WAR CRIME CLEMENCY: THE PRESIDENT'S SELF-DEFEATING PARDON

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Abstract

A president's long-recognized discretion to pardon just about any offense for literally any reason at almost any time leaves little room to argue that such power can be constrained any further by law. Supreme Court decisions, scholarship, and presidential precedent over the last two centuries amply (though grudgingly) support a theory of nearly unilateral and "unfettered" authority, perhaps a last vestige of the British monarchy left in the hands of a democratically accountable chief executive – controversial, but nevertheless constitutional. But when it comes to a specific class of misconduct – war crimes – interpreting and applying this constitutional power requires a second look, for it invariably intersects with another Article II power – a president's role and authority as the military's commander-in-chief. Rather than amplifying this other long-recognized discretionary power to wage war, the pardon power arguably weakens it under certain conditions. This intersection is not merely an academic puzzle on the nature of presidential power; it is a collision of a president's right with a series of quite specific presidential responsibilities and authorities over the military's criminal justice system he has only because Congress believes that a commander-in-chief should wield them. The collateral damage from this collision ironically harms the very institution and profession the president relies on for military action, advice, and ability. Whether this damage is historically contingent on particular presidents or is a predictable consequence of all such pardons is a question that cannot be answered yet.

That is because President Trump's three war crime pardons in 2019 were historic firsts: never before had a president pardoned any soldier for conduct incidental to combat action that violently victimized a non-combatant who was otherwise protected by the international laws of war from unlawful armed force. They were a proof of concept that a president could indeed "go there;" but they were also a proof of consequences not yet fully explored in the literature and not at all by the courts. In exercising his singular strength by pardoning war crimes, a president's power and credibility is paradoxically weakened for three reasons: he ignores or rejects the duties imposed on the very institution he relies on to achieve political objectives through armed force; he devalues the professional expertise of his military agents; and he delegitimizes the military criminal justice system that this institution relies on to promote, enforce, and signal its professional commitments to certain martial values, norms, and requirements – including adhering to the laws of war. Flexing muscle on one arm atrophies muscle on the other. The contrary view is that constitutionally required civilian control of the armed forces means his discretion to flex or atrophy his credibility with the military whenever he wants.

Trump's war crime pardons offer an opportunity to explore whether common arguments and conventional applications of the pardon power are entirely relevant to this class of offenses and this kind of offender. This article suggests, because they lead to a self-defeating paradox (the collision between two independent and stout express Article II powers), that they are categorically distinct; it sketches this new prudential argument for curtailing war crime pardons based on a president's "standing" or relationship he necessarily bears to the military as its commander-in-chief and to the conduct he absolves. Any future case for judicially invalidating such a pardon, for legislating a containment strategy to (at least) deter such a pardon, or for adopting a set of principles for presidential self-restraint, must account for this challenge.

I have an article two, where I have the right to do whatever I want as president.
-President Donald J. Trump[1]

The pardons of our war criminals . . . is unprecedented and should trouble all Americans. We will not pull punches – they are shameful and a national disgrace.[2]

I. INTRODUCTION

The military's formal criminal code and its informal canon of professional value commitments collide with war crime pardons with surprising results, not usually emphasized when debating whether subjective parameters or objective limits exist (or should exist) on a president's pardon power. This criminal code and canon of professional values are intended to control instinctive, self-interested behavior under the stress of combat conditions.[3] Moreover, this code and canon provide guardrails: by both deterring bad conduct and modeling expected conduct, they train service members to engage in conflict in a manner consistent with both norms and duties of International Humanitarian Law.[4] But what happens when this code and canon are resisted by a commander-in-chief's instinctive, self-interested and norm-breaking refusal to hold violators accountable? What happens when pardoning such misconduct even seems to endorse a corrupted, regressive ethic against the advice of the military's uniformed leadership? This used to be a hypothetical question. But former President Trump was the first president to pardon military service members whose actions abroad during armed conflict could have been prosecuted as "war crimes."[5] And he did this three times. Because this type of pardoning was entirely novel, there was no judicial interpretation, no record of what the Framers thought about it before or during the Constitutional Convention, no informative analysis by Blackstone, no legislative enactment or history, and no scholarly study on the books to inform the public's scrutiny. Notwithstanding the legal community's consensus that pardons are largely at the complete discretion of the president, they just felt – intuitively – wrong. But rather than confront and question the power itself, both pragmatic and principled grounds were offered before and after the pardons to justify that intuition and condemn these *particular* grants of mercy.

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[1] Steve Benen, *Trump: Constitution gives me 'the right to do whatever I want'*, MSNBC, July 24, 2019, https://www.msnbc.com/rachel-maddow-show/trump-constitution-gives-me-the-right-do-whatever-i-want-msna1256166.

[2] Pauline M. Shanks Kaurin & Bradley J. Strawser, *Disgraceful Pardons: Dishonoring our Honorable*, WAR ON THE ROCKS, Nov. 25, 2019, https://warontherocks.com/2019/11/disgraceful-pardons-dishonoring-our-honorable/.

[3] *See*, *e.g.*, Gen. William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1970) ("Discipline conditions the soldier to perform his military duty in a way that is highly inconsistent with his basic instinct for self-preservation"); *accord*, In re Grimley, 137 U.S. 147, 153 (1890); Carter v. McClaughry, 183 U.S. 365, 390 (1902); United States ex rel. Creary v. Weeks, 259 U.S. 336, 343 (1922); Burns v. Wilson, 346 U.S. 137, 140 (1953); United States ex rel. Toth v. Quarles, 350 U.S. 11, 17-18, 22 (1955); Reid v. Covert, 354 U.S. 1, 36 (1957); Relford v. Commandant, 401 U.S. 355, 367 (1971); Parker v. Levy, 417 U.S. 733, 751 (1974); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); Chappell v. Wallace, 462 U.S. at 300, 302; and Loving v. United States, 518 U.S. 748, 755-56 (1996).

[4] UNITED STATES MANUAL FOR COURTS-MARTIAL (2019) [M.C.M.], pt. I (*Preamble*), para. 3; Stephen W. Preston, *Foreword*, in OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ii (2016 update) (International Humanitarian Law is also known as the Law of War or Law of Armed Conflict).

[5] *See* Part II, *infra*, for short background on their cases.

In the wake of those surprising acts of clemency (or, if not surprising given Trump's norm-busting "theatrical pardoning,"[6] widely condemned), an opportunity has arisen to ask whether such pardons – as a class – should be within a president's power to grant at all. Should such pardons be categorically distinguished from conventional civilian pardons, in large part because the recipients of the pardon, their battlefield misconduct, and the circumstances surrounding their offenses already are considered categorically distinct under both domestic and international law? The power to make such a discretionary grant of official forgiveness has not been exhaustively considered but ought to be, even if only to confirm whether war crime pardons could be discriminated against – whether they are as reasonable as any other pardon, subject to the same light touch of limits expressly provided for in Article II and explained by the Supreme Court.[7]

This article intends to begin that exhaustive study by suggesting that discrimination between war crimes and other crimes is actually deserved; in doing so this article makes one modest contribution to an already voluminous conversation about presidential power generally and the pardon power specifically. The article does *not* claim that war crime pardons are unconstitutional. Rather, it sketches a new prudential argument that must be employed if such pardons are to ever be formally curtailed or deterred by Congress, or informally curbed through presidential self-restraint. This article offers an original account of why that is. The key idea is that the president's commander-in-chief power and pardon power, viewed together, create a kind of unresolvable self-contradiction or paradox.

It is a paradox because these two powers ostensibly are independently distinct grants of executive authority used for utterly different reasons, yet together they lead a president into a self-defeating position in three ways. First, such pardons delegitimize the system he manages for keeping good order and discipline and controlling the lawful use of armed force; second, they implicitly reject (as inapplicable to himself) the duties of professional care imposed on his subordinate commanders *by Congress*; and, third, they devalue the professional norms and expertise of the military even though it is through such norms and expertise that the president expects the military to achieve (through force or threat of force) political objectives he determines. This is not entirely new ground here. Whether certain kinds of pardons, like self-pardons, are incompatible with the president's other Article II authority – the duty to "take care that the laws be faithfully executed" – has been the subject of scholarly scrutiny before.[8] Alexander Hamilton observed that a pardon used deftly by a commander-in-chief in the case of

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[6] Bernadette Meyler, *Trump's Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92, 93 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/03/72-Stan.-L.-Rev.-Online-Meyler-2.pdf.

[7] *See infra*, Part IV.A.2.

[8] U.S. Const. art. II, § 3. *See* Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST, Mar. 14, 2018 (arguing that self-dealing pardons violate the public trust or implied fiduciary duty owed by presidents to "take care that the laws be faithfully executed" and to "faithfully execute of the Office of the President"), https://www.washingtonpost.com/opinions/this-overlooked-part-of-the-constitution-could-stop-trump-from-abusing-his-pardon-power/2018/03/14/265b045a-26dd-11e8-874b-d517e912f125_story.html?outputType=amp; Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 1, 9 (2007) (arguing that a proper pardon *is* a president "taking care" because a "clemency program administered rigorously at a national level may be the best corrective for the sort of systemic arbitrariness that can result from unchecked prosecutorial discretion"); *and* Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139 (2000) (suggesting that viewing the "take care" clause as a check on the pardon power would effectively nullify the entire pardon clause).

an insurrection can have a positive benefit.[9] Study has also been made as to whether pardoning war crimes is itself a violation of the law of war.[10] But no study has been made of whether pardoning his own troops' battlefield misconduct can contradict those criminal justice authorities Congress grants to a president to effectively act as commander-in-chief.[11] Therefore, this question approaches fertile ground. Before turning to the argument, Part II summarizes the recent war crime pardon controversy to see why Trump's acts of "benign prerogative"[12] generated such pushback, criticism, and shock. Part III pauses to clarify what is really identified when the public and media refer to "war crimes," defining the kind of crimes discussed in In Part II as "battlefield misconduct" and sketching a definition of "battlefield pardon." Part IV advances this article's primary thesis, first by imagining what the best (hypothetical) defense of such pardons would be from the point of view of the President as commander-in-chief, then assessing the strength of that argument against the text of Article II and in light of the more than dozen principles of the pardon power apparently suggested by the Supreme Court's relatively scant pardon line of cases.

Next, the article highlights weaknesses in this defense by considering it light of what the Framers thought about pardons, generally, and how such executive clemency was understood by the leading English jurists of the eighteenth century who influenced the Constitution's drafters. This Part concludes with explaining the unique relationship a commander-in-chief has with both the battlefield misconduct and the offender, and the president's role in relation to the military chain-of-command and military justice system, suggesting reasons grounded in principal-agent theory that such misconduct should be categorically distinguished from other civilian criminal offenses subject to pardons. Part V asks whether – in light of this categorical distinction – Congress has the constitutional authority to impose an outright ban on pardoning this misconduct or at least enact administrative burdens to dissuade presidents from granting them. After examining possible arguments about Congressional interventions drawn from analogizing to the War Powers Resolution, a *Youngstown* analysis, and weighing the relative roles and authorities for military conduct already established in the Uniform Code of Military Justice, this Part concludes by suggesting a strategy, using Article I, § 8, clause 10, for avoiding messy separation of powers conflicts altogether. Part V.D. identifies and addresses the five most compelling objections to this article's thesis and its primary points, including the argument that any categorical distinction between a president's pardon power and commander-in-chief power is illusory and thus no paradoxical collision after all, and that the clause 10 "strategy" is inevitably

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[9] FEDERALIST NO. 74 (Alexander Hamilton).

[10] Gabor Rona, *Can a Pardon be a War Crime?: When Pardons Themselves Violate the Laws of War*, JUST SECURITY, Dec. 24, 2020, https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/; Customary International Law imposes a duty on states whereby the deliberate shielding of criminal consequences for war criminals (by choosing not to investigate or prosecute or punish) is a violation of the law of war. *See* International Committee of the Red Cross, *IHL Database*, "Customary IHL" (especially Rules 158 and 159), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44.

[11] One exception might be Rona, *id*., but pardoning war crimes is viewed there as a breach of the "command responsibility" doctrine under international law; as such, the pardoning of a war criminal is a decision made by the president not simply as the chief executive or administrator but *as* commander-in-chief of the military, held accountable as other generals and admirals might be. This article takes another route: rather than look at a commander-in-chief's grant of a pardon through the command responsibility lens, it views this power in light of the authorities it inherently conveys or is granted by Congress. *See* Part IV, *infra*.

[12] *Supra* note 9.

overbroad, giving Congress too much latitude to erect barriers around presidential authority. A brief wrap-up is offered in Part VI.

II. BACKGROUND: TRUMP'S MILITARY CLEMENCY DECISIONS

A. The Crimes

In 2008, Army First Lieutenant Michael Behenna, an infantry platoon leader, executed an unarmed Iraqi named Ali Mansur Mohamed during an unauthorized "field interrogation."[13] Behenna believed Mansur was responsible for an attack that killed two of his troops with a roadside bomb a few weeks earlier. Though he claimed self-defense, Behenna was convicted by a court-martial panel of officers of unpremeditated murder and assault in 2009 and was sentenced to twenty-five years in federal prison, reduced to twenty years by the court-martial convening authority. His sentence was further reduced to fifteen years by the Army's clemency and parole board. In 2014, he was released on parole after serving less than five years of his original sentence. In May 2019, President Trump pardoned him.[14] In explaining the rationale for the pardon, the president's press secretary implied that the pardon was meant to rectify a flawed conviction for a deserving former soldier. She said that Behenna had been a model prisoner, that his case "has attracted broad support from the military, Oklahoma elected officials, and the public," and that the Army's appellate court had noted concerns about how the trial judge handled the self-defense claim.[15] What the White House chose not to mention was that the same Army appellate court affirmed the court-martial's finding of guilt and sentence anyway, and that the Court of Appeals for the Armed Forces, the nation's primary civilian court for reviewing the legal sufficiency of courts-martial, found that the judge's error was "harmless beyond a reasonable doubt" and that any failure by the government to disclose potentially useful defense evidence was immaterial to the outcome of the case.[16] Regardless of how true (let alone persuasive) the rationale was, this was the first time any president pardoned a former or current soldier for battlefield misconduct that could have been charged as a war crime.

In November of 2019, the president followed up his historic act of executive clemency with two more. First, he pardoned former Lieutenant Clint Lorance.[17] Lorance, like Behenna, was a young and inexperienced army officer whose order to shoot three unarmed Afghan men standing near a motorcycle violated his training in the law of armed conflict, the rules of engagement, and the criminal law. His own soldiers turned him in that night and fourteen of his platoon members testified against him in his court-martial. He was convicted by a panel of officers of second-degree murder and lying to his chain-of-command. He was sentenced to

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[13] Interrogations by military personnel are strictly regulated and officially performed only by trained, qualified specialists. *See* UNITED STATES ARMY FIELD MANUAL 2-22.3 (*Human Intelligence Collector Operations*) (2006). Lieutenant Behenna was not trained or assigned or in any way qualified to "interrogate" this suspect.

[14] Mihir Zaveri, *Trump Pardons Ex-Army Soldier Convicted of Killing Iraqi Man*, N.Y. TIMES, May 6, 2019, https://www.nytimes.com/2019/05/06/us/trump-pardon-michael-behenna.html?module=inline.

[15] White House Press Release, Statement From the Press Secretary Regarding Executive Clemency for Michael Behenna, May 6, 2019, *at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-clemency-michael-behenna [https://perma.cc/JE9Q-M5HC].

[16] United States v. Behenna, 71 M.J. 228 (C.A.A.F. 2012).

[17] White House Press Release, Statement from the Press Secretary, Nov. 15, 2019, *at* https://www.whitehouse.gov/briefings-statements/statement-press-secretary-97 [https://perma.cc/FF9D-KM96].

twenty years in prison, reduced to nineteen by the convening authority.[18] After serving six years of that sentence, significant attention to the case on cable news outlets and op-eds from Lorance's former defense counsel[19] drew the president's interest and resulted in the second war crimes pardon in American history. And – after much public commentary via Twitter[20] – Trump pardoned former Army Special Forces Major Matthew Golsteyn, who had been by that point charged with killing a detainee and associated offenses, but who had not yet faced trial.[21] All three faced or were facing trial by court-martial for offenses charged under the Uniform Code of Military Justice (UCMJ).[22] This Code establishes a hierarchy of military and civilian appellate review, culminating at the Supreme Court.[23] Though for a "separate" professional community with distinct disciplinary purposes,[24] it considered by the Court to be the functional equivalent of state criminal justice systems and with no less a claim to legitimacy.[25]

Controversially, though not a pardon, Trump also reversed a Navy admiral's decision to grant convicted Navy SEAL Edward Gallagher only limited clemency: what had been a reduction in only one pay grade became a full restoration of his rank as a chief petty officer, thanks to the President's largesse.[26] Further sparking outrage was Trump's order to foreclose the Navy Special Warfare Command's administrative review process that could have stripped Gallagher of his SEAL status before his retirement – a mostly symbolic, but utterly dishonoring, form of professional chastisement.[27] Defense Secretary Mark Esper fired Secretary of the Navy Richard Spencer for his behind-the-scenes attempt to block the president from interfering in this process.[28]

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[18] Greg Jaffe, '*The Cursed Platoon*,' WASH. POST, July 2, 2020, https://www.washingtonpost.com/graphics/2020/national/clint-lorance-platoon-afghanistan/.

[19] Don Brown, *Analysis/opinion: Trump must free and exonerate Lt. Clint Lorance*, WASH. TIMES, Nov. 7, 2019, https://www.washingtontimes.com/news/2019/nov/7/trump-must-free-and-exonerate-lt-clint-lorance/; *Member of the Lorance legal team: We need President Trump to take action*, FOX NEWS, April 13, 2019, https://video.foxnews.com/v/6025944819001#sp=show-clips.

[20] Molly Olmstead, *Trump Tweeted About a "Military Hero" Charged with Murder. Here's What we Know About the Bizarre Case*, SLATE, Dec. 17, 2018, https://slate.com/news-and-politics/2018/12/mathew-golsteyn-murder-case-trump-tweet.html.

[21] Dan Maurer, *Trump's Intervention in the Golsteyn Case: Judicial Independence, Military Justice or Both?*, LAWFARE, Jan. 3, 2019, https://www.lawfareblog.com/trumps-intervention-golsteyn-case-judicial-independence-military-justice-or-both-0.

[22] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified at 10 U.S.C.§ 801-946a (2019).

[23] *Id*. at 10 U.S.C. §§ 866-67a and 28 U.S.C. § 1259 (giving the Court power to review decisions by the Court of Appeal for the Armed Forces by writ of certiorari under certain conditions).

[24] Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history").

[25] Ortiz v. United States, 138 S. Ct. 2165, 2174-75 (2018).

[26] Bryan Bender & Wesley Morgan, *Trump pardons soldiers implicated in war crimes*, POLITICO, Nov. 15, 2019, https://www.politico.com/news/2019/11/15/trump-pardon-war-crimes-071244.

[27] Richard Spencer, *I was fired as Navy Secretary. Here's what I've learned because of it*, WASH. POST, Nov. 27, 2019, https://www.washingtonpost.com/opinions/richard-spencer-i-was-fired-as-navy-secretary-heres-what-ive-learned-because-of-it/2019/11/27/9c2e58bc-1092-11ea-bf62-eadd5d11f559_story.html.

[28] Barbara Starr & Ryan Browne, *Esper 'flabbergasted' to learn of Navy secretary's secret White House outreach about Navy SEAL*, CNN, Nov. 25, 2019, https://www.cnn.com/2019/11/25/politics/esper-spencer-aftermath/index.html.

Trump was not the first president to grant clemency to service members who have violated norms, codes of conduct, and criminal law through their actions in combat. President Lincoln famously intervened in cases of Union soldiers accused or convicted of the grave wartime offense of desertion, stopping scheduled executions to the chagrin of commanding generals.[29] President Andrew Johnson granted general amnesty and pardoned the vast majority of ex-Confederates during the Reconstruction era.[30] President Nixon did not pardon Army Lieutenant William Calley after Calley's conviction for the My Lai Massacre, but – with significant public support – Nixon moved him out of prison and into house arrest during his appeals, eventually resulting in an early release after a handful of years for the person chiefly responsible for the deadliest war crime in American history.[31] President Obama controversially commuted the sentence of former Army Private Chelsea Manning, who had been sentenced to thirty-five years in prison for a massive leak of classified and sensitive documents related to the global war on terror.[32] Though not for a war crime, the Manning clemency was another high profile example of presidents intervening in the military justice process on traditional grounds of official mercy to mitigate what might have been considered unjust prosecutions or unjust punishments.[33]

B. The Commentary: "Now he gets to be the hero . . ."[34]

Though Trump's acts of judicial mercy on service members may not be wholly original, they have made him the first president to pardon soldiers for offenses that could have been charged as violations of the international law of war. Like most presidential pardons, his acts garnered both partisan applause and substantial criticism.[35] One notable source of criticism has

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[29] KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 51 (1989).

[30] *Id*.

[31] Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals*, LAWFARE, May 27, 2019, https://www.lawfareblog.com/when-presidents-intervene-behalf-war-criminals; John Darnton, *Decision by Nixon on Calley Hailed*, N.Y. TIMES, Apr. 3, 1971, https://www.nytimes.com/1971/04/03/archives/decision-by-nixon-on-calley-hailed-protests-over-conviction.html.

[32] Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence,* N.Y. TIMES, Jan. 17, 2017, https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html.

[33] As a lame duck president, after his loss in the Electoral College, Trump issued a slew of late-term controversial pardons, including the pardons of four American civilians convicted in the 2007 killing of fourteen Iraqis, while posted to Baghdad as employees of the defense contractor, Blackwater. All were sentenced to terms ranging from twelve years to life in prison. Laurel Wamsley, *Shock And Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR, Dec. 23, 2020, https://www.npr.org/2020/12/23/949679837/shock-and-dismay-after-trump-pardons-blackwater-guards-who-killed-14-iraqi-civil. Arguably, these were also "war crimes" as defined by federal law, but because they were not active-duty soldiers subject to *military* justice, their pardons fall outside the scope of this article's principal argument. Nevertheless, they were employees of a private company with a contract to provide armed security to U.S. government officials in an active combat theater, and subject to the orders – ultimately – of the President as commander-in-chief. For this reason, the conclusions drawn in this article are worth investigating as applied to similar civilian "war crime" cases.

[34] Jaffe, *supra* note 18 (quoting Lucas Gray, referring to Trump's pardon of his platoon leader, Clint Lorance).

[35] *See* Scott D. Sagan & Benjamin A. Valentino, *Do Americans approve of Trump's pardons for court-martialed military officers?*, WASH. POST, Dec. 16, 2019, https://www.washingtonpost.com/politics/2019/12/16/do-americans-approve-trumps-pardons-court-martialed-military-officers/ (quoting a YouGov survey in which 79 percent of Republicans approved of the pardons; one respondent wrote: "thankfully we now have a president that defends the military," and another as "we train these young men to fight and kill and when they do just that, they get punished");

been from within the current and former military ranks, as well as scholars who study traditional military ethos. Naval War College and Naval Postgraduate School ethics professors wrote: "The pardons of our war criminals by Trump, and his interference in and disrespect of our own military justice system is unprecedented and should trouble all Americans. We will not pull punches – they are shameful and a national disgrace."[36] Two retired judge advocate officers-turned-law professors wrote of Trump's "reckless dismissal of the judgments of his military commanders and his misunderstanding of the profession of arms."[37] Retired Lieutenant General David Barno argued that President Trump did not give sufficient consideration to the views of his advisers, the unambiguous results of due process under military law, the collateral consequences for soldiers on the battlefield or obligations under the law of war.[38] This argument is not overstating the case. When the president's defense amounts to sanctifying brutal acts of soldiers he thinks are trained as, and expected to be, "killing machines,"[39] it is difficult for many to believe the president has given that due consideration.[40] Rather, it seemed to many as if he was "pushing the buttons of government indiscriminately,"[41] a real-world illustration of his claims that Article II of the Constitution allows him to do "whatever" he wants.[42]

The Trump Administration was undeniably a proof of concept that long-established norms and expectations, based on relatively vague Constitutional authorities and principles, can be broken with the right amount of political will, neglect, or animus.[43] One such broken norm was process-based: the removal of bureaucratic facilitation and review of pardon applications by

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Ari Shapiro, *Veterans React To 3 Controversial Pardons Issued By President Trump*, NPR, Nov. 18, 2019, https://www.npr.org/2019/11/18/780563061/veterans-react-to-3-controversial-pardons-issued-by-president-trump.

