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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

Nicolo A. Lozano*

*Nova Southeastern University Shepard Broad College of Law, nl686@mynsu.nova.edu

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

NICOLO A. LOZANO*

I. INTRODUCTION

If you knew that President Donald J. Trump ("President Trump") could have pardoned himself after a criminal indictment at the conclusion of Robert S. Mueller's ("Mueller") investigation—in which it could have been

* Nicolo A. Lozano earned his bachelor's degree in Operations Management and Business Law, Ethics, and Decision-Making at Indiana University's Kelley School of Business. He is currently a Juris Doctor candidate for May 2020 at Nova Southeastern University, Shepard Broad College of Law. Nicolo would like to thank his family and friends for their support and encouragement throughout law school. He would like to give a special thanks to Lauren Voke for her encouragement in completing this Comment. Nicolo would also like to thank William Cornelius for inspiring him to write about the topic in this Comment. Lastly, he would like to give a very special thanks to the executive and editorial board members of *Nova Law Review*, Volume 43, and his colleagues for all the time and hard work spent on refining and improving this Comment.

found that President Trump conspired with Russia to win the 2016 presidential election and he could have obstructed justice by interfering with Mueller's investigation into Russian interference—would you still have voted for him?[1] The outright threat to exploit an apparent loophole in our criminal justice system by President Trump has a plethora of legal scholars in a frenzy.[2] On June 4, 2018, President Trump tweeted from his @realDonaldTrump Twitter account that he has the *absolute right to pardon* himself from any criminal conduct, which was presumably directed to Mueller and his team.[3]

According to President Trump, it does not matter if Mueller indicts him over his alleged involvement in Russia's meddling into the 2016 presidential election because he can simply use his pardon power on himself.[4] Mueller began an investigation into President Trump and his alleged collusion with Russia in the meddling into the 2016 presidential election in which President Trump beat Hillary Clinton for President of the United States.[5]

Politics and personal opinions aside, President Trump has a legally sound argument in using his pardon power on himself.[6] United States

1. Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018, 5:35 AM), http://twitter.com/realDonaldTrump/status/1003616210922147841; *see also* Kaitlyn Schallhorn, *Trump and the Russia Investigation: What to Know*, FOX NEWS: POL. (Oct. 10, 2018), http://www.foxnews.com/politics/trump-and-the-russia-investigation-what-to-know. On April 18, 2019, Mueller's redacted report was released to the public by the United States Justice Department on the findings of Mueller's investigation into Russian interference in the 2016 presidential election. Emily Tillett, *Here's Who Has Been Charged in the Mueller Probe*, CBS NEWS (Apr. 18, 2019, 8:41 AM), http://www.cbsnews.com/news/mueller-report-who-has-been-charged-in-special-counsel-robert-mueller-russia-probe-2019-04-18/. While Mueller found connections between the Trump Campaign and Russia, Mueller ultimately concluded—in the first volume of his report—that the Trump campaign did not conspire or coordinate with Russia during the 2016 campaign in its election interference activities. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOLUME I, 1–2 (2019). In Volume II of his report, Mueller did not reach a conclusion on whether President Trump obstructed justice in the course of Mueller's investigation. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOLUME II, 2 (2019).

2. *See* Kaitlyn Schallhorn, *Can Trump Self-Pardon? Legal Experts Weigh in*, FOX NEWS: POL. (June 4, 2018), http://www.foxnews.com/politics/can-trump-self-pardon-legal-experts-weigh-in.

3. @realDonaldTrump, *supra* note 1.

4. *See id.*; Schallhorn, *supra* note 2.

5. Schallhorn, *supra* note 2; *see also* Schallhorn, *supra* note 1.

6. *See* Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 222 (1999); Salvador Rizzo, *Can the President Be Indicted or Subpoenaed?*, WASH. POST: FACT CHECKER, (May 22, 2018), http://www.washingtonpost.com/news/fact-checker/wp/2018/05/22/can-the-president-be-indicted-or-subpoenaed/.

Presidents enjoy plenary pardon power.[7] Although no sitting United States President has ever exercised his pardon power on himself, previous Presidents have had their legal team research the plausibility behind such action.[8] However, President Trump did not exercise his pardon power on himself prior to Mueller ending the investigation into his alleged culpability in the Russian meddling scandal during the 2016 presidential election.[9]

Legal scholars differ on the Justice Department's ability to bring forth a criminal indictment against a sitting President.[10] Some commentators, such as Rudolph Giuliani, argue that President Trump is immune from criminal prosecution while in office.[11] While other commentators believe no man is above the law—not even President Trump—and a sitting President is amenable to criminal prosecution.[12] Such legal conflict is a natural byproduct on the lack of guidance from the Supreme Court of the United States because a sitting President has never been criminally indicted.[13]

While foreign powers have indirectly influenced a United States presidential election,[14] Russia's meddling into the 2016 presidential election and the extended invitation to find Hilary Clinton's deleted e-mails by

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7. *See* U.S. CONST. art. II, § 2, cl. 1; Rizzo, *supra* note 6.

8. Nida & Spiro, *supra* note 6, at 199; *see also* Rizzo, *supra* note 6. "The Constitution is silent, however, as to whether the President may grant himself a pardon from prosecution and, if so, when such a pardon may be issued. In the over 20,000 instances that Presidents have used this exclusive power, no President has used this power to pardon himself." Nida & Spiro, *supra* note 6, at 199.

9. *See* Ashley Parker & Joel Achenbach, *Giuliani Defends Trump's Power*, WASH. POST, June 4, 2018, at A4. Giuliani said, "[President Trump] has no intention of pardoning himself . . . ." *Id.*

10. *See* Schallhorn, *supra* note 2.

11. Rizzo, *supra* note 6. "All [Mueller and his team] get to do is write a report . . . [t]hey can't indict. At least they acknowledged that to us after some battling." *Id.*

12. Norman Eisen & Elizabeth Holtzman, *Donald Trump Should Not Assume He's Above the Law. A Sitting President Can Be Indicted.*, USA TODAY, (May 24, 2018, 4:23 PM), http://www.usatoday.com/story/opinion/2018/05/24/donald-trump-not-above-law-sitting-president-can-indicted-column/634725002/. "Those options, while obviously unpalatable to the president, are consistent with a basic principle of our democracy: No person is above the law." *Id.*

13. Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 422–23 (2001). Former President Richard Nixon's ("President Nixon") assertion that he is criminally immune went unanswered as the case never reached the Supreme Court. *Id.* at 422. Executive criminal immunity "has never been addressed by any court." *Id.* at 423.

