

Opinions

This overlooked part of the Constitution could stop Trump from abusing his pardon power

By **Jed Shugerman and Ethan J. Leib** March 14 at 12:31 PM

Jed Shugerman and Ethan J. Leib are professors at the Fordham University School of Law.

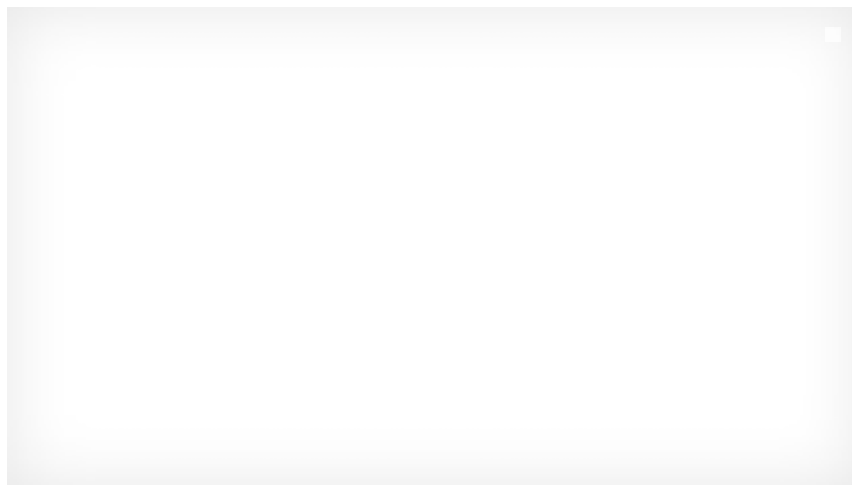
If President Trump is counting on his pardon power as a way of eluding special counsel Robert S. Mueller III, he is mistaken. He is ignoring a core part of the Constitution that most of us have overlooked, too. Most people assume that the president wields absolute authority to pardon others and potentially even himself. However, the Constitution, correctly understood, imposes limits on a president's ability to grant pardons if they are issued for the purpose of self-protection.

This is not because of some abstract notion of political morality or a vague commitment to the rule of law. It is not because of the maxim, "No one may be the judge in his own case," because a pardon is an executive action, not a judicial act.

Rather, the answer lies in a neglected part of the Constitution: Article II, Section 3, which directs that the president "shall take Care that the Laws be *faithfully executed*."

Underscoring that directive is the fact that the only oath whose precise formulation is detailed in the Constitution is the one taken by the president: "I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States." The Constitution refers to many offices as "Office[s] of Trust," invoking the legal concept of trusteeship, but the president's faithfulness is the one most explicitly commanded by the document.

ADVERTISING



The language of faith here is no accident: The concept flows from the Latin "fiducia," meaning faith. Lawyers in the 18th century used the phrase "faithfully execute" in legal instruments such as trusts to impose duties of loyalty and care to others, and the phrase appears in many colonial corporate charters and early state constitutions. The phrase "faithfully execute" incorporates the president's obligation to have fidelity to the best interests of the people. Think of the common-law concept of fiduciary duty applied to lawyers and agents, transplanted to the public sector. These commitments are as foundational to constitutional law as they are to business ethics and corporate law.

The framers imported the well-known fiduciary duty of loyalty from the common law precisely to constrain the exercise of the president's powers under the Constitution. They used the language of faith and trust to signal to courts and to officials that they were invoking well-known commands of loyalty long recognized at common law. Our Constitution's designers wanted public officials to be subject to the same kinds of fiduciary obligations that CEOs, trustees and lawyers are routinely held to in the private sector. Those duties prohibit self-dealing and acting under a conflict of interest.

Therefore, "self-pardoning" or pardoning your closest associates for self-interested reasons should not pass legal muster, because it violates the fiduciary law of public office. If the president tries to pardon himself, he is engaged in blatant self-dealing, transgressing both his oath and the primary prohibition to which all fiduciaries are subject. If the president pardons his associates primarily out of a motivation to protect himself, those pardons would also be invalid as disloyal, and federal courts should probably allow those prosecutions to proceed notwithstanding the pardon; indeed, even if a president succeeds in releasing a pardoned criminal, a successor president would not have to recognize an invalid pardon. The extent to which courts will entertain these limits on the pardon power of the president is as yet untested — but courts through the ages have directly enforced the fiduciary duties of office against public servants. Ultimately, a president is not allowed to put his own narrow interest over the public interest because he is constrained by his oath and his office.

The “faithful execution” clause also has implications for the president’s power to fire executive officials. The Constitution does not explicitly mention a power to fire. This oversight had to be addressed in the first Congress in 1789, and thereafter, the president’s unilateral power to dismiss executive officials became a matter of judicial interpretation. Yet while the presidential power to remove is, at most, implicit, the fiduciary nature of the office is explicit. Therefore, firing a special counsel for largely self-protective reasons would violate the president’s obligation to act for only the right kinds of reasons. With strong enough evidence of motive or purpose, a special counsel such as Mueller might even be able to obtain an injunction to block such an impermissible firing.

To sustain our framers’ vision of a Constitution with offices filled by public fiduciaries, we must find ways to enforce the president’s oath and his legal responsibility of “faithful execution.” That means executive powers that can sometimes look discretionary actually must be limited by fiduciary principles. Thus, a president faithful to the Constitution’s original meaning and faithful to the public, rather than his own self-interest, may not legally issue self-dealing pardons, nor may he fire executive officials largely to protect himself.

Read more on this topic:

[Laurence H. Tribe, Richard Painter and Norman Eisen: No, Trump can’t pardon himself. The Constitution tells us so.](#)

[Elizabeth Holtzman: In the Russia probe, could Trump pardon himself?](#)

[Philip Allen Lacovara: How the pardon power could end Trump’s presidency](#)

[Harry Litman: Trump’s obstruction of justice is far more extensive than Nixon’s](#)

[Jack Quinn: Trump shouldn’t avoid answering Mueller’s questions](#)

 **0 Comments**

Your profile is incomplete

Before you can contribute to our community, please visit your [Profile page](#) in order to complete your profile.