Presidential Pardons: Overview and Selected Legal Issues

Michael A. Foster
Legislative Attorney

January 14, 2020

Congressional Research Service
7-....
www.crs.gov
R46179

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

SUMMARY

R46179

January 14, 2020

Michael A. Foster
Legislative Attorney
-re-acte--@crs.loc.gov

For a copy of the full report, please call 7-.... or visit www.crs.gov.

Presidential Pardons: Overview and Selected Legal Issues

Article II, Section 2 of the U.S. Constitution authorizes the President "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." The power has its roots in the king's prerogative to grant mercy under early English law, which later traveled across the Atlantic Ocean to the American colonies. The Supreme Court has recognized that the authority vested by the Constitution in the President is quite broad, describing it as "plenary," discretionary, and largely not subject to legislative modification. Nonetheless, there are two textual limitations on the pardon power's exercise: first, the President may grant pardons only for federal criminal offenses, and second, impeachment convictions are not pardonable. The Court has also recognized some other narrow restraints, including that a pardon cannot be issued to cover crimes prior to commission.

The pardon power authorizes the President to grant several forms of relief from criminal punishment. The most common forms of relief are *full pardons* (for individuals) and *amnesties* (for groups of people), which completely obviate the punishment for a committed or charged federal criminal offense, and *commutations*, which reduce the penalties associated with convictions. An administrative process has been established through the Department of Justice's Office of the Pardon Attorney for submitting and evaluating requests for these and other forms of clemency, though the process and regulations governing it are merely advisory and do not affect the President's ultimate authority to grant relief.

Legal questions concerning the President's pardon power that have arisen have included (1) the legal effect of clemency; (2) whether a President may grant a self-pardon; and (3) what role Congress may play in overseeing the exercise of the pardon power. With respect to the first question, some 19th century Supreme Court cases suggest that a full pardon broadly erases both the punishment for an offense and the guilt of the offender. However, more recent precedent recognizes a distinction between the *punishment for a conviction*, which the pardon obviates, and *the fact of the commission of the crime*, which may be considered in later proceedings or preclude the pardon recipient from engaging in certain activities. Thus, although a full pardon restores civil rights such as the right to vote that may have been revoked as part of the original punishment, pardon recipients may, for example, still be subject to censure under professional rules of conduct or precluded from practicing their chosen profession as a result of the pardoned conduct.

As for whether a President may grant a self-pardon, no past President has ever issued such a pardon. As a consequence, no federal court has addressed the matter. That said, several Presidents have considered the proposition of a self-pardon, and scholars have reached differing conclusions on whether such an action would be permissible based on the text, structure, and history of the Constitution. Ultimately, given the limited authority available, the constitutionality of a self-pardon is unclear.

Finally, regarding Congress's role in overseeing the pardon process, the Supreme Court has indicated that the President's exercise of the pardon power is largely beyond the legislature's control. Nevertheless, Congress does have constitutional tools at its disposal to address the context in which the President's pardon power is exercised, including through oversight, constitutional amendment, or impeachment.

Contents

Contacts

Article II, Section 2 of the U.S. Constitution authorizes the President "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[1] This executive power of clemency[2] encompasses several distinct forms of relief from criminal punishment,[3] of which a full presidential "pardon" is only one. The power has its roots in the king's prerogative to grant mercy under early English law, which later traveled across the Atlantic Ocean to the American colonies.[4] The Supreme Court has recognized that the authority vested by the Constitution in the President is quite broad, extending to "every offence known to the law" and available "at any time after [a crime's] commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment."[5] That said, there are some limits to the power conferred by the pardon provision of Article II: for instance, the President may grant pardons only for federal criminal offenses, and impeachment convictions are not pardonable.[6] An administrative process has been established through the Department of Justice's (DOJ's) Office of the Pardon Attorney for submission and evaluation of requests for pardons and other forms of clemency,[7] though this process and the regulations governing are purely advisory in nature and do not affect the President's ultimate authority to grant relief.[8]

This report provides an overview of the President's pardon power. After briefly discussing the historical background to the power conferred by Article II, Section 2 of the Constitution, the report explores the different forms of clemency that are available, the relatively few limits on the pardon power, and the process of seeking and receiving clemency. The report concludes by addressing selected legal issues related to the pardon power: (1) the legal effect of pardons and other forms of clemency; (2) whether the President may grant clemency to himself; and (3) Congress's role in overseeing the use of the pardon power.

Historical Background

The concept of governmental relief from the punishment that would otherwise apply to a criminal act has deep historical roots, with some scholars tracing it as far back as ancient Greece and

[1] U.S. CONST. art. II, § 2, cl. 1.

[2] Executive "clemency" is "a broad term that applies to the President's constitutional power" under the pardon provision "to exercise leniency toward persons who have committed federal crimes." *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE: OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/frequently-asked-questions (last updated Dec. 14, 2019).

[3] *See* Schick v. Reed, 419 U.S. 256, 266 (1974) ("The plain purpose of the broad power conferred by s 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 specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable."); Dennis v. Terris, 927 F.3d 955, 958 ("As an act of executive mercy, . . . the pardon power includes the authority to commute sentences in whole or in part, . . . [and t]he President may place conditions on a pardon or commutation.").

[4] William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476–77 (1977).

[5] *Ex parte* Garland, 71 U.S. 333, 380 (1866).

[6] *See* U.S. CONST. art. II, § 2, cl. 1 (limiting power to "Offences against the United States" and excepting "Cases of Impeachment"); James Pfiffner, *Pardon Power*, HERITAGE GUIDE TO THE CONST. (2017), https://www.heritage.org/constitution/#!/articles/2/essays/89/pardon-power (noting that presidential pardons cannot cover "civil or state cases," nor can they "affect an impeachment process").

[7] *See* 28 C.F.R. §§ 1.1–11.

[8] *See id.* § 1.11 (stating that the regulations governing executive clemency are "advisory only" and do not "restrict the authority granted to the President under Article II, section 2 of the Constitution").

Rome.[9] An English form of pardon power vested in the king, the "prerogative of mercy," first appeared during the reign of King Ine of Wessex (688-725 A.D.).[10] Over time, perceived abuses "such as royal sales of pardons or use of pardons as bribery to join the military"[11] prompted Parliament to impose limitations on the pardon power.[12] The king's power to pardon nevertheless endured through the American colonial period and applied in the colonies themselves through delegation to colonial authorities.[13]

Following the American Revolution, the English legal tradition of a pardon power held by the executive directly influenced the pardon provision included in the U.S. Constitution.[14] At the Constitutional Convention, the two major plans offered—the Virginia and New Jersey plans—did not address pardons.[15] However, in a "sketch" of suggested amendments to the Virginia plan, Alexander Hamilton included a pardon power vested in an "Executive authority of the United States" that extended to "all offences except Treason," with a pardon for treason requiring Senate approval.[16] It appears that the rationale for the treason limitation was, at least in part, that the head of the executive branch should not be able to absolve himself and possible conspirators of a crime threatening "the immediate being of the society."[17] Hamilton's proposal was included in a subsequent draft of the Constitution, though the requirement of Senate approval for a pardon of

[9] *See* Duker, *supra* note 4, at 476 ("[O]ne may encounter numerous references to the exercise of the prerogative of mercy in . . . Greek Law[] and Roman Law[.]"); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 583–85 (1991) (describing clemency systems of both societies).

[10] 1 BENJAMIN THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND 46 (1840) (reflecting law "of fighting" in the Laws of King Ine: "If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life"); Duker, *supra* note 4, at 476.

[11] Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1654 (2008).

[12] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *397–99. One limitation imposed by Parliament was that pardons could not be used to bar an impeachment. *Id.* at *399–400; Fowler, *supra* note 11, at 1654 (explaining that abuses "led Parliament to limit the power by requiring the king to provide Parliament with the name of the convict to be pardoned and nature of the crime and by forbidding pardons in cases of impeachment").

[13] *See, e.g.*, 7 FRANCIS NEWTON THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 3800–01 (1909) (granting, in Second Charter of Virginia from 1609, "full and absolute Power and Authority to correct, punish, pardon, govern, and rule all" subjects); Duker, *supra* note 4, at 497.

[14] *See* Dennis v. Terris, 927 F.3d 955, 957 (6th Cir. 2019) ("The Framers modeled [the pardon] provision on the pardon power of the English Crown."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1496 (1833) (noting that exception for impeachment "was probably borrowed" from England); Kobil, *supra* note 9, at 589 ("By choosing to repose the clemency power in the chief executive alone, the Framers of the Constitution aligned themselves with a vision of the power that was decidedly British in nature.").

[15] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–23 (Max Farrand ed., 1911) (Virginia plan, in Madison's notes); *id.* at 242–45 (New Jersey plan, in Madison's notes).

[16] *Id.* at 292.

