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Katherine A. Shaw

Benjamin N. Cardozo School of Law, kshaw2@yu.edu

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The White House and Congress Are Heading for a Collision. Who Will Win?

The law provides no simple answer — which is why investigators should proceed thoughtfully.

March 6, 2019

By **Kate Shaw**

Ms. Shaw is a law professor and a former associate counsel in the Obama White House.

With the 116th Congress up and running, President Trump is facing meaningful congressional oversight for the first time. On Monday, the House Judiciary Committee embarked on a major investigative mission, sending letters to 81 witnesses seeking documents and testimony relating to possible “obstruction of justice, public corruption and other abuses of power” by Mr. Trump and his administration.

But the White House shows no signs of rolling over. It has indicated for months that it is prepared to assert the president’s executive privilege to keep congressional investigators from gathering information about Mr. Trump — including his conversations with high-level advisers.

Will the White House be able to use executive privilege to successfully block investigators from getting information? When executive privilege and congressional oversight collide, who wins?

This is a complex question that federal courts, and perhaps ultimately the Supreme Court, may have to answer. If congressional investigators want to prevail, it is crucial that they keep in mind the likelihood of those court battles — and that they understand the terms on which those battles will be fought — as they proceed with their investigations.

The Constitution mentions neither congressional oversight nor executive privilege. But it is now well settled that both exist. In 1927, the Supreme Court held that each house of Congress had the power “to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.” And in 1974, in *United States v. Nixon*, the Supreme Court confirmed the existence of a constitutionally grounded executive privilege that shields, among other things, certain communications with the president. In that case, however, the court also ruled that the privilege was not absolute and did not shield Richard Nixon’s White House tape recordings from being released to the special prosecutor in the Watergate investigation.

Does this mean that Mr. Trump’s communications are fair game? It is hard to say. The case of the Nixon tapes involved a judicial subpoena issued in connection with a criminal trial, not a congressional investigation. Some have argued — as Attorney General Bill Barr did, during his previous stint as attorney general, in the George H.W. Bush administration — that executive privilege is at least as strong if not stronger against congressional demands for information.

One reason there is so little clarity on this question is that the courts have not had a chance to tell us. To a remarkable extent, the courts have been silent bystanders during the frequent disputes between Congress and the executive over access to information. That is because negotiation and accommodation have long led to the resolution of these disputes outside of the courts. A give-and-take between the two political branches of government usually results in congressional requests being narrowed but ultimately complied with. Each side scores some wins and suffers some losses, and a meaningful if limited investigation occurs.

Under ordinary circumstances, the process of accommodation would start now. But this process is grounded in informal norms, such as the expectation that the political branches will proceed in good faith and with mutual acceptance of their respective roles in our constitutional system.

The Trump White House, unfortunately, has shown little interest in respecting such norms. The prospect of a negotiated resolution thus seems unlikely. House committees, if faced with refusals from President Trump’s advisers to testify or turn over documents, are likely to issue subpoenas and seek to enforce them in court through contempt proceedings.

If that happens, the courts will have to reconcile Congress’s need for information with the president’s need for confidentiality in his communications with advisers and when it comes to information that might implicate national security or international relations. There is no simple formula for that. In the context of the Trump investigation, then, it will matter a great deal how congressional investigators frame and perform their oversight function. Excessively broad requests might erode congressional credibility, as might requests that duplicate or overlap those of other committees, or that seek information already public or in the hands of other congressional investigators.

As this phase of congressional scrutiny begins in earnest, investigators should not only pursue their inquiries with vigilance but also keep an eye trained on the prospect of a judicial resolution of their clashes with the executive branch. Otherwise they risk losing more than particular battles with the executive branch; they jeopardize the long-term prospects of holding the president accountable.

Kate Shaw (@kateashaw1) is a professor at the Benjamin N. Cardozo School of Law and a director of the Floersheimer Center for Constitutional Democracy.

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