U.S. Department of Justice
Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

April 27, 2021

MEMORANDUM FOR LISA MONACO
DEPUTY ATTORNEY GENERAL

Re: The Pardon of Stephen Bannon and Other
January 19, 2021 Pardons of President Trump

Your office has asked whether the pardons of persons identified in a master clemency warrant signed by President Donald J. Trump on January 19, 2021 are valid, even though the Office of the Pardon Attorney completed individual pardon warrants for those persons after the expiration of President Trump's term on January 20, 2021. You have further asked whether, if those pardons are valid, the scope of the offenses pardoned is properly and conclusively determined by the individual pardon warrants completed after the end of the presidential term. You thus have asked how the constitutional constraints on the pardon power, U.S. Const. art. II, § 2, cl. 1, interact with the practice of the Office of the Pardon Attorney in the context of the final pardons of President Trump's term. In the case of one of these pardonees, Stephen Bannon, you have asked whether a "generalized" clause in the individual warrant, which extends the grant of clemency to as-yet-uncharged offenses, forms a legitimate component of his pardon. Finally, you have asked whether and how the government or Mr. Bannon might challenge the scope of his pardon in a judicial proceeding. *See* E-mail for Christopher H. Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from Karl R. Thompson, Senior Counselor to the Deputy Attorney General, Office of the Deputy Attorney General, *Re: OLC Opinion Request* (Feb. 9, 2021, 8:19 PM) ("*Opinion Request*").

We believe that the January 19, 2021 pardons are valid, even though the corresponding individual pardon warrants were not completed until after the expiration of the presidential term. We further believe that the individual warrants properly reflect the scope of those pardons, as long as the individual warrants track some direction from the President. To the extent that any offense, clause, or condition in an individual warrant was included without direction from the President, it would, we believe, be invalid. It may be difficult, however, for courts to determine conclusively what the President intended for these pardons when he signed the master warrant on January 19. Prosecutors might argue that an individual warrant improperly expanded the scope of a pardon, while a pardonee might argue that an individual warrant improperly narrowed the scope. We believe that a court could look to extrinsic evidence to resolve such arguments.

I.

In connection with this request, you provided us with a memorandum summarizing events and details pertaining to the issuance of pardons in the last few days of President Trump's term and in particular the pardon of Stephen Bannon. *See generally* Memorandum for the Files from Rosalind Sargent-Burns, Acting Pardon Attorney, *Re: Circumstances Surrounding the Pardon of Stephen Bannon* (Jan. 25, 2021; amended Feb. 3, 2021) ("Pardon Memo"). As the Acting Pardon Attorney explains in that memorandum, a master warrant conveys a grant of clemency to multiple individuals whose names are set forth on a list, and it typically directs and empowers the Pardon Attorney, as the President's representative, to sign an individual warrant executing the grant of clemency for each listed individual and identifying the pardoned or commuted offenses. *Id.* at 1.

On January 19, 2021, President Trump signed a master warrant granting "full and unconditional pardons to the following named persons for those offenses against the United States individually enumerated and set before me for my consideration," and included a list of twenty-eight individuals. *See* Office of the Pardon Attorney, U.S. Dep't of Justice, *Master Pardon Warrant* (Jan. 19, 2021), https://www.justice.gov/file/1358426/download. A copy of this warrant was transmitted by e-mail from the White House Counsel's Office ("WHCO") to the Office of the Pardon Attorney ("OPA") at 12:14 AM on the morning of President Trump's final day in office, January 20. Pardon Memo at 2. Nine of the twenty-eight individuals listed on the January 19 master pardon warrant, including Mr. Bannon, were persons for whom the Office of the Pardon Attorney had not been aware the President was considering pardons. *Id.* At 1:44 AM on January 20, WHCO sent OPA the contact information for some of these pardonees, as well as a spreadsheet that "contained docket numbers, which is what WHCO had been using over the course of the finals months of the administration to convey to [OPA] the offenses for which clemency was being considered for the various individuals in whom WHCO had interest." *Id.* As provided by the Constitution, *see* U.S. Const. amend. XX, § 1, President Trump's term came to an end at noon the same day.

The Acting Pardon Attorney signed the Bannon individual warrant the following day, January 21, 2021. The docket number for a criminal prosecution pending in the Southern District of New York was "the only direction [OPA] received" about Mr. Bannon's pardon from either WHCO or any other entity at the White House. Pardon Memo at 3. That docket number was used to develop his individual clemency warrant, but because his pardon was preemptive to conviction—occurring before any trial or plea resulting in a conviction—the language of the individual warrant was drafted to "reflect the current status of the case." *Id.* OPA used two prior "high-profile clemency grant[s] of the Trump administration" that were preemptive to sentencing as a model for the Bannon individual warrant: the pardons of Joseph Arpaio and Michael Flynn. *Id.* Each of those warrants included a "generalized" clause, extending the pardon to other offenses arising under the same statutory chapter under which the identified conviction arose. *Id.* When drafting the Bannon individual warrant, OPA included "offenses charged in the United States District Court for the Southern District of New York in an indictment (Docket No. 20-cr-412) charging violations of Sections 981(a)(1)(C), 1349, 1956(h), and 1957(a), Title 18, 2461(c), Title 28, United States Code." *Opinion Request*, att. (Individual Warrant for Stephen Bannon

(Jan. 21, 2021)).[1] OPA also included a "generalized" clause pardoning "any other offenses under Chapter 95 of Title 18, United States Code, that may be arise, or be charged, in connection with the offenses alleged in the above-listed indictment (Docket No. 20-cr-412), in the United States District Court for the Southern District of New York, or any other federal jurisdiction." *Id.* OPA did not include a similar "generalized" clause in the individual warrants for any of the other persons identified on the January 19 master warrant. *See* Pardon Memo at 3.

