

# GRANT OF PRESIDENTIAL PARDON IN THE UNITED STATES AND NIGERIA: POSTHUMOUSNESS, CORPORATENESS AND OTHER MATTERS

## Abstract

Presidents Trump and Buhari of the United States and Nigeria respectively exercised their constitutional pardon power in recent times, in circumstances that many persons view as controversial. Although the pardon power is well recognised, its scope has not, however, been fully explored. This article provides a nuanced articulation of the complexities inherent in the scope of pardon power. The questions it addresses are, can pardon be granted before conviction? Can pardon power be exercised to undermine court's power to penalise contempt? Can a corporate entity be pardoned? Does a deceased person come within the scope of constitutional pardon power?

## Introduction

On 09 April 2020, President Muhammadu Buhari of the Federal Republic of Nigeria (Nigeria) granted posthumous pardons to two prominent Nigerians, Professor Ambrose Alli and Chief Anthony Enahoro.<sup>1</sup> While Alli was the Governor of the defunct Bendel State (now Edo and Delta states) of Nigeria, Enahoro was a foremost Journalist, Federal Minister and Parliamentarian who moved the first motion, in 1953, for Nigeria's Independence from the British. These pardons, especially that of Alli, has generated a cacophony of opinions in Nigeria. This is majorly because the then Governor Alli was overthrown, charged, prosecuted, convicted, sentenced and jailed under the then military regime of the same Buhari who, as a civilian President, has now issued a pardon in his favour. Buhari was the military Head of State in 1984 when the Special Military Tribunal sentenced Alli to 100 years of imprisonment for allegedly misappropriating public funds, which allegation many Nigerians believed was a trumped-up charge to 'deal with' the politician whom many still see till today as one of the best performing Governors Nigeria has ever had.<sup>2</sup>

On the other hand, on 25 August 2017, President Donald Trump of the United State of America (the US) exercised his pardon power in favour of former Arizona Sheriff, Joseph Arpaio.<sup>3</sup>

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<sup>1</sup> Ebuka Onyeji and Oge Udegbunam, 'Decades after, Buhari Pardons Ambrose Alli, Ehanoro Posthumously', Premium Times Newspaper, (Nigeria, 10 April 2020) available at: <https://www.premiumtimesng.com/news/top-news/387081-decades-after-buhari-pardons-ambrose-alli-ehanoro-posthumously.html> (accessed on 11 April 2020). The first known posthumous pardon in Nigeria was granted by former President Goodluck Jonathan to General Shehu Musa Yar'Adua on 12 March 2012. See Uduma Kalu, Abdulwahab Abdullah, Dapo Akinerfon & Gbenga Oke, 'Rumoured Pardon for Alams, Others Sparks Outrage' Vanguard Newspaper (Nigeria, 13 March 2012), available at: <https://www.vanguardngr.com/2013/03/rumoured-pardon-for-alams-others-sparks-outrage/> (accessed on 11 April 2020).

<sup>2</sup> For reactions to this presidential pardon, see Eniola Akinkuotu, 'Buhari Deserves no Praise for Pardoning Ambrose Alli -Adebanjo', The Punch Newspaper (Nigeria, 10 April 2020) available at <https://punchng.com/buhari-deserves-no-praise-for-pardoning-ambrose-alli-adebanjo/>; John Owen Nwachukwu, 'Buhari under Fire "for pardoning Ambrose Alli after overthrowing him in 1983"', Daily Post Newspaper, (Nigeria, 10 April 2020), available at <https://dailypost.ng/2020/04/10/buhari-under-fire-for-pardoning-ambrose-alli-after-overthrowing-him-in-1983-video/>; Henry Umoru & Ozioruva Aliu, 'PRESIDENTIAL PARDON: Our father was never guilty-Andrew Alli', The Vanguard Newspaper, (Nigeria, 13 April 2020), available at <https://www.vanguardngr.com/2020/04/presidential-pardon-our-father-was-never-guilty-andrew-alli/> (accessed on 27 April 2020).

<sup>3</sup> Julie Hirschfeld Davis and Maggie Haberman, 'Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration', The New York Times, (New York: 25 August 2017), available at

Arpaio was charged and convicted of both civil and criminal contempt of court in 2016 and 2017 respectively<sup>4</sup>, after consistently disobeying court orders restraining him from racial profiling of Latinos.<sup>5</sup> It was barely a month after his conviction that he got presidential pardon.<sup>6</sup> 9 months later, precisely on 24 May 2018, Trump again exercised his pardon power but this time, it was a posthumous pardon. The beneficiary of this latter pardon was Jack Johnson, a boxer who was convicted of kidnapping women more than a century ago.<sup>7</sup>

The foregoing raises several legal issues around the presidential pardon power. While it is beyond any debate that section 175 of the Constitution of the Federal Republic of Nigeria, 1999 (the Nigerian Constitution) and Section 2 of Article II of the United States Constitution (the US Constitution) empower the Presidents of the two countries to grant pardons to persons in respect of offences<sup>8</sup>, it is, however, problematic to situate the scope of this power. The interesting questions that the exercise of this power generates are, can a corporate entity be pardoned? Does a deceased person come within the scope of constitutional pardon power? Can the power be exercised to take away court's power to penalise contempt, as American and Nigerian cases such as the *Arpaio case* and *Okongwu v State*<sup>9</sup> suggest? In view of a recent decision of the Nigerian Court of Appeal in the *Federal Republic of Nigeria v Achida (Achida case)*,<sup>10</sup> coupled with the American case of *Murphy v Ford*,<sup>11</sup> can this power be exercised in a pre-conviction stage in the administration of criminal justice system without subverting the settled doctrine of separation of powers? Lastly, further to the February 2020 decision of the US Circuit Court of Appeal in *United States v Arpaio (2020 Arpaio case)*,<sup>12</sup> what, actually, is the legal effect of pardon?

The aim of this paper is to attempt an answer to the above questions, by exploring the scope and effect of presidential pardon powers under the US and Nigerian Constitutions. Through the lens of constitutional provisions (and in some cases recent judicial decisions), the paper examines whether the pardon power is exercisable in favour of corporate bodies, deceased persons, persons standing trial before their conviction as well as contempt proceedings. Despite the political and legal implications that a posthumous and corporate pardon can throw up, there

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<https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> (accessed on 18 April 2020).

<sup>4</sup> Richard Pérez-Peña, 'Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt', The New York Times (New York, 31 July 2017), available at: <https://www.nytimes.com/2017/07/31/us/sheriff-joe-arpaio-convicted-arizona.html> (accessed on 18 April 2020); *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at \*7 (D. Ariz. July 31, 2017);

<sup>5</sup> *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 992–93 (D. Ariz. 2011), aff'd, 695 F.3d 990 (9th Cir. 2012); 'Joe Arpaio racially profiled Latinos in Arizona, Judge rules' The Guardian Newspaper (USA, 25 May 2013), available at: <https://www.theguardian.com/world/2013/may/25/joe-arpaio-latinos-arizona-judge> (accessed on 18 April 2020).

<sup>7</sup> Mahita Gajanan, 'President Trump Just Pardoned the Boxer Jack Johnson. Here's What to Know About the Original Case', Time Newspaper (USA: 24 May 2018), available at <https://time.com/5290570/jack-johnson-trump-pardon/> (accessed on 18 April 2020).

<sup>8</sup> These constitutional provisions will be analysed below.

<sup>9</sup> (1986) 5 NWLR (Pt 44) 721 (where a state Governor granted pardon to a person who was convicted of contempt of court, on the same day the court decision was given. Upon receiving pardon, the ex-convict still went ahead to appeal against his conviction. The substance of this case, which would be discussed below, turned on whether an appeal against conviction is needless, where pardon already exists).

<sup>10</sup>(2018) LPELR 46065 (CA) 23.

<sup>11</sup> 390 F.Supp, 1372 (W. D. Mich. 1975).

<sup>12</sup> *United States v. Arpaio*, D.C. No.2:16-cr-01012-SRB-1 (D.C. February, 2020), full judgment available at <https://drive.google.com/file/d/1bpgOGlhG14Jph7SWHCbpWtfJlagxFlna/preview> (accessed on 18 April 2020). See also the Nigerian case of *Okongwu v State* (n9).

is a near-absence of attention from scholars on the subject matter. The essence of this paper, therefore, is to fill that gap by discussing the constitutionality or otherwise of presidential pardon for dead persons and corporate bodies. It not only enquires on whether pardon power is applicable to both the living and dead ex-convicts, but it also assesses the judicial decisions in the *Achida case* and *2020 Arpaio case* on the validity of pardon for persons yet to be convicted on the one hand, and the legal effect of pardon vis-à-vis criminal record, on the other hand. The paper argues that, going by the framing of the US and Nigerian Constitutions, dead persons and corporate bodies come within the pardon power package. It further argues that if that was not the intendment of the lawmakers, they would have clearly stated so, thus the Constitutions, though difficult to amend, must be amended to effectuate any contrary legislative intendment to place a limitation (in addition to the exceptions already provided by the Constitution) on the President's pardon power. It observes that the two Constitutions have clearly spelt out instances where the pardon power is not exercisable and argues that these exceptions and any other provisions of the Constitutions themselves should be the only limiting factors.<sup>13</sup> It is the author's argument that the express mention of these constitutional exceptions or exclusions prevents any consideration of further exceptions or the implied inclusion of all other offences, including corporate offences and criminal contempt.<sup>14</sup> It is therefore submitted that anything outside these constitutional exceptions would amount to undermining the President's constitutionally donated power. The paper particularly recommends that the present practice of pardoning the dead should be sustained; it is not only constitutional but it also helps those who were innocent or wrongfully convicted to truly rest in peace.<sup>15</sup> While it is true that pardons to living persons are symbolic, because it restores the honour of the beneficiaries,<sup>16</sup> I however agree with Greenspan that,

[p]ardons to dead people are doubly symbolic, in that the recipients are no longer around to feel honored. Such symbolism is important, however, in demonstrating that we live in a society which is willing to make amends for grievously unjust governmental acts. Of all of those acts, the ones most clearly deserving of symbolic reversal are cases where an innocent person was executed, usually as a result of a deeply flawed, and often racially biased, judicial process.<sup>17</sup>

Further, contrary to the recent Court of Appeal's decision in *Achida case*, this paper argues that under the Nigerian Constitution, a pardon can be granted to a person either before or after his conviction. This author assesses the interpretation the court gave to several provisions of the

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<sup>13</sup> A reading of section 175 of the Nigerian Constitution reveals that the presidential pardon power is not applicable in respect of state offences and where there has been no prior consultation with the National Council of State. On its part, Section 2 of Article II of the US Constitution provides that the presidential pardon power is not exercisable in respect of state offences and in cases of impeachment.

<sup>14</sup> *Amgbare v Sylva* (2007) 18 (pt 1065) 1; *Nawa v Attorney-General, Cross Rivers State* (2008) All FWLR (pt 401) 807 (where it was held, '[a] principle of statutory interpretation of statutes is that express mention of one thing in a statutory provision automatically excludes any other thing which otherwise would have applied by implication with regard to the same issue, *expressio unius exclusion alterius*').

<sup>15</sup> See the discussion below on cases of wrongful convictions of innocent persons who later received posthumous pardon.

<sup>16</sup> See generally Moore, K. D., *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1997).

<sup>17</sup> Stephen Greenspan, *Posthumous Pardons Granted in American History*, (the Death Penalty Information Center: March 2011)<sup>14</sup> available at: <https://files.deathpenaltyinfo.org/legacy/documents/PosthumousPardons.pdf> (accessed on 11 April 2020).

Constitution to come to its conclusion but argues, on several grounds, that the court's interpretation does not represent the correct position of the Constitution.

