

# Checking the Pardon Power

Constitutional limitations and options for preventing abuse

Grant Tudor and Justin Florence

APRIL 2024



©2024 Protect Democracy

This paper was authored by Grant Tudor and Justin Florence with contributions from Genevieve Nadeau, Erica Newland, Aisha Woodward, Amanda Carpenter and Lara Hicks.

This publication is available online at:  
[www.protectdemocracy.org/work/checking-the-pardon-power](https://www.protectdemocracy.org/work/checking-the-pardon-power)

Suggested citation: Protect Democracy, *Checking the Pardon Power* (April 2024)

Please direct inquiries to:  
[press@protectdemocracy.org](mailto:press@protectdemocracy.org)

# Contents

---

Executive Summary	3
Introduction	5
Areas of Abuse	8
Preventing and Responding to Abuse	15
Conclusion	19
Notes	20

---

# Executive Summary

**AS PRESIDENT, DONALD TRUMP** claimed that Article II of the U.S. Constitution provided him with “the right to do whatever I want.”<sup>1</sup> This view of unfettered presidential powers extended to the pardon power, which Trump similarly claimed was unconstrained. “[T]he U.S. President has the complete power to pardon,” Trump asserted during his first year in office. Later, he would claim that this included an “absolute right” to pardon himself.<sup>2</sup>

Trump is not alone in his view of a president’s unlimited power to pardon. Various commentators have echoed the former president’s claims.<sup>3</sup> This paper reviews what are, to the contrary, an array of limitations. Various types of pardons violate core constitutional provisions and principles, including those used to:

- Place the president above the law;
- Undermine other parts of the Constitution, including constitutional rights;
- Violate criminal law; or
- License lawbreaking on the president’s behalf.

Each branch of government has constitutional tools at its disposal to prevent and respond to the pardon power’s abuse. This paper reviews certain options.

The president is not a king, and all powers vested with the office of the presidency are subject to the Constitution’s system of checks and balances. The pardon power is no exception. This paper is intended to be a resource for understanding the specific limitations the Constitution places on the pardon power as well as certain constitutional tools available to fortify them.

# When Pardons Breach Constitutional Limits

The president is not a king, and all powers vested with the president are subject to a variety of constitutional limitations. The pardon power is no exception.



Presidential pardons violate core constitutional provisions and principles when they are used to:



## PLACE THE PRESIDENT ABOVE THE LAW

including self-pardons and self-protective pardons.



## UNDERMINE OTHER PARTS OF THE CONSTITUTION

including pardons that subvert an individual's constitutional rights.



## VIOLATE CRIMINAL LAW

including pardons or promises of pardons that function as a bribe or to obstruct justice.



## LICENSE FUTURE LAWBREAKING ON THE PRESIDENT'S BEHALF

including pardons or promises of pardons that sanction insurrection or rebellion against the United States enabled by the president.

# Introduction

**PRESIDENTS ENJOY AN EXPANSIVE** constitutional power to grant clemency for federal crimes. Article II (Section 2, Clause 1) provides that the president “shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>4</sup>

In 2017, former President Donald Trump claimed that this power was “complete.”<sup>5</sup> The claim echoed similar assertions made by prior administrations. In 1919, dismissing a congressional request for pardon papers, President Woodrow Wilson’s Attorney General claimed that the “President, in his action on pardon cases, is not subject to the control or supervision of anyone, nor is he accountable in any way to any branch of the government for his action.”<sup>6</sup> President Dwight Eisenhower’s pardon attorney reaffirmed the position: “In the exercise of the pardoning power, the President is amenable only to the dictates of his own conscience.”<sup>7</sup> President Bill Clinton was advised that any cooperation with congressional oversight of his pardon power would be entirely voluntary.<sup>8</sup>

Yet each branch of the federal government in fact can — and does — check the president’s pardon power. Federal courts may adjudicate disputes over the constitutionality of a pardon, as they have since the early 19th century.<sup>9</sup> In *Burdick v. United States*, for instance, the Supreme Court held that a president may not pardon someone against his will.<sup>10</sup> Congress may also investigate, impeach, and remove a president from office for abuse of the pardon power. In its articles of impeachment against President Richard Nixon, the U.S. House

cited his efforts to obstruct justice by dangling pardons to potential Watergate witnesses.<sup>11</sup> The executive branch itself may investigate criminal abuses surrounding the exercise of the power. In 2001, federal prosecutors empaneled a grand jury after a pardon by President Clinton that appeared to be a quid pro quo with a donor in potential violation of federal bribery law.<sup>12</sup>

Each branch performs these checks because the power to pardon is not, in fact, absolute under our Constitution. Several constitutional limitations curtail a president’s authority to grant pardons. This paper reviews abuses of the pardon power — when the exercise of the power breaches constitutional limitations — and the roles each branch of government can and should play to exercise constitutional checks. In its review of abuses, it explains how various categories of pardons would violate certain constitutional provisions and principles, posing threats to the rule of law. In particular, it explains why, consistent with our constitutional framework, presidents cannot:

- Pardon themselves;
- Grant self-protective pardons, or those that would have the intent and effect of impeding an investigation into themselves or their interests, amounting to a self-pardon;
- Use pardons to subvert individual liberties protected by the Bill of Rights;
- Use pardons to prevent courts from enforcing orders to protect those rights;

- Grant or propose to grant pardons (e.g., “dangled pardons”) that violate generally applicable criminal laws, such as those that would obstruct justice or constitute bribery; and
- Grant pardons that run afoul of their constitutional duty to “take care that the laws be faithfully executed,” such as those that license lawbreaking on their behalf.

In certain circumstances, the constitutional limits of the pardon power have been tested and litigated, and courts have articulated clear guidance. For instance, it is settled law that presidents may not grant a pardon for a crime that has not yet been committed.<sup>13</sup> In others, potential uses of the power — for instance, to attempt to grant a pardon to oneself, or to grant pardons that evidently sanction and encourage lawbreaking on a president’s behalf — are untried. But just because a certain exercise of the pardon power is untested, or that its exercise has not yet been reviewed by a court, does not imply it is permissible under our

checking abuses of the pardon power that run afoul of the Constitution.

According to one legal scholar, since the Watergate era, “Presidents have been more willing to use clemency not merely as an ‘act of grace,’ or ‘for the public welfare,’ as the framers intended, but also as a political weapon to close investigations of their allies or to reward political contributors.”<sup>14</sup> As with many abuses of executive power, however, Trump supercharged the self-dealing use of the pardon power. As a *Washington Post* investigation of all clemency acts during his tenure concluded: “Never before had a president used his constitutional clemency powers to free or forgive so many people who could be useful to his future political efforts.”<sup>15</sup> This included a record number of pardons for white-collar criminals who would go on to provide political and financial support to the former president.

