Articles

The Supreme Court Wants to Know: Can a President Pardon Himself?

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Table of Contents

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I. INTRODUCTION

Before the Donald Trump presidency, the issue of a potential presidential self-pardon was largely relegated to "parlor game" status among constitutional scholars.[1] Then, in 2017 and 2018, President Trump tweeted, "[a]s has been stated by numerous legal scholars, I have the absolute right to PARDON myself,"[2] and, "all agree the U.S. President has the complete power to pardon . . . ."[3] While President Trump did not attempt to issue himself a pardon while serving as President from 2017 to 2021, the constitutionality of a presidential self-pardon played a significant role at Supreme Court oral arguments in *Trump v. United States*, a case involving presidential immunity from criminal prosecution for conduct allegedly involving official acts.[4] Justice Gorsuch and Justice Alito both wanted to know the attorneys' opinions on whether a President could pardon himself, as they both maintained it was relevant to the case under consideration.[5] Justice Alito even explicitly stated, "[d]on't you think we need to know?"[6]

Due to a current convergence of events, the ability of a President to pardon himself could become the most pressing constitutional question of the twenty-first century. President Trump is the Republican candidate for president. President Trump faces numerous criminal charges, and regardless of whether trial and appeal outcomes would occur before or after election day, he may attempt to issue himself a pardon in the event he takes office in January 2025.[7]

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1. Ashley Parker & Joel Achenbach, *Giuliani Calls It "Unthinkable" That Trump Would Pardon Himself*, WASH. POST (June 3, 2018), https://perma.cc/469K-7PEF.

2. Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018, 5:35 AM), https://perma.cc/22QP-M3K8.

3. Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2017, 7:35 AM), https://perma.cc/VW4Y-TGFB.

4. *See* Trump v. United States, 144 S. Ct. 2312, 2324 (2024).

5. *See* Transcript of Oral Argument at 46–47, 108–09, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939).

6. *Id.* at 109.

7. *See* Andrew Prokop, *The Chances That Trump Will Be a Convicted Felon by Election Day Have Dropped*, VOX (Feb. 2, 2024, 4:15 PM), https://perma.cc/4ZG4-3VPR;

The text of the Constitution provides little guidance regarding the issue of a potential presidential self-pardon. The one sentence that mentions the pardon power only states, "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[8] Case law provides no explicit guidance as a presidential self-pardon has never been attempted and therefore never adjudicated. Even the broader issue of the President's pardon power has little case law behind it.[9]

This Article provides a thorough analysis of the implications of the *Trump v. United States* case and the arguments for and against the constitutionality of a presidential self-pardon. This framework will serve a valuable function in this pressing debate. Part II provides a transcript of the oral arguments where presidential self-pardons were discussed. Part III investigates the likely positions of the justices on presidential pardons given the context and word choice used. Part IV provides the arguments against permitting presidential self-pardons, which include the Nixon memo; the definition of a pardon; the Constitutional Convention; adequacy of political consequences; analogy to the King of Britain; congressional pay raise analogy; and themes against self-dealing, self-judging, violating the public trust, and being above the law. Part V provides the arguments in favor of permitting presidential self-pardons. These arguments include analogizing to gubernatorial pardon powers, Supreme Court precedent, the plain reading of the constitutional text, the existence of other explicit pardon power limitations, the debate from the Constitutional Convention, the counterintuitive nature of such an exclusion, and the unlikelihood of frequent abuse. Finally, Part VI concludes by considering how the inherently political nature of the question inevitably leads to bias and how a constitutional amendment adding three words to the end of the Pardon Clause would emphatically end the debate and end any attempt at a self-pardon.

II. REFERENCES TO A SELF-PARDON IN *TRUMP V. UNITED STATES* ORAL ARGUMENTS

The case of *Trump v. United States* does not directly pertain to the President's ability to issue a self-pardon. The oral arguments at the Court of Appeals for the District of Columbia Circuit did not contain any mention of a presidential self-pardon. The case involves the extent to which presidential immunity from criminal prosecution extends to acts of

Brandon Johnson, *A Convict in Chief?*, HARV. L. REV. BLOG (Apr. 18, 2023), https://perma.cc/XU4M-T634.

8. U.S. CONST. art. II, § 2, cl. 1.

9. *See infra* Section V.B.

President Trump.[10] However, Justices Gorsuch and Alito both recognized that their decision in *Trump v. United States* would in some way be contingent upon whether Presidents could pardon themselves. The following are the relevant exchanges between Justice Gorsuch and President Trump's attorney, followed by Justice Alito and the government's attorney.[11]

> Gorsuch: "What would happen if presidents were under fear—fear that their successors would criminally prosecute them for their acts in office . . . . It seems to me like one of the incentives that might be created is for presidents to try to pardon themselves."[12]
>
> Mr. Sauer: "I didn't think of that until Your Honor asked it. That is certainly one incentive that might be created."[13]
>
> Gorsuch: "I mean, we've never answered whether a president can do that, happily. Happily it's never been presented to us . . . . And perhaps, if he feels he has to, he'll pardon himself every—every four years from now on."[14]
>
> Mr. Sauer: "But that, as the Court pointed out, wouldn't provide the security because the legality of that is something that's never been addressed."[15]
>
> Alito: "On the question of whether a president has the authority to pardon himself, which came up earlier in the argument, what's the answer to that question?"[16]
>
> Dreeben: "I don't believe the Department of Justice has taken a position. The only authority that I'm aware of is a member of the Office of Legal Counsel wrote on a memorandum that there is no self-pardon authority. As far as I know the Department has not addressed it further. And of course, this Court had not addressed it either."[17]
>
> Alito: "Now how—don't you think we need to know the answer to—at least to the Justice Department's position on that issue in order to decide this case? Because if a president has the authority to pardon himself before leaving office and the D.C. Circuit is right that there is no immunity from prosecution, won't the predictable result be that presidents on the last couple of days of office are going to pardon

10. *See* Trump v. United States, 144 S. Ct. 2312, 2324 (2024).
11. The transcript has been cleaned up for readability.
12. Transcript of Oral Argument, *supra* note 5, at 46–47.
13. *Id.* at 47.
14. *Id.* at 47–48.
15. *Id.* at 48.
16. *Id.* at 108.
17. *Id.* at 109.

