

Article II and the Pardon Power: Did the Framers Drop the Ball?

I. Introduction

Prior to the 2020 election, the conversation about President Trump's use of the pardon power tended to echo an old joke about two customers bemoaning the meals served at a Catskill Mountains resort. "The food here is terrible," confides one woman to another. Her companion eagerly adds, "And such small portions!"¹ The Trump grants were small in number and largely terrible.²

Yet after Trump lost the election, his approach to clemency began to look not just "terrible," but uniquely dangerous. His efforts to overturn the election results—including inviting supporters to rally in Washington on the day President Biden's victory was to be certified, and inciting an attack on Congress to prevent that from happening—raised the disturbing prospect that pardons could be dispensed to support outright rebellion or that Trump might pardon himself to escape legal consequences.³ Given that past presidents have sometimes issued mass pardons in the form of amnesties before conviction or sentencing had occurred, this was not idle speculation.

Indeed, supporters pleaded with Trump publicly to pardon the Capitol insurrectionists, his family, and himself.⁴ Such importuning was understandable because Trump had previously pardoned or commuted allies who had refused to cooperate with various investigations into his alleged misdeeds,⁵ sometimes even before sentencing or conviction.⁶ During the siege, Trump issued a statement in which he told rioters to go home, but reassured them that "[w]e love you, you're very special."⁷ One of Trump's closest allies in Congress, Senator Lindsey Graham, was concerned enough about possible pardons to the rioters that he tried to dissuade Trump from taking such action. In a striking interview on Fox News, he first flattered Trump, next absolved him of responsibility for the attack, and concluded by warning that issuing preemptive pardons to rioters "would destroy President Trump."⁸ Though Trump ultimately did not pardon those who attacked the Capitol, he did issue a rash of pardons to supporters and allies at the close of his term that even Republican Senator Ben Sasse was compelled to describe as "rotten to the core."⁹ A number of these final pardons, like some of Trump's earlier ones, were issued prior to conviction.¹⁰

In light of these unprecedented events, I argue that we should consider curbing some of the most questionable instances of presidential pardoning by amending Article II

of the Constitution to provide that the president may grant pardons only "after conviction," as a majority of state constitutions already provide.¹¹ Those who debated the adoption of the Constitution perceived the substantial dangers inherent in the grant of such a broad pardoning authority to the president. It is time that we take seriously concerns about abuse of the pardon authority to prevent it from being deployed even more abusively in the future, as Professor Bernadette Meyler has warned, as a form of sovereign power.¹²

II. Advantages of an "After Conviction" Limit on Article II's Pardon Power

Under my proposal, Article II would read that the president "shall have Power to grant Reprieves and Pardons *after conviction* for Offences against the United States, except in Cases of Impeachment." Such a limit would dissuade rare uses of the clemency power that are unnecessary to serve the legitimate ends of justice, but which raise a serious potential for abuse, such as preemptive pardons, self-pardons, and pardons of unspecified offenses. Nevertheless, presidents could still use their pardon authority to accomplish the salutary goal of binding together the nation following outbreaks of rebellion by issuing conditional pardons to those who have been convicted of violations of law.

First, an "after conviction" amendment would eliminate the ability of presidents to issue preemptive pardons, before (1) the legal process had brought to light the factual underpinnings of the crime being pardoned and (2) a determination of guilt had been made by the courts. Without the ability to pardon preemptively, it would be much more difficult for the president to dangle pardons as an incentive for supporters to violate the law or help him overthrow the government. It is simply not as attractive to tell would-be rebels, "If you prevent Congress from certifying my opponent's election, I'll pardon any crimes you commit in Washington, just as soon as you have been prosecuted and convicted in federal court."

The risk that a future president could, like Trump, foment rebellion and then potentially insulate the perpetrators from legal consequences using the pardoning power was a very real concern to those who debated the adoption of the Constitution. At the Philadelphia convention, Edmund Randolph sought to exempt cases of treason from



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the pardon power: “The prerogative of pardon in these cases was too great a trust. The president may himself be guilty. The Traytors may be his own instruments.”¹³ Though Randolph’s amendment was ultimately rejected, and a motion of Luther Martin to limit pardons to “after conviction” was dropped without discussion,¹⁴ such concerns continued to be raised forcefully during the ratification debate.

