



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 55: The Power of the Presidential Pardon: Traditions and Turning Points Influence

*Featuring Matt Adams of Fox Rothschild and Rachel Barkow*

**Matt:** Hi, everyone, and welcome back to "The Presumption of Innocence" podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. I'm your host, Matt Adams.

And today's guest is Rachel Barkow. She is the Charles Seligson Professor of Law and the faculty director of the Peter Zimroth Center on the Administration of Criminal Law at NYU Law School. She is a leading authority on criminal law. We are really delighted to have her. She's served as a member of the Sentencing Commission. She's the author of the book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*. She's also written more than 30 articles and been recognized as one of the country's leading authorities on criminal law. So it's really exciting to have you here on "The Presumption of Innocence," professor. Thank you so much for joining us.

**Rachel:** No, thanks for having me.

**Matt:** You know, as every "Law & Order" episode sometimes begins, "Ripped from the headlines," we would be remiss if we were to not explore the fascinating-- some might say excruciating --back-and-forth pardon, game of tug of war that is going on right now between former President Biden and President Trump beginning his second term.

Professor, let's set the stage for our audience just for a moment as it relates to the pardon power. Is the pardon power constitutionally absolute?

**Rachel:** Yes, it's pretty broad. It's right there next to the commander in chief powers, that's where it sits in the Constitution, and we have Supreme Court decisions essentially saying Congress can't restrict it.

There's really very little that Congress can do. So the president has sweeping powers to reduce somebody's sentence or to give them an outright pardon, which forgives a conviction entirely.

**Matt:** And that includes if it's your son, or it includes if it is what some would say a group of domestic terrorists who stormed the Capitol during the peaceful transition of power.

**Rachel:** Yeah, that's all clear that includes all those folks if the president wants to grant it. The one question mark that hasn't been definitively settled is whether a president could pardon himself. You



know, there's a debate among constitutional scholars about whether or not that could be done. But certainly whenever the power is used for other people, that's a-okay, no matter who they are. And it's just a question of presidential judgment about who they believe deserves it.

**Matt:** And, and I would be remiss not noting at the outset that you were a Supreme Court law clerk. You were a law clerk to the late Justice Antonin Scalia. And I'm fascinated at your perspective on this following question. It really boils down to this: Have you ever seen anything like this before? Because in my view, we have this crazy congruence of circumstances where we have an outgoing president who doesn't have anything to lose because he's done with politics. He's a very old man. He's got a legacy that he's created for himself. Some believe it's good, some believe it's bad. And he has now issued not only just pardons of his family members, but preemptive pardons of high-profile individuals that have been critical of the first Trump administration. And then we have that juxtaposed at the very same time against pardons happening literally on day one of Trump 2.0. Which is virtually unheard of, because you're spending a lot of political capital. Pardons are usually controversial, right?

But have we ever seen this happen before? Because to me, right, at the end of a presidency, President Clinton was, for example, criticized for some of the folks that he pardoned, including, but not limited to I believe his brother and some of the folks that were sort of tied up in some of the scandalous moments of his presidency. But we're one week or so into --at the time of this recording, just about-- the Trump presidency and we've seen mass pardoning. Any historical perspective for something like this?

**Rachel:** No, this is unique. You know, it's unique, but it's not unexpected. You know, I think that's one thing that's worth noting is that President Trump said he was going to do this. I mean, he said it while he was campaigning. He was very explicit about it. And it was one of the issues in the election because he said he was going to give pardons to some of the January 6th insurrectionists. He didn't say how many or how broad it was going to be. Although he entertained the possibility it could be a big blanket, you know, pardon to all of them. And he was criticized for that by Vice President Harris and her campaign, you know, and others and surrogates who were speaking on her behalf, who said, that's crazy, you can't vote for somebody who would forgive that kind of attack on our government.

And he won the election anyway. So, you know, what's kind of interesting about it that's also unprecedented, for me that I find fascinating, is I can't think of another instance where a campaign had whether there would be pardons as one of the campaign issues. You know, that it was, it was out there as one of the things that the campaigns were talking about. And people voted for it anyway.

And so, you know, it's kind of an interesting question to ask which is in some ways these are the most democratically accountable clemency grants we've ever seen. Because it was, someone said hey if you vote for me I'm going to tell you what I'm going to do. I'm going to give clemency to these people. And people voted for him anyway. So in that sense, you know, you could think wow, okay well look we have accountability and that's what the voters wanted and that's what voters got.

On the other hand you know, you could certainly say these grants of clemency are unprecedented, because these are people who openly attacked our democracy. And, they did horribly violent things.



The group of people who got it, it's not as if they've shown that they're repentant. You know, many of them have issued statements, you know, basically suggesting they would do it again --

**Matt:** One of them got arrested on gun charges. It's in the headlines.

**Rachel:** Yes. so it's a, it's kind of an odd question that it raises this question about, you know, so should we think about clemency? It's just, it's a political action. As you started our interview with, there's no oversight by the courts or by Congress. It's pretty much unfettered. And so you're really relying on the elections of good, decent people to hold the office of the presidency. And the hope is that when they exercise this broad power that they have, you know, they'll do it in a just way that the voters believe is correct. And what's weird here, as I guess I might, you know, I'll just give you my personal opinion: I don't think those clemency grants of the insurrectionists were particularly persuasive to me. Like I didn't, I didn't see the case made as to why those folks should get it. And in a lot of other context there's an argument, okay, you know you give clemency because this person has shown they have rehabilitated themselves or their initial sentence was so unjust. And you know the explanation that President Trump gave for this was you know, it was a political prosecution, you know, that they were hostages and, you know, they're being persecuted.

