

TESTIMONY OF CAROLINE FREDRICKSON

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 a Visiting Professor from Practice at Georgetown Law and a Senior Fellow at the Brennan Center for Justice. Prior to joining the Law School, I was President of the American Constitution Society where I oversaw our lawyer and law student chapters throughout the country. In all these positions, I have written and spoken on many legal and constitutional issues, including on the pardon power. For example, I co-wrote a May 2018 report entitled "Why President Trump Can't Pardon His Way Out of the Special Counsel and Cohen Investigations."<sup>1</sup> 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, Deputy Chief of Staff to then-Senate Democratic Leader Tom Daschle of South Dakota, and Special Assistant to the President for Legislative Affairs.

Today we are here to discuss whether and how Congress can rein in abuse of the pardon power.

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."<sup>2</sup> 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.

The pardon power is intended to grant the President broad power to address injustices and show mercy. However, the breadth of this power has also made it susceptible to misuse. Today the possibility of the pardon power being used for corrupt purposes is not merely an academic exercise. A few examples from history suffice to show that this problem has been with us for some time. Just before leaving office in 1992, President George H.W. Bush granted a pardon to former Secretary of Defense, Caspar Weinberger and five others who had been convicted for their role in the Iran-Contra scandal. And President Bill Clinton was roundly condemned for his last day pardons including that for Marc Rich, a fugitive felon, who had been indicted for fraud and tax evasion. Bad enough that he was a felon, but Rich was also the former husband of Denise Rich, a major donor to Clinton's foundation and to Hillary Clinton's Senate campaign. Such was the bipartisan outcry that Congress initiated investigations as did the United States Attorney in Manhattan.

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<sup>1</sup> See Noah Bookbinder, Norman Eisen, Caroline Frederickson, & Conor Shaw, Am. Const. Soc'y & Citizens for Resp. & Ethics in Wash., WHY PRESIDENT TRUMP CAN'T PARDON HIS WAY OUT OF THE SPECIAL COUNSEL AND COHEN INVESTIGATIONS (2018), <https://www.acslaw.org/wp-content/uploads/2018/07/ACS-CREW-Pardon-paper.pdf>.

<sup>2</sup> U.S. CONST. art. 2, § 2.

But upon departure from office, former President Trump went even farther in granting ethically and morally questionable pardons. While it is customary for an outgoing President to wield the pardon power more liberally at the end of a presidency, nearly all of Trump's pardons and commutations were issued in the final months before he left office. On his final day, Trump pardoned 74 people and commuted the sentences of 70 others. This list included a rogues' gallery of criminals, including Salomon Melgen who was convicted of defrauding Medicare to the tune of approximately \$75 million<sup>3</sup> as well as Steve Bannon, his former consigliere who had been indicted for fraud in connection with a non-profit he set up to raise money for the border wall.<sup>4</sup> In addition, Trump issued a final pardon to Albert J. Pirro, Jr., the ex-husband of Trump cheerleader and Fox News host Jeanine Pirro,<sup>5</sup> as well as clemency to several former Members of Congress convicted for corruption, obstruction of justice, and other crimes.<sup>6</sup> These pardons followed those granted to allies caught up in the Russia investigation such as Michael Flynn and George Papadopoulos, other disgraced former Members of Congress, and Jared Kushner's father.<sup>7</sup> While Trump did not attempt a "self-pardon" as many feared nor pardon direct family members, his final actions did bring a harsh spotlight to the problematic nature of the exercise of the pardon power. Other Presidents have been criticized for certain pardons, but the sheer number of questionable grants by Trump has renewed calls for congressional regulation.

