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BY EDWARD A. PURCELL, JR., OPINION CONTRIBUTOR — 07/06/19 04:00 PM EDT
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The coming litigations involving the House of Representatives and the Trump administration will constitute a moment of truth for the federal courts and our constitutional order. Do our ideals of “a government of law and not men” and “no person is above the law” have actual substance? Will the federal courts enforce the law or simply duck and cover?

President Trump has repeatedly attacked judges who decided against him, dismissing one as “a total disgrace.” Such judges, he charged, were “Obama judges.” After remaining silent for the past three years Chief Justice John Roberts, a Republican appointee, finally had enough. “We do not have Obama judges or Trump judges,” [he announced](#), but an “independent judiciary” that strives to apply the law properly.

While few would deny that partisan polarization increasingly marks American politics, the hope is that the federal courts will stand against its pressures and prove that there are indeed no “Trump judges.” [A recent study suggests](#) that the partisan divide on the Supreme Court has grown in recent years but that it remains substantially less of a divide than is true of either the House or Senate. There lies the hope.

As a matter of established law, there is no doubt that the House has the constitutional authority to investigate the Trump administration, to gain access to the documents it needs and to compel the testimony of the witnesses it thinks relevant. Four points are decisive.

First, former special counsel Robert Mueller's report and [at least one federal indictment](#) already filed provide an ample [evidentiary basis](#) to establish probable cause that the president has violated the criminal law and committed “high crimes and misdemeanors.” Contrary to Trump's repeated claims, the Mueller report expressly refused to exonerate him of obstruction of justice and explicitly affirmed the authority of Congress “to prohibit a President's corrupt use of his

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authority.” Further, it explained that it made no prosecutorial finding on obstruction of justice because it was bound by the opinion of the Office of Legal Counsel that a sitting president could not be indicted. The only remedies were impeachment or prosecution after the president left office. Thus, the Mueller report referred the issue to Congress, and the House investigations are not a “do-over” as Trump has claimed but a required “follow-on,” the necessary consequence of the report’s findings and conclusions.

Second, authoritative precedents make the law clear. The court previously ordered both President Nixon and President Clinton to comply with lawful requests for documents and testimony. In 1974, the court ordered Nixon to turn over the “Watergate tapes,” recordings of the president speaking with his closest advisers. In 1997, it ordered Clinton to testify under oath in a private lawsuit involving allegations about his actions before he became president. Most revealing, in that latter case, even Justice Antonin Scalia, a hard-line defender of executive power, joined the court majority and rejected the idea that testifying would burden the president or prevent him from carrying out his official duties.

Third, the president’s sweeping and unprecedented claim of executive privilege is without foundation. The text of the Constitution authorizes no such privilege. It is a judge-made rule that the courts recognize only in limited circumstances — the three principal Supreme Court cases addressing the issue are [United States v. Nixon](#) (1974), [Nixon v. Administrator of General Services](#) (1977) and [Clinton v. Jones](#) (1997). It applies only to communications with the president over policy issues and thus does not protect most of the testimony that the House seeks. Further, it does not apply once the president has waived it, as Trump did with the testimony of the administration figures who appeared before Congress or Mueller’s office. Equally, it does not apply if claimed to protect unlawful or criminal conduct, including obstruction of justice, precisely the conduct that the House must investigate.

Finally, the impeachment power is the only protection the Constitution provides for a lawless president, and it vests that power solely in the House. Thus, it would contradict the constitutional structure to allow a president to defeat a House investigation and thereby hide evidence of his own wrongdoing. As the Mueller report explained, such an investigation “accords with our constitution system of checks and balances and the principle that no person is above the law.” Indeed, it is essential to preserve that system.

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Powerful forces — an executive branch under Trump’s control, the Republican Party and its stranglehold on the Senate, and the take-no-prisoners right-wing media — will exert every effort to block the House investigations. They act as though they believe that their gerrymandering, voter suppression laws, incessantly divisive and dishonest rhetoric, and acceptance of assistance from foreign governments will allow them to control the presidency forever.

In the immediate future, only the federal courts can stand in their way, and only the federal courts can protect our constitutional government. All Americans should hope and pray that there are no “Trump judges” but only independent federal judges committed to ordered constitutional government and the rule of law.

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