But you know you can watch the video and see what happened that day with your own eyes. And I don't think that anybody who sees those videos would say, prosecuting people for what they did that day is a political action. That's just what you would expect prosecutors to do, of course you would do that. You know, somebody makes a physical assault on a law enforcement officer, they break and enter a building that they don't have lawful access to, you know, all that's illegal. And so the expectation would be, of course there would be prosecutions for that. And so the idea that you give clemency, you'd have to have a reason for doing it. You know, if you could make a statement that somehow they wouldn't be sentenced the same way today, or you know, there was any kind of bias in how they were targeted, but none of that is evidence here.

So it's a really strange ... you know I, I have been having a hard time wrapping my mind around it. Because I think if you were just kind of thinking about it on the merits, based objectively on the facts, those are not a group of pardons that make any sense at all. At the same time, voters knew they were coming, you know, they knew they were coming if they voted for him and they voted for him anyway. And so, you know, that's kind of what we're left with.

I think the biggest tragedy of all, as far as I'm concerned, is just, it makes people question why we have a pardon power in the first place. You know, I think for people who find these pardons distasteful, I've been reading a lot of commentary that says, why do we give the president this kind of authority at all? And I think, uh, that's a shame because there are so many cases where this power is really important. It is really deserving. It's necessary as a corrective. It's just in this particular context, I don't see the reason for it. In fact, just the opposite. I think it was important for our democracy for people you know, to be accountable for their actions that day. Now, maybe you could say some people should get a commutation, maybe a sentence reduction, you know, that I could potentially see. But the idea of just an outright pardon, I just haven't seen the evidence for that.



**Matt:** And lest we be accused of criticizing only one side, while the inauguration was underway, President Biden's team unrolled pardons prophylactically of people that hadn't even been charged, including additional members of his own family. Including some of the legislators who were responsible for investigating this very emotionally charged January 6th riot at the Capitol building.

**Rachel:** Oh, yeah, we could criticize President Biden as well. I mean, I, you know, I think to me, the most egregious thing he did was say he was not going to pardon his son and then turn around and go ahead and do it. You know, it would be a different matter, I think, if he never said anything one way or the other about how he was going to treat that case. But I think, you know, that, too, is really troubling because I think he's looking ahead to an election. He's saying, no, no, I'm not going to pardon Hunter. And then I think, when he was going to be the candidate. You know, he said that and he kind of continued to say that because I think he didn't want to taint Vice President Harris's candidacy.

But then to turn around and go ahead and give the pardon, I mean, it's indefensible. It'd be one thing if he never said I wasn't going to do it. But the idea that-- because nothing had changed in between the time he said he wasn't going to do it and when he did it. And the reasons he gave for changing his mind, you know, he said something like well I found out that he actually did pay the back tax. I mean, I, it's not like he didn't have access to his own son to ask questions, you know. I mean so the idea that there were no factual circumstances that had changed other than he wasn't up for election anymore and he decided to save his kid.

I actually, you know, I'm, I'm sympathetic as a parent to the idea. Look, if I had --

**Matt:** Me too!

**Rachel:** -- If I had unfettered power to save a loved one from a, you know, a punishment, I would exercise it, but I would own up to it. You know, I think the important thing there is, I think, honesty. And that, I guess, is, you know, that is one difference between the two of them. You know, put the merits of the actual grants aside. There's a kind of... Trump, you know, said, I'm going to do this thing, you know, here I am, you know, and I'm going to do it and --

**Matt:** Like me or not, here I am.

**Rachel:** Here I am. And, and Biden on the other hand is like, no, no, I'm not going to do it. Uh, but now actually I am going to do it.

And, and, you know, it's part of their political personalities and the way that they operate is just very different. But I do think, in general, when it comes to the pardon power and clemency, you know, traditionally, both parties have been super cautious. You know, they kind of, like you said, they do it at the end of their terms in office when they're not facing reelection, you know, they have been deathly afraid, really, ever since the famous Willie Horton commercial that ran in the campaign between Bush and Dukakis, where, you know, someone was granted a furlough in Massachusetts and committed this horrible crime while he was on furlough. And there was a campaign ad that the Bush campaign ran against Michael Dukakis, who was the governor of Massachusetts at the time when



this furlough was granted. I mean, it's not like Dukakis granted, it's not like clemency, actually, it wasn't like he singled this guy out and said, Oh, let that Horton guy out, it just happened to be a program on his watch.

And the ad, you know, a lot of people credited that ad as being very significant for the election. But even if it wasn't, you know, politicians have thought it was. And so as a result of that, they have been, since then, really afraid of their own Willie Horton ad. And so as a result, they have been just really tepid, really cautious about giving anybody clemency. And if they do it, they do it at kind of like the last days of office, you know, they, they get out of there.

**Matt:** During the inauguration.

**Rachel:** Right? They, when they think their political career is over. And what is interesting about Trump is to use it in a much more aggressive way, as like a kind of political weapon. Like, hey, I'm going to wield this thing, you know, and I'm going to, I'm going to use it for people who are supportive of me.

