

# FAKE NEWS: THE PRESIDENT HAS THE “ABSOLUTE RIGHT” TO PARDON HIMSELF

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*EDITORS NOTE: this paper was written prior to the Trump 2020 impeachment, such that it does not reflect recent events but still showcases important issues with regard to the presidential pardon power and provides a unique perspective and foreshadowing of current events.*

## INTRODUCTION

The President’s ability to pardon and grant reprieves is concretely established in the United States Constitution as set out in Article II, § 2.<sup>1</sup> What is not concretely established in the United States Constitution is whether the pardon power of the president extends to a self-pardon. The exercise of the presidential pardon power in the form of a self-pardon has been contemplated both by legal scholars and numerous presidential administrations.<sup>2</sup> Several presidential administrations starting with the Nixon administration have encountered questions regarding the legality of issuing a self-pardon to eliminate legal issues on the way out of office.<sup>3</sup> The answer as to the constitutionality of a presidential self-pardon is not explicitly clear, and has in recent history presented itself for some level of consideration. For example, President Clinton’s administration encountered major political, constitutional, legal, and institutional issues that were magnified under impeachment proceedings.<sup>4</sup> It is not out of the realm of possibilities that

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<sup>1</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>2</sup> See e.g., BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 40 (2012) (“A self-pardon would only happen in an extreme situation, but such situations are no less imaginable for being extreme. Shortly before President Nixon resigned, his lawyer advised him that he could pardon himself, and Nixon considered doing it. More recently, the legal travails of Presidents Reagan, Bush, Clinton, and Bush have led some commentators, congressmen, and citizens to broach the subject.”).

<sup>3</sup> See JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 70 (2009).

<sup>4</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 161 (David Gray

President Clinton and his legal staff discussed a presidential self-pardon, however, a senior White House attorney by the name of Charles Ruff explicitly stated that President Clinton would not grant a pardon to himself when asked in the context of his impeachment hearings.<sup>5</sup>

Fast forward approximately twenty years later to the days of the current presidential administration with Donald Trump as president.<sup>6</sup> A presidential self-pardon is still a very relevant safeguard in the back pocket of the Executive as a means of protecting them from themselves. While President Clinton's legal staff made it clear they would not be considering a self-pardon,<sup>7</sup> President Trump has made his stance on his ability to pardon himself clear as evidenced by his tweet dated June 4, 2018.<sup>8</sup> President Trump's opinion on the pardon power is as follows:

As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!<sup>9</sup>

The current president of the United States has also had his executive residency plagued with controversies, and this statement was made with regard to special counsel Robert Mueller's investigation into Russian interference in the presidential election of 2016.<sup>10</sup>

A presidential self-pardon would change history as we know it regardless of which president followed such a path and would likely lead to the Supreme Court questioning the legality of such

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Adler & Michael A. Genovese eds., 2002) [hereinafter THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY].

<sup>5</sup> See Robert Nida, et al., *The President as His Own Judge and Jury: A Legal Analysis Of The Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 198 (1999) [hereinafter Nida].

<sup>6</sup> Donald J. Trump:45<sup>th</sup> President of the United States, THE WHITE HOUSE, <https://www.whitehouse.gov/people/donald-j-trump/> (last visited Nov. 20, 2018).

<sup>7</sup> See Nida, *supra* note 5, at 198.

<sup>8</sup> See @realDonaldTrump, TWITTER (June 4, 2018, 7:35 AM), <https://twitter.com/realdonaldtrump/status/1003616210922147841?lang=en>.

<sup>9</sup> *Id.*

<sup>10</sup> See John Wagner, *Trump Says He Has 'Absolute Right' to Pardon Himself of Federal Crimes but Denies Any Wrongdoing*, WASH. POST (June 4, 2018), [https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1\\_story.html?utm\\_term=.913486b52e61](https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.913486b52e61).

a decision. There are numerous methods of Constitutional interpretation: the originalism approach; the textualism approach; the constructionist approach; the doctrinal approach; the structuralist approach; and several other less utilized approaches.<sup>11</sup> The issue of a presidential self-pardon would undoubtedly lend itself to different methods of interpretation because a self-pardon would subject the Supreme Court to unfamiliar ground and potential “gray area” as to resolution.<sup>12</sup> This paper analyzes the theoretical use of the presidential pardon power and the constitutionality of it extending to a self-pardon. Part I will discuss the pardon power and the Constitution including a look at the language used in the Constitution, English origins, and the development of the pardon power over time. Part II will examine the likelihood that a self-pardon would be unconstitutional given the intent of the Framers as to the pardon power, their doctrinal beliefs, and history and tradition related to executive pardon power. Part III will discuss the Clinton and Trump administrations and the controversies that led to the possible consideration of a self-pardon in conjunction with impeachment proceedings. Part IV will contemplate potential consequences and effects if a self-pardon under the executive branch was to be utilized including how the judicial branch might adjudicate this issue, how Congress could implement a check on the pardon power, and the historical and social impacts on society.

## I. THE PARDON POWER AND THE CONSTITUTION

### A. THE CONSTITUTION, ARTICLE II § 2

The United States Constitution vests executive power in the President of the United States.<sup>13</sup> Article II, § 2 of the United States Constitution gives the president the exclusive power to “grant reprieves and pardons for offenses against the United

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<sup>11</sup> See Brad Reid, *Fourteen Ways to Interpret the Constitution*, HUFF POST (Oct. 31, 2016), [https://www.huffpost.com/entry/fourteen-ways-to-interpre\\_b\\_12735744](https://www.huffpost.com/entry/fourteen-ways-to-interpre_b_12735744).

<sup>12</sup> “Gray area” is meant to convey that the Supreme Court could allow for a self-pardon but only under circumstances. Perhaps they could suggest conditions under which a presidential self-pardon can align with good policy implications, i.e., not a situation implicating serious wrongdoing or fraudulent/criminal activity.

<sup>13</sup> See U.S. CONST. art. II, §1, cl.1.

States, except in cases of impeachment.”<sup>14</sup> In addition to its appearance in the Constitution, the presidential pardon power has appeared in discussions in the Federalist Papers.<sup>15</sup> On its face, the language of Article II, § 2 leaves the president’s ability to grant pardons open for interpretation.<sup>16</sup> The language in Article II, § 2 is wholly silent as to a presidential self-pardon and we are left to wonder what its limits are.<sup>17</sup> Generally speaking, the public may not fully understand the intricacies of the president’s capabilities under the clemency power. Under the language set out in Article II, § 2, the president is able to grant a “pardon,” however, a full pardon or reprieve is just one option available.<sup>18</sup> In fact, clemency can be assumed in five different forms: a full pardon, a commutation, by remitting fines and forfeitures, granting a reprieve, and amnesty.<sup>19</sup>

A fully pardoned offender will “simply walk away from jail as if they had never been tried and sentenced.”<sup>20</sup> A pardon will normally follow a trial, conviction and sentencing;<sup>21</sup> a person can also be pardoned before formal charges have been brought against them.<sup>22</sup> A commutation is implemented to give an offender a lesser sentence, meaning the punishment is still in effect, just in a “reduced form.”<sup>23</sup> The president can also “remit fines and forfeitures” meaning he can essentially forgive or cancel monetary consequences.<sup>24</sup> Additionally, the president can grant a reprieve which does not prevent punishment but postpones it.<sup>25</sup>

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<sup>14</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>15</sup> See JULIE NOVKOV, THE SUPREME COURT’S POWER IN AMERICAN POLITICS: THE SUPREME COURT AND THE PRESIDENCY: STRUGGLES FOR SUPREMACY 360 (2013). See also THE FEDERALIST No. 74 (Alexander Hamilton) (Alexander Hamilton discussing his take on the pardon power stating, “The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason.”).

<sup>16</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 79. Of course, keeping in mind their inability to in the case of impeachment.

<sup>17</sup> *Id.*

<sup>18</sup> See CROUCH, *supra* note 3, at 20.

<sup>19</sup> *See id.*

<sup>20</sup> KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 5 (1989).

<sup>21</sup> *See id.*

<sup>22</sup> See e.g., DEAN MOORE, *supra* note 20, at 5 (President Ford pardoned President Nixon before any formal charges were brought against him). See also CROUCH, *supra* note 3, at 71 (President Ford fully pardoned President Nixon after the Watergate scandal).

