

MICAH

Welcome, everyone. My name is Micah Schwartzman. I'm the Director of the Karsh

SCHWARTZMAN:

Center for Law and Democracy at the University of Virginia School of Law. The Karsh Center is a nonpartisan legal Institute whose mission is to promote the understanding and appreciation of principles and practices necessary for well-functioning, pluralistic democracy-- including civil discourse, civic engagement and citizenship, ethics and integrity in public office, and respect for the rule of law.

I want to thank the Miller Center for sponsoring this program. And I also want to recognize the University of Virginia's Institute of Democracy for more generally supporting our efforts to understand what's been happening since the aftermath of the presidential election in November.

Our topic today is whether the president can pardon himself. As President Trump prepares to leave office, can he give himself a presidential pardon? Is that constitutional? We want to ask questions about the arguments for and against self-pardoning. What does the original meaning of the Constitution say about this issue? Is there precedent for it?

This expert panel will focus on the constitutional basis of the pardon power, its history and limits, the relationship between pardoning and impeachment-- which, of course, has become that much more important this week, and also the legal and political implications of an attempt by the president to self-pardon. We have with us today three experts in this area. Let me introduce them in the order in which I'll ask them to present first.

Is Brian Kalt, who is a professor of law and the Harold Norris faculty scholar at Michigan State University. His research focuses on structural constitutional law injuries. His recent publications include the books *Constitutional Cliffhangers*, *A Legal Guide for Presidents and Their Enemies*, and, incredibly timely, the book *Unable, The Law, Politics and Limits of Section 4 of the 25th Amendment*.

Next in order of presentation is Professor Bernadette Meyler, who is the Carl and Sheila Spaeth Professor of Law, and professor by courtesy in English, and the Associate Dean for Research and Intellectual Life at Stanford University. She's a

scholar of British and American constitutional law, and of law in the humanities, and of 2020, Guggenheim fellow in constitutional studies.

And we have with us as well my colleague John Harrison, who is the James Madison distinguished Professor of Law and the Thomas F. Bergen teaching professor of law at the University of Virginia School of Law. He joined our faculty after a distinguished career with the US Department of Justice, including the Office of Legal Counsel. He's also served as counselor on international law in the Office of the Legal Advisor at the US Department of State.

I'm going to give our panelists about 10 minutes to share some thoughts about the questions that I've prompted, and perhaps other ideas and thoughts about this topic. And then we'll have about 30 minutes for question and answers. If you have a question, please enter it in the Q&A function, which should be at the bottom of your screen, and I'll convey those questions to our panelists.

I'm going to start with Brian Kalt, and maybe you can begin by telling us what the pardon power is and what is its basis in the Constitution?

BRIAN KALT:

Article 2 gives the president the power to grant pardons and reprieves for offenses against the United States, except in cases of impeachment. And there aren't a lot of limits expressed in the text, so it is one of the president's broadest, least limited powers. It's not subject to congressional authorization, like most of his take care powers. It's not subject to judicial review. The merits of a pardon, anyway, are not reviewable in court under the political question doctrine.

But the self-pardon presents an interesting question as to whether and what sorts of other limits might exist. And starting with the text-- I just said, there aren't a lot of limits there, but there are limits implicit in the notion of what a pardon actually is. So for instance, as an analogy, a pardon can only be granted for something that the person receiving the pardon has already done. You can't pardon a future act. The Constitution doesn't say that. It's just implicit in the definition of what a pardon is.

So one textual argument against self-pardons is that a pardon is inherently something that you give to somebody else. The Latin root of "pardon" comes from the same root as words like "condone" or "donate."

You can't make a donation to yourself. It just doesn't make sense. I mean, you can pass money from one hand to another. But if you call it a donation, you're wrong. It just doesn't fit the category. And so the argument goes that is not a pardon.

Similarly, the Constitution talks about granting pardons, and some have argued that granting something inherently means something you give to someone else. There's also, not in the text, but in the general jurisprudence, the principle that you cannot be the judge in your own case. Of course, a pardon isn't something that a judge gives. The president isn't being a judge, he's being a president.

But if you look at the pardon as part of the criminal justice process, it would be odd if, unlike everyone else at every other stage, the president was able to deal himself some sort of self-judgment. If you're a criminal defendant, we don't let you be on the jury, we don't let you be the prosecutor, we don't let you be the judge, and arguably, we don't let you be the president who decides if you should get a pardon or not. In all of those other cases, we have someone else fill that role.

And here, the argument would be someone else should be president. Someone else, your successor, should decide whether you merit a pardon or not.

Finally, there's a structural argument against self-pardons. The presidency is supposed to be limited. And the pardon power derives, in a lot of ways, from the British monarch's pardon power. It's more limited in some ways.

But the issue of pardon wouldn't come up in the British context because it's not that the King couldn't have pardoned himself in 1787, it's that such a thing wouldn't make sense. The King could do no wrong. He couldn't be prosecuted. He could be deposed and executed, but such extralegal options wouldn't respond to the pardon power either.

