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

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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 that 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

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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 he has 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. This Article 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 II, 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]

INTRODUCTION

As is the case with nearly every exercise of power, a president's use of their constitutionally granted authority can have unintended collateral consequences. Sometimes, the collateral damage is self-inflicted, like a boomerang witlessly launched by a person who thought it a frisbee. This Article identifies and describes, and offers a solution for avoiding, one such boomerang. The flight path of this presidential practice is determined by variables that include the posture of civil-military relations, the purpose or target of a very niche criminal law, and the strength of unchecked unilateral executive power.

The military's formal criminal code,[3] along with its informal canon of professional value commitments, collide with war crime pardons with surprising results for the President that grants them. This criminal code and canon of professional values are intended to control instinctive, self-interested behavior under the stress of combat conditions.[4] 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

1. Donald J. Trump, President of the U.S., Remarks at Turning Point USA's Teen Student Action Summit 2019 (July 23, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/.

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. 10 U.S.C. §§ 801–946a.

4. *See, e.g.*, William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1971) ("Discipline conditions the soldier to perform his military duty even if it requires him to act 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. 296, 300, 302 (1983); Loving v. United States, 517 U.S. 748, 755–56 (1996).

humanitarian law.[5] 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? The results are not usually emphasized when debating whether *subjective* parameters or *objective* limits exist or should exist on a president's pardon power, because these results have remained a mere abstract possibility, an academic question, since the ratification of the Constitution. 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."[6] 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 or the President's consideration. 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.

In the wake of those surprising acts of clemency (or, if not surprising given Trump's norm-busting "theatrical version of pardoning,"[7] 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 or whether they are as

5. MANUAL FOR COURTS-MARTIAL UNITED STATES, at I-1, ¶ 3 (2019) [hereinafter M.C.M.], https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610; STEPHEN W. PRESTON, U.S. DEP'T DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, at ii, 7 (2016), https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190 (international humanitarian law is also known as the "law of war" or the "law of armed conflict").

6. *See infra* Part I for a short background on their cases.

7. 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.

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.[8]

This Article intends to begin that exhaustive study by suggesting that discrimination between war crimes and other crimes is 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 foreseeable 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 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) the 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 [c]are that the [l]aws be faithfully executed"—has been scrutinized before.[9] Alexander Hamilton observed that a pardon used deftly by a commander-in-chief in the case of an insurrection can have a positive benefit.[10] There have also been studies assessing whether pardoning war

8. *See infra* Section III.A.2.

9. U.S. CONST. art. II, § 3; *see* Jed Shugerman & Ethan J. Leib, Opinion, *This Overlooked Part of the Constitution Could Stop Trump from Abusing his Pardon Power*, WASH. POST (Mar. 14, 2018, 12:31 PM), 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 (arguing that self-dealing pardons violate the public trust or implied fiduciary duty owed by presidents to "take [c]are that the [l]aws be *faithfully executed*" and to "*faithfully execute* the Office of President"); Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 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"); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 139 (2000) (suggesting that viewing the "take care" clause as a check on the pardon power would effectively nullify the entire pardon clause).

10. THE FEDERALIST NO. 74 (Alexander Hamilton).

crimes is itself a violation of the law of war.[11] But there have been no studies on whether a president pardoning their own troops' battlefield misconduct can contradict those criminal justice authorities Congress grants to a president to effectively act as commander-in-chief.[12] Therefore, this question approaches fertile ground. Before turning to the argument, Part I summarizes the recent war crime pardon controversy to see why Trump's acts of "benign prerogative"[13] generated such pushback, criticism, and shock. Part II pauses to clarify what is really identified when the public and media refer to "war crimes," defining the kind of crimes discussed in Part I as "battlefield misconduct" and sketching a definition of a "battlefield pardon." Part III 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 by assessing the strength of that argument against the text of Article II, and in light of the more than a dozen principles of the pardon power apparently suggested by the Supreme Court's relatively scant line of pardon cases.

Next, this Article highlights weaknesses in this defense by considering it in 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. Part III concludes by explaining the unique relationship a commander-in-chief has with both the battlefield misconduct and the offender. It also describes the President's role in relation to the military chain-of-command and military justice system. Taken together, these suggest reasons grounded in principal-agent theory for why such misconduct should be categorically distinguished from other civilian criminal offenses subject to pardons. Part IV asks whether—in light of this categorical distinction—Congress has the constitutional authority to impose an outright ban on pardoning this

11. Gabor Rona, *Can a Pardon Be a War Crime?: When Pardons Themselves Violate the Laws of War*, JUST SEC. (Dec. 24, 2020), https://www.justsecurity.org/64288/can-a-pardon-be-a-war-crime-when-pardons-themselves-violate-the-laws-of-war/. The Customary International Humanitarian 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* CUSTOMARY INT'L HUMANITARIAN L., ch. 44 (INT'L COMM. RED CROSS 2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44 (especially Rules 158 and 159).

12. One exception might be the one put forth by Gabor Rona. Rona, *supra* note 11. But pardoning war crimes is viewed in his article 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 infra* Part III.

13. THE FEDERALIST NO. 74, *supra* note 10.

misconduct, or at least to enact administrative burdens to dissuade presidents from granting them. After examining possible arguments about congressional interventions drawn from analogizing to the War Powers Resolution,[14] a *Youngstown* analysis,[15] and weighing the relative roles and authorities for military conduct already established in the Uniform Code of Military Justice ("UCMJ"),[16] Part IV concludes by suggesting a strategy for avoiding messy separation of powers conflicts altogether using Article I, Section 8, Clause 10 of the U.S. Constitution. Section IV.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 overbroad, giving Congress too much latitude to erect barriers around presidential authority. A brief conclusion is offered in the final Part.

I. 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."[17] 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 it was a homicide in 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. His sentence was later 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.[18]

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

14. 50 U.S.C. §§ 1541–1550.

15. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (Jackson, J., concurring) (1952).

16. 10 U.S.C. §§ 801–946a.

17. Interrogations by military personnel are strictly regulated and officially performed only by trained, qualified specialists. *See Human Intelligence Collector Operations*, UNITED STATES ARMY FIELD MANUAL 2-22.3 (2006). Lieutenant Behenna was not trained, assigned, or in any way qualified to "interrogate" this suspect. *See* Joe Mozingo, *A Deadly Interrogation in Iraq*, L.A. TIMES (Sept. 16, 2014, 5:36 PM), https://www.latimes.com/la-fg-iraq-killing13-2009sep13-story.html (describing the infantry unit to which Behenna was assigned at the time of the murder).

18. 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.

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.[19] 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.[20] Regardless of how true (let alone persuasive) the White House 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.[21] 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 nineteen years in prison.[22] 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[23] drew the President's interest and resulted in the second war crimes pardon in American history. And—after much public commentary via Twitter[24]—Trump pardoned former Army Special Forces Major Matthew Golsteyn, who

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

20. United States v. Behenna, 71 M.J. 228, 229, 232 (C.A.A.F. 2012).

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

22. Greg Jaffe, *The Cursed Platoon*, WASH. POST (July 2, 2020), https://www.washingtonpost.com/graphics/2020/national/clint-lorance-platoon-afghanistan/.

23. Don Brown, *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 (Apr. 13, 2019), https://video.foxnews.com/v/6025944819001#sp=show-clips.

24. Molly Olmstead, *Trump Tweeted About a "Military Hero" Charged with Murder. Here's What We Know About the Bizarre Case.*, SLATE (Dec. 17, 2018, 5:56 PM), https://slate.com/news-and-politics/2018/12/mathew-golsteyn-murder-case-trump-tweet.html.

had been by that point charged with killing a detainee and associated offenses, but who had not yet faced trial.[25] All three faced or were facing trial by court-martial for offenses charged under the UCMJ.[26] This Code establishes a hierarchy of military and civilian appellate review, culminating at the Supreme Court.[27] Though for a "separate" professional community with distinct disciplinary purposes,[28] it is considered by the Court to be the functional equivalent of state criminal justice systems and with no less a claim to legitimacy.[29]

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.[30] 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.[31] 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.[32]

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,

25. Dan Maurer, *Trump's Intervention in the Golsteyn Case: Judicial Independence, Military Justice or Both?*, LAWFARE (Jan. 3, 2019, 8:00 AM), https://www.lawfareblog.com/trumps-intervention-golsteyn-case-judicial-independence-military-justice-or-both-0.

26. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946a).

27. 10 U.S.C. §§ 866–867a; 28 U.S.C. § 1259 (giving the Supreme Court power to review decisions by the Court of Appeals for the Armed Forces by writ of certiorari under certain conditions).

28. 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.").

29. Ortiz v. United States, 138 S. Ct. 2165, 2174–75 (2018).

30. Bryan Bender & Wesley Morgan, *Trump Pardons Soldiers Implicated in War Crimes*, POLITICO (Nov. 15, 2019, 8:32 PM), https://www.politico.com/news/2019/11/15/trump-pardon-war-crimes-071244.

31. Richard Spencer, Opinion, *I Was Fired as Navy Secretary. Here's What I've Learned Because of It.*, WASH. POST (Nov. 27, 2019, 5:56 PM), 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.

32. Barbara Starr & Ryan Browne, *Esper 'Flabbergasted' to Learn of Navy Secretary's Secret White House Outreach About Navy SEAL*, CNN (Nov. 25, 2019, 9:13 PM), https://www.cnn.com/2019/11/25/politics/esper-spencer-aftermath/index.html.

stopping scheduled executions to the chagrin of commanding generals.[33] President Andrew Johnson granted general amnesty and pardoned the vast majority of ex-Confederates during the Reconstruction era.[34] President Nixon did not pardon Army Lieutenant William Calley after his 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.[35] 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.[36] Though not for a war crime, the Manning clemency was another high profile example of a president intervening in the military justice process on traditional grounds of official mercy to mitigate what might have been considered unjust prosecutions or unjust punishments.[37]

B. The Commentary: "Now he gets to be the hero . . ."[38]

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

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

34. *Id.*

35. Mikhaila Fogel, *When Presidents Intervene on Behalf of War Criminals*, LAWFARE (May 27, 2019, 7:59 AM), 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.

36. 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.

37. As a lame duck president, after his loss in the Electoral College, Trump issued a slew of late-term controversial pardons. This included 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, 5:44 PM), 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.

38. Jaffe, *supra* note 22 (quoting Lucas Gray, referring to his platoon leader, Clint Lorance, after hearing that Trump had pardoned him).

of war. Like most presidential pardons, his acts garnered both partisan applause and substantial criticism.[39] One notable source of criticism has come 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."[40] 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."[41] Retired Lieutenant General David Barno argued that President Trump did not sufficiently consider 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.[42] This argument is not overstating the case. When the President's defense amounts to sanctifying brutal acts of soldiers they think are trained as, and expected to be, "killing machines,"[43] it is difficult for many to believe the President has given that due consideration.[44] Rather, it seemed to many as if he was "pushing the buttons of government indiscriminately";[45] a real-

39. *See* Scott D. Sagan & Benjamin A. Valentino, *Do Americans Approve of Trump's Pardons for Court-Martialed Military Officers?*, WASH. POST (Dec. 16, 2019, 7:38 AM), https://www.washingtonpost.com/politics/2019/12/16/do-americans-approve-trumps-pardons-court-martialed-military-officers/ (quoting a YouGov survey in which 79% of Republicans approved of the pardons; one respondent wrote: "[t]hankfully 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"); Quil Lawrence & Ari Shapiro, *Veterans React to 3 Controversial Pardons Issued by President Trump*, NPR (Nov. 18, 2019, 4:19 PM), https://www.npr.org/2019/11/18/780563061/veterans-react-to-3-controversial-pardons-issued-by-president-trump.

40. Shanks Kaurin & Strawser, *supra* note 2.

41. Geoffrey S. Corn & Rachel E. VanLandingham, *The Gallagher Case: President Trump Corrupts the Profession of Arms*, LAWFARE (Nov. 26, 2019, 7:22 PM), https://www.lawfareblog.com/gallagher-case-president-trump-corrupts-profession-arms.