<sup>23</sup> KATHLEEN DEAN MOORE, *supra* note 20, at 5.

<sup>24</sup> See CROUCH, *supra* note 3, at 20.

<sup>25</sup> See DEAN MOORE, *supra* note 20, at 5.

A reprieve will “postpone[] execution of the sentence for a specified period of time—until a pregnant death-row inmate’s child can be born, for example, or until a sick capital offender gets well enough for execution, or until all appeals are heard.”<sup>26</sup> The last form of clemency executives can grant is amnesty which is “typically granted to a group rather than an individual, is often given pre-conviction, and usually rests on the judgment that the public welfare is better served by ignoring a particular crime than by punishing for it.”<sup>27</sup> Much like a commutation, amnesty does not fully excuse the crime but serves more so to forget the crime.<sup>28</sup> The aforementioned acts of clemency all vary at the discretion of the president and are distinguished from each other by degree and procedure.<sup>29</sup> Presidential pardons are processed through the Office of the Pardon Attorney which is overseen by the Department of Justice.<sup>30</sup> Typically, applications for pardons are processed by the Pardon Attorney’s Office, however, a president is able to bypass this bureaucratic step and grant clemency on its own.<sup>31</sup>

### *B. HISTORY – ENGLISH ORIGINS*

In order to better understand pardons in the context of the United States Constitution it is helpful to have perspective from the Framers<sup>32</sup> and their knowledge in forming the executive pardon power. From a historical standpoint, it is well-known that not only the American pardon power, but American government originated from “its English royal counterpart.”<sup>33</sup> Dating back to the Norman Invasion of 1066, English monarchs

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<sup>26</sup> *Id.*

<sup>27</sup> CROUCH, *supra* note 3, at 20.

<sup>28</sup> *Id.*

<sup>29</sup> See DEAN MOORE, *supra* note 20, at 5.

<sup>30</sup> See CROUCH, *supra* note 3, at 21.

<sup>31</sup> *See id.*

<sup>32</sup> RICHARD B. MORRIS, THE FRAMING OF THE FEDERAL CONSTITUTION 6 (1986) (“In the summer of 1787, some 55 delegates met in convention in the State House in Philadelphia and devised a new national government, then loosely allied in a ‘league of friendship’ under the Articles of Confederation. The delegates sat almost daily for [] four months and argued out their ideas in long, often heated sessions behind closed doors. In mid-September they gave to their countrymen the final document, four pages of parchment setting forth a plan of union calculated ‘to secure the Blessings of Liberty to ourselves and our Posterity.’ This document was the Federal Constitution.”).

<sup>33</sup> *See* KALT, *supra* note 2, at 51.

had the power to pardon.<sup>34</sup> Self-pardons in England were not an issue given that the King could do no wrong,<sup>35</sup> however, the English Parliament eventually limited the pardon power of the King in the late seventeenth century.<sup>36</sup>

In 1678, English Parliament initiated the movement to limit the pardon power of the King in response to an episode involving the impeachment of the Earl of Danby (Thomas Osborne) who was a Lord High Treasurer of England under the King (King Charles II).<sup>37</sup> English Parliament began impeachment proceedings against the Earl of Danby for conspiring with France, however, it was King Charles II who was conspiring with the French while the Earl of Danby was merely acting on behalf of the King.<sup>38</sup> Parliament knew of the King's indiscretions and the best option they had was to impeach the Earl of Danby since King Charles was beyond the reach of legal remedies.<sup>39</sup> In March of 1679, King Charles issued a pardon for the Earl of Danby in order to hide the fact that he had been on the receiving end of bribes from the French and in order to spare himself the embarrassment of an investigation he would end speculation by issuing the pardon to Danby.<sup>40</sup> After King Charles issued the pardon to Danby, “[his] action[s] sparked a “constitutional confrontation” with Parliament, which had come to rely on the impeachment power to ensure proper governance.<sup>41</sup> If the King could foil impeachments, Parliament would have no means of controlling his ministers. A debate raged as to the legality of Charles's action.”<sup>42</sup> Critics of King Charles's actions lost this particular battle but won the war with the monarchy in 1701 by way of the Act of Settlement, where English Parliament limited the King's pardoning power by instituting the limitation of being unable to use a pardon to block impeachment proceedings.<sup>43</sup>

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<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 783 (1996) [hereinafter *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*].

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* at 783–84.

<sup>41</sup> See *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, *supra* note 36, at 784.

<sup>42</sup> *Id.* at 784.

<sup>43</sup> See *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, *supra* note 36, at 784.

While the King was still able to reappoint officials that were convicted by Parliament, moving forward he would be unable to (1) interfere with the impeachment process, and (2) hide his own indiscretions, thereby restricting his power to insulate himself.<sup>44</sup> Fast forwarding to colonial America, the pardon power was still as relevant then as it was in the seventeenth century. For example, (Pre-American Revolution) English governors and proprietors designated by the Crown had broad pardoning powers.<sup>45</sup> The English pardon power of the King and governors most likely helped shape and provide relevant background in the mind of the Framers when they were in the process of drafting the United States Constitution.

### *C. DEVELOPMENT AND USE OF PARDON POWER OVER TIME*

“For more than 200 years, presidents have often used their pardon powers aggressively, and sometimes in controversial ways.”<sup>46</sup> The United States’ first pardon was recognized when George Washington pardoned several participants from the Whiskey Rebellion.<sup>47</sup> This pardon came about in July of 1795 when he granted amnesty to those participants after they agreed to “swear their allegiance to the United States.”<sup>48</sup> President Washington was motivated by concerns involving the general public as well as concerns out of mercy.<sup>49</sup> Following in George Washington’s footsteps, his successors, including John Adams and Thomas Jefferson in some ways adopted his rationale when issuing pardons which has been implicitly extended to current

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<sup>44</sup> See *id.*

<sup>45</sup> See KALT, *supra* note 2, at 52.

<sup>46</sup> Kenneth T. Walsh, *A History of Presidential Pardons: Some Presidents Have Used Their Pardon Power Aggressively*, U.S. NEWS & WORLD REPORT (June 8, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-06-08/the-most-prominent-presidential-pardons-in-history>.

<sup>47</sup> See *id.* See also CROUCH, *supra* note 3, at 56.

<sup>48</sup> CROUCH, *supra* note 3, at 56.

<sup>49</sup> See, e.g., CROUCH, *supra* note 3, at 56 (“I shall always think it a sacred duty to exercise firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.”) (citing P.S. Ruckman Jr., *Executive Clemency in the United States: Origins, Development, and Analysis* (1900-1993), 27 *Presidential Studies Quarterly* 251, 253 (1997)).

times.<sup>50</sup>

Presidents that issued pardons Pre-Watergate granted pardons not for any significant gain, but did so in the better interest of the public or as an act of mercy (keeping with Washington's rationale).<sup>51</sup> President Ford's pardon of Richard Nixon significantly changed presidents' pardoning practices.<sup>52</sup> Many critics of the Nixon pardon as well as historians have vocalized their concerns over time. For example:

Gerald Ford adopted Washington's reconciliation rationale for what has probably been the most important and criticized presidential pardon in U.S. history – his granting in 1974 of a "full, free and absolute pardon" to his predecessor Richard Nixon "for all offenses against the United States." Ford was referring to the Watergate scandal, which caused Nixon to resign as the House moved closer to impeaching him. It was the first and only time that a president has received a pardon, and it caused a huge firestorm because Nixon was so unpopular.<sup>53</sup>

Post-Watergate pardons have been heavily influenced by factors outside of the United States Constitution: mainly mass media and public opinion.<sup>54</sup> Modern presidents understand that more than political factors are in play and that the stakes are increased when attention is focused on their pardoning decisions, therefore, fear of unfavorable approval ratings have given presidents Post-Watergate strong incentives to pardon less and less.<sup>55</sup> Further controversy regarding the pardon power was ignited in December of 1992 when President George H. W. Bush pardoned participants in the Iran-Contra Affair.<sup>56</sup> President George H.W. Bush was criticized for many reasons after issuing this pardon including: 1) he had a direct conflict of interest because he himself was involved in the Iran-Contra cover-up under the Reagan administration; 2) the pardon prevented an investigation; 3) the persons pardoned were people that lied to Congress and it sent a bad message; 4) it is speculated that those

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<sup>50</sup> See CROUCH, *supra* note 3, at 56.