So when we think about converting, translating the King's pardon power to the president's pardon power, we're left with a translation problem. Presidents aren't supposed to be kings. At the same time, they can pardon people, which makes them look like kings. But a self-pardon is something that would allow the president to burst free from the limits that the Constitution imposes. You're supposed to be president until you're not. If you're a king, you're a king for the rest of your life. But

if you're a president, you're supposed to, at some point, not be president anymore. Allowing a president to pardon himself would be allowing him to project his power as president past the end of his term in a way that doesn't sit well with the structure.

I did want to say briefly something about scholarship in general, because I know there are some students in the audience. And that is this question came up for me when I was a second-year law student in a criminal procedure class. We were talking about presidential pardons because, you know, it's Yale, so we had to get all theoretical.

And I raised my hand and I said, "Can the president pardon himself?" and the professor, Akil Amar, said, "I don't know. You should look into that." And I did, and there had been nothing written on it, so I decided I would. And it was my note. My student note in the Law Journal.

And the reason I bring this up is to encourage law students and law professors to write about things like this, that people might make fun of you, as they did back in the mid-90s when I wrote this, and say, "This is never going to happen. Why are you writing about things that will never happen?"

And the answer is twofold. One-- maybe it won't ever happen. But if it does, it would be very consequential, and we need to look at both. We learned from torts the probability of something happening and the magnitude if it does. Second-- it helps to think about these things beforehand.

So I'm very proud to be here talking about arguments that I thought about in the mid-90s when I had no idea that Donald Trump would ever be president. I had no idea what he might pardon himself for. I just looked at what I thought the law was.

And it's important for us to do as much work as we can to figure out what the law is before we know whether we want one side to win or the other because that gives us honest answers. And ideally, it also gives people something to work with. Right now, we're seeing a lot of hot takes in the media, but eventually we're going to move on from hot takes and op-eds to briefs and testimony. And when that happens, it helps if someone has done the work, has written the footnotes.

Very quickly, the argument that the president can pardon himself is, the Constitution doesn't say he can't. And it's a broad power, so we look for limits. If we don't see them, then they aren't there. Again, I've already addressed why I think that's not right, but it is a reasonable argument. The pardon power is broad and we have no precedent. Because there are reasonable arguments on either side, courts could go either way on this.

When people ask me if the president can pardon himself, I say he can try. And a court will have to decide, and I can't say what the court would decide. I can say what I would decide, were I a judge, but I'm not. So we'll find out. And this hypothetical issue that made me the object of ridicule in the mid-90s, a chapter in my book *Constitutional Cliffhangers* in 2012, when it still was made fun of. But what we'll see is the court deciding this once and for all, if, as I expect, President Trump does attempt to pardon himself.

MICAH

Thanks! I want to turn things, now, to Bernie Meyler. I should, I think, have

SCHWARTZMAN: mentioned that you also have a very timely book called *Theaters of Pardoning*, and

I want to give you an opportunity to tell us a little bit about the book, and also your thoughts on where things are and might be with this question about whether the president can pardon himself.

BERNADETTE

So, first of all, thank you so much, Micah, for inviting me to this panel, which is

MEYLER:

incredibly timely, and you pulled it together in a very timely fashion as well. So I'll fold in some comments about my book to my remarks, because I think my perspective on this issue really comes out of looking at the broader Anglo-American Common Law history having to do with pardoning and the backdrop of the constitutional provision that Brian was telling us about.

And my perspective on this is that basically the Supreme Court has interpreted the pardon power too broadly over time. It's interpreted to the detriment of what should be legislative functions and in excess of the Common Law conception of pardoning, which lay behind the article to power.

So there are a couple of examples of this that are-- apart from the presidential self-pardon as well. One pertains to something that Micah brought up at the beginning, which was about the ability of Trump to pardon the capital rioters. And I think that

traditionally would be thought of as a power of amnesty rather than pardon.

Now, after the Civil War, and after these battles between Congress and Presidents Lincoln and then his successor that there were very broad determinations by the Supreme Court that said that the power of pardon in Article Two also includes the amnesty power. So it's not limited simply to an individual pardon of a particular person with a specified set of crimes, but instead that the pardon power can extend more generally to a set of events and a set of people that are maybe on the edge.

So President Trump, under that decision, could say anyone involved in the capitol riot is hereby pardoned or anyone of any offenses involved that they have committed. So I think that under current precedent, the Supreme Court has allowed something like a general pardon of the capitol rioters.

But the tradition of pardoning in England and then America actually tended to separate out those two things. So there were acts of amnesty, but also called acts of oblivion within both parliamentary tradition and then also in the colonies, in Maryland and other colonies, where legislatures would issue things that we would consider amnesty is now. And they wouldn't be something that the king or the governor would do.

So that's one area where the presidential pardon power has become aggrandized at the expense of the legislature. Now, also, there could be some arguments about that with respect to impeachment. I'm not sure where I stand on this question, but some people have argued that there can't be pardons in cases of impeachment, including pardons of criminal acts that were also the subject of impeachment. I'm not sure I agree with that. But the question of the relation between impeachment and pardon is another area where there may have been some aggrandizement of the presidential power at the expense of the legislature.