> themselves from anything that they might have been conceivably charged with committing?"[18]
>
> Dreeben: "I—I really doubt that, Justice Alito. And it sort of presumes a regime that we have never had except for President Nixon and as alleged in the indictment here . . . . I think the political consequences of a president who asserted a right of self-pardon that has never been recognized, that seems to contradict a bedrock principle of our law that no person shall be the judge in their own case. Those are adequate deterrents, I think, so that this kind of dystopian regime is not going to evolve."[19]

III. INSIGHT FROM *TRUMP V. UNITED STATES* ORAL ARGUMENTS

Accurately predicting Supreme Court outcomes is a notoriously difficult task.[20] Similarly, attempting to extract insight from comments made on tangentially related matters is far from an exact science. Nevertheless, the comments made by Justices Gorsuch and Alito and the two attorneys may provide insight into their opinions regarding the constitutionality of a presidential self-pardon.

The comments made by Justices Gorsuch and Alito could be interpreted as demonstrating their amenability toward the constitutionality of a presidential self-pardon. In context, their comments suggest that they are at least open to presidential self-pardons being valid. Justice Alito asked the government's attorney, "[w]hat's the answer to that question?"[21] as opposed to something more leading such as "[d]o you actually think a president could pardon himself?" or "[y]ou don't actually think a president could pardon himself, do you?" Justice Alito's hypothetical regarding the incentive a presidential self-pardon power would create for presidents to issue full pardons to themselves upon leaving office further implies that he believes there is a possibility of the practice being permissible; otherwise, it would not be worth bringing up. Likewise, Justice Gorsuch's comments suggest that he is also open to the permissibility of a presidential self-pardon. Justice Gorsuch's comments furthermore hint at the constitutional crisis that such a question would elicit, as he twice expressed how the Supreme Court "happily" has not had to adjudicate such a question. The fact that none of the other Justices pushed back regarding

18. *Id.* at 109–10.

19. *Id.* at 110.

20. *See, e.g.*, Michael Conklin, *The Icing on the Cake: How Background Factors Affect Law Faculties' Predications in* Masterpiece Cakeshop, 9 CONLAWNOW 227, 233–34 (2018) (explaining how experts only predict Supreme Court outcomes with 59.1% accuracy, which is significantly worse than the 73.6% success rate from this same time period that would be accomplished from simply predicting that the petitioner would win in every case).

21. Transcript of Oral Argument, *supra* note 5, at 108.

the openness expressed by Justices Gorsuch and Alito may further imply their amiability to the concept.

The responses from the two advocates in the *Trump v. United States* case may also help shed light on the potential legitimacy of a presidential self-pardon. President Trump's attorney claimed that he had never thought of the issue until asked by Justice Gorsuch.[22] If true, this could be interpreted as evidence that presidential self-pardons should not be allowed. The lack of aforethought implies that presidential self-pardons are so beyond the scope of what is reasonably permissible that even Trump's own attorney has never even considered it as a viable option for avoiding punishment.

The government's attorney appeared somewhat neutral regarding the matter. He accurately stated that the Justice Department and the Supreme Court have never addressed the issue.[23] He referenced "a member of the Office of Legal Counsel [who] wrote on a memorandum that there is no self-pardon authority."[24] The specific language used here to convey this message could be interpreted to imply a lack of support for the findings of this memo from the government's attorney. The statement could have been made much more emphatically. For example, he could have said, "The Office of Legal Counsel has already addressed this issue, recognizing that there exists no authority for a presidential self-pardon and this memorandum was in the context of the 1974 Nixon administration where Nixon was desperately trying to find a way to stay in office." Instead, the government's attorney explicitly referenced how this was just the opinion of one person—"a member"—and that it was just a memo, rather than an official pronouncement. When Justice Alito raised the issue again, the government's attorney at first appeared to go against the belief of the permissibility of a self-pardon by stating how it "seems to contradict a bedrock principle of our law that no person shall be the judge in their own case."[25] However, in the following sentence, he stated that there already exists "adequate deterrents," which is an argument that supporters of the right to presidential self-pardons point out.[26]

The fact that it was two of the Republican-appointed Justices who brought up the issue of presidential self-pardons may itself provide insight. Perhaps the Democrat-appointed Justices do not want the issue to be considered by the Supreme Court at a time when they are outnumbered six to three.[27] And perhaps the liberal Justices do not want to establish a

22. *See id.* at 47.
23. *See id.* at 109.
24. *Id.* For more on this memo, see *infra* Section IV.A.
25. Transcript of Oral Argument, *supra* note 5, at 110.
26. *See infra* Section V.G.
27. *Justices 1789 to Present*, SUP. CT., https://perma.cc/FJ4W-64C7 (last visited May 5, 2024) (The current breakdown of the Supreme Court is that Justices Barrett, Kavanaugh,

precedent for presidential self-pardons while President Trump is the Republican nominee for the 2024 presidential election.[28] While none of the Justices gave a clear indication as to how they would ultimately decide the matter, general theories of constitutional interpretation support the notion that the conservative Justices would be more likely to support presidential self-pardons based on a literal reading of the text and the intent of the Framers.[29] Conversely, the liberal Justices would perhaps be more likely to reject the notion of a presidential self-pardon under a "living Constitution" interpretation, which would place more weight on the consequences of the practice under consideration.[30]

IV. ARGUMENTS AGAINST A PRESIDENTIAL SELF-PARDON[31]

A President's ability to issue a self-pardon is an unresolved issue, as there is no case law directly on the matter, minimal case law on the broader issue of the pardon power in general, and no explicit mention in the Constitution. Additionally, the inherently political nature of the matter means that there is risk of biases clouding the judgment of those opining on the issue depending on which President may be issuing the self-pardon and for what reason.[32] Regardless of numerous gaps, an honest assessment of the arguments for and against presidential self-pardons leads to the conclusion that it is constitutional. This Part addresses the arguments against presidential self-pardons and demonstrates how, when properly understood, they serve to support the practice. These arguments include the Nixon memo; the definition of a pardon; the Constitutional Convention; adequacy of political consequences; analogy to the King of Britain; congressional pay raise analogy; and themes against self-dealing, self-judging, violating the public trust, and being above the law.

A. The Department of Justice's Richard Nixon Memo

In the *Trump v. United States* oral arguments, the government's attorney mentioned one of the only government pronouncements

Gorsuch, Alito, Thomas, and Souter were appointed by Republican Presidents, while Justices Jackson, Kagan, Sotomayor were appointed by Democratic Presidents).

28. *See* sources cited *supra* note 7.

