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

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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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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.

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 powers8—an often celebrated and revered staple of American democracy.


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) (“[I]t 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 become effective . . . .”); Knote v. United States, 95 U.S. 149, 154 (1877) (“[T]he 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. With President Trump and several of his associates currently under investigation for alleged ties to Russian operatives, 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. In response, President Trump has proclaimed he has the “absolute right” to pardon himself. 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.

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. 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.

13. See infra Part I.
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.” President Nixon’s pardon is one of over 14,000 pardons issued since President William McKinley in 1900. 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”).

When the Committee convened, 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. 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.

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.

18. Id.
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

22. See Wrestling 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 Wrestling the Pardoning Power, supra note 21, at 583).


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

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. 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. Pilate did so in order to quell the surmounting discord among his subjects who were calling for his release. 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. Such a practice allowed Rome to prevent revolt, while also conserving assets useful to the empire. 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.

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

   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 I RAYMOND E. BROWN, THE DEATH OF THE MESSIAH: FROM GETHSEMANE TO THE GRAVE 814 (1994).
31. MOORE, supra note 28.
32. See id.
33. WRESTLING 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, while others viewed it as a way to ensure that justice was mercifully administered. 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. 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.” 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.

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. The monarch was also required to specifically identify the crime for which the offender was receiving clemency, especially if it involved treason, murder, or rape.

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. 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.”); Wrestling the Pardon 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.


38. Wrestling the Pardon Power, supra note 21, at 586.


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. Prior to impeachment, Osborne received a “royal pardon.” Believing Charles II had gone beyond his power, Parliament considered measures aimed at limiting his pardon capabilities.

Parliament acted forthwith to diminish the monarch’s pardon power. 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. 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. Such practices led to widespread criticism of the royal pardon.

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. However, after the Revolutionary War, the task of creating a new government lay before the

44. See id. at 488.
46. See Duker, supra note 21, at 491–94.
47. Grupp, supra note 37, at 56–58; Wrestling the Pardoning Power, supra note 21, at 587–88.
48. See sources cited supra note 47.
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.


\(^{55}\) See Duker, supra note 21, at 501.


\(^{57}\) The Federalist No. 74 (Alexander Hamilton).

\(^{58}\) Id.


\(^{60}\) 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.
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.


74. Hagen, supra note 72.


Republicans in future elections. 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. 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.” 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.

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. This was especially true for Presidents Abraham Lincoln and Andrew Johnson, both during and after the American Civil War.

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. Two years after the war began, Lincoln issued a
general amnesty to those who rebelled against the Union. 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.’” Unlike other presidents, Lincoln often invited pardon petitioners to the White House, 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. 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. The limitations on who could be pardoned was primarily based on their net worth and their role in the Civil War.

Within a matter of weeks, Johnson began to systematically disassemble Congress’s reconstruction efforts by granting a vast number of pardons to former Confederates. 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)).
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 War95—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.


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


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 . . . 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.  

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.

Augustus Hill Garland was admitted to the bar in 1860 and began practicing law in Arkansas. When Arkansas seceded from the Union in 1861, Garland remained in Arkansas to serve in both houses of the Confederate States Congress. 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.”

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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{109} Thus, the 1865 Act was held to be unconstitutional because it allowed Congress to subvert the president’s pardon power.\textsuperscript{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.”\textsuperscript{111} Because Garland was pardoned and unable to be punished, Congress could not preclude him from being admitted to the bar.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{114}

Only four years passed after Garland before the Supreme Court again examined the reach of the presidential pardon.\textsuperscript{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.”\textsuperscript{116} Klein effectively

\begin{itemize}
\item \textsuperscript{107} Id. at 375–76.
\item \textsuperscript{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].
\item \textsuperscript{109} Garland, 71 U.S. at 371–73.
\item \textsuperscript{111} Garland, 71 U.S. at 381.
\item \textsuperscript{112} See id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} See United States v. Klein, 80 U.S. 128, 147 (1871).
\item \textsuperscript{116} Id.
\end{itemize}
affirmed Garland’s bar against judicial or legislative interference with the pardon.\textsuperscript{117}

Garland set the stage for the next 150 years, a period in which the Court published seven important pardon-related opinions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{122} Therefore, within the same page as its primary holding,
Garland immediately contradicts itself. The difficulty with Garland’s limitation is that after citing a few sources, the Court fails to expound upon this limitation. The Garland Court did not provide any reasoning or justification as to why the president’s pardon power cannot restore offices or vested property. 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.

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.” 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.”

Knote claimed to own personal property in West Virginia that was seized by the United States government after he allegedly committed treason and rebellion. 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. 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.”

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.
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.
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.\textsuperscript{138}

The Court reaffirmed \textit{Knote} more recently in \textit{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.”\textsuperscript{139} \textit{Office of Personnel Management} did not directly deal with the presidential pardon, but, similar to \textit{Knote}, it determined that another branch of government cannot instruct the removal of funds from the treasury.\textsuperscript{140}

The holdings in both \textit{Knote} and \textit{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.”\textsuperscript{141} This language prohibiting the pardon’s interference with Congress’s Article I powers\textsuperscript{142} demonstrates a desire to protect the overall separation of powers.\textsuperscript{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.\textsuperscript{144}

