

# LIMITING THE PARDON POWER

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*Although our government is said to be one of checks and balances, the president's power "to grant Reprieves and Pardons for Offenses against the United States" appears to be unlimited. In granting this power, the Framers deliberately cast structural safeguards aside. Nevertheless, the presidency of Donald Trump prompted a search for limits. This Article examines: (1) whether a president may pardon crimes that have not yet happened (or announce his intention to do so); (2) whether he may pardon himself; (3) whether he may use pardons to obstruct justice or commit other crimes; (4) whether criminal statutes should be construed not to apply to the president when they arguably limit the pardon power; (5) whether the Take Care Clause limits the pardon power; (6) whether pardons can deprive victims of due process; (7) whether pardons ever violate the separation of powers by limiting the authority of courts; (8) whether the exception to the pardon power for impeachment cases does more than prevent the president from blocking the impeachment of federal officeholders; (9) whether pardons must specifically identify the crimes pardoned; and (10) whether pardons are invalid when issued as the result of fraud, bribery, or other unlawful conduct. Applying common-law principles that have limited the pardon power from the start, the Article explains why the pardons President Trump granted Roger Stone and Paul Manafort are invalid and why the Justice Department could seek a declaratory judgment saying so.*

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### WHAT WERE THEY THINKING?

It's right there in the Constitution: "[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."<sup>1</sup>

But something seems wrong. Our government is said to be one of checks and balances, yet the power to pardon appears to be unfettered. Were the Framers nodding off when they approved Article II, Section 2, Clause 1?

The power the Constitution gave the president was in fact broader than the king's. For more than 1,000 years—at least since the reign of King Ine of

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1. U.S. CONST. art. II, § 2, cl. 1.

Wessex (688–725)—English kings pardoned offenders,<sup>2</sup> and they sometimes abused this power. In the fourteenth century, for example, English kings regularly pardoned murderers and other felons in return for their enlistment in military campaigns.<sup>3</sup>

Charles II's pardon of a close governmental ally<sup>4</sup> led Parliament in 1700 to limit the power to pardon in impeachment cases,<sup>5</sup> and the Framers to forbid clemency in impeachment cases altogether. Parliament, however, imposed other, less significant limits the Framers disregarded—for example, a prohibition of clemency for anyone convicted of causing another person's imprisonment beyond the realm.<sup>6</sup>

Thirty-nine years before the Constitutional Convention, Montesquieu's *The Spirit of Laws* advocated a tripartite system of government, and Montesquieu's vision greatly influenced the Framers. But Montesquieu did not convince the Framers when he suggested scrapping the pardon power. He wrote: "Clemency is the characteristic of monarchs. In republics, whose principle is virtue, it is not so necessary."<sup>7</sup>

2. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977).

3. See HELEN LACEY, *THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND* 86–87, 100–06, 186 (2009) (noting contemporary criticism of this practice but questioning the view of other historians that pardons granted to recruit soldiers led to a notable increase in crime).

4. See Aaron Rappaport, *An Unappreciated Constraint on the President's Pardon Power*, 52 CONN. L. REV. 271, 284–87 (2020) (describing Lord Danby and *L'Affaire Francaise*).

5. An Act of Settlement 1700, 12 & 13 Will. 3 c. 2, §3, sch. 1 (Eng.). Under this act, the king could not block an official's impeachment and removal from office, but he could save an impeached official from execution or other criminal punishment. Note that, although the U.S. Constitution limits impeachment to removal from office and disqualification from holding office in the future, U.S. CONST. art. I, § 3, cl. 7, impeachment in England typically led to criminal punishment. See Duker, *supra* note 2, at 496, n.109; Frank O. Bowman III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming 2021) (manuscript at 14), <https://ssrn.com/abstract=3728908> [<https://perma.cc/5B3E-EEWR>].

6. See Habeas Corpus Act, 1679, 31 Car. 2 c. 2, § 11 (Eng.); 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*391–92; JOHN SOMMERS, *THE SECURITY OF ENGLISHMEN'S LIVES* 38–39 (1821) (1681); James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 351–52 (1993). The Supreme Court has held that the pardon power is subject to limits recognized by the English common law at the time the Constitution was adopted. See *United States v. Wilson*, 32 U.S. 150, 160 (1833); *Ex parte Wells*, 59 U.S. 307, 311 (1855); *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925); *Schick v. Reed*, 419 U.S. 256, 260 (1974). The Constitution, however, should not be read to incorporate *statutory* limits other than the one the Framers expressly approved—the prohibition of clemency in treason cases.

7. 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* 92 (Thomas Nugent trans., Colonial Press 1900) (1748).

Other Enlightenment writers were even more hostile to the pardon power. In the same year the Framers met in Philadelphia, Immanuel Kant described clemency as “the most slippery of all the rights of the sovereign” and a means by which kings can “wreak injustice to a high degree.”<sup>8</sup> At about the same time, Jeremy Bentham wrote: “The essence of this power is, to act by caprice.”<sup>9</sup> Thirteen years before the Constitutional Convention, Cesare Beccaria proclaimed: “Happy the nation in which [clemency and pardon] will be considered as dangerous!”<sup>10</sup>

When the Framers refused to abandon the pardon power or limit it significantly, they were wide awake. The Convention rejected proposals to allow the president to pardon only with the Senate’s approval, to forbid pardons for treason, and to allow pardons only after conviction.<sup>11</sup> Alexander Hamilton wrote in *Federalist No. 74*: “[T]he benign prerogative of pardoning should be as little as possible fettered or embarrassed.”<sup>12</sup> He added: “[A] single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of punishment, than any numerous body whatever.”<sup>13</sup>

A White House official reported in 2018 that pardons were President Trump’s “favorite thing” because he could approve them without the restraints that hampered his other initiatives.<sup>14</sup> But even the pardon power has limits, and Trump’s pardons sparked sharp debate about what those limits are. I describe elsewhere Trump’s clemency grants and suggest that his abuse of the pardon power exceeded that of any other president, including even President Clinton.<sup>15</sup>

Part I of this Article describes three possible remedies for abuse of the pardon power—invalidating pardons, criminally punishing presidents, and removing presidents from office.

Part II notes that presidents may not pardon crimes before they happen. It considers whether presidents may circumvent this requirement by promising before crimes happen to pardon them later.

8. IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 144 (John Ladd trans., Hackett 2d ed. 1999) (1787).

9. JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 429 (1830) (a compilation based on manuscripts written in the mid 1770s).

10. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 134 (trans. from Italian, William P. Farrand & Co. 1809) (1764).

11. Duker, *supra* note 2, at 501–03.

12. THE FEDERALIST NO. 74, 446 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003).

13. *Id.* at 447.

14. Robert Costa et al., *Trump Fixates on Pardons, Could Soon Give Reprieve to 63-Year-Old Woman After Meeting with Kim Kardashian*, WASH. POST (June 5, 2018, 9:30 PM), [https://www.washingtonpost.com/politics/trump-fixates-on-pardons-could-soon-give-reprieve-to-63-year-old-woman-after-meeting-with-kim-kardashian/2018/06/05/37ac6cb6-683d-11e8-bbc5-dc9f3634fa0a\\_story.html](https://www.washingtonpost.com/politics/trump-fixates-on-pardons-could-soon-give-reprieve-to-63-year-old-woman-after-meeting-with-kim-kardashian/2018/06/05/37ac6cb6-683d-11e8-bbc5-dc9f3634fa0a_story.html).

15. Albert W. Alschuler, *The Corruption of the Pardon Power*, 18 U. ST. THOMAS L.J. (forthcoming 2022).

Part III argues that a president may not pardon himself. The common-law prohibition of judging one's own case as well as the language, structure, and goals of the Constitution compel this conclusion. This Part, however, rejects recent arguments that the Take Care Clause empowers courts to set aside pardons issued in violation of a president's fiduciary obligations.

Part IV rejects claims: (1) that a president's motives for exercising a constitutional power may never be questioned and (2) that even unambiguous criminal statutes must be construed not to apply to the president when they arguably limit a presidential power. It concludes that, after leaving office, a president may be convicted of using pardons to obstruct justice and commit other crimes. Current obstruction statutes, however, should not be read to authorize prosecution for frustrating justice in the case of a pardon recipient himself. They should be held to reach only the use of pardons to encourage such obstructive conduct as refusing to cooperate with prosecutors and providing false testimony.

Part V notes that noncriminal abuse of the pardon power—including frustrating justice in a pardon recipient's own case—can properly lead to a president's impeachment and removal from office.

Part VI rejects claims: (1) that President Trump's pardon of Joe Arpaio violated the Due Process Clause and the principle of separation of powers and (2) that Trump's pardon of Roger Stone violated the Constitution's prohibition of clemency in impeachment cases.

Part VII considers the argument that pardons always must specify the offenses forgiven and that the pardon President Ford granted former president Nixon for all crimes he might have committed in office was invalid. A long history of blanket clemency grants in England and America makes this contention untenable. Although a common-law requirement of specificity applied when a convict asked a court to set aside a previously recorded conviction, there was no such requirement in other situations.

Part VIII describes the common-law rule that pardons obtained by fraud are invalid. It also describes a common-law procedure—*scire facias*—that allowed courts to set aside improperly obtained pardons even after they had been delivered and their recipients set free. This Part maintains that the common-law rule applies not only when applicants have deceived authorities but also when pardons are the product of bribery or other criminal conduct. It suggests that a federal court may invalidate a pardon and send its recipient back to court or back to prison by issuing a declaratory judgment that the pardon was improperly obtained.

Part IX applies this Article's analysis to the pardons President Trump granted Roger Stone and Paul Manafort. Both of these grants of clemency were all but openly traded for the recipients' noncooperation with prosecutors. Trump, Stone, and Manafort appear to be guilty of bribery and obstruction of justice, and the pardons appear to be invalid.

## I. CORRECTIVES FOR ABUSE OF THE PARDON POWER: AN OVERVIEW

A president's abuse of the pardon power is subject to three sorts of remedy. First, a court may hold the pardon invalid. It may do so when a defendant charged with a crime pleads the pardon defensively to block prosecution; it may do so when a petitioner in a habeas corpus proceeding pleads the pardon offensively in an effort to secure release from prison; and, as this Article will show, it may do so when a prosecutor seeks a judicial declaration of a pardon's invalidity as a prelude to returning a pardon recipient to prison.<sup>16</sup>

As this Article also will show, declaring a pardon invalid is appropriate when this pardon is the product of fraud or other unlawful conduct.<sup>17</sup> In addition, this remedy is appropriate when a president has exceeded his constitutional power—for example, by purporting to pardon a future crime.<sup>18</sup>

One cannot assume, however, that every constitutional violation deprives a pardon of effect, for some constitutional challenges may be nonjusticiable. A president would violate the equal protection principle, for example, if he pardoned only whites and not applicants of other races.<sup>19</sup> A court, however, might provide no remedy even for flagrant racial discrimination. For one thing, no one might have standing to challenge the violation. Would a non-white challenger be required to show that he personally would have been pardoned in the absence of the president's discrimination?<sup>20</sup> For another, a court might treat the constitutionality of the president's action as a "political" question. The Supreme Court has observed: "[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."<sup>21</sup> One challenging issue is whether a court could devise an effective remedy. Would it invalidate the pardons already granted white offenders, returning them to prison although they did not participate in the president's wrong, or would

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16. See *infra* Part VIII(B).

17. See *infra* Parts VIII(A) & (C).

18. See *infra* Part II.

19. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part).

20. See *McCleskey v. Kemp*, 481 U.S. 279, 294, 295 n.15 (1987) (concluding that statistical proof of racial discrimination in the administration of Georgia's death penalty did not establish the violation of any particular defendant's constitutional rights); *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (refusing to allow Black criminal defendants alleging discriminatory prosecution to discover the races of other prosecuted defendants because they "failed to identify individuals who were not [B]lack and could have been prosecuted").

21. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); see *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.) (declaring that a president's power to pardon is ordinarily "a matter of grace, over which courts have no review"); *Baker v. Carr*, 369 U.S. 186, 226 (1962) (describing the grounds that have led the Supreme Court to deem a question "political" and unsuitable for judicial resolution).

it select an equal or proportionate number of non-white offenders and order them pardoned too?<sup>22</sup>

A second remedy for abuse of the pardon power is criminal punishment of the president. Although President Trump's lawyers and others have argued to the contrary, presidents can be convicted for using pardons to further unlawful ends.<sup>23</sup> Prosecution, however, apparently must await the end of a president's term or his impeachment. The Justice Department has concluded that prosecuting a president while he remains in office would be unconstitutional.<sup>24</sup>

Finally, abuse of the pardon power can be grounds for impeachment. The Framers of the Constitution considered removal from office the primary remedy for misuse of this power, and they saw this remedy as appropriate even when the president's conduct was not criminal.<sup>25</sup>

## II. FUTURE CRIMES

All agree that the power to "Grant Reprieves and Pardons for Offenses against the United States" does not include the power to pardon crimes before they happen.<sup>26</sup> The Constitution's language does not compel this conclusion, and for centuries English kings claimed the power to "dispense with" all but the most serious criminal laws prospectively.<sup>27</sup> English law, however, did not allow prospective exemptions when the Constitution was written,<sup>28</sup> and it seems unthinkable that the Framers meant to empower the Chief Executive to authorize whatever crimes he would like committed.<sup>29</sup>

22. See Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 617–18 (1991) (declaring that a court would hold the pardons already granted white offenders invalid); see generally Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 201–05, 245–62 (discussing issues of standing and remedy in racial discrimination cases).

23. See *infra* Part IV(A).

24. See A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000), [https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf) [<https://perma.cc/6L34-MJDA>].

25. See *infra* Part V.

26. See *Ex parte* Garland, 71 U.S. 333, 380 (1867) ("The power thus conferred . . . extends to every offence known to the law, and may be exercised at any time after its commission . . .").

27. See F. W. MAITLAND, A CONSTITUTIONAL HISTORY OF ENGLAND 302–06 (1920). The king could not authorize the commission of *mala in se* offenses. *Id.* at 304.

28. See An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights) 1688, 1 W. & M. c. 2, § 2 (Eng.), <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> [<https://perma.cc/Z9K4-MXU5>] (declaring the king's "pretended power" illegal); 17 CHARLES VINER, A GENERAL ABRIDGMENT OF THE LAW AND EQUITY 32–33 (1743).

29. The pardon President Trump granted former Sheriff Joe Arpaio proclaimed that it forgave not only the criminal contempt of which he had been convicted but also "any other offenses under Chapter 21 of Title 18 United States Code that might arise, or be charged in connection with *Melendres v. Arpaio*." Donald J. Trump, President of the United States, Executive Grant of Clemency (Aug. 25, 2017), <https://en.wikipedia.org/wiki/>

Although the Constitution does not allow the president to pardon future crimes, it does not block him from encouraging crimes by announcing that he *will* pardon them. In April 2019, President Trump reportedly told the Commissioner of Customs and Border Protection to expect a pardon if he were jailed for blocking asylum seekers from entering the United States. The President soon tweeted a denial.<sup>30</sup> When Homeland Security Secretary Kirstjen Nielsen complained to Trump that he was asking immigration officials to break the law, he responded: “Then we’ll pardon them.”<sup>31</sup> At a White House meeting in August 2019, the President promised pardons to subordinates if they needed to violate any laws in order to construct hundreds of miles of border wall before the 2020 election. A White House official soon told the press Trump was joking.<sup>32</sup> Trump disavowed or retreated from most of his reported promises to pardon future crimes, and anyone who committed a crime in reliance on the promise of a future pardon would be unlikely to find the promise kept.

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Pardon\_of\_Joe\_Arapaio#/media/File:Pardon\_of\_Joe\_Arapaio\_by\_President\_Trump.jpg [https://perma.cc/RVD6-RCK6]. Insofar as Trump sought to block conviction for the future violation of judicial orders or other future crimes, his pardon surely was void. Pardoning Arpaio for completed but uncharged crimes, however, was permissible. See Garland, 71 U.S. at 380 (upholding a pardon for uncharged crimes).

30. Jake Tapper, *Trump Told CBP Head He’d Pardon Him if He Were Sent to Jail for Violating Immigration Law*, CNN POLITICS (Apr. 13, 2019, 10:55 AM) <https://www.cnn.com/2019/04/12/politics/trump-cbp-commissioner-pardon/index.html> [https://perma.cc/X6RR-VW9W].

31. PHILIP RUCKER & CAROL LEONNIG, *A VERY STABLE GENIUS* 307 (2020); see also Rachael Bade, *House Panel Subpoenas Homeland Security Over Trump’s Pardon Promises*, WASH. POST (Sept. 4, 2019, 5:48 PM), [https://www.washingtonpost.com/politics/house-panel-subpoenas-homeland-security-over-trumps-pardon-promises/2019/09/04/553fcf58-cf5b-11e9-9031-519885a08a86\\_story.html](https://www.washingtonpost.com/politics/house-panel-subpoenas-homeland-security-over-trumps-pardon-promises/2019/09/04/553fcf58-cf5b-11e9-9031-519885a08a86_story.html). The Chief of Staff of the Homeland Security Department, Miles Taylor, said that he decided to leave the government when the president told officials at the U.S.-Mexican border not to let anyone else into the U.S. and promised them pardons. Andrew Solender, “*If You Get in Trouble I’ll Pardon You*”: *Ex-DHS Official Miles Taylor Says Trump Promised Protection for Illegal Policies*, FORBES (Aug. 25, 2020, 3:20 PM), <https://www.forbes.com/sites/andrewsolender/2020/08/25/if-you-get-in-trouble-ill-pardon-you-ex-dhs-official-miles-taylor-says-trump-promised-protection-for-illegal-policies/?sh=451a712444f8> [https://perma.cc/8MAV-TQTF]. A spokesman for the Trump presidential campaign responded that Taylor was a “creature of the D.C. Swamp” who “never understood the importance of the President’s agenda.” *Id.* Taylor later acknowledged that he did oppose much of the President’s agenda. He was “Anonymous,” the author of an anonymous *New York Times* op-ed declaring himself part of “a quiet resistance within the administration.” See Michael D. Shear, *Miles Taylor, a Former Homeland Security Official, Reveals He Was “Anonymous,”* N.Y. TIMES (Oct 28, 2020), <https://www.nytimes.com/2020/10/28/us/politics/miles-taylor-anonymous-trump.html> [https://perma.cc/UMC9-45VC].

32. Nick Miroff & Josh Dawsey, “*Take the Land*”: *President Trump Wants a Border Wall. He Wants it Black. He Wants it by Election Day*, WASH. POST (Aug. 27, 2019, 9:04 PM), [https://www.washingtonpost.com/immigration/take-the-land-president-trump-wants-a-border-wall-he-wants-it-black-and-he-wants-it-by-election-day/2019/08/27/37b80018-c821-11e9-a4f3-c081a126de70\\_story.html](https://www.washingtonpost.com/immigration/take-the-land-president-trump-wants-a-border-wall-he-wants-it-black-and-he-wants-it-by-election-day/2019/08/27/37b80018-c821-11e9-a4f3-c081a126de70_story.html) [https://perma.cc/2PRM-W2TX].



Although the Constitution does not bar the president from promising to pardon a future crime, other laws do. A president who offered to pardon a future crime (and wasn't kidding) would be guilty of the crime as an accomplice if someone who received his offer carried it out.<sup>33</sup> The president would be guilty of conspiracy if the recipient responded by agreeing to commit the crime.<sup>34</sup> He might be guilty of criminal solicitation or perhaps an attempt if his offer was unaccepted.<sup>35</sup> Moreover, an unaccepted offer could justify impeachment even if it was not criminal.<sup>36</sup> Offering a future pardon in exchange for building a border wall or other official act also would appear to be a bribe.<sup>37</sup>

### III. SELF-PARDONS

In 2018, President Trump tweeted: "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself[.]"<sup>38</sup> Trump apparently discussed the possibility of pardoning himself with advisors until the very end of his presidency.<sup>39</sup> The President's statement was a partial truth, however, as a larger number of legal scholars have said a president lacks the power to pardon himself.<sup>40</sup>

33. See WAYNE R. LAFAVE, *CRIMINAL LAW* § 13.2 (5th ed. 2010).

34. See *id.* at § 12.2(a).

35. See *id.* at § 11.1(c) & (f).

36. See LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* 44–53 (2018); see also *infra* Part V.

37. See 18 U.S.C. § 201(b) (2018).

38. Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 4, 2018, 8:35 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/ZKV8-UFEK>].

39. See Kaitlan Collins et al., *Trump Talked Out of Pardoning Kids and Republican Lawmakers*, CNN (Jan. 19, 2021, 5:09 PM), <https://www.cnn.com/2021/01/19/politics/trump-self-pardon-warning/index.html> [<https://perma.cc/7W7A-6AGA>]. White House Counsel Pat Cipollone, former Attorney General Bill Barr, and others strongly discouraged Trump from pardoning himself. Especially following his second impeachment by the House of Representatives, a self-pardon might have been seen as a defiant challenge, incriminating, or both. Although it seems unlikely, one cannot be entirely sure that Trump did not secretly pardon himself, intending to reveal the document only if charged with a crime. His former lawyer Michael Cohen believes he did. See Christina Zhao, *Michael Cohen Thinks Donald Trump Issued Secret Pardons for Himself, His Children and Giuliani*, NEWSWEEK (Jan. 24, 2021, 6:22 PM), <https://www.newsweek.com/michael-cohen-thinks-donald-trump-issued-secret-pardons-himself-his-children-giuliani-1564018> [<https://perma.cc/RUV3-JEVM>]; see *infra* note 59.

