The Judges' Book

Volume 4 Article 6

2020

Civil Procedure: Plaintiff Personal Jurisdiction and Venue Transfer

Scott Dodson

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The general venue-transfer statute allows a federal court in one state to transfer a case to another state for the convenience of the parties and witnesses and in the interest of justice.[2] In *Hoffman v. Blaski*, the Supreme Court held that transfer to a court that lacked personal jurisdiction over the defendant was improper.[3] Congress then amended the statute to allow transfer to a court that otherwise would lack personal jurisdiction over the defendant if the parties consent to the transfer.[4]

But what about plaintiffs? The Due Process Clauses protect "persons," not just defendants, so personal jurisdiction protects plaintiffs, too.[5] Yes, a plaintiff effectively consents to the personal jurisdiction of the court where the plaintiff files,[6] but what if the case is whisked out from under the plaintiff to a remote destination in a faraway state, against the plaintiff's choice and without the plaintiff's consent?

To date, neither courts nor commentators have satisfactorily interrogated the personal-jurisdiction implications for plaintiffs in venue-transfer cases. Yet the problem is a prevalent one, for such venue transfer—including MDL transfer—occurs in a sizable percentage of federal cases. In this Chapter, I shine a light on the problem and offer guidance for analyzing it.

Statutory Authorization of Nationwide Personal Jurisdiction

In federal courts, the Fifth Amendment's Due Process Clause supplies the constitutional authority for personal jurisdiction, and that grant is broader than the Fourteenth Amendment's authority, at least for cases involving domestic parties.[7] Congress could, for example, create a single

1. Summarized and excerpted from Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463 (2019).
2. 28 U.S.C. § 1404(a).
3. Hoffman v. Blaski, 363 U.S. 335 (1960).
4. 28 U.S.C. § 1404(a).
5. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).
6. Adam v. Saenger, 303 U.S. 59, 67-68 (1938).
7. William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1215 (2018).

district for the United States, with nationwide personal jurisdiction over all domestic parties,[8] and, if so, personal jurisdiction would not limit transfers of federal cases within the United States.

But Congress has instead created discrete districts for the district courts, and, in the process, statutorily limited each district court's personal-jurisdiction reach to its own district. As the Supreme Court long ago wrote:

> The judiciary act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property; it can only be exercised within the limits of the district. . . . We think that the opinion of the legislature is thus manifested to be, that the process of a circuit court cannot be served without the district in which it is established; without the special authority of law therefor.[9]

Of course, the law has overridden this default by authorizing more expansive district-court personal jurisdiction in a number of ways, including through Rule 4 service and specific statutory provisions enacted by Congress.[10] And Congress undoubtedly could give a transferee court personal jurisdiction over a plaintiff in all cases in which the plaintiff is a U.S. citizen or resident or has sufficient national contacts to comport with the Fifth Amendment's Due Process Clause, even if the plaintiff has never had any contacts or connections to the transferee court's district or state. The question, then, is whether the venue-transfer statutes grant such nationwide jurisdiction.

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8. Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1319–20 (2014).

9. Toland v. Sprague, 37 U.S. 300, 328–29 (1838).

10. *E.g.*, 9 U.S.C. § 9 (Federal Arbitration Act); 15 U.S.C. § 5 (Sherman Act); 15 U.S.C. § 22 (Clayton Act); 15 U.S.C. § 77v (Securities Act of 1933); 15 U.S.C. § 78aa (Securities Act of 1934); 18 U.S.C. § 1965 (RICO); 28 U.S.C. § 1608 (Foreign Sovereign Immunities Act); 29 U.S.C. § 1332(e)(2) (ERISA); 42 U.S.C. § 9613 (CERCLA).

Some federal courts have construed the MDL-transfer statute to provide for just such a grant of nationwide personal jurisdiction.[11] As for the general venue-transfer statute, courts infer transferee personal jurisdiction over the plaintiff because the general venue-transfer statute authorizes transfer *without regard* to personal jurisdiction.[12]

These statutory constructions cannot withstand scrutiny. The first problem is that, in other contexts, Congress has authorized nationwide jurisdiction only by using clear jurisdictional terms or the established equivalent of nationwide service of process, neither of which is present in either transfer statute. The language of the statutes says nothing about personal jurisdiction, and the authorization of transfer to "any district" cannot sensibly be read as an express or implicit authorization of personal jurisdiction. Further, these are eponymously *venue* statutes, which generally operate under—rather than supplant—the normal limits of personal jurisdiction, as the Supreme Court recently confirmed in *BSNF Railway v. Tyrrell*.[13] In light of that backdrop, the statutes should not be read to create nationwide personal jurisdiction.

