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Constitutional Law:*Should the Power of Presidential Pardon be Revised?*David I. Levine¹

The Administration of President Donald J. Trump has provided more than its share of ruptured expectations, including the way it has brandished the power of the presidential pardon. President Trump has hinted that he can pardon himself.² He ignored the standard Department of Justice procedure of screening pardon candidates by taking nakedly political steps to pardon political allies.³ In 2019, he pardoned war criminals.⁴ He reportedly offered to pardon aides and other federal employees who might break the law while fulfilling his quest to build a wall across the entire border with Mexico.⁵ Even more significantly, President Trump has played a cagey game of self-protection by offering glimpses of pardons for witnesses who are “loyal” to him and not “rats” who cooperate with law enforcement.⁶

President Trump’s efforts to use the pardon power to protect political allies and stymie political investigations are not fundamentally new but instead reflect an intensification of presidential misuse of the pardon power since Watergate. Such misuse of the pardon power undermines a basic tenet of our government: everyone is equal before the law. To check abuse of the pardon power, this Chapter argues for a constitutional amendment to require that every presidential pardon have the co-signature of the Speaker of the House of Representatives to become effective.

1. Summarized and excerpted from Budd N. Shenkin & David I. Levine, *Should the Power of Presidential Pardon be Revised?*, 47 HASTINGS CONST. L.Q. 3 (2019).

2. Carol D. Leonnig et al., *Trump Team Seeks to Control, Block Mueller’s Russia Investigation*, WASH. POST (July 21, 2017).

3. Tyler Brown, *The Court Can’t Even Handle Me Right Now: The Arpaio Pardon and Its Effect on the Scope of Presidential Pardons*, 46 PEPP. L. REV. 331 (2019).

4. *Dave Philipps*, Trump Pardons Three Service Members in War Crimes Cases, N.Y. TIMES (Nov. 15, 2019).

5. Alexa Díaz, *Trump Reportedly Tells Officials He’d Pardon Those Who Break the Law to Build Border Wall*, L.A. TIMES (Aug. 28, 2019).

6. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION (Mar. 2019).

Origin and Course of the Presidential Pardon

During our country's conception, the Founders adopted the pardon power from the English Prerogative of Kings, and added it to the executive powers in the United States Constitution.⁷ Alexander Hamilton defended "the benign prerogative" in *The Federalist* for its element of mercy in cases where the blunt instrument of the law may have perpetrated unduly harsh judgments.⁸ He also envisioned the presidential pardon serving the civic welfare by, for instance, enabling the government to forgive participants in rebellions and easing offenders' reincorporation into civil society. Hamilton argued that the pardon power should continue to be vested in a single individual, hopefully one "of prudence and good sense," rather than in a group.⁹ When the Anti-Federalists worried that the president might use the pardon to prevent investigation into his own associates or himself, Hamilton responded that a president of high character would be restrained from misuse of the power by the prospect of peer obloquy following a mischievous decision; if that were not enough, he could be impeached. The view of Hamilton and other Federalists prevailed.

In practice, the presidential pardon has typically been used for mercy, but it has also been used for civic welfare.¹⁰ In 1795, President George Washington used the pardon to expedite reconciliation after the quelling of the Whiskey Rebellion. During the Civil War, Abraham Lincoln used it to bolster the morale of Union troops by pardoning Union Army deserters and others from harsh sentences, including the death penalty. Lincoln, and later, Andrew Johnson, granted pardons and amnesty to many ex-Confederates in an effort to preserve and rebuild the Union. In the same spirit, President Jimmy Carter pardoned Vietnam War resisters a century later.

The most notable misuse of the pardon came from President Ulysses S. Grant, who pardoned several of his personal friends involved in the "Whiskey Ring." Other than Grant, there were few uses of pardons out of self-interest until the Watergate scandal in the 1970s, when a marked change seemed to occur. President Gerald Ford's 1974 pardon preempted

7. U.S. CONST. art. II, § 2.

8. THE FEDERALIST No. 74, at 362 (Alexander Hamilton) (Terence Ball ed. 2003).

9. *Id.*

10. For a more detailed review of the use of presidential pardons, see Shenkin & Levine, *supra* note 1, at 7–11.

the legal prosecution of ex-President Richard Nixon to prevent a return to what Ford called in his inaugural address “our long national nightmare.” While this pardon arguably served the civic purpose Ford claimed for it by allowing the nation to “move on,” it also served the political end of protecting the Republican Party and its members from continued public disgrace and contributed to an impression that the president is above the law.

