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THE PRESIDENT AS HIS OWN JUDGE AND JURY: A LEGAL ANALYSIS OF THE PRESIDENTIAL SELF-PARDON POWER

ROBERT NIDA* & REBECCA L. SPIRO**

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I. Introduction

*The President Shall . . . Have Power To Grant Reprieves and Pardons for Offenses Against the United States, Except in Cases of Impeachment.*¹

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1. U.S. CONST. art. II, § 2.

During the final days of President Clinton's impeachment hearings,² a senior White House attorney, Charles Ruff, was asked whether the President intended to grant a pardon to himself for any criminal wrongdoing.³ Ruff answered that the President would "absolutely" not grant himself a pardon nor accept a pardon from his successor.⁴ Nonetheless, this question raises a provocative constitutional

2. The House Judiciary Committee held hearings and recommended to the full House of Representatives the impeachment of the President of the United States, William Jefferson Clinton. Clinton was impeached on two of the four articles approved by the House Judiciary Committee on December 19, 1998, regarding the Monica Lewinsky scandal. Two articles of impeachment were approved: Article 1 and Article 3. Article 1 stated that President Clinton lied and provided misleading testimony to an August 17, 1998, federal grand jury concerning his relationship with White House intern Monica Lewinsky. Article 1 was approved by a vote of 228-206. Article 3 stated that President Clinton obstructed justice by encouraging Monica Lewinsky to lie about their relationship when she provided testimony for the Paula Jones civil suit, and the President assisted in finding a job for Lewinsky to buy influence for her positive testimony. The article also stated that Clinton allowed his attorney, Robert Bennett, to make false statements to a federal judge regarding the President's relationship with Lewinsky. Article 2, charging perjury in a civil deposition and Article 4, charging abuse of power, were rejected by the House. See H.R. Res. 611, 105th Cong. (Dec. 19, 1998) (enacted) (official Articles of Impeachment against William Jefferson Clinton, President of the United States). See generally Bob Deans, *Clinton Impeached; President Vows Not To Quit; Bid for Censure Moves To Senate*, AUSTIN AM.-STATESMAN, Dec. 20, 1998, at A1; see also, e.g., David Jackson, *Clinton Impeached President Urges Compromise in the Senate to Avoid a Trial House OKs 2 Articles in Bitter Partisan Vote*, DALLAS MORNING NEWS, Dec. 20, 1998, at 1A; Frank Murray, *Impeached; Clinton "Indelibly Stained" in a Decisive Vote; 2 out of 4 Articles Approved by House*, WASH. TIMES, Dec. 20, 1998, at A1; Roger Simon, *House Impeaches President Clinton; He Vows To Serve "Until the Last Hour of the Last Day of My Term"*; "We Must Stop Politics of Personal Destruction," *A Calm President Says*, CHI. TRIB., at 1. The Constitution provides that after impeachment, the U.S. Senate shall conduct a trial to determine whether the President should be convicted and removed from office. See U.S. CONST. art. I, § 3, cls. 6, 7 (describing the impeachment requirements). Conviction requires a two-thirds vote of the members present. See *id.* The United States Senate acquitted Clinton on all charges. On the perjury count, the Senate voted 45 guilty and 55 not guilty. On the obstruction of justice charge, the Senate split 50 votes not guilty and 50 votes guilty, not reaching the two-thirds vote required. See 145 CONG. REC. S1457-02 (daily ed. Feb. 12, 1999) (trial of William Jefferson Clinton, President of the United States). The Constitution requires the Chief Justice of the United States to preside over the trial. See U.S. CONST. art. I, § 3, cl. 6. At the conclusion of the trial, Chief Justice William H. Rehnquist, who had presided over the impeachment trial, stated:

The Senate having tried William Jefferson Clinton, President of the United States, upon two articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: it is, therefore, ordered and adjudged that the said William Jefferson Clinton be, and he is hereby, acquitted of the charges in this said article.

145 CONG. REC. S1457-02. Two hours after the vote of acquittal, President Clinton said he was "profoundly sorry" for the events that lead to his impeachment, and that "this can and must be a time of reconciliation and renewal for America." Peter Baker, *Clinton Acquitted*, WASH. POST, Feb. 13, 1999, at A01; Richard A. Serrano, *Clinton Acquitted; Votes Fall Far Short of Conviction; Perjury Charge Rejected 54-45*, L.A. TIMES, Feb. 13, 1999, at A1.

3. See *House Committee on Judiciary Holds Hearing on Impeachment of President Clinton — The President's Lawyers Present Their Case, Day 2 — Panel 1 — Prosecution Standard for Obstruction of Justice and Perjury, House Comm. on the Judiciary, 105th Cong., 1998 WL 849446* (Dec. 9, 1998) [hereinafter *Judiciary Hearing — President's Lawyers Present Their Case*] (verbatim transcript).

4. See *id.* The exchange between U.S. Rep. Steve Chabot (R.-Ohio) and White House Lawyer

question: can the President pardon himself for criminal acts committed while or before holding office? Article II of the Constitution prohibits a President from using the pardon power to overturn an impeachment.⁵ The Framers of the Constitution placed only this limitation on the ability of the President to exercise his pardon power,⁶ and the only sanction for the abuse of the pardon power is the removal of the President through impeachment.⁷ The Constitution is silent, however, as to whether the President may grant himself a pardon from prosecution and, if so, when such a pardon may be issued.⁸ In the over 20,000 instances that Presidents have used this exclusive power,⁹ no President has used this power to pardon himself.¹⁰

One viewpoint is that a presidential self-pardon is inherently inconsistent with "natural law," which proclaims that one may not judge oneself.¹¹ Some scholars

Charles Ruff follows:

Chabot: You stated in the preface to your written submission that you made to this committee that nothing the President has done justifies criminal conduct. Correct?

Ruff: That's correct.

Chabot: In that case, I assume there's no reason for the President to grant himself a pardon before he would leave office for any criminal acts that he might have committed. Can you assure us that President Clinton will not pardon himself or that he will not accept a pardon from any presidential successor?

Ruff: Absolutely.

Chabot: Okay. Thank you.

Id.

5. See U.S. CONST. art. II, § 2 (stating powers of the presidency include "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment"); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (holding "the power thus conferred is unlimited, with the exception stated").

6. See U.S. CONST. art. II, § 2 (granting the President the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

7. See *id.* In 1788, Alexander Hamilton wrote:

The power of the President, in respect to pardons, would extend to all cases, except those of impeachment. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the Governor, in this article, on a calculation of political consequences, greater than that of the President.

THE FEDERALIST NO. 69 (Alexander Hamilton) (Mar. 14, 1788). Eleven days later, Hamilton wrote that "[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed." THE FEDERALIST NO. 74 (Alexander Hamilton) (Mar. 25, 1788).

8. See U.S. CONST. art. II, § 2; see also *Garland*, 71 U.S. (4 Wall.) at 380 (holding the pardon power "may be exercised at any time after its [offense] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgement"). In cases where the President serves his entire term, suggests New York University law professor Stephen Gillers, the timing of a presidential self-pardon would likely occur during the President's lame-duck period after the election proceeding his retirement from office. See Stephen Gillers, *Is It Principle, or Is It Pragmatism?*, STAR TRIB., Aug. 4, 1998, at 11A.

9. See Harvey Berkman, *Will the President Pardon His Friends?*, NAT'L L.J., Nov. 4, 1996, at A1; Jonathan Kerr, *Presidential Pardons Have Long and Sometimes Unforgiving History*, WEST LEGAL NEWS 12366, Nov. 20, 1996, at *1, available in 1996 WL 667229.

10. See Daniel Schorr, Editorial, *Will Bush Pardon Himself?*, BALT. SUN., Dec. 30, 1992, at 13A (stating absence of any presidential self-pardons). In fact, the only President to ever receive a pardon was President Nixon for his involvement in the Watergate scandal that led to his resignation. See *id.*

11. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (holding in Justice Chase's opinion that the

argue that the Constitution explicitly provides that an impeached President is subject to normal criminal charges after leaving office, and because a presidential self-pardon would prevent prosecution, its use would be antithetical to this constitutional mandate.¹² Others, including lawmakers, have recognized the inherent problem in the text of the Constitution, which can be construed to allow a President to pardon his own criminal activities prior to, or after indictment, trial, or conviction.¹³ In a House Judiciary Committee exchange with former Massachusetts Governor William Weld, Virginia Republican Bob Goodlatte stated that "the President of the United States has the power to pardon, and the prevailing opinion is the President can pardon himself."¹⁴

While commentators may disagree as to the ability of the President to pardon himself,¹⁵ this Article will prove, through a textual and historical analysis, that the

Constitution has inherent natural laws or first principles); *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 433-35 (12th ed. 1991); CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 38-40 (1973).

12. *See Clinton: Well, Pardon Me?*, NEWSWEEK, Dec. 14, 1998, at 14 (citing Professor Stephen Saltzburg of George Washington University, who argues that self-pardons would prevent the President from being subject to traditional criminal charges after his presidency, which goes against the explicit wishes of the Constitution); *see also* U.S. CONST. art. I, § 3, cl. 7 ("Judgements in Case 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.").

13. *See Judiciary Hearing — President's Lawyers Present Their Case*, *supra* note 3.

14. *Id.* The exchange between U.S. Rep. Bob Goodlatte (R.-Va.) and former Massachusetts Gov. William Weld follows:

Goodlatte: The President of the United States has the power to pardon, and the prevailing opinion is the President can pardon himself. Are we all in agreement that the likelihood of any kind of subsequent prosecution of this case, regardless of your opinion of the merits, is not going to take place because of the reality of the circumstance that either for practical reasons after the President leaves office or because he could bestow a pardon upon himself, that that would take place?

Weld: I can't image the President pardoning himself, Mr. Congressman. When I said that I thought the post-term risk was low, that's because of my assessments of the merits of the prosecution case.

Goodlatte: But nonetheless, he has that power, and the Constitution is very explicit about the one exception to the use of that power, and that is the circumstances where the President is impeached. He cannot then pardon himself, and restore himself to office as a result of impeachment, obviously.

Id.

