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June 6, 2018

Donald F. McGahn II
White House Counsel
1600 Pennsylvania Avenue, N.W.
Washington, D.C.

Dear Mr. McGahn:

We write to you for information related to the Trump Administration's view of the pardon power—a topic to which the President and his lawyers have returned again and again in recent days.

Last week, President Trump pardoned conservative commentator Dinesh D'Souza, who pled guilty in 2014 to a felony violation of federal campaign finance laws.¹ The President also suggested that he might offer a commutation to former Illinois governor Rod Blagojevich, as well as a full pardon to television personality Martha Stewart.² These pardons and proposed clemencies—as well as the President's earlier pardons of disgraced Arizona sheriff Joe Arpaio and former White House advisor Scooter Libby—share at least two common traits. First, there is no indication that the Office of the Pardon Attorney at the Department of Justice recommended these cases to the President. In fact, President Trump has distinguished himself as the first president of the modern era to work around that office entirely.³ Second, in each of these cases, the central figure was accused of making some deliberate and material misstatement to the government, resulting in convictions for obstruction of justice, perjury, and contempt of court. Both of these patterns are cause for concern.

¹ Philip Rucker, et al., *Trump pardons conservative pundit Dinesh D'Souza, suggests others also could receive clemency*, WASH. POST, May 31, 2018.

² *Id.*

³ Steve Vladeck, *Trump's Dinesh D'Souza pardon is legal. His willingness to subvert the process is dangerous*, NBC NEWS, May 31, 2018.

Given the recent comments of the President and his legal team, that concern seems well placed. On Sunday, Rudy Giuliani argued that the President Trump’s constitutional powers are so expansive that “[i]n no case can he be subpoenaed or indicted.”⁴ Even if he had shot and killed former FBI Director James Comey, Mr. Giuliani argued, state and federal prosecutors would have no legal recourse against President Trump while he remains in office.⁵ This radical view of executive power is astounding—and absolutely incorrect. The Constitution does not shield the President from justice or from the justice system. The presidency is not a get-of-jail-free card.

On Monday, President Trump escalated his legal team’s rhetoric on Twitter: “As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do so when I have done nothing wrong?”⁶ This claim may give President Trump some comfort as investigators close in on his closest associates, but it has no basis in law and runs counter to the constitutional design. The Framers of the Constitution discussed the question of a self-pardon and found the concept to be inherently corrupt.⁷ These men had just fought a war against a king. They had no intention of turning their new nation over to another. More recently, the Office of Legal Counsel addressed the question of self-pardon in a short memo for the benefit of President Nixon: “Under the fundamental rule that no one may be the judge in his own case, the President cannot pardon himself.”⁸ President Nixon resigned three days later.

Given that the President’s actions and comments appear to cut against legal consensus and long-established practices at the Department of Justice, we ask that you respond to the following questions:

- President Trump has pardoned five individuals since taking office. Did you consult with the President about any of these pardons, before or after he issued them?
- President Trump has proposed pardoning at least two additional individuals. Have you consulted with the President about these proposals or any other potential pardons the may be under consideration at the White House?

⁴ S.V. Date, *Giuliani: Trump Could Have Shot Comey and Still Couldn’t Be Indicted for It*, HUFFPOST, June 3, 2018.

⁵ *Id.*

⁶ @realDonaldTrump (President Donald J. Trump), Twitter, June 4, 2018, 8:35 AM.

⁷ *In Convention, Richmond, June 18, 1788*, in THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION, ed. Jonathan Elliot, 5 vols. (Washington, DC: Taylor and Maury, 1863), 4:498.

⁸ Mary C. Lawton, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice, *Memorandum Opinion for the Deputy Attorney General*, Aug. 5, 1974.

- Since 1893, in order to insulate the exercise of the pardon power from the appearance of impropriety, the White House has delegated the authority to process pardon applications to the Department of Justice. That responsibility currently resides in the Office of the Pardon Attorney.⁹
 - Has President Trump ever consulted with the Office of the Pardon Attorney? Has he ever received a recommendation from the Office of the Pardon Attorney? If so, what is the current disposition of that recommendation?
 - Have you ever discussed the Office of the Pardon Attorney with the President?
 - Has President Trump chosen to work around the Office of the Pardon Attorney and issue pardons without the benefit of the petitioning process described in federal regulations? And, if so, why?
- How does President Trump select individuals for clemency?
- Has President Trump ever discussed issuing a pardon to any of his associates, particularly those under indictment? Has he ever discussed issuing a pardon to Michael Cohen, his private Attorney? To Paul Manafort, his former campaign manager? To Richard Gates, his former deputy campaign manager? To Michael Flynn, his former National Security Advisor? To any other associate or employee of the Trump campaign or the Administration?
- In a January 2018 letter to the Special Counsel, President Trump’s private attorneys asserted that the President’s firing of Director Comey cannot “constitutionally” or “legally” be construed as obstruction of justice because it is a constitutional impossibility for the “chief law enforcement officer” to obstruct himself.¹⁰
 - Do you agree that the President’s role as “chief law enforcement officer” essentially renders him above the law, and that he can never obstruct a federal criminal investigation if the behavior in question implicates the exercise of powers granted to him by the Constitution?
 - If so, on what legal authority do you base your conclusion?
- In that same letter, the President’s attorneys argue further that President Trump “could, if he wished, terminate the [Special Counsel’s] inquiry, or even exercise his power to pardon if he

⁹ See 28 C.F.R. §§ 1.1 et seq.

¹⁰ Michael S. Schmidt, et al., *Trump’s Lawyers, in Confidential Memo, Argue to Head Off a Historic Subpoena*, N.Y. TIMES, June 2, 2018.

so desired.”¹¹ And in an earlier, June 2017 letter to the Special Counsel, the legal team contends that “the President not only has unfettered statutory and Constitutional authority to terminate the FBI Director, he also has Constitutional authority to direct the Justice Department to open or close an investigation, and, of course, the power to pardon any person before, during, or after an investigation and/or conviction.”¹²

- Although the pardon power is broad, does your office believe—as the President’s attorneys imply—that President Trump’s exercise of the pardon power can never be scrutinized under federal obstruction of justice statutes, even if he were to pardon an individual under criminal investigation or who has pled guilty to charges in connection with the Special Counsel’s investigation?
- If so, on what legal authority do you base your conclusions?
- Do you believe, as Mr. Giuliani has stated, that President Trump could murder the FBI Director and not face criminal charges as long as he remains in office?
- Do you agree with President Trump that he has the “absolute” right to pardon himself, and if so, on what legal basis?
- In 1974, the Office of Legal Counsel asserted that the Constitution does not permit the President to pardon himself, as a self-pardon would violate “the fundamental rule that no one may be a judge in his own case.” Do you agree with this conclusions? If not, why not?

We thank you for your prompt attention to these questions. Please return your responses no later than June 20, 2018.

Sincerely,



¹¹ *Id.*

¹² *Id.*

Shelby Johnson Lee

Hank Johnson

Zoe Lofgren

Karen Bass

Ted W. Lieu

David N. Cicilline

Jane Raskin

Red Denton

Murphy

Steve Cohen

Eric Swalwell

Eric Swalwell

Dr. V. Gonzalez