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The President Can Self-Pardon, but It Would Be an Impeachable Offense

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The pardon power is probably the most awesome unilateral power that the president has. He can grant legal absolution to anyone, for any federal crime, at any time—even posthumously, wiping out decades-old convictions. He can use whichever standards he wants, issuing a pardon (or sentence commutation) for good, bad or no reason at all. Unlike with appointments and treaties, he doesn't need the Senate's "advice and consent." And nobody can review him on this: not courts, not Congress, not anyone else. The power is plenary.

Nevertheless, as Donald Trump's presidency draws to a close, a question that came up periodically during his tenure has now resurfaced: Can the president of the United States pardon himself? In their new book *After Trump: Reconstructing the Presidency*, Jack Goldsmith (head of the Office of Legal Counsel (OLC)—the elite Justice Department unit that's essentially the executive branch's legal conscience—under President George W. Bush) and Bob Bauer (White House counsel under President Barack Obama), acknowledge that self-pardons may be possible, but suggest, among other reforms, that "Congress should also make clear that a self-pardon is not allowed and cannot be the basis for immunity from federal criminal investigation." Meanwhile, J. Michael Luttig, a highly respected former Seventh Circuit judge and OLC head under President George H.W. Bush, recently argued against the availability of self-pardon in light of constitutional structure. (Goldsmith, Bauer and Luttig discussed this, and other issues, in a recent Cato Institute forum that I moderated.)

The issue of a presidential self-pardon first came up two and half years ago during the Mueller investigation, when, in one of his more infamous tweets, President Trump claimed the "absolute right" to pardon himself.

As with many Trump tweets, this one raised a media firestorm. Look at this fresh evidence of America's descent into authoritarianism! Not even President Richard Nixon tried to pardon himself—and Watergate was a third-rate burglary, not collusion with a foreign power to steal an election!

Indeed, President Nixon's own OLC issued an informal opinion negating the idea of a presidential self-pardon because "no one may be a judge in his own case."

The problem with that conclusion, which was shared by esteemed Twitter lawyers, is that I've just quoted to you the entirety of the legal analysis. It's what real lawyers call "conclusory": an assertion for which no supporting evidence is offered. Non-lawyers might call it a circular argument, a claim whose necessary premise you simply assume to be true.

It's a nice idea that nobody should have the power to grant himself legal favors, but the Constitution—which grants the president the pardon power—is silent as to any limitations, and no court has ever had occasion to consider the issue. All that Article II, Section 2 says is that the president "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of impeachment."

This discretionary authority is purposely broad because it serves as a check on fundamental injustices and other cases where "the law is an ass." In that sense, presidents should use it more often!

It also facilitates national healing after political crises. George Washington used the pardon power after the Whiskey Rebellion, Abraham Lincoln after the Civil War and Jimmy Carter for draft-dodgers after Vietnam.

Moreover, Stanford Law School professor and former federal judge Michael McConnell has explained that two days before the Constitutional Convention approved the Constitution, a move to narrow the pardon power because "[t]he President himself may be guilty" failed, despite support from James Madison. As James Wilson, who would become a member of the first Supreme Court, argued, if the president "be himself a party to the guilt, he can be impeached."

The Framers thus expressly contemplated the use of the pardon to clear a criminal conspiracy of which the president is himself a part. But importantly, they needed to have this debate in the first place because, unlike the British king from whom they had just declared independence, the American president would be subject to legal process. They ultimately considered impeachment to be a sufficient check on such a potential abuse.

And that's precisely the lesson to learn from this exercise in law school hypotheticals: Even if the president has the power to pardon himself, he shouldn't exercise it. And if he does—at least where he pardons himself to stop an investigation or prosecution that threatens him personally or politically—then he should be impeached.

In the non-hypothetical world, it would be too late to impeach a president who pardons himself the morning of his successor's inauguration. But then his fate would be left to the judgment of history.

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