The Presidential Pardon Power

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[00:00:03.4] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Recently on America's Town Hall, I convened two legal commentators to discuss the founders' debates over the pardon power and to explore significant presidential pardons throughout American history. Jeffrey Toobin is the author of the new book, *The Pardon: The Politics of Presidential Mercy*, and Brian Kalt of Michigan State University is the author of *Constitutional Cliffhangers: A Legal Guide for Presidents and Their Enemies* which has a chapter on presidential self-pardons. Enjoy the show.

[00:00:52.3] Jeffrey Rosen: Thank you so much for joining Brian Kalt and Jeff Toobin. It's an honor to welcome you both for this really timely discussion. I want to begin, beginning with the history and original understanding of pardons. Jeff, in your wonderful and really well-timed book, you quote James Wilson at the Constitutional Convention on pardons, and you quote him as saying, "If the president be himself party to the guilt, he can be impeached and prosecuted." You say Wilson's response, which carried the day, suggests that self-pardon is not a possibility because if a president pardoned himself, he could not be prosecuted. Tell us more about Wilson's argument and why you think self-pardons are not constitutional.

[00:01:36.8] Jeffrey Toobin: Well, he didn't think they were constitutional. I actually do think they're constitutional today. I think we live in a moment where the dominant mode of analysis at the Supreme Court is textualism, and the idea is that the conservative majority on the court says if it's not in the text, it's not constitutional, and that obviously comes up a lot in the abortion debate. They say the Constitution says nothing about abortion, so there is no protected right to abortion. The Article II, Section 2 of the Constitution, which discusses the pardon power, does not prohibit a president from pardoning himself, so my conclusion is if the court were to consider a self-pardon, which they never have done because no president has ever pardoned himself, they would find it constitutional. That's my view, but Brian is the world's foremost authority on self-pardons, so let's hear what he thinks.

[00:02:52.0] Jeffrey Rosen: Very much looking forward to what Brian has to say, and I have to say, Brian, your book, *Constitutional Cliffhangers*, not only has a chapter on the presidential self-pardoning controversy, but also has chapters on other things that you say are improbable but

might happen in the future, including prosecuting a president, impeaching an ex-president, and a president running for a third term, all of which may indeed occur. Tell us, and you give the strong arguments about text history structure, against presidential self-pardons, please share them.

[00:03:28.2] Brian Kalt: So there's an inherent sort of Anglo-American tradition against allowing people to be a judge in their own case, and I think that would hold sway at least with the less textualist justices at every other stage in the process of leveling criminal consequences to someone. You can't be involved in your own case. You can't be your own prosecutor, your own juror, your own judge, and I think that intuitively appeals to a lot of people, that self-judging idea. There is a textual argument against self-pardons, though, and when I first started writing about self-pardons back in the '90s, I didn't put as much emphasis on this, but I did in the book get more into this, and I think that the textual argument against self-pardons has emerged, and it goes something like this. A pardon has to be a pardon, right? There are certain limits in the pardon power inherent in the definition of the word. So, for instance, you can't pardon someone for something they haven't done yet. You can only pardon past acts. The Constitution doesn't specify that. That's just inherent in the definition of what a pardon is. If you tried to pardon someone for a future act, it wouldn't be a pardon.

[00:04:57.3] Brian Kalt: It wouldn't make sense, and so the textual argument against self-pardons is that pardons are inherently bilateral. A pardon is something you give to someone else. The Constitution talks about granting pardons. You can't grant things to yourself. You can't pardon yourself. So, if the textualist justices want to get into the Latin roots of the verb to pardon, other verbs like to donate, to condone, you can't make a donation to yourself. It just doesn't make sense. It wouldn't be a donation. You can't condone your own actions. It doesn't make sense. So, I do think that there is that textual argument. What the Supreme Court would actually decide if a case arose, I have no idea. That's why I wanted to write a book chapter about it, because it was a constitutional cliffhanger. It could go either way. But if for some reason I were the judge, I know I would rule against it.

[00:06:02.3] Jeffrey Rosen: Many thanks for that.

[00:06:03.1] Jeffrey Toobin: If I can just add, I mean, I think a self-pardon, if any president would do it, would be a terrible idea. I think just as a policy matter, it would be an appalling thing for a president to do that. The issue is, would it be constitutionally permissible? And I think Brian and I sort of disagree about that because if I had to take a position this current, I think this current court would say that a self-pardon is constitutional, even if I believe it's a bad idea. But the Supreme Court does a lot of things that I think are bad ideas, so this wouldn't be the first one.

[00:06:49.2] Jeffrey Rosen: And Brian, you do indeed acknowledge that the issue is open. You're not sure what the court would do. You also note the structural argument and the natural law arguments. You say that Justice Samuel Chase said that no one can be a judge in his own case and the principle that no one's above the law is central to the rule of law. And you also note that the British monarch from whom the pardon power evolved couldn't be prosecuted at all. And by locating power in we the people, the framers may have embraced a more limited notion.

