

PRESIDENTIAL PARDONS AND THE PROBLEM OF IMPUNITY

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This Article considers the reach of the president's pardon power and its potential employment as one means of creating legal impunity for a president and his personal and political associates. It addresses, in particular, the possibility that a president might issue self-interested pardons to himself, family members, or political or business associates. The Article reviews the constitutional origins of the federal pardon power and the law and practice of its use since the Founding era, and concludes:

A president cannot constitutionally pardon himself, though the point is untested. In theory, a president could resign, or under the Twenty-fifth Amendment withdraw temporarily from the office, transform the vice president into the president or acting president, and secure a pardon from his former subordinate. But that seems improbable.

A president can pardon anyone but himself (both humans and corporations), and those pardons, once issued, are almost certainly unchallengeable and irrevocable. A presidential pardon can cover any (and perhaps all) federal crimes the beneficiary has ever committed, so long as such crimes occurred and were completed prior to the issuance of the pardon. A president cannot pardon crimes that have not yet been committed. Consequently, a pardon issued corruptly might itself constitute a crime that could not be pardoned.

The pardon power does not extend to state crimes or to any civil or administrative action brought by federal or state authorities. A presidential pardon cannot block congressional investigations. Finally, because a pardon effectively erases the Fifth Amendment privilege as to offenses covered by the pardon, it might make it easier for criminal and civil investigative authorities and Congress to compel testimony from the person pardoned.

Therefore, presidential pardons could inconvenience, but could not prevent, thorough investigations of the private and public actions of a former president or his associates. The Article concludes by recommending a thorough, but judicious, use of available investigative avenues to inquire

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into well-founded allegations of wrongful behavior by former presidents and their personal and political associates.

INTRODUCTION	428
I. THE CONSTITUTIONAL ORIGINS OF THE PARDON	
POWER	434
A. British Antecedents	434
B. The Framers' Pardon Power	435
C. Pardons as a Presidential Prerogative	446
II. LIMITS ON A PRESIDENT'S PARDON POWER	449
A. A President Cannot Constitutionally Pardon	
Himself	450
1. Textual Arguments	451
2. Arguments from British Practice before the	
Founding	458
3. Arguments from Debates at the Constitutional	
Convention & During Ratification	462
4. Arguments from American Practice	
since 1788	464
5. Self-Pardon Must Be Impermissible in a	
Republican Constitution	469
6. Resignation or the VP Switcheroo: Could a	
President Get a Pardon from the Vice-	
President?	470
B. Prospective Pardons	472
C. Once Issued, a Pardon Cannot Be Appealed or	
Voided	474
1. The Fiduciary Duty Theory	476
2. The Limit on Pardons "In Cases of	
Impeachment"	480
3. Pardons for Criminal Contempt of Court	485
a. Argument from a Federal Litigant's Right	
to Redress and Separation of Powers	487
b. Argument from Due Process	494
D. Secret Pardons	497
III. HOW TO RESPOND TO SELF-INTERESTED ABUSES OF	
THE PARDON POWER	498
A. The Options Depend on the Objective	499
B. Possible Responses of Federal and State Legal	
Systems to an Attempted Presidential Self-Pardon	
or a Pardon Spree for Others	500
1. A Presidential Self-Pardon Would Be Subject	
to Legal Challenge	500

2.	The Subject Matter Scope of Presidential Pardons.....	501
3.	The Temporal Scope of a Presidential Self-Pardon	505
a.	A Presidential Self-Pardon Would Not Cover Later or Continuing Offenses.....	505
b.	A Presidential Self-Pardon Could Itself Be a Crime Not Covered by the Pardon	507
4.	A Self-Pardon Could Not Completely Insulate a President from Federal Criminal Legal Inquiries Because It Would Not Cover His Businesses, Family, or Associates	509
5.	Neither a Self-Pardon nor a Pardon Spree for Others Would Block Civil Investigations by Federal Executive Branch Agencies	511
6.	Presidential Pardons Could Make Some Criminal and Civil Investigations into a President or His Associates Easier	514
7.	No Presidential Pardon, Whether of the President or Anyone Else, Can Block State Criminal Prosecutions or Civil Actions	516
C.	The Role of Congress Following an Attempted Presidential Self-Pardon or a Pardon Spree for Others	517
1.	Congress Has Limited Options to Remedy Particular Abuses of Presidential Pardon Power	517
2.	Congressional Oversight Authority, Pardons, and the Impunity Problem	521
a.	The Constitutional Roots and Extent of Congressional Investigative and Oversight Power	521
b.	President Trump's Unique Success in Blocking Congressional Investigation and Oversight	525
c.	How a Change of Administration Empowers Congress.....	529
d.	Pardons and Congressional Investigative Authority	531
IV.	WHAT SHOULD BE DONE?	531

INTRODUCTION

The president's pardon power is a constitutional prerogative that voters almost never consider when choosing a chief executive. Our customary indifference on the subject is perfectly understandable. The pardon authority is a negative power, and an apparently beneficent one. It neither kills, nor wounds, nor imprisons, nor impoverishes. It is, in principle, included in the president's armamentarium so that he or she may, as an act of grace, negate an unjust conviction, reduce a draconian punishment, or reward a convict's journey to personal redemption. Not only does the power of pardon seem inherently benevolent, but because in the modern era it has been rarely used, it may also appear inconsequential. But a careful review of the entire sweep of American history since the constitutional Founding in 1788 reveals two points:

First, although presidential pardons have usually been disconnected acts of individual mercy, they have on a number of critical occasions been important tools of presidential policy.¹ George Washington issued pardons in 1794 to defuse the lingering tensions of the defeated Whiskey Rebellion.² President Andrew Johnson made extensive (and controversial) use of the pardon power to civilly rehabilitate former Confederates.³ A century later, Gerald Ford issued a conditional amnesty and Jimmy Carter a full pardon to Vietnam draft evaders.⁴ In these instances, pardons were employed to reconcile deep societal divisions in the aftermaths of an actual civil war and of a foreign war that incited domestic strife so profound that it often seemed to verge on civil war.

1. See generally Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1173–75 (2010) (quoting Anthony M. Kennedy, Associate Justice, U.S. Supreme Court, Speech at the American Bar Association (Aug. 9, 2003), reprinted in 16 FED. SENT'G REP. 126, 128 (2003)) (noting that the dual purposes of pardons are mercy in cases of “unfortunate guilt” and the exercise of “statecraft”).

2. *Id.* at 1173.

3. See, e.g., *President Johnson's Amnesty Proclamation*, N.Y. TIMES, May 30, 1865 at 1. See also FRANK O. BOWMAN, III, *HIGH CRIMES & MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* 156, 162 (2019).

4. On September 16, 1974, President Ford issued a conditional amnesty for draft evaders and deserters conditioned on performance of two years of public service. The program was primarily administered by the Justice Department, the Selective Service System, and the military. ELMER B. STAATS, U.S. GOV'T ACCOUNTABILITY OFFICE, FPCD-76-64, *THE CLEMENCY PROGRAM OF 1974* (1977), <https://www.gao.gov/assets/120/117627.pdf>. President Carter issued a full pardon on January 21, 1977. Proclamation No. 4483, 42 Fed. Reg. 4,391 (Jan. 21, 1977).

Second, despite their beneficent rationale, pardons can be instruments of darker purposes. They can, as in the case of Bill Clinton's end-of-term pardon of financier Marc Rich, be markers of a kind of grubby corruption.⁵ More consequentially, pardons can be issued or dangled to buy silence from a criminal president's minions and co-conspirators, as was true of Richard Nixon⁶ and may well have been in the case of Donald Trump.⁷

This much our history already teaches. But there exists another, and far more damaging, potential use of the pardon power. In the hands of a corrupt and unprincipled president, it could become a mechanism for promoting in America a culture of official impunity that is one crippling hallmark of modern autocracies. That prospect is the subject of this Article.

There are strong reasons to believe, even if in some instances it cannot yet and may never be proven, that President Trump, members of his family, and a variety of his appointees and political supporters engaged in illegal behavior.⁸ Some of this behavior may predate Trump's term in office. Much of it, and much the most important, may

5. Eric Lichtblau & Davan Maharaj, *Clinton Pardon of Rich a Saga of Power, Money and Influence*, L.A. TIMES (Feb. 18, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-feb-18-mn-27173-story.html>. See also BOWMAN, *supra* note 3, at 265 (2019); Love, *supra* note 1, at 1196–1200 (recounting a pattern of abuse among the large batch of last-minute Clinton pardons).

6. BOWMAN, *supra* note 3, at 264; PETER W. RODINO, JR., IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305 (1974).

7. BOWMAN, *supra* note 3, at 303 (discussing Mr. Trump's actions as of early 2019). As for Trump's actions at the close of his term, see *infra* note 18.

8. Enumerating examples would be a long paper in itself. As to Mr. Trump himself, he has already been named by the Southern District of New York as, in effect, an unindicted coconspirator ("Individual #1") in the Michael Cohen hush money case. Glenn Fleishman, *Feds Accuse Individual-1 — Also Known as Trump — of a Crime in Michael Cohen's Sentencing Memo*, FORTUNE (Dec. 7, 2018), <https://fortune.com/2018/12/07/feds-accuse-trump-crime-cohen-campaign-finance/>. Volume II of the Mueller Report enumerates multiple acts that would be grounds for charging obstruction of justice. U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019), https://www.justice.gov/storage/report_volume2.pdf. Mr. Trump may well have committed bribery in connection with the Ukraine affair that led to his impeachment. Carissa Byrne Hessick, *Bribery Is Right There in the Constitution*, ATLANTIC (Nov. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/understanding-bribery-grounds-impeachment/602353/>. At the time of this writing, the Manhattan District Attorney's Office is investigating the Trump Organization for bank and insurance fraud. Josh Gerstein, *N.Y. Prosecutor: Trump Financial Probe Not Limited to "Hush Money"*, POLITICO (Aug. 3, 2020, 2:14 PM), <https://www.politico.com/news/2020/08/03/prosecutor-trump-organization-probe-hush-money-390954>. For a more general accounting, see Jonathan Mahler, *Can America Restore the Rule of Law Without Prosecuting Donald Trump?*, N.Y. TIMES MAG. (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/magazine/trump-investigations-criminal-prosecutions.html>.

have occurred during Trump's term.⁹ A surprising number of Trump associates have been charged with crimes,¹⁰ but other than the early indictments related to the probe of Russian influence on the 2016 election, none have related to the inner workings of Trump's administration or his private business dealings. And after the ascension of Bill

9. As but one important example, it seems probable that many members of the Trump administration systematically violated the Hatch Act, 5 U.S.C. § 7323 (2018); 18 U.S.C. § 595 (2018). The Act bars government employees from using government resources or government time to engage in partisan political activities. Although its civil and criminal penalties are relatively light, it is a crucial bulwark of the professional, non-political federal civil service system. The executive branch office charged with investigating Hatch Act violations found repeated infractions by Trump appointees, and continues to investigate others. *See, e.g., Violations of the Hatch Act Under the Trump Administration: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. (2019) (detailing, *inter alia*, Hatch Act violations found by the Office of Special Counsel against senior presidential aide, Kellyanne Conway); Kevin Freking, *Agriculture Secretary Violated Hatch Act by Backing Trump Reelection*, *FED. TIMES* (Oct. 8, 2020), <https://www.federaltimes.com/management/2020/10/08/agriculture-secretary-violated-hatch-act-by-backing-trump-reelection/> (reporting OSC finding of Hatch Act violation by Secretary of Agriculture Sonny Perdue); Zach Montague, *What Is the Hatch Act? Is Trump Violating It at the R.N.C.?*, *N.Y. TIMES* (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/politics/hatch-act-trump-rnc.html>; Orion Rummel, *Office of Special Counsel Investigating Whether Pompeo Broke Federal Law*, *AXIOS* (Oct. 26, 2020), <https://www.axios.com/pompeo-hatch-act-trump-republican-national-convention-0125d6ab-fe46-4fee-a15e-4036bfb68f7f.html> (reporting investigation of Secretary of State Mike Pompeo for giving speech to Republican National Convention while on a diplomatic mission in Israel). The most flagrant apparent violation in recent months was the use of White House grounds, facilities, and personnel to host important segments of the Republican National Convention. Andrew Solender, *Special Counsel to Investigate Hatch Act Violations During GOP Convention*, *FORBES* (Sept. 9, 2020), <https://www.forbes.com/sites/andrewsolender/2020/09/09/special-counsel-to-investigate-hatch-act-violations-during-gop-convention/#73d599acbec8>. Asked about these concerns, Trump's White House Chief of Staff Mark Meadows did not deny the allegations, saying, "Nobody outside of the Beltway really cares." Matthew Choi, *Meadows Dismisses Hatch Act Concerns at RNC: "Nobody Outside of the Beltway Really Cares,"* *POLITICO* (Aug. 26, 2020, 10:10 AM), <https://www.politico.com/news/2020/08/26/mark-meadows-hatch-act-rnc-402194>.

10. Those indicted and/or convicted include former National Security Adviser Michael Flynn, longtime Trump political advisor Roger Stone, former Trump campaign manager Paul Manafort, campaign deputy Rick Gates, and Trump's former personal attorney Michael Cohen. Kevin Johnson, *How Many Trump Advisers Have Been Criminally Charged? Manafort, Stone and Steve Bannon Makes 7*, *USA TODAY* (Aug. 21, 2020, 8:11 AM), <https://www.usatoday.com/story/news/politics/2020/08/20/how-many-trump-advisers-were-criminally-charged-steve-bannon-makes-7/5616793002/>; Jemima McEvoy, *Bannon Joins Long List of Trump Associates Who Have Been Charged or Imprisoned*, *FORBES* (Aug. 20, 2020, 12:56 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/08/20/bannon-joins-long-list-of-trump-associates-who-have-been-charged-or-imprisoned/?sh=3d9c07a15ea4>; Benjamin Weiser & William K. Rashbaum, *Michael Cohen Sentenced to 3 Years After Implicating Trump in Hush-Money Scandal*, *N.Y. TIMES* (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/michael-cohen-sentence-trump.html>.

Barr to the office of Attorney General, the Justice Department nullified some of those earlier prosecutorial successes.¹¹

Indeed, a consistent theme of the Trump presidency was the destruction or emasculation of executive branch and congressional mechanisms for investigating, and where appropriate punishing, misconduct by the president and his allies.¹² The Barr Justice Department all-but-officially announced that it would protect, not prosecute, executive branch miscreants. President Trump fired or sidelined multiple agency inspectors general.¹³ The President and his allies in the administration, the media, and Congress actively subverted statutory whistleblower protections for government employees who would like to report wrongdoing,¹⁴ as well as retaliated against government employees who testify before Congress in response to legal subpoenas.¹⁵

11. See, e.g., Marty Lederman, *Understanding the Michael Flynn Case: Separating the Wheat from the Chaff, and the Proper from the Improper*, JUST SECURITY (May 29, 2020), <https://www.justsecurity.org/70431/understanding-the-michael-flynn-case-separating-the-wheat-from-the-chaff-and-the-proper-from-the-improper/>; Carrie Johnson, *Politics Influenced Justice Department in Roger Stone Case, DOJ Lawyer Tells Hill*, NPR (June 23, 2020, 3:03 PM), <https://www.npr.org/2020/06/23/882379916/politics-influenced-justice-department-in-roger-stone-case-doj-lawyer-tells-hill>.

12. See Sam Berger, *How a Future President Can Hold the Trump Administration Accountable*, CTR. FOR AM. PROGRESS (Aug. 5, 2020, 4:00 PM), <https://www.americanprogress.org/issues/democracy/reports/2020/08/05/488773/future-president-can-hold-trump-administration-accountable/>.

13. Melissa Quinn, *The Internal Watchdogs Trump Has Fired or Replaced*, CBS NEWS (May 19, 2020, 11:43 AM), <https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list/> (listing five inspectors general—intelligence community, Transportation Department, Defense Department, Department of Health and Human Services, and State Department—fired or replaced by President Trump as of May 19, 2020); Bill McCarthy, *Trump Has Pushed Out 5 Inspectors General Since April. Here's Who They Are*, POLITIFACT (May 19, 2020) <https://www.politifact.com/article/2020/may/19/trump-has-pushed-out-5-inspectors-general-april-he/>.

14. See, e.g., Erich Wagner, *Lawmakers Look to Further Strengthen Whistleblower Protections*, GOV'T EXECUTIVE (Aug. 6, 2020), <https://www.govexec.com/oversight/2020/08/lawmakers-look-further-strengthen-whistleblower-protections/167519/>; Natasha Bertrand, *Trump's Attacks Fuel Alarm that Whistleblower Protections Fall Short*, POLITICO (Oct. 9, 2019, 4:44 PM), <https://www.politico.com/news/2019/10/09/trump-ukraine-whistleblower-attacks-043567> (detailing Trump attacks on Ukraine affair whistleblower); Jon Brodtkin, *Trump Admin Illegally Retaliated Against Pandemic Whistleblower, Reports Say*, ARSTECHNICA (May 8, 2020, 8:12 PM), <https://arstechnica.com/tech-policy/2020/05/whistleblower-who-trump-called-a-disgruntled-employee-may-be-reinstated/> (reporting conclusion of Office of Special Counsel that Department of Health and Human Services violated Whistleblower Protection Act in relation to Dr. Rick Bright); Isaac Arnsdorf, *Trump Appointees Used "Whistleblower Protection" Law to Target Whistleblowers, Review Finds*, PROPUBLICA (Oct. 24, 2019, 5:30 PM), <https://www.propublica.org/article/trump-appointees-used-whistleblower-protection-law-to-target-whistleblowers-review-finds> (describing misuse of whistleblower statute at the Veterans Administration).

15. Alana Abramson, *Trump's Attack on Vindman May Violate Whistleblower Protection Laws. But Challenging It Could Be Risky*, TIME (Feb. 12, 2020), <https://>

The Trump administration systematically and comprehensively blocked congressional access to information necessary even to ordinary legislative oversight.¹⁶

As effective as these tactics were, they are not available to an ex-president. Therefore, once Mr. Trump lost the 2020 presidential election, it seemed consistent with his record and rhetoric that before leaving office he would issue pardons to himself, his family, and those of his supporters he deemed either sufficiently loyal or possessed of sufficiently damaging knowledge of his and his family's conduct. Indeed, if contemporary press reports are to be believed, Mr. Trump actively contemplated self-pardon, family pardons, and pardons of virtually anyone in his sphere who might ask for one.¹⁷

Trump's final round of pardons justified some of the most dire predictions, particularly the pardons of his former campaign manager, Paul Manafort; his longtime friend and political advisor, Roger Stone; his former national security adviser, Michael Flynn; and his one-time political guru, Steve Bannon.¹⁸ All had been convicted of federal felonies or were facing felony charges and all know a good deal more about Donald Trump's personal and political affairs than they have so far exposed. On the other hand, Trump did not, so far as we know, pardon himself, members of his immediate family, or as-yet uncharged members of his entourage like Rudolph Giuliani. I say so far as we know because it is possible that he has signed such pardons, but not publicly disclosed them, a contingency touched on briefly below.¹⁹

time.com/5783160/trumps-attack-on-vindman-may-violate-whistleblower-protection-laws-but-challenging-it-could-be-risky/.

16. See *infra* notes 387–88, and accompanying text.

17. See, e.g., Anita Kumar & Andrew Desiderio, *Trump Mulls Preemptive Pardons for up to 20 Allies, Even as Republicans Balk*, POLITICO (Dec. 3, 2020, 7:09 PM), <https://www.politico.com/news/2020/12/03/trump-considers-more-pardons-442727>; Maggie Haberman & Michael S. Schmidt, *Trump Has Discussed with Advisers Pardons for his 3 Eldest Children and Giuliani*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/rudy-giuliani-pardon.html>.

18. In the last month of his presidency, Mr. Trump pardoned Paul Manafort, Roger Stone, Michael Flynn, and Steve Bannon. All four were in a position to give potentially damaging testimony about Mr. Trump had they chosen to do so. See Amita Kelly, Ryan Lucas & Vanessa Romo, *Trump Pardons Roger Stone, Paul Manafort and Charles Kushner*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner>; Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html>; Benjamin Weiser, *Trump's Pardon of Bannon Could Raise Risk for 3 Co-Defendants*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/nyregion/steve-bannon-pardon-trump.html>.

19. See *infra* notes 295–96, and accompanying text.

We do not yet know why Mr. Trump retreated from the most aggressive possible uses of the pardon power. Perhaps his advisors convinced him that, for example, a self-pardon would not withstand constitutional scrutiny, or that, as discussed below, pardons are not magic shields against all the difficulties he and his family may face post-presidency. My own surmise is that the assault on the United States Capitol of January 6, 2021, and the resultant impeachment proceedings, were larger factors. As we now know, Trump was acquitted by the Senate because all but a few Republican senators were unwilling to make an open break with him, and more importantly, with his persistently loyal followers. However, any prudent advisor to Mr. Trump would surely have told him that a spate of late pardons for himself, his family, or someone like Mr. Giuliani, who was intimately involved with the effort to reverse the results of the 2020 presidential election,²⁰ might prove to be the straw that broke the long-suffering back of Republican senatorial forbearance.

Regardless, the sordid, but rather underwhelming, denouement of the great Trump pardon panic does not render moot the questions raised by Trump's open flirtation with truly grave abuses of the presidential pardon power. The Senate's failure to convict and disqualify Trump from future federal office leaves open the possibility that he will return to the White House, and there may be other occupants of that residence tempted to do what Trump seemingly shrank from doing. In anticipation of such an unhappy day, I offer the following conclusions.

The pardon authority is not an impermeable protection, even against federal criminal liability. For example, a president cannot pardon himself. Moreover, any future president with Donald Trump's expansive business interests and persistent disregard of legal strictures will find it extraordinarily difficult to throw a pardon blanket over all the people and businesses whose activities could leave him criminally exposed.

More importantly, pardons cannot insulate a president or others in his or her orbit from non-criminal investigation and potential liability. A presidential pardon does not affect federal civil or administrative proceedings,²¹ or state criminal or civil actions.²² Likewise, a pardon would not preclude congressional investigation of the

20. Charlotte Klein, *Watch Giuliani Demand "Trial by Combat" to Settle the Election*, N.Y. MAG. (Jan. 6, 2021), <https://nymag.com/intelligencer/2021/01/watch-giuliani-demand-trial-by-combat-to-settle-election.html>.

21. See *infra* notes 109–110, and accompanying text.

22. See *infra* notes 111–113, and accompanying text.

pardoned conduct or any related matters.²³ Pardons could cause troublesome complications for federal and state authorities who sought to investigate a former president. But the avenues of inquiry are sufficiently various and powerful that the real limitation on discovering the secrets of any former president and his associates, and on imposing consequences where legally warranted, will be the political calculus and political will of the succeeding administration, the Congress, and the states.

But before addressing the question of will, we must arm ourselves with a thorough understanding of the origins and limits of the pardon power, how a president might use it at the close of his term in office, and what a succeeding presidential administration, Congress, the states, and others can do if a departing president misuses his authority.

I.

THE CONSTITUTIONAL ORIGINS OF THE PARDON POWER

A. *British Antecedents*

The notion that a chief executive could pardon a person convicted of crime did not, of course, originate with the authors of the American Constitution. Rather, the Framers inherited an English legal tradition of executive clemency rooted, in its ancestral forms, in the idea that the will of the king was the source of law and thus he could release his subjects from its rigors as an act of royal grace. As discussed below, the concept that law was a pure emanation of kingship withered by the end of the Stuart dynasty in the early 1700s in favor of a theory of law grounded in the shared sovereignty of king and Parliament.²⁴ But the power of royal pardon persisted based on more utilitarian rationales. William Blackstone, among the most influential authorities on English law during the Founding era,²⁵ explained that

23. See *infra* Section IV(C)(2).

24. See *infra* notes 142–154, and accompanying text. To anyone not British, and perhaps indeed to anyone not a serious scholar of British constitutionalism, understanding the precise relation of Crown and Parliament in the eighteenth century, and in particular their roles in the concept of sovereignty, approaches the impossible. Read, for example, Blackstone’s 1769 exposition on the status of the king and his relation to the commons and lords, which puts one inescapably in mind of clerical discourse on Christian trinitarian theology. WILLIAM BLACKSTONE, *Of the Rights of Persons*, in 1 COMMENTARIES ON THE LAWS OF ENGLAND 153–160 (David Lemmings, ed., Oxford Eds. 2018) (1769) [hereinafter BLACKSTONE, COMMENTARIES].

25. The U.S. Supreme Court called Blackstone “the preeminent authority on English law for the founding generation,” *Alden v. Maine*, 527 U.S. 706, 715 (1999), and referred to his work as a guide to Founding era understanding of English law for over

royal pardons were an exercise of clemency necessary to moderate the unjust harshness that will result in some cases from the unyielding imposition of the letter of the law. Said Blackstone:

The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.²⁶

Because in eighteenth century British constitutional theory royal prerogative had not yet yielded entirely to parliamentary preeminence, vesting the monarch with the power to pardon retained a nice symmetry. The king (or queen) remained, in theory, sovereign and British courts were “his” (or “her”) courts.²⁷ Thus, a royal pardon was, in a sense, merely a retention of authority to ensure that the monarch’s own instruments had not perpetrated an injustice.

B. *The Framers’ Pardon Power*

The Constitution crafted by the American Framers had a far different design. Rather than being an evolutionary midpoint between ancient royal absolutism and the parliamentary sovereignty of modern Britain, the American structure was purpose-built with no monarch, and constructed on a theory of separation of powers between executive, legislature, and judiciary, combined with interbranch checks and balances. In the Framers’ system, the elected president had no ancestral claim that law was rooted in his will, and no current claim to any control over statutory law beyond the power to veto it,²⁸ or over the judiciary beyond the power of nominating its members.²⁹

Instead, the scope and limitations of the American president’s pardon power were determined by the place of the presidential office in the overall constitutional scheme. A small faction among the dele-

two centuries. Compare *Marbury v. Madison*, 5 U.S. 137, 147, 163 (1803), with *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008).

26. 1 BLACKSTONE, COMMENTARIES, *supra* note 24, at 396–97.

27. Blackstone refers to “the legal ubiquity of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice.” *Id.* at 174.

28. U.S. CONST. art. I, § 7, cl. 2. Of course, particularly in the modern administrative state, a president may exercise very considerable authority over the implementation of statutory enactments, but that is a point beyond the scope of this Article.

29. U.S. CONST. art. II, § 2.

gates to the Constitutional Convention, most famously Alexander Hamilton,³⁰ did briefly consider raising up an American king, but the idea gained little traction.³¹ Kingship was generally conceded to be inconsistent with the Republican temper of post-Revolutionary America.³² More importantly, many in the Founding generation disdained and feared the “corruption” endemic to monarchy, by which they meant both corruption in the ordinary sense of venal misuse of office for pecuniary gain, but also the system by which English kings managed ministers, parliamentarians, and even judges through grants of money, offices, titles, and honors resting in the royal prerogative.³³

30. Hamilton’s proposal for the Constitution would have placed the president (whom he styled the “governor”), the Senate, and federal judges in office “during good behavior,” which is to say effectively for life, barring removal by impeachment. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 179–80 (Jonathan Elliot ed., 2d ed.) [hereinafter 1 ELLIOT]. In his speech of June 18, 1787, Hamilton said that “the British government was the best in the world,” and on the design of the executive, “The English model was the only good one on this subject.” 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 288–89 (Max Farrand, ed. 1911) [hereinafter 1 FARRAND]. Indeed, some of Hamilton’s personal notes suggested that his American monarch ought to be hereditary, though he does not seem to have expressed this view publicly. RON CHERNOW, ALEXANDER HAMILTON 232 (2004).

31. Hamilton’s view on an American kingship was never popular. Edmund Randolph dismissed even a single executive as a dangerous “foetus of monarchy.” THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON, A DELEGATE FROM THE STATE OF VIRGINIA (Gaillard Hund & James Brown Scott eds., Oxford Univ. Press 1920), republished in *Madison Debates, June 1*, AVALON PROJECT (last visited Feb. 20, 2021, 12:52 PM), https://avalon.law.yale.edu/18th_century/debates_601.asp. See CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 80 (1922) (“If monarchy means only an hereditary executive, as Hamilton . . . claimed, and it is difficult to say that it means anything else, there was, we believe, no really monarchical party in the Convention.”).

32. A clue to the sense of the assembly comes from Elbridge Gerry’s response to Madison’s contention that the convention should strive for the objectively best model of government, rather than trying to anticipate what might secure ratification in the states. Gerry said, “If the reasoning of Mr. M(adison) were just, and we supposed a limited Monarchy the best form in itself, we ought to recommend it, tho’ the genius of the people was decidedly adverse to it, and having no hereditary distinctions among us, we were destitute [sic] of the essential materials for such an innovation.” 1 FARRAND, *supra* note 30, at 176–77 (speech of Elbridge Gerry, June 12, 1787). The most sensible reading of Gerry’s comment is that the people were “decidedly adverse” to monarchy, whatever its objective merits, and that it ought not enter into the Convention’s deliberations.

33. See generally David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L. Q. 131, 166–74, 205 (1992) (describing the views of British Whigs and their influence on Jefferson and others). See also Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 456–58 (1996).

Most new Americans wanted no such entanglements, with their necessary implication of governmental choices bent to royal whim by hope of personal advancement.³⁴

The Framers' inspiration was drawn instead from the study of Montesquieu, the French jurist and political philosopher who extolled the virtues of separated executive, legislative, and judicial power.³⁵ Of

34. For example, in arguing for the necessity of separation from England in June 1775, John Adams wrote, "I think, if we consider the Education of the Sovereign, and that the Lords, the Commons, the Electors, the Army, the Navy, the officers of Excise, Customs, etc., have been now for many years gradually trained and disciplined by Corruption to the system of the Court, We shall be convinced that the Cancer is too deeply rooted and too far Spread to be cured by anything short of cutting it out entire." *John Adams to Moses Gill*, in 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 118 (Edmund C. Burnett ed., 1921), <https://babel.hathitrust.org/cgi/pt?id=pst.000001116021&view=1up&seq=7>.

35. "There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." CHARLES DE MONTESQUIEU, *On the Laws That Form Political Liberty in its Relation with the Constitution*, in THE SPIRIT OF THE LAWS 154–86 (Anne M. Cohler, Basia C. Miller, & Harold S. Stone eds. & trans., Cambridge Univ. Press 1989) (1748). For a summary of the extent of Montesquieu's influence on the American Founders, see Jack P. Greene, *Moderation and Liberty: Montesquieu and the American Founding*, 17 REV. IN AM. HIST. 535 (1989) (reviewing ANNE M. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM (1988)).

Separation of powers was so strong a principle in the revolutionary period that the constitutions of seven states enacted between 1776 and 1787 not only embodied the idea in their structures, but included it as an affirmative right written into the constitutional text. George Mason's original draft of the Virginia Declaration of Rights stated: "That the legislative and executive Powers of the State should be separate and distinct from the judicative. . . ." THE VIRGINIA DECLARATION OF RIGHTS (c. May 20–26, 1776) (first draft), in 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 276–78 (Robert A. Rutland ed., 1970) [hereinafter GEORGE MASON PAPERS, VOL. I]. THE VIRGINIA DECLARATION OF RIGHTS (c. May 20–26, 1776) (first draft). The final draft adopted the same language. *Id.* at 287. Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont each adopted Declarations of Rights containing the separation principle. 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1686, 1687 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS, VOL. III] (Maryland); 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2453 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS, VOL. IV] (New Hampshire); 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2787 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS, VOL. V] (North Carolina); 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3749 (Francis Newton

course, the defining innovation of the Framers' federal constitution was not that it attempted to impose a rigid separation of powers, but that it separated core executive, legislative, and judicial functions into three branches, and then overlaid a web of interbranch constraints that we call "checks and balances" to ensure that no branch overwhelmed the others.³⁶

Thus, the Framers' presidency was a compromise between those who recognized the need for an active, energetic executive to manage the affairs of the nation and implement the laws passed by Congress and those who feared the rise of a new monarchy or a dictatorship.³⁷ It is key to realize that the Framers feared not merely the more overt and sanguinary forms of monarchical tyranny, but also the reemergence of a system rife with workaday corruption fostered by the chief executive of the nation.

Article II of the Constitution creates a president who is neither a king nor selected from a North American aristocracy. The only requirements for the office are being a natural born citizen, having attained the age of 35, and fourteen years residence in the United States.³⁸ The Framers rejected the proposal that a president, once chosen, should serve, as federal judges do, "during good behavior" (effectively for life).³⁹ Instead, they required election for a term of four years.⁴⁰ The Framers considered carefully whether reelection ought to

Thorpe ed., 1909) [hereinafter *FEDERAL AND STATE CONSTITUTIONS*, VOL. VI (Vermont)].

36. Madison was sufficiently sensitive to Montesquieu's great authority in American constitutional thought that he devoted several lengthy paragraphs in *Federalist No. 47* to contending that the Frenchman's doctrine of separation of powers did not imply the absence of any control or influence by one branch over the actions of another. *THE FEDERALIST NO. 47*, at 302–03 (James Madison) (Clinton Rossiter ed., 1961).

37. *See, e.g.*, *THE FEDERALIST NO. 70*, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961). ("[E]nergy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . . to the steady administration of the laws, to the protection of property . . . to justice; [and] to the security of liberty"); *see* Rogan Kersh, *Federalist No. 67: Can the Executive Sustain Both Republican and Energetic Government?*, 71 *PUB. ADMIN. REV.* 590 (Dec. 2011).

