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The Nature and Extent of Presidential Pardon Power: An Analysis in Light of Recent Political Developments

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The Nature and Extent of Presidential Pardon Power: An Analysis in Light of Recent Political Developments

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Abstract

Long recognized as the most sweeping and least checked power vested in the Chief Executive, the pardon power received renewed scholarly attention with the federal investigation of the Trump White House. President Trump's assertion via a Twitter post that "the U.S. President has the complete power to pardon" provoked a heated national debate on the reach of his pardoning authority. This paper is an attempt to elucidate the nature of the pardon power by examining its historical contours and the constitutional principles governing its exercise.

Introduction

On January 6, 2017, the Office of the Director of National Intelligence (DNI) released a report assessing "with high confidence" that "Russia's intelligence services conducted cyber operations against targets associated with the 2016 U.S. presidential election."[1] The declassified intelligence report further assessed that the targeted cyber intrusions were part of an "influence campaign" to help the candidacy of Donald Trump, for whom "Putin and the Russian Government [had] developed a clear preference."[2] The report's findings, coupled with Trump's conciliatory tone on Russia, spurred rumors and suspicions that the Trump campaign had col-

[1] U.S. National Intelligence Council, *Background to Assessing Russian Activities and Intentions in Recent US Elections: The Analytic Process and Cyber Incident Attribution*, (Washington, D.C., January 6, 2017), 2, https://www.dni.gov/files/documents/ICA_2017_01.pdf (accessed May 25, 2019).

[2] Id.

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luded with the Russian government to discredit and defeat his Democratic opponent, in spite of the absence of actual evidence of coordination between the two sides.

Shortly after the inauguration ceremony, the Senate Intelligence Committee announced that it would launch a probe into the alleged Russian interference in the presidential election.[3] For its part, the FBI also announced on March 20, 2017, per Director James Comey, that it was also investigating "whether there was any coordination between the campaign and Russia's efforts."[4] In a move that made his critics more vehement, President Trump fired Director Comey on May 9 while proceeding with the investigation. The Trump administration cited a two-and-a-half page memo written by Deputy Attorney General Rod Rosenstein and Attorney General Jeff Sessions as a basis for its decision. As its title clearly states, the memo recommended replacing James Comey as a means of "Restoring Public Confidence in the FBI."[5] There had been speculations that Comey's future as FBI director was in doubt, given his controversial handling of Hillary Clinton's private email server investigation, which led to no charges despite findings of wrongdoing. But while the termination was unsurprising in itself, it was still criticized as politically motivated because of its timing.

On May 17, 2017, the Justice Department appointed former FBI director Robert Mueller as special counsel to take over the investigation into alleged ties between the Trump campaign and Russia.The appointment of a special counsel ensured that the investigation would continue until definite findings were made. In his appointment letter, Rod Rosenstein expressly authorized Robert Mueller to look into "any matters that arose or may arise directly from the investigation."[6] Consis-

[3] Bryan Koenig, "Senate Intel Committee Moving on Russia Hacking Probe," January 25, 2017, https://www.law360.com/articles/884744/senate-intel-committee-moving-on-russia-hacking-probe (accessed May 25, 2019).

[4] Washington Post Staff, "Full Transcript: FBI Director James Comey Testifies on Russian Interference in 2016 Election," March 20, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/03/20/full-transcript-fbi-director-james-comey-testifies-on-russian-interference-in-2016-election (accessed May 25, 2019).

[5] Deputy Attorney General Rod Rosenstein to Attorney General Jeff Sessions, Memorandum, May 9, 2017, "Restoring Public Confidence in the FBI," https://cdn.factcheck.org/uploadedfiles/comey-letters.pdf (accessed May 25, 2019).

[6] Charlie Savage, "How a Special Counsel Alters the Russia Investigation," *New York Times*, May 17, 2017, https://www.nytimes.com/2017/05/17/us/politics/special-counsel-in-russia-investigation-raises-stakes-for-trump.html (accessed May 25, 2019).

tent with this charge, Mueller initiated two additional probes, one focusing on Trump's finances and the other on possible obstruction of justice.[7]

As the investigation progressed and expanded, unconfirmed media reports surfaced, alleging that the president was "exploring ways to limit or undercut special counsel Robert S. Mueller III's Russia investigation," including the use of his "authority to grant pardons."[8] One report elaborated that President Trump had "asked his advisers about his power to pardon aides, family members and even himself in connection with the probe."[9] The reports generated some discussion but public interest and attention did not peak until the President thrust himself into the vortex by posting a Twitter message on the subject on July 22, 2017. In asserting that "the U.S. President has the complete power to pardon,"[10] Mr. Trump gave credence to the circulating reports that some high-level conversation about clemency had occurred. More importantly, the seemingly banal tweet started a heated national debate about the scope of the president's pardoning authority, which eventually spilled over into the academic realm.

Had Mr. Trump not been such as avid user of social media, the chances are a public and academic debate over presidential powers would have ensued anyway by reason of the ongoing investigation. The showdown between the Justice Department and the White House raised a number of important constitutional questions. The one that this inquiry is concerned with is whether the president's pardon authority is boundless, as purported by Mr. Trump's assertion. There are other issues attendant to this central question that the paper will also address, such as self-pardon and the preemptive use of the pardon power by the president to protect himself or his political allies from possible prosecutions.

That Director Comey might have been terminated for political reasons or personal animus is a matter of no consequence as far as this inquiry is concerned. Equally irrelevant to our purposes is the ultimate findings of the investigation. The chief and only purpose of this study is to examine the nature and ambits of the presidential pardon power, and to arrive at consti-

[7] Greg Farrell and Christian Berthelsen, "Mueller Expands Probe to Trump Business Transactions," July 20, 2017, https://www.bloomberg.com/news/articles/2017-07-20/mueller-is-said-to-expand-probe-to-trump-business-transactions (accessed May 25, 2019).

[8] Carol D. Leonnig, et al., "Trump Team Seeks to Control, Block Mueller's Russia Investigation," *Washington 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 (accessed May 25, 2019).

[9] Id.

[10] Donald Trump, Twitter post, July 22, 2017, 4:35 a.m., https://twitter.com/realDonaldTrump/status/888724194820857857 (accessed May 25, 2019).

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tutionally-based conclusions. The theoretical framework for this study is divided into three sections. It begins with an overview of the constitutional provisions governing the pardon power within the context of the Philadelphia Convention and state ratification debates that elucidate the meaning of the document. The next section, which constitutes the dominant part of the paper, is an exposition of U.S. Supreme Court case law dealing with the pardon power. This section also provides as much of the historical background as is necessary for the legal analysis and interpretation to be coherent. The third part of the paper explores the issue of self-protective pardons in light of the preceding review of the constitutional history and the relevant case law.

I. The Origins and Nature of the Pardon Power

The pardon power originated in England, from which American law developed and took many of its cues. Historically, pardoning was the exclusive privilege of royalty, proceeding from the premise that all power and justice emanated from the king, and all offenses and transgressions were directed at the Crown.[11] Perceived as God's deputy on earth, the king alone held the power of life and death, and had the sole discretion to show mercy or execute punishment. When the British settlers arrived in North America in the early seventeenth century, they brought their legal codes and traditions with them for their own use, including English common law, which formed the foundation of the American legal system and influenced the writing of the federal and state constitutions.

During the colonial period, the English monarchy delegated the pardon power to colonial governors subject to the purview of the Colonial Office,[12] which technically had veto power over their executive decisions but in practice granted them considerable latitude since they had greater loyalty to the Crown than the people they governed. A few years after the colonies gained their independence, the Articles of Confederation came into force in 1781. Adopted as the initial governing document of the United States, the Articles of Confederation made no provision for an executive branch, but merely allowed Congress to appoint "committees and civil officers as may be necessary for managing the general affairs of the United States."[13] Neither Congress nor the executive committees it was authorized to establish had a pardon power under the short-lived confederate system, whose many flaws prompted the states to call a meeting in Philadelphia, in 1787, with the initial purpose of proposing adjustments and discussing improvements to the Articles of Confederation.

[11] For a fuller discussion of this point, see Jeffery Crouch, *The Presidential Pardon Power* (Lawrence, KS: University Press of Kansas, 2009), 11-13.

[12] Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (New York: Routledge, 2016), 15.

[13] Articles of Confederation, Art. X.

At the Convention, the two major plans presented by the New Jersey and Virginia delegates made no mention of the pardon power, but three prominent delegates were instrumental in bringing it forward and shepherding it through: Alexander Hamilton, Charles Pinckney, and John Rutledge.[14] The bold proposition was met with an admixture of caution and skepticism. At points it seemed that executive clemency would not make it into the founding document, as some of the Framers deemed it at odds with the notion of popular sovereignty, and others sought to keep executive power at bay. Ultimately, it barely garnered enough support from delegates for inclusion in the final draft. So while the Pardon Clause is presently deemed to be a source of a plenary presidential power, its insertion in the Constitution was fraught with contention and controversy.

