Western New England Law Review

Volume 41 *41 (2019)*
Issue 1

Article 7

2019

CONSTITUTIONAL LAW—I BEG YOUR PARDON: EX PARTE GARLAND OVERRULED; THE PRESIDENTIAL PARDON IS NO LONGER UNLIMITED

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WESTERN NEW ENGLAND LAW REVIEW

Volume 41 2019 Issue 1

CONSTITUTIONAL LAW—I BEG YOUR PARDON: *EX PARTE GARLAND* OVERRULED; THE PRESIDENTIAL PARDON IS NO LONGER UNLIMITED

Zachary J. Broughton[*]

President Trump's August 2017 pardon of Joseph Arpaio for his contempt of court conviction raised the constitutional question of whether there are any limitations to the president's pardoning power. In the 1867 seminal case, Ex parte Garland, *the Supreme Court opined that the president is the only person who can limit the pardon power, and that a pardon can be issued before, during, or after conviction. Since the late 1800s, however, several cases handed down by the Supreme Court have, in some way, identified a limitation to the pardon power. Therefore, this Note argues that the president's pardon power is limited, and that* Garland*'s statement of a plenary pardon power has been overruled.*

INTRODUCTION

On August 29, 2017, President Donald Trump announced on Twitter that he was pardoning former Sheriff Joseph Arpaio of Maricopa County, Arizona, for Arpaio's contempt of court conviction a month earlier in *United States v. Arpaio*.[1] President Trump's ability to pardon Arpaio

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1. United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at *7 (D. Ariz. July 31, 2017); Jennifer Rubin, *Legal Challenge to Arpaio Pardon Begins*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/08/30/legal-challenge-to-arpaio-pardon-begins/?utm_term=.010014cb18c3 [https://perma.cc/56KP-VS9J].

derives from Article II of the Constitution.[2] This action served as President Trump's first pardon since taking office in January 2017—an uncharacteristic move given that pardons are often issued at the end of a president's term.[3]

The issuance of Arpaio's pardon reignited a 250-year-old constitutional debate about the purpose and limits of the president's pardon power, and—in a much larger context—the effects it has on the separation and balance of powers.[4] Since August 2017, numerous amici

The case derives from a 2011 court order instructing Arpaio and his department to "refrain from racially profiling Latinos during patrols and turning them over to federal immigration authorities." Melissa Etehad, *Joe Arpaio, Former Sheriff in Arizona, Is Found Guilty of Criminal Contempt*, L.A. TIMES (July 31, 2017, 5:55 PM), http://www.latimes.com/nation/la-na-joe-arpaio-verdict-20170706-story.html [https://perma.cc/ET8U-CJ3R]. Arpaio's civil contempt charge, adjudicated by district court Judge G. Murray Snow of Arizona, arose from the *Ortega-Melendres v. Arpaio* case. Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 994 (D. Ariz. 2011). Melendres filed a civil suit against Arpaio in 2007, arguing that the Maricopa County Sheriff's Department targeted Latinos "with the presumption that they entered the country illegally." Laura Gómez, *This Man's Arrest Helped Bring Down Joe Arpaio. Manuel Melendres Speaks Publicly*, AZCENTRAL (Dec. 26, 2016, 6:22 AM), https://www.azcentral.com/story/news/local/phoenix/2016/12/26/phoenix-arrest-manuel-melendres-joe-arpaio-profiling-lawsuit/95041534/ [https://perma.cc/WT7C-DUMZ]. The 2007 suit came after Melendres was pulled over for speeding, ordered to hand over his immigration paperwork, told he does not belong in the United States, arrested, questioned for many hours, and then deemed to be a legal immigrant by an Immigration and Customs Enforcement agent. *Id.*; *see* Melendres v. Arpaio, 695 F.3d 990, 995 (9th Cir. 2012).

2. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The president] shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

3. Adam Liptak, *Why Trump's Pardon of Arpaio Follows Law, Yet Challenges It*, N.Y. TIMES (Aug. 26, 2017), https://www.nytimes.com/2017/08/26/us/politics/trump-pardon-joe-arpaio-constitution.html. Since pardoning Arpaio, President Trump has exercised his Article II power to pardon or commute prison sentences of at least eight other individuals. *See* George Petras, *President Trump's Pardons and Commutations*, USA TODAY (July 10, 2018, 2:31 PM), https://www.usatoday.com/story/news/2018/07/10/president-trumps-pardons-and-commutations/771796002/. Since the issuance of the pardon, it has been upheld by the district court. Criminal Minutes at 1, United States v. Arpaio, No. 2:16-cr-01012 (D. Ariz. Oct. 4, 2017), BL No. 243. The district court also denied Arpaio's motion for vacatur. *See* Clerk Order at 1, United States v. Arpaio, No. 17-10448 (9th Cir. Oct. 30, 2017), BL No. 4 ("A review of the record suggests that this court may lack jurisdiction over the appeal because the district court's order . . . denying appellant's motion for vacatur and dismissal with prejudice is not appealable as a final judgment . . . ."). The progress of Arpaio's case remains relevant to the discussion, purpose, and goals of this Note. While the case was appealed specifically due to the denial of vacatur, the Ninth Circuit, and potentially the Supreme Court, thereafter, could complete a full analysis of the pardon because without the presidential pardon Arpaio would not be in a position to pursue vacatur.

4. *See* Scott Ingram, *Presidents, Politics, and Pardons: Washington's Original (Mis?)Use of the Pardon Power*, 8 WAKE FOREST J.L. & POL'Y 259, 260–66 (2018); *see also* Genevieve A. Bentz, *A Blank Check: Constitutional Consequences of President Trump's Arpaio Pardon*, 11 ALB. GOV'T L. REV. 250, 250 (2018); Laura Palacios, *The Presidential Pardon Power: Interpreting Its Scope and Enacting an Effective Solution to Limit Its Potential for Abuse*, 40 T.

have written to both the district court in Arizona and the Ninth Circuit Court of Appeals, arguing that Arpaio's pardon went well beyond the limitations prescribed by both the Constitution and the Supreme Court.[5]

In *Ex parte Garland*, one of the first cases to address the scope of the pardon, the Court proclaimed the pardon to be "unlimited, with the exception [of impeachment]. It extends to every offence known to the law and may be exercised at any time after its commission . . . ."[6] Since *Garland*, the Court has further defined the reach and, as this Note argues, the limitations of the president's pardon authority.[7] Despite *Garland*'s centuries old ruling, to allow the president to exercise a plenary pardon, unchecked by the other branches, frustrates and threatens the balance and separation of powers[8]—an often celebrated and revered staple of American democracy.

JEFFERSON L. REV. 209, 214–31 (2018) (reviewing the history and scholarship relating to the pardon).

5. *See* [Proposed] Memorandum of Amici Curiae Certain Members of Congress in Opposition to Defendant's Motion for Vacatur and Dismissal With Prejudice at 6, United States v. Arpaio, No. 2:16-cr-01012 (D. Ariz. Oct. 05, 2017), BL No. 239 ("An absolute, unqualified presidential power to pardon would be an impediment to the constitutional duty of the Judiciary to do justice and would conflict with the function of the courts."); Proposed Brief of Amicus Curiae The Protect Democracy Project, Inc. at 2, United States v. Arpaio, No. 2:16-cr-01012 (D. Ariz. Sept. 11, 2017), BL No. 228 [hereinafter Protect Democracy Project] ("[Arpaio's pardon] violates the due process of law at the heart of the Constitution as well as core separation of powers features of the Constitution."); [Proposed] Amicus Brief of Roderick and Solange MacArthur Justice Center in Opposition to Arpaio's Motion to Vacate Conviction at 1, United States v. Arpaio, No. 2:16-cr-01012 (D. Ariz. Sept. 11, 2017), BL No. 223 [hereinafter Roderick] ("This Court should deny Joseph Arpaio's motion to vacate his conviction. The pardon is invalid and unconstitutional because it has the purpose and effect of eviscerating the judicial power to enforce constitutional rights."). *See generally* [Proposed] Memorandum of Amici Curiae Erwin Chemerinsky et al., United States v. Arpaio, No. 2:16-cr-01012 (D. Ariz. Sept. 11, 2017), BL No. 230 (arguing the pardon is void because Arpaio's contempt does not constitute an offense against the United States).

6. *Ex parte* Garland, 71 U.S. 333, 380 (1866).

7. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) ("[S]ome *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted . . . ."); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) ("[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."); Schick v. Reed, 419 U.S. 256, 264 (1974) ("[It] is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute."); *Ex parte* Grossman, 267 U.S. 87, 115 (1925) ("Nothing in the ordinary meaning of the words 'offenses against the United States' excludes criminal contempt[]."); Burdick v. United States, 236 U.S. 79, 94 (1915) ("Granting, then, that the pardon was legally issued . . . it was Burdick's right to refuse it . . . and it, therefore, [did] not becom[e] effective . . . ."); Knote v. United States, 95 U.S. 149, 154 (1877) ("[The pardon] cannot touch moneys in the treasury of the United States . . . .").

8. *Infra* Part III.

As it stands, the case of Arpaio represents one pardon out of many more to come, as signaled by the president himself.[9] With President Trump and several of his associates currently under investigation for alleged ties to Russian operatives,[10] the idea that more pardons are coming does not seem too farfetched. What is more, several of President Trump's closest associates have already been indicted or convicted of lying to investigators, committing fraud, and conspiring against the United States.[11] In response, President Trump has proclaimed he has the "absolute right" to pardon himself.[12] Such a belief posits a new constitutional and public policy reality: not since the unchartered territory that was the Watergate scandal has the need to understand the depth of the president's pardon power been more important.[13]

Notwithstanding the arguments of Arpaio and President Trump's tweets, the president's pardon authority is limited. This Note proceeds in several parts to argue that, since 1867, the Supreme Court has issued several opinions that, together, overrule *Garland*'s holding and render the presidential pardon a limited power. Part I reviews the historical background of the pardon power, its origin, its evolution, and how it has been used in the United States. Part II parses through seven Supreme Court cases that collectively overrule *Garland*.[14] Finally, Part III contextualizes the presidential pardon in the overall separation of powers debate, arguing that the Supreme Court has exercised and should continue to exercise its authority to review presidential pardons.