15. *Compare* Akhil Reed Amar, *Now Playing . . . A Constitutional Nightmare*, WASH. POST, Sept. 20, 1998, at C01 (the President "cannot constitutionally pardon himself" to control an investigation), Stephen B. Presser, *Commentary, The Legal Limits*, CHI. TRIB., Nov. 17, 1996, at 21 (arguing the use of a self-pardon would be unconstitutional due to the structure of the Constitution), and *Clinton: Well, Pardon Me?*, *supra* note 12, at 14 (citing Professor Stephen Saltzburg, who states that self-pardons would prevent the President from being subject to traditional criminal charges after his presidency, which goes against the explicit wishes of the Constitution), with Bill Bush, *Clinton Has Power to Pardon Himself, OSU Professors Say*, COLUMBUS DISPATCH, Sept. 18, 1998, at 3A (citing Ohio State University law professors who support the notion of self-pardoning power inherent in the Constitution), Tom Campbell, *Editorial, Why I Have Decided to Vote to Impeach the President*, S.F. CHRON., Dec. 16, 1998, at A27 (Rep. Campbell (R.-Ca.)) (noting "[f]urthermore, the Constitution does not prohibit the President

Constitution as it currently stands, permits a presidential self-pardon. A constitutional amendment is needed to prevent any President from pardoning himself, and such an amendment should also limit the President's ability to pardon members of his immediate family. This article will overview the history that developed into the modern pardon power. This article will further analyze the legal authority for a self-pardon, concluding with a proposal to amend the Constitution so as to prevent a presidential self-pardon. Part II of this Article provides a history of the pardon power, including how the power arrived in the United States and how United States Presidents have used it. Part III discusses two Presidents, Richard Nixon and George Bush, whose administrations contemplated the self-pardon option. Part IV advocates that the current constitutional make-up allows for a presidential self-pardon. Part V of this article proposes a constitutional amendment that would limit the President's pardon power. Finally, Part VI offers a conclusion on the self-pardon power of the President.

II. Pardon Power History

A. Pre-American Pardon Power History

1. Ancient Athens and Rome

To understand the historical roots of the American pardon power, it is essential to review the historical tradition of pardons in ancient Athens and Rome. In ancient Athens, the notion of granting clemency or a pardon had not fully developed, primarily due to the nature of a pure democracy that was the foundation of the governmental structure.¹⁶ There was, however, a process to allow for clemency.¹⁷

from pardoning himself — leaving impeachment as the only sanction from which the President could not escape by his own action"), Peter Ferrara, Commentary, *Could President Pardon Himself?*, WASH. TIMES, Oct. 22, 1996, at A14 (arguing a constitutional amendment is required to prevent a President from pardoning himself), Joseph T. Hallinan, *The Prosecution Starr Has One Last Option: To Indict Clinton on Criminal Charges Series: Clinton — Investigating the President*, STAR-LEDGER, Sept. 23, 1998, at 14 (quoting, in discussing Clinton's options if indicted, George Washington University Law Professor Paul Butler as stating that "he could always pardon himself"), and Mark Levin & Arthur Fergerson, Editorial, *Can You Indict a Sitting President?*, WASH. TIMES, Jan. 26, 1998, at A17 (arguing a sitting President could not be removed from office by indictment due to the fact that "[h]e also has the power to grant himself an unconditional and complete pardon and thereby bar the prosecution"). On the other hand, some scholars have not reached a conclusion on whether the President may pardon himself. See Thomas Hargrove, *Few Rules Govern Pardon Authority*, ARIZ. REPUBLIC, Sept. 12, 1998, at A25 (quoting University of Southern California Law Professor Erwin Chemerinsky as stating, "Of course, we don't know if a president can pardon himself. No one has ever tried that."); Ronald Rotunda, *The True Significance of Clinton vs. Jones*, CHI. TRIB., July 8, 1997, at 13 ("Could the President avoid the whole problem by giving himself a pardon? Who knows?") (law professor at the University of Illinois). To date, only one other law review article directly titles this topic and concludes for primarily structural reasons that a self-pardon is not permissible. See Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996). This article substantially differs from Kalt's view, as it does not dispute the President's current legal ability to pardon himself. Even Kalt's article acknowledges that the Framers may have relied on the political process to control self-pardoning, through impeachment and election, and not any direct restriction on self-pardoning. *Id.* at 788.

16. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the*

By 403 B.C.E., a process known as *Adeia* allowed a democratic pardon for a person who, by secret ballot, received 6000 citizens' approval.¹⁸ Due to the difficulty of obtaining such a large number of supporters, however, the possibility of receiving a pardon through *Adeia* was generally reserved for athletes, orators, and other powerful figures.¹⁹ Therefore, the process was distinct from a pardon as an executive privilege, and more analogous to a popularity contest.²⁰

Similarly, the ancient Romans employed a system of clemency; however, it was one in which mercy or justice was not the primary motive — politics was the driving force, including one infamous example of Pontius Pilate's historical pardon of Barabbas rather than Jesus.²¹ The Romans used the pardon power to control masses of Roman citizens and soldiers. In a crude example of the use of clemency, the ancient Romans chose to execute every tenth mutinous troop instead of executing the entire army of transgressors,²² thereby using the pardon power as a measure of discipline and fear for the remaining soldiers.²³ Even more intriguing was the Roman use of pardons for those condemned persons who accidentally encountered a vestal virgin on the way to the execution location.²⁴ The lessons learned in Athens and Rome set the framework for the development in England for monarchical pardon powers.²⁵

King, 69 TEX. L. REV. 569, 583-84 (1991) (arguing pardons were not fully developed until a monarchy, because of the very nature of the Athenian democracy, which was based on a governmental structure of decision making by the populace). Athens placed certain limitations on pardons, basically limiting their scope to public crimes, including treason. *See id.* at 583 n.77.

17. *See id.* at 583-84. Athens provided for a process of individual pardons — known as the *Adeia* process — and grants of broad amnesty. *See id.* at 584 n.80 (citing ARISTOTLE, CONSTITUTION OF ATHENS ch. 39 (K. Von Fritz & E. Kapp trans., 2d prt. 1961)).

18. *See id.* at 583 (citing DOUGLAS MACDOWELL, THE LAW IN CLASSICAL ATHENS 258-59 (1978)). The process required a popular collection of 6000 votes to support a pardon from a particular public violation. *See id.*

19. *See* 3 U.S. DEPT OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 9 (1939), cited in Kobil, *supra* note 16, at 583 n.79 (stating only a few pardons were actually granted, including Alcibiades in 408 B.C.E., the pardon of Demosthenes in 323 B.C.E., and other notable athletes and orators).

20. *See* Kobil, *supra* note 16, at 583-84 (demonstrating the popular nature of Athenian pardons, including the special treatment of celebrities).

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

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

23. *See id.*

24. *See* Kobil, *supra* note 16, at 585 (citing PLUTARCH, NUMA POMPILIUS, in THE LIVES OF THE NOBLE GRECIANS AND ROMANS 74, 83 (J. Dryden trans., A. Clough rev., Modern Library ed. n.d.)).

25. *See id.*

2. The Pardon Power Under the English Monarch

William Blackstone recognized the roots of the pardon power in England derived from the Roman tradition.²⁶ The purpose of the pardon in a system of social order, as Blackstone describes, was for the Crown to show mercy towards its subjects.²⁷ He noted that the use of pardons was to "endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince."²⁸ In 1535, Henry VIII gained absolute pardon power.²⁹ In 1536, Parliament passed an action that provided the King the absolute authority to pardon or remit crimes such as treason, murders, and felonies.³⁰

While self-pardons are not specifically mentioned in English law, the King — by definition — could not commit a crime against the Crown, because one cannot commit a crime against oneself.³¹ The only remedy Parliament retained for an abuse of the pardon power was to remove the King from office,³² just as the United States Congress similarly has only the impeachment power as a remedy against abuse of presidential pardons.

The King's pardon power was later limited to exclude pardoning of those impeached,³³ which is the only limitation on the pardon power listed in the United States Constitution.³⁴ Because Henry VIII secured complete pardon power in 1535, full authority was vested in the Crown until political crises overtook London regarding the King's dissention with the will of Parliament.³⁵ The result, the Act of Settlement of 1700, removed from the Crown the power to pardon a person

26. See 4 WILLIAM BLACKSTONE, COMMENTARIES *388 (commenting on Roman traditions being used as examples for English pardon powers).

27. See *id.* at *398 (describing mercy as not only an act of good will, but one to instill loyalty of the subjects for the greatness of the crown).

28. *Id.*

29. See *id.* By the time of Henry VIII's command of England, the law vested the King with exclusive and absolute power to pardon those accused of crimes. Lord Chief Justice Coke characterized the King as a leader with great discretion and authority in exercising the power, and the power could be "either absolute, or under condition, exception, or qualification . . ." SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 233 (1817), cited in Kobil, *supra* note 16, at 584-85.

30. Kobil, *supra* note 16, at 586 n.95 (citing AN ACTE RECONTYNUYNG OF CTAYNE LIBTES AND FRANCHISES HERETOFORE TAKEN FROME THE CROWNE, 1535-36, 27 Hen. 8, ch. 24, § 1) (describing Parliament's granting the King "the [w]hole and sole power and auctoritie [authority]" to pardon).

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

32. See *id.*

33. See Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 963-65 (1997).

34. See U.S. CONST. art. II, § 2.

35. See Kobil, *supra* note 16, at 587 (stating the crisis was precipitated by the King Charles II's circumvention of Parliament's desire to prepare for war with France).

during an ongoing impeachment hearing.³⁶ This act was in response to the impeachment of the Treasurer of England, the Earl of Danby Thomas Osborne, whom King Charles II had pardoned.³⁷ Osborne was alleged to have followed Charles II's order to extend a neutrality offer to France in exchange for substantial payment.³⁸ This was in direct contradiction to Parliament's desire to raise funds for a war against France.³⁹ Parliament took this action as an affront to its authority to conduct foreign policy and, to make an example of Osborne, began impeachment hearings.⁴⁰ The King, in the midst of the inquiry, exercised his pardon authority to relieve Osborne of any responsibility, thereby creating the crisis that eventually limited the King's power to pardon for impeachment.⁴¹ This incident is also one of the factors that led Parliament to limit the monarchy's power in favor of a more democratic form of government. In fact, the compromise between the King and Parliament resulted in the withdrawal of Osborne's impeachment, and the imposition of a sentence of five years in the Tower of London.⁴²

When Britain colonized North America, the King delegated his pardon power to local royal colonial governors.⁴³ The King also granted limited pardons to transgressors in England who agreed to come to the Americas to work for low wages.⁴⁴ This power continued until the signing of the Declaration of Independence and the American Revolution.⁴⁵

After the Revolution, but before the formation of the American Constitution, the pardon power was usually shared in the various states between the state legislature and the governor, or it was vested in the legislature alone.⁴⁶ This was primarily

36. See William Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 496 (1977) (quoting the Act of Settlement of 1700, which states "no pardon under the great seal of England [shall] be pleadable to an impeachment by the commons in Parliament"). Parliament also passed the Habeas Corpus Act of 1679, which limited the King's ability to pardon in cases where a person was accused of causing others to be imprisoned outside of the King's jurisdiction. See Kobil, *supra* note 16, at 587-88 (citing Habeas Corpus Act (1679), 31 Car. 2 ch. 2, § 11 (Eng.)). Parliament also passed the Bill of Rights, W. & M., ch. 2, § 2 (1689), which indirectly limited the King's power by forbidding the King to disregard a law. See generally Jorgensen, *supra* note 31, at 351-52.