So as I mentioned before, the main problem here is that these interpretations ignore the Common Law heritage of the pardon power. And I think that Common Law heritage helps to flesh out another point that Brian raised, which was this issue of judging in one's own case. So there's a brief LLC memo saying, well, we don't think that the president can pardon himself because this would involve judging in

his own case. There's a prohibition against that. They don't really cite authorities or cite much material to ground that proposition.

But if you look back into the Common Law tradition, especially the writings of Sir Edward Cook-- and this is something I talk about in my book *Theaters of Pardoning*-- and also his relation to the natural law tradition, as expressed in the writings of Jean Bodin, an important French theorist of sovereignty, who Cook was very familiar with. He actually had three editions of his work in his library. One in Latin, one in French, and one in English. And he heavily annotated the French version. But if you look at both of those thinkers, they really provide a foundation for why judging in one's own case would not be permissible, and also why pardoning would be thought of as a form of judging one's own case.

So the leaps that the LLC memo doesn't really fill in are, first of all, why pardoning is a form of judging. So this is something that gets elaborated in the tradition, in Bodin's work, and then also by Cook. But then, also why the king shouldn't judge in his own case as well. And this is something Brian was mentioning, that maybe the king was immune. But there was thought within the political theory tradition about whether or not the king should be a judge in his own case. And of course, this would come up in civil matters as well, and not just in the context of pardoning, but in general-- and this carries through Hobbs and others-- there was an idea that the king shouldn't be a judge in his own case because this would offend natural law, and that there were some natural law constraints on what the king could do.

And one of the areas where not judging in one's own case, one of the cases that really prominently mentions this is *Bonham's case*, decided by Sir Edward Coke in the early 17th century. And we know from a lot of the literature on judicial review that the members of the founding generation were familiar with *Bonham's case*. There's a lot of dispute about whether it provides a precedent for judicial review or not. But in this case, what's relevant is that it articulates this principle against judging in one's own case. So that provides a very strong precedent for saying that there is this implicit restriction within the pardon power against the president pardoning himself, which would constitute a form of judging his own case.

So I'll leave it there, and I'm really looking forward to the discussion and questions.

MICAH

Thanks, Bernie. I'll turn it over to John Harrison.

SCHWARTZMAN:

JOHN

Thank you, Micah.

HARRISON:

I think the president can pardon himself. I don't think it's an easy question, but I think the answer is yes. The first step to that conclusion is to see, as Brian talked about, the pardon power in the Constitution. It's pretty general. It's not completely unlimited. It applies only to federal crimes, and it doesn't extend to cases of impeachment. The fact that there are some limits, and that this isn't one of them, indicates-- I don't think I'm about to say is a knockdown argument-- but it indicates that those are the limits and there aren't others.

So the starting point is the power is broad. It can be used for a lot of different reasons, and there's nothing that says it can't be applied to the president himself. That's just a starting point.

The next question is, is there anything in the Constitution, including the Constitution's historical background, is pretty minor was just talking about. That suggests no, there's an exception to. This isn't it an implicit exception to that when the president is considering pardoning himself. I don't think there is, but you just heard about what I think is the leading argument, that there is such an implicit exception, which is the notion that no one, including the king or the president, should be the judge in his own case. Or to use more 21st century terminology, that the president would have a conflict of interest because he would be the person being pardoned.

I think the question for the Constitution is, to what extent does it implement these various natural law and natural justice? Certainly good idea. The kinds of principles. And so is there a place for that principle as a limit on the pardon power?

And I think not. I think the first thing to see is, strictly speaking, the president wouldn't be a judge in his own case. He's not just applying law when he gives a pardon to anybody, including himself, he's making a policy decision based on considerations of what's good for the country, possibly considerations of mercy to an individual, considerations of the possibility that there's been a miscarriage of

justice. Those are policy considerations. They're not the same thing. They're similar to that, but not the same thing that a court does when it's applying law.

So what we need for to answer this question is a more exact version of, "Can the president be a judge in his own case?" And that is are there implicit constitutional principles that limit things presidents and other government officials can do, when they have a conflict of interest? There there are. There are some explicit provisions in the Constitution about that. For example, the vice president doesn't preside over the impeachment trial of the president because the vice president has a conflict of interest in that. And the framers were aware of that. But that's a specific provision.

I think that's an important point about the way the Constitution works. There isn't a general provision, and there's a reason there isn't a general provision that high officers of the government-- especially members of Congress and the president-- can't make decisions that affect them personally. Rather, the principle of republicanism is the high officials, the legislators, the chief executive, have to live under the laws they make. Meaning they're supposed to take into account the effects on them, as well as on everybody else, of the laws they make.

And so, yes, the president can sign or veto a tax bill that's going to have effects on the president's taxes, members of Congress can vote on tax bills that are going to have effects on their personal taxes. And indeed, the framers certainly contemplated that members of Congress probably would have economic interests that were quite similar to those of a lot of their constituents, and that was a good thing. Farm districts would be represented by people who own the farm, districts with a lot of commerce would be represented by people who were involved in commerce. That was a positive, not a negative.

