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Don’t Expect to See Trump’s Tax Returns Before the Election

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Donald Trump *claims that while he is president, his pre-presidency financial records can’t be subpoenaed and he can’t even be investigated for criminal conduct. The Supreme Court will decide by the end of June whether Trump is indeed beyond the reach of the law.*

On May 12, the Supreme Court heard oral arguments about whether Trump can block subpoenas for his tax and other financial records that predate his presidency. Although prior presidents made their tax returns public, Trump has steadfastly refused to reveal his. In 2016, he promised to release them when the purported “audit” is complete. But they remain under wraps.

In April 2019, three committees of the House of Representatives and the New York district attorney issued subpoenas to banks and financial institutions to obtain Trump’s records. Trump sued to prevent the disclosures. Even though all four lower courts that considered the issue ruled that the records must be produced, Trump continues to stonewall, claiming in essence he is above the law.

During the oral arguments, the justices disagreed about what standard should be used to determine when a president can block subpoenas to third parties for records relating to his personal conduct before he took office. A majority of the justices seemed to reject the argument made by the lawyer for the House of Representatives, that congressional committees have broad authority to obtain a president’s personal records. But they were also skeptical of Trump’s argument that he has immunity from state grand jury investigations while he is president.

> “One of the most important takeaways from the oral arguments is that no justice appears to accept the extreme argument made by Jay Sekulow, President Trump‘s personal lawyer, that the president is entitled to an absolute temporary immunity from a state grand jury investigation into his private conduct before becoming president,” **Stephen Rohde**, a scholar of constitutional law, told Truthout. “That argument only had an audience of one.”

Congressional Subpoenas Raise Separation of Powers Concern

The justices first took up the cases of *Trump v. Mazars* and *Trump v. Deutsche Bank*. In April, the House Committee on Oversight and Reform subpoenaed documents from Mazars USA LLP, Trump’s accounting firm, because the committee was investigating payments of hush money and whether Trump lied about his assets to underpay taxes. Pursuant to an investigation of whether there was foreign interference in the election, the House

Permanent Select Committee on Intelligence and the House Committee on Financial Services subpoenaed documents from Deutsche Bank and Capital One, which had loaned Trump large sums of money.

Both the district court and the Court of Appeals rejected Trump's challenges to the subpoenas.

During the Supreme Court argument, Justice Sonia Sotomayor cited the Court's precedent "that a congressional subpoena is valid so long as there is a conceivable legislative purpose and the records are relevant to that purpose."

Justice Brett Kavanaugh said, however,

> "I think, pertinent to a legislative purpose is almost no limiting principle at all."

Most of the justices appeared to agree.

Patrick Strawbridge, Trump's personal lawyer, suggested a more rigid standard. He said that when Congress employs its subpoena power against the president, "it must yield absent any long-standing tradition or particularly compelling showing of need," that is, a "demonstrated need standard."

Strawbridge charged that "the committees have not even tried to show any critical legislative need for the documents these subpoenas seek."

Justice Neil Gorsuch then asked Strawbridge, "Why should we not defer to the House's view about its own legislative purposes?" and Strawbridge replied that Congress's subpoena power was "an implied power" that can't be used "to challenge the structure of government." He added that "a subpoena targeting the President's personal documents is a challenge to the separation of powers."

But Sotomayor warned of a separation of powers problem if the Court were to establish "a heightened standard or clear statement" requirement. She asked Strawbridge whether he was disputing the Intelligence Committee's stated purpose: "investigation efforts by foreign entities to influence the U.S. political process and related to the financial records."

Justice Elena Kagan characterized Strawbridge's position as asking the Court "to put a kind of 10-ton weight on the scales between the President and Congress and essentially to make it impossible for Congress to perform oversight and to carry out its functions where the President is concerned."

Kagan noted that the subpoenas don't request official records, where the president could assert executive privilege, and queried why a lower standard shouldn't apply to personal records.

Deputy Solicitor General Jeffrey Wall appeared as amicus curiae (friend of the court) during the argument. **Justice Stephen Breyer** asked Wall, "why not apply the standard that is ordinarily applied to every human being in the United States … go to a judge and say: Judge, this is overly burdensome." Wall argued that a congressional subpoena for a president's records should be measured by "a heightened standard."

When Kavanaugh suggested, "why not employ the demonstrably critical standard or something like that," **Douglas Letter**, counsel for the House of Representatives, replied that would violate separation of powers. Kavanaugh stated that the demonstrably critical standard is used when the president invokes executive privilege, but Letter reminded him that this case doesn't involve executive privilege because the subpoenas seek financial business records.