[36] Shanks Kaurin & Strawser, *Disgraceful Pardons, supra* note 2.

[37] Geoffrey S. Corn & Rachel E. VanLandingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFARE, Nov. 26, 2019, https://www.lawfareblog.com/gallagher-case-president-trump-corrupts-profession-arms.

[38] Anna Mulrine Grobe, *Does Trump's Navy SEAL pardon undermine military justice?*, CHRISTIAN SCI. MON., Nov. 27, 2019, https://www.csmonitor.com/USA/Politics/2019/1127/Does-Trump-s-Navy-SEAL-pardon-undermine-military-justice.

[39] *Donald J. Trump*, TWITTER, Oct. 12, 2019, https://twitter.com/realdonaldtrump/status/1183016899589955584?lang=en.

[40] Sam Fellman & Ellen Ioanes, *Trump's 'killing machines' comments show he fails to grasp the basics about the US military he leads*, BUSINESS INSIDER, Nov. 21, 2019, https://www.businessinsider.com/trump-killing-machines-comment-shows-failure-to-grasp-us-military-2019-11.

[41] Dean Obeidallah, *Trump doesn't hate anonymous tell-all 'A Warning,' because he knows how he can spin it*, NBC NEWS, Nov. 19, 2019, https://www.nbcnews.com/think/opinion/trump-doesn-t-hate-anonymous-tell-all-warning-because-he-ncna1085241.

[42] *Transcript: ABC News' George Stephanopoulos' exclusive interview with President Trump*, ABC NEWS, June 16, 2019, https://abcnews.go.com/Politics/transcript-abc-news-george-stephanopoulos-exclusive-interview-president/story?id=63749144; The White House, *Remarks by President Trump at Turning Point USA's Teen Student Action Summit 2019,* July 23, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/.

[43] Harold Hongju Koh, Rosa Hayes, Dana Khabbaz, Michael Loughlin, Nicole Ng, Ayoub Ouederni, & Brandon Willmore, *Is the Pardon Power Unlimited?*, JUST SECURITY (Feb. 28, 2020) ("Under Trump's administration . . . pardons have increasingly been issued without articulable standards or indicia of process . . . [he] now entirely bypasses the Justice Department's Office of the Pardon Attorney"). On the power, scope, and relevance of presidential norms, *see* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) (Professor Renan does not, however, discuss norms associated with the exercise of the pardon power, other than to refer to it as an example of the president's "law enforcement discretion." *Id.* at 2208).

the Department of Justice's Office of the Pardon Attorney, leaving all attention focused on the "performative" individual exercising the power.[44] The other broken norm was substantive: the actual pardoning of service members who committed acts during armed hostilities abroad that were prosecutable as war crimes.

But why should breaking norms against the grant of battlefield pardons be so controversial, and why worry about its multidimensional implications if it is relatively rare? Most pardons and other acts of clemency go unreported and are granted in well-vetted, politically "innocuous" cases.[45] In practice, presidents have certainly exercised their power of reprieve and pardon liberally, as if no moral or legal constraint on its exercise existed outside the express terms of the Constitution (though the rate of clemency has decreased over time[46]).[47] As Professor Kobil described its rather arbitrary use, "clemency has not historically been exercised in any principled fashion."[48] Other than the still-undecided question of self-pardons, the public has largely accepted such discretionary exercises as inevitable, even if distasteful or imprudent in individual cases. As described in detail below in Part IV, the Supreme Court has followed suit: "the pardoning power is an enumerated power of the Constitution, and that its limitations, if any, must be found in the Constitution itself."[49] And, as described below, few such limitations can be found. Congress remains, for the most part, quiescent.[50]

Indeed, it is Congress's reticence to restrain presidents' abusive exercise of the pardon power that will be the large subject of this article's discussion in Part V. According to Alexander Hamilton, "humanity and good policy conspire to dictate" that a president's "benign prerogative

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[44] Meyler, *Trump's Theater of Pardoning*, *supra* note 6 (noting that "President Trump's performance of pardoning has exalted himself over both pardon recipients and the rule of law . . . [and his] pardons have seemed to reject law, including constitutional law and the laws of war, and to assert a sovereignty above the law").

[45] *Id.* (noting that Trump's approach involved "largely eschewing bureaucratic process" and the "common law restraints" that had "accreted around pardoning" in favor "political theater" that sparks public adoration or outrage, but which likely calls "law and legal regimes into question through his pardons"); *see also* JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 2 (2009).

[46] Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1171 (2010).

[47] Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 835 (2017).

[48] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 572 (1991).

[49] Schick v. Reed, 419 U.S. 256, 267 (1974).

[50] In the summer of 2020, Representative Adam Schiff (D-CA) introduced H.R. 7694, the Abuse of Pardon Prevention Act. This Act, which did not get a vote at all in the House and died on the vine, would have done two primary things arguably impinging on Article II. First, it would have imposed a post-grant notification to Congress from both the Attorney General ("all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned") and from the President ("all materials obtained or produced within the Executive Office of the President in relation to the pardon"). However, this reporting requirement would only be triggered for certain "covered offenses:" "an offense against the United States that arises from an investigation in which the President, or a relative of the President, is a target, subject, or witness;" offenses involving refusal to testify or produce papers under Congressional subpoena (2 U.S.C. § 192); and offenses involving falsification, concealment, misrepresentation, and fraud and the like with respect to a matter within the jurisdiction or branch of the federal government (18 U.S.C. § 1001); obstruction of certain proceedings in civil investigations (18 U.S.C. § 1505); tampering with a witness, victim, or informant (18 U.S.C. § 1512); and perjury (18 U.S.C. § 1621). Second, it would have amended the federal bribery statute to include the president and vice president as "public officials" subject to its prohibitions. In other words, even had it been enacted, the statute would not have directly barred the president from even granting such pardons, though it was clearly designed to induce self-restraint before actually granting such a pardon.

of pardoning should be as little as possible fettered or embarrassed" by the courts or by Congress.[51] To be sure, such a prescription is reasonable if presidents persistently used their pardon power for ends the public and the Framers expected. Generally, there are only four such legitimate ends: (1) to remedy injustice when no other avenue for justice is available (a legitimate form of specific relief to a specific "victim" of an unfair or unjust process); (2) to communicate or signal law enforcement priorities to prosecutors (a legitimate generalized policy and management guidance within the executive branch); (3) to advance a criminal justice reform agenda with Congress (a legitimate political strategy); or (4) to regularly and frequently promote a specific process managed by a professional Justice Department (a legitimate exercise of the president's duty to "take care that the laws be faithfully executed"[52]).[53] Only one recent president has described his systematic view of the pardon power generally, and his understanding fits within at least the first three of these legitimate ends.[54] This article, however, suggests that Hamilton's view – and the Constitutional and historical treatment of the power that followed – is naïve, and in that naiveté, at risk of justifying poor clemency decisions. Unlike most pardons, pardons for conduct committed on the battlefield *do* raise weighty constitutional, pragmatic, and political concerns implicating the interests of Congress and the military chain-of-command reporting ultimately to the President.[55] The argument below explores what can and should follow when it is recognized that sometimes "humanity and good policy conspire to dictate" that a president's prerogative of pardoning *must* be fettered, for its exercise under certain conditions would violate core conceptions of presidential executive responsibilities.

III. AVOIDING CATEGORY ERRORS: DEFINING "BATTLEFIELD PARDON" AND "BATTLEFIELD MISCONDUCT"

The common criticism (or less frequent, support) for Trump's clemency almost universally referred to the pardons of Behenna, Lorance, and Golsteyn as "war crime" pardons or that these men were accused or convicted of being "war criminals."[56] This is not, as a matter of technical legal status, accurate: they were not formally charged with violating the U.S. "war

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[51] *Supra* note 9.

[52] U.S. CONST., art. II, § 3.

[53] Love, *Reinventing the President's Pardon Power*, *supra* note 8, at 8-10 (suggesting these four reasons for why presidents should "reclaim" the pardon power by regularly using it without abusing it).

[54] Obama, *The President's Role*, *supra* note 47, at 835-38 ("the clemency power represents an important and underutilized tool for advancing reform" and noting that his administration's objective was to actively seek out persons who "deserve" pardoning because of "outdated laws that have since been changed and are no longer appropriate to accomplish the legitimate goals of sentencing," or to undo "overly harsh mandatory sentences," or to benefit those deserving a "second chance"); *but see* Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 FED. SENT'G REP. 271, 273 (2017) (arguing that Obama's efforts at "reinvigorating" clemency, while well-intentioned, left the administrative pardoning process "in shambles").

[55] W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 5-6 (1941) (suggesting that one strong reason for pardons receiving relatively little academic treatment or public controversy is that "the pardoning power in the United States has given rise to very few constitutional questions," which yields much confusion – or at least flawed assumptions – about this power's precise legal parameters, shrouding it in a "veil of mystery").

[56] *See*, *e.g.*, Noor Zafar, *Trump's War Pardons are Sabotaging the Military Justice System*, ACLU NEWS & COMMENTARY, Dec 13, 2019, https://www.aclu.org/news/national-security/trumps-war-pardons-are-sabotaging-the-military-justice-system/.

crimes" statute,[57] nor any specific law of war either codified by treaty or understood under Customary International Law norms.[58] It serves us better to be more careful with our labels: "battlefield pardon" is a more apt marker. We should also be careful with definitions because "battlefield pardon" is not an official U.S. designation or classification of clemency for a certain category of crime or category of offender. It does, however, accurately describe a pardon whose nature and consequences deserve special attention, and the power to grant one deserves special scrutiny. Because it has no formal legal meaning, a definition is needed before any sensible support or criticism of it can proceed. This is particularly important for a term of classification that includes an ambiguous qualifier like "battlefield" that plausibly evokes myriad images of modern armed conflict, whether accurate or unrealistic. For the purposes of this article, then, a "battlefield pardon" is a pardon granted by a U.S. president that meets three conditions:

- It is granted to a current or former U.S. military service member or any other person subject to the jurisdiction of U.S. military discipline and punishment under 10 U.S.C. § 802 at the time of the actual or alleged offense,[59] and

- It is granted for an immediate tactical effect: to terminate, preempt, or reduce certain direct penalties arising from a possible, pending, or already prosecuted criminal charge against that current or former service member,[60] and

- The criminal charge, or criminal investigation, alleges that the service member has committed what this article will simply call *battlefield misconduct*, or what is typically referred to as a "war crime."[61]

The legal classification of the armed conflict (international or non-international), the domestic and international legal authority for the armed conflict (under *jus ad bellum*), the degree of

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[57] 18 U.S.C. § 2441 ("War Crimes") (incorporating within its definition those offenses that violate portions of the Geneva Conventions and Hague Regulations).

[58] Charles J. Dunlap, Jr., *Reasonable People can Differ on Trump's Military Justice Actions*, SMALL WARS J., Dec 16, 2019, https://smallwarsjournal.com/jrnl/art/reasonable-people-can-differ-trumps-military-justice-actions.

[59] For the purposes of distinguishing this type of pardon from others, the timing of the pardon in relation to the offense is immaterial; the active duty, discharged, or retired status of the service member at the time of the pardon is likewise immaterial.

[60] In contrast, the president's *strategic* motive in granting the pardon, whether altruistic, merciful, coercive, or purely for political traction, is irrelevant to classifying a pardon as a battlefield pardon.

[61] It is largely safe to think of "battlefield misconduct" as the same as the intuitively colloquial use of the term "war crime," or the less popular "wartime misconduct." The "war crime" has specialized legal meaning under both the U.S. code and international law but, as we have seen, is often used to describe misconduct by soldiers that is not – technically – charged as a violation of the laws of war but rather as a violation of some other criminal statute, like the Uniform Code of Military Justice's murder statute. Regardless of what statute or positive law the conduct is charged under, we can presume that neither the critics nor supporters of a pardon will deviate from referring to it as a "war crime." On the other hand, "wartime misconduct" can capture the meaning of "battlefield misconduct." *See, e.g.*, Jay Morse, *Why We Prosecute Wartime Misconduct*, JUST SEC'Y, Mar. 10, 2021, https://www.justsecurity.org/75184/why-we-prosecute-wartime-misconduct/ (describing the court-martial of Army Staff Sergeant Robert Bales, who murdered sixteen civilian noncombatant Afghan men, women, and children on a single night in 2012 during his deployment to Kandahar, but was not *technically* guilty of a "war crime"). However, this too is ambiguous – it might also include misbehavior towards fellow service members, or some other conduct unrelated to the kind of armed force regulated by the laws of war.

violence characterizing that armed conflict, the lawfulness of any surrounding circumstances (like the legality of any order that placed the member at the scene of the crime), and manner in which the charge is brought (including its jurisdiction and under what body of law) are likewise immaterial factors for distinguishing these pardons from conventional pardons. Finally, the formal administrative procedure by which a battlefield pardon is granted and accepted is not relevant to its classification.[62]

The Behenna, Lorance, and Golsteyn cases involved presidential intervention at three different time periods: after the sentence had been served, during incarceration, and prior to trial, respectively. But the conduct in all three instances shared two characteristics: (1) the conduct was incidental to the soldier's otherwise legitimate performance of duties in combat, and (2) the victim of the conduct was a party protected from unlawful use of armed force by the laws of war. Battlefield misconduct, therefore, might be defined with more specificity this way:

"Battlefield misconduct" is any act or omission committed by a person, or alleged to have been committed by a person, subject to the Uniform Code of Military Justice (UCMJ) that is (A) punishable under 18 U.S.C. 2441;[63] or *(B) punishable under the Law of War; or (C) would otherwise constitute a violation of the UCMJ Articles 93, 118, 119, 120, 120b, 125, 126, 128, 128a,*[64] *134 (general offense), or Articles 80 (attempts), 81 (conspiracy), 82 (solicitation) with respect to these offenses, but only when the following conditions are met:*

(a) the person suspected, accused, or convicted of said UCMJ offense(s) was, at the time of the alleged conduct, assigned to a U.S. military unit with duty in an overseas contingency operation involving potential or actual participation in armed conflict, declared war, or any other form of armed hostilities, and
(b) the victim or victims of the UCMJ offense(s) are persons, property, or places protected from the unlawful use of force from members of an Armed Force, or from those accompanying an Armed Force in the field, by the provisions of any of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party, or Articles 23, 25, 27, and 28 of Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907.

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[62] Early scholar of pardons W.H. Humbert describes the pardoning process as having five "fairly distinct stages:" application, investigation, preparation, consideration and action, and notification, all managed by the Department of Justice's Office of the Pardon Attorney under the supervision of the U.S. Attorney General. HUMBERT, PARDONING POWER, *supra* note 55, at 82-94. For the specific steps used by the modern Office of the Pardon Attorney, *see* 28 C.F.R. § 1.1 – 1.11. These steps remain "advisory" only – a president can and has ignored the bureaucratic administrative pardoning process.

[63] This U.S. Code provision incorporates in its definition of war crimes examples of Geneva Conventions Common Article 3 offenses. 18 U.S.C. § 2441(c)(3).

[64] Article 93 (10 U.S.C. § 893) prohibits "cruelty and maltreatment." Article 118 (10 U.S.C. § 918) prohibits murder and Article 119 (§ 919) prohibits manslaughter. Articles 120 and 120b (§§ 920, 920b) prohibit sexual assault and rape of adults and children respectively. Article 125 (§ 925) prohibits kidnapping. Article 126 (§ 926) prohibits arson and "burning property with intent to defraud." Article 128 prohibits assault and 128a prohibits maiming (§§ 928, 928a).

As a first effort to define battlefield misconduct, I remain open to amending this. It does not, for example, include the offenses committed by the Blackwater contract employees.[65] But having a precise definition of "battlefield misconduct," whether it takes the textual form above or not, not only helps us more accurately describe the character of the wrongful conduct without generating misleading implications for how that conduct was or could have been prosecuted, it may prove useful should Congress explicitly address by statute (*see infra* Part V.C.).

Just as a war crime or battlefield misconduct is not just any criminal transgression, war crime/battlefield pardons are not just any old pardons. They are rare like black swans;[66] they are high-visibility sources of public debate – even outrage – domestically and internationally; and they are unilateral actions at the extreme edge of a president's powers of executive clemency and powers as commander-in-chief. They are completely constitutional as presently understood, used no differently and analyzed no differently than any other conventional pardon. And yet, they may be self-defeating, and the reasons for this paradox may form a sufficient basis for categorically distinguishing and regulating them.

IV. ARE BATTLEFIELD PARDONS SELF-DEFEATING?

A. The President's Best Argument

The claim that pardons for certain *types* of crime can or should be curtailed appears to breach an otherwise nearly impenetrably secure and unilateral power of the presidency, built on foundations of the Constitution's text and historical practice. Nevertheless, if a president were to, hypothetically, defend the practice of war crime or battlefield pardons, the strongest argument would go something like:

> *I can pardon a soldier for their battlefield violation of the UCMJ, or any so-called "war crime," because the Constitution vests pardon power solely in the president, these offenses are "offenses against the United States" (because they violate U.S. Code provisions), and nothing in the text of Article II prevents me from pardoning this kind of crime or kind of criminal; the Framers did not conceive of such a crime anyway, let alone consider whether a president could pardon it, and the Supreme Court has repeatedly reinforced that I may grant a pardon for any reason whatsoever and that Congress cannot impose restrictions, prohibitions, or limits on who or what I pardon. Moreover, as the soldier's commander-in-chief, I have ultimate responsibility for the military's use of force, including an individual soldier's use of force committed in the name of the United States. It is therefore my sole prerogative and burden to determine which conduct – if any – is sanctionable or forgivable within my discretion, which is bound only by the terms of Article II.*

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[65] *See supra* note 33.

[66] A "black swan event" is a metaphor for an event that has three characteristics: it is abnormal and thus unexpected; it is of large consequence and thus high profile; and is *irrationally* rationalized or explained in hindsight as being both obvious and expected. NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE xxii (2d ed. 2010) ("rarity, extreme impact, and retrospective (though not prospective) predictability").

Of course, this is a defense only of the *authority* to grant such pardons, not a justification for a *particular* pardon, and no such defense was ever articulated publicly by Trump or the Department of Justice before or after his battlefield pardons.[67] This is what we might imagine the defense to be, if one were made in good faith. Though these pardons were objected to on normative grounds, it is not a power one might easily assail legally.

1. What does the text say about such pardons?

As a preliminary matter, nothing in the text of the Constitution expressly permits or prohibits battlefield pardons, just as nothing in the text expressly permits or prohibits pardons for murder or rape, and certainly says nothing specific about pardons for more idiosyncratic offenses, like unlawfully withholding information from Congress related to illegal arms sales to an embargoed Middle Eastern nation to illegally fund a South American anti-Socialist insurgent group.[68] The Constitution describes the pardon power in only one particular place, unlike other presidential powers referenced or cabined by other provisions in Article I or in various Amendments.[69] Within the same clause that makes the president the civilian commander-in-chief of the military, the Framers provided the power to "grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[70] It is also unique: this is the only place in the Constitution that grants to a single officer of the government the authority to alter the legal status, rights, and disabilities of another person without (in contrast to courts) any requirement of procedure. Moreover, "offenses against the United States" excludes offenses against state laws, or any other law beyond the reach of exclusive federal sovereignty.[71] By "offense," it means violations of criminal codes and excludes civil suits among private parties.[72]

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[67] Instead, he said: "I stuck up for three great warriors against the deep state. . . I had so many people say 'Sir, don't think you should do that.'" John Fritze, *Trump ramps up attacks on 'deep state,' focuses on Pentagon amid Eddie Gallagher controversy*, USA TODAY, Nov. 27, 2019, https://www.usatoday.com/story/news/politics/2019/11/27/trump-calls-pentagon-deep-state-amid-eddie-gallagher-controversy/4323327002/.

[68] For example, along with former Secretary of Defense Casper Weinberger who was pardoned for lying to the Independent Counsel but still facing prosecution, Elliot Abrams was convicted in 1991 for his role (as Assistant Secretary of State) in the "Iran-Contra Affair," and was one of six senior Administration officials pardoned by lame duck President George H.W. Bush. David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up'*, N.Y. TIMES (Dec. 25, 1992), https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html?_r=2&oref=login&oref=slogin.

[69] *E.g.*, the president's authority to sign bills into law "if he approve," and ability to veto them, is referenced in Article I, § 7's discussion of how Congress may override the president's veto; the president's authority as commander-in-chief does not extend to declaring war, nor to raising, supporting, providing for, and maintaining the armed forces, nor to making rules for the "government and regulation of the land and naval forces," nor to "calling forth the militia" to "suppress insurrections and repel invasions." *See* Art. I, § 8, cl. 11 – 15. *See also* U.S. CONST. Amend. III (preventing the president from quartering troops in private dwellings without consent), Amend. XXII (term limits), Amend. XXV (discussing removal of the president by death, impeachment, resignation, or otherwise being "unable to discharge the powers and duties of his office").

[70] U.S. CONST. art. II, § 2.

[71] HUMBERT, PARDONING POWER, *supra* note 55, at 54.

[72] *Id*.

There is no further cataloguing of the kinds of offenses that are outside the power of the president to pardon, implying there is no such carve-out, provided it is a federal crime.[73]

That it does not mention any need for a pardon's ratification by one or both houses of Congress or prefatory consent from the Senate, whereas the next section does with respect to making treaties and appointing justices of the Supreme Court, indicates this power is held by only one person and could be used at that person's sole discretion. Moreover, a pardon can be granted after the recipient has served his sentence, while serving a sentence, after conviction but before sentencing, during trial but before conviction, after indictment but before trial has begun, preceding indictment, when the potential charges are still under investigation, or at the time of the commission of the offense. In other words, there is no qualification – except for one – that prohibits the *timing* of the pardon: the only exception here is that the pardon cannot be granted to a person who – for the same conduct – is or has been impeached.[74] Finally, there is nothing explicitly prohibiting the president from granting a pardon subject to the recipient's meeting certain conditions.[75]

2. *The Supreme Court's Principles of the Pardon Power*

Not long after he left office, and before he became Chief Justice, former President William Taft wrote that "the duty involved in the pardoning power is a most difficult one to perform, because it is so completely within the discretion of the Executive and is lacking so in rules or limitations of its exercise."[76] This maybe a true as matter of Constitutional text, but it is also clearly misleading. Taft unnecessarily ignored three relevant sources of guidance: presidential norms that form a kind of quasi-binding administrative precedent;[77] the historical

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[73] *See generally* Ex Parte Grossman, 267 U.S. 87 (1925), *and* JOSEPH STORY, III COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 363 (1833).

[74] Ex Parte Garland, 71 U.S. 333, 380 (1866).

[75] These conditions are not unlimited. They cannot require the recipient to otherwise violate a law and they cannot impose a restraint on the recipient's protected constitutional rights and privileges. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 316 (2006).

[76] WILLIAM HOWARD TAFT: ESSENTIAL WRITINGS AND ADDRESSES 189 (David H. Burton ed., 2009); *see also* Tim Naftali, *Trump's Pardons Make the Unimaginable Real*, ATLANTIC (Dec. 23, 2020), https://www.theatlantic.com/ideas/archive/2020/12/how-abuse-presidential-pardon/617473/ (calling Taft's excessively deferential interpretation of the pardon power and his faith in its wise, just, exercise the "Taft doctrine").

