Transforming the Theater of Pardoning

I. Introduction

Early modern European kings notoriously took the opportunity of executions to stage themselves and their sovereign power. Michel Foucault's description of how a failed French regicide was drawn and quartered before a vast crowd in the middle of the eighteenth century remains perhaps the most vivid account of this practice.[1] Yet pardoning as well as punishment held the potential for staging sovereign power. As philosopher Immanuel Kant claimed at the end of the eighteenth century, the sovereign "show[s] the splendor of his majesty" through exercising the power of clemency.[2]

Despite the centuries of opportunity, no prior political figure has deployed the theatrical potential of pardoning to aggrandize his sovereignty with as much fanfare and commitment as former President Donald Trump. From the selection of those pardoned, to the timing of his pardons, to the performance of the act itself, to the physical form of his pardon grants, Trump generated spectacle after spectacle designed to enhance his own image through his successive pardons.

As a result, although Trump issued only 144 full pardons—fewer than President Obama and in accordance with the trend of declining exercise of the presidential pardon power—his pardons garnered substantial media attention and spawned widespread criticism.[3] Calls to limit the president's power to pardon either constitutionally or through statute pervaded Trump's tenure in office and persist in its aftermath. These calls furnish an opportunity for the Biden administration to transform the pardon process and, in doing so, render it less a relic of sovereign royal authority and more a liberal democratic institution.

While the potential for pardons to overturn values of both liberalism and democracy became most evident through Trump's abuse of the power, fear of this possibility is as long-standing as the U.S. Constitution. While explaining the ability of the pardon to "show the splendor" of the king's "majesty," Kant described it as "of all the rights of a sovereign . . . the slipperiest one for him to exercise" because it can entail "doing injustice in the highest degree."[4] Closer to home, Thomas Jefferson attempted to excise pardoning from the Virginia Constitution, believing that pardoning would no longer be necessary in a fully enlightened criminal justice system.[5] In order to revitalize pardoning after Trump, it will be crucial to render it visibly compatible with liberal democracy. Rather than a theatrical display of the ultimate authority over life and death or imprisonment and freedom, it should instead become a participatory theater permitting citizens to help rethink the foundations of criminal justice.

II. Trump's Theatrical Pardons

President Trump transformed the federal pardon process from a fairly routine bureaucratic mechanism operated by the Office of the Pardon Attorney into a series of personally negotiated and theatrically performed acts. Under the system Trump inherited from President Obama, with origins in the late nineteenth century, the Office of the Pardon Attorney, located in the Department of Justice, vetted potential presidential pardons and recommended which the president should grant.[6] Trump instead circumvented that office and directly decided on pardons lobbied by friends, political allies, and prominent personalities.[7]

In doing so, Trump staged his pardons with attention to timing and context for maximum effect. Two such events occurred during the Republican National Convention in which he was nominated for a second term. After auguring the pardon of Jon Ponder, saying, "I have a feeling he's going to get that full pardon. . . . I can't tell you, but I have a feeling,"[8] he pardoned the formerly incarcerated bank robber turned nonprofit leader in the midst of the convention and announced the pardon on video during that event. He then announced that he had decided to pardon Alice Johnson, whose sentence he had already commuted, upon seeing her in the audience of his speech accepting the nomination. Already following the commutation of her sentence, as the *New York Times* reported, "the 64-year-old African-American woman was the star of the Trump campaign's multimillion-dollar Super Bowl ad, part of an effort by Mr. Trump and his son-in-law and senior adviser, Jared Kushner, to reach black voters."[9] Earlier, Trump had brought pardoned war criminals to the stage during a fundraiser.[10]

In the pardon spectacles that Trump produced, the hero was none other than himself. The written form of his pardon grants rendered the relative importance of the characters involved evident. Unlike any earlier pardons, they featured the name "Donald J. Trump" in bold lettering much larger than the pardon recipient's name, and included his magnified signature.[11] Trump faced criticism for the role of his individual signature on Covid-19 relief checks, but the prominence given him as individual and as president appears even more starkly in these pardon documents.[12]

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Trump's pardons were remarkable not merely for their showmanship but also for the particular messages they were intended to convey. These messages served to bolster Trump's vision of populist leadership unconstrained by the rule of law. Whether they implicated him personally or involved those with whom he had no direct connection, these pardons upheld the legitimacy of behavior akin to Trump's own.