The unofficial leader of the Anti-Federalist opposition was George Mason, who was of the opinion that the pardon power was too monarchical and immense in its nature to be vested in one man. It was all too reminiscent of the system of government that preceded the Revolution against which the American colonists revolted and from which they separated themselves. Edmund Randolph of Virginia echoed his colleague's sentiments, urging the exemption of treason for fear that "the unqualified power of the President to pardon treasons"[15] could drag the nation into tyranny. Put differently, Randolph worried that if treason were to be included among the pardonable offenses, the president could try to hide his guilt by pardoning accomplices who might give evidence against him. Besides these main criticisms, there was also a general concern that the pardoning power would amplify executive power to the detriment of the other two branches so as to upset the balance of powers among the three branches of government.

The Anti-Federalist objections were tempered by the efforts of such ardent proponents of federalism as Alexander Hamilton, who was actually the first delegate to propose that the president be granted clemency powers.[16] Though increasingly criticized, even by his fellow-Federalist James Madison, for embracing a sweeping view of executive power,[17] Hamilton prevailed on this particular point by persuading his Convention colleagues to invest

[14] Katie R. Van Camp, "The Pardoning Power: Where Does Tradition End and Legal Regulation Begin?," *Mississippi Law Journal* 83, no. 6 (2014): 1276.

[15] James Madison's Notes of the Constitutional Convention, May 28, 1787, http://avalon.law.yale.edu/18th_century/debates_910.asp (accessed May 25, 2019).

[16] Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776–2014* (Thousand Oaks, California: CQ Press, 2016), 48.

[17] Chris Edelson, *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror* (Madison, WI: University of Wisconsin, 2013), 22.

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the president with the power to pardon violations of federal law for reasons of "humanity and good policy," as he would subsequently expound in his Federalist Papers, particularly in Federalist No. 74.[18] In further defense of the pardon power, Hamilton added that it could be used by the president not only in cases of "unfortunate guilt" to correct the justice system, but also in times of unrest and insurrection to "restore the tranquility of the commonwealth" by making "a well-timed offer of pardon to the insurgents or rebels."[19] The Federalists would not relent until the lengthy Convention debates culminated in the adoption of the Pardon Clause of Article II, Section 2 of the Constitution, which states that the president "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[20]

Thus was the pardon power included in the provisions of Article II without any procedural checks. A still-suspicious George Mason again argued during the Virginia ratification debate that the pardon power could be used by the president to "stop inquiry and prevent detection" by "frequently pardon[ing] crimes which were advised by himself,"[21] a concern that had apparently lingered on his mind since the late Philadelphia Convention. James Madison, the primary architect of the Constitution, said in reply: "There is one security in this case to which gentlemen may not have adverted; if the President be connected in any suspicious manner with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him."[22] The Mason-Madison exchange at the state convention might have been a reenactment of the clash that transpired between the Federalists and Anti-Federalists at the Convention. It would not be far-fetched to likewise presume that Madison's unequivocal response reflected the prevailing understanding of the delegates who supported executive clemency. Constitutional scholar Ken Gormley of Duquesne University deems it "clear from the debates concerning the Presidential pardon power, at the time of the Constitution's ratification, that the Framers envisioned impeachment as the only real deterrent to the improper exercise of the pardon power."[23]

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[18] James Madison, "Federalist No. 74," in *The Federalist Papers*, Gary Willis, ed. (New York: Bantam Books, 1982), 377.

[19] Id. at 378.

[20] U.S. Const. art. II, §2, cl. 1.

[21] Jonathan Elliot, *The Debates, Resolutions, and Other Proceedings in Convention on the Adoption of the Federal Constitution*, vol. II (Washington, D.C., 1828), 366.

[22] Id. at 367.

[23] United States Cong. Senate. Committee on the judiciary. *President Clinton's Eleventh Hour Pardons. Hearings, February 14, 2001*. 107th Cong. 1st sess. Washington: GPO, 2001.

Turning to the nature of the pardon power, there are four observations that need to be made. First, and perhaps most obviously, the pardon power has an explicit rather than implicit constitutional foundation. Unlike the power to issue executive orders or to invoke executive privilege, which is based on the broad executive power of the president but lack textual support, the pardon power is based on the express and specific wording of Article II, Section 2. The practical significance of this distinction is clear: Congress cannot abridge the pardon power, overturn a clemency decision, or modify a proclamation of pardon short of the adoption of a constitutional amendment to this effect. Nor is the pardon power predicated on a common law theory or a prudential doctrine of executive power. As such, there is precious little that the courts can do either to curb presidential authority in this area.

Second, it should be noted that the pardon power was committed only to the president, which indicates that the Founders intended this power to serve as a check on the other two branches. A grant of pardon, for instance, could be used to cure a possible miscarriage of justice, or to signal the president's objection to the wisdom of a congressional act in terms of purpose, effectiveness, timeliness, or implications. Congress has the power to grant amnesty, which is a blanket legislative measure, but only the president can grant an individual pardon. Moreover, Congress can amend, repeal, or replace a federal criminal statute but has no power to extend mercy to a convicted person or rectify a particular case of judicial malpractice.

Third, it should also be noted that, unlike many other presidential powers, the pardon power is neither shared with nor contingent upon the approval of the other political branch. This bespeaks the desire of the Framers to add a unique weapon to the president's arsenal – one that can be wielded at will without the advice and consent of Congress. In fact, the Constitutional Convention records contain several accounts of abortive attempts to circumscribe the pardon power, whether by excluding certain offenses from its application, confining its execution to the post-conviction stage, or subjecting presidential pardons to senatorial review.[24] The failure of these efforts, coupled with the subsequent unanimous ratification of the Constitution, attests to the Founders' firm conviction that unilateral and unfettered presidential prerogative is necessary if clemency is to be exercised in a proper fashion, or to function as a meaningful check on the other two branches.

The fourth and last point of note is that the pardon power is unlimited "except in Cases of Impeachment." This phrase is full of instruction and has given rise to an abundance of journalistic and scholarly commentary. There is a general consensus that it imposes an absolute ban on executive interference with the congressional power to impeach. Should the president be permitted to intrude on congressional independence, the Impeachment Clause of Article II would become a dead letter, not to mention that the president could poten-

[24] Milkis and Nelson, *The American Presidency*, 48.

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tially suspend an impeachment investigation that might implicate him personally, as already alluded to above. It also seems fitting that the pardon power should not be employed to stop an impeachment proceeding since the president himself is subject to the process of impeachment for "high Crimes and Misdemeanors" under Article II. Therefore, to do away with this exception is to allow the president to receive an absolute pardon from himself and thwart any attempt to remove him from office. This point will be returned to later in the paper.

A corollary principle that can be derived from this exception is that the utilization of the pardon power to obstruct the congressional impeachment process, be it directed at the president or someone else, is itself an impeachable offense no different from any other abuse of office or willful violation of the law. Though the pardon power is unique in its expanse, the Framers, in their wisdom, did not wish to completely insulate presidential pardons from any and all congressional oversight. "The only recognized constitutional check on the pardon power," as one legal commentator has noted, "is Congress's ability to impeach a President for 'treasonous wrongdoing' connected with pardons."[25] This observation is solidly backed by historical evidence. The Convention and ratification debates cited earlier lend strong support to the notion that the Framers instituted impeachment as the only formal constraint on and deterrent against presidential overreaching in the exercise of the pardon power.

II. Supreme Court Jurisprudence on the Pardon Power

Supreme Court decisions squarely addressing the subject of executive clemency are infrequent, but they provide constitutionally adequate guidance on how the pardon power is administered and what effect a pardon has on the rights of the recipient. Spanning over a period of about 140 years, from the pre-Civil War era to the late twentieth century, these sporadic cases have given the Supreme Court a reasonable opportunity to construe the Pardon Clause and demarcate its limits. Though the decisions vary in their reasoning and outcome, there is a general sense that the Court has adopted a consistently expansive approach in interpreting the Clause, affording the president tremendous latitude, if not near-absolute authority, over pardoning. This section offers an extensive historical review of the relatively sparse case law in this area of constitutional law, dating from 1833 to 1974. The principles discussed herein will be utilized to arrive at reasoned and supportable conclusions in the next section.

i. United States v. Wilson (1833)

The Supreme Court's first clemency case was *United States v. Wilson*,[26] a somewhat obscure but nonetheless important case in which Chief Justice John Marshall con-

[25] Kristen H. Fowler, "Limiting the Federal Pardon Power," *Indiana Law Journal* 83, no. 4 (2008): 1651.

[26] 32 U.S. 150 (1833).

sidered the effect of a presidential pardon on the beneficiary and the one condition necessary for the grant to become effective. The case presented a curious question as to whether a convicted felon had the right to reject a presidential pardon. The defendant, George Wilson, was sentenced to death for several crimes related to the U.S. mail system, including obstruction of mail delivery, robbery of mail matter, and endangering a postal worker's life. President Andrew Jackson issued a pardon to Wilson who, strangely, would not accept it. In a subsequent proceeding, Wilson entered a plea of "not guilty" to another indictment stemming from the same alleged conduct. When Wilson was again found guilty and received another death sentence, he expressly declined to avail himself of the pardon thus given him, whereupon a divided court petitioned the Supreme Court to clarify whether the pardon should not be effectuated absent acceptance, and if found valid, whether it should be restricted to the first capital conviction, as asserted by the prosecution.

