

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

Hearing on Examining the Constitutional
Role of the Pardon Power

March 27, 2019

Testimony of Justin Florence
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Chairman Nadler, Ranking Member Collins, Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for calling this important hearing and inviting me to testify.

I am the Legal Director of Protect Democracy, a non-partisan non-profit organization with the mission of preventing the United States from declining into a more authoritarian form of government. I am also a Lecturer on Law at Harvard Law School. I previously served as Associate White House Counsel and as a Senior Counsel on the staff of the Senate Judiciary Committee.

I appreciate the opportunity to testify today on the important role the pardon power plays in our constitutional system, as well as some limits the Constitution places on that power. This Committee’s oversight can ensure that this power is used as a tool to provide mercy and justice, as the Framers intended, and not for corrupt or unlawful means.

My organization, Protect Democracy, works to prevent and respond to actions by government officials that violate the law and undermine our constitutional democracy. We have taken several actions to prevent abuse of the pardon power. For example, when Joe Arpaio moved to have his conviction vacated on the basis of his pardon, we partnered with other legal experts and organizations to file an amicus brief explaining the constitutional flaws in that pardon. We have continued to file amicus briefs as that case has progressed.

Last year, we led a group of ten bipartisan organizations—including Republicans for the Rule of Law, MoveOn, and Stand Up Republic—in issuing a joint statement explaining certain limits that prevent abuse of the pardon power, which we accompanied with a legal memo to Congress. Last week, a similar coalition sent a letter supporting Congress’s role in preventing abuse of the pardon power.

In my testimony today I will outline the purpose of the pardon power in our Constitution and then describe three limits on that power that may be relevant to the Committee. First, Article II of the Constitution prevents the President from issuing a self-pardon or a similar self-protective pardon. Second, the President is not immune from accountability for issuing or dangling pardons

in ways that violate generally applicable criminal laws, such as those prohibiting bribery and obstruction of justice. And third, the President may not issue a pardon that prevents courts from enforcing the constitutional rights of private litigants. Congress has an important role to play in investigating and guarding against these types of abuses of the pardon power.

The constitutional purpose of the pardon power.

The Framers included the pardon power in the Constitution to allow for acts of mercy and to correct injustices. Alexander Hamilton reflects on this in *The Federalist* No. 74, in which he argues that “humanity and good policy” require that “the benign prerogative of pardoning” is necessary to mitigate the harsh justice of the criminal code. The pardon power would provide for “exceptions in favor of unfortunate guilt.”

Chief Justice John Marshall in *United States v. Wilson* expanded on the benign aspects of the pardon power: “A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”¹

We can see the value of the power of clemency in the story of Eugenia Marie Jennings, who received a commutation in 2011. Ms. Jennings was in her early 20s when she traded small amounts of cocaine in exchange for clothing, in an effort to provide for her children. She was arrested in 2001 for selling less than 14 grams, for which she was sentenced to 22 years in prison and eight years of supervised release, along with a \$1,750 fine. Mandatory minimum sentences for crack cocaine at the time were severe. By the time President Obama commuted her sentence, that policy had been reversed with sweeping bipartisan support in Congress and the Sentencing Commission, but Jennings was still in prison. She had been educating students on the dangers of drug abuse during her sentence, and eventually was diagnosed with cancer. President Obama used the pardon power to correct what he saw as an injustice. He ended her prison sentence just before Christmas, but maintained her eight years of supervised release.²

This is one of many moving stories of Presidents using the pardon power, as the Framers intended, to provide mercy and justice. For example, President Reagan pardoned a farmer who stole a mere \$10 as a postal clerk, and also pardoned a “mechanic who, as a soldier in Germany

¹ 32 U.S. 150, 150 (1833).

