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Dissecting Trump's Efforts to Place Himself Above the Law

By Prof. Marjorie Cohn
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*"Nobody is above the law," **Donald Trump** declared during the 2016 campaign. But as special counsel **Robert Mueller** zeroes in on him, the president is carving out an exemption for himself. Trump and his attorneys are claiming absolute power for the president.*

Trump's attorney and mouthpiece **Rudy Giuliani** told HuffPost that Trump could not be indicted even if he "shot" former FBI director **James Comey** in the Oval Office.

A confidential January 29, 2018, memo written by Trump lawyers **John Dowd** and **Jay Sekulow** contends that Trump essentially is above the law. As the French **King Louis XIV** said, "*L'etat c'est moi*" (I am the state). All political power resides in the king. Trump's attorneys are arguing that the president is immunized against legal consequences for his actions.

"Unitary Executive" Theory of Presidential Power

Another Trump attorney, **Marc Kasowitz**, also wrote a confidential memo to Mueller, on June 23, 2017. It advocates the "unitary executive" doctrine, a radical rightwing theory of extensive presidential powers.

> "As a constitutional matter," Kasowitz wrote, "the President also possesses the indisputable authority to direct that any executive branch investigation be open or closed because the Constitution provides for a unitary executive with all executive power resting with the President."

Trump is not the first president to make sweeping claims of executive power.

In 2000, Supreme Court Justice **Samuel Alito** told the conservative Federalist Society that the

> Constitution "makes the president the head of the executive branch, but it does more than that. The president has not just some executive powers, but the executive power — the whole thing."

Shortly after 9/11, legal mercenary John Yoo saw to it that **George W. Bush** included "unitary executive" in several of his signing statements, purporting to limit the parameters of statutes Congress had enacted. Yoo also made the astounding claim that a president could legally crush the testicles of the child of a person being interrogated. Supreme Court Justice Clarence Thomas used the phrase "unitary executive" in his dissent in *Hamdi v.*

Rumsfeld, a case in which the high court upheld due process rights for US citizens held as enemy combatants.

The Dowd-Sekulow memo makes a series of assertions of unbridled executive power. It says that a president should not have to submit to an interview by the special counsel; he cannot be compelled to testify in court; he can't commit the crime of obstruction of justice, and even if he could, he can't be criminally charged; he has the power to fire the special counsel; and he can grant himself a presidential pardon for any conceivable crimes.

That memo is a desperate attempt to avoid subjecting Trump to Mueller's questioning or a grand jury subpoena. His lawyers know it would be a legal minefield as the president has a compulsive habit of contradicting himself.

Must the President Submit to a Mueller Interview?

Trump's legal eagles argue that the president is protected by executive privilege against being compelled to talk to Mueller. Moreover, they contend the documents he has provided and witnesses he has made available for depositions cover everything Mueller would ask about, so there's no need for the president to personally converse with the special counsel.

The hole in their argument is that in order to establish whether Trump engaged in obstruction of justice, Mueller has to determine whether the president had the intent to obstruct the FBI investigation. That decision can best be made by speaking directly to Trump.

On June 3, Giuliani revealed the real reason Team Trump fears a Mueller interview of the president.

> "This is the reason you don't let this president testify in the special counsel's Russia investigation," Giuliani told George Stephanopoulos on ABC's "This Week," adding, "Our recollection keeps changing, or we're not even asked a question and somebody makes an assumption."

Can the President Obstruct Justice?

Dowd and Sekulow maintain that the president cannot commit the crime of obstruction of justice.

> Trump's actions, "by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally constitute obstruction of justice because that would amount to obstructing himself," the lawyers wrote in their memo.

The two primary bases for an obstruction of justice case against Trump are: (1) his firing of former FBI director James Comey to stop the investigation of former **National Security Adviser Michael Flynn** for improper communication with Russia during the campaign; and (2) Trump's memo misstating the purpose of Donald Trump Jr.'s meeting with a Russian lawyer to get dirt on Hillary Clinton during the campaign.

Trump's lawyers claim there was no obstruction of justice because Section 1505 of Title 18

of the US Code forbids obstructing "any pending proceeding before a department or agency of the United States, or Congress," and since the FBI has only investigative — not adjudicatory — authority, it can't conduct "proceedings."

Apparently, Dowd and Sekulow were unfamiliar with the superseding obstruction of justice statute 18 U.S. Code § 1512, enacted in 2002, which prohibits corruptly obstructing proceedings that haven't yet begun — a grand jury investigation that could arise from the FBI case. The lawyers never mentioned that statute in their memo.

Moreover, Trump's attorneys contend the president can fire the FBI director for any reason whatsoever — even a corrupt one.