Executive privilege protects the need for confidentiality in presidential communications. In 1974, the Court held in *United States v. Nixon* that there is a qualified executive privilege and Richard Nixon was compelled to produce the Watergate tapes. "The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the Court ruled unanimously.

Wall complained that the House of Representatives had not explained why it needs the requested documents in order to exercise its legislative powers, in spite of the findings of the lower courts. Justice Ruth Bader Ginsburg charged that Wall would expect more from Congress than from a patrol officer.

> "To impugn Congress's motive, even the policeman on the beat, if he stops a car and gives the reason that the car went through a stop sign, we don't allow an investigation into what the subjective motive really was. So, here, you're — you're distrusting Congress more than the cop on the beat," Ginsburg said.

Prosecutor's Subpoena Tests Whether Presidential Power Is Unlimited

The second case the justices considered during oral argument was *Trump v. Vance*. Manhattan District Attorney Cyrus Vance, Jr., issued a subpoena to Mazars USA LLP for personal and business tax returns for a state grand jury investigation of hush money payments before the 2016 election. The Second Circuit Court of Appeals upheld the subpoena for most of the requested records.

Trump's lawyer **Jay Sekulow** argued that the Court of Appeals decision "would allow any DA to harass, distract, and interfere with the sitting President." He argued for "temporary presidential immunity" in a state criminal case, citing Article II of the Constitution (which establishes the executive branch) and the Supremacy Clause (that affirms the supremacy of federal over state laws).

Sekulow said he wasn't arguing that a grand jury can't investigate the president, just that the president should have immunity while in office. Chief Justice John Roberts retorted, "it's okay for the grand jury to investigate, except it can't use the traditional and most effective device that grand juries have typically used, which is the subpoena."

In 1997, the Court decided unanimously in *Clinton v. Jones* that a sitting president does not have immunity from federal civil litigation arising from conduct that occurred before he took office. Bill Clinton was compelled to give a deposition in Paula Jones's sexual harassment lawsuit against him.

Roberts reminded Sekulow that the *Jones* Court was "not persuaded that the distraction in that case meant that discovery could not proceed." *Jones* was a federal civil case and *Vance* is a state criminal proceeding, Sekulow argued. When he complained that 2,300 district attorneys could harass the president, Breyer responded, "of course, in *Clinton v. Jones*,

there might be a million, I don't know, tens of thousands of people who might bring lawsuits."

Once again, Breyer suggested using the ordinary standard of whether compliance with the subpoena is "unduly burdensome." Kagan echoed Breyer's suggestion.

Gorsuch asked how this is more burdensome than *Jones*, which "sought the deposition of the President while he was serving," whereas "here, they're seeking records from third-parties."

Kavanaugh raised the issue of statute of limitations which could prevent prosecution after the president leaves office.

Solicitor General Noel Francisco, who appeared as amicus curiae, argued that the Court should apply the "special needs standard" from the *Nixon* case and not even reach the issue of presidential immunity. Francisco said the district attorney must show that the requested information is critical to a responsible charging decision, that he can't obtain it elsewhere, and that the information he has is insufficient.

Breyer and Sotomayor reminded Francisco that *Nixon* was an executive privilege case. Sotomayor suggested a standard of "harassment and interference," in which the court would "ask whether the investigation is based on credible suspicion of criminal activity and whether the subpoena is reasonably calculated to advance that investigation."

Carey Dunne, general counsel of the New York County District Attorney's Office, argued for a case-specific analysis. Once the president establishes that his Article II powers are burdened, the prosecutor must show an objective basis for the investigation and a reasonable probability that the request would produce relevant information. Dunne said the lower courts already found that the district attorney had met that standard.

Justice Samuel Alito proposed "a somewhat more demanding standard," where the prosecutor would have to establish that the information cannot be obtained from another source and that delay would cause "serious prejudice to the investigation."

Not necessary, said Dunne.

> "There's no need here to upend precedent or to write a new rule that undermines federalism, especially when such a rule would create a risk that American presidents, as well as third-parties, could unwittingly end up above the law."

When the high court issues its decision, we are likely to see several fragmented opinions. Whatever test ultimately garners five votes, the cases will probably be sent back to the lower courts to apply the new rule. That could take several months or even years, leaving the matter unresolved until after the 2020 presidential election. And even if the Supreme Court were to order Trump to release his tax returns, they would be transmitted confidentially to the grand jury.

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