EXAMINING THE CONSTITUTIONAL ROLE OF THE PARDON POWER

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

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HOUSE OF REPRESENTATIVES

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EXAMINING THE CONSTITUTIONAL ROLE OF THE PARDON POWER

WEDNESDAY, MARCH 27, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 2:06 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Dean, Garcia, Escobar, Jackson Lee, Johnson, Jordan, Armstrong, Reschenthaler, and Cline.

Staff Present: John Doty, Senior Advisor; Will Emmons, Professional Staff Member, Constitution, Civil Rights, and Civil Liberties; David Greengrass, Senior Counsel; Susan Jensen, Parliamentarian/Senior Counsel; Matthew Morgan, Counsel, Constitution, Civil Rights, and Civil Liberties; James Park, Chief Counsel, Constitution, Civil Rights, and Civil Liberties; Moh Sharma, Member Services and Outreach Advisor; Madeline Strasser, Chief Clerk; Paul Taylor, Minority Counsel; and Andrea Woodward, Minority Professional Staff Member.

Mr. Cohen. So we are starting. Thank you, each of you, for coming here. The Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, the chair is authorized to declare a recess of the subcommittee at any time.

I welcome everyone to today's hearing on examining the constitutional role of the pardon power, especially the young students from Collegiate School.

I will now recognize myself for an opening statement.

The fundamental purpose of the pardon power is to ensure fairness and proportionality in our criminal justice system and to provide a check against miscarriages of justice. In essence, mercy and justice.

In light of this purpose, we examine today questions about the potential constitutional limits of that power, particularly given how President Donald Trump has used or has implicitly suggested that he may use this power.

Article II, section 2 of the Constitution outlines the powers and responsibilities of the executive branch and provides among other things, the President, quote, "shall have the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," unquote.

The Constitution only places two textual constraints on the pardon power, limiting its reach to Federal offenses only, and barring its use in the case of impeachment. Nonetheless, the exercise of the pardon power under certain circumstances raises a number of unanswered constitutional legal questions, ergo this hearing.

Chief among these questions are, one, whether the President may pardon him or herself; two, whether other provisions of the Constitution, while not an explicit restraint on the pardon power, nonetheless place boundaries on its exercise; and, three, whether issuing a pardon or offering to issue a pardon can implicate criminal statutes prohibiting obstruction of justice or bribery.

The discussion of these questions, which during normal times may have been mostly on an only academic level, has taken on greater importance during this Trump Presidency. For example, President Trump, in the midst of the now-concluded special counsel investigation, boldly asserted in a tweet, "I have the absolute right to," capitalize, "PARDON myself," unquote.

I would note that today's hearing was scheduled before Attorney General William Barr transmitted his letter characterizing the principal findings of Special Counsel Robert Mueller and his interpretations thereof.

The constitutional and legal issues that this hearing will explore, however, may be profoundly relevant to evaluating one of the counsel's questions of special counsel's—one of his investigations. Did President Trump abuse the powers of his office, including the pardon power to obstruct this and related investigations into his conduct and the conduct of his associates, and might he do so in similar circumstances in the future?

I am sure my friends on the other side will argue that Attorney General Barr's recent letter—well, I am not sure they will. Some of them will say it totally exonerated President Trump. Some of them will realize that it didn't say that. They will say there was no collusion, and there apparently was concurrence with Mr. Mueller there was no collusion.

But I would caution my colleagues against relying solely on Mr. Barr's summary and to avoid making such a sweeping pronouncement before seeing the actual report written by Special Counsel Mueller. Mr. Barr only had a few hours to look at the report. Mr. Mueller had 22 months to prepare it and study it. And it was part of his work, and he said that it did not exonerate the President.

The truth is that Mr. Barr's letter raised more questions than it answered. Mr. Barr's letter revealed Special Counsel Mueller pointedly noted that it did not exonerate the President from obstruction of justice. In fact, according to Mr. Barr, the special counsel's report set out, quote, "evidence on both sides of the question," unquote, which would include evidence that supports the conclusion that the President obstructed justice.

This is why it is imperative that Mr. Barr provide the special counsel's report in its entirety to Congress, along with any underlying evidence.

That is pretty much what has happened in other reports of counsels. They have not drawn conclusions. They have left it to the Congress to do that. Only in this case was there a defensive back on the field who jumped in and intercepted the ball before it was passed to Congress.

Frankly, whether or not President Trump colluded with the Russian Government is irrelevant to the question of whether he abused the powers of his office to obstruct the special counsel's investigation. Special Counsel Mueller had a duty to provide the full picture of Russian interference in the 2016 Presidential election.

President Trump cannot abuse the powers of his office to obstruct a law enforcement investigation. Yet President Trump's use of the pardon power over the last 2 years raises concerns the President may have been willing to do just that to protect himself and his political allies.

Since taking office, President Trump has issued pardons to former Maricopa County Sheriff Joe Arpaio, former Chief of Staff of Vice President Cheney, Mr. Scooter Libby, and conservative author Dinesh D'Souza, as well as Jack Johnson. Was there some other celebrity? Somebody that knew a celebrity. She was from my district, in fact.

President Trump's pardoning of these individuals whose circumstances and convictions closely track with those of his former associates, including Michael Cohen, Paul Manafort, Michael Flynn, raise the possibility the President was signaling his willingness to issue pardons to discourage cooperation with the special counsel investigation or the ongoing investigations in the Southern District of New York.

In fact, this past Monday, a lawyer for former Trump campaign foreign policy adviser George Papadopoulos, who pled guilty to lying to the FBI about facts material to the special counsel's investigation, revealed that she had petitioned the White House for a pardon on behalf of her client before Special Counsel Mueller announced the end of his investigation.

Pardoning Mr. Papadopoulos would not be an act of mercy, nor would the pardoning of Mr. Flynn necessarily or Mr. Manafort or Mr. Gates or the rest. Instead, it would only send the message the President of the United States believes it is acceptable to lie to Federal law enforcement officials.

While I have concerns about many of the ways President Trump has used the pardon power, his exercise of the power has been commendable in some instances—yes, that goes back to the celebrity's friend and my constituent, Alice Marie Johnson—decades of the failed war on drugs, and thousands and thousands of Federal prisoners like her, whose clemency petitions merit the President's attention as well.

It is my hope that going forward, President Trump will use his power to grant more meritorious clemency petitions. The sad thing is, he has really only issued two that were meritorious, except for Jack Johnson, which was deceased. So that was done not to relieve somebody of a sentence, but really for President Trump's sense of

justice from 80 years ago, or 70 years ago. It was done posthumously.

But Ms. Alice Marie Johnson and a gentleman from Nashville were given pardons and they deserved them, I think. But there are thousands and thousands of other people who deserve them, too, and they haven't gotten them.

And from what I understand, the President has asked for a list of celebrities who should be pardoned, not a list of poor African Americans who have been the subject of an unfair and unduly-oppressive-on-minorities drug war, like Ms. Johnson, who came to the attention of Ms. Kardashian—yes, a name I can't remember, Kardashian, celebrity connection.

Anyway, I thank the witnesses for agreeing to appear today, and I look forward to their testimony.

And I now recognize the ranking member of the subcommittee, the gentleman from Shreveport, Louisiana, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Thank you to the witnesses for being here.

A little historical context. Article II, section 2, clause 1, as you all know, of the Constitution provides that the President shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.

There are claims of abuse of the pardon power by the current President, and I am sure we will hear that here today. But regarding the claims of abuse of the pardon power generally, I would like to just at the outset here discuss briefly how executive dispensation has been employed more recently, and contrast it with how the Framers understood its appropriate constitutional application should be.

In 2014, President Obama used the pardon power to commute the sentences of more than 1,700 Federal drug offenders, resulting in their release from prison without an assessment of the individual merits of each of those cases. In the short time since then, at least four of those individuals we know have been sent back to prison for resuming their criminal activities.

Further, that same year, President Obama unilaterally created a program, which he simply announced on television, that suspended immigration laws for over four million people who are in this country illegally, something that is not allowed under the immigration laws that were passed by Congress. As The Washington Post's own fact-checker wrote, President Obama was asked, quote, "about specific actions that ended deportations of a subset of illegal immigrants. Previously the President said that was not possible, using evocative language that he is not a king or the emperor. Apparently he has changed his mind," unquote.

And, indeed, a week after he announced his immigration law suspension program, President Obama announced, in his own words, quote, "the fact that I just took an action to change the law," unquote.

In this last example, President Obama didn't have to act in violation of the law or in an unconstitutional manner. He had a legal and constitutional tool that would have accomplished the same end, namely, the pardon power. Indeed, President George Washington and his Treasury Secretary, Alexander Hamilton, are good

examples of how the Framers understood the pardon power could be used to grant reprieves from enforcement of the law.

President Washington made clear that executive authority to refrain from enforcement of the law extended only to narrow, case-by-case determinations. For example, under his Presidency, there was widespread violation of the Federal whiskey tax laws, as there is widespread violation of the immigration laws today.

But President Washington insisted that he had a duty to enforce the laws to the extent practicable, issuing a proclamation in which he referred to, quote, "the particular duty of the executive to take care that the laws be faithfully executed," unquote.

A delegation that President Washington sent to Pennsylvania to discuss noncompliance with the Federal whiskey tax with representatives of that State even reported that, quote, "One of the conferees then inquired whether the President could not suspend the execution of the excise acts until the meeting of Congress," but he was interrupted by others who objected.

In the end, with the Nation's ranks of whiskey tax avoiders growing larger and larger, President Washington's response was not to suspend the whiskey tax laws for them, but rather to selectively exercise his constitutional pardon power to grant amnesty for some past crimes, conditional on the agreement by the recipients of the pardon to obey the law in the future.

Indeed, the person charged with enforcing the Federal whiskey tax was Secretary of the Treasury Alexander Hamilton, who years earlier, during the ratification debates over the adoption of the U.S. Constitution, wrote Federalist Paper No. 74, that, quote, "In seasons of insurrection or rebellion, there are often critical moments when a well†timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth," unquote.

As at least one of the witnesses here today will testify, the power to pardon is one of the least limited powers granted to the President in the Constitution. The only limitations in the plain wording are that pardons are limited to offenses against the United States, that is, they cannot include pardons of civil or State cases, and that they can't affect an impeachment process, which is always available if supported by the popular will.

As one of our witnesses today has written, the pardon power has been and will remain a powerful constitutional tool of the President. Its use has the potential to achieve much good for the polity or to increase political conflict. Only the wisdom of the President can ensure its appropriate use.

With that, I look forward to hearing from all our witnesses here today. I thank you again. And I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Before I recognize the chair for his statement, I do want to mention that President Obama, in my opinion, didn't give enough pardons, or commutations, to people with drug cases. He investigated all those people too thoroughly. And if 4 out of 1,700 went back to jail, that is 0.3 percent of those issued. That is a pretty good score, and that means 1,696 people got justice.

Mr. Chairman, you are recognized.

Chairman NADLER. I thank the gentleman. I thank the chairman, and I thank him for that comment.

Today's long overdue hearing examines the constitutional role and the limits of the Presidential pardon power.

Presidents are vested by the Constitution with the awesome power to absolve individuals of Federal crimes. This power should be exercised carefully and responsibly.

Unfortunately, President Trump has ignored the hard work of the career professionals in the Department of Justice Office of the Pardon Attorney, who carefully scrutinize pardon applications and who make recommendations for clemency to the President.

Instead, his exercise of the pardon power has created the perception that pardons are a political tool, a publicity stunt to curry favor with the public, and a favor to bestow on the well-connected.

Worse, there are some who believe that President Trump may be signaling the promise of a pardon to those with potentially damaging information about him, to encourage them not to cooperate with investigators.

It is helpful to review this appalling record when it comes to issuing pardons.

In August 2017, he pardoned former Maricopa County, Arizona, Sheriff Joe Arpaio, who had been convicted of criminal contempt for defying a Federal court order forbidding him and his law enforcement officers from racially profiling Latinos.

Sheriff Arpaio was both a political supporter of the President's and a hero to the President's base. But he was pardoned despite the fact that he systematically violated the constitutional rights of helpless people in defiance of a court order.

The following April, President Trump pardoned Scooter Libby, former Vice President Dick Cheney's former chief of staff, who was convicted of perjury and obstruction of justice in relation to the FBI's probe into the leaking of covert CIA officer Valerie Plame's identity.

In June of last year, he pardoned noted conservative author and filmmaker Dinesh D'Souza, who pled guilty to a felony campaign finance violation in 2014.

These pardons raise red flags for several reasons. First, none of the individuals I mentioned appear to have had their applications recommended or even reviewed by the Department of Justice's Office of the Pardon Attorney.

Since the Civil War, the Justice Department has been responsible for administering petitions for executive clemency and preparing recommendations for the White House. While the President is not constitutionally bound to abide by this process, neither President Trump nor the Department have adequately explained why these individuals' applications have not undergone the usual review.

President Trump appears to have cut the pardon attorney out of his decisionmaking regarding pardons entirely. As a result, not only has he made questionable decisions about who he has chosen to pardon, there may be many worthy candidates for clemency who have gone ignored. And where he has granted a pardon to a worthy candidate, it has generally only been when a celebrity friend such as Kim Kardashian West or Sylvester Stallone has lobbied on their behalf.

There are also serious questions about whether President Trump has considered or attempted to use the powers of his office to shield himself or his political allies from legal jeopardy. Most troubling, there have been media reports that Michael Cohen, the President's former personal attorney, may have been offered the promise of a pardon by lawyers representing President Trump in hopes of convincing him not to reveal damaging information about the President.

There is also a concern the President may have signaled the possibility of granting pardons to certain other individuals, including his former national security advisor, Michael Flynn, and his former campaign manager, Paul Manafort, as a means of discouraging them from cooperating with investigators.

Concerns have also been raised about pardoning Mr. Libby for the same crimes several of President Trump's associates are accused of committing. He may have been signaling to those being targeted by investigators that a pardon may be in the offing if they refuse to cooperate with law enforcement.

It is these concerns that prompted my request of several individuals, including former White House counsel Don McGahn, for any documents relating to possible pardons, as part of this committee's investigations into potential obstruction of justice, public corruption, and abuses of power by President Trump.

This is one reason that we must see the entire report by Special Counsel Robert Mueller and all of the underlying evidence so that this committee can make an independent judgment about whether the President has obstructed justice by abusing his pardon power to protect himself or his political allies.

Contrary to what the President may believe, under any reasonable interpretation of the Constitution, the President does not have an absolute right to pardon himself or to use the pardon power in a corrupt manner.

It is true that there are few textual restraints on the President's pardon authority, and there is little direct guidance from the Supreme Court on this issue, as well as on other issues that an exercise of the pardon power may raise.

The President's pardon authority, however, cannot be read in isolation from the rest of the Constitution's text. For example, Article II of the Constitution also contains the Take Care Clause, which requires the President to, quote, "take care that the laws be faithfully executed," unquote; and the mandatory Presidential oath, which requires the President to swear to, quote, "faithfully execute the Office of President."

I find persuasive the argument that the Framers intended this language to impose upon the President a duty to abstain from self-interested conduct and abuses of power, or as one of our witnesses here today terms it, a duty of faithful execution. To interpret the Constitution otherwise would be to render any President into an elected tyrant, who could wield the powers of the office to serve his or her personal needs at the expense of the needs of the Nation.

And let me say one other thing. There are those who argue that since the pardon power is granted to the President, he can use it completely as he sees fit and that misuse could not be an obstruction of justice or an abuse of power.

If you think a moment, this cannot be right. Let's assume that a President pardoned someone in return for a check, personal check, of $50,000. I don't think anyone would think that because he had the unquestioned right to issue a pardon, that that wouldn't be a crime, that that wouldn't be an abuse of power, certainly, and probably an obstruction of justice.

Given the Framers' preoccupation with preventing arbitrary and abusive uses of government power, it is simply illogical to interpret the text of the Constitution to permit such an expansive view of the executive power.

I thank Chairman Cohen for holding this very important hearing, and I look forward to hearing the testimony of our witnesses here today. I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Collins, does he have a statement he wants to enter? No? Okay.

With that, we want to welcome our witnesses and thank you for participating in today's hearing. Your written statement will be entered into the record in its entirety. I ask you to summarize your testimony to 5 minutes. And you will see the lights. Green is go, yellow is warning, and red is over. To help you stay within that limit, there are the lighting switches.

Before proceeding, I remind each of you that your written and oral statements made to the committee within this hearing are subject to penalty of perjury, pursuant to 18 USC 1001, which could result in the imposition of a fine or imprisonment for up to 5 years, or both.

Our first witness is Caroline Fredrickson. Ms. Fredrickson is the president of the American Constitution Society for Law and Policy, a national nonprofit legal organization with increasing influence on legal and constitutional issues. Prior to working at ACS, she served as director of the Washington legislative office of the ACLU, and as general counsel and legal director of NARAL Pro-Choice America.

She had an extensive career serving in government as a special assistant to the President for legislative affairs during the Clinton administration, chief of staff to Senator Maria Cantwell, and as deputy chief of staff and counsel for Senator Daschle. Also has served as a law clerk for the Honorable James Oakes of the U.S. Court of Appeals for the Second Circuit. She received her J.D. from Columbia University—which I guess is in the chairman's district, maybe.

Columbia in your district, Jerry?

Chairman NADLER. Absolutely.

Mr. COHEN. Where she was a Harlan Fiske Stone scholar and served as editor of the Columbia Law Review.

Chairman NADLER. And he lived in my district, too.

Mr. COHEN. We ended up getting a lot of people from Chairman Nadler's district, a lot of scholars.

She received her B.A. in Russian and Eastern European studies summa cum laude from a place that is an adjunct of Mr. Nadler's district, Yale University.

Ms. Fredrickson, you are recognized for 5 minutes.

Mr. JOHNSON. Just one moment, point of parliamentary inquiry. Mr. Chairman, I noticed we are not going to administer the oral oath before their testimony. Is that right?

Mr. COHEN. That is exactly right.

Mr. JOHNSON. And the reason is because we don't want to include the phrase "so help me God" at the end?

Mr. COHEN. No, it is because it is totally unnecessary. The statutes say that the witnesses are subject to perjury and a penalty if they lie to the committee or tell a falsehood. So why have them stand up and swear to something that they are bound to? They are also not going to commit any other crimes they may commit here.

Chairman NADLER. Mr. Chairman.

Mr. COHEN. They will be subject to it whether they swear to it or not.

Chairman NADLER. Mr. Chairman.

Mr. COHEN. Yes, sir, I yield.

Chairman NADLER. Thank you for yielding.

I just want to comment here that swearing in witnesses may be relevant when you are talking about facts: Did this happen? Did that happen? Did you do this? Did you hear about that? When the witnesses are here to give their opinions, to have them swear that they are about to give their opinions as they, in fact, believe them, always seems a little strange to me.

Mr. JOHNSON. Well, with due respect to Chairman Nadler, I do intend to ask the witnesses about facts, and I would like to know that they are going to offer—I assume that they will—but they will offer truthful statements and understand that they are under the penalty of perjury if they don't. It is an important tradition that dates back to the founding of our country, and since we are talking about the history of the Constitution and our great traditions here, I don't think it is one we should abandon today.

Chairman NADLER. Mr. Chairman.

Mr. COHEN. Yes, Mr. Nadler.

Chairman NADLER. I would point out that lying to Congress, whether under oath or not, is a crime.

Mr. COHEN. And it is not a tradition. I was here in 2007 to 2010, and nobody was sworn in. That is something that started with the Republicans, and the votes have changed, and votes make a difference.

You are recognized, Ms. Fredrickson.

STATEMENTS OF CAROLINE FREDRICKSON, PRESIDENT, AMERICAN CONSTITUTION SOCIETY; JUSTIN FLORENCE, LEGAL DIRECTOR, PROTECT DEMOCRACY; JAMES PFIFFNER, UNIVERSITY PROFESSOR, SCHAR SCHOOL OF POLICY AND GOVERNMENT, GEORGE MASON UNIVERSITY; AND ANDREW KENT, PROFESSOR OF LAW, FORDHAM UNIVERSITY SCHOOL OF LAW

STATEMENT OF CAROLINE FREDRICKSON

Ms. FREDRICKSON. Thank you so much. To Mr. Cohen, Chairman Cohen, and Chairman Nadler, and the other members who are here, I am very grateful to have the opportunity to speak before you in these hearings on the President's pardon power. I am Caro-

line Fredrickson. I am the president of the American Constitution Society.

Despite Saturday's letter from Attorney General Barr interpreting the Mueller report, there are still many ongoing investigations of the President, his family, his businesses, his foundation, and there is still a broad concern that there could be a misuse of the Presidential pardon. So it is helpful to review the history of the pardon power, its limitations, and how our Founding Fathers foresaw its possible misuse could threaten the country.

The pardon power was intended to be a benevolent power. President George Washington, himself, issued the first pardon in what was decidedly an effort to use it in a benevolent manner. On November 2 of 1795, he worked to end our Nation's earliest uprising, the Whiskey Rebellion, using the power of the pardon to help heal the fabric of a young Nation.

Among the characteristics of the pardon power is that it is limited to Federal crimes. State cases are beyond its reach, as are Federal civil cases. And although there are important limits on an unfettered prosecution after a pardon, most notably the Fifth Amendment's double jeopardy clause, these limitations are not absolute.

For instance, the Supreme Court has repeatedly confirmed that the Dual Sovereignty Doctrine means that the Fifth Amendment's protection against double jeopardy permits prosecution of State offenses, even if the individual being prosecuted has already received a Presidential pardon, for a Federal offense criminalizing the same conduct.

Similarly, double jeopardy laws don't preclude Federal civil lawsuits brought by private parties or the Federal Government.

Third, it should be readily apparent to all that the pardon power cannot be used to obstruct justice. The Articles of Impeachment drafted by the House Judiciary Committee against President Nixon provide precedent for finding the issuance of an obstructive pardon grounds for impeachment.

Under those articles, it was stated that Nixon intended to, quote, interfere with the conduct of investigations and endeavored to, quote, cause prospective defendants to expect favored treatment through the use of the pardon power.

An obstructive pardon can also expose the President to new criminal liability for obstruction of justice, witness tampering, and possibly even bribery for which he could be indicted after he or she leaves office, and some, or many, believe even beforehand.

Despite this history, now Attorney General Bill Barr theorized in his June 2018 memo that when the President exercises one of the quote, "discretionary powers," such as the power of appointment, removal, or pardon, that act cannot be the basis for a subsequent criminal prosecution, such as for obstruction.

The Barr memo is puzzling for a number of reasons, but for present purposes what is most striking is how utterly devoid of legal support Mr. Barr's conclusions are.

Lastly, it is important to note that a self-pardon is also constitutionally suspect. Past Presidents, most notably President Nixon, have asked if they could use the pardon power to save themselves, only to be told by counsel that, no man—no one may be a judge

in his own case. And there is every reason to think that that opinion was and remains correct.

The pardon power is an awesome power. When used as intended, it is a powerful tool for justice. However, it can also be a tool of greed, oppression, and perversion if used inappropriately. In fact, in 1788, at the Virginia ratifying convention, George Mason said that the President, quote, "ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. If he has the power of granting pardons before indictment or conviction, may he not stop inquiry and prevent detection?"

James Madison, immediately understanding Mason's concerns, replied that he, too, recognized that there was a danger to giving the President the pardon power. But if the pardon power were to be used improperly and to fall into unscrupulous hands, he said, the Constitution had a remedy—impeachment.

Thank you.

[The statement of Ms. Fredrickson follows:]

TESTIMONY OF CAROLINE FREDRICKSON
PRESIDENT, AMERICAN CONSTITUTION SOCIETY

BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
HOUSE OF REPRESENTATIVES

MARCH 27, 2019

Thank you very much for the opportunity to appear before you in these hearings on the President's pardon power. My name is Caroline Fredrickson. I am the President of the American Constitution Society (ACS). As President of ACS I oversee our lawyer and law student chapters throughout the country and speak and write on a number of legal and constitutional issues. For the past two years I have helped lead, in coordination with Citizens for Responsible Ethics in Washington (CREW), our Presidential Investigation Education Project which promotes an informed public evaluation of the investigations by Special Counsel Robert Mueller and others into Russian interference in the 2016 election and related matters. As part of this project I help develop and disseminate legal analysis of key issues that emerge as the inquiries unfold. This includes a May 2018 report that I co-wrote entitled *Why President Trump Can't Pardon His Way Out of the Special Counsel and Cohen Investigations*. Prior to joining ACS, I served as the Director of the ACLU's Washington Legislative Office. I've also served as the Chief of Staff to Senator Maria Cantwell of Washington and Deputy Chief of Staff to then-Senate Democratic Leader Tom Daschle of South Dakota as well as Special Assistant to the President for Legislative Affairs.

Article II Section 2 of the United States Constitution states that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[1] Applicable only to convictions under federal criminal law, the pardon power has been used since the country's founding to grant pardons, clemencies, and amnesties to individuals who have been charged or convicted of federal crimes.[2]

Today the possibility of the pardon power being used for corrupt purposes is no longer a mere academic exercise. As the Department of Justice's various investigations into President Trump and his associates intensify, media commentators, scholars, and even the president's allies have speculated that President Trump might attempt to "pardon his way out" of investigations into potential cooperation between Russia and the Trump campaign and obstruction of justice

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[1] U.S. CONST. art. 2, § 2.

[2] Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN.COM (Aug. 29, 2017), https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/.

inquiries.[3] The suggestion that President Trump can "pardon his way out" however misunderstands the original intention of the pardon power, its limitations, and how its utilization for corrupt purposes could increase President Trump's criminal exposure.

I. The Pardon Power Was Intended to be a "Benevolent Power"

The Constitution vests the President with the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[4] A "benevolent power"[5] intended to balance out the harshness of criminal prosecution, Alexander Hamilton explained in Federalist No. 74 that "the criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[6] Drawing on Hamilton's words, Supreme Court Justice Oliver Wendell Holmes went even further, describing the pardon power as an integral feature of the criminal justice system whose existence was "a part of the constitutional scheme" that should be granted when the "public welfare will be better served by inflicting less than what the judgment fixed."[7]

An examination of the first application of the pardon power confirms its intention to be used in a benevolent fashion – as a way to heal the fabric of society. Issued by George Washington on November 2, 1795, the country's first pardon ended the earliest major instance of civic violence since the Constitution's establishment six years earlier, the Whiskey Rebellion.[8] The Whiskey Rebellion of 1794 was an uprising of farmers and distillers incensed over the federal government's whiskey tax. Although the uprising started at a slow boil it escalated over time eventually leading to serious concerns of internal insurrection. It was so concerning to the survival of the nascent country that President Washington sent troops to quell the insurrection, arrest the instigators, and charge them with treason. President Washington's response to the Whiskey Rebellion – which successfully subdued the rebellion – was seen as a success for the

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[3] *See, e.g.*, Darren Samuelsohn, *Conservatives Urge Trump to Grant Pardons in Russia Probe*, POLITICO (Feb. 19, 2018), https://www.politico.com/story/2018/02/19/trump-russia-pardons-mueller-flynn-417094; Mark Greenberg & Harry Litman, *Can Trump Pardon His Way Out of Trouble After the Manafort Indictment?*, L.A. TIMES (Oct. 30, 2017), http://www.latimes.com/opinion/op-ed/la-oe-litman-greenberg-manafort-muellerindictment-20171030-story.html; David B. Rivkin Jr. & Lee A. Casey, *Begging Your Pardon, Mr. President*, WALL STREET J. (Oct. 29, 2017), https://www.wsj.com/articles/begging-your-pardon-mr-president1509302308.

[4] U.S. CONST. art. 2, § 2.

[5] *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2444&context=wmlr.

[6] THE FEDERALIST No. 74 (Alexander Hamilton).

[7] Biddle v. Perovich, 274 U.S. 480, 487 (1927).

[8] Hagen, *supra* note 2.

young country. His response afterwards – wherein he forgave two Pennsylvania men who were sentenced to hang for treason – further cemented that understanding.

