PRESIDENTIAL PARDON POWER: Are There Limits and, if Not, Should There Be?

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ABSTRACT

Article II, Section 2, Clause 1 of the Constitution gives the President power to pardon those who have committed "offenses against the United States, except in Cases of Impeachment." Although it seems straightforward and all-sweeping, questions about when the clause may and should be employed abound: May the President grant a pardon before a crime has been charged or even committed? May the President grant a pardon for a corrupt purpose and, if so, is the pardon valid? May Congress limit the pardon power in any way? Is a pardon of a person convicted of criminal contempt valid? And, perhaps most often discussed today, may the President pardon himself? This article examines the text of the clause granting the pardon power, offers a brief history of pardons, and discusses the adoption of the clause at the Constitutional Convention, and its treatment in the Federalist Papers and at the various ratification conventions. After suggesting answers to the questions asked above, the article discusses possible ways to cabin the President's pardon power.

> *Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to*

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> *shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his* sole fiat*, would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men.*[1]

INTRODUCTION

Among the more specific and significant powers in the United States Constitution vested in the President is the power to pardon found in Article II, Section 2, Clause 1, which provides in relevant part that the President:

> shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.[2]

Although the Founders considered several limitations on the pardon power, such as requiring full consent of the Senate and prohibiting pardons in cases of treason, ultimately they adopted only one: prohibiting the President from issuing pardons in cases of impeachment.

Every time a President issues a controversial pardon, calls come for curtailing the Presidential pardon power. Calls for such limitations were never more vocal than after President Ford's pardon of President Nixon on September 8, 1974, which even drew a proposed constitutional amendment. Given President Trump's pardon of Arizona Sheriff Joe Arpaio for criminal contempt and the persistent speculation that President Trump will pardon those being investigated by Special Counsel Robert Mueller, it is timely to examine the history of the pardon power and whether courts can and should limit that power in ways beyond that expressly provided in the Constitution.[3]

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1. THE FEDERALIST NO. 74, at 500–01 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

2. U.S. CONST. art. II, § 2, cl. 1.

3. Examination of the pardon power is particularly timely considering an anonymous White House official was recently quoted by the *Washington Post* that President Trump is "obsessed" with pardons, describing them as his new "favorite thing." Robert Costa, Josh Dawsey & Ashley Parker, *Trump Fixates on Pardons, Could Soon Give Reprieve to 63-Year-Old Woman After Meeting with Kim Kardashian*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/politics/trump-fixates-on-pardons-could-soon-give-reprieve-to-63-year-old-woman-after-meeting-with-kim-kardashian/2018/06/05/37ac6cb6-683d-11e8-bbc5-dc9f3634fa0a_story.html?utm_term=.68166b315895 [https://perma.cc/R3ZJ-9VY2]. The President has even met with celebrities Kim Kardashian West and Kanye West to discuss the

After considering the history of the pardon power and its adoption in the Constitution, this article will address several questions, including: when a President may issue a pardon, the validity of a pardon granted to a person charged with contempt of court, whether a pardon granted for a "corrupt purpose" is valid, and whether the President may pardon himself. This article will also address remedies for abuse of the pardon power and whether the pardon power as it now exists in the Constitution should be amended.

I. A BRIEF HISTORY OF PARDONS[4]

Governmental entities have issued pardons since at least the eighteenth century B.C.E.[5] The idea of pardoning criminal acts can be traced to Ancient Greece and Rome and was later adopted by British monarchs.[6] When England established the Colonies, it endowed the colonial Governors with some form

clemency power. *Id.*; *see also* Maegan Vazquez & Betsy Klein, *Kanye West Tells Trump MAGA Hat Made Him Feel Like 'Superman,'* CNN (Oct. 11, 2018, 3:19 PM), https://www.cnn.com/2018/10/11/politics/kanye-west-donald-trump-white-house-chicago/index.html [https://perma.cc/NAW3-DYDF].

As tempted as the authors were to examine the source of the President's power to pardon the Thanksgiving Turkey, they resisted the urge to do so.

4. Some terminology is in order: Reprieves are temporary stays of execution of sentences by the executive, pending final action by the judicial or executive branches. 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 221–26 (1939). Amnesties are general pardons that may be given by either legislative or executive action to an entire group or class of people. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 348 (1866). Presidents frequently grant amnesties for political offenses. For example, Presidents Lincoln and Johnson granted amnesties during and following the Civil War, and President Ford created an amnesty program for Vietnam anti-war protestors. *See* Julian C. Carey, *Amnesty: An Act of Grace*, 17 ST. LOUIS U. L.J. 510, 514 (1973). Courts have also found, however, that there is no practical legal distinction between pardon and amnesty. Brown v. Walker, 161 U.S. 591, 601 (1895); Knote v. United States, 95 U.S. 149, 152–53 (1877).

Commutations are reductions of sentences. Schick v. Reed, 419 U.S. 256, 273 n.8 (Marshall, J., dissenting); *see also* WILLARD H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 26–27 (1941). Remission, or the reduction of court fines, is also within the presidential pardon power but has been delegated to the Department of the Treasury from an early date. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1498 (Cooley ed. 1873).

Full pardons eliminate all the sanctions imposed, or which might be imposed, upon persons convicted or who might be convicted of a crime. Pardons eradicate further punishment for the crime pardoned and are usually thought to restore an individual's civil rights—the rights to hold office, vote, and own property, for example. *See* 3 U.S. DEP'T OF JUSTICE, *supra*, at 267–94.

5. *See generally* Jerry Carannante, *What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325, 328 (2003); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 (1991).

6. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977).

of pardon power. The delegates to the Constitutional Convention in 1787 adopted the British framework in drafting Article II, Section 2, Clause 1. Thus, to understand the scope of the pardon power as written in the United States Constitution, it is useful to examine its historical roots.

Because ancient Athens was a pure democracy, the pardon power was exercised differently than in the British monarchies or colonial America.[7] In 403 B.C.E., Athens adopted a process called Adeia[8] where a person could obtain a pardon by securing the approval of 6,000 citizens voting by secret ballot.[9] Because it was difficult to obtain thousands of supporters, Adeia was often restricted to influential figures such as athletes and orators[10]—making the process more akin to a popularity contest.[11]

The ancient Romans employed a system of clemency with politics as the driving force.[12] The Romans used pardons as an instrument of control over its citizens and soldiers—for example, the ancient Romans chose to execute every tenth mutinous troop instead of executing an entire army of perpetrators. [13] The pardon power in both Athens and Rome established the framework for the pardon power in the British monarchies.[14]

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7. *See* Kobil, *supra* note 5, at 583–84 (noting that Athenians placed certain limitations on pardons, basically limiting their scope to public crimes, including treason).

8. *See id.* Athens provided for a method of individual pardons—known as the Adeia process—and grants of broad amnesty. *Id.* at 584 n.80 (citing ARISTOTLE, CONSTITUTION OF ATHENS ch. 39 (K. Von Fritz & E. Kapp trans., 2d ed. 1961)).

9. *See id.* at 583 (citing DOUGLAS MACDOWELL, THE LAW IN CLASSICAL ATHENS 258–59 (1978)). The process required a popular collection of 6,000 votes to support a pardon from a public violation. *See id.*

10. *See* U.S. DEP'T OF JUSTICE, *supra* note 4, at 9, *cited* in Kobil, *supra* note 5, at 583 n.79 (stating that only a few pardons were granted, including Alcibiades in 408 B.C.E., the pardon of Demosthenes in 323 B.C.E., and other notable athletes and orators).

11. *See* Kobil, *supra* note 5, at 583–84.

12. *See id.* at 584–85; *see also John* 18:38–40 (King James) ("Pilate saith unto him, What is truth? And when he had said this, he went out again unto the Jews, and saith unto them, I find in him no fault at all. But ye have a custom, that I should release unto you one at the passover: will ye therefore that I release unto you the King of the Jews?").

13. *See* KATHLEEN O. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 15–17 (1989). Pardons from execution were often issued around important holidays and coronation celebrations, which allowed the government to show goodwill to the common people, thus building the loyalty of their command. *Id.* at 17.

14. *See id.*

A. England

Noted by William Blackstone, the pardon power in England derived from Rome.[15] The purpose was to allow the Crown to show mercy towards its subjects.[16] The pardon power, then known as the English Prerogative, first emerged in English law during the reign of King Ine of Wessex (668–725 A.D.).[17] Throughout each monarch's reign, various restrictions, expansions, and clauses were added to the power.[18]

Henry VIII reigned at the height of the King's pardon power—absolute pardon power—which gave the King unlimited authority to pardon virtually every crime.[19] Parliament took action to place restrictions on this seemingly limitless pardon power, but the limiting language had little effect on the King's use and abuse of the power.[20]

Because the King continued to abuse the power, Parliament continued to place various limitations on the statute.[21] Parliament later limited the power to exclude pardoning an individual during an impeachment proceeding—a limitation that persists in today in the United States Constitution.[22]

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15. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *395 (commenting on the English using Roman traditions as examples for English pardon powers).

16. *Id.* at *398 (Blackstone noted that in addition to tempering justice with mercy, allowing the King to possess an expansive pardon power fostered goals such as the endearment of the sovereign to his subjects.).

17. Duker, *supra* note 6, at 476 ("[T]he laws provided: 'If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life.'").

18. *Id.* at 477 (For example, King Henry I (1110-1135) first used compensation in exchange for a pardon; and Edward I (1272-1307) used the prerogative to increase his troops by granting pardons for all homicides and felonies in exchange for serving a year in the military.). For a thorough treatment of royal pardons in medieval England see HELEN LACEY, THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND (2009).

19. *See* Kobil, *supra* note 5, at 588–89 (noting that the King could pardon for crimes such as homicide and treason). According to K.J. Kesselring, "Pardons permeated Tudor political culture. . . . Mercy was considered an essential part of sovereignty, both a necessary and legitimate adjunct to justice." K.J. KESSELRING, MERCY AND AUTHORITY IN THE TUDOR STATE 3 (2003).

20. Duker, *supra* note 6, at 482–83 (noting that numerous revisions to the pardon statute demonstrated that the limiting language was ineffective).

21. *Id.* at 484–86 (Parliament placed several limitations on the pardon power such as requiring the King to provide a reason for the pardon and the name of the pardonee; imposing fines and conditions on pardonee recipients; prohibiting the King from pardoning for "'outrageous' crimes"; prohibiting the King from "interfer[ing] with the rights guaranteed to third persons"; and prohibiting the King from dispensing with administering laws that infringed on a person's "life, liberty, or estate.").