[00:07:20.6] Brian Kalt: Yes, the president is not a king, although the pardon power is the most sort of monarchical of the president's powers. It is limited inherently because presidents are not kings. Kings are kings until they die, and presidents aren't. And so the idea that a president could sort of plunder something from the office on his way out, particularly coupled with the immunity that the Supreme Court has already given the president, it would put him completely above the law in a way that I can't imagine the framers ever would have intended.

[00:08:03.0] Jeffrey Rosen: Well, that raises the question of the president's amenability to prosecution after leaving office. And Jeff, you quote Alexander Hamilton, who you said anticipated mass pardons as acts of clemency, like pardons to the whiskey rebels, but did think that the president was amenable both to impeachment and to prosecution after impeachment. Tell us more about Hamilton and the framers' views about prosecuting.

[00:08:29.7] Jeffrey Toobin: Well, this to me is really one of the extraordinary constitutional stories of the last several decades, because this is all the buildup to the Supreme Court's decision last year in *Trump v. United States*. And as you mentioned in the Federalist Papers, Alexander Hamilton said simply as a matter of course, he didn't seem to think it was up for debate, that of course a former president could be charged with a crime for conduct he committed while he was in office. And just to jump ahead for a moment to the Watergate saga, which I write about a lot in my book, is that once Richard Nixon resigned the presidency, every single participant in the debate, all of the best lawyers in the country, Nixon's lawyers, the Watergate prosecutors, the Justice Department lawyers, Gerald Ford's lawyers, all of them considered the question of could Nixon be prosecuted, and they all took it for granted that of course he could be prosecuted. That was the whole reason that Ford pardoned him. But now, as a result of *Trump v. United States*, it's virtually impossible to prosecute a former president for official acts, which is the only reason you'd really want to prosecute a former president. And I just think that's a demonstration of what a radical and dramatically important decision *Trump v. United States* is, and such a transformation of what everyone thought the law was going back all the way to Alexander Hamilton.

[00:10:28.9] Jeffrey Rosen: It is striking, and you argue powerfully, that *Trump v. U.S.* Would have made the Watergate prosecution impossible because you couldn't have subpoenaed the Oval Office conversations as part of the president's official acts. We'll talk more about that after we've reviewed your great discussion of Watergate. But Brian, just to examine *Trump v. U.S.* As a matter of original understanding, is the court's suggestion that former presidents cannot be prosecuted for official acts consistent with the original understanding of the Constitution or not?

[00:11:02.6] Brian Kalt: I can't square it with an original understanding of the Constitution at all. There might be some immunity for official acts, but not official acts defined as broadly as the court did. All of the discussions at the convention presumed this. All of the debates about presidential immunity, which began almost with the birth of the republic, they were talking about can you prosecute a sitting president? Can you prosecute him when he's in office? And some people thought, yes, you can, and other people thought, no, you can't. You have to wait till he's removed from office or his term expires. But everyone on both sides of that debate took it for granted, as Jeff said, that once the president is gone, he can be prosecuted. And in fact, linking

this back up with the pardon, this was part of the argument. They were talking about limiting the pardon power. They said, well, maybe we shouldn't allow pardons for treason because maybe the traitors will be the minions of the president, right? Maybe the president's a traitor and he's pardoning his henchmen. And the response to that was, well, if the president does that, then you can impeach him and remove him and prosecute him. And if there was any sense that the president might be immune, or I would add that he might pardon himself, then that argument would not have been persuasive to anyone in the room. And yet that argument carried the day. They decided not to limit the pardon power, to keep it broad, precisely because there are these other ways of keeping the president accountable through the impeachment process and criminal prosecution.

[00:12:54.6] Jeffrey Rosen: Many thanks for that. Well, we'll return to *Trump v. U.S.* After we've worked our way up through history. But Jeff, give us a sense of how pardons were used in the 19th and early 20th century leading up to Nixon. You talk about Hamilton's views on pardons, Lincoln's amnesties, and how after Reconstruction, the pardon period entered a period of placid acceptance where each president pardoned several hundred people, although that number grew. Give us a sense of its evolution over time.

[00:13:26.2] Jeffrey Toobin: Well, you know, Alexander Hamilton thought there were two main purposes to pardons. One is the straightforward one of the exercise of mercy. He said sometimes people are sentenced to draconian and excessive terms, and the pardon operated as a safety valve to allow presidents to ameliorate those harsh situations. But to me, the more interesting justification for the pardon power that Hamilton offered related to the political tool that it was, that when there were circumstances of rebellion, when the president faced a political problem, as George Washington did shortly after the ratification of the Constitution in Pennsylvania, in the Whiskey Rebellion, the pardon could be used to calm the waters. It was a political tool, and that was something that George Washington did. He pardoned a lot of the rebels in the Whiskey Rebellion, and then much more consequentially, Abraham Lincoln pardoned the hundreds of thousands of foot soldiers who fought for the South in the Civil War as long as they would pledge allegiance to the Union as a way of trying to reunite the country, and I think those were very much legitimate uses of the pardon power. And just to finish the story of the 19th century, this was the period before parole had been invented.