Since President Washington's first pardon in 1795 the process for issuing pardons has become highly systematized, but the intended goals of ensuring fairness and healing the fabric of society have remained.[9] Since the Civil War, pardons have been processed by the Department of Justice. The Office of the Pardon Attorney receives and reviews each pardon application to determine if it meets specified criteria and, in the process, solicits feedback from various government stakeholders. The application, along with the Pardon Attorney's recommendation and intergovernmental feedback, then proceeds to the White House Counsel's Office where it is further examined before eventually making its way to the President's desk for a final decision.

The bureaucracy behind the pardon system is intended to allow for informed feedback from all branches of government and ensure that pardon applications aren't prioritized based on political patronage or celebrity. A review of recent pardons and commutations by President Obama proves the point. Over the course of his two terms President Obama issued 1,715 commutations and 212 pardons.[10] Although some of these pardons were high profile – perhaps most notably the commutation of Chelsea Manning – most of them were given to nonviolent drug convicts serving long sentences.

Not only has President Trump issued fewer pardons than his predecessors, he has upended the pardon process tarnishing the pardon's purpose as a "benevolent power." Rather than working through the administrative apparatus governing the pardon power, President Trump tends to grand pardons on the basis of celebrity and without intergovernmental consultation, including to individuals like Joe Arpaio, Dinesh D'Souza, and Lewis "Scooter" Libby. Even individuals serving long sentences for nonviolent drug convictions who may deserve a pardon, like Alice Marie Johnson, seem to only receive one if they have a celebrity benefactor like Kim Kardashian West who can personally lobby the President on their behalf.[11] Surely the founders did not anticipate the "benevolent power" of the pardon to be corrupted in this way by political patronage and celebrity support.

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[9] There are clearly notable exceptions throughout American history where a pardon has been granted in controversial circumstances. The pardon of former President Nixon immediately comes to mind. However, generally speaking, presidents have honored the extraordinary power of pardons and limited it to appropriate circumstances.

[10] Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS & WORLD REP. (June 8, 2018, 6:00 AM), https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history.

[11] Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html.

II. The Pardon Power Only Protects against Federal Criminal Convictions and Reaches Neither Civil Convictions nor State Convictions

A president's pardon power only extends to federal crimes. This limitation leaves both federal civil convictions and state prosecutions beyond its reach. Although there are important state and federal limitations to unfettered prosecution for civil and criminal charges after a pardon, most notably the Fifth Amendment's Double Jeopardy Clause, these limitations are not absolute and constitute significant restrictions on a president's ability to "pardon his way out" of legal jeopardy.

A. Double Jeopardy Laws Cannot be Relied Upon to Preclude State Criminal Prosecution

The Fifth Amendment of the U.S. Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[12] Applicable to the states under the Fourteenth Amendment, the Supreme Court has held that the Double Jeopardy Clause only applies within a sovereign entity.[13] Since the U.S. Constitution creates a federal form of government wherein, as James Madison explained in Federalist No. 46, the states and national government are "different agents and trustees of the people, constituted with different power[s]," the federal government and state governments are separate sovereigns under our government.[14]

Referred to as the "separate sovereigns" doctrine, the Supreme Court has repeatedly confirmed this understanding of the Double Jeopardy Clause.[15] As such, the Fifth Amendment's protection against double jeopardy nonetheless permits state investigators to pursue state offenses even if the individual being prosecuted has already received a presidential pardon for

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[12] U.S. CONST. amend. V.

[13] Benton v. Maryland, 395 U.S. 784, 794 (1969) ("[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.").

[14] THE FEDERALIST No. 46 (James Madison).

[15] Bartkus v. Illinois, 359 U.S. 121 (1959); *see also* United States v. Lanza, 260 U.S. 377, 382 (1922) ("The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy."); Abbate v. United States, 359 U.S. 187, 194 (1959) (declining to overrule Lanza and referencing cases relying on it as establishing "the general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts"). The case of *Gamble v. United States* is currently pending before the United States Supreme Court with a decision expected before the end of June. In *Gamble* the Court is being asked to overrule the "separate sovereigns" exception to the Double Jeopardy Clause of the Fifth Amendment. Gamble v. United States, No. 17-646 (U.S. June 28, 2018). Should the Court decide to overrule the "separate sovereigns" doctrine this analysis would need to be rethought.

federal offenses that criminalize the same conduct, and it also permits state and federal officials to coordinate in such prosecutions without implicating the Double Jeopardy Clause.

The absence of protection under the U.S. Constitution against successive prosecutions is not the end of the matter though, because some states have enacted their own prohibitions against double jeopardy. Some states impose double jeopardy protections that mirror the Supreme Court's parameters on federal constitutional double jeopardy. For example, in Maryland, courts have held that the English common law double jeopardy protections that were incorporated into the state's constitution do not bar successive state and federal prosecution.[16] The same is true in Florida, where courts have found that the Double Jeopardy Clause does not bar two prosecutions for the same conduct by Florida and the federal government.[17] In states like Maryland and Florida, a presidential pardon therefore provides no protection against state prosecution under state or federal law.

Other states have established more expansive protections against double jeopardy. For example, New York, Virginia, and Delaware impose various statutory limits on state prosecutions of conduct previously prosecuted at the federal level. New York's criminal procedure statute prohibits prosecutions for "two offenses based on the same act or criminal transaction,"[18] whether or not they are federal or state offenses. In Virginia, the double jeopardy statute expressly provides that a federal prosecution of any act that is "a violation of both a state and a federal statute" bars prosecution under the state statute,[19] and the Delaware code imposes a similar prohibition.[20]

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[16] Evans v. State, 301 Md. 45, 58 (1984) ("[T]his Court has adopted, as a matter of Maryland common law, the dual sovereignty concept delineated in the Supreme Court's Bartkus and Abbate cases.").

[17] Booth v. State, 436 So. 2d 36, 37 (Fla. 1983) ("In allowing prosecutorial discretion in such situations, we perceive no violation of constitutional guarantees against double jeopardy and accordingly adhere to the doctrine of dual sovereignty established by federal and Florida case law.").

[18] N.Y. CRIM. PROC. LAW § 40.10(2); N.Y. CRIM. PROC. LAW § 40.20. New York's former Attorney General Eric Schneiderman proposed that the legislature amend the state's double jeopardy law to ensure that a state prosecution is not barred in cases where a federal prosecution has been annulled by a presidential pardon. Jed Shugerman, *No Pardon for You, Michael Cohen*, SLATE (Apr. 17, 2018), https://slate.com/news-and-politics/2018/04/new-york-should-amend-its-double-jeopardy-law-to-make-sure-trump-cant-bail-out-michael-cohen.html.

[19] VA. CODE ANN. § 19.2-294. Virginia courts evaluating whether there are separate acts sustaining separate offenses review "whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute." Hundley v. Commonwealth, 193 Va. 449, 451 (1952). "In determining whether the conduct underlying the convictions is based upon the 'same act,' the particular criminal transaction must be examined to determine whether the acts are the same in terms of time, situs, victim, and the nature of the act itself. Hall v. Commonwealth, 14 Va. App. 892, 898 (1992).

[20] DEL. CODE ANN. tit. 11, § 209.

Finally, some states with double jeopardy statutes have codified exceptions to the rule barring successive federal and state prosecutions. A broad and common exception allows successive prosecution when there is a substantial difference between the offense to which a defendant has already been in jeopardy and the one for which he is being prosecuted.[21] For example, prior prosecution of a federal offense is not a bar to a prosecution of a similar New York offense where the two offenses have substantially different elements and the acts establishing each offense are clearly distinguishable[22] or where each offense has an element that is not in the other and the "statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil."[23] Delaware allows prosecution in cases where the offense requires proof of a fact not required by the former offense "and the law defining each of the offenses is intended to prevent a substantially different harm or evil."[24] For this reason, recipients of a federal pardon for federal offenses to which jeopardy has attached may not necessarily avoid prosecution for state offenses that penalize some of the same conduct.

A final important limitation on the Double Jeopardy Clause is the question of when double jeopardy protections attach. The Constitution's protection against double jeopardy does not attach when an indictment is filed. Instead, double jeopardy only attaches in one of two circumstances. The first is when an individual is convicted or enters a guilty plea.[25] Double jeopardy also attaches when a case proceeds to trial and a jury has been impaneled and sworn in, or, in the case of a bench trial, a witness is sworn.[26] Charges that are dropped prior to trial or excluded from a plea agreement are not subject to the constitution's double jeopardy limitations.[27] It is quite common for federal prosecutors, particular those who have been

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[21] *See, e.g.*, DEL. CODE ANN. tit. 11, § 208; N.J. STAT. ANN. § 2C:1-11; 18 PA. STAT. AND CONS. STAT. ANN. § 111.

[22] N.Y. CRIM. PROC. LAW. § 40.20(2)(a).

[23] N.Y. CRIM. PROC. LAW. § 40.20(2)(b).

[24] DEL. CODE ANN. tit. 11, § 209.

[25] N.Y. CRIM. PROC. LAW. § 40.30; Peterson v. Commonwealth., 5 Va. App. 389, 395 (1987) ("Where there is no trial at all, but rather a plea of guilty, as in the case at bar, jeopardy attaches when the court accepts the defendant's plea."); DEL. CODE ANN. tit. 11, § 207; Rawlins v. Kelley, 322 So. 2d 10, 12-13 (Fla. 1975).

[26] N.Y. CRIM. PROC. LAW § 40.30; Martin v. Commonwealth, 242 Va. 1, 8 (1991) ("[J]eopardy attaches only after a jury is empaneled and sworn in a jury trial or the first witness is sworn in a bench trial."); Tarr v. State, 486 A.2d 672, 674 (Del. 1984); State v. Korotki, 418 A.2d 1008, 1012 (Del. Super. Ct. 1980); Rawlins v. Kelley, 322 So. 2d 10, 12-13 (Fla. 1975).

[27] *See* State v. Carter, 452 So. 2d 1137, 1139 (Fla. Dist. Ct. App. 1984) (double jeopardy does not bar refiling of charges dismissed pre-trial). *C.f.* United States v. Lewis, 844 F.3d 1007, 1010 (8th Cir. 2017) ("The four counts in the 2010 indictment were dismissed before a jury was empaneled. Jeopardy did not attach during any of the pretrial proceedings."); Midgett v. McClelland, 547 F.2d 1194, 1196 (4th Cir. 1977) ("Putting him to trial on the assault charge after he had been put to trial on that charge once, the prosecution dropping the charge only after the testimony was in, was clearly a violation of Midgett's right not to be put in jeopardy twice."). *See* Ohio v. Johnson, 467 U.S. 493, 494 (1984) (holding that a defendant who pled guilty to two of four charges in an indictment could still be prosecuted on the remaining two offenses, without violating the Double Jeopardy Clause). *See also* United States v. Abboud,

working in coordination with state authorities, to exclude certain charges from a plea agreement or drop them before trial to preserve the ability of the state to pursue charges when the federal prosecution has concluded. Moreover, if a defendant pleads guilty in a federal case, that admission of guilt – even if he or she later receives a presidential pardon – can be introduced as an admission of guilt, which could expedite a finding of wrongdoing in a collateral proceeding.[28]

B. Double Jeopardy Laws Cannot be Relied Upon to Preclude Federal Civil Convictions

The president's pardon power does not extend to civil matters – including lawsuits for damages between private parties, civil actions brought by the United States, or collateral consequences such as professional restrictions.[29]

As a starting matter, presidential pardons cannot protect property and other assets owned by those pardoned from civil asset forfeiture. A controversial practice, civil asset forfeiture permits the police to seize any property allegedly involved in a crime regardless of whether the property owner has been arrested or convicted, including individuals who have received a presidential pardon.[30] Potential targets of civil asset forfeiture regimes include civil assets derived from or traceable to money laundering, bank fraud, false statements, and wire fraud, among other offenses.[31]

Individuals who have received a presidential pardon may also be subject to collateral civil consequences, including restrictions on their ability to participate in certain professions. Courts have held that a pardon does not removal all sanctions that might attach to an individual's conduct.[32] For instance, the D.C. Court of Appeals held that a presidential pardon did not

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273 F.3d 763, 766 (8th Cir. 2001) (rejecting a double jeopardy defense where conspiracy charges were brought after having been dropped in a previous prosecution as part of a plea agreement).

[28] FED. R. EVID. 410.

[29] *See, e.g.*, United States v. McMichael, 358 F. Supp. 2d 644, 647 (E.D. Mich. 2005) ("Put differently, a pardon does not erase the guilt of the underlying conviction. For example, a pardoned murderer could still be subject to civil prosecution for wrongful death.").

[30] Legal and widespread, civil asset forfeiture has been condemned by scholars across the ideological spectrum. This Term in *Timbs v. Indiana* the Supreme Court, in its unanimous opinion, held that the Eighth Amendment's excessive fines clause was incorporated against the states under the Fourteenth Amendment. Timbs v. Indiana, 139 S. Ct. 682 (2019). Explaining that "protection against excessive fines has been a constant shield throughout Anglo-American history", the Court indicated that it might rein in civil asset forfeiture in the future. *Id.* at 689.

[31] 18 U.S.C § 981.

[32] *In re* Elliott Abrams, 689 A.2d 6 (D.C. 1997) (en banc), *cert. denied*, 117 S. Ct. 2515 (1997); *see also*, Hirschberg v. Commodity Futures Trading Comm'n, 414 F.3d 679, 684 (7th Cir. 2005) ("[D]enial of floor broker registration based on fraudulent conduct underlying a pardoned criminal conviction does not constitute a violation of the pardon clause.").

preclude a bar association from suspending one of the attorneys implicated in the Iran-Contra Affair, despite the fact that he received a presidential pardon for his convictions.[33] In so ruling, the court relied on a distinction between consequences from the conviction itself and those contingent on the conduct underlying the offence — regardless of whether the case was prosecuted.[34] Because the attorney's dishonesty before Congress violated the D.C. Bar's code of professional responsibility, the suspension was valid even though the attorney had been pardoned.[35]

III. The Pardon Power Cannot be Used to Obstruct Justice

The president's pardon power is nearly absolute and certainly bars successive federal prosecution of the offenses covered by the pardon. When it comes to the question of obstructive pardons, however, that is the start of the inquiry, not the end, because while a president can issue an obstructive pardon, its issuance might create more legal jeopardy for him or her, not less.

If the president issued an obstructive pardon it would unquestionably constitute an impeachable abuse of power for which there is clear precedent in the articles of impeachment drafted by the House Judiciary Committee against President Nixon.[36] The first count in the articles of impeachment against President Nixon charged him with "using the powers of his high office engaged personally and through his close subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such illegal entry

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[33] *In re Elliott Abrams*, 689 A.2d at 6.

[34] *Id.* at 11

[35] *Id. Accord Hirschberg*, 414 F.3d at 682-83 ("Government licensing agencies may consider conduct underlying a pardoned conviction — without improperly 'punishing' the pardoned individual — so long as that conduct is relevant to an individual's qualifications for the licensed position."); Bjerkan v. United States, 529 F.2d 125, 128 n.2 (7th Cir. 1975) ("The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.").

[36] *Articles of Impeachment Adopted by the House of Representatives Committee on the Judiciary*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/articles-impeachment-adopted-the-house-representatives-committee-the-judiciary (last visited Mar. 18, 2019). This precedent draws on the views of the founders at the time the Constitution was drafted. Records from the Virginia Ratifying Convention show that George Mason was deeply worried that one day a president who lacked George Washington's sound character would use the pardon power to stop unsavory inquiries and perhaps even attempt to obstruct justice. D. W. Buffa, *The Pardon Power and Original Intent*, BROOKINGS (July 25, 2018), https://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/. Mason's argument had unmistakable force, but James Madison had a response - impeachment. *Id.*

[into the Watergate hotel]; . . . ."[37] The specific allegation in support of this article of impeachment was that Nixon intended to "interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special Prosecution Force, and Congressional Committees" and endeavored "to cause prospective defendants, and individuals duly tried and convicted, to expect favoured treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony."[38] Indeed, President Nixon repeatedly discussed clemency for one of the officials who was indicted for his role in the conspiracy.[39] This is unquestionable precedent that an obstructive pardon is an impeachable offense.

In addition to impeachment, an obstructive pardon can also expose the president to new criminal liability for obstruction of justice, witness tampering, and possibly even bribery for which he could be indicted after he or she leaves office (and possibly even before).

The concept of bribery is simple: it is the exchange of something of value for influence over another. There is a specific provision of federal law, 18 U.S.C. § 201(b)(4) which explains the criminal interaction between bribery and witness tampering. Section 201(b)(4) prohibits corruptly offering or promising anything of value to a witness with the intent to influence or prevent that witness's testimony or sharing of evidence. A companion provision prohibits a potential witness from demanding, seeking, receiving, accepting, or agreeing to accept anything in value in return for being influenced in the testimony one is giving or for not giving testimony.[40] Although charges under the witness provisions of the federal bribery statute for a corruptly-motivated pardon would be novel, it nonetheless closely maps on to the statute: the pardon would amount to a thing of value that the president might be "giving" to a witness in exchange for influence over that witness or witness's silence. Courts have been quite clear in analogous contexts that the term "anything of value" should be interpreted broadly and can include intangible considerations, such as a pardon.[41]

Despite attempts by conservative legal theorists to claim otherwise, there is no colorable argument that obstruction or bribery charges for an obstructive pardon unconstitutionally infringes on the president's pardon power. As a starting point, there is precedent for conducting a criminal inquiry into the issuance of a presidential pardon. In 2001, the

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[37] AM. PRESIDENCY PROJECT, *supra* note 36.

[38] *Id.*

[39] Bob Woodward & Carl Bernstein, *Nixon Debated Paying Blackmail, Clemency*, WASH. POST (May 1, 1974), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/050174-2.htm.

[40] 18 U.S.C. § 201(b)(4)

[41] United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986) ("In order to put the underlying policy of the statute into effect, the term 'thing of value' must be broadly construed. Accordingly, the focus of the above term is to be placed on the value which the defendant subjectively attached to the items received."); United States v. Nilsen, 967 F.2d 539, 542 (11th Cir. 1992) (holding that a "thing of value" covers intangible considerations).

Department of Justice opened a criminal inquiry into the pardon President Clinton gave to Marc Rich, a fugitive who fled to Switzerland after being indicted on several federal charges.[42] Rich's ex-wife, Denise Rich, was a wealthy donor who contributed hundreds of thousands of dollars to President Clinton's presidential library and to Hillary Clinton's campaign for Senate, which raised the question of whether President Clinton had been promised contributions in exchange for the pardon.[43] Then-Senator Jeff Sessions said that the investigation was warranted: "From what I've seen, based on the law of bribery in the United States, if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, then that could be a criminal offense."[44] Although the investigation was closed four years later without any charges filed,[45] the episode indicates that federal prosecutors have investigated the possibility that a pardon might constitute bribery.

Despite this history, now-Attorney General Bill Bar theorized in his notorious June 2018 memo that when a President exercises one of his "discretionary powers" – such as the power of appointment, removal, or pardon – that act cannot be a basis for subsequent criminal prosecution such as for obstruction.[46] The Barr Memo is puzzling for a number of reasons, not least of which is why he wrote it to begin with. But for present purposes what is most striking is how utterly devoid of legal support Barr's conclusions are.

Barr's Memo is a categorical embrace of the unitary executive theory – a rightwing theory that has no basis in the Constitution's text and has been rejected by the Supreme Court repeatedly, including most recently in its 7-1 decision in *Morrison v. Olson*.[47] Adherents to the unitary executive theory, such as Attorney General Barr, have a propensity to overlook the constitutional obligations of the other branches of government in favor of a reading of the constitution that yields a radically strong executive branch. For instance, acceptance of Barr's

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[42] David Johnson, *U.S. Is Beginning Criminal Inquiry in Pardon of Rich*, N.Y. TIMES (Feb. 15, 2001), https://www.nytimes.com/2001/02/15/us/us-is-beginning-criminal-inquiry-in-pardon-of-rich.html.

[43] James V. Grimaldi, *Denise Rich Gave Clinton Library $450,000*, WASH. POST (Feb. 10, 2001), https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4c38-893e-d500ee4a5b30/?utm_term=.a48dc9641197; Jonathan Rauch, *Forget the Marc Rich Pardon. Worry About the Scandal*, ATLANTIC (Mar. 1, 2001), https://www.theatlantic.com/politics/archive/2001/03/forget-the-marc-rich-pardon-worry-about-the-scandal/377541/.

[44] Johnson, *supra* note 42.

[45] Jessica Taylor, *More Surprises: FBI Releases Files on Bill Clinton's Pardon of Marc Rich*, NPR (Nov. 1, 2016), https://www.npr.org/2016/11/01/500297580/more-surprises-fbi-releases-files-on-bill-clintons-pardon-of-marc-rich.

[46] Memorandum from Bill Barr on Mueller's "Obstruction" Theory to Deputy Att'y Gen. Rod Rosenstein & Assistant Att'y Gen. Steve Engel (June 8, 2018), https://www.documentcloud.org/documents/5638848-June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.html.

[47] Morrison v. Olson, 487 U.S. 654 (1988); *see also* Victoria Nourse, *The Special Counsel,* Morrison v. Olson, *and the Dangerous Implications of the Unitary Executive Theory*, ACS (June 2018), https://www.acslaw.org/wp-content/uploads/2018/07/UnitaryExecutiveTheory.pdf.

theory of governance requires overlooking the fact that the constitutional text itself limits the president's powers including in Article II's appointment clause, which provides Congress with the power to structure the executive branch[48] and Article I's provision that gives Congress the power to "make *all* laws" which shall be necessary and proper for carrying into effect the powers of the Constitution.[49] In addition to perverting the constitutional text, acceptance of the unitary executive theory and Barr's proposition that a president's discretionary powers are beyond the reach of our justice system transforms our democratic government into an authoritarian regime where the president is above the law. Certainly, that is not what our founders intended, who had just fought a war to free themselves from the yoke of a king.

IV. A Self-Pardon Is Constitutionally Suspect

Our pardon power traces its origins to the royal prerogative of mercy exercised by a British monarch, whereby he would sit as a "super-judge," evaluating someone else's conduct to see if it deserved clemency. Scholars who have studied the history of the royal pardon have been unable to find any precedent for a sovereign pardoning himself.[50] Nonetheless past presidents, most notably President Nixon, have asked if they could use the pardon power to save themselves. Indeed, in the waning hours of his presidency President Nixon's Department of Justice issued a memorandum addressing the propriety and constitutionality of a self-pardon.[51]

The Nixon Department of Justice Office of Legal Counsel memo evaluated the pardon power through a rule of law framework. Recognizing the "fundamental rule that no one may be a judge in his own case", the memo unequivocally concludes that "the President cannot pardon himself."[52] This conclusion was seemingly accepted by President Nixon and perhaps may have played a role in President Ford's decision to pardon Nixon after he left office. There is no reason to think the Department Justice's 1974 opinion on the pardon power was incorrect. To the contrary, there is every reason to think it was and remains the correct reading of our constitution.

V. Conclusion

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[48] U.S. CONST. art. II, § 2, cl. 2.

[49] U.S. CONST. art. I, § 8, cl. 18.

[50] 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?noredirect=on&utm_term=.4f67c72bff1a.

[51] Memorandum from Acting Assistant Att'y Gen. Mary C. Lawton on Presidential or Legislative Pardon of the President (Aug. 5, 1974), https://www.justice.gov/file/20856/download.

[52] *Id.*

The president's pardon power is an awesome power. When used as intended, it is a powerful tool for justice. However, it can also be a tool of greed, oppression, and perversion if used inappropriately and contrary to its purpose. The founders recognized that the pardon power could fall into the hands of someone with questionable character and motives. In fact, in 1788 at the Virginia Ratifying Convention George Mason raised this possibility when he said the president

> "ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. It may happen, at some future day, that he will establish a monarchy, and destroy the republic. If he has the power of granting pardons before indictment, or conviction, may he not stop inquiry and prevent detection? The case of treason ought, at least, to be excepted. This is a weighty objection with me."[53]

James Madison, immediately understanding the force of Mason's objections replied that he too recognized that there was danger to giving the president the pardon power. But, if the pardon power were to be used improperly and fall into unscrupulous hands the Constitution had a remedy – impeachment.

[53] D.W. Buffa, *The Pardon Power and Original Intent*, BROOKINGS (July 25, 2018), https://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/.

Mr. COHEN. Thank you, Ms. Fredrickson.

Our next witness is Mr. Justin Florence, and he is legal director of Protect Democracy and a lecturer at Harvard Law School. Previously served as special assistant and assistant counsel to the President during the Obama administration, senior counsel in the Senate Judiciary Committee to Senator Sheldon Whitehouse. He was law clerk for the Honorable Diana Gribbons Motz of the U.S. Court of Appeals of the Fourth Circuit. J.D. from Yale.

Do you all know each other?

Ms. FREDRICKSON. Yes.

Mr. COHEN. Boola boola. Where he served as executive editor of the Yale Law Journal. He received an M.A. in history from Harvard and a B.A. in history from Yale.

Mr. Florence, you are recognized for 5 minutes.

STATEMENT OF JUSTIN FLORENCE

Mr. FLORENCE. Mr. Chairman, members of the committee, thank you for calling this important hearing and for inviting me to testify.

My organization, Protect Democracy, is a nonpartisan, nonprofit organization with the mission of preventing the United States from declining into a more authoritarian form of government.

I appreciate the opportunity to testify today on the role of the pardon power in our constitutional system and some limits that the Constitution places on that power. This committee's oversight can ensure that this power is used to provide mercy and justice, as the Framers intended, and is not abused for corrupt or unlawful means.

Limits on the pardon power begin with the clause's text, which excludes pardons in cases of impeachment and does not extend to pardons of State or civil offenses. In addition, the pardon power cannot be used in ways that violate other parts of the Constitution.

As an example, it is well accepted that the pardon power does not extend to future crimes, for under our Constitution, a President can't license law-breaking ahead of time.

Or consider another scenario. It would violate the Equal Protection Clause and the First Amendment for a President to pardon all people of a certain religion of a particular offense, but nobody else.

In my testimony today, I will focus on three specific constraints on this power.

First, because in our country nobody is above the law, both self-pardons and similar self-protective pardons are unconstitutional.

Second, the President can't issue or dangle pardons in ways that violate generally applicable criminal laws, such as those prohibiting bribery and obstruction of justice.

And third, the President may not issue a pardon that prevents courts from enforcing people's constitutional rights.

Let me begin with the prohibition on self and self-protective pardons, which comes from the Constitution's requirement that the President faithfully execute the duties of his office and faithfully enforce the laws passed by Congress.

The Founders believed this constitutional command was so important that they included it in the Constitution twice, in the Take Care Clause and again in the Oath of Office. These faithful execution clauses bar the President from betraying the public good to

serve his own interests. That means he can't pardon himself, or pardon somebody else to protect himself, rather than act to protect the American people's interest in the faithful execution of the laws.

The Office of Legal Counsel in the Justice Department traditionally interprets executive powers quite broadly, but even OLC says that self-pardons go too far. In an opinion written days before President Nixon resigned, OLC opined that allowing the President to pardon himself would violate the fundamental rule that no one may be a judge in his own case.

A self-pardon would reflect the sort of power wielded by a king, not an American President. And the same is true for a similarly functioning self-protective pardon.

Turning to a second limit, the pardon power can't be used in a way that, on its own, violates our criminal laws. Consider a situation in which a Justice Department official takes a bribe in order to place a name on a list of proposed pardons.

As then Senator Sessions said in the context of President Clinton's pardon of Marc Rich, based on the law of bribery, if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, that could be a criminal offense.

And the same goes for obstruction of justice. If a Federal official, including the President, issues or even offers a pardon to impede an investigation for a corrupt or wrongful purpose, that could run afoul of the law.

Finally, I would like to highlight a third limit on the pardon power. The President may not use a pardon to prevent Federal courts from protecting people's constitutional rights.

An essential component of the court's power to protect the Constitution is the contempt power, the ability to punish those who violate court orders. The Supreme Court has held that the court's role in our constitutional system hinges on their ability to prosecute contempt, without relying on the executive branch.

If the President could use the pardon power to block courts from protecting constitutional rights, we would no longer be a Nation of laws but, instead, subject to the whims of one man.

Mr. Chairman, thank you again for holding this important hearing. The pardon power is a noble provision of the Constitution, but like any power, it can be abused. And so I would urge the committee to continue conducting oversight in this area.