² *The president’s stingy use of pardons*, Wash. Post (Jan. 8, 2012), https://www.washingtonpost.com/opinions/the-presidents-stingy-use-of-pardons/2011/12/22/gIQAHbj6jP_story.html; *Obama commutes sentence of Alton woman in cocaine case*, St. Louis Post-Dispatch (Nov. 22, 2011), https://www.stltoday.com/news/local/crime-and-courts/obama-commutes-sentence-of-alton-woman-in-cocaine-case/article_c30d817e-1523-11e1-8e09-0019bb30f31a.html.

in 1948, was courtmartialed and sentenced to a year's hard labor for an assault in a bar over a card game."³ President Bush pardoned Olgen Williams who, after stealing \$10.90 from the Post Office to fuel a drug habit, "became a born-again Christian, earned three collegiate degrees and became executive director of Christamore House, an Indianapolis community center."⁴

As we see from these stories and from many others, the pardon clause serves a noble purpose of allowing for justice and mercy in our constitutional system.

But the pardon power is not without limits. For example, the text of the clause limits pardons to "offenses against the United States" and prevents pardons in cases of impeachment.⁵ It is well-accepted, therefore, that the President may not pardon a violation of state law, which is not an offense against the United States.⁶ It is also well-accepted that the pardon power does not extend to future conduct. So while a President may pardon somebody for past conduct of which she has not yet been convicted, a President cannot license law-breaking head of time.⁷ And further, courts have recognized that the pardon power may not be used in ways that violate other components of the Constitution. For example, in a 1974 case, Chief Justice Burger explained that the Constitution grants the President "power to commute sentences on conditions which do not in themselves offend the Constitution."⁸

The Equal Protection Clause furnishes an obvious example of how individual Constitutional rights must place limits on 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

³ Leslie Maitland, *62 Getting Reagan's Gift of Forgiveness*, N.Y. Times (Dec. 25, 1982), <https://www.nytimes.com/1982/12/25/us/62-getting-reagan-s-gift-of-forgiveness.html>.

⁴ Associated Press, *Bush's first pardons include ex-postal worker who stole \$10.90, man who made moonshine*, Sioux City Journal (Dec. 23, 2002), https://siouxcityjournal.com/news/local/bush-s-first-pardons-include-ex-postal-worker-who-stole/article_2540a86a-46db-5bd9-b46e-1390f6bf7e1d.html.

⁵ U.S. Const. Art. II, § 2, cl. 1.

⁶ *E.g.*, *Pardon Information and Instructions*, Department of Justice, <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited March 20, 2019).

⁷ *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.").

⁸ *Schick v. Reed*, 419 U.S. 256, 264 (1974).

or denying clemency.”⁹ The Equal Protection Clause imposes the same constraint on the President’s pardon power.

Similarly, the pardon power may not be used to disregard other constitutional rights. As one federal court put it, the pardon power is “limited, as are all powers conferred by the Constitution, by the Bill of Rights which expressly reserved to the ‘individual’ certain fundamental rights.”¹⁰ So, for example, were a President to pardon all people of one religious denomination for an offense, and exclude others, that would contradict the First Amendment’s guarantee of religious freedom.

In this respect, the pardon power is no different from any other element of the original articles of the Constitution that assigns a particular power to a branch of the federal government. For example, the Commerce Clause allows Congress to regulate interstate commerce. But Congress cannot exercise that power in a way that prohibits mailing newspapers across state lines, for that would violate the First Amendment. The pardon power, like all others, must be understood within the structure of the Constitution as a whole.

These limits on the pardon power protect its use for the purposes of mercy and justice. Only if the pardon power is not abused or exercised in ways that violate other aspects of the Constitution will that power continue to be seen and used as a viable executive power. The pardon power has never been an unfettered power, because no one part of the Constitution supersedes the rest of it. If the pardon power were absolute and unlimited, then the United States would have a king, not a President.

Let me turn now to three specific restraints on the pardon power that may be relevant to the Committee’s oversight.

The President may not place himself above the law through a self-pardon or a similarly functioning self-protective pardon of associates.

One significant limitation on the pardon power flows from Article II itself, which ensures that the President carries out his office in service of the people, not as a monarch. Two provisions in Article II—the Take Care Clause and the Oath Clause—require the President to act in the public interest, binding him to exercise fiduciary duties of loyalty and care to the common good.¹¹

⁹ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part).

¹⁰ *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1231 (D.D.C. 1974).

¹¹ Andrew Kent, Ethan J. Lieb & Jed Handelsman Shugerman, ‘Faithful Execution’ and Article II, 132 Harv. L. Rev. ____ (2019) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593.

