



IDEAS

What Pleases Trump Has the Force of Law

No president I know of has asserted a blanket power to reject any request that doesn't suit him—until Donald Trump.

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JOSHUA ROBERTS / REUTERS

In my long career as an academic jack-of-all-trades, I sometimes teach law students Jurisprudence—that is, Philosophy of Law. The course begins with the question “What is law?” and its corollary, “What is lawlessness?”

The latter comes in two flavors. The first is anarchy—Hobbes’s “war of all against all,” a *Mad Max* moonscape in which only stealth and brute force provide even a semblance of safety. Such situations existed for millennia and, though relatively rare, exist in remote parts of the globe today.

But there is an authoritarian lawlessness that is far more common in the 21st century, and next time I teach the course, I will have the most precise example of this second version I have ever seen: the dispute over 26 U.S. Code § 6103(f)(1), which reads: “Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary [of the Treasury] shall furnish

such committee with any return or return information specified in such request,” subject only to a requirement that the return be considered in closed session.

[Read: Trump's assault on the rule of law]

Served with a proper demand by Representative Richard Neal, the Ways and Means Committee chair, Treasury Secretary Steven Mnuchin responded, “I have determined that the Committee’s request lacks a legitimate legislative purpose,” and that he therefore would not comply.

Let’s begin at the beginning: To paraphrase Joe Pesci in *My Cousin Vinny*, Section 6103 is what we lawyers call a “statute.” It was adopted by Congress as part of the Tax Reform Act of 1976. The final Senate vote on the bill was 81–1; in the House, it was 405–2. It was signed by President Gerald Ford (for those scoring at home, a Republican). Under the United States Constitution, Article VI, Section 2, it, like all statutes, is “the supreme law of the land.” It contains no provision requiring a “legislative purpose” at all. That’s not an oversight. Congress isn’t always legislating. It has other functions; one of them is to investigate officials and even private citizens, which has been part of Congress’s mission since its 1790 inquiry into the financier Robert Morris’s management of federal revenue during the Revolution.

I can’t find any mention of “legislative purpose” in the statute’s legislative history; the Senate report notes only that congressional committees “would continue to have access to returns and return information.” Nor is “legislative purpose” mentioned in the two Office of Legal Counsel opinions I have found that deal with disclosure of returns to congressional committees. “While Congress was concerned about the citizens’ right to privacy, it was also concerned about the Government’s need for the tax information, and was very much aware of its own needs,” an opinion stated in 1977. “The legislative reports, in addressing this issue, simply state that the committees will have access to tax information ‘upon written request of their respective chairmen.’”

Finally, the text contains no provision empowering the secretary of the Treasury to determine whether such a request is “legitimate.” It says “shall furnish.” The lawful response is, “Here they are.” The lawless answer is, “I personally don’t think you have a good reason to ask.” A private citizen who gave such an answer to a lawful order would be headed for jail.

[Paul Rosenzweig: By protecting the presidency, Mueller has hurt the country.]

Mnuchin’s defiance is of a piece with the administration’s utterly unprecedented claim that “executive privilege” permits it to refuse to provide documents or testimony whenever it suits the president. Though not mentioned in the Constitution, executive privilege over the years has evolved to protect a few classes of information—military and law-enforcement secrets, for example, specific advice provided by officials directly to the president, and

certain internal deliberations over policy.

But except in those limited cases, the executive is expected to provide information at the request of Congress and the courts. Sometimes these disputes require negotiation to reach a balance between what Congress seeks and what the president feels able to reveal. Since the George Washington administration, the most common result has been compromise; though sometimes the fight turns ugly, as former officials such as Attorney General Eric Holder and White House Counsel Harriet Miers found out when different Congresses held them in contempt for defying subpoenas.

No president I know of has asserted a blanket power to reject any request that doesn't suit him—until Donald Trump. No president I know of has rejected requests on the grounds that the committee requesting is controlled by Democrats—until Donald Trump. The ongoing battle between this administration and the House committees is not, at heart, a legal dispute at all; it is an assertion by a president that the law and the Constitution are simply irrelevant when they conflict with his will.

