

Extra Legal

Can a President Pardon Himself? Law School Faculty Consensus

*By Dr. Michael J. Conklin**

I. Introduction

President Donald Trump sparked a debate after tweeting, “As has been stated by numerous legal scholars, I have the absolute right to PARDON myself”¹ The self-pardon has inspired passionate and discordant views within the legal community. Despite competing claims in the media, there is no clear consensus among legal professionals concerning the constitutionality of the presidential self-pardon, which has never been attempted by a U.S. President. The presidential self-pardon is an amorphous concept that finds no clear authority either in the text of the Constitution, which provides only one sentence describing the President’s pardon power,² or in Supreme Court precedent, which has only minimally

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¹ Donald Trump (@realDonaldTrump), TWITTER (June 4, 2018), <https://twitter.com/realdonaldtrump/status/1003616210922147841?lang=en>.

² The U.S. Constitution provides that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2, cl. 1.

discussed the pardon power's scope.³ There has been no objective attempt to measure a consensus in legal academe, and no media outlet has comprehensively surveyed legal experts to determine whether a consensus actually exists. This article discusses the results of a survey conducted across ninety-five faculty members representing twenty-nine U.S. law schools to illustrate whether an actual consensus exists. In addition, it examines potential correlations between political affiliation, age, and law school tier with faculty members' opinions on the issue. Finally, this article serves as a tool to inform the public by clarifying conflicting media accounts.

Coverage in Media

Media coverage of the topic of the presidential self-pardon leaves much to be desired. As this article examines below, varying media outlets have made unsubstantiated claims arguing that a consensus exists among legal experts as to whether a President can pardon himself. Media outlets' claims have generally followed ideological lines, with conservative outlets claiming that a consensus exists among legal experts that President Trump can pardon himself, and liberal outlets claiming that experts agree he cannot. Despite confident assertions as to an existing consensus among legal experts, media outlets have failed to conduct more than a brief sampling of varying opinions among a handful of legal experts.

One of the closest efforts made to reach a consensus is a 2018 CNBC piece that provides twelve experts' opinions on the matter.⁴ In this piece, six experts concluded that a President could not pardon himself, three suggested that he could, and the remaining three did not provide direct

³ See, e.g., ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* 131 (2018) ("No President has ever tried it. No court has ever ruled on it. The framers of our Constitution never opined on it. History provides no guidance.")

⁴ Dan Mangan & Tucker Higgins, *Here's What 12 Experts Say About Whether President Trump Can Pardon Himself*, CNBC (June 4, 2018), <https://www.cnbc.com/2018/06/04/here-is-what-9-experts-say-about-whether-president-trump-can-pardon-himself.html>.

answers. This CNBC piece illustrates the extent to which the experts disagreed with one another. For example, one opponent asserted that a presidential self-pardon is “radically inconsistent” with the Constitution, while a proponent argued that it is “quite clear” that the Constitution allows it.⁵ The piece ultimately concludes that “experts are divided.”⁶ However, it is unclear whether the twelve experts interviewed adequately represent the diversity of opinion within the greater legal community, or if CNBC intentionally crafted its selection in order to expose readers to varying perspectives on the issue.

More troubling than the lack of consensus in media coverage is the apparent confirmation bias that media outlets have demonstrated on the issue. Notably, conservative outlets have tended to argue that a majority of legal experts support the existence of President Trump’s ability to pardon himself, while liberal outlets have claimed that legal experts agree that a self-pardon would be constitutionally impermissible. For example, in the *Wall Street Journal Law Blog*, Jacob Gershman claimed that President Trump can “probably” legally pardon himself, and that his ability to do so under the Constitution “seems to be the prevailing . . . opinion among legal experts.”⁷ He concedes only that “[a] few scholars doubt the constitutional validity of self-pardons.”⁸ To the contrary, *Slate Magazine*, a left-leaning media outlet, interviewed an expert who stated, “I’m as sure as I am of anything in the realm of constitutional law . . . that no court would accept that Trump’s pardon of himself worked. . . . There are no two sides to this argument. It cannot be that the [P]resident can pardon himself.”⁹ Notably,

⁵ *Id.*

⁶ *Id.*

⁷ Jacob Gershman, *Can a President Self-Pardon?*, WALL ST. J.: L. BLOG (Nov. 3, 2016), <https://blogs.wsj.com/law/2016/11/03/can-a-president-self-pardon/>.