One group of these pardons pertained to Trump personally. Throughout his tenure in office, Trump fueled widespread speculation about whether he would attempt to pardon himself, a move unprecedented in the history of the American presidency.[13] Although ultimately Trump did not issue a public self-pardon, many of his other pardons nevertheless implicated his own susceptibility to the law.

Pardons of his fans signaled that those allied with Trump would not face criminal consequences. Hence, Trump pardoned former New York City police commissioner Bernard Kerik, who often defended the President on Fox News.[14] Pardons of associates and family members showed that those in Trump's inner circle would not be held accountable. The pace of these pardons accelerated as Trump neared the end of his tenure in office, and he pardoned or commuted the sentences of former campaign advisor Paul Manafort, early chief strategist Steve Bannon, and longtime ally Roger Stone, as well as Ivanka Trump's father-in-law, Charles Kushner, during his last few weeks in office.[15]

Another set of pardons involved political leaders who had been involved in corruption or who had put power over and above the rule of law or constitutional and human rights. These pardons suggested the view that the underlying crimes were not crimes at all, a suggestion with implications for Trump's own behavior while in office.

Condoning corruption, Trump ultimately commuted the sentence of former Illinois Governor Rod Blagojevich, who had attempted to sell the Senate seat left vacant by Obama when he became President, over the vociferous objections of many Illinois Republicans.[16] Among his late-breaking acts of clemency, several more aided politicians who had been accused of corruption.[17]

Trump also pardoned individuals condemned for or accused of violating the constitutional or human rights of others, particularly people of color. His very first pardon, of former Maricopa County Sheriff Joe Arpaio, set that paradigm. Arpaio had insisted on state and local intervention in immigration enforcement and, in the process, had infringed on the constitutionally protected rights of many members of the Latinx community through traffic stops and other interventions that impermissibly targeted people on the basis of their race. Trump, who had vocally supported Arpaio's anti-immigrant measures, expressed disdain for the constitutional constraints on immigration enforcement through this pardon.

Similarly, by pardoning war criminals, Trump affirmed the use of force regardless of international human rights law or law of armed conflict constraints. Trump granted full pardons to four former Blackwater security personnel involved in a 2007 attack in Baghdad that killed civilians.[18] In a decision that angered military leaders, Trump also pardoned three war criminals who had fought in Iraq, including a Navy Seal whom colleagues characterized as "freaking evil." In discussing these pardons, Trump announced that "I stood up for three great warriors against the deep state."[19]

III. Democratizing the Theater of Pardoning

The question of how to reclaim the legitimacy of the pardon power in a liberal democracy looms large in the wake of Trump's presidency. Some recent scholars have echoed the skepticism implicit in the writings of members of the founding generation like Thomas Jefferson toward the possibility of the compatibility of mercy with liberalism or democracy, and particularly with the two taken together. Aziz Huq has observed "a tension between the demands of democratic rule and merciful discretion" in addition to the "tension between the demands of justice and the exercise of mercy."[20] According to Huq's account, there are insufficient constitutionally based reasons to prioritize discretionary mercy over majoritarian will, which he takes as the core of democracy. While acknowledging that in European systems, "autonomous bureaucracies" may achieve the ends of mercy, Huq views recourse to these as "abandon[ing] . . . the full spectrum of democratic control mechanisms available on other occasions."[21] Such views might lead to despair about the possibility or even the desirability of redeeming the pardon power.

Many have, however, considered how to restore the legitimacy of pardoning today. Proposals divide roughly into three major categories, the first insisting on the necessity of constitutional amendment of the pardon power, the second relying on the other branches, whether Congress or the courts, to limit the unchecked discretion of the president, and the third reviving old mechanisms or creating new ones within the executive branch itself to regularize the grant of pardons.

Pursuing the constitutional amendment route, Keith Whittington has suggested the necessity of a bipartisan amendment restricting issuance of pardons by a lame-duck president, self-pardons and pardons of family members, as well as pre-conviction pardons.[22] Jack Goldsmith has instead pressed for congressional action, arguing that Congress should legislate to "expressly making it a crime for a president to issue a pardon as part of a bribe or as an inducement to obstruct justice" and to declare presidential self-pardons unconstitutional.[23] Others, including Neil Buchanan and Lawrence Friedman, have maintained that courts should retain the authority to limit the pardon power against certain significant varieties of presidential overreach.[24]

One problem with these proposals is that they only furnish restrictions on the outer limits of presidential pardons and on types of pardons that will hopefully be few and far between under the presidents who succeed Trump.