Today, the former president is now a criminal defendant in multiple state and federal jurisdic-

“ As with many abuses of executive power, Trump supercharged the self-dealing use of the pardon power.

Constitution. As presidents increasingly push the power into untested terrain, each branch of government must be especially watchful and willing to check abuses. Not just judges, but also members of Congress and executive branch attorneys, take oaths to uphold the Constitution and have obligations to do so. Those obligations apply to

tions. He faces 44 charges in two federal criminal cases and another 47 charges between two other state criminal cases. Various close associates are also now under state and federal indictment. As a result, the potential for novel abuses of the pardon power remains a live and urgent issue that merits further scrutiny.

At various times throughout his presidency, relying on the logic of a supposed unconstrained pardon power, Trump considered a self-pardon to broadly insulate himself from potential future prosecutions, and also considered a range of preemptive pardons for family members and close associates.<sup>16</sup> As Trump broadcasts his intentions regarding how he would again use the pardon power — a power that Alexander Hamilton observed should “inspire scrupulousness and caution”<sup>17</sup> — this paper offers a framework for assessing whether those uses comport with the president’s obligation to faithfully uphold the Constitution and the laws of the United States.

**Executive clemency powers are not unfettered. The Pardon Clause is no different from others in the Constitution that assign particular powers to a branch of the federal government, all of which must accommodate one another.** As the Supreme Court has held, the Constitution grants the president the “power to commute sentences on conditions which do not in themselves offend the Constitution.”<sup>18</sup> The pardon power, like all others, must be understood within the structure of the Constitution as a whole. Each branch of government in turn has a critical constitutional role to play in checking its abuses.

# Areas of Abuse

**IN THE FEDERALIST NO. 74**, Hamilton describes the power to pardon as a “benign prerogative.”<sup>19</sup> The absence of a clemency mechanism, Hamilton reasoned, would allow for a system of justice “too sanguinary and cruel.”<sup>20</sup> The pardon power was therefore necessary to temper justice with mercy.<sup>21</sup> Chief Justice John Marshall in *United States v. Wilson* similarly characterized a pardon as “an act of grace.”<sup>22</sup>

Beyond its moral aim, Hamilton construed the strategic purpose of the pardon power narrowly. By specifically vesting the president with this power, it could be exercised quickly to mollify

to pardon would play both a virtuous and a prudent role in the constitutional system.

Over time, federal courts have emphasized not just the *purpose* of pardons, but also that they are used *in the constitutional system*. That is, while they may serve a merciful purpose, they are not a “private act of grace,” according to the Supreme Court.<sup>24</sup> Instead, they are “part of the Constitutional scheme,” and as such, a tool to further “the public welfare.”<sup>25</sup> Chief Justice and former President Howard Taft reflected that “[t]he only rule he [a president] can follow is that he shall not exercise it against the

“ To determine whether a president abuses the pardon power requires assessing whether a pardon violates constitutional provisions or principles and thus upsets the constitutional order.

civil unrest: “In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”<sup>23</sup> The Framers intended that the power

public interest.”<sup>26</sup> In 1974, a federal district court — assessing the constitutionality of a condition placed on a pardon — reaffirmed that the pardon power is not “limitless.” Instead, “[t]he President, who exercises that power as the elected

representative of all the People, must always exercise it in the public interest.”<sup>27</sup>

Certainly, as with the exercise of any executive power, the public has sometimes disagreed with the judgment of presidents, and whether particular pardons in fact best serve the public interest. Since George Washington granted the country’s first-ever pardons in an effort to quell the violent Whiskey Rebellion, the exercise of the power has invited controversy. President Andrew Johnson sparked a national outcry by granting thousands of pardons to Confederate officials, as did President Gerald Ford when he pardoned President Nixon. But controversial pardons are not necessarily illegitimate ones. To determine whether a president abuses the pardon power requires assessing whether a pardon violates constitutional provisions or principles and thus upsets the constitutional order.

The pardon power may be abused in at least four distinct ways: by placing the president above the law; by violating individual liberties protected by the Bill of Rights and preventing courts from enforcing orders to protect those rights; by violating generally applicable federal criminal statutes, including by using pardons to obstruct justice or as a bribe; and by licensing lawbreaking on the president’s behalf.

## 1. Pardons that place the president above the law

Two kinds of pardons would function to place a president above the law: a self-pardon and a self-protective pardon (that is, a pardon that has the intent and effect of impeding an investigation into a president or his interests and that would thus amount to a self-pardon). Both violate several constitutional provisions and principles.

The pardon power must be understood within the context of the other Article II powers and

responsibilities of the president. Two provisions — the Take Care Clause and the Oath Clause<sup>28</sup> — require, respectively, that the president “take Care that the Laws be faithfully executed” and that he swear to “faithfully execute the office of President.” Appearing twice, the term “faithful execution” at the time of the Constitution’s writing specifically meant exercising power in the public interest and served as a rebuke to “self-dealing, self-protection, or other bad faith, personal reasons.”<sup>29</sup> The twin clauses articulating a president’s solemn obligation to faithfully execute the nation’s laws bind the president to exercise fiduciary duties of loyalty and care to the common good.<sup>30</sup>

Aligned with these constitutional commands, the pardon power is intended to serve a public interest function. As the Supreme Court explained in *Biddle v. Perovich*, a pardon “is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”<sup>31</sup> Self-pardons (and similarly, self-protective pardons) would constitute an explicit form of self-dealing, contradicting the power’s public interest purpose as articulated by the Court. They would also, therefore, run afoul of the president’s broader Article II responsibilities by allowing the president to wield the powers of his office in service of himself, not the public interest.<sup>32</sup>

The executive branch has also issued its own perspective on the constitutionality of a self-pardon. Days before President Nixon’s resignation, after Nixon had potentially violated various federal laws related to efforts to ensure he won re-election,<sup>33</sup> the Department of Justice produced a legal opinion that concluded: “Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.”<sup>34</sup> The conclusion relied on a well-settled constitutional principle<sup>35</sup> found in various contexts in U.S. law that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly

bias his judgment,” as articulated by James Madison.<sup>36</sup> The Supreme Court, from among its earliest cases<sup>37</sup> to the modern era,<sup>38</sup> has invoked the principle in order to prevent gross conflicts of interests among public officials. Self-pardons would turn a president into a judge and jury in his

to prosecution and punishment in the ordinary course of the law,” just like any other citizen who had committed crimes.<sup>47</sup> Self- and self-protective pardons, which function to place the president beyond the reach of the federal criminal justice system, are plainly incongruous with the Framers’

“**No one power can run roughshod over other parts of the Constitution. The pardon power is no exception.**”

own case, where his obvious personal interests would bias his judgment. No self-pardon has been attempted so no federal court has entertained a challenge to one; but courts have been “unanimous”<sup>39</sup> when such self-judging conflicts come before them, including in cases involving officials from all three branches of government (e.g., judges,<sup>40</sup> lawmakers,<sup>41</sup> and prosecutors<sup>42</sup>).