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."<sup>8</sup> As Alexander Hamilton explained in Federalist No. 74, this "benevolent power" is intended to mitigate the harshness of criminal prosecution.<sup>9</sup> Hamilton noted 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."<sup>10</sup> Building on Hamilton's words, Supreme Court Justice Oliver Wendell Holmes described the pardon as "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."<sup>11</sup>

The first grants of pardons provide evidence of the framers' vision of its benevolent purpose – as a way to heal the fabric of society. On November 2, 1795, George Washington used the pardon to end the earliest major instance of civic violence since the Constitution's establishment six years earlier.<sup>12</sup> Dubbed "the Whiskey Rebellion," this uprising of farmers and distillers angry over the federal government's whiskey tax threatened the survival of the nascent country, causing President Washington to send troops, arrest the instigators, and charge them with treason. President Washington's subsequent use of his benevolent

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<sup>3</sup> *Here are Some of the People Trump Pardoned*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/article/who-did-trump-pardon.html> [hereinafter *People Trump Pardoned*].

<sup>4</sup> Zolan Kanno-Youngs, Eric Lipton, Stephanie Saul and Scott Shane, *How Bannon and His Indicted Business Partners Cashed In on Trump*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/politics/bannon-we-build-the-wall.html>.

<sup>5</sup> Benjamin Din, *Trump Issues Last-Minute Pardon to Albert Pirro, Ex-Husband of Jeanine Pirro*, POLITICO (Jan. 20, 2021, 12:15 PM), <https://www.politico.com/news/2021/01/20/trump-last-minute-pardon-albert-pirro-460764>.

<sup>6</sup> *People Trump Pardoned*, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> U.S. CONST. art. 2, § 2.

<sup>9</sup> THE FEDERALIST No. 74 (Alexander Hamilton).

<sup>10</sup> *Id.*

<sup>11</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>12</sup> 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/>.

power—which successfully subdued the rebellion—was seen as a success for the young country. His response afterwards—wherein he forgave two Pennsylvania men who were sentenced to hang for treason—further cemented the understanding of the pardon power’s important role.

Since President Washington’s first pardon in 1795, the federal government has systematized its process for issuing pardons, but the intended goals of ensuring fairness and healing the fabric of society have not changed.<sup>13</sup> After the Civil War, the Department of Justice took charge of the pardon process. 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, is sent to the White House Counsel’s Office for review before landing on the President’s desk for a final decision.

This process allows for informed feedback from all branches of government and ensures that pardon applications are not prioritized based on political patronage or celebrity.<sup>14</sup> A review of recent pardons and commutations by President Obama proves this point. Over the course of his two terms, President Obama issued 1,715 commutations and 212 pardons.<sup>15</sup> 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 did President Trump issue fewer pardons than his predecessors since the beginning of the 20<sup>th</sup> century,<sup>16</sup> he degraded the pardon process. Trump used a ‘theatrical pardoning’ style where most pardons were not deserved, the recipient had not reformed or repented, and the pardon did not further justice.<sup>17</sup> Rather than working through the administrative apparatus governing the pardon power, President Trump granted pardons on the basis of celebrity and without intergovernmental consultation, including to individuals like Joe Arpaio, Dinesh D’Souza, and Lewis “Scooter” Libby. Most pardons issued by President Trump went to “to well-connected offenders who had not filed petitions with the [DOJ] pardon office or did not meet its requirements.”<sup>18</sup> Rather, “money and access have proved to be far more valuable under Trump.”<sup>19</sup> Even individuals serving long sentences for nonviolent drug convictions who might have

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<sup>13</sup> There are clearly notable exceptions throughout American history where a pardon has been granted in circumstances that were less than honorable. In addition to those of Presidents Clinton and Bush mentioned above, 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.

<sup>14</sup> It is important to emphasize that this process is not without its flaws. Many legal scholars and practitioners have recognized that the Justice Department has its own biases based on its role in federal prosecutions, making it resistant to clemency and not a strong advocate towards the White House. Indeed, this subcommittee held a hearing in March 2020 focused on clemency from a criminal justice reform perspective, and many members voiced this criticism. This could be an area for further examination.

<sup>15</sup> 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>.

<sup>16</sup> John Gramlich, *Trump Used his Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations*, PEW RESEARCH CENTER (Jan. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/01/22/trump-used-his-clemency-power-sparingly-despite-a-raft-of-late-pardons-and-commutations/>.

