two branches of government and the public."[14] It can be used narrowly to protect only communications with the President and

[10] *Id*. at 501.

[11] *Id*. at 487–88 (discussing an attorney working in the White House Counsel's role during the Clinton administrations and finding that "the attorney plainly does not represent the purely personal, individual interest of the present occupant of the office of President").

[12] Jason Batts, *Rethinking Attorney-Client Privilege*, 33 GEO. J. LEGAL ETHICS 1, 36 (2020) (citing *In re Lindsey*, 148 F.3d 1100, 1108 (1998)); Batts, *Weintraub Principle*, *supra* note 7, at 14 ("Ultimately, just as with corporate employees, an elected official can retain a private attorney to deliver independent advice."); *see also id.* at 15 (arguing that "the attorney-client privilege is not absolute and other opportunities exist to seek legal advice that are exempt from public inspection"); Murphy, *supra* note 1, at 24 ("If a president truly wishes to protect his communications with an attorney, he may engage the services of his own private counsel.").

[13] *Id*. at 51 (analyzing *In re Lindsey* under a proposed approach to determining the scope of presidential attorney-client privilege).

[14] Murphy, *supra* note 1, at 11.

his advisors or possibly more broadly to protect communications involving "lowly assistants and factotums who know about 'pre-decisional deliberations.'"[15] This privilege was first exercised by George Washington, and the "first judicial review of executive privilege occurred in [United States] v. Burr" in 1807.[16]

Executive privilege is not "expressly articulated in the Constitution or other founding document," but the Supreme Court has recognized its existence,[17] and emphasized in *United States v. Nixon*:

> The expectation of the President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making. A president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.[18]

Other cases, primarily out of the D. C. Circuit, "have broadened the privilege in some areas and trimmed it in others, resulting in the modern-day iteration."[19] The results of these decisions "have usually been narrow rulings lacking applicability beyond the cases at hand."[20] Even under these

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[15] Charles Tiefer, *How Trump and Bar could Stretch Claims of Executive Privilege and Grand Jury Secrecy*, THE CONVERSATION (Mar. 24, 2019 11:37PM), https://theconversation.com/how-trump-and-barr-could-stretch-claims-of-executive-privilege-and-grand-jury-secrecy-114166.

[16] Murphy, *supra* note 1, at 11.

[17] First recognized as a broad concept in *United States v. Burr*, the Court "breathed life into the doctrine in 1974 with its decision in *United States v. Nixon*." *See* Anthony W. Wassef, *Executive Privilege—With a Catch: How a Crime-Fraud Exception to Executive Privilege Would Facilitate Congressional Oversight of Executive Branch Malfeasance in Accordance with the Constitution's Separation of Powers*, 105 CORNELL L. REV. 1261, 1262 (2020)*; see also infra* Part II.B (discussing the history and impact of *United States v. Nixon*).

[18] 418 U.S. 583, 708 (1974). *See also infra* Part II.B (discussing *Nixon* in more detail).

[19] *See* Wassef, *supra* note 17, at 1263 n. 8 (citing several court decisions out of the District of Columbia District Court and Court of Appeals).

[20] *Id*. at 1268.

narrow rulings, executive privilege is characterized as a high bar to overcome by those who oppose its use.[21] For this reason, there is concern that the privilege could be used to undermine Congress's ability to act as a check on the Executive Branch.[22]

The term "executive privilege" was coined by President Dwight D. Eisenhower's administration.[23] Several presidents prior to Eisenhower asserted the privilege, but notably, every chief executive since has claimed this privilege "to resist the courts' and Congress' attempts to secure information from the Executive Branch."[24] The consistent use of the privilege over the past 70 years has predictably led to its evolution and expansion, most demonstrably under President Nixon, President Clinton, and President Trump.[25] Indeed, some scholars have posited that "the executive branch's current use of executive privilege to block congressional inquiry bears little relation to a situational balancing of specific harm from disclosure against Congress's need for the information."[26]

While not a novel issue, the question of whether the executive privileges ends once a president leaves office has become increasingly relevant.[27] The Supreme Court considered this question in *Nixon v. Administrator General Services.* [28] Here, the Court recognized "that a former

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[21] *Id.*

[22] *Id.* at 1279 (contending that "fac[ing] a high bar to clear in order to overcome executive privilege, Congress has been made less than a co-equal partner of the executive branch, inhibiting the legislature's ability to serve as a check and balance on the president and other executive branch officials").