I look forward to the committee's questions.

[The statement of Mr. Florence follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Examining the Constitutional Role of the Pardon Power

March 27, 2019

Testimony of Justin Florence
Legal Director, Protect Democracy

Prepared Testimony of Justin Florence

"Examining the Constitutional Role of the Pardon Power"

House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

March 27, 2019

Chairman Nadler, Ranking Member Collins, Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for calling this important hearing and inviting me to testify.

I am the Legal Director of Protect Democracy, a non-partisan non-profit organization with the mission of preventing the United States from declining into a more authoritarian form of government. I am also a Lecturer on Law at Harvard Law School. I previously served as Associate White House Counsel and as a Senior Counsel on the staff of the Senate Judiciary Committee.

I appreciate the opportunity to testify today on the important role the pardon power plays in our constitutional system, as well as some limits the Constitution places on that power. This Committee's oversight can ensure that this power is used as a tool to provide mercy and justice, as the Framers intended, and not for corrupt or unlawful means.

My organization, Protect Democracy, works to prevent and respond to actions by government officials that violate the law and undermine our constitutional democracy. We have taken several actions to prevent abuse of the pardon power. For example, when Joe Arpaio moved to have his conviction vacated on the basis of his pardon, we partnered with other legal experts and organizations to file an amicus brief explaining the constitutional flaws in that pardon. We have continued to file amicus briefs as that case has progressed.

Last year, we led a group of ten bipartisan organizations—including Republicans for the Rule of Law, MoveOn, and Stand Up Republic—in issuing a joint statement explaining certain limits that prevent abuse of the pardon power, which we accompanied with a legal memo to Congress. Last week, a similar coalition sent a letter supporting Congress's role in preventing abuse of the pardon power.

In my testimony today I will outline the purpose of the pardon power in our Constitution and then describe three limits on that power that may be relevant to the Committee. First, Article II of the Constitution prevents the President from issuing a self-pardon or a similar self-protective pardon. Second, the President is not immune from accountability for issuing or dangling pardons

in ways that violate generally applicable criminal laws, such as those prohibiting bribery and obstruction of justice. And third, the President may not issue a pardon that prevents courts from enforcing the constitutional rights of private litigants. Congress has an important role to play in investigating and guarding against these types of abuses of the pardon power.

The constitutional purpose of the pardon power.

The Framers included the pardon power in the Constitution to allow for acts of mercy and to correct injustices. Alexander Hamilton reflects on this in *The Federalist* No. 74, in which he argues that "humanity and good policy" require that "the benign prerogative of pardoning" is necessary to mitigate the harsh justice of the criminal code. The pardon power would provide for "exceptions in favor of unfortunate guilt."

Chief Justice John Marshall in *United States v. Wilson* expanded on the benign aspects of the pardon power: "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."[1]

We can see the value of the power of clemency in the story of Eugenia Marie Jennings, who received a commutation in 2011. Ms. Jennings was in her early 20s when she traded small amounts of cocaine in exchange for clothing, in an effort to provide for her children. She was arrested in 2001 for selling less than 14 grams, for which she was sentenced to 22 years in prison and eight years of supervised release, along with a $1,750 fine. Mandatory minimum sentences for crack cocaine at the time were severe. By the time President Obama commuted her sentence, that policy had been reversed with sweeping bipartisan support in Congress and the Sentencing Commission, but Jennings was still in prison. She had been educating students on the dangers of drug abuse during her sentence, and eventually was diagnosed with cancer. President Obama used the pardon power to correct what he saw as an injustice. He ended her prison sentence just before Christmas, but maintained her eight years of supervised release.[2]

This is one of many moving stories of Presidents using the pardon power, as the Framers intended, to provide mercy and justice. For example, President Reagan pardoned a farmer who stole a mere $10 as a postal clerk, and also pardoned a "mechanic who, as a soldier in Germany

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[1] 32 U.S. 150, 150 (1833).

[2] *The president's stingy use of pardons*, Wash. Post (Jan. 8, 2012), https://www.washingtonpost.com/opinions/the-presidents-stingy-use-of-pardons/2011/12/22/gIQAHbj6jP_story.html; *Obama commutes sentence of Alton woman in cocaine case*, St. Louis Post-Dispatch (Nov. 22, 2011), https://www.stltoday.com/news/local/crime-and-courts/obama-commutes-sentence-of-alton-woman-in-cocaine-case/article_c30d817e-1523-11e1-8e09-0019bb30f31a.html.

in 1948, was courtmartialed and sentenced to a year's hard labor for an assault in a bar over a card game."[3] President Bush pardoned Olgen Williams who, after stealing $10.90 from the Post Office to fuel a drug habit, "became a born-again Christian, earned three collegiate degrees and became executive director of Christamore House, an Indianapolis community center."[4]

As we see from these stories and from many others, the pardon clause serves a noble purpose of allowing for justice and mercy in our constitutional system.

But the pardon power is not without limits. For example, the text of the clause limits pardons to "offenses against the United States" and prevents pardons in cases of impeachment.[5] It is well-accepted, therefore, that the President may not pardon a violation of state law, which is not an offense against the United States.[6] It is also well-accepted that the pardon power does not extend to future conduct. So while a President may pardon somebody for past conduct of which she has not yet been convicted, a President cannot license law-breaking head of time.[7] And further, courts have recognized that the pardon power may not be used in ways that violate other components of the Constitution. For example, in a 1974 case, Chief Justice Burger explained that the Constitution grants the President "power to commute sentences on conditions which do not in themselves offend the Constitution."[8]

The Equal Protection Clause furnishes an obvious example of how individual Constitutional rights must place limits on the pardon power. For example, were a President to issue pardons for a particular offense to all white people guilty of that offense but not to people of color, that would flagrantly violate the requirement to the equal protection of the laws. As Justice Stevens once observed, "[N]o one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting

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[3] Leslie Maitland, *62 Getting Reagan's Gift of Forgiveness*, N.Y. Times (Dec. 25, 1982), https://www.nytimes.com/1982/12/25/us/62-getting-reagan-s-gift-of-forgiveness.html.
[4] Associated Press, *Bush's first pardons include ex-postal worker who stole $10.90, man who made moonshine*, Sioux City Journal (Dec. 23, 2002), https://siouxcityjournal.com/news/local/bush-s-first-pardons-include-ex-postal-worker-who-stole/article_2540a86a-46db-5bd9-b46e-1390f6bf7e1d.html.
[5] U.S. Const. Art. II, § 2, cl. 1.
[6] *E.g.*, *Pardon Information and Instructions*, Department of Justice, https://www.justice.gov/pardon/pardon-information-and-instructions (last visited March 20, 2019).
[7] *Ex parte Garland*, 71 U.S. 333, 380 (1866) (The pardon power "may be exercised at any time after [a crime's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.").
[8] *Schick v. Reed*, 419 U.S. 256, 264 (1974).

or denying clemency."[9] The Equal Protection Clause imposes the same constraint on the President's pardon power.

Similarly, the pardon power may not be used to disregard other constitutional rights. As one federal court put it, the pardon power is "limited, as are all powers conferred by the Constitution, by the Bill of Rights which expressly reserved to the 'individual' certain fundamental rights."[10] So, for example, were a President to pardon all people of one religious denomination for an offense, and exclude others, that would contradict the First Amendment's guarantee of religious freedom.

In this respect, the pardon power is no different from any other element of the original articles of the Constitution that assigns a particular power to a branch of the federal government. For example, the Commerce Clause allows Congress to regulate interstate commerce. But Congress cannot exercise that power in a way that prohibits mailing newspapers across state lines, for that would violate the First Amendment. The pardon power, like all others, must be understood within the structure of the Constitution as a whole.

These limits on the pardon power protect its use for the purposes of mercy and justice. Only if the pardon power is not abused or exercised in ways that violate other aspects of the Constitution will that power continue to be seen and used as a viable executive power. The pardon power has never been an unfettered power, because no one part of the Constitution supersedes the rest of it. If the pardon power were absolute and unlimited, then the United States would have a king, not a President.

Let me turn now to three specific restraints on the pardon power that may be relevant to the Committee's oversight.

The President may not place himself above the law through a self-pardon or a similarly functioning self-protective pardon of associates.

One significant limitation on the pardon power flows from Article II itself, which ensures that the President carries out his office in service of the people, not as a monarch. Two provisions in Article II—the Take Care Clause and the Oath Clause—require the President to act in the public interest, binding him to exercise fiduciary duties of loyalty and care to the common good.[11]

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[9] *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part).
[10] *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1231 (D.D.C. 1974).
[11] Andrew Kent, Ethan J. Lieb & Jed Handelsman Shugerman, *'Faithful Execution' and Article II*, 132 Harv. L. Rev. ___ (2019) (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593.

These constitutional provisions reflect the central principle in our constitutional system that ours is "a government of laws and not of men," and that nobody is above the law.[12] Indeed, just this month, a New York appellate court reiterated this important principle, holding, "the President is still a person, and he is not above the law."[13]

The Take Care Clause and the Presidential Oath, in Article II, each prohibit the President from using any of the other powers available to him to place himself above the law. The Take Care Clause, which requires the President to "take Care that the Laws be faithfully executed," bars the President from betraying the public good to exempt himself from the law.[14] The constitutionally prescribed Oath contains a similar command to "faithfully execute" the office (i.e., the powers assigned) and to "preserve, protect and defend the Constitution of the United States."[15] It was no accident that the Framers included this requirement in the Constitution twice—for representative government only works if those in office act in good faith and in the public interest.

A self-pardon would run afoul of the constitutional commands in the Take Care Clause and Oath Clause. A self-pardon violates these requirements because it exempts the President from the consequences that our laws would otherwise impose. That means he is not faithfully executing the laws or the duties of his office. If the President can use the pardon power to protect himself from being held accountable for his actions through investigation or prosecution, it would effectively transform him into an authoritarian ruler, incapable of being limited by the law.[16]

A self-pardon would also turn the president into a judge in his own case, in defiance of a deeply-rooted constitutional principle. In the Federalist Papers, James Madison explained: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[17] Such is the case with a self-pardon, where the President's own corrupt interests would prevent the faithful application of the law. As the Supreme Court explained in *Biddle v. Perovich*, a pardon "is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[18] A self-pardon would enable the President to pass that judgment in his own case—reflecting no due consideration for the public welfare, only for himself.

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[12] *Cooper v. Aaron*, 358 U.S. 1, 23 (1958).
[13] *Zervos v. Trump*, 94 N.Y.S.3d 75 (N.Y. App. Div. 2019).
[14] U.S. Const. Art. II, § 3.
[15] U.S. Const. Art. II, § 1, cl. 8.
[16] *See, e.g.*, Brian C. Kalt, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779, 797 (1996-97) (The Constitutional provision in Art. I, § 3, cl. 7, stating that no one may "enjoy any Office" after impeachment, is inconsistent with a President pardoning himself. He would otherwise be "the only federal official who can deal himself a fruit of his office and enjoy it after he is gone," retaining immunity despite his impeachment.).
[17] The Federalist No. 10 (James Madison).
[18] 274 U.S. 480, 486 (1927).

For these reasons, the Office of Legal Counsel (OLC), which sits in the Department of Justice and provides the President with opinions on executive actions, has concluded that the President cannot self-pardon. As part of the executive branch, OLC usually favors broad readings of executive power. But on the issue of self-pardons, in a 1974 opinion written just three days before President Richard Nixon resigned, the head of the OLC wrote, "Under the fundamental rule that no one may be a judge in his own case," the President cannot issue himself a pardon.[19] Unable to pardon himself, President Nixon resigned shortly after the issuance of this opinion, a decision that has been hailed as preventing the constitutional crisis that a self-pardon would create. The prohibition on self-pardons thus reflects the basic principle, inherent in our constitutional system, that no person may be the judge in his own case.

These cardinal constitutional rules—that the President is not above the law and may not sit as a judge in his own case—likewise prohibit self-protective pardons. A "self-protective" pardon is one issued or offered for the purpose of protecting the President from an investigation. For example, if the President "dangles" a pardon before a witness in an investigation involving the President's own interests, in a way that influences the witness's testimony or prevents the witness from fully cooperating with investigators, that would be a self-protective pardon.

A self-protective pardon, like a self-pardon, seeks to place the President beyond the reach of the law. It violates the commandment of faithful execution of the law required by the Take Care Clause and the Oath. And it contradicts the prohibition on a person's being a judge in his or her own case.[20] As the Supreme Court has explained, "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case."[21] The pardon power does not alter this fundamental constitutional rule.

The pardon power is not exempt from laws prohibiting bribery and obstruction of justice.

A second, and related, restraint on the pardon power comes from criminal laws that bar everyone, including the President, from engaging in unlawful conduct. The Constitution empowers Congress to enact federal laws—and unless otherwise specified, these laws apply to all Americans, including the President. While Congress cannot legislate limits on the constitutional scope of the pardon power, the pardon power does not exempt federal officials,

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[19] *Presidential or Legislative Pardon of the President*, Op. OLC Supp. (Aug. 5, 1974), *available at* https://www.justice.gov/file/20856/download.

[20] *See, e.g.*, Kalt, *supra* note 16, at 795 ("If the Vice President cannot be trusted to preside over the President's trial [because he could make himself the next President], how can [the President] be trusted to preside over his own?").

[21] *In re Murchison*, 349 U.S. 133, 136 (1955).

including the President, from obeying otherwise applicable criminal laws in the course of granting or proposing to grant pardons.[22]

Let me offer two examples of how granting abusive pardons could run afoul of federal criminal laws enacted by Congress.

First, look at federal bribery laws. To protect the integrity of and trust in public servants, federal law prohibits officials from exchanging official acts for anything of value for themselves or family members.[23] With those laws in mind, consider a situation in which a Justice Department official takes a cash bribe in return for placing someone's name on an official Department list of proposed pardon recipients. This would appear to violate federal law. And the fact that the Constitution gives the pardon power to the executive branch does not mean that the Justice Department official is immune from investigation and prosecution for violating bribery laws.

The same would be true if the President himself were suspected of using the pardon power as part of a bribery scheme. When President Clinton pardoned Marc Rich in 2001 in what some believed could be a quid pro quo for donations, federal prosecutors empaneled a grand jury and spent years investigating. Congress also conducted extensive oversight investigations and prepared public reports on its findings. As then-Senator Jeff Sessions said when he endorsed that investigation, "From what I've seen, based on the law of bribery in the United States, if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, then that could be a criminal offense."[24] If the Marc Rich pardon had been found to be part of a quid pro quo, and the thing of value materially influenced President Clinton's decision to issue the pardon, then the Rich pardon would have violated the bribery statute.

Similarly, federal laws against obstruction of justice come into play if an executive branch official, including the President, issues or promises a pardon in order to impede an investigation. Federal obstruction laws, which bar corruptly motivated actions, exist to ensure that those with access and power cannot evade accountability for their actions. To guarantee a fair and independent criminal process, federal law prohibits hindering a criminal investigation "by means of bribery" or by "corruptly persuad[ing]" a witness or potential witness to withhold information about the commission of a federal offense.[25]

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[22] *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[23] 18 U.S.C. § 201.
[24] David Johnston, *U.S. Is Beginning Criminal Inquiry in Pardon of Rich*, N.Y. Times (Feb. 15, 2001), https://www.nytimes.com/2001/02/15/us/us-is-beginning-criminal-inquiry-in-pardon-of-rich.html.
[25] 18 U.S.C. §§ 1510, 1512.

These laws apply to executive branch officials, including the President, just as they apply to all other Americans. And courts have repeatedly held that public officials cannot evade liability for obstruction of justice because they have used their official powers to interfere in an investigation. So if the President, with corrupt intent, promises or issues a pardon to prevent a witness from cooperating with an investigation or to influence witness testimony, that could constitute obstruction of justice.[26]

The President can run afoul of obstruction laws by dangling or promising pardons to influence a witness. According to recent news reports, President Trump's lawyers discussed the possibility of pardons with Michael Flynn's and Paul Manafort's counsel, and Trump himself may have led Michael Cohen to expect a pardon.[27] The mere discussion of potential pardons could amount to obstruction of justice if a pardon is offered to "corruptly persuade" a witness "not to convey information about the commission of a federal offense."[28] The factual determinations necessary to determine whether dangled pardons violate the criminal laws can, and should, be determined through law enforcement investigations or congressional oversight inquiries.

In short, if the President violates federal criminal statutes through offering or issuing a pardon, he is not immune from accountability under the law. While there is debate about whether a sitting President can be indicted while in office, there is no doubt he can be subject to prosecution upon leaving office. The President can also be subject to other forms of accountability from Congress, up to and including impeachment, for issuing or offering abusive and unlawful pardons.

Finally, the mere fact that a pardon was issued as part of a criminal act does not, by itself, make the pardon invalid, so long as it was within the President's constitutional power to grant it. But a pardon granted for a bribe or granted to obstruct justice would likely also violate the Take Care Clause and Oath of Office. This would not be a good faith execution of the laws. And an unconstitutional pardon, like any other unconstitutional act, can be found to be invalid.

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[26] *See Law Professor Letter on President's Article II Powers*, Protect Democracy (June 4, 2018), *available at* https://protectdemocracy.org/law-professor-article-ii/; Daniel J. Hemel and Eric A. Posner, *Presidential Obstruction of Justice*, 106 Calif. L. Rev. 1277 (2018).

[27] Michael S. Schmidt, et al., *Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort*, N.Y. Times (Mar. 28, 2018), https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html; Maggie Haberman, *Trump Asserts That Michael Cohen Asked Him Directly for a Pardon and Was Told No*, N.Y. Times (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/cohen-pardon.html.

[28] *Supra* note 25; *see also* Paul Rosenzweig and Justin Florence, *Trump cannot use a pardon to stop Manafort's cooperation*, Wash. Post (Sep. 14, 2018), https://www.washingtonpost.com/opinions/trump-cannot-use-a-pardon-to-stop-manaforts-cooperation/2018/09/14/c8338d96-b770-11e8-a2c5-3187f427e253_story.html.

The President may not use the pardon power to undermine the judiciary's role in protecting constitutional rights.

I will turn now to a third constraint on the pardon power: it cannot be used to nullify the ability of the federal courts to protect constitutional rights. The federal courts play a unique role in protecting individual constitutional rights by standing as a bulwark against the attacks of the political branches. As a result, allowing the pardon power to undermine the judiciary's ability to protect individual constitutional rights is a serious threat to all Americans and one that undermines our system of checks and balances.

In our constitutional system, the Article III courts help safeguard individual constitutional rights. As Chief Justice Marshall wrote in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[29]

One power that courts rely on to protect constitutional rights is the contempt power—the ability to punish those who violate court orders. A pardon may not be issued that undermines a court's ability to use the contempt power to enforce its orders protecting constitutional rights.

The Supreme Court has held that the judiciary's role in our constitutional system hinges on the ability of courts to prosecute contempt independently—that is, without relying on the whims of the executive branch.[30] Specifically, the Supreme Court held that "[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated."[31] "The ability to punish disobedience to judicial orders," the court reasoned, "is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches. 'If a party can make himself a judge of the validity of orders which have been issued, and by his own disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.'"[32]

It is foundational to our constitutional system that courts can provide redress when constitutional rights are violated, and the contempt power is an essential tool available to courts to do this. The President may not use the pardon power to make "a mere mockery" of the courts' ability to protect constitutional rights. For could he do so, we would no longer be a nation of laws, but

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[29] 5 U.S. 137, 163 (1803).
[30] *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).
[31] *Id.* at 796.
[32] *Id.* (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

instead a nation subject to the whims of one man. This is all the more true, of course, because a pardon that enables someone to violate people's constitutional rights would contradict the President's obligations under the Oath and the Take Care Clause.

Congress should use its authority to prevent the President from abusing the pardon power and to hold him accountable if he does abuse it.

Congress has extensive oversight authority to investigate wrongdoing by the executive branch. It should bring that authority to bear on abuses of the pardon power. When it appears that the pardon power may have been used unlawfully, including through offering or dangling a pardon—for any of the reasons described above—Congress should investigate. Congressional committees should request or subpoena documents and witness testimony to determine the context of and the intent behind the issuance or offering of particular pardons. As representatives of the American people, Congress should also ensure there is transparency by issuing public reports regarding what it learns from investigations.

Ultimately, if Congress identifies abuses of the pardon power, it may use all forms of accountability to protect the Constitution and the public. In our constitutional democracy, government officials work for the public and are constrained by the Constitution and the laws that the public's representatives enact. If Congress determines that a President is seeking to use the pardon power to circumvent the Constitution or to place himself above the law, then censure or impeachment are available as remedies.

Furthermore, Congress can and should use its legislative authority to ensure its ability to conduct meaningful oversight and accountability proceedings concerning unlawful or corrupt pardons. That can help Congress fulfill its oversight responsibilities to prevent abuse of power and uphold the anti-corruption laws it has enacted. Through careful and measured oversight, Congress can limit the abuse of the pardon power and thus ensure that this power can continue to be used for its intended purposes of providing mercy and justice.

So I urge the Committee to continue conducting oversight in this area. Congress has not only the right but the responsibility to serve as a check on the President's powers. The people have elected Congress to be their voice in government and to reflect their interests. If the President is allowed to exercise an absolute and unlimited pardon power, the American people will no longer have a President, but instead a king. Congress has the power to ensure that the President is not above the law.

The pardon power is a noble provision of the Constitution that allows for mercy and justice. It reflects principles of redemption and an admirable humility about our system of governance. It saves people like Eugenia Marie Jennings and Olgen Williams from losing years of their lives to

unjust punishments. If it is allowed to be abused, that abuse will not only undermine the rest of the Constitution and fundamental rule-of-law values, but also the pardon power itself.

Thank you Mr. Chairman.

Mr. COHEN. Thank you, sir.

Mr. James Pfiffner, university professor at the Schar School of Policy and Government at George Mason University, previously named and mentioned in the testimony of Mr. Florence, George Mason. His major areas of expertise are the U.S. Presidency, American national government, the national security policymaking process, and public management.

He previously served as special assistant in the Director's office at the Office of Personnel Management and has taught at California State University, Fullerton, and University of California, Riverside. He has three degrees, a B.A., an M.A., and a Ph.D. in political science, from the University of Wisconsin in Madison.

You are recognized for 5 minutes, sir.

STATEMENT OF JAMES PFIFFNER

Mr. PFIFFNER. Chairman Cohen, Ranking Member Johnson, distinguished members of the committee, thank you very much for inviting me here to talk about the President's constitutional power to pardon.

The text of the Constitution is pretty straightforward. Unlike most other powers of the President, it is unchecked, there is no check, virtually no check from the other branches of government.

The original purposes of the pardon power were two. First, to benefit an individual as an act of mercy, maybe justice erred, there was a problem, and also to temper justice by mercy.

But the second, and probably more important role, is that of the public good. And James Wilson and Alexander Hamilton mentioned those things, for instance, to get the testimony of somebody who has committed a crime, to restore tranquility after unrest.

But perhaps the broadest formulation of the pardon power is by President Ford, when he said he granted a full, free, and absolute pardon onto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed, or may have committed, or taken part in during the period when he was President.

In terms of the limits of the pardon power, as has been mentioned, first, impeachment, of course, and second, that it must be a Federal offense, of course, as the Supreme Court has heard arguments on Gamble v. The United States where the Dual Sovereignty Doctrine has been challenged.

Can the pardon power be abused by the President? And my suggestion is, yes. And it is derived from the English history, medieval kings, who arbitrarily often enriched themselves or promised pardon in favor for military service.

Now, George Mason, the patron saint of my university, as mentioned before, was against the pardon power. He was an anti-Federalist. He thought that Presidents would abuse it, and he said Presidents ought not to have the power of pardoning: If he has the power of granting pardons before indictment or conviction, may he not stop inquiry and prevent detection of his own crimes.

But, of course, Hamilton and Madison won that argument and they said, if that is a problem, impeachment is the remedy for any abuse of the pardon power.

Now, over U.S. history, over 30,000 pardons have been made by Presidents, but most of them have gone through the Office of Par-

don Attorney in the Department of Justice. The most contentious ones, a colleague, Jeffrey Crouch at American University, has written a book and several articles arguing that President George H.W. Bush, who pardoned some of the Iran-Contra figures, President Clinton's pardons of Roger Clinton and fugitive Marc Rich, President George W. Bush's commutation of Scooter Libby's 30-month prison sentence for perjury and obstruction of justice were potentially abuses. But he also mentioned President Trump and argued that his use of the pardon power was potentially for political purposes.

But whether any of these instances is an abuse of the pardon power I think is a matter of political judgment and not of law or the Constitution. The only remedies for bad Presidents or judgments about pardons are political and not constitutional.

On the other hand, a pardon might be legally questionable if there is, as been mentioned, an explicit quid pro quo, a pardon in exchange for silence or perjury. But, of course, it would depend on the corrupt intent and the nexus, which is, of course, difficult to prove. That is why President Ford was so careful about insisting that there was no prior agreement with him and President Nixon before he pardoned him.

Finally, just a few points about Presidential self-pardons. The self-pardon was never mentioned in the Constitution, constitutional convention, the Federalist Papers. No President has attempted it. No Supreme Court has opined on it. No President has publicly considered it except, of course, President Trump, has been quoted: "I have the absolute power to pardon myself."

The arguments in favor of self-pardons are that they are not explicitly forbidden in the Constitution, but, of course, the Constitution doesn't explicitly forbid a whole lot of other things.

The arguments against, as has been mentioned in Federalist 10, James Madison said that no man should be allowed to be a judge in his own cause. And Chief Justice John Marshall in Marbury v. Madison said that one of the core principles of the U.S. justice system is that the government of the United States has been emphatically determined a government of laws and not of men. A self-pardon would allow the President to put himself above the law.

In writing the Constitution, the Framers didn't mention a whole lot of other things, and it is arguable that they didn't even consider this as a possibility.

And perhaps most importantly, a self-pardon would vitiate the provision of the Constitution that allows for prosecution after removal from office. If there were self-pardons, that part of the Constitution would be meaningless.

Thank you.

[The statement of Mr. Pfiffner follows:]

Statement of James P. Pfiffner
University Professor, George Mason University

Before the

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives

Hearing on
The Constitutional Role of the Pardon Power

March 27, 2019

Chairman Cohen, Ranking Member Johnson and distinguished members of the Committee, thank you for inviting me to offer my views on the President's constitutional power to grant pardons.

The text of the Constitutional provision on pardons seems straightforward: Article II, Sec. 2 provides that, the President "shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Aside from the exception for impeachment, the statement seems unqualified and plenary. And indeed, the pardon power is one of the most unquestioned powers of the president. There is no ready check or limit from the other branches, as there are with most other powers of the president. Supreme Court decisions have affirmed the president's pardon power and protected it from congressional interference, yet the jurisprudence on pardons is not simple.

This analysis will examine the origins of the pardon power in Anglo-American jurisprudence, examine the scope of the pardon power, explore its limitations, assess its potential for abuse, and take up the possibility of presidential self pardons.[1]

Origins and Purpose of the Pardon Power

The roots of the president's pardon power are found in medieval English history and jurisprudence.[2] The Framers of the Constitution adapted the pardon provision from the royal English Prerogative of Kings, which dated from before the Norman conquest. The royal power was absolute, and the king often granted a pardon in exchange for money or military service. A number of times, Parliament tried unsuccessfully to limit the king's pardon power. It finally succeeded to some degree in 1701 when it passed the Act of Settlement, which exempted impeachment from the royal pardon power.

During the period of the Articles of Confederation, the state constitutions conferred pardon powers of varying scopes on their governors, but neither the New Jersey Plan nor the Virginia Plan presented at the Constitutional Convention included a pardon power for the chief executive. Charles Pinckney, in conjunction with the support of Alexander Hamilton and John Rutledge,

introduced a proposal to give the chief executive the same pardon power as enjoyed by English monarchs, that is, complete power with the exception of impeachment.[3]

George Mason argued that treason ought also to be excepted and warned of the possibility of presidential abuse of the pardon power, 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."[4] James Wilson, however, argued that pardons for treason should be available and successfully argued that the power would be "best be placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted."[5] A proposal for Senate approval of presidential pardons was also defeated in the Convention.