38. "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the age of thirty five Years, and been fourteen Years a Resident within the United States." U.S. CONST. art. II, § 1, cl. 6.

39. The motion to have the chief executive serve "during good behavior" was made by Doctor McClurg on July 17, 1787, and failed the same day. Interestingly, however, it failed by the narrow margin of five votes to four. *See* 1 FARRAND, *supra* note 30, at 33–36.

40. U.S. CONST. art. II, § 1.

be permitted, but concluded in the end that it should, in large measure because they believed that the necessity of facing the electorate at fixed intervals would restrain presidential misbehavior.⁴¹

Indeed, a good many delegates to the Constitutional Convention were convinced that the presidency would be so weak an office that nothing much should be feared from its occupant, and that the prospect of elections would be a sufficient check on any executive excesses.⁴² However, the wiser majority of Framers, even though they could not have anticipated the modern presidency in the full panoply of its power, concluded that presidents might indeed become tyrannical or corrupt in ways and to degrees requiring removal during their terms. Accordingly, in addition to checks like Senate authority over presidential appointees, treaties, and declarations of war, and Congress's power of the purse, they adopted the venerable British institution of impeachment.⁴³

This is not the occasion for a full discourse on the U.S. Constitution's impeachment provisions,⁴⁴ but several points about impeachment are critical to understanding how the Framers viewed pardons. First, although the impeachment power is now understood to extend to all federal judges, the president, vice-president, and a variety of subordinate executive branch officials,⁴⁵ the impeachment debate at the Constitutional Convention centered almost exclusively on the presidency.⁴⁶ The Framers knew that impeachment had been invented in the 1300s by the British Parliament as a check on royal authority, and that it had been used aggressively for that purpose for centuries, particularly during the era of the Stuart kings.⁴⁷ However, in Britain, the monarch could not be impeached. Impeachment's utility in checking royal power lay in the removal (and oft-times severe punishment)

41. See, e.g., THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON, A DELEGATE FROM THE STATE OF VIRGINIA (Gaillard Hund & James Brown Scott eds., Oxford Univ. Press 1920), *republished in Madison Debates, June 1*, AVA-LON, https://avalon.law.yale.edu/18th_century/debates_719.asp. (contending, *inter alia*, that denying an opportunity for reelection would remove a powerful incentive for acting in the public interest and “tempt him to make the most of the short space of time allotted him, to accumulate wealth and provide for his friends”); R. Gordon Hoxie, *The Presidency in the Constitutional Convention*, 15 PRES. STUD. Q. 25, 29 (1985).

42. BOWMAN, *supra* note 3, at 90.

43. *Id.*

44. For that discussion, see generally BOWMAN, *supra* note 3, passim.

45. BOWMAN, *supra* note 3, at 112, 122–25 (cabinet officers), 126–27 (judges).

46. *Id.* at 89–94.

47. *Id.* at 99–111.

of the king's ministers through parliamentary impeachment.⁴⁸ The primary innovation of American impeachment was exposing the head of state to impeachment. Indeed, Alexander Hamilton responded to the charge that he was a monarchist by insisting that so long as the chief executive "is subject to impeachment, the term monarchy cannot apply."⁴⁹

Second, in Great Britain, impeachment by the House of Commons and subsequent conviction in the House of Lords authorized not only removal of the offending official, but imposition of the full panoply of what we would now consider criminal punishments: fines, imprisonment, forfeiture of lands and titles, and even the death penalty.⁵⁰ The American Framers disapproved of this aspect of British practice. They thought it brutal, often devoid of fair process, and politically unwise. They saw that the use of the legislature, a political body, to inflict personal punishment not only subverted the ideal of an impartial rule of law, but also risked initiating cycles of political and personal vengeance that would unsettle the state.

Accordingly, the Framers narrowly restricted the consequences of impeachment itself to removal from office and disqualification from future federal officeholding.⁵¹ However, they recognized that conduct meriting impeachment might also offend statutory criminal law, and they wanted to ensure that federal office holders impeached for conduct of that sort would not be immune to the penalties to which ordinary persons were exposed. Thus, in Article I, the Framers explicitly permitted infliction of additional consequences, but only following separate proceedings in ordinary courts:

Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: *but the*

48. *Id.* at 23–25.

49. See 1 FARRAND, *supra* note 30, at 300.

50. BOWMAN, *supra* note 3, at 26.

51. U.S. CONST. art. I, § 3, cl. 7 (emphasis added). The constitutional text could be read to make disqualification from future office automatic upon conviction, but tradition and practice now dictate that removal is automatic but disqualification requires a separate vote of the Senate following conviction. The requirement of a separate Senate vote dates back to at least the 1912 impeachment of U.S. District Judge Robert Archbald, *The Impeachment and Trial of Robert W. Archbald*, in 6 CANNON'S PRECEDENTS, Ch. 200, <https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/html/GPO-HPREC-CANNONS-V6-53.htm>. *Impeachment of Judge Ritter*, in 3 DESCHLER'S PRECEDENTS, Ch. 14, § 18 2205–2246 <https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3-5-5-5.pdf> (describing 1933 impeachment proceedings against Judge Halstead Ritter).

*Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law.*⁵²

In short, an official, including a president, who is impeached and removed from office may also be haled before federal criminal courts and there prosecuted, convicted, and punished for the same conduct. Conversely, just as the impeachment clauses of the Constitution were designed to prevent criminal punishment of presidents by the legislature, while preserving the power to prosecute presidents in court, the Constitution's Pardon Clause was written to prevent a president from using it to nullify Congress's impeachment power. Article II declares: "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, *except in Cases of impeachment.*"⁵³

The exclusion of impeachment cases from the pardon power was not an American invention. Rather, it was drawn directly from British practice. After the restoration of the British monarchy in 1660 following the exhaustion of Oliver Cromwell's Commonwealth, King Charles II was chronically short of funds and perennially at odds with Parliament over its reluctance to fund him.⁵⁴ Charles authorized the Earl of Danby to write letters offering the French king British neutrality in the ongoing Franco-Dutch war in return for a huge cash annuity paid directly to Charles. The letters leaked. Parliament impeached Danby for treason.⁵⁵ The king prorogued Parliament to stop the proceedings, and when a subsequent Parliament revived them, attempted to protect Danby by issuing him a royal pardon.⁵⁶

The House of Commons was outraged, not merely at the effort to circumvent justice for Danby, but at the precedent that accepting such a pardon "in bar of impeachment" would set. If a king could nullify impeachments with pardons, a principal weapon for punishing misdeeds among those close to the king would be snatched from Parliament's fist. If Danby's pardon stood, said one member of Commons, "it will always be thus, whilst after an Impeachment of High Treason, any man should go at large. It was for the safety of the King and the Nation, that a Minister be afraid of this House."⁵⁷ The King appar-

52. U.S. CONST. art I, § 3, cl. 7 (emphasis added).

53. U.S. CONST. art. II, § 2.

54. BOWMAN, *supra* note 3, at 38.

55. WILLIAM COBBETT, *Articles of Impeachment Against the Earl of Danby*, in 4 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, 1067–69 (1808) (the 1678 Articles of Impeachment against Lord Danby).

56. BOWMAN, *supra* note 3, at 38–39; William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 489 (1977).

57. 7 Anchtell Grey, DEBATES OF THE HOUSE OF COMMONS 20 (1763).

ently tried to soothe Parliament's fears by maintaining that issuance of pardons to royal ministers was merely routine. Replied Mr. Booth, "The King has told us, that it is usual for him to pardon his servants when he discharges them, etc. If it be the custom, it is an ill one, and the worst that it can be."⁵⁸ After lengthy debate, the Commons ruled that a royal pardon could not block an impeachment.⁵⁹

The House of Lords was more ambivalent. It permitted argument on the validity of the King's pardon; suggested that, whatever it might decide, Danby's pardon ought not serve as precedent in any future case; and in the end declined to decide one way or the other.⁶⁰ The Danby affair was nonetheless invoked in succeeding decades as precedent, albeit a somewhat equivocal one, for the principle that royal pardons were ineffective against impeachment. In 1700, Parliament resolved the question directly.

The story of that resolution began in 1685, when King James II ascended to the throne of England, Scotland, and Ireland upon the sudden death of his father, Charles II.⁶¹ Within three years, James grievously alienated his subjects through bad governance and by failing to assuage fear that his personal Catholicism would in time replace Anglican Protestantism with a restored English Catholic Church. Powerful figures in the kingdom sought James's abdication and invited the Protestant Prince William of Orange and his wife Mary (daughter of James II) to assume the throne.⁶² The largely bloodless 1688 swap of James II for William and Mary was ever after known as the "Glorious Revolution."⁶³ Parliament conditioned its welcome of the dual monarchs on two basic conditions—recognition of the ultimate sover-

58. *Id.* at 21.

59. The Commons' last ground of decision is particularly apt to our present moment:

An Impeachment is virtually the Voice of every particular Subject of this Kingdom, crying out against an Oppression, by which every Member of that Body is equally wounded; And it would prove a Matter of ill Consequence, That the Universality of the People should have Occasion ministred and continued to them, to be apprehensive of utmost Danger from the Crown, whereby they of Right expect Preservation.

9 HC Jour. (1679) 633; 13 HL Jour. (1679) 592–93.

60. Duker, *supra* note 56, at 494–95.

61. PETER ACKROYD, *THE HISTORY OF ENGLAND, VOL. III: CIVIL WAR* 453 (2014).

62. *Id.* at 453–466.

63. There was scarcely any bloodshed on the English and Scottish main island. James's army in the south deserted and forced him to flee to France. A rising in James's favor in the north sputtered out with little serious conflict. The main pitched battle during the struggle to expel James occurred in Ireland. James landed in Ireland, aided by French troops, and received a better welcome than he had in England and Scotland. William of Orange defeated James at the Battle of the Boyne in 1690, celebrated ever since by Northern Irish Protestants as a triumph of Protestantism over

eignty of the legislature⁶⁴ and a guarantee of a Protestant succession. The particulars of these commitments were embodied first in the Bill of Rights of 1689,⁶⁵ and in the later Act of Settlement of 1700.⁶⁶ The Act of Settlement was devoted mostly to the succession problem, but it also contained provisions protective of parliamentary power. Among these was the declaration, “That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament.”⁶⁷ In short, no future king or queen could stop Parliament from impeaching a royal minister by issuing a pardon.

Some very respectable authorities maintain that, despite the Act of Settlement, the Crown retained the power to pardon *after* impeachment by the Commons and conviction in the Lords.⁶⁸ I am doubtful that this was ever strictly true. In British impeachments, conviction in the House of Lords opened the defendant not only to removal from office, but also to forfeiture of property and titles, imprisonment, and even death. Under the Act of Settlement, the Crown could not prevent impeachment in Commons, conviction in the Lords, or removal from office. To the extent the monarch retained some power of clemency after conviction, royal action could not reverse Parliament’s judgment or automatically restore the defendant to office. Rather, it appears that the claimed royal power of post-impeachment pardon was not a full pardon in Blackstone’s sense of “mak[ing] the offender a new man,”⁶⁹ but merely a reprieve or remission of personal penalties, particularly death.⁷⁰

popery. *Id.* at 466–69; *History of Britain: The British Wars* (BBC Worldwide broadcast May 8, 2001).

64. Whether either the Crown or Parliament would, at the time, have classified the Bill of Rights as conferring sovereignty on Parliament is perhaps debatable. In retrospect, however, the array of rights and powers guaranteed to Parliament in the Bill of Rights amounts to sovereign authority in the state.

65. The Bill of Rights (1689), 1 Will. & Mary, sess.2, c.2.

66. The Act of Settlement (1700), 12 & 13 Will. 3, c. 2.

67. *Id.*

68. See 4 BLACKSTONE, COMMENTARIES, *supra* note 24, at 392–93; 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 618–19 (1792); Duker, *supra* note 56, at 496–97. See also, *Ex Parte Wells*, 59 U.S. 307, 312 (1855). (“By the Act of Settlement, 12 & 13 Will. III. c. 2, Eng., no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined, he may pardon.”).

69. See 4 BLACKSTONE, COMMENTARIES, *supra* note 24, at 395.

70. I think it significant, for example, that although Blackstone asserted that the monarch maintained a power of post-impeachment pardon, the only cases of post-impeachment royal clemency he mentions involved the Scottish lords impeached, convicted, and condemned to death for treason after the Jacobite Rising of 1715. *Id.* at 392–93. Several of these lords were later “reprieved” by the King, meaning that they were permitted to live, but only after the House of Lords first voted in the affirmative

All this British constitutional minutia matters because it helps explain why the American Framers phrased the penalty provisions of the impeachment clause and the impeachment exclusion in the Pardon Clause as they did. The Framers plainly knew that the Act of Settlement barred the Crown from blocking or voiding an impeachment with a pardon, and at least some were aware that the Crown could use the pardon post-impeachment to remit personal penalties.⁷¹ In such cases, the monarch could thereafter seek to restore the convicted fa-

on the proposition that “whether in a case of impeachment, the king has any power to reprieve,” and then in favor of “an address [to] the king to reprieve such of the condemned lords as should deserve his mercy.” 7 WILLIAM COBBETT, *COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND* 283 (1811). Note the use of the specialized term “reprieve” in place of the more general word “pardon.” I interpret the Lords to have been saying no more than that the Crown may relieve an impeached and condemned subject of the ultimate penalty of death. There is no indication that the Lords thought the King by pardon could have undone the convictions or even have relieved the convicted lords of any non-capital elements of their punishment. There is some uncertainty on the latter point. Professor Wooddeson in his *Vinerian Lectures* noted that while the Act of Settlement precludes a royal pardon from preventing an impeachment, “The king may still remit the execution of the sentence.” Wooddeson believed that such a remission could extend to forfeitures of property, but could not void the conviction or erase an attainder of blood and resultant loss of hereditary title and precedence incident to conviction. WOODDESON, *supra* note 68, at 618–19 (1792).

One reason both Blackstone and Wooddeson may have been eager to affirm a sweeping post-impeachment royal pardon power is that both were obviously trying to situate impeachment, which was often employed as a political weapon in the ongoing interbranch struggle between Crown and Parliament, in the workaday framework of the common law. *Id.* at 619–20. From the perspective of a dedicated common law scholar, an impeachment was merely a specialized forum for trying certain special classes of causes and persons, and thus the Crown ought to retain its customary prerogative of mercy. Neither Blackstone nor Wooddeson acknowledge impeachment’s larger constitutional role as a legislative means of checking royal power by trying and punishing crown subordinates who were acting in conformity with the will of the monarch, but contrary to Parliament’s convictions about the national good. In cases where that was Parliament’s purpose (as it often was, for example, in a number of impeachments of the Stuart period, *see* BOWMAN, *supra* note 3, at 30–39), insisting on a post-impeachment royal pardon power reduced the leverage of this important legislative tool for counteracting misconduct by the Crown and royal ministers, and dramatically devalued the language in the Act of Settlement. This approach suited not only Blackstone’s purposes as a promoter of the common law, but also his conservative Tory instincts. *See* Robert Willman, *Blackstone and the ‘Theoretical Perfection’ of English Law in the Reign of Charles II*, 26 *HIST. J.* 39, 45, 57–58 (1983) (describing Blackstone’s conservative, and even monarchist, approach to the common law).

71. In the ratification debates on the Constitution, North Carolinian James Iredell observed:

In England, the only restriction upon this power in the King [pardoning] in the case of Crown prosecutions (one or two slight cases excepted) is, that his pardon is not pleadable in bar of an impeachment. But he may pardon after conviction, even on an impeachment; which is an authority not given to our President, who in case of impeachments has no power either of pardoning or reprieving.

vorite to power by bestowing new titles and offices.⁷² It is reasonable to conclude that the American Framers wrote the language allowing disqualification of impeached and convicted officials from future office into the Constitution's impeachment clause⁷³ to empower Congress to prevent a stubborn president from politically rehabilitating a convicted ally, *and* to protect the country from proven bad actors by permanently barring impeached officials from ever returning to power in the national government. Likewise, the Framers echoed the Act of Settlement in writing the impeachment exclusion into the Pardon Clause⁷⁴ to avoid an end run around these protections.⁷⁵ The result was an impeachment power milder than the British version because its punishments were restricted to the political sphere, but potentially sterner in that sphere because Congress could render permanent a political disqualification following impeachment and thus insulate that disqualification from presidential meddling.⁷⁶

Marcus, *Answers to Mason's Objections*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 351 (P. Ford ed. 1968) (hereinafter Ford Pamphlets); *see also* THE DEBATE ON THE CONSTITUTION: PART TWO 379 (Bernard Bailyn, ed., 1993) [hereinafter 2 BAILYN]. Iredell obviously had studied the extent of the royal power in some detail. His mention of "one or two slight cases excepted" is likely a reference to several peculiar wrinkles in the British law of pardons of the 1700s. For example, the monarch could not pardon convictions obtained by "appeal of felony," which were convictions resulting from private prosecutions initiated by the victims of crime. On this and other nuances, *see* BLACKSTONE, COMMENTARIES, *supra* note 24, at 391-95.

72. This was the case for the Earl of Middlesex, Lord High Treasurer, impeached, convicted, and stripped of office in 1624, but restored to favor by Charles I. BOWMAN, *supra* note 3, at 32-33.

73. U.S. CONST. art. I, § 3, cl. 7.

74. U.S. CONST. art. II, § 2, cl. 1.

75. The Supreme Court has recognized the relationship between the Act of Settlement and the pardon language in the U.S. Constitution. *Ex Parte Wells*, 59 U.S. 307, 312 (1855) (emphasis added):

By the Act of Settlement, 12 & 13 Will. III. c. 2, Eng., no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined, he may pardon. *The provision in our Constitution, excepting cases of impeachment out of the power of the President to pardon, was evidently taken from that statute, and is an improvement upon the same.*

76. Likewise, under the U.S. Constitution, there is no justification for the kinds of post-impeachment "pardons," or more properly "reprieves," that may have remained available in Britain after the Act of Settlement of 1700. Because the U.S. Constitution prohibits any consequence other than removal from office and a bar from future officeholding, no exercise of mercy in the sense of voiding or lowering criminal punishment is ever called for.

C. Pardons as a Presidential Prerogative

The Framers' thinking about the pardon power and impeachment interacted in yet another, even more fundamental, way. For the former British subjects who became American Framers, the pardon power was naturally associated with its origins as a royal prerogative.⁷⁷ But that royal pedigree helped provoke debate at the Convention about whether, in the new, republican United States, pardons should be placed in the exclusive control of the chief executive or ought instead to be issued or regulated by the legislature. Integral to the spirit of the American Revolution was apprehension of excessive executive power, a concern that extended to the pardon authority. In the period following the Declaration of Independence, the new American states drafted their own constitutions, which variously placed the pardon power directly in the legislature,⁷⁸ allowed the legislature to designate by statute the scope of executive pardon power,⁷⁹ excluded impeachment from the pardon authority,⁸⁰ or gave the legislature a veto over pardons of certain offenses like treason and murder.⁸¹

Lingering suspicion of unchecked executive power certainly influenced the Convention debates. Two of the four initial constitutional frameworks proposed in Philadelphia in the early summer of 1787 (the Virginia Plan, primarily drafted by James Madison and introduced by Edmund Randolph,⁸² and William Paterson's New Jersey Plan⁸³) contained no pardon power. On the other hand, Charles Pinckney⁸⁴ and

77. In the colonial period, a power to pardon or commute punishments was sometimes conferred by the Crown on the proprietors who held royal charters to settle particular provinces. In royal colonies, the royal governor might possess a pardon power by royal delegation. But the award of a pardon power to local officials was, it seems, primarily a concession to distance and pragmatism. The legal source of the power was the Crown. *See generally*, Duker, *supra* note 56, at 497–500. *See also*, *Ex Parte Wells*, 59 U.S. at 311 (“At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown At that time both Englishmen and Americans attached the same meaning to the word pardon. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution.”).

78. *Id.* at 500 (describing constitutions of Georgia and New Hampshire that conferred pardon power on the state legislature).

79. *Id.* (describing constitutions of Delaware, Virginia, and North Carolina).

80. *Id.* at 500–01 (describing constitutions of Massachusetts and Pennsylvania).

81. *Id.* (describing constitutions of Pennsylvania and New York).

82. 1 ELLIOT, *supra* note 30, at 143–45.

83. *Id.* at 175–77; 1 FARRAND, *supra* note 30, at 242–45.

84. 1 ELLIOT, *supra* note 30, at 148 (“He [the chief executive] shall have power to grant pardons and reprieves, except in impeachments.”). *See also Sketch of Pinckney's Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735 (1904).

Alexander Hamilton⁸⁵ advanced proposals including such a power. Pinckney's proposal conferred the pardon power on the president alone and for all crimes, while Hamilton's granted the president the individual power to pardon all crimes except treason, for which a pardon would require permission of the Senate. By August, the delegates had approved a draft clause granting executive pardon power except for impeachments.⁸⁶

Some delegates remained chary of conferring absolute pardon power on the president. On August 25, Roger Sherman moved to limit the president's authority to that of granting "reprieves until the ensuing session of the Senate, and pardons with the consent of the Senate."⁸⁷ At this point in the deliberations, some delegates were as concerned with the powers being assigned to the Senate as they were with the potential for presidential overreach.⁸⁸ Perhaps for that reason, the proposal failed, eight delegations to one.⁸⁹ The Convention's final version of the Pardon Clause left the pardon authority within the unchecked discretion of the president.⁹⁰

For ordinary cases, this allocation of authority was consistent with the Framers' overall objective of creating inter-branch checks and balances. A pardon can remedy the legislature's insistence on passing draconian laws⁹¹ or nullify the handiwork of a particularly bloody-minded judge. But some delegates with an eye on their English past, or perhaps just a more coldly realistic appreciation of the darker potential of humans vested with great power, worried that a pardon authority that extended to all offenses, even treason, could be em-

85. 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 205 (Jonathan Elliot ed., 2d ed.) (hereinafter 5 ELLIOT) (The chief executive shall "have the power of pardoning all offenses, except treason, which he shall not pardon without the approbation of the senate.").

86. 1 ELLIOT, *supra* note 30, at 261, 297.

87. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 419 (Max Farrand ed., 1911) (hereinafter 2 FARRAND).

88. As but one example of this type of concern, George Mason listed the excessive power of the Senate as one of his reasons for declining to vote for the Constitution at the close of the Convention. *Id.* at 638.

89. 5 ELLIOT, *supra* note 85, at 480.

90. U.S. CONST., art. II, § 2.

91. President Obama used the pardon power in this way with his program for non-violent drug offenders sentenced to lengthy mandatory terms. DEPARTMENT OF JUSTICE, OBAMA ADMINISTRATION CLEMENCY INITIATIVE (last updated Jan. 12, 2021), <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> [<https://perma.cc/2KC4-BY3B>]; Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa_story.html.

ployed by a president to conceal his own misdeeds by pardoning his confederates.

In early September, Edmund Randolph sought to exclude “cases of treason” from the president’s pardon authority, arguing that, “The prerogative of pardon in these cases was too great a trust. The President himself may be guilty. The traitors may be his own instruments.”⁹² A complex argument ensued. James Madison suggested, as had Hamilton some months before, that pardons for treason should only issue from the Senate or after a collaboration with the Senate.⁹³ Gouverneur Morris of Virginia and Rufus King of Massachusetts feared any legislative involvement, King both because it would violate separation of powers and because he thought legislatures too changeable.⁹⁴ Randolph rejected senatorial participation as presenting the danger of “a combination between the President and that body.”⁹⁵ Randolph’s original motion to exclude treason failed 8-2.⁹⁶

Concern over the power to pardon treason resurfaced repeatedly in the ratification debates.⁹⁷ Randolph reiterated his objection in a letter to the Virginia House of Delegates.⁹⁸ George Mason reprised Randolph’s argument that a treasonous president could protect himself by pardoning his co-conspirators.⁹⁹ In response, James Madison did not deny such a thing was possible, but insisted that a president who abused the pardon power in that way could be impeached:

92. 5 ELLIOT, *supra* note 85, at 549. This argument is recounted, though not attributed to Randolph by name, in Luther Martin’s reports of the results of the Constitutional Convention to the Maryland House of Assembly. Luther Martin, “The Genuine Information” IX, Jan. 29, 1788, in *THE DEBATE ON THE CONSTITUTION: PART ONE* 653 (Bernard Bailyn, ed., 1993) [hereinafter 1 BAILYN].

93. 5 ELLIOT, *supra* note 85, at 549.

94. *Id.* Morris did not amplify on his reservations, or at least contemporary notes of the debate do not record the specifics of his concern.

95. *Id.*

96. *Id.*

97. See, e.g., “Americanus” [John Stevens, Jr.] VII, *A Refutation of Governor Edmund Randolph’s Objections*, *DAILY ADVERTISER* (New York) (January 21, 1788), in 2 BAILYN, *supra* note 71, at 58, 60 (responding to Randolph by saying, “[The pardon power] must necessarily be lodged some where, and where, I would ask, would we place it with greater safety and propriety?”).

98. Letter of Edmund Randolph, Oct. 10, 1787, in 1 BAILYN, *supra* note 92, at 596, 610 (urging that Virginia insist on “taking from [the president] the power of pardoning for treason, at least before conviction”).

99. Mason made this argument both during oral debates, 3 JONATHAN ELLIOT, *THE DEBATES IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 497 (1827), and in a published summary of his arguments against the Constitution. *The Objections of the Hon. George Mason, to the Proposed Federal Constitution. Addressed to the Citizens of Virginia. Printed by Thomas Nicholas, in Ford Pamphlets*, *supra* note 71, at 327, 330–31.

There is one security in this case [a misuse of the pardon power by the president] 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. . . .¹⁰⁰

In Pennsylvania, one author suggested that the risk of a president protecting himself by pardoning his own traitorous co-conspirators could be ameliorated by attaching to the president a council whose approval would be required for every consequential presidential act, including pardons.¹⁰¹ The ratifying convention of New York voted to approve the Constitution, but appended a list of recommended amendments, including one requiring congressional approval for pardons for treason.¹⁰² In Federalist 74, Alexander Hamilton tried to assuage these concerns by nodding quickly at the possibility of a traitorous president, but arguing that a president rather than a legislature would be best suited to act promptly in a situation where insurrection or rebellion might be brewing and a timely offer of pardons could help forestall the plot.¹⁰³ In the end, the ratified Constitution conferred on the president exclusively a power to grant “Reprieves and Pardons for Offenses against the United States,” with the sole exception of cases of impeachment¹⁰⁴ (about which more below¹⁰⁵).

II.

LIMITS ON A PRESIDENT’S PARDON POWER

The grant of presidential power in Article II seems absolute, at least as to federal crimes. There are, nonetheless, limits on its reach. In addition to three restrictions on the effect of pardons not germane

100. 3 ELLIOT, *supra* note 99, at 498. George Nichols, another delegate to the Virginia convention, made the same point. *Id.* at 17. See also James Iredell, *Answers to Mr. Mason’s Objections to the New Constitution, Recommended by the Late Convention*, in Ford Pamphlets, *supra* note 71, at 350–54, discussed in greater detail *infra* notes 165–66, and accompanying text.

101. Reply to James Wilson’s Speech, “Centinel” [Samuel Bryan] II, *Freeman’s Journal* (Philadelphia), Oct. 24, 1787, in 1 BAILYN, *supra* note 92, at 77, 87.

102. Ratification of the Constitution by the Convention of the State of New York, July 26, 1788, 2 BAILYN, *supra* note 71, at 536, 543 (proposing that the Constitution be amended to provide, “That the executive shall not grant pardons for treason, unless with the consent of Congress; but may, at his discretion, grant reprieves to persons convicted of treason, until their cause can be laid before Congress”).

103. THE FEDERALIST No. 74 (Alexander Hamilton) (“a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth”).

104. U.S. CONST., art. II, § 2, cl. 1.

105. See *infra* notes 223–45 and accompanying text.

here,¹⁰⁶ I believe two types of pardon are constitutionally impermissible—self-pardons and prospective pardons. However, I am obliged to reject arguments recently advanced that some federal pardons can be voided based on the president’s duty to ensure that the laws be faithfully executed; in criminal cases related to impeachment; and in some cases of criminal contempt of court.

A. *A President Cannot Constitutionally Pardon Himself*

From very early in his administration, President Trump’s brazen violations of governmental norms stimulated talk about whether he might be committing crimes, and also whether he might try to pardon himself for them.¹⁰⁷ As the investigation by Special Counsel Robert Mueller neared its climax in June 2018, Trump baldly declared, “As has been stated by numerous legal scholars, I have an absolute right to pardon myself.”¹⁰⁸ Trump’s claim of scholarly authority was not completely without foundation. Although the Constitution does not address the question squarely and no president has ever tried to pardon himself, a few commentators have argued that the Constitution grants presidents the power of self-pardon.¹⁰⁹ Nonetheless, the weight of

106. As described in *Pennsylvania Prison Society v. Cortes*, 622 F.3d 215, 242–43 (3d Cir. 2010), these are: (1) a pardon cannot violate the Takings Clause by interfering with the vested rights of third parties; (2) a pardon cannot require the Treasury to expend money in violation of the Spending Clause; and (3) “a pardon cannot require a prisoner to forfeit his constitutional rights unreasonably.” The Third Circuit suggests a fourth limitation grounded in due process principles on the procedures employed to consider pardons based on *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998). I am doubtful that this opinion addressing state clemency procedures is applicable to the federal presidential pardon power. Even if it were, Justice O’Connor’s concurrence explaining the Court’s holding suggests that a due process violation would be cognizable only if the pardon procedures were wholly irrational, as would be the case if the decision were made by a coin flip. *Id.* at 289. See also JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 35 (2009).

107. See, e.g., Elizabeth Holtzman, *Could Trump Pardon Himself?*, WASH. POST (July 8, 2017), https://www.washingtonpost.com/opinions/so-could-trump-pardon-himself/2017/07/07/d2a1af26-60f8-11e7-8adc-fea80e32bf47_story.html (arguing that such an act would be unconstitutional); Charlie Savage, *Can Trump Pardon Himself? Explaining Presidential Clemency Powers*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/us/politics/trump-pardon-himself-presidential-clemency.html>.

108. Caroline Kenny, *Trump: ‘I Have the Absolute Right to Pardon Myself’*, CNN POLITICS (June 4, 2018), <https://www.cnn.com/2018/06/04/politics/donald-trump-pardon-tweet/index.html>. He went on to qualify this declaration with the phrase, “but why would I do that when I have done nothing wrong?” *Id.*

109. See, e.g., John Yoo & Saikrishna Prakash, *For Trump, Self-Pardon Would Equal Self-Immolation*, PHILA. INQUIRER (July 17, 2017), <https://www.inquirer.com/philly/opinion/commentary/for-trump-self-pardon-would-equal-self-immolation-20170727.html>; Michael Conklin, *Yes, Self-Pardons Are Constitutional, Even for Donald Trump*, (Sept. 18, 2020) (unpublished article) (on file with author) <https://priv>

opinion denies that presidents have such power, and, in my view, the arguments against are far more persuasive than those for.¹¹⁰

1. Textual Arguments

Those who contend that a president could validly pardon himself or herself tend to rely heavily on the seemingly absolute language of the Constitution's pardon clause:¹¹¹ "The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."¹¹² Leaving aside the exclusion for "cases of impeachment," the grant of authority appears unlim-

papers.ssrn.com/sol3/papers.cfm?abstract_id=3667738&dgcid=ejournal_html_email_u.s.:constitutional:law:interpretation:judicial:review:ejournal_abstractlink (a perfunctory treatment of the subject).

110. For summaries of arguments commonly made for and against presidential self-pardon, see Jack Goldsmith, *A Smorgasbord of Views on Self-Pardoning*, LAWFARE (June 5, 2018, 11:30 AM), <https://www.lawfareblog.com/smorgasbord-views-self-pardoning>; Michael J. Conklin, *Can a President Pardon Himself? Law School Faculty Consensus*, NE. U. L. R. EXTRA LEGAL (Winter 2020). Among the earliest contemporary arguments against self-pardon was Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L. J. 779, 783 (1996). Professor Kalt elaborated the argument in a later book, BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 39–60 (2012). See also *Examining the Constitutional Role of the Pardon Power: Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Judiciary Comm.*, 116th Cong. (2019) (Statement of Andrew Kent, Professor of Law at Fordham Law School), <https://docs.house.gov/meetings/JU/JU10/20190327/109162/HHRG-116-JU10-Wstate-KentA-20190327.pdf> (contending that constitution does not authorize presidential self-pardon); 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) (arguing that the Constitution permits presidential self-pardon); Lauren Mordacq, *Fake News: The President Has the "Absolute Right" to Pardon Himself*, 13 ALB. GOV. L. REV. ONLINE, no. 1, 2020, <http://www.albanygovernmentlawreview.org/Online%20Articles/2020/1.pdf> (arguing presidential self-pardon is not permitted).

111. See, e.g., Nida & Spiro, *supra* note 110, at 217:

The Constitution does not contain any other words regarding pardons, and it does not contain any text specifically restricting the President's ability to self-pardon. As one commentator has stated, "[t]he Constitution provides no limitation on the pardon power, and it has been consistently interpreted to be virtually unlimited." The only limitation is the restriction on impeachment, and if the Framers had intended the text to restrict the pardon power even more, they most likely would have made this intention apparent from the plain meaning of the Constitution. For instance, to restrict self-pardoning, the Framers could have included a clause similar to the following: Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment and against oneself.

