

# Could President Trump pardon himself?

Either way, we are well outside what the Founding Fathers had in mind.

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**I**N CONSERVATIVE circles, few arguments are more triggering than those that begin: "The Founding Fathers never could have imagined ..."

There are several reasons conservatives don't like this line of reasoning, but chief among them is that it gives license to progressives to exceed constitutional restraints.

Because the founders never could have imagined air travel, AR-15s or Twitter, the logic goes, we are free to come up with laws that violate the text or intent of the Constitution.

The conservative response is that the Constitution's guidelines are timelessly applicable in most cases, and that when they are not, we should amend the Constitution

rather than read things into it that are not there. As a rule, I subscribe to this view. But I am really struggling with the latest challenge to this worldview emanating from the White House.

President Trump and his team have staked out two positions. First, that the president can pardon himself for any federal crime. Second, that a sitting president cannot be indicted while in office for any reason.

Thus, even if Trump did fire FBI Director James B. Comey to obstruct the Russia probe, that couldn't be obstruction of justice because the president essentially *is* the Justice Department. In an interview with the Huffington Post, Rudolph W. Giuliani went so far as to claim that even if the president murdered Comey, Trump couldn't be indicted for obstruction without first being impeached and removed from office.

Now, believe it or not, there are credible arguments behind both of these claims. The Department of Justice has long held as a matter of

policy and constitutional interpretation that a sitting president cannot, or should not, be indicted, because the presidency is bound up in a single person.

As for Trump's pardon power, it is at least arguable that the founders anticipated the possibility that a president might pardon himself. As my National Review colleague, former federal prosecutor Andrew McCarthy, noted last year: "The Pardon Clause says that while the president may pardon any federal offense, this does not extend to 'Cases of Impeachment.' The Framers thus expressly considered a president's potential use of the pardon power to benefit himself."

When the Constitution was written, there were only three federal crimes: piracy, counterfeiting and treason. In that context, the pardon power was an important tool of statecraft.

Pardoning is an act of forgiveness, and one can imagine presidential magnanimity might foster social peace in a young nation full of revolutionary hotheads. The

first presidential pardon, issued by George Washington, forgave two men of treason during the Whiskey Rebellion.

Here's my dilemma (and I cringe to write these words): The Founding Fathers never imagined that the federal government would grow into the behemoth it is today. For good reasons and bad, we've set up a vast national legal apparatus with sweeping police powers. The government cannot even give a definitive answer to the question of how many federal crimes there are today. (Recent estimates range from 3,600 to 4,500.)

The president retains the power to pardon anybody who runs afoul of the federal government. That's probably a good thing, given how opportunities to abuse authority have multiplied along with the number of federal crimes.

But the founders also imagined an assertive and independent Congress that would investigate crimes by the executive branch, not by the executive branch in the form of the DOJ or FBI (estab-

lished in 1870 and 1908, respectively). Some of Robert Mueller's critics are right when they decry the fact that the executive branch is really serving as a fact-finding organ for a (Democratic) House impeachment committee.

The idea that the president can't obstruct justice is predicated on a power that the founders did not fully intend for the executive branch to have in the first place.

Also, I'm unconvinced that the president can use the pardon power on himself. Pardoning is essentially a judicial act, and as James Madison wrote in the Federalist No. 10: "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."

I could be wrong, but it seems we are way outside what the founders had in mind. I have a hard time believing they would shrug at a president assassinating an inconvenient FBI director and pardoning himself for the crime.

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