[77] Renan, *Presidential Norms*, *supra* note 43, at 2190 ("The textual provisions that define our constitutional structure do not, by themselves, offer a sufficiently thick network of rules or standards to create a workable government. Judicial precedent on the content of presidential duty is also scant. Rather, the understandings that structure and constrain presidential behavior, in the main, are supplied by norm-governed practices"). *See also* Josh Chafetz & David E. Posen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1434 (2018) ("constitutional norms are perpetually in flux. The principal source of instability is not that they can be disregarded or denigrated by politicians who deny their legitimacy, their validity, or their value-although these things do sometimes happen. Rather, the principal source of instability is that constitutional norms can be dynamically interpreted in a more or less restrictive manner, and at higher or lower levels of generality, and the potential for such reinterpretation puts ongoing pressure on the integrity of the norms and their capacity to constrain the conduct of government officials"). The political science literature also recognizes the impact and role of "norms" in channeling government actor behavior, including that of presidents. *See* James P. Pfiffner, *Donald Trump and the Norms of the Presidency*, 51 PRES'L STUD. Q. 96 (2021) *and* B. GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE NEW INSTITUTIONALISM 44 (2019).

use or abuse of the pardon power by the British monarchy and Parliament's reactions; and the Supreme Court's case-by-case elucidation of the power's parameters and purpose.

A review of the most significant Supreme Court cases addressing the pardon power (and there are only a handful) reveals certain fundamental maxims defining the scope, purpose, and effect of this form of executive clemency. If battlefield misconduct should be categorically carved out from this authority, these principles might provide either context or circumstantial evidence for making (or rebutting) that argument, especially useful given the lack of textual clues in Article II itself. Unsurprisingly, it was Chief Justice John Marshall who, in 1833, first opined on the meaning of the pardon clause, but it was more than a generation after the Constitution's ratification. In United States v. Wilson,[78] the Court wrestled with a pardon granted by President Andrew Jackson to a man convicted of robbing "the mails" and putting the carrier's life in jeopardy (for which he was sentenced to death). Marshall wrote:

> The power of pardon in criminal cases had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended and not communicated officially to the court.[79]

Furthermore,

> A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered, and if it be rejected, we have discovered no power in a court to force it on him . . . It may be absolute or conditional.[80]

Thus, the Court announced the first set of pardon principles, and these related to understanding the pardon's nature: American courts should interpret the pardon power as the British courts and Parliament did; the pardon is an extra-legal instrument – an "act of grace" that can be absolute or conditional – from the Executive, not the legislative, authority; and this gift – like any gift – may be rejected by the intended recipient.

In 1855, the Court again took up the meaning of a pardon, but this time it was not without its own internal debate. The Court, addressing a conditional pardon from President Fillmore to a convicted murderer, commented on the pardon's historical pedigree under the English crown.

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[78] 32 U.S. (7 Pet.) 150, 160-61 (1833).

[79] *Id*. at 160-61. Humbert acknowledges that this formed the "basis of the law" of pardons, but classifies it is mere (though influential) *dictum*. HUMBERT, PARDONING POWER, *supra* note 55, at 23.

[80] *Id.* at 161.

As in *Wilson*, the Court believed it was an act of "forgiveness, release, remission."[81] Justice Wayne explained that "[w]ithout such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy."[82] But the point of contention within the Court was Justice Wayne's full-throated referral to the binding precedent of how British courts and scholars understood the purpose and effect of a pardon:

> [T]he language used in the Constitution conferring the power to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption . . . At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the Crown. Hence, when the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English Crown or by its representatives in the colonies. At that time, both Englishmen and Americans attached the same meaning to the word "pardon." In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution.[83]

This deference to British historical interpretation of its own regal pardon power sparked the Dissent. Justice McLean argued the Court was basing its interpretation on a false analogy:

> The executive office in England and that of this country is so widely different that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British sovereign. Their respective powers are as different in their origin as in their exercise. A safer rule of construction will be found in the nature and principles of our own government.[84]

Despite the Dissent's reasonable caution, the meaning of the pardon power continued to be viewed in light of what the English jurists understood its parameters to be – or more accurately, *what the Court believed the English jurists understood*. Eight decades after the ratification of the pardon power, the U.S. Supreme Court again took to explaining its "nature." After quoting the pardon clause, the Court in *Ex parte Garland*[85] summarily concluded that the "power thus conferred is unlimited, with the exception stated."[86] In much-quoted language, the Court explained this magisterial power "extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during

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[81] Ex Parte Wells, 59 U.S. (18 How.) 307, 309 (1855). The pardon was a commutation of the death sentence, reducing it to life in prison. *Id*. at 308.

[82] *Id*. at 310.

[83] *Id*. at 311.

[84] *Id*. at 318 (McLean, J., dissenting).

[85] 71 U.S. 333 (1866).

[86] *Garland*, 71 U.S. at 380.

their pendency or after conviction and judgment . . . [and, critically] the power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[87]

To reinforce this point, and to distinguish this federal power from the power of some state governors, in terms evoking images of sacred and holy piety, the Court concluded that "the benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[88] Here, the Court seemed to be following the footsteps of a one hundred and eighty year-old English case, *Godden v. Hales*.[89] Sir Edward Hales was accused of failing to take the oath of supremacy and impiously failing to receive the sacraments of the Church of England. He had received a royal pardon, so he argued in court that this freed him from criminal sanction. The Lord Chief Justice held for Hales, arguing that the Kings of England were absolute sovereigns, which implied that all laws were the King's laws, which further implied that a King could dispense with a law as he saw fit ("he is the sole judge of that necessity"), which meant Parliament could not pass a law or rule to constrain, limit, or bar such pardons.[90]

Similarly, the *Garland* Court held Congress could not impose limits on when or on whom the President extends his mercy. The pardon itself works as much like a sacramental absolution of sin as a secular law could permit: "the pardon reaches both the punishment prescribed for the offense and the guilt of the offender" for it "releases the punishment and blots out the existence of guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense." This naturally and inevitably precludes a bad act's penalties and collateral disabilities "from attaching."[91] The pardon "makes him, as it were, a new man, and gives him a new credit and capacity."[92] Under this logic, the Court held that an 1865 Act's de facto disbarment of former Confederate military officers and elected officials was an unconstitutional violation of Mr. Garland's right to practice his profession.

The Court's approach in the next decade, reviewing the effect of President Lincoln's and President Johnson's general grants of pardon and amnesty during and after the Civil War, continued emphasizing the largely "unfettered" character of the President's pardon power and its purpose. "The pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself."[93] One Court wrote that "[i]t is of the very essence of a pardon that it releases the offender from the consequences of his offense."[94] Summarizing its interpretation, another Court wrote:

> A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his

[87] *Id*.

[88] *Id*.

[89] 89 Eng. Rep. 1050 (K.B. 1686).

[90] *Godden*, at 1050-51. Though the *Garland* Court's sentiment is nearly identical to *Godden*, it is unclear why the Supreme Court did not cite it.

[91] *Garland*, 71 U.S. at 380.

[92] *Id*. at 381.

[93] Carlisle v. United States, 83 U.S. 147, 151 (1872).

[94] Osborn v. United States, 91 U.S. 474, 477 (1875).

> civil rights. In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past.[95]

This same Court went on to state that:

> However large, therefore, may be the power of pardon possessed by the president, and however extended may be its application, there is this limit to it, as there is to all his powers – it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.[96]

By the end of the nineteenth century, this power to "blot out" offenses and restore "credit and capacity" was not something withheld only to the Chief Executive. In *Brown v. Walker*,[97] the Court affirmed the power of Congress to pass acts that would in purpose and effect become general pardons to a groups or classes of people. In this case, the Court addressed an Act of Congress[98] that denied a person – in a response to subpoena from the Interstate Commerce Commission – the right to claim the Fifth Amendment's privilege against self-incrimination to withhold testimony or evidence.[99] Though seemingly an obvious denial of a fundamental and express constitutional right, the Act went on to grant general immunity: "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."[100] Thus, the question was whether an Act that compels "testimony [but also] operate[s] as a complete pardon for the offense to which it relates" satisfies the requirements imposed on the government by the Fifth Amendment.[101]

Analogizing to earlier English and state cases, the Court wrote that "if a witness has already received a pardon, he cannot longer set up his privilege, since he stands, with respect to such offense, as if it had never been committed."[102] The Court then disabused the parties of any notion that there was a material difference between amnesty and pardons: "the distinction . . . of no practical importance."[103] Finally, reviewing cases interpreting the Article II power of pardon, the Court observed: "[t]his power has never been held to take from Congress the power to pass acts of general amnesty."[104] The Act was therefore upheld as having fulfilled the salutary purpose of the protection described in the Fifth Amendment.

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[95] Knote v. United States, 95 U.S. 149, 153 (1877).

[96] *Id*. at 154.

[97] 161 U.S. 591 (1896).

[98] Act of Congress of February 11, 1893, c. 83, 27 Stat. 443 (1893).

[99] 161 U.S. at 593-94.

[100] *Id*. at 594.

[101] *Id*. at 595.

[102] *Id*. at 599.

[103] *Id*. at 601.

[104] *Id*.

By 1915, in *Burdick v. United States*,[105] the 1833 view of Marshall in *Wilson* had become doctrine (if it had not already been so). In reviewing a question of whether an unconditional pardon granted by President Wilson had to be accepted by the recipient in order to make it an effective bar against prosecuting that recipient, the Court in *Burdick* cited *Wilson* as directly on point:

> we have quoted from [*Wilson*] not only for its authority, but for its argument. It demonstrates by both the necessity of the acceptance of a pardon to its legal efficacy, and the court did not hesitate in decision, as we have seen, whatever the alternative of acceptance, whether it be death or lesser penalty. The contrast shows the right of the individual against the exercise of executive power not solicited by him nor accepted by him. The principles declared in *United States v. Wilson* have endured for years; no case has reversed or modified them.[106]

In 1925, the Court in *Ex Parte Grossman*[107] (in the words of Chief Justice Taft) followed the logic of *Wells*: "the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." In doing just that, the Court held that the phrase "offenses against the United States," an apparent attempt to carve out state criminal law offenses, included common law offenses like contempt of court, not just statutory offenses listed in the U.S. Code.[108] Harkening back to some of the same rationale Hamilton employed in Federalist 74, Taft noted:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.[109]

Taft's argument bears special consideration, for he was the only Supreme Court justice to have also served as President, thus with experience exercising the very Article II power the Court was interpreting.[110] A decade before writing *Grossman*, he reflected on this power: despite its wide and unfettered scope, the likelihood of a president abusing it for unjust purposes was de minimis,

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[105] 236 U.S. 79 (1915).

[106] *Id*. at 91.

[107] 267 U.S. 87 (1925).

[108] *Id*. at 111-13 (holding that criminal contempt of court "is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions" and that this was consistent with British common law and the understanding of the Constitution's framers).

[109] *Id*. at 120-21.

[110] Taft granted 383 pardons during his term in office (1910-13). United States Dep't of Justice, Office of the Pardon Attorney, "Clemency Statistics," https://www.justice.gov/pardon/clemency-statistics.

and its drafters clearly believed it would not be misused. "Our Constitution confers this discretion on the highest officer in the Nation in confidence that he will not abuse it."[111]

Two years later, Justice Holmes penned a short opinion addressing a president's ability to commute a sentence of death to one of life in prison without the consent of the prisoner.[112] Explicitly avoiding a digression into English or early American jurisprudence, Holmes explained that the pardon power:

> [i]n our days is *not* a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.[113]

In 1974, in a case arising from the military court-martial of a Master Sergeant for murdering an eight-year-old girl, the Court again articulated the extent to which a president's pardon authority could be regulated by Congress. The short answer was "none at all." In *Schick v. Reed*,[114] the Court addressed President Eisenhower's 1960 decision to commute Schick's 1954 murder conviction to life imprisonment, subject to the express condition that he would never be eligible for parole. Schick, after having exhausted his appeals in the military courts and desiring the opportunity to be paroled at some point, challenged the validity of this condition. The legal question facing the Court was whether it could enforce this condition the president placed on his commutation.[115]

Between the commutation order and the time Schick's case was before the Court on a writ of certiorari, the Court had decided *Furman v. Georgia*,[116] which invalidated all death penalty laws and resulted in an indeterminately long pause before the Court eventually permitted the practice to continue given certain Eighth Amendment protections. Had Schick not received his life-saving commutation from President Eisenhower, and if his death sentence had been still under review on appeal at the time *Furman* was decided, his sentence would have reverted to life in prison but without a no-parole condition attached. With this as background, Schick made two principal arguments: that the 1972 *Furman* decision necessarily applied retroactively to his 1954 sentencing, making the President's later commutation action a legal nullity. In the alternative, he argued that the 1960 commutation exceeded the President's Article II power by imposing a condition not expressly authorized by the Uniform Code of Military Justice.[117]

The Court tackled the second argument first, for if the President's order was unconstitutional, it would make the *Furman* retroactivity issue moot. Thus, Chief Justice Burger, writing for five other members of Court, reviewed the early intent of the pardon power

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[111] *Grossman*, 267 U.S. at 121.

[112] Biddle v. Perovich, 274 U.S. 480 (1927). *Biddle* did not, though, overrule *Wilson* or formally reject the "act of grace" theory of the pardon. *See* CROUCH, *supra* note 45, at 31.

[113] *Id*. at 486 (italics added). As with Chief Justice Marshall's description in *Wilson*, Humbert similarly classifies Holmes' newer description as merely "dictum." HUMBERT, PARDONING POWER, *supra* note 55, at 23 ("Marshall's definition still forms the basis of the law with respect to pardons, though a basis for the modification of this law has been laid by the dictum of the Supreme Court in the Perovich case").

[114] 419 U.S. 256 (1974).

[115] *Id*. at 257.

[116] 408 U.S. 238 (1972).

[117] *Schick*, 419 U.S. at 260.

and its interpretive development. "The authors of this clause surely did not act thoughtlessly, neither did they devote extended debate to its meaning."[118] Though their words were sparse at the Convention, he nevertheless acknowledged that the Framers were "well-acquainted" with history of this authority in England – specifically, that the history "reveals a gradual contraction to avoid its abuse and misuse."[119]

One of the parameters that they all understood from the English experience was that this power could be granted subject to various conditions imposed by the grantor.[120] Unlike most of the previous opinions dealing with this power, the Court cited extensively to Blackstone and some of the Framers for their views.[121] Burger drew from this study, as well as historical record of presidents granting conditional pardons "that are not specifically authorized by Congress," and citing *Wilson*, *Wells*, *Grossman*, and *Garland*, for the following: the "conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not, in themselves, offend the Constitution, but which are not specifically provided by statute."[122] In other words, it did not matter one iota whether the UCMJ said anything about whether any of its offenses or punishments – like the Article 118 capital murder offense of which Schick was convicted – could be affected by a presidential invocation of the pardon power. "This Court has long read the Constitution as authorizing the President to deal with individual cases by granting conditional pardons. The very essence of the pardoning power is to treat each case individually."[123] Therefore, this mountain of evidence "compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by Congress."[124] Any limits, therefore, could not come implied or directly from the UCMJ or any other statute but instead "must be found in the Constitution itself."[125]

Because it is the most recent Supreme Court decision to describe the nature of the pardon power, because it directly confronts the subject of Congressional impositions on the President's prerogative to pardon, and because it arises from the relevant context of the military's criminal justice scheme, *Schick* must either be the answer, in the negative, to part of the question presented in this Article (Congress's authority to regulate pardons of service members for their battlefield misconduct), or it must be distinguished in some material way. The argument that proceeds in Part V below will take up that challenge. But for now, if we can summarize the Court's interpretation of the *nature* of the pardon power up to through *Schick*, the following hardened principles that are (in most regards) the same as those outlined by Chief Justice Marshall in *Wilson*, nearly one hundred and eighty-six years earlier:

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[118] *Id*.

[119] *Id*.

[120] *Id*. at 261.

[121] *Id*. at 263.

[122] *Id*. at 264-66.

[123] *Id*. at 265.

[124] *Id*. at 266.

[125] *Id*. at 267.

(1) The framers of the Constitution were familiar with the English use of pardons, and intended to model the American President's broad power on that monarchial experience, even though it was in some ways checked by Parliament;

(2) therefore, the power listed in Article II was to be interpreted by the courts and exercised by presidents in light of long English precedent on which the American legal system was partly modeled;

(3) a pardon was not an "act of grace" by design (though it may be in effect) but rather an official act by the Chief Magistrate of the laws to obtain some interest that, even if granted to a singular individual, benefits the "public welfare" at large, as a remedy for errors or injustices caused by one or both of the other branches in the execution of their Constitutional duties, like enacting a penal statute or imposing a criminal sentence;

(4) this presidential act of pardon comes, inherently, only from the law-*executing* branch, not by grant of authority from the law-*making* branch;

(5) the power to pardon cannot be regulated or limited by the law-making branch;[126] but,

(6) Congress maintains constitutional authority to grant some pardons itself, in the form of general amnesties; and

(7) to the extent that a pardon touches upon the U.S. treasury without express authorization from Congress, it is invalid;

(8) the pardon "blots out the offense;" as an act of official "forgiveness," it shields the recipient from the legal *punishment* of the act(s) thereby pardoned, but,

(9) the pardon does not blot out other consequences stemming from the legitimate investigation, prosecution, or punishment that preceded the pardon, like the vesting of rights in third parties flowing from legal judgments,[127] and

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[126] United States v. Klein, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit"); *Schick*, 419 U.S. at 266.

[127] *See* Boyd v. United States, 142 U.S. 450-453-54 (1892) ("A pardon does not make amends for the past"), and Carlesi v. New York, 233 U.S. 51 (1914). In *Carlesi*, the Court reviewed a state statute which permitted the prosecution of an offense that had already resulted in trial, conviction, and punishment for violating the law of a different sovereign (*e.g.*, another state or – in this case – the federal criminal code) even though the second prosecution would be for the same act previously punished. In this case, Carlesi had already received a presidential pardon after serving his federal sentence, so he objected and claimed that the New York law in effect infringed or circumscribed the president's pardon power. The Court held that there was no such violation by the New York law; the ability to prosecute again was not a second "punishment" by the same sovereign for the same misconduct, but rather was "simply an exercise by the state of a local power within its exclusive jurisdiction." *Id*. at 58-59. Thus, a presidential pardon's "blotting" out of an offense is not a complete erasure of the fact that the person had been tried, convicted, and sentenced; a subsequent sovereign (like a state) may take that into consideration in its penal code, as

(10) the pardon does not give the pardoned a cause of action or claim against the government for compensation to recover from the legitimately imposed judgment;

(11) a presidential pardon may be conditional, at the president's discretion;[128]

(12) the pardon may be rejected by its intended recipient;

(13) the term "offenses against the United States" is broadly construed to include common law criminal offenses;

(14) the expectation of the English Parliament, the American Framers, and the U.S. Supreme Court was that this power of prerogative would be exercised only in deserving "special cases"[129] in which there was some demonstrated error or injustice in the administration of the law that could not be remedied otherwise;

(15) American history demonstrates that a "President is free to exercise the pardoning power for good reason, bad reason, or no reason at all."[130] However, the American public by and large opposes a pardon when it ostensibly appears to have a corrupt foundation, reflecting "cronyism and influence peddling" for personal and political gain;[131] and

(16) the president's pardon power and its limits apply equally in cases arising from courts-martial of UCMJ offenses.

Yet deference to text and unsophisticated reverence for precedent makes little sense when we give careful notice to the ways in which (a) the context of the crime itself, and (b) the pardon's interbranch and internal Executive Branch tensions may warrant a different consideration. Below, I provide a set of prudential considerations for categorically carving out battlefield pardons from the president's Article II power premised on both (a) and (b). These considerations are important for three reasons: they arise *only* in the context of battlefield misconduct and its potential pardon; they provide grounds for Congress asserting itself in this

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New York did. *See also* Samuel Williston, *Does A Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 (1915) ("when it is said that in the eye of the law they are as innocent as if they had never committed an offense, the natural rejoinder is, then the eyesight of the law is very bad").

[128] *See*, *e.g.*, Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1668 (2001) (observing the long history of President's attaching conditions to commutations and pardons, dating back to George Washington); *see* Patrick R. Cowlishaw, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149 (1975) (describing reasons based on the separation of powers doctrine and individual rights to believe there is "potential for abuse [which] lies rooted in the authority to attach such conditions," quoting Justice McLean's dissent in *Wells* [see *supra* note 81]).

[129] *Grossman*, 267 U.S. at 120-21.

[130] William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 530 (1977).

[131] *Public overwhelmingly opposes Trump pardoning his associates*, THE HILL.COM, (Dec. 21, 2018), https://thehill.com/hilltv/what-americas-thinking/422506-new-poll-public-overwhelmingly-opposes-trump-pardoning-close (reporting results of Hill-HarrisX Poll conducted Dec. 15-16, 2018); Krent, *Conditioning*, *supra* note 128, at 1666.

space by legislatively deterring conscientious presidents from an undesirable grant of unjustified mercy[132] (in fact, such a deterrent approach has been attempted once already, in direct response to Trump's *non*-military pardons[133]); and they provide grounds for a president to justify self-restraint when there is significant partisan political pressure to grant clemency or a president senses political advantage in doing so. It turns out that the self-defeating nature of war crime pardons – the paradox he faces – means that the president's "I'm responsible for the use of armed force as the commander-in-chief" part of his (hypothetical) defense may actually be its weakest point.

B. Weaknesses in this Defense: The Framers' Intentions and the British Experience

Two important considerations undercut this defense. First, "battlefield misconduct" or "war crimes" were about as far from the Framers' thoughts as whether the Equal Protection clause would be incorporated against the states or whether a law enforcement officer would need a warrant to search the contents of a cell phone. Neither the legal concepts nor the subjects of constitutional scrutiny were available to ponder at the time and the same was true of this kind of offense. Second, the learned English jurists whom many of the Framers studied actually identified myriad historical examples of limits imposed on the monarch's power to pardon and explained the reasons behind them. Both the examples and their reasons directly or implicitly influenced the founding generation's views about the purpose, scope, and dangers of the pardon power. Both ostensibly were important to the Supreme Court's later interpretation and application of the power. So, while both of the Court's precedent and the Framer's limited word choice in the text could arguably support the president's best argument, they are either inconclusive or actually more subtle.

1. Did the Framers Even Consider the Question?

Because the Court has looked to them for insight, it is worth considering the extent to which the Framers even understood or conceived of what we would now call "war crimes," and the extremely limited way in which behavior on the battlefield was managed from within the profession through certain humanitarian rules or principles at the time.[134] There are at least three

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[132] *How* Congress could do this is addressed in Part V, *infra*, but suffice it to say that doing so would be consistent with historical English practice before the American Revolution, and not obviously inconsistent with Supreme Court precedent explaining the wide parameters of the pardon power. WILLIAM HAWKINS, 4 A TREATISE OF THE PLEAS OF THE CROWN 335 (1762). Statutorily requiring a president to detail the nature and circumstances of the war crime or imposing a nondelegable duty on the Attorney General to rationalize the pardon after the fact is a theoretical way to nudge presidents away from exercising their authority. Such Congressional interventions would not be unusual in the context of military justice. *See*, *e.g.*, 10 U.S.C. § 833 (imposing requirement on the President to direct the Secretary of Defense to issue certain "non-binding guidance" to commanders and judge advocates regarding prosecutorial discretion); and National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 (2019), §540F (requiring the Secretary of Defense produce a "Report on Military Justice System Involving Alternative Authority for Determining Whether to Prefer or refer Changes [sic] for Felony Offenses Under the Uniform Code of Military Justice").

[133] *Supra* note 50.