<sup>51</sup> See *id.* at 60.

<sup>52</sup> See *id.*

<sup>53</sup> Walsh, *supra* note 46.

<sup>54</sup> See CROUCH, *supra* note 3, at 61.

<sup>55</sup> See *id.* at 61–62.

<sup>56</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 82.

involved in Iran-Contra warranted constitutional violations; 5) he did not follow the correct procedure; 6) an elitist message was portrayed that powerful people will not be punished; 7) it set poor precedent; 8) it undermined independent counsel and investigations; and 9) he left office surrounded by scandal.<sup>57</sup> This administration certainly explored the use of a self-pardon, but instead President George H. W. Bush took his chances of not being prosecuted.<sup>58</sup>

It is rather ironic that President Clinton was President George H. W. Bush’s successor and Clinton’s controversial and criticized use of pardon power rivaled not only his predecessor, but also President Nixon’s. Again, like his predecessor, Clinton gained media attention for several high-profile pardons issued during his presidential tenure.<sup>59</sup> Most notably his “eleventh-hour” pardons garnered extreme scrutiny and elicited controversy; especially because he was not keeping in line with Post-Watergate precedent of issuing a limited number of pardons.<sup>60</sup> A total of 456 pardons were issued including pardons granted to Patricia Hearst, Roger Clinton, Susan McDougal, and Leonard Peltier.<sup>61</sup> Arguably the most controversial eleventh-hour pardon was granted to Mark Rich, a white-collar fugitive who was involved in an illegal oil-pricing scheme.<sup>62</sup> Questions then arose as to the integrity of the administration including trading pardons for favors and contributions causing a political firestorm.<sup>63</sup> The Clinton administration is not the only presidential administration to raise legitimate questions of propriety and abuse,<sup>64</sup> but is one in recent history that invites questions regarding excessive abuse of executive discretion.

President Donald Trump has granted pardons to a total of seven individuals since 2017 according to the United States

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<sup>57</sup> See *id.* at 82–83.

<sup>58</sup> See Nida, *supra* note 5, at 216.

<sup>59</sup> Adler & Genovese *supra* note 4, at 84.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* at 84–85.

<sup>62</sup> See *id.* at 85 (“Rich hid in Switzerland to avoid U.S. prosecution. Rich’s former wife, a prominent Democratic fund-raiser, along with other well-known Democrats and officials from the Israeli government, lobbied Clinton, who, in granting the Rich pardon, circumvented the normal Justice Department procedures.”).

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 86.

Department of Justice.<sup>65</sup> While it is still early in his tenure as sitting President, he has had no shortage of inviting controversy, even extending to his pardon power and use. It has been noted that, “Trump’s pattern is that he appears to be pardoning supporters, celebrities or individuals whose cases caught his attention and captured his fancy because the president concluded they were wronged.”<sup>66</sup> With that in mind, it seems fitting that Trump’s first presidential pardon was granted to Joseph Arpaio.<sup>67</sup> Joseph Arpaio is a fervent supporter of President Trump and was convicted of criminal contempt when he ignored a court order to not detain workers he suspected were undocumented immigrants as an Arizona sheriff.<sup>68</sup> Who is next to be pardoned? While the options and applications are many, President Trump’s remarks have led to a short list speculated to include former Illinois governor Rod Blagojevich, Martha Stewart, and Muhammad Ali.<sup>69</sup> Only time will tell as to how he will utilize his pardon power, but I would speculate that his intended use of the presidential pardon power will spark debates and headlines much like President Nixon and President Clinton.<sup>70</sup> An important policy question could be raised as to President Trump’s ability to pardon individuals: What would it mean if President Trump were to pardon individuals implicated in the investigation of Special Counsel Mueller? If President Trump wanted to pardon an individual that was investigated by Special Counsel Mueller and that individual was found guilty as to charges concerning the Russia probe, we would be left with more questions than answers in many respects.

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<sup>65</sup> See *Clemency Statistics*, U.S. DEPT. OF JUST., <https://www.justice.gov/pardon/clemency-statistics> (last visited Nov. 21, 2018).

<sup>66</sup> Walsh, *supra* note 46.

<sup>67</sup> See Jane C. Timm, *Field Guide to President Donald Trump’s Pardons*, NBC NEWS (June 17, 2018, 9:00 AM), <https://www.nbcnews.com/politics/donald-trump/field-guide-president-donald-trump-s-pardons-n883691>.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> If President Trump’s track record thus far is any indication, it looks as though this may be one of the most controversial presidential administrations in our country’s history.

## II. POSSIBLE CONSTITUTIONAL INTERPRETATIONS

### A. *INTENT OF THE FRAMERS – DOCTRINAL VIEWS*<sup>71</sup>

“The framers were not doctrinaire theoreticians but practical men guided by experience.”<sup>72</sup> Their foundational views on government included that the best form of government was a republic for equal men.<sup>73</sup> The Framers were “deeply committed to the notion that power corrupts” and thus implemented a democracy with checks and balances.<sup>74</sup> In May of 1787, Congress met in Philadelphia to form what we now refer to as the Federal Convention where these ideals were instituted in the documents drafted and revised by these Framers such as, the Articles of Confederation and the United States Constitution.<sup>75</sup> Notable delegates of the Federal Convention include James, Madison, Alexander Hamilton, James Wilson, Gouverneur Morris, Charles Pinckney, and Edmund Randolph.<sup>76</sup> Some scholars have noted that the language used by delegates at the Convention hint that primary concerns included limiting political conflict, avoiding a

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<sup>71</sup> This note attempts to create a hybrid interpretation of Constitutional language by blending an Originalist and Dynamic/Living Constitutionalism view insofar as interpreting the language of Article II, § II, clause 1 of the Constitution via an Originalist interpretation by applying the Framers’ intent of this clause in modern times, because while the meaning of the text has not changed social attitudes have changed drastically. “Originalism is a theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of constitutional texts can be discerned from dictionaries, grammar books, and from other legal documents from which the text might be borrowed. It can also be inferred from the background legal events and public debate that gave rise to a constitutional provision.” Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONSTITUTION CTR., <https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation> (last visited Mar. 21, 2019). “Originalism is usually contrasted as a theory of constitutional interpretation with Living Constitutionalism. Living constitutionalists believe that the meaning of the constitutional text changes over time, as social attitudes change, even without the adoption of a formal constitutional amendment pursuant to Article V of the Constitution.” *Id.*

<sup>72</sup> MORRIS, *supra* note 32, at 24.

<sup>73</sup> *See id.* at 25.

<sup>74</sup> *See id.*

<sup>75</sup> *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 12 (1913).

<sup>76</sup> *See id.* at 196–99.

“disharmonious society,” and strengthening the bonds of union while securing a common interest in a government complete with checks and balances.<sup>77</sup> In designing the executive powers the delegates also considered the possibility of criminal presidents.<sup>78</sup> The exact intentions of the delegates from the Federal Convention will never be known, but scholars have attempted to interpret their intentions by considering the purpose of the Convention itself.<sup>79</sup> However, keep in mind one of the Framers’ main goals of the United States Constitution was to promote good policy and produce good consequences.<sup>80</sup>

### B. INTENT OF THE FRAMERS – PARDON POWER

As John Dickinson pointed out, experience and history guided the Framers after the Revolutionary War while drafting State constitutions.<sup>81</sup> Almost every state constitution during the American Revolution mentioned the pardon power by either permitting or forbidding pardons.<sup>82</sup> Many state constitutions during this time limited pardons, gave pardon power elsewhere, or eliminated it altogether.<sup>83</sup> “For example, the Georgia Constitution of 1777 strictly forbade the governor from issuing pardons. The Massachusetts Constitution of 1780 permitted pardons only after conviction. The Pennsylvania Constitution of 1776 and the New York Constitution of 1777 did not permit pardons in cases of treason and murder.”<sup>84</sup> The limitations set out in these new state documents clearly expressed the Framers’ concerns regarding abuse of executive power (most likely founded

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<sup>77</sup> See DAVID G. SMITH, THE CONVENTION AND THE CONSTITUTION 26–31 (1987).

<sup>78</sup> See KALT, *supra* note 2, at 12.