II.

You have asked whether the master warrant signed by President Trump on January 19, 2021, the individual warrants signed by the Acting Pardon Attorney after January 20, 2021, or some combination of the two, created valid pardons. We believe that because President Trump signed the master warrant pardoning the named individuals before the expiration of his presidential term, the master warrant granted twenty-eight valid pardons.

Article II vests the President with the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const. art. II, § 2, cl. 1. Although the Constitution provides no procedural guidance for the exercise of the pardon power, the Supreme Court, the opinions of this Office and of Attorneys General, and the weight of historical practice have long emphasized that the presidential pardon power is broad; that limitations on that power must be inferred from the Constitution itself; and that questions about the power ought only rarely to be resolved in a manner that might interfere with the President's decision to grant a pardon. *See The Federalist* No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."); *Schick v. Reed*, 419 U.S. 256, 267 (1974) (rejecting an "interpretation of § 2, cl. 1, [that] would in all probability tend to inhibit the exercise of the pardoning power and reduce the frequency of commutations," noting that "the pardoning power is an enumerated power of the Constitution and that its limits, if any, must be found in the Constitution itself"); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867) ("The power thus conferred is unlimited, with the exception stated [for impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control.").

The pardon power belongs solely to the President, and the opinions of the Attorney General and our Office have long classified its exercise—the decision to grant pardons or reprieves for offenses against the United States—as a function that the President cannot delegate to a subordinate or agent. *See Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 464–65 (1855) (even "if the direction of the President to the executive departments [may] be assumed generally," there remain "cases of distinction in which, by the Constitution or by statute, specific things must be done by the President himself"; "[t]hus it may

[1] Consistent with the recent practice, the Acting Pardon Attorney also signed a back-dated version of Stephen Bannon's Individual Warrant, which can be found on the public website of the Office of the Pardon Attorney. *See* Office of the Pardon Attorney, U.S. Dep't of Justice, *Compiled Individual Warrants for Pardons of Donald J. Trump* at 4, https://www.justice.gov/pardon/page/file/1359616/download (last visited Apr. 23, 2021).

be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States, not another man the Attorney General, or anybody else, by delegation of the President"); *accord* Office of Legal Counsel, Memorandum *Re: Delegation of Presidential Functions* at 2 (Sept. 1, 1955) (same); *Presidential Succession and Delegation in Case of Disability*, 5 Op. O.L.C. 91, 93 (1981) (same). While others may offer analysis of or recommendations regarding an executive grant of clemency, the grant itself must be a decision made by the President. *See* Memorandum for Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, from Herman Marcuse, Office of Legal Counsel, *Re: Status of Papers in the Hands of the Pardon Attorney* at 1 (March 22, 1974) ("The pardon power can neither be delegated to nor exercised by anyone else. . . . [T]he exclusive nature of vesting of the pardoning power in the President[] does not preclude the President from seeking the assistance of others in examining and evaluating the record, but his judgment, when pronounced, must be his own judgment and not that of another."); *cf. United States v. Batchelor*, 22 C.M.R. 144, 155 (1956) (holding that, even where another government official's statements may seem to promise amnesty, only the President can make such a promise, since "[i]t is the general rule that this pardon power is nondelegable and cannot be shared with another person or official when the power is granted in terms similar to those used in our Constitution."). Accordingly, although an individual warrant not signed by the President may record a pardon, such a document cannot exercise the pardon power. In this case, the January 19 master warrant, signed by the President, granted a pardon to the individuals listed in that document, and the President could not have delegated this authority to the signatory of the individual warrants.

Article II thus "entrusts clemency *decisions* to the President's sole discretion," but it does not provide that the President must use any particular means to embody these decisions, nor does it call for the preparation of any specific instrument, such as an individual warrant, to make a pardon complete. *United States v. Pollard*, 416 F.3d 48, 57 (D.C. Cir. 2005) (emphasis added). While the individual warrant has been used for some time as a matter of Department of Justice ("DOJ" or "the Department") practice, the Constitution does not require it or any other administrative practice of the Pardon Attorney. The existing pardon regulations govern only the processing of clemency applications within the Department; they do not purport to restrict the President's ultimate authority to grant or deny pardons, commutations, and other forms of clemency as he sees fit. *See* 28 C.F.R. § 1.11 (indicating that the current regulations are "advisory only and for the internal guidance of Department of Justice personnel" and that they "create no enforceable rights in persons applying for executive clemency"); *Yelvington v. Presidential Pardon & Parole Att'ys*, 211 F.2d 642, 643–44 (D.C. Cir. 1954) (concluding that prior pardon regulations, though including no such express disclaimer, created no judicially enforceable rights). In recent practice, an individual warrant is completed by OPA and signed by the Pardon Attorney before being transmitted to the pardonee or his agent, but in the early twentieth century "the practice ha[d] been for the President, upon signing the warrant for clemency, to instruct that the warden be notified immediately, at times by telegraph, and that the authorized clemency be promptly conferred. Mailing of the warrant of pardon follow[ed] in many cases the action authorized in the act of clemency," and, in many cases, "[w]hen the President grant[ed] a reprieve, the beneficiary usually d[id] not see the instrument of clemency." W.H. Humbert, *The Pardoning Power of the President* 72 (1941).

It has long been the view of the Department that

> Neither the Constitution nor any statute prescribes the method by which Executive clemency shall be exercised or evidenced. It is wholly a matter for the President to decide, as a practical question of administrative policy. Nobody but the President can exercise the power, but the power having been exercised the method of making a record and evidence thereof is a mere detail which he can prescribe in accordance with what he deems to be the practical necessities and proprieties of the situation.

