

# THE LEGALITY OF PRESIDENTIAL SELF-PARDONS

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## I. THE CURIOUS CASE OF PRESIDENTIAL SELF-PARDONS

November and December bring the onset of winter, the promise of Thanksgiving turkeys and hams, the anticipation of gifts at Christmas or Hanukkah, and the issuance of presidential pardons.<sup>1</sup> Every fourth year we also might see a transition in administrations, which can lead to dubious clemency grants. Presidents sometimes misuse their pardon power because they see it as a prerogative of

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1. See P.S. Ruckman, Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUD. 21, 27 (2011) (noting that a majority of presidential clemency grants over the preceding forty years were in December or in the last year of their term in office); P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)*, 27 PRESIDENTIAL STUD. Q. 251, 258 (1997) [hereinafter Ruckman, *Clemency Origins*] (“Interestingly, timing may contribute to both the willingness of the president to think in humanitarian terms and the willingness of the public to accept a pardon defended on such grounds. Lincoln and Johnson certainly counted on the Christmas season to soften hearts toward grants of amnesty.”). Sometimes more turkeys are pardoned than people. See Douglas A. Berman, *Justified complaints that Obama’s first pardon will be of a turkey*, SENT’G L. & POL’Y (Nov. 24, 2009), [https://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2009/11/justified-complaints-that-obamas-first-pardon-will-be-of-a-turkey.html](https://sentencing.typepad.com/sentencing_law_and_policy/2009/11/justified-complaints-that-obamas-first-pardon-will-be-of-a-turkey.html) [https://perma.cc/NJ4C-BMCY].

their office—viz., an exclusive and unreviewable power—that they can exercise without relying on the bureaucracy for implementation.<sup>2</sup> Plus, outgoing Presidents, no longer accountable to the electorate and effectively immune from congressional oversight, are freed from any political restraint on their behavior. Some chief executives grant clemency to parties who would never have received it while the political guardrails channeling presidential conduct were still in effect.<sup>3</sup>

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2. The presidential pardon power is plenary. If a good President uses it to clear the record of civil rights protesters, convicted years ago, let us say, of trespassing on federal land, neither the Congress nor the courts may sit in review. If a wicked President uses it to shield white supremacists from a courageous federal prosecutor, there is no recourse. If the President uses the power to make amends for the society's unwillingness to acknowledge religious differences, as President George Bush did on Christmas Eve of 1992, no entity but the public can bring him to brook; and if he uses it to prevent the prosecution of those who carried out a controversial and probably illegal policy, as President Bush also did on Christmas Eve of 1992, that is his right. In particular, there is nothing even constitutionally fishy in the President's use of the pardon power to frustrate the will of the other branches, or to limit their ability to inquire into executive affairs—as President Bush plainly did when he granted pardons to several of the major figures in the Iran-Contra scandal. To say that it cannot be used that way is as silly as saying that the Congress should not use its legislative power to criminalize policy disputes with the executive branch—the rather thin explanation that President Bush offered for his last-minute decision.

Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 883 (1992).

3. Editors, *Reform the Pardon Power*, NAT'L REV. (Jan. 21, 2021, 5:06 PM), [https://www.nationalreview.com/2021/01/reform-the-pardon-power/?utm\\_source=recirc-desktop&utm\\_medium=blog-post&utm\\_campaign=river&utm\\_content=more-in&utm\\_term=fourth](https://www.nationalreview.com/2021/01/reform-the-pardon-power/?utm_source=recirc-desktop&utm_medium=blog-post&utm_campaign=river&utm_content=more-in&utm_term=fourth) [https://perma.cc/CBH4-RNV2]. Several recent Presidents have issued questionable pardons. See BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 116–25 (2020). Two presidents, in particular, stand out.

*President Bill Clinton*: In his final hours as President, his id overpowered his ego, his superego went on a holiday, and he abused his clemency authority. He could not have been more promiscuous than if he had starred in his own “Presidential Clemency Gone Wild” video. See, e.g., Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1136–37 (2010); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 880–81 (2016) [hereinafter Larkin, *Revitalizing Clemency*]; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1195–1200 (2010) [hereinafter Love, *Twilight*] (describing “[t]he Clinton Meltdown”). Acting at the request of private parties who had sought clemency outside of the normal Department of Justice (DOJ) Office of the Pardon Attorney process, some of whom either possessed personal White House connections or had

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contributed to his party or presidential library, President Clinton pardoned a host of people, including fugitive from justice Marc Rich, who would not have received a favorable recommendation from the Justice Department. See Alschuler, *supra*, at 1136–37. That was not Clinton’s only questionable exercise of his clemency authority. *Id.* at 1157 & n.171 (discussing Clinton’s grant of conditional commutations to 16 members of FALN, a Puerto Rican terrorist group responsible for 130 bombings at a time when his wife Hillary was running for the Senate from New York state, which has a large Puerto Rican voting bloc); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1484 (2000) (“The President defended his decision in terms of ‘equity and fairness,’ but it was widely criticized as a thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife’s expected Senate candidacy.” (footnote omitted)). Congress condemned the FALN commutations by votes of 311-to-41 in the House and 95-to-2 in the Senate. Alschuler, *supra*, at 1157.

*President Donald Trump*: It’s questionable that he has an ego and superego. He acted largely without the advice of the Office of the Pardon Attorney of the U.S. Department of Justice, which was created to counsel the President on his treatment of clemency petitions. Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL’Y 451, 463–65 (2020) [hereinafter Larkin, *Guiding Clemency*]. There was little traditional rhyme or reason explaining when or why Trump granted clemency. See *id.* at 498 (“President Trump seems to use his clemency power only when a family member, a friend, an acquaintance, or *Fox News* highlights what one or the other believes is an appealing case for mercy.”). He issued his first pardon to former County Sheriff Joe Arpaio, who was convicted of criminal contempt of court for willfully violating an injunction forbidding him from following a discriminatory practice in arresting supposedly illegal aliens. Some of Trump’s late 2020 pardons were for personal associates Paul Manafort and Roger Stone, who were convicted of or pleaded guilty to crimes uncovered by an investigation into Russia’s influence in the 2016 presidential campaign (discussed *infra* at text accompanying notes 31–37). The Wall Street Journal reported that “[i]n response to Mr. Trump’s pardons of his associates, Sen. Ben Sasse (R., Neb.) said in a statement: ‘This is rotten to the core.’” Rebecca Ballhaus & Byron Tau, *Trump Issues 26 More Pardons, Including to Paul Manafort, Roger Stone*, WALL ST. J. (Dec. 24, 2020, 12:10 AM), [https://www.wsj.com/articles/trump-issues-26-more-pardons-including-to-paul-manafort-roger-stone-11608769926?mod=hp\\_lead\\_pos3](https://www.wsj.com/articles/trump-issues-26-more-pardons-including-to-paul-manafort-roger-stone-11608769926?mod=hp_lead_pos3) [<https://perma.cc/R34S-CLWY>]. Trump also pardoned Charles Kushner, father of Trump’s son-in-law Jared, who was convicted of evading taxes, making illegal campaign contributions, and tampering with a witness. The last crime involved hiring a prostitute to seduce his brother-in-law, videotaping the encounter, and sending the tape to his sister to persuade her not to testify against him in an investigation of his business. “‘Other presidents have occasionally issued abusive, self-serving pardons based on insider connections,’ Harvard Law School professor Jack Goldsmith, who has tracked Trump’s pardons and commutations, said via email. ‘Almost all of Trump’s pardons fit that pattern. What other presidents did exceptionally, Trump does as a matter of course.’” Michael Kranish, *Trump vowed to drain the swamp. Then he granted clemency to three former congressmen convicted of federal crimes*, WASH. POST (Dec. 23, 2020, 8:33 PM),

When that occurs, such transparently opportunistic abuses of a prerogative—one intended to be used, not selfishly for the President’s own personal advancement, but compassionately for others<sup>4</sup>—have justly drawn fire from critics across the political spectrum.<sup>5</sup> Mercy is an ancient and revered trait,<sup>6</sup> and executive clemency is the legal embodiment of mercy,<sup>7</sup> so abuse<sup>8</sup> of the clemency

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[https://www.washingtonpost.com/politics/trump-pardon-hunter-collins-stockman/2020/12/23/dc2ff8e0-4538-11eb-975c-d17b8815a66d\\_story.html](https://www.washingtonpost.com/politics/trump-pardon-hunter-collins-stockman/2020/12/23/dc2ff8e0-4538-11eb-975c-d17b8815a66d_story.html)

[<https://perma.cc/RZV5-9PC5>]; see also *infra* note 10.

4. See, e.g., *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (quoted *infra* at text accompanying note 72); Robert Weisberg, *The Drama of the Pardon, the Aesthetics of Governing and Judging*, 72 STAN. L. REV. ONLINE 80, 80 (2020) (“The venerable purpose of clemency (including pardons and commutations) is for the ruler to harmonize justice and mercy, and often in doing so to solidify his political power by displaying his moral power.” (footnote omitted)).

5. See, e.g., BAUER & GOLDSMITH, *supra* note 3, at 116–25; JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 114–17 (2009); Alschuler, *supra* note 3; Hamilton Jordan, *The First Grifters*, WALL ST. J. (Feb. 20, 2001, 12:01 AM), <http://www.wsj.com/articles/SB982638239880514586> [<https://perma.cc/49V3-JB86>]; Steven G. Calabresi & Norman L. Eisen, *The Problem With Trump’s Odious Pardon of Steve Bannon*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/opinion/trump-bannon-pardon.html> [<https://perma.cc/6P45-QZTZ>]; Larkin, *Revitalizing Clemency*, *supra* note 3, at 880–81; Love, *Twilight*, *supra* note 3, at 1195–1200.

6. See, e.g., *Genesis* 4:13–15 (King James) (describing the Mark of Cain as a merciful shield); *Matthew* 27:15–23 (King James) (describing Pontius Pilate’s decision to pardon Barabbas during Passover); CHARLES L. GRISWOLD, ANCIENT FORGIVENESS: CLASSICAL, JUDAIC, AND CHRISTIAN (2011); NAOMI HURNARD, THE KING’S PARDON FOR HOMICIDE BEFORE AD 1307 (1969); DAVID KONSTAN, BEFORE FORGIVENESS: THE ORIGINS OF A MODERN IDEA (2010); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963). See generally Larkin, *Guiding Clemency*, *supra* note 3, at 475–96 (describing the history of and rationales for clemency).

7. See, e.g., *Cavazos v. Smith*, 565 U.S. 1, 8–9 (2011) (per curium) (“[Clemency is] a prerogative granted to executive authorities to help ensure that justice is tempered by mercy.”).

8. Of course, what is an “abuse” is subject to debate. Everyone would deem some practices—selling pardons is the obvious example—as abusive. See U.S. CONST. art. II, § 4 (specifying “Bribery” as a ground for impeaching and removing a President). Yet there are instances where one political party might treat certain categories of pardons as reflecting policy preferences, even though the other party disagrees vehemently over the policy. For example, one party might deem cannabis offenses to be particularly deserving of clemency, because the party’s leadership believes that federal law ought not to ban its cultivation, sale, or possession. See *Marijuana Opportunity Reinvestment and Expungement Act of 2020* (MORE Act of 2020), H.R. 3884, 116th Cong. (2020) (passed

power not only tarnishes that practice but also violates an almost sacred trust.<sup>9</sup> Atop that, by abusing one of the few unreviewable powers of their office, Presidents poison the well for their successors, creating the impression that clemency is a reward for personal friends, political cronies, or the rich and shameless.<sup>10</sup>

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by the House of Representatives on December 4, 2020, the Act would remove cannabis from the Controlled Substances Act of 1970, 21 U.S.C. § 841 (2018)). The other party might prefer to prohibit cannabis because it has not been proven safe. *See* H.R. Rep. No. 116–604, Pt. 2, at 346–48 (2020) (Minority Views). One party might deem strict liability offenses to be unjust because they do not require proof of any “evil intent” on the part of the defendant. *See* Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law*, 15 GEO. J.L. & PUB. POL’Y 651, 663–68 (2017) (arguing that the President should pardon someone for conviction of a strict liability offense if no reasonable person would have known that the charged acts were illegal). The other party might believe that eliminating strict liability crimes “could undermine public safety and harm progressive goals.” Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017). Clemency grants should not be deemed “abuses” if the President makes a reasonable policy choice no matter how contentious the issue might be.

9. *See, e.g.*, CROUCH, *supra* note 5, at 114 (former President Jimmy Carter described Clinton’s pardon of fugitive Marc Rich as “despicable”); Mark Osler, *The Flynn Pardon Is a Despicable Use of an Awesome Power*, ATLANTIC (Nov. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/corruption-of-mercy/617210/> [<https://perma.cc/Z5JU-F4UL>].

10. *See, e.g.*, Alschuler, *supra* note 3, at 1168 (“In 1215, the Magna Carta declared, ‘To no one will we sell, to none will we deny or delay, right or justice.’ In the administration of President Bill Clinton, the charter’s pledge was broken.” (footnote omitted)); Calabresi & Eisen, *supra* note 5 (“Donald Trump is exiting office with a final outburst of constitutional contempt. Like a Borgia pope trading indulgences as quid pro quos with corrupt cardinals, Mr. Trump on Wednesday used one of the most sweeping powers of the presidency to dole out dozens of odious pardons to a roster of corrupt politicians and business executives as well as cronies and loyalists like Steve Bannon.”); Maggie Haberman et al., *With Hours Left in Office, Trump Grants Clemency to Bannon and Other Allies*, N.Y. TIMES (last updated Jan. 26, 2021), <https://www.nytimes.com/2021/01/20/us/politics/trump-pardons.html> [<https://perma.cc/55MC-V6K3>] (“President Trump used his final hours in office to wipe away convictions and prison sentences for a roster of corrupt politicians and business executives and bestow pardons on allies like Stephen K. Bannon, his former chief strategist, and Elliott Broidy, one of his top fund-raisers in 2016.”); Elie Honig, *Opinion: The worst of Trump’s pardons*, CNN (Jan. 20, 2021, 3:18 PM), <https://www.cnn.com/2021/01/20/opinions/trump-abuses-pardon-powers-last-day-honig/index.html> [<https://perma.cc/J9T5-E8XE>] (“With his final batch of 73 pardons and 70 sentence commutations, Trump offered up one last burst of cronyism and self-dealing. While Trump issued pardons to several recipients whose cases had been rightly advocated by criminal justice reform groups,

A particularly questionable action would be a President's decision to pardon *him- or herself* for any federal offenses committed while in office. Aside from being "an act of unprecedented chutzpah,"<sup>11</sup> the practice is treacherous as a practical matter because it implies that the President might have committed a crime, possibly forever making him a pariah within his political party and in the eyes of history.<sup>12</sup> It is also dubious as a legal matter because there is no clear answer whether a self-pardon is lawful. No President has yet pardoned himself, and for most of our history, the issue of whether one may do so was not a remotely significant public policy issue. In fact, it would not even have been a serious hypothetical on a law school final exam.

The issue could not have arisen in pre-Revolutionary England because, under the common law, the crown could do no wrong.<sup>13</sup> It

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he also doled out free passes to an unseemly lineup of criminals who apparently have been granted mercy based largely on their personal connections to Trump, their wealth and access or their status as celebrity objects of fascination."); Andrew C. McCarthy, *Trump Does His Part in Scandalizing the Presidential Pardon Power*, NAT'L REV. (Jan. 20, 2021, 12:39 AM), <https://www.nationalreview.com/2021/01/trump-does-his-part-in-scandalizing-the-presidential-pardon-power/> [<https://perma.cc/YTT4-HKDB>] ("The most notable grantee on the list is former Trump aide Steve Bannon. . . . The only salient difference between the three codefendants and Bannon is that Bannon is an insider: a Trump 2016 campaign official and former top White House adviser. . . . Also making the cut were Elliott Broidy, a major Trump fundraiser paid millions of dollars by foreign actors to lobby the Trump administration . . . and Ken Kurson, a convicted cyberstalker who just happens to be a friend of Trump son-in-law Jared Kushner.").

11. Brian C. Kalt, Note, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 779 (1996) [hereinafter Kalt, *Pardon Me*] (quoting James Gill, *Walsh's Quarry*, NEW ORLEANS TIMES-PICAYUNE, Jan. 1, 1993, at B7).

12. See *Burdick v. United States*, 236 U.S. 79, 91 (1915) (noting that there is a "confession of guilt implied in the acceptance of a pardon"); *id.* at 94 (stating that "the differences" between "legislative immunity" and a "pardon" are "substantial": "[t]he latter carries an imputation of guilt; acceptance a confession of it").

13. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793) (Wilson, J.) ("The law, says Sir *William Blackstone*, ascribes to the *King* the attribute of sovereignty . . . . [N]o *suit* or action can be brought against the *King*, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power." (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*241, \*242)); 1 WILLIAM BLACKSTONE, COMMENTARIES \*239, \*244; JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 5 (London, Joseph Butterworth & Son 1820). In 1649, Charles I learned to his dismay that England could discipline errant royalty in other, far more

does not appear to have been an issue for royal governors before the Revolution.<sup>14</sup> The Articles of Confederation did not create an office of chief executive, so the issue also could not have surfaced during the nation's early days.<sup>15</sup> There was limited discussion of any aspect of the pardon power at the Constitutional Convention of 1787, and no one raised this precise issue.<sup>16</sup> Finally, no one asked this question during the state ratifying conventions.<sup>17</sup>

The issue did not become a serious possibility until Richard Nixon was in his second term as President. The investigation of the 1972 burglary of the Democratic National Committee headquarters

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unpleasant ways. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 52 (2015) ("The English tried and executed Charles I, thus highlighting a somewhat underappreciated dimension of life tenure.").