When there's a conflict of interest problem these days, there's a tendency to think the solution is for that person who has a conflict to be recused, for somebody else to act. Basic features of the highest levels of government, notably Congress, is there's no substitute for them. If the president's recused, nobody can act. If a member of Congress is recused, nobody can act.

And so members of Congress are not recused in voting on legislation that might have an effect on them personally. The House and Senate have rules, if I

remember right, saying people are supposed to disclose that, but they continue to participate. Because if they don't, their constituents are not represented. If my representative in the House were recused, I would go unrepresented.

Worse that should happen than that individual should have a conflict of interest. So there's not a general constitutional principle against conflicts of interest. And there's not a general principle having to do with the pardon power, that it can't affect the president personally.

President Clinton pardoned his half-brother. That was fine. People can give pardons to those very close to them. Presidents can pardon their children, they can pardon their spouses. Lots of people care more about their children than they care about themselves. If anything is a conflict of interest, it's the possibility of giving a pardon to your child.

But the Constitution permits that. There isn't a general principle either broadly or as to the pardon power that people can't act when their own interests are being affected.

The main argument against the president pardoning himself is that would be a terrible thing. And the hypothetical that people have in mind when they think about that is the president has committed a crime and has decided, "I don't want to have to go to jail for this." And it's certainly true that the pardon power, like any power, can be misused.

But one of the things that people do in law school, and it's a good thing, is learn to think about different hypothetical possibilities that may be cut against their initial presuppositions. So I want to suggest a situation in which it might be quite reasonable for the president to give a pardon to the president. Suppose that the President of the United States decides to say to a couple of close aides-- and here I will demonstrate that I remember Watergate-- "You should deep six those documents."

And maybe there's a really good reason to deep six the documents. Maybe they would be very embarrassing to the head of another government from which the United States wants something. Maybe deep sixing the documents is a crime in my hypothetical, but maybe it's not. The law is unclear about this, as it may well be.

And maybe the law is unconstitutional because it unduly intrudes into the president's control of the executive branch.

So suppose an act that's a good idea as a policy matter, arguably illegal but arguably legal, in the law, arguably unconstitutional. And the president realizes that the incoming president is a very vindictive political opponent of his who would love nothing better than to bring a criminal prosecution so as to discredit his predecessor. That President might think, "If it were anybody but me, I'd issue a pardon. I'd issue a pardon to the people I told to deep six the document. And prosecuting me, in addition to being bad for me, would be bad for the country. So I'm going to pardon everybody, including myself."

That, I think, would be a legitimate use of the pardon power from the standpoint of its purposes, which include preventing miscarriages of justice and serving the public interest. So just as there are misuses of the power for the president to pardon himself, there are good uses of the power. And there's a general principle about power, which is it can be misused.

Congress can do things that are entirely lawful and are extremely bad policy or extremely bad as a matter of moral principle. Congress can launch a war of aggression. Congress can do that-- Congress has done that. That's what the Mexican-American War was. It was entirely constitutional.

So yes, power can be misused. But it can also be used for good purposes. And the people in the federal convention in 1787 realized that the person who was in the chair was not going to be there forever. They understood that some of his successors could be people who were not such splendid individuals.

But they also hoped, I think reasonably, that most of Washington's successors would be decent people who had the public interest at heart. And so they gave those people power, including the power to pardon themselves, that can be abused like any power can be abused, but hoping that it wouldn't normally be abused. Like most powers would not be abused.

And realizing-- and this is the last point I'll make-- and realizing that the consequences of the president pardoning himself for bad reasons would be negative, but they generally wouldn't be disastrous or catastrophic. Important thing

to remember-- the president can pardon only for offenses against the United States. A lot of the really bad scenarios involving presidential pardons of the president involve conduct that may well violate the law of the state and be separately punishable.

So does the Constitution contemplate bad self-pardons in order to allow a good thing, good self-pardons? Yes, I think it does. That's the way power works, and there's no way around that.

MICAH

Thanks, John.

SCHWARTZMAN:

We have a lot to talk about. And there are lots and lots of questions. Let me lead off with this one, which picks up on what John has been talking about in terms of the abuse of the pardon power. And this question asks, "Can a president commit treason while in office and pardon him or herself for that crime?"

I suspect, Brian, that you have thoughts about this. And maybe some responses to John's comments. So let me start with you, and we'll go from there.

BRIAN KALT:

Sure. Really quickly, I want to respond to one thing that John said. Conflict of interest is different from being a judge in your own case. I think John elided the distinction between legislative and adjudicative. And if you're doing something in general, like legislation, then, yeah, that could affect you. But something adjudicative that's about your own case, not being a judge in your own case means it's just about you. It's not about everyone and you're part of everyone. It's just about you. So I think that's an important distinction, especially because, generally speaking, due process principles only really apply to those adjudicative functions rather than the legislative ones.