37. See Duker, *supra* note 36, at 487-95. The pardon of Thomas Osborne was a direct insult to Parliament who viewed the situation as an attack on their sovereign power, and the King, protecting his political messengers, moved members of Parliament to alter the power. See *id.*; see also Jorgensen, *supra* note 31, at 350-52.

38. See Kobil, *supra* note 16, at 587; see also Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST., 51, 91-94 (1963).

39. See Kobil, *supra* note 16, at 587.

40. See *id.*

41. See *id.*

42. See *id.*

43. See Steiner, *supra* note 33, at 964 (noting the power of the King to delegate his power to local colonial governors to grant pardons in the colonies for any offense allotted to this King, which was unbridled discretion, except in cases of impeachment).

44. See Leslie Setba, *Clemency in Perspective*, in CRIMINOLOGY IN PERSPECTIVE: ESSAYS IN HONOR OF ISRAEL DRAPKIN 221, 224-28 (Simba F. Landau & Leslie Setba eds., 1977), cited in Kobil, *supra* note 16, at 588-89.

45. See Kobil, *supra* note 16, at 587-90.

46. See *id.*

attributable to the general distrust of a single executive power — an attitude which slowly changed after the formation of the Federal Republic.⁴⁷

B. United States Constitutional Pardon History

1. The Development of the Pardon Power in the Constitution

This section demonstrates that the Framers failed to include a restriction on self-pardons and vested the President with the exclusive right to pardon anyone, with the exception of overturning an impeachment. With minor debate in the 1787 Constitutional Convention, the pardon power was included in the United States Constitution.⁴⁸ Much of the limited discussion at the Convention addressed which body of government should possess the pardon power and what limitations should be placed on the power.⁴⁹ Some advocates, including Roger Sherman, proposed a plan that placed the pardon power with the Senate. This plan failed, however, because some felt the Senate would become too powerful among the separate branches of government.⁵⁰ One factor considered by the delegates was the pardon power as it was used in the colonies, which placed the pardon power in a variety of models, including in the legislature, the executive, or a combination of the two.⁵¹ With little further discussion, the power was assigned to the executive branch, and the discussion then turned to what limitations would be placed in the provision.⁵²

The Framers looked to New York and other colonies to determine what restrictions should be placed on the President's ability to pardon.⁵³ The Framers placed only one restriction on the pardon power, that of not using a pardon to overturn an impeachment.⁵⁴ It can be argued that the lack of any other enumerated restriction was intentional.

47. *See id.*

48. *See Duker, supra* note 36, at 501. The pardon power was not included in the New Jersey or Virginia plans presented at the convention. It was only brought forward at the advocacy of Alexander Hamilton, Charles Pinckney, and John Rutledge, who proscribed some form of ultimate provisions to allow for mercy. *See id.* In fact, only a few discussions were reported from the Convention. *See Kobil, supra* note 16, at 590. For a general discussion of the pardon power's history in the United States and current developments, see RONALD ROTUNDA, *TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE* 600-03 (2nd ed. 1992).

49. *See Steiner, supra* note 33, at 965-66.

50. *See* 5 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787*, at 380 (Jonathan Elliot ed., 1845), *cited in Duker, supra* note 36, at 501.

51. *See Kobil, supra* note 16, at 589-90 (citing governments in Virginia, Massachusetts Bay, Maine, Maryland, the Carolinas, New Jersey, Pennsylvania, and Georgia placed the power in the executive branch); *see also* Second Charter of Virginia (1609); Charter of Massachusetts Bay (1629); Royal Grant of the Province of Maine (1639); Charter of Maryland (1632); Charter of Carolina (1665); Grant to Duke of York (1676) (chartering New Jersey); Charter for the Province of Pennsylvania (1681); Charter of Georgia (1732). The governments of Connecticut and Rhode Island placed the power in the legislature, but only with the governor and six assistant governors being present. *See* Charter of Connecticut (1662); Charter of Rhode Island and Providence Plantations (1663).

52. *See Steiner, supra* note 33, at 965-66.

53. *See id.*

54. *See* U.S. CONST. art. II, § 2.

One argument that is particularly relevant and supports the proposition that self-pardoning was not excluded from the Framers' intent is that of Edmund Randolph, who argued that the power to pardon for treason should not be allotted to the President, since "[t]he President may himself be guilty."⁵⁵ Randolph argued that pardons should not be available to protect oneself.⁵⁶ This notion, however, was affirmatively rejected at the urging of James Wilson for a strong pardon power with almost no limitations.⁵⁷

While not addressing self-pardons directly, there is a clear indication that pardons were available to protect one's cohorts in a treason attempt.⁵⁸ Wilson further argued that if the President committed treason, he could be impeached and even prosecuted after impeachment.⁵⁹ The language that was ultimately placed in the Constitution prohibited only the pardoning of an impeachment, and did not deal directly with prosecution.⁶⁰

Some commentators argue that other provisions included by the Framers cover this conflict, including a provision in the Constitution which explicitly provides that a former President is subject to criminal charges after leaving office.⁶¹ It could be argued, therefore, that a self-pardon would nullify the provisions of the Constitution that allow for post-presidential prosecution. The pardon power, however, received its most heated debate on the ability of the President to grant pardons for treason of others.⁶² Following the Constitutional Convention, Alexander Hamilton argued that the pardon power would be necessary to assure justice, and the power should resemble that power retained by the King of England.⁶³ The adoption of this exclusive power was later the justification by the Supreme Court for prohibiting Congress from interfering with the discretion of the President to issue pardons.⁶⁴

55. 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 571 (Gaillard Hunt & James Brown Scott eds., 1987) (1787), quoted in Steiner, *supra* note 33, at 965.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See* U.S. CONST. art. II, § 2.

61. *See, e.g., Clinton: Well, Pardon Me?*, *supra* note 12, at 14; *see also* U.S. CONST. art. I, § 3 ("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, Judgement and Punishment, according to Law.").

62. *See* Kobil, *supra* note 16, at 590-92; PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 350, 351-52 (Paul L. Ford ed., 1968) (quoting James Iredell, North Carolina delegate at the ratifying convention, stating that "the probability of the President of the United States committing an act of treason against his country is very slight").

63. *See* THE FEDERALIST NOS. 69, 74 (Alexander Hamilton); *see also* Jorgensen, *supra* note 31, at 353 ("The relative paucity of debate at the federal Constitutional Convention concerning inclusion of the pardoning power in the Constitution suggests that the delegates intended presidential clemency powers to mirror those of the English Crown.").

64. *See, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974) (reaffirming the exclusive pardon power of the President, including the power to grant conditional pardons); *United States v. Klein*, 80 U.S. (13

Alexander Hamilton argued that pardons were necessary so that "justice would [not] wear a countenance too sanguinary and cruel."⁶⁵ James Iredell, a forceful proponent of the strong executive pardon, argued as a delegate at the North Carolina Federal Constitution ratifying convention that the pardon power was needed in government and it should be placed with the body "possessing the highest confidence of the people" — the executive branch.⁶⁶ Hamilton further argued that "one man appears to be a more eligible dispenser of the mercy of the government, than a body of men."⁶⁷ Hamilton's view prevailed and the notion of limitations on the President's pardon power was flatly rejected.⁶⁸

Without substantial debate, the pardon power was adopted with the same powers afforded the King of England.⁶⁹ The pardon power was tested soon after ratification, when our first President promptly utilized this exclusive power.⁷⁰

2. Pardons from the Constitutional Convention to Secession

George Washington was the first American President to use the exclusive pardon power, and among his first pardons were those issued to leaders of the Whiskey Rebellion.⁷¹ In 1795, the leaders of the Pennsylvania Whiskey Rebellion were accused of tarring and feathering officials attempting to collect a new federal tax of sixty cents per gallon on whiskey.⁷² In referring to one of the leaders as being "a

Wall.) 128, 141-42 (1871) (holding the President's pardon power is not subject to the control of Congress); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (declaring the pardon power conferred on the President by the Constitution is "unlimited," except for the impeachment exception, and the power is "not subject to legislative control"); *Ex parte* Wells, 59 U.S. (18 How.) 307, 315 (1855) (noting the pardon power is conferred under the Constitution, and the President may grant full pardons or conditional pardons); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833) (describing a pardon as a "private act, though official, act of the executive magistrate").

65. THE FEDERALIST NO. 74 (Alexander Hamilton).

66. Address By James Iredell, North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 THE FOUNDERS' CONSTITUTION 17, 18 (Philip B. Kurland & Ralph Lerner eds., 1987).

67. THE FEDERALIST NO. 74 (Alexander Hamilton).

68. See U.S. CONST. art. II, § 2; Jorgensen, *supra* note 31, at 353.

69. See Jorgensen, *supra* note 31, at 353 (noting the brevity in the arguments on the pardon power formation in the Constitution, including the little discussion of limitations on the power).

70. See Presidential Proclamation (July 10, 1795), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1895, at 181 (James Richardson ed., 1896) [hereinafter PAPERS OF THE PRESIDENTS], cited in Kobil, *supra* note 16, at 592. In the proclamation, President Washington granted pardons for those involved in the Whiskey Rebellion tax revolt case.

71. See Berkman, *supra* note 9, at A1 (describing the history of the pardon power, including Washington's pardon of those involved in the Whiskey Rebellion).

72. In discussing the Whiskey Rebellion pardons, President Washington stated that

[f]or though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my own feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice and safety may permit.