Memorandum for the Attorney General from Alfred A. Wheat, Acting Solicitor General, *Re: Signature of the President on Pardon Warrants and Signatures of the President and the Attorney General on Commissions of Notaries Public in the District of Columbia* at 2 (Mar. 27, 1929). On this view, the January 19, 2021 master warrant constitutes a valid exercise of the pardon power, and the individual warrant is "a mere detail" occurring after "the power [has] been exercised." That the procedures for processing pardons—including the preparation and signing of an individual warrant by the Pardon Attorney—were not completed before noon on January 20, 2021, therefore does not render these grants of executive clemency invalid.

The understanding that procedural practices or regulatory requirements do not constrain the President's pardon power under the Constitution is consistent with the underpinnings of that power. The Framers chose to vest the exclusive authority of the pardon power in the President in significant part because a single executive could more rapidly make decisions to grant pardons and reprieves than could any parliamentary body, and they believed that flexibility of decision-making would serve the Nation's interest. *See The Federalist* No. 74, at 449 (Alexander Hamilton) ("[T]he principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall."). If "[t]he loss of a week, a day, an hour, may sometimes be fatal" when granting a pardon, *id.*, it would frustrate a key structural feature of the pardon power for the validity of a pardon to turn on the completion of an intermediate administrative process between the grant and delivery of the pardon—particularly a process, like the drafting of an individual warrant, that necessarily follows, and requires additional time after, the President's decision granting the pardon.

Our conclusion that an individual warrant may be completed by the Pardon Attorney after the President who granted the pardon is no longer in office also accords with historical practice. In recent administrations, Presidents have often granted clemency to a large number of individuals, via master warrants, in their final days or hours in office. The corresponding individual clemency warrants have generally been prepared by OPA and signed by the Pardon Attorney after the presidential term has expired. For instance, a congressional hearing weeks after the end of President William J. Clinton's second term revealed that the individual warrant for the controversial pardon of Marc Rich—as well as a number of the individual warrants for the 141 persons pardoned by President Clinton on January 20, 2001—were "prepared after January 20th." *President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong., 33 S. Hrg. No. 107-194 (2001) (statement and testimony of Roger C.

Adams, Pardon Attorney) ("Adams Testimony"). Mr. Adams testified that "[i]t has been customary for many years that the individual warrants reflect the date of the grant, as set out in the master pardon warrant. . . . [I]t is understood that we are not physically able to prepare or deliver" the individual warrants before the expiration of the presidential term, but the later-signed individual warrants "certainly reflected the action of the President, then President Clinton, taken on January 20. . . . [W]hen he delegated the authority to me, he was President. It seemed to me appropriate that we would continue to carry out those instructions." *Id.* at 33–34. In addition, during a telephone conversation our Office had with Acting Pardon Attorney Rosalind Sargent-Burns on February 23, 2021, she confirmed that the preparation of individual warrants after noon on January 20 for pardonees identified in master warrants signed before the end of a presidential term is "standard practice," and she recalled that such a practice was employed by her Office after the end of President Barack H. Obama's second term.

These recent practices of the Office of the Pardon Attorney, as described by Ms. Sargent-Burns and Mr. Adams, indicate that the signing of the individual warrant has historically been viewed by the Department as "a ministerial act . . . carrying out the actions of [the President]" following his exercise of discretion to grant the pardon.[2] Adams Testimony at 34. And the Supreme Court has suggested that historical practice is relevant in determining the scope of the pardon power. *See Ex parte Grossman*, 267 U.S. 87, 118–19 (1925) (noting, in holding that pardons for criminal contempt are constitutional, that "criminal contempts of a federal court have been pardoned for eighty-five years," and "[s]uch long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on"); *Schick*, 419 U.S. at 266 ("[W]e note that Presidents throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute," a fact that is "not insignificant for our interpretation of Art. II, § 2, cl. 1, because, as observed by Mr. Justice Holmes: 'If a thing has been practised for two hundred years by common consent, it will need a strong case' to overturn it." (citation omitted)).

We believe that an individual warrant is an administrative procedure implementing an exercise of pardon authority that has already occurred. The January 19 master warrant makes clear that President Trump had pardoned the twenty-eight named individuals, and thus constitutes the relevant exercise of the pardon authority. *See, e.g.*, *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833) ("A pardon . . . , proceeding from the power entrusted with the execution of the laws . . . is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended[.]"); *see also, e.g.*, *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1244 (D.D.C. 1974) ("We are in full agreement with the plaintiff that the regulations were intended to help rationalize the decisionmaking process with respect to clemency. But . . . [i]t is

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[2] President Carter granted two pardons on January 19, 1981; President Reagan granted ten pardons on January 13, nine on January 17, and one on January 18, 1989; President George H.W. Bush granted twelve pardons on January 18, 1993; President Clinton granted 141 pardons on January 20, 2001; President Obama granted sixty-five pardons on January 17, 2017; and President Trump granted twenty-one pardons on January 13, fifty-two pardons on January 19, and one pardon on January 20, 2021. In the last fifty years, only President George W. Bush did not grant any pardons during his last week in office. *See generally* Office of the Pardon Attorney, U.S. Dep't of Justice, Office of the Pardon Attorney, *Clemency Recipients*, https://www.justice.gov/pardon/clemencyrecipients (last visited Apr. 22, 2021).

the President who, under his express grant of power, must in the end decide; it is the President who must execute the warrant of clemency and he is not required to seek or rely upon any other's advice in so doing."). Accordingly, we believe the pardons issued by President Trump via the January 19 master warrant are valid. Any ambiguity occasioned by the language in that document or the information provided to OPA by the White House about the named pardonees goes to the scope of the pardons, not the question whether valid pardons were granted.