But the Supreme Court has held that Congress can set limits on the president's power to fire officials and require good cause.

The lawyers also argue that Trump didn't fire Comey to halt the FBI investigation into Russian influence in the Trump campaign.

But Trump's own televised statements to NBC's Lester Holt and the president's boasts to Russian diplomats in the Oval Office prove otherwise.

Perhaps the biggest bombshell is his lawyers' admission that Trump drafted the June 2017 memo falsely stating the purpose of Donald Trump Jr.'s Trump Tower meeting with a Russian attorney in June 2016. The Dowd-Sekulow memo says,

> "the president dictated a short but accurate response to The New York Times article on behalf of his son, Donald Trump, Jr."

For a year, beginning with Sekulow's July 2017 statement on "Meet the Press," Trump's lawyers had insisted Trump did not draft that memo.

In the memo he drafted, Trump said the people present at the Trump Tower meeting "primarily discussed a program about the adoption of Russian children" and the topic of the meeting was "not a campaign issue at the time."

But when he had been told the meeting could produce negative information about Hillary Clinton, Trump Jr. replied by email, "if it's what you say I love it."

Trump's lawyers made the damaging concession that Trump himself had drafted the false statement in order to reinforce their contention that it's unnecessary for Mueller to interview the president as he has already conceded he wrote that memo.

Former White House counsel Bob Bauer told The Washington Post that by conceding that Trump authored the July 2017 memo, Dowd and Sekulow actually bolstered the rationale for a Mueller interview with Trump:

> This raises all sorts of questions as to why he did it. What did you know at the time you wrote it? Who did you know it from? And why did you write something we now know wasn't true? The moment that they concede that they lied about [Trump's role], the argument for the interview is strengthened, not weakened.

Furthermore, Bauer noted,

> "The dictating of the false statement is [part of] an ongoing effort to cover up something," adding Trump was "active in writing the cover up."

Can the President Be Compelled to Testify in Court?

If Trump refuses to submit to Mueller's interrogation, the special counsel is likely to serve the president with a subpoena to testify before a grand jury.

There is some precedent for compelling a president to testify in court. In 1998, Bill Clinton was subpoenaed to testify before a grand jury after refusing to voluntarily appear during the Monica Lewinsky investigation. Clinton made a deal with the independent counsel to voluntarily testify under oath remotely and the subpoena was withdrawn. Statements Clinton made during that testimony led to his impeachment in the House of Representatives for obstruction of justice for committing perjury before the grand jury. The Senate later acquitted Clinton of the charges.

Nixon produced the tapes and resigned two weeks later to avoid impeachment. Lawfare's Steve Vladeck and Benjamin Wittes argue that, in all likelihood, a Mueller subpoena to compel Trump to testify would be upheld, citing *United States v. Nixon.* The Supreme Court held that Nixon had to comply with a subpoena to provide some of the Watergate tapes to the independent counsel. The high court recognized a qualified executive privilege against disclosure of confidential executive branch communications. In the Nixon case, the Court held the privilege was superseded by "the fundamental demands of due process of law in the fair administration of criminal justice," adding,

> "The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."

Although the Nixon case affirmed a subpoena to produce items at trial, not grand jury testimony as in the Trump situation, the same principle would likely apply.

In *Clinton v. Jones*, the Supreme Court ruled that a sitting president does not have total immunity from civil litigation for conduct occurring before he took office. Vladeck and Wittes explain, "the interests of the grand jury are generally regarded as far weightier than the interests of any private civil litigant."

On June 6, a New York judge ruled that Trump must submit to a deposition in a defamation lawsuit filed by a former contestant on "The Apprentice." Plaintiff Summer Zervos is charging the president with defamation for his public assertion that she had falsely claimed that Trump had kissed and groped her without permission in 2007. **Judge Jennifer Schechter** set a deadline of January 31, 2019, to complete the deposition but her ruling is being appealed to the New York Court of Appeals.

Can the President Be Charged With a Crime?