(quoting Peter Ferrara, *Commentary, Could President Pardon Himself?*, WASH. TIMES, Oct. 22, 1996 at A-14).

112. U.S. CONST., art. II, § 2, cl. 1.

ited. But a moment's reflection reveals that there are multiple other restrictions built into the language itself.

First, the president's pardon power extends only to certain *kinds* of legal violations. The word "offenses" in the phrase "offenses against the United States" embraces only crimes, and not civil wrongs.¹¹³ So, for example, a president can pardon an offender for the federal crimes of drug dealing, embezzlement, mail fraud, or counterfeiting,¹¹⁴ but the president cannot void a civil judgment for a constitutional tort or breach of contract. Nor can the president use the pardon power to relieve someone of the consequences of a judgment entered by an administrative adjudicative body. Likewise, the phrase "against the United States" limits the president's pardon power to *federal* crimes.¹¹⁵ A president has no authority whatever to pardon state crimes. The limitation to federal crimes was plainly understood by the Founding generation. As James Iredell said during the North Carolina ratifying convention, "This power [of pardoning] however only refers to offences against the United States, and not against particular states."¹¹⁶ The limitation of the presidential pardon power to federal crimes has never been challenged.¹¹⁷

113. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 113–14 (1925) (holding the President may pardon a criminal, but not a civil, contempt).

114. See, e.g., *Pardons Granted by President Barack Obama (2009-2017)*. U.S. Dept. of Just., <https://www.justice.gov/pardon/obama-pardons> [<https://perma.cc/Y4T9-B7NA>] (last updated July 11, 2018) (listing defendants pardoned for these and many other federal offenses).

115. *Grossman*, 267 U.S. at 113:

We have given the history of the clause to show that the words "for offences against the United States" were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States, as distinguished from offenses against the States.

116. James Iredell, Statement to the North Carolina Convention, July 28, 1788, in 2 BAILYN, *supra* note 71, at 875.

117. See *Frequently Asked Questions*, U.S. Dep't of Justice, [<https://perma.cc/69Q7-RMFG>] (last updated Dec. 9, 2018):

The President's clemency power is conferred by Article II, Section 2, Clause 1 of the Constitution of the United States, which provides: "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Thus, the President's authority to grant clemency is limited to federal offenses and offenses prosecuted by the United States Attorney for the District of Columbia in the name of the United States in the D.C. Superior Court. An offense that violates a state law is not an offense against the United States.

Second, to say that a president has “power to grant . . . pardons” strongly implies a limitation on *who* may receive such a boon.¹¹⁸ At the most basic level, both the etymology of the word “pardon” and its usage in virtually every setting for centuries past presupposes one person or entity judging the conduct of another and, having arrived at a favorable conclusion, absolving the other of fault (or at least forgiving it), or remitting the penalty for fault.

According to the *Oxford English Dictionary*, the English word “pardon” as both a noun and a verb is a borrowing from French¹¹⁹ and derives from two Latin roots: *per*, meaning “by” (or as a prefix in this context perhaps thoroughness or completeness),¹²⁰ and *donum*, a

118. Because the issue here is a presidential self-pardon, I have omitted consideration of the word “reprieve.” A reprieve is a delay of execution of a previously imposed sentence. *Reprieve*, TheLaw.com, <https://dictionary.thelaw.com/reprieve>; *What is Reprieve?*, The Law Dictionary, <https://thelawdictionary.org/reprieve/>. For a president to “reprieve” himself would require a prior conviction. The point of a self-pardon would, presumably, be to forestall such an event from ever occurring.

119. The OED gives the etymology of the noun form of “pardon” as:

Anglo-Norman *pardoun*, Anglo-Norman and Old French *pardun*, Anglo-Norman and Old French, Middle French *pardon*, *perdon* (French *pardon*) act of forgiving a fault or offence (1130–40), (theological) indulgence (1160–74), church festival at which indulgences were granted (*c*1240 in Anglo-Norman as *pardun*) <*pardonner* PARDON *v.* Compare Spanish *perdón* (1100), post-classical Latin *perdona*, *perdonum* (frequently 1130–1252 in British sources; 14th cent. in a continental source), Old Occitan, Occitan *perdon* (*a*1150; also *c*1150 as *pardon*, showing French influence), Catalan *perdó* (13th cent.), Portuguese *perdão* (13th cent. as *perdon*), Italian *perdono* (13th cent.).

The etymology of the verb form of “pardon” is:

<Anglo-Norman *pardonnir*, *parduner*, Anglo-Norman and Old French *pardoner*, *perdoner*, Anglo-Norman and Middle French *pardonner*, Middle French *perdonner* to pardon a person condemned to death (end of the 10th cent. in Old French in the phrase *perdoner vida a*), to forgive a sinner (end of the 10th cent.), to pass over an offence (1100), used as polite formula *pardonnez moy* (mid 16th cent.; 1616–20 in sense ‘to release (a person) from a duty’; French *pardonner*, †*perdonner*) <post-classical Latin *perdonare* to grant, concede (4th–5th cent.), to remit, condone, forgive (9th cent.) < classical Latin *per-* PER-prefix + *donāre* (see DONATE *v.*). Compare Old Occitan, Occitan *perdonar* (1053), Catalan *perdonar* (*c*1200 or earlier), Spanish *perdonar* (early 13th cent.), Italian *perdonare* (*a*1250), Portuguese *perdoar* (13th cent.).

Pardon, OXFORD ENGLISH DICTIONARY.

120. JOHN ASH, THE NEW COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (defining verb form of “pardon” as “(v.t. from the Lat. *per* by, *donum* a gift) To forgive, to excuse an offender, to remit a penalty”). The OED includes a more complex treatment of “per.” When used as a preposition, it can mean “for” or “by.” *Pardon*, OXFORD ENGLISH DICTIONARY, *supra* note 119. When used as a prefix to form compound words, it has multiple meanings, among them, “Forming words with the sense ‘thoroughly, completely, to completion, to the end.’” *Id.*

gift,¹²¹ or *donāre*, meaning to make a donation or gift.¹²² Thus, etymologically, a pardon is a type of gift and to pardon is to give such a gift. The act of gift-giving requires both a giver and a recipient. Although we sometimes loosely speak of giving ourselves a gift, in the sense of permitting ourselves an indulgence of some sort, the ordinary sense of the word gift, and thus of the act of pardon, requires two parties.

Although etymology by no means always dictates the evolved meaning of a word, in the case of “pardon,” it pretty much does. Begin with the most common usage of “pardon” in ordinary life. If I walk round an office corner too quickly and collide with you, I say, “Pardon me,” or, if I am feeling a bit more formal, “I beg your pardon.” This formula (which is very old¹²³) acknowledges my fault, to be sure, but so would, “I’m sorry.” To beg the other party’s pardon goes further and asks *both* for her recognition of my acknowledgement of fault *and* for her forgiveness. Thus, usage has elaborated etymology. To ask pardon is to ask for a particular kind of gift, that of forgiveness. At all events, asking for pardon necessarily implies two parties and the judgment of one about the conduct of the other.

The necessary duality of pardoner and pardoned extends beyond customary forms of politeness. All the examples of historical usage of either the noun or verb form of “pardon” enumerated in the *Oxford English Dictionary* either expressly or impliedly involve two parties.¹²⁴ Nothing in the ordinary usage of language during the Founding period suggests any special understanding of “pardon” excluding a second party.¹²⁵ Dictionaries known to be possessed by the Foun-

121. ASH, *supra* note 120.

122. *Pardon*, OXFORD ENGLISH DICTIONARY, *supra* note 119. Brian Kalt argues that two other “donāre” root words (condone and donate) are also useful in illustrating the point that the concept of pardon is inherently bilateral. As he says, “Linguistically, just as you cannot condone your own actions, and you cannot donate to yourself, you cannot pardon yourself.” KALT, *supra* note 110, at 44.

123. The OED traces the French variant (*pardonnez moy*) to the mid-sixteenth century. *Pardon*, OXFORD ENGLISH DICTIONARY, *supra* note 119.

124. *Pardon* (verb), OXFORD ENGLISH DICTIONARY, *supra* note 119. The noun form of “pardon” can refer to a singular object, the document memorializing a legal or ecclesiastical pardon, but here, too, the singular object is a record of a transaction involving two persons or entities.

125. The duality of persons necessary to the act of pardon reflected in the rather dry collation of the OED is also evident in the word’s usage in literature that would have been familiar to the Framers. For example, a search of all the works of William Shakespeare using the online tool OpenSource Shakespeare, Archive of Works by William Shakespeare, GEORGE MASON UNIVERSITY, <https://www.opensourceshakespeare.org>, found 299 uses of “pardon,” only one of which does not presume two parties. The sole exception is found in *Sonnet 58*:

ders¹²⁶ define the noun and verb forms of “pardon” variously, but they universally include the notion of forgiveness, with its implication of a pardoner’s judgment on the pardoned.¹²⁷

The language of the Constitution’s Pardon Clause provides further linguistic reinforcement to our common understanding of the du-

That god forbid that made me first your slave,
I should in thought control your times of pleasure,
Or at your hand the account of hours to crave,
Being your vassal, bound to stay your leisure!
O, let me suffer, being at your beck,
The imprison’d absence of your liberty;
And patience, tame to sufferance, bide each cheque,
Without accusing you of injury.
Be where you list, your charter is so strong
That you yourself may privilege your time
To what you will; to you it doth belong
Yourself to *pardon* of self-doing crime.
I am to wait, though waiting so be hell;
Not blame your pleasure, be it ill or well.

WILLIAM SHAKESPEARE, SONNET 58, https://www.opensourceshakespeare.org/views/sonnets/sonnet_view.php?Sonnet=58. Though the sentiment does the lovelorn poet credit, its literary bite derives from the peculiarity of the beloved granting herself pardon.

126. In identifying certain dictionaries as being possessed by the Founders of the American Constitution, I rely on the superb monograph by John Mikhail, *The Definition of ‘Emolument’ in English Language and Legal Dictionaries, 1523–1806*, at 14–18 (July 13, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693.

127. Consider the definition of “pardon” in four such dictionaries:

- (1) ASH, *supra* note 120:
Pardon (from the French) The forgiveness of a crime, an indulgence, the remission of penalty; the warrant of forgiveness. Pardon (v.t. from the Lat. per by, donum a gift) To forgive, to excuse an offender, to remit a penalty;
- (2) SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (3d ed. 1768):
To PARDON. V. a. [pardoner, Fr.] 1. To excuse an offender. Dryden. 2. To forgive a crime. 3. To remit a penalty. Shakesp. 4. Pardon me, is a word of civil denial, or slight apology. Shakesp.
PARDON. S. [Pardon, Fr.] 1. Forgiveness of an offender. 2. Forgiveness of a crime; indulgence. 3. Resission of penalty. 4. Forgiveness received. South. 5. Warrant of forgiveness, or exemption from punishment. Shakesp.
- (3) NATHAN BAILY, *NEW UNIVERSAL ETYMOLOGICAL DICTIONARY* (1755):
PARDON, Forgiveness, especially that which God gives Sinners.
To PARDON [in Law] the forgiving a Felony or Offence committed against the King.
PARDON [ex gratia Regis] is such a Pardon as the King affords with some special regard to the Person, or some other Circumstances. C.
PARDON [by the Course of the Law] is such as the Law of Equity allows for a light Offence.;
- (4) JOHN ENTICK, *THE NEW SPELLING DICTIONARY* (2d ed. 1776): “Pardon, s. forgive-ness, a remission of penalty. Pardon, v. a. to forgive, excuse, remit.”

ality of a pardon. The clause speaks of a president's "power to *grant* . . . pardons." To "grant" something is to give or bestow it.¹²⁸ In dictionaries known to be owned by the Framers, the verb form of "grant" is defined as, "To bestow something which cannot be claimed of right,"¹²⁹ or "*to . . . give, bestow.*"¹³⁰ The noun form is defined in several dictionaries possessed by the Founding generation as having a particular meaning in law. Nathan Baily defines "grant" as, "[in Law] a Gift in Writing of such a Thing as cannot conveniently be passed or conveyed by Word of Mouth."¹³¹ Samuel Johnson varies this formula only slightly, defining a "grant" as, "[In law] A gift in writing of such a thing as cannot aptly be passed or conveyed by word only."¹³² The transactional, two-party character of a grant is emphasized by the existence of two derivative words—grantor (the person makes a grant) and grantee (the person who receives it)—which were in common usage at the time of the Founding.¹³³

In short, the ordinary sense of the phrase "the power to grant . . . pardons," both now and at the time of the Founding, requires two per-

128. The Oxford English Dictionary defines "grant" as: "To bestow or confer (a possession, right, etc.) by a formal act. Said of a sovereign or supreme authority, a court of justice, a representative assembly, etc. Also, in *Law*, to transfer (property) from oneself to another person, especially by deed." *Grant*, OXFORD ENGLISH DICTIONARY, *supra* note 119, <https://www-oed-com.proxy.mul.missouri.edu/view/Entry/80766?rskey=NASvP7&result=3&isAdvanced=false#eid>.

129. JOHNSON, *supra* note 127; ASH, *supra* note 120 (defining the verb form of "grant" as "To admit, to allow; to bestow what cannot be claimed by right"). See also BAILY, *supra* note 127 (1775) (defining the verb form of "grant" as "to allow, give, bestow").

130. BAILY, *supra* note 127. The full definition of verb form of "grant" is "to allow, give, bestow." However, when grant is used in the sense of allowing something, it can have one of two senses. The first refers to a concession, as in, "I grant the force of your argument." This usage has no direct relevance in the case of pardons. But even this usage presumes the interaction of two parties: to concede a contested point requires a disagreement between two disputants. (See JOHNSON, *supra* note 127, whose first definition of "grant" is "To admit that which is not yet proved"). The second sense of "to grant" as "to allow" involves permission, as in "I grant you the right to cross my lawn." This sense of "to grant" is synonymous with giving or bestowing in that it involves one who gives permission for another to do something, an act that requires two parties. See also ENTICK, *supra* note 127 (defining the verb form of "grant" as "to bestow, give, yield, admit, allow.")

131. BAILY, *supra* note 127.

132. JOHNSON, *supra* note 127.

133. *Id.* (defining "grantor" as "He by whom a grant is made," and "grantee" as "he to whom any grant is made."); ASH, *supra* note 120 (defining "grantor" as, "The person that grants, the person that executes the deed by which any grant is confirmed."); BAILY, *supra* note 127 (defining "grantor" as "the Person who makes a Grant," and "grantee" as "the Person to whom a Grant is made."); ENTICK, *supra* note 127, defining "grantor" as "one by whom a grant is made over," and "grantee" as "one to whom a grant is made over."

sons—a president to grant the pardon, and someone else to receive it.¹³⁴

This conclusion is reinforced by consideration of the other arena in which the concept of pardon has been central to Western thought for two millennia—Christian doctrine. The theology of every reasonably orthodox Christian denomination or sect presumes both the sinfulness of humankind and the necessity of divine forgiveness as a condition precedent for salvation.¹³⁵ This construct requires a divine pardoner and a mortal recipient of grace, which is to say two different entities.

Catholic theology makes petitions for forgiveness integral to the interaction of the faithful with the Church in the form of the sacrament of reconciliation (or penance). Baptized Catholics are enjoined to participate regularly in this sacrament, which consists of four steps: *confession* (admitting and naming one's sin); *contrition* (expressing sorrow for one's sin); *satisfaction* or penance (in which the sinner shows a "firm purpose of amendment," sometimes by performing an act to repair the harm done by sin, and sometimes through prayer); and *absolution* from sin (a declaration of forgiveness offered by the priest acting *in persona Christi*, "in the person of Christ").¹³⁶ Absolution is the attribute of the sacrament most akin to a civil pardon. Indeed, the word pardon has long been used as a synonym for ecclesiastical absolution,¹³⁷ and those who, sometimes fraudulently, purported to peddle such absolution on behalf of the church were called "pardoners."¹³⁸

134. Prof. Philip Bobbitt makes a similar argument in his contribution to a new edition of Charles Black's classic short review of the law of impeachment. CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT, A HANDBOOK* 135 (2018).

135. See, e.g., *How Did John Wesley Understand Original Sin?*, UNITED METHODIST COMMUNICATIONS, <https://www.umc.org/en/content/ask-the-umc-how-did-john-wesley-understand-original-sin> (describing Methodist theology of sin and grace); *Catechism of the Catholic Church* 385–421 (2019), <https://www.usccb.org/sites/default/files/flipbooks/catechism/> (explaining the concept of the Fall and the redeeming grace of God expressed through Christ's sacrifice).

136. Rev. Msgr. Richard B. Hilgartner, *The Sacrament of Penance and Reconciliation: Forgiveness in Four Easy Steps*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catechesis/catechetical-sunday/sacramental-forgiveness/teaching-aid-hilgartner.cfm>. See also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 135, at 373–74 (describing the sacrament of penance).

137. "Those who approach the sacrament of Penance obtain pardon from God's mercy for the offense committed against him, and are, at the same time, reconciled with the Church which they have wounded by their sins and which by charity, by example, and by prayer labors for their conversion." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 135, at 1422.

138. See, e.g., Geoffrey Chaucer, *The Pardoner's Tale*, in *THE CANTERBURY TALES* (1400). See also JOHNSON, *supra* note 127 (defining a "pardonner" both as "[o]ne who

While a sinner may beg forgiveness of God in the silence of his heart, and may hope that God has forgiven him, theologically God and the sinner are not one, and God, not the sinner, makes the choice. Critically for our purposes, in Catholic doctrine, the only means of obtaining *sacramental* absolution is through a human agent of the Church—a priest. Moreover, when a priest partakes of the sacrament of reconciliation, he may not absolve himself. He must confess to another priest and satisfy his confessor of his repentance before the confessor will absolve/pardon the confessed sin. This is true of all priests, including the Pope. Even he cannot pardon himself. Only another priest may do that.¹³⁹

The sacrament of reconciliation is not confined to Catholicism. The Church of England or Anglican Church, to which many of the Founding generation belonged,¹⁴⁰ and which was the progenitor of the American Episcopal Church, retains that sacrament. It has long since ceased to be obligatory, but Anglican/Episcopal practice mirrors the Catholic in retaining the elements of confession by the parishioner and absolution reserved to a priest, deacon, or lay minister.¹⁴¹ Of course, the sacramental theology of neither Roman Catholicism nor Anglicanism can impose a binding construction on the meaning of American constitutional terms. But the concept of pardon is so closely bound to religious patterns of thought that religious practice familiar to the Founding generation is some persuasive evidence of how the Framers understood the concept.

2. *Arguments from British Practice before the Founding*

As detailed above, the Framers' decisions about the pardon power were heavily influenced by their knowledge of the theory and practice of the royal pardon power in Great Britain.¹⁴² Indeed, their

forgives another," and as, "A fellow that carried about the pope's indulgencies, and sold them to such as would buy them.").

139. Cindy Wooden, *How Often Does Pope Francis Go to Confession?*, CATHOLIC NEWS SERVICE (Nov. 20, 2013), https://www.catholicherald.com/news/how_often_does_pope_francis_go_to_confession/ (quoting Pope Francis as saying: "Priests, too, need confession, even bishops. We are all sinners. Even the pope goes to confession every two weeks because the pope, too, is a sinner. My confessor hears what I say, offers me advice and forgives me. We all need this").

140. For example, George Washington, Alexander Hamilton, George Mason, and John Jay all attended Anglican churches. Howard Kramer, *Churches of the Founding Fathers*, COMPLETE PILGRIM (Nov. 3, 2018), <https://thecompletepilgrim.com/churches-of-the-founding-fathers/>.

141. THE RECONCILIATION OF A PENITENT, THE BOOK OF COMMON PRAYER, THE EPISCOPAL CHURCH 447–452 (2007).

142. See *supra* notes 62–70 and accompanying text.

final formulation, in which a president is granted authority to pardon all “offenses against the United States, except in Cases of impeachment,” almost exactly mirrors the scope of the royal pardon power in England following the 1700 Act of Settlement.¹⁴³ Therefore, any analysis of the possibility of presidential *self*-pardon must consider how the Framers would have understood the theory and practice of royal pardons up to 1788.

British history offered no precedent for a monarch pardoning himself or herself. But that is because of the peculiar relation of the monarch to ordinary law. For centuries, the dominant theory of English kingship held that the source of law was the will of the king. Under this doctrine of royal prerogative, the king was not subject to the operation of law because he could not offend against an emanation of his own will.¹⁴⁴ With the advancing years, Parliament and other sources of power in the society hedged the monarchy round with increasing limitations.¹⁴⁵ But as late as 1600, King James I espoused the view that kings emerged:

before any estates or ranks of men, before any parliaments were holden, or laws made, and by them was the land distributed, which at first was wholly theirs. And so it follows of necessity that kings were the authors and makers of the laws, and not the laws of the kings.¹⁴⁶

One root of the two revolutions against kings of the Stuart line—a bloody one against Charles I that produced the English Civil War

143. The applicable provision of the Act of Settlement provided: “That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament.” *See supra* note 66.

144. As Blackstone famously put it, “The king can do no wrong.” 1 BLACKSTONE, COMMENTARIES, *supra* note 24, at 245–46. He elaborated on the principle by asserting that the king has the attribute of “incapacity of committing crimes” arising “from the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind.” The king, continued Blackstone, “by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime.” 4 BLACKSTONE, COMMENTARIES, *supra* note 24, at 32–33.

145. BOWMAN, *supra* note 3, at 35–39.

146. KING JAMES I, THE TRUE LAW OF FREE MONARCHIES: OR THE RECIPROCAL AND MUTUAL DUTY BETWIXT A FREE KING AND HIS NATURAL SUBJECTS (1616). THE TRUE LAW was a treatise, possibly written to counteract emerging contractarian theories of government. The work was first published in Scotland in 1598 and later in England upon James’ accession to the English throne. *See also* KING JAMES I, BASILIKON DORON 69 (1603). THE BASILIKON DORON was a sort of ruler’s manual addressed to James’ eldest son Henry and, after Henry’s premature death, passed on to his second son Charles, who followed James as next king of England. MAURICE ASHLEY, CHARLES I AND OLIVER CROMWELL: A STUDY IN CONTRASTS 40 (1987).

(1642–51) and William Cromwell’s Commonwealth,¹⁴⁷ and the second largely bloodless “Glorious Revolution” against James II in 1688¹⁴⁸ —was a clash between royal absolutism and the view that kings must share power with other social orders and that law has sources exterior to the king’s will.¹⁴⁹ By the 1700s, the notion that the will of the king was the sole source of law had been abandoned in favor of a far more subtle formulation in which the king had certain unique prerogatives, but law emanated from the interplay of common and statutory law, the latter enacted by that curious English composite, “the King (or Queen) in Parliament.”¹⁵⁰ Nonetheless, one prerogative retained by the crown was personal immunity from either civil or criminal actions.

As Blackstone put the matter in his *Commentaries on the Laws of England*:

[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him Hence it is likewise that *by law the person of the king is sacred*, even though the measures pursued in his reign be completely tyrannical and arbitrary: for *no jurisdiction on earth has power to try him in a criminal way; much less to condemn him to punishment.*¹⁵¹

Thus, as matters stood at the time of the American Founding, an English king, being immune from the criminal law, would never have an occasion for self-pardon.

The great historical counterexample was King Charles I, who, in 1648–49, at the end of the English Civil War, was arrested, tried for treason in front of a tribunal selected by Parliament, and then beheaded.¹⁵² Charles’ defense throughout was that the court lacked jurisdiction to try an anointed sovereign,¹⁵³ but neither he nor anyone else seems to have considered the notion that he could pardon himself out

147. See generally BLAIR WORDEN, *THE ENGLISH CIVIL WARS, 1640–1660* (2009).

148. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 59 (4th ed. 1948). See generally J.R. JONES, *THE REVOLUTION OF 1688 IN ENGLAND* (1988).

149. See BOWMAN, *supra* note 3, at 31–37 (discussing, *inter alia*, the struggle between royal absolutism and the adherents of a rule of law during the Stuart period).

150. See generally the discussion of royal prerogatives in 1 BLACKSTONE, *COMMENTARIES*, *supra* note 24, at Ch. 7, 236–279.

151. *Id.* at 242 (emphasis added). See also 4 BLACKSTONE, *COMMENTARIES*, *supra* note 24, at Ch. 2, 32–33 (1769) (“[T]he king: who, by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime.”).

152. C.V. WEDGEWOOD, *A COFFIN FOR KING CHARLES: THE TRIAL AND EXECUTION OF CHARLES I* 135–66, 222–23 (1964).

153. *Id.* at 156–57.

of the difficulty. In any case, Charles' trial and condemnation seem not to have provided any enduring precedent for the monarch's subjection to ordinary law. When the monarchy was restored under James II following Cromwell's Commonwealth, many of the judges who condemned Charles were themselves arrested, convicted of treason for participating in regicide, and executed.¹⁵⁴ In Blackstone's writing of a century later, the personal immunity of the king to criminal process had resumed its place as bedrock legal doctrine.¹⁵⁵ Between Charles I's death in 1649 and the American Constitutional Convention of 1787, no English monarch was ever arrested or prosecuted for crime (which has remained true to the present day).

Thus, the Founding generation would have understood that an English monarch had no power of self-pardon, either because it was superfluous due to the crown's absolute sovereign immunity or because, in the one anomalous case of Charles I, it was ineffectual against the power of Parliament.¹⁵⁶ *But the real point here is not that the Framers would have rejected presidential self-pardon because the English king lacked such power, but that in creating the presidency, the Framers were repudiating the idea of an American king.*

Precisely because they were determined that the office of president not be a kingship,¹⁵⁷ they rejected the idea of a president for life and opted instead for election to set terms of four years. They considered, but rejected, the proposition that quadrennial elections would be a sufficient remedy for a misbehaving president and provided for removal during the presidential term by impeachment.¹⁵⁸ To protect the impeachment power, they excluded impeachment cases from the pardon power.¹⁵⁹ They limited the penalties of impeachment to removal and disqualification, but expressly provided that additional penalties might be exacted by ordinary courts.¹⁶⁰

Some have noted, I think correctly, that these provisions together strongly suggest that the Framers meant for a president to remain ame-

154. *Id.* at 251–62.

155. Blackstone was widely read by lawyers in the American revolutionary period, and given that thirty-three delegates to the Constitutional Convention were lawyers or judges, his view would have been authoritative and generally available. See BOWMAN, *supra* note 3, at 100. In any case, on this point, he did no more than reiterate the general understanding of the time.

156. A truncated version of this point is made in Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L. J. 779, 783 (1996).

157. See *supra* notes 27–30 and accompanying text.

158. See *supra* note 43 and accompanying text.

159. See *supra* note 53 and accompanying text.

160. U.S. CONST., art. I, § 3, cl. 7.

nable to prosecution in addition to impeachment, and that they would therefore have rejected a self-pardon as defeating that end. But what has been insufficiently recognized is that, if a president could pardon himself, he would gain one of the core kingly prerogatives—complete legal impunity for all crimes against national law, regardless of severity, committed while in office. If self-pardon is constitutional, an American president could ransack the treasury, bribe the Congress, commit treason, pardon himself for those crimes, and escape all punishment with the possible exception of losing his office. It simply is not credible to suppose that the Framers intended the pardon power to make an American president the legal equivalent of a king.¹⁶¹

3. *Arguments from Debates at the Constitutional Convention & During Ratification*

The Framers never addressed the question of possible presidential self-pardon directly. However, several made arguments that implicitly reject the possibility. For example, during the September debate at the Constitutional Convention over Edmund Randolph's motion to exclude treason from the pardon power because the president might be guilty and shield himself by pardoning confederates,¹⁶² James Wilson contended that, "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."¹⁶³ I take Wilson's use of the phrase "impeached and prosecuted" to refer to two separate remedies: the congressional power of impeachment and the power of courts to adjudicate ordinary criminal prosecutions. So construed, this remark dovetails with the final constitutional form of the impeachment power, which limits the consequences of impeachment to removal and disqualification from office, but expressly insists that the officer impeached and convicted "shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law."¹⁶⁴ While it is doubtful that Wilson was thinking about the possibility of a self-pardon when he spoke, both his argument and the constitutional text certainly imply that a criminal president cannot ex-

161. It is, of course, true that because the federal pardon power does not extend to state offenses, even a president with the power of self-pardon would still be amenable to state criminal prosecution and in that sense would be less than kingly. Nonetheless, a power of federal self-pardon would insulate the president from any criminal consequence of the great offenses against the nation and the constitutional order that make presidents especially dangerous.

162. See *supra* notes 92–96 and accompanying text.

163. 5 ELLIOT, *supra* note 85, at 519.

164. U.S. CONST. art. I, § 3, cl. 7.

empt himself either from removal or subsequent legal punishment by exercising the pardon power.¹⁶⁵

The same point was made during the ratification debates. George Mason complained that, “The President of the United States has the unrestrained power of granting pardons for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt.”¹⁶⁶ Note that Mason’s example assumes the unavailability of *self*-pardon. If the president can pardon himself for treason, he need not pardon his coconspirators to prevent liability for himself. James Iredell, one of the first Justices of the U.S. Supreme Court, responded to Mason, saying:

The probability of the President of the United States committing an act of treason against his country is very slight Such a thing is however possible, and accordingly *he is not exempt from a trial if he should be guilty or supposed guilty, of that or any other offence.*¹⁶⁷

Iredell went on to make an even more telling observation. He asked whether a guilty president contemplating the pardon of a co-conspirator “would not expose himself to greater danger by pardoning, than by suffering the law to have its course.” He reasoned that a co-conspirator under threat of a heavy sentence would be easily discredited as a potential witness against the president because his claims would be seen as “merely the effort of a man in despair to save himself from an ignominious punishment.” But, noted Iredell, “If a President should pardon an accomplice, that accomplice then would be an unexceptionable witness” (meaning a more credible one) against the president because the pardon would remove the prosecutor’s leverage

165. Michael McConnell has argued that Randolph’s concern about a president pardoning his confederates to escape discovery of his own treason is evidence that the Framers believed a self-pardon was possible. Michael W. McConnell, *Trump’s Not Wrong About Pardoning Himself*, WASH. POST (June 8, 2018), https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html. As noted in the text, I think this reading misconstrues what Randolph said. If Randolph’s concern had been that a president could escape treason liability simply by pardoning himself, presumably he would have said so, rather than focusing on the pardon of others. Moreover, McConnell focuses only on Randolph’s remark, and omits Wilson’s response, which is better evidence of the assumptions of the debaters (in particular, the assumption that a misbehaving president could not employ the pardon power to escape either impeachment *or* ordinary prosecution for crime).

166. FORD, PAMPHLETS, *supra* note 71, at 350.

167. *Id.* at 352 (emphasis added).

to induce the co-conspirator to testify against the president.¹⁶⁸ Leave to one side the accuracy of Iredell's speculation about the psychology of cooperating co-conspirators, or their perceived credibility after a pardon. The point is that the whole elaborate speculation only makes sense if a president cannot pardon himself. If he could, he would be at no practical risk from the testimony of a co-conspirator. In short, Iredell never imagined self-pardon to be an option.

4. *Arguments from American Practice since 1788*

No American president has ever attempted to pardon himself. President Nixon reportedly considered doing so during the Watergate scandal, but decided against it.¹⁶⁹ He may have been influenced by a memorandum from the Justice Department's Office of Legal Counsel

168. *Answers to Mason's "Objections"*: "Marcus" [James Iredell] III, Norfolk and Portsmouth Journal (Virginia), March 5, 1788, in 1 BAILYN, *supra* note 71, at 382. Donald Dripps suggested to me that Iredell may have used the phrase "unexceptionable witness" to mean competent witness, rather than more credible witness. At common law, convicted felons were considered incompetent to testify. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, §372 (1863) (persons convicted of "infamous crimes" are incompetent as witnesses). If an alleged presidential co-conspirator had already been convicted at the time of a presidential pardon, the pardon would restore him to competence as a witness. If the convict had evidence to offer against the president, issuance of the pardon would disadvantage the president. If the convict's evidence favored the president, the reverse would be true. An unconvicted alleged co-conspirator was legally competent to testify against an accomplice, JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, Vol. II 550 (1898), but not in the accomplice's favor, *Washington v. Texas*, 388 U.S. 14, 20 (1967). Arguably, a presidential accomplice who received a pardon would no longer be an accomplice, and thus would become free to testify for the president. Perhaps, therefore, Iredell was talking about the fact that a presidential pardon would restore the testimonial competence of some co-conspirators, a development sometimes to the advantage, and sometimes the disadvantage, of the pardoning president. However, after examining Iredell's argument more carefully, Professor Dripps and I concluded that he was well aware of the distinction between credibility and competence since he inserted a footnote in his essay noting that evidence of a confessed criminal "is undoubtedly admissible" against an accomplice. Iredell, 1 BAILYN, *supra* note 71, at 383. We also agreed that the totality of Iredell's argument makes it clear that he was contending that issuing a pardon to a supposed co-conspirator would make that person more credible as a witness against the president, and thus the president would be unlikely to use the pardon power that way. Regardless of whether Iredell thought the issuance of a pardon to an accomplice would make the recipient legally competent to testify or just more credible as a witness, he believed that presidents could be charged with, and tried for, crimes. If he had believed a president could simply pardon himself, the issue of the competence or credibility of accomplice witnesses in such trials would have been moot.

169. BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* (1976) 325–26 (1976). See also Daniel Schorr, *Will Bush Pardon Himself?*, BALTIMORE EVENING SUN (Dec. 30, 1992), <https://www.baltimoresun.com/news/bs-xpm-1992-12-30-1992365220-story.html> [<https://perma.cc/Z6RK-67RT>].

(“OLC”) opining that a self-pardon would be impermissible.¹⁷⁰ The views of the OLC generally carry considerable persuasive authority, but the self-pardon section of this particular memo is strikingly brief and devoid of serious analysis. The only two paragraphs addressing the self-pardon question rely entirely on the truism that, in Anglo-American law, a judge should not be a judge in his own case. While the principle is sound enough, standing alone it is hardly definitive.¹⁷¹

It has been suggested that several American governors have pardoned themselves.¹⁷² If that were true, it would be of no direct relevance to the presidential pardon power, but at least one defending a presidential self-pardon could say that it was not utterly without historical precedent. But it turns out that this claim is unsupported. One of the supposed instances is drawn from an 1897 newspaper story that identifies the supposed issuer of the pardon only as a “popular statesman,” offering neither a name nor even a state in which the event purportedly occurred.¹⁷³ One involved a clerical error, quickly cor-

170. Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370 (1974).

171. Several commentators have since elaborated on the argument limned in the OLC memo. See, e.g., Laurence H. Tribe, Richard Painter & Norman Eisen, *No, Trump 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 (relying on the 1610 English case of *Thomas Bonham v. College of Physicians*, also known as *Dr. Bonham's Case*, as establishing the principle that, “One cannot be Judge and attorney for any of the parties,” and thus by extension that a president may not, by pardoning himself, act as a judge in his own case); Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 166–67 (2017) (contending that a self-pardon would be void as a violation of due process, primarily on the ground that such a pardon would be an act of self-dealing, but also based on the more capacious claim that a self-pardon for self-interested reasons would be immoral and “the only immutable proposition of due process analysis is that immoral governmental action is, likewise, per se unconstitutional”). See also Kalt, *supra* note 110, at 807 (concluding that self-pardons are probably unconstitutional on multiple grounds, including violation of the principle that no man is above the law). Although I agree with the conclusion that a self-pardon is unconstitutional, I am not sure that the additional detail these authors offer on the self-dealing point alters the essentially conclusory character of the OLC’s argument.

172. Max Kutner, *No President Has Pardoned Himself, But Governors and a Drunk Mayor Have*, NEWSWEEK (July 24, 2017), <https://www.newsweek.com/trump-granting-himself-pardon-governors-641150/>; see also Saikrishna Prakash, Opinion, *The first (the only) federal self-pardon*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/03/the-first-the-only-federal-self-pardon/>. Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71 (2019).

173. *Pardoned Himself: A Good Story of How a Politician Settled Judge and Jury*, MORNING POST (Camden, NJ), Apr. 13, 1897, at 3.

rected, by a governor who mistakenly wrote his own name on pardon documents for a state prisoner.¹⁷⁴ Two were jokes.¹⁷⁵ The only instance with some claim to seriousness arose during an 1856 dispute between Washington Territorial Governor Isaac Ingalls Stevens and a U.S. District Judge. Stevens declared martial law in the territory.¹⁷⁶ The judge nullified the declaration and held Stevens in contempt when he proceeded to arrest certain settlers anyway.¹⁷⁷ Stevens then arrested the judge,¹⁷⁸ who held Stevens in contempt again and fined him \$50. Whereupon Stevens arrested the judge again and issued to himself, not a pardon, but a reprieve from paying the fine pending resolution of the matter by the President.¹⁷⁹ In the end, Governor Stevens was censured by the territorial legislature, the U.S. Congress, President Pierce, and

174. *Gives Self Pardon*, POST-CRESCENT (Appleton, WI), Dec. 20, 1941, at 3 (“Now, therefore, I, Arthur B. Langlie, governor of the state of Washington . . . do hereby pardon the said Arthur B. Langlie and restore him to all the rights and privileges he forfeited by reason of his conviction and confinement”).

175. In 1956, Governor Orville Faubus of Arkansas was “arrested” and jailed when he visited a town where the male citizens had grown beards to celebrate the municipality’s 50th anniversary, and the Governor arrived with neither a beard nor a “shaving permit.” The townspeople placed the clean-shaven governor in a “wooden calaboose” on the main street. Governor Faubus then “pardoned” himself. *Faubus ‘Jailed’: Pardons Himself*, COURIER NEWS (Blytheville, Arkansas), July 14, 1956, at 8 (“Arkansas Gov. Orval Faubus pardoned himself after being ‘arrested’ and jailed.”). In 1911, Gov. Benjamin W. Hooper of Tennessee, who had a keen interest in prisons and rehabilitation, “sentenced himself” to two nights in a prison to observe conditions and assess potential candidates for gubernatorial pardons. Upon his departure, Governor Hooper purportedly “pardoned himself.” Ben W. Hooper, *Gov. Hooper Tells of Life in Prison*, N.Y. TIMES, Dec. 24, 1911, at 3; *Gov. Hooper in Jail Hears Convict Pleas*, N.Y. TIMES, Dec. 21, 1911, at 4; *One Day Enough for Governor*, DAILY GATE CITY (Keokuk, Iowa), Dec. 21, 1911, at 1.

176. See *Cong. Globe*, 34th Cong., 1st Sess. 529, 534 (1857) for the full text of the declaration of martial law. It reads, in part, “certain evil-disposed persons of Pierce County have given aid and comfort to the enemy . . . they have been placed under arrest, and ordered to be tried by a military commission . . . I hereby proclaim martial law over said county of Pierce.”

177. David W. Hastings, *Frontier Justice: The Court Records of Washington Territory, 1853-1889*, 2 W. LEGAL HIST. 79, 83–84 (1989).

178. Roy N. Lokken, *The Martial Law Controversy in Washington Territory, 1856*, PACIFIC NW. Q. 91 (1952) (providing background on the events leading up to the charges and Governor Stevens’ eventual self-pardon); WASH. COURTS, REPORT OF THE COURTS OF WASHINGTON: 2003-2004 (2004) (discussing how Judge F. A. Chenoweth, whom Stevens dismissed, “reopened the Steilacoom court with 50 armed citizens for protection [. . . and] the angry crowd succeeded in turning back troops sent to arrest Chenoweth”); Sherburne F. Cook Jr., *The Little Napoleon: The Short and Turbulent Career of Isaac I. Stevens*, COLUM. MAG., Winter 2000–01; David Mehl, *The First Historical Precedent for Trump Pardoning Himself is the Craziest Story*, FEDERALIST, (Nov. 3, 2017), <https://thefederalist.com/2017/11/03/historical-precedent-trump-pardoning-craziest-story-ever/> (providing a detailed account of back-and-forth between Judge Lander, Territorial Chief Justice Chenoweth, and Governor Stevens).

179. Governor Stevens’ Famous Pardon of Himself, 25 WASH. HIST. Q. 229 (1934)

President Buchanan,¹⁸⁰ and contemporary sources suggest that he (or “his friends”) still paid the fifty dollar fine.¹⁸¹ In short, the best one could say is that Stevens delayed his punishment by purporting to issue a reprieve, but was unsuccessful in actually voiding the judgment or avoiding the punishment. Hardly a sterling precedent for the self-pardon concept.

There is no judicial authority directly addressing the issue of a presidential self-pardon. What authority there is on the point is, at best, inferential. In his 1833 opinion in *United States v. Wilson*,¹⁸² Justice Marshall described the pardon power in a way that reinforces the commonsense notion and historical usage that a pardon is an act of forgiveness and absolution passing from one person to another, saying:

[As this power] had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. *It may then be rejected by the person to whom it is tendered*; and if it be rejected, we have discovered no power in a court to force it on him.¹⁸³

The use of the phrase “act of grace” unmistakably implies a two-party transaction: a grant of forgiveness by one party based on a judg-

I Isaac I. Stevens Governor of the said Territory by virtue of the authority vested in me as Governor as aforesaid in order that the President of the United States may be fully advised in the premises and his pleasure known thereon, do hereby, respite the said Isaac I. Stevens defendant from execution of said judgment and all proceedings for the enforcement and collection of said fine and costs until the decision of the President of the United States can be made known thereon.

180. Cook, *supra* note 178, at 3.

181. HAZARD STEVENS, *THE LIFE OF ISAAC INGALLS STEVENS, VOLUME II* 249 (2013) (noting his father’s payment of the fifty dollar fine and referencing both the President and Territorial Legislature’s censure, and providing background on the efforts to possibly remove Governor Stevens); *id.* at 230.

182. *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).

183. *Id.* at 160–61 (emphasis added).

ment by the grantor about the actions, virtues, or repentance of a second party.¹⁸⁴ The two-party paradigm is reinforced by the right of the person to whom a pardon is tendered to reject it. However, the issue in *Wilson* was not whether a president could pardon himself, but whether a presidential pardon was effective if the person pardoned declined to accept it. Justice Marshall found (in accordance with British precedent) that acceptance was necessary. The requirement of acceptance itself also implies two parties, one who gives and another who receives and then decides whether to accept the gift.

On the other hand, nearly a century later, in a brief and typically oracular opinion by Justice Oliver Wendell Holmes, Jr., the Court reversed its stance on the necessity of acceptance of a pardon. In *Biddle v. Perovich*,¹⁸⁵ the President commuted the defendant's sentence from death to life imprisonment. Later, the defendant sought to gain complete release from prison on the theory that he had not consented to the earlier commutation. Holmes plainly thought this was a bit of slick jiggery-pokery, and, without even mentioning the Court's earlier opinion in *Wilson*, held that acceptance of a pardon or commutation was unnecessary to its effectiveness. In the course of doing so, he wrote:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.¹⁸⁶

Holmes not only rejects the characterization of a pardon as an act of individual grace, but his utilitarian explanation of its function at least admits the possibility of a self-pardon. A president might conclude that pardoning himself served the "public welfare." Still, it seems unlikely that Holmes meant to legitimate any such transparently self-interested assessment when he dashed off his *Biddle* opinion. At all events, despite Holmes' language, later federal courts have continued

184. The Supreme Court also referred to a pardon as an "act of grace" in *Knote v. United States*, 95 U.S. 149, 153 (1877):

A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past.

185. *Biddle v. Perovich*, 274 U.S. 480 (1927).

186. *Id.* at 486.

to refer to pardons as acts of grace.¹⁸⁷ In 2000, former U.S. Pardon Attorney Roger Adams described the pardon process as “all a matter of grace.”¹⁸⁸ And every decided case in American history conforms to the structural template of grace—a discretionary act of forgiveness, remission, or reduction of penalty issued by the president to someone else.

5. *Self-Pardon Must Be Impermissible in a Republican Constitution*

The bottom line is that a president could try to pardon himself, relying on the open-ended text of the Constitution’s pardon language and the absence of a judgment by either a court or legislature anywhere in the Anglo-American sphere expressly prohibiting it. But in this case, the absence of such a judgment is not evidence of the act’s acceptability so much as proof that self-pardon has, for many centuries, been so inconsistent with ordinary language and customary legal practice, and so antithetical to the constitutional structures of England and the United States and to the purposes that executive pardon power serves in those structures, that no one has even tried it. A president who tried to pardon himself would not be relying on some deep, if heretofore unperceived, reservoir of constitutional authority. He would instead be trying to slither through a heretofore untried loophole. In the case of an ordinary criminal defendant, one might merely shrug at the audacity of the dodge. But a miscreant president is no ordinary malefactor. Permitting presidential self-pardons would not merely al-

187. Notably, the Supreme Court itself wrote in *Ohio Adult Parole Auth.*, 523 U.S. at 280–28, that, “the heart of executive clemency . . . is to grant clemency as a matter of grace.” Although the Court was addressing the pardon authority of state officials, at least one lower federal court has quoted the characterization as equally applicable to the federal presidential pardon power. *United States v. Pollard*, 416 F.3d 48, 62 (D.C. Cir. 2005) (“executive clemency is a matter of grace”).

For other characterizations of the pardon power as an act of executive grace, see *Andrews v. Warden*, 958 F.3d 1072, 1076 (11th Cir. 2020) (citing and quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833), for proposition that, “A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws. . . .”); *Dennis v. Terris*, 927 F.3d 955, 958 (6th Cir. 2019) (“The existence of conditional commutations, as President Obama used in Dennis’s case, also supports our jurisdiction. Say the President commuted a life sentence to 25 years but conditioned the commutation on the prisoner maintaining good behavior in prison. If, five years later, the prisoner stabbed a fellow inmate, he would violate the condition, undo the commutation, and *absent more executive grace be subject once again to life imprisonment* under the sentence.”) (emphasis added); *United States ex. rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.) (executive clemency “is a matter of grace, over which courts have no review”).

188. Carl Cannon & David Byrd, *The Power of the Pardon*, 32 NAT’L L. J. 776 (2000).

low individual miscarriages of justice, but would erase a structural barrier to tyranny.

The president is the sole constitutionally enumerated officer of the executive branch. If one leans toward a unitary executive view of the presidency, the president *is* the executive branch, or at the least all authority exercised by that branch derives from him.¹⁸⁹ Nonetheless, the Constitution offers only three significant controls on a president inclined to criminality—quadrennial elections; the provisions of Article I, Section 3 that provide for impeachment by the Congress; and, in the courts, “Indictment, Trial, Judgement and Punishment, according to Law.”¹⁹⁰ The Framers were justly concerned that elections might be insufficient to restrain presidents tempted to crime, particularly crime in aid of dictatorship. They inserted impeachment and expressly preserved the possibility of criminal prosecution as critical structural components of their constitutional system. As the examples of both President Clinton and President Trump illustrate, actual conviction and removal following impeachment is impossible so long as a president can hold the loyalty of at least thirty-four senators (presumably, though not necessarily, of his own party). To put it in terms the Founders might have used, the power of “faction” has all but erased the legislative weapon of impeachment.¹⁹¹ Granting presidents the power of self-pardon would effectively exempt them from the operation of ordinary law, as well, and in so doing eliminate whatever deterrent the prospect of criminal punishment provides to presidential wrongdoing.

6. *Resignation or the VP Switcheroo: Could a President Get a Pardon from the Vice-President?*

If a president were desperate for a pardon for himself, but doubted the constitutionality of a self-pardon, the Constitution pro-

189. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Julian G. Ku, *Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. PA. J. CONST. L. 615 (2010).

190. U.S. CONST. art. I, § 3, cl. 7.

191. See, e.g., THE FEDERALIST NO. 10 (James Madison) (warning of the dangers of “faction”). Of course, impeachment may serve as a deterrent to presidential misconduct even if conviction is not politically possible. Presumably, a prideful president would wish to avoid the stigma associated with having been impeached, and a president considering a run for a second term or a public life after office would consider impeachment a disadvantage. Still, the Framers did not insert impeachment into the Constitution to create those sorts of secondary disincentives. They meant it to be a means of turfing bad presidents (and other civil officers) out of office, and in appropriate cases, of keeping them out. That straightforward objective now seems beyond congressional capacity.

vides two theoretical paths to obtain a pardon from the vice-president. First, the president could simply resign, allow the vice-president to become president as prescribed by the Constitution,¹⁹² and secure a pardon from their former number two.

Second, the Twenty-fifth Amendment would also permit a more convoluted approach that could secure a pardon from the vice-president, but permit the president to end his elected term still holding office. The amendment, passed in 1965, was written to deal with the recurring problem of succession and continuity in the case of presidential death or disability.¹⁹³ Section 3 provides that a president may, in effect, temporarily withdraw from the office of president by transmitting to Congress “his written declaration that he is unable to discharge the powers and duties of his office.”¹⁹⁴ Once that declaration is made, “such powers and duties shall be discharged by the Vice President as Acting President.”¹⁹⁵ But the president may then reassume his office by sending a second “written declaration” to Congress asserting that he is once again able to perform the powers and duties of the office.¹⁹⁶

A Vice-President serving as Acting President is expressly granted the authority to discharge the “powers and duties” of the presidency, which include the pardon power. In theory, therefore, a fearful president could, by declaration to Congress, cede his powers to a subservient vice-president just long enough to receive a pardon, whereupon he could resume office by sending a second declaration to Congress.

The possibility that President Trump would try one or the other of these maneuvers was widely discussed by opinion writers.¹⁹⁷

192. Article II of the Constitution originally provided that upon that the death, resignation, removal, or disability of the President, the “powers and duties” of the presidency shall “devolve on the Vice President.” U.S. CONST., art. II, §1, cl. 6. The first section of the Twenty-fifth Amendment resolved the technical question left open by this language of whether the vice-president would merely assume the powers and duties of the presidential office or would actually become the president. *See, e.g.*, BOWMAN, *supra* note 3, at 287–88 (describing several instances of this technical dispute). Section 1 of the Amendment says, “In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.” U.S. CONST., amend. XXV, § 1.

193. *See generally* BOWMAN, *supra* note 3, at 287–92 (explaining the history and mechanics of the Twenty-fifth Amendment).

194. U.S. CONST. amend. XXV, § 3.

195. *Id.*

196. *Id.*

197. *See, e.g.*, Jonathan Zimmerman, *Pardon Donald Trump to Get Him out of the White House? America Should Make That Deal*, USA TODAY (Aug. 29, 2018, 5:00 AM), <https://www.usatoday.com/story/opinion/2018/08/29/trump-deal-resign-presi->

Purely as a matter of constitutional interpretation, both are perfectly plausible. As a practical matter, however, they seemed unlikely in the last degree. First, they would have required Donald Trump, that famously prideful man, either to quit or to declare his incapacity for office and, at least presumably, explain *why* he was temporarily incapacitated. More importantly, both would have required Vice President Mike Pence to go along with the scheme and actually award the pardon. It always seemed implausible that Pence would tarnish himself this way, whether due to personal integrity or to the fact that participation in such a dodge would damage his own ambitions for the presidency. Similar motivations would seemingly be in play for future vice-presidents.

A second obstacle to either a resignation followed by a pardon or a VP pardon switcheroo is that, as will be discussed below,¹⁹⁸ the corrupt misuse of the pardon power may itself be a crime. And as detailed above,¹⁹⁹ it has since the Founding era been considered an impeachable offense. Any vice-president would be hesitant to participate in a transparently sleazy ploy that would almost inevitably embroil him or her in criminal and congressional investigations. In Mr. Trump's case, although a pardon by a President Pence or an Acting President Pence was legally possible, it did not happen.

B. Prospective Pardons

As will be discussed in detail below, as to persons other than the president himself or herself, the pardon power is broad and nearly absolute.²⁰⁰ However, it is clear that a president may not pardon conduct that has not yet occurred. The Supreme Court described the reach of the president's pardon authority in *Ex parte Garland*:

The [pardon conferred by Article II, Section 2] is unlimited, with the exception [for impeachment] stated. It extends to every offence known to the law, and may be exercised *at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment*. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any

dency-pence-gives-full-pardon-column/1111735002/; Griffin Connolly, *Trump Will Resign and Have Pence Pardon Him if He Loses to Biden, Cohen Claims*, INDEPENDENT (Sept. 9, 2020, 3:57 PM), <https://www.independent.co.uk/news/world/americas/us-election/trump-lose-2020-election-biden-polls-predictions-michael-cohen-b421047.html>.

198. See *infra* notes 307–22 and accompanying text.

199. See *supra* note 100 and accompanying text.

200. See *infra* Section III(C).

class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.²⁰¹

Garland makes clear that a pardon may issue for crimes that have already been committed, but have not yet been prosecuted, or if prosecuted, have not yet resulted in conviction. This point has been plain since the Founding. At the Constitutional Convention, Luther Martin moved to insert “after conviction” following the words “reprieves and pardons” in the draft Pardon Clause, but withdrew the motion after James Wilson retorted that “pardon before conviction might be necessary, in order to obtain the testimony of accomplices.”²⁰² Likewise, Hamilton and others justified the extension of the pardon power to treason on the ground that a timely pardon issued to rebels might forestall open warfare or end it if begun. As Hamilton put it, “in seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”²⁰³

A great many pardons have issued before commencement of any legal proceedings. President Andrew Johnson pardoned thousands of ex-Confederates who might have been, but were not, prosecuted for treason.²⁰⁴ President Carter’s amnesty for draft evaders extended both to those who had been prosecuted and others who could have been.²⁰⁵ Gerald Ford’s famous pardon of recently-resigned President Nixon covered all federal crimes he might have committed during his term in office, including crimes that, according to the evidence uncovered in the impeachment inquiry, Nixon surely had committed.²⁰⁶ Ford’s par-

201. *Ex parte Garland*, 71 U.S. 333, 380 (1866) (emphasis added).

202. 5 ELLIOT, *supra* note 85, at 480.

203. THE FEDERALIST NO. 74 (Alexander Hamilton).

204. Johnson pardoned many thousands of former Confederates. *See, e.g.*, Proclamation No. 179, Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion (Dec. 25, 1868), LIBR. OF CONG., <https://www.loc.gov/resource/rbpe.23602600/?st=text>. However, only about a thousand Confederates were ever tried for any crime in relation to their conduct during the Civil War. *Myth: Henry Wirz Was the Only Person Tried for War Crimes in the Civil War*, NAT’L PARK SERV., <https://www.nps.gov/and/learn/historyculture/wirztribunal.htm> (last updated Apr. 14, 2015). None were tried for treason. Peter Charles Hoffer, *Review: Cynthia Nicoletti, Secession on Trial: The Treason Prosecution of Jefferson Davis*, 20 CIV. WAR BOOK REV. (2018), <https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=3276&context=cwbr>.

205. Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 24, 1977).

206. Proclamation No. 4311, 39 Fed. Reg. 32601 (Sept. 8, 1974). For a summary of the scope of President Nixon’s criminal conduct and the evidence gathered against him during the impeachment process, *see* BOWMAN, HIGH CRIMES, *supra* note 3, at 193–202.

don spared Nixon the indignity of formal prosecution for those offenses.

On the other hand, by noting that a crime may be pardoned only “at any time after its commission,”²⁰⁷ *Garland* also holds that a pardon may *not* be issued prospectively for crimes that have not yet been committed.²⁰⁸ As Brian Kalt has said, “the law is clear that a pardon cannot be prospective—it can only reach offenses committed before the pardon is issued—but that limit is not spelled out in the Constitution It is implicit in the definition of a ‘pardon’ as opposed to a suspension of the law.”²⁰⁹

With one possible exception, no president has ever tried to pardon future conduct. That possible exception is Donald Trump, who included in his pardon of Sheriff Joseph Arpaio for criminal contempt a passage that pardoned Arpaio not only for the contempt already found by the court, but also “for any *other offenses . . . that might arise*, or be charged, in connection with *Melendres v. Arpaio*.”²¹⁰ Inasmuch as there has so far been no allegation that Arpaio committed additional offenses after the issuance of the pardon for which the pardon excused him, the point is of no immediate consequence and can probably be ascribed to sloppy draftsmanship.

C. *Once Issued, a Pardon Cannot Be Appealed or Voided*

Presidential pardons to individuals are usually routine extensions of clemency to obscure ordinary felons, but in unusual cases they can prove controversial. When pardon controversies arise, so, too, does the question of whether a presidential pardon can be challenged in court and reversed. Even before the final spate of pardons at the close of his

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

208. *See also* *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“A pardon is an act of grace, proceeding from the power intrusted [sic] with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a *crime he has committed*”).

209. Brian Kalt, *Can Trump Pardon Himself?*, FOREIGN POL’Y (May 19, 2017 3:25 PM), <https://foreignpolicy.com/2017/05/19/what-would-happen-if-trump-pardoned-himself-mueller-russia-investigation/>. *See also* Chris Cilizza, *Can Trump Pardon Himself?*, CNN POLS. (July 24, 2017 6:21 PM), <https://www.cnn.com/2017/07/21/politics/trump-pardon-authority/index.html> (quoting Brian Kalt as saying, “a pardon can only reach things you already did. It can’t suspend the law in advance, because that wouldn’t be a ‘pardon’”); Sam Berger, *When the Pardon Furthers the Conspiracy: Limits to the Pardon Power*, JUST SECURITY (Jan. 9, 2019), <https://www.justsecurity.org/62174/pardon-furthers-conspiracy-limits-pardon-power/> (“The president’s pardon power is exceedingly broad, but it only applies to actions that have already occurred, not those that are ongoing”).

210. Exec. Grant of Clemency to Joseph M. Arpaio (Aug. 25, 2017), <https://www.justice.gov/pardon/file/993586/download>.

term, President Trump's uses of the pardon power were so irregular²¹¹ that a number of serious observers advanced theories about how some of them might be challenged. Two of these theories contend that pardons of a wide range of offenses and offenders could be nullified if they are unjustifiably self-interested. The first is based on the president's responsibility under Article II to "take Care that the Laws shall be faithfully executed,"²¹² and the other on the contention that some crimes connected to impeachable conduct are unpardonable. A second set of theories relate exclusively to pardons for contempt of court and rely on arguments from separation of powers and due process principles.

I explore each of these theories below, but the bottom line is that none of them withstand scrutiny. For better or worse, I think a pardon, once issued, is absolute in the sense that no other officer or branch of the government may undo it. (And it is doubtful that even the president who issued a pardon could withdraw it, once issued.²¹³) That

211. President Trump's use of the pardon was irregular in several senses. First, he effectively abandoned the review process institutionalized in the Justice Department's Office of the Pardon Attorney. By the end of his term, Trump had publicly issued pardons or sentence commutations to 238 people, roughly 200 of them in his final weeks in office. See *Pardons Granted by President Donald Trump*, U.S. DEP'T OF JUST., Office of the Pardon Attorney, <https://www.justice.gov/pardon/pardons-granted-president-donald-trump>, and *Commutations Issued by President Donald Trump*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/commutations-granted-president-donald-trump-2017-present>. It appears that only twenty-three Trump pardons or commutations were issued following a review and recommendation by the Pardon Attorney. Jack Goldsmith & Matt Gluck, *Trump's Circumvention of the Justice Department Clemency Process*, LAWFARE (Dec. 29, 2020), <https://www.lawfareblog.com/trumps-circumvention-justice-department-clemency-process> (the article is linked to a chart now updated through the end of Trump's term in office, viewable at https://docs.google.com/spreadsheets/d/11PyYaALDOzDWsyf aOjkWk0LkXoGe_ayf9FV4oHgLAhQ/edit#gid=1909960010). Second, a great many of his pardons were substantively unusual. A review of the list reveals a grab-bag of political cronies or supporters, convicted rich people, people pardoned to make a political point (including accused domestic insurgents and military war criminals), folks whose cause was espoused by Trump friends or celebrities, and three dead people—former heavyweight champion Jack Johnson, former head of General Electric Zay Jeffries, and Susan B. Anthony.

212. U.S. CONST. art. II, § 3.

213. The possibility of presidential withdrawal of a pardon was raised by the curious case of Isaac Toussie. On December 23, 2008, President George W. Bush announced a list of pardons, including one pardoning Toussie for his mortgage fraud conviction. Press reports on the pardon questioned its propriety because Toussie's father had given about \$30,000 to the Republican Party and Republican presidential candidate John McCain. David Stout & Eric Lichtblau, *Pardon Lasts One Day for Man in Fraud Case*, N.Y. TIMES (Dec. 24, 2008), https://www.nytimes.com/2008/12/25/washington/25pardon.html?_r=0. On December 24, 2008, the White House announced that the Pardon Attorney had been ordered not to deliver the pardon warrant to Toussie pending further investigation. Karen Tumulty, *Pardon Season Update*, TIME (Dec. 24,

does not mean that either the grantor or recipient of the pardon will be exempt from all adverse consequences related to its subject matter, a critical point I will address at length below. But discussion of what can be done once a pardon issues should be firmly grounded on the recognition that the pardon itself cannot be reversed.

1. *The Fiduciary Duty Theory*

A number of scholars have begun developing a general theory of “fiduciary constitutionalism,” the idea that “the framers of the U.S. Constitution rather self-consciously sought to design ‘the fiduciary law of public power’ in which the government’s ‘conduct would mimic that of the private law fiduciary.’”²¹⁴ Under this theory, the president in particular assumes fiduciary obligations by virtue of his

2008), <https://swampland.time.com/2008/12/24/pardon-season-update/>. The warrant was never delivered. Questions were raised about whether a president could revoke a pardon. The Justice Department took the position that the pardon had not yet become legally operative because the warrant had not been delivered to or accepted by the beneficiary. Stout & Lichtblau, *supra* note 213. This contention finds some support in the doctrine that a pardon must be delivered and accepted to be valid. *United States v. Wilson*, 32 U.S. 150, 161 (1833). However, pardon scholar Brian Kalt has pointed out that President Bush signed a “master warrant” containing the names of multiple people receiving pardons, and that the recipients were notified by phone through their lawyers. Brian C. Kalt, *Can the President Undo a Pardon?*, WASH. POST (Jan. 26, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/01/25/AR2009012501774.html?hpid=opinionsbox1>. Kalt also asserts that the lawyers “accepted” the pardons on behalf of their clients, and that physical delivery of paper copies of pardon warrants had never before been deemed a requirement for pardon validity. *Id.* In Kalt’s opinion, the Toussie pardon was valid and could not constitutionally be revoked. *Id.* The Toussie matter was never litigated. Had it been, the President could also have defended his action by reliance on Blackstone and Coke, who record the principle that a pardon is void if the King has been deceived in issuing it. Said Blackstone, “it is a general rule, that wherever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed.” 4 BLACKSTONE, *supra* note 20, at 393. Sir Edward Coke wrote, “And that party which informeth not the king truly, is not worthy of his grace and forgiveness, and therefore either *supressio veri* or *expressio falsi* doth avoid the pardon.” 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 238 (1797). Even assuming that a pardon, once both issued and accepted, can be withdrawn by the president who issued it on the ground that he was misinformed about critical facts, it seems extraordinarily doubtful that a later president could revoke a pardon on the theory that his predecessor had been deceived.

214. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J. OF L. & PUB. POL’Y 463 (2019) (quoting TAMAR FRANKEL, FIDUCIARY LAW (2010) and Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007)).

constitutionally imposed duty to “take care that the laws be faithfully executed,”²¹⁵ as well as his constitutionally mandated oath to “faithfully execute the office of President of the United States, and . . . preserve, protect and defend the Constitution of the United States.”²¹⁶ Ethan Leib and Jed Shugerman have elaborated the specific suggestion that a president’s fiduciary obligations limit his pardon power, blocking the possibility of self-pardon in virtually any case, and permitting the reversal of pardons for other persons, if the action is adjudged sufficiently self-interested and contrary to the public interest.²¹⁷

The Framers probably did envision public servants generally, and the president in particular, as assuming some sort of fiduciary responsibility for the public welfare in a broad metaphorical sense. Certainly they thought of public office as a public trust, and thought it essential to the success of republican government that public officers act virtuously while exercising powers conferred by that trust. As Madison said in *Federalist 57*:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.²¹⁸

The structure of the Constitution itself contains a variety of “precautions” aimed at encouraging public virtue in public servants—among them elections, the institutional checks provided by other governmental branches, and congressional impeachment power—and it impliedly invites the addition of others, particularly statutes regulating official behavior passed by Congress and applied by the judiciary.²¹⁹ But although I may be selling the intellectual project of fiduciary constitutionalism short, 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

215. U.S. CONST. art. II, § 3.

216. U.S. CONST. art. II, § 1.

217. Lieb & Shugerman, *supra* note 214, at 476.

218. THE FEDERALIST NO. 57 (James Madison).

219. The latter is the point of the constitutional provision on the consequences of impeachment, limiting its immediate effects to expulsion from office and a ban on future federal employment in any office of “Honor, Trust, or Profit,” but expressly admitting the possibility that an impeached official might “nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” U.S. CONST. art. I, § 3, cl. 7.

inquiry into the wisdom or public-spiritedness of particular actions by presidents or other officials. This seems doubly unlikely in the case of the pardon power, which the Founders granted expressly and exclusively to the president after extended debates over whether the power should be shared with or reviewable by some other body.²²⁰ Moreover, given that the thrust of the fiduciary constitutionalism argument is expressly historical, i.e., a careful reading of Founding era and pre-Founding texts and sources, it seems nearly dispositive that Leib and Shugerman, both first-rate historical scholars, have located not a single instance in Anglo-American history of a judge voiding a pardon on the ground that it was issued in contravention of fiduciary obligations of a king, governor, or president.

Beyond the absence of any constitutional warrant for granting courts the power to review pardons, there exists the (I think insuperable) problem of what standard judges would use that did not amount to simple second-guessing. Leib and Shugerman suggest that a pardon could be voided if it was both “chiefly for the narrow self-interest of the President and clearly against the public interest.”²²¹ The indeterminacy of this formulation is obvious. As an elected official, many, perhaps most, things a president does can be construed as in his self-interest to the extent that acts which please the public redound to his electoral benefit or that of his governing coalition. Conversely, a good many things which may benefit a president politically are also in the public interest, or certainly could be rationally argued to be so.

