UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 17-CR-00232-EGS
MICHAEL T. FLYNN,	)	**BRIEF OF AMICUS CURIAE**
	)	**IN OPPOSITION TO**
Defendant.	)	**DEPARTMENT OF JUSTICE'S**
	)	**MOTION TO DISMISS**

Ronald A. Fein (D.D.C. Bar No. #MA0012)
Courtney Hostetler
John Bonifaz
Ben Clements
Free Speech For People
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234 (tel)
(512) 628-0142 (fax)
rfein@freespeechforpeople.org
Counsel for amicus curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Free Speech For People ("FSFP") is a national non-partisan 501(c)(3) organization working to renew our democracy and our Constitution for we, the people. FSFP has filed amicus briefs in constitutional cases in federal district courts across the country, including in this Court. FSFP's interest in this matter is to provide the Court with a perspective on the Department of Justice's motion to dismiss based on recent scholarship on the original meaning of the Constitution as it applies to the pardon power.[1]

SUMMARY OF ARGUMENT

The President's constitutional power to pardon 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

[1] No parent corporation or publicly held corporation owns part of amicus. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than amicus or its counsel contributed money that was intended to fund preparing or submitting this brief.

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, three points indicate that President Trump exercised his pardon power in his own personal self-interest, in violation of Article II's Faithful Execution Clauses. First, the circumstances surrounding the pardon suggest that the president pardoned Flynn as a reward for loyalty after the latter committed crimes to benefit or protect the president himself. Second, the White House's official explanation of the pardon demonstrates that it is also intended to serve the self-interested purpose of providing commentary on the president's own 2020 electoral defeat—and possibly to influence actors involved in challenging the election results in its final stages. And finally, the strangely-worded scope of the pardon, which purports to cover *future* misconduct, indicates that a primary purpose of the pardon is to provide the president himself with continued legal protection. The Court should order further briefing by the parties and

amici regarding the scope and validity of the pardon—and, if it concludes the pardon is unconstitutional, deny the Department of Justice's motion to dismiss.

ARGUMENT

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, clemency 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 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, 2179 (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 perspectives[2]—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

[2] *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).

Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J. L. & 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 of this Court noted 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.[3]

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-interest of the President and clearly against the public interest." Leib & Shugerman, 17 GEO. J. L. & PUB. POL'Y at 476.

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

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. L. & 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

[3] Indeed, Attorney General William Barr, in his Senate confirmation hearings, agreed that a president could not "lawfully issue a pardon in exchange for the recipient's promise to not incriminate him"; as Barr explained, "that would be a crime." CNN, *Barr: "It would be a crime" for a President to pardon someone who promises not to incriminate him*, Jan. 15, 2019, https://cnn.it/33yr8ho.

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. L. & PUB. POL'Y at 486-88.

IV. The Court Should Examine the Substantial Evidence Indicating that the Pardon of Flynn Was Granted for Self-Dealing Reasons 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. Flynn does not appear to meet any of the generally applicable criteria for pardons set forth by the Department of Justice, including in particular "[t]he extent to which a petitioner has accepted responsibility for his or her criminal conduct," since "[a] petitioner should be genuinely desirous of forgiveness rather than vindication." *See* U.S. Dep't of Justice, *Justice Manual* § 9-140.112 (Standards for Considering Pardon Petitions), *available at*

https://www.justice.gov/jm/jm-9-140000-pardon-attorney#9-140.112.[4] While these criteria for pardon applications submitted through the Department of Justice's Pardon Attorney, which account for the vast majority of presidential clemency grants, do not bind the President, the fact that Flynn 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 for three separate purposes—all improper and contrary to Article II's Faithful Execution Clauses.

A. The pardon serves as a reward for Flynn's loyalty after he committed offenses specifically to benefit the president.

Even if it were not obvious from Flynn's actions at issue here and the President's course of conduct regarding this case, President Trump has repeatedly *and publicly* signaled that he will protect allies who obstruct investigations on his behalf. For example, in the similar case of

[4] In fact, the Department of Justice does not even permit submission of applications for pardons until "at least five years after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner." 28 C.F.R. § 1.2.

Roger Stone, 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."[5] President Trump has been steadfast in protecting his co-conspirators from criminal accountability: just days before Stone was to begin serving a forty-month prison term for obstructing justice in order to protect Trump, he was rewarded with a presidential commutation sparing him from *any*

[5] 2 Special Counsel Robert Mueller, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* 133 (Mar. 2019), *available at* https://bit.ly/2ZkrTca.

jail time. *See United States v. Stone*, No. 19-CR-00018, Executive Grant of Clemency, ECF No. 393-1 (July 13, 2020).[6]

Conversely, witnesses and defendants who publicly criticize the President are subject to retaliation. For example, Michael Cohen, the President's formal personal lawyer, who had testified adversely to the President, was convicted and served prison time for crimes committed at the direction and for the benefit of President Trump. *See United States v. Cohen*, No. 18-CR-00602, Information, ECF No. 2 (S.D.N.Y. Aug. 21, 2018). Unlike Stone and Flynn, Cohen received no pardon or commutation from the President, nor any special treatment from Attorney General William Barr and the Department of Justice. Instead, Trump and his allies have retaliated against Cohen, as a federal district court judge recently found in an action filed by Cohen against Attorney General Barr and others. The court there found that "Respondents'

---

[6] 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.*

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).[7]

B. The pardon appears to be motivated by President Trump's desire to provide commentary on his own electoral defeat in 2020 based on a false portrayal of the Flynn prosecution.

