

Learning the Limits of the Pardon Power from Others

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ABSTRACT

The end of a President’s term brings with it the predictable debate about presidential pardon power—the end of President Trump’s term was no different. Some criticized his pardons of well-known personalities, while others speculated about the possibility he might issue secret pardons, pardon his children, or pardon himself. Much of the discussion revolved around politics and norms, all the while acknowledging the lack of formal constitutional limits on a President’s pardon power, save impeachment. The Framers of the Constitution may have envisioned this nearly monarchical view of the President’s pardon power, but the concept of limitless power seems to run contrary to the purpose of a constitution, which, by design and function, ensures the rule of law by confining the very authorities it creates. Indeed, the Slovak Constitutional Court—the product of a more modern constitutional democracy—has applied rule-of-law principles in reviewing amnesties granted under scandalous circumstances by those empowered by the Slovak Constitution to grant them. In doing so, the Slovak Constitutional Court crafted a jurisprudential blueprint worth considering.

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I. INTRODUCTION

As President Trump approached the end of his term, pundits, partisans, and scholars debated the potential, actual, and perhaps even secret pardons issued by the President before he left office.¹ Of the known pardons, President Trump issued a flurry of last-minute pardons to include a rap star and the President's former White House strategist who had been charged with defrauding charitable donors.² Additionally, there were claims that President Trump might preemptively pardon the insurrectionists who stormed the Capitol on January 6, 2021,³ his children,⁴ or himself.⁵ However, unless those pardons were issued secretly, it appears those concerns did not come to fruition.

While scholars rightfully explore the legal dubiousness of cases where a President might pardon himself or herself or grant a pardon for a bribe, the pardon power is often considered to be almost plenary. Thus, President Trump presumably would have been within the permissible sphere of his pardon power to grant amnesty to the insurrectionists, even if it resulted in stopping an investigation into a crime against the very Constitution that gave him the pardon power. Something about this extraordinarily broad power, even if intended by the Framers, seems to conflict with what one might think legally permissible in a modern constitutional democracy—particularly a modern constitutional democracy where concepts like the rule of law and rejections of near limitless power have had almost 250 years to develop.

Guidance to resolve this conflict perhaps can be found by looking to other constitutional democracies whose understanding of the constitutional limits on power, and particularly the pardon power, have developed in more recent years. One such fellow constitutional traveler is the Slovak Republic where, in 2017, the Slovak Constitutional Court played a role in reviewing amnesties that had been granted for reasons that allegedly violated various principles of the rule of law.⁶ In its decision

1. See, e.g., Jeffrey Crouch, *Opinion: If Trump Issued Secret Pardons, They Won't Work*, WASH. POST (Jan. 20, 2021, 12:33 PM), <https://wapo.st/2OrmZHT>.

2. See Ryan Lucas & Ayesha Rascoe, *Trump Pardons Steve Bannon, Lil Wayne in Final Clemency Flurry*, NPR (Jan. 20, 2021, 1:18 AM), <https://n.pr/3mvnfBR>.

3. See David Jackson, *Graham Says Pardoning Capitol Rioters 'Would Destroy' Trump; Warns Schumer Impeachment Could Impede 'Healing'*, USA TODAY (Jan. 17, 2021, 4:01 PM), <https://bit.ly/2Rha1x9>.

4. See Maggie Haberman & Michael S. Schmidt, *Trump Has Discussed with Advisers Pardons for His 3 Eldest Children and Giuliani*, N.Y. TIMES (Dec. 1, 2020), <https://nyti.ms/31SITGH>.

5. See Michael S. Schmidt & Maggie Haberman, *Trump Is Said to Have Discussed Pardoning Himself*, N.Y. TIMES (Jan. 7, 2021), <https://nyti.ms/3dL8BTd>.