29. For intent of the framers, see *infra* Section V.E.

30. *See, e.g.*, Michael Conklin, *Putting It in Neutral: How the Sequence, Severity, and Sincerity of Information Presentation Affect Student Opinions*, 41 N. E. J. LEGAL STUD. 39, 46 (2021).

31. *See generally* Michael Conklin, *Please Allow Myself to Pardon . . . Myself: Arguing in Favor of the Presidential Self-Pardon*, 97 DET. MERCY L. REV. 291 (2020) (Some of the arguments from this section were originally chronicled in this author's previous work published with express permission).

32. *See* Transcript of Oral Argument, *supra* note 5, at 17.

regarding presidential self-pardons.[33] This pronouncement is the Nixon memo that is widely misrepresented by anti-self-pardon advocates. Four days before President Nixon resigned in 1974, the Department of Justice issued a memo regarding the constitutionality of a potential presidential self-pardon.[34] The ultimate conclusion of the memo was that "[u]nder the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative."[35] Given the timing and context of the memo, the assistant attorney general who wrote it likely understood that the goal was to discover some mechanism through which President Nixon could remain in power. Therefore, it could be argued that he was incentivized to find something. In light of this incentive, his inability to support a presidential self-pardon could be interpreted to act as an indication of the lack of evidence to support the practice. Such an argument is of little value, as delving into the psyche of this person is highly speculative. For example, perhaps he was disgusted with the Watergate scandal and was therefore motivated to not find an option to keep Nixon in power.

Properly understood, this Nixon memo is not nearly as reasoned or as authoritative as it may first appear. The memo is only two and a half pages long, is self-described as merely an "outline," and contains very minimal legal analysis.[36] The majority of the short memo addresses legislative pardons, the enactment of a plea as a bar to criminal prosecution, concurrent resolution requesting the next President to grant a pardon, and immunity resulting from testimony before congressional committees.[37] There are only two paragraphs that address a potential presidential self-pardon and they contain only two citations.[38] There is no

33. *See id.* at 109.

34. *See* Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974).

35. *Id.*

36. *See id.*

37. *See id.* at 370–72.

38. The memo states:

> Pursuant to Article II, Section 2 of the Constitution, the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment," is vested in the President. This raises the question whether the President can pardon himself. Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative.
>
> The necessity doctrine would not appear applicable here. That doctrine deals with the situation in which the sole or all judges or officials who have jurisdiction to decide a case are disqualified because they belong to a class of persons who have some interest in the outcome of the litigation, thus depriving the citizen of a forum to have his case decided. In that situation the disqualification rule is frequently relaxed to avoid a denial of justice. Evans v. Gore, 253 U.S. 245, 247–

acknowledgment of any of the pro-self-pardon arguments; it effectively just asserts that a presidential self-pardon would not be allowed.

The memo is simply a rough outline of one assistant attorney general's opinion based on what appears to be very little research on the matter. What is much less well-known regarding this memo is that there were others close to the issue who voiced strong opposition to it.[39] This includes Special Counsel James St. Clair and Solicitor General Robert Bork.[40] The Nixon memo has no more authoritative power than a memo written by a future assistant attorney general under President Trump asserting that a president *can* issue a self-pardon. For a discussion regarding why a self-pardon is not the equivalent of being a judge in one's own case, as the memo alleges, see Section IV.B below.

B. Constitutional Themes Against Self-Dealing and Self-Judging

Some have argued that a presidential self-pardon would be in violation of basic rule-of-law principles that one cannot be his own judge.[41] And there is Supreme Court precedent to support this general notion. In *Calder v. Bull*, the Supreme Court held that allowing someone to be a judge in his own case "is against all reason and justice . . . ."[42] Additionally, there is a prevalent theme throughout the Constitution that self-dealing is prohibited.[43] One could argue, because a presidential self-pardon is the ultimate form of self-dealing, it is therefore in violation of the Constitution and prohibited.

This argument against presidential self-pardons is not without merit. However, the evidence used to support it is not as applicable to the issue at hand as it may first appear. Additionally, attempting to tease out amorphous notions of constitutional themes in an effort to alter the plain meaning of the text from the Pardon Clause is a highly tenuous form of reasoning.[44] Simply put, themes against self-dealing and being one's own judge are not violated by permitting presidential self-pardons.

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48 (1920); Tumey v. Ohio, 273 U.S. 510, 522 (1927). It is, however, extremely questionable whether that doctrine is pertinent where the deciding official himself would be directly and exclusively affected by his official act.

Id. at 370.

39. *See* Nicolo A. Lozano, *Can President Trump Become His Own Judge and Jury? A Legal Analysis of President Trump's Amenability to Criminal Indictment and Ability to Self-Pardon*, 43 NOVA L. REV. 151, 159 (2019).

40. *See id.*

41. *See* Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 793–96 (1996).

42. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

43. *See* Kalt, *supra* note 41, at 795.

44. For a discussion on the plain meaning of the Constitution's Pardon Clause, see *infra* Section V.C.

Setting aside the issue of a presidential self-pardon and considering only the pardoning of others, presidents are not barred from using the pardon power in a manner that promotes self-dealing. Presidents are allowed to pardon alleged partners in a criminal act even if the end result is to derail a criminal prosecution against the President.[45] Moreover, there is no prohibition against a President issuing his spouse a pardon for the sole purpose of benefiting his private life. It would be an odd position to maintain that a self-pardon should not be allowed based on a theory of self-dealing while concurrently allowing other clearly self-serving pardons.[46]

Arguments against presidential self-pardons on the grounds that they violate themes of self-dealing and self-judging are further weakened when one considers that the President is the nation's chief prosecutor. Therefore, the President has prosecutorial discretion to make decisions regarding cases.[47] This includes cases against himself, which could be interpreted as a form of self-dealing.[48] Because such self-dealing actions do not violate the Constitution, it is therefore not a strong argument to use vague notions of constitutional themes against self-dealing to obstruct a presidential self-pardon. To further rebut this argument, presidential self-pardons are not de facto an act of self-dealing. For example, a President may choose to issue himself a pardon—despite any negative political consequences he may incur—in order to protect others from being implicated, to preserve the department's limited financial resources, to stop information from going public that would harm U.S. interests, or to help the country move forward.[49]

The case most frequently used to make the argument that one cannot be a judge in his own case is *Calder v. Bull*.[50] But upon close examination, the case has nothing to do with presidential self-pardons or even the pardon power in general. *Calder v. Bull*, which was decided in 1798,

45. Many believe this was the effect of George H. W. Bush's pardons involving the Iran-Contra prosecutions at the end of his presidency. *See* Lozano, *supra* note 39, at 160.