As far as treason is concerned, this question tees up a very important part of the constitutional history. So treason is one of the things the president can pardon for. It was the basis of the first pardons that George Washington gave to the Whiskey Rebellion defendants.

And this troubled people. So when the convention was debating whether the president should have a restriction on his power, one of the things they said was he

shouldn't be able to pardon for treason. Or if he pardons for treason, there should be more process.

And so, Edmund Randolph, in proposing a restriction on pardoning for treason, said the president may himself be guilty. The traitors may be his own instrument. And the response that drew was, if the president be himself a party to the guilt, he can be impeached and prosecuted. That was James Wilson's response. And it carries today. They didn't restrict the pardon power for treason.

Even contemplating that a president might abuse the power-- as John said, power can be abused. Even contemplating the president could abuse the power, they wanted to keep the power broad, so that people like George Washington could use it for things like the Whiskey Rebellion.

But no, if the safeguard here is that the president can be impeached and prosecuted, you'd be relying on a president who's a traitor, who's leading a treasonous insurrection and pardoning all of his minions, to not pardon himself. And at best, I think that suggests that they didn't even think that a self-pardon might be a thing.

But reading that back-and-forth in Madison's notes, it suggests that they thought a self-pardon just wouldn't be a thing. Otherwise, the possibility of hemming in a president like that, by prosecuting him, wouldn't have given anyone comfort and they would have voted to restrict the pardon power. So, yeah. If the president can pardon himself-- maybe he can, maybe he can't-- but if he can, he can pardon himself for treason.

MICAH I have a question from the audience. This one is directed to you, Bernie, and it goes
SCHWARTZMAN: like this, "I wonder if you could argue that this is not, in fact, a self-pardon. In English law, the monarchy possesses a duality-- the mortal and immortal bodies. Could, potentially, Trump acting in the immortal capacity of the presidency--" I want to put, maybe, an asterisk there, but ask about that-- "--in the immortal capacity of the presidency pardon the mortal person of Donald Trump?" And then, "Not that I want that to happen."

BERNADETTE MEYLER: Yeah, so that's a really fascinating question. I have two responses to it. One is that-- certainly in the heyday of this concept of the two bodies of the king, Charles I was

tried and executed by a rough parliament, and he didn't think about pardoning himself. So I think if we had had a notion that the immortal kingship could pardon the mortal king, that he might have done that.

Now, that might actually bring in a different question, which someone asked also-- "Would Trump have to admit guilt if he were pardoning himself?" I think that one of the reasons why Charles maybe wouldn't have even thought about pardoning himself is that he didn't want to admit that he had done anything wrong. So there's another complication there, but if we had this idea of the immortal body of the king pardoning the mortal one, we would have seen it with Charles-- which we didn't.

And then, it's maybe, as Micah was flagging, that I'm hesitant about translating that dual body into the presidency. The most I could think is that maybe the office of the presidency is actually the immortal body, and then the particular president is the mortal body. And so my translation of that principle, if we were thinking about the immortal body pardoning the mortal, would be to say, well, that's why we have, maybe, successor presidents sometimes contemplating pardoning a prior president. Because that's the office of the presidency almost pardoning the acts of a particular president.

And actually, that goes also to John's point, which was very interesting. The example of maybe where we think a self-pardon might be justified of a president, where, in general, in a case like what John was describing, we might imagine it's ambiguous enough that a successor president would just pardon the prior president. So we have norms about what's excessive behavior as a president and what isn't, and that we might imagine that within a particular parameter or set of parameters. A later president wouldn't actually impose the law against a prior one because of this idea that you're trying to ensure peaceful continuity and don't want to make some kind of political prosecution.

So I think that's where once we get beyond a certain level of violation of norms, then there's a free-for-all about what exactly should happen or what does happen. So those are the reasons why I think that the kind of self-pardoning analogy with the king's two bodies doesn't quite work in this case. But I think it's really interesting.

MICAH

We have a bunch of questions that are about the mechanics of the pardon power.

SCHWARTZMAN: So I thought we could run through a few of those questions and try to get a better sense of how the pardon works. These questions aren't, I think, only about self-pardoning, but are about the content of a pardon.

So one question is, "Can the president pardon a group of people?" Bernie mentioned this question in wondering whether the pardon power has been interpreted too broadly. So that's one question we could talk about.

And the second question is "Can the president--" or more generally, "does the pardon power apply to unspecified acts? How specific to do the crimes that are pardoned need to be?"

And then a third related question is, "Can the president pardon for future acts or do they have to be backward looking?" Maybe we could address those mechanics questions.

Brian, can I start with you? And then maybe if others want to weigh in.

BRIAN KALT:

Sure. So pardoning a group of people is well-precedented. Probably the most recent example is President Carter pardoning the Vietnam era draft evaders. President Andrew Johnson, after the Civil War, issued pardons to large groups of people. So I think there are a lot of theoretical questions that should be explored about the proper bounds, as Professor Meyler said, but it's been done.

And then specificity-- there is a recent article by Aaron Rappaport arguing that there is an implicit specificity requirement. Frank Bowman has responded to that persuasively that there is not. Although Bowman's argument is a little more nuanced than that. He would suggest that just pardoning someone for everything, as Ford pardoned Nixon, is not OK.

