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Why President Trump Can't Pardon His Way Out of the Special Counsel and Cohen Investigations

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I. Executive Summary

Media commentators, scholars, and even the president's allies have speculated that President Trump might "pardon his way out" of the Department of Justice investigations of potential cooperation between Russia and the Trump campaign and obstruction of justice and of President Trump's attorney Michael Cohen.² This strategy would entail issuing presidential pardons to targets of these investigations in the hope that eliminating their exposure to federal charges will prevent them from cooperating with investigators.

Considering the possibility of a pardon strategy is no mere academic exercise. There are many indications that President Trump has contemplated employing it. Last fall, the president's attorneys reportedly broached pardons with attorneys for former Trump campaign manager Paul Manafort and former Trump National Security Adviser Michael Flynn. This March, immediately following FBI raids to gather evidence from the President's Trump Organization associate and former lawyer, Michael Cohen, the president issued a pardon to former Vice President Cheney aide I. Lewis "Scooter" Libby, who was convicted of obstruction of justice and perjury charges stemming from an earlier investigation. Many interpreted that pardon as a signal that President Trump is open to clemency for individuals convicted for lying under oath.

Such a pardon strategy, however tempting it might appear to the president, is fatally flawed. There are two simple reasons for that. First, receiving a federal pardon will not protect key defendants from exposure to state criminal prosecution (as well as state and federal civil liability). In addition, granting a pardon with corrupt intent or for the purpose of interfering or preventing witness testimony could well expose President Trump to impeachment and personal criminal liability for obstruction of justice or bribery. In other words, pardoning key defendants will only complicate, not resolve, President Trump's legal predicaments.

This paper details why the pardon strategy will not work.³ In the first three sections, we focus on the exposure to possible state charges in New York of three representative individuals: Paul Manafort, a defendant in two pending cases; his deputy Rick Gates, a cooperating witness

² See, e.g., Darren Samuelsohn, Conservatives urge Trump to grant pardons in Russia probe, *Politico*, Feb. 19, 2018, available at <https://www.politico.com/story/2018/02/19/trump-russia-pardons-mueller-flynn-417094>; Mark Greenberg and Harry Litman, Can Trump pardon his way out of trouble after the Manafort indictment?, *L.A. Times*, Oct. 30, 2017, available at <http://www.latimes.com/opinion/op-ed/la-oe-litman-greenberg-manafort-mueller-indictment-20171030-story.html>; David B. Rivkin Jr. and Lee A. Casey, Begging Your Pardon, Mr. President, *Wall Street Journal*, Oct. 29, 2017, available at <https://www.wsj.com/articles/begging-your-pardon-mr-president-1509302308>.

³ In so doing, we build on arguments articulated and developed by Professor Jed Shugerman. See, e.g., Jed Shugerman, The States Can Trump Trump's Pardons: State Prosecutions for Money Laundering, Hacking Conspiracy, Tax Fraud, and More, *Just Security*, Sept. 5, 2017, available at <https://www.justsecurity.org/44704/states-trump-trumps-pardons-state-prosecutions-money-laundering-hacking-conspiracy-tax-fraud/>; Jed Shugerman, Robert Mueller's Brilliant Strategy for Outmaneuvering Trump Pardons, *Slate*, Nov. 3, 2017, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/robert_mueller_s_brilliant_strategy_for_outmaneuvering_trump_pardons.html; Jed Shugerman, No Pardon for You, Michael Cohen, *Slate*, Apr. 17, 2018, available at <https://slate.com/news-and-politics/2018/04/new-york-should-amend-its-double-jeopardy-law-to-make-sure-trump-cant-bail-out-michael-cohen.html>.

who has pled guilty; and Michael Cohen, the as-yet unindicted focus of a separate investigation. We find that:

- Presidential pardons do not reach state prosecution. A pardon can wipe away or preempt a federal criminal conviction (or set of convictions), but state authorities, not the president, have the power to pardon state offenses. For this reason, the fact that the targets in the special counsel and Cohen investigations are facing allegations that could lead to state prosecutions means that they may still face criminal liability even if they receive a presidential pardon.
- The federal protection against double jeopardy does not prohibit successive state and federal prosecutions for the same crime. The constitutional protection against double jeopardy applies only to each sovereign, and the individual states as well as the federal government are independent sovereigns.
- State protections against double jeopardy are sometimes more expansive than the federal protection; however, they cannot be relied upon to pose a bar to successive prosecutions. Some state double jeopardy provisions do prohibit successive state and federal prosecutions where the federal prosecution has either gone to trial or resulted in a guilty plea; however, state crimes that are sufficiently distinct from the federal offenses tried or admitted may still be brought.
- A presidential pardon would, moreover, not shield defendants from exposure to federal and state civil litigation, including civil asset forfeiture. While civil litigation is generally less worrisome than criminal prosecution, it brings no shortage of its own worries. Because a pardon would not impact civil litigation related to criminal offenses under investigation by the special counsel, property and other assets owned by defendants could be subject to civil asset forfeiture despite pardons for their criminal conduct. Individuals also could still face civil sanctions such as professional censure, and in some civil litigation settings courts have even found acceptance of a pardon to be evidence of guilt.

Finally, we shift our focus to the president and explain what he risks if he seeks to impede the special counsel investigation by pardoning key defendants. We find that:

- An obstructive pardon would expose President Trump to additional liabilities. Such a pardon would potentially constitute an impeachable abuse of power for which there is clear precedent in the articles of impeachment drafted by the House Judiciary Committee against President Nixon; it would expose the president to criminal liability for bribery, gratuities, and obstruction of justice for which he could be indicted after he leaves office (and possibly also before); and it could constitute an admission of guilt that President Trump's campaign, transition team, and/or White House engaged in criminal misconduct.

II. Key Subjects of the Russia and Cohen Investigations Face Exposure to State Crimes that the President Cannot Pardon

Any strategy to use pardons to impede an ongoing criminal investigation depends on the president's ability to undermine the leverage that prosecutors have on the subjects, targets, and defendants in those investigations. The fundamental problem facing President Trump in the special counsel and Michael Cohen investigations is that his power to do so is incomplete — the president has no power to pardon state crimes.⁴

In this section, we explain that the allegations facing key individuals in both investigations support state charges as well as federal ones. By way of example, we focus on Paul Manafort, who is the subject of two federal indictments, and his deputy, Rick Gates, who has already pled guilty to two federal offenses. Both face state criminal exposure for laundering proceeds of their work lobbying for the Ukrainian government. Michael Cohen, who is facing a federal criminal investigation for his role in allegedly negotiating agreements with women in exchange for their silence about sexual encounters with Mr. Trump, may be exposed to state money laundering and residential mortgage fraud charges. These three and other individuals wrapped up in these investigations could spend years in prison for state offenses that the president cannot pardon.

A. Allegations concerning Paul Manafort and Rick Gates

In the summer of 2016, Paul Manafort served as President Trump's campaign chairman and Rick Gates as his deputy.⁵ A few months later, Manafort was fired as head of the campaign; Gates, however, stayed on, and after the election became deputy chairman of President Trump's inaugural committee.⁶ Before joining the Trump campaign, Manafort and Gates worked as political consultants and lobbyists for the government of Ukraine. Manafort and Gates represented persons and entities related to Viktor Yanukovich, the Russia-friendly president of Ukraine from 2010-2014.⁷

⁴ *Ex Parte Grossman*, 267 U.S. 87, 113 (1925); U.S. Const. Article II, sec. 2.

⁵ Meghan Keneally, *Timeline of Paul Manafort's Role in the Trump Campaign*, ABC News, Oct. 30, 2017, available at <http://abcnews.go.com/Politics/timeline-paul-manaforts-role-trump-campaign/story?id=50808957>; Russ Choma, *Who is Rick Gates?*, Mother Jones, Oct. 30, 2017, available at <https://www.motherjones.com/politics/2017/10/who-is-rick-gates/>.

⁶ Choma, *Mother Jones*, Oct. 30, 2017; Michael Kranish and Tom Hamburger, *Rick Gates, once the man 'in the corner,' is now a central figure in Mueller investigation*, *The Washington Post*, Nov. 5, 2017, available at https://www.washingtonpost.com/politics/rick-gates-once-the-man-in-the-corner-is-now-a-central-figure-in-mueller-investigation/2017/11/05/716708da-bfff-11e7-97d9-bdab5a0ab381_story.html?utm_term=.c2cab804c99d.

⁷ Superseding Indictment, *United States v. Manafort*, 1:17-cr-201, dkt. no. 202 (D. D.C. Feb. 23, 2018) (henceforth "D.D.C. Superseding Indictment") at ¶ 1, available at <https://www.justice.gov/file/1038741/download>; Superseding Criminal Information, *United States v. Richard W. Gates III*, 1:17-cr-201, dkt. no. 195 (D. D.C. Feb. 2, 2018) at ¶ 1, available at <https://www.justice.gov/file/1038796/download>; Max Bearak, *Who did Manafort and Gates work for in Ukraine and Russia?*, *The Washington Post*, Oct. 30, 2017, available at https://www.washingtonpost.com/news/worldviews/wp/2017/10/30/who-did-manafort-and-gates-work-for-in-ukraine-and-russia/?utm_term=.3138b124a71e. An August 2, 2017 memorandum from Acting Attorney General Rod Rosenstein to Special Counsel Mueller identified Manafort's potential crimes colluding with Russian government officials and crimes arising out of payments from the Ukrainian governments as falling within the

1. Federal offenses

In October of 2017 and February of 2018, federal grand juries in Washington, D.C. and Alexandria, Virginia returned indictments against Manafort and Gates.⁸ The indictments charged that Manafort, Gates, and others “engaged in a scheme to hide . . . income [from their Ukraine work] from United States authorities, while enjoying use of the money” including by avoiding paying taxes on the income, by fraudulently obtaining real estate loans, by failing to disclose the existence of offshore bank accounts, and by failing to disclose to the Department of Justice that they worked for a foreign government, as required by federal law.⁹ The special counsel alleged that the scheme allowed Manafort “to enjoy a lavish lifestyle in the United States . . . spend[ing] millions of dollars on luxury goods and services . . . [and] purchas[ing] multi-million dollar properties,” which he then fraudulently used to reduce his taxable income.¹⁰ According to the original indictment, Gates, “aided Manafort in obtaining money from these offshore accounts . . . [and] used money from [them] to pay for his personal expenses, including his mortgage, children’s tuition, and interior decorating of his [home].”¹¹ According to the special counsel, over \$75 million moved through these accounts.¹² Both indictments contain criminal forfeiture allegations.¹³

As charged, the conduct in this scheme constituted several crimes under federal law: conspiracy to defraud the United States, conspiracy to launder money, failure to disclose offshore bank accounts, failure to disclose lobbying for a foreign government, and lying about lobbying for a foreign government, fraudulent tax returns, failure to disclose offshore bank accounts, and using fraud to obtain bank loans.¹⁴

Although conspiracy to violate any federal law is a crime under 18 U.S.C. § 371, the federal money laundering statute, 18 U.S.C. § 1956(h), separately makes it a crime to conspire to commit a federal money laundering offense. When Congress amended section 1856 to add the conspiracy provision in 1992, it omitted a requirement that the government prove that at least one member of the conspiracy commit an overt act in furtherance of the conspiracy — as is the

special counsel’s authority. Attachment C, *United States v. Paul J. Manafort, Jr.*, 1:17-cr-201, dkt. no. 244-3 (D. D.C. Apr. 2, 2018), available at <https://www.documentcloud.org/documents/4429802-Scopememo.html#document/p1>.