14. At least historical treatments of the criminal justice systems operating during that period make no mention of the issue arising. See, e.g., DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776*, at 127–32 (1976); CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 498–500 (1977); Ruckman, *Clemency Origins*, *supra* note 1, at 252.

15. See *Articles of Confederation & Perpetual Union* (1781), in MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 263–70 (1940).

16. See, e.g., 2 MAX FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 419, 626 (1911); Duker, *supra* note 14, at 501–06. Everyone expected George Washington to become the first President, so perhaps no one wanted to insult him by suggesting that he might someday break the law and need to be pardoned. See PRAKASH, *supra* note 13, at 38 (noting that when James Wilson proposed a single chief executive instead of a council, the Convention "fell silent, perhaps realizing that because George Washington likely would serve as the first chief magistrate, any comments could be seen as reflecting the speaker's views about the presiding chair"). Whatever the reason, the Convention delegates did not discuss this specific matter.

17. James Iredell, who later became one of the nation's first Justices of the Supreme Court of the United States, came the closest to discussing the issue at the North Carolina ratifying convention. He remarked that the likelihood of the President being in league with traitors was sufficiently low that there was no need to deny him the power to issue pardons for treason. Noah Feldman, *Trump's Pardoning Himself Would Trash Constitution*, BLOOMBERG (July 21, 2017, 12:25 PM), <https://www.bloomberg.com/opinion/articles/2017-07-21/trump-s-pardoning-himself-would-trash-constitution> [<https://perma.cc/BXZ9-96NW>]. It is possible that Iredell was aware of the possibility that a President could and would pardon his treasonous confederates *and* himself but kept silent to persuade the convention members to approve the Constitution. The answer is lost to history.

at the Watergate office building resulted in the discovery that Nixon had attempted to cover up the involvement of his administration's officials in the crime.<sup>18</sup> That discovery raised the issues of whether Nixon had violated federal criminal law by obstructing justice and whether, as a sitting President, he could be prosecuted for a federal offense without first being impeached and removed from office by Congress. When criminal prosecution of the President became a real possibility, the media speculated that Nixon would pardon himself for his role in Watergate.<sup>19</sup> The Justice Department's Office of Legal Counsel issued an opinion addressing both ends of that possibility. In what might have been intended to serve as a Solomonic resolution, the Department concluded that a sitting President cannot be prosecuted until he is impeached and removed from office,<sup>20</sup> but a President cannot pardon himself.<sup>21</sup>

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18. The discovery came after investigators heard Nixon's taped conversations, which he turned over to the Watergate Special Prosecutor after the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), rejected Nixon's claim of privilege. For a discussion of the pardon issues that arose during the end of the Nixon presidency and the early days after Gerald Ford became President, see BARRY WERTH, *THIRTY-ONE DAYS: GERALD FORD, THE NIXON PARDON, AND A GOVERNMENT IN CRISIS* (2007).

19. See, e.g., Timothy H. Ingram, *Could Nixon Pardon Nixon?*, WASH. POST (June 30, 1974).

20. See MEMORANDUM FROM ROBERT G. DIXON, JR., ASSISTANT ATT'Y GEN., OFF. OF LEGAL COUNS., U.S. DEP'T OF JUSTICE, REGARDING THE AMENABILITY OF THE PRESIDENT, VICE PRESIDENT AND OTHER CIVIL OFFICERS TO FEDERAL CRIMINAL PROSECUTION WHILE IN OFFICE (Sept. 24, 1973), <http://www.fas.org/irp/agency/doj/olc/092473.pdf> [<https://perma.cc/ZM4U-8DB7>] (concluding that the indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions). The Justice Department reaffirmed that conclusion toward the end of the Clinton presidency. See RANDOLPH D. MOSS, ASSISTANT ATT'Y GEN., OFF. OF LEGAL COUNS., A SITTING PRESIDENT'S AMENABILITY TO INDICTMENT AND CRIMINAL PROSECUTION, MEMORANDUM FOR THE ATTORNEY GENERAL (Oct. 16, 2000), <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution> [<https://perma.cc/5X3L-FWTH>].

21. See MARY C. LAWTON, ACTING ASSISTANT ATT'Y GEN., OFF. OF LEGAL COUNS., PRESIDENTIAL OR LEGISLATIVE PARDON OF THE PRESIDENT, MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL (Aug. 5, 1974), <https://www.justice.gov/olc/opinion/presidential-or-legislative-pardon-president> [<https://perma.cc/93D8-XQS3>] [hereinafter LAWTON OLC OPINION]. A second possibly Solomonic feature of the Justice Department's memorandum is the conclusion that a President can pardon himself via

With regard to the latter issue, the Justice Department offered merely a one-sentence conclusion: "Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative."<sup>22</sup> The Justice Department did not explain why the text and structure of the Pardon Clause foreclosed self-pardons or why the role of a President in the pardon process should be analogized to that of a judge.<sup>23</sup> The issue went away when Nixon resigned without pardoning himself and President Gerald Ford later pardoned Nixon for crimes that he might have committed in connection with Watergate.<sup>24</sup>

The issue arose again late in the presidency of George H.W. Bush. A scandal arose toward the end of Ronald Reagan's second term as President. Termed *L'affaire Iran-Contra*, a National Security Council official encouraged Israel to sell arms to Iran with the proceeds ultimately transferred to the Contras, anti-communist guerilla fighters in Nicaragua, all in violation of federal law.<sup>25</sup> An

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what pool players would call a "two-corner" shot: "A different approach to the pardoning problem could be taken under Section 3 of the Twenty-Fifth Amendment. If the President declared that he was temporarily unable to perform the duties of his office, the Vice President would become Acting President and as such he could pardon the President. Thereafter the President could either resign or resume the duties of his office." *Id.* at 2. The Justice Department did not discuss whether that *pas de deux* would or should be disregarded as a sham. *Cf., e.g.,* *Tumey v. Ohio*, 273 U.S. 510, 514–15, 523 (1927) (ruling that a judge whose salary rests upon the number of judgments of conviction entered in his court is not an impartial adjudicator); *Frank v. Magnum*, 237 U.S. 309, 335 (1916) (ruling that a mob-dominated proceeding is not the type of "trial" that the Constitution requires).

22. LAWTON OLC OPINION, *supra* note 21, at 1. By contrast, Nixon's lawyer advised him that he could pardon himself. BRIAN KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES* 40 (2012) [hereinafter KALT, *CONSTITUTIONAL CLIFFHANGERS*].

23. The conclusions are not obvious. *See infra* note 84 and accompanying text; *see also* notes 66, 77–80 & 136–153 and accompanying text.

24. Proclamation 4311, 39 Fed. Reg. 32, 601 (Sept. 8, 1974).

25. In an act known as the Boland Amendment, Congress had prohibited the transfer of funds to an insurgency known as the "Contras" who were rebelling against the Marxist government in Nicaragua. Along with senior Reagan Administration officials, Oliver North, a Marine lieutenant colonel assigned to the National Security Council, used Israel as a go-between to sell weapons to Iran, which was subject to an embargo. Israel then sent the money to the National Security Council, which diverted it to the

Independent Counsel obtained indictments of several former senior government officials, including Caspar Weinberger, Reagan's Secretary of Defense, and the conviction of several others. There was considerable media speculation that then-Vice President Bush knew about the arms sale and could wind up either being charged or brought into court as a witness after he left office as President or that he might pardon himself to avoid prosecution or embarrassment.<sup>26</sup> On Christmas Eve in 1992, however, President Bush pardoned Weinberger and several other officials but not himself.<sup>27</sup> Again, the issue went away.

The issue resurfaced during the tenure of President Bill Clinton. Independent Counsel Kenneth Starr, later succeeded by Robert Ray, investigated Clinton for potential perjury and obstruction of justice charges based on conduct that occurred both before and while Clinton was President.<sup>28</sup> When asked whether Clinton would

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Contras in an effort to skirt the Boland Amendment. See 1 & 2 LAWRENCE E. WALSH, INDEPENDENT COUNSEL, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (Aug. 4, 1993); SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN CONTRA AFFAIR, S. Rep. No. 100-216, H.R. Rep. No. 100-433 (1987).

26. See, e.g., Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1323-24 (2018) ("There was widespread speculation at the time that the true motive for the pardons was to stall the independent counsel's probe into Bush's own wrongdoing—and in particular, to prevent the independent counsel from reviewing a diary Bush kept that had recently surfaced. Roughly half of respondents in a late 1992 Gallup poll said they thought Bush granted the pardons 'to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra.'" (footnote omitted)); Kalt, *Pardon Me*, *supra* note 11, at 799-800.

27. Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992); see David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up'*, N.Y. TIMES (Dec. 25, 1992), <https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html> [<https://perma.cc/WXW4-ZP89>].

28. Starr began by investigating alleged illegalities arising out of real estate transactions in which Clinton, his wife Hillary, and other associates had participated while he was the Arkansas governor—viz., the "Whitewater Investigation." That investigation later branched out to include the potential obstruction of justice charges. See, e.g., *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Presentation on Behalf of the President: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998).

pardon himself, Clinton's White House Counsel represented that he would not.<sup>29</sup> On his last full day in office, Clinton entered into an agreement with then-Independent Counsel Ray to surrender his license to practice law for five years in exchange for immunity in connection with all of the outstanding investigations.<sup>30</sup> The agreement avoided any self-pardon issue.

The issue surfaced for a fourth time after Donald Trump became our forty-fifth President. Concern arose that Russia had attempted to influence the outcome of the 2016 presidential election, and congressional Democrats claimed that the Trump Campaign had been in cahoots with the Russians.<sup>31</sup> Deputy Attorney General Rod Rosenstein, acting in place of recused Attorney General Jeff Sessions, appointed former FBI Director and Justice Department Assistant Attorney General Robert Mueller to investigate the matter.<sup>32</sup> Although the claim ultimately turned out to be bogus,<sup>33</sup> during the course of that inquiry President Donald Trump publicly stated that he had the legal authority to pardon himself to end the Justice Department investigation.<sup>34</sup> A flurry of media commentary followed,

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29. *Id.* at 450 (Charles Ruff, White House Counsel, assuring Rep. Steve Chabot that Clinton would not pardon himself).

30. *See, e.g.*, Pete Yost, *Clinton Accepts 5-Year Law Suspension*, WASH. POST (Jan. 19, 2001), <https://apnews.com/article/7fa4addca900dbc81e78ab73f5795307> [<https://perma.cc/DD3T-ETQ3>] ("President Clinton has reached a deal with prosecutors to avoid an indictment, requiring him to make a written acknowledgment [that he may have misled investigators] in the Monica Lewinsky matter and agree to a suspension of his law license, government sources said.").

31. *See* U.S. HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTEL., THE IMPEACHMENT REPORT, THE HOUSE INTELLIGENCE COMMITTEE'S REPORT ON THE TRUMP-UKRAINE INVESTIGATION, WITH THE HOUSE REPUBLICANS' REBUTTAL (2019).

32. *See* ROBERT S. MUELLER III, THE MUELLER REPORT: REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

33. *See, e.g.*, Edit. Bd., *All the Adam Schiff Transcripts*, WALL ST. J. (May 12, 2020), <https://www.wsj.com/articles/all-the-adam-schiff-transcripts-11589326164> [<https://perma.cc/RZD4-UHQA>] ("Americans expect that politicians will lie, but sometimes the examples are so brazen that they deserve special notice. Newly released Congressional testimony shows that Adam Schiff spread falsehoods shamelessly about Russia and Donald Trump for three years even as his own committee gathered contrary evidence.").

34. Miranda Green, *Trump tweets mention his 'complete power' to pardon and bemoan 'leaks'*, CNN (July 24, 2017), <https://www.cnn.com/2017/07/22/politics/trump-tweets->

taking opposing positions on the legitimacy of self-pardons.<sup>35</sup>

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pardon-powers/index.html [https://perma.cc/6UUM-HTHQ]; see also Jeffrey Crouch, *President Donald J. Trump and the Clemency Power: Is Claiming “Unfair” Treatment for Pardon Recipients the New “Fake News”?*, in *PRESIDENTIAL LEADERSHIP AND THE TRUMP PRESIDENCY: EXECUTIVE POWER AND DEMOCRATIC GOVERNMENT* 91, 104–06 (Charles M. Lamb & Jacob R. Neiheisel eds., 2020); Charlie Savage, *Can Trump Pardon Himself? Explaining Presidential Clemency Powers*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/us/politics/trump-pardon-himself-presidential-clemency.html [https://perma.cc/ME3D-RQT3]; Michael D. Shear, *Trump Says Appointment of Special Counsel Is ‘Totally Unconstitutional’*, N.Y. TIMES (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/trump-pardon-power-constitution.html?searchResultPosition=10 [https://perma.cc/U232-3TKD].

35. For the argument that a President cannot pardon himself, see Philip Bobbitt, *The President Can’t Pardon Himself, So Why Do People Think He Can?*, LAWFARE (June 20, 2018), https://www.lawfareblog.com/self-pardons-president-cant-pardon-himself-so-why-do-people-think-he-can [https://perma.cc/9VTW-L5YC]; Norman Eisen, *Unpacked: Can a President Pardon Himself?*, BROOKINGS INST. (Aug. 13, 2018), https://www.brookings.edu/blog/unpacked/2018/08/13/unpacked-can-a-president-pardon-himself/ [https://perma.cc/X942-HAP5]; Garrett Epps, *The Self-Pardoning President*, ATLANTIC (Jan. 14, 2019), https://www.theatlantic.com/politics/archive/2019/01/can-president-pardon-himself/579757/ [https://perma.cc/GHW2-8GXX]; Feldman, *supra* note 17; David Frum, *Trump Crosses a Bright-Red Line*, ATLANTIC (Jan. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/01/trumps-georgia-call-crosses-red-line/617536/ [https://perma.cc/QG4K-T5BT]; Andrew Hyman, *The President May Not “Grant” Himself a Pardon*, ORIGINALISM BLOG (July 30, 2017), https://originalismblog.typepad.com/the-originalism-blog/2017/07/the-ability-to-self-pardon-is-not-absurd-but-it-is-nevertheless-not-allowed-by-the-us-constitution-t.html [https://perma.cc/X2LS-4U7W]; Brian Kalt, *Can Trump Pardon Himself?*, FOREIGN POL’Y (May 19, 2017), https://foreignpolicy.com/2017/05/19/what-would-happen-if-trump-pardoned-himself-mueller-russia-investigation/ [https://perma.cc/D44W-MWUU]; Eric Muller, *Can Donald Trump “Grant” Himself a Pardon? I Doubt It*, FAC. LOUNGE (June 5, 2018), https://www.thefacultyloounge.org/2018/06/can-donald-trump-grant-himself-a-pardon-i-doubt-it.html [https://perma.cc/2UTA-Y538]; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/opinions/this-overlooked-part-of-the-constitution-could-stop-trump-from-abusing-his-pardon-power/2018/03/14/265b045a-26dd-11e8-874b-d517e912f125\_story.html [https://perma.cc/48BY-6H9F]; Laurence H. Tribe et al., *No, Trump Can’t Pardon Himself. The Constitution Tells Us So*, WASH. POST, July 24, 2017, https://www.sltrib.com/opinion/commentary/2017/07/24/washington-post-op-ed-no-trump-cant-pardon-himself-the-constitution-tells-us-so/ [https://perma.cc/FQ66-CG6L].

For the argument that a President can pardon himself, see Richard A. Epstein, *Pardon Me, Said the President to Himself*, WALL ST. J. (June 5, 2018), https://www.wsj.com/articles/pardon-me-said-the-president-to-himself-1528239773 [https://perma.cc/9XGW-RF8Q]; Andrew C. McCarthy, *Yes, the President May Pardon Himself*, NAT’L REV. (June

Trump did not pardon himself, and the Special Counsel found no evidence that Trump or members of his campaign had colluded with Russia.<sup>36</sup> The issue again arose during the closing weeks of the Trump Administration when speculation arose that Trump might pardon himself for actions that he took in January 2021 when contesting the results of the 2020 election.<sup>37</sup> Trump ended his

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4, 2018), <https://www.nationalreview.com/2018/06/can-a-president-pardon-himself-yes-trump-can/> [https://perma.cc/3D8H-BCNM]; Michael Stokes Paulsen, *The President's Pardon Power Is Absolute*, NAT'L REV. (July 25, 2017), <https://www.nationalreview.com/2017/07/donald-trump-pardon-power-congressional-impeachment/> [https://perma.cc/PB6E-DPDH]; Michael Ramsey, *David Weisberg on Presidential Self-Pardons*, ORIGINALISM BLOG (July 29, 2017), <https://originalismblog.typepad.com/the-originalism-blog/2017/07/david-weisberg-on-presidential-self-pardonsmichael-ramsey.html> [https://perma.cc/68M6-B9W8]; David B. Rivkin, Jr. & Lee A. Casey, *Begging Your Pardon, Mr. President*, WALL ST. J. (Oct. 29, 2017), <https://www.wsj.com/articles/begging-your-pardon-mr-president-1509302308> [https://perma.cc/N7NM-DU78]; Jonathan Turley, *Yes, Donald Trump Can Pardon Himself, But It Would Be a Disastrous Idea*, USA TODAY (June 4, 2018), <https://www.usatoday.com/story/opinion/2018/06/04/donald-trump-self-pardon-constitutional-impeachment-column/667751002/> [https://perma.cc/G9JY-WKFW]; David Weisberg, *More on Presidential Self-Pardons*, ORIGINALISM BLOG (July 31, 2017), <https://originalismblog.typepad.com/the-originalism-blog/2017/07/more-on-presidential-self-pardonsbrmichael-ramsey.html> [https://perma.cc/Z8DH-4D72]; John Yoo, *Trump Can Pardon Manafort. He Shouldn't*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/opinion/trump-pardon-manafort.html> [https://perma.cc/6ZZS-UMRV].