6. See *infra* Part II.

reviewing those amnesties, the Constitutional Court applied rule-of-law principles⁷ in a way that could inform American courts faced with similar issues.⁸ Accordingly, this Article discusses the Slovak Constitutional Court's review of those amnesties⁹ and examines how that review could guide U.S. courts in reviewing the President's pardon power,¹⁰ concluding that there is something to be learned from other, modern constitutions about how a substantive understanding of the rule of law might limit the U.S. President's pardon power.¹¹

II. ANNULING AMNESTIES IN THE SLOVAK REPUBLIC

The tale begins with kidnapping, fraud, and interference with the democratic process. During the mid-to-late 1990s, political tumult gripped the Slovak Republic, manifesting itself in significant disputes between the Prime Minister, Vladimír Mečiar, and the President, Michal Kováč.¹² In 1995, the President's son, Michal Kováč, Jr., was swept up in the dispute after a German court issued an arrest warrant related to a criminal fraud charge.¹³ Allegedly, the Slovak Intelligence Service subsequently kidnapped him, got him drunk, and left him in Austria for the Germans to extradite him.¹⁴ Purportedly, the director of the Slovak Intelligence Service, nominated for the position by Prime Minister Mečiar, orchestrated the kidnapping with the Prime Minister's knowledge.¹⁵ Amnesties were eventually granted to Michal Kováč, Jr., and to those who kidnapped him, but those amnesties—along with an amnesty granted to those who interfered with several national referendums at the behest of the government—were ultimately subjected to constitutional review by the Slovak Constitutional Court.¹⁶

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See Ústavný súd Slovenskej republiky [Constitutional Court of the Slovak Republic] May 31, 2017, PL. ÚS 7/2017 (Slovk.) [hereinafter PL. ÚS 7/2017] (short version) (unpaginated), <https://bit.ly/2RpwgRD> (summarizing the case in English); see also Tomáš Ealík et al., *Slovakia*, in I-CONNECT-CLOUGH CTR., 2016 GLOBAL REVIEW OF CONSTITUTIONAL LAW 181, 182 (Richard Albert et al. eds., 2017), <https://bit.ly/3dOCZMA> (discussing “the so-called Mečiar’s amnesties”). In discussing PL. ÚS 7/2017, this Article cites to the English short version published by the Constitutional Court of the Slovak Republic; for the original, Slovak full version, see Ústavný súd Slovenskej republiky [Constitutional Court of the Slovak Republic] May 31, 2017, PL. ÚS 7/2017-159 (Slovk.), <https://bit.ly/3tcRX5m>.

13. See PL. ÚS 7/2017, *supra* note 12; see also Ealík et al., *supra* note 12, at 182.

14. See PL. ÚS 7/2017, *supra* note 12; see also Ealík et al., *supra* note 12, at 182.

15. See PL. ÚS 7/2017, *supra* note 12; see also Ealík et al., *supra* note 12, at 182.

16. See PL. ÚS 7/2017, *supra* note 12; see also Ealík et al., *supra* note 12, at 182.

Two years after the kidnapping, in 1997, four separate questions were proposed to be submitted to the Slovak electorate as referendums.¹⁷ Three of the questions dealt with the Slovak Republic joining NATO and were proposed by the unicameral legislature.¹⁸ The fourth question, proposing direct elections of the President, was submitted by citizens.¹⁹ The government challenged the fourth question in court, and—despite a Constitutional Court ruling instructing the government to submit all four questions to the voters—the Minister of the Interior instructed that only the NATO-related referendum questions be presented to the electorate.²⁰ Meanwhile, in the same year the Minister of the Interior disregarded the Constitutional Court’s ruling and interfered with the referendum process, President Kováč granted amnesty to his son, Michal Kováč, Jr., for the fraud that led to his German arrest warrant.²¹

One year later, President Kováč’s term ended and the legislature was unable to elect a new President.²² As a result, pursuant to the Slovak Constitution, Prime Minister Mečiar began exercising presidential powers.²³ On his first day exercising that power, Prime Minister Mečiar issued amnesty to those who coordinated and executed the kidnapping of former President Kováč’s son and to those who interfered with the

17. See PL. ÚS 7/2017, *supra* note 12; see also Ján Mazák & Ladislav Orosz, *Quashing the Decisions on Amnesty in the Constitutional System of the Slovak Republic: Opening or Closing Pandora’s Box?*, 8 LAW. Q. 1, 1 n.1 (2018) (Czech), <https://bit.ly/3mBs5xr>.