40. President Trump's assertion that he could pardon himself prompted many op-eds on the subject by distinguished lawyers and legal scholars. Among those who said the president may pardon himself were Richard Epstein, Michael McConnell, Michael Stokes Paulsen, and Jonathan Turley. Among those who said he may not were Laurence Tribe, Richard Painter, Norman Eisen, Noah Feldman, J. Michael Luttig, William Eskridge, Philip Bobbitt, Jed Shugerman, and Ethan Leib. Two scholars—Alan Dershowitz and Garrett Epps—threw up their hands. See Richard A. Epstein, *Pardon Me, Said the President to Himself: Trump Is Right About What He Could Do—Though He Shouldn't*, WALL ST. J. (June 5, 2018, 7:02 PM), <https://www.wsj.com/articles/pardon-me-said-the-president-to-himself-1528239773> [<https://perma.cc/8UUV-A7WS>]; Michael W. McConnell, *Trump's Not Wrong About Pardoning Himself*, WASH. POST (June 8, 2018, 6:28 PM),

[https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637\\_story.html](https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html); Michael Stokes Paulsen, *The President's Pardon Power is Absolute*, NAT'L REV. (July 25, 2017, 7:30 PM), <https://www.nationalreview.com/2017/07/donald-trump-pardon-power-congressional-impeachment/> [<https://perma.cc/3LD6-8VKK>]; Jonathan Turley, *Yes, Donald Trump Can Pardon Himself, But It Would Be a Disastrous Idea*, USA TODAY (June 4, 2018, 6:12 PM), <https://www.usatoday.com/story/opinion/2018/06/04/donald-trump-self-pardon-constitutional-impeachment-column/667751002/> [<https://perma.cc/7NTX-H9R8>]; Laurence H. Tribe, Richard Painter & Norman Eisen, *No, The President Can't Pardon Himself. The Constitution Tells Us So*, WASH. POST (July 21, 2017), [https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5\\_story.html](https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html); Norman Eisen, *Unpacked: Can a President Pardon Himself?*, BROOKINGS (Aug. 13, 2018), <https://www.brookings.edu/blog/unpacked/2018/08/13/unpacked-can-a-president-pardon-himself/> [<https://perma.cc/48NQ-TXAV>]; Noah Feldman, *Trump's Pardoning Himself Would Trash Constitution*, BLOOMBERG OPINION (July 21, 2017, 12:25 PM), <https://www.bloomberg.com/opinion/articles/2017-07-21/trump-s-pardoning-himself-would-trash-constitution> [<https://perma.cc/X7LN-45EM>]; J. Michael Luttig, *No, President Trump Can't Pardon Himself*, WASH. POST (Dec. 7, 2020, 7:10 PM), [https://www.washingtonpost.com/opinions/no-president-trump-cant-pardon-himself/2020/12/07/774c7856-38d9-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/opinions/no-president-trump-cant-pardon-himself/2020/12/07/774c7856-38d9-11eb-98c4-25dc9f4987e8_story.html); William N. Eskridge, Jr., *Trump is Understandably Tempted to Pardon Himself. It Won't Work*, WASH. POST (Jan. 14, 2021, 3:11 PM), [https://www.washingtonpost.com/opinions/2021/01/14/can-trump-pardon-himself-constitutionally-no/?utm\\_campaign=wp\\_todays\\_headlines&utm\\_medium=email&utm\\_source=newsletter&wpisrc=nl\\_headlines](https://www.washingtonpost.com/opinions/2021/01/14/can-trump-pardon-himself-constitutionally-no/?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&wpisrc=nl_headlines); Philip Bobbitt, *Self-Pardons: The President Can't Pardon Himself, So Why Do People Think He Can?*, LAWFARE (June 20, 2018, 2:53 PM), <https://www.lawfareblog.com/self-pardons-president-cant-pardon-himself-so-why-do-people-think-he-can> [<https://perma.cc/N7Q2-JA8K>]; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump From Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018, 12:31 PM), [https://www.washingtonpost.com/opinions/this-overlooked-part-of-the-constitution-could-stop-trump-from-abusing-his-pardon-power/2018/03/14/265b045a-26dd-11e8-874b-d517e912f125\\_story.html](https://www.washingtonpost.com/opinions/this-overlooked-part-of-the-constitution-could-stop-trump-from-abusing-his-pardon-power/2018/03/14/265b045a-26dd-11e8-874b-d517e912f125_story.html); Alan Dershowitz, *Can Trump Pardon Himself? The Answer is No One Actually Knows*, THE HILL (June 4, 2018, 2:45 PM), <https://thehill.com/opinion/white-house/390600-can-trump-pardon-himself-the-answer-is-no-one-actually-knows> [<https://perma.cc/4RV7-9SH6>]; Garrett Epps, *Can Trump Pardon Himself?*, THE ATLANTIC (Dec. 17, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/can-trump-pardon-himself/578074/> [<https://perma.cc/YK9S-9372>].

Lengthier examinations of the legality of self-pardons are similarly divided. Compare Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197 (1999) (contending that the president may pardon himself), and Paul J. Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 HARV. J. LAW & PUB. POL'Y 763 (2021) (same), and Michael Conklin, *Please Allow Myself to Pardon . . . Myself: The Constitutionality of a Presidential Self-Pardon*, 97 U. DET. MERCY L. REV. 291 (2020) (same), with Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J. L. & PUB. POL'Y 463 (2019) (contending that the president may not pardon himself), and Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996) (same). See generally BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE TO PRESIDENTS AND THEIR ENEMIES 39–60 (2012).

### A. Construing the Pardon Power

A precedent from Shakespeare's day illustrates a principle the Department of Justice has considered decisive—the principle that no one may judge his own case. An act of Parliament authorized the College of Physicians to determine whether someone had practiced medicine without a license, to fine him if he had, and to retain half the fine. In *Dr. Bonham's Case* in 1610,<sup>41</sup> the English Court of Common Pleas refused to follow the statute because, by authorizing the College to impose a fine and keep part of it, the statute violated the long-standing prohibition of self-judging.<sup>42</sup> This imperative had been regarded as basic in Roman law and church law as well as the English common law. It often was described as part of the law of nature.<sup>43</sup>

Some of Chief Justice Coke's language suggested that judges would declare statutes invalid whenever they contravened fundamental law,<sup>44</sup> but scholars today widely agree the ruling did not go so far.<sup>45</sup> The court instead presumed that Parliament itself would not have approved the statute if it had recognized its incompatibility with a fundamental principle.<sup>46</sup> Legislative supremacy was unchallenged, and a clear statement that Parliament wished to abandon this principle would be given effect.

In the United States, 188 years after *Bonham's Case* and nine years after the Constitution went into effect, allowing a person to judge his own case remained abhorrent. In 1798 in *Calder v. Bull*,<sup>47</sup> the Supreme Court said that "a law that makes a man a Judge in his own cause" is "contrary to the great first principles of the social compact." It added: "It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed they have done it."<sup>48</sup>

41. *Bonham's Case* (1610) 77 Eng. Rep. 646 (PC).

42. *Id.* at 652.

43. See R. H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 335 (2009).

44. See *Bonham's Case*, 77 Eng. Rep. at 652 ("[F]or when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.").

45. See Helmholz, *supra* note 43, at 346; PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 622–30 (2008); Ian Williams, *Dr. Bonham's Case and 'Void' Statutes*, 27 J. LEGAL HIST. 111, 125 (2006); Charles M. Gray, *Bonham's Case Reviewed*, 116 PROC. AM. PHIL. SOC'Y 35, 36 (1972); S. E. Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543, 548–50 (1938).

46. See *Bonham's Case*, 77 Eng. Rep. at 652 ("[S]ome statutes are made against law and right, which those who made them perceiving, would not put them in execution.").

47. 3 U.S. (3 Dall.) 386 (1798).

48. *Id.* at 388; see also *Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 428 (1995) (calling the principle that no one may judge his own cause "a mainstay of our system of government"); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case."); THE FEDERALIST NO. 10, 74 (James Madison) (Clinton Rossiter ed., Signet Classics 2003) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity."); 1 WILLIAM

The principle applied in *Bonham's Case* and reiterated in *Calder v. Bull*—that even a seemingly unqualified enactment will not prompt a court to abandon a basic principle of justice—also applies to construction of the Constitution. Article II, Section 2, Clause 1 contains no clear statement that the president may judge his own case. On August 5, 1974, four days before President Nixon resigned under threat of impeachment, a Justice Department opinion declared: “Under the fundamental rule that no one may be a judge in his own case, the president cannot pardon himself.”<sup>49</sup>

Scholars who maintain the president may pardon himself typically note that the language of the Pardon Clause is unqualified; they assert that the Framers would not have left an exception to implication.<sup>50</sup> Courts, however, do recognize implied limits to enumerated powers.<sup>51</sup> The Constitution’s grant of the “Power to Grant Reprieves and Pardons for Offenses against the United States” is subject to construction, and limits can be inferred from historic principles. The Constitution’s Framers almost certainly did not mean to depart from the ancient prohibition of self-judging. Their respect for this principle was clearer than Parliament’s in *Bonham's Case*.<sup>52</sup>

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BLACKSTONE, COMMENTARIES \*91 (“[I]t is unreasonable that any man should determine his own quarrel.”).

49. Presidential or Legislative Pardon of the President, 1 Op. O.L.C. 370, 370 (1974), <https://www.justice.gov/file/20856/download> [<https://perma.cc/ZE9R-6GYW>].

50. See, e.g., Nida & Spiro, *supra* note 40, at 217; Conklin, *supra* note 40, at 302; Turley, *supra* note 40.

51. See, e.g., *New York v. United States*, 326 U.S. 572, 575 (1947) (opinion of Frankfurter, J.) (“By its terms, the Constitution has placed only one limitation on [Congress’s power to tax] . . . . But the fact that ours is a federal constitutional system . . . carries with it implications . . . .”); Posse Comitatus Act, 18 U.S.C. § 1385 (2018) (longstanding legislation limiting the president’s power to use the armed forces to enforce domestic law despite the Constitution’s facially unqualified grants of authority to command the armed forces and take care that the laws be faithfully executed).

52. Michael McConnell offers an intriguing but unpersuasive argument for the claim that the president may pardon himself. He writes:

[W]e do not have to guess. Two days before the Constitutional Convention voted in 1787 to approve the final draft, Edmund Randolph of Virginia moved to narrow the president’s pardon power on the ground that it “was too great a trust. The President himself may be guilty.” . . . But James Wilson of Pennsylvania . . . stressed the importance of the pardon power and argued that if the president “be himself a party to the guilt, he can be impeached and prosecuted.” (“Prosecuted” meant prosecuted before the Senate.)

The framers of the Constitution thus specifically contemplated and debated the prospect that a President might be guilty of an offense and use the pardon power to clear himself. They concluded that the remedy of impeachment by the House and conviction by the Senate was a sufficient check on the possibility of abuse.

McConnell, *supra* note 40.

Although McConnell’s argument sounds convincing, he omits part of the exchange between Randolph and Wilson. Speaking specifically of treason cases, Randolph

said: "The prerogative of pardon in these cases is too great a trust. The President himself may be guilty. *The Traytors may be his own instruments.*" JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION, Sept. 15, 1787, The Avalon Project, [https://avalon.law.yale.edu/subject\\_menus/debcont.asp](https://avalon.law.yale.edu/subject_menus/debcont.asp) [<https://perma.cc/2ESV-WPGX>] (emphasis added to the sentence McConnell omitted). Wilson then responded: "Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted." *Id.*

Perhaps neither Randolph nor Wilson imagined that a president would try to pardon himself. The omitted sentence makes it likely that Randolph spoke only of the danger that a criminal president would pardon his confederates. Certainly the antifederalists who echoed Randolph's argument in opposing ratification of the Constitution suggested no more. "Cato," for example, complained that the president had "the unrestrained power of granting pardons for treason, which may be used to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." THE ANTIFEDERALIST NO. 67 (Cato).

Similarly, a minority report following the Pennsylvania ratification convention declared: "The president . . . having the power of pardoning without the concurrence of a council, . . . may screen from punishment the most treasonable attempts that may be made on the liberties of the people, when instigated by his coadjutors in the senate." *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 18, 1787), reprinted in THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 3, 21 (David Wooton ed., 2003).

George Mason told the Virginia ratification convention:

Now, I conceive that the President ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he may establish a monarchy, and destroy the republic. If he has the power of granting pardons before indictment, or conviction, may he not stop inquiry and avoid detection? The case of treason ought, at least, to be excepted.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497 (Jonathan Elliot ed., 2d ed. 1836), [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1907/1314.03\\_Bk.pdf](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1907/1314.03_Bk.pdf) [<https://perma.cc/2Q94-UN8S>].

Mason, the Pennsylvania minority report, and "Cato" all voiced concern that a criminal president might escape punishment by pardoning his confederates. None seemed concerned that the president might escape punishment by pardoning himself. (These initial critics of the president's power were prescient, for President Trump pardoned several associates who might have been able to incriminate him. See *infra* text accompanying notes 78–83; Alschuler, *supra* note 15.)

Wilson responded to Randolph that, despite the president's use of his pardon power, "If he be himself a party to the guilt he can be impeached and prosecuted." McConnell maintains that Wilson referred to prosecution in the Senate following impeachment by the House, but he offers no supporting evidence. McConnell, *supra* note 40. It seems at least equally likely that Wilson contemplated prosecution in a court—something that would be impossible if the president had successfully pardoned himself.

Although McConnell says that the exchange between Randolph and Wilson establishes "beyond question" that the president may pardon himself, a *Yale Law Journal* note (written by Professor Brian Kalt while a student) cited the same exchange as "decisive" proof that he may not. Kalt, Note, *Pardon Me?*, *supra* note 40, at 786–87; see also Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1326

Both the Constitution's text and the consequences of allowing self-pardons reinforce the Justice Department's position. The Pardon Clause empowers the president to "grant Reprieves and Pardons for Offenses against the United States," and the words "grant" and "pardon" imply something given by one person to another. To grant a thing is to bestow it, and a "grantor" and a "grantee" are not the same. Moreover, to request a pardon "is to ask for a particular kind of gift, that of forgiveness."<sup>53</sup> Even the pope cannot forgive his own transgressions.<sup>54</sup>

Moreover, the Constitution provides that, after a president has been removed from office by impeachment, he shall "be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."<sup>55</sup> If a president could pardon himself prior to his removal—perhaps even while the Senate was voting to remove him—this provision would be a nullity. The Framers probably did not mean to give presidents an easy way to defeat the legal accountability provided by Article I, Section 3, Clause 7.<sup>56</sup>

As this Article has explained, a president may not pardon crimes before they happen. A president who may pardon himself on his last day in office, however, knows from his first day in office that he can commit any crime he likes without risking prosecution. In effect, he has a blanket pardon for future crimes. This president might assault selected members of Congress with impunity. He might even incite a mob to storm the Capitol and block Congress from certifying his electoral defeat.

In eighteenth-century England, courts declared that the king could do no wrong.<sup>57</sup> That view, however, "was rejected by the colonists when they declared their independence from the Crown."<sup>58</sup> The Framers would not have allowed presidents to exempt themselves from prosecution for any crime they might choose to commit.<sup>59</sup>

(2018) (endorsing Kalt's position); Leib & Shugerman, *Fiduciary Constitutionalism*, *supra* note 40, at 472–73 (same).

Randolph's and Wilson's thoughts about whether the president should be empowered to grant pardons for treason do not establish what either one of them believed about the legitimacy of self-pardons, and they certainly do establish what other delegates and the people who later voted to ratify the Constitution believed.

53. Bowman, *supra* note 5 (manuscript at 22).

54. *Id.* (manuscript at 25). Bowman develops an impressive textual argument against self-pardons in *id.* (manuscript at 20–26).

55. U.S. CONST. art. I, § 3, cl. 7.

56. See KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 40, at 52–53.

57. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*238–39; JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 5 (London, J. Butterworth 1820).

58. Nevada v. Hall, 440 U.S. 410, 415 (1979).

59. See Feldman, *supra* note 40 (It is "difficult to think of any single idea that would more grossly violate the rule of law than a president free to break any and every law and then wave a get-out-of-jail-free card.").

A president's ability to violate laws with impunity would be enhanced if, at the end of his term, he could grant himself the sort of blanket pardon President Ford granted

In judging whether the Constitution allows an accused president to pardon himself, one might ask just who favors giving the president this power. If the answer is *no one* apart from the president himself and members of his family, one may wonder why some scholars consider it likely the Framers of the Constitution took that position. Our forebears probably did not support a position no one else ever has taken or would defend.

### *B. The Take Care Clause as a Possible Constraint on the Pardon Power*

Article II, Section 3, Clause 5 of the Constitution requires the president to “take Care that the Laws be faithfully executed.” Some federal judges, however, appear to have read this provision while standing on their heads. They have declared that the Constitution gives the president, the Justice Department, and administrative agencies a nearly boundless discretion *not* to enforce the law. Disregarding the word “faithfully,” they have invoked the Take Care Clause as though it justified almost limitless prosecutorial discretion.<sup>60</sup>

Recent scholarship by Andrew Kent, Ethan Leib, and Jed Shugerman<sup>61</sup> shows that, just as the judges who invert the Take Care Clause are not textualists, neither are they originalists. For centuries prior to the framing of the Constitution, language resembling that of the Take Care Clause bound public and private office holders, and this language was understood to impose duties resembling modern fiduciary duties. This language conveyed: “[1] an affirmative duty to act diligently, honestly, skillfully, and impartially in the best interest of the public, [2] a restraint against self-dealing and corruption, and [3] a reminder that officeholders must stay within the authorization of law and office.”<sup>62</sup>

In a second scholarly work, Lieb and Shugerman focus on the implications of what they call “fiduciary constitutionalism” for exercise of the pardon power.<sup>63</sup> They conclude that “the president may not pardon himself or

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former president Nixon, a pardon forgiving any crime the president might have committed while in office. *See* text at *infra* note 158. A president might in fact go farther by pardoning every crime he might have committed since birth. This Article maintains that the Constitution allows blanket pardons, but Aaron Rappaport argues that it does not. *See* Rappaport, *supra* note 4. The issue is discussed *infra* in Part VII.

If blanket pardons were forbidden so that a president could pardon himself only crime-by-crime, his license to break the law would remain intact. He might in fact write himself a pardon for each crime promptly after committing it, keep his pardons secret, place them in a drawer, and then withdraw particular pardons as needed if and when his crimes were detected and prosecuted. This handling of pardons would violate the Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2207, but it would not render the pardons invalid.

60. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Morrison v. Olson*, 487 U.S. 654, 706, 726–27 (1988) (Scalia, J., dissenting); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

61. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

62. *Id.* at 2141.

63. Leib & Shugerman, *Fiduciary Constitutionalism*, *supra* note 40.

pardon his closest associates for self-interested reasons;<sup>64</sup> that such pardons are “invalid;<sup>65</sup> and that “from [a] fiduciary perspective,” President Clinton’s pardons of Marc Rich<sup>66</sup> and Susan McDougal<sup>67</sup> “might have been invalid.”<sup>68</sup>

After the publication of the authors’ scholarship, President Trump commuted the sentence of his long-time friend and associate Roger Stone.<sup>69</sup> The authors then sought permission to file a friend-of-the-court brief to explain to the U.S. District Court for the District of Columbia why the President’s commutation of Stone’s sentence “may not be constitutionally valid.”<sup>70</sup> The court, however, denied their motion.<sup>71</sup>

The authors’ assessment of the duties imposed by the Take Care Clause seems definitive. But apart from their occasional use of the word *invalid* and a brief passage describing criminal prosecutions and civil actions in England for misconduct by government officers,<sup>72</sup> they say nothing about whether and to what extent a president’s violation of these duties is justiciable. Does the Constitution empower judges to assess the motives of presidents and declare every “faithless” or corrupt action invalid? Would the frequent adjudication of whether presidents had served their own interests rather than the public’s impede the ability of even very “faithful” presidents to govern effectively?<sup>73</sup> If the Framers of the Constitution meant judges to have the authority Kent, Lieb, and Shugerman apparently would give them, wouldn’t someone have noticed before 2019?<sup>74</sup>

64. *Id.* at 475.

65. *Id.*

66. For a description of the circumstances leading to Rich’s pardon, see Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1137–42 (2010).

67. For a description of the circumstances leading to McDougal’s pardon, see *id.* at 1158–59.

68. Leib & Shugerman, *Fiduciary Constitutionalism*, *supra* note 40, at 476.

69. This Article describes the sentence commutation and later pardon of Stone *infra* in Part IX(A).

70. Motion for Leave to File Letter Brief of Amici Curiae Professors Ethan Leib and Jed Shugerman, *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. July 15, 2020), <https://freespeechforpeople.org/wp-content/uploads/2020/07/us-v-stone-professors-mtn-for-leave-to-file-2020-07-15.pdf> [<https://perma.cc/4CSD-V6ZU>].

71. *United States v. Stone: Challenging the Abuse of the Pardon Power by the President*, FREE SPEECH FOR PEOPLE, <https://freespeechforpeople.org/united-states-v-stone/> [<https://perma.cc/G557-XTTC>] (last visited July 14, 2021).

72. Kent et al., *Faithful Execution*, *supra* note 61, at 2170–71.

73. Every president has critics both on and off the bench, and one should consider how a greater recognition of “fiduciary constitutionalism” might have limited the effectiveness of America’s greatest presidents as well as its most corrupt.

74. See Bowman, *supra* note 5 (manuscript at 40–41) (“I cannot find any indication in either the founding era constitutional debates or the structure of the constitution itself that the Framers imagined their hope for wise stewardship by public officials as an invitation for courts to become general commissions of inquiry into the wisdom or public-spiritedness of particular actions by presidents . . .”).



Even if the Framers did not contemplate judicial enforcement of the duties imposed by the Take Care Clause, they did not leave the violation of these duties without a remedy. Kent, Lieb, and Shugerman show frequent enforcement of English officials' fiduciary obligations through impeachment,<sup>75</sup> and a sufficiently grave violation of a president's duties would justify his removal from office.<sup>76</sup>

The Take Care Clause and other constitutional provisions manifest the Framers' condemnation of self-dealing.<sup>77</sup> They reinforce the judgment that the Framers did not intend to allow a president to judge his own case. Until a president does attempt to pardon himself and a prosecutor charges him anyway, however, no court is likely to resolve the issue.

#### IV. USING THE PARDON POWER TO OBSTRUCT JUSTICE AND COMMIT OTHER CRIMES

##### *A. May a President Use a Granted Power to Do Things That Would be Criminal if Done by a Private Individual?*

###### *1. Troubling Presidential Conduct.*

The *Mueller Report* presented strong evidence that President Trump obstructed justice by using his pardon power to discourage potential witnesses from cooperating with prosecutors. It declared that “[t]he President’s actions toward witnesses . . . would qualify as obstructive if they had the natural tendency to prevent particular witnesses from testifying truthfully, or otherwise would have the probable effect of influencing, delaying, or preventing their testimony to law enforcement.”<sup>78</sup> It then showed that President Trump had indicated to several potential witnesses—particularly Michael Flynn, Roger Stone, Paul Manafort, and Michael Cohen—that refusing to supply information would lead to pardons.<sup>79</sup>

The final section of this Article will describe in some detail the circumstances leading to the pardons of Stone and Manafort. Briefly, the President sought actively to discourage their cooperation and made little effort to conceal it. He publicly denounced “flipping;” said that it “almost ought to be outlawed;” praised the “bravery” of Stone and Manafort for refusing to do it; claimed that, despite their convictions for serious crimes, they were treated “very unfairly;” and accompanied these statements with indications he was considering pardons.<sup>80</sup>

75. See Kent et al., *Faithful Execution*, *supra* note 61, at 2125, 2150, 2171.

76. See *infra* Part V.

77. See Tribe et al., *supra* note 40.

78. 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 131 (2019).

79. See *id.* at 6–7, 120–56.

80. See *infra* Parts IX(A) & (B).

Trump ultimately pardoned all five of his convicted associates who refused to cooperate with prosecutors<sup>81</sup> but not the two who did.<sup>82</sup> His strategy was successful. Andrew Weissmann, a prominent member of the Special Counsel's team, wrote: "The president's dangling of pardons to those who were considering cooperating with our investigation served, by design, to thwart our uncovering the true facts."<sup>83</sup>

*The Mueller Report* declined to say whether Trump obstructed justice. Noting that a president cannot be indicted while in office, it explained that Trump would have no opportunity to clear his name through judicial proceedings while he was still president.<sup>84</sup> The report did say, however: "[I]f we had confidence . . . that the President clearly did not commit obstruction of justice, we would so state."<sup>85</sup>

More than 1,000 former federal prosecutors were less equivocal. They declared that Trump's actions would have resulted in "multiple felony charges for obstruction of justice" if they had been taken by "a person not covered by the Office of Legal Counsel policy against indicting a sitting President."<sup>86</sup>

81. Roger Stone, Paul Manafort, Michael Flynn, George Papadopoulos, and Alexander van der Zwaan. Flynn initially cooperated but reversed course. See Byron Tau, *Rift Deepens Between Michael Flynn, Prosecutors Over Cooperation*, WALL ST. J. (Sept. 10, 2019, 5:27 PM), <https://www.wsj.com/articles/rift-deepens-between-michael-flynn-prosecutors-over-cooperation-11568141797> [<https://perma.cc/G8P8-UE65>]. Van der Zwaan was not directly associated with Trump but was associated with Paul Manafort, Rick Gates, and Konstantin Kilimnik, who later proved to be a Russian intelligence agent. His cooperation might have provided evidence of crimes by Manafort, Gates, and Kilimnik that preceded Trump's 2016 presidential campaign.