36. See THE MUELLER REPORT, *supra* note 32.

37. For Trump's January 2 effort to cajole or bully the Georgia secretary of state to "find" a sufficient number of 2020 ballots for Trump to carry the state, see, for example, Zachary Evans, *Raffensperger Hints Trump Could Face Prosecution over Call to 'Find' Votes*, NAT'L REV. (Jan. 4, 2021), <https://www.nationalreview.com/news/raffensperger-hints-trump-could-face-prosecution-over-call-to-find-votes/> [https://perma.cc/4QWN-6QX5]; Eric Lipton, *Trump Call to Georgia Official Might Violate State and Federal Law*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-call-georgia.html> [https://perma.cc/F6SQ-DY7Y]; Rich Lowry, *Trump's Shameful Georgia Call*, NAT'L REV. (Jan. 5, 2021), <https://www.nationalreview.com/2021/01/trumps-shameful-georgia-call/> [https://perma.cc/HZD2-AYZK]; Ruth Marcus, *What a Prosecutor Could Do About Trump's Phone Call*, WASH. POST (Jan. 4, 2021), [https://www.washingtonpost.com/opinions/what-a-prosecutor-could-do-about-trumps-phone-call/2021/01/04/4c00451c-4ed5-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/opinions/what-a-prosecutor-could-do-about-trumps-phone-call/2021/01/04/4c00451c-4ed5-11eb-bda4-615aaefd0555_story.html) [https://perma.cc/Y3WT-EZPG]; Cameron McWhirter & Lindsay Wise, *Trump Pressured Georgia Secretary of State to 'Find' Votes*, WALL ST. J. (Jan. 4, 2021), [https://www.wsj.com/articles/trump-urged-georgia-secretary-of-state-to-overturn-election-results-11609707084?mod=searchresults\\_pos3&page=1](https://www.wsj.com/articles/trump-urged-georgia-secretary-of-state-to-overturn-election-results-11609707084?mod=searchresults_pos3&page=1)

presidency without pardoning himself, so the issue will (hopefully) remain undecided for the foreseeable future.<sup>38</sup>

[<https://perma.cc/YZ6D-SU3K>]; Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html?searchResultPosition=3> [<https://perma.cc/595A-XAEP>]; Kevin Williamson, *Trump's Final Insult*, NAT'L REV (Jan. 5, 2021), [https://www.nationalreview.com/the-tuesday/trumps-final-insult/?utm\\_source=recirc-desktop&utm\\_medium=article&utm\\_campaign=river&utm\\_content=more-in-tag&utm\\_term=first](https://www.nationalreview.com/the-tuesday/trumps-final-insult/?utm_source=recirc-desktop&utm_medium=article&utm_campaign=river&utm_content=more-in-tag&utm_term=first) [<https://perma.cc/3HEH-DLS6>]. See generally Amy Gardner & Paulina Firozi, *Here's the full transcript and audio of the call between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html) [<https://perma.cc/DW7Z-29QN>].

For the Trump-inspired January 6 assault on the Capitol, see, for example, Peter Baker, *A Mob and the Breach of Democracy: The Violent End of the Trump Era*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-congress.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/AX7B-6Y4E>]; Dan Barry & Sheera Frenkel, *'Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html?searchResultPosition=1> [<https://perma.cc/8WEE-VG27>]; Maggie Haberman, *Trump Told Crown 'You Will Never Take Back Our Country with Weakness'*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html> [<https://perma.cc/GX6S-4AVZ>]; Kevin D. Williamson, *The Trump Presidency's Inevitable, Wretched End*, NAT'L REV. (Jan. 7, 2021), <https://www.nationalreview.com/2021/01/the-trump-presidencys-inevitable-wretched-end/#slide-1> [<https://perma.cc/QYE9-D936>]; WSJ Video, *When Rioters Stormed the Capitol: How the Day Unfolded*, WALL ST. J. (Jan. 7, 2021), [https://www.wsj.com/video/when-rioters-stormed-the-capitol-how-the-day-unfolded/3437DB4C-4F9C-440D-B062-6D6DD0E3C879.html?mod=trend-ing\\_now\\_video\\_pos4/](https://www.wsj.com/video/when-rioters-stormed-the-capitol-how-the-day-unfolded/3437DB4C-4F9C-440D-B062-6D6DD0E3C879.html?mod=trend-ing_now_video_pos4/) [<https://perma.cc/9BFN-ARTE>]; Lindsay Wise et al., *'The Protesters Are in the Building.' Inside the Capitol Stormed by a Pro-Trump Mob*, WALL ST. J. (Jan. 6, 2021), [https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654?mod=article\\_inline/](https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654?mod=article_inline/) [<https://perma.cc/48G6-MA6A>].

38. There is, of course, a possibility that Trump signed a pardon for himself and his family members but did not make his action public. Commentators have disagreed over whether a secret pardon has legal effect. Compare Jeffrey Crouch, *If Trump issued secret pardons, they won't work*, WASH. POST (Jan. 20, 2021), <https://www.washingtonpost.com/opinions/2021/01/20/trump-secret-pardons-validity/> [<https://perma.cc/7MCU-Z5R5>] (arguing that secret pardons are ineffective), with Greg Walters, *Trump Didn't Pardon Himself. Now His Legal Nightmare Begins*, VICE (Jan. 20, 2021), <https://www.vice.com/en/article/v7mx78/why-didnt-trump-pardon-himself-what-happens-now> [<https://perma.cc/BD8X-JVUU>] (arguing that they have effect). The Presidential Records Act, 44 U.S.C. §§ 2202–2207 (2018), requires that all presidential

That a President would need to consider immunizing himself against a federal criminal prosecution is, generally speaking, a disturbing prospect, even in today's toxic political environment.<sup>39</sup> Unlike what has happened in some countries (after, for instance, the Communist takeover in Cambodia), new administrations do not bring politically motivated prosecutions against former government officials. There also is no clear answer to the question whether a self-pardon is lawful. Neither the Supreme Court of the United States nor any lower court has had occasion to decide whether a President can pardon himself. (Ironically, we should consider ourselves fortunate that the issue has not arisen with the regularity necessary to generate a body of case law.) No act of Congress takes a position on the subject, and, in any event, any statute would have no more legal force or effect than a "sense of the Congress" resolution.<sup>40</sup> As might be expected, commentators have taken all sides of

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records be maintained as federal property, but the Pardon Clause does not require publication for a pardon to become effective. All that Article II requires for a pardon to be effective is for it to be *issued*, not publicized. The Constitution requires *Congress* to act in public. See U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."); *id.* § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."). The Pardon Clause imposes no similar requirement on executive clemency. Of course, publishing a pardon is valuable because it enables a recipient to prove its issuance and informs the public what the President has done, thereby promoting accountability. See *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 159–63 (1833) (stating that a defendant must plead the existence of a pardon to receive its protection). But it is not constitutionally required. We might not know whether Trump issued a secret pardon to himself and his family members unless the government criminally charges them or he publishes his memoirs. But if he did and can prove that he did so before President Biden became our 46th President, the pardon(s) would likely be valid.

39. For explanations of what has happened and why, see, for example, ADAM JENTLESON, *KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY* (2021); YUVAL LEVIN, *THE FRACTURED REPUBLIC* (2016); KENNETH R. MAYER & DAVID T. CANON, *THE DYSFUNCTIONAL CONGRESS?* (1999); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313–14 (2006). For an insider's viewpoint, see Mike Gallagher, *How to Salvage Congress*, ATLANTIC (Nov. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/gallagher-congress/575689/> [<https://perma.cc/SF9J-UZJR>].

40. See, e.g., *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) ("Congress, no doubt, may not usurp a court's power to interpret and apply the law to the

the issue. A large number of scholars have concluded, like the Justice Department, that a president cannot pardon himself;<sup>41</sup> a comparable number of legal experts have come out the other way;<sup>42</sup> and

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circumstances before it, for those who apply a rule to particular cases, must of necessity expound and interpret that rule.” (internal citations and punctuation omitted)); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Congress . . . has been given the power to enforce, not the power to determine what constitutes a constitutional violation.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). That rule applies to pardons. See *The Laura*, 114 U.S. 411, 413–14 (1885) (explaining that the President’s “constitutional power” under the Pardon Clause “cannot be interrupted, abridged, or limited by any legislative enactment.”); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872) (“Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.”).

41. See, e.g., *Examining the Constitutional Role of the Pardon Power, Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (Mar. 27, 2019) (statement of Caroline Frederickson, President, Am. Const’l Soc’y.) [hereinafter *House Pardon Hearing*]; *id.* (prepared Testimony of Justin Florence, Legal Dir., Protect Democracy); *id.* (statement of James P. Pfiffner, Univ. Professor, Geo. Mason Univ.); *id.* (written Statement by Prof. Andrew Kent, Fordham L. Sch.); KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 22, at 39–60; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 804 (1999); Frank O. Bowman III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3728908](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728908) [<https://perma.cc/9HXD-S57Q>]; Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL’Y 463, 469–76 (2019); Bernadette Meyler, *Trump’s Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92, 99–101 (2020); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361, 404 n.196 (1993).

42. See, e.g., MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 173–74 (2020); RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* *passim* (2000); PRAKASH, *supra* note 13, at 107–08; Michael Conklin, *Please Allow Me to Pardon . . . Myself: The Constitutionality of a Presidential Self-Pardon*, 97 U. DET. MERCY L. REV. 291 (2020); Crouch, *supra* note 34, at 108–09; Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Any Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71 (2019); Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. L. REV. 905, 933–36 (2019); James N. Jorgensen, Note, *Federal Executive Clemency Power: The President’s Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345 (1993); Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197 (1999); cf. Adrian Vermeule, Essay, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 388 (2012) (“[T]he President arguably has the power to pardon himself and clearly has the power to pardon his friends, family, and advisers.”); *id.* at 411–13.

some have been agnostic on the matter.<sup>43</sup> The disagreement has lasted for decades.<sup>44</sup>

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43. See, e.g., Duker, *supra* note 14, at 504; Mike Rappaport, *Epstein on Self Pardons*, L. & LIBERTY (June 8, 2018), <https://www.lawliberty.org/2018/06/08/epstein-on-self-pardons/> [<https://perma.cc/T88N-9WUT>]; cf. Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 166–67 (2017) (presidential self-pardons that are “effectively and predominantly acts of self-dealing” are impermissible but would be lawful “[i]n the improbable situation that a self-pardon truly is an act of justice”); Jonathan H. Adler, *The Pardon Power May Be Broad, But that Does Not Mean a Self-Pardon Would Be Legit*, REASON: VOLOKH CONSPIRACY (Nov. 30, 2020), <https://reason.com/volokh/2020/11/30/the-pardon-power-may-be-broad-but-that-does-not-mean-a-self-pardon-would-be-legit/> [<https://perma.cc/M2TH-PKMS>] (dubitante).

44. And still continues. See, e.g., Byron Tau, *Can President Trump Pardon Himself and His Family?*, WALL ST. J. (Dec. 2, 2020), <https://www.wsj.com/articles/can-president-trump-pardon-himself-and-his-family-11606947916?page=1> [<https://perma.cc/MKF2-Q6Z6>] (arguing that the President likely can pardon himself); Josh Gerstein, *Self-Pardon? It Might Not Go How Trump Thinks*, POLITICO (Jan. 13, 2021), <https://www.politico.com/news/2021/01/13/can-trump-pardon-himself-458591> [<https://perma.cc/LG87-TGHZ>]; J. Michael Luttig, *No, President Trump Can't Pardon Himself*, WASH. POST (Dec. 7, 2020), [https://www.washingtonpost.com/opinions/no-president-trump-cant-pardon-himself/2020/12/07/774c7856-38d9-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/opinions/no-president-trump-cant-pardon-himself/2020/12/07/774c7856-38d9-11eb-98c4-25dc9f4987e8_story.html) [<https://perma.cc/93SZ-4PM9>]; Tessa Berenson, *What Donald Trump Can—And Can't—Do with the Pardon Power*, TIME (Dec. 2, 2020), <https://time.com/5916785/donald-trump-presidential-pardon-questions/> [<https://perma.cc/R9NH-SCNN>] (noncommittal); Brian Naylor, *Talk of 'Preemptive' Pardons By Trump Raises Questions: What Can He Do?*, NPR (Dec. 2, 2020), <https://www.npr.org/2020/12/02/941290291/talk-of-preemptive-pardons-by-trump-raises-questions-what-can-he-do> [<https://perma.cc/3TVY-S5KE>] (same); Kristine Phillips & Kevin Johnson, *Can Trump Pardon Himself? What's a Preemptive Pardon? Experts Explain the Sweeping Power*, USA TODAY (Dec. 2, 2020), <https://www.usatoday.com/story/news/politics/2020/12/02/can-trump-pardon-himself-can-pardons-reversed-power-explained/3792550001/> [<https://perma.cc/EB2T-BMBB>] (same); Asha Rangappa, *If Trump Pardons Himself Now, He'll Walk into a Trap*, WASH. POST (Jan. 8, 2021), [https://www.washingtonpost.com/outlook/trump-raffen-sperger-pardon-prosecute/2021/01/06/a32388fe-4f9d-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/outlook/trump-raffen-sperger-pardon-prosecute/2021/01/06/a32388fe-4f9d-11eb-bda4-615aaefd0555_story.html) [<https://perma.cc/EY3P-EPWG>] (same, but arguing that a self-pardon would encourage the Justice Department to charge Trump with a crime to challenge a self-pardon); David Smith, *I Beg Your Pardon? Does Trump Really Plan to Absolve Himself and His Family?*, GUARDIAN (Dec. 5, 2020), <https://www.theguardian.com/us-news/2020/dec/05/donald-trump-pardons-giuliani-ivanka-joe-exotic> [[perma.cc/N8XU-MVFR](https://perma.cc/N8XU-MVFR)] (noncommittal); Jan Wolfe, *Explainer: Can Trump Pardon Himself? Would the Courts Reject the Move?*, REUTERS (Jan. 16, 2021), <https://www.reuters.com/article/uk-usa-trump-pardon-explainer/explainer-can-trump-pardon-himself-would-the-courts-reject-the-move-idUSKBN29L0D4> [<https://perma.cc/TR9R-Y5E9>]. See generally Jack Goldsmith, *A Smorgasbord of Views on Self-Pardoning*, LAWFARE (June 5, 2018),

The legitimacy of presidential self-pardons merits serious debate.<sup>45</sup> Ideally, that issue should arise infrequently, for two reasons. One is our hope that the electorate would select as chief executive only people who steer clear of the line of illegality. The other is our hope that the relationship between the opposing major political parties does not become so fractured that transfers of power from one to the other would result in the civilian version of war crimes trials as each new administration prosecutes its predecessor as a form of retaliation or out of sheer vitriol. A self-pardon would not become a live issue unless a President were at serious legal risk of being charged with a crime. But the issue has now arisen during the terms of four of our last nine presidents,<sup>46</sup> members and supporters

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<https://www.lawfareblog.com/smorgasbord-views-self-pardoning> [https://perma.cc/U7FT-XN2Y]; Sean Illing, *President Trump Says He Can Pardon Himself. I Asked 15 Experts If That's Legal*, VOX (June 4, 2018), <https://www.vox.com/policy-and-politics/2017/7/21/16007934/trump-president-pardon-himself-limits-power-constitution> [https://perma.cc/MF8E-WLBC].

45. A closely related issue is whether the President can pardon family members. That possibility has occurred quite infrequently, in large part because Presidents have rarely appointed family members as federal officials. There are a few exceptions. President John Kennedy appointed his brother Robert to be Attorney General, Bill Clinton appointed his wife Hillary to chair the President's Task Force on National Health Care Reform, and President Trump's daughter Ivanka and son-in-law Jared Kushner were White House advisors. *See, e.g., Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); White House—Senior Advisor: Jared Kushner, Global Leadership Coalition, <https://www.usglc.org/positions/white-house-senior-advisor-president/> [https://perma.cc/JT4Z-DY42]. Nonetheless, while the possibility arises less often than a blue moon, it does present itself more frequently than Haley's Comet. In 1993, Clinton pardoned his half-brother Roger for a drug offense, while Trump pardoned his son-in-law's father. *See Alschuler, supra* note 3, at 1131, 1145; Ballhaus & Tau, *supra* note 3; Maggie Haberman & Michael S. Schmidt, *Trump Has Discussed With Advisers Pardons for His 3 Eldest Children and Giuliani*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/rudy-giuliani-pardon.html> [https://perma.cc/ZL63-NPG2]; *infra* note 49.

46. The issue potentially could have arisen had Hillary Clinton become president. During the 2016 campaign, the FBI conducted a criminal investigation into the question whether she had violated federal law by using a private email server for classified communications, rather than the official Department of State server, and by later erasing evidence of those communications. *See, e.g., U.S. DEP'T OF STATE, OFF. OF INFO. SECURITY, UNCLASSIFIED DS REPORT ON SECURITY INCIDENTS RELATED TO POTENTIALLY CLASSIFIED EMAILS SENT TO FORMER SECRETARY OF STATE CLINTON'S PRIVATE EMAIL SERVER* (Sept. 13, 2019); FBI NAT'L PRESS OFF., STATEMENT BY FBI DIRECTOR JAMES B.

of each of our major political parties routinely demonize their counterparts as evil,<sup>47</sup> and some members of Congress and the public are looking to take scalps.<sup>48</sup> To be sure, the issue might not excite the same passions as some of the incendiary issues that burned during the 2020 presidential election, such as “*Defund the Police!*” But it is a sad testament to our present political world that the legitimacy of a presidential self-pardon is a real issue and that (however much we wish it would) it is not likely to disappear any time soon.<sup>49</sup> As such,

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COMEY ON THE INVESTIGATION OF SECRETARY HILLARY CLINTON’S USE OF A PRIVATE E-MAIL SYSTEM (July 5, 2016).