These constitutional provisions reflect the central principle in our constitutional system that ours is “a government of laws and not of men,” and that nobody is above the law.¹² Indeed, just this month, a New York appellate court reiterated this important principle, holding, “the President is still a person, and he is not above the law.”¹³

The Take Care Clause and the Presidential Oath, in Article II, each prohibit the President from using any of the other powers available to him to place himself above the law. 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.¹⁴ 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.”¹⁵ It was no accident that the Framers included this requirement in the Constitution twice—for representative government only works if those in office act in good faith and in the public interest.

A self-pardon would run afoul of the constitutional commands in the Take Care Clause and Oath Clause. A self-pardon violates these requirements because it exempts the President from the consequences that our laws would otherwise impose. That means he is not faithfully executing the laws or the duties of his office. If the President can use the pardon power to protect himself from being held accountable for his actions through investigation or prosecution, it would effectively transform him into an authoritarian ruler, incapable of being limited by the law.¹⁶

A self-pardon would also turn the president into a judge in his own case, in defiance of a deeply-rooted constitutional principle. In the Federalist Papers, James Madison explained: “No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”¹⁷ Such is the case with a self-pardon, where the President’s own corrupt interests would prevent the faithful application of the law. 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.”¹⁸ A self-pardon would enable the President to pass that judgment in his own case—reflecting no due consideration for the public welfare, only for himself.

¹² *Cooper v. Aaron*, 358 U.S. 1, 23 (1958).

¹³ *Zervos v. Trump*, 94 N.Y.S.3d 75 (N.Y. App. Div. 2019).

¹⁴ U.S. Const. Art. II, § 3.

¹⁵ U.S. Const. Art. II, § 1, cl. 8.

¹⁶ See, e.g., Brian C. Kalt, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779, 797 (1996-97) (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.).

¹⁷ The Federalist No. 10 (James Madison).

¹⁸ 274 U.S. 480, 486 (1927).

For these reasons, the Office of Legal Counsel (OLC), which sits in the Department of Justice and provides the President with opinions on executive actions, has concluded that the President cannot self-pardon. As part of the executive branch, OLC usually favors broad readings of executive power. But on the issue of self-pardons, in a 1974 opinion written just three days before President Richard Nixon resigned, the head of the OLC wrote, “Under the fundamental rule that no one may be a judge in his own case,” the President cannot issue himself a pardon.¹⁹ Unable to pardon himself, President Nixon resigned shortly after the issuance of this opinion, a decision that has been hailed as preventing the constitutional crisis that a self-pardon would create. The prohibition on self-pardons thus reflects the basic principle, inherent in our constitutional system, that no person may be the judge in his own case.

These cardinal constitutional rules—that the President is not above the law and may not sit as a judge in his own case—likewise prohibit self-protective pardons. A “self-protective” pardon is one issued or offered for the purpose of protecting the President from an investigation. For example, if the President “dangles” a pardon before a witness in an investigation involving the President’s own interests, in a way that influences the witness’s testimony or prevents the witness from fully cooperating with investigators, that would be a self-protective pardon.

A self-protective pardon, like a self-pardon, seeks to place the President beyond the reach of the law. It violates the commandment of faithful execution of the law required by the Take Care Clause and the Oath. And it contradicts the prohibition on a person’s being a judge in his or her own case.²⁰ 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.”²¹ The pardon power does not alter this fundamental constitutional rule.

The pardon power is not exempt from laws prohibiting bribery and obstruction of justice.

A second, and related, restraint on the pardon power comes from criminal laws that bar everyone, including the President, from engaging in unlawful conduct. The Constitution empowers Congress to enact federal laws—and unless otherwise specified, these laws apply to all Americans, including the President. While Congress cannot legislate limits on the constitutional scope of the pardon power, the pardon power does not exempt federal officials,

¹⁹ *Presidential or Legislative Pardon of the President*, Op. OLC Supp. (Aug. 5, 1974), available at <https://www.justice.gov/file/20856/download>.

²⁰ See, e.g., Kalt, *supra* note 16, at 795 (“If the Vice President cannot be trusted to preside over the President’s trial [because he could make himself the next President], how can [the President] be trusted to preside over his own?”).