82. Michael Cohen and Rick Gates.

83. ANDREW WEISSMANN, *WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION* xxiii (2020). Weissmann describes former deputy campaign manager Rick Gates' waffling as Paul Manafort and others offered coded messages that noncooperation would produce a pardon. Gates became a cooperating witness only after Charlie Black, a noted Republican lobbyist and political advisor, told him he would be foolish to count on a pardon because President Trump was too self-absorbed to be dependable. *Id.* at 206. According to Weissmann, what had been a "private tug-of-war" for Gates's cooperation became a public dance as the president used Twitter and other public statements to discourage Manafort and others from following Gates's example. *Id.* at 253; see also *id.* at 252–56 (describing some of Trump's statements). Jeffrey Toobin notes that Trump's public indications that he would grant pardons to potential witnesses began in earnest only after Gates "flipped" and Rudolph Giuliani became Trump's principal lawyer. Toobin credits Trump's new strategy with bringing to an end the Special Counsel's success in developing cooperating witnesses. JEFFREY TOOBIN, *TRUE CRIMES AND MISDEMEANORS* 233 (2020).

84. 2 MUELLER, *supra* note 78, at 2.

85. *Id.*

86. *Statement by Former Federal Prosecutors*, MEDIUM: POLITICS (May 6, 2019), <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1> [<https://perma.cc/DV2L-PK59>]. I was one of the signers of the former prosecutors' letter. Both this letter and *The Mueller Report* examined allegedly obstructive acts other than abuse of the pardon power. They focused, for example, on President Trump's dismissal of FBI Director James Comey, an action that Trump told visiting Russian officials had

## 2. *The President's Defense.*

Others, however, took a different view. Alan Dershowitz wrote: “[A] president may never be charged with obstruction of justice for . . . pardoning potential witnesses against him . . . . The constitution explicitly authorizes the president to pardon anyone.”<sup>87</sup> According to Dershowitz, a president’s reasons for exercising a power granted by the Constitution may never be questioned.<sup>88</sup> In 2018, six months before President Trump nominated Bill Barr to be attorney general, Barr sent a memorandum to the Justice Department advancing a similar position.<sup>89</sup> President Trump’s lawyers also maintained that, even when a

“taken off” the “great pressure” he “faced . . . because of Russia.” 2 MUELLER, *supra* note 78, at 4.

87. Alan M. Dershowitz, *Why Donald Trump Can't Be Charged with Obstruction*, MACLEAN'S (Dec. 14, 2017), <https://www.macleans.ca/opinion/why-trump-cant-be-charged-with-obstruction/> [<https://perma.cc/EE4C-B5ZW>]. For a response, see Laurence H. Tribe, *Why Donald Trump Can Be Charged with Obstruction*, MACLEAN'S (Dec. 15, 2017), <https://www.macleans.ca/opinion/why-trump-can-be-charged-with-obstruction/> [<https://perma.cc/4HTU-G9HU>].

88. Dershowitz, *supra* note 87; see Brett Samuels, *Dershowitz: "You Cannot Question a President's Motives When the President Acts,"* THE HILL (July 8, 2018, 1:07 PM), <https://thehill.com/blogs/blog-briefing-room/396012-dershowitz-you-cannot-question-a-presidents-motives-when-the> [<https://perma.cc/F4TA-84QH>].

89. Bill Barr, Memorandum to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel Regarding Mueller’s “Obstruction” Theory (June 8, 2018), <https://s3.documentcloud.org/documents/5638848/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.pdf> [<https://perma.cc/UL74-GZ79>]. Barr’s memorandum was ambiguous. On the one hand, he recognized that a president could “commit obstruction in [the] classic sense” by, for example, “tampering with a witness.” On the other, he argued that “using obstruction laws to review the President’s motives for making facially-lawful discretionary decisions impermissibly infringes on the President’s constitutional powers.” A president’s motive for making a “facially-lawful discretionary decision,” however, might be to “tamper with a witness.” For example, a president might acknowledge to a confederate that he pardoned a potential witness in order to remove the pressure to cooperate this person otherwise would have faced. How Barr would regard such a case was unclear.

At Barr’s confirmation hearing following his nomination to be attorney general, he reduced the ambiguity but did not eliminate it. He testified: “I think that if a pardon was a quid pro quo to altering testimony, then that would definitely implicate an obstruction statute.” CONFIRMATION HEARING ON THE NOMINATION OF HON. WILLIAM PELHAM BARR TO BE ATTORNEY GENERAL OF THE UNITED STATES BEFORE THE S. COMM. ON THE JUDICIARY, 116th Cong. (2019), <https://www.congress.gov/116/chrg/CHRG-116shrg36846/CHRG-116shrg36846.htm> [<https://perma.cc/VY8F-XYYY>]. This statement did not reveal Barr’s position on a president’s use of the pardon power to discourage testimony in the *absence* of an agreement or quid pro quo.

The issue Barr’s testimony failed to resolve was not a fine point of academic interest. President Trump did discourage “flipping” by denouncing cooperation and holding out the possibility of pardons, and *The Mueller Report* presented abundant evidence of this conduct. Three weeks before releasing this report to the public, however, Barr sent an open letter to Congress purporting to summarize it. This letter noted the Special Counsel’s failure to “draw a conclusion . . . as to whether the examined conduct constituted obstruction,” declared it had been left “to the Attorney General to determine whether the conduct

president's goal is to obstruct justice, the Constitution forbids punishing his exercise of an enumerated power.<sup>90</sup>

Dershowitz acknowledged that a president who traded a pardon for cash could be impeached and convicted of a crime after his removal from office. The Constitution expressly authorizes impeachment for bribery.<sup>91</sup> In that situation, Dershowitz said, the conviction would rest on the president's acceptance of a bribe rather than his grant of the pardon.<sup>92</sup> Dershowitz's observation, however, does not distinguish a bribery case from a case like Trump's. Pardoning a potential witness in an effort to influence his testimony can be seen as resting on an effort to influence the witness rather than simply the grant of a pardon.<sup>93</sup>

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described in the report constitutes a crime" (as though the Special Counsel's reason for leaving the question open was that he wanted the attorney general to resolve it), and announced: "Deputy Attorney General Rod Rosenstein and I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense." Letter from William P. Barr, Att'y Gen., to Lindsey Graham, Sen., et al. (Mar. 24, 2019), <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html>. Special Counsel Mueller complained that the "summary letter . . . did not fully capture the context, nature, and substance of this Office's work and conclusions." Letter from Robert S. Mueller, III, Special Couns., to William P. Barr, Att'y Gen. (Mar. 27, 2019), <https://www.npr.org/2019/04/30/718883130/mueller-complained-that-barr-summary-of-trump-russia-probe-lacked-context> [<https://perma.cc/5LP4-U6D9>].

90. *The Trump Lawyers' Confidential Memo to Mueller, Explained*, N.Y. TIMES (June 2, 2018), [https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html?mtref=www.google.com&auth=forgot-password&referring\\_pv\\_id=jhgv61b0dVS9OAMZyKzOBxql](https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html?mtref=www.google.com&auth=forgot-password&referring_pv_id=jhgv61b0dVS9OAMZyKzOBxql) (setting forth a letter from John M. Dowd to Robert S. Mueller dated January 29, 2018).

Dershowitz, Barr, and the President's lawyers focused less on the pardon power than on the president's power to fire subordinates. They insisted that President Trump's dismissal of FBI Director James Comey could not justify either Trump's impeachment or his conviction of obstruction. All of these lawyers, however, spoke of the pardon power as well as the power to discharge subordinates.

91. U.S. CONST. art. II, § 4.

92. Dershowitz, *supra* note 87.

93. *The Mueller Report* rejected the arguments of the President's counsel and made a similar point. In some situations not involving use of the pardon power, the *Report* said, a balancing process should determine the constitutionality of prosecuting a former president for obstruction. A court should assess the extent to which the prospect of prosecution might inhibit a president from carrying out his duties and weigh that effect against the need to carry out objectives within the constitutional authority of Congress. 2 MUELLER, *supra* note 78, at 172–73. The Report recognized, however, that a balancing process could not justify limiting the pardon power. "[T]he President's power to grant pardons is exclusive and not subject to congressional regulation . . ." *Id.* at 173. At the same time, however, "[t]he offer of a pardon would precede the act of pardoning and thus be within Congress's power to regulate even if the pardon itself is not." *Id.*

The issue is not simply one of timing. In the absence of a prior agreement, a president might grant a pardon to remove the pressure a prosecutor otherwise could exert for cooperation. He might reveal his corrupt purpose only after the fact, whispering to a confederate that he approved the pardon in order to keep its recipient silent. Even in this

Just as a president might trade a pardon for cash, he might trade it for silence or perjury. Moreover, at least in a novel by James Patterson or Tom Clancy, he might trade it for an agreement to assassinate a rival. Indeed, no prior exchange or agreement might be necessary. A president might simply free someone from prison because he knew this person planned to kill an opponent. One wonders whether, in a murder case, Dershowitz would insist that a president's reasons for exercising an enumerated power may never be questioned.

Pardoning a killer might in fact be unnecessary under the law as Dershowitz envisions it. The same sentence of the Constitution that grants the pardon power to the president declares him commander in chief of the armed forces.<sup>94</sup> Perhaps the president could simply order the Army, the Navy, or the Air Force to assassinate a rival or bomb Baltimore.<sup>95</sup> Surely, however, a president's command to murder would reveal why even facially unqualified constitutional grants of power are subject to implicit limits<sup>96</sup> and why a president's reasons for exercising his powers may be examined.<sup>97</sup>

While no statute—not even one prohibiting homicide—can alter or limit a constitutional grant, the pardon power is not as absolute as Dershowitz, Barr, and President Trump's lawyers maintain. Determining just how far this power exempts the president from regulation can be difficult.

Following President Trump's commutation of Roger Stone's sentence, House Speaker Nancy Pelosi said that legislation was needed to "ensure that no President can pardon or commute the sentence of an individual who is engaged in

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situation, a prosecution for obstruction could be regarded as resting on the president's attempt to discourage incriminating testimony rather than simply on his grant of a pardon.

94. U.S. CONST. art. II, § 2.

95. The thought that a president might command the armed forces to commit murder is not entirely fanciful. As a candidate, President Trump criticized the United States for "fighting a very politically correct war" and said: "The other thing with the terrorists is you have to take out their families, when you get these terrorists, you have to take out their families." Tom LoBianco, *Donald Trump on Terrorists: "Take Out Their Families,"* CNN POLITICS (Dec. 3, 2015, 12:19 PM), <https://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html> [<https://perma.cc/GGD3-XJ9L>].

96. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641–42, 645–46 (1952) (Jackson, J., concurring) (noting that the term Commander in Chief "is sometimes advanced as support for any presidential action, internal or external, involving the use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy" but concluding that the president's power to command the armed forces "is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic").

97. A familiar, if dated example of excessive literalism and the need to mark implicit limits concerns the request a business executive made when he learned that many smokers would attend a meeting: "Please bring me all the ashtrays you can find." A subordinate who removed ashtrays attached to the wall or stole ashtrays in response to this request would not be a good agent. See William N. Eskridge, Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1549 (1998).

a cover-up campaign to shield that President from criminal prosecution.”<sup>98</sup> A direct restriction of the pardon power of the sort apparently envisioned by Speaker Pelosi certainly would be unconstitutional. When the Constitution says the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States,” it does not leave room for Congress to say: “Yes, but not *those* people and not *those* crimes.”

Even broad, otherwise valid regulatory legislation might be invalid if applied to limit the pardon power. On his last day in office, President Clinton pardoned his half-brother, Roger Clinton, who had spent a year in prison after distributing a small amount of cocaine.<sup>99</sup> If a statute had barred federal officials from granting governmental benefits to close relatives, Clinton might have been constitutionally entitled to disregard it.

The pardon power, however, probably was not meant to exempt the president from basic, broadly enforced criminal laws that restrict him no more than they restrict private individuals. These laws—those punishing offenses traditionally regarded as *mala in se* and other serious crimes—establish rules whose observance by everyone is thought necessary to the peace and wellbeing of society. No delicate balancing of interests is necessary to conclude that the Framers did not mean to exempt the president from the operation of these laws. Just as none of the president’s powers authorize him to murder, none of them authorize him to induce witnesses to stonewall or lie.

The foregoing analysis of how far the pardon power exempts a president from regulation focuses on the breadth, generality, and purpose of legislation limiting this power. Statutes restricting only a president’s ability to pardon—statutes applicable only to the president and purporting to preclude what the Constitution otherwise would entitle him to do—are unconstitutional. The fact that these statutes forbid corrupt behavior Congress might lawfully prohibit if it applied its prohibition broadly cannot save them.<sup>100</sup> Moreover, general regulatory statutes—especially those that limit only public officials—also may be invalid in applications that limit the president’s ability to pardon. But the Pardon Clause was

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98. Veronica Stracqualursi, *Pelosi Blasts Roger Stone Commutation as “an Act of Staggering Corruption” as Trump Defends Move*, CNN POLS. (July 11, 2020, 7:13 PM), <https://www.cnn.com/2020/07/11/politics/trump-roger-stone-sentence-commutation-democrats-romney/index.html> [<https://perma.cc/E6Y9-4DF6>].

99. See Alschuler, *supra* note 66, at 1145.

100. Congress, however, might prohibit presidential self-pardons or other actions it has concluded are unauthorized by the Constitution. When Congress’s judgment is correct, its action would not limit otherwise legitimate exercises of presidential authority. By expressing its view, Congress would simply encourage judges to recognize boundaries they might recognize in the absence of legislation. See BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 130–31, 375–76 (2020). Congress also might require the disclosure of unprivileged information concerning pardons. See Press Release, Adam Schiff, Congressman, *Schiff Introduces Legislation to Prevent Abuse of Presidential Pardons* (Mar. 7, 2019), <https://schiff.house.gov/news/press-releases/schiff-introduces-legislation-to-prevent-abuse-of-presidential-pardons> [<https://perma.cc/ZM23-GEXD>].

not meant to empower a president to engage in serious misconduct that would prompt the criminal punishment of any person other than the president. When a criminal law applies to the president, other public officials, and private individuals alike and is enforced against nearly all known offenders, the president's use of an official power to violate this law entitles him to no exemption.<sup>101</sup>

***B. Does a "Clear Statement Rule" Preclude or Limit the Application of Obstruction Statutes to the President?***

Without commenting on the constitutional issues raised by Dershowitz, Barr, and Trump's lawyers, Jack Goldsmith argued that the principal statute criminalizing obstruction of justice should not apply to the president on the same terms as everyone else.<sup>102</sup> On its face, the statute draws no distinction; it punishes "whoever" obstructs justice.<sup>103</sup> Goldsmith, however, quoted this language of a Justice Department opinion: "[G]eneral statutes must be read as not applying to the President if they do not expressly apply where the application would arguably limit the President's constitutional role."<sup>104</sup> Goldsmith said that the principle asserted in this opinion might appear to preclude application of the obstruction statute to the president altogether. But even if some prosecutions for obstruction are tolerable, the statute should "not apply to [the President's] conduct to the extent [it] would arguably limit or possibly conflict with his [constitutional] prerogatives."<sup>105</sup>

The statute forbidding bribery, like the statute forbidding the obstruction of justice, does not expressly apply to the president, but Goldsmith acknowledged that a president can be prosecuted for accepting a bribe. He maintained that the

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101. Congress might speak directly of the pardon power (for example, by barring a president from trading a pardon for cash) if it limited the president no more severely than it limited everyone else. The generality of the regulation matters, not whether the regulation is contained in single statute.

102. Jack Goldsmith, *The Mueller Report's Weak Statutory Interpretation Analysis*, LAWFARE (May 11, 2019, 10:18 AM), <https://www.lawfareblog.com/mueller-reports-weak-statutory-interpretation-analysis> [<https://perma.cc/84QN-BV8C>]. Josh Blackman took the same position. See Josh Blackman, *The Special Counsel's Constitutional Analysis: The Clear Statement Rule*, LAWFARE (April 19, 2019, 12:31 PM), <https://www.lawfareblog.com/special-counsels-constitutional-analysis-clear-statement-rule> [<https://perma.cc/Q5HH-HT33>].

103. 18 U.S.C. § 1512(c)(2) (2020).

104. Application of 28 U.S.C. § 458 to Presidential Appointment of Fed. Judges, 19 Op. O.L.C. 350, 352 (1995), <https://www.justice.gov/file/20126/download> [<https://perma.cc/26LD-SKAZ>].

105. Goldsmith, *supra* note 102. Declaring obstruction statutes entirely inapplicable to the president would have exempted President Nixon, who allegedly paid hush money to potential witnesses, and President Clinton, who allegedly urged witnesses to commit perjury. See ARTICLES OF IMPEACHMENT ADOPTED BY THE HOUSE JUDICIARY COMMITTEE ON JULY 27, 1974, Art. 1(5), WATERGATE INFO <https://watergate.info/impeachment/articles-of-impeachment> [<https://perma.cc/4SFT-3CXS>] (charging Nixon with paying hush money); *Approved Articles of Impeachment*, Art. III(1)-(2), WASH. POST (Dec. 20, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/articles/122098.htm> (charging Clinton with encouraging perjury).

Constitution's authorization of impeachment for bribery and its prohibition of increasing the president's salary while in office distinguish the two offenses.<sup>106</sup>

One wonders, then, whether Goldsmith would apply the murder statute to a hypothesized president who, as commander in chief, ordered the Air Force to bomb Baltimore. Like the obstruction statute and the bribery statute, the murder statute does not mention the president. And murder, unlike bribery, is not specifically listed in the Constitution as a ground of impeachment. Would Goldsmith exempt a homicidal president from prosecution for destroying Baltimore and from all war-crimes prosecutions that might arguably limit his power as commander in chief? Perhaps Goldsmith would conclude that a prosecution for murder could never "possibly conflict with [presidential] prerogatives." He might reason that, although prosecution for some felonies arguably conflicts with presidential powers, prosecution for really awful felonies does not.

Marty Lederman says of the "clear statement" principle asserted by Goldsmith and the Department of Justice: "That particular, categorical canon of construction doesn't exist."<sup>107</sup> All of the judicial decisions cited by Goldsmith and the Department in support of this principle plausibly construed statutes in light of their legislative history and the canon that courts should avoid constitutional questions when possible.<sup>108</sup> None refused to apply a statute whose terms were clear

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106. Goldsmith, *supra* note 102. The Justice Department's Office of Legal Counsel also concluded that its "clear statement" rule does not preclude prosecuting a president for bribery. It explained: "Application of [the federal bribery statute] raises no separation of powers question, let alone a serious one. The Constitution confers no power in the President to receive bribes." *Application of 28 U.S.C. § 458 to Presidential Appointment of Fed. Judges*, 19 Op. O.L.C. at 357 n.11. Equally, the Constitution confers no power in the president to obstruct justice or commit other serious crimes.

107. Marty Lederman, *Why Robert Mueller Is Right that the Obstruction Statutes Apply to the President*, JUST SECURITY (May 15, 2019), <https://www.justsecurity.org/64087/why-robert-mueller-is-right-that-the-obstruction-statutes-apply-to-the-president/> [<https://perma.cc/L56K-QX9L>]. As Lederman notes, President Nixon unsuccessfully claimed exemption from a subpoena for White House tapes, and President Clinton unsuccessfully claimed exemption from a civil lawsuit while he remained in office. See *United States v. Nixon*, 418 U.S. 683, 707 (1974) (rejecting Nixon's claim that the White House tapes were "absolutely privileged"); *Clinton v. Jones*, 520 U.S. 681 (1997) (rejecting Clinton's claim that responding to a civil lawsuit would unduly hamper the performance of his official duties). Even Nixon and Clinton, however, did not claim they were exempt because the rules and statutes authorizing subpoenas and civil lawsuits did not mention the president explicitly and because the subpoenas and lawsuits might "arguably" interfere with the president's exercise of his prerogatives. See also 2 MUELLER, *supra* note 78, at 169–71 (explaining why the "clear statement rule" would not preclude charging President Trump with obstruction). Goldsmith calls Mueller's analysis "one-sided and weak." He describes his own position as one "that absolutely infuriates people [but that he knows] deep down in [his] heart is 100% true." Goldsmith, *supra* note 102.

108. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that the president does not qualify as an "agency" subject to the restrictions of the Administrative Procedure Act); *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 465–67



simply because it did not expressly mention the president and its application might “possibly” limit the use of a presidential power.<sup>109</sup>

### *C. Do Corrupt Pretrial Pardons Always Obstruct Justice?*

This Article has maintained that the Constitution does not bar prosecution of a former president for using his pardon power to obstruct justice and that no clear-statement principle limits the application of obstruction statutes simply because they do not mention the president. The Article now considers which pardons violate obstruction statutes and which do not. It distinguishes between two sorts of pardons: pardons intended to obstruct proceedings other than those of the pardon recipients themselves (which this Article calls Type I pardons) and pardons intended to impede justice in the recipients’ own cases (which it calls Type II pardons).

The pardons and potential pardons considered in *The Mueller Report* and earlier sections of this Article were all Type I pardons: they were intended to procure the recipients’ perjury or silence. These pardons were meant to influence testimony in cases other than the recipients’ own, including perhaps the case of the president himself. Pardons intended to encourage other obstructive conduct—for example, jury tampering, destroying physical evidence, and threatening or harming witnesses—also are aimed at proceedings other than those of the recipients themselves. Type II pardons—those not intended to influence anyone’s conduct but simply intended to thwart justice in the pardon recipients’ own cases—present very different issues.

On its face, the principal federal obstruction statute seems to encompass pardons of both types. It provides: “Whoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined . . . or imprisoned not more than 20 years, or both.”<sup>110</sup> Every pretrial or presentence pardon may appear to “impede an official proceeding” by preventing it altogether. When the president’s purpose is “corrupt,” the crime of obstruction may seem complete. The obstruction statute may make exercise of the pardon power itself the *actus reus* of a crime, leaving the spongy word “corruptly” to do all the real lifting. When a president has granted a Type II pardon, the argument that prosecution rests on the act of influencing a witness rather than simply the act of pardoning does not work.

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(1989) (holding that a restriction on the use of public funds to lobby Congress does not limit the ability of the president and other officials to advocate new legislation).

109. See *Salinas v. United States*, 522 U.S. 52, 59–60 (1997) (The principle that courts will construe statutes to avoid serious constitutional questions “is not a license for the judiciary to rewrite language enacted by the legislature”); Hemel & Posner, *supra* note 52, at 1331 (“Interpreting the word ‘whoever’ to mean ‘whoever, except the president’ does violence to the statutory language in a way that the canon of constitutional avoidance neither requires nor allows.”). Goldsmith observes: “The Justice Department has invoked the clear statement rule several times to exclude the president from a statute even though the exclusion was difficult or impossible to make consistent with statutory text.” He does not maintain that a court ever has done so. Goldsmith, *supra* note 102.