18. See PL. ÚS 7/2017, *supra* note 12; see also Mazák & Orosz, *supra* note 17, at 1 n.1.

19. See PL. ÚS 7/2017, *supra* note 12; see also Mazák & Orosz, *supra* note 17, at 1 n.1.

20. See PL. ÚS 7/2017, *supra* note 12; see also Mazák & Orosz, *supra* note 17, at 1 n.1.

21. See PL. ÚS 7/2017, *supra* note 12; see also Mazák & Orosz, *supra* note 17, at 1 n.1. The Slovak Constitutional Court uses the term “pardon” to refer to the Slovak President’s decree halting the investigation into his son. PL. ÚS 7/2017, *supra* note 12. In keeping with a common distinction between “pardon” and “amnesty,” the Slovak Constitution contemplates pardons being granted to individuals, like Michal Kováč, Jr., and amnesty being granted to groups of people like those involved in the abduction of Michal Kováč, Jr. CONSTITUTION OF THE SLOVAK REPUBLIC, tit. Six, § One, art. 102(1) (Slovak.) [hereinafter CONSTITUTION OF THE SLOVAK REPUBLIC] (English version), <https://bit.ly/3uFhCnv> (“The President . . . j) remits and mitigates sentences imposed by criminal courts in criminal proceedings and expunges sentences in the form of individual pardon or amnesty”). The U.S. Constitution makes no such distinction. In such situations, the term “general pardon” is often used in place of “amnesty.” For the sake of efficiency, this Article generally uses “amnesty” when referring to the cases reviewed by the Slovak Constitutional Court and “pardon” when referring to the U.S. President’s power. At times, however, for readability, the terms are used interchangeably.

22. See PL. ÚS 7/2017, *supra* note 12; see also Ealík et al., *supra* note 12, at 182.

23. See PL. ÚS 7/2017, *supra* note 12.

referendum.²⁴ After Prime Minister Mečiar lost reelection, however, the new Prime Minister issued an order revoking those amnesties, yet the amnesties endured because the Constitutional Court held the new Prime Minister's revocation unconstitutional.²⁵ Following the court's decision, the legislature made various attempts to annul the amnesties through a constitutional amendment but was unable to garner the necessary votes.²⁶

In 2017, however, the legislature finally amended the constitution.²⁷ The amendment empowered the legislature to annul a President's amnesty or pardon, by three-fifths vote, "if it was incompatible with the principles of democracy and rule of law."²⁸ The amendment required that all annulments by the legislature be reviewed by the Constitutional Court, which would determine the annulments' compliance with the constitution.²⁹ Relying on its new power, the Slovak legislature annulled each of the three amnesties discussed above—for kidnapping, fraud, and interference with the referendum.³⁰ The annulments were then submitted to the Constitutional Court for review and, in PL. ÚS 7/2017, the court found the annulments constitutional.³¹

The Constitutional Court began its analysis by establishing that democracy and the rule of law are fundamental values that form not just a formal source, but also a material core of the Slovak Constitution, and, therefore, every action by a constitutionally created organ is subject to constitutional review.³² The court noted that the exercise of public authority, including amnesties and pardons, could be neither unlimited nor arbitrary.³³ Finally, the court noted that courts in other nations recognized the legal authority to annul amnesties for reasons such as the severity of the crime—e.g., those crimes that implicate human rights—and the identity of the perpetrator—e.g., when the offender was acting at the behest of the government.³⁴