9. Kaitlan Collins, *Exclusive: Trump Considers Dozens of New Pardons*, CNN: POLITICS (June 6, 2018, 4:51 PM), https://www.cnn.com/2018/06/06/politics/donald-trump-pardons/index.html [https://perma.cc/94K3-KWA8].

10. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html [https://perma.cc/GS7F-AYKY].

11. Frances Kerry et al., *Factbox: People Indicted, Convicted, Investigated in Trump-Russia Probe*, REUTERS (Sept. 7, 2018, 6:12 PM), https://www.reuters.com/article/us-usa-trump-russia-aides-factbox/factbox-people-indicted-convicted-investigated-in-trump-russia-probe-idUSKCN1LN2OJ [https://perma.cc/7XFP-ZKBA].

12. Abigail Simon, *President Trump Says He Can Pardon Himself. Most Voters Disagree*, TIME (June 13, 2018), http://time.com/5311182/donald-trump-self-pardon-poll/ [https://perma.cc/9VH4-7URJ].

13. *See infra* Part I.

14. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Schick v. Reed, 419 U.S. 256, 264 (1974); Biddle v. Perovich, 274 U.S. 480, 485 (1927); Burdick v. United States, 236 U.S. 79, 87 (1915); Knote v. United States, 95 U.S. 149, 154 (1877); United States v. Wilson, 32 U.S. 150, 161 (1833).

I. HISTORICAL BACKDROP

One of the most well-known presidential pardons in American history was issued on September 8, 1974, when President Gerald Ford granted former President Richard Nixon "a full, free, and absolute pardon . . . for all offenses against the United States which he . . . ha[d] committed or may have committed."[15] President Nixon's pardon is one of over 14,000 pardons issued since President William McKinley in 1900.[16] By issuing the pardon, President Ford utilized his authority to effectuate the Constitution's mechanism for granting executive mercy, a power designed at the 1787 Constitutional Convention by the Committee on Detail ("Committee").[17]

When the Committee convened,[18] the notion of affording the Executive Branch the power to grant pardons and commutations was not a novel idea; similar powers had been exercised for thousands of years in some areas including Athens, Rome, and England.[19] Once the Committee finalized the language establishing the president's pardon authority, it was approved by the Convention and submitted to the states for ratification.[20]

This section of the Note contains several subparts that discuss the origin of the pardon power coming from Athens, Rome, and England and its introduction at the 1787 Constitutional Convention; pardons issued since 1789, starting with President George Washington; and the *Garland* decision, followed by other important cases affecting the president's pardon power.

A. *The Pardon Power of Ancient Athens and Rome*

Most scholarship discussing the origin of the pardon focuses on its roots in common law and its eventual adoption in pre-colonial America.[21]

15. *President Gerald Ford's Pardon of Richard Nixon*, CNN: ALL POL. (Jun. 17, 1997), http://www.cnn.com/ALLPOLITICS/1997/gen/resources/watergate/ford.speech.html [https://perma.cc/9A5K-L9N4].

16. *See Clemency Statistics*, U.S. DEP'T JUST., https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/P25Y-9F6M].

17. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 185 (Max Farrand ed., rev. 1974) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

18. *Id.*

19. *See* Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 201–05 (1999).

20. *See* G. Sidney Buchanan, *The Nature of a Pardon Under the United States Constitution*, 39 OHIO ST. L.J. 36, 49–54 (1978).

21. *See* Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 9–10 (1976); Buchanan, *supra* note 20, at 50; William F. Duker, *The President's Power to Pardon:*

However, surveying the tradition of pardons in Athens, Rome, and England sheds light on how such practices influenced the 1787 Constitutional Convention.[22]

The way in which we view the president's pardon power today is not how it once existed in Athens, "primarily due to the nature of a pure democracy that was the foundation of the governmental structure."[23] The Athenians designed a mechanism for clemency, often referred to as the Adeia process, which absolved an individual convicted of public crimes or treason, provided he or she received 6,000 votes from fellow citizens.[24] Despite the Adeia process, records reflect difficulty in attaining the votes needed;[25] thus, individuals most likely to receive clemency were powerful figures with well-known names and reputations, including athletes and orators. Because of the difficulty in obtaining the requisite number of votes, there are only a few pardons recorded in Greek history.[26] Such a reality suggests that popularity and celebrity were more influential than fairness or justice in determining whether an individual could receive a pardon.[27]

A Constitutional History, 18 WM. & MARY L. REV. 475, 497 (1977); Scott P. Johnson & Christopher E. Smith, *White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform*, 33 NEW ENG. L. REV. 907, 908–09 (1999); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 590 (1991) [hereinafter *Wresting the Pardoning Power*]; Hugh C. Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56, 63 (1974); Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1227–32 (2003); Richard A. Saliterman, Commentary, *Reflections on the Presidential Clemency Power*, 38 OKLA. L. REV. 257, 259 (1985); Christopher E. Smith & Scott P. Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 1113, 1126 (1989); Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 964–65 (1997).

22. *See Wresting the Pardoning Power*, *supra* note 21, at 583–89; Nida & Spiro, *supra* note 19, at 201–09 (reviewing how the pardon was used).

23. Nida & Spiro, *supra* note 19, at 201 & n.16.

24. *Id.* at 201–02 (citing *Wresting the Pardoning Power*, *supra* note 21, at 583).

25. *See* 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 9 (1939) [hereinafter RELEASE PROCEDURES].

26. *See Wresting the Pardoning Power*, *supra* note 21, at 583.

> Only a few pardons of individuals are recorded in Greek history: the recall of Alcibiades in 408 B.C., the pardon of Demosthenes in 323 B.C., and the recall of Thucydides, the historian. Professor MacDowell also recounts the pardon of Dorieus, a Rhodian athlete who had been condemned to death, because it was thought to be a pity that a man of such athletic prowess should be brought to so low.

Id. at 583 n.79 (citation omitted).

27. *See id.*

The pardon-clemency process utilized in Athens was similar to the one employed by the Romans insofar as neither system was designed to promote or achieve fairness or justice.[28] Rome's use of the pardon was, in many cases, exercised to achieve a political end. For example, after hearing the chanting request of the Jewish people, Pontius Pilate pardoned Barabbas.[29] Pilate did so in order to quell the surmounting discord among his subjects who were calling for his release.[30] Another example of Rome's politically motivated use of the pardon was to discipline mutinous troops by killing every tenth soldier instead of killing entire groups of wrongdoers.[31] Such a practice allowed Rome to prevent revolt, while also conserving assets useful to the empire.[32] The Romans also employed the pardon in pursuit of patriotic ends. This is demonstrated by the pardoning of Horatio for murdering his sister, who "'bewail[ed]' the death of a foe of Rome to whom she was betrothed," while failing to mourn her deceased Roman brothers.[33]

Many of the pardons from Athens and Rome illustrate a clemency process driven by celebrity status and a desire to maintain power and control.[34] These exercises of the pardon power survived the fall of both the Greek and Roman empires and were given new life in England.

28. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 16–17 (1989).

29. *John* 18:38–40 (King James).

> Pilate saith unto him, What is truth? And when he had said this, he went out again unto the Jews, and saith unto them, I find in him no fault at all. But ye have a custom, that I should release unto you one at the passover: will ye therefore that I release unto you the King of the Jews? Then cried they all again, saying, Not this man, but Barabbas.

Id. This passage reviews Pilate's personal struggle and desire not to release Barabbas, a convicted criminal. However, facing a large group of passionate and oppressed people, Pilate made an arguably calculated political decision to grant their request—as acting in the alternative would have been met with significant opposition. *See* 1 RAYMOND E. BROWN, THE DEATH OF THE MESSIAH: FROM GETHSEMANE TO THE GRAVE 814 (1994).

30. MOORE, *supra* note 28. Pontius Pilate was the Governor of Judaea and constantly encountered riotous behavior from those he oppressed: the Jews. *See Pontius Pilate: Governor of Judaea*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/biography/Pontius-Pilate [https://perma.cc/SSJ6-7GT8]. Pilate "wanted to remain on good terms with the Jewish authorities" in order to keep control. Randall Balmer, *Killing Jesus: Who Was the Real Pontius Pilate?*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/books/review/pontius-pilate-aldo-schiavone.html.

31. MOORE, *supra* note 28.

32. *See id.*

33. *Wresting the Pardoning Power*, *supra* note 21, at 584–85, 585 n.86.

34. *Id.* at 584–85.

B. *The Pardon Power of the Pre-Colonial English Monarch*

The development and use of the pardon power by the English monarch was viewed through different lenses—some saw it as a mechanism for the king to consolidate the monarch's power,[35] while others viewed it as a way to ensure that justice was mercifully administered.[36] To complicate matters, all throughout England's history, the monarch was in direct competition with other entities that exercised a similar pardon power, including the clergy, great earls, and the feudal courts.[37] However, this competition over the power to grant pardons ended when the pardon became formally centralized in the monarch—after Parliament gave King Henry VIII the sole power "to pardon or remit treasons, murders, manslaughters, felonies, or outlawries."[38] One famous use of this power was Henry VIII's alteration of Sir Thomas More's punishment; instead of being hanged and disemboweled alive, his original sentence for treason, More was decapitated.[39]

Eventually, limitations were placed on the monarch's pardon power. For example, the monarch could not impair the rights of third parties seeking reparations from wrongdoers.[40] The monarch was also required to specifically identify the crime for which the offender was receiving clemency,[41] especially if it involved treason, murder, or rape.[42]

The monarch's near-absolute pardon power survived for approximately 165 years, until a conflict arose over whether King Charles II could use that power to overrule Parliament's impeachment of Thomas Osborne, the Lord High Treasurer of England.[43] At the direction of Charles II, Osborne secretly offered France neutrality for the price of

35. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 233 (1797) ("Mercy and truth preserve the king, and by clemency is his throne strengthened."); *Wresting the Pardoning Power*, *supra* note 21, at 586 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *388) ("[A]cts of clemency 'endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.'").

36. BLACKSTONE, *supra* note 35.

37. Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55 (1963).

38. *Wresting the Pardoning Power*, *supra* note 21, at 586.

39. Thomas Howell, *The Trial of Sir Thomas More, Knight*, *in* 1 A COMPLETE COLLECTION OF STATE TRIALS 386, 394 (1816).

40. *See* Duker, *supra* note 21, at 486.