[17] THE FEDERALIST NO. 74, at 385–86 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 15, at 626 (Madison's notes) (noting Edmund Randolph's arguments that the pardon power in cases of treason "was too great a trust," that the President "may himself be guilty," and that the "Traytors may be his own instruments"); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 497 (Jonathan Elliot ed., 1836) (quoting George Mason's "weighty objection" that "treason ought, at least, to be excepted" in light of the danger that the President would "frequently pardon crimes which were advised by himself" to "stop inquiry and prevent detection," eventually "establish[ing] a monarchy, and destroy[ing] the republic").

treason was replaced with an exception for impeachment,[18] apparently with the thought that exempting impeachment was sufficient to protect against abuse.[19]

Debate at the Convention over the pardon power was limited, primarily centering on questions of (1) how broad the power should be (i.e., what restrictions or exceptions to the power should exist), and (2) whether the legislature should have a role in the power's exercise. Ultimately, proposals to impose additional limits on pardons beyond an exception for impeachment—such as by calling for Senate approval of pardons[20] or requiring conviction prior to pardon[21]—were rejected, resulting in the expansive power in Article II, Section 2 of the Constitution. Alexander Hamilton made the case for the breadth of this executive-held power in *The Federalist*, arguing that it "should be as little as possible fettered or embarrassed" to ensure "easy access to exceptions in favour of unfortunate guilt."[22] And on this view, "a single man of prudence and good sense," that is, the President, would be "better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever."[23] In accordance with these principles, the text of the Constitution, as ratified, places few limits on the President's ability to grant pardons, as discussed in more detail below.[24]

Scope of the Pardon Power

Forms of Clemency

In light of references in scholarship and the popular press to the President's "pardon power,"[25] a casual observer might think that Article II, Section 2 of the Constitution authorizes only one form of relief from criminal punishment. That is not the case, however: the text of the Constitution speaks of "Reprieves and Pardons,"[26] and the Supreme Court has explained that the "language of the [provision] is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination."[27] As such, the President has "plenary" constitutional authority under the pardon provision "to 'forgive'" an accused or convicted person "in part or entirely, to reduce a penalty in terms of a

[18] 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 15, at 171–72. The exception for impeachment appears to have been modeled on a similar exception under English law. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1227 (D.D.C. 1974) (referencing "the Act of Settlement," a 1701 law that prohibited the use of pardon in cases of impeachment).

[19] *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 15, at 626 (Madison's notes) (arguing that an exception to the pardon power for treason was unnecessary because if the President "be himself a party to the guilt he can be impeached and prosecuted").

[20] *Id.* at 419.

[21] *Id* at 426.

[22] THE FEDERALIST NO. 74, *supra* note 17, at 385 (Alexander Hamilton).

[23] *Id.* at 386.

[24] U.S. CONST. art. II, § 2.

[25] *E.g.*, D.W. Buffa, *The Pardon Power and Original Intent*, BROOKINGS INSTITUTION (July 25, 2018), https://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/; Erik Larson, *What You Need to Know About Presidential Pardon Power*, WASH. POST (Mar. 13, 2019), https://www.washingtonpost.com/business/what-you-need-to-know-about-presidential-pardon-power/2019/03/13/5153de16-45ae-11e9-94ab-d2dda3c0df52_story.html.

[26] U.S. CONST. art. II, § 2, cl. 1.

[27] *Ex parte* Wells, 59 U.S. 307, 314 (1855).

specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable."[28]

At least five forms of clemency fall under this authority:

1. pardon;
2. amnesty;
3. commutation;
4. remission of fines and forfeitures;
5. reprieve.

A full *pardon* is the most expansive form of clemency; it "releases the wrongdoer from punishment and restores the offender's civil rights without qualification."[29] A pardon may be granted at any time prior to charge, prior to conviction, or following conviction,[30] but it appears that it must be accepted to be effective or at least may be refused.[31] For instance, President Woodrow Wilson issued a pardon to George Burdick, an editor at the *New York Tribune*, for any federal offenses he "may have committed" in connection with the publication of an article regarding alleged customs fraud, despite the fact that Burdick had not been charged with any crime at the time of the pardon.[32] The apparent motivation for the pardon was that Burdick had refused to testify before a grand jury investigating the involvement of Treasury Department officials in leaks concerning the wrongdoing, asserting his Fifth Amendment right not to provide testimony that would tend to incriminate him.[33] Despite President Wilson's issuance of the pardon, Burdick "refused to accept" it and continued to refuse to answer certain questions put to him before the grand jury.[34] In *Burdick v. United States*, the Supreme Court assumed that the pardon was within the President's power to issue and concluded that "it was Burdick's right to refuse it" and stand on his Fifth Amendment objection.[35]

Amnesty is essentially identical to a pardon in practical effect, with the principal distinction between the two being that amnesty typically "is extended to whole classes or communities,

[28] Schick v. Reed, 419 U.S. 256, 266 (1974).

[29] *Absolute Pardon*, BLACK'S LAW DICTIONARY (11th ed. 2019); United States v. Arpaio, No. 16-01012, 2017 WL 4839072, at *1 (D. Ariz. Oct. 19, 2017), *appeal docketed*, No. 17-10448 (9th Cir. Oct. 20, 2017) (adopting definition from Black's Law Dictionary). The extent to which a pardon erases the guilt of the offender and impacts the actual judgment of conviction are matters of some dispute that are discussed in more detail *infra*, "Legal Effect of Clemency."

[30] *Ex parte* Garland, 71 U.S. 333, 380 (1866) ("The power . . . may be exercised at any time after [an offense's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.").

[31] *See* Burdick v. United States, 236 U.S. 79, 94 (1915) ("Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it[.]"). As noted *infra*, the Supreme Court subsequently departed from *Burdick* in the context of commutations.

[32] *Id.* at 85–86.

[33] *Id.*

[34] *Id.* at 87.

[35] *Id.* at 94.

instead of individuals[.]"[36] As an example, President Jimmy Carter granted amnesty to many who violated the Selective Service Act by evading the draft during the Vietnam War.[37]

In contrast to pardons and amnesty, which obviate criminal punishments in their entirety, *commutation* merely substitutes the punishment imposed by a federal court for a less severe punishment, such as by reducing a sentence of imprisonment.[38] To take a well-known example, President Richard Nixon conditionally commuted to six and a half years the 13-year sentence of famed labor union leader Jimmy Hoffa, who had been convicted of mail fraud, wire fraud, and obstruction of justice.[39] Along the same lines, the President "may remit [criminal] fines, penalties, and forfeitures of every description arising under the laws of [C]ongress,"[40] and, apparently in contrast to a pardon, a commutation or remission is valid even in the absence of the consent of the offender whose punishment is reduced.[41]

Finally, a *reprieve* merely "produces delay in the execution of a sentence" for a period of time "when the President shall think the merits of the case, or some cause connected with the offender, may require it," such as "where a female after conviction is found to be [pregnant], or where a convict becomes insane, or is alleged to be so."[42] President Bill Clinton, for instance, issued a reprieve delaying by six months the execution date of Juan Raul Garza, who had been convicted

[36] Knote v. United States, 95 U.S. 149, 153 (1877); *see id.* (indicating that "the distinction between" the two terms "is one rather of philological interest than of legal importance"); Reed Cozart, *Clemency Under the Federal System*, 23 FED. PROBATION, Issue No. 3, at 3 (Sept. 1959) (noting that "the terms are sometimes used interchangeably," but amnesty is normally "extended by proclamation to grant clemency to groups of persons who have committed offenses but who have not been convicted"). In a case subsequent to *Knote*, the Supreme Court suggested that there are some other "incidental differences of importance" between pardon and amnesty, including that amnesty "is usually addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment." *Burdick*, 236 U.S. at 95.

[37] *See* Exec. Order No. 11967, 42 Fed. Reg. 4393 (Jan. 21, 1977); Andrew Glass, *President Carter Pardons Draft Dodgers, Jan. 21, 1977*, POLITICO (Jan. 21, 2018), https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493 (describing President Carter's "blanket amnesty" to "hundreds of thousands of men who had evaded the draft during the Vietnam War").

[38] *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1231–32 (D.D.C. 1974) ("Both the Federal and state cases have practically universally upheld the executive's power to commute as part of the power to pardon."); *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, *supra* note 2 ("A commutation of sentence reduces a sentence, either totally or partially, that is then being served[.]"). As discussed *infra*, commutation does not remove the civil disabilities attendant to a criminal conviction. *Id.*

[39] *Hoffa*, 378 F. Supp. at 1223–25.

[40] The Laura, 114 U.S. 411, 413–14 (1885).

[41] Biddle v. Perovich, 274 U.S. 480, 486–87 (1927) ("No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required."). This decision is in some tension with the Supreme Court's earlier holding in *Burdick v. United States* that a full pardon must be accepted to be effective. *See* Haugen v. Kitzhaber, 306 P.3d 592, 605 (Or. 2013) (recognizing that *Burdick* "squarely held that a pardon must be accepted by the recipient to be effective," but the Supreme Court "backed away from the acceptance requirement" in *Biddle*). At least one piece of legal scholarship has argued that the differing treatment of acceptance in *Burdick* and *Biddle* is justified by the different ostensible legal effects of a full pardon and a commutation. *See* Zachary J. Broughton, *Constitutional Law—I Beg Your Pardon: Ex Parte Garland Overruled; the Presidential Pardon is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183, 205–06 (2019) (asserting that acceptance of a pardon also entails acceptance of "the implication of a confession of guilt," whereas "acceptance of a commutation involves no such admittance, so a commutation cannot be refused"). The legal effects of clemency are discussed in more detail *infra*, "Legal Effect of Clemency."