Take two non-pardon examples (after all, fiduciary constitutionalism is a theory not limited to pardons²²²). Assume President A suspended the operation of deportation laws for a large class of undocumented persons who had been brought to the United States as children and had known no other home.²²³ Assume President B were to announce in the early fall of a presidential election year, and during a pandemic-caused economic crisis, that the Treasury Department would not collect payroll taxes for the rest of the year.²²⁴ As for the “narrow self-interest” prong of the Leib-Shugerman test, a cynical observer might conclude that both these presidential moves were indeed

220. See *supra* notes 80–98 and accompanying text.

221. Lieb & Shugerman, *supra* note 214, at 476.

222. See, e.g., *id.* at 477–84 (applying fiduciary constitutionalism to the non-delegation doctrine).

223. See Remarks by the President on Immigration, THE WHITE HOUSE (June 15, 2012, 2:09 PM), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

224. See Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster, 2020 DAILY COMP. PRES. DOC. 1 (Aug. 8, 2020).

narrowly self-interested insofar as each pleased a swathe of voters the president needed for re-election. But persons favoring a more lenient immigration policy or radical fiscal stimulus during a pandemic might see in these moves nothing but benign public-spiritedness. As for the second prong, whether these actions were clearly against the public interest, different observers, with different views of immigration policy on the one hand and fiscal policy on the other, would likely arrive at diametrically opposed conclusions. Whatever other legal challenges might be mounted to these presidential actions, can it seriously be pretended that a judge has constitutional power to invalidate either of them based on his or her judgments about the president's motives and an assessment of whether the challenged policy was in the public interest?

Some pardons might fit more easily into the Leib and Shugerman fiduciary paradigm, but there, too, the judicial determination would in most cases easily deteriorate into a standardless value judgment. Assume, for example, that a president had engaged in a felonious criminal conspiracy with Messrs. A, B, and C, and that the president pardoned these co-conspirators. Such a case would seemingly offend both the "narrow self-interest" and "clearly against the public interest" prongs of the Leib-Shugerman test. But suppose further that the object of this conspiracy was to arrange a prohibited sale of munitions to an embargoed foreign power in return for the release of American hostages, and then to use the profits of the sale to support a Central American rebel group supported by the administration and the president's political party, but blocked by statute from receiving American aid.²²⁵ Would pardons in such a case be narrowly self-interested? Or would they be a recognition that the co-conspirators were merely doing what they perceived to be the bidding of the president in the service of what they honestly thought to be the national interest? Would such pardons, once issued, be clearly against the public interest? Or a reasonable balancing of public interest and private equities?

These are not questions judges are well-suited to answer, and nothing in the Constitution provides any warrant for them to do so.

225. This is, of course, a simplified description of the famous "Iran-Contra Affair," in which President Reagan and his subordinates traded arms to Iran for release of captives in Lebanon, and then used Iranian money from the deal to support Nicaraguan "Contra" rebels. Reagan's successor, George Bush, later pardoned six men convicted of crimes related to the affair. At the time of the pardons, there was considerable suspicion that Bush himself might have been implicated in the matter, making the pardons self-interested, rather than an exercise of disinterested generosity. See *The Iran-Contra Affair*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reagan-iran/> (last visited Feb. 20, 2021).

More importantly, the Constitution already provides at least two venues for judging such pardons, one political and another legal. As Madison pointed out from the first, where a president abuses the pardon power, he or she may be impeached and removed from office.²²⁶ And a president involved in crime with those pardoned can be prosecuted in the ordinary courts.²²⁷

2. *The Limit on Pardons “In Cases of Impeachment”*

Article II grants the President the power to “grant reprieves and pardons for offenses against the United States, *except in cases of impeachment.*”²²⁸ Historians Corey Brettschneider and Jeffrey Tulis have argued that the impeachment exception would preclude a president from issuing a pardon to a person whose criminal conduct related to impeachable conduct by the president him or herself.²²⁹

Although Brettschneider and Tulis are both eminent scholars, their arguments on this point are unpersuasive. The main thrust of their argument is originalist. They point out that “the Constitution’s Framers were deeply concerned about presidents abusing power to protect co-conspirators,”²³⁰ and infer from that concern that the Framers could not have meant to permit a president to pardon his own co-conspirators in a matter of sufficient gravity that it could lead to impeachment. Their argument inverts the plain meaning of the debates at the Constitutional Convention and afterward. As noted above, Edmund Randolph objected at the Convention, and later during the ratification debates, to the language giving presidents power to pardon all offenses including treason precisely because that language would allow a treasonous president to pardon to his co-conspirators.²³¹ The point was taken up by George Mason during the Virginia ratification debates,²³² drew responses from James Madison and James Iredell,²³³

226. See *supra* note 98 and accompanying text.

227. See *supra* notes 156–63 and accompanying text for further discussion of this possibility.

228. U.S. CONST. art. II, § 2 (emphasis added).

229. Corey Brettschneider & Jeffrey K. Tulis, *The Traditional Interpretation of the Pardon Power Is Wrong*, ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/traditional-interpretation-pardon-power-wrong/614083/>. As a supplement to the arguments in the text against the Brettschneider-Tulis theory, see Brian C. 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>.

230. Kalt, *supra* note 229.

231. See *supra* notes 92–96, 98 and accompanying text.

232. See *supra* note 99 and accompanying text.

233. See *supra* note 94 and accompanying text.

and provoked enough general concern that the New York ratifying convention listed exclusion of treason from the pardon power as one of the amendments it urged as necessary improvements on the original document.²³⁴ Hamilton was sufficiently troubled by this argument that he felt it necessary to respond in *Federalist 74*.²³⁵

There are two key points about the Founders' disputes on this issue: First, no defender of the Constitution claimed Randolph or Mason or the New York ratifying convention was reading the constitutional text wrong. All the counterarguments conceded that the text empowered a president to pardon co-conspirators in his own treason; they simply argued that the risk of such an event was slight,²³⁶ worth taking in light of the advantages of confiding unreviewable pardon power in the president,²³⁷ and should it happen, that the president could be impeached for abusing the pardon power²³⁸ and criminally prosecuted for the treason.²³⁹ Second, *treason is an impeachable offense*, indeed the first item on the constitutional list of "Treason, Bribery, or other high Crimes and Misdemeanors."²⁴⁰ If Brettschneider and Tulis are right and the Founders believed that the phrase "except

234. See *supra* note 98 and accompanying text.

235. THE FEDERALIST NO. 74 (Alexander Hamilton) ("The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason.").

236. Iredell, *Answers to Mason*, in 1 BAILYN, *supra* note 67, at 380:

The probability of the President of the United States committing an act of treason against his country is very slight; he is so well guarded by the other powers of government, and the natural strength of the people at large must be so weighty, that in my opinion it is the most chimerical apprehension that can be entertained.

See also THE FEDERALIST NO. 74 (Alexander Hamilton) ("[T]he supposition of the connivance of the Chief Magistrate ought not to be entirely excluded.").

237. *Id.* (finding "strong objections" to any plan that would place legislative constraints on the president's pardon power).

238. See *supra* note 96 (noting that James Madison said the remedy for a misuse of the pardon power to excuse co-conspirators would be impeachment). Brettschneider and Tulis try to make something of the tail end of Madison's rejoinder to Mason, in which he follows the observation that the House may impeach a president for misusing the pardon power with this odd coda: ". . . they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President." *Id.* (emphasis added). It is impossible to know what Madison was thinking here. Perhaps there had been some discussion during the Constitutional Convention about suspending a president from office following impeachment and before resolution of the charges at a Senate trial, but no such provision ever made it into the text. And neither by subsequent amendment nor historical practice has any such suspension ever been instituted. Madison is a deservedly revered figure, but he occasionally said some unaccountable things about the Constitution he helped write.

239. See *supra* notes 165–66 and accompanying text (recounting James Iredell's responses to George Mason's complaints about the Constitution's pardon language).

240. U.S. CONST. art. II, § 4.

in cases of impeachment” barred a president from pardoning persons implicated in crimes that might lead to his own impeachment, then the whole debate about pardons for treason would have been pointless. Somebody would have said, in effect, “Randolph, Mason, and you New York delegates, you fellows are worried about nothing. Treason is impeachable. Pardons of the kind you fear are barred by the impeachment exclusion.” But, of course, no one said anything of the kind because everyone then understood the constitutional text to mean just what everyone since has always thought it means—the exclusion for impeachments merely prohibits a president from nullifying with a pardon the Senate’s conviction in an impeachment case.

A second, and even more daunting, objection to the Brettscneider-Tulis thesis flows from a proper understanding of the Constitution’s impeachment provisions combined with an appreciation of the towering difficulty of employing their thesis in practice. Their proposed limitation on the pardon power would require *courts* to enter orders voiding pardons that fell afoul of their supposed impeachment clause exclusion. No such order could issue until the party challenging the pardon proved to the court a legally sufficient relationship between the criminal charge being pardoned and impeachable conduct by the president. But the scope of impeachable conduct is set by the phrase “Treason, Bribery, and other high Crimes and Misdemeanors,” and the task of determining its reach is assigned to Congress, not the courts. Moreover, although “treason” is defined in the Constitution,²⁴¹ the meaning of the rest of the phrase is, to put it charitably, contestable. As the first Trump impeachment illustrated, the definition of even the common term “bribery” is subject to heated dispute in the specialized impeachment setting.²⁴² As for “high Crimes and Misdemeanors,” generations of politicians, congressional staff, lawyers, and scholars (including Professors Tulis and Brettscneider and me) have written groaning shelves of speeches, reports, articles, and indeed entire books parsing those words.²⁴³ Views of what the phrase *ought* to mean vary, but those who know the subject agree that, in practice, the scope of

241. U.S. CONST. art III, § 3.

242. See, e.g., Carissa Byrne Hessick, *Bribery Is Right There in the Constitution*, ATLANTIC (Nov. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/understanding-bribery-grounds-impeachment/602353/>; Aaron Blake, *Why ‘Bribery’ is the Democrats’ New Impeachment Focus*, WASH. POST (Nov. 14, 2019, 1:46 PM), <https://www.washingtonpost.com/politics/2019/11/02/impeachable-offense-trump-may-have-committed-democrats-arent-really-talking-about/>.

243. See, e.g., BOWMAN, *supra* note 3; COREY BRETTSCNEIDER, ON IMPEACHMENT: THE PRESIDENCY ON TRIAL (2020); Jeffrey K. Tulis, *Impeachment in the Constitutional Order*, in THE CONSTITUTIONAL PRESIDENCY (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009).

impeachable “high crimes and misdemeanors” is a determination reserved to Congress and not justiciable in the courts.²⁴⁴

Yet the Brettscneider-Tulis reading of the Pardon Clause requires that a *judge* considering a challenge to a presidential pardon decide whether the crime pardoned bears a sufficiently close relationship to impeachable conduct by the president. Consider the difficulties this would present.

First, if the pardon were issued and challenged before the president had been impeached by the House, the judge would have to: (a) speculate about what presidential conduct the House *might* deem impeachable, and then (b) make a judicial determination of the hitherto non-justiciable question of whether the president’s conduct was indeed treason, bribery, or a high crime or misdemeanor. Second, if the pardon were issued or challenged after impeachment by the House, but before trial in the Senate, the court would have to decide whether the House vote settled the question of what conduct is properly impeachable, or whether only a Senate guilty verdict could do that, or decide itself the hitherto non-justiciable question of whether the conduct enumerated in the House articles was indeed constitutionally impeachable. Third, a court hearing the challenge to a pardon could suspend its ruling until after the Senate trial. In that case, a two-thirds vote of guilty would establish that the charged conduct was a proper ground for impeachment, but any other result in the Senate would leave the court to decide a question British and American constitutional scholars have been unable to resolve for centuries—what precedent does impeachment without conviction set for the definition of “high crimes and misdemeanors”?²⁴⁵

Perhaps Brettscneider and Tulis mean to suggest only that a pardon can be voided if it was issued for a crime connected with impeachment charges actually approved by the House, irrespective of whether the Senate later convicted. This would be the narrowest construction of their contention that the Constitution “bans a president from using the pardon and reprieve power to commute the sentences of people directly associated with *any impeachment charges against him.*”²⁴⁶ Moreover, that was the sequence in the case they advance as an example of an invalid pardon—Trump’s commutation of Roger Stone’s prison sentence, which occurred in July 2020, five months

244. For the best exposition of this view, see MICHAEL GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000). I concur. BOWMAN, *supra* note 3, at 239.

245. See BOWMAN, *supra* note 3, at 239–42.

246. Brettscneider & Tulis, *supra* note 229 (emphasis added).

after Trump's first impeachment acquittal in the Senate.²⁴⁷ But a constitutional rule limited in that way would neither comport with Founding era understanding nor be particularly useful. A president facing impeachment for his conduct with co-conspirators A, B, and C could simply pardon them *before* the House acted in order to insulate them both from criminal prosecution and from the leverage such a prosecution would create to cooperate against him in court or in Congress. Indeed, this is precisely the scenario multiple Framers seem to have envisioned when they sought a treason exemption to the pardon power.²⁴⁸ If the pardons succeeded in achieving the president's nefarious aim of silencing his co-conspirators, the House process might be hamstrung for lack of evidence. No impeachment would occur, and the pardons could not be voided because there would be no actual impeachment charges to which the pardoned crimes could be connected.

Moreover, even if limited to cases in which the House actually impeaches, the Brettschneider-Tulis thesis tacitly assumes that the articles of impeachment, and any past or prospective charges against the president's associates have some merit. If, as President Trump's defenders vigorously asserted as to the Ukraine affair, an impeachment proves to be no more than a partisan witch hunt, why should a president not be able to pardon associates unjustly caught up in the frenzy?²⁴⁹ Regardless of one's views of the merits that particular case, it is far from impossible that a rancorously partisan House majority

247. Peter Baker, Maggie Haberman & Sharon LaFraniere, *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> [<https://perma.cc/B8LQ-3E5H>].

248. See *supra* notes 164–66 and accompanying text.

249. This is, of course, not my view of the article of impeachment returned against President Trump. As I explained in multiple venues, his impeachment was entirely justified and his acquittal in the Senate was a travesty. See Frank O. Bowman, III, *Trump's Extortion of Ukraine is an Impeachable Abuse of Power*, JUST SECURITY (Oct. 3, 2019), <https://www.justsecurity.org/66407/trumps-extortion-of-ukraine-is-an-impeachable-abuse-of-power/> [<https://perma.cc/MW45-3YFJ>]; Frank O. Bowman, III, *If Trump's Ukraine Call Isn't Impeachable, Nothing Is*, CNN (Sept. 25, 2019, 8:32 P.M.), <https://www.cnn.com/2019/09/25/opinions/trump-ukraine-call-if-this-isnt-impeachable-nothing-is-bowman/index.html> [<https://perma.cc/H3QX-ALY6>]; Frank O. Bowman, III, *Foreign Policy Has Always Been at the Heart of Impeachment*, FOREIGN AFF. (Nov. 25, 2019), <https://www.foreignaffairs.com/articles/2019-11-25/foreign-affairs-has-always-been-heart-impeachment> [<https://perma.cc/HQD4-MNHT>]; Tim Dickinson, *The Guy Who Wrote the Book on Impeachment Says Trump Clears the Bar for Removal from Office*, ROLLING STONE (Oct. 1, 2019, 1:46 P.M.), <https://www.rollingstone.com/politics/politics-features/impeachment-expert-law-trump-merits-removal-893358/> [<https://perma.cc/48HW-AEMC>]. But that may not always be the case.

might impeach a president on wholly specious grounds. Particularly in a case resulting in presidential acquittal, it is a bit hard to see why a president should be categorically barred from pardoning persons connected to charges that the Senate has declined to sustain.

Finally, assuming all the preceding objections could be overcome, there would remain the question of what kind and degree of connection between the president's impeachable conduct and the offense(s) pardoned would be required to merit voiding the pardon. The judiciary is profoundly unlikely to relish resolving that or any of the other conundrums the Brettscneider-Tulis approach would require them to explore. In the end, the Brettscneider-Tulis thesis is contrary to the original understanding of the federal pardon power, has no support in 230 years of subsequent practice, and would be forbiddingly impractical to administer.

3. *Pardons for Criminal Contempt of Court*

In 2017, President Trump issued a pardon to Arizona sheriff Joseph Arpaio for criminal contempt of a federal district judge in connection with a civil rights lawsuit.²⁵⁰ Critics of the pardon filed amicus briefs at the district and appellate court levels contending that the pardon was void or voidable on separation of powers and due process grounds.²⁵¹ In the end, the courts declined to address the merits of these arguments, and as discussed below, I find them unpersuasive. Ordinarily the indeterminacy of the outcome and the narrow focus on pardons for criminal contempt would counsel giving this dispute short shrift. However, the focus of this Article is not merely on pardons, but on pardons that may promote a culture of impunity for a president and his supporters. The power of courts to compel compliance with their orders is an important pillar of the rule of law. A future president might seek to neuter judicial power over subordinates or associates by pardoning them for contempt. Thus, the issue merits some attention.

250. Kevin Liptak, Daniella Diaz & Sophie Tatum, *Trump Pardons Former Sheriff Joe Arpaio*, CNN (Aug. 27, 2017, 2:32 A.M.), <https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html> [<https://perma.cc/8FTS-9T27>].

251. Brief for Erwin Chemerinsky, Michael E. Tigar & Jane B. Tigar as Amici Curiae Supporting the United States, *United States v. Arpaio*, 2017 U.S. Dist. LEXIS 18225 (D. Ariz. 2017) [<https://perma.cc/YWQ3-XLFE>]; Brief for Laurence H. Tribe et al. as Amici Curiae in Support of the Special Counsel and Affirmance, *United States v. Arpaio*, 2019 WL 2013097 (9th Cir. 2019); Brief for Certain Members of Congress as Amici Curiae in Support of Neither Party, 2019 WL 2013098 (9th Cir. 2019).

Understanding the issues requires a quick recap of the proceedings that resulted in Arpaio's contempt conviction and a review of how basic contempt law interacts with the pardon power. In 2007, a group of individuals filed a federal civil rights class action against Arpaio and the Maricopa County Sheriff's Office alleging discriminatory policing and other misbehavior.²⁵² The case dragged on for years. In 2010²⁵³ and again in 2012,²⁵⁴ the Department of Justice filed its own civil lawsuits against Arpaio and the county. Both DOJ and the class action litigants secured court orders requiring changes in the behavior of the Sheriff's Department, but it became evident that the Sheriff was not complying with the orders. In 2015, DOJ intervened in the civil rights action to coordinate its enforcement efforts with those of the plaintiffs and the court.²⁵⁵ Arpaio's resistance to the court's authority continued.

In May 2016, Judge Murray Snow found Arpaio and others in *civil* contempt of orders issued in the civil rights action which was by then being pursued by both private plaintiffs and the Department of Justice.²⁵⁶ In July 2016, Judge Snow ordered a series of remedies for civil contempt designed to protect the rights of the plaintiff class—such as a monetary compensation scheme for victims and changes in Sheriff's Department policies. On August 19, 2016, he also requested the Department of Justice to “prosecute” Sheriff Arpaio and others for “criminal contempt” before a different judge.²⁵⁷

252. *Ortega Melendres, et al. v. Arpaio, et al.*, ACLU (Sept. 13, 2017), <https://www.aclu.org/cases/ortega-melendres-et-al-v-arpaio-et-al> [<https://perma.cc/3ZPM-GVGZ>].

253. *Assistant Attorney General for the Civil Rights Division, Thomas E. Perez, Speaks at the Maricopa County Press Conference*, U.S. DEP'T OF JUST. (May 10, 2012), <https://www.justice.gov/opa/speech/assistant-attorney-general-civil-rights-division-thomas-e-perez-speaks-maricopa-county> [<https://perma.cc/P25R-2DY3>].

254. *Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio*, U.S. DEP'T OF JUST. (May 10, 2012), <https://www.justice.gov/opa/pr/departement-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s> [<https://perma.cc/2DTX-K5SL>].

255. *Justice Department Intervenes in Private Discriminatory Policing Lawsuit Against Maricopa County, Arizona, Sheriff Joseph Arpaio*, U.S. DEP'T OF JUST. (Aug. 13, 2015), <https://www.justice.gov/opa/pr/justice-department-intervenes-private-discriminatory-policing-lawsuit-against-maricopa-county> [<https://perma.cc/M2GL-57LL>].

256. *Finding of Facts and Order Setting a Hearing, Melendres et al. and United States v. Arpaio, et al.*, No. CV-07-2513-PHX-GMS, 2016 WL 3996453 (D. Ariz. May 13, 2016), https://www.aclu.org/sites/default/files/field_document/1677.pdf [<https://perma.cc/U5S7-6T2E>].

257. Stephen Lemons, *Arpaio, Subordinates, Referred for Criminal Prosecution by Judge Snow, Could Face Prison Time*, PHOENIX NEW TIMES (Aug. 19, 2016), <https://www.phoenixnewtimes.com/news/arpaio-subordinates-referred-for-criminal-prosecution-by-judge-snow-could-face-prison-time-8568664>.

A separate criminal case was opened and assigned to Judge Susan Bolton.²⁵⁸ On July 31, 2017, Judge Bolton found Arpaio guilty of *criminal* contempt in violation of 18 U.S.C. § 401.²⁵⁹ On August 25, before Judge Bolton could sentence Arpaio, President Trump issued him a pardon in the criminal contempt case.²⁶⁰ He did not attempt to pardon Arpaio in the civil contempt case. After the pardon, the government abandoned the prosecution, but the court appointed private counsel to handle remaining questions, including Arpaio's motion to vacate Judge Bolton's guilty verdict and, potentially, the issue of whether the pardon was valid.²⁶¹ The Ninth Circuit denied the motion for vacatur, but did not address the pardon's validity, having held that the issue was untimely raised.²⁶²

a. Argument from a Federal Litigant's Right to Redress and Separation of Powers

As illustrated by the *Arpaio* case, contempt can be either civil or criminal.²⁶³ The distinction between the two is sometimes muddled,²⁶⁴ but broadly it is this: in civil contempt, the penalties are coercive and often conditional (such as fines that continue to accrue so long as the offending party persists in violating the court's order), and are designed to compel compliance with a court's order and vindicate the rights of the litigants.²⁶⁵ In criminal contempt, the penalties are fixed,

258. The new case was captioned *United States v. Arpaio, Case No. 2:16-cr-01012*, CT. LISTENER, <https://www.courtlistener.com/docket/4490035/united-states-v-arpaio/> (last updated Feb. 14, 2021) [<https://perma.cc/M9SA-2TGB>]. The "cr" in the case number denoted a criminal, rather than a civil, case.

259. Richard Pérez-Peña, *Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/us/sheriff-joe-arpaio-convicted-arizona.html?mcubz=1> [<https://perma.cc/P9WW-42NF>].

260. Julie Hirschfeld Davis and 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-arpaio-trump-pardon-sheriff-arizona.html> [<https://perma.cc/ZD4G-T9G6>]; OFFICE OF THE PARDON ATT'Y, DEP'T OF JUSTICE, EXECUTIVE GRANT OF CLEMENCY: JOSEPH M. ARPAIO (2017) [<https://perma.cc/B3KB-A8XB>].

261. *United States v. Arpaio*, 887 F.3d 979, 980 (9th Cir. 2018).

262. *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020).

263. See *Richmond Black Police Officers Ass'n v. Richmond*, 548 F.2d 123 (4th Cir. 1977) (explaining differences between civil and criminal contempt).

264. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1033 (1993) (describing the distinction between civil and criminal contempt as "conceptually unclear and exceedingly difficult to apply").

265. *Shillitani v. United States*, 384 U.S. 364, 368–70 (1966); *United Mine Workers v. Bagwell*, 512 U.S. 821, 827–28 (1993) (civil contempt "penalties designed to compel future compliance with a court order").

not conditional on the defendant's subsequent behavior, and intended to vindicate the authority and dignity of the court.²⁶⁶ Criminal contempt penalties may include incarceration and all the collateral consequences of any other criminal conviction, such as disqualification from voting or running for office.²⁶⁷

The Constitution grants a president the power to pardon crimes, not civil wrongs.²⁶⁸ Criminal contempt "is a crime in the ordinary sense."²⁶⁹ Moreover, the Supreme Court has expressly held that the pardon power extends to criminal, but not civil, contempts.²⁷⁰ In *Ex parte Grossman*²⁷¹—a 1925 opinion written by a man who knew about the pardon power from first-hand experience, Chief Justice and former President of the United States, William Howard Taft—the Court unanimously rejected the argument that separation of powers principles prevented a president from pardoning a defendant convicted of criminal contempt.²⁷² The amicus brief filed by Erwin Chemerinsky and colleagues²⁷³ nonetheless tries to distinguish *Grossman*. Their argument runs something like this:

The Supreme Court in *Grossman* said that, when creating the president's constitutional pardon power, the Framers thought of it as roughly coextensive with the King's pardon power in England before the American Revolution.²⁷⁴ Therefore, Chemerinsky sets out to find some limitation on the King's pardon power that, by analogy, would limit a president's power to pardon the Arpaio contempt. In England from the 1300s through the 1600s, there were several avenues of redress for victims of crime. The first was an ordinary prosecution of the wrongdoer in which the Crown was theoretically the party bringing the case. I say theoretically, because until the 1800s there was no body of public prosecutors, and virtually all criminal cases involving private victims or harms were brought by the victim, who was commonly

266. Shillitani, 384 U.S. at 370 n.6. See also *Hicks v. Feiock*, 485 U.S. 624 (1988) (remanding for determination whether payment of child support arrearages would purge a determinate sentence).

267. See, e.g., 18 U.S.C. § 402.

268. U.S. CONST. art. II, § 2.

269. *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). See also *New Orleans v. The Steamship Company*, 87 U.S. 387, 392 (1874); *In re Christensen Engineering Co.*, 194 U.S. 458, 460 (1904); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 326 (1904). Under current law, certain contempts are felonies under 18 U.S.C. §§ 401, 402.

270. *Ex parte Grossman*, 267 U.S. 87, 113 (1925) (holding the President may pardon a criminal, but not a civil, contempt).

271. *Id.*

272. *Id.* at 119–22.

273. Although Dean Chemerinsky's pleading was co-authored by Michael and Jane Tigar, I will refer to it as the "Chemerinsky brief" for the sake of brevity.

274. *Grossman*, 267 U.S. at 108–11.

called “the prosecutor.”²⁷⁵ The punishments in such cases were those we would ordinarily think of as criminal—fines, prison, or death—plus some specialties of the period like flogging, the stocks, or transportation to the colonies. In addition to this customary practice of eighteenth century English criminal courts, there was a very old procedure called “appeal of felony” that allowed victims to bring private prosecutions which, if successful, could result in both restitutionary payments to the victim *and* criminal punishment of the wrongdoer. Chemerinsky noted that the King could pardon defendants convicted in actions brought by the Crown, but could not pardon defendants convicted in private “appeal of felony” actions.²⁷⁶ And Chemerinsky contended that contempt cases, particularly those that had their beginnings in civil litigation that was originally instituted by private plaintiffs, are sufficiently akin to an appeal of felony as to be excluded from the pardon power.

To begin, Chemerinsky argues that the Constitution’s Founders would have been familiar with the exclusion of “appeal of felony” cases from the King’s pardon power, and thus that they intended to limit a president’s pardon power in any modern case analogous to the old “appeal of felony” mechanism.²⁷⁷ A few very well-read Founders may have known about “appeal of felony” and the King’s pardon. It is

275. See generally DOUGLAS HAY, PETER LINEBAUGH, JOHN G. RULE, E.P. THOMPSON & CAL WINSLOW, *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* (Pantheon Books, 1975).

276. Chemerinsky et al., *supra* note 244. In addition to the sources cited, see also 4 BLACKSTONE, *supra* note 24, at 391.

277. As an historical matter, it is quite unlikely that many in the American Founding generation would have been familiar with “appeal of felony” and its relation to the royal pardon power. In the first place, “appeal of felony” does not seem to have existed in American colonial jurisprudence. *Bos. & Worcester Railroad Corp. v. Dana*, 67 Mass. (1 Gray) 83 (1854). I have searched the records of the Constitutional Convention and the state ratifying conventions and can find no mention of “appeal of felony.” Moreover, even in England, the mechanism of “appeal of felony” was already falling out of favor by the early 1600s, and there are only a dozen reported cases of its use in all of the 1700s. “By 1800 the appeal was as obsolete as any institution can be that has not been formally abolished.” J.H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *CRIME IN ENGLAND 1550-1800* (J.S. Cockburn ed., 1977). In short, it is improbable that, by 1787, an American lawyer would have any personal acquaintance with a legal mechanism that had effectively been extinct in England for nearly a century. The likelihood that any significant number of the Constitution’s drafters or ratifiers knew about “appeal of felony,” and were aware that it was outside the royal pardon power, and thought that bit of historical arcana relevant to the scope of the pardon power of an American president is small. As one scholar wrote about a similar issue, “Even in the unreformed common law, there was a distinction between precedents and fossils.” Martha Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138 (1969).

an obscure point, but one mentioned in Blackstone.²⁷⁸ But even if the Founders were properly steeped in British legal arcana, *the analogy of “appeal of felony” to criminal contempt proves exactly the reverse of what Chemerinsky claims.* In England, once the Crown undertook prosecution of a criminal wrong, the King *could* pardon the resulting conviction. Likewise, the King could, and very often did, issue pardons in cases where private prosecutors filed informations in the name of the Crown.²⁷⁹ In Arpaio’s case, the Department of Justice became a party to the civil rights action and then, in a separate case heard by a different judge, prosecuted and obtained a criminal contempt conviction against Arpaio. Hence, even if this were 1787 and Mr. Trump were His Royal Highness Donald I, once the government entered the case seeking criminal penalties for violation of a criminal contempt statute, the resultant conviction would be pardonable by the Crown.

In addition, both Chemerinsky and the brief of Professor Laurence Tribe, et al., argue that the contempt conviction in *Grossman* is different because there the underlying lawsuit was brought by the government to enforce a federal statute, whereas the underlying lawsuit in Arpaio was a civil rights case initially brought by individual plaintiffs. Therefore, they contend, the contempt in *Grossman* was designed to protect government interests, while the contempt in Arpaio was designed to protect the interests of the individual civil rights plaintiffs in the original lawsuit. But in attempting this distinction, amici misconstrue two centuries of American case law on contempt and gloss over the procedural posture of Arpaio’s criminal contempt.

There is no suggestion in prior cases that the distinction between civil and criminal contempt turns on the identity of the litigants in the lawsuit in which the defendant behaved contemptuously. Rather, federal courts have held that the difference between civil and criminal contempt lies in the nature and purpose of the penalties imposed.²⁸⁰ The purpose of civil contempt is either to give the party injured by the contumacious conduct immediate relief in the form of something like monetary compensation or to coerce a recalcitrant contemnor into changing his future behavior by following the court’s orders so that litigants get the relief to which the court has found them entitled. By contrast, the purpose of the penalty imposed following a criminal contempt is not compensation of injured parties or coercion of the con-

278. 4 BLACKSTONE, COMMENTARIES, *supra* note 24, at 391–95.

279. John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 21 (1983).

280. *Shillitani v. United States*, 384 U.S. 364, 369 (1966).

temnor, but punishment.²⁸¹ It is delivered in the form of a criminal sentence indistinguishable in form and effect from a sentence for any other crime. It is fixed—so many months in prison, such-and-such a fine paid to the government—and cannot be later reduced or altered conditional on the defendant’s subsequent behavior.²⁸²

In short, *Grossman* cannot be persuasively distinguished from the *Arpaio* case.²⁸³ But Chemerinsky also argues that *Grossman* should be overturned. First, he contends that aggrieved litigants in federal court have a “right to redress” implied from Article III, of which they would be deprived if judges could not employ criminal contempt sanctions to coerce compliance with their orders. Second, he argues that the power to compel obedience to the judgments of courts through contempt sanctions is an inherent component of judicial authority that exists independent of any statutory authorization. He is right that courts have found an inherent contempt power,²⁸⁴ but he is obliged to concede that Congress can, and has, limited that authority in a variety of ways. Nonetheless, he strongly implies that either removing or significantly limiting the judiciary’s contempt power would violate Article III.

Both of these claims are doubtful. A general right to redress does not make constitutionally mandatory every possible means of judicial coercion. Likewise, the existence of *an* inherent judicial contempt power does not necessarily imply that *criminal* contempt is a constitutionally mandated attribute of judicial authority. If, for example, Congress were to repeal Sections 401 and 402 of Title 18 and decree that

281. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441–43 (1911) (“if [a conviction] is for criminal contempt, the sentence is punitive, to vindicate the authority of the court”). See also *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327–28 (1904).

282. Indeed, under Fed. R. Crim. P. 35(b), fourteen days after any criminal sentence is entered, the district judge loses the power to change it. Hence, a judge could not issue a conditional sentence in a criminal contempt even if she wanted to do so.

283. For another effort to distinguish *Grossman* and make the separation of powers argument, see Sanya Shahrabi, *Can a Presidential Pardon Trump an Article III Court’s Criminal Contempt Conviction? A Separation of Powers Analysis of President Trump’s Pardon of Sheriff Joe Arpaio*, 18 *GEO. J. OF LAW & PUB. POL’Y* 207 (2020).

284. *Ex parte Robinson*, 89 U.S. 505 (1874):

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

henceforward federal judges would enjoy only civil contempt authority, it seems doubtful that such an action would be unconstitutional.