Speaking for the Court, Chief Justice John Marshall began his analysis by defining the pardon as "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."[27] By this strict definition, the pardon power was to be exercised for the benefit of the convict rather than society at large, and the purpose of a pardon was to do mercy rather than justice. However, the gift of mercy granted by the executive must be accepted by the offender, being a two-way transaction that requires mutual assent to be enforceable. To use Marshall's own words: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance."[28] Having made this determination, the Court concluded that it had no power to obtrude a pardon upon a reluctant offender. Voluntary acceptance is necessary for a pardon to take effect. The Supreme Court would not recede from these rudimentary constructions until the early twentieth century, as it would later note: "The principles declared in *United States v. Wilson* have endured for years; no case has reversed or modified them."[29]

Another important point that incidentally emerged from this ruling was the cursory exposition of two types of presidential

[27] Id. at 160.

[28] Id. at 161.

[29] *Burdick v. United States*, 236 U.S. 79, 91 (1915). In *Burdick*, a unanimous Supreme Court upheld the right of a newspaper editor to reject a presidential pardon and invoke the right against self-incrimination rather than accept the pardon and testify.

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pardons. Though not a matter of direct relevance to the controversy at hand, Marshall identified two forms that this "private, though official, act of the executive" may take,[30] stating that a pardon could be "absolute or conditional."[31] An absolute pardon would "restrain the court from pronouncing judgment,"[32] whereas a conditional pardon could stipulate terms that "may be more objectionable than the punishment inflicted by the judgment."[33] Marshall opined that a convicted person could waive or decline "any advantage or protection which might be supposed to arise from the pardon,"[34] because a free gift cannot be forcibly conferred upon the receiving party.

ii. Ex Parte Wells (1855)

The second pardon case to reach the Supreme Court was *Ex Parte Wells*.[35] In it, defendant William Wells was sentenced to death for a murder he had committed in the District of Columbia. President Millard Fillmore pardoned Wells "upon condition that he be imprisoned during his natural life."[36] After signing a document accepting the commutation, however, Wells filed a habeas corpus petition, challenging the validity of the condition attached to the pardon based on the premise that "granting such a pardon assumes a power not conferred by the Constitution."[37] He appealed an adverse ruling by the D.C. Circuit Court to the Supreme Court, which had to decide whether the president indeed had the power to issue a conditional pardon.

Drawing on legal history and the *Wilson* precedent, the Court determined per Justice James Moore Wayne that the president had acted properly and within his power. The Court resoundingly rejected the petitioner's contention that the word pardon "was meant to be used exclusively with reference to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed."[38] The proposition urged by the petitioner, the Court explained, had no

[30] *Wilson*, 32 U.S. at 160.

[31] Id. at 161.

[32] Id. at 159.

[33] Id. at 161.

[34] Id. at 155.

[35] 59 U.S. 307 (1855).

[36] Id. at 308.

[37] Id. at 309.

[38] Id.

support "either in common parlance or in law."[39] It was also inconsistent with the sense or meaning in which the word "pardon" was used and understood not only "when the Constitution was made," but also "in the earliest books of the English law."[40] The Court also noted the petitioner's theory was squarely at odds with its holding in *Wilson*, where the Chief Justice affirmed that "a pardon may be conditional."[41] But even apart from the historical context and legal precedent, the petitioner hardly had a chance from the beginning, given his full acceptance of the terms of his pardon when it was first delivered to him. If he made a conscious choice, "he cannot complain if the law executes the choice he has made."[42]

Wells was an affirmation of *Wilson* is three respects. First, the Court reiterated that the president's pardon power under Article II encompasses the right to grant a full pardon as well as a conditional pardon or commutation. The continued fulfillment of the condition is what keeps the pardon operative, so that "if the felon does not perform the condition of the pardon, it will be altogether void, and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced."[43] Second, the Court again confirmed that acquiescence is a prerequisite to the validity of a pardon. Once acceptance has been tendered, no objections may be raised as regards the conditions of the pardon, and no court is competent to prevent its enforcement. Third, the *Wells* Court embraced the same conception of the pardon propounded by the *Wilson* Court. Quoting Lord Edward Coke in agreement, the Court described the pardon as "a work of mercy," which can be extended by the president "upon what terms he pleases," as traditionally exercised by the Kings of England in former times.[44] This understanding would dominate the

[39] Id.

[40] Id. at 310.

[41] Id. at 320 (quoting *Wilson*, supra, at 161).

[42] Id. at 315.

[43] Id. at 311.

[44] Id.

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Court's approach to clemency for six more decades.[45]

The majority's differential disposition toward the executive provoked a compelling dissent from Justice John McLean who disagreed with the Court's holding that the presidential pardoning power included the power to commute a sentence without a constitutional or statutory provision to this effect. While conceding that the powers of the British sovereign were quite significant and his prerogatives were "more than a match for the parliament,"[46] McLean asserted that the American president "has no powers which are not given him by the Constitution and laws of the country."[47] He further reasoned that even state governors who had granted conditional pardons and commuted sentences were generally acting "under special provisions in the constitution or laws of the state or on the principles of the common law adopted by the state."[48] McLean's main concern was that giving the president free rein to create clemency conditions that Congress did not authorize or approve could "override[ ] the law and the judgments of courts"[49] and "become dangerous to popular rights."[50] Though McLean's argument was not without some merit, it gained no traction and was consistently rejected in subsequent cases. The basic rationale of the Court was that neither Congress nor the judiciary is at liberty to carve out limitations to the pardon power when the Constitution imposes none.

iii. Ex Parte Garland (1866)

The Civil War brought profound changes to American government and tested the limits of executive power in diverse contexts, including the presidential power to pardon. The most notable pardon case was *Ex Parte Garland*,[51] where the Supreme Court provided its most compre-

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[45] What may be dubbed the grace model of executive clemency prevailed until the Court declared per Justice Oliver Wendell Holmes in *Biddle v. Perovich*, 274 U.S. 480 (1927) that a pardon "in our days" served a public policy goal and was no longer considered "a private act of grace from an individual happening to possess power" (Id. at 486). The practical implication of this new interpretative approach, which was reaffirmed in *Schick v. Reed*, 419 U.S. 256 (1974), is that a pardon can be valid without the recipient's consent in certain circumstances since the determination of how public welfare is best served or accommodated lies solely with the president.

[46] *Wells*, 59 U.S. at 318 (McLean, J., dissenting).

[47] Id.

[48] Id.

[49] Id. at 319.

[50] Id.

[51] 71 U.S. 333 (1866).

hensive and lucid articulation of executive clemency. The case came to the Supreme Court as an ex post facto challenge to a controversial piece of legislation that set apart and marked the Confederate population for disparate treatment. In January 1865, as the final campaigns of the Civil War were underway, Congress passed an act requiring all persons who practiced law before a federal court to solemnly swear that they had never "voluntarily borne arms against the United States" or "given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto."[52] The act of 1865 was an extension of an earlier act that required persons seeking "any office of honor or profit under the government of the United States" to take an oath of allegiance.[53] It did not create a new oath requirement but merely expanded the existing one to include legal practitioners.

The new legislation produced considerable indignation because it was clearly designed to penalize southerners who took part in the war or contributed to the war effort in any way, though President Abraham Lincoln had already announced his Reconstruction and Amnesty plan in December of 1863. It essentially had the effect of disbarring numerous lawyers who were confederate sympathizers during the armed conflict. It was unclear whether those who received a presidential pardon afterwards would be able to take the mandated oath due to their former support for the Confederacy. Either way, the law was justifiably perceived as punitive in intent and effect.

It is pertinent to note that President Lincoln's amnesty was expanded and completed by his successor, President Andrew Johnson. Whereas Lincoln's amnesty was limited to civilians who had held political office in the Confederate government and officers who had served in the Confederate Army above the rank of colonel, Johnson's amnesty covered all Confederate soldiers and personnel. One of the beneficiaries of the blanket pardon was an attorney from Arkansas by the name of Augustus Hill Garland. He assailed the congressional act under Article I, Section 9, as an ex post facto law and a bill of attainder, since it not only attached new consequences to past behavior, but also suspended his legal rights without the benefit of a trial. Should the contested law still be upheld, Garland sought exemption from taking the oath by virtue of the "full pardon for all offences committed by his participation, direct or implied, in the Rebellion."[54]

A closely divided Supreme Court struck down the act as unconstitutional, finding it in violation of both the bill of attainder and ex post facto prohibitions. The Court noted that the "perpetual exclusion" from a profession by legislative decree "can be

[52] Id. at 334.

[53] Id. at 334-335.

[54] Id. at 375.