22. Parliament limited the pardon power to prevent the pardoning of an individual during an impeachment proceeding in response to King Charles II pardon of the royal treasurer. Charles II, acting against the will of Parliament, ordered Great Britain's Treasurer to extend a neutrality

English law did not explicitly mention self-pardons, but they were a non-issue for an English monarch because the King, by definition, could not commit a crime against the Crown. English law provided that one cannot commit a crime against oneself.[23]

Parliament's only remedy for abuse of the pardon power was removing the King from office, just as the United States Congress has the impeachment power as a remedy against abuse of Presidential pardons.[24]

B. The Colonies

When Great Britain colonized North America, the King delegated the pardon power to local royal colonial governors, and the power varied within each colony.[25] For example, in North Carolina, governors were given the power "to remit, release, pardon, and abolish (whether before judgments or after) all crimes and offences whatsoever" and the governor held the power to mitigate all fines and to suspend all executions in criminal cases before or after a sentence was served.[26] Conversely, the Connecticut and Rhode Island colonial charters vested the pardon power in the general assemblies.[27]

This power was entrusted to the royal colonial governors until the signing of the Declaration of Independence—after which, the drafters of the various state constitutions entrusted the pardon power with the local governor, the state legislature, the legislative body, or some combination of the three.[28] Entrusting the pardon power in multiple governmental bodies was largely due to the drafters' mistrust of a sole executive.[29] However, the majority of

pact to France in exchange for compensation. At the same time, Parliament was attempting to raise funds for a war against France. Parliament impeached the Treasurer for his actions that challenged the will of Parliament and Charles II pardoned the Treasurer during the impeachment hearings. As a result, Parliament ceased the impeachment hearings and dismissed all charges against the Treasurer. *Id.* at 487–95.

23. *See* JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 5 (1820) ("[T]he law suppose[d] it impossible that the King himself [could] act unlawfully or improperly."), *cited in* James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 350 n.41 (1993).

24. *See* Jorgensen, *supra* note 23, at 352–53.

25. Duker, *supra* note 6, at 497.

26. *Id.* at 498–99.

27. Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1672 (2001).

28. *See* THE FEDERALIST NO. 47, at 330–31 (James Madison) (Jacob E. Cooke ed., 1961) (explaining that in Virginia "[t]he executive prerogative of pardon . . . is in one case vested in the legislative department" and that in Georgia "the executive prerogative of pardon" is exercised by the legislature).

29. *Id.*

delegates of the Constitutional Convention did not share this distrust of an exclusively executive pardon power.

II. ADOPTION OF THE PARDON POWER IN THE CONSTITUTION

While the concept of clemency has its origins in ancient Roman law, the Framers of the United States Constitution borrowed directly from the British legal tradition when drafting the pardon power.[30] The pardon power was placed in the Constitution after limited debate at the Constitutional Convention.[31] After the Convention, the Federalists advocated for the proposed provisions of the Constitution, including the pardon power, in the Federalist Papers. While the pardon power was debated in limited fashion during the ratification of the Constitution at the various state conventions, it was ultimately adopted as initially drafted.

A. The Constitutional Convention

The two significant plans proposed at the Constitutional Convention—the Virginia and the New Jersey plans—did not initially include the pardon power.[32] John Rutledge, the author of the Virginia plan, eventually revised his proposal to vest the pardon power in the executive branch, specifically to be held by the President.[33] The discussion and debate at the Convention largely revolved around which body of government should possess the pardon power and what limitations should be placed on the power.[34]

A preliminary draft proposed a limit on the power that would require the Senate's confirmation of any proposed pardon.[35] This plan ultimately failed because many delegates argued the Senate was already delegated too much

30. *See* Kobil, *supra* note 5, at 589.

31. *See* Duker, *supra* note 6, at 501.

32. *See* HUMBERT, *supra* note 4, at 15.

33. *See id.*

34. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 411–26 (Max Farrand ed., 1911) [hereinafter THE RECORDS].

35. *Id.* at 626 ("Mr. King thought it would be inconsistent with the Constitutional separation of the Executive & Legislative powers to let the prerogative be exercised by the latter. A Legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment."). Madison, on the other hand, while admitting to the force of the Legislature's objections, believed that pardoning treason was so peculiarly improper for the President alone that before granting a pardon the President should seek the advice of the Senate. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 646 (Bicentennial ed. 1987) [hereinafter NOTES OF DEBATES].

power among the three branches of government.[36] Another proposed option was the model used in the colonies, which placed the pardon power in the legislature or a combination of the legislature and the executive.[37] Despite suggested variations on the language, the delegates assigned the power to the executive branch with little discussion. The conversation then turned to what limitations should be placed on the power.[38] On this issue, the Framers looked primarily to the lessons learned in the colonies.[39]

Luther Martin, a delegate from Maryland, proposed that the pardon power be exercised only for persons already convicted of a crime.[40] This proposal was withdrawn because, it was argued, "pardon before conviction might be necessary in order to obtain the testimony of accomplices."[41] There was also a proposal to exempt treason from the power—the argument being that if a President conspired to commit treason, he should not be able to protect himself by pardoning his fellow conspirators.[42] Edmund Randolph of Virginia argued for excluding pardons for treason because "[t]he President may himself be guilty," and pardons should not be available to protect oneself.[43] This notion was ultimately rejected, largely due to the urging of Pennsylvania delegate James Wilson.[44] Wilson argued that if the President committed treason, the President could be impeached and prosecuted criminally afterwards.[45]

At the close of the Convention, the Framers accepted the Rutledge proposal and adopted the existing impeachment limitation in Article II, Section 2, Clause 1. Ultimately, the pardon power emerged from the Constitutional Convention as exclusive, broad, and virtually unrestricted by constitutional checks and balances.

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36. *See* NOTES OF DEBATES, *supra* note 35 at 646.

37. *See* Kobil, *supra* note 5, at 589–90 (citing governments in Virginia, Massachusetts Bay, Maine, Maryland, the Carolinas, New Jersey, Pennsylvania, and Georgia that placed the power in the executive branch); *see also* SECOND CHARTER OF VIRGINIA (1609); CHARTER OF MASSACHUSETTS BAY (1629); ROYAL GRANT OF THE PROVINCE OF MAINE (1639); CHARTER OF MARYLAND (1632); CHARTER OF CAROLINA (1665); GRANT TO DUKE OF YORK (1676) (chartering New Jersey); CHARTER FOR THE PROVINCE OF PENNSYLVANIA (1681); CHARTER OF GEORGIA (1732). The governments of Connecticut and Rhode Island placed the power in the legislature, but only with the governor and assistant governors being present. *See* CHARTER OF CONNECTICUT (1662); CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663).

38. *See* HUMBERT, *supra* note 4, at 15–17; *see also* THE RECORDS, *supra* note 34, at 426.

39. THE RECORDS, *supra* note 34, at 426.

40. *Id.*

41. *Id.*

42. *Id.* at 626.

43. *Id.*

44. *Id.*

45. *Id.*

B. The Federalist Papers

Of the eighty-five essays making up the Federalist Papers written by Alexander Hamilton, James Madison, and John Jay, two dealt explicitly with the pardon power: Numbers 69 and 74.[46]

In Federalist Nos. 69 and 74, Alexander Hamilton argued for a robust and centralized pardon power residing in the President. Hamilton argued that: (1) investing the power in one person afforded the President broad discretion and ability to take quick action;[47] (2) the pardon power should be exercised by the executive alone because "one man appears to be a more eligible dispenser of the mercy of the government than a body of men;"[48] (3) broad discretion allowed the President to deal swiftly with situations involving political upheaval or other emergencies;[49] and (4) allowing only the President the power to confer pardons ensured the transparency of his actions.[50] The "principal argument[]" for the power, wrote Hamilton, was that if the United States ever experienced an insurrection or rebellion, "a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."[51]

Hamilton argued that the pardon power constituted an act of "mercy," which implied that the person being pardoned needed compassion or forgiveness[52] and explained that the criminal code was so severe that an expansive Presidential pardon power was necessary as a check on the criminal justice system.[53]

Hamilton argued for a broad pardon power based on the assumption that the President would not be a bad actor. Indeed, Hamilton assumed that future Presidents would exercise the pardon power only with "[h]umanity and good policy," and concluded that "the benign prerogative of pardoning should be

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46. *See* THE FEDERALIST NOS. 69, 74 (Alexander Hamilton).

47. *See* THE FEDERALIST NOS. 69, 74 (Alexander Hamilton); *see also* Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1502–03 (2000).

48. THE FEDERALIST NO. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

49. *See* THE FEDERALIST NOS. 69, 74 (Alexander Hamilton).

50. *See* THE FEDERALIST NOS. 69, 74 (Alexander Hamilton).

51. THE FEDERALIST NO. 74, at 502 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). President Washington used the pardon power in just such an instance when, in 1794, he pardoned two persons who had been sentenced to death for participating in the Whiskey Rebellion in western Pennsylvania. D.S. HEIDLER & J.T. HEIDLER, WASHINGTON'S CIRCLE: THE CREATION OF THE PRESIDENT 329–30 (2015).

52. *See* THE FEDERALIST NO. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

53. *Id.* ("[W]ithout an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").

as little as possible fettered or embarrassed."[54] Rather than requiring formal checks on the pardon power, Hamilton believed the President would exercise the power fairly, solely because of his position and a fear of being accused of wrongdoing by the people. Hamilton thought future Presidents would feel a "sense of responsibility" and thus would exercise such awesome power with "scrupulousness and caution."[55] The "dread of being accused of weakness or connivance," Hamilton insisted, would "beget equal circumspection."[56]

The Antifederalist papers expressed apprehension about the broad language of the pardon power and its interpretation.[57] The Antifederalists feared that giving the President the sole power to pardon would cause tyranny and abuse and warned that it would create a "vile and arbitrary aristocracy or monarchy."[58] The Antifederalists, with a more pessimistic view than Hamilton, noted the possibility of a tyrannical President.[59]

Unlike the Federalists, the Antifederalists argued for stronger checks on the power for fear that the President would not always exercise it with fairness and good policy. However, the language adopted at the Constitutional Convention was the language voted on in the state ratifying conventions—the provision's language as originally drafted.

C. The State Ratifying Conventions

The delegates to the state ratifying conventions engaged in very little discussion of the pardon power.[60] One delegate argued that the pardon power should not be given to the President.[61] Another claimed that pardons for treason should not be allowed without Congress's consent.[62] James Iredell, later a Justice of the U.S. Supreme Court and a proponent of a strong executive pardon power, argued as a delegate at the North Carolina ratifying

54. *Id.* at 500–01.

55. *Id.* at 501.

56. *Id.*

57. *See* THE ANTIFEDERALIST NO. 67 (Cato) (noting that the President had "vast and important powers," including "the unrestrained power of granting pardons for treason, which may be used to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt").

58. *Id.*

59. THE ANTIFEDERALIST NO. 69 (Richard Henry Lee) ("We may have, for the first President, and perhaps, one in a century or two afterwards (if the government should withstand the attacks of others) a great and good man, governed by superior motives; but these are not events to be calculated upon in the present state of human nature.").