[23] Murphy, *supra* note 1, at 13.

[24] *Id.*

[25] Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 56, 90 (2020) (discussing the evolution of the executive privilege caused by the shift in its utilization by different presidents).

[26] *Id*. at 56–57.

[27] *See infra* Part III.C.

[28] Debra Cassens Weis, *Does Executive Privilege Still Protect Trump After His Term Ends? Fight Brews Over Congressional Subpoenas*, ABA J. (Oct. 12, 2021) https://www.abajournal.com/news/article/does-executive-privilege-still-protect-trump-after-his-

president does retain some right to assert executive privilege."[29] More recently, President Obama issued an executive order that instructed the National Archives on how to resolve competing directives from former and current Presidents.[30] Interestingly, neither the Trump nor Biden administration have disturbed that order.[31] While notice must be provided to a former president before releasing potentially privileged records, based on President Obama's executive order, "the sitting president gets to make the call on releasing the documents," even where "the former president invokes executive privilege."[32]

term-ends-fight-brews-over-congressional-subpoenas. In *Nixon v. Administrator of General Services*, commonly known as *Nixon II*, the court considered former President Nixon's challenge to the Presidential Records Act, which provided for eventual public access to some presidential records. While *Nixon II* did not resolve how to address competing claims of privilege between former and incumbent presidents, it did recognize that a former president retains the right to assert executive privilege in some instances. *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (asserting the Nixon "may legitimately assert the President privilege, of course, only as to those materials whose contents fall within the scope of the privilege recognized in United States v. Nixon . . . , that the privilege is limited to communications 'in performance of a President's responsibilities'") (citing *United States v. Nixon*, 418 U.S. 683, 711 (1974)).

[29] *Id.*

[30] Exec. Order No. 13489, 74 F.R. 4669 (Jan. 21, 2009).

[31] *See supra* note 28.

[32] *Id*.; *see supra* note 30, at § 4(a)–(b) (stating that in making the determination for claims of executive privilege by the former president, the Archivist of the united States or his designee "shall abide by any instructions given him by the incumbent president unless otherwise directed by final court order").

II. Past Presidential Issues of Privilege

A. Vice President Aaron Burr

U.S. v. Burr arose from Vice President Aaron Burr's trial for treason in relation to his alleged plans to initiate a rebellion.[33] A spy in Burr's company wrote a letter to President Thomas Jefferson that disclosed Burr's plans.[34] The court issued a subpoena for the letter, but Jefferson refused to comply,[35] arguing that "courts could not force the executive branch to comply with their orders."[36] The court ultimately held that a "sitting president [was] still subject to the judicial process" but that "special procedures should be followed,"[37] reasoning that, although subject to the general rules that apply to others, a president "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."[38] In addition, the court emphasized that the occasion for requesting production of a document from the President "ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on . . . [and that] much reliance must be placed on the declaration of the president."[39] Additionally, the Court found that correspondence sent in a president's private capacity might be entitled to greater deference or privilege than official correspondence sent to him.[40]

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[33] Murphy, *supra* note 1, at 12.
[34] *Id.*
[35] *Id*.
[36] John C. Yoo, *The First Claim, The Burr Trial, United States v. Nixon, and President Power*, 83 MINN. L. REV. 1435, 1451.
[37] Murphy, *supra* note 1.
[38] *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807).
[39] *Id*. at 192.
[40] *Id.* (finding that "a privilege does exist to withhold private letters of a certain description" which includes when "[s]uch a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view").

While a president being subject to judicial process is related to the question of the scope of executive privilege, *Burr* did not address "whether the executive could withhold some information from the court in the national interest."[41]

B. President Richard Nixon

In *United States v. Nixon*, the Supreme Court "officially recognized the concept of an executive privilege."[42] After the Watergate scandal, a Special Counsel issued a subpoena to President Nixon to produce audio tapes from the Oval Office. President Nixon refused and moved to quash the subpoena. The district court denied the motion, and the Supreme Court granted certiorari because of "the public importance of the issues presented and the need for their prompt resolution."[43] Nixon contended that he enjoyed absolute protection of confidential executive communications under the executive privilege.[44] The Court disagreed, stating that "[n]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[45] The Court did recognize that the President "need[s] candor and objectivity from his advisors, and should therefore receive great deference from the courts."[46] Communications by the President are thus presumptively privileged.[47] When reviewing the privileged material in question the court "must weigh the importance of the general privilege of confidentiality of the Presidential communications in performance of the President's

[41] Yoo, *supra* note 36, at 1454 (stating that *Nixon* recognizes this distinction and that case "acknowledged that the chief executive could refuse to hand over information that involves the national security, military, or diplomatic information) (citing 418 U.S. 683, 706 (1974)).