[00:15:09.0] Jeffrey Toobin: So the only way you could get out of prison or any kind of relief from a criminal sentence, including a death sentence, was through a presidential pardon, and a lot of presidents did use the pardon power for that reason because it was the only tool available. Once parole came into the federal system in the 1920s, the number of pardons dropped off because there was that other safety valve, and that was really the situation when we got to the 1970s and Richard Nixon and Gerald Ford, that pardon drama in 1974.

[00:15:54.4] Jeffrey Rosen: Thank you for that important history. Brian, tell us about some of the more controversial uses of the pardon power in the 19th century. One of the most controversial, as Jeff also notes in his book, is Andrew Johnson's pardon of Jefferson Davies after the Civil War. Tell us about that and broad trends in 19th and early 20th century pardons.

[00:16:19.1] Brian Kalt: Yeah, so Andrew Johnson picked up where Abraham Lincoln left off.

Initially, it looked like he wouldn't. Abraham Lincoln was criticized somewhat for being maybe too merciful. Andrew Johnson was even more so. Because Lincoln's goal was to reunite the country, it looked like Johnson's motive was more restoring the antebellum power structure in the South by getting all of the, not just the foot soldiers as Lincoln had pardoned, but all the leaders too. And initially, people talk a lot about the Johnson impeachment and how he was acquitted by only one vote. There was an earlier attempt to impeach him that did not pass the House, although it came close. And one of the counts against him was for abusing, overusing the pardon power. And that sort of got folded into the larger struggle against him and Reconstruction playing out. Another trend I think that was interesting in the post-Civil War era was presidents got kind of tired of all these people coming and asking them for pardons because we didn't have this big federal bureaucracy like we do now. And presidents used to, the typewriter hadn't been invented yet. These things had to be sort of done in a more manual way.

[00:18:02.1] **Brian Kalt:** And so the Office of the Pardon Attorney currently does this, but presidents starting in the 1870s sort of farmed out the process of considering all of these things to the Justice Department. And this is an advisory role. It's not delegating the power to them. They're just making recommendations to the president. But this made a big shift. It wasn't just the president's whim anymore. It was people who did nothing but consider these things all day. And there have been some ups and downs with the pardon power as the politics in the Office of the Pardon Attorney has changed through the decades. And I think in addition to parole, another development was other forms of judicial relief. People could appeal in ways they couldn't. There was post-conviction review that didn't exist before. And so the sort of workaday pardon role of the president sort of faded away. And what that left was the more controversial and consequential ones.

[00:19:17.6] **Jeffrey Rosen:** Thanks so much for that. Well, Jeff, let's talk about President Ford's pardon of Nixon. It's a centerpiece of your great book, and you explore it in chapters 1 through 25. And although the conventional wisdom is that it was necessary to heal the country, you have challenged that. And your view is that the pardon was wrong then and remains wrong now. And that Ford's justification that by accepting the power, Nixon was acknowledging guilt was unconvincing. Tell us about Ford's pardon and why you think it was wrong.

[00:19:53.8] **Jeffrey Toobin:** Well, you know, one of the reasons I wrote the book is I was struck by how the conventional wisdom about Ford's pardon of Nixon had shifted so much over the years. When the pardon happened in 1974, it was a political disaster for Ford. His popularity, which had been quite high, he had only become president a month earlier. He became president on August 9th, and the pardon was on September 8th, 1974. His popularity dropped more than 20 points in a single week. And many people to this day believe that Ford lost the 1976 election to Jimmy Carter in significant part because of the pardon. But then when you get to the more recent times, like in 2001, when Ted Kennedy gave the Profile in Courage Award to Gerald Ford and said, "I was wrong about the pardon and you were right," and Bob Woodward, the great journalist, made a similar statement. I wondered, like, who was right? Were Americans right in the first place about the pardon or was the later evaluation right? And I think Americans were right in the first place. You know, pardons are an aberration in our criminal justice system.