[42] *Ex parte* Wells, 59 U.S. 307, 314–15 (1855).

of multiple capital homicide offenses, so that DOJ could conduct a study of "racial and geographic disparities in the federal death penalty system."[43]

As noted above, forms of clemency such as pardons and commutations may be unconditional or may carry specific conditions that must be met for the relief to be effective.[44]

Constraints on the Pardon Power

The federal courts have recognized that the power conferred by Article II, Section 2 of the Constitution is quite broad, establishing virtually "unfettered executive discretion" to grant clemency.[45] The judiciary accordingly has been reticent to weigh in on clemency matters within the purview of the executive branch, particularly given separation-of-powers constraints inherent in the Constitution's structure.[46] As a result, there is very little judicial guidance regarding the limits of the President's pardon authority. Two limits are nonetheless obvious from the constitutional text: first, pardons may be granted only for "offences against the United States," that is, federal crimes,[47] and second, pardons may not be granted "in Cases of Impeachment."[48]

Beyond the limits established in Article II, Section 2 of the Constitution, the power to grant conditional or unconditional clemency, though broad, may also be externally limited by other constitutional provisions and guarantees. The Supreme Court has, at times, alluded to such limits, noting, for example, that the President may attach to a grant of clemency conditions "which are in themselves constitutionally unobjectionable."[49] Notably, in *Hoffa v. Saxbe*, the federal district

[43] Henry Weinstein & Eric Lichtblau, *Clinton Stays Execution for Racial Study*, L.A. TIMES (Dec. 8, 2000), https://www.latimes.com/archives/la-xpm-2000-dec-08-mn-62953-story.html; *see Commutations, Remissions, and Reprieves Granted by President William J. Clinton (1993–2001)*, U.S. DEP'T OF JUSTICE: OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clinton-commutations (last updated Jan. 26, 2015).

[44] *See* Ex parte *Wells*, 59 U.S. at 315 ("[T]he power to pardon conditionally is not one of inference at all, but one conferred in terms [by the Constitution].").

[45] Hoffa v. Saxbe, 378 F. Supp. 1221, 1234 (1974); *see also* United States v. Klein, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

[46] *See Klein*, 80 U.S. at 147 ("It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others."); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 275 (1998) (recognizing in context of state clemency proceedings that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review" (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981))).

[47] For this reason, in addition to the other constraints discussed in this report, state-level criminal prosecutions are beyond the reach of presidential clemency and can serve indirectly as a check on the federal power (assuming they are otherwise lawful). *See, e.g.*, Devlin Barrett & Matt Zapotosky, *Manafort Indicted in New York State, Charges That Fall Outside Trump's Pardon Power*, WASH. POST (Mar. 13, 2019), https://www.washingtonpost.com/world/national-security/manafort-indicted-in-new-york-state-charges-that-fall-outside-trumps-pardon-power/2019/03/13/c5188cd4-45ae-11e9-90f0-0ccfeec87a61_story.html (referring to state fraud charges "as a kind of prosecutorial insurance policy against a possible presidential pardon" but noting potential double jeopardy issue).

[48] U.S. CONST. art. II, § 2, cl. 1.

[49] Schick v. Reed, 419 U.S. 256, 265 (1974); *see also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (arguing that "some *minimal* procedural safeguards apply to clemency proceedings."); Hand v. Scott, 285 F. Supp. 3d 1289, 1303 (N.D. Fla. 2018) ("[E]xecutive clemency is not immune from judicial review if it violates the Constitution."). Other apparent limitations include that an exercise of clemency may not affect "vested" rights of third parties (as where forfeited property is sold) or proceeds "paid into the treasury" (which "can only be secured to the former owner . . . through an act of [C]ongress"). Ill. C.R. Co. v. Bosworth, 133 U.S. 92, 104–05 (1890); *cf.* Osborn v. United States, 91 U.S. 474, 479 (1875) (ordering return of confiscated property belonging to pardoned petitioner where proceeds had not yet been distributed or paid into treasury). The Court in *The Laura* also excepted "fines . . . imposed by a co-ordinate department of the government for contempt of its authority," 114 U.S. 411, 413 (1885), though later cases have recognized that the President may pardon one who is subject to criminal punishment for

court for the District of Columbia was called upon to squarely address the relationship between the President's pardon power and "the rights and liberties of the individual" as enshrined in other constitutional provisions.[50] The case involved a commutation that was conditioned on the recipient forgoing participation in labor union management for a period of years.[51] The recipient of the commutation challenged the condition as a violation of his First Amendment rights of free speech and association, among other things.[52] Faced with the issue, the court took the view that "there are obvious limits beyond which the President may not go in imposing and subsequently enforcing" clemency conditions[53] and "arrive[d] at a two-pronged test of reasonableness in determining the lawfulness of a condition: first, that the condition be directly related to the public interest," meaning that it "must relate to the reason for the initial judgment of conviction" in a way that reflects regard for protection of the public; "and second, that the condition not unreasonably infringe on the individual commutee's constitutional freedoms."[54] Applying this two-pronged test, the district court ultimately concluded that the condition was valid because (1) the commutation recipient's crimes related to participation in union activities, which the public had a strong interest in the integrity of; and (2) the condition met applicable First Amendment standards.[55]

Because case law regarding the President's authority to grant clemency is limited, the two-pronged analysis laid out in *Hoffa* has not been endorsed by the Supreme Court, nor has there been extensive judicial development of alternative frameworks.[56] Nevertheless, though the proposition remains largely theoretical given the dearth of case law,[57] legal scholars have maintained that grants of clemency or clemency conditions at odds with certain constitutional guarantees like equal protection of the law, due process, and the prohibition of cruel and unusual punishment are subject to judicial review and potential invalidation.[58]

---

contempt of court. *Ex parte* Grossman, 267 U.S. 87, 122 (1925); *see also* United States v. Arpaio, No. 16-01012, 2017 WL 4839072, at *1 (D. Ariz. Oct. 19, 2017), *appeal docketed*, No. 17-10448 (9th Cir. Oct. 20, 2017) ("Criminal contempt is included among . . . pardonable offenses."). Whether the President may pardon a person held in criminal contempt of Congress appears to be an open question, but it has occurred on at least one occasion without court challenge. *See* Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 OKLA. L. REV. 163, 181 (1999) (describing pardon of Dr. Francis Townsend during the presidency of Franklin D. Roosevelt). Twenty-four Members of Congress recently filed an amicus brief in the *Arpaio* case, which is being heard on appeal before the U.S. Court of Appeals for the Ninth Circuit, arguing that pardons for criminal contempt of court or Congress encroach on the independence of coequal branches of government and that *Grossman* is distinguishable and "incompatible with later" Supreme Court decisions addressing separation-of-powers issues. Brief of Amici Curiae Certain Members of Congress in Support of Neither Party at 9, United States v. Arpaio, No. 17-10448 (9th Cir. Apr. 29, 2019). At least one legal scholar has argued that, even accepting *Grossman*'s conclusion that criminal contempt of court is pardonable, contempt of Congress is distinguishable because of Congress's constitutional authority to impeach (which the pardon provision explicitly excepts). *See* Berger, *supra* note 49, at 182–84.

[50] 378 F. Supp. 1221, 1234 (D.D.C. 1974).

[51] *Id.* at 1224.

[52] *Id.* at 1225. He also argued that the condition violated the Fifth Amendment in multiple ways. *Id.*

[53] *Id.*

[54] *Id.* at 1236–38.

[55] *See id.* at 1236–40.

[56] One federal appellate court remarked in a pre-*Hoffa* case that a clemency condition "may be of any nature, so long as it is not illegal, immoral or impossible of performance." Kavalin v. White, 44 F.2d 49, 51 (10th Cir. 1930).

[57] *See* Christopher Man & Jacob Laksin, *Applying the Presidential Pardon Power in the Context of an Investigation of the Executive Branch*, 33 CRIM. JUST. 12, 13 (2018) ("Although judicial review remains a theoretical check on the pardon power, the Supreme Court only has noted the breadth of the president's power without ever invalidating the president's use of that power as having gone too far.").