However, the paper recognises the potential for abuse in the present framing of the two Constitutions and contends that, while it is desirable to emplace some control mechanism on pardon power to prevent this abuse, such check should not come from the judiciary but from the legislature. Departing from the position of some scholars,<sup>18</sup> the paper contends that placing the controlling power in the hands of the judiciary would not be fair to the President. It also recommends a constitutional amendment whereby the President is mandated to disclose the reasons for pardon. Such a disclosure would not only enable the electorate to determine the 'public welfariness' of the act of pardon, it would also help them to electorally punish a President who abuses the power.<sup>19</sup>

To achieve the set-out aim, this paper proceeds in 6 sections. While this section 1 introduces the work, section 2 conceptualises pardon and examines its historical underpinning. In section 3, the paper examines the legal effect of pardon, and section 4 undertakes a critical examination of presidential pardon under the Nigerian and US Constitutions. Section 5 assesses the scope of pardon power vis-à-vis its applicability to pre-conviction cases, criminal contempt proceedings, deceased persons and corporate bodies. Finally, Section 6 concludes the work and makes recommendations.

### **Pardon in Definitional and Historical Context**

It is important to unpack the word 'pardon' and engage with its historical evolution, to be able to discuss the subject within its proper context or perspective. It becomes more important against the backdrop that most Constitutions, like the Nigerian and American Constitutions in section 175 and Article II section 2 respectively, have simply provided for pardon without defining what it is. Much of the elucidation on the term is however found in dictionaries, scholarly works and judicial interpretations. For the purposes of this paper, pardon refers to full or unconditional pardon; it does not cover conditional pardons.

#### **a. Defining Pardon**

According to the Oxford Dictionary of Law, 'pardon' is 'the withdrawal of a sentence or punishment by the sovereign, on advice of the Home Secretary under the Prerogative of Mercy'.<sup>20</sup> Further, the Black's Law Dictionary states that, 'pardon' is an official decision not to punish somebody for a crime, or to say that somebody is not guilty for a crime; the action of forgiving somebody for something; to officially allow somebody who has been found guilty of a crime to leave prison and/or to avoid punishment.<sup>21</sup>

From the scholarly field, Coke observes that at common law, '[a] pardon is a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime,

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<sup>18</sup>Olusola Babatunde Adegbite, 'Presidential Pardoning Power, Judicial Review and New Face of Mercy: An Examination of Pardoning Power in Nigeria and India' (2019) 6 *LUMS LJ* 69.

<sup>19</sup> It is commonly believed that the 38<sup>th</sup> American President Gerald Ford's pardon to his former boss President Richard Nixon, who resigned over Watergate, did not only badly affect the administration but also led to the failure of Ford's re-election bid. See Donald Rumsfeld, 'How the Nixon Pardon tore the Ford Administration apart', *Politico*, (USA, 20 May 2018) available at <https://www.politico.eu/article/how-richard-nixon-pardon-tore-gerald-ford-administration-apart-watergate/> (accessed on 20 April 2020).

<sup>20</sup> Jonathan Law & Elizabeth A. Martin, *Oxford Dictionary of Law* 7<sup>th</sup> ed (Oxford: Oxford University Press, 2009) 391.

<sup>21</sup> Bryan A. Garner, *Black's Law Dictionary*, 10<sup>th</sup> ed (Thomson West, 2015).

offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical'.<sup>22</sup> Judicially, pardon has also been defined. *United States v Wilson*<sup>23</sup> is the first known American case on pardon. Drawing on the English precedent, Chief Justice Marshall held that,

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive... A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance.<sup>24</sup>

Pardon also means the act of officially nullifying punishment or other legal consequences of a crime.<sup>25</sup> In the Nigerian case of *Falae v Obasanjo* (No.2),<sup>26</sup> the Court of Appeal stated that '[a] pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges forfeited on account of the offence...'.<sup>27</sup>

From all of the above, I argue that pardon refers to an act of forgiving or restoring a person for an offence he has either committed or wrongfully accused of, before, during or after his conviction. It is pertinent to note that I deliberately used the word 'restoring' to differentiate the case of an innocent person falsely accused from that of a real offender. While the latter needs forgiveness and restoration of his rights and privileges, the former deserves only restoration of his rights and privileges, wrongfully denied him. In the former's case, there is nothing to forgive, he should rather be the one to forgive the government, hence his pardon should be understood in this context. I will come to this issue of an innocent pardonee later in this paper.

### **b. Historical Evolution of Pardon**

It could be argued that pardon has its roots from the Bible where King David pardoned Shimei the Benjamite.<sup>27</sup> Kobil<sup>28</sup>, though, argues that pardon practice is traceable to ancient Athens, Rome and England. In ancient Athens, by the Adeia process, a convict could be pardoned if he or she received not less than 6,000 votes from the compatriots.<sup>29</sup> Thus, one's ability to obtain pardon depended on one's popularity rather than on the principles of fairness or justice.<sup>30</sup> The Roman pardon was not different from the Athenian practice, in the sense that it promoted selfish political interest rather than justice.<sup>31</sup> This was evidently demonstrated by the way Pontius Pilate pardoned and released guilty Barabbas instead of innocent Jesus<sup>32</sup>, in a bid to protect his political interest against his riotous Jewish subjects who wanted Jesus dead by all means.<sup>33</sup>

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<sup>22</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England* 4th ed (London: 1669) 233.

<sup>23</sup> 32, US (7. Pet.) 150(1833) 159-160; 32 U.S. 435 (1833).

<sup>24</sup> 32 U.S. 435 (1833)438.

<sup>25</sup> *Adeola v State* (2017) LPELR 42327 (CA).

<sup>26</sup> (1999) 4 NWLR (pt. 599) 476.

<sup>27</sup> 2 Samuel 19:16-23 of the Holy Bible.

<sup>28</sup> Daniel T. Kobil, 'The Quality of Mercy Strained: Wresting the Pardoning Power from the King' (1991) 69 *Tex. L. Rev.* 569.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Zachary J Broughton, 'I Beg Your Pardon: Ex Parte Garland Overruled; The Presidential Pardon Is No Longer Unlimited' (2019) 41 *W New Eng L Rev* 183.

<sup>32</sup> John 18:38-40 of the Holy Bible.

<sup>33</sup> Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 16 (1989) cited in Zachary J Broughton (n31).

However, contemporary pardon has its origin from British practice, where the prerogative of mercy debuted on the statutory rolls of the Anglo-Saxon monarchs during King Ine of Wessex.<sup>34</sup> Originally, the pardon power was exercised by the Crown, the clergy, earls and feudal courts until 1535 when the power was exclusively given to the Crown.<sup>35</sup> According to Blackstone, the Crown used the pardon power to ensure that justice was administered with mercy and it was one of the great advantages of monarchy over any other kind of government because it softened the law.<sup>36</sup> The King enjoyed the flexibility to use pardons for any purpose advantageous to his goals.<sup>37</sup> For example, in *Godden v. Hales*<sup>38</sup>, Sir Edward Hales showed in evidence that he had been exempted by the King in respect of an oath of allegiance. The Court held that '[T]he Kings of England [are] absolute Sovereigns; ...the laws [are] the King's laws; ... the King [has] a power to dispense with any of the laws of Government as he [sees] necessary . . . he [is] the sole judge of that necessity; ..no act of Parliament [can] take away that power'.<sup>39</sup> Thus, through petitions or royal writ to the King, a condemned criminal could be pardoned and set free. Through this mechanism, the King used the 'royal prerogative of mercy' as part of the 'power of the sovereign' to forgive an offender by mitigating or removing the consequences of conviction.<sup>40</sup>

One ugly feature of the pardon power in its early stage in Britain is that it became abused, monetised and went beyond the reach of the common man.<sup>41</sup> The rationales which informed the pardon practice, i.e., raising money and enlisting members of the military through the practice became eroded.<sup>42</sup> Thus, Adler argues that 'the king frequently used pardons as partisan indulgences for friends and supporters' and that 'pardons frequently [were] sold'.<sup>43</sup> This led the Parliament to make several attempts to curtail the Crown's power, most of which attempts were unsuccessful until the 1701 Act of Settlement. In 1678, the Parliament attempted to impeach Thomas Osborne who was Earl of Danby and Lord High Treasurer for acts of treason (for conspiring with France by offering it a neutrality) whereas the British Parliament had just approved funds for a war with France. However, King Charles II, whose ally Osborne was, pardoned the latter for the treason, thereby truncating the impeachment proceedings and generating what Duker calls a 'constitutional confrontation'<sup>44</sup> with Parliament. Although the King won the battle by quickly issuing a prorogation of Parliament, the entire British monarchy however lost the war by subsequent events.<sup>45</sup> Subsequently, Parliament passed the 1701 Act of Settlement which prohibited grant of pardon to stop impeachment proceedings. Although the Act did not inhibit the King's pardon power, either generally or specifically, it however prevented the use of that pardon to stop Parliament's

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<sup>34</sup> William F. Duker, 'The President's Power to Pardon: A Constitutional History' (1977) 18(3) *Wm. & Mary L. Rev.* 475.

<sup>35</sup> Daniel T. Kobil (n28) 586.

<sup>36</sup> Williams Blackstone, *Commentaries* (1769)390.

<sup>37</sup> Harold J. Krent, 'Conditioning the President's Conditional Pardon Power' (Dec 2001) 89(6) *California Law Review* 1665.

<sup>38</sup> (1686) 11 St Tr 1166.

<sup>39</sup> *Ibid* [1050]- [1051].

<sup>40</sup> Solomon A.M. Ekwenze, 'Presidential Pardon and Prerogative of Mercy: A Necessary National Soothing Balm for Social Justice', (June 19, 2014) available at SSRN: <https://ssrn.com/abstract=2541929> or <http://dx.doi.org/10.2139/ssrn.2541929> (accessed on 15 April 2020).

<sup>41</sup> William F. Duker (n34) 479.

<sup>42</sup> *Ibid* 478.

<sup>43</sup> David Gray Adler, 'The President's Pardon Power' in Thomas E. Cronin (ed) *Inventing the American Presidency* (Lawrence: University Press of Kansas, 1989)213.

<sup>44</sup> William F. Duker (n34) 489.

<sup>45</sup> Brian C. Kalt, 'Pardon Me: The Constitutional Case Against Presidential Self-Pardons', (1996-1997) 106 *Yale L.J.* 779.

impeachment of the King's officers in deserving cases. In fact, he could still pardon and re-appoint an impeached person but that would be after Parliament has concluded the impeachment process unhindered.<sup>46</sup> This new order thus served some modicum of balancing the power play in the British government.

Upon gaining independence from Britain, most of the new governments in the former colonies fashioned their pardon style in line with the English practice. Thus, under the presidential system of the US and Nigeria, the President is given the sole responsibility of granting pardon for federal offences.<sup>47</sup>

### **Legal Effect of Pardon**

As fundamental as a clarity on the effect of pardon is, this has however not been clearly and unanimously settled, whether statutorily or judicially. The following discussion on American, English and Nigerian cases would reveal the discordant views of courts on the legal implication of pardon.

In the *Wilson case*,<sup>48</sup> the US Supreme Court held that pardon 'exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed'. Also, in *Ex-Parte Garland*,<sup>49</sup> one of the issues for determination was whether the appellant was entitled to go back to law practice, having received presidential pardon for his offences which would have prevented him from doing so. In holding that he was so entitled, the Supreme Court, per Justice Field, stated that,

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.<sup>50</sup>

A similar position was taken in the subsequent case of *Osborn v United States*<sup>51</sup> where the plaintiff, after forfeiting his property to government by an order of court for aiding an enemy confederacy, received a full presidential pardon. The court held that, '[i]t is of the very essence of a pardon that it releases the offender from the consequences of his offense' and that 'the penalty of forfeiture annexed to the commission of the offense must fall with the

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<sup>46</sup> William F. Duker (n34) 496.

<sup>47</sup> Article II s.2 US Constitution and s.175 Nigerian Constitution respectively.

<sup>48</sup> *Wilson* (n23).

<sup>49</sup> 71 U.S. 333(1867).

<sup>50</sup> *Garland* (49) [380]-[381]. A similar decision was held in the similar-fact case of *In the Matter of Petition for Disbarment of Emmons*, 29 Cal. App. 121, 154 Pac. 61g (i915) 46. See also *Hildreth v. Heath*, 1 Ill. App. 82, 87 (1878) where the court said that a Presidential pardon for a federal offense would remove the disqualification, if any, to hold the office of alderman, notwithstanding that the city charter declared that persons convicted of malfeasance, bribery, etc., shall be ineligible.