14. Josh Zeitz, *Foreign Governments Have Been Tampering with U.S. Elections for Decades*, POLITICO: MAG. (July 27, 2016), http://www.politico.com/magazine/story/2016/07/russia-dnc-hack-donald-trump-foreign-governments-hacking-vietnam-richard-nixon-214111.

presidential candidate Trump is unprecedented.[15] No sitting President has faced the accusations President Trump faces today.[16] Unfortunately, President Trump's conduct on the campaign trail had become the basis of Mueller's investigation into his alleged involvement with the Russian meddling.[17]

Whether or not a President can use his pardon power on himself has not been addressed by the Supreme Court.[18] The Court has not directly addressed the amenability of a President to a criminal indictment.[19] This Comment will discuss the constitutionality of President Trump's suggested self-pardon ability.[20] Further, this Comment will discuss the constitutionality of indicting the President.[21] Lastly, this Comment will discuss the danger of President Trump using his pardon power on himself.[22]

II. PRESIDENT TRUMP'S ABILITY TO SELF-PARDON

Article II of the United States Constitution is the foundation for the powers of the executive branch and the President.[23] According to Section Two of Article II, President Trump "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[24]

Generally, President Trump enjoys plenary power to grant pardons and reprieves.[25] Although the Supreme Court has never decided the constitutionality of a presidential self-pardon, the Court has issued decisions

15. *Id.*

16. *See* Peter Baker & Juliet Eilperin, *Clinton Impeached*, WASH. POST, Dec. 20, 1998, at A1; *The Impeachment of Andrew Johnson (1868) President of the United States*, U.S. SENATE: ART. & HIST., http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm (last visited May 1, 2019).

17. Schallhorn, *supra* note 1.

18. Nida & Spiro, *supra* note 6, at 220.

19. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 260 (2000).

20. *See* discussion *infra* Part II.

21. *See* discussion *infra* Part III.

22. *See* discussion *infra* Part IV.

23. U.S. CONST. art. II, § 2, cl. 1.

24. *Id.*

25. *See* Nida & Spiro, *supra* note 6, at 221. "[T]he Court has defined the presidential pardon power as unconditional, except for impeachment." *Id.* "The Constitution does not say what sort of pardon; but the term being generic necessarily includes every species of pardon . . . ." *Ex parte* Garland, 71 U.S. 333, 351 (1866). "To the executive alone is intrusted the power of pardon; and it is granted without limit." United States v. Klein, 80 U.S. 128, 147 (1871).

on the power of a presidential pardon.[26] In those decisions, the Court put few limitations on pardoning, which closely follows the text of the Constitution and the intent of the Framers ("Framers").[27]

While President Trump pardoning himself would be an unprecedented use of his pardon power, the idea of issuing a self-pardon is not unprecedented.[28] Under the Nixon and Bush administrations, the Presidents' legal counsel researched the feasibility of such action.[29] Just as President Trump's legal team concluded that such ability to pardon himself is constitutional, former Presidents Nixon and George H. W. Bush's ("President Bush") legal teams reached the same conclusion.[30]

Although seemingly abusive and unprecedented, President Trump's tweet on his ability to self-pardon does have some constitutional support as it is not expressly prohibited with the only limitation coming in cases of impeachment.[31] Moreover, the Court has not limited the President's ability to issue pardons.[32] Therefore, President Trump should have the ability to pardon himself because: (i) the Court has not limited such power, (ii) the only constitutional limitation on pardoning is in cases of impeachment, and (iii) Congress lacks constitutional authority to alter President Trump's ability to pardon.[33]

A. Framers' Drafting of the Presidential Pardon Power

Although bestowing upon the President a plenary pardon power akin to the King of England seemingly is contradictory to the Framers' intent of creating a system of checks and balances, there is evidence that the Framers intended for such plenary power.[34] When taking into account the debates on the presidential pardon power during the 1787 Constitutional Convention, it is evident that the Framers intentionally left the only restriction on pardoning

26. *See* Nida & Spiro, *supra* note 6, at 220–21.
27. *See id.*
28. *See id.*; Zeitz, *supra* note 14.
29. Nida & Spiro, *supra* note 6, at 212–16.
30. *Id.*; Schallhorn, *supra* note 2.
31. Nida & Spiro, *supra* note 6, at 217; Schallhorn, *supra* note 2.
32. *See* Nida & Spiro, *supra* note 6, at 220–21.
33. U.S. CONST. art. II, § 2, cl. 1; *Ex parte* Grossman, 267 U.S. 87, 106 (1925); United States v. Klein, 80 U.S. 128, 147 (1871); *Ex parte* Garland, 71 U.S. 333, 351 (1866); Nida & Spiro, *supra* note 6, at 206–07. The pardon power was adopted with little limitation similar to the King of England's power, and the Court thwarted "Congress from interfering with the discretion of the President to issue pardons." Nida & Spiro, *supra* note 6, at 206.
34. *See* THE FEDERALIST NO. 69, at 516 (Alexander Hamilton) (John C. Hamilton ed., 1864).

for cases of impeachment as all other motions failed and none others were passed.[35]

During the 1787 Constitutional Convention, various ideas on who would possess pardon power in the United States government were debated.[36] Although such discussion was not extensive, the pardon power and its limitations were formed after some debate.[37] For example, Roger Sherman and other Framers believed the pardon power should be given to the legislative branch, while some others argued that the pardon power should be bestowed on a combination of the legislative and executive branches.[38] Ultimately, however, the power was given to the executive branch as some feared the legislative branch would become too powerful with the ability to create laws and grant reprieves for individuals breaking those laws.[39]

Once the pardon power was given to the executive branch, the discussion on such power revolved around the limitations to pardon.[40] Some advocates argued for a limitation on pardoning an individual only after a conviction of the crime.[41] However, it failed because the majority of the Framers agreed that "a pardon before conviction might be necessary" in some instances.[42] Others motioned to exclude the President's pardon power in cases of treason since the President could secretly hide his involvement with the crime by pardoning his accomplices.[43] However, this motion failed to garner the majority's support because the majority believed pardoning to be a necessity in government and placing limits upon it to be inherently

35. Nida & Spiro, *supra* note 6, at 205–06.

36. *Id.* at 205.

37. Brian C. Kalt, Note, *Pardon Me? The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 786 (1996). "There was little debate on the pardon power—only a few verbal exchanges and a couple of motions." *Id.*

38. *Id.*; Nida & Spiro, *supra* note 6, at 205. "Some advocates, including Roger Sherman, proposed a plan that placed the pardon power with the Senate . . . [o]ne factor considered . . . placed the pardon power in a variety of models, including in the legislature, the executive, or a combination of the two." Nida & Spiro, *supra* note 6, at 205.

39. Nida & Spiro, *supra* note 6, at 205–06.

40. *Id.* "With little further discussion, the power was assigned to the executive branch, and the discussion then turned to what limitations would be placed in the provision." *Id.* at 205.

41. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501–02 (1977). Luther Martin motioned to include the words *after conviction* in the pardon clause but was persuaded to remove his motion by James Wilson, as Wilson argued that a pardon could be used to get testimony against accomplices. *Id.*

42. *Id.*

43. *Id.* at 502; Nida & Spiro, *supra* note 6, at 206; Kalt, *supra* note 37, at 786. Edmund Rudolph argued treason should be excluded as the President himself could be guilty. Kalt, *supra* note 37, at 786.

dangerous.[44] Ultimately, the only motion passed in amending the President's pardon power was the inclusion of "except in cases of impeachment" at the end of the clause.[45]

Further, Alexander Hamilton explained such power should resemble the King of England's pardon power as it is necessary to justice because it is an act of mercy by the government on its citizens.[46] Hamilton supported this argument by pointing out that the Governor of New York has more pardon power because he can pardon in cases of impeachment, yet the President of the United States cannot.[47] If the Governor of New York can have absolute discretion in pardoning an individual, then why is it that the President should not enjoy the same power—except in cases of impeachment—as the President is the leader of a nation of states?[48] Clearly, if the Framers believed the President's pardon power should have been limited in more circumstances, then they would have ratified more limitations.[49]

Therefore, while some Framers believed the President's pardon power should not extend to treason cases, a sound argument can be made that the Framers intended for impeachment to be the only restriction on pardoning; the majority of the Framers believed the President should have the ability to pardon in all cases, except those of impeachment, and the only other limitation argued for was cases involving treason.[50]

While elements of President Trump's presidency are exercised in a manner the Framers could not have envisioned back in 1776, the Framers did have considerable foresight and implemented constitutional provisions that have stood the test of time.[51] Further, the concept of a self-pardon has not

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44. *See* Duker, *supra* note 41, at 502; Nida & Spiro, *supra* note 6, at 206. James Iredell argued that we should lean to strengthening our Executive than weakening our Executive by placing too many limitations on its power. Duker, *supra* note 41, at 502.

45. *See* Nida & Spiro, *supra* note 6, at 217. "The language that was ultimately placed in the Constitution prohibited only the pardoning of an impeachment . . . ." *Id.* at 206.

46. THE FEDERALIST NO. 74, at 553–54 (Alexander Hamilton) (John C. Hamilton ed., 1864); *see also* Nida & Spiro, *supra* note 6, at 206, 217–18.

47. THE FEDERALIST NO. 69, *supra* note 34, at 516 (Alexander Hamilton).

48. *Id.*

49. Nida & Spiro, *supra* note 6, at 217; *see also* THE FEDERALIST NO. 69, *supra* note 34, at 516 (Alexander Hamilton).

50. Kalt, *supra* note 37, at 786–87; *see also* THE FEDERALIST NO. 69, *supra* note 34, at 516 (Alexander Hamilton).

51. *See Constitution of the United States*, U.S. SENATE, http://www.senate.gov/civics/constitution_item/constitution.htm. "Written in 1787, ratified in 1788, and in operation since 1789, the United States Constitution is the world's longest surviving written charter of government." *Id.*; *see also* Andrew Friedman, *Can Constitutional Drafters See the Future? No, and It's Time We Stop Pretending They Can*, 46 SW. L. REV. 29, 30 (2016); Schallhorn, *supra* note 2.

been brought about by an advancement in technology unavailable to the Framers in the 18th century.[52] Thus, the omission on a President's ability to self-pardon must carry weight in analyzing the text of the Constitution and the explicit limitations the Framers placed on the power because, if the Framers feared Presidents would begin pardoning themselves, then the Framers would have at the very least debated the issue.[53]

B. Prior Considerations of Self-Pardon

President Trump's belief in his ability to self-pardon is not unprecedented.[54] President Nixon and President Bush considered using their pardoning power on themselves to avoid potential criminal liability for their actions.[55] President Nixon contemplated his ability to self-pardon following the Watergate scandal.[56] Meanwhile, President Bush considered self-pardoning during the Iran-Contra arms scandal.[57]

1. President Nixon's Consideration of Self-Pardon

On June 17, 1972, "[f]ive men [were] arrested after breaking into the Democratic National Committee headquarters in the Watergate complex in Washington, D.C."[58] After an investigation into the break-in, President Nixon's connection to the crime and subsequent attempt to cover it up

52. Friedman, *supra* note 51, at 30; Kalt, *supra* note 37, at 786–87. While Framers did not directly address a self-pardon concept, the Framers were nonetheless concerned with the presidential self-dealing in cases of treason, which may involve himself and his ability to pardon his cohorts. Nida & Spiro, *supra* note 6, at 206. Thus, the idea of a self-pardon has been around since the formation of our Constitution and not brought about by some technological advancement. Kalt, *supra* note 37, at 786–87; *see also* Friedman, *supra* note 51, at 30.

53. *See* Nida & Spiro, *supra* note 6, at 206; Kalt, *supra* note 37, at 790–93. "While not addressing self-pardons directly," pardons were nonetheless available to protect treasonous accomplices. Nida & Spiro, *supra* note 6, at 206.

54. Nida & Spiro, *supra* note 6, at 212 (noting that President Nixon and President Bush considered using a self-pardon); *see also* Kalt, *supra* note 37, at 799–800 (detailing President Nixon's and President Bush's consideration of a self-pardon); Jennifer Rubin, *How Democrats Should Address Trump's Self-Pardon Claim*, WASH. POST: OPINION (June 5, 2018), http://www.washingtonpost.com/blogs/right-turn/wp/2018/06/05/how-democrats-should-address-trumps-self-pardon-claim/.

55. Nida & Spiro, *supra* note 6, at 212.

56. *Id.*

57. *Id.*

58. *Watergate Fast Facts*, CNN, http://www.cnn.com/2014/01/23/us/watergate-fast-facts/index.html (last updated Jan. 14, 2019, 2:29 PM).

became clear.[59] Fearing removal from office and a potential criminal indictment, President Nixon ordered his legal team to look into his options out of the scandal and presidency as President Nixon believed he would not survive impeachment proceedings.[60]

President Nixon was presented with a handful of options and among them was the option of a self-pardon.[61] In a memorandum authored by Special Counsel James St. Clair, St. Clair advocated for the legality of President Nixon's ability to pardon himself.[62] Further, while former Solicitor General Robert Bork believed a President is immune from criminal prosecution in office, Bork nonetheless acknowledged "a President could pardon himself for any acts committed . . . during his term."[63] Such internal support of President Nixon's ability to self-pardon led the President to believe he could exercise his pardon power on himself.[64] Ultimately, President Nixon chose against a self-pardon and resigned only to be subsequently pardoned by his successor, President Gerald Ford.[65]

2. President Bush's Consideration of Self-Pardon

Following President Nixon's consideration of self-pardon, President Bush and his legal team considered the same action after the Iran-Contra scandal became national news.[66] In November 1986, an illegal plan to free hostages held in Lebanon was revealed.[67] President Bush and his team organized a deal to "sell [weapons] to Iran through Israel" in exchange for *freeing United States hostages*.[68] The proceeds from the sale would then be used for military action in Nicaragua to combat the rising threat of

59. *See id.* "June 25–29, 1973 — Dean testifies before the Senate Select Committee about the White House, and [President] Nixon's involvement in the Watergate break-in and cover-up." *Id.*

60. Nida & Spiro, *supra* note 6, at 212–13.

61. *Id.* "[President] Nixon also was asked to consider pardoning himself and resigning or pardoning all Watergate defendants and himself before resigning." *Id.*

62. *Id.* at 212–13.

63. *Id.* at 213.