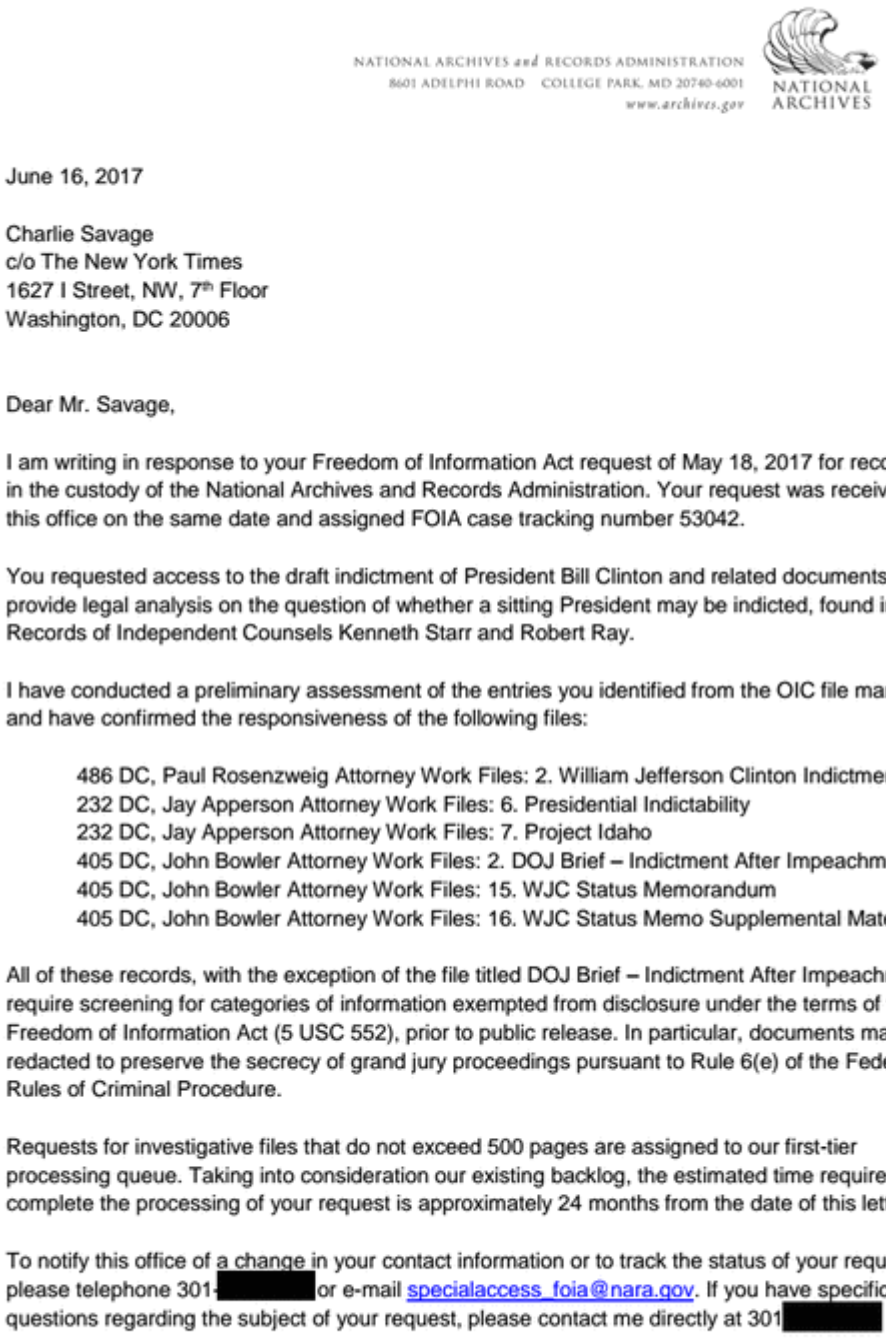
No president has ever been charged with a crime. Neither **Richard Nixon** nor **Bill Clinton** was prosecuted for crimes, including obstruction of justice, which was one of the articles of impeachment against them. **Gerald Ford** pardoned Nixon, and Clinton made a deal with

the independent counsel to avoid prosecution.

The Department of Justice's Office of Legal Counsel during both the Nixon and Clinton administrations took the position that presidents are immune from prosecution during their time in office.

But a memo from independent counsel **Kenneth Starr**'s investigation of Clinton said a president can be indicted for criminal activity:

> "It is proper, constitutional, and legal for a federal grand jury to indict a sitting president for serious criminal acts that are not part of, and are contrary to, the president's official duties. In this country, no one, even President Clinton, is above the law."



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NATIONAL ARCHIVES

June 16, 2017

Charlie Savage
c/o The New York Times
1627 I Street, NW, 7th Floor
Washington, DC 20006

Dear Mr. Savage,

I am writing in response to your Freedom of Information Act request of May 18, 2017 for records in the custody of the National Archives and Records Administration. Your request was received in this office on the same date and assigned FOIA case tracking number 53042.

You requested access to the draft indictment of President Bill Clinton and related documents that provide legal analysis on the question of whether a sitting President may be indicted, found in the Records of Independent Counsels Kenneth Starr and Robert Ray.