41. BLACKSTONE, *supra* note 35, at *400.

42. RELEASE PROCEDURES, *supra* note 25, at 135.

43. *See* Duker, *supra* note 21, at 487–95.

"600,000 livres," a move contrary to Parliament's desire.[44] Prior to impeachment, Osborne received a "royal pardon."[45] Believing Charles II had gone beyond his power, Parliament considered measures aimed at limiting his pardon capabilities.[46]

Parliament acted forthwith to diminish the monarch's pardon power.[47] Specifically, Parliament enacted the following legislation: the Habeas Corpus Act of 1679, prohibiting clemency for individuals convicted of causing others to become imprisoned outside England; the 1689 Bill of Rights eliminated the monarch's former power to suspend operation of laws or disregard its execution; the 1701 Act of Settlement removed the pardon as a bar to impeachment; and in 1721, Parliament established its own power.[48] Despite such legislation, the monarch continued to exercise the pardon power—often to win over key clerics and nobles—while failing to save those wrongly sentenced to death.[49] Such practices led to widespread criticism of the royal pardon.[50] Notwithstanding Parliament's attack on the monarch, English courts regularly held the monarch's pardon power to be absolute.[51]

Eventually, the monarch's pardon power was introduced to the American colonies by way of the royal governors, who, through their charters, were granted substantial pardon authority.[52] However, after the Revolutionary War, the task of creating a new government lay before the

44. *See id.* at 488.

45. 1 ANDREW BROWNING, THOMAS OSBORNE, FIRST EARL OF DANBY AND DUKE OF LEEDS: 1632-1712 324–25 (1951).

46. *See* Duker, *supra* note 21, at 491–94.

47. Grupp, *supra* note 37, at 56–58; *Wresting the Pardoning Power*, *supra* note 21, at 587–88.

48. *See* sources cited *supra* note 47.

49. *See* RELEASE PROCEDURES, *supra* note 25, at 30; NAOMI D. HURNARD, THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307, at vii–viii (1969).

50. Leslie Sebba, *Clemency in Perspective*, *in* CRIMINOLOGY IN PERSPECTIVE: ESSAYS IN HONOR OF ISRAEL DRAPKIN 221, 225–28 (Simha F. Landau & Leslie Sebba eds., 1977).

51. *See* Godden v. Hales (1686) 89 Eng. Rep. 1050, 1050–51.

> [T]he Kings of England were absolute Sovereigns; . . . the laws were the King's laws; . . . the King had a power to dispense with any of the laws of Government as he saw necessity for it; . . . he was sole judge of that necessity; . . . no Act of Parliament could take away that power . . . .

Id. at 1051.

52. 7 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3801 (Francis Thorpe ed., 1909) (reviewing the Virginia Colony charter); Duker, *supra* note 21, at 497–501 (reviewing the charters of several other colonies).

American people, and so did the opportunity to reimagine an executive pardon.

C. *To the Convention of 1787 and Beyond*

During the Constitutional Convention of 1787, the Committee on Detail was charged with designing the presidential pardon.[53] However, despite this responsibility, "the Framers 'did [not] devote extended debate to [the] meaning [of the Pardon Clause].'"[54] Instead, throughout the brief drafting process, Charles Pickney, Alexander Hamilton, and John Rutledge led the effort to include a pardon power solely vested in the president.[55]

Critics feared an unchecked and unfettered pardon would result in abuse,[56] while Hamilton argued against legislative involvement with the pardon, believing that the reasons for, and benefits of, vesting the pardon with the president outweighed concerns of legislative exclusion.[57] Hamilton further argued that the presidential pardon was a mechanism for furthering public policy goals, such that "in seasons of insurrection or rebellion, there are often critical moments, when a [well-timed] offer of pardon to the insurgents or rebels may restore the tranquility . . . . The dilatory process of convening the legislature . . . would frequently be the occasion of letting slip the golden opportunity."[58] Hamilton's argument not only reflects his overall desire for a strong executive, but also the notion that it would be far more expedient for one person to make a decision, rather than a representative body.[59]

Additionally, Hamilton believed "[t]he 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."[60] Meaning, the presidential pardon power enables the president to take into consideration that which

53. *See* Peterson, *supra* note 21, at 1229.

54. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 9 TEX. L. REV. 561, 565 n.19 (2001) (alterations in original) (quoting Schick v. Reed, 419 U.S. 256, 260 (1974)); *see Wresting the Pardoning Power*, *supra* note 21, at 590 ("[F]ew reported exchanges at the Convention concern[ed] the clemency power . . . .").

55. *See* Duker, *supra* note 21, at 501.

56. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (Max Farrand ed., 1911).

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

58. *Id.*

59. *See* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1674–75 (2001).

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

Congress cannot foresee—"the particularities of every crime and the circumstances of every offender."[61] Due to Hamilton's zealous support, and that of his federalist brethren, the first draft of the pardon power read: "He [the President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an Impeachment."[62]

Despite Hamilton's arguments, some members of the Convention suggested modifications. Roger Sherman of Connecticut proposed language that would empower the president "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate,"[63] but a Committee vote defeated this proposal.[64] A motion to include the words "except in cases of impeachment" and to remove the phrase "but his pardon shall not be pleadable in bar" was approved by the Convention.[65] Luther Martin tried to insert the words "after conviction," but was persuaded otherwise in favor of the idea that a pardon pre-conviction could be helpful in some circumstances.[66] Finally, Edmund Randolph tried to insert a limitation to the pardon power by excluding "cases of treason," but his amendment failed.[67]

At the conclusion of the Convention, the presidential pardon was approved, using the same language still employed today.[68] After ratification of the Constitution in June of 1788,[69] the pardon power became a staple of the American presidency, beginning with President George Washington.

D. *The Pardon's Constitutional Development*

The early uses of the pardon were primarily for granting mercy.[70] Washington was the first to exercise this Article II power when he pardoned leaders of the Whiskey Rebellion who, in 1795, "were accused

61. Krent, *supra* note 59.

62. RECORDS OF THE FEDERAL CONVENTION, *supra* note 17.

63. *Id.* at 419.

64. *Id.* n.15.

65. 5 JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 480 (Jonathan Elliot ed., 1827).

66. *See id.*

67. *Id.* at 549.

68. *Compare* Hoffstadt, *supra* note 54, *with* U.S. CONST. art. II, § 2, cl. 2.

69. *Observing Constitution Day*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/constitution-day/ratification.html [https://perma.cc/2REC-LL44] (discussing the order in which states voted for the Constitution and that after New Hampshire became the ninth state to do so, the Constitution then became ratified).

70. *Ex parte* Wells, 59 U.S. 307, 311 (1855) ("A pardon is said . . . to be a work of mercy . . . .").

of tarring and feathering officials attempting to collect a new federal tax . . . on whiskey."[71] These pardons came after Washington spent several years engaged in dialogue and negotiations with the rebellion's leadership in an ongoing attempt to quell the riotous behavior that ensued.[72] Despite referring to one of the leaders as being "a little short of an idiot," Washington thought the government's responsibility was to show mercy.[73] After the pardons, Washington explained his actions to Congress:

> The misled have abandoned their errors . . . . For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.[74]

Washington's actions and remarks to Congress demonstrated a process geared towards patience, restraint, sympathy, and mercy.

After Washington left office, most of his forty-four successors exercised their Article II pardon power.[75] Similar to Washington, President John Adams tried to put an end to the Pennsylvania Whiskey Rebellions by issuing pardons because "it [had] become unnecessary for the public good that any future prosecutions should be commenced."[76]

President Thomas Jefferson issued pardons to individuals incarcerated pursuant to the Alien and Sedition Acts.[77] Jefferson believed the Acts were unconstitutional because their primary purpose was to stifle political opposition by precluding critical comments of the federal government, all in an effort to silence and defeat the Jeffersonian

71. Nida & Spiro, *supra* note 19, at 207.

72. *See* Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN.COM (Aug. 29, 2017), https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/ [https://perma.cc/PE7C-6BHN].

73. JOSEPH E. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE 452–53 (1966).

74. Hagen, *supra* note 72.

75. *See* P.S. Ruckman, Jr., *Lacking in Mercy: Least Merciful Presidents*, PARDON POWER (Sept. 30, 2014), http://www.pardonpower.com/2014/09/lacking-in-mercy.html [https://perma.cc/6TS5-SAPG].

76. Amnesty—Power of the President, 20 Op. Att'y Gen. 330, 343 (1892).

77. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 837 (2015) (citing Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 143 (2001)).

Republicans in future elections.[78] When Jefferson pardoned those punished by the Acts, it appeared he showed mercy in order to counteract the type of government action he and his contemporaries fought against during the Revolution.[79] However, some scholars later questioned Jefferson's reasons for executing these pardons because, shortly thereafter, Jefferson remained relatively quiet when popular Federalists were eventually "prosecuted for seditiously libeling the United States and Jefferson."[80] Jefferson's conduct may have signaled a shift in the use of the pardon power toward political, rather than merciful ends—a shift that would remain in effect for two hundred years.[81]

E. *Cry Havoc and Let Slip the Dogs of War: Using the Pardon During Armed Conflict*

During the military conflicts of the nineteenth century, several presidents employed the pardon—some in an effort to strengthen their ability to win the conflict and to achieve national healing and unity.[82] This was especially true for Presidents Abraham Lincoln and Andrew Johnson, both during and after the American Civil War.[83]

During the Civil War, it was common for Lincoln to issue pardons to individuals who either deserted their post in the Union Army—seeking to escape the perils of war—or to those who renounced their commitment to the Confederacy.[84] Two years after the war began, Lincoln issued a

78. Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, 43–44 (Albert Ellery Bergh ed., 1907) ("I 'liberated a wretch who was suffering for a libel against Mr. Adams.'"); Steiner, *supra* note 21, at 959–60. The Supreme Court noted in *New York Times Co. v. Sullivan* that the Acts' constitutionality was never tested. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

79. *See Wresting the Pardoning Power*, *supra* note 21, at 592–93.

80. *Id.* at 593 (citing LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 163 (1963)).

81. *See infra* Section I.E. (highlighting instances where presidents received significant political benefits after exercising their pardon power).

82. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 452 (2009) ("[T]he President's ability to pardon federal offenders swiftly has helped to heal the nation and serve the public interest."); P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)*, 27 PRESIDENTIAL STUD. Q. 251, 254 (1997) [hereinafter *Executive Clemency*].

83. Menitove, *supra* note 82, at 452.

84. *See* Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 598 & n.28 (2012). During the Civil War, Lincoln issued approximately 343 pardons. P.S. RUCKMAN, JR., FEDERAL EXECUTIVE CLEMENCY IN UNITED STATES, 1789-1995: A PRELIMINARY REPORT (1995), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214593 [https://perma.cc/69TD-BND9].

general amnesty to those who rebelled against the Union.[85] Lincoln's proclamation provided that "upon taking an oath of allegiance, [a rebel would receive] 'a full pardon . . . with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened.'"[86] Unlike other presidents, Lincoln often invited pardon petitioners to the White House,[87] a ritual typically performed after the issuance of a pardon.

After ascending to the presidency upon the assassination of Lincoln, Andrew Johnson continued down the path of granting mercy via the pardon.[88] Johnson established what this Note will refer to as an exemption test in which former Confederate soldiers could participate in order to obtain a pardon.[89] The limitations on who could be pardoned was primarily based on their net worth and their role in the Civil War.[90]

Within a matter of weeks, Johnson began to systematically disassemble Congress's reconstruction efforts by granting a vast number of pardons to former Confederates.[91] Despite Johnson's test, by the end of the summer in 1867, he had granted nearly 15,000 pardons, "effectively restoring the political status of the planter elite who had dominated

85. Peterson, *supra* note 21, at 1241.

86. *See* Brief of Professor Edward A. Hartnett as Amicus Curiae in Support of Respondents at 4, Patchak v. Zink, 138 S. Ct. 897 (2018) (No. 16-498), BL No. 31 (quoting Proclamation No. 11, 13 Stat. 737, 737 (Dec. 8, 1863)).

87. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1177 (2010). Of note, in 1865, just after the conclusion of the Civil War, Congress allocated funds to hire a pardon clerk, who would assist the Attorney General in reviewing clemency and pardon petitions. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 286–87 (2013). Prior to the Civil War, the system for applying for, reviewing, and receiving a pardon was relatively informal; usually judges would urge the president to intervene. *See* George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212, 212–14 (2004). After a steady, yearly increase in pardon applications and issuances, in 1891, Congress decided to establish the Office of the Pardon Attorney in order to assist the president. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1489 & n.26 (2000) [hereinafter *Of Pardons, Politics and Collar Buttons*].

88. *See* Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 309–10 (2010).

89. JONATHAN T. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898 339, 343–44 (1953).

90. *Id.*

91. *Id.* at 135, 141–42, 161, 340.

antebellum Southern society."[92] Johnson also pardoned approximately 60,000 Confederate military prisoners, more than 180,000 civilians who signed a loyalty oath, and former Confederate President Jefferson Davis on Christmas Day in 1868.[93] Congress became disenchanted with Johnson's lenient pardoning polices; thus it sought to curtail his pardon power through legislation.[94]

Presidents in the post-Reconstruction era transitioned from granting general pardons to masses of citizens—save for draft-dodgers of the Vietnam War[95]—to evaluating pardons more case-by-case.[96] The last fifty years witnessed the pardoning of individuals with whom presidents had a personal connection, including Gerald Ford,[97] George H. W. Bush,[98] Bill Clinton,[99] George W. Bush,[100] and now Donald Trump.[101] With thousands of pardons issued, the Supreme Court has had a number of opportunities

92. Morison, *supra* note 88, at 310. "These applicants included such legal luminaries as . . . John Campbell, a former Associate Justice of the U.S. Supreme Court, who resigned at the outbreak of the war and served as the Confederate Assistant Secretary of War." *Id.* n.275.

93. DORRIS, *supra* note 89, at 135, 141–42, 161, 311; Morison, *supra* note 88, at 310–11.

94. *See* Duker, *supra* note 21, at 514–15. Congress's actions and the Supreme Court's response will be addressed later in this Note. *Infra* Section I.F.

95. *See* Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, POLITICO (Jan. 21, 2008, 3:56 AM), https://www.politico.com/story/2008/01/carter-pardons-draft-dodgers-jan-21-1977-007974 [https://perma.cc/Q54B-P2QJ]. *See generally* Saliterman, *supra* note 21 (discussing Saliterman's clemency board experience where he assessed applications relating to Vietnam).

96. *See* Krent, *supra* note 59, at 1674–76.

97. *See* Scott Shane, *Critics of Ford's Nixon Pardon Now Call It Wise*, N.Y. TIMES (Dec. 29, 2006), http://www.nytimes.com/2006/12/29/world/americas/29iht-pardon.4047202.html (recollecting Ford's decision to pardon Richard Nixon).

98. *See* Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 401–05 (1993) (reviewing Bush's pardoning of his former colleagues from the Iran-Contra Affair).

99. *See* Josh Gerstein, *Clinton Pardon Records Offer Fuel for Hillary's Foes*, POLITICO (Jan. 28, 2016, 4:11 PM), https://www.politico.com/story/2016/01/hillary-clinton-pardon-record-218331 [https://perma.cc/ETR9-NBEX] (reviewing Clinton's last-minute pardons, including one for his brother).

100. *See* Andy Sullivan & Tabassum Zakaria, *Bush Spares Libby from Prison*, REUTERS (July 2, 2007, 5:56 PM), http://www.reuters.com/article/us-usa-crime-libby-bush/bush-spares-libby-from-prison-idUSWAT00783220070702 [https://perma.cc/298K-TFCC] (covering Bush's commutation of Lewis Libby, former chief of staff to Vice President Dick Cheney, who was sentenced for obstructing a CIA leak probe).

101. *See* Catherine Rampell, *Why Did Trump Pardon Arpaio? Because He Sees Himself in the Former Sheriff*, WASH. POST (Aug. 28, 2017), https://www.washingtonpost.com/opinions/why-did-trump-pardon-arpaio-because-he-sees-himself-in-the-former-sheriff/2017/08/28/26690608-8c2e-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.c3cfa6f0cfd0 [https://perma.cc/CC3S-7SYM] (arguing that Trump pardoned Arpaio for various reasons including political support and loyalty).

to review the scope of the president's pardon power, beginning with *Ex parte Garland*.

F. Garland, *the Supreme Court, and the Pardon Power*

Garland arose when Congress passed a law in 1865 preventing former Confederate officials from becoming licensed lawyers by requiring them to take a loyalty oath—one which affirmed they never voluntarily gave aid to the Confederacy:

> [N]o person shall be admitted as an attorney and counsellor to the bar of the Supreme Court . . . Circuit or District Court . . . or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed by the act . . . . [I]f any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offence.[102]

The oath prescribed by the act included:

> I . . . do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; *that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;* that I have neither sought nor accepted, not attempted to exercise the functions of *any office whatever, under any authority or pretended authority in hostility to the United States;* that I have not yielded a voluntary support to any pretended government, authority, power, or constitution with the United States, hostile or inimical thereto. . . . [S]o help me God.[103]

Augustus Hill Garland was admitted to the bar in 1860 and began practicing law in Arkansas.[104] When Arkansas seceded from the Union in 1861, Garland remained in Arkansas to serve in both houses of the Confederate States Congress.[105] After the Civil War ended, Arkansas rejoined the Union and in July 1865, Garland received a full pardon from President Andrew Johnson "for all offences committed by his participation, direct or implied, in the Rebellion."[106]

102. *Ex parte* Garland, 71 U.S. 333, 374–75 (1866).
103. *Id.* at 334–35.
104. *Id.* at 375.
105. *Id.* at 374–75.
106. *Id.* at 375.

Upon receiving the pardon, Garland sought to continue practicing as an attorney without taking the disqualifying oath, arguing the pardon exempted him from having to take the oath.[107] When the case of *Garland* went before the Court, the issue "was whether the bar admission law passed by Congress infringed on the president's pardon power."[108]

The Court answered this question by proclaiming the pardon is unlimited, with the exception of impeachment, as identified in the Constitution, and that the power cannot be interrupted or obstructed by Congress.[109] Thus, the 1865 Act was held to be unconstitutional because it allowed Congress to subvert the president's pardon power.[110] The Court further held that Garland's pardon was for all offenses relating to his prior Confederate allegiance; therefore, the pardon relieved him of all "penalties and disabilities attached to the offence of treason" and placed him "beyond the reach of punishment of any kind."[111] Because Garland was pardoned and unable to be punished, Congress could not preclude him from being admitted to the bar.[112]

The Court reasoned that to prohibit Garland from his previously acquired right, that of practicing law, would be to allow a punishment despite Johnson's pardon.[113] Additionally, the Court stated that "[i]t is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."[114]

Only four years passed after *Garland* before the Supreme Court again examined the reach of the presidential pardon.[115] In *United States v. Klein*, the Court wrote, "[i]t is the intention of the Constitution that each of the great co-ordinate departments of the government . . . shall be, in its sphere, independent of the others. To the executive alone is [en]trusted the power of pardon; and it is granted without limit."[116] *Klein* effectively

107. *Id.* at 375–76.

108. Ronald L. Goldfarb, *No Premature Pardons*, WASH. POST (Dec. 8, 1987), https://www.washingtonpost.com/archive/opinions/1987/12/08/no-premature-pardons/6f0026e2-bc0a-4cf1-89c2-715d15422097/?utm_term=.5c3cd4982b39 [https://perma.cc/5F5G-B7TG].

109. *Garland*, 71 U.S. at 371–73.

110. *See* Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 163 n.1 (1995), https://www.justice.gov/file/20206/download [https://perma.cc/5X6M-8UGF].

111. *Garland*, 71 U.S. at 381.

112. *See id.*

113. *Id.*

114. *Id.*

115. *See* United States v. Klein, 80 U.S. 128, 147 (1871).

116. *Id.*

affirmed *Garland*'s bar against judicial or legislative interference with the pardon.[117]

Garland set the stage for the next 150 years, a period in which the Court published seven important pardon-related opinions.[118] The next section of this Note carefully parses these cases to argue that their collective opinions overrule the 1867 *Garland* decision.