[42] Murphy, *supra* note 1, at 13.

[43] *Id.* at 14.

[44] *Id*.

[45] *Id.* at 14–15.

[46] *Id.* at 15.

[47] *Nixon*, 418 U.S. at 708.

responsibilities against the inroads of such a privilege on the fair administration of criminal justice."[48]

C. President William Jefferson Clinton

The question of presidential privileges arose multiple times during the Clinton Administration.[49] In *Clinton v. Jones*, President Clinton was sued for sexual harassment that allegedly occurred prior to his taking office.[50] The President "filed a motion 'to dismiss . . . without prejudice and to toll any statutes of limitation [that may be applicable] until he [was] no longer President.'"[51] Clinton based his motion on claims of presidential immunity and privileges.[52] The district court denied the motion, but ordered any trial stayed until the end of Clinton's presidency based on the reasoning in *Nixon v. Fitzgerald*.[53] Judge Susan Webber Wright was not convinced that "a President has absolute immunity from civil damage actions arising prior to assuming office," but "she concluded that the public interest in avoiding litigation that might hamper the President in conducting the duties of his office outweighed any demonstrated need for an immediate trial." [54]

The Eighth Circuit reversed regarding the stay,[55] reasoning that "the President, like all other government officials, is subject to the same laws that apply to all other members of our society."[56]

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[48] *Id.* at 711–12.

[49] *See Clinton v. Jones*, 520 U.S. 681 (1997); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

[50] 520 U.S. 681, 685 (1997).

[51] *Id.* at 686–87.

[52] *Id.* at 681.

[53] *Id.* at 687. In *Nixon v. Fitzgerald*, the Supreme Court held that the President was immune from suits for damages based on actions taken in his official capacity because participating in a lawsuit would severely detract from the President's ability to perform his official duties and serve the American people. 457 U.S. 731 (1982).

[54] *Id*. (citing *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994), *aff'd in part, rev'd in part,* 72 F.3d 1354 (8th Cir. 1996)).

[55] *Id.* at 687–88.

[56] *Id.* at 688 (citing *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996)).

In addition, the court observed that there was no "case in which any public official ever has been granted any immunity from suit for his unofficial acts," and that official immunity "is inapposite where only personal, private conduct by a President is at issue."[57] The Supreme Court affirmed, holding that "not a single privilege is annexed to [the President's] character; far from being above the laws, he is amendable to them in his private character as a citizen, and in his public character by impeachment."[58]

In 1998, Deputy White House Counsel Bruce Lindsey refused to answer grand jury inquiries about, *inter alia*, Clinton's possible perjury in the *Jones* cases on the basis of both executive privilege and governmental attorney-client privilege.[59] Clinton also attempted to "invoke executive privilege to prevent close aides from testifying."[60] Both these attempts failed. "The D.C. Circuit held that considerations of public policy did not warrant recognition of a governmental attorney-client privilege as against a federal grand jury's criminal inquiry conducted by an Independent Counsel."[61]

In 1997, the Clinton White House made another claim of attorney-client privilege against a grand jury subpoena issued for notes taken by White House lawyers when investigators questioned First Lady Hillary Clinton in connection with the Whitewater investigation conducted by Independent Counsel Kenneth Starr.[62] Relying heavily on *U.S. v. Nixon*, the Eighth Circuit "rejected the claim of executive branch attorney-client privilege as against an Independent Counsel