III.

We turn now to the scope of the pardons granted by President Trump's master warrant of January 19. You have asked whether the offenses identified in the individual warrants signed by the Acting Pardon Attorney after January 20, 2021 validly define the scope of those pardons. The President, we believe, has great latitude in how he chooses to identify the offenses being pardoned. The individual warrants issued after January 20 validly defined the scope of the pardons to the extent they tracked some direction, express or implied, by President Trump.

A.

Much of the existing authority on the pardon power suggests that, because of the broad discretion afforded by the pardon power, the President may choose how to indicate which "offenses against the United States" are being pardoned. *See, e.g.*, *Grossman*, 267 U.S. at 120; *see also United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872) (the President's power to pardon is "granted without limit" except for those in the pardon clause itself). Because of the President's broad latitude in identifying the pardoned offenses, the Pardon Attorney's preparation of an individual warrant may be based on either an express direction from the President as to those offenses or an implied direction, resting (for example) on an established course of dealing with that President or his administration.

The Supreme Court has never squarely addressed what information a pardon must include about the offenses to which it applies. In *Burdick v. United States*, 236 U.S. 79 (1915), the Court considered President Woodrow Wilson's pardon of George Burdick, which granted "a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter, or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act." *Id.* at 86 (internal quotation marks omitted). The President sought to eliminate Burdick's Fifth Amendment objections to providing testimony to a grand jury about information he had obtained for an article he had written, but Burdick refused to accept the pardon, arguing that his rejection rendered it ineffective and kept intact his Fifth Amendment justification for refusing to testify before the grand jury. Burdick also had "contended . . . that the pardon is illegal for the absence of specification, not reciting the offenses upon which it is intended to operate; worthless, therefore, as immunity." *Id.* at 93. The Court, in considering that contention, observed that in Burdick's pardon "[t]here is no identity of the offenses pardoned, and no other clue to ascertain them but the information incorporated in an article in a newspaper. And not that entirely, for absolution is declared for whatever crimes may

have been committed or taken part in 'in connection with any other article.'" *Id.* Yet the Court declined to rule on which offenses might have been validly pardoned, instead holding that, according to the decision in *Wilson*, acceptance of a pardon is required for it to be effective, so that Burdick's rejection did render it ineffective.

Although the Supreme Court has never ruled how the scope of a pardon is to be inferred from a grant that does not identify specific offenses,[3] Attorneys General have historically endorsed the concept of "an implicit pardon," whereby the President's appointment of a convicted person for higher office constitutes a constructive pardon of that conviction. *See Effect of Promotion of a Suspended Passed Midshipman*, 4 Op. Att'y Gen. 8, 9 (1842); *see also Court Martial—Pardon*, 6 Op. Att'y Gen. 123, 125–26 (1853). In those cases, no presidential document specified the offenses pardoned, and no pardon warrants existed for the pardoned individuals, yet the appointment to higher office by the President was deemed to function as a pardon; from the specific appointments made by the President, the pardoned offenses could be inferred.

Furthermore, opinions of Attorneys General have suggested that pardons need not follow any standard form. *See Pardon—Removal of Disabilities—Pension*, 27 Op. Att'y Gen. 178, 181 (1909) ("Nor is the form which this pardon may assume at all important, or the manner of its promulgation. Whenever the President, as an act of grace or clemency, intervenes to condone, in whole or in part, an offense committed . . . ; and in whatever form this is done, whether by a formal pardon directed and delivered to the beneficiary, by executive order through the Adjutant-General, or by a proclamation of amnesty to a class of offenders, this is always and necessarily an exercise of the pardoning power vested in the President by the Constitution."); *Effect of*

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[3] Some scholars have suggested that implicit in the pardon power is a requirement of specificity, so that the sorts of inferences we discuss here might be impermissible. *See, e.g.*, William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 530–32 (1977) (suggesting that President Ford's grant of an "open pardon" to President Nixon, which "fail[ed] to specify any of the crimes for which Nixon was pardoned," may have been unconstitutional).

These scholars often point to English law, which the Supreme Court has indicated may inform the scope of the pardon power in Article II. *See id.* at 485, 532–33; *Schick*, 419 U.S. at 262 ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice."). Blackstone explained that "[a]s to the *manner* of pardoning: it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void. . . . General words" will therefore "have . . . a very imperfect effect in pardons," and pardoned convictions "must be particularly mentioned," for otherwise "it is presumed the king knew not of those proceedings." William Blackstone, 4 *Commentaries on the Laws of England* 393 (1769). Any emphasis in English law on the specificity of the language in a pardon likely is a legacy of the Pardon Act of 1389, in which Parliament required that the King identify by name various pardoned offenses viewed as particularly heinous. *See id.* at 393 ("It is also enacted by statute . . . that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein. . . . Upon which Sir Edward Coke observes, that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations."). Much of that 1389 Act was repealed by the time the Founders were drafting the Constitution, however, and the text of the Pardon Clause incorporates no language similar to the 1389 statute. Nor are we aware of any other indication that the Founders sought to incorporate anything akin to its constraints in the presidential pardon power. *See also* Duker, 18 Wm & Mary L. Rev. at 485 (noting that the 1389 Act's "check proved ineffective on an executive with power to dispense as well as power to pardon").

