

Pardon as Prerogative

When the Federal Convention of 1787 set out to draw a republican projection of the British monarch, they eliminated almost all of the royal prerogative. Executive authority to dispense the laws, for example, was specifically denied through the Take Care Clause of Article II. Almost all the prerogative went out, but not quite. Indeed, the framers retained one part of the royal authority that most closely fits John Locke's definition of prerogative, the power of doing good without a rule.¹ Like British monarchs, American Presidents may pardon crimes and offenses against their government.

By and large, governments do good through rules and not outside them. Requiring that government operate through rules laid down in advance is a powerful tool for ensuring that those with power do what they are supposed to, and therefore a powerful tool for inspiring the kind of confidence that leads people to plan and invest for the long term. Discretionary decision after the fact undermines confidence and invites abuse of power. Discretion is dangerous. So far, however, no one has come up with a system of rules that can meaningfully be specified *ex ante* and call for no discretion in their application. No rule or set of rules captures practical wisdom. Hence one of the central problems for institutional and especially constitutional design is finding the best combination of rules and discretion.² Using while limiting prerogative is as much a problem for us as it was for the framers or for the British under the Stuarts.

Seeing the pardon power as a bit of the royal prerogative dropped into our generally law-bound constitutional system provides a perspective on the actual and possible functions of that power, a perspective that both furthers our understanding and provides a basis for policy. I will identify the main purposes to which presidential pardons have been and could be put and ask whether they are exercises of the prerogative in Locke's sense. Then I will suggest that the pardon power as our Constitution establishes it should be a prerogative power and should not be heavily legalized, and draw implications from that normative position.

Even after recent events, the most famous use of this power in American history remains President Ford's pardon of Richard Nixon. Ford's action falls into a category that *The Federalist* features prominently: pardons for reason of state. Hamilton, writing as Publius, explained that the President might be able to nip a treasonous conspiracy in the bud by timely offers of pardon.³ During the Constitution's great crisis President Lincoln sought to do just that, offering pardons for

Confederates who would return to federal allegiance. Once the war was over President Andrew Johnson, in similar fashion, made the pardon one of his principal tools for encouraging southerners to mend their ways.⁴ Hamilton's hypothetical case, and the real examples provided by Lincoln, Johnson, and Ford, all involve situations in which the President could decide that the ordinary operations of criminal justice should be suspended, not for reasons having to do with guilt or innocence or any other concern of the criminal law, but for overriding considerations of policy that could not have been foreseen when the law was made.

Hamilton mentioned another function that remains current: the pardon power as safety valve for guilt and innocence.⁵ Even the best systems of adjudication make mistakes, and their ability to correct mistakes is limited, not least by rules that reflect the need for finality in adjudication. But conviction of the innocent is a heavy price to pay, and execution of the innocent a nightmarish one. Where the demands of finality cut off reconsideration as of right, the pardon power can provide it as of grace.

Students of the pardon power know about a third function, one of which even lawyers may be largely unaware. For decades Presidents have granted prisoners relief on the basis of developments after their conviction that, while not foreseen by the sentencing court in any particular case, are sufficiently common over the range of cases to constitute identifiable categories. Presidents in the twentieth century often pardon offenders whose guilt was unquestioned and whose case raised no great policy or moral issue but who have atoned by accepting their punishment and going on to lead blameless lives. They also sometimes commute sentences for humanitarian reasons, such as age or extreme illness, or because the sentence turns out to be disproportionate compared to those of similar offenders. Such cases form the bread and butter of the pardon process and mainly occupy the Pardon Attorney and Attorney General. These are the situations contemplated by the Department of Justice's regulations on pardons.⁶

Fourth, the President can use this authority to influence federal criminal justice policy. At the retail level it is a way in which Presidents can control prosecutors. Although the President's other means of exerting such control may seem to make pardons unimportant in this connection, there is enough room for the pardon power to make a difference. President George H. W. Bush's pardon of Secretary Weinberger