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[57] *Id*.
[58] *Id.* at 696.
[59] Paulsen, *supra* note 7, at 476–77.
[60] *See* Wassef, *supra* note 17, at 1265 (discussing the involvement of Clinton's personal counsel, Kenneth Starr, in *Jones* and the desire to keep White House aides, namely Monica Lewinsky, off of the stand).
[61] Paulsen, *supra* note 7, at 477.
[62] *Id.*

conducting a federal criminal investigation, on the ground that the privilege simply does not exist in such a context."[63] The court reasoned that "privileges, as exceptions to the general rule, 'are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"[64] In rejecting the argument for attorney-client privilege under *Upjohn*, the Eighth Circuit noted that the "important differences between the government and nongovernmental organizations such as business corporations weigh against the application of the principles of *Upjohn* in this case" because a "corporation, in contrast [to the White House], may be subject to both civil and criminal liability for the actions of its agents, and corporate attorneys therefore have a compelling interest in ferreting out any misconduct by employees. The White House simply has no such interest with respect to the actions of Mrs. Clinton."[65] The Eighth Circuit further observed that "the general duty of public service calls upon government employees and agencies to favor disclosure over concealment. The difference between the public interest and the private interest is perhaps, by itself, reason enough to find Upjohn unpersuasive in this case."[66]

In this case, Mrs. Clinton could not invoke governmental attorney-client privilege to withhold information from the grand jury as no common interest existed between her and the White House justifying extension of the attorney-client privilege to communications between Mrs. Clinton, her personal attorney, and attorneys representing the White House.[67] Furthermore, the court rejected the argument that Mrs. Clinton's reasonable belief that the conversations at issue

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[63] *Id.*; *see also*, Murphy, *supra* note 12, at 35 (contending that in heavy reliance on *Nixon*, "[t]he Court determined that there was a government attorney-client privilege, but that it did not apply to criminal proceedings of public officials").

[64] In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8th Cir. 1997) (quoting *Nixon*, 418 U.S. at 710).

[65] *Id*. at 919.

[66] *Id*.

[67] *Id.* at 922–23.

were confidential was irrelevant to determination of applicability of the attorney-client privilege because "Mrs. Clinton [did] not claim that she believed that the White House lawyers represented her personally" and she presented no authority to support the argument that the "law sweeps broadly enough to cloak these conversations with attorney-client privilege."[68]

III. Current Context: President Trump's Claims of Privilege

During and after his term in office, President Donald Trump frequently claimed, and arguably sought to expand, the protections accorded under the attorney-client and executive privileges. As with the other examples already discussed, it has often been difficult to determine to whom the privileges belonged—the President in his official capacity; the President as an individual; the Executive Branch as an institution; or the United States (i.e., the "people").[69] Although President Trump once proclaimed that the "attorney-client privilege is dead,"[70] he asserted it on numerous occasions throughout his presidency.[71] With regard to the executive privilege, the President's invocation thereof, at times, seemed to focus less on guarding against identifiable harm that might occur from disclosure than on the perceived "need to protect the president's prerogative to assert privilege to refuse to provide information."[72] Several instances of

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[68] *Id*. at 923.

[69] *See, e.g.*, Kathleen Clark, *The Lawyers Who Mistook a President for Their Client*, 52 IND. L. REV. 271 (2019) (discussing subsequent changes in the Department of Justice's interpretation of the emoluments clause which benefited Trump as an individual).

[70] On April 10, 2018, Trump tweeted "Attorney-client privilege is dead" after the FBI raided the office and residence of his personal attorney, Michael Cohen. Cohen was reportedly under investigation related to bank fraud and campaign finance violations. Trump also referred to the investigation involving Cohen as a "witch hunt." Michael Sheetz & Mike Calia, *President Trump Claims "Attorney-Client Privilege is Dead" after FBI Raids His Lawyer Michael Cohen's Office and Residence*, CNBC (April 10, 2018) https://www.cnbc.com/2018/04/10/trump-tweet-attorney-client-privilege-is-dead.html; *see also infra* Part III.B.2.

[71] *See, e.g.*, *infra* Part III.A & III.B.

[72] Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1, 56, 90 (arguing that "the constitutional doctrine that executive privilege has developed allows it to nullify oversight" as demonstrated during President Trump's impeachment proceedings).

President Trump's dealings with attorneys and associated claims of privilege are illustrative of his administration's approach to protecting presidential communications and vividly demonstrate the complexity of ascertaining when and to what extent these shields can properly be invoked.