The second problem is that the state-based scope of personal jurisdiction set out in Rule 4(k) undeniably applies to both forms of venue transfer, at least for defendants, which is inconsistent with a construction of the statute that supplants Rule 4(k)'s limits with nationwide personal jurisdiction. Rule 4(k) applies to general venue transfer to protect defendants from transfer to a transferee court that lacks personal jurisdiction over them, as assessed under the normal state-based standard of Rule 4(k).[14] Rule 4(k) also applies in MDL cases. For one, the JPML recognizes that an MDL transferor court must still have personal jurisdiction under Rule 4(k) and that MDL transfer does not "expand the territorial limits" of Rule 4(k).[15] For another, plaintiffs cannot file directly in the MDL court if the MDL court would lack personal jurisdiction over the defendant under Rule 4(k), unless the defendant consents.[16] These Rule 4(k)-based restrictions could not exist were the venue statutes to authorize

11. *E.g.*, Howard v. Sulzer Orthopedics, Inc., 382 F. App'x 436, 442 (6th Cir. 2010); *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987).

12. *E.g.*, *In re* Genentech, Inc., 566 F.3d 1338, 1346 (Fed. Cir. 2009).

13. 137 S. Ct. 1549, 1553 (2017).

14. Sullivan v. Behimer, 363 U.S. 335, 338 (1960).

15. *In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969).

16. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 763 (2012).

nationwide personal jurisdiction over all parties. And because the venue-transfer statutes do not distinguish between plaintiffs and defendants, it would strain statutory construction to read them as authorizing personal jurisdiction over plaintiffs but not defendants, especially without language even mentioning personal jurisdiction. For these reasons, the statutes cannot be read to authorize expanded personal jurisdiction.

The Temporary Nature of MDL Transfers

The MDL-transfer statute specifically limits transfer "for coordinated or consolidated pretrial proceedings" and directs that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[17] According to the Joint Panel on Multidistrict Litigation (JPML), because of this temporary, limited-purpose nature of MDL transfer, the authority of the transferee court over plaintiffs (or defendants, for that matter) is "simply not encumbered by considerations of in personam jurisdiction."[18] In essence, the JPML's theory is that when transfer is temporary, the transferee court has personal jurisdiction derived from the transferor court—and that personal-jurisdiction authority flows through, unchanged, to the transferee court.

There are both legal and practical problems with this reasoning. The legal problem is that nothing in the Supreme Court's caselaw suggests that personal jurisdiction is different when the proceedings are temporary and confined to pretrial matters. To the contrary, courts adhere to personal-jurisdiction principles in contempt proceedings[19] and in enforcing discovery matters, especially against nonparties.[20] True, the Supreme Court has indicated that "[personal] jurisdiction is vital only if the court proposes to issue a judgment on the merits" and that a court may dismiss a case on nonmerits grounds without confirming personal jurisdiction,[21] but that principle has not been extended to full pretrial delegation to a

17. 28 U.S.C. § 1407(a).

18. *In re* FMC Corp. Patent Litig. 422 F. Supp. 1163, 1165 (J.P.M.L. 1976); *In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1141–42 (J.P.M.L. 1969).

19. *E.g.*, Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387 (9th Cir. 1995).

20. *E.g.*, *In re* Sealed Case, 141 F.3d 337, 341 (D.C. Cir. 1998).

21. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431 (2007).

different court whose pretrial rulings will bind the parties and shape any final judgment. That is for good reason: the JPML's rationale essentially bars any personal-jurisdiction objection to the decisions of the court that will render significant and important rulings in the case. Even if the transferee court does not purport to enter judgment on the merits, personal jurisdiction protects parties—including plaintiffs—from being bound by the transferee court's pretrial rulings.

