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Can Trump Game the Legal System? Only if the Courts Cooperate.

By Joel Cohen and Bennett L. Gershman

Why do the courts really have to take so long to decide these cases?

Facing impeachment, and an array of witnesses who could incriminate him, President Trump and his legal team believe that by stonewalling, obfuscating, and litigating, they can delay the process enough to possibly derail any accountability. A big question is whether the courts will contribute to these tactics or forcefully expedite any litigation.

Trump has already succeeded in stonewalling and threatening litigation. As the Report of Special Counsel Robert Mueller describes, the investigators decided not to pursue interrogating Trump either in the grand jury or through a formal interview because Trump resisted, threatened litigation, and Mueller basically surrendered, realizing that litigation might be so time-consuming that it would cause an unacceptable delay in completing the investigation. It is clear that facing a likely impeachment by the House, Trump has ordered—and will continue to direct—members and former members of his Administration to refuse to appear before the House impeachment inquiry, even if they have been subpoenaed and face being held in contempt.

And from everything we have seen, Trump is right. Is there any realistic potential for Congress holding any unwilling or recalcitrant witness in contempt? Is Congress likely to wage a court battle over executive privilege? Or is Congress more likely to throw in the towel and simply use the evidence that it already has, and possibly add a charge of obstruction to the Articles of Impeachment? Indeed, given Trump's overblown view of executive privilege, and the solid evidence of waiver of the privilege, Congress might ultimately prevail in these judicial battles, even ultimately winning in the Supreme Court. But the clock might run out, the litigation game will be over, Trump will declare victory, and the 2020 election will be moments away.

Put simply, the House leadership likely recognizes that fighting the good fight in the courts will yield only pyrrhic victories when court decisions will likely come too late. Better, they may

decide, is simply to add impeachment counts premised on the president's direction to staffers to thumb their noses at congressional subpoenas and at Congress itself. After all, if Congress is committed to staying away from what may well be long drawn out court battles, the courts will never be asked to direct the testimony or production of documents by the president's insiders who can best tell the story that it was the president himself, not Rudolph Giuliani, Mike Mulvaney, or his other henchmen, who produced, directed, and starred in the drama to compel Ukraine to investigate the Bidens.

But here is the obvious question that nobody has seriously asked: Why do the courts really have to take so long to decide these cases? The court's scheduled argument on whether John Bolton should testify is a month from now. Why can't it be scheduled tomorrow? To be sure, there probably have been more cases involving constitutional issues relating to the current administration than ever before. And, yes, federal judges have lengthy dockets and are extraordinarily busy people. But when a case of such magnitude as the impeachment of a president appears on a judge's docket, other business might well be put aside, at least temporarily, and permit a court to decide the merits in a matter of days.

This is not to minimize other important cases. And of course criminal defendants have a constitutional right to a speedy trial, which should not be brushed off. Still, no matter how complicated the issue, and with a bevy of able law clerks, trial judges can hear arguments on issues such as the enforcement of a subpoena to a cabinet officer and decide it in a few days, and then allow an appellate court to review the matter expeditiously.

Judges want to write the most well-reasoned and persuasive decision they can. They want to consider every issue of law, give careful consideration to both sides, and maybe address every legal nuance, every detail. Still, all of this can be meted out relatively quickly. And, if necessary, the judge can write a two- or three-page order formally deciding the case, and citing some precedents, especially when the case will be invariably reviewed by an appeals court and maybe even the Supreme Court.

Think about it. When *The New York Times* and *The Washington Post* published the so-called "Pentagon Papers," Federal District Judge Murray Gurfein issued a restraining order on June 15, 1971, and lifted it six days later. The U.S. Court of Appeals for the Second Circuit, having previously continued the restraining order, allowed publication of some of the materials on June 23. The Supreme Court granted certiorari on June 25, heard argument on June 26, and decided the landmark case in favor of the *Times* and the *Post* on June 30, a mere 15 days from when the case was on Judge Gurfein's docket. Start to finish! Litigation from the district court to the U.S. Supreme Court over a grand jury subpoena to President Nixon for tapes and documents took a somewhat longer—2.5 months—but still a fairly rapid process. Why can't this happen today?

The president has a perfect right to litigate all of his claims in the courts, even if some may seem patently frivolous. But why should the president have a right—if *right* is the correct

term—to rely on the courts to help him “string it out,” expecting that they will afford him a default victory from the Congress without his Administration having to wage any battle at all.

The President has, thus far, more than any previous litigant, been able to rely on the “law’s delay” that Shakespeare described through the voice of Hamlet. Maybe Chief Justice John Roberts should respond to the public perception of the litigation as a lawyer gamesmanship and should formalize procedures and protocols to ensure that hard-working judges who face *momentous cases* involving the President of the United States should roll up their sleeves, burn the midnight oil, and protect the integrity of the Constitution and the impeachment process with reasonable dispatch.

Joel Cohen is senior counsel at *Stroock & Stroock & Lavan*. He is the author of “*Blindfolds Off: Judges On How They Decide*” (ABA Publishing, 2014.). **Bennett L. Gershman** is a Professor of Law at the *Elisabeth Haub School of Law, Pace University*. He is the author of “*Prosecution Stories*” (Twelve Tables Press, 2018)

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