

President Trump's Commutation of Roger Stone's Criminal Sentence Violated the Faithful Execution Clauses of the U.S. Constitution

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Ron Fein
Courtney Hostetler
John Bonifaz
Ben Clements

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INTRODUCTION

The President’s constitutional power to pardon (or to commute) is broad, but it is not absolute. Rather, it is limited by the text of the Constitution, including, for example, the Equal Protection Clause and the First Amendment, and, most relevant here, Article II’s Faithful Execution Clauses, which established legal constraints on the Executive similar to fiduciary duties. Based on centuries of English and American usage, the original public meaning of the Faithful Execution Clauses is that they limit the President’s power by requiring him to exercise that power in good faith in the public interest — not corruptly in his self-interest. Here, however, it appears that the President exercised his pardon power in his own personal self-interest, in violation of the Faithful Execution Clauses.

On July 17, 2020, Free Speech For People requested leave of the U.S. District Court for the District of Columbia to submit an amicus brief on behalf of Professors Jed Handelsman Shugerman and Ethan Leib at Fordham Law School.¹ The amicus brief would have set forth an argument based on Professors Shugerman and Leib’s academic scholarship regarding the Constitution’s Faithful Execution Clauses as limits on the presidential pardon power.² Unfortunately, the court denied that motion. The court should have instead requested further briefing on this issue, scrutinized the purpose of the commutation order, and determined whether to declare it constitutionally invalid. This paper summarizes the key points that the court should have considered.

¹ See ECF No. 396, Motion for Leave to File Amicus Brief, *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. filed July 17, 2020).

² Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self Pardons and Non-Delegation*, 17 *Geo. J. Law & Pub. Pol’y* 463 (2019); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 *Harv. L. Rev.* 2111 (2019).

I. The Pardon Power Is Not Absolute, But Like All Governmental Powers, Subject to Constitutional Constraints

The pardon power, though broad, is like every power enumerated in the Constitution, limited by the Constitution itself. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (“[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”); *see also Schick v. Reed*, 419 U.S. 256, 263, 267 (1974) (emphasizing that the pardon power’s “limitations, if any, must be found in the Constitution itself”).

For example, the pardon power, like every other power conferred on the federal government, is limited by constitutional requirements of due process and equal protection. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring) (in state clemency proceedings, “[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process”); *id.* at 292 (Stevens, J., concurring in part and dissenting in part) (suggesting that “[the] use [of] race, religion, or political affiliation as a standard for granting or denying clemency” would offend the Equal Protection Clause); *Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (holding that equal protection limits state pardons). Thus, if the President were to grant full pardons to all white police officers who committed Fourth Amendment violations involving excessive force and violence against Black suspects, such pardons would be constitutionally invalid. Similarly, a commutation that the President expressly conditioned on the applicant refraining from criticizing the President would violate the First Amendment. *See Schick*, 419 U.S. at 264 (concluding that the pardoning power was intended to include the power to commute sentences on *conditions which do not in themselves offend the Constitution*) (emphasis added).

II. The Faithful Execution Clauses of Article II Prohibit the President from Exercising the Pardon Power for Corrupt and Unlawful Purposes

Article II of the Constitution, the very section establishing the office of the President, further constrains the exercise of presidential power by effectively providing that the presidency is a public trust and its powers must be exercised for the benefit of the public, not the personal benefit of the President. Specifically, Article II twice imposes a duty of faithful execution on the President, requiring the President to take an oath or affirmation to “faithfully execute the Office of President,” and requiring that the President must “take Care that the Laws be faithfully executed.” U.S. Const. art. II, §§ 1, 3. These Faithful Execution Clauses should be understood in light of this language’s likely meaning at the time of the Framing.

The language of “faithful execution” was for centuries before 1787—from its roots in the time of Magna Carta and medieval England, through colonial America, and up through the Philadelphia Convention and ratification debates—very commonly associated with the performance of public and private offices. “Faithful execution” language applied not only to senior government officials but to a vast number of more ministerial officers, too. This common usage, familiar to the Framers of the Constitution, imposed three interrelated requirements on officeholders: (1) a duty not to act *ultra vires*, beyond the scope of one’s office; (2) a duty not to misuse an office’s funds or take unauthorized profits; and (3) diligent, careful, good faith, honest, and impartial execution of law or office. *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2121 (2019).

