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CAN TRUMP OBSTRUCT JUSTICE?

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Can Trump Obstruct Justice?

[Mark Greenberg](#)

Can a president commit obstruction of justice by terminating a criminal investigation? This question has become critical to the future of the Trump presidency.

In general, a person commits obstruction of justice if that person tries to impede an investigation, and does so with a corrupt purpose, such as to protect him- or herself from criminal liability or to reap financial gain. Special Counsel Robert Mueller is widely believed to be building a case that President Trump committed obstruction of justice by trying to shut down the FBI investigation of former national security adviser Michael Flynn. Such a claim of obstruction of justice would likely be central in any impeachment proceeding.

When considering whether it is possible for the president to commit obstruction of justice by terminating an investigation, legal experts feel the pull of two conflicting ideas. On the one hand, it seems clear that a president who orders subordinates to lie to the FBI, destroys evidence, or bribes witnesses has committed obstruction of justice. This idea leads to the straightforward view that if the president acts with the corrupt purpose required for obstruction of justice, he can be guilty of that crime just as anyone else can. This *republican* view of presidential powers is probably the one held by most experts.

On the other hand, one may think that surely the president must be special by virtue of the Constitution's broad grant of executive power. The executive branch would be unduly hampered if there were constant scrutiny of the president's motives in exercising his authority. But an embrace of this idea without qualification leads to a *royalist* view of presidential powers.

The president's personal lawyer, John Dowd, [has recently defended](#) the royalist view, maintaining that the president, as chief law enforcement officer of the United States, cannot commit obstruction of justice. This position would have the implausible consequence, among others, that President Nixon's actions did not constitute obstruction of justice. The notion that it is legally impossible for the president to obstruct justice is untenable in a democracy, and most commentators have roundly dismissed Dowd's royalist view.

Several others—including two former Justice Department officials, David B. Rivkin Jr. and Lee A. Casey, writing in [The Wall Street Journal](#), but most notably Harvard Law professor emeritus [Alan Dershowitz](#)—have advocated a more nuanced position that seems to reconcile the two conflicting ideas, what I call the *protected act* view. Dershowitz rejects the royalist position: a president who lies to the FBI or authorizes the bribery of a witness is not exercising a power granted to the president by the Constitution, and therefore can be guilty of obstruction of justice. At the same time, Dershowitz argues that presidential actions “within [the president's] constitutional authority,” such as firing an executive official or terminating an investigation, cannot be an obstruction of justice; in fact, a president acting within that authority, regardless of his purposes, cannot violate the law.

Dershowitz and others who take similar positions maintain something close to the view that there are no restrictions on the powers granted to the president by Article II of the Constitution, except those explicitly stated in the provisions from which the powers derive. Dershowitz seems to think that if there is a constitutional power under which a president could take an action of a certain type, then the president may legally take *any* action of that type. For example, Dershowitz says that the president “is authorized to take care that the laws be faithfully executed,” and, in order to do so, the president may need to investigate a particular person, terminate an investigation, or fire someone. Therefore—and this is the crucial step in Dershowitz’s argument—the president may do any of these things without any restrictions. Motive is irrelevant—whether the president instigates an investigation to intimidate a political opponent, to silence a critic, to generate profits for his family’s company, or to cover up a serious crime, the action is constitutionally authorized.

The protected act view has important implications for a potential impeachment proceeding. The constitutional standard for an impeachable offense—“treason, bribery, or other high crimes and misdemeanors”—is best understood to require serious official misconduct, but not the commission of a crime. But since Dershowitz’s protected act view implies that any presidential termination of an investigation is constitutionally authorized, impeachment for such an action could not be legally permissible. The view thus implies a constitutional bar to impeachment as well as to criminal prosecution.

The protected act view suffers from two fundamental flaws. First, despite Dershowitz’s insistence to the contrary, it means that there is very little the president would *not* have constitutional authority to do. As I’ll explain, the view comes close to collapsing into the royalist view, allowing the president to commit what would otherwise be serious crimes with impunity. Second, sound constitutional interpretation does not support the view’s central claim, for reasons I’ll give shortly. Moreover, the legitimate concern that the president’s purposes should not be subjected to constant scrutiny by Congress or the courts can be substantially accommodated without accepting the extreme position that any presidential exercise of power is legally permissible.

As mentioned above, Dershowitz says that if the president, to impede a criminal investigation, orders a subordinate to lie to investigators, destroys evidence, or authorizes the bribing of a witness, he can be guilty of obstruction of justice. But if the president, for the same purpose, fires an executive official or orders a subordinate to terminate an investigation, these actions are constitutionally authorized and cannot constitute obstruction of justice—indeed, cannot violate the law. But what is the distinction between these two types of conduct? The Constitution does not mention a power to fire executive officials or to terminate investigations. Dershowitz assumes that such powers follow from the president’s general duty to, as the Constitution puts it, “take care that the laws be faithfully executed.” By the same logic, though, the president would have the power to take the very actions that Dershowitz claims would amount to an obstruction of justice.