I mean, the way he does it is also different in the sense that we have never seen a president in our history who has used it as a reward for loyalty the way he has. I mean, he's really, he, most of his grants the first time he was in office-- so even before he said he was gonna grant the January 6th people-- we have a record of his clemency grants from his first term, which was very similar. You know, he gave it to people who were loyal to him and said nice things about him and supported his campaign with money, etc. So, you know, it was a lot of favoritism. He didn't give a lot of clemency grants to, kind of people he didn't know or he hadn't heard about on Fox News. There were a few, but very few. And the vast majority were people who worked on his campaign, who are part of his administration, you know, who otherwise were political supporters.

And so he's been very aggressive about this idea that, you know, if you support him, you know, you do his bidding, he'll have your back later with a clemency grant. And, you know, that is really concerning, obviously, because the message it sends is, don't worry if you do something unlawful, if it's a federal crime, I'll give you a clemency grant.

**Matt:** Yeah, in episode 39 of this podcast, we interviewed Nick Bilton, whose book chronicles the story of the Silk Road and its founder, Ross Ulbrich. Ross Ulbrich was among the first-day pardons. And Bilton came on this program and explained that he believed-- and he wrote in his book about it-- that the Silk Road may very well be the origins of the fentanyl crisis in our country. And the idea of using the mail to support the Amazon marketplace of illicit activities that expanded from drugs into guns and murder-for-hire and all kinds of crazy business. This guy founded it, and Trump in his campaign went before a group of libertarian voters and said, if you vote for me, I'm going to pardon Ross Ulbrich. And he made good on it in the first 24-hours of his second presidency.

And that is an enormous power. And you can't help but talk about the politics of it all, because the power is seemingly so unchecked. I mean, would you agree with that?



**Rachel:** Yeah, I mean, but that's another really great example of the fact he was very clear that he was going to do it. And, and, you know, one of the issues with Trump as a political candidate and a politician is, there are just so many things that he does that are unprecedented --and some might say are outrageous-- that you almost can't get a handle on any one of them. You know, there's like so many things that he's doing and that he's saying at any one time that it's, it's not like there's just the one thing.

So, you know, if you imagine if he was a more traditional candidate or politician, and he was running a more traditional campaign. And he said in a speech he's gonna give a pardon to Ross Ulrich, right, then the idea I think would get more attention because people would say, Oh, my gosh, today he announced he's going to do this thing against the Silk Road founder. And I could imagine his political opponent might run an ad, the Willie Horton kind of ad about Silk Road, because you could run one of those ads, you know, you could talk about a lot of people died because of Silk Road.

**Matt:** People died, yeah. People died.

**Rachel:** And, and directly traceable to the fact that you know, you could solicit killers for hire, you know, and pay them in crypto. And you could traffic drugs and you could engage in all kinds of illicit behaviors on this platform. And I could easily see that political ad, you know, I could, I could make it myself, you know, the voiceover and an ominous tone. And, you know, and he wants to let someone who does this free, you know, someone who's --

**Matt:** A crying mother, a crying mother of a drug-addicted, fentanyl death.

**Rachel:** Yeah. You know, there was no such ad, right? Like again, cause he's such a, he, there's so many things that I think sometimes it's hard to just pick one thing that you're going to target. But you easily could have. ' Cause he said he was going to do it, you know, he did it.

There, I think again, you could make an argument, okay, maybe, maybe Ulrich shouldn't have gotten a life sentence, you know, because, uh, the government presented no evidence that he was personally responsible for any deaths. You know, they, they kind of, they, they alleged it, but they didn't charge it, you know, so there's... you know, and I, I'm a very big believer in due process that, you know, you don't hold somebody responsible for things that you haven't proven. And so you could say, yes, he should be accountable for running, a website that allowed that kind of activity to take place. But without any evidence that he personally did it, you know, I think you could raise a question about whether someone like that who has no criminal record should get a life sentence. You know, I think that's, that's actually harsh.

But again, that's not really the way that pardon or, you know, that grant was given. It was a much broader-based kind of a notion. And it's hard to escape the fact that, you know, he, because it was such a big platform for using cryptocurrencies, and there's so many people in the administration that have investments in cryptocurrencies. You know, there's, there's lots of things about it that just look unsavory.



But again, he was very clear he was going to do it and, you know, and he did it. And voters seemed okay with the idea. I mean, I don't know if they know, you know, it's you never really know what kind of information filters its way into the average voter in the voting booth. So I doubt that many people were aware of it. And that's probably not like a highly salient thing that people are thinking about when they're deciding which candidate to choose. But he was open about it.

**Matt:** Along those same lines in this kind of disruption of norms with respect to the presidential pardon power, this unfettered, absolute constitutional right, as you say, right up there with the commander in chief power. You are a former law clerk of Justice Scalia, a originalist. How would Justice Scalia feel about a preemptive pardon?

**Rachel:** I think that, um, I mean, I don't know exactly what he would say, I should say, but I think, a person who is looking at the history and tradition of the pardon power and all of the case law around grants, I think it is fine and part of the textual grant that allows you to give a grant to pardon somebody, even before the crime is charged.

