

FL Turn Blue!

Presidential Pardon Power

By Steven M. Blumrosen

The other day, I received an email asking whether I would answer the following question on Quora: NPR 5/21/19 - NY Assembly passes bill closing 'double jeopardy' loophole as rebuke to Trump. - Does this violate the 5th amendment of the US Constitution?

<https://www.quora.com/NPR-5-21-19-NY-Assembly-passes-bill-closing-double-jeopardy-loophole-as-rebuke-to-Trump-Does-this-violate-the-5th-amendment-of-the-US-Constitution>):

Not knowing what the double jeopardy loophole was, I was not inclined to answer.

Being inquisitive, I looked into it.

Turns out, not surprisingly, a full and complete answer would take a while.
Here is my short version.

The question is whether closing the double jeopardy loophole violates the 5th Amendment. Perhaps, you should first ask a few other things, like: "What is the double jeopardy loophole?" And, why do you think of it as a loophole?

The Constitution was written in Philadelphia at a remarkable gathering of men who understood the issues, their states, and their own interests. Yes, I said "men." Even John Adams - after his wife Abigail pled with him to "Remember the Ladies" - did not. Apparently, his myopia followed him through life.

The gathering was tasked with fixing the structure of government so there would not be so much divisiveness. States, for example, were taxing goods as they moved into and out of the state. This was not good for business or for unity.

At that time, there was no president. The Congress wanted some central authority but feared that too much authority would start to look like the power and arrogance of London aristocrats.

They were not particularly concerned with individual rights. They were focused on the structure of government and protecting the power and business of slavery. (As part of that process, the Congress - then meeting in New York City - passed the Northwest Ordinance and created the then-largest slave-free area of the world.)

Rather than correcting minor flaws in the existing government, they created a new one. This went well beyond the scope of their authority. When they presented their proposal to the Congress, they had to explain their actions and were somewhat investigated. Finally, their proposed Constitution was sent to the states for ratification. Each state had their own process for ratifying the Constitution. The final two states demanded a Bill of Rights.

If those states had refused to ratify the proposed Constitution for lack of a Bill of Rights, then the Congress would have had to go through the entire process again, including ratification by each state. To avoid that time, energy and uncertainty, people like James Madison promised that a Bill of Rights would be one of the first orders of business of the new bicameral legislature.

They were politicians and leaders: tested, believed and trusted. The Constitution was ratified and they were good to their word.

Going through the process of amending the new Constitution, their proposed Bill of Rights became the first ten amendments. They had intentionally created a plan for the Constitution to be a "living document" that could be changed by individual cases and great social movements, as happened in that first Congress.

The rule of law and the documents upon which it is based are so important to the United States that they are well protected. The National Archives in Washington DC has originals of the Declaration of Independence, the Constitution and the Bill of Rights. You can go see them. Or, you can read them in many places, including the National Archives website. According to [Archives.gov](https://www.archives.gov), the Fifth Amendment says:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(<https://www.archives.gov/foundin...>)

That's it. 108 words.

You asked the question, now that you have read it, what do you think it means?

Let's pretend to pause a few years while you think about it, maybe go law school, talk with some experts, and read the 142-page report on the Fifth Amendment posted by the U. S. Congress at <https://www.congress.gov/content...>

After all that, you will have to determine the meaning from the context. Just to make it more complicated, remember that almost every court case involving Constitutional Law has three or more trained lawyers trying to apply the law to the facts of that case. There is typically a lawyer on each side of every issue. So, reasonable minds can differ and whatever you think about the Fifth Amendment may be as good and defensible as what anyone else thinks about it.

The Fifth Amendment says, for example, "nor shall private property be taken for public use, without just compensation." Obviously, this is talking about PRIVATE property, being taken by the government, for PUBLIC use.

One might think this means the government can take your property and use it, like the British used private homes in Boston to bivouac their soldiers. The difference that made the Fifth Amendment so remarkable was that it required "just compensation." Today, this is often called "eminent domain."

In 2005, the Supreme Court informed everyone that "Public Use" does not mean the public gets to use the property or, even, that the government representing the public gets to use the property. "Public use" turns out to mean that the government can take your property, pay

you something for it, and then turn it over to someone else for their private use and profit! The case is KELO V. NEW LONDON (04-108) 545 U.S. 469 (2005). You can read it at: <https://www.law.cornell.edu/supc...>

In her dissent, Justice Sandra Day O'Connor wrote, "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."

In other words, there is a lot of talk, today, about Socialism. Here it is. While this is not what was originally meant by Socialism, it is what is called "Socialism" in today's political repartee. The government takes from one and gives to another.

To summarize, although this taking was not directly for the good of the people but for the profits of private parties, it was allowed because it provided a supposed public benefit in removing blighted neighborhoods. Seemingly at odds with the opinion of the Court, the people who made a Federal case of it did not think their neighborhood was blighted. They wanted to remain there.