60. Duker, *supra* note 6, at 504.

61. *Id.*

62. *Id.*

convention that the power should be placed with the Executive Branch—the body "possessing the highest confidence of the people."[63] Iredell addressed the critics' arguments that the President might abuse the pardon power to obscure his guilt in criminal conduct by stating that it is irrational to argue that it should not exist just because some Presidents may try to abuse it.[64] Iredell argued that "[w]hen a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it."[65] Iredell's view was similar to Alexander Hamilton's—that the President's restraint upon abusing of the pardon power was the risk of tarnishing his reputation.[66]

One delegate from the dissent of the minority of the Pennsylvania ratifying convention stated his concerns about such a broad pardon power when he said: "[t]he president . . . having the power of pardoning without the concurrence of a council, . . . may screen from punishment the most treasonable attempts that may be made on the liberties of the people, when instigated by his coadjutors in the senate."[67] The minority dissent went on to argue that the pardon power should be entrusted in the president but "with a small independent counsel."[68]

At the end of the ratifying conventions the pardon power was adopted in the Constitution as initially written during the Constitutional Convention with little discussion and very few opposing arguments.

III. EXAMINATION OF THE TEXT OF ARTICLE II, SECTION 2, CLAUSE 1

The pardon power as written in the United States Constitution is seemingly limitless, with only one textual restriction and one specific exception.

The Constitution states that "[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases

63. *President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 52 (2001) (statement of Ken Gormley, Professor of Constitutional Law, Duquesne University).

64. *Id.* ("Nobody can contend upon any rational principles, that a power of pardoning should not exist somewhere in every government, because it will often happen in every country that men are obnoxious to a lawful conviction, who yet are entitled, from some favorable circumstances in their case to a merciful interposition in their favor.").

65. *Id.*

66. *Id.* ("I entirely lay out of the consideration the probability of a man honored in such a manner by his country, risking . . . the damnation of his fame to all future ages . . . .").

67. The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONVENTION DEBATES 237–38 (Ralph Ketcham ed., 1986).

68. *Id.*

of Impeachment."[69] By granting a pardon to a person who committed a federal crime, the President nullifies the legal consequences of that crime, including any restrictions on the pardonee's right to vote, hold state or local office, testify in court, or sit on a jury.[70] It may also help the pardonee obtain licenses, bonding, or employment.[71] The Presidential pardon is distinct from the Presidential power of commutation, which merely mitigates the sentence of someone who was convicted and is currently serving the sentence, but does not vacate the conviction itself.[72]

When the President grants a pardon, the pardonee retains the option to reject the pardon.[73] Because pardons have the effect of making a person look

69. U.S. CONST. art. II, § 2, cl. 1.

70. *See* Office of the Pardon Attorney, *Frequently Asked Questions*, U.S. DEP'T JUST., https://www.justice.gov/pardon/frequently-asked-questions (last visited Jan. 12, 2019) [https://perma.cc/69Q7-RMFG]; *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866) ("[T]he inquiry arises as to the effect and operation of a pardon, and on this point, all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.").

This does not mean that a pardon relieves the pardonee from anything suffered due to the conviction before the pardon. *See* Boyd v. United States, 142 U.S. 450, 453–54 (1892) ("[A pardon] does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others while that judgment was in force. If, for example, by the judgment, a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.").

71. *See* Office of the Pardon Attorney, *supra* note 70.

72. *Id.*

73. Chief Justice Marshall said:

> As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules

guilty, a recipient may not want to accept one. But pardons have no legal effect declaring guilt. Although a pardon is not a legal admission of guilt, a court may consider a person's pardoned offenses when determining punishment for that person's subsequent crimes.[74]

The President's power to pardon is seemingly absolute. Congress cannot withdraw, limit, or overturn Presidential pardons, and prosecutors and the

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> prescribing the manner in which it is to be used by the person who would avail himself of it.
>
> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual whose benefit it is intended, and not communicated officially to the Court . . . .
>
> A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may be then rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833); *see also* Burdick v. United States, 236 U.S. 79, 90–91 (1915) (allowing a witness refusing to testify before a federal grand jury because his testimony would tend to incriminate him to reject a Presidential pardon because "escape by confession of guilt implied in the acceptance of a pardon may be rejected").

A President may, however, commute a sentence against the will of a prisoner, provided the substituted penalty is authorized by law and does not exceed the original penalty. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 264 (1976) (upholding a Presidential commutation of a death sentence to imprisonment for life with no possibility of parole, the foreclosure of parole being contrary to the scheme of the Code of Military Justice because "[t]he conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute"); Biddle v. Perovich, 274 U.S. 480, 486 (1927) ("When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

74. Carlesi v. New York, 233 U.S. 51, 59 (1914) (holding a state court could consider a prior federal conviction in determining the punishment for a subsequent state offense even though the federal offense was pardoned). Although this case involved offenses against different sovereignties, the Court declared in dictum that its decision

> must not be understood as in the slightest degree intimating that pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted.

Id.

courts cannot ignore them.[75] The language of the Constitution is broad and contains only one textual restriction and one specific exception on the pardon power.[76] The textual restriction is that the pardon must be an "Offense[] against the United States"—meaning a federal crime, not a state crime.[77]

Even if a person is convicted of identical state and federal crimes, the President can only pardon that individual for the federal crime.[78] Generally, a federal pardon does not prevent a person from being prosecuted or punished for violating state criminal laws.[79] If an individual who has been convicted of

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75. *See* Daniel Hemel & Eric Posner, Opinion, *If Trump Pardons, It Could Be a Crime*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/opinion/if-trump-pardons-crime-russia.html [https://perma.cc/CE59-6BYR].

76. *See* U.S. CONST. art. 2 § 2, cl. 1. Presidential pardons occasionally cover all crimes that the pardonee may have committed before the date the pardon was issued, without specifying the particular crime or crimes that prompted the issuance of the pardon. Professor Aaron Rappaport suggests in a draft paper that history justifies interpreting the Pardon Clause as requiring the President to specify the particular crimes or crimes being pardoned and that the pardon be limited to those specified crimes. Aaron Rappaport, *An Unappreciated Constraint on the President's Pardon Power*, 52 CONN. L. REV. (forthcoming 2020).

77. U.S. CONST. art. 2 § 2, cl. 1; *see also* Office of the Pardon Attorney, *supra* note 70 ("The President's authority to grant clemency is limited to federal offenses and offenses prosecuted by the United States Attorney for the District of Columbia in the name of the United States in the D.C. Superior Court.").

78. *See* Office of the Pardon Attorney, *supra* note 70 ("[T]he President's authority to grant clemency is limited to federal offenses and offenses prosecuted by the United States Attorney . . . An offense that violates a state law is not an offense against the United States. A person who wishes to seek a pardon or commutation of sentence for a state offense should contact the authorities of the state in which the conviction occurred. Such state authorities are typically the Governor or a state board of pardons and/or paroles, if the state government has created such a board.").

79. The Fifth Amendment states that no person can "be subject for the same offense to be twice put in jeopardy of life or limb," thus prohibiting double jeopardy for the same offense. U.S. CONST. amend. V. A common law exception known as the "dual sovereignty doctrine" has been in force since the founding of the country which allows both federal and state prosecutors to charge an individual for the same crime under the theory that the state and federal governments are separate actors and being charged separately with state and federal crimes is therefore not double jeopardy. Adam J. Alder, Note, *Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem*, 124 YALE L.J. 448, 450 (2014).

On December 6, 2018, the U.S. Supreme Court heard oral arguments for the case *Gamble v. United States*—a case that will decide whether the longstanding exception to the Constitutional protection against double jeopardy will remain in effect. Transcript of Oral Argument at 1, Gamble v. United States, No. 17-646 (U.S. Dec. 6, 2018); *see* Gamble v. United States, No. 16-16760, 694 Fed. App'x 750 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018). While the case is about double jeopardy, it has the potential to strengthen the president's pardon power. If the President pardons members of his administration who are convicted of federal crimes, under the current separate sovereigns exemption, individual states would still be able to charge and convict administration officials under state statutes. This case could eliminate the exception and drastically enhance presidential pardons.

a state crime wishes to request a pardon, he can still seek one through the appropriate state government entity, usually the Governor's office.[80]

The specific exception is that the President cannot use the pardon power to save himself or another official from impeachment.[81] Chief Justice Story commented on this limitation, stating that if the pardon power extended to impeachments, then the impeachment itself would be "wholly inefficient, as a protection against political offences."[82] As noted above, this limitation was adopted from the same restriction on the British monarchs' power to pardon.[83]

Although the Supreme Court has ruled on the pardon power's scope on very few occasions, "[c]onsistent with the framers' design, the Supreme Court has interpreted the president's pardon power broadly."[84] This broad view has roots in *Marbury v. Madison*,[85] where Chief Justice John Marshall, writing generally of Presidential power, said:

> [T]he President is invested with certain important political powers . . . which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion . . . the decision of the executive is conclusive.[86]

Thus, *Marbury v. Madison* laid the foundation for the principle that the constitution gives the President broad and seemingly unqualified power.[87]

New York law bars someone from being prosecuted in state court if that person has already been prosecuted elsewhere for the same act as a protection against double jeopardy. When jeopardy attaches in a federal prosecution, a subsequent prosecution for state crimes "based upon the same act or criminal transaction" is barred unless an exception applies. In New York, and other states with similar double jeopardy laws, a defendant pardoned by the President for a federal crime could be freed from all accountability under federal and state criminal law, even though the President has no authority under Article II to pardon state crime. *See* Letter from Eric T. Schneiderman, Att'y Gen. of N.Y., to Andrew M. Cuomo, Gov. of N.Y., et al. (Apr. 18, 2018), https://ag.ny.gov/sites/default/files/letter_from_ag.pdf [https://perma.cc/WU2X-ZFQ4] ("[A] strategically-timed pardon [from President Trump] could prevent individuals who may have violated [New York State's] laws from standing trial in [New York] courts as well.").

80. *Id.*

81. U.S. CONST. art. II, § 2, cl. 1.

82. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 172 (1842).

83. *See supra* Section I.A.

84. Hemel & Posner, *supra* note 75.

85. 5 U.S. (1 Cranch) 137 (1803).

86. *Id.* at 165–66.

87. *Id.*

IV. QUESTIONS AND LIMITATIONS RAISED UNDER ARTICLE II, SECTION 2, CLAUSE 1

All but two Presidents have issued pardons.[88] Presidential pardons have often been controversial, mainly because the power has been used by some Presidents to pardon close friends and campaign donors.[89] Some of the more controversial pardons are discussed in later sections of the article. This section of the article suggests answers to questions that arise under the pardon power, such as when a pardon may be issued, whether a President may grant a pardon to someone charged with criminal contempt of court, whether a pardon is valid if issued with a corrupt purpose, and, finally, whether the President may pardon himself.

A. When a Pardon May Be Issued

Although a President may not issue a pardon before an offense occurs,[90] the Supreme Court held in *Ex parte Garland* that a President may issue a pardon before a person is charged and convicted.[91] But even before the *Garland* holding, several Presidents granted pardons pre-conviction.[92] Several of these preemptive pardons have proven highly controversial.