[134] For a description of contemporary practice, *see* EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 83-88 (2016); M.C.M, *supra* note 4, pt. I (Preamble), at I-1, para. 2(b); Art. 2(a)(10), UCMJ; M.C.M., App. 2.1, at A2.1-2, para. 2.1.b.; *see generally* Michael W. Meier & James T. Hill, *Targeting, the Law of War, and the Uniform Code of Military Justice*, 51 VAND. J. TRANS. L. 787 (2018).

ways of interpreting the Framer's intentions in the absence of any mention of anything like battlefield misconduct in Article II's text. First, the Framers did not intend to exclude battlefield misconduct from the reach of a pardon – that it was not categorically distinct from any other "offense against the United States;" if they had, they would have included such language as they did with respect to impeachments and cabining the power to "offenses against the United States." Instead, the very narrow discussion on the record of the Constitutional Convention, or in the Federalist Papers, indicates a different set of concerns – principally the intersection of the pardon power and impeachment, and the offense of treason.[135]

At the beginning of the American Revolution, most of the original colonies had express pardon power clauses in their constitutions.[136] In New York, the governor could pardon any offense; his power was limited only in the cases of treason and murder. In such cases, the most he could do was grant a temporary reprieve and wait for the action of the Assembly to ratify the decision by affirming a pardon, or they could direct the execution of the sentence, or grant further reprieve.[137] In both Virginia and Delaware, the chief executive (variously termed the "governor," "president," or "chief magistrate") could pardon anyone for any crime, provided the advice and consent of the state legislature; the only exceptions were cases in which the legislature itself prosecuted an offense – there, the executive had no pardon authority whatsoever.[138] Similarly, when the legislature of North Carolina led a prosecution, its governor was barred from granting pardons but in all other cases he was free to exercise discretion without the advice and consent of any legislative body.[139] The power to pardon was shared in New Jersey between the governor and a legislative council, but it extended to any offense (including treason and murder); the only restraint was on timing – they could pardon only after the "condemnation" of the subject.[140] In Georgia, the governor was expressly barred from pardoning ("which he shall in no instance grant"), resting that power solely in the hands of the legislature.[141] In both Pennsylvania and Vermont,[142] using nearly identical language, the chief

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[135] Even the Supreme Court eventually admitted as such, despite its regular return to the debates as a source of interpretation. "The records of the Constitutional Convention . . . reveal little discussion or debate on § 2, cl. 1, of Article II." *Schick*, 419 U.S. at 263. *See also* HUMBERT, PARDONING POWER, *supra* note 55, at 21. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON, *available at* https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2#lf0544-02_head_232 (last viewed Apr. 1, 2021).

[136] According to Humbert in his now classic treatment of this power and its long history, the extent to the which the revolutionary colonies and later states limited their governors' ability to grant pardons and placed it in the control of or influence of the legislature was a function of their revolt from the trappings of monarchy that might otherwise remain in the hands of the chief executive after having devolved from the British King to the earlier Royal Governors. HUMBERT, PARDONING POWER, *supra* note 55, at 13-14.

[137] THE CONSTITUTION OF NEW YORK (1777), Art. XVIII, *available at* https://avalon.law.yale.edu/18th_century/ny01.asp.

[138] DRAFT VIRGINIA CONSTITUTION (1776), *available at* http://vagovernmentmatters.org/archive/files/vaconstitution1776_0366e939fc.pdf; THE CONSTITUTION OF DELAWARE (1776), Art. 7, *available at* https://avalon.law.yale.edu/18th_century/de02.asp.

[139] CONSTITUTION OF NORTH CAROLINA (1776), Art. XIX, *available at* https://avalon.law.yale.edu/18th_century/nc07.asp.

[140] CONSTITUTION OF NEW JERSEY (1776), Art. IX., *available at* https://avalon.law.yale.edu/18th_century/nj15.asp.

[141] CONSTITUTION OF GEORGIA (1777), Art. XIX, *available* at https://avalon.law.yale.edu/18th_century/ga02.asp.

[142] Vermont was not then an independent colony; it was still claimed in part by New York, New Hampshire, and Massachusetts. Contesting these claims, residents of Vermont assembled in a Constitutional Convention in 1777 anyway and acted as if it were a sovereign body independent of the claims of its surrounding neighbors. In 1781,

executive could grant a pardon in concert with the standing executive Council, but not for impeachments, murder, or treason.[143] Massachusetts permitted the governor to pardon with the advice and consent of the legislative Council, barred pardons in cases of impeachment, and imposed a timing rule – only after conviction could a pardon be granted at all.[144] The Revolutionary era constitutions of South Carolina, New Hampshire, an Rhode Island did not provide for pardoning one way or another.

The Articles of Confederation – with its extremely narrow form of federal government with limited national powers – of course did not provide for any pardon power either. When the delegates to the Constitutional Convention met in 1787 to rework the frame of government – this time with a powerful chief executive position – the issue of pardoning was once again a matter of debate. But it was not a particularly robust debate on pardons, full of thoughtful reflection and comparative analysis of the various state constitutions, nor were they infused with academic considerations of the historical use of pardons by the English crown. Though certainly at least a few of the delegates were well-versed in Montesquieu and Blackstone,[145] nobody mentioned their *explicit* cautions that monarchies – not republics – were best-suited for a pardon power in the hands of a single executive officer.

> Clemency is the distinctive attribute of monarchs. In the republic, where the principle is virtue, it is less necessary. In the despotic state, where fear rules, less use is made of it, because the grandees of the state must be contained by examples of severity. In monarchies, where one is governed by honor, which often demands what the law forbids, it is more necessary. There, disfavor is an equivalent of punishment . . . Monarchs have so much to gain from clemency, it is followed by so much love, and they derive so much glory from it, that it is almost always a welcome thing for them to have the opportunity to exercise it.[146]

Rather than pull out their copies of Montesquieu's *Spirit of Law* or Blackstone's *Commentaries on the Laws of England*, the first mention of the power seems to come when Alexander Hamilton of New York presented his "sketch" of a plan for the federal government on June 18, 1787, a little more than a month into the Convention.[147] Arguing for an elected chief executive who would then serve for life during "good behavior," this "Supreme Executive" would possess unilateral discretionary power to pardon any and all offenses except treason; in

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Massachusetts acceded to Vermont's independence; in 1782, New Hampshire followed; New York remitted its claims in 1790.

[143] CONSTITUTION OF PENNSYLVANIA (1776), Sect. 20, *available at* https://avalon.law.yale.edu/18th_century/pa08.asp.

[144] CONSTITUTION OF MASSACHUSETTS (1780), Art. VIII, *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm.

[145] Donald S. Lutz, *The Relative Influence of European Writers on Late-Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193-94 (1984) (finding that between 1760 and 1805, Montesquieu and Blackstone were the two most frequently cited, quoted, or paraphrased authors in political writings published by Americans in the Colonies and the early years of the United States).

[146] MONTESQUIEU, THE SPIRIT OF LAW (Book VI, 21) (1748); *see also* David W. Carrithers, *Montesquieu's Philosophy of Punishment*, 19 HIST. POL. THOUGHT 213, 239 (1998).

[147] Crouch, however, writes the August 6 "marked the first formal appearance of the pardoning power at the convention." CROUCH, *supra* note 45, at 15 (but cites as a source not the notes of the Convention, but rather John Feerick, *The Pardoning Power of Article II of the Constitution*, 47 N.Y. ST. BAR J. 9 (1974)).

that rare instance, he would need the "approbation of the Senate" first.[148] On August 25, Roger Sherman of Connecticut motioned to amend the pardon power clause to require consent of the Senate. This motion failed by a vote of eight delegations to one.[149] Two days later, Luther Martin of Maryland moved to insert the words "after conviction," thereby limiting only the timing (not the object or subject) of the president's pardon. Even this was quickly objected to: James Wilson of Pennsylvania argued that pardons before conviction might be useful carrots to motivate accomplices to testify in trial, and Martin withdrew his motion without further debate.[150] On September 10, Edmund Randolph of Virginia objected to a large swath of the draft Constitution's text, including the pardon power – he referred to as an "unqualified power of the President to pardon treasons."[151] Two days later, the Convention reviewed the full draft. The only exception or limit on the president's discretion to grant a pardon, by that point, was for impeachments. Otherwise, as long as the offense was "against the United States," the President was free to grant a pardon before or after conviction, without the need to first consult with some permanent or ad hoc Executive Council, or act only when concert with one, or seek the endorsement or consent of any part of Congress.[152]

The final word on the matter was on September 15, just days before the draft Constitution was sent to the states for ratification, and it focused narrowly on the subject of pardoning the high crime of treason. Madison's notes recount the short debate among several of the delegates after his fellow Virginian, Randolph, moved to add language that would except cases of treason from the president's authority because of the fear that the president himself might be a party to that treasonous act.[153] This motion was orally supported by George Mason, another Virginian, while Gouverneur Morris of Pennsylvania agreed with Randolph but suggested that this caveat should itself be caveated – give the power to pardon treason to the Congress alone.[154] Wilson argued that no exception was needed because any president guilty, directly or by association, with acts of treason could still be impeached.[155] Rufus King of Massachusetts argued that the Congress was "utterly unfit" for pardoning, because as a collective body it was likely to be "governed too much by the passions of the moment."[156] Any sharing of the pardon power between the executive and the legislature (like many of the states provided) posed a "great danger to liberty," Randolph said in response.[157] Madison, himself, stated that pardoning the crime of treason was "so peculiarly improper for the President that he should acquiesce in the transfer of [such a decision] to the Legislature; he would, therefore, prefer an "association of the Senate as a Council of advice" for the president with respect to this kind of offense.[158]

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[148] 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 292 (Max Farrand ed.) (1911), *available at* https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1057/0544-01_Bk.pdf.

[149] 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 419 (Max Farrand ed.) (1911), available at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1786/0544-02_Bk.pdf.

[150] *Id*. at 426.

[151] *Id*. at 564.

[152] *Id*. at 599.

[153] *Id*. at 626.

[154] *Id*.

[155] *Id*.

[156] *Id*.

[157] *Id*. at 627.

[158] *Id*.

Randolph's motion was not carried, losing by a vote of eight "no" and two "aye" votes.[159] The final draft of the power, filtered and revised by this fairly limited debate, left it "exclusive, broad, and virtually unrestricted by constitutional checks and balances."[160]

By the time he wrote essay number 74 of what came to be known as the Federalist Papers, in March of 1788, Hamilton was able to scope the problem of pardoning to the slender confines of subject matter – and that only for the crime of treason.[161] And in that case, he had evidently either changed his mind about the desirability of having the Senate "approbation" of a presidential offer of pardon for treason, or had acceded to making the case for the text as it then stood (with no mention of treason) in the proposed Article II.

For Hamilton, the virtues of vesting pardon authority for all crimes, at any time, by the sitting president – except in cases of impeachment – was worth explaining. "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should as little as possible fettered or embarrassed."[162] Noting the "necessary severity" of the criminal law, he wrote that there must be "easy access to exception in favour of unfortunate guilt." Hamilton favorably emphasized certain features: the ease of accessing clemency and the presumption that it would be sought – and granted – only in cases of "unfortunate" guilt.[163] The person most capable and likely to recognize cases of unfortunate guilt and act swiftly enough to remedy it with finality was a president. The "sense of responsibility is always strongest" when it is "undivided," he asserted, largely without example or logical argument.

But Hamilton did not suggest that this was the same as acting without constraint or in an unprincipled manner. What he implied was that pardoning should be a presidential power without *external legal* constraint. He believed that bestowing this authority solely on the President would force him to act with "scrupulousness and caution," lest he be accused of "weakness or connivance." This *internal* motive for self-restraint would render the President a "more eligible dispenser of the mercy of the government." All this he took as a matter of faith in an energetic, morally upright, dutiful, and politically conscientious chief executive. His primary concern was about burdening such a president with the need to consult with or gain consent from the legislature, and his lone target was treason.

Having explained his preference for keeping all pardon authority in a single branch, he turned his attention in the remainder of essay 74 to this question of treason, and why pardoning this *particular* offense ought not be burdened by the need to consult with or seek approval from a second branch of government. But he only wrote in the context of seditious uprisings (he referenced the counter-tax Shay's Rebellion in western Massachusetts as a recent example); his "principal argument" was that great utility was to be found in consigning sole power to pardon

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[159] *Id*. Virginia and Georgia voted to include the exception. The Connecticut delegation was split.

[160] Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 78 (2019).

[161] "The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason." Hamilton's first mention of the pardon power in the Federalist Papers came in number 69, where he stressed that the only exception to the pardon power was in cases of impeachment; however, he argued that this power was actually smaller in scope and more desirable than the pardon power then afforded to the Governor of New York, who could pardon even in cases of impeachment (just not in cases of treason and murder).

[162] *Supra* note 9.

[163] In other words, one purpose of the pardon was to "temper the law's harsh results as a matter of compassion." Love, *Twilight of the Pardon Power*, *supra* note 46, at 1172.

such treason in a single officer of the government under the circumstances of an insurrection. If a president timed it just right, and publicized it just right, a gracious pardon to the insurrectionists could ease tensions and draw active fighting to a close. Only a president, acting as commander-in-chief, could make such a tactical decision – based on the flow of events in a domestic armed conflict – quickly enough to be useful. But Hamilton said nothing more about pardons, offering no other contextual hypotheticals or historical allusions to explain or justify the limits and likely uses of a pardon power left solely in the hands of the president.

This *expressio unius est exclusio alterius* argument depends on the assumption that the Framers knew of such misconduct, weighed its relevance to the issue of a commander-in-chief's pardon power, and chose not to mention it.[164]

Alternatively, perhaps the Framers failed to mention such misconduct because they did not consider it one way or the other. This is somewhat more plausible. Though wars were fought according to generally-accepted and self-restraining norms of proportionality, chivalry, and honor (though not necessarily in those terms) for millennia, the concept of "war crime" – a serious violation of some body of law that triggers criminal liability – did not become part of national and international law's lexicon until the mid-1800s.[165] The Framers were certainly aware of and treated with respect the customs and formal bounds of international law.[166] But the first set of true rules of engagement or a nascent "law of armed conflict" regulating soldiers' behavior with respect to prisoners, other combatants, and civilians (and their property) did not appear until Lincoln's General Order number 100 in 1863, known as the "Lieber Code" after its primary author, Francis Lieber.[167] Up to that point, the only written "law" that regulated battlefield conduct and punished violations via a process of court-martial loosely resembling judicial adjudication could be found in the Articles of War. This precursor to the Uniform Code of Military Justice[168] was narrowly constructed and – in 1776 – copied by John Adams in the Continental Congress almost verbatim from the British Articles of War.[169]

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[164] At least with regard to the question of presidential self-pardons, the text's lack of an exclusion for such events is the "most potent argument in favor of the legality of such a power." Brian C. Kalt, *Note, Pardon Me?: The Constitutional Case Against Self-Pardons*, 106 YALE L.J. 779, 790 (1996) (Kalt ultimately suggests that the *expressio unius est exclusio alterius* argument is "simplistic and inaccurate").

[165] Oona Hathaway, Paul K Strauch, Beatrice A. Walton, Zoe A.Y. Weinberg, *What is a War Crime?*, 44 YALE J. INT'L L. 53, 56-57 (2019).

[166] 19 JOURNALS OF THE CONTINENTAL CONGRESS 315, 361 (1912); 20 *id.* at 762; 21 *id.* at 1136–37, 1158.

[167] *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 2012 (describing law professor Francis Lieber's work on the "breathtakingly ambitious" project, a first of its kind, that later influenced and inspired both the Hague Regulations at the turn of the Twentieth Century and the Geneva Conventions after World War II); *see id.* at 377 (Appendix, reprinting U.S. War Department, Adjutant General's Office, General Orders, No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863)).

[168] For excellent work reconstructing the long history of courts-martial and military discipline, both in Europe prior to the American Revolution and leading up to the enactment of the UCMJ in 1950, *see* CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016); JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (1886) (Second Edition, 1920); Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981); *and* David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

[169] *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS 112-23 (1790); American Articles of War of 1776. Reprinted in WINTHROP, *supra* note 168, at 961; *compare* British Articles of War of 1765. Reprinted in WINTHROP, *supra* note 168, at 931.

These early American Articles – operative at the time of the Constitution's drafting – did not explicitly prohibit what today we would categorize as a "war crime:" some serious violation of an established prohibition, causing obvious harm, by a member of an Armed Force against a civilian or non-combatant who ought to have been shielded from such violence by both customary norms of chivalry, honor, and humanity developed and practiced by "civilized" nations and express positive laws. Instead, the Articles of War focused on traditional martial offenses that troops were most likely going to commit – those that would undermine the effective, efficient command and control over large numbers of armed men facing perilous, uncertain conditions for indefinite periods of time. This meant deterring through threat of swift punishment the crimes of mutiny, disobeying lawful commands, assaulting superior officers, quarreling and dueling, neglecting the care of military property like arms and ammunition, absence without leave ("AWOL"), failing to be at a required place at a required time, drunk on duty, sleeping on guard duty, and harboring the enemy.[170]

From the lack of discussion on the record, and the lack of relevant codified law or normative practice on the subject, it might be tempting to conclude that the Framers had not even conceived of the type of conduct that Behenna, Lorance, and Golsteyn committed, or – if they had – that it would have been considered "criminal." But this would ignore the brutal reality of *any* armed conflict, a reality that many of the Framers knew first-hand or was at least part of the collective historical knowledge. Acts of savagery, by both the British and Colonists, against civilians and prisoners of war were well-documented controversies and publicly debated during the Revolutionary War, for unmitigated and unjustified violence was contrary to the informal codes of honor and "civilized warfare" the military leaders of both belligerents believed they subscribed to.[171] So perhaps the most we can say reasonably about this way of interpreting the lack of discussion on the record or in the prohibitive Articles of War is that the Framers simply did not think about whether this sort of conduct should or should not be excluded from the pardon power, as state offenses and civil wrongs were excluded.

Third, perhaps the Framers felt that such misconduct was so outside the bounds of reasonably pardonable conduct that no reasonable president would consider granting one. The limited debates at the Convention, and the focus of Hamilton's pen – one of the more strident supporters of wide executive discretion – suggest that the pardon power was never intended to permit a president's discretion over *this* kind of misconduct; that if inclusion of such misconduct (as an express exception, like cases of impeachment) had been on the table and openly debated, it would have been roundly approved.

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[170] The closest this body of quasi-operational, quasi-criminal law comes to such a suggestion of wrongfulness is in Article XII:

> Every officer, commanding in quarters or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command: If upon any complaint [being] made to him, of officers or soldiers beating, or otherwise ill-treating *any person*, or of committing *any kind of riot*, *to the disquieting of the inhabitants* of this Continent; he the said commander, who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as the offender's wages shall enable him or them, shall, upon due proof thereof, be punished as ordered by a general court-martial, in such manner as if he himself had committed the crimes or disorders complained of. (emphasis added)

[171] *See generally* HOLGER HOOCK, SCARS OF INDEPENDENCE: AMERICA'S VIOLENT BIRTH (2017).

Of course, any ambiguities remaining in the Constitution's text would be parsed and adjudicated in courts, further refining the boundaries, if any, on the President's power.[172] *How* the courts came to interpret this presidential prerogative, by turning to the words of the founding Framers (rarely) and supposed precedent from the British monarchy,[173] tellingly exposes a weakness in the conventional understanding of how broad and uncontrolled this power actually is. It is often overlooked that Hamilton's strongest defense of a unitary presidential discretion over pardons was focused on one specific kind of crime – treasons – and in light of just two public purposes: in the context of domestic insurrections or other grave public emergencies, and when the severity of the law warranted compassionate absolution.[174] Moreover, the authority of English kings and queens to pardon was simply not as uninhibited as U.S. Supreme Court cases, and some scholars,[175] have suggested.

2. Pardons According to the English Jurists

The founding fathers favored the lessons imparted by their education of European (especially British) legal and governmental history.[176] The inference (from lack of discussion on the record at the Conventions and from Hamilton's focus) that pardoning such battlefield crimes was far outside the bounds of a reasonable executive might therefore be strengthened if it is consistent with the understanding and explanation of the British monarch's historical pardon authority by that nation's crown jewels of jurisprudence: William Hawkins and William Blackstone. In fact, excluding such misconduct from the president's pardon power *is* consistent with their views. These commentators agreed that the English king's prerogative to grant pardons was – in a sense – absolute and age-old,[177] but it was absolute in the sense that Parliament could not *prevent* the crown from its exercise in specific cases; but it was *not* absolute in its scope, nor its purpose.

First and foremost, even Blackstone remarked that pardons were not sensible or appropriate extralegal tools outside of monarchies. Even within monarchies, they should only be granted to dim the relative severity of the British penal code. At the time he wrote, roughly 160 crimes were classified as "felonies" and all felonies were capital offenses. There was no appeal

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[172] HUMBERT, PARDONING POWER, *supra* note 55, at 33.

[173] *Id*. at 34.

[174] For example, *Id*. at 18-19 and Duker, *supra* note 130, at 501-06; *Schick*, 419 U.S. at 263 ("the draftsmen of Art. II, § 2, spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed'). Akhil Reed Amir seems to suggest Hamilton's justification in Federalist 74 for a unitary pardon power in the hands of the President illustrates a larger affirmation of "the sleeplessness and unity of executive power, the president's unique capacity for decisive action, and this officer's special role in handling crises that might threaten the national tranquility or even the national existence." AMAR, *supra* note 75, at 189.

[175] *Id*. at 187 ("the British monarch could pardon all criminals"). Professor Amar interprets the text somewhat more intuitively and draws from President's Jefferson's mass pardoning of those convicted under the 1798 Alien and Sedition Act. He analogizes the President's power to pardon to a trial jury's power to nullify – that is, to acquit in spite of guilt under the terms of the law – and offers it as an example of the Constitution implicitly granting the Chief Executive – not just Article III judges – power to object to a law as "unconstitutional." *Id*. at 61, 179, 239.

[176] *See*, *e.g*., Dennis R. Nolan, *Sir William Blackstone and the new American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976); Wilson, 32 U.S. at 160-61.

[177] For discussion of the pardon power extending back, in one form, to the Anglo-Saxon kings pre-dating William the Conqueror's invasion, *see* Duker, *supra* note 130, at 476-97; *and* HUMBERT, PARDONING POWER, *supra* note 55, at 9-13.

of right from a conviction, since there was no English appellate court until 1908; pardons were the lone method of official remedy for an "injustice."[178] "The great operation of his sceptre," Blackstone wrote in 1769, is not his power to command the army and navy, or to engage with foreign leaders, but rather was his "mercy."[179] Having the power to grant a pardon was like "holding a court of equity in his own breast to soften the rigour of the general law." Hamilton alluded to this sort of buffer against the inflexible "rigour" imposed by legislatures in Federalist 74, but whether it was intentional is not clear. He certainly did not contend with Blackstone's conclusion that such power:

> in democracies . . . can never subsist; for there is nothing higher acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and pardoning to center in one and the same person . . . it would tend to confound all ideas of right among the mass of the people.[180]

According to Blackstone (like Montesquieu[181]), the pardon power is a natural attendant to monarchies, and only monarchies, because the king:

> regulates the whole government as the first mover . . . whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him therefore the people look up as a fountain of nothing by bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.

Whether or not the Framers anticipated the President to be the "first mover," they certainly did not presume he or she would be a sole source of "bounty and grace," nor did they likely believe the person serving as president would seek or need "filial affection" and "personal loyalty" taking root in the hearts of all Americans.[182] If the Framers thought so, they certainly did not say so.