<sup>17</sup> See Bernadette Meyler, *Trump’s Theater of Pardoning*, 72 STANFORD L. REV. ONLINE 92, 93-95 (2020).

<sup>18</sup> *Holding Presidents Accountable*, CITIZENS FOR RESP. & ETHICS IN WASH. (Dec. 2, 2020), <https://www.citizensforethics.org/reports-investigations/crew-reports/holding-presidents-accountable/#issue11> (quoting Beth Reinhard and Anne Gearan, *Most Trump Clemency Grants Bypass Justice Dept and Go to Well-Connected Offenders*, WASH. POST (Feb. 3, 2020, 6:15 PM), [https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959\\_story.html](https://www.washingtonpost.com/investigations/most-clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959_story.html)).

<sup>19</sup> *Id.* (quoting Beth Reinhard and Anne Gearan, *Most Trump Clemency Grants Bypass Justice Dept and Go to Well-Connected Offenders*, WASH. POST (Feb. 3, 2020, 6:15 PM), <https://www.washingtonpost.com/investigations/most->

deserved a pardon, like Alice Marie Johnson, seemed only to receive one if they had a celebrity benefactor like Kim Kardashian West who lobbied the President on their behalf.<sup>20</sup> Surely the founders did not anticipate the “benevolent power” of the pardon to be corrupted in this way by political patronage and celebrity support.

II. The pardon power is not absolute.

Even without congressional reform of the pardon power, there are several limits on the exercise of this “benevolent power” that already are well-recognized: 1) a President’s pardon power only extends to federal crimes; 2) the pardon power may not be used to obstruct justice; and 3) a self-pardon is constitutionally suspect.

A. Double jeopardy laws cannot be relied upon to preclude state criminal prosecution or federal civil actions.

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.”<sup>21</sup> Applicable to the states under the Fourteenth Amendment, the Supreme Court has held that the Double Jeopardy Clause only applies within a sovereign entity.<sup>22</sup> 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.<sup>23</sup>

Referred to as the “separate sovereigns” doctrine, the Supreme Court has repeatedly confirmed this understanding of the Double Jeopardy Clause.<sup>24</sup> 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 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. Other states have established more expansive protections against double jeopardy. For example, New York, Virginia, and Delaware impose various statutory limits on state

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clemency-grants-bypass-doj-and-go-to-well-connected-offenders/2020/02/03/4e8f3eb2-21ce-11ea-9c2b-060477c13959\_story.html).

<sup>20</sup> 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>.

<sup>21</sup> U.S. CONST. amend. V.

<sup>22</sup> *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.”).

<sup>23</sup> THE FEDERALIST No. 46 (James Madison).

<sup>24</sup> *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, *Gamble v. United States*, 587 U.S. \_\_\_\_ (2019) reaffirmed this longstanding interpretation.

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,”<sup>25</sup> whether federal or state offenses. 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> Charges that are dropped prior to trial or excluded from a plea agreement are not subject to the Constitution’s double jeopardy limitations.<sup>29</sup> It is quite common for federal prosecutors, particular those who have been 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.<sup>30</sup>

The President’s pardon power also 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.<sup>31</sup> As a starting matter, presidential pardons cannot protect property and other

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<sup>25</sup> 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, 12:24 PM), <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>.

<sup>26</sup> See, e.g., DEL. CODE ANN. tit. 11, § 208; N.J. STAT. ANN. § 2C:1-11; 18 PA. STAT. AND CONS. STAT. ANN. § 111.

<sup>27</sup> 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).

<sup>28</sup> 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).

<sup>29</sup> See State v. Carter, 452 So. 2d 1137, 1139 (Fla. Dist. Ct. App. 1984) (double jeopardy does not bar refile of charges dismissed pre-trial). Cf. 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, 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).

<sup>30</sup> FED. R. EVID. 410.