⁸ Indictment, *United States v. Manafort*, 1:17-cr-201, dkt. no. 13 (D.D.C. Oct. 30, 2017) (henceforth “D.D.C. Indictment”), available at <https://www.politico.com/f/?id=0000015f-6d73-d751-af7f-7f735cc70000>; Superseding Indictment, *United States v. Manafort*, 1:18-cr-83, dkt. no. 9 (E.D. Va. Feb. 22, 2018) (henceforth “E.D. Va. Superseding Indictment”), available at <https://www.justice.gov/file/1038391/download>.

⁹ D.D.C. Superseding Indictment, at ¶¶ 2-3.

¹⁰ *Id.* at ¶¶ 5, 17.

¹¹ D.D.C. Indictment at ¶ 5.

¹² D.D.C. Superseding Indictment at ¶ 6.

¹³ *Id.* at ¶¶ 48-50; E.D. Va. Superseding Indictment at ¶¶ 75-77.

¹⁴ D.D.C. Indictment at ¶¶ 37-51; E.D. Va. Superseding Indictment, at ¶¶ 45-74.

case in prosecutions under section 371.¹⁵ For that reason, conviction of federal conspiracy to commit money laundering only requires the government to prove an agreement between two or more individuals to commit a substantive money laundering offense and the defendant's knowing and voluntary joinder in that agreement.¹⁶

In February of 2018, Gates agreed to plead guilty to one count of conspiracy against the United States and one count of willfully and knowingly making a false statement.¹⁷ In exchange for his guilty plea, the special counsel consolidated the charges against Gates into one case in D.C. that covers some conduct from both the earlier indictments: tax fraud, concealing offshore bank accounts and concealing and lying about his work for foreign governments.¹⁸ Notably, this case does not include the money laundering count, among others that were in the original indictments.

2. Potential state offenses

The federal indictments filed against Manafort and Gates lay out conduct that would support prosecution under state law. If Manafort and Gates did in fact engage in the conduct that is alleged in the federal indictments (and by entering a guilty plea, Gates is admitting to having done at least some of what the grand juries charged), it is very likely that they broke various state laws as well.¹⁹ There is not a state counterpart for every crime charged in the Manafort and Gates indictments; for example, the requirement to disclose political work done for a foreign government is only imposed by the federal government.

¹⁵ See *Whitfield v. United States*, 543 U.S. 209, 214 (2005) (“Because the text of § 1956(h) does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction.”).

¹⁶ See, e.g., *United States v. Jarrett*, 684 F.3d 800, 802 (8th Cir. 2012) (approving jury instructions indicating that the “three essential elements of conspiracy to launder money are (1) an agreement . . . to launder money; (2) the defendant’s voluntary joinder of the agreement; and (3) the defendant’s knowing joinder of the agreement.”) (internal quotation marks omitted); accord *United States v. Prince*, 618 F.3d 551, 553–54 (6th Cir. 2010) (“To establish a money laundering conspiracy, the government must prove (1) that two or more persons conspired to commit the crime of money laundering, and (2) that the defendant knowingly and voluntarily joined the conspiracy.”).

¹⁷ Superseding Criminal Information, *United States v. Richard W. Gates III*, 1:17-cr-201-2, dkt. no. 195 (D. D.C. Feb. 2, 2018), ¶¶ 37-39.

¹⁸ *Id.*

¹⁹ Because many banks and other businesses are either located or incorporated in New York or Delaware, it is likely that some illegal conduct may have occurred in one or both of those states; because Manafort lived in Florida and Virginia (along with New York), and Gates lived in Virginia, it is also possible that illegal conduct occurred in those states. It is conceivable that other defendants in the special counsel investigation may be exposed to prosecution in other states, including Delaware, Maryland, New Jersey, and Pennsylvania. For instance, the special counsel investigation has reportedly probed former National Security Adviser Michael Flynn’s involvement in a possible plot to unlawfully extradite a Turkish cleric from his home in Pennsylvania. See James V. Grimaldi, Shane Harris, and Aruna Viswanatha, *Mueller Probes Flynn’s Role in Alleged Plan to Deliver Cleric to Turkey*, *Wall Street Journal*, Nov. 10, 2017, available at <https://www.wsj.com/articles/mueller-probes-flynn-s-role-in-alleged-plan-to-deliver-cleric-to-turkey-1510309982>.

Perhaps the best example of a direct counterpart is New York's money laundering statute, which substantially replicates the federal statute.²⁰ New York courts applying the state money laundering statute turn to case law interpreting the federal statute in their analysis given the overarching similarities.²¹ But Manafort's and Gates's exposure to possible state prosecution extends far beyond money laundering. In New York alone, plausible charges include criminal tax fraud,²² scheme to defraud,²³ falsifying business records,²⁴ and conspiracy.²⁵ Determining conclusively which state or states, if any, would have jurisdiction to prosecute Manafort's and Gates's conduct would require information that is currently not public; however, we have a high degree of confidence that the evidence that the special counsel investigation has yielded would support state charges that could result in stiff terms of imprisonment.

B. Allegations concerning Michael Cohen

On April 9, 2018, the FBI searched and seized communications from the office, home, and temporary hotel residence of Michael Cohen,²⁶ a New York lawyer and businessman who has worked for President Trump for over a decade.²⁷ These searches were conducted pursuant to search warrants executed by the U.S. Attorney's Office for the Southern District of New York. Prosecutors reportedly are examining Cohen's involvement in negotiating non-disclosure arrangements with women who had relationships with Trump and other Cohen business activities.²⁸ Representatives of the office handling the investigation have disclosed in court

²⁰ New York sets forth four degrees of money laundering, *see* Penal Law §§ 470.05, 470.10, 470.15, 470.20, and the statutes defining those four degrees include a total of 19 subdivisions where the defined money laundering crimes within those subdivisions are divided into the same three classifications as the federal statute (transaction, transportation and sting operation). *See* William C. Donnino, Practice Commentary to § 470.00 (McKinney). Penalties for violations turn on factors including the value of the property at issue and whether the conduct involves a drug-trafficking offense, and can range from no greater than \$5,000 for a "fourth degree" money laundering offense to fines exceeding \$1,000,000 for "first degree" violations. *Id.*

²¹ *See, e.g., People v. Rozenberg*, 862 N.Y.S.2d 895, 897 (Sup. Ct. 2008) (applying federal case law interpreting the federal statute because the New York money laundering statute was modeled on the federal statute).

²² *See* N.Y. Tax Law §§ 1802-06.

²³ *See* N.Y. Penal Law §§ 190.60, 190.65.

²⁴ *See* N.Y. Penal Law §§ 175.05, 175.10.

²⁵ *See* N.Y. Penal Law §§ 105.00 *et seq.*

²⁶ Matt Apuzzo, F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful', *The New York Times*, Apr. 9, 2018, available at <https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html>.

²⁷ Michael Schwirtz, William K. Rashbaum, and Danny Hakim, Trump Foot Soldier Sidelined Under Glare of Russia Inquiry, *The New York Times*, Jul. 2, 2017, available at <https://www.nytimes.com/2017/07/02/us/politics/michael-cohen-donald-trump.html>.

²⁸ Apuzzo, *The New York Times*, Apr. 9, 2018; Michael Rothfeld, Erica Orden, and Joe Palazzolo, Trump Lawyer Michael Cohen Used the Same Delaware Company for Payment Deals to Two Women, *Wall Street Journal*, Apr. 15, 2018, available at <https://www.wsj.com/articles/trump-lawyer-michael-cohen-used-the-same-delaware-company-for-payment-deals-to-two-women-1523835216>.

filings that Cohen “is being investigated for criminal conduct that largely centers on his personal business dealings.”²⁹

While the U.S. Attorney’s Office for the Southern District of New York has not publicly detailed the scope of its investigation, one area of focus reportedly is a \$130,000 payment Cohen made shortly before the November 8, 2016 presidential election to Stephanie Clifford, a former adult film actress also known by her stage name of “Stormy Daniels.”³⁰ Allegations by Daniels in a separate civil lawsuit³¹ against Trump and Cohen and public statements by Trump and Cohen have raised questions about whether the payment constituted a campaign contribution that violates election laws and whether this transaction involved federal bank or wire fraud violations.³²

Daniels claims she began an “intimate” relationship with Trump in 2006 and that relationship continued through 2007. According to Daniels, following the October 7, 2016, *Washington Post* disclosure of the “Access Hollywood” tape on which Trump discussed groping women, she sought to publicly discuss details of her relationship with Trump, and Cohen drafted an agreement providing for her silence. Terms of this document included the \$130,000 payment and conditions applying to a third party, which Daniels asserts was Donald Trump using the pseudonym “David Dennison.” The document includes three signatory lines: Daniels aka “Peggy Peterson,” “Dennison,” and “Essential Consultants LLC,” an entity Cohen allegedly established in Delaware on October 17, 2016. Daniels, and Cohen on behalf of Essential Consultants LLC, signed the document on October 28, 2018, but neither Trump nor anyone else purporting to be “Dennison” ever signed it.³³

President Trump has acknowledged that Cohen represented him in the “crazy Stormy Daniels deal,”³⁴ but he has denied he was aware of the \$130,000 payment to Daniels.³⁵ The

²⁹ Gov’t’s Opp. to Michael Cohen’s Mot. for a Temporary Restraining Or., *Michael Cohen v. United States*, 18-mj-03161 (Apr. 13, 2018), at 1, available at <https://www.politico.com/f/?id=00000162-db0f-d230-a36b-ffffb9e30000>.

