Please Allow Myself to Pardon . . . Myself:
The Constitutionality of a Presidential Self-Pardon

Michael Conklin¹

INTRODUCTION

President Donald Trump sparked a debate after tweeting, “[a]s has been stated by numerous legal scholars, I have the absolute right to PARDON myself . . . ,”² and, “all agree the U. S. President has the complete power to pardon . . . .”³ Suddenly, the constitutional question of a self-pardon—previously relegated to “parlor game”⁴ status among constitutional scholars—became real.

This Article argues in favor of the president’s power to issue a self-pardon by critically analyzing common arguments against the self-pardon and then by providing arguments in favor of the self-pardon. As this Article demonstrates, many of the anti-self-pardon arguments are the result of misunderstandings regarding judicial precedent, the Constitutional Convention, or the significance of one person’s ill-informed opinion during the Nixon administration. Other anti-self-pardon arguments are premised on vague themes that could be interpreted a number of different

¹ Powell Endowed Professor of Business Law, Angelo State University.
⁴ Ashley Parker & Joel Achenbach, Giuliani Calls it “Unthinkable” that Trump would Pardon Himself, WASH. POST (June 3, 2018, 4:43 PM), https://www.washingtonpost.com/politics/giuliani-calls-it-unthinkable-that-trump-would-pardon-himself/2018/06/03/99b0a1ca-6748-11e8-bbc5-9f3634fa0a_story.html?utm_term=.05887e495255.
ways. The arguments in favor of the self-pardon, however, are well-grounded in American jurisprudence and are consistent with the text of the United States Constitution.

The goal of this Article is to shed light on the constitutionality of presidential self-pardons and the need for implementation of protections against the practice. Or alternatively, a constitutional amendment to bar the practice altogether, thus avoiding the constitutional crises that would surely surround a self-pardon attempt. One such example of preemptive action would be the proposal to amend the Constitution with the language, “The President of the United States Shall Have the Power to Grant Reprieves and Pardons for Offenses, Except Impeachment, Against the United States to All Individuals Except for the President’s Spouse, Children, Siblings, Parents, or Self.”

The Constitution provides little guidance on the issue of a potential presidential self-pardon. Only one sentence is dedicated to pardons: “The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”

Looking to historical precedent and case law likewise provides no dispositive answer. No president has ever issued a self-pardon, and very few Supreme Court cases have addressed any aspect of the president’s pardon power.

Looking to law journal articles for a consensus on whether the president can pardon himself serves only to illustrate how disputed the issue is. There are only two journal articles whose primary focus is the constitutionality of a presidential self-pardon. One emphatically maintains

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6 U.S. CONST. art. II, § 2, cl. 1.
that this would be allowed, while the other is equally emphatic that it would not be allowed. 7

Extending the search to all law journal articles that have provided a related opinion does not elucidate the matter. There are eight in favor of the constitutionality of a self-pardon 8 and eight against. 9

ARGUMENTS AGAINST PRESIDENTIAL SELF-PARDONS

Constitutional Themes Against Self-Judging and Self-Dealing

Argument: A presidential self-pardon would violate the basic rule of law principle that one cannot be his own judge. 10 The Supreme Court has held that allowing someone to be a judge in his own case “is against all reason and justice. . . .” 11 Another prevalent theme throughout the Constitution is that self-dealing is forbidden. 12 Pardoning oneself is the ultimate act of self-dealing. Therefore, a self-pardon is unconstitutional.

7 Nida & Spiro, supra note 5 (arguing that a self-pardon is allowed); Brian C. Kalt, Pardon Me?: The Constitutional Case Against Presidential Self-Pardons, 106 YALE L.J. 779, 795 (1996) (arguing that a self-pardon is not allowed).
10 Kalt, supra note 7, at 805–10.
12 Kalt, supra note 7, at 795.
Response: Teasing out vague notions of constitutional themes in an effort to alter the plain text of the pardon clause is tenuous at best. Even if one accepts the stated themes against self-dealing and being one’s own judge, it is misguided to think a self-pardon would violate either of them.