In debates over the ratification of the Constitution, Alexander Hamilton in Federalist 74 defended the pardon power and argued that the judicial process might occasionally err and that at times justice should be tempered by mercy. "The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." In 1833, Chief Justice John Marshall in *United States v. Wilson* commented on the benign aspects of the pardon power: "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."[6]

Another purpose of the pardon power focused not on obtaining justice or forgiveness for the person pardoned, but on the public good. During the debates in 1787, Luther Martin argued that any pardon should be considered only after a crime had been prosecuted, and moved to insert the words "after conviction" after "reprieves and pardons." But James Wilson countered that "pardon before conviction might be necessary in order to obtain the testimony of accomplices," and Martin withdrew his motion.[7] In addition, Hamilton argued in Federalist 74 that in cases of "insurrection or rebellion there are critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth." The pardon power may be exercised at any time after the commission of a crime, even before indictment or conviction.

Thus the original purposes of the pardon power, as argued by the Framers of the Constitution were the tempering of justice with mercy with respect to individuals and the broader purposes of the public good.

Scope of the Pardon Power

Due to the straightforward constitutional provision, the scope of the pardon power is sweeping. In *Ex Parte Garland*, Justice Field wrote, "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it released the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence . . . . [a pardon] restores him all his civil rights; it makes him as it were, a new man, and gives him a new credit and capacity."[8]

The power to pardon also includes more limited acts of clemency, such as reprieves (delay of sentencing) and commutation (reducing) of sentences or penalties. The scope of a commutation

merely reduces the penalty but does not negate or expunge the conviction itself. Pardons may be conditional on specific actions by the pardoned, such as taking a rehabilitation course or public service; the conditions, however, may not be harsher than the imposed sentence.

The pardon power also extends to amnesties for classes of people. For instance in 1795, George Washington pardoned participants in the Whisky Rebellion, in part because the rebellion had already been defeated. After the Civil War, Presidents Lincoln pardoned "all persons who have, directly or by implication, participated in the existing rebellion."[9] Lincoln's and Andrew Johnson pardons included about 200,000 people who had participated in the Confederate rebellion.[10] After the World War II, President Truman, restored civil rights to 9,000 of those convicted of desertion during peacetime. President Ford granted amnesty to those who avoided service in the Vietnam War, conditional on them turning themselves in and serving two years in public service job. President Carter later pardoned draft evaders, but not deserters, with no requirement of public service.[11]

Although Congress cannot limit the president's pardon power, it can protect individual witnesses from prosecution for information given in Congressional testimony and pass amnesty laws.[12] It can also reduce penalties, as it did in Fair Sentencing Act of 2010, reducing sentences for those convicted of using of crack cocaine, which were harsher than for users of powder cocaine.[13]

Pardons can be limited, conditional, or sweeping, as was President Ford's pardon of Richard Nixon. Ford 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 the period from January 20, 1969 through August 9, 1974" (emphasis added).[14] Thus the pardon was not limited to Watergate related matters, but also included any other crimes, such as Nixon's backdating of his tax declarations, which were considered by the House Judiciary Committee as a possible article of impeachment.[15]

Limits on the Pardon Power

The only explicit limits in the constitutional text are with respect to impeachment and that the law broken must be a federal law. The crime must already have been committed, or the pardon power would amount to presidential authority to suspend the law, a practice of British absolute monarchs, which was rejected by the Framers of the Constitution.

At the Constitutional Convention Roger Sherman suggested conditioning the pardon power on Senate approval and moved "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate." But the motion was defeated by a vote of 8 to 1.[16] Edmund Randolph wanted to "except cases of Treason" from the pardon power, because "The President may himself be guilty. The Traytors my be his own instruments." But James Wilson countered that the power should remain the president's prerogative and, "If he be himself a party to the guilt he can be impeached and prosecuted."[17]

Though pardons have been litigated, the Court has consistently refused to limit the President's discretion. Chief Justice Warren Berger in *Shick v. Reed*, wrote that "that the power flows from

the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."[18]

The Constitution limits the pardon power to federal offences, so violations of state laws can be prosecuted, despite a presidential pardon for the same crime. Some have argued that this violates the protections against double jeopardy in the Fifth Amendment. Thus far, the Supreme Court has adhered to the dual sovereignty doctrine, according to which the states are separate governments with their own sovereignty and thus can try persons for violations of state law. Federal prosecutors have used this doctrine to try civil rights crimes for which local juries would not convict.[19]

The answer to the question of whether a person must accept a pardon in order for it to take effect is – probably, or at least that a pardon can be rejected (though not a commutation). Justice John Marshall in *US v. Wilson* in 1833 ruled that a pardon must be accepted in order for it to become official. "A pardon is an act of grace" for 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" (emphasis in original).[20]

But in 1915 Justice McKenna, writing for the Court in *Burdick v. US*, ruled that a pardon can be rejected by the intended recipient.[21] Burdick was accused of a crime and was called to testify before a grand jury. He refused on the grounds that his testimony might incriminate himself. President Wilson, wanting to obtain his testimony regarding his confederates, offered him a full pardon if he would testify, but Burdick refused to accept the pardon because, he argued, it would imply his guilt. The Court ruled that since acceptance of the pardon might lead to the "confession of guilt implied in the acceptance of a pardon [it] may be rejected." Thus Burdick did not have to accept the pardon because it imperiled his Fifth Amendment protection. (The court distinguished amnesty from pardons, noting the recipients of amnesties do not need to accept pardons.)

On the other hand, a commutation or remission of a sentence cannot be refused by the recipient of leniency. In *Biddle v. Perovich* President Coolidge commuted a federal death sentence, and he was transferred to the State of Connecticut, which convicted him of the murder and sentenced him to hang. Biddle appealed by arguing that he had not accepted the president's commutation of his sentence and thus it was not valid. Justice Oliver Wendel Holmes wrote that the commutation of a sentence did not have to be accepted by the recipient in order to be valid. "A pardon in our days is not a private act of grace," rather "it is a part of the constitutional scheme" and the public welfare is more important than a criminal's wishes. He concluded "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done."[22]

Does acceptance of a pardon amount to an admission of guilt? From Judge McKenna's ruling in *Burdick*, it would seem that there is a strong implication that "by confession of guilt implied in the acceptance of a pardon [it] may be rejected." On the other hand, a president may pardon a

person whom he believes to be completely innocent and was wrongfully convicted. Acceptance in such a case would not seem to be an admission of guilt.

Although a pardon of an individual removes all legal effects of his conviction, it does not expunge the record of conviction. Thus if a prior conviction of a felony would prevent a person from being admitted to the bar in a state, the conviction can be taken into account regarding the character of the person.[23]

Abuse of the Pardon Power?

English Kings often exercised their pardon prerogative arbitrarily, and often to enrich themselves or to conscript soldiers, promising a pardon in exchange for military service. Parliament tried to limit the royal prerogative a number of times, but it was not successful until the Settlement Act of 1700, which disallowed pardons in cases of impeachment. Since the King or Queen had absolute authority, the monarch could not be impeached, but impeachment was a useful tool for the parliament to use against the crown by removing ministers from office.[24]

The Framers, particularly the Anti-Federalists, were aware of the abuse of the pardon power in English history, and were wary of granting too much power to the executive of the new republic. During the deliberations over executive power in the Constitution, George Mason objected to an unrestricted power to pardon, particularly the exception to treason. "The President of the United States has the unrestricted power of granting pardons for treason, which may be some 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."[25]

Later, during the Virginia debates over ratifying the Constitution, Mason continued his arguments against the pardon power. "[T]he President ought not to have the power of pardoning, because he may frequently pardon crimes which were advised by himself. . . . If he has the power of granting pardons before indictment, or conviction, may he not stop inquiry and prevent detection?"[26] James Madison addressed Mason's objection to the president's pardon power by arguing that abuse of he pardon power could be remedied by impeachment: "If the president be connected in any suspicious manner with any persons, and there be grounds to believe he will shelter himself; the house of representatives can impeach him. . . . This is a great security."[27]

Hamilton in Federalist 74 also addressed the issue of allowing the president to issue pardons before indictment or conviction, by making the point that a "well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth." He also argued that the executive would possess a "sense of responsibility" that "would naturally inspire scrupulousness and caution" lest he risk impeachment.

For most of the more than 30,000 pardons presidents have made, pardons have been handled by the Office of the Pardon Attorney in the Department of Justice, which was created by Congress in 1891.[28] In the normal course of pardon applications, they are not considered until five years after a sentence has been served, and they entail assiduous research on the background of each individual case. If the Pardon Attorney concludes that a pardon is warranted, the

recommendation is sent to the Attorney General, who then forwards the recommendation to the president, if he or she agrees with the pardon office.

The most contentious pardons, however, are often made by the president without the full participation of the Pardon Attorney. Jeffrey Crouch argues that before Watergate, president used the pardon power for the traditional purposes of mercy and the public good. But after Watergate, presidents have occasionally used the pardon power for their own political advantage or to shut down investigations. He mentions particularly President George H.W. Bush who, after the election in 1992, pardoned Iran-Contra figures Elliot Abrams, Duane Claridge, Robert MacFarlane, and Clair George, all former Reagan administration officials in 1992. Bush also pardoned Caspar Weinberger, who might have called the former president to testify at his trial.[29] Crouch also argues that some of President Clinton's pardons and commutations at the end of his term were inspired by his personal interests, for example his pardons of his brother, Roger Clinton, and fugitive Marc Rich, whose ex-wife had contributed significantly to Clinton's presidential library.

President George W. Bush commuted Scooter Libby's 30 month prison sentence stemming from his conviction for perjury and obstruction of justice regarding the public revelation of Valerie Plame's status as a CIA officer. Crouch notes that a full pardon would preclude a refusal by Libby to testify about the matter because of the Fifth Amendment prohibition of forced self incrimination. Granting only a commutation of his sentence would have allowed Libby to refuse to testify.[30]

In a recent paper Crouch criticized President Trump's use of the pardon for what Crouch believes are political purposes rather than reasons of mercy or the public good.[31] Unlike most presidential pardons, Trump's pardons seemed to be intended to send political messages and were issued early in his presidency and not after the usual Pardon Attorney process.

Regardless of one's judgment about or disapproval of presidential pardons that seem to be motivated by personal political advantage rather than the public good, presidential pardons are the president's constitutional prerogative. Whether any one of these instances is an abuse of the pardon power is a matter of political judgment, not of law or the Constitution. The only remedies for bad presidential judgment about pardons are political, not constitutional.

But could a presidential pardon run afoul of the law or Constitution? A pardon might be legally questioned if there were an explicit quid pro quo, e.g. an offer of a pardon in exchange for lying to a law enforcement officer or to Congress. This could be judged to be bribery or obstruction of justice. This is why President Ford was so careful about insisting that there was no prior agreement that he would pardon President Nixon after he resigned from office. Ford testified to Congress that there was no deal or agreement. If there were, it could have been considered bribery. Nixon would resign and give Ford the Presidency, if Ford agreed to pardon Nixon. Bribery is explicitly listed as an impeachable offense.[32]

Some have argued that Congress cannot impeach the president for exercising his constitutional powers, such as the pardoning power. But Justice Warren Berger in *Schick v. Reed* argued that any limitation on the pardon power, if such limit exists, "must be found in the Constitution

itself." Bribery is specifically mentioned in the impeachment clause of Article II. The Federal Bribery Statute (18 USC prec. Sec. 201(b) states that "whoever directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any official act" is guilty of bribery. So if it were proven that a president granted a pardon (clearly something of value) in exchange for the silence of a witness in court or before Congress, an impeachment charge of bribery could be considered. Thus bribery could be considered to be a constitutional limit to the president's pardon power.

Presidential Self Pardons

A self pardon was never considered in the Constitutional Convention or the Federalist Papers; no president has attempted it; and there are no Supreme Court discussions of the possibility. Although President Nixon is reported to have considered a self pardon for his crimes during Watergate, no president has publicly considered a self pardon until President Trump tweeted, "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself."

Although at first glance, a self pardon may seem implausible, constitutional scholars are split on the legitimacy of presidential self-pardons. The strongest argument in favor of self-pardons is the fact that the Constitution does not explicitly forbid self pardons.[33] The Framers did forbid pardons in cases of impeachment, and they explicitly rejected excepting treason from the pardon power or requiring Senate concurrence. The argument proceeds that if the Framers had wanted to exclude self pardons, they would have said so in the Constitution. In addition, they considered impeachment to be an effective preventative and remedy for any presidential abuse of power.

The Court in *Ex parte Garland* (1866) declared that the pardon power is "unlimited" (except for impeachment) and "may be exercised at any time after [the crime's] commission." More recently, Chief Justice Berger in *Schick v. Reed* (1974) declared the pardon power to be "plenary," and thus not limitable by Congress or the courts. Scholars Nida and Spiro conclude that "the power is plenary and may be exercised at any time." They conclude by recommending a constitutional amendment to preclude self pardons.[34]

The arguments against self pardons begin with generally recognized principles of justice in the United States. In Federalist 10, James Madison echoed the long accepted principle of Anglo-American jurisprudence that self judgment presents an unacceptable conflict of interest. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." A presidential self pardon clearly violates this principle.

Chief Justice John Marshall declared in *Marbury vs. Madison* a core principle of US justice. [The] "government of the United States has been emphatically termed a government of laws, and not of men." One of the pillars of the rule of law is that no one is above the law. A self pardon would allow the president to place himself above the law by committing crimes and then pardoning himself.

In writing the Constitution, the Framers did not forbid pardons before a crime was committed, presumably because such a provision was superfluous and it would amount to granting the

president the power to suspend the laws. The issue never came up at the Constitutional Convention. The same point might apply to a self pardon; the Framers may not have debated it because a self pardon was tantamount to the doctrine of sovereign immunity (that the king can do no wrong) in an absolute monarchy, a system of government they reviled.

Although Justice Berger in Schick called the pardon power "plenary," he also said that "that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself." There is an explicit constitutional provision that also pertains to the pardon power. Article I, Section 3 provides that impeachment cannot extend beyond removal from office and prohibition from holding any further office in the U.S. government. If the president could pardon himself, why would the Framers have explicitly provided for post-removal "Indictment, Trial, Judgment and Punishment, according to Law"?

A self pardon could vitiate this provision of the Constitution by allowing a president threatened by impeachment to wait until the Senate was poised to vote on removing him from office, and then pardon himself from any crime he may have committed. Such an action would make the Article I provision for possible prosecution after removal from office meaningless. Given the post-impeachment and removal provision in the Constitution, it is entirely plausible that the idea of a self pardon did not occur to the Framers.

In 1973 the Office of Legal Counsel issued a three page memorandum stating, "Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself." However, the OLC memo also suggested that a president could take advantage of the 25th Amendment: "If the President declared that he was temporally unable to perform the duties of his office the Vice President would become Acting President and as such he could pardon the President. Thereafter the President could resign or resume the duties of his office." [35] In such a case the issue of conspiracy and possible bribery would arise. Would a president be offering something of value (i.e. the presidency, though for a short period of time) for an official act (i.e. a pardon)?

Self pardons also present an anomaly. A president could embezzle money in secret (or even commit murder), and then in his last days in office pardon himself for any crimes he may have committed as president (per President Ford's formulation). In such a case would the president be faithfully executing the law? Some might argue that impeachment would be a deterrent for self pardons, but a shrewd president could wait until the end of his term and proclaim a self pardon; in such a case impeachment would provide no deterrent or remedy because there would not be sufficient time for House and Senate consideration.

Though the issue of self pardons has not been legally or constitutionally settled, the arguments against allowing self pardons seem to outweigh the arguments in favor.

Conclusion

This statement has argued that the president's pardon power, is in many ways, plenary. The Framers of the Constitution intended the power to be broad and did not provide for any explicit check on this presidential prerogative. At times, they seemed to think that impeachment would

be a ready remedy for abuses of presidential power related to the issuance of pardons. Nevertheless, US jurisprudence and experience have shown that the ramifications of the pardon power are complex. Though legal limits are few, presidents may abuse their power by issuing pardons for offences in order to protect themselves from possible legal jeopardy or embarrassment. The judgments about presidential abuse of the pardon power, however, are primarily political and cannot be easily adjudicated by laws or the Constitution. Finally, though no one can predict what the Supreme Court might rule, the arguments against presidential self pardons seem compelling.

ENDNOTES

[1] This statement is partially based on my entry on the pardon power in *The Heritage Guide to the Constitution* edited by Matthew Spalding and David Forte (Washington: Regnery, 2005, 2014).
[2] See Wiliam F. Duker, "The President's Power to Pardon: A Constitutional History," *William and Mary Law Review*, Vol. 18, No. 3 (1977).
[3] Ducker, "President's Power to Pardon," p. 501.
[4] *The Records of the Federal Convention of 1787*, edited by Max Farrand (New Haven: Yale University Press, 1966), Vol. II, p. 639.
[5] Farrand, Vol. II, p. 626.
[6] John Marshall, *US v. Wilson* 1833, p. 160.
[7] *The Records of the Federal Convention of 1787*, edited by Max Farrand (New Haven: Yale University Press, 1966), (hereinafter Farrand), Vol. II, pp. 422, 426.
[8] *Ex Parte Garland* 4 Wall 333, 380 (1866). Edward Corwin, however, argued that Field's statement is "much too sweeping." Edward S. Corwin, *The President: Office and Powers, 1787-1984* (New York University Press, 1984), p. 183.
[9] Ducker, "President's Power to Pardon," p. 511.
[10] Other amnesties by Presidents Adams, Madison, and Theodore Roosevelt are listed in Edward S. Corwin, *The President: Office and Powers, 1787-1984* (New York University Press, 1984), p. 181.
[11] David Gray Adler, "The President's Pardon Power," in Thomas E. Cronin, ed. *Inventing the American Presidency* (University Press of Kansas, 1989), pp. 218-219.
[12] Such as the Amnesty Act of 1872, which lifted penalties imposed on former Confederates.
[13] Public Law 111-220.
[14] Some scholars argue that a pardon can only be issued after a process of adjudication. See Mark J. Rozell, "The Presidential Pardon Power: A Bibliographic Essay, *Journal of Law & Politics*, Vol. V, 549, p.460.
[15] *Federal Register*, Vol. 39, pp. 32601-2 (1974).
[16] Farrand, Vol. II, p. 419.
[17] Farrand, Vol. II, p. 626.
[18] *Schick v. Reed*, 410 US 256.
[19] In 2018 the Supreme Court heard argument in Gamble v. United States challenging the double sovereignty doctrine, though most justices seemed disinclined to overturn it. New York State also considered changing its law that prohibits prosecution of a person who is being prosecuted or has pleaded guilty in federal court. See Garrett Epps, "There's an Exception to the Double-Jeopardy Rule," *The Atlantic* (December 5, 2018); and Richard Wolf, Supreme Court justices defend' double jeopardy' exception," *USA Today* (December 6, 2018).

[20] *United States v. Wilson*, 32 US 150 (1833).
[21] *Burdick v. US*, 236 US 79 (1915). For a discussion of Budick, see Corwin, *The President*, p.182.
[22] *Biddle v. Perovich* (274 US 480) 1927.
[23] Corwin, *The President*, pp. 188-189.
[24] David Gray Adler, "The President's Pardon Power," in Thomas E. Cronin, ed. *Inventing the American Presidency* University Press of Kansas, 1989), pp. 209-235.
[25] Farrand, Vol. II, p. 639.
[26] The Founders' Constitution, Debate in Virginia Ratifying Convention, 18 June 1788, Elliot 3:496-498. Volume 4, Article 2, Section 2, Clause 1, Document 6
http://press-pubs.uchicago.edu/founders/documents/a2_2_1s6.html
The University of Chicago Press. Elliot, Jonathan, ed. The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787. . . . 5 vols. 2d ed. 1888. Reprint. New York: Burt Franklin, n.d.
[27] Powers of the President, [18 June] 1788, Robertson, Virginia Debates, pp. 353–54.
https://founders.archives.gov/documents/Madison/01-11-02-0097.
[28] Jeffrey Crouch, "President Donald J. Trump and the Clemency Power," paper presented at the 2018 Annual Meeting of the American Political Science Association, Boston, MA. For a detailed, historical analysis, see Crouch, *The Presidential Pardon Power* (University Press of Kansas, 2009).
[29] Jeffrey Crouch, "Presidential Misuse of the Pardon Power, *Presidential Studies Quarterly*, Vol. 38, No. 4 (December 2008), p.730.
[30] Jeffrey Crouch, "Presidential Misuse of the Pardon Power, *Presidential Studies Quarterly*, Vol. 38, No. 4 (December 2008), p. 731.
[31] Jeffrey Crouch, "President Donald J. Trump and the Clemency Power," paper presented at the 2018 Annual Meeting of the American Political Science Association, Boston, MA.
[32] On the Ford pardon, see Mark J. Rozell, "President Ford's Pardon of Richard M. Nixon: Constitutional and Political Considerations," *Presidential Studies Quarterly* (Vol. 24, No. 1 (Winter 1994), pp. 121-137.
[33] For an argument that the president may constitutionally pardon him/herself, see Robert Nida and Rebecca L. Spiro, "The President as his own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power, *Oklahoma Law Review*, Vol. 52, p. 197. Jeffrey Crouch also agrees, "President Donald J. Trump and the Clemency Power," paper presented at the 2018 Annual Meeting of the American Political Science Association, Boston, MA. For an argument that a self pardon would be unconstitutional, see Brian C. Kalt, "Pardon Me? The Constitutional Case against Presidential Self-Pardons," *Yale Law Journal*, Vol. 106, 779 (1996).
[34] Robert Nida and Rebecca L. Spiro, "The President as his own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power, *Oklahoma Law Review*, Vol. 52, p. 222.
[35] Department of Justice, Office of Legal Counsel, "Presidential or Legislative Pardon of the President," Mary C. Lawton, 1973, pp. 370372.

Mr. COHEN. Thank you, sir.

And now for the testimony of Mr. Andrew Kent.

Collegiate School students, listen well.

Mr. Kent is a professor of law at Fordham Law School, also in the chairman's district, where he has taught since 2007. Teaches courses in con law, Federal courts, foreign relations, professional responsibility, and national security law. He served as a visiting professor at Columbia University School of Law.

He was a law clerk for the Honorable Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit and for the Honorable Carol Amon of the U.S. District Court for the Eastern District of New York. He received his J.D. from Yale Law School and his A.B. in social studies magna cum laude from Harvard College.

Professor Kent is also the father of at least two up-and-coming young scholars.

You are recognized for 5 minutes.

STATEMENT OF ANDREW KENT

Mr. KENT. Chairman Cohen, Ranking Member Johnson, members of the committee, thank you very much for having me here today to talk about some difficult and somewhat novel constitutional questions about the use of the pardon power. My written testimony covers a number of topics, but I thought I would focus primarily on the question of whether a President could pardon him or herself.

My conclusion is that, although this is a difficult question, I think the best answer is no, for some of the same reasons as my fellow panelists, but also for reasons of some recent scholarship that I have been working on with my two Fordham Law colleagues, Ethan Leib and Jed Shugerman.

We are in the process of publishing a paper in the Harvard Law Review that for the first time really explores in detail where some extremely important language in Article II of the Constitution comes from, the so-called Take Care Clause, which binds a President to take care that the laws be faithfully executed, and the Presidential Oath, which must be taken before assuming the office, in which the President is required to swear or affirm that he or she will faithfully execute the Office of the President.

There have been a lot of claims by courts and commentators over the years about what these clauses mean, but really nobody has figured out where they came from. And we did, and found that the roots of these clauses go back at least a thousand years in English law. Certainly by the time of Magna Carta it was well established that many different kinds of executive officers had to take oaths and sometimes were also bound by commands as well to faithfully execute their offices.

We found that these clauses over time developed three meanings, what we call kind of the three core principles of faithful execution for executive office holders.

They are, first, that the office holder must act diligently, honestly, carefully, in good faith, and impartially when they execute the law or their office.

Second, the officer has a duty not to misuse an office's funds or take unauthorized profits from the office.

And third, the command of faithful execution is a promise not to act ultra vires, beyond the jurisdiction or scope of one's office.

And one of our interesting findings was that it was not only in some very powerful offices in Anglo-American history where these commands were imposed, offices like colonial governors, governors of the American States post-independence, senior officials under the Articles of Confederation government, but also there were many lowly offices that had these commands as well, offices like the vestryman of a church, a weigher of bricks, or an inspector of agricultural products. So it was both high and low that were commanded to faithfully execute their offices.

And as we note, these commands of faithful execution and their meanings actually look quite a bit like what today we call fiduciary duties that a fiduciary has. And at the core here thus is a duty to act in good faith, for the public interest, not for reasons of self-dealing, self-protection, corruption, bad faith, or other personal, non-public reasons.

So we think that it is most plausible to view the faithful execution commands and promises that bind the President as limits on the pardon power. And we note in the paper, I wanted to stress today also, that it would not be strange or unusual to find that our Constitution was limiting or restraining a potentially dangerous executive power in ways that try to shape it so that it acts in favor of the public interest, rather than private interests.

In fact, the Framers, although they took some of the powers of the English monarch, very much did not want to reproduce the British monarchy because of so many ills and problems that monarchy had revealed.

So in addition to a new requirement—the English monarch did not have to swear to faithfully execute the laws—in addition to that new requirement, the Constitution also does a number of other things to prevent corruption and self-dealing that were experienced with monarchs but that we very much did not want to have here.

So, for example, the President is barred from having any titles of nobility, to stop foreign governments from being able to dangle some kind of promise or title or lands that might influence the President. The President is barred from taking emoluments of office besides those that are allowed by law. The President is given a salary, in contrast to the English king, who tried to monetize the monarchy. I could go on and on.

But the core idea is that the interpretation we give to these commands of faithful execution is very consistent with many provisions of Article II of the Constitution that seek to restrain the President not to be someone who abuses their office for personal ends. And for those reasons, we think that a self-pardon would be utterly inconsistent with the idea of faithfully executing the office.

[The statement of Mr. Kent follows:]

Examining the Constitutional Role of the Pardon Power:

Hearing before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Wednesday, March 27, 2019

Statement by Prof. Andrew Kent, Fordham Law School

My name is Andrew Kent. I am a Professor of Law at Fordham University School of Law, where I teach and write about constitutional law, separation of powers, and related topics. It is an honor to provide testimony to this subcommittee.

This written statement addresses four questions, the first in the most detail: (1) Does the Constitution allow a President to pardon him- or herself? (2) Does the Constitution allow the President to pardon family members or confederates who may be linked with him in criminal activity? (3) May the offering or granting of a presidential pardon be used as an element of a criminal charge such as obstruction of justice against a President or his agents? (4) What authority does Congress have to legislate with regard to problematic pardons, or pardons and other clemency decisions generally?

These questions are complex, but I can briefly answer them as follows: (1) No, the best view of the Constitution is that self-pardons are unconstitutional and hence void. (2) Yes, the President may pardon potential confederates in crime, but the Constitution does provide some important limitations on potential abuse of that power, and impeachment is available as a remedy when the President overreaches. (3) Yes, the offering or granting of a pardon may be treated by a prosecutor as a crime or element of a crime. (4) Congress's power to regulate pardons is quite limited but there is still room for meaningful legislation.

1. Does the Constitution allow a President to pardon himself or herself?

No President has ever purported to pardon himself, though several have apparently contemplated it, including the current President. In August 1974, at the nadir of the Nixon presidency, the Office of Legal Counsel at the Department of Justice issued an opinion stating, with only the briefest explanation, that the President lacked power under the Constitution to pardon himself.[1] This was prompted by speculation in the press on the

[1] Mary C. Lawton, Mem. Op. for the Deputy Att'y Gen., Presidential or Legislative Pardon of the President, 1 Supplemental Opinions of the Office of Legal Counsel 370, 370 (Aug. 5, 1974), https://www.justice.gov/file/20856/download.

topic of a Nixon self-pardon;[2] and, we now know, by White House discussions of the topic[3] and by a secret White House legal opinion concluding that a presidential self-pardon was permissible under the Constitution.[4] In addition, in a brief filed nine months earlier in the criminal investigation concerning Vice President Agnew, Solicitor General Robert Bork had asserted that a presidential self-pardon would be lawful.[5]

Thus, during the Watergate crisis the executive branch was divided within itself on the constitutionality of the self-pardon. This was no doubt due in part to the powerful political and institutional imperatives that were buffeting the relevant actors. But the division of opinion was also likely due to good faith differences about the scope of executive power and by the novelty and difficulty of the question about the constitutionality of a self-pardon.

