

Pardon me? A short history of the bizarre world of presidential forgiveness

Pardons were conceived as a kind of safety valve, but how safe are they in the hands of someone like Trump?



Setting out on the most bizarre victory lap in history, Donald Trump has issued the first of an anticipated avalanche of presidential pardons.

Trump pardoned Michael Flynn, his former national security adviser, who pleaded guilty to lying to the FBI during its investigation of Russian interference in the 2016 election.

Flynn is likely to be joined by other Trump associates convicted of crimes connected to the administration. Roger Stone has already been pardoned: he was doing time for witness tampering and obstruction during the Mueller investigation of Trump's campaign.

The president has so far pardoned 45 people, on predictably eclectic grounds.

His first beneficiary was Joe Arpaio, a sheriff in Arizona who had been done for contempt of court for refusing to cease his practice of "immigrant round-ups". However, Trump has also offered posthumous pardons to Jack Johnson, a famous Black boxer jailed in 1913 for crossing state lines with his white girlfriend; and Susan B. Anthony, the suffragist, who was fined \$100 for daring to vote in the 1872 election.

Presidential pardons have been a thing since George Washington. Almost every president has issued them in large numbers, for all kinds of reasons.

In 1868, Andrew Johnson, who succeeded Lincoln, pardoned all former soldiers of the Confederate rebellion, along with the surviving conspirators in Lincoln's assassination (Johnson was a proud Southern segregationist).

In 1893, president Benjamin Harrison issued a general pardon to all Mormons who had engaged in illegal polygamous marriage.

Perhaps the most famous pardon was that given by Gerald Ford to his predecessor Richard Nixon, just before Nixon could be indicted over Watergate. But in terms of sheer numbers, the record holder is Jimmy Carter; in 1977, he pardoned more than 200,000 men who had dodged the Vietnam War draft.

The president's power to pardon, which has been held to be unlimited and unreviewable by the courts, is contained in the US constitution. It only applies to federal crimes.

The historical root of this anachronism is, like most legal oddities, the British monarchy. Back in the day, the king's power was absolute and the law emanated ultimately from the crown. That power was chipped away from the Magna Carta onwards — first by the nobility, then the courts and finally parliament.

However, some bits remained and remain to this day. Traditionally called the "royal prerogatives", they are undefined reserve powers that the monarch can still find in her back pocket and pull out as she deems fit. One of them is the prerogative of mercy.

The right of the monarch to pardon a subject for crimes of which they've been convicted is treated as an ultimate safety valve. It is exercised for many reasons. For example, in 2013 the Queen posthumously pardoned Alan Turing, the mathematician and father of computing who helped win WWII but was convicted in 1952 for gross indecency (homosexual sex) and chemically castrated, suiciding shortly afterwards.

This prerogative of mercy applies to Australia too. It still resides with the Queen, exercised by the governor-general and state governors. Our most famous recipient of a royal pardon is Lindy Chamberlain.

But our courts have fallen out of love with the old language of royal privilege. The Federal Court recently insisted that we should be referring to it as an exercise of federal executive power, conferred on the governor-general by the constitution.

There is still a large unresolved question: is the pardoning power open to judicial review? Or is it, as in the US, immune?

The Brexit case moved that conversation a long way forward. The UK Supreme Court ruled the Queen's proroguing of parliament invalid and said that the courts couldn't review Her Majesty's decision but could second-guess the advice she received from her ministers.

It's difficult to make a good case for why the residual powers of the crown should remain protected from judicial scrutiny. It was established in the 17th century that even the monarch can commit treason — Charles I lost his head for it. There's no reason to maintain the pretence that he or she can't do an injustice.

In Australia, a democracy with a written constitution demarcating the separation of powers, there's even less reason to continue to invest the monarchy with any powers that are completely unfettered. Nothing should be beyond the courts to inspect and, if found wanting, overturn.

This makes the American set-up all the weirder. The president was never supposed to be monarchical; in fact, the whole idea was to guard against the future risk of the presidency turning into tyranny. There's no philosophical justification for the president to have this extrajudicial power.

It's sweet that the pardoning power has sometimes been used to overcome historical wrongs or attempt to reconcile past divisions. But there are other more democratic ways of achieving the identical purpose. The safety valve is not required, and it's open to abuse.

Trump's inevitable trashing of convention will expose its flaws. Can he pardon himself? The preponderance of legal opinion says he cannot. In any event, most of the crimes he's committed are under state law.

Word has it the New York District Attorney is just counting down the days.

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