<sup>51</sup> 91 U.S. 474 (1875). See also *In the matter of an Attorney*, 86 N. Y. 563, 569 (1881) where it was held that, 'The pardon does reach the offence for which he was convicted, and does blot it out, so that he may not now be looked upon as guilty of it. But it cannot wipe out the act that he did, which was adjudged an offence. It was done and will remain a fact for all time' (but see Samuel Williston, 'Does a Pardon Blot Out Guilt' (1914-1915) 28 *Harv L. Rev.* 647. criticising this judicial opinion as being an 'unpardonable reasoning' because of the court's seeming approbation and reprobation).

pardon of the offense itself'.<sup>52</sup> However, a pardon cannot be used to draw money from the government treasury, neither can it be used to recover prior rights or property that are now vested in a third party by virtue of the conviction. Thus, in *Knote v United States*<sup>53</sup>, Knote was convicted of treason, which resulted in his forfeiture of landed property. The government sold the property and paid the proceeds into government treasury. Upon receiving pardon from President Johnson, he sought to recover the proceeds from government. It was held that,

A pardon is an act of grace by which an offender is released from the consequences of his offence, **so far as such release is practicable and within control of the pardoning power,...** Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force.<sup>54</sup>

More specifically on recovery of the sale proceeds in government treasury, the court held that, 'there is this limit to it[President's pardon power], as there is to all his powers,-it cannot touch moneys in the treasury ... except expressly authorized by... Congress. The Constitution places this restriction upon the pardoning power'.<sup>55</sup>

The *Knote case* shows that though the effect of pardon is to blot out the conviction, there are certain baggage or loss that remains permanent with the pardonee, especially where the interest of a third party is involved. This case belies a fundamental issue which was not addressed in the case-perhaps because it was not relevant to the issues for determination. The issue is, when can a pardonee not recover property forfeited as a result of his conviction? Here, Knote's property had been sold and the proceeds lodged in the government account. However, it is not clear whether the court would have reached the same decision if the property had not been sold after forfeiture. Would Knote have been able to recover the property after his pardon? I argue that it would have been possible to recover, because, as the court held, the pardon 'releases the offender from all disabilities imposed by the offence and restores to him all his civil rights'. So, in the absence of an intervening third party's interest, I argue that return of Knote's property would have been the right and lawful thing to do, because part of his civil rights is the right to acquire and own property, which right has been restored by the pardon.

Moving into the English law, there are cases that align with the above American cases. Bracton argues that a pardoned person 'is like a new-born infant and a man as it were lately born'.<sup>56</sup> In *Cuddington v. Wilkins*,<sup>57</sup> the plaintiff was a thief who received pardon. He sued the defendant for defamation on the ground that the latter referred to him as a thief despite the pardon. The court upheld his claim and held that the King's pardon had cured him of the thievery.<sup>58</sup> Also in *Hay v Justices of the Tower Division of London*<sup>59</sup>, it was held that, 'When the crime of which a man has been convicted

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<sup>52</sup> *Osborn* (51) 477.

<sup>53</sup> 95 U.S. 149, 154 (1877).

<sup>54</sup> *Knote* (n53) [153]-[154]. Emphasis mine. In *Boyd v. United States*, 142 U. S. 450 (1892), it was held that a pardonee had a new credit, meaning that he now had competence to testify in court, despite his previous conviction, although the fact of conviction can be used to question his credibility during cross-examination.

<sup>55</sup> *Knote* (n53).

<sup>56</sup> Bracton, *On the Laws and Customs of England* 371 (Twiss trans., 1879), cited in Samuel Williston, 'Does a Pardon Blot Out Guilt?', (1915) 28 *Harv. L. Rev.* 647.

<sup>57</sup> 80 Eng. Rep. 231 (1615).

<sup>58</sup> The court also observed that pardon does not, however, affect private persons' rights (e.g. contractual rights).

<sup>59</sup> (1890) 24 QBD 561.



is pardoned, he is absolved not only from the punishment inflicted upon him by the judge who pronounced the sentence, but from all penal consequences, such as disqualification from following his occupation. To treat it otherwise would be contrary to all good sense’.

Perhaps, owing to the fact that Nigeria’s legal and political systems are tailored after Britain and the US, this same judicial position reverberates in Nigeria. Thus, in *Falae v Obasanjo* (No.2),<sup>60</sup> the Court of Appeal of Nigeria stated:

...The effect of a pardon is to make the offender, a new man (*novus homo*), to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned. I am of the view, that by virtue of the pardon contained in Exhibit 11, the disqualification the 1st respondent was to suffer because of his conviction, has been wiped out...

Despite the seeming consistent judicial position in the three countries I have examined, there are American Supreme Court cases that took a dissimilar position. Thus, in *Burdick v United States*<sup>61</sup>, the court held that there is the ‘confession of guilt implied in the acceptance of a pardon’.<sup>62</sup> This decision means that, contrary to *Garland*, pardon does not blot out guilt but admits it. Also, in *Biddle v Perovich*,<sup>63</sup> a murder convict challenged the validity of commutation. The apex Court, through Justice Holmes, said,

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served **by inflicting less than what the judgment fixed.**<sup>64</sup>

The highlighted part of this decision again suggests that pardon does not blot out guilt. This latter judicial position has been echoed by lower courts in subsequent cases like *In North (George Fee Application)*<sup>65</sup> and *In re Abrams*.<sup>66</sup> Both cases related to the Iran-Contra scandal during President Bush administration. Both George and Abrams served in the administration and testified before Congress over the scandal. They were subsequently indicted and convicted of perjury and unlawfully withholding material information, respectively. After their conviction, President Bush granted them full and unconditional pardons. In their application to recover fees incurred during the testimony<sup>67</sup> and to stop professional discipline by the Bar Board on Professional Responsibility based on the same facts constituting the pardon,<sup>68</sup> the court held that the pardon did not obliterate guilt but merely remove the punishment. Though there were dissenting opinions in both cases, the majority decisions were that, ‘a pardon does not blot out guilt or expunge a judgment of conviction...a pardon does not

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<sup>60</sup> (1999) 4 NWLR (pt. 599) 476.

<sup>61</sup> 236 U.S. 79 (1915).

<sup>62</sup> *Ibid* 90.

<sup>63</sup> 274 U.S. 480 (1927).

<sup>64</sup> *Ibid* 486. Emphasis mine.

<sup>65</sup> 62 F.3d 1434 (D.C. Cir. 1994).

<sup>66</sup> 662 A.2d 867 (D.C. 1995) (Abrams I), vacated and reh g en banc granted, 674 A.2d 499 (D.C. 1996) (Abrams 11). rev'd, 689 A.2d 6 (D.C. 1997) (Abrams III), petition for cert. filed, 65 U.S.L.W. 3767 (U.S. May 6, 1997) (No. 96-1778) Abrams 111, 689 A.2d 6 (D.C. 1997).

<sup>67</sup> *In North* (n65).

<sup>68</sup> Abrams(n66)

blot out probable cause of guilt or expunge an indictment,'<sup>69</sup> and that the pardon 'could not and did not require the court to close its eyes to the fact that Abrams did what he did'.<sup>70</sup>

The most recent American case on this latter school of thought is the 2020 *Arpaio case*.<sup>71</sup> After President Trump had pardoned Arpaio based on the facts already discussed in the introduction, the pardonee applied for a removal of his guilt verdict from the court record, based on the pardon. The District Court held that the verdict still remains in the court's record even after a pardon.<sup>72</sup> In the court's reasoning, '[t]he pardon undoubtedly spared [Arpaio] from any punishment that might otherwise have been imposed', but did not 'revise the historical facts of this case.' On appeal, the 9<sup>th</sup> US Circuit Court of Appeals unanimously affirmed the District Court's decision, by stating that although the verdict no longer has any legal consequence because of the pardon, the conviction cannot however be erased from the court's record.<sup>73</sup>

This latter school of thought appears more convincing than the first school. The *Wilson* and *Garland cases* suggest that the effect of pardon is to blot out the guilt and treat the offender as if he had never committed the offence. This is a hard pill to swallow, because, as seen in the subsequent cases, the fact that a person has been pardoned for an offence does not remove his guilt or conviction from the court's records. The effect of pardon in the real sense, is to remove the punishment attached to the verdict of guilt or conviction, but it does not remove the guilt itself. Thus, it has been observed that, 'Whatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen'.<sup>74</sup>

Further, Williston rightly argues that, '...[e]verybody knows that the word "pardon" naturally connotes guilt as a matter of English...and when it is said that in the eye of the law they [pardonees] are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad'.<sup>75</sup> This position is further fortified by the earlier referenced *Cuddington v Wilkins*, where the court held that, '... he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain after he be cured or manumitted, but that he had been a thief or villain he might say'.<sup>76</sup> Thus, the court's opinion that the pardonee could be called a thief in the past perfect progressive tense (had been) but not in the present tense suggests that the guilt remains-though now in the past- despite the pardon. The American case of *In re William Spenser*<sup>77</sup> illuminatingly sums this point up when the court held that, 'The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offense.'

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<sup>69</sup> *In North* (n65) 1437.

<sup>70</sup> *Abrams* (66) 7.

<sup>71</sup> Arpaio, (n12). Also see *Okongwu* (n9).

<sup>72</sup> Lauren Castle, 'Joe Arpaio to go back to Court over Criminal Contempt Conviction', *Azcentral* (USA:15 December 2019) available at <https://eu.azcentral.com/story/news/politics/arizona/2019/08/13/joe-arpaio-appeals-court-criminal-contempt-conviction-trump-pardon/1997447001/> (accessed on 18 April 2020).

<sup>73</sup> Edvard Pettersson, 'Trump Pardon Won't Erase Arpaio's Criminal Past in Comeback Bid', *Bloomberg* ( 27 February 2020) available at <https://www.bloomberg.com/news/articles/2020-02-27/trump-pardon-won-t-remove-sheriff-joe-arpaio-s-guilty-verdict> (accessed on 18 April 2020).

<sup>74</sup> *State v. Hawkins* 44 Oh. St. 98, 5 N. E. 228 (1886).

<sup>75</sup> Williston (56) 647.

<sup>76</sup> *Wilkins* (57) 82.

<sup>77</sup> 122 Fed. Cas. No. 13234 at 922 (C. C. D. Ore. 1878) where it was held than an alien who seeks to satisfy the statutory condition of naturalisation which requires him to be a man of good moral character cannot rely on his pardon to show good character.

This position thus raises a question around the criminal record of pardonees vis-à-vis pre-employment checks. Assuming a job applicant who was once convicted but pardoned is required to fill out a job application form with a question like, 'have you ever been convicted of any offence?', what would be the answer to the question? This is a dilemmatic situation because, on the one hand, the applicant has been convicted but on the other hand, he has been pardoned and if the *Garland* decision were to be followed, the pardon has blotted out his previous conviction. This issue appears to have been settled in United States *v Noonan*<sup>78</sup> where Noonan received a presidential pardon after his conviction. In his subsequent job search, he was bedevilled with a criminal record disclosure which affected his prospects. He thus applied to court for an expunction of his conviction based on the presidential pardon. While he succeeded at the district court, the Circuit Court of Appeal however held that,

...The President's power, if any, to issue an order of expunction of a criminal record must stem either from an Act of Congress or from the Constitution itself... There is no statute that expressly authorizes the President to tamper with judicial records or to create any fiction through the pardon power...The power to pardon is an executive prerogative of mercy, not of judicial record-keeping...the notion that the President has the ability, through the pardon power...to tamper with judicial records is a concept jurisprudentially difficult to swallow. The idea flies in the face of the separation of powers doctrine...It is beyond cavil that the maintenance of court records is an inherent aspect of judicial power.