Finally, self- and self-protective pardons would violate the central principle in our constitutional system that ours is “a government of laws, not of men”<sup>43</sup> and that as such, no president is “above the law.”<sup>44</sup> “No man in this country is so high that he is above the law,” the Supreme Court held in *United States v. Lee*. “All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.”<sup>45</sup> In *Trump v. Vance*, the Court reiterated that the president is not a king, but rather “of the people’ and subject to the law.”<sup>46</sup> Indeed, the Framers, when galvanizing support for the newly drafted Constitution, were explicit that the nation’s presidents, unlike British kings, would be “liable

vision of an American presidency subject to the rule of law.

## **2. Pardons that infringe on constitutional rights or prevent courts from enforcing orders protecting those rights**

Another type of abuse arises when a president grants a pardon that violates an individual’s constitutional rights or subverts the judiciary’s constitutional power to enforce orders protecting those rights. While enumerated powers across the three branches of the federal government, as well as protections enshrined in the Bill of Rights, may come into conflict with one another, they must also accommodate one another. No one power can run roughshod over other parts of the Constitution. The pardon power is no exception.

First, no power vested with any branch of the federal government can be legitimately wielded to violate constitutionally protected rights. Consider how the Commerce Clause allows Congress

to regulate interstate commerce. If, however, Congress were to exercise that power in a way that prohibited mailing certain newspapers across state lines, it would violate the First Amendment. The Commerce Clause does not itself explicitly limit Congress's authority to pass such a law;<sup>48</sup> other parts of the Constitution — in this case, the First Amendment — do so instead.<sup>49</sup> Constitutional rights are likewise vulnerable to abuse by the pardon power. For example, were a president to grant pardons for a particular offense to all white people guilty of that offense but not to people of color, that would flagrantly violate the requirement of equal protection of the laws. As Justice John Paul Stevens once observed, “no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency.”<sup>50</sup>

The requirement that the pardon power accommodate the individual rights protected by the Constitution is not merely a hypothetical one. In *Burdick v. United States*, the Supreme Court explained that a pardon cannot be used to abrogate a witness's Fifth Amendment right against self-incrimination. Newspaper editor George Burdick had invoked that right when refusing to testify to a federal grand jury investigating customs fraud.<sup>51</sup> To compel Burdick's testimony, President Wilson attempted to pardon him, eliminating his risk of criminal exposure and thus nullifying his ability to invoke his right to remain silent. However, Burdick did not accept the pardon and the Court held that the Fifth Amendment constrained the effects of the pardon power. “It is to be borne in mind,” the Court wrote, “that the power of the President under the Constitution to grant pardons and the [Fifth Amendment] right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should therefore be the anxiety of the law to preserve both — to leave to each its proper place.”<sup>52</sup>

Second, the pardon power must also accommodate the authorities assigned by the Constitution to the other branches of government. The use of any power vested with one branch of the federal government, including the pardon power, to neuter powers granted to the other branches, gives rise to a constitutional conflict between branches. Justice Robert Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* sets out a framework for assessing the permissibility of exercises of presidential power vis-à-vis the powers of Congress. Under that framework, if the president “takes measures incompatible with the expressed or implied will of Congress,” the president's authority is at a “nadir.”<sup>53</sup> The same concept applies if a president seeks to use a power in a manner incompatible with the will of the third branch: the judiciary.

Consider one power that the courts rely on to perform their constitutional function: the contempt power, or the ability to hold a person in contempt of court in order to enforce the court's orders. The Supreme Court has held that the judiciary's role in our constitutional system hinges on the ability of courts to prosecute contempt independently — that is, without relying on the whims of the executive branch. “The ability to punish disobedience to judicial orders,” the Court reasoned, “is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”<sup>54</sup> Otherwise, “the courts [are] impotent, and what the Constitution now fittingly calls ‘the judicial power of the United States’ would be a mere mockery.”<sup>55</sup> A president who seeks to grant a pardon for contempt of court, overriding a court's ability to enforce its orders, would make “a mere mockery” of the courts' constitutional powers.<sup>56</sup> Because the pardon power cannot be used to vitiate constitutionally protected rights, a pardon cannot purport to prevent a court from enforcing its orders safeguarding those rights.<sup>57</sup>

### 3. Pardons that function as a bribe or to obstruct justice

Pursuant to its legislative authority, Congress has enacted certain federal criminal laws, including 18 U.S. Code § 201 forbidding bribery of public officials and witnesses,<sup>58</sup> 18 U.S. Code § 1510 prohibiting obstruction of criminal investigations,<sup>59</sup> and 18 U.S. Code § 1512 disallowing tampering with witnesses, victims, or informants.<sup>60</sup> Granting or proposing to grant a pardon in order to impede an investigation or as part of a bribery scheme would violate these federal laws and so be impermissible.

of a quid pro quo, wherein the provision of a thing of value materially influenced President Clinton's decision to grant the pardon, then the pardon would have violated the bribery statute.

Second, any pardon that is granted, or any pardon that is offered or promised to be granted (i.e., "dangled pardons"<sup>64</sup>), with the intent and effect of impeding an investigation in which the president or a close relative or employee or associate is a target or subject would constitute an obstruction of justice. To guarantee a fair and independent criminal process, obstruction laws prohibit

**“ The president cannot exempt himself from criminal laws. And in the event that the president violates the law, he is not immune from liability by virtue of having used an official act to commit the violation.**

First, a pardon in exchange for something of value would violate the criminal prohibition on bribery.<sup>61</sup> To protect the integrity of and trust in public servants, federal law prohibits public servants from exchanging official acts for anything of value for themselves or their family members.<sup>62</sup> The president is a public servant and a pardon constitutes a clear official act. When President Clinton pardoned Marc Rich in 2001 in what some believed could be a quid pro quo for donations, federal prosecutors empaneled a grand jury to investigate.<sup>63</sup> Congress also conducted extensive oversight investigations of its own and prepared public reports on its findings. If the Rich pardon had been found to be part

corruptly motivated actions to hinder a criminal investigation “by means of bribery” or by “corruptly persuad[ing] a witness or potential witness to withhold information about the commission of a federal offense.”<sup>65</sup> Promising a pardon to prevent a witness from cooperating with an investigation would thus constitute obstruction. This would be unlawful in the same way that it would be unlawful for the president to lie to a grand jury or assault a witness.