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regarded in no other light than as punishment."[55] A legislative enactment effecting this result must fall within the "constitutional inhibition against the passage of bills of attainder."[56] The Court added that the statute must also be "brought within the further inhibition of the Constitution against the passage of an ex post facto law" because it "imposes a punishment for some of the acts specified which were not punishable at the time they were committed."[57] Even if the act were constitutional, the oath it prescribed "could not be exacted" from a person who had been "relieved from all penalties and disabilities attached to the offence of treason."[58]

Going beyond the interests of the parties, the Court used the case as an occasion to delineate the nature of the pardon power and the manner in which it should be exercised. The Court took a decidedly broad view of the pardon power, holding that, with the exception of impeachment, it is "unlimited" and "extends to every offence known to the law."[59] It makes the offender a "new man," placing him "beyond the reach of punishment of any kind."[60] Further, the Court declared that Congress is without power to restrict the president in the use of his pardon prerogative, stating that it "can neither limit the effect of his pardon nor exclude from its exercise any class of offenders" because the pardon power "is not subject to legislative control."[61]

Garland stands out in its expansive reading of the Pardon Clause. Although the "*Garland* decision has been robbed of much of its virility by later decisions of the court,"[62] as one judge would later observe, several aspects of the decision, if not its general import, stand intact. It remains undisputed that the president's pardon power "cannot be fettered by any legislative restrictions,"[63] as the Court stated. Another aspect of the decision that has survived is the timing of the pardon, which is entirely within the president's discretion so long as it is issued after the

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[55] Id. at 377.

[56] Id.

[57] Id.

[58] Id. at 334 and 380.

[59] Id. at 380.

[60] Id.

[61] Id.

[62] *State v. Hazzard*, 139 Wn. 487, 489 (Wash. 1926).

[63] *Garland*, 71 U.S. at 380.

commission of the offense. To this day, his "prerogative of mercy" can be exercised "either before legal proceedings are taken or during their pendency, or after conviction and judgment."[64] Finally, the Court's assertion that a pardon "removes the penalties and disabilities and restores him to all his civil rights" remains true. Although the Supreme and lower courts have retreated from the broad language of the opinion that a pardon "blots out" guilt,[65] the recipient still recovers all the rights, privileges, and civic abilities forfeited due to the conviction, notwithstanding the fact that accepting a pardon may be a tacit admission of guilt.

A landmark case, *Garland* had far-reaching legal implications and prompted more lawsuits by citizens of the eleven states of the late Confederacy. Its liberal pronouncements intimated that a presidential pardon essentially turned the clock back, as if the offending act had never occurred. As such, it cleared the way for pardon recipients in the South to file petitions to reclaim their seized property and lands from the federal government, just as though they had not joined or aided the rebellion from a legal perspective. This only made congressional Republicans, especially the Radical Republicans, more determined to dismantle the Reconstruction program that they perceived as too lenient on the secessionist South.

iv. United States v. Klein (1872)

A series of legal challenges were mounted to frustrate congressional efforts to scale back moderate Reconstruction policies. One major case that went to the Supreme Court was *United States v. Klein*,[66] which stemmed from an 1870 act prohibiting the admission of a presidential pardon into evidence "in support of any claim against the United States in the Court of Claims."[67] The act effectively turned the pardon's purpose on its head by requiring that its acceptance be "taken as conclusive evidence" of past insurrectionary conduct.[68] It also included a jurisdiction-stripping measure, providing that the "Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."[69]

The property under dispute belonged to V. F. Wilson, a southerner who had taken the

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[64] Id.

[65] More specifically, the *Garland* Court stated that a pardon "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." Id.

[66] 80 U.S. 128 (1872).

[67] Id. at 143.

[68] Id.

[69] Id.

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oath of allegiance and remained loyal to the United States until he died in the summer of 1865. In 1869, the Court of Claims granted the recovery petition of John A. Klein, the administrator of Wilson's estate, based on the oath that the latter took and the pardon he received. By the time Klein was due to collect the judgment, however, Congress had already passed the act of 1870, precluding the use of a presidential pardon as the basis for a property claim.[70] The United States then filed suit in the Supreme Court under the new act in an attempt to vacate the decision of the Court of Claims and bar recovery.

The Supreme Court upheld the indemnification claim and affirmed the lower judgment. Chief Justice Salmon Chase, writing for the seven-member majority, opined that the case was about separation of powers as much as it was about executive clemency. He proceeded to identify two congressional transgressions. First, the Court found that Congress had exceeded its constitutional authority by encroaching on judicial independence through the denial of appellate jurisdiction. Presumably, it would have been proper for Congress to deny "the right of appeal in a particular class of cases," but it is "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[71] So while Congress has the right to define the Supreme Court's appellate jurisdiction, it cannot tailor that right to dictate judicial "decision of a cause in a particular way."[72] In other words, enacting jurisdiction-stripping legislation merely "as a means to an end" is constitutionally impermissible per se,[73] because Congress cannot arbitrarily manipulate judicial institutions to suit its own ends, just as it cannot coerce the judiciary to do its bidding.

Second, the Court also found that Congress had committed the vice of "infringing the constitutional power of the Executive" by "impairing the effect of a pardon," when "the executive alone is intrusted the power of pardon; and it is granted without limit."[74] "The legislature," the Court added, "cannot change the effect of such a pardon any more than the executive can change a law."[75] It follows that, as a matter of constitutional law, the pardon power cannot be curtailed by way of federal legislation.

[70] Paul J. Haase, "'Oh My Darling Clemency': Existing or Possible Limitations on the Use of the Presidential Pardon Power," *American Criminal Law Review* 39 (2002): 1295.

[71] *Klein*, 80 U.S. at 145-146.

[72] Id. at 146.

[73] Richard H. Fallon, Jr., "Jurisdiction-Stripping Reconsidered," *Virginia Law Review* 96 (2010): 1079.

[74] Id. at 147.

[75] Id.

Further, Congress cannot overturn or second-guess the president's judgment so long as no laws have been broken and no corrupt or criminal intent is found. Upholding this sort of congressional action would put Congress above the executive branch in violation of the tripartite constitutional scheme of separated powers, and herein lies the lasting impact of the case.

In terms of its legacy, *Klein* is considered more important as a separation of powers than a pardon precedent, and continues to be cited in that context. Its significance resides primarily in setting the separation-of-powers principle that Congress cannot direct the courts on how to decide pending cases under the guise of regulating federal appellate jurisdiction. Nor can Congress exercise its authority under Article III as a roundabout means to impinge on judicial authority. *Klein* was also an affirmation of constitutional supremacy in that it precluded Congress from using federal law as a convenient substitute for a constitutional amendment to limit the scope and effect of the pardon power, or any express presidential power for that matter. Basic as these tenets may appear, Congress has occasionally flouted them in the course of the twentieth century, and had to be admonished and corrected by the Supreme Court.[76]

v. Boyd v United States (1892)

With the Civil War behind the country, the Supreme Court heard various other cases related to the pardon power, the first of which was *Boyd v. United States*.[77] There, the Supreme Court had to decide whether a state could deny an ex-convict who received a pardon the right to testify in a criminal trial. The pardon question was only incidental to the main proceedings before the Court, but nonetheless essential to the disposition of the appeal. The case originated from an objection lodged by two murder suspects to the calling of a witness with a prior larceny conviction who had been pardoned by the president. The prosecution argued, and the Supreme Court agreed, that the witness should be allowed to testify because the full pardon he received from President Benjamin Harrison restored his testimonial capacity.

Citing Civil War-era pardon cases, the Court reasoned that if the "disability to testify" was a consequence of the "judgment of conviction," and if the pardon "obliterated that effect," then the competency of the witness was "completely restored."[78] The fact that the pardon was proffered at the request of the district attorney prosecuting the case as an aid in obtaining a conviction did not make a constitutionally cognizable difference. A pardon issued for the express purpose of restoring competency to testify at trial is

[76] This aspect of *Klein's* holding was further confirmed in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Dickerson v. United States*, 530 U.S. 428 (2000).

[77] 142 U.S. 450 (1892).

[78] Id. at 454.

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still valid. It may well be that the jury would have difficulty believing the witness's testimony because of his criminal history, but credibility is a distinct and separate issue from the capacity to testify.[79]

As precedent, *Boyd* established two important principles in relation to the pardon power. First, an unconditional pardon restores a convict's competency as a witness. It cannot be truly said that the pardon makes the offender "as innocent as if he had never committed the offence,"[80] as the Court stated in *Garland*, unless the eye of the law is "unable to distinguish between a pardoned convict and one who had never been found guilty of a crime."[81] The second principle is that a pardon is fully effective so long as no laws were violated, even if it was issued for no purpose other than removing the legal barriers to testify. One might add, as a matter of logical inference, that it is beyond the purview of the judiciary to question or ascertain the president's motives for granting a lawful pardon. The courts must recognize a pardon as valid and give it full legal force regardless of the reasons behind it, unless the president is reasonably believed to be involved in an illegal scheme, and the pardon was the instrument of effecting it.

vi. Ex Parte Grossman (1925)

All the pardons discussed so far were granted to individuals who had broken federal laws, consistent with the constitutional guideline that the pardon power extends to "offenses against the United States." One question that remained unanswered up to this point was whether contempt against a court of the United States may be pardonable by the president. The Supreme Court took advantage of a prohibition era case, *Ex Parte Grossman*,[82] to address this new question and further develop its doctrinal framework on the subject.