The court in *Noonan case* further held that 'the Presidential pardon ...does not eliminate Noonan's 1968 conviction and does not "create any factual fiction" that Noonan's conviction had not occurred to justify expunction of his criminal court record'. In coming to this conclusion, the court relied on the English case of *R. v Foster*<sup>79</sup> where the Court of Appeal held that '...constitutionally the Crown no longer has a prerogative of justice, but a prerogative of mercy. It cannot, therefore, ...remove a conviction but only pardon its effects. The Court...is the only body which has statutory power to quash a conviction...' <sup>80</sup>. Thus, the court anchored its decision on the principle of separation of powers, i.e., whereas the President is imbued with prerogative of mercy (pardon power), he, however, cannot use that prerogative to impinge the judicial power of prerogative of justice to retain or dispose of the record of conviction.

I, therefore, argue that, for a person to have a clean criminal record after his conviction and subsequent pardon, he must appeal against his conviction and have it quashed on its merit.<sup>81</sup> This argument draws on *R v Derek Bentley*,<sup>82</sup> where Bentley was convicted of murder, sentenced and executed on 28 January 1953. In 1993, that is 40 years after his execution, he was granted a royal pardon posthumously. After that, his family applied for quashing of the conviction on the ground of inconsistencies in evidence and misdirection and they succeeded on appeal in 1998.

That notwithstanding, one fundamental issue with the latter school of thought on effect of pardon is that it assumes all pardons means that the pardonee actually committed the offence. However, it is possible

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<sup>78</sup> 906 F.2d 952, 958 (3d Cir. 1990)).

<sup>79</sup> 1 QB 115 [1984] 2 ALL ER 679 [1984]; 3 WLR 401, 79 Cr. App. Rep 61 .

<sup>80</sup> *Ibid* 130.

<sup>81</sup> *Okongwu* (9).

<sup>82</sup> [1998] EWCA Crim 2516.

to convict the innocent. A judicial opinion from the Nigerian *Okongwu case*<sup>83</sup> envisages this situation when it stated that pardon can be granted where a convict ‘...is wrongfully convicted and is afterwards pardoned upon the ground of his innocence’. So, what happens, for instance, where A has been convicted for stealing a laptop and months after his conviction, B confesses that he, not A, actually committed the offence, he is arrested and being prosecuted, and consequent upon his ongoing prosecution, the President decides to pardon A? In this type of situation, would it be correct to say that pardon does not blot out the guilt, both prospectively and retrospectively? Would that not amount to perpetuation of injustice against A? I argue that, in this kind of a situation, the pardon applies both retrospectively and prospectively to the extent that it could ‘annihilate the established fact that he was guilty of the offense’.<sup>84</sup> I, therefore, agree with Weihofen that,

.... A pardon granted for innocence, if it is to serve its purpose, must be given the same effect as a judicial acquittal... A pardon for innocence is an acquittal, and must be given all the effects of an acquittal. A pardon for other reasons is not an acquittal; it leaves the determination of the convict's guilt stand, and only relieves him from the legal consequences of that guilt...The innocent person who has been wrongly convicted has been done a great injustice. Properly, the ...system should provide him a remedy...<sup>85</sup>

Furthermore, Hamilton whose opinion shaped the US constitutional pardon power, also argues in this line by stating that, ‘[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel’.<sup>86</sup> In fact, there is evidence that innocent persons have been pardoned. Thus, in the English case of *R v Timothy John Evans*<sup>87</sup>, Evans was convicted of the murder of his wife and daughter and executed in March 1950. However, few years after his execution, evidence showed that he was innocent, as his neighbour committed the murders. Consequently, on October 18, 1966, Queen Elizabeth II issued a posthumous ‘free pardon’, exonerating him of guilt and declaring his innocence.<sup>88</sup>

### **Presidential Pardon Power under the Nigerian and American Constitutions**

In what follows, I discuss the constitutional framework on presidential pardon in Nigeria and the United States.

#### **Nigerian Constitution**

The presidential pardon power in Nigeria is donated by section 175<sup>89</sup> of the Nigerian Constitution which is compositely captioned ‘Prerogative of Mercy’. The section provides:

Section 175  
The President may-

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<sup>83</sup> *Okongwu* (9).

<sup>84</sup> *Spenser* (77).

<sup>85</sup> Henry Weihofen, ‘The Effect of a Pardon’, [December 1939] *University of Pennsylvania Law Review* 179.

<sup>86</sup> Alexander Hamilton, James Madison and John Jay, *The Federalist Papers: A Collection of Essays Written in Favour of the New Constitution*, No. 74 ((C. Rossiter ed., Coventry House Publishing, 1961) 447.

<sup>87</sup> *R. v John Timothy Evans*, trial transcripts of shorthand, TNA, CAB 143/11

<sup>88</sup> 734 Parl. Deb., H.C. (5th Ser.) at 38-40 (1966).25

<sup>89</sup> The Governors’ equivalent pardon power is contained in section 212 of the Constitution. Owing to their similarities, this discussion on the presidential pardon power should be taken as covering that of the Governors as well.

- 1) Grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;
  - 2) Grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;
  - 3) Substitute a less severe form of punishment for any punishment imposed on that person for such an offence;
- or
- 4) Remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.
  - 5) The powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.
  - 6) The President, acting in accordance with the advice of the Council of State, may exercise his powers under subsection (1) of this section in relation to persons concerned with offences against the army, naval or air force law or sentenced by a court martial.

To summarise, the key features of the above constitutional provisions as they relate to pardon, are, first, the President has exclusive power to grant a pardon to ‘any person concerned with or convicted of any offence’, provided the offence is a federal one. Second, the pardonee could either be ‘concerned with or convicted of’ a federal offence’. The use of the phrase ‘concerned with’ in section 175(1) has become judicially problematic. On a first glance, it suggests that pardon is grantable in favour of those arrested, accused of, charged or being tried for any federal offence before they are ever convicted.<sup>90</sup> However, a recent decision of the Court of Appeal in *Federal Republic of Nigeria v Achida and Anor*<sup>91</sup> held a contrary opinion which opinion I have opposed, strongly, under the discussion on scope of pardon power below.

The third feature in section 175 is that presidential pardons could be conditional or unconditional (full). Where it is conditional, the condition imposed must be lawful. Thus, a condition that seeks to restrict the pardonee’s constitutional rights or order him to commit a crime would not be lawful.<sup>92</sup> Fourth, the President must consult with the Council of State (the Council)<sup>93</sup>, before exercising his pardon power. The use of the word ‘shall’ in section 175(5) indicates that the consultation is a condition precedent to exercise of the power. However, there is a question around the effect of the consultation. Does the law require the President to comply with the outcome of the consultation? Nwabueze contends, and rightly in my view, that, although the President cannot exercise the power without consulting with the Council, he is however not bound by the outcome of the consultation proceedings.<sup>94</sup> This is a sound argument because, the ordinary meaning of

<sup>90</sup> That was the decision in *Murphy v Ford* 390F Supp 1372 (WD Michigan 1975).

<sup>91</sup> (2018) LPELR 46065 (CA) [45]-[46].

<sup>92</sup> Krent (n37).

<sup>93</sup> This is a constitutional body created by Part I of Third Schedule to the Constitution which itemises its composition as the President who is the Chairman, the Vice President as the Deputy Chairman, all former Presidents and Heads of the Federal Government of Nigeria, all former Chief Justices of Nigeria, the President of the Senate, the Speaker of the House of Representatives, all the Governors of the states of the Federation, and the Attorney-General of the Federation. For a critique on the necessity of this body, see Obi, Nwankma, ‘Council of State? What is that?’, *The Vanguard Newspaper*, (Nigeria, 25 February 2018) available at <https://www.vanguardngr.com/2018/02/council-of-state-what-is-that/> (accessed on 20 April 2020).

<sup>94</sup> Nwabueze, Benjamin Obi, *The Presidential Constitution of Nigeria* (London: C. Hurst & Company)144.

the word ‘consultation’ admits of discretion. For example, the word is defined as ‘[t]he act of seeking counsel or advice from someone...’.<sup>95</sup> This plain meaning should be given to the word, except the Constitution otherwise provides, which is not the case here. Thus, any decision at the consultation meeting is merely advisory and not compulsory. To buttress this argument, sections 5 and 6 of Part I of the Third Schedule to the Constitution do not only make the President Chairman of the Council (thereby making the outcome of the consultation predictable), but they also simply limit the power of the Council to ‘advise the President in the exercise of his powers...’ It should also be noted that failure to state clearly on the instrument of pardon that consultation was held with the Council is not fatal, as there is a rebuttable presumption of regularity of official acts.<sup>96</sup> On the other hand, it is unacceptable to use a blanket statement that the pardonee has been pardoned of ‘all offences’, instead of specifying the pardoned offence(s), as that might include both retrospective and prospective offences.<sup>97</sup>

The last feature is that, the presidential pardon power is exercisable in respect of both civilian and military offences.<sup>98</sup> However, section 175(6) states that he is to act on the advice of the Council in this regard. Udofa<sup>99</sup> has argued that as regards military offences, the requirement that the President should act in accordance with the Council’s advice is mandatory, unlike the general provision on consultation already discussed above. The reason the scholar gave for this position is that the President ‘is expressly mandated to act on the advice of that body’.

I do not accept this argument. There is nowhere in the Constitution where such a mandatory tone was used. The gravamen of my disagreement with Udofa is that, the said subsection 6 clearly provides that, ‘[t]he President, acting in accordance with the advice of the Council of State, **may**<sup>100</sup> exercise his powers under subsection (1) of this section...’ The conclusion that can be drawn from the use of ‘may’ in the subsection is that the President still retains his exclusive pardon power, with or without acting on the Council’s advice. While it is true that the word ‘may’ can be interpreted to mean ‘shall’ and *vice versa* in certain cases, I however argue that this is not one of the cases where ‘may’ is deserving of an interpretation of mandatoriness. A community or holistic reading of the entire section 175, together with the already stated constitutional provisions establishing and empowering the Council would reveal that, the letter and spirit of the Constitution tends toward the direction that the Council’s consultation, comments and advice in the entire presidential pardon process is merely advisory and not mandatory.

#### a. American Constitution

Section 2 of Article II of the US federal Constitution provides:

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**

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<sup>95</sup> *US Legal*, available at <https://definitions.uslegal.com/c/consultation/> (accessed on 20 April 2020).

<sup>96</sup> Achida (*n91*)68 and Nigerian Evidence Act 2011 s.168.

<sup>97</sup> *Ibid.*

<sup>98</sup> Nigerian Constitution 175(6).

<sup>99</sup> Imo Udofa, ‘The Abuse of Presidential Power of Pardon and the Need for Restraints’ (2018) 9 *Beijing Law Review* 113.

<sup>100</sup> Emphasis mine.

## against the United States, except in Cases of Impeachment.<sup>101</sup>

The highlighted portion of the above section donates the pardon power of President of the United States. What can be gleaned from it is that the presidential pardon power applies to all offences except cases of impeachment or offences created under state laws. Apart from these exceptions, it is arguable that the scope of the presidential power is almost unlimited. This conclusion is supported by the fiery debates, at the 1787 Constitutional Convention, between Alexander Hamilton's Federalist group and the anti-Federalist group who tried all they could to place several limitations on the pardon power by excluding pre-conviction and treason cases.<sup>102</sup> However, at the end, the Federalists had the upper hand wherein the President was given extensive pardon power, limited in scope only by the impeachment and state offences exceptions.<sup>103</sup>

### Scope of Presidential Pardon Power: Pre-Conviction, Posthumousness, Corporateness and Contempt

As seen in the earlier part of this paper, one issue that the *Wilson* and *Garland* cases generated is, they seem to suggest that the power to pardon is private or discretionary to the President and thus not subject to any external influence. I argue that while the pardon power is almost unlimited, it is however not entirely private to the President. As Kalt argues, 'If pardons are an act of grace, they are an act of public grace, not private fiat'.<sup>104</sup> It could be that it was for this reason that section 175 of the Nigerian Constitution expressly provides that the President shall consult with the Council before taking a pardon decision. Although the outcome of the consultation is not binding on him, it however puts the President under some external advice. This accords with the Holmes' *dictum* that pardon is not a private act of grace but a matter of constitutional scheme to cater for public welfare.<sup>105</sup> In this section, I will analyse the extent of the US and Nigerian constitutional power as it relates to pre-conviction, posthumous and corporate pardons as well as contempt proceedings.

