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SECOND CIRCUIT REVIEW

Expert Analysis

Presidential Immunity From Criminal Investigation

Earlier this month, in *Trump v. Vance*, the U.S. Court of Appeals for the Second Circuit considered whether a sitting President of the United States is immune from a state grand jury subpoena to a third-party custodian in possession of the President's financial and tax records. In a unanimous opinion, written by Chief Circuit Judge Robert Katzmann, and joined by Circuit Judges Christopher Droney and Denny Chin, the Second Circuit held that presidential immunity does not bar a state grand jury from issuing a subpoena seeking non-privileged material to aid an investigation, even if the investigation may implicate the President. In light of recent and ongoing cases on the scope of presidential immunity, the Second Circuit's decision represents a major, and potentially historic, step toward limiting a President's immunity from a state criminal process.

By **Martin Flumenbaum** | And **Brad S. Karp**

The Manhattan District Attorney's Subpoena

On Aug. 29, 2019, the District Attorney for New York County served a grand jury subpoena on Mazars USA (the Mazars subpoena), an accounting firm that has provided services to President Trump and his businesses. The District Attorney requested, among other things, the President's personal and business tax returns dating back to 2011.

On September 19, the President filed a complaint and an emergency motion for a temporary restraining order and preliminary injunction in the Southern District of New York, claiming the President cannot be "subject to the criminal process" while in office. The District Attorney voluntarily agreed to stay the enforcement of the subpoena prior to the hearing on President Trump's motion.

The District Court's Ruling

Following expedited briefing, U.S. District Court Judge Victor Marrero heard oral arguments on Sept. 25, 2019 and issued a 75-page ruling denying the President's motion 12 days later. In ruling against the President, Judge Marrero first applied the doctrine of abstention set forth in *Younger v. Harris*, 401 U.S. 37 (1971), under which a federal court should decline jurisdiction where a plaintiff attempts to enjoin an ongoing state criminal prosecution. On that basis, Judge Marrero abstained from exercising jurisdiction and dismissed the case.

In addition, in an "alternative holding" to avoid remand in the event the Second Circuit disagreed on the abstention ruling, Judge Marrero also reviewed the merits of presidential immunity. The District Court explained why the President had not met his burden for obtaining injunctive relief. First, the court found that disclosure of President Trump's financial records to a grand jury would not cause irreparable harm, particularly because a grand jury is legally obligated to

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keep records confidential. Second, the District Court concluded that the President was unlikely to succeed on the merits of his claim, in light of the Constitution's text and history, as well as Supreme Court precedent finding that the separation-of-powers doctrine does not absolutely prohibit jurisdiction over the President. Third, the court found that the public interest did not weigh in favor of an injunction, because the "unimpeded operation" of grand juries is in the public interest.

The Second Circuit Opinion

President Trump quickly appealed the District Court's ruling. On appeal, the President's primary argument was that he is "constitutionally immune" from the criminal process while in office. At oral argument, President Trump asserted a "temporary absolute presidential immunity," which would provide for complete immunity from all stages of the state criminal process—including investigations preceding an indictment—while he is in office. *Trump v. Vance*, 2019 WL 5687447, *5 (2d Cir. Nov. 4, 2019).

The court rejected President Trump's sweeping claim of immunity. In a narrow ruling, and expressly declining to decide "the precise contours and limitations of presidential immunity from prosecution," the court held that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." Id.

In reaching its conclusion, the court observed the "long-settled proposition" that a President "is subject to judicial process in appropriate circumstances." Id. at *6 (citing *Clinton v. Jones*, 520 U.S. 681, 703 (1997)). The court recalled that more than two centuries prior, Chief Justice John Marshall judged the prosecution of former Vice President Aaron Burr (not for killing Alexander Hamilton, but for treason—Burr had tried to seize western territories). There, the Chief Justice upheld a subpoena issued to President Thomas Jefferson. Id. (citing *United States v. Burr*, 25 F. Cas. 30, 34-35 (C.C.D. Va. 1807) (No. 14, 692D) (Marshall, C.J.)). Looking to more modern times, the court further reasoned, "presidents have been ordered to give deposition testimony or provide materials in response to subpoenas." Id. (citing *Clinton*, 520 U.S. at 704-05). And, the Supreme Court found jurisdiction over the President to be appropriate if necessary to "vindicate the public interest in an ongoing criminal prosecution." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