A Chicago speakeasy operator, Philip Grossman sold liquor during prohibition in violation of a court order and the National Prohibition Act of 1919. A federal district A unanimous Supreme Court rejected the government's argument that criminal contempt was not a pardonable infraction, holding that there was nothing in the text or history of Constitution that barred federal courts from construing contempt as an offense against the United States. As to the government's contention that the presidential pardon power was more limited than its monarchical counterpart and did not cover contempt, the Court determined that "when the words to

[79] Henry Weihofen, "The Effect of a Pardon," *University of Pennsylvania Law Review and American Law Register* 88, no. 2 (1939): 182.

[80] *Garland*, 71 U.S. at 380.

[81] Samuel Williston, "Does a Pardon Blot out Guilt?," *Harvard Law Review* 28, no. 7 (1915): 654.

[82] 267 U.S. 87 (1925).

grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English Crown, or by its representatives in the colonies," since the American statesmen who drafted the Constitution "were conversant with the laws of England and familiar with the prerogatives exercised by the Crown."[83] Finally, the Court found no merit in the contention that allowing the president to pardon contempt of court would infringe upon the independence of the judiciary. While the three branches of government are separate, they are also interdependent so that "the Judiciary, quite as much as Congress and the Executive, is dependent on the cooperation of the other two, that government may go on."[84] After all, pardoning contempts would "embarrass courts" or "lessen their effectiveness" no more than "a wholesale pardon of other offenses."[85]

After considering and refuting the three arguments advanced by the government, the Court set forth and approved the axiomatic proposition that a pardon may be disseminated to an innocent person, or tendered in the interest of justice, as when the penalty assessed is deemed to be excessive, arbitrary, or otherwise unmerited. Taking issue with the idea that a pardon inherently "carries an imputation of guilt,"[86] the Court observed that "[t]he administration of justice…is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt."[87] It should then be supposed that "[e]xecutive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."[88] The implication for the recipient, as one commentator remarked, is that a pardon based on an executive finding of innocence "should render the pardoned person as legally innocent as if he had never been convicted."[89]

A final point that should not be overlooked is that the *Grossman* Court set forth a new ground for impeachment in relation to the abuse of executive clemen-

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[83] Id. at 110.

[84] Id. at 120.

[85] Id. at 121.

[86] *Burdick*, 236 U.S. at 94.

[87] *Grossman*, 267 U.S. at 120-121.

[88] Id. at 120.

[89] "Effect of Pardons for Innocence under 'Habitual Criminal' Statutes," *The Yale Law Journal* 51, no. 4 (1942): 700.

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cy. Naturally, the exceedingly broad discretion empowered to the president affords ample room for abuse, and may potentially be used to "deprive a court of power to enforce its orders."[90] In those "exceptional cases," the Court suggested that the appropriate remedy would be the "resort to impeachment" rather than the "narrow and strained construction of the general powers of the President."[91] This removes the matter from judicial scrutiny altogether and places it directly in the hands of Congress, which has the sole power to impeach and convict the president. In proposing a congressional solution to the problem, the Court essentially relegated the issue of abuse of the pardon power to the realm of political questions.

vii. Schick v. Reed (1974)

The final seminal case in the development of pardon power jurisprudence was *Schick v. Reed*,[92] which helped the Court refine its constitutional analysis and establish additional standards for the granting of executive clemency. Though decided in late 1974, the case had its genesis in a murder conviction dating back to 1954. Maurice Schick, a master sergeant in the U.S. Army, was found guilty of first-degree for killing an eight-year-old girl. A military tribunal tried and sentenced Schick to death, but President Dwight Eisenhower commuted his sentence to life imprisonment on the condition that he would never be eligible for parole. In 1971, however, after serving 17 years in prison, Schick filed suit in the U.S. District Court for the District of Columbia contending that he should be considered for parole on the grounds that the conditional commutation was not within the president's clemency powers. If life imprisonment with the possibility of parole was the only statutory alternative to the death penalty, Schick argued, then the condition imposed by the president must be invalid. The chairman of the U.S. Board of Parole, George Reed, moved for and received a summary judgment, which the Circuit Court affirmed. A dissatisfied Maurice Schick took his case to the High Court.

The Supreme Court, on a 6-3 vote, agreed with the outcome reached by the lower courts, holding that the president had the power to attach conditions to grants of pardon. Proceeding from the premise that "[t]he history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice," the Court reviewed English jurisprudence to arrive at the "inescapable" conclusion 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."[93] As further support for this finding, the Court added that "Presidents

[90] *Grossman* , 267 U.S. at 121.

[91] Id.

[92] 419 U.S. 256 (1974)

[93] Id. at 263-264.

throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute."[94] Even in those instances where challenges were made to the conditions attached, "as in the *Wells* case, attacks have been firmly rejected by the courts."[95]

The Court also addressed, in passing, the narrow question of whether the pardoned person's consent was required for this type of pardon to take effect. Drawing briefly on English heritage, the Court rejected Schick's claim, concluding that "the requirement of consent was a legal fiction."[96] Historically, the Court noted, the "English prerogative to pardon was unfettered."[97] For instance, the Crown was at liberty to grant "pardons or commutations conditional upon banishment" without parliamentary concurrence or legislative authorization, and the subject's mere consent to have his life spared was deemed sufficient to effect his transportation pursuant to the conditional pardon.[98] In so reasoning, the Court rendered another decisive "blow to the separation of powers principle as an effective limit on this presidential power."[99]
The Court then turned to the larger constitutional question of whether the pardon power is amenable to legislative regulation and abrogation. Lest any doubt be entertained concerning this matter, the Court reiterated in plain and certain terms 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."[100] Just as the Crown's exercise of the pardon power was "equivalent and completely independent of legislative authorization,"[101] the Court reasoned, the president's "pardoning power is an enumerated power of the Constitution, and

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[94] Id. at 266.

[95] Id.

[96] Id. at 261. This declaration was a reaffirmation of the Court's earlier decision in *Biddle v. Perovich* 274 U.S. 480 (1927), which established that the recipient's acquiescence was irrelevant to the validity of the conditional pardon that could be exercised in furtherance of the "public welfare." See supra note 45.

[97] *Schick*, 419 U.S. at 262.

[98] Id. at 261-262.

[99] Patrick R. Cowlishaw, "The Conditional Presidential Pardon," *Stanford Law Review* 28, no. 1 (1975): 156.

[100] *Schick*, 419 U.S. at 266.

[101] Id. at 261-262.

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that its limitations, if any, must be found in the Constitution itself."[102]

The last pardon case to reach the Supreme Court, *Schick v. Reed* produced important guidelines for lower courts to use in resolving clemency petitions and disputes. The significance of the case is threefold. First, it upheld the power of the president to issue conditional pardons absent a congressional grant of authority, and to attach various conditions to the commutation of a sentence, as long as these conditions do not controvert the Constitution. This outcome is consistent with the holdings of early precedents, as the *Schick* Court duly acknowledged that the "teachings of *Wilson* and *Wells* have been followed consistently by this Court."[103] The context of that statement indicates that the Court was keen on preserving *Wells'* precedential effect, at least insofar as the determination that the president could grant a conditional pardon in the form of commutation.

Second, *Schick* firmly enshrined the fundamental principle that restricting the pardon prerogative can only be accomplished through constitutional amendment. It signaled the Court's reluctance to sanction any restrictions on the pardon power except in narrowly defined circumstances, where constitutional values and norms are at stake. Third, this ruling can be interpreted as allowing the president to grant partial pardons, too. Although distinct in essence, a conditional commutation is similar to a partial pardon in that both relieve the offender from some of the punishment, and neither becomes operative unless the recipient performs the remaining term of the pardon.

III President Trump and the Pardon Power

Several recent factors have coalesced to bring the issue of executive clemency to the fore, including the criminal investigation of the Russian meddling in the 2016 election, the floating reports concerning the discussion of the pardon power within the White House, the President's tweet about his "complete power to pardon," and the high-profile pardon he granted to Arizona Sheriff Joseph Michael Arpaio in August 2017. This final section considers briefly two momentous questions that have been raised regarding the exercise of the pardon power as it relates to the Trump administration. The first question pertains to pardoning political allies and the second to pardoning oneself. The answers provided are in accordance with the conclusions derived from the forgoing discussions and the theories advanced by constitutional scholars and legal commentators.

i. Can Trump Pardon his Close Associates?

The question of whether the president can pardon his aides, confidantes, and family members for personal reasons is a crucial one that did not escape the Framers. As already stated, the nation's founders, particularly those within the Anti-Federalist

[102] Id. at 267.

[103] Id. at 266.

camp, were concerned about the president's use of executive clemency to conceal the crimes that he committed or advised. It is not the pardoning of a trusted lieutenant per se that taints the pardon but rather the unlawful purpose behind it, as will be elaborated below. The potential abuse of the pardon power, as evident from the Convention and ratification debates cited earlier, was among the wrongs that the congressional power to impeach and remove was designed to prevent and address.