Although earlier presidents had sometimes been accused of corruption in pardoning, as with President Clinton's eleventh-hour pardon of financier Marc Rich, the extremity of the change in the exercise of pardoning under Trump furnishes some assurance that his use of the power might be an anomaly. More problematic going forward than Trump's efforts to pardon family members or close associates is his use of the pardon not for the general good and for the polity as a whole but to affirm his own power above the law. It is this lack of democratic legitimacy at the core of the decision-making about pardoning that a reform proposal should address.

Judicial reinterpretation of the pardon power or a constitutional amendment might partially remedy this problem by giving the amnesty power back to Congress. It was only during the late-nineteenth-century cases arising out of President Andrew Johnson's vigorous use of the pardon power to assist members of the former Confederacy and Congress's objections against it that the Supreme Court declared in *United States v. Klein* that pardoning included amnesty. Earlier constitutional history suggests that that interpretation was not inevitable, and many European countries allocate the responsibility for pardons and amnesty to different actors, giving the amnesty power to a legislative body.[25] Given the history, the Supreme Court could alter its interpretation of the president's power; alternatively, a constitutional amendment might clearly separate the two functions. This would permit Congress to actively debate amnesties for certain categories of drug crimes or other mechanisms for remedying the problems of mass incarceration and allow for democratic input into the process.

In addition, certain proposals to reform pardoning within the executive branch hold promise. Margaret Love has long advocated reinvigorating the reliability of the administrative process of the Office of the Pardon Attorney, including in the aftermath of Obama's presidency, when she lamented how closely Obama's "clemency initiative" had become tied to "the agenda of federal prosecutors."[26] Perhaps most recently, Rachel Barkow has proposed to fix that problem by urging President Biden to move the clemency process outside of the Department of Justice and to "create a clemency advisory board with bipartisan, diverse membership; charge them with evaluating clemency petitions; and consider the board's recommendations regularly."[27]

Although this recommendation would regularize pardoning and render it more compatible with a liberal system, it might not solve the problem of its democratic basis—at least not for those unconvinced that an administrative process alone possesses sufficient democratic legitimacy. One mechanism that could be incorporated into the idea of the clemency advisory board and thereby integrate a more fully democratic element might be a lay component along the lines of a pardon jury. Bringing ordinary citizens into the process through a selection mechanism similar to that of a grand jury would involve individuals directly in the process of deliberation about the justice of granting pardons in particular cases as well as assessment of the values served by the underlying legal regimes. While citizens are involved in the decision about whether to convict or acquit accused individuals, far too few are privy to the aftermath of the criminal process and evidence of the consequences of conviction, whether in the form of prison terms or the civil disabilities subsequently imposed. Integrating lay members into a clemency advisory board would further implement what Akhil Amar and others have argued was the Framers' vision of juries as protective of democratic participation.[28]

The most troubling aspect of President Trump's theater of pardoning was not that it sent a variety of messages about the criminal justice system, but rather that the form and nature of those messages affirmed his own power over the law. A democratized theater of pardoning would involve the citizenry as well as experts in evaluating the effects of the criminal justice system, an exploration that would both do justice in the individual case and help motivate broader systemic reform.