MOORE, *supra* note 22, at 27 (citing U.S. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT (1975)); see Berkman, *supra* note 9, at A1 (describing the history of the pardon power, including Washington's pardon of those involved in the Whiskey Rebellion).

little short of an idiot," Washington noted that the government should show mercy.⁷³ In a less notable case, President John Adams used the pardon power to excuse those involved in a Pennsylvania insurrection.⁷⁴

In a controversial act, President Thomas Jefferson next used the pardon power to excuse alleged acts of treason under the Alien and Sedition Act.⁷⁵ The pardons released a number of Jeffersonian Republicans, whom the Federalists had convicted when they published anti-Federalist political materials, which Jefferson believed were protected by the First Amendment.⁷⁶ Some scholars, however, suggest that Jefferson's motivation was not law or mercy, but rather freeing his political allies.⁷⁷ Jefferson also used the pardon power as an immunity tool to gain accomplice testimony in the treason trial of Aaron Burr; however, the plan failed when the individuals refused to accept the pardons.⁷⁸ The pardon power went largely unchallenged at a time when the Supreme Court was without a true understanding of its own role until the nation's fourth Chief Justice, John Marshall, defined the Court's role as the interpreter of the Constitution in 1803.⁷⁹

The Supreme Court first reviewed the use of the pardon power during the Andrew Jackson presidency in 1833, in a mail theft case.⁸⁰ Upholding the presidential pardon, Chief Justice Marshall wrote that a pardon is "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."⁸¹ In another case, the Court later ruled that the pardon power inherently allowed a President to issue clemency of a lesser nature, including

73. JOSEPH KALLENEFACH, *THE AMERICAN CHIEF EXECUTIVE* 452-53 (1966) (discussing President Washington's pardons of those involved in the Whiskey Rebellion, including one leader he learned was "a little short of an idiot").

74. See Presidential Proclamation (May 21, 1800), reprinted in 1 *PAPERS OF THE PRESIDENTS*, *supra* note 70, at 303-04, cited in Kobil, *supra* note 16, at 592.

75. See Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Perogative*, 21 *HASTINGS CONST. L.Q.* 865, 895 (1994) (these political pardons were issued to excuse supporters of Jefferson, which demonstrated a use of the power for political purposes); see also JAMES M. SMITH, *FREEDOM'S FEITERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 268-69 & n.67, 358 n.84 (1955).

76. See LETTER FROM THOMAS JEFFERSON TO ABIGAIL ADAMS (July 22, 1804), reprinted in 11 *THE WRITINGS OF THOMAS JEFFERSON* 43-44 (Andrew A. Lipscomb ed., 1905), cited in May, *supra* note 75, at 895; SMITH, *supra* note 76, at 268-69 & n.67, 358 n.84.

77. See Kobil, *supra* note 16, at 593 (citing LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES* 163 (1963) (suggesting Jefferson's personal political motivation in issuing the pardons)).

78. See *id.* Jefferson used the pardon power in effect as a grant of immunity to initiate the testimony of alleged accomplices, but the plan ultimately failed, as the parties failed to accept the pardons. See *id.*

79. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally GUNTHER, *supra* note 11, at 1-20; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 203-08 (2nd ed. 1988); HAINES, *supra* note 11, at 193-203.

80. See *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833); Kobil, *supra* note 16, at 594.

81. *Wilson*, 32 U.S. (7 Pet.) at 160; Kobil, *supra* note 16, at 594.

partial or conditional pardons.⁸² Along with much of American law and society, the pardon power underwent significant changes during the Civil War.⁸³

3. Pardons from the Civil War Through Reconstruction

The Civil War years brought forth several scenarios involving presidential pardons. Prior to Abraham Lincoln becoming the nation's sixteenth President, his predecessor, James Buchanan, used the pardon power to release Mormon settlers in Utah from treason charges.⁸⁴ This act set a precedent for using the pardon power, not as an act of mercy or to free supporters, but as a tool to reconcile national divisions.⁸⁵ Similar techniques were used in the Civil War to develop loyalty and heal a divided nation.⁸⁶

The secession of the Confederate States divided the newly formed nation, and President Lincoln used the pardon power to develop loyalty to the Constitution.⁸⁷ Lincoln's successor, Andrew Johnson — the only President prior to Bill Clinton to be impeached⁸⁸ — followed suit and issued a number of pardons for the similar

82. See *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855); Kobil, *supra* note 16, at 594. On Apr. 23, 1852, William Wells was sentenced to hang for a murder committed in the District of Columbia. President Fillmore granted Wells a conditional or partial pardon. The pardon order placed the condition that

[f]or divers good and sufficient reasons I have granted, and do hereby grant unto him, the said William Wells, a pardon of the offence of which he was convicted — upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington.

Id. at 308. The court ruled that the President's power, as adopted in the Constitution from similar powers of the king, includes the right to lower a sentence as much as the right to offer a full pardon. *Id.* at 313-15.

83. See Kobil, *supra* note 16, at 594-95. Professor Kobil describes the granting of Civil War amnesties and the attempts by Congress to restrict the President's pardon authority. The conflict was resolved by the Supreme Court, who ruled that the pardon power belongs solely to the President and is not subject to legislative control. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

84. See Harold Schindler, *Utah War Broke Mormon Hold on Territory Utah War Broke Mormon Hold on State*, SALT LAKE TRIB., Jan. 21, 1996, at N2. The territory's forced removal of federally appointed Judge W.W. Drummond and related uprising caused newly elected President James Buchanan to order federal troops into Utah to remove Governor Brigham Young. Between 1857-58, Brigham Young was removed as governor, federal troops would be sent into the territory to quell uprising, the Mountain Meadow massacre would scare the church, and on the 25th anniversary of the formation of Mormon church in Utah, President Buchanan authorized pardons for those who were accused of treason in the uprising. The pardons were conditioned on the requirement that those accepting the pardon deed must pledge allegiance to the United States. See *id.*

85. See *id.*

86. See Kobil, *supra* note 16, at 593-95 (describing pardons of confederate soldiers with the purpose of reuniting the nation).

87. See JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953) (overviewing historical pardons during the civil war); Kobil, *supra* note 16, at 593-95 (arguing the Civil War pardons, that required a loyalty oath, were used as a method to heal the nation and develop loyalty); KALLENBACH, *supra* note 73, at 543-44.

88. On March 2, 1867, overriding a presidential veto, Congress enacted the Tenure of Office Act, which required the consent of the Senate before a President could remove from office a member of the President's own cabinet. President Andrew Johnson had taken the Act as an affront to the constitutional

purpose of excusing allegations of crimes in order for citizens to develop loyalty to the federal system.⁸⁹ In 1862, Congress passed a statute that allowed Lincoln to issue war amnesties,⁹⁰ but later repealed that law when it felt Johnson was abusing the privilege by issuing too many pardons.⁹¹ In a loyalty oath case, the Supreme Court held that Congress may not meddle with the pardon power.⁹² The Court stated that the power is "unlimited, with the exception stated," and "[i]t extends to every offence known to the law . . ."⁹³ Therefore, despite any opposition to a presidential pardon, the power is absolute and at the complete discretion of the President.⁹⁴ The only available remedy would be for the President to be impeached if the power is abused.⁹⁵

powers allotted to the executive branch, and on February 21, 1868, had removed a member of the Cabinet with whom he had a significant conflict: the Secretary of War, Edwin Stanton. On February 24, 1868, the House of Representatives impeached Johnson. The Senate held a trial, presided by the Chief Justice, Samuel Chase, where the President prevailed by one vote. As with the impeachment of President Clinton, some charged that the motivation was not the enforcement of law, but politics. See May, *supra* note 75, at 908-20.

89. See Kobil, *supra* note 16, at 593-95 (citing Presidential Proclamation (May 29, 1865), reprinted in 6 PAPERS OF THE PRESIDENTS, *supra* note 70, at 310; Presidential Proclamation (Sept. 7, 1867), reprinted in 6 PAPERS OF THE PRESIDENTS, *supra* note 70, at 547; Presidential Proclamation (July 4, 1868), reprinted in 6 PAPERS OF THE PRESIDENTS, *supra* note 70, at 655; Presidential Proclamation (Dec. 25, 1868), reprinted in 6 PAPERS OF THE PRESIDENTS, *supra* note 70, at 708).

90. See Kobil, *supra* note 16, at 593 (citing Act of July 17, 1862, ch. 195, § 13, 12 Stat. 589, 592). Congress later repealed the act authorizing the amnesties in 1867. See Act of Jan. 21, 1867, ch. 8, 14 Stat. 377. The Supreme Court eventually resolved this conflict by stating that pardon powers are plenary powers of the President that may not be regulated by Congress. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866).

91. See David D. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. CHI. L. REV. 131, 139-47 (1984).

92. See *Garland*, 71 U.S. (4 Wall.) at 380-81. Justice Fields, in his opinion in *Garland*, wrote that a pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Id. The opinion also sets forth the exclusive right of the President to issue pardons without regulation by the legislature or overview by the courts. In regards to the pardon power of the President, the decision stated that

[t]he power thus conferred is unlimited, with the exception stated. 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.

Id. at 380.

93. *Id.*

94. See *id.* The only exception to the absolute power is the textual prohibition preventing a President from using a pardon to overturn an impeachment. See U.S. CONST. art. II, § 2, cl. 1.

95. See U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on impeachment

4. Pardons During the Twentieth Century

As the Twentieth Century experienced the expansion of the federal government and the presidency, pardons were not exempt from this growth. While over 20,000 pardons have been granted during the Twentieth Century,⁹⁶ most were not significant. A few, however, were noteworthy. For example, President Richard Nixon pardoned Jimmy Hoffa for jury tampering.⁹⁷ Not long thereafter, President Gerald Ford issued the most famous pardon in United States history by granting a full pardon to Nixon, who had resigned over the Watergate scandal.⁹⁸ Ford claimed that he wanted to end America's nightmare with Watergate, and issuing a pardon for Nixon would be the correct measure to close the era.⁹⁹ The possibility of a long trial caused Ford to state that "the tranquility to which this nation has been restored by events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States."¹⁰⁰

President Jimmy Carter closed some of the final doors of Watergate by commuting the sentence of G. Gordon Liddy, a key "plumber" in the Watergate scandal.¹⁰¹ More important, President Carter issued amnesty pardons to those who violated the Selective Service Act during the Vietnam War.¹⁰² As President Johnson did after the Civil War, President Carter was attempting to help heal a shaken nation, which was still recovering from the divisiveness of the Vietnam experience.¹⁰³ President Carter was not the first Twentieth Century President to grant amnesty for those who violated the draft. President Harry Truman granted amnesty for those who, if approved by a presidentially appointed board, violated the draft during World War II.¹⁰⁴

for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

96. See Berkman, *supra* note 9, at A1; Kerr, *supra* note 9, at 1.

97. See Berkman, *supra* note 9, at A1 (reporting on former Teamsters President Jimmy Hoffa's commutation to time served by President Nixon in 1971). Nixon's commutation of Hoffa for jury-tampering was conditional on Hoffa's agreement to stay out of union politics, which Hoffa later attacked unsuccessfully. See *id.*

98. See Presidential Proclamation 4311, 39 Fed. Reg. 32,601 (1974) (pardoning Nixon for all Watergate and other related offenses, including use of government agencies to cover up illegal acts, including burglaries, tax evasion, and use of government agencies for improper purposes).