I have conducted a preliminary assessment of the entries you identified from the OIC file manifest and have confirmed the responsiveness of the following files:

486 DC, Paul Rosenzweig Attorney Work Files: 2. William Jefferson Clinton Indictment
232 DC, Jay Apperson Attorney Work Files: 6. Presidential Indictability
232 DC, Jay Apperson Attorney Work Files: 7. Project Idaho
405 DC, John Bowler Attorney Work Files: 2. DOJ Brief – Indictment After Impeachment
405 DC, John Bowler Attorney Work Files: 15. WJC Status Memorandum
405 DC, John Bowler Attorney Work Files: 16. WJC Status Memo Supplemental Materials

All of these records, with the exception of the file titled DOJ Brief – Indictment After Impeachment, require screening for categories of information exempted from disclosure under the terms of the Freedom of Information Act (5 USC 552), prior to public release. In particular, documents may be redacted to preserve the secrecy of grand jury proceedings pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

Requests for investigative files that do not exceed 500 pages are assigned to our first-tier processing queue. Taking into consideration our existing backlog, the estimated time required to complete the processing of your request is approximately 24 months from the date of this letter.

To notify this office of a change in your contact information or to track the status of your request, please telephone 301[redacted] or e-mail specialaccess_foia@nara.gov. If you have specific questions regarding the subject of your request, please contact me directly at 301[redacted] or

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Source: The New York Times

George Washington University law professor **Jonathan Turley**, writing in The Washington Post, concurs and explains why a sitting president could be charged with a crime.

> "An indicted president is a terrible proposition," he wrote. "But so is the continuation of a presumed felon in office — one who clings to power as a shield from accountability."

Ultimately, the Supreme Court would decide whether a president could be criminally

charged.

Can the President Fire the Special Counsel?

Could the president fire Mueller?

> "He certainly believes he has the power to do so," White House press secretary **Sarah Sanders** said in April.

But since **Attorney General Jeff Sessions** recused himself from the Russia investigation, the power to fire Mueller resides only with **Deputy Attorney General Rod Rosenstein**, who has said he sees no cause to dismiss the special counsel.

The Department of Justice regulation says a

> special counsel can "be disciplined or removed from office only by the personal action of the attorney general," and only "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause."

In his memo, Kasowitz uses the unitary executive theory to shore up his argument that the president has the "constitutional authority to terminate or direct an investigation" because he "controls all subordinate officers within the executive branch,"

Can the President Pardon Himself?

On June 4, Trump wrote that he has the "absolute right" to pardon himself, tweeting,

> "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong?"

He then proceeded to attack Mueller's probe as a "never ending Witch Hunt."

Kasowitz argued the president has "the power to pardon any person before, during, or after an investigation/and or conviction."

The presidential pardoning power is located in Article II, Section 2 of the Constitution, which says the president "shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

In 1974, just before Nixon resigned from the presidency, the Office of Legal Counsel issued an opinion stating,

> "Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself."

Giuliani told NBC's "Meet the Press" on June 3,

> "Pardoning himself would be unthinkable and probably lead to immediate

> impeachment," adding, "and he has no need to do it, he's done nothing wrong."

On ABC's "This Week," Giuliani said,

> "I think the political ramifications would be tough. Pardoning other people is one thing, pardoning yourself is tough."

Legal experts disagree on the validity of a presidential self-pardon.

Harvard law professor **Laurence Tribe** and University of Minnesota law professor **Richard Painter** wrote in The Washington Post,

> "The Constitution specifically bars the president from using the pardon power to prevent his own impeachment and removal. It adds that any official removed through impeachment remains fully subject to criminal prosecution. That provision would make no sense if the president could pardon himself."
>
> "Only if President Trump believes that he may be guilty of a crime would he be interested in pardoning himself," University of Notre Dame Law **Professor Jimmy Gurulé** told Vox.

Indeed, a self-pardon by Trump might be used as evidence that he obstructed justice, according to **Eric Posner**, professor of law at University of Chicago. Posner and Daniel Hemel, also from University of Chicago law school, wrote in a 2017 New York Times op-ed that in the event Trump pardoned his relatives and assistants to cover up criminal behavior and hinder the Mueller investigation, he could be charged with obstruction of justice.

It remains to be seen whether Trump will give the Supreme Court an opportunity to decide if a president can pardon himself.

Trump's claims of absolute power are reminiscent of Nixon's infamous 1977 television interview with David Frost three years after Nixon resigned.

> "Well, when the president does it, that means that it is not illegal," the disgraced former president stated.

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***Marjorie Cohn** is professor emerita at Thomas Jefferson School of Law, former president of the National Lawyers Guild, deputy secretary general of the International Association of Democratic Lawyers and an advisory board member of Veterans for Peace. An updated edition of her book, Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues, was recently published. Visit her website: http://marjoriecohn. com. She is a frequent contributor to Global Research.*

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