47. See, e.g., William McGurn, *Joe Biden’s Bitter Harvest*, WALL ST. J. (Nov. 9, 2020), [https://www.wsj.com/articles/joe-bidens-bitter-harvest-11604963930?mod=searchresults\\_pos1&page=1](https://www.wsj.com/articles/joe-bidens-bitter-harvest-11604963930?mod=searchresults_pos1&page=1) [<https://perma.cc/3MA3-UPTF>] (“It isn’t over, either. At the same moment President Biden is being applauded for his Lincolnesque call to come together, Michelle Obama, in her own congratulatory message, reminded President Biden that millions of Trump voters chose to support ‘lies, hate, chaos, and division.’ Mrs. Obama appears not to have got the memo about not demonizing people on the other side.”); David A. Walsh, *How the Right Wing Convinces Itself that Liberals Are Evil*, WASH. MONTHLY (July/Aug. 2018), <https://washingtonmonthly.com/magazine/july-august-2018/how-the-right-wing-convinces-itself-that-liberals-are-evil/> [<https://perma.cc/ZG2W-ESCK>].

48. See, e.g., Alexandria Ocasio-Cortez (@AOC), TWITTER, Nov. 6, 2020, <https://twitter.com/aoc/status/1324807776510595078> (“Is anyone archiving these Trump sycophants for when they try to downplay or deny their complicity in the future? I foresee decent probability of many deleted Tweets, writings, photos in the future[.]”); Edit. Bd., *Cancel Culture Comes After the Trump Administration*, WALL ST. J. (Nov. 15, 2020), [https://www.wsj.com/video/series/journal-editorial-report/wsj-opinion-cancel-culture-comes-after-the-trump-administration/1C982B02-9B37-4A5C-B92A-20029608E8F0?mod=searchresults\\_pos3&page=1](https://www.wsj.com/video/series/journal-editorial-report/wsj-opinion-cancel-culture-comes-after-the-trump-administration/1C982B02-9B37-4A5C-B92A-20029608E8F0?mod=searchresults_pos3&page=1) [[perma.cc/5T2N-MXRK](https://perma.cc/5T2N-MXRK)] (Video No. 146); Hana Levi Julian, *AOC Wants an ‘Enemies List’ of Trump Supporters*, JEWISHPRESS (Nov. 8, 2020), <https://www.jewishpress.com/news/us-news/aoc-calls-for-archiving-trump-sycophants-before-tweets-are-deleted/2020/11/08/> [<https://perma.cc/UND8-FGEC>]; Samuel Dorman & Lydia Moynihan, *Petition Circulating at Harvard to Stop Former Trump Administration Officials from Attending, Teaching, or Speaking at the University*, FOX BUS. (Nov. 17, 2020), <https://www.foxbusiness.com/lifestyle/harvard-petition-ban-trump-officials> [<https://perma.cc/X5CJ-YWLZ>]; Sam Dorman, *AOC, Others Pushing for Apparent Blacklist of People who Worked with Trump*, FOX NEWS (Nov. 9, 2020), <https://www.foxnews.com/politics/aoc-blacklist-trump-supporters> [<https://perma.cc/TR6M-DWQP>].

49. A related issue could arise during President Biden’s term as President. In 2019, the FBI opened a criminal investigation into money laundering and subpoenaed a laptop and computer hard drive that once belonged to President Biden’s son Hunter. Late in 2020, Hunter Biden acknowledged that the U.S. Attorney’s Office in Delaware was

it is far better to examine that subject during President Joe Biden's honeymoon period, before he accumulates his own brigade of compliant apparatchiks and his own share of relentless nemeses. That time is now.

In my opinion, Article II allows the President to pardon himself, but Article I permits Congress to impeach and remove him for doing so—not because issuance of a self-pardon itself is unlawful, but for the underlying offense and the public's resulting lack of confidence in a President who broke the law.<sup>50</sup> There would be no legal judgment holding a president accountable for his misdeeds, but there would be the contemporary, practical judgment of Congress and the political judgment of history that the person elected President is no longer fit to hold that office. That result would be insufficient for anyone who believes that a President, like any other individual, must be held legally accountable for his crimes, but it

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investigating (as he put it) "his tax affairs." Ken Thomas & Sabrina Siddiqui, *Hunter Biden Says His Taxes are Under Investigation*, WALL ST. J. (Dec. 9, 2020), [https://www.wsj.com/articles/hunter-biden-says-u-s-attorney-s-office-investigating-my-tax-affairs-11607548376?mod=searchresults\\_pos1&page=1](https://www.wsj.com/articles/hunter-biden-says-u-s-attorney-s-office-investigating-my-tax-affairs-11607548376?mod=searchresults_pos1&page=1) [<https://perma.cc/8SZ2-D7EE>]; see also Roger Kimball, *Hunter Becomes the Hunted*, SPECTATOR (Dec. 10, 2010), [https://spectator.us/hunter-biden-tax-investigation/?utm\\_source=Spectator+USA+Email+Signup&utm\\_campaign=1407954aec-EMAIL\\_CAMPAIGN\\_8\\_31\\_2020\\_19\\_27\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_edf2ae2373-1407954aec-154827651&mc\\_cid=1407954aec&mc\\_eid=171f5e6311](https://spectator.us/hunter-biden-tax-investigation/?utm_source=Spectator+USA+Email+Signup&utm_campaign=1407954aec-EMAIL_CAMPAIGN_8_31_2020_19_27_COPY_01&utm_medium=email&utm_term=0_edf2ae2373-1407954aec-154827651&mc_cid=1407954aec&mc_eid=171f5e6311) [<https://perma.cc/5G6E-4F4J>]; Ian Schwartz, *James Rosen: FBI Has an Active Criminal Investigation Into Hunter Biden For Money Laundering*, REAL CLEAR POL. (Oct. 29, 2020), [https://www.realclearpolitics.com/video/2020/10/29/james\\_rosen\\_fbi\\_has\\_an\\_active\\_criminal\\_investigation\\_into\\_hunter\\_biden\\_for\\_money\\_laundering.html](https://www.realclearpolitics.com/video/2020/10/29/james_rosen_fbi_has_an_active_criminal_investigation_into_hunter_biden_for_money_laundering.html) [<https://perma.cc/X9E7-E94F>]. A presidential pardon of a family member raises the same policy concerns as a presidential self-pardon.

50. Whether Congress can impeach and convict a President *after* he or she has left office is an interesting and unanswered question that is beyond the scope of this Article. Compare, e.g., Keith E. Whittington, *Yes, the Senate Can Try Trump*, WALL ST. J. (Jan. 22, 2021), [https://www.wsj.com/articles/yes-the-senate-can-try-trump-11611356881?mod=searchresults\\_pos1&page=1](https://www.wsj.com/articles/yes-the-senate-can-try-trump-11611356881?mod=searchresults_pos1&page=1) [<https://perma.cc/MT8N-R97A>], with, e.g., Alan M. Dershowitz, *No, You Can't Try an Impeached Former President*, WALL ST. J. (Jan. 20, 2021), [https://www.wsj.com/articles/no-you-cant-try-an-impeached-former-president-11611167113?mod=searchresults\\_pos1&page=1](https://www.wsj.com/articles/no-you-cant-try-an-impeached-former-president-11611167113?mod=searchresults_pos1&page=1) [<https://perma.cc/3VR2-8GPY>]; Paul J. Larkin, Jr., *Impeachment Follies: Why the Senate Cannot Try Trump*, DAILY SIGNAL (Jan. 29, 2021), <https://www.dailysignal.com/2021/01/29/impeachment-follies-why-the-senate-cannot-try-trump/> [<https://perma.cc/NK2N-XUUN>].

would have been adequate for the Framers, whose principal concern was with removing from office any executive official, including the chief executive, caught abusing his authority.

## II. THE COMPETING ARGUMENTS REGARDING THEIR VALIDITY

When interpreting the Constitution, courts turn for potential illumination to a variety of traditional sources. Among them are the text, the Founders' debates at the Convention of 1787 and the state Ratifying Conventions, eighteenth-century dictionaries, early practice under the new charter, the Court's precedents, and constitutional theory.<sup>51</sup> In this case, the supply of useful sources is a small one. Just as there are few guideposts to assist a President in deciding whether clemency is appropriate for a particular applicant,<sup>52</sup> there is little in the traditional interpretative sources that bears on the legitimacy of self-pardons.

Start with the text of the Pardon Clause.<sup>53</sup> Some scholars have maintained that the text of the clause itself bars self-pardons. The argument is that the term "grant" implies that the grantor and grantee must be different individuals, making a self-pardon

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51. For a discussion of those sources, see, for example, CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed., 2007); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Thomas R. Lee, *Corpus Linguistic & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20 (2016); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014). For examples of the Supreme Court's reliance on them, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 381 (1821) (describing the text as the "authoritative language of the American people"); *INS v. Chadha*, 462 U.S. 919, 946 (1983) (evaluating the structure of the Article I lawmaking process); *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (relying on the "Decision of 1789"); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (relying on "unbroken practice").

52. See Larkin, *Guiding Clemency*, *supra* note 3, at 465–96.

53. "The President . . . shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment." U.S. CONST. art. II, § 2, cl. 1; *cf.*, e.g., *Nixon v. United States*, 506 U.S. 224, 229 (1993) (beginning its analysis of the Impeachment Trial Clause, U.S. CONST. art. I, § 3, cl. 6, with its text).

linguistically incoherent and constitutionally impossible.<sup>54</sup> That conclusion, the argument goes, is also consistent with common sense. We do not “grant” ourselves what is already ours.

The cornerstone of the argument against self-pardons is the tenet that no one, including the President, is above the law.<sup>55</sup> That principle arose at common law<sup>56</sup> and took formal shape in Chapter 39 of Magna Carta. That provision kept the king, colloquially speaking, “from taking the law into his own hands”<sup>57</sup> by prohibiting the Crown from depriving anyone of life, liberty, or property except in accordance with “the law of the land.”<sup>58</sup> Allowing a President to

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54. See, e.g., Bowman, *supra* note 41, at 21–26, 32–33.

55. See Feldman, *supra* note 17 (“The basic problem with self-pardon is that it would make a mockery of the very idea that the U.S. operates under the rule of law. A president who could self-pardon could violate literally any federal law with impunity, knowing that the only risk was removal from office by impeachment.”); cf., e.g., United States v. Lee, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.”); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149–50 (1803) (“It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in the exercise of those duties.”). To some extent, every pardon could be said to place someone above the law, because it removes the legal effect of a conviction. That interpretation, however, is not a reasonable one. Pardons serve multiple interests, such as rewarding metanoia, and it serves the law to allow a chief executive to recognize that someone has turned his life around for the better.

56. See, e.g., A.J. CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES 53 (1941) (“[T]he supreme authority in political society was not that of the ruler, but that of the law”); JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 4–6 (2005); JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 12 (2004). See generally Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 327–32 (2016) [hereinafter Larkin, *Lost Doctrines*].

57. Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 71 (2021) [hereinafter Larkin, *Private Delegation*].

58. J.C. HOLT, MAGNA CARTA 2 (2d ed. 1992) (“[N]o free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land.”); see also, e.g., CARLYLE, *supra* note 56, at 53 (quoting sixteenth-

immunize himself from prosecution would largely nullify that principle. It also would frustrate the Framers' expectation that Congress can impeach and remove a President so that he can be made to stand in the dock for any crimes he committed in office.<sup>59</sup> Finally, presidential self-pardons would eviscerate the Supreme Court's 1974 ruling in *United States v. Nixon* that a President cannot forestall a criminal investigation into potentially criminal conduct by invoking executive privilege.<sup>60</sup>

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century legal commentator Richard Hooker that the King owed his sovereign power to the law, which meant "the supreme authority in political society was not that of the ruler, but that of the law"); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 123* (2d ed. 1914) ("The 'value' of the Charter . . . lay, not in the exact terms of any or all of its provisions, in the fact that the agreement enunciated a definite body of law, claiming to be above the King's will and admitted as such by John."); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 41 (1914) ("The main point in this [provision], the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*.").

59. U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."). The Convention debated the issue of whether the President may pardon traitors. Edmund Randolph proposed an amendment providing an exception for that scenario. Madison's notes on the Convention contain the following account of the debate:

Mr Randolph moved to "except cases of treason". The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments.

Col: [George] Mason supported the motion.

Mr Govr Morris had rather that there should be no pardon for treason, than let the power devolve on the Legislature.

Mr [James] Wilson. Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he himself be a party to the guilt, he can be impeached and prosecuted.

Randolph's motion failed by a vote of 8-2. 2 FARRAND, *supra* note 16, at 626; *see* KALT, *CONSTITUTIONAL CLIFFHANGERS*, *supra* note 22, at 52-53. In my view, that exchange is the strongest argument against presidential self-pardons.

60. 418 U.S. 683, 703-07 (1974); *see also* *Trump v. Vance*, 140 S. Ct. 2412, 2424-31 (2020) (reaffirming the holding in *United States v. Nixon*, 418 U.S. 683 (1974), that the President must respond to a federal grand jury subpoena and extending that ruling to a state criminal investigation).

The argument against self-pardons also invokes the ancient ethical precept of *nemo iudex in causa sua*, a Latin phrase meaning “no one should be a judge in his own cause.” That tenet has deep roots in Anglo-American law. Legal titans such as William Blackstone,<sup>61</sup> Edward Coke,<sup>62</sup> James Madison,<sup>63</sup> and Justice Samuel Chase,<sup>64</sup> as well as political philosopher Thomas Hobbes,<sup>65</sup> endorsed that principle long ago. It remains vital today, undergirding the due process rule, repeatedly applied by the Supreme Court, that no one can adjudicate a case in which he has a financial or personal interest.<sup>66</sup> Moreover, aware of the risk that federal officials might give in to the temptation of unseemly political self-dealing, the Framers

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61. See 1 BLACKSTONE, *supra* note 13, at \*91 (“[I]t is unreasonable that any man should determine his own quarrel.”).

62. See, e.g., *Dr. Bonham’s Case* (1608) 77 Eng. Rep. 638 (K.B.), 8 Co. Rep. 107a, 108a (Coke, C.J.).

63. See THE FEDERALIST No. 10, at 44 (James Madison) (Clinton Rossiter ed., 2003) (“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.”).

64. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (“[A] law that makes a man a Judge in his own cause . . . is against all reason and justice . . .”).

65. See THOMAS HOBBS, LEVIATHAN 102 (Michael Oakeshott ed., Macmillan 1946) (1651) (“[S]eeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause; and if he were never so fit; yet equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also . . . . For the same reason, no man in any cause ought to be received as arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other: for he hath taken, though an unavoidable bribe, yet a bribe; and no man can be obliged to trust him.”).

66. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–06 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–77 (2009); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428–29 (1995); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955) (“[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (ruling that the Due Process Clause incorporates the common law rule that a judge must recuse himself if he has “a direct, personal, substantial pecuniary interest” in a case); *Spencer v. Lapsley*, 61 U.S. (20 How.) 264, 266 (1857) (“The act of Congress [in question] proceeds upon an acknowledgement of the maxim, ‘that a man should not be a judge in his own cause[.]’ . . .”). See generally John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947).

adopted several constitutional provisions barring federal officials from advancing themselves by using the powers of their offices.<sup>67</sup> And the precept that no one can judge his own case takes on additional cachet as the rationale that persuaded the Department of Justice in 1974 to conclude that Nixon could not pardon himself.<sup>68</sup>

Finally, the argument against self-pardons looks outside the Pardon Clause to other constitutional provisions, which can limit that provision.<sup>69</sup> The most relevant one is the Article II Take Care Clause, which directs the President to see to the faithful

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67. Members of Congress cannot simultaneously hold an office in the Executive Branch. U.S. CONST. art. I, § 6, cl. 2. Congress cannot vote itself a pay raise that takes effect before the next congressional election. *Id.* amend. XXVII. The President can neither receive a raise in salary without an intervening presidential election, nor can he receive any other “emolument” atop his salary. *Id.* art. II, § 1, cl. 7. The Chief Justice presides over a Senate trial of an impeached President, *id.* art. I, § 3, cl. 6, because the Vice President, who otherwise would preside over the Senate, *id.* § 3, cl. 4, would benefit from the President’s removal, *id.* amend. XXV, § 1 (upon removal of the President, the Vice President becomes President). See Kalt, *Pardon Me*, *supra* note 11, at 794–96; see also, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 122 n.59 (1995) (arguing that the Vice President may not preside over his own impeachment trial).

68. See *supra* notes 19–22 and accompanying text.

69. See *Schick v. Reed*, 419 U.S. 256, 266 (1974) (assuming that other constitutional provisions can limit the Pardon Clause); Larkin, *Guiding Clemency*, *supra* note 3, at 468–69 (so arguing). See generally Amar, *supra* note 41. The Appropriations Clause bars the President from disbursing unauthorized funds. U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]”). That keeps him from remitting criminal fines and penalties to a clemency applicant without express statutory authority. See *Knote v. United States*, 95 U.S. 149, 154–55 (1877). But see *United States v. Padleford*, 76 U.S. (9 Wall.) 531, 543 (1869) (ruling that a presidential amnesty and implementing legislation entitles a claimant to return of funds paid into the Treasury from the sale of his seized property). Several Bill of Rights provisions also limit the President’s Pardon Clause power. See Larkin, *Guiding Clemency*, *supra* note 3, at 469 (“The Bill of Rights is also relevant—in particular, the First Amendment, the Second Amendment, the Fourth Amendment, and the Fifth Amendment Due Process Clause. Those provisions grant people certain constitutional rights against the government. The President, therefore, cannot grant clemency only to people of his own political party or faith, to people who work for media outlets who do not criticize his performance, to people who have never owned firearms, to people who will allow the police to tramp through their homes or lives without good cause, or to people of only one race or sex.” (footnote omitted)).

implementation of federal law.<sup>70</sup> A variety of scholars have argued that the Take Care Clause imposes on the President a body of fiduciary obligations, either one that is comparable to the responsibilities that the eighteenth-century common law imposed on private trustees or that constitutes its own discrete body of law governing public officeholders requiring the President always to act in the best interests of the public.<sup>71</sup> That rule applies no less to the President's

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70. U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”). There has been a recent surge of scholarly treatment of the clause. *See, e.g.*, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Robert G. Natelson, *The Original Meaning of the Constitution's “Executive Vesting Clause” – Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009) (concluding that the Constitution generally imposes fiduciary duties on government officials). That is atop the continued interest in the general subject of presidential power. *See, e.g.*, BAUER & GOLDSMITH, *supra* note 3; SUSAN HENNESSEY & BENJAMIN WITTES, *UNMAKING THE PRESIDENCY* (2020); HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005); MCCONNELL, *supra* note 42; SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* (2020).