64. Nida & Spiro, *supra* note 6, at 213. President Ford, Vice President under President Nixon, explained President Nixon's consideration and belief that he could self-pardon was based upon the legal advice given to him from his legal team. *Id.* President Nixon's lawyers concluded a self-pardon was constitutional. King, *supra* note 13, at 433.

65. Nida & Spiro, *supra* note 6, at 213–14.

66. *Id.* at 214–15; *see also* Kalt, *supra* note 37, at 799.

67. Nida & Spiro, *supra* note 6, at 214.

68. *Id.*

communism in Central America.[69] Ultimately, the illegal plan was revealed and spurred an investigation into the Bush presidency.[70]

Independent counsel Lawrence Walsh was in charge of investigating and bringing forth any criminal indictments in connection with the scandal.[71] Walsh began turning up the heat on President Bush's administration by getting one conviction, three guilty pleas, and two more set to be tried.[72] However, as President Bush neared the end of his presidency, with no possibility of reelection and with a month to go before the trials of the two indicted were set to begin, President Bush granted pardons to six of his alleged partners in the scandal.[73] President Bush's pardons reversed the penalty of the conviction, prevented Walsh from pursuing the rest of President Bush's alleged partners, and effectively shut down the investigation altogether.[74] Some believe President Bush effectively issued a self-pardon by relieving the six alleged partners because it prevented President Bush from testifying during the trials and shut down Walsh's investigation.[75] However, President Bush gave his reasoning for the pardons by stating they were politically motivated to prevent the *criminalization of policy differences* in the upcoming trials.[76]

While President Bush ultimately decided to issue pardons to only his alleged partners in the scandal, President Bush's team did consider a self-pardon.[77] Some suggested President Bush's reasoning in omitting his name

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69. *Id.* at 214 n.123.

70. *See id.* at 214–15.

71. *Id.* at 214. "In the midst of the Iran-Contra crisis, Independent Counsel Lawrence Walsh brought forth grand jury indictments against some of President Bush's aides, who were alleged to have contributed to the breaking of laws regarding the scandal." Nida & Spiro, *supra* note 6, at 214.

72. *See id.* at 215.

73. *Id.* at 214–15; *see also* Kalt, *supra* note 37, at 799; Peter Applebome, *Loss of Democratic Vote Imperils Bush in South*, N.Y. TIMES, Oct. 18, 1992, at A28. While Walsh claimed the pardons were "an act of friendship or an act of self-protection," President Bush explained his reasoning behind pardoning his aides by stating:

> The prosecutions of individuals I am pardoning represent what I believe is a profoundly troubling development in the political and legal climate of our country: [T]he criminalization of policy differences. These differences should be addressed in the political arena, without the Damocles sword of criminality hanging over the heads of some of the combatants. The proper target is the President, not his subordinates; the proper forum is the voting booth, not the courtroom.

Nida & Spiro, *supra* note 6, at 215 (quoting Grant of Executive Clemency, 57 Fed. Reg. 62,145, 62,146 (Dec. 30, 1992)).

74. Nida & Spiro, *supra* note 6, at 214–15; Kalt, *supra* note 37, at 799.

75. Nida & Spiro, *supra* note 6, at 214–15.

76. *Id.* at 215.

77. *Id.* at 216. President Bush also considered invoking the Twenty-fifth Amendment to allow Vice President Quayle to pardon President Bush. *Id.* at 216; *see also* U.S. CONST. amend. XXV.

from the six pardons was because of his concern for his image and legacy.[78] While President Bush may deny his actions were in effect a self-pardon, his pardoning of his six partners did constructively issue a self-pardon for his actions because it stopped Walsh's investigation into the scandal.[79] Moreover, President Bush's pardons were not challenged or reversed by either the legislative or judicial branches as being an abuse of a President's pardon power.[80] Thus, the acquiescence of the government—by choosing not to pursue President Bush for effectively pardoning himself—could support the conclusion that a self-pardon is constitutional.[81]

C. The Supreme Court of the United States and Presidential Pardons

While the Supreme Court of the United States has not specifically decided the constitutionality behind a self-pardon, the Court has issued various decisions on the President's ability to pardon.[82] In *United States v. Wilson*,[83] Chief Justice Marshall defined the presidential pardon power by stating:

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual

78. Nida & Spiro, *supra* note 6, at 216.

79. *See id.* at 214–16.

80. *See id.*; Kalt, *supra* note 37, at 799–800. Although President Bush did not pardon himself, he was still under investigation and could have been indicted following his exit from office. Kalt, *supra* note 37, at 799–800. Ultimately, he was not indicted for misuse of pardon power, nor were the pardons reversed. *Id.*

81. *See* Nida & Spiro, *supra* note 6, at 200–01; *but see* Kalt, *supra* note 37, at 799–800. Kalt argues that President Bush's pardons were effectively not a self-pardon, but in effect, President Bush's pardons shut down the investigation into the scandal. Kalt, *supra* note 37, at 799; Nida & Spiro, *supra* note 6, at 214. Furthermore, once President Bush left office months later, Walsh chose not to indict President Bush. Kalt, *supra* note 37, at 780. Also, as Kalt recognizes, those pardoned by President Bush could have still been forced to testify against President Bush, if President Bush was ultimately indicted once out of office, which could have led to President Bush facing conviction. *Id.* at 799–800. While Kalt believes such actions were political and not constitutional, the acquiescence of Walsh and the government in allowing President Bush to effectively shut down the investigation into his alleged criminal conduct is a *constructive self-pardon* as he decided to take sole action that would prevent Walsh from continuing to investigate his alleged criminal conduct. *Id.*

82. *See Ex parte* Grossman, 267 U.S. 87, 121 (1925); United States v. Klein, 80 U.S. 128, 147 (1871); *Ex parte* Garland, 71 U.S. 333, 351 (1866); United States v. Wilson, 32 U.S. 150, 160–62 (1833).

83. 32 U.S. 150 (1833).

> for whose benefit it is intended, and not communicated officially to the court.[84]

The Court went on to explain that pardons may be reviewed by a court, however, such review is limited and the court cannot judge the *character* of the pardon.[85] So long as the pardon is executed, delivered, and accepted properly, the President could argue the pardon is valid as an executive order.[86]

About three decades later, in *Ex parte Garland*,[87] the Court again discussed the President's ability to pardon.[88] The Court issued an opinion that upheld and reaffirmed a strict textual argument of Section Two of Article II of the Constitution.[89] The Court stated that besides the express impeachment prohibition on pardons, "the power is unlimited. It extends to every offence and is intended to relieve the party who may have committed it."[90] Furthermore, the Court continued its analysis on the President's pardon power by stating: "This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."[91] This strict interpretation of the President's pardon power falls in line with the text of Article II, and the Framers' intent to make such power similar to the King of England, whereby the President may issue it upon anyone for any crime—except cases of impeachment.[92] The decision in *Ex parte Garland* was upheld in *United States v. Klein*,[93] as the Court prevented Congress from enacting laws that would control the President's pardoning power.[94]

In *Ex parte Grossman*,[95] the Court discussed what result would likely occur should a President abuse his pardon power.[96] The Court stated