42. Anna Mulrine Grobe, *Does Trump's Navy SEAL Pardon Undermine Military Justice?*, CHRISTIAN SCI. MONITOR (Nov. 27, 2019), https://www.csmonitor.com/USA/Politics/2019/1127/Does-Trump-s-Navy-SEAL-pardon-undermine-military-justice.

43. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 9:49 AM), https://twitter.com/realdonaldtrump/status/1183016899589955584?lang=en.

44. Sam Fellman & Ellen Ioanes, *Trump's 'Killing Machines' Comments Show He Fails to Grasp the Basics About the US Military He Leads*, BUS. INSIDER (Nov. 21, 2019, 4:06 PM), https://www.businessinsider.com/trump-killing-machines-comment-shows-failure-to-grasp-us-military-2019-11.

45. Dean Obeidallah, *Trump Doesn't Hate Anonymous Tell-All 'A Warning,' Because He Knows How He Can Spin It*, NBC NEWS (Nov. 19, 2019, 5:07 PM), https://www.nbcnews.com/think/opinion/trump-doesn-t-hate-anonymous-tell-all-warning-because-he-ncna1085241.

world illustration of his claims that Article II of the Constitution allows him to do "whatever" he wants.[46]

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.[47] One such broken norm was process-based: The removal of bureaucratic facilitation and review of pardon applications by the Department of Justice's Office of the Pardon Attorney, leaving all attention focused on the "performative" individual exercising the power.[48] 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.[49] 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.[50] As Professor Kobil described its rather arbitrary use, "clemency has not historically been exercised in any principled fashion."[51] Other than the still-undecided question of self-pardons, the public

46. *Transcript: ABC News' George Stephanopoulos' Exclusive Interview with President Trump*, ABC NEWS (June 16, 2019, 7:58 PM), https://abcnews.go.com/Politics/transcript-abc-news-george-stephanopoulos-exclusive-interview-president/story?id=63749144; Donald J. Trump Remarks at Turning Point USA's Teen Student Action Summit 2019, *supra* note 1.

47. Harold Hongju Koh et al., *Is the Pardon Power Unlimited?*, JUST SEC. (July 11, 2020), https://www.justsecurity.org/68900/is-the-pardon-power-unlimited/ ("Under Trump's administration . . . pardons have increasingly been issued without articulable standards or indicia of process. . . . Trump 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.

48. Meyler, *supra* note 7, at 95 (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").

49. *Id.* at 92 (noting that Trump's approach involved "[l]argely eschewing bureaucratic processes" and the "common law restrictions" that had "accreted around pardoning" in favor of "political theater" that sparks public adoration or outrage, but which likely calls "law and legal regimes into question through his pardons"); JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 2 (2009).

50. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 835 (2017). The rate of clemency, however, has decreased over time. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1171 (2010).

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

has largely accepted such discretionary exercises as inevitable, even if distasteful or imprudent in individual cases. As described in detail below in Part III, the Supreme Court has followed suit: "[T]he pardoning power is an enumerated power of the Constitution, and . . . its limitations, if any, must be found in the Constitution itself."[52] And, as described below, few such limitations can be found. Congress remains, for the most part, quiescent.[53]

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 IV. According to Alexander Hamilton, "[h]umanity and good policy conspire to dictate" that a president's "benign prerogative of pardoning should be as little as possible fettered or embarrassed" by the courts or by Congress.[54] 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 the Justice Department (a legitimate exercise of the

52. Schick v. Reed, 419 U.S. 256, 267 (1974).

53. In the summer of 2020, Representative Adam Schiff (D-CA) introduced H.R. 7694, the Abuse of Pardon Prevention Act. Abuse of Pardon Prevention Act, H.R. 7694, 116th Cong. (2020). 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"). *Id.* § 2(a)(1). However, this reporting requirement would only be triggered for certain "covered offenses," such as "an [o]ffense 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). H.R. 7694 § 2(c)(2). Second, it would have amended the federal bribery statute to include the President and Vice President as "public officials" subject to its prohibitions. *Id.* § 3. 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 granting such a pardon.

54. THE FEDERALIST NO. 74, *supra* note 10.

President's duty to "take [c]are that the [l]aws be faithfully executed"[55]).[56] 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.[57] This Article, however, suggests that Hamilton's view—and the Constitutional and historical treatment of the power that followed—is naïve and, because of 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.[58] The argument below explores what can and should follow when it is recognized that sometimes "[h]umanity and good policy conspire to dictate"[59] that a president's prerogative of pardoning *must* be fettered, for its exercise under certain conditions would violate core conceptions of presidential executive responsibilities.

II. AVOIDING CATEGORY ERRORS: DEFINING "BATTLEFIELD PARDON" AND "BATTLEFIELD MISCONDUCT"[60]

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 asserted that these men were accused or convicted of being "war criminals."[61] This is not, as a matter of technical legal status, accurate: They were not formally charged with violating the United States'

55. U.S. CONST. art. II, § 3.

56. Love, *supra* note 9, at 8–10 (suggesting these four reasons for why presidents should "reclaim" the pardon power by regularly using it without abusing it).

57. Obama, *supra* note 50, at 835–38 (asserting that "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 "reinvigorat[ing]" clemency, while well-intentioned, left the administrative pardoning process "in shambles").

58. 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").

59. THE FEDERALIST NO. 74, *supra* note 10.

60. Much of Part II originally appeared in Dan Maurer, *Talking About "War Crimes"*, LIEBER INST. (Aug. 31, 2022), https://lieber.westpoint.edu/talking-about-war-crimes/.

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

"war crimes" statute[62] or any specific law of war codified by treaty or understood under Customary International Law norms.[63]

A. What is a War Crime?

There is no single universal definition of "war crime," much as there is no single universal definition of "murder" across all jurisdictions. At a minimum, however, we can count on three core elements: A "war crime" is an act or omission that is (1) a serious violation of the law of armed conflict; (2) occurring during an "armed conflict" (broadly defined); (3) and which has a "battlefield nexus."[64] This formula distinguishes standard criminal offenses from a separate class of war-atypical criminal offenses, the latter justified by the structure and purposes of the international law of nations. For example, imagine that a senior army officer deployed to a counterinsurgency operation becomes enamored with a local woman, who happens to have a contract with the Army to deliver various sundry items to the officer's forward operating base. After she rebuffs his overtures and advances, he violently strikes her then strangles her to death. Murder of civilian non-combatants is prohibited by the laws of war, and indeed is one of the most serious offenses. The officer's crime occurred in the midst of an armed conflict in which he was performing military duties. But the facts of this murder have no "nexus" to the battlefield. This does not mean the offense must occur *at a time and place of actual hostilities*—if it meets the "nexus" test, the actual crime can occur far from a front line and during a period of relative security. What matters, according the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Kunarac*,[65] is that the existence of the armed conflict must play a "substantial part in the perpetrator's ability to commit [the offense], his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[66] In this hypothetical, the officer's deployment was the

62. 18 U.S.C. § 2441 (incorporating within the definition of "war crime" those offenses that violate portions of the Geneva Conventions and Hague Regulations).

63. Charles J. Dunlap, Jr., *Reasonable People Can Differ on Trump's Military Justice Actions*, SMALL WARS J. (Dec. 16, 2019, 9:06 AM), https://smallwarsjournal.com/jrnl/art/reasonable-people-can-differ-trumps-military-justice-actions.

64. Oona A. Hathaway et al., *What is a War Crime?*, 44 YALE J. INT'L L. 53, 55, 84 (2019) (discussing the basic presumption that a violation of IHL is a "serious" violation and discussing the requirement of a "'nexus' between the conduct at issue and the relevant armed conduct"); Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić Interlocutory Appeals Decision].

65. Case No. IT-96-23 & IT-96-23/1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002), https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.

66. *Id.* ¶¶ 58–59 (noting that nexus is relevant in "determining whether or not the act in question is sufficiently related to the armed conflict").

setting for the offense, but did not impact his decision to commit it, the manner in which he did it, or his purpose in doing it. This was murder, but not murder-as-a-war crime. In other words, it offended social, cultural, and moral norms encoded into positive state law but did not offend the law of nations under which the laws of war are but a part.

Customary International Law ("CIL") Rule 156, reflecting norms of State practice, recognizes that "war crimes" occur in both traditional interstate International Armed Conflicts and in some forms of Non-International Armed Conflict.[67] CIL also recognizes that such offenses need not be just direct physical harms to protected persons or property; rather, certain key "values" may also be the reason behind a prescribed "war crime" (e.g., abusing dead bodies; denying a prisoner a fair trial; humiliation and degradation).[68] CIL is of course a reflection of domestic practices and laws as well as international treaty obligations and prohibitions.

The Rome Statute for the International Criminal Court (the "Rome Statute"), one such source for what could be called CIL but that creates its own criminal jurisdictional regime, defines "war crimes" broadly.[69] First, it categorically includes any "[g]rave breach[]" of the Geneva Conventions of August 12, 1949.[70] But the Rome Statute also incorporates non-Convention-based prohibitions drawn from customary practice. This includes, *inter alia*, "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities . . . [c]ommitting outrages upon personal dignity, . . . enforced prostitution, [and] forced pregnancy," and using civilian persons as human shields to protect military equipment or personnel from lawful attack.[71] This statute defines war crimes irrespective of the characterization of the armed conflict: Even acts, provided they are "serious," committed in armed conflict "not of an international character" can be prosecuted as war crimes, including acts against members of an armed force who are "*hors de combat*" and conscripting children under the age of 15.[72] This sweeping definition of war crime and the International Criminal Court's jurisdiction only applies,

67. CUSTOMARY INT'L HUMANITARIAN L., R. 156 (INT'L COMM. OF THE RED CROSS 2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.

68. *Id.*

69. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

70. *Id.* art. 8, ¶ 2(a).

71. *Id.* art. 8, ¶ 2(b).

72. *Id.* art. 8, ¶ 2(c), (e). *Hors de combat* translates to "out of combat," and refers to a combatant who is (1) in the power of an adverse belligerent party; (2) wounded, unconscious, or sick and therefore incapable of defending himself; or (3) clearly expressing an intention to surrender. CUSTOMARY INT'L HUMANITARIAN L., R. 47 (INT'L COMM. OF THE RED CROSS 2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule47.

however, to nations who are parties to that Treaty—the U.S. is not such a party.

The United States has its own domestic federal prohibition, the War Crimes Statute.[73] This statute applies only when the alleged perpetrator or victim is a member of the U.S. Armed Forces or is a U.S. national, but it too incorporates categorically "grave breach[es]" of the Geneva Conventions (e.g., willful killing of POWs, torture, and hostage taking); it also incorporates by reference violations of certain "regulations" of the Annex to the 1907 Hague Convention IV, including *inter alia* using poisoned weapons, declaring "no quarter," employing "arms, projectiles, or material calculated to cause unnecessary suffering," misusing a "flag of truce," and bombarding undefended towns, villages, and buildings.[74] Also like the Rome Statute, the U.S. War Crimes Statute prohibits by reference acts already prohibited by virtue of Common Article 3 to Non-International Armed Conflicts.[75]

Given the wide range of, and in some places vague, definitions of "war crime," the legal term is subject to inadvertent misuse or deliberate abuse. This manifests in several ways. Acts that should not be considered "war crimes" might be labeled and condemned as such in public discourse or political messaging, inflaming passions about the war effort and mischaracterizing the culpability of the accused. Second, acts that *should* be considered "war crimes" might instead slip into the mere "violation" bin, either delaying proper and thorough investigations into credible allegations or under-accounting for the seriousness of wrongdoing committed by U.S. troops, as was the case in Trump's depiction of Golsteyn's actions as heroic rather than criminal.[76]

B. Battlefield Misconduct

To dampen the effects of this misuse and abuse problem, we can arm ourselves with a higher-level abstraction of the underlying (alleged) act or omission. We should refer to this as simply "battlefield misconduct." All such offenses—regardless of whether it was eventually charged as a "war crime" or not—share two overlapping characteristics:

1. The conduct was incidental but orthogonal to the soldier's otherwise legitimate performance of duties in combat; and

73. 18 U.S.C. § 2441.

74. Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, art. 23(d), (e), (f), 36 Stat. 2277, 2302 [hereinafter Hague Convention (IV)]; *see* 18 U.S.C. § 2441(c)(2) (referring to Hague Convention (IV), *supra*, articles 23, 25, 27, and 28).

75. 18 U.S.C. § 2441(d).

76. Olmstead, *supra* note 24.

2. The victim of the conduct was a party or property protected from various applications of armed force by the laws of war, however those laws are codified.

The phrase "incidental but orthogonal" is chosen deliberately to distinguish this type of misconduct from "collateral" harms. Collateral harms or damages are anticipated to occur incidentally to the legitimate use of force but are generally permitted by the laws of war provided they are proportional: That is, not (normatively speaking) excessive in relation to the concrete and direct military objective that was expected.[77] Battlefield misconduct—a *potential* war crime—therefore, is conduct that could not have occurred but for the fact that the alleged perpetrator was functioning as a belligerent in the kind of armed conflict where the laws of war apply (hence, "*incidental*"), but which is objectively wrongful in and of itself (e.g., raping a civilian) or that diverges from the normal expectation of lawful conduct associated with that soldier's particular duty or mission (hence, "*orthogonal*").

Most importantly, this more generalized and broader category of misbehavior is defined in parts by punish-*ability* as a war crime. This is, case-by-case, behavior that *could have been* (or *might yet* be) prosecuted as a "war crime" so it shifts attention from the public's colloquial default use of the term (or the technical charging language used in that case) to what is ultimately more relevant and worthy of public and legal scrutiny: The facts of who the victim was and the bad act's deviant relationship to what otherwise would have been legitimate and lawful performance of military duties.

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 these two characteristics. 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 either (A) punishable under 18 U.S.C. § 2441;*[78] *or (B) punishable under the Law of War.*
>
> *Additionally, "battlefield misconduct" is any act or omission committed by a person, or alleged to have been committed by a*

77. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, ¶ 5(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see also* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 228–36 (3d ed. 2022) (describing the history of this principle of proportionality).

78. 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), (d).

> *person, subject to the UCMJ that would otherwise constitute a violation of the UCMJ Articles 93, 118, 119, 120, 120b, 125, 126, 128, 128a,*[79] *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 the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907.*

As a first effort to define "battlefield misconduct," this could be unreasonably over- or under-inclusive. It does not, for example, include the offenses committed by the Blackwater contract employees.[80] 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, but it may also prove useful should Congress explicitly address it by statute.[81]

Thus, "battlefield pardon" is a more apt marker. However, "battlefield pardon" is not an official U.S. designation or classification of clemency for either a certain category of crime or category of offender. It does accurately describe, though, 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

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79. Article 93 prohibits "[c]ruelty and maltreatment." 10 U.S.C. § 893. Article 118 prohibits murder and Article 119 prohibits manslaughter. *Id.* §§ 918–19. Articles 120 and 120b prohibit sexual assault and rape of adults and children respectively. *Id.* §§ 920, 920b. Article 125 prohibits kidnapping. *Id.* § 925. Article 126 prohibits arson and "burning property with intent to defraud." *Id.* § 926. Article 128 prohibits assault and 128a prohibits maiming. *Id.* §§ 928, 928a.

80. *See supra* note 37.

81. *See infra* Section IV.C.

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:

1. 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,[82] and
2. 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,[83] and
3. 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."

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*[84]), the degree of 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 the 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.[85]

Just as a war crime or battlefield misconduct are not just any criminal transgression, war crimes or battlefield pardons are not just any old pardons.

82. 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.

83. 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.

84. *See generally* Carsten Stahn, *'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921 (2006).

85. 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, *supra* note 58, 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.

They are rare like black swans;[86] 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 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.

III. 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. The Supreme Court has repeatedly reinforced that I may grant a pardon for any reason whatsoever, and 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 what conduct—if any—is sanctionable or forgivable within my discretion, which is bound only by the terms of Article II.*

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

86. 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 it 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, at xxii (Random House Trade Paperback ed. 2010) (explaining that black swan events are characterized by their "rarity, extreme impact, and retrospective (though not prospective) predictability").

articulated publicly by Trump or the Department of Justice before or after his battlefield pardons.[87] 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. The first hurdle is the constitutional text.

1. What Does the Constitution 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. There is also 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.[88] 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.[89] Within the same clause that makes the President the civilian commander-in-chief of the military, the Framers provided the power to "grant [r]eprieves and [p]ardons for [o]ffences against the United States, except in [c]ases of [i]mpeachment."[90] 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)

87. Instead, Trump 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, 7:32 PM), https://www.usatoday.com/story/news/politics/2019/11/27/trump-calls-pentagon-deep-state-amid-eddie-gallagher-controversy/4323327002/.

88. Along with former Secretary of Defense Casper Weinberger (who was pardoned for lying to the Independent Counsel but still faced prosecution), former Assistant Secretary of State Elliot Abrams was convicted in 1991 for his role 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.

89. The President's authority to sign bills into law "[i]f he approve[s]," and ability to veto them, is referenced in Article I, Section 7's discussion of how Congress may override the President's veto. U.S. CONST. art I, § 7. 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 "[g]overnment and [r]egulation of the land and naval [f]orces," nor to "calling forth the [m]ilitia" to "suppress [i]nsurrections and repel [i]nvasions." *Id.* art. I, § 8, cl. 11–15; *see also id.* amend. III (preventing the President from quartering troops in private dwellings without consent); *id.* amend. XXII (creating presidential term limits); *id.* amend. XXV (discussing removal of the President by death, impeachment, resignation, or otherwise being "unable to discharge the powers and duties of his office").

90. *Id.* art. II, § 2, cl. 1.

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.[91] By "offense," the text refers to violations of criminal codes and excludes civil suits among private parties.[92] 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 the offense is a federal crime.[93]

That the Constitution's clause discussing pardons does not mention any need for ratification by one or both houses of Congress or prefatory consent from the Senate, whereas the next clause 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.[94] Finally, there is nothing explicitly prohibiting the President from granting a pardon subject to the recipient's meeting certain conditions.[95]

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 "[t]he 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."[96] This may be true as a matter of constitutional text, but it is also clearly misleading. Taft unnecessarily ignored three relevant sources of

91. HUMBERT, *supra* note 58, at 54.

92. *Id.*

93. *See generally Ex parte* Grossman, 267 U.S. 87 (1925); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 363 (1833).

94. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (citing U.S. CONST. art. II, § 2, cl. 1).

95. 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).

96. 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").

guidance: presidential norms that form a kind of quasi-binding administrative precedent;[97] the historical 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 he did so more than a generation after the Constitution's ratification. In *United States v. Wilson*,[98] the Court wrestled with a pardon granted by President Andrew Jackson to a man "convicted of robbing the mail" and putting the carrier's life in jeopardy (for which he was sentenced to death).[99] Marshall wrote of the pardon power in Britain:

> [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

97. Renan, *supra* note 47, 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. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1434 (2018) ("[C]onstitutional 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 generally* James P. Pfiffner, *Donald Trump and the Norms of the Presidency*, 51 PRESIDENTIAL STUD. Q. 96 (2021); B. GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE NEW INSTITUTIONALISM 44 (4th ed. 2019).

98. 32 U.S. (7 Pet.) 150 (1833).

99. *Id.* at 160.

> official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.[100]
>
> 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.[101]

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"[102] 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. As in *Wilson*, the Court believed it was an act of "forgiveness, release, remission."[103] 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."[104] 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

100. *Id.* at 160–61. Humbert acknowledges that this formed the "basis of the law" of pardons but classifies it as mere (though influential) *dictum*. HUMBERT, *supra* note 58, at 23.

101. *Wilson*, 37 U.S. at 161.

102. *Id.* at 160.

103. *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.

104. *Id.* at 310.

> 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.[105]

This deference to British historical interpretation of its own regal pardon power sparked a 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.[106]

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*[107] summarily concluded that the "power thus conferred is unlimited, with the exception stated."[108] In much-quoted language, the Court explained that this magisterial power:

> [E]xtends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during 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.[109]

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 "[t]he benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[110] Here, the Court seemed to be following the footsteps of a 180-year-old English case, *Godden*

105. *Id.* at 311.
106. *Id.* at 318 (McLean, J., dissenting).
107. 71 U.S. (4 Wall.) 333 (1866).
108. *Id.* at 380.
109. *Id.*
110. *Id.*

v. Hales.[111] 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.[112]

Similarly, the *Garland* Court held Congress could not impose limits on when or to whom the President extends his mercy. The pardon itself works as much like a sacramental absolution of sin as a secular law could permit: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender" for it "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."[113] This naturally and inevitably precludes a bad act's penalties and collateral disabilities "from attaching."[114] The pardon "makes him, as it were, a new man, and gives him a new credit and capacity."[115] The Court therefore 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.[116]

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 Supreme Court held that "the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself."[117] One Court wrote that "[i]t is of the very essence of a pardon that it releases the offender from the consequences of his offence."[118] Summarizing its interpretation, another Court wrote:

> A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of

111. (1686) 89 Eng. Rep. 1050 (KB).

112. *Id.* 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.

113. *Garland*, 71 U.S. (4 Wall.) at 380.

114. *Id.*

115. *Id.* at 380–81.

116. *Id.*

117. Carlisle v. United States, 83 U.S. (16 Wall.) 147, 151 (1872).

118. Osborn v. United States, 91 U.S. 474, 477 (1875).

> officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, 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.[119]

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.[120]

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.[121] In *Brown v. Walker*,[122] the Court affirmed the power of Congress to pass acts that would in purpose and effect become general pardons to groups or classes of people. In this case, the Court addressed an act of Congress[123] that denied a person—in response to a subpoena from the Interstate Commerce Commission—the right to claim the Fifth Amendment's privilege against self-incrimination to withhold testimony or evidence.[124] Though seemingly an obvious denial of a fundamental and express constitutional right, the act went on to grant general immunity to the person compelled to testify:

> [N]o 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.[125]

Thus, the question was whether an act that compels "testimony [but also] operate[s] as a complete pardon for the offence to which it relates" satisfies the requirements imposed on the government by the Fifth Amendment.[126]

119. Knote v. United States, 95 U.S. 149, 153 (1877).
120. *Id.* at 154.
121. *See id.* at 153.
122. 161 U.S. 591 (1896).
123. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.
124. *Brown*, 161 U.S. at 593–94.
125. *Id.* at 594 (quoting Act of Feb. 11, 1893, 27 Stat. at 443–44).
126. *Id.* at 595.

Analogizing to earlier English and state cases, the Court wrote that "if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed."[127] The Court then disabused the parties of any notion that there was a material difference between amnesty and pardons: "The distinction . . . is of no practical importance."[128] 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 . . . ."[129] The Act was therefore upheld as having fulfilled the salutary purpose of the protection described in the Fifth Amendment.

By 1915, in *Burdick v. United States*,[130] the 1833 view of Justice 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:

> [W]e 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 [C]ourt 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 *Wilson v. United States* [sic] have endured for years; no case has reversed or modified them.[131]

In 1925, the Court in *Ex parte Grossman*[132] (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."[133] 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

127. *Id.* at 599.
128. *Id.* at 601.
129. *Id.*
130. 236 U.S. 79 (1915).
131. *Id.* at 91.
132. 267 U.S. 87 (1925).
133. *Id.* at 108–09.

statutory offenses listed in the U.S. Code.[134] 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.[135]

Taft's argument bears special consideration. He was the only Supreme Court Justice to have also served as President, thus giving him experience exercising the very Article II power the Court was interpreting.[136] A decade before writing the Court's opinion in *Grossman*, he reflected on this power. Despite its wide and unfettered scope, Taft believed that the likelihood of a president abusing it for unjust purposes was de minimis, 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."[137]

Two years after *Grossman*, Justice Holmes penned a short opinion addressing a president's ability to commute a sentence of death to a sentence of life in prison without the consent of the prisoner.[138] 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.[139]

134. *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).