#### a. Pre-conviction Pardon

In the US and Nigerian Constitutions, the President has power to pardon 'Offenses against the United States, except in Cases of Impeachment' in the case of the US and 'any person concerned with or convicted of any offence created by an Act of the National Assembly' in the case of Nigeria. However, in the US, the question of whether these offences are pardonable before conviction is 'steeped in constitutional and historical controversy'<sup>106</sup> among scholars-although only very old literature have addressed this issue. On the one hand, Firmage and Mangrum argue that since pardon technically means admission of guilt, it 'should logically follow, not precede, formal adjudication of the offenses'.<sup>107</sup> On the other hand, Jaworski<sup>108</sup> argues that the President's pardon power extends to pre-conviction cases. This latter position is preferable. Apart from the fact that it enjoys judicial support<sup>109</sup> and has been in practice<sup>110</sup>, it is also the reasonable interpretation of the constitutional provisions on pardon; the

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<sup>101</sup> Emphasis mine.

<sup>102</sup> For a comprehensive discussion of this debate, see Ashley M Steiner, 'Remission of Guilt or Removal of Punishment--The Effects of a Presidential Pardon' (1997) 46 Emory L J 959..

<sup>103</sup> Hamilton (n86) 447.

<sup>104</sup> Kalt (n45) 805.

<sup>105</sup> *Perovich* (n63).

<sup>106</sup> Mark J Rozell, 'The Presidential Pardon Power: A Bibliographic Essay' (1989) 5 *JL & Pol* 459.

<sup>107</sup> Edwin Brown Firmage and Richard Collin Mangrum, 'Removal of the President: Resignation and the Procedural Law of Impeachment' [1974] *Duke LJ* 1023.

<sup>108</sup> Leon Jaworski, *The Right and the Power: The Prosecution of Watergate*, (New York: Reader's Digest Press; Houston: Gulf Publishing Co. 1976) 299.

<sup>109</sup> *Garland* (n49).

<sup>110</sup> E.g., Ex-President Nixon was not a convict when President Ford granted him a pardon.

provisions do not expressly exclude the President's power in pre-conviction cases. Further, to buttress this point, it is apposite to remember that, during the Constitutional Convention of 1787, Luther Martin's argument that the pardon power should be restricted to post-conviction cases did not pull through. This, together with the historical practice at British Common Law where the American pardon power originated from, suggests that the framers of the Constitution intended pre-conviction pardons.

As regards the position in Nigeria, I argue that pre-conviction pardons are constitutional. The Constitution clearly provides that the President may pardon any person 'concerned with or convicted of' a federal offence. It uses a disjunctive ('OR') instead of a conjunctive ('AND'). The Constitution does not define what 'concerned with' or 'or' means. However, section 18(3) of Nigeria's Interpretation Act provides that, 'The word "or" and the word "other" shall, in any enactment, be construed disjunctively and not as implying similarity'.<sup>111</sup> So, it is my argument that the framers of the Nigerian Constitution intended the President's pardon power to extend to pre-trial, pre-conviction and post-conviction cases. Any contrary interpretation would do violence to the clear provisions of the Constitution. While it is true that there are circumstances where the word 'or' can be interpreted to mean 'and' so as to avoid absurdity,<sup>112</sup> I argue that those circumstances do not arise in the instant constitutional provision, because, the literal meaning of 'concerned with' would not lead to any absurdity.

However, in the recent case of *Federal Republic of Nigeria v Achida & Anor*<sup>113</sup>, the Court of Appeal held otherwise. In the case, the appellant had already examined 6 witnesses when the respondents, who were being tried for conspiracy and receiving stolen property, received State Governor's pardon.<sup>114</sup> They subsequently applied and were discharged and acquitted based on the pardon. However, the trial court's decision was quashed on appeal. Justifying its contrary position, the Court of Appeal said:

...This position is in contemplation of the notion that there must be guilt for the exercise of pardon to be activated, taking into consideration the presumption of innocence in Section 36 of the CFRN which attaches to every citizen of Nigeria. By these findings, it is rather apparent... that for there to be a pardon, there must have been a conviction. A pardon is premature and uncalled for when a person, who is presumed innocent until found guilty by a competent Court of law, is yet to be convicted. To proceed to grant a pardon to such a person to whom the presumption of innocence attaches, is to limit or restrict or constrict the constitutional presumption of his innocence therefore impinging on his right, and unwittingly concluding extra judicially, that the accused person still standing trial, is guilty of the offence charged and therefore deserving of a pardon, id est forgiveness ...whereas it is unarguable that Section 212(1) (a) (supra) gives the executive of a State the power to bestow pardon on whom he will, that

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<sup>111</sup> Affirmed in *Abubakar V Yar'adua* (2009) All FWLR (Pt. 457) 1 which held that 'or' is not the same as 'and'.

<sup>112</sup> *Ndoma-Egba V Chukwuogor* (2004) 6 NWLR (Pt. 869) 382 ('In ordinary usage, the word "or" is disjunctive and "and" is conjunctive. But ... there are situations which would make it necessary to read "and" in place of "or" and vice versa. This may occur in order to carry out the intention of the Legislature...').

<sup>113</sup> *Achida* (n91) [45]-[46].

<sup>114</sup> I already stated that section 212 of the Nigerian Constitution gives identical pardon power to state Governors.



power is only exercisable after the person, the beneficiary of the pardon, has been convicted....<sup>115</sup>

As illuminating as the above decision seems, I find myself unable to agree with the court's reasoning. While it is true that the Constitution presumes innocence in favour of an accused person, that presumption does not in any way, whatsoever, affect the constitutional power expressly and identically donated to the Governors and President by sections 212(1) and 175(1), to grant pardon, either before or after conviction. As I have argued above, the use of 'or' in the phrase 'concerned with or convicted of...' in the above sections is not cosmetic but intended to give EITHER accused persons OR convicts access to pardon. I shall come back to this point on 'concerned with or convicted of' very soon, in this paper.

To better situate my disagreement with the court on its interpretation of section 36, I have taken the liberty to reproduce the relevant portions of the Constitution below:

Section 36

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

(6) .....

(7) .....

(8) .....

(9) No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.

(10) No person who shows that he has been pardoned for a criminal offence shall again be tried for that offence.

A holistic reading of the above constitutional provisions would reveal certain fundamental issues. First, and in line with the court's reasoning, everyone charged with an offence has a presumption of innocence in his favour. Second, the section never says the presumption bars pardon, that is, the presumption alone is not suggestive that the President cannot grant the accused pardon while still enjoying the presumption of innocence. Third and most importantly, when one looks at subsection 9 and subsection 10 of section 36 above, it would be clear that the framers of the Constitution never intended that the presumption of innocence would inhibit pardon power. While subsection 9 clearly provides that before one can raise the plea of double jeopardy, he must have been convicted or acquitted<sup>116</sup>, subsection 10, on the other hand, requires a pardonee to show evidence of his pardon for a criminal offence, without the need to show conviction or acquittal.

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<sup>115</sup> *Achida* (n91) 44-45.

<sup>116</sup> See *Umeze v. State* (1973) S.C. 221 where it was held that there must be a final judgment before the doctrine of double jeopardy can arise.

Consequently, I argue that the lawmakers' exclusion of the requirement for conviction or acquittal in subsection 10 was intentional. It is submitted that they had the constitutional provisions on pardon in mind, hence the exclusion, which is unlike the preceding subsection 9. So, the implication here is that, once criminal prosecution has commenced against a person, the President or Governor does not have to wait till the completion of the prosecution before he can pardon him or her, and such a pardon absolves the pardonee of the punishment for the present trial and any subsequent trial on the same facts<sup>117</sup>. This is the only logical conclusion that can be drawn from the above section 36. Additionally, Section 221(1)(b) of Nigeria's Criminal Procedure Act(CPA)<sup>118</sup> buttresses my argument when it provides that where any accused person against whom a charge or information is filed pleads and proves that he has obtained a pardon for his offence, by the production of the instrument of pardon, the court must acquit him. Also, section 277(1) of the Administration of Criminal Justice Act 2015(ACJA) states that, 'A defendant against whom a charge or information is filed may plead that: (a) by virtue of section 238 of this Act he is not liable to be tried for the offence with which he is charged; **or**<sup>119</sup> (b) he has obtained a pardon for his offence. The referenced section 238 requires that an applicant who is claiming double jeopardy under section 277(1)(a) must prove either a conviction or acquittal in his earlier trial, whereas nothing of such is said about pardon in section 277(1)(b). This Act thus supports my argument that pardon can be granted before conviction. In this *Achida case*, the accused successfully produced the instrument of pardon, but the Court discountenanced it simply because they were yet to be convicted. The combined effect of Sections 36(10) and 175 of the Nigerian Constitution, Section 277(1)(b) of the ACJA and Section 221(1)(b) of the CPA, I argue, is that an accused is entitled to an acquittal upon proof of pardon.

In addition, the court failed to reckon with the Supreme Court's reasoning in *Nigerian Army V Brig. Gen. Maude Aminun-Kano*<sup>120</sup> as regards when pardon can apply. While the court in the *Achida* case might have been correct in distinguishing the two cases and disapplying the *Aminun-Kano* decision on the ground that condonation under the Armed Forces Act is different from the constitutional pardon,<sup>121</sup> I however find it perplexing that the Court in *Achida* did not consider the apex court's pronouncement on pardon before coming to the conclusion that there must be conviction before a pardon can be granted. Now, in the *Aminun-Kano* case, the Supreme Court held:

Section 36 (10) of the Constitution of the Federal Republic of Nigeria, 1999 lays down the principles of criminal law that where a person **accused of** committing a criminal offence which is recognized by law and where he has shown that he has **either** been pardoned of the offence by the appropriate authority **or** that he has been tried by a court of law or a tribunal set up by law, then he cannot be subjected to any further trial by any court or tribunal on that same offence. A bar to further prosecution has been placed between him and the offence.<sup>122</sup>

A cursory examination of the above judicial opinion would reveal that conviction does not need to precede pardon. While I notice that the Supreme Court erroneously combined section 36(9) (double

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<sup>117</sup> However, under the Dual Sovereignty Rule, a pardon for a federal offence does not inhibit subsequent state prosecution if the same facts also constitute an offence under the state laws, and vice versa. See *Gamble v United State* 587 U. S. \_\_\_\_ (2019)

<sup>118</sup> Cap C41, Laws of the Federation of Nigeria (LFN) 2004

<sup>119</sup> Emphasis mine.

<sup>120</sup> (2010) 5 NWLR (Pt. 1188) 42

<sup>121</sup> *Achida* (n91) 46-49.

<sup>122</sup> *Aminun-Kano* (n120) 467-469. Emphasis mine.

jeopardy) and section 36(10) (pardon) under the latter section, that error does not detract from the effect of the issue being addressed here. As can be seen in the apex Court's decision, a person only needs to show that he has either been pardoned OR has been tried, convicted or acquitted. If the court in *Achida case* had taken this part of *Aminun-Kano* decision into consideration, it would have come to the correct position that pardon can be granted without conviction. Besides, the Court did not take the historical practice of pardon into consideration. Under the English Common Law, the King could grant pardon either before or after conviction.<sup>123</sup> Therefore, we should not even think of the idea of 'judges' setting timetables for action on clemency[pardon]... by state governors'<sup>124</sup> or Presidents.