But even if we concede that litigants as a class have a constitutional entitlement to redress *and* that judges have a constitutionally implied power to hold in criminal contempt those who defy judicial orders, neither proposition creates a constitutional argument for voiding the Trump pardon of Arpaio. The general principle that litigants have a right of redress is, at most, a guide to the kinds of processes that ought to be built into the judicial system as a whole. It does not imply a rule that every litigant must receive perfect justice or complete satisfaction of all his legal objectives. Nor does it imply that judges are to be the exclusive arbiters of how justice should be apportioned. Once the pains and stigma attendant on criminal conviction enter a case, Anglo-American law has long reserved a place for executive judgments about clemency.

As for the Arpaio pardon in particular, it changed no laws, procedures, or rules of court. It had no effect on the right of redress of any litigant in any case other than that involving the Maricopa County Sheriff. And even there, the civil rights plaintiffs sued, won, and secured injunctive relief and monetary compensation. Arpaio and the county resisted the court's orders, a resistance that begat further court orders, a civil contempt verdict, and additional remedial measures. Arpaio was convicted of criminal contempt, even though he escaped punishment for it by virtue of the pardon. Arpaio's avoidance of criminal punishment is a deeply regrettable circumstance and one that demonstrates Mr. Trump's personal disregard of both the individual plaintiffs and the sanctity of their constitutional liberties. But it is not an outcome that denied the civil plaintiffs all "redress."

Likewise, the general power of judges to hold recalcitrant litigants in criminal contempt remains unchanged by the Arpaio pardon. By issuing the pardon, Mr. Trump repealed no statute, promulgated no new Justice Department policy, advocated no new interpretation of Article III, and raised no challenge to the criminal contempt power of judges. Here, too, his action reflects adversely on his judgment because it manifests a personal disregard for the role of an independent judiciary and a disposition to employ the powers of the presidency to undermine the rule of law in favor of friends or political allies. But the baseness of a president's motives in exercising a power granted him by the Constitution does not deprive judges as a class of their contempt power.

The core of the arguments of all the Arpaio amici is that the authority to hold persons in criminal contempt for violating court orders

is such an indispensable attribute of judicial power that nullifying it by presidential pardon in even a single case violates the constitutional principle of separation of powers. With the greatest respect to the eminent scholars who signed these briefs, invocation of the phrase “separation of powers” cannot nullify the unequivocal pardon language of Article II, Section 2.²⁸⁵

After all, the Constitution nowhere says, “There shall be a separation of powers.” Instead, it creates a structure of three branches of government and specifies how powers are to be distributed among them. The separation principle is inferred from the textual power distribution. In cases where the language of the Constitution is unclear or fairly open to interpretation, or in cases that plainly could not have been anticipated by the Founders, it may be appropriate to employ the inferred separation principle to decide the constitutional propriety of a contested use of power by one of the branches against another. But, at least absent some extraordinary justification, one cannot use a general principle that is, after all, merely an implication from the structure to void an explicit, unequivocally worded, part of that structure.

Moreover, the inferred separation principle does not mean that the three federal branches occupy three non-intersecting silos of authority. Rather, the Madisonian Constitution is one of checks and balances—three co-equal branches, each endowed both with its own characteristic powers *and* with powers to check abuse of power by the others. The presidential pardon power is a checking power. It was designed to provide a case-by-case executive branch check on legislative and judicial overreach and an avenue of redress for individuals oppressed or misjudged by the other branches.²⁸⁶

Note also that Dean Chemerinsky’s argument is not limited to Sheriff Arpaio’s case. Instead, he is necessarily arguing that no president can ever pardon *any* criminal contempt, regardless of its circumstances. Judicial power over contempts, he says, is absolute and untouchable by executive clemency. For this categorical exclusion to succeed in the face of the unequivocal language of Article II, Section 2, would require some powerful reason to believe either that occasional use of the pardon power would subvert judicial authority generally, or that criminal contempt cases are peculiarly immune from the danger of judicial misjudgment, meanness, or malignancy.

But the Arpaio pardon, however repellent one may find it, is not an instance of one branch (the president) preventing another branch

285. U.S. CONST. art. II, § 2.

286. *Ex parte* Grossman, 267 U.S. at 120–21.

(the judiciary) from functioning *at all*. The judiciary is still in business. Nor does it present an example of one branch preventing another branch from exercising a particular *type of power*. President Trump did not pardon everyone who has been found guilty of criminal contempt of a federal judge. Nor did he threaten to do so. The contempt power remained available to federal judges to enforce their orders, and they have continued to employ it regularly.

Moreover, there is no reason to think that judges are any less prone to misjudgment or injustice in cases of criminal contempt than in any other class of crime, and thus that there is less need for executive clemency in such cases. Indeed, there is every reason to fear that, in cases that necessarily involve defiance of their official authority and may closely touch their own outraged professional dignity, at least some judges may lose perspective. This risk does not outweigh the imperative requirement of effective means of enforcing judicial orders, but it may make the case for an executive check on self-protective instances of judicial overreach even stronger than in ordinary criminal cases. That check is the pardon power.

b. Argument from Due Process

The Arpaio pardon also drew challenges on due process grounds. A group called the Protect Democracy Project argued in a letter to the Justice Department²⁸⁷ and later in an amicus brief²⁸⁸ that Arpaio's pardon was legally invalid as a violation of the Due Process Clause. The group contended that:

While the Constitution's pardon power is broad, it is not unlimited. Like all provisions of the original Constitution of 1787, it is limited by later-enacted amendments, starting with the Bill of Rights. For example, were a president to announce that he planned to pardon all white defendants convicted of a certain crime but not all black defendants, that would conflict with the Fourteenth Amendment's Equal Protection Clause.

Similarly, issuance of a pardon that violates the Fifth Amendment's Due Process Clause is also suspect. Under the Due Process Clause,

287. Jennifer Rubin, Opinion, *Legal Challenge to Arpaio Pardon Begins*, WASH. POST: RIGHT TURN (Aug. 30, 2017), <https://www.washingtonpost.com/blogs/right-turn/wp/2017/08/30/legal-challenge-to-arpaio-pardon-begins>.

288. Proposed Brief for The Protect Democracy Project, Inc. as Amicus Curiae, *United States v. Arpaio*, 2017 WL 4839072 (D. Ariz. Oct. 19, 2017). The argument raised by *Protect Democracy* was first articulated in a New York Times op-ed. 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-arpaio-pardon-arizona-sheriff.html>.

no one in the United States (citizen or otherwise) may “be deprived of life, liberty, or property, without due process of law.” But for due process and judicial review to function, courts must be able to restrain government officials. Due process requires that, when a government official is found by a court to be violating individuals’ constitutional rights, the court can issue effective relief (such as an injunction) ordering the official to cease this unconstitutional conduct. And for an injunction to be effective, there must be a penalty for violation of the injunction—principally, contempt of court.²⁸⁹

I am sympathetic to the sentiment. The Arpaio pardon was a transparent abuse of the pardon authority to help a political supporter.²⁹⁰ Nonetheless, the Due Process Clause does not authorize invalidation of a presidential pardon. The Protect Democracy authors contend that the unfettered scope of the pardon power in the original Constitution is limited by the later-enacted provisions of the Bill of Rights, specifically the Fifth Amendment’s guarantee of due of process of law. It is true that the amendments in the Bill of Rights are amendments to the entire Constitution and thus, in appropriate cases, may constrain or modify the powers granted under the original Constitution. But none of the conventional forms of constitutional argument support invalidating *pardons* on due process grounds.

The Article II text defining the president’s pardon power is unequivocal and admits of no exceptions except impeachment. As discussed in detail above, the Framers carefully considered, and then rejected, placing subject matter or procedural limitations on the president’s pardon authority.²⁹¹

The text of the Fifth Amendment’s Due Process Clause says nothing about pardons. Nor is there any evidence of an original understanding by the authors or ratifiers of the Fifth Amendment’s Due Process Clause that it modified the unequivocal pardon language of Article II. Elastic originalists sometimes argue that conditions have changed over the past two centuries in ways that, had the Founders anticipated them, they would have wanted the constitutional language

289. Rubin, *supra* note 287. A virtually identical passage appears in the group’s amicus brief in the district court. The Protect Democracy Project, Inc., *supra* note 288, at 3. For a more extended response to the Project Democracy arguments than is possible here, see Frank O. Bowman, III, *A Due Process Challenge (Almost Certainly Fruitless) to the Arpaio Pardon*, IMPEACHABLE OFFENSES (Aug. 30, 2017), <https://impeachableoffenses.net/2017/08/30/a-challenge-almost-certainly-fruitless-to-the-arpaio-pardon/> [https://perma.cc/CGV7-4GYA].

290. See Frank O. Bowman, III, *Trump’s Pardon of Joe Arpaio Is an Impeachable Offense*, SLATE (Aug. 26, 2017, 5:17 PM), <https://slate.com/news-and-politics/2017/08/trumps-pardon-of-joe-arpaio-is-an-impeachable-offense.html>.

291. See *supra* Section II(C).

to cover the problem. But Mr. Trump's pardon of Arpaio is hardly something the Constitution's authors could not have anticipated. Many of them were lawyers and some were or had been judges.²⁹² They understood courts, injunctions, and the power of courts to enforce their own orders. Had they wanted to carve out an exception to the pardon power for criminal contempt convictions, they could have done so. They did not. And there is no hint that those who enacted the Due Process Clause only a few years later (many of them the same people) had any other view of the question. Moreover, and this seems key, the Framers *did* anticipate that a president might abuse the pardon power, and they provided a remedy: impeachment.²⁹³

Even if one disavows any interest in the intentions of the Framers and treats the language of the Constitution as a mere framework for an evolving set of rules, norms, and governing principles, one cannot (or at least should not) completely ignore what the Constitution itself says. The language of Article II, Section 2 is unequivocal. To use the vague concept of "due process" to negate the plain meaning of another section of the Constitution requires a far more powerful argument than the good folks at Protect Democracy muster.

At all events, a due-process-based judicial review of presidential pardons would have to be consistent with the checks-and-balances structure written into the Constitution we have. It is not.²⁹⁴ The pardon power was designed in large measure as an executive check on judi-

292. See BOWMAN, *supra* note 3, at 100.

293. See *supra* note 96 and accompanying text. For further discussion of misuse of the pardon power as an impeachable offense, see BOWMAN, *supra* note 3, at 263–66.

294. One might make a somewhat different due process argument than Protect Democracy advanced in *Arpaio*. As noted above, a splintered Supreme Court held in *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272 (1998), that some "minimal" due process protections apply to state clemency proceedings. See *supra* note 106. The argument there was procedural in the narrow sense: the defendant claimed that he had been denied access to customary pardon procedures in the state. However, it is unclear that the reasoning of the Court applying the Fourteenth Amendment Due Process Clause to Ohio and other states would apply to a Fifth Amendment argument concerning the very explicit and absolute grant of pardon power to the United States president. Certainly there has never been a successful due process challenge to the failure of a president to issue a pardon. Moreover, as *Woodward* itself emphasized, and subsequent appellate opinions have made still clearer, the standard for minimally sufficient process is very low. See, e.g., *Winfield v. Steele*, 755 F.3d 629, 630–32 (8th Cir. 2014). But most importantly, *Woodward* is about protecting access of a pardon petitioner to whatever processes have been set up to award pardons. A challenge to a pardon already awarded simply does not raise that issue—regardless of the process employed to arrive at the decision, the president has granted the pardon. The pardonee can hardly complain about success, however procedurally truncated the process or undeserved the outcome. And it is hard to see who else would have standing to object that the president acted with undue haste or insufficient deliberation.

cial excesses. It would hardly make sense to imply from the due process clause a judicial veto on that check. Even if we assume that the Due Process Clause could be read to place some outside limits on the president's pardon power, it is difficult to imagine how a court could fashion an appropriate standard of review of the pardon decision that would not give courts the final word on a question expressly and unqualifiedly reserved to the president by the Constitution.

The real meat of Protect Democracy's argument is a reformulation in due process terms of Dean Chemerinsky's separation of powers claim that the Constitution must be read to provide a *judicial* remedy for every improper executive action. That is not so. The Constitution gives the judiciary the power to effect case-specific remedies for some executive improprieties, but not all. Sometimes the Constitution provides no remedy except political ones.

D. Secret Pardons

At the close of the Trump presidency, a number of observers speculated that a president could issue pardons, but keep them secret until such time as the beneficiaries might need to invoke them to block a federal prosecution.²⁹⁵ At least some knowledgeable persons have suggested that a secret pardon would be impermissible,²⁹⁶ but I am not entirely convinced. In the first place, there is no obvious textual barrier to a pardon kept secret at the time of issuance, and at least one of the Framers seems to have suggested that a secret pardon might be necessary in the case of a secret agent sent abroad to gather intelligence.²⁹⁷ There are no laws or regulations of which I am aware gov-

295. Press Release, Office of the United State Congressman Raja Krishnamoorthi, Krishnamoorthi Reintroduces the Presidential Pardon Transparency Act to Prevent the President from Issuing Secret Pardons (Jan. 11, 2021), <https://krishnamoorthi.house.gov/media/press-releases/congressman-krishnamoorthi-reintroduces-presidential-pardon-transparency-act#:~:text=WASHINGTON%2C%20DC%20%E2%80%93%20Today%2C%20Congressman,three%20days%20of%20being%20issued> [https://perma.cc/4CVJ-XLZU].

296. Jeffrey Crouch, Opinion, *If Trump Issued Secret Pardons, They Won't Work*, WASH. POST (Jan. 20, 2021, 12:33 PM), <https://www.washingtonpost.com/opinions/2021/01/20/trump-secret-pardons-validity/>.

297. *Answers to Mason's "Objections"*: "Marcus" [James Iredell] III, Norfolk and Portsmouth Journal (Virginia), March 5, 1788, in Ford Pamphlets, *supra* note 71, at 352 (1968). Concededly, it is not entirely clear that Iredell was positing the issuance of a secret pardon prior to the secret agent's departure. His primary focus in this passage was on the need for a president to have the power to pardon in such a case free from a legislative veto; however, the passage can fairly be read to imply the propriety of issuing a secret pardon to assure the agent of his welcome back to the country after his mission was complete.

erning the precise form a pardon must take or the precise manner in which it must be memorialized or recorded.²⁹⁸

Of course, a president can only issue a pardon while still in office. Moreover, a pardon must define its scope (even if that scope may sometimes be very broad). Thus, if a president issued a secret pardon, its existence and terms would have to be memorialized in a way that allowed proof of its original terms and date of issuance if the recipient later needed to offer the pardon to a court. The most obvious way to accomplish this end would be to place a copy among the president's official records that, pursuant to the Presidential Records Act of 1978 ("PRA"),²⁹⁹ pass into the custody of the National Archives at the close of the president's term. Indeed, a failure to leave a copy of a pardon among the outgoing president's records might violate the PRA.³⁰⁰

Still, it seems improbable that a violation of the PRA would void the pardon. So long as it could be shown that the pardon was issued while the president was still in office, and that the terms of the pardon, when issued, covered the offense or offenses against which the recipient sought protection, the pardon might remain valid.

III.

HOW TO RESPOND TO SELF-INTERESTED ABUSES OF THE PARDON POWER

The key conclusions so far are two: First, presidents almost surely cannot constitutionally pardon themselves; but the question is untested, so a bold and unscrupulous (or perhaps frightened and unscrupulous) president might try it anyway. Second, if a president pardons someone else for a federal criminal offense, that pardon, once issued, almost certainly cannot be reversed, voided, or undone. With those two fundamental postulates in mind, this Part considers the options available to a successor administration, federal and state legal

298. As noted above, some are of the view that a pardon must be accepted by its beneficiary before it becomes enforceable. *See supra* note 213. But even if that is the case, a pardon could be accepted at the time of its issuance, or even sometime afterward, without being made publicly known.

299. 44 U.S.C. §§ 2201–2209.

300. The PRA requires that the president "shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records." 44 U.S.C. § 2203(a). The Act further provides that, "Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. § 2203(g)(1).

systems, and Congress if a president were to conclude his term in office by purporting to pardon himself and/or issuing a bouquet of pardons to family, friends, and associates.

A. *The Options Depend on the Objective*

Any analysis of potential responses to a spate of self-protective pardons must begin with an appreciation of, first, what the president would be trying to achieve with the pardons, and second, what a new presidential administration, Congress, and the public would want to accomplish in the face of those pardons. In Mr. Trump's case, his objectives would have been reasonably clear: (1) prevent criminal conviction and imprisonment of himself, his family, and his friends; (2) avoid direct financial penalties and sanctions to which criminal, civil, and administrative investigations could expose him and his business enterprises; (3) avoid the indirect negative effects on his business enterprises caused by exposure of criminal misconduct and other misbehavior; and (4) avoid the reputational and political consequences of such exposure (particularly insofar as he hopes either to remain personally active in politics or to become a major player in political media).

The objectives of a successor to a president who issued a batch of self-protective pardons and the objectives of such a president's critics in Congress and beyond would likely be more uncertain. Some would cry out for punishment, including prison, for the ex-president himself and any provably criminal member of his clan and their principal supporters. Others would doubtless shy away from criminal punishment and focus purely on full disclosure of both public and private misconduct and mismanagement during the offender's presidency. And some would seek a middle ground, allowing for the possibility that punishment might be deserved and desirable, but interested primarily in shining a (hopefully) disinfecting light on past misdeeds as a predicate for remedial and prophylactic alterations in federal government practices and operations. I reserve to the concluding section of this Article the question of which of these approaches is preferable for the short and long-term health of American government. Because the answer to that question depends in large part on what is feasible, I address the feasibility issue first.

B. Possible Responses of Federal and State Legal Systems to an Attempted Presidential Self-Pardon or a Pardon Spree for Others

This section considers how the American legal system, meaning for this purpose federal and state prosecutors, courts, and administrative agencies, could respond to an attempted presidential self-pardon, a spate of pardons issued to presidential family members and associates, or both. Some issues presented by an attempted self-pardon would be unique, and will be addressed accordingly. Other issues are common to both an attempted self-pardon and pardons of others. The question of congressional response to such pardons is taken up in Section IV(C) below.

1. A Presidential Self-Pardon Would Be Subject to Legal Challenge

The first question about a presidential self-pardon is whether anyone would be empowered to contest it. Assuming that the Department of Justice under such a president's successor is prepared to prosecute a former president, the answer is yes. During the Trump presidency, a good deal of ink was spilled arguing the merits of the Justice Department's policy, expressed in memoranda by the Office of Legal Counsel ("OLC"), barring prosecution of a sitting president.³⁰¹ Robert Mueller, for example, seemed to have felt that this policy precluded the Special Counsel's office both from indicting President Trump and from publicly expressing a conclusion that he had committed a crime.³⁰² Once a president has left office, however, he becomes an ordinary citizen beyond the protection of the OLC's restrictive views and subject to indictment like anyone else. Should a former president attempt to forestall such a prosecution by pardoning himself on the way out of the White House door, he would have to plead the pardon in a motion to dismiss any case brought against him, and Justice Department prosecutors could oppose that motion just as they would a motion to dismiss on any other ground.

301. See A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 U.S. Op. O.L.C. 222 (2000) (summarizing conclusions of 1973 OLC memorandum on same subject and concurring that a sitting president is not constitutionally amenable to criminal prosecution). For discussion of merits of this view, see, for example, Daniel Cotter, *Options for Dealing with a Sitting President*, HARV. L. & POL'Y REV.: NOTICE & COMMENT BLOG (Feb. 3, 2020), <https://harvardlpr.com/2020/02/03/options-for-dealing-with-a-sitting-president/>.

302. Li Zhou, *Why Mueller Said He Couldn't Indict Trump, Explained*, VOX (July 24, 2019, 1:31 PM), <https://www.vox.com/2019/7/24/20708393/robert-mueller-report-trump-olc-justice-department-indictment-charge-sitting-president>.

2. *The Subject Matter Scope of Presidential Pardons*

In general, pardons of individual persons are carefully drafted to cover particular crimes, or in some instances classes of crime, committed at particular times or during specified periods.³⁰³ Accordingly, a president who was concerned that he had engaged in a wide range of at least arguably criminal behavior and wanted to use a self-pardon to insulate himself from prosecution for all of it would confront a difficulty—how to word the pardon in a way that would cover any possible ground of federal prosecution without specifying (and thus alerting the public, state authorities, Congress, and others about) the matters that most concerned the president. The most obvious solution would be to issue himself a pardon covering all violations of federal criminal law during his entire tenure in office, or potentially, during his entire life to that date. But a self-pardon with that breadth would pose two related risks for the issuing president: first, that courts might find a blanket pardon covering all past crimes constitutionally impermissible regardless of the recipient, and second, that the startling breadth of the presidential self-exculpation would add to the already strong arguments against the constitutionality of self-pardons.

There is at least some question whether a blanket pardon for all past crimes is constitutionally permissible. Courts have often intoned that the broad scope of presidential pardon power is an inheritance from British monarchical practice.³⁰⁴ But even the old English kings and queens did not (so far as I have been able to determine) issue absolute pardons of all offenses whatever. In Magna Carta, King John promised pardons, but only for offenses committed between Easter 1215 and the “restoration of peace,” and only for offenses “committed as a result” of the baronial rebellion against him.³⁰⁵ The Tudor

303. See, e.g., *Clemency Recipients*, OFFICE OF THE PARDON ATT’Y, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/clemencyrecipients> [<https://perma.cc/4TGQ-AJLB>] (last visited Feb., 25, 2021) (list of clemency recipients, with specific offenses pardoned or sentences commuted, maintained by the Department of Justice back through the presidency of Richard Nixon).

304. See, e.g., *Ex parte Grossman*, 267 U.S. at 113.

305. Magna Carta, paragraph 62:

We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects, whether clergy or laymen, since the beginning of the dispute. We have in addition remitted fully, and for our own part *have also pardoned, to all clergy and laymen any offences committed as a result of the said dispute between Easter in the sixteenth year of our reign (i.e. 1215) and the restoration of peace.*

Magna Carta ¶ 62 (1215), translated in G.R.C. Davis, *Magna Carta* (British Museum, 1963), <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (emphasis added). For discussion of similar English royal amnesties proclaimed in the thirteenth and fourteenth centuries, see Helen Lacey, *The Politics of Mercy: The Use*

monarchs granted multiple general pardons covering multiple classes of offenses.³⁰⁶ As over the centuries Parliament took an ever-greater share of authority, it began playing a larger role in general pardons, periodically passing bills proposed by the monarch proclaiming amnesty for various classes of offenses. Whether issued in the form of royal proclamations or as parliamentary bills sponsored by the monarch, these pardons were certainly non-specific, in the sense of covering many unnamed people and a wide range of offenses, but none covered absolutely all violations of English law and the number of exclusions tended to increase over time.³⁰⁷ For example, in 1750, George II proposed and Parliament passed “An Act for the King’s Most Gracious, General, and Free Pardon,” which nonetheless contained pages of detailed exceptions to its coverage.³⁰⁸

The United States has never embraced an equivalent to English general pardons. However, American presidents have issued roughly thirty group amnesties.³⁰⁹ Among these were President James Madison’s 1815 pardon of the so-called Barrataria pirates, followers of Jean Lafitte who assisted American forces at the Battle of New Orleans,³¹⁰ and the set of post-Civil War pardons and amnesties issued

of the Royal Pardon in Fourteenth-Century England 46–49 (Mar. 2005) (unpublished Ph.D. dissertation, University of York) (on file with White Rose Libraries, Universities of Leeds, Sheffield and York), <http://etheses.whiterose.ac.uk/10964/>. King Charles II, in response to the House of Commons’ complaints about his attempt to pardon the Earl of Danby, supposedly adverted to a practice of pardoning all his outgoing ministers. The parliamentarians expressed both surprise and outrage. *See supra* note 55 and accompanying text. Whether this really was a royal practice I have not been able to discover.

306. Krista Kesselring, *To Pardon and to Punish: Mercy and Authority in Tudor England* 95–96 (Aug. 2000) (unpublished Ph.D. dissertation, Queen’s University, Kingston, Ontario) (on file with Library and Archives Canada), <https://www.bac-lac.gc.ca/eng/services/theses/Pages/item.aspx?idNumber=1006900357>.

307. In the fourteenth century, general pardons customarily excluded treason, murder, rape, and thefts. Lacey, *supra* note 305, at 54. By the sixteenth century, the list of exclusions grew to include, *inter alia*, murder, robbery, burglary, felonious theft of over 20 shillings value, arson of houses, rape, escape of felons from custody, piracy, and witchcraft. *Id.* at 54. *See also*, Kesselring, *supra* note 306, at 97–100 (describing increasingly restrictive terms of pardons during reign of Elizabeth I).

308. An Act for the King’s Most Gracious, General, and Free Pardon 1747, 20 Geo. 2 (Eng.), Eighteenth Century Collections Online, <https://link.gale.com/apps/doc/CW0106101699/ECCO?u=new64731&sid=ECCO&xid=8e5de7c5&pg=5>.

309. Aaron Rappaport, *An Unappreciated Constraint on the President’s Pardon Power*, 52 CONN. L. REV. 271, 317–18 (2020).

310. Madison’s proclamation granted to all who assisted in the defense of Louisiana: [A] full and free pardon of all offenses committed in violation of any act or acts of the Congress of the said United States touching the revenue, trade, and navigation thereof or touching the intercourse and commerce of the United States with foreign nations at any time before the 8th day of January, in the present year 1815, by any person or persons whomsoever

to former Confederates by President Andrew Johnson.³¹¹ Almost all were non-specific in the sense of covering multiple unnamed persons and a range of offenses and conduct. There have also been non-specific individual pardons that covered as-yet-uncharged crimes relating to broadly defined incidents or courses of action.³¹² Accordingly, there is little historical support for the contention that either group amnesties or individual pardons must achieve some particular standard of specificity to be valid.³¹³ That said, with one famous exception, no previous group amnesty or individual pardon purported to cover all federal crimes, even over a specified time period.

The outlier is Richard Nixon. In August 1974, President Nixon resigned in the face of near-certain House impeachment and Senate conviction.³¹⁴ As the reports of the Senate Watergate Committee and the House Judiciary Committee made clear, Nixon faced substantial criminal exposure on multiple fronts, including bribery, subornation of perjury, obstruction of justice, and tax evasion.³¹⁵ Wishing to avoid a

being inhabitants of New Orleans and adjacent country, or being inhabitants of the said island of Barrataria and the places adjacent.

James Madison, Presidential Proclamation (Feb. 6, 1815), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 543–45 (James D. Richardson, ed.), 2, 543–45 (James D. Richardson, ed.) <https://babel.hathitrust.org/cgi/pt?id=chi.29033292&view=1up&seq=127&q1=%22revenue,%20trade,%20and%20navigation%22>.

311. For example, Johnson’s December 1868 proclamation “Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion” did not reach all federal crimes, being limited in both time and subject matter to the offenses of “treason against the United States, or of adhering to their enemies during the late civil war.” ANDREW JOHNSON, PRESIDENTIAL PROCLAMATION GRANTING FULL PARDON AND AMNESTY TO ALL PERSONS ENGAGED IN THE LATE REBELLION (Dec. 25, 1868), <https://www.loc.gov/item/rbpe.23602600/>.

312. E.g., Proclamation No. 6518, 57 Fed. Reg. 62,145, *reprinted in* 107 Stat. 2606 (Dec. 24, 1992) (the pardons of Iran-Contra defendants by President George H.W. Bush); Josh Gerstein and Kyle Cheney, ‘Any and All Possible Offenses’: *Trump Pardon Grants Flynn a Sweeping Reprieve*, POLITICO (Dec. 1, 2020), <https://www.politico.com/news/2020/11/30/trump-flynn-pardon-reprieve-441527> (the pardon of Michael Flynn by President Trump).

313. Professor Aaron Rappaport has argued forcefully for the existence of a specificity requirement. Rappaport, *supra* note 309. I have laid out my reasons for disagreeing. Frank O. Bowman, III, *The Constitutionality of Non-Specific Pardons*, JUST SECURITY (Dec. 14, 2020), <https://www.justsecurity.org/73851/the-constitutionality-of-non-specific-pardons/>. He replied. Aaron Rappaport, *Are Blanket Pardons Constitutional? A Reply to Bowman*, JUST SECURITY (Dec. 17, 2020). And I responded. Frank O. Bowman, III, *Purpose, Not Specificity, Limits the Pardon Power: A Rejoinder to Rappaport*, JUST SECURITY (Dec. 28, 2020) [hereinafter Bowman, *Purpose, Not Specificity*].

314. *See* BOWMAN, *supra* note 3, at 190.

315. *Id.* at 190–202 (summarizing the evidence collected and articles of impeachment approved and rejected by the House Judiciary Committee).

prolongation of the Watergate trauma, and perhaps feeling expulsion from the White House was punishment enough, Nixon's successor, President Gerald Ford, pardoned Nixon. His proclamation granted "a full, free, and absolute pardon unto Richard Nixon for *all offenses against the United States* which he, Richard Nixon, has committed or may have committed or taken part in during" Nixon's term of office.³¹⁶ Ford was roundly criticized and the pardon may have contributed to his electoral defeat by Jimmy Carter in 1976,³¹⁷ but no one ever sought to challenge the scope of the Nixon pardon in court.³¹⁸

Ford's action provides at least one precedent for an absolute pardon of all presidential federal crime (at least during the pardoned president's term of office). Yet inasmuch as the scope of Ford's action was never legally tested, its very singularity devalues its precedential weight. One could fairly argue that the Carter administration's passive acquiescence in Ford's move represented a political, not constitutional, judgment on a highly contestable point. Presented with analogous facts, a court might well accept even a blanket pardon of all federal crimes if issued by a president *to someone else* for articulable reasons of state. After all, the Ford-Nixon pardon, though ferociously controversial at the time, can fairly be defended as precisely the kind of exercise of clemency to promote national harmony that the Framers envisioned and American presidents from Washington forward have periodically employed.

Still, I remain doubtful that a blanket pardon for all federal offenses would be constitutional, even if issued to another person. As I

316. Proc. No. 4311, 88 Stat. 2502 (Sept. 8, 1974) (emphasis added).

317. Zachary B. Wolf, *What the Most Epic Pardon of All Time Tells Us About Trump*, CNN (Sept. 13, 2020, 7:04 PM), <https://www.cnn.com/2020/09/13/politics/gerald-ford-richard-nixon-pardon-wolf-what-matters/index.html> (noting that Ford's approval rating dropped 30 points following the Nixon pardon and contributed to his electoral defeat in 1976).

318. Special Prosecutor Leon Jaworsky apparently considered challenging the Nixon pardon on various grounds, but ultimately decided against it. LEON JAWORSKY, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* 244–49 (1976). In his resignation letter to Attorney General William Saxbe, Jaworsky explained his views on the pardon question, but did not address the overbreadth issue. *Text of Jaworski's Report to Attorney General*, N.Y. TIMES (Oct. 13, 1974), <https://www.nytimes.com/1974/10/13/archives/text-of-jaworskis-report-to-attorney-general-issue-of-jurisdiction.html>. A private lawyer, F. Gregory Murphy, filed an action in the U.S. District Court for the Western District of Michigan seeking a declaratory judgment that the Nixon pardon was void, primarily on the ground that a "pardon could not be validly granted to a person who had never been indicted or convicted and who had therefore never been formally charged with an offense against the United States." *Murphy v. Ford*, 390 F. Supp. 1372, 1372 (W.D. Mich. 1975). The court denied the request, finding, *inter alia*, that pardons can be granted for offenses not yet indicted or convicted. *Id.* at 1374–75.

have argued elsewhere, in order for a pardon to be valid, the president must have made a judgment that a crime or class of crimes committed by a particular defendant or class of defendants deserved clemency. Judgment requires knowledge on the part of the president, which cannot exist if the pardon is for every offense, known and unknown.³¹⁹

The bigger risk for a president contemplating self-pardon might be that a *blanket* self-pardon would add overbreadth to the many arguments recounted above against the constitutional validity of any self-pardon.³²⁰ To accept that a blanket self-pardon is constitutional is to accept that, once elected, a president can place himself completely beyond the reach of national criminal law. So long as the current DOJ policy barring prosecution of sitting presidents remains, a president cannot be touched during his or her term. If blanket self-pardons are constitutional, a departing president can then give himself an immunity bath for *all* federal crimes committed during *and before* his term. A being with power like this truly would be a king, not a president. One suspects that even judges favorable to a powerful chief executive would question so expansive and self-serving a claim of pardon authority.

3. *The Temporal Scope of a Presidential Self-Pardon*

Remember that a president can pardon any federal criminal offense, even one that has not yet been investigated or charged, so long as it occurred prior to the issuance of the pardon.³²¹ This temporal limitation has a series of intriguing implications for an attempted self-pardon.

a. A Presidential Self-Pardon Would Not Cover Later or Continuing Offenses

A president cannot pardon himself (or anyone else) for criminal conduct occurring after the moment at which the pardon becomes legally effective.³²² Thus, even if a president waits to the end of his

319. For a more complete treatment of this argument, see Frank O. Bowman, III, *Are Blanket Pardons Constitutional?*, FED. SENT'G REP. 301 (2021). *See also* Bowman, *Purpose, Not Specificity*, *supra* note 313.

320. *See supra* Section III(A).

321. *See Ex parte Garland*, 71 U.S. 333, 380 (holding that the pardon power “may be exercised at any time after [the commission of the crime], either before legal proceedings are taken, or during their pendency, or after conviction and judgment”); *United States v. Burdick*, 211 F.492, 493 (S.D.N.Y. 1914) (Hand, J.) (“I have no doubt whatever that the President may pardon those who never have been convicted.”)