President Nixon dangled pardons to witnesses in order to prevent their cooperation during the Justice Department's investigation into the Watergate break-in — an action that the U.S.

House cited in its articles of impeachment.<sup>66</sup> More recently, President Trump’s counsel discussed the possibility of pardons with Michael Flynn’s and Paul Manafort’s counsel, and Trump himself may have led Michael Cohen to expect a pardon.<sup>67</sup> (Indeed, after Manafort’s counsel was told by Trump’s to “sit tight” and that he would be “taken care of,” Manafort refused to cooperate with a grand jury and investigators.)<sup>68</sup> The mere discussion of potential pardons with known witnesses could amount to obstruction of justice if intended to impede criminal investigations.

The president cannot exempt himself from criminal laws. And in the event that the president violates the law, he is not immune from liability by virtue of having used an official act to commit the violation. While there is debate about whether a president can be indicted *while in office*, there is no doubt (notwithstanding Trump’s audacious claims to absolute immunity)<sup>69</sup> that he can be subject to prosecution upon leaving, as the executive branch itself has clarified<sup>70</sup> and federal courts have affirmed.<sup>71</sup> Violating criminal law through the corrupt use of the pardon power would constitute an abuse of that power subject to criminal accountability.<sup>72</sup>

As the Supreme Court reiterated in *Trump v. Vance*, unlike the British monarchs, “[t]he President, by contrast, is ‘of the people’ and subject to the law.”<sup>73</sup> There is no exception for federal criminal laws.<sup>74</sup> Should the president be permitted to use one lawful power, such as the pardon power, to violate other laws with impunity, it would render him a king.

#### 4. Pardons that license lawbreaking on the president’s behalf

Granting pardons in order to in effect give license to lawbreaking would also breach the president’s duty to faithfully execute the law — particularly when the president’s own interests are implicated.

Trump has proposed pardoning those convicted for actions related to the January 6th insurrection for which he is now a criminal defendant.<sup>75</sup> According to evidence presented by the Justice Department in its prosecution of the former president, Trump has “financially supported and celebrated these offenders — many of whom assaulted law enforcement on January 6,” embracing “particularly violent and notorious rioters... [many of] whom he now calls ‘patriots.’”<sup>76</sup> Indeed, the act of promising pardons to these offenders is, according to prosecutors, a method of “publicly signaling that the law does not apply to those who act at his urging regardless of the legality of their actions.”<sup>77</sup>

This use of the pardon power to sanction future lawbreaking, particularly when the president’s interests are involved, runs afoul of the president’s Article II responsibilities to faithfully execute the law. The twin commands of faithful execution — the Oath Clause and the Take Care Clause — impose upon the president a duty to “preserve, protect and defend the Constitution of the United States,”<sup>78</sup> and to ensure that the nation’s “Laws be faithfully executed.”<sup>79</sup> The Faithful Execution Clauses restrain the president’s discretion in the use of the office’s powers: *all* powers, including the pardon power, must be used to serve the public interest. Commands of faithful execution date back to 13th century English law and were carried through to the American colonies, from which the Framers derived them. The throughline of meaning, according to legal scholars, is an affirmative duty to carry out the responsibilities of public office “in the best interest of the public” and, critically, to reject “self-dealing.”<sup>80</sup>

The proposed pardons for crimes related to the January 6th insurrection would both sanction an attempt to violently overthrow the U.S. government, violating the president’s duty to defend the Constitution, and serve the president’s personal interests given his own status as a criminal defendant for his role in the insurrection.

Certainly, controversy surrounding pardons is not novel, including pardons related to domestic armed activity. Presidents George Washington, James Buchanan, Abraham Lincoln, and Andrew Johnson, for instance, all ignited public backlash for pardoning those who took up arms against the United States, or gave comfort or aid to those

The proposed pardons for January 6th are dissimilar in at least two key respects. In each prior case, presidents sought to *prevent* attempts to overthrow the U.S. government by granting pardons, not to give those violent uprisings their blessing. Trump's proposed pardons would not be for the purposes of restoring tranquility and

**“ Use of the pardon power to sanction future lawbreaking, particularly when the president's interests are involved, runs afoul of the president's Article II responsibilities to faithfully execute the law.**

who did (during the Whiskey Rebellion, Utah War, and Civil War, respectively).<sup>81</sup> Yet in each instance, the pardons comported with a legitimate purpose of the power — in these cases, the Framers' intention that the power be used to mollify civil unrest. During the Whiskey Rebellion, Washington promised pardons to rebels who in turn promised to lay down their arms, just as Hamilton intended of “a well timed offer of pardon to... restore the tranquility.”<sup>82</sup> During the Civil War, Lincoln made similar use of the power, offering pardons to those who would “resume their allegiance to the United States,” and conditioning the pardons on recipients taking an oath.<sup>83</sup>

resuming allegiance to the United States; according to him, those convicted of crimes related to the January 6th insurrection acted “patriotically” and are being held as “hostages.”<sup>84</sup> Instead, they would pervert the Framers' intended purpose of the power — not to mollify insurrectionary activity, but to give it license. And in no prior case was the president himself a co-conspirator in the insurrection and the target of ongoing state and federal investigations and prosecutions. Such pardons would thus fail as a measure to defend the Constitution against domestic enemies, and would serve to further the president's personal interests as a criminal defendant.

# Preventing and Responding to Abuse

**AS WITH ANY ABUSES** of executive power, each branch of government must protect the Constitution against abusive exercises of the pardon power, including to deter abuses and to hold the president accountable in cases of abuse. The following outlines how each branch can and should do so.

## Congress

First, Congress should employ its extensive oversight tools to investigate potentially unlawful pardons or promises of pardons. Congressional committees may request or subpoena documents and witness testimony to determine the context and intent behind the granting of particular pardons or pardon offers, and can publish reports to ensure transparency and allow for public scrutiny. Congress should also pass legislation that aids specifically in its oversight of pardon abuse, codifying information disclosure requirements that ensure lawmakers have access to materials relevant to their oversight activities.

For instance, through statute, Congress could require that the Department of Justice and White House Counsel submit to it all investigative materials related to an offense for which the president grants or offers to grant a self- or self-protective pardon, as well as records of conversations and materials associated with its consideration. The Protecting Our Democracy Act, passed by the U.S. House during the 117th Congress and re-introduced in the 118th Congress, provides one model, requiring that all materials in relation to

a “self-serving” pardon (although not a pardon offer) be disclosed to Congress.<sup>85</sup> While statutory reporting requirements will assist in investigations, or even potential litigation, they can also serve as a deterrent to abuse. The expectation of sunlight — that others will continue investigating the underlying conduct and the potential improper pardon — may dissuade corrupt behavior. Even if a president were not deterred, such requirements may nonetheless deter others who help to implement an unlawful pardon, including Department of Justice or White House officials.