[00:21:16.3] **Jeffrey Toobin:** I think it's good that the pardon power exists, but there has to be a

very good reason for a pardon because the whole concept of our judicial system is equality before the law. People who, whether they come from whatever background they come from, should be treated similarly and people who commit similar crimes should be prosecuted in the same way. And so there really has to be a good justification to depart from that system. And I think by giving Richard Nixon a pardon, Gerald Ford distorted the idea that no one is above the law. If Nixon committed crimes, just as his aides were about to go on trial for the Watergate cover-up, he should have been prosecuted in the same way. Now, I would understand a lot better if Ford had pardoned Nixon after conviction to avoid a prison sentence, because I do think there is something unbecoming in a democracy to have a new administration lock up the leader of the old. But to stop a prosecution, even before it took place, errs in the other direction, and I think that's what the Ford pardon did.

[00:22:51.9] Jeffrey Rosen: Fascinating, and there are just so many amazing details in the book that I want to explore in a moment, including you say that H.R. Haldeman recommended that a pardon could be combined with mass pardons of Vietnam draft dodgers, as well as all the Watergate conspirators, but that was rejected. But Brian, before we walk our way through the details of the Ford pardon, do you agree with Jeff or not that the Ford pardon was a mistake, and why?

[00:23:24.5] Brian Kalt: I think I have a more sympathetic view of Ford's motives. Looking at the pardon power more broadly, I think the things that I like about the Nixon pardon are, first of all, Ford did it because he thought it was the right thing to do. Now, we can disagree about that, but it wasn't part of a deal, right? It's a great book, by the way. I had a chance to look through it, and I recommend it. Like you said, those details are great. But Ford was going to become president anyway. He didn't need to pardon Nixon to become president. And he did what he thought was right, not what benefited him personally. It didn't benefit him personally. It cost him politically. It cost him the election. That's how pardons are supposed to work. The president makes a political call, and the voters get to weigh in. And so it's hard for me to look down on this pardon when comparing it to other pardons where presidents, at a moment when they're not at all accountable, when they're on their way out of office, issue controversial pardons. I'm thinking of the George H.W Bush pardons of the Iran-Contra defendants. After he had been defeated for re-election, the Biden pardons on his way out, of course, Bill Clinton's pardons on his last day, pardoning his brother, pardoning Mark Rich. Those were completely unaccountable. And maybe with the exception of the Iran-Contra pardons, they didn't look like considered policy judgments. They looked like personal things. And I say with the possible exception of the Iran-Contra ones because Bush was a potential defendant. And by pardoning everyone, it shut down the investigation, and he didn't have to pardon himself. But he did benefit from those pardons. So comparing it to all those things, yeah. Now, if I were Ford, would I have waited a little while? Maybe. I don't know. I think Nixon's health also played a part in this. It was seen as a merciful thing to do for someone who had suffered enough. He had lost everything. But, you know, it's kind of hard to muster too much sympathy for Richard Nixon in that moment. But again, that's why I think it was a courageous act by Ford. And no less courageous for being something that I don't know that I would do, and as Jeff Toobin said, he definitely wouldn't have.

[00:26:15.6] Jeffrey Rosen: Thank you for that. Jeff, just...

[00:26:18.0] Jeffrey Toobin: Brian raised something I just think is worth emphasizing. One of the big criticisms of the pardon at the time was that it looked like a deal. And some journalists had suggested there really was a deal in that Richard Nixon, through intermediaries or directly, said to Ford, look, if you give me a pardon, I will give you the presidency in a straightforward and corrupt deal. And one thing I learned in writing the book was that there was no deal. I mean, this was not a corrupt undertaking by Gerald Ford. He really did this for reasons of state that he thought the pardon would be good for the country as a whole. I think he was wrong about that, but I really don't question his motives. I think his motives were good, but just because your motives are good doesn't mean you make the right decision. And I think he made the wrong one.

[00:27:25.2] Jeffrey Rosen: Thanks for that. Share some more of the details, which are so powerful. You know, on Nixon's health, you have Benton Becker, the 36-year-old former high school football player, going out to San Clemente to negotiate. Nixon's fingernails are yellowing. Becker is shocked at how old and sick he looks. And a crucial question is control over the presidential papers. And you argue that Ford basically gave away the ship. He didn't have to either give the pardon or access to the papers, but did because he was just so determined to get the whole thing behind us. So what details most surprised you and give our audience a sense of this sort...

[00:28:00.9] Jeffrey Toobin: Well, in one respect, I took this personally because one thing they all decide, you know, that, that Ford and, and Benton Becker, his volunteer aide, you know, thought about was, oh my God, Nixon's so old, and he's 61 years old. And I'm like, wait a second, that's so old. [laughter] But just in terms of just as statecraft, in terms of planning and how presidents behave, Ford handled this terribly. He didn't do his research. He didn't find out whether Nixon was really at risk of being indicted. Leon Jaworski, who was the Watergate special prosecutor, didn't want to indict Nixon. And I don't think would have indicted Nixon. So that meant that the pardon was unnecessary. And if Ford had simply taken the time to find that out, he would have learned that. In a similar way, one of the ways presidents line up political support in advance of their actions is they preview what they're going to do and they go to their supporters, particularly in Congress, and they say, you know, "If I do X, are you going to support me?" And they learn whether there will be congressional support. Ford did none of that. He sprung it on the country. You know, the pardon was announced on a Sunday morning at 11:00 in the morning, September 8th, when no one was expecting a presidential speech, much less one on such an important topic. And Ford had not lined up any political support. So just as a matter of presidential behavior and strategy, it was really a terrible undertaking. And Ford paid a very big political price for that.