While impeachment is a legitimate remedy in principle, making the intent determination would be fraught with practical difficulties due to the confidentiality and secrecy around executive deliberations on the one hand, and the unilateral and discretionary nature of executive clemency on the other. These challenges are exacerbated by the dearth of limitations on the exercise of the pardon power. The Constitution expressly bans the use of clemency "in cases of impeachment," that is, to halt or hinder an impeachment proceeding. It also restricts the application of the power to "offenses against the United States."[104] This means that, under the principles of federalism, the president cannot pardon an individual for a violation of state law, just as governors cannot pardon violations of federal law.

In addition to the above broad points, there are three unstated but obvious limitations. First, as pointed out by Michigan State law professor Brian Kalt, the president cannot pre-pardon or pre-approve an offense because that would be a "suspension of the law" rather than a grant of pardon.[105] Second, the president cannot issue a pardon in exchange for monetary remuneration, because that would be a bribe for which the president "could almost certainly be prosecuted," according to Alan Dershowitz, a professor emeritus of Harvard Law School.[106] Third, the president cannot employ his pardon power in a discriminatory manner so as to exclude certain groups of people from clemency based on suspect or quasi-suspect characteristics, such as race, color, national origin, gender, or religion. The use of any such classification would violate the Equal Protection component of the Fifth Amendment's Due Process Clause.

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[104] U.S. Const. art. II, §2, cl. 1

[105] Brian C. Kalt, *Constitutional Cliffhangers: A Legal Guide for Presidents and Their Enemies* (New Haven, CT: Yale University Press, 2012), 44.

[106] Alan Dershowitz, "Can Trump, or Any Other President, Pardon Himself?," July 28, 2017, https://www.washingtonexaminer.com/alan-dershowitz-can-trump-or-any-other-president-pardon-Himself (accessed May 25, 2019).

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Any of the aforementioned misuses would be relatively easy to show in court. However, challenging a pardon on the basis of impeding a criminal investigation might be more challenging and would entail some "creative lawyering," as Professor Kimberly Wehle of University of Baltimore School of Law put it.[107] For instance, a pardon could be contested as unconstitutional abuse of discretion if granted for the sole purpose of "insulating high-level government officials from criminal liability involving potential abuses of office."[108] Should the president exercise his pardon prerogative with the ulterior intent of saving himself from prosecution, he could face obstruction of justice charges, which would in turn give rise to impeachment charges. Alternatively, a tainted pardon could also be contested as a violation of the Faithful Execution or Take Care Clause, which requires the president to uphold and enforce all laws in good faith, including the Constitution as the highest law of the nation.

The above arguments could theoretically be used to annul a presidential pardon, but again this would be a difficult and unprecedented task. What adds to the difficulty of such a case is the fact that a pardon can be issued preemptively for past actions before any criminal charges are brought. It should be remembered that the *Garland* Court unequivocally held that the pardon power "extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment."[109] This aspect of the *Garland* ruling remains intact, as the High Court has never declared otherwise, and the issue has since been authoritatively decided, albeit not by the highest court in the land.

Perhaps the most famous preemptive pardon is the "full, free, and absolute pardon" that President Richard Nixon received from his successor, Gerald Ford, for any offense he "has committed or may have committed or taken part in" while in office.[110] Ford's preemptive pardon was unsuccessfully challenged in the U.S. District Court case of *Murphy v. Ford*.[111] The plaintiff was a Michigan lawyer who asked the court to find the pardon invalid for being issued before the indictment or

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[107] Kimberly Wehle, "Legally, Trump Can't Pardon Manafort to Save Himself," November 3, 2017, http://thehill.com/opinion/white-house/358636-the-many-reasons-trump-cant-pardon-manafort-to-save-himself (accessed May 25, 2019).

[108] Id.

[109] *Garland*, 71 U.S. at 380.

[110] Gerald Ford, "Proclamation 4311 – Granting Pardon to Richard Nixon," September 8, 1974, http://www.presidency.ucsb.edu/ws/?pid=4696 (accessed May 25, 2019).

[111] 390 F. Supp. 1372 (W.D. Mich. 1975).

conviction of the pardonee. The district court dismissed the case, stating: "The fact that Mr. Nixon had been neither indicted nor convicted of an offense against the United States does not affect the validity of the pardon."[112] This ruling set two precedents. First, it upheld that constitutionality of preemptive pardons. Second, it established that the act of pardoning an individual who is the actual or potential target of a criminal investigation does not qualify as an obstruction of justice. It is not mere conjecture, therefore, to maintain that the president can legally pardon anyone before the commencement of the prosecution and without naming any specific offenses.

One last point that ought to be highlighted here is that the president cannot be constrained by the Office of the Pardon Attorney in the exercise of his pardon power. A common but mistaken view holds that presidential pardons must be vetted and approved by the Office of the Pardon Attorney. In actuality, however, the Office of the Pardon Attorney exists for the service and convenience of the Chief Executive and not as a check on his constitutional authority. The Pardon Attorney may advise and assist the president in the resolution of clemency matters, but cannot dictate or override the presidential prerogative of clemency because the constitutional "power to grant reprieves and pardons" is vested solely in the president. This fact does not change even if the Pardon Attorney is the de facto decision-maker in most clemency cases.

The difficulty inherent in establishing the intent to violate the law leaves impeachment as the only practical safeguard against the abuse of executive clemency. Both historical documents and Supreme Court case law permit the understanding that abusing such power is an impeachable offense. Though the process of impeachment is a quasi-judicial procedure that does not require conviction of a crime, it still requires some legal foundation and cannot be based on purely political allegations. The two presidents who were impeached, Andrew Johnson and Bill Clinton, were impeached on charges of violating federal laws because, according to the Impeachment Clause of Article 2, Section 4, the grounds for impeachment and conviction are "Treason, Bribery, or other high Crimes and Misdemeanors."[113] An unwise or undeserved pardon decision does not fit any of these categories. Even if a pardon was so egregious as to arouse the indignation of most Americans, "unpopularity is not an impeachable offense," as put by Jonathan Turley, a professor of public interest law at George Washington University.[114]

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[112] Id. at 1374.

[113] U.S. Const. art. II, §4.

[114] Jonathan Turley, "Five Myths about Impeachment," *Washington Post*, August 1, 2014, https://www.washingtonpost.com/opinions/five-myths-about-impeachment/2014/08/01/1f00f4ea-1808-11e4-9e3b-7f2f110c6265_story.html (accessed May 25, 2019).

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As much as impeachment is a proper response to the abuse of executive clemency, it is not constitutionally defensible or legitimate in absence of a legal violation or abuse of office, which makes it an increasingly difficult option to pursue. It takes a strong case with compelling evidence to convince two-thirds of the Senate that a presidential pardon amounts to an obstruction of justice. Unless the independent or special counsel can somehow find credible and cooperative witnesses, it is unlikely that such evidence will be forthcoming, as the president need not justify his pardon decision, and members of his inner circle can refuse to testify, knowing that the pardon power "extends to every offence known to the law,"[115] including contempt per *Grossman v. United States*. It should be noted, however, that the *Grossman* Court also warned against the "successive pardons of constantly recurring contempts in particular litigation,"[116] which would interfere with judicial functions and proceedings. While suggesting that impeachment might be warranted in such cases, the Court did not articulate what would rise to the level of unreasonable interference; nonetheless, it is clear that this is a clemency area that the president ought to approach with more caution.

The foregoing analysis and findings compel two conclusions. First, the president could, without legal obstacles or consequences, pardon close associates and aides, as long as they were not under impeachment at the time of receiving the pardon. Second, the controls on the abuse of the pardon power are more political than institutional or structural. In his first term, the president's decisions are largely influenced by his interest of getting reelected, and in his second term by creating a positive legacy. There may well be a political price to pay, whether by the president or his party, for an ill-judged pardon, but this is not a matter of constitutional concern. In sum, it appears that the pardon power is indeed "one of the few absolutes in the law," as one observer put it.[117]

ii Can Trump Pardon Himself?

The final question before us is whether the power of executive clemency comprises self-pardon. The question, simply stated, is whether the president could circumvent the criminal justice process by pardoning himself. This question stems from the fact that no provision in the Constitution provides a sitting president with immunity from prosecution for a crime that he committed in or before taking office. Although the issue of presidential immunity from criminal prosecution has never been judicially decided, it is reasonable to suppose that the president is not temporarily immune from criminal liability, since the

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[115] *Garland*, 71 U.S. at 380.

[116] *Grossman*, 267 U.S. at 121.

[117] David G. Savage, "On Pardons, Framers Had Wars in Mind," *Los Angeles Times*, February 10, 2001, http://articles.latimes.com/2001/feb/10/news/mn-23712 (accessed May 25, 2019).

Supreme Court has held, in *Clinton v. Jones*,[118] that the president is not temporarily immune from civil liability, and the general rule is that criminal matters take precedence over civil matters.