Further, in the said *Achida* decision, the Court asserted that what the Government should have done was to urge the Attorney-General (A-G) to discontinue the criminal case against the accused persons under his discontinuance power in section 211 of the Constitution.<sup>125</sup> However, I argue that the discontinuance power (also known as '*nolle prosequi*') and pardon power are two separate powers exercisable by two different persons and having separate legal effect. I argue that such a discontinuance does not generally enjoy the same constitutional potency as pardon. Apart from the fact that criminal proceedings can be re-activated against the accused on the same facts subsequent upon discontinuance<sup>126</sup>, a discontinuance is not exercisable in all cases<sup>127</sup>, neither is it applicable where there is no current occupant in the office of the A-G.<sup>128</sup> On the other hand, according to section 36(10) above, a pardon bars all subsequent criminal proceedings on same facts. To summarise this arm of the argument, I state that there was no irreconcilable conflict between sections 36 and 175 to warrant the position the court took. However, assuming without conceding that such a conflict ever existed, a better option would have been to adopt the doctrine of specificity and last-in-time whereby the more specific provision on the subject matter (pardon) which is section 175 and which also happens to be later in time than section 36, would be treated as an exception to the more general provision in section 36.<sup>129</sup>

Now, let me come back to the point on 'concerned with or convicted of'. I find it difficult to agree with the Court when it held:

In the instant case, the Appellant has discharged this onus of showing that Section 212(1) (a)<sup>130</sup> CFRN (supra) discloses an intention of applying the *eiusdem generis* principle, as only by doing so can effect be given to that provision as a whole. Consequently, the words "grant any person concerned with or convicted of any offence created by any Law of a State..." must be construed to mean persons convicted of offences in any Law of Sokoto State... Thus, the word "or" therein should be read as "and"

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<sup>123</sup> Coke (n 22); Maitland, Frederic William, and H. A. L. Fisher, 'The Constitutional History of England' (London: Cambridge University Press, 1963)480.

<sup>124</sup> *Bowens v Quinn*, 561 F.3d 671, 676 (7th Cir. 2009).

<sup>125</sup> *Achida*(n91) 24. The equivalent identical power for the federal A-G is in section 174.

<sup>126</sup> See *Clarke v. AG Lagos State* (1986) 1 QLRN 119.

<sup>127</sup> By section 174 of the Nigerian Constitution, the A-G cannot prosecute, take over or discontinue criminal cases in a Court- Martial which tries military offences. This is unlike presidential pardon which applies to all federal offences.

<sup>128</sup> See *Attorney General of Kaduna State v. Hassan* (1985) 2 NWLR (Pt. 8) 483 where it was held that discontinuance power is personal to the A-G and that a Solicitor-General or any other person cannot exercise same when there is vacancy in the AG's office.

<sup>129</sup> Philip E. Oamen & Tijani A. Abdulkakeem, 'The Constitutional Jurisdiction of the National Industrial Court: The Unsettled Exclusiveness Question', (2013) 3(1) *Ambrose Alli University Law Journal* 1; AM. JUR. 2D *Constitutional Law* 67 (2009), cited in Mia So, 'Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion'(2011) 86 *Indiana Law Journal* 713.

<sup>130</sup> Equivalent of s.175.

to give meaning and effect to Section 212(1) (a) CFRN and the spirit and intent of the Constitution as a whole.<sup>131</sup>

The court misdirected itself here, because, the *ejusdem generis* rule was clearly inapplicable. To be sure, the rule states that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.<sup>132</sup> Now, the phrase being interpreted in the above case was ‘any person concerned with OR convicted of any offence’. A logical application of the *ejusdem* rule dictates that ‘any person concerned with’ are the specific and PRECEDING words followed by ‘convicted of any offence’ which are the general and SUBSEQUENT words. If the rule were to apply, it means that ‘convicted of any offence’ would be construed to embrace the preceding specific words (any person concerned with) and not the other way round. It is therefore bewildering and unpardonably unnerving that the Court of Appeal could apply the rule in a reverse order. So, I argue that under sections 212(1) or 175(1), the beneficiary of a Governor or President’s pardon power can either be a person charged with an offence OR a person convicted of an offence, not just the latter only. A journey into a commonwealth country, the Republic of the Gambia (Gambia) would help to drive this point home. Section 82(1) of the 1997 Gambian Constitution contains a similar presidential pardon power, but it clearly states that, ‘[t]he president may, after consulting the Committee established by subsection (2) grant to any person **convicted of**<sup>133</sup> any offence a pardon either free or subject to lawful conditions’. This Constitution clearly provides that presidential pardon is only available to those who have been convicted. So, if the Nigerian lawmakers had intended the same thing, they would not have inserted ‘concerned with’ in section 175(1).

Lastly on the *Achida* case, I also disagree with the Court on its needless assumption that every pardon assumes element of guilt. In other words, the fact that a person is pardoned does not necessarily mean that he is guilty of the offence charged and so have his presumption of innocence impinged. As has been seen in this paper, cases abound where innocent persons have been charged and even convicted.

#### **b. Contempt Proceedings**

As I have argued, a cursory look at the provisions of the two Constitutions being considered indicates that the President has the power to pardon any federal offence, except cases of impeachment as regards the US. The question then is, can the President pardon offences that are subversive of the effective functioning of other arms of government? Would such pardon not violate the principle of separation of powers? Put more pointedly, can a Presidential pardon a person who has been charged or convicted of contempt in the front or outside the court.<sup>134</sup> It is well known that the power to penalise contempt ‘is essential to the preservation of order in judicial proceedings and to the enforcement of judgments, orders, and writs; consequently, it is essential to the due administration of justice.’<sup>135</sup> A court without the power to punish those who assault its proceedings or enforcement of its orders disgraces its enabling enactment and stigmatises its age of invention.<sup>136</sup> Then, should the outcome of the exercise of this judicial power be subject to the pardon of the head of another arm of government? Though it may not seem proper, the exercise of pardon in such cases, is a constitutional possibility and available evidence demonstrates this. In *Ex-Parte Grossman*,<sup>137</sup> Grossman was accused of nuisance by unlawfully selling liquor, consequent

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<sup>131</sup> *Achida (91) [59]-[60]*.

<sup>132</sup> *Buhari v Yusuf* (2003) NWLR (pt 841) 446; (2003) 6 S.C. (pt. II) 156; *Circuit City Stores Inc v Adams*, 532 U.S. 105 (2001).

<sup>133</sup> Emphasis mine.

<sup>134</sup> For a detailed discussion on the difference between civil and criminal contempt of court, see Genevieve A Bentz, ‘A Blank Check: Constitutional Consequences of President Trump’s Arpaio Pardon’ (2018) 11 *Alb Gov’t L Rev* 250.

<sup>135</sup> Duker (n34)528.

<sup>136</sup> *In re Nevitt*, 117 F. 448, 455 (8th Cir. 1902); *Watson v. Williams*, 36 Miss. 331, 341 (1858).

<sup>137</sup> 267 U.S. 87 (1925)

upon which the court granted an injunction, prohibiting him from selling liquor on his business' premises. Having disobeyed the order of injunction, he was convicted of contempt. While serving his sentence, he got a presidential pardon. 6 months later, the court recommitted him to prison on the same facts. He pleaded presidential pardon. His plea was upheld by the Supreme Court which held that,

The king of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court just as he did ordinary crimes and misdemeanors .... the word "pardon" included within its scope the ending by the king's grace of the punishment of such derelictions, whether it is imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had.<sup>138</sup>

The implication of this decision is that the President's pardon extends to criminal contempt of court.<sup>139</sup> While I agree that this *Grossman* position may not serve the interest of due administration of justice nor respect the tenets of separation of powers, in that '[w]ithout the ability to hold persons in contempt, it would be substantially more difficult to prevent judicial proceedings from being reduced to non-binding advisory opinions'<sup>140</sup>, this decision however remains the correct interpretation of the two Constitutions being discussed in this paper. It is arguable that this *Grossman* principle was what emboldened President Trump's recent pardon for Arpaio who was convicted of criminal contempt. The validity of this Trump's exercise of pardon has been recognised by both the trial District Court and the 9<sup>th</sup> Circuit Court of Appeals,<sup>141</sup> thus following the precedent in *Grossman*.<sup>142</sup> In any case, the *Grossman* principle could be justified by a reasoned explanation 'that contempt of court is not an offense against a judge personally. Instead, it is considered an offense against the state in general'.<sup>143</sup> Consequently, the President's pardon power can be extended to anyone charged or convicted of (federal) courts' contempt which comes within the definition of 'offence',<sup>144</sup> because, 'the power ... conferred is unlimited, with the exception stated, i.e., cases of impeachment It extends to every offense known to the law'.<sup>145</sup>

Further, this *Grossman* case has similarity with the Nigerian case of *Okongwu v State*<sup>146</sup> where the Governor granted a convict a pardon on the same day he was convicted of criminal contempt of court. In deprecating the action of the Governor, the Court of Appeal held that, 'One need not say much on the rather indecent haste and pointless confrontation with the Court attendant on the grant ...of a free

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<sup>138</sup> *Ibid* 272. See the earlier English case of *Thomas of Chartham v. Benet of Stamford*, YB 6-7 Edw. 2, reprinted in 24 SELDEN SOCIETY 185 (1909) which recognised the power of the British Sovereign to grant pardon for criminal contempt. However, see the earlier American case of *Jones v. Mould*, 132 N.W. 45, 49 (Iowa 1911) where it was held that the constitutional provision of due process, and thus pardon, applies "only to charges of crime" and contempt is not a crime though it is "generally spoken of as a quasi-crime".

<sup>139</sup> The court in *Grossman* however held that the pardon power does not extend to civil contempt proceedings because, unlike criminal contempt, the punishment in the proceedings is merely remedial and not punitive. See Paul M. Butler, 'Contempt and Executive Power to Pardon' (1929) 4 *Notre Dame L. Rev.* 548.

<sup>140</sup> Bentz (134) 253.

<sup>141</sup> *United States v. Arpaio* D.C. No.2:16-cr-01012-SRB-1 (D.C. February, 2020), full judgment available at <https://drive.google.com/file/d/1bpgOglhG14Jph7SWHCbpWtfJlagxFlna/preview> (accessed on 18 April 2020).

<sup>142</sup> However, see the arguments in Bentz(134), 281 to the effect that the two cases are distinguishable. According to the author, 'What distinguishes this case is Arpaio's targeting of Judge Snow's wife, the spurious investigation of Judge Gary Donahoe, and public statements that Arpaio would continue his discriminatory practices regardless of what the court had ruled...'.  
<sup>143</sup> *Grossman* (n132), 265.

<sup>144</sup> See *United States v Klein* 80 U.S. 128, 147 (1871) where it was held that '[i]t is the intention of the Constitution that each of the great co-ordinate departments of the government ... shall be, in its sphere, independent of the others. To the executive alone is [en]trusted the power of pardon; and it is granted without limit'.

<sup>145</sup> *Grossman* (132).

<sup>146</sup> *Okongwu* (9).

pardon... more so, that the offence...had to do with maintaining the dignity of the Court...'. However, this condemnation did not affect the validity of the pardon.

In addition, it is arguable that the *Grossman* principle may apply to legislative proceedings too. For example, on 17 April 2018, armed thugs, in alleged support for a suspended Senator, invaded the hallowed chambers of the Senate of the National Assembly of Nigeria and made away with the mace.<sup>147</sup> Similarly, on 07 August 2018, the precincts of the National Assembly was invaded by masked officers of the Government secret police, State Security Services (SSS) in apparent solidarity with the pro-executive Senators who wanted to impeach the anti-executive Senate President.<sup>148</sup> Assuming those pro-government invaders were arrested and charged to court, would the President's pardon power under the Constitution be applicable in the circumstance? Would that not lead to an encouragement of thugs to invade the hallowed chambers of the legislature at will? Unfortunately, going by the Constitution and the *Grossman* decision, the power would be applicable. The unchallengeability of pardon power finds further fortification in the fairly recent American case of *Bowens v. Quinn*<sup>149</sup> where it was held that '[e]xecutive clemency is a classic example of unreviewable executive discretion because it is one of the traditional royal prerogatives ... borrowed by republican governments for bestowal on the head of government.' The President's unlimited pardon power was also recognised in the Ex parte Garland case.<sup>150</sup>

### c. Posthumous Pardon

As seen above, sections 175(1) and Article II Section 2 of the Nigerian and American Constitutions form the basis of presidential pardon. While former says that the pardon may be granted to 'any person' concerned with or convicted of any federal offence, the latter also provides that pardon can be granted in respect of 'offenses' against the United States except in cases of impeachment.