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88. Robert Longley, *The Rules of Presidential Pardons*, THOUGHTCO https://www.thoughtco.com/presidential-pardons-legal-guidelines-4070815 [https://perma.cc/K483-D88U] (last updated Jan. 8, 2019). William Henry Harrison and James A. Garfield are the only two Presidents who did not give pardons—both due to death shortly after taking office. *Id.* Presidents gave the following number of pardons: William McKinley - 291; Theodore Roosevelt - 668; William Howard Taft - 383; Woodrow Wilson - 1,087; Warren Harding - 300; Calvin Coolidge - 773; Herbert Hoover - 672; Franklin D. Roosevelt - 2,819; Harry Truman - 1,913; Dwight D. Eisenhower - 1,110; John F. Kennedy - 472; Lyndon B. Johnson - 960; Richard Nixon - 863; Gerald Ford - 382; Jimmy Carter - 534; Ronald Reagan - 393; George H.W. Bush - 74; Bill Clinton - 396; George W. Bush - 189; Barack Obama - 212 people and commuted the sentences of 1,715 more people; Donald Trump - 7 as of December 2018. Office of the Pardon Attorney, *Clemency Statistics*, U.S. DEP'T JUST., https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/4K9W-F8BV] (updated Dec. 7, 2018).

89. *See* Evan Andrews, *7 Famous Presidential Pardons*, HISTORY (July 23, 2013), https://www.history.com/news/7-famous-presidential-pardons [https://perma.cc/F24D-BD3D].

90. CONG. RESEARCH SERV., LIBRARY OF CONG., 112th Cong., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, Doc. No. 112-9, at 512 (2013) ("The President cannot pardon by anticipation, or he would be invested with the power to dispense with the laws, King James II's claim to which was the principal cause of his forced abdication.").

91. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 373 (1866) (holding that while pardons could only reach past acts, pardons "may be exercised at any time after [the act's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment").

92. *See* U.S. DEP'T OF JUSTICE, *supra* note 4, at 2. To give a few examples, President Lincoln pardoned many people preemptively; President Carter pardoned thousands of Vietnam War draft evaders, including men who had not been convicted or charged; and President Ford pardoned

For example, following the Watergate scandal, President Nixon resigned to avoid impeachment.[93] Because Nixon faced prosecution for his involvement in the scandal, President Ford issued a "full, free and absolute pardon" to Nixon for all crimes against the United States he "committed or may have committed or taken part in" during his presidency.[94] While President Ford insisted that the pardon was necessary for America to move forward, many believed he was attempting to thwart a judicial branch investigation into potential Presidential corruption.[95]

President Nixon, who had not been charged. Brian C. Kalt, *Five Myths About Presidential Pardons*, WASH. POST (June 7, 2018), https://wapo.st/2sNPH6z?tid=ss_tw&utm_term=.d8bcb78ac039 [https://perma.cc/YLJ4-X2CE].

93. *See Watergate Scandal*, HISTORY (Oct. 29, 2009), https://www.history.com/topics/1970s/Watergate [https://perma.cc/9673-BBDP]. Following the Watergate scandal, people were skeptical, but not enough to prevent President Nixon's reelection in 1972 for a second term. *See id.* It wasn't until Nixon's second term that the public was made aware of his actual involvement in the scandal. *See id.* After an investigation by the Attorney General, seven of President Nixon's former aides were charged with the Watergate break-in, and Nixon was left as an "unindicted co-conspirator." *Id.* Nixon resigned before Congress could impeach him. *See id.*; *see also* Andrews, *supra* note 89.

A memorandum written to Leon Jaworski, the special prosecutor in the case, listed a number of factors the prosecutor should consider when deciding whether to prosecute Nixon for obstruction of justice. The factors that weighed against indictment and prosecution included (1) Nixon's resignation; (2) he was subject to an impeachment inquiry that resulted in the House Judiciary Committee unanimously endorsing articles of impeachment; (3) prosecution could aggravate political divisions in the country; (4) the times politically called for conciliation; and (5) a fair trial would be difficult due to massive pre-trial publicity. *See* Memorandum from Carl B. Feldbaum & Peter M. Kreindler to Leon Jaworski, Special Prosecutor, Factors to Be Considered in Deciding Whether to Prosecute Richard M. Nixon for Obstruction of Justice (Aug. 9, 1974), https://www.archives.gov/education/lessons/watergate-constitution/memo-transcript [https://perma.cc/MGA6-W46C]. The factors that weighed in favor of indictment and prosecution were: (1) equal justice under the law requires that every person answer to the criminal justice system for offenses; (2) the country would be divided unless there was a final disposition of charges against Nixon, and prosecution was necessary to preserve the integrity of the criminal justice system; (3) the Framers contemplated that a person removed from office via impeachment in Article I, Section 3, Clause 7 of the Constitution would still have to answer to the criminal justice system for criminal offenses; (4) surrendering public office is not sufficient retribution for criminal offenses; and (5) the modern nature of the Presidency necessitates public exposure of the President through the media. *See id.* A bar to prosecution would immunize all future Presidents for their actions. The memorandum further stated that the authors believed there was "clear evidence that Richard M. Nixon participated in a conspiracy to obstruct justice by concealing the identity of those responsible for the Watergate break-in" and that Nixon, "like every other citizen, is subject to the rule of law." *Id.* Importantly, the authors believed, as the authors here also believe, that the Founders intended for a President to be subject to criminal prosecution after impeachment and removal from office. *See id.*

94. Proclamation No. 4311, 39 Fed. Reg. 32,601, 32,601–02, (Sept. 10, 1974); Andrews, *supra* note 89.

95. *See* Andrews, *supra* note 89.

In another example of a controversial preemptive pardon, President George H.W. Bush pardoned several Reagan administration officials in 1992 for their involvement in the Iran-Contra affair.[96] Lawrence E. Walsh, the independent prosecutor in the affair, accused President H.W. Bush of attempting to cover up his own potential role in the scandal.[97]

In the current administration, President Trump's lawyers have taken the position that the President has "the power to pardon any person before, during, or after an investigation and/or conviction,"[98] which is an accurate statement of the law, as far as it goes. But, as will be discussed below, President Trump himself has taken an even more expansive view of the pardon power than his predecessors.[99]

It is not only the granting of pardons that has caused controversy, but also the refusal of Presidents to grant pardons. A good example of such a controversy arose during President Woodrow Wilson's administration. After Eugene V. Debs was convicted of violating the 1917 Espionage Act and sentenced to ten years in prison, numerous friends and supporters of Debs lobbied President Wilson to pardon him.[100] Even Wilson's Attorney General, A. Mitchell Palmer (hardly a friend of socialists), argued that 65-year-old Debs "has surely been severely punished."[101] Wilson famously examined Palmer's recommendation and promptly denied the petition.[102] In 1921, the next President, Warren Harding, commuted Debs's sentence.[103]

Another controversial case involving the denial of a pardon concerned Jonathan Pollard, who was convicted of violating the Espionage Act for providing classified information to the State of Israel and was sentenced to life imprisonment.[104] Those advocating on behalf of Pollard argued that he

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96. Charlie Savage, *Can Trump Pardon Himself? Explaining Presidential Clemency Powers*, N.Y. TIMES (June 1, 2018), https://www.nytimes.com/2017/07/21/us/politics/trump-pardon-himself-presidential-clemency.html [https://perma.cc/47AW-7VTS].

97. *See* David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up,'* N.Y. TIMES (Dec. 24, 1992), https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/1224.html#article [https://perma.cc/SAV2-8A6S].

98. *The Trump Lawyers' Confidential Memo to Mueller, Explained*, N.Y. TIMES (June 2, 2018), https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html [https://perma.cc/J6EE-M8BP].

99. *See infra* pp. 98–101 and note 161.

100. Debs v. United States, 249 U.S. 211 (1919)

101. A. SCOTT BERG, WILSON 697 (2013).

102. *Id.*

103. *Id.* at 713.

104. Peter Baker & Jodi Rudoren, *Johnathan Pollard, American Who Spied for Israel Released After 30 Years*, N.Y. TIMES (Nov. 20, 2015), https://www.nytimes.com/2015/11/21/world/jonathan-pollard-released.html [https://perma.cc/H434-MEJ3].

was the only American who had received a life sentence for providing classified information to an ally of the United States.[105] Despite enormous pressure, numerous presidents (George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama) refused to pardon Pollard.[106] The United States Parole Commission announced in July 2015 that Pollard would be released in November 2015.[107] Therefore, although Pollard has been released from prison, he was never pardoned.

B. The Validity of a Pardon Issued to Someone Charged with Contempt of Court

Whether contempt of court is a pardonable crime is an important issue in determining the scope of the pardon power. The language of the Constitution provides no real guidance regarding the appropriateness of such a pardon. In *Ex parte Grossman*, the Supreme Court upheld the President's power to pardon criminal contempt.[108] The Government argued that (1) the power of the courts to hold people in contempt is inherent and essential to the judiciary, and that if the President could substitute his authority for that of the court, he would become the ultimate source of judicial authority;[109] (2) allowing the President to issue such a pardon would distort the American principle that the executive, legislative, and judicial branches are independent and co-equal;[110] and (3) contempt is not an offense "against the United States" and therefore is not within the purview of the Presidential power to pardon.[111]

The Court rejected these arguments and held that the power to pardon for contempt is inherent in the pardoning power.[112] Chief Justice Taft, writing for the Court, found English rulings authoritative in construing the power:[113]

105. *Id.*
106. *Id.*
107. *Id.*
108. 267 U.S. 87, 98 (1925).
109. *Id.*
110. *Id.*
111. *Id.* at 100.
112. *Id.* at 113.
113. *Id.* at 110–11. ("The king of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common-law lawyer of the eighteenth century, the word 'pardon' included within its scope the ending by the king's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the king's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the king, in the

> It is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempt. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions.[114]

In finding no special danger from this interpretation of the pardoning power, the Court observed, "[i]f we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?"[115] *Grossman* was reaffirmed in *Schick v. Reed*, where Chief Justice Berger, speaking for the Court, stated that the pardon power flows from the Constitution, not legislative enactments, and cannot be limited by Congress.[116] *Grossman* ratified a power of the executive that can be used to frustrate powers essential to the operation of the judiciary. The authors of this article are of the view that *Grossman* and *Reed* were wrongly decided.

The contempt power is essential to the preservation of order in judicial proceedings and the enforcement of judgments and orders, and, consequently, it is essential to the administration of justice. If the President has the power to issue pardons to expunge orders of criminal contempt issued by the courts in one case, she can do it in all cases and, by doing so, unilaterally preempt much of the power given to the judiciary under Article III.

On August 25, 2017, President Trump pardoned "America's Toughest Sheriff," Sheriff Joe Arpaio, after Arpaio was convicted of criminal

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public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. The same distinction, nowadays referred to as the difference between civil and criminal contempt, is still maintained in English law." (citations omitted) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *285, *397, *398; 2 WILLIAMS HAWKINS, PLEAS OF THE CROWN 553 (6th ed. 1787)).

114. *Id.* at 111.

115. *Id.* at 121. "The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary," in light of the fact that a court exercises this power

> without the restraining influence of a jury and without many of the guaranties [sic] which the bill of rights offers . . . . May it not be fairly said that in order to avoid possible mistake, undue prejudice of needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?"

Id. at 122.

