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"Informal Executive Actions and Agency Guidance: Legal and Political Implications for Immigration and Other Policy Areas

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Abstract

This paper is a study the use of various forms of informal executive actions used by presidents and cabinet officials to guide the policy implementation of federal agencies. Among these are policy manuals, guidance statements, statements of administration policy, and announcements of executive priorities. The recent executive action regarding immigration announced by President Obama is also an example of this kind of behavior. The paper will rely upon the analysis of legal scholars who have examined the causes and consequences of informal executive actions. We will examine the implications that these actions have for public participation, transparency, consistency in decision-making, and inter-branch comity. The analysis will be applied to President Obama's recent action regarding immigration enforcement.

Introduction

Since the late 1980s, many jurists and legal scholars have identified a significant tendency for many federal agencies to forsake more formal and legally binding forms of decision-making (such as notice and comment rulemaking) in favor of issuing informal, presumably advisory documents such as interpretive rules, guidance documents, administration statements of policy, agency manuals, and the like (see, e.g., Anthony, 1992). The advantage of reliance on such informal documents, from the standpoint of the agency, is speed, flexibility, and insulation form legal challenge. Formal decision-making is time-consuming and tedious. Another advantage for the agency but a disadvantage from the perspective of those adversely affected by the policy is the difficulty in challenging the decision in court.

In recent months, the Obama Administration has made substantial use of such informal executive actions, under circumstances that illustrate the political strategies and the legal difficulties in using these means of achieving policy objectives. These actions, including most no-

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tably the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parental Accountability (DAPA), are considered "prosecutorial discretion" programs administered through the United States Customs and Immigration Service (USCIS). The term "prosecutorial" is a bit of a misnomer, since immigration cases do not generally fall under criminal law. These executive actions are also sometimes called "executive orders," although that term is not quite correct, either, for reasons that are discussed below.

This paper examines these executive actions in light of the standard critiques of informal administrative decision-making. The paper will then show how that critique was applied by district court judge Andrew Hanen shortly before this paper was written. It is probably necessary to state clearly what this paper is not. It is not a study of immigration policy generally, nor is it an advocacy document that urges a particular position regarding the merits of deporting or offering benefits to undocumented migrants. It is not even a study of whether the recent use of discretion by President Obama or other presidents has exceeded the executive's constitutional and/or statutory authority. Instead, this paper examines the use of discretion through informal, presumably non-legally binding practices compared to more formal, substantive and legally-binding procedures. Our analysis reveals that the recent use of executive discretion has tried to escape challenge by use of informal decision-making while at the same time claiming the legal authority of official policymaking. The paper will conclude by discussing the political and legal implications that executive actions may have in immigration and other policy areas.

Discussion of Informal Executive Actions

Section 553 of the federal Administrative Procedure Act (APA) establishes a brief set of standards for what is commonly called "notice-and-comment" or "informal" rulemaking. In actuality, this set of procedures is much more formal than some of the alternative forms of decision-making that agencies have used when they refrain from "notice-and-comment" rulemaking. Under Section 553, agencies must post a notice of proposed rulemaking in the Federal Register, state the statutory authority for a proposed rule, invite public comments, usually hold public hearings, and respond to comments offered orally or in writing to the agency before finalizing a rule. Once finalized, these rules become legally binding. Since these rules are binding and are based upon delegated authority given by legislatures, they are often styled "legislative rules." Alternatives, however, have emerged. These include "interpretive rules" which give the agencies' interpretation of statutory or regulatory language, and policy statements, which are statements of substantive law or policy, but which is not considered a rule and which is owed much less deference by the courts. While interpretive rules and policy statements may have no legally binding direct effect on the public at-large, these documents may have great influence on decision-making within agencies, which indirectly affects the external public. These and other documents may be categorized as "guidance documents," which were defined in Executive order #13,422 as "an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue" (3 C.F.R.

191-192 [2007]). These documents would include manuals, circulars, memoranda, and bulletins.

Legally, these guidance documents differ from legislative rules in terms of the procedures required for their issuance, their legal impact outside the agency, and the scope of judicial review (Raso, 2010: 792) Guidance documents require no "notice and comment" process (although the Bush administration did require that they be sent to OMB). Guidance documents have, at times, been deemed non-binding, yet some statutes (e.g., the FDA Modernization Act) require the pertinent agency to observe them. Generally, an agency that departs from a guidance document may have to offer a reasonable explanation for the departure, lest they be deemed by a court to be acting in an arbitrary and capricious manner (Funk, 2004). Finally, if a guidance document is challenged in court, it may not accord the agency the deference normally available under the doctrine established in Chevron, USA v. Natural Resources Defense Council (104 S. Ct. 2778 [1984]). According to the Chevron doctrine, courts should defer to agencies' official policies when those agencies are interpreting a vaguely written statute. If the statute is clear, the courts may strike down agency interpretations that are obviously departing from the legislative text, but otherwise should defer to any reasonable interpretation. On the other hand, courts are more likely to resort to the weaker Skidmore or Mead level of deference when hearing a challenge of a less formal agency decision, such as those made pursuant to a guidance document (see Skidmore v. Swift & Co., .323 U.S. 134 [1944] and United States v. Mead, 533U .S. 218 [2002]) In these decisions, the court ruled that agencies' more informal, less rigorous, less transparent, and less fully justified should receive less deference than decisions made through a notice-and-comment rulemaking procedure.

Yet while courts may be less deferential to these informal decisions, they also are less likely to accept a case challenging these decisions or to address these issues in a case that comes before them. To be justiciable, guidance documents would have to meet the "finality" requirement under the APA. Since guidance documents generally leave plenty of room, at least in theory, for discretion and individualized decision-making, they normally won't be considered the "final" word on agency action. Some challenges to guidance documents will be rejected under the "ripeness" doctrine, particularly since it is hard to determine when a set of decisions shaped by the guidance document constitute a settled policy that can subject to review.

In light of these differences, guidance documents offer some special advantages over legislative rules. They may be overturned by the courts but only if the cases get to a full hearing. If they were overturned, they could be replaced by new guidance documents that differ only marginally from the ones they supplanted. In most cases, of course, the guidance documents would be treated as agency policy, just as much as they would if they were considered legally binding.

Some scholars have argued that agencies substitute informal guidance documents for legislative rules for strategic reasons. Raso's empirical research (2010) on this question suggests that agencies do not do this on a systematic basis. For example, it does not appear that agencies may more use of guidance documents at times when there is a partisan division of government between the executive and legislative

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branches. Nevertheless, even if agencies do not adopt this strategy systematically, there is no reason to believe that they are unable or unwilling to do so under the right circumstances. That appears to be the case in the recent executive actions regarding the Deferred Action for Childhood Arrivals (DACA) and (Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs.

Recent Executive Actions Regarding Immigration

Both President George W. Bush and President Obama, made campaign promises to "fix" America's "broken" immigration system by working with Congress to pass a comprehensive immigration reform law. President George W. Bush was unable to achieve immigration reform in part due to the national crisis of the 9/11 attacks, the subsequent War on Terror and wars in Afghanistan. President Obama also made campaign promises during his first and second presidential campaigns to fix America's broken immigration system but was unable to deliver on his promises. One of those promises dealt with a legislative proposal called the DREAM Act, which dealt with educational opportunities for children of undocumented workers. This legislation has been proposed repeatedly in Congress since 2001. Yet this legislation has never been enacted by Congress. In 2010, the DREAM bill did pass through the House of Representatives but could not reach the floor of the Senate because of an unsuccessful cloture vote.

Much more comprehensive immigration reform favored by open borders proponents and most Hispanic-Americans have not come close to passage.

The disappointment of the supporters of immigration reform at the failure of the Obama administration to deliver comprehensive immigration reform was aggravated by the perception that record levels of removals were achieved during the Obama presidency. This engendered a sense of betrayal with immigrant rights and ethnic advocates puzzled by the apparent contradictions between Obama's campaign promises and actions as President. This enforcement reality is explained by the fact that while Congress was unwilling or unable to pass comprehensive immigration reform, there was bipartisan support to ever increasing the funding for immigration enforcement. With more funding, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), two divisions of the Department of Homeland Security (DHS), were able to arrest, detain and remove more undocumented/illegal immigrants.

With President Obama realizing that Congress is unable to pass even the DREAM Act even though it benefits a sympathetic group of undocumented immigrants, children who were illegally brought into the country or illegally stayed. With pressure from Democratic pro-immigrant constituencies, especially Latinos, President Obama decided to use executive discretion to provide temporary relief to potentially millions of unauthorized immigrants. This discretion used many of the criteria of the Dream Act proposal. There are two Obama executive actions on immigration that used prosecutorial discretion to provide temporary relief from deportation/removal to potentially millions of the undocumented immigrants. The first executive action is a memorandum issued by Secretary of the Department of Homeland Security Janet Napolitano on June 15, 2012. This memorandum laid out

President Obama's executive action program Deferred Action for Childhood Arrivals (DACA).

The United States Citizenship and Immigration Services (USCIS) on its website provides this information on DACA:

On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status. NOTE: On November 20, 2014, the President made an announcement extending the period of DACA and work authorization from two years to three years.

Potential DACA applicants could try to register if they:

1. Were under the age of 31 as of June 15, 2012;

2. Came to the United States before reaching your 16th birthday;

3. Have continuously resided in the United States since June 15, 2007, up to the present time;

4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;

5. Had no lawful status on June 15, 2012;

6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety (United States Citizenship and Immigration Services [USCIS], 2012).

The inability of the Congress to pass the DREAM Act, a proposal that garnered some public sympathy, motivated the Obama administration to use executive discretion to grant temporary relief to the young unauthorized immigrants that the DREAM Act intended to provide relief. The DREAM ACT and DACA requirements have many commonalities. The latest version of the DREAM ACT provides:

most students who came to the U.S. at age 15 or younger at least five years before the date of the bill's enactment and who have maintained good moral character since entering the U.S. would qualify for conditional permanent resident status upon acceptance to college, graduation from a U.S. high school, or being awarded a GED in the U.S. Students would not qualify for this relief if they had committed crimes, were a security risk, or were inadmissible or removable on certain other grounds. Under the Senate bill qualifying students must be under age 35, whereas under the House bill they must be under age 32 (National Immigration Law Center, 2011).

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One notes the similarities between the requirements of DACA and the latest version of the DREAM Act introduced on May 11, 2011. To be eligible for relief under the DREAM Act, the undocumented immigrant must have arrived before the age of 16 and have five years of continuous presence. The key difference between DACA and the DREAM ACT is that while the DREAM Act puts the beneficiaries on the path to naturalization, DACA provides a temporary legal status that has an expiration date.

Deferred Action for Parents of Americans and Lawful Permanent Residents

In 2014, President Obama's second DHS Secretary, Jeh Johnson, issued a memorandum expanding DACA and initiating DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) to benefit the undocumented immigrant parents, spouses, sons and daughters of American citizens and lawful permanent residents (Green Card holders). On DAPA, the USCIS website provides:

On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

These initiatives include:

Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years.

Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks |

Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens (USCIS, 2014).

President Obama has initiated DAPA and DACA because the odds of passing a comprehensive immigration reform during his second term did not seem any better than his first term in office. DeSipio and de la Garza (2015) consider immigration reform comprehensive if it achieves the following:

1.Redesigning the rules for immigration to permanent residence in order to meet the labor needs of sectors of the economy most dependent on immigration labor.

2.Guaranteeing the labor rights of immigrants, including the right to organize

3.Regulating more rigorously the flow of unauthorized migration

4.Legalizing some (many or most) of the unauthorized immigrants resident in the U.S. at the time of the law's passing

5.Protecting the civil and human rights of immigrants

6.Ensuring that national security needs and global interests are met through US immigration and immigrant policies

7.Restructuring fiscal policy so that costs of immigration are shared equitably by local, state, and federal authorities

8.Developing programs to ensure that immigrants -- particularly immigrants to permanent residence and any newly legalized immigrants – have the training and encouragement needed to speed their entry and incorporation into US society (30-31).

It is unlikely that comprehensive immigration reform would occur in the near future. In the conclusion of their book, DeSipio and de la Garza (2015) offer a diagnosis and a prognosis:

The primary locus of the current stalemate is the House of Representatives. We anticipate that this will remain the case at least until the early 2020s, and potentially beyond. Republicans are likely to remain in the majority until the House is redistricted after the 2020 census. Republicans in the House will retain today's plurality, or perhaps a majority, that for principled and political reasons opposes any immigration reform that includes a path to legal status for unauthorized immigrants. Neither Speaker Boehner nor his successors will be likely to pass an immigration reform bill with mostly democratic votes, and so the Republican House majority ensures that no comprehensive reform bill will become law.

This stalemate may well remain beyond 2022 (the first congressional election after the 2020 redistricting), even though Democrats will likely do better in state legislative races that largely shape the redistricting that follow I 2020 than they did in 2010. It will also be a presidential election year – when more Democrats turn out – and Congress will be unlikely to have passed as controversial a bill as they had before the 2010 election – the Affordable Care Act, or Obamacare – which angered and mobilized many Republican voters. However, by itself, more success in redistricting may not be enough for the Democrats to overcome the Republican congressional geographic advantage. Instead, Congress will be won or lost by each party based on its success reaching out to voters, speaking to the issues that drive them, and communicating why their party will be better for the nation. At this writing, it isn't possible to anticipate which party will have won this battle for the nation's hearts and minds in the distant future. We can, however, say with confidence that a careful reading of the political tea leaves suggests that the House membership will not change sufficiently before 2020 to create a likely path to comprehensive immigration reform (221-222).

The Traditional Role of Discretion in Immigration Decision-Making

In his *Immigration Law Sourcebook* (2004), Kurzban states the following on the discretionary immigration benefit of deferred action:

Discretionary. Deferred action is a discretionary act through the recommendation of a DD and approval of the Regional Commissioner not to prosecute or deport a particular alien. It cannot be granted by the IJ. Johnson v. INS, 962 F.2d 574, 579 (7th Cir. 1992). It is "an act of administra-

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tive choice to give some cases lower priority and in no way an entitlement…" former O.I. 242.1 (a)(22). See also, Reno v. American-Arab Anti-Discrimination Committee, 119 S.Ct. 936 (1999) {Court discusses deferred action as a purely discretionary act not subject to review}.

Although the operations instructions for deferred action have been withdrawn, the relief is still be available.

See Standard Operation Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal (Standard Operating Procedures), Part X; Meissner, Comm., Memo, HQOPP 50/4 (Nov. 17, 2000), posted on AILA InfoNet at Doc. No. 00112702 (Nov. 27, 2002) {Regarding prosecutorial discretion}.

Among the factors the DD may consider are:

1. The likelihood of ultimately removing the alien.

2. The presence of sympathetic factors.

3. The likelihood that because of sympathetic factors a large amount of adverse publicity will be generated.

4. Whether the individual is a member of a class of deportable aliens whose removal has been given high enforcement priority (e.g. terrorists, drug traffickers).

Preclusion of Review: Some cases addressing deferred action include: *Pasquini v. Morris*, 700 F.2d 658 (11th Cir. 1983); Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979); David v. INS, 548 F.2d 219 (8th Cir. 1977); *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). However, the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 119 S.Ct. 936 (1999), has interpreted INA 242 (g) as precluding judicial review of any decision concerning deferred action. (p. 802)

Deferred action is a temporary relief that an unauthorized immigrant that is ineligible for legal status under the immigration laws would seek to be able to stay and work in the United States. It is difficult for an unauthorized immigrant to meet the requirements for deferred action and while the Government does not disclose these numbers in its annual reporting on immigration, there is reason to believe that the numbers are not more than a thousand a year. Judge Hanen in his Memorandum Opinion and Order granting the Plaintiffs' Motion for a preliminary injunction in *Texas v. USA*, 2015 US Dist. Lexis 18551, stated in footnote 46 of the opinion that the Government was not "forthcoming" in providing deferred action statistics to a scholar, Shoba S. Wadhia, who requested this information for her law review article on deferred action. Judge Hanen quoted Wadhia estimating that "between 2003 and 2010 (118 plus 946) yields fewer than 1,100 cases, or less than 130 cases annually. Hanen continued:

The Court is not comfortable with the accuracy of any of these statistics, but it need not and does not rely on them given the admissions made by the President and the DHS Secretary as to how DAPA would work. Nevertheless, from less than a thousand individuals per year to over 1.4 million individuals per year, if accurate, dramatically evidences a factual basis to conclude that the Government has abdicated this area- even in the absence of its own announcements (p. 61).