71. *See* GARY LAWSON & GUY SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION* (2017); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Leib & Shugerman, *supra* note 41, at 469–76; *cf.* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL’Y 239 (2007) (discussing the law governing fiduciaries at the nation’s founding); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). Not everyone agrees with that thesis. *See, e.g.*, Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020); John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter?*, 17 GEO. J.L. & PUB. POL’Y 407 (2019); Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL’Y 373 (2019); Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J.L. & PUB. POL’Y 441 (2019). But that disagreement is not important here.

The Take Care Clause is not the only provision imposing (or assuming) a fiduciary duty on the President. The Presidential Oath Clause makes that obligation explicit. U.S. CONST. art. II, § 1, cl. 8 (requiring the President to swear or affirm that he or she will “preserve, protect and defend the Constitution of the United States”). For other provisions, *see id.* art. I, § 3, cl. 7 (impeachment and removal can disqualify someone from holding “Office of honor, Trust or Profit under the United States”); *id.* § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall

exercise of his pardon authority than to any other power he possesses. As Justice Holmes explained in *Biddle v. Perovich*, clemency is appropriate only if “the ultimate authority” decides that “the public welfare will be better served” by modifying a court’s judgment.<sup>72</sup> A fiduciary that places his personal interest ahead of the public interest violates the most elementary duty any fiduciary possesses.<sup>73</sup>

Together those arguments make a powerful case against the legitimacy of presidential self-pardons. That is particularly true if a chief executive pardons himself the morning of, or while riding en route to, his successor’s inauguration. That would also be especially galling if doing so enabled him to escape scot-free from any and all criminal responsibility for serious misdeeds while in office.

Nonetheless, there is a difference between an unwise use of clemency and an unlawful use.<sup>74</sup> Conflating the two is a common legal mistake. First-year courses in contracts and torts steep law students in the common-law decision-making process, which identifies and balances the logic, equities, benefits, and costs of every potential rule in the effort to select the one that best advances the public welfare. From that point on, many lawyers expect that there should always be a legal remedy available to redress every instance of wrongdoing and that the courts are the preferred forum for devising and applying it.<sup>75</sup> Yet that is not always the case. In fact, the Supreme Court decision first reiterating the old saw that there is a

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be appointed an Elector.”); *id.* art. VI, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

72. 274 U.S. 480, 486 (1927) (“A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”). Technically, *Perovich* involved a commutation, not a pardon. The principle, however, is the same.

73. See Leib & Shugerman, *supra* note 41, at 469–76.

74. As Professor Stephen Carter once put it, “To say that the President’s pardoning power is plenary — not subject to review — and that it is part of the system of checks and balances — available to frustrate the other branches — is not to say that every use of the pardon power is a good use of the pardon power.” Carter, *supra* note 2, at 885.

75. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9 (Amy Gutmann ed., 1997).

judicial remedy for every legal wrong, *Marbury v. Madison*, denied William Marbury the relief that the Court concluded he was entitled to receive—delivery of his judicial commission—because the text of the Constitution did not permit the Supreme Court to award it to him.<sup>76</sup>

That principle has force in this context too. Some controversies pose, in the Supreme Court's words, only "political questions," not legal ones—viz., disputes that are not amenable to resolution by an Article III court. *Marbury* itself recognized that such issues exist. As Chief Justice Marshall wrote, in the exercise of some presidential powers, our chief executive "is accountable only to his country in his political character, and to his own conscience."<sup>77</sup> One example of what the Court has labeled the "political question" doctrine exists where the Constitution textually and explicitly assigns decision-making responsibility to one of the other two branches.<sup>78</sup>

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76. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting 3 BLACKSTONE, *supra* note 13, at \*23)), *with id.* at 162, 180 (ruling that the text of Article III prohibited Congress from granting the Supreme Court original jurisdiction over Marbury's case).

77. *Id.* at 165–66.

78. In an attempt to synthesize its rulings on this subject, the Court devised a standard in *Baker v. Carr*, 369 U.S. 186, 217 (1962), to define issues properly characterized as raising only "political questions." It is unclear how much of that standard has survived later cases. See, e.g., *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (stating, in a case raising the issue whether the political questions doctrine barred judicial resolution of a dispute between Congress and the President over whether to recognize Jerusalem as the capital of Israel, that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case."). The tests that clearly still have life are the ones involving a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or a "lack of judicially discoverable and manageable standards for resolving it." See *Nixon v. United States*, 506 U.S. 224, 229–38 (1993) (ruling that the legality of Senate removal procedures fits into the first category); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498–2508 (2019) (ruling that the legality of political gerrymandering fits into the second category). The issue of who should receive a pardon could arguably fit into Category 1 or 2. If the issue were viewed simply as whether the Take Care Clause bars the President from pardoning himself, that narrow issue likely would not be deemed a political question. It would be characterized as the antecedent issue of whether answering the

Other issues are susceptible to judicial review, but require the courts to afford the chief executive extraordinary deference when he exercises an inherent power. The classic example is the President's exercise of his authority to represent and protect the nation when dealing with other countries or the nation's foes.<sup>79</sup> Such

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question is "what courts do." By contrast, if the issue included an inquiry into whether clemency is appropriate for a particular President, a strong argument can be made that the inquiry falls into either category. The Pardon Clause specifically vests the President with the clemency power, and there is widespread agreement that the clause does not offer the President any standard for deciding when clemency is appropriate. *See, e.g.,* Jody C. Baumgartner & Mark H. Morris, *Presidential Power Unbound: A Comparative Look at Presidential Pardon Power*, 29 POL. & POL'Y 209, 215 (2001) ("As with other provisions of the Constitution, except for the impeachment exclusion, the Framers were very general in their draft and omitted any specifics regarding the definition and use of the pardon power, the use and understanding of which would evolve over time."); Erin R. Collins, *Clemency and the Administration of Hope*, 29 FED. SENT'G REP. 263, 264 (2017) ("Clemency is a completely discretionary power; there is no 'clemency law,' no precedent we could use to interpret the [Obama Administration Clemency Project 2014] criteria."); Paul J. Haase, Note, "*Oh My Darling Clemency*": *Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287, 1293 (2002) ("The language of the Constitution provides no real guidance regarding the manner in which the appropriateness of a pardon should be determined."); Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 567 (2000) (describing clemency as a "largely unprincipled, almost standardless component in our justice system"); Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 282 (1993) ("[T]he Framers provided no criteria for distinguishing between proper and improper uses of the pardoning power and put no constitutional limit on the president's use of that power, except to prohibit pardons in cases of impeachment."); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 597 (2012); Ruckman, *Clemency Origins*, *supra* note 1, at 258. *See generally* Larkin, *Guiding Clemency*, *supra* note 3, at 465–69. However that issue is resolved, there is a reasonable argument that a President may pardon himself, as explained in the text.

79. *See, e.g.,* *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018) ("Any rule of constitutional law that would inhibit the flexibility of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained." (quoting *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976))); *id.* at 2421 ("[P]laintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which are 'delicate, complex, and involve large elements of prophecy.'" (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))).

deference is appropriate here as well, because the Pardon Clause grants the President a prerogative over clemency.<sup>80</sup>

Several features of the Pardon Clause text are illuminating in that regard. The first one is that the clause specifically identifies the President as the particular individual responsible for federal clemency decisions.<sup>81</sup> The Framers knew that the President could not personally execute every responsibility placed on him and would need to rely on “Officers of the United States” in different “executive Departments” for assistance.<sup>82</sup> The Pardon Clause, however, singles out the President as the one person who may forgive offenders on behalf of the nation.<sup>83</sup> The President exercises that power on his own, not as a collegial body, like Congress, or as a judicial tribunal, like the Supreme Court, but as an individual holding the office of the nation’s chief executive. That designation carries forward “the British model” in which pardon authority resided in the Crown, which had a prerogative over forgiveness.<sup>84</sup>

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80. See *infra* notes 85–86 and accompanying text; see also, e.g., 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (Thomas M. Cooley ed., 4th ed. 1873) (“Congress cannot limit or impose restrictions upon the President’s power to pardon.”); Larkin, *Guiding Clemency*, *supra* note 3, at 455–56, 472–74.

81. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”); cf. *id.* art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives.”).

82. U.S. CONST. art. II, § 2, cl. 1 (“[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”); *id.* art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law”); see *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (“In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’ 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).”).

83. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1873) (quoted *infra* at text accompanying note 137).

84. See *Herrera v. Collins*, 506 U.S. 390, 412 (1993). The Pardon Clause creates an executive power, not a judicial one, and therefore is not subject to the core *nemo iudex* criticism. See Conklin, *supra* note 42, at 294–95 (“Even if a vague notion against self-

Second, the lean text of the Pardon Clause suggests that the Framers well understood the institution of clemency under British law,<sup>85</sup> sought to incorporate that meaning wholesale into the Pardon Clause, and thereby carried forward the Crown's prerogative over its use.<sup>86</sup> Aside from two narrow exceptions (whose significance is

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judging could supersede parts of the Constitution, the president's power to self-pardon is not an act of self-judging. A presidential pardon is an executive action, not a judicial one." (footnote omitted)). Plus, the *nemo iudex* principle is more a rule of thumb than a law of physics; other considerations can outweigh it. See Vermeule, *supra* note 42, at 400–20.

85. See, e.g., *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015) ("The colonists brought the principles of Magna Carta with them to the New World[.]"); *Kerry v. Din*, 576 U.S. 86, 91 (2015) (plurality opinion) ("Edward Coke's . . . Institutes 'were read in the American Colonies by virtually every student of law[.]'" (quoting *Klopper v. North Carolina*, 386 U.S. 213, 225 (1967))); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that Blackstone's "works constituted the preeminent authority on English law for the founding generation."); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30–31 (1992). That knowledge is particularly important in the case of the Pardon Clause. See *Schick v. Reed*, 419 U.S. 256, 262 (1974) ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice.").

86. See, e.g., *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855) ("At the time of our separation from Great Britain, that power had been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to 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. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."); *Wilson v. United States*, 32 U.S. 150, 160 (1833) (Marshall, C.J.) ("As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."); cf. PRAKASH, *supra* note 13, at 153 ("The absence of an explanation of the [commander-in-chief's] office's contours suggests that the Framers drew upon prevailing conceptions of what it meant to be a commander in chief.").

discussed below)—one for state crimes, the other for impeachment and removal—the text does not limit whom or how the President may forgive, nor does it establish any conditions that he must satisfy before exercising that authority.

Third, the Framers placed the Pardon Clause in the same provision of Article II as the Commander-in-Chief and Opinion Clauses.<sup>87</sup> That placement is critical because the latter clauses are presidential prerogatives. The President may issue commands to American service members engaged in a congressionally authorized use of military force without obtaining antecedent approval from Congress on an operation-by-operation basis,<sup>88</sup> and he can ask his principal lieutenants for their opinions as he sees fit.<sup>89</sup> The

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87. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).

88. There is a longstanding disagreement between Congress and the President whether Congress must authorize the use of military action. When Congress has done so, as it did with the Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001), there is no serious disagreement over who may command military operations. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 26 (1942) (“The Constitution . . . invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.”); LOUIS HENKIN, *FOREIGN AFFAIRS & THE UNITED STATES CONSTITUTION* 123 (2d ed. 1996) (“When the President acts by Congressional authority he has the sum of the powers of the two branches, and can be said ‘to personify the federal sovereignty,’ and in foreign affairs, surely, the President then commands all the political authority of the United States.” (footnotes omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring))).

89. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 672–75 (1996) (describing the clause’s breadth). Alexander Hamilton found the Opinion Clause unnecessary since the ability to obtain advice from subordinates inheres in the authority granted the President by the Article II, § 1, Executive Vesting Clause. *See* THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.”). Regardless, there is no prerequisite for or limitation on its use.

President does not share those authorities with anyone else.<sup>90</sup> Those powers sharply contrast with other Article II authorities, such as the appointment of federal officials or the adoption of treaties, both of which require Senate approval before they may take effect.<sup>91</sup> The Framers also distinguished the President's commander-in-chief, advice-seeking, and clemency authority from many of Congress's Article I powers, which are limited to particular uses<sup>92</sup> or which require specific features of implementing legislation,<sup>93</sup> and from the federal courts' Article III adjudicative power, which is limited to specified "Cases" and "Controversies."<sup>94</sup>

Fourth, the existence of the two exceptions noted above—for state crimes and impeachment—is quite important. Consider the former.

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90. *See, e.g., Ex parte Quirin*, 317 U.S. at 25 ("[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.").

91. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

92. *See, e.g., id.* art. I, § 8, cl. 1 (authorizing Congress to impose "Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); *id.* art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *id.* art. I, § 8, cl. 15 (authorizing Congress to pass laws federalizing the "Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

93. *See, e.g., id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* art. I, § 8, cl. 4 (requiring that the laws governing "Naturalization" and "Bankruptcies" be "uniform"); *id.* art. I, § 8, cl. 8 (authorizing Congress to create patent and copyright protections "for limited Times"); *id.* art. I, § 8, cl. 12 (prohibiting appropriations for the Army to last "for a longer Term than two Years"); *id.* art. I, § 8, cl. 18 (authorizing Congress to pass legislation that is "necessary and proper" to implement federal law); *id.* amends. XIII, XIV, XV (authorizing Congress to "enforce" via "appropriate" legislation the substantive guarantees of those provisions).

94. *Id.* art. III, § 2, cl. 1; *see infra* notes 142, 149.

In “a bow to federalism,”<sup>95</sup> the Framers limited the Pardon Clause to only federal offenses. The states retain the ability to decide whether, when, and how to excuse anyone, including the President, for state law crimes. States can adopt a criminal code that largely mirrors the federal one<sup>96</sup>—in some respects, states can even exceed the breadth of federal criminal law<sup>97</sup>—and states may prosecute a President for any crimes he committed while holding office. The result is that a President cannot escape potential criminal liability by pardoning himself.<sup>98</sup> Accordingly, a presidential self-pardon is not a “Get Out Of Jail Free” card because a state can prosecute a President under the state penal code for any crimes he committed.<sup>99</sup>

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95. MCCONNELL, *supra* note 42, at 172.

96. The principal limitation on the states’ criminal lawmaking authority is geographic. The states must prove that a crime occurred, at least in part, within its borders or had an actual or intended in-state effect. See Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law, and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 342 n.19 (2015). In theory, a state could incorporate by reference the entire federal criminal code. Cf. Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2018) (incorporating by reference state criminal code provisions for federal enclaves).

97. See *United States v. Morrison*, 529 U.S. 598, 617–19 (2000) (holding portions of the Violence Against Women Act unconstitutional as exceeding Congress Article I Commerce Clause power); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (same, Gun-Free School Zones Act).

98. Indeed, that proposition is perhaps implicit in the Supreme Court’s 2020 ruling in *Trump v. Vance*, 140 S. Ct. 2412 (2020) that the President is not absolutely immune from responding to a state criminal subpoena. *Id.* at 2425–31. *Vance* involved conduct that Trump undertook before becoming President and did not involve the issue of whether a state can force a sitting chief executive to stand trial during his presidency, rather than after he leaves office. That question remains open.

99. That possibility might come into play, given Trump’s conduct on January 2, 2021. See *supra* note 37; Richard Fausset & Danny Hakim, *Georgia Prosecutors Open Criminal Inquiry into Trump’s Efforts to Subvert Election*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/trump-georgia-investigation.html> [<https://perma.cc/FYA3-PKPW>]. It might be seen as solicitation of voter fraud, which is a felony under federal and state law. See, e.g., 52 U.S.C. § 20511 (2018) (“A person, including an election official, who in any election for Federal office . . . knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by . . . the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with Title 18 . . . or imprisoned not more than 5 years, or both.”); GA. CODE ANN. § 21-2-604(a)(1) (West 2021) (“A person commits the offense of criminal

The state offenses exception also means that allowing presidential self-pardons does not make the President more powerful than the English Crown.<sup>100</sup> Keep in mind that the Crown would never need a self-pardon because the common law deemed the Crown incapable of committing a crime.<sup>101</sup> Moreover, the Framers could not have foreseen the extraordinary breadth of today's federal criminal code. The first federal criminal law had a quite limited reach.<sup>102</sup> Given the narrow scope of federal criminal law at the time of the founding and the fact that every state carried forward the crimes known to the common law,<sup>103</sup> state criminal law defined the only exposure a President faced. As such, the Framers' decision to deny the President the ability to pardon himself for state-law offenses paid respect to the principle that the President is accountable to the law.

The impeachment and removal exception is also important. The

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solicitation to commit election fraud in the first degree when, with intent that another person engage in conduct constituting a felony under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”); *id.* § 21-2-604(b)(1) (“A person convicted of the offense of criminal solicitation to commit election fraud in the first degree shall be punished by imprisonment for not less than one nor more than three years.”).