<sup>31</sup> 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.”).

assets owned by those pardoned from civil asset forfeiture. 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 remove all sanctions that might attach to an individual's conduct.<sup>32</sup> For instance, the D.C. Court of Appeals held that a presidential pardon did not 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.<sup>33</sup> In so ruling, the court relied on a distinction between consequences from the conviction itself and those contingent on the conduct underlying the offense—regardless of whether the case was prosecuted.<sup>34</sup> 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.<sup>35</sup>

B. The pardon power cannot be used to obstruct justice or as bribery.

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 questions of obstructive pardons, however, this 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 issues an obstructive pardon it could 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.<sup>36</sup> 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 [into the Watergate hotel]."<sup>37</sup> 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 favored treatment and consideration in return for their

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<sup>32</sup> *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.").

<sup>33</sup> *In re Elliott Abrams*, 689 A.2d at 6.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *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.").

<sup>36</sup> *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/>.

<sup>37</sup> AM. PRESIDENCY PROJECT, *supra* note 36.

silence or false testimony, or rewarding individuals for their silence or false testimony.”<sup>38</sup> Indeed, President Nixon repeatedly discussed clemency for one of the officials who was indicted for his role in the conspiracy.<sup>39</sup> This is unquestionable precedent that an obstructive pardon is an impeachable offense.

In addition to impeachment, an obstructive pardon could also expose a president to criminal liability for obstruction of justice, witness tampering, and possibly even bribery for which he or she could be indicted after leaving office (and possibly even before). A specific provision of federal law, 18 U.S.C. § 201(b)(4), 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 of value in return for shaping the testimony or for not testifying at all.<sup>40</sup> 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. Indeed, in the case of the pardon granted by President Clinton to Marc Rich, the Department of Justice opened a criminal inquiry in 2001 and then-Senator and subsequent Attorney General 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.”<sup>41</sup> 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.<sup>42</sup> Nonetheless, new legislation should clarify that a pardon is a thing of value under the bribery laws to put to rest any lingering questions.

### C. 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 or she 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 him- or herself. 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.<sup>43</sup>

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.”<sup>44</sup> This conclusion was

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<sup>38</sup> *Id.*

<sup>39</sup> 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>.

<sup>40</sup> 18 U.S.C. § 201(b)(4) (1994).

<sup>41</sup> 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>.

<sup>42</sup> *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).

<sup>43</sup> 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> [hereinafter Lawton Memorandum].

<sup>44</sup> *Id.*

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. Nonetheless, here too, it would be useful for Congress to settle any remaining question over the correctness of this understanding.

### III. How can the pardon power be reformed constitutionally?

#### A. Congress could reform the pardon power by constitutional amendment.

Obviously, the most significant reform to the pardon power would be through a constitutional amendment. The proposal introduced by Chairman Cohen would, according to the Chairman, "limit the President's pardon power to grant a pardon or clemency to himself, his family, his administration officials, or his campaign advisors. It would also prevent pardons for conduct undertaken for a direct and significant personal benefit of the President, the President's family, or Administration officials, and for crimes committed in cooperation with the President. Finally, it ensures that pardons issued for a corrupt purpose are invalid. Donald Trump has demonstrated that the broad nature of the pardon power makes it ripe for abuse. Passing this joint resolution would remove that threat, now and in the future."<sup>45</sup>

The Chairman rightly states that Americans need to address what the outer limits of the pardon power should be. Currently, it often operates like a get-out-of-jail free card for campaign donors and political allies or even family members, rather than as a grant of mercy to those who have been "clear victims of injustice, like those convicted of marijuana offenses, or whose actions seem excusable after calm reflection, like Jimmy Carter's pardon of Vietnam-era draft resisters or Lincoln's grants of clemency that prevented some young soldiers from execution."<sup>46</sup>

Amending the Constitution is a significant challenge, but in light of the abuses that have taken place, the pardon power might certainly be considered as an appropriate focus for constitutional change.