These three duties of fidelity resemble fiduciary duties in modern private law. This “fiduciary” reading of the original meaning of the Faithful Execution Clauses—increasingly recognized among scholars

from a broad range of perspectives³—has important implications in modern constitutional law. So understood, Article II of the Constitution requires presidents to exercise their powers in good faith, for the public interest, and not for reasons of self-dealing, self-protection, or other bad faith, personal purposes. See Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self Pardons and Non-Delegation*, 17 GEO. J. LAW & PUB. POL'Y 463, 469-76 (2019).

Consistent with *Schick*, Article II's Faithful Execution Clauses limit the President's pardon power. The fiduciary duties imposed by those clauses require the President to exercise the pardon power in good faith and not for a corrupt self-interested purpose. As a judge in the same federal court that heard Stone's case noted back in 1974, "This is not to say that the [pardon] power is limitless. The President, who exercises that power as the elected representative of all the People, must always exercise it in the public interest." *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1231 (D.D.C. 1974).

The Constitution does not require that the President exercise the pardon power wisely, but it does not permit him to exercise it for a corrupt purpose. For example, few would argue that the President could, consistent with the Constitution, offer and provide full pardons to any person who made a payment of \$1 million to the President personally. Such a pardon would be a criminal act. It would be incongruous to conclude that the pardon remains valid, but the issuing of the pardon should be punishable with prison. Such pardons are not only criminal bribery, but also wholly contrary to the duty to faithfully execute the laws and would be constitutionally invalid.

This constitutional understanding does not mean that any pardon that might happen to further a President's self-interest is *per se* invalid. That would neither track fiduciary law nor be a workable rule. "The question is rather whether the pardon is chiefly for the narrow self-

³ See GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); TAMAR FRANKEL, FIDUCIARY LAW (2010); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).

interest of the President and clearly against the public interest.” Leib & Shugerman, 17 GEO. J. LAW & PUB. POL’Y at 476.

III. The Constitutional Constraints on the Pardon Power are Judicially Enforceable

There is substantial evidence that the framers of the Constitution specifically recognized that the presidential pardon power was not absolute and that corrupt abuses of that power would be grounds for impeachment and even prosecution of the President. Leib & Shugerman, 17 GEO. J. LAW & PUB. POL’Y at 472 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Farrand ed., 1911)). At the same time, however, neither the historical record nor the text of the Constitution suggest that impeachment is the *sole* remedy for addressing constitutionally invalid pardons. Indeed, while impeachment and removal of the President would serve to prevent further unlawful pardons, those remedies do not address unconstitutional pardons or commutations that the President has already executed.

While a President who had pardoned 50 prisoners in exchange for \$1 million from each prisoner could be impeached, removed, and even prosecuted, the only remedy for reversing those constitutionally invalid pardons, as with most constitutional enforcement, must come from the judiciary. And while the D.C. Circuit has quoted Judge Learned Hand’s observation that clemency “is a matter of grace, over which courts have no review,” *United States v. Pollard*, 416 F.3d 48, 57 (D.C. Cir. 2005) (quoting *United States ex. rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950)), Judge Hand recognized an exception in that same sentence: “unless . . . it affirmatively appears that the [act] has been actuated by [inappropriate] considerations.” *Kaloudis*, 180 F.2d at 491. Indeed, if there were *no* judicially reviewable limits on clemency, then the Supreme Court’s cautions in *Schick* and *Woodard* would be superfluous. Rather, just as federal courts routinely decide other questions of public fiduciary obligations, so too when faced with questions about the validity of clemency “on grounds of faithless self-protection . . . a federal district court [can] rule on whether the pardon

was faithful or in derogation of the law against self-dealing.” Leib & Shugerman, 17 GEO. J. LAW & PUB. POL’Y at 486-88.

IV. There is Substantial Evidence that the Commutation of Roger Stone’s Sentence Was Granted as Part of an Effort to Obstruct a Lawful Investigation and Is Therefore Invalid

Here, there is substantial evidence that the “Executive Grant of Clemency” issued by President Trump to the defendant was *not* made in good faith for the public interest, but rather for reasons of self-dealing, self-protection, or other bad faith personal purposes, and therefore violated the Faithful Execution Clauses. Stone does not appear to meet any of the generally applicable criteria for commutation of criminal sentences set forth by the Department of Justice: “disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action,” or “other equitable factors (such as demonstrated rehabilitation while in custody or exigent circumstances unforeseen by the court at the time of sentencing),” let alone “[t]he amount of time already served.” See U.S. Dep’t of Justice, *Justice Manual* § 9-140.113 (Standards for Considering Commutation Petitions), <https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.113>. While these criteria for commutation applications submitted through the Department of Justice’s Pardon Attorney, which account for the vast majority of presidential commutations, do not bind the President, the fact that Stone does not appear to meet *any* of these criteria indicates that he would not be a candidate for commutation “in the public interest” based on the merits of his application.

