

Why Hamilton Promoted Presidential Pardon Power

By Edward Spannaus

June 15, 2018—Much ink has been spilt over President Donald Trump's use of his pardoning power. Yet his use of that power is entirely consistent with the powers granted to the President by the U.S. Constitution, and with the intent of its Framers.

It is refreshing to see the pardon power being used more liberally today, after it has fallen into such disuse in recent decades due to presidents' fear of the political consequences.

With one exception – in cases of impeachment – the President's power to pardon is without limitation. Article II, Section 2, Clause 1 of the Constitution states: "The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

[John Marshall](#), the greatest Chief Justice of the United States, defined the pardon power as follows, in an 1833 [case](#):

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.

The Constitutional Convention

The pardon power was granted to the President with relatively little debate. It was first proposed by Alexander Hamilton when he presented his [plan](#) on June 18, 1787, to remedy what he considered deficiencies in both the Virginia and New Jersey Plans which were then under debate. Hamilton's proposal was

that the Executive was “to have the power of pardoning all offenses except Treason; which he shall not pardon without the approbation of the Senate.”



The Constitutional Convention. where Hamilton proposed the Presidential pardon power.

Once Hamilton had introduced the idea of a pardoning power, there was never any opposition to the granting of the power; the only questions were whether it should be granted to the Legislature rather than the Executive, or whether it should be shared in some way between the Executive and the Legislature, and whether it should be limited to pardons after conviction of a crime. The Legislative branch – especially the House of Representatives – was felt to be too much subject to “the passions of the moment,” and some thought the Senate already had too much power, so proposals for sharing the pardon power were defeated. James Wilson argued against restricting the grant of a pardon until after conviction, saying that there might be times when it would be advisable to grant a pardon before a conviction – a point later elaborated by Hamilton.

The end result was that the Philadelphia Convention approved the provision whereby the President would have unlimited power to grant pardons, and Congress would have no voice in the matter – except that a pardon could not be granted in cases of impeachment (which of course is initiated and conducted solely

by the Congress).

Why was there so little debate? The Framers were well aware of the ways in which criminal laws under the Crown had been abused, and applied in an arbitrary and vindictive manner – not to mention the multitude of offenses for which the death penalty was prescribed. For that reason, there was no opposition to the pardon power itself in the Federal Convention.

Hamilton's defense of the pardon power in the [Federalist No. 74](#) has become the classic exposition of this Constitutional grant of authority.

The first reason for the pardon power advanced by Hamilton, was as a remedy against injustices in criminal proceedings – and for this reason, he said, it should be subject to as few restrictions as possible:

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

Hamilton went on to argue why this power were better lodged with one man, who would be less likely to be goaded on by others as would be the case in the legislature; One man is more likely to be “a more eligible dispenser of the mercy of government, than a body of men.”

The only real objection to the pardon power, was with respect to the crime of treason, Hamilton pointed out. It had been argued that, in cases of treason, the pardoning power ought to require the assent of one or both houses of Congress. There might be good arguments for this, Hamilton acknowledged (as well he might, since his initial proposal required the assent

of the Senate in treason cases). But there are even stronger objections to it, Hamilton conceded, such as in cases of sedition which involve a large portion of the community. This was the situation in Massachusetts (in the upheaval known as Shay's Rebellion), in which the population of that state was almost evenly divided. The legislature would likely reflect these same divisions, in the same proportions, and the spirit of party would probably make it impossible to work justice.

This shows the wisdom of lodging the pardon power in the Chief Magistrate, who would have the ability to act quickly, Hamilton contended:

[I]n seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal.

Washington's First Use of the Pardon Power



Washington led the army against the Whiskey

Rebellion, and then pardoned those convicted.

The first use of the pardon power in a criminal case, was by our first President, George Washington, in the wake of the 1794 Whiskey Rebellion in western Pennsylvania. After leading an army across the Appalachians to put down the rebellion, Washington pardoned them all! He explained his reasoning in his Annual [Address](#) to Congress in December 1795:

It is a valuable ingredient in the general estimate of our welfare that the part of our country which was lately the scene of disorder and insurrection now enjoys the blessings of quiet and order. The misled have abandoned their errors, and pay the respect to our Constitution and laws which is due from good citizens to the public authorities of the society. These circumstances have induced me to pardon generally the offenders here referred to, and to extend forgiveness to those who had been adjudged to capital punishment. For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.

President John Adams followed suit by pardoning the leaders of Fries' Rebellion among Pennsylvania Germans in 1800. Thomas Jefferson pardoned deserters from the Continental Army; President James Madison (in the War of 1812) and Andrew Jackson also pardoned deserters. Jefferson also pardoned many convicted of violating the Alien and Sedition Acts under previous, Federalist administrations.