As regards the US, there is no clear constitutional statement as to when the offence must have been allegedly committed to warrant a pardon. Further, the question of posthumous pardon 'has never been resolved judicially'<sup>151</sup> in the US as no judicial opinion has been rendered on it. The closest to the issue are the decisions in *Meldrim v United States*<sup>152</sup> and *Sierra v United States*<sup>153</sup> which have similar facts. In the first case, the President granted a pardon to Mr Doyle who aided the enemy during the Civil War, he however refused to accept it as demanded before he died. In the second case, the President granted general pardon to many rebels with a condition that they swore to an oath of allegiance, which Mr. Sierra refused to take for two years before he died. In the two cases, the wives as Administratrix sought to claim benefits under the pardon but it was held that, the pardon was not effective as the deceased did not act according to the conditions that would have activated it..

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<sup>147</sup> Nasir Ayitogo and Kemi Busari, 'Developing Story: Thugs invade Senate, steal Mace', *Premium Times Newspaper*, (Nigeria, 18 April 2018), available at <https://www.premiumtimesng.com/news/headlines/265329-developing-story-thugs-invade-senate-steal-mace.html> (accessed on 14 April 2020).

<sup>148</sup> Kemi Busari and Nasir Ayitogo, 'Live Updates: SSS blocks National Assembly as plot to remove Saraki thickens', *Premium Times Newspaper*, (Nigeria, 08 August 2018) available at <https://www.premiumtimesng.com/news/headlines/279141-live-updates-sss-blocks-national-assembly-as-plot-to-remove-saraki-thickens.html> (accessed on 14 April 2020).

<sup>149</sup> 561 F.3d 671, 676 (7th Cir. 2009).

<sup>150</sup> Garland (n49) 380 where it was held that, '[t]he [pardon] power thus conferred is unlimited, with the exception [in cases of impeachment]. It extends to every offence known to the law and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction'.

<sup>151</sup> Office of the Legal Counsel, Presidential Authority - Slovik Case 2 Op. Off. Legal Counsel 370, 373 (1977).

<sup>152</sup> 7 Ct. Cl. 595 (1871),

<sup>153</sup> 9 Ct. Cl. 224 (1873).

However, I argue that, a deceased person can be pardoned under the US Constitution, provided he was accused or charged or convicted of any federal offence while alive. What the Constitution provides is any federal offence- and I argue that such alleged offence may be a past or present offence and that the alleged offender may or may not be alive at the time of the grant of pardon. Since one of the objectives of pardon is the removal of stigma from a person or correction of injustice,<sup>154</sup> a deceased person whose image was wrongfully tarnished by a baseless charge or conviction should be entitled to it. The fact that he or she is no longer alive to benefit from the restoration of his rights and reputation does not mean that the value of pardon has been defeated, as the stigma of conviction remains even in death, until removed by pardon.<sup>155</sup> I also argue that pardon serves as a relieving closure for the family of the deceased.

Apparently in line with this argument, there are evidence that posthumous pardons have been granted, at least three times, by American Presidents. The first beneficiary of posthumous pardon was Lt. Henry Flipper who was the first African-American officer to command Buffalo Soldiers' units. He however became a victim of miscarriage of justice on grounds of race when he was court-martialled for embezzlement and conduct unbecoming of an officer. Although he was acquitted on the first charge, he was convicted of the charge of conduct unbecoming of an officer and subsequently dismissed. He later died at the age of 84 while he was still pursuing the restoration of his tarnished reputation. After his death, the Army Board of Appeals gave him a posthumous honourable discharge because he was unduly and unjustly treated at his trial.<sup>156</sup> On 19 February 1999, President William Clinton granted the first ever posthumous pardon in his favour. The second President to have granted a posthumous pardon was George W. Bush who pardoned Charlie Winters in 2008 after he was convicted for aiding the enemy in 1940.<sup>157</sup> The last one was granted recently by President Trump to Boxer Jack Johnson on 24 May 2018.<sup>158</sup>

As regards Nigeria, the question turns on the meaning of 'any person' used in section 175. The question is, does a dead person come within the meaning of any person? I answer the question in the affirmative. At this juncture, it is important to determine who a person is, in order to determine whether deceased persons are eligible for pardon. It would be useful to look at the position of Nigerian laws on the matter. Section 175 does not define 'any person' and Section 318 of the Constitution which is the interpretation section of the Constitution also does not define the word 'person'. However, according to section 18 of Nigeria's Interpretation Act<sup>159</sup>, "person" includes anybody of persons corporate or unincorporated'. By this statutory definition, two arguments are tenable. First, a literal interpretation of the section suggests that the presidential pardon power which applies to 'any person' can be granted to a natural person or artificial person (the argument on corporate pardon is discussed below).

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<sup>154</sup> *Garland* (49)120.

<sup>155</sup> Darryl W. Jackson, *etal*, 'Beuding Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper' (1999) 74 *Indiana Law Journal* 1251.

<sup>156</sup> *Ibid* 1253.

<sup>157</sup> Gregory Korte, 'A Trump Pardon for boxer Jack Johnson would be just the Third Posthumous Pardon in History, *USA Today*, (USA, 15 December 2019), available at <https://eu.usatoday.com/story/news/politics/2018/04/25/trump-pardon-boxer-jack-johnson-would-just-third-posthumous-pardon-history/539030002/> (accessed on 03 May 2020).

<sup>158</sup> Gregory Korte, 'A Trump Pardon for boxer Jack Johnson would be just the Third Posthumous Pardon in History, *USA Today*, (USA, 15 December 2019), available at <https://eu.usatoday.com/story/news/politics/2018/04/25/trump-pardon-boxer-jack-johnson-would-just-third-posthumous-pardon-history/539030002/> (accessed on 03 May 2020).

<sup>159</sup> Cap 123 Laws of the Federation of Nigeria (LFN) 2004.

The second argument under the Interpretation Act relates to the use of the word 'include' instead of 'means' in the definition section of a person. Thus, I argue that, using the word 'include' for the definition, the Act makes its own definition of 'person' inexhaustive. This argument is further fortified by the fact that the same section 18 uses 'means' for some words while it uses 'includes' for others. For example, with respect to the police, the section provides, "police officer" means any member of the police force and "superior police officer" means a police officer of or above the rank of assistant superintendent'. So, while the definition of police officer or superior police officer is statutorily determined, closed and exhausted by the Act, the definition of 'person', is inexhaustive or open to further definition. Hence, I contend that, for the purposes of section 175(1) above, 'any person' includes any living person or any dead person. A cursory look at the provisions suggests that what the President should consider in determining the eligibility of a person is whether, at the time of granting the pardon, the person was 'concerned with or convicted of any offence...'. In other words, the President is not bound to enquire into the living status or existence of the person at the time of grant of pardon.

Thus, once it is established that the person was engaged in or participated in any offence (that is concerned with) or was actually convicted of any offence at any point in time, the section kicks in, whether or not the pardon beneficiary is still alive. The pardon provisions of the Constitution, as ambiguous as they may be, must be respected until they are amended. As the court stated in the American case of *Schick v. Reed*<sup>160</sup>, 'the pardoning power is an enumerated power of the Constitution and..., its limitations, if any, must be found in the Constitution itself'.<sup>161</sup> To fortify my argument, a borrowing from the Halsbury's Laws of England(Halsbury's) may be pertinent. According to Halsbury, 'A pardon may be granted posthumously'.<sup>162</sup> Further, under the British Policing and Crime Act 2017,<sup>163</sup> a person who died before 31 January 2017 but was convicted or cautioned for homosexuality before his death may be entitled to a posthumous pardon. Since the Nigerian and American pardon system is tailored after the British system, there is no valid reason for rejecting the clear import of this definition and the British statutory and judicial position on posthumous pardon as represented by the *Bentley* and *Evans* cases which have already been discussed above.<sup>164</sup> Thus, there is 'no proper legal or policy justification for refusing to issue a posthumous Presidential pardon...'.<sup>165</sup>

It is further argued that, after all, a dead person is still a person.<sup>166</sup> In other words, a person could either be described as a living person or a dead person. I argue that death does not affect the personness of a person, it only removes the livingness of the person. A dead person can still possess certain features, including rights and privileges, such as having his reputation restored by pardon. To buttress this argument, I refer to paragraph 1 of the First Schedule to Nigeria's Copyright Act<sup>167</sup> which provides that copyright in literary, musical or artistic other than photographs shall be valid until 70 years after the death of the copyright owner. This simply demonstrates that dead persons have some rights, even though they may not be able to enforce them in person. So, pardon is available to both the living and the dead. A contrary interpretation would do a great violence to the letter and spirit of the Constitutions under consideration. If the lawmakers had intended to limit the grant of pardon to living bodies only, they would have stated so clearly.

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<sup>160</sup> 419 U.S. 256 (1974).

<sup>161</sup> Ibid. 267. See also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) where it was held that, 'To the executive alone is intrusted the power of pardon, and it is granted without limit'.

<sup>162</sup> Halsbury's Laws of England, 4th ed. Reissue 1996, Vol. 8(2)823.

<sup>163</sup> s. 164(1) & (2).

<sup>164</sup> *Bentley* (n82) and *Evans* (n87).

<sup>165</sup> Jackson (155)1292.

<sup>166</sup> Ellen Stroud, 'Law and the Dead: Is a Corpse a Person or a Thing?' (2018) *14 Annual Review of Law and Social Science* 11 available at: <https://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-110316-113500> (accessed on 20 April 2020).

<sup>167</sup> Cap 28, Laws of the Federation of Nigeria, 2010.



Moreover, in the African context, existence goes beyond death; death is a form of transformation to the after-life and therefore part of human existence.<sup>168</sup> Thus, ‘Africans see death as a transition, a deviation from one status to a higher realm of duty...it is expected that one moves to the next stage as soon as he she is done with the lessons of the earthly stage’.<sup>169</sup> In the same vein, the American context appreciates the uniqueness of death and the dead. Hence, in *Louisville & NR Co v Wilson*,<sup>170</sup> a US Court stated that, ‘Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing...The body is left still and cold and is all that is visible to mortal eye of the man we knew. Around it clings love and memory...And the law – that rule of action which touches all humans – must touch also this thing of death...’. It is, therefore, my argument that the law of pardon ‘must touch also this thing of death’ by restoring the reputation of the dead, even if posthumously. Reputation is one property that makes for a constitutive element of personhood. I further argue that reputation in this sense transcends the human existence and attaches even to the dead. After all, there is always an assumption in many cultures that the dead do not always cease to live.<sup>171</sup> That is why virtually all societies have customs concerning respect for corpses and the treatment of the bodies of the dead.<sup>172</sup> Hence, a dead person’s reputation can open a floodgate of goodwill for those associated with him or her while alive. Therefore, once that reputation has been assailed, as in the case of innocently convicted persons, the attack on their reputation may make them to not rest in peace in the great beyond. Thus, a pardon by the appropriate authority would bring about a restoration of that reputation, thereby assuaging both the living and the dead.

Lastly on posthumous pardons, it should be noted that a support for a posthumous pardon does not mean a call for history to be re-written. What happened in the past may not be judged correctly through today’s lens and microscope. However, what I support is a re-evaluation and perhaps correction of what went wrong under some mistrials, like the one that happened to Flipper. As Tomassini has rightly put it:

Those of us who support posthumous pardoning are not necessarily re-writing history to suit the moral standards of the present. Understanding historic justice does not preclude re-evaluating its moral force now. The normative force of the past is not hermetically sealed; its effect has an influence on present generations who have to live with decisions that condemned their ancestors. This is particularly difficult when normative historic decisions no longer stand the test of time. Whilst it is, of course, important not to rewrite the past to suit the present, it is perfectly acceptable to re-evaluate its normative influence, especially when such influence shames contemporaries still affected by it.<sup>173</sup>

#### **d. Corporate Pardon**

I argue that, in the absence of any clear-cut definition that demonstrates that the legislative intent was to make the presidential pardon exclusive to natural persons, corporate bodies can come within

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<sup>168</sup> Kwame Gyekye, *African Cultural Values: An Introduction* (Lansing, MI: Sankofa, 1996).

<sup>169</sup> Jones M. Jaja, ‘The Dead in the Lives of the Living: A Socio- Cultural Survey of Burial Sites in the Niger Delta’ (2013) 13(3) *Global Journal of Human Social Science* 37.