To the contrary, the public record suggests that President Trump granted clemency as a reward, or continued incentive, for Stone’s efforts to impede an investigation that came to involve President Trump and his associates. Indeed, the White House’s official statement announcing the grant of clemency explained this justification: “Roger Stone is a victim of the Russia Hoax that the Left and its allies in the media perpetuated for years in an attempt to undermine the Trump Presidency. There was never any collusion between the Trump

Campaign, or the Trump Administration, with Russia.” The White House, *Statement from the Press Secretary Regarding Executive Grant of Clemency for Roger Stone, Jr.*, <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-roger-stone-jr/> (July 10, 2020).

President Trump has repeatedly signaled that he will protect allies who obstruct investigations on his behalf. In Stone’s case in particular, the president stated that Stone was “very brave” for refusing to cooperate with the investigation and praised him for having the “guts” to state that he would never testify against President Trump. Special Counsel Robert Mueller, in his Report on the Investigation into Russian Interference in the 2016 Presidential Election, explained that these and other statements by President Trump “support the inference that the President intended to communicate a message that witnesses could be rewarded for refusing to provide testimony adverse to the President and disparaged if they chose to cooperate.”⁴ As the very judge that heard Stone’s trial recognized, Stone “was prosecuted for covering up for the president.”⁵

According to media reports, Stone had “lobbied for clemency . . . emphasizing that he had stayed loyal to the president rather than help investigators.” Peter Baker, Maggie Haberman, & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. Times, July 10, 2020, <https://nyti.ms/3eMgEgR>. Indeed, on the day Trump commuted Stone’s sentence, Stone himself hinted at a reward for loyalty: “He knows I was under enormous pressure to turn on him. . . . It would have eased my situation considerably. But I didn’t.” *Id.* The public record provided sufficient evidence for the court to inquire further into the extent to which the President’s grant of

⁴ Special Counsel Robert Mueller, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. II, at 133 (Mar. 2019), available at <https://bit.ly/2ZkrTca>.

⁵ Rachel Weiner et al., *Roger Stone Sentenced to Three Years and Four Months in Prison, as Trump Predicts ‘Exoneration’ For His Friend*, Wash. Post, Feb. 20, 2020, <https://wapo.st/3aU3rAZ>.

clemency was made in his own narrow self-interest, rather than any plausible conception of the public interest.⁶

CONCLUSION

The commutation of Roger Stone’s sentence should have, at the very least, prompted the court to order further legal briefing from the parties and from amici curiae on the question of whether the Executive Grant of Clemency issued to Stone violates constitutional limits on the pardon power—including appointing an amicus curiae to present arguments in the interests of the United States to the extent that the Department of Justice cannot effectively do so.⁷ Given the strong evidence that the president commuted Stone’s sentence for purely self-interested reasons, that grant of clemency violated the Constitution’s Faithful Execution Clauses. While the court failed to correct the president’s violation in this case, the public and legal community should remain vigilant because President Trump is likely to continue granting clemency to cronies and witnesses for entirely self-serving purposes.

⁶ The court could have also taken judicial notice of a recent decision in an action by Michael Cohen (the President’s formal personal lawyer, who had testified adversely to the President) against Attorney General William Barr and others. The court there found that “Respondents’ purpose in transferring Cohen from release on furlough and home confinement back to custody was retaliatory in response to Cohen desiring to exercise his First Amendment rights to publish a book critical of the President and to discuss the book on social media.” *Cohen v. Barr*, No. 20-cv-05614-AKH, Order Granting Preliminary Injunction, ECF No. 30 (S.D.N.Y. July 23, 2020). While these matters are separate, the contrast between the court’s finding that the administration re-incarcerated Cohen for seeking to criticize the President, and the circumstances surrounding the clemency granted to Stone, suggests that the President’s motives in the latter do not derive from any conception of the public interest.

⁷ See, e.g., *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016) (court of appeals appointed amicus where Department of Justice agreed with defendant); cf. *In re Flynn*, 961 F.3d 1215, *stayed pending consideration of pet. for reh’g en banc*, 2020 WL 3895735 (D.C. Cir. July 10, 2020).

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