Moreover, it is not accurate to say that the only restraint on a monarchs' pardon power was in cases of impeachment. Aside from his belief that pardons were nonsensical for the chief executive in a democracy, Blackstone was clear that English statutory and common law placed substantial constraints on the monarch's discretion. Once a king considered a pardon, he was not even as free as the American president would eventually be to decide when, on whom, and why to grant a pardon. Reading Blackstone, there were at least *eight* circumstances in which a king was limited in his pardoning, either by common law precedent, prior conduct by the monarchy, or a statutory condition.[183]

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[178] Duker, *supra* note 130, at 503 (n. 151).

[179] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *389 (1769).

[180] *Id*. at *390; this was the same kind of distinction made by Justice McLean in *Wells* dissenting opinion (*supra* note 81 and accompanying text).

[181] *See supra* note 146 and accompanying text.

[182] BLACKSTONE, *supra* note 179, at *391.

[183] *Id*. at *391-95.

Only one of these, and the reason behind it, is particularly germane to the ultimate question presented in this article – whether a president can and ought to be prevented from pardoning acts that are, have been, or could be prosecuted as "war crimes." The king was free to pardon the most severe and harmful of offenses known to the law: treason, murder, and rape. But *only if* the pardon charter itself accurately described the offense (it must be "particularly specified").[184] Blackstone writes that this requirement for specificity was included because Parliament believed no reasonable monarch would pardon such an offense if he or she knew the particulars. "They did not conceive it possible" that a king's mercy would be bestowed on, and the scales of justice rebalanced for, a person guilty of the most morally wicked and unforgivable of crimes.[185] Those offenders who might deserve such mercy and escape from the gallows are those already guaranteed pardons "as of right:" the excusable homicides. So, while not an explicit restraint, the statutorily-imposed administrative *requirement* to specify the ugly facts constituting the worst crimes acted – or was intended to act – as a signal that such offenses should not be pardoned by a beneficent monarch.[186] The requirement itself underscored the English belief that no English king would be so craven, callous, or capricious to consider this a desirable opportunity for displaying his reasonable equity. They presumed no chief executive would ponder how a pardon of a traitor, murderer, or rapist might yet "endear the sovereign to his subjects."

The requirement of specificity for pardoning such crimes was a logical extension from the general rule that a king's pardon must be – to use today's language – knowing and voluntary. William Hawkins, a contemporary of Blackstone, wrote that if a king was not fully appraised of the heinousness of the crime and "how far the party stands convicted upon record," the pardon is void, regardless of the reasons felt or stated by the king. Such an unknowing act of grace was described "as being gained by imposition upon the king."[187] This is:

> very agreeable to the reason of the law, which seems to have intrusted [sic] the king with this high prerogative, upon a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may have presumed willing to have excepted out of its general rules.[188]

Hawkins described another possible restraint on a king's pardoning prerogative:

> It seems agreed that the king can by no previous licence [sic], pardon, or dispensation whatsoever, make an offense dispunishable [sic] which is malum in se, as being against the law of nature, or so far against the public good as to be indictable at common law. For a grant of this kind tending to encourage the doing

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[184] *Id*. at *393.

[185] *Id*.

[186] One scholar concludes this common law "specificity" requirement ought to be imputed to the modern interpretation of the Pardon clause, acting as a constraint, for "specificity" was historically intended to deter gullible monarchs from being hoodwinked into granting clemency or monarchs from abusing their authority to benefit disreputable applicants, shielding their mercy from public scrutiny and awareness in the most heinous of crimes. Aaron Rappaport, *An Unappreciated Constraint on the President's Pardon Power*, 52 CONN. L. REV. 271, 291 (2020).

[187] HAWKINS, *supra* note 132, at *335.

[188] *Id*. at *336.

> of evil, which is the chief end of the government to prevent, is plainly against reason and the common good, and therefore void.[189]

This would prevent a king from decreeing some mal in se offense, or class of such offenses, automatically free from legal condemnation in advance of a person committing it, preemptively decriminalizing it. Hawkins believed this preemptive ban on preemptive regal pardons was a wise one. He cited to the case of the Bishop of Salisbury, who received pre-offense absolution from the king if any convict were to escape the prison the Bishop oversaw. In other words, the king preemptively pardoned the negligent management of a prison. To Hawkins, such pardons were bad policy for they would "tend[] to make any gaolor less diligent in his duty" of guarding the prisoners.[190] Therefore, this limit on the monarch's power would – at least in similar situations demanding some degree of attentive, competent diligence of someone on whom a duty of care is imposed – encourage attentive, competent diligence. If the chief concern is assuring that a king's agent is not neglectful, reckless, or careless in the performance of duties, there is a strong analogy to be made to warfighting: a pardon of a soldier by the commander-in-chief for conduct related to the performance of military duties would similarly "tend to make" a soldier "less diligent in his duty," whether the pardon is granted before-the-fact *or* after-the-fact. Though they were not preemptive like that described by Hawkins, a similar objection was at the heart of some of the criticism leveled at President Trump's pardons of Lorance, Behenna, and Golsteyn.[191] In other words, the post-crime legal absolution for battlefield misconduct that many more similarly situated soldiers might be tempted to engage in has the opposite effect of the deterrent-minded criminal law.

The president's best argument relies, at least in part, on the assumptions about the wide scope of the pardon power attributed to the Framers, who in turn learned their lessons from the English experience and who subsequently influenced a Supreme Court jurisprudence protective of that interpretation of this power. But that argument is weakened when we see that the Framers said very little about the power itself and said nothing at all about this kind of offense, and that the likes of Blackstone very clearly relegated the utility of pardons to royalty; even then, they articulated a host of explicit and indirect means Parliament relied on to constrain that unilateral authority. The logic of those means suggests that such crimes would – if considered – be in the same malum in se class as treason, murder, and rape: that no chief magistrate would willingly describe the heinous character and facts of the offense in order to dare pardon it.

C. The President's "Standing" Relationship to the Battlefield Misconduct

How can the combination of the near unilateral commander-in-chief power and the nearly unfettered discretion to grant pardons at will actually produce a self-defeating paradox for a president? This is like saying two positives (from the president's perspective) equal a negative. However, what may seem heretical on its face is actually a subtle but nonetheless inevitable point about political risk. This argument does not hinge on contingent context: it considers such a pardon in light of the president's constitutional role as the military's commander-in-chief and is based on three essential facts. One relates to the operational chain-of-command, one is the

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[189] *Id*. at *345-46.

[190] *Id*. at *346.

[191] *See supra*, Part II.B.

nature of the civil-military relationship, and the other relates to the accountability for unlawful violence committed during operations. All three relate to the president's position and purpose, or "standing," in the military hierarchy.

First, the soldier who committed the battlefield misconduct (whether charged as a war crime or not) *could not have committed the wrongful act but for having been on the proverbial battlefield by order of the commander-in-chief*. If law holds individual agency to be a key factor in determining a person's criminal culpability, behavior in combat reflects a kind of clemency-specific shared agency. This shared agency does not diminish the soldier's culpability under the law, and it does not expose the president to criminal liability. Rather, it justifies accounting for – even emphasizing – *the political leader's relationship to the crime and the offender* for the sole purpose of *diminishing that leader's unilateral discretion* to forgive and remove the stain of that culpability.

As the military's commander-in-chief, the president has a significant moral, legal, and practical standing in relation to both the military offender and the war crime offense itself. Even though no soldier swears an oath of loyalty to the office of the presidency or any particular president, the president is the ultimate superior in the operational chain-of-command. The service member investigated for, charged with, or convicted of a battlefield misconduct could not have acted when and where he did *but for* having – as a preliminary condition – the president's express order or tacit acceptance of the military operation within which the service member dutifully executed a mission. This "standing" relationship exists in no other criminal context ripe for potential pardoning.[192] While the president is not clearly *legally* complicit in the wrongful act, his constitutional duties imply a moral onus for the enabling circumstances of the wrongful act. In that sense, pardoning a war criminal of one's own military appears to be a conflict of interest, broadly understood. President George H.W. Bush was condemned roundly for pardoning his former White House colleagues for their role in the Iran-contra affair, actions that likely happened with Bush's situational awareness while serving as vice president, and which he defended as being motivated by the recipients' "patriotism."[193] This alone makes pardoning one's military subordinates a weakly-defensible choice, similar – in some respects – to the still-unresolved question of presidential self-pardons.[194]

Because we are concerned with whether a president should pardon the battlefield misconduct of others, not with whether the president is guilty of it himself, it is not necessary to subscribe to any fiction that a particular president personally issued the deployment order to the

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[192] Except for crimes in which the president is a principal or accomplice, in which case the unresolved problem of self-pardons is raised.

[193] Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS & WORLD REPORT, June 8, 2018, https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history; President George Bush, Proclamation 6518—Grant of Executive Clemency (Dec. 24, 1992), AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/proclamation-6518-grant-executive-clemency (last accessed Oct. 5, 2020); *and* Johnston, *supra* note 68.

[194] When considering a president's "standing" relative to the recipients of executive clemency, there are notable historical episodes in which a pardon had a particular "partisan cast" of self-interest, as if pardoning others would act as a shield blocking investigation or prosecutorial interest in their own possibly illegal or impeachable conduct. *See*, *e.g.*, Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 403-04 (1993). For a recent analysis (relying mostly on original intent of the Framers as expressed through the *Federalist Papers*) of the self-pardon controversy, triggered by Donald Trump's public speculation about its legality, *see* James M. DeLise, *The Text Where it Happened: Alexander Hamilton, The Federalist Papers, and Presidential Self-Pardons*, 14 N.Y.U. J.L. & LIBERTY 331 (2020).

individual soldier in question (let alone an order to engage in the specific set of actions leading up to the crime). The kind of misconduct at issue – the very kind committed by Behenna, Lorance, and Golsteyn – occurred because certain necessary (but not sufficient) conditions were present. The soldier in question was deployed, armed with certain weapons and lawful authority to use them, undertaking (presumptively) an otherwise lawful mission, part of some larger sustained operation aimed ultimately at some legitimate strategic end, under the command and control of superiors in the military chain-of-command, who themselves were part of increasingly larger organizations ultimately reporting and responsive to the National Command Authority – the President and the Secretary of Defense.

The president as commander-in-chief is a necessary (but not sufficient) setter of those conditions. The soldier could not have deployed from his home station to armed conflict without his unit (part of a Matryoshka doll-like hierarchy of increasingly larger units) receiving an order to do so, and that order ultimately must have been expressly or tacitly approved by the commander-in-chief. The protracted link between the ultimate civilian principal in the chain-of-command and the illicit acts of the military agent are enough to suggest that a pardon from that principal would be appear improper, at best. If we recall the warnings of the Framers who debated the pardon power, one significant concern was whether a president should be able to pardon the crime of treason. Those against this discretion argued that it would allow the president – who may have had a role or culpable knowledge of the treasonous acts – to shield his accomplices or himself from criminal accountability. On the other hand, those who argued against including a treason exception (in addition to the impeachment exception) felt that no president would ever engage in "so peculiarly improper" a decision. Even if he did so, they felt, impeachment was a viable threat and consequence and placed helpfully outside the bounds of the pardon power already.[195] This reveals that the Framers were concerned with at least one manifestation of the president's standing in relation to those he may pardon.

The second fact essential to this standing relationship involves a pair of important considerations. One is the nature of the civil-military relationship between the civilian commander-in-chief as "principal" and the professional military as "agent."[196] This includes the military justice system's reliance on subordinate commanders[197] and their uniformed judge advocate military lawyers[198] to manage an "integrated court-martial system" endorsed as

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[195] NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 626-27, *available at* https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2#lf0544-02_head_232 (last viewed Apr. 1, 2021).

[196] For important and original theoretical work on this framework, *see* PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS (2003) (intending to ground a new, but much needed, update to SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS (1957)).

[197] 10 U.S.C. §§ 815, 818 – 820, 822 – 824, 853a, and 860a (various command authorities to manage aspects of military justice) and 10 U.S.C. § 7233 ("Requirement of exemplary conduct": "All commanding officers and others in authority in the Army are required— . . . to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge").

[198] 10 U.S.C. §§ 827, 834, and 838 (describing various functions of certain judge advocate officers).

fundamentally just by the U.S. Supreme Court.[199] The other consideration is the entrenched collection of martial values and professional norms that are intended to be controlling influences and expectation-setters for service member conduct.[200]

In this light, war crime pardons risk alienating those in uniform or who have been in uniform who believe such conduct was immoral, illegal, or unprofessional and therefore beneath them, damaging the institution and its professional reputation. As retired General Martin Dempsey (former Chairman of the Joint Chiefs of Staff, the president's principal military advisor and highest military ranking officer) wrote (tweeted):

> Absent evidence of innocence or injustice the wholesale pardon of US servicemembers accused of war crimes signals our troops and allies that we don't take the Law of Armed Conflict seriously. Bad message. Bad precedent. Abdication of moral responsibility. Risk to us. #Leadership[201]

War crime clemency through battlefield pardons further risks undermining the confidence the military agent has in the civilian principal's knowledge, intentions, and good faith, as former Secretary of the Navy, Richard Spencer, learned the hard way when trying to influence Trump's clemency decision for former Navy SEAL Gallagher.[202] Military leaders do not generally subscribe to the belief – espoused by President Trump – that service members are "trained to be killing machines."[203] What he believed to be flattering actually evokes images of musclebound, programed automatons with no individual agency or moral compass, directly antithetical to the training on the law of war that the Defense Department mandates.

> It is DoD policy that . . . Members of the DoD Components comply with the law of war during all armed conflicts, however characterized. In all other military operations, members of the DoD Components will continue to act consistent with the law of war's fundamental principles and rules, which include those in Common Article 3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor [and] . . . The law of war obligations of the United States are observed and enforced by the DoD

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[199] *See generally* Parker v. Levy, 417 U.S. 733 (1974); for the most recent take, *see* Ortiz v. United States, 138 S. Ct. 2165, 2171 (2018).

[200] *See generally* U.S. DEP'T OF ARMY, ARMY DOCTRINE PUBLICATION 6-22 (Army Leadership and the Profession) (2019) (discussing the Army "ethic" and "Army Values"); Westmoreland, *Military Justice—A Commander's Viewpoint*, *supra* note 3, at 5 ("Discipline conditions the soldier to perform his military duty in a way that is highly inconsistent with his basic instinct for self-preservation"); Richard H. Kohn, *First Priorities in Military Professionalism*, ORBIS 380-89 (2013) (identifying four norms and values that all officers should follow); Eugene A. Ellis, *Discipline: Its Importance to an Armed Force and the Best Means of Promoting or Maintaining it in the United States Army*, 16 J. MIL. SERV. INST. 211-50 (1895).

[201] *See*, *e.g.*, *GEN(R) Martin R. Dempsey*, TWITTER, May 21, 2019, https://twitter.com/Martin_Dempsey/status/1130809276191035392?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1130809276191035392&ref_url=https%3A%2F%2Fwww.lawfareblog.com%2Fwhen-presidents-intervene-behalf-war-criminals.

[202] Spencer, *supra* note 27.

[203] Phil McCausland, *Trump announces "review" of Green Beret murder case: 'We train our boys to be killing machines,'*" NBC NEWS, Oct. 12, 2019, https://www.nbcnews.com/politics/donald-trump/trump-announces-review-green-beret-murder-case-we-train-our-n1065421.

> Components and contractors or subcontractors assigned to or accompanying U.S. Armed Forces").[204]

Moreover, as the Supreme Court has recognized since 1862,

> The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.[205]

A reasonable military commander would expect the commander-in-chief to (at least publicly) support that doctrine. The bold denial of it, instead, exposes that principal's failure to understand or at least follow the rule of law that binds his own agents. As Michael Walzer wrote:

> Soldiers can never be transformed into mere instruments of war. The trigger is always part of the gun, not part of the man. If they are not machines that can just be turned off, they are also not machines that can just be turned on. Trained to obey "without hesitation," they remain nevertheless capable of hesitating.[206]

Such pardons also risk signaling to those still in uniform and in harm's way a subtle advance consent or culture of permissiveness to engage in similar acts. When trained and followed, rules of engagement and law of war principles of distinction, humanity, military necessity, proportionality, and precaution further the positive goals of self-regulation within the profession of arms.[207] Such pardons also risk signaling a contemptuous civilian disregard for the very military due process for which the commander-in-chief is responsible.[208]

As illustrated by Trump's clemency decision-making, ignoring or misreading these risks may trigger strong disagreement, or even outright dissent, between the military agent and the civilian political principal.[209] Most pundits and scholars generally agree that the lesson of civilian control over the military is the civilian political leader's "right to be wrong."[210]

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[204] United States Department of Defense, *DoD Directive 2311.01* ("DoD Law of War Program") (2020), at 3.

[205] The Prize Cases, 67 U.S. (2 Black) 635, 667 (1862).

[206] MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 311 (2d ed. 1992).

[207] Adil Ahmad Haque, *McMaster on the Ethics of War*, JUST SEC'Y, Feb. 21, 2017, https://www.justsecurity.org/37977/mcmaster-ethics-war/; Kohn, *First Priorities, supra* note 200.

[208] Leo Shane III, *Clemency for war criminals an 'insult' to the military, lawmaker argues*, MIL. TIMES (Nov. 22, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/11/22/clemency-for-war-criminals-an-insult-to-the-military-lawmaker-argues/.

[209] Meghann Myers, *Esper: 'Robust' conversation with Trump about proposed pardons for SEAL, two soldiers*, MIL. TIMES (Nov. 6, 2019), https://www.militarytimes.com/news/your-military/2019/11/06/esper-will-ask-trump-to-reconsider-pardons-for-service-members-charged-with-convicted-of-war-crimes-report-says/.

[210] Peter Feaver, *The right to be wrong, but not the right to lie*, FOREIGN POL'Y, June 29, 2011, https://foreignpolicy.com/2011/06/29/the-right-to-be-wrong-but-not-the-right-to-lie/; Ed Kilgore, *Military Brass Warn Trump Against Memorial Day Pardons for War Criminals*, N.Y. MAG. (May 22, 2019), http://nymag.com/intelligencer/2019/05/military-brass-warn-trump-against-pardons-for-war-criminals.html; Ellen Ioanes, *Military leaders are worried that Trump pardoning troops accused of war crimes will impair the justice*

However, inciting and fueling a disagreement between principal and agent that reflects a core difference over what is morally and legally acceptable within the bounds of armed conflict, risks considerable penalties and costs. A combination of risks like these ought to be, for reasonable presidents, too strong to ignore.[211]

The third pillar of this "standing" argument for carving out battlefield misconduct considers the president's responsibility for the very military justice system that either could have, or did, hold the soldier criminally liable for those offenses. It is true that nothing in Article II mentions "military justice."[212] However, Article I's section 8 "make rules" clause is the constitutional foundation for the UCMJ, the federal criminal law that proscribes and authorizes the punishment for certain conduct of service members. This law also *prescribes* certain delegations of authority – Congress itself does not manage the administration of this law, just as it does not manage the administration of any other federal criminal code. Instead of the Department of Justice, the Department of Defense manages the investigation, prosecution, defense, punishment, and appellate processes, ultimately under the supervision of the Secretary of Defense and President (but subject to review by the Article I-created Court of Appeals for the Armed Forces and U.S. Supreme Court).[213] The Rules for Courts-Martial, the Military Rules of Evidence, the maximum punishments, the Preamble that describes the three purposes of military law – even the specific delineation of the *elements of each offense* that must be proven beyond a reasonable doubt and the official explanation of the terms – are established through Executive Orders and are controlling unless contrary to statute or the Constitution.[214]

In fact, Congress went even further by assigning to the president certain other discrete criminal justice authorities. The president may act as a General Court-Martial Convening Authority (GCMCA), able to refer a particular criminal accusation to an ad hoc court-martial prosecution in the same way a district attorney or grand jury would take case from investigation to trial. Moreover, as a GCMC, a president may enter and approve plea agreements like a prosecutor could, dismiss or withdraw charges as a prosecutor or judge could, and approve or amend certain punishments. These authorities are what other senior commanding officers in the military chain-of command may do within their respective "jurisdiction" of the chain-of-command.[215] A president might sensibly respond with "well, forget the pardon; I will just take authority of this particular case as the GCMCA, then exercise my UCMJ-granted clemency authority to get what I and the recipient want anyway."

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system and undermine overseas bases, BUSINESS INSIDER, Nov. 15, 2019, https://www.businessinsider.com/military-leaders-worry-that-trump-pardons-will-impair-justice-system-2019-11.

[211] David Lapan, *President Trump is Damaging Our Military: War Crimes Cases are the Latest Example*, JUST SEC'Y, Nov 18, 2019, https://www.justsecurity.org/67310/president-trump-is-damaging-our-military-war-crimes-cases-are-the-latest-example/.

[212] Some scholars consider this part of a president's inherent authority as commander-in-chief. *See*, *e.g.*, William F. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 862-63 (1959).

[213] 10 U.S.C. §§ 833, 836, and *see generally* M.C.M., *supra* note 4.

[214] *See* M.C.M., *supra* note 4, at I-1 (*Preamble*, para. 3) and President Donald J. Trump, Executive Order 13825, 83 Fed. Reg. 9889 (Mar. 8, 2016). For the list of all relevant Executive Orders implementing or amending the Military Rules of Evidence, Rules for Courts-Martial, descriptions of the punitive articles, and non-judicial punishment procedures, dating back to 1984, *see* M.C.M., app. 19, at A19-1.

[215] *See* 10 U.S.C. §§ 822, 853a, 860a, and M.C.M., *supra* note 4, Rules for Court-Martial (hereinafter R.C.M.) 401, 601, and 604.

There are two problems with this possible president-as-GCMCA-end-around. First, as GCMCA, the president could "withdraw" charges, but that only works until the factual findings are announced in court, not after the court-martial conviction, and is usually under circumstances in which the charges will be referred to *another* court-martial or some other prosecutorial option is contemplated.[216] This would have meant Trump could not have acted as GCMCA to grant clemency in cases like those of Lorance and Behenna, who were already court-martialed, convicted, and sentenced before his interest was piqued. Or, for a case like that of Golsteyn or Gallagher, he could cause the charges pending against the subject to be "dismissed,"[217] but this would *not* protect the accused from subsequent prosecution by a new commander-in-chief acting as the GCMCA unless double jeopardy attached. Under the UCMJ, this means that the president would have a relatively narrow window of time in which to effectuate a dismissal that would act partly as a pardon.[218]

Second, purposefully acting as GCMCA ought to box in the president's options, actually confining the disposition decision to the same rules and standards imposed on military commanders acting as GCMCAs. Withdrawing or dismissing charges, as an alternative to granting a pardon, risks violating his own Executive Orders. As mentioned earlier, Congress mandated that the president publish guidance on how, when, and why to prosecute cases under the UCMJ to his commanders and subordinate military lawyers.[219] This guidance is directed at "convening authorities, commanders, staff judge advocates, and judge advocates" in order to "promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to . . . facilitate[] the fair and effective response to local conditions in the interest of just and good order and discipline."[220] The disposition guidance factors purposefully mirror in most respects the guidance to prosecutors published by the Department of Justice *Principles of Federal Prosecution*, the National District Attorneys Association *National Prosecution Standards*, and the American Bar Association's *Criminal Justice Standards*.[221] Of particular note, this guidance – again issued under the authority of the president – prohibits the consideration of political matters: "political pressure to take or not to take specific actions in the case."[222] All this suggests that acting as GCMCA would not have achieved for the president what a pardon could achieve far more directly.

Though not expressly intended to moderate the president's pardon power, it beggars belief to suggest that the pardoning act ought not be considered what it really is: an intrinsically prosecutorial decision (even if made after the prosecution and sentence). Though acting ostensibly to fix a flaw in the law or the legal process related to a specific case – to remedy an "injustice" – the rules and guidance related to ensuring *justice* seem at least relevant to this decision.

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[216] R.C.M. 604, at II-65.

[217] R.C.M. 401, at II-35.