<sup>170</sup> 51 S.E. 2d, 25; Ga. 1905

<sup>171</sup> William Henry Francis Basevi, *The Burial of the Dead* (E.P. Dutton and Co. 1920):

<sup>172</sup> Thomas C. Grey, *The Legal Enforcement of Morality* 105 (1983), cited in Tyler T. Ochoa and Christine Jones, ‘Defiling the Dead: Necrophilia and the Law’ (1997) 18 *Whittier L. Rev.* 539. Available at: <http://digitalcommons.law.scu.edu/facpubs/89>

<sup>173</sup> Floris Tomassini, *Remembering and Disremembering the Dead: Posthumous Punishment, Harm and Redemption over Time* (London: Palgrave Macmillan, 2017).

the meaning of ‘any person’ to whom pardon can be granted. Section 18 of Nigeria’s Interpretation Act states that,<sup>174</sup> “‘person” includes anybody of persons corporate or unincorporated’. By this statutory definition, pardon for corporate bodies is legally tenable. This argument finds anchorage in the fact that, by several Nigerian laws, such as the Companies and Allied Matters Act<sup>175</sup>, Standard Organization of Nigerian Act,<sup>176</sup> the National Environmental Standards and Regulatory Agency Act 2007, and Failed Banks (Recovery of Debts and Financial Malpractices in Banks Act,<sup>177</sup> both natural and artificial persons are subjects of criminal prosecution. These Acts create several administrative and criminal corporate offences, and it has even been observed that a corporation can commit heinous offences, including manslaughter or murder<sup>178</sup> and corruption.<sup>179</sup> In fact, section 317 of Nigeria’s Criminal Code Act<sup>180</sup> provides for the offence of manslaughter and there is evidence that a company was convicted and fined for manslaughter in the Nigerian ‘My Pikin’ case.<sup>181</sup> Further, Section 478 of Nigeria’s Administration of Criminal Justice Act 2015 (ACJA) states that a corporation can take its plea to a criminal charge either orally or in writing through its representative. The ACJA also defines a corporation as anybody corporate, incorporated in Nigeria or elsewhere.<sup>182</sup> So, nothing should stop corporate bodies from benefiting from pardons in deserving cases.

In the US, corporate offences are also recognised under federal and state laws.<sup>183</sup> So, where a corporation faces any criminal trial, I argue that it can be pardoned either before, during and after conviction by virtue of the constitutional pardon power. It is arguable that a corporation cannot be imprisoned or sentenced to death<sup>184</sup> but it is also true that imprisonment or death penalty is not the

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<sup>174</sup> Interpretation Act (n159).

<sup>175</sup> Cap C20, LFN 2004. Section 65 provides that, ‘Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and **the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person**’. Note that this law is about to be repealed by the Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 which is currently awaiting presidential assent at the time of writing this paper. However, the proposed law retains several corporate administrative and criminal offences.

<sup>176</sup> Cap S9 LFN 2004

<sup>177</sup> Cap F2, LFN 2004.

<sup>178</sup> For this proposition, see *R v East Kent Coroner, Ex Parte Spooner and Others* [1989]88 Cr App 10; Mueller, ‘Mens Rea and Corporation’ (1957)19 *U.P.L. Rev.* 21, cited in Samson Erhaze & Daud Momodu, ‘Corporate Criminal Liability: Call for a New Legal Regime in Nigeria’ (Dec. 2015) 3(2) *Journal of Law and Criminal Justice* 63.

<sup>179</sup> Eghosa Osa Ekhaton, ‘Regulating the Activities of Multinational Corporations in Nigeria: A Case for the African Union?’ (2018) 20 *International Community Law Review* 30.

<sup>180</sup> Cap C38 LFN. 2004.

<sup>181</sup> Ramon Olademiji, ‘Appeal Court Orders “My Pikin” Seller to Pay N1m Fine’, *The Punch Newspaper* (Nigeria, 31 May, 2016) available at: <https://punchng.com/appeal-court-orders-pikin-seller-pay-n1m-fine/> (accessed on 29 April 2020). See also Olarinde E. Smaranda & Udosen Jacob, ‘Corporate Manslaughter Law in Nigeria: A Comparative Study’ (2020) 11 *Beijing Law Review* 358.

<sup>182</sup> S.477.

<sup>183</sup> The principle of Corporate offence was first recognised in *New York Central & Hudson River R.R. Co. v. United States* 212 U.S. 481 (1909). Also see Brickey, K.F., ‘Corporate Criminal Accountability: A Brief History and an Observation’, (1982) 60 *Washington University Law Quarterly* 393; Beale, S.S., ‘Symposium: Corporate Criminality: Legal, Ethical, and Managerial Implication: Solution: Is Corporate Criminal Liability Unique?’, (2007) 44 *American Criminal Law Review* 1503; John Hasnas, ‘The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability’, (2009)46 *American Criminal Law Review* 1329; Ved P. Nanda, ‘Corporate Criminal Liability in the United States: Is a New Approach Warranted?’ in Pieth M. & Ivory R. (eds) *Corporate Criminal Liability* (Ius Gentium: Comparative Perspectives on Law and Justice, vol 9. Springer,2011).

<sup>184</sup> However, see Olarinde E. Smaranda & Udosen Jacob, ‘Corporate Manslaughter Law in Nigeria: A Comparative Study’ (2020) 11 *Beijing Law Review* 358 for a contrary argument.

only punishment; fine is also a punishment<sup>185</sup>. Hence, assuming a corporation is convicted and fined as in the Nigerian ‘My Pikin’ case above, the President has the power to pardon it either before or after the payment of the fine. The pardon would restore the corporate integrity or goodwill that the company may have lost as a result of the conviction<sup>186</sup>, and if it has suffered any forfeiture or loss of any regulatory license or recognition because of the offence<sup>187</sup>, it shall be entitled to a restoration. It is only sensible, in the absence of any express contrary constitutional or statutory provisions, that justice be served by applying pardon power to both natural and artificial persons facing criminal proceedings.

Although there is no known caselaw, either in Nigeria or the US, where pardon has been granted to a corporate body, there is however some evidence that suggests that it is possible constitutionally. In 1976, a US company by name Emprise Corporation was convicted of racketeering and it later applied for a presidential pardon.<sup>188</sup> Although it was not granted on grounds of merits, the Justice Department in their recommendation to the President stated that though the application was unprecedented, same however fell within his pardon power.<sup>189</sup>

### Final Thoughts

My discussion of the pardon power reveals that the framing of the two Constitutions that have been examined gives the President an almost unlimited pardon power. He can pardon any conceivable person, provided the person does not come within the constitutionally stated exceptions to the pardon power. However, this presents a situation where the President’s power is inexhaustible and at the same time unchecked, which power could be used to empower and encourage his foot soldiers to attack the other arms of government. Also, the pardon power empowers the President to grant pardon for any reason or for no reason as he does not need to disclose justification for his choices.<sup>190</sup> This, according to Story, could lead to a situation where the courts and the legislature ‘would be wholly dependent upon the [President’s] good will and pleasure for the exercise of their own powers’.<sup>191</sup> As terrible as this situation is, it cannot be helped by any means other than by a constitutional amendment. The presidential pardon is a donation from the Constitution and ‘its limitations, if any, must be found in the Constitution itself’.<sup>192</sup>

To avert this situation, Adebite suggests that the judiciary should be empowered to review the exercise of pardon power.<sup>193</sup> However, I contend that placing the checking power in the hands of the judiciary would not be fair to the President, in the sense that the judiciary must have had something to do with the subject of pardon, thereby making it an ‘interested party’. Put differently, the judiciary, for instance, whose actions or contempt powers a pardon seeks to pre-empt or undermine, cannot be in

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<sup>185</sup> For example, section 1(6) of the UK’s Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) provides that upon conviction for manslaughter or homicide, a corporation shall be liable to a fine. This law is replicated in the Nigeria’s Corporate Manslaughter Bill (CMB), 2010.

<sup>186</sup> For example, section 10 of the CMCHA provides that a corporate convict may be asked to publish the fact of conviction to the general public.

<sup>187</sup> Stephen A. Yoder, ‘Criminal Sanctions for Corporate Illegality’ (1978) 69(1) *The Journal of Criminal Law and Criminology* 40.

<sup>188</sup> Tony Kornreiser, ‘Federal Pardon Sought By Emprise Corporation’, *The New York Times*, (New York, 14 September, 1976), available at: <https://www.nytimes.com/1976/09/14/archives/federal-pardon-sought-by-emprise-corporation-a-pardon-is-sought-by.html> (accessed on 01 May 2020).

<sup>189</sup> Anthony Marro, ‘Emprise Corp, Loses Plea For U.S. Pardon’, *The New York Times*, (New York, 29 September, 1977), available at: <https://www.nytimes.com/1977/09/29/archives/emprise-corp-loses-plea-for-us-pardon-sports-conglomerate.html> (accessed on 01 May 2020).

<sup>190</sup> Krent (37)1673.

<sup>191</sup> I. J. Story, *Commentaries on the Constitution of the United States* (Michigan: Microfilms International, 1851)551.

<sup>192</sup> *Schick v Reed*, 419 U.S. 256, 266 (1974).

<sup>193</sup> Adebite (18) 79-81.

the best position to fairly determine the use of the presidential pardon power. As Kalt notes, government officials, whether executive or judicial, should be kept from acting as decision-makers in matters that directly, materially, uniquely and indirectly affect them.<sup>194</sup> Therefore, since pardon pre-judges or undoes a judicial decision, the judges are not well-suited to review the pardon process.<sup>195</sup>

Instead, I recommend that the legislature is better placed to perform an oversight or controlling function over the pardon power. To fortify this argument, it is further contended that several presidential or executive appointments are constitutionally required to go through a legislative approval or confirmation, thereby demonstrating that, by constitutional design, the legislature is better suited to regulate the exercise of pardon power. I propose that a constitutional amendment be effected by an insertion of a controlling clause in the pardon sections of the Constitutions. Such a clause may be modelled after the one proposed by an American Senator in 1974<sup>196</sup> to the effect that any pardon granted under the Constitution would become ineffective, if within a certain period (say 6 months) of its issuance, the legislature disapproves of it by a 2/3 majority resolution. Although such legislative checkmating mechanism is itself subject to abuse in that the legislators may use it as a political bargaining tool,<sup>197</sup> it is however more advantageous than a one-tiered pardon power or a likely biased judicial review. As Duker notes, this proposed checking device is analogous to the courts' power of judicial review which makes the challenged legislation valid and effective until judicially pronounced otherwise.<sup>198</sup> In other words, the fact that the legislature may disapprove of a certain pardon does not affect the validity of the pardon, it only becomes invalid upon disapproval. This proposed check would not negate Hamilton's thesis that a single person would be better positioned to exercise pardon power which may require some form of urgency.<sup>199</sup> In other words, my argument is that while the President would remain the sole wielder of pardon power, his exercise of the power should be tested by the legislature through a post-pardon exercise resolution. Such an approach would make the President to have some restraint or a second thought before issuing pardons as his 'misuse of the pardon power will undermine public confidence in the President and our Constitution'.<sup>200</sup>

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<sup>194</sup> Kalt, (45)796.

<sup>195</sup> See *Re Murchison*, 349 U.S. 133, 136 (1955) where a Judge presided over a contempt proceeding concerning a separate forum in which he had personal involvement. The Court held that there could be a potential for bias, though he was not strictly speaking, judging himself or sitting as a judge over his own case.

<sup>196</sup> Duker (34)537.

<sup>197</sup> For example, the US Congress used the independent or special counsel investigation process under the Independent Counsel Statute as a tool to embarrass the President and his cabinet members. For instance, Republican Congress used the statute to embarrass Democrat Bill Clinton Administration officials by way of several investigations.

<sup>198</sup> Duker (n34) 537.

<sup>199</sup> Hamilton (86) 417.

<sup>200</sup> Jeffrey Crouch, 'The Law: Presidential Misuse of the Pardon Power' (December 2008)38(4) *Presidential Studies Quarterly* 722.