The president is not barred from using the pardon power in a way that fosters self-dealing. The president can pardon alleged partners in crime even if the effect is to derail a criminal prosecution of the president.\(^\text{13}\) It would be odd to bar a direct self-pardon while allowing this functional equivalent.\(^\text{14}\) Likewise, a president is free to engage in a form of self-dealing by, say, pardoning a spouse for the sole purpose of benefiting the president’s private life. Furthermore, as the nation’s chief prosecutor, the president has prosecutorial discretion to make decisions regarding cases against himself, which is another form of self-dealing.\(^\text{15}\) Since these examples do not violate the Constitution on the grounds of self-dealing, neither would a self-pardon. Additionally, a self-pardon is not necessarily an act of self-dealing. A president might decide to issue himself a pardon—despite the negative political consequences—in order to protect others from being implicated or to help the country move on.\(^\text{16}\)

*Calder v. Bull* is the Supreme Court case most often used to establish that one cannot be a judge in his own case.\(^\text{17}\) However, the case has nothing to do with a president’s constitutional

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\(^{13}\) Many believe this was the effect of George H. W. Bush’s pardons involving the Iran-Contra prosecutions at the end of his presidency. Lozano, *supra* note 8, at 160.

\(^{14}\) Another example of a widely accepted use of the pardon power that is a functional equivalent of a self-pardon is for a president to resign under the understanding that his vice president will issue a pardon to the former president. And unlike in the Ford/Nixon pardon, this could be done in the last hours of a presidency. Additionally, it was suggested in the Nixon memo discussed *infra* that a president could reach a similar result without having to wait until the end of his term by taking advantage of the 25th 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 resign or resume the duties of his office.” *Mary C. Lawton, Dep’t of Just., Off. of Legal Couns., Presidential or Legislative Pardon of the President*, 370 (1974).

\(^{15}\) Kalt, *supra* note 7, at 798.

\(^{16}\) Nida & Spiro, *supra* note 5 at 218.

\(^{17}\) *Calder v. Bull*, 3 U.S. 386 (1798).
pardon power. The case, decided in 1798, resolved whether a state legislature’s extension of the statute of limitations for probate court violated protections against ex post facto laws. The twelve words in the opinion that address self-judging are irrelevant to the holding. The reference to self-judging is just one in a list of examples of things state legislatures are not entrusted to do. The notion that state legislatures do not have the power to pass “a law that makes a man a judge in his own cause” does nothing to alter the plain text of the president’s pardon power.

Even if a vague notion against self-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. Therefore, standard judicial rules do not apply. The entity responsible for prosecuting the pardoned citizen has no judicial rights to appeal, and no judicial determination is made. A pardon does not alter a judicial finding of guilt; it circumvents the judicial process and its determinations entirely. The pardon power “is not about ascertaining guilt or innocence; it is about demonstrating clemency at a time when guilt has already been presumed.” A presidential pardon does not adjudicate someone to be not guilty as a judge would. The difference between judging and pardoning can be illustrated by looking at judicial recusals.

18 Id.
19 Id.
20 Id. at 388–89.
22 The misguided notion that a president issuing a pardon is acting in a judicial capacity seems to stem from the inappropriately broad definition of “judging” as anytime someone makes a decision. In other words, since a president must decide to issue a pardon, that is a judgment and therefore he is acting as a judge. For example, “The pardon provision of the Constitution is there to enable the president to act essentially in the role of a judge of another person’s criminal case . . . . In all such instances, however, the president is acting as a kind of super-judge . . . .” Laurence Tribe et al., No, Trump Can’t Pardon Himself. The Constitution Tells us so., WASH. POST (July 21, 2017), https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html?
23 Gonzales, supra note 8, at 936.
24 See id. at 936–37.
25 See id.
26 Id.
judge would have to recuse himself in a case involving his children, while a president is free to issue pardons to his children.\(^{28}\)

