

# Preventing Pardon Abuse

## Abuses of the Pardon Power and a Role for Congress

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### 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.”

In 2017, President Trump claimed that this power was “complete.”<sup>1</sup> The assertion echoed a longstanding position of the Executive Branch. In 1919, dismissing a congressional request for pardon papers, President 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>2</sup> President 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>3</sup> President Clinton was

<sup>1</sup> 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>.

<sup>2</sup> Todd David Peterson, [Congressional Power Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative](#), Wake Forest Law Review 38 (2003).

<sup>3</sup> Ibid.

### SUMMARY

- Pardons that place the President above the law, undermine the constitutional powers of another branch of government or the Bill of Rights, or function as a bribe or to obstruct justice constitute abuses of the power.
- Congress should employ its constitutional authorities to deter and respond to abusive exercises of the pardon power, as it should with any abuses of executive power.
- Specifically, Congress should mandate disclosure of materials related to self- and self-protective pardons; clarify that federal bribery and obstruction of justice laws apply to pardons and dangled pardons; and delimit through resolution the power’s constitutional boundaries.

advised that any cooperation with congressional oversight of his pardon power would be entirely voluntary.<sup>4</sup>

The pardon power is indeed expansive, but it is not absolute. The Constitution requires that the President exercise all powers of the office to uphold the Constitution and the law. Despite the Executive Branch’s sustained efforts to thwart constraints, the pardon power has never been unfettered; no one provision of the Constitution supersedes the rest of it. There are necessary roles for both Congress and the courts to prevent abuse of a power that Alexander Hamilton observed should “inspire scrupulousness and caution.”<sup>5</sup>

### “THE PARDON POWER IS INDEED EXPANSIVE, BUT IT IS NOT ABSOLUTE.”

This brief details three distinct areas where the President’s pardon power may be abused. It then specifies options available to Congress to exercise appropriate checks. Some of

<sup>4</sup> 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”).

<sup>5</sup> Alexander Hamilton, [The Federalist Papers: No. 74](#), Yale Law School Lillian Goldman Library.

these proposals are included in the Protecting Our Democracy Act introduced in the 116th Congress.<sup>6</sup>

## AREAS OF ABUSE

In *The Federalist* No. 74, Hamilton describes the power to pardon as a “benign prerogative.” The absence of a clemency mechanism, Hamilton reasoned, would allow for a system of justice “too sanguinary and cruel.” The pardon power was therefore necessary to temper justice with mercy.<sup>7</sup> Chief Justice John Marshall in *United States v. Wilson* likewise characterized the pardon as “an act of grace.”<sup>8</sup>

Beyond its moral aim, Hamilton construed its strategic purpose narrowly. By specifically vesting the President with this power, it could be exercised quickly to mollify 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>9</sup> The Framers intended that the power to pardon would thus play both a virtuous and a prudent role in the constitutional system.

Nonetheless, controversies surrounding the pardon power have been significant from the outset. President Washington pardoned leaders of the violent Whiskey Rebellion. President Johnson sparked a national outcry by issuing thousands of pardons to Confederate officials. President Ford pardoned President Nixon despite significant public disapproval. But concerns in recent years have escalated about exercises of the pardon power that may not only be unpopular, but that threaten the rule of law. Three types of pardons harm the broader constitutional system and undermine the purpose of the pardon power as described in *Federalist* 74.

### 1. PARDONS THAT PLACE THE PRESIDENT ABOVE THE LAW

A President may abuse the pardon power by issuing a self-pardon, or a pardon of associates that would impede an investigation into himself or his interests and that would thus amount to a self-pardon (a “self-protective pardon”).

<sup>6</sup> [Protecting Our Democracy Act](#), H.R.8363, Title I 116th Cong. (2020).

<sup>7</sup> *Ibid.*

<sup>8</sup> *United States v. Wilson*, 32 U.S. 150, 150 (1833).

<sup>9</sup> Alexander Hamilton, [The Federalist Papers: No. 74](#), Yale Law School Lillian Goldman Library.

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>10</sup>—require that the President act in the public interest, binding him to exercise fiduciary duties of loyalty and care to the common good.<sup>11</sup> Both entrust the President with faithfully executing the law and bar him from betraying the public interest. Self-pardons (and similarly, self-protective pardons) would explicitly run afoul of these Article II provisions by allowing the President to wield the powers of his office not in service of the public but in service of himself.<sup>12</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* [emphasis added] will be better served by inflicting less than what the judgment fixed.”<sup>13</sup> A self-serving pardon contradicts both a pardon’s public interest purpose and the President’s broader Article II responsibilities.