³⁰ Michael Rothfeld and Joe Palazzolo, *Trump Lawyer Arranged \$130,000 Payment for Adult-Film Star’s Silence*, *Wall Street Journal*, Jan. 12, 2018, available at <https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678>.

³¹ CBS News, *Stormy Daniels amends complaint to include Trump attorney, defamation claim*, Mar. 26, 2018, available at <https://www.cbsnews.com/news/stormy-daniels-amends-complaint-to-include-trump-attorney-defamation-claim/>; First Amended Complaint, *Clifford v. Trump*, No. 18-CV-02217 (Mar. 26, 2018, C.D. Ca.), available at <https://www.courthousenews.com/wp-content/uploads/2018/03/StormyDanielsAmended.pdf>. Defendants removed the case to federal court on March 18, 2018.

³² See Carol D. Leonnig, Tom Hamburger, and Devlin Barrett, *Trump attorney Cohen is being investigated for possible bank fraud, campaign finance violations*, *The Washington Post*, Apr. 9, 2018, available at https://www.washingtonpost.com/politics/fbi-seizes-records-related-to-stormy-daniels-in-raid-of-trump-attorney-michael-cohens-office/2018/04/09/e3e43cf4-3c30-11e8-974f-aacd97698cef_story.html?utm_term=.b401eba8acf2.

³³ CBS News, Mar. 26, 2018; First Amended Complaint, *Clifford v. Trump*.

³⁴ Fredreka Schouten, *Trump alters story on Michael Cohen and lawyers immediately pounce on his words*, *USA Today*, Apr. 26, 2018, available at <https://www.usatoday.com/story/news/politics/2018/04/26/donald-trump-fox-and-friends-interview-michael-cohen-stormy-daniels-fbi-raid-federal-prosecutors/553351002/>.

³⁵ Jenna Johnson, Emma Brown and Frances Stead Sellers, *Trump says he didn’t know his attorney paid \$130,000 to porn star Stormy Daniels*, *The Washington Post*, Apr. 5, 2018, available at

veracity of this claim has been called into question by recent statements by the president's attorney, Rudy Giuliani.³⁶ Cohen has stated that “[n]either the Trump Organization nor the Trump campaign was a party to the transaction with Ms. Clifford, and neither reimbursed me for the payment, either directly or indirectly.”³⁷ Cohen further has said he transferred funds for the payment from his home equity line to the LLC's account with his bank.³⁸

Daniels has requested that the court issue an order declaring the non-disclosure document null and void. She further asserts that Cohen, “through intimidation and coercive tactics” in January 2018 forced her to sign a denial of her relationship with Trump.³⁹ In March, she amended her claim against Cohen to add defamation charges based on his public statements after Daniels filed the lawsuit.⁴⁰ The court recently granted Cohen's request to stay proceedings after Cohen asserted he would plead the Fifth Amendment in light of the federal criminal inquiry.⁴¹

Cohen has apparently used Essential Consultants LLC for other transactions, including “hush” payments to other women such as one allegedly on behalf of Elliott Broidy, former deputy finance chair of the Republican National Committee.⁴² It is not clear whether Cohen's role in facilitating this payment is under investigation.

1. Potential federal offenses

One major issue on which Cohen faces potential civil and criminal liability concerns the question of whether the payment to Clifford constituted a campaign contribution that violated federal election law. In any election cycle, the cap on total contributions by any individual to any campaign committee is \$2,700, and “contributions” encompass “anything of value made by any person for the purpose of influencing any election for Federal office,” including in-kind

https://www.washingtonpost.com/politics/trump-says-he-didnt-know-his-attorney-paid-130000-to-porn-star-stormy-daniels/2018/04/05/ef038dc6-3913-11e8-8fd2-49fe3c675a89_story.html?utm_term=.5202ac065422.

³⁶ Michael D. Shear and Maggie Haberman, *Giuliani Says Trump Repaid Cohen for Stormy Daniels Hush Money*, *New York Times*, May 2, 2018, available at <https://www.nytimes.com/2018/05/02/us/politics/trump-michael-cohen-stormy-daniels-giuliani.html>.

³⁷ Maggie Haberman, *Michael D. Cohen, Trump's Longtime Lawyer, Says He Paid Stormy Daniels Out of His Own Pocket*, *The New York Times*, Feb. 13, 2018, available at <https://www.nytimes.com/2018/02/13/us/politics/stormy-daniels-michael-cohen-trump.html>.

³⁸ Leonnig, Hamburger, and Barrett, *The Washington Post*, Apr. 9, 2018.

³⁹ First Amended Complaint, *Clifford v. Trump*, ¶ 26,

⁴⁰ Amanda Lee Myers, *Judge agrees to delay Stormy Daniels' lawsuit against Trump*, *AP News*, Apr. 28, 2018, available at <https://apnews.com/d35efb522fa444f59fbb2baff55c095e/Judge-agrees-to-delay-Stormy-Daniels-lawsuit-against-Trump>; CBS News, Mar. 26, 2018.

⁴¹ Scott Glover, *Michael Cohen asserts Fifth Amendment rights in Stormy Daniels case*, *CNN*, Apr. 26, 2018, available at <https://www.cnn.com/2018/04/25/politics/michael-cohen-fifth-amendment/index.html>.

⁴² Rebecca R. Ruiz and Jim Rutenberg, *R.N.C. Official Who Agreed to Pay Playboy Model \$1.6 Million Resigns*, *The New York Times*, Apr. 13, 2018, available at <https://www.nytimes.com/2018/04/13/us/politics/elliott-broidy-michael-cohen-payout.html>; Rothfeld, Orden, and Palazzolo, *Wall Street Journal*, Apr. 15, 2018.

contributions. If, as Daniels claims in her lawsuit,⁴³ the purpose of the \$130,000 payment was keeping Daniels silent in the weeks just before the November 8 election to help Trump win, that payment may constitute an in-kind contribution to the Trump campaign in violation of individual contribution limits.⁴⁴

An additional issue for Cohen concerns the fact that he reportedly used his Trump Organization email in communications with his bank on the transfer of \$130,000 to Daniels's attorney. Federal election law prohibits corporations from making contributions to political candidates or committees and from "facilitating the making of such contributions to candidates or political committees."⁴⁵ If the \$130,000 payment were found to be an in-kind contribution and if Cohen was acting on behalf of the Trump Organization, he may face legal exposure relating to facilitating prohibited corporate campaign contributions.⁴⁶

Cohen may face additional exposure for helping the Trump campaign or candidate Trump evade campaign finance reporting requirements that may apply to the Daniels payment. Campaigns must submit reports to the Federal Election Commission (FEC) on contributions of \$200 or more received from any individual and expenditures over \$200 made to any individual.⁴⁷ While candidates may generally make unlimited expenditures on their own campaigns,⁴⁸ they must be reported as in-kind contributions. It appears that the Trump campaign did not report the \$130,000 payment to Daniels as either a contribution or expenditure.⁴⁹ If prosecutors can show that the Daniels payment is considered either a campaign contribution or expenditure and Cohen coordinated with Trump to conceal this payment from the FEC, they may have grounds for charging Cohen with conspiracy to defraud the United States by interfering with the FEC's ability to conduct oversight over campaign spending.⁵⁰

Beyond election law violations, prosecutors reportedly are examining whether Cohen's conduct violates federal bank and wire fraud laws.⁵¹ By Cohen's own public account, he transferred funds from his "home equity line" for purposes of the Daniels payment. Further, press accounts indicate the bank subsequently had concern about this transaction, flagging it as suspicious to the Treasury Department.⁵² If the payment to Daniels involved deceiving his

⁴³ First Amended Complaint, *Clifford v. Trump*, No. 18-cv-02217 (C.D. Ca. Mar. 26, 2018), available at <https://www.courthousenews.com/wp-content/uploads/2018/03/StormyDanielsAmended.pdf>.

⁴⁴ See Complaint (Amended), *Common Cause v. Trump*, MUR No. 7313 (Mar. 12, 2018), available at <https://www.commoncause.org/media/president-trump-added-to-amended-doj-and-fec-complaints-related-to-stormy-daniels-hush-money-payment/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 52 U.S.C. § 30104(b)(3)(a).

⁴⁸ *Buckley v. Valeo*, 424 U.S. 1, 51-54 (1976).

⁴⁹ Complaint, *Common Cause v. Trump*.

⁵⁰ *Id.*

⁵¹ Leonnig, Hamburger, and Barrett, *The Washington Post*, Apr. 9, 2018.

⁵² *Id.*

financial institution about the intended use of the funds, prosecutors may be able to show Cohen violated the federal statutory prohibition on making false representations in order to obtain funds from a financial institution.⁵³ Depending on the circumstances of Cohen’s communication with financial institutions in obtaining funds for the Daniels payment, he may also face liability under the federal wire fraud statute, which prohibits use of interstate electronic communication to execute fraud to obtain money.⁵⁴

Because Cohen is reportedly under investigation for financial transactions that used a taxi business he ran as collateral, Cohen’s liability may extend much further.⁵⁵ Public records indicate that Cohen took out a loan for an undisclosed amount in 2014 from New York-based Sterling National Bank and a separate \$1.98 million real estate loan with his in laws from the same bank in 2015.⁵⁶

All told, these potential criminal violations carry substantial penalties. For example, a single conviction under the bank fraud statute could result in up to \$1 million in fines and up to 30 years in prison,⁵⁷ while a wire fraud violation could result in fines of up to \$250,000⁵⁸ and imprisonment of up to 20 years.⁵⁹

2. Potential state offenses

Since New York state election law requirements on contribution and expenditure limits and reporting requirements apply to state, not federal candidates,⁶⁰ the FEC requirements discussed above do not have counterparts in New York State law relevant to the Daniels payment.⁶¹ Several anti-fraud provisions of the New York penal code, however, may be applicable to the financing aspect of Cohen’s actions. For one, New York bars conduct involving “intent to defraud more than one person” or “to obtain property from more than one person by

⁵³ See 18 U.S.C. § 1344.

⁵⁴ See 18 U.S.C. § 1343.

⁵⁵ Rosalind S. Helderman, Tom Hamburger, and Carol D. Leonnig, [FBI raid sought Trump lawyer’s communications with bank that loaned him money against his taxi business](https://www.washingtonpost.com/politics/fbi-raid-sought-trump-lawyers-communications-with-bank-that-loaned-him-money-against-his-taxi-business/2018/04/12/5c42549c-3ddf-11e8-974f-aacd97698cef_story.html?utm_term=.c63435b63631), *The Washington Post*, Apr. 12, 2018, available at https://www.washingtonpost.com/politics/fbi-raid-sought-trump-lawyers-communications-with-bank-that-loaned-him-money-against-his-taxi-business/2018/04/12/5c42549c-3ddf-11e8-974f-aacd97698cef_story.html?utm_term=.c63435b63631.