24. See PL. ÚS 7/2017, *supra* note 12; see also Mazák & Orosz, *supra* note 17, at 1 n.1.

25. See PL. ÚS 7/2017, *supra* note 12; see also Mazák & Orosz, *supra* note 17, at 3.

26. See PL. ÚS 7/2017, *supra* note 12; see also Ľalík et al., *supra* note 12, at 182.

27. See PL. ÚS 7/2017, *supra* note 12.

28. *Id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

When applying these considerations to the amnesty granted to those who interfered with the referendum, the court found the amnesty incompatible with democracy and the rule of law.³⁵ Because the Minister of the Interior had no legal justification or legal right to arbitrarily order that a properly certified referendum question be omitted from the ballot, the court reasoned that his actions violated the fundamental right of the people to exercise their sovereign constituent power to change the constitutional order.³⁶ At the very least, the court held, his actions violated the rights of the 500,000 citizens who had signed the petition calling for the referendum.³⁷ Furthermore, because the Interior Minister was subordinate to the same Prime Minister who issued the amnesty, it acted as a form of self-pardon, which the court considered to be a violation of the separation of powers.³⁸

Like the amnesty granted to those who interfered with the referendum, the court held that the amnesty granted to those who kidnapped the former President's son also violated principles of democracy and the rule of law.³⁹ The court reasoned that, when the amnesty was granted, there was reasonable suspicion that members of the Slovak Intelligence Service had participated in the kidnapping and the Prime Minister would have known of the allegations.⁴⁰ And, like the Interior Minister, the director of the Intelligence Service was also subordinate to the Prime Minister.⁴¹ The court determined that it would have been in the public interest to allow an independent criminal investigation to confirm or refute the gravity of the allegations of inhumane treatment and torture.⁴² Further, the court held that the amnesty undermined the public trust in democracy and violated various rule-of-law principles, including non-arbitrariness.⁴³ Finally, the court held that President Kováč's grant of amnesty to his son for the fraud allegations was a violation of the rule of law.⁴⁴ In particular, the amnesty violated the non-arbitrariness principle because of the apparent use of subjective over objective standards.⁴⁵

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

III. THE RULE OF LAW AND THE U.S. PRESIDENT'S PARDON POWER

The story of how the Slovak Constitutional Court came to have jurisdiction over the President's and Prime Minister's amnesties is less than admirable and not necessarily one worth emulating. When a legislature changes a constitution to give itself authority—including *ex post facto* authority—to annul pardons, it “tilt[s] the constitutional pendulum . . . to political branches” away from the judicial branch.⁴⁶ In doing so, it presents the threat of simply inserting more politics into the pardon process, even with the requirement that the legislature ostensibly review pardons for violations of democratic and rule-of-law principles. Moreover, while the legislature in Slovakia is the country's “sole constitutional body” and can, arguably, confer or abrogate all constitutional power exercised by public institutions,⁴⁷ the U.S. Congress does not hold the same sort of position within our constitutional framework. Nevertheless, what is worthy of consideration is the Slovak Constitutional Court's role in reviewing the amnesties, even if the court played that role following constitutional hocus-pocus by the legislature.

Despite that legislative hocus-pocus, the Slovak Constitutional Court is undoubtedly the proper body to identify and apply legal standards to the President's and Prime Minister's amnesties, as it did in PL. ÚS 7/2017.⁴⁸ More specifically, as both amnesties and those who grant them find their geneses in the Slovak Constitution,⁴⁹ the Constitutional Court is the proper body to determine the constitutional limits of the pardon power and review a particular pardon's compliance with the Slovak Constitution. To be sure, in any constitutional democracy, courts are the proper institutions to ensure constitutional compliance and maintain the rule of law when pardons are issued.

In the United States, the President's pardon power is often considered to be virtually plenary. Having borrowed from the Roman and British monarchical legal tradition, the Framers understood the President's pardon power to be “exclusive, broad, and virtually unrestricted.”⁵⁰ Slovakia's constitutional identity, however, grows out of a different historical experience. “[A]s a post-communist country,” Slovakia has generationally

46. Kamil Baraník, *Why Have Constitutional Courts Been So Important for Democracy in Central Europe (. . . And So Hated by Those in Power)?*, 11 J. U. LAT. 77, 86 (2018) (Lat.), <https://bit.ly/2PKPOQ4>.

47. Mazák & Orosz, *supra* note 17, at 6.

48. *See generally* PL. ÚS 7/2017, *supra* note 12.

