Pardoning Power of Article II of the Constitution, The

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Only rarely are lawyers and other citizens treated to the education in Constitutional Law that Americans have had in the last two years. President Ford's pardon of former President Nixon was a controversial act involving the pardoning power. The author, a constitutional law scholar, reviews in this article the legal basis of the President's pardoning power.

Following President Gerald Ford's unconditional pardon of former President Richard Nixon on September 8, 1974, claims were made that the pardon was invalid because it came before indictment and conviction. Special Prosecutor Leon Jaworski was urged to test its validity in court. Indeed, one federal judge expressed in open court the view that the public interest required the pardon's validity to be tested. The Special Prosecutor's decision not to proceed appears well founded when a review is made of the history of the President's pardoning power.¹

Common Law Antecedents

At the common law the king possessed and exercised the power to pardon offenses against the Crown both before and after indictment and conviction.² He could grant pardons unconditionally or conditionally, based on the performance of some condition precedent or subsequent. This power of the Crown was designed to allow for the dispensation of mercy in cases where it was deserved. It was given to the King because "nothing higher is acknowledged than the magistrate, who administers the laws; and it would be impolitic for the power of judging and pardoning to centre in one and the same person."³

One of the few common law limitations on the power was imposed by the Act of Settlement, which provided that a pardon could not be pleaded in bar of an impeachment; however, the Act did not prohibit a pardon after an impeachment conviction.⁴ The Settlement Act's limitation arose because of a pardon granted Lord Danby in the 1670's prior to his impeachment by the House of Commons. Another limitation on the power was that it could not impair a third party's right to sue civilly.⁵ According to Blackstone, a pardon was void if the King was misinformed or deceived in granting it.⁶

¹ See generally, Humbert, The Pardoning Power of the President (1941).
³ Blackstone, supra note 2, at 730.
⁴ Maitland, supra note 2, at 480.
⁵ Id. at 479.
⁶ Blackstone, supra note 2, at 731.
Pardon Proclamation

Following is the text of the proclamation by which President Ford Sept. 8 pardoned former President Nixon.

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969, and was re-elected in 1972 for a second term by the electors of thirty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended articles of impeachment.

As a result of certain acts or omissions occurring before his resignation from the office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospect of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office in the United States.

Now, therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969, through August 9, 1974.

In witness whereof, I have hereunto set my hand this 8th day of September in the year of Our Lord nineteen hundred seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.

GERALD R. FORD
The effect of a King's pardon was to make "the offender a new man" and acquit "him of all corporal penalties and forfeitures annexed to that offense, for which he obtains his pardon."  

Colonial Antecedents
The governors of both the royal and proprietary colonies possessed the power to grant pardons. This power was fixed in some cases by colonial charter and in others by the Crown's instrument of instructions to the governors it commissioned. Generally, the pardoning prerogative of the governor was exercisable independently of the colonial council. In the royal colonies, the power extended to all cases except those of treason and murder.

In the state constitutions which were adopted following the Declaration of Independence the provisions pertaining to the executive reflected the colonial enmity which had developed against the King's governors. In most states the governor was elected by the legislature and his term was limited to one year. His power of appointment and veto were restricted, as was his power to pardon. In several colonies where the governor was authorized to grant pardons, cases of impeachment were placed beyond the power's reach. In New York the governor could grant pardons in such cases but not in cases of treason and murder.

When the Constitutional Convention assembled in 1787, these colonial and common law antecedents strongly influenced the delegates in framing the pardoning provision of Article II of the Constitution: "[H]e shall have power to grant Reprieves and Pardons for Offenses Against the United States, except in Cases of Impeachment."

Constitutional Convention
Interestingly, none of the principal plans of government presented at the outset of the Constitutional Convention of 1787 contained a pardoning provision. It was not until the Committee of Detail rendered its report of August 6, 1787 that the subject surfaced. That report provided for a President to be elected by the legislature and entrusted, among others powers, with the broad power to grant pardons and reprieves. The one limitation, taken from the Act of Settlement, was that a pardon could not be pleasurable in bar of an impeachment.