<sup>79</sup> See SMITH, *supra* note 77, at 31.

<sup>80</sup> See Steven G. Calabresi, *supra* note 71 (“The tenth and final purpose of the Constitution is aspirational and consequential. The Constitution itself describes its purposes aspirationally and consequentially in the Preamble. The Framers say the purposes of the Constitution include forming a more perfect Union, *establishing Justice, ensuring domestic tranquility*, providing for the common defense, and securing the Blessings of Liberty to ourselves and our posterity. The Constitution aspires to promote these ends so as to *produce good consequences*, and the Preamble describes the promotion of these ends as being a purpose of the document.”) (emphasis added).

<sup>81</sup> See MORRIS, *supra* note 32, at 24 (“Experience must be our only guide.”).

<sup>82</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 78; KALT, *supra* note 2, at 52 (After the Revolutionary War a number of states either restricted or eliminated pardons.).

<sup>83</sup> See KALT, *supra* note 2, at 78.

<sup>84</sup> *Id.*

in their English origins and recent history involving King Charles’ abuse of power).<sup>85</sup>

The Records of the Federal Convention indicate consideration and debate of the pardon power and potential issues with a self-pardon.<sup>86</sup> Edmond Randolph, a delegate at the Convention, was concerned that the president may be guilty of treason and the pardon power could provide too much insulation from prosecution by the executive.<sup>87</sup> Delegate James Wilson, however, reiterated that the pardon power was best delegated to the president and that if the president was “a party to the guilt he can be impeached and prosecuted.”<sup>88</sup> Since the language of Article II, § II includes “except in cases of impeachment[,]” does that mean the Framers never intended for the executive to utilize a self-pardon?<sup>89</sup> If a president has been implicated to have done something so egregious as to warrant impeachment proceedings, utilizing a self-pardon could show a finding of guilt on the part of the executive and imply “treasonous” actions and executive wrongdoing. The language of Article II, § II does not affirmatively address the inability to grant a presidential self-pardon, nor does it affirmatively allow for a presidential self-pardon.<sup>90</sup> While we will never know the exact intention as to the Framers in this regard, a strong argument can be made that it would be a gross misuse of executive power to issue a self-pardon given the doctrinal views of the Framers in general and their old English Origins. For example, by implementing a system with checks and balances the Framers formed a democratic government so that one branch would not over-extend its power. Corruption, and more specifically treason in the better interest of good policy, were likely foundational principles sought to be avoided as discussed by Alexander Hamilton in The Federalist Paper No. 74. He stated:

Humanity and *good policy* conspire to dictate that the benign prerogative of pardoning should be as little possible fettered or

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<sup>85</sup> *See id.*

<sup>86</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 626 (Max Farrand ed., 1911).

<sup>87</sup> *See id.* An ideological issue shown to have been a topic of debate for English Parliament in the 17<sup>th</sup> century. *See supra* Part I, Section B.

<sup>88</sup> *Id.*

<sup>89</sup> *See U.S. CONST. art. I, § 2.*

<sup>90</sup> *See U.S. CONST. art. I, § 2.*

embarrassed. The criminal code of every country partakes so much necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.<sup>91</sup>

Hamilton went on in The Federalist Paper No. 74 to discuss the pardon power and the executive and their relationship in situations of treason.<sup>92</sup> One interpretation of intent in relation to Alexander Hamilton's discussion of the pardon power is that because his discussion focuses on good policy and treason, there was potentially no need to explicitly prohibit executive self-pardons because it is simply not good policy. There was no affirmative contemplation of a self-pardon by any of the delegates attending the Federal Convention or by Alexander Hamilton in either the Records or in the Federalist Papers.

Joseph Story<sup>93</sup> explored the Framers' considerations of the pardon power in his *Commentaries on the Constitution of the United States*. A portion of his commentary on the pardon power relates to the Framers' struggles over which branch should hold the pardon power and in what branch the pardon power the safest.<sup>94</sup> After discussing which branch was best to hold the power he noted that in cases of impeachment, "the President should not have the power of preventing a thorough investigation of their conduct, or of securing them against the disgrace of a public conviction by impeachment, if they should deserve it."<sup>95</sup> "The Constitution has, therefore, wisely interposed this check upon his power . . ."<sup>96</sup> Here, we can take away two important things from Justice Story. The first: The Framers built in a check on the President's pardoning power so as to not let the president circumvent the legal consequences of his actions in cases of

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<sup>91</sup> THE FEDERALIST No. 74 (Alexander Hamilton) (emphasis added).

<sup>92</sup> *See id.*

<sup>93</sup> See Joseph Story, OYEZ, [https://www.oyez.org/justices/joseph\\_story](https://www.oyez.org/justices/joseph_story) (last visited Apr. 7, 2019) ("President James Madison nominated Story for the Supreme Court of the United States on November 15th, 1811. He was confirmed on November 18th and took his judicial oath on February 3rd. At only 32 years old, Story was one of the youngest justices to ever sit on the Supreme Court . . . Story was also an accomplished writer. Arguably his most famous written works were his nine *Commentaries* on the law, which advocated economic liberty and expressed his support for a strong national government.").

<sup>94</sup> See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 327–337 (1891).

<sup>95</sup> *See id.* at 336.

<sup>96</sup> *See id.*

wrongdoing. The second: He attempts to relate this check on the pardon power back to the Framers’ English origins.<sup>97</sup> If the Framers limited a president’s pardoning capability by building in an impeachment exception, it is a strong possibility that (although it was never affirmatively stated) they certainly never intended for a president to have the capability to pardon himself because he would be “unchecked” in his use of power. The English origins of the Framers and the Federal Convention point to the concerns that one person or branch should not hold an overabundance of power, hence, the importance of separation of powers by creating three branches of government. Allowing a president to execute a self-pardon, goes against one of the core principles of the Framers – good policy, and that much power without a check could easily give rise to political conflict and corruption.

### C. A LOOK AT HISTORY AND TRADITION

An argument can be made that both history and tradition point to the Framers never intending for a president to have the ability to pardon himself. As discussed above,<sup>98</sup> in 1678 English Parliament moved to limit the King’s ability to insulate himself by limiting his ability to pardon individuals to block impeachment proceedings. Justice Story drew the conclusion that this limit on monarchical power back in the 17<sup>th</sup> century likely extended to the Framers’ minds when drafting their own pardon power.<sup>99</sup> This helps to highlight the importance that text isn’t the only consideration since, if anything, the text of Article II, § 2, clause 1 never resolves the issue of a self-pardon.<sup>100</sup> One argument and the one this paper adopts, is that since the text did not affirmatively give the president the ability to execute a self-pardon and because such a maneuver was not within the intent of the Framers, to allow it would leave an unchecked use of executive power. Moreover, the first pardons in this country issued by George Washington were granted to show mercy in times of conflict and to strengthen the bonds of union.<sup>101</sup> Again,

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<sup>97</sup> *Id.* (“In England, (from which this exception was probably borrowed), no pardon can be pleaded in bar of an impeachment.”).

<sup>98</sup> See *supra* Part I, Section B.

<sup>99</sup> See STORY, *supra* note 94 at 337.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

drawing attention to the Framers' intent, the purpose for including a pardon power in the Constitution was to ensure fairness and good policy. The history of the contemplation of the pardon power lends itself to the side of caution in terms of a self-pardon by a sitting president. Tradition also points to an argument against the ability to execute a presidential self-pardon. Neither President Nixon nor President Clinton pardoned themselves even though they knew they had engaged in questionable and potentially illegal practices.<sup>102</sup> The Watergate scandal under President Nixon's administration certainly was an incident most likely to warrant a self-pardon given the certainty of impeachment proceedings.<sup>103</sup> A self-pardon ended up being a moot point for Nixon since he resigned and was subsequently pardoned by President Gerald Ford.<sup>104</sup> Additionally, President Clinton invited conversations about a self-pardon due to his involvement in multiple scandals both before and during his presidential tenure.<sup>105</sup> Most importantly, neither president ever actually pardoned themselves. Therefore, history and tradition would suggest a strong case for not utilizing a self-pardon as president when faced with a strong reality of criminal prosecution.