Michigan attorney Fawzeah Abusalah thinks that most attorneys that practice immigration law are aware of deferred action but do not file for it because they know that the chances of approval are slim (Personal communication, February 27, 2015). The decision of the District Director is final and not subject to judicial review. An attorney who files for deferred action and gets a denial can internally appeal the decision by asking that the director reconsider the decision. But it is highly unlikely that the decision would change.

President Obama's declaration of "I don't make law" reminds one of the authors of this paper of a statement by a former head of the immigration services in Detroit, District Director Carol Jenifer. In a town hall meeting with Arab Americans in 2002 in Dearborn she was asked what her agency would do with individuals who are in the country illegally but are contributing to the country. Director Jenifer stated as to the "good people" who are illegally present she can't "manufacture a legal status" for them. However, she could and did grant deferred action in very few cases. One of the authors of this paper filed and obtained deferred action for a Lebanese from Sierra Leone who had an American-born child with a rare medical disorder. The child was getting treatment in the US that he could not get in Sierra Leone. Before filing for deferred action, favorable media coverage was sought. A local paper was contacted and the paper expressed interest in the story. The paper wrote a very sympathetic story on the child. Letters of support were obtained from a Congressman, a Senator, clergy and leaders of Arab American organizations. The request for deferred action was granted with the father of the child issued a work permit. It is understood that deferred action cannot be obtained simply because removal from the US would cause hardship. For most unauthorized immigrants' removal, formerly referred to as deportation, would cause hardship. There has to be hardship and a compelling case that warrants the extraordinary temporary relief of deferred action.

Judge Hanen's Opinion

In February of 2015 Judge Andrew Hanen handed down his opinion regarding a temporary injunction to block the Obama administration's executive action. Many of the media reports and public discussion of the decision seemed to imply that the judge's decision was a reaction to the breadth and scope of the action and its alleged absence of explicit statutory authority. Hanen had been a fairly outspoken critic of some of the Obama administration's immigration actions, but his opinion imposing the injunction was largely limited to the procedural issues of executive discretion rather than the substance of its effects. After establishing that Texas and the other plaintiff states had standing to bring suit, Hanen presented a fairly conventional administrative law kind of argument for agency action using Section 553 notice-and-comment rulemaking. Hanen establishes that the DAPA directive constitutes final agency action and that the plaintiffs have a "zone of interest" affected by the action. The court acknowledges that non-enforcement decisions are generally exempted from review, Hanen claims that this directive actually is an "affirmative action:" to confer statuses rather than a discretionary decision not to enforce. Successful applicants under DACA and DAPA are not simply given a stay on a deportation order. They are considered "legally present" in

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the United States. Furthermore, several specific benefits are associated with conferral of legal status, including work permits, drivers' licenses. Subsequent to the district court's decision, the congressional testimony indicated that Social Security benefits must be offered to successful applicants under the DACA and DAPA programs (cited in Hanen,2015, footnote 14, p. 10).

It is noteworthy that Judge Hanen's ruling against the administration's executive action had little mention of the suspension of deportation. Such power is explicitly granted to the Secretary of Homeland Security without limitation. But the granting of legal statuses and accompanying benefits was not something Hanen was willing to permit without a legislative rulemaking process. Work permit approvals by the department are already provided for a federal regulation (8 C.F. R Section 274a.12), but those approvals are only provided for designated classes of aliens. The authority for those designations can be found in four statutory provisions. One such provision, Section 1101(a)(15) of Title 8 of the USCA, suggests some discretion in the granting of work permits to the attorney general, whose powers in the realm of immigration should have been transferred to the DHS secretary after the creation of Homeland Security as a cabinet level agency. The question of whether that discretion is limited by the specific criteria for conferring benefits in the statute is critical. Under the canon of *expressio unius* ("inclusion of one thing implies the exclusion of the other"), the specific criteria for granting benefits should constrain the secretary's discretion. Supporters of the DACA and DAPA programs would contend that the secretary's discretion is unlimited.

The Department of Homeland Security has published fairly explicit conditions, listed above in this paper, that can be used as a basis to offer benefits to applicants. Therefore, the court viewed the directive as establishing new policy so that the presumption of nonreviewability in *Heckler v. Chaney* (470 U.S. 821 [1985]) is rebutted. Furthermore, the court found that specific provisions within the immigration law (i.e., Section 1225(a)(1)) compel particular procedures for alien applicants for legal status. The statute also authorizes the Secretary of the Department of Homeland Security to establish regulations that form the criteria for legal entry into the United States. Such regulations would be matters of general policy and have binding effect. Judge Hanen deemed such a regulation to be a legislative rule, rather than an interpretive rule or guidance document. Hence, the notice-and-comment requirements must, in Judge Hanen's judgment, come into play.

After the district court ruling, the federal government filed an Emergency Expedited Motion to stay Judge Hanen's order. The government also filed an appeal with the Fifth Circuit Court of Appeals. The state of Texas and other plaintiffs filed a motion of discovery to obtain documents within DHS regarding the implementation of the contested programs. Judge Hanen ruled on the motion to stay his order in April of 2015. In his ruling, denying the government's motion, Judge Hanen contended that evidence brought to his attention indicated that the government had been less than candid in its statements in

his courtroom. He furthermore reiterated that recent statements from the president (Remarks by the President in Immigration Town Hall, available at https://www.whitehouse.gov/the-press-office/2015/02/25/remarks-president-immigration-town-hall-miami-fl) had vividly demonstrated that the administration's executive action was binding on immigration enforcement personnel. According to Hanen, this removed any doubt that the executive action was effectively a substantive rule that established a binding norm, a substantive change in existing policy, and a granting of new benefits not conferred by existing law (Hanen, 2015, pp. 7-10). In Judge Hanen's view, these circumstances indicate that DHS must propose its program through a legislative rulemaking process, which clearly the administration does not wish to use.

Implications for the Future

Judge Hanen's injunction will be challenged soon in federal appellate courts. Exactly what the disposition of his decision will remain to be seen. His ruling, however, follows a fairly traditional position regarding the need to constrain executive discretion, procedurally if in no other way. Hanen's opinion suggests that the substance of DACA and DAPA is not particularly problematic. If such programs were established by a normally legislative rulemaking process, there would be no particular legal difficulty. Perhaps in other litigation, claims that the actions were ultra vires might be sustained, but that argument did not come up in the judge's opinion.

Such a legislative rulemaking process would be more time-consuming than simply handing down directives from the DHS secretary. It would also open up the policy to criticism from tens of thousands of commenters on the proposed role. It would require responses from DHS regarding those comments. The final result might be the same, butb the time and political capital consumed by the administration to accomplish its immigration goals would be substantial.

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Abstract

This paper analyzes the ways that United States foreign policy is depicted in two prominent current television programs: *House of Cards* and *Madam Secretary*. Both of these programs have had frequent plots in which the fictional foreign policy of the U.S. deals with issues very similar to those that the United States has actually confronted in recent years. Examples include nuclear proliferation negotiations with Iran and U.S. concern over anti-gay legislation in Russia. Several of these fictional stories are analyzed here to consider how processes and policies of the U.S. are portrayed. *Madam Secretary* does much more to demonstrate the give and take among executive and legislative branch actors that result in foreign policy, while *House of Cards* shows the president as dominant. Neither program fits very well into the realist paradigm of international relations; *Madam Secretary* fits the liberal idealist model well in most regards. Both shows include commentary on specific U.S. foreign policy issues, such as the *House of Cards'* criticism of the Russian legislation and *Madam Secretary*'s endorsement of negotiation with Iran.

I. Introduction

ll fiction, of course, relates to the real world to varying degrees. Despite the growth of fantasy in television and film (consider, for example, the huge number and popularity of Marvel and DC superhero television shows and films), there are still plenty of fictional worlds that are more closely grounded in reality. Some fictional television shows make a point of running story lines that parallel recent history and current events. Doing so adds an aura of verisimilitude to these programs, and it also allows them to comment fairly directly on current political issues and governmental processes. It is the latter that particularly interests me in this project.

House of Cards and *Madam Secretary* have several commonalities that make them intriguing in this regard. Both are shows that focus explicitly on American

politics and include considerable discussion of U.S. foreign policy. *Madam Secretary*, centered around a fictional U.S. Secretary of State, Elizabeth McCord (played by Tea Leoni), is almost entirely about foreign policy, along with a healthy dose of domestic family drama and some inside-Washington, D.C. politics. *House of Cards* features U.S. politician Frank Underwood (Kevin Spacey), who becomes president in the third season of the show. From that point on, foreign policy is a major emphasis of the program. Both shows started in the past few years and recently ended. *House of Cards* streams on Netflix, which released an entire season at a time; it ran from 2013 through 2018.[1] *Madam Secretary* ran in the traditional television format on CBS; it began showing in the fall of 2014 and concluded in 2019. Thus, both programs began well into the Obama presidential administration and continued into that of President Trump.

Televised fiction commenting on foreign policy is not new, but most of the famous examples involve more oblique references. Decades ago, the popular comedy/drama *M*A*S*H*, set during the Korean War, was widely seen as broadly anti-war and specifically anti-Vietnam War, as the U.S.' involvement in the latter conflict overlapped with the start of *M*A*S*H* in the early 1970s (Schochet, 2007). Scholars have found metaphorical content on U.S. foreign policy even in science fiction such as *Star Trek* (Neumann, 2003; Inayatullah, 2003).

In contrast, the two shows studied here have both had foreign policy plotlines that ran very close to events in actual U.S. foreign policy: some of these will be discussed in the next section. They are also both successful shows that have relatively large audiences. No audience share ratings are available for Internet streaming shows, but *House of Cards* is one of the first and most successful of Netflix's original programs, it was the first web-streaming series to receive major Emmy nominations, and it has won seven Emmys ("List of Awards…", 2018). *Madam Secretary*, while not as critically acclaimed, was a highly-rated program in terms of viewership: it was the tenth, fourteenth, and eighteenth highest rated program on all of broadcast television in its first, second, and third seasons.[2]

The main goal of this paper is to examine the ways in which these fictional plotlines, running closely parallel to U.S. foreign policy events, portray U.S. foreign policy, and its aims and processes. Among the main questions to be addressed are these:

- What specific commentary about these current events are these shows making with these parallel plotlines?
- How do these portrayals of foreign policy relate to prominent academic

[1] In late 2016, news of lead actor Kevin Spacey's alleged sexual assaults and inappropriate behavior led to his dismissal from the program, but Netflix continued the show for one season without him (Spangler, 2017).

[2] The sources are de Moraes (2015, 2016, and 2017.)

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frameworks, such as realism and liberal idealism?
- What is the nature of the U.S. foreign policy processes shown?

This analysis is significant because media socializes viewers, and such socialization is not limited to news coverage of actual political events. There is considerable evidence of these effects, especially for repeated exposure to similar messages, as one might receive on multiple episodes of a television program or on different shows with similar messages (Morgan and Signiorelli, 1990, as cited in Carlson, p. 50). And on foreign policy, where there is usually less public knowledge, one might expect effects to be greater than on other issues where people are more likely to have strong opinions already[3]. Despite the fact that political science studies of media politics are overwhelmingly focused in news media (see for example texts such as Graber (1997) or Iyengar (2019)), Graber and Carlson both argue that fictional sources are more widely used for political information than are non-fiction sources (Graber, 1997, p. 194; Carlson, 1995, p. 49).[4]

II. Four Examples from Two Shows: a Brief Overview and the Main "Lessons" of Each

The analysis in this paper will focus on four topics emphasized in the two shows: two each from *House of Cards* and *Madam Secretary*. As mentioned above, these four were chosen because they each contain significant commonalities with what has been occurring in actual United States foreign policy in recent years. These topics are also significant in each program, taking up many episodes. In this section, I will present a relatively brief overview of the four topics. The four topics include one fairly linear arc plot on U.S.-Iranian relations from Season One of *Madam Secretary* and three somewhat more diffuse topics: U.S.-Chinese relations on *Madam Secretary*, U.S.-Russian relations on *House of Cards*, and U.S. dealings with "ICO," a fictionalized version the Islamic State/ISIS also on *House of Cards*. I will consider some parallels with real-world foreign policy and what the two programs are trying to say about the real-world parallels to these plots.

U.S.-Russian relations on *House of Cards*

The focus of this topic is the Russian president, Viktor Petrov (Lars Mikkelsen). Petrov is deliberately drawn as a very Vladimir Putin-like figure. This is apparent in his firm, autocratic grip on Russia, his KGB background, and his colorful, prickly personality that makes him a formidable adversary for President Frank Underwood and his wife, Claire Underwood (Robin Wright). *House of Cards* gives us a world in which the tough, amoral Frank Underwood deals with this Putin stand-in instead of George W. Bush,

[3] For example, Ole Holsti, while arguing that U.S. foreign policy opinion is not merely random and irrational, acknowledges that " there remains little doubt that most Americans are poorly informed about world affairs" (2014, p. 153).

[4] See Heyrman for more extended discussion of significance of non-fiction (2018, pp. ix-xi).

Barack Obama, and Donald Trump doing so. We meet Petrov in the third episode of Season Three, soon after Frank Underwood becomes president. Several Russia-U.S. plots unfold thereafter.

Perhaps the most memorable episode ("Chapter 32") involves Frank and Claire Underwood travelling to Russia to negotiate the release of an American gay rights activist, Michael Corrigan, who was arrested for violating Russia's "gay propaganda law," which criminalizes pro-gay rights activism. Such a law was passed in reality by Russia in 2013 ("Russian Anti-Gay Bill…," 2013) and has been opposed vocally by many American politicians. In the show, Frank Underwood and Petrov are also working on a deal for U.S. and Russian troops to jointly act as peacekeepers in the Middle East. Petrov and Underwood, after much posturing by Petrov, seem to be on the verge of an agreement that would also release Corrigan, but the deal includes Corrigan apologizing, which he will not do. Claire tries unsuccessfully to persuade Corrigan to do so, but she fails, and Corrigan kills himself in prison.

This and other episodes show Petrov as at least as cunning as the Underwoods are, sometimes more so. The episodes also serve to put actual Russian policies in a bad light. In addition to the anti-gay law at the heart of the above episode, another one features the real-life anti-Putin Russian activists Pussy Riot denouncing Petrov when he visits the White House.

Thus, even the amoral Underwoods look good compared to this Putin-like leader. *House of Cards'* purpose with the Petrov plot is in part, perhaps, simply to show Frank Underwood dealing with a foreign leader who is just as shady and clever as Underwood is. But the Russian-related plots also portray Russian policies negatively and human rights activists in Russia more positively. Thus, there is direct commentary on Putin's Russian government and the U.S.' unsuccessful attempts to reign in its abuses. Underwood finds it as difficult to deal with Putin as Obama did. Most of these fictional plots were written before the controversies occurred in real U.S. politics about whether President Trump is too close to Putin, and no such issue arises in *House of Cards*.

ICO on *House of Cards*

"ICO" on *House of Cards* stands for Islamic Caliphate Organization, which is clearly a fictional stand-in for ISIS/The Islamic State. Both ISIS and its fictional counterpart operate in and around Syria; ISIS sprung to international prominence in 2014 and 2015, and *House* began its ICO plot in "Chapter 46" in 2016. This plot was arguably the dominant policy issue that the Frank Underwood administration dealt with in the latter Frank Underwood seasons of the show (before his character stopped being president.)

ICO is a radical Islamic terrorist organization, with which US politics quickly becomes greatly concerned, which tracks well with ISIS as a U.S. foreign policy concern in the 2010s. The presidential election between Underwood, the incumbent Democrat, and Republican nominee Will Conway (Joel Kinnaman) includes debate over whether the current policy is tough enough. Similarly, President Oba-

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ma faced some criticism for ISIS' territorial acquisitions on his watch.

While ICO is brought up many times in recent seasons, there are two particularly important plot threads regarding it. First, domestic ICO sympathizers kidnap a U.S. family and eventually execute the father, all during the presidential election campaign. This plot shows how the two candidates must appear to not be playing politics with the crisis, even while they each try to spin it to their advantage. This becomes particularly tricky when Conway goes to the White House to assist in talks with the terrorists.

Despite the above, ICO is not shown in *House of Cards* to be a major domestic threat. The above incident is not inconsistent with the ways that a few domestic terrorists in the U.S. have claimed allegiance to ISIS, while ISIS itself has not shown significant organizational reach into the U.S. But Frank Underwood, the ultimate cynical manipulator, invents and exaggerates ICO threats to help him win reelection.