Pardons, 8 Op. Att'y Gen. 281, 284 (1857) ("He may do it by warrant of remission in all cases . . . . And he may do it by the common form of a general warrant of pardon. And in my judgment he may do it for and at any time, either anterior to prosecution, or pending the same, or subsequently to the execution in part or in whole of sentence—subject in the latter case only to the limits of legal, moral, or physical possibility. Whatever of controversy there may have been or still be, on the latter point, will be found to resolve itself into a question of the *form* of the pardon, or of its legal *consequences* and effect." (citation omitted)); *cf. Pardons,* 1 Op. Att'y Gen. 341, 343 (1820) ("A pardon pre-supposes an offence, and nothing more."). Indeed, grants of amnesty—essentially, pardons directed to unnamed individuals for specified conduct but not, necessarily, for specified charges—have long been employed by Presidents, notwithstanding their lack of specificity. *See, e.g.*, *Amnesty—Power of the President*, 20 Op. Att'y Gen. 330 (1892); *see also Pardon—Removal of Disabilities—Pension*, 27 Op. Att'y Gen. at 181; *Armstrong v. United States*, 80 U.S. 154, 155–56 (1872).

Because restrictions on the pardon power must be found in or derived from the Constitution, and because the power was designed to be flexible and has a history of varied usage, we believe that what is relevant in determining the scope of a pardon is whether there is a reasonable inference that the President intended the pardon to apply to a particular offense. "As long as it was the President who finally decided and acted upon the clemency request," procedural challenges to pardons will likely be without merit. *Hoffa*, 378 F. Supp. at 1244–45. Indeed, the Supreme Court has explained that "[t]he very essence of the pardoning power is to treat each case individually. . . . Individual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick*, 419 U.S. at 265, 268. We believe that this feature could be said to characterize the form as well as the substance of a pardon, allowing the President to take, if he wishes, an unusual approach to a specific pardon. This includes conveying the offenses that had been pardoned by reference to an OPA recommendation or, as here, a WHCO spreadsheet.

B.

Applying these principles to President Trump's January 19, 2021 pardons, we believe that the offenses covered by the pardons are those for which each pardonee had been charged or convicted in the particular case whose docket number was furnished by WHCO on the spreadsheet of the type that "WHCO had been using over the course of the final months of the administration to convey to [the Pardon Attorney] the offenses for which clemency was being considered for the various individuals in whom WHCO had interest." Pardon Memo at 2. As long as an offense included in an individual warrant for a person identified in President Trump's January 19 master warrant corresponded to an indictment or judgment associated with the docket number identified in the WHCO spreadsheet, that offense would seem to be properly within the scope of the pardon. In accordance with the practice of President Trump's administration—a course of dealing that appears to have reflected a common understanding—OPA understood the

docket numbers to mean that the indictments or judgments on those dockets should supply the pardoned offenses.[4]

In the case of the pardon of Stephen Bannon, WHCO furnished OPA with only "Mr. Bannon's name, contact information, and the docket number from the Southern District of New York" in a spreadsheet provided by WHCO to the Office of the Pardon Attorney at 1:44 a.m. on January 20, 2021. *See id.* The Pardon Attorney recounted that "[t]he docket number listed by WHCO for Mr. Bannon" on that spreadsheet was "the only direction PARDON received" and "was used to develop the individual warrant in his case." *Id.* at 3. On the record we have, the determination to include "a generalized clause against subsequent identical or closely related charges," *id.*, was made without any direction from the President; in contrast to the offenses charged in the indictment on the docket whose number WHCO gave OPA, the "generalized" provision does not appear to track any instruction, express or implied, from the President or WHCO. Accordingly, we believe that it is likely beyond the scope of Mr. Bannon's pardon.[5]

The Acting Pardon Attorney explained that her office included the "generalized" provision because two similarly high-profile pardons granted by President Trump earlier in his administration had contained such a provision: the August 25, 2017 pardon of Joseph Arpaio, which was the first of President Trump's pardons, and the November 25, 2020 pardon of Michael Flynn. Both of these pardons were preemptive, but, unlike Mr. Bannon's pardon, preemptive to sentencing rather than preemptive to conviction. Furthermore, "WHCO gave direction in the drafting of the Arpaio warrant and solely drafted the Flynn warrant without PARDON assistance or input." *Id.* at 3. By contrast, WHCO gave neither express nor implied direction for the drafting of the Bannon warrant; nevertheless, "[t]he Arpaio warrant was the model used in drafting Mr. Bannon's individual pardon warrant." *Id.* As the Acting Pardon Attorney recalled, "[a]bsent WHCO direction," the Bannon warrant "was not crafted to be any more or less broad or narrow" than the Arpaio warrant. *Id.*

Mr. Bannon is the only one of the pardonees from the January 19 master warrant whose individual warrant includes a "generalized" clause pardoning uncharged offenses. OPA similarly had only docket numbers to guide its drafting of the individual warrants for some of the other

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[4] During our conversation with the Acting Pardon Attorney, she explained that her office had worked with the White House to develop the language used in the January 19 master warrant—"full and unconditional pardons for those offenses against the United States individually enumerated and set before me for my consideration"—which had not been used by prior Presidents. Other Presidents' master warrants typically referred to the recommendations and reports of the Pardon Attorney and the offenses discussed there. Because President Trump often did not have recommendations from the Pardon Attorney about the individuals to whom he had decided to grant clemency and, in some cases, had no clemency petition or other records for those individuals, his master warrants required different language to direct the Pardon Attorney's preparation of the individual warrants. The WHCO therefore consulted with OPA in the drafting of that different language. The Acting Pardon Attorney understood the language in President Trump's January 19 master warrant to refer to the spreadsheet provided by WHCO on January 20th; she used that understanding to determine the scope of each of the January 19 individual pardon warrants.