#### B. Congress could reform the pardon power by creating statutory limits.

Short of amending the Constitution, Congress could limit the use of the pardon power legislatively. One bill, introduced by Representative Adam Schiff, focuses on two important reforms.<sup>47</sup> In cases of "covered offenses," Abuse of the Pardon Prevention Act would require DOJ and the president to provide congressional committees documents and other materials that pertain to the pardoned individual's prosecution as well as to the pardon. The bill defines covered offenses as those arising "from an investigation in which the President, or a relative of the President, is a target, subject, or witness";<sup>48</sup> offenses related to refusals of a witness to testify or produce papers to Congress;<sup>49</sup> and offenses under 18

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<sup>45</sup> Press Release, Congressman Cohen Introduces Constitutional Amendment to Reform Presidential Pardon Power (Jan. 3, 2021), <https://cohen.house.gov/media-center/press-releases/congressman-cohen-introduces-constitutional-amendment-reform>.

<sup>46</sup> Rep. Steve Cohen, *Stopping the Abuse of the Pardon Power*, THE HILL (Dec. 23, 2020, 4:00 PM), <https://thehill.com/blogs/congress-blog/politics/531513-stopping-the-abuse-of-the-pardon-power>. See also *This Day in History: President Carter Pardons Draft Dodgers*, HISTORY.COM (last visited Feb. 5, 2021), <https://www.history.com/this-day-in-history/president-carter-pardons-draft-dodgers>.

<sup>47</sup> Abuse of the Pardon Prevention Act of 2019, H.R. 1627 (2019).

<sup>48</sup> *Id.*

<sup>49</sup> See 2 U.S.C. § 192 (1938).



U.S.C. § 1001 (false statements), § 1505 (obstruction), § 1512 (witness tampering) or § 1621 (perjury), if the offense related to a congressional proceeding or investigation.<sup>50</sup>

The second major focus of the Schiff bill is to strengthen the use of the bribery statute to get at the use of bribery connected to the grant of a pardon. Amending the criminal statute on bribery, 18 U.S.C. § 201, the bill would clarify its application to the president and vice president as well as that it is an “official act” under the statute to grant a pardon or commutation and that such a grant is “anything of value.”<sup>51</sup> Thus, the amendment would ensure that any offer of a pardon or a pardon would be a criminal act if part of a corrupt exchange.

Another provision of this legislation, derived from legislation authored by a member of this subcommittee, Representative Jamie Raskin, would “declare presidential self-pardons invalid.”<sup>52</sup> According to its language, “The President’s grant of a pardon to himself or herself is void and of no effect, and shall not deprive the courts of jurisdiction, or operate to confer on the President any legal immunity from investigation or prosecution.”<sup>53</sup>

There is strong reason to believe this legislation would withstand constitutional challenges and impose important reforms on the pardon power. With respect to the bribery provisions, it is widely accepted that Congress may impose criminal penalties on a presidential pardon issued to bribe a recipient. As Bob Bauer and Jack Goldsmith, one a Democrat and the other a Republican who served in high-level legal positions in several administrations, have explained: “A pardon or commutation may be ‘absolute’ for the beneficiary. But it would not in any way afford the president, as the grantor, immunity from commission of a crime in connection with granting a pardon, nor would it cover any such separate crime committed by the grantee. Congress could, for example, make it a crime for the president and the grantee to engage in a bribery scheme in which the grantee makes a personal payment or campaign contribution as part of an explicit quid pro quo arrangement. The president’s subsequent pardon or commutation would remain fully in effect for the offense pardoned, in accordance with the Pardon Clause. But the law would apply to the independent criminal acts committed by the president and the grantee in the course of reaching an illegal agreement about the terms on which a pardon would be granted. Congress can similarly criminalize the use of the pardon to undermine a judicial proceeding, which the president might do by offering it as a means of inducing false testimony.”<sup>54</sup>

Since the legislation does not attempt to circumscribe the actual grant of a pardon, it does not tread anywhere near a limit on the president’s Article II powers. It would, however, ensure that a pardon designed to function as a bribe – even if it allowed the grantee to escape any repercussions for the crime to which the pardon was directed – would in itself form the basis for a separate crime with penalties for both the president and the pardon recipient.