Despite this novelty and difficulty, I believe that the best understanding of the Constitution is that the President lacks authority to self-pardon.

A. Background on the pardon power

Article II, section 2 of the Constitution provides that "[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." A reprieve is a temporary suspension or stay of a criminal sentence. A pardon is "[a]n executive action that mitigates or sets aside punishment for a crime."[6] Pardons can take many forms, including conditional pardons and broad amnesties directed to whole groups of people. But we are today discussing only the traditional pardon to a particular individual.

Pardons have deep roots, going back to ancient Greece and Rome, and at least a millennium in English law. By the seventeenth and eighteenth centuries, pardons in England were understood to be acts of grace and mercy granted by the Crown, necessary to soften the severity of a criminal justice system in which most serious crimes were capital and which

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[2] *See* Timothy H. Ingram, *Could Nixon Pardon Nixon?*, WASH. POST, June 30, 1974.

[3] *See, e.g.*, Pardon of Richard M. Nixon and Related Matters, Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 93d Cong., 2d Sess., at 94 (1974) (testimony of President Gerald R. Ford).

[4] *See* Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 779 & n.1 (1996) (citing sources).

[5] Mem. for the United States Concerning the Vice President's Claim of Constitutional Immunity, In Re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Civ. No. 73-965 (D. Md., filed Oct. 5, 1973), at 20. The brief has been reprinted as an appendix to Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677 (1999).

[6] Nixon v. United States, 506 U.S. 224, 232 (1993) (citation omitted). *See also* United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) (stating that a pardon "exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed").

gave few means of defense to the accused.[7] English monarchs sometimes abused their prerogative to pardon, and therefore the American framers were well aware of both the benefits and risks of a broad pardon power. They chose a broad but not unlimited one. Of course impeachment is available as a check on a President's misuse of the pardon power; here I will address whether the Constitution places other internal or external limits on self-pardons.

Because the Constitution does not on its face expressly rule in or rule out a self-pardon, we must turn to the traditional methods of constitutional interpretation to determine the correct answer. At the least, we should examine: the meaning the text would have had to the adopting generation; the purposes motivating the adoption of the Constitution and the provisions at issue, including an understanding of important events in Anglo-American history that motivated constitutional design choices; the fit of the particular clause at issue within the larger Constitution, its structure, and its principles; judicial precedent, if any; and where available, both practical and formal interpretations of the Constitution by Congress and the executive branch.

B. A self-pardon is inconsistent with the President's duties of faithful execution

Article II of the U.S. Constitution twice imposes a duty of "faithful execution" on the President, who must "take Care that the Laws be faithfully executed," and must take an oath or affirmation before assuming his or her duties to "faithfully execute the Office of President."[8]

With my Fordham colleagues Ethan Leib and Jed Shugerman as co-authors, I am publishing a lengthy research paper on the origins and historical meaning of the Constitution's Faithful Execution Clauses in the *Harvard Law Review* this spring.[9] Our article is the first to explore the textual roots of these clauses from the time of Magna Carta and medieval England, through colonial America, and up to the original meaning in the Philadelphia Convention and ratification debates. We find that the language of "faithful execution" was for centuries before 1787 very commonly associated with the performance of public offices—especially those in which the officer had some control over the public fisc.

Thus, the drafters at Philadelphia did not on their own come up with the idea of having a chief magistrate who would take an oath of faithful execution and be bound to follow and execute legal authority faithfully. The models were everywhere. Governors of American colonies pre-independence, post-independence state governors, executive officers under the Articles of Confederation government, and other executives such as mayors and governors of corporations were required, before entering office, to take an oath for the due

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[7] *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *389-90 (1769); The Federalist No. 74 (Alexander Hamilton).

[8] U.S. CONST. art. II, § 1, cl. 8 and § 3.

[9] Andrew Kent, Ethan J. Leib, and Jed H. Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming May/June 2019), draft available at https://ssrn.com/abstract=3260593.

or faithful execution of their office. These officials were directed to follow the standing law, avoid taking unauthorized profits, and stay within their limited authority as they executed their offices. Anyone experienced in law or government in 1787 would have been aware of this because it was so basic to what we call the law of executive office-holding.

One of our most interesting findings here is that commands of faithful execution applied not only to senior government officials like governors who might have been plausible models for the presidency in Article II, but also to a vast number of less significant officers too. It turns out that the U.S. President, who today bestrides the globe in the world's most powerful office, has antecedents dating back centuries in humble offices like town constable, tax assessor, weigher of bricks, and vestryman of a church.

Drawing on this history, we contend that faithful execution imposed three core requirements on officeholders:

> (1) diligent, honest, careful, good faith, and impartial execution of law or office;
> (2) a duty not to misuse an office's funds and or take unauthorized profits; and
> (3) a duty not to act ultra vires, beyond the scope of one's office.

And we contend that these meanings were incorporated into Article II in the Faithful Execution Clauses.

Interestingly, these three duties of faithfulness look a lot like fiduciary duties in modern private law. This "fiduciary" reading of the original meaning of the Faithful Execution Clauses in Article II has important implications for understanding the presidency. History supports readings of Article II of the Constitution that limit Presidents to exercise their power in good faith, for the public interest, and not for reasons of self-dealing, self-protection, or other bad faith, personal reasons.

A self-pardon would seem to be utterly inconsistent with the historical meaning of the Faithful Execution duties placed on the President.[10] Thus, the best understanding of the original meaning of the Constitution is that a self-pardon would be unauthorized by Article II and hence unconstitutional.

Evidence of the historical purposes of constitutional provisions and the original public meaning of the text must, for everyone except strict originalists, be considered together with any relevant judicial precedent, political branch practice, or constitutional principles or practices which have developed since the Founding era. These other sources of constitutional meaning will be discussed below. To preview my conclusion, I do not find any reason to change my judgment that the best reading of the Constitution is that self-pardons are unconstitutional.

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[10] *See* Andrew Kent, Ethan J. Leib, & Jed Shugerman, *Self-Pardons, Constitutional History, and Article II*, TAKE CARE, takecareblog.com/blog/self-pardons-constitutional-history-and-article-ii; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST, Mar. 14, 2016, http://wapo.st/2pdolzK.

But before turning to other arguments for and against self-pardons, I pause to note that the idea of a President constrained to prevent self-dealing and related abuses of office is consistent with other features of Article II and the Constitution as a whole. The worst features of monarchy were rejected by the Founders.[11] As discussed below, the chief magistrate would not have total and perpetual immunity of from legal accountability. By banning titles of nobility,[12] and providing that the President would be elected to a term of years,[13] not chosen on hereditary principles, and not ruling for life, the Constitution addresses the fear that a chief executive's primary interest would be perpetuation of his dynastic successors and retainers rather than the good of the country. Many English kings had been foreign born, and still held lands and titles abroad, giving them personal interests that might differ from those of the citizenry. In response, the Constitution requires that the President be a citizen.[14] The President is given a salary, which may not be raised (or lowered) by Congress while he was in office, and is also prohibited from imposing taxes or otherwise raising funds on his own authority, and barred from accepting bribes, gifts, or other emoluments of office from foreign governments or state governments.[15] By so doing, the Americans framers intended to check typically monarchical kinds of financial self-dealing. Other scholars have noted that the Constitution contains additional principles barring self-dealing and related kinds of corruption.[16]

C. Other arguments against self-pardons

As noted at the outset, a few days before Nixon resigned, the DOJ's Office of Legal Counsel concluded that a self-pardon was likely unconstitutional. The stated reason was "the fundamental rule that no one may be a judge in his own case." This rationale has been seconded by some influential commentators, such as Professor Akhil Amar of Yale Law School.[17]

Some proponents of the constitutionality of the self-pardon have responded that pardoning is not an act of judging,[18] and therefore reasoning like OLC's misses the mark. It does seem

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[11] The following paragraph is drawn from a law professors' letter to President Trump's White House counsel and outside lawyers which I helped draft in concert with other scholars and the group Protect Democracy. *See* https://protectdemocracy.org/law-professor-article-ii/#_ftn6.

[12] U.S. CONST. art. I, § 9, cl. 8 & § 10 cl. 1.

[13] *Id.* art. II, § 1.

[14] *Id.* art. II, § 1, cl. 5.

[15] *Id.* art. I, § 9, cls. 7-8 & art. II, § 1, cl. 7.

[16] *See, e.g.*, Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1311, 1325-26 (2018); Kalt, *supra* note 4, at 794-99.

[17] *See, e.g.*, Akhil Reed Amar, Testimony Before the Senate Committee on the Judiciary, Sept. 26, 2017 at 6, https://www.judiciary.senate.gov/download/09-26-17-amar-testimony ("[B]ecause of the foundational rule-of-law principle that no man can be a judge in his case, President Trump may not properly pardon himself.").

[18] *See, e.g.*, Jonathan Turley, *Does Trump have total power to pardon? He just might*, THEHILL.COM, July 24, 2017, https://thehill.com/blogs/pundits-blog/the-administration/343408-opinion-does-trump-have-complete-power-to-pardon-he.

more correct to view the pardon as an executive rather than a judicial act.[19] But that does not undermine OLC's conclusion. The maxim that no man may be a judge in his own case states a centuries-old fundamental rule-of-law principle that has long been applicable to more than judges.[20] Notably, personal interest or bias by a prosecutor is unconstitutional,[21] just as it is for judges.[22] Whether the decision to grant a pardon is best viewed as a prosecutorial-executive decision or a quasi-judicial one, it does seem to violate a deep-seated principle of the rule of law, which has constitutional status in our legal tradition.

Relatedly, ensuring that the President is not above the law is also a core rule-of-law value that would be violated by a self-pardon. As the Supreme Court has stated, "No man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[23] In the famous Nixon tapes case, the Supreme Court reiterated this, rejecting the contention that the president "is above the law."[24] The Supreme Court expressly weighs rule-of-law values and seeks to preserve means of presidential accountability when deciding novel separation of powers questions about presidential power.[25]

The Framers of the Constitution had divergent opinions about whether a sitting President could be prosecuted. But the Constitution itself makes perfectly clear that criminal prosecution of a former President may follow his or her removal from office by impeachment.[26] In addition—and there is essentially universal agreement about this—a former President may also be criminally charged if his absence from office is due to resignation, electoral defeat, or a 22nd Amendment term limit instead. Especially today when it is Department of Justice policy that a sitting President may not be prosecuted,[27]

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[19] *See* Nixon v. United States, 506 U.S. 224, 232 (1993) (stating that a pardon is "an executive action that mitigates or sets aside punishment for a crime"); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) (stating that the pardon "proceed[s] from the power intrusted with the execution of the laws").

[20] *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 6-14 (2012) (discussing the principle in connection the Constitution's provision for presiding over trials of impeachment in the Senate); CHARLES L. BLACK, JR. & PHILIP BOBBITT, IMPEACHMENT, A HANDBOOK: NEW EDITION 135 (1975 & 2018) (noting that the principle applies "to prosecutions, judgments, and even jury participation").

[21] *See, e.g.*, Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987); United States v. Heldt, 668 F.2d 1238, 1275 (D.C. Cir. 1981); Ganger v. Peyton, 379 F.2d 709, 714 (4th Cir. 1967).

[22] *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886-87 (2009); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[23] United States v. Lee, 106 U.S. 196, 220 (1882). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (stating that the Constitution has created a "government of laws, and not of men").

[24] United States v. Nixon, 418 U.S. 683, 715 (1974).

[25] *See, e.g.,* Nixon v. Fitzgerald, 457 U.S. 731, 757-58 (1982); United States v. Nixon, 418 U.S. 683, 703-13 (1974).

[26] U.S. Const. art. II, § 4; *id.* art. I, § 3.

[27] *See* Mem. from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973), https://fas.org/irp/agency/doj/olc/092473.pdf; Mem. from Randolph D. Moss, Assistant Att'y Gen.,

ensuring accountability for misdeeds and preserving the rule of law would seem to require that a President may not grant himself permanent impunity with a self-pardon. A President permanently unaccountable at law savors too much of the legally untouchable English monarchy that the American Founders rejected.[28] It is also hard to see how using a pardon to accomplish self-impunity is consistent with duties of Faithful Execution.

Another argument against the constitutionality of self-pardons has been made by Professor Philip Bobbitt of Columbia Law School. He points out that the Constitution speaks of the President "grant[ing]" a pardon, thus employing a legal term that meant conveying a chattel or status to a third party. It makes no sense, and is contrary to traditional legal usage, Bobbitt contends, to think that the President could be both the grantor and grantee of a pardon.[29] While perhaps not dispositive by itself, this argument supports the conclusions I have reached on other grounds.

D. Arguments in favor of President's ability to self-pardon are weak

The most common argument in favor of self-pardons is that the pardon power is phrased in very broad language, with only two express limitations—that pardons reach only federal offense, not state offenses and not private civil suits,[30] and that pardons cannot interfere with impeachments[31]—and therefore it must be absolute and subject to no other limitations.[32]

This is not persuasive. For one thing, the broad language of the pardon clause has always been understood to have an important, unwritten limitation: it can only be used to pardon crimes already committed, not future crimes.[33] If a President could pardon future crimes, this would be equivalent to having the dangerous power to preemptively dispense with the laws,[34] a power that England's Parliament in the seventeenth century wrested away from

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Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000), https://www.justice.gov/olc/file/626926/download.

[28] *See generally* The Federalist No. 69 (Alexander Hamilton).

[29] BLACK & BOBBITT, *supra* note 20, at 135.

[30] Ex Parte Grossman, 267 U.S. 87, 113 (1925); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 525-26 (1977).

[31] Ex Parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

[32] *See, e.g.*, Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. U.L. REV. 905, 934 (2019); Richard A. Epstein, *Pardon Me, Said the President to Himself*, WALL ST. J., June 5, 2018, www.wsj.com/articles/pardon-me-said-the-president-to-himself-1528239773; Michael Stokes Paulsen, *The President's Pardon Power Is Absolute*, NAT. REV., July 25, 2017, www.nationalreview.com/2017/07/donald-trump-pardon-power-congressional-impeachment/. *See also* SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 108 (2015) (concluding that "[o]n balance, the slightly better view is that the president may pardon himself," largely because the breadth of the constitutional text).

[33] *See Garland*, 71 U.S. at 380; EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 167 (1957); Duker, *supra* note 30, at 526.

[34] *See* CORWIN, *supra* note 33, at 167; Duker, *supra* note 30, at 526.

absolutist Stuart kings, and that no one can plausibly argue would have been given back to the new American President by the generation that revolted against George III.

It is the norm in U.S. constitutional law that seemingly broad text in the Constitution is constrained both by other express parts of the document[35] and by implicit constitutional principles.[36] And indeed, the Supreme Court has found that there are other limitations on the pardon power besides the ones in its text. In one decision, the Court held that the pardon power "cannot touch moneys in the treasury of the United States" or property vested in private third parties when it blots out the punishment from a federal crime.[37] "The Constitution places this restriction upon the pardoning power," stated the Court.[38] In another decision, the Court suggested that individual constitutional rights must be protected in construing the scope of the pardon power.[39] The Court has also looked to British law and practice prior to 1787 to find possible limits on the pardon power, on the assumption that the American Framers largely incorporated the pardon power as they knew it.[40] Although the pardon power is exceptionally broad, it is still "part of the Constitutional scheme" and subject to constitutional limitations.[41]

It is true that the argument that self-pardons are permissible because of the breadth of the constitutional text is buttressed by dicta in some Supreme Court decisions, which have stated—addressing very different contexts than a purported self-pardon—that the pardon power is "plenary,"[42] "granted without limit,"[43] and "unlimited" but for the express restriction about impeachments.[44] But it is an elementary principle of our law that broad, general statements in Court opinions that were unnecessary to the decision are not automatically applicable to later cases, especially those addressing different questions.[45] And, in any event, the Court has several times confirmed that the pardon power is not in fact unlimited.

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[35] For example, the Bill of Rights and other individual rights amendments.

[36] Two examples are state sovereignty immunity in federal or state court from suits by their own citizens, *see, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and the anti-commandeering principle, *see* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

[37] Knote v. United States, 95 U.S. (5 Otto) 149, 154 (1877).

[38] *Id.*

[39] Burdick v. United States, 236 U.S. 79, 93-94 (1915).

[40] *See, e.g.*, Schick v. Reed, 419 U.S. 256, 264-65 (1974).

[41] *Id.* at 267 (stating about the pardon power that "its limitations, if any, must be found in the Constitution itself"); Biddle v. Percovich, 274 U.S. 480, 486 (1927) (Holmes, J.) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme.").

[42] *Schick*, 419 U.S. at 266.

[43] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

[44] *Garland*, 71 U.S. at 380.

[45] *See, e.g.*, Cohens v. Virginia, 19 U.S. 264, 399–400 (1821) (Marshall, C.J.).

Another argument in favor of the self-pardon is that the Framers specifically contemplated and approved presidential self-pardons, supposedly shown by the records of the debates at the Philadelphia Convention of 1787.[46] But properly understood, the debates reveal no assumption that a self-pardon was available.[47] Moreover, the proceedings at Philadelphia were held in secret, and for several decades little information about what had transpired was public. The secret intentions of the drafters are not what made the Constitution our supreme law, but rather the adoption of the Constitution after open debate in the state conventions.[48] That is why the most plausible and widely-accepted version of originalist constitutional interpretation looks not to the intentions of the drafters at Philadelphia but at the objective meaning that the Constitution's words would have conveyed to the American public at the time of ratification.[49]

In sum, based on the historical meaning of the text of Article II, a structural principle against self-judging, and the fundamental principle that the President is not above the law, and in the absence of judicial precedent or political branch practice which provide compelling counter-arguments, I conclude that the best reading of the Constitution prohibits self-pardons.

2. Does the Constitution allow the President to pardon family members or confederates who may be linked with him in criminal activity?

Unlike a presidential self-pardon, this may actually have occurred. There are still unresolved debates about whether George H.W. Bush or Bill Clinton may have used the pardon power this way.

It is clear that the Founding generation contemplated the possibility that a President would use the pardon power to shield treasonous or corrupt associates from criminal responsibility. Alexander Hamilton suggested that the remedy for such an abuse would be impeachment.[50] In discussing the same issue, James Wilson convinced the Philadelphia Convention not to bar pardons for treason because he argued that sufficient safety was ensured by the fact that a President guilty of pardoning co-conspirators could be impeached and criminally prosecuted.[51]

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[46] *See* Michael W. McConnell, *Trump's Not Wrong About Pardoning Himself*, WASH. POST, June 8, 2018, www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html?utm_term=.1e3b5b077489.

[47] *See* Kent, Leib, and Shugerman, *supra* note 10 (explaining this point).

[48] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C.J.).

[49] I have not addressed other, even less compelling arguments in favor of the self-pardon. For example, the brief filed by Solicitor General Bork states its conclusion with no reasoning. See *supra* note 5.

[50] *See, e.g.*, The Federalist No. 69 (Alexander Hamilton).

[51] 2 MAX FARRAND ED., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (1911).

These original understandings, coupled with the Supreme Court's very broad pronouncements about the pardon power, suggest that it may well be constitutional—though of course dishonorable and subject to review via impeachment—for a President to pardon family members or other associates who have engaged with him in misconduct. But I do not believe the pardon power should be viewed as entirely unlimited in these circumstances. A pardon of a third party motivated principally by the President's desire to protect *himself* would seem to violate the faithful execution principles sketched above. Likewise, I think it is plausible to argue, though admittedly a harder case, that a pardon of a close family member or friend, linked with the President in personal or official misconduct, purely for reasons of desiring to shield them from legal accountability, could also violate the faithful execution principles.

3. May the offering or granting of a presidential pardon be used as an element of a criminal charge, such as obstruction of justice?

Whether or not a pardon of family members or confederates who are linked with the President in corrupt or criminal activity is a constitutional use of the pardon power standing alone, Congress has not left this issue unregulated. Statutes barring obstruction of justice criminalize the completed or attempted obstructing or impeding of the due administration of justice with a corrupt purpose.[52] It is complicated to determine the extent to which these statutes apply to the President generally, and to his power to pardon specifically. I commend to you a thorough and convincing analysis of this issue by Professors Daniel Hemel and Eric Posner of the University of Chicago Law School. They conclude that a President is bound by the obstruction statutes, and that he violates them when by pardon or other action "he significantly interferes with an investigation, prosecution, or other law enforcement action to advance narrowly personal, pecuniary, or partisan interests."[53]

Similarly, a President who personally or through an agent offers a pardon in exchange for a personal benefit—for example that the pardoned individual would decline to testify about the President or lie to the authorities to protect the President—should surely be reachable under the federal bribery statute.[54]

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[52] *See* 18 U.S.C. §§ 1503(a), 1505, 1512(c).

[53] Hemel & Posner, *supra* note 16, at 1312 (italicization removed). *See also id.* at 1325 (concluding that "Congress cannot limit the effect of a pardon that has been granted, but that criminal law can still apply to the pardon's grantor"). For additional thoughts, see Daniel J. Hemel & Eric A. Posner, *The President Is Still Subject to Generally Applicable Criminal Laws: A Response to Barr and Goldsmith*, LAWFARE, Jan. 8, 2019, www.lawfareblog.com/president-still-subject-generally-applicable-criminal-laws-response-barr-and-goldsmith.

[54] *See* 18 U.S.C. § 201. William Barr recently testified at his confirmation hearing that it would be a crime for a President to "offer a pardon in exchange for the witness's promise not to incriminate the president." *See* https://www.businessinsider.com/william-barr-confirmation-hearing-trump-pardon-2019-1.

4. What authority does Congress have to legislate with regard to problematic pardons, or pardons and other clemency decisions generally?

Although the Supreme Court has occasionally made very broad pronouncements to the effect that the power to pardon is "not subject to legislative control,"[55] this loose language must be qualified in order to make it accurate.

First, whatever constitutional immunity the pardon power has from legislative regulation can only extend so far as the pardon power itself properly extends. In other words, a purported presidential pardon that is in actuality unauthorized by the Constitution should be subject to legislative regulation. Thus, I see no reason why Congress could not legislate against self-pardons.

One might ask why Congress would bother to prohibit something that was already (probably) unconstitutional. There could be several reasons. Congress's considered judgment that a self-pardon is void could be persuasive authority for other audiences who might in the future consider the legality or morality of a self-pardon, such as an executive branch lawyer, a court, members of Congress contemplating impeachment, or the public in the voting booth. Moreover, such a statute might spur either a special counsel during the pardoning President's term or prosecutors in a later presidential administration to file criminal charges notwithstanding the self-pardon, thus setting up a controversy that would almost certainly be subject to judicial resolution. And in addition, the contemplation or existence of such a statute would provide a legal basis for congressional oversight requests seeking information from the White House or the DOJ about an actual or potential self-pardon.

The second reason not to fully credit the Supreme Court's sweeping dicta about the pardon power's supposed immunity from legislative regulation is that the Constitution expressly grants Congress the power to enact laws necessary and proper for carrying into effect both Congress's own powers and the powers of the other two branches of the federal government.[56] This suggests that there should be at least *some* room for congressional regulation of the process involved in the consideration or issuance of valid, constitutional pardons by the President and other executive officials. To be sure, Congress could not require approval from any other body or official before the President issues a pardon,[57]

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[55] *Garland*, 71 U.S. at 380.

[56] U.S. CONST. art. I, § 8, cl. 18.

[57] *See, e.g.*, Todd David Peterson, *Congressional Power Over Pardons and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1251-52 (2003). *See also* Duker, *supra* note 30, at 501 (recounting how the delegates at the Philadelphia Convention rejected a proposed amendment to require Senate concurrence for a pardon to be effective).

and could not legislate in a manner that impairs or nullifies the effectiveness of a pardon.[58] But less intrusive legislation could well survive constitutional challenge.[59]

I can only speculate about what types of legislation regarding pardons Congress might consider enacting. One possibility would be to require the President to issue a report, either before pardoning, concurrently with the act, or within a reasonable time afterward, explaining (1) the crimes which the pardon covers and/or (2) the reasons for granting the pardon. Because such a statute would not restrict the ability of the President to pardon whomever he wants, whenever he wants, for whatever reason he wants, I think there is a good argument that it should be upheld against the inevitable executive branch challenge to its constitutionality.[60] The first requirement, specifying the crimes, has deep roots in English legal history, which the American constitution drafters drew upon.[61] As to the second, the U.S. Code is full of executive branch reporting requirements, including in areas in which the President has substantial independent constitutional power, such as the use of the military. And requiring a report about the reason for a pardon promotes transparency and rule-of-law values, and seems relevant to Congress's wise exercise of its impeachment power, thus arguably making it a necessary and proper regulation of the pardon power.

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[58] *See, e.g.*, *Klein*, 80 U.S. at 144-48; United States v. Padelford, 76 U.S. 531, 543 (1869).

[59] *But see* Letter from Robert Raben, Assistant Att'y Gen., to the Hon. Orrin G. Hatch (Feb. 17, 2000) (quoted in Peterson, supra note 57, at 1254) (opining that the Congress does not have "any power to regulate pardons").

[60] *See generally* Morrison v. Olson, 487 U.S. 654, 695 (1988) (rejecting a separation of powers challenge to a congressional limitation on presidential power because, among other things, the act did not "impermissibly undermine[ ]" the powers of the Executive Branch or "disrupt[ ] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions") (citations omitted). *See also* Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2094 (2015) (employing the same framework of analysis).

[61] *See* Hugh C. Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56, 74-83 (1974) (concluding that the sources relied upon by the American constitution drafters to understand the English monarch's pardon power—chiefly Blackstone, Coke, and Hawkins—taught that the charter of pardon had to specify the offenses pardoned or else have no legal effect).

Mr. COHEN. Thank you, Professor Kent. I appreciate your testimony.

We will now proceed with the 5-minute rule of questions, and I will begin by recognizing myself for 5 minutes.

Firstly, I had introduced H.J. Res. 8 on the first day of this Congress, January 3, 2019, with several cosponsors—Mr. Raskin and Mr. Lieu and Ms. Jayapal from this committee—to change the pardon power.

And what we proposed was that the President shall not have the power, he shall not have the power to pardon himself or herself, the President's brother, sister, brother-in-law, sister-in-law, spouse, parent, child, grandchild, or spouse of the President's grandchild, the President's aunt, uncle, nephew, niece, or the spouse of the President's nephew or niece, or the President's first or second cousin, the spouse of the President's first or second cousin, the President's mother-in-law, father-in-law, son-in-law, daughter-in-law, or any current or former member of the administration, or anyone who worked on the President's Presidential campaign as a paid employee.

Ms. Fredrickson, do you think the pardon power needs to be amended? Mr. Madison said, yes, the remedy is impeachment. But most pardons have been issued on the last day. Impeachment is kind of not a very effective prohibition.

Ms. Fredrickson.

Ms. FREDRICKSON. Well, thank you, Mr. Chairman, for your question. I have to say I haven't looked deeply into your legislation.

I think, on balance, the pardon power has been exercised with restraint, perhaps too much restraint, by Presidents, as you mentioned about President Obama. And when it is done correctly and with mercy, when benevolence, as it was intended, it is an incredible tool for justice.

So I think I would have to spend some time thinking more deeply about whether or not it should be amended. I think there are already some very significant limitations on its use when it is, as I mentioned in my testimony, used inappropriately or with corrupt intent.

So I think the strength of the Constitution is that that is already implicit. So I would just leave it there.

Mr. COHEN. Well, we went to a pretty good length of family members. And when you get to a family member, it is kind of—it is almost self-dealing.

Mr. Florence, you mentioned self-protecting pardons. What exactly would a self-protecting pardon be?

Mr. FLORENCE. So a self-protective pardon is a pardon that has the same purpose and effect as a self-pardon in that what it is doing is allowing the President to place himself beyond the reach of the law.

