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

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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

[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-4e38-893e-d500ee4a5b30/?utm_term=.a48de9641197; 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/.