110. 18 U.S.C. § 1512(c)(2).

Offering a pardon in exchange for silence or perjury is analogous to offering other benefits (cash or a turkey), behavior that regularly sends private individuals to prison. Simply “pardoning corruptly” is not closely analogous to any conduct in which a private individual might engage.

This conduct is, however, indistinguishable from conduct in which prosecutors, judges, and the members and staffs of administrative agencies might engage. Making a crime of “pardoning corruptly” also would make a crime of corruptly dismissing a case or an administrative proceeding. Indeed, it would make a crime of any action by a prosecutor, judge, or regulator that *impeded* an official proceeding if that action were undertaken with a corrupt purpose. Corruptly granting a motion to suppress evidence or corruptly reducing a charge, for example, could lead to prosecution and conviction.

Although a literal reading of obstruction statutes might make corrupt pardoning a crime, it would not make *all* corrupt pardoning a crime. A president cannot “impede an official proceeding” when all official proceedings have been concluded. A president who delays a pardon until its recipient has begun serving his sentence is not guilty of obstructing justice, however nefarious his purpose.

Inducing a president to delay a corrupt pardon until all official proceedings have been concluded might be worthwhile. It would permit the disclosure of evidence at trial and allow an official determination of guilt or innocence.<sup>111</sup> At the same time, letting a president pardon before trial could save the burden and expense of a trial. When a president is determined to free a crony for bad reasons, perhaps he should do it promptly.

Corrupt pardons in Type II cases are not offensive primarily because they impede official proceedings. They are offensive primarily because they discriminate in favor of the president’s associates and other advantaged applicants and because they free these advantaged applicants from apparently deserved punishment. When the goal is to remedy presidential corruption, a distinction between pretrial and post-trial pardons seems misplaced. Yet obstruction statutes draw this distinction, suggesting they serve a narrower purpose.

A grand jury investigation of former president Clinton focused on his possible obstruction of justice by granting a Type II pardon. On his last day in office, Clinton pardoned Marc Rich, an untried fugitive from justice. Rich’s former wife, a major contributor to Democratic candidates and the Clinton Presidential Library, had urged his pardon although the President’s chief of staff, the White House counsel, and all members of the White House counsel’s office opposed it.<sup>112</sup> A grand jury in the Southern District of New York considered not only whether Denise Rich had bribed Clinton but also whether Clinton’s pardon obstructed

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111. At the Constitutional Convention, Luther Martin moved to allow pardons only after conviction, but, after brief discussion, he withdrew the motion. James Madison, *Notes on the Debates in the Federal Convention* (Aug. 27, 1787), [https://avalon.law.yale.edu/18th\\_century/debates\\_827.asp](https://avalon.law.yale.edu/18th_century/debates_827.asp) [<https://perma.cc/HT84-87R4>].

112. See Alschuler, *supra* note 66, at 1137–42.

justice. This investigation—led for a time by United States Attorney James Comey—continued for years but produced no charges.<sup>113</sup>

This Article has maintained that the Constitution does not bar the prosecution of a former president for obstructing justice by granting a Type I pardon. Prosecuting a former president for approving a Type II pardon, however, would pose substantial constitutional issues.

*The Mueller Report* declares: “A preclusion of ‘corrupt’ official action is not a major intrusion on Article II powers.”<sup>114</sup> The prospect of prosecution for corrupt official action, however, can inhibit any action that *might* be found corrupt. It could make a president hesitant to pardon a friend, relative, or associate; a friend of a friend, relative, or associate; a major campaign contributor; a niece or business partner of a campaign contributor; or anyone else with perceived clout.

Pardoning associates should not be condemned categorically.<sup>115</sup> In 2001, a bipartisan panel selected former president Ford to receive the John F. Kennedy Library’s Profiles in Courage Award. It bestowed this honor because Ford had approved a pardon in 1974 that at the time was widely condemned—his pardon of

113. See Louis Fisher, *The Law: When Presidential Power Backfires*, 32 PRESIDENTIAL STUD. Q. 586, 597–98 (2002); Josh Gerstein, *Comey “Enthusiastic” About Bill Clinton Probe in 2001, FBI Memo Says*, POLITICO (Jan. 18, 2017, 6:58 PM), <https://www.politico.com/story/2017/01/james-comey-fbi-bill-clinton-233808> [<https://perma.cc/EFA5-VCEY>].

114. 2 MUELLER, *supra* note 78, at 174.

115. The ethical issues posed by crony pardons are not as simple and straightforward as newspaper editorials and popular discussions often make them seem. Consider this thought experiment:

President P has known Member of Congress C for many years, and when C was indicted for mail fraud, convicted, and sentenced, P followed his case closely. P believes that C was treated unjustly. If the merits of C’s application were all that mattered, P would pardon him.

Nevertheless, P hesitates. He thinks: “There may be other applicants who were treated as unfairly as C. Indeed, there probably are many of them. But because I do not know their cases as well as I know C’s, I cannot be sure. To find out, I would need to investigate their cases in depth, and it isn’t my job to do over what the criminal justice process already has done. Unlike C, the other applicants haven’t overcome my presumption that the criminal justice system got it right.”

P also thinks: “My friend C is a wealthy, white college graduate, and many of the others who are likely to have meritorious cases are none of those things. To favor applicants whom I know or whose friends have my ear is systematically to favor the already advantaged.”

Should P’s concern about equal treatment lead him to reject C’s application for a pardon? Or should he conclude that neither his inability to provide equal justice nor his predicable tilt in favor of wealthy white men should keep him from redressing the injustice he sees in C’s case?

Albert W. Alschuler, *Justice, Mercy, and Equality in Discretionary Criminal Justice Decision Making*, 35 J. L. & RELIGION 18, 23–24 (2020).

former president Nixon. Nixon was a longstanding friend of Ford who chose Ford to be his vice president after a scandal that brought the resignation of Ford's predecessor as vice president and during another scandal that soon would bring Nixon's own downfall.<sup>116</sup>

*The Mueller Report* also says: "[T]he term 'corruptly' sets a demanding standard."<sup>117</sup> This statement may be the only one in the report that warrants a guffaw. "Corrupt intent" is a troublesome standard even for people who are *not* president.<sup>118</sup>

Some courts have made this requirement redundant by requiring only the intent to impede an official proceeding.<sup>119</sup> Coupling these decisions with the conclusion that pretrial pardons do impede official proceedings would produce the remarkable conclusion that *all* pretrial pardons are criminal. It also would make a crime of every prosecutorial refusal to file charges. More commonly, courts define the word "corruptly" in language that is just as fudgy, open-ended, and evaluative as the word itself. They declare, for example, that a defendant must have acted "with improper motive or with bad or evil or wicked purpose."<sup>120</sup>

116. Scott Shane, *Critics of Ford's Nixon Pardon Now Call It Wise*, INT'L HERALD TRIB. (Dec. 30, 2006), <https://www.nytimes.com/2006/12/29/world/americas/29iht-pardon.4047202.html>; Bob Woodward, *Ford, Nixon Sustained Friendship for Decades*, WASH. POST (Dec. 29, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/12/28/AR2006122801247.html>.

117. 2 MUELLER, *supra* note 78, at 178.

118. See *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991) (holding the word "corruptly" too vague to give fair notice to a witness accused of corruptly influencing Congress by lying to a congressional committee); *United States v. Bonds*, 784 F.3d 582, 584 (9th Cir. 2015) (Kozinski, J., concurring) ("[W]e have given 'corruptly' such a broad construction that it does not meaningfully cabin the kind of conduct that is subject to prosecution."); Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 *FORDHAM L. REV.* 463, 468–69, 483–84 (2015) (suggesting that, if the incorruptible philosopher Aristotle were resurrected and elected Governor of New Jersey, he might wind up in a federal prison). *But see* 2 MUELLER, *supra* note 78, at 166–67, 166 n.1083.

119. *E.g.*, *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (requiring only an act "done with the purpose of obstructing justice"); see Hemel & Posner, *supra* note 52, at 1286; Alschuler, *supra* note 118, at 468–69.

120. *United States v. Partin*, 552 F.2d 621, 624 (5th Cir. 1977); see Hemel & Posner, *supra* note 52, at 1288; Alschuler, *supra* note 118, at 469. In support of its claim that corrupt intent is a "demanding standard," *The Mueller Report* cites a law dictionary's statement that corrupt intent consists of an actor's "intent to obtain an 'improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others.'" 2 MUELLER, *supra* note 78, at 178 (citing *BALLENTINE'S LAW DICTIONARY* 276 (3d ed. 1969)). At least in some contexts, a better construction would give the word "corruptly" its common-law meaning. As this word was understood in common-law extortion cases, it required a knowing violation of law or established norms of conduct. See Alschuler, *supra* note 118, at 468.

In an article titled *Presidential Obstruction of Justice*, Daniel Hemel and Eric Posner note the disarray of the decisions and propose a clearer standard.<sup>121</sup> They are agnostic, however, about whether this standard should apply when a president is alleged to have obstructed justice by issuing a pardon, and indeed about whether issuing a pardon can obstruct justice at all.<sup>122</sup> At least in other cases (for example, one in which a president is alleged to have fired an FBI director to impede an investigation), Hemel and Posner say that a president should be guilty of obstruction “when he [has] significantly interfere[d] with an investigation, prosecution, or other law enforcement action to advance narrowly personal, pecuniary, or partisan interests.”<sup>123</sup> When a president has both proper and improper motives, Hemel and Posner would have a jury determine whether the improper motives were causal—that is, whether the president would not have interfered in their absence.<sup>124</sup>

If the Hemel-Posner standard applied to the grant of a Type II pardon, President Clinton apparently would have committed obstruction if his gratitude for Denise Rich’s political contributions motivated his pardon of Marc Rich. President Trump would have committed obstruction if he pardoned Joe Arpaio primarily because Arpaio was a prominent Trump booster. President George H. W. Bush would have committed obstruction if he pardoned former Defense Secretary Caspar Weinberger because Weinberger was a long-time crony.<sup>125</sup> President Ford

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121. Hemel & Posner, *supra* note 52, at 1326.

122. *Id.* at 1320–27.

123. *Id.* at 1312.

124. *Id.* at 1319–20. A requirement of “causal” motivation would depart from the customary interpretation of criminal statutes. *See, e.g.*, *United States v. Garcia-Lopez*, 234 F.3d 217, 219–20 (5th Cir. 2000) (upholding an instruction directing conviction when a proscribed motivation was among a defendant’s reasons for travelling in foreign commerce and rejecting the claim that this motivation must be dominant); *People v. Cahill*, 809 N.E.2d 561, 583 (N.Y. 2003) (declaring that a defendant may be convicted of murdering a witness for the purpose of preventing the witness’s testimony as long as the proscribed motivation was a “substantial factor” in the killing).

125. President Bush’s pardon of former defense secretary Weinberger might have been both a Type II and a Type I pardon, intended to free a crony and to impede justice in cases other than the recipient’s own. Forty-nine percent of the respondents to a Gallup poll believed that Bush pardoned Weinberger “in order to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra.” JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 107 (2009). The *Final Report of the Independent Counsel for Iran-Contra Matters* declared: “The question before Independent Counsel was . . . whether President Bush exercised his constitutional prerogative to pardon a former close associate to prevent further Iran/contra revelations. In the absence of evidence that the pardon was secured by corruption, Independent Counsel decided against taking the matter before the Grand Jury.” 1 LAWRENCE E. WALSH, *UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS* 48 (1993), <https://archive.org/details/WalshReport/page/n73> [<https://perma.cc/7U2L-4ZWR>].

President Bush’s motives were suspicious, but apparently the *only* circumstances indicating a purpose to interfere with an investigation or to obstruct justice in a case other than Weinberger’s were that Bush himself was suspected of misconduct and

would have been guilty of obstruction if his pardon of Richard Nixon was prompted mostly by friendship and gratitude for Nixon's elevation of Ford to be his vice president. With the Hemel-Posner standard in place, the Federal Bureau of Prisons might need to create a special presidential wing at Leavenworth.

But the Hemel-Posner standard would not send President George W. Bush to prison even if cronyism prompted his remission of the prison sentence of Scooter Libby, his vice president's chief of staff. Bush remitted this sentence after it was imposed.<sup>126</sup> Because no "official proceeding" was pending, Bush could not have obstructed one.

The troublesome consequences of applying obstruction statutes to grants of Type II pardons warrant focusing carefully on the *actus reus* of obstruction—obstructing, influencing, or impeding any official proceeding.<sup>127</sup> The statutory term most readily applied to a Type II pardon is "impede," which the Merriam-Webster dictionary defines as "interfere with or slow the progress of."<sup>128</sup> It would not stretch this term to say that an official who *terminates* a proceeding *impedes* it (or even to say that he impedes it *massively*). The statutory list, however, lacks any language that someone who meant to include the official termination of a proceeding by an authorized public official would be likely to use. It seems

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Secretary Weinberger was a potential witness. Bush's stated reasons for pardoning Weinberger looked to the former secretary's poor health, his wife's poor health, and his long career of distinguished public service. The President also voiced concern that the prosecution of Weinberger and others reflected the criminalization of political differences. See *Text of President Bush's Statement on the Pardon of Weinberger and Others*, N.Y. TIMES, Dec. 25, 1992, at A22, <https://timesmachine.nytimes.com/timesmachine/1992/12/25/916192.html?pageNumber=22>. Even if Bush's ostensible reasons were not his only reasons or were disingenuous, see Albert W. Alschuler, *Unequal Justice for Girtha Gulley*, CHI. TRIB. (Jan. 13, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-01-13-9303161543-story.html> [<https://perma.cc/8E9Y-WPLU>], his pardon might have been motivated by cronyism (Type II motivation) rather than a desire to influence Weinberger not to cooperate (Type I motivation). Taken as a whole, the evidence did not seem to justify a finding that one of Bush's motives was to discourage Weinberger's cooperation.

President Bush left office less than a month after pardoning Weinberger. Partly because prosecuting the former president might have inhibited legitimate exercises of presidential power and, more basically, because the evidence of Type I obstruction did not seem to justify conviction, the independent counsel's decision not to seek an indictment was sound. The evidence that President Trump used and brandished his pardon power in order to obstruct justice was much stronger.

Note that the independent counsel for Iran-Contra Matters saw no reason to address the argument that the Constitution entitles the president to pardon whomever he wants for whatever reasons he wants, or the argument that obstruction statutes do not apply to the president because they do not mention him specifically. Harvard law professors apparently did not advance those claims until the Trump presidency. See *supra* text accompanying notes 87–88, 102–105.

126. See *Scooter Libby*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Scooter\\_Libby](https://en.wikipedia.org/wiki/Scooter_Libby) [<https://perma.cc/2TX6-8L4L>] (last visited Jan. 24, 2020).

127. 18 U.S.C. § 1512(c)(2).

128. *Impede*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/impede> [<https://perma.cc/DR7R-JHUT>] (last visited Aug. 3, 2021).

doubtful that, when Congress outlawed obstruction, it meant to include a public official's termination of proceedings through dismissal, acquittal, or pardon. The official termination of a proceeding by an authorized public official does not closely resemble a paradigmatic case of obstruction. Especially because criminalizing every pretrial pardon that a court or jury finds corrupt would raise serious constitutional questions, obstruction statutes should not be read to include the termination of a proceeding by a public official authorized to terminate it. Under current statutes, only Type I pardons should be criminal.<sup>129</sup>

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129. If the verbs "obstruct" and "impede" were construed to include the official termination of a proceeding by an official authorized to terminate it, neither committing the *actus reus* of obstruction nor desiring it would indicate any culpability. A prosecutor, judge, or president who deliberately ends a proceeding may be doing just what the public pays him to do. Only performing this act "corruptly" would make the act wrongful. Criminalizing otherwise innocent conduct simply because it is done corruptly is troublesome. It may in fact be unconstitutional. See *United States v. Poindexter*, 951 F.2d 369, 379 (D.C. Cir. 1991). It should not be a crime to walk, chew gum, or speak "corruptly."

If the words "obstruct" and "impede" referred only to impeding a proceeding the actor was *not* entitled to terminate (or was not authorized to terminate in the way he did), the word "corruptly" would no longer do all the lifting. The crime would not consist simply of pardoning an offender or dismissing a prosecution corruptly. A prosecutor would be required to prove conduct and a mental state that would provide some indication of culpability even in the absence of the squishy adverb. Because this proof might not establish culpability conclusively, however, obstruction statutes require the prosecutor to show a corrupt purpose in addition. Cf. *United States v. Aguilar*, 515 U.S. 593, 616–17 (Scalia, J., concurring in part and dissenting in part) (concluding that the word "corruptly" in an obstruction statute was not unconstitutionally vague—but only because the statute's additional requirement of intent to "influence, obstruct, or impede the due administration of justice" made "any claim of ignorance of wrongdoing . . . incredible").

This Article does not consider whether a president would commit obstruction if he discharged an executive branch subordinate (say, a director of the FBI or a special counsel) in order to halt or impede the investigation or prosecution of a presidential crony or the president himself. It is worth noting, however, that criminalizing this conduct would differ from criminalizing every grant of a pretrial pardon that a court or jury finds "corrupt." This crime would not consist simply of exercising a presidential prerogative (the power to discharge subordinates) corruptly. Although a broad construction of obstruction statutes would make corrupt pretrial pardoning a crime, these statutes would not make corrupt firing a crime. A president could discharge a subordinate corruptly without obstructing justice (say, because this subordinate refused to contribute half his salary to the president's reelection campaign).

To prove that the discharge of a subordinate constituted obstruction, a prosecutor would be required to show at least a substantial step toward impeding a proceeding as well as a purpose to impede this proceeding. Whether this conduct and mental state would indicate culpability apart from proof of "corruption" is disputed. A presidential directive to dismiss a specific criminal prosecution or end a specific criminal investigation would contravene well-established tradition even if the president's motives were pure, but some insist that the Constitution permits the president to take this action. See, e.g., Barr, *supra* note 89 ("The Constitution vests all Federal [law] enforcement power, and hence prosecutorial discretion, in the President."). If presidential interference with an ongoing investigation does not by itself indicate culpability, the word "corruptly" may do more work

## V. IMPEACHING A PRESIDENT FOR NONCRIMINAL ABUSE OF THE PARDON POWER

Although obstruction statutes should not be read to authorize a president's prosecution for granting a Type II pardon, a sufficiently corrupt Type II pardon could justify the president's impeachment. So could other corrupt but noncriminal pardons. Scholars widely agree that the Constitution's authorization of impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors"<sup>130</sup> does not limit impeachable conduct to offenses that could be prosecuted in court.<sup>131</sup> This Article will note only one piece of evidence supporting this judgment. James Madison, the "father of the Constitution,"<sup>132</sup> pointed specifically to impeachment as the appropriate corrective for abuse of the pardon power.

In the Virginia ratification convention, George Mason objected to granting the president this power. He was concerned that a president guilty of treason might use it to protect his confederates.<sup>133</sup> Madison replied:

There is one security in this case to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President. Should he [the Vice-President] be suspected, also, he may likewise be suspended till he be impeached and removed, and the legislature may make a temporary appointment. This is a great security.<sup>134</sup>

Madison maintained that a president would be subject to impeachment when he was merely *suspected* of being *about* to pardon a confederate. Plainly he

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than it should (which does not mean that the obstruction statute does not apply or that its application to the president would necessarily be unconstitutional). Congress could address the statute's overemphasis on the vague word either by defining it or by revising the *actus reus* of obstruction in cases of presidential misconduct. The president's power to discharge sub-cabinet officers like a special counsel or FBI director is not absolute, and, when Congress can constitutionally require good cause for an officer's removal, it should be able to specify some of the causes that are not good. See 2 MUELLER, *supra* note 78, at 174-75.

130. U.S. CONST. art. II, § 4.

131. See, e.g., Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999) ("[I]t appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order for it to be impeachable as a high crime or misdemeanor."); TRIBE & MATZ, *supra* note 36, at 44-53.

132. See, e.g., IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800* (1941).

133. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 52, at 497.

134. *Id.* at 498.



did not believe a criminal act was necessary.<sup>135</sup> The Supreme Court also has made clear that abuse of the pardon power can justify impeachment when it is not criminal.<sup>136</sup>

## VI. OTHER LIMITS? SOME CHALLENGES TO THE CLEMENCY GRANTED JOE ARPAIO AND ROGER STONE

President Trump's first grant of clemency—his pardon of Sheriff Joe Arpaio—prompted an inventive hunt for constitutional limits, and so did his pardon of his long-time associate, Roger Stone. This Part criticizes recent arguments for invalidating these pardons. A later Part, however, endorses a different argument for declaring Stone's pardon invalid and sending him to prison.<sup>137</sup>

A federal judge ordered Sheriff Arpaio to halt, among other things, the practice of stopping people who appeared to be Latino and detaining those thought to be in the United States illegally. After Arpaio defied the judge's order for 18 months, the judge held him in contempt. This action—the entry of a judgment of civil contempt—imposed no criminal punishment. A later trial conducted by another judge, however, led to Arpaio's conviction of *criminal* contempt, a misdemeanor. Before Arpaio was sentenced for this crime, President Trump pardoned him.<sup>138</sup>

The President's action heartened people who believed that violating the rights of suspected illegal immigrants should be applauded, but it brought howls from almost everyone else. Laurence Tribe tweeted that the pardon “gives the middle finger to courts and the Constitution and signals total contempt for the rule of law and for human decency.”<sup>139</sup> In a *New York Times* op-ed, Martin Redish maintained that the Arpaio pardon was not merely awful but *unconstitutional*.<sup>140</sup>

135. Madison's reference to the possibility of “suspension” prior to impeachment, however, is baffling. The Constitution does not appear to authorize this interim measure.

136. *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

137. *See infra* Part IX.

138. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaiio-trump-pardon-sheriff-arizona.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>.

139. Laurence Tribe (@tribelaw), TWITTER (Aug. 25, 2017, 9:05 PM), <https://twitter.com/tribelaw/status/901249091065303044?lang=en> [https://perma.cc/B3VQ-TSJS]. For lengthier criticism of the Arpaio pardon, see Noah Feldman, Opinion, *Arpaio Pardon Would Show Contempt for Constitution*, BLOOMBERG (Aug. 23, 2017, 12:57 PM), <https://www.bloomberg.com/opinion/articles/2017-08-23/arpaiio-pardon-would-show-contempt-for-constitution> [https://perma.cc/3PSS-VAX3].