The first discussion of the Committee's recommended clause took place on August 25, when a motion was made and defeated to require the Senate's consent before the President could grant a pardon. Thereupon, the limitation of the Act of Settlement was dropped in favor of a provision that simply excluded cases of impeachment from the reach of the power. Two days later Luther Martin sought to limit the exercise of the power to the period after "conviction." He withdrew his motion, and thereby made significant legislative history, when James Wilson argued that the exercise before conviction should be allowed because such an exercise might be necessary to obtain the testimony of accomplices. On September 15 Edmund Randolph sought to remove cases of treason from the reach of the power, arguing that the President himself might be guilty of treason and therefore use the power to suppress the truth. The delegates divided on the point, with some delegates, including Madison, believing the power should be shared with the legislature. Others, including Morris and King, argued against such a sharing. Randolph argued that a combination of the President and Senate constituted too great a danger to liberty. King asserted that a legislature would be "governed too much by the passions of the moment."

Wilson, who favored the President having the power alone and opposed excluding cases of treason from its reach, said that if the President

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7 Id. at 732.
8 See Humbert, supra note 1.
9 Hamilton's plan of government, which was never formally considered, did contain a provision allowing the President to pardon all offenses except treason, which required the the Senate's consent. Since an exact copy of Pinckney's original plan has never been located, it is in dispute whether his plan contained a pardoning provision. 3 The Records of the Federal Convention of 1787, at 597-601 (Farrand ed. 1911 & 1937 & 1966).
10 2 Id. at 185.
11 1d. at 419-20.
12 Id. at 426.
"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."

himself were guilty of treason, the impeachment power would be available to deal with such a situation. By a vote of 8 to 2, Randolph's motion was defeated and no further discussion on the pardoning power occurred prior to the Convention's submission of the Constitution to the states.  

Post-Convention Discussion

Much of the discussion of the pardoning power in the post-convention period focused on the failure of the Constitution to exclude cases of treason from the power's reach. Concern was expressed that the President could use the power before indictment to stop investigations that might reveal his involvement in treasonous activities. The most extensive discussion of the power appeared in Number 74 of The Federalist. There, Hamilton gave these reasons for having such a power:

"The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."

As for one person possessing the power, he said:

"As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men."

Hamilton further stated with respect to giving the President the power to grant pardons in cases of treason:

"But the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power with a view to such contingencies might be occasionally conferred upon the President, it may be answered in the first place that it is questionable, whether, in a limited Constitution that power could be

13 Id. at 626-27.
14 Humbert, supra note 1, at 18.
delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt."

Cases

Between 1833 and 1927 the Supreme Court had occasion to discuss the pardoning power in a number of cases. These cases, while at odds on certain aspects of the power, make clear that the power may be exercised any time after commission of an offense against the United States, both before and after indictment and conviction. Set forth below is a discussion of the principal decisions.

1. Nature of a Pardon

In United States v. Wilson, the Court, in an option by Chief Justice Marshall, gave this description of a pardon:

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on." 16

Almost 100 years later, in Biddle v. Perovich, the Court gave a different emphasis to the power, stating:

"... 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. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.... Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done...." 17

2. Extent of Power

In Ex parte Garland, the Court was faced with the effect of a pardon granted by President Andrew Johnson to one Garland for all offenses committed by him arising from his participation in the Civil War. Prior to the granting of the pardon, Congress had passed an Act providing that before any individual could practice law in the federal courts he had to take an oath stating that he had never voluntarily bore arms against the United States or given aid to its enemies.

The Court, finding the Act to be unconstitutional as constituting a bill of attainder, held that the pardon relieved Garland from all penalties and disabilities, including the oath. Said the Court:

"It 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." 18

(Continued on page 42)

15 A discussion of state cases construing the governor's pardoning power is beyond the scope of this article. Suffice it to say that substantially all state constitutions explicitly limit the exercise of the power to the period after conviction. Where there is no such specific limitation, case law indicates that the power can be exercised prior to conviction. See, e.g., Dominick v. Bowdoin, 44 Ga. 357 (1871); State v. Woolery, 29 Mo. 300 (1860); and Oklahoma Territory v. Richardson, 9 Okla. 579 (1900).

16 7 Pet. 150, 160-61 (1833).
17 274 U.S. 480, 486 (1927).
18 4 Wall 333, 380 (1867). Even the dissent conceded that a pardon could be pleaded in bar of an indictment for any of the acts covered by the pardon.
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