99. See *id.*

100. *Id.*

101. See Samuel Dash, *Congress' Spotlight On The Oval Office: The Senate Watergate Hearings*, 18 NOVA L. REV. 1719, 1723 (1994) (describing the "plumbers" as a group of individuals working for Nixon that were involved in a number of covert projects to cover up Administration misdeeds); Berkman, *supra* note 9, at A1 (reporting on G. Gordon Liddy's sentence reduction to 52 months by President Carter in 1977).

102. See Exec. Order No. 11,967, 42 Fed. Reg. 4393 (1977) (containing President Carter's authorization order that allowed amnesties for violation of the Selective Service Act during the Vietnam War).

103. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1484-85 (1997) (stating post-Vietnam amnesty programs were intended to "heal and restore social peace" to the nation).

104. See Exec. Order No. 9814, 11 Fed. Reg. 14,645 (1946) (containing President Truman's grants of amnesty for selected individuals for violating the 1940 Selective Training and Service Act).

President Ronald Reagan, who never faced charges for his alleged involvement in the Iran-Contra scandal, exercised his pardon power a few days before leaving office on behalf of ten individuals, including New York Yankees owner George Steinbrenner.¹⁰⁵ President George Bush also used the pardon power in a provocative case when he pardoned six alleged actors in the Iran-Contra scandal, including former Defense Secretary Caspar Weinberger.¹⁰⁶ By pardoning these individuals, Bush also assured that he would not be called to testify in their trials.¹⁰⁷ The self-pardoning option crossed both the Nixon and Bush Administrations, but neither issued such an order.¹⁰⁸

III. History of Self-Pardon Consideration in the United States

While Presidents often use this exclusive power, only two chief executives have contemplated issuing a self-pardon. President Nixon considered such a move when he realized the devastating impact that the Watergate scandal would have on his presidency.¹⁰⁹ The Bush administration also reviewed the self-pardon option during the Iran-Contra arms for hostages scandal.¹¹⁰

A. Richard Nixon and Watergate

When President Nixon came to the conclusion that surviving an impeachment vote and subsequent Senate trial was hopeless, he was presented with a number of options to facilitate the conclusion of his presidency.¹¹¹ In a later Congressional hearing, President Ford discussed an August 1, 1974, meeting he had with Nixon's White House Chief of Staff Alexander Haig.¹¹² Haig laid out options developed by Nixon's legal team, including Special Counsel James St. Clair, the alleged author

105. See *Ninth-Inning Pardon*, TIME, Jan. 30, 1989, at 31 (reporting on President Reagan's pardoning of Yankees owner George Steinbrenner for illegally funneling \$100,000 to Richard Nixon's 1972 re-election campaign); Bill McAllister, *Reagan's Finale: Quips, Appointment, Pardons*, WASH. POST, Jan. 20, 1989, at A07 (reporting on President Reagan's pardoning of Steinbrenner's fine of \$15,000 for illegal campaign donations to the 1972 Nixon presidential campaign). President Reagan also pardoned nine other individuals for relatively minor crimes, including a North Dakota health official who received a 10-day jail sentence for filing a false report with the government and a Mississippi man convicted of possessing liquor in a unstamped container, which violated the tax code. *Id.*

106. See *infra* note 127 and accompanying text.

107. See *Bush Assailed Over Pardons Granted to 6*, CHI. SUN-TIMES, Jan. 19, 1994, at 10. Independent Counsel Lawrence Walsh stated that these pardons, including that of former Defense Secretary Caspar Weinberger, were done as "an act of friendship or an act of self-protection" for the President. *Id.* Walsh also alleged that the political purpose of granting the pardons would in effect prevent Bush from testifying as a witness in their trials. See *id.*

108. See *infra* notes 111-18 & 124-38 and accompanying text.

109. See *infra* note 127 and accompanying text.

110. See *infra* notes 111-18 & 124-38 and accompanying text.

111. See Schorr, *supra* note 10, at 13A (describing President Ford's October, 1974, appearance before a subcommittee of the House Judiciary Committee reviewing Ford's pardon of President Nixon); BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 325-26 (1976) (overviewing the final days of the Nixon administration when Nixon's lawyers informed the President that it would be legal to issue a pardon for himself).

112. See Schorr, *supra* note 10, at 13A.

of a memorandum advocating the legality of a self-pardon.¹¹³ In the private forty-five minute meeting, from which all aides were excluded, Haig set forth five options available to Nixon.¹¹⁴ Along with "toughing it out" through impeachment, invoking the Twenty-Fifth Amendment to the Constitution to leave office temporarily,¹¹⁵ and resigning with the expectation his successor would pardon him, Nixon also was asked to consider pardoning himself and resigning or pardoning all Watergate defendants and himself before resigning.¹¹⁶ Ford subsequently acknowledged Nixon's consideration of the self-pardon option, and Nixon's belief, with the advice of his legal team, that he could pardon himself.¹¹⁷ In considering his options, Nixon reportedly vowed to "put the special prosecutor out of business by leaving nothing unpardoned."¹¹⁸ In 1973, Solicitor General Robert Bork¹¹⁹ argued that a President must have immunity from criminal acts while in office, due to the fact a President could pardon himself for any acts committed while in office, thereby preventing criminal prosecution during his term as President.¹²⁰ Nixon obviously

113. *See id.*

114. *See id.*

115. *See* U.S. CONST. amend. XXV (allowing a President to temporarily declare that he is "unable to discharge the powers and duties of his office," and subsequently regain his power upon declaration to the Senate).

116. *See* Schorr, *supra* note 10, at 13A (indicating Nixon considered a self-pardon).

117. *See* Murray, *supra* note 2, at A1 (quoting President Ford as saying that in considering a self-pardon he believed it was legally based on what "the lawyers thought he had the power to do").

118. *Id.* (describing Nixon's consideration of self-pardoning by declaring that he would rule nobody out of consideration to shut down the special prosecutor; Nixon, in the end, did not pardon himself).

119. Robert Bork served as United States Solicitor General during the Nixon Administration, when the "Saturday Night Massacre" occurred. On Saturday, October 20, 1973, President Richard Nixon ordered Watergate Special Prosecutor Archibald Cox to be fired. Attorney General Elliot Richardson refused to carry out the President's order and resigned, and the number two official, William French Smith, was removed for refusing to carry out Nixon's order. As the number three official at the Justice Department, Bork assumed the role and fired Cox. Bork's record also includes serving as a law professor at Yale, an attorney with the Washington law firm of Kirkland and Ellis, a judge on the U.S. Court of Appeals for the District of Columbia, and a nominee, by President Reagan, to the Supreme Court. Bork withdrew his name from consideration to the Court after a tremulous nomination hearing in the Senate. *See generally* Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077 (1998); Nadine Cohodas, *For Robert Bork, the Real Test Begins Now*, CONG. Q., Sept. 12, 1987, at 1; Frank Trippett, *The Battle Begins: Bork's Nomination is Likely to Stir a Fiercely Political Senate Fight*, TIME, July 13, 1987, at 10.

120. *See* Memorandum of the United States Concerning the Vice President's Claim of Constitutional Immunity at 20, *In re* Proceedings of the Grand Jury Impaneled Dec. 5, 1972 (D. Md. 1973), *cited in* Eric Freedman, *The Law As King and The King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 58 (1992) (noting Bork's pronouncement of the President's ability to pardon oneself as a method of nullifying any conviction that took place while serving in office, thus creating an immunity from criminal prosecution while in office). While Bork acknowledges the President's ability to pardon himself, he also notes that "if Clinton pardons himself, it would be such an abuse of power that it ought to become an impeachment matter." Matthew Robinson, *National Issue Clinton II: Probed, Paralyzed?*, INV. BUS. DAILY, Nov. 4, 1996, at A1. Of course, a President would likely sign his self-pardon order just prior to leaving office. *See* Gillers, *supra* note 8, at 11A (arguing the timing of a presidential self-pardon would likely occur during the President's lame-duck period after the election proceeding his retirement from office).

chose to place his fate in the hands of his successor, Gerald Ford, who denies having made a deal before the resignation.¹²¹ Nevertheless, while a self-pardon was not used, the President's advisors considered the idea.¹²²

B. George Bush and the Iran-Contra Affair

In November 1986, the country learned of the Iran-Contra scandal, an illegal scheme to secretly sell arms to Iran through Israel in hopes of freeing United States hostages being held in Lebanon, and diverting funds from the sales for military action in Nicaragua.¹²³ Prior to leaving office, President George Bush issued pardons that formed, in effect, a constructive self-pardon for his alleged conduct in the Iran-Contra scandal.¹²⁴ In the midst of the Iran-Contra crisis, Independent Counsel Lawrence Walsh brought forth grand jury indictments against some of President Bush's aides, who were alleged to have contributed to the breaking of laws regarding the scandal.¹²⁵ During the month prior to the beginning of the trials of the indicted individuals, Bush granted pardons that effectively shut down investigations and trials regarding Iran-Contra.¹²⁶ Walsh alleged that these six pardons,¹²⁷ including that of former Reagan Defense Secretary Caspar Weinberger,

121. See Schorr, *supra* note 10, at 13A.

122. See *id.*

123. See REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong. (1987). In 1984, the Reagan Administration, primarily through the National Security Counsel, started secretly moving arms through Israel for secret sales with Iran, in order to procure favor with the Iranians to place pressure on Lebanon to release a number of United States citizens being held hostage in Lebanon. The monies raised from these sales were allocated to anti-communism movements in Central America. This act violated the Boland Amendment, which prohibited the U.S. from increasing spending for the Nicaraguan's Contra insurrection. See Intelligence Authorization Act of 1985, Pub. L. No. 98-618, § 801, 98 Stat. 3898, 3304 (1985). The law in effect stopped previous support of the United States government's support of the Contras in Nicaragua, who were attempting to overthrow Nicaragua's Sandinista government. See *id.*

124. See *Bush Assailed Over Pardons Granted to 6*, CHI. SUN-TIMES, Jan. 19, 1994, at 10; R.W. Apple, Jr., *The President as Pardoner: A Calculated Gamble*, N.Y. TIMES, Dec. 25, 1992, at A23 (remarking Bush's pardons of Iran-Contra would be recorded in history "as the President who in effect pardoned himself"); see also Dash, *supra* note 119, at 2094 (stating "[i]ndeed, the presidential pardons and successful campaign to discredit Walsh may have been the final acts of cover up of the Iran-Contra affair"); Eric Brazil, *Ex-Special Prosecutor Doubts Starr's Goals Probing Lewinsky Case Exceeds Mandate, He Says*, S.F. EXAMINER, Jan. 27, 1998, at A7 (citing a Iran-Contra special prosecutor, James Brosnahan, as denouncing Bush's pardon of Caspar Weinberger as an act, in effect, of pardoning himself).