What is *House of Cards* trying to say about ISIS and current U.S. foreign policy? One thing is certainly the use of security issues as political footballs. These ICO episodes emphasize the huge knowledge advantage that presidents still have over Congress and ordinary citizens, even with modern communications and the Internet available to most citizens. The public cannot know the whole picture of international terror threats and relies on the executive branch for information. Thus, Frank Underwood manipulates the public through their desire for security, and so recent and current U.S. administrations could be doing so as well. President George W. Bush relied much on his image as a fighter against terrorism, for example, although in practice this was an international more than domestic focus.

Iran on *Madam Secretary*

The Iran-U.S. story on *Madam Secretary* is rather remarkable in that it is at once idealistic and paranoid. It parallels the nuclear deal struck among Iran and six nuclear powers in 2015 that was opposed by many Republicans. In that agreement, the United States and other countries sought to allow Iran's nuclear power development but prevent it from developing nuclear weapons ("Iran Nuclear Deal," 2017). Iran has consistently denied that it seeks the latter, but it is widely assumed that it was doing so, in part to balance the nuclear weapons that Israel is assumed to possess. President Trump, as he promised he would, withdrew from the treaty in 2018, leaving its fate and the possibility of Iranian nuclear weapons development uncertain (Liptak and Gauette, 2018).

In the television show, the deal is similar, and, as in reality, the U.S. and Iran do not have diplomatic relations, so negotiations between the two are difficult. The opposition to the real-world deal was fierce among some Republicans, with most Senate Republicans even signing a letter to Iran reminding them that any permanent deal would need the ratification of the Senate ("Letter From Senate Republicans…", 2015). In *Madam Secretary*, however, U.S. government plotters, including McCord's Secretary of State predecessor and the head of the Central Intel-

ligence Agency, actively worked to undermine the deal, and even supported regime change in Iran. These actions led to violence within Iran and some deaths of U.S. officials, painting a rather extreme, paranoid view of conspiracies within the government. At the same time, the show portrays Secretary McCord and the Iranian foreign minister meeting secretly to thwart this conspiracy, thus giving us a very hopeful picture of peace-seeking by members of both governments.

The rather over-the-top conspiracy, bordering on paranoia, can be seen in part as a way to have a dramatic plot. However, the frequency of such plots on recent television and films might have an effect on viewers. Gregg Easterbrook recently tallied several of these in his column and wondered, perhaps in jest, if President Trump, who apparently watches a great deal of television, might be influenced by "show after show that depict the United States government in the hands of traitors. Perhaps there is a link between Trump telling voters that Washington, D.C. was actively trying to ruin the United States" and these shows (Easterbrook, 2017).

On this specific U.S. foreign policy, *Madam Secretary* is pretty clearly endorsing President Obama's pursuit of the Iran treaty. This was not a particularly controversial view in most of the world, but the Israeli government and Congressional Republicans vehemently dissented. Little did the showrunners know during the first season that an open opponent of the treaty would be the next U.S. president and that he would pull out of the deal. The show portrays its plotting opponents of the treaty as perhaps well-meaning (one of them is an old CIA friend of Secretary McCord), but they are also dangerous, and they even kill to keep their secrets.

China on *Madam Secretary*

This is a more general topic, rather than a specific plot like the one above. It is given some continuity by the many appearances on the show of Chinese Foreign Minister Chen (Francis Jue). He sometimes meets Secretary McCord in person and more often via video-call. Chen is shown as a formidable negotiator, representing a rising world power. But most episodes show him as rational and reasonable; by the end of each of his appearances, he and McCord have almost always reached a deal or understanding. Chen can be described as a humanized character, sometimes an ally and sometimes an adversary.

An example of some of the above can be seen in the Season Two episode "Render Safe." In this story, the government of Pakistan has been overthrown in a coup, ultimately leaving Pakistan on the verge of becoming a failed state. Thus, its nuclear arsenal is left vulnerable, and it is revealed that the U.S. and Russia have a plan in place to capture and disarm all of Pakistan's nuclear weapons in case of such an event. But, for regional political reasons, Russia backs out of the deal, and the U.S. is left attempting to do the job on its own. Chinese Minister Chen comes to McCord to express his government's official condemnation of U.S. interference in the internal affairs of Pakistan. However, unofficially, he offers to help, and China assists in preventing a nuclear disaster. This is one of several times that China is

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portrayed on the show as a more stable and predictable country than is Russia in its relationship with the U.S.

This example and many others on *Madam Secretary* depict China in a nuanced way; the quality of its relationship with the United States depends on the issue. And many of the China examples demonstrate that this television program, unsurprisingly, places great faith in diplomacy. Most episodes end with a diplomatic resolution of a crisis or international issue. The examples of the U.S.-China relationship seen on the program contrast markedly with the real-world deterioration of the countries' relationship, especially during the Trump presidency, during which China was often painted as the U.S.'s most dangerous adversary. Thus, *Madam Secretary* seems to be advocating a possible alternative, more hopeful, relationship with China, the rising global power.

III. How Foreign Policy Processes are Portrayed

Roles of Key Executive Branch Actors

One of the ways in which political programs such as these can matter is in the ways that they show to audiences who makes crucial decisions and how. In doing so, they demonstrate which political actors are important and should be closely observed by citizens. They also paint a picture of how the foreign policy process works that might or might not be accurate.

The most predictable observation that can be made in this regard is that *House of Cards*, whose lead character is the president, focuses overwhelmingly on the president's role in making foreign policy, and *Madam Secretary* emphasizes the secretary of state. Beyond that obvious point, it is interesting to analyze the ways each shows the interactions among the president, the secretary of state, and other key actors such as the national security advisor and secretary of defense.

House of Cards is a very personality-driven show. Frank Underwood is shown consistently making bold, controversial decisions in foreign policy, just as he does in other areas. His cabinet members and other advisors often try to dissuade him from these, but they rarely succeed in doing so. Thus, he is the one with power, and he seems not to be influenced much by advisors. Examples can be found in his Russia policies. His initiative to put U.S. and Russian peacekeepers in the Middle East was seen by his Secretary of State, Catherine Durant (Jayne Atkinson), as too risky and unlikely to be agreed to by all parties. He pursued it nonetheless, and it led to problems when Russian President Petrov tried to maneuver Russia out of the agreement.

Another risky choice Underwood made against advice from advisors was to name his wife Claire ambassador to the United Nations, despite her lack of foreign policy experience. When the Senate balked, he used a recess appointment to make it happen. The potential cost to the president's political capital of such moves is seldom explored. Claire, however, was not just Frank's puppet or clone. While Frank Underwood mostly steamrollered Durant over disagreements, Claire sought to win Durant over and not step on her toes. In the long run, however, Claire Underwood

had to resign as ambassador, largely on Russian president Petrov's insistence. One could conclude that, while *House of Cards* often shows Frank Underwood as a very successful and shrewd political operator, his tactics and lack of respect for other actors sometimes backfire in foreign policy.

While the prominence of Secretary of State Elizabeth McCord is a given in *Madam Secretary*, there are some more significant conclusions to draw from that program's process portrayal. *Madam Secretary* shows U.S. foreign policy much more as an outcome of a collective, complex process than does *House of Cards*. The Iran plot provides an example. More hawkish and dovish voices on the potential nuclear treaty with Iran compete through many episodes of the first season. The president ultimately backs Secretary McCord's more conciliatory approach, and a treaty is signed. But, as discussed above, others in power are actively working against this outcome. This process is worth exploring in slightly more detail.

Secretary of State McCord's backstory includes the fact that she used to work for the current president in the CIA (he was the CIA director) before she retired into academia and then later was hired to head the State Department. Her husband, Henry (Tim Daly) was a Marine and eventually winds up working for the CIA in the show. These backgrounds serve in several instances of the program to show these protagonists as tough, realistic, seasoned professionals, and this balances against the generally idealistic outlook of the show.

In the Iran plot, Elizabeth McCord works with a colleague from her days in the CIA, as well as her husband, to analyze and eventually uncover a plot by many in government, including her State Department predecessor, the current CIA director, and another of her former CIA friends, to undermine the U.S.-Iran negotiations and encourage the overthrow of the current Islamic regime in Iran. This plot characterizes both the U.S. and Iran as having complex, multifaceted governments and societies, and these facets battle for dominance in the foreign policy sphere.

In this sense, *Madam Secretary*'s foreign policy world resembles Graham Allison's "government politics" model of foreign policy decision-making in his classic work, *The Essence of Decision*. In this book, Allison presents three different models for foreign policy decisions making. In the government politics model, powerful actors such as cabinet members and other key advisors jockey for position and influence, and the personalities of these actors matter (Allison, 1971, pp. 144-147). *House of Cards* also sometimes adheres to this model, although it is top-heavy with the influence of the president. *Madam Secretary* certainly corresponds as well to the "organizational politics" model, which focuses on governmental bureaucracy and its standard operating procedures. The organizational politics model emphasizes the well-known idea that government bureaucracies are inherently conservative in their adherence to traditional ways of dealing with problems, and they resist presidents or other outsides who try to impose innovations upon them (Allison, 1971, pp. 67-69).

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An excellent example of the latter is an episode in which Secretary McCord, staff members, and reporters are jetting around West Africa attempting to make deals on economic development and women's empowerment, all the while competing with China, which is also seeking to aid and influence the region. McCord's airplane breaks, and the State Department cannot easily obtain repairs because of the bureaucratic rules that do not prioritize her plane. Only considerable persistence and resourcefulness by her staff rescue the situation after she is forced to fly commercially around Africa for a while.

Neither show relies as much on Allison's "rational actor" model, in which governments are seen as unitary and rationally pursuing their interests. The rational actor view says that, unlike in the above two models, differing views within the government matter less than what is in the country's best interest (1971, pp. 10-14). This model shows states as rationally seeking to maximize their power, wealth, etc. in a way parallel to how economists often assume individuals act. *House of Cards*' foreign policy is essentially driven by the personalities of its main actors. One gets the impression that US relations with Russia, for instance, hinge on the extent to which the two presidents get along. When President Petrov snubs President Underwood's overtures in their first meeting, at the White House, he seems to want to put Underwood in his place as a newcomer and foreign policy neophyte who was not elected.

On the other hand, *Madam Secretary*'s foreign policy plays more heed to the rational interests of countries. China seems to be, for the most part, rationally pursuing its goal of a peaceful rise. Foreign Minister Chen can be counted on to object to any U.S. policy that might threaten China's interests, such as when Secretary McCord meets with the Dalai Lama and when a new Lama might be chosen that China cannot control. This, by the way, perfectly parallels China's current policy of attempting to use its power to isolate the Tibetan religious leader and, thus, maintain dominance over the disputed Tibet region ("Q&A: China and the Tibetans," 2011).

While it might be quixotic to seek realistic portrayals of governmental processes on popular television programs, one could reasonably conclude that *Madam Secretary* provides more useful education on U.S. foreign policy processes overall than does *House of Cards*. I say this in light of the preceding analysis: *Madam Secretary* does regularly demonstrate some of the complexity of competing voices from different agencies of government and bureaucratic procedures. Of course, its main emphasis as a show is on foreign policy, while *House of Cards* is more driven by the power-acquisition strategies and their personalities of Frank and Claire Underwood.

One piece of current reality that *Madam Secretary* completely avoids is the weakening of the U.S. diplomatic apparatus. There have been several news articles written in the past year on the Trump Ad-

ministration's de-emphasizing of the State Department.[5] These reports tell the story of a department with many unfilled vacancies at the top, facing large budget cuts, and, unsurprisingly, with low morale. With President Trump's plans to vastly increase the military budget, these changes could significantly shift U.S. foreign policy away from diplomacy and towards use of force (or its threat.) These current trends contrast sharply with fictional Secretary of State McCord coming to the rescue every week and preventing conflicts, signing new treaties, etc. The divergence of current events from fictional ones in this regard could not be starker.

The Role of Congress

While *House of Cards* does show Frank Underwood overwhelming his cabinet and advisors and underplaying the complexity of the executive branch, both programs have plots in which Congress' role as a potential check on the executive is shown.

Congress does appear to be a larger impediment to President Frank Underwood's plans than are others in the executive branch, which would make sense, since he appointed the latter. However, Underwood still mostly defeated Congress in the plots focused on in this study. Two major conflicts between Underwood and Congress occurred in relation to the Russian plot of *House of Cards* First of all, as mentioned above, Underwood could not get sufficient support for the controversial appointment of his wife as ambassador to the United Nations. (Such a move sounds like a strange television plot, but there is the precedent of Robert Kennedy serving as his brother John Kennedy's Attorney General.) However, as mentioned above, Frank Underwood got around that by making a recess appointment of Claire Underwood. It was the Russian president, rather than Congress, that ultimately forced Frank Underwood to ask for her resignation, so Congress' powers were not much on display in this plot.

That concession to Petrov was part of President Underwood's efforts to save his Middle East plan, for which he needed Russia to commit troops. It is worth mentioning that many in Congress opposed this plan as well. Underwood's ability to make international deals with or without Congressional support is not necessarily unrealistic, given general presidential advantages in the foreign policy realm. Presidents can make executive agreements without Senate ratification, and their commander-in-chief power often has wide scope, especially in committing troops (Davidson, et.al., 2018, pp. 310-312).

With its greater focus on foreign policy and tendency to show interplay of many actors discussed above, it is perhaps unsurprising that *Madam Secretary* shows a more regular role for Congress in policy-making. Also, many of the more routine programs that the Secretary of State oversees depend heavily on Congress for funding, as opposed to the crises and big-power diplomatic issues that *House of Cards*

[5] Two good examples are "Neglecting the State Department…" (2017) and Zengerle (2017).

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is more likely to deal with.[6] Thus, the greater reliance on Congress in *Madam Secretary* makes some sense.

In several *Madam Secretary* episodes, members of Congress and/or committees threaten specific or broad cuts to State Department funding. The drama needed for television comes in when Secretary McCord sometimes solves these with theatrical testimony to Congress. Actual drama that leads to policy changes is unusual in real committee hearings, which tend to be more predictable. An example of a more mundane and realistic interaction occurs when McCord makes complex deals in a successful effort to get the Senate to ratify a ban on landmines.[7] Swing voters in the Senate need reassurance from the Secretary of Defense to support the treaty. The Secretary wants China to ratify the treaty, and China wants the Senate to act first. Somehow, McCord gets all these things to happen.

Motivations of Key Players: Power, Policy, and Cynicism

Certainly, one of the starkest differences in the foreign policy of these two fictional worlds is in the basic outlook of their protagonists: Secretary of State Elizabeth McCord, while somewhat hardened by her CIA experience, is an idealist and an optimist who is trying to change the world in every episode of the program. Frank Underwood's overwhelming motivation is personal power, and *House of Cards* leaves unclear the extent to which he has policy goals beyond that.

In fictional portrayals of the American political process, the most common outlook is a combination of idealism and cynicism: the American political system is most often shown as worthwhile at its core, but infested with politicians seeking their own good at the expense of the public at large. More idealistic individuals, who most often come from outside of politics to be untainted by it, must regularly fight to redeem American politics and government. This is the case, certainly, in the body of films on American politics, as well as many previous television programs (Heyrman, 2018, pp. xvi-xviii).

House of Cards does not follow this tendency at all, fitting much better into a smaller but important tradition of overwhelmingly cynical portrayals of American government (Heyrman, 2018, pp. xviii-xix). The ICO plot demonstrates this point most convincingly. While ICO in this fictional world is a real threat, Frank Underwood initially rules out a military strike against it, despite his military advisors' arguments, for the most cynical of reasons. Underwood's administration is seeking judicial permission for extensive domestic surveillance that he will actually use to manipulate public opinion and help him win the election. His opponent, Will Conway, is already attempting to do something similar with the help of a social media company. If ICO is destroyed in a

[6] See Hook on Congress' tight purse strings with regard to diplomacy (2008, pp. 157-8).

[7] There is an actual landmine treaty unratified by the U.S. called the Ottawa Treaty, and in the program it is the "Calgary Treaty."

military strike, Underwood will no longer be able to justify his surveillance request, so he opposes the strike!

Later, when the presidential election appears to be very close and possibly not going his way, Underwood begins exaggerating and inventing ICO threats in what can be called a *Wag the Dog* scenario. In that 1997 farcical film, a president's staff creates an imaginary war with Albania to distract the public from a presidential sex scandal shortly before an election (Heyrman, 2018, pp. 82-83). In *House of Cards*, Underwood falsely claims that there are threats against polling places in several key swing states. In a rather bizarre plot, voting in some of these states is halted and resumed later. Underwood is able to take advantage of the "rally around the flag" effect that political scientists have determined helps incumbent presidents' popularity in the time of international crises (Pika, et al., 2018, pp. 111-113). This is a well-known tendency that can be seen in recent U.S. history in the case of George H.W. Bush's high approval ratings after the first Gulf War and in his son George W. Bush's popularity after the 9-11 attacks. The public tends to unite around the president in such times. Through the manipulations shown in *House of Cards*, and after much complication, Underwood is reelected.