A. Attorneys for President Trump in His Official Capacity

1. Jeffrey Clark

Following the 2020 Election, President Trump was disappointed that the Acting Attorney General Jeffrey Rosen and the Department of Justice ("DOJ") were not taking an active role in challenging the outcome of the election.[73] Jeffrey Clark, the acting chief of the DOJ's Civil Division, was "more sympathetic to the President's efforts to overturn the election results."[74] In the final days of his presidency, Trump met with Clark, allegedly about the possibility of Clark replacing Rosen as Attorney General.[75] When pressed on the accuracy of the accounts and the contents of his conversation with President Trump, Clark maintained that the accounts "contained inaccuracies but did not specify, adding that he could not discuss any conversations with Mr. Trump . . . because of 'the strictures of legal privilege.'"[76] Clark also stated that "[i]t is unfortunate that those who were part of a privileged legal conversation would comment in public about such internal deliberations."[77]

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[73] Rebecca Roiphe & Bruce Green, *Is Jeffrey Clark's Secret Conversation with Trump "Privileged"?*, JUST SECURITY (Feb. 5, 2021) https://www.justsecurity.org/74475/is-jeffrey-clarks-secret-conversation-with-trump-privileged/.

[74] *Id.*

[75] *Id.*

[76] Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021) https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html.

[77] *Id*.

Notably, Clark did not identify the specific privilege claimed when declining to comment on his conversations with the President and only ambiguously asserted "legal privilege."[78] If this was intended to be a reference to the attorney-client privilege, then the propriety of that claim seems somewhat dubious. Specifically, with regard to the last element of the privilege— "for the purpose of obtaining or providing legal assistance for the client"—Clark, as a DOJ lawyer, could not represent Trump personally.[79] For the attorney-client privilege to be applicable here the legal assistance sought and provided must have been for Trump in his role as President, not as an individual client, with Clark serving as counsel for the United States.[80] In other words, the U.S. would have to have been the client.[81] Thus, to the extent that the conversation between Clark and Trump was privileged, the privilege belonged to the United States or the President in his official capacity, but not to him individually.[82] Indeed, then-acting Attorney General Monty Wilkinson "could [have] waive[d] [the] privilege if he felt doing so would [have been] in the country's interest."[83]

2. William Barr

In 2018, President Trump announced that William Barr would replace Jeff Sessions as Attorney General.[84] During his term as Attorney General in the Trump administration, Barr received criticism for his handling of the Mueller Report and for interventions in judicial

[78] Roiphe & Green, *supra* note 6 ("It is not even clear what privilege Clark has in mind when he describes his meeting with trump as a 'privileged conversation.'").

[79] *Id.*

[80] *See id.* (discussing potential application of *Upjohn* in a government attorney-client setting).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 24 (2020).

proceedings of individuals close to President Trump, including Michael Cohen, Roger Stone, and Michael Flynn. In light of these instances, the New York City Bar Association described Barr as "view[ing] his primary obligation as loyalty to the president individually rather than to the nation."[85]

In relation to the Mueller Report, Barr made trips to investigate President Trump's "theory regarding the origins of the FBI's investigation into . . . Russia's interference in the 2016 election."[86] Barr openly questioned whether the investigation into the Trump campaign was "adequately predicated" and frequently described the investigation as "spying," a description in line with the President's accusations that American law enforcement officials were "targeting his campaign out of political malice."[87] After Mueller turned over the results of his investigation to the White House, President Trump and Barr utilized different tools, including executive privilege, to "minimize access of House investigations to the [Mueller] report and conclusions and evidence."[88] For example, in May 2019, Trump "made a protective assertion of executive privilege in response to the House Judiciary Committee's intention to hold . . . Barr in contempt of Congress for failing to comply with a Committee subpoena to turn over the unredacted Mueller Report."[89] Furthermore, Barr's involvement, and often intervention, into the judicial proceedings of

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[85] *Id.*

[86] *Id*.

[87] Nicholas Fandos & Adam Goldman, *Barr Asserts Intelligence Agencies Spied on the Trump Campaign*, N.Y. TIMES (Apr. 10, 2019) https://www.nytimes.com/2019/04/10/us/politics/barr-trump-campaign-spying.html.

[88] Charles Tiefer, *How Trump and Barr Could Stretch Claims of Executive Privilege and Grand Jury Secrecy*, THE CONVERSATION (Mar. 24, 2019) https://theconversation.com/how-trump-and-barr-could-stretch-claims-of-executive-privilege-and-grand-jury-secrecy-114166.

