

Legal Sidebar

Presidential Pardons: Frequently Asked Questions (FAQs)

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[Article I, § 2](#) of the United States Constitution provides the President the authority “to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” While the text makes it clear that the pardon power is limited to federal offenses (“offenses against the United States”) and cannot be used to avoid impeachment, the terse, one-sentence provision offers little other guidance on the scope of the President’s pardon authority. The Supreme Court has [stated](#) that the President’s pardon power is near plenary, but the exercise of this authority may occasionally prompt questions regarding the power’s compatibility with notions of fairness and the rule of law. Recently, some Members of Congress (see, e.g., [here](#)) and [legal observers](#) have raised or opined upon various, oftentimes difficult, legal questions pertaining to the pardon power, including whether the President can issue “prospective” pardons; whether the President can pardon himself; and the extent to which Congress can regulate or respond to the exercise of the President’s pardon authority. This Sidebar provides a general overview of the pardon power and briefly addresses a few frequently asked legal questions concerning its scope and application.

Pardon Basics

Chief Justice John Marshall [described](#) the pardon power in an 1833 case as “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.” The Constitution’s Framers put little textual restrictions on this broad authority, which they had borrowed from English custom, when designating the President’s Article II powers. Indeed, several proposals offered at the Constitutional Convention would have curbed this power. Such proposals included requiring [Senate approval](#) of each pardon, [prohibiting](#) pardons for the crime of treason, and [prohibiting](#) preconviction pardons. Each proposal was voted down, leaving only the two restrictions found in the current text—presidential pardons are limited to federal criminal offenses and may not be used “in cases of Impeachment.” Thus, the President’s power does not extend to criminal convictions under state law. Also, a pardon only absolves penal sanctions and cannot be used to absolve a person from civil sanction or liability directly. Given the basic contours of the pardon power, several significant questions remain to be answered.

Can the President issue a so-called “prospective pardon”?

With respect to crimes committed prior to the issuance of the pardon, it appears the President can issue a pardon before any criminal proceeding against the pardon recipient has been initiated. In the 1866 case [ex parte Garland](#), the Supreme Court announced that the pardon power “extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment.” Put another way, for the President to issue a pardon, the crime must have already been committed, but the President need not wait for an indictment or other information before granting the pardon. Take, for example, President Gerald Ford’s pardon for former President Richard Nixon, which [granted](#) Nixon “a full, free, and absolute pardon . . . for all offenses against the United States which he . . . has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.” Although no indictment had been brought against Nixon, his pardon shielded him from any future federal prosecution based upon any criminal acts he may have committed during the time period stated. A 1995 [memo](#) from the Department of Justice Office of Legal Counsel (OLC) confirms this

understanding by the executive branch, noting that “throughout the Nation’s history, Presidents have asserted the power to issue pardons prior to conviction, and the consistent view of the Attorneys General has been that such pardons have as full an effect as pardons issued after conviction.”

Can the President pardon himself?

The text of the Pardon Clause does not speak to whether the President can pardon himself. The [Framers did not debate](#) this question at the Convention, and it unclear whether they considered whether the pardon power could be applied in this manner. No President has attempted to pardon himself. In a memorandum issued several days before President Nixon resigned, the OLC concluded that the President could not issue a self-pardon, positing that “under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.” This general legal assertion closely echoes [Federalist No. 10](#), in which James Madison declared that “[n]o 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.” However, Madison’s comments were not made in the context of pardons, and appear to be a general assertion about the rule of law, rather than an opinion on the constitutionality of self-pardons. While some legal scholars have contended that the President cannot pardon himself (see, e.g., [here](#) and [here](#)), others contend (see, e.g., [here](#)) that a good-faith argument, at least, could be made to support a self-pardon’s constitutional validity given the lack of textual restrictions against self-pardons within the Constitution. Accordingly, this is an unsettled constitutional question, unlikely to be resolved unless a President acts to pardon himself for a criminal offense.

Can the president issue “secret” pardons”?