140. Martin H. Redish, Opinion, *A Pardon for Arpaio Would Put Trump in Uncharted Territory*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/opinion/trump-arpaiio-pardon-arizona-sheriff.html>. Laurence Tribe and Ron Fein later argued that the Arpaio pardon was unconstitutional. Laurence H. Tribe & Ron Fein, ‘*Sheriff Joe*’ is Back in Court. *The Impeachment Inquiry Should Pay Attention*, BOS. GLOBE (Oct. 22, 2019, 3:30 PM), <https://www.bostonglobe.com/opinion/2019/10/22/sheriff-joe-back->

He claimed that this pardon violated the Fifth Amendment provision that “[n]o person . . . shall be deprived of life, liberty, or property without due process of law.”<sup>141</sup>

Redish did not specify what person or persons Trump had deprived of liberty without due process, but the only plausible candidates are the people Arpaio ordered stopped and arrested unlawfully. Redish did not contend that the Due Process Clause gave these victims a personal right to the criminal punishment of the official who had wronged them; that argument would have been a sure loser.<sup>142</sup> Rather, Redish noted that Arpaio had violated the Constitution and a civil injunction. His position seemed to be that the sheriff’s victims were entitled to an effective civil remedy and that criminal punishment for contempt was necessary to make the civil remedy effective.<sup>143</sup>

Even this less sweeping argument, however, is untenable. Although James Madison maintained that “a right implies a remedy,”<sup>144</sup> the Supreme Court disagrees.<sup>145</sup> Despite the “originalist” pretense of some of its Justices, the Court’s own legal standards often block the victims of constitutional wrongs from obtaining any remedy at all.<sup>146</sup>

Moreover, Trump’s pardon did not leave Arpaio’s victims without a remedy. The Constitution empowers the president to pardon only “Offenses against the United States.” He has no authority to restrict civil remedies such as the civil contempt decree already entered in Arpaio’s case and the right to sue for money damages. Criminal punishment is not a court’s only means of enforcing an injunction,<sup>147</sup> and injunctions are not a court’s only means of enforcing rights. Moreover, the president cannot restrict state remedies or state punishment—for

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court-the-impeachment-inquiry-should-pay-attention/1Yv9YZmzwL93wP9gYIFj7J/story.html [https://perma.cc/8Q9C-TE9K].

141. U.S. CONST. amend. V.

142. See *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).

143. See Redish, *supra* note 140 (“The power of courts to restrain government officers from depriving citizens of liberty absent judicial process is the only meaningful way courts have to enforce important constitutional protections.”).

144. THE FEDERALIST NO. 43, 271 (James Madison) (Clinton Rossiter ed., Signet Classics 2003); see also 3 WILLIAM BLACKSTONE, COMMENTARIES \*23 (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . .”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring) (observing that the Framers of the Constitution “appeared to link ‘rights’ and ‘remedies’ in a 1:1 correlation”).

145. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–58 (2017) (declaring that the implication of a right to recover damages for deprivations of constitutional rights is disfavored).

146. See Pamela S. Karlan, *What’s a Right Without a Remedy?*, BOS. REV. (Mar. 1, 2012), <http://bostonreview.net/pamela-karlan-supreme-court-rights-legal-remedies> [https://perma.cc/7HEL-3V8A]; Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 501–07, 510–11 (2009).

147. See *Int’l Union v. Bagwell*, 512 U.S. 821, 826–30 (1994) (describing both civil and criminal enforcement mechanisms).

example, a conviction of criminal contempt for violating a state-court decree. Assistant U.S. attorneys often block federal punishment by declining to prosecute offenders, and even when they give a pass to racists and civil-rights violators, they do not violate the Due Process Clause. Prosecutors probably do not have a broader power to free the guilty than the president.

A more credible constitutional challenge to the Arpaio pardon rests on the principle of separation of powers. Trump's pardon limited the ability of a court to enforce its orders, and the Constitution can plausibly be read to forbid a president from doing that. The separation-of-powers challenge, however, also confronts a difficulty: the Supreme Court rejected it in 1925 when it upheld President Coolidge's pardon of a speakeasy operator who had been convicted of criminal contempt after violating a court order.<sup>148</sup> The Court did note that a president's persistent use of the pardon power to frustrate judicial orders would justify his impeachment.<sup>149</sup>

In litigation concerning the effect of the Arpaio pardon, friend-of-the-court briefs filed by members of Congress, academics, public-interest law firms, and other organizations contended the pardon was unconstitutional.<sup>150</sup> When the Ninth Circuit heard argument and resolved the case, however, no lawyer or judge mentioned the briefs' strained contentions.<sup>151</sup>

President Trump's commutation of Roger Stone's sentence sparked further creativity. It inspired two political scientists, Corey Brettschneider and Jeffrey Tulis, to offer an original interpretation of the exception to the pardon

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148. *Ex parte Grossman*, 267 U.S. 87 (1925). Chief Justice Taft's opinion for a unanimous Court declared:

To exercise [the pardon power] to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.

*Id.* at 121.

149. *Id.*

150. Brief of Amici Curiae Certain Members of Congress in Support of Neither Party, *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020) (No. 17-10448); Brief of Amici Laurence H. Tribe; Martin H. Redish; Lawrence Friedman; William D. Rich; Citizens for Responsibility and Ethics in Washington; the Coalition to Preserve, Protect and Defend; Free Speech for People; Move On; the Protect Democracy Project; Republicans for the Rule of Law; and the Roderick and Solange MacArthur Justice Center in Support of the Special Counsel and Affirmance, *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020) (No. 17-10448); Memorandum of Amici Curiae Erwin Chemerinsky, Michael Tigar, and Jane B. Tigar, *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, (D. Ariz. Sept. 11, 2017), Doc. 230.

151. *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020); Oral Argument, *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020) (No. 17-10448), <https://www.ca9.uscourts.gov/media/video/?20191023/17-10448/> [<https://perma.cc/G25R-H5YP>].

power contained in the pardon clause itself.<sup>152</sup> This clause empowers the president “to grant Reprieves and Pardons for Offenses against the United States, *except in Cases of Impeachment.*”<sup>153</sup>

Until the commutation of Stone’s sentence, just about everyone agreed that the impeachment exception did no more than prevent the president from blocking the impeachment of federal officeholders.<sup>154</sup> Brettschneider and Tulis maintain, however, that the exception also “bans a president from using the pardon and reprieve power to commute the sentences of people directly associated with any impeachment charges against him.” Because one of the impeachment charges of which President Trump was acquitted declared that his conduct was “consistent with [his] previous efforts to undermine . . . investigations into foreign interference in United States elections,”<sup>155</sup> Brettschneider and Tulis maintain that the President had no “power to commute the sentences of those charged with crimes related to Russian interference in the 2016 campaign.”<sup>156</sup>

The Constitution, however, bars pardons in “Cases of Impeachment,” not in cases that touch tangentially on subjects briefly mentioned in unsuccessful impeachment efforts. Brettschneider and Tulis’s analysis gives color to the “realist” view that law is “completely indeterminate” and allows lawyers, judges, and political scientists to endorse “any proposition whatever.”<sup>157</sup>

## VII. MUST PARDONS SPECIFICALLY IDENTIFY THE CRIMES PARDONED?

President Ford pardoned former president Nixon for “all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from [Nixon’s inauguration through his

152. Corey Brettschneider & Jeffrey K. Tulis, *The Traditional Interpretation of the Pardon Power Is Wrong*, THE ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/traditional-interpretation-pardon-power-wrong/614083/> [<https://perma.cc/RAC5-87V4>]; see Corey Brettschneider & Jeffrey K. Tulis, *No, Trump Can’t Pardon Himself or Other Insurrectionists. Impeachment Would Strip Him of that Power*, WASH. POST (Jan. 15, 2021, 11:11 AM), <https://www.washingtonpost.com/politics/2021/01/13/no-trump-cant-pardon-himself-impeachment-would-strip-him-that-power/>; Lawrence Friedman, *Enforcing the Constitutional Limits on the Pardon Power*, JURIST (Mar. 14, 2020, 1:52 PM), <https://www.jurist.org/commentary/2020/03/lawrence-friedman-limits-pardon-power/> [<https://perma.cc/PSK9-3FKW>] (endorsing Brettschneider and Tulis’s argument).

153. U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

154. See Brian Kalt, *Regrettably, President Trump Does Have the Power to Commute Roger Stone’s Sentence*, TAKE CARE (July 17, 2020), <https://takecareblog.com/blog/regrettably-president-trump-does-have-the-power-to-commute-roger-stone-s-sentence> [<https://perma.cc/6SQ2-77GS>] (“The traditional view of the impeachment exception, which one can find in any treatise that explains it, is that pardons cannot apply to impeachment proceedings.”).

155. H.R. Res. 755, 116th Cong. art. 2 (2019).

156. Brettschneider & Tulis, *The Traditional Interpretation of the Pardon Power Is Wrong*, *supra* note 152.

157. See Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1385.

resignation].”<sup>158</sup> Aaron Rappaport maintains that this pardon was invalid because it violated “the specificity requirement”—the principle that a “pardon must identify the specific crimes covered by the order.”<sup>159</sup> This Section questions Rappaport’s view of common-law history and contends that blanket pardons of the sort granted former president Nixon are permissible.

Noting that the Supreme Court looks to English law as it stood in 1789 to determine the scope of the pardon power,<sup>160</sup> Rappaport finds authority for the specificity requirement in this passage of Blackstone:

General words have a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder [legislative punishment] of felony; (for it is presumed the king knew not of those proceedings) but the conviction or attainder must be particularly mentioned.<sup>161</sup>

As Rappaport notes, other eighteenth-century sources were similar. Hawkins’s *Pleas of the Crown* declared: “[T]he pardon of one who is convicted by verdict of felony is not good, unless it recited the indictment and conviction.”<sup>162</sup> Thomas Wood’s *Institute of the Laws of England* observed: “A general pardon of all murders, robberies, etc. to one indicted and convicted of murder, robbery, etc. is not good, without recital of the indictment and conviction. For it shall be intended that the King knew not of that conviction.”<sup>163</sup>

Although these sources spoke of the need to identify the offenses pardoned, pardons of unspecified offenses in England were at least as old as the

158. Gerald R. Ford, *Proclamation 4311—Granting Pardon to Richard Nixon* (Sept. 8, 1974), <https://www.presidency.ucsb.edu/documents/proclamation-4311-granting-pardon-richard-nixon> [<https://perma.cc/3CKK-LGYE>].

159. Rappaport, *supra* note 4, at 274. Other commentators have written approvingly of Rappaport’s argument. See Cass R. Sunstein, Opinion, *Yes, Presidents Can Issue Pre-Emptive Pardons*, BOS. HERALD (Jan. 12, 2021, 5:33 AM), <https://www.bostonherald.com/2021/01/12/yes-presidents-can-issue-pre-emptive-pardons/> [<https://perma.cc/MY2J-SMJT>]; Steven G. Calabresi & Norman L. Eisen, Opinion, *The Problem with Trump’s Odious Pardon of Steve Bannon*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/opinion/trump-bannon-pardon.html>.

President George H. W. Bush’s pardon of Caspar Weinberger and other Iran-Contra defendants forgave not only crimes previously charged by the Office of the Independent Counsel but also all other crimes “committed by these individuals and within the jurisdiction of that office.” Proclamation 6518 (Grant of Executive Clemency), 107 Stat. 2606, 2608 (Dec. 24, 1992). Rappaport maintains that Bush’s pardon only “arguably” violated the specificity requirement. Rappaport, *supra* note 4, at 302–03, 303 n.136.

160. Rappaport, *supra* note 4, at 279; see cases cited *supra* note 6.

161. 4 WILLIAM BLACKSTONE, COMMENTARIES \*393; see Rappaport, *supra* note 4, at 289 (observing that Blackstone’s declaration “is broad, and . . . lists no exceptions” and calling it a “clear statement about the necessity of naming the particular offense to be pardoned”).

162. 2 WILLIAM HAWKINS, A TREATISE OF PLEAS OF THE CROWN 383 (1721).

163. THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 636 (J. Watts corrected ed., 1724).

Magna Carta. In that document, King John pardoned “any offenses committed as a result of” the dispute between him and his barons between Easter 1215 and the restoration of peace.<sup>164</sup> Later uprisings through several centuries led to similar pardons for unspecified crimes.<sup>165</sup>

In 1377, Edward III marked his 50th year on the throne (his “jubilee” year) by granting England’s first general pardon—a pardon of all the king’s subjects. This pardon extended to “all manner of felonies” but excluded treason, murder, rape, and common thefts.<sup>166</sup> Later kings and parliaments granted general pardons to celebrate coronations, royal births, the conclusion of parliaments, and other occasions. These pardons appeared as often as every four or five years, and they specified only the crimes left out.<sup>167</sup>

Early in the seventeenth century, Edward Coke complained that the exceptions to general pardons had become so numerous that these pardons were of little benefit.<sup>168</sup> In 1661, however, Charles II declared that his coronation pardon was “more ample in the things pardoned, and with fewer Exceptions then have been usual in Pardons granted . . . at the Coronation of his Majesties Predecessors.”<sup>169</sup> A half-century later, William Hawkins remarked that general pardons had been “of late Years very rarely granted by the Crown,”<sup>170</sup> but even in 1750, George II obtained Parliament’s approval for granting one.<sup>171</sup> No one maintained that these pardons of unspecified offenses were unlawful.

The first clemency granted by an American president did not specify the crimes it forgave. Alexander Hamilton observed in *Federalist 74*: “[I]n seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth . . . .”<sup>172</sup> President Washington showed Hamilton’s prescience when he pardoned participants in the Whiskey Rebellion in 1795. The President’s proclamation noted that peace commissioners had promised the rebels “a general pardon . . . of all treasons and other indictable offenses against the United States.”

164. MAGNA CARTA ch. 62; see also THE DICTUM OF KENILWORTH (1266), THE NATIONAL ARCHIVES, <https://www.nationalarchives.gov.uk/education/resources/magna-carta/dictum-of-kenilworth/> [<https://perma.cc/4ZV7-6UH2>] (conditionally pardoning all “who have offended against or done any injury to [the king] or his royal crown”).

165. LACEY, *supra* note 3, at 93–100, 127–59.

166. *Id.* at 89.

167. Cynthia Herrup, *Negotiating Grace, in POLITICS, RELIGION, AND POPULARITY IN EARLY STUART BRITAIN* 124, 126 (Thomas Cogswell et al. eds., 2002). For an unbearably tedious examination of the effects of general and specific pardons, see 17 CHARLES VINER, *A GENERAL ABRIDGMENT OF LAW AND EQUITY* 18–60 (1743).

168. Herrup, *supra* note 167, at 134.

169. A Proclamation Concerning His Majesties Coronation Pardon (April 23, 1661), <https://quod.lib.umich.edu/e/eebo/A79292.0001.001?rgn=main;view=fulltext> [<https://perma.cc/WAK5-QZBH>].

170. 2 HAWKINS, *supra* note 162, at 384.

171. An Act for the King’s Most Gracious, General, and Free Pardon, 20 Geo. 2 (Eng.), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112204864203&view=1up&seq=1023>.

172. THE FEDERALIST NO. 74, *supra* note 12, at 447.

The proclamation then granted “a full, free, and entire pardon to all persons . . . of all treasons, misprisions of treason, and other indictable offenses against the United States” committed in a specified area before a specified date.<sup>173</sup> No one appears to have questioned the lawfulness of Washington’s pardon, and one could not hope for clearer evidence of the Framers’ understanding.

Pardons of unspecified crimes by English kings and American presidents were consistent with the specificity requirement set forth in the eighteenth-century treatises. This requirement did not extend beyond the situation the treatises described. Blackstone declared that a pardon would not forgive an applicant’s *prior conviction* unless it identified the conviction;<sup>174</sup> Hawkins said that a pardon of *an already convicted* felon was invalid unless it recited the conviction;<sup>175</sup> and Wood said that granting a pardon of all felonies to one *indicted and convicted* of these felonies was invalid unless it recited the indictments and convictions.<sup>176</sup> After offering this description, Wood added: “But if the Party is neither indicted or Attainted, A Pardon of all Felonies in General . . . is Good.”<sup>177</sup> The amnesties granted by President Washington in 1795 and King John in 1215 did not forgive any crimes of which the recipients had been convicted.

Demanding specificity in pardons of prior convictions but not other pardons may seem curious. The requirement noted by the treatise writers, however, responded to a recurring problem in the administration of English pardons. From the medieval period onward, a judge who presided at a convicted felon’s trial could recommend a pardon with assurance it would be granted,<sup>178</sup> and a convicted felon who did not obtain a favorable recommendation from the judge could seek a pardon on his own. This defendant, however, rarely prepared his own petition. Instead, he induced a patron, a member of the royal household, a lawyer, a surety,

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173. George Washington, Proclamation of Pardons in Western Pennsylvania (July 10, 1795), <https://millercenter.org/the-presidency/presidential-speeches/july-10-1795-proclamation-pardons-western-pennsylvania> [<https://perma.cc/RBX2-BYJL>]. The pardon exempted people already indicted, and it was conditioned on a pledge to comply with the law in the future. Of the ten alleged traitors who were tried, only two were convicted. After they were sentenced to death, Washington pardoned them. See Carrie Hagan, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN MAG. (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/> [<https://perma.cc/6AJZ-STH9>] (erroneously describing Washington’s pardons of the convicted traitors on November 2, 1795 as the first pardons in U.S. history). The next month, Washington told Congress that he thought it “consistent with the public good [as well as his own] feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.” 1 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 176 (1896).

174. 4 BLACKSTONE, *supra* note 161, at \*393.

175. 2 HAWKINS, *supra* note 162, at 383.

176. WOOD, *supra* note 163, at 636.

177. *Id.*

178. See LACEY, *supra* note 3, at 19–22; JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 60–61, 324–25 (2003) (describing the persistence of this practice in the eighteenth century).

or some other intercessor to present his case. Perceptions that intercessors stretched and invented facts were widespread.<sup>179</sup> The conduct of these intermediaries was the “subject of frequent and clamorous complaint.”<sup>180</sup>

A statute enacted by Parliament in 1353 required every pardon of felony to list the name of the person who had sought it and to describe the representations this person had made.<sup>181</sup> This statute, which the next Section of this Article will describe more fully,<sup>182</sup> directed judges to examine the representations and disallow pardons when the representations were inaccurate. A later fourteenth-century statute instructed judges to disallow pardons for murder, treason, or rape unless those crimes were “specified in the charter.”<sup>183</sup> Blackstone and other writers described the specificity requirement of their time as a means of ensuring that the king understood what “proceedings” a pardon set aside. When there had been no proceedings, no convictions, and no applications for clemency, there was little chance the king had been deceived by felons and their unscrupulous champions.<sup>184</sup>

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179. See LACEY, *supra* note 3, at 44–58.

180. *In re Greathouse*, 10 F. Cas. 1057, 1059 (N.D. Cal. 1864).

181. 27 Edw. 3 stat. 1 c. 2 (Eng.), reprinted in 1 STATUTES OF THE REALM 330 (William S. Hein & Co. 1993) (1810).

182. See *infra* text accompanying notes 194–95.

183. 13 Rich. 2 stat. 2 c.1 (Eng.), reprinted in 2 STATUTES OF THE REALM, *supra* note 181, at 68.

184. Moreover, it is easy to be specific when forgiving an offense of which someone has been convicted and difficult to be specific when no offense has been charged. To specify uncharged offenses effectively, a president must list every crime an inventive prosecutor might charge. Cataloging all of these crimes could make even a minor offender look like Charles Manson, and, even after a conscientious effort, a president advised by able lawyers might miss some possible charges.

Rappaport maintains that a pardon must specify the crimes it forgives because, by accepting a pardon, a recipient admits his guilt, and “[a] defendant must know the specific crimes he is admitting to when utilizing a pardon.” Rappaport, *supra* note 4, at 294. In *Burdick v. United States*, 236 U.S. 79 (1915), the Supreme Court did explain a grantee’s right to refuse a pardon partly by saying that a pardon “carries an imputation of guilt; acceptance a confession of it.” *Id.* at 94. President Ford reputedly carried a copy of *Burdick*’s statement in his wallet, and he defended his pardon of former president Nixon by claiming that Nixon must have admitted one crime or another by accepting Ford’s pardon of unspecified offenses. Brian C. Kalt, *Five Myths About Presidential Pardons*, CHI. TRIB. (June 7, 2018, 5:00 PM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-pardons-presidential-trump-nixon-ford-kardashian-0608-story.html> [<https://perma.cc/63D5-SWNJ>].

Perhaps *Burdick* meant only that a grantee should be allowed to refuse a pardon because others might perceive his acceptance as an acknowledgment of guilt. If the Supreme Court truly meant that accepting a pardon constitutes a confession as a matter of law, it would follow that a president could not pardon an exonerated prisoner unless this innocent prisoner falsely confessed. The idea is bizarre. See Eugene Volokh, *Is Accepting a Pardon an Admission of Guilt?*, WASH. POST (Aug. 26, 2017, 2:41 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/26/is-accepting-a-pardon-an-admission-of-guilt/>.



Aaron Rappaport defines “amnesties” as pardons issued to groups of unnamed offenders. He reports that presidents have granted approximately 30 amnesties over the course of American history, and he acknowledges that at least seven of them failed to identify the crimes forgiven.<sup>185</sup> Rappaport, however, does not include Washington’s amnesty for the Whiskey Rebels among the seven.<sup>186</sup> This first pardon by America’s first president shows beyond doubt that, contrary to Rappaport’s thesis, the Framers did not see the Constitution as requiring specificity in every grant of clemency.<sup>187</sup>

Rappaport suggests that, because “[a]mnesties are almost always issued for offenses relating to military conflict,” the president’s authority to command the armed forces might allow him to exempt amnesties from the specificity requirement applicable to other pardons.<sup>188</sup> General pardons in England, however, show that the king’s authority to pardon unspecified offenses extended well beyond situations of military conflict.

The Supreme Court has said that the distinction between amnesties and other pardons is of no legal importance,<sup>189</sup> and the treatises on which Rappaport relies did not suggest this distinction. They distinguished instead between pardons of recorded felony convictions and other pardons, and they insisted on specificity only when a convict asked a court to set aside his previously recorded conviction.<sup>190</sup> These treatises did not indicate that President Ford’s pardon of former president Nixon for unspecified, uncharged offenses was invalid.<sup>191</sup>

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185. Rappaport, *supra* note 4, at 304. See generally Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT. REP. 139 (2001).

186. See Rappaport, *supra* note 4, app. A at 317 (mistakenly indicating that Washington pardoned participants in Fries Rebellion on the date he in fact pardoned participants in the Whiskey Rebellion and mistakenly indicating that Washington’s pardon identified the offenses forgiven). Rappaport acknowledged and expressed regret for this error in a gracious email sent to me on December 6, 2020.

187. Rappaport, *supra* note 4, at 304 (“[I]ncluding amnesties in the analysis does not change the conclusion.”).

188. *Id.* at 304–05. When a large group of ill-behaved rebels have committed a variety of crimes, specifying all of these crimes in a grant of clemency might be a formidable task. Providing a list of the crimes excluded usually would be easier. In some situations, an offer of clemency in the form Rappaport says the Constitution requires might not bring an end to hostilities. Insurgents might fear that even a long list of pardoned offenses would leave loopholes. They might insist on blanket forgiveness subject to exceptions.

189. *Knote v. United States*, 95 U.S. 149, 153 (1877); see *Brown v. Walker*, 161 U.S. 591, 601 (1896) (“The distinction between amnesty and pardon is of no practical importance.”).

190. Coronation pardons and other general pardons in England reached some previously recorded felony convictions. A literal reading of the specificity requirement described in the eighteenth-century treatises might require a court to leave these convictions undisturbed, but Blackstone and the other treatise writers probably did not mean to question the validity of general pardons even when they undid past convictions. These writers seem to have contemplated only cases in which a convict presented an insufficiently precise pardon the king had granted to him as an individual.

