The Law of Obstruction as a Check on Presidential Power

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Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 **Cal. L. Rev.** __ (forthcoming 2018), available at SSRN.

Full-length articles on current newsworthy issues are a difficult genre. Special praise, therefore, goes to legal scholars who thoroughly explore a constitutional question on a hot-button issue not only in depth and in a timely fashion, but with insights that exceed the present moment. Dan Hemel and Eric Posner have made just such a contribution with *Presidential Obstruction of Justice*.

"Can a president be held criminally liable for obstruction of justice?" they ask. (P. 1.) This question has taken on greater urgency in the wake of President Trump's firing of FBI director James Comey and the continuing investigation by special counsel Robert Mueller into Russian efforts to interfere with the 2016 presidential election and possible collusion between Russia and the Trump campaign.

Hemel and Posner's article gives this question, and the range of constitutional and policy issues that it raises, a thorough analysis in succinct and punchy prose. They harmonize constitutional text and history—most importantly the arguably conflicting principles that the president is vested with the "executive power" and that no one, not even the president, is above the law—with federal obstruction statutes that bar anyone from interfering with law enforcement based on a "corrupt" motive. At the same time, Hemel and Posner make a broader point: "[W]ithout anyone noticing it, the law of obstruction of justice," they observe, "has evolved into a major check on presidential power." (P. 1.) Obstruction allegations have been levied against six of the last nine presidents or their close aides—raising the stakes on whether, and in what circumstances, a president can obstruct.

Hemel and Posner begin their argument with the arguable tension between the principle that the president controls the quintessentially executive functions of criminal investigation and prosecution and the bedrock notion that no one is above the law. Generally, as the nation's top law enforcement official, the president possesses the power to end investigations and to fire executive branch officers who fail to maintain his confidence. If the president can fire an FBI director who displeases him, why can't he fire one who pursues an investigation he wants shut down, regardless of motive? Surely, no one thinks that the president should be able to murder his valet and call off the investigation of it, Hemel and Posner respond. More seriously, neither should the president be able to control law enforcement to hamper political opposition. If he could, they observe, he or his aides could engage with impunity in criminal activity to harass their opponents—precisely what the Watergate burglary illustrates.

Article II suggests an answer to this puzzle, they argue. It not only vests the executive power in the president, but it obligates him to "take care that the laws be faithfully executed." The exercise of the executive power, while vast, is not unlimited. It does not encompass the power to "corruptly" interfere with law enforcement to benefit oneself, family, or political allies. The trick is how one defines "corrupt," meaning "with an improper purpose."

The authors take a historical and originalist approach to this question, beginning with the Declaration of Independence's charge that George III interfered with the administration of justice in the colonies. Parsing obstruction of justice statutes and cases, they survey the law of obstruction to the present day,

including Watergate, Iran-Contra, the impeachment of President Clinton, and the dismissal of U.S. Attorneys under President George W. Bush. This historical survey helps elaborate the meaning of "corruptly." Hemel and Posner then harmonize this history with the special role of the president in law enforcement, the constitutional provisions elaborating on that role, and recent precedents, both in the impeachment and prosecution contexts, to frame the parameters of obstruction.

Significantly, Hemel and Posner reject the unitary executive argument that the Constitution vests "complete" presidential control over federal law enforcement so that, as President Trump's lawyers have argued, he cannot exercise the power unconstitutionally. There may be substantial gray area in what constitutes obstruction, but it is not the case that the president, by dent of his role, cannot commit it.

The article's historical and analytical survey provides a foundation for the authors' proposed definition of presidential obstruction: "A president commits obstruction of justice when he significantly interferes with an investigation, prosecution, or other law enforcement action to advance narrowly personal, pecuniary, or partisan interests. He does not, however, commit obstruction when he acts on the basis of a legitimate and good-faith conception of his constitutional responsibilities, even if he receives a personal or pecuniary benefit or incidentally advances his party's interests." (P. 37.)

Hemel and Posner do not spell out all the scenarios that might meet that standard, but they explore a wealth of variations, providing a rich basis for analyzing cases that might arise. In particular, they explore presidential discretion to intervene in an investigation because the president thinks national security depends on it, or to stop prosecuting cases involving possession of marijuana because he considers such efforts a poor use of scarce enforcement resources. But the Constitution does not authorize the president to employ his office for personal or partisan advantage—say, to advance the financial interests of a family member or call off the prosecution of a senator from his own party who is up for reelection.

The authors canvass various counter-arguments and complications, including cases of mixed motives, the pardon power, whether a sitting president can be indicted, and the canon of constitutional avoidance. The authors' approach is nuanced and rich with examples, so we will only hit a few highlights.

Recognizing the deep challenge that mixed motive cases present, they reject a "partially corrupt motive" test as too broad, given presidents' involvement with politics. They argue instead for a "but-for" motive: If the president would not act "but for" the corrupt motive, the charge is actionable.

Next, they ask whether the president's exercise of the pardon power could ever itself constitute obstruction. And what of the argument (prominently made by Alan Dershowitz) that because the president possesses the power to pardon, he must possess the lesser-included power to end criminal investigations, regardless of motive?

On the first point, the authors contend that while a "corruptly" given pardon would still be effective, excusing the grantee of criminal process, it is a separate question whether the president, as grantor, could obstruct justice by granting the pardon. And because nobody thinks a presidential sale of pardons for money could not be prosecuted, in principle the pardon power can be used to obstruct.

On the second, the authors convincingly argue that Dershowitz is wrong: from text, structure, and function, the president cannot self-pardon, so he has no "lesser power" to drop an investigation of himself. Further, Dershowitz's argument rests on a conceptual error: the power to drop an investigation is different in kind and effect than the power to pardon. The pardon power is public, with different

political costs and implications, than the ability to drop an investigation in secret.

Concerning the implication for their argument of whether a sitting president can be criminally indicted, Hemel and Posner offer this synopsis: “First, the claim that a sitting president cannot be convicted of a crime while in office does not represent settled law. Second, even if a president cannot be convicted of a crime while in office, it may be possible to convict him after he leaves office of a crime he convicted while in office. Third, even if a president cannot be convicted of a crime committed while in office, he may be impeached for such a crime.” (P. 52.)

Finally, the authors consider whether the constitutional avoidance canon should be used to excise the president from the reach of ambiguous obstruction statutes. No, they conclude: the statutes contain no arguably ambiguous language. Interpreting “whoever” to mean “whoever, except the president” would do violence to the statutory language, not avoid ambiguity.

The authors make two major points in closing. First, they ask, what to make of the historical anomaly that obstruction charges have been raised against so many recent presidents or their aides, while no such charges were brought against the first 36 presidents? This development is perhaps explained, they posit, by the growth in presidential power, the difficulty of impeachment, and the weakness of electoral mechanisms to control that power. The law of obstruction, in other words, has developed as a matter of necessity, as a valuable check in the face of growing executive abilities and incentives to use law enforcement for personal or political ends.

Second, should the rise of the law of obstruction as a check on presidential power be “celebrated or bemoaned”? On the one hand, the law of obstruction may provide a needed check on abuse. On the other, its growth may mean that “all presidents will permanently be under investigation even when they do nothing wrong.” (P. 59.) The authors remain normatively uncommitted—suggesting, perhaps appropriately, that only time will tell.

In short, this is a fabulous article concerning both immediate constitutional issues and lasting constitutional structural developments.

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