George Mason, at the Virginia ratifying convention, specifically pointed to the substantial danger to the republic posed by giving the president the ability to issue preemptive pardons:

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.¹⁵

Similar concerns were raised by anti-Federalists in Maryland, New Jersey, Pennsylvania, and New York.¹⁶

An “after conviction” limitation would have prevented some of the most questionable pardons that have been issued by modern presidents. For instance, Bill Clinton marred his legacy and incurred withering criticism even from staunch allies by issuing a pre-conviction pardon to financier Marc Rich at the end of his second term.¹⁷ George H. W. Bush, in the days before leaving office, likewise short-circuited the legal process and provoked charges of a cover-up by issuing pardons to the Iran-Contra defendants, including to Caspar Weinberger prior to his criminal trial.¹⁸ And the most controversial preemptive pardon in our history, President Gerald Ford’s pardon of former President Richard Nixon prior to indictment, trial, or conviction, could only have been accomplished after Nixon had been held accountable and taken responsibility for his crimes in court, which many believe would have been far preferable for the country.¹⁹

An “after conviction” requirement would also prevent the disturbing prospect of a presidential self-pardon, which Trump repeatedly considered²⁰ and asserted that he had the right to do. After the attack on the Capitol, it was widely reported that Trump had been considering a self-pardon, as well as preemptive pardons for family members and those in his inner circle.²¹ Richard Nixon reportedly considered a self-pardon before resigning.²² Although it has been forcefully argued that a self-pardon is unconstitutional,²³ scholars are divided on the question and there is no clear answer from the Supreme Court. However, given the broad language in Court opinions stating that the only limits on the pardoning power must be found “in the Constitution itself,”²⁴ it is certainly possible that a presidential self-pardon could be upheld on textualist grounds. By adding an “after conviction” limitation, this vexing question would be

resolved (assuming, of course, that a sitting president cannot be prosecuted for a federal crime, which has long been the position of the Justice Department).²⁵

Finally, an “after conviction” amendment would prevent presidents from issuing pardons of sweeping generality, effectively creating a “get out of jail free” card for even unknown or unspecified violations of federal law. While scholars have argued that such a “specificity” limit is implicit in Article II, it has never been recognized by the Supreme Court.²⁶ Nor, as a practical matter, do I think it very likely that judges confronting the issue would conclude that they have the authority to review the textually demonstrable commitment of the president’s pardon power and second-guess the executive’s wording as to a pardon’s specificity (is a pardon issued for “all violations of Title 18 U.S.C.” particular enough?).

Although the vast majority of pardon warrants do specify particular federal offenses, some presidents have exercised the authority to issue generic pardons, with President Ford’s pardon of Richard Nixon being Exhibit “A.” Ford issued a pardon “for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.” When I had occasion to interview Ford in 2001 regarding the breadth of this pardon, I asked if he may have been concerned that he was pardoning Nixon for unknown crimes. He replied that his pardon covered obstruction of justice, which Ford said he considered to be “bad enough” conduct to be forgiving: “[T]hat was ample.”²⁷ President George H. W. Bush likewise issued pardons for unspecified crimes, granting to the Iran-Contra defendants “a full, complete, and unconditional pardon [to the named defendants] for all offenses charged or prosecuted by Independent Counsel Lawrence E. Walsh or other member of his office, or committed by these individuals and within the jurisdiction of that office.”²⁸ And a number of presidential amnesty grants leave the offenses pardoned unspecified.²⁹ Thus, historical practice seems to suggest that the Constitution as currently written allows presidents to issue pardons of sweeping generality.

In summary, amending the Constitution to provide that the president may issue pardons only “after conviction” would prevent preemptive pardons from occurring, close off the possibility of a presidential self-pardon, and ensure that clemency is granted only for specific violations of the law. Yet if this is such a good idea, why did the Framers choose to do otherwise and leave a broad pardoning authority in the hands of the president? Viewed with the benefit of hindsight, the two main reasons that prompted the Framers to reject sensible limits on the pardon power are no longer very persuasive.

III. We Would Lose Little by Requiring Presidents to Pardon Only “After Conviction”

Proponents of the Constitution responded in two ways to arguments favoring additional limits on the president’s pardon power akin to what I am suggesting in this essay.