46. Another example of use of the pardon power that is widely considered acceptable and would be a functional equivalent of a self-pardon is for a President to resign under the understanding that his Vice President will issue a pardon to the former President. Additionally, it was suggested in the Nixon memo previously discussed that a President could reach a similar result without having to wait until the end of his term by taking advantage of the Twenty-Fifth Amendment. "If the President declared that he was temporarily unable to perform the duties of his office, the Vice President would become Acting President and as such he could pardon the President. Thereafter the President could resign or resume the duties of his office." *See* Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 371 (1974).

47. *See* Kalt, *supra* note 41, at 798.

48. *See id.*

49. *See* Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 218 (1999).

50. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

involved the issue of whether a state legislature's extension of the statute of limitations in probate court violated protections against ex post facto laws.[51] There are only twelve words in the opinion that address the issue of self-judging, and they are largely irrelevant to the ultimate holding of the case.[52] This brief reference to self-judging is just one point in a list of examples of things state legislatures—not the President—are not entrusted do to. This case, which, in dicta, points out that state legislatures do not have the power to pass "a law that makes a man a judge in his own cause" is inapplicable to the question of whether a President may pardon himself. The use of this case as the primary precedent against presidential self-pardons is illustrative of the lack of evidence in support of such a position.

Even if such a vague notion against self-judging could somehow supersede the plain reading of the pardon power in the Constitution,[53] a presidential self-pardon would not even be an act of self-judging.[54] This is because a presidential pardon is an executive action, not a judicial one.[55] Therefore, the standard judicial rules do not apply when the President exercises his pardon power.[56] For example, unlike a judge's decision, the entity responsible for prosecuting a pardoned citizen has no judicial rights to appeal the decision, as no judicial determination was made.[57] A presidential pardon does not function to alter a judicial finding of guilt; rather, it circumvents the judicial process and its determinations entirely.[58] The purpose of a presidential pardon does not involve a determination of guilt or innocence; it is an act of clemency at a time when culpability has been presumed. In this way, a presidential pardon is not an adjudication of not guilty as a trial from the judicial branch may conclude. This difference is illustrated by considering how a judge would have to recuse himself if he were assigned a case involving his children, while a President would be free to issue pardons to his children.

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51. *See id.*

52. *See id.* at 388.

53. For a discussion on the plain meaning of the Constitution's Pardon clause, see *infra* Section V.C.

54. This incorrect belief that a President issuing a pardon is acting in a judicial capacity appears to stem from the inappropriately broad definition of "judging" as anytime someone renders a decision. In other words, since a President must decide to issue a pardon, that is a judgment and therefore the President is acting as a judge. Lawrence Tribe encapsulates this view by stating, "The pardon provision of the Constitution is there to enable the president to act essentially in the role of a judge of another person's criminal case . . . . In all such instances, however, the president is acting as a kind of super-judge . . . ." *See* Laurence Tribe et al., *No, Trump Can't Pardon Himself. The Constitution Tells Us So.*, WASH. POST, https://perma.cc/NB6U-F4ET (July 21, 2017).

55. *See* Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. U. L. REV. 905, 928 (2019).

56. *See id.* at 928–29.

57. *See id.*

58. *See id.*

One final argument against using vague notions of self-dealing to bar presidential self-pardons is to consider the absurd results of consistently applying such a standard to other presidential acts. Given that presidents are motivated to be re-elected and protect their reputations, most of their actions could be accurately described as providing some self-benefit. It would be highly impractical for the Supreme Court to undertake the task of analyzing presidential actions and barring ones that provided a benefit to the President.[59] Not only would such a standard render the President largely powerless to perform his duties; it would also take up an inordinate amount of the Supreme Court's valuable time, severely limiting its capacity for other cases that it needs to adjudicate. Furthermore, the highly subjective responsibility of adjudicating the relative self-serving nature of nuanced presidential decisions would almost certainly result in discriminatory enforcement.[60]

C. The President Is Not Above the Law

There is an argument against presidential self-pardons that simply states they are a violation of the notion that nobody is above the law, including the President. This is an even weaker argument than the previous, self-dealing argument. A President who pardons himself is no more above the law than a person who receives a traditional presidential pardon—or someone who receives a gubernatorial pardon. Nor do other commonplace aspects of our legal system, such as prosecutorial discretion to not bring charges, the exclusionary rule, or jury nullification place the people who benefit from them above the law. Just because some

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

60. While the judicial branch is designed to be more insulated from public opinion than the legislative and executive branches, it is not immune to the effects of public opinion. For example, Benjamin Cardozo explained that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (Yale Univ. Press 1921).
Experts have also provided commentary on how Supreme Court Justices sometimes consider popular support for their decisions. "With little formal institutional capability to enforce the Court's decisions and to compel the elected branches or the public to respect its judgments, justices must often act strategically in their opinion writing, adjusting to shots in the public mood in order to ensure the efficacy of their decisions." Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 75 (2011).

mechanism results in the forbearance of a punishment does not mean that it is somehow unconstitutional by way of placing people above the law.

The primary case used to support this argument against presidential self-pardons is *Thomas Bonham v. College of Physicians*.[61] The fact that this case is over 400 years old and not from the United States is illustrative of the dearth of support for this argument in case law. In *Bonham*, the court considered whether the College of Physicians could fine and imprison Dr. Bonham for the unauthorized practice of medicine.[62] The court struck down Dr. Bonham's punishment, ruling that the College of Physicians cannot act as both judge and litigant in the same case.[63] This ruling has no relevance to the issue it is used to argue against—the constitutionality of a presidential self-pardon. The College of Physicians, who was forbidden to be judge and litigant in the same case, was not the nation's chief prosecutor nor did they have an enumerated constitutional right to self-judge.