[218] After the introduction of the evidence at trial (if tried by judge alone) or after the jury-like members are impaneled and sworn after voir dire challenges are complete. *See* 10 U.S.C. § 844(c) (UCMJ Article 44(c)); United States v. Easton, 71 M.J. 168 (C.A.A.F. 2012).

[219] 10 U.S.C. § 833.

[220] M.C.M., *supra* note 4, app. 2.1, at A2.1-1 (para. 1.1.).

[221] *Id*. at A2.1-4 ("Analysis").

[222] *Id*. at A2.1-3 (para. 2.7.e.).

When viewed as a whole, these disposition factors strongly suggest that the following are *ir*relevant to a clemency decision: the character of the service member's combat experience; previous professional awards or recognition for performance of duties; results of the combat incident that served as context for the offense; the character or actions of the victim of the war crime; and the probability or promise of partisan political backing from the military at large or from specific individuals like the pardoned soldiers or their families and supporters. Yet, by foregoing the bureaucratic vetting of pardon applications by the Office of the Pardon Attorney, Trump indulged in a form of political theater criticized for highlighting his own beneficence rather than highlighting any systemic injustice in the prosecution or punishment.[223] In other words, Trump did what he told his commanders, in the interests of justice, not to do.

In sum, these pardons tolerate, or even signal approval of, behavior objectively contrary to the military professional ethic and contrary to the military mission ultimately approved by the president and for which he is politically accountable. The pardon itself intervenes in a legitimate military justice system he formally stewards, one presumptively aimed at "justice, good order and discipline, and efficiency and effectiveness," and it overrules that system's decisions made by his military subordinate commanders (under authority Congress granted them) for reasons the president himself says are to be ignored in making "just" disposition of criminal cases. Whether formally charged or casually labeled as "war crimes," a president's battlefield misconduct pardon is Pyrrhic.

V. CAN CONGRESS CATEGORICALLY BAR PRESIDENTS FROM BATTLEFIELD PARDONS?

The foregoing discussion ought to give presidents, courts, and Congress significant pause before concluding that battlefield pardons are essentially indistinguishable from "normal" civilian criminal pardons. The president's principal-agent *standing relationship* to both the crime and the offender described in Part IV.C. provides articulable reasons why. British Parliament's history of limiting the monarch's pardon power, Blackstone's multiple caveats, the Framers' focus on treason and impeachments rather than conduct in battle, the "principles" that seem to outline the Court's take on the pardon's purpose and limitations (in Parts IV.A.2. and IV.B.) all suggest that encoding this categorical distinction into law would be a wise, though historically unusual, constraint on Executive Power. But would it be *Constitutional*?

The easy button – so to speak – is to say: Yes…*provided a constitutional Amendment*. But short of that highly improbable solution, could Congress legislate a specific bar for battlefield misconduct? Here, the answer becomes less clear; the plausibility depends on how willing Congress is to erect such a containment around an otherwise powerful tool of executive sovereignty. But it also depends on how willing the Court would be to interpret such a constraint. Below, I discuss two possible solutions. The first solution is based on how the legislative constraint is analytically framed – not in terms of violating the extra-judicial authority of a president to intervene in the criminal justice system, but rather in terms of a Congress exercising its constitutional *war powers* to constrain the Commander-in-Chief in a very narrow way. The second is a more elegant legislative tactic, with Congress using its constitutional authority to define certain types of offenses to categorically remove battlefield misconduct from the embrace of the "offenses against the United States" qualifier of the pardon power. This tactic

[223] BERNADETTE MEYLER, THEATERS OF PARDONING 2 (2019) ("Trump has cannily recognized the theatrical power of pardoning. He has built pardons upon personal dramas and stories he has kept the public tenterhooks—will he or won't he? . . .").

is subject to criticism as being an overly broad, and therefore slippery, slope for Congress to tread (a criticism addressed in Part V.D., *infra*). But let us briefly turn to a short history of Congressional efforts to regulate pardons, the most significant of which ironically came in the context of wartime misconduct.

A. A Brief History of Congressional Efforts to Contain (the Effects of) Pardons

Congress has attempted to regulate aspects of the pardon power before and has not been successful. But it is important to distinguish what, specifically, the Court has found impermissible. In 1863, Congress gave the president "full discretionary power to pardon or remit, in whole or in part, either one of the two kinds [of punishment – fines and imprisonment], without in any manner impairing the legal validity of the other kind . . .."[224] In effect, this authorized presidents to issue general amnesties for specified classes of people, ostensibly supplementing his pardon power in Article II. Both Lincoln and Johnson used this authority several times,[225] but then again Presidents Washington (1795), Adams (1800), and Madison (1815) had all issued their own general amnesties without any enabling legislation.[226] Congress repealed this statute in 1867,[227] but Johnson continued issuing them anyway.[228]

Later, in Armstrong v. United States,[229] Court ruled that a woman's receipt of amnesty categorically excepted her from the provisions of the Abandoned and Captured Property Act,[230] under which she would not have been able to present an enforceable claim against the United States because she had "given aid and comfort" to the Confederacy. Here, the Court drew no distinction between amnesties and pardons, and reinforced that a president could grant either without any authorizing legislation. This case did not directly address whether Congress could impose restrictions, but the Court had already begun to expound on this concern in United States v. Padelford[231] two years earlier. Padelford had received a pardon conditioned on swearing a loyalty oath to the United States, renouncing his fidelity and relationship to the Confederacy, which he did. His cotton was later seized under the Confiscation Act. This Act allowed a person to claim proceeds from that property after the war ended, in a court of claims, provided that he proved that had never given aid or comfort to the Rebellion. Unfortunately for Padelford, he had done so but the Court of Claims held that his earlier pardon, with condition fulfilled, released him from the "disability" imposed by the Act, and therefore compensated him for the captured cotton.

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[224] Act of Feb. 20, 1863, ch. 46, 12 Stat. 656.

[225] President Abraham Lincoln, Proclamation, No. 11, 13 Stat. 737 (Dec. 8, 1863) (Lincoln prefaced this amnesty on his Article II power but said that the Congressional authorization "accords with well-established judicial exposition of the pardoning power"); President Andrew Johnson, Proclamation No. 37, 13 Stat. 758 (May 29, 1865) (Johnson did not cite any authority).

[226] David Todd Peterson, *Congressional Power Over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FORREST L. REV. 1225, 1242-43 (2003).

[227] Act of Jan. 21, 1867, ch. 8, 14 Stat. 377.

[228] Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867); Proclamation No. 6, 15 Stat. 702 (July 4, 1868); and Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

[229] 80 U.S. (Wall.) 154 (1871).

[230] The Abandoned and Captured Property Act, ch. 20, 12 Stat. 820 (1863).

[231] 76 U.S. (9 Wall.) 531 (1869).

The Supreme Court affirmed; as in *Armstrong*, the Court was concerned with the intersection of a Congressional Act's imposition of a legal disability with the effect of an earlier pardon, in both cases upholding the broad consequences of the president's broad power against countervailing legislative intent. Congress subsequently tried to indirectly regulate the kinds of the pardons that had benefited Padelford and Armstrong. Any pardon or amnesty, the new Act purported, could not later be used in a court of claims as evidence in support of a claim against the United States; it also purported to take away the Supreme Court's jurisdiction over any such court of claims case involving the invocation of the pardon.[232] In United States v. Klein,[233] the following year, the Court repudiated the Act's attempt to erect rules of evidence and a narrowing of judicial jurisdiction as a means to effectively negate one financial or property benefit implicitly bestowed by the pardon: ". . . to the Executive alone is intrusted [sic] the power of pardon; and it is granted without limit [and the power to] pardon includes amnesty."[234]

Thus, *Padelford*, *Armstrong*, and *Klein* may be read as affirming the power of the president to pardon (or grant amnesty) and conversely affirmed the implied limitations of Congress. But limitations are not exclusions: the trigger for the Court's concern was not the type of pardon, nor the type of crime it pardoned, nor the beneficiary of the pardon, but rather the *effect* of the pardon *after* it is granted.

B. When viewed as a Commander-in-Chief power (including over Military Justice), maybe?

If we are convinced that the president's *standing relationship* to the battlefield misconduct is reason enough to categorically distinguish it, if only for the purposes of counseling a president that it would be imprudent to grant a pardon for it, then the framework we have used is one that elevates substance over form. It emphasizes the president's role as commander-in-chief making decisions about what kind of conduct is permissible, forgivable, or encouraged in an armed conflict he is ultimately responsible for waging lawfully. Though a president has fairly wide discretion in waging that conflict under the Court's interpretation and historical precedent of Article II, Congress is not without its own Constitutional responsibility for war-making. The War Powers Resolution is perhaps the most controversial but clearest illustration of Congress taking that responsibility seriously. The Uniform Code of Military Justice is another, albeit less recognized, way that Congress's responsibilities for the armed forces overlaps with and – in some notable ways, dictates and controls – the president's tasks and relationships as commander-in-chief.

1. War Powers Resolution

The political science and legal literature on the legality and efficacy of the War Powers Resolution[235] is vast, and this article will not summarize those debates or engage in them, other

[232] Act of July 12, 1870, ch. 251, 16 Stat. 230 (1870).

[233] 80 U.S. (13 Wall.) 128 (1871).

[234] *Klein*, 80 U.S. at 145.

[235] Pub. L. 93-148, 87 Stat. 555 (1973), *codified at* 50 U.S.C. §§ 1541-1548.

than to highlight that the *fact* of this legislative act has implications for the manner by which Congress could view its own authority over *battlefield* misconduct and its potential pardoning.[236]

The War Powers Resolution was passed in late 1973, in response mostly to reports of President Nixon's secret bombing campaign in Cambodia during the Vietnam War.[237] It was promptly vetoed by Nixon, who thought the law an "usurpation of his basic power."[238] In his veto letter back to Congress, he argued that the Resolution was both "unconstitutional and dangerous to the best interests of our nation" because it imposed strict constraints on what the commander-in-chief could do with armed forces in time of hostilities or an imminent threat, context of national crisis that required the president to act "decisively and convincingly."[239] Congress by Joint Resolution passed the law over Nixon's veto. Presidents continue to argue it is unconstitutional, but nevertheless abide by its terms and even cite it, at times, *in support* of the president's broad power to use force.[240]

Without debating its merits or deficiencies,[241] it is important to note what those terms actually are – in other words, how did Congress go about constraining this presidential prerogative long held to be his alone, without any legislative interference?[242] Building from a

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[236] Briefly, if interested in the compelling debate from all perspectives on the constitutionality and practicality of the War Powers Resolution and whether it is Congress or the President that does, or should, dominate in this area, the following sources were useful background for this part of the article's argument: Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1 (1998); Stephan L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000); Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683 (1984); *and* Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001).

[237] DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS 388 (2016).

[238] *Id*. at 344.

[239] President Richard Nixon, Letter to House of Representatives regarding veto of the War Powers Resolution, Oct. 24, 1973*, available at* https://www.visitthecapitol.gov/exhibitions/artifact/president-richard-nixons-letter-house-representatives-regarding-his-veto-war.

[240] *See*, *e.g.*, John C. Yoo, Memorandum Opinion for the Deputy Counsel to the President: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting them, 25 Op. O.L.C. 188 (Sept. 25, 2001), *available at* https://fas.org/irp/agency/doj/olc092501.html. Peter Rodman argues that the War Powers Resolution is but one example of an increased state of legislative oversight and engagement with presidential activity that forms the "ironic legacy" of President Nixon, a president bent on consolidating executive authority and shielding it from Congressional checks. PETER W. RODMAN, PRESIDENTIAL COMMAND: POWER, LEADERSHIP, AND THE MAKING OF FOREIGN POLICY FROM RICHARD NIXON TO GEORGE W. BUSH 80 (2009).

[241] For an argument how the Act is self-defeating, *see* Fisher & Adler, *Time to Say Goodbye*, *supra* note 236, at 1, 3 (the Resolution was intended to be a "high-water mark of Congressional reassertion in national security affairs" but suffers from "tortured ambiguity and self-contradiction," ultimately resulting in an ironic twist: it "unconstitutionally delegates the power to make war to the president"); *but see* Testimony of Rebecca Ingber, Professor Of Law, Cardozo School of Law, Prepared Testimony to the Committee on Rules, United States House of Representatives, Hearing on Article I: Reforming the War Powers Resolution for the 21st Century, Mar. 23, 202 ("the War Powers Resolution did not expand the President's power to act unilaterally; it simply imposed a statutory limit on the President's exercise of that power").

[242] *But see* LOUIS FISHER, PRESIDENTIAL WAR POWER 1-16 (2015) (highlighting reasons to believe that Framers understood and intended that the dominant branch for war-making – or at least initiating – was Congress, and how the Twentieth Century in particular saw the inflation of the president's war power "beyond the intentions of the framers and beyond the control of Congress and the public"; *see also id*. at 294). The principal cases explaining the president's authority as commander-in-chief remain The Prize Cases, 67 U.S. (2 Black) 635 (1862) (holding that the president need not wait for a Congressional declaration of war or some other special legislative action before

premise that it was helping the president carry "into execution" his own Article II power, Congress opened its Resolution by citing to Article I, § 8's "necessary and proper clause," rather than its own authority under clause 11 ("to declare war"). In fact, that specific power is nowhere mentioned in the Resolution other than by implication.[243] This cabining of the president's ability to deploy armed forces into hostilities is very much a long and ongoing controversy,[244] and one that that Court has not sought to resolve yet. We might further describe the statute by noting where it establishes reporting and consultation requirements on the president both before and after introducing troops into harm's way. For example, it requires the president "in every possible instance" to

> consult Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement his hostilities is clearly indicated by the circumstances and after every such introduction shall consult regularly.[245]

Another such reporting onus falls on the president "within 48 hours" of introducing the military into hostilities, or into foreign territory "while equipped for combat."[246] Presidents must also "periodically" (at least every six months) update Congress on the status of the engagement, its scope and duration.[247]

But most significantly, beyond its reading of Article II commander-in-chief power and reporting or consultation requirements, Congress erected a very narrow and specified limit on the president's war-waging discretion. This limit has nothing to do with the *kind* of conflict into which the president introduces the armed forces, nor with the *location* of that deployment, nor with the national security *strategy*, military campaign strategy, or political *ends* that purportedly justify that deployment. Rather, the limit has only to do with *duration* of deployment when ordered by the president on his own authority. Because he has two full days before he "shall" report to Congress, the law gives the president authority to have troops engaged in hostilities or in a locale where hostilities are imminent for up to sixty-two days. The president can unilaterally extend that by an additional thirty days, provided he "certifies" to Congress in writing that

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committing armed forces to repeal invasions or defeat insurrections, and leaving it to the president alone to determine how much force must be used); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (in "external" or foreign affairs, the president is the sole organ or representative of the United States). The principal case explaining the president's power in areas like national security relative to Congress, and some limits to the reach of the commander-in-chief power itself, remains Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952), especially Justice Jackson's concurring opinion with its "oversimplified grouping of [three] practical situations" distinguished by the degree to which Congress has expressed or implied its will already in the area the president seeks to act in. *Id*. at 635-37 ("powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress," *id*. at 635), *accord* Zivotofsky v. Kerry, 576 U.S. ___, 135 S. Ct. 2076, 2083-84 (2015).

[243] 50 U.S.C. § 1541(c) (the limitations on the president's discretion in the statute are triggered only in cases in which Congress has not otherwise declared war or statutorily authorized use of force, or in cases of "national emergency created by attack upon the United States").

[244] BARRON, *supra* note 237, at 344-45 ("ever since World War II . . . modern presidents had defined their strength chiefly by waging war without the slightest concern for what Congress thought").

[245] 50 U.S.C. § 1542.

[246] *Id*. at § 1543(a).

[247] *Id*. at § 1543(c).

"unavoidable military necessity respecting the safety of the United States Armed Forces" requires the extra time to ensure the troops' "prompt removal" from harm's way.[248]

The other surviving controversy is the statute's direction that, when there is no Congressional permission via declaration of war or other authorization, the president must remove troops from combat if ordered by a concurrent resolution of Congress.[249] For the sake of this section's argument-by-analogy, I highlight that this act of independent legislative agency in national security attempts to remain respectful of the manner by which a president directs or permits troops to fight once engaged or could be engaged. Again, the *why*, *where*, against *whom*, and *how* decisions remain in the hands of the commander-in-chief, untouched by this Resolution. It would be a tenuous, if not specious, argument for a president to suggest that Congress – by prohibiting battlefield pardons – effectively takes away his ability *to manage the use of force*. Afterall, that use of force, at any and every scale (from individual soldier with a rifle, to missiles launched by ship, to drones) must be lawful. By definition, the use of force that is the subject of the potential pardon was unlawful, should never have occurred, and was specifically deterred by positive criminal law, international law, military training and doctrine, and theater- or mission-specific rules of engagement.

Therefore, if Congress can (and has) legislated a narrow form of control over the commander-in-chief's full discretion to employ armed force in combat, encroaching on what appears to be unilateral authority in Article II, then it might be said that Congress can legislate a narrow exception to the pardon power by categorically barring them for battlefield misconduct.

2. Youngstown Sheet & Tube *and Political Questions*

When analyzing the constitutionality of an assertion of Executive power relative to Congressional authority, the Court still "refers to Justice Jackson's familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer."[250] Let us, for the sake of the argument, imagine that Congress does statutorily bar the president from granting battlefield pardons and that afterward, just as President Johnson did with granting general amnesties after the Civil War, a president grants such a pardon anyway. Or, in manner less openly confrontational, imagine that Congress imposes an administrative requirement pre- or post-pardon, like public notice and comment, or consultation with Congress, which is then ignored by the President in granting such a pardon. Would that pardon be an unlawful exercise of executive authority or would the statute be an unconstitutional aggrandizement of legislative authority?

Under the *Youngstown* framework, the answer depends on what Congress has expressly or implicitly said on the matter. First, when a president acts pursuant to the express or implied authorization of Congress, his authority is at its maximum."[251] It is a knock-out combination of the President's Article II powers plus what Congress piles on top. On the other end of the

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[248] *Id*. at § 1544(b). Fisher suggests that this actually defeats the intent of the Congress: by specifically opening the door for up to three months of combat without any Congressional authority, Congress in effect "legalizes a scope for independent presidential power that would have astonished the framers . . . and does not in any manner ensure collective judgement" of both the president and Congress before committing troops to hostilities abroad. FISHER, *supra* note 242, at 144.

[249] *Id*. at § 1544(c).

[250] Zivotofsky v. Kerry, 572 U.S. 1, 10 (2015) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring).

[251] *Youngstown*, 343 U.S. at 635.

spectrum, when a President acts in way "incompatible with the expressed or implied will of Congress," the Executive's authority is at its nadir or "lowest ebb," entirely a function of what is in Article II but "minus any constitutional powers of Congress over the matter."[252] The Court has said such presidential measures in this category will be "scrutinized with caution."[253] However, when Congress neither grants nor denies some authority to the president, the two branches are in a political "zone of twilight" where the lines between the two are blurred and their authorities are perhaps concurrent. If one branch is unclear on its intentions, or takes no action, the door is open for the other to assume the initiative.[254]

When it is clear that the President and Congress are at loggerheads – that the President has taken some action contrary to the will of Congress as Truman did in ordering the seizure of the steel mills in *Youngstown* – the Court will inquire whether the President's authority to do so is both "exclusive" and "conclusive."[255] This is how the Court would manifest its cautious scrutiny in our hypothetical. In other words, the power must be both plenary and irreversible by the judiciary, making it – essentially – a nonjusticiable political question.[256] Exclusivity, for its part, is answered by looking at the "Constitution's text and structure, as well as precedent and history bearing on the question."[257] *This* part of test is not particularly helpful to advocates for restraining presidents from issuing battlefield pardons or imposing burdens to disincentivize them: the Constitution's text does give discretion to pardon (generally) to the President, and the Courts – as in *Klein* and *Scheck* – have unequivocally rejected the theory that Congress can actively restrain or abridge that power. Moreover, there are three occasions (Behenna, Lorance, and Golsteyn) in which the President has granted a battlefield pardon, with no adverse court ruling or formal Congressional response. Historical practice, while recent and few in number, arguably outweighs the absence of *any* contrary position.

But is the President's power also "conclusive?" As with the question of exclusivity, the court must – as Jackson wrote – "scrutinize with caution." If we read "conclusive" to mean the

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[252] *Id.* at 637-38.

[253] *Id.* at 638.

[254] *Id*. at 637.

[255] *Zivotofsky*, 576 U.S. at 10.

[256] At least, this seems to be a fair reading of what the Court now understands Jackson's "lowest ebb" category to mean. In *Zivotofsky*, a case about Executive Power relative to Congress and employing the *Youngstown* framework, the Court seems to obliquely distinguish exclusivity from conclusiveness, though arguably if it is the former it must also be the latter. The Court cited to Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) for the proposition that a president's decision, consistent with historical practice and precedent, to recognize a foreign government and receive its foreign ambassadors was binding on "all domestic courts." *Id*. at 18-19. The Court also cited extensively to other cases involving presidential diplomatic power, at least relative to states and the judiciary. *Id*. at 22 (quoting Oetjen v. Central Leather Co., 246 U.S. 297 (1918): "who is sovereign, *de jure* or *de facto*, of a territory is not a judicial question, bit is a political question, the determination of which . . . conclusively binds the judges"). *See also Zivotofksy*, 576 U.S. at 19, 21 (citing, *inter alia*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and United States v. Belmont, 301 U.S. 324 (1937) for the proposition that presidents determine questions of diplomatic recognition, not states). *Banco Nacional de Cuba*, in particular, stressed: "Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive." *Banco Nacional de Cuba*, 376 U.S. at 461. These cases supported the *Zivotofsky* Court's inference that "it is for the President alone to determine which foreign governments are legitimate," not Congress). In this way, *Zivotofsky* incorporates a political question analysis into answering part of the *Youngstown* tripartite analysis, even though the Court held that *applying* this doctrine to resolve or avoid its own controversy was inapt. *Zivotofsky*, 576 U.S. at 9.

[257] *Zivotofsky*, 576 U.S. at 10.

same thing as "it is a non-justiciable political question to be answered definitively by only the President," then defending a presidential pardon for battlefield misconduct actually might get a bit easier. In other words, if it is a political question to be answered by the President, then it is *ipso facto* a "conclusive" power within only the Executive branch. But on the other hand, if it is *not* a political question then it may not be a "conclusive" presidential authority. Without that kind of authority to rest on, the Court probably lacks sufficient reason to both intervene to determine which of the two competing constitutional narratives from the President and Congress is "correct," and to reject a presidential attempt to grant a battlefield pardon if after Congress expressly regulated it.

The political question doctrine rests on a fundamental premise that the political branches are imbued with "characteristics making them superior to the judiciary in deciding certain constitutional questions."[258] In such instances, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[259] The leading case expounding a method for deciding whether a particular matter is a proper case or controversy for an Article III court is Baker v. Carr.[260] The *Baker* Court articulated six characteristics distinguishing justiciable questions from those prudentially left to political actors to resolve, any one of which would justify a Court dismissing the suit: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[261]

It is this menu of vague and fact-dependent factors that forces the Court into a corner of purely normative judgment, and this judgment remains best by challenges. For example, whether there are "judicially discoverable" standards for resolving the matter is easier to answer than whether those standards are "manageable." Moreover, what, exactly, would constitute a "lack of respect" for Congress and the President, and why is a coordinate branch's embarrassment (and *potential* for embarrassment at that) at all relevant to whether a Court can and should competently resolve the matter?

Whether the Political Question Doctrine remains meaningful, useful, or correct is a disputed question, and the standard list from *Baker* often leaves lower courts inconsistently applying it. Justice Sotomayor, though not an advocate for trashing the test, observed that "*Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether

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[258] Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2003).

[259] Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion)).