First, they contended that further limitations on the pardon power beyond excepting “cases of impeachment” were unnecessary because impeachment remained an effective way to hold the president accountable for wrongdoing in which he was involved or which he encouraged. James Wilson argued against Randolph’s motion to exempt treason from the pardon power: “If he be himself a party to the guilt he can be impeached and prosecuted.”³⁰ The second and “principal” argument in favor of giving the president broad power to pardon, as Hamilton contended in *Federalist* No. 74, was that it was necessary in order to allow the president to prevent rebels from overthrowing the federal government:

In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. . . . The loss of a week, a day, an hour, may sometimes be fatal.³¹

Upon closer examination, these arguments appear flawed.

First, we now can say with some certainty that the mechanism of impeachment is not an effective check on serious—even treasonous—presidential misconduct. Trump was impeached twice for actions that constituted brazen assaults on our constitutional system. According to Republican Representative Lynn Cheney, there has never been a greater traitor to the Office of President:

The President of the United States summoned this mob, assembled the mob, and lit the flame of this attack. Everything that followed was his doing. None of this would have happened without the President. The President could have immediately and forcefully intervened to stop the violence. He did not. *There has never been a greater betrayal by a President of the United States of his office and his oath to the Constitution.*³²

And yet, astonishingly—a matter of hours after the deadly Capitol attack had forced lawmakers to abandon their work and seek safety—147 Republican members of Congress (139 Representatives and eight Senators) voted to overturn the 2020 election results and keep Trump in office.³³ And despite overwhelming evidence of wrongdoing, at both of Trump’s Senate impeachment trials, the outcome of acquittal was never seriously in doubt.

Historian Jill Lepore recently observed that with the Trump presidency, our Constitution, in practical operation, has been “circumvented, betrayed, violated, and abandoned.” She asks: “Can a U.S. President compel a foreign leader to interfere in an American election? Apparently. Can a U.S. President refuse to accept the results of a free and fair election and incite a mob to attack Congress in order to prevent the certification of the vote? Apparently.”³⁴ Constitutional impeachment scholar Michael Gerhardt, even prior to Trump’s second Senate acquittal, had concluded that impeachment simply does not work as

a check under our current system: “The bar for removing a president is too high for American politics ever to clear, and party resistance to abandoning their own is too strong; the result is a virtually unrestrained executive.”³⁵ Thus, the Framers’ reliance on the threat of impeachment to keep future presidents from fomenting treason has proved to be misplaced. A constitutional amendment to permit pardons only after conviction would not prevent treasonous behavior by future presidents, but it would remove a potent tool from their hands that, as George Mason presciently warned, could cause great mischief.

But what about the “seasons of insurrection” argument advanced in *Federalist* No. 74? Hamilton believed that if the Constitution prevented the speedy issuance of pardons for treason, as an “after conviction” limitation concededly would, the delay could let slip a “golden opportunity” to “restore the tranquillity of the commonwealth.”³⁶ He predicted that a president would sometimes need to dispense pardons to a group of insurrectionists preemptively, in order to stop an ongoing rebellion. However, that is not how mass pardons have been used historically by our presidents.

In his forthcoming study of presidential pardons, Professor Graham Dodds examines the mass pardons issued by presidents after rebellions—Hamilton’s “seasons of insurrection” grants.³⁷ However, in all but one instance, it appears that the mass pardons were not issued in order to stave off ongoing rebellions in the manner imagined by Hamilton. Rather, presidents have used mass pardons primarily as a way to let bygones be bygones, after the violent controversies had been resolved in favor of federal authorities and the erstwhile “rebels” acknowledged their commitment to the laws of the United States.

Thus, under almost every one of the mass pardon grants studied by Dodds, I believe that it would have been possible for presidents to accomplish the goal of using pardons to promote societal reconciliation and stabilization within the strictures of an “after conviction” requirement. That is because, apart from Lincoln’s first Civil War mass pardon (discussed below), the federal government had already squelched the rebellions at issue and the president was dispensing pardons magnanimously, to allow the defeated to express contrition and return to the nation’s fold. These pardons typically required those availing themselves of their benefits to affirm their submission to the laws of the United States in some formal way.

For example, after the so-called Whiskey Rebellion had been put down, Washington granted pardons to the rebels upon their compliance with the terms that had been set forth by his commissioners, who had specified that recipients were required to give bona fide “assurances of submission to the laws of the United States.”³⁸ Surely, a president wishing to issue such pardons subject to an “after conviction” requirement could have sought such assurances by issuing a mass pardon conditionally to those willing to take responsibility for their actions by pleading guilty to specific offenses in federal court.