[89] Anthony W. Wassel, *Executive Privilege--with a Catch: How a Crime-fraud Exception to Executive Privilege would Facilitate Congressional Oversight of Executive Branch Malfeasance in Accordance with the Constitution's Separation of Powers*, 105 CORNELL L. REV. 1261, 1292 (2020).

individuals in Trump's inner circle, suggest a blurring of the line between the attorney general's representation of Trump as the president and Trump individually.[90]

3. Don McGahn

Don McGahn served as White House Counsel from the beginning of Trump's time in office until October 17, 2018. In early 2018, there were reports that McGahn was pressured by President Trump to instruct the DOJ to dismiss special counsel Robert Mueller and that McGahn refused. It was later reported that McGahn was cooperating extensively with Mueller's investigation.[91] When McGahn was later subpoenaed by the House Judiciary Committee, he blanketly objected, reportedly because the President had instructed him not to cooperate.[92] The basis for Trump's claim of absolute immunity was unclear, but it was most likely executive privilege because the administration argued that "[t]he Constitution does not allow the House and the executive branch

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[90] *See* Benjamin Weiser, Ben Protess, Katie Benner, & William K. Rashbuam, *Inside Barr's Effort to Undermine Prosecutor's in N.Y.*, N.Y. Times (June 25, 2020) https://archive.ph/20200701141801/https://www.nytimes.com/2020/06/25/nyregion/geoffrey-berman-william-barr-michael-cohen.html (detailing Barr's questioning of prosecutors over their decision to charge Michael Cohen, the former personal attorney of President Trump, and at one point instructing Justice Department officials "to draft a memo outlining legal argument that could have raised questions about Mr. Cohen's conviction and undercut similar prosecutions in the future"); Klarman, *supra* note 84 (discussing Barr's intervention to reduce the prosecutor's recommendation in sentencing President Trump's close friend and advisor Roger Stone"); Kevin Johnson, Michael Collins, & Christal Hayes, *DOJ Drops Case against Former Trump Adviser Michael Flynn in Boldest Step Yet to Undermine Mueller Probe*, USA TODAY (May 7, 2020) https://www.usatoday.com/story/news/politics/2020/05/07/trump-adviser-michael-flynn-has-case-dropped-justice-department/3090071001/ (contending that Barr's influence led to the Justice Department dropping its case against Michael Flynn, former aide to President Trump, for false testimony about his contacts with Russia during the F.B.I. investigation into Russia's interference with the 2016 election).

[91] Michael S. Schmidt & Maggie Haberman, *Trump Order Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018); Michael S. Schmidt & Maggie Haberman, *White House Counsel Has Cooperated Extensively with Mueller's Obstruction Inquiry*, N.Y. TIMES (Aug. 18, 2018).

[92] Nicholas Fandos, *McGahn Skips Hearing Defying Subpoena, and Democrat's Anger Swells*, N.Y. TIMES (May 21, 2019).

to sue each other in court."[93] The district court ultimately held that McGahn was "not absolutely immune from compelled testimony . . . but declined to reach the merits of McGahn's immunity."[94]

Subsequently, it was reported that "President Trump's previous personal legal team encouraged full cooperation with the Special Counsel, and waived both the executive privilege and the attorney-client privilege."[95] McGahn's attorney also issued a statement: "President Trump, through counsel, declined to assert any privilege over Mr. McGahn's testimony, so Mr. McGahn answered the Special Counsel team's questions fulsomely and honestly, as any person interviewed by federal investigators must."[96] Trump criticized the reports that he had encouraged McGahn to resist the subpoena as "fake news."[97] The real question is: Would there have been any valid basis for McGahn refusing to cooperate, given the nature of the investigation?

B. Attorneys for President Trump in His Personal Capacity

1. Rudy Giuliani

In 2019, Rudy Giuliani, acting as President Trump's personal lawyer, indicated that he would invoke the attorney-client privilege in response to an impeachment inquiry into Trump's phone conversation with Ukrainian President Volodymyr Zelensky.[98] Critics of this assertion of privilege contended that there was ample evidence to show that Giuliani's services had been used to advance a crime or fraud related to this matter and that the privilege did not attach due to the

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[93] Charlie Savage, *Trump's Claim that Aides are Immune from Testifying is Tested in Courts*, N.Y. TIMES (Nov. 25, 2019).

[94] Shaub, *supra* note 25, at 51–53 (citing *Comm. on Judiciary of United States House of Representatives v. McGahn,* 968 F.3d 755, 762 (D.C. Cir. 2020)).

[95] Murphy, *supra* note 1, at 37.

[96] *Id.* at 38.

[97] *Id*.

