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### CORPORATE CRIME

## Pardon Me? Can U.S. Presidents Pardon Themselves?

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**N**o, I'm not above the law, I never want anybody to be above the law." "Yes, I do have an absolute right to pardon myself...."

These statements, recently voiced in quick succession by President Donald J. Trump,<sup>1</sup> beg the constitutionally significant question of whether the President of the United States can issue a self-pardon. This article explores the history and traditional use of the presidential pardon power, and illuminates the constitutional and legal issues involved.

### Pardon Process

Pursuant to Article II, Section 2 of the United States Constitution,

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the "Power to grant Reprieves and Pardons for Offences against the United States" is vested in the President.<sup>2</sup> Although the constitutional grant of the pardon power is broad, it has, at least historically, not gone unchecked. Indeed, presidents have traditionally abided by a certain process laid out by the Department of Justice's Office of the Pardon Attorney. This process has essentially three components. First, the individual seeking a pardon files a formal petition with the Office of the Pardon Attorney. The Office maintains eligibility criteria, including that no petition should be filed until the completion of a five-year waiting period after release from confinement or conviction (in the event of no confinement). Second, the Attorney General (or a designee) reviews the application and conducts an investigation, leveraging

other agencies like the Federal Bureau of Investigation. Third, the Attorney General (or a designee) issues a recommendation to the president, based on that investigation and his or her own independent judgment.<sup>3</sup>

Although the Office of the Pardon Attorney has made clear that its guidelines are merely advisory and solely for the internal guidance of DOJ personnel, the vast majority of presidential pardons issued to date have followed the three-step process. In recent memory, however, there have been a handful of pardons that have garnered critical national attention. Such examples include President Clinton's pardon of Mark Rich; President George H. W. Bush's pardon of Caspar Weinberger and other aides; and President Trump's pardon of Sheriff Joe Arpaio. Notably, in each of his pardons issued

to date, President Trump has bypassed the DOJ process.

Only once in the course of American history has a president received a pardon, and in that case it was from another president. In 1974, President Gerald Ford, who assumed office following President Richard Nixon's resignation, granted his predecessor "a full, free, and absolute pardon...for all offenses against the United States which he...committed or may have committed or taken part in" during the Watergate scandal.<sup>4</sup>

### Self-Pardon?

President Trump has repeatedly maintained that he has the absolute right to pardon himself, should the need arise. This raises the question of whether the Office of the President is above the law.

In the heat of Watergate, then-President Richard Nixon asked the Office of Legal Counsel (OLC) for an opinion as to whether or not he had the power to pardon himself. OLC's Mary C. Lawton, Acting Assistant Attorney General, issued a short memorandum on Aug. 5, 1974, concluding that he did not. OLC based its conclusion on the "fundamental

rule that no one may be a judge in his own case."<sup>5</sup>

This principle is central to English common law. The English Court of Common Pleas' decision in 1610 in *Thomas Bonham v. College of Physicians* is the seminal case. In finding that the college could not receive a fine that it had the power to levy against its members, the court held: "One cannot be Judge and attorney for any of the parties."<sup>6</sup> This

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principle is reflected in the separation of powers that expressly and implicitly runs throughout the U.S. Constitution. By way of example, the Constitution mandates that a congressional pay increase cannot become effective during the same term in which it was enacted.<sup>7</sup>

Curiously, the OLC memorandum in the Nixon case also noted that, under the Twenty-Fifth Amendment to the Constitution, if the president declared that he was temporarily unable to perform the duties of his office, the

vice president would become acting president and could pardon the president, who would presumably thereafter either resign or perhaps even resume office. Nixon apparently accepted the conclusion of the OLC memorandum that he could not pardon himself, and resigned just four days later.

The plain language of Article II, Section 2 of the Constitution vests in the president the power to issue pardons "for Offences against the United States," but does not indicate who the recipients of such pardons may be.<sup>8</sup> Thus, nothing in the Constitution itself expressly prohibits the president from issuing a self-pardon.<sup>9</sup> But other portions of the Constitution indicate that a president cannot do so. The pardon language in Article II, Section 2, is qualified by the phrase "except in Cases of Impeachment."<sup>10</sup> From this reference it seems clear that the president cannot use the pardon power to prevent his or her own impeachment and removal from office. The Constitution states elsewhere in Article I, Section 3 that any individual removed from office remains subject to criminal prosecution. Such language would seem superfluous

if the president could issue a self-pardon. In another indication of the principle that “no one may be a judge in his own case,” Article I, Section 3 of the Constitution vests in the Senate the sole power to try all impeachments, and dictates that “When the President of the United States is tried, the Chief Justice shall preside.”<sup>11</sup>

The Federalist Papers, written contemporaneously with the Constitution itself, contain references supporting the conclusion that a sitting president may not issue a self-pardon. Alexander Hamilton’s argument in favor of the pardon power in Federalist No. 74 suggests its purpose was to allow the president to act as final arbiter in *another’s* case when justice demanded that the president do so.<sup>12</sup> Indeed, Hamilton’s choice of language contemplates that it would be used exclusively for others: “The reflection that the fate of a *fellow-creature* depended on his sole fiat, would naturally inspire scrupulousness and caution.”<sup>13</sup>

Although the Constitution may not explicitly forbid a president from issuing a self-pardon, the very idea of doing so appears to be contrary to

Anglo-American legal precedent, procedure, and the words of the Framers themselves.

Nearly a century ago, Chief Justice of the U.S. Supreme Court William Howard Taft wrote, in reference to the pardon power, that “our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.”<sup>14</sup> Whether the current or any future president would attempt to issue a self-pardon, and whether that would be considered an abuse of the unique pardon power of the presidency, remains to be seen. But the issue is certain to draw increased attention by legal, Constitutional, and political scholars in the years to come.



1. President Donald J. Trump, Remarks to The White House press pool (June 8, 2018); see also President Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018) (“As has been stated by numerous legal scholars, I have the absolute right to PARDON myself....”) (emphasis in original).

2. U.S. Const. art. II, § 2.

3. See Office of the Pardon Attorney, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/pardon>

4. See 61-Proclamation 4311—Granting Pardon to Richard Nixon (Sept. 8, 1974).

5. Memorandum Opinion For The Deputy Attorney General By Mary

C. Lawton Acting Assistant Attorney General Office Of Legal Counsel, Presidential or Legislative Pardon of The President (Aug. 5, 1974).

6. 77 Eng. Rep. 638.

7. U.S. Const. amend. XXVII.

8. U.S. Const. art. II, § 2.

9. See *United States v. Klein*, 80 U.S. 128, 147 (1871) (“To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit.”)

10. U.S. Const. art. II, § 2.

11. U.S. Const. art. I, § 3.

12. See THE FEDERALIST No. 74 (Alexander Hamilton) (“The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”).

13. *Id.* (emphasis added).

14. *Ex Parte Grossman*, 267 U.S. 87, 121 (1925).