84. *Id.* at 160–61.
85. *Id.*; Nida & Spiro, *supra* note 6, at 220.
86. *Wilson*, 32 U.S. at 161.
87. 71 U.S. 333 (1866).
88. *Id.* at 380.
89. *Id.*; *see also* U.S. CONST. art. II, § 2, cl. 1.
90. *Ex parte Garland*, 71 U.S. at 373.
91. *Id*. at 380.
92. *See* U.S. CONST. art. II, § 2, cl. 1; *Ex parte Garland*, 71 U.S. at 341, 373.
93. 80 U.S. 128 (1871).
94. *Id.* at 148; *Ex parte Garland*, 71 U.S. at 333. "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law." *Klein*, 80 U.S. at 148.
95. 267 U.S. 87 (1925).
96. *See id.* at 121.

that the likely result would be impeachment.[97] In *Grossman*, the Court opined on the President's ability to pardon criminal contempt and the problems that may occur in successive pardoning of a particular offense.[98] The Court realized the problems courts may face in carrying out their duties if the President consistently pardons, but the Court believed that the proper recourse in addressing the abusive President is not limiting such pardons, but rather impeachment.[99]

Thus, President Trump has the ability to make a strong precedential argument for his ability to pardon himself because the Court has consistently upheld a strong presidential pardon power.[100] The Court has prevented Congress from interfering with such power and has used strong language that proves such power is plenary.[101] While no self-pardon case has come before the Court—based upon the historical interpretation of the Court's analysis of the President's power to pardon—the Court has consistently taken a strict textual position in stating that the only exception to the power is impeachment.[102]

III. PRESIDENT TRUMP'S AMENABILITY TO INDICTMENT

Special Counsel Mueller has indicted twelve Russians for allegedly meddling in the 2016 presidential election,[103] and some within the White House believe Mueller could be targeting President Trump, as well, in connection with the meddling.[104] However, a sitting United States President has never been indicted before.[105] Some legal scholars and commentators

97. *Id.* at 106. An abuse of the pardon power by the president will likely result in an impeachment rather than the Court narrowing and restraining the construction of the general powers of the Constitution. *Id.* at 121.

98. *Id.* at 106, 121.

99. *Ex parte Grossman*, 267 U.S. at 121.

100. *See* Nida & Spiro, *supra* note 6, at 221. While the Court has never addressed a self-pardon directly, strong precedent leans toward the Court refusing to narrow the Constitution. *Id.*

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

102. *See id.*; Nida & Spiro, *supra* note 6, at 221.

103. Mark Mazzetti & Katie Benner, *12 Russian Agents Charged in Drive to Upset '16 Vote*, N.Y. TIMES, July 14, 2018, at A1. "The special counsel investigating Russian interference in the 2016 election issued an indictment of [twelve] Russian intelligence officers on Friday in the hacking of the Democratic National Committee and the Clinton presidential campaign." *Id.*

104. *See* Parker & Achenbach, *supra* note 9; Schallhorn, *supra* note 1.

105. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 237 n.14 (citing Clinton v. Jones, 520 U.S. 681, 692 n.14 (1997)).

believe the President is immune from criminal prosecution while in office.[106] Others believe the President is susceptible to a criminal indictment, regardless of being in office, if the President committed a crime.[107]

Nonetheless, the Constitution specifically lays out how the President should be handled if he has committed egregious acts against the United States.[108] Accordingly, pursuant to Section Four of Article II, "[t]he President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[109]

While the Constitution does not explicitly prohibit the indictment of President Trump, there are several commentators that have supported criminal immunity for President Trump.[110] For example, Justice Story came to the conclusion that a President is immune from criminal prosecution because a President is unable to be arrested, imprisoned, or detained while he is President.[111] In addition to Justice Story's belief, the Justice Department's Office of Legal Counsel ("OLC") has issued two separate reports in 1973 and 2000, respectively, that reach the same conclusion.[112] Although no court has decided the issue, President Trump has strong legal support of his immunity from prosecution while in office.[113]

This section will argue why President Trump is criminally immune while in office—because a proper trial for President Trump is not held inside

106. *See id.* at 222; King, *supra* note 13, at 422; Douglas W. Kmiec, *Trump Can't Be Indicted. Can He Be Subpoenaed?*, N.Y. TIMES: OPINION (June 4, 2018), http://www.nytimes.com/2018/06/04/opinion/trump-lawyers-indicted-subpoena.html. "Indictment and criminal trial derails a presidency by the compromising stigmas harming presidential ability to carry out foreign or domestic duties . . . ." Kmiec, *supra*.

107. *See* King, *supra* note 13, at 417–18; Eisen & Holtzman, *supra* note 12; Schallhorn, *supra* note 1.

108. *See* U.S. CONST. art. II, § 4.

109. *Id.*

110. *See id.*; King, *supra* note 13, at 418.

111. King, *supra* note 13, at 418.

112. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222; Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Amenability of the President, Vice President & Other Civil Officers to Fed. Criminal Prosecution While in Office 1 (Sept. 24, 1973) (on file with Dep't of Justice). "[T]he indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions." A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222.

113. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 260. "No court has addressed this question directly, but the judicial precedents that bear on the continuing validity of our constitutional analysis are consistent with both the analytic approach taken and the conclusions reached." *Id.*

a courtroom, but rather inside the Senate.[114] Further, this section will argue that a criminal indictment against President Trump while in office would be unconstitutional because the Framers stated impeachment proceedings should come before the filing of a criminal indictment.[115]

A. Who Prosecutes the President?

The prosecution of President Trump while in office is problematic because a state prosecutor would be unable to *arrest the [e]xecutive branch*, and a federal prosecutor would be acting in a manner contrary to the Constitution.[116] While a sitting President has never been indicted, a state prosecutor would not likely become the first to indict the President as the Supremacy Clause should prevent such action.[117] Further, a federal prosecutor would not likely become the first to indict the President because the Constitution specially bestows the power to try the President upon the legislative branch through impeachment proceedings.[118]

1. State Prosecution

While President Trump could potentially be indicted by a state prosecutor for committing a state crime, it is unlikely such indictment would stand as constitutional.[119] According to Article VI Clause 2,[120] the "Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby" ("Supremacy Clause").[121] As such, for a state prosecutor to impose state jurisdiction and attempt to bind President Trump to a state judicial system would be contrary to the Supremacy Clause because the state would be acting contrary to the laws in the Constitution by putting state law over federal law; by doing so, a state prosecutor would essentially be *arrest[ing] the [e]xecutive branch*.[122]

In addition to the apparent contradiction of the Supremacy Clause, the Court has already decided who should prevail in a dispute between the

114. *See* King, *supra* note 13, at 434.
115. *See id.*
116. *Id.* at 425.
117. *See* U.S. CONST. art. VI, cl. 2; McCulloch v. Maryland, 17 U.S. 316, 436 (1819); King, *supra* note 13, at 424–25.
118. *See* U.S. CONST. art. I, § 3, cl. 6.
119. *See* King, *supra* note 13, at 424–25.
120. U.S. CONST. art. VI, cl. 2.
121. *Id.*
122. *See* King, *supra* note 13, at 425 (quoting *McCulloch*, 17 U.S. at 432).