[00:30:11.2] Jeffrey Rosen: Thank you for that. Brian, talk about the constitutional legacy of Watergate for the pardon power, Congress passes the Presidential Records Act to ensure the presidents can't claim the papers of their personal property. Of course, the Impoundment Control Act and the *U.S. v. Nixon* decision comes to stand for the proposition that whatever executive privilege the president has has to be balanced against the public's interest in the information, seeming to vindicate the prosecution. Talk about those precedents and the way to which many of them have been repudiated by *U.S. v. Trump*.

[00:30:54.4] Brian Kalt: So a lot of things. The whole campaign finance regulation system as

we know it arose after Watergate because of the campaign finance angles there. One thing about the pardon I think that is interesting here is there was outrage about the pardon and Ford testified about it. And the idea that now, of course, it wasn't push coming to shove and them hauling him in there. He was willing to do it. But what we've seen more recently talking about repudiating this legacy is much more resistance by presidents to any sort of congressional oversight. The idea of a president or sometimes even a cabinet member voluntarily going and subjecting themselves to these sorts of questions and investigations has faded away. And I think much to our detriment. I think that congressional oversight, Congress being interested in its own prerogatives, not just partisan side-taking is a key part of the structure of the Constitution that we seem to be losing and that at least during and after Watergate was at a, I mean, it's been declining for centuries, but it came back up a little bit at Watergate and has only faded since then. So it was kind of like Congress's last best gasp of independent oversight.

[00:32:43.0] **Brian Kalt:** There is one thing I do want to talk about, about the pardon power and the legacy of this. And also this connects to how Ford could have done this differently and better. Ford could have said to Nixon, "I'll pardon you if you admit that you did something wrong," if you apologize, if you tell us more, right? Fess up, truth and reconciliation sort of thing. He didn't do that. And he liked to talk about how for the rest of his life he carried a little scrap of paper in his wallet with the line from the Supreme Court decision in *Burdick v. United States* that says that accepting a pardon is a confession of guilt. And he said, "See, that's, you know, I wasn't letting him off the hook. He was admitting he was guilty." But that's not what *Burdick* actually said. And we see this trotted out a lot, but sometimes presidents pardon people because they're not guilty. And they do it to exonerate them. And so the meaning of the pardon is whatever the president says is the meaning of the pardon. And so if Ford had made it clearer at the time he was doing it or even gotten Nixon to sign on to that admission of guilt, I think it would have been more palatable. And, you know, at least, of course, the 10th Circuit recently made clear, yeah, the point in *Burdick* was pardons might make you look guilty, so you don't have to accept one if you don't want to. That was all they were saying. It doesn't have this necessary legal effect of declaring you guilty. It just has a practical one, which the president can make go away, as sometimes presidents do by exonerating people, saying "I'm pardoning him not to forgive him, but because he didn't do it."

[00:34:40.5] **Jeffrey Rosen:** Jeff, you discuss Ford's fixation with a naivete about the verdict decision of Benton Becker's distress over the draft of Nixon's speech, which kept refusing to accept responsibility. And Arthur Sudler asks in the chat, what's the impact of the Nixon pardon? Given the fact that Nixon repeatedly stated if the, that when the President does something, it can't be illegal?

[00:35:05.5] **Jeffrey Toobin:** Well, you know, Ford's obsession with the *Burdick* case and that one stray line that acceptance of a pardon is an acknowledgment of guilt, I think it's just so wrong. You know, Brian laid it out well that, you know, it's never been true that acceptance of a pardon is an acknowledgment of guilt. And just from a practical matter, everyone knows that, you know, when someone is pardoned, it's a gift. It's something that, it's a celebration. And, you know, just to jump ahead to the January 6th pardons, the 1,500 people pardoned, President Trump didn't think that they were acknowledging guilt. They didn't think they were acknowledging guilt. He pardoned them because that was, he said, a day of love. He wasn't

forgiving them for a crime. He was saying they didn't commit a crime in the first place. And I thought Ford's obsession with that one line from *Burdick* just showed his political naivete, at least on this subject, because it just attempted to persuade people of something that was just obviously not true. A pardon is a gift. A pardon is something that the recipient can enjoy in good health and good spirits. And most people who get pardons do. And the idea that there was some sort of sanction in a pardon, which Ford argued for the rest of his life, I think is just simply untrue.

