# Law Professor Letter on President's Article II Powers

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Dear Mr. McGahn & Mr. Flood:

We, legal scholars who study and teach constitutional and criminal law, write in connection with the President's apparent belief that he is empowered by the Constitution to halt the Special Counsel's investigation into alleged Russian interference in the 2016 election for any reason whatsoever, and his apparent view that he is not constrained by Congress's duly enacted laws prohibiting the obstruction of justice. As reported in the *New York Times*, attorneys for the President wrote a letter to Special

Counsel Robert S. Mueller asserting that the Constitution empowers him to "to terminate the inquiry, or even exercise his power to pardon," and that he cannot illegally obstruct any aspect of the investigation because of these powers.[1] These views are incorrect.

First, the best understanding of Article II of the Constitution is that presidential actions motivated by self-protection, self-dealing, or an intent to corrupt or suborn the legal system are unauthorized by and contrary to Article II of the Constitution. Second, and even if one does not accept the foregoing construction of Article II, Congress has enacted obstruction of justice statutes that prohibit any person from acting "corruptly" to interfere with federal criminal investigations.[2] Whatever a President may have been able to do in the absence of such statutes, Congress's judgment that obstruction of justice is prohibited binds the President.

**(1) Article II and Faithful Execution**

While Article II empowers the President to execute the laws, it also constrains him in so doing. The "Take Care Clause" requires that the President "shall take Care that the Laws be *faithfully* executed" (emphasis added). Article II contains a mandatory Oath of Office whereby the President must swear to "faithfully execute the office of President." Like the Take Care Clause, the Oath also conceives of the President's role as a *duty*—to "preserve, protect, and defend the Constitution"—not a personal *power*.

When the Founders thus defined the Presidency as an office bound and restricted by overarching duties of care and faithfulness (fidelity) to the Constitution and laws of the United States, they were invoking the well-known concept of treating a public officer as a fiduciary.[3] In the eighteenth century, as today, English and American law required fiduciaries to act always with due care, solely for the good of their beneficiaries, and to abstain from self-dealing, corruption, and other kinds of self-interested actions.

The President's duties of care and faithfulness are the fiduciary duties most explicitly required by the Constitution, a document that refers to many offices as "Offices of Trust," invoking the legal concept of trusteeship (a fiduciary relationship). Mirroring the Constitution's text, the *Federalist Papers* repeatedly use the language of care, faith, and

trust to describe the offices and duties of all three branches of the federal government and the way their powers should be exercised on behalf of the American people. George Washington, in the opening lines of his first inaugural address, spoke of the presidency as a "trust" committed to him by the American people.[4] The Founders' carefully-chosen words, with their well-known meanings, reflect a conception of a chief magistrate who is duty bound to act with faithfulness to the law and the people, not to his own selfish interests. A similar view of the office underlies the conclusion of the Department of Justice's Office of Legal Counsel that a president may not pardon himself.[5]

It is not strange that the Founders chose to create a chief executive who would be bound to act for public-spirited reasons, rather than pursuing self-interest, self-dealing, or self-protection. Monarchy and all of its attendant ills were rejected by the Founders. The President would not be a king by another name.[6] By banning titles of nobility,[7] and providing that the President would be elected to a term of years,[8] not chosen on hereditary principles, and not ruling for life, the Constitution addressed the fear that a chief executive's primary interest would be perpetuation of his dynastic successors and retainers rather than the good of the country. Many English kings had been foreign born, and still held lands and titles abroad, giving them personal interests that might differ from those of the citizenry. In response, the Constitution requires that the President be a citizen.[9] The President was to be given a salary while in office, and prohibited from imposing taxes or otherwise raising funds on his own authority, and also positively barred from accepting bribes, gifts, or other emoluments of office from foreign governments or state governments.[10] Typically monarchical kinds of financial self-dealing by the chief magistrate were therefore substantially checked. And importantly, the Constitution was conceived at a time when the English Bill of Rights constrained even the monarch from exercising the so-called "dispensing" power to dispense with or suspend Acts of Parliament. Our Constitution similarly limits the President, and certainly cannot be read to grant him a power the British monarch lacked.[11]

These structural checks against abuses typical of monarchy further elucidate the Founders' vision—seen in the Oath and Take Care Clause—of a chief executive bound to act with care and fidelity for the benefit of the country, not himself personally. Other structural provisions in the Constitution which evidence a norm against self-dealing support this reading.[12]

The President's executive powers therefore would not permit him to terminate the Russia investigation by firing the Special Counsel or his Department of Justice supervisors; to order the destruction of evidence developed in the Special Counsel's investigation; to pardon himself or other subjects of the Special Counsel's investigation;[13] or to attempt to quash a subpoena, if the President takes any of these actions motivated predominantly by self-interest. Indeed, the Constitution, properly understood, would prohibit all of those actions under those conditions.