125. See Dash, *supra* note 119, at 2094. Iran-Contra Independent Counsel Lawrence Walsh publicly released his final indictment of Reagan Defense Secretary Caspar Weinberger on the Friday prior to the 1992 presidential election, which brought criticism that the indictment was issued to influence the election. See Malcolm S. Forbes, Editorial, *Dirty Trick (Special Prosecutor Lawrence Walsh Indicts Caspar Weinberger for Statements on George Bush's Role in Iran-Contra Scandal Shortly Before the Election)*, FORBES, Nov. 23, 1992, at 25.

126. See Apple, *supra* note 124, at A23. The trials were scheduled to begin January 5, 1993, just 12 days after the pardons were issued. See Larry Bensky, *Burying Iran-Contra*, S.F. CHRON., Jan. 17, 1993, at 7/Z1; Harold Hongju Koh, Essay, *Begging Bush's Pardon*, 29 HOUS. L. REV. 889 (1992) (arguing Bush's pardons nullified the rule of law).

127. The six people who received pardons were former Defense Secretary Caspar Weinberger,

were issued as "an act of friendship or an act of self-protection" for the President.¹²⁸ Of the six pardoned, three had already pled guilty, one was already convicted, and two — including Weinberger — were set to be tried.¹²⁹ Walsh also alleged that the political purpose of granting the pardons would effectively prevent Bush from being exposed as a witness in their trials.¹³⁰ Bush, however, claimed that he was merely using the pardon power to even out the fact that the opposition was using the criminal system to combat policy differences.¹³¹ Bush did, however, acknowledge that the "Christmas Eve Pardons" were politically motivated.¹³² In fact, President Bush's pardon document states:

The prosecutions of the individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: the criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.¹³³

In addition to the political motivation, it could be argued that Bush was attempting to bring closure to this issue in the national interest. One name that did not appear on the list of the six pardoned was George Bush. President Bush was under investigation for withholding key documents from investigators and other related charges, as well as his direct role in the Iran-Contra scandal.¹³⁴ President Bush could have said, as he did with the pardon of Weinberger, that the intent for a self-pardon would be understandable due to the "patriotic" motivation by which other pardons were granted.¹³⁵ While Iran-Contra Independent Counsel Lawrence Walsh

Assistant Secretary of State Elliot Abrams, former National Security Advisor Robert McFarlane, and three former Central Intelligence Agency officials: Duane Clarridge, Alan Fiers, and Clair George. See Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992); *Presidential Present*, TIME, Jan. 4, 1993, at 11 (reporting on the six Iran-Contra pardoning and establishing their titles and roles in the government).

128. *Bush Assailed Over Pardons Granted to 6*, supra note 107; *Walsh Soldiers On*, TIME, Feb. 22, 1993, at 15 (quoting Walsh as saying that Bush's pardoning of six Iran-Contra was a "grave disservice" to the country).

129. See James Gill, *Walsh's Quarry*, NEW ORLEANS TIMES-PICAYUNE, Jan. 1, 1993, at B7.

130. See *Bush Assailed Over Pardons Granted to 6*, supra note 107; Jorgensen, supra note 31, at 360; William Schneider, *Bush's Pardons Break All the Rules*, L.A. TIMES, Jan. 3, 1993, at M2 (citing a CNN-USA Gallup poll concluding that fifty percent of the American public believed Bush's motive in granting pardons was "to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra").

131. See Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992) (containing Bush's Christmas Eve Pardons of key Iran-Contra figures).

132. See *id.*

133. *Id.*; see also Stephen Carter, *The Iran-Contra Mess*, 29 HOUS. L. REV. 883, 886 (1992) (criticizing Bush for issuing pardons based on an "overzealous prosecutor," but acknowledging the plenary pardon power in the system of checks and balances inherently required in the constitutional structure).

134. See Schorr, supra note 10, at 13A.

135. See Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992). (stating "Caspar Weinberger is a true

has stated that he doubts whether a President could pardon himself, legal scholars and presidential lawyers beg to differ, primarily because nothing in the Constitution prevents the act of self-pardon.¹³⁶ Some have suggested that Bush refrained from pardoning himself not because of the question of the constitutionality of self-pardon, but rather out of concern for his image and the historical record of not being seen as a weak figure.¹³⁷ Bush could have pardoned himself and protected his record by claiming that it was for the good of the nation and not a self-interested motive.¹³⁸ Bush, like Johnson and Carter, could have claimed that the pardon was in the national interest of bringing closure to the subject and healing the nation on this divided issue.¹³⁹ In fact, Bush claimed that Weinberger's and the other five pardons were granted due to the patriotism of those accused.¹⁴⁰

While the Bush camp pondered the question of self-pardons, other options were available, including resigning on January 19, 1993, and swearing in Vice President Dan Quayle, who could have been President for the administration's final day and issued Bush a pardon.¹⁴¹ Another option for Bush was to invoke the Twenty-Fifth Amendment, which would have given the powers of the presidency to the vice-president for the time specified by the President, thus allowing Quayle to pardon Bush, and for Bush to then immediately regain the powers of the presidency.¹⁴² Instead, Bush decided to take his chances of not being prosecuted.

IV. Constitutional Interpretations Regarding Self-Pardons

A. Textual Arguments

A textual interpretation of the Pardon Clause provides the strongest argument that a self-pardon is not prohibited by the Constitution. The concept of a textual interpretation is extremely lucid and direct, but its significance is essential. The Supreme Court has stated that the pardon power is plenary, and when interpreting it, one should look to the text to determine its authority.¹⁴³

American patriot" and "the common denominator of their motivation — whether their actions were right or wrong — was patriotism").

136. See WOODWARD & BERNSTEIN, *supra* note 111, at 325-26; Ferrara, *supra* note 15, at A14; Schorr, *supra* note 10, at 13A.

137. See Schorr, *supra* note 10, at 13A (regarding Bush's consideration of self-pardons) ("Bush would probably see that as the coward's way out").

138. See Gill, *supra* note 129, at B7.

139. See *id.*

140. See Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992).

141. See Gill, *supra* note 129, at B7.

142. See U.S. CONST. amend. XXV.

143. See *Schick v. Reed*, 419 U.S. 256 (1974). Chief Justice Burger wrote that "the plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specific number of years, or to alter it with conditions which are themselves constitutionally unobjectionable." *Id.* at 266. Burger went on to pronounce that "we therefore hold that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself." *Id.* at 267.

The text of the presidential pardon power reads: "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."¹⁴⁴ The Constitution does not contain any other words regarding pardons, and it does not contain any text specifically restricting the President's ability to self-pardon.

As one commentator has stated, "[t]he Constitution provides no limitation on the pardon power, and it has been consistently interpreted to be virtually unlimited."¹⁴⁵ The only limitation is the restriction on impeachment,¹⁴⁶ and if the Framers had intended the text to restrict the pardon power even more, they most likely would have made this intention apparent from the plain meaning of the Constitution. For instance, to restrict self-pardoning, the Framers could have included a clause similar to the following: Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment and against oneself.

Other scholars have recognized the textual permissiveness of self-pardons.¹⁴⁷ Colonel Richard Rosen recently wrote that "nothing on the face of the Constitution prohibits a President from pardoning himself . . ."¹⁴⁸ Professor Edward Foley has argued that while a President cannot "undo" an impeachment, the Constitution allows him to protect himself from further prosecution.¹⁴⁹ This textual argument is essential and it stems from the words drafted by the Framers.

B. Original Intent Arguments

The pardon power was not widely discussed in the Constitutional Convention,¹⁵⁰ however, one may infer that no restriction on self-pardoning was intended by the Framers. While the Framers were putting the constitutional framework in order, they looked at restrictions on the governors in the various colonies, and no colony expressly prohibited self-pardons.¹⁵¹ Alexander Hamilton professed that the

144. U.S. CONST. art. II, § 2.

145. Ferrara, *supra* note 15, at A14 (advocating, as a former Associate Deputy Attorney General of the United States, that a constitutional amendment is needed to prevent a President from exercising the pardon power on himself).

146. See U.S. CONST. art. II, § 2; Freedman, *supra* note 120, at 58 ("[A]ny President who pardoned himself for a crime of that sort would likely forfeit political support and be impeached.").

147. See Col. Richard Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 *MIL. L. REV.* 1, 148 n.703 (1998). Colonel Rosen's article only briefly mentions the ability of self-pardoning when he states that "nothing on the face of the Constitution prohibits a President from pardoning himself of herself in the event of such a prosecution, with exclusion of impeachment proceeding." *Id.*

148. *Id.*

149. See Bush, *supra* note 15, at 3A.

150. See ROTUNDA, *supra* note 48, at 600 (stating common law firmly established the executive pardon power that the Constitutional Convention's delegates adopted with little discussion).

151. See Kobil, *supra* note 16, at 587 (citing the government of Massachusetts restricting the governor to pardons only after conviction); see also Charter of Massachusetts Bay (1629). Fearful of a monarchy, some states did not allow the governor to hold a sole pardon power. The governments of Connecticut and Rhode Island placed the power in the legislature, but only with the governor and six assistant governors being present. See Charter of Connecticut (1662); Charter of Rhode Island and Providence Plantations (1663). See generally Duker, *supra* note 37, at 500-01.

President should have the same power as the King of England, whose power to pardon was limited only in cases of impeachment.¹⁵² In fact, while some Framers wanted to place limitations on the pardon power, such as a Senate approval for pardons, this restriction was flatly rejected in favor of an exclusive presidential power with only one limitation.¹⁵³

One restriction discussed was whether the President should have the power to pardon treason charges.¹⁵⁴ An argument that is particularly relevant and supports the theory that self-pardoning was not excluded from the Framers' intent is that of Edmund Randolph, who argued that pardoning for treason should not be allotted to the President, since "[t]he President may himself be guilty [because] [t]he Traytors may be his own instruments."¹⁵⁵ Randolph worried that the President may release his accomplices, thereby indirectly allowing himself to be spared, save impeachment.¹⁵⁶ Others held the prevailing view, that anyone trusted with the presidency is worthy of this supreme power.¹⁵⁷ The Framers' final version did not prevent pardons for treason or any other reason except those involving impeachment.¹⁵⁸ Therefore, Randolph's view that self-dealing may be a problem was directly rejected in favor of a stronger presidency with the risk of occasional abuse. The Framers also structured the Constitution in a particular manner, but the plain meaning of the text indicates that self-pardoning is permitted.