During the Civil War, Abraham Lincoln pardoned deserters on the condition they return to the fight by rejoining their

units. Lincoln also granted pardons to many supporters of the Confederacy, to undercut the secessionists. After the Civil War, Presidents Andrew Johnson and Ulysses Grant pardoned almost all the leaders of the Confederacy. Lincoln and Johnson issued about 200,000 amnesties between them.

And, along these same lines, President Jimmy Carter famously granted amnesty to 10,000 Vietnam draft evaders. In fact, pardons and amnesties have been [used after every war](#), in an effort to bind up the nation's wounds, and remedy injustices growing out of war-inflamed fears. Lincoln was explicit in his intentions: "I hope there will be no persecutions, no bloody work after the war is over. No one need expect me to take part in handing or killing these men, even the worst of them."

Presidential pardons have also been used in high-profile political cases. For example, President Warren Harding commuted the prison sentence of socialist presidential candidate Eugene Debs, who had been convicted of violating the Sedition Act for denouncing U.S. participation in the first World War. Perhaps best-known is President Gerald Ford's pardon of former President Nixon, in terms which track closely Hamilton's argument that the pardon power could be used "to restore the tranquillity of the commonwealth." In his pardon proclamation for Nixon, Ford noting that, without a pardon, Nixon could be put on trial, which might not happen for a year or more:

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks [i.e. Nixon's resignation] could be irreparably lost by the prospects of bringing to trial a former President of the United States.

The Decline of the Pardon Power

Despite a few controversial pardons over recent decades – for

example, President George H. W. Bush's pardoning of officials implicated in the Iran-Contra scandals, or President Clinton's pardoning of financier Marc Rich – the use of the presidential pardon power has dwindled over recent decades. This is generally attributed to fear (one could call it cowardice) of the political consequences of a pardon which goes wrong. The signal case was that of Willie Horton, a convicted felon who allegedly committed additional violent crimes while on a weekend furlough under a Massachusetts program supported by then-Governor Michael Dukakis. The Horton case was played up by George H.W. Bush and other candidates in the 1988 presidential election, and is regarded as a major factor in the defeat of Democratic nominee Dukakis. President Ford's pardon of Richard Nixon is also regarded by many as the reason he lost to Jimmy Carter in 1976.

In the latter part of the 19th century, the pardon power was widely used. One [authority](#) reports that between 1860 and 1900, almost 50 percent of all applications for federal pardons were granted. Statistics prior to 1896 for the total federal prison population are hard to come by, but in 1896 there were 64 pardons issued for every 100 federal prisoners.



Eugene Debs, the Socialist presidential candidate pardoned by President Harding in 1921.

The highest number of pardons in the 20th century were issued by Franklin D. Roosevelt, who in his three-plus terms in office, issued 3,600 pardons and commutations of sentences,

the vast majority of which were full pardons. FDR averaged about 880 pardons for each year he was in office – the highest in modern times. The rate then gradually declined, so that by the time of Presidents Nixon and Ford, the rate was about 150 per year. Jimmy Carter, in addition to the Vietnam War amnesty, granted a little over 125 a year. Under Ronald Reagan, the numbers dropped further, to about 50 per year; and under George H.W. Bush, the number of pardons fell even more, to fewer than 20 a year. Bill Clinton increased the rate back to about 50 a year, roughly the same as Reagan. Under George W. Bush, the numbers plummeted again, down to fewer than 25 a year. President Obama changed things little, averaging slightly more than 25 a year – although he issued a record number of commutations of sentences, almost all of which were for drug offenses.

Bottom line: the Constitutional power of presidential pardon, viewed as essential to the administration of justice by the Constitution's Framers, has all but been ignored by recent presidents, even as the United States continues to display the highest rate of incarceration, and largest number of prisoners, in the world. The total U.S. prison population (state and federal) skyrocketed in the 1980s due to mandatory sentencing laws, and although decreasing slightly over the past ten years, is still about five times greater than it was in 1980. The decrease is largely due to reductions in sentences for drug-related offenses.

The total number of federal inmates today is about 185,000, which is over seven times greater than in 1980, and about 23 times greater than it was 90 years ago – all of which reflects the "federalization" of crime, i.e., the expanding number of offenses defined by Congress and the Justice Department as federal crimes. So, as the number of federal prisoners has gone way up, the number of pardons issued has gone way down. And this despite widespread of exposure of prosecutorial misconduct and abuse by the FBI and the Justice Department

over decades.

The Founding Fathers and the Framers – most notably George Washington and Alexander Hamilton – saw the pardon power as essential to mitigate or remedy injustice, but modern Presidents have turned a blind eye to this explicit constitutional provision, because of pragmatism and political cowardice. If President Trump takes steps to reverse this decline, it will be for the good of the nation.