[58] *E.g.*, Broughton, *supra* note 41, at 209–10 (citing legal scholars); Daniel T. Kobil, *Compelling Mercy: Judicial*

Clemency Process

While not necessary, clemency is typically granted through an administrative process established in regulations that provide for consideration of applications by the Office of the Pardon Attorney within the Department of Justice (DOJ).[59] The regulations require any person "seeking executive clemency by pardon, reprieve, commutation of sentence, or remission of fine" to execute a "formal petition" and submit it to the Pardon Attorney.[60] To be eligible to file a pardon petition, at least five years must have elapsed since one's release from confinement or one's conviction (if no prison sentence was imposed).[61] Petitions for commutation generally may be filed only after all other forms of judicial and administrative relief have been pursued, though allowance may be made "upon a showing of exceptional circumstances."[62]

Once a petition for clemency has been submitted, the Pardon Attorney is to investigate its merit by engaging "appropriate officials and agencies of the Government" like the Federal Bureau of Investigation.[63] At the conclusion of the investigation, the Pardon Attorney submits a recommendation through the Deputy Attorney General to the Attorney General as to whether the

Review and the Clemency Power, 9 U. SAINT THOMAS L.J. 698, 698 (2012) (arguing that "clemency decisions can potentially violate Equal Protection or Due Process principles, but without judicial review there is little to prevent even blatant constitutional violations by executives"). A slightly different and unresolved question is whether the President could be criminally prosecuted for issuing pardons for an improper purpose—for instance, obstructing justice by issuing pardons to cover up crimes—which could raise other constitutional issues. *See* Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 94–97 (2019) (surveying arguments that abuse of pardon power could subject President to prosecution and noting DOJ Office of Legal Counsel's (OLC's) position that President may not constitutionally be prosecuted during his term).

Setting aside constitutional considerations regarding prosecution of the President, Special Counsel Robert Mueller's report on Russian interference in the 2016 election suggested that "the promise of a pardon to corruptly influence testimony would not be a constitutionally immunized act" and could constitute obstruction of justice under existing law, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 173 (2019), https://www.justice.gov/storage/report.pdf, though that proposition has been disputed. *See The Trump Lawyers' Confidential Memo to Mueller, Explained*, N.Y. TIMES (June 2, 2018), https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html#footnote-0-1 (annotating correspondence from President's attorneys, which asserted that President's "position as the chief law enforcement officer" meant that exercise of otherwise-lawful powers "could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself"); Abigail Tracy, *"That's Obstruction of Justice": What Pardoning Manafort Would Mean for Trump*, VANITY FAIR (Aug. 24, 2018), https://www.vanityfair.com/news/2018/08/donald-trump-paul-manafort-pardon (noting argument that "exercise of an explicit constitutional power [could not] be part of any obstruction case—even if the reason for it is illicit or in other people's judgment wrong").

[59] *See* 28 C.F.R. §§ 0.35–36; Lauren Schorr, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1535 (2009) (stating that the "pardon process is usually conducted" by means of an application submitted to the Pardon Attorney).

[60] 28 C.F.R. § 1.1. Petitions for clemency with respect to military offenses are submitted "directly to the Secretary of the military department that had original jurisdiction over the court-martial trial and conviction of the petitioner." *Id.*

[61] *Id.* § 1.2. Petitions "[g]enerally" should not be submitted by persons on probation, parole, or supervised release. *Id.* A petitioner "may make a written request for waiver" of the waiting period requirements, but such waiver "is rarely granted and then only in the most exceptional circumstances." *Pardon Information and Instructions*, U.S. DEP'T OF JUSTICE: OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/pardon-information-and-instructions (last updated Nov. 23, 2018).

[62] 28 C.F.R. § 1.3. With respect to petitioners sentenced to death, other special procedures apply, including that a first motion for habeas corpus relief under 18 U.S.C. § 2255 must first have been exhausted by the petitioner. *See id.* § 1.10.

[63] *Id.* §§ 1.6(a), 1.9. The investigation involves "a detailed inquiry into [the] personal background and current activities" of the applicant in order to determine whether he or she meets the factors described *infra*. *Pardon Information and Instructions*, *supra* note 61.

request for clemency should be granted or denied,[64] and the Attorney General is to then review all pertinent information to "determine whether the request for clemency is of sufficient merit to warrant favorable action by the President."[65] The Attorney General's final recommendation is made to the President in writing.[66]

The general standard for a pardon request "of sufficient merit" is that the petitioner has "demonstrated good conduct for a substantial period of time after conviction and service of sentence."[67] DOJ lists five "principal factors" in determining whether a particular application warrants a favorable recommendation:

1. **post-conviction conduct, character, and reputation**, including, among other things, financial and employment stability, "responsibility toward family," and participation in community service;
2. **the seriousness and relative recentness of the offense**, with consideration of victim impact and whether sufficient time has passed "to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction";
3. **acceptance of responsibility, remorse, and atonement**, including victim restitution and any attempts "to minimize or rationalize culpability";
4. **the need for relief**, such as a legal disability like a bar to licensure, though "the absence of a specific need should not be held against an otherwise deserving applicant"; and
5. **recommendations and reports from officials** like the prosecuting attorneys and sentencing judge.[68]

Factors considered on a request for commutation include "disparity or undue severity of sentence, critical illness or old age," the "amount of time already served," the "availability of other remedies," "meritorious service rendered to the government" (such as cooperation with investigations and prosecutions), and/or "other equitable factors" like demonstrated rehabilitation or pressing unforeseen circumstances.[69] Similarly, "satisfactory post-conviction conduct" is considered on application for remission of a fine or restitution, as well as "the ability to pay and any good faith efforts to discharge the obligation."[70]

During President Obama's second term, DOJ announced a "clemency initiative" to "encourage qualified federal inmates to petition to have their sentences commuted[.]"[71] Under the initiative, DOJ prioritized applications of inmates who met special factors that included (1) being nonviolent, low-level offenders without significant ties to organized criminal enterprises; (2) lacking a significant criminal history; (3) demonstrating good conduct in prison; (4) lacking a history of violence; (5) having served at least 10 years of their sentence; and (6) serving a

[64] 28 C.F.R. §§ 0.36, 1.6(c).

[65] *Id.* § 1.6(c).

[66] *Id.*

[67] U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-140.112 (2018), https://www.justice.gov/jm/jm-9-140000-pardon-attorney.

[68] *Id.*

[69] *Id.* § 9-140.113. DOJ guidance notes that commutation is "an extraordinary remedy," suggesting it is difficult to obtain. *Id.*

[70] *Id.*

[71] *Clemency Initiative*, U.S. DEP'T OF JUSTICE: OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clemency-initiative (last updated Dec. 11, 2018).

sentence for which they "likely would have received a substantially lower sentence" by operation of law if convicted at the time of consideration.[72] DOJ made recommendations to President Obama on thousands of petitions received through the initiative, many of which were still pending at the end of his second term.[73] The program ended when President Obama left office on January 20, 2017.[74] More broadly, according to statistics kept by the Office of the Pardon Attorney, recent Presidents have granted a relatively small percentage of clemency petitions—for instance, President George W. Bush received over 11,000 petitions for pardon or commutation and granted a total of 200.[75]

Though DOJ's regulations and requirements guide its consideration of requests for clemency, they do not "restrict the authority granted to the President under Article II, section 2 of the Constitution."[76] In other words, the President is free to grant clemency as he or she sees fit (subject to the constraints described elsewhere in this report), regardless of whether a prospective recipient meets DOJ standards or even participates in the formal petition process through the Office of the Pardon Attorney. For instance, as noted above, while DOJ regulations impose a five-year waiting period for submission of a pardon application through the Pardon Attorney, the President may issue a pardon at any time after the *commission* of a federal offense even if no charges have been filed,[77] as was the case with President Gerald Ford's pardon of former President Nixon.[78]

When a pardon or commutation is granted, the recipient is notified, and a "warrant" is mailed to him or her (or sent to the officer in charge of the place of confinement in the case of a commutation of a sentence still being served).[79] Though the requirements of notice and delivery are set out in DOJ regulations, it appears that they may be necessary for at least a full pardon to have legal effect. As noted above, an ostensible pardon recipient may be able to reject the pardon, at least when "personal rights" like assertion of the Fifth Amendment right against self-incrimination are at issue.[80] Moreover, Presidents have, in the past, revoked pardons prior to delivery and acceptance. For instance, in 1869, after outgoing President Andrew Johnson issued

---

[72] *Id.* The applications of inmates who met "most, if not all" of the factors were prioritized. *Id.*

[73] *Id.*

[74] *Id.*

[75] *Clemency Statistics*, U.S. DEP'T OF JUSTICE: OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clemency-statistics (last updated Dec. 3, 2019).

[76] 28 C.F.R. § 1.11.

[77] *See supra* note 30 and accompanying text.