C. Structural Arguments

While the text of the Constitution does not prohibit self-pardoning, some have argued that the structure of the Constitution does.¹⁵⁹ This section will set forth the structural arguments asserted and the reasons why those arguments are not as persuasive as the textual arguments supporting self-pardoning.

One argument is that the provisions in the Constitution which provide for a President to be prosecuted following his term in office would be nullified by the use of a self-pardon.¹⁶⁰ According to this contention, the Constitution explicitly

152. See THE FEDERALIST Nos. 69, 74 (Alexander Hamilton); Duker, *supra* note 37, at 500-01; Kobil, *supra* note 16, at 594-95.

153. See W.H. HUMBERT, THE PARDONING OF THE PRESIDENT 14-17 (1941) (discussing the Constitutional Convention, where James Madison argued for some Senate oversight of pardons, particular in cases involving treason); see also U.S. CONST. art. II, § 2 (listing only one restriction on the pardon power, which prohibits overturning an impeachment).

154. See MADISON, *supra* note 55, at 471-72.

155. *Id.*

156. See *id.*

157. See Duker, *supra* note 37, at 509-21 (demonstrating historical arguments that the President is vested with the awesome sole power of impeachment, because anyone worthy of this grand office is trusted to administer its duties appropriately).

158. See U.S. CONST. art. II, § 2.

159. See *supra* note 15 and accompanying text.

160. See U.S. CONST. art. I, § 3, cl. 7 ("[J]udgements in Case 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, Judgement and Punishment, according to Law."); Clinton: *Well, Pardon Me?*, *supra* note 12, at 14.

provides that a former President is subject to normal criminal charges after leaving office, and the power to pardon oneself would prevent such prosecution.¹⁶¹ This viewpoint, however, is inappropriate, due to the fact that a pardon removes the particular criminal act from an individual's record, thereby eliminating any act that may be prosecuted.¹⁶² Prosecution may still occur if a President does not pardon himself.¹⁶³ For example, Richard Nixon decided not to invoke the self-pardon, and could still have been prosecuted.¹⁶⁴

Another structural argument centers on the idea that the Constitution is designed to avoid self-dealing.¹⁶⁵ This belief may be true, but even a presidential self-pardon may not be solely an act of self-dealing. A President may use the pardon power, not for himself, but rather to help heal a divided nation and bring closure to an issue.¹⁶⁶ Richard Nixon could have thereby spared Gerald Ford the odious task of issuing the pardon for his predecessor.¹⁶⁷ While self-dealing may be a factor, the country may actually be a significant beneficiary of the self-pardon concept. President Clinton, for example, until the conclusion of his presidency, could use the pardon power not only to heal the deeply divided country over his alleged misdeeds, but also to close the investigation by the independent counsel and to disband any grand jury.¹⁶⁸ Certainly, one could argue that the Clinton impeachment issue divided the nation and that a more rapid conclusion of the ordeal undoubtedly would have been positive for the nation as a whole.

The Constitution provides a set of checks and balances to assure compliance by the executive, legislative, and judicial branches. The check on the transgressions of the President is impeachment.¹⁶⁹ The pardon power, however, cannot be reviewed

161. See U.S. CONST. art. I, § 3, cl. 7.

162. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (stating a pardon "releases the punishment and blots out of existence guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence"); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833) (holding a pardon "exempts" that person from "the punishment the law inflicts for a crime he has committed").

163. See U.S. CONST. art. I, § 3, cl. 7.

164. See Schorr, *supra* note 10, at 13A; see also Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974) (containing Ford's pardon of Nixon).

165. See Presser, *supra* note 15, at 21 (arguing the structure of the Constitution has checks and balances that prevent a self-pardon).

166. There is a long history of using the pardon power for national healing and closure. The pardon power was first used as a tool for national healing in the United States by President Buchanan, when he pardoned Mormon settlers accused of treason in 1858. See *supra* note 84 and accompanying text. National healing was later used as a reason to pardon by President Andrew Johnson, who used the power to heal the Civil War by granting pardons to confederate soldiers. President Carter followed suit by granting relief to Vietnam War protestors who failed to serve in the required draft. See generally Kerr, *supra* note 9, at 1; Calabresi & Yoo, *supra* note 103, at 1484-85.

167. See Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974).

168. See Harvey Silverglate, Editorial, *Close the Starr Chamber — Clinton Should Move Case Into Political Arena*, BOSTON HERALD, Aug. 16, 1998, at 27 (arguing President Clinton can pardon all of the actors surrounding the Independent Counsel investigation and even himself to end the process).

169. See U.S. CONST. art. II, § 2.

by the legislature, as Congress has no power to regulate the pardon.¹⁷⁰ The Supreme Court was very clear when it stated in 1866 that "[t]his 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."¹⁷¹ Therefore, the President may exercise the pardon power for anyone — including himself — except in cases of impeachment.

D. Precedent Arguments

A self-pardon case brought to the Supreme Court would be one of first impression, yet the Court's reasoning in other pardon cases set forth precedent that indicates that a self-pardon is not prohibited by the Constitution. The Court would first have to decide whether to address the issue or simply refuse to make a determination on the merits, based on the notion that this is a political question. In the first substantial pardon case, *United States v. Wilson*, in 1833, Chief Justice Marshall wrote, "[i]t is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court."¹⁷² The Court went on to state that, while a court may review a pardon, its review is limited, and a court will not judge the "character" of the pardon deed.¹⁷³ The President may argue that so long as the pardon was executed and delivered correctly, it is valid as an executive action, and a court may not judge its legitimacy beyond the formalities of the document. A self-pardon case, however, unlike those involving the general pardon standard, would go directly to the meaning of the Constitution, including separation of powers, and not merely a political question.

In *Ex parte Garland*,¹⁷⁴ the Supreme Court used extremely strong language to say that the President's pardon power is "unlimited," except for the impeachment exception.¹⁷⁵ In even more powerful language, the Court stated that "Congress can neither limit the effect of his pardon, nor exclude from its exercise *any class* of offenders."¹⁷⁶ The Court reaffirmed this position five years later when it held that Congress is restrained in controlling the pardon power.¹⁷⁷ The President could argue that the language "any class" would include himself.

The Supreme Court has also stated that the remedy for abuse of the pardon power is found in impeachment, not the lessening of the power conferred to the President.¹⁷⁸ In *Ex parte Grossman*,¹⁷⁹ Chief Justice Taft wrote that if the

170. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

171. *Id.*

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

173. See *id.* at 161.

174. 71 U.S. (4 Wall.) 333 (1866).

175. See *id.* at 380.

176. *Garland*, 71 U.S. (4 Wall.) at 380 (emphasis added).

177. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141-42 (1871).

178. See *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

179. 267 U.S. 87 (1925).

President used his power to overturn contempt orders and lessen the powers of the judiciary, that "would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."¹⁸⁰ Again, the Court, through the writings of former President Taft, noted that the only remedy for an abuse of the pardon power is impeachment, not judicial intervention.¹⁸¹

More recently, in *Schick v. Reed*,¹⁸² the Court held that in reviewing the pardon power, it should be read from "the language of that clause itself."¹⁸³ The Court went on to state that any limitations on the power are found in the Constitution itself,¹⁸⁴ and not some other source; thus, since the Constitution only has one limitation, the President is eligible to pardon himself. One commentator has argued that in *Schick*, the Court left open the possibility of some control, when it stated that the President may "commute sentences on conditions which do not themselves offend the Constitution."¹⁸⁵ As stated above, the Court has defined the presidential pardon power as unconditional, except for impeachment. Although a direct case has never been brought, a strong precedential argument may conclude that there is no prohibition on self-pardons.

V. Proposal

While a self-pardon may be constitutional,¹⁸⁶ and may even be permissible under the situation presented to President Clinton, no individual should have the ability to place themselves in judgment of their own actions in the public arena. This quagmire in the Constitution ought to be resolved preventatively. To accomplish this, an amendment to the Constitution would clarify the ambiguity in Article II.

The following constitutional amendment is proposed:

Section 1: 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.

Section 2: Congress Shall Have No Power to Regulate This Authority.

Section 1 of this proposed amendment not only restricts the president's ability to pardon him or herself, but also removes the power to pardon members of his direct family. A system that allows a president to judge and pardon himself or members

180. *Id.* at 121.

181. *See id.*

182. 419 U.S. 256 (1974).

183. *Id.* at 265.

184. *See id.* at 267 ("We therefore hold that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself.").

185. *See* Kalt, *supra* note 15, at 803-04 (citing *Schick*, 419 U.S. at 263-64).

186. *See* John Leo, *On Granting an Iranscam Pardon: A Debate Grows over the President's Power vs. the Public Good*, TIME, Apr. 11, 1988, at 57 (quoting law professor Michael Josephson, speaking of Ronald Reagan and Iran-Contra, stating "Reagan, on the other hand, could pardon everyone, theoretically including himself"). Professor Josephson alludes that a system that allows a self-pardon cannot possibly be "proper," but acknowledges the theoretical possibility in the Constitution. *See id.*

of his direct family diminishes the confidence that is essential in a democracy and tears at the very concepts of the rule of law.¹⁸⁷ Professor Peter Shane has remarked that "[o]ur founders believed that the new Constitution deserved the allegiance of the citizenry in large part because of the ideas of governance that it embodied."¹⁸⁸ This proposed amendment, however, in no way contradicts the conclusion that a presidential self-pardon is currently permissible by law. The proposal merely suggests a solution to this ambiguity in the Pardon Clause, thereby eradicating the loophole for which the Constitution currently allows.

Section 2 of this proposed amendment maintains the pardon power with the presidency. It also assures that the Congress will not have the constitutional authority to infringe on the power, a power the Founding Fathers granted exclusively to the executive branch.¹⁸⁹

VI. Conclusion

The textual, historical, structural, and precedential arguments set forth in this article indicate that the President of the United States has the power to issue pardons to any individual, including himself, except to overturn an impeachment. This power is plenary and may be exercised at anytime.¹⁹⁰ The Supreme Court stated in 1866 that "[t]he power thus conferred is unlimited, with the exception stated. 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 judgement."¹⁹¹

A self-pardon by President Clinton would have likely caused a political backlash with many members of Congress and with the public. One commentator stated that "[f]or a President to pardon himself would, admittedly, be an act of unprecedented chutzpah, but the Constitution does not forbid it, containing nothing that circumscribes the 'power to grant reprieves and pardons for offenses against the United States.'¹⁹² President Clinton, prior to attempting such a constitutional maneuver, would be wise to consider its result in his already maligned historical legacy, in addition to the fact that any criminal charges against him are widely believed to be weak at best.