The self-pardon debate has garnered considerable public and academic interest as of late, but it actually dates back to the Watergate affair when the investigation focused on the White House, and criminal charges were being contemplated against President Nixon himself. Beset by legal travails, Nixon found himself under tremendous pressure to turn over the White House tapes and quit to avoid a certain impeachment. A question arose at the height of the crisis as to the constitutional validity of a presidential self-pardon. In August 1974, barely four days before Nixon's resignation, Acting Assistant Attorney General Mary Lawton prepared a "Memorandum Opinion for the Deputy Attorney General" in which she stated that the president could not pardon himself under the "fundamental rule that no one may be a judge in his own case."[119] Many contemporary prominent legal scholars seem to agree with Lawton's statement, which is a slight variant of what James Madison wrote in Federalist No. 10: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[120] In a testimony before the U.S. Senate in September of 2017, Yale Law Professor Akhil Reed Amar said that the president "has no such power," when asked whether the president could pardon himself.[121] Paraphrasing Madison's famous statement, Amar elaborated: "If you can't be a judge in your own case, you can't pardon yourself."[122] Other legal experts on the panel agreed with the logic of that statement, with one adding that the House might "seriously consider exercising its impeachment power" should the president take such action, and the other noting that the "non-self-dealing principle" is not explicitly expressed in the Constitution.[123] That a principle is not directly stated, however, does not necessarily mean that it is entirely absent from the Constitution. Professor Martha Davis of Northeastern

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[118] 520 U.S. 681 (1997).

[119] Charlie Savage, "Can Trump Pardon Himself? Explaining Presidential Clemency Powers," *New York Times*, July 21, 2017, https://www.nytimes.com/2017/07/21/us/politics/trump-pardon-himself-presidential-clemency.html (accessed May 25, 2019).

[120] James Madison, "Federalist No. 10," in *The Federalist Papers*.

[121] Cogan Schneier, "Law Prof to Senators: Trump Can't Pardon Himself," September 27, 2017, https://www.law.com/texaslawyer/sites/texaslawyer/2017/09/27/law-prof-to-senators-trump-cant-pardon-himself (accessed May 25, 2019).

[122] Id.

[123] Id.

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University School of Law believes that the non-self-dealing principle is embodied in the concept of due process. She assumes that if the presidential self-pardon is challenged in court it would be found "antithetical to due process."[124]

Some legal scholars object to self-pardon on the premise that it is patently inimical to constitutional values and the republican form of government. One such scholar is Harvard law professor Noah Feldman, who finds the very notion of self-pardon "fundamentally inconsistent with the republic established by the Constitution."[125] To him, the question of self-pardon "isn't even worth debating" because it would place the president "outside the law."[126] "A president who could self-pardon," he asserts "could violate literally any federal law with impunity."[127] It stands to reason that the Framers who sought to establish a republic bound by the rule of law would not permit the president to defy the most elementary principles of equality before the law.

Here, one could also add that a number of constitutional provisions serve as imperatives against presidential self-dealing, such as the prohibitions on taking foreign emoluments or gifts, holding multiple offices, making appointments two months prior to the next presidential election, and appointing all the top federal officials single-handedly. It is inconceivable that the Framers who took such great pains not to create a self-serving presidency would envisage the use of executive clemency in a self-serving manner. Likewise, if the Constitution, per Article I, Sections 9 and 10, forbids federal and state governments to grant titles of nobility to ensure that are all Americans are equally subject to the rule of law, could it be interpreted as allowing the president to pardon his way out of legal woes? Such interpretation would be incompatible with the core constitutional values of equality and accountability.

Other leading academics have echoed the same sentiment, though perhaps more reservedly since no case law exists on that particular point. To mention but a few examples, Professor P. S. Ruckman, who teaches Political Science at Northern Illinois University and blogs on the pardon power, is of the opinion that the president cannot use the pardon power on himself because "Supreme Court jurisprudence has always assumed a dichotomy – the

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[124] Jason Silverstein, "President Trump Can Pardon Himself – but It Would Only Begin Bigger Legal Battles," *New York Daily News*, July 29, 2017, http://www.nydailynews.com/news/politics/trump-pardon-bigger-battles-article-1.3367987 (accessed May 25, 2019).

[125] Noah Feldman, "Trump's Pardoning Himself Would Trash Constitution," July 21, 2017, https://www.bloomberg.com/view/articles/2017-07-21/trump-s-pardoning-himself-would-trash-constitution (accessed May 25, 2019).

[126] Id.

[127] Id.

granter and the recipient."[128] The implication, therefore, is that "one person cannot play both roles."[129] A similar line of reasoning is advanced by Professor Brian Kalt of Michigan State University College of Law. He proposes that "the word "pardon" means something "inherently bilateral," which was historically practiced and understood as "something that a sovereign bestows upon a subject."[130] Had self-pardon been a permissible option, no English monarch would have been deposed, put on trial, or sent to the "chopping block."[131] In a related vein, Professor Jason Mazzone of the University of Illinois College of Law is of the belief that there are implicit but recognized limits to the clemency powers. While conceding the absence of a constitutional provision barring the president from pardoning himself, Professor Mazzone suggests that it is "no accident that no president has ever pardoned himself."[132] There seems to be an unspoken yet widely shared and well-founded understanding that self-pardon is an abuse of constitutional norms punishable by impeachment and removal from office. A case in point is President Richard Nixon, whose lawyer, J. Fred Buzhardt, advised him that he could either pardon himself or resign.[133] Nixon chose the latter, presumably, because he knew that a self-pardon would not work.

On the other hand, a handful of reputable scholars have taken the view that self-pardoning is constitutionally permissible simply because it is not explicitly prohibited. Included in this camp is Professor Jonathan Turley of George Washington

[128] Philip Bump, "Could Trump Issue Himself a Pardon?" *Washington Post*, May 24, 2017, https://www.washingtonpost.com/news/politics/wp/2017/05/24/could-trump-issue-himself-a-pardon (accessed May 25, 2019).

[129] Id.

[130] Brian Kalt, "Can Trump Pardon Himself?," *Foreign Policy*, May 19, 2017, http://foreignpolicy.com/2017/05/19/what-would-happen-if-trump-pardoned-himself-mueller-russia-investigation (accessed May 25, 2019).

[131] Laurence H. Tribe, Richard Painter, and Norman Eisen, "No, Trump Can't Pardon Himself. The Constitution Tells Us So," *Washington 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 (accessed May 25, 2019).

[132] Phil Ciciora, "Can President Trump Pardon Himself?" July 27, 2017, https://news.illinois.edu/view/6367/535524 (accessed May 25, 2019).

[133] Julia Munslow, "Does Trump Have 'Complete Power to Pardon' Himself? We Asked a Legal Expert," July 24, 2017, https://www.yahoo.com/news/trump-complete-power-pardon-asked-legal-expert-162102466.html (accessed May 25, 2019).

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University Law School, who postulates that a "textual reading of Article II would support a president asserting the right to pardon himself."[134] James Pfiffner, a public policy professor at George Mason University, similarly contends that pardoning oneself is "not constitutionally prohibited, even if it's against the spirit of the Constitution's separation of powers."[135] Again, Professor Susan Low Bloch of Georgetown University Law Center believes that while self-pardon is constitutionally possible, its validity will remain an open question until the president gets indicted and challenges the indictment in federal court.[136] What is legally feasible, however, can still be politically damaging, which is why scholars on both sides of the debate doubt whether the constitutional question at issue will eventually be answered.

A third category of scholars sit on the fence or equivocate on whether the Constitution allows self-pardon, but agree with many of their peers that it is highly unlikely to happen because of the potentially dire political fallout. For instance, Andrew Wright of the American Constitution Society acknowledges that there are reasonable arguments on both sides and thinks that the unprecedented act of self-pardoning would present a justiciable question for federal courts. However, he does not expect that question to ever be settled because the president would first have to be "indicted by a federal grand jury" and then try to "quash the indictment on pardon grounds."[137] In fact, he describes these two prerequisite conditions as "unthinkable steps," because it would be "dishonorable and politically disastrous for Trump" to take them.[138]

The fact that self-pardon is probably not a constitutionally appropriate exercise of executive clemency does not necessarily spell the end for a president in trouble. There is a sophisticated legal tactic to bypass the supposed restriction on self-pardon, which was tersely discussed in Mary Lawton's aforementioned legal opinion of 1974. After opining that the president could not pardon himself, she went on to suggest that there was an alternative approach that could be taken under the

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[134] Jonathan Turley, "Yes, Trump can Legally Pardon Himself or His Family. No, He Shouldn't," *Washington Post*, July 21, 2017, https://www.washingtonpost.com/outlook/yes-trump-can-legally-pardon-himself-or-his-family-no-he-shouldnt/2017/07/21/6134fb12-6e2d-11e7-b9e2-2056e768a7e5_story.html (accessed May 25, 2019).

[135] Silverstein, "President Trump Can Pardon Himself – but It Would Only Begin Bigger Legal Battles."

[136] Turley, "Yes, Trump can Legally Pardon Himself or His Family. No, He Shouldn't."

[137] Andrew Wright, "A Self-Pardon?," July 25, 2017, https://www.acslaw.org/acsblog/a-self-pardon (accessed May 25, 2019).

[138] Id.