The administration's contempt for statutes is not limited to its disputes with Congress. Statute 8 U.S.C. § 1158(a) states: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been indicted in international or United States waters), irrespective of such alien's status, may apply for asylum" Critics often rightly criticize congressional draftsmanship as unclear—but this particular provision isn't. "*Any* alien ... whether or not at a designated port of arrival."

And yet the Trump administration's new asylum regulations say that any alien *not* at a port of entry may *not* receive asylum. Congress said "may apply"; Trump said "may not."

[Conor Friedersdorf: Republicans must choose between Trump and the rule of law]

This is the climate of law in 2019. If a president obstructs justice, it's not illegal—because, you see, he doesn't like being investigated. If Congress refuses to appropriate funds for a border wall, build it anyway. If the Posse Comitatus Act forbids use of the military in immigration enforcement, urge soldiers to shoot migrants anyway. If the Administrative Procedure Act requires a notice-and-comment procedure before changing regulations, skip the procedure and announce it anyway. If a racist sheriff gets caught harassing Latinos, pardon him. Urge police to beat suspects; urge crowds to shoot immigrants. If a federal trial court rules against a Trump business, attack the judge as "Mexican"; if a federal judge rules against the "travel ban," attack the "so-called judge". If a Court of Appeals agrees about the travel ban, threaten to abolish it. If another judge halts the asylum rules, call him an "Obama judge." If the chief justice mildly protests that the judiciary is independent, tell him he's wrong.

The Trump administration aspires to be the first of the post-legal era. It lives by a principle

enunciated 2,000 years ago by the Roman jurist Ulpian and relied upon by tyrants ever since: *Quod principi placuit, legis habet vigorem*. What pleases the prince has the force of law.

The formal precursor to the age of post-legality was the post-norm era. This began in 2016 with the decision by Senate Majority Leader Mitch McConnell to block the Senate from considering President Barack Obama's nomination of Merrick Garland for a vacancy on the Supreme Court. Learned commentators rushed to explain that because the Constitution didn't say in so many words "The Senate has to act on a presidential nomination," the Senate had no duty to do anything at all. The *Washington Post* fact guru Glenn Kessler said that since the Republican majority "can in effect do what it wants—unless it becomes politically uncomfortable," McConnell's critics had no leg to stand on. "No duty [to consider a nomination] can be found in text, history, or practice," proclaimed the conservative oracle Josh Blackman.

The fact is, the duty to vote up or down on presidential nominations was a constitutional norm, an unwritten practice forged over decades. Today, with the eager assistance of the legal right, that norm sleeps with the fishes. After the Garland victory, the new administration and its Senate allies revoked other norms—such as Congress's oversight role and the executive branch's duty to respond to it. The prince decides what Congress may consider and what it may not.

Without norms, the Constitution is toothless. The Constitution doesn't, for example, say that Congress *must* create an Army and a Navy—or appropriate any funds for any purpose at all; it doesn't say that the Supreme Court *has* to decide on the constitutionality of laws, or even hear cases at all; it doesn't say that there must be a Justice Department or that it must prosecute federal crime or that attorneys general need to follow the law or that judicial nominees must support *Brown v. Board of Education*. The Constitution doesn't say that officials have to tell the truth to the public. All those things are norms, and without them, the system will harden into autocracy with alarming speed.

[Quinta Jurecic: If Congress won't act, Trump will]

A decade or so ago, I spent part of a summer advising a Chinese news magazine about American law. As I was preparing to leave Beijing, I had a farewell dinner with one of the magazine's young reporters. More or less out of the blue, she asked me for the meaning of the phrase "rule of law."

I answered that "rule of law" meant that both the government and the people existed within a binding legal framework, and that both respected the decisions of legislatures and courts even when they disagreed with them.

She seemed taken aback by my answer. "'Rule of law' means that law binds the sovereign?" she asked. I said yes.

After a long minute, she said, "That would never work in China."

At that time, many outsiders were hopeful that China would evolve toward democracy. Ten years on, it has not. China has a constitution; it has laws; it has lawyers and courts galore. But none of these things bind the government of Xi Jinping—whether it is kidnaping Hong Kong bookstore owners or penning Uighurs in concentration camps. “Rule of law” in China means the rulers command and the people obey. The “justice system” exists, more and more, only to effectuate those commands and demand that obedience.

The United States could find itself in a similar place much sooner than its people would like to think.

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