Finally, many actions by presidents involve some ultimate self-benefit to the president; it would be highly impractical for the Supreme Court of the United States to undertake the task of analyzing these decisions on the grounds of presidential self-benefit.\(^{29}\) This would be a highly subjective responsibility regarding complex political issues and therefore would almost certainly result in discriminatory enforcement based on the political ideology of the president in question.\(^{30}\)

**President Not Above the Law**

**Argument:** The power to self-pardon places the president above the law. Since no one is above the law, self-pardons cannot be allowed.\(^{31}\)

**Response:** A president who pardons himself is no more above the law than a person who receives a pardon. Additionally, pardons are part of the legal system. Their use does not place someone

\(^{28}\) Id.

\(^{29}\) This phrasing even underemphasizes how daunting the task would be. Most presidential actions that are positively received have some beneficial effect on a president (increased likelihood of reelection, improved legacy, bolstered status for president’s political party, etc.). Therefore, the Supreme Court would be undertaking the creation of a formula for calculating the ratio of personal benefit to overall societal benefit, and then identify a threshold beyond which a president’s action is said to be too self-serving to be Constitutional. Given the political and amorphous nature of the variables required for the Supreme Court to make these determinations, the task would be all but impossible to execute in a neutral manner.

\(^{30}\) While the judicial branch is certainly more insulated from public opinion than the legislative and executive branches, it is not immune to the effects of public opinion. For instance, former Justice Benjamin Cardozo explained that “the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by.” BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921). Experts have also commented on how justices consider popular support for their decisions: “With little formal institutional capability to enforce the Court’s decisions and to compel the elected branches or the public to respect its judgments, justices must often act strategically in their opinion writing, adjusting to shots in the public mood in order to ensure the efficacy of their decisions.” Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, How Public Opinion Constrains the U.S. Supreme Court, 55 AM. J. OF POL. SCI. 74, 75 (2011).

\(^{31}\) Kalt supra note 7, at 794–96.
above the law any more than other aspects of our legal system, such as prosecutorial discretion, the exclusionary rule, or jury nullification, which can also result in the forbearance of punishment.

The primary case cited to support this claim is the seventeenth-century British case of *Thomas Bonham v. College of Physicians*. There, the court ruled on whether the College of Physicians could fine and imprison Dr. Bonham for practicing medicine without their approval. The court held that the College of Physicians cannot act as both judge and litigant in the same case and therefore, Dr. Bonham’s punishment was struck down. However, this holding provides no guidance to the issue of whether the United States Constitution allows self-pardons. The College of Physicians did not have an enumerated constitutional right to be judge and litigant.

Additional problems arise with using the *Bonham* case when one looks deeper into the circumstances that surround the holding. It seems that Bonham’s own lawyer never argued against the dual judge-and-litigant role of the College of Physicians. The case was the result of a three to two decision, with the swing vote apparently deciding “on the basis of disliking Bonham’s imprisonment rather than other points of law,” which was “clearly in the[] favor” of the college. Not surprisingly, the decision received widespread criticism. King James and Sir Francis Bacon immediately questioned the court’s rationale in the case. Particularly, the decision has been referred to as “[a] foolish doctrine which ought to have been laughed at.”