[260] 369 U.S. 186 (1962) (cited and quoted in *Rucho*, 139 S. Ct. at 2487; cited and quoted in Zivotofsky ex rel Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (and six factor test explained, *id*. at 202-03 (Sotomayor, J., concurring); quoted and cited in Nixon v. United States 506 U.S. 224, 228 (1993)).

[261] *Baker*, 369 U.S. at 226.

a case is suitable for adjudication."[262] The extensive scholarly literature on the Doctrine also suggests it may only be an empty vessel, ignored on one end by a Court wishing to view itself as the "supreme expositor" on the Constitution[263] regardless of the political nature of the controversy, and raised defensively by the Court wishing to avoid questions it prefers not address.[264] We need not address the merits of these arguments, but need only note that applying the analysis from the Doctrine leaves the issue of political question-hood potentially indeterminate. Whether the President's authority, therefore, to pardon this *type* of misconduct is (for lack of better word) inconclusively "conclusive." At the very minimum, it may suggest that the presidential discretionary *decision* to grant a soldier a pardon for battlefield misconduct is not one that can be countermanded or reversed or otherwise limited by the Court (by, say, upholding the constitutionality of our hypothetical restrictive legislation), just as the Court would not be able to override a presidential factual determination made about the sovereign status of some foreign territory.[265]

But it does not dictate that the Congress-imposed burden or bar is outside the purview of the federal judiciary. Even assuming *arguendo* that it is unclear whether the President's authority over this kind of crime is both exclusive and conclusive, the *Youngstown* framework remains at play. Let us first imagine that the Court would find that, yes, the President has acted in direct confrontation with the express or implied will of Congress. In this lowest ebb category, the Court considers the President's Article II powers as diminished by the extent to which Congress has exercised its own Article I power. Is there anything that illustrates the breadth and depth of Congress's concern?

There are two ways to answer this. If framed narrowly around the sole point of battlefield pardons, it is probable that the Court's own language in cases like *Schick* confining pardon power generally to the individual in the West Wing will tilt the balance in favor of the President's judgment. That is to say, Congress has no "expressed will" at all on this narrow point, let alone one that is incompatible with the President's. But if framed *broadly*, considering the full engagement Congress has across the field of the niche specialty of military justice, there is more room to believe that Congress has *implicitly* demonstrated a sufficient degree of will that covers the question.

3. The UCMJ and the Manual for Courts-Martial

In this second, wider, frame where a Court would ask whether Congress has implied its own views on military justice applied to combat circumstances writ large, the Court has plenty to consider and work with. First, by enacting the punitive articles of the UCMJ, it is Congress with its Article I, § 8, clause 14 power that determines what is or is not a possible offense triable and

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[262] Zivotofsky v. Clinton, 566 U.S. at 202 (Sotomayor, J., concurring).

[263] United States v. Morrison, 529 U.S. 598, 617 n. 7 (2000).

[264] *See*, *e.g.*, Barkow, *More Supreme Than Court?, supra* note 258, at 244 (noting that the very idea is "in tension with" the notion of judicial review); John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457 (2017); Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481 (2020); and Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Questions Doctrine" as a Justiciability Doctrine*, 29 J. L. & POLITICS 427 (2014).

[265] *Zivotofsky*, 576 U.S. at 18 (citing President Van Buren and the recognition of the Falkland Islands, in dispute in Williams v. Suffolk In. Co., 38 U.S. (13 Pet.) 415, 420 (1839)).

punishable by court-martial.[266] Congress has declared that misconduct occurring abroad during a deployment falls within this military justice jurisdiction, even if that misconduct would also violate the laws of war under International Humanitarian Law.[267] Congress has statutorily barred commanders, including convening authorities like presidents, from "unlawfully" influencing the investigative and adjudicative legal process.[268] Congress has established professional qualifications for military prosecutors, defense counsel, and judges.[269] Congress has established the minimum qualifications for military jurors ("panel members").[270] Congress has determined what due process protections must be encoded by statute (like a prohibition on compulsory self-incrimination and rules for regulating law enforcement questioning of suspects,[271] a statute of limitations,[272] and a double jeopardy protection[273]). Moreover, Congress has delegated certain responsibilities for the application and management of military justice to the President, suggesting that such authorities are not inherent to the role of commander-in-chief. These include, in no particular order of importance, the authority to enact rules of both procedure and evidence;[274] to serve as a possible general court-martial convening authority;[275] a directive to publish guidance to commanders and judge advocates for what to consider when determining who, what, and why to charge an offense or otherwise dispose of it administratively or "nonjudicially."[276] These powers are granted by Congress by statute, and no court has ever held them to be inherent commander-in-chief powers under Article II.

Nevertheless, these sources are not indisputable evidence of Congressional will. Each of these requirements or enabling authorities make the President, as commander-in-chief, far more of an active participant in the administration of a peculiarly idiosyncratic criminal justice process than is causally assumed. First, the President, by Executive Order, publishes and periodically revises the Manual for Courts-Martial, the handbook for the practice of military justice with court-enforced rules of evidence and procedure.[277] At the beginning of this Manual, the

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[266] *See* 10 U.S.C. § 877 – 934 (Articles 77 – 134, UCMJ).

[267] *See* 10 U.S.C. §§ 802(a)(9) (applying UCMJ jurisdiction to "prisoners of war in custody of the armed forces"), (a)(10) ("in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field"), and (a)(13) ("individuals belonging to one of the eight categories enumerated in Article 4 if the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316) who violate the law of war"); 10 U.S.C. § 805 (establishing worldwide jurisdiction of the UCMJ); 10 U.S.C. § 818 ("general courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war").

[268] 10 U.S.C. § 837 (Article 37, UCMJ).

[269] 10 U.S.C. §§ 826, 826a, and 827.

[270] 10 U.S.C. § 825(e)(2).

[271] 10 U.S.C. § 831.

[272] 10 U.S.C. § 843.

[273] 10 U.S.C. § 844.

[274] 10 U.S.C. § 836 (related to "pretrial, trial, and post-trial procedures" and "modes of proof").

[275] 10 U.S.C. § 822.

[276] 10 U.S.C. § 833 and M.C.M., *supra* note 4, at app. 2.1.

[277] Obviously, this is not usually at the initiation of the White House or President individually. Each year, the Joint Service Committee on Military Justice (JSC), organized under the Department of Defense, considers changes in statutory or case law from the Supreme Court and the CAAF, as well as recommendations from within the Services and the public at large. The JSC then recommends and proposes changes to the Office of the Secretary of Defense, which then advances, modifies, or removes those recommendations and proposals when forwarding on to the President. *See* United States Department of Defense Directive 5500.17, Role and Responsibilities of the Joint

President has – since 1984 – published a "preamble," which states the purposes of military law: "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States."[278] These goals (or ideals?) are not found anywhere in the UCMJ itself. While no scholar can definitively define "good order and discipline," "justice," or "efficiency and effectiveness,"[279] neither the military itself nor any court has either, and no court has suggested it would be beyond the implied power commander-in-chief to formalize this set of criminal justice principles. And as the Preamble subsequently notes, the Manual "shall be applied in a manner consistent the purpose of military law."[280]

Second, the President establishes the range of judicial punishments and commander-initiated non-judicial punishments available upon conviction by court-martial.[281] On a more discrete, tactical, case-by-case level, a president may act as a convening authority at his discretion.[282] Not only does this mean he may push a case from investigation to docketed court-martial, his engagement triggers other commensurate authorities. For instance, he may "dispose of" charges by dismissing them.[283] And while Congress legislated the minimum qualifications for panel members, it is ultimately the Convening Authority's discretion that identifies who – within the chain-of-command – meets that criteria.[284] More systematically, the President has also determined the rules and standards regulating the imposition of pre-trial confinement;[285] and though Congress has dictated qualifications for counsel, it is the President who has determined their "duties."[286]

Notably, most of those authorities are found not in the UCMJ, but in the Rules for Courts-Martial, which are promulgated by Executive Order.[287] Also promulgated by Executive Order are the Rules of Evidence,[288] and Congress has limited that discretion by simply telling the President that those rules must, "so far as he considers practicable," follow the Federal Rules of Evidence used in federal criminal trials.[289] Though it was Congress that gave the President

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Service Committee (JSC) on Military Justice, Feb. 21, 2018. But this process is not dictated by Congress; it implements Executive Order 12473.

[278] *Supra* note 4.

[279] *See*, *e.g.*, David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 74 (2013); Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline*, 66 CLEV. ST. L. REV. 123 (2017) (and see his earlier unpublished thesis, *The Disorderly, Undisciplined State of the "Good Order and Discipline" Term*, Research Report (unpublished thesis), U.S. Air War College (2016), *available at* https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/weber_j.pdf?ver=2017-12-29-142200-423).

[280] M.C.M., *supra* note 4, pt. I, para. 3.

[281] *See* M.C.M., *supra* note 4, pt. IV (subparagraph d. of each numbered paragraph lists the maximum punishment available for that particular offense) and pt. V (Nonjudicial Punishment Procedure).

[282] 10 U.S.C. § 822.

[283] R.C.M. 401(c)(1) and 407(a)(1).

[284] 10 U.S.C. § 825(e)(2).

[285] R.C.M. 305.

[286] R.C.M. 502(d).

[287] *See* M.C.M., *supra* note 4, at app. 19.

[288] *See* M.C.M., *supra* note 4, pt. III.

[289] 10 U.S.C. § 836(a).

authority to do so, there remains an argument that Congress has not occupied quite enough of the field to warrant a Court's deference at the expense of presidential prerogative.

Ironically, language in a recent Supreme Court case, unrelated to pardons and not at all using a *Youngstown* framework, suggests that much of the evidence of Congressional regulation of military justice described above actually works *against* Congressional intervention over battlefield pardons. In Ortiz v. United States,[290] the Court described the military justice system in the process of justifying its own jurisdiction over matters raised by courts-martial and the subsequent appellate courts. Most notably, the Court drew explicit parallels between military justice and traditional state court systems, emphasizing the very structural protections that Congress is responsible for erecting to protect service-members from unreasonably aggressive prosecution or punishment from commanders focused on obedience and discipline. Indeed, to the Court, good order and discipline is only incidental, or at best a positive side-effect, of a justice system that is oriented around and aiming for "justice."[291]

> [C]ourts-martial have operated as instruments of military justice, not (as the dissent would have it) mere 'military command' . . . [a]s one scholar has noted, courts-martial "have long been understood to exercise 'judicial' power of the same kind wielded by civilian courts."[292]

The Court again remarks:

> the independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function, as the dissent claims. By adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so – in comparison to, say, a commander in the field – is fundamentally judicial.[293]

So, if *Ortiz* can be read as analogizing the purpose of military justice and its administrative systems to civilian criminal law, it is not clear that the President's substantial role within military law justifies thinking of his ability to pardon battlefield misconduct differently than any other (federal) criminal offense. If both systems are inherently equal – even if not in form – than being able to pardon crimes unfettered by legislation arising in one system means being able to pardon crimes in another unfettered by legislation.

But also unclear is what the true long-term impact or relevance of *Ortiz* will be, for its language is in many ways contrary to the Court's previous descriptions and caveats. For example, in the seminal Parker v. Levy,[294] the Court upheld convictions of an Army captain who made disparaging comments about the then-ongoing Vietnam War and openly encouraged Black junior soldiers to disobey orders. The Court disagreed with Levy's claim that his prosecution under Articles 133 (Conduct unbecoming an officer) and 134 (conduct that is to the prejudice of

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[290] *Supra* note 25. For a detailed description of the case, the Court's rationale, and its implications, *see* Dan Maurer, *A Logic of Military Justice?*, 53 TEXAS TECH L. REV. ___ (2021) (especially pt. I).

[291] *Ortiz*, 138 S. Ct. at 2174-75.

[292] *Id*. at 2175.

[293] *Id*. at 2176, n.5.

[294] *Supra* note 24.

good order and discipline) were constitutionally vague or overbroad violations of his First Amendment rights. The Court cited two earlier cases from the 1950s,[295] and cautioned:

> [t]he differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian code.[296]

Ortiz, however, did precisely that. Even more puzzling is that none of these earlier cases were distinguished, let alone overruled, by *Ortiz*.

For these reasons, an argument to interdict presidential pardoning of battlefield misconduct via statutory amendment, while justifiable on grounds described above in Part IV, is nevertheless up against a formidable barrier. The relative novelty of such pardons, and the absolute absence of constitutional text, legislative history, evidence of original intent, and lack of controlling on-point precedent, give the argument a fighting chance. The best it might hope for, though, is a *Youngstown* analysis in which it is shown that when the President pardons such conduct it is contrary to the implied will of Congress. As discussed above, this "will" in turn must be liberally interpreted in a way that considers the massive role Congress plays in setting the standards for military good order and discipline as outweighing the administrative role presidents play systematically in rulemaking and specifically through interventions as court-martial convening authorities. Language of precedent – in particular that of *Schick* – suggests that this argument will not likely survive a confrontation.

Instead of framing Congressional intervention in wartime pardons as a point of direct conflict with presidential authority, what if we presume that the issue falls more reasonably into Jackson's "zone of twilight?"

> 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.[297]

If we view Trump's pardons of Behenna, Lorance, and Golsteyn – or any hypothetical battlefield misconduct pardon – as lawfully filling the space left open by Congressional "inertia, indifference, or quiescence," then the only way to suggest such an Article II exercise exceeds its own bounds is by affirmative Congressional action. Relying on inferences from the UCMJ and analogies to the War Powers Resolution is, as stated, not an overwhelmingly compelling strategy to defend amendments to the War Crimes Act or the UCMJ itself. It may look too much like grasping on "abstract theories of law" that will result in imprudent demands and limits on what

[295] Orloff v. Willoughby, 345 U.S. 83 (1953) and Burns v. Wilson, 346 U.S. 137 (1953).

[296] *Parker*, 417 U.S. at 749.

[297] *Youngstown*, 343 U.S. at 637.

must otherwise be a matter for the prudent discretion of the commander-in-chief alone. If neither Congress nor the Courts want to saddle up on an unfamiliar horse to explore uncharted territory, is there a safer option? Yes; safe, albeit also novel. But as the entire question of regulating battlefield pardons is on legally uncharted ground, discussing this novel approach, and reasonable objections to it, is entirely reasonable.

C. The Article I, § 8, cl. 10 End-Around?

The pardon power only works for "offenses against the United States."[298] But what if battlefield misconduct can be categorically classified by Congress as *not* an "offense against the United States" but rather as an "offense against the law of nations?" Article I, § 8, clause 10 gives Congress the authority to "define and punish . . . Offenses against the Law of Nations." This power is – relative to Congress's other express powers – understudied and therefore not well understood and exercised, applied inconsistently by Congress and the Supreme Court.[299] Even though its generic historical meaning encompassed the relationships between nation states,[300] at a minimum, it has also long been thought a source of authority for Congress to regulate and punish behavior by (mostly foreign) individual actors who breach the customary rules of international order, like the commission of piracy,[301] or by those who threaten violent or non-violent breaches of international law obligations.[302] More recently, Congress has employed this authority under Clause 10 to criminalize torture in accordance with the U.S. obligation under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;[303] to authorize extraterritorial jurisdiction by military courts over U.S. citizens who are civilian employees of or contractors for the Department of Defense overseas (even if the crimes were not violations of international law);[304] and in the War Crimes Statute, 18 U.S.C.§ 2441.[305] This is far from controversial:

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[298] *Supra* notes 71, 72 and accompanying text.

[299] Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses against the Law of Nations*, 85 TEX. L. REV. 843, 847, 853 (2007) (arguing that the clause should be interpreted by Congress and the courts to permit law-making with respect to both individual conduct under Customary International Law and nation state violations of this unwritten body of international law and norms – that is to say, giving Congress another source in the Constitution through which it might engage the national use of armed force ("coercive means" and other "countermeasures") against other states [*id*. at 854]; Kent calls this "dual conception" more "faithful" to the "textual, structural, and historical evidence of the Clause's eighteenth-century meaning and its fit within the larger framework of the U.S. Constitution").

[300] Dreyfus v. Von Finck, 534 F.2d 24 30-31 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976).

[301] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 6, § 404 reporters' note 1 (1987). As early as 1790, the "Act for the Punishment of Certain Crimes Against the United States" penalized, *inter alia*, murder and robbery by pirates, or other "act of hostility" against the U.S. or its citizens, on the "high seas."

[302] Boos v. Barry, 485 U.S. 312, 323 (1988) ("the United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress 'to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations'").

[303] *See* Pub. L. No. 103-236, 108 Stat. 463 (1994), sec. 506 (codified as 18 U.S.C. § 2340-2340A).

[304] *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000); H.R. Rep. No. 106-778, pt. 1, at 14 (2000) (citing Clause 10).

[305] Kent, *supra* note 299, at 861-62 (noting that this is a "plainly legitimate" use of Clause 10 by Congress).

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.[306]

The modern UCMJ's generic jurisdictional reach over conduct punishable under the law of war[307] is an implicit illustration of the Congress "defining" such crimes.[308] This power, in concert with authority in clause 14 of § 8 to "make rules for the regulations and government of land and naval forces," suggests that Congress can amend the UCMJ, or even the War Crimes Statute, to *classify* certain conduct, when committed by a person subject to the UCMJ *under conditions in which the law of war applies*, as something like "battlefield misconduct." The definition offered above in Part III is a more precise why to categorize this misconduct in relation to the pardon power, but such explicit definition would not be constitutionally required.[309] Congress can further amend the UCMJ to affirmatively withhold the President's court-martial convening authority discretion for such misconduct – what has been given can be taken away, as there is no inherent convening authority power necessarily implied by functioning as commander-in-chief. Congress can then state that such misconduct as just defined shall be construed as an "offense against the law of nations and shall *not* constitute an offense against the United States."

Alternatively, it could say something like "any conduct punish*able* under 18 U.S.C. § 2441 shall be considered an "offense against the law of nations and not an offense against the United States." Importantly, this would *not* preclude those offenses from being triable by court-martial (unless Congress withdrew them from such tribunals).[310] Nor would it give up jurisdiction to international criminal courts or tribunals.[311] But it would, by definition, remove this misconduct from the reach of Article II pardon power. Whether Congress wishes to test drive this argument and carve out a class of crime from the reach of a President is likely dependent, if not on pure partisan or personality grounds alone, then on the merits of the arguments presented in Part IV. Those arguments described the President's "standing" relationship to both the battlefield crime and the uniformed offender; it suggested that such crimes are categorically distinct, are self-defeating, and both legally and historically unaccounted for when thinking about pardons. Therefore, it is a matter of viewing the problem as one views principal-agent relationships and expertise-dependent and expertise-deferential professionalism. Admittedly, this perspective and these arguments are unconventional, but so are presidential battlefield pardons of misconduct that could be, or were, prosecuted as war crimes.

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[306] Ex Parte Quirin, 317 U.S. 1, 27-28 (1942).

[307] *Supra* note 280.

[308] *See* Ex Parte Quirin, 317 U.S. at 28 (reasoning that the Congress's reference, in United States Articles of War, to offenses triable under the Law of War "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals").

[309] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160, 162 (1820).

[310] *See supra* note 279 and accompanying text.

[311] *Id*.

D. Objections and Concerns

This article has suggested a number of novel interpretations and extrapolations, all from the lack of definitive textual, historical, or jurisprudential answers to the problem of war crime clemency for what I have termed "battlefield misconduct." Moreover, I have argued that the lack of presidential "precedent" makes Trump's three battlefield pardons not ahistorical outliers we can safely ignore, but a proof of concept that Congress can and should consider curtailing. I am not making the more difficult claim that Trump's war crime pardons were *unconstitutional*; I am claiming that Congressional intervention might not be unconstitutional. Nevertheless, good reasons to be skeptical about possible Congressional interventions remain – about either the theory or the political practicality of these suggestions. There are at least five good reasons and the next section wrestles with their implications.

1. Schick *Puts (All) Pardons Outside of Congress's Reach*

Other than the absence of any restriction on war crime clemency in the text of Article II, the most direct to protest formal legislative curtailment of pardons like those of Lorance, Behenna, and Golsteyn is from the Court itself. At first glance, this is odd: many of the principles of pardon power articulated by the Court since *Wilson* in 1833 can support a thesis that such pardons are outside of the intended (but very wide) parameters of Article II.[312] But it is ironically the only Supreme Court decision involving *court-martial* clemency that provides the strongest grounds for rebuffing Congressional interventions over battlefield misconduct. "In Schick v. Reed, we reiterated in most direct terms the principle that Congress cannot interfere in any way with the president's power to pardon."[313]

As described earlier in Part IV, *Schick* emphatically affirmed the Court's long-held interpretation that the president's pardon authority is plenary, crowding out any intrusive attempt by the other political branch to conjure up restraints not already expressed in the Constitution's text itself. But it is still critical to parse exactly what *Schick* says. First, it is not obvious that the target of the *Schick* Court's objection is indistinguishable from a future legislative limit on battlefield misconduct pardons. *Schick* dealt with a presidential condition imposed on a grant of pardon, not with an explicit attempt by Congress to restrain the ability to grant a pardon for a certain *class* of crimes. Second, it is not obvious that the *Schick* Court's reasoning is compelling either. The Court wrote:

> A fair reading of the history of the English pardoning power, from which our Art. II, § 2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress.[314]

There is a legitimately fair argument that reading the English history of pardons may be relevant to understanding the Framers' perspective and orientation, but not at all relevant to interpreting

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[312] *See* Part IV.A.2., *supra*.

[313] Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

[314] *Schick*, 419 U.S. at 266.

the role of pardon power in a constitutional democracy. This argument has the virtue of being deep-rooted: it was made explicit in 1855 by Justice McLean in his *Ex Parte Wells* dissent:

> The executive office in England and that of this country is so widely different that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British sovereign. Their respective powers are as different in their origin as in their exercise. A safer rule of construction will be found in the nature and principles of our own government.[315]

More directly, as recounted above (Part IV.B.2.), the English monarch's pardoning power was never as plenary as the Court permits, with Parliament quite often acting as a check on the king's benevolent mercy.[316] This included requirements for the grant to explicitly describe the conduct being pardoned as a not-so-subtle means to induce second-guessing that grant of mercy for the most serious of offenses. Furthermore, unlike presidentially imposed conditions, there is no "unbroken practice since 1790" of granting clemency to soldiers after their battlefield misconduct. Third, even if that "reading of the history" is fair, the *Schick* Court supplemented its holding with extra-historical and extra-legal factors:

> Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution. [317]

As discussed in Parts IV.C. and V.B.3., the potential reactions within the military and the effect of such pardons on the health of civil-military relations matter. These relations are partly defined by civilian deference to certain kinds of expert advice informed by formal and informal codes of military professionalism. Therefore, they offer solid public policy grounds for limiting the pardon power in this narrow way. By being consistent with Congress's regulatory role in Article I, § 8, cl. 14, such Congressional interventions could be seen as satisfying constitutional responsibilities without degrading the president's actual ability to function as commander-in-chief, and thus not "offend[ing] the Constitution."

Nevertheless, the sweeping language of *Schick* does not obviously confine itself to cases of presidential conditions, and Congress would not be unreasonable to conclude that the case's principle stands in the way of directly banning outright the kinds of pardons granted to Lorance, Behenna, and Golsteyn. Congress might stand on firmer constitutional ground if it simply enacted administrative requirements that would only provide a political *disincentive* to grant such pardons, not otherwise modify, abridge, or diminish his authority to do so. Requiring the president to fully describe the nature of the battlefield misconduct and its attendant facts might be an option. But even this might not be quite so onerous or as distasteful (or successful) as Blackstone might have thought – the Trump administration arguably did so in describing the "reason" for Behenna's pardon.[318] Congress could up the ante, however, by also requiring that

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[315] *Ex Parte Wells*, 59 U.S. at 318 (McLean, J., dissenting).

[316] BLACKSTONE, *supra* note 179, at *391-95.

[317] *Schick*, 419 U.S. at 266.