\textbf{B. Pardons Must Be Accepted by Receiver}

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

\begin{footnotesize}
\begin{enumerate}
\item See United States v. Klein, 80 U.S. 128, 146–48 (1871). In \textit{Klein}, the Court held that “the legislature cannot change the effect of such a pardon any more than the executive can change a law.” \textit{Id.} at 148.
\item \textit{Office of Personnel Management} involved an individual who claimed government incompetence prohibited him from obtaining disability benefits. \textit{Id.} at 417–18. The Court held that, in conjunction with the Constitution, funds could only be dispersed from the treasury through Congress. See \textit{id.} at 425; \textit{Hart}, 118 U.S. at 67.
\item Hofstatt, \textit{supra} note 54, at 594 (internal citations omitted).
\item See U.S. CONST. art. 1, § 8, cl. 1.
\item See \textit{Marbury v. Madison}, 5 U.S. 137, 165–77 (1803) (establishing judicial review by recognizing the separation of powers created by the Constitution).
\item Burdick v. United States, 236 U.S. 79, 87 (1915).
\end{enumerate}
\end{footnotesize}
answer questions relating to a customs fraud investigation. He was set to reappear before the grand jury but instead received “a full and unconditional pardon for all offenses against the United States.”

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.” 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.

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.” 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.

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

146. Id. at 84–85.
147. Id. at 86.
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) . . . .

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.” 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.


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.”).


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.

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

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.” 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. 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.”

Schick challenged the validity of the commutation, arguing Eisenhower had exceeded his authority. Ultimately, the Court held the president could issue commutations and pardons that do not offend the Constitution. 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.” The Court did not believe the condition Eisenhower attached to Schick’s pardon in any way offended the Constitution. Indeed, conditional pardons were frequently used under the common law and the British monarchy. The history of the United States is replete with examples where the president issued conditional pardons.

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168. Burdick, 236 U.S. at 93–94.
170. Id. at 266.
171. Id. at 256.
174. Id. at 266–67.
175. Id. at 267.
176. Schoenburg, supra note 172, at 928.
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); Wrestling 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. 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. After accepting Nixon’s pardon, Hoffa argued that the Nixon’s restriction was too broad and implicated the First Amendment. In response, the court used a two-pronged analysis to determine whether the pardon was constitutional. 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.”

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.

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.

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

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


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 that 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.”).

practice. 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.

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. 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. 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.

*Skinner* and *Obergefell* represent a large area of jurisprudence that involves overturning government action interfering with individuals’ fundamental rights. 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.

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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).
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.\footnote{199}{Schick v. Reed, 419 U.S. 256, 266–67 (1974).} Therefore, *Schick* furthers the central argument of this Note—that there are limitations to the pardon power, those limitations exist in the Constitution,\footnote{200}{Id.} 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.\footnote{201}{See infra Section II.D.}

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.\footnote{202}{See generally Marbury v. Madison, 5 U.S. 137 (1803) (reviewing the Court’s role in deciding the law and establishing judicial review).} 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.\footnote{203}{Id. at 177–78.}

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.\footnote{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*.”).}

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.\footnote{205}{See supra Section I.F.} Despite the Court’s proscription against judicial intervention with the pardon,\footnote{206}{See United States v. Klein, 80 U.S. 128, 147 (1871).} if the Court did not believe....
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. However, the Court heard Garland, followed by Klein, Knote, Burdick, Biddle, Schick, Dumschat, and—most recently—Ohio Adult Parole Authority v. Woodard. 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.

In Woodard, the official opinion of the Court rests in Parts I and III of the decision, with a plurality opinion in Part II. The Woodard Court provided two important yet conflicting notions. 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.” 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. . . . Some 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.

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].

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. She, too, argues that the pardon cannot offend other parts of the Constitution. 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. 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.

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. 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.

214. Id. at 289.
215. See supra Section II.C.
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. 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.

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.” 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.” 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.

Leaving “the door open” to litigation represents a dramatic shift from the Court’s original *Garland* decision. 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.

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.

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

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. 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, 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. 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.

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.”).
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. The United States jurisprudence addressing separation of powers began with Marbury v. Madison. The Garland court continued that jurisprudence when it ruled the pardon was an unlimited power of the president.

Traditionally, the judicial branch has utilized contempt of court as a means to punish those who fail to comply with a court order. 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.” While contempt of court is not enumerated in the Constitution, it is seen as an inherent power of the judicial branch. 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.” 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.” A contempt of court conviction constitutes “an offense against the United States” and thus is pardonable by the president.


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.


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


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.\textsuperscript{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.”\textsuperscript{246} Without protecting contempt sanctions “[court] orders would have little practical force, and would be rendered essentially meaningless.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,”\textsuperscript{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.\textsuperscript{251} However, through *Klein, Knote, Burdick, Wilson, Schick, Dumschat*, and *Woodard*, the Court has

\textsuperscript{245} See Roderick, supra note 5, at 3.
\textsuperscript{246} Chemerinsky et al., supra note 236, at 9.
\textsuperscript{247} Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y, 774 F.3d 935, 952 (9th Cir. 2014).
\textsuperscript{248} Gompers v. Buck’s Stove & Range Co., 221 U.S. 418, 450 (1911).
\textsuperscript{249} See supra Part II.
\textsuperscript{250} Marbury v. Madison, 5 U.S. 137, 165–77 (1803).
\textsuperscript{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.\textsuperscript{252}

Although some may object to overruling \textit{Garland} based on its longstanding precedent, the Court has written that “stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision.”\textsuperscript{253} In the last two centuries, the Court has demonstrated a willingness to overrule its own precedents\textsuperscript{254}—it has done so over two hundred times.\textsuperscript{255} Because the Court has overruled itself many times before, it can and should do so now with \textit{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) \textit{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.

\begin{footnotes}


\footnote{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 \textit{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).}