And perhaps issuing a mass pardon only after conviction would have been preferable to the approach taken by Washington. Afterward, many believed that Washington had been too lenient in issuing pardons so soon, without requiring more from the insurrectionists. In their view, Washington's ready pardoning led just three years later to Fries's Rebellion, another violent uprising in Pennsylvania, which President John Adams suppressed by, once again, sending overwhelming military force. Learning a lesson from Washington's approach, Adams was not as quick to grant clemency to the insurrectionists and waited until after they had suffered formal consequences to show leniency. The participants in Fries's Rebellion were indicted, tried, convicted, and given severe sentences (Fries and two companions were sentenced to death) before Adams, albeit reluctantly, pardoned the rebels.³⁹

Other mass pardons tended to follow the Adams approach and required some sort of formal acknowledgment of guilt by the offender and acquiescence to the authority of the United States.⁴⁰ However, one mass pardon grant that does seem to fit the model described by Hamilton in *Federalist* No. 74 is President Lincoln's mass pardon of 1863, issued in the midst of the Civil War.

On December 8, 1863, as the war was turning in favor of the Union, Lincoln announced a "Proclamation of Amnesty and Reconstruction" granting a full preemptive pardon, with restoration of all rights of property (except as to slaves) to former rebels who would "take and subscribe" a detailed oath of loyalty set forth in the Proclamation, and "thenceforward keep and maintain said oath inviolate, and which oath shall be registered for permanent preservation."⁴¹ This grant comes closest to Hamilton's "well timed offer of pardon to the insurgents," and it could arguably have been precluded by an "after conviction" limitation, given that many federal courts were closed during the war in the Confederate states.⁴² However, the pardon itself still required acceptance of responsibility and consequences before it became effective, and its purpose appears to have been less to create an effective "contract" of forgiveness than to operate as a type of psychological ploy aimed at undermining the Confederate cause by tempting many to pledge allegiance to the Union.⁴³ To the extent that the Proclamation represented a military strategy and had not been prohibited by Congress, there is at least a plausible constitutional argument that even with an "after conviction" limitation, Lincoln could have issued an executive order similar to the 1863 Proclamation pursuant to his enumerated power as Commander in Chief.⁴⁴ Moreover, if those who wanted the pardon—and many did for instrumental reasons, such as to get their property back—had been required formally to plead guilty after the federal courts had reopened, many of the difficulties Lincoln later encountered with implementing the 1863 grant (Who could administer the oath? How might the duplicitous be prevented from easily obtaining a pardon?)⁴⁵ could have been avoided.

Thus, I believe that Hamilton's suggestion that presidents would sometimes need to pardon their way out of a rebellion preemptively is not consistent with our history. Armed insurrections have been stopped by the exercise of military power, followed by generous grants of executive clemency after the rebels had acknowledged that they were wrong—something that almost always could be accomplished after their conviction.

IV. Conclusion

Amending the U.S. Constitution is notoriously difficult and happens with far less frequency than do amendments to state constitutions.⁴⁶ However, twenty-nine state constitutions have included or added an "after conviction" or "after sentence" limitation to the clemency authority,⁴⁷ and these systems appear to function perfectly well. According to the Restoration of Rights Project website, nine of the "after conviction" or "after sentence" states have a "regular clemency process" with a "significant" percentage of clemency requests being granted—constituting 53% of the states that have this distinction.⁴⁸

In the end, our conclusion as to whether amendment of Article II is worthwhile depends, as did the views of the Framers, on what we predict the future will bring. If Trump was an utter aberration as a president, and we are confident that we will never see others of his kind, then attempts to amend the Constitution are an overreaction. However, if we suspect that "Trump 2.0" is but a closely contested election away, then erecting parchment barriers such as an "after conviction" amendment is perhaps the least we can do.

