

THE BROOKINGS INSTITUTION

5 on 45: On the presidential pardon

July 21, 2017

Contributors:

Host:

ADRIANNA PITA

JOHN HUDAK

Deputy Director – Center for Effective Public Management

Senior Fellow – Governance Studies

(MUSIC)

PITA: You're listening to 5 on 45 from the Brookings Podcast Network, analysis and commentary from Brookings experts on today's news regarding the Trump Administration.

HUDAK: I'm John Hudak, I'm a senior fellow in Governance Studies. The power of a president to pardon or grant clemency is unique. Article 2 section 2 of the Constitution grants the president the power to pardon people who have committed federal crimes and in many ways that power is unchecked.

In fact the only explicit limitation is that a president cannot issue a pardon that seeks to avoid an impeachment. So what does that mean? It means the president could clear someone of a charge but Congress would still retain the power to impeach that individual, whether it's a federal judge, a cabinet member, or the president himself. But a few questions arise when discussing pardons. First, when can a president make a pardon? Well, presidents have the pardon power at all moments of their tenure. Often presidents will issue a number of pardons and commutations in their final days in office but that's due largely to tradition and not because of any restriction on the office or the power. Second, can a pardon be overturned? In reality the answer's no. In many ways the presidential pardon power is absolute; it's a specific power granted to the president by the Constitution, and the Constitution offers no mechanism to reverse or overturn such a decision. Third, can a president pardon a family member? Right now in Washington this is a hot topic, as President Trump perhaps considers pardoning some of his own members of the family. So is that out of range or out of line? It actually is not. There's precedent for it. At the end of his administration President Clinton pardoned his own half-

brother Roger, who had been convicted of a federal drug charge and served a prison term.

Fourth, can a President pardon his own staffers? Once again the answer is yes. There's precedent here too. George H.W. Bush pardoned Caspar Weinberger for his role in the Iran-Contra scandal during the 1980s when Weinberger was the defense secretary for President Reagan and Bush served as Reagan's vice president. Fast forward a couple of decades. George W. Bush's adviser Scooter Libby was convicted of perjury and obstruction of justice, among other charges. And President Bush commuted his 30 month prison sentence shortly after he was sentenced. Fifth, can a president pardon himself? Well this is an interesting question because it's never happened in American history. The closest we've come happened in 1974 when, after assuming the presidency, Gerald Ford pardoned Richard Nixon for his role in Watergate. It was a controversial decision at the time but over time historians have looked at it is actually a very important move to get the country moving forward post-Watergate. However, given that there's no explicit mention in the Constitution that a president cannot pardon himself, it would be unlikely that a federal court would declare that pardon unconstitutional. And there's really no constitutional basis for a court to reverse a pardon anyways. Sixth, must pardons be individual? Well the answer here is no, also. While most pardons and commutations are granted to an individual for that person specific crimes, blanket pardons have been issued. The two most famous ones happened in 1865 when President Andrew Johnson pardoned Confederates from the Civil War and in 1977 when Jimmy Carter pardoned Vietnam draft dodgers. Although it's important to note that both of those blanket pardons came with a list of exceptions for people who did not qualify for that pardon.

And finally, are pardons politically risky? Absolutely. Even though pardons are an explicit in clear presidential power, they can come with political and reputational costs. Simply because the president has the power to do something does not necessarily mean that the public will think it prudent. President Clinton's pardon of financier and donor Marc Rich in 2001 was highly controversial. President Bush's commutation of Scooter Libby's sentence caused significant criticism in the media and in public while many pardons go largely unnoticed, while many pardons go largely unnoticed, most people never hear about them at all oftentimes except the president and the person who's pardoning, some can cause headaches for a sitting president or scar the legacy of a president who has left office. So my advice for any president who is considering issuing a pardon particularly one for a family member or someone involved in a scandal that's close to the president? Think first about what that decision might mean to that person and to you, but think even harder about how that pardon is going to play out in the public eye. In some ways, even if it's not a technical scandal because nothing wrong happened, it can rise to scandal level proportions in terms of the type of criticism that a president can face.

(MUSIC)

PITA: If you've been listening to 5 on 45 and like what you're hearing, please take a minute to rate it on iTunes and don't forget to follow us and the rest of the Brookings Podcast Network on Twitter @policypodcasts.