⁸ *Id.*

⁹ Jacob Weisberg, *Pardon Me, Mr. President: Can Our Petulant President Pardon Himself?*, SLATE: TRUMPCAST (July 24, 2017), <https://slate.com/news-and-politics/2017/07/a-history-of->

during the Clinton administration, *Slate* interviewed an expert who argued that “[t]he simplest interpretation is that the [P]resident can pardon any federal criminal offense, including his own. . . .”¹⁰ It is evident based on the contrasting statements from *Slate* and the *Wall Street Journal* that media outlets have failed to make a good faith effort to determine what the actual consensus among legal experts is. Instead, they have demonstrated clear confirmation bias by cherry picking experts whose opinions reflect their political leanings.

Law Journal Consensus

Coverage of a potential self-pardon in law journals, while more robust, leaves the reader equally in the dark as to whether a consensus exists among legal professionals concerning the self-pardon’s constitutionality. At present, there are only two articles that focus primarily on the constitutionality of the presidential self-pardon. One article emphatically maintains that a presidential self-pardon is constitutional, while the other article strongly insists that it is not.¹¹ Of several other law journal articles that analyze the issue, there are a total of five law journals that conclude that the Constitution authorizes a presidential self-pardon¹² and eight law

presidential-pardons-and-why-you-cant-pardon-yourself.html (quoting Harvard law professor Noah Feldman).

¹⁰ *Can President Clinton Pardon Himself?*, SLATE (Dec. 30, 1998), <https://slate.com/news-and-politics/1998/12/can-president-clinton-pardon-himself.html>.

¹¹ 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, 222 (1999) (maintaining that a self-pardon is allowed); Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 782 (1996) (arguing that a self-pardon is not allowed).

¹² William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 535 (1977) (“Alone among the powers enumerated in the Constitution, the power to pardon proceeds unfettered.”); Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 58 (1992) (“If a President deemed the legal and political risks of the pardon route worth taking in order to achieve protection after leaving office, he or she could take it

journals that conclude that it does not.¹³ However, this is not to be taken as a general consensus, because this is a self-selecting group (people who chose to write on the issue).

II. Arguments For and Against the Presidential Self-Pardon

This article addresses the general consensus among law school faculty, but it does not comment on the validity of either side. However, arguments from both sides are addressed here to provide the reader a better understanding of the issue. Arguments against the self-pardon's constitutionality describe how the basic structure of the Constitution bars self-dealing and self-judging, the bilateral nature of "granting" a pardon, and cite to the conclusion of a short memo issued by the Justice Department towards the end of the Nixon administration concluding that a U.S. President may not issue a self-pardon. On the other hand, arguments in favor of the self-pardon's constitutionality have referenced dicta in past Supreme Court decisions reflecting on the broad nature of the pardon power, the history of U.S. colonies authorizing gubernatorial self-pardons, and the separation of powers doctrine.

regardless of how the immunity issue was decided."); Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. U. L. REV. 905, 934–35 (2019) (explaining several reasons why a presidential self-pardon would not violate the Constitution); Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 323 (1999) ("Article II, Section 2 grants the President power to pardon *any* citizen for offenses against the United States 'except in cases of Impeachment.'"); Nida & Spiro, *supra* note 11, at 222.

¹³ Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1419–20 n.38 (1999); Akhil Reed Amar, *On Impeaching Presidents*, 25 HOFSTRA L. REV. 291, 298–99 (1999); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, NEXUS, Spring 1997, at 20; Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 170 (2017); Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1325–26 (2018); Kalt, *supra* note 11, at 795; Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 404 n.196 (1993); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 231 n.72 (1993).