Notes

- * I thank my former student, Mackenzie Packard, for her insightful assistance with researching and writing this essay.
- 1 Barry Popik, *The Food Is Terrible—and Such Small Portions!*, The Big Apple (July 27, 2009), https://www.barrypopik.com/index.php/new_york_city/entry/the_food_is_terrible_and_such_small_portions.
 - 2 Editorial, *Trump Corrupted the Presidential Pardon. Biden Must Repair It*, N.Y. Times (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/opinion/trump-biden-pardon.html?searchResultPosition=36> ("President Trump doesn't use his pardon power often, but when he does, he abuses it for all it's worth."); Jack Goldsmith & Matt Gluck, *Trump's Circumvention of the Justice Department Clemency Process*, Lawfare (Dec. 29, 2020), <https://www.lawfareblog.com/trumps-circumvention-justice-department-clemency-process> ("The clemency system is dominated by insider access to the president and almost exclusively serves the president's personal and political goals and whims.");
 - 3 Kaitlan Collins, Kevin Liptak & Pamela Brown, *Trump Talked out of Pardoning Kids and Republican Lawmakers*, (Jan. 20, 2021), <https://edition.cnn.com/2021/01/19/politics/trump-self-pardon-warning/index.html> (reporting that Trump had been considering issuing preemptive pardons to himself, his family, and Republican lawmakers who may have been involved in the Capitol rally).
 - 4 *Id.* ("Several of Trump's closest advisers have also urged him not to grant clemency to anyone who breached the US Capitol, despite Trump's initial stance that those involved had done nothing wrong"); David Lee, *US Capital Rioters Ask for Pardons After Facing Federal Charges*, Courthouse News Service (Jan.