Moreover, the Department of Justice has issued two opinions consistent with this understanding. An October 1995 opinion stated: “Application of [the bribery statute, 18 U.S.C. § 201, to the president] raises

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<sup>50</sup> See 18 U.S.C. § 1001 (2006); 18 U.S.C. § 1505 (2004); 18 U.S.C. § 1512 (2008); 18 U.S.C. § 1621 (1994).

<sup>51</sup> See 18 U.S.C. § 201 (1994).

<sup>52</sup> See Kyle Cheney, *House Dems Push Legislation to Criminalize Quid-Pro-Quo Pardons*, POLITICO (July 22, 2020, 11:46 AM), <https://www.politico.com/news/2020/07/22/democrats-legislation-criminalize-quid-pro-quo-pardons-378037>.

<sup>53</sup> *Id.*

<sup>54</sup> Bob Bauer & Jack Goldsmith, *How to Reform the Pardon Power*, LAWFARE (Feb. 26, 2020, 8:00 AM), <https://www.lawfareblog.com/how-reform-pardon-power>.

no separation of powers question, let alone a serious one.”<sup>55</sup> According to the Office of Legal Counsel, the “Constitution confers no power in the President to receive bribes,” as it “specifically forbids any increase in the President’s compensation for his service while he is in office, which is what a bribe would function to do,” and because “the Constitution expressly authorizes Congress to impeach the President for, *inter alia*, bribery.”<sup>56</sup>

As to the provision banning self-pardons, this section would serve an important purpose in regulating an out-of-control power. There is no language or precedent regarding a president’s pardon of him or herself—although there has been much discussion. As mentioned above, however, in 1974, the Office of Legal Counsel issued an opinion that such a pardon was illegitimate.<sup>57</sup> Since that opinion has never been tested, we cannot know exactly how a court might approach the question, although it certainly has the merit of falling on the side of commonsense, the normal usage of the word “to grant,” and the historical understanding that the use of the pardon was a matter of grace by the executive. Nonetheless, legislation is worth pursuing because it expresses an important viewpoint of congressional opinion on this matter that courts would take into account. And, since it may not be tested for a long time, if ever, such a law could help shape how future administrations design their policies with respect to pardons.

Another bill meriting consideration, H.R. 1348 authored by Representative Krishnamoorthi, would require certain information about presidential pardons and reprieves to be made public.<sup>58</sup> Specifically, the President would be required to publish the issue date, recipient, and full text of each pardon or reprieve granted.<sup>59</sup> Even if not limiting to whom or for what reason a pardon could be granted, such legislation would bring public attention and potential condemnation for ill-considered grants. To minimize any burden on the president, the reporting requirement should apply only in cases where the individual seeking a pardon has a close personal, professional, or financial relationship to the president. As a corollary, in courts, a similar relationship typically warrants recusal by a judge.<sup>60</sup>

Congress could also pass a resolution expressly and categorically condemning self-pardons.<sup>61</sup> There is precedent for this type of congressional resolution. At least 22 “sense of” Congress resolutions have been introduced in Congress to disapprove, censure, or condemn a president’s actions, with a 1912 resolution condemning President Taft being the latest that was adopted.

### C. Oversight and prosecutions

Another area where Congress can help police the pardon power is simply through its oversight and investigative powers. After President Clinton pardoned Marc Rich and others, Congress engaged in a thoroughgoing and bipartisan investigation. Although no criminal charges were issued, Congress’s work did uncover some highly questionable behavior, including efforts by President Clinton’s half-

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<sup>55</sup> Cited in Bauer & Goldsmith, *supra* note 54. See also 18 U.S.C. § 201 (1994).

<sup>56</sup> Cited in Bauer & Goldsmith, *supra* note 54

<sup>57</sup> Lawton Memorandum, *supra* note 43.

<sup>58</sup> See Presidential Pardon Transparency Act of 2019, H.R. 1348 (2019).

<sup>59</sup> *Id.*

<sup>60</sup> See Preet Bharara, Christine Todd Whitman, Mike Castle, Christopher Edley, Jr., Chuck Hagel, David Iglesias, Amy Comstock Rick, & Donald B. Verrilli, Jr., Brennan Center for Justice, NATIONAL TASK FORCE ON RULE OF LAW & DEMOCRACY: PROPOSALS FOR REFORM 22 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_TaskForceReport\\_2018\\_09.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_TaskForceReport_2018_09.pdf).