II. POST *GARLAND* JURISPRUDENCE LIMITS PARDON POWER

The post-*Garland*, pardon-focused Supreme Court decisions had an impact on the president's ability to exercise his Article II power.[119] While none of these cases have expressly overruled the "unlimited" nature of the pardon power, several outlined a series of limits that—by their existence—collectively overrule *Garland* and *Klein*.[120] This Part of the Note demonstrates how specific cases have limited the pardon to the point where *Garland* should no longer be considered good law.

Garland itself was the first case that provided a limitation to the president's pardon power.[121] The *Garland* Court proclaimed—one paragraph after stating the pardon is unlimited—"[t]here is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."[122] Therefore, within the same page as its primary holding,

117. *See* Steiner, *supra* note 21, at 988.

118. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) ("[S]ome *minimal* procedural safeguards apply to clemency proceedings."); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) ("Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."); Schick v. Reed, 419 U.S. 256, 264–65 (1974) (stating that a presidential pardon cannot offend other parts of the Constitution); *Ex parte* Grossman, 267 U.S. 87, 115, 120 (1925) (holding that criminal contempt of court constitutes an offense against the United States, and an offense against the United States is pardonable by the president); Burdick v. United States, 236 U.S. 79, 87 (1915) (holding that a pardon must be accepted by the individual to whom it was issued in order to be valid); Knote v. United States, 95 U.S. 149, 154 (1877) (holding that the presidential pardon cannot touch funds vested in the Treasury); *Klein*, 80 U.S. at 147 (1871) (reaffirming the unlimited holding in *Garland*).

119. *See, e.g.*, *Woodard*, 523 U.S. at 289; *Dumschat*, 452 U.S. at 464; *Schick*, 419 U.S. at 264; *Burdick*, 236 U.S. at 87; *Knote*, 95 U.S. at 154.

120. *See* cases cited *supra* note 119.

121. *Ex parte* Garland, 71 U.S. 333, 380–81 (1866).

122. *Id.* at 381 (citing BLACKSTONE, *supra* note 35, at *402); *see* 6 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 133–46 (7th ed. 1832) ("[I]n general, . . . the king may pardon any offence whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over, and, consequently, may prevent a popular action on a statute, by pardoning the offence before the suit is commenced."); 1 WILLIAM HAWKINS, A TREATISE OF

Garland immediately contradicts itself. The difficulty with *Garland*'s limitation is that after citing a few sources,[123] the Court fails to expound upon this limitation.[124] The *Garland* Court did not provide any reasoning or justification as to why the president's pardon power cannot restore offices or vested property.[125] Despite the Court's lack of explanation, the *Garland* limitation becomes more comprehensible when viewed in the context of *Knote v. United States*, where the Court held that pardons cannot take money from the treasury.[126]

A. *Presidential Pardons Cannot Involve the Withdrawal of Money from the United States Treasury*

In 1877, ten years after the *Garland* decision, the Supreme Court provided its first post-*Garland* limitation to the presidential pardon beyond impeachment: the president cannot issue a pardon that would involve the withdrawal of "[m]oneys once in the treasury."[127] *Knote v. United States* arose a few years after the Civil War, in the middle of Reconstruction, when President Andrew Johnson issued a general pardon by proclamation on December 25, 1868, "for the offence of treason against the United States, or of giving aid and comfort to their enemies, to all persons who had directly or indirectly participated in the rebellion."[128]

Knote claimed to own personal property in West Virginia that was seized by the United States government after he allegedly committed treason and rebellion.[129] Upon seizure, Knote's property was condemned, forfeited to the government, and sold for $11,000, and the money from the sale was then paid into the United States Treasury.[130] Knote argued that because he was pardoned by President Johnson, he was "relieved of all disabilities and penalties attaching to the offence of treason and rebellion . . . and was restored to all his rights, privileges, and immunities under the Constitution . . . and thus became entitled to receive the said proceeds of [the property] sale."[131]

THE PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 529–52 (1824) (outlining the laws surrounding the pardon and its requirements incident to specific crimes).

123. *Garland*, 71 U.S. at 381.

124. *See id.* at 380–81.

125. *See id.*

126. Knote v. United States, 95 U.S. 149, 154 (1877).

127. *Id.*

128. *Id.* at 152.

129. *Id.* at 149.

130. *Id.*

131. *Id.* at 150.

In response to Knote's claim, Justice Field provided a now-frequently cited description of what a pardon is:

> A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. . . . Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force.[132]

Justice Field further stated that, with regard to the president's pardon power, "there is this limit to it, as there is to all his powers,—it cannot touch moneys in the treasury . . . except expressly authorized by . . . Congress. The Constitution places this restriction upon the pardoning power."[133]

Knote does not cite *Garland* except to mention that the pardon power has been subject to frequent review by the Court.[134] While the Court does not embark on an extensive analysis as to the constitutionality of the pardon power, it still clearly prescribes a significant limitation. The Court's analysis dictates that the president's ability to issue a pardon halts at the gates of the nation's treasury, controlled and funded by the legislative branch, because the money became "vested" in the United States.[135]

"Vested," a term stemming from property law, is defined as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute."[136] Therefore, the Court's ruling in *Knote* suggests that the limitation to the pardon relates to Congress's vested property rights in the treasury.[137] By providing that funds vested

132. *Id.* at 153–54.

133. *Id.* at 154.

134. *Id.* at 153.

135. 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 28:6 (3d ed. 1996).

136. *Vested*, BLACK'S LAW DICTIONARY (10th ed. 2014).

137. Hart v. United States, 118 U.S. 62, 67 (1886) ("[N]o pardon could . . . authorize the payment out of a general appropriation, of a debt which a law of congress had said should not be paid out of it."); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The*

in the treasury can only be spent by Congress, the Court is indirectly providing a separation of powers justification for prescribing this limitation.[138]

The Court reaffirmed *Knote* more recently in *Office of Personnel Management v. Richmond*, ruling that "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."[139] *Office of Personnel Management* did not directly deal with the presidential pardon, but, similar to *Knote*, it determined that another branch of government cannot instruct the removal of funds from the treasury.[140]

The holdings in both *Knote* and *Office of Personnel Management* support the notion that "a pardon cannot interfere with the vested property rights of third parties in violation of the Takings Clause. Second, a pardon cannot require the payment of funds from the Treasury in violation of the Spending Clause."[141] This language prohibiting the pardon's interference with Congress's Article I powers[142] demonstrates a desire to protect the overall separation of powers.[143] While respecting this fundamental design of our tripartite government, the Court held next that pardons must also be accepted by the pardonee in order to be valid.[144]

B. *Pardons Must Be Accepted by Receiver*

In 1915, the Court decided *Burdick v. United States*, invalidating a presidential pardon because the individual to whom it was issued refused the pardon.[145] Burdick, a newspaper editor, appeared before a federal grand jury and, after asserting his Fifth Amendment rights, refused to

Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1, 100 (1998) ("Of course, neither the President's pardon power nor his foreign affairs responsibilities carries an authority to obligate the treasury.").

138. *See* United States v. Klein, 80 U.S. 128, 146–48 (1871). In *Klein*, the Court held that "the legislature cannot change the effect of such a pardon any more than the executive can change a law." *Id.* at 148.

139. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425 (1990).

140. *Office of Personnel Management* involved an individual who claimed government incompetence prohibited him from obtaining disability benefits. *Id.* at 417–18. The Court held that, in conjunction with the Constitution, funds could only be dispersed from the treasury through Congress. *See id.* at 425; *Hart*, 118 U.S. at 67.

141. Hoffstadt, *supra* note 54, at 594 (internal citations omitted).

142. *See* U.S. CONST. art. 1, § 8, cl. 1.

143. *See* Marbury v. Madison, 5 U.S. 137, 165–77 (1803) (establishing judicial review by recognizing the separation of powers created by the Constitution).

144. Burdick v. United States, 236 U.S. 79, 87 (1915).

145. *Id.*

answer questions relating to a customs fraud investigation.[146] He was set to reappear before the grand jury but instead received "a full and unconditional pardon for all offenses against the United States."[147] President Woodrow Wilson issued this pardon in an effort to "eliminate the possibility of [Burdick's] prosecution and thus frustrate [his] . . . claim of Fifth Amendment privilege."[148] Burdick rejected Wilson's pardon, refused to answer questions about his sources, pled his Fifth Amendment right against self-incrimination, and was fined and imprisoned for contempt of court.[149]

Writing for the majority, Justice McKenna used the Court's prior ruling in *United States v. Wilson* to reaffirm its holding that a pardon requires delivery, "and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."[150] Therefore, a presidential pardon does not automatically take effect once it is signed, sealed, and delivered.

> That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the government in the case at bar, was rejected by the [Wilson] court with particularity and emphasis.[151]

The *Wilson* Court explained that a pardon must be accepted to become effective because it must be plead by the pardonee.[152] Therefore,

146. *Id.* at 84–85.

147. *Id.* at 86.

148. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 702 (2012) [hereinafter *Compelling Mercy*].

149. Buchanan, *supra* note 20, at 41; *see* U.S. CONST. amend. V ("[N]or shall [he] be compelled in any criminal case to be a witness against himself . . . .").

150. *Burdick*, 236 U.S. at 90 (quoting United States v. Wilson, 32 U.S. 150, 161 (1833)). Wilson was charged with robbing the mail in Pennsylvania and threatening the mail carrier. *Wilson*, 32 U.S. at 150. Wilson plead guilty, was convicted, and thereafter was sentenced to death. *Id.* at 151. President Andrew Jackson issued Wilson a pardon, one that Wilson ultimately refused and did not bring to the attention of the trial court. *Id.* at 154. The district attorney notified the trial court of the pardon, and when asked by the court if he had anything to say, Wilson answered "that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to." *Id.* at 158–59.

151. *Burdick*, 236 U.S. at 90.

152. *Wilson*, 32 U.S. at 160–61.