Further consideration of the *Bonham* case reveals additional problems with its use to argue against presidential self-pardons. For example, Bonham's own lawyer never argued against the dual judge-and-litigant role of the College of Physicians.[64] The case was the product of a three-to-two decision, with the swing vote evidently rendering his decision "on the basis of disliking Bonham's imprisonment rather than other points of law,"[65] which was "clearly in the[] favor"[66] of the college. The case has subsequently received widespread criticism. Sir Francis Bacon and King James both immediately questioned the court's rationale in the case.[67] And the decision has been referred to as "[a] foolish doctrine which ought to have been laughed at."[68]

Some anti-self-pardon advocates have attempted to bolster the significance of *Bonham* to support their position. For example, Lawrence Tribe claims that the *Bonham* case is "[t]he foundational case in the Anglo-American legal tradition."[69] This is a highly peculiar claim given the widespread criticism it received. More importantly, it has no significant precedential effect. The holding in *Bonham* was "explicitly found to provide no precedents for other common law cases brought by the College

61. Thomas Bonham v. College of Physicians (1610) 77 Eng. Rep. 638; *see also* Tribe et al., *supra* note 54.

62. *See* Harold J. Cook, *Against Common Right and Reason: The College of Physicians Versus Dr. Thomas Bonham*, 29 AM. J. LEGAL HIST. 301, 316 (1985).

63. *See id.* at 302.

64. *See id.* at 311–12, 318.

65. *Id.* at 313.

66. *Id.* at 309.

67. *See id.* at 320.

68. R. A. Edwards, *Bonham's Case: The Ghost in the Constitutional Machine*, 1 DENNING L.J. 63, 66 (1996).

69. Tribe et al., *supra* note 54.

of Physicians . . . ."[70] "Within a short time of Bonham's case, the College of Physicians regained its juridical [sic] confidence and acted as if [the *Bonham* case never happened]."[71] Therefore, "Bonham's case came to be regarded at best as a legal relic . . . ."[72]

D. Violation of the Public Trust

Some have attempted to claim that a presidential self-pardon is forbidden on the ground that it would violate the public trust.[73] This argument is somewhat tangentially related to the text in the Constitution that requires the president to "take Care that the Laws be faithfully executed . . . ."[74] As the argument alleges, this trust with the American people would be violated if a President attempted to pardon himself and thus would be unconstitutional and impermissible.[75]

This is a particularly weak argument against presidential self-pardons. Any attempt to consistently apply this principle would quickly become untenable. This untenability is because, based on the logic employed in the argument, every pardon—whether a self-pardon or more traditional pardoning of another—could in some way be interpreted as a violation of the public trust and therefore unconstitutional and impermissible. President Obama's pardoning of non-violent drug offenders,[76] President Carter's pardoning of Vietnam War draft dodgers,[77] President Ford's pardon of Nixon,[78] and a potential President Trump pardon of himself would all serve to stop the consequences of a law from being executed.[79] An even clearer rebuttal against this anti-self-pardon argument is that since the plain meaning of the President's pardon power

70. Cook, *supra* note 62, at 321.

71. *Id.* at 322.

72. Edwards, *supra* note 68, at 68.

73. *See, e.g.*, Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018), https://perma.cc/F3MH-DXWF.

74. U.S. CONST. art. II, § 3.

75. *See, e.g.*, Shugerman & Leib, *supra* note 73.

76. Kevin Liptak, *Obama Cuts Sentences of Hundreds of Drug Offenders*, CNN (Jan. 17, 2017, 5:18 PM), https://perma.cc/FMC3-3DSQ.

77. *President Carter Pardons Draft Dodgers*, HISTORY, https://perma.cc/69PJ-ZQZ6 (last visited May 6, 2024).

78. *The Nixon Pardon in Constitutional Retrospect*, NAT'L CONST. CTR. (Sept. 8, 2023), https://perma.cc/6WS8-ES4H.

79. The problem with applying this logic consistently is further demonstrated by two of its proponents, Jed Shugerman and Ethan J. Leib. They state that "pardoning your closest associates for self-interested reasons should not pass legal muster, because it violates the fiduciary law of public office." Shugerman & Leib, *supra* note 73. This would create a new restriction to presidential pardons that is not in the text of the Constitution and not currently supported by legal precedent.

in the Constitution is clear,[80] a President who issues one is therefore not acting beyond his duty to faithfully execute the law.

E. Definition of Pardon Precludes Self-Pardons

Some have attempted to argue that it is inherent in the very definition of a pardon that a presidential self-pardon would not be permissible.[81] The argument is presented by explaining that the Pardon Clause in the Constitution gives the President the power to "grant" pardons.[82] But one cannot be said to "grant" something to oneself.[83] Additionally, a pardon is an act of forgiveness toward someone else; but one cannot forgive oneself.[84] As John Marshall explained in the 1833 case of *United States v. Wilson*, "[a] pardon is an act of grace, proceeding from the power entrusted with the execution of the laws . . . ."[85] It is impossible for one to bestow grace upon oneself, and therefore it would be incoherent to the very definition of a pardon to allow a President to pardon himself.

This anti-self-pardon argument is not without merit. And if there were equally strong arguments for and against the ability of a President to self-pardon, perhaps this abstract, categorical argument could be used as an effective tiebreaker. But this tie scenario is not where the debate leads to, and, therefore, this creative argument does little to answer the ultimate question up for debate. It is certainly not proper justification to deny the President a power arising from the plain reading of the text of the Constitution.[86]

Additionally, this categorical argument is not even as strong as it first appears. The Supreme Court held in *Biddle v. Perovich* that citizens are unable to reject a presidential commutation—which stems from the presidential pardon power.[87] This is because if someone were to "grant" you something that you did not want, you would be free to reject it.[88]

80. For a discussion on the plain meaning of the Constitution's Pardon Clause, see *infra* Section V.C.

81. *See* Kalt, *supra* note 41, at 804–805.

82. *Id.*

83. *Id.*

84. *See id.*

85. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833). However, this notion was directly contradicted by Oliver Wendell Holmes in *Biddle v. Perovich* when he stated, "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme." Biddle v. Perovich, 274 U.S. 480, 486 (1927).

86. For a discussion on the plain meaning of the Constitution's Pardon Clause, see *infra* Section V.C.

87. *See Biddle*, 274 U.S. at 486 (holding that a President may commute a sentence of death to life imprisonment regardless of the inmate's consent).

88. However, note the distinction between a commutation and a full pardon. *See, e.g.*, *Wilson*, 32 U.S. (7 Pet.) at 150 (holding that a pardon must be accepted for it to become

Therefore, the consistent application of the logic behind this anti-self-pardon argument would necessarily lead to the overturning of well-established precedent regarding the President's pardon power.