In 1864, a federal prosecutor, citing the eighteenth-century treatises, maintained that President Lincoln's "full pardon" for "all persons who have directly or by implication participated in the existing Rebellion" (a general pardon conditioned on a loyalty oath and subject to exceptions) did not free a prisoner who previously had been convicted of giving aid and comfort to Confederate rebels. A trial court rejected the prosecutor's claim and freed the prisoner. *In re Greathouse*, 10 F. Cas. 1057 (N.D. Cal. 1864).

The court initially doubted "whether, at the present day, [the specificity requirement set forth in the treatises] would be enforced in this country, or even in England." *Id.* at 1059. In addition:

The only reason assigned for holding void the pardon of a convict, which does not recite the conviction or indicting of a person indicted, is, that it appears from the omission that the king was not acquainted with the facts of the case. But this reason can have no application to general acts of amnesty and pardon, which are intended to include whole classes of offenders.

*Id.* at 1060.

The court recited evidence that general pardons in England did set aside prior convictions, and it said: "The diligence of the district attorney has failed to discover a single case where the benefit of a general pardon . . . has been withheld on the ground that the party had already been convicted." *Id.* For a description of the crime the court held within Lincoln's amnesty (joining with others to purchase a 90-ton schooner, outfit it with weapons, and use it to seize other vessels and send the gold they carried to the Confederacy after taking a share), see *United States v. Greathouse*, 26 F. Cas. 18 (N.D. Cal. 1863); *Confederate Privateers in California*, CIVIL WAR TALK (Nov. 15, 2013), <https://civilwartalk.com/threads/confederate-privateers-in-california.92003/> [<https://perma.cc/RWB3-8PXM>].

191. Frank Bowman endorses a position that could be called "Rappaport light." Although he rejects Rappaport's claim that pardons must specify the offenses forgiven, he maintains that pardons must either specify these offenses or else describe the "events or transactions" in which the offenses might have occurred. Bowman concludes that, because President Ford's pardon of former president Nixon did not refer to any events or transactions, it was invalid. By contrast, he says that President George H. W. Bush's pardon of the Iran-Contra defendants for all crimes they might have committed within the jurisdiction of the Office of the Special Counsel for Iran/Contra Matters (that is, all crimes that had been or might be uncovered during the investigation of Iran-Contra matters) was "constitutionally appropriate." Frank O. Bowman, III, *Why "Blanket Pardons" Are Unconstitutional*, 33 FED. SENT. REP. 301 (2021).

General pardons in England neither specified the crimes forgiven nor referred to events or transactions, but Bowman discounts their relevance. He notes that, by the time of the U.S. Constitution, general pardons were infrequent and issued only after "careful negotiations between the Crown and the legislature." *Id.* at 303. As Bowman recognizes, however, the Framers of the U.S. Constitution rejected giving Congress a role in granting pardons. *Id.* at 304. By affording the president the "Power to grant Reprieves and Pardons for Offenses against the United States," the Constitution presumably conferred upon the president all the power to grant clemency the king and Parliament could exercise together in England. When these authorities agreed, they plainly could approve what Bowman calls "blanket pardons."

Bowman writes: "All American group pardons or amnesties have been limited either by reference to the beneficiaries' participation in certain specified events, or

### VIII. ARE PARDONS INVALID WHEN ISSUED AS A RESULT OF FRAUD, BRIBERY, OR OTHER WRONGFUL CONDUCT?

#### A. Pardons Obtained by Fraud

At common law, a pardon granted to an individual to forgive a past conviction was invalid when it failed to specify the conviction with sufficient precision. That limitation of the pardon power was four centuries old when the Constitution was written, and so was another: a pardon obtained by fraud was void. An 1863 decision of the Pennsylvania Supreme Court described and applied this limitation.<sup>192</sup>

In 1862, the Governor of Pennsylvania and a United States Marshal received letters that appeared to be from Assistant Secretary of War P. H. Watson. The letters declared that the War Department wished to send the “somewhat notorious forger, Buchanan Crosse” on a mission behind Confederate lines. They asked the Governor to pardon Crosse and the Marshal to convey the freed prisoner to Washington. The Governor and the Marshal complied. When the Marshal reached the office of Secretary of War Stanton and learned the letters were forged, however, he returned Crosse to prison. Crosse then sued for his freedom, alleging that a court could not receive evidence to contradict the pardon signed by the Governor. He lost.<sup>193</sup>

The Pennsylvania court noted a relevant English statute enacted in 1353, a statute briefly mentioned in Section VII of this Article.<sup>194</sup> It declared that “our Lord the King hath often granted Charters of Pardon of Felonies upon feigned and

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by enumeration of the offenses pardoned, or both.” *Id.* Even if this statement were accurate, it would bear on the constitutional issue only if presidents referred to specified events because they believed the Constitution required it. There seems to be no evidence that they did. Bowman appears to be the first person in either England or America to suggest that the specification of “events or transactions” bears on the validity of pardons.

Like Rappaport, moreover, Bowman fails to note the first grant of clemency in U.S. history. In 1795, following the Whiskey Rebellion, George Washington granted “a full, free, and entire pardon to all persons . . . of all . . . indictable offenses against the United States committed within the fourth survey of Pennsylvania before the said 22d day of August last past.” Washington, *supra* note 173. That was a blanket pardon, and no one seems to have doubted its validity.

192. Commonwealth *ex rel.* Crosse v. Halloway, 44 Pa. 210 (1863).

193. *Id.* Jefferson Davis later claimed that the Pennsylvania Governor, Andrew G. Curtin, had released Crosse, paid him a large sum of money, and sent him south to assassinate Davis. *More About Jeff Davis, How Governor Curtin Figured in His Life*, DAILY ARKANSAS GAZETTE (July 19, 1887), <https://www.newspapers.com/clip/14664818/j-buchanan-crosse/> [<https://perma.cc/Q8R2-J2QA>]. For accounts of some of Crosse’s “somewhat notorious” activities before his conviction in Pennsylvania, see *The Romance of Crime; The Alleged Forger, J. Buchanan Cross*, N.Y. TIMES (Feb. 14, 1860), <https://www.nytimes.com/1860/02/14/archives/the-romance-of-crime-the-alleged-forger-j-buchanan-cross.html>; *J. Buchanan Cross, the Forger, Recaptured*, N.Y. TIMES (Aug. 11, 1860), <https://www.nytimes.com/1860/08/11/archives/j-buchanan-cross-the-forger-recaptured.html>.

194. See *Crosse*, 44 Pa. at 219.

untrue Suggestions of divers People, whereof much Evil had chanced in Times past." The statute directed "that from henceforth in every Charter of Pardon of Felony, which shall be granted at any Man's Suggestion, the said Suggestion, and the Name of him that maketh the Suggestion, shall be comprised in the same Charter." Finally, the statute provided:

[T]he Justices before whom such Charters shall be alleged, shall enquire of the same Suggestion, and that as well of Charters granted before this Time, as of Charters which shall be granted in time to come; and if they find them untrue, then they shall disallow the Charters so alleged, and shall moreover do as the Law demandeth.<sup>195</sup>

Although the court recognized that the ancient statute had never been in effect in Pennsylvania, it reported that the common law rule was similar: "[A]ll charters and patents may be avoided if based on any false suggestion."<sup>196</sup> Many English and American texts and decisions confirm that pardons obtained by fraud are void.<sup>197</sup>

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195. 27 Edw. 3 stat. 1 c. 2 (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 181, at 330.

196. *Crosse*, 44 Pa. at 219.

197. *See, e.g.*, 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 382–83 (3d ed. 1739) (declaring pardons "void" when the king "was not fully apprised . . . of the Heinousness of the Crime"); 4 BLACKSTONE, *supra* note 6, at \*393 ("[W]herever it may reasonably be presumed the king is deceived, the pardon is void."); FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE 383 (9th ed. 1889) ("A pardon fraudulently procured will . . . be treated by the courts as void . . . . Yet this test should be cautiously applied . . . , for there are few applications for pardon in which some suppression or falsification may not be detected."); 20 RULING CASE LAW 550–51 (William M. McKinney & Burdett A. Rich eds., 1918) ("In the United States also it has often been broadly stated that a pardon obtained by fraud is void."); *State v. Leak*, 5 Ind. 359, 361–62 (1854) ("It is well settled in the British Courts that fraud vitiates a pardon or remission, and so it is in the American."); *State v. McIntire*, 46 N.C. (1 Jones) 1, 4 (1853); *Dominick v. Bowdoin*, 44 Ga. 357, 365 (1871); *Rosson v. State*, 23 Tex. Ct. App. 287, 290 (1887); *Ex parte Paquette*, 27 A.2d 129, 133 (Vt. 1942).

For a description of one of President Trump's sentence commutations that might well be invalid as based on a "false suggestion," see Michael S. Schmidt et al., *Trump's Last-Minute Pardon Frees Man Still Facing Accusations of Violence*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/trump-pardons-jonathan-braun.html> (reporting that the White House substantially overstated the portion of a clemency recipient's sentence he had served and indicating the White House might have been unaware that the recipient was the subject of ongoing civil and criminal investigations and had a recent history of violence). There may be other vulnerable grants as well. Eighty-one percent of Trump's clemency grants (193 grants) followed his defeat in the presidential election of 2020, and 60% (143 grants) came on his last day as president. Alschuler, *supra* note 15. A large majority of these end-of-the-term grants were the result of personal and political connections and went to people whose applications had not been reviewed by the Department of Justice. *Id.* Now that the Trump administration is over, it might be worthwhile for the Justice Department to recover from the National Archives the letters and briefs filed with the White House in support of successful clemency applications.

### B. The Procedure for Challenging a Pardon

In 1883, the Ohio Supreme Court disagreed with the Pennsylvania court on an issue of procedure. The Governor of Ohio had pardoned a convicted murderer, Isaac Knapp, in the belief he was dying of tuberculosis, but the Governor later concluded that Knapp had deceived prison doctors "by eating unwholesome articles and by other devices."<sup>198</sup> At the Governor's direction, a prison warden arrested Knapp and returned him to prison.

Knapp then sought a writ of habeas corpus. The warden responded that the pardon procured by fraud was void, so that Knapp's imprisonment on the basis of his earlier conviction and sentence was valid. The Ohio court, however, refused to consider whether Knapp had obtained his pardon dishonestly. Because no judicial determination of the pardon's invalidity had preceded the Warden's arrest, Knapp was entitled to his freedom.<sup>199</sup>

The court acknowledged that "at common law . . . a pardon may be impeached for fraud by *scire facias*,"<sup>200</sup> but it concluded that the validity of Knapp's pardon was not subject to review in a habeas corpus proceeding. In the case of the "somewhat notorious forger," the Pennsylvania Supreme Court had insisted that "such a question may be raised by a *scire facias* . . . but it may also be raised on habeas corpus."<sup>201</sup>

The common-law procedure to which both courts referred—*scire facias*—originated in the thirteenth century.<sup>202</sup> A writ of *scire facias* allowed a court to examine the validity of any public grant, including a patent, charter, or

Prosecutors and other department personnel with knowledge of the applicants' cases could examine the accuracy of the representations made in these papers.

198. *Knapp v. Thomas*, 39 Ohio St. 377, 378 (1883).

199. *Id.* at 394. The court doubted that Dr. Gay, "a physician of ability," could have been tricked into a tuberculosis diagnosis by a prisoner's ingestion of unwholesome articles, but it insisted that its skepticism about the Governor's judgment played no part in its decision. *Id.* Knapp was released in accordance with the court's decision in February 1883 and died six months later. Following his death, Dr. Gay advised the court that his diagnosis of the prisoner had been confirmed. *Id.* at 380 (note by Okey, J.).

200. *Id.* at 386.

201. *Crosse*, 44 Pa. at 219. *Knapp*, the Ohio case, was a three-to-two decision, and rulings in other states allowed wardens to defend habeas corpus actions by showing that pardons had been obtained by fraud. *E.g.*, *Dominick v. Bowdoin*, 44 Ga. 357, 365 (1871); *Rosson*, 23 Tex. Ct. App. at 290; *State v. Morris*, 208 S.W.2d 701, 703-04 (Tex. Civ. App. 1948); *Jamison v. Flanner*, 228 P. 82, 85 (Kan. 1924). *But see Bess v. Pearman*, 150 S.E. 54, 62 (S.C. 1929) (endorsing *Knapp*); *In re Edymoin*, 8 How. Pr. 478 (N.Y. S. Ct. 1852), <https://cite.case.law/how-pr/8/478/> [<https://perma.cc/UCU3-WMK8>] (anticipating *Knapp* by refusing to consider an allegation of fraud in a habeas corpus proceeding). In both *Knapp* and *Edymoin*, a pardoned prisoner had been rearrested by order of a governor without any prior judicial determination of his pardon's invalidity.

202. *See Statute of Westminster*, 2d, 1285, 13 Edw. c. 11, 39 (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 181, at 71.

pardon.<sup>203</sup> In a case in 1661, three convicted murderers sought to block their executions by presenting a pardon to the Court of King's Bench. Reviewing this document, the judges thought the defendants or their champions might have misdescribed their crime when seeking the king's mercy. Warning that a *scire facias* as much as seven years later could lead to a determination of the pardon's invalidity and the defendants' executions, the court stayed their executions to allow them to seek a less questionable pardon.<sup>204</sup> At the time of the U.S. Constitution, anyone in England could obtain a writ of *scire facias* as long as the attorney general approved.<sup>205</sup> Nothing resembling the standing requirements the Supreme Court later read into the U.S. Constitution applied.<sup>206</sup>

In 1938, the Federal Rules of Civil Procedure abolished *scire facias* in the federal courts. They added, however: "Relief previously available through [this writ] may be obtained by appropriate action under these rules."<sup>207</sup> The appropriate federal procedure for challenging a pardon today is an action against the pardon recipient for a declaratory judgment that the pardon is invalid.<sup>208</sup> No private party may be able to bring this action, but, just as the U.S. Attorney General and other prosecutors have standing to seek a conviction, they have standing to challenge a pardon that purports to set a conviction aside.<sup>209</sup>

### C. Pardons Obtained by Bribery

All of the decisions invalidating pardons obtained by fraud came in cases in which authorities had been tricked. None came in cases in which kings, governors, presidents, or other officials had joined pardon recipients in defrauding the public—for example, by taking bribes. No decision appears to have addressed whether a pardon can entitle a recipient to his freedom even when he paid cash.

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203. See JOSEPH CHITTY, TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 330–31 (1820); THOMAS CAMPBELL FOSTER, TREATISE ON THE WRIT OF SCIRE FACIAS 211–16 (1851).

204. Thomas Howard's Case (1661), T. Raymond \*13 (3d ed. 1793).

205. See Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673, 1683 (2013); WILLIAM HANDS, THE LAW AND PRACTICE OF PATENTS FOR INVENTIONS 16 (1808) ("[A] writ of scire facias . . . issues out of the Court of Chancery, at the instance of any private person, but in the name of the King, leave to issue it must therefore be previously obtained from the Attorney General.").

206. See *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922); *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923).

207. FED. R. CIV. P. 81(b).

208. See 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration."). As the writ of *scire facias* fell into disuse in America, prosecutors used bills in equity to challenge the validity of pardons. See, e.g., *Bess v. Pearman*, 150 S.E. 54, 61–62 (S.C. 1929); *Rathbun v. Baumel*, 191 N.W. 297, 299 (Iowa 1923). In the federal courts, declaratory judgment has now supplanted both bills in equity and *scire facias*, but the ability of a prosecutor to challenge a pardon seems essentially unchanged.

209. See, e.g., *Rathbun*, 191 N.W. at 299.

In eighteenth-century England, obtaining a pardon by deception might have looked different from obtaining one by paying a bribe. Today, however, any possible distinction between these two forms of dishonesty has collapsed. The perceived wrong once might have consisted simply of deceiving the king. In America today, however, “[a]ny fraud in procuring the pardon is not a fraud against the individual who grants it, but is rather a fraud against the office and the state.”<sup>210</sup> The fact that a governor, a president, or another official has joined a pardon recipient in deceiving the public only makes the fraud worse.

In England in the eighteenth century, the king’s motives could not be questioned, and he could not be prosecuted. Courts sometimes said he could do no wrong.<sup>211</sup> As the Supreme Court has said repeatedly, however, the United States was founded on the opposite principle.<sup>212</sup> The Constitution says a president may be prosecuted for bribery and other crimes following his impeachment,<sup>213</sup> and a president who completes his term without being impeached also may be prosecuted for crimes committed while in office.

Perhaps while a president remains in office, a court may not consider his motives or examine whether he has been bribed,<sup>214</sup> but a member of the president’s administration is so unlikely to challenge his pardons that the question is hardly worth asking.<sup>215</sup> After a president leaves office, a court may examine his reasons

210. *Gulley v. Budd*, 189 S.W.2d 385, 391 (Ark. 1945) (McFaddin, J., concurring); see *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (“A pardon in our days is not a private act of grace from an individual happening to possess power.”).

211. See 1 BLACKSTONE, *supra* note 48, \*238–39; CHITTY, *supra* note 57, at 5.

212. See *Trump v. Vance*, 140 S. Ct. 2412, 2422 (2020) (“[A] king is born to power and can ‘do no wrong.’ The president, by contrast, is ‘of the people’ and subject to the law.”); *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979) (noting that the fiction that the king could do no wrong “was rejected by the colonists when they declared their independence from England”); *Langford v. United States*, 101 U.S. 341, 343 (1879) (similar).

213. U.S. CONST. art. I, § 3, cl. 7.

214. Some state decisions, after noting the invalidity of fraudulently obtained pardons, declared that a “court will not inquire into the motives which prompted the pardoning official to issue the pardon, for to do so would be to usurp the pardoning power.” *Jason v. Flanner*, 228 P. 82, 85 (Kan. 1924); see *Rathbun*, 191 N.W. at 299 (“The Governor may issue pardons without let or hindrance on the part of the judiciary.”); *Adkins v. Commonwealth*, 23 S.W.2d 277, 279–80 (Ky. 1929) (declaring that the governor’s motives may not be questioned).

At least one decision, however, added a qualification to this qualification:

Courts have no right to substitute their discretion for the discretion of the Governor . . . or to nullify any of his official acts; unless it clearly appears that the Governor . . . has usurped powers not granted him, or has used his discretion in such a manner as to violate the law. It is the duty of the courts to indulge every presumption in favor of the regularity of the official acts of the Governor . . . and only interfere where it is clear that he has violated the law.

*Ex parte Hawkins*, 136 P. 991, 992 (Okla. Crim. App. 1913).

215. A special counsel or other special prosecutor conceivably might challenge a pardon granted by a current president.

for granting a pardon in a criminal trial, and any justification for examining his motives in that trial extends equally to a civil proceeding challenging a pardon's validity.<sup>216</sup> If a president is not unduly inhibited in exercising his pardon power by the prospect of criminal prosecution, he is unlikely to be unduly inhibited by the prospect that the harm he has done will be corrected and the *status quo ante* restored.<sup>217</sup>

Although it is difficult to conceive of a justification today for treating bribery differently from other kinds of fraud,<sup>218</sup> and although courts plainly may set aside pardons obtained by deception,<sup>219</sup> numerous scholars have made assertions like this one of Bob Bauer and Jack Goldsmith: "A pardon or commutation is 'absolute' for the beneficiary for the crime pardoned. But a pardon does not afford the president, as the grantor, immunity from commission of a crime in connection with granting a pardon."<sup>220</sup> None of these scholars have

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216. A former president has "absolute . . . immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). An action to declare a pardon invalid, however, would not subject a former president to any financial detriment but would merely set aside a presidential act determined to be unlawful. Like a criminal prosecution, an action to declare a pardon void would be brought by the attorney general on behalf of the people of the United States. A former president would not be inundated with every claim a private litigant might choose to file. Indeed, the former president would not be a party to the action at all.

217. At least if I were a corrupt president, I would fear imprisonment more than the invalidation of one of my pardons.

218. Courts long have spoken of bribery as a kind of fraud. *See, e.g., Ex parte Wilson*, 114 U.S. 417, 423 (1885) (describing the "suppression of testimony by bribery" as a "fraud [upon] the administration of justice"); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("A scheme to get a public contract on more favorable terms . . . by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public."); *Commonwealth ex rel. Tate v. Bell*, 22 A. 641, 642 (Pa. 1891) ("Bribery of delegates to nominating conventions is a contemptibly mean fraud upon our elective system."); *State ex rel. Bradford v. Cross*, 17 P. 190, 190 (Kan. 1888) ("A contract obtained by bribery of those having control over such contracts is obtained by fraud upon the principal.").

219. *See supra* Part VIII(A).

220. BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 126 (2020); *see, e.g., Hemel & Posner, supra* note 52, at 1324–25 ("The most natural interpretation [of the Pardon Clause and Supreme Court precedent] is that Congress cannot limit the effect of a pardon that has been granted, but that criminal law can still apply to the pardon's grantor."); Bowman, *supra* note 5, (manuscript at 39–40) ("I think a pardon, once issued, is absolute in the sense that no other officer or branch of government may undo it . . . . That does not mean that either the grantor or the recipient of the pardon will be exempt from all adverse consequences related to its subject matter."); Rappaport, *supra* note 4, at 274 n.3 (Although a president who has obstructed justice by granting pardons is subject to prosecution, "the pardons themselves would likely be upheld and remain binding"); KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 40, at 58 (maintaining that if President Nixon and Vice President Ford had agreed to trade Nixon's resignation for Ford's pardon, both could be convicted of bribery, but the pardon would remain valid); Laurence Tribe, *Donald Trump's Pardons Must Not Obstruct Justice*, FINANCIAL TIMES (Dec. 26, 2020, 7:27 PM), <https://www.ft.com/content/e73fdd69-1fee-4886-b299-959ce9647151> [<https://perma>



explained why a pardon should stand even after a president has been sent to prison for issuing it, and their conclusion seems odd. The law hardly ever denies a civil corrective for a wrong it punishes criminally. One would not applaud a court that sent a thief to prison but refused to return the stolen property to its owner.

Perhaps the scholars see no mechanism for challenging a pardon after it has been delivered. They may be unaware that courts have entertained challenges to pardons for 700 years. Or perhaps their position rests on a schizophrenic interpretation of the Pardon Clause—one that says the president has an “absolute” power to grant a pardon in exchange for a bribe but can be imprisoned if he does it.

Such a “split the difference” interpretation makes no sense. A better interpretation would say the Constitution neither authorizes a president to trade clemency for bribes nor authorizes imprisoning him for lawfully exercising his powers. As this Article has noted, people who read a text “literally” to stand for a proposition that no one would endorse probably have misread it.<sup>221</sup> Few people of ordinary sensibilities would contend that a pardon obtained by bribery should remain inviolate while both the bribe giver and bribe recipient are punished. Just as a president who grants a pardon in return for a bribe may be prosecuted, a pardon obtained by bribery should be void.