Second, Congress should reiterate that federal bribery and obstruction of justice laws apply to granted or offered pardons to remove any possible argument to the contrary. Congress should clarify that pardons cannot be made in exchange for some benefit or to impact or influence participation in an investigation, and that courts should not view such pardons as valid and enforceable. To correct for any uncertainty that may arise as to whether these laws apply to the president, Congress could preemptively revise relevant federal bribery and obstruction of justice statutes to remove all doubt.<sup>86</sup> (The Protecting Our Democracy Act clarifies that the federal bribery statute applies to the president and vice president and that pardons and offers of pardons can constitute bribes.<sup>87</sup>)

Third, Congress should delimit the constitutional boundaries of the pardon power through a Sense of Congress resolution. While non-binding, the resolution would clarify the legislature’s

understanding of appropriate limits of the president’s power in order to uphold the Constitution. Such a resolution could consider various limitations as outlined in this paper. However, pardons that place a president above the law present a

and publicize corruption, maladministration or inefficiency in agencies of the Government.”<sup>90</sup> Thus, Congress undoubtedly has the power to require reporting<sup>91</sup> so that it can bring those constitutional violations to light and, where appropri-

“ The expectation of sunlight — that others will continue investigating the underlying conduct and the potential improper pardon — may dissuade corrupt behavior.

direct threat to Congress as a co-equal branch of government by upending our system of checks and balances. As such, Congress should at minimum clarify that pardons that place the president above the law through a self-pardon, or through a self-protective pardon that amounts to a self-pardon, would pose a threat to the constitutional order.

Ultimately, if Congress identifies abuses of the pardon power, it may use its impeachment authorities to protect the Constitution. There is no doubt that misuse of the pardon power — like other abuses of presidential powers — can be a proper basis for impeachment.<sup>88</sup>

Each of these recommendations are well within Congress’s constitutional powers. If the president uses the pardon power to violate the law or subvert the Constitution, Congress can and should use its lawful authorities to deter and respond. Congress, of course, has the power to pass federal criminal laws (such as anti-bribery statutes), and through the Necessary and Proper Clause,<sup>89</sup> to ensure that those laws are properly implemented. Congress also has broad powers to “inquire into

ate, act on its constitutional prerogative to pass legislation preventing such constitutional violations in the future.<sup>92</sup>

## The Judiciary

Federal courts must also play a role as a constitutional check on abuses of the pardon power. As the branch of government entrusted to consider all cases arising under the Constitution and to safeguard individual rights, federal courts in appropriate cases have the power to adjudicate whether certain pardons are valid and to void those that are not.

The Pardon Clause details certain limits explicitly, including that presidents may only pardon “Offenses against the United States,” or federal crimes (i.e., state crimes and civil liability are not pardonable), and that presidents may not use the power in “Cases of Impeachment.”<sup>93</sup> But for over two centuries, federal courts have also articulated other limitations — particularly when uses of the power would “offend the Constitution.”<sup>94</sup> That is, beyond the Pardon Clause’s explicit limitations,

courts have held that uses of the pardon power that undermine other parts of the Constitution may also be impermissible. For instance, federal courts have ruled that a pardon cannot violate certain constitutional powers vested in Congress,<sup>95</sup> and cannot require that individuals forfeit certain constitutional rights<sup>96</sup> in order to receive a pardon.

Courts opining on the validity of pardons may invalidate unconstitutional pardons, provide remedies to victims whose rights have been infringed upon, and develop case law to guide the president and potential pardon applicants.

## The Executive

Officials within the executive branch also have a critical role to play should a president use the pardon power to violate generally applicable federal criminal laws.

Across administrations, the Department of Justice has opened investigations into presidential misconduct. And while it remains subject to debate as to whether a *sitting* president may be indicted, both the executive branch<sup>97</sup> and federal courts<sup>98</sup> have made clear that presidents are subject to prosecution upon leaving. Investigations by the Department of Justice have included examining whether presidents have used official acts to potentially commit crimes, including use of the pardon power. In 2001, the U.S. Attorney for the Southern District of New York opened a criminal investigation into former President Clinton,

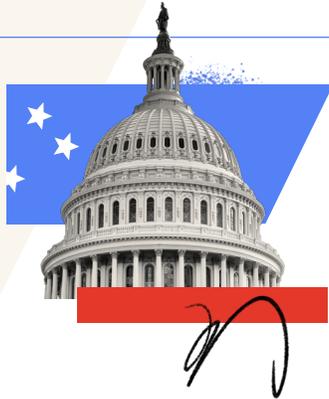
assisted by the FBI, examining whether his pardon of financier Marc Rich was given in exchange for money. Rich received a pardon after his ex-spouse donated to both the Clinton Presidential Library and the Democratic Party.<sup>99</sup> Had the investigation found that Clinton granted a pardon in exchange for something of value, the former president could have been indicted for violating federal bribery law.

Presidents are not exempted from federal criminal laws; and official acts, including the granting of pardons, can be used to violate those laws. As the chief agency within the branch of government entrusted with enforcing the law, it is incumbent upon the Department of Justice to investigate abuses of the pardon power that may include potential criminal misconduct.

Finally, various executive branch attorneys, including those in the Office of the Pardon Attorney in the Department of Justice and in the Office of White House Counsel, participate in the process of advising the president on matters related to pardons and ensuring the execution of pardons. As with presidents themselves, those attorneys swear an oath of office to “support and defend the Constitution of the United States.”<sup>100</sup> Abiding by those oaths requires affirmatively acting in service of the Constitution, and not in service of a president who, through abuse of the pardon power, would subvert it.

# Putting Pardons in Check

Each branch of government has constitutional tools at its disposal to prevent and respond to the pardon power's abuse.



## Congress

- Investigate potential abuses of the pardon power and mandate reporting requirements to assist its oversight functions
- Amend federal bribery and obstruction of justice laws to clarify that they apply to the president and to granted or offered pardons
- Impeach and remove from office a president who abuses the pardon power

## The Judiciary

- Adjudicate whether certain pardons are valid and void those that are not
- Provide remedies to victims whose rights have been infringed upon by unconstitutional pardons
- Develop case law to guide the president and potential pardon applicants



## The Executive

- Through the Department of Justice, investigate potentially unlawful uses of the pardon power
- Prosecute criminal uses of the pardon power, as when pardons are used to obstruct justice or as part of a bribery scheme
- Among attorneys who advise and assist with pardons, faithfully uphold one's oath of office to support and defend the Constitution

# Conclusion

**THE PARDON POWER IS** not unlimited. It cannot be used to place the president above the law; to subvert other parts of the Constitution, including constitutional rights; to violate criminal law with impunity; or to license future lawbreaking on the president's behalf. Like any executive power, it is constrained by the rest of the Constitution, including the duties imposed upon the president to act in the public interest.