The White House's official statement announcing the grant of clemency emphasized this attempt at narrative construction:

> Multiple investigations have produced evidence establishing that General Flynn was the victim of partisan government officials engaged in a coordinated attempt to subvert the election of 2016. These individuals sought to prevent Donald Trump from being elected to the Presidency, to block him from assuming that office upon his election, to remove him from office after his inauguration, and to undermine his Administration at every turn.

[7] The contrast between the administration's conduct in this matter and in the Cohen matter (where, as the court found, the administration re-incarcerated Cohen for seeking to criticize the President), as well as the the circumstances surrounding the clemency granted to Flynn, further suggest that the President's motives in this case do not derive from any conception of the public interest.

> The prosecution of General Flynn is yet another reminder of something that has long been clear: After the 2016 election, individuals within the outgoing administration refused to accept the choice the American people had made at the ballot box and worked to undermine the peaceful transition of power.

The White House, *Statement from the Press Secretary Regarding Executive Grant of Clemency for General Michael T. Flynn,* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-general-michael-t-flynn/ (Nov. 25, 2020). Reinforcing the president's current political messaging as he battles the end stages of the 2020 election is also an improper self-interested purpose.

C. The unusual circumstances surrounding the grant of clemency, and the text of the instrument itself, demonstrate the need for further inquiry.

The issue of whether the pardon is an improper attempt to reward Flynn for protecting the president (and provide continued protection for the president) is closely related to the issue that this Court was already reviewing concerning the propriety of the Department of Justice's request for dismissal of the prosecution. Indeed, President Trump's act to pardon Flynn appears to be a direct response to—and an effort to circumvent and preempt—this Court's decision to review that issue.

Finally, the broad and strangely worded Executive Grant of Clemency suggests that something even more troubling is afoot. While "blanket" pardons for uncharged offenses are constitutionally permissible, such pardons generally must specify, at minimum, the period of time at issue—and the time period so specified must be in *the past*. *See, e.g., Ex parte Garland,* 71 U.S. 333, 381 (1866) (upholding pardon "for all offences by [Garland] committed, arising from participation, direct or implied, in the Rebellion"); Gerald R. Ford, *Proclamation 4311—Granting Pardon to Richard Nixon*, 88 Stat. 2502-03 (Sept. 8, 1974), *available at* https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg2502.pdf (granting 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").

But the pardon here purports to cover potential *future* offenses. The Executive Grant of Clemency states that it covers "any and all possible offenses . . . that *might arise* . . . in connection with the proceedings" in this action, as well as "any and all possible offenses . . .

in any manner related to the investigation of the Special Counsel." Donald J. Trump, *Executive Grant of Clemency*, ECF No. 308-1 (emphases added). As the *Garland* Court was careful to note, the pardon power "may be exercised at any time *after* [an offense's] commission." 71 U.S. at 380 (emphasis added). The fact that the pardon here purports to also cover offenses that Flynn *may yet commit in the future* provides further reason to scrutinize the circumstances surrounding the grant of clemency.

CONCLUSION

The public record provides sufficient evidence for the Court to inquire further into the extent to which the President's grant of clemency was made in his own narrow self-interest, rather than any plausible conception of the public interest. The Court should order briefing from the parties and from amici curiae on the question of whether the Executive Grant of Clemency issued to Flynn violates constitutional limits on the pardon power.

In the event that the Court finds that the pardon is inconsistent with the Constitution, the Court should deny the Department of

Justice's request to dismiss the case and instead proceed with sentencing.

Respectfully submitted,

/s/ Ronald A. Fein
Ronald A. Fein (D.D.C. Bar No. #MA0012) *
Courtney Hostetler
John Bonifaz
Ben Clements
Free Speech For People
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234 (tel)
(512) 628-0142 (fax)
rfein@freespeechforpeople.org
Counsel for amicus curiae

DATED: December 1, 2020

* Mr. Fein is a member in good standing of the bar of this Court. Ms. Hostetler, Mr. Bonifaz and Mr. Clements are members in good standing of the bar of the Supreme Judicial Court of Massachusetts who do not practice at an address in the District of Columbia. Their participation in this motion is appropriate under Local Criminal Rule 44.1(c).

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I served a copy of the foregoing upon all registered counsel by filing it electronically through the Court's CM/ECF system.

/s/ Ronald A. Fein
Ronald A. Fein (D.D.C. Bar #MA0012)
Legal Director, Free Speech For People
1320 Centre St #405
Newton, MA 02459