Twenty-Fifth Amendment to achieve the same objective as a self-pardon. Section 3 of that Amendment allows the president to temporarily transfer his power to the vice president. The purpose behind this provision is to efficiently fill the office of the president in case of a temporary vacancy due to a disabling illness, or a permanent vacancy due to death, removal, or resignation. Since the Amendment's adoption in 1967, this provision has been invoked three times by two presidents for very brief periods of incapacity.[139]

Taking advantage of this procedure, an embattled president could formally transfer his power to the vice president, who would become acting president and wield the full powers of the office, including executive clemency. The vice president, while serving in the capacity of acting president, could issue an absolute pardon forgiving the president for any offenses he has or may have committed. The "recovered" president would then have the choice of returning to office as an innocent man or resigning from office without fear of punishment under the law. Although originally unintended, this quid pro quo scheme appears to be practicable under the Twenty-Fifth Amendment, assuming, of course, that the vice president will agree to let the president's misconduct go unpunished. The transfer of power approach has the advantage of not only insulating the president from potential criminal culpability, but also protecting him from the threat of impeachment that comes with self-pardoning, having received rather than issued the controversial pardon that exempted him from prosecution. Should such a scheme materialize, however, it is not unreasonable to expect Congress to take some adverse action against it, including a possible legal challenge.

IV Conclusion

In framing and ratifying the Constitution, the Founders were worried about the abuse of the executive power in general and the pardon power in particular. Having just fought a prolonged and bloody war to force Britain to recognize the independence of the colonies, they were careful not to install a monarch-in-disguise, the reason some Anti-Federalists were skeptical about the amplification of the powers of the president, who could potentially use the pardon power to cover up his own malfeasance. However, after considerable debate and compromise, the Framers deemed it wise to endow an elected president with broad clemency authority to counterbalance the legislative and judicial powers of the new government.

Some 140 years of Supreme Court case law on the subject confirm that the pardon power is the least checked of all the powers conferred upon the president, although the interpretation of the Pardon Clause has

[139] The transfer of power provision of Section 3 was invoked on three occasions for medical reason: in 1985 by President Ronald Reagan and in 2002 and 2007 by President George W. Bush. See "List of Vice-Presidents Who Served as 'Acting' President Under the 25th Amendment," http://www.presidency.ucsb.edu/acting_presidents.php (accessed May 25, 2019).

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somewhat evolved over the years. Beginning with *United States v. Wilson* (1833) to its last pardon decision of *Schick v. Reed* (1974), the Supreme Court has consistently been clear that few powers in the U.S. Constitution are as absolute as executive clemency, and accordingly, has cautioned Congress and the lower courts to tread lightly in this area of the law.

The historical and legal status of the pardon power remains unchanged, despite the atmosphere of polarized politics and partisan acrimony that has come to characterize Washington. What has changed is the level of public interest in arcane constitutional matters that have traditionally been the preserve of academicians and legal researchers. This resurgence of interest is due to recent developments in the political landscape. The Justice Department's investigation into possible ties between the Trump campaign and Russia has sparked concerns that the president might exercise his pardon power to shield himself from congressional scrutiny and legal liability. The president's social media missives and statements from his counsel have also given rise to the same fears and expectations,[140] the fact that fed the burgeoning national debate and heightened public interest.

There are two questions central to this debate; one pertains to pardoning the president's loyalists and the other to pardoning himself. Although the speculative views expressed on these two issues vary, there appears to be broad consensus among legal experts on two points. First, the president has the constitutional authority to pardon whomever he wishes. Second, the president lacks the constitutional authority to pardon himself. These two positions seem to be premised on the most reasonable interpretation of the constitutional text and its historical background. Until these questions are definitively decided by a court of law, they are bound to remain a major topic of interest for public comment and constitutional research.

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[140] Michael S. Schmidt, et al., "Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort," *New York Times*, March 28, 2018, https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html (accessed May 25, 2019).

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[2] Id.

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[9] Id.

[10] Donald Trump, Twitter post, July 22, 2017, 4:35 a.m., https://twitter.com/realDonaldTrump/status/888724194820857857 (accessed May 25, 2019).

[11] For a fuller discussion of this point, see Jeffery Crouch, *The Presidential Pardon Power* (Lawrence, KS: University Press of Kansas, 2009), 11-13.

[12] Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (New York: Routledge, 2016), 15.

[13] Articles of Confederation, Art. X.

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17 Chris Edelson, *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror* (Madison, WI: University of Wisconsin, 2013), 22.

18 James Madison, "Federalist No. 74," in *The Federalist Papers*, Gary Willis, ed. (New York: Bantam Books, 1982), 377.

19 Id. at 378.

20 U.S. Const. art. II, §2, cl. 1.

21 Jonathan Elliot, *The Debates, Resolutions, and Other Proceedings in Convention on the Adoption of the Federal Constitution*, vol. II (Washington, D.C., 1828), 366.

22 Id. at 367.

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26 32 U.S. 150 (1833).

27 Id. at 160.

28 Id. at 161.

29 *Burdick v. United States*, 236 U.S. 79, 91 (1915). In *Burdick*, a unanimous Supreme Court upheld the right of a newspaper editor to reject a presidential pardon and invoke the right against self-incrimination rather than accept the pardon and testify.

30 *Wilson*, 32 U.S. at 160.

31 Id. at 161.

32 Id. at 159.

33 Id. at 161.

34 Id. at 155.

35 59 U.S. 307 (1855).

36 Id. at 308.

37 Id. at 309.

38 Id.

39 Id.

[40] Id. at 310.

[41] Id. at 320 (quoting *Wilson*, supra, at 161).

[42] Id. at 315.

[43] Id. at 311.

[44] Id.

[45] What may be dubbed the grace model of executive clemency prevailed until the Court declared per Justice Oliver Wendell Holmes in *Biddle v. Perovich*, 274 U.S. 480 (1927) that a pardon "in our days" served a public policy goal and was no longer considered "a private act of grace from an individual happening to possess power" (Id. at 486). The practical implication of this new interpretative approach, which was reaffirmed in *Schick v. Reed*, 419 U.S. 256 (1974), is that a pardon can be valid without the recipient's consent in certain circumstances since the determination of how public welfare is best served or accommodated lies solely with the president.

[46] *Wells*, 59 U.S. at 318 (McLean, J., dissenting).

[47] Id.

[48] Id.

[49] Id. at 319.

[50] Id.

[51] 71 U.S. 333 (1866).

[52] Id. at 334.

[53] Id. at 334-335.

[54] Id. at 375.

[55] Id. at 377.

[56] Id.

[57] Id.

[58] Id. at 334 and 380.

[59] Id. at 380.

[60] Id.

[61] Id.

[62] *State v. Hazzard*, 139 Wn. 487, 489 (Wash. 1926).

[63] *Garland*, 71 U.S. at 380.

[64] Id.

[65] More specifically, the *Garland* Court stated that a pardon "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." Id.

[66] 80 U.S. 128 (1872).

[67] Id. at 143.

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68 Id.

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70 Paul J. Haase, "'Oh My Darling Clemency': Existing or Possible Limitations on the Use of the Presidential Pardon Power," *American Criminal Law Review* 39 (2002): 1295.

71 *Klein*, 80 U.S. at 145-146.

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73 Richard H. Fallon, Jr., "Jurisdiction-Stripping Reconsidered," *Virginia Law Review* 96 (2010): 1079.

74 Id. at 147.

75 Id.

76 This aspect of *Klein's* holding was further confirmed in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Dickerson v. United States*, 530 U.S. 428 (2000).

77 142 U.S. 450 (1892).

78 Id. at 454.

79 Henry Weihofen, "The Effect of a Pardon," *University of Pennsylvania Law Review and American Law Register* 88, no. 2 (1939): 182.

80 *Garland*, 71 U.S. at 380.

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82 267 U.S. 87 (1925).

83 Id. at 108.

84 Id. at 110.

85 Id. at 120.

86 Id. at 121.

87 *Burdick*, 236 U.S. at 94.

88 *Grossman*, 267 U.S. at 120-121.

89 Id. at 120.

90 "Effect of Pardons for Innocence under 'Habitual Criminal' Statutes," *The Yale Law Journal* 51, no. 4 (1942): 700.

91 *Grossman* , 267 U.S. at 121.

92 Id.

93 419 U.S. 256 (1974)

94 Id. at 263-264.

95 Id. at 266.

96 Id.

97 Id. at 261. This declaration was a reaffirmation of the Court's earlier decision in *Biddle v. Perovich* 274 U.S. 480 (1927), which established that the recipient's acquiescence was irrelevant to the validity of the conditional pardon that could be exercised in furtherance of the "public welfare." See supra note 45.

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104 Id. at 266.

105 U.S. Const. art. II, §2, cl. 1

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[123] Id.

[124] Id.

[125] Jason Silverstein, "President Trump Can Pardon Himself – but It Would Only Begin Bigger Legal Battles," *New York Daily News*, July 29, 2017, http://www.nydailynews.com/news/politics/trump-pardon-bigger-battles-article-1.3367987 (accessed May 25, 2019).

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