²¹ *In re Murchison*, 349 U.S. 133, 136 (1955).

including the President, from obeying otherwise applicable criminal laws in the course of granting or proposing to grant pardons.²²

Let me offer two examples of how granting abusive pardons could run afoul of federal criminal laws enacted by Congress.

First, look at federal bribery laws. To protect the integrity of and trust in public servants, federal law prohibits officials from exchanging official acts for anything of value for themselves or family members.²³ With those laws in mind, consider a situation in which a Justice Department official takes a cash bribe in return for placing someone's name on an official Department list of proposed pardon recipients. This would appear to violate federal law. And the fact that the Constitution gives the pardon power to the executive branch does not mean that the Justice Department official is immune from investigation and prosecution for violating bribery laws.

The same would be true if the President himself were suspected of using the pardon power as part of a bribery scheme. 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 and prepared public reports on its findings. As then-Senator Jeff Sessions said when he endorsed that investigation, "From what I've seen, based on the law of bribery in the United States, if a person takes a thing of value for himself or for another person that influences their decision in a matter of their official capacity, then that could be a criminal offense."²⁴ If the Marc Rich pardon had been found to be part of a quid pro quo, and the thing of value materially influenced President Clinton's decision to issue the pardon, then the Rich pardon would have violated the bribery statute.

Similarly, federal laws against obstruction of justice come into play if an executive branch official, including the President, issues or promises a pardon in order to impede an investigation. Federal obstruction laws, which bar corruptly motivated actions, exist to ensure that those with access and power cannot evade accountability for their actions. To guarantee a fair and independent criminal process, federal law prohibits hindering 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.²⁵

²² See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²³ 18 U.S.C. § 201.

²⁴ David Johnston, *U.S. Is Beginning Criminal Inquiry in Pardon of Rich*, N.Y. Times (Feb. 15, 2001), <https://www.nytimes.com/2001/02/15/us/us-is-beginning-criminal-inquiry-in-pardon-of-rich.html>.

²⁵ 18 U.S.C. §§ 1510, 1512.

These laws apply to executive branch officials, including the President, just as they apply to all other Americans. And courts have repeatedly held that public officials cannot evade liability for obstruction of justice because they have used their official powers to interfere in an investigation. So if the President, with corrupt intent, promises or issues a pardon to prevent a witness from cooperating with an investigation or to influence witness testimony, that could constitute obstruction of justice.²⁶

The President can run afoul of obstruction laws by dangling or promising pardons to influence a witness. According to recent news reports, President Trump's lawyers 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.²⁷ The mere discussion of potential pardons could amount to obstruction of justice if a pardon is offered to "corruptly persuade" a witness "not to convey information about the commission of a federal offense."²⁸ The factual determinations necessary to determine whether dangled pardons violate the criminal laws can, and should, be determined through law enforcement investigations or congressional oversight inquiries.

In short, if the President violates federal criminal statutes through offering or issuing a pardon, he is not immune from accountability under the law. 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 office. The President can also be subject to other forms of accountability from Congress, up to and including impeachment, for issuing or offering abusive and unlawful pardons.

Finally, the mere fact that a pardon was issued as part of a criminal act does not, by itself, make the pardon invalid, so long as it was within the President's constitutional power to grant it. But a pardon granted for a bribe or granted to obstruct justice would likely also violate the Take Care Clause and Oath of Office. This would not be a good faith execution of the laws. And an unconstitutional pardon, like any other unconstitutional act, can be found to be invalid.

²⁶ See *Law Professor Letter on President's Article II Powers*, Protect Democracy (June 4, 2018), available at <https://protectdemocracy.org/law-professor-article-ii/>; Daniel J. Hemel and Eric A. Posner, *Presidential Obstruction of Justice*, 106 Calif. L. Rev. 1277 (2018).

²⁷ Michael S. Schmidt, et al., *Trump's Lawyer Raised Prospect of Pardons for Flynn and Manafort*, N.Y. Times (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/politics/trump-pardon-michael-flynn-paul-manafort-john-dowd.html>; Maggie Haberman, *Trump Asserts That Michael Cohen Asked Him Directly for a Pardon and Was Told No*, N.Y. Times (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/us/politics/cohen-pardon.html>.