[5] We conclude that the "generalized" clause is *likely* beyond the scope of Mr. Bannon's pardon because of the possibility, discussed in Part IV *infra*, that extrinsic evidence not known to us at this time may shed further light on President Trump's intended scope for this pardon.

pardonees on that master warrant, but it included the "generalized clause against subsequent identical or closely related charges" only in the Bannon individual warrant. Further, "generalized" clauses were not included in the warrants of the seven other individuals on the January 19 master warrant whose pardons were preemptive; the Acting Pardon Attorney explained that "[a]s the various stages of each preemptive case became known to [OPA]—preemptive to sentencing, preemptive to conviction, and even preemptive to indictment—the charges at issue became more difficult to discern with only docket numbers provided by WHCO (several indictments were sealed or unavailable and others were pre-indictment)."[6] Pardon Memo at 3 n.1. There is no indication, then, that the President intended or expected that the Acting Pardon Attorney would draft Mr. Bannon's individual warrant with terms like Arpaio's and Flynn's simply because it, too, was a preemptive pardon; the other preemptive pardons on the January 19 master warrant were treated differently from the Bannon pardon. *See also id.* at 3 n.2 (explaining that President Trump's preemptive pardons prior to the January 19 master warrant included, in addition to Arpaio and Flynn, "Mathew Golsteyn, a U.S. Army case preemptive to conviction, and Dwayne Carter, individually granted on January 19, 2021, preemptive to sentencing and for whom WHCO gave direction").[7]

According to the Acting Pardon Attorney, preemptive-to-conviction pardons are uncommon, and pardons for uncharged offenses are even more so. Courts have expected a clear direction from the President when the scope of a pardon is unusual or deviates from historical norms. *See, e.g.*, *Richards v. United States*, 192 F.2d 602, 606 (D.C. Cir. 1951) ("Nothing on the face of the proclamation indicates any specific desire on the part of the Executive to accord to the recipients the particular measure of benefit (freedom from cross-examination) which is sought in this case. The President, in using the language 'full pardon,' doubtless desired to grant all—but no more than—the usual and established benefits deriving from the issuance of individual instruments of pardon . . . [which] do not include the immunity from questioning which is here demanded."). Nor is there any historical indication that pardons lacking a specification of the pardoned offenses would typically cover uncharged offenses. President Clinton, for instance, supplied only very limited information to the then-Pardon Attorney Roger C. Adams about the offenses for which he was pardoning the 141 individuals named in a master warrant he signed on the final day of his second term. In a statement about these January 20,

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[6] Only one individual in this last batch of President Trump's pardonees received a pre-indictment pardon: Kenneth Kurson. For this lone pre-indictment pardon, the WHCO spreadsheet identified the number of a docket on which a complaint in support of an arrest warrant for Mr. Kurson had been filed, and the individual warrant states that he is being pardoned "for offenses alleged in a complaint and affidavit in support of an arrest warrant (Docket No. 20-MJ-990) . . . in the United States District Court for the Eastern District of New York." *Compiled Individual Warrants for Pardons of Donald J. Trump* at 50.

[7] The Mathew Golsteyn pardon, though "full and unconditional," took the form of an individual warrant signed by President Trump, which referenced only "that offense charged in violation of Article 118, Uniform Code of Military Justice, . . . which was referred for trial to the United States Army general court-martial." *See* Office of the Pardon Attorney, U.S. Dep't of Justice, *Pardon of Mathew Golsteyn* (Nov. 15, 2019), https://www.justice.gov/pardon/page/file/1218421/download. We believe that this means that the Bannon pardon is the only one of President Trump's preemptive-to-conviction pardons that included a "generalized clause against subsequent identical or closely related charges." During our call with the Acting Pardon Attorney, she explained that because the Golsteyn case was a military pardon, which OPA does not typically handle, WHCO had provided specific direction as to the drafting of the individual warrant.

2001 pardons, Mr. Adams described "a variety of ways" that his office determined the scope of these pardons, including searching out existing federal convictions and referencing pardon petitions, where they existed.[8] Adams Testimony at 28. But, he explained, "we have no knowledge or belief that President Clinton intended to pardon anyone for conduct for which he or she was not at least charged and, in most cases, convicted." *Id.* OPA's practice during the Clinton administration confirms our view that some direction from the White House would have been required to include a "generalized" clause pardoning uncharged crimes. *See also Ex parte Weimer*, 29 F. Cas. 597, 598–99 (C.C.E.D. Wis. 1878) (No. 17,362) ("[T]he penalties and forfeitures from which the person is released by a pardon, are such as accrue from the particular offense or offenses embraced in the instrument of pardon," and the pardon does not "grant[] a release from the consequences of all offenses committed anterior to the date of the pardon, whatever may have been their nature, and however foreign to that which is expressed in the instrument of pardon. Such a view of the scope and effect of the pardons . . . is not maintainable.").

During the Trump administration, adding a "generalized clause against subsequent identical or closely related charges" to any individual warrant was highly unusual. It had been done only two prior times, in the cases of Arpaio and Flynn. In each of those two cases, the White House Counsel's office either drafted the individual warrant or discussed its contents with OPA. By contrast, the spreadsheet relating to the Bannon pardon gave no indication that the President intended to include a "generalized" clause in that case, and there was no further communication or direction from the White House to the Acting Pardon Attorney about this particular pardon (or any of the January 19 pardons). Our review of recent practices in OPA reveals no historical basis for interpreting the spreadsheet of docket numbers as indicating a pardon that extends beyond the offenses charged in the docketed indictment. Because the exercise of the pardon power is a nondelegable power of the President, and may not be supplemented by "some department or functionary of . . . government," *Ex parte Wells*, 59 U.S. 307, 310 (1856), we conclude that the "generalized" clause likely does not reflect an exercise of the Article II pardon power and does not form a valid component of Mr. Bannon's pardon.

