Supreme Court rules against Trump on releasing tax returns, but allows delay

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The Supreme Court's October 2019 term ended yesterday with pair of 7–2 decisions rejecting Donald Trump's assertion of absolute presidential immunity from subpoenas. The two closely watched cases were the subject of telephonic oral arguments last May that lasted more than three hours.

Any remaining chance that Trump's tax returns might become public before the November election, however, seems dashed by the court's failure to order that the financial documents, which are in the possession of Trump's accountants and lenders, be turned over forthwith. Instead both cases were remanded to the lower courts burdened with various instructions to consider additional factors before compelling any production of documents. Trump's legal team will have no problem running out the clock.

Trump not only asserted absolute presidential immunity from subpoena, he sought to extend that immunity to cover third parties like banks and accounting firms with which he did business before becoming president. The court majority rejected his arguments, but the practical result of the decision is to push back any release of compromising financial information until after the election, the main short-term goal of the White House.

The tax returns and other financial documents no doubt reveal extensive financial chicanery and tax avoidance by Trump himself, family members and the complex network of entities they control.

Both controlling opinions were authored by Chief Justice John Roberts and supported by what seems to be a carefully assembled political coalition: the four more liberal associate justices, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, all joined without issuing separate opinions, and both associate justices appointed by Trump, Neil Gorsuch and Brett Kavanaugh, voted with the majority as well. Only associate justices Clarence Thomas and Samuel Alito dissented and would have quashed all the subpoenas, effectively placing the president above the law.

It seems clear that Roberts, who is dedicated to preserving what remains of the wilting credibility of the Supreme Court, wanted to pose as a defender of the traditional separation of powers, which strictly limits the president's authority, while at the same time delaying the release of the records until after the election.

Trump v. Vance overruled Trump's claim of absolute immunity from the Manhattan grand jury subpoenas directed to his longtime accounting firm, Mazars USA, that sought financial documents relating to what Roberts delicately characterized as "business transactions involving multiple individuals whose conduct may have violated state law." In fact the District Attorney opened a criminal investigation following the federal conviction of Trump's attorney Michael Cohen for orchestrating payoffs made illegally with campaign funds to silence women with whom Trump supposedly had sexual affairs.

Roberts began his analysis with the 1807 federal prosecution of Aaron Burr for treason. Following the infamous duel with Alexander Hamilton, the former vice-president allegedly schemed to raise a private army and seize territory from Spain, and then foment a rebellion to form an independent nation out of the Louisiana territory recently purchased from France.

Burr subpoenaed correspondence from President Thomas Jefferson, who objected on the basis of executive immunity and state secrets. In a biting rejection of Trump's claim to absolute immunity from subpoenas, Roberts quoted at length from Chief Justice John Marshall's opinion overruling Jefferson's objection.

Marshall, according to Roberts, wrote that the president does not "stand exempt from the general provisions of the Constitution." Citing the "common law" of England on which United States jurisprudence is based, Marshall identified as the "single reservation" to the duty to testify

in response to a subpoena was “the case of the king,” whose “dignity” was seen as “incompatible” with appearing “under the process of the court.”

Roberts continued, “But, as Marshall explained, a king is born to power and can ‘do no wrong.’ The President, by contrast, is ‘of the people’ and subject to the law.”

“In the two centuries since the Burr trial, successive Presidents have accepted Marshall’s ruling that the Chief Executive is subject to subpoena,” Roberts concluded.

Roberts addressed Trump’s back-up argument that at minimum grand jury subpoenas directed to papers of sitting presidents “must satisfy a heightened need standard,” in other words that the evidence is “critical,” “not available from any other source,” and needed “now, rather than at the end of the President’s term.” Roberts called Trump’s argument a “double standard that has no basis in law.”

Rather than ordering the accounting firm to turn over the papers immediately to the grand jury, where they would still be subject to secrecy, Roberts sent the case back to the lower court with an invitation for Trump to raise more procedural and legal hurdles.

Trump “can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause,” or “argue that compliance with a particular subpoena would impede his constitutional duties,” Roberts wrote.

In *Trump v. Mazars USA*, the president sued to block subpoenas served by the House of Representatives Oversight and Reform, Intelligence and Finance Services Committees on the accounting firm and two of Trump’s biggest lenders, Deutsche Bank and Capital One. These subpoenas sought, according to Roberts’ description, “a decade’s worth of transactions by the President and his family,” ostensibly to “guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in US elections.”

This clash was literally unprecedented, according to Roberts. He outlined instances of Congress seeking documents from the president at least as far back as 1792, but “Historically, disputes … have not ended up in court. Instead, they have been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive.”

“This dispute therefore represents a significant departure from historical practice,” Roberts wrote. “We recognize that it is the first of its kind to reach this Court.”

Roberts then announced that lower courts “must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President,” listing four factors: the legislative need, the breadth of the request, the validity of the legislative purpose and the burden imposed.

“Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list,” Roberts concluded.

Under a more democratic view of the balance of powers, the House of Representatives should itself determine whether subpoenaed documents relate to legitimate legislative concerns. Roberts’ ruling inserts the entire federal judiciary, stacked with Trump-appointed reactionaries, between the House and the executive branch to arbitrate the legitimacy of Congressional actions and is itself an anti-democratic interference with the balance of powers.

Trump immediately tweeted his reaction to the rulings with his typical cocktail of ignorance, mendacity and grievance, complaining that “Courts in the past have given ‘broad deference.’ BUT NOT ME!” adding, “This is all a political prosecution. I won the Mueller Witch Hunt, and others, and now I have to keep fighting in a politically corrupt New York. Not fair to this Presidency or Administration!”

Trump’s personal lawyer, Jay Sekulow, contradicted his client. “We are pleased that in the decisions issued today, the Supreme Court has temporarily blocked both Congress and New York prosecutors from obtaining the president’s tax records,” according to a statement. Confirming the stonewalling will continue, Sekulow added, “We will now proceed to raise additional constitutional and legal issues in the lower courts.”