49. *See* CONSTITUTION OF THE SLOVAK REPUBLIC, *supra* note 21, tit. Six, § One.

50. Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 77–78 (2019) (citation omitted).

recent experience with criminal abuse of power by public officials.⁵¹ Perhaps it is Slovakia's resulting vigilance that is reflected in the rejection of any unlimited power residing in the head of state and an exacting understanding of "the rule of law, which *a priori* [prohibits] any act of the public authority, including the decision on amnesty, to be beyond the constitutional review."⁵² While this seems like a fundamental concept in a modern constitutional democracy, it is one that should be explicitly adopted by the U.S. Supreme Court in reviewing pardons, even if rejected by the Framers of the Constitution.

Perhaps this suggestion rests upon the U.S. Supreme Court following the example set by the Slovak Constitutional Court in finding there is a material core of the Slovak Constitution that includes the rule of law. Unlike the U.S. Constitution, however, the Slovak Constitution specifically describes, in the formal sense, the Slovak Republic as one "governed by the rule of law."⁵³ While the U.S. Constitution lacks similar language, one need look no further than *Marbury v. Madison*, where the Court noted that the U.S. Constitution establishes paramount legal limits on government action, which ensure "a government of laws, and not of men"⁵⁴—a sentiment that is the foundational principle for the rule of law and which finds its embodiment in any modern, well-functioning constitutional democracy. Thus, if there is any material core to the U.S. Constitution, it would seem to include, at a minimum, the same material core the Slovak Constitutional Court identified as underpinning the Slovak Constitution and the Slovak Republic—the rule of law.

Most would agree that the rule of law is a fundamental concept that constrains all government actions in a constitutional democracy. Yet its abstract nature and seeming "lack of judicially discoverable and manageable standards,"⁵⁵ coupled with the traditional view of the U.S. President's pardon power, suggests that it might remain a philosophical, not material, legal concept. However, even in the absence of formal legal limitations, the U.S. Supreme Court has identified material legal limitations on presidential power and authority. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court determined that the Constitution does not authorize the President to seize production plants when the President declares it necessary to avert a national emergency.⁵⁶ Additionally, in *Nixon v. Fitzgerald*, the Court determined that a President

51. Mazák & Orosz, *supra* note 17, at 8.

52. *Id.* (citation omitted).

53. CONSTITUTION OF THE SLOVAK REPUBLIC, *supra* note 21, tit. One, § One, art. 1.

54. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 176–77 (1803).

55. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

56. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952).

loses absolute immunity where his or her actions fall outside the “outer perimeter” of his official duties.⁵⁷ These material, though not formal, constitutional constraints on presidential power can likewise apply to the pardon power in ways similar to the constraints placed on amnesties by the Slovak Constitutional Court.

Constitutions are instruments that, by their very nature, limit power. Thus, all constitutional actors and powers, including the President and the pardon power, are *ab initio* limited by the sheer dint of being born out of the Constitution. If those limits in the U.S. Constitution include the rule of law, then it is important to identify the material criteria that constitute the rule of law and thus constrain the pardon power. Certainly, the rule of law demands that law be superior and binding on everyone.⁵⁸ This is perhaps especially true for public officials who are government agents and act under its authority, including those directed to act on behalf of public officials.⁵⁹ As a result, pardons that seek to ensure impunity for public officials for no other reason than to escape responsibility for criminal activity would conflict with the rule of law. This would be particularly so, for example, within the context of impunity for acts directed by a President when he or she knew the acts to be criminal, and when the goal of the resulting pardon is to immunize the actor for engaging in criminal activity directed by the very person authorized to issue the pardon. It is this sort of pardon—or its close relative—that the Slovak Constitutional Court found to have violated the rule of law when it annulled Prime Minister Mečiar’s amnesty to his subordinates who kidnapped his political rival’s son when the Prime Minister, at a minimum, knew about the operation.⁶⁰ This sort of pardon would seem to subvert the superiority and binding nature of law and fall outside the constitutional limits of the U.S. President’s pardon power.