The practical problem is that any characterization of MDL transfer as temporary borders on the fictional.[22] More than 97% of transferred MDL cases are resolved by the transferee court.[23] Many of those terminations are on the merits in dispositive motions like summary judgment,[24] and these merits adjudications undeniably require the personal jurisdiction of the transferee court.[25] The premise that an MDL transfer is for temporary pretrial matters that are just a prelude to remand for disposition in the transferor court is mistaken. For both legal and factual reasons, then, that premise cannot justify ignoring the strictures of personal jurisdiction in MDL-transfer cases.

Consent

One could argue that a plaintiff consents to personal jurisdiction in the transferee court by filing the lawsuit in the first place. Personal jurisdiction can, of course, be waived or consented to, and consent is exactly what justifies the personal jurisdiction of the plaintiff's chosen court over the plaintiff. A plaintiff who files a lawsuit in a Texas court submits to the personal jurisdiction of that court for purposes of adjudicating the claim, even if the plaintiff lacks any other contacts with Texas.[26] I have no quibble with that unremarkable application of the consent doctrine of personal jurisdiction.

But it is a significant extension to say that consent to personal jurisdiction in the plaintiff's chosen court also extends to any other court

22. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 35–36 (2018).

23. Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 339, 400–01 (2014).

24. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1297 (2018).

25. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999).

26. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780–81 (1983).

where the lawsuit ultimately may end up. Consider a plaintiff from New Jersey who is injured in New Jersey by a machine manufactured in California by a California company and distributed into New Jersey by a New Jersey distributor. The plaintiff sues both the manufacturer and the distributor in New Jersey state court for state-law claims, and both defendants conceded personal jurisdiction over them in New Jersey. The case is eligible neither to be filed in federal court nor to be removed to federal court because of the presence of a nondiverse defendant, the distributor. By all expectations, this case will be resolved in New Jersey.

But what if, six months into the lawsuit, the distributor agrees to a default judgment and exits the case? The manufacturer now can remove the case to federal court[27] and then, once there, can move to transfer the case to federal court in California based on the convenience of the parties and over the objection of the plaintiff. The upshot is that the plaintiff filed a case in New Jersey state court with no reasonable expectation that it could ever be transferred without his consent to California for trial on the merits before a California jury, and yet it was. To take it a step further, perhaps after transfer to California, the defendant asserts a significant counterclaim against the plaintiff, forcing the plaintiff to defend against that claim in California and exposing the plaintiff to the risk of a California-based money judgment. I think consent to personal jurisdiction in California under these circumstances cannot be rationalized from the filing of a nonremovable lawsuit in New Jersey, and no Supreme Court case supports such an attenuated notion of consent.

Analyzing Plaintiff Personal Jurisdiction

The somewhat extreme example above means that the doctrine of consent cannot support a blanket extension of personal jurisdiction over plaintiffs in all transferee courts. But consent can be relevant to personal jurisdiction in some circumstances. If the plaintiff files a case in federal court in a state either lacking serious connection to the lawsuit or otherwise under circumstances in which a transfer under § 1404(a) or even § 1406(a) is obvious, perhaps because of a valid forum-selection clause, then the invocation of federal court under these circumstances could be construed as consent to the expected transferee court's personal jurisdiction.

Say, for example, a plaintiff from California is injured in Arizona by a device manufactured by a Texas defendant with its principal place of

27. 28 U.S.C. § 1446(b)(3).

business in Texas. The device was designed and manufactured entirely in Texas. The plaintiff sues the defendant in federal court in Arizona, claiming the device had a design defect. No one disputes the injury or the accident. The only dispute is whether the defendant is liable for a design defect. The plaintiff can reasonably expect the defendant (or the court) to transfer the case to Texas, where the defendant is headquartered, where the product was designed and manufactured, and where most witnesses are likely to be. To be sure, transfer may not happen. But by filing in federal court in these circumstances, the plaintiff can reasonably expect the case to end up in Texas and should be deemed to have consented to personal jurisdiction in Texas on that basis, even if the plaintiff has no contacts with Texas.

Or say the same accident occurred on the same facts, except that a multidistrict litigation under the MDL statute against the defendant for the same design defect currently is pending in the District of Delaware, consolidating hundreds of existing cases. The plaintiff's act of filing a case in Arizona that is highly likely to be transferred to the District of Delaware for consolidation in the MDL should be deemed consent to personal jurisdiction in Delaware on those facts.