A self-pardon would also turn the President into a judge and jury in his own case where the President’s personal interests would prevent the impartial application of the law. As the Supreme Court has explained, “[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case.”<sup>14</sup> The pardon power does not alter this fundamental constitutional principle. Days before President Nixon’s resignation, the Executive branch issued its own legal analysis that arrived at the same conclusion: “Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.”<sup>15</sup>

<sup>10</sup> 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.

<sup>11</sup> Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugerman, [Faithful Execution and Article II](#), *The Harvard Law Review* 2111 (2019).

<sup>12</sup> See, e.g., Brian C. Kalt, [Pardon Me: The Constitutional Case Against Presidential Self Pardons](#), *Yale Law Journal* (Dec. 7, 2008) (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.).

<sup>13</sup> *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

<sup>14</sup> *In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>15</sup> Mary C. Lawton, [Presidential or Legislative Pardon of the President](#), *The United States Department of Justice* (Aug. 5, 1974).

These provisions reflect the central principle in our constitutional system that ours is “a government of laws, not of men.”<sup>16</sup> Self- and self-protective pardons would function to place a President above the law, exempting him from the consequences that our laws would otherwise impose. It was for this reason that George Mason, during debates over the Constitution’s ratification, warned of a President who would “pardon crimes which were advised by himself,” transforming the presidency into “a monarchy.”<sup>17</sup> As the Supreme Court plainly reiterated this year in *Trump v. Vance*, the President is not a king, but rather “‘of the people’ and subject to the law.”<sup>18</sup> Self-pardons are incongruous with this principle.

## 2. PARDONS THAT UNDERMINE THE CONSTITUTIONAL POWERS OF ANOTHER BRANCH OR THE BILL OF RIGHTS

A President may abuse the pardon power by using it to violate the constitutional rights of private litigants or to undermine the constitutional powers of the Judiciary or Congress.

First, no power vested with any branch of the federal government should be wielded to violate constitutionally protected rights. For example, the Commerce Clause allows Congress to regulate interstate commerce. But if Congress were to exercise that power in a way that prohibited mailing newspapers across state lines, it would violate the First Amendment. Likewise, constitutional rights are vulnerable to abuse by the pardon power. For example, were a President to issue 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 to the equal protection of the laws. As Justice Stevens once observed, “[N]o 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.” Equal protection under the law would likewise be at risk of abuse by a presidential pardon.<sup>19</sup>

<sup>16</sup> *Cooper v. Aaron*, 358 U.S. 1, 23 (1958).

<sup>17</sup> D.W. Buffa, [The Pardon Power and Original Intent](#), The Brookings Institution (July 25, 2018).

<sup>18</sup> *Trump v. Vance*, 140 S.Ct. 2412, 4 (2020).

<sup>19</sup> Similarly, the Court has also explained that a presidential pardon cannot be used to abrogate a witness’s Fifth Amendment right against self-incrimination. In *Burdick v. United States*, newspaper editor George Burdick had invoked that right when refusing to testify to a federal grand jury investigating customs fraud. To compel Burdick’s testimony, President Wilson pardoned him, eliminating his risk of criminal exposure and thus nullifying his ability to invoke his right to remain silent. However, Burdick

Second, no one power vested with one branch of the federal government should be wielded to neuter powers granted to the others, such as the Judiciary’s power to protect constitutional rights. Consider one power that the courts rely on to do so: the contempt power, or the ability to enforce court 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.” 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>20</sup>

Thus, a President who grants a pardon that undermines a court’s ability to enforce its orders would make “a mere mockery” of the courts’ constitutional powers.<sup>21</sup> 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.

The same principle holds true with respect to the integrity of congressional powers. For instance, if a President were to pardon someone who was charged with making false statements to Congress,<sup>22</sup> it would undermine the legislature’s ability to conduct meaningful hearings and gather requisite

did not accept the pardon and the Supreme 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.” See, *Burdick v. United States*, 236 U.S. 79, 93-94 (1915).

<sup>20</sup> See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

<sup>21</sup> 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 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.)

<sup>22</sup> *I.e.*, charged with violating 18 U.S. Code § 1001 or 18 U.S. Code § 1621.

information for its constitutionally provided oversight and legislative functions. In 2019, Trump advisor Roger Stone was convicted by a federal jury of lying to Congress, impeding a congressional inquiry into the President's 2016 campaign. President Trump—who had prior dangled the prospect of clemency to Mr. Stone during the federal investigation—commuted Mr. Stone's sentence in 2020, undermining Congress's ability to compel truthful testimony.