100. See Conklin, *supra* note 42, at 300 (“Comparing the president's ability to self-pardon with the King of England's absolute immunity only serves to demonstrate that the power to self-pardon is far less tyrannical. A president only has the power to self-pardon for a limited time, would likely pay a high political cost, can only pardon federal offenses (and therefore would still be subject to state prosecution), and is still liable in civil court for pardoned actions.”).

101. See *supra* note 13.

102. See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 726 (2013) (“The first federal criminal statute outlawed no more than approximately thirty crimes, and each one was closely tied to the needs of the new enterprise. [¶] As it turned out, that law was just an acorn. Today, there are approximately 3,300 federal criminal statutes. Moreover, those statutes are not limited to the ones listed in Title 18, the federal penal code. Federal criminal laws are interspersed across the fifty-one titles and 27,000 pages that make up the United States Code. There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes.” (footnotes omitted)).

103. See, e.g., BAILYN, *supra* note 85, at 30–31. The Colonies also had rudimentary criminal codes. See, e.g., GREENBERG, *supra* note 14; HUGH RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* (1965).

King and Parliament battled for years over the issue whether the Crown could halt a parliamentary impeachment proceeding by pardoning the official under investigation. Parliament ultimately won that contest in 1701 with the Act of Settlement.<sup>104</sup> The Framers decided to avoid any dispute by answering the question in the text of the Pardon Clause.<sup>105</sup> The exception means that while the President may excuse someone from guilt or jail, he cannot keep Congress from removing him from office and violating the public trust by abusing its powers.<sup>106</sup> Coupled with the state crimes exception, the impeachment exception suggests that the Framers were more worried by the harm that the public could suffer from the continued abuse of government power by a scoundrel working for a President than the possibility that a President might be one himself.<sup>107</sup>

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104. Act of Settlement, 12 & 13 Will. 3 c. 2, § 3 (Eng.) (“That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament.”); see RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 1–55 (1973).

105. See Larkin, *Guiding Clemency*, *supra* note 3, at 466 & n.80.

106. See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); *id.* § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”); *id.* § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”); *id.* art. II, § 4 (“The President, Vice President, and all other civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors.”).

107. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 121 (1925) (Taft, C.J. and former President) (“Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.”); BERGER, *supra* note 104, at 1 (“Impeachment, with us largely a means for the ouster of corrupt judges, was for the English the chief institution for the preservation of the government.” (footnotes and internal punctuation omitted)); Tim Naftali, *Trump’s Pardons Make the Unimaginable Real*, ATLANTIC (Dec. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/how-abuse-presidential-pardon/617473/> [https://perma.cc/EV4G-S5WK] (referring to Taft’s opinion in *Grossman*: “He was certain that no president would ever be so corrupt as to issue bad pardons. . . . And the chief justice thought he was uniquely qualified to say so: William Howard Taft is the only member of the Court ever to have been president. Taft considered himself a gentleman, and he expected his successors to behave like gentlemen, too.”); Paul Rosenzweig, *Trump’s Pardon of Manafort Is the Realization of the Founders’ Fears*, ATLANTIC (Dec. 23, 2020), <https://www.theatlantic.com/ideas/archive/>

For those reasons, the term “grant” in the Pardon Clause does not have the import that it might possess were it read in isolation from the remainder of the clause. In addition, not every dictionary, including *Black’s Law Dictionary*, defines a “pardon” in a way that requires a dyadic relationship.<sup>108</sup> Finally, the Pardon Clause should not be read with the level of granularity or literalness that the “grant”-based argument demands. The Supreme Court certainly has not read the clause in that manner.<sup>109</sup> After all, immediately following the word “grant” are the terms identifying what the President may bestow—“Reprieves and Pardons.” A “Reprieve” is merely a delay in the imposition of punishment, while a “Pardon” erases the underlying conviction<sup>110</sup> necessary for any punishment.<sup>111</sup> Yet the Supreme Court has not limited the clause to only

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2020/12/problem-pardons-was-clear-start/617397/ [https://perma.cc/Y7PZ-KD4F] (“[T]he Constitutional Convention, having heard and rejected Mason’s prediction [of potential presidential pardon abuse], can reasonably be said to have accepted the possibility of pardon abuse as the collateral cost of having a pardon power in the first place. [¶] And why exactly would the delegates have done that? Why did they disregard Mason’s prediction? In the end, his concerns were rejected by his fellow convention delegates because, in their judgment, there were adequate remedies for that type of presidential misbehavior. As James Madison put it: ‘There is one security in this case [of misused pardons] to which the gentlemen [i.e., Mason and his supporters] 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 [with a pardon], the House of Representatives can impeach him; they can remove him if found guilty.’ Madison saw Congress as a powerful guard dog capable of preventing executive misconduct. Instead, in terms of pardon abuse, as with so many other instances of Trump’s overreach, it has proved little more than a lapdog.”).

108. See *Pardon*, BLACK’S LAW DICTIONARY 1137 (11th ed. 2019) (“The act or an instance of officially nullifying punishment or other legal consequences of a crime. . . . A pardon is usu. granted by the chief executive of a government. The President has the sole power to issue pardons for federal offenses, and state governors have the power to issue pardons for state crimes.”); KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 22, at 44–45. Besides, the notion of self-forgiveness, as a corollary to divine forgiveness, predates both Article II and English common law. See 1 *John* 1:9, 3:20–22 (King James).

109. See *infra* text accompanying notes 134–141.

110. See, e.g., *Carlisle v. United States*, 83 U.S. 147, 1514 (1872) (“All [justices of the Supreme Court] have agreed that the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself.”); Larkin, *Revitalizing Clemency*, *supra* note 3, at 846–47 & n.46.

111. See *Chapman v. United States*, 500 U.S. 453, 465 (1991) (explaining that a valid

those remedies. The Court has twice ruled that the Pardon Clause also grants the President authority to “commute” a sentence—viz., to shorten it or make it less onerous<sup>112</sup>—even though the text of the clause does not mention that remedy. Under several other Supreme Court decisions, the President may also grant “amnesty”—viz., a category-wide pardon—and remit funds or property to a pardoned individual even though the Pardon Clause is silent as to those forms of relief.<sup>113</sup>

Perhaps that conclusion is easier to understand (and accept) if we see the President’s Pardon Clause power as “a bit of the royal prerogative dropped into our generally law-bound constitutional system.”<sup>114</sup> The Framers certainly did not want the President to be a king, and they made sure of that in several ways: they required that he or she be elected to that office, rather than born into it.<sup>115</sup> They limited the period that anyone can hold that office, rather than grant someone a life estate.<sup>116</sup> They specified the powers that a President may exercise, rather than grant him or her absolute authority

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conviction is a prerequisite for any criminal punishment).

112. See *Schick v. Reed*, 419 U.S. 256 (1974); *Biddle v. Perovich*, 274 U.S. 480 (1927); RONALD L. GOLDFARB & LINDA R. SINGER, *AFTER CONVICTION* 343 (1973) (“[P]resumably the [commutation] power is simply a lesser form of pardon. The power to commute sentences has been held to be implicit in the general grant of the pardoning power in the states whose constitutions do not mention commutation and in the federal system . . .”).

113. See *Burdick v. United States*, 236 U.S. 79, 91 (1915); *The Laura*, 114 U.S. 411, at 413–14 (1885) (“It may be conceded that, except in cases of impeachment, and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the president, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress . . .”); *Knote v. United States*, 95 U.S. 149, 152–54 (1877); *United States v. Klein*, 80 U.S. 128, 147 (1871) (“Pardon includes amnesty.”); *Carlisle v. United States*, 83 U.S. 147, 153 (1872) (ruling that “claimants [are] restored to their rights of property, by the pardon of the President”); *United States v. Paddleford*, 76 U.S. 531, 542–43 (1869); *In re Armstrong’s Foundry*, 73 U.S. 766, 770 (1867) (“[T]he claimant of property seized under the act of August 6th, 1861, is entitled to the benefit of amnesty to the same extent as, under like pleading and proof, he would be entitled to the benefit of pardon.”).

114. John Harrison, *Pardon as Prerogative*, 13 *FED’L SENT’G REP.* 147, 147 (2000–2001).

115. U.S. CONST. art. II, § 1, cls. 1–2; *id.* amend. XII.

116. *Id.* art. II, § 1, cl. 1; *id.* amends. XII, XX.

or leave the matter unresolved.<sup>117</sup> And they identified when and how a President can be lawfully removed from office, rather than leave abdication or violent revolution as the only routes.<sup>118</sup> The Framers also acted against an English common law background in which a nation's chief executive was immune from criminal or civil liability,<sup>119</sup> and they rejected every proposed limitation on the Pardon Clause but the two they placed into its text addressing state offenses and impeachment.<sup>120</sup> Moreover, the authority to award clemency cannot be used to increase a party's sentence, only to reduce it, so a President cannot use it to harm an individual recipient.<sup>121</sup> Perhaps most importantly, members of the Founding Generation deemed an individual's "Honor" to be "sacred"<sup>122</sup> and presumed that whoever the nation elected President would hold the same view.<sup>123</sup> At the end of the day, the Framers believed that removal from office alone would stain a former President's reputation throughout history without the additional need for a criminal conviction and punishment.<sup>124</sup> However we might treat the

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117. *Id.* art. II, § 1, cl. 2.

118. *Id.* art. II, § 4; *id.* amend. XXV. See generally Larkin, *Guiding Clemency*, *supra* note 3, at 452–53.

119. See Larkin, *Guiding Clemency*, *supra* note 3, at 480–81; *supra* note 13.

120. See *supra* notes 59, 81.

121. *Schick v. Reed*, 419 U.S. 256, at 266–67 (1974) ("The plain purpose of the broad power conferred by [the Pardon Clause] was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable. . . . Of course, the President may not aggravate punishment . . .").

122. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("And for the support of this Declaration, with a firm Reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.").

123. See *supra* note 16.

124. See Jeffrey A. Engel, *The Constitution, in IMPEACHMENT: AN AMERICAN HISTORY* 42–43 (2018) ("To the Constitution's framers the greatest dishonor a president could suffer would be not the criminal consequences of nefarious acts, but rather the judgment of his peers that he had violated the people's trust."); see also *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.").

deterrent and retributive effect of removal today, the Framers saw it as a fitting punishment all by itself.<sup>125</sup>

It is no argument that removal is an insufficient remedy for presidential misconduct because there is too little time between the November election and the January 20th inauguration for Congress to investigate and hold the necessary proceedings. The Framers cannot be faulted for leaving only two months for Congress to hold the President accountable. The Convention of 1787 did not know when (or even whether) the proposed Constitution would be ratified, so the Confederation Congress set March 4 as the date for the commencement of a new Congress and the President's inauguration.<sup>126</sup> The Twentieth Amendment, which took effect in 1933, advanced the inauguration from March 4 to January 20 to lessen the "lame duck" period between different administrations.<sup>127</sup> Today's Congresses must act within the constraint set by that amendment even if it means working through the holidays.<sup>128</sup>

Focusing on the need for prosecution of a scoundrel who becomes President is also the wrong way to consider this problem. A far superior approach is to make sure that the person we elect as President has the character not to approach the line of illegality and not to subordinate the public's welfare to his personal interests. The best way to keep Presidents from using their clemency power as a tool for protecting themselves and for rewarding friends, cronies, and campaign contributors is to elect people who would never even think of doing so because they find such conduct morally reprehensible. The Framers assumed that America would elect only such people. They did not discuss the issue during Constitutional

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125. What the Framers believed, whether or not deemed conclusive, matters to everyone across the legal spectrum. See PRAKASH, *supra* note 13, at 2.

126. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 117–18 (2005); Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 717.

127. See U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January . . .").

128. Besides, an outgoing president could sign a self-pardon warrant in the limousine en route to the Capitol for the inauguration of the incoming chief executive whenever that event occurs.

Convention probably because, as Harvard Law School Professor Mark Tushnet put it, they believed that it was “unthinkable” that “the American people would elect the kind of person who would pardon himself,”<sup>129</sup> particularly since the likely first President, George Washington, was the presiding officer at the Convention.<sup>130</sup>

Unfortunately, we have learned that the Framers’ confidence in the electorate was misplaced. Perhaps that is because the number of issues the federal government addresses is far beyond what the Framers thought would fall within the province of the federal government and those issues are of greater concern to different interest groups than the character of the people who run for that office.<sup>131</sup> Whatever the reason might be, we shortchange ourselves and our fellow citizens if we do not treat the character of the people we elect as being a critically important factor when we cast our ballots. If we do and if we elect people with a sterling personal moral character, the self-pardon issue should disappear.<sup>132</sup>

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129. Eric Tucker, *Does Trump Have Power to Pardon Himself? It's Complicated*, ABC NEWS (Dec. 7, 2020), <https://abcnews.go.com/Politics/wireStory/trump-power-pardon-complicated-74590139> [<https://perma.cc/2BC4-9RMU>].

130. See *supra* note 16.

131. See Larkin, *Revitalizing Clemency*, *supra* note 3, at 915–16.

132. Consider what Hamilton Jordan, Chief of Staff for President Jimmy Carter, wrote when describing Carter’s likely response to Jordan’s attempt to obtain a pardon for fugitive Marc Rich:

I could not imagine walking into the Oval Office and raising the subject of a pardon with President Carter. Nor could I imagine other chiefs of staff in this modern era—Dick Cheney, Howard Baker, Jim Baker or Leon Panetta—discussing with their president the political pros and cons of a pardon for a fugitive who had renounced his citizenship and fled the country to escape prosecution on tax fraud and racketeering charges.

If I’d have had the nerve to walk into the Oval Office to discuss a pardon with Mr. Carter, I would have been peppered with questions:

“Hamilton, why on earth are you bringing this to me?”

“What does (Attorney General) Griffin Bell think?”

“Why isn’t Lloyd Cutler (the White House counsel) here?”

“What is the case history and rationale for this pardon?”

“What are the extenuating circumstances that merit my overturning the judgment of a jury and our court system?”

“Do the former prosecutors favor a pardon, and if so, why?”

Turn now to what the Supreme Court has said about the Pardon Clause. The Court has not addressed the self-pardon issue. In fact, with the exception of the wrongful conviction of an innocent person, the Supreme Court has never attempted to define when clemency is necessary or appropriate or what type of relief should be granted (such as a pardon versus a commutation).<sup>133</sup> Instead, the Court has described the president's authority in dramatically expansive, virtually unlimited terms.

Chief Justice Marshall described a pardon as the "private, though official act of the executive magistrate," an "act of grace" that "proceed[s] from the power intrusted 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."<sup>134</sup> Writing in his treatise on the Constitution, Justice Story concluded that "Congress cannot limit or impose restrictions upon the President's power to pardon."<sup>135</sup> Then, there is Chief Justice Chase's pithy

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After a series of my answering "I don't know," President Carter would have surely given me one of his famous icy stares and admonished me, "Pardons are serious legal business and not your business, Hamilton. Don't ever come in here again to talk to me about a pardon."

If I had summoned the courage to say, "But Mr. President, this pardon is for someone who contributed generously to our campaign and has even promised to contribute to the Carter Presidential Library," he would have thrown me out of the Oval Office and probably fired me on the spot.

Jordan, *supra* note 5.

133. See *Cavazos v. Smith*, 565 U.S. 1, 8–9 (2011) (describing clemency in a state case: "It is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention."); *Herrera v. Collins*, 506 U.S. 390, 412, 415 (1993) (describing clemency as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" and as the "'fail safe' in our criminal justice system" (quoting KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 131 (1989))); *Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.").

134. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833).

135. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1504, at 324 n.4 (Thomas M. Cooley ed., 4th ed. 1873).

description of the Pardon Clause in *United States v. Klein*<sup>136</sup>: “To the executive alone is intrusted the power of pardon; and it is granted without limit.”<sup>137</sup> More recently, Chief Justice Burger concluded that the pardon power “flows from the Constitution alone, not from any legislative enactments,” and gives the president “plenary authority” to forgive an offender.<sup>138</sup> He added that the Framers “spoke in terms of a ‘prerogative’ of the President, which ought not to be ‘fettered or embarrassed’” by anyone else, including the courts, and that any limitations on the Pardon Clause must be found in the Constitution’s text.<sup>139</sup> Those descriptions, however, were quite modest compared to what Justice Field wrote in *Ex parte Garland*<sup>140</sup>:

The power thus conferred is unlimited, with the exception [in cases of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.<sup>141</sup>

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136. 80 U.S. (13 Wall.) 128 (1872).

137. *Id.* at 147.

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

139. *Id.* at 263 (quoting 2 FARRAND, *supra* note 16, at 626), 266.

140. *Ex parte Garland*, 71 U.S. 333 (1867).

141. *Id.* at 380; *see also* Larkin, *Guiding Clemency*, *supra* note 3, at 473–74 (“It would be difficult to find a Supreme Court decision describing a different presidential power in more sweeping terms. Certainly, nothing in the canonical decision defining general presidential authority—*Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure Case*)—contains any passage in the majority opinion by Justice Hugo Black, or the renowned concurring opinion by Justice Robert Jackson, that remotely approximates the Court’s description of the imperial scope of the President’s clemency authority. Indeed, the breadth of the Court’s description of the President’s pardon authority in *Ex parte Garland* brings to mind the way Chief Justice Marshall described some of the President’s inherent powers in *Marbury v. Madison*. There, he concluded that, in some instances, the President is accountable only to the nation and his own conscience when he acts. Marshall specifically referred to the President’s authority over foreign affairs and

The result is that the Supreme Court's description of the Pardon Clause's text is sufficiently capacious to allow for a self-pardon.<sup>142</sup>

Interestingly, the text, purposes, and case law discussing the "judicial Power" created by Article III support the conclusion that the question of who should receive a pardon, including the President, should be subject to, at most, extremely deferential judicial review. Article III grants federal courts the "judicial Power" to adjudicate identified types of "Cases" and "Controversies."<sup>143</sup> Those terms draw meaning from cognate provisions of the Constitution, as well as the history of the English common-law and equity courts.<sup>144</sup> The English courts presided over the resolution of criminal prosecutions and civil disputes, and American federal courts may adjudicate issues arising at "Trial[s]" in "criminal prosecutions" or in "Suits at common law."<sup>145</sup>

Not every issue, however, poses a matter "of a Judiciary Nature,"

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did not identify the pardon power as another example of that authority. Yet, given the expansive understanding of the Pardon Clause that he later endorsed in *United States v. Wilson*, one that the Court reiterated in *Ex parte Garland* and *Schick v. Reed*, if asked Marshall might have included the Pardon Clause in that category as well." (footnotes omitted)).

