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Elizabeth Joh:

In 2016, President Obama pardoned Tater. In a grand display of mercy. Obama spared Tater from the ultimate punishment. Obama also spared Tater's alternative, Tot, they were both turkeys presented to President Obama by the National Turkey Federation, which has presented a Turkey to every president of the United States since 1947. Ronald Reagan was the first president to use the word "pardon" to spare the presidential Turkey. And the first President Bush was the first to formalize the event. It's kind of silly--and I realize that--and the source of a lot of groan inducing jokes by the president, especially President Obama, who made a lot of dad jokes about it.

Barack Obama:

No way I'm cutting this habit, cold turkey.

Elizabeth Joh:

But the silliness does point to an actual constitutional power every American president has, and that's the pardon power.

Roman Mars:

So right now, there are investigations into the ties between the Trump campaign and Russia. There are reports that investigators are looking into former national security advisor, Michael Flynn, and at Trump's son-in-law and advisor, Jared Kushner. And now reports indicate that Trump himself is under investigation for obstruction of justice related to his firing of FBI director, James Comey, among other things.

Elizabeth Joh:

So one question that comes up around these issues is, will Trump use his presidential pardon power and how might he use it?

Roman Mars:

Now, I want to be really clear here. There have been no announcements or indications that Trump would use his pardon power in the investigations of his administration. But what does the Constitution say he could do? You're going to want to sit it down for this. This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where our favorite law professor, Elizabeth Joh, comes to my house every week to teach us all a lesson about a constitution that is being looked at by everyone in brand new ways because of the 45th president of the United States. I'm your fellow student and host, Roman Mars. Please pardon us while these fine people pay for us to learn about the Constitution. So what does the Constitution say about the president's power to pardon?

Elizabeth Joh:

We can start with the text of the Constitution itself. In the section of Article II--that's the section on the executive branch--you'll see that among the powers of the President is the, quote, "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." That's the text. It's a brief statement on what is widely thought of as a wide-ranging power on the part of the President. So under our system, the President can use pardons in a number of ways: to reduce an existing sentence, to restore the civil rights of someone long after they've served their sentence, or to

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entirely excuse a person for their acts. If you think about it, that latter power is remarkable. The President of the United States has the constitutional authority to wipe out criminal consequences for people believed to be deserving of mercy.

Roman Mars:

So that means it's completely up to the discretion of the President who gets a pardon. And once the President decides to issue a pardon, there's no taking it back.

Elizabeth Joh:

And that's pretty amazing. It's contrary to the way we think about the way the other branches of government work normally with criminal justice. So this is a way--the kind of ultimate power that derives back to the power of kings--and ability on the part of our chief executive to show this ultimate mercy. So by the terms of the pardon clause, we know two things. First, the President can't pardon anyone in a case of impeachment. The Constitution at the very end of Article II says that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment." So the pardon clause explicitly excludes impeachment. So impeachment cannot be the subject of a pardon.

Roman Mars:

It's any case of impeachment against anybody. Senators, judges, presidents--the pardon cannot be used to thwart that process.

Elizabeth Joh:

Second, the president can only use the pardon power when it comes to federal crimes. So most state governors have a pardon power that's pretty similar to that of the President. and it's actually these people--state governors--who can grant pardons when it comes to state crimes. So federal crimes--president. State governors--state crimes. A couple of other things that aren't entirely clear from the clause itself or widely accepted... While lots of presidents have commuted--that really means modified--the existing sentences of people currently serving time in federal prison, they've also wholly wiped out crimes even after people have served time. And it's also even the case that a president doesn't have to wait for criminal charges to occur in the first place. More than 150 years ago, the United States Supreme Court said the President could pardon someone at any time after the commission of the offense.

Roman Mars:

That means the President can pardon someone who is facing possible but not actually pending federal criminal charges.

Elizabeth Joh:

It doesn't matter if criminal charges never come about at all, the president still has the pardon power in that case. And apart from the exclusion on impeachment and the limitation to federal offenses, the constitutional authority of the President to grant pardons is almost limitless.

Roman Mars:

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Almost limitless power, but it is somewhat checked by political and societal norms of behavior. So we should be just fine.

Elizabeth Joh:

The Supreme Court has made it clear that the pardon power cannot be modified, abridged, or diminished by Congress, nor does the President have to consult the courts--doesn't have to ask them for permission if someone can be pardoned.

Roman Mars:

The thing about the pardon is that it's used quite a lot.

Elizabeth Joh:

It's common for presidents to grant hundreds of individual pardons during their terms. Most people we don't really know or remember who are the recipients of these pardons, but there are definitely some that stand out. So in 1869, president Andrew Johnson pardoned Dr. Samuel A. Mudd. After John Wilkes Booth assassinated Abraham Lincoln and was on the run, he showed up at the door of Mudd's Maryland home. Mudd set his broken leg. and for aiding Booth, Mudd received a life sentence for conspiracy. Mudd went on to be known for other things. He helped save the lives of hundreds of inmates from yellow fever while he was serving his own sentence at Fort Jefferson, an island prison in the Gulf of Mexico. and a survivor actually petitioned President Johnson to show Mudd mercy. In 1977, President Carter issued a blanket pardon--that means a whole lot of people at once--to everyone who failed to register for the draft or left the country to avoid serving in the Vietnam War. On his very last day in office in 2001, President Bill Clinton issued 140 pardons, including one for his half-brother, Roger, who had been convicted of cocaine possession. And maybe most famously, in 1974, President Ford granted former president, Richard Nixon, a pardon after Nixon had resigned from office. Remember, Nixon hadn't been charged with any crime at all. He had resigned shortly after the House Judiciary Committee approved three articles of impeachment against him. President Ford's pardon pardoned him for every federal offense Nixon had committed or may have committed while in office.