However, constraints remain theoretical unless and until those vested with the authorities to effectuate them do so. Congress, the judiciary, and the executive branch itself each have access to critical constitutional tools to appropriately constrain the pardon power in order to prevent its abuse. **The specter of any president who intends to abuse the power, or who attempts to do so, must prompt swift responses within our system of checks and balances.**

The prospect of pardon abuse and others' authorities to prevent it are neither new nor unique to the U.S. The legislature's prerogative to circumscribe the executive's pardon power finds its roots in 13th century England. Kings were vested with a plenary power to grant pardons, which Parliament delimited over time. For instance, the Statute of Northampton in 1328 "laid down a general restraint calling for the king not to grant a pardon except where it was consistent with his oath."<sup>101</sup> The 1689 Bill of Rights suspended the Crown's authority to use its powers, including the power to pardon, in ways that disregarded laws passed by Parliament.<sup>102</sup>

The Framers imported this executive power for both noble and prudent reasons. They also constructed a constitutional system designed to prevent its abuse through both express and structural limitations. The Constitution's guarantees of individual rights, a faithful executive, and checks through judicial and congressional powers provide for meaningful and necessary constraints together with the tools to enforce them.

# Notes

- 1 Erin Burnett, “Trump: Article II gives me right to do whatever I want,” *Erin Burnett Out Front*, CNN, July 23, 2019. <https://www.cnn.com/videos/politics/2019/07/23/rep-sean-maloney-trump-not-above-the-law-sot-ebf-vpx.cnn>
- 2 Donald J. Trump (@realDonaldTrump). “As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!” Twitter, June 4, 2018. [https://twitter.com/realDonaldTrump/status/1003616210922147841?ref\\_src=twsrc%5Etfw](https://twitter.com/realDonaldTrump/status/1003616210922147841?ref_src=twsrc%5Etfw)
- 3 See, e.g. Michael W. McConnell. “Trump’s not wrong about pardoning himself.” *The Washington Post*, June 8, 2018. [https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637\\_story.html](https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html); Richard A. Epstein. “Pardon Me, Said the President to Himself.” *The Wall Street Journal*, June 5, 2018. <https://www.wsj.com/articles/pardon-me-said-the-president-to-himself-1528239773>
- 4 “ArtII.S2.C1.3.1 Overview of Pardon Power.” Constitution Annotated. Accessed February 26, 2024. [https://constitution.congress.gov/browse/essay/artII-S2-C1-3-1/ALDE\\_00013316](https://constitution.congress.gov/browse/essay/artII-S2-C1-3-1/ALDE_00013316).
- 5 Donald J. Trump (@realDonaldTrump), “While all agree the U. S. President has the complete power to pardon, why think of that when only crime so far is LEAKS against us.FAKE NEWS,” Twitter, July 22, 2017. <https://twitter.com/realDonaldTrump/status/888724194820857857>.
- 6 Todd David Peterson, *Congressional Power Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 Wake Forest L. Rev. 1225, (2003). <https://heinonline.org/HOL/LandingPage?handle=hein.journals/wflr38&div=39>.
- 7 *Id.*
- 8 See, Letter from Janet Reno, Attorney General to President Bill Clinton (Sept. 16, 1999) ((quoted in H.R. REP. NO. 106-488, at 120 (1999)) stating that to the Justice Department’s knowledge, the executive branch has provided information “only voluntarily and without conceding congressional authority to compel disclosure”).
- 9 *United States v. Wilson*, 32 U.S. 150 (1833).
- 10 *Burdick v. United States*, 236 U.S. 79 (1915).
- 11 Sam Berger. “Obstructing Justice through Pardons Is an Impeachable Offense.” Center for American Progress, June 21, 2018. <https://www.americanprogress.org/article/obstructing-justice-pardons-impeachable-offense/>.
- 12 18 U.S. Code § 201.
- 13 *Ex parte Garland*, 71 U.S. 333 (1866).
- 14 Jeffrey Crouch. *The Presidential Pardon Power*. Lawrence, Kansas: University Press of Kansas, 2009, 4.
- 15 Beth Reinhard, Manuel Roig-Franzia, and Clara Ence Morse. “Trump Pardoned Them. Now They’re Helping Him Return to Power.” *The Washington Post*, December 2, 2023. [https://www.washingtonpost.com/politics/interactive/2023/trump-pardon-power-2024-benefit/?itid=hp-top-table-main\\_p001\\_f001](https://www.washingtonpost.com/politics/interactive/2023/trump-pardon-power-2024-benefit/?itid=hp-top-table-main_p001_f001).
- 16 Michael S. Schmidt and Maggie Haberman. “Trump Is Said To Have Discussed Pardoning Himself.” *The New York Times*, January 7, 2021. <https://www.nytimes.com/2021/01/07/us/politics/trump-self-pardon.html>.
- 17 Alexander Hamilton, *Federalist No. 74*, in *The Federalist Papers*. Yale Law School Lillian Goldman Library, 2008. [https://avalon.law.yale.edu/18th\\_century/fed74.asp](https://avalon.law.yale.edu/18th_century/fed74.asp)
- 18 *Schick v. Reed*, 419 U.S. 256, 264 (1974).
- 19 Hamilton, *Federalist No. 74*.
- 20 *Id.*
- 21 *Id.*
- 22 *United States v. Wilson*, 32 U.S. 150, 150 (1833).
- 23 Hamilton, *Federalist No. 74*.
- 24 *Biddle v. Perovich*, 274 U.S. 480 (1927).
- 25 *Id.*
- 26 William Howard Taft, *Our Chief Magistrate and His Powers*, New York: Columbia University Press, 1925, 121.
- 27 *Hoffa v. Saxbe*, 378 F. Supp. 1221 (D.D.C. 1974).