### **3. PARDONS THAT FUNCTION AS A BRIBE OR TO OBSTRUCT JUSTICE**

Finally, granting or proposing to grant certain pardons may also run afoul of generally applicable criminal laws, constituting a threat to Congress's constitutional power to enact federal laws that apply equally to all Americans. The abuse would be most potent when used to immunize the President from criminal liability.

First, a pardon in exchange for a bribe would violate federal bribery statutes. 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>23</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 and spent years investigating. 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 of a quid pro quo, wherein the provision of a thing of value materially influenced President Clinton's decision to issue the pardon, then the pardon would have violated the bribery statute.

Second, any pardon that is issued, or any pardon that is offered or promised to be issued (i.e., "dangled pardons"<sup>24</sup>), in order to impede an investigation would constitute an obstruction of justice. To guarantee a fair and independent criminal process, obstruction laws prohibit 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

<sup>23</sup> 18 U.S.C. § 201.

<sup>24</sup> 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.

commission of a federal offense."<sup>25</sup> Promising a pardon to prevent a witness from cooperating with an investigation would thus constitute obstruction. For instance, 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>26</sup> The mere discussion of potential pardons 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 sitting President can be indicted while in office, there is no doubt he can be subject to prosecution upon leaving. Violating criminal law through use of the pardon power would constitute an abuse of that power subject to accountability.

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The Pardon Clause provides express limitations on the pardon power: It limits pardons to "offenses against the United States," proscribing pardons for violations of state law, and prevents pardons in cases of impeachment. It is also well-accepted that the pardon power does not extend to future conduct. While a President may pardon someone for past conduct of which he has not yet been convicted, a President cannot license law-breaking head of time.<sup>27</sup> Any breach of these limitations would constitute a clear abuse.

### **"THE PARDON POWER, LIKE ALL OTHERS, MUST BE UNDERSTOOD WITHIN THE STRUCTURE OF THE CONSTITUTION AS A WHOLE."**

<sup>25</sup> 18 U.S.C. §§ 1510, 1512.

<sup>26</sup> Michael S. Schmidt, et al., [Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort](#), N.Y. Times (Mar. 28, 2018); Maggie Haberman, [Trump Asserts That Michael Cohen Asked Him Directly for a Pardon and Was Told No](#), N.Y. Times (Mar. 8, 2019).

<sup>27</sup> *Ex parte Garland*, 71 U.S. 333, 380 (1866) (The pardon power "may be exercised at any time after [a crime's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.").

However, as reviewed, these are not the only areas of significant potential abuse. The Pardon Clause is no different from any other in the Constitution that assigns particular powers to a branch of the federal government, all of which must accommodate one another. When pardons are wielded in ways that undermine these accommodations, that power is being wielded improperly. As Chief Justice Burger summarized in a 1974 case, the Constitution grants the President “power to commute sentences on conditions which do not in themselves offend the Constitution.”<sup>28</sup> The pardon power, like all others, must be understood within the structure of the Constitution as a whole.

## PREVENTING & RESPONDING TO ABUSE

Congress can and should uphold the Constitution against abusive exercises of the pardon power, as it should with any abuses of executive power. In particular, Congress should use its authorities both to deter abuses and to hold the President accountable in cases of abuse.

First, Congress should employ its extensive oversight tools to investigate potentially unlawful pardons or promises of pardons. Oversight is all the more critical when pardons are dangled as a means of obstructing an investigation or as a bribe. Congressional committees may request or subpoena documents and witness testimony to determine the context and intent behind issuance of particular pardons or pardon offers, and should 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 issues or offers to issue a self- or self-protective pardon, as well as records of conversations and materials associated with its consideration. The Protecting Our Democracy Act provides one model, requiring that all materials in relation to a “self-serving” pardon (although not

a pardon offer) be disclosed to Congress.<sup>29</sup> While statutory reporting requirements will assist in investigations, or even potential litigation, they should 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 might 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 issued or offered pardons. 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>30</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>31</sup>) In addition, just through a resolution, Congress could clarify that pardons cannot be made in exchange for some benefit or to impact or influence participation in an investigation; that courts should not view such pardons as valid and enforceable; and that the acts of issuing or offering pardons for these purposes may be high crimes and misdemeanors that could lead to impeachment proceedings.