Another [question](#) occasionally raised is whether the President can issue pardons without informing the public. In a certain sense, the President appears to have the authority to issue a pardon that is not officially made public, i.e., a “secret” pardon. As [historically understood](#), the only requirements for a valid pardon are that (1) the President grant it and (2) the recipient accept it. Under DOJ [regulations](#), the [Office of Pardon Attorney](#) must mail warrants of pardon to their recipients to notify them of the grant of clemency, although it is unclear whether this rule would necessarily inform a President’s practice in situations where the Office of Pardon Attorney has not taken part in consideration of the pardon request. In any event, these regulations are [advisory](#) and cannot be interpreted in a way that would impinge on the President’s Article II authority. So while the President might issue a “secret” pardon, the recipient would ultimately have to produce the pardon in order to reap its benefits.

Is acceptance of a pardon an “admission of guilt” that carries legal consequences?

Whether accepting a pardon is an “admission of guilt” under the law is another gray area surrounding the pardon power. In [Garland](#), the Court described the legal effect of a pardon in broad terms:

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

However, in the 1915 case, [Burdick v. United States](#), the Court arguably seemed to move away from this expansive reading when it observed that a “confession of guilt [may be] implied in the acceptance of a pardon.” More recent lower court cases tend to agree that a pardon does not abrogate the recipient’s guilt. The [D.C. Circuit](#), for instance, opined that “*Garland’s* dictum was implicitly rejected in *Burdick v. United States*, which recognized that the acceptance of a pardon implies a confession of guilt.” Applying *Burdick*, the D.C. Circuit concluded that “[b]ecause a pardon does not blot out guilt ... one can conclude that a pardon does not blot out probable cause of guilt or expunge an indictment.” The [Seventh Circuit](#) agreed that “a pardon does not ‘blot out guilt’ nor does it restore the offender to a state of innocence in the eye of the law as was suggested in *Ex Parte Garland*.” It has not been definitely adjudicated whether *Garland* remains good law after *Burdick*. For more information on the collateral consequences of a pardon, see this [CRS report](#).

Can Congress regulate the President’s pardon power?

The final and perhaps most important question for a congressional audience is whether Congress can regulate the President's pardon power. The Court has traditionally taken the view that Congress cannot constrain the President's authority in this regard. For example, in *Garland*, the Supreme Court held that the pardon power "is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions." This notion was reiterated in *United States v. Klein*, where the Court observed that "[t]o the executive alone is intrusted the power of pardon; and it is granted without limit." And in *Schick v. Reed*, the Court stated that the President's pardon power "flows from the Constitution alone, not any legislative enactments," and "cannot be modified, abridged, or diminished by the Congress."

While it appears that Congress lacks constitutional authority to restrict the President's pardon authority substantively—such as who may receive a pardon, when a pardon may be issued, and which crimes are pardonable—there is precedent for Congress funding attorneys in DOJ specifically to assist the Executive when assessing pardon applications. In an [1865 bill](#) funding DOJ's various clerk positions, Congress first funded the position of "pardon clerk" within DOJ, which would later become the [Office of the Pardon Attorney](#). Although DOJ has promulgated regulations for evaluating pardon petitions, the rules are expressly advisory in nature and cannot impinge on the President's Article II pardon authority. Moreover, the President is not obligated to consult with the Pardon Attorney before considering or granting a pardon, limiting the effect of congressional attempts to regulate this power.

While Congress likely is without direct legislative authority to limit the pardon power via federal statute, Congress has other constitutional tools for regulating and overseeing the President's pardon authority. Under [Article V](#) of the Constitution, Congress can offer amendments to the Constitution to alter or terminate the President's pardon authority. For example, [H.J. Res. 115](#), introduced in the 115th Congress, would, upon approval of the requisite number of states, prohibit the President from using his Article II authority to pardon himself. Additionally, to the extent it deems such action appropriate, Congress could rely on its own constitutional prerogatives—e.g., its oversight and impeachment powers—to provide a check on the President's broad pardon authority. For instance, following President Bill Clinton's last-minute pardons near the end of his second term, congressional committees held [oversight hearings](#) to assess the propriety of such pardons.

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