135. *Id.* at 120–21.

136. Taft granted 383 pardons during his term in office (1910–1913). *Clemency Statistics*, U.S. DEP'T OF JUST. (Feb. 10, 2023), https://www.justice.gov/pardon/clemency-statistics.

137. *Grossman*, 267 U.S. at 121.

138. 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 49, at 31.

139. *Biddle*, 274 U.S. at 486 (emphasis added). As with Chief Justice Marshall's description in *Wilson*, Humbert similarly classifies Holmes's newer description as merely "dictum." HUMBERT, *supra* note 58, 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.").

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 "not at all." In *Schick v. Reed*,[140] the Court addressed President Eisenhower's 1960 decision to commute Schick's 1954 death sentence for his 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 that President Eisenhower placed on his commutation.[141] Schick argued that the 1960 commutation exceeded the President's Article II power by imposing a condition not expressly authorized by the UCMJ.[142]

Chief Justice Burger, writing for five other members of the Court, reviewed the early intent of the pardon power and its interpretive development. "[T]he authors of this clause surely did not act thoughtlessly, neither did they devote extended debate to its meaning."[143] 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."[144]

One of the parameters that all Framers understood from the English experience was that this pardon power could be granted subject to various conditions imposed by the grantor.[145] Unlike most of the previous opinions dealing with this power, the Court cited extensively to Blackstone and some of the Framers for their views.[146] Burger drew from this study, as well as historical record of presidents granting conditional pardons "that are not specifically authorized by statute," and cited *Wilson*, *Wells*, *Grossman*, and *Garland*, for the following: "[T]he 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 for by statute."[147] 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

140. 419 U.S. 256 (1974).
141. *Id.* at 257.
142. *Id.* at 260.
143. *Id.*
144. *Id.*
145. *Id.* at 261.
146. *Id.* at 263.
147. *Id.* at 264–66.

which Schick was convicted—could be affected by a presidential invocation of the pardon power. "[T]his 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."[148] Therefore, this mountain of evidence "compel[led] 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."[149] Any limits, therefore, could not come implicitly or directly from the UCMJ or any other statute but instead "must be found in the Constitution itself."[150]

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. There are three reasons for conclusion. First, *Schick* is the most recent Supreme Court decision to describe the nature of the pardon power; second, it directly confronts the subject of congressional impositions on the President's prerogative to pardon; and third, it arises from the relevant context of the military's criminal justice scheme. The argument that proceeds in Part IV 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 and through *Schick*, the following hardened principles are (in most regards) the same as those outlined by Chief Justice Marshall in *Wilson*, nearly one hundred and eighty-six years earlier:

1. The Framers of the Constitution were familiar with the English use of pardons. They intended to model the American President's broad power on that monarchial experience, even though regal discretion 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 upon 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). Rather, it is 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.

148. *Id.* at 265.
149. *Id.* at 266.
150. *Id.* at 267.

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 legislative branch;[151] 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.[152]
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.[153]
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.[154]
12. The pardon may be rejected by its intended recipient.

151. United States v. Klein, 80 U.S. (13 Wall.) 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.

152. *See supra* notes 119–121 and accompanying text.

153. *See* Knote v. United States, 95 U.S. 149, 154 (1877) ("[A pardon] does not make amends for the past."); Carlesi v. New York, 233 U.S. 51 (1914). In *Carlesi*, the Court reviewed a state statute that 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. *Carlesi*, 233 U.S. at 58. 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 57–59. 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 New York did. *Id.* at 59; *see also* Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 (1915) ("[W]hen it is said that in the eye of the law they are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad.").

154. *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 presidents attaching conditions to commutations and pardons, dating back to George Washington); Patrick R. Cowlishaw, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 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 *Ex parte* Wells, 59 U.S. (18 How.) 307, 319 (1855) (McLean, J., dissenting))); *see also supra* note 103.

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"[155] 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."[156] However, the American public by and large opposes a pardon when it ostensibly appears to have a corrupt foundation, reflecting "cronyism and influence peddling"[157] for personal and political gain.[158]
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 that (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 arise *only* in the context of battlefield misconduct and its potential pardon. They provide grounds for Congress asserting itself in this space by legislatively deterring conscientious presidents from an undesirable grant of unjustified mercy[159] (in fact, such a deterrent approach has been

155. *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925).

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

157. Krent, *supra* note 154, at 1666.

158. Matthew Sheffield, *Public Overwhelmingly Opposes Trump Pardoning his Associates*, HILL (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 December 15 to 16, 2018).

159. *How* Congress could do this is addressed in Part IV, *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. 2 WILLIAM HAWKINS & JOHN CURWOOD, A TREATISE OF THE PLEAS OF THE CROWN 529 (8th ed. 1824). 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 a requirement on the President to direct the Secretary of Defense to issue certain "non-binding guidance" to commanders and judge advocates regarding prosecutorial discretion); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198, 1367–68 (2019) (requiring the Secretary of Defense to produce a "Report on Military

attempted once already, in direct response to Trump's *non*-military pardons[160]). 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 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, 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 the Court's precedent and the Framers' limited word choice in the text could arguably support the President's best argument, they are either inconclusive or more nuanced.

1. Did the Framers Even Consider the Question?

Because the Court has looked to them for insight, 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, is worth consideration.[161] There are at least three

Justice System Involving Alternative Authority for Determining Whether to Prefer or Refer Changes for Felony Offenses Under the Uniform Code of Military Justice").

160. *See supra* note 53.

161. For a description of contemporary practice, see EUGENE R. FIDELL, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 83–88 (2016); M.C.M., *supra* note 5, at I-1, ¶ 2(b), app. 2.1, ¶ 2.1(b); 10 U.S.C. § 802(a)(10) (article 2 of the UCMJ). *See generally* Michael W. Meier & James T. Hill, *Targeting, the Law of War, and the Uniform Code of Military Justice*, 51 VAND. J. TRANSNAT'L L. 787 (2018).

ways of interpreting the Framers' intentions in the absence of any mention of anything like battlefield misconduct in Article II's text. First, it is possible that the Framers did not intend to exclude battlefield misconduct from the reach of a pardon—that it was not categorically distinct from any other "[o]ffense 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 "[o]ffenses against the United States."[162] Instead, the very narrow discussion on the record of the Constitutional Convention, and in the Federalist Papers, indicates a different set of concerns—principally the intersection of the pardon power and impeachment, and the offense of treason.[163]

At the beginning of the American Revolution, most of the original colonies had express pardon power clauses in their constitutions.[164] In New York, the governor could pardon any offense; his power was limited only in the cases of treason and murder.[165] In such cases, the most he could do was grant a temporary reprieve and wait for the action of the State Legislature to ratify the decision by affirming a pardon, or they could direct the execution of the sentence, or grant further reprieve.[166] In both Virginia and Delaware, the chief executive could pardon anyone for any crime, provided he received 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.[167] 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

162. U.S. CONST. art. II, § 2, cl. 1.

163. 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 Art. II." Schick v. Reed, 419 U.S. 256, 262 (1974); *see also* HUMBERT, *supra* note 58, at 21; *accord* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2#lf0544-02_head_232 (notes of debates in the Federal Convention of 1787 as reported by James Madison).

164. According to Humbert in his now classic treatment of this power and its long history, the extent to which the revolutionary colonies, and later the states, limited their governors' ability to grant pardons and placed it under the influence of the legislature was a response mechanism. Their investing the legislature with this power reflected 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, *supra* note 58, at 13–14.

165. N.Y. CONST. art. XVIII (1777), https://avalon.law.yale.edu/18th_century/ny01.asp.

166. *Id.*

167. VA. CONST. ¶ 29 (1776), https://encyclopediavirginia.org/entries/the-constitution-of-virginia-1776/; THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3816–17 (Francis Newton Thorpe ed., 1909) (reproducing the Virginia Constitution of 1776); DEL. CONST. art. 7 (1776), https://avalon.law.yale.edu/18th_century/de02.asp.

consent of any legislative body.[168] 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.[169] 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.[170] In both Pennsylvania and Vermont,[171] using nearly identical language, the chief executive could grant a pardon in concert with the standing executive council, but not for impeachments, murder, or treason.[172] 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.[173] Maryland allowed its governor to "grant reprieves or pardons for any crime, except in such cases where the law shall otherwise direct."[174] The Revolutionary era constitutions of South Carolina, New Hampshire, and 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—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, 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,[175] nobody mentioned their *explicit* cautions that monarchies—not republics—were best-suited for a pardon power resting in the hands of a single executive officer.

168. N.C. CONST. art. XIX (1776), https://avalon.law.yale.edu/18th_century/nc07.asp.

169. N.J. CONST. art. IX (1776), https://avalon.law.yale.edu/18th_century/nj15.asp.

170. GA. CONST. art. XIX (1777), https://avalon.law.yale.edu/18th_century/ga02.asp.

171. 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 they were part of a sovereign body, independent of the claims of its surrounding neighbors. In 1781, Massachusetts acceded to Vermont's independence; in 1782, New Hampshire followed. New York remitted its claims in 1790. VT. CONST. art. XVIII (1777), https://avalon.law.yale.edu/18th_century/vt01.asp.

172. PA. CONST. § 20 (1776), https://avalon.law.yale.edu/18th_century/pa08.asp.

173. MASS. CONST., ch. II, § I, art. VIII (1780), http://www.nhinet.org/ccs/docs/ma-1780.htm.

174. MD. CONST. art. XXXIII (1776), https://avalon.law.yale.edu/17th_century/ma02.asp.

175. *See* 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).

> Clemency is the characteristic of monarchs. In republics, whose principle is virtue, it is not so necessary. In despotic governments, where fear predominates, it is less customary, because the great men are to be restrained by examples of severity. It is more necessary in monarchies, where they are governed by honour, which frequently requires what the very law forbids. . . .
>
> So many are the advantages which monarchs gain by clemency, so greatly does it raise their fame, and endear them to their subjects, that it is generally happy for them to have an opportunity of displaying it; which in this part of the world is seldom wanting.[176]

Rather than pull out their copies of Montesquieu's *Spirit of Laws* 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.[177] Arguing for an elected chief executive who would then serve for life during "good behaviour," this "[S]upreme Executive" would possess unilateral discretionary power to pardon any and all offenses except treason; in that rare instance, he would first need the "approbation of the Senate."[178] 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.[179] 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.[180] On September 10, Edmund Randolph of Virginia objected to a large swath of the draft Constitution's text, including the pardon power, which he referred to as an "unqualified power of the President to pardon treasons."[181] Two days later, the Convention reviewed the full draft. By that point, the only exception or limit on the President's discretion to grant a

176. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 109, 109–10 (Thomas Nugent trans., 1752, Batoche Books 2001); *see also* David W. Carrithers, *Montesquieu's Philosophy of Punishment*, 19 HIST. POL. THOUGHT 213, 239 (1998).

177. Crouch, however, writes that August 6 "marked the first formal appearance of the pardoning power at the convention." CROUCH, *supra* note 49, at 15 (citing 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. 7, 99 (1975)).

178. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., 1911), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1057/0544-01_Bk.pdf.

179. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 163, at 419.

180. *Id.* at 426.