Third, Congress should codify the requirement that the court must appoint a private attorney to prosecute contempt of court for defying a court order that protects others’ constitutional rights in a case in which the Justice Department abandons an investigation or prosecution after the President issues a pardon. The Federal Rules of Criminal Procedure call for the courts to appoint a private attorney if the Justice Department fails to prosecute a contempt of court matter. Congress should codify this provision into the U.S. Code to make clear that it is required, including in the face of pardons and for cases on appeal. Congress should also expand the private attorney requirement to cover self-protective pardons that lead the Justice Department to abandon an ongoing investigation or prosecution in which the President,

<sup>28</sup> *Schick v. Reed*, 419 U.S. 256, 264 (1974).

<sup>29</sup> [Protecting Our Democracy Act](#), H.R.8363, Title I 116th Cong. (2020).

<sup>30</sup> Bob Bauer and Jack Goldsmith elaborate on this recommendation in *After Trump: Reconstructing the Presidency*, Chapter 6.

<sup>31</sup> [Protecting Our Democracy Act](#), H.R.8363, Title I 116th Cong. (2020).

## A ROLE FOR THE COURTS

Courts must also play a role. 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. In particular, courts can rule on the constitutionality of pardons when considering whether to grant relief based on purported pardons or when victims come before the court saying that a pardon infringes upon their rights. Courts opining on the validity of pardons may invalidate unconstitutional pardons, provide remedies to victims whose rights have been infringed upon, and provide case law to guide the President and potential pardon applicants.

his family, campaign, or business is a subject, target, or witness.

Fourth, 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. At least two major categories of abuse, as detailed above, violate the Constitution: pardons that place the President above the law through a self-pardon, or through a self-protective pardon that amounts to a self-pardon by impeding an investigation into himself or his campaign or business interests; and pardons that violate the constitutional rights of individuals or undermine the constitutional powers of Congress or the Judiciary.

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 such abuses of official powers—can be a proper basis for impeachment.<sup>32</sup> U.S. officials work for the public and are constrained by the laws the public's representatives enact. If Congress determines that a President is seeking to use the pardon power to serve his own private or personal interest, to undermine the public good, to circumvent the Constitution, or place himself above the law, then impeachment is a proper remedy.

Each of these recommendations are well within Congress's constitutional powers. The President violates both federal statutes and the Constitution if he or she issues a self-pardon,<sup>33</sup> a pardon as a result of bribery, a pardon that

obstructs justice, a pardon that undermines another branch's constitutional powers, or a pardon that violates an individual's constitutional rights.<sup>34</sup> Congress can and should use its lawful authority to deter and respond to these unlawful actions. Congress of course has the power to pass federal criminal laws (such as anti-bribery statutes), and through the Necessary and Proper Clause, to ensure that those laws are properly implemented. Congress also has broad powers to “inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government.”<sup>35</sup> Thus, Congress undoubtedly has the power to require reporting<sup>36</sup> so that it can bring those constitutional violations to light and, where appropriate, act on its constitutional prerogative

<sup>34</sup> See Protect Democracy, [Legal Limits on the Pardon Power](#) (Sept. 2018); Andrew Kent, Ethan J. Lieb & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019) (analyzing the Faithful Execution Clause); [Amicus Brief, United States v. Arpaio](#), No. 17-10448 (9th Cir. Apr. 29, 2019), (explaining that a pardon that undermines the federal courts' authority is unlawful); Daniel J. Hemel & Eric A. Posner, [Presidential Obstruction of Justice](#), 106 Calif. L. Rev. 1277, 1325–27 (2018) (explaining that a pardon in exchange for a bribe violates statutes and the constitution).

<sup>35</sup> *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”).

<sup>36</sup> 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.

<sup>32</sup> History, Art & Archives, [Impeachment](#), U.S. House of Representatives.

<sup>33</sup> The Justice Department's Office of Legal Counsel, which tends to embrace a broad understanding of presidential power, has determined that a President may not lawfully issue a pardon to him or herself. Office of Legal Counsel, [Presidential or Legislative Pardon of the President](#) (Aug. 5, 1974).

to pass legislation preventing such constitutional violations in the future.<sup>37</sup>

## CONCLUSION

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>38</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>39</sup>

The Framers imported this executive power—as defended by Hamilton—for both noble and prudent reasons. However, 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.

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

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<sup>37</sup> See generally, Andrew Kent, [Can Congress Do Anything about Trump's Abuse of the Pardon Power?](#) Lawfare, (July 24, 2020).

<sup>38</sup> Stanley Grupp, [Some Historical Aspects of the Pardon in England](#), The American Journal of Legal History 7, no. 1 (1963), 56.

<sup>39</sup> *Ibid.*, 57.