[98] Cyrus Mehri, Richard Condit & Cleveland Lawrence III, *Why Giuliani and Trump Can't Hide Behind the Attorney-Client Privilege*, POLITICO (Oct. 3, 2019), https://www.politico.com/magazine/story/2019/10/03/rudy-giuliani-ukraine-donald-trump-attorney-client-privilege-229123/.

crime-fraud exception.[99] Giuliani then claimed that "his work in Ukraine was official business on behalf of the State Department."[100] If so, Giuliani's activities could have conceivably been protected by the executive privilege if the President could argue that disclosure of documents and communications related to this matter would compromise national security or executive branch deliberations.[101] Giuliani, however, is a private citizen and was Trump's lawyer in his personal, not presidential capacity.[102] Further to this point, the State Department made a statement emphasizing that Giuliani "was acting in his personal capacity and 'does not speak on behalf of the U.S. government.'"[103] Giuliani's apartment was raided by the FBI in relation to these charges in 2021.[104] In response, his attorney maintained that the seizure's yield was "replete with material covered by the attorney-client privilege."[105] Whether and to what degree such a broad assertion is valid will depend on the role that Giuliani was fulfilling as the President's counsel.

2. Michael Cohen

Michael Cohen was President Trump's personal attorney for almost ten years, and this relationship raises a number of issues related to the attorney-client privilege.[106] In April 2018, in connection with its investigation into Cohen's possible involvement in the alleged collusion between the Trump Campaign and the Russian government, the FBI searched his office, residence,

[99] *Id*.

[100] *Id.* Giuliani contends that he was acting in an official capacity. This argument would help him avoid prosecution under the Logan Act, which makes it unlawful for private citizens to engage in unauthorized negotiations with foreign governments. 18 U.S.C. § 1953.

[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] Brett Samuels, *Biden Says He Learned of Giuliani Raid After it Happened*, THE HILL (Apr. 29 2021).

[105] *Id*.

[106] *Id.* at 39.

hotel room, safe deposit box, and electronic devices.[107] This search and a subsequent raid led Trump to infamously tweet that the "Attorney-client privilege is dead!"[108] Despite this proclamation, the privilege could very well protect many of the former President's communications with Cohen.[109] As noted by a special master appointed to oversee matters related to privilege in the investigation, "[s]earches of an attorney's law office or other premises require special 'heightened care.'"[110] Consistent with this, the U.S. Attorney Office and the FBI instituted "'rigorous protocols' to ensure that the privilege [would] not be violated."[111] Given the absolute nature of the protection once it attaches, one seeking access to attorney-client communications must demonstrate that: (1) the elements of the privilege have not been satisfied; (2) the privilege has been waived; or (3) the crime-fraud exception applies. Cohen, who was once dubbed "Trump's pit bull," has become very outspoken against his former client and has cooperated with authorities in their investigations..[112] Specifically, Cohen worked closely with the Russia-probe investigation in hopes of securing a favorable plea deal for himself.[113] He has also made regular appearances on CNN and other news programs, opining about the ex-President and his practices.[114] Cohen even

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[107] *Id*. *See also* Joshua Roberts, *Michael Cohen Documents Released: Read the Search Warrant*, NBC NEWS (Mar. 6, 2019) https://www.nbcnews.com/politics/politics-news/michael-cohen-documents-released-read-search-warrant-n984936.

[108] *Supra* note 70.

[109] Murphy, *supra* note 1.

[110] *Id*. at 39–40.

[111] *Id*. at 40.

[112] William Cummings, *From Trump Fixer to Mueller Informant: Timeline of Michael Cohen's Role in Russia Probe*, USA TODAY (Nov. 29, 2018) https://www.usatoday.com/story/news/politics/onpolitics/2018/11/29/michael-cohen-timeline/2147748002/ (describing how Cohen was nicknamed Trump's "pit bull" in 2011 because of how fervently Cohen defended Trump before the unraveling of their relationship in 2018).

[113] *Id*.