181. *Id.* at 564.

pardon 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 in concert with one, or seek the endorsement or consent of any part of Congress.[182]

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 for 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.[183] 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—by giving the power to pardon treason to the Congress alone.[184] Wilson argued that no exception was needed because any president guilty, directly or by association, with acts of treason could still be impeached.[185] 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."[186] 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.[187] 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.[188] Randolph's motion was not carried, losing by a vote of eight "no" and two "aye" votes.[189] 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."[190]

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

182. *Id.* at 599.
183. *Id.* at 626.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 627.
188. *Id.*
189. *Id.* Virginia and Georgia voted to include the exception. The Connecticut delegation was split.
190. 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).

of pardoning to the slender confines of subject matter—and only for the crime of treason.[191] 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, vesting pardon authority for all crimes, at any time, in the sitting President—except in cases of impeachment—had its virtues. "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."[192] Noting the "necessary severity" of the criminal law, he wrote that there must be "easy access to exceptions in favour of unfortunate guilt."[193] Hamilton emphasized certain features: The ease of accessing clemency and the presumption that it would be sought—and granted—only in cases of "unfortunate" guilt.[194] The person most capable and likely to recognize cases of unfortunate guilt and act swiftly enough to remedy it with finality was the President. The "sense of responsibility is always strongest" when it is "undivided," he asserted, largely without example or argument.[195]

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 them to act with "scrupulousness and caution," lest they be accused of "weakness or connivance."[196] This *internal* motive for self-restraint would render the President a "more eligible dispenser of the mercy of [the] government."[197] All this Hamilton 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, Hamilton turned his attention in the remainder of Federalist

191. "The expediency of vesting the power of pardoning in the [P]resident has, if I mistake not, been only contested in relation to the crime of treason." THE FEDERALIST NO. 74, *supra* note 10. 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 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). THE FEDERALIST NO. 69 (Alexander Hamilton).

192. THE FEDERALIST NO. 74, *supra* note 10.

193. *Id.*

194. In other words, one purpose of the pardon was to "temper the law's harsh results as a matter of compassion." Love, *supra* note 50, at 1172.

195. THE FEDERALIST NO. 74, *supra* note 10.

196. *Id.*

197. *Id.*

Paper number 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.[198] 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 such treason in a single officer of the government under the circumstances of an insurrection.[199] If the 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.[200] Only the 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 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.[201]

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 referred to in those terms) for millennia, the concept of a "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.[202] The Framers were certainly aware of, and treated with respect, the customs and formal bounds of international law.[203] 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,

198. *Id.* at 416.

199. *Id.*

200. *Id.*

201. 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, *Pardon Me?: The Constitutional Case Against Self-Pardons*, 106 YALE L.J. 779, 790 (1996). Kalt ultimately suggests that this argument is too "simplistic and inaccurate." *Id.*

202. Hathaway et al., *supra* note 64, at 56–57.

203. 19 JOURNALS OF THE CONTINENTAL CONGRESS 315, 361 (1912); 20 JOURNALS OF THE CONTINENTAL CONGRESS 762 (1912); 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136–37, 1158 (1912).

Francis Lieber.[204] 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.[205] This precursor to the Uniform Code of Military Justice[206] was narrow in its scope and, in 1776, copied by John Adams in the Continental Congress almost verbatim from the British Articles of War.[207]

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 perilously violent, 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, being drunk on duty, sleeping on guard duty, and harboring the enemy.[208]

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204. *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 2 (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); WAR DEP'T, ADJUTANT GEN. OFF., GENERAL ORDERS, NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Apr. 24, 1863), *reprinted in* WITT, *supra*, at 377.

205. AMERICAN ARTICLES OF WAR OF 1776 (1776), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 961 (2d ed. 1920); Act of Apr. 10, 1806, ch. 20, 2 Stat. 359, 359–72.

206. 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); WINTHROP, *supra* note 205; Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

207. *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS 112–23 (1905). *Compare* AMERICAN ARTICLES OF WAR OF 1776, *reprinted in* WINTHROP, *supra* note 205, at 961, *with* BRITISH ARTICLES OF WAR OF 1765, *reprinted in* WINTHROP, *supra* note 205, at 931.

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

> Every [o]fficer, commanding in [q]uarters, [g]arrisons, or on a march, shall keep good [o]rder, and, to the utmost of his [p]ower, redress all such abuses or disorders which may

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.[209] 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.

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.[210] *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,[211] 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

> be committed by any [o]fficer or [s]oldier under his [c]ommand; if upon [any] complaint [being] made to him, of [o]fficers or [s]oldiers beating, or otherwise ill-treating [any person], . . . or of committing any [k]ind of riot[], to the disquieting of [the inhabitants of this Continent]; he the said [c]ommander who shall refuse or omit to see [j]ustice done on the [o]ffender or [o]ffenders, and [r]eparation made to the [p]arty or [p]arties injured, as far as [p]art of the offender's [p]ay shall enable him or them, shall, upon [p]roof thereof, be punished as ordered by a [g]eneral [c]ourt-martial, as if he himself had committed the [c]rimes or [d]isorders complained of.

WINTHROP, *supra* note 205, at 937 (tenth alteration in original) (emphasis added).

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

210. HUMBERT, *supra* note 58, at 33.

211. *Id.* at 34.

defense of a unitary presidential discretion over pardons was focused on one specific kind of crime—treason—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.[212] Moreover, the authority of English kings and queens to pardon was simply not as uninhibited as U.S. Supreme Court cases, and some scholars,[213] 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.[214] The inference, from the 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 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,[215] 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

212. For example, see *id.* at 18–19; Duker, *supra* note 156, at 501–06; Schick v. Reed, 419 U.S. 256, 263 (1974) ("[T]he draftsmen of Art. II, § 2, spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" (quoting THE FEDERALIST NO. 74, *supra* note 10)). Akhil Reed Amar seems to suggest that Hamilton's justification in Federalist No. 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 quick 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 95, at 189.

213. AMAR, *supra* note 95, at 187 (noting that "the British monarch could pardon all criminals"). Professor Amar interprets the text somewhat more intuitively and draws from President 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.

214. *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, 731–32 (1976); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833).

215. 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 156, at 476–97; HUMBERT, *supra* note 58, at 9–13.

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 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.[216] "The great operation of his [the monarch's] sceptre," Blackstone wrote in 1769, was not his power to command the army and navy, or to engage with foreign leaders, but rather was his "mercy."[217] 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."[218] Hamilton alluded to this sort of buffer against the inflexible "rigour" imposed by legislatures in Federalist No. 74, but whether it was intentional is not clear. He certainly did not contend with Blackstone's conclusion that such power:

> [I]n democracies, . . . this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to centre in one and the same person . . . [I]t would tend to confound all ideas of right among the mass of the people.[219]

According to Blackstone (and Montesquieu[220]), the pardon power is a natural attendant to monarchies, and only monarchies, because the king:

> [R]egulates the whole government as the first mover. . . . Whenever the nation see[s] him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but 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 any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.[221]

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 that the person serving as president would seek or need "filial affection" and "personal loyalty" taking

216. Duker, *supra* note 156, at 503 n.151.

217. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 389 (16th ed. 1825).

218. *Id.* at 397.

219. *Id.* at 397–98. This was the same kind of distinction made by Justice McLean in his *Wells* dissenting opinion. *See supra* note 106 and accompanying text.

220. *See supra* note 176 and accompanying text.

221. 4 BLACKSTONE, *supra* note 217, at 397–98.

root in the hearts of all Americans.[222] If the Framers thought so, they certainly did not say so.

Moreover, it is not accurate to say that the only restraint on a monarch's 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, who would eventually be able 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.[223]

Only one of these, and the reason behind it, is particularly germane to the ultimate question presented in this Article—whether the 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 offenses known to the law: treason, murder, and rape. But *only if* the pardon charter itself "particularly specified" the offense.[224] Blackstone writes that this requirement of specificity was included because Parliament believed no reasonable monarch would pardon such an offense if he or she knew the particulars. "[T]hey did not conceive it possible" that the scales of justice could be rebalanced for a person guilty of the most morally wicked and unforgivable of crimes.[225] Those offenders who might deserve such mercy and escape from the gallows are those already guaranteed pardons "as of right." 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.[226] 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

222. *Id.* at 398.

223. *Id.* at 391–95.

224. *Id.* at 400.

225. *Id.*

226. One scholar concludes that 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 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).

a pardon of a traitor, murderer, or rapist might yet "endear the sovereign to his subjects."[227]

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, the 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.[228] Such an unknowing act of grace was described "as being gained by imposition upon the king."[229] This is:

> [V]ery agreeable to the reason of the law, which seems to have intrusted the king with this high prerogative, upon the 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 . . . .[230]

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 of evil, which it is the chief end of government to prevent, is plainly against reason and the common good, and therefore void.[231]

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.[232] 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 a [jailer] less diligent in his duty" of guarding the prisoners.[233] Therefore, this limit on the monarch's power would—at least in similar situations demanding some degree of attentive, competent diligence

227. 4 BLACKSTONE, *supra* note 217, at 398.
228. 2 HAWKINS & CURWOOD, *supra* note 159, § 8, at 533.
229. *Id.*
230. *Id.*
231. *Id.* § 28, at 540.
232. *Id.* at 540–41
233. *Id.* at 541.

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.[234] 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 *mal in se* class as treason, murder, and rape: That no chief executive 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 produce a self-defeating paradox for a president? What may seem heretical on its face is really 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 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.

234. *See supra* Section I.B.

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 relevant in determining a person's criminal culpability, behavior in combat reflects a kind of clemency-specific shared agency. This shared agency would not diminish the soldier's culpability under the law, and it would 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 President or any particular president, the officeholder is the ultimate superior in the operational chain-of-command. The service member investigated for, charged with, or convicted of 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.[235] 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 that he defended as being motivated by the recipients' "patriotism."[236] 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.[237]

235. Except for crimes in which the President is a principal or accomplice, in which case the unresolved problem of self-pardons is raised.

236. Kenneth T. Walsh, *A History of Presidential Pardons*, U.S. NEWS & WORLD REP., (June 8, 2018) https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history; Proclamation No. 6518, 57 Fed. Reg. 62,145 (Dec. 24, 1992); Johnston, *supra* note 88.

237. 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

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 unnecessary to subscribe to any fiction that a particular president personally issued the deployment order to the individual soldier in question (let alone issued 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. That soldier was undertaking (presumptively) an otherwise lawful mission, part of some larger sustained operation. That operation was 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 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.[238] Even if he did so, they felt, impeachment was a viable threat and consequence, and was already placed outside the bounds of the pardon power.[239] This reveals that the Framers were concerned with at least one manifestation of the President's standing in relation to those he may pardon.

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).

238. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 163, at 626–27 (notes of debates in the Federal Convention of 1787 as reported by James Madison).

239. *Id.*

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 the "principal" and the professional military as the "agent."[240] This includes the military justice system's reliance on subordinate commanders[241] and their uniformed judge advocate military lawyers[242] to manage a court-martial system endorsed as fundamentally just by the U.S. Supreme Court.[243] 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.[244]

In this light, battlefield misconduct 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:

> Absent evidence of innocence or injustice the wholesale pardon of US servicemembers accused of war crimes signals [to] 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[245]

240. For important and original theoretical work on this framework, see PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS, at vii (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)).

241. 10 U.S.C. §§ 815, 818–820, 822–824, 853a, 860a (various command authorities to manage aspects of military justice); 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.").

242. *Id.* §§ 827, 834, and 838 (describing various functions of certain judge advocate officers).

243. *See generally* Parker v. Levy, 417 U.S. 733 (1974). For the most recent take, see Ortiz v. United States, 138 S. Ct. 2165, 2170–71 (2018).

244. *See generally* U.S. DEP'T OF ARMY, ADP 6-22: ARMY LEADERSHIP AND THE PROFESSION (2019) (discussing the Army "ethic" and "Army Values"); Westmoreland, *supra* note 4, at 5 ("Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation."); Richard H. Kohn, *First Priorities in Military Professionalism*, 57 ORBIS 380 (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 and Maintaining it in the United States Army*, 16 J. MIL. SERV. INST. 211 (1895).

