

U.S.A.: A Constitutional Primer on Russiagate*

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Introduction

This Comment examines the constitutional issues in the Russiagate matter. In particular, it explores the role of Congress in relation to the Executive Branch, the role of the Special Counsel, and the privileges and immunities enjoyed by Executive Branch officials—all with an eye to the separation-of-powers and checks-and-balances issues that they raise.

Importantly, most of these issues involve only two branches of government, Congress and the Executive Branch. Under separation-of-powers principles, the judiciary tends to stay out of these matters. The courts have held that many of these questions are inappropriate for judicial review; instead, the courts tend to leave these kinds of questions to the “democratic” branches of government. As a result, many of the constitutional questions must be worked out politically between Congress and the President—at least for now. Later, of course, these questions will be worked out politically by the American people, when we go to vote in the next election.

One final note. The issues described below are current as of this writing. But other, more important questions may well overshadow them by the time you read this.

1. The Role of Congress

Congress has authority under the U.S. Constitution to investigate matters in the coordinate branches of government. It also has authority to take certain actions against these branches and the officials that serve within them. These authorities operate as checks against the coordinate branches of government (here, the Executive Branch).

1.1 Can Congress Investigate Collaboration Between the Russian Government and the Trump Campaign?

Yes, Congress has constitutional authority to investigate Russiagate. Congress has wide-ranging authority to investigate any matter that is, or could be, the subject of legislation or appropriations. This includes investigations into possible violations of federal criminal law by officers in the Executive Branch.¹ Congress exercises its power to investigate through its committees.

There are currently four separate congressional committee investigations into the Russia connection, two in the House and two in the Senate, each proceeding at its own pace.

* Scritto sottoposto a referee.

¹ Congress, however, has no power to prosecute violations of federal criminal law. That power resides exclusively in the Executive Branch, as discussed below.

1.2 What Can Congress Do?

Congressional committees can hold hearings, issue reports, publicize findings, prepare legislation, and refer matters for criminal prosecution. Congress may also exercise other constitutional authorities—for example, its power to approve (or not) presidential appointments, its power to appropriate (or not) federal funds, and its power to pass legislation—in order to check the President in other ways.

Ultimately, Congress could impeach the President and other Executive Branch officials and remove them from office for “Treason, Bribery, or other high Crimes and Misdemeanors.”² Removal from office by impeachment is a two-step process; it requires (1) impeachment in the House of Representatives and (2) trial and conviction in the Senate.³ Because impeachment is a *political* process (and not a *criminal* process), the penalty is only removal from office.⁴ But impeachment does not foreclose a later criminal indictment. Because impeachment raises a “political question” outside the Article III jurisdiction of the courts, the courts, in order to avoid overreaching in violation of the separation of powers, will not hear a challenge to an impeachment.⁵

2. The Special Counsel

The Special Counsel also operates as a constitutional check on the Executive Branch. And the Office also raises important questions related to the separation of powers and presidential abuse of power.

2.1 What is the Special Counsel?

The Special Counsel is an independent but impermanent office within the U.S. Department of Justice designed to handle special matters that are inappropriate for regular Department attorneys and divisions. The Attorney General may appoint a Special Counsel “when he or she determines that criminal investigation of a person or matter is warranted” and when regular Department processes would raise a conflict of interest.⁶

The Special Counsel serves important constitutional functions—*independent* investigation into potential criminal activity, and *independent* prosecution of any criminal activity, within the Executive Branch—even though the U.S. Constitution does not specifically provide for this kind of independence.⁷ The Department’s regulations protect the independence of the Special Counsel by authorizing the Special Counsel to operate with relaxed oversight by the Attorney General and by allowing the Attorney General to

2 U.S. Const. Art. II, § 4. By tradition, Congress may determine for itself what constitutes “high Crimes and Misdemeanors.”

3 U.S. Const. Art. I, §§ 2 and 3.

4 U.S. Const. Art. I, § 3.

5 *Nixon v. United States*, 506 U.S. 224.

