

Limiting Presidential Pardon Power
The one constitutional amendment both political parties could support

In the last days a president spends in office, and sometimes in the last hours, one of the actions that attracts the most attention is their choice for pardons of people accused or convicted of federal crimes. These pardons by both Republican and Democratic chief executives also attract criticism, especially when the people they order to be pardoned are notorious for their crimes or political connections to the outgoing president. A constitutional amendment requiring the Senate to consent to all presidential pardons would place an important check on the power of the executive branch and bring the design of our democracy into closer alignment with the vision of three co-equal branches of government.

The first clause of Article II Section 2 of the Constitution states: “The President ... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” The proposed constitutional amendment would make a simple adjustment to this clause: “The President ... shall have Power, **with the concurrence of the Senate**, to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”

This amendment is especially important today because of the many recent examples in which presidents from both political parties abused this unilateral pardoning authority and rewarded criminal misconduct by friends and political allies. New attention was placed on this authority when President Trump pardoned 144 people on his last day in office in January 2021, some of them implicated in the Jan. 6 insurrection at the Capitol. But Trump, a Republican, is hardly the only president to spend his final hours in office letting friends, political cronies and hardened criminals off the hook and, in fact, Trump issued fewer pardons than most other contemporary presidents.

The presidential pardon power was inspired by a British law meant to protect the unjustly accused. It was for this reason that Federalist Alexander Hamilton advocated successfully for a presidential pardon power that did not require judicial or Senate approval. This was a point of disagreement at the Constitutional Convention in 1787, as opponents argued that this unchecked power to pardon would encourage corruption and tyranny (1).

For more than 200 years, accusations of corruption have accompanied many presidential pardons, but there are also examples of presidents pardoning or commuting the sentences of the wrongly convicted, or trying to stabilize society after a time of conflict. The proposed amendment would still allow this to happen. Abraham Lincoln and Andrew Johnson pardoned Confederate soldiers after the Civil War in an effort to promote unification. In 1977, Democrat Jimmy Carter pardoned more than 100,000 men who had dodged the draft to avoid serving in the military during the Vietnam War. Republican Gerald Ford pardoned former president Richard Nixon in 1974, saying it was in the best interests of the country. Interestingly, Nixon had someone research whether he could proactively, legally pardon himself, a question that also came up in the final days of the Trump administration. (2) The answer from legal experts was, probably not, but practically speaking this amendment would close the door on any potential self-pardon.

Even without the spectacle of a self-pardon, there are many examples of questionable pardons that have generated debate over whether this unique presidential power still has a place in modern society. In many cases, presidents – Republicans and Democrats – issued pardons only out of self-interest. One could argue that is the case with some of the Trump pardons, which included political insiders Steve Bannon, Roger Stone and Michael Flynn, all of whom were thought to be potential witnesses who could be called in any criminal action against the

president. Another infamous example was in 1971 when Nixon commuted corrupt labor leader Jimmy Hoffa's prison sentence, supposedly as part of a backroom deal that required the union to support Nixon's reelection campaign. More recently, Democrat Bill Clinton is remembered for issuing a pardon in his last hours in office in 2001, letting a notorious financial criminal, tax evader and generous campaign contributor, Marc Rich, skip out on federal charges. Clinton is also remembered for pardoning his half-brother, Roger, for a cocaine possession charge (3).

The extra scrutiny that Senate confirmation would require would probably discourage the most controversial pardon requests like Marc Rich and Roger Clinton, but it would still enable exceptions to be made for those who deserve a second chance or for their name to be cleared (4).

Despite the polarization that divides our country today, this amendment would help restore faith in our government by affirming that no one is above the law. It would presumably generate bipartisan support because it would not provide any advantage to either party. The language of the amendment is simple, and so is the appeal to the average citizen: The rich and powerful no longer have a get-out-of-jail-free card.

In 232 years, more than 10,000 amendments have been introduced, but only 27 have been ratified, the last in 1992 (5). Both its bipartisan nature and the fact it gives new power to the Senate are also reasons it would find support in Congress and in states. Achieving the two-thirds majority needed in both the House and Senate to propose the amendment would be challenging, but doable. A campaign rallying for support by two-thirds of the state legislatures would also be similarly challenging and would probably take years but would not fall along red and blue divides.

At a time of mistrust and cynicism about our democracy, this amendment would help restore their confidence that we are governed by a system of laws, not men. It would strengthen the democratic system of checks and balances envisioned by the framers of the Constitution by eliminating the few “loopholes” that grants the executive branch an important unchecked power. And this amendment would still enable pardons that would correct serious injustices and under circumstances that could promote national unity.

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