

You Cannot Pardon a Crime you Authorized

War Crimes of President Bush and His Subordinates

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Statement from the Steering Committee for the Prosecution for War Crimes of President Bush and His Subordinates

Never before has a president pardoned himself or his subordinates for crimes he authorized. The closest thing to this in U.S. history thus far has been Bush's commutation of Scooter Libby's sentence. Bush is widely expected to follow that commutation with a pardon. Not only did Libby work for the White House, but he was convicted of obstruction of justice in an investigation that was headed to the president. Evidence introduced in the trial, including a hand-written note by the vice president, implicated Bush, and former Press Secretary Scott McClellan has since testified that Bush authorized the exposure of an undercover agent, that being the crime that was under investigation.

There are widespread concerns that Bush might pardon other subordinates for various crimes that he authorized, potentially including torture, warrantless spying, a variety of war crimes, taking the nation to war on fraudulent evidence, and the abuses of the politicized Justice Department. Voices in the media advising Bush to issue such pardons include: Stuart Taylor Jr. (Newsweek 7/12/08) and Alan Dershowitz (Wall Street Journal 9/12/08), while many additional voices have urged Obama to commit to not prosecuting.

The idea that the pardon power constitutionally includes such pardons ignores a thousand year tradition in which no man can sit in judgment of himself, and the fact that James Madison and George Mason argued that the reason we needed the impeachment power was that a president might some day try to pardon someone for a crime that he himself was involved in. The problem is not preemptive pardons of people not yet tried and convicted. The problem is not blanket pardons of unnamed masses of people. Both of those types of pardons have been issued in the past and have their appropriate place. The problem is the complete elimination of any semblance of the rule of law if Bush pardons his subordinates for crimes he instructed or authorized them to commit.

If Bush attempts this, here are possible responses:

1. Immediate impeachment of Bush and Cheney and various pardonees, even if they are out of office. (Here are arguments for the permissibility of such impeachments: <http://afterdowningstreet.org/node/37834>)
2. Overturning of the pardons by the new president or by Congress, as Bush's lawyers told him he could do to Clinton's pardon of Marc Rich, which was a far more minor abuse of the pardon power.

3. Legislation banning self-pardons and pardons of crimes authorized by the president.

4. A Constitutional Amendment banning self-pardons and pardons of crimes authorized by the president.

5. Refusal by the courts to honor the supposed pardons.

6. Prosecution of Bush, Cheney, and their subordinates for their crimes.

With thanks to all who have aided over the past millennia in the establishment of the rule of law.

Lawrence Velvel, *Dean of Massachusetts School of Law, chairs the Steering Committee whose members include Ben Davis, Marjorie Cohn, Chris Pyle, Elaine Scarry, Peter Weiss, David Swanson, Kristina Borjesson, Colleen Costello, Valeria Gheorghiu, and Andy Worthington.*

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