

Bush's Preemptive Self-Pardon: Pardon Me, Congress?

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Global Research, October 24, 2008

[After Downing Street](#) 23 October 2008

Region: [USA](#)

Theme: [Law and Justice](#)

Jerry Seib, executive Washington editor of The Wall Street Journal said on the Diane Rehm Show on NPR last week that he expects Bush, Cheney, and their subordinates to be prosecuted for torture. This expectation is spreading.

As we approach W's last day in office, on which I'm willing to bet you he issues some sweeping pardons of crimes he himself authorized, an act already recommended to him by various voices in the corporate media, we also approach, of course, the dates before and/or after those pardons on which congressional committees may hold hearings to whine about the matter.

I actually think Congress should hold hearings, and hold them as soon as possible, but not just to speechify, rather to take serious steps to prevent something brand new in American government: a president pardoning himself and/or pardoning his subordinates for crimes he instructed them to commit, crimes for which they have, in most cases, not yet even been charged, much less convicted and sentenced.

The unconstitutionality of self pardons is discussed at length in "Pardon Me? The Constitutional Case Against Presidential Self-Pardons," by Brian C. Kalt in the Yale Law Journal, December 1, 1996: <http://www.jstor.org/pss/797310> Kalt gives an argument based on original intent and the English history that informs it, text and structure, case law, and the broader precedential principles of self-judging and the rule of law. I would supplement Kalt's section on original intent with a couple of pieces of information he overlooks.

First, George Mason argued that we needed impeachment in the Constitution because a president might some day try "to stop inquiry and prevent detection" of wrongdoing within his administration or might "pardon crimes which were advised by himself." And James Madison maintained that if "the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty."

When these men gave the president the pardon power in the Constitution, they clearly did not intend it to include self-pardons or pardons of crimes authorized by the president. They thought the latter sort of abuse merited impeachment. In fact, they thought the possibility of such abuse justified the creation of the power of impeachment in the Constitution. And they apparently considered self-pardons so outrageously counter to the basic idea of a government of laws, that their unacceptability went without saying.

Second, Alexander Hamilton defended the pardon power in Federalist 74, suggesting that "the fate of a fellow-creature depended on his sole fiat, would naturally inspire

scrupulousness and caution [in the president]." A fellow-creature is clearly not the president himself. Hamilton discussed the possibility of "the secret sympathy of the friends and favorers of the condemned person, availing itself of the good-nature and weakness of others [were the pardon power to be given to more than a single individual]." Clearly the condemned person is someone other than those holding the pardon power.

The belief has taken hold in Washington, D.C., that the presidential pardon power cannot be restricted other than through amendment of the Constitution. But part of the reason for that belief is that few people heretofore have considered the outrageous possibility of a president pardoning himself. A careful analysis, I believe, would lead to the conclusion that Congress is completely within its rights to legislate a ban preventing the presidential pardon power from being distorted to include the power to self-pardon the president, or to pardon any staff or contractors of the executive branch, including the vice president, for crimes authorized by the president.

Of course, such legislation would be vetoed by Bush, but it could be passed during the next Congress, and it could be written to retroactively revoke Bush's illegal pardons. After all, we recently retroactively legalized massive violations of the Fourth Amendment and statutory law by telecommunications companies. Surely, we can retroactively revoke pardons. In fact, according to press accounts in 2001, President George W. Bush seriously considered, himself, revoking former President Bill Clinton's controversial pardon of Marc Rich, but ultimately chose not to do so despite the advice from his lawyers in the Justice Department, advice that Congress could subpoena next year if it hasn't all been shredded. Of course, this suggests the possibility of lobbying President Barack Obama to revoke invalid pardons made by Bush.

Another course that Congress could take right now would be to introduce and support legislation creating a Constitutional Amendment to restrict self-pardons and pardons of subordinates for crimes ordered by the president. Such an amendment would not be ratified quickly, but it would raise the level of potentially bipartisan opposition to Bush pardons, which might discourage them. At some point, surely, the Republican Party is going to decide that one more nail in its coffin is too many.

The best approach of all, however, would be one that Bob Fertik has proposed, although I guess the framers of the Constitution beat him to it. The House could impeach each top official likely to receive a preemptive pardon from Bush, or impeach them once they receive the pardons, whether or not they are still in office, and whether or not President Obama has tapped them to stay on. First on the list would be I. Lewis "Scooter" Libby whose sentence Bush has already commuted.

One way to get a feel for how a Congressional hearing on this topic might go is to read the transcripts of the last ones. The House Committee on Government Reform, chaired by Republican Dan Burton, held a hearing on February 8th and March 1st, 2001, on the topic of Clinton's pardon of Rich, a hearing that apparently dragged on for many, many hours. One noteworthy witness was Scooter Libby himself, in his capacity as lawyer for Marc Rich, a man alleged — among other things — to have traded with enemy nations, a practice long engaged in by Libby's boss in the White House, Dick Cheney. The Senate held a similar hearing, but I haven't read it. And the House Judiciary Committee's Subcommittee on the Constitution, chaired by Republican James Sensenbrenner, held a hearing on February 28, 2001, on the general topic of presidential pardon power.

What you learn from reading these transcripts is that corrupt pardons are nothing new, but pardons of the sort Bush may make would be so new as to not yet have been even contemplated. Toward the end of the Constitution Subcommittee hearing, the topic does arise of a president issuing a pardon from which he benefits indirectly through bribery from the person pardoned. On this topic, the strongest comments in favor of holding the president to the rule of law came from the man who is now the chair of that same subcommittee, Jerrold Nadler.

The Government Reform transcript makes clear that the Washington bureaucracy has all variety of concern over the process of issuing pardons, over requests coming a certain number of years after sentences have been served, over input being received from prosecutors, and so forth. Congressman Bob Barr goes so far as to suggest that pardons issued by Clinton are invalid because he didn't follow proper procedures, and because he speedily pardoned a long list of people without properly explaining himself to the public. Of course, no one imagines that Bush will follow any procedures at all or explain himself to anyone, but Barr's argument may be worth resurrecting nonetheless. Congressman Burton himself asserted during the hearing that "if a Republican President had presided over a pardon process that resembled the chaotic mess that seemingly characterized the final days of the Clinton administration, I would be outraged and would criticize it." Get ready to do more than criticize, Congressman.

While pardons cannot slow down civil, state, local, international, or foreign prosecutions, they can completely block federal prosecution. An ideal outcome right now would be for president-elect Obama to oppose pardons, because it would move him in the direction of prosecuting. He will take his cue from Congress, which in theory represents the will of we, the people.

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