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32 Tribe et al., *supra* note 22; Thomas Bonham v College of Physicians, 8 Co. Rep. 107 (1605).
34 *Id*. at 302.
35 *Id*. at 311–12, 318.
36 *Id*. at 313.
37 *Id*. at 309.
38 *Id*. at 320.
It is problematic to claim that the Bonham case is “[t]he foundational case in the Anglo-American legal tradition”\(^{40}\) regarding the issue of one simultaneously acting as judge and litigant because the case had no significant precedential effect. The holding in the case was “explicitly found to provide no precedents for other common law cases brought by the College of Physicians”\(^{41}\) and “[w]ithin a short time of Bonham’s case, the College of Physicians regained its juridical confidence and acted as if [the Bonham case never happened].”\(^{42}\) As a result, “Bonham’s case came to be regarded at best as a legal relic.”\(^{43}\)

**Violation of Public Trust**

**Argument:** The Constitution requires the president to “take Care that the Laws be faithfully executed.”\(^{44}\) A self-pardon violates this trust with the American people and is therefore unconstitutional.\(^{45}\)

**Response:** Based on the logic of this argument, every pardon—whether a self-pardon or otherwise—would be in violation of the public trust and therefore unconstitutional. After all, President Barack Obama’s pardon of non-violent drug offenders and President Trump’s pardon of himself would both serve to stop the consequences of a law from being executed. Additionally,

\(^{40}\) Tribe et al., *supra* note 22.
\(^{41}\) Cook, *supra* note 33, at 321.
\(^{42}\) *Id.* at 322.
\(^{44}\) U.S. CONST. art. II, § 3.
\(^{45}\) 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. The logic employed by Shugerman and Leib also leads them to conclude that “pardoning your closest associates for self-interested reasons should not pass legal muster, because it violates the fiduciary law of public office.” The language in the pardon clause does not mention such restriction and for good reason. The judiciary striking down presidential pardons based on the subjective determination that they, in some way, also benefitted the president would be highly problematic.
since the language of the pardon clause allows for a self-pardon, a president who issues one cannot accurately be said to be acting beyond his duty to faithfully execute the law.

**Definition of Pardon Precludes Self-Pardon**

**Argument:** A pardon is a bilateral act by its very definition. The president is given the power to “grant” pardons. One cannot “grant” something to oneself. Furthermore, a pardon forgives someone else; and one cannot forgive oneself. In *United States v. Wilson*, John Marshall explained, “A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws.” One cannot bestow grace upon oneself.

**Response:** If there were equally strong arguments for and against the ability to self-pardon, perhaps such an abstract, definitional argument could be used as a tiebreaker. But this is certainly not a strong enough argument to deny the president powers arising from direct Constitutional language. For instance, in *Biddle v. Perovich*, the Supreme Court held that citizens are unable to reject a presidential commutation (which stems from the pardon power). This is contrary to the logic of the definitional argument. After all, if someone were to “grant” you something you did not want, you would be free to reject it.

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47 United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). However, this notion was directly contradicted by Oliver Wendell Holmes in *Biddle v. Perovich* when he stated, “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.” *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).
48 *Biddle*, 274 U.S. at 487.
49 However, note the distinction between a full pardon and a commutation. See *Wilson*, 32 U.S. (7 Pet.) at 155, where the Supreme Court held that a pardon must be accepted for it to become official. See also *Burdick v. United States*, 236 U.S. 79, 90 (1915), where the Supreme Court held that a pardon can be rejected by the intended beneficiary.
**Department of Justice Nixon Memo**

**Argument:** Four days before President Richard Nixon resigned, the Department of Justice (“DOJ”) issued a memo regarding the constitutionality of a potential self-pardon. The memo concluded that “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.”

**Response:** The conclusion reached in the DOJ’s memo is not the culmination of a meaningful legal analysis. Rather, the two-and-a-half-page memo, self-described as only an “outline,” merely asserts this. The single paragraph that discusses a presidential self-pardon is only sixty-nine words long with no citations. Further, the memo contains no acknowledgment of any of the pro-self-pardon arguments presented in this Article.

The memo is simply a rough outline of an assistant attorney general’s opinion based on what seems to be very little research. There were other people close to the issue who espoused the opposing viewpoint, including Special Counsel James St. Clair and Solicitor General Robert Bork. The Nixon memo is no more authoritative than a memo from President Trump’s assistant attorney general stating, with no evidence to support the claim, that a president can issue a self-pardon.