So, for example, if a President says to a witness in an investigation, "Go ahead, change your story, don't answer the questions, don't cooperate because there is a pardon coming for you," in a way that leads the witness to do that, that terminates the investigation or interferes with the investigation, and that is an investigation that involves the President, himself, or the President's campaign or business organization or family members, that self-protective par-

don that is dangled or issued, even though it is not to the President himself, it has the same purpose and the same effect of placing the President above the law.

And as we have all testified, there is one kind of central tenet of our Constitution, which is the rule of law applies to everybody, that nobody is above the law, that nobody can be a judge in their own case. And so if the President can use that pardon power, to make himself a judge in his own case, to place himself above the law, that violates a core principle of our Constitution.

Mr. COHEN. And Ms. Fredrickson said that our pardon powers work pretty well, and it has worked pretty well, I guess. But because it has doesn't mean that it will. And we never had a President who said, I can pardon myself. I mean, nobody ever thought about it. I am sure George Washington and Mr. Mason and Mr. Madison never thought what happened could happen in 2018.

Now that we have seen that that is a possibility, that a President has such an expansive perspective of his own power and his potential own criminal liability, don't you think we ought to change the pardon power, Mr. Florence, in some ways?

Mr. FLORENCE. You know, I think one option would be to amend the Constitution to make that crystal clear, but I think there are other ways to prevent abuse of the pardon power, including a self-pardon.

And this committee has a really important role to play in that. It is doing that by holding this hearing and by conducting oversight into Presidents who try and use the pardon power in that way.

As we have all, I think, also said——

Mr. COHEN. How would you go ahead enforcing it? Let's assume a President pardoned himself. You would have to have an Attorney General to bring the action, would you not? Who would have standing to go to court to question that pardon?

Mr. FLORENCE. You know, courts are one actor in the system that can decide how to enforce things, but Congress can offer its own remedies through oversight, through political accountability, through other forms of accountability. And prosecutors within the executive branch can decide to take various law-enforcement actions. And so you could ultimately have, either through Congress or the executive branch, this question teed up for a court.

I think what we have all said here is that you have got to read the pardon clause alongside the rest of Article II, alongside the Constitution, and that there are provisions there now, the Take Care Clause, the oath, that prevent this type of self-interested abusive pardon that places somebody above the law. And so we shouldn't lose sight of that even if we look to be a little bit more clear going forward in how this works.

Mr. COHEN. Professor Kent, do you have any thoughts on amending the Constitution to prevent abuses?

Mr. KENT. Well, it is always difficult, and given the two-thirds requirement, perhaps impossible in the present circumstances.

I mean, I guess the one thing I would note is, I do think Congress could have some legislative power. I think there is some possibility of doing things without amending the Constitution. And I think certainly one principle would be that Congress could legisla-

tively prohibit uses of the pardon power that are unconstitutional in themselves.

So if those of us on the panel here today are correct, that a Presidential self-pardon is unconstitutional, then I don't think a constitutional amendment would be required for Congress to say so.

Mr. COHEN. But don't you think—while I agree with you, and I understand your legal logic, it is not in the law, it is not in the Constitution. And can we pass a statute that basically limits what is an unrestricted power to pardon based on a legal theory that three brilliant professors agree on?

Mr. KENT. Yeah, you could. And if the President tried to do so and he were later criminally charged, as Mr. Florence said, that would be a proper case that the judiciary could resolve.

And I do agree with some of the things that have been said. The President's pardon power is extraordinarily broad and it is subject to very few limitations. I just think it is not subject to zero limitations. So there would, I think, be some very hard constitutional questions about Congress doing anything beyond preventing or legislating against a self-pardon.

Once you move out beyond the President himself, you do get into areas where the executive branch would have some very strong constitutional arguments that that is improper. But again, also, there are other forms of checking besides statutory prohibitions.

Mr. COHEN. Thank you.

And I know I am over my time, but I am the chair.

Mr. Pfiffner, do you have any thoughts on this?

Mr. PFIFFNER. It seems to me that Congress—it is clear that Congress can't limit this straightforward power of the President. It might be reasonable to say that there is no self-pardons, and it might be reasonable to say the President shouldn't pardon his relatives and friends or so forth, but I don't think that that would be constitutionally enforceable.

So I think the argument against it depends on the Constitution itself, not on what Congress may do. Nevertheless, it might be reasonable for Congress to pass a resolution saying that, but I don't think it would have constitutional effect.

Mr. COHEN. Thank you, sir.

And I now recognize the distinguished ranking member, Mr. Mike Johnson. So help you God.

Mr. JOHNSON. Thank you, Mr. Chairman. So help me God.

Ms. Fredrickson, 5 days ago you authored a press release for your organization which stated, quote, "The question isn't whether members of the Trump campaign conspired with Russia to sway the 2016 elections. We already know they did," unquote.

But just 2 days later, a summary of the report of the special counsel was released which contains the following quote from the report itself: "The investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian Government in its election interference activities," unquote.

Since you previously wrote that we already know that members of the Trump campaign so conspired, what reasons do you have to doubt the validity of the opposite conclusion as reached by the special counsel with all his vast resources, time, and unlimited discretion?

Ms. Fredrickson. Well, thank you for that question. I appreciate it.

So I would say—funny thing was that my piece came out 2 days before the report—but I would also say very importantly—or not the report, but the interpretation—that as you said, as you quoted from Mr. Barr's letter, he said that Mr. Mueller's investigation did not establish conspiracy.

However, what we don't know is what the standard of proof was and what the evidence was, which was clearly—there was some evidence. And we know that the Trump—various members of his campaign, his campaign manager and many others, had direct contacts with Russians. There were over 100 contacts between Russians and Trump associates. They changed the Republican platform on Ukraine. Paul Manafort was convicted of not disclosing his relationship with Russian-associated people in Ukraine, to lobby on their behalf.

And so, you know, I think you can draw the conclusion pretty clearly that there were relationships between the Russians and the Trump campaign, and nothing that you have said makes that any less true.

Mr. JOHNSON. But just to be clear for the record, you don't have any additional special insight into all these facts than Mr. Mueller does, Attorney General Barr, Deputy Attorney General Rosenstein. Are they incompetent in their jobs? Do they not know how to interpret that evidence?

Do you have some special information about that that none of us—the rest of us know?

Ms. Fredrickson. I think there is a very large amount of information about contacts between the Russians and The Trump Organization. And as I have said, I can read to you the number of people who have been indicted, who have pled guilty, who have been convicted because of relationships with the Russians.

Mr. JOHNSON. We all know that. But we also know the outcome of the special counsel's report.

Let me ask. You also wrote an op-ed that appeared in the New York Times on March 22. It was entitled, "We Don't Need to Read the Mueller Report."

Can you please explain to us why you think we don't need to read the Mueller report?

Ms. Fredrickson. First I should say, unfortunately, I didn't get to choose the title. However, if you actually read what the piece said, you will see it says clearly the report needs to be provided to the public and to Congress.

However, even if this administration puts up a struggle over providing what Congress and the American public are entitled to, nonetheless, because of the variety of information that has come forward, and even from looking at the indictments and the process of prosecution that has gone forward under the special counsel, but also in the Southern District of New York and the Eastern District of New York—now we have Cy Vance in New York, the attorney general of New York, many others legal actors who are investigating this President. We have a lot of information that leads us, I think, to be very disappointed in how this President has behaved as President. The indications of corruption——

Mr. JOHNSON. I reclaim my time. I am running out of time.

Look, you also, October 19, 2017——

Mr. COHEN. I will give you some more time.

Mr. JOHNSON. He is the chairman. He can do whatever he wants.

You signed a letter to Members of Congress that was entitled, quote, "Benchmarks for Ongoing Congressional Investigations"—oh, for Mr. Florence. Mr. Florence, sorry, you did this one.

All right. Let me grill you a little bit.

Okay. You wrote this letter, "Benchmarks for Ongoing Congressional Investigations into Russian Interference in U.S. Elections and Related Matters," okay, and in the letter you recommended that each committee should issue a public interim investigation or report or public update that includes the following elements: How many full-time and part-time staff are currently assigned to the investigation, making up how many full-time employee slots. The training or experience of the assigned staff in conducting investigations. How much money was spent on the investigation in total and since the last report. How many hearings have been held, etcetera, etcetera.

My question is, do you think that same report entailing that same kind of information should be made by the special counsel's office?

Mr. FLORENCE. So I think it is important for the special counsel's office to provide this committee with all kinds of information, including how it went about conducting its investigation, what it learned from that investigation, what evidence it uncovered, what conclusions it drew from that. And so I think as much information as this committee wants to request and the special counsel can provide would be useful to this committee's oversight.

Mr. JOHNSON. But just for the record, of course, the Attorney General's summary of the special counsel report included that—in the investigation they spent $25 million, by the way, but they also employed 19 lawyers, 40 FBI agents, 2,800 subpoenas executed, 500 search warrants, 230 orders of communication records, 50 orders authorizing the use of pen registers, 13 requests to foreign governments for evidence, and interviewed approximately 500 witnesses.

In your professional opinion, would you say that is thorough, that is a thorough investigation?

Mr. FLORENCE. From everything I know, the special counsel's investigation was thorough. And I think what is so important is for both this committee, for Congress as a whole, and for the public to learn what the special counsel found. A four-page summary letter can't do justice to all of that work.

And so I appreciate that this committee has asked for those materials. And I think once the American public can see them, they can see how much work the special counsel did and what he truly found from doing that.

Mr. JOHNSON. I appreciate it.

I am out of time, and I am not chairman, so I can't elaborate further.

Mr. COHEN. You did go 1 minute and 12 seconds over. I don't want you to get used to that, because we don't want you to have that prerogative.

Mr. Raskin, you are recognized.

Mr. RASKIN. Thank you.

I just want to tell my distinguished friend from Louisiana, if the Mueller investigation cost $25 million, I am looking at a headline here saying that Trump's travel to Mar-a-Lago cost taxpayers more than $64 million. So that is just flying and the Secret Service and so on.

You know, in that interesting numerical recitation of the number of lawyers in the Mueller investigation, which was, of course, appointed by a Republican Attorney General, and Mueller is a Republican, and so on, the lawyers and the depositions, and so on, one thing we didn't get was the number of pages in the Mueller report. And I am wondering how many pages are in that. Is it like 800 pages or 200 pages? Because we have got the right to read that.

But let me get back over to our distinguished witnesses today. You guys make me miss academia. And thank you very much for your thoughtful testimony, all four of you.

First of all, just to be straight, does everybody on the panel agree that the President cannot sell a pardon and put it up on eBay and take the highest bidder? Does everybody agree the President cannot sell a pardon?

Ms. FREDRICKSON.

Ms. FREDRICKSON. Yes.

Mr. RASKIN. Mr. Florence.?

Mr. FLORENCE. Yes.

Mr. PFIFFNER. Not on eBay.

Mr. RASKIN. I take that to be yes.

And, Mr. Kent.

Mr. KENT. Yes.

Mr. RASKIN. Okay. And let's go back the other way.

Does everybody agree the President cannot pardon himself because of the Madisonian principle that no man may be a judge in his own cause because it will impair his integrity and corrupt his judgment?

Mr. KENT. And for other reasons, yes.

Mr. RASKIN. And for other reasons, yes.

Mr. PFIFFNER.

Mr. PFIFFNER. That is a compelling argument.

Mr. RASKIN. Yes.

Mr. FLORENCE.

Mr. FLORENCE. Yes, I agree.

Mr. RASKIN. Okay.

Ms. FREDRICKSON. Yes.

Mr. RASKIN. Ms. Fredrickson.

Okay. So everything is very clean.

This is what I don't miss about academia. What do you do if the President does pardon himself? You all say it is unconstitutional and think that is the end of the matter. But let's say the President issues a pardon to himself.

Now, are you just asserting at that point it is legally null and void, that if the President is later prosecuted that a court should disregard it? Or are you just saying the President can still be impeached and convicted for it?

Well, what does it mean if a President does try to pardon himself?

And, perhaps, Ms. Fredrickson, let me start with you.

Ms. FREDRICKSON. Well, I think both of those things could be possible, that it is null and void and that he also can be prosecuted. Certainly can be impeached.

Mr. RASKIN. Okay. Did anybody else want to weigh in on this?

Mr. PFIFFNER. I think John Marshall said that the Supreme Court can say what the law is. So it seems to me that that constitutional decision could be decided by the Supreme Court.

Mr. RASKIN. Gotcha.

Mr. Kent, let me ask you a question. I am fascinated by your research on the history of the Take Care Clause. And I know that you are here to talk about the pardon power. But it may be illuminating as to Attorney General Barr's 19-page single-spaced memorandum making the argument that the President cannot, as a matter of law, ever be subject to an obstruction of justice prosecution because he controls the law enforcement machinery.

This is the insurgent, now unitary executive theory of Presidential power essentially that the President has complete control over the executive branch. So even if he were to interfere, say, corruptly or in a self-interested way to try to squelch an investigation or kill an investigation of a friend like Michael Flynn, that could not be obstruction of justice.

How does that relate to your historical investigation about the meaning of the Take Care Clause?

Mr. KENT. Well, certainly it would not be a good faith, public spirited execution of the office to have engaged in any of the acts that you describe. And so I think there is a strong argument that they are unconstitutional and void. But certainly——

Mr. RASKIN. You would say not only could it be prosecuted, but you are saying it itself could be interpreted as unconstitutional, totally outside of the Constitution?

Mr. KENT. I do. And I also agree with the many critics of Attorney General Barr's fairly aggressive theory of Presidential nonaccountability.

I think certainly Presidential acts can, even though they are within the scope of Article II powers to make, can be treated as bribery by a prosecutor, can be treated as obstruction of justice by a prosecutor.

There is not something magic about doing something pursuant to an Article II power that means you are entirely immunized from criminal liability.

Mr. RASKIN. Okay.

Ms. Fredrickson, let me come back to you since the door was opened to getting your thoughts on the current crisis this week.

Let me ask you, by what right did Attorney General Barr decide to—by what right did he take to himself to decide the question of whether or not the President had obstructed justice? Did he have the right to do that?

Ms. FREDRICKSON. I think that is the big question and the big concern. It seems inappropriate that he placed himself in the role of deciding something that Mr. Mueller left undecided and, more appropriately, left to this committee, to this subcommittee——

Mr. RASKIN. Did he decide it on the basis that he had spelled out in that 19-page memorandum, which is the President can never be guilty of obstructing justice in the executive branch of government because he controls the executive branch of government?

Ms. FREDRICKSON. Well, it is certainly possible. Very little is spelled out. I think it is an important reason for Congress to hear from Mr. Barr directly, as well as from Mr. Mueller, who apparently was not consulted in the drafting of this interpretation of his report.

So I think those are very important questions because it is incumbent on Congress to have an answer to whether—to what Mr. Mueller actually found.

Mr. RASKIN. Let me ask one final question, and, perhaps, Mr. Florence, you could answer this.

For many decades now, I think the President has followed the formal pardon process. There is a pardon attorney in the Department of Justice. There is a formal process for petitioning it goes through. There is a recommendation and so on. This President, of course, with the Sylvester Stallone and so on has gone completely outside of that and has just written letters.

Are there any formal requirements for a pardon? Or, really, could the President pardon somebody by a tweet and, like, watch something on TV, get upset about it, and say, "I am going to pardon this person"?

Mr. FLORENCE. So I think as a formal matter a warrant has to issue from the White House.

As to the process, I think that process is helpful in protecting against some of the violations we have talked about and maintaining safeguards. I don't think that process is constitutionally required. And so if the President wants to sit down and write on his pad, "I grant a pardon," he is constitutionally permitted to follow that——

Mr. RASKIN. Well, don't fight the hypothetical. I am talking about a tweet here. I am not talking about a legal pad.

Mr. FLORENCE. I think a tweet would not have legal effect in executing a pardon.

Mr. JOHNSON. You mean a tweet is not anticipated by the Constitution?

Mr. COHEN. Thank you, Mr. Raskin.

Mr. RASKIN. I yield back. Thank you, Mr. Chairman, for your indulgence.

Mr. COHEN. I now recognize the gentleman from Virginia who made a marvelous maiden speech in this committee, and now he has got high hopes for a second one.

Mr. CLINE. Thank you, Mr. Chairman.

I want to follow up a little bit on the previous questioners now that the door has been opened, so to speak.

Ms. Fredrickson, you stated that there is a lot of information out there about the relationships, as you put it, between the Trump administration and Russia.

Are you aware of any actual evidence to support an allegation of collusion between the Trump administration and the Trump campaign and Russia?

Ms. FREDRICKSON. As I mentioned, it has been well documented that there were over 100 contacts between Russians and various members of the Trump campaign, the Trump family, and up to the Trump administration.

Mr. CLINE. Where has it been documented?

Ms. FREDRICKSON. If you have been reading the newspaper or watching television, it has been all over the place.

Mr. CLINE. Publicly available?

Ms. FREDRICKSON. Publicly available.

Mr. CLINE. Okay. So given that the special counsel issued more than 2,800 subpoenas, executed nearly 500 search warrants, interviewed approximately 500 witnesses, issued approximately 50 orders authorizing use of pen registers, do you believe that he had this information as well?

Ms. FREDRICKSON. I think it is really important to read how it was phrased by the Attorney General, which is that it was not established. He didn't say there was no evidence. There is clearly some evidence. And I think it is important that Congress examine it, because even if—and one has to actually see the full Mueller report to understand how he evaluated the evidence.

But even if there wasn't enough to show beyond a reasonable doubt, one assumes that is the standard that he was using, although perhaps not the appropriate standard for an indictment, one has to ask: Was there enough for Congress to find highly problematic relationships between the variety of players representing, either officially or in some private capacity, the Russian Government, with the Trump campaign, with the Trump administration?

I think those are all very important questions for Congress to examine.

Mr. CLINE. So with regard to conspiracy—I am sorry—the issue of whether or not there was obstruction of justice, the question is, does the Department have the authority to determine whether the evidence rises to the level of a chargeable offense?

Ms. FREDRICKSON. Well, it is very interesting, because I think, as Attorney General Holder has stated, in his 6 years in running the Justice Department he never had one of his prosecutors present him with a case and not come to a conclusion.

I think one has to look historically at the other times when there has been an obstruction of justice inquiry into Presidential behavior, and in those particular circumstances that has been presented to Congress to resolve. And I think one can intuit that that is perhaps what Mr. Mueller was thinking and that, nonetheless, the Attorney General put himself in the place of Congress and made that decision.

Mr. CLINE. So it does not—that power does not reside with the Department of Justice to determine whether an offense?

Ms. FREDRICKSON. I didn't say that. But traditionally it has been with the prosecutor who has been leading the investigation to recommend a decision. And in this case Mr. Mueller didn't, again, consistent with past obstruction of justice inquiries into Presidential behavior and certainly quite unprecedented for the Attorney General to substitute himself in this way.

Mr. CLINE. Unprecedented for the Attorney General to determine that there is not enough evidence to proceed with the charging of an obstruction of justice charge?

Ms. FREDRICKSON. As Attorney General Holder said, he never experienced such a situation in his 6 years running the Justice Department when there was no recommendation from a prosecutor to conclude an investigation. And Mr. Mueller said very directly, and that was actually quoted by the Attorney General, that the President was not exonerated.

Mr. CLINE. Thank you.

Mr. COHEN. Thank you, Mr. Cline.

I now recognize Ms. Garcia from Texas.

Ms. GARCIA. Thank you, Mr. Chairman.

And I wanted to start with you, Ms. Fredrickson, just to clear something.

I know that the statement was made earlier about—in discussion of a pardon, and a reference was made to President Obama's orders on DACA, which was a deferred action.

Would you find any way that any deferred action of deportation would be the same as a pardon?

Yes, ma'am?

Ms. FREDRICKSON. You know, it is a very novel theory, so I haven't really engaged with it, so I——

Ms. GARCIA. Has anybody else agreed with that characterization?

Mr. PFIFFNER. It seemed that President Obama used Presidential prosecutorial discretion as a directive to DHS to do that. So it doesn't sound like a pardon to me.

Ms. GARCIA. Okay. Well, thank you. I think I agree with you on that. And I was sort of taken aback when that comment was made. I just wanted to clear it up.

But, Ms. Fredrickson, I want to go back to you. You mentioned earlier that the word "did not establish" was very, very critical in the discussion of the conspiracy and coordination. Is it also interesting that the word "collusion" was not used, it was just conspiracy and coordination?

Ms. FREDRICKSON. Well, I think it is just a reflection of the fact that collusion is not technically a legal term. And so Mr. Mueller was referring to the actual legal terms. And collusion is one that sort of encompasses the variety of ways that coordination or conspiracy can happen. It is not technically a legal term. So I think I wouldn't find more to it than that.

Ms. GARCIA. Okay. Well, thank you for that.

Then I wanted to ask you, do you agree that the Constitution bars an obstruction of justice inquiry that might examine the President's subjective motive behind a facially legal exercise of a discretionary power because the burden would be too great on the executive branch?

Ms. FREDRICKSON. No, certainly not. I think it is one of the elements of obstruction of justice. And if that were not—if that could not be investigated, then the President could never be investigated for obstruction of justice. Can't be right.

Ms. GARCIA. Right. So could you just kind of tell me just a little bit more so the average viewer who is listening to us that is sort

of kind of lost of how this really works. What does that really means?

Ms. FREDRICKSON. Well, what is the intent behind the action? So it may be technically legal. But if it is done for an illegal purpose, it could still be illegal. So I think that is the essence of the way that inquiry look works.

Ms. GARCIA. Right. Because I find it interesting that, when I go back home, people just don't understand what we are really doing, that, frankly, they think that the President could just tweet, "Sylvia Garcia is pardoned," and that it is done.

So would one of you—maybe you, sir, could take an—I can't see your name. Is it Justin?

Mr. FLORENCE. Justin Florence.

Ms. GARCIA. I can't read "Florence," but I can read "Justin," so forgive me for using your first name.

But can you just kind of pretend that you are talking to, I don't know, a middle school in my district and you want to explain to them how a pardon really works, when does it start? Can you do it? I mean, because you have clearly said you can't do it for future crimes.

We already heard reports this morning that at least one campaign aide, Papadopoulos, who had pled guilty on one of the things arising from this whole episode, his lawyer has asked for a pardon for him. So is this something a lawyer has to do? Who does it? When?

And, again, just you now have less than a minute to explain to a middle school class in my district what the heck is this all really about.

Mr. FLORENCE. Sure. I will give it a stab. And I think these concepts are ones that everybody can understand, and so we shouldn't obfuscate.

Ms. GARCIA. Well, obviously, they have been litigated.

Mr. FLORENCE. So our criminal justice system can be harsh at times. And as a safety valve for that, the Constitution includes the pardon power that allows the President to decide, in some cases, that an injustice occurred or that somebody is entitled to mercy and a second chance in redemption. And the President can shorten their sentence or can say, "I am going to take this crime away and take it off your record, because you have served your time, you are entitled to a second chance."

The President has broad authority to decide when to do that and when he thinks it is the right thing to do. And there are not a lot of procedural rules about how that happens. Different Presidents follow different processes. This President talked to Kim Kardashian. Other Presidents require sort of formal petitions and explanations for why this should happen and consult with a lot of people.

The problem is, and what I think we are talking about today, is that that power can be abused in some cases. And when the President uses that power to undermine our system of checks and balances or to undermine the principle that nobody in our country is above the law, then that power can take our constitutional system and throw it out of whack. And so it is really important for this committee, for the Congress——

Ms. GARCIA. But, again, do you do it at the beginning of somebody's trial? I mean, like Papadopoulos, he didn't do it at the time he pled guilty. You know, the lawyers are now asserting that request. I mean, when can it happen?

Mr. FLORENCE. As a legal matter, the President can pardon any crime that has been committed, including before the person has been charged, before they have been prosecuted, before they have been convicted.

What they can't do, although this isn't in the text of that one clause, but it is in the Constitution, they can't pardon future crimes that have not yet been committed. But in principle it is okay for a President to say, "I know you haven't yet been charged, but I think mercy and justice entitle you to a pardon here."

Now, what can't happen is to do that for purposes of getting the President himself out of trouble and allowing the President to shut down an investigation. That is something that I don't think can happen.

Ms. GARCIA. Right.

And you, I think, all of you seem to be in agreement that he can't pardon himself. But I know one question I get again in the district from many of my constituents is, can he pardon his children, especially the two that work at the White House, or his wife?

Mr. PFIFFNER. The President can pardon anybody except, I would argue, himself.

And asking for a pardon is okay. But if you are talking to your middle school students, I say, but pardoning somebody in exchange for lying, say to a jury, that would be bribery or obstruction.

Ms. GARCIA. Or for money.

Mr. PFIFFNER. Pardon?

Ms. GARCIA. Right. It would be legal to do it for money.

Mr. PFIFFNER. No, it would not be legal to do it for money.

Ms. GARCIA. Correct. I said it would be illegal—we are saying the same thing.

Mr. PFIFFNER. Illegal. Okay.

Ms. GARCIA. We don't want to confuse the students. We are trying to make sure they understood.

But, yes, to the children and, yes, he can even pardon his wife.

Mr. PFIFFNER. Yes.

Ms. GARCIA. OKAY.

Mr. PFIFFNER. Constitutionally. It may not be right, it may not look good, but constitutionally I think would be hard to overcome that.

Ms. GARCIA. All right. Well, thank you.

And I yield back my time, Mr. Chairman.

Thank you.

Mr. COHEN. Thank you.

I now recognize a gentleman who will wrestle with you, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. Pfiffner, assuming no quid pro quo, no payment, or anything like that, and assuming they are not talking about themselves, just to be clear, does the Constitution give the President of the United States broad and almost absolute authority to pardon others for a Federal crime?

Mr. PFIFFNER. Correct.

Mr. JORDAN. Correct. It gives broad, almost kind of blanket authority that the President has, assuming he is not trying to pardon himself or anything that was just discussed with the previous Member of Congress.

Okay. So the ones that he has done this year. So let's talk about the current President, President Trump, the pardons he has given. Has he done anything wrong with those particular pardons?

Mr. PFIFFNER. You or I or many people might think that it is an abuse of power, but he has the constitutional authority to be able to do that legally, yes.

Mr. JORDAN. Joe Arpaio was fine?

Mr. PFIFFNER. Pardon?

Mr. JORDAN. Mr. Arpaio was fine, one of the pardons, Mr. Arpaio?

Mr. PFIFFNER. Constitutionally and legally, yes.

Mr. JORDAN. Scooter Libby was fine?

Mr. PFIFFNER. Legally, yes.

Mr. JORDAN. Okay. Jack Johnson.

Mr. PFIFFNER. Well, that is posthumous and maybe not necessary, but sure.

Mr. JORDAN. No one got paid there, right? Mr. Johnson, he has passed away, right? So that was fine, right?

Mr. PFIFFNER. Yes.

Mr. JORDAN. How about Dinesh D'Souza? Is that okay?

Mr. PFIFFNER. Yes.

Mr. JORDAN. And I think the other one was Mr. Saucier. Is that right? I think there has been five. Is that correct?

Mr. PFIFFNER. Whoever, yes.

Mr. JORDAN. Whoever, yes. So that hasn't been a problem.

And how about any sentences that were commuted? Ms. Johnson, Alice Johnson, I think.

Mr. PFIFFNER. Sure. Commuting sentences is part of the pardon power.

Mr. JORDAN. Same thing.

So we have got this hearing and all where all this concern. But there has been no problem whatsoever thus far with this power as it is currently under the Constitution.

We have a bill that wants to change it. But it has worked out all right, hasn't it?

Mr. PFIFFNER. There could be problems with it, but there is not a constitutional or legal prohibition on it.

Mr. JORDAN. Fine. Thank you.

Ms. Fredrickson, let me go back to where the ranking member was. I want to look at what you said 5 days ago.

You wrote a piece—where did you write the piece? Was this in the newspaper or was this a statement? Press release. Excuse me, press release.

"The question isn't whether members of the Trump campaigned conspired with Russia to sway the 2016 elections. We already know they did."

You stand by that statement?

Ms. FREDRICKSON. We have much evidence, as I have answered several times already.

Mr. JORDAN. Let me read from the special counsel's—well, the letter by the Attorney General referencing the special counsel's report. It says this: "The special counsel did not find that the Trump campaign or anyone associated with it conspired or coordinated with the Russian Government in these efforts."