245. *See, e.g.*, Martin E. Dempsey (@Martin_Dempsey), TWITTER (May 21, 2019, 8:15 AM), https://twitter.com/Martin_Dempsey/status/1130809276191035392?ref_src=twsrc%5Etfw%7Ctw

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.[246] Military leaders do not generally subscribe to the belief—espoused by President Trump—that service members are "train[ed] to be killing machines."[247] What Trump believed to be flattering instead evokes deprecatory images of musclebound, programed automatons with no individual agency or moral compass, directly antithetical to the training on the law of war that the Department of Defense mandates. For example:

> It is DoD policy that . . . [m]embers 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. . . . The law of war obligations of the United States are observed and enforced by the DoD Components and contractors or subcontractors assigned to or accompanying U.S. Armed Forces.[248]

Moreover, the Supreme Court has recognized, since 1862, that:

> 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.[249]

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 civilian principal's failure to understand or at least follow the rule of law that binds his own military 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

camp%5Etweetembed%7Ctwterm%5E1130809276191035392&ref_url=https%3A%2F%2Fwww.lawfareblog.com%2Fwhen-presidents-intervene-behalf-war-criminals.

246. Spencer, *supra* note 31.

247. Phil McCausland, *Trump Announces 'Review' of Green Beret Murder Case: 'We Train our Boys to be Killing Machines'*, NBC NEWS (Oct. 12, 2019, 12:40 PM), https://www.nbcnews.com/politics/donald-trump/trump-announces-review-green-beret-murder-case-we-train-our-n1065421.

248. U.S. DEP'T DEF., DOD DIRECTIVE 2311.01: DOD LAW OF WAR PROGRAM 3 (2020).

249. The Prize Cases, 67 U.S. (2 Black) 635, 667 (1862).

> machines that can just be turned on. Trained to obey "without hesitation," they remain nevertheless capable of hesitating.[250]

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.[251] Such pardons also risk signaling a contemptuous civilian disregard for the very military due process for which the commander-in-chief is responsible.[252]

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.[253] Most pundits and scholars generally agree that a fundamental axiom of civilian control over the military is the civilian political leader's "right to be wrong."[254] 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.[255]

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

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

251. Adil Ahmad Haque, *McMaster on the Ethics of War*, JUST SEC. (Feb. 21, 2017), https://www.justsecurity.org/37977/mcmaster-ethics-war/; Kohn, *supra* note 244.

252. 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/.

253. 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/.

254. Peter Feaver, *The Right to be Wrong, but Not the Right to Lie*, FOREIGN POL'Y (June 29, 2011, 3:21 PM), 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 System and Undermine Overseas Bases*, BUS. INSIDER (Nov. 15, 2019, 5:09 PM), https://www.businessinsider.com/military-leaders-worry-that-trump-pardons-will-impair-justice-system-2019-11.

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

justice."[256] However, Article I, Section 8's 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 the President (but subject to review by the Article I-created Court of Appeals for the Armed Forces and U.S. Supreme Court).[257] The Rules for Courts-Martial ("R.C.M."), 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 in effect controlling unless contrary to statute or the Constitution.[258]

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 a case from investigation to trial.[259] Moreover, as a GCMCA, 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.[260] 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

256. 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).

257. 10 U.S.C. §§ 833, 836. *See generally* M.C.M., *supra* note 5.

258. *See* M.C.M., *supra* note 5, at I-1, ¶ 3; Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018). 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., *supra* note 5, at app. 19. A president's explanation of the substantive elements of the offenses in the Manual is not binding on the courts, but the courts will defer to those explanations provided they do not expressly contradict statutes or the Constitution. United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998) (citing United States v. Mance, 26 M.J. 244, 252 (C.M.A. 1988)).

259. 10 U.S.C. § 822(a)(1).

260. *See id.* §§ 822, 853a, 860a; M.C.M., *supra* note 5, R.C.M. 401, 601, 604.

UCMJ-granted clemency authority to get what I and the recipient want anyway."

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.[261] This would have meant that 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, Trump could have caused the charges pending against the subject to be "dismissed,"[262] 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.[263]

Second, purposefully acting as GCMCA ought to box in the President's options, confining the disposition decision to the same 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.[264] 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 justice and good order and discipline."[265] The disposition guidance factors purposefully mirror in most respects the guidance to prosecutors published by the Department of Justice in *Principles of Federal Prosecution*, the National District Attorneys Association in *National Prosecution Standards*, and the American Bar Association's *Criminal Justice Standards*.[266] Of particular note, this guidance—again

261. M.C.M., *supra* note 5, R.C.M. 604.

262. M.C.M., *supra* note 5, R.C.M. 401.

263. This window would be after the introduction of the evidence at trial (if tried by judge alone), or after the jury-like members are impaneled and sworn, which is 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).

264. 10 U.S.C. § 833.

265. M.C.M., *supra* note 5, at A2.1-1, § 1.1.

266. *Id.* at A2.1-4.

issued under the authority of the President—prohibits the consideration of political matters.[267] All this suggests that acting as GCMCA would not have achieved for the President what a pardon could achieve far more directly.

When viewed as a whole, these disposition factors strongly suggest that the following are irrelevant 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.[268] In other words, Trump did what he told his commanders, in the interests of justice, not to do.

In sum, battlefield misconduct pardons as a class or category 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 the President formally stewards, one presumptively aimed at "justice, . . . good order and discipline, . . . and efficiency and effectiveness,"[269] 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.

IV. 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 Section III.C. provides articulable reasons why. British

267. *Id.* at A2.1-3, § 2.7(e) ("Political pressure to take or not to take specific actions in the case.").

268. BERNADETTE MEYLER, THEATERS OF PARDONING 8 (2019) ("Trump has cannily recognized the theatrical power of pardoning. He has built pardons upon personal dramas and stories and has kept the public on tenterhooks—will he or won't he? . . .").

269. M.C.M., *supra* note 5, at I-1, ¶ 3.

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, and the "principles" that seem to outline the Court's take on the pardon's purpose and limitations[270] 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 answer—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 is subject to criticism as being an overly broad, and therefore slippery slope for Congress to tread.[271] 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 . . . ."[272] In effect, this authorized presidents to issue general amnesties for specified classes of people, ostensibly supplementing his pardon power under Article II. Both Presidents Lincoln and Andrew Johnson used this authority several

270. *See supra* Sections III.A.2, III.B.

271. This criticism is addressed in Section IV.D, *infra*.

272. Act of Feb. 20, 1863, Pub. L. No. 37-46, ch. 46, 12 Stat. 656.

times,[273] but then again Presidents Washington (1795), Adams (1800), and Madison (1815) had all issued their own general amnesties without any enabling legislation.[274] Congress repealed this statute in 1867,[275] but Johnson continued issuing them anyway.[276]

Later, in *Armstrong v. United States*,[277] the Court ruled that a woman's receipt of amnesty categorically excepted her from the provisions of the Captured and Abandoned Property Act,[278] under which she would not have been able to present an enforceable claim against the United States because she had "given [] aid or comfort" to the Confederacy.[279] 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*[280] two years earlier. Padelford had received a pardon conditioned on swearing a loyalty oath to the United States and renouncing his fidelity and relationship to the Confederacy, which he did. His cotton was later seized under the 1863 Abandoned and Captured Property 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 he 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 the condition fulfilled, released him from the "disability" imposed by the Act, and therefore compensated him for the captured cotton.[281]

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 pardons that had benefited Padelford and Armstrong. Any pardon or

273. Proclamation, No. 11, 13 Stat. 737 (Dec. 8, 1863) (President 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"); Proclamation No. 37, 13 Stat. 758 (May 29, 1865) (President Johnson did not cite any authority).

274. David Todd Peterson, *Congressional Power Over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1242–43 (2003).

275. Act of Jan. 21, 1867, Pub. L. No. 39-8, ch. 8, 14 Stat. 377.

276. *See* Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867); Proclamation No. 6, 15 Stat. 702 (July 4, 1868); Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

277. 80 U.S. (13 Wall.) 154 (1871).

278. Act of Mar. 12, 1863, Pub. L. No. 37-120, ch. 120, 12 Stat. 820.

279. *Armstrong*, 80 U.S. at 155.

280. 76 U.S. (9 Wall.) 531 (1869).

281. *Id.* at 536.

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.[282] In *United States v. Klein*,[283] 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] [p]ardon includes amnesty."[284]

Thus, along with the 1866 case of *Ex parte Garland*, *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 in those cases 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 was granted. However, accounting must be made for *Ex parte Garland*'s explicit determination that Congress cannot "exclude from [the pardon power's] exercise any class of offenders," and that the "benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[285]

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 properly 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 that he is ultimately responsible for waging lawfully. Though a president has 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

282. Act of July 12, 1870, Pub. L. No. 41-251, ch. 251, 16 Stat. 230.
283. 80 U.S. (13 Wall.) 128 (1871).
284. *Id.* at 147.
285. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

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[286] is vast, and this Article will not summarize those debates or engage in them, other than to highlight that the *fact* of this legislative act has implications on the manner by which Congress could view its own authority over *battlefield* misconduct and its potential pardoning.[287]

The War Powers Resolution was passed in late 1973 primarily in response to reports of President Nixon's secret bombing campaign in Cambodia during the Vietnam War.[288] It was promptly vetoed by Nixon, who thought the law was an "usurpation of his basic power."[289] 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, or in the context of national crisis that required the President to act "decisively and convincingly."[290] Congress by joint resolution passed the law over Nixon's veto. Presidents continue to argue that the statute 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.[291]

286. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–48).

287. 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, see 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 CALIF. 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); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001).

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

289. *Id.* at 344.

290. Veto of the War Powers Resolution, 1 PUB. PAPERS 893 (Oct. 24, 1973); *see also* Gerhard Peters & John T. Wooley, *Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/veto-the-war-powers-resolution (last visited Feb. 10, 2023).

291. *See, e.g.*, The President's Const. Auth. to Conduct Mil. Operations Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188 (Sept. 25, 2001), 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,

Without debating its merits or deficiencies,[292] 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?[293] Building from a premise that it was helping the President carry "into execution" his own Article II power, Congress opened its Resolution by citing to Article I, Section 8's Necessary and Proper Clause, rather than its own authority to declare war under Clause 11.[294] In fact, that specific power is nowhere mentioned in the War Powers Resolution other than by implication.[295] This cabining of the President's ability to deploy armed forces into hostilities is very much a long and ongoing controversy,[296] and one that the 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

PRESIDENTIAL COMMAND: POWER, LEADERSHIP, AND THE MAKING OF FOREIGN POLICY FROM RICHARD NIXON TO GEORGE W. BUSH 80 (2009).

292. For an argument how the Act is self-defeating, see Fisher & Adler, *supra* note 287, at 1, 3 (asserting that 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 [P]resident"). *But see Hearing on Article I: Reforming the War Powers Resolution for the 21st Century Before the H. Comm. on Rules*, 117th Cong. 2 (2021) (statement of Rebecca Ingber, Professor of Law, Cardozo Sch. of L.) ("[T]he 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.").

293. *But see* LOUIS FISHER, PRESIDENTIAL WAR POWER 1–16 (3d. ed. 2013) (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 committing armed forces to repel invasions or defeat insurrections, and leaving it to the President alone to determine how much force must be used) and *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 "over-simplified 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 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."); *accord* Zivotofsky v. Kerry (*Zivotofsky II*), 576 U.S. 1, 10 (2015).

294. 50 U.S.C. § 1541(b).

295. *Id.* § 1541(c) (explaining 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").

296. BARRON, *supra* note 288, 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.").

harm's way. For example, it requires the President "in every possible instance" to:

> [C]onsult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly . . . .[297]

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."[298] Presidents must also "periodically" (at least every six months) update Congress on the status of the engagement, its scope, and duration.[299]

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,[300] 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 "unavoidable military necessity respecting the safety of United States Armed Forces" requires the extra time to ensure the troops' "prompt removal" from harm's way.[301]

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.[302] 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 near engagement.

297. 50 U.S.C. § 1542.

298. *Id.* § 1543(a).

299. *Id.* § 1543(c).

300. *Id.* § 1543(a)(3).

301. *Id.* § 1544(b). Fisher suggests that this 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 . . . . [A]nd does not in any manner ensure collective judgement" of both the President and Congress before committing troops to hostilities abroad. FISHER, *supra* note 293, at 144.

302. 50 U.S.C. § 1544(c).