F. Arguments from the Constitutional Convention

Some have attempted to argue that discussions regarding the President's general pardon power at the Constitutional Convention demonstrate that the Framers intended that the President, in contrast to the King of England, not be above the law.[89] However, a proper understanding of these discussions at the Constitutional Convention work to support the presidential self-pardon, not undermine it.

Proposals were made at the Constitutional Convention to limit the President's pardon power, and they were defeated by substantial margins. The Framers preferred the use of political consequences to address potential presidential abuses of the pardon power. The context of the Constitutional Convention and the displeasure with the King of England further demonstrate how the discussions and end result of the Convention support wide latitude regarding presidential pardons. The problem of having a leader with too much power and the abuses that can follow would certainly have been on the minds of the Framers while drafting Article II of the Constitution. It is therefore unlikely that the potential for a President to issue himself a pardon would have escaped the minds of all fifty-five delegates at the Convention given their heightened skepticism toward executive power formed from their experience under an authoritarian king.[90]

G. Political Consequences Are Inadequate to Protect Against Self-Pardon Abuses

Some anti-self-pardon advocates attempt to argue that presidential self-pardons should not be allowed because the political consequences cited as a deterrent are inadequate.[91] These consequences would include impeachment, loss of reelection, and damaged reputation. People making this argument accurately point out that a presidential self-pardon is most likely to be issued by a President at the end of his time in office. For example, George H. W. Bush allegedly considered a self-pardon after losing reelection in 1992.[92] Bill Clinton allegedly considered issuing a

official); *see also* Burdick v. United States, 236 U.S. 79, 90 (1915) (holding that a pardon can be rejected by the intended beneficiary).

89. *See, e.g.*, Kalt, *supra* note 41, at 784–87.

90. *But see* Kalt, *supra* note 41, at 782–83 (arguing that the Framers might not have considered the possibility of a self-pardon).

91. *See, e.g.*, *id.* at 799.

92. *See* Nida & Spiro, *supra* note 49, at 214–15; Kalt, *supra* note 41, at 799.

self-pardon toward the end of his second, and therefore final, term in office.[93] And President Nixon looked into the option of a self-pardon right before resigning.[94] The President Nixon example is of particular importance to this argument because at that point he was in his second term and therefore unable to run for reelection. Additionally, he had such little political capital due to the Watergate scandal that any further diminution incurred from issuing a self-pardon would have been minimal. Thus, President Nixon illustrates how potential scenarios could render the incentives against a presidential self-pardon largely moot. As one anti-self-pardon advocate summarizes, "the only President who would pardon himself is one with nothing to lose; the political check is thus rendered irrelevant."[95]

This argument is of little value, as it completely ignores the plain reading of the Constitution's pardon power[96] and instead focuses merely on an "ends justify the means" logic whereby the President should be denied a constitutional power because, in rare circumstances, the President may lack the incentive to exercise said power in a way that some would personally prefer. This argument also confuses the pro-self-pardon position and therefore serves as a straw man fallacy. While pro-self-pardon advocates do point out that there are political consequences that naturally protect against the abuse of the President's pardon power, they do not claim that these political consequences will be adequate in every imaginable scenario to deter a President from issuing a self-pardon. The circular nature of such an argument would render the debate largely unintelligible, as there would be little point arguing in favor of the President's power to self-pardon while concurrently arguing that no President would ever use it.

If the logic of this anti-self-pardon argument were consistently applied, much of constitutional law would be overhauled. For example, the very same logic could be used to argue against the President's pardon power altogether. After all, the political consequences of issuing unethical, self-serving pardons to other people are not in every instance sufficient to deter such an occurrence. At its core, this argument merely claims that a presidential self-pardon should be rendered unconstitutional by way of personal disapproval of potential outcomes. At best, such personal disapproval only supports the claim that the Constitution should be amended.

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93. *See Can President Clinton Pardon Himself?*, SLATE (Dec. 30, 1998, 6:46 PM), https://perma.cc/7ACD-F8HQ.

94. *See* Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370–72 (1974).

95. Kalt, *supra* note 41, at 799.

96. For a discussion on the plain meaning of the Constitution's Pardon Clause, see *infra* Section V.C.

H. Analogy to the King of Britain's Inability to Self-Pardon

Some anti-self-pardon advocates, such as Lawrence Tribe, have attempted to argue against presidential self-pardons by drawing a comparison between the President of the United States and the King of England.[97] There is evidence to suggest that, at the time of the Constitutional Convention, the President's pardon power was intended to be similar to that of the King of England. For example, in Federalist number 69 Alexander Hamilton wrote that the power to pardon is to "resemble equally that of the king of Great Britain and of the governor of New York."[98] Therefore, as this argument goes, since the King could not pardon himself, the President cannot either.[99]

This line of reasoning likely stems from a misunderstanding regarding the King of England. This is because the King of England had explicit, absolute immunity against all criminal prosecution.[100] "The law suppose[d] it impossible that the king himself [could] act unlawfully or improperly."[101] To such a person, the ability to self-pardon is rendered completely unnecessary. With this understanding, the analogy to the King of England works to undermine the anti-self-pardon position, not advance it. This is because the ability to issue a presidential self-pardon, with all of the accompanying political consequences that would likely follow, is a far less tyrannical power and places the President far less "above the law" than possessing absolute immunity against all criminal prosecution as the King of England enjoyed. A President only has the power to self-pardon for a limited time, would pay a high political and reputational cost in most circumstances for doing so, could still be liable for crimes in state courts, and would remain liable in civil court.[102]

I. Congressional Pay Raise Analogy

Anti-self-pardon advocates such as Lawrence Tribe have attempted to use rules regarding congressional pay raises to argue for their

97. *See, e.g.*, Tribe et al., *supra* note 54.

98. THE FEDERALIST NO. 69, at 349 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009).

99. *See, e.g.*, Tribe et al., *supra* note 54.

100. *See* Chisolm v. Georgia, 2 U.S. 419, 458 (1793) (quoting Sir William Blackstone) ("No suit or action can be brought against the King, even in civil matters; because no court can have jurisdiction over him: for all jurisdiction implies superiority of power.").

101. JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 5 (1820).

102. "A pardon only absolves penal sanctions and cannot be used to absolve a person from civil sanction or liability directly." *Presidential Pardons: Frequently Asked Questions*, CRS REPORTS & ANALYSIS (Aug. 28, 2017), https://perma.cc/U6HN-KV8C.

position.[103] The argument is tenuous but is generally presented by drawing an analogy to the principle against self-dealing. As Lawrence Tribe explains, "[t]he Constitution embodies this broad precept against self-dealing in its rule that congressional pay increases cannot take effect during the Congress that enacted them . . . ."[104]

This is a highly peculiar argument against presidential self-pardons, as it works to support the practice, rather than argue against it. It is currently the case that a congressional pay increase cannot take effect during the Congress that enacted it. However, this was not the case until 1992, and it required a constitutional amendment to implement.[105] Therefore, for the vast majority of U.S. history, Congress could engage in behavior that anti-self-pardon advocates refer to as "self-dealing."[106] And this practice was not barred in 1992 due to a judicial determination that it was somehow unconstitutional by way of violating vague notions of "self-dealing." Therefore, this analogy supports the claim that presidential self-pardons would likewise require a constitutional amendment to ban.

V. ARGUMENTS FOR PRESIDENTIAL SELF-PARDONS

As previously demonstrated in this Article, many of the arguments that have been presented against presidential self-pardons, properly understood, function to support the permissibility of the practice. [107] Additionally, there are positive arguments in favor of the practice that are covered in this Part. These arguments include analogizing to gubernatorial pardon powers, Supreme Court precedent, the plain reading of the constitutional text, the existence of other explicit pardon power limitations, the debate from the Constitutional Convention, the counterintuitive nature of such an exclusion, and the unlikelihood of frequent abuse.

A. Gubernatorial Pardon Powers

The Framers of the Constitution undoubtedly would have been aware of the pardon power that was possessed by the colonial governors at the time. Alexander Hamilton in *Federalist No. 69* explained that the power to pardon "resemble[s] equally the . . . governor of New York."[108] The colonies implemented various restrictions on the pardon power for their respective governors, but no colony restricted a governor's power to self-

103. *See, e.g.*, Tribe et al., *supra* note 54.
104. *Id.*
105. *See* U.S. CONST. amend. XXVII.
106. Tribe et al., *supra* note 54.
107. Many of the arguments from this Part were originally chronicled in this author's previous work published with express permission. *See generally* Conklin, *supra* note 31.
108. Hamilton, *supra* note 98, at 349.

pardon.[109] Furthermore, there exists legal precedent in the United States for governors pardoning themselves.[110] Therefore, if the Framers wanted to create an exception to this standard whereby the President's pardon power did not include the ability to self-pardon, they would have done so explicitly.

B. Supreme Court Precedent

As mentioned by Justices Alito and Gorsuch in oral arguments in the *Trump v. United States* case, the Supreme Court has never addressed the issue of presidential self-pardons. And few Supreme Court opinions have even addressed the issue of presidential pardons in general. But the few cases that have addressed the President's pardon power strongly imply support for the ability to self-pardon. In *Ex parte Garland*, the Supreme Court maintained that the pardon power " . . . is unlimited except in cases of impeachment. It extends to every offence known to the law . . . ."[111] The Court further explained that Congress "can neither limit the effect of [the President's] pardon, nor exclude from its exercise any class of offenders."[112] In *Schick v. Reed*, the Supreme Court held that limits on the pardon power, "if any, must be found in the Constitution itself."[113] In *United States v. Wilson*, the majority opinion explained that the Supreme Court cannot review the "character" of a presidential pardon.[114] Finally, in *Ex parte Grossman*, the Supreme Court held that the proper remedy for presidential abuses of the pardon power is impeachment, not restricting the pardon power.[115]

These holdings all combine to create a strong precedential argument for presidential self-pardons. Not allowing the President to pardon himself would clearly be a "limit" to the pardon power. Therefore, Supreme Court precedent explicitly stating that the pardon power is "unlimited except in cases of impeachment" would naturally imply that presidential self-pardons are permissible.[116] Furthermore, the Supreme Court explicitly maintained that any limits to the pardon power "must be found in the Constitution itself."[117] Therefore, the previous attempts addressed in this

109. *See* Nida & Spiro, *supra* note 49, at 217.

110. *See, e.g.*, Max Kutner, *No President Has Pardoned Himself, but Governors and a Drunk Mayor Have*, NEWSWEEK (July 24, 2017, 2:22 PM), https://perma.cc/9GCR-M5AX; *see also* Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are there Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 97 n.157 (2019).

111. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 334 (1866).

112. *Id.* at 380.

113. Schick v. Reed, 419 U.S. 256, 267 (1974).

114. United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

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

116. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 334 (1866).

117. Schick v. Reed, 419 U.S. 256, 267 (1974).

Article to deny the President the power to pardon himself based on inadequacy of political consequences, analogies to congressional pay raises, and vague notions of being above the law are insufficient according to Supreme Court precedent. Even the foundational case of *Marbury v. Madison* offers support for presidential self-pardons. Chief Justice John Marshall wrote regarding the presidential powers:

> [T]he President is invested with certain important political powers . . . [for] which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion . . . . [T]he decision of the executive is conclusive.[118]

C. Plain Reading of the Constitutional Text

One of the well-established principles of statutory interpretation and constitutional interpretation is that if the language is clear, then the plain meaning of the text should be followed. When interpreting statutes, judges "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[119] Summarized more succinctly by then Chief Justice Burger, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete . . . ."[120] The text of the Constitution regarding a President's ability to self-pardon is so clear that even some anti-self-pardon advocates admit that the plain reading of the pardon clause is a strong argument in favor of self-pardons.[121] Therefore, no further debate or investigation is required, and if the people want to alter this plain meaning, a constitutional amendment is required.

D. The Existence of Explicit Pardon Power Limitations

The Constitution contains explicit limitations to the pardon power. For example, it may only be exercised to pardon an "Offence[] against the United States"[122] and it cannot be exercised in "Cases of Impeachment."[123] This implies that if any additional limitations were intended, they would

118. Marbury v. Madison, 5 U.S. 137, 165–66 (1803).

119. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

120. Rubin v. United States, 499 U.S. 424, 430 (1981).

121. *See, e.g.*, Kalt, *supra* note 41, at 790.