> It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with

continuing its *Wilson* precedent, the *Burdick* Court held that "the pardon was legally issued . . . it was Burdick's right to refuse it . . . therefore, [the pardon could not become] effective."[153] Thus, *Wilson* and *Burdick* limit the pardon in that it is not final until accepted.[154] The ruling in *Wilson* was reaffirmed in other federal and state cases prior to *Burdick*.[155]

Only ten years later, the issue of acceptance appeared before the Court again. In *Biddle v. Perovich*, the petitioner was convicted of murder and sentenced to be hanged.[156] In 1909, President William Howard Taft commuted Perovich's death sentence to life in prison.[157] Sixteen years later, Perovich filed for writ of habeas corpus, arguing that his commutation, and subsequent transfers to various prisons, were done without consent or legal authority.[158]

Upon reviewing Perovich's request, the Court answered yes to the question: "Did the President have authority to commute the sentence of Perovich from death to life imprisonment?"[159] Justice Oliver Wendell Holmes reasoned—by way of analogizing the pardon to the imposition of a judicial sentence—that, because the original punishment took effect without regard for the prisoner's assent, the public welfare determines the final outcome when said punishment is altered.[160]

What Justice Holmes encountered in *Biddle* was different than what Justice McKenna discussed in *Burdick*. When an individual accepts a pardon, they also accept the implication of a confession of guilt;[161]

> judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

Id.

153. *Burdick*, 236 U.S. at 94.

154. *See id.*; *Wilson*, 32 U.S. at 150.

155. *See, e.g.*, *Ex parte* Wells, 59 U.S. 307, 315 (1855) (holding that the conditional pardon was accepted and thus valid); Commonwealth v. Lockwood, 109 Mass. 323, 339 (1872) ("[I]t is within the election of the defendant whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional) . . . .").

156. Biddle v. Perovich, 274 U.S. 480, 485 (1927).

157. *Id.*

158. *Id.*

159. *Id.* at 486.

160. *Id.* at 486–87.

161. Steiner, *supra* note 21, at 971 n.90 (quoting United States v. Noonan, 906 F.2d 952, 958 (3d Cir. 1990)).

"whereas acceptance of a commutation involves no such admittance, so a commutation cannot be refused."[162] Therefore, while the ruling in *Biddle* might seem to have weakened *Burdick*'s holding, the Court simply decided not to extend *Burdick*.[163]

Because the president's pardoning power is conditioned upon acceptance, *Wilson* and *Burdick* further demonstrate that the presidential pardon is not without its limitations.[164] To this day, the pardon granted in *Burdick* remains the only presidential pardon invalidated by the Court.[165] When deciding *Burdick*, the Court also believed Burdick's pardon would undercut his ability to assert his Fifth Amendment right, thus offending another part of the Constitution—something neither the president nor the pardon can do.[166]

C. *Pardons Cannot Offend the Constitution*

In *Burdick*, the Court reasoned that by accepting a pardon, Burdick was placed in a position that essentially forced him to give up his Fifth Amendment right against self-incrimination.[167] With regard to the pardon and the Fifth Amendment, the Court believed its responsibility was "to preserve both [and] to leave to each its proper place," so the pardon would

> Pardon implies guilt. If there be no guilt, there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of right but of grace. A party is acquitted on the ground of innocence; he is pardoned through favor.

Id.

162. Dan Jacoby, *Not Unpardonable*, DANJACOBY.COM (2009), http://www.danjacoby.com/politics/columns/writing/183_not_unpardonable.htm [https://perma.cc/XN6B-U4YG]. In a roundtable discussion conducted by ABC News, various legal scholars engaged in a conversation regarding the difference between a presidential pardon and commutation. *Commutation? Clemency? Pardon? Sorting Out Legalese in Libby Case*, ABCNEWS (July 3, 2007), http://abcnews.go.com/TheLaw/story?id=3339765&page=1 [https://perma.cc/3T9T-36G7]. Christopher Schroeder of Duke University stated that "[c]ommutations have always been a lesser included authority under president's power to pardon." *Id.* Randy Barnett of the Georgetown University Law Center stated "[p]ardon is an 'executive forgiveness of crime'; commutation is an 'executive lowering of the penalty.'" *Id.*

163. *Biddle*, 274 U.S. at 487–88 (internal citation omitted) ("We are of opinion that the reasoning of [Burdick] is not to be extended to the present case.").

164. *See* Burdick v. United States, 236 U.S. 79, 95 (1915); United States v. Wilson, 32 U.S. 150, 150 (1833).

165. *See* cases cited *supra* notes 7, 118, 150–52 and accompanying text (reviewing each case where the Court addressed the presidential pardon but rejected only one pardon: Burdick's).

166. *See Burdick*, 236 U.S. at 93–94.

167. Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 105–06 (2002).

not offend other parts of the Constitution.[168] Decades later, the Court continued this line of reasoning in *Schick v. Reed*.[169]

The *Schick* Court held that "considerations of public policy . . . support an interpretation of [the pardon] power so as to permit the attachment of any condition which does not otherwise offend the Constitution."[170] Schick, the petitioner, was sentenced to death pursuant to the Uniform Code of Military Justice for murder, only to receive a conditional presidential commutation lessening his sentence to life in prison.[171] President Eisenhower's commutation came with a steep price: Schick would only receive the commutation "on [the] condition that he never become eligible for parole."[172]

Schick challenged the validity of the commutation, arguing Eisenhower had exceeded his authority.[173] Ultimately, the Court held the president could issue commutations and pardons that do not offend the Constitution.[174] Without citing *Garland* or the "unlimited" power of the presidential pardon, the *Schick* Court ruled that "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself."[175] The Court did not believe the condition Eisenhower attached to Schick's pardon in any way offended the Constitution.[176] Indeed, conditional pardons were frequently used under the common law and the British monarchy.[177] The history of the United States is replete with examples where the president issued conditional pardons.[178]

168. *Burdick*, 236 U.S. at 93–94.

169. Schick v. Reed, 419 U.S. 256, 267–68 (1974).

170. *Id.* at 266.

171. *Id.* at 256.

172. Samuel E. Schoenburg, *Clemency, War Powers, and Guantánamo*, 91 N.Y.U. L. REV. 917, 927 n.74 (2016) (citing *Schick*, 419 U.S. at 257–59).

173. *Schick*, 419 U.S. at 259–60.

174. *Id.* at 266–67.

175. *Id.* at 267.

176. Schoenburg, *supra* note 172, at 928.

177. *See generally* Patrick R. Cowlishaw, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 150–57 (1975) (reviewing the history of pardons throughout England and the United States, including those with attached conditions).

178. *See* David Gray Adler, *The President's Pardon Power*, *in* INVENTING THE AMERICAN PRESIDENCY 209, 220 (Thomas E. Cronin ed., 1989) (discussing how President Harding commuted the sentence of war radicals on the condition they be law-abiding, including the requirement that one travel to Washington D.C. to meet the President); *Wresting the Pardoning Power*, *supra* note 21, at 593 n.147 (citing 1 OP. ATT'Y GEN. 341 (1820)); Krent, *supra* note 59, at 1676–77 nn.69–75 (citing various instances where presidents have issued conditional pardons, particularly in the earlier years of the United States).

Contemporaneously with *Schick*, the United States District Court for the District of Columbia adjudicated a case involving James "Jimmy" Hoffa and President Richard Nixon.[179] President Nixon extended a commutation to Hoffa, conditioned upon his agreement not to engage, directly or indirectly, in union-related activities until the expiration of his original sentence.[180] After accepting Nixon's pardon, Hoffa argued that the Nixon's restriction was too broad and implicated the First Amendment.[181] In response, the court used a two-pronged analysis to determine whether the pardon was constitutional.[182] In this analysis, the court declared that a president may not issue a conditional pardon or clemency that is not "directly related to the public interest" or that will "unreasonably infringe on the individual commutee's constitutional freedoms."[183]

To arrive at its final decision, the court conducted an extensive constitutional analysis:

> Considered within the framework of our constitutional system, wherein the rights and liberties of the individual are accorded a position of paramount importance, there are obvious limits beyond which the President may not go in imposing and subsequently enforcing such conditions. On the other hand, every condition which to some degree impinges on those rights and liberties is not thereby unenforceable. Constitutional rights, including those First and Fifth Amendment rights raised by plaintiff, may be restricted provided that the restrictions are precisely drawn to accomplish a legitimate governmental purpose.[184]

The court also considered an amicus brief by the American Civil Liberties Union, which argued that "a condition requiring the commutee to forego supporting any candidate for political office, except the President who commuted his sentence," would be unconstitutional.[185]

Employing the two-pronged analysis, the district court held that the president had constitutional authority to act as he did because the

179. Hoffa v. Saxbe, 378 F. Supp. 1221, 1224 (D.D.C. 1974).

180. Cowlishaw, *supra* note 177, at 154–55.

181. *See* Krent, *supra* note 59, at 1714–15.

182. *Hoffa*, 378 F. Supp. at 1236.

183. *Id.*

184. *Id.* at 1234–35 (citations omitted).

185. *Id.* at 1235 n.48 ("We fully agree that such a condition would be unenforceable and would clearly fail to meet the standards . . . set forth infra.").

banishment condition was reasonable in light of the fact that Hoffa's crimes related to his leadership of the trade union.[186]

Notwithstanding the fact that *Schick* and *Hoffa* fail to provide holdings on behavior that would be offensive to the Constitution, the Court's rule stands: "[I]n at least some circumstances, conditions imposed on a grant of clemency could violate the Constitution and be subject to invalidation by the judiciary."[187] It is difficult to identify what the Court would specifically recognize as constitutionally offensive behavior because there is a lack of actual litigation on the matter, and United States jurisprudence regarding the presidential pardon is, overall, very limited.[188] However, a number of scholarly works have identified offensive behavior that would frustrate constitutional limits and require judicial review.[189]

One argument suggests pardons implicating "cruel and unusual punishment[s] could not be imposed as a condition, even if the alternative, e.g., death, might have been viewed as even less desirable by the would-be pardonee."[190] Despite the fact that judicial interpretation of the Eighth Amendment's proscription against cruel and unusual punishment continues to evolve,[191] Harold Krent argues that a pardon containing such a punishment would offend the Constitution and require judicial intervention, as would pardons that affect freedom of speech or religious

186. Boudin, *supra* note 21, at 22; *see also Hoffa*, 378 F. Supp. at 1235.

> [I]t would be unrealistic to consider the restriction placed on plaintiff Hoffa's commutation except in the context of his status as a felon twice convicted for activities arising out of his union office and serving a combined sentence of thirteen years imprisonment. This point of reference is significant to the decision of the instant case because Hoffa's "[constitutional] rights of necessity are conditioned by the situation in which [his] convictions placed [him]."