[00:37:05.7] Jeffrey Rosen: Well, let's, as we move our way up to the president ask about the post-Nixon pardons leading up to President Trump. Jeff notes that on his first day in office, Jimmy Carter used a broad clemency to pardon Vietnam, give Vietnam amnesty. Ronald Reagan used a pair of pardons to announce that he and the Republican Party were finished feeling guilty for the abuses of Watergate. And Bill Clinton, in an era of mass incarceration, was stingy with pardons, but used them in ways that some people felt was self-dealing, unique among modern presidents, Jeff says, "President Obama tried to reverse some of the effects of mass incarceration and did it in a cautious and limited way." And then I'll just finish the paragraph. "Joe Biden betrayed his principles, went back on his word, and damaged his legacy by pardoning his son." Brian, as you look at all those pardons, except for President Trump, how would you categorize them? And in particular, was Joe Biden out of the norm, both in pardoning his son and in issuing very broad clemency and amnesty for the federal death penalty and for drug convicts or not?

[00:38:21.6] Brian Kalt: So I think you can separate these sort of controversial high-profile pardons into two categories. One is the big policy action. So something like the Vietnam draft amnesty, for instance. And that's consistent with the original understanding of what the pardon was supposed to be about, right? You have this social issue. You have this tearing apart of the country that this is a way of bringing it back together. Or the policy of we reduced all the sentences on a lot of these drug offenses. What about the people who are already in prison with these sentences that we've decided going forward are too high? Let's go back and apply that retroactively. So that, there's an honorable tradition of those sorts of pardons and amnesties. The other type, though, is the, I'm the president and I have this power. And like I said, the most monarchical power the president has, everything else the president does has to be, you know, Congress has to pass legislation to give him power or they have to confirm his nominees or he does things that are subject to judicial review or he needs the deep state to implement these things. The pardon is the only thing that the president can do that's like that magic wand where he says it and it happens. And it's just too tempting. And I think that's what we saw with Biden. He had the ability to protect his son. And if anyone else had asked if it was a good idea, he probably would have told them no. But it was his son. He had the power. He had the magic wand. And so he waved it. And one would have thought after the Clinton administration ended with that ignominy, the Mark Rich pardon, and George W. Bush didn't do things like that. Barack Obama didn't do things like that. It looked for a while like presidents had learned their lesson, but it looks like they've learned a different lesson more recently.

[00:40:44.9] Jeffrey Rosen: Jeff, you say that Biden's matched the pardon to his son with his pardon of 39 people and commutations to 1,500 more released to home confinement during COVID. And in the final days in office, you say the question was whether the bequest to his son began a transformational approach to clemency. Were Biden's pardons within the historical norm

or not?

[00:41:09.0] Jeffrey Toobin: Well, I think one of the lessons is there really is no historical norm because there are a lot of bad pardons and there are a lot of good pardons. So there is no norm. And I think Biden's pardons reflected both of that. I think he did do some good pardons. He pardoned a number of people who had been convicted of marijuana offenses in the District of Columbia. He pardoned soldiers who had been penalized when being gay was illegal in the military. Those were good pardons, I think. I think it was good that he commuted the death sentences of virtually all the prisoners on federal death row. But he also pardoned his son, which I thought was a complete mistake. But basically, for similar reasons, that the Ford pardon of Nixon was a bad idea, that it is true that the federal government came down pretty hard on Hunter Biden, and those were tough cases, the one in Delaware and the other tax case in California. But that's true of a lot of people. A lot of people get a very tough deal from federal prosecutors. And the only difference is their father is not president of the United States, and they don't get the kind of special treatment that Hunter Biden got. And I thought it demeaned the Joe Biden presidency that he did that. And even more bizarrely, on his last day in office, the pardon of five other Biden relatives who weren't even under criminal investigation, as far as I know, and I think as far as anyone knows, was just a self-dealing of such an inappropriate kind that I think Biden damaged his legacy at the very end.

[00:43:23.4] Jeffrey Rosen: Thank you for that. Brian, Jeff's final chapter is the first term Trump pardons. And Jeff notes that "over his first four years in office, President Trump issued 143 pardons and 94 commutations. The total, 237, was on the low side by modern standards. But what was most striking was the way President Trump issued them and to whom. And by bypassing the Office of the Pardon Attorney and issuing pardons without input from the White House, President Trump turned clemency," Jeff argues, "into the crudest political currency, which he used to reward dozens of undeserving cronies, allies, and crooks." Do you agree with that or not?