IV. The Role of the United States in the World, Realism, and Liberal / Idealism

This section considers the portrayal of the United States' foreign policy in these two programs in light of the well-known international relations models of realism and liberal idealism. Realism, described by Steven Hook as the dominant view in the study of world politics, emphasizes the flawed nature of humans and the essentially anarchic international system (2008, p. 66). Similarly, Kegley and Wittkopf state that "the primary obligation of every state" in realism is to promote its own interests, and allies' reliability cannot be assumed. In such a world, states seek to protect their security by maintaining a balance of power (Kegley and Wittkopf, 2008, pp. 22-25). This theory corresponds somewhat with Allison's rational actor model, in that both generally assume that states will rationally pursue their own interests.

The major competing theory is often called "liberalism" and sometimes "idealism," so I will label it here as "liberal idealism." Hook emphasized the more positive view that liberals have of human nature and the ability of states to develop norms of behavior that avoid war. They argue that the type of states matter; for example, democracies have usually been at peace with each other (2008, pp. 68-69). Kegley and Wittkopf add that flawed institutions rather than simply flawed human nature cause violence, and these institutions can be improved. Multilateral cooperation is possible and necessary to decrease the likelihood of war (1999, pp. 19-22).

Madam Secretary is much easier to classify in terms of these models than is *House of Cards*: its plots clearly fit into the liberal idealist model. That does not mean, of course, that everything is positive, for that would not be dramatic. There are serious

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international crises and/or problems on every episode, but they are most often resolved, Secretary McCord and the U.S. do so through diplomacy much more often than through hard military power, although there are certainly examples of the latter in the show. Furthermore, McCord works with the United Nations and seeks to establish relationships with other world actors to reduce conflict, just as liberal idealism posits it is possible to do.

As mentioned above, China is shown as a largely rational actor seeking to increase its power, and its attitude toward the U.S. varies by issue; these characteristics could be described as a realist aspect of *Madam Secretary*. But Secretary McCord diffuses tension with China in part through establishing a personal relationship with Foreign Minister Chen. And the U.S. is shown pursuing a human rights agenda and not simply its narrow interests. In one conflict with China over developing Ecuadoran oil, McCord succeeds in getting a private foundation to pay Ecuador to not develop, thus helping the environment and angering both China and U.S. oil companies. The Iran plot also demonstrates that states' leadership matters, and states are not simply pursuing one objective version of their self-interest.

The cynical worldview of *House of Cards*, in which individuals seem to be almost completely selfish, could indicate that it would also depict a realist view of foreign policy. To some extent that is certainly the case, in that neither the Underwood administration nor its international adversaries such as Russia seem to be working to improve international institutions. On the other hand, the Underwoods do appear to be promoting the rights of the gay activist imprisoned in Russia, and they might be seeking peace in the Middle East through their initiative to send peace keeping forces there. It is hard to tell because, given the ways these characters are generally shown, they might only be pursuing these goals instrumentally, to gain more political support.

It is also worth emphasizing the degree to which, in *House of Cards*, international politics is personality-driven, as mentioned in my discussion of Graham Allison's models. The U.S.-Russian relations depicted in the program appear to hinge not as much on an alignment of interests, as realist theory would predict, as on the characteristics of Underwood and Petrov, and the extent to which they can get past their macho posturing and strike a deal. Petrov pointedly puts out his cigar on the wall of a stairwell in the White House at the end of an unsuccessful bargaining session with Underwood, leaving a mark so we know he was there! And when Claire Underwood (or Vice President Donald Blythe) must negotiate in Frank's place when Frank is incapacitated, Petrov is dismissive towards them and hesitant to seriously negotiate, indicating the international relations might hinge on lack of personal respect. Neither model seems to be a clear fit with *House of Cards*.

V. Conclusions

These fictional plots that skate close to the reality of United States foreign policy are significant in several ways. The two programs, as mentioned in the introduction, are fairly popular. The typical television

audience member for American politics and foreign policy-related programming is likely older and more educated than the average American, and thus more likely to vote. I suspect that these audiences are somewhat more liberal than average, which, in the case of *Madam Secretary*, might mean a fair amount of preaching to the converted on that show's liberal values about international human rights and the U.S.' role in the world.

Even relatively educated audiences could learn something from these programs. American's knowledge of foreign policy details is low (Hook, 2008, pp. 209-210), so any significant discussion of other countries and U.S. policies toward them that is closely related to real U.S. policy issues might be educational. And, unlike some programs and films, these two feature real countries, not invented ones (although *House of Cards* did invent ICO, an ISIS-like group.) As discussed above, *Madam Secretary* more than *House of Cards* features relatively realistic process details that could be educational. Presumably, most viewers would be sophisticated enough to recognize that the television secretary of state rescues the world a fair amount more often than the actual one does.

The points of view these shows express might also have some impact, although, as discussed at the start, this is more likely through repeated viewing of these or other shows that reinforce messages than through an occasional viewing of an episode. Some of the interesting points of view mentioned above are these:

House of Cards:

- The Russian government is oppressive, especially toward the LGBT community.
- International terrorism is less of a real threat to the U.S. than is implied through its exploitation by American government for political purposes.

Madam Secretary:

- The U.S. can keep peace and make deals even with historical enemies such as Iran.
- China is an international competitor to the U.S. and its interests. However, it is usually possible for the U.S. to make deals with China and avoid conflict.
- The U.S. State Department can be and often is a force for good in the world, not to mention an important voice within the U.S. government for diplomacy and avoiding conflict.

That last point is especially interesting considering the de-emphasis on diplomacy that the Trump Administration has attempted *Madam Secretary* continued until its conclusion to present an interesting alternate reality of an active State Department that increasingly diverged from what was happening in Washington. The show does feature politicians of a more hawkish or isolationist bent with whom Secretary McCord must deal, but never was there a scenario with a Trump-like president while she held that job. In fact, towards the end of the series, McCord became president.

House of Cards is the more stylish and cinematically bold of the two shows, hence its favorable critical regard. The

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acting is also superb. But, as mentioned previously, its foreign policy process portrayal is not very sophisticated. Its view that almost all political actors are cynical and self-serving is not bold or innovative at all: that is the dominant view of political films and television, and, arguably, of the public, although *House of Cards* lacks the hero that usually defeats these corrupt forces in political fiction (Heyrman, 2018). *House of Cards* has always done well at having over-the-top plots, such as the wild confrontations between President Petrov of Russia and President Underwood. The show ultimately had trouble keeping up with the outrageousness of current U.S. politics. Both of these programs have been interesting in their foreign policy portrayals, but political fiction in the world of a Trumpism poses new challenges.

TABLE 1: COMPARISON OF FOREIGN POLICY IN TWO SHOWS

	House of Cards	*Madam Secretary*
Executive Branch Actors	Dominated by president	Many important & powerful
Graham Allison Model	Government politics	Government politics (& organizational politics)
Congress' Role	Present but limited	More significant, but less than executive
Idealism & Cynicism	Cynical	Idealistic/Cynical
International Model	Unclear	Liberal idealism

APPENDIX: LIST OF EPISODES ANALYZED

The preceding analysis considers the overall body of work of these two series, but the following episodes were viewed most carefully (and multiple times) because of their concentration on the plotlines discussed above.

House of Cards (Netflix: released for viewing from 2013-2017)

Episodes of *House of Cards* are all titled simply with chapter numbers.

Season 3: Chapters 28 through 36.

Season 4: Chapters 41 through 52.

Season 5: Chapters 53 through 65.

Madam Secretary (CBS: aired from 2014-2017)
Season 1: Episodes 1, 2, 4-6, 8-11, 14-16, 21-22
Season 2: Episodes 1, 9, 11, 22
Season 3: Episodes 3, 11, 12, 16, 21
Season 4: Episodes 1, 9

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Party Registration Deadlines and Hidden Partisanship: An Individual Analysis

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Abstract

Many voters in states with party affiliation identify with or lean towards one political party but are not registered with it. This sort of "hidden partisanship" may be intentional be it may also result from a combination of changes in a voter's party identification and the electoral institutions in place. In many states it is difficult to change party registration due to early deadlines intended to prevent crossover voting. Using individual-level survey data, I find that hidden partisanship in a state increases, the further in advance of the primary the deadline to change party affiliation is. This deadline affects primary turnout, with deadlines further in advance of primary elections leading to lower turnout by partisans in their own party's primary and greater rates of abstention and crossover voting. A difference-in-difference design at the county level shows that moving the deadline to change party registration closer to the primary increases primary turnout.

Introduction

In 2016, Republican Donald Trump won 62.5% of the vote in Kentucky to Hillary Clinton's 32.7%. At the same time, registered Democrats outnumbered registered Republicans 51.2% to 40.4%. While this disjunction might at first glance reflect Kentuckians' longstanding ticket-splitting tendencies, aggregate Gallup data on the state in 2016 found the GOP to have a nearly 10-point edge in party identification at the time of the 2016 election (Jones 2017). It is reasonable to conclude from these data that many voters in Kentucky identify or lean Republican but remain registered as Democrats. What explains this phenomenon?

Notably, Kentucky has the second earliest deadline in the country to change party registration. A voter who wishes to vote in primary elections during an election year must have changed their party affiliation by December 31 of the previous year. The "hidden partisanship" (lack of concordance between a voter's party identification and party registration) (Arrington and Grofman 1999), of Kentucky voters may be due to this significant hurdle to change

party affiliation, which requires vigilance and advance planning.

Most states in the country require voters to officially affiliate with a political party when they register to vote. This affiliation manages their participation in primary elections. In the fourteen states with closed primaries, voters must be affiliated with a political party to participate in its primary elections. In order to discourage crossover voting, all of these states require individuals who change political party affiliation to be registered with a political party for a certain period of time (ranging from two weeks to nearly a year) in advance of voting in that party's primary.

This deadline to change affiliation is notable as a consistent finding in the literature on general election turnout is that individuals are more likely to register when an election is salient. Thus, states with deadlines to register to vote close to Election Day (Kelley et al. 1967; Wolfinger and Rosenstone 1980) or even election day registration (Brians and Grofman 2001) exhibit higher voter turnout.

Thornburg (2019) examines the effect of party registration deadline on hidden partisanship and primary turnout using aggregate data at the county level from 2010 and 2014. The author finds that counties in states with early deadlines to change party registration exhibit more hidden partisanship and that this effect is conditioned on realignment that the county has experienced. Counties that have exhibited the largest changes in aggregate partisanship and are located in states with early deadlines to change party registration (such as Kentucky on both counts) exhibit a large disconnect between aggregate party registration and partisan vote of the county which causal mediation analysis shows then affects primary turnout.

However, the Thornburg (2019) piece uses aggregate units (counties) to reach its conclusions and thus is vulnerable to the ecological fallacy. I extend this research by examining whether deadlines to change party affiliation affect turnout in primaries at the individual level. Based on the existing literature, I predict early party registration deadlines to be associated with lower turnout in primaries as more voters have hidden partisanship, now identifying with one party but still having registration that reflects their previous party identification. While party identification is generally thought to be resistant to change, it is not immutable, especially in the face of large scale realignments like the South.

Analyzing Democratic and Republican identifiers/leaners in closed primary states, I find greater incidence of hidden partisanship—self-identified Democrats and Republicans not registered with the party with which they identify. The misregistered comprise as much as 25 percent of registrants among party identifiers and leaners in states with the earliest party registration deadlines compared with just 10 percent in states with party registration deadlines near the primary. Looking at turnout in the 2010 state and federal primaries at the individual level, I find party registration deadlines to have a modest but statistically significant effect on turnout in the primary of the party a voter identifies with/leans to. I also use a difference-in-difference model, regressing changes in county primary turnout from

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2010 to 2014 on changes in party registration closing date during this same period. I find results that strongly support my hypothesis on the effect of party registration deadlines on primary turnout.

I find that party registration deadlines near the primary do *not* lead to more crossover voting. This indicates that the fears of policymakers that a party registration closing date near the election will lead to voters "raiding" the opposition primary do not appear to be justified. In fact it is states with early party registration closing dates that see a modest rise in crossover voting. Ironically, party registration closing dates appear to have the opposite of their intended effect. The only effect early closing dates have on who votes in primary elections appears to be to depress turnout in primaries among identifiers and leaners and lead to *greater* crossover voting.

Literature Review and Theory

Most studies examining the effect of electoral institutions on voter turnout rely on the theoretical framework of Downs (1957) as well as Riker and Ordeshook (1968) which posit the decision to cast a vote as balancing costs against benefits. While quantifying the benefits of voting has been controversial (e.g. Grofman 1993) most research has held that voters are responsive to the administrative costs of casting a ballot.

This research, beginning with Merriam and Gosnell (1924) and reaching a major milestone with Wolfinger and Rosenstone (1980) identifies aspects of election administration that affect voter turnout. Notably, the latter work finds deadlines to register to vote have the largest single effect on individual turnout. This finding has been confirmed by numerous other studies (Kim et al. 1975, Rhine 1995, Rhine 1996, Rosenstone and Hansen 1993, Squire et al. 1987, Texeira 1992). Related work on the timing of voter registration shows that it is most frequent in the final days before an election (Gimpel, Dyck and Shaw 2007).

Thornburg (2019) applies this line of research to the effect of party registration deadlines on hidden partisanship at the aggregate (county) level. Examining hidden partisanship and primary turnout in 2010 and 2014, the author finds that counties which have undergone a significant aggregate shift in partisanship over the decade prior and are located in states with early deadlines to change party registration contain many voters who have shifted partisanship with the county but remain registered with their old party. This leads to decreased turnout in the primary of the ascendant party in the county and elevated turnout in the primary of the waning party.

Thornburg (2019) draws on the literature from economics (Frederick et al. 2002), biology (McClure et al. 2004) and psychology (Ainslie 1975, Trope and Liberman 2003) which shows human beings have a tendency to discount the value of future events. The author theorizes that deadlines to change party registration far in advance of a primary lead to fewer people doing so because the lack of salience and proximity to the primary does not provide sufficient motivation to bring one's party registration in line with one's new party identification.

While Thornburg's (2019) results are suggestive, they rely on aggregate data vulnerable to the ecological fallacy and require guesses about the party identification of voters based on their aggregate vote. In this article, I therefore use survey data to observe hidden partisanship at the individual level. The present research also acknowledges the possibility that deadlines to change party registration are not exogenous to primary turnout or the political conditions in a state. Because primary turnout, hidden partisanship and deadlines to change party registration may all be related to the strength of the party system in a state, I use categories for party system strength devised by Morehouse and Jewell (2005) and use a difference-in-difference design to examine how *changes* in party registration deadlines may affect turnout in primaries.

Another possible spurious correlation may result between timing of primary elections and party registration closing date. States with early party registration closing dates tend to hold primary elections closer to the general election compared to those with later closing dates. When evaluating the effect of party registration closing date on turnout, I therefore also control for the number of days in advance of the general election that the state primary was held.

Party Registration Deadlines and Hidden Partisanship

If an early party registration closing date increases the peripheral costs of bringing one's party registration in line with one's party identification, decreasing turnout, we should expect to observe a relationship between closing date and likelihood of "hidden partisanship"—identifying with or leaning to one party but not registered with it. The further out the party registration deadline, the more likely that hidden partisanship is observed. The most effective way to test this hypothesis is to observe party registration and party identification in individual-level data to judge their concordance. The Cooperative Congressional Election Study (CCES) is one of the few election studies to provide validated party registration. The CCES is a large opt-in survey conducted online by YouGov Polimetrix. The sample size for the 2008 CCES, which is used here, is 7,918 respondents residing in closed primary states with validated party registration. Using the 2008 CCES, I am able to measure political attitudes, demographic characteristics, party registration and state characteristics.

Primary turnout at the aggregate level has traditionally been measured as the percentage of supporters of a political party that vote. This level of support at the state or county level has been measured mainly by votes for candidates for high office, either in the most recent election or over time as a "normal vote" (Norrander 1986). For individual analysis of primary turnout and party misregistration, there are a greater number of options for deciding who to include in the pool of Democratic and Republican supporters. I use a measure of party identification—including Democratic and Republican identifiers. Independent leaners are included in the analysis shown here. However, the substantive conclusions of the analysis in this paper are replicated when only identifiers are examined.

