Is the U.S. President Above the Law?

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28.06.2018 doi: 10.17176/20180628-095855-0

On June 4, President Trump tweeted that the President has the absolute right to issue pardons, even to himself. The President's claim came close on the heels of the New York Times's publication of a letter two White House attorneys had sent months earlier to Robert Mueller, the Special Counsel appointed to investigate links between Trump's election campaign and the Russian government. That letter made a number of assertions, but one stood out. The lawyers argued that the President's firing of FBI Director James Comey could not constitute obstruction of justice, because the President is the chief law enforcement officer of the nation, and can fire the FBI Director for any reason at all.

These claims are striking, perhaps especially to international observers of U.S. politics. Can it really be the case that the President of the United States is above the law?

One might suppose that the metes and bounds of presidential power had been long since established. In fact, many important questions about what the President can do—and can get away with—lack definitive answers. The Constitution is silent, for instance, on whether the presidential pardon power extends to the President himself, and a court has never considered the issue, because it has never before arisen in a case. In the absence of definitive answers, we are left to reason our way to conclusions using constitutional first principles and the few fixed points laid down by judicial rulings, guided by scholarly commentary and other sources of persuasive authority.

In that last category, the Office of Legal Counsel (OLC), a Justice Department unit that provides authoritative legal guidance to the executive branch, deserves a mention. Over the years, OLC has produced a substantial body of opinions on presidential powers and immunities. None of these are binding outside the executive branch, and while OLC opinions do tend to take positions favorable to the President, it would be a mistake to dismiss them as hackwork. With some notable exceptions, OLC opinions have a reputation for careful analysis and independence, and they do not always give the President what he wants. Of particular relevance today, a 1974 OLC opinion concluded that the President could not constitutionally pardon himself.

It can be difficult to distinguish among the different claims currently circulating about the President's powers and immunities, but it is important to do so. For the President to be "above the law" could mean several different things. It could stand for the proposition that the President cannot be criminally prosecuted while in office. This claim has its critics, but substantial mainstream support as well. The core of the argument is that subjecting a sitting President to prosecution would impermissibly interfere with his constitutional responsibilities to the nation, as head of the executive branch. This is the position taken by the OLC, in memoranda issued in 1973 and again in 2000.

Presidential immunity to prosecution might seem to fly in the face of rule-of-law values. But it is important to remember that the Constitution provides another mechanism for dealing with a wayward President: impeachment. The House of Representatives initiates impeachment proceedings by bringing charges for "Treason, Bribery, and other high Crimes and Misdemeanors," triggering a trial in the Senate, with the Chief Justice presiding. If convicted, the President is removed from office, and there is no bar to prosecuting a former President.

A much more aggressive assertion of presidential immunity holds that whatever use the President makes of his executive powers under Article II of the Constitution is ipso facto lawful. Richard Nixon famously claimed something of the sort when, years after his resignation, he told interviewer David Frost that

"when the president does it that means that it is not illegal." This sweeping proposition finds little support in the law and has few takers today.

The President's lawyers seem to take a somewhat more nuanced view, but figuring out their argument still requires some work. They write:

It remains our position that the President's actions here, by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself, and that he could, if he wished, terminate the inquiry, or even exercise his power to pardon if he so desired.

Later, they add:

As you know, and as Mr. Comey himself has acknowledged, a President can fire an FBI Director at any time and for any reason. To the extent that such an action has an impact on any investigation pending before the FBI, that impact is simply an effect of the President's lawful exercise of his constitutional power and cannot constitute obstruction of justice here. No President has ever faced charges of obstruction merely for exercising his constitutional authority.

Legal scholars Josh Blackman and Alan Dershowitz have articulated what is perhaps the best version of this argument. It runs roughly as follows. The President has the authority under Article II of the Constitution to remove the FBI Director, for any reason or no reason at all. While other forms of presidential misbehavior could amount to obstruction of justice—say, accepting bribes, or tampering with witnesses—the removal of an FBI Director, an official presidential act authorized by the Constitution, could not. It is not so much that the President is above the law when removing the FBI Director, as that there is no law to apply, since the President enjoys complete discretion over whether, when, and why to remove the FBI Director.

It seems to me that this argument only works if we understand the President's at-will removal authority over the FBI Director to be guaranteed by the Constitution. It is true that, by default, Presidents have the power to remove executive branch officers at will, and no statute expressly purports to limit the President's removal power over the FBI Director. But the Supreme Court long ago rejected the claim that the Constitution requires that the President be allowed to remove at will all officials in his administration. Congress can place restrictions on the President's removal authority, so long as these do not impermissibly interfere with the President's constitutional responsibilities. Thirty years ago, the Supreme Court held that Congress may deny the President at-will removal authority over the Independent Counsel, a powerful prosecutor appointed to investigate executive branch wrongdoing pursuant to the (now defunct) Ethics in Government Act. Surely it would be permissible for Congress to provide that the President may not remove the FBI Director in order to corruptly impede an official proceeding. Indeed, this is one way to read the effect of the obstruction of justice statute, as it interacts with the President's removal power.

Even if we don't understand the obstruction of justice statute to impose an implied limit on the President's removal authority, it does not follow that it can't apply to the President when he fires the FBI Director. Again, by default, the President has the power to remove executive branch officers. Whether or not the obstruction of justice statute alters that default rule, it can still impose an independent, binding obligation on the President. Even if the President can remove the FBI Director at will, there is no reason why the power to do so must imply immunity from an otherwise valid and applicable anti-corruption statute. In other words, it is possible that the President could fire the FBI Director, and he could stay fired—but the President would have broken the law, if the firing was for a corrupt purpose.

Conflicts over the scope of presidential power are a persistent feature of American democracy. In the past, those involved have sometimes managed to negotiate around some of the open questions, avoiding outright confrontation. In 1998, Ken Starr, the Independent Counsel investigating President Clinton, issued a subpoena requiring the President to testify before a grand jury. Legal experts differed on whether the President could be forced to testify before a grand jury. Rather than defy the subpoena on constitutional

grounds, the Clinton Administration worked out an alternate arrangement with the Independent Counsel, whereby the President appeared at the White House for four hours to give testimony under oath.

More conflicts between the Trump Administration and the Special Counsel's Office may be coming. Although the President regards himself as the consummate negotiator, his tweets suggest he is spoiling for a fight. We could see some spectacular clashes between the President and those investigating him in the future, and a lot of new law on the scope of presidential power being made as a result.

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SUGGESTED CITATION

Mathews, Jud: Is the U.S. President Above the Law?, Verfassungsblog, 28.06.2018, doi: 10.17176/20180628-095855-0.

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