In 1810, in the landmark case of *Fletcher v. Peck*,<sup>222</sup> the Supreme Court failed to decide whether an official action procured by bribery was invalid. In *Fletcher*, a litigant claimed that Georgia legislators had taken bribes to approve a massive sale of state land (land that encompassed the current states of Alabama and Mississippi<sup>223</sup>). Chief Justice Marshall’s opinion for the Court noted that the question before it was not whether the state would be bound by the sale if the claim of corruption were true. If that question were presented, Marshall said, “the court would approach [it] with much circumspection.”<sup>224</sup> In such a case, the Court would be required to consider whether “direct corruption” was essential or whether “undue influence of any kind [would] be sufficient.”<sup>225</sup> The Court also would need to consider whether “the vitiating cause” must “operate on a majority” or a different number of legislators.<sup>226</sup> In *Fletcher* itself, Georgia did not challenge the sale, and the Court declined to consider a collateral challenge to the allegedly corrupt sale in a suit between subsequent purchasers.<sup>227</sup>

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cc/A5Q5-XXMW] (“The result is not to negate the pardons issued but to expose a president to prosecution for the way he deployed them.”).

221. See text *supra* accompanying notes 59–60.

222. 10 U.S. (6 Cranch) 87 (1810). The case is a landmark primarily because, in a portion of the opinion not considered here, it was the first in which the Supreme Court held a state statute unconstitutional.

223. JOHN T. NOONAN, JR., BRIBES 435 (1984).

224. *Fletcher*, 10 U.S. (6 Cranch) at 130.

225. *Id.*

226. *Id.*

227. Resolving questions *Fletcher* left open, Stephen Gardbaum maintains that bribes paid to legislators and other improper influences sometimes render legislation unconstitutional. See generally Stephen Gardbaum, *Due Process of Lawmaking Revisited*,

Today, when a government, a business entity, or an individual enters a contract because its agent has been bribed, the government, entity, or individual is entitled to treat the contract as void.<sup>228</sup> In addition, when an agent of the federal government has been bribed to enter a contract, the government is entitled to special statutory remedies for fraud.<sup>229</sup>

Bribery of a judge or juror constitutes a fraud upon the court and entitles a litigant to vacate any civil judgment the bribe has procured.<sup>230</sup> Bribery can also render an acquittal in a criminal trial a nullity. In 1997, a Chicago hit man was convicted of murder although he earlier had been acquitted of that crime. The court rejected his double-jeopardy claim because he had bribed a judge to obtain the acquittal.<sup>231</sup> In denying this defendant's habeas corpus petition, the Seventh Circuit remarked: "It seems only appropriate that a defendant should not be able to avoid punishment for murder because he bribed the judge."<sup>232</sup> Equally, a criminal should not be able to avoid punishment because he bribed a president.

## IX. AN APPLICATION: LEGAL RESPONSES TO PRESIDENT TRUMP'S PARDONS OF ROGER STONE AND PAUL MANAFORT

The first two Sections of this Part describe the circumstances that led President Trump to pardon Roger Stone and Paul Manafort. The third considers the significance of these circumstances. By exchanging grants of clemency for the recipients' noncooperation with prosecutors, Trump, Stone, and Manafort apparently committed both bribery and obstruction of justice. They are subject to criminal prosecution, and the clemency granted to Stone and Manafort appears to be invalid.

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21 U. PA. J. CONST. L. 1 (2018). Of course the difficulties of examining whether a large number of legislators took bribes and of determining how many improperly influenced votes might be needed to void a statute do not arise when someone challenges an allegedly corrupt act by a single public official.

228. See *Gardner v. North State Mut. Life Ins. Co.*, 79 S.E. 806, 810 (N.C. 1913) ("A contract made by an agent under the influence of bribery . . . , in fraud of the principal, is voidable by the latter." (quoting TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT 229 (1903))); RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. e (AM. L. INST. 2006) ("A principal may avoid a contract entered into by the agent with a third party who participated in the agent's breach of duty."); 1 CORBIN ON CONTRACTS § 85.3 (2020) ("Even if the conduct is not tortious or criminal, contracts that are . . . the product of commercial bribery are not enforceable.").

229. See *SuperMex, Inc. v. United States*, 35 Fed. Cl. 29, 47 (1996).

230. See, e.g., *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) ("Generally speaking, only the most egregious misconduct, such as bribery of a judge or member of a jury . . . , will constitute a fraud upon the court." (quoting *United States v. Int'l Telephone & Telegraph Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972), *aff'd*, 410 U.S. 919 (1973))).

231. See *People v. Aleman*, 667 N.E.2d 615, 626 (Ill. App. 1996) (rejecting the hit man's double-jeopardy claim and allowing his second trial to proceed).

232. *Aleman v. Judges of the Circuit Court*, 138 F.3d 302, 309 (7th Cir. 1998).

### A. The Pardon of Roger Stone

Commentator Tucker Carlson once called Roger Stone “the Michael Jordan of political mischief.”<sup>233</sup> Stone’s dishonest political tricks began before he turned 20 during the election campaign of 1972.<sup>234</sup> They led to his dismissal from the staff of Senator Robert Dole a few years later.<sup>235</sup> Before Stone turned 30, one of Donald Trump’s lawyers, Roy Cohn, introduced him to Trump.<sup>236</sup> Before Stone turned 50, he had urged Trump to run for president, had served as chair of an exploratory committee for a third-party run by Trump, and had worked as a lobbyist for Trump’s casino business. Both Stone and Trump had been fined for concealing their financing of an advertising campaign against allowing competitor casinos.<sup>237</sup>

Before Stone turned 65, he participated in Trump’s 2016 presidential campaign. After communicating through intermediaries with WikiLeaks founder Julian Assange (or at least pretending to), he passed information to campaign officials about future WikiLeaks releases of unlawfully obtained materials harmful to Trump’s opponent.<sup>238</sup>

233. Tucker Carlson, *Introduction* to ROGER STONE, *STONE’S RULES* i (2018). Carlson added: “This is either terrifying or delightful, depending on your uptightness level. I love it.” *Id.*

234. Stone’s first political stunt may have been using a false identity to send a contribution in the name of the Young Socialist Alliance to Pete McCloskey, one of Richard Nixon’s rivals for the Republican presidential nomination, and then sending a receipt for the contribution to the *Manchester Union Leader*. Stone also hired a Republican operative to infiltrate the campaign of Democratic nominee George McGovern. Jeffrey Toobin, *The Political Trickster*, *THE NEW YORKER* (May 23, 2008), <https://www.newyorker.com/magazine/2008/06/02/the-dirty-trickster> [<https://perma.cc/9SDK-5KCX>].

235. *Id.*

236. Olivia Paschal & Madeleine Carlisle, *A Brief History of Roger Stone*, *THE ATLANTIC* (Nov. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/11/roger-stones-long-history-in-trump-world/581293/> [<https://perma.cc/K9T8-RBFS>].

237. *Id.*; Michael Duffy & Matthew Cooper, *Jesse Ventura May Not Run for President in 2000—But He Wouldn’t Mind if Donald Trump Joined the Fray*, *CNN* (Sept. 20, 1999), <https://edition.cnn.com/ALLPOLITICS/time/1999/09/20/trump.html> [<https://perma.cc/MR36-WX4U>]; Charles V. Bagli, *Trump and Others Accept Fines for Ads in Opposition to Casinos*, *N.Y. TIMES* (Oct. 6, 2000), <https://www.nytimes.com/2000/10/06/nyregion/trump-and-others-accept-fines-for-ads-in-opposition-to-casinos.html>.

238. Here are some findings of the Senate Intelligence Committee approved by both its Republican and Democratic members:

Trump and senior Campaign officials sought to obtain advance information about WikiLeaks through Roger Stone. In spring 2016, prior to Assange’s public announcements, Stone advised the Campaign that WikiLeaks would be releasing materials harmful to Clinton. Following the July 22 DNC release, Trump and the Campaign believed that Roger Stone had known of the release and had inside access to WikiLeaks, and repeatedly communicated with Stone about WikiLeaks throughout the summer and fall of 2016. Trump and other senior Campaign officials specifically directed Stone to obtain information about upcoming document releases relating to Clinton and report back.

Shortly before Stone was indicted, the President praised one of Stone's many statements that he would "never testify against Trump." The President commented: "Nice to know that some people still have 'guts!'"<sup>239</sup> In an interview, Trump said: "This flipping stuff is terrible." He added: "But I had three people . . . [who refused] to say what [the Special Counsel's Office] demanded—Manafort, [Jerome] Corsi, and Roger Stone. It's actually very brave."<sup>240</sup> Trump called the FBI's execution of the search and arrest warrants for Stone "a very sad thing for this country," criticized the Special Counsel for indicting Stone while ignoring "the lying done by [former FBI Director James] Comey," and said that, although he was not currently considering a pardon for Stone, "you have to get rid of the Russia witch hunt."<sup>241</sup>

In November 2019, a jury convicted Stone of obstruction, witness tampering, and five counts of making false statements to Congress.<sup>242</sup> Stone's false statements included denying his possession of any written material relating to Assange (when in fact he possessed hundreds of documents) and denying that he discussed his conversations about WikiLeaks plans with anyone in the Trump campaign (when in fact he discussed these conversations with Steve Bannon, Paul Manafort, Rick Gates, Erik Prince, and the candidate himself).<sup>243</sup> Stone's witness

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At their direction, Stone took action to gain inside knowledge for the Campaign and shared his purported knowledge directly with Trump and senior Campaign officials on multiple occasions. Trump and the Campaign believed that Stone had inside information and expressed satisfaction that Stone's information suggested more releases would be forthcoming.

5 SELECT COMM. ON INTEL., U.S. SENATE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGN AND INTERFERENCE IN THE 2016 U.S. ELECTION: COUNTERINTELLIGENCE THREATS AND VULNERABILITIES at 172 (2020), <https://www.intelligence.senate.gov/press/senate-intel-releases-volume-5-bipartisan-russia-report> [<https://perma.cc/Q9RJ-6A5Q>].

239. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 3, 2018, 10:48 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/ZD2U-UECR>].

240. Marisa Schwartz & Nikki Schwab, *Trump Says Pardon for Paul Manafort Still a Possibility*, N.Y. POST (Nov. 28, 2018, 2:41 PM), <https://nypost.com/2018/11/28/trump-says-pardon-for-paul-manafort-still-a-possibility/> [<https://perma.cc/Y2AS-UFAR>].

241. 2 MUELLER, *supra* note 78, at 130.

242. Spencer S. Hsu et al., *Roger Stone Guilty on All Counts of Lying to Congress, Witness Tampering*, WASH. POST (Nov. 15, 2019, 2:02 PM), [https://www.washingtonpost.com/local/public-safety/roger-stone-jury-weighs-evidence-and-a-defense-move-to-make-case-about-mueller/2019/11/15/554fff5a-06ff-11ea-8292-c46ee8cb3dce\\_story.html](https://www.washingtonpost.com/local/public-safety/roger-stone-jury-weighs-evidence-and-a-defense-move-to-make-case-about-mueller/2019/11/15/554fff5a-06ff-11ea-8292-c46ee8cb3dce_story.html).

243. See Indictment, United States v. Stone, No. 1:19-cr-00018-ABJ (D.D.C. Jan. 24, 2019), <https://www.justice.gov/file/1124706/download> [<https://perma.cc/J4E2-TU3T>]; Rachel Weiner et al., *At Roger Stone Trial, A Key Witness Takes the Stand*, WASH. POST (Nov. 7, 2019, 8:15 PM), [https://www.washingtonpost.com/local/legal-issues/at-trial-roger-stone-claims-he-was-a-player-who-got-played/2019/11/07/dce51620-00de-11ea-9518-1e76abc088b6\\_story.html](https://www.washingtonpost.com/local/legal-issues/at-trial-roger-stone-claims-he-was-a-player-who-got-played/2019/11/07/dce51620-00de-11ea-9518-1e76abc088b6_story.html); *Roger Stone Goes Free*, LEGAL EAGLE'S REAL L. REV. (July 20, 2020), <https://www.youtube.com/watch?v=mbzVr-Pgc64> [<https://perma.cc/H54M-XQNE>].

tampering included threatening to take a key witness's dog away and telling him to "prepare to die, cocksucker."<sup>244</sup> The President tweeted that Stone's conviction reflected a "double standard like never seen before in the history of our country."<sup>245</sup>

After the conviction, prosecutors proposed a prison sentence within the range recommended by the Federal Sentencing Guidelines: 87 to 108 months.<sup>246</sup> Trump promptly tweeted that this recommendation was "horrible and very unfair" and that he could not "allow this miscarriage of justice."<sup>247</sup> The following day, the Justice Department withdrew the prosecutors' recommendation, and the President wrote: "Congratulations to Attorney General Bill Barr for taking charge of a case that was totally out of control."<sup>248</sup> The four career prosecutors assigned to Stone's case then refused to work further on the case, and one left the Justice Department altogether.<sup>249</sup> On the day a judge sentenced Stone to 40 months in prison, Trump declared that Stone was a "good person" and added: "[A]t some point I will make a determination. But Roger Stone and everyone has to be treated fairly. And this has not been a fair process."<sup>250</sup>

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244. Josh Gerstein & Darren Samuelsohn, *WikiLeaks, Dog Threats, and a Fake Death Notice: Roger Stone's Odd Friendship with Randy Credico*, POLITICO (Nov. 8, 2019, 2:36 PM), <https://www.politico.com/news/2019/11/08/roger-stones-trial-randy-credico-068072> [<https://perma.cc/634E-D2BK>]. The witness testified that he did not take Stone's threats literally but did sense that he would be in danger if he failed to yield to Stone's demands that he either perjure himself or invoke the privilege against self-incrimination.

245. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 15, 2019, 12:13 PM), <https://www.thetrumparchive.com/> [<https://perma.cc/42BP-WNWM>].

246. Government's Sentencing Mem. at 16, *United States v. Stone*, No. 1:19-cr-00018-ABJ (D.D.C. Feb. 10, 2020), <https://assets.documentcloud.org/documents/6773690/Stone-Memo-USA-2020-02-10.pdf> [<https://perma.cc/HQ7F-TM3U>].

247. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 11, 2020, 1:48 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/WD76-ESZX>].

248. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 12, 2020, 6:53 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/BH6E-94NH>].

249. Matt Zepotosky et al., *Prosecutors Quit Amidst Escalating Justice Dept. Fight Over Roger Stone's Prison Term*, WASH. POST (Feb. 11, 2020, 8:44 PM), [https://www.washingtonpost.com/national-security/justice-dept-to-reduce-sentencing-recommendation-for-trump-associate-roger-stone-official-says-after-president-calls-it-unfair/2020/02/11/ad81fd36-4cf0-11ea-bf44-f5043eb3918a\\_story.html](https://www.washingtonpost.com/national-security/justice-dept-to-reduce-sentencing-recommendation-for-trump-associate-roger-stone-official-says-after-president-calls-it-unfair/2020/02/11/ad81fd36-4cf0-11ea-bf44-f5043eb3918a_story.html). Although the attorney general had ordered the withdrawal of the Justice Department's sentence recommendation, he disagreed with the president's commutation of Stone's sentence. Barr told an interviewer: "I felt it was an appropriate prosecution and I thought the sentence was fair." Pierre Thomas et al., *Attorney General William Barr Defends Justice Department Against Claims of Politicization*, ABC NEWS (July 9, 2020, 4:09 PM), <https://abcnews.go.com/Politics/attorney-general-william-barr-defends-justice-department-claims/story?id=71680447> [<https://perma.cc/K3L8-CU62>].

250. Caitlin Oprysko, *Trump: Roger Stone Has "Very Good Chance of Exoneration" but Will "Let the Process Play Out,"* POLITICO (Feb. 20, 2020, 4:55PM), <https://www.politico.com/news/2020/02/20/trump-roger-stone-exoneration-116514> [<https://perma.cc/N6XY-EDY9>].

Stone's truthful testimony might have incriminated Trump. In a sworn response to a written interrogatory from the Office of Special Counsel Robert Mueller, Trump had said: "I have no recollection of the specifics of any conversations I had with Mr. Stone between June 1, 2016 and November 8, 2016. I do not recall discussing WikiLeaks with him, nor do I recall being aware of Mr. Stone having discussed WikiLeaks with individuals associated with my campaign."<sup>251</sup> Michael Cohen, however, told Congress he had been in Trump's office during a speakerphone conversation between Stone and Trump. Stone advised Trump that "there would be a massive dump of emails [from Assange] that would damage Hillary Clinton's campaign," and Trump "responded by stating to the effect of 'wouldn't that be great.'"<sup>252</sup> At Stone's trial, Rick Gates, Trump's former deputy campaign manager, testified that he was in a limousine with Trump when Trump spoke with Stone by phone. At the end of the call, Trump told Gates that "more information would be coming out."<sup>253</sup> Stone's truthful testimony might have revealed other "specifics" Trump could not have forgotten.

Four days before Stone was to report to prison, on July 10, 2020, Trump commuted his sentence.<sup>254</sup> A few hours earlier, Stone had told an interviewer he expected it. He explained: "I had 29 or 30 conversations with Trump during the campaign period. He knows I was under enormous pressure to turn on him. It would have eased my situation considerably. But I didn't."<sup>255</sup>

If Stone had "turned on" Trump, his truthful testimony might have established that Trump's response to the Special Counsel's inquiry was perjured<sup>256</sup>

251. 2 MUELLER, *supra* note 78, at app. C18–C19.

252. *Full Transcript: Michael Cohen's Opening Statement to Congress*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/politics/cohen-documents-testimony.html>.

253. See Darren Samuelsohn & Josh Gerstein, *What Roger Stone's Trial Revealed About Donald Trump and WikiLeaks*, POLITICO (Nov. 12, 2019, 7:33 PM), <https://www.politico.com/news/2019/11/12/roger-stone-trial-donald-trump-wikileaks-070368> [<https://perma.cc/E3MC-F5BD>]; Spencer S. Hsu et al., *Roger Stone Trial: Former Top Trump Official Details Campaign's Dealings on WikiLeaks, and Suggests Trump Was in the Know*, WASH. POST (Nov. 12, 2019, 10:15 PM), [https://www.washingtonpost.com/local/legal-issues/roger-stone-trial-to-resume-with-focus-on-trump-campaign-and-wikileaks/2019/11/12/e2e0fb0c-0309-11ea-9518-1e76abc088b6\\_story.html](https://www.washingtonpost.com/local/legal-issues/roger-stone-trial-to-resume-with-focus-on-trump-campaign-and-wikileaks/2019/11/12/e2e0fb0c-0309-11ea-9518-1e76abc088b6_story.html).

254. See Peter Baker et al., *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>.

255. Howard Fineman, *Roger Stone is Saved*, WASH. POST (July 10, 2020, 10:39 PM), <https://www.washingtonpost.com/opinions/2020/07/10/roger-stone-is-saved/>.

256. The bipartisan report of the Senate Intelligence Committee declared: "Despite Trump's recollection, the Committee assesses that Trump did, in fact, speak with Stone about WikiLeaks and with members of his Campaign about Stone's access to WikiLeaks on multiple occasions." 5 SELECT COMM. ON INTEL., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGN AND INTERFERENCE IN THE 2016 U.S. ELECTION, *supra* note 238, at 245.

and might have revealed other crimes as well.<sup>257</sup> The judge who sentenced Stone declared that he “was not prosecuted for standing up for the President; he was prosecuted for covering up for the President.”<sup>258</sup>

Following Trump’s defeat in the presidential election of 2020 and shortly before Christmas, he granted Stone a full pardon.<sup>259</sup>

### ***B. The Pardon of Paul Manafort***

In 1970, when Roger Stone was a high school student, he met Paul Manafort at a Connecticut state convention of Young Republicans. In 1977, Manafort managed Stone’s successful campaign for president of the Young Republican National Federation. In 1980, Stone, Manafort, and Charlie Black founded Black, Manafort, and Stone, a D.C.-area firm that prospered as one of the few then providing both lobbying and political consulting services. Black, Manafort, and Stone often represented lobbying clients before legislators the firm had helped elect. One of its first clients was Donald Trump.<sup>260</sup>

Stone lobbied for Trump. Manafort’s clients ultimately included Philippine President Ferdinand Marcos, Angolan rebel leader Jonas Savimbi, Zaire President Mobutu Sese Seko, and the governments of Saudi Arabia, the Dominican Republic, Equatorial Guinea, Kenya, and Nigeria.<sup>261</sup>

In 2004, Manafort became an advisor to Viktor Yanukovych, the pro-Russian President of Ukraine. In 2017, when Manafort belatedly registered as a foreign agent following a U.S. lobbying campaign defending Ukraine’s prosecution of a Yanukovych rival, he revealed he had received more than \$17 million from the Party of Regions, a Ukrainian political party associated with

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257. At the time Trump spoke with Stone about upcoming WikiLeaks releases of hacked materials, “public reports stated that Russian intelligence officials were behind the hacks.” 2 MUELLER, *supra* note 78, at 77. Federal law prohibits anyone from accepting a contribution to a campaign of any “thing of value” from a foreign national. 52 U.S.C. § 30121(a)(1)(A), (a)(2). For several reasons, however, it would be extremely difficult to establish a criminal violation of this prohibition. See 1 ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 184–88 (2019).

258. Rachel Weiner et al., *Roger Stone Sentenced to Three Years and Four Months in Prison, as Trump Predicts “Exoneration” for His Friend*, WASH. POST (Feb. 20, 2020, 6:18 PM), [https://www.washingtonpost.com/local/public-safety/roger-stone-sentence-due-thursday-in-federal-court/2020/02/19/2e01bfc8-4c38-11ea-9b5c-eac5b16dafaa\\_story.html](https://www.washingtonpost.com/local/public-safety/roger-stone-sentence-due-thursday-in-federal-court/2020/02/19/2e01bfc8-4c38-11ea-9b5c-eac5b16dafaa_story.html).

259. Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone, and Charles Kushner*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html>.

260. Manuel Roig-Franzia, *The Swamp Builders: How Stone and Manafort Helped Create the Mess Trump Promised to Clean Up*, WASH. POST (Nov. 29, 2018), <https://www.washingtonpost.com/graphics/2018/politics/paul-manafort-roger-stone/>.

261. *Id.*; Paul Manafort, WIKIPEDIA, [https://en.wikipedia.org/wiki/Paul\\_Manafort](https://en.wikipedia.org/wiki/Paul_Manafort) [https://perma.cc/CQK5-TF8Q] (last visited Dec. 31, 2020).

Yanukovych.<sup>262</sup> The Special Counsel's office called Manafort's financial disclosure "plainly deficient."<sup>263</sup>

Prosecutors separately alleged that Manafort received more than \$60 million from Ukrainian sponsors between 2010 and 2014.<sup>264</sup> When protests and threatened civil war caused Yanukovych to flee Ukraine for Russia in 2014, Manafort remained associated with the Party of Regions, but his income sharply declined. By the time he joined Trump's presidential campaign, he owed at least \$17 million to people with ties to Yanukovych and Russian Premier Vladimir Putin.<sup>265</sup> Among the items prosecutors assembled to show Manafort's extravagant lifestyle were charges at a clothing store totaling \$444,000 in one year, an \$18,500 men's jacket made of python skin, a \$15,000 men's jacket made of ostrich skin, several luxury automobiles, and four pieces of real estate worth \$11 million that Manafort acquired between 2006 and 2012.<sup>266</sup>

In March 2016, on Stone's recommendation, the Trump campaign named Manafort its director of convention-delegate operations.<sup>267</sup> On June 20, Manafort became Trump's campaign manager.<sup>268</sup> On August 14, the American press reported that a government bureau in Ukraine had released a handwritten ledger showing \$12.7 million in illegal, off-the-books cash payments from the Party of

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262. Theodor Meyer, *Manafort Registers as Foreign Agent*, POLITICO (June 27, 2017, 7:29 PM), <https://www.politico.com/story/2017/06/27/manafort-foreign-agent-ukraine-240027> [<https://perma.cc/67HS-3CCG>].