**JOHN
HARRISON**

Professor of Law and
Class of 1966
Research Professor,
University of Virginia.

reflected a disagreement between the chief executive and a prosecutor over whom he had less-than-usual control. Presidents also may wish to use pardons to project their power backwards or forwards in time. President Jefferson pardoned defendants convicted of seditious libel under the Adams Administration because he thought the Sedition Act unconstitutional. President Clinton's pardon of Marc Rich locked in his decision, because while his successor could reverse a decision to drop the prosecution he could not undo a valid pardon. At the wholesale level, pardons can reflect the President's judgment about federal criminal policy. For example, a President who agreed with Congress' decision to criminalize certain conduct but thought the legislature's chosen punishment too severe could systematically commute sentences.

Some pardons will not fall into any of the preceding categories, so there is also a miscellaneous section, but I think that these four types capture the bulk of cases.⁷ As indicated at the outset, my perspective here centers on pardons as exercises of prerogative, as ways of doing good without a rule. The first two types are prerogative pardons: reasons of state override the normal concerns of the criminal law precisely in extraordinary circumstances not dealt with by those rules, and pardons of the unjustly convicted are likewise supplementary to elaborate rules designed to keep the innocent from being convicted in the first place. If the rules laid down in advance dealt properly with all possibilities, such pardons would not be necessary.

In the two latter categories, by contrast, it would be possible to capture the underlying considerations in a rule that could be specified in advance. With respect to pardons for the truly reformed, the Justice Department's pardon process under the regulations seeks to do exactly that, and the flow of pardons over the years has been large enough to show the rules in operation.⁸ In similar fashion, age and illness and other grounds of humanitarian commutation are all too predictable, and uniformity of sentencing is one of the principal goals of criminal justice policy. The fact that atonement or severe illness happens, or disparity is discovered, after conviction, does not mean that the possibility of such developments cannot be foreseen. On the contrary, those possibilities are well known. Most criminal justice policy pardons, in particular those that arise from disagreement over sentencing policy, likewise reflect considerations that could be captured in a rule. When the President pardons because he believes that Congress' sentencing mandates are too harsh, he is proposing to replace one rule with another.⁹

As a normative matter I favor the vision of pardons as exercises of prerogative. They should be like lightning bolts, relatively rare and in principle hard to predict because their incidence, although chosen on a reasoned basis, cannot be accounted for in advance by

the imperfect approximations of reality on which legal rules are based.

That normative preference is relative to our particular constitutional arrangement. The President is a single individual, politically selected and politically accountable. Such methods of selection and accountability will, we hope, yield Presidents who are capable of acting well in unpredictable circumstances and have incentives to do so.¹⁰ The same discretion that makes a good chief diplomat and good military commander should make a wise dispenser of pardons in circumstances that no rule could have dealt with in advance. It is the President's job to exercise judgment in the face of the unexpected.

But when the pardon power is used to deal with situations that are foreseeable, that can be dealt with through ex ante rules, it creates a form of legislation. The current Department of Justice pardon process is largely of that nature. Its offer of a pardon for the truly reformed is based on principles that will apply to crimes yet to be committed, and indeed criminals yet to be born. Those principles are not an effort to deal with unforeseen events. Granting significant legislative power to a single individual, even the President of the United States, is contrary to the genius of our Constitution. Collective deliberative bodies are not very good at responding quickly to sudden shocks, but they are the best mechanism we know for collecting conflicting views on important questions and producing solutions that most people can live with.

Moreover, a pardon system that is not limited to the exercise of prerogative-style discretion puts the routine application of those rules, which so resemble legislation, in the hands of the President and his executive subordinates. This too is anomalous. While the relative scope of the judicial and executive powers can be a maddening legal tangle, in most circumstances final decisions concerning the imposition of criminal sanctions are made by indirectly selected, politically unaccountable officers whose incentives are supposed to lead them to apply legal rules as impartially as frail human nature permits. To the extent that the pardon power involves a quasi-judicial function, that function is most naturally performed by actual judges.