- 28 The Take Care Clause, which requires the president to “take Care that the Laws be faithfully executed,” bars the President from betraying the public good to exempt himself from the law. The constitutionally prescribed Oath contains a similar command to “faithfully execute” the office (i.e., the powers assigned) and to “preserve, protect and defend the Constitution of the United States.” See, U.S. Const. Art. II, § 3.
- 29 Andrew Kent. “Examining the Constitutional Role of the Pardon Power: Hearing before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties | Statement by Prof. Andrew Kent, Fordham Law School.” Fordham School of Law, March 27, 2019, 4. <https://www.fordham.edu/media/home/schools/school-of-law/pdfs/HHRG-116-JU10-Wstate-KentA-20190327.pdf>.
- 30 Ethan J. Lieb, Jed Handelsman Shugerman, & Andrew Kent, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).
- 31 *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).
- 32 See, e.g. Brian C. Kalt “Pardon Me?: The Constitutional Case against Presidential Self-Pardons.” The Yale Law Journal 106, no. 3 (1996): 779–809. <https://doi.org/10.2307/797310>. (The Constitutional provision in Art. I, § 3, cl. 7, stating that no one may “enjoy any Office” after impeachment, is inconsistent with a president pardoning himself. He would otherwise be “the only federal official who can deal himself a fruit of his office and enjoy it after he is gone,” retaining immunity despite his impeachment.)
- 33 Tim Naftali. “Trump’s Pardons Make the Unimaginable Real.” The Atlantic, December 23, 2020. <https://www.theatlantic.com/ideas/archive/2020/12/how-abuse-presidential-pardon/617473/>.
- 34 Mary C. Lawton. “Presidential or Legislative Pardon of the President, Memorandum Opinion for the Deputy Attorney General.” Office of Legal Counsel, U.S. Department of Justice, August 5, 1974. <https://www.justice.gov/file/147746/dl?inline>.
- 35 *Calder v. Bull*, 3 U.S. 386 (1798).
- 36 James Madison. *Federalist No.10*, in *The Federalist Papers*, Library of Congress. <https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493273>.
- 37 *Calder v. Bull*, 3 U.S. 386 (1798).
- 38 *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).
- 39 Brian C. Kalt. “Pardon Me?: The Constitutional Case against Presidential Self-Pardons.” The Yale Law Journal 106, no. 3 (1996): 779–809. <https://doi.org/10.2307/797310>.
- 40 *In re Murchison*, 349 U.S. 133 (1955); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).
- 41 Nevada Commission on *Ethics v. Carrigan*, 564 U.S. 117 (2011).
- 42 *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987).
- 43 *Cooper v. Aaron*, 358 U.S. 1, 23 (1958).
- 44 *United States v. Nixon*, 418 U.S. 683 (1974).
- 45 *United States v. Lee*, 106 U.S. 196 (1882).
- 46 *Trump v. Vance*, 140 S.Ct. 2412, 4 (2020).
- 47 Alexander Hamilton, *Federalist No. 69*, in *The Federalist Papers*. Yale Law School Lillian Goldman Library, 2008. [https://avalon.law.yale.edu/18th\\_century/fed69.asp](https://avalon.law.yale.edu/18th_century/fed69.asp).
- 48 U.S. Const. art. I, § 8, cl. 3.
- 49 U.S. Constitution, amend. 1.
- 50 *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).
- 51 *Burdick v. United States*, 236 U.S. 79 (1915).
- 52 *Id.*
- 53 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- 54 See, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).
- 55 *Id.*
- 56 The Supreme Court has made clear that the pardon power does not extend to pardoning contempt where doing so would interfere with a court’s ongoing ability to enforce the rights of a litigant. *Ex parte Grossman*, 267 U.S. 87, 121 (1925). (The Court in *Grossman* upheld the pardon of a contempt order for disobeying a regulatory injunction related to Prohibition—the case did not involve a contempt order arising out of a case protecting individual constitutional rights. As the Court explained: “A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor’s right.”)
- 57 In 2017, President Trump pardoned Arizona ex-Sheriff Joe Arpaio, who defied a criminal contempt of court order to stop racial profiling that violated Americans’ constitutional rights. This rendered the underlying plaintiffs unable to access a remedy for the violation of their rights by neutering the court’s authority to enforce its own orders. The pardon, therefore, functioned to undermine the constitutional power of another branch of government. See *Brief of Protect Democracy et al. as Amici Curiae, United States v. Arpaio*, 9th Cir. (2018) (No. 17-10448), explaining that a pardon that undermines the federal courts’ authority is unlawful.
- 58 “18 U.S. Code § 201 - Bribery of Public Officials and Witnesses.” Legal Information Institute. Accessed March 4, 2024. <https://www.law.cornell.edu/uscode/text/18/201>.
- 59 “18 U.S. Code § 1510 - Obstruction of Criminal Investigations.” Legal Information Institute. Accessed March 4, 2024. <https://www.law.cornell.edu/uscode/text/18/1510>.

