The Quest for Trump's Taxes Heads to the Supreme Court

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19.11.2019 doi: 10.17176/20191120-002106-0

Donald J. Trump is an open book in many respects, but not when it comes to his federal income taxes. Every major party presidential candidate since 1976 has released his tax returns, and candidate Trump pledged that he would do so as well—yet the promised Form 1040 has not been forthcoming. It remains to be seen, however, whether President Trump can keep his tax returns under wraps in the face of efforts to uncover them currently wending their way through U.S. courts.

Last week, the President lost battles in two fronts of the tax wars, before two federal appeals courts. In *Trump v. Vance*, a three-judge panel of the Court of Appeals for the Second Circuit unanimously denied the President's request for an injunction against a subpoena issued by a New York state grand jury to Mazars USA, the President's accounting firm, seeking eight years of his tax returns. A day later, in *Trump v. Mazars USA LLP*, the Court of Appeals for the D.C. Circuit declined to revisit *en banc* an October ruling by a divided three-judge panel permitting a congressional committee of the Democratic-controlled House of Representatives to subpoena his tax records from Mazars. The President is appealing both rulings to the U.S. Supreme Court, which on Tuesday temporarily stayed the order to turn over the records in the D.C. Circuit case.

Presidential immunity

The litigation raises questions of presidential immunity: the idea that the President does not have to comply with some aspects of ordinary legal process by virtue of his office. And in fact, Presidents do enjoy some immunity under settled Supreme Court precedent. For instance, under *Nixon v. Fitzgerald*, Presidents need not answer to civil suits for money damages predicated on their official acts as President. There is also broad, if not universal, agreement that a sitting President cannot be criminally charged and prosecuted: rather, he can be removed from office through impeachment and prosecuted afterwards.

But the precise contours of presidential immunity are hazy, for a couple of different reasons. In the past, Congress and the executive branch have generally sought to reach negotiated solutions to disputes over the scope of congressional information requests, rather than fight it out in court. (In case you haven't noticed, that old spirit of compromise has not been much in evidence of late.) More generally, the number of variables that potentially bear on the scope of presidential immunity is far larger than the number of cases we have. Is the President a defendant or just a source of information? Are we dealing with a civil matter or a criminal one? Brought in federal court or state court? Is the subpoena directed at the President directly or a third party? What is sought—documents; answers to questions; a deposition; appearance in open court?

The President's lawyers sought to cut through these complexities in *Trump v. Vance*, offering a simple and sweeping conception of immunity. The President, Trump attorney William Consovoy submitted at oral argument, has a temporary absolute presidential immunity: he cannot be subjected to criminal process, including a subpoena relating to a criminal investigation, while President. At oral argument, Judge Denny Chin posed as a hypothetical the very scenario that Trump joked about on the campaign trial: what if he shot someone on New York's Fifth Avenue? Consovoy stuck to his guns: an ensuing criminal investigation could not so much as gather documents from the President or his custodians.

The Second Circuit's ruling was as narrow as the President's argument had been broad. The decision held only that presidential immunity did not bar enforcement of a state grand jury subpoena directing a third party to turn over non-privileged material that relates to the President. The panel's opinion leaned heavily on *United States v. Nixon,*in which a unanimous Supreme Court had rejected a stronger claim to immunity. In that 1974 decision, the Supreme Court had refused to block a federal court subpoena of President Nixon's tape-recorded conversations and other documents as part of the criminal investigation into Watergate, even though the President had a strong claim to executive privilege in the material. (Executive privilege, which applies to communications between the President and high-level advisers, is not at issue in the present litigation over tax records that predate and do not relate to Trump's service as President.)

President Clinton's unsuccessful invocation of immunity to delay a sexual harassment suit brought by a former Arkansas state employee also told against President Trump. In *Clinton v. Jones*(1997), the Supreme Court rejected the argument that, by permitting litigation to proceed, the judicial branch would be interfering with the President's constitutional obligation to perform the duties of his office. If defending a civil lawsuit would not unconstitutionally overtax the President's time and energy, as the *Clinton* Court had unanimously held, how could the current subpoena, which is directed to a third party? The Second Circuit concluded that it could not.

The fact that existing law disfavors the President is, of course, no guarantee that he will lose before a Supreme Court that is home to several Justices with strong views about executive power and no compunction about making waves. The Court could make something of the fact that this case, unlike *Nixon* and *Clinton*, involves a state, rather than federal, proceeding. But it is not obvious how that should change the analysis, and the Justices who champion executive power are the ones who also tend to champion federalism.

One argument could build on the President's contention that the New York grand jury proceeding is not so much a legitimate criminal investigation as a politically motivated effort to embarrass the President. (The district attorney is investigating payments the Trump Organization made to two women who claimed to have affairs with the President: any false business records filed in connection with those payments would violate state law.) Justices who share that view could argue that immunity should have extra force in the context of state proceedings, because the sheer number of states multiplies the opportunities for using legal process to harass the President.

Congressional powers

Trump v. Mazars USA LLP raises a somewhat different set of issues, focusing less on a presidential claim to immunity and more on the scope of the House committee's subpoena power. Congress's power to hold investigations in support of its legislative function, and to issue subpoenas as part of those investigations, is uncontested: the key question before the D.C. Circuit panel was whether this subpoena served a valid legislative purpose or amounted to a law-enforcement effort that is beyond Congress's powers.

Communications from Chairman Elijah Cummings explained that the committee sought the President's financial records in order to determine whether he had engaged in wrongful conduct, and to inform legislative proposals for reform, a number of which Congress was considering. This was enough for the majority of the panel, but not for dissenting Judge Neomi Rao, who found the committee to operate from an impermissible law-enforcement objective rather than a legitimate legislative one. One could imagine a fairly narrow dissent that found, based on the record, that the committee was really interested in exposing the President's financial misdeeds rather than enacting new legislation. Judge Rao went farther, arguing that an interest in investigating wrongdoing by the President disqualifies the subpoena, even if Congress seeks the records also in the service of a legitimate legislative purpose. In her view, the availability of impeachment as a means to investigate Presidential wrongdoing subtracts from the scope of Congress's regular investigation powers. The vote to deny rehear-

ing *en banc* was 8-3, with two other judges joining Judge Rao in dissent.

The formalistic and compartmentalized view of congressional powers expressed by Judge Rao is likely to find some takers on the Supreme Court; the question is whether there will be enough to overturn the D.C. Circuit's decision. If there are, Congress stands to lose not only access to Donald Trump's tax returns, but some of its investigatory powers in the bargain.

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SUGGESTED CITATION

Mathews, Jud: The Quest for Trump's Taxes Heads to the Supreme Court, Verfassungsblog, 19.11.2019, doi: 10.17176/20191120-002106-0.

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