Examining the Constitutional Role of the Pardon Power:

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

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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

[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/2pdoIzK.

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).