322. I say “moment at which the pardon becomes effective,” rather than “date on which the pardon becomes effective” because, although the matter has not to my

administration and pardons himself the instant before his successor takes the oath of office on January 20, that pardon (even if held valid in principle) would not cover crime committed by the ex-president thereafter. If, after January 20, the ex-president committed some entirely new criminal act, wholly unconnected with anything he had done before, the pardon would not cover it. Crucially, for example, a self-pardon would provide no legal protection for a president who, *after leaving office*, engaged in criminal obstruction of a federal investigation into events before, during, or after his administration.

Likewise, a pardon should not function to block prosecution of a “continuing offense” that began before the pardon, but persisted after it. There are a fair number of such offenses in federal law, but the most obvious are the various kinds of conspiracy, notably conspiracies to commit other federal crimes or to defraud the United States, 18 U.S.C. § 371, and conspiracy to commit mail or wire fraud, 18 U.S.C. § 1349.³²³ The most common legal consequence of determining that a crime is a continuing offense is to extend the statute of limitations, but it has implications for pardons as well.

As an illustration of the statute of limitations effect, compare two cases. In the first, assume that, in 2010, A and B rob a bank. The federal statute of limitations for that crime is five years.³²⁴ If the Justice Department does not indict A and B within five years of the date of the robbery, it is barred from ever doing so. In such a case, the government would have until sometime in 2015 to indict.

By contrast, suppose instead that, in 2010, A and B enter into a conspiratorial agreement to defraud investors in XYZ Inc., and one of them thereafter performs an overt act in furtherance of that agreement. At that point, the crime would be prosecutable,³²⁵ but the law would

knowledge been tested, that must be the law. After all, if a president pardons Joe Smith for all prior federal crimes and signs the pardon warrant at noon on July 1, it cannot be the case that Smith thereby gains a license to commit any other additional crimes that strike his fancy until the stroke of midnight on July 1.

323. Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 *Nw. J. L. & Soc. POL'Y* 219, 233 (2012).

324. 18 U.S.C. § 3282 (2012) (setting out statutes of limitation for most federal crimes).

325. Some conspiracy statutes require only an agreement. Others require both an agreement and an overt act by one of the co-conspirators in furtherance of the conspiracy. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 430–35 (7th ed. 2015). Conspiracies prosecuted under 18 U.S.C. § 371 require proof of an overt act. *United States v. \$11,500.00 in United States Currency*, 869 F.3d 1062, 1072 (9th Cir. 2017); *United States v. Ngige*, 780 F.3d 497, 503 (1st Cir. 2015); *United States v. Salahuddin*, 765 F.3d 329, 338 (3d Cir. 2014); *United States v. Mathis*, 738 F.3d 719, 735 (6th Cir. 2013). In conspiracies of that type, the crime is deemed complete in the sense of

treat the crime as “continuing”³²⁶ until the conspiracy achieved its objective, or A and B had abandoned the conspiracy³²⁷ (a development often determined by the performance of the last overt act in furtherance of the conspiracy³²⁸). The five-year statute of limitations applicable to Section 371 conspiracies would not even start to run so long as the crime continued. Thus, if the conspiracy were deemed to have ended in 2019, the government could still prosecute until 2024, *and* could include within its indictment all the conspiratorial conduct engaged in, and harm caused by the conspiracy, all the way back to 2010.

The implication of the law governing continuing offenses and statutes of limitation is that an attempt to pardon a crime that was continuing on the date of the pardon should be legally ineffective.³²⁹ Pardons are only available for past crimes. A continuing crime is not a past crime. Any compelling evidence that a purportedly pardoned crime was a continuing one should vitiate the pardon. I am aware of no case addressing this proposition. And I hasten to add that determining the termination date of continuing offenses can be very complex. But the principle seems sound.

b. A Presidential Self-Pardon Could Itself Be a Crime Not Covered by the Pardon

The final point about the temporal limitation on the pardon power is subtle, and relates directly to an attempted self-pardon. I think it can be fairly argued that a president who attempted to pardon himself would, in the very act of issuing the pardon, be committing the new crime of obstruction of justice under 18 U.S.C. § 1512(c). Space does not permit an exhaustive analysis of this question, but in brief:

Felony obstruction of justice under Section 1512(c) occurs when the defendant “corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so.” The term “official proceeding” is very broad and includes proceedings before judges, grand juries, Congress, and federal agencies.³³⁰ Critically, Section 1512

being amenable to prosecution once there has been an agreement and a subsequent overt act.

326. For general discussion of the concept of continuing offense, see Boles, *supra* note 323, at 227–34.

327. WAYNE R. LAFAVE, *CRIMINAL LAW*, 599 (3d ed. 2000).

328. *United States v. Ngige*, 780 F.3d 497, 502 (1st Cir. 2015); *United States v. Salmonese*, 352 F.3d 608, 614–15 (2d Cir. 2003).

329. This argument is also advanced in Berger, *supra* note 209.

330. The term “official proceeding” is defined in 18 U.S.C. § 1515(a) (2018), which reads, in pertinent part, as follows:

specifies that, “an official proceeding need not be pending or about to be instituted at the time of the offense.”³³¹ Thus, a defendant who attempts to obstruct, influence, or impede either ongoing official proceedings or those he anticipates may commence in the future can be prosecuted.

The toughest hurdle in many obstruction cases is proving the mental state of acting “corruptly.” The term is famously difficult to define, but in general means acting “with an improper purpose.”³³² Courts routinely hold that otherwise legal conduct can amount to criminal obstruction if undertaken “corruptly,” in the sense of dishonestly, wrongfully, or immorally.³³³ The same issue also arises in federal bribery cases.³³⁴ Proving corrupt intent would be particularly difficult in the case of a president exercising power undeniably granted him by the Constitution.³³⁵ But it is plainly not impossible. A president who accepted a bribe from a foreign power to negotiate a treaty favorable to that power would be acting corruptly, as would a president who accepted a bribe to award a pardon. Absent a motive as overt as a bribe, proving a president acted corruptly in awarding a pardon to *someone else* would be challenging. However, if that other person were a relative, or someone whose testimony was being sought

(a)As used in sections 1512 and 1513 of this title and in this section—

(1) term “official proceeding” means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law.

331. 18 U.S.C. § 1512(f)(1) (2018).

332. 18 U.S.C. § 1515(b) (2018) defines corruptly to mean “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” Section 1515(b) limits this definition to use of the term in 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees). This definition has at least persuasive force when construing the same term in Section 1512.

333. See, e.g., *United States v. Matthews*, 505 F.3d 698, 704–708 (7th Cir. 2007); *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998).

334. See 18 U.S.C. § 201(b) (2018), which makes it a crime for a public official to, *inter alia*, “corruptly” demand, seek, receive, or accept anything of value in return for being influenced in performance of official acts.

335. For the best and most extensive recent treatment of this issue, see Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018). See also Frank O. Bowman, III, *Obstruction of Justice Posts: Definition and Discussion of the Elements*, IMPEACHABLE OFFENSES?, <https://impeachableoffenses.net/definition-and-discussion-of-the-elements/>.

in an investigation of the president or his interests, the task would become much easier. If a president were to pardon *himself*, the act would be so transparently self-interested that, as a practical if not as a technical legal matter, the burden of justifying the action as being in the public interest would shift from the government to the president.

That brings us to the timing issue: If corruptly pardoning oneself *can* be a crime, that crime is not completed until the pardon is issued and becomes legally effective. But it is universally agreed that a pardon is only effective as to criminal conduct that took place *prior* to the pardon. A crime that was not prosecutable before a pardon was effective cannot be covered by that pardon. Thus, whatever else a self-pardon might cover, it cannot bar investigation and potential prosecution of the pardon itself.

4. *A Self-Pardon Could Not Completely Insulate a President from Federal Criminal Legal Inquiries Because It Would Not Cover His Businesses, Family, or Associates.*

If an outgoing president were bold enough to issue a self-pardon with the same comprehensive scope as Ford's pardon of Nixon, and the Supreme Court were to uphold its validity, the outgoing president would still face an array of other potential legal complications. Consider, for example, the case of former President Trump had he issued himself such a pardon. First, a successful self-pardon would cover only Trump himself. But Trump's pride and joy—his source of wealth, the basis for his claim to competence, and his hope of future comfort and national influence—is his private business. The very organizational intricacy of that business, reportedly an opaque network of corporations, limited liability companies, and other organizational forms,³³⁶ makes it very difficult to protect from serious and sustained federal criminal inquiries. As we will see below, there are other federal and state investigative entities with the power to investigate even an ex-president. But investigation by the federal criminal apparatus—the powerful alliance of Justice Department prosecutors, federal grand juries, judges with contempt power, and the alphabet soup of resource-rich federal investigative agencies—is the one thing anyone with something to hide will most desperately wish to avoid.

336. Megan Twohey, Russ Buettner & Steve Eder, *Inside the Trump Organization, the Company That Has Run Trump's Big World*, N.Y. TIMES (Dec. 25, 2016), <https://www.nytimes.com/2016/12/25/us/politics/trump-organization-business.html>; Madeline Stone & Samantha Lee, *Here Are All of the Properties that Are Branded with the Trump Name*, BUS. INSIDER (Dec 15, 2016, 11:00 AM), <https://www.businessinsider.com/what-is-the-trump-organization-2016-12>.

The problem for Trump would have been that his situation was distinct from that of Richard Nixon. Ford's blanket pardon of Nixon effectively blocked any further federal criminal inquiries into Nixon's prior misdeeds. Nixon had no far-flung business empire. He was just a career politician who committed serious crimes in the exercise of his presidential power, and may have committed some minor personal offenses in managing his limited personal wealth.³³⁷ Moreover, by the time of his pardon, all his criminal associates had been detected and largely dealt with by the law.³³⁸ In Trump's case, a personal self-pardon could, if upheld, prevent federal prosecution of him personally.³³⁹ But Trump has so many associated entities engaged in so many activities that such a pardon could not prevent criminal investigations or indictments of all his business entities, employees, family members, confederates, and counter-parties in business transactions.

Corporations can be prosecuted criminally.³⁴⁰ Although the question is not free of doubt, the Justice Department seems to have concluded that a corporation can be awarded a pardon.³⁴¹ For Trump to secure broad protection from federal criminal investigation and prosecution of his business entities, family members, and so forth, he would

337. See BOWMAN, *supra* note 3, at 202.

338. See Alice Popovici, *Watergate: Who Did What and Where Are They Now?*, HISTORY.COM (Oct. 16, 2018), <https://www.history.com/news/watergate-where-are-they-now>.

339. With the possible exception noted above of prosecution for issuance of his own pardon. See *supra* Section IV(B)(3)(b) and accompanying text.

340. *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–95 (1909). For federal policy on bringing corporate prosecutions, see U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL, § 9-28.200(A) PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS: GENERAL CONSIDERATIONS OF CORPORATE LIABILITY (revised July 2020):

Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

341. MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY & PRACTICE §2:79 (3d ed. 2018–19). See also Anthony Marro, *Emprise Corp. Loses Plea for U.S. Pardon*, N.Y. TIMES (Sept. 29, 1977), <https://www.nytimes.com/1977/09/29/archives/emprise-corp-loses-plea-for-us-pardon-sports-conglomerate.html> (reporting that in response to the first recorded request for corporate pardon, Justice Department concluded such a pardon was possible, albeit the request was denied). In addition, presidents have been “remitting corporate fines since the nineteenth century.” LOVE ET AL., *supra* note 341, at §2:79 n.15.

have had to identify all business entities and persons within the Trump Organization, as well as those outside corporations and persons subject to possible criminal liability as a consequence of dealings with Trump, his business, or his political operations . . . and grant general pardons to all of them. An enterprise of that scope seems implausible. Leaving aside the magnitude of the task, it would require exposing and specifying to the public all the business organizations and people Trump thought might have assisted him or his business or political organizations in committing crimes. Any omission from the pardon bath would leave an avenue of investigation and thus of exposure of Trump secrets.

5. *Neither a Self-Pardon nor a Pardon Spree for Others
Would Block Civil Investigations by Federal
Executive Branch Agencies*

Presidential pardons cover only federal *criminal* offenses.³⁴² If any of a former president's conduct during or before his or her term of office, whether in the personal or public spheres, fell within the civil enforcement jurisdiction of federal executive branch agencies, neither a self-pardon nor a pardon spree for others would bar civil investigations or enforcement proceedings by those agencies. Purely by way of illustration, consider a number of areas in which civil enforcement and regulatory authorities might wish to inquire into Mr. Trump's activities.

During Mr. Trump's presidency, his businesses reportedly received substantial payments from a variety of government entities and political organizations.³⁴³ All of these may prove to have been entirely legal, but no pardon could prevent a thorough federal investigation

342. *Ex parte* Grossman, 267 U.S. 87, 113 (1925).

343. *See, e.g.*, David A. Fahrenthold, Josh Dawsey, Jonathan O'Connell & Anu Narayanswamy, *Ballrooms, Candles and Luxury Cottages: During Trump's Term, Millions of Government and GOP Dollars Have Flowed to His Properties*, WASH. POST (Oct. 27, 2020, 1:00 PM), https://www.washingtonpost.com/politics/ballrooms-candles-and-luxury-cottages-during-trumps-term-millions-of-government-and-gop-dollars-have-flowed-to-his-properties-mar-a-lago-charged-the-government-3-apiece-for-glasses-of-water-for-trump-and-the-japanese-leader/2020/10/27/186f20a2-1469-11eb-bc10-40b25382f1be_story.html; David A. Fahrenthold & Joshua Partlow, *Trump's Company Has Received at Least \$970,000 from U.S. Taxpayers for Room Rentals*, WASH. POST (May 14, 2020, 5:05 PM), https://www.washingtonpost.com/politics/trumps-company-has-received-at-least-970000-from-us-taxpayers-for-room-rentals/2020/05/14/26d27862-916d-11ea-9e23-6914ee410a5f_story.html; Derek Kravitz, Alex Mierjeski & Gabriel Sandoval, *We've Found \$16.1 Million in Political and Taxpayer Spending at Trump Properties*, PROPUBLICA (June 27, 2018, 6:00 AM), <https://www.propublica.org/article/political-and-taxpayer-spending-at-trump-properties-16-1-million>.

into such payments and whether they were in accordance with federal contracting and ethics rules. Nor could it prevent civil actions for recoupment of funds, if appropriate. Should investigation produce evidence of misdeeds by the Trump Organization in its relations with the government which included any “offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor,”³⁴⁴ the government could suspend³⁴⁵ or debar³⁴⁶ the Trump Organization from doing business with the federal government.³⁴⁷ Because Trump is primarily in the hospitality business, such penalties would probably be less damaging than they would be to a company selling goods to the government. Still, they could marginally impact many Trump properties and might degrade the financial viability of the Trump hotel in downtown Washington, D.C. Likewise, detailed examination of Trump’s financial dealings with the government might endanger his already-controversial long-term lease on the D.C. hotel property from the General Services Administration.³⁴⁸

Civil federal tax matters would not be covered by a pardon. Mr. Trump famously declined to release his tax returns on the excuse that they have been “under audit.”³⁴⁹ Whatever else may be involved in the claimed audits, the *New York Times* has reported that the Trump organization has been involved since roughly 2011 in a dispute with the Internal Revenue Service over a contested \$72.9 million tax refund.³⁵⁰

344. 48 C.F.R. § 9.407-2(a)(9)(2019).

345. 48 C.F.R. § 9.407-1 (2019). A “suspension” is a temporary measure lasting the duration of an investigation into contractor behavior, in general no more than one year, although extensions are possible. 48 CFR § 9.407-4 (2019).

346. 48 CFR §§ 9.406-1–9.406-5 (2019). Debarment is generally limited to three years. 48 CFR §§ 9.406-4(a) (2019).

347. Steven L. Schooner, Kathleen Clark, & Scott Amey, *Viewpoint: Suspend the Trump Organization from Doing Business with Government*, GOV’T EXEC. (Jan. 27, 2020), <https://www.govexec.com/management/2020/01/viewpoint-suspend-trump-organization-doing-business-government/162672/>. For a general explanation of the suspension and debarment processes, see KATE M. MANUEL, CONG. RSCH. SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS (2008).

348. The GSA’s handling of the Trump lease on the Old Post Office building has been widely criticized, including by a report of the GSA’s own inspector general. Jan Wolfe, *U.S. Watchdog Faults Handling of Government Lease for Trump D.C. Hotel*, REUTERS (Jan. 16, 2019, 4:20 PM), <https://www.reuters.com/article/us-usa-trump-hotel/u-s-watchdog-faults-handling-of-government-lease-for-trump-d-c-hotel-idUSKCN1PA2WU>.

349. Russ Buettner, Susanne Craig & Mike McIntire, *Long-Concealed Records Show Trump’s Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html>.

350. *Id.*

Although it is impossible to say with certainty, recent press investigations of Mr. Trump's finances might well prompt further IRS inquiries once he has left office. A blanket self-pardon (if upheld) would bar a prosecution for criminal tax fraud, but not a civil investigation into tax underpayment or civil judgments for back tax payments and appropriate monetary penalties. For a person with a financial situation as precarious as Mr. Trump's is reported to be,³⁵¹ major federal tax enforcement actions may be a more daunting prospect than fear that the Justice Department would seek to imprison a former president.

Mr. Trump's relations with the banking sector have long been a subject of concern. Some of that story is primarily about banks being snookered by a real estate developer and self-promoter with a penchant for not paying his debts.³⁵² But Trump's former attorney, Michael Cohen, has alleged that Trump made false statements in bank finance applications, which, if true, could amount to criminal bank fraud.³⁵³ There are also credible concerns that Trump accounts have been involved in money laundering.³⁵⁴ A successful blanket self-pardon could preclude a criminal prosecution of the ex-president for bank fraud or money laundering, but could not prevent federal bank regulators from carefully scrutinizing past and ongoing relationships between regulated financial institutions and Trump and his businesses. The mere fact of such investigations could be crippling to Mr. Trump's personal financial future. The *New York Times* has re-

351. See *infra* notes 352–54 and accompanying text (detailing Trump's large personally secured debts).

352. See, e.g., David Enrich, Russ Buettner, Mike McIntire & Susanne Craig, *How Trump Maneuvered His Way Out of Trouble in Chicago*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/2020/10/27/business/trump-chicago-taxes.html>; David Enrich, *The Money Behind Trump's Money*, N.Y. TIMES MAG. (Jan. 8, 2021), <https://www.nytimes.com/2020/02/04/magazine/deutsche-bank-trump.html>.

353. David Enrich, Matthew Goldstein & Jesse Drucker, *Trump Exaggerated His Wealth in Bid for Loan, Michael Cohen Tells Congress*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/business/donald-trump-buffalo-bills-deutsche-bank.html>. Under 18 U.S.C. § 1344 (2012), it is a felony to obtain money or property from a financial institution “by means of false or fraudulent pretenses, representations, or promises.” Federal prosecutors frequently charge this crime in the case of persons who lie to banks to obtain loan financing. See ROGER W. HAINES, JR., FRANK O. BOWMAN, III & J. DOUGLAS WILSON, FEDERAL SENTENCING GUIDELINES HANDBOOK (2019–2020 ed., Thomson Reuters 2019) (discussing many cases of this general type).

354. Michael Hirsch, *How Russian Money Helped Save Trump's Business*, FOREIGN POL'Y (Dec. 21, 2018, 1:31 PM), <https://foreignpolicy.com/2018/12/21/how-russian-money-helped-save-trumps-business/>; David Enrich, *Deutsche Bank Staff Saw Suspicious Activity in Trump and Kushner Accounts*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/business/deutsche-bank-trump-kushner.html>; Derek Thompson, *Do Trump's Taxes Show He's a Failure, a Cheat, or a Criminal?*, ATLANTIC (Oct. 5, 2020), [https://www.theatlantic.com/ideas/archive/2020/10/three-interpre-tations-of-trumps-tax-records/616570/](https://www.theatlantic.com/ideas/archive/2020/10/three-interpretations-of-trumps-tax-records/616570/).

ported,³⁵⁵ and Mr. Trump has effectively confirmed,³⁵⁶ that he has \$421 million of personally guaranteed debt, with \$300 million coming due within the next three years. Trump was years ago frozen out of ordinary lending channels by virtually all large banks.³⁵⁷ Active investigations of banking improprieties by him and his businesses, not to speak of the possibility that they would reveal wrongdoing, could make it make impossible for him to secure extensions or refinancing of his debts.

All the foregoing points also apply to family members and business or political associates a president might pardon. Presidential pardons cover federal crimes. They cannot block federal civil investigations.

6. *Presidential Pardons Could Make Some Criminal and Civil Investigations into a President or His Associates Easier*

The grant of a pardon deprives the grantee of the Fifth Amendment right against self-incrimination as to the matters covered by the pardon. As the Supreme Court once observed, “if the witness has already received a pardon, he cannot longer set up his [Fifth Amendment] privilege, since he stands with respect to such an offense as if it had never been committed.”³⁵⁸ Thus, any presidential pardon would immensely complicate, though it might not wholly bar, any effort by a pardon recipient to refuse on Fifth Amendment grounds cooperation with civil or criminal investigations into the president’s affairs.

One nuance of the relation between pardons and the Fifth Amendment is that there is some question about whether one to whom a pardon is issued must accept it before it becomes valid, and thus operates to remove Fifth Amendment protections. As noted above, Justice Marshall held in 1833 that acceptance was a prerequisite for validity.³⁵⁹ The Court reiterated the point in 1915 in *Burdick v. United States*, holding that a defendant could not be forced to accept a pardon issued for the purpose of removing his Fifth Amendment right to refuse self-incriminatory testimony.³⁶⁰ Justice Holmes’ 1927 opinion in *Biddle v. Perovich*³⁶¹ seems to reject the acceptance doctrine.³⁶² But

355. Buettner et al., *supra* note 349.

356. Russ Buettner & Susanne Craig, *\$421 Million in Debt: Trump Calls It ‘a Peanut,’ but Challenges Lie Ahead*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/10/16/us/trump-taxes.html>.

357. See Enrich, *Money Behind Trump’s Money*, *supra* note 352.

358. *Brown v. Walker*, 161 U.S. 591, 599 (1896).

359. *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).

360. *Burdick v. United States*, 236 U.S. 79 (1915).

361. *Biddle v. Perovich*, 274 U.S. 480 (1927).

that case did not involve Fifth Amendment issues, so it is fair to conclude the issue remains live in that setting. That said, it seems unlikely that any president would issue pardons to persons who did not request and were unwilling to accept them. Therefore, the question is somewhat unlikely to arise.

In any case, if a president issued pardons limited to particular times and offenses, the pardon recipient might still be able to “plead the Fifth” if investigators’ queries arguably exposed him to risk of prosecution for federal crimes not covered by the pardon. But, as noted above, a president who wanted broad-spectrum protection for himself and his associates would be tempted to issue Nixon-style blanket pardons.³⁶³ Pardons of that breadth (if determined to be legally valid) would deprive those pardoned of any later argument that testimony would pose a genuine risk of self-incrimination in federal courts.

Of course, a presidential pardon does not cover state crimes.³⁶⁴ Some recipients of presidential pardons may have potential state criminal liability.³⁶⁵ Should the subject matter of a congressional inquiry plausibly involve state criminal violations, those with state exposure could continue to take the Fifth in Congress, albeit only as to questions that genuinely posed a risk of incrimination on the state matter. Even as to those issues, the protection would be lifted if the state in question were prepared to grant immunity.³⁶⁶ Accordingly, a promiscuous distribution of pardons among a president’s supporters might vaporize one significant barrier to probes into such a president’s administration and personal conduct.

362. See *supra* note 88 and accompanying text.

363. See *supra* notes 291–92 and accompanying text.

364. See *supra* notes 180–82, and accompanying text.

365. See, e.g., William K. Rashbaum & Benjamin Weiser, *D.A. Is Investigating Trump and His Company Over Fraud, Filing Suggests*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/08/03/nyregion/donald-trump-taxes-cyrus-vance.html>.

366. The government, whether state or federal, can compel a witness to testify so long as the witness is granted immunity coextensive with the Fifth Amendment privilege against self-incrimination, which is to say a guarantee that nothing the witness says under grant of immunity will be introduced against him in court. *Kastigar v. United States*, 406 U.S. 441, 444–45, 457 (1972) (holding that a witness granted immunity may be compelled to testify and that use and derivative use immunity is coextensive with the Fifth Amendment privilege).

7. *No Presidential Pardon, Whether of the President or Anyone Else, Can Block State Criminal Prosecutions or Civil Actions*

Presidential pardons reach only federal criminal offenses.³⁶⁷ Therefore, a federal pardon cannot block a state criminal prosecution or any civil action against the pardon recipient. For example, we know that there is at least one New York state investigation into the Trump Organization's financial dealings,³⁶⁸ and at least one criminal investigation by the Manhattan District Attorney's Office.³⁶⁹

States are not foreclosed by the straitjacket of the Justice Department's OLC memorandum from prosecuting a sitting president. While Supremacy Clause considerations might move federal courts to delay such a prosecution until after the president left office, the Supreme Court recently affirmed in *Trump v. Vance*³⁷⁰ that state investigations into even a sitting president are fine. During the *Vance* litigation, even the President conceded "that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term."³⁷¹ The Court agreed, and went on to hold both that a sitting president does not enjoy absolute immunity to state prosecution, and that the state need not meet a heightened standard of need to secure records relating to a president's potential state criminal liability.³⁷² Once a president leaves office, there is no plausible legal barrier to states proceeding against him as they would any other civil or criminal defendant. No federal pardon would change that.

367. See *supra* notes 111–13 and accompanying text.

368. David A. Fahrenthold, Jonathan O'Connell & Joshua Partlow, *New York Attorney General Files Legal Action Against Trump Organization, Revealing State Investigation into the Company's Financial Dealings*, WASH. POST (Aug. 24, 2020, 7:47 PM), https://www.washingtonpost.com/politics/new-york-ag-trump-organization-law-suit/2020/08/24/882c03a8-e60e-11ea-bc79-834454439a44_story.html; Jonathan Stempel, *New York Probing Whether Donald Trump and the Trump Organization Manipulated Asset Values*, REUTERS (Aug. 24, 2020, 11:59 AM), <https://www.reuters.com/article/us-usa-trump-new-york-lawsuit/new-york-probing-whether-donald-trump-and-the-trump-organization-manipulated-asset-values-idUSKBN25K1XG>.

369. Benjamin Weiser & William K. Rashbaum, *Manhattan D.A. Can Obtain Trump's Tax Returns, Judges Rule*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/07/nyregion/donald-trump-taxes-cyrus-vance.html> (describing investigation into, *inter alia*, state criminal tax fraud).

370. *Trump v. Vance*, 140 S. Ct. 2412 (2020).

371. *Id.* at 2426–27.

372. *Id.* at 2431.

C. *The Role of Congress Following an Attempted Presidential Self-Pardon or a Pardon Spree for Others*

The nature of the president's pardon authority—nearly absolute, but restricted to federal crimes—both limits Congress's options to remedy or prevent pardon abuse, and simultaneously enhances Congress's power to investigate wrongdoing and mismanagement by a president and his associates.

1. *Congress Has Limited Options to Remedy Particular Abuses of Presidential Pardon Power*

Throughout Donald Trump's term, his Democratic congressional critics expressed concern about what they viewed as ongoing abuses of the pardon power.³⁷³ Although the pardons issued at the end of Mr. Trump's term did not fulfill the worst prognostications, some members of Congress remain concerned about the possibility of abuse by future presidents.³⁷⁴ The main tool the Constitution gives Congress to deal with presidential abuse of the pardon power is impeachment.³⁷⁵ However, the types of pardon that raise the greatest concerns are likely to be issued at the very end of a president's term, days or hours before the president leaves office. In theory, the House could impeach a president even after leaving office for the "high Crime and Misdemeanor" of issuing corrupt or otherwise abusive pardons while in office. The point would not be to secure removal, but rather to invoke the other constitutional impeachment penalty—"disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."³⁷⁶ In the case of a first-term president defeated for re-election, this remedy could prevent a run for a second term. This penalty would

373. They were critical of Trump's pardon of political ally Joseph Arpaio, as well as of his commutation of the sentence of longtime friend and supporter Roger Stone. Peter Baker, Maggie Haberman & Sharon LaFraniere, *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>. And they worried that Trump was unsightly dangling the prospect of a pardon to former campaign manager Paul Manafort, who was sentenced to 81 months in prison in two cases, in return for Manafort's silence. Morgan Gstalter, *Top House Dem: Trump 'Dangling a Pardon' for Manafort, Strengthening 'Claim or Charge of Obstruction of Justice'*, HILL (Nov. 28, 2018, 7:55 AM), <https://thehill.com/homenews/administration/418609-top-house-dem-trump-dangling-a-pardon-for-manafort-strengthening>. Trump did end up pardoning Manafort. See Kelly et al., *supra* note 18.

374. See, e.g., Steve Cohen, *Congress Is Well Aware of Need to Reform Presidential Pardon Power*, TENNESSEAN (Jan. 19, 2021), <https://www.tennessean.com/story/opinion/2021/01/19/steve-cohen-congress-aware-need-presidential-pardon-reform/4216346001/>.

375. See *supra* notes 40–72 and accompanying text.

376. U.S. CONST. art. I, § 3, cl. 7.

be of less concern for a second-term president because the Twenty-second Amendment already bars a third presidential term.³⁷⁷ The disqualification remedy would also prevent occupancy of any other federal office during the life of even a two-term president, but inasmuch as returns to federal service by former presidents have been rare, disqualification probably has little deterrent value for such persons.³⁷⁸

House Democrats have nonetheless proposed a number of bills attempting to address their concerns about pardon abuses. The most recent contains three provisions on pardons. First, it purports to legislatively ban presidential self-pardons.³⁷⁹ Second, it would amend the federal bribery statute, 18 U.S.C. § 201, to: (a) expressly include the President and Vice President within the category of “public official” subject to the bribery prohibition; (b) include pardons as among the official acts for which a bribe may be offered or accepted; and (c) list pardons as among the “thing[s] of value” that can constitute a bribe.³⁸⁰ Third, the bill requires that the attorney general and the president disclose to Congress information from Justice Department files about several classes of pardon, particularly those in any case in which the President or his relations are targets or subjects, criminal contempt of Congress cases under 2 U.S.C. § 192, and false statements, perjury, or obstruction charges in connection with a congressional proceeding or

377. U.S. CONST. amend. XXII.

378. As the second impeachment trial of Donald Trump illustrated, some have questioned whether impeachment and trial of a former government official is even constitutionally permissible. It has been tried at least three times, once in 1797, in the case of Senator William Blount, again in 1876, in the case of Secretary of War William Belknap, and finally in 1926, in the case of District Judge George English. *See* BOWMAN, *supra* note 3, at 116–20 (Blount), 122–23 (Belknap), and 123 (English). I think the best reading of these cases is that Congress has jurisdiction to impeach former officials. I have laid out the case for congressional jurisdiction based on text, original understanding, and prudential factors in the following articles: Frank O. Bowman, III, *What the Founders Would Have Done with Trump*, WASH. MONTHLY (Jan. 18, 2021), <https://washingtonmonthly.com/2021/01/18/what-the-founders-would-have-done-with-trump/>; Frank O. Bowman, III, *The Constitutionality of Trying a Former President Impeached While in Office*, LAWFARE (Feb. 3, 2021), <https://www.lawfareblog.com/constitutionality-trying-former-president-impeached-while-office>. *See also* Brian C. Kalt & Frank Bowman, *Congress Can Impeach Trump Now and Convict Him when He’s Gone*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/outlook/2021/01/11/trump-impeachment-senate-trial/>.

379. “The President’s grant of a pardon to himself or herself is void and of no effect, and shall not deprive the courts of jurisdiction, or operate to confer on the President any legal immunity from investigation or prosecution.” Protecting Our Democracy Act, H.R. 363, 116th Cong., § 104 (2020), Prohibition of self-pardon, https://intelligence.house.gov/uploadedfiles/bill_text.pdf.

380. *Id.* at § 103.

investigation.³⁸¹ The utility of these provisions ranges from purely symbolic to potentially helpful.

Statutory ban on self-pardon: A statutory ban on presidential self-pardons is almost surely a constitutional nullity. The constitutional text confers the pardon power exclusively on the president. The Framers actively considered, but rejected, giving the Senate joint authority over pardons.³⁸² In *Ex parte Garland*, the Supreme Court held that the pardon power “of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”³⁸³ As argued at length above, I think that the Constitution is best read to deny a president the power of self-pardon.³⁸⁴ But if that position is wrong, Congress cannot by statute make it right.

Of course, no president has ever tried to self-pardon and should some president do so, a court challenge would raise an issue of first impression. In such a case, the Supreme Court might find the views of Congress on the point expressed in statutory form to be of some modest persuasive value, but the statute could not be binding on a question of the reach of the president’s constitutional power.³⁸⁵ In short, while a statutory ban on self-pardons wouldn’t hurt anything, it wouldn’t change anything much either.³⁸⁶

Amendment to federal bribery statute: The proposed amendments to the bribery statute would do no harm, but may be unnecessary. Although the point has not been tested by an actual case, I should have thought that the language of the current statute plainly covered the President and Vice President, and that pardons fell easily into both the category of official acts an official might accept a bribe to commit, and the category of things of value that could constitute a bribe.³⁸⁷ At

381. *Id.* at § 102.

