

Trump and the Return of Divine Right

In deploying his pardon power freely and using the Bible to justify family separation, the president is exactly the sort of ruler that Enlightenment thinkers feared.

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CAMBRIDGE, Mass. — The heartbreaking scenes on the southern border seem a world away from recent presidential pardons. Sobbing children and bereft parents have nothing in common with Joe Arpaio, Dinesh D’Souza and, most recently, the Oregon ranchers Dwight Hammond and his son, Steven, who had been convicted of arson in 2016 and whom President Trump pardoned on Tuesday. Yet both come down to a relationship between justice and mercy that has a long history — and a cautionary moral for the president.

Family separation shows justice without mercy. The pardon power displays mercy in the name of justice. The administration cites the biblical injunction to obey the powers that be as one explanation for their zero-tolerance policy on immigration. With regard to immigration, it seems, there can be no discretion. By contrast, presidential pardons show how extensive discretion can be, because the Constitution gives the president “power to grant reprieves and pardons for offences against the United States, except in case of impeachment.”

Most Enlightenment thinkers were uneasy about the pardoning power. The two greatest oracles for the Constitution’s framers, the French philosopher Montesquieu and the English lawyer William Blackstone, both attacked it. “Clemency is the characteristic of monarchs,” wrote Montesquieu, who thought it inappropriate in republics. Blackstone was adamant. “In democracies,” he thundered, “this power of pardon can never subsist.” Contemporary reformers like Cesare Beccaria and Jeremy Bentham were just as skeptical about pardons. So was Immanuel Kant, for whom it was one of the slipperiest rights of the sovereign, a majestic encouragement to injustice.

Eighteenth-century Europeans didn’t have to look far to find examples to prove their case. At his trial for treason in January 1649, King Charles I of England had denied the authority of the court set up by Parliament on the grounds that “no earthly power can justly call me (who am your King) in question as a delinquent.” Yet the court insisted on its authority to try him and he was

convicted of “a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will.” In the later 17th century, Parliament proceeded to crimp the royal prerogative until little residue of an absolute monarch’s godlike capacity remained in the hands of George III.

In this sense the American Constitution actually pushed back against Europe’s anti-monarchical movement. The framers argued that “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel,” as Alexander Hamilton argued in Federalist No. 74. This was particularly true in “season of insurrection or rebellion,” Hamilton continued, “when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth.”

With the ratification of the Constitution in 1789, George Washington received an array of powers many European monarchs might have envied. The president could veto legislation — something no British monarch had done since 1707. He was commander in chief of the armed forces; 1743 was the last time a British king had led an army, at the Battle of Dettingen. And after 1789, the French revolutionaries abolished the pardoning power that America’s elective monarch now retained.

Washington wielded his pardon power for the first time to reprieve insurgents in the Whiskey Rebellion in 1795, “to mingle in the operations of government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.” Abraham Lincoln and Andrew Johnson later pardoned rebels during and after the Civil War. In this way, mercy tempered justice, to justify importing kingly clemency into the republic.

“A pardon is an act of grace,” opined Chief Justice John Marshall in 1833. His view held for a century until the Supreme Court overturned this view to argue, in the words of Oliver Wendell Holmes Jr., that a “pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme.” The pardoning power may be sanctioned by the Constitution but it is now exercised by the president at his own discretion. The ability to absolve an individual of a legally mandated punishment remains a semi-divine power cloaked in constitutional dress.

Despite suggestions at the Constitutional Convention that Congress should share in the determination of pardons, the proposal did not fly. The pardoning power is absolute and unmitigated.

With his legislative agenda foundering, President Trump has had to find other means to express his will. He has used the pardoning power as one of his few unfettered prerogatives, in just the undemocratic way Enlightenment thinkers feared. For them, authority flowed from the people, not from God; the pardon

was a residue of divine right. When Attorney General Jeff Sessions cites Paul's epistle to the Romans to justify family separation, he not only revives an argument used to defend absolutism and slavery but also implies there is still a power above the law defined by the Constitution.

There is a tension here, as well. The president's and Mr. Sessions's claim to be bound by law to tear children apart from their parents is a lie. Not only is that a lie — the president has broad powers to set administrative policy — it is also hypocritical. The president can casually exercise his discretionary power to pardon Mr. Arpaio, who abused prisoners in his care, but then claims he is powerless to end a policy worthy of Sheriff Joe himself. As Hamilton might have said, that is not justice. It is sanguinary and cruel.

Fortunately, the founders did not leave the people powerless. Impeachable offenses — high crimes and misdemeanors, carried out in the exercise of official duties — are literally unpardonable. King Charles lost his head for claiming a divine prerogative; a president can lose only his job. No one is above the law, not even the wielder of the pardoning power himself. King Donald should beware.

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