Because the President does have vast powers as head of the executive branch, and because the difference between public-interested (constitutional) and corrupt (unauthorized and hence unconstitutional) presidential actions may often turn on the reasons for which actions are taken, the lawyers for a President have an especially important obligation of their own to the Constitution and people of the United States. The President's lawyers must counsel their client so that he understands that acting for the right reasons is the key to lawfully exercising the great powers he wields.

### (2) Congress's Obstruction Statutes and the Separation of Powers

In addition to internal constraints imposed on the President by the text of Article II and constitutional structure, the President is also externally constrained to avoid obstruction of justice.

The mistaken claim that Article II provides a complete defense to obstruction by the President rests in part on the incorrect premise that the Constitution grants him the exclusive right to exercise the executive powers. A President's Article II powers must be read in conjunction with the restrictions the Constitution places on the federal government, Congress's Article I powers, and the courts' Article III powers, as well as

laws duly enacted by Congress. The administration of justice involves all three branches of government.

The limitation on the President's exercise of Article II powers is perhaps easiest to understand in the context of the Bill of Rights. For instance, it would violate the First and Fifth Amendments for the President to fire federal employees based on their race or religion. To give another example, the Due Process Clause requires that persons wielding prosecutorial power be "disinterested."[14] The Constitution must be read as a whole; none of its provisions, including Article II, is an island.

Most importantly for our purposes, Congress can also exercise its constitutional authority to place limits on the executive.

When Congress legislates within its constitutional authority in a manner that restricts the President, the President is presumptively bound to comply with that law.[15] After all, Congress is expressly given power to enact laws "necessary and proper" for implementing the powers of the President.[16]

Congressional limitations upheld by the Supreme Court on the President's exercise of his war powers, in a case such as *Hamdan,* are especially instructive. There, the Court held that Congress could specify procedures for the President to follow for trying military detainees at Guantanamo.[17] If Congress can constrain the President's vast powers as Commander in Chief in times of war, then it can surely place limits on his conduct in his everyday role as the head of our domestic law enforcement agencies.

And, indeed, that is exactly what Congress and the courts have done. Even though the executive branch is generally empowered with law enforcement responsibility, Congress has enacted civil service laws and created independent agencies limiting the executive branch's power to hire and fire federal employees who enforce the law. In upholding the statute that provided for an independent counsel, rather than the Department of Justice, to investigate wrongdoing in the upper reaches of the executive branch, the Supreme Court "concluded [that] 'we simply do not see how' it is 'so central to the functioning of the Executive Branch as to require as a matter of constitutional law that' the President be

understood to have unlimited control over the investigation and prosecution of potential crimes involving himself or his top aides."[18] As Richard Pildes wrote recently, "Given the established constitutional principle that Congress can protect a federal prosecutor from the President's domination in these type of cases, Congress can certainly constrain the President's power in more limited ways . . . including by making it a crime for the President to act with a corrupt intent to stymie or shut down investigations of the President himself and his top aides."[19]

It is only in rare cases that the President has constitutional power that is "both 'exclusive' and 'conclusive'" on a particular issue,[20] thereby disabling Congress from legislating. And it would likewise be in only a very rare case that generally applicable federal criminal statutes would not apply to the President because of inconsistency with Article II. The Constitution, after all, directly contemplates that the President (and other officers) could be subject to criminal liability for their official actions.[21]

While the President might, for example, intervene directly in an on-going criminal investigation to advance a public-interested goal concerning national security or some other consideration, it is implausible to contend that Article II overrides Congress's obstruction of justice statutes in circumstances where the President is acting to advance "narrowly personal, pecuniary, or partisan interests."[22]

The federal obstruction laws, with their bar on corruptly-motivated actions, apply whether the president obstructs an investigation through firing officials leading it, shutting down the investigation, ordering the destruction of documents, or dangling or issuing pardons to induce witnesses to impede the investigation. Just as the President could not use otherwise lawful firing powers in exchange for a bribe without running afoul of federal bribery laws, he is not free to exempt himself from the application of the obstruction of justice laws.