[78] *See* Proclamation No. 4311, 39 Fed. Reg. 32,601 (Sept. 10, 1974) (alluding to "possible indictment and trial for offenses against the United States"); Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 COLO. L. REV. 1, 34 (1976) (noting that the pardon "was granted before conviction or even indictment and for crimes which were not specified[,] without regard to the normal procedures regulating grants of clemency"). Though relatively rare, other more recent examples of pardons granted outside the normal process include President Bill Clinton's pardon of financier Marc Rich and President Donald Trump's pardon of former sheriff Joe Arpaio. *See* Julian Borger, *Pardons Scandal Engulfs Clintons*, THE GUARDIAN (Feb. 22, 2001), https://www.theguardian.com/world/2001/feb/23/usa.julianborger (indicating that the pardon of Marc Rich "bypassed the normal justice department approval process"); Andrew Rudalevige, *Why Trump's Pardon of Joe Arpaio isn't Like Most Presidential Pardons*, WASH. POST (Aug. 26, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/26/why-trumps-pardon-of-joe-arpaio-isnt-like-most-presidential-pardons/ (noting that DOJ regulations were "not consulted" with respect to pardon of Joe Arpaio).

[79] 28 C.F.R. § 1.7. Any victim of the offense may also be notified. *Id.* § 1.6(b).

[80] Burdick v. United States, 236 U.S. 79, 94 (1915). As described *supra*, in the later case *Biddle v. Perovich*, the Supreme Court concluded that "consent is not required" for a *commutation*. 274 U.S. 480, 487 (1927); *see supra* note 41.

but did not deliver a pardon, incoming President Ulysses S. Grant revoked the pardon, and a federal court upheld the revocation.[81]

Selected Legal Issues for Congress

The President's use of the pardon power in particular circumstances can raise a number of legal questions, many of which may be unresolved given the limited authority addressing federal clemency matters.[82] Three unresolved legal issues may be of particular interest to Congress given recent commentary: (1) the legal effect of clemency;[83] (2) whether a President may issue a self-pardon;[84] and (3) Congress's role in overseeing the exercise of the pardon power.[85]

Legal Effect of Clemency

The legal effect of limited forms of clemency like commutations is fairly clear: criminal punishment is reduced "either totally or partially," but the relief "does not change the fact of conviction, imply innocence, or remove civil disabilities that apply to the convicted person as a result of the criminal conviction."[86] The legal significance of a full pardon, however, has been a subject of shifting judicial views over time. While early cases suggested that a pardon obviates all legal guilt of the offender, effectively wiping the crime from existence, more recent case law suggests that a pardon removes only the punishment for the offense without addressing the guilt of the recipient or other consequences stemming from the underlying conduct.

In an 1866 decision, *Ex parte Garland*, the Supreme Court took a broad view of the nature and consequence of a pardon:

> A pardon reaches both the punishment prescribed for the offense 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 had 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 civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[87]

[81] *See In re* De Puy, 7 F. Cas. 506, 511 (S.D.N.Y. 1869) (No. 3,814) ("The intention of the executive to grant a pardon can have no legal force until carried into completed act. . . . The completed act is the charter of pardon and delivered. This is the only step that gives title to a pardon.").

[82] *See* Man & Laksin, *supra* note 57, at 12 (noting "many open questions remain about [the pardon power's] scope and its practical consequences for potential criminal defendants").

[83] *See* United States v. Arpaio, No. 16-01012, 2017 WL 4839072, at *1 (D. Ariz. Oct. 19, 2017), *appeal docketed*, No. 17-10448 (9th Cir. Oct. 20, 2017) (addressing whether President's pardon of Sheriff Joseph Arpaio required vacatur of judgment of conviction).

[84] *See, e.g.*, Sean Illing, *President Trump Says He Can Pardon Himself. I Asked 15 Experts if That's Legal*, VOX (June 4, 2018), https://www.vox.com/policy-and-politics/2017/7/21/16007934/trump-president-pardon-himself-limits-power-constitution (examining President's assertion of "absolute right" to pardon himself).

[85] *See, e.g.*, Eckstein & Colby, *supra* note 58, at 101–07 (surveying congressional options to "check" President's use of pardon power, among other things).

[86] *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, *supra* note 2.

[87] *Ex parte* Garland, 71 U.S. 333, 380–81 (1866). The Court in *Garland* did recognize some limits to the effect of a pardon, however; namely, that it "does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *Id.* at 381.

A few years after *Garland*, the Court appeared to affirm that a pardon "not merely releases the offender from the punishment prescribed for the offence, but . . . obliterates in legal contemplation the offence itself."[88] However, in subsequent decisions, the Court backed away from the broad proposition that a pardon erases both the consequences of a conviction and the underlying guilty conduct. Most notably, in *Carlesi v. New York*, the Court determined that a pardoned offense could still be considered "as a circumstance of aggravation" under a state habitual-offender law,[89] and then in *Burdick v. United States*, the Court noted that a pardon in fact "carries an imputation of guilt; acceptance a confession of it."[90] Based on this more recent Supreme Court case law, multiple federal Courts of Appeals have concluded that the "historical language" from early cases "was dicta and is inconsistent with current law."[91]

Modern cases instead recognize a distinction between the punishment for a conviction, which the pardon obviates, and "the fact of the commission of the crime," which may be considered in subsequent proceedings or preclude the pardon recipient from engaging in certain activities.[92] A pardon will accordingly relieve the recipient of legal disabilities that "would not follow from the commission of the crime without conviction,"[93] such as possession of a firearm[94] or the right to vote,[95] but the conduct and circumstances of the offense may still be considered for purposes of, among other things, certain benefits or licensing determinations[96] or as a basis for censure under rules of professional conduct.[97] Relatedly, courts have held that a pardon does not automatically

[88] Carlisle v. United States, 83 U.S. 147, 151 (1872).

[89] 233 U.S. 51, 59 (1914).

[90] 236 U.S. 79, 94 (1915).

[91] Hirschberg v. CFTC, 414 F.3d 679, 682 (7th Cir. 2005); *see also In re* North, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (recognizing that the "expansive view of the effect of a pardon turned out to be dictum" that was "implicitly rejected" in later cases); United States v. Noonan, 906 F.2d 952, 958 (3d Cir. 1990) ("By 1915, . . . the Court made clear that it was not accepting the *Garland* dictum[.]").

[92] *Noonan*, 906 F.2d at 958 (quoting Bjerkan v. United States, 529 F.2d 125, 128 n.2 (7th Cir. 1975)); *see also* Nixon v. United States, 506 U.S. 224, 232 (1993) ("[A] pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is an executive action that mitigates or sets aside *punishment* for a crime." (internal alteration and quotation marks omitted)); Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653 (1915) ("[I]f the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible."). DOJ's OLC, which provides legal advice to the President and executive branch agencies, is in accord. *See* Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104, 104 (2006) ("[A] presidential pardon removes . . . the punitive legal consequences that would otherwise flow from conviction for the pardoned offense. A pardon, however, does not erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct."). With respect to pardons occurring prior to conviction, OLC has opined that "[a]ny consequences that would have attached had there been a conviction are precluded," though "[c]onsequences that attach simply by reason of an *indictment* for an offense generally are not[.]" Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 165 & n.3 (1995) (citing *In re* North, 62 F.3d 1434 (D.C. Cir. 1994)).

[93] Williston, *supra* note 92, at 653.

[94] *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, *supra* note 2.

[95] *Bjerkan*, 529 F.2d at 128.

[96] Robertson v. Shinseki, 26 Vet. App. 169, 179 (2013) (concluding that pardon relieved pardonee of legal punishment of court-martial conviction for being AWOL and disabilities incident to conviction, but did not "eliminate the consideration the conduct" for purposes of benefits determination); *Hirschberg*, 414 F.3d at 684 (concluding Commodity Futures Trading Commission properly considered pardoned crime in denying application for floor broker registration).

[97] *In re* Abrams, 689 A.2d 6, 19 (D.C. 1997) (upholding authority to discipline attorney for violations of rules of professional conduct based on pardoned offense of willfully refusing to answer questions of Congress).

expunge the record of the conviction itself or require that the court's orders be vacated.[98] Despite the judicial trend toward a narrower understanding of the legal effect of a pardon, however, the Supreme Court has not directly revisited its broad language from *Garland*, and thus its precise meaning in relation to later pronouncements from the Court remains somewhat unclear.

Presidential Self-Pardons

Whether a President may pardon himself is an unresolved legal question that has been a subject of renewed interest following President Trump's statement in 2018 that he has "the absolute right" to do so.[99] No past President has issued a self-pardon,[100] and, as a result, no federal court has directly addressed the matter.[101] That said, legal scholars and commentators have debated the question extensively and reached differing conclusions. Proponents of the view that the President may pardon himself tend to emphasize the lack of limitation in the constitutional language,[102] as well as certain historical views and pronouncements of the Supreme Court as to the breadth of the President's pardoning power in general.[103]

---

[98] *See* United States v. Noonan, 906 F.2d 952, 960 (3d Cir. 1990) (determining that pardon "does not eliminate" conviction "and does not create any factual fiction that [the] conviction had not occurred to justify expunction of [the] criminal court record"); United States v. Arpaio, No. 16-01012, 2017 WL 4839072, at *1 (D. Ariz. Oct. 19, 2017), *appeal docketed*, No. 17-10448 (9th Cir. Oct. 20, 2017) (denying motion to vacate all orders after pardon, as pardon "does not erase a judgment of conviction, or its underlying legal and factual findings"): Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104, 104 (2006). The *Arpaio* case is currently being considered by the U.S. Court of Appeals for the Ninth Circuit. In that case, a pardon was granted to Joseph Arpaio, the former Sheriff of Maricopa County, AZ, after he had been convicted of contempt of court, but before sentencing, entry of final judgment, or any appeal. Appellant's Amended Opening Brief at 7, United States v. Arpaio, No. 17-10448 (9th Cir. Feb. 19, 2019). Arpaio argues before the Ninth Circuit that his case is thus "radically different" from cases where courts have declined to expunge convictions after the opportunity to appeal has passed, asserting that declining to vacate his conviction would unfairly render him "at once guilty, but forever unable to appeal [that] decision." *Id.* at 1. The special prosecutor appointed to defend the district court's decision responds that Arpaio "voluntarily" chose to forgo an appeal by accepting his pardon and is now seeking to improperly "expand the pardon power" beyond the scope of modern precedent. Answering Brief of Plaintiff and Appellee at 21–22, United States v. Arpaio, No. 17-10448 (9th Cir. Apr. 22, 2019).