[00:44:04.7] Brian Kalt: I think that's a fair assessment. There were others where they were actually good. They did bypass the Office of the Pardon Attorney. Someone had his ear, right? Kim Kardashian had his ear, convinced him of some worthy people. There's the Jack Johnson posthumous pardon in addition to that. So I think the issue is, even with those that were maybe more justifiable, the arbitrariness, the capriciousness of it, it's problematic. I will say, and this relates more to Biden, but the office of the pardon attorney has come to be sort of a bottleneck in that staffed by former prosecutors, they tend to not be very merciful. And Biden did take some steps towards sort of changing that pattern. We'll see if that sticks. But if you are someone who's seeking a pardon, and you have the choice between going through the office of the pardon attorney and going directly to the president, and you have the ability to get the president's ear, then it's easy to see why someone would go directly to the president. That is sort of a 19th century or first half of the 19th century model of the pardon power. But we're not in the first half of the 19th century anymore. That's not how the president is supposed to operate anymore. So I agree with Jeff that it was problematic. I will say, though, that getting back to this accountability point, except for the ones that he did on his way out of office, he did a lot of his controversial pardoning while he was still accountable, right? While he was still going to be running for re-election, while his party still needed him to do a good job to do well in the midterms. So in that

sense, I think that one cheer for the Trump pardons, he did it in a way that was, for the most part, that was politically accountable, at least.

[00:46:30.2] **Jeffrey Toobin:** And he's continuing to do that. I mean, one of the things that's been quite remarkable about this, we're still just barely two months into Trump's second term, he continues to pardon people on almost a weekly basis. And yes, it's true that because they are so early in his presidency, he and his party will be accountable for it. But they are such a bunch of transactional pardons for political supporters. He's pardoned 23 people who stormed abortion clinics because his supporters don't like abortion clinics. He's pardoned Rod Blagojevich, the corrupt former governor of Illinois, because Blagojevich is now a political supporter. He pardoned a guy who testified against Hunter Biden because President Trump doesn't like Hunter Biden, I mean, these pardons are the most crude political acts, but it is true, as Brian says, that he's not saving it up all for when he's walking out the door. He's doing it, as it were, in broad daylight.

[00:47:47.2] **Jeffrey Rosen:** Well, that brings us squarely to the January 6th pardons. Jeff, of course, you note that he promised to pardon the January 6th defendants, and in fact, he did. And you say that just as President Ford rewarded the greatest abuse of presidential power in history at that time, so Trump will reward, at the time you were writing, a different kind of abuse, the use of mob power and the most serious threat to democratic rule since the Civil War. Brian, are the January 6th pardons like Washington and the Whiskey Rebels, or are they like Ford and Nixon, or are they in another category of rewarding political violence on the president's own behalf?

[00:48:26.4] **Brian Kalt:** It's hard to know where to start. The first thing I'd say is that the political accountability point, like he said on the campaign trail he was going to pardon these folks. He also sort of hinted that he wouldn't pardon the violent offenders. He would only pardon the nonviolent ones, whoever those were. And so he doesn't even get my one cheer for political accountability on that one. It really brings us full circle from that discussion in the Constitutional Convention about not letting the president pardon people who were committing crimes on his behalf. And they said, "Oh, no, it's okay, we can let presidents do that because, yeah, he'll pardon all of his cronies," but we can still, if he does that, we'll impeach him. We'll remove him. We'll prosecute him. And here we have the January 6th pardons coming at a time when that possibility is, it's been revealed to no longer be there, right? He was impeached for January 6th and he was acquitted. The Supreme Court has made it apparent that he's not going to be prosecuted for anything he did as president. So it's not like the Whiskey Rebellion, Washington needed to not forgive the rebels because he agreed with them. He needed to forgive them because there was a rebellion and he needed to use that to tamp things down. This was not tamping things down. This was firing things back up and in a way that I can't, I try to see two sides to things whenever possible, but I don't see the other side on this one.

[00:50:21.1] **Jeffrey Rosen:** Powerful argument, Jeff, Brian just said that not letting the president pardon people who commit crimes on his behalf was a central goal of the convention. Did the January 6th pardons violate that principle or not?

[00:50:33.3] **Jeffrey Toobin:** I certainly think it violated that principle. I think it's a principle. It's not an actual law that came out of the Constitutional Convention. I think President Trump

had the legal right to do what he did, but I think it was an appalling decision for him. And just to emphasize, it is, how it is not like the Whiskey Rebellion pardons or Lincoln's Civil War pardons. Those were pardons of political opponents in effect. Those were the president, President Washington, President Lincoln saying, "I know you people disagreed with me and you fought me, but I am going to forgive you in the interests of national unity." The January 6th people were on Trump's side. And in fact, he was arguing that they did nothing wrong. And in fact, he was a January 6th defendant himself. He was not charged with the violence like the people at the Capitol, but the special counsel, Jack Smith, prosecuted him for putting forth the fake elector scheme. So what Trump was doing with the January 6th pardons was saying, we were all right in the first place. So it was not an act of forgiveness. It was an act of celebration and it was an act of celebrating people who did something that was terribly, terribly wrong.