* * *

The Office of the President is not a get out of jail free card for lawless behavior. Indeed, our country's Founders made it clear in the Declaration of Independence that they did

not believe that even a king had such powers; they specifically cited King George's obstruction of justice as among the "injuries and usurpations" that justified independence. Our Founders would not have created—and did not create—a Constitution that would permit the President to use his powers to violate the laws for corrupt and self-interested reasons.

In sum, both Article II and the criminal laws of this country forbid the president from engaging in corrupt and self-dealing conduct, even when exercising Article II powers to execute the laws.

We have no doubt that you take your professional roles very seriously—and we hope our legal analysis above provides some illumination as you continue to advise your client to faithfully execute our laws and to take care that those laws are faithfully executed throughout the Executive Branch.

Sincerely,

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**Senator Chuck Grassley**

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**Senator Dianne Feinstein**

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[1] *See* Michael S. Schmidt, Maggie Haberman, Charlie Savage and Matt Apuzzo, "Trump's Lawyers, in Confidential Memo, Argue to Head Off a Historic Subpoena *(https://www.nytimes.com/2018/06/02/us/politics/trump-lawyers-memo-mueller-subpoena.html)*," the *New York Times*, June 2, 2018.

[2] *See* 18 U.S.C. § 1505 et seq. Most relevant here, 18 U.S.C. § 1512 (b), the "witness tampering" provision, prohibits any person from "corruptly" persuading a witness in order to prevent them from testifying or communicating information to a federal officer or judge in an "official proceeding."

[3] *See* Ethan J. Leib & Jed H. Shugerman, *Fiduciary Constitutionalism and "Faithful Execution": Two Legal Conclusions*, Georgetown Journal of Law & Public Policy (forthcoming 2018) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968 *(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968)*.

[4] http://avalon.law.yale.edu/18th_century/wash1.asp *(http://avalon.law.yale.edu/18th_century/wash1.asp)*.

[5] *See Presidential or Legislative Pardon of the Presiden*t, OLC Opinion, August 5, 1974; see also Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justic*e, 106 California Law Review (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876 *(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876)*, at 50–51.

[6] *See* The Federalist (No. 69) (Alexander Hamilton).

[7] U.S. Const. art. I, § 9, cl. 8 & § 10 cl. 1.

[8] U.S. Const. art. II, § 1.

[9] U.S. Const. art. II, § 1, cl. 5.

[10] U.S. Const. art. I, § 9, cls. 7–8 & art. II, § 1, cl. 7.

[11] *See, e.g.*, The Heritage Guide to the Constitution, Heritage.org/Constitution ("Under this reading of the [take care] clause, the President can neither authorize violations of the law (he cannot issue dispensations) nor can he nullify a law (he cannot suspend its operation).").

[12] Notably the Ineligibility Clause of Article I and the rule that the Vice President may not preside at the impeachment trial of the President. *See* Hemel & Posner, supra, at 36; Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009).

[13] *See* Leib & Shugerman, *supra*.

[14] *See, e.g.*, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967).

[15] *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 638-39 (2006).

[16] U.S. Const. art. I, § 8, cl. 18.

[17] *See Hamdan, supra*. *See also Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court, at the height of the Korean War, held that Congress's refusal to grant the President the authority to seize private property in the United States meant that a presidential seizure of steel plants to avert a slowdown in production of war materiel was illegal.

[18] Richard Pildes, *In the View of the Supreme Court, Alan Dershowitz Is Wrong About the Powers of the President*, Lawfare (June 9, 2017), https://lawfareblog.com/view-supreme-court-alan-dershowitz-wrong-about-powers-president *(https://lawfareblog.com/view-supreme-court-alan-dershowitz-wrong-about-powers-president)* (quoting *Morrison v. Olson*, 487 U.S. 654 (1988)).

[19] *Id*.

[20] *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

[21] *See* U.S. Const. art. II § 4 ("The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."), and art. I, § 3, cl. 7 ("Judgment in cases of impeachment shall not extend further than to removal from

office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.").

[22] Hemel & Posner, *supra*, at 37.

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