142. The breadth of that power proves that even time travel is possible. See PRAKASH, *supra* note 13, at 99 ("The pardon power extends the president's command of law execution across time. If predecessors secured punishments that seem unwise, unjust, or unconstitutional, the incumbent may wipe them away with pardons. Likewise, the president may revisit his own administration's successful prosecutions and modify or efface them. Finally, if the president grants pardons for any successful governmental prosecution, he extends his control of law execution into the future. No successor may prosecute someone for pardoned offenses.").

143. See U.S. CONST. art. III, § 2, cl. 1.

144. See, e.g., *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("The Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits . . . in equity.' . . . We have long held that '[t]he "jurisdiction" thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" (first quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; and then quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939))); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

145. U.S. CONST. art. III, § 2, cl. 1; *id.* art. III, § 2, cl. 3; *id.* amend. VI; *id.* amend. VII.

in James Madison's words.<sup>146</sup> The Constitution assigns some tasks to the Article I and II branches. That principle is relevant here because, in the Supreme Court's words, where the Constitution contains "a textually demonstrable constitutional commitment" of the power to decide an "issue to a coordinate political department,"<sup>147</sup> the federal courts must stand aside. That is true even though, as Chief Justice Marshall wrote, it is "the province and duty of the judicial department to say what the law is."<sup>148</sup> The reason is that occasionally "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."<sup>149</sup> Both factors arguably are present here. Article II creates a presidential prerogative, and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution" of someone else.<sup>150</sup>

That conclusion is a sensible one. As the Supreme Court has explained, federal courts cannot trespass on the bailiwicks of the other branches; the courts' role is to resolve lawsuits, not solve social problems.<sup>151</sup> As such, federal courts cannot assume the

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146. James Madison, *Monday Augst. 27th, 1787 In Convention, in 2 FARRAND, supra* note 16, at 426, 430 (referencing the United States Supreme Court).

147. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962), *abrogated on other grounds by Rucho v. Common Cause*, 139 S. Ct. 2884 (2019)).

148. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

149. *Rucho*, 139 S. Ct. at 2494 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion)).

150. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 n.13 (2005); *Diamond v. Charles*, 476 U.S. 54, 64 (1986).

151. As the Court explained in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011),

Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.' This language restricts the federal judicial power 'to the traditional role of the Anglo-American courts.' . . . In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. . . . If the judicial power were 'extended to every question under the constitution,' Chief Justice Marshall once explained, federal courts might take possession of 'almost every subject proper for legislative discussion and decision.' The legislative and executive departments

responsibilities placed on Congress to decide whether to pass legislation, to impose a tax, whom to select as its legislative officers, or to declare war.<sup>152</sup> Nor may the federal courts make decisions entrusted to the President, such as whether and how to wage war, what advice to seek from his lieutenants, whether to appoint an official during a congressional recess, and whether to recognize a foreign nation.<sup>153</sup> In each instance, Congress vested exclusive decision-making power outside of the Article III courts in an Article I body or an Article II individual.<sup>154</sup> Clemency fits into the same

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of the Federal Government, no less than the judicial department, have a duty to defend the Constitution.

See U.S. CONST. art. VI, cl. 3. That shared obligation is incompatible with the suggestion that federal courts might wield an ‘unconditioned authority to determine the constitutionality of legislative or executive acts.’” *Id.* at 132–33 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009), then quoting 4 PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen ed., 1984)).

152. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers.”); *id.* art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.”); *id.* art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”); *id.* art. I, § 7, cls. 2 & 3 (requiring all bills to be submitted to the President for his signature or veto); *id.* art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War . . .”).

153. *Id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”); *id.* art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”); *id.* art. II, § 3, cl. 1 (“[The President] shall receive Ambassadors and other public Ministers.”); *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (upholding the President’s right to decide whether to recognize Jerusalem as the capital of Israel).

154. See Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 58–59 (2020) (“Several provisions grant exclusive adjudicative, managerial, or remedial authority to Congress or the President, which impliedly forecloses supplementary judicial solutions. . . . [N]o court may order Congress to pass a law, expel a member, impeach and remove an executive officer, raise taxes, or declare war. Nor may a court direct the President how to grant mercy, manage the prosecution of a war, make foreign-policy decisions for the nation, or staff the government.”).

category.<sup>155</sup> In any event, even if some clemency issues are subject to judicial review, the President should be afforded extraordinary deference regarding whom should receive that relief, even if he is the recipient.

There are two other points to keep in mind. First, we hope that self-pardons would ordinarily become an issue only when there is at least an objectively justified reasonable suspicion that the President has broken the law, as occurred during the Watergate Investigation.<sup>156</sup> Yet, as our recent presidential campaigns show, supporters of either major political party can use social media to generate suspicion of criminality among the public where none exists solely to serve their own partisan interests.<sup>157</sup> That is troublesome. The range of scenarios in which the issue can arise should give us pause before concluding that every self-pardon is motivated only or

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155. See *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (quoted *supra* note 133).

156. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (“Although an officer’s reliance on a mere hunch is insufficient to justify a [Terry] stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard . . . .”); *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (“The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person. [¶] The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. [¶] The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, [392 U.S. 1, 21 n.18 (1968)], said that, ‘[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court’s Fourth Amendment jurisprudence.’”) (emphasis added in *Cortez*)).

157. Engel, *supra* note 124, at xii (“Lies told often enough form a reality of their own . . . .”).

entirely by a President's desire to immunize himself for conduct that he knew was a crime when he acted.<sup>158</sup> It could be that a President desires to save the nation of the same type of turmoil that the nation endured during the impeachment and removal proceedings against Nixon, Clinton, and Trump. That is hardly an illegitimate motive for a self-pardon.<sup>159</sup>

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158. A "mixed motive" problem would arise if a President acts to benefit the public and himself. That scenario often arises in employment cases when an employer dismisses a worker for an impermissible reason (such as race or sex) but defends the action on a permissible ground (such as incompetence or absenteeism). *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977). The same analysis would be appropriate here, even though (except in exceptional circumstances, *see infra* text following note 181) the issue would not arise in litigation. It is worth noting, however, that labeling as illegitimate a President's motive to benefit himself by exercising the powers of his office would invalidate many actions that a President, or any other elected official, takes.

159. *See, e.g.*, *Murphy v. Ford*, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975) (describing Ford's pardon of Nixon as a "prudent public policy judgment" and "within the letter and the spirit" of the Pardon Clause); GERALD R. FORD, *A TIME TO HEAL* (1979) ("I wasn't motivated primarily by sympathy for his plight or by concern over the state of his health. It was the state of the country's health at home and abroad that worried me. . . . America needed recovery, not revenge. The hate had to be drained and the healing begun."); *id.* at 173 ("Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible."); *id.* at 179 ("[C]ompassion for Nixon as an individual hadn't prompted my decision at all"); WERTH, *supra* note 18, at 234, 244, 317, 320–21, 329, 333 (noting that President Ford pardoned Nixon to end our travails over Watergate). In the immediate aftermath of the Nixon pardon, numerous critics assailed Ford for immunizing Nixon from legal accountability. *Id.* at 331–33. History, however, looks favorably on what Ford did. *See, e.g.*, MARTHA MINOW, *WHEN SHOULD LAW FORGIVE?* 119–20 (2019); WERTH, *supra* note 18, at 344 ("The [*Washington Post's*] Bob Woodward, after interviewing Ford in 1998 concluded: 'If Ford mishandled some of the details and disclosures, he got the overall absolutely right—the pardon was necessary for the nation.'"); Carter, *supra* note 2, at 887 ("[A]lthough it was politically wrenching at the time, President Ford probably made the right decision in pardoning Richard Nixon shortly after Nixon's resignation. Although our national anger seemed to demand punishment for Nixon's crimes, Ford believed that in the long run, the national interest would be better served by enabling the ex-President to avoid prosecution, leaving him untouched by legal proceedings that would otherwise have kept alive our national obsession with Watergate, which, in retrospect, it was plainly time to put aside."). (In fact, one commentator has argued that President Biden should seriously consider following President Ford's lead in pardoning President Trump if President Biden believed that doing so would "heal the country's pain and, to coin a phrase, build back better." Jonathan

For example, suppose Congress enacts legislation that imposes duties on the President or one of his lieutenants, with noncompliance punishable as a criminal offense, and that he refuses to comply with the law because he believes that it trespasses on Article II. A President could refuse to comply with the statute (or order his subordinates not to comply) and pardon his noncompliance (or theirs) in order to force members of Congress to concede that the legislation is unconstitutional or to initiate impeachment and removal proceedings and face potential retribution at the polls for a partisan stunt.<sup>160</sup> There might be other examples as well. The point is that some self-pardons could serve *both* the public interest *and* the

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Rauch, *The Case for Pardoning Trump*, LAWFARE (Jan. 22, 2021), <https://www.lawfare-blog.com/case-pardoning-trump>. [<https://perma.cc/3TM9-8CM8>.] Some scholars have argued that Nixon could and should have “spared Gerald Ford the odious task of issuing the pardon for his predecessor” by pardoning himself. Nida & Spiro, *supra* note 42, at 219; *see also* Vermeule, *supra* note 42, at 412.

160. That possibility is a realistic one, because Congress and the President can disagree on separation of powers issues. They certainly have in the past. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2187 (2020) (holding unconstitutional the for-cause limitations on the President’s Article II removal power imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 478–481 (2010) (holding unconstitutional limitations on the President’s Article II removal power imposed by the Sarbanes Oxley Act); *INS v. Chadha*, 462 U.S. 919, 920–22 (1982) (holding unconstitutional the “legislative veto”). They could do so again even under existing law. For example, the Federal Advisory Committee Act, 5 U.S.C. App. §§ 1–11 (2018) (FACA), imposes various open-meeting and records-disclosure requirements on “advisory committees,” including ones on which a president might rely. The FACA would be unconstitutional as applied if it were interpreted to limit the President’s ability to obtain the advice he needs to carry out his Article II duties. *See* *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 467–89 (1989) (Kennedy, J., concurring in the judgment) (so concluding); *cf. In re Cheney*, 406 F.3d 723, 727–28 (D.C. Cir. 2005) (en banc) (narrowly construing the FACA to avoid creating a constitutional problem with its application to the Vice President). The Independent Counsel provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, is another example. It required the U.S. Attorney General to apply to a special court created by the act to appoint an Independent Counsel to conduct an investigation into potentially criminal conduct by certain Executive Branch officials. If a President believed that the statute was unconstitutional, as Justice Scalia later concluded, *see* *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting), the President could have ordered the Attorney General to refuse to comply with the law and then pardoned himself for any crime that he might have committed in the process. That would have put Congress to the choice noted in the text.

President's self-interest. Where that is true, we should not hesitate to conclude that the President has acted lawfully.<sup>161</sup>

Second, even when the President violates his fiduciary duty to the public to always use the powers of his office for their benefit, not his own,<sup>162</sup> the remedial question remains: Does the violation retroactively nullify his self-pardon? In answering that question, it is significant that the President has not taken a client's money or tangible property. Had he done so, he would certainly have no right to keep it or profit from using it even on a temporary basis.<sup>163</sup> What is at stake in the case of a self-pardon, however, is intangible. It is "society's general interest in assuring that the guilty are punished."<sup>164</sup> There are various occasions in which society has decided that even guilty parties must go free because countervailing interests outweigh that "general interest." Offenses barred from prosecution by statutes of limitations are a prominent example,<sup>165</sup> but not the only one.<sup>166</sup> Those laws recognize that, at times, the importance

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161. Professors Ethan Leib and Jed Shugerman recognize that possibility. *See* Leib & Shugerman, *supra* note 41, at 476 ("[A] presidential self-pardon as a good-faith constitutional defense of the Executive Branch might arguably be valid, but would also raise complicated questions about motives, departmentalism, and judicial deference."). I would go further and say that, in such a case, the self-pardon would definitely be valid.

162. The Presidential Oath and Take Care Clauses obligate him or her to do this. *See supra* notes 70–73 and accompanying text.

163. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.").

164. *Heckler v. Chaney*, 470 U.S. 821, 847 (1985) (Marshall, J., concurring in the judgment).

165. *See, e.g.*, 18 U.S.C. § 3282 (2018) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

166. Diplomatic immunity for foreign officials in the United States is another example. Under the Vienna Convention on Diplomatic Relations of April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 7310, and its implementing legislation, the Diplomatic Relations Act,

of enforcing the criminal law is subordinate to other national interests. Not forcing the nation to endure the spectacle of a President standing trial and being imprisoned is one of those interests.

Accordingly, just as Article I makes Congress the final authority when it comes to deciding whether to impeach and remove a President,<sup>167</sup> Article II makes the President the exclusive decision maker when it comes to clemency. Moreover, even if the President's clemency decisions do not technically constitute classic "political questions," the Pardon Clause gives the President sufficient discretion to decide how best to exercise that power that he is entitled to special deference when granting clemency, even if he is the intended recipient.

Where does that leave us? Would the foregoing discussion lead the Supreme Court to uphold a self-pardon? The answer is, "We don't know."

The generally plain vanilla Pardon Clause does not contain the word "sole" or a phrase such as "to anyone, including himself" that would make the argument for a self-pardon a layup.<sup>168</sup> Moreover, the Pardon Clause is only slightly less laconic than the Due Process Clauses;<sup>169</sup> the meaning those clauses had at common law was only that the Crown must comply with "the law of the land" before trespassing on one's life, liberty, or property;<sup>170</sup> and the Supreme Court

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22 U.S.C. §§ 254a–258a (2018), diplomatic and consular officials, as well as their families, are entitled to immunity from criminal prosecution in a host nation's courts.

167. See U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole power of Impeachment."); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *Nixon v. United States*, 506 U.S. 224, 229 (1993) ("The language and structure of this [Removal] Clause are revealing. The first sentence is a grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else.").

168. Cf. *Nixon*, 506 U.S. at 229 (quoted *supra* note 167). Interestingly, the word "alone" does appear in the Supreme Court's opinion in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872), when the Court describes the pardon power. See *supra* text accompanying note 137 (quoting *Klein*).

169. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); *id.* amend. XIV ("No State shall deprive any person if life, liberty, or property, without due process of law . . .").

170. See Larkin, *Private Delegation*, *supra* note 57, at 71–72.

has read those clauses far beyond their limited (albeit important) common law meaning.<sup>171</sup> The result is that the Court has never felt itself trapped by the common law<sup>172</sup>—or even by its own precedents<sup>173</sup>—when it becomes persuaded that the Constitution requires a different result. That could happen here. Sometimes the realities of the controversy the Court is asked to referee are too striking to be disregarded, and those facts influence the Court’s view of the law.<sup>174</sup> The Court might find itself unable to swallow the prospect that a President could go scot-free for a federal crime, unwilling to interpose itself between outgoing and incoming administrations, reluctant to fend off an overwhelming public demand that a former President be held accountable, or fearful of the loss to its prestige from upholding a self-pardon. For those reasons, and probably others, the Court might rule that a President cannot pardon himself.<sup>175</sup> But if it does, the Court would be wrong.

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171. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Roe v. Wade*, 410 U.S. 113 (1973). See generally Larkin, *Lost Doctrines*, *supra* note 56, at 297–303.

172. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and requiring a state to appoint counsel for an indigent defendant charged with a felony even though there was no such right at common law, *id.* at 466); *Powell v. Alabama*, 287 U.S. 45, 60–61 (1932)).

173. See, e.g., *Obergefell*, 576 U.S. at 675–76 (overruling *Baker v. Nelson*, 409 U.S. 810 (1972), which had upheld a state law limiting marriage to heterosexual couples over a constitutional challenge); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a state anti-sodomy law against a constitutional challenge).

174. See, e.g., *Bush v. Gore*, 531 U.S. 98, 110 (2000) (finding the ballot recount procedure ordered by the Florida Supreme Court “cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work” that was impossible to complete before a state-law deadline); *Powell*, 287 U.S. at 49, 53, 56 (ruling that the appointment of “all the members of the bar for the purpose of arraigning” five black defendants accused of the capital crime of rape, with the “anticipat[ion]” that they would “continue to help” the defendant “if no counsel appears,” with no specific attorney designated until the “the morning of the trial,” was “little more than an expansive gesture” and did not satisfactorily afford the defendant counsel for their defense).

175. For an excellent discussion of how and why that could occur, see Benjamin Wittes, *Trump’s Self-Pardon Fantasy Will Meet a Harsh Reality*, ATLANTIC (Jan. 7, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/a-self-pardon-wont-save-trump/617592/>[<https://perma.cc/F6UB-L5MR>].

Yet the Supreme Court need not reach that conclusion to decide that self-pardons are permissible. The last issue in this regard involves the question of how the Court should proceed in the face of constitutional uncertainty. The text of the Constitution does not answer the self-pardon issue with the same precision as it does regarding presidential pardons for state-law crimes or presidential efforts to fend off impeachment and removal. We therefore need to decide what approach courts should follow when deciding whether to impose limitations on the actions of the political branches in the face of uncertainty as to the meaning of the relevant constitutional provision.