Id. (quoting Berrigan v. Sigler, 499 F.2d 514, 522 (D.C. Cir. 1974)). Hoffa submitted an appeal that was later dismissed due to his disappearance and presumed death. *Of Pardons, Politics and Collar Buttons*, *supra* note 87, at 1488 n.19.

187. *Compelling Mercy*, *supra* note 148, at 716.

188. *See generally Executive Clemency*, *supra* note 82 (discussing the history of the presidential pardon power).

189. *See Compelling Mercy*, *supra* note 148, at 701 (arguing pardons that deny fundamental rights would offend the Constitution); Krent, *supra* note 59, at 1693 (contending that pardons that result in cruel and unusual punishments would offend the Constitution); Strasser, *supra* note 167, at 115 (averring that castration, as a prerequisite to receiving a pardon, would constitute a cruel and unusual punishment).

190. Strasser, *supra* note 167, at 115; *see also* Avital Stadler, Comment, *California Injects New Life into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution*, 46 EMORY L.J. 1285, 1322 (1997) ("There is little question that actual castration would be considered a violation of the Eighth Amendment.").

191. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958). The Eighth Amendment standard constantly changes and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*

practice.[192] Daniel Kobil argues that presidential pardons and clemencies could offend the Constitution if they were to undermine fundamental rights, deny equal protection of the law, deny due process, or be granted in cases of impeachment.[193]

These are all areas of constitutional law for which the Court has identified as so important that they require a heightened level of scrutiny to determine the validity of government action.[194] For example, if a presidential pardon were issued upon the condition that a pardonee be sterilized, the Court's ruling in *Skinner v. Oklahoma* may stand in the president's way or, at the very least, invoke judicial review.[195] Similarly, if the president were to issue a pardon upon the condition that an individual not engage in a same-sex marriage, the Court's ruling in *Obergefell v. Hodges* may ignite a judicial response similar to if a state were to pass legislation, once again, banning same-sex marriage.[196]

Skinner and *Obergefell* represent a large area of jurisprudence that involves overturning government action interfering with individuals' fundamental rights.[197] If the Court would strike down laws that severely hinder an individual's enjoyment of certain rights as violative of the Constitution—whether they be fundamental or any other—then similar actions taken by the president should provoke the same judicial response and protections.[198]

192. Krent, *supra* note 59, at 1692–94.

193. *See Compelling Mercy*, *supra* note 148, at 712–28 (arguing that such pardons are actions that would offend the Constitution, are subject to judicial review, and should be overturned by the Supreme Court).

194. *See* W. Kent Davis, *Answering Justice Ginsburg's Charge That the Constitution is "Skimpy" in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. TEX. L. REV. 951, 954–55 (1998).

195. *See* Skinner v. State of Okla. *ex rel.* Williamson, 316 U.S. 535, 541–43 (1942) (recognizing that procreation is a fundamental right requiring a strict scrutiny analysis if government action were taken to hinder the right).

196. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

197. *See id.*; *Skinner*, 316 U.S. at 541; *see also* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that parents have a fundamental right to the custody of their children and revocation of said right requires an individualized hearing to determine fitness; overruling law that automatically revoked unwed father's custody of children upon death of the mother); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that marriage is a fundamental right and the law banning interracial marriage was violative of the Fourteenth Amendment's equal protection clause).

198. *See* cases cited *supra* notes 195–97 and accompanying text.

The Court in *Schick* limited the presidential pardon to the extent that it may not offend other parts of the Constitution.[199] Therefore, *Schick* furthers the central argument of this Note—that there are limitations to the pardon power, those limitations exist in the Constitution,[200] and there may be others not yet identified or explored. As a result, the Court must recognize and effectuate its ability to review constitutionally questionable pardons, a power that one former Justice recognized and herself addressed.[201]

D. *Procedural Safeguards Apply and the Supreme Court Can Intervene*

In one of its first cases, the Supreme Court demonstrated its primary power in our tripartite government when it invalidated a law through the exercise of judicial review.[202] In *Marbury v. Madison*, Chief Justice John Marshall wrote the unanimous decision that included the following language:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> . . . .
>
> The judicial power of the United States is extended to all cases arising under the constitution.[203]

Two centuries later, *Marbury* remains the primary authority upon which the Court recognizes its power to review cases—a power derived from the language and structure of the Constitution.[204]

The ruling in *Marbury* is what empowered the Court to hear and ultimately adjudicate the decision in *Ex parte Garland*, the case where the Court defined the pardon's scope.[205] Despite the Court's proscription against judicial intervention with the pardon,[206] if the Court did not believe

199. Schick v. Reed, 419 U.S. 256, 266–67 (1974).

200. *Id.*

201. *See infra* Section II.D.

202. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (reviewing the Court's role in deciding the law and establishing judicial review).

203. *Id.* at 177–78.

204. *See* Carlos Manuel Vázquez, *Judicial Review in the United States and in the WTO: Some Similarities and Differences*, 36 GEO. WASH. INT'L L. REV. 587, 589 (2004) ("The power to nullify legislative acts that exceed the constitutional powers of the federal government is, of course, the type of judicial review later affirmed in *Marbury v. Madison*.").

205. *See supra* Section I.F.

206. *See* United States v. Klein, 80 U.S. 128, 147 (1871).

it had the authority to review the presidential pardon, it most likely would have denied certiorari to Garland's appeal, as well as the several other pardon-related cases thereafter.[207] However, the Court heard *Garland*, followed by *Klein*, *Knote*, *Burdick*, *Biddle*, *Schick*, *Dumschat*, and—most recently—*Ohio Adult Parole Authority v. Woodard*.[208] The split opinions provided in *Woodard* demonstrate—and possibly forecast—the evolving legal landscape upon which the Court will now traverse when adjudicating decisions involving the pardon.[209]

In *Woodard*, the official opinion of the Court rests in Parts I and III of the decision, with a plurality opinion in Part II.[210] The *Woodard* Court provided two important yet conflicting notions.[211] First, the Court reaffirmed 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."[212] Second—and what makes *Woodard* unique and important to the argument of this Note—is not the majority decision, rather the concurrence provided by Justice O'Connor in which she states:

> I do not, however, agree . . . that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. . . . [S]ome *minimal* procedural safeguards apply to clemency proceedings. *Judicial intervention might . . . be warranted in . . . a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.*[213]

207. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288–89 (1998) (O'Connor, J., concurring) (highlighting situations where it may be appropriate for the Court to review a presidential pardon); *see also* Motion for Leave to File Brief of Amici Curiae Martin Redish, Free Speech for People and Coalition to Preserve, Protect and Defend in Opposition to Motion of Defendant Joseph Arpaio for Vacatur and Dismissal with Prejudice at 5–6, United States v. Arpaio, 2:16-cr-01012 (D. Ariz. Sept. 11, 2017), BL No. 227 [hereinafter Redish].

> [I]n neither *Burdick* nor *Biddle* did the Court decline to exercise its role as final arbiter of the pardon power's scope on the ground that the power is absolute.
>
> Together, these cases teach that courts limit the President's pardon power where, and only where, competing constitutional rights are at stake.

Id.

208. *See Woodard*, 523 U.S. at 289 (O'Connor, J., concurring); *see also supra* Section I.F.

209. *Woodard*, 523 U.S. at 289.

210. *Id.*

211. *Id.*

212. *Id.* at 276 (citing Conn. Bd. of Pardons vs. Dumschat, 452 U.S. 458, 464 (1981)).

213. *Id.* at 288–89 (O'Connor, J., concurring) (second emphasis added).

The crux of Justice O'Connor's concurrence is that an executive pardon could be reviewed by the courts if the pardon implicates due process concerns or is arbitrarily implemented.[214] She, too, argues that the pardon cannot offend other parts of the Constitution.[215] While this was not the official opinion of the Court in *Woodard*, it demonstrates a potential shift in the Court's most recent jurisprudence: not only is the pardon power limited in some capacity, it is appropriate for the Court to step in and exercise judicial review.[216] From 1998 onward, several federal circuits have directly cited Justice O'Connor's concurrence while recognizing that some clemency procedures do require some form of due process.[217]

Justice Stevens, in his concurrence and partial dissent, agreed with Justice O'Connor when he wrote that the Fourteenth Amendment's due process clause does apply to matters relating to clemency.[218] Specifically, Justice Stevens wrote:

> There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required. Presumably a State might eliminate this aspect of capital sentencing entirely, and it unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy. Nevertheless, there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review. . . . [N]o one would contend that [an executive] could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency. Our cases also support the conclusion that if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.[219]

214. *Id.* at 289.

215. *See supra* Section II.C.

216. *See* Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement*, 13 FED. SENT'G REP. 150, 152 & n.20 (2001) (citing *Woodard*, 523 U.S. at 289–90).

217. *See* Lee v. Hutchinson, 854 F.3d 978, 981 (8th Cir. 2017); Mann v. Palmer, 713 F.3d 1306, 1316–17 (11th Cir. 2013); Harvey v. Horan, 285 F.3d 298, 313–14 (4th Cir. 2002); Wilson v. United States Dist. Court, 161 F.3d 1185, 1187 (9th Cir. 1998); Duvall v. Keating, 162 F.3d 1058, 1060–61 (10th Cir. 1998).

218. *See Woodard*, 523 U.S. at 292 (Stevens, J., concurring and dissenting in part).