Myriad variations exist, and some may present difficult cases, but the key point is that they should be dealt with on grounds of plaintiff consent (or normal minimum contacts) in ways consistent with the operation of ordinary precepts of personal jurisdiction. That inquiry demands fact-sensitive appreciation for the circumstances at hand.

Practicalities

How should plaintiffs invoke objections to a transferee court's personal jurisdiction over them?

I propose that the lack of personal jurisdiction of the transferee court be considered as part of the transfer or retransfer decision. Happily, the language of both the general venue-transfer statute and the MDL-transfer statute can be read to incorporate consideration of the personal jurisdiction of the transferee court. Each statute uses the word "may" to lodge discretion in the transferor court and demands that transfer be "just" or "in the interest of justice."[28] Transfer to a court that lacks personal jurisdiction cannot be just, and such a transfer would be an abuse of discretion. Thus, the plaintiff's primary opportunity to invoke personal jurisdiction will be

28. 28 U.S.C. §§ 1404(a), 1406(a), 1407(a).

in the transferor court in the briefing on the propriety of a transfer order,[29] with the remedy for a finding of lack of personal jurisdiction being a denial of transfer.

If erroneous transfer is made nonetheless, the plaintiff's timely objection to transfer in the transferor court is enough to preserve the issue for appeal for all intracircuit transfers and for those intercircuit transfers into circuits that allow review of out-of-circuit orders.[30] In circuits that hold themselves without authority to review an intercircuit transferor order,[31] or if the transferor court did not offer the plaintiff an opportunity to object to or contest the transfer, the plaintiff should immediately move, in the transferee court, to retransfer the case back to the original transferor court.[32] The law-of-the-case doctrine should not prevent the transferee court from revisiting the personal-jurisdiction determination made by the transferor court, particularly when the question is the *transferee* court's own jurisdiction.[33] The transferee court's denial of such a motion then would be reviewable by the transferee court's circuit court, with the circuit court empowered to order retransfer.[34] Appeal of an erroneous transfer order may have to await a final judgment, but that is no different from the denial of a defendant's motion to dismiss for lack of personal jurisdiction under Rule 12.

Conclusion

Personal jurisdiction over plaintiffs in venue-transfer cases has long been sidestepped. It ought not be. Plaintiffs are entitled to the same personal-jurisdiction protections as any other parties. And it is time for courts and commentators to treat the issue with the seriousness and sensitivity it deserves.

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29. If a district court is inclined to transfer a case sua sponte, it should give the parties an opportunity to be heard prior to ordering transfer to a court where personal jurisdiction could be challenged.

30. *E.g.*, SongByrd v. Estate of Grossman, 206 F.3d 172, 178–80 (2d Cir. 2000).

31. *E.g.,* Moses v. Business Card Express, Inc., 929 F.2d 1131, 1136 (6th Cir. 1991).

32. *E.g.*, ESCO Corp. v. Cashman Equip. Co., 65 F. Supp. 3d 626, 630 (C.D. Ill. 2014).

33. *E.g.*, PDIC v. McGlamery, 74 F.3d 218, 221 (10th Cir. 1996).

34. *E.g.*, Nascone v. Spudnuts, Inc., *735* F.2d 763, 766 (3d Cir. 1984).

Constitutional Law:
Should the Power of Presidential Pardon be Revised?

David I. Levine[1]

The Administration of President Donald J. Trump has provided more than its share of ruptured expectations, including the way it has brandished the power of the presidential pardon. President Trump has hinted that he can pardon himself.[2] He ignored the standard Department of Justice procedure of screening pardon candidates by taking nakedly political steps to pardon political allies.[3] In 2019, he pardoned war criminals.[4] He reportedly offered to pardon aides and other federal employees who might break the law while fulfilling his quest to build a wall across the entire border with Mexico.[5] Even more significantly, President Trump has played a cagey game of self-protection by offering glimpses of pardons for witnesses who are "loyal" to him and not "rats" who cooperate with law enforcement.[6]

President Trump's efforts to use the pardon power to protect political allies and stymie political investigations are not fundamentally new but instead reflect an intensification of presidential misuse of the pardon power since Watergate. Such misuse of the pardon power undermines a basic tenet of our government: everyone is equal before the law. To check abuse of the pardon power, this Chapter argues for a constitutional amendment to require that every presidential pardon have the co-signature of the Speaker of the House of Representatives to become effective.