<sup>61</sup> See *Id.* at 23; *Holding Presidents Accountable*, *supra* note 18.

brother and brother-in-law to lobby for pardons in exchange for pay.<sup>62</sup> Certainly, the exposure of this sordid episode lingered for the Clintons even without criminal prosecutions and may indeed deter others from so acting.

Hearings focused on Trump's most egregious pardons would similarly raise public awareness of his misdeeds, even if not criminal, and provide strength to deterrence in the future. Congress could ensure the public has a better understanding that pardons are not to be used as gifts for corrupt political donors and supporters but are meant to assist those who have suffered a miscarriage or excess of justice. In the same light, Congress should examine reports that during the Mueller investigation Trump contemplated pardoning Michael Cohen and Paul Manafort as a way to obstruct justice and avoid any legal liability.<sup>63</sup> Moreover, while prosecutions generally take place out of the public eye, hearings are an important forum for public education about significant public policy and constitutional issues, not to mention a mechanism to underscore the message that we are a nation of laws, and not of men and women.

Prosecutions are an important complement to the public process led by Congress. Essential to demonstrating that no one is above the law, a prosecution could focus on the potential illegalities of pardons issued by Trump, even without the changes recommended by the above bills. For example, his pardon for Michael Flynn, after two guilty pleas of lying to the FBI, should face further examination, especially in light of reporting of conversations about pardons between Trump's lawyers and those of Flynn and Paul Manafort.<sup>64</sup> The Flynn pardon may implicate obstruction, bribery or other criminal laws. In addition, prosecutors could also examine whether Trump's commutation of the sentence of political ally Roger Stone was provided in exchange for Stone's lying to Congress. The Department of Justice has apparently already begun to dig into potential claims of pardon bribery,<sup>65</sup> which can serve as the basis for further examination as more evidence comes to light.

## V. Conclusion

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

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<sup>62</sup> See Alison Leigh Cowan, *Roger Clinton's Dogged Effort for Drug Trafficker*, N.Y. TIMES (Aug. 26, 2001), <https://www.nytimes.com/2001/08/26/us/roger-clinton-s-dogged-effort-for-drug-trafficker.html>; *Hillary's Brother Was Paid for Pardon Work*, ABC NEWS (Jan. 6, 2006, 6:12 PM), <https://abcnews.go.com/Politics/story?id=121771&page=1>.

<sup>63</sup> See Paul Rosenzweig and Justin Florence, *Opinion: Trump Cannot Use a Pardon to Stop Manafort's Cooperation*, WASH. POST (Sept. 14, 2018, 12:26 PM), [https://www.washingtonpost.com/opinions/trump-cannot-use-a-pardon-to-stop-manaforts-cooperation/2018/09/14/c8338d96-b770-11e8-a2c5-3187f427e253\\_story.html](https://www.washingtonpost.com/opinions/trump-cannot-use-a-pardon-to-stop-manaforts-cooperation/2018/09/14/c8338d96-b770-11e8-a2c5-3187f427e253_story.html).

<sup>64</sup> See Michael S. Schmidt, Jo Becker, Mark Mazzetti, Maggie Haberman, & Adam Goldman, *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>.

<sup>65</sup> Katelyn Polantz, *Justice Department Investigating Potential President Bribery Scheme, Court Records Reveal*, CNN (Dec. 2, 2020, 6:01 AM), <https://www.cnn.com/2020/12/01/politics/presidential-pardon-justice-department/index.html>.

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.”<sup>66</sup>

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. Over the course of several decades, unfortunately, we have come to learn that impeachment may not be enough of a check, especially because many pardons come at the end and not early in a presidency, making it impossible to condemn pardons that are immoral or indefensible in a way that can protect rule of law. Congress is right to take up the task of restoring the pardon to its status as a “benevolent power.”

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<sup>66</sup> 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/>.