116. 419 U.S. 256, 264 (1974).

contempt.[117] In 2011, Judge Murray Snow on the United States District Court for the District of Arizona enjoined Sheriff Arpaio and his subordinates from detaining individuals unless they had actual knowledge that the individuals were not legal residents of the United States.[118] In response to a series of escalating civil contempt orders enjoining his discriminatory practices, Arpaio said what he was doing was not illegal and that he would continue his practices.[119] Arpaio refused to follow court orders and was held in criminal contempt.[120] The sentence imposed on Arpaio was to be up to one year in jail, but President Trump pardoned him before sentencing.[121] Arpaio accepted the pardon and subsequently moved for dismissal with prejudice and vacatur of all orders in the case.[122] Lawyers from the United States Department of Justice ("DOJ") refused to contest the extraordinary relief Arpaio sought.[123] Instead, they agreed with Arpaio that vacatur and dismissal with prejudice were proper in light of the pardon.[124]

Just two days before President Trump pardoned Arpaio, Harvard Law School Professor Noah Feldman wrote that pardoning Sheriff Arpaio would be an impeachable offense,[125] arguing that if Trump pardoned Arpaio, it would be "an assault on the federal judiciary, the Constitution and the rule of law itself."[126] If an individual is held in contempt for willfully refusing to follow the Constitution, Feldman argued, the action of pardoning that individual undermines the rule of law and "threaten[s] the very structure on which the right to pardon is based."[127] Is Feldman right?

This precise issue is currently being litigated in the Ninth Circuit Court of Appeals in *United States v. Arpaio*.[128] In that case, it is being argued that *Grossman* should be distinguished from pardons of contempt orders designed

117. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://nyti.ms/2vwEQx7 [https://perma.cc/FM7U-D7L6].

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Defendant's Motion for Vacatur and Dismissal with Prejudice, United States v. Arpaio, No. 2:16-cr-01012-SRB (D. Ariz. Aug. 28, 2017).

123. Government's Response to Defendant's Motion for Vacatur and Dismissal with Prejudice, United States v. Arpaio, No. 2:16-cr-01012-SRB (D. Ariz. Sept. 11, 2017).

124. *Id.*

125. Noah Feldman, *Arpaio Pardon Would Show Contempt for Constitution*, BLOOMBERG (Aug. 23, 2017, 9:57 AM), https://www.bloomberg.com/view/articles/2017-08-23/arpaio-pardon-would-show-contempt-for-constitution [https://perma.cc/K7BM-5FZC].

126. *Id.*

127. *Id.*

128. *See* Defendant's Notice of Appeal, No. 2:16-cr-01012-SRB-1 (D. Ariz. Oct. 19, 2017).

to protect the rights of private litigants. The district court agreed with that position and ruled that "the criminal contempt pardoned [in the Arpaio case] is for a willful violation of a preliminary injunction that affected constitutional rights, a more significant issue than the willful violation of the injunction against selling alcohol in *In re Grossman*."[129] Nevertheless, the district court concluded that it was bound by *Grossman* and therefore found the pardon valid. The court also found that *Grossman* required that the action be dismissed with prejudice but reserved ruling on Arpaio's additional request for vacatur—the court later denied Arpaio's request for vacatur in a separate order, which is currently on appeal to the Ninth Circuit.[130]

C. Whether a Pardon Is Valid if the President Has a "Corrupt Purpose" in Issuing It

The pardon power has historically been viewed as "an act of grace, proceeding from the power entrusted with the execution of the laws . . . ."[131]

129. Motion for Leave for the Protect Democracy Project, Inc. et al. to Participate as *Amici Curiae* at 3, United States v. Arpaio, No. 17-10448 (Nov. 8, 2017) (quoting transcript of district court's October 4, 2017 hearing on Arpaio's Vacatur Motion); *see* [Proposed] Memorandum of *Amici Curiae* Certain Members of Congress in Opposition to Defendant's Motion for Vacatur and Dismissal with Prejudice at 3–13, United States v. Arpaio, No. CR-16-01012-001-PHX-SRB (Oct. 5, 2017) [hereinafter Congress Brief] (arguing that *Grossman* is fundamentally distinct from, and does not apply to, pardons of contempt orders designed to protect the rights of private litigants); The Protect Democracy Project, Inc.'s Motion for Leave to Participate as *Amicus Curiae* at 3, 8–11, United States v. Arpaio, No. CR-16-01012-001-PHX-SRB (Sept. 9, 2017); Congress Brief, *supra* at 4–5. The members of Congress who joined in the amicus brief include: Representatives John Conyers, Jr.; Jerrold Nadler; Zoe Lofgren; Sheila Jackson Lee; Steve Cohen; Henry C. "Hank" Johnson, Jr.; Theodore Deutch; Karen Bass; Cedric L. Richmond; Luis V. Gutierrez; David N. Cicilline; Ted Lieu; Pramila Jayapal; Jackie Speier; Raúl M. Grijalva; Joseph Crowley; Linda Sanchez; Bennie G. Thompson; Keith Ellison; Adriano Espaillat; Ro Khanna; Ruben Gallego; Norma J. Torres; Eleanor Holmes Norton; Jimmy Gomez; Dwight Evans; Juan Vargas; Nydia M. Velazquez; Jim Costa; Colleen Hanabusa; Frank Pallone, Jr.; Grace F. Napolitano; and Barbara Lee. *See* Congress Brief, *supra*.

130. After the Government refused to oppose the relief Arpaio sought in the Ninth Circuit, the Ninth Circuit issued an order appointing a special counsel to defend the district court's decision below. United States v. Arpaio, 887 F.3d 979 (9th Cir. 2018), *reh'g en banc denied*, 906 F.3d 800 (9th Cir. 2018). Briefing is currently stayed while the Solicitor General determines whether to file a motion for writ of certiorari from the Ninth Circuit's order appointing special counsel. Order, United States v. Arpaio, No. 17-10448, (9th Cir. Oct. 25, 2018). On January 16, 2019, Arpaio filed a Petition for Writ of Mandamus in the Supreme Court of the United States challenging the decision of the Ninth Circuit to appoint a special prosecutor. *In re* Joseph M. Arpaio, No. 18-962 (U.S. filed Jan. 16, 2019).

131. United States v. Wilson, 32 U.S. (1 Pet.) 150, 160 (1833); *see Ex parte* Wells, 59 U.S. 149, 153 (1877) (Justice Wayne adding to Chief Justice Marshall's definition stating that the pardon power means "forgiveness, release, [and] remission" based on England's historical view of the pardon as a work of mercy); Knote v. United States, 95 U.S. 149, 153 (1877) (adopting the

Generally, there is an agreement that a President exercises the pardon power properly—as opposed to "corruptly"—when he grants a pardon with considerations of mercy and the public welfare.[132] And most Presidents have historically invoked these principles of mercy and the public welfare when issuing pardons.

For example, when President Gerald Ford pardoned former President Nixon, he said that a prosecution of Nixon would be too divisive and that Nixon had suffered enough.[133] Similarly, President George H.W. Bush acknowledged both principles when he pardoned former Reagan administration officials for their involvement in the Iran-Contra scandal.[134] If a President does not pardon with considerations of mercy or the public welfare, it is arguably an abuse of the pardon power.

Some scholars argue that President Clinton abused the pardon power by issuing pardons for a corrupt purpose.[135] In 2001 alone, President Clinton granted 141 pardons and 26 commutations—most were granted within the final hours of his presidency and bypassed the DOJ review process.[136] President Clinton's most controversial pardons were of three men with close ties to the President: Marc Rich, Pincus Green, and Carlos Vignali.[137] Jeff Sessions, then a Republican senator from Alabama, advocated for starting the bribery investigation into Clinton's pardon of Marc Rich—a financier whose former wife had donated to the Clinton Public Library Foundation.[138] Although the investigation lasted several years, no charges ensued.[139] After

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English interpretation of the pardon power, and defined the power as an act of grace); *Wilson*, 32 U.S. at 160–61 (defining the pardon power as an act of grace, noting that the act of grace was referred to from a moral perspective and describing the pardon power as a second chance); THE FEDERALIST NO. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the pardon power as an act of "mercy").

132. Hemel & Posner, *supra* note 75.

133. *Id.*

134. Proclamation No. 6518, 57 Fed. Reg. 62,145, 10 Stat. 2606 (Dec. 24, 1992).

135. *See, e.g.*, Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS. L.J. 730 (2012); Jeffrey Crouch, *The President and the Pardon Power: A Bibliographic Essay*, 12 U. ST. THOMAS L.J. 413 (2016); Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENT'G REP. 150 (2001).

136. Office of the Pardon Attorney, *Pardons Granted by President William J. Clinton (1993-2001)*, U.S. DEP'T JUST., https://www.justice.gov/pardon/clinton-pardons [https://perma.cc/6HV5-EZ72] (last updated Sept. 8, 2015). For an explanation of the DOJ review process, see 3 U.S. DEP'T OF JUSTICE, *supra* note 4, § V.C.2 and accompanying text.

137. Julian Borger, *Pardons Scandal Engulfs Clintons*, GUARDIAN (Feb. 22, 2001, 9:01 PM), https://www.theguardian.com/world/2001/feb/23/usa.julianborger [https://perma.cc/Y2CK-BP9C].

138. Savage, *supra* note 96.

139. Hemel & Posner, *supra* note 75.

facing considerable backlash, Clinton published an op-ed in *The New York Times* explaining his reasoning for these controversial pardons.[140]

Even though pardons are irrevocable, even if issued through questionable means or motives, some scholars argue that a President who abuses his pardon power may be subject to prosecution.[141] For example, two University of Chicago law professors, Daniel Hemel and Eric Posner, argue that President Trump could be charged with obstruction of justice were he to pardon his relatives or aides to cover up possible crimes and impede Special Counsel Robert Mueller's investigation, rather than for reasons of mercy or public welfare.[142] "If a President sold pardons for cash . . . that would violate

140. William Jefferson Clinton, Opinion, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), https://nyti.ms/2qjaD5I [https://perma.cc/4V5F-GEZ3] ("I decided to grant the pardons in this unusual case for the following legal and foreign policy reasons: (1) I understood that the other oil companies that had structured transactions like those on which Mr. Rich and Mr. Green were indicted were instead sued civilly by the government; (2) I was informed that, in 1985, in a related case against a trading partner of Mr. Rich and Mr. Green, the Energy Department, which was responsible for enforcing the governing law, found that the manner in which the Rich/Green companies had accounted for these transactions was proper; (3) two highly regarded tax experts, Bernard Wolfman of Harvard Law School and Martin Ginsburg of Georgetown University Law Center, reviewed the transactions in question and concluded that the companies 'were correct in their U.S. income tax treatment of all the items in question, and that there was no unreported federal income or additional tax liability attributable to any of the challenged transactions'; (4) in order to settle the government's case against them, the two men's companies had paid approximately $200 million in fines, penalties and taxes, most of which might not even have been warranted under the Wolfman/Ginsburg analysis that the companies had followed the law and correctly reported their income; (5) the Justice Department in 1989 rejected the use of racketeering statutes in tax cases like this one, a position that The Wall Street Journal editorial page, among others, agreed with at the time; (6) it was my understanding that Deputy Attorney General Eric Holder's position on the pardon application was 'neutral, leaning for'; (7) the case for the pardons was reviewed and advocated not only by my former White House counsel Jack Quinn but also by three distinguished Republican attorneys: Leonard Garment, a former Nixon White House official; William Bradford Reynolds, a former high-ranking official in the Reagan Justice Department; and Lewis Libby, now Vice President Cheney's chief of staff; (8) finally, and importantly, many present and former high-ranking Israeli officials of both major political parties and leaders of Jewish communities in America and Europe urged the pardon of Mr. Rich because of his contributions and services to Israeli charitable causes, to the Mossad's efforts to rescue and evacuate Jews from hostile countries, and to the peace process through sponsorship of education and health programs in Gaza and the West Bank.").