Notes

1   Michel Foucault, Discipline and Punish: The Birth of the Prison, trans. Alan Sheridan 3–6 (2nd ed., 1995).
2   Immanuel Kant, The Metaphysics of Morals, trans. Mary Gregor 109–10 (1996).
3   In his first term, however, Obama used the pardon power much less than Trump. Including commutations, Trump exercised clemency in a total of 238 cases. John Gramlich, *Trump Used His Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations* (Jan. 22, 2021), https://www.pewresearch.org/fact-tank/2021/01/22/trump-used-his-clemency-power-sparingly-despite-a-raft-of-late-pardons-and-commutations/. Usually Trump is referred to as having granted 237 pardons; this number neglects his pardon of Susan B. Anthony. Maggie Haberman and Katie Rogers, *On Centennial of 19th Amendment, Trump Pardons Susan B. Anthony and Targets 2020 Election*, N.Y. Times (Feb. 12, 2021), https://www.nytimes.com/2020/08/18/us/politics/trump-susan-b-anthony-pardon.html.
4   Kant, *supra* note 2, at 109–10.
5   *See* discussion in Bernadette Meyler, *Trump's Theater of Pardoning*, Stan. L. Rev. Online (Mar., 2020).
6   For a longer discussion of the history and role of the Office of the Pardon Attorney, see Jeffrey Crouch, The Presidential Pardon Power 21–23 (2009).
7   Kevin Liptak, *Trump's Pardons Appear Prompted by TV, Friends and Politics*, CNN (May 21, 2019), https://www.cnn.com/2019/05/21/politics/donald-trump-pardons-pattern.
8   Pranshu Berma & Stephanie Saul, *Trump Pardons Jon Ponder, a Convicted Bank Robber*, N.Y. Times (Sept. 23, 2020), https://www.nytimes.com/2020/08/25/us/politics/trump-jon-ponder-pardon.html.
9   Annie Karni, *What It's Like to Be the Face of Trump's Super Bowl Ad*, N.Y. Times (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/us/politics/alice-johnson-trump-super-bowl-ad.html.
10 Maggie Haberman, *Trump Brings Two Officers He Cleared of War Crimes Onstage at Fund-Raiser*, N.Y. Times (Dec. 8, 2019), https://www.nytimes.com/2019/12/08/us/politics/trump-war-crimes-pardons.html.

11 *See, e.g.*, the pardon of Joseph M. Arpaio, https://www.justice.gov/pardon/file/993586/download.

12 Josh Boak, *Biden Won't Be Putting His Signature on Covid-19 Relief Checks, Unlike Trump*, L.A. Times (Mar. 10, 2021), https://www.latimes.com/politics/story/2021-03-10/biden-not-putting-signature-covid-relief-checks.

13 Michael S. Schmidt & Maggie Haberman, *Trump Is Said to Have Discussed Pardoning Himself*, N.Y. Times (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/us/politics/trump-self-pardon.html. For some of the arguments for and against the permissibility of presidential self-pardons, *see* Brian C. Kalt, *Pardon Me? The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 776 (1996); and Michael McConnell, *Trump's Not Wrong About Pardoning Himself*, Wash. Post (June 8, 2018), https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html?noredirect=on.

14 Michael Biesecker, *Trump Picks Pardon Requests from Wealthy Pals and GOP Donors*, Associated Press (Feb. 19, 2020), https://apnews.com/article/5f5462f4b8a41a63e0235e7dff33295a.

15 Amita Kelly, Ryan Lucas & Vanessa Romo, *Trump Pardons Roger Stone, Paul Manafort, and Charles Kushner*, NPR (Dec. 23, 2020), https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner; Steven G. Calabresi & Norman L. Eisen, *The Problem with Trump's Odious Pardon of Steve Bannon*, N.Y. Times (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/opinion/trump-bannon-pardon.html.

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20 Aziz Huq, *The Difficulties of Democratic Mercy*, 103 Calif. L. Rev. 1679, 1699 (2015).

21 *Id.* at 1700.

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23 Jack Goldsmith, *Trump Loves to Use the Pardon Power. Is He Next?*, N.Y. Times (Nov. 10, 2020), https://www.nytimes.com/2020/11/10/opinion/trump-pardon.html.

24 Lawrence Friedman, *Enforcing the Constitutional Limits on the Pardon Power* (Mar. 14, 2020), https://www.jurist.org/commentary/2020/03/lawrence-friedman-limits-pardon-power/; Neil H. Buchanan, *Reforming Presidential Pardons: Possible and Necessary, But How High a Priority?* (Mar. 30, 2021), https://verdict.justia.com/2021/03/30/reforming-presidential-pardons-possible-and-necessary-but-how-high-a-priority.

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26 Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 Federal Sentencing Reporter 271, 273 (2017). For her proposal to restructure and elevate the pardon advisory function within the Justice Department, *see* Love, *A Plan to Restructure (and Revive) Pardoning After Trump*, Lawfare, Feb. 12, 2021, https://www.lawfareblog.com/plan-restructure-and-revive-pardoning-after-trump.

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