I believe that the best approach is to leave to the political process the authority to act as elected officials see fit unless there is a clear constitutional impediment in their way. We have become accustomed to entreating the courts to resolve not just legal disputes but political controversies, in part because the deep polarization that is the current state of affairs on Capitol Hill makes almost impossible the political accommodations and compromises necessary to produce legislation. That practice resembles using opiates for their euphoric effect without regard to the long-term addictive problems created by a short-term fix. By resolving issues for them, courts would only enable members of Congress to avoid taking responsibility for their actions. Besides, were the Supreme Court to adopt a self-pardon exception to the text of the Pardon Clause, the decision would be a precedent for creating other exceptions, such as ones excluding certain types of crimes (like treason or mass murder) or certain types of offenders (like recidivists or serial killers). Were the Court to do so, it might turn the Pardon Clause into the Free Speech Clause, a provision whose text does not limit the courts from endorsing whatever speech policies they find most appealing.

It is far better, in my opinion, for the judiciary to decide “matters of a Judiciary Nature”<sup>176</sup> and leave political disputes to the political branches. The courts must respect and follow an express

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176. *Supra* note 146 and accompanying text.

constitutional provision where one exists.<sup>177</sup> But where, as here, there is no clear textual answer to an issue, the courts should not attempt to devise one. Chief Justice and former President William Howard Taft took that approach in *Ex parte Grossman*<sup>178</sup> in ruling that the President does not abuse his clemency power and violate separation of powers principles by pardoning someone for being held in criminal contempt of a federal court.<sup>179</sup> Impeachment was the proper remedy for a President who abuses his clemency power, he concluded, not the creation of a nontextual restriction on clemency.<sup>180</sup> Where the text does not illuminate a controversy or guide a court's path like the North Star to the correct resolution, the risk is too great that judges will find their own personal policy preferences to be constitutional commands. Discretion is the better part of valor not only for warriors but also for judges.

Unfortunately, that approach might not work in this case.<sup>181</sup> A President who pardons himself might be succeeded by one who believes that a self-pardon is invalid. The new President might order

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177. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 436–47 (1998) (holding unconstitutional the Line Item Veto Act on the ground that it conflicts with the text of the Article I bicameral and presentment clauses).

178. *Ex parte Grossman*, 267 U.S. 87 (1925).

179. *Id.* at 121 (“An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery. A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common-law origin and long years of practice and acquiescence.”).

180. *Id.* (“If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this if to be imagined at all would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.”).

181. I am indebted to Brian Kalt for pointing this scenario out to me.

the Attorney General to file charges against his predecessor if justified by the evidence. Once he is charged with a federal crime, the former President would move to dismiss the indictment on the ground that his pardon covers all of the relevant crimes. In that scenario with different Presidents disagreeing about the correct answer to this issue, a political resolution would not be possible. The federal courts would be called upon to decide whether a self-pardon is lawful.<sup>182</sup>

At that point, the Supreme Court would be forced to determine whether to create an additional but implicit exception for presidential self-pardons. The exception would need to be implicit, of course, because there is no such express limitation. At common law, that prospect would have raised no one's eyebrows, because the English courts regularly created rules governing contracts, torts, wills, estates, and crimes.<sup>183</sup> But this context is materially different. It has been a fundamental rule of law since *Marbury v. Madison* that the text of the Constitution has crucial importance in matters of constitutional law.<sup>184</sup> Ordinarily, courts interpret the terms found in that text and leave full-scale revisions to the Article V amendment process.

Consider the Double Jeopardy Clause. It provides that no "person" may "be subject for the same offence to be twice put in

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182. There is another, intriguing possibility. The new President could *withdraw* the self-pardon issued by his or her predecessor and order the Attorney General *not* to prosecute the president. See Ken Gormley, *If Trump Pardons Himself, Biden Should Un-Pardon Him*, WASH. POST (Dec. 18, 2020), <https://www.washingtonpost.com/opinions/2020/12/18/if-trump-pardons-himself-biden-should-un-pardon-him/> [<https://perma.cc/NM8Z-2WMG>]. This would allow the new President to express his disagreement with the legality of a self-pardon while denying his predecessor the opportunity to defend its legality in a criminal case. The predecessor President might try to bring an action for declaratory relief to establish the legality of his self-pardon, but he or she would have difficulty establishing an Article III "Case" or "Controversy" absent proof of a concrete action adversely affecting him other than the alleged illegality of withdrawing an already-issued self-pardon. The reason is that the courts might conclude that the withdrawal itself merely expresses a difference of opinion as to the legality of a government action. See *supra* notes 133, 141 and 179.

183. See, e.g., THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 56, 238, 455–56 (Lib. Fund 2010) (1929).

184. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803).

jeopardy of life or limb.”<sup>185</sup> In cases raising issues under that clause, the Court must decide issues such as whether a “corporation” is a “person,”<sup>186</sup> how to define “the same offence,”<sup>187</sup> when is a person “in jeopardy” of a second punishment,<sup>188</sup> and if separate charges filed by the federal and state governments “twice” place someone at risk of multiple punishments.<sup>189</sup> Those inquiries, and others like them,<sup>190</sup> are materially different from questions asking whether

185. U.S. CONST. amend. V.

186. *See* *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (ruling by implication that a corporation can invoke the Double Jeopardy Clause).

187. *See* *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (different charges are not the “same offence” if each one requires proof of an element not required by the other); *United States v. Dixon*, 509 U.S. 688, 696 (1993) (explaining that the *Blockburger* test applies in the context of multiple punishment and multiple prosecution); U.S. CONST. amend. V.

188. *See* *Crist v. Bretz*, 437 U.S. 28, 32–38 (1978) (ruling that jeopardy attaches when the jury is empaneled and sworn).

189. *See* *Gamble v. United States*, 139 S. Ct. 1960, 1964–80 (2019) (ruling that successive prosecutions by the state and federal governments for the same crime do not violate the Double Jeopardy Clause).

190. The Sixth Amendment Jury Trial Clause guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district” where the crime was committed. U.S. CONST. amend. VI. That text forces the Court to answer questions such as when does a person become “the accused,” *see, e.g.*, *United States v. Marion*, 404 U.S. 307, 313 (1971) (ruling that a person does not become “the accused” until he is formally charged with a crime, such as by the filing of an indictment), how many people are necessary to constitute a “jury,” *compare* *Williams v. Florida*, 399 U.S. 78, 86–103 (1970) (ruling that a six-person jury satisfies the Jury Trial Clause) *with* *Ballew v. Georgia*, 435 U.S. 223 (1978) (ruling that a five-person jury does not), *and* what deprives a jury of its required “impartial[ity],” *see, e.g.*, *Rivera v. Illinois*, 556 U.S. 148, 158–60 (2009) (ruling that the mistaken deprivation of a defendant’s right to exercise peremptory challenges to members of the venire does not deny a defendant an impartial jury); *Holland v. Illinois*, 493 U.S. 474, 477–84 (1990) (ruling that the use of peremptory challenges to excuse racially identifiable members of the venire violates the Equal Protection Clause but does not necessarily violate the Sixth Amendment guarantee of an “impartial” jury); *Lockhart v. McCree*, 476 U.S. 162, 177–83 (1986) (ruling that the exclusion from the jury in capital cases of jurors unalterably opposed to capital punishment does not violate the guarantee of an “impartial” jury). For similar cases deciding whether particular law enforcement practice constitutes a “search” or a “seizure” for purposes of the Fourth Amendment, *see, for example*, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (defining “searches” and “seizures”); *Burdeau v. McDowell*, 256 U.S. 465, 475–76 (1921) (ruling that conduct by a private party cannot constitute a “search” or “seizure”).

certain conduct nowhere mentioned in the text of the Constitution should nonetheless be treated as if the text in fact did mention it.<sup>191</sup> To be sure, there will be close cases where the proper interpretation of the text will lead to a rule that might not itself be found in the constitutional text when read literally.<sup>192</sup> But a difference in degree can become a difference in kind when that difference exceeds a reasonable range.

In my opinion, the latter would occur if courts were to add a third limitation to the Pardon Clause's text. After all, there will always be strong policy arguments for denying some parties clemency. Prominent examples include individuals who commit certain especially heinous crimes (treason, espionage, terrorism, mass murder, serial killings, child abuse, rape, to name a few), the individuals who stand atop large-scale criminal enterprises, sociopaths, and repeat offenders. If the Supreme Court were to rule that it may create a new, third category of exclusions (for self-pardons) in addition to the two already identified in the text (for state crimes and congressional impeachments), it would be a small step for lower courts—or legislatures, for that matter—to add additional exceptions. If so, the result would be to abandon the rule of *Marbury* because courts and legislatures would be free to amend the constitutional text in a common-law like manner rather than limit themselves to interpreting the Framers' words. The Supreme Court cannot follow that path without abandoning the importance that *Marbury* placed on fidelity

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191. Compare, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (creating a constitutional right to same-sex marriage), and *Roe v. Wade*, 410 U.S. 113 (1973) (creating a constitutional right to have an abortion), with, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (refusing to create a constitutional right to protection against violent harm by private parties), and *Harris v. McRae*, 448 U.S. 297 (1980) (refusing to create a constitutional right to public funding of abortions).

192. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (ruling that a jury verdict in a "serious" criminal case (where there is the potential of more than six-months confinement) must be unanimous despite the absence of that requirement in the text of the Jury Trial Clause); *Taylor v. Louisiana*, 419 U.S. 522, 527–31 (1975) (ruling that the automatic disqualification of women from service as jurors denied the defendant an "impartial" jury by denying him a "fair possibility" of a petit jury representing a cross-section of the community).

to the constitutional text as the justification for judicial review.<sup>193</sup> To paraphrase Justice Kagan, the Framers could have written the Pardon Clause differently, but they didn't, and we have to live with the text they chose.<sup>194</sup> Otherwise, we would be guilty of writing fiction rather than honestly interpreting a legal text.

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193. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained. The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

194. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325–26 (2020) (discussing the problem of the so-called “faithless presidential elector”: “The Framers could have done [the Twelfth Amendment] differently . . . Whether by choice or accident, the Framers did not reduce their thoughts about electors’ discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors’ votes should be.”).

## III. GOING FORWARD

At one time, the prospect of an adverse judgment by history (or the Almighty) about a President might have been a sufficient deterrent to (and adequate punishment for) any presidential misuse of clemency. Today, however, few people deem adequate an unfavorable judgment by posterity on either side of the River Styx. Most people offended by a President's decisions may take to social media to express their outrage, but some will look for a more traditional vehicle to bring the chief executive to heel.

One option is to pursue litigation challenging a self-pardon. Elected officials might be among the first plaintiffs, if only to appease their constituents who believe that what the President has done is disgraceful. It would cost an elected official nothing—they can always find someone to represent them *pro bono*—and would allow a member of Congress to display outrage and garner media attention. Nowadays most political disputes wind up as lawsuits alleging a constitutional violation of some sort,<sup>195</sup> so there is a fair chance that someone would sue a federal official—perhaps the Secretary of the Treasury and the Director of the Office of Personnel Management, to enjoin his retirement checks—were the President to pardon himself. Litigation, however, is not likely to prove successful.<sup>196</sup> It would be an insuperable challenge just to find a

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195. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835 & 1840) (“There is almost no political question in the United States that is not resolved sooner or later into a judicial question.”).

196. It is difficult to sue the President himself. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (ruling that the President is not an “agency” for purposes of the Administrative Procedure Act); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (“[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.”); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (quoted *supra* note 124); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1569, at 372 (Thomas M. Cooley ed., 4th ed. 1873) (“There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these must necessarily be included the power to perform them. . . . The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose

plaintiff who could establish the requisite Article III injury-in-fact necessary to enable a federal court to consider the merits of the claim.<sup>197</sup> Of course, were the Justice Department to prosecute a former president for a federal offense arguably within the scope of a self-pardon, the former President could raise that pardon as a complete defense to the charge, and the legality of a self-pardon would become an issue for the federal courts (and very likely the Supreme Court) to resolve. Otherwise, the prospects are not good for anyone who hopes that a court will adjudicate the legality of and nullify a self-pardon.

Nor may Congress outlaw self-pardons by legislation. Parliament has imposed limitations on the Crown's clemency power,<sup>198</sup> but

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his person must be deemed, in civil cases at least, to possess an official inviolability.”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196–97 (2006) (explaining challenges to executive power often do not result in judiciable issues).

197. See, e.g., *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (“A litigant ‘raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992))); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597–615 (2007) (plurality opinion) (ruling that taxpayers lack standing to challenge an agency’s use of federal funds to underwrite a conference promoting the President’s faith-based initiatives); *Raines v. Byrd*, 521 U.S. 811, 818–30 (1997) (ruling that members of Congress lack standing to challenge the constitutionality of the Line Item Veto Act); *Allen v. Wright*, 468 U.S. 737, 754 (1984) (“[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–13 (1983) (ruling that a plaintiff seeking injunctive relief must show that he will be subject to the government’s allegedly unlawful actions); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215–28 (1974) (ruling that private citizens cannot bring suit to challenge the military reserve officer commissions held by members of Congress, on the ground that the commissions violate the Incompatibility Clause, U.S. CONST. art. I, § 6); *United States v. Richardson*, 418 U.S. 166, 171–80 (1974) (same, alleged violation of the Statement of Accounts Clause, U.S. CONST. art. I, § 9, cl. 6, for not expressly identifying the Central Intelligence Agency’s budget); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“The Court’s prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”).

198. See, e.g., *Schick v. Reed*, 419 U.S. 256, 260–61 (1974); Feldman, *supra* note 17 (both listing examples).

Parliament is the supreme lawmaking body in England since that nation has no written Constitution. This nation does, and that fact is critically important. The Supreme Court made it clear in *Marbury* that the Constitution limits Congress's legislative power.<sup>199</sup> That principle applies in full to the President's clemency power.<sup>200</sup> Because Article II grants the President a prerogative over clemency, Congress can no more obstruct his exercise of that power than the President can disrupt Congress's impeachment authority. Congress might chafe at its inability to regulate the President's clemency decisions, but the Framers made that choice for them.<sup>201</sup>

Finally, there is the possibility of revising the Pardon Clause via a constitutional amendment. In response to past clemency abuses, some parties called for constitutional limitations on a President's clemency authority, particularly during the end of his or her administration.<sup>202</sup> The amendment process, however, is quite rigorous. Article V requires a two-thirds vote by each House of Congress to submit a proposed constitutional amendment to the states.<sup>203</sup> Then, three-fourths of the state legislatures must vote in its favor for it to become law.<sup>204</sup> That is a steep hurdle to overcome for a proposed amendment to be eligible for consideration by the states.

Members of Congress have tried without success. After President Gerald Ford pardoned Richard Nixon for any crimes that the latter

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199. See *supra* note 193; *supra* note 40.

200. See, e.g., *Schick*, 419 U.S. at 266 ("A fair reading of the history of the English pardoning power, from which our Art. II, §2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 152 (1872) (quoted *supra* at text accompanying note 137); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380–81 (1866) (quoted *supra* at text accompanying note 141); 2 STORY, *supra* note 80, § 1504, at 324 n.4 (quoted *supra* at text accompanying note 135); cf. LAWTON OLC OPINION, *supra* note 21, at 3 (arguing that "a concurrent resolution [recommending a pardon] would be only hortatory and have no legal effect").

201. Congress could, however, make clear that federal offenses, such as bribery, do apply to the President, as Bob Bauer and Jack Goldsmith have suggested. See BAUER & GOLDSMITH, *supra* note 3, at 130–31, 361, 373–75.

202. See *infra* text accompanying notes 205–07.

203. U.S. CONST. art. V.

204. *Id.*

might have committed in connection with Watergate, Senator Walter Mondale proposed an amendment to the Pardon Clause that would have allowed Congress to overrule a grant of clemency by a two-thirds vote. Mondale's proposal failed.<sup>205</sup> After Clinton left the White House, Congress held hearings into his profligate use of the clemency power during his final days in office.<sup>206</sup> Representative Barney Frank proposed a constitutional amendment to bar the President from granting clemency between October 1 in an election year and January 21 in the following year.<sup>207</sup> Frank's proposed amendment also did not become law.

The upshot is this: a constitutional amendment is highly unlikely. No proposal to amend the Pardon Clause has made it out of Congress, even in times that were as politically sulfuric as we are witnessing today. Hope may spring eternal, but reality is a cruel mistress.

#### CONCLUSION

The clemency power that President Biden came to possess when he took the oath of office is the same one enjoyed by George Washington and every successor. It stands as perhaps the last surviving remnant of the English Crown's royal prerogatives. Hopefully, President Biden will not need to consider pardoning himself. If he were to take that step, he might pay a short-term political price of being impeached and removed from office, as well as the long-term reproach of history for having disgraced the office of the presidency. But whatever price he might pay, he would not be acting unlawfully simply by pardoning himself. The Pardon Clause gives him that power. We often forget that there is a difference between

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205. MOORE, *supra* note 133, at 217; Larkin, *Guiding Clemency*, *supra* note 3, at 462 n.60.

206. See S. REP. NO. 106-231, at 2 (2000) (report on Pardon Attorney Reform and Integrity Act, (2000)); *Recent Presidential Pardons: Testimony Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Roger C. Adams, Pardon Attorney); *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 342 (2001); *Presidential Pardon Power: Hearing Before the H. Subcomm. on the Const. of the H. Comm. on the Judiciary*, 107th Cong. (2001).

207. See Crouch, *supra* note 34, at 109–10.

a President who acts unwisely and one who acts unlawfully. Only time will tell whether we will need to be reminded of that difference.