But there, too, is precedent. So when Ford pardoned Nixon, it was for everything that Nixon had-- any crimes he committed or may have committed while in office. And people say, well, sure, it's been done. But it wasn't really tested in court.

And the Rappaport's article shows us pardons like, that aren't specific, are very uncommon. You can count them on one or two hands. And so Rappaport's argument that there is a specificity requirement, while a novel argument, is not

really fighting up against that much precedent.

And then on pardoning future acts, the Supreme Court said in *Ex parte Garland* once the Act has been committed, it can be pardoned. But you can't pardon future acts. But once it's been committed, you can pardon someone, even if they haven't been charged yet, even if they haven't been convicted yet. But they do have to have done the act for which you are pardoning them.

BERNADETTE

MEYLER:

I would just chime in to say that a lot of these questions about specificity and the groups being pardoned really also relate to this question of the boundaries between pardon and amnesty. Because if you look at the history of these so-called acts of oblivion, which were these early modern amnesties, they all have this language of specifying a time period. It's actually very similar to Ford's pardon of Nixon. They specify a time period within which all those committing crimes are going to be pardoned, and then they say that those pardons can be pleaded in court. But those are all parliamentary acts, so they're not they're not issued by the king. So I think that that's an important distinction that then the Supreme Court precedent winds up eliding, in interpreting the pardon power under the Constitution.

MICAH

SCHWARTZMAN: John, go ahead. Let me--

JOHN

HARRISON:

I wanted to say a couple of things about this topic. About group pardons and amnesties, the two points. One is all of the British concepts then have to be refracted through the American constitutional system, and in particular, the federal Constitution, which has a principle of enumerated powers for the legislature. Congress is not a legislature of general power, and it doesn't have an amnesty power.

So one reason to think that the American situation on the federal level may be different from either the British situation or what goes on at the state level is it's not clear if the president can't pardon a lot of people. Not clear anybody can. Another important thing for a but for both pardons to lots of people and general pardons, like the one that Ford gave Nixon, is that there are situations in which that may be a very good thing to do.

The pardon power isn't just about mercy. It's an important tool of state. And one of the things Federalists talks about is how during a rebellion, a well-timed author of pardon might be a way to nip the rebellion in the bud. That's a powerful tool of state design for emergencies, and it might require pardoning a lot of people, and for whatever it is they did rather than being able to specify. So there's a pragmatic argument supporting the generality of the pardon power there. Thanks, Micah.

MICAH

Great. So let me come back to this question from Bill Antholis, which will take us

SCHWARTZMAN: deep into the constitutional weeds, but it's a great place to be. The question is this--

"The House articles of second impeachment mention the 14th Amendment clause, prohibiting from office-holding anyone who commits acts of insurrection. If the president pre-pardons himself of any crime of insurrection, if determined either by a convicted or by the Senate in the impeachment process or by the District of Columbia, does that pardon extend also to the punishment of prohibition from office?"

So there's a quite complicated scenario, where we're looking at Section 3 of the 14th Amendment asking about disqualification because of participation in insurrection. And the question, I gather, is could the president pardon himself in a way that rescues him from that?

I'll start with you, John. Then I'll come to--

JOHN

HARRISON:

Yeah, I think not. That Section 3 doesn't deal with separate criminality. It just says these acts have certain consequences. And the historical background of Section 3 is they wanted to get around the presidential pardon power. There is a pardon power in Section 3, but it's in Congress. Both houses of Congress have to vote by 2/3 to relieve the disabilities.

And during the late 1860s and early 1870s, Congress gradually did that. My recollection is eventually they just lifted it for everybody. Universal suffrage and universal amnesty was the slogan.

But no. Section 3 is set up so the pardon power doesn't reach that.

MICAH

Bernie?

SCHWARTZMAN:

BERNADETTE I actually absolutely agree with John. So I don't have anything to add there. That's

MEYLER: exactly where I was going.

MICAH Some of the questions asking-- and you've nodded to this in some of the

SCHWARTZMAN: discussions, but does the president have to confess guilt if he grants a self-pardon?

Brian is nodding vigorously. Let me--

BRIAN KALT: Yeah. I've written about this a lot because people talk about it a lot. President Ford talked about it a lot when he pardoned Nixon. And people said, "Why did you let him get away with this?" And he would pull this scrap of paper out of his wallet-- the citation to *Burdick versus the United States*. And people talk about this because Burdick said, if you take it out of context, that a pardon carries an imputation of guilt, and that accepting a pardon is an admission of guilt.

But that's not quite right. What Burdick was saying is, generally speaking, most pardons are for forgiving guilty people. And if you get pardoned, then that might be causing people to say, well, there's something that you're being pardoned for. You did something wrong.

And as a result-- and here is the point of verdict-- you don't have to accept a pardon in certain circumstances. And so it was just dicta about practical perception, not any legal definitive consequence of a pardon. And as a result, we have plenty of examples, and John mentioned some.