[99] Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018, 8:35 AM), https://twitter.com/realDonaldTrump/status/1003616210922147841.

[100] The prospect of a self-pardon has been discussed during prior administrations, such as the Nixon and Clinton Administrations, as noted *infra*. Were the matter to come before the judiciary, a court might consider the sparse historical record of self-pardons in assessing their constitutionality. *Cf.* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill ("[L]ong-established[] historical practices . . . are an important source of constitutional meaning to many judges, academics, and lawyers."); Schick v. Reed, 419 U.S. 256, 266 (1974) ("'If a thing has been practiced for two hundred years by common consent, it will need a strong case' to overturn it." (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922))); *but see* NLRB v. Noel Canning, 573 U.S. 513, 573, 584 (2014) (Scalia, J., concurring) (arguing that past practice does not relieve the judiciary of its "duty to interpret the Constitution in light of its text, structure, and original understanding").

[101] *See* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 108 (1999) ("There is no case law on the question, of course[.]").

[102] *E.g.*, *id.* ("[I]t has generally been inferred from the breadth of the constitutional language that the President can indeed pardon himself[.]"); Jonathan Turley, *Self-Pardons: A Response to Tribe, Painter, and Eisen*, RES IPSA LOQUITUR – THE THING ITSELF SPEAKS (July 23, 2017), https://jonathanturley.org/2017/07/23/self-pardons-a-response-to-tribe-painter-and-eisen/ (noting that "the Constitution does not clearly limit the power of pardons beyond its use with regard to impeachment," and "the text of the Constitution remains the most important determinant in" constitutional interpretation); 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, 216 (1999) ("A textual interpretation of the Pardon Clause provides the strongest argument that a self-pardon is not prohibited by the Constitution.").

[103] *E.g.*, Eckstein & Colby, *supra* note 58, at 100 (stating that the textual argument is "consistent with the Federalist

By contrast, those asserting that the President lacks the power of self-pardon raise competing textual arguments[104] and suggest that self-pardons would be inconsistent with other constitutional provisions, such as the Article I provision stating that officials convicted in an impeachment trial "shall . . . be liable and subject to Indictment, Trial, Judgment, and Punishment, according to law."[105] An Office of Legal Counsel opinion issued shortly before President Nixon's resignation in 1974 concluded that the President cannot pardon himself "[u]nder the fundamental rule that no one may be a judge in his own case,"[106] and some scholars subsequently have supported this opinion.[107] In any event, even were a President to pardon himself, at least one commentator has noted that it is questionable whether a court would issue a definitive ruling as to that pardon's lawfulness given practical considerations and separation-of-powers concerns.[108]

Role of Congress in President's Use of the Pardon Power

Legislation

The Supreme Court has taken the view that Congress generally cannot circumscribe the President's pardon authority. In *Ex parte Garland*, the Court remarked that the "power of the President [to pardon] 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."[109] Consistent with this broad language, the Court later rejected post-Civil War attempts by Congress to limit the effect of

papers" and "strong" given "the Supreme Court's view that the constitutional text gives the President plenary pardon power"); *see also* Jack Goldsmith, *A Smorgasbord of Views on Self-Pardoning*, LAWFARE (June 5, 2018), https://www.lawfareblog.com/smorgasbord-views-self-pardoning (collecting views on both sides).

[104] Eckstein & Colby, *supra* note 58, at 98 (acknowledging argument that the constitutional text establishes power to "grant" pardons, and "a grant is something given to another person").

[105] Laurence H. Tribe, Richard Painter, & Norman Eisen, *No, Trump Can't Pardon Himself. The Constitution Tells Us So*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html (referencing U.S. CONST. art. I, § 3, cl. 7). Others argue that a self-pardon would conflict with the Article II requirement that the President "take Care that the Laws be faithfully executed," *e.g.*, Philip Bobbitt, *Self-Pardons: The President Can't Pardon Himself, So Why Do People Think He Can?*, LAWFARE (June 20, 2018), https://www.lawfareblog.com/self-pardons-president-cant-pardon-himself-so-why-do-people-think-he-can (citing U.S. CONST. art. II, § 3), or with the Due Process Clauses of the Fifth and Fourteenth Amendments. Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 157 (2017).

[106] Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974). The OLC opinion did allude to a "different approach" to pardons that "could be taken" and that would potentially circumvent any constitutional limitation on self-pardons: the President could declare a temporary inability to perform the duties of his office pursuant to the Twenty-Fifth Amendment, after which the Vice President could, as Acting President, pardon the President and then allow him to resume his duties or resign. *Id.* at 371. Furthermore, President Nixon apparently received advice from other members of his legal team that a self-pardon would be available to him. Nida & Spiro, *supra* note 102, at 212–13. In support of this view, at least one Member of Congress noted during the impeachment of President Clinton that "[t]he prevailing opinion is that the President can pardon himself." *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 358 (1998) (statement of Rep. Robert Goodlatte).

[107] *See* Tribe, Painter, & Eisen, *supra* note 105 (describing a "foundational case in the Anglo-American legal tradition" from 1610 in which it was held that a party "could not act as a court and a litigant in the same case").

[108] Goldsmith, *supra* note 103 (noting that a prosecutor would have to try to prosecute a former President, the President would then have to raise the pardon in defense, and the courts would then have to decide whether they had jurisdiction to review the action). As noted *infra*, constitutional amendments have been introduced in the 116th Congress that would preclude self-pardons, among other things. *See infra* notes 151–152 and accompanying text.

[109] 71 U.S. at 380.

pardons granted to those who aided the Confederate cause on their right to recover for seized property,[110] stating that "the legislature cannot change the effect of such a pardon any more than the executive can change the law."[111] More recently, in rejecting the proposition that a condition attached to clemency must be authorized by statute, the Court indicated that "the power [of clemency] flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress."[112]

It thus appears that Congress lacks the authority to substantively constrain the President's power to grant clemency, though Congress may be able to take some actions that would facilitate exercise of the power, such as through appropriations.[113] There is historical precedent for Congress funding positions in DOJ to assist in considering clemency petitions.[114] That said, attempts to indirectly impair the pardon power through appropriations limitations could potentially be viewed as inappropriate.[115]

---

[110] United States v. Klein, 80 U.S. 128, 133–34 (1871).

[111] *Id.* at 148; *see also Ex parte* Grossman, 267 U.S. 87, 120 (1925) (recognizing that President "can reprieve or pardon all offenses . . . without modification or regulation by Congress").

[112] Schick v. Reed, 419 U.S. 256, 266 (1974).

[113] *See* U.S. CONST. art. I, § 8 (giving Congress power "to make all Laws which shall be necessary and proper for carrying into Execution" the powers "vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). Additionally, as noted *supra*, Congress may pass laws of general applicability that could theoretically apply to misuse of the pardon power, *see* REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE, *supra* note 58, at 173 (arguing that "the offer or promise of a pardon to induce a person to testify falsely or not to testify at all . . . would precede the act of pardoning and thus be within Congress's power to regulate even if the pardon itself is not"); *but see The Trump Lawyers' Confidential Memo to Mueller, Explained*, N.Y. TIMES (June 2, 2018), https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html#footnote-0-1 (annotating correspondence from President's attorneys, who asserted that President's "position as the chief law enforcement officer" meant that exercise of otherwise-lawful powers "could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself"), though there appears to be disagreement on the question of whether a sitting President constitutionally may be prosecuted for a violation of federal law. *See supra* note 58.