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[8] Mr. Adams' prepared statement explained that a majority of the persons on President Clinton's last master warrant had submitted pardon petitions to the Department, and OPA had submitted recommendations about those petitions to the White House; for those cases, "it is clear that President Clinton intended to grant pardons for the offenses so noted and discussed." Adams Testimony at 28. For the persons who had submitted petitions to the White House or the Department but without time for OPA to review the petitions and make recommendations, Mr. Adams was "confident that President Clinton intended to grant pardons for the offenses cited in their petitions." *Id.* And for the persons who had not submitted any petitions for pardon, OPA "determined the scope of the pardons . . . in various ways," including by tracking down existing convictions "from the Internet web sites of several Independent Counsels, and in some cases obtain[ing] the court documents such as the judgment orders." *Id.* But for "non-Independent Counsel cases in which [OPA] ha[d] received either no documents at all or very sketchy information from the White House Counsel in the last hours before the pardons were granted, [OPA] determined in all but one case that the person has only one federal conviction," and was "therefore confident that it was this single conviction that President Clinton intended to pardon, and so drafted the individual warrants accordingly." *Id.* As of the date of Mr. Adams' testimony, February 14, 2001, there were still nine individual warrants that had not been completed, and he stated that OPA "intend[ed] to prepare in this fashion the remaining nine individual warrants." *Id.*

IV.

Finally, you have asked whether Mr. Bannon, or federal prosecutors, would be entitled to challenge the scope of his pardon in a judicial proceeding. It is by now well settled that a pardonee must plead the pardon as a defense to benefit from its grant of clemency in present or future proceedings. *See Wilson*, 32 U.S. at 163; *see also* Blackstone, 4 *Commentaries on the Laws of England* at 394, 401. A defendant may always claim, as a defense, that he was pardoned for the crime with which he is now being charged or is already serving time. *See, e.g.*, *Wells*, 59 U.S. at 309 (considering, in a habeas petition, whether the President's conditional pardon of a murder, was in fact a full pardon "and the condition of it void" such that the petitioner should no longer have been incarcerated).[9]

As discussed above, we believe an individual pardon warrant is definitive as to the scope of the pardon only if it reflects what the President has directed, either expressly or by implication. We therefore think that either a defendant or a prosecutor would be entitled to argue that an individual warrant does not reflect the President's direction fully and accurately. Courts may be hesitant, however, to look beyond the four corners of the individual warrant and to consider extrinsic evidence about the President's intent in granting the pardon. *See, e.g.*, *Stetler's Case*, 22 F. Cas. 1314, 1316 (C.C.E.D. Pa. 1852) (No. 13,380) ("[W]here the pardon misrecites the time of conviction, or recites rather an impossible time[;] . . . and referring to one felony as its implied subject, and omits another, of which the party was equally convicted, and omits, besides, a portion of his sentence," it cannot "reasonably be intended that the executive was fully apprised of the crime of the party, or the action of the court upon it," for "[t]here is nothing of which we can take hold, to connect the pardon with the conviction, and thus to make them commensurate . . . . We cannot, by judicial construction, expand the pardon of one felony into a pardon of two[.]"); *Andrews v. Warden*, 958 F.3d 1072, 1078 (11th Cir. 2020) ("We can neither enlarge nor cabin the commutation order; we must evaluate only whether the commutation order supports the Bureau's calculation [of the petitioner's sentence]."); *cf. Runkle v. United States*, 122 U.S. 543, 561 (1887) (considering whether an order of the Secretary of War stating that President Hayes had approved a sentence following a court-martial but then had pardoned the individual in fact was "the result of the judgment of the President himself" by examining the text of the order); *United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990) (in determining whether a pardon may expunge the record of a conviction, "[w]e are requested to

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[9] The two other pardons with "generalized" clauses granted by the President Trump have already been the subject of judicial inquiry, with respect to their effect on ongoing criminal proceedings; those courts did not analyze the pardons' validity or their scope. *See United States v. Flynn*, No. 17-cr-232-EGS, 2020 WL 7230702, at *14 (D.D.C. Dec. 8, 2020) ("[T]he scope of the pardon is extraordinarily broad—it applies not only to the false statements offense to which Mr. Flynn twice pled guilty in this case, but also purports to apply to 'any and all possible offenses' that he might be charged with in the future in relation to this case and Special Counsel Mueller's investigation. However, the Court need only consider the pardon insofar as it applies to the offense to which Mr. Flynn twice pled guilty in this case." (citation omitted)); *United States v. Arpaio*, 951 F.3d 1001, 1006 (9th Cir. 2020).

construe both the text of the pardon power in Art. II, § 2 and the language of the January 21, 1977 pardon to determine the legal effect of" that individual's pardon).[10]

It is possible that a court may consider the Bannon individual warrant, now made public by OPA, to constitute the public record of the pardon. *See Andrews*, 958 F.3d at 1075 ("The President's grant of clemency and a description of it is publicly available on the website of the office of the United States Pardon Attorney."); *cf. Armstrong*, 80 U.S. at 155–56 (post-Civil War grant of amnesty and pardon to those who "participated in the late insurrection or rebellion" was "a public act, of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect"). And just as courts might refuse to entertain evidence that the President promised, but did not grant, a pardon to a defendant, they might be disinclined to consider evidence that the President gave a pardonee a narrower or broader grant of clemency than is reflected in an individual warrant. *See, e.g.*, *Griggs v. Fleming*, No. 03-10727, 2004 WL 315195, at *1 (5th Cir. 2004) (no discovery "required to determine why the President's intention was frustrated" where habeas petitioner asserted that President Clinton "allegedly wrote a note evidencing an intent to pardon him," since petitioner was "not actually pardoned").[11]