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My dependent variable is validated party registration. Because of their small numbers, minor party registrants are included with unaffiliated voters. The dependent variable has three values: registration as a Democrat, Republican and unaffiliated/ minor party.

My independent variable is a transformation of party registration closing date.[1] Many states have different party registration closing dates for those switching from major party registration compared to those switching from being unaffiliated. Because I believe the negative effects of closing date are felt most keenly by those registered with a major party who shift party identification, I use the date for shift from major party registration. The independent variable transforms the number of days this deadline lies in advance of the primary. States with no party registration closing date are excluded from the analysis due to their qualitative difference as *de facto* open primary states. My theory is partially based on the psychological predilection to discount the benefits of far off-events. Scholarship evaluating the functional form of this discounting rate has consistently found it to be nonlinear and either exponential (Lancaster 1963, Meyer 1976) or hyperbolic (Madden et al. 1999). I thus use a natural log transformation to convert party registration closing date.

I also control for education (whether the respondent graduated from four-year college), age, race (dummy variables for African-American or Hispanic), whether the respondent had a high level of political interest, gender, and the percentage of the state's population identifying as Democrats minus the percentage identifying as Republicans based on 2008 Gallup data. Finally, as described previously, I include dummy variables for moderate and weak state party strength. Separate analyses are run for Democrats and Republicans using a multinomial logit model with robust standard errors clustered by state.

The results are shown in Table 1. For the Democratic identifiers/leaners, the coefficients in the Republican and unaffiliated/ minor party comparisons are both positive. They approach statistical significance in both cases and a plot of the predicted probabilities and their confidence intervals (Figure 1) shows a significant decrease in the number of Democrats registered with their party against the transformation of party registration closing date. For Republicans, in the Democratic registration comparison the coefficient is also positive. The variable is statistically significant at $p < 0.005$. Figure 1 uses these models to plot our quantity of interest—probability of being registered as a Democrat, unaffiliated/minor or Republican—against the transformation of party registration closing date for Democrats and Republicans. Probabilities and confidence intervals are generated using the "observed value" approach rather than the "average case" approach because the former leads to less bias in the estimates

of marginal effects (Hanmer and Kalkan 2013). Both Democrats and Republicans

[1] These dates are derived primarily from Paradis (2009) for the 2008 election.

show a significant decrease in the percentage of voters registered with their party as the transformation of party registration closing date increases.

		Democratic Voters				Republican Voters			
		Unaffiliated/ Minor Party		Republican		Unaffiliated/ Minor Party		Democratic	
		Coeff.		Coeff.		Coeff.		Coeff.	
Variable		(Std. Error)	*p*-value	(Std. Error)	*p*-value	(Std. Error)	*p*-value	(Std. Error)	*p*-value
Closing Date	*Ln(Days Between CD and Primary)*	0.410	0.065	0.628	0.104	0.084	0.738	0.817	0.007
		(0.222)		(0.386)		(0.253)		(0.303)	
S. Partisanship	*D% - R% by Gallup in 2008*	-0.042	0.031	-0.064	0.060	-0.022	0.302	-0.020	0.416
		(0.019)		(0.034)		(0.022)		(0.025)	
Party Sys. Str.	*Medium*	0.180	0.634	0.546	0.365	-0.610	0.174	1.091	0.033
(Ref. Cat.:		(0.378)		(0.603)		(0.449)		(0.512)	
*Strong***)**	*Weak*	-0.815	0.029	0.121	0.826	-1.216	0.003	1.094	0.011
		(0.374)		(0.551)		(0.414)		(0.429)	
Political Interest	*High Political Interest*	-0.525	0.000	-0.058	0.807	-0.092	0.578	-0.631	0.001
		(0.148)		(0.236)		(0.165)		(0.198)	
Hispanic	*Hispanic*	0.269	0.220	0.122	0.739	0.043	0.893	0.517	0.270
		(0.219)		(0.364)		(0.322)		(0.469)	
Black	*African-American*	-0.588	0.014	-1.040	0.084	0.447	0.515	1.296	0.017
		(0.239)		(0.602)		(0.687)		(0.543)	
Age	*Age*	-0.010	0.009	0.001	0.868	-0.011	0.034	0.014	0.022
		(0.004)		(0.008)		(0.005)		(0.006)	
College	*College Graduate*	-0.077	0.591	-0.551	0.021	-0.252	0.104	-0.204	0.293
		(0.142)		(0.239)		(0.155)		(0.194)	
Female	*Female*	-0.242	0.097	-0.174	0.427	-0.431	0.004	-0.218	0.264
		(0.146)		(0.219		(0.152)		(0.195)	

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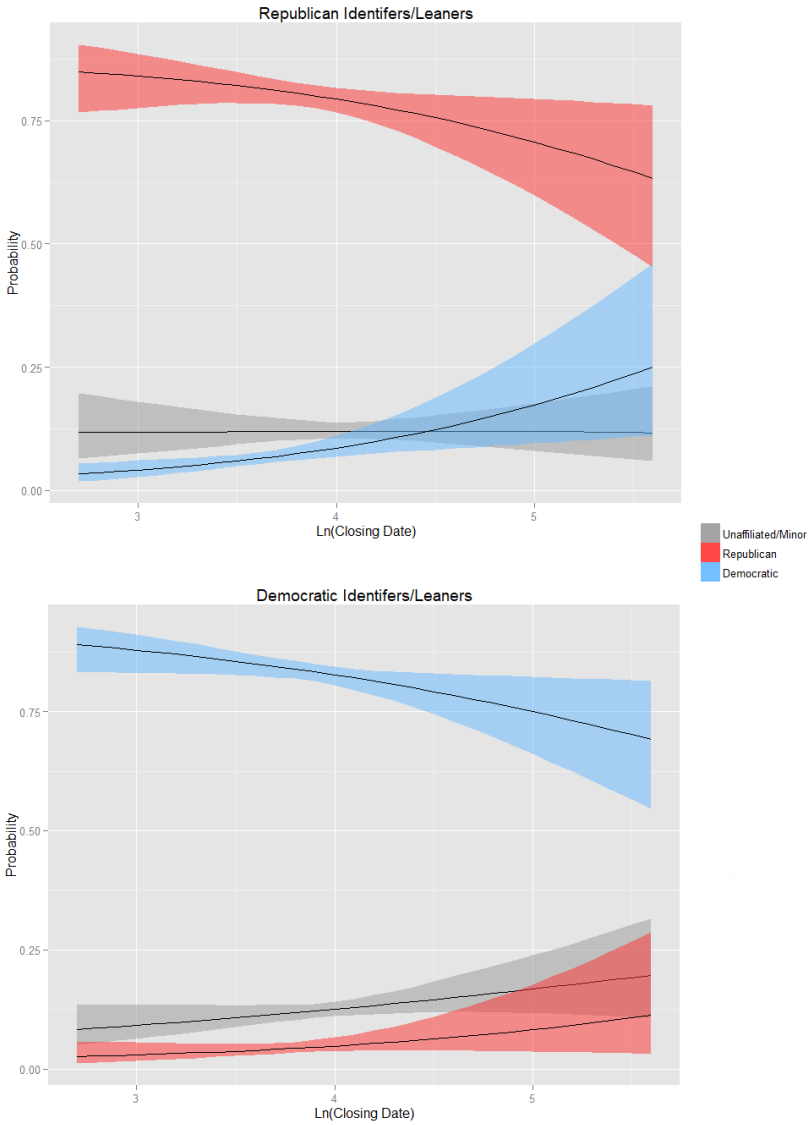
Constant *Constant*	-2.020	0.060	-4.822	0.004	-0.268	0.830	-6.378	0.000
	(1.073)		1.663		(1.244)		(1.467)	
Number of Observations	3,151				2,770			
Log Likelihood	-1693.369				-1337.765			
Pseudo R^2	0.030				0.034			

Table 1: Party Registration of Democratic and Republican Voters, 2008

Source: 2008 CCES, robust standard errors clustered on state Reference Category: Democratic registration
Reference Category: Republican registration

Figure 1: Party Registration Probabilities, 2008 CCES



The theorized relationship between party registration closing date and misregistration holds for both Democrats and Republicans. The change in the percentage of Democrats and Republicans voters who are not registered with their party when one goes from shortest to longest party registration closing dates analyzed (fifteen days to ten months, respectively) is substantial. Among both Democrats and Republicans, going from a closing date fifteen days in advance of the primary to one ten months in advance leads to a roughly fifteen percentage point drop in the percentage of voters registered with their party in closed primary states.

Party Registration Closing Date and Primary Turnout in 2010, Individual Analysis

Because closed primary states prohibit voters not registered with a party from voting in its primaries, the conclusions in the preceding section have implications on primary turnout. Misregistered voters are prevented from voting in the primary of the party they support. To test whether party registration closing date influences

turnout in primary elections through the mechanism of misregistration, I examine turnout in the 2010 state and federal primaries at the individual level.

Because presidential primaries introduce several complications to comparing primary turnout across states, such as caucuses as well as presidential primaries in some states linked to state and federal primary elections, I restrict myself to analysis of state and federal primaries during midterm elections. The CCES survey is the only one to measure turnout in midterm primaries and the 2010 version of the CCES is the only one to explicitly ask which party primary the voter participated in. This is then validated with Catalist turnout data. This makes primary turnout in a midterm election easy to measure accurately.

I separately analyze Democratic and Republican identifiers/leaners with a validated active registration in closed primary states. The dependent variable is primary turnout in the 2010 state and federal primaries and has three possible values—(1) abstention if Catalist validated this individual as not voting, (2) Democratic primary if Catalist validated the voter as participating and the voter reported she voted in the Democratic primary and (3) Republican primary if Catalist validated the voter as participating and the voter reported she voted in the Republican primary. All other combinations of these variables are removed from the analysis.

As in the previous section, my primary independent variable of interest is a natural log transformation of party registration closing date. I also include the same controls for race, age, gender, education, state partisanship, state party strength and voter political interest. In addition, I include the primary margin of victory for the gubernatorial or senatorial race in the state for the voter's party.[2] I also include a variable for

[2] States without a gubernatorial or senatorial primary were not included in the analysis.

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the number of days in advance of the 2010 general election that the state's state and federal primary took place.

The results for Democrats and Republicans are shown in Table 2. For Republicans, the natural log transformation of party registration closing date is positive and statistically significant at $p < 0.01$ for the Democratic comparison and in the positive direction in the abstention comparison. Among Democrats, the coefficients in the Republican and abstention comparisons are both positive and the Republican coefficient is significant at $p < 0.05$. The positive coefficients indicate that an earlier party registration closing date makes Republican voters more likely to either abstain from voting in a primary or vote in the Democratic primary than with a closing date closer to the election, and analogous results among Democrats.

		Democratic Voters				**Republican Voters**			
		Abstention		**Republican Primary**		**Abstention**		**Democratic Primary**	
		Coeff.		**Coeff.**		**Coeff.**		**Coeff.**	
Variable		**(Std. Error)**	***p*-value**	**(Std. Error)**	***p*-value**	**(Std. Error)**	***p*-value**	**(Std. Error)**	***p*-value**
Closing Date	*Ln(Days Between CD and Primary)*	0.198	0.095	1.485	0.038	0.132	0.400	0.578	0.003
		(0.119)		(0.717)		(0.157)		(0.193)	
S. Partisanship	*D% - R% by Gallup in 2008*	-0.059	0.000	-0.068	0.337	0.012	0.260	0.035	0.002
		(0.011)		(0.071)		(0.011)		(0.011)	
Statewide MOV	*MOV in Gubernatorial/ Senatorial Race*	0.013	0.000	-0.020	0.298	0.010	0.076	-0.005	0.261
		(0.002)		(0.019)		(0.006)		(0.004)	
Party Sys. Str.	*Medium*	-0.929	0.000	0.741	0.278	-0.797	0.000	2.358	0.000
(Ref. Cat.:		(0.089)		(0.683)		(0.191)		(0.319)	
*Strong***)**	*Weak*	-1.426	0.000	-1.902	0.045	-0.768	0.000	2.599	0.000
		(0.194)		(0.947)		(0.157)		(0.129)	
Days to Gen.	*Number of days between pri. and gen.*	-0.001	0.376	-0.000	0.536	-0.002	0.182	0.005	0.004
		(0.001)		(0.001)		(0.001)		(0.002)	
Political Interest	*High Political Interest*	-1.041	0.000	0.023	0.953	-1.000	0.000	-0.681	0.068

		(0.088)		(0.397)		(0.066)		(0.373)	
Hispanic	*Hispanic*	0.225	0.277	-1.136	0.017	0.372	0.009	1.196	0.041
		(0.207)		(0.476)		(0.143)		(0.587)	
Black	*African-American*	0.015	0.886	-1.912	0.120	0.691	0.000	0.017	0.928
		(0.107)		(1.231)		(0.109)		(0.189)	
Age	*Age*	-0.039	0.000	-0.011	0.223	-0.029	0.000	0.034	0.003
		(0.003)		(0.009)		(0.004)		(0.011)	
College	*College Graduate*	-0.218	0.005	-0.172	0.412	-0.117	0.004	-0.179	0.519
		(0.077)		(0.210)		(0.041)		(0.278)	
Female	*Female*	0.022	0.761	-0.603	0.146	-0.069	0.318	-0.272	0.174
		(0.072)		(0.415)		(0.069)		(0.277)	
Constant	*Constant*	3.270	0.000	-7.313	0.011	1.781	0.001	-7.723	0.000
		(0.455)		(2.879)		(0.529)		(1.178)	
Number of Observations		5,021				6,382			
Log Likelihood		-3236.414				-3908.605			
Pseudo R^2		0.126				0.116			

Table 2: Primary Election Turnout for Democratic and Republican Voters, 2010 State and Federal Primaries

Source: 2010 CCES. Reference Category: Democratic primary vote

Reference Category: Republican primary vote

Figure 2 plots the predicted probability of each primary turnout choice against natural log of party registration closing date for Democrats and Republicans and the corresponding confidence intervals. Both Democrats and Republicans find turnout in their respective primaries decreasing while the prevalence of crossover voting (and in the case of Republicans, abstention) increases. The trend is stronger among Republicans but a notable increase in crossover voting is also seen among the Democrats.

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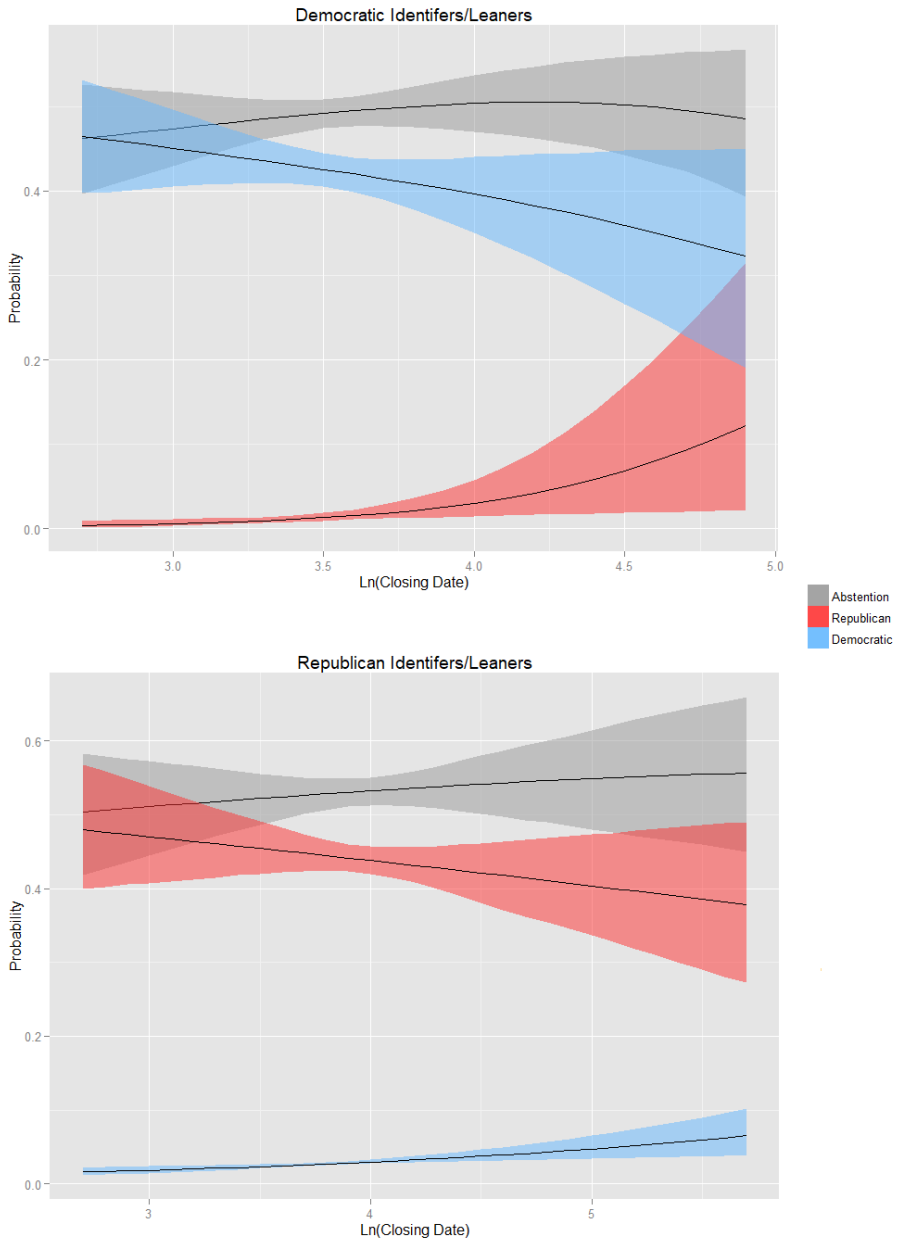
Figure 2: Primary Turnout Probabilities, 2010 CCES



Party Registration Closing Dates and Primary Turnout, Difference in Difference Model

Individual level results with the 2010 CCES offer strong support for the deleterious effect of party registration closing date on primary turnout. However, individual level estimates of turnout based on self-report are fraught with over-report

bias (e.g. Karp and Brockington 2005). I thus take the additional step of estimating the effect of changes in party registration closing date on changes in aggregate primary turnout at the county level for the 2010 and 2014 state and federal primaries.