Arguments Against the Constitutionality of the Presidential Self-Pardon

The following are examples of arguments that are commonly made against the constitutionality of the presidential self-pardon:

- *Allowing a president to pardon himself would violate the basic rule-of-law principle that one cannot be his own judge.¹⁴ In one of the first Supreme Court cases, the Court insinuated that allowing someone to be a judge in his own case “is against all reason and justice”¹⁵*
- *The Constitution was intentionally structured to prevent self-dealing.¹⁶ Since pardoning oneself is the ultimate act in self-dealing, one could infer that a presidential self-pardon is clearly against the spirit of the Constitution.*
- *A pardon is, by nature, a bilateral act. One cannot “grant” oneself a pardon. Likewise, the meaning of the word pardon is to forgive someone else; one cannot forgive oneself.¹⁷ Chief Justice John Marshall, in *United States v. Wilson*, explained, “A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws”¹⁸ One cannot bestow grace upon oneself.*

¹⁴ See Kaitlyn Schallhorn, *Can Trump Self-Pardon? Legal Experts Weigh In*, FOX NEWS (June 4, 2018), <https://www.foxnews.com/politics/can-trump-self-pardon-legal-experts-weigh-in> (quoting University of Michigan law professor Richard Primus).

¹⁵ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (explaining that it would be against all reason and justice for a people to entrust a legislature with the power to create a law “that makes a man a Judge in his own cause”); see also Kalt, *supra* note 11, at 806 (discussing *Calder* as illustrative of the “deep roots of disfavor for self-judging in Anglo-American law”).

¹⁶ See Kalt, *supra* note 11, at 794-95 (explaining that the Bill of Rights was intended to prevent the federal government from self-dealing and that other parts of the Constitution prohibit government officials from acting as decisionmakers in matters that directly, materially, and uniquely affect them).

¹⁷ Schallhorn, *supra* note 14 (referring to an interview with University of Minnesota law professor Richard Painter, who suggests that the meaning of the word pardon is “to forgive someone else”).

¹⁸ *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833). This notion, however, was directly contradicted by Oliver Wendell Holmes in *Biddle v. Perovich* when he stated, “A pardon in our days is not a private act of grace from an individual happening to possess

- *Toward the end of the Nixon administration, the Department of Justice issued a memo about a potential self-pardon that concluded, "Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative."*¹⁹
- *It would be misguided to claim that impeachment and/or political consequences from the electorate would serve as suitable checks against a President who is contemplating whether to pardon himself. A self-pardon is most likely to be issued by a President nearing the end of his term, such as George H.W. Bush and Bill Clinton²⁰, or with little-to-no political capital left, such as Richard Nixon. Therefore, "the only President who would pardon himself is one with nothing to lose; the political check is thus rendered irrelevant."*²¹

Arguments in Favor of the Constitutionality of the Presidential Self-Pardon

The following are examples of arguments that are commonly made in favor of the constitutionality of the presidential self-pardon:

- *While the colonies placed numerous restrictions on a governor's ability to pardon himself, no colony explicitly prohibited self-pardons.²² Additionally, there are several state governors who have pardoned themselves throughout U.S. history.²³*

power. It is a part of the Constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

¹⁹ Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370 (1974).

²⁰ George H.W. Bush had already lost election when he allegedly considered a self-pardon. See Nida & Spiro, *supra* note 11, at 216. Bill Clinton was at the end of his second term when it was proposed that he might, although he maintains he never considered it. Tim Marciniak, *Bill Clinton Says He Never Considered Pardoning Himself*, NEWSWEEK (June 6, 2018), <https://www.newsweek.com/bill-clinton-says-never-considered-pardoning-himself-961484>.

²¹ Kalt, *supra* note 11, at 798–99.

²² Nida & Spiro, *supra* note 11, at 217.

²³ Max Kutner, *No President Has Pardoned Himself, But Governors and a Drunk Mayor Have*, NEWSWEEK (July 24, 2017).