Um, now you can't pardon activity that hasn't happened yet. But for any behaviors that have already occurred, you can say that person should not be prosecuted for those behaviors, you know, I'm going to give them a preemptive pardon. I think that's pretty, um, I think the legal case for saying that is included in the textual language of the Constitution and the history and tradition of it is strong.

So I think that, you know, a kind of fair-minded person who's just looking at that, not thinking about whether you think a specific grant is a good one, or whether it's, it's wise policy to do that, right? I think we could ask a question of, you know, do we think it's a good idea? But, you know, just the root question of does that authority exist as part of what the pardon power is? I think the answer to that is yes, it does.

**Matt:** Would you agree with me at least, though, that it undermines --what President Biden did in preemptively pardoning members of his family, members of the January 6th Commission, Dr. Fauci -- doesn't that undermine the public's confidence in our criminal justice system?

Doesn't that type of use... you know, I speak to lay family and friends that are not part of the criminal justice system. And it's almost like what you and I do for a living, it has almost become this caricature because it's so influenced by the political winds of the moment.

How do we level-set that? I mean, at the end of the day none of the January 6th Commission -- in fact, I've heard some people that were begging not to be pardoned-- none of the January 6th Commission has been charged with any wrongdoing. Certainly Dr. Fauci hasn't been charged with any wrongdoing. The president's-- there's been political accusation made, but the president's family, his brothers, their wives-- they haven't been charged with any crimes.

How is it that a preemptive pardon like those given by President Biden to these people close to him don't undermine the trust and the faith in our criminal justice system? Because isn't it supposed to



be apolitical? Isn't our criminal justice system supposed to be its own branch of government that doesn't get involved in politics? Or is it just inherently all politics?

**Rachel:** So, with a preemptive pardon, you know, the the famous example that we have of it being issued before is President Ford's pardon of Richard Nixon. So before President Nixon had been charged with any crimes in relation to the Watergate break-in, President Ford made the decision to issue a preemptive pardon.

So, so there's historical precedent for it. Um, obviously, that historical precedent is singular in that, we're talking about potentially bringing charges against a former president, you know, in a kind of highly publicized set of circumstances that everybody knew about and, you know, could kind of, there were tapes and, you know, you could kind of follow. And, and, President Ford made the decision that it was better for the sake of the country to not have that prosecution go forward. And so he gave a preemptive pardon, and he gave it in like, you know, strong blanket terms, you know, for any behavior during, you know, this period of time. Which is actually the blueprint that was used for Hunter Biden and his preemptive pardon. It's that same kind of language and formatting.

What's different about President Biden's use of that preemptive pardon is, first of all, in addition to giving a pardon to Hunter for the things he had been charged with, he gave him a blanket one, you know, for, any possible federal charges that could be brought during this period of time. The same kind of big, broad grant that President Nixon was given by President Ford.

And, you know, ditto for his other relatives, you know, as he's leaving office, and the other people that he preemptively pardoned, like Dr. Fauci, members of the January 6th investigative committee in Congress. So, you know, I guess, I think it does reflect on President Biden's part. To me, what it signals more than anything is a lack of faith that our criminal process would have, you know, done a good enough job that, you know-- because that is what's supposed to protect people, right, is we have due process. We have to have trials and the result of those trials should be sufficient to protect innocent people.

And I think what President Biden's preemptive pardons reflect is a lack of faith, first of all, in those processes and I think a desire to insulate people that he thinks have done nothing wrong from the misery that is a criminal investigation. Because, you know, even if at the end of the day you're acquitted and you're not subject to punishment or a conviction, you know, no one wants to be investigated for a federal crime. You know, the process is the punishment because how expensive it would be, you have to get a lawyer, you know, it's the fear hanging over your head the whole time. You know, that's miserable for people.

And so, I think-- you know, to put it in the most favorable light-- I think his thinking was, I want to spare these people from that misery. And I think he thought, I want to spare, you know, my family members because I love them. And the only reason they'd be investigated in the first place is because they're related to me. And then for these committee members or Dr. Fauci, uh, I think his thought is I want to spare these people because they were just doing their duty and why should they have to suffer, you know, this kind of scrutiny for just, you know, doing what they thought was right. I want to sort of spare them that, you know.



So that's the kind of way to pitch it in its most favorable light.

I, you know, in a, in a more negative light, it's that well, how about everybody else in the world who finds themselves subject to criminal investigations and prosecutions? You know, there's a lot of people who I think would look at that and say, well, let me tell you about my case, you know, and what happened to me and how miserable it was for me. And I think what makes that particularly poignant is that, you know, he was given a huge stack of petitions from regular people who had been through the process and had filed petitions asking for clemency. They were vetted by the Department of Justice, and the Department of Justice said, yeah, grant some of these, you know. There were all kinds of cases like that that he left behind. And you know, he's, he had four years where he did really nothing to kind of help the average Joe or Jane who'd been through the process, um, and, and show kind of, uh, an awareness of what regular people go through.

And so that, you know, the idea of kind of just picking and choosing who's going to get that favorable treatment I think is what leaves a really bad taste in most people's mouths when they kind of look at the Biden record. Because it just looks like, you know, he's shielding certain people, but he didn't otherwise seem to show much awareness of how miserable that process can be for all kinds of people. And, you know, the ones that I find most puzzling that he gave, frankly, were the members of Congress. You know, they have sweeping immunity as members of Congress anyway.