⁵⁶ *Id.*

⁵⁷ 18 U.S.C. § 1344.

⁵⁸ 18 U.S.C. § 3571(b)(3).

⁵⁹ 18 U.S.C. § 1343.

⁶⁰ See, New York State Board of Elections Handbook (2016), at 41 (stating “filing requirements do not apply to ... federal candidates or committees filing with the Federal Election Commission ... where the activity solely pertains to federal office”) (<https://www.elections.ny.gov/NYSBOE/download/finance/hndbk2016.pdf>).

⁶¹ Professor Jed Shugerman, however, has argued that if Cohen were found to have been involved in meeting with Russians to collude to influence the campaign, he may be liable under New York State laws prohibiting conspiring unlawfully to influence an election. Shugerman, *Slate*, April 17, 2018.

false or fraudulent pretenses.”⁶² A separate New York law specifically prohibits fraud in refinancing or modifying residential mortgage loans.⁶³ State prosecutors may be able to show a violation of both of these laws if Cohen’s strategy of using his home equity line to free up funds for Daniels involved misrepresentations to his bank about a residential mortgage and if he replicated that approach with the other women with whom he reportedly negotiated “hush money” arrangements. As mentioned above, Cohen’s business practices are also reportedly under investigation, which could substantiate similar state offenses.⁶⁴

III. State Double Jeopardy Laws Cannot Be Relied Upon to Preclude Prosecution of State Criminal Violations of Key Defendants

In this section, we anticipate and rebut the principal counterargument to our claim that the president cannot pardon state crimes — the possibility that double jeopardy protections will prevent those pardoned for federal crimes from being prosecuted by states. The problem with this argument is that federal and state protections against double jeopardy are in fact limited and in many scenarios would not pose an obstacle to state prosecution. The federal constitutional right does not generally bar successive state and federal prosecutions for the same conduct. And while state double jeopardy protections are in some cases stronger, those protections only apply when the federal prosecution has reached a certain stage, and do not necessarily bar state prosecution where state offenses involve different elements and conduct from federal charges that were tried or accepted in a guilty plea. Using the examples of Manafort, Gates, and Cohen, we show that even when state double jeopardy protections are factored in, presidential pardons will not guarantee key individuals in these investigations a shield from criminal liability.

A. The Double Jeopardy Clause of the United States Constitution does not prohibit successive federal and state prosecutions

A starting point for this analysis is the protection provided defendants by the Fifth Amendment of the U.S. Constitution, which states that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb”⁶⁵ and applies to the states under the Fourteenth Amendment.⁶⁶ The Supreme Court has found that the Double Jeopardy Clause applies only within a sovereign entity, and since the federal government and states have overlapping but separate sovereignties, each can bring its own prosecutions for the same acts.⁶⁷ Further, federal and state officials may coordinate in such prosecutions without implicating the

⁶² N.Y. Penal Code § 190.65.

⁶³ N.Y. Penal Code § 187.

⁶⁴ Helderman, Hamburger, Leonnig, *The Washington Post*, Apr. 12, 2018.

⁶⁵ U.S. Const. Amend. V.

⁶⁶ *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.”).

⁶⁷ *Bartkus v. Illinois*, 359 U.S. 121 (1959).

Double Jeopardy Clause of the Fifth Amendment.⁶⁸ For this reason, the Fifth Amendment protection against double jeopardy would not bar state investigators from pursuing the state offenses discussed in section II even if the individuals being prosecuted received a presidential pardon for federal offenses that criminalize the same conduct.⁶⁹

B. State double jeopardy protections cannot be relied upon to pose a bar to successive state and federal prosecutions

The absence of protection under the U.S. Constitution against successive prosecutions is not the end of the matter, though, because states have enacted their own prohibitions of double jeopardy. Some states impose double jeopardy protections that mirror the Supreme Court's parameters on federal constitutional double jeopardy. For example, in Maryland, courts have held that the English common law double jeopardy protections that were incorporated into the state's constitution do not bar successive state and federal prosecution.⁷⁰ The same is true in Florida, where courts have found that the double jeopardy clause does not bar two prosecutions for the same conduct by Florida and the federal government.⁷¹ In states like Maryland and Florida, a presidential pardon provides no protection against state prosecution under *state or federal law*.

Other states have established more expansive protections against double jeopardy. For example, New York, Virginia, and Delaware impose various statutory limits on state prosecution of conduct previously prosecuted at the federal level. New York's criminal procedure statute prohibits prosecutions for "two offenses based on the same act or criminal transaction,"⁷² whether or not they are federal or state offenses. In Virginia, the double jeopardy statute

⁶⁸ *Id.* at 133. See also *United States v. Lanza*, 260 U.S. 377, 382 (1922) ("The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy."); *Abbate v. United States*, 359 U.S. 187, 194 (1959) (declining to overrule *Lanza* and referencing cases relying on it as establishing "the general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts").

⁶⁹ New York's Attorney General has proposed that the legislature amend the state's double jeopardy law to ensure that a state prosecution is not barred in cases where a federal prosecution has been annulled by a presidential pardon. Shugerman, *Slate*, April 17, 2018. We would of course welcome that change to New York law (and to other states with similar double jeopardy provisions). In this paper, however, we focus on the latitude that may exist under existing law, including in New York.

We note furthermore that many of the alleged crimes affect multiple states. Thus, if the \$130,000 hush payment turns out to have been part of an illegal scheme involving bank, wire, and other frauds, there may be liability not only under the laws of New York, should transfer of the funds have been initiated there, but also California, the apparent destination of the funds. Other states too may have been affected, and so have jurisdiction. That determination must await further fact finding.

⁷⁰ *Evans v. State*, 301 Md. 45, 58 (1984) ("[T]his Court has adopted, as a matter of Maryland common law, the dual sovereignty concept delineated in the Supreme Court's *Bartkus* and *Abbate* cases.").

⁷¹ *Booth v. State*, 436 So. 2d 36, 37 (Fla. 1983) ("In allowing prosecutorial discretion in such situations, we perceive no violation of constitutional guarantees against double jeopardy and accordingly adhere to the doctrine of dual sovereignty established by federal and Florida case law.").

⁷² N.Y. Crim. P. L. § 40.10(2); 40.20.

expressly provides that a federal prosecution of an act that is “a violation of both a state and a federal statute” bars prosecution under the state statute,⁷³ and the Delaware code imposes a similar prohibition.⁷⁴

However, the filing of an indictment is not sufficient for double jeopardy protections to attach. Instead, double jeopardy attaches where either the action (1) terminates in a conviction upon a plea of guilty;⁷⁵ or (2) proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.⁷⁶ The authorities we have found that address this point also suggest that jeopardy also does not attach with respect to charges that were dropped prior to trial⁷⁷ or excluded from a plea agreement.⁷⁸

Finally, states with double jeopardy statutes have codified exceptions to the rule barring successive federal and state prosecutions. A broad and common exception allows successive prosecution when there is a substantial difference between the offense to which a defendant has already been in jeopardy and the one for which he is being prosecuted.⁷⁹ For example, prior prosecution of a federal offense is not a bar to a prosecution of a similar New York offense where the two offenses have substantially different elements and the acts establishing each offense are clearly distinguishable⁸⁰ or where each offense has an element that is not in the other

⁷³ Va. Code § 19.2-294. Virginia courts evaluating whether there are separate acts sustaining separate offenses review “whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute.” *Hundley v. Com.*, 193 Va. 449, 451 (1952). “In determining whether the conduct underlying the convictions is based upon the ‘same act,’ the particular criminal transaction must be examined to determine whether the acts are the same in terms of time, situs, victim, and the nature of the act itself. *Hall v. Com.*, 14 Va. App. 892, 898 (1992).

⁷⁴ Del. Code Ann. tit. 11, § 209.

⁷⁵ N.Y. Crim. P. L. § 40.30; *Peterson v. Com.*, 5 Va. App. 389, 395, 363 S.E.2d 440, 444 (1987) (“Where there is no trial at all, but rather a plea of guilty, as in the case at bar, jeopardy attaches when the court accepts the defendant’s plea.”); 11 Del. C. 207; *Rawlins v. Kelley*, 322 So. 2d 10, 12-13 (Fla. 1975).

⁷⁶ N.Y. Crim. P. L. § 40.30; *Martin v. Com.*, 242 Va. 1, 8, 406 S.E.2d 15, 18 (1991) (“[J]eopardy attaches only after a jury is empaneled and sworn in a jury trial or the first witness is sworn in a bench trial”); *Tarr v. State*, 486 A.2d 672, 674 (Del. 1984); *State v. Korotki*, 418 A.2d 1008, 1012 (Del. Super. 1980); *Rawlins v. Kelley*, 322 So. 2d 10, 12-13 (Fla. 1975).

⁷⁷ See *State v. Carter*, 452 So. 2d 1137, 1139 (Fla. Dist. Ct. App. 1984) (double jeopardy does not bar refiling of charges dismissed pre-trial). *C.f. United States v. Lewis*, 844 F.3d 1007, 1010 (8th Cir. 2017) (“The four counts in the 2010 indictment were dismissed before a jury was empaneled. Jeopardy did not attach during any of the pretrial proceedings.”); *Midgett v. McClelland*, 547 F.2d 1194, 1196 (4th Cir. 1977) (“Putting him to trial on the assault charge after he had been put to trial on that charge once, the prosecution dropping the charge only after the testimony was in, was clearly a violation of Midgett’s right not to be put in jeopardy twice.”).

⁷⁸ See *Ohio v. Johnson*, 467 U.S. 493, 494 (1984) (holding that a defendant who pled guilty to two of four charges in an indictment could still be prosecuted on the remaining two offenses, without violating the Double Jeopardy Clause). See also *United States v. Abboud*, 273 F.3d 763, 766 (8th Cir. 2001) (rejecting a double jeopardy defense where conspiracy charges were brought after having been dropped in a previous prosecution as part of a plea agreement).

⁷⁹ See, e.g., Del. Code Ann. tit. 11, § 208; N.J. Stat. § 2C:1-11; 18 Pa. Stat. and Cons. Stat. § 111.

