

**U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
February 9, 2021**

**“Constitutional Means to Prevent Abuse of the Clemency Power”**

**Statement of Professor Josh Blackman  
South Texas College of Law Houston**

## **Written Statement of Professor Josh Blackman**

Chairman Cohen, Ranking Member Johnson, thank you for inviting me to testify. I am a constitutional law professor at the South Texas College of Law Houston.

People often think that the courts have a monopoly on interpreting the Constitution. They don't. As we speak, the House Managers are trying President Trump for violating the Constitution. And here, we will discuss the "constitutional means to prevent abuse of the clemency power."

In my brief opening remarks, I'd like to make three primary points. First, I will discuss an important purpose of the pardon power. Second, I will consider proposed statutory regulations of the pardon power. And third, I will talk about H.R. 4, a proposed constitutional amendment that would limit presidential clemency.

Today, people often think of the pardon power as a form of error correction. For example, the courts made an error by imposing an unjust sentence. Or prosecutors pursued an unjust charge. But as originally understood, clemency could serve a greater purpose. In Federalist No. 74, Alexander Hamilton identified the "principal argument" for the pardon power: "restor[ing] the tranquillity of the commonwealth." Pardons do not merely help individuals. Presidents can issue pardons to advance broader public policies. Some of the most famous pardons in American history served this purpose. President Washington pardoned participants in the Whiskey Rebellion. President Jefferson pardoned those convicted under the Sedition Act. After the Civil War, President Andrew Johnson pardoned former Confederates. And President Ford pardoned people who evaded the draft. Each of these decisions was unpopular in some quarters. But, in each case, the President used his pardon power to pursue the common good, as he saw it.

This history brings me to my **second** point. Last summer, this Committee marked up the *Abuse of Pardon Prevention Act*. I criticized this bill in a post I co-authored for *Lawfare* with my colleague, Seth Barrett Tillman, Lecturer at the Maynooth University Department of Law in Ireland.<sup>1</sup> I will submit that post for the record. In short, this proposed bill would alter the presidency such that he would now second-guess his official actions for fear of prosecution. Congress should not empower Federal prosecutors, through the power of the criminal process, to dictate what the public interest is.

**Third**, this committee is considering H.R. 4, a proposed constitutional amendment that would limit whom the President can pardon. I oppose this amendment. It attempts to constitutionalize a single conception of the public interest: what is, and is not a proper pardon. The public interest is always contestable because no one has the institutional knowledge to declare a monopoly on what is in the common good. The President should be able to make important decisions with vigor, independence, and dispatch. The President should have the greatest latitude to issue pardons, precisely because the President should have the greatest latitude to pursue what he sees as the common good. Limiting the President's power to issue pardons will limit the President's power to promote what Hamilton referred to as "the tranquility of the commonwealth." This amendment should not be adopted.

Thank you for your time, and I would be happy to answer any of your questions.

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<sup>1</sup> Josh Blackman & Seth Barrett Tillman, The Abuse of the Pardon Prevention Act Would Criminalize Politics, *Lawfare* (Aug. 20, 2020), <https://perma.cc/GE4N-A3GD>.