Almost any action that Dershowitz would argue falls outside the president’s powers is one the president could conceivably take *for a legitimate purpose*. For example, in undercover investigations and national security operations, agents sometimes have to lie to investigators.

During the Manhattan Project under President Roosevelt, thousands of participants were required to lie about their work to everyone not authorized to know about the project. Similarly, to protect a classified program, the president may legitimately order subordinates to destroy records. Again, the president may order a sting operation that involves agents' offering bribes to a target.

The reason that such presidential actions are not crimes is that the president's purposes are legitimate. But because the protected act view holds that the president's purposes are legally irrelevant, it follows that he has the power to order subordinates to lie to investigators, destroy records, or offer bribes to witnesses for *any* purpose. An instructive example: the proponents of the protected act view assume that the president does commit a crime if he accepts a bribe for performing an official act. They would argue that Congress can treat this as a crime because what is being criminalized is not the exercise of the president's powers, but a separate action of accepting payment for exercising them. Now, if the president is constitutionally authorized to exercise his powers for any purpose, then he is constitutionally authorized to do so *for the purpose of* receiving a payment. From that conclusion, however, it seems fair to infer that the president is constitutionally authorized to *accept* the payment—and therefore that Congress cannot treat his doing so as a crime.

The Constitution does give broad powers to the president. But if the president had the authority to use these powers for any purpose, he would be able, for example, to launch a military attack in order to kill a personal enemy or to use his executive power over investigations to destroy political opponents. The protected act view thus puts the president above the law, violating a fundamental tenet of our democracy and of the rule of law.

The second fundamental flaw of the protected act view is that it is not supported by our constitutional text and tradition. Its proponents seem to assume that any power the Constitution grants the president must be unrestricted except for restrictions expressly mentioned in the text that grants the power. But this assumption breaks with standard methods of interpreting the Constitution. For example, the Constitution gives the president the "power to grant reprieves and pardons," but it does not follow that the president can grant a pardon for crimes that have not yet been committed, pardon someone on the condition, say, that she convert to Roman Catholicism, or pardon himself. Understanding what the pardon power actually involves requires considering, among other things, the history of the pardon power in England, other constitutional provisions, and fundamental legal principles (such as, for instance, that no one may be a judge in his or her own cause).

The Constitution also appears to allow for scrutiny of the president's purposes by specifying treason and bribery as grounds for impeachment. Whether a president's helping a foreign power constitutes treason depends on whether his purpose is to give "aid and comfort" to the enemy (part of the constitutional definition of treason). Limiting the president's liability for treason only to acts that do not come under any legitimate presidential power would eviscerate the force of that constitutional provision. As for bribery, if accepting a bribe for exercising a presidential power is an impeachable offense, Congress must be able to examine the president's *purposes* in exercising his or her powers.

Dershowitz argues that the president's powers to make investigative and prosecutorial decisions derive from the injunction to "take care that the laws be faithfully executed," but the constitutional language seems to suggest that the president's purposes are relevant to whether he has fulfilled his constitutional duties. Whether a president has taken care to execute the law *faithfully* arguably depends on the president's motives, not his actions alone. It is perverse to read the duty to "take care that the laws be faithfully executed" to imply an unrestricted power to deliberately thwart the execution of the laws.

An animating concern of the protected act view is that the president's mental states—his reasons, purposes, or motives—should not be subject to routine scrutiny, or not to the same degree as in ordinary criminal prosecutions. And this concern is legitimate. But we must distinguish between an action's having some protection from legal scrutiny and an action's being legally *permissible*. For example, an offender cannot be prosecuted if the statute of limitations on his crime has expired, but it does not follow that the conduct was legally permissible. This distinction matters: if the protected act view is correct, then improperly motivated exercises of presidential power cannot be prosecuted under any circumstances, cannot be grounds for impeachment, and cannot violate citizens' rights.

It is perfectly possible to address legitimate concerns about excessive scrutiny of the president's purposes while rejecting the protected act view. As a practical matter, the threshold for bringing proceedings against a sitting president is already much higher than that for an ordinary criminal prosecution. If further protection for the president were needed, we could adopt legal rules requiring a higher-than-ordinary showing for initiating a case against a president. An example would be a requirement of an objective red flag—such as an action that benefits the president personally or for which there is no reasonable justification. Such a requirement could respond to the need for presidential purposes to be shielded from routine examination without our accepting the constitutional permissibility of presidential conduct motivated by improper purposes.

The dispute over the protected act view is no abstract, academic debate. As a matter of practical politics, it might take only a credible argument that Trump's conduct was constitutionally protected to imperil the possibility of impeachment. A long-running controversy among legal experts on this point could give political cover to Republican members of Congress to resist taking up an obstruction charge, and might sway public opinion in their favor.

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