141. Savage, *supra* note 96.

142. Hemel & Posner, *supra* note 75. But if the President pardoned his relatives or aides to cover up possible crimes related to the Robert Mueller investigation, said pardons would be a double-edged sword to their recipients. While the aides would be relieved of any federal convictions, those pardoned could be required to testify in a case against those who were not pardoned in relation to the investigation, including Russian officials. A pardonee cannot invoke the Fifth Amendment privilege against self-incrimination and remain silent on the stand in relation to those pardoned crimes because there would be no fear of criminal prosecution, the very thing the Fifth Amendment privilege was designed to protect. People who have been pardoned are no

the federal bribery statute," explained Hemel and Posner.[143] They continued by arguing that, "if a President can be prosecuted for exchanging pardons for bribes, then it follows that the broad and unreviewable nature of the pardon power does not shield the [P]resident from criminal liability for abusing it."[144] Based on Hemel and Posner's argument, a President could be subject to prosecution for other "corruptly issued" pardons, including when the President obstructs justice in issuing them.

Obstruction of justice is an attempt to impede or undermine a criminal investigation.[145] If it could be shown that a President pardoned her family members or close aides to cover up possible crimes, that could be seen as issuing pardons corruptly, and she could be charged with obstruction of justice.[146] But this still begs the question of whether a President can be criminally charged with anything at all.

Two opinions written by the DOJ's Office of Legal Counsel say she cannot, but this position has never been directly tested in court.[147] Writing of President Trump's alleged attempts to shut down the Russia investigation, his lawyers Jay A. Sekulow and John M. Dowd (who has since resigned), argued that the President cannot obstruct justice because he is the arbiter of justice.[148] The President's actions, they wrote, "by virtue of his position as the chief law enforcement officer, could neither constitutionally nor legally constitute

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longer under any legal jeopardy for those crimes. *See* Jack Brewster, *How a Presidential Pardon Could Backfire*, TIME (July 21, 2017), http://time.com/4868418/donald-trump-presidential-pardons-backfire [https://perma.cc/B3LL-2C7R] ("Anyone pardoned by Trump would lose most of the 5th Amendment's protection against compelled testimony that might otherwise have incriminated the pardoned family member or associate, making it much easier for DOJ and Congress to require such individuals to give testimony that could prove highly incriminating to Trump himself.").

A pardonee's refusal to testify before Congress could lead to more constitutional uncertainty. The most likely remedy for such a refusal would be to hold the pardonee in contempt of Congress, which could then lead to a second pardon. *Id.*

143. Hemel & Posner, *supra* note 75.

144. *Id.*

145. *Id.*

146. *Id.*

147. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222 (2000), https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf [https://perma.cc/PSE9-54EX] ("The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."). The same office wrote an opinion saying the President cannot pardon himself. *See infra* Section III.E and accompanying text.

148. *White House Won't Explain Contradictory Comments About President Trump's Role in Dictating Trump Tower Meeting*; *Interview with Dinesh D'Souza*, (CNN television broadcast June 4, 2018), http://transcripts.cnn.com/TRANSCRIPTS/1806/04/acd.01.html [https://perma.cc/T8EG-2TQG].

obstruction because that would amount to him obstructing himself."[149] This is a substantially similar argument to monarchial English law where the King could not commit a crime against the Crown because one could not commit a crime against oneself. Another President Trump attorney, Rudolph Giuliani, told the *Huffington Post* that President Trump could not be subpoenaed or indicted while in office, even if he shot the former Federal Bureau of Investigation Director James Comey.[150] This is the same line of reasoning President Nixon used when he famously said, "when the President does it, that means that it is not illegal."[151]

Writing in Federalist No. 69, Alexander Hamilton argued that "[t]he President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law."[152] This prompts the question of whether a President can be indicted before he is tried and convicted through the impeachment process. If he can be, it may be argued that impeachment is an essential step against a criminal President regardless of whether his crime involves the use of Presidential powers or has any public dimension at all. But if, as President Trump's lawyers and some other commentators believe, a sitting President cannot be indicted, President Trump could still face prosecution after he leaves the White House.

Several commentators on the other side of the argument believe the President is subject to indictment and prosecution while he is still in office. Peter Shane, an Ohio State University law professor, said, "We overthrew control by a monarchy, and the Constitution signals in multiple places that the President is subject to law."[153] When the House Judiciary Committee voted to impeach President Richard Nixon in 1974, Democrats and Republicans alike acknowledged that obstruction of justice by the President was both impeachable and criminal.[154] And in 1998, while the Senate was

149. *The Trump Lawyers' Confidential Memo to Mueller, Explained*, *supra* note 98.

150. S.V. Date, *Giuliani: Trump Could Have Shot Comey and Still Couldn't Be Indicted for It*, HUFFINGTON POST (June 3, 2018 6:00 PM), https://www.huffingtonpost.com/entry/trump-shoot-comey_us_5b145897e4b02143b7cd633e [https://perma.cc/CC9S-H6N8].

151. Divine Anger, *Nixon When the President Does It, That Means That It Is Not Illegal*, YOUTUBE (June 18, 2013), https://www.youtube.com/watch?v=HiHN3IJ_j8A [https://perma.cc/B5RA-8NBG].

152. THE FEDERALIST NO. 69, at 463 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

153. Charlie Savage, *Trump and His Lawyers Embrace a Vision of Vast Executive Power*, N.Y. TIMES (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/trump-executive-power-russia-investigation.html [https://perma.cc/H6E8-3AUR].

154. Hemel & Posner, *supra* note 75.

evenly split on whether to remove President Clinton from office on obstruction of justice charges, Senators from both parties agreed that Clinton was subject to the obstruction laws.[155] But if the President can be charged with obstruction of justice, there still remains the looming question of whether the President may pardon himself.

D. Whether a President May Pardon Himself

The actual language of the Constitution does not impose limitations on the President's right to self-pardon except in "[c]ases of [i]mpeachment."[156] While no President has ever attempted to pardon himself, the question of the validity of Presidential self-pardons has arisen several times throughout United States history.[157]

The question first arose under the Nixon presidency and the Watergate scandal. In the midst of the scandal, Mary C. Lawton, the then-Acting Assistant Attorney General for the Office of Legal Counsel, took the position that the President cannot pardon himself, writing: "[u]nder the fundamental rule that no one may be a judge in his own case, it would seem that the question [of whether the President can pardon himself] should be answered in the negative."[158] Interestingly, Lawton argued that it would be lawful, however, for a President to use the Twenty-fifth Amendment to declare

155. *Id.*

156. U.S. CONST. art. II, § 2, cl. 1.

157. Several governors have pardoned themselves, the most notable being Isaac Stevens, the governor of Washington, in 1856. An unnamed governor identified as a "popular statesman" pardoned himself for stealing a horse in 1897; James Woodward, mayor of Atlanta, pardoned himself for drunken and disorderly conduct in 1901; Tennessee Governor B.W. Hooper sentenced himself to two days in prison to "study conditions firsthand," and pardoned himself a day later in 1911; Arkansas Governor Orval Faubus pardoned himself in 1921, but details are unclear; Washington State Governor Arthur Langlie unintentionally pardoned himself in 1941. *See* Max Kutner, *No President Has Pardoned Himself, but Governors and a Drunk Mayor Have*, NEWSWEEK (July 24, 2017 2:22 PM), https://www.newsweek.com/trump-granting-himself-pardon-governors-641150 [https://perma.cc/6PQ8-92BB]; Saikrishna Bangalore Prakash, Opinion, *The First (the Only?) Federal Self-Pardon*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/03/the-first-the-only-federal-self-pardon/?utm_term=.87ba83a35d1b [https://perma.cc/32EQ-GF5Y] ("That I Isaac I. Stevens Governor of the said Territory by virtue of the authority vested in me as Governor as aforesaid in order that the President of the United States may be fully advised in the premises and his pleasure known thereon, do hereby, respite the said Isaac I. Stevens defendant from execution of said judgment and all proceedings for the enforcement and collection of said fine and costs until the decision of the President of the United States can be made known thereon.").

158. Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974), https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370_0.pdf [https://perma.cc/M884-AWGR].

himself temporarily disabled, receive a pardon from the Vice President, and then resume his role as President.[159]

The self-pardon question again arose during the impeachment of President Clinton. During a House Judiciary Committee hearing about the proposed impeachment, Chairman of the panel Representative Bob Goodlatte stated, "'[t]he prevailing opinion is that the President can pardon himself.'"[160] But Lawton and Goodlatte's statements are not definitive rulings. They are just opinions that do not end the discussion.

The historical question has arisen again with President Trump. In June 2018, the President declared in a tweet that he has "the absolute right" to pardon himself for any crime.[161] Despite denials of the discussions taking place, the *Washington Post* reported that President Trump consulted his legal advisors about the possibility of pre-emptively pardoning his associates and himself to undercut the Special Counsel Robert Mueller's Russia investigation.[162]

Most scholars contend that a President may not constitutionally pardon himself.[163] Some scholars argue that the Constitution gives the President power to "grant" pardons, and that because a grant is something given to another person, the President cannot "grant" a pardon to himself.[164] Lawrence Tribe, Richard Painter, and Norman Eisen wrote in the *Washington Post* that the "Constitution specifically bars the president from using the pardon power to prevent his own impeachment and removal."[165] Other legal scholars argue

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159. *Id.* at 371.

160. *Impeachment Inquiry: William Jefferson Clinton, President of the United States*: *Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 358 (1998); Savage, *supra* note 96.

161. Savage, *supra* note 153 (quoting @realDonaldTrump, TWITTER (June 4, 2018, 5:35 AM), https://twitter.com/realdonaldtrump/status/1003616210922147841?lang=en [https://perma.cc/6MW6-JZQJ] ("As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong?")).

162. Carol D. Leonnig et al., *Trump Team Seeks to Control, Block Mueller's Russia Investigation*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html?noredirect=on&utm_term=.e37a242a4435 [https://perma.cc/BGW3-3YGR].

163. *See, e.g.*, BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 40–41 (2012).

164. *Id.* at 54.