Plenty of examples of pardons where the president is trying to exonerate someone. The president is saying this person did nothing wrong and should be protected. Governors, in particular, do this all the time to save people from execution, perhaps. If you're saying that this person did nothing wrong, what guilt is that imputing?

So the imputation of guilt is a practical matter and it depends on how the president characterizes the action. And in any case, it doesn't have any formal legal effect of imputing guilt. That said, when people get pardoned, it makes them look guilty. That's, as a practical matter, something presidents should think about before pardoning someone. But it doesn't have that legal effect.

BERNADETTE MEYLER: I just want to add two small things. One has to do with this idea that the president might pardon someone precisely saying they're not guilty. I think that actually has been one of Trump's mechanisms in his prior pardons, that in a way they're indicting the legal system for certain kinds of crimes that he doesn't believe should be crimes, or that he thinks are unjust prosecutions. And so that they're making a political statement in that respect.

But then secondly, I think that, in terms of the history, yes. Definitely accepting a pardon doesn't mean that you're guilty, but historically, people have often been reluctant to accept pardons because they feel that it kind of casts shame on them as an acceptance of guilt. And even in the 19th century, someone agreed to be executed instead of being pardoned because they felt that it was too shameful to be pardoned. So I think there is this history where people have been reluctant to accept pardons because they feel that it implies guilt.

MICAH SCHWARTZMAN: There are a couple of questions that ask about the possibility of limiting the pardon power and how that might happen. And then one that asks-- maybe a way of formulating this question would be to say, if there's a pardon for a crime that hasn't been charged yet, could that pardon be undone by a future president or could there be prosecutions that take place afterwards?

So the broad question is about limitations. Maybe the narrow one is about, can a pardon be undone in the future?

JOHN HARRISON: Yeah, I think not. I know of no attempt at the federal level by a subsequent president to undo a prior pardon. But I think it would be ineffective. The idea of the pardon, it is, in this respect, like a grant. I think it's unlike a grant in some other respects, and so it can be given to oneself.

But it creates what would be called-- especially in the 18th and 19th century-- invested right. That is to say it's an irreversible legal act. It washes away guilt. Supreme Court has used language like that in describing the pardon power. And if the guilt has been washed away, it can't be brought back.

Another principle the Supreme Court has stated is Congress can't interfere with the effects of the pardon. Whatever those effects are, they come out of the

Constitution. The president can do it and Congress can't undo any of that. And I think that's right. I think that comes from this being a power given to the president, and with no authority in Congress to do anything about it.

BRIAN KALT: I think that-- Oh, go ahead.

BERNADETTE

No, you go ahead, Brian.

MEYLER:

BRIAN KALT: That's right and it's important. US versus Klein, there were a lot of uses of the pardon power that President Johnson used, that the Republican Congress wanted to override and the Supreme Court wouldn't let them. They have a mechanism for controlling the pardon power, which is the impeachment power, if it's abused.

And as far as a preemptive pardon or reversing that, as John said once, it's final, it's final. But there have been cases where presidents have tried to un-deliver pardons. And so you get into some technical questions about when is it final? Does it have to be delivered? Does it have to be accepted? And there have been some interesting cases on that. But once it's delivered and accepted, there's no question that it's final-- even if it's a preemptive pardon.

BERNADETTE

MEYLER:

So I just want to raise one other question that I think is related to this that I saw in the chat, which is how President Trump's self-pardon, if he did one, would come into court? Now, I think that he could self-pardon, but then a future administration could say, "We don't believe that's valid and still prosecute him." And then at that point he would say, "Well, I have a pardon. You can't prosecute me. That would have to be adjudicated." So I think that would be how I would envision a self-pardon coming into court in this instance.

MICAH John?

SCHWARTZMAN:

JOHN

HARRISON:

Especially for the lawyers in the audience, I want to say about whether the pardon has to be delivered. On the subject whether a commission has to be delivered for an appointment to become effective. There is a case on that subject.

MICAH Yeah. Signed, sealed, delivered.

SCHWARTZMAN:

BERNADETTE [LAUGHING]

MEYLER:

MICAH Could you say a little more about how a pardon might be litigated? Why it might
SCHWARTZMAN: come up? What would be some vehicles or cases that would raise the question of whether the pardon was legitimate? How would this constitutional question get into court in the first place? John?

JOHN Well, Bernie just, I think, mentioned the easy way for it to come in is for is a
HARRISON: subsequent federal prosecution, and then the pardon would be pleaded as the defense. And the question would be is the pardon valid because it was granted by the president himself? I think one of the interesting-- and here, we'll get down to the weeds again but it's an interesting question-- issues is if President Trump were to pardon himself, could a subsequent president bring a declaratory proceeding saying Trump is liable to be prosecuted without saying or prosecuting him because the pardon was invalid? That would be a slightly lower stakes way to raise the issue.

And there would then be the question is a prosecution sufficiently likely? That the declaratory proceeding is right for constitutional purposes? Which it might be. So I would add that to the list is possible modes through which this could come into court.