6 28 C.F.R. § 600.1.

7 Congress previously authorized an Independent Counsel to serve these functions. 28 U.S.C. §§ 591-599. The Supreme Court upheld the constitutionality of the Independent Counsel against a separation-of-powers challenge. *Morrison v. Olson*, 487 U.S. 654 (1988). Still, Congress allowed the Independent Counsel to expire in 1999. 28 U.S.C. § 599. For the same reasons that the Independent Counsel did not violate the separation of powers, the Special Counsel also does not violate the separation of powers.

fire the Special Counsel only for “misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause.”⁸

2.2 Can the Special Counsel Investigate Collaboration Between the Russian Government and the Trump Campaign?

Yes, the Special Counsel can investigate collaboration between the Russian government and the Trump campaign. Deputy Attorney General Rod Rosenstein appointed Robert S. Mueller III to serve as Special Counsel in the matter, with wide-ranging authority to investigate nearly any aspect of the Russia connection,⁹ including, under Department regulations, obstruction of justice and perjury related to the investigation.¹⁰

2.3 What Can the Special Counsel Do?

The Special Counsel has authority to investigate and to prosecute violations of federal criminal law. As part of this authority, the Special Counsel can convene a grand jury and issue subpoenas and enforce subpoenas in court. The Special Counsel can also issue grants of immunity from criminal charges to any individual, usually in exchange for testimony. The Special Counsel can share the results of its investigations with Congress in order to aid with congressional investigations or impeachment proceedings.

2.4 How are the Special Counsel Investigation and Congressional Investigations Different?

The most significant difference between the two investigations is the result: The Special Counsel can bring criminal charges, while congressional committees can publicize the results of their investigations and recommend impeachment.

The two investigations raise very different separation-of-powers issues. The Special Counsel investigation calls into question the President’s ability to exert plenary control over officials within the Executive Branch, while congressional investigations call into question Congress’s powers to check the co-equal Executive Branch. Moreover, because the investigations are housed in two different branches of government, any conflicts between the two raise the possibility of separation-of-powers problems. (For example, if congressional investigations frustrate the Special Counsel’s investigation, this raises the possibility of undue congressional interference with the executive authority.) In the end, however, neither investigation constitutes a violation of the separation of powers. They are simply examples of how the U.S. Constitution permits institutions to be designed to check the Executive Branch.

2.5 Can the President Fire the Special Counsel?

⁸ 28 C.F.R. § 600.7.

⁹ The appointment order is available at <https://www.justice.gov/opa/press-release/file/967231/download> (last visited July 21, 2017). The Deputy Attorney General (and not the Attorney General) made this appointment, because Attorney General Jeff Sessions recused himself from any investigations involving Russian interference with the 2016 presidential election.

¹⁰ 28 C.F.R. § 600.4(a).

No, the President cannot fire the Special Counsel directly. Under Department of Justice regulations, “[t]he Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General.”¹¹ In this case, only Rosenstein, who appointed the Special Counsel, could fire him,¹² and only for good cause.¹³ As described above, this good-cause firing standard is an important way that the U.S. system protects independence.

3. Presidential Privileges and Immunities

Even as Congress and the Special Counsel have significant powers to check the Executive Branch and control abuses of power, the President enjoys certain privileges and immunities against these checks.

3.1 Does the President Enjoy Executive Privilege?

Yes, but this is a qualified privilege, belonging only to the President. Executive privilege allows the President to protect his high-level communications with advisers from disclosure under certain circumstances.¹⁴ But “[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets,” the President may successfully assert executive privilege only when the need for the privilege outweighs the legitimate needs of a coordinate branch of government.¹⁵ Any greater privilege—like an absolute privilege—would encroach too far into the role of a coordinate branch, and would therefore violate the separation of powers.¹⁶

President Trump may invoke, or order another person to invoke, executive privilege in response to a judicial subpoena in the Special Counsel investigation or a congressional request or subpoena in the congressional investigations. (Because the privilege belongs to the President, only the President can formally invoke it, or order another person to invoke it.) But if the President invoked the privilege in a criminal proceeding, the courts would likely rule against him. If the President invoked the privilege in a congressional proceeding, Congress and the White House would probably work out a compromise (and the courts would be unlikely to get involved).