state and federal government.[123] In *McCulloch v. Maryland*,[124] the Court prevented Maryland from imposing a tax on a federal bank, overturned a Maryland statute that prevented a bank from operating without state approval, and held that the statute was a violation of the Supremacy Clause.[125] The Court supported its holding by reasoning that Maryland burdened the operation of a federal bank, which was to benefit all United States citizens including the citizens of Maryland, by imposing a tax not just on its Maryland constituents, but on the rest of the United States population, as well.[126] Thus, Maryland was unconstitutionally interfering with the operation of the federal government and levying a tax on United States citizens not within Maryland's jurisdiction.[127]

While *McCulloch* was a dispute over a tax and not a criminal indictment of a sitting President, the principles of federal supremacy still carry.[128] For a state prosecutor to indict President Trump, that state would unduly burden and interfere with the federal government that benefits all United States citizens, not just that respective state's citizens.[129] Further, the Court expressly stated, "[t]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted."[130] Thus, if a President is indicted, then the indictment must come from a federal prosecutor because the Supremacy Clause prohibits any state from burdening the operations of the federal government.[131]

2. Federal Prosecution

Pursuant to Article I, Section Three, "[t]he Senate shall have the sole [p]ower to try all [i]mpeachments . . . [w]hen the President of the United States is tried, the Chief Justice shall preside."[132] Accordingly, a potential separation of powers issue could arise if a federal prosecutor indicts a

123. *See McCulloch*, 17 U.S. at 435–36.
124. 17 U.S. 316 (1819).
125. *Id.* at 436–37.
126. *Id.* at 435–36.
127. *Id.* at 435–37.
128. King, *supra* note 13, at 425; *see also McCulloch*, 17 U.S. at 434–35. To allow a state to prosecute the President while in office would be a direct contradiction of *McCulloch* as it would be a single state interfering with the operation of the federal government, which benefits all states. King, *supra* note 13, at 425.
129. King, *supra* note 13, at 425.
130. *McCulloch*, 17 U.S. at 317.
131. *See* King, *supra* note 13, at 425.
132. U.S. CONST. art. I, § 3, cl. 6.

President.[133] The Constitution expressly states the Senate shall have the power to try the President for the alleged misconduct or crime, all while the Chief Justice presides over the trial.[134] For a federal prosecutor to try a President first—before any trial by the Senate—would be a circumvention of the express language in the Constitution.[135] Further, a federal prosecutor, or an agent of the executive branch, and a federal judge, or an agent of the judicial branch, would be acting in place of the legislative branch and the Chief Justice by trying a President for his alleged misconduct, which is a direct contradiction of Article I, Section Three.[136]

B. Presidential Immunity from Indictment

While a separation of powers issue is apparent, OLC concluded twice—in 1973 and 2000—that it believes it does not have the constitutional authority to indict its boss, the President of the United States.[137] Although OLC is not a court, nor can it make law through its decisions, the 2000 OLC report ("Report") on indicting a sitting President sheds light on the Justice Department's interpretation of its ability to indict the President.[138] The Report reaffirms its 1973 conclusion by stating "the Department . . . would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions" by indicting a sitting President.[139]

Although the Report states the Constitution does not expressly prohibit an indictment and subsequent criminal proceeding to occur while the President is in office,[140] the Report recognizes that the burden placed on the President to defend himself from criminal prosecution would be so great that

133. King, *supra* note 13, at 426; *see also* U.S. CONST. art. I, § 3, cl. 6. The Constitution specifically states the legislative branch has the power to try and impeach the President. U.S. CONST. art. I, § 3, cl. 6. A federal prosecutor is under the executive branch; thus, it would be the executive branch trying the executive branch. King, *supra* note 13, at 426.

134. U.S. CONST. art. I, § 3, cl. 6.

135. *See* King, *supra* note 13, at 427.

136. *Id.*

137. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222.

138. *Id.*

139. *Id.*

140. *Id.* at 223. "The memorandum concluded that the plain terms of the [Impeachment] Clause [in Article I, Section 3 of the United States Constitution] do not impose such a general bar to indictment or criminal trial prior to impeachment and therefore do not, by themselves, preclude the criminal prosecution of a sitting President." *Id.*

it would impair his ability to carry out his constitutional duties.[141] The Report states three burdens that President Trump would face if indicted:

> Three types of burdens merit consideration: (a) [T]he actual imposition of a criminal sentence of incarceration, which would make it physically impossible for [President Trump] to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise [President Trump's] ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper [President Trump's] performance of his official duties.[142]

While the Twenty-fifth Amendment allows for a President to step away if he cannot discharge his constitutional duties while preparing a defense to his criminal indictment, the President's potentially indefinite absence if he is sentenced to prison for the remainder of his term was not the intention of the Amendment and is in direct contradiction of the Constitution's process for removing the President from office.[143] Moreover, the embarrassment of a criminal indictment would be detrimental to a President in his role as the chief diplomat with foreign nations.[144]

Ultimately, the Report balanced the omission of presidential criminal immunity with the practicality of indicting a sitting President and concluded that:

> [T]he interests in facilitating immediate criminal prosecution of a sitting President against the interests underlying temporary immunity from such prosecution, considered in light of alternative means of securing the rule of law, we adhere to our 1973 determination that the balance of competing interests requires recognition of a presidential immunity from criminal process.[145]

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141. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 246.

142. *Id.*

143. U.S CONST. amend. XXV; A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 248. "None of the contingencies discussed by the Framers of the Twenty-fifth Amendment even alluded to the possibility of a criminal prosecution of a sitting President." A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 248.

144. *See* Kmiec, *supra* note 106.

145. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 255.

Moreover, the Report's conclusion is consistent with former United States Assistant Attorney General Douglas Kmiec's analysis of President Trump's ability to be indicted.[146] Kmiec stated "[i]ndictment and criminal trial derails a presidency by the compromising stigma's harming presidential ability to carry out [his] . . . duties."[147]

Thus, should it be found that a President acted criminally on the campaign trail or otherwise, then the only recourse should be impeachment—as he should experience criminal immunity for his actions while in office because initiating a federal prosecution before impeachment proceedings would be inconsistent with the text of the Constitution and would greatly impair a President's ability to carry out his duties.[148]

C. Impeachment Instead of Indictment

The legislative branch has constitutional authority to preside over impeachment proceedings, including the President's impeachment.[149] According to Article I, the House of Representatives has the sole power to impeach and the Senate has the sole power to try all impeachments.[150] If the President is impeached, the Chief Justice of the Court shall preside over the trial.[151] Moreover, Article I states:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[152]

If an investigation concludes the President committed a crime while on the campaign trail or otherwise, then the proper recourse would first be the suggestion of impeachment.[153] Once impeachment proceedings are finished, then a President would be susceptible to a criminal indictment—regardless of whether removal occurs or not.[154]

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146. *Id.* at 260; *see also* Kmiec, *supra* note 106.
147. Kmiec, *supra* note 106.
148. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 260; King, *supra* note 13, at 434; Kmiec, *supra* note 106.
149. U.S. CONST. art. I, § 3, cl. 6.
150. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6.
151. U.S. CONST. art. I, § 3, cl. 6.
152. U.S. CONST. art. I, § 3, cl. 7.
153. *See* King, *supra* note 13, at 429; Kmiec, *supra* note 106.
154. King, *supra* note 13, at 428.