One concern in studies of the effect of electoral institutions on turnout is endogeneity. In measuring these effects, it is possible that the implementation of the institution may in fact be shaped by turnout rate. To deal with this concern, scholars examining the effect of electoral institutions on turnout have frequently used difference-in-difference models to establish causality (e.g. Burden et al. 2014, Erikson and Minnite 2009, Giammo and Brox 2008). In such models, the dependent variable is the *change* in turnout measured between two close elections. This is regressed on changes in electoral institutions within the interval between the two elections that compose the dependent variable. This model offers two major advantages (Burden et al. 2014). First, it alleviates concerns about endogeneity because the independent variable precedes the dependent variable. It is unlikely that in this short term, there is an endogeneity bias. In addition, since the dependent variable is not raw turnout but *change* within the same unit, a difference-in-difference approach addresses concerns about omitted variable bias.

I regress the change in voting age population (VAP) turnout between the midterm primaries of 2010 and 2014 on changes in the natural log of party registration closing date.[3] In the interval between the 2010 and 2014 primaries, two states for which turnout was measured moved their party registration closing date nearer the primary election date, three measured states moved their party registration closing date further in advance of the primary election and eight did not change the party registration closing date vis-à-vis the primary election date.[4]

Among the counties in party registration states, 568 have Democratic primary turnout data (measured as above) for both elections and 626 have Republican primary turnout data. I analyze Democratic and Republican primary turnout separately. In addition to evaluating the effect of change in natural log of primary closing date, I also control for the change in the competitiveness of the primary from 2010 to 2014 (as defined above). This variable is interacted with the normal vote for the respective party's presidential candidate in the state. Other control variables include the change in the proportion of the county's VAP that was Hispanic from 2010 to 2014 as well as a similar variable for African-Americans. Change in the number of days in advance of the general election that the primaries were held in 2010 and 2014 is included. Finally, the proportion change in the overall VAP of the county is included as a control. The observations are weighted by 2014 VAP times the proportion of

[3] While the VAP turnout has been shown to be an imperfect measure of voter turnout (McDonald and Popkin 2001), voting eligible population data are not available at the county level.

[4] California switched to a top-two primary for its 2014 midterm primary, leading to its omission. Several states, such as New York, did not have a state-wide primary one year, leading to their omission.

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the county voting for the party's presidential candidate in 2012.

The results from the regressions are shown in Table 3. The effect of the party registration closing date change is strong and in the expected direction when examining Democratic and Republican primary turnout. The variable is statistically significant at $p < 0.01$. Counties in states moving party registration closing dates further from the primary had lower turnout in the Democratic and Republican primaries while counties in states moving party registration closing dates closer to the primary had the opposite effect.

Table 3: Difference-in-Difference Model for Change in Primary Turnout, 2010-2014

		Δ Democratic Turnout		**Δ Republican Turnout**	
		Coeff.		**Coeff.**	
Variable		**(Std. Error)**	***p*-value**	**(Std. Error)**	***p*-value**
Δ Closing Date	**Δ** *Ln(Days Between CD and Primary)*	-7.357	0.002	-4.899	0.000
		(2.335)		(1.320)	
Normal Vote	*Avg. State Pres. Vote Share, 2008 & 2012*	-0.083	0.356	0.423	0.000
		(0.090)		(0.058)	
Δ Primary Comp.	**Δ** *MOV for Sen. or Gov. Race in Primary*	-0.056	0.396	-0.149	0.201
		(0.066)		(0.116)	
Normal*Δ Primary Comp.	*Interaction Term*	0.001	0.471	0.002	0.350
		(0.001)		(0.002)	
Δ VAP	*Proportion* **Δ** *in VAP, 2010-2014*	56.762	0.000	20.628	0.249
		(12.940)		(17.865)	
Δ Black	**Δ** *in AA proportion of VAP*	-70.661	0.330	87.388	0.084
		(72.494)		(50.505)	
Δ Hispanic	**Δ** *in Hispanic proportion of VAP*	103.009	0.019	30.328	0.573
		(43.692)		(53.761)	
Δ Days to Gen.	**Δ** *in days to General election from Primary*	-0.084	0.047	-0.008	0.575
		(0.042)		(0.014)	

Constant	*Constant*	0.337	0.942	-25.730	0.000
		(4.666)		(3.130)	
Number of Observations		568		626	
R^2		0.192		0.528	

Numbers in Percent

Conclusion

Most of the discussion of the effect of institutions on voter turnout follows the basic logic of Downs (1957) and Riker and Ordeshook (1968) that voter turnout balances costs against benefits. Deadlines to register to vote that are well in advance of the election lead to lower turnout because they increase the marginal costs of registering by forcing voters to plan ahead and decrease the perceived benefits through the human tendency to discount the value of future events. Thus, voter registration closing dates well in advance of an election lead to significantly lower turnout. The present research has extended this literature on closing dates to the institution of party registration in states with closed and semi-closed primaries. While voter registration closing dates are limited by federal law from extending more than one month prior to an election, no such restriction exists for the deadline a voter has to change from one political party to another. This means that in many states with party registration, a voter must reregister with a new political party months in advance if he or she wishes to vote in the party's primary.

I find that over 25% of Democrats and Republicans are not registered with the party they identify with/lean to. These voters may have initially identified differently, but over time have moved to their current party identification. In contrast, states that have party registration closing dates closer to the primary election have only approximately 10% of Republicans and Democrats not registered with their party.

Examining 2010 primary turnout at the individual level, I find a change in party registration closing date from ten months to fifteen days leads to a ten percentage point change in Republican primary turnout. Among Democrats, a change from five months to fifteen days leads to an eight percentage point change in turnout in the Democratic primary.

One major finding of this research is that party registration closing dates close to the election do *not* increase the probability of either Republicans or Democrats "raiding" opposition primaries. This has long been a justification for early party registration closing dates but party registration states uniformly have little in the way of crossover voting except among voters where party registration closing dates are early.

For party registration to function as intended, a voter's party in the records must match his or her internal party identification. However, because party registration is a government record, it must be updated when a voter's party loyalty changes. This is an arduous task with little reward relative to initially registering to

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vote. In order to facilitate participation in primary elections, voters need to have the ability to change their party registration quickly and easily.

The present research demonstrates that early party registration closing dates serve as a barrier to voters updating their party registration when it is obsolete. This has a negative effect on primary turnout among Democrats and Republicans. Moving closing dates for party registration closer to the election would serve to raise turnout. The research demonstrates that such a change would not appreciably increase crossover voting, or raiding, of opposition primaries.

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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-

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[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-

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[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.

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[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

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[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

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[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-

[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.

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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.

[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

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[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

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[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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[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).

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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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[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.

[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.

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

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

[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.

[69] Id.

[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.

[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.

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

[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.

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

[99] Id. at 261-262.

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

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

[102] Id. at 261-262.

[103] Id. at 267.

[104] Id. at 266.

[105] U.S. Const. art. II, §2, cl. 1

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

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

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

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

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

[118] 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).

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

[122] 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).

[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).

[126] 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).

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[128] Id.

[129] 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).

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[1]36 Silverstein, "President Trump Can Pardon Himself – but It Would Only Begin Bigger Legal Battles."

[1]37 Turley, "Yes, Trump can Legally Pardon Himself or His Family. No, He Shouldn't."

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[1]40 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).

[1]41 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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Perceptions of Discrimination in the Legal Profession

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Abstract

Historically, the legal profession has been dominated by white men (García-López 2008). Over time, the barriers hindering diverse participation have been somewhat lifted. In recent years, law schools enrolled equal percentages of men and women, and the number of minority students has also increased. So, how has the legal profession adapted to these changes? The hiring of women and minorities in the field of law does not reflect the increasing diversity seen in law school. Today, only 36% of lawyers are women. While existing research shows discrimination present in the field of law, few studies have examined the relationship between an attorney's practice area and experiences of discrimination. It is expected that masculine-typed areas of law create less inclusive work environments; therefore, I expect that women working in masculine-associated areas would report more gender discrimination as well as lower job satisfaction relative to attorneys in feminine-associated areas. Using an existing data set of practicing attorneys in North Carolina, we explored the degree to which reported levels of job satisfaction and perceived gender discrimination varied across gendered areas of law.

Introduction

Historically, the legal profession has been dominated by white men (García-López 2008). In recent years, law schools have been enrolling men and women in equal proportions, and a growing number of minority students are graduating from law school (National Association for Law Placement 2015; Olson 2017); however, the growing diversity in law school is not mirrored in the field of law. As of 2017, only 36% of lawyers were women and racial minorities made up less than 10% of the American Bar Association (National Association for Law Placement 2017). The percentage of women and minorities represented in the upper ranks of the field is even smaller, as there is little diversity among law partners (National Association of Law Placement 2017).

In this paper, I aim to analyze how experiences of attorneys differ across gendered areas of law. This paper will first discuss the struggles that women face in the legal profession. Understanding the way that out-group identities function within gender-associated workplaces allows for an understanding of how gender identities affect reported job satisfaction and per-

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ceptions of workplace discrimination.

Women in the Legal Profession

The lack of representation in the field of law leads to unique problems faced by marginalized groups. There is a wealth of research regarding women's experiences in employment, particularly in the field of law. The literature focuses on systematic barriers preventing equality in the field and the tangible ways in which this workplace discrimination is demonstrated. While women in law have made great strides in recent years, they still struggle with issues regarding discrimination in the field, balancing work and family, and pressures to perform gender in the workplace. Such struggles make it difficult for women in the legal profession to achieve the same status and respect as their male coworkers.

Systematic Barriers in the Legal Profession

Although work is being done to narrow the gender pay gap in the legal profession, wage disparity in the field is still a pressing issue (Rikleen 2013). Research suggests that women and men earn the same amount at the beginning of their career; however, in later years, women earn much less than their male counterparts, although the exact pay disparity is debated (Noonan, Corcoran, and Courant 2005; Reichman and Sterling 2013). While there is question as to why, exactly, the wage gap exists in the field, there is little question that the gap exists and reflects systematic hindrances to women's success. One explanation for this phenomenon is that it is harder for women in law to move up into male-dominated positions which make more money (Kay, Alaire, and Jones 2016; Hagan, et al. 1991; Spurr 1990; but also see Hultin 2003). For instance, in 2007, only a fifth of partners were women, while women made up a little under half of associates at law firms (National Association for Law Placement, 2017). Many women are leaving the field before they can become partners because pressures to balance work and family are not alleviated by benefits, such as paid family leave (Kay, Alaire, and Jones 2016).

Performing Gender in the Workplace

Because men disproportionately populate the upper ranks of the legal system (e.g., partners, judges), there may be a pressure on individuals working in the field of law to present their gender in a more masculine way. Some women in the field choose to abide by such constraints to avoid professional consequences, while a smaller portion of female lawyers attempt to buck the system (Tomlinson et al. 2012). In the article "What It Takes to Be a Trial Lawyer If You're Not a Man", Laura Bazelon describes the struggles that many women face to be taken seriously in the masculine legal profession. Many women in law perform their gender by keeping their hair "not too long," but "not too short," and wearing clothes deemed "appropriate" by

those in power (i.e., men). Women must also be conscious of how they present themselves in the courtroom. Female lawyers have to find a balance between being "too hard" and "too soft", so that they are not deemed as overly emotional by judges and fellow attorneys (Bazelon 2018; Rhode 2011).

Work and Family

A major factor which impacts the retention of women in the legal profession is the struggle to balance work and family. The field of law is particularly unsupportive of women with families, which causes many women to leave the field entirely (Cooney and Uhlenberg 1989). This issue is exacerbated by practices such as the billable hour and the lack of paid family leave. In particular, the billable hour has become an issue which hinders women in the field. Many professional women still feel a pressure to be the primary homemaker while balancing a successful career. To balance work and family, female lawyers spend extra time outside of work hours attending to the physical needs of their children, whereas male lawyers tend to spend leisure time with their children (DeGusti, 2008). Since the more time-intensive physical care is typically allocated to mothers, male lawyers can contribute more billable hours at work. Billable hours generate revenue for firms, making this kind of "masculine" work highly valued, which disadvantages mothers who work in the law profession (Kay, Alaire, and Adjei 2016).

While women are typically tasked with taking care of the kids, men are expected to work longer hours in order to provide for their families. Excessive "work ethic" is just one way that masculinity is performed in the legal profession. Men are awarded status for spending long nights at the office and never making it home to their families. Despite these workplace norms, some men in the legal profession choose to make family time a priority. When men opt out of the hypermasculine "breadwinner" model, their masculinity tends to be questioned in the workplace. Similarly, to women with children, these male lawyers tend to be overlooked and are assumed to take work less seriously than their "masculine" coworkers (McGinley 2013).

Although both men and women are impacted by workplace norms surrounding work and family, these struggles more frequently result in female attrition from the field of law. Women ultimately leave the legal profession when it becomes clear that their prospects for advancement are quite different than female attorneys without families or male attorneys with children (Kay, Alaire, and Adjei 2013).

Occupational Segregation

Occupational segregation exists within different fields and workplaces to separate the kinds of work deemed fit for men and women. In general, men are seen as more hierarchical and are more likely to work in positions that are associated with leadership and

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power (Diekman, Goodfriend, and Goodwin 2004; Haire and Moyer 2015). In the field of law, men are more likely to work in private practice, become a partner, work for smaller firms, and engage in solo practice; meanwhile, women are more likely to stay in the lower ranks of the field and work in the public sector (Hagan et al. 1991; Haire and Moyer 2015; Merritt 2015; National Association for Law Placement 2017). The composition of the law profession has changed since the recession in 2008. In the early 2000s, the disparities between men and women in the field of law were beginning to narrow, with more women graduating from law school and finding a place in the field; however, when the economy started to turn, prospects for law school graduates began to plummet. Women's careers were hit harder than men's, as more men moved to smaller firms and solo practice (Merritt 2015). The changes seen after the recession are still reflected in the law profession today and impact lawyers' experiences finding a place in the field.

Job Satisfaction and Perceptions of Discrimination

A smaller body of research exists on job satisfaction in the field of law. It seems likely that job satisfaction varies based on the kind of law that an individual practices (public vs. private law). Since public and privatized law are gendered arenas, one might expect that job satisfaction is a gendered idea; however, little research supports this hypothesis. In general, most research shows no job satisfaction discrepancy on the basis of gender or minority status (Dau Schmidt and Mukhopadhaya 1999; Dinovitzer and Garth 2007; Hagan and Kay 2007). Meanwhile, studies show that female lawyers are more likely to report feelings of depression relative to men (Hagan and Kay 2007).