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1. Summarized and excerpted from Budd N. Shenkin & David I. Levine, *Should the Power of Presidential Pardon be Revised?*, 47 HASTINGS CONST. L.Q. 3 (2019).

2. Carol D. Leonnig et al., *Trump Team Seeks to Control, Block Mueller's Russia Investigation*, WASH. POST (July 21, 2017).

3. Tyler Brown, *The Court Can't Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons*, 46 PEPP. L. REV. 331 (2019).

4. *Dave Philipps,* Trump Pardons Three Service Members in War Crimes Cases*,* N.Y. TIMES (Nov. 15, 2019).

5. Alexa Díaz, *Trump Reportedly Tells Officials He'd Pardon Those Who Break the Law to Build Border Wall*, L.A. TIMES (Aug. 28, 2019).

6. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION (Mar. 2019).

Origin and Course of the Presidential Pardon

During our country's conception, the Founders adopted the pardon power from the English Prerogative of Kings, and added it to the executive powers in the United States Constitution.[7] Alexander Hamilton defended "the benign prerogative" in *The Federalist* for its element of mercy in cases where the blunt instrument of the law may have perpetrated unduly harsh judgments.[8] He also envisioned the presidential pardon serving the civic welfare by, for instance, enabling the government to forgive participants in rebellions and easing offenders' reincorporation into civil society. Hamilton argued that the pardon power should continue to be vested in a single individual, hopefully one "of prudence and good sense," rather than in a group.[9] When the Anti-Federalists worried that the president might use the pardon to prevent investigation into his own associates or himself, Hamilton responded that a president of high character would be restrained from misuse of the power by the prospect of peer obloquy following a mischievous decision; if that were not enough, he could be impeached. The view of Hamilton and other Federalists prevailed.

In practice, the presidential pardon has typically been used for mercy, but it has also been used for civic welfare.[10] In 1795, President George Washington used the pardon to expedite reconciliation after the quelling of the Whiskey Rebellion. During the Civil War, Abraham Lincoln used it to bolster the morale of Union troops by pardoning Union Army deserters and others from harsh sentences, including the death penalty. Lincoln, and later, Andrew Johnson, granted pardons and amnesty to many ex-Confederates in an effort to preserve and rebuild the Union. In the same spirit, President Jimmy Carter pardoned Vietnam War resisters a century later.

The most notable misuse of the pardon came from President Ulysses S. Grant, who pardoned several of his personal friends involved in the "Whiskey Ring." Other than Grant, there were few uses of pardons out of self-interest until the Watergate scandal in the 1970s, when a marked change seemed to occur. President Gerald Ford's 1974 pardon preempted

7. U.S. CONST. art. II, § 2.

8. THE FEDERALIST No. 74, at 362 (Alexander Hamilton) (Terence Ball ed. 2003).

9. *Id.*

10. For a more detailed review of the use of presidential parsons, see Shenkin & Levine, *supra* note 1, at 7–11.

the legal prosecution of ex-President Richard Nixon to prevent a return to what Ford called in his inaugural address "our long national nightmare." While this pardon arguably served the civic purpose Ford claimed for it by allowing the nation to "move on," it also served the political end of protecting the Republican Party and its members from continued public disgrace and contributed to an impression that the president is above the law.

The next great scandal of illegal acts by the executive branch was the Iran-Contra affair. Although President Ronald Reagan resisted pressure to pardon the Iran-Contra conspirators, his former vice-president and successor, President George H.W. Bush, exercised no such restraint. Having been defeated for reelection to a second term as president, but having not yet departed office, Bush issued Christmas Eve pardons in 1992 to six Iran-Contra conspirators—all high officials, friends, and colleagues—sparing them shame and imprisonment, and sparing himself further investigation by the Independent Counsel into what he knew and when he knew it.

President Bill Clinton waited until his very last day in office in 2001 to issue more than 175 pardons, more than 60 of which had not been properly evaluated by the Justice Department's Office of Pardons. Most notoriously and sordidly, President Clinton pardoned the fugitive arms dealer Marc Rich, former husband of Denise Rich, who was a close political supporter and an important donor to the Clinton Presidential Library. A congressional committee subsequently investigated Clinton's record on pardons and issued a scathing report.