- 60 “18 U.S. Code § 1512 - Tampering with a Witness, Victim, or an Informant.” Legal Information Institute. Accessed March 4, 2024. <https://www.law.cornell.edu/uscode/text/18/1512>.
- 61 18 U.S.C. § 201.
- 62 *Id.*
- 63 Kelly Phillips Erb. “Blast from the Past: Who Was Alleged Tax Evader & Subject of Presidential Pardon Marc Rich?” *Forbes*, November 3, 2016. <https://www.forbes.com/sites/kellyphillipserb/2016/11/02/blast-from-the-past-who-was-alleged-tax-evader-marc-rich/?sh=3da3a93be19f>.
- 64 Dangled pardons reference pardons that are promised in order to influence the potential recipient’s behavior, such as those that are offered in order to impede an investigation.
- 65 18 U.S.C. §§ 1510, 1512.
- 66 Berger, “Obstructing Justice through Pardons...” 2018.
- 67 Michael S. Schmidt, et al., “Trump’s Lawyer Raised Prospect of Pardons for Flynn and Manafort,” *The New York Times*, March 28, 2018. <https://www.nytimes.com/2018/03/28/us/politics/trumppardon-michael-flynn-paul-manafort-johndowd.html>; Maggie Haberman, “Trump Asserts That Michael Cohen Asked Him Directly for a Pardon and Was Told No,” *The New York Times*, March 8, 2019. <https://www.nytimes.com/2019/03/08/us/politics/cohen-pardon.html>
- 68 Katelyn Polantz. “Manafort Request for Leniency Met with a Final Sentence: 7.5 Years.” CNN, March 14, 2019. <https://www.cnn.com/2019/03/13/politics/manafort-hearing/index.html>.
- 69 Justin Florence and Genevieve Nadeau. “Courts to Trump Again and Again: You’re Not Above the Law.” *The Bulwark+*, December 7, 2023. <https://plus.thebulwark.com/p/donald-trump-immunity-courts-quixotic>.
- 70 Randolph D. Moss. “A Sitting President’s Amenability to Indictment and Criminal Prosecution.” Office of Legal Counsel, United States Department of Justice, October 16, 2000. <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution>.
- 71 Katelyn Polantz, and Hannah Rabinowitz. “Federal Judge Says Trump Does Not Have Absolute Immunity, Denying Bid to Dismiss Election Subversion Case.” CNN, December 1, 2023. <https://www.cnn.com/2023/12/01/politics/trump-presidential-immunity-election-subversion-case-chutkan/index.html>.
- 72 118 U.S. Code § 201 forbids bribery of public officials and witnesses; 18 U.S. Code § 1510 prohibits obstruction of criminal investigations; 18 U.S. Code § 1512 broadly disallows tampering with witnesses, victims, or informants.
- 73 *Trump v. Vance*, 591 U.S. \_\_\_\_ (2020).
- 74 While the relevant federal criminal laws do not exempt the president, some (for example, former Attorney General Bill Barr) have argued that these generally applicable laws must include an explicit clear statement to apply to the president. See, Bill Barr to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel, June 8, 2018, U.S. Department of Justice, Re: Mueller’s “Obstruction” Theory, *The New York Times*. Accessed March 4, 2024. <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf#page=1>; Jack Goldsmith. “A Qualified Defense of the Barr Memo: Part I.” *Lawfare*, January 4, 2019. <https://www.lawfaremedia.org/article/qualified-defense-barr-memo-part-i>. Those arguments are unpersuasive, and contrary to precedent of prior investigations into Presidents Nixon, Bush, and Clinton, for reasons explained by Andrew Kent and Benjamin Wittes. See, Andrew Kent. “More Justice Department Precedent in Support of Mueller’s Obstruction Theory.” *Lawfare*, May 14, 2019. <https://www.lawfaremedia.org/article/more-justice-department-precedent-support-muellers-obstruction-theory>; Benjamin Wittes. “In Defense of Mueller’s Obstruction Theory: A Reply to Jack Goldsmith.” *Lawfare*, May 12, 2019. <https://www.lawfaremedia.org/article/defense-muellers-obstruction-theory-reply-jack-goldsmith>.
- 75 Mariana Alfaro. “Trump Vows Pardons, Government Apology to Capitol Rioters If Elected.” *The Washington Post*, September 1, 2022. <https://www.washingtonpost.com/national-security/2022/09/01/trump-jan-6-rioters-pardon/>.
- 76 *United States v. Donald J. Trump*, No. 1:23-cr-00257-TSC (D.D.C. 2023).
- 77 *Id.*
- 78 U.S. Const. art. II, § 3, cl. 1
- 79 U.S. Const. art. II, § 1, cl. 8
- 80 Lieb, Shugerman, and Kent, *Faithful Execution and Article II*, 2141.
- 81 James Pasley. “The President’s Power to Pardon Is Broad, Unchallengeable, and Almost Unlimited. Here Are 25 of the Most Controversial Pardons and Commutations in History.” *Business Insider*, May 5, 2023. <https://www.businessinsider.com/most-controversial-presidential-pardons-commutations-in-us-history-2023-4>.
- 82 Graham Dodds. *Mass Pardons in America: Rebellion, Presidential Amnesty, and Reconciliation*. New York Chichester, West Sussex: Columbia University Press, 2021. <https://doi.org/10.7312/dodd20078>
- 83 Abraham Lincoln. *Proclamation 108—Amnesty and Reconstruction*. The American Presidency Project, December 8, 1863. Online by Gerhard Peters and John T. Woolley, <https://www.presidency.ucsb.edu/node/202362>
- 84 Adam Gabbatt. “Trump’s Novel Take on January 6: Calling Convicted Rioters ‘Hostages.’” *The Guardian*, January 13, 2024. <https://www.theguardian.com/us-news/2024/jan/13/trump-january-6-rioters-hostages>.

- 85 Congress.gov. “Text - H.R.8363 - 116th Congress (2019-2020): Protecting Our Democracy Act.” September 23, 2020. <https://www.congress.gov/bill/116th-congress/house-bill/8363/text>.
- 86 Bob Bauer and Jack Goldsmith elaborate on this recommendation in “The Pardon Power,” Chapter 6 in *After Trump: Reconstructing the Presidency*. Washington, DC: Lawfare Press, 2020.
- 87 Congress.gov. “Protecting Our Democracy Act.”
- 88 History, Art & Archives, Impeachment, U.S. House of Representatives. <https://history.house.gov/Institution/Origins-Development/Impeachment/>
- 89 U.S. Const. art. I, § 8, cl. 18.
- 90 *Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957); see also *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) (explaining that Congress’s “legislative powers” include the power to obtain any “needed information”).
- 91 Any concerns that some of the materials regarding pardons might be privileged do not implicate the constitutionality of these proposals. The privileges possibly implicated in materials regarding pardons are complex, and as the Office of Legal Counsel acknowledges, whether they apply is dependent on the fact-specific context. See, e.g., Office of Legal Counsel, “[Assertion of Executive Privilege Concerning Counsel’s Interviews of the Vice President and Senior White House Staff](#),” July 15, 2008. Moreover, executive privilege is also not absolute, and can be overcome when the information is “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (*en banc*). Thus, whether any materials that Congress seeks would be covered by the privilege, and whether that privilege could be overcome, cannot be assessed ahead of time, and would not implicate the constitutionality of any bill. Rather, should the White House believe that it cannot provide any specific materials due to executive privilege, it would need to assert that privilege at the time, and adjudicate that matter — through negotiation with Congress or through litigation — based on the specific facts at issue.
- 92 See generally, Andrew Kent. “Can Congress Do Anything about Trump’s Abuse of the Pardon Power?” *Lawfare*, July 24, 2020. <https://www.lawfaremedia.org/article/can-congress-do-anything-about-trumps-abuse-pardon-power>.
- 93 U.S. Const. art. II, § 2, cl. 1
- 94 *Schick v. Reed*, 419 U.S. 256 (1974).
- 95 *Illinois R. CO. v. Bosworth*, 133 U.S. 92 (1890).
- 96 *Hoffa v. Saxbe*, 378 F. Supp. 1221 (D.D.C. 1974).
- 97 Moss. “A Sitting President’s Amenability...”
- 98 Polantz and Rabinowitz. “Federal Judge Says Trump...”
- 99 Erb. “Blast from the Past...”
- 100 “5 U.S. Code § 3331 - Oath of office.” Legal Information Institute. Accessed March 6, 2024. <https://www.law.cornell.edu/uscode/text/5/3331#:~:text=An%20individual%2C%20except%20the%20President,enemies%2C%20foreign%20and%20domestic%3B%20that>
- 101 Stanley Grupp. “Some Historical Aspects of the Pardon in England.” *The American Journal of Legal History* 7, no. 1 (1963): 56. <https://doi.org/10.2307/844083>.
- 102 *Id.* at 57.



Protect Democracy is a nonpartisan nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government.

[protectdemocracy.org](https://protectdemocracy.org)