²⁸ *Supra* note 25; see also Paul Rosenzweig and Justin Florence, *Trump cannot use a pardon to stop Manafort's cooperation*, Wash. Post (Sep. 14, 2018), https://www.washingtonpost.com/opinions/trump-cannot-use-a-pardon-to-stop-manaforts-cooperation/2018/09/14/c8338d96-b770-11e8-a2c5-3187f427e253_story.html.

The President may not use the pardon power to undermine the judiciary’s role in protecting constitutional rights.

I will turn now to a third constraint on the pardon power: it cannot be used to nullify the ability of the federal courts to protect constitutional rights. The federal courts play a unique role in protecting individual constitutional rights by standing as a bulwark against the attacks of the political branches. As a result, allowing the pardon power to undermine the judiciary’s ability to protect individual constitutional rights is a serious threat to all Americans and one that undermines our system of checks and balances.

In our constitutional system, the Article III courts help safeguard individual constitutional rights. As Chief Justice Marshall wrote in *Marbury v. Madison*, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”²⁹

One power that courts rely on to protect constitutional rights is the contempt power—the ability to punish those who violate court orders. A pardon may not be issued that undermines a court’s ability to use the contempt power to enforce its orders protecting constitutional rights.

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.³⁰ Specifically, the Supreme Court held that “[c]ourts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated.”³¹ “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. ‘If a party can make himself a judge of the validity of orders which have been issued, and by his own disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls “the judicial power of the United States” would be a mere mockery.’”³²

It is foundational to our constitutional system that courts can provide redress when constitutional rights are violated, and the contempt power is an essential tool available to courts to do this. The President may not use the pardon power to make “a mere mockery” of the courts’ ability to protect constitutional rights. For could he do so, we would no longer be a nation of laws, but

²⁹ 5 U.S. 137, 163 (1803).

³⁰ See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

³¹ *Id.* at 796.

³² *Id.* (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

instead a nation subject to the whims of one man. This is all the more true, of course, because a pardon that enables someone to violate people's constitutional rights would contradict the President's obligations under the Oath and the Take Care Clause.

Congress should use its authority to prevent the President from abusing the pardon power and to hold him accountable if he does abuse it.

Congress has extensive oversight authority to investigate wrongdoing by the executive branch. It should bring that authority to bear on abuses of the pardon power. When it appears that the pardon power may have been used unlawfully, including through offering or dangling a pardon—for any of the reasons described above—Congress should investigate. Congressional committees should request or subpoena documents and witness testimony to determine the context of and the intent behind the issuance or offering of particular pardons. As representatives of the American people, Congress should also ensure there is transparency by issuing public reports regarding what it learns from investigations.

Ultimately, if Congress identifies abuses of the pardon power, it may use all forms of accountability to protect the Constitution and the public. In our constitutional democracy, government officials work for the public and are constrained by the Constitution and the laws that the public's representatives enact. If Congress determines that a President is seeking to use the pardon power to circumvent the Constitution or to place himself above the law, then censure or impeachment are available as remedies.

Furthermore, Congress can and should use its legislative authority to ensure its ability to conduct meaningful oversight and accountability proceedings concerning unlawful or corrupt pardons. That can help Congress fulfill its oversight responsibilities to prevent abuse of power and uphold the anti-corruption laws it has enacted. Through careful and measured oversight, Congress can limit the abuse of the pardon power and thus ensure that this power can continue to be used for its intended purposes of providing mercy and justice.

So I urge the Committee to continue conducting oversight in this area. Congress has not only the right but the responsibility to serve as a check on the President's powers. The people have elected Congress to be their voice in government and to reflect their interests. If the President is allowed to exercise an absolute and unlimited pardon power, the American people will no longer have a President, but instead a king. Congress has the power to ensure that the President is not above the law.

The pardon power is a noble provision of the Constitution that allows for mercy and justice. It reflects principles of redemption and an admirable humility about our system of governance. It saves people like Eugenia Marie Jennings and Olgen Williams from losing years of their lives to

unjust punishments. If it is allowed to be abused, that abuse will not only undermine the rest of the Constitution and fundamental rule-of-law values, but also the pardon power itself.

Thank you Mr. Chairman.