219. *Id.*

Justice Stevens' opinion is primarily about the clemency power vested in the Governor of Ohio.[220] However, Chief Justice Rehnquist—the author of the Court's opinion—and Justices O'Connor and Stevens all discuss broadly the ability of the Court to interfere with or review issues pertaining to clemencies and pardons.[221]

In Part II of *Woodard*, "Chief Justice Rehnquist . . . would have ruled that clemency, as a matter of 'grace' rather than a legitimate claim of entitlement, is not subject to judicial review for alleged violations of due process."[222] However, Justice O'Connor's concurring opinion, coupled together with that of Justice Stevens, shows that "a majority of the Supreme Court has not embraced such a 'hands off' approach to judicial involvement in clemency matters."[223] Therefore, the *Woodard* decision did not rule out due process arguments relating to the constitutionality of executive clemency, leaving "the door open to future challenges" to the pardon's scope.[224]

Leaving "the door open" to litigation represents a dramatic shift from the Court's original *Garland* decision.[225] Therefore, if Arpaio's case continues to include the validity of his pardon, and makes its way to the Supreme Court, the Court has the responsibility to reevaluate *Garland*. That is to say, the Court must proclaim *Garland* to be bad law in accordance with its aforementioned case law, collectively demonstrating that the president's power to pardon is not unlimited.[226]

E. *Current Limitations that Apply to the Presidential Pardon*

This Note agrees with the aforementioned jurisprudence and scholarship discussed throughout Part II, that the president's pardon is constrained—but not exclusively—by the following limitations.[227]

First, pardons cannot interfere with the separation of powers in our tripartite government; for example, a pardon cannot remove funds from the treasury because it would interfere with Congress's Article I

220. *See* Strasser, *supra* note 167, at 129–30.

221. *Id.*

222. *Compelling Mercy*, *supra* note 148, at 700 (citing *Woodard*, 523 U.S. at 284–85).

223. *Id.* at 701.

224. Matthew B. Meehan, *A Gathering Storm: Future Challenges Necessitate Reform of Arizona's Dysfunctional Post-Conviction Regime*, 9 ARIZ. SUMMIT L. REV. 1, 24 (2016).

225. *See Ex parte* Garland, 71 U.S. 333, 380 (1866).

226. *See* cases cited *supra* notes 7, 118, 150–52 and accompanying text (identifying each case where the Court provided a limit to the president's pardon power).

227. *Supra* Part II.

powers.[228] Second, pardons must be accepted to be valid.[229] Third, pardons cannot offend the Constitution, such as interfering with an individual's First or Fifth Amendment rights or their fundamental rights.[230] Fourth, pardons and clemencies are subject to procedural due process.[231] Fifth, and finally, pardons are always reviewable by the Supreme Court, who is empowered to "say what the law is."[232]

While the Court has been careful not to wade into the waters of the president's pardon power, it can no longer afford to stand idly by. In addition to implicitly restricting *Garland* by its subsequent opinions that limit the president's pardon power, the Court has impliedly recognized it has a significant role to play in the pardon process overall.[233] Stemming from its ruling in *Marbury*, the Court is the only entity capable of reviewing executive or legislative action to determine if it falls within the confines of the Constitution,[234] and it must do so now with the presidential pardon. The notion that the president can exercise a plenary power unchecked by another branch is contrary to the ideals of the balance and separation of powers.[235] Therefore, when the Court reviews the president's power to issue pardons, it must do so with an eye towards creating a new precedent that more accurately states the pardon's scope and better protects the Court's overall role and authority in our government.

Because so much of the discussion involving the presidential pardon invokes matters relating to the balance of powers, the next section contextualizes *Garland* and the pardon within the larger separation of powers debate.

228. Knote v. United States, 95 U.S. 149, 154 (1877); *see Garland*, 71 U.S. at 380–81.

229. *See* Burdick v. United States, 236 U.S. 79, 87–93 (1915); United States v. Wilson, 32 U.S. 150, 161 (1833).

230. Schick v. Reed, 419 U.S. 256, 264 (1974); Hoffa v. Saxbe, 378 F. Supp. 1221, 1234–35 (D.D.C. 1974); *Compelling Mercy*, *supra* note 148, at 716; Krent, *supra* note 59, at 1693; *see also* Redish, *supra* note 207, at 6 ("[C]ourts limit the President's pardon power where . . . competing constitutional rights are at stake.").

231. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288–90 (1998) (O'Connor, J., concurring); *Compelling Mercy*, *supra* note 148, at 701.

232. Marbury v. Madison, 5 U.S. 137, 177 (1803).

233. *See supra* notes 229–32.

234. *Marbury*, 5 U.S. at 177.

235. *See infra* Part III.

III. CONTEXTUALIZING *GARLAND*, CONTEMPT OF COURT, AND THE PARDON

President Trump's pardoning of Arpaio's contempt of court conviction reignited a centuries old separation of powers dispute between the executive and judicial branches of government.[236] The United States jurisprudence addressing separation of powers began with *Marbury v. Madison*.[237] The *Garland* court continued that jurisprudence when it ruled the pardon was an unlimited power of the president.[238]

Traditionally, the judicial branch has utilized contempt of court as a means to punish those who fail to comply with a court order.[239] The Supreme Court has described contempt of court as "[t]he ability to punish disobedience to judicial orders [and] is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority."[240] While contempt of court is not enumerated in the Constitution, it is seen as an inherent power of the judicial branch.[241] The Court itself has stated "[t]hat the power to punish for contempt[] is inherent in all courts, has been many times decided and may be regarded as settled law."[242] In *Young v. United States ex rel. Vuitton et Fils S.A.*, the Court held that contempt was essential to its administration of justice and "may not be left to the mercy of the Executive Branch."[243] A contempt of court conviction constitutes "an offense against the United States" and thus is pardonable by the president.[244]

236. *See* Brief of Amici Curiae Erwin Chemerinsky, Michael E. Tigar, and Jane B. Tigar Supporting Denial of Vacatur at 15–18, United States v. Arpaio, No. 17-10448 (9th Cir. Dec. 21, 2017), BL No. 18-2 [hereinafter Chemerinsky et al.] (reviewing the history of the separation of powers debate). The Constitution grants the president power to pardon "[o]ffenses against the United States." U.S. CONST. art. II, § 2.

237. *See generally* Marbury v. Madison, 5 U.S. 137, 165–77 (1803). "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Id.* at 166. "The powers of the legislature are defined, and limited . . . ." *Id.* at 176. "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

238. *Ex parte* Garland, 71 U.S. 333, 380 (1866).

239. *See Ex parte* Grossman, 267 U.S. 87, 108 (1925); Bessette v. W.B. Conkey Co., 194 U.S. 324, 327 (1904).

240. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 796 (1987).

241. Protect Democracy Project, *supra* note 5, at 3.

242. Michaelson v. United States *ex rel.* Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65 (1924).

243. Protect Democracy Project, *supra* note 5, at 12 (citing *Michaelson*, 266 U.S at 65–66).

244. *Grossman*, 267 U.S. at 115.

Notwithstanding the Court's decision in *Grossman*, some view a court's ability to issue a contempt conviction, and imprison an individual for said conviction, as the only mechanism in which the judicial branch is able to uphold its power against the other branches.[245] Others have described the judiciary's ability to punish contempt violations as its "most important duty: [in order] to act as a 'counter-majoritarian' check on excesses threatened or committed by the coordinate branches of government."[246] Without protecting contempt sanctions "[court] orders would have little practical force, and would be rendered essentially meaningless."[247] If parties can interfere with contempt orders "then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."[248]

Despite the history regarding the president's ability to pardon contempt charges, the national, scholarly, and legal debate on the pardon should turn to its limitations.[249] Without recognizing that the pardon is a limited presidential power and that the Supreme Court is empowered to review the president's exercise of that power, the Court diminishes its ability to "say what the law is,"[250] thus threatening the continuity of the balance and separation of powers. The creation of a new precedent would better protect the separation of powers and the Court's authority overall.

CONCLUSION

Since 1867, the Supreme Court has issued several decisions that collectively limit the reach of the presidential pardon, thus overruling its holding in *Ex parte Garland* that the pardon is unlimited. Despite outlining decisions to the contrary, the Court has not specifically said the president's pardon authority is limited.[251] However, through *Klein*, *Knote*, *Burdick*, *Wilson*, *Schick*, *Dumschat*, and *Woodard*, the Court has

> Nothing in the ordinary meaning of the words "offenses against the United States" excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States, and so must be an offense against the United States.

Id. (internal citation omitted).

245. *See* Roderick, *supra* note 5, at 3.

246. Chemerinsky et al., *supra* note 236, at 9.

247. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 774 F.3d 935, 952 (9th Cir. 2014).

248. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911).

249. *See supra* Part II.

250. Marbury v. Madison, 5 U.S. 137, 165–77 (1803).

251. *See supra* Section II.E.

effectively limited the president's ability to exercise the pardon power by prohibiting pardons from withdrawing funds vested in third parties, pardons not accepted by receiver, and pardons that offend the Constitution.[252]

Although some may object to overruling *Garland* based on its long-standing precedent, the Court has written that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision."[253] In the last two centuries, the Court has demonstrated a willingness to overrule its own precedents[254]—it has done so over two hundred times.[255] Because the Court has overruled itself many times before, it can and should do so now with *Garland* by proclaiming it to be bad law and unworkable in today's jurisprudence.

It is time for the Supreme Court, to review the 150-year jurisprudence involving the presidential pardon and finally declare: (1) *Garland* is overruled; (2) the presidential pardon is limited; and (3) a new interpretation of the pardon's scope is necessary. By sticking to its 1867 ruling, the Court is upholding bad law, while limiting its ability to protect itself, preserve its power, and remain an effective, coequal branch in the United States government.

252. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 265–66 (1981); Schick v. Reed, 419 U.S. 256, 264 (1974); Burdick v. United States 236 U.S. 79, 87 (1915); Knote v. United States, 95 U.S. 149, 154 (1877); United States v. Klein, 80 U.S. 128, 147 (1871); United States v. Wilson, 32 U.S. 150, 160–61 (1833).

253. Helvering v. Hallock, 309 U.S. 106, 119 (1940).

254. *See* U.S. GOV'T PUBLISHING OFFICE, SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISIONS 2385 (2002), https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-12.pdf [https://perma.cc/NC4Y-4E57]; *see also* Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 184–94 (1958).

255. U.S. GOV'T PUBLISHING OFFICE, *supra* note 254, at 2399. Some well-known and noteworthy examples of when the Court overruled itself include *Bell Atlantic Corp. v. Twombly*, *Mapp v. Ohio*, and *Brown v. Board of Education*. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957) by holding plaintiffs must include sufficient facts in their complaint to make it plausible, not just possible or conceivable, they will be able to prove facts to support their claims); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949) by holding evidence obtained in violation of the Fourth Amendment may not be used in state criminal proceedings); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896) by holding that separate but equal "segregation is a denial of the equal protection of the laws" and thus unconstitutional).