- 17, 2021), <https://www.courthousenews.com/us-capitol-rioters-ask-for-pardons-after-facing-federal-charges/>.
- 5 Maggie Haberman & Michael S. Schmidt, *Trump Gives Clemency to More Allies, Including Manafort, Stone and Charles Kushner*, N.Y. Times (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/us/politics/trump-pardon-manafort-stone.html>.
- 6 See Office of the Pardon Attorney, *Pardons Granted by President Donald Trump*, <https://www.justice.gov/pardon/pardons-granted-president-donald-trump> (e.g., pardon to Joseph Arpaio prior to sentencing; pardon to Mathew Golsteyn prior to conviction; pardon to Michael T. Flynn prior to sentencing).
- 7 Maggie Haberman & Michael S. Schmidt, *Under Heavy Pressure, Trump Releases Video Condemning Capitol Siege*, N.Y. Times (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-video-capitol-riot.html>.
- 8 Jack Brewster, *Senator Graham Warns Trump Against Pardoning Capitol Rioters*, Forbes (Jan. 17, 2021), <https://www.forbes.com/sites/jackbrewster/2021/01/17/sen-graham-warns-trump-against-pardoning-capitol-rioters/?sh=39a2f6747a3b>.
- 9 Paul Handley, *Trump Pardons More Allies and Kushner's Father, Sparking Fresh Outrage*, Barron's (Dec. 23, 2020), <https://www.barrons.com/news/trump-pardons-spark-outrage-01608750612>.
- 10 See <https://www.justice.gov/pardon/pardons-granted-president-donald-trump>, notation of N/A in column for "Sentenced."
- 11 Twenty-nine state constitutions allow pardons only "after conviction" or "after sentence." Ala. Const. art. V, § 124; Ariz. Const. art. V, § 5; Ark. Const. art. 6, § 18; Cal. Const. art. V, § 8; Colo. Const. art. IV, § 7; Haw. Const. art. V, § 5; Ill. Const. art. V, § 12; Ind. Const. art. 5, § 17; Iowa Const. art. 4, § 16; La. Const. art. IV, § 5; Me. Const. Pt. 1, art. V, § 11; Mich. Const. ch. I, art. V, § 14; Minn. Const. art. V, § 7; Mo. Const. art. IV, § 7; Neb. Const. art. IV, § 13; Nev. Const. art. 5, § 14; N.M. Const. art. 5, § 6; N.Y. Const. art. IV, § 4; N.C. Const. art. I, § 5; Ohio Const. art. III, § 11; Okla. Const. art. VI, § 10; Or. Const. art. V, § 14; Tenn. Const. art. III, § 6; Tex. Const. art. IV, § 11; Utah Const. art. VII, § 12; Va. Const. art. V, § 12; W. Va. Const. art. VII, § 11; Wis. Const. art. V, § 6; Wyo. Const. art. 4, § 5.
- 12 See Bernadette Meyler, *Transforming the Theater of Pardoning*, ___ Fed. Sent'g Rep. __ (2021).
- 13 2 The Records of the Federal Convention of 1787, at 626 (M. Farrand ed. 1911).
- 14 *U.S. Constitutional Convention: Session 3518*, Quill Project (Kieran Hazzard et al. eds., Pembroke Coll. Oxford 2019), https://www.quillproject.net/session_visualize/3518#83749 ("It was moved and seconded to add the words 'after conviction' after the words 'reprieves and pardons' 2 sect. 10 article.—(Motion withdrawn).").
- 15 3 Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution 333* (Liberty Fund 2011) (1836) (emphasis added), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1907/Elliot_1314-03_EBk_v6.0.pdf.
- 16 2 The Complete Anti-Federalist 2.4.85, at 67 (Herbert J. Storing ed., Univ. of Chi. Press 1981) (Luther Martin, Md.) (arguing that the power to grant pardons is "extremely dangerous" in that it allows pardons to be given for treason and to protect those from punishment who the president instigated to commit the crime); *id.* 2.7.23, at 142 (Letters of Cetinel, Pa.) (objecting on grounds that pardons by the president will "skreen from punishment the most treasonable attempts on the liberties of the people"); *id.* 2.8.229, at 348–49 (Federal Farmer, N.J.) (objecting to the lack of limitation placed on the president's pardon power); *id.* 2.9.20, at 371 (Essays of Brutus, N.Y.) (arguing that the president will one day use his pardon power for his own interest and ambitions); 5 *id.* 5.3.17, at 87 (Samuel Chase, Md.) (opposing the new government because of the dangers associated with pardoning before conviction).
- 17 Opinion, *An Indefensible Pardon*, N.Y. Times (Jan. 24, 2001), <https://www.nytimes.com/2001/01/24/opinion/an-indefensible-pardon.html>.
- 18 David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up'*, N.Y. Times (Dec. 25, 1992), <https://www.nytimes.com/1992/12/25/us/pardons-bush-pardons-6-iran-affair-aborting-weinberger-trial-prosecutor-assails.html>.
- 19 Isaac Chotiner, *The Lessons of the Nixon Pardon*, The New Yorker (Jan. 14, 2021), <https://www.newyorker.com/news/q-and-a/trump-impeachment-and-the-lessons-of-the-nixon-pardon> (quoting historian Rick Perlstein's observation that the preemptive pardon to Nixon was extremely costly to the country and "caused a cascade of élite wrongdoing that was specifically enabled by this single act of determining that the Presidency was 'too big to fail'").
- 20 See Evan Perez et al., *As Trump Wrestles with Defeat, Pardons Loom for Allies—and Himself*, CNN (Nov. 12, 2020), <https://www.cnn.com/2020/11/12/politics/trump-pardons-loom-defeat/index.html> (reporting that Trump had been asking aides since 2017 whether he could pardon himself and members of his family).
- 21 Michael S. Schmidt & Maggie Haberman, *Trump Is Said to Have Discussed Pardoning Himself*, N.Y. Times (Mar. 21, 2021), <https://www.nytimes.com/2021/01/07/us/politics/trump-self-pardon.html>.
- 22 Daniel Schorr, *Will Bush Pardon Himself?*, Balt. Sun (Dec. 30, 1992), <https://www.baltimoresun.com/news/bs-xpm-1992-12-30-1992365220-story.html>.
- 23 See, e.g., Brian C. Kalt, *Pardon Me? The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779, 780–82 (1996).
- 24 Schick v. Reed, 419 U.S. 256, 267 (1974) ("The pardoning power is an enumerated power of the Constitution and . . . its limitations, if any, must be found in the Constitution itself.").
- 25 Ramsey Touchberry, *OLC Opinion Explained: Why Robert Mueller Couldn't Indict Trump, Despite 10 Obstruction Incidents*, Newsweek (July 24, 2019), <https://www.newsweek.com/olc-opinion-mueller-doj-memo-indict-trump-sitting-president-1450896> (noting that the Office of Legal Counsel has concluded that a sitting president cannot be indicted).
- 26 See Aaron Rappaport, *An Unappreciated Constraint on the President's Pardon Power*, 52 Conn. L. Rev. 271, 274 (2020).
- 27 Telephone interview with former President Gerald R. Ford (Aug. 15, 2001) (on file with author).
- 28 George Bush, *Proclamation No. 6518—Grant of Executive Clemency*, UCSB: The American Presidency Project (Dec. 24, 1992), <https://www.presidency.ucsb.edu/documents/proclamation-6518-grant-executive-clemency> (emphasis added).
- 29 See Rappaport, *supra* note 26, at fn.186 and accompanying text (indicating that seven out of thirty presidential amnesty grants "lack references to specific offenses").
- 30 *U.S. Constitutional Convention: Session 4437*, Quill Project (Kieran Hazzard et al. eds., Pembroke Coll. Oxford 2019), https://www.quillproject.net/session_visualize/4437#112288.
- 31 The Federalist No. 74, at 449 (Alexander Hamilton) (C. Rossiter ed. 1961).
- 32 READ: *Liz Cheney's Statement Saying She Will Vote to Impeach Trump*, CNN (Jan. 12, 2021), <https://www.cnn.com/2021/>

