



## Presidential Pardoning Power: Are There Limits?

As the media-driven mania for finding some shred of convincing evidence of collusion between President Donald Trump — or his surrogates — and Russian officials shows no sign of spinning down, the legal limits of the presidential pardon power are being analyzed by partisans on both sides of the issue.



Article II of the U.S. Constitution declares that the president “shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

President Trump has made his opinion on the matter very clear, insisting on that he has “complete power to pardon” to himself, his family, as well as his political and personal associates should they be charged with any crime.

“While all agree the U.S. President has the complete power to pardon, why think of that when only crime so far is LEAKS against us,” the president posted on his Twitter account, doubling down on his claim that the Constitution places no limits on the executive’s pardoning power.

With special counsel Robert Mueller reportedly impanelling two grand juries (one in Virginia and one in Washington, D.C.) tasked with considering the evidence of any Russian interference in the 2016 presidential election, the possibility that President Trump might need to pull a pardon out of his presidential tool kit is become less remote.

As with most questions of constitutional construction, the commentary written by those who drafted and debated the Constitution between 1787 and 1789 is persuasive and illuminating.

In *The Federalist*, No. 69, Alexander Hamilton explores the potential misuse of the proposed power of the executive to pardon all offenses except impeachment.

“A President of the Union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction,” Hamilton writes.

Presumably, “no offender” would include the president himself.

In other words, the president could, Hamilton claims, pardon himself for crimes, even treason or conspiracy to commit treason, though he could not shield himself from impeachment and removal from office.

About 11 days after penning this examination of the pardon power, Hamilton — himself a friend of an executive possessed of nearly unbounded authority — takes up the topic again.

In *The Federalist*, No. 74 Hamilton writes:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be



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as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

Hamilton's espousal of extreme executive pardon power was contradicted in the philosophy of Italian jurist and philosopher Cesare Beccaria. In his *An Essay on Crimes and Punishment*, Beccaria posits the following about the existence of the power to pardon and legitimate reasons for its exercise:

It is indeed one of the noblest prerogatives of the throne, but, at the same time, a tacit disapprobation of the laws. Clemency is a virtue which belongs to the legislator, and not to the executor of the laws; a virtue which ought to shine in the code, and not in private judgment. To shew mankind, that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression. The prince, in pardoning, gives up the public security in favour [sic] of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity.

There are those who will dismiss Beccaria's denunciation, being unfamiliar with the author and his influence. Readers would do well to remember, however, that the research conducted by Professor Donald Lutz on the writers who most influenced the Founding Fathers revealed that Beccaria was in the top 10 of that list, ranking just two spots below John Locke!

Closer to home, "Centinel," the pseudonym of the Pennsylvania anti-federalist Samuel Bryan, warned that the pardon power granted to the president in the proposed constitution would allow the president to "screen from punishment the most treasonable attempts on the liberties of the people."

Bryan's fellow Pennsylvanian anti-federalists suggested that the only way to prevent the president from exercising the pardon power to protect his cronies (or himself) would be to have required any such action be subjected to the review of "a small independent council" created specifically to avoid such self-serving clemency.

Anti-federalist admonitions aside, there is no debate that the Constitution establishes only one exception to the pardon power granted in that document to the president: impeachment. Any other crime, therefore, could be constitutionally pardoned by President Trump and he would be within the boundaries of his legitimate constitutional authority.

That said, elections aren't won on philosophy, and since the first days of his presidential campaign, Donald Trump promoted himself as tough on crime. If he were to pardon himself, his son, or anyone indicted for colluding with Moscow, "law and order" Republicans might find themselves facing the



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dilemma of choosing to stand behind their president or remaining rigid on the question of punishing crime.

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