

Legal experts say Trump's last-ditch effort to hide his taxes is 'untenable,' and we could see them as soon as next year



President Donald Trump. Associated Press

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- President Donald Trump's lawyers are duking it out with New York state prosecutors over a subpoena for his tax returns in a case that is likely to go all the way to the Supreme Court.
 - Trump's lawyers argue that the subpoena should be nullified because, as president, Trump is immune not just from criminal prosecution but from any investigation at all.
 - Constitutional scholars told Insider there's no legal precedent backing up Trump's position, which one called "untenable."
 - "Chief Justice John Roberts looks for big cases around which he can build a consensus," one legal expert said. "That's exactly this case. I suspect that the vote at the Supreme Court would be 7-2, 8-1, or even 9-0 in favor of the state of New York."

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President Donald Trump's lawyers are putting forth a bold argument as they battle a subpoena from New York state prosecutors for Trump's tax returns: that the president is immune not just from criminal prosecution but from the criminal investigation as well so long as he is in office.

The notion that a sitting president cannot be indicted isn't new; it was put forth in a 1973 memo from the Justice Department's Office of Legal Counsel under the Nixon administration and proved pivotal in the special counsel's Russia investigation.

But Trump's argument — that he's immune from being investigated in the first place — has confounded legal and constitutional scholars and even sitting judges.

The fight over Trump's taxes is likely to make it all the way to the Supreme Court. If he loses, the public would get a window into Trump's closely-held finances before the 2020 election.

Louis Seidman, a professor of constitutional law at Georgetown University, told Insider that there's no legal precedent backing up the Office of Legal Counsel memo's claim. The Supreme Court also held, in *Clinton v. Jones*, that a president could be sued civilly while in office.

Moreover, even the Office of Legal Counsel opinion doesn't go as far as to say a sitting president cannot be criminally investigated while in office, as Trump's lawyers have claimed in the legal fight over his tax returns.

To be sure, "even if actual indictment has to be delayed, there can be strong reasons to investigate now while the recollection of witnesses is fresh and evidence is still available," Seidman said.

The subpoena for Trump's taxes, issued by the Manhattan district attorney's office, is part of a criminal investigation into whether the Trump Organization fabricated business records related to hush-money payments made to women who say they've had affairs with Trump.

After the Manhattan district attorney, Cyrus Vance Jr., subpoenaed Trump's accounting firm for the records, Trump's team countersued to nullify the subpoena.

An 'untenable' position

Earlier this month, US District Judge Victor Marrero dismissed the countersuit, ruling that Trump's lawyers were making an "extraordinary" reach that was "repugnant to the nation's governmental structure and constitutional values."

Marrero wrote that Trump's argument implied "the constitutional dimensions of the presidential shield from the judicial process are virtually limitless."

If that argument held, then until Trump leaves office, "his exemption from criminal proceedings would extend not only to matters arising from the performance of the President's duties and functions in his official capacity, but also to ones arising from his private affairs, financial transactions, and all other conduct undertaken by him as an ordinary citizen both during and before his tenure in office," the ruling said.

Trump's lawyers contested the ruling, and the case is now being considered by the federal appeals court in New York.

On Wednesday, during a hearing before the three-judge appeals court panel, Trump's lawyers went a step further and said the president would theoretically be immune from investigation or prosecution even if he were to shoot someone in the middle of Fifth Avenue in Manhattan, alluding to comments he made during the 2016 election.

Jens David Ohlin, a vice dean at Cornell Law School who is an expert in constitutional and criminal law, told Insider that the case looked "destined" for the Supreme Court — and not because it's a close call but rather because it's the opposite.

"Chief Justice John Roberts looks for big cases around which he can build a consensus," Ohlin said. "That's exactly this case. I suspect that the vote at the Supreme Court would be 7-2, 8-1, or even 9-0 in favor of the state of New York."

Ohlin added that Trump's legal position was "untenable" and stood little chance of withstanding scrutiny.

"Even if you accept that the president can't be indicted while in office (which is contested), the president must be subject to investigation; otherwise, it would be

nearly impossible to prosecute him after leaving office,” he said. “It would also be impossible to prosecute conspirators who don’t have presidential immunity because both — the conspirators and Trump — would be part of the same investigation.”

Seidman struck a more cautious tone, suggesting that how the Supreme Court would rule was anyone’s guess. The bench has a 5-4 conservative majority, and two of the justices were appointed by Trump.

Cases surrounding the president, Seidman said, are so politicized that predicting how the highest court would rule is “more a judgment about what the individuals think about Trump than what they think about the law.”

- Read more:
- Trump’s lawyers say he couldn’t be investigated or prosecuted if he shot someone on 5th Avenue
- Newly uncovered tax documents show Trump kept ‘2 sets of books’ and may have committed financial fraud
- A federal court ordered Trump’s accounting firm to turn over 8 years of his taxes to Congress
- A Fox News poll just found that more than half of American voters want Trump impeached and removed from office

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