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*. After all, 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, this control encroaches on what appears to be unilateral authority in Article II. It might then be said that Congress can legislate a narrow exception to the pardon power by categorically barring them for battlefield misconduct.

2. Youngstown Sheet & Tube Co. v. Sawyer[303] *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*."[304] 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 a 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, "[w]hen [a] President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."[305] 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 spectrum, when a President acts in way "incompatible with the expressed or implied will of Congress," the Executive's authority is at its

303. 343 U.S. 579 (1952).

304. Zivotofsky v. Kerry (*Zivotofsky II*), 576 U.S. 1, 10 (2015) (citing *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring)).

305. *Youngstown*, 343 U.S. at 635.

nadir or "lowest ebb," entirely a function of what is in Article II but "minus any constitutional powers of Congress over the matter."[306] The Court has said such presidential measures in this category will be "scrutinized with caution."[307] 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.[308] If one branch is unclear on its intentions, or takes no action, the door is open for the other to assume the initiative.[309]

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."[310] In other words, the power must be both plenary and irreversible by the judiciary, making it—essentially—a nonjusticiable political question.[311] 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."[312] *This* part of the test is not particularly helpful to advocates for restraining presidents from issuing battlefield

306. *Id.* at 637–38.

307. *Id.* at 638.

308. *Id.* at 637.

309. *Id.*

310. Zivotofsky v. Kerry (*Zivotofsky II*), 576 U.S. 1, 10 (2015) (quoting *Youngstown*, 343 U.S. at 637–38).

311. At least, this seems to be a fair reading of how the Court now understands Jackson's categories. In *Zivotofsky II*, 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, 137–38 (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." *Zivotofsky II*, 576 U.S. 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 ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial [question], but is a political question, the determination of which . . . conclusively binds the judges." (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918))); *see also id.* at 19, 21 (citing, *inter alia*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), and *United States v. Belmont*, 301 U.S. 324 (1937), for the proposition that presidents determine questions of diplomatic recognition, not states). The Court in *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 II* Court's inference that "it is for the President alone to determine which foreign governments are legitimate," not Congress. *Zivotofsky II*, 576 U.S. at 19. In this way, *Zivotofsky II* 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. *Id.* at 9.

312. *Zivotofsky II*, 576 U.S. at 10.

pardons or imposing burdens to disincentivize them: the Constitution's text does give discretion to pardon (generally) to the President, and the Court—as in *United States v. Klein* and *Schick v. Reed*—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, a court must—as Jackson wrote—"scrutinize[] with caution."[313] If we read "conclusive" to mean the 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 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 after Congress expressly regulated it.

The political question doctrine rests on a fundamental premise that the political branches are imbued with "characteristics that make them superior to the judiciary in deciding certain constitutional questions."[314] 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."[315] 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*.[316] 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

313. *Youngstown*, 343 U.S. at 638.

314. 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 (2002).

315. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion)).

316. 369 U.S. 186 (1962). The Court cited and quoted *Baker* in *Rucho*, 139 S. Ct. at 2487, *Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189, 195 (2012), *id.* at 202–03 (Sotomayor, J., concurring) (explaining the six factor-test), and *Nixon v. United States*, 506 U.S. 224, 228 (1993).

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."[317]

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 beset 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 abolishing 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 a case is suitable for adjudication." [318] 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 "ultimate expositor" on the Constitution[319] regardless of the political nature of the controversy, and raised defensively by the Court wishing to avoid questions it prefers not address.[320] 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. The President's authority, therefore, to pardon this *type* of misconduct is (for lack of a better word) inconclusively "conclusive." At the very minimum, 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

317. *Baker*, 369 U.S. at 217, 226.

318. *Zivotofsky I*, 566 U.S. at 203 (Sotomayor, J., concurring).

319. United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

320. *See, e.g.*, Barkow, *supra* note 314, 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, 512–13 (2017); Richard H. Fallon Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1484 (2020); Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 427, 428–29 (2014).

factual determination made about the sovereign status of some foreign territory.[321]

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. First, imagine that the Court would find that the President has acted in direct conflict 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 that 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, Section 8, Clause 14 power that determines what is or is not a possible offense triable and punishable by court-martial.[322] 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.[323] Congress has statutorily barred commanders, including convening authorities like presidents, from "unlawfully" influencing the investigative and adjudicative

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

322. *See* 10 U.S.C. §§ 877–934 (UCMJ Articles 77–134).

323. *See id.* § 802(a)(9) (applying UCMJ jurisdiction to "[p]risoners of war in custody of the armed forces"); *id.* § 802(a)(10) ("In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field."); *id.* § 802(a)(13) ("Individuals belonging to one of the eight categories enumerated in Article 4 of 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."); *id.* § 805 (establishing worldwide jurisdiction of the UCMJ); *id.* § 818(a) ("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.").

legal process.[324] Congress has established professional qualifications for military prosecutors, defense counsel, and judges.[325] Congress has established the minimum qualifications for military jurors (called "panel members").[326] 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,[327] a statute of limitations,[328] and a double jeopardy protection.[329] Moreover, Congress has assigned 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;[330] to serve as a possible general court-martial convening authority;[331] 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.[332] 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 makes 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.[333] At the beginning of this Manual, the President has—since

324. *Id.* § 837 (UCMJ Article 37).

325. *Id.* §§ 826, 826a, 827.

326. *Id.* § 825(e)(2).

327. *Id.* § 831.

328. *Id.* § 843.

329. *Id.* § 844.

330. *Id.* § 836 (related to "[p]retrial, trial, and post-trial procedures" and "modes of proof").

331. *Id.* § 822(a)(1).

332. *Id.* § 833; M.C.M., *supra* note 5, at app. 2.1.

333. 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 United States Court of Appeals for the Armed Forces ("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* U.S. DEP'T OF DEF., DIRECTIVE 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (2018). But this process is not dictated by Congress; it implements Executive Order 12473.

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 to strengthen the national security of the United States."[334] These goals are not found anywhere in the UCMJ itself. While no scholar can definitively define "good order and discipline," "justice," or "efficiency and effectiveness,"[335] neither the military itself nor any court has either. No court has suggested it would be beyond the implied power of a 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 with the purpose of military law."[336]

Second, the President establishes the range of judicial punishments and commander-initiated non-judicial punishments available upon conviction.[337] On a more discrete, tactical, case-by-case level, the President may act as a convening authority at his discretion.[338] Not only does this mean he may push a case from investigation to docketed court-martial, but his engagement also triggers other commensurate authorities. For instance, he may "dispose of" charges by dismissing them.[339] 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.[340] More systematically, the President has also determined the rules and standards regulating the imposition of pre-trial confinement;[341] though Congress has dictated qualifications for counsel, it is the President who has determined their duties.[342]

Notably, most of those authorities are found not in the UCMJ, but in the Rules for Courts-Martial, which are promulgated by executive order.[343] Also

334. M.C.M., *supra* note 5, at I-1.

335. *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); *see also* Jeremy S. Weber, The Disorderly, Undisciplined State of the "Good Order and Discipline" Term, (Feb. 16, 2016) (M.S.S. thesis, Air War College), https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/weber_j.pdf?ver=2017-12-29-142200-423.

336. M.C.M., *supra* note 5, at I-1.

337. *See* M.C.M., *supra* note 5, at pt. IV (subparagraph (d) of each numbered paragraph lists the maximum punishment available for that particular offense); *id.* at pt. V (Nonjudicial Punishment Procedure).

338. 10 U.S.C. § 822(a)(1).

339. M.C.M., *supra* note 5, R.C.M. 401(c)(1), 407(a)(1),.

340. 10 U.S.C. § 825(e)(2).

341. M.C.M., *supra* note 5, R.C.M 305.

342. M.C.M., *supra* note 5, R.C.M 502(d).

343. *See* M.C.M., *supra* note 5, at app. 19.

promulgated by executive order are the Rules of Evidence,[344] 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.[345] Though it was Congress that gave the President 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 works *against* congressional intervention over battlefield pardons. In *Ortiz v. United States*,[346] 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.[347] 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."[348] The Court noted:

> [C]ourts-martial have operated as instruments of military justice, not (as the dissent would have it) mere "military command." As one scholar has noted, courts-martial "have long been understood to exercise 'judicial' power," of the same kind wielded by civilian courts.[349]

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.[350]

344. *See* M.C.M., *supra* note 5, at pt. III.

345. 10 U.S.C. § 836(a).

346. 138 S. Ct. 2165 (2018).

347. *Id.* at 2174–75. For a detailed description of the case, the Court's rationale, and its implications, see Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669 (2021) (especially part I).

348. *Ortiz*, 138 S. Ct. at 2174–75.

349. *Id*. at 2175 (citation omitted).

350. *Id*. at 2176 n.5 (citation omitted).

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—then 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*,[351] the Court upheld convictions of an Army captain who made disparaging comments about the then-ongoing Vietnam War, and who openly encouraged Black junior soldiers to disobey orders.[352] 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 good order and discipline) were constitutionally vague or overbroad violations of his First Amendment rights. The Court cited two earlier cases from the 1950s,[353] and cautioned:

> The 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 criminal code.[354]

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 the grounds described above in Part III, 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 this argument might hope for 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. 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

351. 417 U.S. 733 (1974).

352. *Id.* at 757.

353. *Id.* at 744 (first citing Orloff v. Willoughby, 345 U.S. 83 (1953); and then citing Burns v. Wilson, 346 U.S. 137 (1953)).

354. *Id.* at 749.

precedent—in particular that of *Schick*—suggests that this argument will not likely survive a judicial confrontation.

Instead of framing congressional intervention in battlefield 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.[355]

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 future 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. 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 justified.

C. The Article I, Section 8, Clause 10 End-Around?

The pardon power only works for "offenses against the United States."[356] But what if battlefield misconduct can be categorically classified by Congress as *not* an "[o]ffense against the United States" but rather as an "[o]ffense against the Law of Nations?" Article I, Section 8, Clause 10 of the Constitution gives Congress the authority "to define and punish . . . Offences against the Law of Nations."[357] This power is—relative to Congress's other express powers—understudied, misunderstood, and applied inconsistently by

355. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

356. U.S. CONST. art. II, § 2, cl. 1.

357. *Id.* art. I, § 8, cl. 10.

Congress and the Supreme Court.[358] Even though its generic historical meaning encompassed the relationships between nation states,[359] at a minimum, it has also long been thought of as 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,[360] or by those who threaten violent or non-violent breaches of international law obligations.[361] More recently, Congress has employed this authority under Clause 10 to criminalize torture in accordance with the United States' obligation under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;[362] 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);[363] and in the War Crimes Statute, 18 U.S.C. § 2441.[364] This is far from controversial:

> 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.[365]

The modern UCMJ's generic jurisdictional reach over conduct that is punishable under the law of war[366] is an implicit illustration of Congress

358. 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). Kent argues 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." *Id.* at 853.

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

360. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §§ 111 n.6, 404 n.1 (AM. L. INST. 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[s] of hostility" against the U.S. or its citizens, on the "high sea[s]." Ch. IX, § 9, 1 Stat. 112, 114 (1790).

361. Boos v. Barry, 485 U.S. 312, 323 (1988) ("[T]he United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress '[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.'" (quoting U.S. CONST. art. I, § 8, cl. 10)).

362. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (1994) (codified as amended at 18 U.S.C. §§ 2340–2340A).

363. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488; H.R. REP. NO. 106-778, pt. 1, at 14 (2000) (citing U.S. CONST. art. I, § 8, cl.10).

364. Kent, *supra* note 358, at 861–62 (noting that this is a "plainly legitimate" use of Clause 10 by Congress).

365. *Ex parte* Quirin, 317 U.S. 1, 27–28 (1942).

366. 10 U.S.C. § 818(a).

"defining" such crimes.[367] This power, in concert with authority in Clause 14 of Section 8 to "make rules for the regulations and government of land and naval forces,"[368] 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 II.A.[369] is a more precise way to categorize this misconduct in relation to the pardon power, but such an explicit definition would not be constitutionally required.[370] 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, Congress 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).[371] Nor would it give up jurisdiction to international criminal courts or tribunals.[372] 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 the President is likely dependent, if not on pure partisan or personality grounds alone, on the merits of the arguments presented in Part III. 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, 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

367. *See Ex parte Quirin*, 317 U.S. at 28 (reasoning that the Congress's reference, in the 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").