Ms. FREDRICKSON. The Attorney General's letter said that there was not—that conspiracy was not established. Examined evidence, there is evidence. Does not necessarily mean that the special counsel decided to move forward with bringing an indictment.

Mr. JORDAN. I guess the question is, is Bob Mueller wrong?

Ms. FREDRICKSON. We need to see what he found.

Mr. JORDAN. That wasn't my question. My question is, is Bob Mueller wrong?

Ms. FREDRICKSON. I would have to look at the evidence, as I think Congress needs to, to do a thorough——

Mr. JORDAN. "The special counsel did not find that any U.S. person or Trump campaign official or associate conspired or knowingly coordinated with [Russia]. The special counsel did not find that the Trump campaign or anyone associated with it conspired or coordinated with the Russian Government in these efforts"—interesting clause that follows next—"despite multiple offers from Russian-affiliated individuals to assist the Trump campaign."

So multiple times they dangled the fruit in front of them, and they chose not to take it. And yet you said, "We already know they did." And I am trying to figure out who is right, you or Bob Mueller.

Ms. FREDRICKSON. I think we need to see what Bob Mueller was examining. It looks from the Attorney General's letter that he—it was limited to only the hacking and leaking and the Russian troll effort as opposed to some of the other evidence that we have seen in the public eye.

Mr. JORDAN. Well, you were dogmatic. You were emphatic. You said, "We already know they did." And 2 days later the special counsel, via the letter from the Attorney General of the United States, says, no, they didn't.

So someone is right and someone is wrong, and I am just trying to figure out who it is.

Ms. FREDRICKSON. I have to refer back to what I said earlier. There are over 100 contacts between various Russians and Russian-affiliated people with the Trump campaign, the Trump administration, the Trump family, and that is certainly evidence.

If Mr. Mueller didn't find it conclusive, then I think it is up to Congress to examine it.

Mr. JORDAN. That is not evidence of conspiring, collusion, or coordination. That is not. Because he said this: "Based on these activities, the special counsel brought criminal charges against a number of Russian military officers for conspiring to hack into computers in the United States for the purposes of influencing the election."

But the special counsel did not find that the Trump campaign or anyone associated conspired with Russians. Even though they were given multiple chances to do so, they chose not to do so. But yet you pronounced to the whole world 2 days before this letter, "We know they did."

Mr. RASKIN. Would the gentlemen yield?

Mr. JORDAN. No, I have got 8 seconds.

All I am asking is, is Bob Mueller wrong? And you are the head of the Constitutional Society, so I want to know what your thoughts are.

Ms. FREDRICKSON. As I said, there was much public evidence that there were contacts between many Russians, and not just the Russian Government, but private people who were very close to the Russian Government——

Mr. JORDAN. If I could, Ms. Fredrickson——

Ms. FREDRICKSON [continuing]. With the Trump administration, the Trump campaign.

Mr. JORDAN. But that is not what you said. You said, "The question isn't whether members of the Trump campaign conspired with Russia. We know they did."

So you are not talking about contacts. People can contact folks all the time. I bet—Mr. Cline is a freshman Member of Congress. I bet he has contacted foreigners, because they come to see him, because it is important that they talk. People from different embassies. That happens all the time.

So contacts is a lot different than conspiring. You said 2 days before this letter from the Attorney General, we know they conspired. And Bob Mueller said, no, they didn't, very clearly, very often. And he even emphatically said they were given multiple chances to conspire and they didn't go for it. That is completely opposite of what you said 2 days before. And all I am asking is, are you calling Bob Mueller a liar?

Ms. FREDRICKSON. No, I am not. But I do think that this Congress needs to look and see what that evidence was and——

Mr. JORDAN. Well, that raises one last question, if I could, Mr. Chairman.

Are you going to take back your statement?

Ms. FREDRICKSON. Once the Mueller report comes out and the Congress has had a chance to examine it, I would be welcome—I would welcome an invitation to come back to discuss it.

Mr. JORDAN. You are going to take it back?

Mr. Chairman, I look forward to having Ms. Fredrickson come back in front of this committee——

Mr. COHEN. Thank you, Mr. Jordan. Thank you, Mr. Jordan.

Ms. Escobar is recognized.

Ms. ESCOBAR. Thank you, Mr. Cohen. Thank you, Chairman.

Thanks to everyone on the panel. I really appreciate your being here.

Ms. Fredrickson, I want to allow you the opportunity to finish. This has been a very interesting debate so far. And I just want you to answer one question. I think this is important for the public, and I think clearly it is important for this committee and subcommittee.

Why should Members of Congress want to see the Mueller report?

Ms. FREDRICKSON. Well, thank you for that question.

You know, as was elaborated earlier, this was quite a lengthy and thorough investigation and accumulated quite a lot of evidence. Certainly a fair amount of evidence on obstruction of justice to the

extent that Mr. Mueller himself said that the President was not exonerated.

I think that it requires Congress to examine, what were the questions that Mr. Mueller was answering? What was the standard he was applying legally? Was it the standard to issue an indictment or was it the standard to actually convict? Which I think is quite important and a difference that should be examined by Congress. And then how many different issues did he actually look into in terms of relationships with Russians?

Ms. ESCOBAR. Actually, I wanted to get to the different standards, because I think this is important for the American public as well to understand. What are the thresholds? What are the standards?

We have not had the privilege yet, obviously, of seeing the report. And I appreciate the ranking member pointing out how many millions of dollars, how many attorneys have actually been utilized, the public resources put into this that require us, that give us an obligation to see the report.

But what are the different standards that the American public should be aware of? And I will actually let you answer the question.

Ms. FREDRICKSON. Great. Well, thank you.

And I would first just say that I have not been a prosecutor, so I don't speak from that experience. But generally, to issue an indictment is a lower standard. The grand jury determines whether or not there is probable cause, whereas a prosecutor bringing forth a case, putting a case in front of a jury has to prove beyond a reasonable doubt.

And so it is a question about whether—and which standard was applied here, which might have meant an indictment would issue if it were probable cause but not under the higher standard.

We just don't know. And I would defer to my colleagues up here who may have more experience in criminal procedure than I do.

However, I would say there is also a different standard in terms of Congress. And that is your constitutional role of oversight, to examine whether or not, even if behavior which didn't reach a threshold of beyond a reasonable doubt is nonetheless something that Congress needs to take action to correct.

And that could be through many mechanisms. Certainly impeachment is always available to Congress under the Constitution. But you have the appropriations power, you have the power to make law, and so forth.

So I think that is another standard that in this case is the most important standard for you to take to heart.

Ms. ESCOBAR. Thank you so much.

And actually, Mr. Florence, I want to ask you about that behavior, because in your written testimony you wrote: "The President can run afoul of obstruction laws by dangling or promising pardons to influence a witness." And then you later write: "The factual determinations necessary to determine whether dangled pardons violate the criminal laws can, and should, be determined through law enforcement investigations or through congressional oversight inquiries."

I am curious as to your thoughts and opinions. We have seen the messaging that President Trump has put out through Twitter and through interviews in the media. What are your thoughts on whether the President has actually dangled pardons?

Mr. FLORENCE. So I want to begin by pointing out why it is so important for Congress to look at this. The Mueller investigation was into whether a foreign government interfered in our election. And the special counsel did not exonerate the President from interfering in that investigation, from obstructing that investigation.

So we have a foreign government that has attacked our democracy. I would hope that our executive branch is fully united behind investigating what happened there, who was involved in it, and what we can do to make sure it never happens again. And yet we have a special counsel who, while being very measured, very cautious, is not able to exonerate the President from interfering in that investigation? That is scary.

And so this Congress, this committee, needs to know was the President trying to block an investigation into a foreign power altering or interfering in our elections. This committee can do that in a lot of ways. It can take testimony. It can start by getting the full Mueller report, all of the underlying evidence that it found, both into what happened in our election, what the Russians did, and into whether, how, and why the special counsel had some concerns that the President may have been trying to block that investigation.

And that is something that I don't think is a partisan issue. We should all agree that our elections should be decided by American voters and by our country, and that we should all want to make sure that no foreign power interferes, and that when it does we are all united to make sure that it doesn't happen again.

Ms. ESCOBAR. I agree. We should all be united. And some of us are trying to get to that.

One last quick question.

We have learned about the way—or we have discussed today about how the President actually circumvented what many people would consider a normal process for determining a pardon by at least getting some consultation. His consultation instead has been Kim Kardashian.

Is there a way for Congress, without infringing on the broad constitutional power that the President has, is there a way for us to legislate that somehow to put some transparency in a process?

Mr. FLORENCE. I think transparency is the key word there, and that there are things that Congress can do with its legislative authority to ensure that if the President abuses this power or if there is some suggestion he may be abusing this power, that Congress can make sure that doesn't go unpunished and unnoticed.

And so a bill was offered by Mr. Schiff, the Pardon Abuse Prevention Act, that I think this committee may wish to look at, to make sure when there is a pardon that may look to put the President above the law, that the underlying investigative materials can make their way to Congress so that there is transparency and that nobody can use this one power to put themselves above the law and prevent the equal application of the law.

Ms. ESCOBAR. Thank you.

Mr. COHEN. Thank you.

Ms. Sheila Jackson Lee, a successor to a great, great former impeachment member of this committee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Yes, I had the experience of being a member of this committee in the impeachment proceeding that occurred in the 1990s.

Let me thank the chairman and the ranking member. This is an extremely important hearing. And I thank the witnesses very much for their presence being here.

I want to ask a question that would warrant just a yes or no. I am going to take you down memory lane, and that is to recall, in the fall of 2016, 17 intelligence agencies determined that Russia was attempting to interfere with the 2016 election. It fell around the fall time. I know that the then Secretary of Homeland Security was extremely engaged in the process of working with other intelligence agencies to make sure that it was as broad a review as possible.

Ms. Fredrickson, do you remember that determination?

Ms. FREDRICKSON. Yes, I do.

Ms. JACKSON LEE. Mr. Florence, do you remember that determination?

Mr. FLORENCE. Yes.

Ms. JACKSON LEE. Mr. Pfiffner, do you remember that determination?

Mr. PFIFFNER. Yes, ma'am.

Ms. JACKSON LEE. And, Mr. Kent, do you remember that determination?

Mr. KENT. I do.

Ms. JACKSON LEE. With that as a backdrop, I am going to proceed with questions.

That establishes that any thought, any facts, any presentations about Russia's involvement is predicated on the fact that in 2016 our intelligence agencies, 17, confirmed that they were attempting to do so. And that was in the midst of the 2016 Presidential election.

In the summer of 2017, I introduced H. Res. 474. And I ask the chairman unanimous consent to introduce this into the record.

Mr. COHEN. Without objection.

[The information follows:]

********** INSERT 2–1 **********

Ms. JACKSON LEE. This was a resolution in the midst of the ongoing hysteria and castigating of Director Mueller, accusing the special counsel's work as a witch hunt. And, frankly, Members of Congress were frightened.

So the resolution expresses the disapproval of any action by the President to remove the special counsel investigating the Russian interference in the 2016 Presidential election and opposition to the grant of pardons to any person for offenses against the United States arising out of Russia's activities to bring about the election of President Donald J. Trump as President of the United States.

A number of members joined. This was a vigorous discussion. And I might say, Ms. Fredrickson, it was evidence of the Article I

body attempting to give oversight to what was seemingly threatening a rule of law—process of the rule of law.

I will read into the record the language, the opening language.

"The strength of the American constitutional system designed in 1787 in Philadelphia is the national government's separated powers in which the legislative, executive, and judicial branches serve as checks and counterbalances on each other, and fidelity to the rule of law is the highest value and responsibility."

I am very glad to say Mr. Cohen was a cosponsor of this legislation.

But, Ms. Fredrickson, would you, then—may I give you an opportunity to, as you were making your comments, that was it in your mind that the Article I body, the Congress, had not been heard on the Mueller report?

Ms. FREDRICKSON. Absolutely. That is an essential piece.

Ms. JACKSON LEE. And offer to me what you thought we might do as a constitutional body even in receiving the Mueller report.

By the way, do you believe that we should immediately receive the Mueller report and its supporting documents?

Ms. FREDRICKSON. Well, I believe that you should receive it as soon as whatever redactions that need to be made consistent with the law, not overly expansive, are made. But that should be very prompt. And Congress is certainly entitled to.

The Article I powers are clear. Congress has a role in oversight. Congress has to ensure that rule of law is upheld. And it is entrusted to you in the Constitution to make sure that the President himself is not above the law.

So because of the breadth of this investigation, because of the dangers that you have enumerated that it was meant to address, and that, according to our intelligence agencies, are still ongoing threats, it is imperative that this body take up the report and examine it. I think we still have a lot of questions about what might happen in the next election. And there may be lessons to be learned for that purpose as well.

Ms. JACKSON LEE. Some will offer the fact that they believe the pardon power is unconditional. This committee has made a commitment to the American people to abide by the rule of law. And we will be looking at issues involving corruption, obstruction of justice, and the abuse of power.

Mr. Florence, can there be, and what parameters would you suggest to be considered, if the pardon power was abused?

Mr. FLORENCE. I think this committee has a lot of tools at its disposal. The first thing that should happen is real oversight and investigation to find out what abuse has happened, to assess that, and to provide a report to the public so that the people can know what has been going on and make their own judgments.

But the Congress has additional tools at its disposal that it can use in cases of abuse of power, up to and including censure, impeachment, and other authorities. And it is ultimately for the Congress to make those judgments.

What I would offer——

Ms. JACKSON LEE. Let me just—you can abuse power with the use of the pardon power.

Mr. FLORENCE. It is a serious concern that the pardon power can be abused. And it is incumbent on Congress to prevent that abuse.

One of the things that we have seen is that it is fairly rare, although not unprecedented, for pardon questions to get in front of the courts. There are various reasons for that. And one consequence of that is that it is so important for this body as a coequal branch of government to make sure that abuse doesn't happen.

Ms. JACKSON LEE. Well, would you be kind enough to offer just an example—we won't hold you to it—that might be an abuse of the pardon power?

Mr. FLORENCE. So I will take your invitation and offer two.

One is the President's pardon of Sheriff Arpaio. So Sheriff Arpaio was sued by private people for violating their constitutional rights. The court said he violated their rights, you got to stop doing that. It entered an injunction to tell him to stop doing that. He violated that court order again and again. And the court used its concept authority to say: You have got to follow my order. You have got to stop violating constitutional rights.

President Trump then issued a pardon to pardon Sheriff Arpaio of contempt and to take away the court's ability to enforce its orders for the reasons I have laid out in my testimony and that are in briefing in that case. That violates our system of separation of powers and the core constitutional command that, when people's rights are violated, they can go to courts and courts can provide a remedy and protect the Constitution.

So that is one. If I have time, I will——

Mr. COHEN. You can answer, finish up, and then we will move on.

Mr. FLORENCE. So I think there has been a lot of reporting about potential dangled or discussed pardons where people around the President, his lawyers, have been talking with subjects of investigations about maybe there will be a pardon for you. This is just news reporting. I don't know all of the facts of this.

But if, in fact, the President and his people are offering or dangling pardons to influence witness testimony in order to interfere with an investigation, that would be an abuse of the power.

We don't know all the facts there, and that is why it is so important to have real investigation and oversight and get to the bottom of what happened, some of which is alluded to in the short summary of the Mueller report and all of the findings and conclusions and evidence that the special counsel had on obstruction.

Ms. JACKSON LEE. Mr. Chairman, I thank you for allowing that time extended. And I just want to say this evidences, although I was not able to pose questions to all the witnesses, it evidences the importance of this hearing.

Thank you so very much. I yield back.

Mr. COHEN. Thank you. And Ms. Barbara Jordan would be proud of you.

Ms. Dean, you are recognized.

Ms. DEAN. Thank you, Mr. Chairman. I appreciate the chance to be here.

And thank you to all the witnesses.

Thank you Mr. Chairman for having this hearing.

Over the course of the last 2 years, I found myself thinking I am looking in a mirror upside down. So many things seem upended. So many things seem out of place. So many of our institutions or the use of our institutions seem just out of kilter. And much of this before I came to Congress and was sworn in January the 3rd.

And I want to ask about pardon power and, like my colleagues and like all of you, talk about the importance of full transparency of the Mueller report, because if we don't have full transparency of the Mueller report and then pardons flow from the activities of that, even more troubling and more hidden and obscure will the truth be from the American public.

Professor Kent, I wanted to give you an opportunity to—and I apologize. I was in another hearing. So if this is repetitive, I am sorry, Mr. Chairman.

I wanted to give you a chance to comment on the constitutional authority to pardon. And I saw your outline of the four kind of fundamental questions that you asked.

Could you tell me some of your concerns with this President and his already use of the pardon power and what you worry about as possible use of the pardon power moving forward?

Mr. KENT. Yes. Thank you, Congresswoman.

You know, certainly one thing that I and I think a lot of other people worry about would be a self-pardon. We have talked about that at length and reasons why it seems that we all agree that that would be unconstitutional.

You know, I think also extremely troubling are what Mr. Florence and others have referred to, the news reports—and, again, we don't know all the facts—but the reports that people who seem to be intermediaries of the President have been interacting with lawyers for people who may have damaging testimony about the President to raise the possibility of pardons.

And again, we certainly would want to gather all of the facts before making any kind of conclusions about it. But I, in addition to thinking that the Congress has oversight power to look into this, I mean, those clearly could be Federal crimes. Those could be crimes of obstruction of justice or related crimes. And I think we should all hope that we live in a country where the Justice Department would be independent enough to be looking into that as well.

Ms. DEAN. Okay. Thank you.

And, Ms. Fredrickson, one of the more troubling aspects I found with Attorney General Barr's scant summary—and it was by no means encompassing, we didn't even see a single full sentence from the Mueller report, which I found troubling—the Attorney General came to a legal conclusion regarding obstruction of justice. It was 48 hours after the report was delivered. And yet unable to deliver the report to us, he was able to get through it in that 48 hours and made the legal conclusion that there was no obstruction of justice by this President. That I found particularly troubling.

The Attorney General argued there that the President cannot commit obstruction of justice—this was in his 19-page memo that he wrote before he earned the position of Attorney General—that he cannot commit obstruction of justice when using his own constitutional authority. I found that reasoning to be flawed.

Could you expand on this notion of constitutional powers that cannot lead to obstruction of justice and explain where the Attorney General's reasoning is either right or falls short when it relates to pardon power?

Ms. FREDRICKSON. Thank you for that question.

So the issue is, as Professor Kent had discussed earlier, the unitary executive theory, which posits that the President has absolute control over the entire executive branch, and that is in all decisions, hiring and firing, and so forth, and that by exercising his discretionary powers, he can actually not commit obstruction of justice.

It is a very, very questionable fringe theory. And Professor Kent in his, I think, upcoming Harvard Law Review article with a couple of other esteemed scholars goes to examine the history of the pardon power and discusses at length the unitary executive theory.

But it is, as I said, a fringe theory that arrogates complete power to the President that I think certainly, if you consider why there was a founding of the United States of America after a rebellion against an absolute monarch, it is clear that even if you believe in the originalist understanding of the Constitution, you would particularly then assume that the President could not be above the law.

But I think maybe I should turn it over to Professor Kent who has delved so deeply into the history that he might offer you more.

Ms. DEAN. Thank you.

Mr. Kent, did you want to add to that?

Mr. KENT. I agree that the very, I would call it extreme view of Presidential unaccountability that was offered by Mr. Barr while he was still a private citizen has very little basis in our constitutional history and tradition.

You know, the President has many powers that are in Article II, and the idea that just simply because you can point to some part of Article II and say, "I am exercising that power," that immunizes Presidential action from accountability by the law, it is illogical and just contrary to so much Supreme Court precedent and so many generally accepted legal understandings, I am not quite sure what more to say about it. It is incorrect.

Ms. DEAN. I appreciate that. And I appreciate the chance to remind the American public of our history and where the pardon power came from, that it was to be exercised as a benevolent power, not a power to get cronies off for doing some criminal acts.

Mr. COHEN. Thank you, Ms. Dean.

Mr. RASKIN. Will the gentlelady yield?

Ms. DEAN. Yes.

Mr. RASKIN. Could I——

Mr. COHEN. Go ahead.

Mr. RASKIN. I promise it will be brief, a concluding question along this point.

Mr. COHEN. Go ahead.

Mr. RASKIN. I just want to know, certainly when we all read Attorney General Barr's—or then lawyer Barr's memorandum asserting that the President could not obstruct justice within the meaning of the law, that this was an extreme and eccentric kind of view, could somebody characterize whether it has gained traction in the

scholarly literature or in the law generally? Is it still a real minority view, or is he speaking for a lot of people now?

I yield back to you, Mr. Chair.

Mr. FLORENCE. I would be happy to offer an observation here.

Even before that memo came out, when others in the President's circle had floated this theory, my organization, Protect Democracy, organized a letter from dozens of constitutional law scholars, I believe Professor Kent and his coauthors among them, explaining why this theory has no basis in the Constitution.

What I think is important for this committee to do is to make sure that this stays a fringe position and doesn't somehow make its way into the law. Since Watergate, it has been clear that the President can't abuse his powers to place himself above the law. This President I think is trying to do that in a number of ways, and it is really critical for this body to make sure that that doesn't happen, and, frankly, for all of the people who you represent, to make sure that we stay a Nation of laws and not a Nation where we have a king who can do what he wishes subject to no law.

Mr. COHEN. Thank you.

Let me ask you all to refresh my recollection or to give me some information. I believe that we have only had one other special counsel, and that was Mr. Danforth in Waco, under the regulations. And we had two independent counsels, Mr. Jaworski, he was a successor to another independent counsel, and Mr. Starr.

Did any of those three individuals give opinions of violations of the law in their reports? Or did they make the reports, submit them to Congress, and let Congress make decisions?

Mr. Florence.

Mr. FLORENCE. They made sure that those reports could get to Congress. And one thing that we have done to make sure that that is publicly known is to unearth the Jaworski road map that the grand jury provided to this committee in the context of that investigation because it is so important for Congress, as a coequal branch, to uphold our Constitution and ensure accountability here.

Mr. COHEN. And same thing for Kenneth Starr. He didn't recommend this is a violation, that is a violation, I would indict, or I wouldn't indict. He just gave the report to Congress, did he not?

So this is really strange. This is the first time in maybe the history of the country in a special counsel or independent counsel that the Attorney General has jumped in the breach and given his opinion of what the report said. It has never happened.

Okay, let me ask you this. Is it possible there was a counterintelligence portion to the Mueller investigation and that wasn't—wouldn't have been part of conspiracy but something in there about counterintelligence that might have shown that the President was compromised by his holdings of properties in foreign countries or his desire to have a property in a foreign country or loans that were made to him or moneys that were laundered through a bank to him, and that possibly those compromised him and we could have a President that the report could show is under the influence or could be under the influence of the Russians, and yet it still wouldn't amount to a conspiracy? Is that not possible?

Ms. Fredrickson, would that be something you think might be in, could be in the Mueller report?

Ms. FREDRICKSON. Well, it might be. Obviously, I haven't seen the Mueller report, and there may be parts of it that involve national intelligence that I would never see since my top secret clearance has expired.

But certainly an important question, and, again, a reason why Congress needs to get that report, because you can certainly examine all of that.

Mr. COHEN. And is it possible that there is something in there that might amount to a coverup of knowledge of what the Russians were doing which would not amount to a conspiracy? Like if the Trump children or one of the children knew that the Trump campaign was—what the Russians were doing, but didn't say, "We are going to do this for it," there is no quid pro quo, but they knew about it, and maybe they even discussed, "Well, we would sure like to have sanctions lifted at some time," that wouldn't be a conspiracy, would it?

How far would they have to go to make that a conspiracy? And maybe they wouldn't want it to be known if it was less than a conspiracy but maybe a coverup of some information?

Ms. FREDRICKSON. I really don't—I can't comment on what might be in the national intelligence portion of the Mueller memo. But, again, I can only say that that is why it is so vital that this body examine that information. There certainly are many aspects of—certainly much that we have seen reported about relationships that have to do with financial holdings, with property, with the Trump Tower in Moscow, with a variety of other issues that may not have been part of a conspiracy, may not have been the government necessarily, but may be a reason why there could have been a coverup.

But, again, I can't really speculate, but I think it is important for you—because many people are thinking of those—asking those questions of themselves that for them to be definitely answered, it comes to Congress to do that.

Mr. COHEN. You made a point in your opening statement to say that the Barr 19-page memo was devoid of legal support, right? But if it had a lot of political support, wouldn't that trump the legal support?

Ms. FREDRICKSON. Right. Well, I think Professor Kent, he used the word extreme. I used the word in my oral testimony or just now of fringe. But I think you can find a few people who will endorse it.

But it certainly—it is a very interesting contrast between some of the things that Mr. Barr said in his testimony before the Senate Judiciary Committee to what he said in the memo when he was a private citizen auditioning for a different kind of a job with the President. So certainly it has some political force behind it.

Mr. COHEN. Coming back to pardons, to close this hearing out, there was a governor of Tennessee—I don't know if any of you all heard of him—Leonard Ray Blanton. Anybody heard of Leonard Ray Blanton? Former Member of the House, Governor of Tennessee from 1974, when he was elected leaving Congress after 8 years, and served from 1975 to 1979.

Leonard Ray Blanton, at the last minute right before he was leaving office, the FBI found out he was going an issue a lot of pardons to a lot of people for money.

So the lieutenant governor of the State, John Wilder, the speaker of the State, Ned McWherter, jumped into action with the winner of the 1978 election, now United States Senator Lamar Alexander, and swore him into office about 48 hours or 24 hours, right at the last minute, early, so that Governor Blanton couldn't issue those pardons, and he didn't. And Senate Alexander became—then Mr. Alexander became Governor Alexander.

But by issuing pardons at the last minute, but for somebody having knowledge of it and stepping into the breach, there is no remedy. Impeachment is not a remedy.

So I find Mr. Mason's perspective better than Mr. Madison's, because Mr. Madison was wrong to say impeachment is the answer. Impeachment is tough, and impeachment can't do anything for somebody who issues pardons at the last minute. I just remember the Clinton administration. Almost all the pardons were at the last minute.

As I have said, I urged President Obama for 3 or 4 years to be issuing commutations. And I had confirmation from people who were in the office, his attorneys in the office who worked on that, that they had gone so slow and the process was terribly slow, and they didn't get offices geared up, and they lost people, they lost—their pardon attorney, I think quit. And I forget the lady's name that worked over there in the White House Counsel's Office.

But if he issued 1,700 commutations, I, again, say that was about 7,000 too few. And it was 0.3, not 3 percent, but 0.3 percent that Mr. Johnson said had violated some portion of the law, 4 people out of 1,700. Obama did pretty good in his thorough examination. He didn't do good enough for the rest of them.

I think we need to amend the pardon power. I recommended it back in 1977 when I was a constitutional convention of Tennessee vice president, an E vice president of the constitutional convention. And we had the pardon power before us, because I knew what Ray Blanton was doing and it had come up, and recommended that we change the pardon power and give it, say, if four of five of our Supreme Court justices looked at it and didn't think it was the interest of justice, it wouldn't go into effect.

Now, the justices didn't want to touch it, it didn't get anywhere. But it was a way to put some kind of a limit on the Governor's pardon power by having the court look at it.

Here we proposed limiting it to certain close folk. But there should be something. And I hope you all would give it a little thought and submit to me, if you would, any thoughts you have on how we should amend the pardon power or recommend it. Not easy.

But there are certain things we can work together on the Republican side. We had a hearing on the Emergency Powers Acts, and we have a lot of agreement there on a possible statute. And the Republicans are just as much concerned about an overreaching executive if it is, you know, maybe a different party, but, in general, their philosophy is that. And so we might find some common ground. I hope you would help us with that. You know, I am concerned what could happen with these pardons.

I think somebody said that these acts of obstruction of justice were in clear public view. That is what maybe Mueller said, they

were all in public view, which would have been the Comey thing. But it wasn't all in public view, because the dinner wasn't in public view when he had the one-on-one dinner and asked him to lay off of Mr. Flynn. We don't know what else was not in public view. It was in public view, I guess, when he told Lester Holt: I did it because of the Russia thing.