Just as important, President Clinton would have to consider the political, historical and legal recoil that may occur after using a self-pardon, including possible calls to remove the pardon power from the presidency. An amendment to the Constitution could certainly remove the power, or at least greatly restrict the President from

187. For a discussion of the rule of law in the Constitution, see Peter Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 381-84 (1993). See also TRIBE, *supra* note 79, at 1673-87 (describing the process of law as a governing mechanism).

188. Shane, *supra* note 187, at 405.

189. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1866).

190. See *id.* at 380-81.

191. *Id.* at 380.

192. Gill, *supra* note 129, at B7.

pardoning members of his staff, family, himself, or others. If correctly drafted, such an amendment may even be applied retroactively to Clinton. After all, an amendment may effectively alter any part of the Constitution.¹⁹³ The broad power of the presidential pardon could even be removed as an exclusive power and be given legislative control, as was present in two of the original colonies.¹⁹⁴

As of today, there is no question that all of the actors surrounding Whitewater,¹⁹⁵ Travelgate,¹⁹⁶ Filegate,¹⁹⁷ Electiongate,¹⁹⁸ the Paula Jones lawsuit,¹⁹⁹ the Monica Lewinsky affair,²⁰⁰ or other scandals could be released from

193. See U.S. CONST. art. V ("The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .").

194. See Kobil, *supra* note 16, at 589-90 (citing the governments of Connecticut and Rhode Island as placing the power in the legislature, but only with the governor and six assistant governors being present); see also Charter of Connecticut (1662); Charter of Rhode Island and Providence Plantations (1663).

195. In 1978, then-Arkansas Gov. Bill Clinton, his wife Hillary, and friends invested in a real estate development known as Whitewater, where some allege wrongdoing in the structure and use of the land deal, as well as the misuse of the governor's powers. See *Bill Clinton's Luck*, ECONOMIST, Feb. 13, 1999, at 27.

196. The 1993 Travelgate scandal occurred when White House officials fired seven longtime members of the White House Travel Office, whose responsibilities included arranging travel for the White House Press Corp. The new team was headed by a 25-year-old former campaign worker who was a distant cousin of the President. See Charles Fenyevesi, *Washington Whisper Whitewater: Is the Tide Turning in the First Family's Favor?*, U.S. NEWS & WORLD REP., Apr. 11, 1994, at 21.

197. The Filegate scandal occurred when a White House security aid obtained over 400 sensitive FBI personal security files on political enemies. Clinton claimed that the aid used an outdated list of former White House employees from the previous Bush Administration and apologized for the mistake. See David Bowermaster, *Summer on the Grill; First It Was Whitewater, Then Travelgate and Disappearing Records, Now It's the FBI Files*, U.S. NEWS & WORLD REPORT, July 1, 1996, at 24; Carl Mollins, *And Now, "Filegate"; The Whiffs of Scandal Will Not Lift From Bill Clinton's Campaign*, MACLEAN'S, July 1, 1996, at 26.

198. President Clinton faced criticism for the methods of raising money for his 1996 re-election campaign, including an accusation that some of the 938 people who stayed overnight in the famous Lincoln Bedroom, located on the third floor of the White House, were invited based only on the amount of contributions given to the campaign. Clinton responded by stating that the people staying in the Lincoln Bedroom were "friends" and the "The Lincoln Bedroom was never sold." *The Lincoln Bedroom Scandal*, MACLEAN'S, Mar. 10, 1997, at 29. Clinton was also accused of taking campaign contributions from foreign sources, particularly members of the People's Republic of China. This fund raising allegedly took place in part at "coffee" mixers, where potential donors were hosted for social gatherings in the White House. See Nancy Gibbs, *Cash-and-Carry Diplomacy: The Latest Documents Show a Close Link Between the White House and Democratic Donors on Matters Best Left to the National Security Council*, TIME, Feb. 24, 1997, at 22; Mark Hosenball, *On the Trail of a "China Connection": Why the Scandal over Clinton's Foreign Money Keeps Raising Questions About Beijing*, NEWSWEEK, Mar. 10, 1997, at 30; Daniel Klaidman, *Fumbles In High Places*, NEWSWEEK, Oct. 20, 1997, at 26.

199. In May 1994, Paula Jones, a former Arkansas state employee during the period when Bill Clinton was Governor, filed a law suit against Clinton alleging he sexually harassed her in the Little Rock Excelsior Hotel. See Michael Isikoff, *"I Want Him To Admit What He Did,"* NEWSWEEK, June 9, 1997, at 30. While the lawsuit settled, Clinton was impeached for allegedly providing false testimony

further prosecution with the pardon order.²⁰¹ There is also no doubt that the list of those pardoned may include the President's wife, his confidantes, and even his political foes, including Independent Counsel Kenneth Starr. If the President were to pardon himself, such an action would undoubtedly be seen as an act of great audacity; however, in this era of rabid partisanship, such a brazen act may be considered appropriate. Certainly, some people would be sympathetic to such an act, especially in light of the fact that other public figures have recently been accused of similar indiscretions, including the Speaker-elect of the 106th House of Representatives and members of the House Judiciary Committee.²⁰² President

before a federal grand jury concerning his relationship with White House Intern Monica Lewinsky, who he was asked about in a discovery deposition. *See supra* note 2 and accompanying text; *see also infra* note 200 and accompanying text.

200. President Clinton was impeached, but acquitted, for matters surrounding his affair with a 22-year-old White House intern, Monica Lewinsky. Clinton was accused of lying and attempting to cover-up the relationship in the Paula Jones lawsuit. *See supra* notes 2, 199 and accompanying text; *see also* Michael Isikoff, *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 30; Lee Walczak, *Is This One Scandal Too Many*, BUSINESS WEEK, Feb. 2, 1998, at 38. Clinton was, however, held in civil contempt of court for giving "intentionally false" statements about his relationship with Monica Lewinsky at a January 17, 1998 deposition. *See Jones v. Clinton*, No. LR-C-94-290, 1999 WL 202909, at *8 (E.D. Ark. Apr. 12, 1999); *see also* Roberto Suro, *Judge Finds Clinton in Contempt of Court*, WASH. POST, Apr. 13, 1999, at A1.

201. *See* U.S. CONST. art. II, § 2; Ferrara, *supra* note 15, at A14 ("Under the Constitution he can pardon everyone who has evidence against him, his wife, or his friends, in return for their silence."). Furthermore, the Constitution only limits a pardon against impeachment, but not any specific offense or person. *See Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

202. Several members of Congress who voted on the impeachment of President Clinton similarly admitted to marital indiscretions, including:

Bob Livingston (R.-La.), House Speaker-Elect of the 106th Congress, who resigned during the Clinton Impeachment hearing after his own affair was revealed. *See* Nancy Roman, *Impeachment Debate Resumes*, WASH. TIMES, Dec. 18, 1998, at A1; William Welch, *Livingston: "My Fate Is In Your Hands": Republicans Maintain Support for Incoming House Speaker*, USA TODAY, Dec. 18, 1998, at 22A (quoting Livingston as saying, "[D]uring my 33-year marriage to my wife, Bonnie, I have on occasion strayed from my marriage"). Livingston removed his name from the final House Speaker vote and announced his resignation from Congress due to this revelation. *See* Jill Lawrence, *Poisonous Atmosphere Pervades Washington Politics*, USA TODAY, Dec. 21, 1998, at 10A.

Bob Barr (R.-Ga.). In a reported case, outspoken Judiciary Committee member Robert Barr — from Georgia's most conservative district — was photographed during his third marriage licking whipped cream off of a woman's breasts at a charity luncheon. *See* Lloyd Grove, *Clinton's Public Enemy; Even Before Monica Lewinsky, Bob Barr, Had Impeachment on His Mind*, WASH. POST, Feb. 10, 1998, at E01 ("Barr enlivened a Leukemia Society luncheon by — as one local newspaper put it — 'licking whipped cream from the chests of two buxom women.'"); Andrew Phillips, *Daring to Speak The Capitol's "I-word"*, MACLEAN'S, Mar. 30, 1998, at 34 (stating about Representative Barr, "but his critics quickly pointed out that the champion of family values has been divorced twice, has been sued for child support, and was once photographed licking whipped cream off a woman's breasts — to raise money for charity").

Helen Chenoweth (R.-Idaho). *See* John Farmer, *A Glass House Got Its Due for Throwing Stones*, STAR-LEDGER, Feb. 13, 1999, at 001; Ellen Goodman, Editorial, *How Much Do We Need To Know About Sex Lives?*, IDAHO STATESMAN, Sept. 15, 1998, at 7B (demonstrating Representative Chenoweth admission of a six-year affair with a married man).

Dan Burton (R.-Ind.). *See* *Lawmaker's Statement Includes Apology*, INDIANAPOLIS STAR, Sept. 5, 1998, at A09 (reprinting a statement from Representative Burton, who stated about his affair, while married,

Clinton may believe that his actions, although wrong, were reviewed by a partisan independent counsel with an agenda influenced by zealots in the 105th session of the House of Representatives — including House Judiciary Committee Chairman and Impeachment Manager Henry Hyde, who also has admitted his own marital indiscretion.²⁰³ This hypocrisy may disenfranchise many Americans from politics and dissuade others from entering public service.²⁰⁴ It is this same attitude that may warrant the President's consideration of a self-pardon in order to place a check on a partisan Congress.

In the final analysis, our constitutional system depends on the trust of the American people and that trust is best secured by a system that does not allow a leader to stand in judgment of him or herself. A constitutional amendment of the presidential pardoning power is therefore needed to afford the American people a more secure democracy.

that, "[t]here have been some rough times during my 38 years of marriage. In fact, we were separated several times and at one point almost divorced. I have certainly made some mistakes that are mine and mine alone. There was a relationship many years ago from which a child was born. I am the father.").

203. See Tody Eckert, *Hyde Admits to Affair 30 Years Ago: He Sees "Attempt to Intimidate Me,"* SAN DIEGO UNION-TRIB., Sept. 17, 1998, at A14 (describing Hyde's affair); Howard Kurtz, *Report of Hyde Affair Stirs Anger*, WASH. POST, Sept. 17, 1998, at A15 (quoting Hyde as stating, in describing his five-year affair to a married woman, while married, beginning at age 41, that "the statute of limitations has long passed on my youthful indiscretions").

204. See Roger Simon, Perspective, *Seeking Office? Better Be Squeaky Clean*, CHI. TRIB., Sept. 20, 1998, at 1 (describing the results of the press "outing" candidates and members of elected office for having affairs).