A separate question, over which there appears to be some dispute, is whether Congress can itself grant pardons or amnesties through legislation. In two 19th century cases, the Supreme Court appeared to suggest that it can, *see* Brown v. Walker, 161 U.S. 591, 601 (1896) (noting that pardon power of President "has never been held to take from congress the power to pass acts of general amnesty"); The Laura, 114 U.S. 411, 414 (1885) (upholding law that authorized subordinate officers to remit forfeitures and penalties). Nevertheless, the executive branch has taken the position that "the Constitution gives Congress no authority to legislate a pardon for any particular individual or class of individuals," Legislative Proposal to Nullify Criminal Convictions Obtained Under the Ethics in Government Act, 10 Op. O.L.C. 93, 94 (1986), and at least one scholar agrees, pointing out the potential for conflict between presidential and legislative clemency. *See* Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1278 (2003) ("If Congress had the power to pardon through legislation, it would be able to defeat the President's ability to grant conditional pardons by granting unconditional clemency to recipients of the President's conditional pardon."); *but see* James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 360 (1993) (citing *Brown* and *The Laura* for the proposition that the "[pardoning] prerogative is vested concurrently in the Congress").

[114] CRS Legal Sidebar WSLG1865, *Presidential Pardons: Frequently Asked Questions (FAQs)*, by Charles Doyle and Richard M. Thompson II (noting 1865 bill that funded a "pardon clerk" in DOJ to assist with assessing pardon applications).

[115] *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring) (suggesting a statutory restriction on appropriations could "encroach on the powers reserved to another branch of the Federal Government" if, for example, Congress sought to "impair the President's pardon power by denying him appropriations for pen and paper"); Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 267 (1996) ("Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control." (internal quotation marks omitted)); *but see* Act of

Given these limitations, Congress's practice for formally conveying its views on clemency matters has typically involved passing nonbinding resolutions expressing the sense of Congress as to whether clemency should or should not be granted.[116] Legislation has also been introduced in the 116th Congress that would impose certain post hoc *procedural* requirements on the Attorney General in connection with pardons—specifically, (1) requiring submission of investigative materials to congressional committees upon the grant of a pardon or commutation arising from an investigation in which the President or a relative is a target, subject, or witness;[117] and (2) requiring publication of pardon information within three days of any grant.[118] Although such legislation may not be a direct substantive constraint on the President's authority to grant clemency, given the relative lack of case law interpreting the pardon power and the sometimes sweeping language the Court has used to describe the President's prerogative, it is unclear whether such legislation would be viewed by the courts as an impermissible imposition on an area of executive authority.[119]

Oversight

Beyond legislation, Congress may have a role to play in pardon decisions through other constitutional processes. For instance, Congress has invoked its Article I authority to conduct oversight as a more indirect constraint on the use of the pardon power.[120] And on that front, Congress has, in the past, been relatively successful in obtaining information from the executive branch on particular clemency decisions, up to and including congressional testimony from the President himself.[121] Nevertheless, DOJ has taken the position that past examples of executive

Aug. 2, 1977, Pub. L. No. 95-86, § 706, 91 Stat. 419, 444 (1977) (prohibiting use of funds for specified purposes following President Carter's grant of amnesty to Vietnam War draft evaders).

[116] *E.g.*, H.R. Con. Res. 14, 114th Cong. (2015) (expressing sense of Congress that boxer Jack Johnson should receive posthumous pardon); H.R. Res. 9, 111th Cong. (2009) (expressing sense of Congress that President should not grant pardons to senior officials during final 90 days of term).

[117] Abuse of the Pardon Prevention Act, H.R. 1627 & S. 2090, 116th Cong. (2019).

[118] Presidential Pardon Transparency Act of 2019, H.R. 1348, 116th Cong. (2019).

[119] *See* Peterson, *supra* note 113, at 1252–59 (noting DOJ objections to bill imposing certain procedural and reporting requirements on Attorney General but arguing that creating some procedural obligations could pass constitutional muster if directed to Pardon Attorney). Directing reporting obligations to a subordinate executive branch official like the Pardon Attorney, over which Congress has funding authority, could place the obligations on firmer constitutional footing. *See* S. REP. NO. 106-231, at 16 (2000) ("The Constitution does no[t] require that such a low-level office even exist. It is up to the Congress to decide whether to create such an office; and how to fund it. The most relevant constitutional power here is Congress's power of the purse, not the President's power of the pardon." (quoting Letter from Akhil Reed Amar, Professor, Yale Law School, to the Honorable Orrin G. Hatch, Chairman, Senate Committee on the Judiciary, at 2 (Feb. 23, 2000))); *but see id.* at 10 (setting out DOJ's view that "because the President's pardon authority is plenary, even statutes that create what may seem to be only minor incursions on the President's discretion are unconstitutional").

[120] *E.g.*, *Examining the Constitutional Role of the Pardon Power: Hearing Before the Subcomm. on Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019); Letter from Rep. Jerrold Nadler, Ranking Member, H. Judiciary Comm., et al., to Donald F. McGahn II, White House Counsel (June 6, 2018), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/6.6.2018%20Letter%20to%20McGhan.pdf (requesting responses to specific questions regarding view and use of pardon power); *President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001).

[121] *See Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 90–151 (1974) (testimony of President Gerald Ford); *see also* CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey (noting that President Andrew Johnson furnished Congress with information related to his use of the pardon power during the House Judiciary Committee's impeachment investigation). DOJ regulations provide that most information connected to consideration of petitions for executive clemency "shall be available only to the officials concerned with the consideration of the

branch compliance with congressional requests for information regarding pardon decisions have been purely voluntary,[122] and that in fact "Congress has no authority whatsoever to review a President's clemency decision."[123] Whether a court, faced with an interbranch dispute regarding congressional demands for information on pardon decisions, would order the executive branch to comply with such demands would likely depend on the court's view of two possible constraints on Congress's oversight authority: (1) the existence of a valid legislative purpose, and (2) executive privilege.

With respect to the first constraint, the Supreme Court has said that Congress's power to conduct oversight is inherent in the legislative process and is broad, encompassing "inquiries concerning the administration of existing laws[,] . . . proposed or possibly needed statutes," and "probes into departments of the federal government to expose corruption, inefficiency, or waste."[124] However, a congressional investigation cannot be used "to expose for the sake of exposure,"[125] meaning that a valid inquiry "must be related to, and in furtherance of, a legitimate task of the Congress."[126] The Court has also cautioned that Congress "cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."[127] It is on the basis of this language that DOJ has maintained that Congress's oversight authority does not extend to clemency decisions, averring that "[t]he granting of clemency pursuant to the pardon power is unquestionably an exclusive province of the Executive Branch."[128] That said, the Supreme Court has at other times framed the issue of legislative purpose in the context of executive or judicial prerogatives as being whether it is "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive,"[129] and a congressional committee seeking information on a clemency decision might accordingly argue that a subpoena or request for information on the decision is not a "usurpation" of the clemency function but is merely levied in aid of a "probe . . . to expose corruption, inefficiency, or waste."[130]

---

petition," but records "may be made available for inspection, in whole or in part, when in the judgment of the Attorney General their disclosure is required by law or the ends of justice." 28 C.F.R. § 1.5.

[122] *See* Letter from Janet Reno, Att'y Gen., to President Bill Clinton (Sept. 16, 1999) (quoted in H.R. REP. NO. 106-488, at 120 (1999)) [hereinafter *Reno Letter*] (stating that to DOJ's knowledge, executive branch has provided information "only voluntarily and without conceding congressional authority to compel disclosure").

[123] *Id.* at 119; *see also id.* at 120 (citing letters from prior administrations and concluding the following: "[I]t appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that process, or to the advice or views the President received in connection with a clemency decision").

[124] Watkins v. United States, 354 U.S. 178, 187 (1957).

[125] *Watkins*, 354 U.S. at 200.

[126] *Id.* at 187; *see also* Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (indicating that investigation must be "in aid of the legislative function").

[127] Barenblatt v. United States, 360 U.S. 109, 112 (1959).

[128] *Reno Letter*, *supra* note 122, at 119.

[129] Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

[130] Allegations that the pardon power has been abused might strengthen a committee's position in this regard. *Watkins*, 354 U.S. at 187. As noted above, it might be difficult to justify a legislative inquiry by reference to "proposed or possibly needed statutes" given Congress's apparent inability to constrain the President's exercise of the pardon power through legislation, and accordingly the executive branch might argue that there would be no legislative purpose for such an inquiry. *See Barenblatt*, 360 U.S. at 111 ("Congress may only investigate into those areas in which it may potentially legislate or appropriate[.]"); Trump v. Mazars USA, LLP, 940 F.3d 710, 723 (D.C. Cir. 2019) ("If no constitutional statute may be enacted on a subject matter, then that subject is off-limits to congressional investigators."). However, some authority suggests that "legitimate task[s] of the Congress" can extend beyond simply passing legislation. *See In re* Chapman, 166 U.S. 661, 671 (1897) (upholding authority of Congress to conduct inquiry

Assuming a valid legislative purpose, the question would become whether materials related to a pardon decision are nevertheless protected from disclosure by executive privilege. Executive privilege "is a term that has been used to describe the President's power to 'resist disclosure of information the confidentiality of which [is] crucial to the fulfillment of the unique role and responsibilities of the executive branch of our government.'"[131] The term encompasses at least two distinct forms of privilege that have been recognized by the federal courts:[132] (1) a "presumptive privilege for Presidential communications"[133] that extends to "direct communications of the President with his immediate White House advisers"[134] made "'in performance of the President's responsibilities'" and "'in the process of shaping policies and making decisions,'"[135] as well as "communications authored or solicited and received" by immediate White House advisers;[136] and (2) a "deliberative process privilege" that may extend more broadly to "decisionmaking of executive officials generally," shielding "documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[137] Neither form of privilege is absolute, as either "can be overcome by a sufficient showing of need."[138] However, "the presidential communications privilege is more difficult to surmount" than the deliberative process privilege; at least in the context of a congressional subpoena, the U.S. Court of Appeals for the D.C. Circuit has indicated that the former can be overcome on a showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions,"[139] while the latter is subject to a flexible, "ad hoc" determination of need and may "disappear[] altogether when there is any reason to believe government misconduct has occurred."[140]

related to discipline of Members); Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938) ("A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress."); CRS Report RL30240, *Congressional Oversight Manual*, by L. Elaine Halchin et al. ("A committee's inquiry must have a legislative purpose or be conducted pursuant to some other constitutional power of Congress[.]").