165. Lawrence H. Tribe, Richard Painter & Norman Eisen, Opinion, *No, Trump Can't Pardon Himself. The Constitution Tells Us So*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html?utm_term=.2dd8a99c9351 [https://perma.cc/GZ5G-ZRXJ]; *see also* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 108 (2000) ("There is no case law on the question, of course, but it has generally been inferred from the

that a President cannot pardon himself because it would be a conflict of interest.[166]

Fordham University law professors Jed Shugerman and Ethan Leib argue that the Constitution's "Take Care Clause," which obligates the President to "take Care that the Laws be faithfully executed," prohibits the President from pardoning for self-protection.[167] Specifically, they argue that the Take Care Clause mandates that the President act in a way to advance the public interest rather than President's private affairs.[168] By that logic, a Presidential self-pardon would be unconstitutional and therefore void.

Other opponents of presidential self-pardons point to the constitutional provision that the President may be "subject to Indictment, Trial, Judgment and Punishment, according to Law."[169] Arguably, a self-pardon, by preventing prosecution of the President following an impeachment conviction and removal from office, would nullify that constitutional provision. However, none of these arguments against self-pardons are supported by case law.

On the other side of the argument, scholars like Jonathan Turley and former Seventh Circuit Judge Richard Posner agree with President Trump, noting the Constitution's lack of express limits when it gives the President the power to pardon.[170] Their textual argument is strong, especially given the

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breadth of the constitutional language that the President can indeed pardon himself, and although this conclusion has been challenged, it is unlikely that the present Supreme Court would be bold enough, in the teeth of the constitutional language, to read into the pardon clause an exception for self-pardoning. Unlikely, but not inconceivable.").

166. Savage, *supra* note 153.

167. Sean Illing, *Can Trump Pardon His Way Out of the Mueller Probe? This Law Professor Says No*, VOX (Apr. 19, 2018), https://www.vox.com/2018/4/19/17251216/trump-pardon-cohen-mueller-scooter-libby-russia [https://perma.cc/H3WN-74JS].

168. *Id.* ("This language comes directly from fiduciary documents from the 17th and 18th centuries. Fiduciary duties still come up today in the context of corporate boards, trusts, wills, and other legal documents that impose obligations on people to act in the best interests of the people they're serving. A fiduciary duty means you can't serve your interests over the interests of your client or company or, in the case of the [P]resident, your country. In the same way that a lawyer or a chief executive officer must act in the best interests of her client or company, a President is compelled by the Constitution to execute the laws in such a way as to protect the best interests of the people." (quoting law professor Jed Shugerman)).

169. *See* U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.").

170. U.S. CONST. art. II, § 2; *see* Jonathan Turley, *How Do You Get Rid of Trump? An Election, Not the 25th Amendment*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/19/how-do-you-get-rid-of-trump-an-election-not-the-25th-amendment/?utm_term=.2df787de3990 [https://perma.cc/NQC9-VP37].

Supreme Court's view that the constitutional text gives the President plenary pardon power.[171] That textual interpretation is also consistent with the Federalist papers, which argued for a practically limitless pardon power, and which rejected the Antifederalists view that the power ought not rest in the hands of the President for the very reasons raised today.[172]

Despite the breadth of the constitutional text, the issues discussed in this section continue to generate competing views about the scope of Presidential power. Because the implications of a limitless pardon power are so significant, it is appropriate to examine possible ways to cabin the pardon power through impeachment, judicial limitations, or amendments to the Constitution.

V. POSSIBLE REMEDIES FOR ABUSE OF THE PARDON POWER

Although the broad language of Article II, Section 2, Clause 1 allows the President to pardon an individual for any offense committed against the United States, limitations on how the President uses the pardon power deserve consideration.[173] Much of what we take for granted in our political system is the product of informal norms as opposed to fixed laws. The United States' government was built on the assumption that the President, as the elected leader of the country, would be constrained by a sense of decency and

171. *See* Schick v. Reed, 419 U.S. 256 (1974). Chief Justice Burger wrote that

> [t]he plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specific number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.

Id. at 266. Burger went on to pronounce that "[w]e therefore hold that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself." *Id.* at 267.

172. *See* THE ANTIFEDERALIST NO. 67 (George Clinton), NO. 74 (Philadelphiensis).

173. Many other countries' constitutions contain a range of constitutional provisions limiting or modifying pardon powers. The Kenya Constitution, for instance, prohibits pardons by lame-duck or outgoing executives. *See* CONSTITUTION 2010, art. 134(1) (Kenya). The Malaysia Constitution contains an elaborate provision establishing an alternative process for executive self-pardons or pardons for immediate family members. *See* FEDERAL CONSTITUTION Nov. 1, 2010, art. 42(12) (Malay.). Several other constitutions prohibit pardons for corruption, impeachment, or abuse of political office. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF LIBERIA Jan. 6, 1986, art. 59; CONSTITUTION OF THE REPUBLIC OF MALAWI May 15, 1994, art. 89(2)(b) (preventing the president from pardoning herself or the vice president in the case of impeachment); CONSTITUTION OF TONGA 2016, cl. 37 (replacing "maladministration" with "impeachment"). The Nigeria Constitution has a provision exempting corruption and economic crimes from the scope of the pardon power where the sentence was handed down by the Code of Conduct Tribunal. *See* CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999, sched. 5, ¶ 18(7).

respect for democratic customs, and that separation among the three branches of government would protect against bad actors.

But the original purpose of the pardon power is undermined when a President pardons himself or an individual who has violated the Constitution, been held in criminal contempt of court, or maintained a personal connection with the President. Technically, there are checks on the power. Congress can check the President through impeachment, the federal courts can check him by declaring his pardon unconstitutional, and of course, the people can check the President by voting him out of office. These checks, among others, are examined in this section.

A. Impeachment

There is a constitutional avenue available to Congress if the President abuses the pardon power—impeachment. The President, "though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter *no* offender in any degree from the effects of impeachment [and] conviction."[174] A self-pardon, for example, might be outrageously improper, but the remedy the Constitution creates for such misconduct is impeachment—a political rather than a criminal remedy.

But the power of impeachment is a weak check on the President for several reasons. First, it is unlikely that Congress would classify a potential abuse of the pardon power as a high crime or misdemeanor.[175] Next, the impeachment limitation is useless against a President, like President Clinton, who grants controversial pardons in the very last hours of his tenure. And third, the impeachment power is a partisan tool—serious impeachment proceedings have only been carried out when Congress and the White House were controlled by opposing political parties.[176]

Unless Congress is willing to use the impeachment power in cases where the President abuses his Article II powers, there should be more checks in the system. The Supreme Court may provide some check through narrowing interpretations of the pardon power, but the words of the constitutional text only allow the Court to go so far.

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174. THE FEDERALIST NO. 69, at 466 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

175. *See* STAFF OF H.R. COMM. ON THE JUDICIARY, 93D CONG., REP. ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4–17 (Comm. Print 1974).

176. *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, http://history.house.gov/Institution/Impeachment/Impeachment-List/ [https://perma.cc/D3Y2-EZX4] (last visited Jan. 13, 2019).

B. Take the Issue to the Supreme Court

If a President did pardon herself and was later indicted anyway, it could create an opportunity for the Supreme Court to resolve the pardon's legality.[177] The judicial branch has both protected the broad language of the pardon power and limited its effect and meaning when it is extended beyond constitutional boundaries. For instance, in *Knote v. United States*, the Supreme Court interpreted the pardon power broadly by adopting the broad historical British monarchy's definition of the power.[178]

Although the Court interpreted the power broadly, it did impose limitations for when a pardon exceeds constitutional limits. For example, the Court held that a pardon cannot affect the vested rights of third parties—in other words, a pardon cannot interfere with the constitutional rights of others.[179]

The Supreme Court indirectly upheld another constitutional limitation on the pardon power in *Schick v. Reed*.[180] In *Schick*, the Court first reaffirmed that the pardon power "flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."[181] But, when discussing the constitutionality of conditional pardons, the Court held that conditional pardons are valid only if the conditions themselves are constitutional.[182] Thus, the constitutional limitation on conditional pardons is that if the condition the President wishes to impose before a pardon is granted is unconstitutional, then the pardon itself is unconstitutional.[183]

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177. Savage, *supra* note 153.

178. 95 U.S. 149, 151–53 (1877) ("A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within the control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him new credit and capacity, and rehabilitates him to that extent in his former position.").

179. *Id.* at 154–156.

180. 419 U.S. 256, 266 (1974).

181. *Id.*

182. *Id.* at 266–68. A pardon may be full or conditional; it is conditional when its effectiveness depends on fulfillment of a condition by the offender. *See* Krent, *supra* note 27, at 1667 (examining several conditional pardons by President Clinton where he attached conditions to pardons to several individuals, most serving long sentences for drug violations, by requiring "the offenders to periodically take drugs tests" and requiring others to "serve a period of supervised release")).

183. *Id.* at 267 (stating that restraints on the pardon power "must be found in the Constitution itself").

And in *Burdick v. United States*, the Court did not constitutionally limit the pardon power, but recognized that a pardon cannot erode a pardon recipient's constitutional rights.[184]

Because these cases involved judge-made exceptions to the pardon power, a prohibition on self-pardoning is conceivable. But, even if another judge-made exception to the pardon power is possible, there are other judicial limitations that may prevent the Supreme Court from even hearing a constitutional challenge to a Presidential pardon. Given the narrow holdings of these cases, unless a pardon recipient's constitutional right is infringed, the Court likely would not take a case involving a challenge to a Presidential pardon on the ground that the constitutional validity of a pardon is a political question.[185] In determining whether there is a nonjusticiable political question, a court examines whether the constitutional text grants the power at issue exclusively to a single branch of the federal government, and whether there is a lack of a judicially manageable standard.[186] In analyzing the Constitution's pardon power clause under these factors, first, the Constitution places the power exclusively within the executive branch. And second, no Supreme Court case has found a judicially manageable standard to determine whether there was an abuse of the pardon power.

Lastly, the Court may also find separation of powers concerns. Because the pardon power was originally enacted to serve as a check against the judicial branch of government,[187] if the judicial branch analyzed the appropriateness of a pardon, the protection against the harsh criminal justice

184. Burdick v. United States, 236 U.S. 79, 87–88 (1915). In *Burdick*, Burdick refused to testify before a federal grand jury, invoking his Fifth Amendment privilege against self-incrimination. *Id.* The President offered Burdick a pardon in exchange for his testimony, but Burdick refused the pardon and maintained his silence. *Id.* The Court stated that, although no criminal punishment would stem from Burdick's testimony discussing a Presidential pardon, negative consequences could still flow from admitting guilt, and that the pardon offered was in direct tension with the protection of his Fifth Amendment rights. *Id.* at 87. A unanimous Court supported Burdick on his refusal to testify and stated that a pardon should not erode an individual's constitutional rights. *Id.* at 94.

185. Nixon v. United States, 506 U.S. 224, 228 (1993); Baker v. Carr, 369 U.S. 186, 211 (1962) (determining nonjusticiability of a political question is, primarily, "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution").

186. *Nixon*, 506 U.S. at 228 (citing *Baker*, 369 U.S. at 217, and Powell v. McCormack, 395 U.S. 486, 519 (1969)).

187. *See* THE FEDERALIST NO. 74, at 500–01 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

system that the Founders originally intended would be rendered effectively moot.[188]

C. Limit the Pardon Power by Constitutional Amendment

As stated previously, the Supreme Court has held that "the [pardon] power flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified."[189] In two different cases the Supreme Court invalidated congressional limitations on the pardon power.[190] Thus, Congress is constitutionally unable to limit the effect of a pardon.

