Last month, President Donald Trump issued a pardon to a
scientist who helped secure an allied victory in World War II.
Zay Jeffries helped develop artillery shells capable of piercing
the armor of German tanks and also consulted on the top-
secret Manhattan Project, which produced the first atomic
bomb. Prior to his significant involvement in the war effort,
he was indicted in 1941 on antitrust charges related to his
employment. At the time that he was indicted, top defense
officials asked for his prosecution to be delayed until after the
war. They stated that Jeffries “is now engaged in research of
the utmost importance to victory in the war which he feels he
would have to drop in the immediate future in order to prepare
for trial …” Then U.S. Secretary of War Henry L. Stimson
wrote, “I therefore state that in my opinion the prosecution of
the case … will seriously interfere with the war effort.”

In 1947, when the Justice Department finally returned to
the case, it grounded its legal argument in a theory of U.S.
Supreme Court precedent that did not exist at the time when
Jeffries was first indicted. In 1948, Jeffries was convicted and
fined $2,500 – the same year that President Harry S. Truman
ironically awarded him the Presidential Medal for Merit. He
was given no time in jail.

The decision to pardon Jeffries, who went on to receive numerous accolades in the scientific field, is an example of the
immense power behind the presidential pardon. By Carl W. Hittinger and Jeanne-Michele Mariani

The pardon power originates in Article II Section 2 of the
Constitution which gives the president the power to “grant
reprieves and pardons for offenses against the United
States.” The rationale for the pardon power was partly
articulated by Alexander Hamilton in the Federalist Papers,
when he wrote in No. 74 that “without an easy access to
exceptions in favor of unfortunate guilt, justice would wear
a countenance too sanguinary and cruel.” Particularly in
the early days when so many Americans were concerned
about the immense amount of power within a centralized
government, the pardon existed to provide a system of
checks and balances – an “out” in the no need to explain
view of the elected president.

The U.S. Supreme Court clarified presidential pardon power
in an 1866 case, *Ex Parte Garland*. The case dealt with a
law passed by the 1865 Congress that effectively disbarred
former members of the Confederate government. Augustus
Hill Garland, an attorney and a former Confederate senator
from Arkansas, subsequently received a controversial
pardon from President Andrew Johnson. Garland then
came before the court and pleaded that the act of Congress
was a bill of attainder and unfairly punished him for a
crime for which he had been pardoned, thereby making it
unconstitutional. In its opinion, the Supreme Court stated
that the pardon power “extends to every offense known
to the law, and may be exercised at any time after its
commission, either before legal proceedings are taken or
during their pendency or after conviction and judgment.”
This meant that due to his pardon, Garland was beyond the
reach of the newly minted law and therefore could not be
punished for his service in the Confederacy. In essence, the
pardon power was made nearly untouchable.

That sentiment, centering on the far-reaching effects of the
pardon power, becomes important for the commander-in-
chief for multiple reasons. Presidents do not always agree
with the decisions made by past administrations or even their
own, and that extends to antitrust prosecutions. For example,
in 1974, the Gerald Ford administration’s Department of
Justice sued AT&T for violations of the Sherman Act. The
case extended into the Ronald Reagan presidency where
there was a bitter fight over whether to continue litigating the
case. Over fierce lobbying from his Defense Secretary Caspar Weinberger, Reagan insisted on continuing the case, which led to the breakup of AT&T. In still another example, during President Bill Clinton’s administration, an antitrust investigation was commenced into Microsoft’s vertical integration of its operating system and its software applications that, according to industry rivals at the time, unfairly disadvantaged competing software developers. While Clinton was considered an activist president in most areas, he would go on to say that his Justice Department, headed by his rather independent attorney general, Janet Reno, had no contact with the White House about the case, and Clinton said he only found out about the Microsoft investigation when it was in the papers.

While these are only two examples, there are multiple cases of presidents fielding antitrust issues differently than their predecessors or even those in their own administration. We published a series of articles on presidential powers under the antitrust laws focusing in depth on such historic case studies. Examples such as these make the pardon power of any president that more profound in scope. A pardon could allow a president to speak on an antitrust matter without ever having to wade into the intricacies of the American legal system – there is no need to consult the Justice Department, the Federal Trade Commission (FTC) or any other governmental agency in order to act. The pardon exists as a tool that can only be invoked and exercised by the president even though it only applies to federal, not state, cases, and only individuals, not corporations, can be pardoned; although the thinking behind cases like Citizens United and Burwell v. Hobby Lobby could change that. As such, it can also be used by a president to express an opinion or foreshadow future policies, not only grant justice.

In even other examples, the pardon can be a creative political tool. For example, when Ford took office, he pardoned more than 50,000 draft resisters. He argued that the move was necessary to move past the ire of the preceding years’ Nixon administration’s scandals, from an extremely unpopular war to the outrage over Watergate. When Jimmy Carter became president in 1976 he pardoned even more draft resisters – over 200,000 – in still another bid to make up for the handling of the Vietnam War. Just as the pardon can be used as a symbol of presidential preference or policy, it can also be used as a political tool and send a strong message.

In this present instance, however, the Jeffries’ pardon by Trump, granted nearly 70 years after the fact, stands out as odd. Why choose to pardon, without any explanation, an antitrust violator who was given the Presidential Medal of Merit – and why now? While Jeffries by all accounts was an integral part of the war effort, is there another policy or political message being sent through this pardon? It is puzzling and somewhat paradoxical considering the present aggressive antitrust stance of the Trump DOJ.

The pardon power is an intriguing tool at any president’s disposal, and its historic use recently for antitrust violators opens up another avenue of potential remedy to consider before or after the fact. While it does not apply to corporations, and is hard to get, for individuals, who are subject these days to 10-year jail sentences under the law for antitrust violations, the presidential pardon may be something to think about as a last hurrah.

Stay tuned.

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