Thus a system in which pardons are dispensed pursuant to ex ante rules that require only some relatively minor discretion in their application is a square peg in the Constitution's round hole. It has the President legislating and adjudicating, which is not what he is supposed to be good at, and not exercising the high political discretion in the face of the unexpected that is supposed to be his strong suit. Like many jury-rigged governmental systems, it can function reasonably well with good personnel, and largely has done so. Systematic presidential pardons, either as a form of early release or of more complete forgiveness than the law

usually allows, probably have not deviated far from the result Congress and the courts would have produced in creating and administering a formally rule-bound system. That may be true, however, only because the policy questions involved are relatively uncontroversial.

One class of possible pardons, however, very much puts the President in conflict with congressional policy. Many today believe that federal sentencing is too draconian in important areas. Should the President come to believe that, he could use the pardon power as a substitute for curative legislation. I find that possibility very troublesome. Although his nationwide constituency justifies the President's role in the legislative process, in broadly overturning congressional sentencing policy he would be acting as a single-member legislature, not just as part of the law-making process. One way to see how disturbing it would be for him to use the pardon power legislatively is to ask whether Congress could responsibly have conferred the authority it granted to the Sentencing Commission on the President alone. Most people, I expect, would find that grant excessive (and many find the grant to the Sentencing Commission excessive).

This is not to say that the third function I identified, mercy based on developments after conviction, should not be performed at all. Rather, in my view it is not a good use of the pardon power because it does not respond to *ex post* emergencies that require discretion. Congress could, and I think probably should, legislate for such situations. For example, with respect to absolution for the reformed, Congress could provide that after a stated number of years convicted criminals who satisfied specified criteria of reform were to receive from the sentencing court a form of relief that largely undid their conviction. It might press into service the old writ *coram nobis*, or could devise some new mechanism, perhaps one resembling the expungement of minors' convictions. In similar fashion, it could authorize sentencing courts to grant relief for humanitarian reasons, and provide post-sentencing review to even out disparities in punishment. The law and the courts can deal in a rule-bound way in atonement and forgiveness, just as they deal in judgment and retribution.

They cannot, however, deal in a rule-bound way with circumstances that the rules cannot foresee, and

therefore in my view they should not be in that business at all. Courts at their best possess technical expertise and considered legal judgment, but for the kind of political judgment that should guide the prerogative we should look elsewhere. When our Constitution vests the power of doing good without a rule, there is no better place to put it than in the hands of George Washington's successor.

Notes

¹ "For Prerogative is nothing but the Power of doing publick good without a Rule." JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 425 (P. Laslett ed., 1960) (Section 166 of the Second Treatise of Civil Government) (emphasis in original).

² "It is impossible to foresee, and so by laws to provide for, all Accidents and Necessities that may concern the Publick; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all Persons, that may come in their way, therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe." *Id.* at 422 (Section 160, Second Treatise of Civil Government).

³ ALEXANDER HAMILTON, THE FEDERALIST, No. 74.

⁴ The number of pardons involved in the Civil War and Reconstruction should not obscure their discretionary nature. Lincoln and Johnson were dispensing the law against treason for reasons not contemplated by those who forbade treason. They were dealing with an emergency that the ordinary law could not foresee (other than to say that emergencies happen and someone should be authorized to deal with them).

⁵ ALEXANDER HAMILTON, THE FEDERALIST, No. 74.

⁶ In the nineteenth century, the pardon power often was used for the early release of federal prisoners, thus performing the function of parole.

⁷ Pardoning one's siblings, for example, would fall into the miscellaneous category.

⁸ Early release, which at the federal level was often handled through pardons in the nineteenth century, later was institutionalized through parole and then through determinate sentencing.

⁹ Retail-level pardons that control prosecutorial policy are less likely to reflect decisions that could be formulated as rules.

¹⁰ Not the least of those incentives is fame. Although the framers did not use the term legacy in this context, they were very much concerned with their reputations, both in their lifetimes and among their posterity.