Similarly, perceptions of discrimination tend to differ among survey respondents. A great deal of research on earnings and promotion in the field of law exist. These factors are indicative of differential treatment towards certain groups in the law profession; however, reported perceptions of discrimination within the field differ. Research shows that women and minorities in the field of law are more likely to perceive discrimination in the workplace (Collins, Dumas, and Moyer 2017; Hirsh and Lyons 2010). Furthermore, individuals who began their careers during a time of great discrimination are likely to be more perceptive to discrimination (Haire and Moyer 2015). A 2017 study by Collins, Dumas, and Moyer examines survey data for trends regarding perceptions of discrimination. In this paper, race, gender, and age are analyzed as independent variables which influence perceptions of discrimination and overall job satisfaction. Ultimately, this study finds that women and minorities are more likely to perceive discrimination in the workplace and that women of color, in particular, are more likely to report lower levels of job satisfaction (Collins, Dumas, and Moyer 2017).

Even though job satisfaction, wage gap, and retention data tell a story about the experiences of women and minorities in the field of law, survey responses might not always reflect what is known about conditions in the field of law. One explanation for this phenomenon is the System Justification Theory. System Justification Theory suggests that individuals who face discrimination are likely to report low levels of discrimination when asked. This is because they have internalized their oppression and justify their experiences as part of the "status quo" (Blasi and Jost 2012). System Justification Theory explains that, while conditions are clearly different for women and minorities in the law profession, survey respondents might still report high levels of job satisfaction and low perceptions of workplace discrimination.

Implications of Practice Area on Experiences

In the field of law, men and women tend to work in separate spheres. These variables are operationalized in two ways (See Table 1). First, I categorize the type of legal practice that respondents identified as their workplace and label these as masculine-typed, feminine-typed, neutral, or other. In response to the question, "Which one below best describes your practice?" attorneys could choose from the following categories: solo private practitioner, small private firm (2 to 5 attorneys), medium private firm (6-19 attorneys), large private firm (20 or more attorneys), in-house counsel for a private business or corporation, in-house counsel for a nonprofit organization, government attorney, legal aid attorney, not actively practicing, and other.

From the literature, it is clear that men are more likely to engage in solo practice while women are more likely to work in larger firms. For this reason, work in smaller firms is classified as masculine-typed while work in larger firms is classified as feminine-typed.

Furthermore, women are more likely to do work that facilitates the operations of more prestigious, masculine work. Because of this, practice types (such as legal aid) are categorized as feminine-associated work.

A second way that gendered framework could be conceptualized is through the amount of litigation associated with the type of law practiced. In this study, masculine associations are paired with more litigation-based practice, feminine associations less focused on litigation. In the survey, respondents were asked to estimate the percentage of their work that is based on litigation. While qualitative coding of practice areas provides a more general view of attorneys' experiences in particular fields of law, quantitative coding allows for a more individualized analysis.

My hypotheses focus on ways that gender identities contribute to experiences within gender-associated specializations of legal practice, leading to the following predictions:

The emphasis on hypermasculine norms in masculine fields of law will

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shape the experiences of the "outgroup" in a negative way. I anticipate that masculine-associated practice areas will be organized in a more hierarchical sense and will foster less inclusive work environments. I expect that similar atmospheres are created among attorneys working primarily in litigation. I expect that these masculine-associated spheres will result in higher reports of discrimination among members of the outgroup:

H_{1a}: Female attorneys will report more perceived discrimination when working in masculine associated practice areas.

H_{1b}: Female attorneys will report more perceived discrimination when working in positions where more than half of their time is spent in litigation.

Is there a relationship between perceptions of discrimination and job satisfaction? From the literature, it is clear that perceptions of discrimination differ based on the identity of the respondent (Collins, Moyer, and Dumas 2017); meanwhile, there is debate as to whether there are meaningful gender or racial differences in career satisfaction. While most studies conclude that the difference among these groups is minimal (Dau-Schmidt and Mukhopadhaya 1999; Dinovitzer and Garth 2007; Hagan and Kay 2007), previous studies have not analyzed career satisfaction as it differs based on legal specialization. I anticipate that once reported career satisfaction is categorized by gender-associated spheres, nontrivial differences between respondent demographics will emerge.

H_{2a}: Female attorneys will report lower job satisfaction than men when working in masculine associated practice areas.

H_{2b}: Female attorneys will report lower job satisfaction than men when working in positions where more than half of their time is spent in litigation.

Data, Variables, and Methods

To assess the impact of gender identity on workplace experiences in the legal profession, I use the results from an online survey of North Carolina attorneys conducted by Collins, Moyer, and Dumas in 2014. The survey was distributed to every licensed attorney (24,775 attorneys in total) from North Carolina via email using Qualtrics software. Ultimately, 2,744 usable survey responses were collected over the course of one month. Although limited in terms of the focus on a single state, the sample is comparable to both state and national estimates of the legal profession with respect to both demographics and practice types, lessening the concern of self-selection bias in the data set (Collins, Moyer, and Dumas 2017). The survey consisted of questions regarding practice-type and specialization, as well as information about respondent characteristics, including law school attended, years of practice, and how much of the re-

spondent's practice involves litigation.

Table 1: Practice Area

Masculine-Typed	solo, small firm, in house-private
Feminine-Typed	large firm, in house- nonprofit, legal aid
Neutral	medium-sized firm , government
Other	other

The main independent variables in this study are gender and the amount of litigation a respondent engages in. I treat the gender-association of a respondent's practice area as an independent variable to measure the impact on personal feelings about one's career. Practice areas were coded as masculine-typed, feminine-typed, neutral, or other. This coding was done in two ways. The first categorization was done based on qualitative characteristics of legal practice that change based on the size of a law firm (See Table 1). Gender-associated coding was also quantitatively done on the basis of the estimated percentage of time spent in litigation. Percentage of time spent in litigation was recorded on a scale of 0 to 100. Responses from 0 to 50 are categorized as feminine-associated practice, while responses from 51-100 are categorized as masculine-associated practice. To determine the relationship between gender associated spheres of law and the two dependent variables (perceptions of discrimination and career satisfaction), I performed bivariate analysis by cross tabulations with chi squared.

Table 2: Overall Reports of Gender Discrimination in Feminine Areas of Law.[1]

	Non-feminine area	Feminine-area	Total
No gender discrimination	71.30% (1304)	77.12% (327)	72.39% (1631)
Gender discrimination	28.70% (525)	22.88% (97)	27.61% (622)
Total	100.00 % (1829)	100.00 % (424)	100.00 % (2253)

Results and Discussion

Of the 2,254 survey responses collected, about two thirds of the respondents were male, while the remaining third identified themselves as female. Furthermore, 91 percent of survey respondents were white, 5 percent were African American, and less than 4 percent of respondents identified themselves as American Indian, Hispanic, or any other race. Additionally, around 32% of respondents said they spend half of their time at work or less in litigation. Approximately 68 percent of respon-

[1] Relationship is statistically significant (p = 0.016)

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dents identified that they spend 51% or more of their time at work in litigation. A t-test was performed to determine the relationship between gender and reported percentage of litigation. Overall, women reported spending an average of 55% of their time in litigation while men reported spending 58% of their time in litigation. The difference in the amount of litigation reported by men and women was found to be statistically significant.

Cross tabulations with chi squared calculations showed that there is not a statistically significant relationship between women's reported gender or race discrimination and masculine associated practice areas. 76% of women working in masculine practice areas reported gender discrimination, compared to 72% of women working in non-masculine practice areas. Despite these differences in percentages, the relationship is not statistically significant; As a result, I cannot reject the null hypothesis for hypothesis 1a.[2]

Table 3: Women's Reported Gender Discrimination in Masculine Practice Areas [3]

	Non-masculine area	Masculine-area	Total
No gender discrimination	26.30% (101)	23.78% (88)	25.07% (189)
Gender discrimination	72.70% (283)	76.22% (282)	74.93% (565)
Total	100.00 % (384)	100.00 % (370)	100.00 % (754)

Additionally, there was not a statistically significant relationship between amount of litigation (when categorized as 51% or more and 50% or less) and reports of gender and race discrimination, respectively. The null hypothesis for hypothesis 1b cannot be rejected.

Table 4: Women's Reports of Race Discrimination[4]

	50% or less litigation	51% + litigation	Total
No race discrimination	85.76% (259)	89.91% (392)	88.21% (651)

[2] However, there is a statistically significant relationship between overall reports of gender discrimination and practice area gender associations. Overall reports of gender discrimination were lower in feminine practice areas (See Table 2).

[3] Relationship not statistically significant. Similar results found when analyzing women's reported race discrimination in masculine practice areas.

[4] Relationship not statistically significant. Similar results found when analyzing women's reported gender discrimination based on percentage of litigation.

Race discrimination	14.24% (43)	10.09% (44)	11.79% (87)
Total	100.00% (302)	100.00% (436)	100.00 (738)

Overall, there is a relationship seen between women's reports of career satisfaction and masculine-areas of law. Women are more likely to report lower career satisfaction when working in masculine practice areas. 21 percent of women working in masculine practice areas of law reported low career satisfaction, compared to 14% in non-masculine practice areas. Additionally, 85% of women working in non-masculine practice areas reported high career satisfaction, compared to 78% of women who work in masculine practice areas. As a result, I reject my null hypothesis for hypothesis 2a.[5]

Table 5: Women's Reports of Career Satisfaction in Masculine Areas of Law[6]

	Non-masculine area	Masculine-area	Total
Low Career Satisfaction	14.62% (57)	21.39% (80)	17.92% (137)
High Career Satisfaction	85.38% (333)	78.61% (294)	82.07% (627)
Total	100.00% (390)	100.00% (374)	100.00 (764)

Finally, the relationship between women's reports of career satisfaction and amount of litigation is not statistically significant; therefore my hypothesis (2b) is rejected. This conclusion could be a result of the dichotomous way that the litigation variable was categorized.

Table 7: Women's Reports of Career Satisfaction[7]

	50% or less litigation	51% + litigation	Total

[5] In addition, there is a statistically significant relationship between overall reports of career satisfaction and feminine practice areas. Overall, respondents were more likely to report high career satisfaction when working in feminine areas of law than those who work in non-feminine areas. (See Table 6).

[6] Career satisfaction was assessed on a scale from 0-7. Responses of 0-3 were coded as "low career satisfaction" while responses of 4-7 were coded as "high career satisfaction". Relationship statistically significant ($p = 0.015$).

[7] Relationship not statistically significant.

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Low Career Satisfaction	20.32% (63)	16.30% (74)	17.92% (137)
High Career Satisfaction	79.68% (247)	83.70% (380)	82.07% (627)
Total	100.00 % (310)	100.00 % (454)	100.00 % (764)

Further research will explore the degree to which career satisfaction and perceptions of discrimination differ on the basis of gendered specializations of law practice. Furthermore, my future research on this topic will account for age as an identity intersecting with race and gender to create unique experiences in the legal profession. Finally, additional work can focus on men's experiences in feminine practice areas and specializations of legal practice, as it relates to their perceptions of discrimination and reported career satisfaction.

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Politics at the Pulpit: Elite Religious Cues and Immigration Attitudes

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Abstract

Previous scholarship has demonstrated a link between religiosity and immigration attitudes, often inferring the effect of cues from religious leaders as the motivating source. This study directly examines the "elite cues" linking mechanism with an experiment embedded in a nationally representative public opinion survey. We improve on previous research designs by introducing a pretest that measures immigration policy attitudes among respondents which can then be directly compared to posttest measures after the introduction of the elite cue stimulus. Multivariate analysis of the survey results reveal no support for the elite cues explanation. We discuss the implications of these findings for elite religious cues as an influential factor on immigration policy attitudes in the United States as well as assess the appropriateness of survey experiments to test the elite cues mechanism in driving immigration attitudes.

Introduction

Most scholarly research on immigration has focused primarily on social and economic factors. In terms of social determinants of immigration attitudes, scholars have identified the important effect of cultural anxiety (Citrin 1990; Citrin and Wright 2009; Higham 1955), racial/ethnic attitudes (Brader, Valentino, and Suhay 2008; Burns and Gimpel 2000; Dustmann and Preston 2007), and social context (Hood and Morris 1998; Hopkins 2010; Rocha and Espino 2009). In terms of economic influences on immigration attitudes, research has focused on sociotropic vs. individual economic well-being (Citrin et al. 1997; Espenshade and Calhoun 1993; Wilson 2001), and how opposition to immigration tends to follow predictable cycles in response to macroeconomic boom and bust periods (Daniels 2004).

More specific to our topic, recent research has investigated the effect of religious variables as key determinants of immigration attitudes (Brenneman 2015; Brown 2010; Fetzer 1998; Fitzgerald 2012; Knoll 2009; McDaniel, Nooruddin, and Shortle 2011; Nteta and Wallsten 2012). With the exception of Brown (2010), this research has found a consistently positive relation-

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ship between religiosity and/or religious attendance and liberal immigration attitudes. Despite the relative consistently in these findings, the theoretical explanation for this connection still subject to debate. One proposed explanation has been the "elite cues" mechanism: higher levels of religiosity are associated with political attitudes more favorable toward immigration/immigrants because religious leaders broadly tend to oppose more punitive and restrictive immigration policies. Those who have higher levels of religiosity are more likely to be exposed to and internalize these messages from their clergy which are then reflected in their policy attitudes.

A growing body of literature supports this argument that churches wield significant power to influence their congregants' attitudes toward "moral" issues. Wald, et al. (1988), for instance, found that a church's mean level of "moral conservatism" is a strong predictor of the levels of the corresponding individual levels of moral conservatism among church members. This is to say, a church's position on questions of morality seems to directly impact its congregants. Building off of this earlier study, Bjarnason and Welch (2004) find that church attendance among Catholics is negatively correlated with support for capital punishment. Catholics, the study explains, are distinct among Christians in their vocal opposition to the death penalty. This phenomenon is absent among other Christian denominations, whose church officials often do not express the same moral opposition to the death penalty. The more Catholics attend religious services, where they are likely to hear these messages, the more likely they are to oppose capital punishment. Smith (2008) furthers this line of research by showing that political messaging from Catholic priests has both direct and indirect effects on the opinions of those in their parishes. Djupe and Gwiasda find a similar effect among Evangelicals' attitudes toward the environment (2010). The traditional heuristic dictates that Evangelical ministers either ignore environmental issues or address them negatively from the pulpit. This heuristic is broken, however, when Evangelical ministers deliver a pro-environmental message framed as a "moral issue." This forces church-goers to assess the minister's position based the soundness of argument, and, as Djupe and Gwiasada (2010) conclude, in-group members will often accept the conclusion itself. This again underscores the church's position as an influence on moral issues.

Insomuch as religious elites frame immigration as a moral issue, it may also be subject to these same forces.

Other scholars have attempted to determine why elites engage in this behavior as well as which types of clergy are more likely to involve themselves and in what ways. These findings show that pastors see themselves as "spiritual representatives" of their churches and are particularly likely to engage in political cueing when they are either geographically or ideologically isolated from their broader communities outside of their church (Djupe and Gilbert 2002).

Additionally, both Guth, et al. (1997) and Putnam and Campbell (2012) find that politically liberal pastors and congregations engage more frequently in the process of political cueing than their conservative counterparts. Smith (2005) also finds that liberal Catholic clergy not only engage in cueing more frequently but also that they wield more actual influence than do their conservative counterparts,

though, as Putnam and Campbell (2012) note, their influence is exhibited in different ways. Churches with individuals who "connect faith and politics" are more likely to be identify as Republicans, despite the fact that traditions with "more political activity at church" have fewer Republicans (Putnam and Campbell 2012, 440). This highlights the different ways in which conservatives and liberals give and receive cues in church communities.

Though this theory of elite religious cueing is widely proposed, there is little direct evidence validating it as a driver of immigration attitudes. Instead, previous research has *inferred* this relationship based on the correlation between elite cueing and attitudes among religiously active congregants. In other words, previous studies have answered the questions of *how* and *to what extent* religious behavior influences immigration attitudes but have not been able to address clearly the fundamental questions of *why* and *by what means*. Knoll (2009) writes of his own piece, but also summarizing the state of the literature: "Even though we have herein demonstrated with confidence that religion exerts an independent effect on immigration preferences, the argument for elite cues presented in this article is merely implied by these results" (328).

Nteta and Wallsten (2012) attempt to account for this by asking individuals directly whether or not they received a message on immigration from their pastor. They offer additional support for elite cueing theory as they show that American religious leaders are communicating support for liberal immigration policy and that the cues are impactful in changing the immigration attitudes of their congregants. While this research is a more direct test of the elite cues mechanism, it relies on survey data that does not directly indicate whether the elite cues given are in support or in opposition to liberal immigration policy, limiting the conclusion's applicability.