- 01/12/politics/liz-cheney-trump-impeachment-statement/index.html.
- ³³ Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>.
- ³⁴ Jill Lepore, *When Constitutions Took over the World*, The New Yorker (Mar. 22, 2021), <https://www.newyorker.com/magazine/2021/03/29/when-constitutions-took-over-the-world>.
- ³⁵ Michael Gerhardt, *Madison's Nightmare Has Come to America*, Atlantic (Feb. 13, 2021), <https://www.theatlantic.com/ideas/archive/2020/02/constitution-flawed/606208/>. Professor Gerhardt explained, regarding the first three impeachments in U.S. history: “Each of the three presidential-impeachment trials in American history ended with acquittals, the first with an immensely unpopular president who may have bribed senators to acquit him, the second with a popular president whose party had the numbers to block his conviction, and the third for a president whose party dared not offend or oppose him. Impeachment, in brief, has yet to work against a president of the United States. Any president prone to misconduct can look at the pattern and see that as long as he can keep most, if not all, of his party’s senators in line, he is immune to conviction and removal from office. Future presidents will see the acquittals as license to do whatever they want.”
- ³⁶ The Federalist No. 74, *supra* note 28, at 449 (Alexander Hamilton).
- ³⁷ Graham Dodds, *Mass Clemency in America* (forthcoming in 2021). Dodds devotes chapters to what he characterizes as “each of the four main cases of such pardons throughout U.S. political history: George Washington’s and John Adams’s pardoning of participants in armed insurrections in Pennsylvania in the 1790s (chapter 2); James Buchanan’s, Benjamin Harrison’s, and Grover Cleveland’s pardons of Mormon insurrectionists and polygamists over several decades in the nineteenth century (chapter 3); multiple pardons by Abraham Lincoln and Andrew Johnson for Confederates both during and after the U.S. Civil War (chapter 4); and Gerald Ford’s clemency and Jimmy Carter’s amnesty of Vietnam War draft evaders and military deserters (chapter 5).” *Id.* at 21. I would like to thank Professor Dodds for his generosity in sharing a draft of this excellent book with me prior to its publication.
- ³⁸ *Id.* at 70.
- ³⁹ *Id.* at 76–82.
- ⁴⁰ For example, President Cleveland issued a mass pardon to “convicted” polygamists in 1894. *Id.* at 111. President Ford issued an amnesty to Vietnam War resisters if they “would turn themselves in to authorities by the end of January 1975, acknowledge their allegiance to the United States, and perform up to two years of ‘alternate service’ in public-service positions—all to be overseen by a nine-member clemency review board.” *Id.* at 159. And although President Carter’s pardon stated that it applied to all those “who may have” violated the Selective Service Act during the Vietnam War, according to instructions issued by the Office of the Pardon Attorney, the only way anyone could obtain an individual certificate of pardon was by proving that they had been “convicted of such an offense.” Dep’t of Justice, Vietnam Era Pardon Instructions, <https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions> (last updated Mar. 3, 2016).
- ⁴¹ Abraham Lincoln, Proclamation 108—Amnesty and Reconstruction, UCSB: The American Presidency Project (Dec. 8, 1863), <https://www.presidency.ucsb.edu/documents/proclamation-108-amnesty-and-reconstruction>.
- ⁴² *Ross v. Jones*, 89 U.S. 576, 577 (1874) (“[T]his court has repeatedly decided that during the civil war, the courts of the United States in the insurrectionary States were closed”).
- ⁴³ Dodds, *supra* note 37, at 119–20.
- ⁴⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1942) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”) (Jackson, J., concurring).
- ⁴⁵ Dodds, *supra* note 37, at 123–24.
- ⁴⁶ See Lepore, *supra* note 34 (citing Richard Alberts, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (2019)).
- ⁴⁷ See *supra* note 11.
- ⁴⁸ CCRC Restoration of Rts. Project, *50-State Comparison: Pardon Policy & Practice*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> (last visited Apr. 9, 2021). These states are Alabama, Arkansas, California, Illinois, Louisiana, Nebraska, Nevada, Oklahoma, Utah, and Virginia.