- *The few Supreme Court opinions that discuss presidential pardons support the notion of a self-pardon. For example, in United States v. Wilson, the majority opinion stated that the Supreme Court will not review the “character” of the pardon deed.²⁴ Additionally, in Ex parte Garland, the Court ruled that the pardon power is unlimited “except in cases of impeachment,”²⁵ and that the President can pardon “any class of offenders.”²⁶ In Ex parte Grossman, the Court held that Congress can impeach a President who abuses the pardon power, but cannot restrict a President’s use of the pardon power.²⁷ Finally, in Schick v. Reed, the Supreme Court held that limits on the pardon power “must be found in the Constitution itself.”²⁸ Therefore, although the Supreme Court has never specifically addressed whether a President can pardon himself, precedent seems to be in favor of allowing the act.*
- *The pardon clause’s impeachment exception illustrates that the clause extends to presidential misconduct.²⁹ Furthermore, it suggests that the ultimate remedy for punishing a President is impeachment by the House and conviction by the Senate, and not by criminal prosecution.³⁰*
- *The pardon power is integral to the President’s position as chief executive. If the President’s ability to limit prosecutions of himself does not violate the Constitution’s notion of self-dealing, then why would a self-pardon?³¹*

²⁴ United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

²⁵ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

²⁶ *Id.*

²⁷ *Ex parte Grossman*, 267 U.S. 87, 120–21 (1925).

²⁸ *Schick v. Reed*, 419 U.S. 256, 267 (1974).

²⁹ Michael W. McConnell, *Trump’s Not Wrong About Pardoning Himself*, WASH. POST (June 8, 2018), https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html.

³⁰ *Id.*

³¹ *See generally* Kalt, *supra* note 11, at 798 (noting that a President controls who is and is not prosecuted and can reinforce that power by pardoning anyone who is prosecuted). However, the author immediately refutes this argument by explaining that when a President leaves office, his successor can choose to proceed with a neglected prosecution, but he cannot “un-pardon” someone. *Id.*

- *A self-pardon would not violate the “fundamental rule that no one may be a judge in his own case.” The pardon power “is not about ascertaining guilt or innocence; it is about demonstrating clemency at a time when guilt has already been presumed.”³² To further illustrate this distinction, while a judge would have to recuse himself in a case involving his children, a President is free to issue pardons to his children.³³*
- *The notion that the Constitution’s overarching theme against self-dealing makes a self-pardon unconstitutional is misguided. A President may pardon his convicted co-conspirators even if the effect is to derail a criminal prosecution of the President.³⁴ If this does not violate the Constitution on the grounds of self-dealing, then why would a self-pardon?*
- *It would be odd if attaining the presidency—the only elected office other than the vice presidency voted on by every eligible citizen—was rewarded with a temporary loss of the ability to receive a pardon. If Jimmy Carter had been a draft dodger, would it make sense that his pardon would have included all draft dodgers except himself?*

III. Survey and Results

Methodology

This survey was sent out to law school faculty at twenty-nine American Bar Association accredited law schools in February 2019. Respondents were asked, “Can a U.S. President pardon himself in a non-impeachment related matter? Note that this question is asking if you think

³² *Pardon Me? Yes, Donald Trump Can Pardon Himself*, OPENING ARGUMENTS (July 27, 2017), <https://openargs.com/oa90-pardon-yes-donald-trump-can-pardon/>.

³³ *Id.*

³⁴ Many believe this was the effect of the George H. W. Bush pardons involving the Iran-Contra prosecutions at the end of his presidency. *See, e.g.*, Nicolo A. Lozano, Comment, *Can President Trump Become His Own Judge and Jury? A Legal Analysis of President Trump’s Amenability to Criminal Indictment and Ability to Self-Pardon*, 43 NOVA L. REV. 151, 160–61 (2019) (discussing how President George H.W. Bush’s pardons of six alleged co-conspirators halted an independent counsel’s investigation into the President’s potential criminal activity).

it would be constitutional, not to predict how the Supreme Court would rule.” Answer options for this question were “absolutely not,” “probably not,” “I’m not sure,” “probably yes,” and “absolutely yes.”