At the same time, we are not aware of any reason a court would be barred from considering extrinsic evidence of the intended scope of a presidential pardon. *See Robertson v. Gibson*, 759 F.3d 1351, 1357–58 (Fed. Cir. 2014) ("We begin by examining the plain language of Mr. Robertson's pardon, giving the words their ordinary meaning[;] . . . [but] we cannot read the pardon in a vacuum, as Mr. Robertson suggests. We must also look to the nature and purpose of the pardon, namely, President Ford's clemency program." (citation omitted)); *cf. United States v. Flynn*, No. 17-cr-232-EGS, 2020 WL 7230702, at *6 n.6 (D.D.C. Dec. 8, 2020) (taking judicial notice of, but not otherwise discussing, a Tweet sent by President Trump on the same day that he pardoned the defendant). If a defendant claims that another document better reflects the direction of the President than the individual warrant signed by the Pardon Attorney, a court might decide to consider that document. Should Mr. Bannon assert, for instance, that the White House public statement issued on January 20, 2021 reflects the President's intent in signing the master warrant that day, courts might be inclined to consider that statement in

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[10] In a somewhat analogous context, our Office was asked to interpret the condition of a presidential commutation of James R. Hoffa—which barred Hoffa from engaging in "direct or indirect management of any labor organization" for a time—but did not examine any extrinsic evidence of President Nixon's intent in including that condition in the Hoffa commutation. *See* Memorandum for Sol Lindenbaum, Executive Assistant to the Attorney General, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: James R. Hoffa—Presidential Commutation* at 5 (Feb. 11, 1972) (focusing on dictionary definitions and common usage of words used in the presidential commutation to interpret the meaning of the commutation's condition); *cf. Boyd v. United States*, 142 U.S. 450, 453 (1892) (even where the pardon document "recit[ed] . . . that the district attorney requested the pardon in order to restore Byrd's competency as a witness in a murder trial," that statement of intent "did not alter the fact that the pardon was, by its terms, 'full and unconditional'").

[11] A court might even give some deference to OPA's interpretation of a master warrant, on the ground that an executive agency is generally entitled to deference in interpreting an executive order it is charged with administering. *See, e.g.*, *Andrews*, 958 F.3d at 1078–79. We doubt that such principles of deference are applicable in the context of the pardon power, which may be exercised only by the President. But even if deference in the interpretation of a pardon might be appropriate in some instances, here the "generalized" clause does not appear to follow from anything the President did.

determining the intended scope of the pardon. *See Statement from the Press Secretary Regarding Executive Grants of Clemency* (Jan. 20, 2021), https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/ ("President Trump granted a full pardon to Stephen Bannon. Prosecutors pursued Mr. Bannon with charges related to fraud stemming from his involvement in a political project."). That statement could be taken to suggest the President was pardoning Mr. Bannon for all offenses relating to the fraud for which some specific charges had been brought against him. Along the same lines, the Acting Pardon Attorney believed that "the grant of pardon was for the offenses charged in the indictment and bearing a generalized clause against subsequent identical or closely related charges." Pardon Memo at 3. If so, the individual warrant arguably should have been drafted more broadly, so as to cover not only uncharged offenses under chapter 95 of title 18 of the U.S. Code, but also any uncharged offenses "closely related" to or arising from the same conduct or scheme at issue in the named indictment. Furthermore, the language of the master warrant—"offenses against the United States . . . set before me for my consideration"—might seem to invite an inquiry into what information was presented to the President, whether in writing or orally, before he signed the master warrant. It might even invite an inquiry into how that language in the master warrant, which had not been used by any other President, came to be developed.

Conversely, courts might be willing to consider evidence presented by the government that the Acting Pardon Attorney did not receive any direction from the White House to include the "generalized" clause in the Bannon pardon, received only the docket numbers from WHCO for Mr. Bannon and other January 19 pardonees, and decided to draft all of the other individual warrants for the January 19 pardonees besides Mr. Bannon's in a manner limited to the offenses charged in indictments or convictions in those dockets. The courts might even be willing, more broadly, to consider testimony about how OPA decided to draft the Bannon individual warrant, as summarized in the Acting Pardon Attorney's memorandum. But although we believe that the "generalized" clause likely went beyond the offenses that the President had communicated he was pardoning, and although the President could not delegate his pardon power to the Pardon Attorney, the government would be in the awkward position of questioning its own official's good-faith effort to determine what the President had decided. Thus, a court might not be moved by the government's attempt to impeach the regularity of its own process in this case, and could treat the text of the individual warrant as the definitive scope of the Bannon pardon, notwithstanding our analysis here.

V.

For these reasons, we conclude that the January 19, 2021 master clemency warrant signed by President Trump granted valid pardons, and that the scope of those pardons is defined by the individual pardon warrants signed by the Acting Pardon Attorney, to the extent that those individual warrants track direction from the President. In the case of the pardon of Stephen Bannon, the individual warrant contains a "generalized clause against subsequent identical or closely related charges" whose inclusion the President apparently did not direct, and we accordingly conclude that the uncharged offenses covered by that clause are likely beyond the legitimate scope of the pardon. Nevertheless, it may be difficult to establish as much in a future criminal proceeding.

Please let us know if we may be of further assistance.

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