### III. THE CONTROVERSY PLAGUED PRESIDENTIAL ADMINISTRATIONS

#### A. CLINTON ADMINISTRATION

The nation was afforded real insights into the impeachment process during the years of the Clinton Administration as President Clinton became only the second president to be impeached.<sup>106</sup> He was formally impeached by the House of Representatives on December 19, 1988, on two charges: obstruction of justice and perjury.<sup>107</sup> Two months later, President Clinton was acquitted of all charges (February 12, 1999) by the

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<sup>102</sup> *Id.*

<sup>103</sup> See *Watergate Scandal*, HISTORY (Oct. 29, 2009), <https://www.history.com/topics/1970s/watergate>.

<sup>104</sup> *See id.*

<sup>105</sup> FA

<sup>106</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 160.

<sup>107</sup> *See id.*

Senate.<sup>108</sup> At the time, there was “no shortage of analyses about the president’s behavior and the effort to remove him that it spawned.”<sup>109</sup> The events that led to President Clinton’s formal impeachment arose from alleged perjury when he was testifying to investigators as to his inappropriate, sexual relationship with Monica Lewinsky and his alleged attempts to encourage White House staffers to give misleading testimony and withhold information about their relationship.<sup>110</sup> According to Lewinsky, the sexual affair with the President started a few months after working in the White House and their relationship lasted for over a year.<sup>111</sup> What put President Clinton in the so-called “hot seat” was his alleged obstruction of justice which included specific allegations that he encouraged Monica Lewinsky and Oval Office secretary Betty Currie “to give false testimony in a sexual harassment lawsuit against him, that he allowed his attorney to make false and misleading statements to a federal judge in the harassment suit, and that he lied to aides about his relationship with Lewinsky” with knowledge that the aides would likely repeat the lies in front of a federal grand jury.<sup>112</sup> The implications and arguments surrounding President Clinton’s conduct were raised under impeachable offenses and obstruction of justice.<sup>113</sup> As previously discussed, Clinton also issued a number of “eleventh hour” pardons.<sup>114</sup> It has been argued by scholars that President Clinton’s exercise of executive power was expansive, abusive, and aggressive.<sup>115</sup> For example, as indicated by Mark Rozell, “Clinton’s invocation of executive privilege on no less than six occasions before his substantive abuse of it in the Lewinsky scandal revealed a penchant for secrecy.”<sup>116</sup> Even

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<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

<sup>110</sup> See *id.*; see also Tara Law, *Bill Clinton Was Impeached 20 Years Ago. Here’s How the Process Actually Works*, TIME (Dec. 18, 2018), <http://time.com/5477435/impeachment-clinton/>.

<sup>111</sup> See Marjorie Cohn, *The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization*, 102 W. VA. L. REV. 67 (1999).

<sup>112</sup> Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1305–06 (2018).

<sup>113</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 161.

<sup>114</sup> See *supra* Part I, Subsection C.

<sup>115</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 177.

<sup>116</sup> See *id.*

though some of President Clinton's pardons were not as historically significant as Gerald Ford's pardon of Richard Nixon, his pardons issued to FALN<sup>117</sup> members, lack of formality with regard to the pardon process, and broad claim of immunity represented his over extension of executive power.<sup>118</sup>

After the Watergate scandal, Congress implemented the independent counsel in 1978 to allow the attorney general to request a special division of the Court of Appeals for the District of Columbia to appoint an individual counsel contingent upon the AG's credible and specific evidence of wrongdoing by members of the executive branch.<sup>119</sup> Independent counsel was implemented during President Bill Clinton's tenure as president under Attorney General Janet Reno in what is now known as the "Whitewater" investigation.<sup>120</sup> Three different investigators filled the position of independent counsel over a six year period over an inquiry that "was launched in 1994 to investigate the Clintons' role in an Arkansas real estate venture dating to the 1970s."<sup>121</sup> Kenneth Starr's independent counsel investigation expanded the scope of the investigation itself from including not only Whitewater and Madison Loan but also the Monica Lewinsky scandal.<sup>122</sup>

The events that gave rise to the Whitewater investigation take us back to 1978, when Bill Clinton was serving as Arkansas's attorney general and Hillary Clinton was working in private practice.<sup>123</sup> To help supplement Bill's government salary and Hillary's earnings as an attorney they began scouting opportunities for investment income, taking into account the instability of working in politics and their growing family.<sup>124</sup> It was during that time that Bill and Hillary started the

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<sup>117</sup> FALN is commonly known as Fuerzas Armadas de Liberación Nacional, a Puerto Rican terrorist group. See Laura Palacios, *The Presidential Pardon Power: Interpreting its Scope and Enacting an Effective Solution to Limit Its Potential for Abuse*, 40 T. JEFFERSON L. REV. 209, 224 (2018).

<sup>118</sup> See THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY, *supra* note 4, at 177.

<sup>119</sup> See *id.* at 90.

<sup>120</sup> See *id.*

<sup>121</sup> Peter Dizikes, *Whitewater Probe Clears Clintons of Criminal Wrongdoing*, ABC NEWS, <https://abcnews.go.com/Politics/story?id=122883&page=1> (last visited Apr. 7, 2019).

<sup>122</sup> See *id.*

<sup>123</sup> See Dylan Matthews, *Whitewater, Explained for People Who Don't Remember the Clinton Presidency*, VOX (Apr. 13, 2015), <https://www.vox.com/2015/4/13/8397309/hillary-clinton-whitewater>.

<sup>124</sup> See *id.*

Whitewater Development Corporation with James and Susan McDougal, where they acquired 230 acres of riverfront land to sell as lots for vacation homes.<sup>125</sup> Essentially, Jim McDougal, arranged a deal where the Clintons could profit from the home sales but did not have to pay anything upfront on the investment.<sup>126</sup> “The land was purchased for \$203,000, and paid for by a \$180,000 loan on which the Clintons and McDougals were jointly liable, plus a second loan McDougal took out for the down payment.”<sup>127</sup> The project was a failure from multiple standpoints: the location; vulnerability to flooding; interest rates were climbing; and vacation homes became unaffordable for many families.<sup>128</sup> Aside from the project failing, Jim McDougal made matters worse due to his fraudulent, criminal activity surrounding his investments thereby implicating Whitewater properties.<sup>129</sup> Prior to the Whitewater Development, McDougal bought a small savings and loan association and defrauded both the association and a small-business investment firm to the tune of at least three million dollars.<sup>130</sup> A former employee of the investment firm claimed that the Clintons were in on the conspiracy due to their relationship in the Whitewater Development.<sup>131</sup> Six years of investigating into Whitewater uncovered real wrongdoing by fifteen people, including Jim and Susan McDougal.<sup>132</sup> As far as the results of the Whitewater investigation in regard to the Clintons? The Clintons were cleared of any criminal wrongdoing by an independent counsel report stating that “neither the president nor Mrs. Clinton intentionally violated the law in the botched Whitewater real

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<sup>125</sup> *See id.*

<sup>126</sup> *See id.* (Jim McDougal was a real estate entrepreneur and old friend of President Clinton).

<sup>127</sup> *Id.*

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See Dylan Matthews, supra* note 123.

<sup>131</sup> *See id.* (“Hale alleged that Clinton pressured him to issue a fraudulent \$300,000 loan to Susan McDougal, money that Hale claimed had been used in part to shore up Whitewater. Other allegations swirled about the Clintons and Madison, including claims that McDougal used Madison funds to pay off Bill’s gubernatorial campaign debts in 1985, and that Bill appointed a friendly state bank regulator to protect McDougal. McDougal himself, after the fraud conviction, turned against the Clintons, alleging that they were in on his schemes.”).