Roman Mars:

As notable as those are, those are pretty uncontroversial today. I mean, you might disagree with those decisions, but no one says the President didn't have the right to do it. Now, let's get into the freaky stuff.

Elizabeth Joh:

So President Trump loves to tweet. It's his medium clearly. So could Trump pardon people by tweet? So there is an office of the pardon attorney that exists to help with requests for presidential pardons. It's a formal office. It has attorneys in it. They're supposed to review applications and prepare recommendations. And it's really an important part of how modern presidents consider pardons. They prepare what are called "pardon warrants," which are assigned by the president and have the presidential seal. But that's really just a matter of a way of helping the presidency. as a matter of constitutional law However, the pardon attorney and its rules aren't really a hard limit. The president can grant pardons to anybody he wants.

Roman Mars:

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And remember, the constitution doesn't say anything about the form A pardon has to take.

Elizabeth Joh:

So an example: reportedly, General Joseph Hooker once sent an envelope to Abraham Lincoln that contained the names of 55 convicted military deserters. Lincoln supposedly scrawled "pardoned" on the envelope and returned it to the general. That counted. So could it be a tweet? So could Trump tweet tomorrow, "I, @realdonaldtrump, pardon @romanmars for any and all federal offenses he has committed since January 20th, 2017"? That's not going to fit in a tweet, but you get my idea. It's not an obviously laughable idea. Congress doesn't have the ability to place firm legislative restrictions on the pardon power. So it's not totally absurd as a valid pardon. So I'm just leaving it out there as a possibility.

Roman Mars:

And I'm just putting it out there that I'm cool with that--you know, if he wanted to do it. Not that I've done anything, but it couldn't hurt.

Elizabeth Joh:

So that leads me to wonder, "What if Trump deleted that tweet?" After all he did post and delete a tweet with a word he made up "covfefe." could he delete your pardon tweet, Roman, and then take it back? There's no obvious answer here either. Some people have suggested that, once a pardon's issued, it's good. and others have said, "Really, it's a version of the no backsies rule. once the President pardons you, That's it." Now, here's the other question. Could Trump pardon himself? You heard me. Could he pardon himself? No president has ever actually tried to pardon himself. There was some question as to whether Nixon or Clinton would, but they didn't even try it. Trump, of course, has proven to be an entirely unconventional president. So let's think about this for a minute. So if you go to that text of the pardon clause in the Constitution, it doesn't actually exclude the president from his own ability to pardon. It's the old "Hey, if the founders wanted it to be that way, they would've said so" argument. On the other hand, the idea that the president could absolve himself of criminal responsibility through a basically unreviewable power is kind of pretty inconsistent with the fundamental rule of law. You're generally not supposed to be the judge of your own case. There's also the political part of it. If you are a president and you're at the point of self-pardon, your presidency isn't long for this world anyway, so that's probably not going to help. This is just a total aside. But you know The Simpsons, right? Every time I think of self-pardon, I think of a line that Homer Simpson says--it's kind of a Zen-like question--where he says...

Homer Simpson:

Hey. I got a question for you. Could Jesus microwave a burrito so hot that he himself could not eat it?

Ned Flanders:

Well, sir, of course he could. But then again... Wow, as melon scratchers go, that's a honeydoodle.

Elizabeth Joh:

Presidential self-pardon to me, has that level of self-referential, dada absurdity. I just think of that line every time.

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Roman Mars:

And if you really want to follow this to its conclusion, could the President pardon himself with a tweet?

Elizabeth Joh:

That just gives me a headache thinking about it, so I'm not going to answer it.

Roman Mars:

Coward.

Elizabeth Joh:

And so while the pardon power is quite broad, using the power itself improperly could get a president into trouble anyway. So this is an interesting part of the Constitution. When the Constitution gives one of the actors in it a certain kind of authority or ability to do something, it's considered a full power in and of itself, so long as they don't violate other parts of the Constitution. So while the pardon power is described as a really broad power on the part of the President, you could imagine, for example, President Trump might pardon someone in such a way that it would seem like the pardon itself was an attempt to cover up some wrongdoing on his own part. So while the pardon itself might be valid, the very existence of the pardon that seems suspicious might be, for example, grounds for impeachment.

Roman Mars:

Which, of course, pardoning himself would do nothing to stop. What's the real check against the pardon power and how do presidents usually subvert it? Find out after this. we're back. So what has kept the pardon power in check all these years?

Elizabeth Joh:

Ultimately, the real check--a realistic, non-constitutional check on the pardon power--is politics. And there's a complication with that with most presidents because if you notice, if they're going to issue any controversial powers, they always do it in the week or the day before no one ever considers them a president ever again. They don't face any backlash.

Roman Mars:

Cowards.

Elizabeth Joh:

So in the case of President Trump, who seems to be embattled already so early in his presidency, he doesn't have the luxury of saying, "Okay, fine, I'll just pardon a bunch of people before I leave office." Or is that the case? I don't know.

Roman Mars:

But again, there's been no statement or indication that any pardons are imminent. People have just been asking all these questions. and the answer to all of them is pretty much, "Yes, he can." So go ahead and tweet your pardon, @realdonaldtrump. I'm sure it's exactly what Madison had in mind." This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com, on

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