[00:52:16.1] Jeffrey Rosen: A very important distinction that responds in part to a question we have from Fresno Hugo, which asks, have pardons become more self-serving over time? Well, this brings us squarely back to *U.S. v. Trump*, Brian, the main goal of the majority seemed to be to avoid the criminalization of politics. Justice Alito said that at the oral argument, unlike other countries, we don't prosecute our political opponents. It seemed more pragmatic than a decision based on original understanding. The dissenter said in the process, the majority had made the president a king and that it was the central goal, even of Hamilton, the most pro-executive framer, to not put the president above the law. And now the majority had done that. Do you view the combination of January 6th pardons and *U.S. v. Trump* as fulfilling that fear of making the president a king or not?

[00:53:11.5] Brian Kalt: I think it certainly pushes us too far in that direction. The entire structure of the Constitution is based on checks and balances. And we've seen the erosion of these checks and balances in a lot of ways. Things are left to the court to decide. Instead of Congress restraining itself from doing things that it thinks are unconstitutional, they say, "Well, we'll do this because it's good policy. If it's unconstitutional, the court will say so." Same with the president. We used to have all these lines of defense against things happening that shouldn't under the Constitution. And we've sort of ceded all of those, leaving just the court as a line of defense. And so the immunity decision takes that one last line of defense and severely undermines it. Now the judicial system can't stop, can't hold a president accountable for criminal actions. And that's the difference between a Democratic Republic with checks and balances that is designed to constrain power and a system where power is unconstrained. And that's not the system we're supposed to have.

[00:54:41.5] Jeffrey Toobin: And I think it's worthwhile to acknowledge the power of Justice Alito's argument, which is, you know, we don't want to be a country where the new guy throws the old guy in prison as a matter of course. And there's a lot of intuitive appeal, I think, to that argument that we are not that kind of country. However, there has to be some remedy when someone does something so awful, so criminal, so much in a violation of actual criminal statutes that there has to be some accountability. And the tragedy of *Trump v. United States* is that the worst acts a president can do, abuse of his official powers, you know, no one really cares. I mean, the president is not a great threat if he smacks someone in the face during a campaign rally because that's not an official act. But in Justice Sotomayor's famous example from her dissenting opinion, if a president uses his official power to order Navy SEALs to assassinate his political

opponents, that's the kind of thing we really do want the criminal law to sanction. And because of Trump, and I would argue, trying to overturn the results of a legitimate election as Trump did in 2020, that's the kind of thing we should reserve criminal sanction for and *Trump v. United States* took that away, made that possibility go away.

[00:56:30.4] Jeffrey Rosen: Thank you so much for that. And since we're almost out of time, Brian, we'll give you the last word. What are your final thoughts about whether or not the pardon power today is being exercised as the framers intended or not?

[00:56:44.5] Brian Kalt: Well, again, I'll come back to this erosion of accountability as a problem. The pardon power only makes sense if you can situate it in a structure in which the president is held accountable, accountable by the voters, accountable by Congress, perhaps even accountable to the criminal law. And this is happening at the same time that there's sort of a, I don't know, an erosion in respect for neutral principles. It's very difficult for me, anytime I talk about this, 99% of the discussion that I get from lay people is not about the principles here. It's about either Trump good or Trump bad. And we need people to understand if you think that presidential immunity is a good thing, is it because you think presidential immunity for Trump is a good thing? You have to ask yourself, is presidential immunity a good thing by asking yourself, would it be good if a president I didn't like was immune and was able to do whatever he wanted under official acts and would be immune? That's what we need to get back to. And I think I'd say the same thing with the pardons. If you agree with the pardon, great, but you should still want presidents to be held accountable, that structure of accountability to be there because sooner or later, you're not going to like the president and you're not going to like the pardon, and if that accountability is gone, there won't be anything you can do about it.

[00:58:25.2] Jeffrey Rosen: Thank you so much, Jeffrey Toobin and Brian Kalt for a deep, thoughtful, and illuminating examination of this crucially important constitutional power. Dear NCC friends, thanks so much for joining and be sure to read Jeff"s and Brian's great new books, *The Pardon: The Politics of Presidential Mercy* and *Constitutional Cliffhangers*. Thanks again. See you soon. This episode was produced by Samson Mostashari and Bill Pollack. It was engineered by Bill Pollack and Kevin Kilburn. Research was provided by Yara Daraiseh, Gyuha Lee, Samson Mostashari, and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Check out the Constitution 101 course with Khan Academy at constitutioncenter.org/khan101. Sign up for the newsletter at constitutioncenter.org/connect. There's so much great content that will be coming up as the end of the Supreme Court term approaches. And always remember that the National Constitution Center is a private nonprofit. This podcast and all of our work is made possible only thanks to the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting our efforts by donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.