General Results

The survey was completed by ninety-five law school faculty members. The consensus from the survey is that it is probably not constitutional for a President to pardon himself in a non-impeachment related matter. The results were averaged based on a scale where the responses were awarded one to five points: one for “absolutely not,” through five for “absolutely yes.” The average result was 1.99. Additionally, thirty-four respondents answered “absolutely not,” while only four answered “absolutely yes.”

Political Affiliation Results

In theory, a person’s position on whether the Constitution allows for a President to pardon himself should not be contingent on who is the President at the moment. However, this survey found a significant disparity between the conservative respondents’ positions (2.92 average) and the liberal respondents’ positions (1.71 average). It is important to clarify that despite the significant disparity, even the conservative group’s average of 2.92 does not mean the demographic favors a self-pardon; 2.92 is between “probably not” and “I’m not sure.”

It is beyond the ability of this one-time survey to determine if the political affiliation disparity is due to a temporary bias based on the current President or if the conservative and liberal ideologies naturally lend themselves to these positions. It is possible that conservatives are more likely to adopt a strictly textual interpretation of the Constitution and therefore recognize a President’s ability to pardon himself, regardless of who the President is, based on the lack of any express prohibition in the

Constitution concerning a presidential self-pardon. Likewise, perhaps liberals are more inclined to look beyond the text of the Constitution and inquire into the Constitution's general founding principles. Future research should be conducted during a different presidential administration to see if conservatives and liberals provide different answers based on the party affiliation of the sitting president.

Age Results

Respondents thirty-nine years of age and younger were the only demographic that, when averaged, favored the constitutionality of a presidential self-pardon. The average for this group was 3.14, placing the demographic between "I'm not sure" and "probably yes." Positing a feasible explanation for this age-dependent finding is challenging. Perhaps this is the result of the modern rise in textualism popularized by Justice Scalia and promoted in law schools by the Federalist Society, which younger faculty have had more exposure to during their law school experience.

Level of Involvement with the Issue Results

The survey also asked respondents to identify their level of involvement with the issue. Analysis of this categorization produced no relevant distinction. The absence of a significant difference between those who had read about the issue extensively and those who had never looked into it is up for interpretation. Perhaps this indicates that the matter is so simple that extensive study is unnecessary. Conversely, it may indicate that the issue is so complex and amorphous that even extensive research produces little or no additional clarity.

*Institutional Tier Results*³⁵

Surprisingly, faculty from tiers one and two were more likely to support the constitutionality of a self-pardon than faculty from tiers three and four. The averages from tiers one through four are 2.24, 2.31, 1.5, and 1.95, respectively. This result is even more surprising given that there was a disproportionate number of faculty who identified as conservative in tiers three and four. Additionally, of the four respondents who answered “absolutely yes” to the constitutionality of a self-pardon, three were professors at tier one law schools and the fourth taught at a tier two school.

It is difficult to determine the cause of this result. Perhaps faculty members at higher-tier institutions feel they have more freedom to express an unpopular opinion. Alternatively, it is possible that faculty members at tier one and tier two law schools are more likely to admit uncertainty due to their constant exposure to colleagues who are renowned experts in their respective fields; this tends to lead people to demonstrate humility in areas outside of their direct expertise.

IV. Conclusion

Overall, the survey revealed that the consensus in legal academe is that a presidential self-pardon is probably not constitutional. While this result is helpful to shape the discourse of this important constitutional and political topic, perhaps the most significant revelations come in the cross-tab results of the survey. Although results based on political affiliation fell generally in line with what one might expect, breakdowns by age, exposure to the issue and institutional tier provided surprising results. While this research clarifies the general consensus in legal academe, it simultaneously

³⁵ The traditional four-tier structure was implemented using the U.S. News & World Report 2019 rankings. See *Best Law Schools*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Nov. 20, 2019).

raises questions about whether each demographic would respond similarly during a different presidential administration.