368. U.S. CONST. art. I, § 8, cl. 14.

369. *See supra* note 64 and accompanying text.

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

371. 10 U.S.C. § 818(a).

372. *Id.*

arguments are unconventional, but so are presidential battlefield pardons of misconduct that could be, or were, prosecuted as war crimes.

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. This Article does not assert the more difficult claim that Trump's war crime pardons were *unconstitutional*; rather it claims more modestly 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 *is Dispositive*

Other than the absence of any restriction on war crime clemency in the text of Article II, the most direct protest to 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 *United States v. Wilson* in 1833 can support a thesis that such pardons are outside of the intended (but very wide) parameters of Article II.[373] 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."[374]

As described earlier in Part III, *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. Factually, *Schick* dealt with a presidential condition imposed on a grant of pardon, not with an

373. *See supra* Section III.A.2.

374. Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

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.[375]

There is a legitimately fair argument that reading the English history of pardons may be relevant to understanding the Framers' perspective and orientation, but is not at all relevant to interpreting 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.[376]

More directly, as recounted above,[377] 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.[378] 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"[379] of granting clemency to soldiers after their battlefield misconduct. Third, even if that "reading of the history"[380] 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.[381]

375. Schick v. Reed, 419 U.S. 256, 266 (1974).
376. *Ex parte* Wells, 59 U.S. (18 How.) 307, 318 (1855) (McLean, J., dissenting).
377. *See supra* Section III.B.2.
378. 4 BLACKSTONE, *supra* note 217, at 391–95.
379. *Schick*, 419 U.S. at 266.
380. *Id.*
381. *Id.*

As discussed in Sections III.C and IV.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, Section 8, Clause 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, and not otherwise modify, abridge, or diminish the President's 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.[382] Congress could up the ante, however, by also requiring that 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.[383] 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.[384] 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."[385]

382. *See supra* Section I.A.

383. 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 levels).

384. Risa Brooks & Jim Golby, *Congress Controls the Military, Too—Gen. Milley Should Testify*, HILL (June 8, 2020, 5:00 PM), https://thehill.com/blogs/congress-blog/politics/501718-congress-controls-the-military-too-gen-milley-should-testify.

385. 10 U.S.C. § 151(f).

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 the *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.[386]

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.[387] In this vein, *Morrison v. Olson*[388] might provide the standard "balancing test": "[W]hether the [pardon] restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[389] The test would be more nuanced than simply a question of "impediment."[390] In *Morrison*, the Court dealt with the constitutionality of the independent counsel provisions of the Ethics in Government Act.[391] Not only was the Act not a violation of the Appointments Clause or Article II, the Court expounded on how the Act did not violate "the separation of powers principle."[392] Indicators of such a problem, the Court wrote, would look like Congress attempting to increase its own powers at the

386. My thanks to Eugene Fidell for suggesting these as more viable alternatives that would not violate the warning in *Schick*. *But see* Peterson, *supra* note 274, 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 concluded:

> [T]he 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.

Id. 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.

387. *Id.* at 1256.

388. 487 U.S. 654 (1988).

389. Peterson, *supra* note 274, at 1256 (quoting *Morrison*, 487 U.S. at 691).

390. *See Morrison*, 487 U.S. at 706 ("[L]imiting removal power to 'good cause' is an impediment to, not an effective grant of, Presidential control.").

391. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (codified as amended at 28 U.S.C. § 49, § 591 et seq. (1982)).

392. *Morrison*, 487 U.S. at 697.

expense of the executive branch, some sort of "judicial usurpation of properly executive functions . . . 'impermissibly undermin[ing]' the powers of the Executive Branch," or "prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[393]

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. *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 Ethics in Government Act's requirement that only good cause could justify firing an independent counsel was constitutional, and so looked to prior removal cases for precedential insight.[394] Moreover, the Court framed removal in terms of whether Congress's influence interfered with the President's responsibility to "take care that the laws be faithfully executed."[395] Arguably, this is a responsibility of the executive *branch* more widely, the impersonal and bureaucratic victim (so-to-speak) of congressional intrusion.[396] 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, but 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 a pardon for heinous crimes when the facts of those crimes were described accurately.[397] 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

393. *Id.* at 695 (second alteration in original) (emphasis omitted) (first quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986); and then quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

394. 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).

395. U.S. CONST. art. II, § 3.

396. The phrase "Executive Branch" is mentioned in this light no less than fifteen times. *Morrison*, 487 U.S. at 671, 677, 681, 686, 691, 694, 695, 696 (including twice on pages 691 and 694, and three times on page 695). 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 (emphasis added). The Court then concludes that "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).

397. *See supra* Section III.B.2.

certainly depend on Congress invoking its "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces" responsibility in Article I, Section 8, Clause 14.[398] *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. 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 "standing" relation a president has with the offender and the offense.[399] 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.[400] Moreover, 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[401] 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. 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. Nor can we say that the risk of those consequences is ever-present regardless of the personality in the White House. Only *one*

398. U.S. CONST. art. I, § 8, cl. 14.

399. *See supra* Section III.C.

400. *See supra* note 240 and accompanying text.

401. Like those recounted in Section I.B, *supra*.

President has done it, and that particular President already breached the standard mold of presidential behavior and decision-making in *most* areas,[402] 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" is tricky at best.[403] 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.[404] And so, we have but one presidential administration as a relevant case study, and whether it really does serve as precedent for future cases is uncertain. 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. Re-classification Leads to Obsolescence

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?[405]

402. David Montgomery, *The Abnormal Presidency*, WASH. POST MAG. (Nov. 20, 2020), https://www.washingtonpost.com/graphics/2020/lifestyle/magazine/trump-presidential-norm-breaking-list/; Ben Gittleson, *How Trump Obliterated Norms and Changed The Presidency*, ABC NEWS (Jan. 19, 2021, 2:29 PM), https://abcnews.go.com/Politics/trumps-legacy-obliterated-norms-chipped-institutions-end/story?id=75275806; Ilya Shapiro, *An Exit Survey of Trump's Constitutional Misdeeds*, CATO INST. (Jan. 24, 2021), https://www.cato.org/commentary/exit-survey-trumps-constitutional-misdeeds.

403. *See, e.g.*, Deborah Avant, *Conflicting Indicators of 'Crisis' in American Civil-Military Effectiveness*, 24 ARMED FORCES & SOC'Y 375 (1998). For a source placing this challenge in historical context, and arguing that a lack of objective criteria leaves the public with 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).

404. Maurer, *supra* note 347, at 26.

405. *See, e.g.*, United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1254, 1257 (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").

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 Clause 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."[406] As described earlier,[407] 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.[408] 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 "[o]ffences against the Law of Nations" unless these are considered by learned treatises, nation state conduct, or domestic law to be violations of customary international law.[409] Private individual crimes—that is to say, not action by state actors derived ostensibly from state authorities—are generally not considered such violations,[410] so Congress would not risk inflating its jurisdiction unconstitutionally. The slippery slope argument is, in this regard, exaggerated.

406. U.S. CONST. art. I, § 8, cl. 10.

407. *See supra* Section IV.C.

408. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820); *see also* Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 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-Hurtado*, 700 F.3d at 1251 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004)).

409. 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 THE FOREIGN RELS. OF THE U.S. § 102(2) (AM. L. INST. 1987). To determine what the general and consistent practice is, "resort must be had 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 recognising 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 also violations of the rights guaranteed by Common Article 3 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. *Id.* at 602 (citing *Ex parte* Quirin, 317 U.S. 1, 30 (1942)). 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. *Id.* at 631–32.

410. *Flores*, 414 F.3d at 249 ("Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.").

Additionally, it is worth emphasizing that the argument made in Section IV.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 as creating a new federal criminal provision. Rather, it suggests that Congress, by statute, can make a determination under Clause 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 Clause 10 "end-around" suggestion. To mitigate the reasonable anxiety over an aggressive future Congress bent on corralling presidential power which might re-sort 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 earlier[411] 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 Codified in Federal Statute

For the sake of the argument, imagine that Congress statutorily classifies "battlefield misconduct"[412] as an "[o]ffense 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 [o]ffense 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 is always subject to a president's pardon power? Neither question has been answered, or even asked, by any court. Judicial opinions regarding Clause 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 Clause 10.[413] The extent to which an

411. *See supra* Part II.

412. *See supra* Part II.

413. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (discussing customary international law's relevance to the applicability of judicially-created private causes of action under

offense against *both* the Law of Nations and the United States impacts the reach of Article II pardon power is unchartered territory.

Even without cases to consider, we can accept the logical assertion that an offense, already proscribed under 10 U.S.C. § 877 through 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-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.[414] 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 that the Constitution's 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, knew of such a distinction and intended it to matter with respect to a president's executive authority. As earlier sections of this Article concluded, there is no

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the Alien Tort Statute against foreign corporations); *Bellaizac-Hurtado*, 700 F.3d at 1245; Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

414. *See supra* Section IV.B.2.

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

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.[415] 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[416] necessarily means that his intervention—whether on noble or nonsensical grounds—will interpose his will against the expert advice of the military professional agents. These professionals are those 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.[417] This interposition may conflict with the values, norms, and self-regulation of the professional military.

If it does conflict—as it did in our single case study of the Trump Administration—then 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 serves immediate tactical needs. 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 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.

415. *See supra* INTRODUCTION for a discussion of this paradox.
416. *See supra* Section III.C.
417. *See supra* Sections III.C, IV.B.3.

But what if this paradox is illusory? It *can* be said—as illustrated in our hypothetical defense of a war crime pardon in Section III.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. The President is ultimately responsible for the lawful employment of armed force in the nation's name, and that includes an individual soldier's 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. The 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 of her contract. A president cannot reinstate an officer's commission nor reinstate an enlistment, for the benefit of that soldier, after an otherwise lawful court-martial sentence *without* granting a pardon. 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 that even the President may take under the UCMJ.[418]

Even if the paradox 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 purpose 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" power) for the armed forces, including its conduct under arms in combat, warrants it; and the international community's—let alone international law's—expectation that combatants will comply with just war principles, rules of

418. *See supra* Section IV.B.3.

engagement, treaties, conventions, and the customary law of war, and that violators will be held legally accountable, warrants it.

CONCLUSION

Can a president pardon a war criminal? Yes, as demonstrated in recent history. *Should* a president pardon a war criminal? Probably not, again as demonstrated by recent history. Can Congress, without amending the pardon power in the Constitution itself, impose a barrier to such pardons? Probably not, at least explicitly. However, the answer changes to "probably yes," through indirect national security oversight requirements, and is theoretically possible if Congress categorically reclassifies battlefield misconduct as a violation of the "Law of Nations" and not as an "offense against the United States." *Should* Congress proactively impede all future presidents, regardless of party, from pardoning servicemembers for their battlefield misconduct regardless of their context? No, if Congress is satisfied not only with continued presidential encroachment into matters of justice involving crimes that violate not only the international law of war, but also the very criminal statute Congress specifically enacted to regulate the good order and discipline of the military. Yes, if Congress finds such encroachment unacceptable from a separation of powers perspective and unnecessarily detrimental to the military professional ethic, administration of military justice, and the pragmatic viability of the always complex civil-military relationship.

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.[419] 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 the President by Section 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 the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . ."[420] In their novelty, they are also 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.

419. Duker, *supra* note 156, at 530 (noting that a President "is free to exercise the pardoning power for good reason, bad reason, or no reason at all").

420. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (Frankfurter, J., concurring).

Alexander Hamilton argued that a wise president would wield this merciful authority as a matter of case-by-case compassion to mitigate "unfortunate guilt,"[421] 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 contradicts 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 find a remedy.

421. THE FEDERALIST NO. 74, *supra* note 10.