President George W. Bush partly resisted persistent appeals—especially from Vice-President Richard Cheney—to pardon Cheney's Chief of Staff, I. Lewis "Scooter" Libby. Libby was convicted of obstruction of justice and perjury in connection with the White House's vindictive outing of a deep-cover CIA agent, Valerie Plame Wilson. Bush responded to the pressure by commuting Libby's sentence, sparing Libby from prison. The commutation also enabled Libby to continue to invoke the Fifth Amendment in further inquiries, thus saving officials from revelation of their roles in the outing of CIA agent Valerie Plame. In other words, as with his father's Iran-Contra pardons, the second President Bush granted mercy to an associate while protecting himself and other officials from further jeopardy.

Writing in 2010, Margaret Colgate Love, a former U.S. Pardon Attorney, observed: "Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians' fear of

making a mistake, and subverted by unfairness in the way pardons are granted." She contended that, "as the official route to clemency has all but closed, the back-door route has opened wide." About Presidents Clinton and George W. Bush, she noted, "The two presidents are also at fault: in confirming popular beliefs about pardon's irregularity and unfairness, they disserved both the institution of the presidency and their own legacies."[11]

Because the Obama Administration left a less controversial record, it is possible that President Barack Obama was never tempted to grant pardons with a personal agenda. Even if he had been tempted, that allure does not appear in his record of issuing over 1900 commutations and pardons while in office. Yet abuse of the pardon power since the 1970s remains a worrisome trend, intensified by Trump's political and personal weaponization of pardons.

Adjusting the Power to Pardon

Once a malignant trend is in place, action to counter the trend is required. If scholars correctly posit that Hamilton's theory worked well for the first 180 years, but then broke down after Watergate, what are we to do?

Soft measures could be taken. Congress could pass legislation, such as proposed by Representative Adam Schiff, mandating that the Department of Justice provide information to Congress on certain questionable pardons. The bill would ensure that the facts surrounding the pardon would be revealed, even if the damage from the pardon itself could not be undone. Soft measures might make presidents think twice before violating the original intent of the pardon power. None, however, would dissuade a determined executive, especially a lame-duck president making midnight pardons on the eve of departure, from using the pardon power for personal or political benefit.

At the other end of the spectrum, the strongest measure of all would be to pass a constitutional amendment simply revoking the power to pardon. This would be an unduly severe reaction to a generally valuable power that is only sometimes abused. Surely, Hamilton's judgment still holds that the pardon power is an important safety valve for mercy in the judicial process and that national purposes can be furthered by judicious use of the power.

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11. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169, 1172 (2010).

What intermediate measures might then be available to readjust the power to avoid misuse? Some have suggested that certain types of pardons be forbidden, such as pardoning one's self, family members, or close associates, or issuing a pardon preemptively.[12] Another suggestion is to place a moratorium on pardons from October 1 of any presidential election year until after the next inauguration in January.[13] The trouble with singling out specifically incorrect practices, however, is that there are too many variables for them to be well-captured in a constitutional text. There will always be other practices that are objectionable, and if they were not specifically named, the interpretative doctrine of *expressio unius est exclusio alterius* might suggest that they were allowed.

A more effective approach to curbing abuses would be to adjust pardon procedure. Currently, the Department of Justice's Office of the Pardon Attorney uses well-established criteria to recommend worthy candidates for pardons to the president. Because this procedure is not required by law, however, presidents have been able to evade it in precisely those cases that go beyond grace and national purpose. Other scholars have proposed reforms for mandating that the Office of the Pardon Attorney be involved in all recommendations for pardons, for creating a Presidential Clemency Board to review and approve all presidential pardons, and for designating the vice president as the head of a White House Clemency Office.[14] The problems with these particular approaches include the cumbersomeness of the arrangements, the likelihood that the participants would not be sufficiently independent of the president, and the difficulty of opposing presidential will when the gulf between the prestige of the president and a functionary is so wide.

But the basic idea of a second, independent assent to a president's desire to issue a pardon is tenable. We propose that this second entity needing to co-sign the pardon document not be a committee, nor a bureaucratic entity, nor a person appointed by the president, nor someone whose prestige pales in comparison to the president. We propose that the needed cosignature come from the highest constitutional officer elected

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12. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 199–210 (1989).

13. Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 26–27 (2002).

14. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991); Paul J. Larkin, Jr., *A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL'Y 237 (2017).

independently from the president, who also happens to represent a coequal branch of government, Congress. That officer, next in the line of succession for the presidency after the vice president, is the Speaker of the House of Representatives.

How would this have worked in cases of questionable use of the pardon power? Knowing that the speaker's signature was required, the president and his advisors would have reviewed the pardons more thoroughly and widely. Would Speaker Carl Albert have cosigned for the 1974 pardon of Richard Nixon, Tom Foley for Iran-Contra in 1992, Dennis Hastert for Marc Rich in 2001, Paul Ryan for Joe Arpaio in 2017, or Nancy Pelosi for war criminals and what may come? While those counterfactuals are unknowable, it seems that the additional layer of approval would be protective, at least in the most controversial cases. Although the cosignature requirement might not be a strong check on presidential power when the president and the speaker are members of the same party, it will likely prevent many of the most abusive pardons.

Objections and Unanticipated Consequences

Although controversial pardons are a small percentage of all pardons issued by presidents, the matter is important enough to expend the effort to secure ratification of a constitutional amendment. Controversial pardons undermine the ideal of equal justice under law: that no one is above the law. That ideal must be protected.

The cosignatory proposal might cause the president to become less personally involved and caring. Judgments of mercy could be subject to political trading of favors. Instead of elevating the power to pardon, involving another politician in the process might degrade it. Still, even though our era has cast doubt on the ability of politicians to cooperate in a noble cause of governing, requiring the speaker's signature will increase the odds that nobility in the use of the pardon would return and remain.

Another objection to the proposal might be that eliminating the absolute discretion to pardon from presidential power would weaken the executive office. In modern times, however, the concern is not that Congress is too powerful, but that it is not powerful enough. Few states grant their governors the unfettered power that presidents now enjoy. States often require a second person or body to agree with governors' recommendations for pardons. Being able to check pardoning abuses can help the Congress protect the pardon power our Founders envisioned.

Finally, while we typically think of unanticipated consequences as being unwelcome, unforeseen consequences here might be positive. For instance, some observers believe that granting pardons for merciful purposes have been inhibited because of increased surveillance and suspicion.[15] Two signatures might inoculate both signatories from some criticism. In addition, the need to work together on pardons might open up additional avenues for executive-legislative cooperation.

Practicality

Although constitutional amendments require a two-thirds vote in each house of Congress and ratification by three-quarters of the states, some amendments do get passed. Major amendments have been successfully adopted after profound changes in society, like the Civil War and the women's suffrage movement. Minor amendments—like right to vote at the age of eighteen, the limitation of presidents to two terms, and the limitations on Congress giving itself raises—have passed because they have not offended any significant entrenched interests. Because an amendment imposing a co-signing requirement on the pardon power would have prospective effect only, on the power of unknown future presidents rather than the current occupant of the office, the amendment should offend no significant interests and thus fall into the latter category of minor amendments.

Sufficient popular and political support for the amendment process would be required. In normal times, perhaps such intensity of public support to reform the pardon power could not be mustered. But these are not normal times. Imagine the outrage that will emerge should Trump fulfill his threats to bestow pardons on those who do not cooperate with legitimate congressional inquiries, if he pardons his family members, his cabinet members, or himself. It would be difficult to imagine insufficient demand to enact meaningful reforms of the pardoning power, including by constitutional amendment.

Conclusion

The presidential pardon has been increasingly abused since Watergate. To maintain an effective democracy, equality before the law is fundamental. Preserving the pardon power is important for mercy in

15. Love, *supra* note 11, at 1204.

justice and for strategic national purposes. Soft measures could serve as useful first steps. However, a stronger measure—adjusting the pardon process—is necessary.

Americans rightly view the Constitution as a sacred but imperfect document. The Founders demonstrated that they knew it was imperfect when they included a means of amending the document. Hamilton's reliance on the high character of the presidents, and their respect for the office, appears to have been fairly well-placed for nearly two centuries. In light of the post-Watergate era, however, we the People need to consider granting a portion of the responsibility for the benign prerogative of pardoning to the Speaker of the House of Representatives.