[318] *Supra* Part II.A.

the president transmit the views of the senior military leadership, like those of the Chairman of the Joint Chiefs of Staff or the Combatant Commander responsible for the theater of conflict in which the misconduct occurred.[319] Such demands on military agents to provide their candid opinions to Congress, even if in disagreement with the president, are not only a valuable source of transparency but are historical norms nearly always followed.[320] A statute even provides an open venue for senior members of the Armed Services (the members of the Joint Chiefs of Staff, each the senior officer of their respective branch) to "make such recommendations to Congress relating to the Department of Defense as he considers appropriate."[321]

Other methods meant to dissuade presidents from granting mercy in these cases, without overtly running afoul of *Schick*, might include a requirement to "nominate" such cases in writing and get "confirmation" from Congress; or a requirement to notify and consult first with the Foreign Relations and Armed Services Committees, giving them time to formally object in writing; or a requirement that the intent to pardon that specific act of battlefield misconduct be posted in Federal Register for notice and public opportunity to comment; or a requirement that the White House provide formal notice to victims of the crime and through formal diplomatic channels to the victim's home nation.[322]

But even this strategy – avoiding direct confrontation with *Schick* – is not without risk. As Professor Peterson notes, the Court could assess indirect procedural requirements by the degree to which they interfere with an assigned constitutional prerogative. In this vein, *Morrison v. Olson*[323] might provide the standard "balancing test:" "whether the [pardon] restrictions are of such a nature that they impede the President's ability to perform his constitutional duty," Peterson writes.[324] The test would be more nuanced than simply a question of "impediment." In *Morrison*, the Court dealt the constitutionality of the independent counsel provisions of the Ethics in Government Act.[325] Not only was the Act not a violation of the Appointments Clause or Article III, the Court expounded on how the Act did not violate "separation of powers principles." Indicators of such a problem, the Court wrote, would look like Congress attempting

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[319] Congress attempted something similar in its "Pardon Attorney Reform and Integrity Act," S. 2042, 106th Cong. (2000); H.R. 3626, 106th Cong. (2000); especially in S. 2042, § 2(c)(2)-(4) (requiring the United States Pardon Attorney to determine the opinions of intelligence and law enforcement officials at local, state, and federal level).

[320] Risa Brooks & Jim Golby, *Congress controls the military, too – Gen. Milley should testify*, THE HILL, June 8, 2020, https://thehill.com/blogs/congress-blog/politics/501718-congress-controls-the-military-too-gen-milley-should-testify.

[321] 10 U.S.C. § 151(f).

[322] My thanks to Eugene Fidell for suggesting these as more viable alternatives that would not violate the warning in *Schick*. *But see* Peterson, *Congressional Power*, *supra* note 226, at 1247 (after reviewing historical attempts to legislate restrictions, especially after the Civil War, and the *Klein* court's rejection of one such example, Peterson concludes: "the Supreme Court clearly established that the President's pardon authority is not subject to legislative restriction or control. Congress lacks this authority not only with respect to direct restrictions on the pardon power, but also with respect to indirect restrictions, even those that make use of a textual grant of power to the legislature, such as the authority to restrict the appellate jurisdiction of the Supreme Court"). Peterson discusses the possibility of non-substantive legislative tactics, like imposing procedural requirements, but considers that possibility's constitutionality to be "unlikely." *Id*. 1250-52. However, Peterson only discussed *pre*-grant consultation or notice requirements that would in effect preclude the president from issuing a pardon as quickly as he wished to; this delay he asserts would be the thorn catching the Court's attention. As discussed above, though, pre-grant procedures are not the only means by which Congress might dissuade presidents from these pardons.

[323] 487 U.S. 654 (1988).

[324] Peterson, *Congressional Power*, *supra* note 226, at 1256.

[325] Pub. L. 95-921, 92 Stat. 1867 (1978), *codified at* 28 U.S.C. § 49, § 591 et seq. (1982).

to increase its own powers at the expense of the Executive Branch, some sort of "judicial usurpation of properly executive functions," "impermissibly undermin[ing] the powers of the Executive Branch," or "preventing the Executive Branch from accomplishing its constitutionally assigned functions."[326]

These provide a little more guidance for Congress to avoid an unconstitutional amount of interbranch encroachment, but *Morrison* is easily distinguishable. The *ability* to grant a pardon at will is not the same as a *duty* to exercise pardon power, as Peterson seems to imply; discretionary prerogative is not the same as a "constitutionally-assigned function." *Morrison* was not about a specific Article II grant of personal, optional, authority to the President, and certainly not one historically considered "unfettered" like the pardon power. It addressed whether the Act's requirement that only "good cause" justify firing an independent counsel was constitutional and so looked to prior removal cases for precedential insight.[327] Moreover, the Court framed removal in terms of whether Congress's influence interfered with the president's "take care that the laws be faithfully executed" responsibility. Arguably, this is a responsibility of the Executive *Branch* more widely, the impersonal and bureaucratic victim (so-to-speak) of Congressional intrusion.[328] It is not clear, therefore, that *Morrison*'s balancing test is entirely pertinent here.

Not only do the removal cases deal with an Executive Branch-wide responsibility and not with the president's personal power to pardon, no other case (nor the Framers) ever considered the question of battlefield misconduct and did not account for the English view that Parliament imposed certain requirements on monarchs as a subtle signal to not grant them (for cases of murder, rape, or treason), believing that no reasonable commander-in-chief would ever grant one for heinous crimes when the facts of those crimes were described accurately.[329] As a result, assessing the prospects of Congressional intervention in battlefield pardons depends most definitely on the specific elements of the legislation – to what extent do they formally inhibit a president's personal judgment and discretion – and would almost certainly depend on Congress invoking its "make rules for the government and regulation of the land and naval forces" responsibility in § 8, cl. 14. *Youngstown*, not *Morrison*, would likely be the right judicial framework for analyzing any claim that this particular legislation violated the *Schick* principle of non-interference in pardons.

2. Military Professionalism and Principal-Agent Concerns are Contingent, not Inevitable

The argument that war crime clemency through battlefield pardons makes such pardons categorically distinct – and therefore deserve special reconsideration – is premised on the

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[326] *Morrison*, 487 U.S. at 685-96.

[327] Primarily Humphrey's Executor v. United States, 296 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); and Wiener v. United States, 357 U.S. 349 (1958).

[328] The "Executive Branch" is mentioned in this light no less than fifteen times. *Morrison*, 487 U.S. at 671, 677, 681, 686, 691 (twice), 694 (twice), 695 (three times), and 696. Most directly, the Court writes: "[t]he final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive *Branch*" (*id*. at 693) and concludes: "the Act does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive *Branch*" (*id*. at 697) (emphasis added).

[329] *Supra* Part IV.B.2.

"standing" relation a president has with the offender and the offense (see Part IV.C., *supra*). As discussed above, this unique standing implicates the fundamental nature of the civil-military relationship between an elected commander-in-chief and his senior military subordinates. Political science literature tells us that this nature – a principal-agent dynamic – in turn is guided by certain forms and functions of the respective parties: for the military agent (either as an individual or as the institution), those forms and functions are derived from the military's purported or claimed expertise in certain areas.[330] Moreover, that literature and practical experience tells us that their sense of professional identity is reinforced by civilian respect for that expertise – that respect is usually manifested by civilian non-interference in "military personnel matters" like military justice, or at least outward honoring of the military's cardinal virtues and value systems (which includes adherence to the laws and principles of "just war").

This premise only persuades so far as these observations are generalizable. It is entirely reasonable, therefore, to wonder whether the fall-out caused by the undermining of military expertise in matters of military discipline – especially regarding conduct in combat – really (or even apparently) degrades the quality of civil-military relations *regardless* of who is president. If the consequences – like those recounted in Part II.B., *supra* – are limited only to cases in which the military leadership already questions the credibility, judgment, and competence of the president as commander-in-chief, a universal ban (of whatever type or degree) against battlefield misconduct pardons seems less necessary. The issue is whether the problem is contextually contingent and one answer is that we do not have the empirical evidence to generalize.

We cannot say that such consequences resulting from war crime clemency are universal, or even if the risk of those consequences is ever-present, regardless of the personality in the White House, because only *one* president has done it and that particular president already breached the standard mold of presidential behavior and decision-making in *most* areas, not just pardons. The best we can do, if we want to speculatively generalize from such a small body of precedent from a norm-busting anomalous presidency, is to look at evidence of apparent civil-military relationship disfunction when *other* presidents have in the past publicly discarded norms of non-intervention in *other* military personnel matters or openly behaved in ways incompatible with the military professional ethic. But drawing conclusions about, or diagnosing, the relative health of such relationships from episodes of "crisis" tricky at best.[331] Those historical episodes still do not help us persuasively argue for – *or against* – the specific premise that the act of pardoning war crimes and battlefield misconduct is so normatively different than pardoning other offenses that such pardons are worth a different legal calculus by Congress. And so, unfortunately, we have but one presidential administration as a relevant case study, and whether it really does serve as precedent for future cases is up in the air. At the very least, it has value as a proof of concept, and this alone suggests there is merit to exploring the legal *possibility* of erecting legislative barriers of one sort or another.

3. If Congress Re-classifies One Type of Crime to Skirt the Pardon Power, the Pardon Power will Always be in Danger of Obsolescence

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[330] *Supra* note 196 and accompanying text.

[331] *See, e.g.,* Deborah Avant, *Conflicting Indicators of 'Crisis' in American Civil-Military Effectiveness*, 24 ARMED FORCES & SOC'Y 375 (1998); for a placing this challenge in historical context and arguing that a lack on objective criterial leaves the public with and the parties an "inability to distinguish between events that signal symptoms of unhealthy civil-military relationships from those events that are actually remedies for such conflict, *see* DANIEL MAURER, CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS 17-36 (2017).

A third cause for alarm raised by suggesting war crime clemency should be legislatively rebuffed or restrained is the slippery slope concern. Certainly, this concern has teeth biting into the "*clause 10 end-around*" argument. We might claim, for instance, that if Congress could simply reclassify this type of crime to categorically except it from the language of Article II, what is to stop Congress from reclassifying other crimes to place further handcuffs on the president's discretionary power?[332]

There are several responses to this concern. First, it can only be a relevant concern if Congress eyes reclassifying other *federal* offenses, for the terms of the pardon clause itself already carve out state criminal sanctions from the president's authority. Second, the text of cl. 10 would also further limit Congress's reclassification to certain subject areas: "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." As described earlier (Part V.C.), the "Law of Nations" is not so broad as to encompass such a swath of "regular" crimes as to make this slippery slope argument all that slippery – it only includes that which already violates customary international law.[333] It would not, therefore, be possible for Congress to reclassify murder or bank fraud, or other types of misconduct that have formed the background for past presidential pardons, as "offenses against the laws of nations" unless these are considered by *opinio juris*, learned treatises, nation state conduct, or domestic law to be violations of customary international law.[334] Private individual crimes – that is to say, not action by state actors derived ostensibly from state authorities – are generally not considered such violations,[335] so Congress would not risk inflating its jurisdiction unconstitutionally. The slippery slope argument is, in this regard, exaggerated.

Additionally, it is worth emphasizing that the argument made in Part V.C. is not that Congress can or should reclassify a greater number of otherwise non-federal offenses in a certain way so that – later on – a president cannot pardon them. It emphatically does not read this move

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[332] *See*, *e.g.*, United States v. Bellaizac-Hurtdao, 700 F.3d 1245 (11th Cir. 2012) (holding that Congress may not, under clause 10, criminalize drug trafficking in the territorial waters of another nation under a theory that it is an "offense against the law of nations").

[333] *See* United States v. Smith, 18 U.S. 153, 160-61 (1820); *see also* Flores v. S. Peru Copper Corp., 414 F.3d 233, 237, n. 2 (2003). The Supreme Court has not squarely addressed whether "offenses against the Law of Nations" necessarily equals "customary international law" but strongly implied it: *see Bellaizac-Hurtdao*, 700 F.3d at 1251 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004)).

[334] The Foreign Relations Law Restatement defines "customary international law" as the "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987). To determine what the general and consistent practice is, "resort must be had to . . . to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S. 677, 700 (1900). *See* also *Smith*, 18 U.S. at 160-61 ("what the law of nations on this subject is may be ascertained by consulting the works of jurists writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law." This is the approach the Court took in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), holding that various provisions of the Detainee Treatment Act and the military commissions the president employed to try detainees not only violated the UCMJ, but were violations of the rights guaranteed by Common Article III of the Geneva Conventions – the relevant terms of which (including the offense of "conspiracy") could only be understood by referencing the "common law of war" built under customary state practice; the Court relied heavily on the works of various treatise writers, the International Military Tribunal at Nuremberg, and the interpretations of the International Committee of the Red Cross).

[335] *Flores*, 414 F.3d at 249.

as creating a new federal criminal provision. Rather, it suggests that Congress, by statute, can make a determination under cl. 10 that certain conduct is an offense against the Law of Nations *for the sole purpose of understanding the scope of Article II's pardon power.* But this too highlights another key caveat on the cl. 10 "end-around" suggestion. To mitigate the reasonable anxiety over an aggressive future Congress bent on corralling presidential power which might resort a great number of *otherwise federal* crimes into the "Law of Nations" bin, the legislation would have to carefully describe what conduct it means to carve away from the pardon clause. The definitions of "battlefield misconduct" and "battlefield pardon" developed in Part III, *supra*, are ways to do that. Those definitions are merely illustrative; they demonstrate the plausibility of making such refined classifications provided certain limiting principles are in play. By definition, the pardon clause carve-out should apply only to certain already highly regulated actors who committed certain kinds of high-profile offenses that already breach the laws of armed conflict, and only then under certain combat contextual conditions.

4. Any "Offense Against the Law of Nations" is Necessarily an "Offense Against the United States" When Already Encoded in Federal Statute

For the sake of the argument, imagine that Congress statutorily classifies "battlefield misconduct" (as defined in Part III, *supra*) as an "offense against the law of nations." If the conduct itself is *already* proscribed by federal law, does that mean that it will always, as a matter of basic logic, be "an offense against the United States?" Imagine a Venn Diagram: the set of offenses labeled "Against the United States" necessarily includes all of the set of conduct Congress wishes to reclassify as "Against the Law of Nations" because that conduct is already proscribed by federal law. If so, does that mean it always subject to a president's pardon power? Neither question has been answered, or even asked, by any court. Judicial opinions regarding cl. 10's "Law of Nations" provision are focused on either defining what "the Law of Nations" means or whether a particular government prosecution under a federal statute validly criminalized something purportedly violating customary international law within the meaning of cl. 10.[336] The extent to which an offense against *both* the law of nations and the U.S. impacts the reach of Article II pardon power is unchartered.

Even without precedential judicial opinion, we can accept the logical assertion that an offense, already proscribed under 10 U.S.C. § 877-934 (UCMJ offenses) or 18 U.S.C. § 2441 (War Crimes), remains an "offense against the United States" even if Congress classifies them otherwise for the limited purpose of affecting the reach of Article II's pardon power. But their dual nature is not the real concern or ground for objecting, for both federal and state statutes may criminalize the same conduct: that Iowa also punishes murder does not make it any less of a federal offense *for applicability of Article II's pardon power* for it only matters what jurisdiction the conduct was being, or had been, prosecuted in. So, the argument would go, if Lieutenant Lorance was tried by court-martial under the federal UCMJ, it does not matter whether he *could* have been tried by other jurisdictions (say, for example, extraterritorially by Iraq for violating its domestic murder laws, or an international war crimes tribunal). The fact is that he was not, and thus the pardon affected only a case involving the actual application of a federal law, thereby giving the president pardon jurisdiction over it and Lorance. In this view, the mere limited-

[336] *See*, *e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (customary international law's relevance to the applicability of judicially created private causes of action under the Alien Tort Statute against foreign corporations); Bellaizac-Hurtado, 700 F.3d 1245, *and* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

purpose labeling by Congress is simply an ineffective restraint against the well-rehearsed and mostly understood pardon power.

The real concern, then, is that by reclassifying such conduct for the limited purpose of Article II's scope, Congress has apparently encroached on the president's personal authority. This makes the issue not one of logic, but of the more complicated concern over separation-of-powers. This concern must be met, if it can be at all, by the *Youngstown* analysis discussed in Part V.B.2., *supra*. It therefore becomes a question of whether Congress has demonstrated sufficient express or implied will over the question of adjudication and punishment for what could be considered "war crimes," and how that might intersect with a president's power to pardon such offenses. That, in turn, assumes that a claim of categorical distinction (between battlefield misconduct and "regular" misconduct) has a basis in fact, and that the distinction is relevant to the re-scoping of a president's pardon power. Finally, that re-scoping of the pardon power is only possible if we conclude the text leaves open the possibility for interpretation, which of course brings us all the way back to arguing over whether the Framers, let alone the practice of English kings and Parliament on which they ostensibly modeled the pardon power. As earlier sections of this article concluded, there is no definitive answer to any of these questions, only a range of arguments (of varying strengths) that might be tested by a Congress eager to curtail overzealous presidential discretion over events implicating both branches' war powers.

5. There is no "Paradoxical" Collision between the Commander-in-Chief Power and the Pardon Power

This article theorized that the heart of the war crime clemency problem is the inherent (but underexamined) glitch in the president's Article II programming. Two enumerated constitutional powers – one being a unilateral authority to use his discretion for any (or no) reason, the other being a responsibility or duty – collide, making each *weaker* rather than stronger, under certain conditions.[337] Once a president grants a pardon for battlefield misconduct, those conditions are set: he does so not just as a president who takes care that the laws are faithfully executed, he does so as the commander-in-chief ultimately responsible for managing the combat context in which the misconduct occurred. This special, unique "standing" in relation to the crime and the criminal[338] necessarily means his intervention – whether on noble or nonsensical grounds – will interpose his will against the expert advice of the military professional agents on whom he unavoidably relies both to execute the lawful use of armed force abroad and to administer the military justice system designed to adjudicate that very battlefield misconduct, using the very court-martial rules he is responsible for promulgating.[339] This interposition may conflict with the values, norms, and self-regulation of the professional military.

If it does – as it did in our single case study of the Trump Administration (*see* Part II.B., *supra*) – that interposition diminishes the credibility of those professionals and those values, norms, and self-regulatory processes. It may suggest that behavior skirting, or crossing, the "war crime" line is ultimately forgivable, or even encouraged if it achieves immediate tactical success.

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[337] *See* discussion of this paradox in Part I, *supra*.

[338] *See* discussion in Part IV.C., *supra*.

[339] Discussed at length in Parts IV.C. and V.B.3, *supra*.

Not only could such misconduct negatively impact domestic and international support for the mission and the military, it may make the actual tactical fighting more violent on both sides, and less responsive to positive and customary international law of armed conflict. In all of these ways, that act of benevolent clemency – flexing presidential discretion – weakens his functional and moral credibility as commander-in-chief. It is *this* paradox that makes battlefield misconduct worthy of categorical distinction and makes proactive congressional restraints within the limits suggested by the Supreme Court precedent worth debating.

But what if this paradox is illusory? It *can* be said – as illustrated in our hypothetical defense of a war crime pardon in Part IV.A. – that acting on, in *any* way, the adjudication of battlefield behavior is simply part and parcel of a president's commander-in-chief duties. He is ultimately responsible for the lawful employment of armed force in the nation's name, and that includes individual soldier actions as much as it does the decision to launch a nuclear strike. It is therefore the president's duty and burden to carefully determine when and where force is to be used, and – if used improperly or unlawfully – to determine the appropriate consequence. It is no different, fundamentally, from any other decision the commander-in-chief makes affecting the rights, liberties, or duties of the service members in the chain-of-command.

But a president as commander-in-chief is still not a monarch. He cannot force a soldier to obey an *unlawful* order just as he cannot force a soldier to *accept* a pardon. A president cannot commission officers without the advice and consent of the Senate and cannot force a person to enlist nor unilaterally force a soldier out her contract. A president cannot re-instate an officer's commission nor re-instate an enlistment, for the benefit of that soldier, after an otherwise lawful court-martial sentence *without* granting a pardon. So this broad interpretation of what it means to be responsible for the actions of service members as commander-in-chief, including the unilateral disposition of their misconduct, fails by analogy; and it fails literally when we look closely at the limited range of actions even the president may take under the UCMJ.[340]

Even if it is a fiction, does its removal from the argument force the rest of the argument to crumble? I do not think that follows: the paradox is *a* consequence of what it means to be president, and what it means to wield certain powers in light of what Congress's roles, responsibilities, and interests are. Categorically distinguishing battlefield pardons from other pardons, for the purposes of possibly erecting limited legislative constraints, is warranted for reasons other than the existence of a paradoxical collision of Article II powers. The bureaucratically, politically, and philosophically complex relationship between a civilian president-as-principal and the military-as-agent warrants it; the sharing of national security responsibility and division of labor between the president and Congress warrants it; Congress's role in enacting a criminal code (under its "making rules for" power) for the armed forces, including its conduct under arms in combat, warrants it; the international community – let alone international law – expectation that combatants will comply with just war principles, rules of engagement, treaties, conventions, and the customary law of war, and that violators will be held legally accountable, warrants it.

[340] *See* Part V.B.3., *supra*.

VI. CONCLUSION

The important question of whether a president has authority to pardon battlefield misconduct seems to have a simple answer – a president clearly has plenary, unilateral discretion to grant a pardon for any federal offense, for any reason or motive.[341] Trump's three war crime pardons are now precedent or a proof of concept. But that is not to say it is good precedent, worthy of following – it lacks altogether the characteristics of an unenumerated "gloss" on executive power vested in president by § 1 of Article II: such pardons are not, as Justice Frankfurter wrote, part of a "systemic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by presidents who have also sworn to uphold the Constitution."[342] In their novelty, they are also a proof of another concept: such pardons are categorically distinct and trigger problems for the president unlike those associated with other controversial acts of mercy, like a self-pardon or pardoning one's close associates or family.

Alexander Hamilton argued a wise president would wield this merciful authority as a matter of case-by-case compassion to mitigate "unfortunate guilt," or as a means to put the cork back in a potentially explosive public passion. The irony is that Trump's war crime pardons were not meant to provide compassionate relief for unjust prosecutions or to douse the fires of public outcry. These pardons actually inflamed public passion. But the other, more subtle irony is that the president's commander-in-chief and pardon powers, viewed together, are self-defeating. When considering the three-part "standing" relationship a civilian commander-in-chief has with his expert military agents, war crime pardons jeopardize the credibility of the very military justice code in which he plays a key managerial role and contradict his own prosecutorial guidance to his subordinates. Relatedly, they also signal ignorance or rejection of the self-regulation professional military ethic and legal obligations, including adherence to the law of war, imposed on his subordinate commanders by Congress. Finally, these pardons will almost certainly dismiss the expertise-driven advice and practices of commanders and their judge advocates whose prosecutorial decisions are valid under authorities long-established by Congress. Whether formally through legislative impositions or amendment, or informally through presidential self-restraint, these are reasons enough to categorically pull war crimes out from the unchecked discretion of the pardon power.

War crime/battlefield pardons are uncommon, incompatible with the purposes of the pardoning power, and hostile to the very profession of arms such pardons are said to defend. They are also tragically understudied. Studying them, however, reveals that they are indefensible for reasons easy to see but often overlooked. If we believe that such war crime pardons and the battlefield misconduct they target are indeed categorically distinct, and if we believe that the collateral damage left in the wake of the pardon power colliding with the commander-in-chief duties is both unacceptable and avoidable, then we cannot dismiss out of hand that Congress could or should act. Whether (and how) this might justify a constitutional amendment, legislative curtailment by imposing various administrative disincentives, outright legislative prohibition, are reasonable questions not yet answered.

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[341] Duker, *supra* note 130, at 530 (noting that a president is "free to exercise the pardoning power for good reason, bad reason, or no reason at all").

[342] *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).