382. See *supra* notes 84–86 and accompanying text.

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

384. See *supra* Section III(A).

385. In the case of a sitting president, unless a statute banning self-pardons passed over an inevitable presidential veto before the award of the self-pardon, it could not apply to that president’s action.

386. For a discussion of the proposed statutory ban on self-pardons, see Andrew Kent, *Can Congress Do Anything about Trump’s Abuse of the Pardon Power?*, LAWFARE (July 20, 2020), <https://www.lawfareblog.com/can-congress-do-anything-about-trumps-abuse-pardon-power>.

387. See Josh Blackman & Seth Barrett Tillman, *The Abuse of the Pardon Prevention Act Would Criminalize Politics*, LAWFARE (Aug. 20, 2020), <https://www.lawfareblog.com/abuse-pardon-prevention-act-would-criminalize-politics>. Although I disagree with the authors’ general take on the possible expansion of bribery liability under the proposed statute, I tend to agree with their view that, “federal law

all events, any amendment to the bribery statute after January 20, 2021, could have no effect on the applicability of the bribery statute to whatever Mr. Trump might have done while in office. Applying such an amendment to any Trump pardon would be a plain violation of the Ex Post Facto Clause.³⁸⁸

Congressional reporting requirement: The proposed requirement that the attorney general and the president submit information to Congress about both suspiciously self-interested pardons and pardons for criminal contempt or obstruction of Congress has considerable attractions. For a president to employ the pardon authority to benefit himself or his family would raise reasonable concern about an abuse of the sort both the Founders and later Congresses have believed impeachable. That alone justifies measures to ensure congressional access to information about such pardons. Relatedly, given the difficulties recent Congresses have experienced in extracting information from the executive branch, it seems reasonable to insist that a president who uses a pardon to nullify criminal sanctions for defying Congress be prepared to show why.³⁸⁹

In sum, there is little Congress can do in direct response to a president's potential misuse of the pardon power. It cannot undo pardons of which it does not approve, even if it may be able to require increased transparency about the pardon process. It cannot legislatively restrict the scope of the power given presidents by the Constitution.³⁹⁰ It can impeach a president who misuses the authority, but recent experience provides a sharp reminder of the practical limits of that remedy. Expansion of criminal bribery or corruption statutes may be marginally useful in criminally prosecuting an egregious future case, but current law is probably already adequate. A mandatory disclosure law for information on questionable pardons may be helpful if it withstands separation of powers scrutiny.

already would permit the prosecution of a (former) president for having accepted or solicited a bribe during his term as president." *Id.*

388. U.S. CONST., art. I, §9, cl., 3; *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

389. An earlier version of the proposed statute would have required that the Executive Office of the President turn over its materials on questioned pardons. Although the point is too nuanced to explore here, such a requirement might intrude impermissibly into executive privilege. Pardons are a presidential power shared with no other branch. Pardon decisions are quintessentially discretionary and, even when entirely benign, are often politically controversial. This may be one area where the need for confidential advice is at its apogee.

390. It may be constitutionally permissible to impose by legislation some procedural constraints on the process by which pardons are granted, but that is a subject for another day.

All that being said, even though Congress may not be able to reverse bad pardons, or even to facilitate punishment of their presidential issuers, it is equally the case that pardons should not raise meaningful barriers to thorough congressional investigation of wrongdoing or mismanagement by a former president, his family, or his associates.

2. *Congressional Oversight Authority, Pardons, and the Impunity Problem*

Congress's most important role during the Biden administration will not be, or at least should not be, as surrogate prosecutors of wrongdoing by the former president and those around him. Rather, Congress should seek to reestablish itself as a venue for investigating and overseeing executive branch behavior, past and present. The law and practice of presidential pardons would seem to have relatively little to do with the congressional oversight function, but in the special case of the Trump presidency they intersect at both a general and specific level.

The central focus of this Article is the pardon power, but the larger theme is the problem of regime impunity, the fear that the customary norm in American politics of openness and accountability will be supplanted by one in which those in power can behave illegally, corruptly, even tyrannically, and suffer neither public disclosure nor any meaningful legal penalty. The absoluteness of the president's pardon power makes it a dangerous tool in the hands of a president seeking impunity. But Congress's investigative and oversight powers can, if employed vigorously, act as a corrective. In the current moment, the fact that the presidency and both houses of Congress are controlled by the same party should dramatically enhance congressional investigative authority. This is not to say that pardons would create no complications for inquiring minds in Congress. They could. But the primary effect would be to provide a ground on which congressional investigative subjects could seek delay. And some pardons could *reduce* obstacles to congressional investigation of misconduct by the president, his businesses, family, and associates.

a. *The Constitutional Roots and Extent of Congressional Investigative and Oversight Power*

Article I grants Congress an array of powers, primarily the power to legislate.³⁹¹ But it can be easy to forget that almost all legislation either funds, authorizes, or regulates executive branch activities or en-

391. U.S. CONST., art. I.

lists executive branch actors to facilitate initiatives aimed at states, private sector business actors, or individuals.³⁹² Unsurprisingly, therefore, under the Constitution, Congress has both a responsibility and a right to inquire closely into the operations and behavior of the federal agencies, programs, and employees it authorizes, regulates, and funds. The Supreme Court has repeatedly recognized this “oversight power”³⁹³ and held it to be “coextensive with the power to legislate.”³⁹⁴ The Court went on to say that, “Without the power to investigate—including, of course, the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.”³⁹⁵ The power of oversight includes the power to use subpoenas to compel production of testimony and documents.³⁹⁶

Courts have held that a legislative demand for information under the oversight power does not extend to “private affairs unrelated to a valid legislative purpose.”³⁹⁷ But the Supreme Court has never found

392. Article I of the Constitution vests in Congress the ultimate control over most of the subject areas now dealt with by cabinet departments and executive agencies: national finance (borrowing money); regulation of foreign and domestic commerce; relations with Native American tribes; immigration; bankruptcy; issuance of currency; establishing standard weights and measures; postal services; copyrights and patents; and raising, supporting, and regulating the military. In addition, Congress has substantial shared responsibility with the executive in matters of foreign policy, and is granted such other powers as are necessary and proper to addressing the enumerated powers.

393. For a general discussion of congressional oversight power and case law addressing its reach and limitations, see Brianne J. Gorod, Brian R. Frazelle & Ashwin P. Phatak, *The Historical and Legal Basis for the Exercise of Congressional Oversight Authority*, CONST. ACCOUNTABILITY CTR. (Jan. 2019), <https://www.theconstitution.org/wp-content/uploads/2019/01/Congressional-Oversight-Issue-Brief.pdf>.

394. *Quinn v. United States*, 349 U.S. 155, 161 (1955). See also *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927):

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

Watkins v. United States, 354 U.S. 178, 187, 197 (1957) (holding that “investigation is part of lawmaking” and describing congressional investigative power as extensive).

395. *Quinn*, 349 U.S. at 360–61. See *Trump v. Comm. on Oversight & Reform of House of Representatives*, 380 F. Supp. 3d 76, 99 (D.D.C. 2020) (“In the nearly 140 years since *Kilbourn*, neither the Supreme Court nor any circuit court has found a congressional investigation unconstitutional because it invades the ‘private affairs of the citizen.’”).

396. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 505 (1975) (holding that issuance of subpoenas “is an indispensable ingredient of lawmaking”).

397. *Quinn*, 349 U.S. at 161; *McGrain*, 273 U.S. at 173–74;

a congressional inquiry into the operations of the federal government itself or the behavior of government employees in their official capacities to lack a valid legislative purpose. The last occasion on which the Supreme Court or any federal appellate court held a congressional subpoena invalid on the ground that it demanded information about a private person and his activities in the private sphere seems to have been *Kilbourn v. Thompson*, in 1880.³⁹⁸ Later opinions support the view that *Kilbourn* is, practically speaking, a dead letter.³⁹⁹ The reason is fairly plain. Given the vast scope of federal legislative authority in the modern state, Congress will at one time or another legitimately require information about most types of private activity. Courts have been, and will doubtless continue to be, loath to second-guess a congressional claim that it needs particular information to do its work.

The Supreme Court has also suggested that congressional subpoena power does not extend to situations in which Congress is somehow usurping the “powers of law enforcement” constitutionally delegated to the executive and judiciary branches.⁴⁰⁰ But that pronouncement, too, has proven largely toothless. Clear though it may be that Congress ought not punish particular persons for past wrongdoing,⁴⁰¹ it is equally clear that Congress has an essential interest in exposing civil or criminal wrongs as a predicate for legislative action. The fact that congressional inquiries into matters of legitimate legislative interest may expose crime does not constitute “a valid objection to the investigation.”⁴⁰² The same is true of the possibility that congressionally unearthed information may be of value in civil actions. As the Supreme Court observed in *Sinclair v. United States*,⁴⁰³ a prosecution for contempt of Congress, the fact that information disclosed to Congress might prove relevant to pending lawsuits claiming defendant’s

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: . . . that neither house is invested with ‘general’ power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied.

398. 103 U.S. 168, 190 (1880).

399. See, e.g., Comm. On Oversight & Reform, 380 F. Supp. 3d at 99–100 (discussing cases and commentary disparaging *Kilbourn* as a useful guide to judicial action).

400. *Quinn*, 349 U.S. at 161.

401. *Watkins v. United States*, 354 U.S. at 187 (1957) (“Nor is the Congress a law enforcement or trial agency.”).

402. *McGrain*, 273 U.S. at 179–80 (“Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on [the Attorney’s General’s] part.”).

403. 279 U.S. 263 (1929).

oil company violated federal land law did not excuse the defendant from testifying:

It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.⁴⁰⁴

That said, the Supreme Court recently ducked when asked to enforce congressional subpoenas for records of the business activities of then-President Trump. In *Trump v. Mazars U.S., LLP*, the Court heard consolidated appeals of two lower court cases that had upheld congressional subpoenas from three House committees to private companies possessing records of or relating to business dealings by Trump, his family, and his companies.⁴⁰⁵ In a 7-2 decision, the Court vacated the judgements of both lower courts and remanded the cases for further proceedings.⁴⁰⁶

Chief Justice Roberts' majority opinion in *Mazars* acknowledges the extensive investigative powers of Congress, and does not rely on either the quiescent *Kilbourn* restriction on inquiring into private matters or the hazy proscription of congressional intrusion into law enforcement powers. Indeed, the opinion implicitly concedes that Congress does have the power to investigate even the private affairs of a sitting president. It insists, however, that, "Congressional subpoenas for information from the President . . . implicate special concerns regarding the separation of powers."⁴⁰⁷ Roberts concludes that the courts below were insufficiently attentive to those concerns and lays out a multi-factor guide for courts evaluating legislative subpoenas to a president.⁴⁰⁸ The Court urges enhanced showings of congressional need, reasonable specificity in the subpoena, careful attention to the

404. *Id.* at 295.

405. 140 S. Ct. 2019 (2020).

406. *Id.* at 2036.

407. *Id.*

408. *Id.* at 2035–36. In dissent, Justice Thomas asserts that Congress cannot investigate a sitting president at all except by invoking the impeachment power. *Id.* at 2037 (Thomas, J., dissenting). This argument is akin to one made by President Trump's lawyers during his impeachment proceedings, where they contended that Trump committed no impeachable offense by defying House subpoenas because those subpoenas were invalid unless issued following a formal invocation of the impeachment power. As I said during the impeachment fight, "This is, not to put too fine a point on it, absolutely daft." See Frank O. Bowman, III, *Trump's Defense Against Subpoenas Makes No Legal Sense*, ATLANTIC (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/trumps-defense-against-subpoenas/605635/> [<https://perma.cc/QF9F-68JQ>]. Justice Thomas's argument in *Mazars* is no less so.

evidence offered by Congress to prove that the material sought advances a valid legislative purpose, and an assessment of the burden on the President of complying.⁴⁰⁹

Mazars should not be a significant impediment to congressional investigations of an *ex*-president. It is one thing to insist on separation of powers grounds that Congress make a strong showing of legislative purpose before the Court will enforce a subpoena for private records of a sitting president. It is quite another to refuse to enforce such a subpoena against a *former* president. A former president facing congressional subpoenas would doubtless advance separation of powers arguments nonetheless, presumably asserting that the mere prospect of having personal records exposed post-presidency would somehow impede or chill a president in the conduct of his or her current duties. But that is pretty thin. So long as Congress is prepared to make a specific showing of the relevance of the matters being investigated to a legislative objective, including potential legislation on matters like presidential corruption or executive branch conflicts of interest, nothing in *Mazars* should impede congressional investigators. Moreover, the separation of powers solicitude for the person of the president evident in *Mazars* should be far harder to extend to the family, friends, business entities, and appointees of a former president.

b. President Trump's Unique Success in Blocking Congressional Investigation and Oversight

If the law so clearly favors congressional investigative power, why did it prove so ineffectual during President Trump's term, and what would change with a new president of the opposite party? The short answer to the first question is that in the case of congressional oversight (as in so many other instances), Mr. Trump and his advisors seem to have recognized that most of the limits observed by prior presidents were not rules, but norms that could be flouted without legal penalty. Trump added to this realization his lifelong attitude that litigation can be used to wear down opponents and delay undesirable outcomes almost indefinitely.⁴¹⁰

409. *Mazars*, 140 S. Ct. at 2035–36.

410. See, e.g., David Fahrenthold, *Trump's Legal Strategy: If You Can't Beat the Case, Beat the System*, WASH. POST (Nov. 22, 2019, 8:00 AM), https://www.washingtonpost.com/outlook/trumps-legal-strategy-if-you-cant-beat-the-case-beat-the-system/2019/11/21/1555586a-f998-11e9-8190-6be4deb56e01_story.html [<https://perma.cc/ZR4X-EP9J>]; Mike Allen, *Trump's "Run Out the Clock" Legal Strategy*, AXIOS (Apr. 24, 2019), <https://www.axios.com/donald-trump-legal-strategy-subpoenas-investigations-f472ed47-988b-4762-824b-6578dfbedc3f.html> [<https://perma.cc/6RDT-NWUP>].

This Trumpian worldview facilitated a near-complete shutdown of congressional oversight. There have always been conflicts between the executive branch and Congress over testimony and records. But before Trump, the operating assumption on both sides—the norm—was that Congress will probably be entitled to most of what it asks for as part of its oversight power. The traditional understanding was that presidents can haggle with Congress over the particulars of information requests but must ultimately provide most of what Congress demands. This constitutional assumption was supported by the belief that flat refusal by the executive branch to comply with congressional information demands would carry a steep political cost. Everyone assumed that, when push came to shove, Congress would protect its own prerogatives, even when the presidency was in the hands of the party that held congressional majorities. In theory, Congress has multiple tools for compelling executive compliance. The most direct is a citation of an individual person for contempt of Congress, to which we will return in a moment. But the real hammer has always been congressional power over administration policy priorities, and its direct control over appropriations. If an executive branch agency or employee thereof refused to produce information, Congress could simply gut the agency's budget, or parts of it that were particularly cherished by the administration.

The Trump administration challenged the norm of general compliance with congressional information requests. When confronted with demands for information it did not want to reveal, particularly if they originated from Democrats, it just ignored them or flatly said no.⁴¹¹ It found that there would be no sustained push-back from congressional Republicans, who for the first two years controlled both House and Senate. No votes for contempt citations. No willingness to withhold money or legislative cooperation until compliance was obtained. No disposition even to go loudly public with complaints about administration highhandedness.

When Democrats won control of the House in 2018, they were in position to challenge this behavior. They assumed control of committees with investigative subpoena power and set about the task of investigative oversight. However, the Trump administration adamantly resisted requests from Democratic lawmakers, evading or flatly refus-

411. Press Release, Office of Sen. Ed Markey, Senate Democrats Release New Compilation of Over 100 Oversight Letters President Trump Refuses to Answer (June 27, 2017), <https://www.markey.senate.gov/news/press-releases/senate-democrats-release-new-compilation-of-over-100-oversight-letters-president-trump-refuses-to-answer> [<https://perma.cc/966R-HGD8>].

ing to comply with House subpoenas.⁴¹² Once Democrats held the House, they had the votes for contempt citations and other enforcement actions against recalcitrant officials or other witnesses because such actions need not be approved by both houses.⁴¹³

Contempt of Congress can be pursued in one of three ways: (a) as a criminal violation of 2 U.S.C. § 192; (b) civilly by Congress asking the courts for an order compelling compliance; or (c) through inherent contempt, in which Congress itself charges, tries, and imposes penalties on the contemnor.⁴¹⁴ The problem for House Democrats in the Trump era was that these remedies were either unavailable, too slow, or, in the case of inherent contempt, they lacked both established internal procedures, and perhaps the stomach, to employ it.

A prosecution for violation of the criminal contempt of Congress statute, 2 U.S.C. § 192, can only be brought by the U.S. Department of Justice. Section 194 of the same title expressly requires a congressional referral to “the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.”⁴¹⁵

412. See, e.g., Matthew Callahan & Rueben Fischer-Baum, *Where the Trump Administration Is Thwarting House Oversight*, WASH. POST (Oct. 11, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-blocking-congress/> [https://perma.cc/PH8M-B3GQ]; Molly E. Reynolds & Jackson Gode, *Tracking House Oversight in the Trump Era*, BROOKINGS (Jan. 2021), <https://www.brookings.edu/interactives/tracking-house-oversight-in-the-trump-era/> [https://perma.cc/BF7K-SWGX]; Andrew Desiderio & Kyle Cheney, *Trump Investigations: A List of Ongoing Battles with Congress*, POLITICO (June 17, 2019, 4:04 PM), <https://www.politico.com/story/2019/05/08/trump-investigations-list-congress-1309746> [https://perma.cc/2R9E-VWLN].

413. TODD GARVEY, CONG. RSCH. SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 10, 18, 22 (2017).

414. See *id.* at 1–2; Thomas L. Shriner, Jr., Note, *Legislative Contempt and Due Process: The Groppi Cases*, 46 IND. L. J. 480, 491 (1971).

415. 2 U.S.C. § 194:

Whenever a witness summoned as mentioned in Section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Moreover, although a Section 192 violation is only a misdemeanor which can be prosecuted by information rather than indictment, the Federal Rules of Criminal Procedure nonetheless require that both informations and indictments “must be signed by an attorney for the government,”⁴¹⁶ a term effectively confined to Justice Department lawyers.⁴¹⁷ The language of Section 194 about the “duty” of the U.S. Attorney to present the case to a grand jury certainly implies that a congressional referral makes prosecutorial action mandatory. However, the limited case law on the topic is inconclusive,⁴¹⁸ and in practice, the Justice Department and U.S. Attorney for the District of Columbia (where such cases are almost inevitably venued) have tended to treat such referrals as mere requests calling for exercise of prosecutorial discretion. Particularly in the case of cabinet-level officers, the Justice Department under both parties has felt free to decline to act in response to contempt citations initiated by congressional majorities of the other party.⁴¹⁹ Certainly it was plain, so long as Trump remained in office, that the Justice Department would simply refuse to pursue any congressional referral for criminal contempt against administration officials.⁴²⁰

Both the House and the Senate also have the power to seek assistance from the federal judiciary in enforcing their subpoenas. The

416. FED. R. CRIM. P. 7(c)(1).

417. FED. R. CRIM. P. (1)(b)(1) states that “attorney for the government” means (A) the Attorney General or an authorized assistant; (B) a United States attorney or an authorized assistant; (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

418. See GARVEY, *supra* note 410, at 34–53 (describing previous episodes and OLC opinions characterizing the U.S. Attorney’s referral requirement as discretionary).

419. The first cabinet officer held in contempt by vote of a house of Congress was Attorney General Eric Holder in 2012, in connection with the so-called “Fast and Furious” affair. H.R. 711, 112th Cong. (2012). No criminal case was presented to a grand jury. See John Bresnahan & Seung Min Kim, *Holder Held in Contempt*, POLITICO (June 28, 2012, 4:43 PM), <https://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988> [<https://perma.cc/S59K-NSN9>].

420. For example, in 2019, the House voted to hold both Attorney General William Barr and Commerce Secretary Wilbur Ross in contempt for their refusal to turn over documents related to the Trump administration’s decision to truncate the 2020 Census count. Nicholas Fandos, *House Holds Barr and Ross in Contempt Over Census Dispute*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/us/politics/barr-ross-contempt-vote.html> [<https://perma.cc/7H6Z-P3VW>]. The Justice Department refused to take the case to the grand jury. Andrew Desiderio, *DOJ Won’t Charge William Barr, Wilbur Ross After Contempt Vote*, POLITICO (July 24, 2019, 5:50 PM), <https://www.politico.com/story/2019/07/24/justice-william-barr-wilbur-ross-1432595> [<https://perma.cc/F4TY-5Y2V>].

form is a petition or motion to a federal district court for a determination of the validity of the subpoena request and an order from the court to the witness to comply. If the witness fails to do so, the remedy is a citation for contempt of court, not contempt of Congress.⁴²¹ The law governing this avenue of congressional redress is complicated, and beyond the scope of this Article.⁴²² However, the undeniable lesson of the last two years of the Trump administration, during which the newly Democratic House sought disclosure of administration information, was that, so long as the White House is resistant, the civil process can be interminably delayed.⁴²³

As for inherent contempt, either house can in theory direct its sergeant at arms to arrest and confine a person who defies a subpoena.⁴²⁴ The power to proceed in this way was explicitly affirmed by the Supreme Court in the 1935 case of *Jurney v. McCracken*, in which the Court also opined that inherent contempt can be employed both to secure compliance with congressional demands for information and to punish past misconduct that had the effect of obstructing Congress.⁴²⁵ But that approach was last taken in 1935,⁴²⁶ and has long been felt to be outmoded, cumbersome, and probably ineffectual.⁴²⁷ At all events, the modern Congress has so far evinced no disposition to engage in any direct action of that sort, even as a symbolic gesture.

c. How a Change of Administration Empowers Congress

The election putting a Democrat in the White House changed the calculus for congressional inquiries into the conduct of Mr. Trump and his administration. The change could be particularly marked since Democrats gained control of both House and Senate.

It seems likely, though not certain, that one priority of a new Democratic administration will be discovering, and where appropriate, exposing to public view what former President Trump and his family,

421. See GARVEY, *supra* note 413, at 22.

422. See *id.* at 22–34.

423. Charlie Savage, *Trump Keeps Losing in Court. But His Legal Strategy Is Winning Anyway*, N.Y. TIMES (Nov. 27, 2019), <https://www.nytimes.com/2019/11/27/us/politics/trump-legal-strategy.html> [<https://perma.cc/YB5N-B7DZ>].

424. See GARVEY, *supra* note 413, at 22–23.

425. 294 U.S. 125, 147–150 (1935).

426. LEWIS DESCHLER, 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15, § 17, at 2409 n.7 (1994).

427. See S. REP. NO. 95-170 (1977) (“While historically this method has been used numerous times, it is generally considered to be time consuming and not very effective.”); see also Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 255–56 n.71 (1978).

friends, and appointees did during his term in office. In some cases, the new administration will undoubtedly seek congressional assistance in remedying problems uncovered by such inquiries. Accordingly, the new administration should be broadly amenable to congressional requests for information about what its predecessors did. This is not to say that a Biden administration will create some sort of open file policy for Congress. There will surely be points on which Biden's people would resist disclosing to Congress even arguably wrongful conduct by the previous administration insofar as disclosure might complicate or distract from the pursuit of Biden's central objectives. But the degree of cooperation should increase dramatically.

Critically, a Biden Justice Department should transform congressional enforcement of subpoenas regarding Trump-era conduct. To the extent the new Congress wants information from government employees still in the government, one would expect full cooperation in virtually any case. If Congress wants information from Trump administration appointees who have left government, or from Trump family or associates who never held government jobs, congressional subpoenas to those folks would suddenly have teeth. No DOJ lawyers would be appearing to argue against civil enforcement of legislative subpoenas. And the Biden U.S. Attorney for the District of Columbia would, one suspects, favorably consider and pursue most referrals for criminal contempt against resistant witnesses. Former President Trump himself would in theory be subject to a summons before congressional committees, and to properly predicated subpoenas *duces tecum* for records.

In short, the alliance of Congress and the new administration will for the first time place Trump, his associates, and former officials in his administration within the practical grip of congressional subpoena power enforceable with criminal sanctions. They might, of course, have colorable arguments for not responding to some or all congressional questions, but, in sharp contrast to the situation over during Trump's term, they will have to *make those arguments* to judges or congressional bodies with the power to reject them and punish defiance.

In addition, members of Congress of both parties should consider the enduring weakness of their institution when confronted with an uncooperative Justice Department and strengthen the modes and procedures for expeditiously resolving disputes over executive branch

compliance with congressional subpoenas. A variety of attractive proposals for accomplishing this end have already been advanced.⁴²⁸

d. Pardons and Congressional Investigative Authority

This is the point at which understanding the law of pardons becomes critical. First, a pardon concerns only crimes prosecuted in courts, and does not relieve the recipient of the obligation to participate in congressional investigative and oversight processes.⁴²⁹ Second, because a president cannot pardon future crimes, no Trump pardon could protect a witness from criminal prosecution for any efforts to obstruct congressional investigation that occurred after Inauguration Day 2021. Likewise, a Trump pardon could not bar prosecution for criminal contempt of Congress under 2 U.S.C. § 192 of any witness who refused to comply with a subpoena from the new Congress.

Third, the presidential pardons issued to Trump associates Manafort, Stone, Flynn, and Bannon might fractionally ease Congress's investigative path. As noted above, one who receives a pardon can no longer invoke the Fifth Amendment right against self-incrimination as to the matters covered by the pardon.⁴³⁰ Some congressional witnesses might still claim a Fifth Amendment privilege as to matters not covered by the pardon, or based on potential state criminal liability not covered by a presidential pardon. But using the Fifth under these circumstances would be far harder than without a pardon.

IV.

WHAT SHOULD BE DONE?

The bottom line on the effect of pardons is this: A President almost certainly cannot constitutionally pardon himself. In theory, the President could resign, or under the Twenty-fifth Amendment withdraw temporarily from the office, thus transforming the Vice President into the President or Acting President, and secure a pardon from a

428. See, e.g., Emily Berman, *Good Governance Paper No. 2: The Congressional Subpoena Power*, JUST SECURITY (Oct. 14, 2020), <https://www.justsecurity.org/72847/good-governance-paper-no-2-the-congressional-subpoena-power/> [https://perma.cc/B53C-86KP].

429. Moreover, anyone who received a Trump pardon and later sought to resist a congressional subpoena on the ground that Congress was engaging in "law enforcement" rather than legislative information gathering would confront the reality that the only federal criminal liability that could arise from the congressional process would be for current obstruction of that process. Where no federal criminal prosecution for Trump-era conduct is possible, it becomes hard to argue that Congress is setting up such prosecutions.

430. See *supra* notes 358–66 and accompanying text.

sufficiently complaisant Vice President; but that seems unlikely. A President can pardon anyone but himself (both humans and corporations), and those pardons, once issued, are almost certainly unchallengeable and irrevocable. A presidential pardon can cover any (and perhaps all) federal crimes the beneficiary has ever committed, so long as such crimes occurred and were completed prior to the issuance of the pardon. A president cannot pardon crimes that have not yet been committed, and the pardon power does not extend to state crimes or to any civil or administrative action brought by federal or state authorities. A presidential pardon cannot block congressional investigations. Finally, because a pardon effectively erases the Fifth Amendment privilege as to offenses covered by the pardon, it might make it easier for criminal and civil investigative authorities and Congress to compel testimony from the person pardoned.

If this analysis is correct, the one person in America ineligible to receive a valid presidential pardon is the sitting president. So far as is known, Mr. Trump did not try to pardon himself, but if he did so secretly, that effort should prove constitutionally futile. Therefore, Mr. Trump will remain subject to prosecution, civil and administrative action, and investigation by any interested governmental body, federal and state. Even if there is a clutch of secret pardons designed to throw a protective ring around Mr. Trump's family, businesses, and such associates as he deemed worthy of protection, that ring will be highly permeable, allowing multiple avenues for investigation, civil and administrative sanctions, congressional inquiry, and even criminal conviction in the case of state law violations.

Therefore, the real question is what the Biden administration, Congress, and state authorities *should* do. In the first years of the Trump administration, I was deeply engaged with the question of whether Mr. Trump had committed impeachable offenses, and if so, whether impeachment should be tried.⁴³¹ Although I finally answered yes to both those questions, I was resistant to the cries from Mr. Trump's most fervent critics that he should be criminally prosecuted. An indispensable feature of successful democracies is the peaceful transfer of power from one elected administration to its popularly chosen successor. Such transfers reliably occur only if the loser of an election knows that the sole consequence of losing is a return to private life. But if the predictable consequence of losing is criminal pros-

431. See, e.g., BOWMAN, *supra* note 3, at 296–315, and my blog, *Bowman on Impeachment: Impeachable Offenses? Examining the Case for Removal of the 45th President of the United States*, IMPEACHABLE OFFENSES, <https://impeachableoffenses.net/home/bowman-on-impeachment/>.

ecution or civil impoverishment by the winner, then losing becomes unthinkable and the contestants are tempted to ever more extreme measures to prevent it. Vicious propaganda, overt corruption, strong-arm tactics, and ethnic incitement can all be rationalized. All are soon normalized. A new cycle of retribution follows every election. And democracy dies. This is the all-too-common story in the developing world. But regression is perfectly possible among mature democracies like our own.

I resisted the idea that Mr. Trump should be prosecuted rather than merely removed by impeachment because I feared that prosecution would be the first step down a dark and troublesome path. Criminal prosecution of an ex-president's family risks the same dynamic. Indeed, even vigorous civil and administrative pursuit of an ex-president and his circle would carry similar risks.

In the past year or so, my thinking changed as Mr. Trump and those around him became ever more contemptuous both of overt legal prohibitions and of the vital norms of constitutional governance. Mr. Trump's effort to overturn the results of the 2020 election and his incitement of the assault on the Capitol of January 6, 2021, completed my conversion. I now think that the danger of igniting cycles of legal retribution against political losers must be balanced against the imperative of ensuring that a culture of impunity does not take root. When presidential wrongdoing is isolated, relatively inconsequential, or simply a marginal excess in the service of defensible policy objectives a successor administration does not share, then the maintenance of civic peace probably favors letting bygones be bygones, even if some individuals escape deserved punishment. But where, as has been increasingly the case over the past four years, a President and his entire administration brazenly and publicly ignore laws they find inconvenient, and equally brazenly defy legitimate efforts to discover how their private interests intersect with their public offices, then two consequences must follow if the rule of law and the Republic itself are to be preserved:

First, the public and private behavior of the President and his supporters must be subject to full, fair, judicious, professional investigation. The very pervasiveness of Trump's resistance to public disclosure of both facts related to potential personal wrongdoing and facts relating to the operation of public agencies itself demands investigation. Second, there must be consequences for repeated or overt violations of the law. The consequences could be criminal punishment, or civil monetary or injunctive relief, or administrative sanctions, or even just the public exposure of unethical official behavior. But conse-

quences there must be or the next President with exalted self-regard and flexible morals will feel free to repeat or exceed the abuses we have recently witnessed.

Both the new Biden administration and Congress have a great deal of work on their plates without undertaking exhaustive investigations of everything Trump and his people have been up to. Likewise, any investigation, however well-founded in the facts, will inevitably draw outraged cries from the ex-President's supporters in Congress, the media, and around the country. Given President Biden's expressed (and I think genuine) desire to bridge partisan divides and lessen the rancor in our political relations, there will be a strong and entirely understandable impetus among some administration officials and moderates in Congress to let the past slide in the service of solving current problems. Opposed to this inclination will be legions of ardent liberal opponents of Mr. Trump—legions who helped Biden to victory—who will demand both in-depth investigations, criminal prosecution where possible, and stringent penalties for any proven wrongdoing.

I favor a middle path. At a minimum, a thorough inquiry into the events of the Trump years is a precondition to repairing the immense damage done to our public institutions and to devising reforms that protect against a repetition by any successor president. Our systems have proven weaker than we confidently assumed. A host of barriers to executive branch misbehavior we thought solid were nothing more than unenforceable expectations. Both Congress and the Executive must involve themselves in the dual task of investigation and remediation. Some governmental institutions may require reform. Some norms may need to be transformed into enforceable law through new statutes or regulations. An essential predicate for any such actions is knowledge of what went wrong.

There must also be individual accountability. The Justice Department's criminal investigative apparatus should be employed, where appropriate. But it must be done openly, transparently, and professionally by career prosecutors and agents who proceed with caution and, within legally allowable limits, explain their results. Similarly, federal agencies like the Internal Revenue Service and bank regulators should be prepared to investigate Mr. Trump, his associates, and his businesses, with particular focus on any misconduct during his presidency or in relation to public entities. But they must be doubly careful to proceed only where the evidentiary and legal predicates for doing so are absolutely sound, and only to the same extent they would if he were an ordinary citizen and not an ex-president. The inspectors gen-

eral and other internal auditing and ethics officers in every federal agency should get busily to work ascertaining and publicly reporting what has happened in their bailiwicks over the last four years. States should inquire into alleged wrongdoing by the former president and those around him in the same way they would allegations against any other citizen.

As each of these investigative tasks is completed, there will be time enough to consider appropriate sanctions, criminal or otherwise. Forbearance will often be prudent. But in the end, if we are to remain a country of laws, serious transgressions of either civil or criminal law proven by solid evidence must draw meaningful penalties.

The pardon power may slow, but it should not stop, that reckoning.