⁸⁰ N.Y. Crim. P. L. § 40.20(2)(a).

and the “statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil.”⁸¹ Delaware allows prosecution in cases where the offense requires proof of a fact not required by the former offense “and the law defining each of the offenses is intended to prevent a substantially different harm or evil.”⁸² For this reason, recipients of a federal pardon for federal offenses to which jeopardy has attached may not necessarily avoid prosecution for state offenses that penalize some of the same conduct.

C. Scenarios under which state prosecutors could pursue criminal charges despite a presidential pardon

There are therefore a multitude of scenarios in which a federal pardon will impose no impediment to state prosecution, even when double jeopardy concerns are implicated. In the following subsections, we focus on three of the most relevant considerations to the special counsel and Michael Cohen investigations: (1) a pre-trial pardon of a defendant will not provide any protection against state prosecution for any offense; (2) a pardon granted after an individual has pled guilty will only bar state prosecution of offenses that are identical (or nearly identical) to the federal offenses pleaded; (3) a pardon granted after an individual’s trial has commenced may not bar state prosecution of offenses that are sufficiently distinct from the federal charges he is facing (or faced).

1. Pardons issued to defendants who are awaiting trial and have not pled guilty will not foreclose prosecution of *any* state offense

Pardoning an individual who is awaiting trial (and has not pled guilty) would pose no impediment to the prosecution of any state offense. This is for a very simple reason: jeopardy has yet to attach the first time, so no analysis is needed as to whether it might attach a second, impermissible time during a state prosecution.

At the time of publication, Paul Manafort and Michael Cohen fall into this category. Manafort has been indicted by two different grand juries and is awaiting trial in both cases; meanwhile, Michael Cohen is likely the target of a grand jury investigation and there are signs that he will face indictment soon. A pardon granted to either man — or anyone else who is under investigation or has been indicted but is still awaiting trial — would therefore provide them no protection from state prosecution.

2. Those who have already pled guilty to federal offenses may still be subject to state prosecution

When a defendant and prosecutor reach agreement on a guilty plea, it is not unusual for the defendant to plead guilty to a subset of the offenses on which the prosecution has gathered evidence.⁸³ This means that even if a defendant and federal prosecutor finalize a deal where the

⁸¹ N.Y. Crim. P. L. § 40.20(2)(b).

⁸² Del. Code Ann. tit. 11, § 209.

⁸³ See, e.g., *A Comparative Look at Plea Bargaining*, William and Mary L. Rev. vol. 57, article 4, at 1165 (2016) (noting that while occasionally plea agreements involve dismissing all charges, that “[m]ore often, the prosecution

prosecutor agrees to drop certain charges in exchange for guilty pleas on other charges, the defendant may remain legally liable for state prosecution concerning conduct underlying the dropped charges.

The plea agreement between the Office of the Special Counsel and Rick Gates (the “Gates plea”), entered on February 23, 2018, provides a case in point.⁸⁴ As discussed above, prior to reaching the plea agreement with Gates, the special counsel secured indictments from two separate grand juries charging Gates and Manafort with a total of 37 counts including conspiracy against the United States, conspiracy to launder money, false and misleading statements concerning the Foreign Agents Registration Act, false statements, failure to file reports of foreign bank and financial accounts, bank fraud, tax fraud, and bank fraud conspiracy.⁸⁵ Ultimately, the plea deal struck between Gates and the government allows him to plead guilty to two counts in a superseding information: conspiracy against the United States in violation of 18 U.S.C. 371, and making a false statement to the Special Counsel’s Office in violation of 18 U.S.C. 1001;⁸⁶ in exchange, the government has promised to dismiss the remaining counts in the indictments of Gates at the time of sentencing, upon completion of full cooperation promised within the agreement.⁸⁷

Thus, at this juncture in the special counsel’s investigation, even if Gates were to receive a presidential pardon that covers all of the federal crimes that he originally faced in the two indictments and the new false statement charge in the superseding information, jeopardy would only have attached to the two charges to which Gates pled guilty. That is significant because some counts dismissed by the government have clear state analogues.

3. Even if Trump waits until a trial is underway, there is no guarantee that he will be able to block subsequent state prosecution

Even if President Trump sought to maximize the disruptive effective of a pardon by waiting until jeopardy attaches when a defendant’s trial commences, he is unlikely to be able to completely foreclose subsequent state prosecution.

While a presidential pardon after empanelment of a jury would trigger double jeopardy protections in some states concerning the conduct prosecuted in those trials, defendants could nonetheless face potential legal exposure to state prosecution. First, the indictments in the federal cases may not reach the full scope of potentially applicable offenses. Second, the federal prosecutors may choose to bring to trial only a subset of the charges laid out in the indictments,

will agree to limit the number and type of charges brought or to dismiss certain counts”), available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3636&context=wmlr>.

⁸⁴ Plea Agreement, *United States v. Gates*, No. 17-cr-201 (Feb. 23, 2018), available at <https://www.justice.gov/file/1038801/download>.

⁸⁵ See D.D.C. Indictment; E.D. Va. Superseding Indictment.

⁸⁶ Plea Agreement, *United States v. Gates*, No. 17-cr-201 (Feb. 23, 2018), available at <https://www.justice.gov/file/1038801/download>.

⁸⁷ *Id.*

leaving the remaining conduct unaffected by any state prohibition on successive federal and state prosecution. This would be an unusual step, but is one federal prosecutors could take specifically to avoid double jeopardy problems. A third scenario provides additional legal liability for defendants despite any prospect of a pardon: a state offense may be sufficiently distinct from the federal offenses prosecuted at trial such that there is no double jeopardy protection even where the jury has been empaneled and prosecution proceeds.

Consider, for example, Paul Manafort's legal exposure for criminal prosecution in New York state concerning conduct relating to his federal indictment for money laundering. As discussed above, the federal money laundering count cites evidence that Manafort engaged in a wide variety of financial transactions across several different states in order to conceal illegally obtained income. One subset of this conduct raises the specter of a violation of New York state criminal laws prohibiting real estate fraud.

Specifically, the indictment states that Manafort directed some of his illegally obtained income to real estate purchases in Manhattan and Brooklyn, New York, in order to evade tax laws and conceal this income.⁸⁸ Manafort allegedly enhanced his liquidity through these purchases by obtaining a \$3.185 million loan on one of these properties based on misrepresentations that it was owner-occupied and deserved a more favorable loan rate, and by obtaining a \$5,000,000 loan on the other property based on misrepresentations that he was seeking funds for construction purposes.⁸⁹ These actions raise questions about potential violations of New York penal code provisions barring the presentation of statements applying for, underwriting, or closing a residential mortgage loan, where an individual knowingly and with fraudulent intent includes "materially false information" concerning material facts.⁹⁰ If proceeds of such conduct, as allegedly is the case with Manafort, exceed \$1,000,000, penalties include jail time of up to 25 years.⁹¹

Thus, if a federal trial proceeded on charges other than conspiracy to commit money laundering, Manafort could potentially remain exposed to substantial penalties in New York on real estate fraud charges alone. Even if the special counsel proceeded with a federal trial that included money laundering charges, it is possible he could determine that the breadth of alleged money laundering transactions beyond those with a nexus to New York create sufficient support for the federal money laundering count at trial, and exclude from consideration at trial any evidence involving New York real estate transactions. In this scenario as well, Manafort could take little comfort that a pardon for any federal money laundering conviction would protect him from real estate fraud charges in New York.

⁸⁸ Entities used in the alleged scheme included New York entities "MC Brooklyn Holdings, LLC," and "MC Soho Holdings, LLC," D.D.C. Superseding Indictment at ¶ 11; the transfer of funds to several vendors in New York without reporting those funds as income, *id.* at ¶ 15; the purchase of real estate in New York without reporting funds used as income, *id.* at ¶ 17; the allegedly disguised loans used to purchase real estate in New York, *id.* at ¶ 16; deposit of transferred funds in a number of banks that could include New York banks, *id.* at ¶ 18.

⁸⁹ *Id.* at ¶¶ 33-36.

⁹⁰ N.Y. Penal Law § 187.00.

⁹¹ N.Y. Penal Law §§ 70.00, 187.25.

Further, beyond Manafort's potential legal exposure concerning real estate fraud charges, both the New York state attorney general and the Manhattan district attorney reportedly are investigating Manafort for money laundering violations under New York law.⁹² To prove money laundering violations by Manafort in the state of New York, prosecutors would need to establish that he conducted a financial transaction involving proceeds of "specified criminal conduct" knowing the property was the proceed of a criminal activity and with intent to promote criminal conduct, avoid taxes, conceal the proceeds, or avoid transaction reporting requirements.⁹³

Since the federal and New York money laundering statutes are themselves not identical, and the federal indictment against Manafort charges *conspiracy* to commit money laundering, it is also possible that New York state prosecutors may find a basis for alleging Manafort committed a separate money laundering offense under New York law. In such a scenario, depending on the full factual record of Manafort's conduct, state prosecution of Manafort for money laundering following a federal prosecution for conspiracy to launder money may not be considered the same offense under New York law or may meet the exception to the New York double jeopardy bar where each offense has an element that is not in the other and the acts establishing each offense are clearly distinguishable.⁹⁴

One last observation regarding Manafort: the fact that he faces two separate trials means that for a pardon to have maximum possible impact on limiting future state prosecutions, the president would need to wait until the second jury is empaneled. Manafort's legal jeopardy for actions relating to money laundering violations illustrates this point. The Virginia grand jury proceeding, which pre-dates the D.C. grand jury proceeding, centers on offenses stemming from alleged false tax returns and bank fraud but does not involve any charges of violation of the federal money laundering statute.⁹⁵ A pardon for Manafort before the commencement of the D.C. trial would therefore leave him at risk of future state prosecution that could result in decades of jail time.

In the case of Michael Cohen as well, there are a number of strategies federal prosecutors could employ in bringing Cohen to trial that would ensure Cohen remains exposed to state prosecution even after a presidential pardon. For example, if federal prosecutors focused the

⁹² Josh Dawsey, *Mueller teams up with New York attorney general in Manafort probe*, *Politico*, Aug. 30, 2017, available at <https://www.politico.com/story/2017/08/30/manafort-mueller-probe-attorney-general-242191>; Michael Rothfeld, *New York Seeks Bank Records of Former Trump Associate Paul Manafort*, *Wall Street Journal*, Jul. 17, 2017, available at <https://www.wsj.com/articles/new-york-seeks-bank-records-of-former-trump-associate-paul-manafort-1500327062>.