But this President is a President who thinks he can get away with shooting somebody on 5th Avenue. If he thinks he can get away with shooting somebody on 5th Avenue, he is not going to have a problem in public view going: I did this because of the Russia thing. He also doesn't think about the ramifications of his actions, because he has not real good on the second and third steps. Not real good on that.

So I think the pardon power is something we need to look at. I think it can be abused. I think it will be abused.

And I am so happy that Ms. Johnson got out of jail, my constituent, and the gentleman in Nashville got out. But there are thousands and thousands of people who Kim Kardashian has not taken to her heart and that Sylvester Stallone hasn't read about, people who may not be dandies, who deserve commutations, and the idea that we give them on celebrity.

And he has asked for a list of people who are celebrities, not asked for people who have been unjustly convicted or served too long. He hasn't even through about that. He is just looking for celebrities.

Mr. COHEN. So it is a problem.

Mr. Raskin, you want to follow up with something? Professor Raskin.

Mr. RASKIN. Mr. Chairman, I want to thank you for calling this hearing. I want to thank everybody for their flexibility and suppleness in dealing with the questions today. Obviously, we are in the middle of an ongoing constitutional emergency here, and we appreciate all of the support and the insight of the people in academia.

Thank you, Mr. Chairman. I yield back to you.

Mr. COHEN. Thank you.

And that will conclude our hearing. And I have to find the last things I need to say. That conclude, we appreciate that, we have done that, we have done that, we have done that.

This concludes today's hearing. I want to thank all of our witnesses for appearing today, even if they weren't under oral God's witnessed oath.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

With that, excellent hearing, thank you for your participation, excellent children in attendance. We are adjourned.

[Whereupon, at 4:08 p.m., the subcommittee was adjourned.]

APPENDIX

Protect Democracy

Law Professor Letter on President's Article II Powers

If you would like to add your name, please email press@protectdemocracy.org *(mailto:press@protectdemocracy.org)* with your organizational affiliation.

June 4, 2018

Donald McGahn II
White House Counsel
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Emmet Flood
Special Counsel to the President
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Mr. McGahn & Mr. Flood:

We, legal scholars who study and teach constitutional and criminal law, write in connection with the President's apparent belief that he is empowered by the Constitution to halt the Special Counsel's investigation into alleged Russian interference in the 2016 election for any reason whatsoever, and his apparent view that he is not constrained by Congress's duly enacted laws prohibiting the obstruction of justice. As reported in the *New York Times*, attorneys for the President wrote a letter to Special

Counsel Robert S. Mueller asserting that the Constitution empowers him to "to terminate the inquiry, or even exercise his power to pardon," and that he cannot illegally obstruct any aspect of the investigation because of these powers.[1] These views are incorrect.

First, the best understanding of Article II of the Constitution is that presidential actions motivated by self-protection, self-dealing, or an intent to corrupt or suborn the legal system are unauthorized by and contrary to Article II of the Constitution. Second, and even if one does not accept the foregoing construction of Article II, Congress has enacted obstruction of justice statutes that prohibit any person from acting "corruptly" to interfere with federal criminal investigations.[2] Whatever a President may have been able to do in the absence of such statutes, Congress's judgment that obstruction of justice is prohibited binds the President.

(1) Article II and Faithful Execution

While Article II empowers the President to execute the laws, it also constrains him in so doing. The "Take Care Clause" requires that the President "shall take Care that the Laws be *faithfully* executed" (emphasis added). Article II contains a mandatory Oath of Office whereby the President must swear to "faithfully execute the office of President." Like the Take Care Clause, the Oath also conceives of the President's role as a *duty*—to "preserve, protect, and defend the Constitution"—not a personal *power*.

When the Founders thus defined the Presidency as an office bound and restricted by overarching duties of care and faithfulness (fidelity) to the Constitution and laws of the United States, they were invoking the well-known concept of treating a public officer as a fiduciary.[3] In the eighteenth century, as today, English and American law required fiduciaries to act always with due care, solely for the good of their beneficiaries, and to abstain from self-dealing, corruption, and other kinds of self-interested actions.

The President's duties of care and faithfulness are the fiduciary duties most explicitly required by the Constitution, a document that refers to many offices as "Offices of Trust," invoking the legal concept of trusteeship (a fiduciary relationship). Mirroring the Constitution's text, the *Federalist Papers* repeatedly use the language of care, faith, and

trust to describe the offices and duties of all three branches of the federal government and the way their powers should be exercised on behalf of the American people. George Washington, in the opening lines of his first inaugural address, spoke of the presidency as a "trust" committed to him by the American people.[4] The Founders' carefully-chosen words, with their well-known meanings, reflect a conception of a chief magistrate who is duty bound to act with faithfulness to the law and the people, not to his own selfish interests. A similar view of the office underlies the conclusion of the Department of Justice's Office of Legal Counsel that a president may not pardon himself.[5]

It is not strange that the Founders chose to create a chief executive who would be bound to act for public-spirited reasons, rather than pursuing self-interest, self-dealing, or self-protection. Monarchy and all of its attendant ills were rejected by the Founders. The President would not be a king by another name.[6] By banning titles of nobility,[7] and providing that the President would be elected to a term of years,[8] not chosen on hereditary principles, and not ruling for life, the Constitution addressed the fear that a chief executive's primary interest would be perpetuation of his dynastic successors and retainers rather than the good of the country. Many English kings had been foreign born, and still held lands and titles abroad, giving them personal interests that might differ from those of the citizenry. In response, the Constitution requires that the President be a citizen.[9] The President was to be given a salary while in office, and prohibited from imposing taxes or otherwise raising funds on his own authority, and also positively barred from accepting bribes, gifts, or other emoluments of office from foreign governments or state governments.[10] Typically monarchical kinds of financial self-dealing by the chief magistrate were therefore substantially checked. And importantly, the Constitution was conceived at a time when the English Bill of Rights constrained even the monarch from exercising the so-called "dispensing" power to dispense with or suspend Acts of Parliament. Our Constitution similarly limits the President, and certainly cannot be read to grant him a power the British monarch lacked.[11]

These structural checks against abuses typical of monarchy further elucidate the Founders' vision—seen in the Oath and Take Care Clause—of a chief executive bound to act with care and fidelity for the benefit of the country, not himself personally. Other structural provisions in the Constitution which evidence a norm against self-dealing support this reading.[12]

The President's executive powers therefore would not permit him to terminate the Russia investigation by firing the Special Counsel or his Department of Justice supervisors; to order the destruction of evidence developed in the Special Counsel's investigation; to pardon himself or other subjects of the Special Counsel's investigation;[13] or to attempt to quash a subpoena, if the President takes any of these actions motivated predominantly by self-interest. Indeed, the Constitution, properly understood, would prohibit all of those actions under those conditions.

Because the President does have vast powers as head of the executive branch, and because the difference between public-interested (constitutional) and corrupt (unauthorized and hence unconstitutional) presidential actions may often turn on the reasons for which actions are taken, the lawyers for a President have an especially important obligation of their own to the Constitution and people of the United States. The President's lawyers must counsel their client so that he understands that acting for the right reasons is the key to lawfully exercising the great powers he wields.

(2) Congress's Obstruction Statutes and the Separation of Powers

In addition to internal constraints imposed on the President by the text of Article II and constitutional structure, the President is also externally constrained to avoid obstruction of justice.

The mistaken claim that Article II provides a complete defense to obstruction by the President rests in part on the incorrect premise that the Constitution grants him the exclusive right to exercise the executive powers. A President's Article II powers must be read in conjunction with the restrictions the Constitution places on the federal government, Congress's Article I powers, and the courts' Article III powers, as well as

laws duly enacted by Congress. The administration of justice involves all three branches of government.

The limitation on the President's exercise of Article II powers is perhaps easiest to understand in the context of the Bill of Rights. For instance, it would violate the First and Fifth Amendments for the President to fire federal employees based on their race or religion. To give another example, the Due Process Clause requires that persons wielding prosecutorial power be "disinterested."[14] The Constitution must be read as a whole; none of its provisions, including Article II, is an island.

Most importantly for our purposes, Congress can also exercise its constitutional authority to place limits on the executive.

When Congress legislates within its constitutional authority in a manner that restricts the President, the President is presumptively bound to comply with that law.[15] After all, Congress is expressly given power to enact laws "necessary and proper" for implementing the powers of the President.[16]

Congressional limitations upheld by the Supreme Court on the President's exercise of his war powers, in a case such as *Hamdan,* are especially instructive. There, the Court held that Congress could specify procedures for the President to follow for trying military detainees at Guantanamo.[17] If Congress can constrain the President's vast powers as Commander in Chief in times of war, then it can surely place limits on his conduct in his everyday role as the head of our domestic law enforcement agencies.

And, indeed, that is exactly what Congress and the courts have done. Even though the executive branch is generally empowered with law enforcement responsibility, Congress has enacted civil service laws and created independent agencies limiting the executive branch's power to hire and fire federal employees who enforce the law. In upholding the statute that provided for an independent counsel, rather than the Department of Justice, to investigate wrongdoing in the upper reaches of the executive branch, the Supreme Court "concluded [that] 'we simply do not see how' it is 'so central to the functioning of the Executive Branch as to require as a matter of constitutional law that' the President be

understood to have unlimited control over the investigation and prosecution of potential crimes involving himself or his top aides."[18] As Richard Pildes wrote recently, "Given the established constitutional principle that Congress can protect a federal prosecutor from the President's domination in these type of cases, Congress can certainly constrain the President's power in more limited ways . . . including by making it a crime for the President to act with a corrupt intent to stymie or shut down investigations of the President himself and his top aides."[19]

It is only in rare cases that the President has constitutional power that is "both 'exclusive' and 'conclusive'" on a particular issue,[20] thereby disabling Congress from legislating. And it would likewise be in only a very rare case that generally applicable federal criminal statutes would not apply to the President because of inconsistency with Article II. The Constitution, after all, directly contemplates that the President (and other officers) could be subject to criminal liability for their official actions.[21]

While the President might, for example, intervene directly in an on-going criminal investigation to advance a public-interested goal concerning national security or some other consideration, it is implausible to contend that Article II overrides Congress's obstruction of justice statutes in circumstances where the President is acting to advance "narrowly personal, pecuniary, or partisan interests."[22]

The federal obstruction laws, with their bar on corruptly-motivated actions, apply whether the president obstructs an investigation through firing officials leading it, shutting down the investigation, ordering the destruction of documents, or dangling or issuing pardons to induce witnesses to impede the investigation. Just as the President could not use otherwise lawful firing powers in exchange for a bribe without running afoul of federal bribery laws, he is not free to exempt himself from the application of the obstruction of justice laws.

* * *

The Office of the President is not a get out of jail free card for lawless behavior. Indeed, our country's Founders made it clear in the Declaration of Independence that they did

not believe that even a king had such powers; they specifically cited King George's obstruction of justice as among the "injuries and usurpations" that justified independence. Our Founders would not have created—and did not create—a Constitution that would permit the President to use his powers to violate the laws for corrupt and self-interested reasons.

In sum, both Article II and the criminal laws of this country forbid the president from engaging in corrupt and self-dealing conduct, even when exercising Article II powers to execute the laws.

We have no doubt that you take your professional roles very seriously—and we hope our legal analysis above provides some illumination as you continue to advise your client to faithfully execute our laws and to take care that those laws are faithfully executed throughout the Executive Branch.

Sincerely,

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Cc: **Rod J. Rosenstein**

Deputy Attorney General, United States Department of Justice

Representative Bob Goodlatte

Chairman, House of Representatives Judiciary Committee

Representative Jerry Nadler

Ranking Member, House of Representatives Judiciary Committee

Senator Chuck Grassley

Chairman, Senate Judiciary Committee

Senator Dianne Feinstein

Ranking Member, Senate Judiciary Committee

[1] *See* Michael S. Schmidt, Maggie Haberman, Charlie Savage and Matt Apuzzo, "Trump's Lawyers, in Confidential Memo, Argue to Head Off a Historic Subpoena *(https://www.nytimes.com/2018/06/02/us/politics/trump-lawyers-memo-mueller-subpoena.html)*," the *New York Times*, June 2, 2018.

[2] *See* 18 U.S.C. § 1505 et seq. Most relevant here, 18 U.S.C. § 1512 (b), the "witness tampering" provision, prohibits any person from "corruptly" persuading a witness in order to prevent them from testifying or communicating information to a federal officer or judge in an "official proceeding."

[3] *See* Ethan J. Leib & Jed H. Shugerman, *Fiduciary Constitutionalism and "Faithful Execution": Two Legal Conclusions*, Georgetown Journal of Law & Public Policy (forthcoming 2018) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968 *(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968)*.

[4] http://avalon.law.yale.edu/18th_century/wash1.asp *(http://avalon.law.yale.edu/18th_century/wash1.asp)*.

[5] *See Presidential or Legislative Pardon of the Presiden*t, OLC Opinion, August 5, 1974; see also Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justic*e, 106 California Law Review (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876 *(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876)*, at 50-51.

[6] *See* The Federalist (No. 69) (Alexander Hamilton).

[7] U.S. Const. art. I, § 9, cl. 8 & § 10 cl. 1.

[8] U.S. Const. art. II, § 1.

[9] U.S. Const. art. II, § 1, cl. 5.

[10] U.S. Const. art. I, § 9, cls. 7-8 & art. II, § 1, cl. 7.

[11] *See, e.g.*, The Heritage Guide to the Constitution, Heritage.org/Constitution ("Under this reading of the [take care] clause, the President can neither authorize violations of the law (he cannot issue dispensations) nor can he nullify a law (he cannot suspend its operation).").

[12] Notably the Ineligibility Clause of Article I and the rule that the Vice President may not preside at the impeachment trial of the President. *See* Hemel & Posner, supra, at 36; Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009).

[13] *See* Leib & Shugerman, *supra*.

[14] *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967).

[15] *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 638-39 (2006).

[16] U.S. Const. art. I, § 8, cl. 18.

[17] *See Hamdan, supra. See also Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court, at the height of the Korean War, held that Congress's refusal to grant the President the authority to seize private property in the United States meant that a presidential seizure of steel plants to avert a slowdown in production of war materiel was illegal.

[18] Richard Pildes, *In the View of the Supreme Court, Alan Dershowitz Is Wrong About the Powers of the President*, Lawfare (June 9, 2017), https://lawfareblog.com/view-supreme-court-alan-dershowitz-wrong-about-powers-president *(https://lawfareblog.com/view-supreme-court-alan-dershowitz-wrong-about-powers-president)* (quoting *Morrison v. Olson*, 487 U.S. 654 (1988)).

[19] *Id.*

[20] *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

[21] *See* U.S. Const. art. II § 4 ("The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."), and art. I, § 3, cl. 7 ("Judgment 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 party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.").

[22] Hemel & Posner, *supra*, at 37.

IV

115TH CONGRESS
1ST SESSION

H. RES. 474

Expressing disapproval of any action by the President to remove the Special Counsel investigating Russian interference in the 2016 Presidential election and opposition to the granting of pardons to any person for offenses against the United States arising out of Russia's activities to bring about the election of Donald J. Trump as President of the United States.

IN THE HOUSE OF REPRESENTATIVES

JULY 25, 2017

Ms. JACKSON LEE (for herself, Mr. COHEN, Ms. HANABUSA, Mr. GUTIÉRREZ, Mrs. CAROLYN B. MALONEY of New York, Mr. CASTRO of Texas, Mr. TED LIEU of California, Mr. CLEAVER, Mr. BUTTERFIELD, Mr. LEWIS of Georgia, Mr. CONNOLLY, Mr. MEEKS, Mr. RASKIN, Mrs. LAWRENCE, Ms. BASS, Mr. KRISHNAMOORTHI, Mr. KILDEE, and Mr. BEYER) submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Expressing disapproval of any action by the President to remove the Special Counsel investigating Russian interference in the 2016 Presidential election and opposition to the granting of pardons to any person for offenses against the United States arising out of Russia's activities to bring about the election of Donald J. Trump as President of the United States.

Whereas the strength of the American constitutional system designed in 1787 in Philadelphia is the national govern-

ment's separated powers in which the legislative, executive, and judicial branches serve as checks and counterbalances on each other, and fidelity to the rule of law is the highest value and responsibility;

Whereas in late July 2016, the FBI opened an investigation into the hacking of the Democratic National Committee's emails, which the U.S. Intelligence Community would attribute to the Russian government;

Whereas, on January 27, 2017, one week after his inauguration as President of the United States, Donald J. Trump had a private dinner at the White House with FBI Director James Comey, at which he is alleged to have asked Comey for his "loyalty";

Whereas, on February 13, 2017, President Donald J. Trump fired his National Security Advisor Michael Flynn after public disclosure that contrary to his previous denials, Flynn had held a series of communications with Russian Ambassador Sergey Kislyak in December 2016 regarding sanctions imposed on Russia by the Obama administration in response to Russian interference in the 2016 Presidential election;

Whereas, on February 14, 2017, the day after Flynn's firing, FBI Director Comey attended an Oval Office briefing of the President with a large group of advisers, at the end of which, the President cleared the room so he could speak with FBI Director Comey alone;

Whereas according to FBI Director Comey's account, given under oath, the President said, "I want to talk about Mike Flynn," stating his belief that Flynn had not done anything wrong in talking to the Russians;

Whereas during that same meeting, the President said to FBI Director Comey: "He is a good guy and has been through a lot. I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go.";

Whereas, on March 1, 2017, news broke that, contrary to his prior sworn testimony before the Senate Judiciary Committee, Attorney General Jeff Sessions in fact had undisclosed contacts with the Russian ambassador to the United States during the 2016 Presidential campaign;

Whereas, on March 2, 2017, Attorney General Sessions announced that he would recuse himself "from any existing or future investigations of any matters related in any way to the campaigns" for President in 2016;

Whereas, on March 20, 2017, FBI Director Comey testified before the House Intelligence Committee and publicly confirmed the FBI is investigating whether Trump's campaign or associates coordinated with Russia;

Whereas, on March 30, 2017, President Trump telephoned the FBI Director to complain that the Russia investigation was "'a cloud' that was impairing his ability to act on behalf of the country" and asked him "what we could do to 'lift the cloud' ";

Whereas, on May 9, 2017, President Trump fired FBI Director Comey, an action White House spokespersons explained was based on the recommendation of Attorney General Sessions and Deputy Attorney General Rod Rosenstein;

Whereas, on May 10, 2017, during an Oval Office meeting with Russian Foreign Minister Sergei Lavrov and Russian Ambassador Sergey Kislyak, President Trump is re-

ported to have discussed his firing of FBI Director Comey, saying "I just fired the head of the FBI. He was crazy, a real nut job," adding "I faced great pressure because of Russia. That's taken off.";

Whereas, on May 11, 2017, President Trump admitted to NBC Nightly News anchor Lester Holt that the "made-up" Russia investigation was on his mind when he fired Comey and that regardless of Deputy Attorney General Rosenstein's recommendation, "I was going to fire Comey.";

Whereas, on May 17, 2017, Deputy Attorney General Rosenstein appointed former FBI Director Robert Mueller as Special Counsel to oversee the Russia investigation;

Whereas the order appointing Special Counsel Mueller confers upon him broad authority "to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including: (i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and (ii) any matters that arose or may arise directly from the investigation.";

Whereas, on July 20, 2017, according to media reports, Special Counsel Mueller's investigation of possible ties between the Donald Trump Presidential campaign and Russia in the 2016 Presidential election is expanding to include a broad range of transactions involving Trump's businesses as well as those of his associates;

Whereas these questionable transactions are reported to include Russian purchases of apartments in Trump buildings, Trump's involvement in a SoHo development in

New York with Russian associates, the 2013 Miss Universe pageant in Moscow, and Trump's sale of a Florida mansion to a Russian oligarch in 2008;

Whereas in an interview with the New York Times published July 19, 2017, President Trump acknowledged that digging into his finances would constitute a red line that the Special Counsel should not cross while carrying out the Russia investigation;

Whereas, on July 21, 2017, the Washington Post reported that some of President Trump's lawyers are exploring ways to limit or undercut Special Counsel Mueller's Russia investigation and discussing President Trump's authority to grant pardons;

Whereas according to the Washington Post article, "Trump has asked his advisers about his power to pardon aides, family members and even himself in connection with the probe."; and

Whereas in the United States, it is an article of faith that, as President Theodore Roosevelt stated in his Third Annual Message to Congress on December 7, 1903, "No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it.": Now, therefore, be it

Resolved, That the House of Representatives—

(1) strongly disapproves and condemns any action by the President to remove the Special Counsel investigating Russian interference in the 2016 Presidential election;

(2) strongly opposes the granting of pardons to any person for offenses against the United States

arising out of Russia's activities to bring about the election of Donald J. Trump as President of the United States and deems any such pardon granted to constitute an abuse of the Pardon Power conferred in Article II, Section 2 warranting a proportionate congressional response; and

(3) calls upon the Congress to enact H.R. 2444, the "Trusted, Reliable, Unquestioned Method of Procedure for Special Counsel Appointment, Limitations, and Powers Act of 2017".

○

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HOMELAND SECURITY
SUBCOMMITTEES

CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

JUDICIARY COMMITTEE HEARING EXAMINING THE CONSTITUTIONAL ROLE OF THE PARDON POWER

MARCH 27, 2019 – 2:00 PM – 2141 RAYBURN

- Thank you, Mr. Chairman, for convening this important hearing today.
- The purpose of this hearing is to examine the potential constitutional limits on the president's power to grant clemency.
- Just two years into his term, President Donald Trump has issued a number of controversial pardons, including pardons for Sheriff Joe Arpaio and former White House official Lewis "Scooter" Libby.
- Although the Special Counsel's investigation has concluded, several current and former close associates of President Trump pled guilty or were convicted of criminal wrongdoing over the course of the investigation and some remain the subject of ongoing criminal investigations by the United States Attorney's Office for the Southern District of New York (SDNY).
- These circumstances, coupled with President Trump's public statements about his ability to pardon himself, raise several legal and constitutional questions, including whether the President's exercise of the pardon power

or other forms of clemency can constitute obstruction of justice under the relevant criminal statute.

- President Trump's exercise of the pardon power also raises questions regarding shortcomings in the clemency process.

- In the 115th Congress I introduced a resolution which expressed my opposition to the "granting of pardons to any person for offenses against the United States arising out of Russia's activities to bring about the election of Donald J. Trump as President of the United States and deems any such pardon granted to constitute an abuse of the Pardon Power conferred in Article II, Section 2 warranting a proportionate congressional response.".

- My resolution states that:

    - "the strength of the American constitutional system designed in 1787 in Philadelphia is the national government's separated powers in which the legislative, executive, and judicial branches serve as checks and counterbalances on each other, and fidelity to the rule of law is the highest value and responsibility."

    - And the resolution continues, "on July 21, 2017, the Washington Post reported that some of President Trump's lawyers are exploring ways to limit or undercut Special Counsel Mueller's Russia investigation and discussing President Trump's authority to grant pardons; according to the Washington Post article, 'Trump has asked his advisers about his power to pardon aides, family members and even himself in connection with the probe.'

    - "And in the United States, it is an article of faith that, as President Theodore Roosevelt stated in his Third Annual Message to Congress on December 7, 1903, 'No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it.'"

- A longstanding criticism of the presidential clemency process is that clemency is viewed singularly as an act of mercy rather than treated as a routine feature of the federal criminal justice system.

- This approach results in numerous meritorious applications being ignored, while favoring well-connected petitioners with access to the president.

- For example, in June 2016, President Trump commuted the sentence of Alice Marie Johnson, a 63 year-old woman serving life in prison for a nonviolent drug offense, after reality television celebrity Kim Kardashian lobbied on her behalf.

- While the commutation of Ms. Johnson's sentence was appropriate, President Trump appears to have only considered the merits of her application because she attracted the attention of a celebrity patron.

- The framers of the Constitution's original intent when evaluating the constitutional pardon power was so that others may lay down arms against the U.S.; to serve the national interest, not be handed out like candy like this president has done.

Executive Clemency Background

- Article II, section 2 of the Constitution outlines the powers and responsibilities of the Executive Branch and states that the president "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

- The Constitution indeed places a few textual constraints on the exercise of the pardon power.

- In other words, article II, section 2, states that Presidential pardons are limited to federal crimes, or "Offenses against the United States," and may not be granted in cases of impeachment.

- Pardons also only absolve criminal sanctions and cannot be used to absolve "civil sanctions or liability directly."

- Although derived from the same constitutional authority, pardons and commutations are two distinct forms of executive clemency.

- A pardon is "a complete absolution of guilt which removes all attendant penalties," but it may not necessarily remove all civil disabilities stemming from the underlying offense.

- A commutation is a reduction of criminal punishment, typically in the form of a reduced sentence, and is not considered a full absolution of the recipient's guilt.

- A pardon must be issued by the president and accepted by the recipient to be valid.

- The fact that these are the only two historically-understood requirements for a valid pardon raises the prospect that a president may issue "secret pardons."

- A pardon recipient, however, would have to present the pardon "in order to reap its benefits," likely revealing its existence to the greater public.

- The president also appears able to issue pardons prospectively, meaning that the president can issue a pardon after a crime has been committed, and before the initiation of any criminal proceeding against the recipient.

- The president, however, cannot pardon an offense before it has been committed.

President Trump's Exercise of the Pardon Power

- In August 2017, President Trump pardoned Sheriff Joe Arpaio a political supporter convicted of criminal contempt for defying a federal court order.

- The following April, President Trump pardoned Lewis "Scooter" Libby, former Vice President Dick Cheney's chief of staff, who had been convicted of perjury and obstruction of justice in relation to the FBI's probe into the leaking of CIA Officer Valerie Plame's identity.

- President George W. Bush previously commuted Mr. Libby's 30-month prison sentence in July 2007.

- In June 2018, President Trump pardoned conservative author and filmmaker Dinesh D'Souza, who in 2014 pled guilty to a felony campaign finance violation.

- Mr. D'Souza has characterized his case as a "political prosecution by the administration of President Barrack Obama," claiming that the Department of Justice (DoJ) prosecuted him because of "'Obama's anger over my movie that I made about him.'"

- None of these pardons appear to have been issued pursuant to the usual vetting process conducted through the Office of the Pardon Attorney.

- The circumstances of these pardons raise questions regarding President Trump's apparent willingness to use the powers of his office to protect himself and his political allies from the consequences of Special Counsel Robert Mueller's investigation and the ongoing SDNY investigations.

- Although Special Counsel Mueller has concluded his investigation, there is still an open question as to whether President Trump obstructed justice, and specifically, whether there is any evidence that President Trump may have offered or implied an offer of a pardon in order to discourage individuals from cooperating with investigators.

- Attorney General William Bar's recent letter characterizing the principal findings of the Special Counsel Mueller's report stated that the Special Counsel did not "draw a conclusion – one way or the other – as to whether the examined conduct constituted obstruction."

- The letter directly acknowledged, however, that the Special Counsel report pointedly states that "while this report does not conclude the president committed a crime, it also does not exonerate him."

- Instead, Attorney General Barr and Deputy Attorney General Rod Rosenstein arrived at the conclusion that the evidence was not sufficient to establish that the president committed obstruction.

- Chairman Nadler, in conjunction with the chairs of other relevant committees, has written a letter demanding that Attorney General Barr release the full Mueller Report to Congress by April 2nd and to begin transmitting the underlying evidence the same day.

- The end of Special Counsel Mueller's investigation has also created media speculation over whether President Trump will pardon individuals who plead guilty or were convicted of charges stemming from the probe.

- Beyond the context of Special Counsel and SDNY investigations, President Trump's exercise of the pardon power also highlights potential shortcomings in the federal clemency process.

- For example, President Trump's posthumous pardon of boxer Jack Johnson (brought to his attention by actor Sylvester Stallone) and his pardon of Navy sailor Kristian Saucier, whose conviction for unauthorized retention of national defense information "became a rallying cry for conservatives who felt it showed Hillary Clinton was treated too leniently" by the FBI, appear to demonstrate that access and political considerations weigh heavily in President Trump's clemency decision-making process.

- The power of a presidential pardon should be used as a tool of redemption to remedy unfortunate circumstances not as a self-serving tool to subvert the consequences of his actions.

- Thank you.