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# Signed, sealed, delivered, but not yours

By Harlan J Protass  
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President George W. Bush is now gone. But, like Bill Clinton before him, controversies related to pardons granted in his administration's final days still swirl. On Dec. 23, Bush executed a "master warrant" granting full and unconditional pardons to 19 people, including Isaac Toussie, a New York developer who did time for his involvement in a real estate fraud. A White House spokesperson publicly announced all of the pardons, and the Department of Justice issued a news release identifying the recipients.

The next day, though, Bush did an about-face. He learned Toussie's pardon recommendation had come directly from White House counsel Fred Fielding, and that the Justice Department's pardon attorney had not reviewed Toussie's application, as is customary. It was also discovered that Toussie's father donated money to the Republican Party. Realizing the potential firestorm, Bush recalled the pardon, apparently taking the position that it wasn't effective because Toussie hadn't physically received or accepted the paperwork.

It's of no consequence that Toussie avoided normal processes. It's also not relevant that his pardon may have had political undertones. And it doesn't matter whether Toussie deserved clemency. The fact is that Toussie's pardon became effective and irrevocable as soon as it was announced to the world. And, once given, it couldn't be taken back.

Bush's position seems to be based on several long-forgotten Supreme Court cases suggesting that pardons require actual delivery and acceptance. That ill-conceived and outdated notion, though, finds no support in the Constitution or English law traditions. Even the Justice Department has acknowledged that delivery and acceptance are only necessary for conditional pardons, which require an affirmative act by the recipient.

This view is consistent with historical precedent. For example, several presidents have granted general pardons, like those given to Confederate rebels after the Civil War and to Vietnam draft dodgers. If personal delivery and acceptance are required, those pardons would have been invalid. The same goes for posthumous pardons. After all, delivery and acceptance pose unique problems for someone who is dead. Yet no one has

ever claimed any problem with these types of pardons.

All of this is confirmed by those in the know. Roger Adams, U.S. pardon attorney from 1997 to 2008, testified before Congress that individual warrants are but “a ministerial act which simply sets forth the decision that the president has already made.” Likewise, Margaret Love, who held that position from 1990 to 1997, testified that signing a pardon is just “the public act that accomplishes the clemency action.”

President Barack Obama pledged to make a “clean break” from his predecessor. If he wants to protect and serve the Constitution that he swore to uphold, he should validate Isaac Toussie’s pardon, or at least instruct government lawyers not to contest any legal challenge Toussie might make. It’s the right thing to do. It also protects the constitutional legitimacy of any pardon conferred by any president—including any that Obama might someday grant himself.

*Harlan Protass is a criminal defense lawyer in New York and an adjunct professor at the Cardozo School of Law, where he teaches sentencing law.*

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