⁹³ N.Y. Penal Law § 470.20. See N.Y. Penal Law § 470.00 (defining "specified criminal conduct" to mean "criminal conduct committed in this state constituting a criminal act, as the term criminal act is defined in section 460.10 of this chapter, or constituting the crime of enterprise corruption, as defined in section 460.20 of this chapter, or conduct committed in any other jurisdiction which is or would be specified criminal conduct if committed in this state"); N.Y. Penal Law § 460.10 (listing felonies that constitute a "criminal offense," including false statements, residential mortgage fraud, schemes to defraud, perjury and contempt, and money laundering).

⁹⁴ § 40.20(2)(b); see also *Robinson v. Snyder*, 259 A.D.2d 280, 281, 686 N.Y.S.2d 392, 393 (1999) ("The crime of conspiracy and the category of offenses involving possession of contraband are comprised of distinct elements and serve to prevent different kinds of harm.").

⁹⁵ See E.D. Va. Superseding Indictment.

federal trial of Cohen solely on federal election law charges and did not proceed with bank or wire fraud charges, a Trump pardon would still leave state prosecutors latitude to pursue Cohen for violation of New York state criminal laws prohibiting fraud.

* * *

For the reasons discussed above, it would be foolish for a defendant in the special counsel or Cohen investigations to think that a presidential pardon would provide complete protection against criminal liability. Double jeopardy protections — even those that attach after a pardon issued during trial — are unlikely to foreclose all of the state offenses potentially in play. It also bears repeating that there are states like Maryland and Florida in which state double jeopardy law provides no bar to successive state and federal prosecution for identical offenses.

IV. A Pardon Would Not Shield Defendants from Exposure in Civil Cases, Including Civil Asset Forfeiture Liability

The president’s ability to pardon his way out of the Russia investigation is also limited by the fact that recipients of a pardon may still be subject to civil liabilities and penalties. For that reason, civil litigation related to potential criminal offenses being investigated by the special counsel would not be impacted by a pardon. Property and other assets owned by those pardoned could still be subject to civil asset forfeiture. And in such civil proceedings, it is even conceivable that other parties may be able to use acceptance of a pardon against the recipient as evidence.

The president’s power to pardon does not extend to civil matters — including lawsuits for damages between private parties or civil actions brought by the United States.⁹⁶ This limitation on the pardon power is demonstrated most starkly by the distinctions that court have made between criminal and civil contempt of court. As the Supreme Court explained in *Ex parte Grossman*, 267 U.S. 87, 111 (1925),

[L]ong before our Constitution, a distinction had been recognized at common law between the effect of the King’s pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest and its inefficacy to halt or interfere with the remedial part of the court’s order necessary to secure the rights of the injured suitor.

⁹⁶ See, e.g., *United States v. McMichael*, 358 F. Supp. 2d 644, 647 (E.D. Mich. 2005) (“Put differently, a pardon does not erase the guilt of the underlying conviction. For example, a pardoned murderer could still be subject to civil prosecution for wrongful death.”).

Thus, criminal contempt,⁹⁷ a statutory crime that like any other must be tried and proven beyond a reasonable doubt, is a pardonable offense; however, civil contempt — failure to obey a court’s judgment in a civil suit — is not.⁹⁸

The possibility that individuals wrapped up in the Russia investigation will face civil liability is not theoretical. Three individuals who contributed to the Democratic National Committee (D.N.C.) have sued the Trump campaign and Trump associate Roger Stone for damages they suffered in conjunction with the hack of emails from the DNC and subsequent public disclosure of those emails.⁹⁹ Other similar litigation is pending.

Individuals pardoned by the president could be subject to collateral civil consequences, including restrictions on their ability to participate in certain professions. Courts have held that a pardon does not removal all sanctions that might attach to an individual’s conduct.¹⁰⁰ For instance, the D.C. Court of Appeals held that a presidential pardon did not preclude a bar association from suspending one of the attorneys implicated in the Iran-Contra Affair, despite the fact that he received a presidential pardon for his convictions.¹⁰¹ In so ruling, the court relied on a distinction between consequences that flow from the fact of conviction and consequences that stem from the conduct underlying the offence — regardless of whether the case was prosecuted.¹⁰² Because the attorney’s dishonesty before Congress violated the D.C. Bar’s code of professional responsibility, the suspension was valid even though the attorney had been pardoned.¹⁰³

⁹⁷ See 18 U.S.C. § 402.

⁹⁸ See *In re Nevitt*, 117 F. 448, 453 (8th Cir. 1902) (“ . . . an order committing a defendant for contempt in refusing to pay for a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the remedies of a party to the action is civil and remedial, and not criminal, in its nature; that it does not fall within the pardoning power of the president, because it is not an execution of the criminal laws of the land; and that it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court alone, either in the original case or in an appropriate auxiliary proceeding.”); *c.f. State v. Verage*, 177 Wis. 295, 187 N.W. 830, 834 (1922) (“[T]he king’s power to pardon did not extend to those cases where punishment in the nature of contempt was inflicted for the purpose of securing to a suitor private rights which it was the duty of the court to enforce.”).

⁹⁹ Compl., *Cockrum v. Donald J. Trump for President*, No. 17-1370 (D.D.C. Jul. 12, 2017), available at https://protectdemocracy.org/wp-content/uploads/2017/08/complaint_final.pdf.

¹⁰⁰ *In re Elliott Abrams*, 689 A.2d 6 (D.C.) (en banc), cert. denied, 117 S.Ct. 2515 (1997); see also, *Hirschberg v. Commodity Futures Trading Commission*, 414 F.3d 679, 684 (7th Cir. 2005) (“[D]enial of floor broker registration based on fraudulent conduct underlying a pardoned criminal conviction does not constitute a violation of the pardon clause.”).

¹⁰¹ *In re Elliott Abrams*, 689 A.2d at *6.

¹⁰² *Id.* at *11.

¹⁰³ *Id. Accord Hirschberg v. Commodity Futures Trading Comm’n*, 414 F.3d 679, 682-83 (7th Cir. 2005) (“Government licensing agencies may consider conduct underlying a pardoned conviction — without improperly “punishing” the pardoned individual — so long as that conduct is relevant to an individual’s qualifications for the licensed position.”); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) (“The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though

Similarly, in a second case that arose from Iran-Contra, the D.C. Circuit Court of Appeals held that an individual who had been pardoned after indictment but before conviction was not eligible to receive attorneys' fees under a statute that allowed for individuals subject to investigation to recover the costs of their representation if they were investigated but not indicted by a special counsel.¹⁰⁴ Pointing to precedent where a pardon did not justify expunging the pardon recipient's conviction records, the court reasoned that since the pardon did not "blot out guilt or expunge a judgment of conviction, one can conclude that a pardon does not blot out probable cause of guilt or expunge an indictment."¹⁰⁵

Individuals pardoned by a president might also be subject to civil forfeiture by the federal government,¹⁰⁶ which is a civil proceeding that is brought "*in rem*" (against property) that is the fruit or instrument of a criminal enterprise.¹⁰⁷ It is therefore distinct from its criminal counterpart — criminal forfeiture — which is the process by which property is seized as a component of the punishment sought in a criminal case against an individual (*i.e.* "*in personam*").¹⁰⁸ Because *in rem* civil forfeiture is a "remedial civil sanction, distinct from potentially punitive *in personam* civil penalties,"¹⁰⁹ the Supreme Court has held it does not constitute punishment subject to the Double Jeopardy Clause.¹¹⁰

Once again, the prospect of civil asset forfeiture is a very real one for defendants in the special counsel investigation. The current indictments of Paul Manafort in the federal district courts for the Eastern District of Virginia and the District of Columbia each contain criminal asset forfeiture allegations¹¹¹ that could easily be converted into a civil asset forfeiture action¹¹²

there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.").

¹⁰⁴ *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994).

¹⁰⁵ *Id.*

¹⁰⁶ 18 U.S.C § 981.

¹⁰⁷ See *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("Forfeiture of property prevents illegal uses ... by imposing an economic penalty, thereby rendering illegal behavior unprofitable"); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984) ("In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object.").

¹⁰⁸ 18 U.S.C. § 982(a)(1) ("The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.").

¹⁰⁹ *United States v. Ursery*, 518 U.S. 267, 270-71 (1996) ("These civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy Clause.").

¹¹⁰ *Id.* at 274 (1996) (explaining that "in a long line of cases, this Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment"). See also *Hudson v. United States*, 522 U.S. 93, 98-99 (1997) (holding that criminal prosecution of bank officers for misapplication of bank funds did not violate double jeopardy clause even though they had already been subject to monetary penalties and occupational debarment).

¹¹¹ D.D.C. Superseding Indictment at ¶ 49; E.D. Va. Superseding Indictment at ¶ 76.

¹¹² Civil assets derived from or traceable to money laundering, bank fraud, false statements, and wire fraud, among other offenses, are subject to forfeiture. 18 U.S.C § 981.

if Manafort were pardoned. Although civil asset forfeiture has been the subject of some controversy because of the substantial impact that it can have on an individual who is never proven guilty, the policy of the Department of Justice under the Trump Administration has been to pursue civil asset forfeiture aggressively.¹¹³

Finally, in each of these civil proceedings, there is the possibility that acceptance of a pardon might be used as evidence against the recipient — particularly if the individual takes the witness stand. The Supreme Court has held that prospective recipients of a pardon have a right to reject it in part because acceptance of a pardon implies some measure of guilt.¹¹⁴ The Federal Rules of Evidence allow evidence of a conviction that has been pardoned to be used to impeach a witness so long as the pardon was not based on a finding of rehabilitation or innocence.¹¹⁵

V. An Obstructive Pardon Would Expose President Trump to New Liabilities

The final reason why President Trump cannot pardon his way out of the Russia investigation is that doing so would increase his jeopardy, not reduce it. Issuing an obstructive pardon would have important consequences for President Trump. First, it would constitute an impeachable abuse of power for which there is clear precedent in the articles of impeachment drafted by the House Judiciary Committee against President Nixon. Second, it would expose the president to new criminal liability for obstruction of justice, witness tampering, and possibly even bribery for which he could be indicted after he leaves office (and possibly also before).

This argument does not contest, but rather presumes, the validity of an obstructive pardon, even one that is granted in the most corrupt of circumstances. Except for matters of impeachment, the president’s pardon power is absolute, and almost certainly bars federal prosecution of the recipient for the offenses covered by the pardon.¹¹⁶ As explained above, the

¹¹³ See, e.g., Jefferson Sessions, Order No. 3946-2017: Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies, Office of the Attorney General, Jul. 19, 2017, available at <https://www.justice.gov/opa/press-release/file/982611/download>.