**Matt:** Speech and debate.

**Rachel:** Exactly. And they can get counsel quite easily because of their position. So, you know, for them getting lawyers and being protected, I thought that was a really odd choice.

You know, it's one thing to say, okay, a Dr. Fauci, you know, kind of a, he doesn't have that kind of immunity. You know, maybe you think, you know, Trump's threatening to kind of come down on him. And I guess I should say, that's the other thing about what Biden did is, we also haven't had in our history before a outgoing president looking at the incoming president and knowing that person has said he wants to exact retribution and use the Department of Justice to investigate and potentially prosecute people he views as his enemies, you know. That's new. And given that that's new, you know, it's like a chess match.

You say, okay, what do I do? Should I do a new thing as the outgoing president and protect those people? But thereby using this clemency power that's never been used this way before that makes it look like our normal processes can't handle this sort of thing. Or, do I not exercise it and just let the process play out? And if Trump is going to try to order his Department of Justice to do these things, trust the courts and other actors to kind of make sure there aren't abuses later on, but be transparent. And that, that way the public can see, look, there was no criminal activity here.

Because the other thing you do when you give a preemptive pardon is, it sure does look bad. I think a lot of people don't think oh, you get one of those even when you don't need it. You know, I think people think you get a preemptive pardon because you must have done something wrong. Which is why a lot of people who he offered it to are like, thank you, no, I don't want your pardon. I would rather like show to the world that I'm innocent and go through the regular process.



So, you know, it's tricky. I have to say, I've, I've certainly never seen anything like this. I've been studying the clemency power for decades. And you know, yeah. This is all new, and not in a good way, I, I guess I would say. I don't really think any of it is, is great. You know, I think what the clemency power at its core should be used for, and what the framers talked about is, you know, they recognized that we often give disproportionately harsh punishments. And the idea of the clemency power was to have a corrective when that happens, you know.

It's a little bonkers today, I think, when you talk to people about it where you're like, wait the president of the United States is supposed to be like the one guy who fixes excessive federal sentences? Like, wouldn't design that I don't think um from scratch that way, you know. But when you think about it the founding, you know, we didn't really have very many federal crimes. There was really a tiny federal footprint. And so the idea that, you know, for those few things that were federal crimes, the idea that you'd have authority in the president of the United States to kind of correct any injustices as they came along, you know, that model didn't seem odd. Over time, it starts to seem more and more strange. When you get a ton of federal criminal laws, you know, you get hundreds of thousands of people with federal convictions. You know, the idea that the president of the United States has the time and the ability to really kind of think about all those cases, it's just not sustainable, you know. We need a different kind of model.

But those are the cases it should be for, in my opinion, is correcting injustices, you know, addressing changes in circumstances, um, rehabilitation, outlier kinds of charging decisions by prosecutors where there's geographic variation that doesn't make sense. You know, all that sort of thing is the core function of clemency.

And what I think we're seeing right now is not just that clemency is, you know, become this kind of tool and the politicization of criminal laws generally, but it's just the broader point that there is a lot of politicization around prosecutions and how you use the Department of Justice and, you know, what the Department of Justice should be used for.

And, you know, I think, you know, the Trump supporters believe that the Department of Justice was politicized against him. And I think Biden and Harris supporters believe that the Trump Department of Justice will be used as a political weapon against them and their allies. And so, you know, the supporters of each camp believe that it has all become political. And if you have that belief, I think at that point, that starts to justify, okay, if this is all political, then you've got to use this political tool, the clemency power, as one of the weapons in that political fight. And sadly, I think that's where we are. And I think it's just a small piece of a much larger pattern of the fact that norms around prosecution and how you think about the Department of Justice and its role and the president's role and kind of intervening in particular cases, I just think all that is really in flux right now. And the clemency power is maybe a canary in the coal mine of what we're gonna see going forward, which is probably much greater politicization of all of this.

**Matt:** So, I want, I want you to take out your crystal ball and I want you to predict the impact of this crazy time, this crazy expanded use of the pardon power, this unprecedented competition between the outgoing and the incoming administration. When we see things like this in our history, we often see action on the backend to try to remedy it from happening again. But against the backdrop where



we started, that this is an absolute constitutional power, it would really take an amendment of the Constitution, which is no small feat. Could this spur at least a movement? Do you see there being any legs there to modify the pardon power?

**Rachel:** I don't think so. I, I, you know, I, first, I don't have a very good working crystal ball.

**Matt:** Yeah, mine's broken today. So I--

**Rachel:** I would not, you know, don't, don't go to the betting markets with anything I'm about to say for sure.

You know, I think if anything were to change as a result of all this, um, and I, I don't anticipate it's going to change during the current administration. And I'm not even sure it would change in a future one. But it would be maybe a president who decides as a matter of just, uh, of their, their prerogative to limit their own powers themselves, you know, because the president could do that. A president could say, wow, I have seen how this has unfolded and we need to fix how this is done. And you know what we should have instead is maybe we should have like an advisory board made up of, you know, uh, bipartisan people who look at clemency applications and review them and make recommendations to me. And it, it, we could create a process so it's not just, like, me in the White House making decisions off the cuff based on what I see on Fox News or what my friends are telling me. But instead, you know, we could have a process.