The rule of law also prohibits the arbitrary exercise of government power, including arbitrary decision-making.⁶¹ Subjective decisions, unbound by known objective criteria, result in unequal treatment and thus violate the rule of law.⁶² Of the various government powers created by the U.S. Constitution, the rule-of-law’s insistence on non-arbitrariness is

57. *Nixon v. Fitzgerald*, 457 U.S. 731, 755–56 (1982).

58. See Justice Anthony Kennedy, U.S. Supreme Court, The Twentieth Sultan Azlan Shah Law Lecture: Written Constitutions and the Common Law Tradition (Aug. 10, 2006), in *THE SULTAN AZLAN SHAH LAW LECTURES II: RULE OF LAW, WRITTEN CONSTITUTIONS & THE COMMON LAW TRADITION* 198, 261 (Dato’ Seri Dr Visu Sinnadurai ed., RNS Publications 2011) (Malay.), <https://bit.ly/3wMGTOI>.

59. See *id.*

60. See *supra* Part II.

61. See Kennedy, *supra* note 58, at 261.

62. See *id.*

acutely threatened by the President's pardon power. It is inherently a power that resides in the President alone and contains almost no formal limitations identified in the Constitution.⁶³ This lack of formal limitations makes it all the more important for the judiciary to apply the material rule-of-law principle of non-arbitrariness to the President's pardon power. An application of the non-arbitrariness principle would ensure that biased and indulgent pardons for family members, friends, or others in exchange for reciprocation, would be legally untenable. Even more untenable would be the utter indifference for neutral, known criteria that a President would need to adopt to enact a self-pardon or secret pardon.

Finally, the rule of law requires the establishment and protection of the right to participate in creating the rules that govern society.⁶⁴ This rule-of-law principle, when applied to the President's pardon power in its material sense, would limit a President's pardon of criminal activity that intentionally sought to undermine democracy or interfere with democratic participation. In PL. ÚS 7/2017, the Slovak Constitutional Court held that the Interior Minister was not legally authorized to interfere with the referendum and, in doing so, interfered with the right to participate in the democratic process.⁶⁵ In the United States, the presidency and the power to pardon are products of a Constitution that also contains explicit and implicit commitments to voting rights. Whether in Article I, Section 4, in the Guarantee Clause, or in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, ensuring the right to participate in democracy and "[t]he elective mode of obtaining rulers" is a principle of the U.S. Constitution.⁶⁶ Therefore, when considering the constitutional commitment to participate in democracy, a pardon power limited by the rule of law would suggest that, like in Slovakia, a U.S. President's pardon would be unconstitutional when the President knew or should have known that the crimes he or she pardoned were related to intentional interference with the democratic process, especially when committed by a public official.

IV. CONCLUSION

The U.S. President's pardon power lacks virtually any formal constitutional limitations.⁶⁷ However, modern constitutions—like the Slovak Republic's—and the courts charged with expounding them, have found limitless power to be fundamentally at odds with a modern

63. See U.S. CONST. art. II, § 2, cl. 1.

64. See Kennedy, *supra* note 58, at 261.

65. See PL. ÚS 7/2017, *supra* note 12.

66. THE FEDERALIST NO. 57, at 259 (James Madison) (David Wootton ed., 2003).

67. See *supra* Part III.

constitutional democracy.⁶⁸ To that end, the Slovak Constitutional Court identified the rule of law as forming a material core of the Slovak Constitution and applied rule-of-law principles to review and annul amnesties.⁶⁹ As the U.S. Supreme Court identified in *Marbury v. Madison*, limits on government action, and implicitly—if not explicitly—the rule of law, are the very purposes of the U.S. Constitution.⁷⁰ Though the Framers of the Constitution may have relied on a monarchical understanding of the pardon power, there is something to be learned from other, modern constitutions about how a substantive understanding of the rule of law might limit the U.S. President’s pardon power.⁷¹

68. *See supra* Part II.

69. *See supra* Part II.

70. *See supra* Part III.

71. *See supra* Part III.