The next great scandal of illegal acts by the executive branch was the Iran-Contra affair. Although President Ronald Reagan resisted pressure to pardon the Iran-Contra conspirators, his former vice-president and successor, President George H.W. Bush, exercised no such restraint. Having been defeated for reelection to a second term as president, but having not yet departed office, Bush issued Christmas Eve pardons in 1992 to six Iran-Contra conspirators—all high officials, friends, and colleagues—sparing them shame and imprisonment, and sparing himself further investigation by the Independent Counsel into what he knew and when he knew it.

President Bill Clinton waited until his very last day in office in 2001 to issue more than 175 pardons, more than 60 of which had not been properly evaluated by the Justice Department’s Office of Pardons. Most notoriously and sordidly, President Clinton pardoned the fugitive arms dealer Marc Rich, former husband of Denise Rich, who was a close political supporter and an important donor to the Clinton Presidential Library. A congressional committee subsequently investigated Clinton’s record on pardons and issued a scathing report.

President George W. Bush partly resisted persistent appeals—especially from Vice-President Richard Cheney—to pardon Cheney’s Chief of Staff, I. Lewis “Scooter” Libby. Libby was convicted of obstruction of justice and perjury in connection with the White House’s vindictive outing of a deep-cover CIA agent, Valerie Plame Wilson. Bush responded to the pressure by commuting Libby’s sentence, sparing Libby from prison. The commutation also enabled Libby to continue to invoke the Fifth Amendment in further inquiries, thus saving officials from revelation of their roles in the outing of CIA agent Valerie Plame. In other words, as with his father’s Iran-Contra pardons, the second President Bush granted mercy to an associate while protecting himself and other officials from further jeopardy.

Writing in 2010, Margaret Colgate Love, a former U.S. Pardon Attorney, observed: “Since 1980, however, presidential pardoning has fallen on hard times, its benign purposes frustrated by politicians’ fear of

making a mistake, and subverted by unfairness in the way pardons are granted.” She contended that, “as the official route to clemency has all but closed, the back-door route has opened wide.” About Presidents Clinton and George W. Bush, she noted, “The two presidents are also at fault: in confirming popular beliefs about pardon’s irregularity and unfairness, they disserved both the institution of the presidency and their own legacies.”¹¹

Because the Obama Administration left a less controversial record, it is possible that President Barack Obama was never tempted to grant pardons with a personal agenda. Even if he had been tempted, that allure does not appear in his record of issuing over 1900 commutations and pardons while in office. Yet abuse of the pardon power since the 1970s remains a worrisome trend, intensified by Trump’s political and personal weaponization of pardons.

Adjusting the Power to Pardon

Once a malignant trend is in place, action to counter the trend is required. If scholars correctly posit that Hamilton’s theory worked well for the first 180 years, but then broke down after Watergate, what are we to do?

Soft measures could be taken. Congress could pass legislation, such as proposed by Representative Adam Schiff, mandating that the Department of Justice provide information to Congress on certain questionable pardons. The bill would ensure that the facts surrounding the pardon would be revealed, even if the damage from the pardon itself could not be undone. Soft measures might make presidents think twice before violating the original intent of the pardon power. None, however, would dissuade a determined executive, especially a lame-duck president making midnight pardons on the eve of departure, from using the pardon power for personal or political benefit.

At the other end of the spectrum, the strongest measure of all would be to pass a constitutional amendment simply revoking the power to pardon. This would be an unduly severe reaction to a generally valuable power that is only sometimes abused. Surely, Hamilton’s judgment still holds that the pardon power is an important safety valve for mercy in the judicial process and that national purposes can be furthered by judicious use of the power.

11. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169, 1172 (2010).

What intermediate measures might then be available to readjust the power to avoid misuse? Some have suggested that certain types of pardons be forbidden, such as pardoning one's self, family members, or close associates, or issuing a pardon preemptively.¹² Another suggestion is to place a moratorium on pardons from October 1 of any presidential election year until after the next inauguration in January.¹³ The trouble with singling out specifically incorrect practices, however, is that there are too many variables for them to be well-captured in a constitutional text. There will always be other practices that are objectionable, and if they were not specifically named, the interpretative doctrine of *expressio unius est exclusio alterius* might suggest that they were allowed.

A more effective approach to curbing abuses would be to adjust pardon procedure. Currently, the Department of Justice's Office of the Pardon Attorney uses well-established criteria to recommend worthy candidates for pardons to the president. Because this procedure is not required by law, however, presidents have been able to evade it in precisely those cases that go beyond grace and national purpose. Other scholars have proposed reforms for mandating that the Office of the Pardon Attorney be involved in all recommendations for pardons, for creating a Presidential Clemency Board to review and approve all presidential pardons, and for designating the vice president as the head of a White House Clemency Office.¹⁴ The problems with these particular approaches include the cumbersomeness of the arrangements, the likelihood that the participants would not be sufficiently independent of the president, and the difficulty of opposing presidential will when the gulf between the prestige of the president and a functionary is so wide.