Therefore, if the people wish to amend the pardon power outside of the powers of the Supreme Court, it will need to be done by constitutional amendment. A few suggestions are outlined in the next sections.

1. Adopt a State Method

One amendment option is to adopt one of the various methods used by state governments. Many states do not give their Governor broad, unfettered discretion to issues pardons as the U.S. Constitution gives the President.[191]

188. *Id.*

189. Schick v. Reed, 419 U.S. 256, 266 (1974).

190. In *Ex parte Garland*, Congress passed a law requiring each person who wanted to practice in federal court to swear an oath asserting that he had never "voluntarily borne arms" against the United States or "voluntarily given aid, comfort, counsel, or encouragement" to enemies of the United States. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 336–37 (1866). Garland, who wished to practice in federal court, was previously granted a pardon for actions he committed as a Confederate sympathizer. *Id.* at 381. The Court held that when a complete pardon is granted, the recipient is legally innocent as if he had never committed the offense. *Id.* The Court concluded that Congress could not limit the effect of a pardon through a legislative act. *Id.*

Similarly, in *United States v. Klein*, Congress banned the use of a pardon as evidence to prove an individual's loyalty. United States v. Klein, 80 U.S. (13 Wall.) 128, 143 (1871). Klein was pardoned for his support of the Confederacy in return for an oath of loyalty to the Union, and he attempted to regain his confiscated land. *Id.* at 131–133. Klein won in the lower court, but during the appeal, Congress passed a limiting statute restricting Klein from using his oath of loyalty as evidence. *Id.* at 133–34. The Supreme Court struck down the statute, holding that the Constitution does not allow Congress to "change the effect of . . . a pardon any more than the executive can change a law." *Id.* at 148.

191. In Alabama, an independent board appointed by the governor exercises the pardon power, except the governor has authority in capital cases. ALA. CONST. amend. 38; ALA. CODE §§ 15-22-20 to -40 (2019). In California, for recidivists, a parole board must be consulted, and a majority of supreme court justices must recommend a pardon. CAL. CONST. art. V, § 8; CAL. PENAL CODE §§ 4800, 4812, 4813, 4852.16 (West 2019). In Connecticut an independent board appointed by the governor exercises the pardon power. CONN. GEN. STAT § 54-124a(f) (2019). In Delaware, the Governor decides but may not act without an affirmative clemency board recommendation. DEL. CONST. art. VII, § 1. In Florida, the Governor and three cabinet officials

Several states have a system where the Governor appoints an independent pardoning board to make all pardoning decisions; in some states, the Governor sits on an Executive Pardoning Board with other cabinet members; and, in others, the Governor cannot review a pardon unless she has express authority or a recommendation from a type of clemency board.[192]

For example, in Arizona, the Governor has the power to issue pardons "upon such conditions and with such restrictions and limitations as may be provided by law."[193] The Arizona Legislature used the limiting language in the Arizona Constitution to create the Arizona Board of Executive Clemency.[194] So, while the Governor ultimately decides who receives a pardon, she may not act without an affirmative clemency board recommendation.[195] This method, or one of the several other state government methods for issuing pardons, should be considered as possible alternatives to

act as the pardon board. FLA. CONST. art. IV, § 8(a); FLA. STAT. §§ 940.01, 940.05 (2019). In Georgia an independent board appointed by the Governor exercises the pardon power. GA. CONST. art. IV, § 2, ¶ II. In Idaho, an independent board appointed by the governor decides all but violent and drug offenses, which must be approved by the governor. IDAHO CONST. art. IV, § 7; IDAHO CODE ANN. §§ 20-210, 20-240 (West 2019). In Louisiana, the Governor may pardon upon a favorable recommendation from the Board of Pardons. LA. CONST. art. IV, § 5(E)(1); LA. STAT. ANN. § 15:572(A) (2019). In Massachusetts, the Governor may not act without an affirmative recommendation from the Governor's Council. MASS. CONST. pt. 2, ch. II, sec. I, art. VIII. In Minnesota, the Governor and high officials (attorney general and chief justice) act as a board exercising power. MINN. CONST. art. V, § 7. In Nebraska, the Governor and high officials (secretary of state and attorney general) act as a board of pardon, which exercises the pardoning power. NEB. CONST. art. IV, § 13. In Nevada, the Governor and high officials (justices of state supreme court and attorney general) act as a board exercising pardoning power. NEV. CONST. art. 5, § 14. In Oklahoma, the Governor decides who receives a pardon, may not act without an affirmative recommendation from the board of pardons and parole. OKLA. CONST. art. VI, § 10. In Pennsylvania, the Governor decides who receives a pardon, but may not act without an affirmative recommendation from pardon board chaired by the lieutenant governor. PA. CONST. art. IV, § 9(a). In South Carolina, an independent board appointed by the governor exercises pardon power except in capital cases (where the governor retains power). S.C. CONST. art. IV, § 14; S.C. CODE ANN. § 24-21-920 (2019). In South Dakota, the Governor decides but the Board of Pardons and Paroles must recommend pardon to obtain sealing relief. S.D. CONST. art. IV, § 3; S.D. CODIFIED LAWS § 24-14-11 (2019). In Texas, the Governor decides, but may not act without an affirmative recommendation from the Board of Pardons and Paroles. TEX. CONST. art. IV, § 11(b). In Utah, there is an independent board appointed by the Governor. UTAH CONST. art. VII, § 12; UTAH CODE ANN. § 77-27-5(1) (2019).

192. *See id.*

193. ARIZ. CONST. art. V, § 5.

194. ARIZ. REV. STAT. ANN. § 31-402(A) (2019). The Board meets monthly and must publish the applications for clemency, hold public hearings, and publish their recommendations to the governor with reasons. §§ 31-401, 31-402.

195. The Governor must also publish reasons for each grant and report regularly to the legislature. §§ 31-445 to -446.

the current federal system. Of course, such a change would require a constitutional amendment.

2. The Department of Justice Method

Another possible constitutional amendment is to adopt the DOJ's pardon application review process. The DOJ has overseen petitions for clemency for over 125 years.[196] The review process is designed as a safeguard for completeness, consistency, and apolitical results.[197] Although the DOJ has a system of review in place, the President is not required to follow any of its recommendations—the regulations are advisory and serve as guidelines for DOJ pardon attorneys.[198]

The DOJ uses several criteria used to assess an applicant's pardon application such as the post-conviction conduct and reputation of the applicant; the seriousness of the offense; the amount of time that has passed since the offense; the applicant's acceptance of responsibility, remorse, and atonement; official recommendations and reports; and specific need for relief.[199] Because the DOJ attorneys assigned to the Office of the Pardon Attorney are career employees, they are not reliant on political considerations in maintaining their employment.[200]

The review process goes generally as follows: the convicted criminal must petition the DOJ for a pardon after a suggested five-year, post-conviction waiting period.[201] Next, the Federal Bureau of Investigation examines the petitioner to inquire specifically about pre-conviction and post-conviction behavior.[202] Finally, the United States Attorney General reviews the file and recommends a decision to the President.[203] Despite the lengthy and detailed

196. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL *§ 9-140.112,* https://www.justice.gov/pardon/about-office-0 [https://perma.cc/WF43-QFJC]. Current regulations governing the submission, consideration, and granting of pardons are outlined in 28 C.F.R. §§1.1–1.10 and 28 C.F.R. §§ 0.35–0.36.

197. *Id.* at § 9-140.112.

198. *Id.*

199. *Id.*; *see* Paul J Haase, Note, *"Oh My Darling Clemency": Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287, 1294 (2002).

200. *See* Haase, *supra* note 199 at 1294; Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 216 (2003).

201. 28 C.F.R. § 1.2 (2019).

202. *See id.* § 1.6.

203. *See id.*

process, the President ultimately retains complete discretion over whether to grant or deny the pardon.[204]

By constitutional amendment, the last step of the process could be changed so that the President does not have complete discretion, but rather, must have a recommendation from the DOJ Pardon Attorney before issuing a full pardon. This way, the President would have a non-political check from within the Executive Branch over his ability to issue pardons.

3. Advice and Consent of the Senate

Another alternative is to require advice and consent from the Senate for Presidential pardons to be valid—an amendment that has been previously proposed in Congress. In 1974, after President Ford's pardon of President Nixon, Senator Walter Mondale proposed a constitutional amendment giving both houses of Congress the ability to veto a Presidential pardon.[205]

Although the amendment was never adopted, in light of the current public mistrust of the pardon power, it may be time to reconsider the Mondale Amendment. And given the current dysfunction in Washington D.C., it is time to consider several options for amending the pardon power to avoid its continued abuse, arguable misuse, and to avoid an even more deeply divided partisanship.[206]

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204. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 334 (1866) (outlining the sweeping scope of the President's power to pardon).

205. 120 CONG. REC. 31,552 (1974) (statement of Sen. Mondale) ("No pardon granted to an individual by the President under section 2 of Article II shall be effective if the Congress by resolution, two-thirds of the members of each House concurring therein, disapproves the granting of the pardon within 180 days of its issuance.").

206. *See* NOTES OF DEBATES, *supra* note 35, at 646. Just last year, Tennessee Congressman Steve Cohen introduced a Constitutional Amendment to limit the scope of the President's pardon power. *See Preventing Presidents from Pardoning Themselves, Family or Aides*, CONGRESSMAN STEVE COHEN (Nov. 3, 2017), https://cohen.house.gov/taxonomy/story-type/enewsletters/preventing-presidents-pardoning-themselves-family-or-aides [https://perma.cc/YRF2-NZB2]. "The amendment would prohibit presidents from pardoning themselves, as well as members of their families, their administrations and campaign staffs." Press Release, Congressman Steve Cohen, Ranking Member Cohen Introduces Constitutional Amendment to Limit Presidential Pardon Power (Oct. 31, 2017), https://cohen.house.gov/media-center/press-releases/ranking-member-cohen-introduces-constitutional-amendment-limit [https://perma.cc/B92L-JAFW] ("The pardon power is supposed to be a safety valve against injustice. . . . It is not supposed to be a way for presidents to put themselves, their families and members of their administration and campaigns above the law. Monday's indictment of President Trump's Campaign Chairman Paul Manafort demonstrates how important it is for Congress to act."). The proposed resolution did not make it out of committee. *See* H.R.J. Res. 120, 115th Cong. (2017).

VI. CONCLUSION

The checks on the pardon power are not as effective as Alexander Hamilton argued and the rationales for vesting the pardon power exclusively with the President are not as compelling today as they were when originally drafted. The rationale of broad discretion and quick action as support for the pardon power is still valid, but the justification of the President's accountability to the electorate and the check provided by the political process on his actions no longer seem to justify a plenary executive pardon power. Furthermore, because the political process does not provide an effective check against the abuse of the pardon power, the President essentially has absolute power to pardon any individual he chooses for whatever reason he chooses—whether for a legitimate purpose or not. New limitations on the President's pardon power such as those suggested above should be seriously considered.