¹¹⁴ *Burdick v. United States*, 236 U.S. 79, 90–91 (1915) (“[E]scape by confession of guilt implied in the acceptance of a pardon may be rejected, -preferring to be the victim of the law rather than its acknowledged transgressor, -preferring death even to such certain infamy.”); *id.* at 94 (“This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it.”). For discussion of the *Burdick* holding and legal debate over circumstances in which acceptance of a pardon may be viewed as admission of guilt, see Ryan Goodman, The Pardon Boomerang: Why Trump Associates May Need to Decline any Offer of a Pardon, *Just Security*, Feb. 19, 2018, available at <https://www.justsecurity.org/52775/trump-associates-decline-offer-pardon/>.

¹¹⁵ Fed. R. Evid. 609. See *McMichael*, 358 F. Supp. 2d at 647 (“The pardoned conviction may also still be used as evidence of bad character.”).

¹¹⁶ We do not address notable exceptions to the “absolute” nature of the pardon power. For instance, it seems unlikely to us that the founders intended to give the president power to issue a self-pardon. See Laurence H. Tribe, Richard Painter and Norman Eisen, No, Trump can’t pardon himself. The Constitution tells us so., *The Washington Post*, Jul. 21, 2017, available https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html?utm_term=.7f7f8f52c43f. There are also colorable arguments that a president may not issue a pardon that is inconsistent with other Constitutional protections.. Laurence H. Tribe and Ron Fein, Trump’s pardon of Arpaio can — and should — be

value of the pardon may be limited where a witness or defendant is exposed to state prosecution as well. Here, though, we explain why President Trump may not want to issue any such pardon.

A. The president’s pardon of a witness in the Russia investigation would likely constitute an impeachable abuse of power

A president’s pardoning of a witness in the Russia investigation would likely constitute an impeachable abuse of power. All presidents are required to swear or affirm that they will “faithfully execute the Office of President of the United States” and to the best of their ability, “preserve, protect and defend the Constitution of the United States.”¹¹⁷ Presidents also have a constitutional duty to “take Care that the Laws be faithfully executed.”¹¹⁸ Using the powers of the presidency to interfere with an ongoing investigation for corrupt purposes is a clear violation of the presidential oath and the presidential duty to take care that the laws be faithfully executed.

The congressional proceedings that prompted President Nixon’s resignation provide precedent for the proposition that an obstructive pardon is an impeachable offense. In July 1974, the House Judiciary Committee adopted articles of impeachment against President Nixon, the first count of which charged him with “using the powers of his high office engaged personally and through his close subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such illegal entry [into the Watergate hotel];”¹¹⁹

The House Judiciary Committee made two specific allegations in support of the first article of impeachment against Nixon that are applicable to an obstructive pardon. The Committee alleged that Nixon’s scheme included “interfering or endeavouring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special Prosecution Force, and Congressional Committees;” and “endeavouring to cause prospective defendants, and individuals duly tried and convicted, to expect favoured treatment and consideration in return for their silence or false testimony, or rewarding individuals for their silence or false testimony.”¹²⁰ In White House tapes obtained during the Watergate investigation, President Nixon and senior aides repeatedly discussed clemency for one of the officials who was indicted for his role in the conspiracy.¹²¹

overturned, *The Washington Post*, Sept. 18, 2017, available at https://www.washingtonpost.com/opinions/the-presidential-pardon-power-is-not-absolute/2017/09/18/09d3497c-9ca5-11e7-9083-fbdfdf6804c2_story.html?utm_term=.d4f9137dca7b.

¹¹⁷ U.S. Const. art. II, § 1, cl. 7.

¹¹⁸ U.S. Const. art. II, § 3.

¹¹⁹ Report on the Impeachment of Richard M. Nixon, President of the United States, 120 Cong. Rec. H29219 (Daily ed. Aug 20, 1974), available at <https://www.brookings.edu/wp-content/uploads/2017/10/appendix-to-presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf> (Appendix D).

¹²⁰ Report on the Impeachment of Richard M. Nixon, President of the United States, 120 Cong. Rec. H29219 (Daily ed. Aug 20, 1974), available at <https://www.brookings.edu/wp-content/uploads/2017/10/appendix-to-presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf> (Appendix D).

¹²¹ Bob Woodward and Carl Bernstein, *Nixon Debated Paying Blackmail, Clemency*, *The Washington Post*, May 1, 1974, available at <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/050174-2.htm>.

An obstructive pardon given by President Trump to a defendant in the Russia investigation would be fully consistent with the allegations against President Nixon. It would constitute interference with an investigation properly brought by the Department of Justice, the FBI, and the Special Counsel's Office. It also would raise the question whether it was an attempt to give favorable treatment to defendants (*i.e.*, immunity from prosecution) in exchange for their silence.

As the articles of impeachment against Nixon make clear, it is no defense for a president to assert that his lawful authority to grant pardons is a bar to impeachment. Abuse of power necessarily contemplates that the power in question is the president's to wield; however, the president is not free to use those powers in a manner that is inconsistent with his constitutional oath and duties. Congress, not the president, is the arbiter of whether a president has so abused his authority, and it may remove him from office if it believes he has done so.

B. Pardoning a witness in the Russia investigation could also expose President Trump to federal criminal charges of bribery (or gratuity) and obstruction of justice

President Trump risks exposure to several criminal statutes if he pardons a witness in the Russia investigation. Depending on the manner in which a such a pardon was granted, it could constitute bribery, the related crime of gratuity, or obstruction of justice.

1. Pardoning a witness to influence or prevent his or her testimony is bribery or gratuity

The concept of bribery (and the related crime of gratuity) is simple: it is the exchange of something of value for influence over another. Federal law prohibits several forms of bribery, perhaps the most familiar of which prohibits the payment or promise of anything of value to a public official to influence an official act, to participate in any fraud on the United States, or to omit or do any act in violation of his or her lawful duty.¹²² Where the potential bribery implicates witnesses, two sets of provisions are in play. Section 201(b)(4) prohibits corruptly offering or promising anything of value to a witness with the intent to influence or prevent that witness's testimony or sharing of evidence.¹²³ A companion provision prohibits a potential witness from demanding, seeking, receiving, accepting, or agreeing to accept anything of value in return for being influenced in the testimony one is giving or for not giving testimony.¹²⁴ Meanwhile section 201(c)(2) prohibits "gratuities," which proscribes essentially the same conduct as witness bribery except that the threshold for demonstrating intent is lower: the prosecution need not demonstrate that there was an agreed upon exchange, just that the payment was made "for or because of" a witness's testimony. As is the case in the bribery context, a companion provision prohibits the witness from demanding or seeking a gratuity.

¹²² 18 U.S.C. § 201(b)(1). A companion provision prohibits the public official's demand, receipt, or acceptance of a payment for these actions. 18 U.S.C. § 201(b)(2).

¹²³ 18 U.S.C. § 201(b)(3).

¹²⁴ 18 U.S.C. § 201(b)(4).

Charges under the witness provisions of the federal bribery and gratuity statute for a corruptly-motivated pardon would be novel. Nonetheless, an obstructive pardon closely maps on to the statute: the pardon would amount to a thing of value that the president might be “giving” to a witness in exchange for influence over that witness or the witness’s silence. Courts interpreting the term “anything of value” in this context and in other federal criminal provisions have held that it should be interpreted broadly.¹²⁵ Whether something is a thing of value does not depend on its monetary value; instead, courts have looked to factors such as the subjective value it has to a defendant¹²⁶ and conduct and expectations of the parties.¹²⁷ In a closely analogous context, courts have held that freedom from imprisonment constitutes a “thing of value.”¹²⁸

Bribery of witnesses is unaffected by recent court decisions constraining bribery cases against public officials. Those cases have set forth a narrow definition of what constitutes an “official act” based on the constitutional concern that ordinary interactions between constituents and their representatives might be chilled if the bribery statute swept too broadly.¹²⁹ Those cases have no application in the witness context because the thing being bought is the witness’s testimony (or silence), not an “official act.” Nor is there an analogous constitutional concern in the witness context: the ability of an individual to influence witness testimony has the potential to undermine, not reinforce, the constitutional rights of defendants to due process and a fair trial.¹³⁰

There is also no colorable argument that bribery charges for an obstructive pardon unconstitutionally infringe on the president’s power to pardon. First, the possibility of criminal liability stemming from the pardon does not undermine the validity of the pardon — in fact, it assumes it. A pardon has value because it immunizes an individual from prosecution (or wipes clean a punishment if it is offered after prosecution). Second, the potential exposure to bribery charges is limited to a very narrow set of circumstances: cases in which the individual being pardoned is a potential witness against the president or his associates. For instance, during his eight years in office, President Obama granted pardons to 212 individuals and commuted the sentences of a further 1,715 individuals, and there is no evidence that any of these individuals were potential witnesses against him.¹³¹ Third, even in circumstances where the president

¹²⁵ *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986) (“In order to put the underlying policy of the statute into effect, the term “thing of value” must be broadly construed. Accordingly, the focus of the above term is to be placed on the value which the defendant subjectively attaches to the items received.”); *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir.1992) (holding that a “thing of value” covers intangible considerations).

¹²⁶ See *United States v. Williams*, 705 F.2d 603, 623 (2nd Cir. 1983).

¹²⁷ See *United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008) (“The conduct and expectations of both the defendant and the subject of the extortionate threat also *can* establish whether an intangible objective is a ‘thing of value’”) (quoting *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992)).

¹²⁸ *United States v. Fernandes*, 272 F.3d 938, 944 (7th Cir.2001) (prosecutor's expungement of convictions constituted a thing of value); *United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir. 2011) (“we conclude that intangibles, such as freedom from jail and greater freedom while on pretrial release, are things of value under § 666(a)(1)(B).”).

¹²⁹ *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016).

¹³⁰ See U.S. Const. amends. V, VI.

¹³¹ See [Clemency Statistics](https://www.justice.gov/pardon/clemency-statistics), Office of the Pardon Attorney, available at <https://www.justice.gov/pardon/clemency-statistics> (accessed Apr. 27, 2018).

pardoned a witness against him, the government would have to prove its case beyond a reasonable doubt, and the president would have the opportunity to offer innocent explanations for the pardon. If, for instance, the president went through the ordinary Department of Justice procedures and received a recommendation that an individual be pardoned, he could argue that there was a neutral case for clemency.