But the basic idea of a second, independent assent to a president's desire to issue a pardon is tenable. We propose that this second entity needing to co-sign the pardon document not be a committee, nor a bureaucratic entity, nor a person appointed by the president, nor someone whose prestige pales in comparison to the president. We propose that the needed cosignature come from the highest constitutional officer elected

12. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 199–210 (1989).

13. Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 26–27 (2002).

14. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991); Paul J. Larkin, Jr., *A Proposal to Restructure the Clemency Process—The Vice President as Head of a White House Clemency Office*, 40 HARV. J.L. & PUB. POL'Y 237 (2017).

independently from the president, who also happens to represent a coequal branch of government, Congress. That officer, next in the line of succession for the presidency after the vice president, is the Speaker of the House of Representatives.

How would this have worked in cases of questionable use of the pardon power? Knowing that the speaker's signature was required, the president and his advisors would have reviewed the pardons more thoroughly and widely. Would Speaker Carl Albert have cosigned for the 1974 pardon of Richard Nixon, Tom Foley for Iran-Contra in 1992, Dennis Hastert for Marc Rich in 2001, Paul Ryan for Joe Arpaio in 2017, or Nancy Pelosi for war criminals and what may come? While those counterfactuals are unknowable, it seems that the additional layer of approval would be protective, at least in the most controversial cases. Although the cosignature requirement might not be a strong check on presidential power when the president and the speaker are members of the same party, it will likely prevent many of the most abusive pardons.

Objections and Unanticipated Consequences

Although controversial pardons are a small percentage of all pardons issued by presidents, the matter is important enough to expend the effort to secure ratification of a constitutional amendment. Controversial pardons undermine the ideal of equal justice under law: that no one is above the law. That ideal must be protected.

The cosignatory proposal might cause the president to become less personally involved and caring. Judgments of mercy could be subject to political trading of favors. Instead of elevating the power to pardon, involving another politician in the process might degrade it. Still, even though our era has cast doubt on the ability of politicians to cooperate in a noble cause of governing, requiring the speaker's signature will increase the odds that nobility in the use of the pardon would return and remain.

Another objection to the proposal might be that eliminating the absolute discretion to pardon from presidential power would weaken the executive office. In modern times, however, the concern is not that Congress is too powerful, but that it is not powerful enough. Few states grant their governors the unfettered power that presidents now enjoy. States often require a second person or body to agree with governors' recommendations for pardons. Being able to check pardoning abuses can help the Congress protect the pardon power our Founders envisioned.

Finally, while we typically think of unanticipated consequences as being unwelcome, unforeseen consequences here might be positive. For instance, some observers believe that granting pardons for merciful purposes have been inhibited because of increased surveillance and suspicion.¹⁵ Two signatures might inoculate both signatories from some criticism. In addition, the need to work together on pardons might open up additional avenues for executive-legislative cooperation.

Practicality

Although constitutional amendments require a two-thirds vote in each house of Congress and ratification by three-quarters of the states, some amendments do get passed. Major amendments have been successfully adopted after profound changes in society, like the Civil War and the women's suffrage movement. Minor amendments—like right to vote at the age of eighteen, the limitation of presidents to two terms, and the limitations on Congress giving itself raises—have passed because they have not offended any significant entrenched interests. Because an amendment imposing a co-signing requirement on the pardon power would have prospective effect only, on the power of unknown future presidents rather than the current occupant of the office, the amendment should offend no significant interests and thus fall into the latter category of minor amendments.

Sufficient popular and political support for the amendment process would be required. In normal times, perhaps such intensity of public support to reform the pardon power could not be mustered. But these are not normal times. Imagine the outrage that will emerge should Trump fulfill his threats to bestow pardons on those who do not cooperate with legitimate congressional inquiries, if he pardons his family members, his cabinet members, or himself. It would be difficult to imagine insufficient demand to enact meaningful reforms of the pardoning power, including by constitutional amendment.

Conclusion

The presidential pardon has been increasingly abused since Watergate. To maintain an effective democracy, equality before the law is fundamental. Preserving the pardon power is important for mercy in

15. Love, *supra* note 11, at 1204.

justice and for strategic national purposes. Soft measures could serve as useful first steps. However, a stronger measure—adjusting the pardon process—is necessary.

Americans rightly view the Constitution as a sacred but imperfect document. The Founders demonstrated that they knew it was imperfect when they included a means of amending the document. Hamilton's reliance on the high character of the presidents, and their respect for the office, appears to have been fairly well-placed for nearly two centuries. In light of the post-Watergate era, however, we the People need to consider granting a portion of the responsibility for the benign prerogative of pardoning to the Speaker of the House of Representatives.