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51 The majority of the memo covers the legislative actions of a legislative pardon, enactment of a plea as bar to criminal prosecution, concurrent resolution requesting the next President to grant a pardon, and immunity resulting from testimony before congressional committees. *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 Lozano, *supra* note 8, at 159.
56 For a discussion on why a self-pardon is not the equivalent of being a judge in one’s own case, as this memo asserts, see supra “Constitutional Themes Against Self-Judging and Self-Dealing.”
Constitutional Convention

**Argument:** Discussions regarding the president’s pardon power at the Constitutional Convention show that the framers intended the president, unlike the King of England, not to be above the law.\(^57\)

**Response:** The discussions regarding the presidential pardon power at the Constitutional Convention work to undermine—not support—the anti-self-pardon argument. Proposals were presented to limit the pardon power, and they were defeated by wide margins in favor of the use of political consequences to address presidential pardon abuses.\(^58\)

The awareness of how having a leader with too much power leads to abuses was certainly on the minds of the framers when drafting Article II of the Constitution. However, pointing this out only serves to strengthen the argument for a self-pardon. It is highly unlikely that the thought of a president pardoning himself would escape the minds of all fifty-five delegates of the Constitutional Convention given their skepticism toward executive power formed from their recent experience with an authoritarian king.\(^59\)

**Political Consequences do not Protect Against Self-Pardon Abuse**

**Argument:** It is a misguided notion to claim that impeachment and/or political consequences from the electorate are suitable checks against a president pardoning himself. A self-pardon is most likely to be issued by a president at the end of the line (e.g., George H.W. Bush and Bill Clinton)\(^60\)

\(^{57}\) See e.g., Kalt, *supra* note 7, at 784–87.

\(^{58}\) See infra at “Constitutional Convention Debate” for a more thorough explanation of how the Constitutional Convention supports a self-pardon.

\(^{59}\) *But see* Kalt, *supra* note 7, at 782–83, where it is argued that the framers might not have considered the possibility of a self-pardon.

\(^{60}\) George H.W. Bush had already lost re-election when he allegedly considered a self-pardon, and Bill Clinton was at the end of his second term when it was proposed that he might (Clinton maintains he never considered it). For a discussion on the potential George H. W. Bush self-pardon, see Nida & Spiro, *supra* note 5, at 214–16.
or with little-to-no political capital left (e.g., Richard Nixon). Therefore, “[t]he only President who would pardon himself is one with nothing to lose; the political check is thus rendered irrelevant.”

**Response:** This argument ignores whether the Constitution allows for a self-pardon, which is the relevant issue. Anti-self-pardon advocates are free to present this pragmatic-based argument that allowing self-pardons would lead to undesirable results. But this only supports the claim that the Constitution should be amended to not allow self-pardons, not that they are somehow unconstitutional by way of personal disapproval.

### Kings Do Not Self-Pardon

**Argument:** The president’s pardon power is similar to that of the King of Great Britain at the time of the Constitutional Convention. See *The Federalist No. 69* (Alexander Hamilton) (The power to pardon is “resembling equally the King of Great Britain and Governor of New York.”).

**Response:** It is highly peculiar to analogize the president’s pardon power to that of the King of England in an effort to maintain that the president cannot pardon himself. The King of England had absolute immunity against all criminal prosecution, thereby rendering unnecessary the ability to self-pardon. “The law suppose[d] it impossible that the King himself [could] act unlawfully or improperly.” 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.