<sup>132</sup> *See id.* (The McDougal’s were convicted of fraud.).

estate deal.”<sup>133</sup> As noted above, President Bill Clinton survived impeachment proceedings and a news-story filled residency to make his exit from the Executive Office just as controversial.<sup>134</sup>

### B. THE TRUMP ADMINISTRATION

No presidential administration will make it free and clear of controversy; it’s the inherent nature of our partisan democracy. However, the Trump administration has been swimming in controversy since its inception and continues to be a topic of conversation comparable to the likes of both the Nixon and Clinton administrations. One issue in general seems to be the overhanging plague of the Trump administration: the presidential election itself. “Throughout the confusion of Donald Trump’s campaign and the chaotic events of his early days in the White House, one controversy has clung to the Trump team like glue: Russia.”<sup>135</sup> Russian hackers allegedly stole information in relation to his rival Hillary Clinton’s democratic campaign and passed the information over to WikiLeaks with the intention to undermine her and sabotage her campaign.<sup>136</sup> The release of the Clinton information prompted not only congressional committees to investigate the matter, but also prompted the FBI, under then-director James Comey, to initiate their own investigation.<sup>137</sup> What President Trump did next led to speculation of a cover-up: he fired Director Comey.<sup>138</sup> His reason for firing Comey -- “[t]his Russia thing.”<sup>139</sup> The Department of Justice then appointed ex-FBI director Robert Mueller as special counsel to investigate further into the matter.<sup>140</sup>

Until recently, Special Counsel Mueller had been investigating Russian involvement in the 2016 presidential election and the “alleged collusion” between Russian officials and President Trump’s campaign.<sup>141</sup> Mueller’s investigation has led to charges

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<sup>133</sup> Peter Dizikes, *supra* note 121.

<sup>134</sup> See *supra* Part I, Section C.

<sup>135</sup> *Russia: The ‘Cloud’ Over the Trump White House*, BBC News (Sept. 14, 2018), <https://www.bbc.com/news/world-us-canada-38966846>.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> See Kaitlyn Schallhorn, *What is the Mueller Report? Everything You Need to Know About the Russia Investigation*, FOX NEWS, <https://www.foxnews.com/politics/what-is-the-mueller-report-everything-to-know-about-the-russia>.

for several associates of President Trump, although none of the charges that have been filed thus far are directly related to any misconduct by the president’s campaign.<sup>142</sup> Mueller has been and continues to be silent as to the investigation, but the media has been reporting on investigations of President Trump for “possible obstruction of justice,” in regards to the firing of Mr. Comey and President Trump’s involvement in the resignation of his National Security Adviser, Michael Flynn.<sup>143</sup> Michael Flynn resigned his position in February of 2018 “after failing to reveal the extent of his contacts with Sergei Kislyak, the Russian ambassador to Washington.”<sup>144</sup> In December, he pleaded guilty to making false statements to the FBI about his meetings with Mr. Kislyak.”<sup>145</sup> Flynn hasn’t been the only Trump Administration wound. At the time the election scandal was beginning to come to light, Paul Manafort (Trump’s campaign manager) was accused of accepting a large amount of money for representing “Russian interests in Ukraine and US, including dealings with an oligarch with close ties to Russian President Vladimir Putin.”<sup>146</sup> Since Special Counsel Mueller began his investigation, he has convicted or secured guilty pleas from a total of three companies and thirty-four individuals.<sup>147</sup> On March 22, 2019, Special Counsel Mueller concluded his nearly two year probe into potential collusion between President Donald Trump, his campaign, and Russia, and submitted his report to Attorney General William Barr.<sup>148</sup>

The highly-anticipated details of Special Counsel Robert Mueller’s investigation into Russian involvement in the 2016 presidential election [was] released [] in Attorney General William Barr’s letter written to Capitol Hill lawmakers. The four-page letter

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investigation (last updated Mar. 24, 2019).

<sup>142</sup> See *id.*

<sup>143</sup> See *Russia: The ‘Cloud’ Over the Trump White House*, *supra* note 135 (Michael Flynn being one of the more high-profile associates of President Trump).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (Paul Manafort being one of the other extremely high-profile associates under the microscope).

<sup>147</sup> See Ryan Teague Beckwith, *Here Are All of the Indictments, Guilty Pleas and Convictions From Robert Mueller’s Investigation*, TIME (Mar. 22, 2019), <http://time.com/5556331/mueller-investigation-indictments-guilty-pleas/> (individuals that include top advisers to President Trump, and Russian hackers and spies.).

<sup>148</sup> See *id.*

summarized the “principal conclusions” of the report, which stated definitively that Mueller did not establish evidence that President Trump’s team or any associates of the Trump campaign had conspired with Russia to sway the 2016 election. The specific contents of the report have not yet been divulged, but a senior Department of Justice official told Fox News that Mueller is “not recommending any further indictments.” It’s not clear how much, if any, of the report will be made public or provided to Congress.<sup>149</sup>

At this point in time, a redacted copy of Mueller Report has been released by the Department of Justice and the report “is nearly 400 pages and covers subjects ranging from questions about Russian interference in the 2016 US presidential election to whether President Donald Trump obstructed justice.”<sup>150</sup>

Aside from the Russia investigation, the Trump Administration has invited interesting conversation in other respects. The Stormy Daniels Affair continues to be a controversy troubling the Trump Administration and continues to affect the Administration’s efforts in rehabilitating the President’s image. Adult film star Stephanie Clifford (Stormy Daniels), made waves when she came forward in 2018 alleging that she and Trump had an affair back in 2006 after he had married Melania Trump and she gave birth to their son.<sup>151</sup>

President Trump’s former personal lawyer, Michael Cohen, arranged the nondisclosure agreement and paid Daniels \$130,000. He admitted in federal court that ‘in coordination and at the direction of a candidate for federal office,’ he kept information that would have harmed Trump from becoming public during the 2016 election cycle. He has since said that the candidate was Trump.<sup>152</sup>

President Trump denied having an affair with Stormy Daniels, and she has since filed a lawsuit against President Donald Trump over a non-disparagement agreement.<sup>153</sup> The goal of the lawsuit was to nullify the \$130,000 agreement that kept her from

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<sup>149</sup> Kaitlyn Schallhorn, *supra* note 141.

<sup>150</sup> *Read and Search the Full Mueller Report*, CNN (Apr. 18, 2019), <https://www.cnn.com/2019/04/18/politics/full-mueller-report-pdf/index.html> (the Report itself is available online).

<sup>151</sup> See Sara Sidner & Kate Sullivan, *Judge Tosses Stormy Daniels’ Lawsuit Against Trump Over Hush Money Agreement*, CNN (Mar. 7, 2019), <https://www.cnn.com/2019/03/07/politics/stormy-daniels-trump-hush-money/index.html>.

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

speaking publicly about her allegations of an affair with Trump.<sup>154</sup> It seems as though more and more controversial discoveries come to light in the context of Trump administration – one news story invites another.

Since the revelation of the Stormy Daniels affair, Michael Cohen, Trump’s personal attorney has been sentenced to three years in prison.<sup>155</sup> In December of 2018, Michael Cohen was sentenced to three years in prison for multiple crimes including: arranging payments during the presidential election to silence women who claimed affairs with Trump and campaign-finance violations.<sup>156</sup> “Cohen’s sentence is the longest imposed to date on anyone connected to the President or stemming from special counsel Robert Mueller’s investigation into Russian interference in the election -- a probe that has consumed much of Trump’s presidency and is poised to continue into the coming year.”<sup>157</sup> In February of 2019 Michael Cohen testified in front of the House Committee on Oversight and Reform where he offered details as to his time as personal attorney for President Trump.<sup>158</sup> In his testimony, Cohen was blunt as to his opinions on his former friend and boss, where he referred to Trump “as a con man, a cheat and a racist.”<sup>159</sup> Cohen also referred to himself as President Trump’s “fixer” and elaborated on how Trump directed him to lie about hush money payments made to Stormy Daniels.<sup>160</sup> Additionally, Cohen implicated the involvement of Trump’s son, Donald Trump Jr., and the chief financial officer of Trump’s company, Allen Weisselberg, in arranging those payments.<sup>161</sup> In this testimony, Cohen also sparked more life into the Russia controversy and raised questions as to Trump’s involvement in the election.<sup>162</sup> Specifically, Cohen implicated in his testimony

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<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*; see also Erica Orden et al., *Michael Cohen Sentenced to Three Years in Prison After Admitting He Covered Up Trump’s “Dirty Deeds”*, CNN (Dec. 12, 2018), <https://www.cnn.com/2018/12/12/politics/michael-cohen-sentencing/index.html>.

<sup>157</sup> Erica Orden et al., *supra* note 156.

<sup>158</sup> See Michael Tackett, *Five Takeaways From Cohen’s Testimony to Congress*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/politics/cohen-testimony.html>.