BRIAN KALT: I think it could come up also earlier if there were investigations or subpoenas that would be inconsistent with there being a pardon. And then, if it's not a preemptive pardon, if this is just restoring someone's rights afterwards, the pardon could be challenged in that context. So a president pardons himself from some conviction that he had before, and then says, "Now I have the power to-- I don't know-- have a gun or vote or something "else, it's unlikely to come up in the context of the self-pardon, I suppose, but if they then deny the person that right and they say, "Oh, but I have pardon," and they say, "Well, no you don't," then it could be adjudicated in that context, too.

MICAH We have a set of questions about the relationship between the pardon power and
SCHWARTZMAN: impeachment, which I think is quite confusing-- even to many people who've studied these issues. So I wonder if you all could speak to this issue? The way that

pardon power is described in the Constitution is not effective as against impeachment. What does that mean in the current context, especially given that we currently have a second impeachment but not yet a trial or let alone a conviction? And it's possible the president might self-pardon for related actions in-between when an impeachment happened than when a Senate trial might take place.

Does any of that matter? Or how are these two powers related to each other?

BRIAN KALT:

I got to jump in here because I've been dealing with this. I've gotten a lot of questions about that. So when it says "except in cases of impeachment," cases of impeachment means impeachment proceedings themselves. The impeachment power-- the Constitution separates impeachment on the one hand from the criminal process on the other in a lot of ways.

So, for instance, it says trials are by jury, except impeachment. There's no double jeopardy problem. You can still be prosecuted even if you've been convicted because they're separate.

Same thing. Pardons are just for the criminal consequences. They don't affect the impeachment proceedings, even if the criminal case is related. And there is a theory Corey Brettschneider and Jeffrey Toole have been pushing this theory that when the House impeaches, that means that the president can't pardon anyone for anything related to that impeachment. I find that a remarkable argument.

I've written a long blog post picking apart their historical argument. It just it just doesn't hold water. And besides the textual problems that has, the notion that one house, just by impeaching could strip the president of his powers, just as a structural matter, is remarkable. But I'm not going to go through my blog post on all the historical evidence, but it just means you can't stop an impeachment. You can't undo an impeachment conviction. It doesn't affect criminal pardons related to that case.

MICAH

Bernie?

SCHWARTZMAN:

BERNADETTE

Yeah, so I would just say to add to that-- and I haven't looked at their historical

MEYLER: arguments in sufficient detail to have a full view on this-- but my view is that the framers added this no pardoning in cases of impeachment because of the British history there, which involved the king trying to pardon people who were impeached and then that causing a real separation of powers conflict, where parliament was trying to impeach people at the same time as the king was attempting to pardon them. So I think that was the historical situation that they had in mind.

MICAH John, go ahead.

SCHWARTZMAN:

JOHN Yeah, I also haven't read the work Brian was just talking about, but I think as a structural matter, it's pretty clear, as he was saying, that the regular criminal process and the impeachment process-- and that's what cases of impeachment means-- are just siloed from one another. They are entirely distinct.

HARRISON:

And I think what that means is there's no influence in either direction. That is to say a pardon that's effective on the criminal side has no effect on impeachment, and what's going on the impeachment side has no effect with respect to regular criminal prosecutions.

MICAH We still have a long set of questions. I'm going to take this opportunity to ask a question that is on many people's minds, even though it's not directly related to the pardon power. But because we have a group of constitutional experts who have studied, not only the pardon but also the impeachment process, a lot of people want to know can a Senate trial happen after the inauguration?

SCHWARTZMAN:

And this question's come up repeatedly in the chat, so I'm just-- even though it's not directly on the self-pardon question, I'm going to ask you this question anyway. Because it's on a lot of people's minds.

BRIAN KALT: So, I wrote this thing about the president pardon himself, and people said that's ridiculous. In 2001 I wrote a 50,000-word article on just this question. I went through all the evidence. It's a complicated question. It's a very interesting question.

I can't go through all 50,000 words, but my short answer is looking at the evidence, yes. There are precedents for it. We're going to see arguments against it. The

Senate will vote. But on balance, the evidence supports late impeachability. That's my take.

MICAH Bernie? John? You want to weigh in? I didn't ask you to address this, but I'll give you
SCHWARTZMAN:a chance if you want to.

JOHN Bernie, [STAMMERS]. I don't know as much about this as Brian, but based on what I
HARRISON: do know, I think it's not an easy question. But I think the answer is yes. The impeachment trial and the consequences, in particular disqualification, can be imposed afterwards.

It's a tricky one. That's not the central case, but I think that it's included.

MICAH And my last question is going to be about your over-under on whether the
SCHWARTZMAN: president will in fact pardon himself. But I think I won't put that question to you as experts. I just, at this point, want to thank you for sharing your knowledge about this very important constitutional question with us.

I want to thank all of you in the audience for joining us and for your really excellent questions. There were many more that I'm sorry we won't have a chance to get to, but we've reached our time. I hope you'll join us, the Karsch Center and also the Miller Center, who's cosponsoring this event. For future events, keep an eye out for updates and for news on upcoming programs. Thanks for joining us.