1. Constitutional Authority

As discussed in the Presidential Immunity section, President Trump should enjoy criminal immunity while in office.[155] Despite having criminal immunity, President Trump is nonetheless susceptible to impeachment and removal should he be found to have committed "Treason, Bribery, . . . other high crimes, and Misdemeanors."[156] Such immunity falls in line with the text of the Constitution, and is supported by various commentators, including the Justice Department.[157]

Impeachment and removal from office is the proper recourse for an abusive President.[158] The constitutional mechanism for checking an abusive President, or one that has committed a serious misconduct, is impeachment.[159] To circumvent such a process by filing an indictment prior to impeachment contradicts the express language of the Constitution.[160] Although impeachment proceedings will burden President Trump, similar to a criminal prosecution, such proceedings are what the Constitution put in place to check serious misconduct from the President.[161] Further, not one United States President that was impeached had a criminal indictment filed before impeachment.[162] Thus, a strong historical and constitutional argument can be made by President Trump that it would be unprecedented for a President to be indicted before undergoing impeachment proceedings.[163]

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155. *See supra* section III.B.; A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 260.

156. U.S. CONST. art. II, § 4; King, *supra* note 13, at 428–30.

157. *See* U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. II, § 4; Rizzo, *supra* note 6.

158. Nida & Spiro, *supra* note 6, at 210; *see also* U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. II, § 4;

159. Nida & Spiro, *supra* note 6, at 210; *see also* U.S. CONST. art. I, § 3, cl. 7; Kmiec, *supra* note 106.

160. *See* King, *supra* note 13, at 427.

161. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 222, 257–58. "[W]e recognize that invoking the impeachment process itself threatens to encumber a sitting President's time and energy and to divert his attention from his public duties. But the impeachment process is explicitly established by the Constitution." *Id.*; *see also* U.S. CONST. art. I, § 3, cl. 6–7.

162. Baker & Eilperin, *supra* note 16; *The Impeachment of Andrew Johnson (1868) President of the United States*, *supra* note 16. Clinton was not indicted prior to impeachment. Baker & Eilperin, *supra* note 16. Johnson was not indicted before impeachment. *The Impeachment of Andrew Johnson (1868) President of the United States*, *supra* note 16.

163. King, *supra* note 13, at 418, 423.

a. Prior Presidential Impeachments

Only two United States Presidents—former President Andrew Johnson ("President Johnson") and former President Bill Clinton ("President Clinton")—have been impeached by the House of Representatives.[164] However, both Presidents were acquitted by the Senate.[165] President Johnson was the first impeached President and he was impeached for violating the Tenure of Office Act after he replaced Secretary of War Edwin M. Stanton with Thaddeus Stevens.[166] President Johnson already had disputes with Stanton and Senate Republicans during the reconstruction era and, after replacing Stanton, congressional leaders drafted eleven articles of impeachment, which included, among others, conspiracy to remove Stanton from office.[167] Although Congress deemed President Johnson's actions criminal, he nonetheless finished out his presidency after being acquitted by the Senate and, most importantly, President Johnson was not indicted for his alleged criminal conduct before or after impeachment proceedings.[168]

The second impeached President was President Clinton.[169] President Clinton was impeached for committing perjury before a grand jury and obstructing justice.[170] President Clinton's crimes stemmed from a sexual scandal, in which President Clinton lied about having sexual relations with Monica Lewinsky in front of a grand jury, and obstructed justice in a civil suit by lying in a separate lawsuit and to Special Investigator Ken Starr.[171] Ultimately, President Clinton was acquitted by the Senate after trial, and, again most importantly, no criminal indictment was introduced after Ken Starr finished his investigation into President Clinton's criminal conduct.[172]

Thus, President Trump had a strong historical argument in opposing a Mueller indictment while in office, as no previously impeached President had to face a criminal indictment for the crimes they committed.[173] While the previous impeached Presidents were not alleged to have used a foreign

164. Baker & Eilperin, *supra* note 16; *The Impeachment of Andrew Johnson (1968) President of the United States*, *supra* note 16.

165. *The Impeachment of Andrew Johnson (1868) President of the United States*, *supra* note 16.

166. *Id.*

167. *Id.*

168. *Id.*

169. Baker & Eilperin, *supra* note 16.

170. *Id.*

171. *Id.*

172. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 237 n.14; Baker & Eilperin, *supra* note 16.

173. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 237 n.14; Baker & Eilperin, *supra* note 16.

rival's power to win the Office, the allegation President Trump faced should not affect the procedure in place in dealing with a President allegedly committing high crimes and misdemeanors.[174]

2. Senate Acquittal and Double Jeopardy

Despite the apparent inability to indict a President while in office, a President can still feel the effects of an investigation into alleged criminal conduct by the President through the threat of impeachment—should the investigation conclude the President committed a crime or serious misconduct.[175] The constitutional mechanism for punishing an elected official begins with impeachment, then removal from office, then indictment.[176] However, as history has shown, impeachment proceedings are partisan and Senators are pressured to vote in support of their political party.[177] Thus, despite the serious or criminal misconduct of the President, he can evade punishment and remain in power if his political party holds the supermajority of Senate seats.[178] Even if President Trump had gotten impeached and faced a Senate trial, the Republican party controls a majority of Senate seats which means President Trump could have been acquitted and remained in office.[179]

However, even if President Trump got acquitted, he could still be susceptible to criminal indictment once he relinquishes the Oval Office if Mueller would have concluded President Trump acted criminally.[180] A Senate acquittal should not bar a criminal indictment once the impeached

174. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 237 n.14; Rizzo, *supra* note 6. "The constitutional mechanism for addressing serious misconduct (treason or other high crimes) by a sitting president is impeachment." Kmiec, *supra* note 106.

175. Kmiec, *supra* note 106; Schallhorn, *supra* note 1.

176. U.S. CONST. art. I, § 3, cl. 6–7.

177. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. 110, 133–34 (2000); Baker & Eilperin, *supra* note 16. The Framers feared impeachment proceedings could become partisan. Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34.

178. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34.

179. Parker & Achenbach, *supra* note 9.

180. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 155.