263. Government's Sentencing Memorandum at 21, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. Feb. 23, 2019), <https://int.nyt.com/data/documenthelp/632-manafort-sentencing-memo/8a39153cd0f03e68454d/optimized/full.pdf> [<https://perma.cc/7SRT-SAQU>].

264. Sharon LaFraniere et al., *The Rise and Fall of Paul Manafort: Greed, Deception, and Ego*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2018/08/12/us/politics/manafort-trump-trial.html>.

265. Mike McIntire, *Manafort Was in Debt to Pro-Russia Interests, Cyprus Records Show*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/us/politics/paul-manafort-russia-trump.html>.

266. Ashley Collman, *Prosecutors Went to Extraordinary Lengths to Document Paul Manafort's Life of Luxury. Here are the Custom Suits, Lavish Cars, and Sprawling Properties They Tried to Show the Jury*, BUS. INSIDER (Aug. 22, 2018, 4:32 PM), <https://www.businessinsider.com/paul-manafort-life-of-luxury-in-pictures-2018-8> [<https://perma.cc/72ME-6C38>].

267. Catherine Ho, *From Ukraine to Trump Tower, Paul Manafort Unafraid to Take on Controversial Jobs*, WASH. POST (Apr. 7, 2016, 2:50 PM), <https://www.washingtonpost.com/news/powerpost/wp/2016/04/07/from-ukraine-to-trump-tower-paul-manafort-unafraid-to-take-on-controversial-jobs/>.

268. Maggie Haberman & Ashley Parker, *Trump Aide Paul Manafort Promoted to Campaign Chairman and Chief Strategist*, N.Y. TIMES (May 19, 2016), <https://www.nytimes.com/2016/05/20/us/politics/paul-manafort-trump.html>.



Regions to Manafort.<sup>269</sup> Five days later, Manafort, encouraged to resign from the campaign, did resign.<sup>270</sup>

In October 2017, at the behest of the Special Counsel's office, a grand jury in the District of Columbia indicted Manafort and Rick Gates for conspiring to launder money, commit tax offenses, and violate registration requirements.<sup>271</sup> Gates had been employed by Manafort during his time as a lobbyist and consultant. When Manafort became Trump's campaign manager, Gates became the deputy campaign manager.<sup>272</sup>

In June 2018, Manafort and Konstantin Kilimnik were charged with conspiring to obstruct justice by tampering with two of the witnesses against Manafort.<sup>273</sup> Kilimnik had worked closely with Manafort in Ukraine. As the bipartisan report of the Senate Intelligence Committee concluded, he was a Russian intelligence officer.<sup>274</sup> He now apparently lives in a \$2 million, heavily guarded home near Moscow and is unlikely to be tried on the witness-tampering charge.<sup>275</sup> Manafort's witness tampering led a judge to order him jailed pending trial.<sup>276</sup>

In February 2018, a federal grand jury in Virginia indicted Manafort for bank fraud and tax and registration offenses. Manafort's trial on these charges began on July 31.<sup>277</sup> The next day, one of Trump's tweets urged Attorney General Sessions to "stop this rigged Witch Hunt right now."<sup>278</sup> Another declared: "Looking back on history, who was treated worse, Alphonse Capone, legendary mob boss, killer and 'Public Enemy Number One,' or Paul Manafort, political

269. Andrew E. Kramer et al., *Secret Ledger in Ukraine Lists Cash for Donald Trump's Campaign Chief*, N.Y. TIMES (Aug. 14, 2016), <https://www.nytimes.com/2016/08/15/us/politics/what-is-the-black-ledger.html>.

270. Maggie Haberman & Jonathan Martin, *Paul Manafort Quits Donald Trump's Campaign After a Tumultuous Run*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/us/politics/paul-manafort-resigns-donald-trump.html>.

271. See Indictment, United States v. Manafort, No. 1:179-cr-00201-ABJ (D.D.C. Oct. 30, 2017), <https://www.justice.gov/file/1007271/download> [<https://perma.cc/W27C-PZ6R>].

272. See Cleve R. Wootson, Jr., *For Decades, Rick Gates Was Paul Manafort's Right-Hand Man: Now He's His Co-Defendant*, WASH. POST (Oct. 30, 2017, 4:10 PM), <https://www.washingtonpost.com/news/politics/wp/2017/10/30/for-decades-rick-gates-was-paul-manafort-s-right-hand-man-now-hes-his-co-defendant/>.

273. Government's Sentencing Memorandum, *supra* note 263, at 4–5.

274. 5 SELECT COMM. ON INTEL., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGN AND INTERFERENCE IN THE 2016 U.S. ELECTION, *supra* note 238, at vi. The report also concluded that Manafort's willingness to share information with Kilimnik "represented a grave counterintelligence threat." *Id.* at vii.

275. *Konstantin Kilimnik*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Konstantin\\_Kilimnik#cite\\_ref-42](https://en.wikipedia.org/wiki/Konstantin_Kilimnik#cite_ref-42) [<https://perma.cc/5RWJ-W8JN>] (last visited Jan. 1, 2021).

276. Government's Sentencing Memorandum, *supra* note 263, at 5.

277. *Id.* at 5–6.

278. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2018, 9:24 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/Q9SD-Q5KY>].

operative & Reagan/Dole darling, now serving solitary confinement—although convicted of nothing?”<sup>279</sup>

The jury at Manafort’s trial was not sequestered. During its deliberations, Trump told reporters: “I think the whole Manafort trial is very sad.” He added: “When you look at what is going on, I think it’s a very sad day for our country . . . . He happens to be a very good person. And I think it’s very sad what they’ve done to Paul Manafort.”<sup>280</sup>

When the jury convicted Manafort of eight felonies, Trump reiterated: “[I]t’s a very sad thing that happened.”<sup>281</sup> The next day, he tweeted:

I feel very badly for Paul Manafort and his wonderful family.  
“Justice” took a 12 year old tax case, among other things,  
applied tremendous pressure on him and, unlike Michael Cohen,  
he refused to “break” – make up stories in order to get a “deal.”  
Such respect for a brave man!<sup>282</sup>

On the same day, Trump gave an interview in which he declared that “flipping” was “not fair” and “almost ought to be outlawed.”<sup>283</sup> In response to a question about whether he was considering a pardon for Manafort, he expressed “great respect” for what Manafort had done and suggested that, on some counts, he had been convicted only of what “every lobbyist in Washington probably does.”<sup>284</sup> Later in the day, the President’s personal lawyer, Rudolph Giuliani, told journalists that he and the President had discussed pardoning Manafort, and the President “really thinks Manafort has been horribly treated.”<sup>285</sup>

Manafort then “flipped” or seemed to. On September 14, he pleaded guilty to the District of Columbia charges and entered a cooperation agreement with the Special Counsel’s office. As the Special Counsel later alleged and the trial judge later found, however, Manafort broke the agreement by lying repeatedly to

279. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2018, 11:35 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/3JTF-UEYN>].

280. Caitlin Oprysko, *Trump: Manafort Trial is a “Very Sad Day for Our Country,”* POLITICO (Aug. 17, 2018, 11:29 AM), <https://www.politico.com/story/2018/08/17/paul-manafort-trial-trump-pardon-783133> [<https://perma.cc/4V6L-TK4M>]. Andrew Weissmann, who prosecuted Manafort, later wrote: “Bear in mind that Paul Manafort had been charged with numerous federal crimes, including millions of dollars in tax and bank fraud, lying to the government, and even tampering with witnesses while he was out on bail . . . . What sort of person is in favor of such crimes . . . ?” Weissmann noted that he would have been held in contempt if he had responded to the president’s statement. WEISSMANN, *supra* note 83, at 255.

281. 2 MUELLER, *supra* note 78, at 126.

282. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 22, 2018, 9:21 AM), <https://www.thetrumparchive.com/> [<https://perma.cc/F3M2-4D7Q>].

283. 2 MUELLER, *supra* note 78, at 126–27.

284. *Id.* at 127.

285. Maggie Haberman & Katie Rogers, “How Did We Get Here?” *Trump Wonders as the White House Soldiers On*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/us/politics/trump-cohen-manafort-mood.html>.

investigators and a grand jury.<sup>286</sup> In addition, Manafort's lawyer apparently briefed the President's lawyers about Manafort's discussions with members of the Special Counsel's team.<sup>287</sup> Two days after the Special Counsel revealed in court that Manafort had violated his agreement, the President reiterated that it was "very brave" that Manafort did not "flip."<sup>288</sup>

If Manafort had spoken the truth, he, like Stone, might have incriminated Trump. Manafort attended a Trump Tower meeting in June 2016 at which a Russian operative was expected to deliver damaging information about Hillary Clinton "as part of Russia and its government's support for Mr. Trump."<sup>289</sup> Two months later, on August 2, 2016, then-campaign-manager Manafort had dinner at the Grand Havana Room in New York with Konstantin Kilimnik, the Russian intelligence officer. Kilimnik had flown from Moscow for the meeting. His trip and the willingness of the campaign manager for a major-party presidential candidate to meet during the campaign indicated the meeting was important. Rick Gates was present for the last part of the meeting, and the three men departed by different routes to avoid being seen together.<sup>290</sup>

The topics discussed at the dinner included internal campaign polling data that Gates, at Manafort's direction, had been sending to Kilimnik since early May, and a Russian plan to make all of eastern Ukraine an "autonomous region." Yanukovich sought to return to Ukraine as president of this region, and he hoped to hire Manafort to aid his campaign.<sup>291</sup> Kilimnik, moreover, hoped the next U.S. President would wink at Russia's takeover of half of Ukraine.<sup>292</sup> Manafort's easily

286. See Byron Tau & Aruna Viswanatha, *Judge Rules Paul Manafort Lied in Violation of Plea Deal*, WALL ST. J. (Feb. 13, 2019, 9:38 PM), <https://www.wsj.com/articles/judge-rules-paul-manafort-made-false-statements-in-violation-of-plea-agreement-11550101738> [<https://perma.cc/523L-LQY2>]; Government's Submission in Support of its Breach Determination, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. May 21, 2021) (a refiling of a pleading initially submitted on Dec. 7, 2018 with many of the initial pleading's redactions removed), <https://www.dropbox.com/s/01889o91g8w6ape/manafort2.pdf> [<https://perma.cc/E5HG-J5UU>].

287. Michael S. Schmidt et al., *Manafort's Lawyer Said to Brief Trump Attorneys on What He Told Mueller*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/us/politics/manafort-lawyer-trump-cooperation.html>.

288. 2 MUELLER, *supra* note 78, at 127–28; Schwartz & Schwab, *supra* note 240. Trump spoke of Roger Stone and Jerome Corsi as well, and his statement is quoted *supra* in text accompanying note 240.

289. WEISSMANN, *supra* note 83, at 198. The quoted language is from an email proposing the meeting that was sent to Donald Trump, Jr. It was included in an email chain forwarded to Manafort. *Id.*

290. 5 SELECT COMM. ON INTEL., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGN AND INTERFERENCE IN THE 2016 U.S. ELECTION, *supra* note 238, at 75–76.

291. *Id.* at 76–84.

292. There is no direct evidence Kilimnik mentioned this goal at the Grand Havana meeting, but it seems likely he did. In a later email Kilimnik wrote and shared with Manafort after Trump became president, he said: "All that is required to start the process is a very minor 'wink' (or slight push) from DT." *Id.* at 99; see WEISSMANN, *supra* note 83, at 300.

demonstrated lies about his conversations with Kilimnik were among the falsehoods that led the office to conclude he violated his plea agreement.<sup>293</sup>

The Treasury Department later determined that Kilimnik “provided the Russian Intelligence Services with sensitive information on polling and campaign strategy.”<sup>294</sup> Prosecutors, however, were unable to determine how the Russian government and its proxies used the information Manafort and Gates supplied, what they expected in return for whatever campaign assistance they provided,<sup>295</sup> and how much of Kilimnik’s plotting, if any, Manafort conveyed to Trump.

On December 23, 2020, the same day the President pardoned Stone, he granted Paul Manafort a full pardon.<sup>296</sup>

Evidence of President Trump’s exchange of clemency for his associates’ silence and lies appeared, not in coded language on surreptitiously recorded telephone calls, but in public statements and presidential tweets. The following Section considers ways in which prosecutors might use this evidence.

### C. Prosecutorial Options

Exchanging clemency for a witness’s noncooperation is a criminal act twice over. As this Article has explained, it constitutes obstruction of justice.<sup>297</sup> Attorney General Barr in fact acknowledged at his confirmation hearing: “I think that if a pardon was a quid pro quo to altering testimony, then that would definitely implicate an obstruction statute.”<sup>298</sup> Bribery, moreover, consists of trading anything of value for an official act.<sup>299</sup> Granting clemency is an official act,<sup>300</sup> and a witness’s silence and lies are “things of value.”<sup>301</sup>

293. See Government’s Submission in Support of its Breach Determination, *supra* note 286.

294. Press Release, U.S. Dept. of the Treasury, Treasury Escalates Sanctions Against the Russian Government’s Attempts to Influence U.S. Elections (Apr. 15, 2021), <https://home.treasury.gov/news/press-releases/jy0126> [<https://perma.cc/V5BH-AFRE>].

295. See 2 SELECT COMM. ON INTEL., U.S. SENATE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGN AND INTERFERENCE IN THE 2016 U.S. ELECTION: COUNTERINTELLIGENCE THREATS AND VULNERABILITIES, at 34 (2019) (quoting a message sent by an employee of the Internet Research Agency, a Russian company engaged in online influence operations, describing a celebration on the night of President Trump’s election in 2016: “And when around 8 a.m. the most important result of our work arrived, we uncorked a tiny bottle of champagne . . . [and] uttered almost in unison: ‘We made America great.’”).

296. Haberman & Schmidt, *supra* note 259.

297. See *supra* Part IV.

298. CONFIRMATION HEARING ON THE NOMINATION OF HON. WILLIAM PELHAM BARR TO BE ATT’Y GEN. OF THE UNITED STATES, *supra* note 89. A pardon might be the final act in a course of obstruction. In its absence, a convicted defendant who expected or hoped for clemency might reconsider his decision not to cooperate. A president who granted a pardon to discourage a witness’s cooperation might have had other reasons for granting clemency as well. The strength of these reasons would not matter. Courts do not assign juries the speculative task of determining which of several motivations was dominant. See cases cited *supra* note 124.

299. See 18 U.S.C. § 201(b).

The Justice Department in a post-Trump administration might charge Stone, Manafort, and Trump with obstruction and bribery. If it did, there might be little reason for it to challenge Stone and Manafort's pardons in addition. President Biden, however, is said to have little appetite for prosecuting his predecessor,<sup>302</sup> and the Justice Department might conclude that prosecuting a former president would be too divisive and distracting to be worthwhile even if evidence of the former president's guilt was strong.<sup>303</sup>

A decision not to prosecute Trump should not cause the Department to ignore his corruption altogether. As this Article has explained, a pardon obtained by bribery is void, and the department may seek a declaratory judgment saying so.<sup>304</sup> A successful challenge of Stone and Manafort's pardons would send them to prison. Although invalidating their pardons would leave Trump unpunished, this action would rest on a determination of his criminality and so provide a measure of accountability.

The procedure for challenging a pardon would differ substantially from that of a criminal trial. The case would be heard by a judge, not a jury. Proof beyond a reasonable doubt would not be required. The proceedings would be unaffected by any pardon a president might have granted himself. Moreover, unlike a criminal trial, a civil action would allow Justice Department lawyers to depose the former president and call him as a witness. Executive privilege would

300. See 18 U.S.C. § 201(a)(3). In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court held that simply calling a meeting to discuss approving a research study did not qualify as an official act, but it declared that actually authorizing a research study would qualify. The Court said that making any decision an official has a legal responsibility to make is an official act. *Id.* at 2369–70.

301. See, e.g., *United States v. Renzi*, 769 F.3d 731, 744 (9th Cir. 2014) (“[T]hing of value” is defined broadly to include “the value which the defendant subjectively attaches to the item received.”) (quoting *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986)); ELLEN L. WEINTRAUB, FED. ELECTION COMM’N, THE LAW OF A “THING OF VALUE” (2019), <https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf> [<https://perma.cc/B3NX-YXC4>] (collecting decisions interpreting the words “thing of value” in bribery law, campaign-finance law, and other contexts).

302. Carol E. Lee et al., *Biden Hopes to Avoid Divisive Trump Investigations, Preferring Unity*, NBC NEWS (Nov. 17, 2020, 5:00 AM), <https://www.nbcnews.com/politics/justice-department/president-elect-biden-wary-trump-focused-investigations-sources-say-n1247959> [<https://perma.cc/4AAG-8F6D>].

303. For a discussion of the powerful arguments for and against prosecuting an apparently criminal former president, see BAUER & GOLDSMITH, *supra* note 100, at 231–44.

The Justice Department seems able to prosecute Manafort for crimes not covered by his pardon, and doing so might be less difficult than seeking invalidation of the pardon. See Andrew Weissman, *Update: Gaps in Trump’s Criminal Pardons Apply to Bannon as Well*, JUST SEC. (Jan. 24, 2021), <https://www.justsecurity.org/74241/the-gaps-in-trumps-pardons-how-the-biden-administration-can-still-pursue-justice/> [<https://perma.cc/QQ8D-3J5M>]. The crimes of which Stone was convicted and later pardoned, however, may well have included every charge prosecutors could reasonably bring.

304. See *supra* Part VIII(B)–(C). Granting a pardon to obstruct justice also defrauds the public and should provide an additional basis for declaring the pardon invalid.

allow him to refuse to testify about communications made “in performance of his responsibilities.”<sup>305</sup> This privilege, however, would not permit him to withhold testimony about events before his inauguration. Former president Trump could refuse to testify about communications during the 2016 campaign only by invoking his privilege against self-incrimination.<sup>306</sup>

In 1973, White House Counsel John Dean informed President Nixon that E. Howard Hunt, one of the Watergate burglars, was “demanding clemency or he’s going to blow.” Dean doubted that Nixon could “deliver on clemency” because “[i]t may be just too hot.” Nixon replied, “You can’t do it until the elections, that’s for sure.”<sup>307</sup> Hunt went to prison, and so did Dean.<sup>308</sup>

President Trump was bolder than President Nixon. But even if the Justice Department were to decline to prosecute Trump, it might challenge Trump’s pardons. As with President Nixon, Trump’s confederates could go to prison even if the former president does not.

### CONCLUSION

In 1866, the Supreme Court declared that the power conferred by the Pardon Clause is unlimited.<sup>309</sup> Five years later, it reiterated: “To the executive alone is intrusted the power of pardon, and it is granted without limit.”<sup>310</sup> Although the Court has not discovered any judicially enforceable limit in 230 years of U.S. history, it has told lawyers where to look. In *Schick v. Reed*, it wrote: “The pardoning power is an enumerated power of the Constitution and . . . its limits, if any, must be found in the Constitution itself.”<sup>311</sup>

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305. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 448–49 (1977). As the quoted language suggests, executive privilege does not extend to all White House communications and, when it applies, is not absolute. In addition, executive privilege may be subject to a crime-fraud exception analogous to the crime-fraud exception to the attorney-client privilege. See generally Anthony W. Wassef, Note, *Executive Privilege—With a Catch: How a Crime-Fraud Exception to Executive Privilege Would Facilitate Congressional Oversight of Executive Branch Malfeasance in Accordance with the Constitution’s Separation of Powers*, 105 CORNELL L. REV. 1261 (2020).

306. Whether a president had reason to fear truthful testimony because he had engaged in criminal or other embarrassing conduct is relevant in judging whether he traded clemency for silence or lies. President Trump did not submit to an in-person interview with the Special Counsel’s office during his presidency and was not called before a grand jury. Civil actions to set aside Stone and Manafort’s pardons would allow Justice Department lawyers to ask the former president the questions prosecutors did not ask then.

307. TOOBIN, *supra* note 83, at 232.

308. See *Dean Pleads Guilty in Deal: Will Aid the Prosecution*, N.Y. TIMES (Oct. 20, 1973), <https://www.nytimes.com/1973/10/20/archives/dean-pleads-guilty-in-deal-will-aid-the-prosecution-immunity-fight.html> (describing six acts of obstruction that Dean admitted); Lesley Oelsner, *Dean Sentenced to 1 to 4 Years in Cover-Up Case*, N.Y. TIMES (Aug. 3, 1974), <https://www.nytimes.com/1974/08/03/archives/dean-sentenced-to-1-to-4-years-in-coverup-case-excounsel-to-nixon.html>.

309. *Ex parte Garland*, 71 U.S. 333, 380 (1866).

310. *United States v. Klein*, 80 U.S. 128, 147 (1871).

311. *Schick v. Reed*, 419 U.S. 256, 267 (1974).

The Trump presidency led scholars to scrutinize the map to which the Supreme Court pointed. These scholars announced the discovery of previously unrecognized limits in the Take Care Clause,<sup>312</sup> the Due Process Clause,<sup>313</sup> the separation of powers principle,<sup>314</sup> and the Pardon Clause's impeachment exception.<sup>315</sup> This Article has maintained that none of these scholars' mining efforts hit pay dirt.

The Supreme Court, however, misled both when it declared the power conferred by the Pardon Clause unlimited and when it declared that this clause can be restricted only by other constitutional provisions. Like most other provisions, the Pardon Clause is subject to construction. It confers the "Power to grant Reprieves and Pardons" as it was understood in 1789, and this power was never absolute.

The Constitution gives the president no power to pardon crimes that have not happened, and a president who promised to pardon a future crime would be likely to commit a crime himself. Moreover, a prohibition of presidential self-pardons is appropriately inferred from historic principles as well as from the clear intention of the Framers not to license presidents to commit whatever crimes they like. The pardon power does not authorize a president to violate criminal statutes that are broadly enforced and apply to public officials in the same way they apply to everyone else. Pardons granted to individuals that fail to specify the convictions they forgive are invalid. Pardons are also invalid when they have been obtained by trickery, bribery, or other fraudulent conduct. English law at the time the Constitution was written allowed courts to set aside these pardons even after criminal proceedings had been concluded and even after prisoners had been released.

The judicially enforceable limits of the pardon power do not greatly constrain it, but Congress's power to impeach a president for misuse of this power is broad. Sadly, legislators who claim to revere the Constitution appear to have little sense of the responsibilities the Framers expected them to perform. Politics more partisan than those of the Nixon era have nearly erased what the Framers regarded as the principal remedy for presidential corruption.

The presidency of Donald Trump has shown how corrupted an unchecked power to pardon can become.<sup>316</sup> Nevertheless, this Article has pointed to two of Trump's pardons that appear to justify both criminal prosecution and judicial declarations that the pardons are invalid.

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312. See *supra* Part III(B).

313. See *supra* text accompanying notes 141–147.

314. See *supra* text accompanying notes 148–149.

315. See *supra* text accompanying notes 52–57.

316. See Alschuler, *supra* note 15.

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