President Trump’s Claims of Immunity from Accountability

One of this nation’s most important founding principles is that ours is “a government of laws, and not of men.” The Founders rejected the English model of a king who could do no wrong and stood above the law. Instead, they adopted a system under which every American—from an ordinary citizen to the president—must comply with the law. One recurring feature of the Trump presidency has been the rejection of this founding principle. President Trump and his representatives have repeatedly argued that he is not subject to the law—rather, it is subject to him.

This argument that the president is above the law takes two related forms. First, President Trump claims an “absolute right” to control federal law enforcement, including directing it against his perceived enemies and shielding his friends and allies (and even himself). Second, he contends that he cannot be held accountable by anything or anyone.

The attached appendix collects and documents examples of the presidential immunity claimed by President Trump—that is, immunity from accountability and oversight. Time and again, President Trump, his representatives, his personal lawyers, and lawyers for the government have claimed that the president is immune from oversight, investigation, and inquiry.

Each example documented below, standing alone, might seem like a narrow or technical argument that does not go much beyond the positions taken by prior presidents. But taken together, a more alarming picture emerges from which two conclusions can be drawn. First, President Trump and his lawyers do not believe that anyone—not Congress; not federal, state, and local law enforcement; not federal and state courts—can investigate his actions or hold him accountable. Second, President Trump and his lawyers are attempting to cover up the extreme nature of their arguments by engaging in a kind of shell game with federal courts and Congress.
This shell game was most clearly on display in the context of impeachment. President Trump and his lawyers have repeatedly resisted other traditional forms of presidential accountability and emphasized impeachment as the main check on presidential abuses of power. For example, when claiming complete immunity from criminal prosecution or investigation at both the federal and state level for both official and unofficial actions, President Trump argues that the proper check on his authority is Congress’s power to impeach.

But when Congress moves to use its impeachment powers as a check on the president, President Trump then systematically attempts to undermine the impeachment power. First, he refuses to provide evidence in response to congressional subpoenas or in any way cooperate with the impeachment inquiry, and claims that his advisors are absolutely immune from subpoena. Next, he claims that impeachment would be improper when there was no witness with actual knowledge that could testify as to the president’s actions and that Congress should have gone to court to enforce its subpoenas. Next, when Congress does go to court, the Justice Department argues that the courts are powerless to intervene in an interbranch dispute and that the only remedy is the impeachment power (and unfortunately, thus far that argument has prevailed). Finally, in impeachment proceedings, President Trump’s lawyers argue that he cannot be impeached for declining to respond to congressional subpoenas but instead only for “crime” or “crime-like” offenses, which, of course, elsewhere he has also suggested he is incapable of doing when exercising his official powers because Article II gives him the right to do whatever I want as president.”

President Trump’s arguments—if accepted—would dismantle the Constitution’s separation of powers. The impeachment power would be left as the primary check on presidential power but it would be hollowed out by Congress’s inability to investigate whether the president has committed an impeachable offense. This is the result that President John Quincy Adams noted would make a mockery of the separation of powers. And when that gutting of the impeachment power is combined with President Trump’s view—outlined below—that he’s accountable in no other forum, the result is an autocratic form of government where the president is entirely unaccountable to any law or any other branch of government. As a result, if President Trump’s arguments are accepted, the only remaining check on presidential power will be an election in which the president can abuse his powers and break the law in order to gain an electoral advantage.
I. Examples of President Trump claiming that federal law enforcement cannot check him

A. President Trump has claimed an “absolute right” to control the Justice Department—a right extending to the ability to shut down investigations into the president and his associates that might bring to light wrongdoing by the president.

1. President Trump has repeatedly claimed that he has an “absolute right” to interfere with and control the Justice Department and federal law enforcement matters, even to punish perceived enemies and reward his allies or to impede an investigation that would uncover his own unlawful conduct.

2. In a letter to Special Counsel Robert Mueller, President Trump’s personal attorney, John Dowd, expounded on that claimed power and noted that “[The president] could, if he wished, terminate” an inquiry into whether President Trump and his close associates broke the law.

3. President Trump has also claimed the “legal right” to use official powers to instruct Justice Department officials to pursue more lenient sentencing recommendations for his political allies.

B. President Trump has claimed that so long as he is exercising his presidential powers, anything that he does is legal.

1. In a letter to Special Counsel Mueller, John Dowd also asserted that the president cannot obstruct justice because “the President’s actions . . . by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself . . . .”

C. President Trump has claimed complete immunity from criminal process.

1. In a Supreme Court filing, President Trump’s lawyers claimed that he “cannot be criminally prosecuted while in office” and
that “the remedy for wrongdoing by the President is impeachment, not criminal prosecution.” But President Trump’s argument extends well beyond criminal prosecution, to all stages of criminal proceedings, including investigation.

2. The Justice Department has also opined and argued to the Supreme Court that the president cannot be indicted.

D. And if all else fails, President Trump has rejected the view of the Office of Legal Counsel and has claimed the right to pardon himself and his close associates to dissuade cooperation with the Justice Department.