<sup>159</sup> *Id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

that Trump was aware of negotiations regarding building a Trump Tower in Moscow throughout his presidential campaign and lied about it.<sup>163</sup> Importantly, Mr. Cohen said that President Trump never explicitly instructed him to lie about the Moscow negotiations which raised more questions for Robert Mueller's investigation. "Mr. Cohen offered just enough strands of information, though, to keep the Russia issue very much alive, and to invite additional scrutiny from congressional Democrats, possibly even involving the president's children."<sup>164</sup> What does this all mean? Impeachment has been certainly a topic of conversation. Impeachment of President Trump has gained more traction since the 2018 midterms when Democrats regained control of the House of Representatives with a noteworthy majority, however, Speaker of the House Nancy Pelosi has made her attitude clear on impeaching the current president.<sup>165</sup> Pelosi "does not support impeaching Trump unless the reasons are overwhelming and bipartisan."<sup>166</sup> For impeachment proceedings to succeed the House would need to bring charges against the president contingent on a majority vote, after which the case would be submitted to the Senate where they would need a two-thirds majority vote for the president to be ousted from his office.<sup>167</sup> Since the results of the Mueller report have been released, and as far as the contents of Attorney General Barr's report to Congress, there is nothing in the report that leads to President Trump being guilty of "collusion." The alleged lack of evidence of wrongdoing in the Mueller Report could mean that impeachment really is not that strong of a possibility at this point, and Trump could truly contemplate the use of a self-pardon, if for some reason, criminal wrongdoing was to be uncovered.

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<sup>163</sup> *See id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See* Oliver Laughland, *James Comey Says He Hopes Trump Will Not Be Impeached After Mueller Report*, THE GUARDIAN (Mar. 22, 2019), <https://www.theguardian.com/us-news/2019/mar/22/james-comey-oped-trump-impeached-mueller>.

<sup>166</sup> *Id.*

<sup>167</sup> *See* MacKenzie Sigalos & Kyle Walsh, *How to Impeach the President of the United States*, CNBC (July 5, 2018), <https://www.cnbc.com/2018/06/28/impeach-president-united-states.html> [hereinafter Sigalos & Walsh].

#### IV. POTENTIAL CONSEQUENCES AND EFFECTS

Article II, § IV of the United States Constitution states: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, *Treason, Bribery, or other high Crimes and Misdemeanors.*”<sup>168</sup> Unless and until the results of Special Counsel Mueller’s investigation into Russian interference indicate any criminal wrongdoing by President Trump himself during the presidential election of 2016,<sup>169</sup> there likely is not an avenue for the House to pursue well-founded impeachment proceedings. If, however, there arises an instance either through Mueller’s investigation or another investigation for any other potential “high crimes and misdemeanors” that might have been or still could be committed by any officials currently included in the executive branch, the United States could be subject to the phenomenon of President Trump issuing pardons in several forms. He could either grant pardons to anyone implicated of any criminal wrongdoing that could potentially circle back to him, or he could grant a pardon to himself.<sup>170</sup> If President Trump is not impeached and he moves to invoke a self-pardon for any reason, what would that mean? Since a presidential self-pardon has not yet been invoked by a sitting executive we can only speculate as to how the judiciary would decide this issue, how Congress would react, and how it could affect policy and society as a whole. Next, this article speculates as to how a self-pardon *could* be interpreted by the United States Supreme Court, how Congress might react, and the potential social ramifications of such actions.

##### A. JUDICIAL ACTION: CRAWFORD V. WASHINGTON<sup>171</sup>

Since no president in United States history has attempted to issue a pardon to himself this would present an issue of first impression for the United States Supreme Court to decide.<sup>172</sup> There is a possibility that the Supreme Court would avoid

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<sup>168</sup> U.S. CONST. art. II, § II (emphasis added).

<sup>169</sup> Or any of President Trump’s associates, advisors, etc.

<sup>170</sup> President Trump has already made his stance on the ability to pardon himself clear. *See* @realDonaldTrump, TWITTER (June 4, 2018, 7:35 AM), <https://twitter.com/realdonaldtrump/status/1003616210922147841?lang=en>

<sup>171</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>172</sup> *See* Nida, *supra* note 5, at 220.

deciding this issue on the basis of it being a political question.<sup>173</sup> The current makeup of the Supreme Court raises an interesting question as well. Two of the nine Supreme Court Justices, Associate Justice Neil Gorsuch and Associate Justice Brett Kavanaugh, were nominated by President Trump.<sup>174</sup> With the confirmations of these two Associate Justices under Trump's tenure, should they recuse themselves? While it is unlikely that they ever would, it still is something to consider along with the growing difference of ideological views of the remaining Justices of the Supreme Court; and in particular their stances on interpreting Constitutional language.<sup>175</sup> If the Supreme Court were to decide to hear such a case they could adopt Justice Scalia's approach to Constitutional, textual ambiguities.<sup>176</sup> While there are many avenues the Supreme Court could pursue to decide this issue, Justice Scalia set out a method of Constitutional interpretation in the case of *Crawford v. Washington* that could be a useful guide for the current Supreme Court to consider.

In 2004, the Supreme Court of the United States had to resolve an issue that presented itself in terms of the language of the Confrontation Clause contained in the Sixth Amendment.<sup>177</sup> The issue presented to the Court was whether the petitioner's inability to cross-examine his wife, who had made a tape-recorded statement to the police, violated the petitioner's Sixth Amendment guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the

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<sup>173</sup> See *Political Question Doctrine*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/political\\_questionDoctrine](https://www.law.cornell.edu/wex/political_questionDoctrine) (last visited Apr. 11, 2019) ("Federal courts will refuse to hear a case if they find that it presents a political question. This doctrine refers to the idea that an issue is so politically charged that federal courts, which are typically viewed as the apolitical branch of government, should not hear the issue. The doctrine is also referred to as the justiciability doctrine or the nonjusticiability doctrine.").

<sup>174</sup> See *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 11, 2019).

<sup>175</sup> See Ephrat Livni, *The Divided US Supreme Court is in Unanimous Agreement on One Thing*, QUARTZ (Nov. 12, 2018), <https://qz.com/1460296/the-divided-us-supreme-court-completely-agrees-on-one-thing/> ("The US Supreme Court is deeply ideologically divided, according to the general consensus about the current bench.").

<sup>176</sup> See *Antonin Scalia*, OYEZ, [https://www.oyez.org/justices/antonin\\_scalia](https://www.oyez.org/justices/antonin_scalia) (last visited Apr. 10, 2019) ("Justice Scalia was an originalist in that he interprets the U.S. Constitution in accordance with the meanings and intentions that were present when it was first adopted.").

<sup>177</sup> See *Crawford*, 541 U.S. at 38.

witnesses against him.”<sup>178</sup> The Supreme Court answered this question in an opinion delivered by Justice Scalia.<sup>179</sup> Justice Scalia noted that the text of the Constitution alone did not resolve the issue and therefore the Court had to take a look at the historical background of the Confrontation Clause to understand its meaning.<sup>180</sup> The opinion first discussed that the phrase “witnesses against” contained in the Sixth Amendment could be interpreted either to mean the actual persons testifying at trial, persons whose statements are given at trial, or “something in-between.”<sup>181</sup> The Court then looked at the history of the clause itself starting with the Founders’ conceptual knowledge of English common law.<sup>182</sup> A look further into English common law revealed that traditionally, civil and criminal trials were conducted in different ways; criminal trials were comprised of live testimony and adversarial testing in live court while civil trials consisted of private examination by judges.<sup>183</sup> The opinion then addresses the evolution of English law through the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> centuries, and that the English courts frequently questioned the admissibility of an unavailable witness’s pre-trial testimony and whether the defendant had a prior opportunity to cross-examine them.<sup>184</sup>

Justice Scalia then proceeded to go into the history of 18<sup>th</sup> century Colonial America to show that those courts also encountered questionable examination practices.<sup>185</sup> “Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation.”<sup>186</sup> The opinion then continues a discussion of 18<sup>th</sup> century decisions and the courts grappling with confrontation issues. Ultimately, Justice Scalia came to the conclusion that “history supports two inferences about the meaning of the *Sixth Amendment*.”<sup>187</sup> The first point the Court articulated was that:

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<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See id.* at 42–43.

<sup>181</sup> *Id.* at 43.

<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See id.* at 45–48.

<sup>185</sup> *See id.* at 48.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 50.