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62 See *The Federalist No. 69* (Alexander Hamilton) (The power to pardon is “resembling equally the King of Great Britain and Governor of New York.”).
63 Tribe et al., *supra* note 22.
64 “No 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.” *Chisolm v. Georgia*, 2 U.S. 419, 458 (1793) (quoting Sir William Blackstone).
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.66

Congressional Pay Raise Analogy

**Argument:** “The Constitution embodies this broad precept against self-dealing in its rule that congressional pay increases cannot take effect during the Congress that enacted them.”67

**Response:** Properly understood, the congressional pay raise example would be better placed under arguments in favor of the self-pardon. It is currently true that congressional pay increases cannot take effect during the Congress that enacted them. However, it was not until 1992 that this was the case, and it took a constitutional amendment to implement.68 Therefore, it was perfectly constitutional for the practice to occur for over two-hundred years. Analogizing congressional pay increases to presidential self-pardons only serves to illustrate that a constitutional amendment would likewise be required to ban self-pardons.

ARGUMENTS FOR PRESIDENTIAL SELF-PARDONS

Gubernatorial Pardon Powers

The framers of the Constitution would have been aware of the pardon power possessed by colonial governors. Alexander Hamilton in Federalist No. 69 stated that the power to pardon is

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67 Tribe et al., supra note 22.
68 U.S. CONST. amend. XXVII.
“resembling equally the King of Great Britain and Governor of New York.”69 Although the colonies implemented various restrictions on their respective governor’s pardon power,70 no colony restricted a governor’s power to self-pardon.71 Furthermore, there is precedent in the U.S. for governors pardoning themselves.72

**Supreme Court Precedent**

While few Supreme Court opinions have addressed the president’s pardon power, the ones that do address the issue support the notion of a self-pardon. In *Ex parte Garland*, the Supreme Court held that the pardon power is “unlimited except in cases of impeachment. It extends to every offence known to the law . . .”73 Further, Congress “can neither limit the effect of [the president’s] pardon, nor exclude from its exercise any class of offenders.”74 Additionally, in *Schick v. Reed*, the Supreme Court determined that limits on the pardon power, “if any, must be found in the Constitution itself.”75 In *United States v. Wilson*, the majority opinion stated that the Supreme Court will not review the “character” of a pardon.76 In *Ex parte Grossman*, the Supreme Court held that the proper remedy for presidential abuses of the pardon power is impeachment, not restricting the pardon power.77 Although the Supreme Court has never explicitly addressed the issue of a self-pardon, the Court’s precedent is strongly in favor of allowing it. Even the

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69 THE FEDERALIST NO. 69, supra note 52 (Alexander Hamilton).
70 Duker, supra note 8, at 497–501.
71 Nida & Spiro, supra note 5, at 217.
72 Max Kutner, No President Has Pardoned Himself, But Governors and a Drunk Mayor Have, NEWSWEEK (July 24, 2017), https://www.newsweek.com/trump-granting-himself-pardon-governors-641150; Eckstein & Colby, supra note 8, at 97 n.157.
74 Id. at 380.
77 Ex parte Grossman, 267 U.S. 87, 121 (1925).
foundational case of *Marbury v. Madison* can be viewed as supporting self-pardons. Chief Justice John Marshall wrote regarding the presidential powers:

> [T]he President is invested with certain important political powers . . . [for] which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . [.] [W]hatsoever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion . . . [.] [T]he decision of the executive is conclusive.\(^{78}\)

**Plain Reading of the Text**

Even self-pardon opponents admit that the plain reading of the pardon clause is a strong argument in favor of self-pardons.\(^{79}\) One of the well-established principles of statutory or constitutional interpretation is that if the language is clear, that plain meaning should be followed.\(^{80}\) When interpreting statutes, judges “begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”\(^{81}\) Summarized more succinctly by then Chief Justice Warren Burger, “[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.”\(^{82}\) The argument follows that because the meaning of the constitutional clause providing for presidential pardons is clear from the express language alone, no further debate or investigation is required.


\(^{79}\) See e.g., Kalt, *supra* note 7, at 790.

