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Pardoning Power of Article II of the Constitution (continued), The

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3. Effect of Pardon

As for the effect and operation of a pardon, Justice Field stated in *Ex parte Garland*:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

The wide scope of the pardoning power again was emphasized by the Court in *Ex parte Grossman*.¹⁹ In that case, the Court held that the power could be exercised not only with respect to indicatable crimes but criminal contempts of court. Chief Justice Taft stated:

"The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial, or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress."²⁰

As for the claim that successive pardons of constantly recurring contempts in a litigation might deprive a court of power to enforce its orders, Chief Justice Taft stated:

"... Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and

strained construction of the general powers of the President."²¹

In several decisions rendered between 1856 and 1890 the Court also made clear that the pardoning power incuded the power to remit fines, penalties and forfeitures; to commute sentences; to grant amnesty to specified classes or groups; and to pardon conditionally or absolutely.²² However, certain limitations on the power were noted. As the Court stated in *Knote v. U.S.*:

"... It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it... Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force... However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers, it cannot touch moneys in the Treasury of the United States, except expressly authorized by Act of Congress. The Constitution places this restriction upon the pardoning power."²³

In this connection, the Supreme Court's decision in *Carlesi v. New York* is of interest.²⁴ There, the Court held that a state court was not precluded from considering a prior federal connection and pardon in assessing the punishment for a subsequent state crime. In the Court's view, according second offender treatment to a defendant did not impose additional punishment for the past offense.

Another effect of a pardon is to take away from the recipient the privilege against self-

¹⁹ 267 U.S. 87 (1925).

²⁰ Id. at 120. A few years before, in *United States v. Burdick*, 211 Fed. 492, 493 (S.D. N.Y. 1914), Judge Learned Hand observed: "I have no doubt whatever that the President may pardon those who have never been convicted. The English precedents are especially pertinent."

²¹ Id. at 121.

²² *Illinois Central R.R. v. Bosworth*, 133 U.S. 92 (1890); *Armstrong v. United States*, 80 U.S. 154 (1871); *United States v. Klein*, 80 U.S. 128 (1869); *Ex parte William Wells*, 18 How. 307 (1865).

²³ 95 U.S. 149 (1877).

²⁴ 233 U.S. 51 (1914).

“whether the acceptance of a pardon constitutes an admission of guilt by the recipient is not clear.”

incrimination with respect to the pardoned offenses. The Court stated in *Brown v. Walker*:

“It is almost a necessary corollary of the above proposition that if the witness has already received a pardon, he can no longer set up his privilege, since he stands with respect to such offense as if it had never been committed.”²⁵

4. Acceptance of a Pardon

In *United States v. Wilson*, Marshall stated:

“A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.”²⁶

The need for acceptance of a pardon was again emphasized by the Court in *Burdick v. United States*, where a witness in a grand jury proceeding refused to accept a pardon and instead asserted his privilege against self-incrimination. The Court, relying on *United States v. Wilson*, held that acceptance was essential.²⁷ Consequently, the witness' refusal to accept did not destroy the privilege. But in *Biddle v. Perovich*, where the Court gave a different emphasis to the pardoning power, a presidential commutation of a death sentence to life imprisonment was held effective without an inmate's consent.²⁸ Although *Perovich* can be

viewed as casting doubt on the need for acceptance of an unconditional pardon, it has been noted that:

“... Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful. They seem clearly to indicate that by substantiating a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.”²⁹

5. Admission of Guilt

Whether the acceptance of a pardon constitutes an admission of guilt by the recipient is not clear. In support of the view that it does is the Court's dictum in *Burdick v. United States*:

“This brings us to the difference between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law given protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.”³⁰

In the lower court decision, Judge Learned Hand stated:

“It is suggested that a pardon may not issue where the person pardoned has not at least admitted his crime. I need not consider this,

²⁵ 161 U.S. 591, 598-99 (1896) See *Boyd v. United States*, 142 U.S. 450, 453-54 (1892). Of course, the privilege would be available if there were significant risk of prosecution under state law. *Malloy v. Hogan*, 378 U.S. 1 (1964).

²⁶ 7 Pet. at 161.

²⁷ 236 U.S. 79 (1915).

²⁸ See note 17 supra and accompanying text.

²⁹ The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 39, 88th Cong., 1st Sess. at 457 (1964).

because every one agrees, I believe, that if accepted the acceptance is at least admission enough. It is an admission that the grantee thinks it useful to him, which can only be in case he is in possible jeopardy, and hardly leaves him in position thereafter to assert its invalidity for lack of admission."³¹

On the other side of the issue is reasoning which equates a pardon and an amnesty.³² Said one writer:

"Amnesty may be pleaded by a defendant as a defense to possible criminal prosecution. One is led to ask: Why does the mere acquittal of an additional defense, which renders further inquiry needless, necessarily import guilt and exclude innocence?"³³

In addition, it has been argued that an acceptance of a pardon only may be to avoid the expense, trauma and other side effects of a criminal proceeding so that its acceptance is not inconsistent with a position of innocence.³⁴

6. *Fraud in the Granting*

Although in his *Commentaries* Blackstone

³⁰ 236 U.S. at 94.

³¹ 211 Fed. 492, 494 (S.D.N.Y. 1914).

³² *Knote v. United States*, 95 U.S. at 153, where the Court stated: "the distinction between them is one rather of philological interest than of legal importance."

³³ Letter to Editor from Harry Cohen, N.Y. Law Journal, October 4, 1974, p. 4.

³⁴ See Humbert, *supra*, note 1, at 77 and n. 91a.

indicated that at the common law a pardon could be set aside for fraud, a different view has been expressed by Chief Justice Taft:

"It has been suggested to me that if the man had been guilty of fraud in inducing me to pardon him, I might have set aside the pardon as void and directed the arrest of the former convict. I do not think that in such a case a pardon could be set aside. I do not think either I or a court would have had the authority to issue a warrant for the arrest of the man and to restore him to prison. It seems to me it would be like a case of a man acquitted by a jury which was bribed by him. He might be thereafter convicted of bribery, but he could not be convicted of the crime of which the verdict of the jury acquitted him."³⁵

Conclusion

It is unfortunate that the pardoning provision, as many other provisions of the Constitution, has not received more attention by scholars and writers. It is hoped that the recent interest in the subject occasioned by the pardon of Richard Nixon will lead to studies of the provision by the Congress and Bar with a view to developing acceptable guidelines for its exercise in our system of justice.



³⁵ William Howard Taft, "Our Chief Magistrate and His Powers", 123-24 (1916).