[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.<sup>188</sup>

As such, the Court looked to the text of the clause and focused on the Framers intentions and the likelihood that they did not intend for *ex parte* testimony to be admissible.<sup>189</sup> The second point the Court articulated was that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."<sup>190</sup> The Court expanded on this point by addressing the lack of exceptions contained in the text and that the Sixth Amendment incorporates the limitations of an unavailable witness' testimony at trial.<sup>191</sup> Additionally, the Court noted that "[w]e do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements."<sup>192</sup> Ultimately, the opinion continues to compare the Framers intent, case law, and other interpretations to help come to a conclusion as to the interpretation of the Confrontation Clause. An important takeaway from Justice Scalia and this opinion is the thorough look at the history behind the text of the Confrontation Clause and the Framers intent as to this particular clause. Justice Scalia's preference for interpreting Constitutional language is potentially one guide for how the United States Supreme Court could interpret the scope of the executive's ability to grant pardons.

### *B. CONGRESSIONAL ACTION*

Article I of the United States Constitution explicitly states the

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<sup>188</sup> *Id.*

<sup>189</sup> See *id.* at 51.

<sup>190</sup> *Id.* at 53–54.

<sup>191</sup> See *id.* at 54–55.

<sup>192</sup> *Id.* at 55.

duties required of the legislative branch.<sup>193</sup> Article I, § VIII, clause 18 provides that Congress has the power, “To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>194</sup> Congress could try and confront the issue of a presidential self-pardon through legislative action. The use of a presidential self-pardon would raise separation of powers issues because this could be an instance where one branch is holding too much power. Separation of powers is one of the main principles behind the Constitution, and the Necessary and Proper Clause may be used by Congress in a way to assist the executive in carrying out his duties, even if that means possibly limiting the scope of the power.<sup>195</sup>

One way Congress could attempt to “check” the President’s power would be to propose an amendment to the Constitution that would strictly forbid a president from issuing a self-pardon.<sup>196</sup> In 1947, Congress moved to limit presidential term limits and were successful with “The Twenty-Second Amendment to the Constitution, proposed by Congress in 1947 and ratified by the states in 1951, [which] confines any president to two elected terms.”<sup>197</sup> The same concept could be applied if Congress wanted to take defensive measures as far as the pardon power is concerned. Congress could move to limit executive power just like they did in 1947 with an amendment limiting the scope of the pardon power. Taking the literal meaning of necessary and proper into account, it is possible that Congress could take this action pursuant to the Necessary and Proper Clause of the United States Constitution in an effort to support the intention of the Framers to promote good policy; even if it means putting a check on the power of the executive branch.

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<sup>193</sup> See generally U.S. CONST. art. I (listing all the responsibilities of Congress).

<sup>194</sup> U.S. CONST. art. I, § VIII, cl. 18 (emphasis added).

<sup>195</sup> U.S. CONST. art. I § 8, cl 18.

<sup>196</sup> See Nida, *supra* note 5, at 221–22.

<sup>197</sup> Peter Feuerherd, *How FDR’s Presidency Inspired Term Limits*, JSTOR (Apr. 12, 2018), <https://daily.jstor.org/how-fdrs-presidency-inspired-term-limits/>.

### C. PUBLIC REACTION: THROUGH THE LENS OF THE CURRENT ADMINISTRATION

A presidential self-pardon would unquestionably be seen as an act of great boldness; a notion not all that unfamiliar with regard to the Trump Administration. For starters, Trump “has never spent a single day in office with an average approval mark above 50 percent. In fact, only the highly suspect Rasmussen poll has ever shown him with an approval rating at or above 50 percent after inauguration day, a truly remarkable record of consistent and deep unpopularity . . .”<sup>198</sup> It is hard to imagine that if President Trump were to pardon himself for any criminal wrongdoing whatsoever that it would be well-received by the public. Apparently, aside from political decision-making, personality also plays into the public approval and perception of a president.<sup>199</sup> For example:

[A] president’s personality can also have something to do with it. In 1990, TIME posited that the first President Bush’s high approval ratings were the result of him “keeping his head down” during his presidency. “In a slick piece of reverse psychology, he strives for underexposure: while most politicians crave attention, Bush made a conscious decision before his Inauguration to avoid appearing regularly on the nightly news,” the story noted. “He not only wants to lower expectations that a President can solve the nation’s problems but he also fears that his re-election will be more difficult if the public wearies of his visage in the first few years. ‘People get tired of seeing anybody on television,’ says a senior White House aide. So Bush stays on the margins of public consciousness, betting that in today’s peculiar politics, as in romance, absence makes the heart grow fonder.” Trump, on the other hand, tends toward the opposite strategy, regularly tweeting updates about all sorts of things — not least his own approval ratings.<sup>200</sup>

Given the abrasive, argumentative nature of President Trump it is likely that if he were to over-extend his use of pardon power

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<sup>198</sup> David Farris, *What Trump’s Lousy Approval Rating Means For His 2020 Chances*, THE WEEK (Apr. 12, 2019), <https://theweek.com/articles/834550/what-trumps-lousy-approval-rating-means-2020-chances>.

<sup>199</sup> See Olivia B. Waxman, *President Trump’s Approval Rating Is at a Near-Record Low. Here’s What to Know About the History of Those Numbers*, TIME (Jan. 14, 2019), <http://time.com/5511118/presidential-approval-ratings-history/>.

<sup>200</sup> *Id.*

that it would cause a significant amount of political and social backlash. If any president were considering attempting such a maneuver, they should at the very least consider the impact it would make on their constituents and the potential instability/controversy it could cause.

## V. CONCLUSION

The law is not static; it should develop and grow in conjunction with evolving concepts and society but we cannot forget about the policy and historical considerations behind it – a concept utilized in this paper to support the unconstitutionality of a presidential self-pardon. The Preamble to the United States Constitution states, “We the People of the United States, in Order to form a more perfect Union, establish Justice, *insure domestic Tranquility*, provide for the common defense, *promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”<sup>201</sup> Important ideas to remember from the Preamble include: insuring domestic tranquility and promoting the general welfare; neither of which would be upheld if a self-pardon were to be implemented by a sitting executive. Since the text of the Constitution does not affirmatively give the president the power to grant a self-pardon, or deny the ability to do so,<sup>202</sup> we are left to wait out the Trump presidency where one of three things can happen. Hypothetically, if any criminal wrongdoing was to be discovered that implicated President Trump then the House of Representatives would have grounds for impeachment.<sup>203</sup> Secondly, President Trump could potentially employ a self-pardon on the way out of office leaving Congress and the American people in a wake of instability and bipartisanship. Or, lastly, he could avoid impeachment and the instance of granting a self-pardon to himself altogether to avoid further scrutiny under the lens of criminal activity or wrongdoing.

The text of the Constitution, the intent of the Framers, and policy considerations all hint to the unconstitutionality of a presidential self-pardon; and it is my assertion that a self-pardon

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<sup>201</sup> U.S. CONST. pml. (emphasis added).

<sup>202</sup> See U.S. CONST. art. II., § II, cl. 1.

<sup>203</sup> See Sigalos & Walsh, *supra* note 146.

is unconstitutional. As discussed previously, a presidential self-pardon seems contrary to the doctrinal beliefs of the Framers. Abuse of executive power has plagued several presidential administrations from Nixon/Watergate era, to Clinton/Whitewater era, and now to Trump/Russia era; all of which discussed the ability to pardon themselves. Point blank, the President's pardon power should have a check so as not to abuse executive power and to uphold the separation of powers principle implemented by the Framers. Given the current political climate and tension amongst the major political parties in the United States, if President Trump were to attempt to pardon himself a political firestorm would ignite, and the constitutionality of a presidential self-pardon would likely be an issue presented to the Supreme Court in an expedited manner since there seems to be no limit as to what he might do/thinks he can do. Allowing for a self-pardon under certain circumstances and for legitimate reasons that fall in line with good policy as imagined by the Framers might be an avenue to explore; however, without guidelines or limitations, separation of powers issues would arise, and a self-pardon utilized in bad faith could open the floodgates for limitless executive power with no mechanism to combat it. If President Trump were to pardon himself for any reason it would not be done with fairness in mind and it would not be done in order to strengthen the bonds of union, limit political conflict, or to limit political corruption. It remains to be seen whether a current or future president would attempt to issue a self-pardon, but it is certainly an issue that will warrant increased legal scrutiny and good policy discussions in years to come.