122. U.S. CONST. art. II, § 2, cl. 1 (ruling out pardons for state crimes and civil liability).

123. *Id.*

likewise have to be expressly stated. The simple act of adding three words to the end of the Pardon Clause would have ended all ambiguity. For example, creating the ending to the clause, "except in cases of impeachment *and against oneself*" would have been sufficient.[124] As previously demonstrated in this Article, the Framers were likely well aware of the issue of presidential self-pardons given the ability of colonial governors to do so and their heightened skepticism toward executive power. Finally, the Pardon Clause's impeachment exception illustrates how the clause extends to presidential misconduct and suggests that the ultimate remedy for punishing the President is impeachment by the House and conviction in the Senate, not criminal prosecution.[125]

E. Debate from the Constitutional Convention

There were proposals to limit the President's pardon power during the Constitutional Convention.[126] Roger Sherman offered a proposal to require consent from the Senate for all presidential pardons.[127] This proposal to limit the presidential pardon power was voted down by a significant margin.[128] Another unsuccessful effort to limit the President's pardon power at the Constitutional Convention was Edmund Randolph's proposal to bar presidential pardons when applied to acts of treason.[129] Randolph argued that allowing the president to pardon treason was "too great a trust. The President may himself be guilty. The Traytors [sic] may be his own instruments."[130] After a debate in which opponents argued that political consequences were the preferred way to deal with such a scenario,[131] Randolph's motion to limit the pardon power suffered another defeat by a significant margin.[132] Therefore, the issue of potential presidential abuses regarding the pardon power was thoroughly debated, and the conscious decision was made to err on the side of giving more power to a President to issue pardons. And again, the Framers were likely well aware of the issue of presidential self-pardons given the ability of colonial governors to do so and their heightened skepticism of executive power. Therefore, if their intent was to limit the ability of a President to pardon himself, they would have discussed it.

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124. Nida & Spiro, *supra* note 49, at 216.

125. *See* Michael W. McConnell, *Trump's Not Wrong About Pardoning Himself*, WASH. POST (June 8, 2018), https://perma.cc/FL9A-TJC7.

126. *See* Kalt, *supra* note 41, at 786.

127. *See id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. *See id*. ("If [the President] be himself a party to the guilt he can be impeached and prosecuted.")

132. *See id.*

F. Counterintuitive Nature of Such an Exclusion

Barring a President from pardoning himself would produce the peculiar effect of presidents, upon taking their oath of office, becoming the only American not allowed to receive a presidential pardon. Consider President Carter's pardon of Vietnam War draft dodgers.[133] If Jimmy Carter himself had been a Vietnam War draft dodger, it would make little sense that his pardon would include everyone in that group *except* himself.

This counterintuitive exclusion of the President from receiving a pardon is further illustrated by the following attempt to argue against the presidential self-pardon: "If [the President] is truly deserving of a pardon, he can appeal to the rightful authorities—the prosecutor, the judge, the juries, and his successor as President—*just like every other citizen* must do."[134] But if presidents are not allowed to self-pardon, then they cannot "appeal to the rightful authorities . . . just like every other citizen . . . ."[135] Every other citizen can receive a presidential pardon and, according to these advocates, the President cannot. Giving the President less power than every other American regarding an ability to avoid criminal prosecution is inconsistent with established principles that recognize the President should, in many respects, receive more protection from criminal prosecution.[136] Just how far this principle should extend—not whether it exists—is at the heart of the case in *Trump v. United States*.

G. Unlikelihood of Frequent Abuse

Presidents have considered issuing themselves a self-pardon[137] and President Trump has even explicitly stated that he has the power to do so.[138] In light of this, the fact that no President has attempted to do so illustrates how this is not a significant danger. It is true that in certain narrow situations a President could largely avoid political and reputational harm for issuing a self-pardon. But there is an extremely unlikely confluence of events necessary to reach such a scenario. And even in such an unlikely scenario, a President's personal ethics and possibly also religious conviction could act as a sufficient deterrent. The rarity of governors issuing themselves self-pardons is further evidence that use of such a power will not become commonplace. Finally, the U.S. legal system tolerates, and sometimes even celebrates, other constitutional protections that routinely result in far more guilty people going unpunished. Examples

133. *See* Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 24, 1977).

134. *See* Kalt, *supra* note 41, at 808 (emphasis added).

135. *Id.*

136. *See, e.g.*, A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222 (2000).

137. *See supra* notes 92–94 and accompanying text.

138. *See supra* notes 2–3 and accompanying text.

include the exclusionary rule, the right against self-incrimination, and unanimous jury verdict requirements.

VI. CONCLUSION

The oral arguments in *Trump v. United States* demonstrate both the uncertainty and significance of determining whether a President can pardon himself. As demonstrated in this Article, an honest assessment of the arguments for both sides emphatically leads to the conclusion that a presidential self-pardon is constitutionally permitted. However, this analysis leaves open the related questions of whether a President should do so and whether action should be taken to amend the Constitution to take away this power. Simply adding "and against oneself" to the end of the Pardon Clause would emphatically end the debate and any attempts at a self-pardon.[139]

Despite the strong conclusion of the constitutionality of a presidential self-pardon documented in this Article, such an amendment to the Pardon Clause is desperately needed. This is because, due to the intrinsically political nature of the question, there is widespread disagreement in legal academia. A 2019 survey of law school faculty found that a majority expressed an opinion that a President could not issue himself a pardon.[140] In 2020 an examination of law journal articles found that out of the two that primarily focused on the issue, one was in favor of allowing the practice, while the other was not.[141] Of the sixteen other law journals that contained an opinion on the matter, eight were in favor of allowing the practice and eight were against.[142] Hopefully, the valuable framework provided in this Article will serve as a powerful catalyst for igniting bipartisan agreement on the need to address this issue and avoid what has the potential to be the greatest constitutional crisis of the twenty-first century.

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139. This could also be a convenient time to add additional restrictions to the President's pardon power such as that proposed by Nida and Spiro to add "except for the President's Spouse, Children, Siblings, Parents, or Self." Nida & Spiro, *supra* note 49, at 221.

140. *See* Michael Conklin, *Can a President Pardon Himself? Law School Faculty Consensus*, NE. U. L. REV. EXTRA LEGAL, Dec. 2019, at 1, 12. The survey options were absolutely not, probably not, I'm not sure, probably yes, and absolutely yes. *See id.* at 10. Responses were tabulated with a one-to-five Likert scale and the average was 1.99. *See id.* However, to demonstrate the intrinsically political nature of the question, law school faculty who identified as conservative averaged 2.92, while those who identified as liberal averaged 1.71. *See id.* Also note that this survey was conducted during the Trump presidency. Amiability toward a presidential self-pardon power may have been greater under, say, the Obama presidency.

141. *See* Conklin, *supra* note 31, at 293.

142. *See id.*