[114] *See e.g.*, *Cohen Says Trump 'Actually Looking to Change the Constitution'* CNN (Sep. 10 2020) https://www.cnn.com/videos/politics/2020/09/10/michael-cohen-trump-election-dictator-ctn-sot-vpx.cnn; *Michael Cohen Makes Prediction about Trump and 2024*, CNN (Apr. 29 2021) https://www.cnn.com/videos/politics/2021/04/29/

published a book detailing many of his experiences working for President Trump, a great deal of which would seem to be covered by the duty of confidentiality and possibly the attorney-client privilege.[115]

C. Former President Trump's Current Claims of Executive Privilege

Over the past year, President Trump invoked executive privilege to resist requests for presidential records sought in connection with the investigation of the "insurrection" of January 6, 2021 and urged others to do so as well.[116] The House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol has demanded the production of executive documents from the National Archives, as well as the testimony of various aides of the President.[117] Although President Biden agreed to produce an initial set of documents from the National Archives, the former President has continued to resist, instructing potential witnesses not to testify and objecting to the National Archives request on the basis of "the executive or other privileges, including . . . the attorney-client privilege.'"[118] While the Supreme Court has

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michael-cohen-intv-trump-circle-giuliani-raid-devices-nr-vpx.cnn; *Michael Cohen: Everything Went Through Donald Trump*, CNN (July 1, 2021) https://www.cnn.com/videos/politics/2021/07/01/allen-weisselberg-indictment-trump-organization-michael-cohen-intv-nr-vpx.cnn.

[115] The book, aptly titled *Disloyal: The True Story of the Former Personal Attorney to President Donald J. Trump*, was published in September 2020. *See* Carlos Lozada, *Even in a Tell-All Trashing Trump, Michael Cohen Can't Stop Emulating His Boss*, WASHINGTON POST (Sep. 10, 2020); Joel Cohen, *Michael Cohen Continues to Cause Serious Damage to the Legal Profession with Tell-All Book*, LAW & CRIME (Apr. 21, 2020) https://lawandcrime.com/opinion/michael-cohen-continues-to-cause-serious-damage-to-the-legal-profession-with-tell-all-book/ (contending that, though many lawyers write books about their experiences, Cohen's book which focuses solely on a single client continues to violate confidences of his former client and arguably damages faith in the legal profession).

[116] Debra Cassens Weis, *Does Executive Privilege Still Protect Trump After His Term Ends? Fight Brews Over Congressional Subpoenas*, ABA J. (Oct. 12, 2021) https://www.abajournal.com/news/article/does-executive-privilege-still-protect-trump-after-his-term-ends-fight-brews-over-congressional-subpoenas.

[117] *Id.*

[118] *Id.*

recognized "that a former president does retain some right to assert executive privilege,"[119] the Court has not resolved how to address conflicting claims between former and current presidents.[120]

In a recent decision concerning the House Committee's request for the National Archives documents, U.S. District Court Judge Tanya Chutkan rejected President Trump's claim of executive privilege, holding that it "exists for the benefit of the *presidency*, rather than for any individual president, much less former presidents."[121] On December 9, 2021, the U.S. Court of Appeals for the D.C. Circuit in a 3-0 decision affirmed the decision of the district court. The D.C. Circuit reasoned that President Trump had failed to establish the likelihood of success on his claim that executive privilege barred release of the records "given (1) President Biden's . . . determination that a claim of executive privilege is not in the interests of the United States; (2) Congress's . . . vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations; (3) the demonstrated relevance of the documents at issue to the congressional inquiry; (4) the absence of any identified alternative source for the information; and (5) Mr. Trump's failure even to allege, let alone demonstrate, any particularized harm that would arise from disclosure, any distinct and superseding interest in confidentiality attached to these particular documents, lack of relevance, or any other reasoned justification for withholding the documents."[122] President Trump filed a petition for *certiorari* with

[119] *See infra* Part I.B (discussing *Nixon II* and the scope of former president's claims of executive privilege).

[120] *Id*.

[121] Steven Lubet, *Trump is Learning What Executive Privilege Really Means*, THE HILL (Nov. 17, 2021) (emphasis added).

[122] Trump v. Thompson, 20 F.4th 10 (D.C. Cir. 2021).

the Supreme Court following the D.C. Circuit decision in a continued attempt to block turnover of the January 6 records,[123] but that petition was denied on January 19, 2022.[124]

[123] Greg Stohr, *Trump Asks Supreme Court to Block Turnover of Jan. 6 Records*, BLOOMBERG LAW (Dec. 23, 2021) https://tinyurl.com/3kdwfsyw.

[124] *See* Josh Gerstein & Kyle Cheney, *Supreme Court Rejects Trump's Bid to Shield Records from Jan. 6 Committee*, POLITICO (Jan. 19, 2022) https://www.politico.com/news/2022/01/19/trump-supreme-court-records-527421.