The government won the case and obtained permission to replace private homes with "office space for research and development., a conference hotel, new residences and a pedestrian 'riverwalk' along the Thames River" (<https://www.nytimes.com/2005/06/...>)

Your question mentions the President of the United States and I am wondering whether you are concerned about something else related to the Fifth Amendment?

When thinking about the United States and a state, each is a separate government, a separate "sovereignty." The Constitution creates a framework so the sovereignties of the Federal government and each state government can work together.

"New York legislators recognized that the dual sovereignty doctrine is a license for injustice, allowing a defendant to be punished twice for the same crime or tried again after an acquittal. They therefore enacted a law that says, 'a person may not be separately prosecuted for two offenses based upon the same act or criminal transaction.' There are 12 exceptions to that rule, but none of them covers objectionable pardons by Donald Trump. That is the 'double jeopardy loophole' Underwood (the NY Attorney General) has in mind." (<https://reason.com/2018/06/01/ny...>)

Perhaps that is what your question is about? Google it and you'll find many opinions. My opinion is that this is not about crime, but about punishment.

Presidential pardons can be remedial or prospective. When President Ford pardoned resigned-president Nixon, the text of the pardon granted "a full, free, and absolute pardon onto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974."

Watergate was almost 50 years ago. Many people may not realize the depth of involvement of the President. (See, the transcript of his Oval Office conversation with his lawyer, John Dean, at <https://www.nixonlibrary.gov/sit...>)

There was great concern about the pardon at the time and, as Laura M. Holson reports in the September 8, 2018 issue of the New York Times, "Mr. Nixon's pardon, 44 years ago this week, is relevant once again, particularly as a debate has been revived over how pardons should be granted." (<https://www.nytimes.com/2018/09/...>)

For more historical context and links to the actual 2-page pardon, see:

- <http://www.historyplace.com/spee...>
- <https://historynewsnetwork.org/a....>

Nixon's pardon was prospective. In effect, it cut off any prosecution of the resigned-president for the times and for the things specified in the pardon.

Pardons may be remedial. After a trial and due conviction of a crime, the President may grant a pardon that affects the sentence (the consequences of the crime) which may affect the risk-analysis when someone is considering entering into a conspiracy of Watergate proportions.

Every president may utilize the pardon power. The Department of Justice provides a list people who were pardoned by Presidents Nixon, Ford, Carter, Reagan, Bush I, Clinton, Bush II, Obama and Trump. (<https://www.justice.gov/pardon/c...>)

Examples from President Barack Obama's administration include:

- Ronald Lee Foster who had been sentenced to Probation and a \$20 fine for mutilating coins.
- Michael Ray Neal who had been sentenced to 6 months in prison, 3 years of supervised release conditioned on 6 months of home confinement, and a \$2,500 fine for the manufacture, assembly, modification and distribution of equipment for unauthorized decryption of satellite cable programming
- Edwin Alan North who had been sentenced to 6 months of unsupervised probation for the transfer of a firearm without payment of transfer tax.
- James Anthony Bordinaro who had been sentenced to 12 months' imprisonment, three years' supervised release, and a \$55,000 fine for conspiracy to restrain, suppress, and eliminate competition in violation of the Sherman Act and conspiracy to submit false statements.
- Alfor Sharkey who had been sentenced to three years' probation with 100 hours of community service and \$2,750 restitution for unauthorized acquisition of food stamps.
- Donna Kaye Wright who had been sentenced to 54 days' imprisonment and three years' probation conditioned on performance of six hours of community service per week for embezzlement and misapplication of bank funds.
- Chelsea Elizabeth Manning who had been court martialed and imprisoned from 2010 until 2017 for violations of the Espionage Act and other offenses after disclosing to WikiLeaks nearly 750,000 classified, or unclassified but sensitive, military and diplomatic documents. Her situation exemplifies the doctrine that the scope of a pardon is limited to what is in the pardon. After Obama's pardon released her from prison, she was jailed for refusing to testify before a grand jury about Julian Assange in 2019.

The presidential power to grant pardons comes from Article II of the Constitution:

"The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall

have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

(<https://www.law.cornell.edu/cons...>)

So, there is no definitive answer. My opinion comes from the article about the NY legislature that says, "a person may not be separately prosecuted for two offenses based upon the same act or criminal transaction." With a prospective pardon, there is no prosecution. Hence, no double jeopardy.

Another question might be whether a president may constitutionally pardon someone for what they did during the time leading up to actual impeachment proceedings which were done as part of the preparation for those proceedings, as a lawyer may spend considerable time working on a case before the case actually begins in court.

Perhaps that is what the Constitution means when it says: "except in cases of impeachment." Perhaps the Constitution does not give a president the power to pardon someone for violating criminal law by participating in a conspiracy and cover-up committed to avoid the prospect of impeachment.

The text says, "The President ... shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The intent is to encourage presidents to behave in ways that are beyond reproach, so thoughts of impeachment do not arise, rather than behaving in ways the president and his or her team want to cover-up.