President leaves office.[181] While no court has addressed the issue directly, OLC issued a memorandum in 2000 that analyzed the possibility of double jeopardy attaching to a Senate trial.[182] Ultimately, OLC concluded that double jeopardy should not attach because a Senate trial differs from a criminal trial.[183]

According to the Judgment Impeachment Clause, "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[184] The Constitution provides the possibility for criminal proceedings to subsequently occur if an impeached official is removed from office.[185] However, the clause is silent on the possibility of criminal indictment for an acquitted official.[186] Thus, President Trump could have made an argument that Senate acquittal bars subsequent criminal prosecution.[187] Such argument falls on the "canon of statutory construction, *expressio unius est exlusio alterius*, [or in other words,] 'the expression of one is the exclusion of others.'"[188] The clause's omission of parties acquitted from impeachment could imply a bar on criminal prosecution of the same offenses.[189] Further, when the clause was originally drafted by the Framers, it was modeled after various states' impeachment provisions which stated "the party, whether convicted or acquitted."[190] So, the omission by the Framers to include language which addressed parties acquitted, and not just impeached, is important.[191]

Despite the omission of whether convicted or acquitted, double jeopardy still should not attach to Senate trials, as double jeopardy is intended to protect individuals from repeated trials for the same offenses that threaten to take away life and liberty.[192] Only taking away an individual's elected position, and disqualifying an individual for future elected positions,

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181. *Id.*
182. *Id.* at 110.
183. *Id.* at 138, 155.
184. U.S. CONST. art. I, § 3, cl. 7.
185. *Id.*
186. *Id.*; Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 114.
187. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 114.
188. *Id.*
189. *Id.*
190. *Id.* at 114, 116.
191. *See id.* at 116.
192. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 117.

was an American innovation to impeachment.[193] In Britain, impeachment and conviction could result in death.[194] The Framers intentionally avoided such harsh penalties for impeached and convicted officials by only subjecting such individuals to subsequent criminal prosecution for their acts.[195] Impeachment trials were not designed to result in the taking away of one's life or liberty, which would invoke double jeopardy.[196]

Moreover, the branch of government conducting the trial is an important distinguishing factor.[197] The legislative branch conducts the trial as opposed to the judicial branch, by design.[198] Hamilton addressed this distinguishing factor by claiming the judicial branch could have two trials of an impeached official for the same offenses, which is why the Senate conducts the impeachment trial.[199] Additionally, Senators must play the role of fact finder and *interpreter of governing law*—hence, judge and jury.[200]

Lastly, double jeopardy should not attach to Senate acquittal because impeachment proceedings are susceptible to partisan loyalties which can affect the Senate's decisions to convict or acquit.[201] As previously discussed, partisan politics play a decisive role in Senators' decisions, and going against the Republican Party or President Trump could prove costly in reelection.[202] The Framers also feared impeachments were liable to partisan abuse, to retain an abusive President, or to remove an unpopular President.[203] Therefore, while President Trump should enjoy criminal immunity while in office, he nonetheless is liable to impeachment proceedings and should not

193. *Id.* at 126–27.

194. *Id.* at 120, 126.

195. *Id.* at 126–27.

196. *Id.* at 129.

197. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 132.

198. *See id.*

199. *Id.* at 123.

200. *Id.* at 132.

201. *See* Baker & Eilperin, *supra* note 16. Impeachment votes fall largely along party lines. *Id.*

202. *See* John Verhovek & Kendall Karson, *Sanford Loss Magnifies* Trump Effect *on GOP Primaries*, ABC NEWS (June 13, 2018, 11:31 AM), http://abcnews.go.com/Politics/sanford-loss-magnifies-trump-effect-gop-primaries/story?id=55862833 (discussing recent cases where incumbent Congressmen lost reelection after opposing President Trump and his policies); Paul Waldman, *In Today's Republican Party, You Worship Trump or You Get Out*, WASH. POST: PLUM LINE (June 25, 2018), http://www.washingtonpost.com/blogs/plum-line/wp/2018/06/25/in-todays-republican-party-you-worship-trump-or-you-get-out/?utm_term=.06bb211c4c7a.

203. Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34.

be barred from subsequent criminal proceedings if he was found to have acted criminally—regardless of a Senate acquittal.[204]

IV. CONCLUSION

Taking a strict textual approach to the construction of the Constitution, a self-pardon is not prohibited because the President, historically and intentionally, enjoys plenary pardon power.[205] While such plenary power seemingly is abusive, the Court has done little to limit the President's power to pardon individuals.[206] The power was designed to be an act of mercy and similar to the King of England's power to pardon those guilty of committing a crime.[207] While the actual use of a self-pardon is unprecedented, the idea of using a self-pardon is not.[208] Previous embattled Presidents reached the conclusion that a self-pardon is not prohibited based upon the text of the Constitution and the Court's interpretation of the power.[209] The sole exception to such power is in cases of impeachment.[210] Therefore, President Trump's threat to Mueller to use a self-pardon has legal support.[211] However, such an action would presumably indicate that President Trump is in fact guilty of colluding with Russia to win the election, which President Trump adamantly denies.[212]

Furthermore, the way for Mueller to hold President Trump responsible for any criminal or serious misconduct is not through use of an indictment—rather a recommendation of impeachment—because an indictment should be unconstitutional.[213] President Trump should enjoy criminal immunity while he is in office, not because of partisan beliefs, but in consideration of the instability a criminal indictment would produce.[214] Moreover, the Constitution creates a mechanism for combatting serious or

204. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 224; Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 155.

205. *See* Nida & Spiro, *supra* note 6, at 216, 220–21.

206. *Id.* at 220–21.

207. *Id.* at 203–04.

208. *Id.* at 220.

209. *See id.* at 213, 216.

210. Nida & Spiro, *supra* note 6, at 217.

211. @realDonaldTrump, *supra* note 1; Parker & Achenbach, *supra* note 9; *see also* Nida & Spiro, *supra* note 6, at 221.

212. *See* Schallhorn, *supra* note 1; Schallhorn, *supra* note 2; @realDonaldTrump, *supra* note 1.

213. *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 223.

214. *See id.* at 230, 236.

criminal misconduct from the President through impeachment and removal from office.[215] Although removing a President from office is unprecedented, an acquittal from the Senate should not absolve a President from criminal prosecution once he is out of office.[216] Barring criminal prosecution after a Senate acquittal would be inconsistent with fundamental principles of justice, and inconsistent with the applied use of double jeopardy because a Senate trial does not carry the same penalty a criminal trial carries.[217]

Ultimately, although a self-pardon is not prohibited by the Constitution, the danger in President Trump pardoning himself is the seeming abuse of the executive pardon power, which itself could be grounds for impeachment if President Trump obstructs justice through his self-pardon.[218] Thus, it would be this move by President Trump—rather than the alleged misconduct Mueller investigated—that could have become the impeachable and unpardonable offense committed.[219]

215. U.S. CONST. art. I, § 3, cl. 6, 7; *see also* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. at 258.

216. *See* Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 133–34; Rubin, *supra* note 54.

217. Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O.L.C. at 136–38, 155.

218. Parker & Achenbach, *supra* note 9; Rubin, *supra* note 54. "Exceptional [pardon] cases like [successive pardons of the same offense] if to be imagined at all, would suggest a resort to impeachment . . . ." *Ex parte* Grossman, 267 U.S. 87, 121 (1925).

219. Parker & Achenbach, *supra* note 9. "[Giuliani] went on to describe [self-pardoning as] *unthinkable* and said it would probably lead immediately to impeachment." *Id.*