[131] CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey (quoting *In re* Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997)).

[132] The executive branch maintains that executive privilege covers other categories of information as well, such as open law enforcement files. Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 116–17 (1984).

[133] United States v. Nixon, 418 U.S. 683, 708 (1974).

[134] Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1116 (D.C. Cir. 2004).

[135] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 449 (1977).

[136] *Sealed Case*, 121 F.3d at 750, 752. The D.C. Circuit has justified extension of the so-called "presidential communications" privilege to immediate White House advisers in order to protect "the need for confidentiality to ensure that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge." *Id.*

[137] *Id.* at 737, 745.

[138] *Id.* at 737.

[139] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974).

[140] *Sealed Case*, 121 F.3d at 745–46; *see also* Hobley v. Chicago Police Commander Burge, 445 F. Supp. 2d 990, 998 (N.D. Ill. 2006) (noting that the presidential communications privilege is "more difficult to surmount than the deliberative process privilege").

It does not appear that courts have addressed the application of either form of privilege to information regarding presidential clemency decisions sought by Congress. However, the U.S. Court of Appeals for the D.C. Circuit considered whether the presidential communications privilege would apply to "internal pardon documents" of the Offices of the Pardon Attorney and Deputy Attorney General that were *not* solicited or received by the President or his immediate advisors in *Judicial Watch v. Department of Justice*, concluding that such documents fell outside the scope of the presidential communications privilege but might still be covered by the deliberative process privilege.[141]

Based on *Judicial Watch* and the limited Supreme Court precedent addressing executive privilege, it seems that whether a court[142] would order disclosure to a congressional committee of information concerning a presidential clemency decision in the face of an assertion of executive privilege could depend on whether the information sought is limited to internal agency documents (in which case the deliberative process privilege could apply) or includes communications among and between the President and/or senior White House officials (in which case the presidential communications privilege would appear to apply). Because the threshold of need is higher in the latter case than in the former, it seems more likely that Congress could obtain documents and information generated by the Pardon Attorney that are not requested by or submitted to the President or his advisors.[143] Even in the case of presidential communications, however, a court could still conclude that a congressional committee is entitled to the information if the committee can demonstrate that it is critically needed.

Impeachment

An additional way in which Congress might assert itself with respect to presidential pardon decisions is through impeachment. James Madison alluded to this "great security" against abuse of the pardon power when he noted during the Virginia ratification convention that "if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him[.]"[144] The Supreme Court also appeared to acknowledge the possibility of impeachment for misuse of clemency in the early 20th century case of *Ex parte Grossman*.[145] In concluding that the pardon power extended to criminal punishment for contempt of court, the Supreme Court in that case indicated that if the President ever sought to "deprive a court of power to enforce its orders" by issuing "successive pardons of constantly recurring contempts in particular litigation," such an "improbable" situation "would suggest a resort to impeachment, rather than a narrow and strained construction of the general powers of the President."[146] Consistent with these authorities, several commentators have alluded to the potential availability of impeachment as a check on the President's pardon

[141] 365 F.3d at 1124. The court declined to extend the presidential communications privilege beyond "key White House advisers in the Office of the President and their staff" to "staff outside the White House in executive branch agencies" such as the Office of the Pardon Attorney. *Id.* at 1115–16.

[142] Information access disputes between Congress and the executive branch rarely make it to court. *See* CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey ("Congress has only rarely resorted to either criminal contempt or civil enforcement to combat non-compliance with subpoenas. In most circumstances involving the executive branch, committees can obtain the information they seek through voluntary requests or after issuing (but not yet seeking enforcement of) a subpoena.").

[143] *See id.* at 1114 (indicating that the presidential communications privilege "is a broader privilege that provides greater protection against disclosure").

[144] 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 17, at 498.

[145] 267 U.S. 87 (1925).

[146] *Id.* at 121.

authority.[147] That said, some have also raised doubts as to the efficacy of impeachment as a constraint on the President, arguing that it is "useless against a President . . . who grants controversial pardons in the very last hours of his tenure" as some Presidents have.[148] Were a President to be impeached in the House of Representatives for abusing the pardon power and subsequently convicted in the Senate, the remedy would be limited by the Constitution to his removal from office and "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States[.]"[149]

Constitutional Amendment

Finally, Congress can seek to amend the Constitution to clarify or constrain the President's clemency authority.[150] Resolutions have been introduced in the 116th Congress that would amend the Constitution to prohibit the President from granting a pardon to himself[151] or to family members and current or former members of his campaign or administration.[152] However, the requirements for successfully amending the Constitution are, by design, exceptionally stringent—amendments would need to be passed by a two-thirds vote of each House of Congress and ratified by three-fourths of the states.[153] Passing a constitutional amendment as a means of addressing unpopular or controversial pardon decisions accordingly may be difficult.

[147] *E.g.*, Kobil, *supra* note 9, at 597 n.182; Berger, *supra* note 49, at 188–89; Bayer, *supra* note 105, at 140–41; *see also* Boudin, *supra* note 78, at 16 (noting that Congress investigated whether President Andrew Johnson accepted money in exchange for pardons but did not include abuse of the pardon power as an eventual impeachment count); Man & Laksin, *supra* note 57, at 13 ("Escalating criticism of a president's exercise of the pardon power to a fight over impeachment would be an unprecedented step, but it is a step that exists in theory."); Editorial Board, *Pardoning Flynn and Manafort Would be Grounds for an Impeachment Investigation*, L.A. TIMES (Mar. 30, 2018), https://www.latimes.com/opinion/editorials/la-ed-trump-pardons-20180330-story.html (arguing that if President Trump granted pardons "in an attempt to silence potential witnesses against him" in course of Mueller investigation, an impeachment inquiry would be appropriate).

[148] Eckstein & Colby, *supra* note 58, at 101–02; *cf. Clemency Statistics*, U.S. DEP'T OF JUSTICE, *supra* note 75 (reflecting that some recent Presidents, including Presidents Bill Clinton and Barack Obama, have granted more requests for clemency during their final years in office than during prior years of their terms). In response to the contention that impeachment is "useless" once the President's term is over, one scholar has noted that impeachment may still be pursued after the President has left office "in order to strip him of his pension and entitlements" and that concern for the reputational effects of such an impeachment could still "weigh heavily on any executive contemplating . . . abuse," much as electoral accountability may provide a significant disincentive to grant controversial pardons during the President's term. Berger, *supra* note 49, at 184, 188–89; *see also* CRS Report R46013, *Impeachment and the Constitution*, by Jared P. Cole and Todd Garvey, "Impeachment After an Individual Leaves Office." An impeachment inquiry could also facilitate access to information on particular clemency decisions that might otherwise be limited by the "legislative purpose" requirement or executive privilege. *See* CRS Report R45983, *Congressional Access to Information in an Impeachment Investigation*, by Todd Garvey (noting that "the legislative purpose requirement appears to be substantially limited as a defense to a subpoena in an impeachment investigation," and "there are reasons to believe that a committee engaged in an impeachment investigation may be more likely to overcome a presidential assertion of the privilege than a committee engaged in a traditional legislative investigation").

[149] U.S. CONST. art. I, § 3, cl. 7. For more information on impeachment, see CRS Report R46013, *Impeachment and the Constitution*, by Jared P. Cole and Todd Garvey.

[150] U.S. CONST. art. V.

[151] H.R.J. Res. 13, 116th Cong. (2019).

[152] H.R.J. Res. 8, 116th Cong. (2019). Past proposed constitutional amendments also would have sought to prohibit preconviction and lame-duck pardons and to allow Congress to overrule pardon decisions, among other things. *See* H.R.J. Res. 22, 107th Cong. (2001); H.R.J. Res. 30, 104th Cong. (1995); S.J.Res. 241, 93rd Cong. (1974).

[153] *See* U.S. CONST. art. V.

Author Contact Information

Michael A. Foster
Legislative Attorney
[redacted]@crs.loc.gov, 7-....