1. President Trump has claimed: “I have the absolute right to PARDON myself,” and his personal attorney Rudy Giuliani told the Washington Post that Trump “probably” can pardon himself.

2. Special Counsel Mueller found that President Trump’s decision to make ‘repeated statements suggesting that a pardon was a possibility for [his former campaign manager Paul] Manafort, while also making it clear that the President did not want Manafort to ‘flip’ and cooperate with the government” had the “potential to influence Manafort’s decision whether to cooperate with the government” because “a pardon was a more likely possibility if Manafort continued not to cooperate with the government.” A federal district court later held that Mr. Manafort breached his plea agreement by lying to the Justice Department.

II. Examples of President Trump claiming that Congress cannot check him

A. President Trump has rejected efforts by Congress to subpoena his personal records.

1. President Trump’s lawyers have argued to the Supreme Court that Congress cannot subpoena his personal, pre-office records when determining whether presidential conflict-of-interest statutes need to be strengthened. They have asserted, among other things, that doing so would transgress the Constitution
because such subpoenas would supposedly be distracting to the president and would “keep[] the President from fulfilling the obligations of his office.”

2. The Office of Legal Counsel issued a 2019 opinion that Congress cannot obtain President Trump’s tax returns pursuant to statute because Congress was acting with an improper motive.

B. President Trump has also rejected efforts by Congress to subpoena White House employees—even in the context of an impeachment inquiry—suggesting that they are absolutely immune from subpoena.

1. The Office of Legal Counsel has repeatedly claimed that top White House advisors have absolute immunity from congressional subpoenas.

2. In court, the government has argued that President Trump and his advisors are absolutely immune from congressional oversight, even in the context of impeachment.

3. The White House categorically refused to cooperate with impeachment proceedings.

4. But, at the same time, President Trump’s lawyers have argued that he cannot be impeached for obstructing a congressional investigation. They have also argued that impeachment would be improper when there are no “witness[es] with actual knowledge” that could testify as to President Trump’s actions (even though, as noted above, President Trump has also claimed that such individuals are completely immune from subpoena).

C. President Trump has rejected the idea that the use of his constitutional powers to further his electoral self-interest can constitute an impeachable offense.

1. In impeachment proceedings, President Trump’s counsel argued that he does not commit an impeachable offense (i.e., a high crime or misdemeanor) when he takes actions “which he believes
will help him get elected” if he believes those actions are “in the public interest.”

2. Instead, President Trump has argued that he can only be impeached for committing a “crime” or “crime-like” offense, even though he has also suggested he is incapable of committing crimes when exercising his official powers because Article II gives him “the right to do whatever I want as president.” And he has also argued that he can shut down investigations into associates that might uncover evidence of criminal activity.

III. Examples of President Trump claiming that the courts cannot check him

A. President Trump has argued that the courts have no power to stop him from taking unlawful actions.

1. Justice Department lawyers have repeatedly argued that a court cannot issue injunctive relief “directly against the President for his official conduct.” Thus, according to the Justice Department, the federal courts have no power to order President Trump to follow the Constitution.

2. The Justice Department has also argued that the federal courts are powerless to even consider whether President Trump’s claims of absolute immunity from subpoena are correct, and that the federal courts should leave it to Congress to decide whether to impeach the president for obstructing a congressional investigation. (The argument that courts cannot enforce congressional subpoenas in this context unfortunately prevailed in the D.C. Circuit recently, in a blow to Congress’s role as a check on the executive.)

B. Moreover, even when courts do conclude that they have the power to issue orders compelling government action, President Trump has used his pardon power to undermine the incentive of government officials to follow judicial orders.
1. In 2017, President Trump **pardoned** Sheriff Joe Arpaio for his criminal contempt conviction after Sheriff Arpaio disregarded court orders remedying constitutional violations, suggesting that the Sheriff was “**convicted for doing his job**.”

2. In 2019, President Trump reportedly (i) told border agents not to follow **judicial orders** requiring the entry of migrants and (ii) **offered to pardon** the Acting Secretary of Homeland Security were he ever convicted for disobeying the law.

**IV. Examples of President Trump claiming that states cannot check him, even for actions that have absolutely nothing to do with his presidential duties**

A. President Trump has argued that he is completely immune from any obligation to respond to state criminal investigations, even when the investigation concerns unofficial conduct.

1. President Trump’s lawyers have argued to the Supreme Court that not only would it be unconstitutional for state prosecutors to indict the president for not paying his taxes, but also that it is unconstitutional for state prosecutors to even subpoena **third parties** seeking information related to the president because doing so would supposedly distract the president, thereby violating the Supremacy Clause.

B. President Trump has also argued that he is immune from all lawsuits in state court, even when the suits concern unofficial, pre-office conduct.

1. President Trump’s lawyers have argued that he is **immune from** all lawsuits in state court because “any assertion of jurisdiction by a state court over the President will inevitably interfere with . . . his or her ability to exercise the President’s Article II powers.”