



Trump's use of executive privilege is an abuse of authority

BY ERWIN CHERMERINSKY *SPECIAL TO THE SACRAMENTO BEE*
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President Donald Trump speaks at an Opportunity Zone conference at the White House in Washington, April 17, 2019. (Erin Schaff/The New York Times) ERIN SCHAFF *THE NEW YORK TIMES*

No president in all of American history has so resisted congressional scrutiny in the manner of Donald Trump.

Most recently, he invoked executive privilege to keep Congress from having access to the full Mueller report. He has gone to court to keep banks from turning over his financial records to a congressional committee. He has refused to provide his tax records which have been subpoenaed. He has refused to cooperate with the investigation of his campaign's ties to Russia. And it also appears that he is instructing administration officials to refuse to comply with congressional subpoenas.

These are not frivolous requests. Nor should they be seen as partisan harassment.

The Mueller report presents a compelling case that Trump engaged in obstruction of justice. The report simply said that it would offer no conclusion because under Department of Justice rules there could not be an indictment of a sitting president.

Eight hundred former federal U.S. attorneys – including appointees by Republican and Democratic presidents – signed a letter explaining that Trump's actions to impede the investigation into Russian election meddling, as described in the Mueller report, amount to “overwhelming” evidence of obstruction. The prosecutors' letter says that if he were anyone else – literally any other American citizen – Trump's conduct would have resulted in “multiple felony charges for obstruction of justice.”

OPINION

At the same time, many of Trump's legal arguments for refusing to cooperate with Congress are weak or even frivolous. For example, there is no basis for the Treasury

Department's decision to withhold the president's tax returns from the House Ways and Means Committee. The law is clear and states: "Upon written request from the chairman of the Committee on Ways and Means . . . the Secretary shall furnish such committee with any return or return information specified in such request."

Likewise, there are no grounds for Trump's invocation of executive privilege for the entire Mueller report. To be sure, there are arguments that some of the redactions are justified. Under federal law, grand jury material is kept secret and apparently that accounts for some of the material that has not been disclosed.

But executive privilege for the entire report is unfounded. Executive privilege is the authority of the president to keep secret conversations with or memoranda from advisers. In 1974, the U.S. Supreme Court held in *United States v. Nixon* that presidents have executive privilege even though this is not mentioned in the Constitution. The court explained that such secrecy is important to ensure presidents receive candid advice.

The court, though, also held that executive privilege is not absolute and must yield to overriding needs for the information. It ruled against Nixon's claim of executive privilege in his effort to keep secret tapes of conversations in the Oval Office. The court concluded that the need for evidence in a criminal trial outweighed the interests of secrecy. Nixon was ordered to produce the tapes.

To begin with, the Mueller report cannot possibly be characterized as communications with the president from his advisers. Moreover, the need for Congress to investigate – long recognized as a core and essential congressional power – justifies disclosure of the Mueller report.

Certainly, there have been fights between Congress and other presidents about access to information. What is different is that no other president ever has expressed such defiance of all forms of congressional scrutiny.

Over the last few years, we are constantly reminded of how much constitutional governance depends on the good faith of those who govern. The norm for more than 200 years has been compliance by the executive branch with most congressional requests for information. Not any more.

It appears that now it will go to the courts. The greatest concern here is that litigation takes time, and it will be a long time before any of these issues gets decided by the judiciary.

Lawsuits were filed early in the Trump presidency claiming that he is violating the emoluments clauses of the Constitution, which prevent officers of the U.S. from receiving benefits from foreign governments and forbid the president from receiving any benefit for serving other than their paid salary. Trump is violating these provisions every day. Yet, even though two federal district courts denied Trump's motion to dismiss, the cases are on appeal and no resolution appears likely in the foreseeable future.

But if Congress cannot check the president and the courts won't in an expeditious manner, who will hold the President accountable? And if no one, can we really claim to be a nation under the rule of law?

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