Now, the process we have now, just so everybody understands: There is a process. I have criticized this process for a very long time, along with Mark Osler, a law professor at St. Thomas. We, we've been banging this drum for a while. But just so everybody is aware, the normal course of clemency-- not what you've just seen recently-- what would normally happen in a given case is you would file a petition as a person who wanted to get either a pardon or a reduction in your sentence, a commutation. You'd file a petition with the Office of the Pardon Attorney in the Department of Justice. And they would take your petition and a lawyer who works in the Pardon Attorney's Office would review it. You know, to get a pardon, you would have to have already been out and, you know, crime-free, living a good life for five years and essentially say, hey, look, you know, how great I've been and as a result of that, you know, I'm asking for this pardon.

And usually you ask for a reason, like, you know, you need a firearms license or some occupational license, that it's important for you to clear your record. And for a commutation, you know, you normally would make the case, look, this sentence wouldn't be given today. It was excessive, or, you know, I've done these amazing things since I've been incarcerated. You know, you kind of make the case for yourself. It gets vetted by an attorney in the Pardon Attorney's Office. And if they think you've kind of done that, you've met that burden, it then goes to the Deputy Attorney General of the United States. And it gets looked at by an attorney in that office.

And then ultimately, the Deputy Attorney General has to sign off on it. So the normal process requires four layers of review in the Department of Justice itself. And honestly, most petitions never make it out of there. Because one of the things the process requires is that you go back to the original prosecuting attorney and you say, hey, what do you think? Should we grant that? And it



takes an enormous amount, I think, of cognitive fortitude for you to expect the prosecutor who originally brought the case to now say, you know what? I think I shouldn't have done that. You know, I was wrong. Um, you know, that, that's just not really how human psychology works.

So most of the time, when they go back to the original prosecuting authority, the answer there is absolutely not. You know, this case deserved to be prosecuted. It deserved that sentence, you know, absolutely no. And for most cases that, it just dies in the Department of Justice. And then the very few that make it out of there, if you make it through that gauntlet, it then would go over to the White House Counsel's Office, and it would get reviewed by a lawyer in the White House Counsel's Office. And then the White House Counsel, and if it makes it through all of that, then it would get to the president's desk.

So, you know, we've now talked about six layers of review before it gets to the president. I had heard that in the Biden administration, they had an additional layer of review, by the Domestic Policy Council. I, I'm, I'm not certain if that actually happened in all cases, but, you know, just bureaucratic, kind of, redundancy and review primarily by the agency that brought the case. So, you know, I think there's a reason why presidents have found that process unsatisfying. And I think when they get to the end of their term, it has been now, if this has happened over and over and over again, where the president who's kind of ignored clemency for the first four years --because politically they don't see it as a winner-- then they get to the end and they think, okay, now I can use this power. I'm ready, you know, I'm ready to use it. I want to use it. And they look and the Department of Justice is like, yeah, we got nothing for you. You --

**Matt:** Exactly.

**Rachel:** These cases, but you know, lo and behold, we've been perfect. And you don't need to use it for anything. And so we've had presidents say, you know, don't, that process is terrible, but no one has fixed it.

And so instead, what they do is this kind of ad hoc thing at the end, where they kind of on their own try to find cases. And you know, that gets them into trouble. That's how you get someone like Bill Clinton giving clemency to Mark Rich, who was a fugitive from justice. You know, he had fled the country and didn't even face up to his criminal behavior. I mean, who gives clemency to that guy? Well, how does that happen? That happens when you don't have a vetting process. But he kind of, like, left the vetting process behind because that process doesn't really produce enough cases.

And so, you know, in an ideal world, I'm not saying my crystal ball is saying this is going to happen, but it could be that somebody finally says, you know what, this process is broken. We can't have it in the Department of Justice, like, that's not working. But if we set up a separate body to do this, maybe that would give people confidence again that this isn't just me giving clemency to my friends, but it's me taking advice from a board.

And you know, this idea isn't like off the wall. This is what most governors have going on in the states, you know, they have commissions that give recommendations. And it's probably time for the federal system to have something like that. I mean, to be honest with you, I'm not optimistic it is



going to happen, but that would be the thing that could happen as a result of all this. Because a president could on, you know, his or her own decide that's what I'm gonna do, I'm gonna set this up. Now, the next person who's elected president, if they don't like it, they could disband it, because it wouldn't be a permanent thing of any kind. It would just be kind of a person saying I'm gonna regulate my own authority, I'm gonna give a little bit of it away, you know to this body so that I can show you that when I use it I'm being very careful with it.

You know, it wouldn't surprise me if somebody ultimately did that. It, actually, a lot of the Democratic candidates for president in 2020 had said they were going to do that. Had said they were going to set up a commission. They were going to take it out of the Department of Justice. They recognize that process was a failure. And that was part of a lot of campaign platforms. Amy Klobuchar had said she was going to do it. Kamala Harris said she was going to do it. So this was in 2020. And then even Biden had claimed as part of the Biden-Sanders task force. I don't know if you remember that one, that was when he was trying to get Bernie voters to come on board, they put together a task force with recommendations and that task force had also said they were going to do that. But you know, it didn't happen.