\(^{80}\) *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). “[When interpreting statutes, judges] begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”


Explicit Limitations

The Constitution contains explicit limitations to the pardon power: there must be an “[o]ffence[] against the United States.” 83 and it cannot be used in “[c]ases of [i]mpeachment.” 84 This implies that if an additional limitation were intended, it would have likewise been expressly stated. Simply adding three words to the end of the pardon clause would have ended all ambiguity: pardons allowed “except in cases of impeachment and against oneself.” 85 Furthermore, the pardon clause’s impeachment exception illustrates “that the clause extends to presidential misconduct, and suggests that the ultimate remedy,” for punishing the president “is impeachment by the House and conviction in the Senate, not criminal prosecution.” 86

Constitutional Convention Debate

During the Constitutional Convention there were proposals to limit the president’s pardon power. 87 Roger Sherman proposed a requirement of consent from the Senate for all presidential pardons. 88 This proposal to limit the pardon power was voted down by a wide margin. 89

Another unsuccessful effort to limit the president’s pardon power at the Constitutional Convention was Edmond Randolph’s proposal to bar presidential pardons for treason. 90 Randolph argued that allowing the president to pardon treason was “too great a trust. The President may himself be

83 U.S. CONST. art. II, § 2, cl. 1 (removing the possibility of pardons for state crimes and civil liability).
84 Id.
85 Nida & Spiro, supra note 5, at 216.
87 Kalt, supra note 7, at 786.
88 Id.
89 Id.
90 Id.
guilty. The Traytors [sic] may be his own instruments.”

After a debate, where opponents argued that political consequences were the preferred way to deal with such a scenario, Randolph’s motion to limit the pardon power suffered a defeat equally as lopsided as Roger Sherman’s. As stated previously in “Constitutional Convention,” the recent experience and distain for an authoritarian ruler (the King of England) would have been foremost in the minds of the framers. Therefore, the framers would likely have gone out of their way to make clear any intended limitations to the president’s pardon power.

**Counterintuitive Exclusion**

Barring presidential self-pardons would have the peculiar effect of presidents, upon taking their oath of office, becoming the only American not allowed to receive the benefit of a presidential pardon. Imagine if President Jimmy Carter was a draft dodger. It would make no sense that his presidential pardon of draft dodgers in 1977 would pardon everyone in that group except himself.

This counterintuitive exclusion of the president from receiving a pardon is illustrated by the following attempt to argue against the self-pardon: “If [the president] is truly deserving of a pardon, he can appeal to the rightful authorities—the prosecutor, the judge, the juries, and his successor as President—just like every other citizen must do.” But the president does not have the exact same avenues to avoid prosecution as “every other citizen.” Every other citizen can receive a presidential pardon and thus end a current prosecution, while the president cannot.

91 *Id.*
92 *Id.* (“If [the President] be himself a party to the guilt he can be impeached and prosecuted.”)
93 *Id.*
96 Kalt, *supra* note 7, at 808.
Infrequent and Unlikely Abuse

Although not strictly an argument in favor of self-pardons, it is important to note how rare the practice is. Anti-self-pardon advocates are quick to claim how harmful the practice would be. But these warnings are quelled by the fact that it has never happened in America’s 220-plus years of existence. While allowing a president to elude punishment for his actions without even a political consequence may seem unfair, it is an extremely unlikely confluence of events that would lead to such an occurrence. Constitutional protections that result in the guilty going unpunished are intentionally commonplace in our legal system. The right against self-incrimination and the exclusionary rule are just two examples.

CONCLUSION

As demonstrated in this Article, an honest, neutral assessment of the arguments for and against the constitutionality of a presidential self-pardon lead to the conclusion that it is allowed. However, the questions of whether a president should issue a self-pardon or whether it would be politically expedient for a president to do so are less clear and beyond the scope of this Article. Also not addressed in this Article are predictions as to how the Supreme Court would ultimately rule on the issue. Given the strong evidence in favor of allowing presidential self-pardons and the constitutional crises that would nevertheless likely follow the issuing of one, protections against the practice should be addressed.