Our current objective is to provide a more direct assessment of the elite cues mechanism that has either been inferred by previous research or limited in its methodology. We take advantage of a survey experiment that directly measures attitudes toward a particular immigration policy (President Obama's 2015 executive order) and how these attitudes are affected by an elite religious cue introduced in the survey. This will provide the most direct test to date of the elite cues mechanism linking religiosity with immigration policy preferences.

Hypothesis

Based on the previous research described in the literature review and the elite cues mechanism discussed above, we propose the following hypothesis:

> *Those exposed to an elite religious support cue for Obama's executive immigration actions will become more approving of the executive order than those not exposed to the cue.*

Additionally, there are reasons to expect that this effect will be stronger for some individuals than for others. For example, Knoll (2009) argued that the elite cue mechanism worked for individuals with higher levels of religious service attendance because they are more likely to receive these elite religious cues on immigration more frequently. Theoretically, more frequent religious service attendance would increase the likelihood that an indi-

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vidual would be exposed to an elite religious cue. More frequent attendance is also often an indicator of more devout observance of one's religious traditions and teachings, meaning that they would be more likely to take seriously and internalize the cues given by their religious leaders.

> *The effect of elite religious cues on approval for Obama's executive immigration action will be stronger for individuals who attend religious services more frequently than for those who attend less frequently.*

There is also good reason to suspect that partisanship and political ideology may mediate the effect of elite religious cues on immigration policy attitudes. Social psychology research has consistently shown that political conservatives are more sensitive to hierarchy and deferential to authority (Graham, Haidt, and Nosek 2009; Haidt 2012). We also know that conservatives tend to be more religious and invested in their congregations (Layman 1997). We may thus expect conservatives to be more likely to defer to cues given by religious authorities with whom they identify. When religious authorities indicate support for a particular position on immigration policy, we may then expect conservatives to internalize and manifest that position in their stated policy opinions. On the other hand, we expect an already-high degree of support from pro-immigrant policies from Democrats and liberals and thus do not expect a further endorsement from a religious authority to substantively affect their stated levels of support.

> *The effect of elite religious cues on approval for Obama's executive immigration action will be stronger for political conservatives and Republicans than for political liberals and Democrats.*

While our focus in this research is on elite *religious* cues, there is also a good deal of research showing the effectiveness of elite *political* cues on attitudes and behaviors (Lodge, Steenbergen, and Brau 1995; Miller and Krosnick 2000; Zaller 1990). It is possible that the combination of religious and elite cues may interact in such a way as to strengthen and reinforce one another. Thus, those who approve of President Obama may be more likely to internalize a religious cue endorsing the president's executive order.

> *The effect of elite religious cues on approval for Obama's executive immigration action will be stronger for those who approve of Obama's job performance than those who disapprove.*

Data and Method

To directly test the effect of elite religious cues on immigration policy attitudes, we used survey data collected from the 2015 Colonel's Canvass Poll, a nationally representative sample of 715 adult Americans, although due to missing data not all are included in each analysis. This survey was conducted in March of 2015 and sampled both landline (62%) and cellphone (38%) respondents. Post-stratification weighting is used to account for underrepresentation among racial minorities and younger respondents.

Methodology

As is standard for experimental research designs, we assess the effect of the treat-

ment stimulus with a series of difference-of-means t-tests between the control and treatment groups, including among the various demographic and political subgroups as described in the previous section. Because of the usual levels of correlation between the various independent variables, we also use a standard multivariate regression analysis to determine the independent effect of each variable on changes in favorability toward President Obama's executive immigration action.

Dependent variable

Respondents were first asked early in the survey to indicate their approval of "President Obama's executive order that expands the number of undocumented immigrants who are allowed to stay and work in the country." They indicated responses on a 0 to 10 scale with higher values corresponding to higher levels of support. Half of these respondents were later randomly selected to receive a second "treatment" question which was disguised as one of five "religious awareness" questions in response to a sampling of headlines. This question informed them that American religious leaders have "recently express[ed] support for President Obama's executive action on immigration, including the U.S. Conference of Catholic Bishops and leaders of many Protestant denominations and other religious groups." This prompt was intentionally designed to be both suitably broad, cueing both Catholic and Protestant respondents, and intentionally narrow so as to make respondents believe that the "religious leaders" referenced would likely include be their own. The control group received the other four religious awareness questions but were not given the executive immigration action prompt. Both the control and treatment groups were then asked again to indicate their 0 to 10 level of approval of President Obama's executive order on immigration. This question was placed toward the end of the survey in order to mask the research design as much as possible and also to minimize the potential effects of social desirability.

The pretest score was then subtracted from the posttest score to produce a new value for each respondent measuring the change in approval from the first time the question was asked to the second time. A positive value of this new variable would indicate that an individual answered the posttest question more favorably than the pretest question (that is, they become more favorable toward the executive action at the end of the survey as compared to the beginning) and a negative value would mean the opposite. Theoretically, if the elite cue mechanism works as hypothesized, we should expect to see the favorability change variable higher for the treatment group than for the control group, indicating that the reception of the elite religious endorsement increased levels of approval among those who received it.

We note that it is possible that that the explicit cuing of "President Obama" in the treatment prompt may prime respondents to associate their perceived favorability of the specific immigration policy described with their preexisting feelings toward President Obama. We chose to do so, however, in order to reflect as closely as possible the way in which respondents would likely encounter information about specific immigration policies in the "real world"—that is, with specific partisan framings. In this way, the question wording attempts to achieve as much external validity as possible which is often difficult in an experimental design.

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We also call attention to the fact that our operationalization of the dependent variable is a direct measure of *change in approval* from the beginning to the end of the survey, not objective favorability overall. This is important because most experimental survey designs lack a pretest measure of attitudes. Respondents are ordinarily split into control and treatment groups with the latter receiving some sort of stimulus, and then measures of the outcome of interest are compared between the two groups to determine the effect of the stimulus. Without a pre-treatment pretest, however, it is impossible to definitively know whether any apparent difference is due to the treatment or existed in the treatment group as a result of the random assignment process. In contrast, our experimental design has both pretest and posttest measures of favorability toward the executive immigration order allowing us to directly track any change in attitudes from Point A to Point B and determine how they change in response to our elite religious cue prompt.

Independent Variables

Frequency of religious service attendance is a six-point ordinal variable ranging from "never" to "more than once a week," which is collapsed to a binary variable for the bivariate analysis between those who attend at least "once or twice a month" and "a few times a year" or less. Theological traditionalism is measured by agreement that one's religion or church should "preserve traditional beliefs and practices" while theological progressivism is measured as agreement that it should "adopt modern beliefs and practices" or "adjust beliefs and practices in light of new circumstances." We also include measures of the % Latino and % foreign-born in a respondent's zip code as per the 2010 Census and 2013 American Community Survey, respectively, which are collapsed at their means into binary variables for the bivariate analysis. We also examine relationships for partisans and ideologues (leaners are included with the partisan and ideological group). For the multivariate analysis, we also include standard demographic controls for age, race/ethnicity, education, income, as well as dummy variables representing Catholic and Evangelical Protestant affiliation.

Results

Figure 1 and Table 1 display the distribution of change in approval of Obama's executive immigration action from the pretest to the post-post. Figure 1 shows how approval scores changed among both the control and treatment groups while Table 1 reports the distribution of scores separately for each group. As can be seen in Figure 1, nearly three-fourths (74.7%) of all individuals had a value of zero, which occurs when the pre-and post-test responses are identical, indicating no change. Table 1 also shows that the distribution of attitude change is nearly identical between the control and treatment groups.

Figure 1. Distribution of change in favorability toward Obama's executive immigration order posttest vs.

pretest

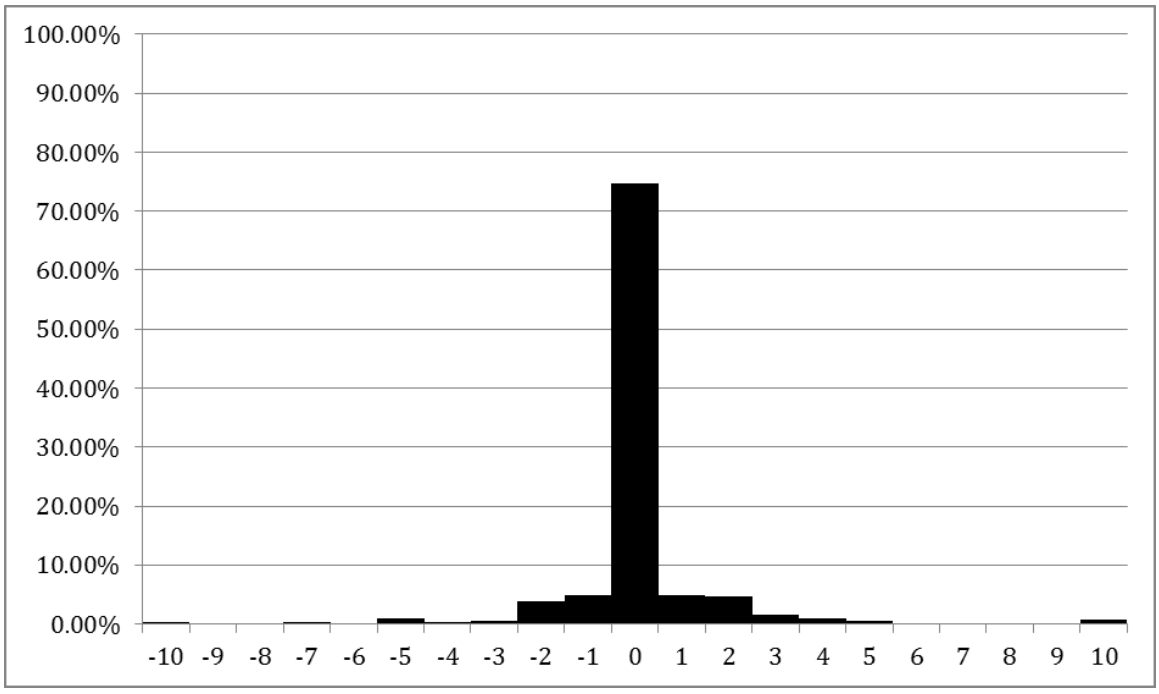

Table 1. Distribution of change in favorability toward Obama's executive immigration order posttest vs. pretest, by control and treatment group

	Control group	Treatment group
Approval decreased	11.7%	11.6%
No change	73.2%	76.1%
Approval increased	15.1%	12.3%

Bivariate analysis

Looking at the results as a whole, a difference of means t-test reveals no statistically significant difference in the scores between the control (M=0.17, SE=0.13) and treatment (M=-0.04, SE=0.11) groups; t(398)=1.24, p = 0.215. At first pass, these results indicate that the elite religious cue had no effect on an individual's attitude toward Obama's immigration executive action as there is no statistically significant difference in attitude change between the control and treatment group.

Demonstrating that there is no discernible effect for the treatment group as a whole does not, however, eliminate the possibility that there is an effect for a subset of respondents as we originally hypothesized might be the case. Table 2 displays the results of a series of bivariate

difference of means tests among the various subgroups discussed in the hypothesis section. As can be seen, there are no sig-

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nificant differences between the control and treatment groups for any of the hypothesized subgroups when analyzed at the bivariate level.

Table 2. Bivariate analysis of effect of elite religious endorsement on immigration policy approval.

	Control mean (SE, N)	Treatment mean (SE, N)	t-statistic
Overall			
Frequent church attendance	0.06 (0.20, 80)	0.02 (0.17, 117)	0.150
Infrequent church attendance	0.26 (0.12, 110)	-0.13 (0.11, 83)	1.701
Democrats	0.27 (0.20, 94)	-0.12 (0.13, 112)	1.703
Independents	-0.02 (0.22, 19)	0.27 (0.24, 23)	-0.876
Republicans	0.00 (0.21, 73)	-0.07 (0.24, 62)	0.205
Liberals	0.25 (0.18, 80)	0.17 (0.11, 87)	0.395
Moderates	0.00 (0.30, 45)	-0.35 (0.25, 50)	1.206
Conservatives	0.10 (0.20, 53)	-0.08 (0.29, 50)	0.521
Obama approve	0.19 (0.16, 92)	-0.06 (0.10, 105)	1.438
Obama disapprove	0.04 (0.20, 85)	0.02 (0.21, 70)	0.076

* p<0.05, ** p<0.01, *** p<0.001

Multivariate analysis

As a further test of these bivariate results, we performed a multivariate regression analysis estimating change in approval for the immigration executive order using the various hypothesized factors as predictors. We interacted each of these predictors with a dummy variable indicating whether or not the respondent received the elite religious cue as well as the standard demographic control variables described earlier. (We use robust standard errors to correct for heteroscedasticity.) The results presented in Table 3 confirm those presented in Table 2 and indicate that, once controlling for each predictor as well as the various demographic variables, the elite religious cue still does not seem to exert a discernible effect on any of the hypothesized subgroups.

Table 3. Multivariate analysis of effect of elite religious endorsement on immigration policy approval.

Variable	**B (SE)**

Treatment group	0.54 (0.85)
Obama approval	-0.14 (0.41)
Obama approval × treatment	-0.19 (0.59)
Partisanship	0.01 (0.11)
Partisanship × treatment	-0.07 (0.17)
Ideology	-0.06 (0.12)
Ideology × treatment	0.02 (0.15)
Religiosity	0.09 (0.07)
Religiosity × treatment	-0.09 (0.11)
Age	-0.01 (0.00)*
Income	-0.03 (0.00)
Education	0.10 (0.07)
Black	-0.27 (0.22)
Latino	-0.08 (0.21)
Asian	-0.05 (0.15)
Evangelical	0.17 (0.21)
Catholic	-0.02 (0.22)
N	296
R-squared	0.046

* p<0.05, ** p<0.01, *** p<0.001

Discussion and Conclusion

Our analysis has uncovered no support for our hypotheses related to the effect of elite religious cues and immigration policy attitudes at either the bivariate or multivariate level. Not only were we unable to uncover any evidence that our elite religious cue produced a measurable change in opinions toward Obama's executive immigration action in the aggregate, we were also unable to discern any effect of the religious cue among most of our hypothesized subgroups.

Why might this be the case? There are a number of possible explanations. Perhaps elite religious cues do work in the way described previous literature on the topic, work only when given by religious leaders themselves in an actual real-world setting and not by a telephone surveyor in the respondent's home (as per Nteta and Wallsten 2012, e.g.). This experiment simply informed respondents of the general position of a broad group of religious elites and did not attempt to convey their words exactly. We designed the question in this way so as to be sufficiently broad to fit the vast majority of American churchgoers. In

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the absence of direct contact by actual religious elites, perhaps the cueing effect is diminished or eliminated entirely in our brief telephone survey context.

It is also possible that the research design muted the potential effect of elite religious cue because the cue was given just minutes before the posttest question. It is possible, however, that any meaningful cueing effect requires time to "sink in" among those in the population and perhaps also requires multiple repetitions. Offering individuals one cue and only a few minutes to process and internalize it may be inadequate to produce the desired effect. It is possible that our experimental telephone survey research design simply lacks the necessary external validity to appropriately test the elite religious cues mechanism.

Another explanation for our non-findings is that elite religious cues are ineffective in the presence of an overwhelmingly partisan cue like the one in the pre-and posttest questions. Our question explicitly mentioned President Obama by name, triggering a strong partisan framing, which might have drowned out the potential effect of elite cues. We designed the question in this way so as to maximize external validity as much as possible given the reality of political discourse on immigration policy where it is almost always discussed in a partisan environment. The inability to effectively disentangle religious and partisan cues in a "real world" context has meaningful implications about the effectiveness of elite religious cues to change attitudes on immigration policy.

Despite these concerns, it is also very possible that the above results *do* reflect reality. Perhaps elite religious cues are simply ineffective to change attitudes on immigration and are not the key linking mechanism between religiosity and immigration attitudes as inferred by previous research (Knoll 2009; Nteta and Wallsten 2012). Instead, it is possible that the aspect of religiosity that truly matters in driving immigration policy attitudes is the socialization effect of face-to-face interaction, as described by Wald, Owen, and Hill (1988) and Fitzgerald (2012). Both sources attribute church-goers' changes in political attitudes in part to these connections between fellow congregants (which often involve people of diverse backgrounds) rather than to interactions between congregants and clergy. This is an important shift in thinking that warrants further investigation.

Further research is warranted to isolate the alternate explanations described above and test them individually. For example, a future test could attempt to better simulate the nature of a direct elite cue by offering exact quotes from real religious leaders. Alternatively, another experiment could present multiple and obvious cues in an experimental survey context, with the possibility that this could allow a more thorough internalization of the message.

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