And here we are today, looking at what just happened, which I think is more evidence that it should happen. But that's all I can really think that could happen. There's really nothing Congress can do. And the voters, I think, you know, it's a, it's not a high salient kind of an issue that voters really latch on to. So I, I don't think you're going to get a lot of checks through that process either.

**Matt:** It's fascinating stuff. I was always of the view that this whole federal system was designed so we never had a king. But, turns out maybe we do after all, at least at, when it comes to the clemency power.

I, I would encourage our, our readers or listeners to check out your featured work, "Clemency and the President," for the NYU Law Review. It's a fascinating exploration of sort of the, what you call the fall of the clemency power and argue for its resurrection as a mechanism for the president to assert control over the executive branch and criminal cases. I found it very, very fascinating. I think it probably predates this little circus that we just experienced, um, in, in 2024, 2025, as, as we transitioned from Biden to Trump.

I want to shift gears for just a moment, Professor, and talk a little bit about your time on the Sentencing Commission. We talk a lot on this podcast about the sentencing guidelines structurally, the impacts that they have on lives. They're intended to be a framework for uniformity throughout the country so that a sentence in the Southern District of New York is the same as you might get in Alabama or Florida or wherever you might face consequence for your federal conviction.

The practical reality of that is it's not necessarily always the case. And the guidelines are sort of this living, breathing document that constantly require some additional revision. In the 3rd Circuit, where I principally practice, the issue du jour over the last couple of years has been this notion of intended loss, and whether you can take the explanatory guidance that the commission provides for its guidelines and use those as gospel. Or whether they are just that, they are explanatory guidelines and not part of the rule. And the 3rd Circuit ruled that you couldn't sentence based on intended loss.



And the Sentencing Commission, lo and behold, they came back and, and they changed, and they made the intended loss provisions-- whether you like it or not-- now part of the guideline.

And this sort of work in progress to an effort at uniformity really strikes me from a policy perspective as somewhat of the same imperfect system of checks and balances and a little bit seemingly ad hoc, that we talked about with respect to the clemency power. If you had one change that you could make to the guidelines and you were queen for the day and nobody could tell you no, what would you change about the guidelines?

**Rachel:** Oh, it's hard to pick one thing, but, but I guess if I, for me, I think that the guidelines should have mens rea as part of any sentencing consequence. So, you know, currently, right now, it's basically like, a kind of a reasonable foreseeability idea, you know, as, as long as, you know, you can imagine that factor being something that happened as part of your offense, if it's kind of a reasonable risk, you're stuck with it.

Given the way the guidelines and relevant conduct work, you know, you commit a crime with somebody else and they bring a firearm and you didn't have an idea, but it's reasonably foreseeable that they would have done it, you know, you're on the hook for it and you get the enhancement. And, you know, similarly with a lot of the fraud provisions and the way that they're set up, it's basically like a negligence standard. Even if you didn't intend for things to happen the way that they did and that wasn't what you wanted, you get on the hook for it.

And, and I think that's a mistake. You know, I think the core of criminal law and blameworthiness and punishment is, it's, we think about people who do it with an awareness that it could cause harm. You know, that's what makes somebody blameworthy. And if you don't have someone with subjective awareness that this bad thing is going to happen, I think they shouldn't face additional punishment as a result.

I don't think it should be just a kind of negligence-like, standard, you know, where you're kind of you just run the risk. I think we should think about, there's a difference in blame for someone who intends to traffic, you know, 100 grams of drugs and someone who, thinks it's only going to be 10, you know? And, and I don't think it should, just, if it turns out to be a bigger quantity, I don't think you should saddle them with the additional punishment if they really didn't have any awareness that that could happen.

So, for me, the biggest reform would be to think about mens rea. Now, the-- and, and I said that when I was on the Commission, you know, I, I, we thought about some revisions to the fraud provision, uh, when I, when I was on the Commission, including the issue with actual loss, intended loss, you know, all the enhancements you can get in a white-collar case as well, sophisticated means, you know. There are whole things we were looking at and, we had proposals that basically said, you know, in some of these high-end securities cases, the punishments are really high, you know, you really need to fix the guidelines. And, and one of the things that I thought was really important was, you know, fixing it with mens rea.



And we got a proposal that had wanted to do that. I, you know, I think that the ABA proposal on fixing the guidelines related to fraud had that recommendation in it. And it ultimately did not attract a majority of commissioners to sign on to it. In part, you know, because if we did that for the fraud guideline, it would be inconsistent with the way the rest of the guidelines operate.

And so, you know, some of the other commissioners had, had issued comments at the time that basically said, you can't just do that for fraud. You know, we'd have to rethink the entirety of the guidelines. And if we're going to rethink the entirety of the guidelines, you know, then there's all kinds of things I'd want to consider, said each individual commissioner.

So in the end, we didn't do it. But me personally, I actually think the idea of mens rea is really important. It's, you know, foundational to our criminal law and always has been. And I think the sentencing guidelines made a mistake when they adopted relevant conduct and went away from that. And just saddle people with additional punishment without any kind of, subjective blameworthiness on their part.

So if I had to pick one thing, that's probably the one.

**Matt:** I couldn't agree with you more. The idea of relevant conduct from a practitioner's perspective is the bane of our existence. It truly brings in just about anything, even uncharged conduct that is, in my view, inherently unfair.