Finally, there is precedent for conducting a criminal inquiry into the issuance of a presidential pardon. In 2001, the Department of Justice opened a criminal inquiry into the pardon granted by President Clinton to Marc Rich, a fugitive who fled to Switzerland after being indicted on several federal charges.¹³² Rich's ex-wife, Denise Rich, was a wealthy donor who contributed hundreds of thousands to President Clinton's presidential library and to Hillary Clinton's campaign for Senate, which raised the question of whether President Clinton had been promised contributions in exchange for the pardon.¹³³ Then-Senator Jeff Sessions said that the investigation was warranted: "From what I've seen, based on the law of bribery in the United States, if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, then that could be a criminal offense."¹³⁴ Although the investigation was closed four years later without any charges filed,¹³⁵ the episode indicates that federal prosecutors have investigated the possibility that a pardon might constitute bribery.

2. Pardoning a witness in a criminal or congressional proceeding may constitute obstruction of justice

Pardoning a witness in the Russia investigation could also constitute obstruction of justice. There are several overlapping federal "obstruction of justice" statutes, all of which criminalize similar conduct, namely, obstructing (or attempting to obstruct) a foreseeable criminal or congressional proceeding with corrupt intent.¹³⁶ There is already substantial evidence that President Trump has obstructed justice by engaging in a pattern of conduct including his demands for loyalty from former FBI Director Comey, his request to Comey to "see your way clear to letting Flynn go," and his firing of Comey.¹³⁷ Pardoning a witness to the Russia

¹³² David Johnson, *U.S. Is Beginning Criminal Inquiry in Pardon of Rich*, *The New York Times*, Feb. 15, 2001, available at <https://www.nytimes.com/2001/02/15/us/us-is-beginning-criminal-inquiry-in-pardon-of-rich.html>.

¹³³ James V. Grimaldi, *Denise Rich Gave Clinton Library \$450,000*, *The Washington Post*, Feb. 10, 2001, available at https://www.washingtonpost.com/archive/business/2001/02/10/denise-rich-gave-clinton-library-450000/e0e10291-841a-4e38-893e-d500ee4a5b30/?utm_term=.a48de9641197; Jonathan Rauch, *Forget the Marc Rich Pardon. Worry About the Scandal*, *Atlantic Monthly*, Mar. 1, 2001, available at <https://www.theatlantic.com/politics/archive/2001/03/forget-the-marc-rich-pardon-worry-about-the-scandal/377541/>.

¹³⁴ Johnson, *The New York Times*, Feb. 15, 2001.

¹³⁵ Jessica Taylor, *More Surprises: FBI Releases Files on Bill Clinton's Pardon of Marc Rich*, *NPR*, Nov. 1, 2016, available at <https://www.npr.org/2016/11/01/500297580/more-surprises-fbi-releases-files-on-bill-clintons-pardon-of-marc-rich>.

¹³⁶ See 18 U.S.C. §§ 1503, 1505, 1512.

¹³⁷ Barry H. Berke, Noah Bookbinder, and Norman L. Eisen, *Presidential Obstruction of Justice: The Case of Donald J. Trump*, *Brookings*, Oct. 10, 2017, available at <https://www.brookings.edu/wp-content/uploads/2017/10/presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf>.

investigation would constitute further evidence of the president's corrupt intent in the existing obstruction case against him.

Obstruction of justice can take many forms.¹³⁸ Attempting to influence testimony or prevent a witness from testifying altogether is classic obstruction of justice.¹³⁹ Like a payment or a threat, a pardon could be an obstructive act if it was given for the purpose of preventing a witness from testifying before a grand or petit jury. Even though we argue above that a presidential pardon would not remove the threat of all criminal liability for cooperating witnesses, a pardon would likely undermine the leverage *federal* prosecutors have over them and thereby jeopardize ongoing federal proceedings.

The proximity and nexus of this obstructive act to a qualifying criminal or congressional proceeding would also be relatively easy to establish: because a federal grand jury has already returned several indictments in conjunction with the Russia investigation, establishing a nexus between ongoing grand jury proceedings and criminal trials and an obstructive pardon would not pose a significant challenge. The final element, a showing of a corrupt or improper intent, could be established by evidence suggesting that the pardon was intended to protect the president or his associates from exposure to criminal charges.¹⁴⁰

In addition, there is already substantial evidence that President Trump has obstructed justice in the pattern of conduct that includes the firing of former FBI Director James Comey.¹⁴¹ Among the largest outstanding issues presented by that case is the question of whether President Trump acted with corrupt intent.¹⁴² The pardon of a key witness in the Russia case could be further evidence that the president's other obstructive acts were done with corrupt intent — thereby bolstering the already serious case that the president has obstructed justice.

¹³⁸ *United States v. Rainey*, 757 F.3d 234, 245 (5th Cir. 2014) (explaining that the statutes were “‘drafted with an eye to the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined’”) (quoting *United States v. Griffin*, 589 F.2d 200, 206-07 (5th Cir. 1979)).

¹³⁹ See, e.g. *United States v. Tackett*, 113 F.3d 603, 612 (6th Cir. 1997) (“The Tacketts, knowing that the grand jury was investigating the events surrounding the ATF form, tried to persuade Kirby to present false testimony, and they were properly convicted for endeavoring to obstruct justice”); *United States v. Tedesco*, 635 F.2d 902, 907 (1st Cir. 1980) (“An effort to alter the testimony of a witness for corrupt purposes is plainly an endeavor to impede the due administration of justice.”).

¹⁴⁰ See Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, at 5 (Jul. 22, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876.

¹⁴¹ Berke, Bookbinder, and Eisen, *Brookings*, Oct. 10, 2017.

¹⁴² *Id.* See also Barry Berke, Noah Bookbinder, Norm Eisen, *A Response to Lawfare's Comments on Our Obstruction Report*, *Lawfare*, Oct. 12, 2017, available at <https://www.lawfareblog.com/response-lawfares-comments-our-obstruction-report>.

3. Pardoning a witness with the intent of preventing that person’s communication of information to a criminal investigation would also constitute obstruction of justice

In addition, a separate federal statute, 18 U.S.C. § 1510, makes it a felony to obstruct an ongoing criminal investigation by, among other things, bribing an individual as part of an attempt to prevent that person’s communication of information relating to a violation of a criminal statute by any person to a criminal investigator.¹⁴³ Congress enacted this provision to “close a loophole in former laws which protected witnesses only during the pendency of a proceeding.”¹⁴⁴ The government need not establish that a federal criminal investigation was actually taking place to prove a violation of section 1510.¹⁴⁵ A prospective pardon of a witness in the Russia investigation might therefore also constitute an obstruction of a criminal investigation even if there is insufficient evidence to tie the pardon to a qualifying criminal or congressional proceeding.

C. A president does not enjoy immunity from prosecution

The president’s potential exposure to criminal liability for issuing an obstructive pardon is not just theoretical: while the matter is not free from doubt, it is our view that a president can be prosecuted while in office. Two of the authors of this paper have elsewhere set forth in detail the reasoning for this position.¹⁴⁶ In sum, we do not read the text of the Constitution to proscribe it; it would be contrary to the reigning principle of American jurisprudence, that no person is above the law; opinions of DOJ’s Office of Legal Counsel to the contrary are flawed and are not binding on the courts, which have yet to rule. A detailed explication of these arguments may be found in our previous work.¹⁴⁷

Moreover, although no court has resolved the question of whether a sitting president can be indicted, there is little doubt that a former president might be.¹⁴⁸ Article 1, Section 3, Clause 7 of the Constitution explicitly states that judgment in cases of impeachment shall result in removal from office and disqualification from holding future office; it goes on to state that a person so convicted and removed “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”¹⁴⁹ Although this provision only addresses removal from office via impeachment and conviction, there is no textual support in the Constitution to think that removal from office by other means — namely resignation or election — is any different.

¹⁴³ 18 U.S.C. § 1510.

¹⁴⁴ *United States v. San Martin*, 515 F.2d 317, 320 (5th Cir. 1975).

¹⁴⁵ *United States v. Zemek*, 634 F.2d 1159, 1176–77 (9th Cir. 1980) (“Section 1510 does not require ‘an investigation be taking place’ concurrently with the proscribed acts.”); *United States v. Abrams*, 543 F. Supp. 1184, 1187 (S.D.N.Y. 1982).

¹⁴⁶ See Berke, Bookbinder, and Eisen, *Brookings*, Oct. 10, 2017.

¹⁴⁷ *Id.*

¹⁴⁸ See Berke, Bookbinder, and Eisen, *Brookings*, Oct. 10, 2017.

¹⁴⁹ US Const., Art. I, sec. 3, cl. 7.

Indeed, several presidents have been subject to investigation as they were leaving or after they left office. As previously mentioned, President Clinton's pardon of donor Marc Rich was the subject of a four-year criminal inquiry. President Nixon accepted a pardon from President Ford — a move that makes little sense if either had believed that Nixon enjoyed immunity for his actions as president.¹⁵⁰

Accordingly, the personal jeopardy President Trump would face by issuing an obstructive pardon is quite real. The five-year statute of limitations¹⁵¹ that applies to bribery and obstruction of justice will not have run if President Trump is voted out of office in 2020. Ford's pardon of Nixon was thought by many to have been a material factor in limiting him to one term, and the Trump pardons here contemplated have the potential to cause equal or greater electoral harm.

VI. Conclusion

President Trump will not be able to pardon his way out of the special counsel or Cohen investigations. A pardon strategy only makes sense from his perspective if it might plausibly eliminate the liabilities faced by the individuals who he is worried might cooperate with federal or state prosecutors and if it does not worsen his own liabilities. We have demonstrated that neither of these conditions are met.

Culpable individuals in the special counsel and Cohen investigations will not likely be able to escape state criminal liability even if they are pardoned. For some states, there is no prohibition on successive prosecution for the same crime, and even where states have provided greater double jeopardy protections, they may not fully insulate key individuals from exposure to state prosecution. Then there is the possibility of civil liability and civil asset forfeiture — neither of which would be ameliorated by a presidential pardon.

The pardon strategy is also flawed because it increases the political and criminal peril that President Trump faces. Using the powers of the presidency to undermine directly the operation of a criminal justice system for the purpose of protecting oneself could be the subject of impeachment proceedings. In addition, granting a pardon in exchange for a witness's refusal to cooperate with federal or state prosecutors or with other corrupt intent could constitute federal crimes. President Trump could be prosecuted for those offenses after he leaves office if not sooner. For these reasons, the pardon strategy is also ineffective: it expands rather than reduces the legal and political exposure of the president.

¹⁵¹ 18 U.S.C. § 3282.