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Of these historical examples, the court relied most heavily on *United States* v. *Nixon*, 418 U.S. 683 (1974). Ruling on a subpoena for President Nixon to produce tape recordings and documents related to discussions with advisers, a unanimous Supreme Court held that there is no "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Id. at 706. With *Nixon* in mind, the Second Circuit found President Trump had "not persuasively explained why, if executive privilege did not preclude enforcement of the subpoena issued in *Nixon*, the Mazars subpoena must be enjoined despite seeking no privileged information and bearing no relation to the President's performance of his official functions." 2019 WL 5687447, *6.

The court was mindful that the President is not an "ordinary individual," that "historical practice" indicates courts may not compel the President to "personally attend trial or give live testimony in open court," and that the Supreme Court has held that a President has "absolute immunity from damages liability predicated on his official acts." Id. at 7. The court also acknowledged that the Supreme Court has previously "quoted with approval Justice Story's conclusion that the President is not 'liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office.'" Id. (quoting *Fitzgerald*, 457 U.S. at 749). However, the court concluded that the Mazars subpoena is a far cry from those hypotheticals: The subpoena "is directed not to the President, but

to his accountants; compliance does not require the President to do anything at all." Id.

The court next addressed President Trump's remaining arguments. First, President Trump cited to a passing footnote in *Clinton v. Jones*, which suggested that "direct control by a state court over the President" may implicate Supremacy Clause concerns. The Second Circuit, without ruling on the authority of a state court to issue orders to a President, distinguished the Mazars subpoena on the basis that no court has ordered the President to produce documents, and therefore no state court has asserted "direct control" over the President. Furthermore, the court found that President Trump has not shown how a third-party subpoena would interfere with his duties. Id. at *8. Second, the court addressed President Trump's argument that he is a "target" of the investigation, responding that the President has not been charged with a crime or indicted, and that the District Attorney has represented that the grand jury is investigating "not only the President, but also other persons and entities." Id. The court was also skeptical of President Trump's claim that a "mere investigation" carries a "stigma too great for the Constitution to tolerate": If President Nixon was "ordered to comply with a subpoena seeking documents for a trial proceeding on an indictment that named him as a conspirator," then surely "the mere specter of 'stigma' or 'opprobrium' from association with a criminal case is not a sufficient reason to enjoin a subpoena," particularly where "no formal charges have been lodged." Id. Finally, the court rejected President Trump's arguments that a grand jury investigation is less important than a criminal trial.

The court also addressed a point raised by the United States in its amicus brief, that a prosecutor "must make a heightened showing of need for the documents sought." Id. at *10. The court dismissed that argument as relying on cases that concerned documents protected by executive privilege, and which therefore had scant bearing on a subpoena for tax returns which fall outside the scope of that privilege.

If the Second Circuit's ruling stands, the federal courts will have made plain that non-privileged personal records are not shielded from investigation merely because those records may pertain to the current occupant of the Oval Office.

Finally, the court concluded its opinion by reiterating "the narrowness of the issue." Id. at *10. "The only question before us is whether a state may lawfully demand production by a third party of the President's personal financial records for use in a grand jury investigation while the President is in office." The enforcement of such a subpoena, the court held, is not barred by "any presidential immunity from state criminal process." Id.

In the wake of the court's ruling, President Trump petitioned the U.S. Supreme Court for certiorari, which the Manhattan District Attorney will oppose. Briefing will have been complete by the time this column is published. The parties have agreed that the District Attorney will not enforce the Mazars subpoena until the Supreme Court either denies the petition for certiorari or issues an opinion.

Conclusion

The Second Circuit's decision in *Trump v. Vance* places a clear and significant, albeit narrow, limitation on the scope of presidential immunity from criminal investigation. Together with the D.C. Circuit's decision—and a forthcoming Second Circuit decision—concerning congressional subpoenas to Mazars, the opinion sets the stage for a seemingly inevitable ruling by the Supreme Court on the extent to which a President may be investigated in light of *Nixon* and *Clinton*. If the Second Circuit's ruling stands, the federal courts will have made plain that non-privileged personal records are not shielded from investigation merely because those records may pertain to the current occupant of the Oval Office.