In our waning moments together today, Professor, I just want to give you a chance to plug your new book that's coming out. *Justice Abandoned: How the U.S. Supreme Court Ignored the Constitution and Enabled Mass Incarceration*. I can tell you that I have preordered it and, uh, welcome when it arrives on March 4th from Amazon. I'm looking at it right now and see it in my cart.

But I also had a chance to pick up your other book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*. Give us a little sense for your scholarship in that area, mass incarceration coming against the background of being on the Sentencing Commission. The idea that there is a mass incarceration problem in our country, and there's so many competing ideas on how to fix it. And I know your scholarship really focuses on that, focuses on the punitive aspect of our criminal justice system and, and how we get that right and make it more perfect. I don't think there's a, a way to make punishment perfect all the time, but at least more perfect. And I've, I've read a couple of the law review articles you've written about putting that in the hands of prosecutors and debating this idea of sort of the other extreme, which is the abolition of punishment altogether, none of which are tenable. But how do we solve this mass incarceration problem? And preview your new book for us a little bit.

**Rachel:** Okay, thanks. So, you know, I guess I would say that you know the first book that you mentioned, *Prisoners of Politics*, what I try to do there is, first I try to make the case that mass incarceration is a problem. You know, because there are some people who don't think that is true and, and what I try to do in the first several chapters is basically show the irrationality of our punishment practices, you know, why I do think they are excessive. If your goal is public safety, I should say, you know. That these are not achieving what they are setting out to do for a variety of



reasons. So I have a lot of empirical information in there you know, that I think does make the case for the fact our laws are overbroad and excessively harsh.

And then, you know, the, then the next part of the book says, okay, well, you know, now that I've shown you that if our goal was public safety, we're not achieving it and in fact, you know, we're doing all kinds of counterproductive things. Why would we do that? You know, why would that happen? And I talk about the political factors that push us in these irrational directions. You know, the public is just really fearful.

And we all are fearful of crime, right? You know, nobody wants to to be attacked or have loved ones attacked. And so you get information from the media that just primes you for kind of like, Oh my gosh, lock whoever you need to lock up, just do it, you know. And, and, you know, be as severe as you need to. And there's a kind of intuitive sensibility that that will keep us safe.

And what I try to show in the book is that's actually not right. You know, that there's all kinds of ways that it's counterproductive and it makes us less safe. But the politics and the media kind of feed that, and that has gotten us to where we are today.

And then I try to think of, okay, so given that, environment, what could we do to try to be more rational in our approach? And so, you know, in *Prisoners of Politics*, I spent some time thinking about, okay, you know, maybe we could think about electing prosecutors who are sensitive to that idea. Um, you know, maybe we could create some agencies like sentencing commissions that could be a little bit more insulated from direct. political pressures and really look at data and evidence and try to come up with good policies.

And then the last chapter is, you know, is thinking about the courts. Because we could also think about, you know, maybe having a different kind of judge-- who isn't so prosecution-minded, which has been our tradition-- might help. And so the book that I have coming out is kind of a sequel, really, because as I was writing that last chapter on judges, I was thinking, you know, the reason I think that could help is because, you know, as someone who is, you know, so I'm, I'm a Democrat, but I did, as you mentioned, clerk for Justice Scalia. And one of the reasons that worked for us is because, you know, I do believe in the original meaning of the Constitution and history and tradition as a way of interpreting that document. Like, I believe that's true. That is how we should, we should do it. And what, when you do that and you look, you realize the framers totally anticipated the danger of government overreach in criminal cases. In fact, they were kind of obsessed with it. And there's all kinds of things in the Constitution designed to check mass incarceration. And so after I wrote the first book, I thought, you know, the reason I thought maybe different judges things would turn out differently is because the tools are there in the Constitution already.

And I realized what I wanted to do was kind of explore that by showing people key cases that, had they been decided differently and faithful to the Constitution and its original meaning, would have been a barrier against some of the excesses that later came to pass. So I have six cases that are in *Justice Abandoned* that I point out, show on originalist grounds, they should have been decided differently. and I explain what happens when the court, you know, kind of ignores that original meaning and goes its own direction, what happens afterwards. And you can kind of see-- I'm not



saying the court is the only reason we have mass incarceration. You know, I believe it's a political failing, that's what the first book was about. But I do think the Supreme Court has played a role. And I think it's really important to document that, and not only just to kind of, so we understand how we got here, but, you know, I, I remain at my core, hopeful that someday some of these things could be corrected. And so part of what I'm hoping to do with the book that's coming out is to show people, you know, if you had, precedents get overturned, you know, we're seeing that all the time now and, and these are cases that I truly believe should be overturned They were wrongly decided. They have led to awful consequences. And if you believe in original meaning you should not want these cases to stand. And so maybe if we had a different set of justices who were attuned to that-- or maybe even some of the justices who are there now but they just haven't thought about this issue, and they looked at these cases with fresh eyes, they might think of them differently.

**Matt:** Well, Professor Rachel Barkow of NYU School of Law, thank you so much for joining us on "The Presumption of Innocence."

Promise me you won't be a stranger and we can have you back and talk about all the exciting aspects of your scholarship and some of these cutting-edge topics. Can't thank you enough for joining us. That's all the time we have for today. We'll see you next time.

**Rachel:** Thank you so much. That was really fun.