11 28 C.F.R. § 600.7(d).

12 Of course, the President could order Rosenstein to fire Mueller, and the President could fire Rosenstein if he failed to comply. Alternatively, the President could fire Sessions, replace him with a permanent or temporary (“recess”) appointment, and order his appointee to fire Mueller. But either course of action would violate the tradition that the Department of Justice acts independently of the White House, especially when it investigates the White House. While this tradition is not constitutionally mandated—indeed, the Department of Justice sits within the Executive Branch, with no specific constitutional protections against presidential control—a violation of the tradition would nevertheless raise serious abuse-of-power concerns.

13 28 C.F.R. § 600.7(d).

14 *United States v. Nixon*, 418 U.S. 683, 706 (1974).

15 *United States v. Nixon*, 418 U.S. 683, 707 (1974) (holding that executive privilege did not apply, because the “constitutional dimensions” of a criminal trial outweighed the President’s “broad, undifferentiated claim of public interest in the confidentiality of [his] conversations.”).

16 *United States v. Nixon*, 418 U.S. 683, 707 (1974).

3.2 Is the President Immune from Criminal Indictment While in Office?

This is in dispute. The U.S. Constitution does not explicitly provide the President with immunity from criminal prosecution, and the courts have never ruled on this issue. But even if the President is immune from criminal indictment, the immunity extends only to the President. Other Executive Branch officials, including the Vice President, are not immune.

Under the prevailing, majority view, the President is absolutely immune from criminal indictment while in office. This is because “the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions.”¹⁷ But this immunity extends only while the President is in office.

On the other hand, under the minority view, the President is not immune. Under this position, the President is subject to the laws, including criminal laws, just like every other person in the United States. Moreover, the Constitution is silent on presidential immunity from criminal indictment.

Under either approach, the President is not immune after he leaves office, either at the end of his term or by impeachment.

3.3 Can the President Issue Pardons?

Yes, the President has the power “to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”¹⁸ The President may even issue a pardon before a person is indicted for a crime.¹⁹ The President may pardon any person, including Executive Branch officials, private individuals, and even family members.

It is an open (and hotly disputed) question whether the President may pardon himself. The Constitution is silent on the question, and the courts have not ruled on it. According to one view, the President’s pardon power extends to anyone, and he should therefore be able to pardon himself. According to the opposing view, a self-pardon would constitute a blatant abuse of power and undermine longstanding norms against self-interested-decisionmaking by the President.

As a practical matter, there is really no restraint on the President pardoning himself, and it is difficult to see how a self-pardon might ever be challenged in court (absent a far-fetched scenario).

Conclusion

The possible collaboration between the Russian Government and President Trump’s campaign in the 2016 presidential election raises many important constitutional

17 A Sitting President’s Amenability to Indictment and Criminal Prosecution, Office of Legal Counsel, U.S. Department of Justice (Oct. 26, 2000).

18 U.S. Const. Art. II, § 2.

19 See *Ex Parte Garland*, 71 U.S. 333 (1866). Indeed, perhaps the most famous pardon in U.S. history occurred before an indictment. President Ford’s pardon of former President Nixon pardoned Nixon for “all offenses against the United States which he . . . has committed or may have committed or taken part in.”

issues. Some of these are familiar, but many are novel. And more new and untested issues seem to arise almost every day.

So far, the U.S. Constitution has been pliable enough to allow the American people to work out significant constitutional issues. It has also been durable enough to survive significant constitutional crises (including a civil war). While Russiagate has the potential to test the Constitution in yet new and different ways, constitutional checks and balances—including the ultimate check in any democracy, the people's vote—will ensure that the system survives.

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